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On the Merits: A Response to Professor Sherry

*John C.P. Goldberg**

It is accepted wisdom among constitutional law scholars that the Supreme Court is now considerably more conservative than it was during the tenure of Chief Justice Earl Warren.¹

Professor Sherry's Article has three parts. The first is doctrinal and undertakes to demonstrate that the above quoted wisdom is not only false, but patently so. It is apparent, this Part argues, that the current Court has not drifted toward the "right," but has steadfastly held to the principle of justice that animated the Warren Court.² This is the principle of "formal neutrality," which generally holds that government may never distinguish among its citizens on the basis of race, creed, or color.

Professor Sherry's second project is to explain why constitutional scholars have failed to recognize this obvious consistency.³ Her ultimate explanation is somewhat involved. In outline it proceeds as follows. It is the academy, not the Court, that has changed. In particular, the modern academy has rejected neutrality. Moreover, it has rejected neutrality not only in its incarnation as the substantive moral principle of formal neutrality, but also in its incarnation as the epistemological meta-principle that substantive moral principles can be justified by appeal to neutral, objective reasons. The academy's critique of the current Court as "conservative" expresses this twin rejection of formal neutrality and of neutrality as objectivity. The academy condemns the Court's continued commitment to formal neutrality as conservative because the academy regards formal neutrality as nothing more than a slogan used by the Court to mask its partisan agenda of maintaining white privilege.

* Assistant Professor of Law, Vanderbilt University. Thanks to Jim Blumstein, Rebecca Brown, Chris Eisgruber, Julie Faber, Barry Friedman, Thomas McCoy, Bob Rasmussen, Tony Sebok, Nick Zeppos, and Ben Zipursky for their help. Remaining errors are mine.

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

2. *Id.* at 477.

3. *Id.* at 459.

In the third Part of her Article, Professor Sherry argues that the academy should not abandon the meta-principle of neutral, objective reason.⁴ She further maintains that the embrace of reason logically leads to the embrace of formal neutrality, because the rationality of that principle is obvious and intuitive—hence the allusion in her title to the popular self-help book that claims all we need to know as adults are the simple truths we learned in kindergarten. Accordingly, the academy should endorse rather than critique the commitment of both the Warren Court and the current Court to the principle of formal neutrality.

I share some of the concerns that animate Professor Sherry's Article, particularly her worry over the careless use of labels like "conservative" and her anxiety over many legal academics' apparent enchantment with moral skepticism. Nevertheless, I hope to show in this Comment that the particular arguments that she has marshaled to meet these concerns are ineffective because overstated. There are significant senses in which the current Court may be described as conservative. Moreover, to the extent the academy has misattributed conservatism to the Court, this misattribution is not explained by the academy's embrace of moral skepticism. Finally, I am unpersuaded that formal neutrality is obviously or intuitively the most appealing available conception of justice.

I.

Professor Sherry claims that if one bothers to read the decisions of the Warren Court and what she calls the "current Court" in two core areas of constitutional law—equal protection and free speech—one will readily see a shared commitment to the principle of formal neutrality.⁵ That principle requires that each law, "on its face, treat all races with equal solicitude and all views with equal tolerance."⁶ As manifested in the Courts' decisions, the principle of formal neutrality denies legislatures the right to distinguish among persons on the basis of their respective races or beliefs. Thus, according to Professor Sherry, the decisions of both the Warren Court and the

4. *Id.* at 483-85.

5. *Id.* at 459-60. A desire to skirt the inconvenient datum of *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 552 (1990) (holding that FCC minority preference policies "do not violate equal protection principles"), overruled by *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995) perhaps explains why Professor Sherry refers to the "current [1997?] Court," rather than the "Rehnquist Court."

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

current Court clearly state that the Fourteenth Amendment's Equal Protection Clause prohibits legislatures from enacting laws that in any way take account of the race of those subject to the laws.⁷

A fictional narrative may help illuminate the strength of this claim. Imagine that it was a young lawyer named Smith who, in 1967, appeared before the Court and successfully argued on behalf of Richard and Mildred Loving.⁸ Triumphant and tired, Smith thereafter retreated to (what else?) a remote desert island. Roughly thirty years later, a restored Smith is summoned back to argue before the current Court on behalf of Adarand Constructors.⁹ According to Professor Sherry, when Smith reacquaints himself with the country and the recent work of the Court, he will quickly realize that, apart from altering the width of his tie and the length of his sideburns (and perhaps toning down—or at least de-gendering—his famous flourishes about the “basic civil rights of man”¹⁰), he should not change his presentation. The Court's recent decisions should make it quite plain to Smith that he is, for all intents and purposes, arguing another case before the Warren Court and that he thus has his best chance of prevailing by reasserting the “colorblind” equal protection arguments he made in 1967.

