# All the Supreme Court Really Needs to Know It Learned from the Warren Court

*Suzanna Sherry**

## I. INTRODUCTION

It is accepted wisdom among constitutional law scholars that the Supreme Court is now considerably more conservative than it was during the tenure of Chief Justice Earl Warren. In this Article, I hope to suggest that the conventional wisdom is at least partly wrong. In Part I, I suggest that many of the current Court's so-called conservative cases and doctrines are direct descendants of Warren Court cases and doctrines. Although my attribution of similarity is new, the description of the cases and doctrines themselves is entirely unoriginal. Indeed, the history of the two sets of cases—of the Warren Court and the current Court—could be drawn from almost any basic textbook in constitutional law. The interesting question, then, is why the obvious parallels have escaped most observers. In Part II, I explore why we cling to the myth that the current Court is much more conservative than its predecessor.

I begin with two definitional caveats. To canvas the entire scope of the Warren Court—or of the current Court, for that matter—would be a massive task. Instead, I will limit this Article to a few salient areas of law. The Warren Court is known primarily for its championship of individual liberty and racial equality. Even much of the vaunted "Due Process Revolution"—onlarging the rights of both criminal defendants and civil litigants—found its genesis in racial equality.[1] The Equal Protection Clause was the centerpiece of the

* Earl R. Larson Professor of Civil Rights and Civil Liberties Law, University of Minnesota. I would like to thank Paul Edelman and Daniel Farber for their comments on earlier drafts of this Article. Kaitlin Hallet provided excellent research assistance. I am also grateful to my commentators, Rebecca Brown, Barry Friedman, and John Goldberg, for challenging me and forcing me to hone and strengthen my arguments.

1. See generally Fred P. Graham, *The Self-Inflicted Wound* 27-66 (Macmillan, 1970) (discussing the impact of racial equality on the "Due Process Revolution"); Charles Whitebread and Christopher Slobogin, *Criminal Procedure: An Analysis of Cases and Concepts* (Foundation

Court's equality jurisprudence. The paradigmatic protection of individual liberty is the Free Speech Clause of the First Amendment, which first received its most expansive interpretations at the hands of the Warren Court. Thus, I will focus on the jurisprudence of those two clauses.

There is also the question of timing. Earl Warren retired in 1969, but for purposes of examining the "liberal" jurisprudence of the Warren Court, Warren's actual tenure is not wholly relevant. After all, both *Roe v. Wade*[2] and the cases extending heightened scrutiny to gender discrimination[3]—key liberal holdings—were decided after Warren Burger became Chief Justice. And of the Justices still on the Court, the conservative Rehnquist was appointed in 1972 and the liberal Stevens in 1975, so things must still have been in flux at that time. Thus, although I will focus primarily on cases decided between 1954 and 1969, I will include a few cases up through 1976—trying always to pick cases that continued earlier trends, and examining individual Justices' votes to emphasize the continuity with Warren Court decisions.

## II. DOCTRINAL PARALLELS

### *A. Equal Protection*

#### 1. The Current Court

The current Court's controversial equal protection cases hardly need reviewing, but a brief summary is in order. The Court has been most loudly denounced as conservative for its decisions on two contemporary issues: affirmative action and the creation of unusually

---

Press, 1986); Mark Tushnet, ed., *The Warren Court in Historical and Political Perspective* (U. of Virginia, 1993); Barry Feld, *Bad Kids* (forthcoming 1997); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 Tenn. L. Rov. 869, 884-928 (1994) (examining the expansion of federal court review of state actions under the Warren Court).

2. 410 U.S. 113 (1973).

3. See, for example, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (Brennan, J.) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of these objectives."); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) ("[C]lassifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

shaped legislative districts in order to increase minority representation.

In a pair of recent cases, the Supreme Court held that racial discrimination is equally constitutionally suspect whether it is directed against whites or against people of color. "[T]he standard of review under the Equal Protection Clause," the Court wrote in *City of Richmond v. Croson Co.*[4] and reiterated six years later in *Adarand Constructors, Inc. v. Pena*,[5] "is not dependent on the race of those burdened or benefited by a particular classification."[6] This even-handedness is demanded, according to Justice O'Connor's majority opinion in *Adarand*, by the "basic principle" that the Fifth and Fourteenth Amendments "protect *persons*, not *groups*."[7] And it is consonant with the Constitution's underlying aspiration toward "a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement."[8] Noting "the sorry history of both private and public discrimination in this country,"[9] the Court nevertheless required race-neutral responses in all but the rarest circumstances. Otherwise, as Justice Scalia pointed out in his *Croson* concurrence, we risk making the problem worse:

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a Nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all.[10]

Whether or not we agree with the decisions in *Croson* and *Adarand*, they clearly rest on an underlying model of evenhandedness and colorblindness.

In 1993, in *Shaw v. Reno*,[11] the Court extended a modified principle of colorblindness to legislative redistricting. In *Shaw*, the Court struck down North Carolina's attempt to create a second "majority-minority" district in the state. Citing *Croson*, Justice O'Connor's majority opinion held that "racial gerrymandering" was subject to the same high level of scrutiny regardless of whether it

---

4. 488 U.S. 469 (1989).
5. 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).
6. 115 S. Ct. at 2111 (quoting *Croson*, 488 U.S. at 494).
7. Id. at 2112.
8. *Croson*, 488 U.S. at 505-06.
9. Id. at 499.
10. Id. at 520-21 (Scalia, J., concurring).
11. 509 U.S. 630 (1993).

favored whites or blacks.[12] Indeed, the cases on which the Court relied to conclude that North Carolina had engaged in racial gerrymandering, and that racial gerrymandering violated the Constitution, had all involved attempts to reduce the voting power of African Americans.[13] Although the Court recognized that redistricting poses special problems—and thus that determining when racial gerrymandering has occurred can be difficult—it held unequivocally that the practice cannot constitutionally be used even to increase black voting power.[14] In subsequent cases, the Court has applied *Shaw* to strike down other majority-minority districts.[15]

Justice Marshall, dissenting in *Croson*, castigated the Court for ignoring its own prior decisions and for "sound[ing] a full-scale retreat from the Court's longstanding solicitude toward race-conscious remedial efforts . . . ."[16] Justice White, dissenting in *Shaw*, accused the majority of "sidestep[ping]" earlier precedent.[17] We can quibble over whether the fractured Courts that decided *Regents of the University of California v. Bakke*,[18] and *Fullilove v. Klutznick*,[19] and *United Jewish Organizations of Williamsburgh, Inc. v. Carey*,[20] can be meaningfully interpreted as evidencing much solicitude toward race-conscious remedies. But the more important point for present purposes is that *Croson*, *Adarand*, *Shaw*, and the other redistricting cases in fact represent a return to the defining principles of the Warren Court, from which some intervening decisions might have strayed. Far from a conservative betrayal of Warren Court

---

12. Id. at 657-58.

13. Id. at 643-49 (citing *Rogers v. Lodge*, 458 U.S. 613 (1982); *Mobile v. Bolden*, 446 U.S. 55 (1980); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *White v. Regester*, 412 U.S. 755 (1973); *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

14. *Shaw*, 509 at 657-58.

