Vanderbilt Law Review

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

Article 11

3-1997

Formal Neutrality in the Warren and Rehnquist Courts: Illusions of Similarity

Rebecca L. Brown

Formal Neutrality in the Warren and Rehnquist Courts: Illusions of Similarity

Rebecca L. Brown[*]

I read recently that if one compares the genetic structure of humans to that of dogs, one finds that ninety-six percent of the DNA in the two species is identical. That is a lot of common ground. Yet it may not be enough to draw meaningful conclusions about the sameness of the two creatures. Without suggesting that either of the two Courts discussed in her Article is a "dog," I do think it is fair to say that Professor Sherry has perhaps underestimated the relative importance of the divergent four percent.

Professor Sherry argues that in the defining areas of racial equality and freedom of speech, the Warren Court and the Rehnquist Court have adhered to identical views about the meaning of the Constitution. They have developed and consistently applied the same informing principle governing a state's obligation with regard to treatment of the individual. That commonly recognized principle is formal neutrality.[1] By requiring a state to remain neutral as between races and viewpoints, both Courts have embraced a common philosophy that renders them equally liberal or equally conservative, Professor Sherry contends. It is wrong, therefore, for the academy to revere the Warren Court as liberal and condemn the Rehnquist Court as conservative, in light of their equal recognition of the appropriate equality principle. She goes on to explain why the legal academy insists on these unfair characterizations despite what she calls the "obvious" identity between the two bodies of case law.[2]

In this Comment, I do not have occasion to consider the question of why the academy might persist in perpetuating an illusory distinction between the Warren and Rehnquist Courts. Instead, I

---

* Professor of Law, Vanderbilt University. I am grateful to Barry Friedman, Stephen Gardbaum, John Goldberg, and Bob Rasmussen for their help.

1. Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 Vand. L. Rev. 459, 477 (1997).

2. Id. at 475-76.

intend to show that it is the asserted identity, rather than dichotomy, between the two Courts that is illusory. The claimed similarity between the jurisprudence of the Warren Court and that of the current Court can be drawn only at the expense of giving full recognition to the deep ideological commitments of both Courts. The characterization of both Courts as endorsing formal neutrality overlooks the powerful philosophical leanings of both Courts and their respective places in prevailing political theory. Once considered in context, the decisions of the two Courts make clear that a theory of identity between them shares a common flaw with the canine/human equation: even if superficially plausible, it utterly fails to account for the soul.

Professor Sherry has identified neutrality—defined to mean a state's obligation to treat all races with equal solicitude and all views with equal tolerance—as the touchstone of a liberal, enlightened society.[3] But the role of state neutrality in liberal political theory is itself a contestable and complex question. By turning to a more detailed examination of neutrality as a liberal precept, I hope to show that Professor Sherry has confounded two separate schools of liberal thought and has thus reached some inappropriate conclusions about the two Courts' places in these schools of thought. This analysis leads me to conclude that the two Courts have less in common than Professor Sherry suggests and in fact hold to such different views of racial justice as to warrant fully the dichotomous labels they have received.

I.

To identify a decisionmaker as "liberal" is not necessarily to describe that person's political views with any degree of precision. Just as the term "conservative" can carry at least four different meanings,[4] the term "liberal" as applied to a judge or group of judges also denotes many possible types of philosophical commitments. The truth of what liberalism requires is itself the topic of heated and longstanding debate not only among legal academics but also among political theorists and philosophers. In this Comment, I can only touch on the broadest themes that characterize this debate.

