

# The Burger Court Opinion Writing Database

## *Robertson v. Wegmann*

436 U.S. 584 (1978)

Paul J. Wahlbeck, George Washington University  
James F. Spriggs, II, Washington University in St. Louis  
Forrest Maltzman, George Washington University



Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
THE CHIEF JUSTICE

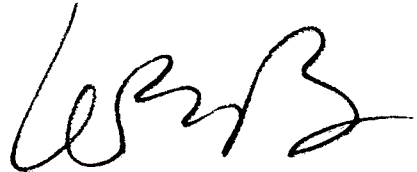
May 23, 1978

Re: 77-178 - Robertson v. Wegmann

Dear Thurgood:

I join.

Regards,



Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WM. J. BRENNAN, JR.

May 17, 1978

RE: No. 77-178 Robertson v. Wegmann

Dear Harry:

Please join me in your most persuasive and splendid  
dissent in the above.

Sincerely,

*Bill*

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE POTTER STEWART

May 10, 1978

No. 77-178, Robertson v. Wegmann

Dear Thurgood,

I am glad to join your opinion for  
the Court.

Sincerely yours,

P.S.  
/

Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE BYRON R. WHITE

May 17, 1978

Re: 77-178 - Robertson v. Wegmann

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Dear Harry:

Please join me.

Sincerely yours,



Mr. Justice Blackmun

Copies to the Conference

10 MAY 1978

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-178

<p>Willard E. Robertson, Petitioner,  <i>v.</i>          Edward F. Wegmann, Executor of          the Estate of Clay L. Shaw,          et al.</p>	}	<p>On Writ of Certiorari to the          United States Court of          Appeals for the Fifth          Circuit.</p>
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[May —, 1978]

MR. JUSTICE MARSHALL delivered the opinion of the Court.

In early 1970, Clay L. Shaw filed a civil rights action under 42 U. S. C. § 1983 in the United States District Court for the Eastern District of Louisiana. Four years later, before trial had commenced, Shaw died. The question presented is whether the District Court was required to adopt as federal law a Louisiana survivorship statute, which would have caused this action to abate, or was free instead to create a federal common-law rule allowing the action to survive. Resolution of this question turns on whether the state statute is "inconsistent with the Constitution and laws of the United States." 42 U. S. § 1988.<sup>1</sup>

<sup>1</sup> Title 42 U. S. C. § 1988 provides in pertinent part:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is

Pp. 3, 8

18 MAY 1978

Recirculation

2nd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-178

Willard E. Robertson, Petitioner, v. Edward F. Wegmann, Executor of the Estate of Clay L. Shaw, et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
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[May —, 1978]

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Pg. 4-5

24 MAY 1978

Recirculation

3rd DRAFT

## SUPREME COURT OF THE UNITED STATES

No. 77-178

<p>Willard E. Robertson, Petitioner,</p> <p style="text-align: center;">v.</p> <p>Edward F. Wegmann, Executor of the Estate of Clay L. Shaw, et al.</p>	}	<p>On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.</p>
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[May —, 1978]

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Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE THURGOOD MARSHALL

June 15, 1978

Re: Cases Held for No. 77-178, Robertson v. Wegmann

MEMORANDUM TO THE CONFERENCE

Three petitions have been held for Robertson. Nos. 77-1203, 77-1221, 77-1294. They all involve a decision of the Seventh Circuit. Beard v. Robinson, 563 F.2d 331 (1977).

Beard, administratrix of the estate of a man who had allegedly been murdered by federal and local officials, sued a Chicago policeman under "the Civil Rights Acts," principally 42 U.S.C. § 1983, and in the same action sued FBI agents under the Fourth Amendment pursuant to Bivens. The DC dismissed, holding that Illinois law allowed survival only with regard to the physical injuries suffered by the deceased and that the physical injury claims were barred by the two-year Illinois statute of limitations applicable to tort claims.

The CA reversed, disagreeing with the DC's construction of the Illinois survival statute and holding that the appropriate statute of limitations was the five-year statute applicable to "all civil actions not otherwise provided for." The court noted that the Illinois courts had construed the five-year statute as applicable to "causes of action created by statute" and that a § 1983 action is one "created by statute." While the Bivens action is not statutory, the court declined to adopt "the inconsistent result of applying different statutes of limitations to defendants who are charged with engaging in a single conspiracy."