Professor Sherry's assertion that the current Court is no more or less conservative than the Warren Court is intended to serve as a corrective to what she believes is a reflexive tendency among academics to condemn the current Court as “conservative” while praising the Warren Court as “liberal.”¹¹ In responding to this concern, however, Professor Sherry has overstated her case in such a way as to commit the sin that she decries. If it is unhelpful simply to call the current Court “conservative,” it is equally unhelpful simply to call it the Warren Court.

7. *Id.* at 461, 463, 468 (explaining that any attempt, whether benign or invidious, to distinguish between persons on the basis of color violates formal neutrality).

8. See *Loving v. Virginia*, 388 U.S. 1 (1967).

9. See *Adarand*, 115 S. Ct. at 2097.

10. See *Loving*, 388 U.S. at 12. As Professor Brown points out in her comment, *Loving's* invocation of fundamental rights provides evidence that it was not decided on the principle of formal neutrality. See Rebecca L. Brown, *Formal Neutrality in the Warren and Rehnquist Courts: Illusions of Similarity*, 50 Vand. L. Rev. 487, 493-94 (1997).

11. Sherry, 50 Vand. L. Rev. at 459 (cited in note 1).

Part of the problem resides in Professor Sherry's own loose use of the term conservative. To clarify matters, I offer the following tentative definitions:¹²

Doctrinal conservatism: the belief that judges should adhere to a relatively strict version of stare decisis; a judicial unwillingness to depart from settled legal doctrine.

Judicial conservatism: the belief that the Judicial Branch ought to be reluctant to interfere with the operation of the political branches based on allegations that those branches have violated some standard of justice or right.¹³

Political conservatism: the belief that government should hesitate to interfere with private activity and in particular, should not take measures to redistribute wealth or opportunities.

Social conservatism: the belief in preserving certain traditional social, cultural, and moral institutions or values, whether by government action or inaction.

When Professor Sherry asserts that the current Court is no more or less conservative than the Warren Court, she is claiming that it is no more or less judicially or politically conservative, and that it has thus been doctrinally conservative vis-à-vis Warren Court precedents.

Professor Sherry believes that this claim merely states the obvious.¹⁴ But it is neither obvious nor even true. For better or worse, the current Court has not demonstrated across-the-board doctrinal conservatism with respect to Warren Court precedents. Moreover, the current Court's doctrinal innovations have often (although not always) reflected a greater degree of judicial conservatism than those of the Warren Court. Even Professor Sherry admits that the current Court's decisions bearing on criminal defendants' rights are "almost incontrovertibly more conservative" than comparable Warren Court decisions.¹⁵ This distinction is not adequately addressed by her surprising claim that criminal procedure is not part of the world of constitutional law scholarship.¹⁶ Even outside of criminal constitutional law, the current Court has issued

12. These definitions are drawn in part from Benjamin C. Zipursky, *The Pedigrees of Rights and Powers in Scalia's Cruzan Concurrence*, 56 U. Pitt. L. Rev. 283, 292-94 (1994); David A. Strauss, *Tradition, Precedent, and Justice Scalia*, 12 Cardozo L. Rev. 1699, 1705-08 (1991).

13. Judicial conservatism is usually founded on rights-skepticism, on court-skepticism, or on some combination of the two. See Lawrence G. Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. Rev. 417, 418 (1981).

14. Sherry, 50 Vand. L. Rev. at 475-76 (cited in note 1).

15. *Id.* at 476.

16. *Id.*

important constitutional decisions that depart from Warren Court doctrine via outright overrulings and truncations of precedent, as well as doctrinal revival and doctrinal innovations. Some of these departures evince a more judicially conservative approach to the constitutional doctrine in question,¹⁷ while others are less judicially conservative.¹⁸ Members of the academy therefore have legitimate grounds for describing the current Court as being in some respects "conservative."

At least, then, Professor Sherry is guilty of overstatement. She might, however, retreat from her exaggerated initial claim and more narrowly argue (and from here on I shall take her to argue) that the Warren Court and the current Court demonstrate equal conservatism *only* with respect to equal protection and free speech jurisprudence. Cast in this circumscribed manner, Professor Sherry's claim is considerably more promising. It still needs further qualification, however, particularly with respect to the law of equal protection.¹⁹

The Warren Court's decisions in *Brown v. Board of Education*²⁰ and *Bolling v. Sharpe*²¹ signaled the Court's commitment to eliminating federal and state *de jure* discrimination. As Professor Sherry notes, however, the Court was never very explicit about the principle undergirding these decisions.²² Thus, since the time of those and subsequent related decisions, scholars have debated their proper interpretation.²³ Herbert Wechsler, of course, famously argued that