---

3. Id. at 477-79.

4. See John C.P. Goldberg, *On the Merits: A Response to Professor Sherry*, 50 Vand. L. Rev. 537, 540 (1997).

Two major strands of liberal political theory provide fodder for much theoretical discussion today.[5] One strain of liberalism is termed "political liberalism." This school is committed to ensuring that a state does not privilege any of the competing moral ideals of its citizens about the meaning of the good life; its core value is neutrality.[6] In terms of justifying its actions, a state must remain neutral as between all points of view and as between possible substantive outcomes. For the political liberal, no moral value—even that of tolerance of diverse moral views—can be promoted or endorsed by the state. This conviction rests on the premise that because there is no single principle or ideal that can command universal belief, justice requires that none of them be privileged by the basic political institutions of society.[7] Thus, no controversial ideal of the good life will be called upon to justify the fundamental political principles under which all must live.[8] The label "political" granted this strain of liberalism refers to the instinct that the institutions of government—society's *political* institutions—have no place choosing among competing visions of the good life for their citizens. To the political liberal, the government may not adopt or endorse visions of society that privilege one group over another, and even in the interest of some perceived societal good it may not enact laws that give preference to particular racial groups. Neutrality is a required posture for government, controlling both the ends of government and the means it chooses to achieve them.

The contrasting, and more traditional, form of liberalism is known as "comprehensive liberalism." Its name, "comprehensive," refers to the fact that it envisions liberalism as incorporating a particular conception of the good that is not limited to the political sphere.[9] Its central objective is to identify how a state can facilitate the moral lives of its citizens and thus contribute to their fulfillment as human beings.[10] The state's proper role is not merely to leave citizens as it finds them to work out their lives for themselves.

---

5. The summary that constitutes Part I draws heavily on an excellent exposition of the philosophical schools and the implications of their differences in Stephen A. Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 Stan. L. Rev. 385 (1996). I have benefited from Professor Gardbaum's lucid and extremely helpful bridge between political theory and law.

6. Joseph Raz, *The Morality of Freedom* 110 (Clarendon Press, 1986).

7. Charles E. Larmore, *Patterns of Moral Complexity* 43-44 (Cambridge U., 1987).

8. Id. at 69.

9. See Gardbaum, 48 Stan. L. Rev. at 386 n.3 (cited in note 5).

10. See generally Stephen A. Gardbaum, *Why the Liberal State Can Promote Moral Ideals After All*, 104 Harv. L. Rev. 1350 (1991).

Instead, the state has an affirmative obligation to promote human flourishing, which inevitably involves the state in endorsing some substantive values.

According to many comprehensive liberals, the particular moral ideal that is constitutive of liberalism is individual autonomy.[11] The idea is that by giving people real choices, allowing them to be part-authors of the text that is their lives, the state does the best it can to promote human flourishing, which is its highest calling. Comprehensive liberals are generally not concerned with what choices people actually make, as long as the choices themselves are uncoerced by design and circumstance. In privileging this ideal of autonomy—an unapologetically substantive value—the state will often find it necessary to remain neutral. This need arises not because neutrality is itself an objective, but because in many cases state neutrality promotes autonomy by increasing freedom of choice for citizens. For example, if the state stays out of all religious discourse, citizens will generally have an unconstrained choice about their own religious preferences. This approach would satisfy political and comprehensive liberals alike.

For comprehensive liberals, however, it may sometimes become necessary for the state to promote certain ways of life rather than others, always in the interest of autonomy as the greatest moral good. For example, if one particularly intolerant religion became so dominant in the private sector that people of other religions were subjected to discrimination in employment, housing, and private social institutions, the comprehensive liberal might determine that the state had an obligation to use government vehicles to open the doors of opportunity for the minority religious groups.[12] For this reason, political and comprehensive liberalism are not merely two means to the same end of state neutrality. They seek different ends: the maintenance of strict political neutrality in the one case and the maximization of autonomy in the other.

The adoption of autonomy as the goal of the state flows from the origins of Western liberalism itself. Liberalism rejected the once-dominant world view that assigned individuals, by birth, to roles in life that placed them permanently in some immutable position in a hierarchical political society. The liberal innovation saw political society as artificially constructed rather than natural, and therefore insisted that it be justified. It posited a premise of natural equality

11. See Raz, *The Morality Of Freedom* at 369 (cited in note 6).
12. This example ignores any influence of the First Amendment.

rather than natural hierarchy and viewed individuals as having some control over their own roles in life. The meaningful accommodation of autonomy and individual choice is a logical outgrowth of this rejection of the hierarchical order and new emphasis on freedom.

