

# Vanderbilt Law Review

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Volume 50  
Issue 2 *Issue 2 - Symposium: Defining  
Democracy for the Next Century*

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Article 12

3-1997

## Neutral Principles: A Retrospective

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### Recommended Citation

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# Neutral Principles: A Retrospective

Barry Friedman\*

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## I. INTRODUCTION

Once upon a time, Enlightenment ideals prevailed across the land. Neutrality, objectivity, and reason were accepted as the firmaments of Supreme Court decisionmaking. "Americans tend[ed] to believe that 'playing fair' [meant] making everyone play by the same rules, and any deviation from this definition [was] immediately suspect."<sup>1</sup> But "then, some scholars . . . abandoned the fundamental aspiration toward . . . neutrality in government."<sup>2</sup> "Neutrality" came to be "considered a chimera, an illusion used by those in power to justify and perpetuate existing hierarchies."<sup>3</sup> The nation was threatened with a return to pre-Enlightenment days, a "return to a world in which it matters not what is said, but who says it,"<sup>4</sup> "where objectivity is replaced by power."<sup>5</sup>

This is the story Professor Suzanna Sherry tells about the time of the Rehnquist Court. In *All the Supreme Court Really Needs to*

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\* Professor of Law, Vanderbilt University. I would like to thank the following colleagues for comments on drafts of this Comment or for discussing with me the ideas contained in it: Rebecca Brown, John Goldberg, Laura Kalman, Suzanna Sherry, Nancy Staudt, and Nick Zeppos. Thanks also to James Rowan for dedicated research assistance. The Vanderbilt University Research Council has contributed generously to the historical research upon which I relied in preparing this paper; for that continued support I am grateful.

1. Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 Vand. L. Rev. 459, 481 (1997).

2. *Id.* at 482.

3. *Id.* at 477.

4. *Id.* at 484.

5. *Id.* at 486.

*Know It Learned from the Warren Court*, Professor Sherry argues that some academics have unfairly called the Rehnquist Court conservative for adhering to the very same values of neutrality and objectivity advanced by that “beacon of [liberalism],” the Warren Court.<sup>6</sup> According to Professor Sherry, two groups of scholars threaten these ideals. First, there are those who would replace the decisionmaking ideal of “[f]ormal neutrality” with the conflicting idea of “substantive neutrality or equality of results.”<sup>7</sup> Second, and even worse, are some scholars, “commonly called postmodernists or social constructivists,” who attack the very idea of neutrality.<sup>8</sup> These scholars “have abandoned the fundamental aspiration toward . . . neutrality in government,”<sup>9</sup> which “explains the[ir] condemnation of the current Supreme Court: its adherence to principles of neutrality places it squarely among those committed to perpetuating existing hierarchies of power.”<sup>10</sup>

One of Professor Sherry’s particular targets is affirmative action. According to Professor Sherry, the Warren Court pursued a policy of race neutrality, insisting that race play no part in governmental decisionmaking.<sup>11</sup> Such neutrality was a step forward at the time, Professor Sherry explains, but it failed to eliminate all barriers to full racial equality, and so some scholars “began to demand different remedies—remedies that would transgress the command of formal neutrality” in favor of “equality of results.”<sup>12</sup> Although Professor Sherry does not come down squarely against affirmative action, she considers any argument for substantive neutrality to be difficult to justify because it would deviate from the widely-held norm of formal neutrality.<sup>13</sup> She saves particular criticism for those who “have begun to attack the idea of neutrality altogether.”<sup>14</sup>

What is intriguing about Professor Sherry’s story is that with just one difference, it is very nearly the same story that could be told about the years of the Warren Court. Some scholars during that time, purporting to represent the mainstream of opinion, extolled the values of reason, neutrality, and objectivity, viewing them as bedrock

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6. Id. at 483.

7. Id. at 478.

8. Id. at 481.

9. Id. at 482-83.

10. Id.

11. Id. at 477.

12. Id. at 478.

13. See id. at 481-82.

14. Id. at 482. Professor Sherry continues: “It has become fashionable to assert that doctrines of neutrality are not simply ineffective in combating racial injustice, but pernicious and intentionally discriminatory.” Id.

principles of law.<sup>15</sup> What Professor Sherry does not explain, however, is that these “neutral” scholars were attacking the Warren Court, not defending it. The work of the Warren Court was defended by other scholars, who felt that it was the substantive equality of results rather than the formal neutrality of rules that mattered.<sup>16</sup> Moreover, some of the Warren Court defenders—like the scholars Professor Sherry criticizes today—also suggested that neutrality and adherence to principled reasoning were an illusion meant only to preserve existing power hierarchies and to subordinate minority interests.<sup>17</sup>

The fact that Professor Sherry could tell very nearly the same story about today’s debate as could be told about the debate over the Warren Court suggests that it would be profitable to revisit that earlier debate. Professor Herbert Wechsler’s famous paper, *Toward Neutral Principles in Constitutional Law*, delivered in 1958, is in a sense what kicked off all the earlier debate about neutrality in Supreme Court decisionmaking.<sup>18</sup> Professor Sherry states that by insisting on “neutrality” she does not mean to invoke “anything so grand as Herbert Wechsler’s ‘neutral principles.’”<sup>19</sup> Professor Sherry’s modesty aside, however, her paper and Professor Wechsler’s do bear similarity.<sup>20</sup>

A retrospective look at the neutral principles debate over the Warren Court suggests that Professor Sherry overstates some of the historical claims she seems to be making. This retrospective demonstrates that, contrary to Professor Sherry’s views, the Warren Court’s defenders emphasized substantive results over formal neutrality. The defenders’ operative concern was not to assure colorblind laws but to eliminate legal structures that permitted the majority to subordinate a racial minority.<sup>21</sup> To the extent that formal neutrality posed a barrier to this substantive agenda, Warren Court defenders

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15. See notes 60-97 and accompanying text.

16. See notes 98-106 and accompanying text.

17. See notes 116-34 and accompanying text.

18. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959). The lecture was later published in a collection of selected essays. Herbert Wechsler, *Principles, Politics, and Fundamental Law* (Harvard U., 1961). The fuss over Wechsler’s lectures had its origins in intellectual thought tracing back to the Realist challenge to law’s neutrality. See Neil Duxbury, *Patterns of American Jurisprudence* 271-72 (Clarendon Press, 1995); Morton J. Horowitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* 5-6 (Oxford U., 1992). See also Parts II.A and II.B (discussing the roots of the neutral principles debate).

19. Sherry, 50 Vand. L. Rev. at 477 (cited in note 1).

20. See notes 64-66 and accompanying text.

21. See notes 71-85 and accompanying text.

challenged the very concept of neutrality as "an illusion" or as unhelpful to resolving disputes over constitutional values.<sup>22</sup>

This retrospective can also lead to a more sophisticated discussion about the value and importance of formal neutrality in constitutional decisionmaking. Some political scientists of the Warren Court era took a studied posture to the entire neutral principles debate, trying to understand what animated it.<sup>23</sup> One conclusion was that "neutrality" is an important rhetorical approach, one that strikes a chord in the body politic, thus giving credence to Professor Sherry's broader position.<sup>24</sup> But students of that era also concluded that, ultimately, what matters most to the public is the basic justice of the results reached in individual cases, not the rhetoric that explains those results.<sup>25</sup>

This retrospective has particular implications for affirmative action. Professor Sherry's story suggests skepticism about affirmative action; she uses history to put the burden of proof on those who would justify it. As this retrospective suggests, however, matters are not quite so simple. Professor Sherry explains that one reason the Rehnquist Court may be considered conservative is its refusal to "extend the trendlines established by Warren Court precedent."<sup>26</sup> That observation, amply supported by history, at least raises difficult questions about where the burden of proof over affirmative action should rest. If Rehnquist Court decisions are, indeed, a refusal to "extend the trendlines," then perhaps it is the Rehnquist Court decisions that are deviant and require reasoned justification.<sup>27</sup>

This debate warrants a personal caveat at the outset. It is difficult to be against reason and neutrality, and I am not. It is dangerous to say that right decisions are necessarily those with popular support, and I am not. But the very same spirit that animates reason's enduring appeal to the courts, to the public, and to the academy, requires that any appeal to reason not be over-simplified, that historical concerns be kept straight, and that concerns about privileging

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22. See notes 116-34 and accompanying text.

23. See Part II.D.

24. See notes 139-45 and accompanying text.

25. See notes 146-50 and accompanying text.

26. Sherry, 50 Vand. L. Rev. at 479 (cited in note 1).

27. Professor Sherry does say that "[m]any 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.*" *Id.* (cited in note 1) (emphasis added). If Professor Sherry were correct about the "changed circumstances," that *might* have some further implication as to where the burden of proof rests. But circumstances have not changed, which is precisely the problem. If the goal is racial equality, Professor Sherry herself recognizes that "principles of neutrality failed to produce desired results." *Id.*

formal neutrality not be dismissed too easily. Today's challengers to the idea of neutrality may be out of bounds in some ways,<sup>28</sup> but their arguments carry force—at least historically—in others.

## II. THE DEBATE OVER NEUTRAL PRINCIPLES

### A. *The Genesis of the Neutral Principles Debate*

*Brown v. Board of Education*,<sup>29</sup> decided on May 17, 1954, may fairly be regarded as the first significant act of the Warren Court.<sup>30</sup> It played to immediate and widespread applause. Most of the country hailed *Brown* for its egalitarian result, and commentary at the time regularly noted racial segregation's incongruity with the broader promise of democracy.<sup>31</sup> Many saw the decision as particularly useful for removing a blot on the United States's ability to combat the communist threat.<sup>32</sup>

Not all reviews of *Brown* were positive, however; the decision was met with catcalls and threats of defiance as well. Some of the criticisms academics advanced in later years about *Brown* and the Warren Court bore a remarkable similarity to segregationist complaints at the time of the decision itself. Many of those attacking

28. Surely this is true regarding the anti-Semitism that Professor Sherry and her co-author Daniel Farber find in some of the outsider scholarship. See Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: Radical Multiculturalism, Law, and Anti-Semitism* (forthcoming 1997).

29. 347 U.S. 483 (1954).

30. See Alexander M. Bickel, *The Supreme Court and the Idea of Progress* 4-8 (Harper & Row, 1970) (arguing that *Brown* represented the first sharp break with the Vinson Court).

31. Michael Klarman has argued persuasively that *Brown's* countermajoritarian nature is greatly exaggerated—an assessment with which I agree. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 Va. L. Rev. 1, 19-21 (1996).

