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Memoirs of a General in the Inglorious Revolution

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MEMOIRS OF A GENERAL IN THE INGLORIOUS REVOLUTION

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I

Conservative constitutional theory has been marked by an unwillingness to confront questions of political morality head on. Conservatives have too often proffered an implausible, denatured view of constitutional adjudication that sees judges as glorified meter readers whose job is to report what they have found in the basement of history. Committed to a thin account of democracy that bows unreflectively to majoritarian political processes, these theorists have insisted that judges have only the license to recover the decisions made by historical constitutional majorities and encrypted in the text of the Constitution.

This view, sometimes called originalism, fails to capture the actual practice of constitutional decisionmaking as it is today, as it has ever been, or indeed, as it could be: the text and historical context of the Constitution cannot yield answers to questions of meaning without engaging judgments of political value on the part of those who undertake its interpretation.

Without bending originalism well past its breaking point, conservative constitutional critics cannot explain even the core of our constitutional tradition. They cannot explain, for example, the institution of judicial review itself, or the application of the Bill of Rights — originally directed at federal conduct exclusively — to the states, or the central details of our commitment to free speech. Persuasive discourse about any of these involves locating the matter at issue within an attractive account of the Constitution and our constitutional tradition; and judgments of political value are the stuff of which such an account must be built. Even more clearly, conservative commentators can take no support from the originalist protocol they sponsor for their own constitutional projects, like resisting affirmative action.

Some constitutional conservatives, faced with these looming difficulties, have led uneasy theoretical double lives. Quietly, these theo-

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rists have commuted to more plausible understandings of constitutional adjudication in order to explain the elementary premises of our constitutional tradition and to advance their political agenda. At the same time, they continue to pay lip service to the narrow premises of naive originalism in order to support their charge that judges and commentators who have adopted more liberal views of the Constitution are not merely wrong but subversive — guilty of bending judicial authority undemocratically to their own political ends. Lost in this theoretical handwaving is the opportunity for serious discussion of the important constitutional disputes.[1]

It is a welcome change, accordingly, to open Charles Fried's apologia for his term of office as Solicitor General of the United States and encounter a far more realistic and attractive view of constitutional adjudication. Fried acknowledges that the objections to originalism are "devastating" (p. 62), and emphasizes that the Constitution must be subject to the same rich canons of interpretation as other legal sources (p. 64).

He takes as the model of good judging Justice Harlan's opinion in *Poe v. Ullman*[2] defending the right of married couples to resist Connecticut's ban on the use of contraceptives. Justice Black, who criticized Harlan's approach in *Poe* as ethical adventurism, is dismissed by Fried as pursuing "[an] anti-intellectual, textual fundamentalism," while Harlan is celebrated for his "belief in the possibility — indeed, inevitability — of reasoning and judgment in applying the Constitution" (p. 73). Sounding more like a disciple of Ronald Dworkin than a general in the Reagan revolution, Fried describes what he sees as the ground that he and Harlan share:

> In interpreting the broad language of the Fourteenth Amendment, the Constitution as a whole should serve as a guide. The particular guarantees specified in the Bill of Rights are like the points on a graph, which the judge joins by a line to describe a coherent and rationally compelling function. [p. 74]

Asking for nothing more than "a conception of law disciplined by a respect for tradition, professionalism, and careful, candid reasoning" (p. 70), Fried emphatically rejects originalism's infatuation with majority rule:

> I am puzzled by the originalist celebration of majority rule as the presumed default source of law, from which one may only depart on the clearest textual warrant in the Constitution, a warrant underwritten by the intent of the framers. The originalists belong to the party of liberty — as do I — so it is odd to see them repair to majority rule, which has not often been seen as a very secure haven of liberty, and certainly was

1. I defend and elaborate on these complaints in the course of a critique of the views of Robert Bork, who is regarded by many as the founding spokesperson of originalism. *See* Lawrence Sager, *Back to Bork*, N.Y. REV. BKS., Oct. 25, 1990, at 23.

2. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting), *discussed at* pp. 72-75.