The problem, and the area in which comprehensive liberals and political liberals must diverge, arises when it becomes apparent that merely remaining neutral among competing ways of life will not ensure the attainment of individual autonomy for some citizens. When faced with this dilemma, the political liberal must sacrifice autonomy for the sake of neutrality; the comprehensive liberal will, if necessary, sacrifice neutrality for the sake of autonomy.[13] State coercion of individual choice would offend both liberal schools by undermining both autonomy and neutrality. But the comprehensive liberal goes further than simply condemning coercion. The comprehensive liberal claims that just as the state has the unique ability and duty to protect life, liberty, and property against dangers posed by other individuals, so too it may have an obligation to counter constraints on autonomy generated by private elements of society. It must guarantee individuals an adequate range of genuine options and the means to choose among them. Economic, educational, and informational barriers to meaningful choice may require positive state action to ensure the protection of autonomy. Such action violates the political-liberal value of state neutrality.

II.

This core distinction between the two schools of liberal thought, I suggest, is the key to the comparison between the Warren and Rehnquist Courts. I would like to look briefly at some of the Warren Court cases that Professor Sherry offers as examples of a judicial commitment to enforcing state neutrality and suggest a different way of reading them.

First is *Brown v. Board of Education*.[14] There, it is true, the Court declared, as Professor Sherry quoted, that education "must be

13. This is why Professor Sherry's suggestion that she is concerned only with means, Sherry, 50 Vand. L. Rev. at 479-80 (cited in note 1), misses the point I am making here. Adherents of the autonomy-promoting school of liberal thought (a group that I argue includes the members of the Warren Court) would not agree with Professor Sherry that the state's quest to promote individual autonomy should be limited by principles of colorblindness.

14. 347 U.S. 483 (1954).

made available to all on equal terms."[15] But that statement comes only at the conclusion of a paragraph that suggests quite a more complex motivation:

> Today, education is perhaps the most important function of state and local governments.... It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening a child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[16]

The Court's explanation of its reasoning could have been lifted from any one of the many liberal writings, starting with Adam Smith, that discuss the vital role of public education in enhancing individual autonomy.[17] Thus, while the Court's ultimate holding—invalidating racial segregation in public schools—could be read as evidence of a commitment to state neutrality between the races, its extensive discussion of the nature of the benefit denied (education) reinforces the view that this opinion was motivated by the autonomy-promoting strand of liberal thought at least as much as by the neutrality strand. The Court was clearly concerned that the segregating state was denying a group of its citizens the means to make the fundamental life choices that form the core of personal autonomy and fulfillment. Undeniably, the Court's concern about the disadvantages that accompany an inferior education was certainly heightened by the fact that a long-oppressed racial group bore the burden of the system. But the case does not suggest that the only or even the dominant principle at work was an aspiration for colorblindness as a means or an end of state action.[18]

Similarly in *Loving v. Virginia*,[19] the interracial marriage case, it is hard to see how the Court's decision invalidating the state ban can be understood to endorse Professor Sherry's view of neutrality. Under her characterization, the neutrality principle means that "the

---

15. Id. at 493.

16. Id.

17. See Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* 13-23 (U. of Chicago, 1995). See also Gardhaum, 48 Stan. L. Rev. at 402-03 n.64 (cited in note 5).

18. To the contrary, the Court expressed concern that segregation "generates a feeling of inferiority as to [blacks'] status in the community." 347 U.S. at 494.

19. 388 U.S. 1 (1967).

standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by the particular classification."[20] That is, the state must treat people of one race the same as those of another, irrespective of other factors. In *Loving*, the statute made it equally criminal for any member of one race to marry someone of another race. Before the Court, the state argued that this represented exactly the kind of evenhanded treatment that Justice O'Connor's later definition, adopted by Professor Sherry, appears to envision—equal burdens on all races.[21] Indeed, because of the nature of this particular offense (it takes two to miscegenate), any violation by a member of one race would necessarily be accompanied by an equal violation by a member of another, and both offenders would be equally susceptible to punishment under the terms of the statute.

