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Culture(s) of Free Expression

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BOOK REVIEW

THE CULTURE(S) OF FREE EXPRESSION

THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE. *By Steven H. Shiffrin.* Cambridge, Mass. and London: Harvard University Press, 1990. Pp. 285.

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I
INTRODUCTION

Professor Steven Shiffrin's interesting, heavily footnoted,[1] and somewhat awkwardly presented[2] study of the theory and law of free expression offers three fundamental theses. First, in considering the theory of free expression, we ought to be eclectic, resting the defense of freedom of expression not on one overriding norm such as the promotion of democracy or the value of self-expression but

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1 The book has 169 pages of text and 103 pages of endnotes, many of which are substantive. It is a common and entirely warranted criticism of authors and publishers today that, notwithstanding the availability of computer-based typesetting systems, they too often use endnotes rather than footnotes. Endnotes deter readers from reading them, which in Shiffrin's case is too bad. The endnotes are frequently interesting and engagingly written. I should note, however, that the endnotes contain at least one intriguing anomaly. On page 95, Shiffrin writes: "[A]s Harry Kalven once said, 'It is an unbeatable proposition that the truth will not emerge in the marketplace if it does not get in.'" STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 95 (1990). The attached endnote reads: "I cannot find the quotation, but I am certain Kalven said it or something close to it, and if he didn't, he should have." *Id.* at 222 n.42. On page 20, Shiffrin has this: "It is an 'unbeatable proposition' that truth will never emerge in the marketplace if it does not get in. . . ." *Id.* at 20. The endnote attached to the internal quotation is, "H. Kalven, *The Negro and the First Amendment* 204 (1966)." *Id.* at 179 n.48. The sentence on the page in Kalven's book is: "[In *Cox v. New Hampshire* it] was, therefore, established that discretion in granting permits was limited exclusively to . . . the unbeatable proposition that you cannot have two parades on the same corner at the same time." H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 204 (1966).

2 One awkwardness is that Shiffrin has been profligate with placing the siguals to his endnotes in odd places in the text. My favorite example is: "Closet[25] heretic though he may have been, Kalven recognized the appeal of the Meiklejohn position." S. SHIFFRIN, *supra* note 1, at 50. The endnote begins: "Some closet—the pages of the *Supreme Court Review*." *Id.* at 192 n.25. A more serious awkwardness, which is the primary topic of this Review, is that, in an important sense, Chapters One and Two ought to have followed rather than preceded the rest of the book.

on a number of norms, some of which will conflict with others in important and interesting cases. When such conflicts occur, we ought to acknowledge them openly and resolve them with a relatively unarticulated process of intuitively balancing the values in the circumstances presented. Second, one of the values to be built into an eclectic defense of free expression is the value of dissent per se, that is, the importance to society and its members of placing social value on expression by those who set themselves apart from the dominant norms of the society. Shiffrin argues that the general culture of the United States includes respect for the value of dissent per se, and the culture demonstrates this respect by honoring dissenting figures. He believes, however, that academic theories of the first amendment have failed to place sufficient weight on the value of dissent, in large measure because they have been dominated by a misplaced desire to develop a unitary rather than an eclectic approach to the law.

As this last point suggests, Shiffrin's third thesis is that the law of the first amendment ought to develop along the lines suggested by his first two themes: It should become eclectic, and it should place more weight on the value of dissent per se. I believe that the main lines of Shiffrin's arguments about the first two theses are correct, although I also believe that Shiffrin needs to qualify the arguments more than he does. The third thesis, however, is more problematic. In urging that the law simply appropriate the form and content of considered judgments by detached analysts like Shiffrin, he overlooks the important institutional differences between general moral reasoning and law. Many of the defects he finds in contemporary academic theories of the first amendment derive, not from their authors' commitments on questions of philosophical method, as Shiffrin appears to believe, but from their concerns about the institutional limitations of courts as articulators of moral values. Once those limitations are brought to the fore, we might wonder about the likelihood that courts would adopt Shiffrin's proposals.

