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REVIEW ESSAY

THE PROGRESSIVE DILEMMA

Neil Kinkopf*


I. Introduction: The End of Constitutionalism?

American constitutionalism is in crisis. One of its central claims is that constitutional interpretation is rational and neutral with respect to moral and political preferences. This claim has lost its credibility. In its most pointed form, the crisis undermines the legitimacy of constitutionalism's most prominent institution, judicial review as practiced in the Supreme Court.¹

We have come to lack a persuasive case that the Court's decisions are rational extrapolations of constitutional meaning as opposed to impositions of the political and moral preferences of the individual justices. If the Court's decisions are nothing more than unconstrained moral or political judgments, then judicial review substitutes the political and moral judgments of unelected and democratically uncontrollable judges for the judgments of accountable officials and institutions. Given the fundamental American commitment to demo-

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¹ By judicial review, I mean the judiciary's power, in the setting of a case or controversy, to interpret the Constitution and declare void legislation or other governmental action that is inconsistent with the Court's interpretation.
ocratic principles, a convincing explanation of how judicial review, as practiced in the Supreme Court, is harmonious with constitutional principles is a necessary condition for understanding that institution's legitimacy. I will refer to the current absence of such an account as the legitimacy crisis.

The legitimacy crisis is increasingly acute for progressives. The Rehnquist Court has repeatedly invoked both individual rights and the provisions structuring the government in ways that protect and promote conservative ends. It has done this under the headings of federalism and separation of powers,2 commercial speech,3 the Takings Clause,4 Equal Protection,5 and the Due Process Clause.6 Thus, judicial review, which had been friendly to the progressive agenda during the Warren and Burger Courts, has become deeply hostile to that agenda. Not only has the Court ceased to be a promising forum for securing progressive aims, it has become an obstacle to achieving progressive ends through democratic processes.7

This progressive dilemma is the culmination of the American constitutional tradition.8 To appreciate the dilemma fully, we must

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7 The Rehnquist Court has been remarkably active in invalidating or narrowing federal and state legislation on constitutional grounds. In addition to the cases cited in supra notes 2–6, the Court has taken a cramped view of Congress's enumerated powers, especially under the Commerce Clause and Section 5 of the 14th Amendment, to invalidate legislation. See United States v. Morrison, 120 S. Ct. 1740 (2000) (holding Violence Against Women Act unconstitutional); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (finding that the Age Discrimination in Employment Act is not appropriate legislation under Section 5 and so cannot abrogate a state's Eleventh Amendment sovereign immunity); Boerne, 521 U.S. at 507 (striking down the Religious Freedom Restoration Act, at least as applied to the states); Lopez, 514 U.S. at 549 (striking down the Gun-Free School Zones Act).
first locate it within the tradition. American constitutionalism is animated by a paradox that arises between two of its central claims. On the one hand, "American constitutionalism came to claim . . . that it embodies specific moral commitments . . . ."9 On the other hand, "it is autonomous with respect to moral argument and political preference (a claim that implicitly reinstates the Enlightenment assertion of neutral rationality)."10 Until recently, constitutionalism has been able to resolve this paradox. The tradition's current inability to resolve the paradox is the source of its current crisis.

Historically, the tradition has been able to resolve its animating paradox by acknowledging that it resolves moral and political issues through a common law method, which checks against judges deciding cases on the basis of naked moral or political preference. The common law method was understood as a distinct mode of rational inquiry practiced by a professional elite that had acquired the discipline through elaborate study, practice, and experience.11

Despite confronting a number of crises,12 this explanation was ultimately successful in resolving each crisis that has preceded the current one. The crisis surrounding the Lochner13 era, for example, foreshadows the current crisis. In this period the Court developed a doctrine of substantive due process, which read the Due Process Clause to embody a strong notion of freedom of contracts. The Court used the doctrine to invalidate a wide range of—usually progressive—legislation.

The Lochner crisis concerned whether the Court was legitimately interpreting the Constitution, or rather was exceeding its role by substituting its own policy preferences for those of democratic institutions. The crisis came to a head during the Great Depression, when the Court ruled many of the New Deal's most important programs unconstitutional. The Court resolved the crisis by repudiating substantive due process. It took to heart concerns about antidemocratic decision making and declared it generally would defer to the judgments of responsible political officials and institutions. The exceptional categories of cases, in which the Court would withhold deference, were those where judicial review would be necessary to ensure participation and the proper functioning of democratic institu-

9  Id. at 49.
10  Id.
11  See id. at 74–86.
12  See id. at 119–32 (discussing the crisis of slavery, secession, and reconstruction).
tions, set forth in the famous footnote four of *United States v. Carolene Products Co.*

The tradition plunged into its current crisis when the Court revived substantive due process, most clearly in *Eisenstadt v. Baird.* In *Eisenstadt,* the Court addressed the validity of a state law that criminalized the provision of contraceptives to unmarried persons, which the state defended as having been enacted on moral grounds. Although the case was outside the categories of footnote four, the Court ruled the statute unconstitutional based on its substantive moral judgment. The Court's decision in *Roe v. Wade* rested on similar reasoning and brought much broader attention to the re-emergence of substantive due process.

The deployment of substantive moral and political reasoning has been a hallmark of Supreme Court jurisprudence over the last three decades. As with the *Lochner* crisis, the legal academy has responded by challenging the legitimacy of judicial review on the now familiar ground that judgments are a function of political preference rather than the product of an independent tradition of legal reasoning. Indeed, these postmodernist critiques are skeptical of the possibility of a coherent tradition of common law or legal method acting to check the judicial imposition of political preferences. To date, the tradition has not been able to formulate a response that persuasively establishes the legitimacy of judicial review.

Prior to the Rehnquist Court, the revitalized substantive due process typically favored the agenda of the political left. This fueled something of a political backlash, with conservative politicians inveighing against judges who flout democratic principles and "legislate from the bench." Republican presidents pronounced that they would nominate judges who were committed to avoiding this error. The Rehnquist Court comprises a substantial majority of justices who were appointed by such presidents. Yet the current court has deepened the post-*Eisenstadt* crisis. Its most stunning pronouncement came last.

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14 304 U.S. 144, 152 n.4 (1938). *See generally Powell,* supra note 8, at 142–73 (discussing the development of a "modern theory" of constitutional interpretation).
16 See Powell,* supra note 8, at 175–77.
17 410 U.S. 113 (1973).
19 This is not for lack of trying. Numerous leading constitutional theorists have tried their hand at justifying judicial review, yet the crisis persists. *See Powell,* supra note 8, at 182–230 (reviewing the major attempts to construct a theory of legitimacy and explaining how each fails).
term in the *Florida Prepaid* cases. Through the *Eisenstadt* period, the Court had consistently extolled the importance of deference to the judgments of the political branches, even as its practice has strayed from this ideal. In *Florida Prepaid*, the Court expressly refused to defer to Congress's judgment. The opinion, dealing with patent statutes and the Court's own evolving Eleventh Amendment doctrine, acknowledges that Congress has the authority to legislate in the area notwithstanding the Eleventh Amendment and that Congress had made a legislative record including findings of specific cases demonstrating the need for federal legislation. Chief Justice Rehnquist simply disagreed with Congress's substantive judgment. In his view, the record was not strong enough to justify the federal statutory protection. He concluded that the statute was inappropriate. The Court thus dispensed with the obligatory incantation of deference and directly second-guessed Congress's political judgment.