In No. 77-1221, Flynn v. Bauman, and No. 77-1294, Reeves v. Wand, DCs had held § 1983 claims to be time-barred under the two-year Illinois statute, and in both cases the CA reversed on the basis of Beard. Petitioners, city and county officials, seek review here on the ground that Beard was wrong to apply the five-year Illinois statute. A conflict is alleged with decisions in other CAs that have applied state tort statutes of limitations.

I believe that the CA's decision in Beard is fully consistent with the approach that we took in Robertson v. Wegmann. We held there that a DC could not ignore state law and create in its stead a federal common law rule of survival. The CA here quite explicitly applied state law; the only issue

April 3, 1978

Re: No. 77-178 - Robertson v. Wegmann

Dear Bill:

I shall be glad to attempt a dissenting opinion in this case.

Sincerely,

HAB

Mr. Justice Brennan

cc: Mr. Justice White

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE HARRY A. BLACKMUN

May 10, 1978

Re: No. 77-178 - Robertson v. Wegmann

Dear Thurgood:

I shall attempt to get a dissent to you in this case  
in due course.

Sincerely,



Mr. Justice Marshall

cc: The Conference

To: The Chief Justice  
Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Rehnquist  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 17 1978

Recirculated: \_\_\_\_\_

No. 77-178 - Robertson v. Wegmann, Executor

MR. JUSTICE BLACKMUN, dissenting.

It is disturbing to see the Court, in this decision, although almost apologetically self-described as "a narrow one," ante, p. 9, cut back on what is acknowledged, id., p. 6, to be the "broad sweep" of 42 U.S.C. § 1983. Accordingly, I dissent.

I do not read the emphasis of § 1988, as the Court does, ante, p. 1 and p. 9 n. 11, to the effect that the federal district court "was required to adopt" the Louisiana statute, and was free to look to federal common law only as a secondary matter. It seems to me that this places the cart before the horse. Section 1988 requires the utilization of federal law ("shall be exercised and enforced in conformity with the laws of the United States"). It authorizes resort

Mr. Justice Brennan  
Mr. Justice Stewart  
Mr. Justice White  
Mr. Justice Marshall  
Mr. Justice Powell  
Mr. Justice Kennedy  
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: \_\_\_\_\_

Recirculated: MAY 23 1978

1st PRINTED DRAFT

**SUPREME COURT OF THE UNITED STATES**

No. 77-178

Willard E. Robertson, Petitioner,  
v.  
Edward F. Wegmann, Executor of  
the Estate of Clay L. Shaw,  
et al. } On Writ of Certiorari to the  
United States Court of  
Appeals for the Fifth  
Circuit.

[May —, 1978]

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

It is disturbing to see the Court, in this decision, although almost apologetically self-described as “a narrow one,” *ante*, p. 9, cut back on what is acknowledged, *id.*, p. 6, to be the “broad sweep” of 42 U. S. C. § 1983. Accordingly, I dissent.

I do not read the emphasis of § 1988, as the Court does, *ante*, p. 1 and p. 9 n. 11, to the effect that the Federal District Court “was required to adopt” the Louisiana statute, and was free to look to federal common law only as a secondary matter. It seems to me that this places the cart before the horse. Section 1988 requires the utilization of federal law (“shall be exercised and enforced in conformity with the laws of the United States”). It authorizes resort to the state statute only if the federal laws “are not adapted to the object” of “protection of all persons in the United States in their civil rights, and for their vindication” or are “deficient in the provisions necessary to furnish suitable remedies and punish offenses against law.” Even then, state statutes are an alternative source of law only if “not inconsistent with the Constitution and laws of the United States.” Surely, federal law is the rule and not the exception.

Accepting this as the proper starting point, it necessarily follows, it seems to me, that the judgment of the Court of

Supreme Court of the United States  
Washington, D. C. 20543

4

CHAMBERS OF  
JUSTICE LEWIS F. POWELL, JR.

May 10, 1978

No. 77-178 Robertson v. Wegmann

Dear Thurgood:

Please join me.

Sincerely,

*Lewis*

Mr. Justice Marshall

lfp/ss

cc: The Conference

5

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE WILLIAM H. REHNQUIST

May 17, 1978

Re: No. 77-178 - Robertson v. Wegmann

Dear Thurgood:

Please join me.

Sincerely,



Mr. Justice Marshall

Copies to the Conference

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE JOHN PAUL STEVENS

May 11, 1978

Re: 77-178 - Robertson v. Wegmann

Dear Thurgood:

Please join me.

Respectfully,



Mr. Justice Marshall

Copies to the Conference