II

Eclecticism as a Method

Shiffrin criticizes contemporary academic theories of the first amendment on two grounds. First, these theories are devoted to what he calls "social engineering," as in the title of Chapter One. For these purposes, social engineering is the attempt to develop an approach to the law of free speech that will maximize the achievement of some specified single value to which the theorist attaches primary importance. Alexander Meiklejohn's theory, for example, attempts to develop a law of free speech that will best promote

democratic self-government, while other theorists, including Martin Redish and, in a different way, C. Edwin Baker, view the law of free expression as an effort to maximize individual self-development. But, Shiffrin argues, "[t]o formulate an organizing vision for the first amendment is to risk detachment from social reality."[3]

The theme, repeated throughout the book, is that social reality and the values that social organization properly promotes are too complex and varied to be subordinated to any single value. For example, the Kantian method of moral reasoning,[4] which is for Shiffrin a philosophical version of social engineering, "encourages decisionmakers to give cryptic attention to complicated social questions."[5] Shiffrin acknowledges that Kantianism and similar approaches to moral reasoning have some attractions, such as the aesthetic appeal of rigor, the appeal to reason, and apparent objectivity.[6] But, he argues, an eclectic approach is preferable because it can incorporate at least some of those attractions while respecting the irreducible complexity of social life. As Shiffrin puts it, "rationality depends upon integrating and reintegrating reason with desire, principles with passions, and theory with practice."[7]

Shiffrin's presentation of the attractions of eclecticism is persuasive, and my only quibble is with the extent to which there actually is a Kantian competitor in the field. Shiffrin says that "the

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3 *Id.* at 3.

4 For Shiffrin, Kantian methods describe the human condition on a relatively high level of abstraction and derive conclusions about specific controversies from these abstract principles. *See id.* at 129-30.

5 *Id.* at 130. Much of Shiffrin's discussion of Kantianism takes the form of a criticism, along now-familiar lines, of the method apparently offered by John Rawls in *A Theory of Justice*. Shiffrin devotes a few long footnotes to Rawls's recent work, which is explicitly addressed to that sort of criticism and which claims to defend Rawls's results on what Rawls says are the true original grounds. *See id.* at 238-40 nn.58-59; 251-53 n.125. The most important articles in Rawls's recent work are John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223 (1985) and John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987). Shiffrin argues, as have other law professors, that Rawls really has not articulated a different defense of his results. The argument here is complicated by the fact that Rawls insists that he has indeed not changed ground but that the critics of his early works misunderstood the ground he offered. However the interpretive question is resolved, it is entirely clear that, in light of Rawls's recent claims, Shiffrin's simple reiteration of criticisms of the early work is insufficient without more sustained attention to the recent work. I understand that certain theorists (like Shiffrin) have developed what organizational economists would call "firm-specific human capital" in their criticisms of early Rawls, and I sympathize with their annoyance at what they might think of as Rawls's opportunistic relocation to deprive them of that capital. But, for readers who lack that capital, Shiffrin's treatment is inadequate.

6 S. SHIFFRIN, *supra* note 1, at 120-24.

7 *Id.* at 124-25. Shiffrin acknowledges "many useful suggestions" from Roberto Unger, *id.* at v, and here as elsewhere in the book one can detect stylistic influences as well.

model [of Kantianism] outlined here is fictitious; . . . somewhat more extreme and ambitious than has been put forward by neo-Kantian advocates."[8] His argument, he says, is not designed "to show that a sophisticated neo-Kantian approach must fail" but is, rather, "heuristic."[9] I confess to some uncertainty about what the argnment then accomplishes, other than to strike down a straw person. Heuristic arguments, I would have thought, direct our attention to certain kinds of defects in arguments in order to bring to our attention otherwise neglected matters. But if the method of the heuristic argument is to criticize extreme arguments which, precisely because everyone understands they are extreme, no one really holds, the critic may inadvertently strengthen the less extreme versions and distract attention from alternatives.[10]

More troublesome is Shiffrin's second criticism of academic theories of free expression. They are defective, he argues, because they fail to acknowledge the eclecticism that characterizes the decisions of the Supreme Court. In contrast to single-valued theories of free expression, the Court's decisions respect the "multiplicity of first amendment interests and concerns."[11] This is not to say, of course, that the Court's resolution of first amendment controversies is always correct, and Shiffrin devotes an important part of his defense of the value of dissent per se to criticism of decisions that fail to respect that value.[12] On the level of method, though, Shiffrin defends the Court against its academic critics, and even against those who, while not severely critical of the overall course of the Court's decisions, attempt to impose more structure on the decisions than the decisions can accommodate.[13]

I believe that Shiffrin's desire to defend the eclectic method may have misled him to some extent here. In understanding academic theories of the first amendment, much depends on what one takes the purposes of such theories to be. If they are purely normative, the fact that the theories yield results discrepant with some of the Court's decisions is not a criticism of the theories. Even if a theory purports to be largely descriptive, discrepancies between the theory and the Court's decisions might not be troublesome. If the theory explains a large portion of the Court's decisions, the proper response to someone who points out the discrepancies may be to

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8 *Id.* at 111.