The Rehnquist Court has in common with its immediate predecessors the willingness to substitute its own moral and political reasoning for those of democratic institutions and officials. It has distinguished itself in terms of the political agenda it has served. In area after area, the Rehnquist Court has interpreted the Constitution to favor conservative interests. This deepens the current crisis by reinforcing the sense that the methods of the legal profession provide no

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21 In a number of recent cases running up to *Florida Prepaid*, the Court regretted that it could not defer to Congress's judgment, because the Court (implausibly) claimed to be unable to locate any relevant congressional judgment. See City of Boerne v. Flores, 521 U.S. 507, 530–31 (1997) (decrying the lack of findings); United States v. Lopez, 514 U.S. 549, 562–63 (1995) (citing absence of support in the legislative record, even though Justice Breyer, in dissent, found voluminous supporting congressional documentation).


24 See *Florida Prepaid*, 119 S. Ct. at 2208 (conceding that the record contains support for Congress's judgment, but dismissing this as providing only "little support" insufficient to sustain the validity of Congress's enactment).

25 In response the leading academic doctrinalist and defender of judicial review, Laurence Tribe, remarked, "Breathtaking!" 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 958 (3d ed. 1999).
The progressive dilemma is how to respond to the Rehnquist Court, in light of the legitimacy crisis. There are two obvious alternatives. First, progressives might advocate doctrinal reforms that return the Court to its friendly stance toward the progressive agenda. Second, progressives might abandon judicial review entirely. The first alternative is pursued in a recent book by Professor Steven Shiffrin, while the second alternative is advanced in a recent book by Professor Mark Tushnet.

This Essay reviews the books of these important constitutional scholars in turn and concludes that neither alternative is attractive. The first alternative, doctrinal reform, is not a viable option without an account of the doctrine's legitimacy. On the other hand, the case for the legitimacy of abandoning judicial review is also troubled. These books, taken together, define the progressive challenge: to articulate an account of the legitimacy of judicial review. While I do not propose to produce such an account, I believe that Professors Shiffrin and Tushnet provide some indications of what judicial review might look like after an account of its legitimacy is fashioned.

II. Thesis: Doctrinal Reform

In the debate over the value of constitutional rights, so lively among scholars who locate themselves on the left, the First Amendment right of free speech is an important battleground. The Supreme Court has elaborated a doctrine of free speech that emphasizes content neutrality, and that doctrine has yielded decisions that protect powerful interests against meaningful governmental regulation. These scholars then see the right of free speech as an obstacle to fundamental commitments such as meaningful equality and substantive justice. The intramural debate leaves this point largely undisputed. The battle lines are drawn over whether free speech doctrine might nevertheless be reconceived and rendered worthy of the reverence that many have accorded it.

26 Steven H. Shiffrin, Dissent, Injustice, and the Meanings of America (1999). Professor Shiffrin does not undertake to reform all of constitutional doctrine. Instead, he focuses his project on the First Amendment freedom of speech. See id.


Professor Steven Shiffrin’s newest book, *Dissent, Injustice, and the Meanings of America (Dissent)*, comes down squarely in favor of doctrinal reform. He offers powerful criticisms of the Supreme Court’s current free speech doctrine and advances an alternative vision of free speech. In this, *Dissent* is a further elaboration of the project Shiffrin undertook in his acclaimed *The First Amendment, Democracy, and Romance (Romance)*. As Professor Shiffrin puts it,

In *Romance*, I argued that dissent should be at the center of an appropriate theory of free speech. In this book, I return to that perspective, but I emphasize two of the social functions of dissent: its place in cultural struggles about the meanings of America and its role in combating injustice. With this emphasis, I hope to make the case for dissent’s special role more attractive in terms of both constitutional law and political theory.

In *Romance*, Shiffrin sought to offer a romantic reading of the First Amendment’s Free Speech Clause. That reading yields two major prescriptions: one methodological and the other substantive. Methodologically, Shiffrin advocates an eclectic approach to First Amendment decision making. Substantively, dissent is an important First Amendment value.

Shiffrin’s methodological and substantive prescriptions follow from his version of romanticism as emphasizing 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,

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29 See SHIFFRIN, supra note 26.
31 Id. at xi. This description of *Romance* may come as a surprise to readers of that book. In *Romance*, Shiffrin specifically rejects any “centered” approach to free speech. Instead he advocates eclecticism as a First Amendment methodology, drawing on his version of a romantic tradition. (Shiffrin asserts that there are numerous romantic traditions, “a pluralism of romanticisms.” Id at 141.) To Shiffrin, this eclecticism means that no value can claim to be at the center of the First Amendment. Rather, the First Amendment embodies many values, and those values must all be weighed in making a First Amendment decision. Although *Romance* plainly regards dissent as a critical and unappreciated value, Shiffrin’s reference to a dissent-centered approach to the First Amendment is incongruous. Moreover, because Shiffrin’s romanticism means that the list of First Amendment values cannot be limited, it is far from clear what Shiffrin means when he accords dissent a “special role.”

32 See id. at 132-39. Shiffrin is usually ambiguous about the identity of these decision makers. The courts are but one First Amendment decision maker. Congress, the President, the Attorney General, and the Federal Communications Commission are important examples of other decision makers, but it is not clear whether Shiffrin means to include them or whether he takes a view of judicial supremacy that renders non-judicial decision making uninteresting. This ambiguity persists in *Dissent.*
static, and eternal; creativity, originality, imagination, and spontaneity against mechanical calculation, rote analysis, or artificial bloodless routine; invention over discovery; and struggle over victory.\textsuperscript{33}

This articulation of romanticism is grounded in the work of Ralph Waldo Emerson and Walt Whitman.\textsuperscript{34} As this description indicates, Shiffrin's romanticism not only defies but also rejects clear definition and limitation. True to these romantic commitments, Shiffrin's project defies categorization or easy summary. A fair synopsis of the project, then, cannot avoid being lengthier and more labored than is customary in the law journals. I will endeavor first to give an accurate description and then proceed to set forth my major criticisms in a separate subsection.

