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INTRODUCTION

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This year . . . will be a watershed in the history of civil rights laws -- whether for good, or for ill, the Congress and the President will decide its future course. In February of 1989 no one . . . could have imagined that the Supreme Court could turn so dramatically away from the national consensus in favor of vigorous enforcement of federal equal opportunity laws. The Court has forcefully reminded us all of how even the most clearly written of statutes can be drained of practical effectiveness by a crabbed, capricious interpretation.¹

In a series of controversial decisions issued during its 1988-89 Term, a narrow majority of the Supreme Court undermined what had previously seemed to be entrenched principles of civil liberties and civil rights.² Characteristically for the Rehnquist Court, there were no outright reversals of prior cases on point.³ Rather, the Court achieved its rights-

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At every level of its review, . . . [including] its intended evisceration of precedents and its
eroding results indirectly, through revisionist reinterpretations of constitutional provisions, statutory language and its own precedents. 4

Dissenting Justices 5 as well as commentators 6 have complained that these rulings in effect rewrote not only the Court’s own previous decisions, but also congressional enactments. 7

In unusually harsh tones, commentators deplored the formidable incursions into personal freedom made by the 1988-89 Term decisions. 8

For example, Norman Dorsen, Stokes Professor of Constitutional Law at New York University and President of the American Civil Liberties Union, said:

The United States Supreme Court['s] . . . 1988 Term . . . struck an ominous blow against principles of civil liberties and civil rights that seemed well-settled and secure only a year ago. Indeed, the Bill of Rights fared worse during this term than any other in recent memory. In many ways, this Court is reminiscent of the Vinson Court of the early

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4. Id.


6. See, e.g., Twenty-Five Years of the Civil Rights Act: History and Promise, 25 WAKE FOREST L. REV. 159, 174 (1990) [hereinafter Wake Forest Panel Discussion] (remarks of Julius Chambers, Director-Counsel of NAACP Legal Defense and Educational Fund, Inc.) (“Some might say that we are commemorating the demise of title VII [as opposed to its twenty-fifth anniversary].”).

7. Id.

8. Id. See also Chemerinsky, supra note 2.
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1960's, whose rulings regularly rejected strong constitutional claims on a wide range of issues.

Further, Julius Chambers, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., offered a similarly bleak assessment: "This was one of the worst terms of Court that we have experienced in our lifetime and it has been and will be devastating to victims of employment discrimination." The 1988-89 Term's negative impact on individual rights was perhaps most succinctly captured in the apocalyptic but apt title of Professor Erwin Chemerinsky's foreword to the Harvard Law Review analysis of that Term: "The Vanishing Constitution."

The Court's 1988-89 decisions, eroding individual rights, can be grouped into two broad categories: first, decisions curtailing the right to be free from discrimination based on race, gender, or other invidious classifications, as guaranteed by two major federal civil rights statutes -- the 1866\(^1\) and 1964\(^2\) Civil Rights Acts -- and prior Supreme Court cases interpreting them; and second, decisions curbing constitutionally guaranteed civil and political liberties. For the sake of brevity, the first

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10. Wake Forest Panel Discussion, supra note 6, at 173 (remarks of Julius Chambers).

11. Chemerinsky, supra note 2. See also Wake Forest Panel Discussion, supra note 6, at 173 (remarks of Julius Chambers).


group of cases will be referred to as "civil rights" cases and the latter as "civil liberties" cases.

This Symposium issue of the New York Law School Journal of Human Rights focuses on the first group of the Court's recent rights-limiting decisions, those dealing with civil rights. The contributors to this Symposium afford particularly interesting insights into these decisions, because they bring to the relevant issues not only academic expertise, but also extensive experience in litigating civil rights issues. From their dual perspectives as scholars and activists, the Symposium contributors provide trenchant criticism both of the opinions' theoretical reasoning and of their adverse practical impact on discrimination victims.