But the Court did not for a moment appear to consider that racial evenhandedness sufficient to save a measure so deeply offensive to individual choice in a matter of such acute personal importance. It seems to me that a Court committed only to Professor Sherry's principle of racial neutrality would be hard pressed to strike down the miscegenation statute in *Loving*. Far from supporting the neutrality principle, the *Loving* case suggests quite persuasively that something other than an insistence on state neutrality is at work in the analysis.[22] There are of course snippets of language in the Court's opinion decrying "arbitrary and invidious discrimination."[23] But the Court's analysis of the role of race—why this statute *is* invidious discrimination—is quite unresponsive to the claim of evenhandedness. The clearest statement of the Court's reasoning is perhaps that "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free

---

20. Sherry, 50 Vand. L. Rev. at 477 (cited in note 1) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)). See also *Loving*, 388 U.S. at 8.

21. *Loving*, 388 U.S. at 8.

22. Professor Sherry does not suggest, but perhaps it could be argued, that the failure of neutrality in the statute at issue in *Loving* lay in the state's insistence that *individuals* treat the races differently: each private person was required, in essence, to discriminate on the basis of race in the selection of a spouse. Still, however, such an interpretation would suggest not that the state had run afoul of the formal neutrality principle, but rather that the societal ideal of colorblindness as a way of life had been compromised. This would offend neutrality only if one understood formal neutrality to promote an end state of societal colorblindness as opposed to calling for colorblind legislative means of getting there. For reasons discussed by Professor Goldberg, 50 Vand. L. Rev. at 552 (cited in noto 4), I do not think that understanding of formal neutrality (which is not really formal at all) is the one Professor Sherry adopts. Rather, I believe Professor Sherry intends formal neutrality to indicate evenhandedness by the state in its legislation. That is also the sense in which I am using the term.

23. *Loving*, 388 U.S. at 10.

men."[24] That, of course, is a statement of commitment to state-protected autonomy. Thus, a highly plausible interpretation of the *Loving* case is that the Court was unwilling to legitimate a measure so grossly antagonistic to the pursuit of individual autonomy.

Other Warren Court decisions perhaps demonstrate even more clearly its commitment to the values of comprehensive liberalism. *Wisconsin v. Yoder*[25] exemplifies the type of case that would divide the comprehensive liberal from the political liberal. *Yoder* involved a mandatory school attendance law in the state of Wisconsin. There is nothing non-neutral about this requirement; it provides, simply, that every child of a specified age must go to school. In our society, mandatory schooling is generally not a contested value. I believe that a political liberal would uphold such a law as applicable equally to all, neither facially nor designedly discriminatory with regard to any group or belief system. But the Amish plaintiffs in *Yoder* claimed that exposing their children to the worldly values that they would encounter in public high schools would threaten their commitment to "wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from . . . contemporary worldly society."[26] The Court indicated that for people of the Amish faith going to school would be a violation of a religious tenet and therefore a transgression of the First Amendment.[27] The case is not known only for its contribution to free exercise jurisprudence, however, because much of the thrust of the facts and of the Court's analysis lay elsewhere.

What concerned the Court about the statute in *Yoder* was that the state was interfering with the independent judgment of the Amish students and their parents in making fundamental life choices.[28] That is why the decision is routinely included as one of the cases

---

24. Id. at 12.
25. 406 U.S. 205 (1972).
26. Id. at 211.
27. Id. at 234-35.
28. Id. at 218. ("The conclusion is inescapable that secondary schooling . . . expose[s] Amish children to worldly influences in terms of attitudes, goals and values contrary to beliefs, and . . . substantially interfer[es] with the religious development of the Amish child and his integration into the way of life of the Amish faith community."). While not strictly still the "Warren" Court, since Chief Justice Earl Warren had retired by the time the case was decided, *Yoder* can still be considered a product of the same philosophical commitments. Furthermore, the majority opinion was joined by all of the members of the Warren Court except Justice Douglas. Justice Douglas dissented in part on a ground suggesting that he felt the Court had not given *enough* deference to the importance of autonomy. His criticism was that the Court had taken account of the interests of the state and the Amish parents, but had not adequately considered the perhaps independent interests of the Amish children in making their own life choices. Id. at 241 (Douglas, J., dissenting in part).

antecedent to the explicit recognition of a constitutional zone of "privacy." The Warren Court did much to find a constitutional home for the concept of privacy, with its decisions such as *Griswold v. Connecticut*,[29] *Eisenstadt v. Baird*,[30] and of course, *Roe v. Wade*.[31] A better word than "privacy" for the interest at stake in this line of cases might be "autonomy."