15. See, for example, *Bush v. Vera*, 116 S. Ct. 1941, 1953, 135 L. Ed. 2d 248 (1996); *Miller v. Johnson*, 115 S. Ct. 2475, 2490, 132 L. Ed. 2d 762 (1995).

16. *Croson*, 488 U.S. at 561 (Marshall, J., dissenting).

17. *Shaw*, 509 U.S. at 659.

18. 438 U.S. 265 (1978). In *Bakke*, a divided court struck down the University's affirmative action plan but five justices, in two separate opinions, indicated that a less rigid affirmative action plan would be constitutional. There was no majority opinion.

19. 448 U.S. 448 (1980). In *Fullilove*, a divided Court upheld a federal affirmative action set-aside plan. There was no majority opinion, and the two groups that combined to form a majority to uphold the program could not agree on a rationale. Three justices, including Justice Stevens, who seems to have changed his mind, dissented.

20. 430 U.S. 144 (1977). Cited by Justice White in his *Shaw* dissent, 509 U.S. at 658, *Carey* upheld a redistricting plan that deliberately increased black representation at the expense of the Hasidic Jewish community in New York City. 430 U.S. at 167-68. The Justices in the majority could not agree on a rationale, and there was no majority opinion. Three separate opinions purported to explain the ruling.

jurisprudence, the most recent affirmative action and redistricting cases reflect a straightforward application of Warren Court doctrines.

### 2. The Warren Court

The Warren Court is most famous, and deservedly so, for its championship of racial justice. While its free speech jurisprudence might be seen as the realization of aspirations expressed—and occasionally implemented—by previous Courts, its rulings on race were without precedent. In *Brown v. Board of Education*,[21] *Loving v. Virginia*,[22] and *Gomillion v. Lightfoot*,[23] the Court turned its back on a century of Court complicity in racial discrimination and demanded better from itself and from the citizenry. And the principles it announced and implemented in those and other cases are the same principles that underlie the current Court's affirmative action and redistricting cases.

It hardly needs stating that a key principle underlying the Warren Court's race cases is that of colorblindness. Race, according to the Court, is simply not an appropriate basis of classification. In *Brown* of course, the Court declared that education "must be made available to all on equal terms."[24] Whatever may be said of the Court's reasoning that separate educational facilities violate this principle, the analysis must begin with an assumption that racial inequalities violate the Constitution. Thus, although *Brown* notoriously failed to articulate an underlying principle, later cases stressed the invidiousness of racial classifications. As the Court noted in *Loving*, " 'distinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.' "[25]

While the Court never explicitly adopted a principle of colorblindness or government neutrality in racial matters, the principle makes sense of otherwise inexplicable cases. Certainly a principle of colorblindness can explain *Brown* and *Loving*. But it can also explain cases in which the Court *failed* to find an equal protection violation. For example, the Court consistently held that only intentional discrimination violates the Constitution. Beginning

---

21. 347 U.S. 483 (1954).
22. 388 U.S. 1 (1967).
23. 364 U.S. 339 (1960).
24. 347 U.S. at 493.
25. 388 U.S. at 11 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

with *Lassiter v. Northampton County Board of Elections*[26] in 1959, the Court repeatedly refused to invalidate facially neutral statutes with a disparate impact. In *Lassiter*, a unanimous Court upheld a racially neutral literacy test for voting. Justice Douglas's opinion for the Court suggested that only literacy tests actually "employed to perpetuate"[27] race discrimination would be unconstitutional. Thus, according to the Warren Court, as long as both a statute and its purpose are racially neutral, the statute does not violate the Constitution.

Indeed, in an early Burger Court case, the Court upheld a facially neutral statute that was arguably motivated by discrimination. In *Palmer v. Thompson*,[28] the Court upheld the closing of all municipal swimming pools, despite claims that the city had closed the pools in order to avoid integrating them. Justice Black's majority opinion stressed that this was "not a case where whites are permitted to use public facilities while blacks are denied access," nor one "where a city is maintaining different sets of facilities for blacks and whites,"[29] highlighting the conclusion that colorblindness is the operative principle for equal protection law. Similarly, in the school desegregation cases, the Court focused on the difference between *de jure* and *de facto* segregation, demanding remedies only for the former. The busing cases confirm that, like the modern Court, the older Court allowed racial classifications only where necessary to remedy previous violations of the Equal Protection Clause. So firm was this commitment that the Court occasionally stretched to find a previous violation, indulging in weak reasoning in order to justify busing remedies without abandoning the requirement that the segregation be due to prior unlawful acts.[30]

The use of a racial neutrality principle in equal protection cases may be profitably compared with the Warren Court's rather different course in religious freedom cases. Beginning in 1963, in *Sherbert v. Verner*,[31] the Court adopted a principle of more substantive equality in interpreting the Free Exercise Clause. When a neutral government policy has a disparate impact on a racial minority,

---

26. 360 U.S. 45 (1959).
27. Id. at 53.
28. 403 U.S. 217 (1971).
29. Id. at 220.
30. See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1099-1101 (1978) (discussing the Warren Court's strained efforts to "tie the condition of segregation to [an] identified violation" of equal protection).
31. 374 U.S. 398 (1963).

standard equal protection doctrine nevertheless permits that policy. When a neutral government policy has a detrimental impact on the exercise of a religious belief, by contrast, the Warren Court required the government to prove a compelling interest in applying the law to those whose religious beliefs were compromised.[32] Whatever the merits of this doctrine, which has since been overruled,[33] the Court's failure to extend it to race discrimination nicely illustrates the operation of the formal neutrality or colorblindness principle in equal protection law.

Nor do the similarities between the Warren Court and the current Court stop with the racial neutrality principle itself. In *Gomillion*, the Warren Court invalidated an attempt at racial gerrymandering. Faced with an "uncouth twenty-eight-sided figure,"[34] the Court did exactly what the later Court would do with North Carolina's "bug splattered on a windshield":[35] it struck down the new district, finding the evidence "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters. . . ."[36]

The Warren Court also recognized that the Constitution is only concerned with formal discrimination by the government. *Swann v. Charlotte-Mecklenburg Board of Education*[37] is often considered one of the most aggressively liberal of the post-*Brown* busing cases. In that case, Chief Justice Burger's opinion for a unanimous Court stated that the Court was concerned only with "the elimination of the discrimination inherent in the dual school systems, not with the myriad factors of human existence which can cause discrimination in a multitude of ways on racial, religious, or ethnic grounds."[38] In the school desegregation cases, Burger continued, the Court's objective "does not and cannot embrace all the problems of racial prejudice, even when

---

32. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963).