Moreover, from their combined academic/activist vantage point, these commentators are able to suggest possible strategies that discrimination victims might employ to overcome the new obstacles that the Court has interposed to their recovery. The most effective response to the 1988-89 civil rights decisions would be new legislation to restore to the anti-discrimination statutes the meanings they had before the Court's rewriting. Congress is attempting such a restoration through the proposed Civil Rights Act of 1990.16

The fact that the Court's 1988-89 civil rights decisions have forced Congress to pass legislation to reinstate its previously expressed will17 teaches us two basic lessons. First, it underscores that the decisions discussed in this Symposium are hardly hallmarks of judicial restraint, notwithstanding the rhetoric of Chief Justice Rehnquist and his

16. H.R. 4000, 101st Cong., 2d Sess. (1990); S. 2104, 101st Cong., 2d Sess. (1990). In addition, Minnesota recently enacted a statute providing, as a matter of state anti-employment-discrimination law, for certain remedies and procedures that the Supreme Court had eliminated from federal anti-discrimination law. It was the first state to adopt such legislative counter-measures to the Supreme Court's 1988-89 Term civil rights decisions. See 1990 Minn. Sess. Law Serv. 567 (West).

17. See Wake Forest Panel Discussion, supra note 6, at 191 (remarks of Prof. Eleanor Holmes Norton).

[W]e have essentially to go through the ritual of 1964 again. That is truly insulting. If Congress wanted to repeal the Act, they know how to do that. It wasn't up to the Court to do that, and I think the Congress is put in the position where it almost has to re-enact the Act or admit that the act they passed was not what the courts [and Congress] have said it was . . . for 25 years.

Id.
"conservative" allies. Second, the interactions between Congress and the Court concerning the Civil Rights Acts of 1866, 1964, and 1990 demonstrate the potential efficacy of our tripartite governmental system for protecting and promoting individual rights.

Concerning the first point, the civil rights decisions discussed in this Symposium violate fundamental canons of judicial restraint and conservativism, including the following principles: that the Court should address only those questions which must be answered in order to resolve the case before it; that the Court should defer to judgments by elected government officials; and that the Court should abide by its own precedents. Instead, in the cases analyzed in this Symposium, the Rehnquist block reached questions that were not squarely presented by the facts at issue; it ignored plain congressional language and legislative history, and likewise nullified the judgment of an elected city council, and it repudiated settled judicial constructions of statutory and constitutional provisions. In terms of their judicial activism, the civil rights subset of the 1988-89 Term’s rights-limiting cases starkly contrasts with the civil liberties subset. In the latter, Chief Justice Rehnquist and his ideological allies aggressively adhered to a central canon of judicial

18. See Chemerinsky, supra note 2, at 46 ("The Rehnquist Court... approaches judicial review based on an oft-stated desire to avoid judicial value imposition."). See also id. at 64 ("The current Justices profess a desire to avoid overturning legislative or executive decisions based on their personal preferences and generally rule in favor of the elected branches of government.") (footnote omitted).


21. See id. at 345, 348, 354-55.


23. See Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2369 (after briefing and oral argument on issues raised by the parties, the Court requested briefing and argument on whether its prior construction of 42 U.S.C. § 1981, as it extends to private discrimination, should be reconsidered).


27. See Civil Rights Decisions, supra note 14 and accompanying text.

restraint. They deferred to the elected branches of government, including the Congress and city councils, in almost sycophantic fashion, virtually abdicating judicial review.

This Introduction will not describe in detail the manner in which the Court's recent civil liberties decisions have hewed to an extremely narrow vision of the appropriate judicial role, and embodied an exaggerated form of judicial deference to determinations of elected government officials. However, a general understanding of the judicial process employed in these civil liberties cases, and of its contrast with the judicial process employed in the civil rights cases, places the latter in an illuminating perspective.

Once we realize that the two groups of recent Supreme Court cases concerning individual rights are not linked in terms of the judicial process or analytical methodology they employ, but only in terms of their rights-limiting results, the Rehnquist block's substantive ideological agenda becomes glaringly apparent. In contrast with such a classic judicial conservative as (the second) Justice Harlan, the new majority does not consistently practice judicial restraint. Rather, it invokes tenets of judicial passivism selectively, as asserted justifications for refusing to invalidate majoritarian decisions that violate constitutionally guaranteed civil liberties. When the goal of limiting individual rights is better served by active judicial review, however, through effectively invalidating statutes and programs that advance civil rights, the Rehnquist block forsakes judicial restraint. Accordingly, Justice Stevens, who can more rightfully claim to be heir to Harlan's legacy of constraint, consistently decries the "conservative" majority's judicial activism in pursuit of rights-restraining results.