Moreover, the Warren Court invented the notion of deriving a fundamental rights strand from the Equal Protection Clause. Those fundamental rights that it identified as deserving of special judicial protection correspond quite closely with many of the personal choices in areas of important individual control that comprehensive liberalism protects: the right to travel, that is, to choose where one lives;[32] the right to equal access to the ballot;[33] and the right to access to the judicial process.[34] These are all important aspects of the overall concept of autonomy, and they were all recognized by the Warren Court as deserving of special protection under the Equal Protection Clause.[35] This protection is not neutral as between values; it singles out specific values that the state must respect because of their particular role in the life of a citizen in a democratic society. And with respect to means, the state must ensure that it does not

---

29. 381 U.S. 479 (1965) (invalidating a state law criminalizing the use of contraceptives).

30. 405 U.S. 438 (1972) (invalidating a state law criminalizing distribution of contraceptives to unmarried people).

31. 410 U.S. 113 (1973) (invalidating a state law criminalizing abortion).

32. See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (striking down state waiting period requirements designed to impede interstate movement).

33. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966) (declaring Virginia's poll tax unconstitutional).

34. See *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding that an Illinois law effectively denying prisoners access to trial transcripts violates the Equal Protection Clause of the Constitution).

35. Eventually, the Supreme Court called a halt to the identification of fundamental rights in the Fourteenth Amendment. By the time the Court explicitly addressed the question of education, which one would expect an autonomy-supporting court to recognize as a fundamental right, its composition had changed so substantially that it can no longer be meaningfully called the Warren Court. In *San Antonio Independent School Distriet v. Rodriguez*, 411 U.S. 1 (1973), a majority of five justices concluded that education is not a fundamental right. The majority comprised Justices Powell, Burger, Stewart, Blackmun, and Rehnquist. Justices Marshall, Brennan, Douglas, and White dissented by reason of the importance of education to the good life—the type of autonomy-driven analysis such as one would expect from the authors of *Brown*. See notes 14-18 and accompanying text. For some purposes it may be useful to say that the Warren Court lasted through the mid-1970s. For example, I agree with Professor Sherry that *Roe v. Wade* should be so understood. For purposes of characterizing *Rodriguez*, however, it does not make sense to attribute Warren Court motivations to that group of Nixon appointees plus Justice Stewart, with the staunch Warren Court members in dissent on the very point at issue, the importance of autonomy.

differentiate among citizens with respect to fundamental rights because of their tremendous importance to all.

If anyone familiar with the literature were to offer an impressionistic assessment of the Warren Court's jurisprudence, it is almost unthinkable that such a person would suggest "state neutrality" as a driving aspiration of that Court. Instead, I would venture to guess that the Court's firm call for racial justice, coupled with its development of the new constitutional recognition of rights to privacy and fundamental interests, would lead such a Court-watcher to posit that the soul of the Warren Court lay in its commitment to the value of government accommodation of the individual.

The Rehnquist Court decisions in the same areas of law, by contrast, display marked hostility to any state accommodation of individual needs or interests. They manifest great fear that any controversial societal ideal, including the ideal of individual autonomy, should become the established orthodoxy of the state. This is reminiscent of the posture of political liberalism. Professor Sherry, I think, accurately describes the Rehnquist Court cases in the areas of affirmative action and hate speech as requiring the state to adopt a strict position of formal neutrality with regard to all political values.[36] This credo requires the state to abandon accommodation of idiosyncratic, that is, non-majority, beliefs or considerations. In such unmitigated government generality, the argument goes, lies the path to greatest freedom from state-imposed orthodoxy. This is a radically different commitment from that of the Warren Court.