32. Professor Sherry singles out for criticism Derrick Bell's "interest convergence" argument that *Brown* outlawed school segregation only when doing so converged with the interests of the majority. Sherry, 50 Vand. L. Rev. at 483 (cited in note 1). As part of his argument, Professor Bell explained that "the decision helped provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples." Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 524 (1980). News accounts of the time bear out Professor Bell's argument; indeed, the argument is persuasively developed in full in Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 Stan. L. Rev. 61 (1988) (asserting that the consensus against racial segregation in the 1950s resulted from the convergence of interests of whites and persons of color). See also Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 26-29 (1994). Klarman's article situates *Brown* within the entire fabric of changing attitudes about race in America.

*Brown* made claims that the decision represented naked power politics by the Supreme Court, which had abandoned proper constitutional forms. "The South," proclaimed Senator James Eastland of Mississippi, "will [neither] abide by nor obey this legislative decision by a political court."<sup>33</sup> A Manifesto of Ninety-Six Members of Congress accused the Court of substituting its "personal, political and social ideas for the established law of the land" and decried the decision as "naked power" and "naked judicial power."<sup>34</sup> Although the ugly vehemence of these remarks is troubling, the juxtaposition of "naked power" with judicial propriety mirrors the neutral principles debate of both judicial generations.

Complaints that the Supreme Court had abandoned its judicial role to engage in power politics were not unique to the time immediately following *Brown*; they would plague the Warren Court throughout its tenure. In 1958, the Conference of Chief Justices, in a sharply critical report commenting on many of the Supreme Court's decisions not dealing with race, accused the Court of exercising "almost unlimited policy-making powers."<sup>35</sup> Speaking in the midst of a heated congressional and national furor over whether to strip the Court of jurisdiction in cases involving communists or otherwise to modify Court decisions, Senator Jenner of Illinois suggested that judicial review was being used "as a device for conforming the law to what the individual members of the Court, or a majority of them, think the law should be. In the latter case, judicial review is being used to promote a judicial oligarchy, and is bringing us far closer to a government of men and not of laws."<sup>36</sup> In 1965, following the turmoil that arose after the school prayer<sup>37</sup> and reapportionment<sup>38</sup> decisions, a publication for

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33. William S. White, *Ruling to Figure in '54 Campaign: Decision Tied to Eisenhower—Russell Leads Southerners in Criticism of Court*, N.Y. Times 1 (May 18, 1954).

34. *Text of 96 Congressmen's Declaration on Integration*, N.Y. Times 19 (Mar. 12, 1956). See also *Southern Manifesto*, 102 Cong. Rec. 4460 (1956).

One federal judge even called the Supreme Court a "hierarchy of despotic judges" and accused it of discriminating against white citizens. *U.S. Judge in South Assails High Court*, N.Y. Times 6 (July 26, 1957) (comment of George Bell Timmerman, Sr., Federal District Judge of South Carolina). Apparently anticipating Wechsler's argument, Senator Sam Ervin of North Carolina said the Court's segregation decisions violated "the freedom to select one's associates. Whenever Americans are at liberty to choose their own associates, they virtually always select within their own race." Sam J. Ervin, Jr., *The Case for Segregation*, Look 32 (Apr. 3, 1956).

35. *What 36 State Chief Justices Said About the Supreme Court*, U.S. News & World Report 92 (Oct. 3, 1958). See also *Conference of Chief Justices, Report of Committee on Federal-State Relationships as Affected by Judicial Decisions* (August, 1958), printed in 104 Cong. Rec. A7782 (1958).

36. 104 Cong. Rec. 18,641 (Aug. 20, 1958).

37. *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

students called Senior Scholastic published an article entitled *The Supreme Court . . . Guardian or Dictator of the Nation's Laws?*<sup>39</sup> Although the foaming cries of rabid segregationists might have been dismissed easily, by the time the furor was over the Court could count among its critics many members of the American Bar Association, many members of Congress, and many state Supreme Court Chief Justices.<sup>40</sup>

In light of the identity of the Court's critics and the tenor of their criticism, academic critics stayed mute for some time after *Brown*, and when critical, they approached the task with delicacy. Erwin Griswold, Dean of the Harvard Law School, explained: "With such a hue and cry being raised, one should be very careful that he does not join it, and that he does not create the impression that he is joining it."<sup>41</sup> In a later article, he elaborated, "[a]nything [a critic] may write is susceptible to misuse by such irresponsible critics of the Court and its work."<sup>42</sup> Phillip Kurland, a Professor of Law at the University of Chicago, rose to defend the work of the state Supreme Court Chief Justices whose report he had helped draft. He worried that the report "gave aid and comfort to the enemy. . . . It was the warm greetings of brotherhood from the Southern demagogues and the paeans of praise from the American witch-hunting fraternity that did the harm."<sup>43</sup> He might have added that releasing the report amidst the Little Rock controversy that resulted in *Cooper v. Aaron*<sup>44</sup> had not helped.

If the ice was to be broken in polite circles, no one was better suited to do so than Learned Hand, "the most revered of living American judges."<sup>45</sup> Eighty-seven years old in February of 1958, he "was called"<sup>46</sup> to the Harvard Law School to give the prestigious Holmes Lectures, an event whose attendance rivaled a major theater

38. See, for example, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

39. *The Supreme Court . . . Guardian or Dictator of the Nation's Laws?*, Senior Scholastic 6 (Mar. 4, 1965).

40. See notes 33-36 and accompanying text.

41. Erwin N. Griswold, *Morrison Lectures*, 43 Mass. L. Q. 98, 101 (1958).

42. Erwin N. Griswold, *The Supreme Court, 1959 Term—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 Harv. L. Rev. 81, 82 (1960).

43. Philip B. Kurland, *The Supreme Court and Its Judicial Critics*, 6 Utah L. Rev. 457, 459 (1959).

44. 358 U.S. 1 (1958).

45. Gerald Gunther, *Learned Hand: The Man and the Judge* 653 (Knopf, 1994).

46. J. Skelly Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 Harv. L. Rev. 769, 769 (1971).



opening. Judge Hand's appearance came amidst fury at some of the Supreme Court's decisions in cases involving communists. Southern segregationists had stood alone since *Brown*, but with recent civil liberties decisions limiting state and federal witch-hunting activities, the segregationists had finally found an issue calculated to attract broader national condemnation of the Supreme Court.<sup>47</sup> Learned Hand, as it turned out, was sharply critical of the Supreme Court's activism, a fact that turned the heads of the Court's admirers. "Warren Court admirers could dismiss the most vocal critics of the Court as extremists; yet here was the nation's most highly regarded judge, renowned as the most articulate advocate of liberty, apparently joining the Court's enemies."<sup>48</sup>

Context helps to illuminate how this revered judge of generally liberal ideals came to be criticizing the Warren Court. Learned Hand was an old-guard progressive. He had fought the battle in favor of progressive legislation against the Old Court,<sup>49</sup> a battle that was not won until the defeat of that Court amidst the furor over President Franklin Roosevelt's Court-packing plan.<sup>50</sup> Learned Hand and other progressives had attacked the Old Court repeatedly for using the Constitution, particularly the Due Process Clause, to strike progressive legislation.<sup>51</sup> Given his part, Learned Hand could not reconcile criticizing courts for invalidating economic legislation, while approving their using those same clauses to strike laws in the name of civil or personal rights.<sup>52</sup> Any such interference with the operations of legitimate democratic government constituted the Supreme Court, in Learned Hand's view, as a "third legislative chamber."<sup>53</sup>

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47. See J. Patrick White, *The Warren Court Under Attack: The Role of the Judiciary in a Democratic Society*, 19 Md. L. Rev. 181, 189 (1958) Southern Congressmen, having failed in their initial effort to mobilize anti-Court sentiment . . . were quick to perceive that their basic purpose of discrediting the Supreme Court would be served whether the issue was undue concern for civil liberties or softness to communism or states' rights." .

48. Gunther, *Learned Hand* at 655 (cited in note 45).

49. See Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495 (1908). On Hand's involvement in Progressive Era politics, see, for example, Gunther, *Learned Hand* at 202-69 (cited in note 45).

50. See Gunther, *Learned Hand* at 459-60 (cited in note 45). The question of whether Justice Roberts's famous switch was in response to FDR's Court-packing plan is contested, but I stand with those who think that widespread popular attacks on the Court apparently influenced the Supreme Court's general turnaround. See Laura Kalman, *The Strange Career of Legal Liberalism* 349 n.70 (Yale U., 1996).

51. See Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 Harv. L. Rev. 545 (1924); T.W. Brown, *Due Process of Law*, 32 Am. L. Rev. 14, 20-21 (1898).

52. Learned Hand, *The Bill of Rights* 46 (Harvard U., 1958).

53. *Id.* at 42. Judge Hand expressed his disapproval of such a system in no uncertain terms. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." *Id.* at 73.

Although Learned Hand's main point of criticism was the exercise of activist judicial review in general, he also took *Brown* to task.<sup>54</sup> Learned Hand's original inclination had probably been to support *Brown*, but his correspondence with Supreme Court Justice Felix Frankfurter suggests that heavy lobbying by Justice Frankfurter about the decision's rationale ultimately led Learned Hand to attack *Brown*.<sup>55</sup> In the end, Learned Hand concluded that like other judicial decisions he had criticized, *Brown* was nothing but an illegitimate "coup de main."<sup>56</sup>

After Learned Hand threw down the gauntlet, the way was clear for further academic criticism of the Supreme Court and of *Brown*. Herbert Wechsler, the Harlan Fiske Stone Professor of Law at Columbia University,<sup>57</sup> accepted the challenge in his own Holmes Lectures a year later. Unlike Learned Hand, Professor Wechsler was prepared to accept a role for judicial review. This, Wechsler felt, followed from Article III and from the decision in *Marbury v. Madison*.<sup>58</sup> the Court could not shirk its duty to decide constitutional questions thrust upon it.<sup>59</sup> That duty, however, only raised the question of what standard the Court was to apply, a question Wechsler was forced to answer although Learned Hand had not.

It is here that Professor Wechsler developed his famous argument for "neutral principles." In order to separate court processes from "the ad hoc in politics," Wechsler said, the judicial process must be "genuinely principled, resting with every respect to every step that is involved in reaching judgment on analysis and reasons quite

54. Id. at 55.

55. Gunther, *Learned Hand* 665-66 (cited in note 45). According to Learned Hand's biographer Gerald Gunther, Hand was sympathetic to *Brown*. Although skeptical of the *Brown* Court's rationale, which seemed to be limited to the special rule of education, Learned Hand felt he could have supported the decision on the ground that "racial equality was a value that must prevail against any conflicting interest." Id. at 666. But Justice Frankfurter could not accept this rationale, reluctant as he was to be boxed into striking down state anti-miscegenation laws on the very same ground, a result he did not believe the country would tolerate. Id. at 666-67.