> not seen as such by the framers. The framing generation would soon have the French Revolution to show that majority rule, pure and direct, was a will-o'-the-wisp, the pursuit of which could only end in calamity for justice, for tranquility, for prosperity, for liberty — the things they really cared about. The sense in which the Constitution is based on the consent of the governed is complex and structured. The authority, powers, and methods of John Marshall's judiciary were — and are — entirely appropriate to it. [pp. 67-68]

But hold the amens. As generous to modern understandings of constitutional adjudication as all this may seem, Fried also insists from the outset on his status as a bona fide revolutionary, leading the righteous battle on the field of legal theory. "In a real sense the Solicitor General is responsible for the government's legal theories, its legal philosophy. And legal philosophy was at the heart of the Reagan Revolution" (pp. 14-15). And there is nothing namby-pamby about his rhetorical swipes at the constitutional judiciary. His early salvos include characterizations of the pre-Reagan Supreme Court as "complicit in the aggrandizement of government [and] . . . a principal engine for redistributing wealth and shackling the energies and enterprise of the productive sector" (p. 17), as guilty of "a mistaken approach to judging . . . that confused and threatened the ideal of the rule of law" (p. 20), and as embracing, all in all, "a system of judging that had run badly off the rails" (p. 57).

Two of Fried's three revolutionary targets are abortion and affirmative action.[3] Taken together, they represent the deepest source of Fried's complaints about the pre-Reagan world of public law: *Roe v. Wade*[4] is cast as the worst symptom of a judiciary that has lost its bearings and perverted its role (pp. 20, 57, 75-88); while the pre-Reagan treatment of affirmative action inspires the charge that liberty has been sacrificed to a judicially inspired scheme of egalitarian social engineering (pp. 20, 89-90, 93-101, 118-22).

We already have enough of Fried's battle plan in front of us to appreciate the difficult campaign of justification he faces in his book. On two levels, his positions threaten to contradict themselves. He has forsaken naive originalism in favor of a sophisticated and robust understanding of constitutional adjudication, but he still undertakes to establish *Roe v. Wade* as the glaring symptom of a fundamentally misguided approach to judging. At the same time Fried levels this deep criticism of *Roe* and the pre-Reagan Court, he means to show that the other critical failing in public law is that government, by endorsing affirmative action, has usurped prerogatives that belong in the domain of private choice.

3. The third is separation of powers in general and the Independent Counsel controversy in particular. This issue does not engage Fried's harsh criticism of the judiciary.

4. 410 U.S. 113 (1973).

Were he able at once to embrace a defensible model of constitutional adjudication and yet defend his fierce indictment of pre-Reagan Supreme Court methodology, and were he able to justify his apparent unconcern for the liberty of women to secure abortions while passionately advancing the cause of economic liberty, Fried would have accomplished something of considerable interest and importance. He would have offered a serious, coherent defense of the modern conservative agenda, and thereby have enriched political discourse.

Unfortunately, Fried's memoir — breezy and literate as it is — falls badly short of this ambition.

II

The abortion controversy lies at the center of Fried's problems; it is the source of tension for both his methodological and substantive claims. At the behest of the Reagan administration, Fried twice asked the Supreme Court to overrule *Roe*.[5] He urged the Court then, and urges his readers now, to see *Roe* as the wrongheaded decision of a Court out of touch with its proper role in constitutional governance. But he accepts *Griswold v. Connecticut*,[6] which invalidated a law preventing married couples from buying or using contraceptives, as well within the paradigm of good judging (pp. 85-86).

At the heart of Fried's attempt to establish an analytical chasm between *Griswold* and *Roe* is a familiar argument: the Constitution is "silent" on the question of the legal and moral status of the fetus, neither insisting that the state protect fetal life as it would the life of a person nor forbidding it from so doing; accordingly, protection of the fetus takes place in an aconstitutional space where majority rule should prevail. Where state legislatures have voted to usurp a woman's choice whether to bear the fetus she carries to term or to have it aborted, they are entitled to the authority of their majoritarian status as exercised over the question of fetal protection (pp. 77-78).

Obviously, this tidy equation is missing a crucial term: the unwilling pregnant woman, forced by the state to bear the fetus for nine months, to endure the physical and emotional consequences of both pregnancy and delivery, and to face the impossible, inhuman choice between unwelcome parenthood and abandonment of an infant child. How exactly are we to understand the observation that the Constitution is silent on the legal or moral status of the fetus, in this context, where silence is invoked in response to the claim of the unwilling pregnant woman that she is being treated unjustly when the state requires her to carry the fetus to term?