The stark contrast can be seen by comparing *Wisconsin v. Yoder*, the Warren Court compulsory education case, with *Employment Division, Department of Human Resources of Oregon v. Smith*,[37] a 1990 decision holding that a state may constitutionally enforce its general ban on drugs against a person who smokes peyote as a part of his Native American religion.[38] In an opinion by Justice Scalia, the *Smith* Court explained that because the state did not *intend* to restrict religious freedom, it could constitutionally penalize the religious conduct at issue as an incident to the general policy of drug prohibition.[39] Thus, the Rehnquist Court opted for a position of state neutrality with respect to different life choices. All persons were prohibited from ingesting peyote, and thus the state had no further obligation. The *Yoder* Court, in contrast, had found that even though

36. Sherry, 50 Vand. L. Rev. at 467, 475 (cited in note 1).
37. 494 U.S. 872 (1990).
38. Id. at 890.
39. Id. at 878.

the state had had no *intent* to disadvantage Amish children with its truancy law, it had an affirmative duty to accommodate their peculiar religious demands by creating an exception to an otherwise general law.[40] The divergent results clearly illustrate the difference in the two Courts' philosophical commitments regarding a state's obligation to the individual.

The evidence is strong that the Warren Court adhered quite consistently to the comprehensive-liberal ideal that assigns the state the task of promoting individual fulfillment. The manifestations of this credo at times appear to be decisions of the political liberal, in cases in which the two philosophies overlap. I think Professor Sherry has mistakenly looked at these cases, in which both schools would agree on the outcome, and has assumed that the political-liberal, as opposed to the comprehensive-liberal, reasoning gave rise to them. As a result, when she extrapolates to determine how the Warren Court might have decided cases involving issues on which the two schools would diverge, she predicts the wrong outcomes. Thus, for example, Professor Sherry assumes that the rationale of *Brown* would give rise to *Adarand Constructors, Inc. v. Pena*,[41] finding the principle of racial neutrality to underlie both decisions. If, however, one understands *Brown* as a case about protecting an historically subordinate group from being denied access to the means to an autonomous life in society, then the result in *Adarand* (striking down minority preferences in government contracting) does not follow at all. Indeed, one might wonder if, for the Warren Court, the preferences at issue in *Adarand* might not be seen simply as a further step along a continuum toward the goal of achieving autonomous lives for citizens historically and currently denied the means to flourish. For the Warren Court, neutrality was a means; for the Rehnquist Court, neutrality is an end. For the Warren Court, neutrality was acceptable under some circumstances; for the Rehnquist Court, neutrality is essential always. Professor Sherry has invited us to look back at the Warren Court's decisions through the lens of Rehnquist Court philosophy. What we find by doing so misses the soul that animated the earlier Court.

Although we have no actual indications of what the Warren Court would have done with regard to affirmative action, it is possible to extrapolate from its general philosophical position. As comprehen-

---

40. See notes 25-28 and accompanying text.
41. 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).

sive liberals rather than political liberals, the members of the Warren Court would have had a powerful inclination to uphold affirmative action. The state's duty to protect and endorse the value of individual autonomy leads directly to an obligation on the state to lessen barriers that may exist to the exercise of meaningful choice by its citizens. The suggestion that all citizens alike may choose to go to college, for example, rings hollow to the comprehensive liberal in the face of evidence that entire groups will never attend college because of economic, cultural, and circumstantial impediments to matriculation. This brief Comment is not the place to make the complete argument in favor of affirmative action from the perspective of the comprehensive liberal, but I think the very definition of that school of thought directly gives rise to the case that could be made. Thus, it is a mistake to believe that the occasional bows to neutrality in the Warren Court's jurisprudence suggest anything like the type of severe restriction that the Rehnquist Court has imposed on state attempts to achieve racial justice.

The other issue that Professor Sherry raises is hate speech. This presents a very difficult legal question, especially for liberals of any stripe, and I am not entirely comfortable claiming to know what the Warren Court would have done if it had faced the constitutionality of a law restricting speech on the basis of its racist content. For me, however, it is a bit too glib to claim that just because that Court prohibited the suppression of the "Fuck the Draft" message in *Cohen v. California*[42] it would also necessarily have prohibited the suppression of hate speech. Professor Sherry notes that the Court in *Cohen* stated that "one man's vulgarity is another man's lyric."[43] But in my view, the mere vulgarity at issue in *Cohen* should not necessarily be equated with the speech at issue in more recent hate speech cases involving the personal debasement of intimidation and condemnation on the basis of race.[44] The two types of "offense" that one might take

---

42. 403 U.S. 15 (1971).