33. See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990) (holding that the Free Exercise Clause of the First Amendment did not prohibit Oregon from including religiously inspired peyote ingestion within the reach of its general criminal prohibition on use of that drug). Congress has in turn reinstated the *Sherbert* rule. See the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994 ed.). The question of the constitutionality of RFRA is currently before the Supreme Court. See *Flores v. Boerne*, 73 F.3d 1352 (5th Cir. 1996), cert. granted, 117 S. Ct. 293, 136 L. Ed. 2d 212 (1996).

34. *Gomillion*, 364 U.S. at 340.

35. *Shaw*, 509 U.S. at 635. This language actually referred to the majority-minority district *not* invalidated by the Court; the Court described the district it did invalidate as "even more unusually shaped." Id.

36. *Gomillion*, 364 U.S. at 341.

37. 402 U.S. 1 (1971).

38. Id. at 22.

those problems contribute to disproportionate racial concentrations in some schools."[39] This insistence on remedying only discrimination dovetails nicely with the *Croson* Court's holding that only prior official discrimination will justify affirmative action, for the sole focus of the Equal Protection Clause is discrimination, not numerically disproportionate results.

The principle of racial neutrality is put to its hardest test in cases challenging affirmative action. While there is nothing that can justify government discrimination against racial minorities, government discrimination in favor of racial minorities raises different questions. As I will discuss in more detail below, affirmative action pits formal neutrality or colorblindness against a more substantive conception of equality. A Court that forbids segregated schools on the basis of substantive equality can comfortably uphold affirmative action programs with little additional analysis. For a Court committed to formal neutrality or colorblindness, however, a decision to uphold affirmative action takes some sophisticated justification. Had the Warren Court ever decided a case challenging affirmative action, the resulting opinion—whichever way it went—would provide strong evidence as to whether that Court was committed to formal or substantive principles of neutrality.

Although the Warren Court never faced a case challenging affirmative action under the Equal Protection Clause, the Burger Court confronted such a case in 1973. In *DeFunis v. Odegaard*,[40] a disappointed white applicant to the University of Washington Law School challenged the school's policy of evaluating white and minority applicants using different standards. Although a majority of the Court sidestepped the question on technical jurisdictional grounds, Justice Douglas dissented from that holding and insisted on reaching the merits. Because Justice Douglas was perhaps the most consistently liberal member of the Warren Court, his views on affirmative action are particularly noteworthy. In his *DeFunis* dissent, Douglas adhered to principles of formal neutrality, squarely concluding that affirmative action violated the Equal Protection Clause. In so doing, he drew on all the precedent of the Warren Court. He interpreted "the point at the heart of all our school desegregation cases" as holding that the Equal Protection Clause "commands the elimination of racial barriers, not their creation in

39. Id. at 23.
40. 416 U.S. 312 (1974).

order to satisfy our theory as to how society ought to be organized."[41] Stressing that the law school's selection process should be "racially neutral,"[42] he concluded that "whatever his race, [DeFunis] had a constitutional right to have his application considered on its individual merits in a racially neutral manner."[43] One could not find a more succinct description of the views underlying *Croson* and *Adarand*.

One more aspect of the Warren Court's equal protection jurisprudence deserves comment for its congruence with the more recent cases. Again acting without precedent, the Court in *Reynolds v. Sims*[44] invalidated legislative apportionment schemes that failed to treat all voters equally. Declaring that "[l]egislators represent people, not trees or acres,"[45] the Court demanded that legislative districts for both state and congressional elections contain, as nearly as practicably possible, equal populations. Any larger deviation was, the Court noted, analogous to the racial gerrymandering condemned in *Gomillion*.[46] Racial gerrymandering thus served as the paradigm evil, against which other apportionment schemes were judged.

In its "one-person, one-vote" cases, the Court seemed especially hostile to districts constructed to represent particular interests. In *Reynolds* the Court recognized that respecting conventional boundary lines could justify some inequality because the alternative might produce a greater evil: "Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[47] Five years later, in *Kirkpatrick v. Preisler*,[48] the Court again stressed the unconstitutionality of special interest districts. Missouri had attempted to justify its unequal districts as "necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress."[49] The Court rejected this claim, holding that "to accept population variances, large or small, in order to create districts with specific

41. Id. at 342-43.
42. Id. at 334, 336.
43. Id. at 337.
44. 377 U.S. 533 (1964).
45. Id. at 562.
46. Id. at 566.
47. Id. at 578-79.
48. 394 U.S. 526 (1969).
49. Id. at 533.

interest orientations is antithetical to the basic premise of the constitutional command. . . ."[50]

The current Court's affirmative action and redistricting cases are thus direct descendants of the Warren Court's equal protection jurisprudence. Affirmative action conflicts with the principle of colorblindness and formal neutrality underlying most of the early cases, and was, moreover, squarely rejected by the most liberal member of the Warren Court. As for redistricting, two principles stand out in the Warren Court's reapportionment cases: gerrymandering of any sort is suspect, and gerrymandering to create special interest districts is particularly invidious. Both of these principles are consistent with—and indeed can be derived from—the principle of neutrality announced in the race cases. And all three principles support the current Court's rejection of overt, heavy-handed racial gerrymandering. The Warren Court thus invalidated all types of racial discrimination—including racial gerrymandering—and condemned the creation of districts designed to enhance the voting power of particular interest groups. Districts created solely to enhance the voting power of a particular racial group would seem to fall into both these disfavored categories.

### *B. Freedom of Speech*

#### 1. The Warren Court

The free speech jurisprudence of the Warren Court was the culmination of the decades-long trend that began with Justice Holmes's dissent in *United States v. Abrams*.[51] The crux of that jurisprudence is that the government may not suppress speech it does not like. The earliest opinions expressing this basic principle were voices in the wilderness: Justice Holmes urged us to be "eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death,"[52] and Justice Brandeis reminded us that those who founded our nation "eschewed silence coerced by law."[53] As the century wore on, the principle gained currency. Perhaps the most stirring invocation of the basic principle comes from Justice Jackson's 1943 majority opinion in *West Virginia*

50. Id.
51. 250 U.S. 616 (1919).
52. Id. at 630 (Holmes, J., dissenting).
53. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

*State Board of Education v. Barnette*:[54] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ."[55] But *Barnette* was only a temporary recognition of the centrality of the prohibition against government censorship. In 1951, the Vinson Court, with Justices Black and Douglas in dissent, upheld Smith Act prosecutions of members of the Communist Party despite the absence of any showing that the Party presented a real threat.[56] It was thus left to the Warren Court to fulfill the promise of *Barnette*.

That Court began by immediately limiting Smith Act prosecutions to those who knowingly and intentionally promote unlawful action. Neither mere membership in the Party nor abstract advocacy of the overthrow of the United States government, the Court ruled in a trio of cases in 1957 and 1961, would suffice to permit prosecution.[57] Nevertheless, these cases did not yet unequivocally reflect the *Barnette* principle. That step was taken in 1964, in a case that perhaps best represents the Warren Court's commitment to the core principle against government suppression of unpopular speech.