56. See Hand, *The Bill of Rights* at 55 (cited in note 52). On Learned Hand's struggle with the *Brown* decision, see Horwitz, *The Transformation of American Law* at 259 (cited in note 18); Gunther, *Learned Hand* at 671 (cited in note 45); Kalman, *The Strange Career of Legal Liberalism* at 33-34 (cited in note 50).

57. Professor Wechsler's professional chair was more than a little ironic in light of the tension over the rationale in *Brown*. After Professor Wechsler's speech, the neutral principle advanced most often to justify *Brown* was a rationale based essentially on Justice Stone's famous footnote four in his decision in *Carolene Products, United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4. (1938). See notes 71-85 and accompanying text.

58. 5 U.S. (1 Cranch) 137 (1803).

59. Wechsler, 73 Harv. L. Rev. at 3-10 (cited in note 18).

transcending the immediate result that is achieved.”<sup>60</sup> “[M]ust they not,” Wechsler asked, “decide on grounds of adequate neutrality and generality, tested not only by the instant of application but by others that the principles imply?”<sup>61</sup> “[I]s not the relative compulsion of the language of the Constitution, of history and precedent—where they do not combine to make an answer clear—itself a matter to be judged, so far as possible, by neutral principles—by standards that transcend the case at hand?”<sup>62</sup> Wechsler’s concern was to distinguish a court of law from “a naked power organ.”<sup>63</sup>

This emphasis on “neutral principles” that “transcend the case at hand” seems nothing more and nothing less than what Professor Sherry asks of the Supreme Court. Professor Wechsler, as will be clear from his position on *Brown*, insisted only that the principle in a case—the rule of a case—not differ depending upon the identity or interest of the plaintiff. According to Professor Wechsler, it was essential that a court employ a rule of decision that treated alike the claims of a “labor union or a taxpayer, a Negro or a segregationist, a corporation or a Communist.”<sup>64</sup> While disclaiming pretensions to “anything so grand as Herbert Wechsler’s ‘neutral principles,’”<sup>65</sup> Professor Sherry actually demonstrates her affinity by adopting the sort of neutrality “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.’”<sup>66</sup> All three seem to be insisting upon the same sort of neutrality.

From the general statement about neutral principles, Professor Wechsler turned to troubling cases, the most vexing of which was *Brown*.<sup>67</sup> Professor Wechsler professed to agree personally with the result in *Brown*,<sup>68</sup> but he simply could not explain it by the standard of neutrality he had imposed. As Wechsler saw it, the decision was

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60. *Id.* at 15.

61. *Id.*

62. *Id.* at 17.

63. *Id.* at 19.

64. *Id.* at 12.

65. Sherry, 50 *Vand. L. Rev.* at 477-78 (cited in note 1).

66. *Id.* at 461. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111, 132 L. Ed. 2d 158, 178 (1995) (opinion of O’Connor, J.) (quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 494 (1989)). Here again, Justice O’Connor is simply making the judgment that laws “benefiting” or “burdening” racial minorities are the same in a relevant way, such that the same rule should apply.

67. “I would surely be engaged in playing Hamlet without Hamlet if I did not try to state the problems that appear to me to be involved.” Wechsler, 73 *Harv. L. Rev.* at 31 (cited in note 18).

68. *Id.*

not about race, but about the right of association.<sup>69</sup> Here, however, neutral principles escaped him:

Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail? I should like to think that there is, but I confess that I have not written the opinion.<sup>70</sup>

### B. A Neutral Principle, But Not "Colorblindness"

Although Herbert Wechsler could not write an opinion resolving *Brown* on neutral principles, many others were willing to do it for him. Significantly, the "neutral" principle most often identified by these other scholars was *not* that advanced by Professor Sherry and adopted by the Supreme Court in its affirmative action decisions. Professor Sherry argues that the legal legacy of *Brown* is the principle of colorblindness or race neutrality,<sup>71</sup> the very principle Justice O'Connor ostensibly adopted for the Supreme Court in the recent affirmative action decision in *Adarand Constructors, Inc. v. Peña*.<sup>72</sup> But those writing immediately after Wechsler typically saw *Brown* as standing not for "colorblindness," but for the proposition that laws were suspect if they discriminated against racial minorities—the "antisubordination" principle.<sup>73</sup> This too is a neutral principle. It finds ample support in footnote four of the *Carolene Products* decision,

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69. *Id.* at 34.

70. *Id.*

71. See Sherry, 50 Vand. L. Rev. at 463-64 (cited in note 1). There are those who doubt that *Brown* really stood for a principle of race neutrality or indeed that such a principle would make any sense. See Duxbury, *Patterns of American Jurisprudence* at 267 (cited in note 18).

The problem with this "principle" is that it no more justifies the decision in *Brown* than it does the "separate-but-equal" formula which had been adopted in *Plessy v. Ferguson*. The principle behind *Brown*, it may be assumed, not only upholds racial equality but also denies the legitimacy of state-imposed racial segregation. The Warren Court failed, in *Brown*, to articulate any such principle.

*Id.*

72. 115 S. Ct. 2097, 132 L. Ed. 2d. 158 (1995). I say "ostensibly" because, as discussed in notes 184-92 and accompanying text, the *Adarand* Court did not discount the possibility of employing race-conscious remedies. 115 S. Ct. at 2117-18. But see Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 How. L. J. 1, 84-85 (1995) (questioning the *Adarand* majority's commitment to race-conscious remedies).

73. This is what Laurence Tribe refers to as the "antisubjugation" principle. Laurence A. Tribe, *Constitutional Law* 1515 (Foundation Press, 2d ed. 1988).

and it would call for a lower level of scrutiny in affirmative action cases than that adopted by the Supreme Court.<sup>74</sup>

Louis Pollak's is perhaps the most famous "opinion" suggesting that the *Brown* Court had adopted the antisubordination rationale.<sup>75</sup> Promising adherence to the idea of neutral principles advanced by Professor Wechsler, then-Professor and later-Judge Pollak accepted that "one who supports the judgment but confesses dissatisfaction with the opinion rendered has some obligation to draft what he regards as an adequate opinion," which he did.<sup>76</sup> Although there are hints of the colorblindness rationale in Pollak's draft "opinion," the opinion rested primarily on the stigma caused by segregation imposed by a dominant white majority.<sup>77</sup> In support of this approach, Pollak cited *Carolene Products's* footnote four, and he pointed to Justice Stone's concern for "searching judicial inquiry into the legislative judgment in situations where prejudice against discrete and insular minorities may tend to curtail the operation of those political processes ordinarily to be relied on to protect minorities."<sup>78</sup>

Although some commentators after *Brown* occasionally referred to something akin to the colorblindness rationale,<sup>79</sup> many followed Pollak in resting *Brown* on the antisubordination principle. "What, on the score of generality and neutrality," asked an exasperated Alexander Bickel, "is wrong with the principle that a legislative choice in favor of a freedom not to associate is forbidden, when the consequence of such a choice is to place one of the groups of which our society is constituted in a position of permanent,

74. *Carolene Products*, 304 U.S. at 152 n.4. This is the basis for John Hart Ely's famous defense of the Warren Court decisions. John Hart Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723 (1974); John Hart Ely, *Democracy and Distrust* (Harvard U., 1980). As Ira Heyman has pointed out, "Professor Wechsler's whole argument depends on his refusal to consider that the Court might have based its decision on a determination that Negroes are intentionally made to feel inferior through the mechanism of segregation." Duxbury, *Patterns of American Jurisprudence* at 271-72 (cited in note 18) (quoting Ira Michael Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 Cal. L. Rev. 104, 112 (1961)).

75. Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1 (1959).

76. *Id.* at 24.

77. Judge Pollak saw "little room for doubt that it is the function of Jim Crow laws to make identification as a Negro a matter of stigma." *Id.* at 28.

78. *Id.* at 27 (quoting *Minersville School District v. Gobitis*, 310 U.S. 586, 606 (1940) (Stone, J., dissenting)).

79. Albert M. Sacks, *The Supreme Court, 1953 Term—Foreword*, 68 Harv. L. Rev. 96 (1954); Griswold, 43 Mass. L. Q. at 100 (cited in note 41) ("After all, what does 'equal protection of the law' mean if not equal protection?"); Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 63 (Yale U., 1986) ("That there should be no distinctions of race ordained by the state—that is a principle.").

humiliating inferiority.”<sup>80</sup> Charles Black found the matter “awkwardly simple.” The Equal Protection Clause means that “the Negro race, as such, is not to be significantly disadvantaged by the laws of the states. . . . [S]egregation is a massive intentional disadvantaging of the Negro race, as such, by state law.”<sup>81</sup> M.P. Golding felt neutral principles only required (and *Brown* so held) that a “justification” was necessary if race were used as a basis for drawing legal lines, and that after *Brown* no justification would suffice for segregated schools in light of the harm caused: “it generates a feeling of inferiority in the minority group, i.e., the group not politically dominant.”<sup>82</sup> These scholars plainly saw the result in *Brown* as following from a principle that forbade racial discrimination imposed on a minority by a dominant class.

Indeed, to the extent that Wechsler himself saw *Brown* as a case about race, he too saw it in terms of the antisubordination principle. The *Brown* Court did not claim to strike all racial lines in legislation, Wechsler said, although he conceded subsequent per curiam might have gone that far.<sup>83</sup> Rather, the decision was limited to

80. Bickel, *The Least Dangerous Branch* at 57 (cited in note 79). Bickel continued: “[W]hen the consequence beyond that is to foster in the whites, by authority of the state, self-damaging and potentially violent feelings of racial superiority—feelings that, as Lincoln knew, find easy transference from Negroes to other groups as their particular objects?” *Id.*

81. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L. J.* 421, 421 (1960).