17. For familiar doctrinal departures that are more judicially conservative and potentially less politically conservative, see *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (recasting settled free exercise jurisprudence and reducing judicial scrutiny of the regulation of religious activity); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (truncating the right to privacy doctrine and permitting legislative control of certain sexual practices). See also *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384, 398-400 (1993) (Scalia, J., concurring) (discussing the slow demise of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

18. For doctrinal departures that are judicially non-conservative (that is, intrusive on the activity of the political branches) and potentially more politically conservative, see *BMW v. Gore*, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) (striking a punitive damage award for violating the substantive due process rights of the defendant); *United States v. Lopez*, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (possibly reviving the pre-New Deal account of limited congressional powers under the Commerce Clause).

19. Professor Sherry's strongest case for doctrinal conservatism is in the free speech area, although, as she recognizes, it is certainly arguable that in this area the current Court has departed from Warren Court precedent by being *less* judicially conservative and more speech protective. Sherry, 50 Vand. L. Rev. at 472 n.77 (cited in note 1) (noting that *United States v. O'Brien*, 391 U.S. 367 (1968), "would be decided differently today").

20. 347 U.S. 483 (1954).

21. 347 U.S. 497 (1954).

22. Sherry, 50 Vand. L. Rev. at 463 (cited in note 1).

23. See Barry Friedman, *Neutral Principles: A Retrospective*, 50 Vand. L. Rev. 503, 505 (1997).

there was no principle to be found.²⁴ Others have contested this claim. Some have maintained, as does Professor Sherry, that the Warren Court adopted the formal neutrality principle that legislation may never treat individuals differently solely because of their different races.²⁵ Others have argued that these decisions expressed a commitment on the part of the federal government, originally expressed in the Civil War Amendments, to help ensure that African Americans achieve the free and secure status traditionally enjoyed by white Americans.²⁶ The difference between these propositions is important. The latter at least allows for the possibility that the Equal Protection Clause permits legislation that draws racial distinctions for benign purposes such as advancement of historically disfavored groups, an idea sometimes expressed and justified negatively in terms of a principle of "antidomination" or positively in terms of equal opportunity.²⁷ Following Professor Sherry, I will refer to this latter family of principles under the somewhat misleading heading, "equality of results."²⁸

As applied to equal protection jurisprudence, Professor Sherry's claim is that the decisions of the current Court are no more or less conservative than the decisions of the Warren Court because both accept formal neutrality and reject equality of results.²⁹ Although this refined claim is certainly more plausible than Professor Sherry's initial assertion, it contains two remaining weaknesses. First, it seems equally if not more plausible to assert that the Warren Court never definitively settled on either principle of equality. Second—and perhaps more tellingly—even assuming that both Courts' decisions do embrace the principle of formal neutrality, this fact is of itself insufficient to establish that the current Court is no more or less conservative in its equal protection jurisprudence than was the Warren Court.

Suppose there is a society governed by Rex, a vicious and arbitrary despot. At a certain point in time, the heads of powerful, wealthy families and groups form a revolutionary party (the Anti-Rex

24. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 22-23 (1959).

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

26. See Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. Pa. L. Rev. 1, 31 (1959).

27. See, for example, Laurence H. Tribe, *American Constitutional Law* 1515-21 (Foundation Press, 2d ed. 1988) (asserting that equal protection is best understood as embodying an antidomination principle that bars legislation drawing racial distinctions only if that legislation perpetuates the subordination of traditionally subordinated groups).

28. Sherry, 50 Vand. L. Rev. at 478 (cited in note 1).

29. *Id.* at 462-63.

Party or "ARP"). Enlisting the support of the masses with the rallying cry of "good government," the leaders of the ARP stage an insurrection. Rex flees to a modest estate in France, and, by means of an uncontested election, the ARP's leaders are installed as heads of a new government. Now suppose that after a generation of relatively benign rule by the ARP, certain individuals attempt to break the ARP's monopoly by forming the alternative Anti-Anti-Rex Party ("AARP"), which adopts the slogan "truly good government." Their efforts are successful and they manage for a time to get AARP candidates on the ballot and elected into office. Eventually, however, the ARP regains all the seats it had previously lost to the AARP. As a result, the AARP disbands.

An observer could describe this sequence of events simply by reporting that this society was once, and is now again, committed to the idea that one-party democracy is good government. But such a description may be lacking in two respects. First, it is unclear whether the revolutionaries' cry meant to equate good government with one-party rule or instead meant only that one-party rule was good government as compared to the then-available alternative. Thus, the restoration of one-party rule may or may not be continuous with its revolutionary establishment, depending on the content of the unspecified (and, until the rise of the AARP, untested) standard of "good government."

