



The First Amendment, Democracy, and Romance.

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Unlike his earlier article, however, the book does not seem to proscribe equality claims but, rather, to note that were the inconsistent meanings of equality fully recognized, equality claims would lose their rhetorical force. This is certainly a more realistic conclusion, since advocates of social change are not likely to—and would be foolish to—abandon what few advantages they have. The opponents of “affirmative” action are hardly likely, in return, to abandon their undeserved rhetorical edge.

In making the point about the rhetorical power of equality, Westen realizes that, if generally recognized, his insight would weaken the arguments of those with whom he agrees on a substantive level: “I have made arguments that will tend to inhibit my ideological friends (as I feel myself being inhibited) from resorting to ‘equality’ to expound values we happen to share” (p. 287). Westen makes the point because of his commitment to understanding the words we use.

For those interested in technical philosophical and jurisprudential debates about the meaning of equality, Westen’s book makes a number of contributions in clear, rigorous, and compelling prose. For those more concerned about normative and pragmatic issues—what equality should mean and how racial and sexual equality might be increased—the book is frustrating. Westen declines to say anything on the points many consider most important pragmatically and most interesting intellectually.

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Shiffrin, Steven. *The First Amendment, Democracy, and Romance*.

Cambridge, Mass.: Harvard University Press, 1990. Pp. 285. \$29.95 (cloth).

“Our citizenry does not understand first amendment doctrine and it never will. But citizens understand what the FIRST AMENDMENT means” (p. 169). Steven Shiffrin ends his book by implying that there is something the first amendment means, that citizens share an accurate understanding of it, and that the courts have not been sufficiently attuned to it. He proposes the image of the dissenter, drawing on Emerson, as a way for American culture to approach the first amendment without resorting to abstract principles or “general theory.” Shiffrin mounts a philosophical critique of what he argues is a crude intellectualist bias in an influential school of moral, political, and jurisprudential thought, namely, the Kantianism of Rawls, Dworkin, Ackerman, Richards, and others. While there is more to the book, this critique forms the theoretical core, and I concentrate on it in this brief review, testing the argument at several points against the views of John Rawls.

“The core of Kantianism,” he says, “is the effort to transcend the passions.” Since passions are the source of social conflict, the Kantians hope to “escape” them (p. 126) into a final consensus. Conflict is expected to disappear once the authority of rational principles is recognized and everyone properly subjugates passion in deference to principle.

It is undeniable that Kantians believe that our other inclinations ought to be subordinate in a certain way to moral motives. The substance of Shiffrin’s

critique is to characterize such a view as authoritarian (pp. 128, 146). On Shiffrin's reading, Kantianism resembles much pre-Kantian thought, according to which all law has its source in God and/or nature, conceived as entirely distinct from the judgment or will of mortal agents. The authority of moral or political laws, on this view, is as independent of agents as are the laws of physics. Such a view can be usefully characterized as authoritarian (as Rawls himself pointed out in his doctoral dissertation, "A Study in the Grounds of Ethics Knowledge" [Princeton University, 1950, pp. 1–2]), but it is not Kantian. In fact, it would not be an exaggeration to regard the essence of the Kantian philosophy of morality to be a rejection of the idea of any moral authority that is prior to and independent of agency and deliberation. Rawls explicates this aspect of Kantianism in "Kantian Constructivism in Moral Theory" (*Journal of Philosophy* 77 [1980]: 558–60). Kantianism is not compatible with the idea that agents are answerable to any superiors, be they personal kings or cosmic principles. Kantianism is antiauthoritarian at the deepest philosophical level. It is a distortion to say that "for Kant, . . . moral autonomy demands submission to the dictates of reason" (p. 238). Even if we describe the Kantians as advocating the subordination of the passions, that is not at all the same thing as the subordination of persons. To think of principles as a kind of boss, as in Shiffrin's reading of Kantianism, is to suppose that morality is an imposition and that the very possibility of moral transgression represents a constraint on human liberty. There is nothing in Kant or Kantianism to support this idea. Whether or not Kantianism is finally tenable, its view of moral authority makes it entirely the wrong target for many of Shiffrin's objections.

The idea that Kantians make principles into bosses also leads Shiffrin to make fundamental mistakes about the kind of moral epistemology to which Kantians subscribe. As against the Kantian, Shiffrin speaks for "the eclectic," for whom "principles are important, but reason is not principled" (p. 126). Nothing more is said to indicate what importance principles have for the eclectic, but the opponent Kantian view is supposed to be the "reductionist" theory that we can begin with one or a few principles and then discover the answers to free speech problems by deducing them from the principles.

His opposition to this model is shared by Rawls, who, twenty years ago, in *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), the founding and central book of the neo-Kantian movement Shiffrin opposes, put forward the influential idea of "reflective equilibrium." The idea, briefly, is that our considered moral judgments are not held hostage to the dictates of the principles we (at first) endorse. Nothing prevents us from maintaining our considered judgments as constraints on acceptable principles. However, there is no good reason for the supremacy of our considered judgments, either. Rather, we will often properly regard certain principles as more weighty than the judgments with which they conflict, and often not. We have no indubitable foundations in either principle or judgment from which we can legitimately hope to build our moral or political theory. As with logical inference in other domains, if the premises and logic imply an implausible conclusion, nothing compels us to accept the conclusion rather than reject the premises or the inference. There is a choice to make.