43. Sherry, 50 Vand. L. Rev. at 470 (cited in note 1) (quoting *Cohen*, 403 U.S. at 24-25 (1971)).

44. See, for example, *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 380 (1992) (striking down an ordinance outlawing speech that caused "anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender"). In *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the Warren Court did consider a state effort to suppress the racist speech expressed at a Ku Klux Klan rally. The case does not provide insight into the question of the Court's attitude toward "hate speech" as that term has been used in the 1990s, however, because the restriction at issue did not seek to protect autonomy-based values. Rather, the statute at issue outlawed the advocacy of "the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political

are fundamentally different from the perspective of the comprehensive-liberal commitment to personal autonomy. The sight of a vulgar word that may offend societal etiquette is not a threat to the essence of any individual or to the security of one's place in society. But being called worthless as a human being because of a personal characteristic over which one has no control has a far more insidious effect in negating the very value that the comprehensive-liberal state seeks to promote—human flourishing through self-fulfillment.

I offer a skeletal argument on behalf of those who might guess that the Warren Court would have tolerated the suppression of hate speech. As I have discussed above,[45] comprehensive liberalism holds that the state has a duty to counter constraints on autonomy, even if generated by private elements of society. It must promote the goal of individual choice without endorsing a particular point of view on the topic in question. In the area of speech, the value of autonomy has often been discussed only from the perspective of the autonomy of speakers, a perspective that leads to prohibition of most forms of regulation. But because an individual citizen's capacity for autonomy in society is as much affected by the range of opinions to which she is exposed as it is by what she may herself say, some suggest that the autonomy analysis ought to focus more on the autonomy of *hearers* as distinct from that of speakers.[46] Individuals develop the capacity to make meaningful and informed choices about the important issues in their lives in part by being exposed to reasoned argument. Thus, speech that does not invoke or invite reason but instead by denigration tends to corrupt the development of a "public culture" within which the nature and quality of opportunities in society can be reasonably determined,[47] may well be seen as the type of impediment to autonomy that the state has the right and the duty to protect against.

Of course, it is possible that the Warren Court would have gone the other way, striking down such hate speech regulations as impermissible, content-based restrictions. One could imagine an argument, still consistent with the Warren Court's comprehensive-

---

reform." Id. at 444-45. Thus, the issue was neither framed, nor probably even conceived of, as the validity of a state's effort to protect autonomy.

45. See Part I.

46. See Stephen A. Gardbaum, *Broadcasting, Democracy, and the Market*, 82 Geo. L. J. 373, 380-82 (1993).

47. See Joseph Raz, *Liberalism, Skepticism, and Democracy*, 74 Iowa L. Rev. 761, 783 (1989) (identifying the importance of the environment in evaluating autonomy).

liberal leanings, to the effect that the autonomy of all speakers and hearers of speech is enhanced by unconstrained discussion of all kinds. But my goal is simply to suggest that that result is far from "obvious." Indeed, if one engages in a fair analysis of actual indications of the Court's political theory, one might well find that the extrapolation points in the opposite direction.

III.

It seems to me that Professor Sherry's paper falls into a trap that has also captured the Rehnquist Court itself. That trap is the overly abstract and formal interpretation of prior cases. The only way for a legal scholar to accept the facially bizarre notion that the Warren and Rehnquist Courts share the same view of racial justice is to pluck holdings, sentences, or paragraphs from their contexts and assign them new meaning. Only in such a way can one say that *Brown* should now be understood to proscribe all race-based distinctions. I am heartened by the sociological phenomenon that Professor Sherry describes in her Article: that constitutional scholars do not readily see her suggested equation between the two Courts.[48] What that tells me is that most of us do not favor such formalistic, acontextual readings of prior decisions, and perhaps we expect our judges to do a better job of giving meaningful interpretation to the texts before them as well.