In addition, even if both the revolution and the restoration actually do manifest a commitment to the "principle" of one-party rule, the respective adoptions of that rule might still have differing significance by virtue of the fact that the adoptions occurred against the background of different prior regimes. Whereas the revolutionary adoption of one-party rule over despotism likely constituted an improvement by any plausible standard of good government, the restoration of one-party rule over two-party rule is on its face a more ambiguous achievement.

Of course this hypothetical bears on Professor Sherry's argument only insofar as the political circumstances under which the current Court has adopted formal neutrality differ from those under which the Warren Court adopted it. In fact, however, they do so differ. As Professor Sherry must concede, there was an interregnum between the Warren Court and the current Court (from roughly 1978 to 1989). During that time, decisions like *Regents of the University of*

*California v. Bakke*³⁰ and *Fullilove v. Klutznick*³¹ evinced the Court's commitment to some alternative notion of "equality of results," under which federal and state legislatures began to experiment with what they believed were benignly discriminatory laws.³²

The existence of this interregnum poses both of the problems identified above. First, even if it is clear that the Warren Court rejected the white supremacist principles of Jim Crow in the name of "equality," it is not at all clear that the Court ever specified the positive content of that notion of equality sufficiently to determine whether it embraced formal neutrality over equality of results. If the Warren Court made no explicit statement to that effect, then to the extent the current Court has made that choice,³³ it has departed from the Warren Court—at the very least by deciding a question the prior Court never decided.³⁴

Second, even if it is clear that both Courts have in fact embraced formal neutrality as the proper principle of equality, one may still plausibly assert that the current Court is more politically conservative than the Warren Court. If the Warren Court adopted the principle of formal neutrality, it did so as part of an effort to invalidate Jim Crow laws. By contrast, the current Court has relied on the prin-

30. 438 U.S. 265 (1978).

31. 448 U.S. 448 (1980).

32. Sherry, 50 Vand. L. Rev. at 462 (cited in note 1) (acknowledging that the Court may have strayed during this period).

33. The extent to which the current Court has rejected equality of results remains somewhat uncertain because of the multiple opinions in *Adarand*. See Friedman, 50 Vand. L. Rev. at 534-35 (cited in note 23).

34. As Professor Sherry notes, the decision that perhaps could have provided a complete account of the Warren Court's theory of equal protection, *DeFunis v. Odegaard*, 416 U.S. 312 (1974), was resolved on procedural grounds. Sherry, 50 Vand. L. Rev. at 466-67 (cited in note 1). She nevertheless argues that Justice Douglas's dissent, which addressed the merits of the case and appears to reject equality of result, is proof that the entire Warren Court rejected equality of result. *Id.* at 466 ("Because Justice Douglas was perhaps the most consistently liberal member of the Warren Court, his views on affirmative action are particularly noteworthy.").

This argument rests on a curious assertion of inter-Justice transitivity: If Justice Douglas—"the most consistently liberal member of the . . . Court"—rejected equality of result, it must be the case that each of his less consistently liberal colleagues also rejected it. See *id.* Such an assertion amounts to the very sort of argument-by-labeling that Professor Sherry elsewhere decries. The fact that Justice Douglas was very "liberal" about certain matters (maintaining, for example, hostility towards government efforts to regulate private sexual conduct) hardly entails that he was committed to a strongly egalitarian theory of social justice. Hence his rejection of equality of result does not entail that others equally or less committed to protection of those liberties must also reject it. Nor are we required to speculate about this issue, since three members of the Warren Court—Justices Brennan, Marshall, and White—did not join Justice Douglas's opinion and were soon on record in favor of equality of result. See, for example, *Bakke*, 438 U.S. at 324-79 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). It is unclear why Professor Sherry does not regard these Justices as equally legitimate representatives of the Warren Court's (not fully articulated) views on equal protection.

ciple of formal neutrality to invalidate affirmative action laws of the interregnum. Thus, even if it is true that the current Court's equal protection decisions are doctrinally conservative with respect to the Warren Court³⁵ and thus evince the same degree of judicial conservatism, one may fairly ascribe greater political conservatism to the current Court precisely because its judicial activism (unlike the Warren Court's) has been designed to serve—and in practice has served—to eliminate all race-conscious legislation, including legislation attempting to alter the existing distribution of wealth and opportunities in order to improve the lot of members of certain groups that have tended to fare poorly in the private sphere.³⁶

One might counter this argument by claiming, as Professor Sherry at times appears to,³⁷ that the interregnum I have posited never really existed because decisions like *Bakke* and *Fullilove* never garnered a majority opinion espousing any one theory of equality of result, and therefore never actually strayed from the principle of formal neutrality. Since the Supreme Court has in fact consistently adopted formal neutrality at all times between 1954 and the present (the counter-argument continues), the current Court's embrace of formal neutrality cannot be described as having a distinctly conservative political import.