In *New York Times v. Sullivan*,[58] the Court held that the First Amendment shielded the newspaper from a libel suit for printing falsehoods about a public official.[59] While the specifics of the doctrine are complicated—and still evolving—the underlying principle is clear and simple. The First Amendment, according to Justice Brennan's eloquent majority opinion, reflects "a profound national commitment to the principles that debate on public issues should be uninhibited, robust, and wide open. . . ."[60] This is so despite the fact that that public debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ."[61] The Court explicitly recognized the potential for abuse of speech rights and the view that the marketplace-of-ideas concept was "folly,"[62] but it nevertheless chose to interpret the First Amendment as a broad prohibition against government censorship in all its forms. Justice Goldberg, writing in concurrence

54. 319 U.S. 624 (1943).
55. Id. at 642.
56. *Dennis v. United States*, 341 U.S. 494 (1951).
57. *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957).
58. 376 U.S. 254 (1964).
59. Id. at 264-66.
60. Id. at 270.
61. Id.
62. Id.

for himself and Justice Douglas, said it best: individuals "may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious."[63]

The Court reiterated this mistrust of government orthodoxy again and again, rejecting attempts to censor speech that could not firmly be shown to present a real danger. In 1969, the Court held that even advocacy of violence or illegal conduct could not be prohibited unless it was both "directed to inciting or producing imminent lawless action" and "likely to produce such action."[64] The Court's solicitude for free speech sometimes outstripped the views of even its most liberal members. Justice Black dissented from the holding, in *Tinker v. Des Moines Independent Community School District*,[65] that students could not be punished for wearing black armbands to school. Both Chief Justice Warren and Justice Fortas dissented in *Street v. New York*,[66] which reversed a conviction for casting contempt on the American flag. The key principle in all these cases was an abhorrence of government attempts to prescribe what ideas could and could not be expressed.

The quintessential example of the Warren Court's adherence to this principle came in a case decided two years after Chief Justice Warren retired. In *Cohen v. California*,[67] five stalwarts of the Warren Court held that the government could not punish Paul Cohen for wearing a jacket bearing the words "Fuck the Draft."[68] The two new Nixon appointees, Justice Blackmun and the new Chief, along with Justices Black and White, dissented. Justice Harlan's matter-of-fact majority opinion repeated once again the core principle of the First Amendment: that provision, Harlan wrote, "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely in the hands of each of us. . . ."[69] Despite instances of individual abuse, despite the resulting "verbal tumult, discord, and even offensive utterance," the First Amendment recognizes that "one man's vulgarity is another man's lyric."[70]

---

63. Id. at 299 (Goldberg, J., concurring).
64. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
65. 393 U.S. 503 (1969).
66. 394 U.S. 576 (1969).
67. 403 U.S. 15 (1971).
68. Id. at 26.
69. Id. at 24.
70. Id. at 24-25.

And neither the Warren nor the Burger Court limited its hostility to only the most glaring governmental intrusions on beliefs. As *Tinker*, *Cohen*, and other cases indicate, the Court protected subtle as well as straightforward expressions of belief. An unsophisticated analysis might lead one to conclude that restrictions on the wearing of an armband or the choice of one word rather than another do not constitute government censorship of speech or ideas. But the Court rejected such a simplistic conclusion, invalidating the restrictions at issue. The Warren Court also recognized that the government violates the First Amendment when it uses its power of conferring benefits in such a way as to coerce silence, holding that neither public schools nor public universities could condition employment on an individual's relinquishment of his first amendment rights.[71]

By and large, the Burger Court continued and even extended its predecessor's vigilance against government-prescribed orthodoxy. From Warren Court holdings that the government could not prohibit speech, the Burger Court derived the principle that the government could not coerce speech either, asserting that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all."[72] Thus, the state of New Hampshire could not punish George and Maxine Maynard for refusing to display the motto "Live Free or Die" on their license plates. Just as the Warren Court defined "speech" to include conduct with a communicative focus, the Burger Court in *Buckley v. Valeo*[73] relied on Warren Court precedent to include campaign expenditures within the definition of speech. And in rejecting a proffered justification for government restrictions on campaign expenditures, the Court echoed its predecessor's vision of the First Amendment as both evenhanded and inclusive: "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ."[74] Although *Buckley* produced six different opinions that ran 294 pages in the U.S. Reports, the section that both contains the quoted statement and rejects limits on some campaign expenditures[75] was joined by six of the eight participating justices, including, from the Warren Court era, Justices Brennan,

71. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Keyishian v. Board of Regents of the State of New York*, 385 U.S. 589 (1967).
72. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
73. 424 U.S. 1 (1976).
74. Id. at 48-49.
75. Id.

Stewart, and Marshall; only Justice White and Chief Justice Burger dissented from this part of the opinion.

Principles often harden into doctrines and tests, and so did the Warren Court's mistrust of government restrictions on speech. The principle that the government cannot prescribe orthodoxy eventually took the basic doctrinal form of insistence on "content-neutrality." The Warren Court sowed the seeds for the content-neutrality doctrine in 1968, in *United States v. O'Brien*.[76] In that case the Court held that the government may regulate certain types of speech only if the government interest underlying the regulation is "unrelated to the suppression of free expression."[77] The Court elaborated on this doctrine, rephrasing it in its current form, in *Police Department of the City of Chicago v. Mosley*.[78] Justice Marshall's opinion in that 1972 case held that the government may not justify restrictions on speech "by reference to content alone."[79] Under the "essence" of the First Amendment, the government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."[80] This distinction between content-neutral regulations, which may sometimes be constitutional, and content-based regulations, which almost never are, is probably the most basic principle of modern free speech doctrine. And despite its association with the Burger Court, its Warren Court heritage is obvious.

This abbreviated romp through the Warren Court's free speech jurisprudence is hardly novel. Every graduate of an American law school—to say nothing of the constitutional law scholars who now condemn the Supreme Court as conservative—is familiar with the principles, cases, and doctrines I have mentioned. So why did I bother repeating them? I bothered because they are directly relevant to some of the most controversial cases decided by the current Court. Keep the holdings, reasoning, and language of these precedents firmly in mind as we turn to the free speech jurisprudence of the current Court.

---

76. 391 U.S. 367 (1968).

77. Id. at 377. *O'Brien* has had a peculiar history: the full four-part test has been modified by subsequent cases. The test, originally applied to cases with both speech and non-speech elements, or "symbolic speech," now probably applies instead to regulation of the time, place, and manner of speech; and the case was probably wrongly decided and would be decided differently today. Nevertheless, its core principle has been retained.

78. 408 U.S. 92 (1972).