5. Webster v. Reproductive Health Servs., 492 U.S. 490 (1989), *discussed at* pp. 85-88; Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), *discussed at* pp. 33-35.

6. 381 U.S. 479 (1965).

Fried appears to be saying that, absent explicit material in the text or context of the Constitution foreclosing the state from protecting fetal life as it would human life, majoritarian process must prevail, whatever the nature of the burden thereby imposed on women. So understood, Fried adopts precisely the originalist position that he took such pains to renounce earlier, the position that treats majority rule as the presumptive state of our governance, yielding only to unmistakable commands of the Constitution. In so doing, Fried ignores important analytical possibilities excluded only by an originalist dogma that he himself discredits.

He ignores, for example, the view — suggested by the much maligned opinion of the Court in *Roe* — that the constitutionally founded interests of women who suffer unwanted pregnancies should prevail over an interest of the state in protecting the fetus, given the absence of constitutional support for the state's characterization of the fetus as human life and the absence of any nonconstitutional legal tradition, or any social consensus, regarding the fetus as a person.[7]

Refuge in originalism's obeisance to majority rule is so baldly contradictory of Fried's purported beliefs about the Constitution as to encourage a more charitable reading. In this spirit, we might understand Fried's reference to the silence of the Constitution not as an argument in itself, but as a way of stating the conclusion to an analysis of the Constitution and our constitutional tradition — an analysis that takes account both of the great and disproportionate burden of unwanted pregnancies on women trying to chart lives for themselves, and of *Griswold v. Connecticut,* yet still finds fault with *Roe v. Wade.*

To the extent that Fried has any such argument to offer, it is captured in his oral argument before the Supreme Court in *Webster v. Reproductive Health Services.* Appearing on behalf of the United States, amicus curiae, Fried for the second time asked the Court to overrule *Roe.* Justices O'Connor and Kennedy pressed Fried to explain how the liberty interest the Court recognized in *Griswold* could suddenly collapse when abortion was at issue; Fried is sufficiently pleased with his response to reprint it at length:

> Justice O'Connor: Do you say there is no fundamental right to decide whether or not? . . . to procreate?
>
> *A:* I would hesitate to formulate the right in such abstract terms, and I think the Court prior to *Roe versus Wade* quite prudently also avoided such sweeping generalities. That was the wisdom of *Griswold.*
>
> Justice O'Connor: Do you think that the state has the right to, if in a future century we had a serious overpopulation problem, has a right to require women to have abortions after so many children?
>
> *A:* I surely do not. That would be quite a different matter.
>
> Justice O'Connor: What do you rest that on?

7. *See Roe,* 410 U.S. at 157-62.

> *A:* Because unlike abortion, which involves the purposeful termination of future life, that would involve not preventing an operation, but violently . . . laying hands on a woman and submitting her to an operation . . . .
>
> Justice O'Connor: And you would rest that on substantive due-process protection?
>
> *A:* Absolutely.
>
> Justice Kennedy: How do you define the liberty interest of the woman in that connection?
>
> *A:* The liberty interest against a seizure would be concerned. That is how the Court analyzed the matter in *Griswold.* That is how Justice Harlan analyzed the matter in *Poe v. Ullman* which is, in some sense, the root of this area of law. . . .
>
> Justice Kennedy: How would you define the . . . liberty interest . . . of a woman in an abortion case?
>
> *A:* I would define it in terms of the concrete impositions on the woman which so offended the Court in *Griswold* and which are not present in the *Roe* situation. [pp. 85-86; footnote omitted]

Remarkably, what Fried sees as distinguishing *Roe* from the natural reach of the liberty interest recognized in *Griswold* is the absence in *Roe* of the "concrete impositions" suffered by married couples in *Griswold.* Similarly, what he sees as distinguishing *Roe* from Justice O'Connor's compulsory abortion hypothetical is that compulsory abortion would entail the state "laying hands on a woman and submitting her to an operation." It is hard to imagine what Professor Fried could have in mind here. The idea that requiring a woman to endure a pregnancy followed by the medical procedure of childbirth — a procedure that may require serious surgery — is less a "concrete imposition" on her, less a "laying hands on" her, than requiring her to submit to an abortion, is simply wrong, at least in an age where the stork and cabbage leaf are unavailable as mechanisms of delivery.