This objection, to the extent it is cogent,³⁸ seems to rest on the claim that decisions like *Bakke* should not only be discounted as "weak" or "unclear" precedents, but also be ignored altogether as not-law. Yet this further conclusion follows only if we accept a particularly stringent theory of law—one that requires as a necessary condition for the existence of constitutional law not only a majority in the

35. Note that if my description of the interregnum is correct, there is a second sense in which the current Court is no more or less doctrinally conservative than the Warren Court: both Courts were equally prepared to modify or reject the equal protection precedents of earlier Courts. This observation only further demonstrates that the term "conservative" must always be modified by reference to the thing being conserved.

36. Many critics of race-conscious remedial legislation argue that such legislation is in actual effect counterproductive to these egalitarian goals. They would thus maintain that the current Court's restriction on such legislation has effects that are no more or less politically conservative than the effects of the Warren Court's decisions. My point is only that since one may plausibly reject these arguments, one may plausibly take issue with Professor Sherry's claim that the current Court is no more politically conservative than was the Warren Court.

37. See Sherry, *Vand. L. Rev.* at 462 (cited in note 1) (arguing that it is unclear whether the "fractured" *Bakke* and *Fullilove* decisions evidenced rejection of formal neutrality).

38. Even if the affirmative action statutes that were enacted and applied in this period are and have always been unconstitutional, the current Court has arguably acted in a less judicially conservative and a more politically conservative fashion by more aggressively enforcing this constitutional limit against Congress and the states than its predecessor Courts.

Supreme Court accepting or permitting a particular result,³⁹ but also one coherent, principled theory supporting the result. One can appreciate the stringency of this test simply by noting that under it, there may at present be no constitutional right to abortion.⁴⁰ By contrast, alternative theories of law justify the conclusion that the courts of this period permitted benign race-conscious legislation under the Equal Protection Clause. Thus, for example, in 1980, Holmes's "bad man" would have concluded that the Court had embraced some version of equality of result.⁴¹ Likewise, Ronald Dworkin's theory of law would likely have led (and, at least as he applied it, did lead) to the same conclusion.⁴²

Jurisprudentially, the best hope of establishing that equality of results was never the law for any modern Court lies, not surprisingly, in an extreme version of legal process requiring that a rule be justified by reference to a single, coherent principle.⁴³ But even if one could claim that from 1978 to 1989 the Court did not embrace the principle of equality of results because it never successfully provided a single reasoned elaboration of that principle, it does not follow that the Court was therefore consistently committed to the opposing principle of formal neutrality. Rather, the most that can be said is that the Court during this time failed to articulate any law of equal protection. As a result, one may still fairly assert that the current Court's equal protection jurisprudence is more politically conservative than the Warren Court's insofar as it has ended the preceding period of confusion among competing principles by settling on the arguably more politically conservative principle of formal neutrality.

39. For example, a majority of the *Bakke* justices indicated (albeit for different reasons) that a Harvard-style diversity program would not violate equal protection principles. *Bakke*, 438 U.S. at 315-20 (Powell, J., joined by Blackmun, Brennan, Marshall, and White, JJ.).

40. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 844-69 (1992) (joint opinion of Kennedy, O'Connor, and Souter, JJ.) (espousing multiple, possibly conflicting, justifications for limited abortion rights).

41. See Oliver W. Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) (law is a prediction of what the courts will in fact do). And, of course, public officials and affected private institutions generally did so conclude, enacting the various programs that have since been thrown into doubt by the current Court.

42. Ronald Dworkin, *Taking Rights Seriously* 223-39 (Harvard U., 1978).

43. This is not say that all Legal Process scholars subscribed to this criterion of constitutionality. On the difference between various conceptions of Legal Process, see Anthony J. Sebok, *Misunderstanding Positivism*, 93 Mich. L. Rev. 2054, 2095-131 (1995). I am grateful to Professor Sebok for aiding my articulation of the following point.

II.

Professor Sherry's second task is to explain the awkward fact that the vast majority of constitutional scholars has missed an obvious pattern of inter-Court consistency.⁴⁴ It would be absurd to suggest that scholars devoted to this subject have simply overlooked this fact, and I do not believe Professor Sherry makes this claim. Rather, her assertion is that they have deliberately misdescribed (or acquiesced to others' misdescriptions of) their own inconsistency as the Court's.