79. Id. at 96.

80. Id.

### 2. The Current Court

The current Supreme Court has continued to adhere to the Warren Court's basic principles of free speech. Indeed, in some instances—such as commercial speech—it has expanded their application. Overall, the Court has remained as steadfast as the Warren Court in its insistence that the government has no power to prescribe orthodoxy.

I begin with the two cases that have sparked the most controversy. In *R.A.V. v. City of St. Paul, Minnesota*,[81] the Court invalidated a St. Paul ordinance that banned hate speech. The ordinance penalized anyone who engaged in specified types of symbolic speech that caused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[82] Justice Scalia, writing for a majority of the Court, began his analysis by restating the two fundamental principles of Warren Court free-speech jurisprudence: that government may not suppress speech "because of disapproval of the ideas expressed," and that "[c]ontent-based regulations are presumptively invalid."[83] And, indeed, the St. Paul ordinance is an exemplary case of governmental proscription of speech based on disapproval of the content. As Justice Scalia pointed out, the city had singled out for special punishment only speech that communicates "messages of racial, gender, or religious intolerance."[84] It is difficult to imagine a clearer case of deliberate government censorship of speech based on disagreement with the ideas it expresses. If the government cannot ban the word "fuck" despite the fact that it offends, angers, or alarms some hearers, then neither can it ban the cross-burning that offends, angers, or alarms others. The only difference lies in the identity of those offended.

Some academic commentators have tried to justify the St. Paul ordinance and other similar restrictions on speech by suggesting that hate speech "silences" its victims.[85] Although Justice Scalia did not address this argument, *Buckley v. Valeo* did. As even Justices Brennan and Marshall recognized in that case, it is not constitutional to silence some voices in order to enhance others. The difference

---

81. 505 U.S. 377 (1992).
82. Id. at 380 (quoting the text of the statute).
83. Id. at 382.
84. Id. at 394.
85. See generally Mari J. Matsuda, et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, 1993); Owen M. Fiss, *The Irony of Free Speech* (Harvard U., 1996).

between *R.A.V.* and earlier cases such as *Cohen* or *Tinker* is only that we condemn the speech at issue in *R.A.V.* It always takes more integrity to uphold freedom for speech we abhor, but the Court in *R.A.V.* had that integrity.

The *R.A.V.* Court thus adhered unswervingly to the first amendment principles established by the Warren Court. Indeed, one might even argue that *R.A.V.* represents a Court that is *more* solicitous of speech than its predecessor. After all, although the Warren Court recognized in *Tinker* that symbolic speech should also be protected by the First Amendment, it failed to live up to its own aspirations when it allowed the government to ban the burning of draft cards.[86] The current Court recognizes more readily that igniting objects is an effective way of inflaming passions: in addition to its decision in *R.A.V.*, it has invalidated two attempts to prohibit flag-burning.[87]

The current Court again angered some on the Left when it upheld the right of parade organizers to exclude gay and lesbian groups from marching.[88] But as the Warren Court recognized, the right to speak includes the right not to speak. To force the parade organizers to communicate a gay rights message by including marchers carrying that message is exactly analogous to forcing the Maynards to communicate "Live Free or Die" by carrying it on their license plates. Again, the only significant difference between the two cases is that current sympathies may lie with, rather than against, the message the government is trying to encourage. The Warren Court could not have put it better than Justice Souter did in his unanimous opinion in *Hurley*: the government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[89]

The regulation of commercial speech provides another example of continuity between the two Courts. Although the Warren Court never explicitly confronted the question of commercial speech, Justice Blackmun's 1976 opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[90] resonated with Warren Court precedent when it invalidated restrictions on advertising by

86. *O'Brien*, 391 U.S. at 372.
87. *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).
88. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).
89. 115 S. Ct. at 2350.
90. 425 U.S. 748 (1976).

pharmacists. The Court's two most recent cases on commercial speech take a similarly expansive approach to protecting all types of speech. In *Rubin v. Coors Brewing Company*,[91] the Court unanimously invalidated a federal statute prohibiting malt liquor manufacturers from listing the alcohol content on the beverage's label. In *44 Liquormart, Inc. v. Rhode Island*,[92] a fractured Court could not produce a majority opinion, but it nevertheless unanimously concluded that Rhode Island could not prohibit price advertising by liquor stores.

Numerous other, less politically controversial examples also illustrate the current Court's adherence to the ideas of its predecessor. Relying on *Buckley v. Valeo*, the Court last term struck down federal laws attempting to limit campaign expenditures by political parties.[93] Only Justices Stevens and Ginsburg dissented. Expanding *Keyishian* and *Pickering*, the Court also held last term that, as a general rule, independent contractors' relationships with government entities may not be severed because of their unpopular speech or their party allegiance.[94] On that issue, only Justices Scalia and Thomas dissented. Thus the center of the Court seems firmly committed to Warren Court precedent, with only sporadic and inconsistent dissents from both political extremes.[95]

If content-neutrality and the avoidance of government censorship of ideas or prescription of orthodoxy were the watchwords of the Warren Court, they are equally central to the current Court. The tenor of government orthodoxy, and thus of its regulation of speech, may have changed, but the Court's resistance to it has not.

---

91. 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995).

92. 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

93. *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S. Ct. 2309, 135 L. Ed. 2d 795 (1996).

94. *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353, 135 L. Ed. 2d 874 (1996); *Board of Commissioners, Wabaunsee County, Kansas v. Umbehr*, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996).

95. There is one glaring exception to the Rehnquist Court's acceptance of the principle that government benefits may not be conditioned on the relinquishment of the right against censorship. In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court failed to recognize the serious first amendment issue raised by the government's insistence that entities receiving federal funds not talk about abortion.

## III. MISSING THE OBVIOUS

### *A. Beyond Neutrality*

If it can be so easily demonstrated that the current Court is adhering to the principles and precedents of its predecessor, why is the current Court so often criticized as conservative? Certainly that label was never attached to the Warren Court, although I have just suggested that both Courts followed the same course. Why is it that we seem to need, as Justice Holmes once said, "education in the obvious"?[96]

I shall put aside immediately the fact that the current Court is almost incontrovertibly more conservative than the Warren Court in some areas peripheral to core constitutional law. For example, in the law of federal jurisdiction, the current Court has overruled a number of significant Warren Court precedents and has severely limited others.[97] The law of federal habeas corpus, in particular, has changed so significantly as to be almost unrecognizable: what was once a fruitful avenue for reviewing state court decisions has been almost entirely closed off. In criminal procedure, too, although few major Warren Court cases have been overruled, many have been so narrowly interpreted as to render them almost meaningless. But shifts to the right in the law of federal jurisdiction or criminal procedure cannot explain the widespread belief *among constitutional law professors* that the Court is now more conservative. Specialization is now so complete that few constitutional lawyers consider themselves also to be experts in federal jurisdiction or criminal procedure. (I know of only one prominent academic who writes in all three areas, and very few who write in even two of the three.) Our collective judgment of conservatism stems instead from the Court's rulings on such core constitutional questions as equal protection and freedom of speech.