9 *Id.* at 112.

10 For an example of this phenomenon, see *supra* note 5, in which I express some irritation at Shiffrin's failure to address arguments that Rawls has recently made.

11 S. SHIFFRIN, *supra* note 1, at 13.

12 *Id.* at 74-81. For additional discussion of this part of Shiffrin's analysis, see *infra* notes 22-26 and accompanying text.

13 *See* S. SHIFFRIN, *supra* note 1, at 12.

say, "Yes, and those were the cases that came out wrong." The normative portion of a largely descriptive theory can provide some critical leverage for academics, in a way that Shiffrin's eclecticism cannot.[14] As Shiffrin points out, the doctrinal language of eclecticism is "balancing."[15] And what can a "balancer" do to criticize a Supreme Court decision? The extensive literature authored by balancers in the late 1950s and early 1960s makes it clear that, to the extent that they are critical, balancers can only say, "Well, I would have come out the other way because, in my view, the weights to be accorded the various values in the circumstances were thus and so."[16] To which the obvious, and I think obviously correct, response is, "As soon as you show me your commission from the President and confirmation by the Senate, I'll take you seriously."[17]

Further, some theories, like the two-track theory that distinguishes laws regulating speech because of its content from those that are, in the jargon, content-neutral, are not really descriptive. They are designed to orient thinking about problems of the first amendment and to provide some preliminary structure for the discussion that will ensue. It is not a criticism of such "orienting" theories that the discussion produces results in doctrinal categories different from the "content-based"/"content-neutral" starting point. This makes Shiffrin's discussion of the two-track theory, to which most of Chapter One is devoted, a little peculiar: he criticizes the theory (a) because it fails to do what it does not purport to do, and (b) because theories should not attempt to do what the two-track theory does not attempt to do. Well, sure.

In the end, I think, Shiffrin provides a persuasive defense of eclecticism. I criticize his argument only because he claims too much novelty for it. If we combine the fact that he must use a "fictitious" version of Kantianism as the foil for his general discussion of method with the fact that the Supreme Court's decisions are eclectic, it is not at all clear who is not an eclectic these days.

III
THE VALUE OF DISSENT

Drawing on Emerson (Ralph Waldo, not Thomas), Shiffrin urges that our thinking about free expression take more account of

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14 Except, as I will argue below, in the extreme case where the Court simply fails to take into account some value that an eclectic would throw into the stew.

15 S. SHIFFRIN, *supra* note 1, at 132-33.

16 The classic example of a balancer caught in this trap is Gerald Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972).

17 Here, too, the institutional points that Shiffrin tends to overlook seem crucial to me. For further discussion, see *infra* text accompanying notes 27-33.

the value of dissent per se. The core of his discussion defends the value of dissent against the charge that dissenters are hyperindividualists who place their own views above those of the rest of their society. While acknowledging that dissent can take a pathological form through the dissenter's narcissism and self-indulgence, Shiffrin argues that dissent is necessarily social because it "seeks converts and colleagues,"[18] and that "[a] focus on dissent emphasizes forms of collective action that are obscured by the individualism celebrated by the marketplace analogy."[19] Consistent with his methodological preference for eclecticism, Shiffrin insists that dissent should be one among many values considered, not that it always must prevail: "That an independent spirit should generally be supported does not imply that the military is required to encourage dissent as a routine practice on the battlefield."[20] But, Shiffrin contends, the law of free expression has, presumably even in its balancing mode, failed to take the value of dissent sufficiently into account.

There is much in Shiffrin's argument that is quite attractive, and perhaps my reservations here are only quibbles. I believe, however, that Shiffrin's argument does not include enough qualifications, and that once properly qualified, it becomes somewhat less attractive.