The origins of the academy's inconsistency, Professor Sherry argues, lie in its impatience over the pace of progress toward genuine social and economic equality under the Warren Court's regime of formal neutrality.⁴⁵ Eager to speed social change, the academy in the 1970s came to reject formal neutrality, to endorse the new constitutional principle of equality of results, and thus to endorse legislative efforts to distinguish between people on the basis of race. The goal of this shift was to hasten the realization of an equal distribution of wealth and other social goods.⁴⁶

Of course, members of the academy could simply have acknowledged their change of mind and could then have proceeded to criticize the current Court for its continued endorsement of the outmoded principle of formal neutrality. Professor Sherry contends, however, that they have instead misdescribed their shift in position as a conservative shift on the part of the Court.⁴⁷ To understand why the academy did this requires an appreciation of the depth of the current academy's rejection of neutrality. Indeed, this rejection is so thoroughgoing that the academy has attacked not only the moral principle of formal neutrality but also any and all concepts in the extended neutrality family, including the epistemological meta-norm that moral principles can be justified by neutral or objective reasons holding good for all rational persons.⁴⁸ Caught up in skeptical "postmodernism," the academy now believes that there are no genuine, objectively justifiable legal or moral rules or principles—only

44. Sherry, 50 *Vand. L. Rev.* at 459, 475-76 (cited in note 1) (stating that her task is to explain why "most observers" have missed this "obvious" doctrinal consistency).

45. *Id.* at 478.

46. *Id.*

47. *Id.* at 476.

48. *Id.* at 482. For clarity, I will refer to this second sense of neutrality by the terms "objectivity" and "objectivism."

political stances.⁴⁹ Thus, the academy now assesses the validity of moral and legal norms merely by determining the extent to which adherence to them advances the particular political cause or causes with which it happens to sympathize. Today, the Court's adherence to the norm of formal neutrality serves to maintain white privilege and thus functions as a hindrance to the improvement of conditions for members of minority groups—a cause the academy supports—while the norm of equality of result is more congenial to such a cause.⁵⁰ Irrationalist, postmodernist scholars therefore feel no compunction in attacking the principle of formal neutrality by means of a mythical narrative which misdescribes the current Court's steadfast commitment to it as a conservative shift.⁵¹

Professor Sherry never clarifies whether she intends this explanation to apply to most members of the current constitutional law academy or to some minority of scholars within it.⁵² Cast in its strongest variant, her explanation rests on the claim that the current constitutional law community overwhelmingly rejects formal neutrality and embraces both equality of result and the Conservative Court Myth as a byproduct of its overwhelming acceptance of postmodern irrationalism. In its weaker variant, the explanation rests on a claim that one important segment of the academy has espoused a myth to which most other segments have at least acceded.

As it turns out, even the strong version of the sociological explanation may not explain the existence of the Conservative Court Myth. Suppose the academy is filled with left-leaning postmodernists. Is it obvious why they have decided to foster a myth that praises the Warren Court while trashing the current Court? By hypothesis, the decisions of both Courts *clearly* embrace the formal neutrality principle that the academy now regards as politically unacceptable ideology. Why then single out the current Court for blame rather than criticizing both Courts for fostering the same pernicious ideology? Even if, during the Warren Court's tenure, the academy had no reason to critique the Court (because it was using the formal neutrality principle to obtain results the academy then favored), the current Court is today applying the Warren Court's ideology to reach politically unacceptable outcomes. Thus, it would seem that left-lean-

49. *Id.* at 478.

50. *Id.* at 483-84.

51. *Id.* at 483.

52. Compare *id.* at 477 (explaining that "our" attitude toward neutrality has been transformed), and *id.* at 478 (describing the "transformation of the academy"), with *id.* at 481 (noting the transformation of "some opponents").

ing irrationalists have good reason to attack the Warren Court as the Court responsible for generating the ideology of neutrality that is now producing bad political results. The strong version of the sociological explanation needs some further argument to explain why the current academy chooses to hold the current Court solely responsible for a state of affairs brought about in the first instance by the Warren Court.

In any event, the strong version of the sociological explanation cannot possibly account for the academy's adoption of the Conservative Court Myth because the strong version is, as Professor Sherry ultimately concedes, manifestly false. Indeed, one need not look past the work of prominent mainstream liberal scholars such as John Hart Ely and Ronald Dworkin to establish its falsity. Dworkin has devoted a significant part of his academic career to defending a version of equality of result and objectivity in legal and moral reasoning.⁵³ He thus rejects formal neutrality without rejecting reason and defends non-formal-neutrality equality on the ground that it is objectively justified. Likewise, as Professor Sherry notes, Ely has made interesting objectivist arguments for some version of equality of result.⁵⁴