A more tempting, but still too simplistic, explanation is that it is not the Court that has moved to the right but its critics who have moved to the left. There is some evidence for this proposition. A

---

96. Oliver Wendell Holmes, Jr., *Law and the Court*, in Harold Joseph Costin, *Collected Legal Papers* 291, 292 (Harcourt Brace, 1920).

97. See, for example, *Wainwright v. Sykes*, 433 U.S. 72 (1977) (overruling most of *Fay v. Noia*, 372 U.S. 391 (1963)); *Coleman v. Thompson*, 501 U.S. 722 (1991) (overruling the remainder of *Fay*); *Valley Forge Christian College v. Americans United For Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (narrowly construing the broad standing rules of *Flast v. Cohen*, 392 U.S. 83 (1968)); *Allen v. McCurry*, 449 U.S. 90 (1980) (reviving the long-dormant barrier to de novo suits in federal court).

recent study finds conservatives in general, and Republicans in particular, underrepresented among law professors.[98] Unfortunately, we do not know whether they were equally underrepresented thirty years ago. We may consider, additionally, the fact that a number of left-wing schools of thought have arisen only since the end of the Warren era: Critical Legal Studies, Critical Race Theory, feminism, and gaylegal studies. Nevertheless, without further data I am unwilling to conclude that the change in attitude toward the Court is entirely or even largely attributable to a change in the overt political leanings of the academy.

But speculating that the current Court's "conservatism" is due to a change in academic commentary rather than to a change in the Court itself points us toward a more sophisticated explanation. I suggest that what has changed is our attitude toward what might be labelled evenhandedness or neutrality. Once thought the epitome of enlightened jurisprudence, neutrality is no longer considered sufficient as a basic principle. Neutrality (together with its cousin, objectivity) is now considered a chimera, an illusion used by those in power to justify and perpetuate existing hierarchies. It is the Court's failure to accept the demise of neutrality as a meaningful concept that leads many academics to label it conservative.

I should first make clear what I mean by "neutrality." I do not mean anything so grand as Herbert Wechsler's "neutral principles."[99] Unlike Wechsler, I do not care (for purposes of this argument) where the principle comes from or how it is justified. I am merely describing the principle that I believe animates the equal protection and free speech jurisprudence of both Courts. That principle relies on the sort of evenhandedness that is represented by Justice O'Connor's insistence that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by the particular classification."[100] Similarly, neutrality demands that the protections of the First Amendment be equally available to those whose views we abhor and to those whose views we applaud. For purposes of this Article, I need not go beyond this simple, formal neutrality. The law must, on its face, treat all races with equal solicitude and all views with equal tolerance. Whether or not we agree with this principle, or consider the principle itself neutral, is

98. James Lindgren, *Measuring Diversity* (unpublished manuscript on file with the Author).

99. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

100. *Adarand*, 115 S. Ct. at 2111 (quoting *Croson*, 488 U.S. at 494).

irrelevant. All I am suggesting is that the demand that government remain neutral in this limited sense provides the framework underlying the jurisprudence of both the Warren Court and the Rehnquist Court.

This limited neutrality principle, moreover, says nothing about how society should choose its ultimate values. The long-ranging debate between those who would have the government remain neutral on individual value choices and those who would have the government adopt policies that foster values such as autonomy is not implicated by the principle I am describing. Demanding racial and content neutrality only prohibits certain means of achieving whatever goals the government is legitimately permitted to adopt. Thus, whether or not the government should be fostering individual autonomy, the Warren Court's neutrality principle simply holds that it cannot do so by means that discriminate on the basis of race, or that censor speech according to its content.

The trend toward modern disenchantment with the previously lauded concept of formal neutrality is easy to document. As the Warren Court era began, many laws were decidedly non-neutral. The Court's great achievement under the Equal Protection Clause was to eliminate facially discriminatory laws by demanding that the law remain formally neutral. Analogously, its first amendment jurisprudence systematically invalidated many non-neutral limits on freedom of speech. Blacks and whites, Communists, Nazis, and patriots all had equal claim to the protections of the Constitution. Neutrality was, at that time, an enormous step forward.

But it was not a panacea. Lifting formal barriers to opportunity did not immediately ensure equality of results. And so those who considered themselves progressive began to demand different remedies—remedies that would transgress the command of formal neutrality. Some races *are* entitled to different treatment, and some speech *is* proscribable because of its content. Formal neutrality fell into disrepute, replaced by such ideas as substantive neutrality or equality of results. Note that formal and substantive neutrality are not merely gradations of neutrality, but are instead often in conflict: to achieve substantive neutrality we may have to violate formal neutrality, as when we create different standards for admitting students of different races in order to achieve some numerical parity.

The transformation in the academy can be illustrated by the work of one of our foremost constitutional scholars. In 1970, John Hart Ely suggested that the Equal Protection Clause meant "simply that race shall not be employed as a criterion of selection for benefit

or deprivation."[101] Ely then defended the Court's disapproval of a purposefully proportional system of jury selection in language that resonates with the current Court's views:

> [T]he government's intentional and explicit use of race as a criterion of choice is bound—no matter how careful the explanation that this is a 'good' use of race—to weaken the educative force of its concurrent instruction that a man is to be judged as a man, that his race has nothing to do with his merit.[102]

He concluded that while "[c]olorblindness may in time turn out . . . to be a less than absolute constitutional command," it is nevertheless "constitutionally satisfactory" for "the foreseeable future."[103] The foreseeable future did not last very long. By 1974, Ely was eloquently defending affirmative action as ordinarily constitutional, reiterating that view in his 1980 book.[104]

I do not mean to cast aspersions on Professor Ely, whose work I greatly admire and who inspired my own first article (defending reduced scrutiny for reverse racial classifications).[105] His change of heart is representative of the movement in the academy generally. As principles of neutrality failed to produce desired results, constitutional scholars began to question those principles.

These academic developments highlight one sense in which the Rehnquist Court is justifiably thought more conservative than its predecessor. Many of those who support affirmative action—that is, proponents of some version of substantive equality—are trying to extend the trendlines established by Warren Court precedent, in the face of changed circumstances. What distinguishes the Rehnquist Court is that it has refused to extend those trendlines and has instead stopped with the precedents themselves. This may explain why we think there is a difference between, say, Justice Scalia and Justice Douglas, even if their opinions are virtually interchangeable. To the extent that the current Court is conserving Warren Court precedents rather than extending them, it is superficially conservative.

But I think it is misleading to label as conservative a defense of formal neutrality. Formal neutrality—a colorblind society—is a liberal aspiration insofar as it is derived from Enlightenment ideas

---

101. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L. J. 1205, 1256 (1970).

