

9-1-2007

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C. Edwin Baker

Recommended Citation

C. E. Baker, *Steve Shiffrin: Friend and Scholar*, 41 Loy. L.A. L. Rev. 49 (2007).
Available at: <https://digitalcommons.lmu.edu/llr/vol41/iss1/4>

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STEVE SHIFFRIN: FRIEND AND SCHOLAR

*C. Edwin Baker**

Being able to contribute in this collaboration to honor Steve Shiffrin is a great pleasure. Steve's significance to me has been great both personally and professionally since we met 30 years ago at a conference in Los Angeles. We appeared on the same panel, and both later published our papers in both the conference book itself and the *UCLA Law Review*.¹

I assume that this is an occasion for offering amusing or maybe embarrassing personal stories, but that is not my skill. I can turn neither Steve's kindness in reacting to my mis-bids in the single time he took me as a bridge partner in duplicate bridge in Ithaca, nor his single-minded focus on making winning adjustments to his fantasy baseball team while I waited outside a café in Prague, into anything interesting.

So I will limit myself to discussing Steve as a scholar. First, he is an extraordinarily sharp, careful, but fair reader with the keenest eye for weaknesses or inconsistencies. This quality is constantly exhibited in Steve's reviews of judicial doctrine and is equally present in his iconoclastic and telling critiques of the homilies that fill constitutional, political, and philosophical discourses.

My experience with this trait is, however, more personal. In an article in *Northwestern University Law Review*, Steve summarized my views on commercial speech with a clarity that I wish I could duplicate, and certainly with more accuracy than any other critic of my views.² I take Steve's care to be a true virtue, especially given

* Nicholas F. Gallicchio Professor of Law and Professor of Communication, University of Pennsylvania Law School.

1. CONSTITUTIONAL GOVERNMENT IN AMERICA (Ronald K.L. Collins ed., 1980); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964 (1978); Steven Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 *UCLA L. REV.* 915 (1978). I thank Ron Collins for his central role in putting together both this and the earlier conference and hence, among other things, bringing Steve and me together.

2. Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *NW. U. L. REV.* 1212, 1239-45 (1983).

how often a critic misrepresents my views or, as continually happens, raises questions about my position without noticing that I had already considered that precise question and answered it in the article the critic was purportedly discussing. But Steve's clarity and care were just for starters. He then proceeded to write what I believe is the best and most powerful challenge to my First Amendment scholarship currently available.³

Second, but even more important, is Steve's development of his own position. He is clearly one of the country's three or four top First Amendment scholars, each of whom has different strengths. Still, I consider Steve the best in terms of possibly the most important criterion: being right about what really matters. On that ground, his achievement is truly worthy of honor.

Steve tells us that romantics like Whitman and Emerson have more to teach us about the First Amendment than Holmes and Meiklejohn.⁴ Romance led Steve to identify protection of the dissenter as the most important attribute of the First Amendment—that is where the First Amendment makes a real difference. In any pragmatic assessment, his emphasis on dissent compares favorably to the views of theorists who emphasize the connection between free speech and democracy, a marketplace of ideas, or individual autonomy.

Robert Post, another of our great First Amendment theorists, has been superb in grounding free speech theory in the American commitment to democracy. A major problem with most political speech theories, though not necessarily with Post's given his broad conception of a public realm in which he argues restrictions are impermissible, is that no one proposes suppressing speech that they admit is actually political speech. For example, one reason Justice Frankfurter accepted suppression of communists was that their speech was not political, or at least so he apparently thought in *Dennis v. United States*.⁵ But Steve's emphasis on the dissenter cuts to the chase; few would argue that the communists were not dissenting. The merit of his position is that people need protection against offended or nervous majorities precisely *when* dissenting.

3. *Id.* at 1245–51.

4. STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 74–85 (1990).

5. 341 U.S. 494, 546–47 (1951).

The potential instrumental contributions that an ideally working marketplace of ideas can make to a good society are immense. Social engineers should aim at achieving these benefits. Nevertheless, as Steve has shown, there is no reason to expect that an unregulated marketplace of ideas will provide for this ideal, as opposed to being hugely distorted in ways that lead to unwise results. In contrast, his pragmatic theory of free speech shows the practical contribution that dissent can make to improving major institutions that, like those in all societies throughout historical periods, are riddled with injustice.

I have argued that the legitimacy of the legal order requires the government to respect an individual's freedom, and that this required respect for the person as an autonomous agent, who makes her own choices about her expression and her commitments, is the foundational basis of the demand that government not abridge freedom of speech. I will not argue against my own position, but I must admit that dominant forces seldom abridge their own freedom. The demand of respect for individual autonomy really matters in precisely the context that Steve identifies as central: the context of dissent.

Reminiscent of some the best arguments of utilitarians such as John Stuart Mill and of people like Emerson—in this case Tom Emerson, who described the role of free speech as maintaining a proper balance between stability and change⁶—Steve described how nourishing dissent can strengthen society and its institutions, exposing areas where change is needed.⁷

The penultimate sentence of Steve's first book said: "If we play our cards right, we can have social engineering and romance."⁸ Steve has admirably put both romance and his intellectual version of social engineering to work in service of protecting dissent. Tonight I can say that we too have played our cards right. Without dissent, we have Steve with us to honor at this conference.

6. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 7 (1970).

7. STEVEN SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999).

8. SHIFFRIN, *supra* note 4, at 169.