Even more demanding of his readers' credulity is Fried's assertion that Connecticut's ban on the use of contraceptives by married couples in *Griswold* constituted a more opprobrious imposition on women than did Texas' restrictions on abortion in *Roe.* Fried at moments suggests that *Griswold* should be particularized to the state's prying into marital intimacy (pp. 76-77), but he quickly concedes that the principles of *Griswold* extend to Justice O'Connor's mandatory abortion hypothetical and to state attempts to outlaw homosexual conduct as well (pp. 82-84).

Fried simply has no basis consistent with his own premises for denying the reach of the liberty interest recognized in *Griswold* to a woman who suffers an unwanted pregnancy. To make sense of his position, he can only repair to the offsetting concern of a state that takes itself to be protecting the life of a person when it protects the life of a fetus. But that could only be the beginning of his argument, not the end. He would still have to explain how the Supreme Court could

sensibly recognize that a woman suffering an unwanted pregnancy had a *Griswold*-based liberty interest in abortion and yet concede to state governments the capacity to define for themselves in the selective context of abortion the weight of the competing interest in the protection of the fetus.[8]

So far we have taken at face value Fried's commitment to the proposition that he regards as central to an understanding of the Supreme Court's failure in *Roe v. Wade:* state legislatures have the constitutional license to equate fetal life with the life of the person, and abortion with the taking of an innocent person's life. Our observations have all spoken to the difficulty Fried has in justifying that position. If he is serious about leaving the untenable protocol of originalism behind, his claim from the silence of the Constitution has to be dismissed as a lapse of reason. If he means the reference to silence metaphorically, as a way of stating the conclusion to a process of reflection on the relevant constitutional materials, then he collides with *Griswold v. Connecticut,* which he himself lauds. But Fried's problems with abortion go still further. Not only is he unable to defend the idea that state legislatures have license to define abortion as murder; he is also unable to live with the natural consequences of that idea.

Having castigated the Supreme Court at length for its "infuriating" decision in *Roe* (p. 81), and having presented the curing of the egregious judicial abuses exemplified by *Roe* as the issue most dear to the Reagan revolutionaries whose banner he carried, Fried ends his discussion of abortion with a remarkable set of qualifications to his own theme:

> [H]aving one day abandoned *Roe,* the Court may reasonably distinguish between statutes forbidding abortions outright and statutes requiring a delay of a few days in which a woman may consider alternatives to abortion, which the clinic is obliged to tell her about; or between statutes regulating abortion services and statutes punishing women who undergo abortions. This last is a distinction that might have considerable practical importance with the greater availability of safe, simple, self-administered pharmaceuticals to induce early-term abortions. In fact, medical

8. Fried might resist this analytical structure, and argue that the *Griswold* liberty interest is similar in form to the liberty famously argued for by John Stuart Mill. For Mill, it was the absence of a certain sort of collective interest, the avoidance of harm to other persons, that made some collective restraints on behavior improper. In Mill's own words, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others." JOHN STUART MILL, *On Liberty, in* UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 73 (H.B. Acton ed., J.M. Dent & Sons 1972) (1859). Fried might understand *Griswold* in this way, and see the state's interest in protecting fetal life as the life of a person as voiding a claim from *Griswold* rather than offsetting it. But this view of things gives Fried no help. If anything, it puts more pressure still on the idea that a state legislature can justify its restraints on abortion by deeming the extinction of fetal life to be the equivalent of murder; on that account, a state, rather than the Supreme Court, decides whether *Griswold* applies. Moreover, this view of *Griswold* is at odds with Fried's response to Justice O'Connor, which concedes that *Griswold* would apply to mandated abortion even if it were imposed in the interest of preventing the harms of overpopulation.

discoveries might then make this whole constitutional episode moot. [p. 87]

Suddenly, nothing in Fried's position seems to hold. Women surely should be constitutionally entitled to obtain and use medicines or other safe devices to induce early-term abortions;[9] and statutes that broadly forbid abortions surely should not survive Supreme Court scrutiny. Fried makes his position seem more reasonable by acknowledging as much here. But neither of these propositions is consistent with his attack on *Roe,* which depends on the claim that state legislatures are entitled to treat fetuses as persons and abortion as the taking of an innocent person's life.[10] Were state legislatures able to declare the fetus a person, they would in turn be able to protect the fetus against abortifacients; had Fried persuaded the Supreme Court to adopt his view of state legislative authority, his qualifications would have been thereby undone.