82. M. P. Golding, *Principled Decision-Making and the Supreme Court*, 63 *Colum. L. Rev.* 35, 55 (1963).

83. The Warren Court’s practice of deciding controversial cases with per curiam decisions drew frequent complaints from the academy, both in and out of the *Brown* context. See, for example, Sacks, 68 *Harv. L. Rev.* at 99 (cited in note 79) (“There remains . . . the problem [of the summary opinion’s] appropriate use, and, more specifically, whether the Court is extending the use of the summary opinion to cases where fuller exposition of views is warranted.”); Note, *Supreme Court Per Curiam Practice: A Critique*, 69 *Harv. L. Rev.* 707 (1956) (criticizing the Court’s per curiam practice); Jerome A. Cohen, *Reviews*, 67 *Yale L. J.* 169 (1957) (reviewing Bernard Schwartz, *The Supreme Court* (Ronald Press, 1957)); Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 *Harv. L. Rev.* 84 (1959) (discussing the increase in per curiam opinions during the 1950s). Per curiam were a point of particular frustration after *Brown*. Although the *Brown* Court had relied on the special nature of education in prohibiting segregated schools, the Court subsequently issued per curiam decisions citing only *Brown* that reversed state segregation in many other areas such as public transportation, public beaches, and municipal golf courses. See *Muir v. Louisville Park Theatrical Ass’n*, 347 U.S. 971 (1954) (municipal amphitheaters); *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (1955) (public beaches); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (municipal golf courses); *Gayle v. Browder*, 352 U.S. 903 (1956) (public transportation); *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (public golf courses and parks); *State Athletic Comm’n v. Dorsey*, 359 U.S. 533 (1959) (athletic contests); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (restaurant in municipal airport); *Johnson v. Virginia*, 373 U.S. 61 (1963) (public facilities); *Schiro v. Bynum*, 375 U.S. 395 (1964) (municipal

education, and to the impact of segregation in education on the minority children. "[I]t seems to me," Wechsler said, that "[*Brown*] must have rested on the view that racial segregation is, in principle, a denial of equality to the minority against whom it is directed; that is, the group is not dominant politically and, therefore, does not make the choice involved."<sup>84</sup> Wechsler could not accept this principle as neutral, however, because he felt it made the Supreme Court's decision in *Brown* turn impermissibly on legislative motive, or on the feelings of the group subject to the discrimination.<sup>85</sup>

### C. *Substantive (Rather than Formal) Neutrality*

Much more was at stake in the neutral principles debate than the legitimacy of the *Brown* decision itself. For Wechsler and his contemporaries, as for Professor Sherry, the problem of neutral principles far transcended the immediate result in any given case. It went to the very heart of the legal system's legitimacy. Context is important here as well. The jurisprudential counterpart to the old-guard progressive attack on the *Lochner* Court was the Legal Realist movement. The Realists argued that legal doctrine was relatively indeterminate, and that legal decisions were often as much the result of the predilections of the judges who reached them, and of broader social norms, as they were of any binding legal rules.<sup>86</sup> For most

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auditorium). Professors Bickel and Wellington explained why the Supreme Court might engage in the practice:

This is very possibly a feature, even if not always a deliberate one, of the Court's response to today's controversy. The controversy has undoubtedly and understandably increased the pressure for unity within the Court and placed a great premium on opinions that speak for as many of the Justices as possible. Hence we get opinions which have the vacuity characteristic of desperately negotiated documents. Moreover, the less an opinion says, the less there may be in it for critics of the Court to seize upon for their own purposes; and one wonders whether it is not for this reason also that opinions have, of late, often said very little and have carried an air of assertion, as opposed to one of deliberation and rational choice.

Alexander M. Bickel and Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 Harv. L. Rev. 1, 3 (1957) (citations omitted).

84. Wechsler, 73 Harv. L. Rev. at 33 (cited in note 18).

85. Gary Peller elaborates on this point, arguing that a legal process scholar such as Professor Wechsler could not have accepted that law depended upon the subjective view of the oppressed racial minority without unraveling the distinction between objective law and subjective politics upon which the entire legal process response to realism depended. See Gary Peller, *Neutral Principles in the 1950's*, 21 U. Mich. J. L. Ref. 561, 617 (1988).

86. See Horwitz, *The Transformation of American Law* at 198-208 (cited in note 18) (discussing Realist attacks on legal formalism); Duxbury, *Patterns of American Jurisprudence* at 131 (cited in note 18). Of course, as these and others are quick to point out, Legal Realism was about much more than this. See, for example, *id.* at 66; Eugene V. Restow, *American Legal Realism and the Sense of Profession*, 34 Recky Mt. L. Rev. 123, 131 (1962).

Realists this insight simply implied the need to understand the broader social forces at work.<sup>87</sup> But for Wechsler's generation, the Realist argument about the indeterminacy of doctrine threatened the citadel of law altogether.

In response to the Legal Realists, there emerged a school of thought called "Legal Process."<sup>88</sup> Professor Wechsler stood at the center of that school along with his sometime colleagues and collaborators Professors Albert Sacks and Henry Hart. Legal Process scholars generally recognized the difficulty of taming substantive law, but they did not infer from that difficulty that determinacy was impossible in the legal system. Rather, the answer was a shift in focus from the substance of law to the process by which it was made: "[a]t the level of 'process,' . . . neutral, apolitical, reasoned—that is, legal—discourse was still possible. . . ."<sup>89</sup>

Within this framework, it was essential for the Legal Process scholars to distinguish the work of law courts from that of the political branches, and their basis for doing so was "reasoned

87. Rostow, 34 Rocky Mt. L. Rev. at 131 (cited in note 86) ("What they were trying to achieve was an awareness of the relationship between rules and policy. . . .").

88. Neil Duxbury concludes that process jurisprudence actually developed in the 1950s "as a critical analysis of specific Warren Court initiatives." Duxbury, *Patterns of American Jurisprudence* at 237 (cited in note 18). It is certainly true that the Legal Process scholars never accounted adequately even for *Brown*. Thus Akhil Amar observes in his penetrating review of the third edition of Hart and Wechsler's legendary federal jurisdiction book: "*Brown* called into question every central tenet of the legal process theory embodied in the first edition of *The Federal Courts and the Federal System*." Akhil Reed Amar, *Law Story*, 102 Harv. L. Rev. 688, 703 (1989) (reviewing Paul M. Bator, et al., *Hart and Wechsler's The Federal Courts and the Federal System* (Foundation Press, 3d ed. 1988)). Similarly, Anthony Sebok notes what likely was a backhanded challenge to *Brown* in the equally famous Hart and Sacks Legal Process materials:

It is hard not to imagine that Hart and Sacks are addressing the specter of *Brown v. Board of Education* when they state that "[t]he present question is whether the enthusiasts for adjudication as a method of settling every kind of social problem may not be open to the charge of trying to make a similarly parasitic use of the prestige of the method."

Anthony J. Sebok, *Reading The Legal Process*, 94 Mich. L. Rev. 1571, 1587 n. 67 (1996) (citing Howard Raiffa, *In Memoriam: Albert M. Sacks*, 105 Harv. L. Rev. 1, 12 (1991)). See also Duxbury, *Patterns of American Jurisprudence* at 266 (cited in note 18) (suggesting that Legal Process scholars could not account for *Brown* because they never explicitly mentioned the case); Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* 36, 46-47 (New York U., 1995) (discussing the difficulty Legal Process scholars had with *Brown*).

89. Peller, 21 U. Mich. J. L. Rev. at 567 (cited in note 85). See also Sebok, 94 Mich. L. Rev. at 1575-79 (cited in note 88) (reviewing the development of Legal Process through the publishing of Hart and Sack's manuscript, *The Legal Process*). On the development of the Legal Process School, see generally, Kalman, *The Strange Career of Legal Liberalism* at 47-48 (cited in note 50); Minda, *Postmodern Legal Movements* at 33-37 (cited in note 88); Horwitz, *The Transformation of American Law* at 247-68 (cited in note 18).



elaboration.”<sup>90</sup> Political theory of the time emphasized pluralism, the struggle among groups for rewards from the political process.<sup>91</sup> In this struggle the ad hoc was inevitable; power politics would have its way. But the difference between courts of law and the political branches was that law rested on the process of reason.<sup>92</sup> As Neil Duxbury explained, in the Legal Process school “[r]easoned elaboration . . . is integral to adjudication. It is in this way that adjudication may be distinguished not only from legislation, but also from other institutional activities within the legal process.”<sup>93</sup>

This distinguishing of law decisions from naked power politics was critical to the Legal Process scholars, for only then could they sustain the legitimacy of judicial review. The heart of Wechsler’s argument was a requirement that the courts not “function as a naked power organ.”<sup>94</sup> This same concern was at the core of Henry Hart’s own attack on the Warren Court, an attack anxious to avoid anything really controversial, like *Brown* itself.<sup>95</sup> “[T]he time must come,” Hart insisted, “when it is understood again, inside the profession as well as outside, that reason is the life of the law and not just votes for your

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90. Duxbury, *Patterns of American Jurisprudence* at 260 (cited in note 18) (“Reasoned elaboration, then, is integral to sound adjudication. It is in this way that adjudication may be distinguished not only from legislation, but also from other institutional activities within the legal process.”). For a history of the development of the idea of reasoned elaboration prior to the Warren Era, see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279 (1973).

91. See generally Duxbury, *Patterns of American Jurisprudence* at 244-45 (cited in note 18). The vision of pluralist politics open to all on an equal basis obviously came under attack during the Warren Era. See William N. Eskridge, Jr. and Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 Mich. L. Rev. 707, 738-39 (1991) (stating that the intellectual consensus that the United States government was an open, pluralist democracy ended in the late 1950s). It is somewhat ironic that given the Legal Process school’s foundation in a rapidly-outdated view of politics, and its failure to account for cases as fundamental as *Brown*, see note 88, it is nonetheless seen as the precursor of many present day schools of legal scholarship. See generally, Edward L. Rubin, Commentary, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 Harv. L. Rev. 1393 (1996) (stating that the last unified approach in legal scholarship was the Legal Process theory).

92. Although Legal Process was not just about courts, judicial review was a central project. In his review of Hart and Sacks’s Legal Process materials, recently edited and published by William Eskridge and Philip Frickey, Tony Sebok argues that “[a]lthough Hart and Sacks are explicitly not court-centered, their book is implicitly but aggressively ‘adjudication-centered.’” Sebok, 94 Mich. L. Rev. at 1579 (cited in note 88).

93. Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 Cardozo L. Rev. 601, 663 (1993) (citing Henry M. Hart, Jr., and Albert M. Sacks, *The Legal Process: The Basic Problems in the Making and Application of Law* 665 (Cambridge, tentative ed. 1958)).