I begin by distinguishing, as Shiffrin sometimes does,[21] between the general culture and the legal culture. Shiffrin invokes Emerson in part, of course, because Emerson's romanticism places precisely the kind of value on the individual dissenting from social norms that Shiffrin believes appropriate. In part, though, he invokes Emerson because, in Shiffrin's view, Emerson is a central figure in the general culture of the United States; Shiffrin can establish the legitimacy of his position by demonstrating that a revered cultural figure would approve of it. I confess that I do not know enough about Emerson to evaluate the use Shiffrin makes of him, but even if Shiffrin's interpretation of Emerson is correct, as it well may be, it is not clear to me that his interpretation of the general culture of the United States is correct.

The difficulty is that Shiffrin needs to show that the general culture places significant value on dissent per se, but most of the examples of dissenters that come to mind—Martin Luther King, Jr., those who protested the war in Vietnam—are people whose dissent

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18 S. SHIFFRIN, *supra* note 1, at 91.

19 *Id.*

20 *Id.* at 103.

21 *See, e.g., id.* at 73 ("Law can play a role in shaping culture, but legal doctrine is a part of the culture and is frequently hostage to it"); *id.* at 168 ("judges are themselves a part of the culture they seek to interpret"). For additional discussion of the implications of these observations, see *infra* text accompanying notes 30-33.

turned out to be right.[22] These examples do not establish that the general culture values dissent per se; rather, they demonstrate the much more modest proposition that the culture values those expressions of dissent that, in the fullness of time, we now regard to have been correct. One can of course make this proposition somewhat stronger by noting that, when the dissent occurs, no one can be sure whether or not time will ultimately reveal its correctness, and, therefore, we ought to respect dissent today despite the fact that we disagree with its assertions. So transformed, the proposition appears to be a rather standard Millian or marketplace defense of free expression as a social process designed to achieve the best results in conditions of pervasive social uncertainty.

To make the case that the general culture values dissent per se, we need examples of people who are respected for the fact of their dissent even though they turned out to be wrong. 1 am hard-pressed to identify such figures. Consider as possibilities Patrick Henry, Jefferson Davis, and Whittaker Chambers. Henry is indeed a fignre revered for the fact of his dissent; unfortunately, the dissent for which he is revered is his opposition to the imperial pretensions of Great Britain, which turned out to be right, rather than for his opposition to the Constitution, which turned out to be wrong. Davis is revered in a part of the country, but 1 would not want to defend the proposition that he holds an important place in the value system of the nation as a whole. And Chambers's dissent is ambignous because at the time he offered it, he had powerful backers as well as powerful opponents; nor is it clear that he is currently an important cultural figure, or even that he was wrong. In short, notwithstanding Shiffrin's invocation of Emerson, 1 remain unconvinced that the general culture values dissent per se.[23]

When I turn to examining the legal culture, I find Shiffrin largely on my side. Shiffrin argues, correctly in my view, that the legal culture, while not discontinuous from the general culture, nonetheless is to some degree autonomous from it. The point of invoking Emerson, I take it, is to use aspects of the general culture

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22 Shiffrin uses recent cases involving intra-office dissent, "the seven dirty words," and draft-card burning as his primary examples of contemporary dissent. *Id.* at 74-82. His presentation clearly demonstrates, however, that here too he believes that the dissenters were *right* on the merits, or at least right enough to warrant our taking their substantive claims seriously.

23 I should note as well that Shiffrin's Emersonian defense of dissent is not so much a defense of *dissent* as it is a defense of a particular kind of individualism-in-society. Because character can be exhibited in many guises, this individualism need not only appear in dissent. Indeed, I can imagine circumstances in which a person who chose to conform, understanding her decision as a choice, might be exhibiting that character. Of course, this observation does not undermine Shiffrin's point that, when the character is exhibited in dissent, it ought to be valued.

to identify directions for reforming the legal culture. I have suggested that the general culture actually does not place enough value on dissent per se for it to be an influence. And, to the extent that Shiffrin himself argues that the law of free expression does not place enough value on dissent, he cannot contend that the courts as presently constituted are able to exert a reformist influence on the general culture. In short, the legal culture of the United States does not value dissent per se.

Nor, in a curious way, could it. Consider Shiffrin's discussion of flag burning. The first flag-burning case was decided "just as [Shiffrin] was sending this book off to the publisher to meet a publication deadline."[24] Shiffrin terms Justice Brennan's opinion "Emersonian" because it refers to the decision to strike down an anti-flag burning statue as "a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects."[25] Yet, to the extent that the defendant claims immunity from prosecution because of the values embedded in the first amendment, the defendant is, in an important sense, affirming society's values rather than dissenting from them. Justice Brennan's opinion for the Court in *Texas v. Johnson* demonstrated his understanding of this point when he suggested that people should have saluted the flag as Johnson burned it and then given the remains a respectful burial.[26] Flag burning, thus protected by the first amendment, becomes an occasion for celebrating the nation's values rather than for criticizing them.