III

When Fried turns to his second target, affirmative action, he leaves behind any thought that an absence of a clear constitutional mandate invites deference to legislative judgement. Fried concedes that ours is a "society that had practiced public and private apartheid" (p. 99), inflicting "centuries of deprivation" (p. 100) on black Americans. But he sees affirmative action — including Title VII doctrine, which in his view induces employers to adopt racial preferences — as angering whites, demoralizing blacks, and fostering "a bureaucratic-collectivist state" (p. 105). His passion, oddly suppressed when the matter at issue is the plight of women who suffer unwanted pregnancies, is fully engaged here: within seven pages he is moved on three occasions to characterize the "left-collectivism" (p. 101) of affirmative action as "sinister" (pp. 99, 100, 105).

The efficacy and wisdom of affirmative action programs is a matter on which well-meaning persons can disagree; we ought to welcome debate, even passionate and hyperbolic debate, when the stakes are so high and the issues so complex. But Fried means to argue that affirmative action programs are very often unconstitutional, not merely unwise. Even the most robust view of constitutional interpretation

9. The most prominent pharmaceutical option now available in Europe, but not the United States, is RU 486. RU 486, properly considered, does not induce abortions at all, or operate to the detriment of a fetus, since it acts to prevent implantation of the fertilized egg by suppressing the hormone progesterone. *See generally* Jane M. Cohen, *Comparison-Shopping in the Marketplace of Rights,* 98 YALE L.J. 1235, 1254-56 (1989).

Ethical controversy over the status of the fetus could be enlarged, of course, to include the fertilized egg prior to implantation; this can only place still greater strain on the idea that state legislatures are free to bless a prenatal entity with personhood.

10. For a similar critique of the contradictory nature of Fried's moderating premises, see Ronald Dworkin, *The Reagan Revolution and the Supreme Court,* N.Y. REV. BKS., July 18, 1991, at 23.

insists on something more than the invocation of the specter of "left-collectivism" to explain why governmental entities should be barred from the effort to redress the disgraceful consequences of slavery and discrimination.

Fried finds the basis of his constitutional attack in a principle that he proffers early on but never defends at length: "the basic right of every person to be considered as a distinct individual and not in terms of the groups to which the government says he belongs" (p. 90). Accordingly, government should never adopt a program that prefers or disprefers persons or enterprises on the ground of race. Even remedies for past wrongs are unconstitutional on this view, unless they return the individuals benefited or harmed by unlawful discrimination to the positions they would have occupied absent that discrimination.

Describing the Reagan administration's endorsement of this view as the basis of its campaign against affirmative action, Fried celebrates it as the policy of "color-blindness" and invokes the famous dissent of the first Justice Harlan in *Plessy v. Ferguson:* "[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[11] Fried is careful — though his readers could easily miss the implicit disclaimer — to appropriate Harlan's color-blind Constitution only as a "good slogan" (p. 101). He could not plausibly depend on Harlan for more: it surely does not follow from the unconstitutionality of a legally enforced caste system that race-conscious efforts to efface the residue of caste are unconstitutional.

It was precisely the effacement of the residue of caste, of course, that was at hazard when the Reagan administration advanced its version of the color-blind Constitution. In the name of "color-blindness," for example, Fried appeared for the United States in *City of Richmond v. Croson*[12] to argue successfully that it was unconstitutional for Richmond to set aside thirty percent of its construction contracts for minority-owned businesses. And in the name of that precept, Fried set out to "tame" (p. 121) the Supreme Court's 1971 decision in *Griggs v. Duke Power Co.*[13]

Griggs held that a facially neutral, benignly motivated employment practice that disproportionately excludes minorities from the workforce violates Title VII unless it is justified by a "business necessity." Fried's complaint about *Griggs* and cases that have followed its lead is indirect: he worries that employers whose work forces have a slender complement of persons of color will be moved by fears of Title VII liability voluntarily to create employment preferences aimed at

11. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *quoted at* p. 101.