\textbf{A. Romance and Dissent}

Professor Shiffrin rejects the possibility of a single, general theory in favor of eclecticism as the preferred methodology for construing the Free Speech Clause. This method is a highly refined form of balancing that calls upon decision makers to consider all relevant social, individual, and governmental interests and values implicated by the decision and to balance them not according to an abstract weight but rather according to how strongly or weakly a given interest is implicated in the specific controversy. Shiffrin describes this eclecticism as a "contextualized approach" that is "pragmatic, pluralistic, and nonreductive."\textsuperscript{35} He rejects the contention that eclecticism is completely unrestrained, though he admits—repeatedly—that it is "capacious."\textsuperscript{36} While capacious, the eclectic method would still demand that decision makers render judgments that contend with and can plausibly be evaluated against whether they "fit with sources of interpretation such as language, intent, precedent, policy, and power."\textsuperscript{37} Thus, Shiffrin concludes that the eclectic approach imposes some limitations, admittedly loose or "wildly capacious," on the ability of decision makers to impose their brute preferences under the guise of free speech decision making.\textsuperscript{38}

\textsuperscript{33} \textit{Id.} at 141 (footnote omitted). Shiffrin amplifies this understanding of romanticism with a quote from Isaiah Berlin: "[T]he romantics stand for the 'celebration of all forms of defiance directed against the . . . static and the accepted and [for] the value placed on minorities . . . as such, no matter what the ideal for which they suffer.'" \textit{Id.} (second and third alterations in original).

\textsuperscript{34} \textit{Id.} at 72–86.

\textsuperscript{35} \textit{Id.} at 133 (citations omitted).

\textsuperscript{36} \textit{Id.} at 138.

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.}
There is a symbiotic relationship between romanticism and eclecticism. Eclectic methodology lends strong symbolic support to romanticism. When decision makers utilize an eclectic method to resolve free speech concerns, they emphasize the particular and the concrete over the general and the universal. To use this method, then, is to adopt, at least in this setting, Shiffrin’s version of romanticism.

In turn, the eclectic method derives meaning from romanticism. Given Shiffrin’s description of eclecticism as capacious and open-ended, it is not hard to imagine it falling into utter indeterminacy, barely a mask for the ad hoc imposition of a decision maker’s individual preferences. By emphasizing passions, invention, and spontaneity over reason, order, and continuity, romanticism affords some check against the eclectic method succumbing to this fate. That is, romanticism provides some content and so marks at least broad parameters of eclectic decision making. It offers a measure of guidance for determining the weight to accord the various competing interests that eclecticism seeks to balance. Emphasizing the interdependence of these concepts, Shiffrin ultimately takes to referring to his innovation as “romantic eclecticism.”

Shiffrin’s version of romanticism also drives his major substantive prescription. He argues that the Free Speech Clause should be understood to establish dissent as a distinct and important value. In keeping with his version of romantic eclecticism, Shiffrin declines to offer a definition of dissent. Instead, he offers that “the analysis of dissent and its value will often be specific to diverse factual contexts and... it is likely that the perspectives associated with dissent will best be defined in the hard and continuing struggle of case-by-case adjudication.” Nevertheless, Romance clearly understands dissent to include challenges to existing authority, power arrangements, morals, and so-

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39 Indeed, this appears to be the primary reason that Shiffrin advocates eclecticism. Methodology standing alone strikes Shiffrin as entirely irrelevant.

[T]he problem with First Amendment decisionmaking is for the most part not with the method employed but with the values held by the decision makers. The path to first amendment safety lies not in the imposition of a particular method, but in a genuine cultural commitment to substantive first amendment values. If that commitment is not present, no “binding” method will hold. If that commitment exists, method will take care of itself. Id. at 110. Shiffrin, nevertheless, sees great symbolic importance in methodology. Because rhetoric matters, the method that decision makers use to justify their judgments and actions has a powerful effect on whether “a genuine cultural commitment to substantive first amendment values” will develop. Id. at 110–11.

40 Id. at 139.
41 See id. at 108–09.
42 Id. at 107–08.
cial conventions. This obviously advances the cause of romanticism. Understanding dissent as an important constitutional value will favor invention, struggle, and dynamism over order and continuity.43

Shiffrin also offers an argument from democracy in favor of his view of dissent as a distinct and important free speech value. He repeatedly asserts that the Free Speech Clause is popularly understood to value dissent.44 He then goes further, contending that dissent is an indispensable component of the structure of American democracy. “Whether American democracy depends upon genuine majority rule is open to debate, he explains, but American democracy would not exist in the absence of a commitment to safeguarding dissent.”45

Shiffrin’s two prescriptions, that romantic eclecticism is the appropriate method for free speech decision making and that dissent is a distinct and important free speech value, are subordinate and instrumental to Shiffrin’s ultimate project: promoting romanticism.46 From the perspective of the progressive audience for which Shiffrin is writing, romanticism will redeem the Free Speech Clause, by allowing it to

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43 Shiffrin also contends that a focus on dissent will preserve the other values that have been associated with the constitutional right of free speech, such as “liberty, . . . equality, justice, tolerance, respect, dignity, self-government, [the search for] truth, . . . associational values, and catharsis.” Id. at 167. Regrettably, Shiffrin does not explain how dissent—as opposed to his eclectic methodology—will preserve these values. It is difficult to see how a focus on dissent would preserve the value of self-government, for example. Early in Romance, Shiffrin recounts the case of Connick v. Myers, 461 U.S. 138 (1983). See Shiffrin, supra note 30, at 74–80. In thumbnail, Myers was a disgruntled local assistant prosecutor who voiced her frustration with her superiors and distributed a questionnaire to her coworkers concerning office policies. See id. at 75. Calling Myers’s action a mini-insurrection, the local prosecutor, Harry Connick Sr., fired her. See id. Myers claimed that her termination violated her First Amendment right of free speech. The Supreme Court disagreed, drawing Shiffrin’s lamentation. Id. Had the Supreme Court focused on promoting the value of dissent and ruled in Myers’s favor, how would that have preserved the value of self-government? To be sure, an eclectic approach to deciding the case would have called upon the Court to consider both the value of dissent and the value of effective self-government. Once dissent is accepted as the focal value of free speech, as advocated in Dissent, the conclusion that other values, like self-government, are diminished is unavoidable. If they are “liquidated,” that is not because of anything about the value of dissent, but rather a function of eclecticism.

44 Id. at 157.

45 Id. at 72.

46 For a discussion of the place of method in Shiffrin’s scheme, see supra note 39. As to dissent, Shiffrin believes that “courts [and] commentators . . . would best serve the interests of the country by associating the first amendment with the metaphor of dissent, with dissenters and the dissent value.” Shiffrin, supra note 30, at 169. He recognizes, however, that the concept of dissent may become “twisted and distorted” over time and so considers it “a potentially temporary romance.” Id. at 168.
play an affirmative role in achieving substantive justice. Romanticism’s redemptive capacity stems from the emphasis it places on how humans flourish. “[T]he concept of human flourishing (or something like it) must be an important part of human decision making.”

Shiffrin realizes that this focus will yield arguments about competing conceptions of the good, of what represents and what will advance “human flourishing.” Rather than seeing the choice between competing conceptions of the good as incoherent, he regards it as inevitable. “What would be incoherent would be . . . to suppose that the state could do anything other than make a decision about the issue.”

Thus, Shiffrin argues that the state may adopt conceptions of substantive justice and meaningful equality and seek to advance those conceptions through a variety of programs including compulsory public education. The Free Speech Clause, far from being an obstacle to a progressive agenda, is properly understood as a vehicle for that agenda because of both the particular results yielded and because of the symbolic effects. Specifically, by applying a romantic eclecticism that is concerned with dissent and human flourishing to speech-related decision making, the Free Speech Clause will not be a ground for invalidating or opposing important particulars of the progressive agenda. Moreover, the Free Speech Clause, having received a construction that extols the value of dissent and the essentials of human flourishing, will stand as a powerful symbol of affirmation of fundamental progressive values.