These obvious counter-examples suggest that Professor Sherry must endorse the weaker version of the sociological explanation, which holds only that there is some group of scholars within the community of constitutional law scholars that endorses equality of result out of a commitment to postmodernist irrationalism. But to concede this is to drain Professor Sherry's explanation of its force. It may be that some members of the academy are irrationalists who advocate equality of result, but this concedes that there are others who are not, either because they endorse formal neutrality or because they endorse equality of result on objectivist grounds. Even if we make Professor Sherry's best case by assuming, however falsely, that

53. See, for example, Ronald Dworkin, *Law's Empire* 78-86, 393-97 (Belknap Press, 1986) (rejecting skepticism and arguing for the constitutionality of affirmative action); Dworkin, *Taking Rights Seriously* at 1-5, 223-29 (cited in note 42) (same); Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 *Phil. & Pub. Affairs* 87 (1996) (arguing against moral skepticism).

54. Sherry, 50 *Vand. L. Rev.* at 478-79 (cited in note 1). Indeed, the most perplexing and endearing feature of Ely's *Democracy and Distrust* is its simultaneous embrace of law-skepticism and moral objectivism: Constitutional/legal analysis of concepts like equality and privacy is radically indeterminate, but political/theoretical analysis of the concept of democracy can yield objective, determinate results, including a defense of affirmative action. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard U., 1980).

there is no significant academic support for formal neutrality, she must still explain the willingness of objectivist scholars such as Dworkin and Ely to embrace or accede to the myth of the conservative current Court. If the current Court demonstrably endorses formal neutrality, as Professor Sherry claims it has, her weak sociological explanation of the myth only succeeds if she can explain why non-postmodernist members of the academy have not simply made their case first by conceding that current law is against them and then by openly advocating its rejection on normative grounds. What could possibly explain why these scholars (who, unlike the irrationalists, believe in the necessity of justification by appeal to reasons) have instead weakened their normative arguments for equality of result by associating them with postmodernists' patently false descriptive claims about the Court's jurisprudence?

III.

Because it flows from her sociology, Professor Sherry's normative attack on "equality of results" proceeds indirectly through an attack on postmodernism. The argument runs roughly as follows. Postmodernism is dangerous because, by denying the possibility that norms can be justified, it renders Americans unable to reach a collective settlement on what might count as a fair allocation of society's resources. Given this danger, the academy has good reason to reject postmodernism and embrace objectivism. If one accepts objectivism, moreover, one must (at least "presumptively") accept formal neutrality and reject equality of results.⁵⁵

There are at least two problems with this argument. First, the argument does not even begin to demonstrate the invalidity or incoherence of postmodernism or the validity of objectivism. Far from it, the argument asserts only that adoption of postmodernism is inexpedient to the attainment of a universally acceptable account of the fair distribution of social goods, a goal that irrationalists might not share. Moreover, a number of self-styled postmodernists conspicuously absent from Professor Sherry's list reject her claim that a commitment to anti-objectivism entails the inability to endorse societal norms of fairness or justice as opposed to an inability to justify those norms by reasoning from uncontroversial premises.⁵⁶ It is thus incumbent on

55. Sherry, 50 *Vand. L. Rev.* at 485 (cited in note 1).

56. For example, Richard Posner argues that the norm of wealth maximization is justifiable notwithstanding that it cannot be proven "objectively" valid by means of philosophical

Professor Sherry to explain why postmodernism is of itself radical and dangerous, rather than unthreatening or—as some have suggested⁵⁷—fundamentally socially conservative.

Second, and more importantly, even if we concede that we can and should be objectivists, Professor Sherry's argument hinges on the further premise that formal neutrality is obviously justified. This claim is either confused or disingenuous. That it might be confused is suggested by Professor Sherry's assertion that formal neutrality is simply what kindergartners understand to be "playing fair." This assertion appears to conflate formal renditions of the principle of justice—"play fair" or "treat like situations alike"—with a particular interpretation of those principles holding that playing fair and treating like situations alike requires ignoring the race of the parties in question. The former principles may well rest on easily grasped, universal intuitive notions of justice, but that is only because they are purely formal. The formal neutrality interpretation of those principles is, by contrast, contestable precisely because it is substantive.

Professor Sherry knows all this. She concedes, after all, that John Ely and Randall Kennedy have made objectivist arguments for affirmative action and equality of result on the ground that "our commitment to racial justice demands some deviation from . . . merit standards."⁵⁸ Indeed, she sometimes describes the notion of "equality of results" as "substantive neutrality," indicating her recognition that there are some who think that race-conscious remedies are consistent with a "neutral" principle of justice.⁵⁹ But once the possibility of a truly principled argument for a conception of equality other than formal neutrality is conceded, the "obviousness" of Professor Sherry's minor premise collapses. It turns out, contrary to the suggestion of her title, that we did well to stay in school past kindergarten.