12. 488 U.S. 469 (1989).

13. 401 U.S. 424 (1971).

bolstering their numbers (pp. 94-95). Fried looked for an opportunity to chip away at the *Griggs* line of cases and found it in the 1989 case *Wards Cove Packing Co. v. Atonio.*[14]

Wards Cove vividly illustrates how poorly suited limited antidiscrimination principles are to the task of undoing the entrenched consequences of racism. Characteristic of the industry of which they are a part — seasonal salmon canning in Alaska — the two enterprises challenged under Title VII in *Wards Cove* were vividly stratified along racial lines. The canneries staffed their assembly lines almost exclusively with Filipinos and Alaska Natives. The other jobs — better paid work ranging from dock labor and construction to carpentry, cooking, storekeeping, and bookkeeping — were predominately held by whites. The cannery line workers were housed in separate dormitories and fed in separate mess halls, facilities which, at least in the eyes of the four dissenting justices, were distinctly inferior.[15] The cannery line workers were hired through a union local or from nearby Native Alaskan villages. The noncannery jobs were not advertised or filled in any systematic or competitive way. There was no in-house training and no promotion from the cannery line to the noncannery jobs. The salmon gutting machine, unhappily, was known as the "iron chink" (p. 122). In a dissent joined by Justices Blackmun, Brennan, and Marshall, Justice Stevens was moved to characterize the employment regime as a "plantation economy."[16]

Fried sees it as "obvious that the Philippine workers were not the victims of discrimination" (p. 122). He is blind to the possibility that what he dismisses as the "nasty" but irrelevant details of a "racially segmented" work force (p. 122) are the unhappy product of a history of racial discrimination that we could and should work to unmake, and that the workers on the cannery line are indeed the victims of our history. It was a limited vision much like Fried's that drove the five-Justice majority in *Wards Cove* to render the industrywide practices there virtually invulnerable to attack under Title VII and that, in turn, prompted Justice Blackmun, writing in dissent, to wonder "whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites — is a problem in our society, or even remembers that it ever was."[17]

The Reagan approach championed by Fried is not color-blind, at least in the sense intended by the elder Justice Harlan; it is history-blind. No one familiar with even the rough outlines of American history could deny that profound injustices have been systematically vis-

14. 490 U.S. 642 (1989).

15. *See* 490 U.S. at 662 (Blackmun, J., dissenting); 490 U.S. at 663 n.4 (Stevens, J., dissenting).

16. 490 U.S. at 664 n.4 (Stevens, J., dissenting).

17. 490 U.S. at 662 (Blackmun, J., dissenting).

ited on a variety of racial groups during the modern settlement, domestication, and industrialization of our nation; and no one who lives in our world and accepts the evidence of his or her senses could believe that we have purged ourselves of the consequences of this sorry history. Disadvantage, distrust, and distaste have been passed from generation to generation, leaving our society sharply and unjustly divided along the fault lines of race.

For decades, the question how best to proceed in the face of this blunt reality has preoccupied many who are committed to change, including responsible governmental officials. But if persons have the right never to be made worse off by government on account of their race than they would have been absent unlawful discrimination, then redress for most of the consequences of our history of discrimination is barred. History-blindness countenances reparations only for the specific, identifiable victims of discrimination themselves and at the expense of the specific, identifiable beneficiaries; accordingly, governmental entities violate the Constitution if they try to undo any but the most proximate, traceable artifacts of their own discrimination. Having failed for much of our history to protect against what Fried himself characterizes as public and private apartheid, the Constitution now is made vigilant against attempts to undo the consequences of that apartheid that reach beyond local and immediate wrongdoing.

The appeal of the history-blind Constitution is far from self-evident. The ambition of dismantling the consequences of race discrimination shares no moral ground with that of maintaining white supremacy in a segregated society: while the latter is despicable and unconstitutional, the former is one of the most distinguished ends toward which governmental authority can be directed. Accordingly, nothing in the esteemed tradition we associate with *Brown v. Board of Education*[18] can be taken as supportive of history-blindness. That view must depend for its justification on a different and problematic claim: that persons disfavored on account of their race in the service of dismantling the consequences of prior discrimination are thereby done an injustice, unless they were themselves direct beneficiaries of prior racial discrimination.