The connection between principles and judgments, on the Rawlsian view, is a connection of reason. If this were not so, the fact that an attractive principle conflicts with a plausible judgment would not give rise to the kind of choice

or difficulty it does. And if it did not do that, it is hard to see how Shiffrin or anyone could hold that “principles are important.” Shiffrin supposes that the idea that there are principles which yield, by reason, certain judgments, requires the foundationalist view that principles can be known prior to, independently of, and with more certainty than moral judgments. Rawls shows how these two ideas are separable, by coherently accepting the former and rejecting the latter. Shiffrin replies that this is “moving some distance from the Kantian project and toward the eclectic perspective” (p. 125), but his implied assumption that a truly Kantian moral theory would be foundationalist in the alleged way is given no defense.

The critique of Kantianism is not only “antirule” (p. 150). Its broader purpose is to discredit the idea of any common good to which politics should aspire. To the idea of a common good that is unanimous at some level, Shiffrin prefers “accommodation of individual and group preferences” (p. 155)—in a word, compromise.

This is combined with an attack on the idea that citizens rule in any meaningful sense in American democracy, or that they ought to. Majority rule is “a deficient ideal in theory and a myth in practice” (p. 68). He sees this as partly undermining the influential idea that political speech is central to the meaning of the first amendment. Many have questioned the “political speech” model of the first amendment by defending the value of much non-political speech. Shiffrin, instead, devalues political speech by denying that there are any “citizen governors” to make wiser decisions on the basis of free political discussion. He holds up to ridicule those, including Lincoln, who accept the rhetoric of “government by the people.” Of course, that rhetoric cannot be adequately defended here, but Shiffrin’s conviction that he is capturing Americans’ own sense of their devotion to American democracy (p. 69) is breathtaking. Granted, nobody believes American politics is a town meeting writ large, partly because of the institution of elected representatives at all levels. But Shiffrin does not even believe that representatives are elected by majority rule, arguing fallaciously from his belief that voters’ attitudes are heavily influenced by the rich and powerful few.

If we can summarize Shiffrin’s view on the proper aim of political decisions as being compromise rather than the common good, we can ask who he sees as the agent of such decisions if not the citizens. The answer is the judicial “social engineer.”

		Agent	
		Citizens	Social Engineer
Aim	Common Good		
	Compromise		Shiffrin

“For the most part, the first amendment social engineer just balances the relevant interests and comes to a decision” (p. 13). Judicial social engineers are simply to use their own personal judgment, without resort to principles.

This they would have in common with kings, who also balance interests and promote the good of the polity as they see fit, with enormous flexibility, unconstrained by general rules or by myths about self-government. May social engineers, like kings, reason from their preferred religious or deeply controversial moral premises? Need they give reasons at all (and, if so, what would count?), or should they just “come to a decision”? Are there any conditions on the legitimacy of their decisions? These questions are not discussed.

It should not have seemed paradoxical that the Kantian idea of general principles is actually deeply democratic rather than (as Shiffrin would have it) authoritarian. Similarly, it is not a surprise that Shiffrin’s attack on principle should, in the end, appear as so antidemocratic and authoritarian. He embraces this result, since the authoritarian character of social engineers, if properly appreciated, “emphasizes the presence of power” and thereby “opens decisions to criticism” (p. 272n) and dissent.

Here’s the romance of which the title speaks. There is indeed something romantic about challenging the powers that be, especially when those powers are great and arbitrary. Shiffrin’s social engineers in black robes are perfect romantic foils, but it is no reason to create a dragon that it might be courageously slain.

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Gorovitz, Samuel. *Drawing the Line: Life, Death, and Ethical Choices in an American Hospital*.

Oxford: Oxford University Press, 1991. Pp. 224. \$19.95.

It has always been a source of irritation to me that my mother does not seem to understand what my job is. Whenever we see each other she asks me to explain again what a medical ethicist is. I give it my best shot but, no matter how much I talk about patient rights, decisions about withdrawing life support, or the allocation of scarce organs for transplant, she still doesn’t buy the idea that a philosopher would be hired to teach and discuss these issues with doctors, administrators, and nurses at a university medical center. It is not that she fails to grasp the fact that there are a host of challenging ethical choices to be made in the practice of medicine. She just finds it hard to believe that someone who is not a physician or a nurse would have much to say that would be of any use to practitioners.

Samuel Gorovitz has written a book which will dissolve my mother’s doubts. While he probably did not have this particular goal in the forefront of his mind while writing his engaging little book, he has provided an account of what many philosophers do when working in health care settings that is sufficiently lively, engaging, and thought provoking to persuade even highly skeptical mothers that their philosophical offspring might have something useful to contribute to health care professionals and students.

Gorovitz, a philosopher who is currently dean of the College of Arts and Sciences at Syracuse University, was asked by the president of the Beth Israel