Romance left key concepts, such as dissent, undefined and gave no clear indication as to what exactly would result from applying romantic eclecticism to actual controversies or from pursuing its romantic vision generally. Dissent, Injustice and the Meanings of America responds to some of these shortfalls and concludes with a program to encourage dissent.

According to Dissent, the First Amendment’s Free Speech Clause should be understood not only to protect dissent but affirmatively to encourage it. Shiffrin defines “dissent” to “mean speech that criticizes existing customs, habits, traditions, institutions, or authorities.” As it

47 Id. at 165.
48 Id. at 166.
49 See id. at 88–90 & 216–17 n.15. Shiffrin is not untroubled about this prescription. He admits that “the whole notion of government’s providing an authoritative rendition of public morality is democratically problematic.” Id. at 84. Nevertheless, public education must choose some subjects to cover and others to leave out. Shiffrin offers the uncontroversial examples of astrology and phrenology. See id. at 89. He dodges the obvious and difficult controversy surrounding creationism and evolution.
50 SHIFFLIN, supra note 26, at xi.
turns out, however, not all speech that criticizes existing norms is properly labeled dissent. Consider, for example, tobacco advertising. At first blush this appears fully to fit Shiffrin’s definition of dissent. It often challenges dominant views regarding smoking and responds to governmental regulation of tobacco products and the practice of smoking. Shiffrin concedes that "tobacco advertising has some elements of dissent," but he argues that it does not deserve the full protection that he would accord to "classic" dissent because it misses vital elements ordinarily associated with our valuing dissent. Tobacco advertising is not an instance of the rebel, the maverick, or a social movement striking out against the current. It is an instance of the powerful influencing the market rather than one of dissent by the less powerful. Tobacco advertising is no part of a social practice that challenges unjust hierarchies with the prospect of promoting progressive change.51

Thus, for speech to be considered fully valued dissent, it must not only meet the definition. It must also be speech by a "less powerful" "rebel, maverick or social movement" and be intended to challenge not any prevailing norm, but an "unjust" norm.

Shiffrin is by no means alone in contending that there is a central value of the constitutional right of free speech. Other contenders for the title include the marketplace of ideas,52 toleration,53 self-government,54 and self-realization.55 Less common is Shiffrin’s willingness, expressed in his eclecticism, to accord weight to other values.56 While Shiffrin will allow consideration of other factors, he places the focus of free speech analysis on dissent. He begins his examination of dissent’s place in free speech analysis with a discussion of the flag-burning controversy.57 Flag-burning represents "classic dissent" and so deserves to be seen as resting at the heart of the constitutional freedom of speech. For Shiffrin, the inability of competing free speech

51 See id. at xii; see also SHIFFRIN, supra note 30, at 153.
52 See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
54 See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948).
56 Other theories purport to be the sole, unifying consideration. See, e.g., MEIKLEJOHN, supra note 54.
57 See SHIFFRIN, supra note 26, at 11.
models to provide a powerful rationale for protecting flag-burning demonstrates the defects of those models. 58

Having examined the dissent model in light of what lies at its core, Shiffrin next extols the dissent model’s virtues by explaining what rests largely outside its protection: commercial speech. 59 The content neutrality model, which presently dominates the Supreme Court’s free speech doctrine, is peculiarly unable to justify deference to regulation of commercial speech. 60 To command that the government treat speech of all types equally (other than speech falling within an exception) is to prohibit special regulation of non-excepted speech. 61 The content-neutrality model, then, can only defer to regulation of commercial speech if it is analogous to obscenity and the other recognized forms of low value speech. As the Supreme Court has placed increasing doctrinal reliance on this model, it finds itself on the verge of applying strict scrutiny to commercial speech regulations. 62

Shiffrin cannot abide any free speech model that places value on commercial speech. Not only does the Free Speech Clause not afford protection to commercial speech, a proper understanding of free speech affirmatively supports progressive commercial speech regulations. As he puts it,

[W]e can . . . suppose that the private allocation of resources is part of public decision making in a democracy. We should further notice, however, that government allocation of resources is also part of public decision making in a democracy. That one predominates over the other (for many wealthy corporations, of course, free enterprise is the exception, not the rule) seems quite beside the point. Even if we suppose that commercial advertising is political, protec-

58 See id. at 11–18.
59 See id. at 32–48.
60 This model of free speech prohibits the government from regulating speech on the basis of its content. Regulation of speech on the basis of its content is permissible only when the government can articulate a compelling interest that the regulation advances and show that the regulation is narrowly tailored to advancing that compelling interest. While there are regulations that have satisfied this test, they are extremely rare. For an example of a regulation of speech that passes strict scrutiny, see Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990). In addition, the content neutrality model makes exceptions for certain forms of low value speech, such as obscenity, see Miller v. California, 413 U.S. 15 (1973), fighting words, see Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), and defamatory statements, see Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times v. Sullivan, 376 U.S. 254 (1964).
61 A caveat must be observed for regulations that can withstand strict scrutiny.
tion of "political speech" in this context seems dramatically less im-
portant than in others if all that is at stake is the efficient allocation
of resources. Moreover, since government frequently departs from
free enterprise with constitutional blessing, perhaps the proper allo-
cation of resources as seen by the market should not be privileged
after all.63

Next, Shiffrin takes up the issue of racist speech.64 He begins by
offering a doctrinal critique of the Supreme Court's content-neutrality
approach to this matter as articulated by Justice Antonin Scalia in his
opinion for the Court in *R.A.V. v. City of St. Paul*,65 where the Court
struck down a Minneapolis hate-speech ordinance. His major objec-
tions to content-neutrality as a model of free speech are by now famil-
lar, although anyone interested in this aspect of the Court's doctrine
would benefit from Shiffrin's penetrating analysis of *R.A.V.*66

But Shiffrin is hunting much bigger game. He is less concerned
with whether the Court has applied the content-neutrality model co-
herently than with the "meaning of America" that the model ad-
venes. The issue of racist speech affords a vehicle to describe the
meaning of America that informs the model of content neutrality and
serves as an opportunity to hold this story against the meaning of
America that informs the dissent model. Shiffrin aptly summarizes
the "vision of America" that underlies the content-neutrality model:

America [is] a nation that spurns paternalism and tolerates differ-
ent points of view, however hateful. It is a nation that is formally
neutral in race relations (affirmative action programs, from [this]
perspective, are undesirable), ideally neutral in the economic mar-
ket (although the Constitution does not guarantee this), and neu-
tral in the "marketplace of ideas." Of course, government will
engage in programs that have differential impacts on groups and
ideas, but substantive equality is not the goal of the Constitution.67