It is especially important to look at meaning and context when examining claims to neutrality. Neutrality is a concept that is defined, at least to some degree, by what it displaces. For the Warren Court, state neutrality in race cases was a step away from official oppression intentionally designed to harm and subordinate people of color. As between those two choices, neutrality was clearly the alternative more likely to advance the state toward racial justice—but to the Warren Court it was always racial justice, and not neutrality, that was the end. Neutrality, as opposed to state-imposed segregation, was simply a means to get to that end.

In contrast, the state neutrality that the Rehnquist Court has mandated is an alternative not to intentional harm of an entire race, but to efforts to increase the meaningful choices of racial minorities. Although the characteristic of race neutrality may be identified here, it cannot be understood as the same principle that the Warren Court

48. Sherry, 50 Vand. L. Rev. at 459, 476 (cited in note 1).

employed. For the Rehnquist Court, neutrality is itself an end—an absolute limitation on state action—rather than a means to achieve racial justice. Indeed, the Court has effectively told us that racial *in*justices are a cost we must bear for the sake of state neutrality.[49] If there is any connection for this Court between the principle of race neutrality and that of racial justice, it is simply a definitional one such as that offered by Professor Sherry: "fairness presumptively requires racial neutrality."[50] For the Rehnquist Court, state neutrality is not something to be accepted only if it promotes other objectives; it is to be embraced, period.

Thus, the two Courts have very different visions of the role of neutrality in social ordering. A commitment to requiring neutrality in place of intentional evil is simply not the same thing as a commitment to requiring neutrality in place of intended good. Indeed, the moral defensibility of neutrality, which Professor Sherry simply assumes was recognized by both Courts, is not self-evident. Switzerland and the Vatican, for example, have been passionately criticized for remaining "neutral" in the face of the Nazi Holocaust. The famous sardonic claim that rich people as well as beggars are forbidden from sleeping under bridges; the fatal error in Marie Antoinette's "let them eat cake" remark—all suggest a moral queasiness that many people feel about a strict neutrality principle divorced from the consequences of its application. It may be possible to construct a justification for state neutrality in the face of horrendous discrepancies in the abilities of citizens to flourish in society. But such a justification would take much more than a mere invocation of kindergarten etiquette.

An important ramification of the divergence between the political-liberal and comprehensive-liberal visions lies in their respective tolerance for societal injustice created or perpetuated by forces other than current state policy itself. Political liberalism's formal neutrality would suggest that existing discrepancies in societal benefits must be tolerated. In this respect, the Rehnquist Court can fairly be labeled "conservative," in that it conserves the social order. In contrast, the autonomy principle central to comprehensive liberalism would suggest that the state must critically examine the status quo to discover fundamental injustices or other impediments to human ful-

---

49. See, for example, *Adarand*, 115 S. Ct. at 2109 ("Societal discrimination, without more, is too amorphous a hasis for imposing a racially classified remedy.") (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion)).

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

fillment, and that it must take steps to compensate for such impediments. The baseline of the autonomy principle is normative, not positive, and in this respect may fairly be called "liberal."

Professor Sherry suggests that fairness cannot exist without formal neutrality.[51] The truth of that statement depends on whether one has confidence that the status quo, toward which the state remains neutral, is itself fair. If one has concerns about the fairness of the status quo, one should also be concerned about efforts to perpetuate it through the vehicle of state neutrality. Whatever else one may say about postmodernism, that message from critical scholarship is a powerful one.

I cannot lay to rest the profound question of whether comprehensive liberalism or political liberalism has captured the better vision of the good. But I can say that the affirmative case for the comprehensive-liberal ideal of fulfillment of individual potential through autonomous choice is a plausible contender and should not be dismissed as unenlightened, arbitrary, unfair, or irrational. The Warren Court made a good start toward attainment of that ideal, accomplishing a level of progress that the Rehnquist Court has not carried forward. The philosophical stances of the two Courts on these issues have deservedly attracted the contrasting names "liberal" and "conservative," respectively—labels that will stick, despite Professor Sherry's dogged efforts to dislodge them.

51. Id.