94. Wechsler, 73 Harv. L. Rev. at 19 (cited in note 18).

95. Professor Hart argued that there simply was not time in the day for the Justices to carry their present case load and write coherent decisions. Hart, 73 Harv. L. Rev. at 84 (cited in note 83).

side.”<sup>96</sup> And the same distinction was the stated basis for Phillip Kurland’s challenge to judicial activism, which he argued “should be rejected because the exercise of such naked power ignites a reply in kind from those on whose domain the Court is poaching.”<sup>97</sup>

While the Legal Process scholars focused on neutral rules and rationales to ensure the legitimacy of decisions, the defenders of the Warren Court were far more concerned with the substantive correctness of decisions. Professor Sherry juxtaposes “formal” neutrality of rules (such as colorblindness) with the “substantive” neutrality of outcomes (such as racial equality). She argues that the latter is a “deviation” from the generally prevalent and universally accepted idea of formal neutrality. The Warren Court’s defenders, however, saw things in just the opposite terms. For these scholars, the question was not whether the decisions always rested on principles that could be applied to every imaginable case, but whether the consequences of the decisions were good. “Everyone is against sin and for good argument,” explained Martin Shapiro, a political scientist with an interest in law. “However, this approach soon blossoms into a broad attack on result-oriented jurisprudence, not only in the sense of what happens to the particular litigants, but [also] in terms of general social, political, and economic results.”<sup>98</sup>

Wechsler’s approach, to those critical of it, bore too much similarity to the now bad old days of arid legal formalism. In an impassioned speech, Eugene Rostow, the dean of the Yale Law School, fairly spanked Wechsler and his cohort for their attack on the Court.

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96. *Id.* at 125.

97. Kurland, 6 Utah L. Rev. at 466 (cited in note 43).

98. Martin Shapiro, *The Supreme Court and Constitutional Adjudication: Of Politics and Neutral Principles*, 31 Geo. Wash. L. Rev. 587, 591, 592 (1963). Even those who purported to go along with Wechsler’s insistence on neutral principles ultimately ended up questioning it. Wechsler sought “a method of adjudication which is disinterested, reasoned, and comprehensive of the full range of like constitutional issues,” Pollak explained, and “[s]o stated, the proffered creed is hard to resist, and few are likely to be counted in opposition.” Pollack, 108 U. Pa. L. Rev. at 32 (cited in note 75).

But Judge Pollak ended up quoting Myres McDougal:

The essence of a reasoned decision . . . is a disciplined appraisal of alternative choices of immediate consequences in terms of preferred long-term effects, and not in either the timid forswearing of concern for immediate consequences or in the quixotic search for criteria of decision that transcend the work of men and values of metaphysical fantasy. The reference of legal principles must be either to their internal—logical—arrangement or to the external consequences of their application. It remains mysterious what criteria for decision a “neutral” system could offer.

*Id.* at 34 (quoting Myres S. McDougal, *Perspectives for an International Law of Human Dignity*, 1959 Am. Soc. Int’l L. Proceedings 107, 121 (1959)).

"Professor Wechsler's lecture . . . represents a repudiation of all we have learned about law since Holmes published his *Common Law* in 1881, and Roscoe Pound followed during the first decade of this century with his pathbreaking pleas for a result-oriented, sociological jurisprudence, rather than a mechanical one."<sup>99</sup> And Martin Shapiro remarked, "This search for legal standards which the Justices are to discover by the process of collective legal reasoning is little more than the lawyer's nostalgia for the legal Court and the legal modes of discourse which prevailed before the advent of the political Court and political modes of discourse."<sup>100</sup>

The critics' problem with neutral principles was that the search for them masked the underlying values at stake in constitutional adjudication. A preference for neutral principles could not resolve these underlying value questions. For example, M.P. Golding, who went along with Wechsler in theory, still concluded, "I fail to grasp Professor Wechsler's position if it consists in the statement that one ought to, or even can, supply 'neutral principles' for 'choosing' between competing values."<sup>101</sup> "[R]easons," Arthur S. Miller stressed, "can be considered to be 'good' or 'bad,' 'valid' or 'invalid,' 'true' or 'false,' it seems to me, not in terms of themselves, but in terms of the realization or nonrealization of a given set of values."<sup>102</sup> In another piece he and his co-author Ronald Howell, a political scientist, stressed that "[t]o call for [an opinion] to be 'reasoned' means little, for 'reason' is a tool, not an end: the results of a process of 'reasoning' depend entirely upon what premises (i.e., values) are used in that process, just as the end product of Univac depends upon what is fed into it."<sup>103</sup>

To all of these scholars who questioned neutral principles, it was the consequences of legal decisions that mattered, not the formal neutrality of the decisional rules employed. This group was prominent; it included in its number Professors Bickel and Shapiro, Deutsch and Miller, Golding and Rostow. Ridiculing the neutralists, Martin Shapiro stated:

In other words, [a judge's] chief concern should not be whether a given decision will for the next twenty years facilitate or hinder the rise of the Negro to a po-

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99. Rostow, 34 *Rocky Mt. L. Rev.* at 138 (cited in note 86).

100. Shapiro, 31 *Geo. Wash. L. Rev.* at 594 (cited in note 98).

101. Golding, 63 *Colum. L. Rev.* at 48 (cited in note 82).

102. Arthur Selwyn Miller, *Notes on the Concept of the "Living" Constitution*, 31 *Geo. Wash. L. Rev.* 881, 904 (1963).

103. Arthur S. Miller and Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 *U. Chi. L. Rev.* 661, 682 (1960).

sition of equality; rather, it should be whether the standard of equality which he enunciates today will in the next twenty years maintain him in the path of logic and consistency or lead him to the temptation of irrationality.<sup>104</sup>

Eugene Rostow, quoting Dean Pound, was equally blunt:

Law is not scientific for the sake of science. Being scientific as a means toward an end, it must be judged by the results it achieves, not by the niceties of its internal structure; it must be valued by the extent to which it meets its end, not by the beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundations.<sup>105</sup>

As Professor Rostow explained, the Court's task had been "most important of all . . . to make good the promises we made to our Negro citizens almost a hundred years ago . . . ."<sup>106</sup>

Lest there be any question as to whether substantive outcomes and formal rules were often in opposition, it was this very focus on results rather than on the neutral bases for reaching them that so troubled the "neutralist" critics. Warily, Phillip Kurland conceded that "[m]easuring the desirability of the results decreed, most students of the Court—even the 'nonactivists'—are inclined to approbation."<sup>107</sup> But he was critical of what he saw to be the unprincipled support for those results:

[T]he "liberal" element in the community . . . [is] in sympathy with the results that the Court has reached. They do not care who makes the laws, or how, so long as the laws are to their liking. The time to attack the Court, for them, is when the Court is formulating the wrong rules.<sup>108</sup>

Robert McCloskey challenged the entire turn from protection of economic to personal rights as unprincipled: "So we are left with a judicial policy which rejects supervision over economic matters and asserts supervision over 'personal rights'; and with a rationale, so far as the written opinions go, that might support withdrawal from both fields but does not adequately justify the discrimination between

104. Shapiro, 31 Geo. Wash. L. Rev. at 592 (cited in note 98).

105. Restow, 34 Rocky Mt. L. Rev. at 124 (cited in note 86) (quoting Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 605 (1908)).

106. *Id.* at 143.

107. Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 Harv. L. Rev. 143, 143 (1964).

108. *Id.* at 176.

them."<sup>109</sup> He thus found it to be "a common and just complaint that the modern Court has so far failed to develop reasoned formulations for many of its judgments in the personal-rights area."<sup>110</sup>

The "one-person, one-vote" standard of the reapportionment decisions<sup>111</sup>—singled out for applause because of its neutrality by Professor Sherry<sup>112</sup>—also came in for strident criticism from the "neutral" scholars, despite wide popularity in the public at large. Of *Baker v. Carr*,<sup>113</sup> Phillip Neal said, "[u]ntil the Supreme Court can provide a more satisfying explanation of the authority and principles by which courts decree reapportionment than it or the lower courts have yet given, the case will better serve as an example of the role of fiat in the exercise of judicial power."<sup>114</sup> The "one-person, one-vote" principle came in for an especially strong hit from Professor McCloskey:

Should the Court undertake a *Lochneresque* responsibility for defining the substantive constitutional norm (e.g., "one man, one vote") and for determining whether each departure from the norm is "rational" or "capricious"? . . .

It is hard to see how the process of balancing these complexities and subtleties could be reduced to anything even resembling "an exercise of reason," how could it reflect anything more than a subjective ipse dixit.<sup>115</sup>

Moreover, to the extent that a concern for neutrality interfered with pursuit of the progress of the Warren Court's substantive agenda, it was the very idea of neutrality that the Warren Court defenders called into question. Professor Sherry, again, suggests that when postmodern scholars attack the idea of neutrality, they deviate from a norm that ostensibly stretches from the Enlightenment to the present. But postmodern scholars may be doing nothing more than taking a page from the Warren-era book.<sup>116</sup> Perhaps the most exuberant critic of neutrality was Arthur S. Miller, who frankly scoffed at the idea of neutrality, and proposed a "[t]eleological jurisprudence, one purposive in nature rather than 'impersonal' or

109. Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 Sup. Ct. Rev. 34, 45.

110. *Id.* at 61.

111. See note 38 and accompanying text.

112. Sherry, 50 Vand. L. Rev. at 467 (cited in note 1).

113. 369 U.S. 186 (1962).

114. Phillip C. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 S. Ct. Rev. 252, 327.

115. Robert G. McCloskey, *The Supreme Court, 1961 Term—Foreword: The Reapportionment Case*, 76 Harv. L. Rev. 54, 73 (1962).

116. In addition to the Warren-Era articles, see also White, 59 Va. L. Rev. at 299 (cited in note 90) (arguing that in the charged political climate of judicial egalitarianism the "Reasoned Elaboration ideal of judicial performance is at least partially obsolete").

'neutral.'"<sup>117</sup> For Miller and Howell, neutrality was a myth, one long ago exploded in almost every discipline other than law. For that proposition they cited no lesser authorities than Plato, P.W. Bridgman, Michael Polanyi, Karl Mannheim, Gunnar Myrdal, Leo Strauss, Isaiah Berlin, and Reinhold Neibuhr.<sup>118</sup> Theirs was standpoint epistemology, the social constructionism of the day: "when [choices among values] are made, they are motivated not by neutral principles or objective criteria but by the entire biography and heredity of the individual making them."<sup>119</sup> Professors Miller and Howell argued that judges should un-self-consciously eschew neutrality, "taking sides . . . so as to further the ideals of American democracy."<sup>120</sup> Judge Charles Clark, former Dean of the Yale Law School, and his then-law clerk (and now Professor) David Trubek, echoed similar themes. They felt that the idea of judicial objectivity was dangerous both for creating the idea of infallibility in judges and for crippling them from the exercise of creativity.<sup>121</sup> "These new concepts of judicial objectivity, untempered by recognition of the limits of human knowledge, all contribute to an illusion which hides the real machinery of the judicial process from its observers and its participants."<sup>122</sup>

Alexander Bickel, a transitional figure between the Legal Process generation and the newer Warren Court scholars pursued a somewhat intermediate course, stressing prudence along with principle. Bickel was content to accept the role of neutral principles,<sup>123</sup> so long as insistence on them not be carried too far, a point made crisply by the question of benevolent quotas. The problem of benevolent quotas arose with regard to desegregating housing. Many blacks moving into a neighborhood might cause the neighborhood to "tip," with all the white residents fleeing. The question then was whether in service of the broader goal of integration the government could impose a quota limiting the number of black residents.<sup>124</sup> "That

117. Miller and Howell, 27 U. Chi. L. Rev. at 684 (cited in note 103).

118. Id. at 665.

119. Id. at 671.

120. Id. at 692.

121. Charles E. Clark and David M. Trubek, *The Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition*, 71 Yale L. J. 255, 270 (1961).