Professor Sherry tries to avoid this conclusion by suggesting that the arguments of Ely and other "good liberals" for the permissibility of affirmative action policies do not really question the principle of formal neutrality; instead, they simply raise questions

argument. See Richard A. Posner, *Wealth Maximization and Tort Law*, in David G. Owen, ed., *Philosophical Foundations of Tort Law* 99, 101-03 (Clarendon Press, 1995).

57. See Richard J. Bernstein, *One Step Forward, Two Steps Back: Richard Rorty on Liberal Democracy and Philosophy*, 15 *Pol. Theory* 538, 555-56 (1987).

58. Sherry, 50 *Vand. L. Rev.* at 480 (cited in note 1) (emphasis added).

59. *Id.* at 466.

about the most expedient means to that agreed-upon end.⁶⁰ But she cannot make this move without recharacterizing formal neutrality and thereby undermining her descriptive and normative theses.

As it is used in the bulk of Professor Sherry's Article, formal neutrality refers to a principle of political justice holding that laws must treat citizens equally without regard to race or creed.⁶¹ Race-conscious legislation thus violates formal neutrality and, according to Professor Sherry, the merit of the Warren Court and the current Court lies precisely in their rejection of such legislation in decisions ranging from *Brown* to *Adarand*.⁶² In treating Ely and other liberals as arguing for an "expedient" exception to formal neutrality, however, she redefines formal neutrality in terms of an ideal of social justice—a "colorblind society" in which no one, government or private citizen, takes race into account.⁶³ While this latter rendition of formal neutrality is perhaps attractive, it is quite distinct from the principle just described. Indeed, given this definition of formal neutrality (in what sense does it remain "formal"?), governmental implementation of affirmative action policies in any less-than-perfectly-just society does not necessarily "violate" formal neutrality. Such action may in fact turn out to be permitted or perhaps even required as the most effective means to the realization of this end-state. In other words, if formal neutrality was meant all along to be this end-state principle, it is not obvious why Professor Sherry maintains that colorblind legislation claims "the high moral ground";⁶⁴ why it is only the proponents of affirmative action (and not proponents of colorblindness in legislation) who are making expedient arguments about "means" rather than "ends"; why decisions like *Bakke* and *Fullilove* strayed from the principle of formal neutrality; why the writings of scholars in support of affirmative action should be interpreted as arguing for an "exception" to formal neutrality rather than presenting a strategy for its achievement; and why, in the end, there is any necessary conflict between formal neutrality and race-conscious legislation.⁶⁵

60. *Id.* at 480.

61. See note 6 and accompanying text.

62. 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). See Sherry, 50 Vand. L. Rev. at 483-85 (cited in note 1).

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

64. *Id.* at 480-81.

65. Perhaps Professor Sherry's claim is that the principle of end-state formal neutrality contains within it the distinct constraint that the end-state may not be achieved by laws that on their face distinguish on the basis of race and creed. This is an intriguing idea, but, again, hardly one that is self-evident.

IV.

Professor Sherry concludes her Article by asserting her commitment to the Enlightenment aspiration that citizens should “abide by a certain framework for deliberating through their disagreements” premised on “a favorable attitude toward, and constructive interaction with, the persons with whom one disagrees.”⁶⁶ I would have hoped to see in her Article a more substantial engagement with those with whom she disagrees. Scholars attempting to “define” American democracy for the next century, particularly those engaged in the charged and difficult debates about equal protection and race, must come to terms with the history of legislative and judicial treatments of race-neutral and race-conscious policies, must garner whatever empirical information is available on the need for and effects of such policies, must assess the relative merits of conflicting philosophical theories of equality, and perhaps must assess the merits of arguments for and against moral skepticism. In this Article, however, Professor Sherry has shied away from these difficult tasks, choosing instead to rely in the first instance on broad assertions—the Rehnquist Court is the Warren Court; the academy’s attacks on the Rehnquist Court are the product of irrationalism; formal neutrality is obviously acceptable—only to back away from each such assertion in a manner that renders her analysis and arguments incomplete.

Perhaps Professor Sherry has adopted this rhetorical style of argument as a means of responding to those whom she perceives to have rejected the aspirations of the Enlightenment. If this is her strategy, however, it is in danger of backfiring. The case for reason is best made on the basis of reasoned analysis, and this entails exacting scrutiny of the merits of all claims, even those made on behalf of irrationalism. Of course it hardly needs saying that Professor Sherry has long been a distinguished and important contributor to our reasoned discourse on equality. I look forward to her continued efforts to make the case for merit on the merits.

66. Sherry, 50 *Vand. L. Rev.* at 485 (cited in note 1) (citing Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* 79 (Belknap Press, 1996)).