The only thread that ties together all the 1988-89 civil rights and civil liberties decisions is that they all leave individual rights less

29. See, e.g., Ashwander, 297 U.S. at 345, 348, 354-55 (Brandeis, J., concurring).
31. The author has chronicled these trends elsewhere. See id. at 866-903.
32. See, e.g., Wards Cove, 109 S. Ct. at 2136 (Stevens, J., dissenting). "Why the Court undertakes these unwise changes in elementary and eminently fair rules is a mystery to me." Id. at 2127-28 (accusing majority of betraying congressional purpose underlying title VII in "its latest sojourn into judicial activism").
secure than they were under previous judicial rulings.33

A second general lesson that can be derived from the Court's 1988-89 civil rights rulings is their illustration of how our tripartite governmental system provides potential safety nets for individual rights. At various points in our history, the legislative and judicial branches of the federal government have each stepped into the breach when the other has not adequately protected civil rights or civil liberties.

For example, following the Civil War, Congress passed far-reaching civil rights statutes, only to have them eviscerated by narrow judicial constructions.34 Following World War II, these roles were reversed. Congress kept a low profile in the civil rights area, but the Supreme Court invalidated racially discriminatory laws and practices in a series of decisions culminating with Brown v. Board of Education.5

A decade after Brown, Congress became an ally in the Court's continuing battle to guarantee equal rights regardless of race or other invidious classifications, by passing the landmark 1964 Civil Rights Act.35 Under the stewardship of Chief Justices Warren and Burger, the Court continued its collaboration with Congress in securing civil rights through decisions that allowed the Act to be meaningfully implemented. Yet now, under the leadership of Chief Justice Rehnquist, the Court is

33. For another example of the result-oriented nature of the Rehnquist Court's approach to judicial process issues, see Chemerinsky, supra note 2.

Although for the past two decades conservative scholars have championed originalist constitutional interpretation, the Rehnquist Court has not consistently followed this philosophy.

... One is left with the impression that the Court is originalist only when it justifies the result that the Court wants.

... Reading the [1988 Term] decisions leaves one with the sense that the Court invokes whatever interpretive method justifies a particular decision, a criticism that is particularly trenchant for a Court that professes a desire for judicial neutrality.

Id. at 51-56 (footnote omitted).

34. See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); United States v. Reese, 92 U.S. 214 (1876).


37. Chemerinsky, supra note 2, at 45.
effectively, if not literally, overturning some of these decisions.\textsuperscript{38}

For example, in 1971, pursuant to a unanimous opinion authored by then Chief Justice Burger, the Court recognized that title VII of the 1964 Civil Rights Act\textsuperscript{39} prohibits employers from using selection criteria that have a significant adverse impact on minorities or women.\textsuperscript{40} A prominent civil rights lawyer described \textit{Griggs v. Duke Power Co.} as "comparable [in the field of employment] to \textit{Brown} in the field of education."\textsuperscript{41} Yet, during its 1988-89 Term, pursuant to a five to four decision, the Court effectively overruled \textit{Griggs}.\textsuperscript{42}

In seeking to counter the revisionist impact of the 1988-89 civil rights decisions through the proposed 1990 Civil Rights Act,\textsuperscript{43} Congress is acting consistently not only with its general responsibilities under our system of separated government powers, but also with its special responsibilities under the fourteenth amendment.\textsuperscript{44} By so doing, Congress helps to maintain traditions of liberty and equality which, throughout United States history, have directly benefitted an increasingly broad spectrum of American society, and which have served as models for other societies as well. As we approach the Bicentennial of our Bill of Rights in December 1991, and as other peoples around the world are invoking the precepts it enshrines in their own efforts to entrench democracy and human rights, it is especially ironic that the Court would forsake its time-honored role as the guarantor of individual rights, and especially important that Congress step into the breach. As Professor Dorsen declared: "At a time when the doors of freedom are opening throughout the world, we must not allow a backward-looking Supreme Court to close the door on [civil rights and civil liberties]."\textsuperscript{45}

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  \item \textsuperscript{38} See supra note 3. See, \textit{e.g.}, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989).
  \item \textsuperscript{39} 42 U.S.C. §§ 2000e to 2000e-17 (1988).
  \item \textsuperscript{40} See \textit{Griggs v. Duke Power Co.}, 401 U.S. 424 (1971).
  \item \textsuperscript{41} See \textit{Hearings}, supra note 1, at 14 (testimony of William T. Coleman, Jr.).
  \item \textsuperscript{42} Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989).
  \item \textsuperscript{44} See U.S. CONST. amend. XIV, § 5 (granting Congress express authority to adopt appropriate legislation to enforce amendment).
  \item \textsuperscript{45} N. Dorsen, \textit{supra} note 9, at 19.
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