122. Id. at 269.

123. Bickel defined neutral principles as "an intellectually coherent statement of the reason for a result which in like cases will produce a like result, whether or not it was immediately agreeable or expedient." Bickel, *The Least Dangerous Branch* at 59 (cited in note 79).

124. See generally Victor S. Navasky, *The Benevolent Housing Quota*, 6 How. L. J. 30 (1960).

there should be no distinctions of race ordained by the state—that is a principle,” said Bickel.<sup>125</sup> But, he explained:

[I]f judicial review is to remain a process of principled decision, it would seem that it must here either impose upon the country a rigidly doctrinaire rule of behavior which will appear almost ludicrous to anyone who has any sense of the actualities of the situation[,] . . . or it must uphold the segregation of the races by law.<sup>126</sup>

Bickel could not go down this road with Wechsler.<sup>127</sup>

For Bickel, the right solution was pragmatic rather than principled.<sup>128</sup> “No society, certainly not a large and heterogeneous one, can fail in time to explode if it is deprived of the arts of compromise, if it knows no ways of muddling through. No good society can be unprincipled; and no viable society can be principle-ridden.”<sup>129</sup> Bickel conceded that “our nation would be severely damaged” “if in the second half of the twentieth century it believed that segregation of the races was neither right nor wrong.”<sup>130</sup> But by the same token,

is it not equally clear—as the example of the benevolent quota may show—that the problem of the association of the black and white races will not always yield to principled resolution, that it must proceed through phases of compromise and expedient muddling-through, or else fail of an effective and peaceable outcome?<sup>131</sup>

125. Bickel, *The Least Dangerous Branch* at 63 (cited in note 79).

126. *Id.* at 63-64.

127. *Id.* at 64. He explained, “I believe Mr. Wechsler suggests something like such a conclusion, and the fact that he does so gives one much pause. Mr. Wechsler is not right.” *Id.*

128. Alexander Bickel later tilted back toward principle, just as he tilted away from broader support of the Warren Court program. See Bickel, *The Supreme Court and the Idea of Progress* at ch. 3 (cited in note 30) (The Web of Subjectivity). In *The Supreme Court and the Idea of Progress*, Bickel held in greater esteem the need for reasoned and principled decisionmaking, see, for example, *id.* at 81, 98, just as he apparently did Herbert Wechsler’s insistence on neutral principles. *Id.* at 81 n.\*. “I have come to doubt,” Bickel said, “the Court’s capacity to develop ‘durable principles,’ and to doubt, therefore, that judicial supremacy can work and is tolerable in broad areas of social policy.” *Id.* at 99. Nonetheless, Bickel continued to understand the tension between principle and reason on the one hand, and reaching decisions consistent with popular acceptance on the other hand. See, for example, *id.* at 97. See also note 150 and accompanying text (discussing Bickel’s agreement with Jan Deutsch). Either popular frustration with the Warren Court or Bickel’s own disagreement with it apparently caused him to come to favor reason over results. It is difficult to know which. On the one hand, Bickel was harshly critical of the reapportionment decisions, although they were tremendously popular. Compare *id.* at 35, with *id.* at 91. On the other hand, he was generally supportive of the Court’s innovations in the area of criminal procedure, *id.* at 32, although he realized that the body politic had nearly repudiated those reforms. *Id.* at 93.

129. Bickel, *The Least Dangerous Branch* at 64 (cited in note 79).

130. *Id.*

131. *Id.* at 64-65.

Calm minds of the time recognized the wisdom in Bickel's observation that there was not always a principled answer immediately at hand, although his solution was not universally accepted. Bickel's answer was for a court to use the "passive virtues," to duck for a time questions too intractable to address, a position that led Gerald Gunther to argue that Bickel was "100% insistent on principle, 20% of the time."<sup>132</sup> But Bickel's broader understanding was precisely that of Eugene Rostow, who argued:

[T]he felt necessities of society have their impact, and the law emerges, gnarled, asymmetrical, but very much alive—the product of a forest, not a nursery garden, nor of the gardener's art. . . . I stress that the work of the Court is a work in progress, and that the positions it takes today will not necessarily be those it takes tomorrow.<sup>133</sup>

Similarly, Anthony Lewis, the New York Times's able and widely respected Supreme Court correspondent, took to task the "academic critics" of the Court:

One may wholly agree with the academic critics that the judicial process must be one of reason and principle and yet recognize that a court may reach a proper result without at once being able to agree on a fully satisfying rationalization. There are many areas of the law, especially of constitutional law, in which it has taken years and decades for the Supreme Court to work out all the implications of a doctrine. The new and emerging problems of today are as difficult as any in the past, and fraught with the gravest social implications. Is it not understandable if adequate articulation has to await a similarly slow, painful, halting process? The *Brown* decision is an example. . . . The fact that the opinion in the *Brown* decision was difficult to write, or that the desired unanimity on the Court was hard to obtain behind a particular form of words, or that all the implications were not foreseen—none shows that the decision should have gone the other way. . . .<sup>134</sup>

#### D. Public Opinion and Neutrality

The debate thus far is framed in stark terms between the "neutrals" who attacked the Warren Court's departure from formal neutrality, and the defenders who were more concerned with substan-

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132. Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1, 3 (1964).

133. Rostow, 34 Rocky Mt. L. Rev. at 142, 143 (cited in note 86).

134. Anthony Lewis, *The Supreme Court and Its Critics*, 45 Minn. L. Rev. 305, 330-31 (1961).



tive outcomes. The discussion has called into question several of Professor Sherry's historical assumptions. But the Warren-Era debate did not end at this point. Scholars with a bent toward political science tried to mediate the dispute between those who advocated a frankly "political" role for the Court and those who worried that the departure from "neutrality" would imperil it. That further debate provides great insight into the importance of neutrality, making the point that for the public at large, the outcomes of cases are as important as the neutral reasoning supporting them.

The task of mediating the "neutral"/"political" dispute was taken up by Martin Shapiro. Shapiro marveled at the distance between the political scientist, who "is not aware that he has proposed anything particularly startling or subversive" in suggesting the Court is just another governmental body, and the lawyer, whose "interest [is] in maintaining the health and prestige of the Supreme Court."<sup>135</sup> "To those particularly concerned with the health of courts, it would seem a black day indeed when this political vision of the Supreme Court became the popularly accepted one. It is this feeling which has given rise to the recent search for neutral principles and constitutional standards."<sup>136</sup>

Shapiro reconciled the views by focusing on the Court's position in the broader body politic and on the means of maintaining respect for it. As for whether the political or the neutral view should prevail on the merits, Shapiro's biting comments suggested his strong affinity with the political camp. But matters did not end there. "[P]olitics is the art of the possible."<sup>137</sup> "The decisive issues are those related to the tag 'judicial modesty.' How strong is the Court? What are the sources of its power? To what extent can it challenge other agencies of government?"<sup>138</sup> So far as Shapiro was concerned, if the Supreme Court was to advance its agenda rather than merely announcing it, the support of lower courts and opinion leaders was essential.<sup>139</sup> "Actions may speak louder than words, but words do speak and in one sense the Supreme Court's only action is words."<sup>140</sup> Here Shapiro fell down squarely on the side of principle and reason. "If the Court is to be successful as a political actor, it must have the

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135. Shapiro, 31 *Geo. Wash. L. Rev.* at 590 (cited in note 98). See generally Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (Free Press of Glencoe, 1964).

136. Shapiro, 31 *Geo. Wash. L. Rev.* at 590 (cited in note 98).

137. *Id.* at 601.

138. *Id.* at 598.

139. *Id.* at 599-600.

140. *Id.* at 603.

authority and public acceptance which the principled, reasoned opinion brings."<sup>141</sup>

Ultimately, for Shapiro, the question was one of "political strategy":<sup>142</sup>

To put it bluntly, the real problem is how the Supreme Court can pursue its policy goals without violating those popular and professional expectations of "neutrality" which are an important factor in our legal tradition and a principal source of the Supreme Court's prestige. It is in these terms, not in terms of the philosophic, jurisprudential, or historical correctness of the concept of neutral principles, that the debate should now proceed.<sup>143</sup>

In looking beyond the moral propriety of judicial decisions and focusing on the Supreme Court's legitimacy in the body politic, Shapiro underscored a role for neutrality that is not so far from Professor Sherry's own. While Professor Sherry maintains her preference for neutrality within a broader Enlightenment framework, she also defends it in far more pragmatic terms in terms of acceptance by the general public of Supreme Court decisions. In a critical passage that intermixes these two arguments, Professor Sherry explains:

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 one.<sup>144</sup>

Thus, Professor Sherry joins Shapiro in understanding that judicial legitimacy rests on offering rationales for decisions that appear to meet popular standards of neutrality.<sup>145</sup>

Martin Shapiro's analysis was taken a step further by Jan Deutsch of the Yale Law School, who, at least insofar as the tenure of Earl Warren was concerned, had the last significant word. Deutsch began with confusion about how Shapiro, who plainly understood the political nature of the Court, nonetheless came to express sympathy

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141. *Id.*

142. *Id.* at 605.

143. *Id.* at 605-06.

144. Sherry, 50 *Vand. L. Rev.* at 481 (cited in note 1).

145. Shapiro, 31 *Geo. Wash. L. Rev.* at 605 (cited in note 98).

with the neutrals, who Deutsch (following Shapiro's own label of "judicial modesty") called "the modest."<sup>146</sup> "The crucial fact remains that Shapiro characterizes as dangerously improper both the reapportionment and segregation decisions. If this be the music of political jurisprudence, the 'modest' ought to urge Shapiro to play on."<sup>147</sup>

The primary factor that separated Deutsch from those who came before was his critical observation that the general public cares not only about the reasoning of opinions, but about results.<sup>148</sup> For this reason, the "novelty" of decisions Kurland attacked was misplaced:

The "novel" element in recent segregation and criminal decisions can thus largely be accounted for in terms of the relatively recent public (and judicial) awareness of the extent to which the world of the poor and of the Negro differs from that which the bulk of the public lives, and of the consequences entailed by that disparity for the content of a meaningful constitutional guarantee of "equal protection."<sup>149</sup>

Similarly, Bickel went astray in thinking that the passive virtues were necessarily a solution, for in the public eye, a decision to abstain is indistinguishable from failure to render a decision.<sup>150</sup>

According to Deutsch, the Supreme Court's challenge was to reconcile "craft pressures and the needs of its symbolic role—the complex and often conflicting demands for adherence to logic, to neutrality, and to experience that our society makes upon it."<sup>151</sup> In this regard, the reapportionment decisions take on a different light, even conceding Shapiro's argument that "[t]he 'one man, one vote' slogan,

146. Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 *Stan. L. Rev.* 169, 170 (1968) (citing Martin Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* 108-11 (1966)).