63 Shiffrin, supra note 26, at 40. Shiffrin then considers Cass Sunstein's applica-
tion of civic republicanism to free speech. See id. at 42-48. In thumbnail, Sunstein
argues that deliberation on public issues is at the core of the right of free speech.
Thus, regulations of political speech should be subject to exacting scrutiny unless
designed to promote deliberation on a public issue. So, for example, campaign fi-
nance regulation should be subject to a relatively deferential standard of review. Shif-
frin argues that the vision of an engaged and deliberative public that watches public
affairs programming instead of sitcoms is so unrealistic that it cannot provide a plausi-
ble model of free speech. See id.
64 See id. at 49-57.
66 See Shiffrin, supra note 26, at 51-63.
67 Id. at 64.
This vision undeniably embraces deeply rooted values, such as tolerance and a distrust of governmental paternalism. Shiffrin recognizes the strong purchase this vision has on America's self-conception. Nevertheless, he prefers an alternative meaning of America: "[T]he First Amendment's major purpose and function in the American polity is to protect and sometimes affirmatively to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all." Thus, the dissent model would permit regulations, such as the one at issue in R.A.V., that criminalize racist speech but not other forms of fighting words. Shiffrin would go further and embrace viewpoint discrimination. Specifically, his dissent model would allow proscription of racist speech that is targeted against individual members of groups that are historically oppressed because of race, ethnicity, or national origin. He defines this category by the individuals it excludes: "non-Jewish white Americans." The justification for this viewpoint distinction rests largely in the history of slavery and racial oppression in this country, which supports the conclusion that this particular category of racist speech is peculiarly harmful and chilling. It also stems from "[r]ecall[ing] that one of the minimum conditions of a legitimate system is that it assumes that all citizens are worthy of equal concern and respect." Given this "major premise on which the polity is constituted," a racist speaker is estopped from claiming constitutional protection for the right to claim that others should not be treated with equal dignity and respect.

Next Shiffrin turns to injustice, introducing the discussion by considering an epistemological problem with the marketplace of ideas model of the First Amendment. Different marketplaces (or socie-
ties) yield different and sometimes precisely opposite truths. What individuals accept as true, then, depends upon the society in which they live. The lesson he draws from this observation is that “persons in power” have the human capacity for self-deception—to believe that what is in their interest is true. As a result, power is deployed in self-interested ways even if the person exercising the power does not realize it. We are reassured not to despair: “there is no such thing as a perfectly just society. . . . This is not a prescription for hopeless abdication; injustice may never be completely eradicated but some societies are more just than others. It is always possible to move toward a better society.”

Dissent is the key to optimism. As Shiffrin puts it, 

[D]issent is indispensable. Without it, unjust hierarchies would surely flourish with little possibility of constructive change. If the truth about the presence of injustice is to be spread, social institutions must be constructed in a way that nurtures critical speech.

In the end, the premises of the argument are quite simple. Injustice exists; the impulse to resist it is less than it should be; dissent should be encouraged.

Thus, the constitutional freedom of speech does not guarantee justice, but it guarantees an opportunity to identify and oppose injustice—that is, an opportunity to dissent.

While it may not yet be time to despair, the extent to which dissent has been marginalized is cause enough for Shiffrin to lament. One glaring source of lament is the media. The media respond to advertisers. Ads are sexist, promote hedonism and materialism, and carry the overall theme that “all is right with the world.” As to entertainment programming, advertisers demand that shows be mindlessly riveting by using continuous violence and gratuitous sex. Advertisers also require the networks to cater to eighteen to thirty-five-year-olds and push newspapers and magazines to focus on the wealthy.

place in which opposing ideas are expressed, error will be exposed and the truth will out. See Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

76 This presentation of the idea that “truth” is socially constructed is in some tension with an earlier discussion. See Shiffrin, supra note 26, at 27–31 (rejecting postmodernist approaches to free speech).

77 Id. at 92–93.

78 Id. at 93. Shiffrin contends for spreading “the truth about the presence of injustice” without a hint of irony over having just raised a serious question about whether truth is a notion with any coherence.

79 Id. at 97–101.
News reporting, according to Shiffrin, is no less bleak. Coverage excludes issues that progressives care about, such as wealth distribution, the extent of corporate power, and the "inferior position" of women and minorities. Political analysis focuses on questions of strategy and prognostication rather than substance. Foreign affairs reporting tends to parrot the line of American foreign policy and fails to accurately and fully report the point of view in other countries except in rare cases. Generally, media reporting fails to challenge the status quo and, in fact, serves mainly to perpetuate it.80

The media is by no means alone; the Court has played a co-starring role in the marginalization of dissent. Shiffrin commends the Court for constructing meaningful protections against libel and slander actions for those who criticize government officials.81 But the Court has not extended those protections to a sufficiently broad range of public figures. As a result, it is comparatively difficult to express dissent against the actions of powerful non-governmental officials. The Court has also left in place serious institutional barriers to effective dissent. With judicial blessing, dissenter’s are denied access to “prisons, post offices, [Lafayette Park] across from the White House, school mailboxes and private mailboxes, utility poles and polling booths, airports, county fairs, and shopping centers.”82

The Supreme Court's decision invalidating much of the 1974 campaign finance reform law deserves special attention.83 The Federal Election Campaign Act of 1974 (FECA) placed limits on the amount of money candidates for federal office could spend on their campaigns.84 One rationale the government proffered was to make campaigns more egalitarian and democratic. Recognizing that relative spending levels strongly correlate with success in federal election campaigns, spending limits would allow more candidates representing a broader array of positions to present their candidacies competitively.85 The Court held this motive to be forbidden. “[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment ....”86 Shiffrin responds with a question: “[W]hy is it ‘wholly foreign to the First Amendment’ for Congress to

80 Id. at 101–07.
82 See Shiffrin, supra note 26, at 110–11.
84 See 18 U.S.C. § 608(a)(1) (Supp. IV 1970) (expenditures from personal funds); id. § 608(c) (campaign expenditures).
85 See Buckley, 424 U.S. at 56–57.
86 Id. at 22.
take measures limiting injustice in the democratic system?"  

Certainly, he posits, the FECA offered the possibility of promoting dissenting positions.  

Shiffrin offers a four point program for redressing the marginalization of dissent. The four points are (1) education that promotes dissent against injustice, (2) access to the media for dissenting viewpoints, (3) lowered legal barriers to dissent, and (4) providing dissenters with access to information. The program is meant to be an outline and so lacks specifics, but it offers at least some content.  

As to education, schools should teach substantive concepts of justice. This will provide the basis on which students will ultimately be able to dissent against injustice. In this vein, students should be taught to dissent—to be prepared to reject dominant conventions—and should be taught to think of dissent as appropriate behavior for virtuous citizens.  