IV

THE MISSING DISCUSSION OF INSTITUTIONS

In reading the first two chapters of Shiffrin's book, I experienced a peculiar sort of disorientation. Its source became clear as I continued reading. The disorientation occurred because the first two chapters consist of a sustained challenge to single-valued normative theories of the first amendment, on the ground that their normative visions are unattractive because oversimplified. And yet there was no discussion of what I usually take to be the main point of normative theories of the first amendment, which is that the amendment is administered by imperfect judges whose imperfections differ from those of executive officials and legislators. One who believes that to be the main point of constitutional theories might prefer single-valued constitutional theories to Shiffrin's eclecticism, but not because the single value overrides all others. Rather, such a person would prefer them for institutional reasons. Propo-

24 S. SHIFFRIN, *supra* note 1, at 274 n.130.
25 *Id.* (quoting Texas v. Johnson, 491 U.S. 397, 419 (1989)).
26 *Johnson*, 491 U.S. at 420.

nents of single-valued theories believe that judges can use a single-valued theory in response to overreaching by the imperfect legislature and executive without themselves overreaching because of their own imperfections, whereas judges cannot always be eclectic without overreaching. Single-valued normative theories, that is, are—or so I had thought—defended as second-best solutions.

Shiffrin's book expresses almost no concern about these institutional questions. I think that my puzzlement at his enterprise reflects a generational difference between him and me.[27] For Shiffrin's generation of constitutional scholars, influenced by the fading image of the Warren Court in its heyday, constitutional law is a direct reflection of normative inquiry and has no special institutional characteristics. One might put it this way: Shiffrin's first two theses describe a general culture of constitutionalism, in which eclecticism prevails and dissent is valued, and his third thesis is that this culture of constitutionalism just is what the institutions of constitutional law should implement.

I doubt that Shiffrin can avoid the institutional questions that preoccupied an earlier generation. His book culminates with a chapter urging that the first amendment be shaped with a romantic temperament. For Shiffrin,

> romantics [are] those who have sought to emphasize the passions against abstract reason; the subjective against the objective; the concrete and the particular against the general and the universal; activity, dynamism, and movement against the frozen, static, and eternal; creativity, originality, imagination, and spontaneity against mechanical calculation, rote analysis, or artificial, bloodless routine; invention over discovery; and struggle over victory.[28]

This is powerful and eloquent, but I confess that, in the context of a book about the first amendment, I want to say merely, "Nino Scalia? David Souter? Sandra Day O'Connor?" That is, there is precious little reason to believe that the people who actually will make the law of the first amendment will be romantics. Indeed, given the political dynamics of the nomination and confirmation process, the presumption ought to be that romantics will be systematically screened out.[29]

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27 I may be making too much of a small difference in the timing of our legal educations, but Shiffrin's work has, for me, the feel of a younger generation than mine. I received my undergraduate degree in political science, with an emphasis on constitutional law, in 1967 and my law degree in 1971. My teachers were, in the main, men whose fundamental understanding of the central questions of constitutional law was defined by the struggle over judicial activism during the New Deal. Although Shiffrin received his undergraduate degree in 1963, and is actually older than I am, he received his law degree in 1975, by which time, I think, the central paradigm of constitutional law was *Brown v. Board of Education* and the Warren Court, rather than the New Deal Court.

28 S. SHIFFRIN, *supra* note 1, at 141.

29 This is not to say that romantic urges will never be present on the courts, be-

Similarly, it is unlikely that the people who become judges will value dissent per se. As Chico Escuela on Saturday Night Live used to say, "Beisbol been berry, berry good to me" and so too with conformity for judges. Consider three examples. First, the general history of the first amendment: The overall history of the Supreme Court's treatment of sedition is quite depressing; whenever it mattered, the Court gave in.[30] Second, Justice Oliver Wendell Holmes, in his classic defense of a constitutional rule that would protect expression, referred to the defendants as "poor and puny anonymities,"[31] and their product "a silly leaflet by an unknown man."[32] Holmes was, of course, a peculiar man, but I think it significant that he thought it relevant to refer to the defendants in that way and that his dissent is central to contemporary discussions of the first amendment. Third, with respect, I think that Shiffrin has it precisely backward in his brief discussion of the flag burning issue. The majority does *not* value dissent per se. One cannot read Justice Brennan's opinion without seeing how deeply he was disgusted by the actions of the defendant. It is not that he or his colleagnes have the romantic's preference for "struggle over victory." Rather, in Brennan's view, it would clearly be a better society if no one thought it useful to burn a flag, but putting up with that sort of behavior is something we have to do, and, because we have to do it, we ought to make sure that putting up with that sort of thing becomes a valued part of our social self-understanding. It is not the dissent that is valuable, but the fact that we put up with it.