147. *Id.* at 174.

148. *Id.* at 239. See also White, 59 *Va. L. Rev.* at 298 (cited in note 90) ("Legitimacy comes, then, when the dialectical process reveals that the Court is generally perceived as having made a 'right' decision, not necessarily one that is popular in an ephemeral, immediate sense, but one that embodies values—equality and liberty conspicuous among them—that have over time emerged as endemic to American civilization, at least as it is currently perceived.")

149. Deutsch, 20 *Stan. L. Rev.* at 226 (cited in note 146).

150. Deutsch explained that "public acceptance of the Court does not rest solely on perceptions of adequately general decisions. That acceptance rests also, to a very considerable degree, on a view of the Court as the guardian of our constitutional rights." *Id.* at 216. Ironically, although Bickel later came down more in the neutrals' court than in that of the Warren Court defenders, he nonetheless adhered to Deutsch's analysis in this regard. See Bickel, *The Supreme Court and the Idea of Progress* at 96 (cited in note 30). Perhaps it was the difficulty of achieving success in the area of desegregation and school prayer that turned Bickel's head, for as he recognized, "[t]he effectiveness of the judgment universalized depends on consent and administration." *Id.* at 91

151. Deutsch, 20 *Stan. L. Rev.* at 243 (cited in note 146).

in equating the whole of democracy with majority-rule elections represents naive political philosophy, bad political theory, and no political science."<sup>152</sup> Deutsch's point was that one-person, one-vote is a standard easily administered by courts. The right question is whether "the consequences of malapportionment were sufficiently serious that greater injury would have been done to the Court's prestige by a refusal to deal with them than by the public controversy that application of that standard aroused."<sup>153</sup>

Deutsch ultimately concluded that the place of the Supreme Court in American government would be assured to the extent that the justices of that Court continued to reflect broader societal values. Where Shapiro went wrong, as did Robert Dahl in his famous study *Who Governs?*,<sup>154</sup> was in focusing on "the process rather than the actor, on the interactions within a given system rather than on the component parts of that system."<sup>155</sup> "[A]ny study of the distribution of political power that does not include a detailed analysis of the origins and content of the community agenda must be adjudged incomplete."<sup>156</sup> And as for the relationship between that agenda and the Court?:

[I]f we are concerned about the day-by-day operation of the Court, about the routine decision rather than the isolated, spectacular exception, the question whether the Court will confine itself to those decisions the society regards as legitimately within its authority can ultimately be answered only by examining the extent to which individual Justices have internalized the community consensus that defines the Court's sphere of competence.<sup>157</sup>

Thus, for Deutsch the essential concern was whether the views of the justices actually mirrored those of the public. The public cares not only about playing fair, but also about "being" fair. The public tends to focus as much on the result of an opinion as on its form. A public comfortable with judicial results will be comfortable with the Court that rendered them. Judicial results are likely to be consistent

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152. *Id.* at 172 (quoting Shapiro, *Law and Politics in the Supreme Court* at 250 (cited in note 135)).

153. *Id.* at 249.

154. Robert Dahl, *Who Governs? Democracy and Power in an American City* (Yale U., 1961).

155. Deutsch, 20 *Stan. L. Rev.* at 257 (cited in note 146).

156. *Id.* at 256.

157. *Id.* at 259.

with public feelings to the extent the justices share the values of the public at large.<sup>158</sup>

Earl Warren left the Court soon after Deutsch wrote, although the furor over the Warren Court's handiwork hardly died down.<sup>159</sup> Scholars sympathetic to the Warren Court agenda were, like John Hart Ely,<sup>160</sup> to be busily employed in justifying that agenda on substantive terms, and a decision in *Roe v. Wade*<sup>161</sup> in 1973 was to throw the debate wide open again.<sup>162</sup> By this point, however, most of the changes had been rung in the debate over "neutral" principles.<sup>163</sup>

### III. NEUTRAL PRINCIPLES AND AFFIRMATIVE ACTION

Although some historians question "presentist" uses of history,<sup>164</sup> the very fact that we treat history as an academic discipline suggests that we believe history holds the possibility of helping us to understand ourselves.<sup>165</sup> History cannot tell us how to live the present, but it may help us comprehend it.<sup>166</sup> Professor Sherry's own endeavor to compare the reactions to the Rehnquist and Warren Courts suggests that she sees some lesson in that comparison of the present with the past.

It is no small irony that in history there is an ongoing debate about objectivity and neutrality similar to the one Professor Sherry

158. See generally *id.* at 239.

159. See Wright, 84 Harv. L. Rev. at 769 (cited in note 46) (noting the many critics of the Warren Court).

160. See Ely, 41 U. Chi. L. Rev. at 769 (cited in note 74).

161. 410 U.S. 113 (1973).

162. See Kalman, *The Strange Career of Legal Liberalism* at 232 (cited in note 50) (discussing criticism that followed *Roe*).

163. For an example of the continuing debate sounding similar themes compare Bickel, *The Supreme Court and the Idea of Progress* at 96 (cited in note 30), with Wright, 84 Harv. L. Rev. at 775-85 (cited in note 46) (criticizing Bickel for coming to favor neutrality and principle over results).

164. On the concern about presentism among historians, see Kalman, *The Strange Career of Legal Liberalism* at 183-84 (cited in note 50).

165. R. G. Collingswood, *The Idea of History* 209, 315 (Oxford U., 1946) ("We study history . . . in order to attain self-knowledge."). See also Eric H. Monkkenon, ed., *Engaging the Past: The Uses of History Across the Social Sciences* (Duke U., 1994) (collecting essays detailing the importance of history to the social sciences).

166. Joyce Appleby, Lynn Hunt, and Margaret Jacob, *Telling the Truth About History* 305 (Norton, 1994) ("People want to make sense of their world, even if explanations are proved to be necessarily partial."). See also *id.* at 3, 52; Arthur C. Dante, *Narration and Knowledge* 341 (Columbia U., 1985) (arguing that the past defines our present); Edward Hallett Carr, *What Is History?* 69 (Knopf, 1972) ("To enable man to understand the society of the past and to increase his mastery over the society of the present is the dual function of history.").

observes in the law.<sup>167</sup> Some historians question the extent to which the past can be “known” outside the perspective of the observer.<sup>168</sup> Yet for all the fervor of that debate, many historians seem to agree that one can do a better or worse job of coming to terms with what happened in the past, and that the entire endeavor of history is not worth the candle without some attempt, within the limits of knowing and describing, at accuracy.<sup>169</sup> This retrospective suggests that Professor Sherry’s own message may rest on a historically inaccurate understanding of the time of the Warren Court. To the extent that this is correct, it may be that a more accurate understanding leads to conclusions different from those drawn by Professor Sherry.

History suggests, first, that *Brown* was not necessarily premised upon the idea of colorblindness or understood that way.<sup>170</sup> This is a lesson that bears heavily upon the present struggle over affirmative action, as well as on Professor Sherry’s assertions about it. Professor Sherry recognizes, as did Herbert Wechsler, that *Brown* itself did not “declare, as many wish it had, that the fourteenth amendment forbids all racial lines in legislation.”<sup>171</sup> Rather, as we have seen, many of the academics commenting on *Brown* saw the case as resting on the antisubordination principle: the evil in *Brown* flowed from the imposition of segregation on a black minority by a dominant white majority.<sup>172</sup>

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167. See generally Keith Windschuttle, *The Killing of History: How a Discipline is Being Murdered by Literary Critics and Social Theorists* (Macleay Press, 1996); Peter Novick, *That Noble Dream: The “Objectivity Question” and the American Historical Profession* (Cambridge U., 1988); Appleby, Hunt, and Jacob, *Telling the Truth About History* (cited in note 166).

168. For a discussion of the debate, see Novick, *That Noble Dream* (cited in note 167). For a strongly-argued rebuttal, see Windschuttle, *The Killing of History* (cited in note 167). For a reconciliation of both sides, arguing that the fullest understanding of historical events is one that comprehends all perspectives, see Appleby, Hunt, and Jacob, *Telling the Truth About History* (cited in note 166).

169. See Kalman, *The Strange Career of Legal Liberalism* at 182-83 (cited in note 50) (describing how objectivity has receded as a problem for historians; many historians do not need the “new language” of post-structuralism because although they understand that they will never obtain objectivity, “they must do the best they can”); David Hackett Fischer, *Historians’ Fallacies: Toward a Logic of Historical Thought* (Harper & Row, 1970) (providing an elaborate logic for the study of history); Windschuttle, *The Killing of History* at 185 (cited in note 167) (“Without a claim to be pursuing truth, writing history would be indistinguishable in principle from writing a novel about the past.”).

170. See Part II.B.

171. Wechsler, 73 Harv. L. Rev. at 32 (cited in note 18). See also Spann, 39 How. L. J. at 125 (cited in note 72) (arguing that *Brown* itself represents conflicting principles of color blindness and affirmative action).

172. This, incidentally, is a neutral principle under both Professor Sherry’s definition and Wechsler’s. Wechsler sought a principle that could decide a case whether the plaintiff was a “Negro or a segregationist,” a principle that transcended the case at hand. Wechsler, 73 Harv.