Given the important role that the mass media play in American life, Shiffrin argues that meaningful dissent requires that dissenters have improved access to the media. His specific proposals include requiring television broadcasters to air educational programming for a portion of each day and to authorize the National Education Association to declare what programming is educational. He would also

87 Shiffrin, supra note 26, at 112.  
88 It is by no means clear that this would have been the result. It may be that unseating the status quo, which is to say incumbents, requires that opponents be able to spend amounts in excess of the legislated caps. If so, the legislation would have functioned to prevent effective dissent and to protect incumbents and the status quo. Because the FECA never emerged from its cradle, it is speculative to regard the legislation as promoting or restraining dissent. On the other hand, Shiffrin is correct in reading Buckley to reject the idea that promoting dissent is an important constitutional value, let alone the central value of the Free Speech Clause.  
89 See id. at 112–13.  
90 See id. at 113. Shiffrin argues,  
[I]t is important to communicate the importance of constitutional values. If our citizens are not educated with a sense of justice, they are less likely to acquire it. Indeed, a sense of justice and of injustice is typically a prerequisite for progressive dissent. In addition, our educational system must educate not only autonomous thinkers prepared to reject the habits, customs, and traditions of the larger society but also citizens who generally regard dissent against injustice as virtuous behavior.  
91 In this section, Shiffrin refers repeatedly to “the media,” but he specifically discusses only one medium, broadcast television. Id. at 115–17. In a concluding paragraph he argues for “access to the sites of injustice.” Id. at 117. By this, he means access to both private and public property for the purpose of holding demonstrations.  
92 See id. at 115–16.
apply the fairness doctrine to commercial advertising, allowing free access for those who dissent from the commercial messages. Finally, Shiffrin proposes granting free access to broadcasting facilities to all candidates on the ballot. In a later section he adds that campaign finance reform should include restrictions on spending by candidates and adoption of proportional representation.

In addition to this affirmative support for dissent, Shiffrin seeks to minimize disincentives to dissent. His primary concern is with the possibility of defamation actions being brought against dissenters. The treatment of dissent against public officials, where First Amendment doctrine is sweepingly protective of the dissenter, is satisfactory. Shiffrin calls for this protection to be extended to dissenting speech made against any public figure, and he suggests that this category be defined in reference to "the extent to which the criticized individual exercises power." Finally, access to information will encourage dissent and make dissent more effective. Accordingly, Shiffrin urges greater public access to information to foster "a responsible citizenry prepared to challenge injustice when appropriate." He calls for greater subsidies for

93 This proposal raises obvious and perhaps insuperable practical problems. For example, how does one determine who is entitled to respond? Consider an advertisement for clothing. Would the television station accord response time to a group that opposes sweatshop conditions in the apparel industry, to one that opposes the exploitation of child labor, or to unions whose members have lost jobs as operations have moved overseas? Shiffrin spends two sentences discussing this proposal and so does not begin to suggest how such a plan could ever work. See id. at 116.

94 Shiffrin again fails to offer any sense of how this proposal could work. For example, it is not difficult to imagine "candidates" coming out of the woodwork simply to receive free air time. See id. at 116-17.

95 See id. at 120. Again, Shiffrin simply lists the ideas without elaboration. He does not explore any of the complexity of the blunderbusses he offers. For example, he contends that by imposing spending limits on candidates and making available public funding for much of what candidates may spend, candidates will be freed from moneyed interests. See id. This is far from obvious. The advent of independent advertising campaigns, funded and produced directly and independently by moneyed interests, means that candidates no longer rely on moneyed interests exclusively for contributions. The National Rifle Association, industry organizations, and labor unions have all funded massive advertising and get-out-the-vote campaigns that have directly served the political agenda of specific parties and candidates. By reducing the amount a candidate can spend, Shiffrin's proposal may make candidates more reliant on such special interests by diminishing their ability to control the agenda of their own campaigns.


97 SHIFFRIN, supra note 26, at 117.

98 Id. at 118. Shiffrin commits precisely the error that formed the basis of his critique of civic republicanism. Shiffrin rejects civic republicanism because it rests on
education and libraries and for equitable access to the "new communications infrastructure." He proposes that all magazines and publications be subsidized. These subsidies would be financed through a tax on advertising revenue in order to give the media greater incentive to look to its circulation for revenue.

B. Analysis

Insofar as Shiffrin aims to reform the substance and method of the judiciary's constitutional doctrine, his project is unlikely to convince even those who share his romantic and progressive commitments. First, his major substantive proposal—that the central meaning of the Free Speech Clause be understood as the protection and encouragement of dissent—would likely diminish dissent. The effectiveness and meaning of dissent depends upon its being socially disapproved, if not illegal. Consider Shiffrin's paradigmatic case, flag
If flag-burning is not only protected but respected and encouraged as a core constitutional value, then burning an American flag ceases to function as a powerful way of protesting injustice within American society. Those who burn the flag seek to engage in a form of protest that is antithetical to prevailing norms and that is, in a sense, shocking. Shiffrin's own reading of Ralph Waldo Emerson and Walt Whitman underscores this point. They "celebrated the courage of the nonconformist, the iconoclast, the dissenter." In Shiffrin's conception of the Free Speech Clause, dissent ceases to be an act of courage and becomes a matter of responsible citizenship and represents conformity as much as protest. Infused with responsibility and conformity, dissent is fundamentally altered and would be, at best, a flawed vehicle for pursuing Shiffrin's project.

Second, many who share Shiffrin's romantic and progressive commitments have well-founded objections to placing any reliance on the courts to achieve their agenda. In a recent book, Richard Rorty sets forth some of these concerns. Judges and lawyers are ill-suited to applying a romantic eclecticism designed to promote the conditions of human flourishing. As Rorty puts it, "Inspirational value is typically not produced by the operations of a method, a science, a discipline, or a profession. It is produced by the individual brushstrokes of unprofessional prophets and demiurges." History is also a source of caution. Except for the interval of the Warren and Burger Courts, the Supreme Court has rarely been friendly and has frequently been hostile to the progressive agenda, repeatedly striking down legislation that progressives were able to enact. By the early 1900s, the heirs to Emerson and Whitman had clearly "devalued (then-) 'prevailing constitutionalist, legalistic and party-electoral expressions of citizenship.' These criticisms helped substitute a rhetoric of fraternity and national solidarity for a rhetoric of individual rights and this new rhetoric was ubiquitous on the Left.
until the 1960s."\textsuperscript{107} Beyond historically-based distrust of the courts, Rorty regards judicial attempts to define human needs or the conditions of human flourishing as illegitimate.\textsuperscript{108} Because we cannot achieve objectivity,\textsuperscript{109} the resolution of what human needs are "can only be political: one must use democratic institutions and procedures to conciliate these various needs, and thereby widen the range of consensus about how things are."\textsuperscript{110}