Of course, one can discount Brennan's rhetoric by arguing that he had to say something along those lines to make an unappealing result even marginally defensible in the public arena, and that, deep in his heart, he experienced a romantic thrill when he got the record

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cause, as I believe Shiffrin would agree, everyone has those urges and sometimes "succumbs" to them. I take it that Justice Blackmun's "poor Joshua" dissent in DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), will become the classic example. But, without deprecating the power of that dissent, I would suggest that people who take it as an example ought also to consider Justice Blackmun's opinions for the Court in United States v. Kras, 409 U.S. 434 (1973), and, more ambiguously, Wyman v. James, 400 U.S. 309 (1971).

30 The principle cases in the relevant section of GEOFFRY STONE, L. MICHAEL SEIDMAN, CASS SUNSTEIN & MARK TUSHNET, CONSTITUTIONAL LAW 938-91 (1986), are Shaffer v. United States, 255 F. 886 (9th Cir. 1919); Masses Publishing Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917) (a district court opinion later reversed by the 2nd Circuit: 246 F. 24 (2nd Cir. 1917)); Schenck v. United States, 249 U.S. 47 (1919)l Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919); Gitlow v. New York, 268 U.S. 652 (1925); Whitney v. California, 274 U.S. 357 (1927); Dennis v. United States, 341 U.S. 494 (1951); and Brandenberg v. Ohio, 395 U.S. 444 (1969). As a whole, the majority opinions make for depressing reading.

31 *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting).

32 *Id.* at 628.

of the case. I doubt it. We ought not underestimate the patriotism that is at the core of the self-understandings of the people who become judges,[33] a patriotism that takes the form of valuing things as they are. Sometimes, of course, patriotism means putting up with things that you do not like. And, as Shiffrin points out by taking Emerson as his central cultural figure, sometimes "activity, dynamism, and movement" are the traits of society as it is. It follows that it is not out of the question that judges will be romantics; it is just damned unlikely.

V
CONCLUSION

Shiffrin's description of a romantic constitutional culture in which dissent is valued per se, and in which people consider questions of free expression with an eclectic's sense of the complexity of social life, is undeniably attractive. The translation of such a culture into constitutional law is likely to be quite difficult, for the institutional reasons that Shiffrin neglects. Shiffrin notes that "romance," a central term in his discussion, has been used with many meanings.[34] One that he does not mention, but which may indeed best fit his work, is Freud's discussion of the "family romance,"[35] which is an eroticized fantasy.[36]

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33 Abe Fortas, Arthur Goldberg, and Thurgood Marshall all said, in essence, that they gave up things they valued because, when your President says that it's important for the country for you to do something, you do it. (Goldberg and Marshall gave up life-tenured appointments—on the Supreme Court and the Second Circuit—for appointments to untenured positions—as Ambassador to the United Nations and as Solicitor-General). They did so, of course, in response to "requests" by Lyndon Johnson, who had notable powers of persuasion. But there are enough additional examples, at least some of which involve resignations from life-tenured positions without serious prospect of later reappointment or promotion, to make me think that the phenomenon is general. For a list of resignations, see Mark Tushnet, Norman Schneider & Mark Kovner, *Judicial Review and Congressional Tenure: An Observation*, 66 TEX. L. REV. 967, 980 (1988).

34 S. SHIFFRIN, *supra* note 1, at 140.

35 *See* S. FREUD, MOSES AND MONOTHEISM 9-13 (K. Jones trans. Vintage Books ed. 1939).

36 *But see* S. SHIFFRIN, *supra* note 1, at vi (referring to his family whose "very existence is a constant reminder that romance does not depend upon politics"; if, as the context suggests, Neesa Levine is Shiffrin's wife, the term "very existence" is a little peculiar, though not entirely unwarranted).