Antisubordination is a neutral principle with very different implications for the affirmative action question than the colorblindness approach adopted by the current Supreme Court or preferred by Professor Sherry. The current Court clearly has come down against variable standards of scrutiny depending upon whether or not the discrimination is benign.<sup>173</sup> Remarkably, the majority opinion in *Adarand* does not cite to *Brown* at all. At least for this issue, the case Professor Sherry so admires seems to have receded into irrelevance. But a view of *Brown* and the other decisions of the Warren Court turning on the antisubordination principle might have rendered a very different result in affirmative action cases. As Professor Sherry herself wrote not so very long ago in applying this neutral "antisubordination" standard: "Legislative schemes discriminating against a nondisfavored class (affirmative action quotas, for example) would ordinarily not be subject to heightened scrutiny at all."<sup>174</sup>

Another lesson that history teaches is that for many who commented on and admired the Warren Court, it was the substantive results that mattered, not the formal neutrality of the decisions.<sup>175</sup> The dispute along this fault line was sharp; the "neutrals" condemned the very lack of formal neutrality while many others stressed the "consequences" of decisions.<sup>176</sup> Professor Sherry is correct in observing that the battle in the days of the Warren Court was over race-conscious laws that actually impeded equality or neutrality, rather than over race-conscious laws that sought to promote it. For this reason it is impossible to know how the defenders of the Warren Court would necessarily have viewed affirmative action. From their words, however, it is apparent that they did not have in mind the empty idea of doing nothing to achieve race equality other than prohibiting laws that employed explicit race discrimination against minorities. It is not at all clear that the "trendlines" of the Warren Court decisions, as Professor Sherry calls them, would not take us

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L. Rev. at 12 (cited in note 18). This one does. That was precisely Bickel's point in his retort to Wechsler. See Bickel, *The Least Dangerous Branch* at 57-65 (cited in note 79).

173. See *Adarand*, 115 S. Ct. at 2112 (rejecting the idea that benign racial discrimination should receive a lower level of scrutiny).

174. Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 Geo. L. J. 89, 114-15 (1984).

175. See notes 98-106 and accompanying text.

176. Some stressed consequences while developing their own neutral principles, while others did so while scoffing at the very idea of neutrality.

directly to decisions such as *Regents of the University of California v. Bakke*<sup>177</sup> or *Metro Broadcasting, Inc. v. FCC*<sup>178</sup> rather than to *Adarand*.

Yet history also teaches, and Professor Sherry takes the upper hand here, that the idea of neutrality does have popular appeal. Whether or not neutrality is attainable, there is a reason the subject keeps coming back. Many of the things we learned in kindergarten are too simple for the complex world in which we live.<sup>179</sup> But that does not mean they lack popular or intuitive appeal. That is the lesson Martin Shapiro was trying to teach.<sup>180</sup> It is true, for example, that affirmative action has suffered most at the hands of those who think that it unfairly discriminates against individuals, particularly individuals who have no direct connection with societal racism or its effects.

But it is also true that how the public views judicial and other governmental decisions is as much a function of agreement with the outcomes as it is a function of agreement with the reasoning. This was Jan Deutsch's insight.<sup>181</sup> The insight can be taken too far, of course, as urging that whatever the public wants is what the Supreme Court should give it.<sup>182</sup> In its weaker sense, however, it is an insight that deserves attention.

The general public possesses a very real ambivalence about affirmative action, one that results not from a tension between results and neutrality, but rather from a tension between what might be two competing neutral principles. Professor Sherry is undoubtedly right that some versions of affirmative action seem not to be "neutral" or "evenhanded" to the general public. But the public also seems largely inclined to concede not only past but also present racism—not only its

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177. 438 U.S. 265 (1978).

178. 497 U.S. 547 (1990).

179. Sherry, 50 Vand. L. Rev. at 481 (cited in note 1) (explaining that her title derives from Robert Fulghum, *All I Really Need to Know I Learned in Kindergarten: Uncommon Thoughts on Common Things* (Villard Books, 1988)).

180. Shapiro, 31 Geo. Wash. L. Rev. at 587 (cited in note 98).

181. Deutsch, 20 Stan. L. Rev. at 169 (cited in note 146).

182. There are scholars who question, at any rate, how often we can expect the Supreme Court to render decisions contrary to public will. The genesis for this view was Robert Dahl's path-breaking work. Robert Dahl, *A Preface to Democratic Theory* (U. of Chicago, 1956); Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279 (1957). Of more recent vintage, see generally Steven L. Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 Tex. L. Rev. 1881 (1991) (observing that the law can act only against a sedimented background that already bears normative intentions); Kalman, *The Strange Career of Legal Liberalism* (cited in note 50); Barry Friedman, *Dialogue and Judicial Review*, 91 Mich. L. Rev. 577 (1993) (arguing against the countermajoritarian view of the judicial system in favor of a theory based on interpretive dialogue).



lingering effects, but also its present ones.<sup>183</sup> And the public seems to see some justice in the principle that those who have been wronged ought to be made whole.

Seen in these terms, it is possible to ask the "right" questions about affirmative action, questions not about whether affirmative action is "neutral" or not, but whether competing neutral principles can be reconciled, whether racial equality can be advanced without doing harm to other interests we hold dear. For example, there is a very real question as to whether race-conscious remedies stigmatize the very groups they are meant to assist. And there is the question of whether reliance on race-conscious remedies impedes the ultimate goal of race equality.

The Supreme Court's affirmative action decisions mirror deep tensions in the body politic about affirmative action. The Supreme Court has never obtained a majority on the question of affirmative action or race-conscious remedies. Despite some appearance to the contrary, even its last effort in *Adarand* missed the mark. In that decision, a seeming majority of the Supreme Court held that racial discrimination, benign and invidious alike, was to be subjected to the same standard of strict scrutiny.<sup>184</sup> But the "majority" carried only to the extent that it was not inconsistent with Justice Scalia's separate opinion,<sup>185</sup> and on the face of it, the differences between the two opinions are significant.

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183. See James O. Goldsborough, *The Art of the Possible*, San Diego Union-Tribune B23 (Dec. 5, 1991) ("Affirmative action has been supported by every president since Lyndon Johnson, . . . [it] means a national commitment to help minorities lift themselves out of prejudice and poverty."); John Leo, *Endgame for Affirmative Action*, U.S. News & World Report 18 (Mar. 13, 1995) ("[W]hites generally are willing to spend money, perhaps funding affirmative action programs based on need and class, rather than on race."); Roger Wilkins, *The Case for Affirmative Action: Racism has Its Privileges*, The Nation 409 (Mar. 27, 1995) ("Affirmative action has done wonderful things for the United States . . . . It has not outlived its usefulness."); D'Vera Cohn, *Reality Check: Affirmative Action at Work*, Wash. Post A1 (Oct. 11, 1995) (quoting 46-year-old white male Dick Bushway: "There are a lot of [minority] people out there who want to do good and, if given opportunities, can do good. Government has a role to play."). See *id.* (reporting a survey of 1,970 randomly selected adults responding to discrimination, diversity, and affirmative action in America and finding that 40% of whites polled called affirmative action a good thing for the country compared to 68% of blacks); *Fax Forum Results, Is Affirmative Action Obsolete?*, Training & Development 20 (Oct. 1995) (quoting a respondent of the survey: "There is still a need for affirmative action. We just need to find a more effective way of handling the situation."); Pamela Burdman, *Boalt Host Lively, Civil CCRI Forum: Leaders on Both Sides Face Student Questions*, San Fran. Chronicle A21 (Oct. 11, 1996) (quoting Eileen Hernandez, former EEOC official: "We are not a colorblind society. . . . We are very color-conscious, and we always have been.").

184. *Adarand*, 115 S. Ct. at 2113.

185. *Id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment) (joining the Court's opinion "except insofar as it may be inconsistent with the following . . .").

The “majority” of the Supreme Court in *Adarand*, while taking the hard line on the level of scrutiny, recognized that America has not moved beyond the problem of race and held open the promise that even race-conscious governmental remedies for that problem may still be permissible.<sup>186</sup> The Court thus sought “to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”<sup>187</sup> Time may well tell that precious few race-conscious actions cross the barrier of strict scrutiny, but it is too early to say for certain and the Court has left the door open.

Although there is plenty of room for skepticism, it is possible that the plurality opinion in *Adarand* offers a way of “muddling through.” The opinion warrants skepticism because Justice O’Connor, who wrote *Adarand*, also wrote the decision in *Croson* that seemed oddly unwilling to accept the obvious regarding past discrimination.<sup>188</sup> If we are unwilling to accept past discrimination, we can hardly remedy it. Moreover, too strict an insistence on limiting remedial measures to entities themselves responsible for past discrimination is both meaningless given the long history of discrimination and unlikely to result in any remedy at all.<sup>189</sup> Still, the “majority” opinion in *Adarand*, in its formulation if not its application, seems to be asking some of the right questions.

In contrast, Justice Scalia seems not to be asking the right questions, but to be in denial about them. Justice Scalia’s image of America is quite different, and with it his view of the law. For Justice Scalia, “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction.”<sup>190</sup> That is because for Justice Scalia

[T]here can be no such thing as either a creditor or a debtor race. . . . To pursue the concept of racial entitlement—even for the most admirable and

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186. The Court explained that the “unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 2117.

187. *Id.* (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (Marshall, J., concurring in judgment)).

188. *Croson*, 488 U.S. at 469.

189. See Spann, 39 *How. L. J.* at 45 (cited in note 72) (stating that the Supreme Court may view general societal discrimination as “too subtle and diffuse to be legally cognizable”).

190. *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment).

benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege, and race hatred.<sup>191</sup>

Justice Scalia's vision is simply stated: "In the eyes of government, we are just one race here. It is American."<sup>192</sup>

It is not that surprising to see neutrality under attack when the ideas expressed under the guise of neutrality are untenable ones. Although Professor Sherry suggests that the postmodern scholars are novel in their attack on neutrality, history also conclusively establishes that the attack on neutrality is not some recent concoction of a small group of radical scholars. The work of Professors Miller and Howell, of Professors Clark and Trubek, of Eugene Rostow, and perhaps even of someone like Louis Pollak, is deeply skeptical of the idea of objectivity or neutrality. These were not radical social constructionists, or maybe they were. But they were also deeply respected teachers, leaders, and scholars.

The attack on neutrality Professor Sherry observes today may arise from circumstances similar to those that motivated the attack during the Warren era. In the face of a defense of *Brown* as non-neutral, one response was to demonstrate its neutrality. But another, in light of what seemed to many an unquestionably correct result, was to question the very idea of neutrality itself. Right or wrong, for better or worse, the public will question neutrality when it is the ostensible basis for results that are difficult to accept. This may explain why neutrality is again being questioned. The observation may be trite, but when any group in society is consistently relegated to second-class status under the guise of neutrality,<sup>193</sup> it cannot be all that surprising when members of the group challenge the idea of neutrality itself.

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191. *Id.* at 2118-19.

192. *Id.* at 2119.

193. Neutrality is particularly likely to be seen as a guise when the Supreme Court seems to change or manipulate the stated rules in affirmative action cases. See, for example, Spann, 39 *How. L. J.* at 45 (cited in note 72) (asserting that despite the rule that intent matters in race cases, the Supreme Court in *Adarand* effectively refused to consider intent—in that case benign—thus effectively equating affirmative action and discrimination, which are two very different things).