With this last observation, Rorty points us to the fundamental failing of Shiffrin’s project. He never provides an account of its legitimacy. Shiffrin offers a substantive construction of the Free Speech Clause’s central meaning and a methodology for adjudicating free speech issues. Through two books, however, he does not pause to explain how these prescriptions are legitimate elaborations of constitutional meaning.\textsuperscript{111} Shiffrin instead extols the results that his reformed judicial doctrine would yield. For those who agree with

\begin{enumerate}
\item Id. at 50.
\item Id. at 35.
\item I take Shiffrin to accept this premise. \textit{See}, e.g., SHIFFRIN, \textit{supra} note 26, at 91–92 (accepting the argument that truth is socially constructed).
\item RORTY, \textit{supra} note 105, at 35.
\item One passage, while not expressly taking up the legitimacy crisis, may be understood as responsive. In contending that eclecticism, while “wildly capacious,” is not wholly unbounded, Shiffrin asserts, "Judges make decisions in a cultural context that places some policy arguments beyond the pale." SHIFFRIN, \textit{supra} note 30, at 137. In interpreting the Free Speech Clause, judges are bound by “American tradition.” Id. This invocation of tradition is contradicted by his version of romanticism, which expressly prefers “originality,” “spontaneity,” and “invention” over the “static” and “bloodless routine.” \textit{Id.} at 141.
\item He also fails to explain what he means by American tradition or what falls outside it. Shiffrin’s case for dissent demonstrates how little weight he places on notions of tradition. While he discusses Emerson and Whitman and a few isolated instances of dissent, he never attempts a rendering of the role dissent has played through American history—not that there is a shortage of material. This has enabled at least one commentator to question whether the American tradition places a significant value on dissent at all. \textit{See} Mark Tushnet, Book Review, \textit{The Culture(s) of Free Expression}, 76 CORNELL L. REV. 1106, 1111–12 (1991). Nor does he attempt to discuss other values of the American tradition that might supersede the priority that American tradition, whatever he means by that term, accords it.
\item One troublesome omission is any reference to the formative debate over the place of dissent that raged through the bitter and divisive Presidential campaign of 1800. This debate focused on the Alien and Sedition Acts, which criminalized certain dissent as “seditious libel,” and their constitutionality. Thomas Jefferson had opposed them as unconstitutional limitations on the freedom of speech. Jefferson’s advocacy, and his election, are strong evidence that dissent is and long has been an important component of the freedom of speech. Even Jefferson, however, declined to accord dissent the status of central or core value of free speech. His inaugural address, for example, accorded priority to unity and harmony. \textit{See} The First Inaugural Address
Shiffrin's agenda, this may be reason enough to accept his doctrinal prescriptions. For those who do not hold romantic or progressive commitments, however, Shiffrin gives no reason to accept his doctrinal reformations. He preaches exclusively to the choir.


During the contest of opinion through which we have passed, the animation of discussion and of exertions has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and to write what they think; but this being now decided by vote of the nation according to the rules of the constitution, all will, of course, arrange themselves under the will of the law, and unite in common efforts for the common good. . . . Let us, then, fellow citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which life itself are but dreary things.

Id. at 291.

For the reasons set forth above, however, even those sympathetic to Shiffrin's goals will have cause for skepticism. See supra notes 103-08 and accompanying text.

On the last full page of the book, Shiffrin asserts that his dissent-based model would also protect "[t]he overwhelming majority of right-wing dissent." SHIFFN, supra note 26, at 129. The assertion is dubious. See id. at 145 n.50 ("Democracy might well be improved, however, if [the Wall Street Journal's] editorial page were to take a thirty-year vacation."). For example, Shiffrin denies tobacco advertising the status of fully protected dissent, even though it challenges prevailing conventions, because it lacks the "prospect of promoting progressive change." Id. at xii (emphasis added).

Shiffrin's disdain, expressed throughout the book, for neutrality makes this foray into viewpoint neutrality all the more jarring. For the purposes expressed in the text, his denial is beside the point. Shiffrin propounds the dissent-based model as instrumental to achieving a society that is more just as measured from his romantic and progressive commitments. It is unlikely that even "right-wing dissenters" would accept the dissent-based model if that is where it would lead. Some right-wing dissenters might also feel uneasy, and unprotected, in light of Shiffrin's treatment of hate speech. One is left to wonder further whether Shiffrin would protect protests in front of abortion clinics. On one view, the protesters are quite powerless—the supreme law of the land precludes the enactment of their views into law. On another view, the number and fervor of the protesters may make them seem quite powerful relative to a lone and harassed women seeking access to the clinic. Ultimately, the powerful interest is the one the court decides to protect. In this case, the model seems self-defeating.

Moreover, those who are conservative (as opposed to right-wing dissenters) or whose speech is expressly grounded in appeals to prevailing social norms in order to defeat non-conforming societal conditions, Martin Luther King, Jr.'s "I Have a Dream" speech for example, are denied full protection under the dissent-based model. Shiffrin is quite candid on this point: "Those who wish to preserve the status quo, of course, should oppose a dissent-centered theory . . . ." Id. at 129. This statement says something deeper about how Shiffrin regards constitutional doctrine. One's position on issues of constitutional doctrine should be determined by one's political position. I take up the implications of this position below.

See, e.g., SHIFFN, supra note 26, at 121–30.
There is an important pragmatic problem with this approach: no one in Shiffrin’s choir is on the Supreme Court. Because it is the Supreme Court that ultimately must accept Shiffrin’s doctrinal reforms, there is no basis for the members of the choir to believe that Shiffrin’s doctrinal vision will foreseeably become reality. This shortcoming was evident in *Romance* and *Dissent* does nothing to respond to it.

This is no idle criticism, for if Shiffrin were to provide a persuasive account of his project’s legitimacy, he would create the basis for those who disagree with him politically to accept his doctrinal prescriptions. In turn, he would provide those sympathetic to his agenda reason to believe his project could succeed.

History is illuminating, especially from the standpoint of progressives. The constitutional tradition fell into crisis in the early twentieth century over judicial response to progressive legislative victories. The Court used substantive due process as a grounds to invalidate numerous pieces of progressive legislation. Emblematic was the Court’s ruling in *Lochner v. New York*, which held unconstitutional a statute that restricted the number of hours bakery employees could work per day and per week. The Court’s opinion rested on the grounds of substantive due process, which the court understood to prohibit much regulation of private contracts. The opinion was subject to withering attack in a dissent by Justice Holmes, who saw the majority as imposing its own policy preferences, derived from the economics of Herbert Spencer, under the guise of the Due Process Clause. The specific crisis concerned whether the Court was legitimately interpreting the Constitution or was exceeding its role and substituting its policy preferences for those of democratic institutions. The crisis came to a head during the New Deal and was resolved when the Court changed

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115 In this, *Dissent* calls to mind Rorty’s criticism of one of the leading contemporary romantics, the playwright Tony Kushner, who “produces dreams . . . of inexplicable, magical transformations. The cultural Left has contributed to the formation of this politically useless unconscious.” Roryy, *supra* note 105, at 102.

116 Mark Tushnet raised exactly this question in a review of *Romance*. “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.” *Tushnet, supra* note 111, at 1114.

117 198 U.S. 45 (1905).