102. Id. at 1259.

103. Id. at 1260.

104. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723 (1974); John Hart Ely, *Democracy and Distrust* (Harvard U., 1980).

105. Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L. J. 89 (1984).

about merit and equality. In one sense, neither side in the debate over affirmative action calls into question this liberal aspiration; the dispute is instead only about the best means of achieving it. Take merit standards for admission to law school, for example. Basing law school admission primarily on numerical indicators of success such as LSAT and undergraduate GPA disadvantages minority applicants.[106] Scholars have thus argued for a long time that our commitment to racial justice demands some deviation from these merit standards.[107] Similarly, some scholars have suggested that racist speech is so inimical to our aspirations of racial justice that it justifies a departure from our ordinary reluctance to regulate speech on the basis of its content.[108] These are, in essence, arguments that the neutrality doctrines of the past are insufficient to eradicate racial discrimination in the present, and thus that we ought to recognize exceptions in order to achieve our ultimate goal of neutrality. But others *with the same goals and commitments* might suggest that affirmative action or hate speech regulations undermine rather than serve those goals. Thus good liberals can and do disagree about whether the proponents of affirmative action or hate speech regulations have made a persuasive case for deviation from liberal ideals. Deprecating as "conservative" those who are not persuaded—whether on or off the Court—does not help us resolve the difficult issues raised by affirmative action and hate speech regulation. If the ACLU is conservative because it opposes hate speech regulations, where does that leave Robert Bork, who believes that almost any governmental interest will suffice to justify censorship?[109] If those who oppose affirmative action as race discrimination are conservative, then what is Richard Epstein, who thinks that all anti-discrimination laws should be repealed?[110]

---

106. One study reports that the median LSAT score for whites is the 65th percentile, for Mexican Americans it is the 30th percentile, and for blacks it is the 22nd percentile. Lino A. Graglia, Hopwood v. Texas: *Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. Legal Educ. 79, 82 (1995).

107. See, for example, Randall L. Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 Harv. L. Rev. 1327, 1331 n.15 (1986) (advocating an affirmative action program that "require[s] the satisfaction of certain minimal requirements appropriate to a given context" and allowing "the minority status of an applicant . . . [to] play a legitimate role in hiring or admission decisions" once these requirements have been met).

108. See, for example, Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2357 (1989) (arguing that racist speech should be treated as a *sui generis* category of speech outside the realm of protected discourse).

109. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971); Rebert H. Bork, *The Tempting of America: The Political Seduction of the Law* 126-28 (Collier Macmillan, 1990).

110. See generally Richard Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard U., 1992).

Thus one purpose of my comparison between the Warren and Rehnquist Courts is to suggest that to the extent that charges of conservatism stem from disagreement over means, those charges are unfair and counterproductive. The debate about whether temporary deviations from principles of racial neutrality are necessary or detrimental does not call into question the basic aspiration toward color-blindness and formal neutrality itself. To the many scholars who defend affirmative action in these traditional terms, I say only that they should not allow the debate to degenerate into the sort of name-calling that has become all too prevalent.

But some claims that the Rehnquist Court is conservative stem from another source entirely. If we remain committed to Enlightenment ideals, the case for even partial exceptions to principles of formal neutrality is a difficult one, as proponents have found. However clever or sophisticated the arguments, they are met with skepticism because of the intuitive appeal of formal equality.

The title of this Article is taken from Robert Fulghum's book, *All I Really Need to Know I Learned in Kindergarten.* His title essay contains a list of the things he learned, including play fair, clean up your own mess, and don't take things that aren't yours. These fundamentals reflect our liberal attachment to individualism and formal neutrality. Americans tend to believe that "playing fair" means making everyone play by the same rules, and any deviation from this definition is immediately suspect. This is not to suggest that proponents of affirmative action are necessarily wrong, just that they have the more challenging side of the argument. Within the Enlightenment tradition, the high moral ground seems to belong to those who favor formal neutrality. Even though the simplest answer is not always the best one, it is often the most marketable.

Recognizing the inherent difficulty of explaining why substantive neutrality should displace formal neutrality—that is, why the government should vary the rules according to perceived need, thus formally disadvantaging some people in order to give others substantive equality—some opponents of formal neutrality have begun to take another approach. While many scholars, including Ely, have continued to defend affirmative action (or, in some cases, hate speech regulations), with the traditional liberal arguments, others have taken a more radical turn. These newer scholars have begun to attack the idea of neutrality altogether. It has become fashionable to assert that doctrines of neutrality are not simply ineffective in combating racial injustice, but pernicious and intentionally discriminatory.

It is this turn in the debate that explains much of the vehemence with which the charges of conservatism are levelled. And it is this turn in the debate that I find especially troubling. On this view, the condemnation of the current Court as conservative goes deeper than a mere disagreement about how best to implement our commitment to a liberal democratic polity. It stems from a rejection of the traditional liberal Enlightenment ideal of objectivity. According to the scholars who embrace this view—commonly called postmodernists or social constructivists—any standard that purports to be neutral or objective is simply a mask for the desires of the powerful elites in society. Thus, all "normative orderings . . . reflect the views of the powerful,"[111] and all "[s]tandards are nothing more than structured preferences" of the powerful.[112] Objective reality is "a myth,"[113] and objectivity "is only a cover for a male viewpoint."[114] Merit standards, in particular, are not neutral, but are deliberately constructed to favor those in power: merit is "not merely contingent, it is racially biased,"[115] and reflects "what white men value about themselves."[116]

In the minds of more traditional proponents of affirmative action, neutrality is a useful tool that is sometimes inadequate to the task at hand, and thus occasionally needs to be supplemented or replaced. The postmodernists, on the other hand, also view neutrality as a tool, but one which quite effectively serves its intended purpose of perpetuating white male dominance.

Similarly, the core principle of content-neutrality in speech regulation is merely a cover for selective censorship. Decisions about which speech is protected by the First Amendment do not turn on principle, but on "the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard . . . and the regula-

111. Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. Pa. L. Rev. 933, 951 (1991).

112. Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* 103 (Harvard U., 1991).

113. Ann C. Scales, *The Emergence of Feminist Jurisprudence*, 95 Yale L. J. 1373, 1378 (1986).

114. A.W. Phinney III, *Feminism, Epistemology and the Rhetoric of Law: Reading* Bowen v. Gilliard, 12 Harv. Women's L. J. 151, 176 (1989).

115. Robert L. Hayman, Jr., and Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 Cal. L. Rev. 377, 403 (1996).

116. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L. J. 1281, 1291 (1991).

tion of speech they want silenced."[117] Again, neutrality is merely an illusion that serves the interests of those currently in power.