But when government works to achieve legitimate ends, it often must establish criteria in furtherance of those ends, criteria that prefer some and disfavor others.[19] Unless those criteria are independently ruled out, we judge their propriety in terms of their connection to the ends they serve. A history-blind view of affirmative action depends on

18. 347 U.S. 483 (1954).

19. A state academic institution, for example, might favor some applicants because of: (a) their geographic origins or intention to locate professionally in poorly serviced areas; (b) their demonstrated commitments to work in the public interest as they perceive it; or (c) their sustained development in other endeavors such as musical performance or athletics.

the unsupported view that racial criteria are inherently unjust, no matter what end they serve.

Fried offers no real defense of this, either as a matter of political justice or constitutional law; indeed, as the burden of our discussion suggests, it is far from apparent that a defense can be found. And remarkably, Fried's commitment to history-blindness, upon which his constitutional attack on affirmative action depends, is every bit as unstable as is his commitment to legislative authority over the status of the fetus, upon which his attack on *Roe* depends.

Fried takes pains to distinguish himself from the many other Reagan warriors who took a stricter line with regard to the precepts of color-blindness. Fried, for example, argues that communities that have discriminatorily awarded municipal construction contracts in the past, or that can point to "specific and identifiable" past discrimination within the local construction industry, can constitutionally favor minority-owned construction companies with set-aside requirements of the sort at issue in *Croson* (pp. 127-28). This, of course, contradicts the view that it is unconstitutional to disfavor anyone by virtue of their race except to the extent that they were personally the beneficiaries of past discrimination. That a community itself engaged in past discrimination, or that a community is addressing "specific and identifiable" discrimination by others, does not warrant that only the people harmed by past discrimination will be aided now or that only people benefited by past discrimination will be harmed now.

IV

One is tempted to be tolerant of this muddled moderation. Coherence aside, it seems more savory than rigid adherence to the principles of history-blindness and state legislative authority over fetal status; neither of these principles, after all, is defensible. In an earlier era, there was a joke attributed to Eastern Europe in which communist hell was preferred to capitalist hell because of its great inefficiency. In a similar vein, a flawed acolyte of modern conservatism may look better than a true believer.

Indeed, there is a reason for being more sympathetic still. A plausible understanding of the gaps in reason within his memoir is that Professor Fried, at least in retrospect, is drawn to human values suppressed by the revolutionary manifesto of Reagan conservatism — that he ultimately refuses to be bound by the logic of a failed moral geometry.

But there are at least three important reasons to emphasize the structural flaws in Fried's case. The first, of less global consequence than the others, concerns a leitmotif of Brennan-bashing. At a number of points, Fried faults Justice Brennan, and always for the same delict: surreptitiously advancing his political agenda at the price

of clear reason.[20] It is irksome to encounter these repeated and derogatory references to a luminary jurist in a work so vulnerable to precisely the same charge.

The second reason involves the connection in normative discourse between coherence and reason. Fried aims not merely to provide a sympathetic account of his experiences as Solicitor General in the Reagan administration, but to persuade us of the rectitude of the broad premises on which the conservative revolution in constitutional law is proceeding. The inconsistency of those premises with each other and with plausible social outcomes is one of the strongest reasons for rejecting the premises themselves.

The third reason is the problem of sugar-coating. By offering a version of the conservative constitutional revolution that denies its natural reach, Fried softens the political unacceptability of the views he sponsors. But he twice asked the Supreme Court to *overrule Roe v. Wade,* not to moderate its trimester-based protection of women suffering unwanted pregnancies. Had he succeeded, it is far from likely that he would have returned to the Court and urged it to recognize those qualified rights he now says women should have; and it is less likely still that the Court, having accepted his basic position, would have been moved to extend rights so obviously inconsistent with that position.

We can only wonder how Fried himself would choose between his conservative principles and his more appealing instincts were he a judge.

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20. *See, e.g.,* pp. 77, 92-93, 115-16.