Moving beyond the pragmatic debate about whether departures from neutrality are justified, then, some scholars have abandoned the fundamental aspiration toward racial or content neutrality in government. This change explains the condemnation of the current Supreme Court: its adherence to principles of neutrality places it squarely among those committed to perpetuating existing hierarchies of power. A few of the social constructivists go so far as to condemn the Warren Court in retrospect—Derrick Bell, for example, suggests that *Brown v. Board of Education* was actually decided the way it was only because it served the interests of the white majority.[118] But for most critics of the Supreme Court, the Warren Court remains a beacon of progressive wisdom. The difference between the doctrines of the two Courts lies in their effects: in the 1960s, principles of neutrality served the substantive goals that these principles are thought to hinder today. For the social constructivists, that difference is enough to demonstrate the conservatism of the current Court.

### *B. Back to the Future*

One last item remains. I have shown that the same principles underlie the core constitutional jurisprudence of both the Rehnquist and Warren Courts. I have suggested that the widespread belief that the latter is more conservative than the former (at least in these two areas) is either unfair or stems from the postmodern critique of objectivity. What, if anything, is wrong with the postmodern view? Perhaps we should, as the postmodernists suggest, move beyond Enlightenment ideals, recognize the pervasive effects of power, and abandon even the aspiration of objectivity and neutrality.

If we did that, though, our future would look too much like our (distant) past. It is necessarily a return to pre-Enlightenment regimes. If neutrality and other objective standards cannot mediate among competing claims to truth and justice, then we return to a cultural version of the religious wars of earlier centuries. Indeed, the similarities between the pre-Enlightenment religious world view and the world view of radical social constructivists is apparent in the claim by one scholar that "[t]he allocation of creationism to the mar-

117. Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing Too* 110 (Oxford U., 1994).

118. Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363 (1992).

ginalized world of subjectivity, and evolution to the privileged world of objectivity, is merely the exercise of social power rather than a natural, value-neutral distinction."[119] Substitute "racial balance" and "merit standards" for "creationism" and "evolution," respectively, and you have a statement that might be endorsed by any social constructivist. Many of the social constructivists do not conceal their distaste for Enlightenment ideals: one suggests that "enlightenment-style Western democracy" is "the source of black people's subordination" because "racism and enlightenment are the same thing."[120]

As I have written elsewhere on the dangers of the critique of objectivity and the abandonment of the Enlightenment tradition,[121] I will offer only brief arguments here. One of the greatest achievements of the Enlightenment was to uncouple claims to truth from the institutional, religious, or hereditary affiliations of those who made them. As Justice Frankfurter said in a slightly different context, the Enlightenment concept of a meritocracy made "your father or your face equally irrelevant," in determining one's status and one's contribution, all that mattered was "scholarship and character, objectively ascertained."[122] To abandon that aspiration is to return to a world in which it matters not what is said, but who says it.

It is an American tragedy that, inspired to nationhood by the Enlightenment, we nevertheless failed to implement its basic principles. The Warren Court's adoption of principles of neutrality began to rectify that great lapse. We can argue about whether more needs to be done—whether the centuries when pedigree did eclipse merit can be so easily erased—but we shonld not revert to the pre-Enlightenment principles themselves. By denying that neutrality is possible, we give up any hope for a society in which people are judged "not by the color of their skin but by the content of their character."[123]

There are even greater dangers to the abandonment of neutrality. Without neutrality as a guiding principle, there is no way to

---

119. Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 Va. L. Rev. 671, 686 (1992).

120. Richard Delgado, *Rodrigo's Seventh Chronicle: Race, Democracy, and the State*, 41 UCLA L. Rev. 720, 729 (1994).

121. See Daniel A. Farber and Suzanna Sherry, *Beyond All Reason* (forthcoming, Oxford U., 1997); Suzanna Sherry, *The Sleep of Reason*, 84 Geo. L. J. 453 (1996); Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. Contemp. Legal Issues 473 (1996).

122. Quoted in *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Lawyers in Public Service in the 1930s*, in G. Edward White, *Intervention and Detachment: Essays in Legal History and Jurisprudence* 149, 154-55 (Oxford U., 1994).

123. Martin Luther King, Jr., Aug. 28, 1963, Washington D.C., reprinted in Coretta Scott King, ed., *The Martin Luther King, Jr., Companion: Quotations from the Speeches, Essays, and Books of Martin Luther King, Jr.* 101 (St. Martin's Press, 1994).

justify or defend any particular allocation of society's goods and benefits (such as law school placement). How are we to define fair allocations if not by reference to neutral standards such as merit? If we try to define fairness by outcome, suggesting that racial and ethnic groups should be roughly proportionately represented among the advantaged of our society, what shall we do about Jews, who, at 3% of the American population, constitute 26% of the law professoriate, 40% of the wealthiest 40 Americans, and 40% of the American Nobel Prize winners in science and economics?[124] If we try to define fairness in procedural terms, how will we define fair procedures if neutrality is ruled out as a yardstick?

The advantage of the Enlightenment is that it gives us an answer to these questions. Fairness presumptively requires racial neutrality, and deviations are allowed only if we are persuaded that, in a particular situation and for openly-discussed reasons, principles of neutrality are substantively unfair. That is the case that traditional defenders of affirmative action have always made, and should continue making. But making such a case is no less necessary because it is difficult, or because a facile claim that neutral, objective standards cannot exist is superficially more attractive.

## IV. CONCLUSION

Philosophers Amy Gutmann and Dennis Thompson have recently published a wonderful book suggesting that the best way for citizens in a heterogenous democracy to coexist peacefully is to abide by a certain framework for deliberating through their disagreements.[125] That way, even where some moral disagreement remains, all members of the society can (we hope) accept whatever resolution the majority ultimately reaches. Rather than prescribing appropriate results, Gutmann and Thompson provide a framework for moral and political deliberation. One of their fundamental principles is "mutual respect": mutual respect "requires a favorable attitude toward, and

124. James Lindgren, *Measuring Diversity* (unpublished manuscript on file with Author); Seymour Martin Lipset and Earl Raab, *Jews and the New American Scene* 26-27 (Harvard U., 1995) (wealth and Nobel prizes). See also Robert Burt, *Two Jewish Justices: Outcasts in the Promised Land* 64 (U. of California, 1988); Charles E. Silberman, *A Certain People: American Jews and Their Lives Today* 99 (Summit Books, 1985); Gerald Krefetz, *Jews and Money; The Myths and the Reality* (Ticknor and Fields, 1982).

125. Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Belknap Press, 1996).

constructive interaction with, the persons with whom one disagrees."[126]

This Article follows their lead. I do not try to resolve the disputes about affirmative action and hate speech, but only to suggest the form that the disputes should and should not legitimately take. Disagreement over the best way to achieve common goals should not degenerate into political name-calling. And to the extent that the debate actually focuses on goals, and calls into question the appropriateness of the aspirations of the Enlightenment, my Article offers a word of warning. The critics who take a postmodern approach that makes the Enlightenment itself conservative should be aware of the dangers. Those who currently lack power are likely to be better off in a world of objective standards than in a postmodern world, where objectivity is replaced by power.

126. Id. at 79.