118 See *id.* at 75 (Holmes, J., dissenting).
course and determined that it generally would defer to judgments of the legislature.119

The Supreme Court's approach during the *Lochner* era favored conservative political and economic interests. Nevertheless, conservatives came to embrace the Court's repudiation of *Lochner* because they could not persuasively respond to Holmes's critique.120 There is thus reason to expect that, were Shiffrin to provide a persuasive account of his doctrine's legitimacy, those who do not share his political agenda could accept it.121

The major preoccupation of constitutional theory for more than twenty years has been the effort to respond to the legitimacy crisis.122 It is thus initially surprising that Shiffrin does not take up the matter of his project's legitimacy as such and that he offers only brief passages that can be understood as speaking to the question at all. His inattention to the topic may be an expression of his romanticism. Any account of his project's legitimacy would require a theory, and romanticism is resolutely pragmatic.123 To propound a theory is to place limits on those qualities that Shiffrin seeks to free. Embracing a theory would reverse his stated priorities, emphasizing "the general and the universal" over "the concrete and the particular."124 Shiffrin appears to have taken to heart Emerson's aphorism, "The only sin is limitation."125

Shiffrin also seems to take a dim view of the possibility of legitimacy. He repeatedly regards judges as inevitably acting in result-oriented fashion126 and regards the ultimate basis for assessing legal

120 See Powell, supra note 8, at 274.
121 See Bork, supra note 18, at 78 (explaining legitimacy is the central role of constitutional theory and in turn prevents judges from imposing their own preferences).
124 Shiffrin, supra note 30, at 141.
126 See, e.g., Shiffrin, supra note 30, at 98.
arguments to be whether they meet with one's political preferences. The conclusion to *Dissent* rests on this view:

The [free speech] principle does not interpret itself. The rightward drift of argument cannot be understood by searching for an inherent meaning of the free speech principle or even by seeking to assess its political tilt. We would make more progress if we recalled the name of the chief justice of the United States: William H. Rehnquist. . . . Like it or not, the free speech principle is here to stay. 'Tis better *political strategy* to claim it than to hold out oneself as an enemy of a cherished right. But the calculus of whether reforming judicial doctrine "'Tis better political strategy" is quite a bit more complicated. Rorty and many other progressives have rejected this calculus not only on principle, but on strategic grounds. Shiffrin's strategy rests on twin premises. First, the claims he makes in the name of the free speech principle must have a chance of being adopted. Second, the risk that the judiciary will adopt a doctrine that actually impedes the progressive political agenda and/or promotes its competitors must be acceptably low. Shiffrin never offers any reason to believe that the first premise is satisfied. Moreover, history gives ample cause for concern as to the second. As a matter of strategy, the better course for those who share Shiffrin's political commitments may be to renounce efforts to reform judicial doctrine and to abandon judicial review.

III. ANTITHESIS: ABANDONMENT

Professor Mark Tushnet seeks to preserve constitutionalism by abandoning the defining institution of the American constitutional tradition (judicial review) and the constitutional elite (the judges, lawyers, and academics who practice constitutionalism). As he has argued, "[B]oth Enlightenment rationality and common law method understood as in some way associated with the idea of authenticity, considering Professor Tushnet's "claim that legal rights are *essentially* individualistic, at least in the United States constitutional and legal culture, and that progressive change requires undermining the individualism that vindicating legal rights reinforces. . . . [T]he long-term ideological consequences of winning victories in courts are almost certainly going to be adverse to progressive change." *Tushnet, supra* note 27, at 142. His prescription forms the basis of the next Section.
have run out." Tushnet is concerned about the Constitution remaining the exclusive province of this elite. Thus, he wants not only to take the Constitution away from the courts, but to give the Constitution to the democratically accountable branches and, through them, to the people.

Tushnet offers a provocative argument in support of his proposal that the Supreme Court no longer exercise judicial review. His argument rests on an important distinction between what he terms the "thin constitution" and the "thick constitution." The thin constitution refers to the principles articulated in the Declaration of Independence as well as the Preamble to the Constitution. The thick constitution refers to the operative clauses of the Constitution, the Constitution minus the Preamble.

The thin constitution is the province of the public and of their agents in government. It is, Tushnet contends, the aspirational principles of the thin constitution (such as equality, liberty, and the general welfare) as opposed to the relatively technical and detailed clauses of the thick constitution to which public commitment attaches. It is through this common commitment that the people become "the People." Further, it is by discussing and debating the meaning of these principles in the context of specific governmental actions or omissions that we create our national identity and constitute ourselves as a people. The construction of the thin constitution is a political process. Competing conceptions of its principles are contended for, draw or fail to draw support, and evolve over time. As a fundamentally political process, the Court has no direct role, although its interpretations of related provisions in the thick constitution, such as the Equal Protection Clause, may have some persuasive influence on deliberations regarding the thin constitution.

Tushnet uses the case of Dred Scott v. Sandford to provide an illustration. The Supreme Court issued an opinion that, read fairly and fully, put the federal government out of the business of enacting any significant regulation of slavery. Abraham Lincoln responded by refusing to embrace the Supreme Court's opinion in all its fullness. Instead, he accepted only that the decision resolved the dispute between the parties. Lincoln refused to accept that the Supreme Court

132 This distinction echoes the question raised by Professor Thomas Grey. See Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703 (1975).
133 See Tushnet, supra note 27, at 50–52.
134 See id. at 50–51, 181–82.
135 60 U.S. 393 (1856).
could, in effect, adopt a conception of equality that would govern the political branches. It is for Congress and the President, and the people acting through them, to construe and effectuate the ideals of the Declaration of Independence.\footnote{136}

Accepting the legitimacy of Lincoln’s treatment of the \textit{Dred Scott} decision, it does not follow that judicial review is illegitimate. All that follows is that, at least under certain circumstances, it is proper for the political branches to challenge the broad application of Supreme Court precedents. Rather than a comment on judicial review, the furor over \textit{Dred Scott} speaks to the question of judicial supremacy—the extent to which the Supreme Court’s interpretation of the (thick) Constitution is binding on the political branches in the future, as opposed to the parties to the specific case in which the interpretation is announced.\footnote{137} Tushnet understands this and pushes on.

The Constitution’s design contemplates that the political branches will deliberate on behalf of the public and subject to public input and scrutiny. James Madison and other founders expected that through this exercise in republican self-government we would constitute ourselves as a people and would forge our national identity. He was, of course, not so naive as to expect that there would be no self-interested action by members of the political branches. Instead, the government was divided into branches, and the predominant branch, Congress, was further divided into two chambers of intentionally different and not entirely compatible character. Each of the branches would serve as a check against the ambitions of and overreaching by the others. The Constitution’s design rests on the premise that no particular special interest or faction would likely take control of all the divisions of power at once and so the structural checks and balances would provide a sufficient safeguard against oppressive governmental

\footnote{136} Tushnet recognizes the major counterexample—massive resistance by Southern politicians to the Supreme Court’s desegregation orders. Because this resistance could not plausibly be based on any principle within the thin constitution, Tushnet considers it illegitimate and distinguishable from Lincoln’s response. \textit{See Tushnet, supra} note 27, at 51, 181–82.

\footnote{137} Tushnet offers a subtle and compelling approach to judicial supremacy, suggesting the circumstances under which it is and is not proper for political leaders to challenge the Supreme Court’s constitutional interpretations. While he gives the book’s first chapter the provocative title “Against Judicial Supremacy,” his argument can be just as readily understood as making the case for a nuanced understanding of judicial supremacy in that it accepts the judiciary’s interpretations as supreme in all but exceptional cases. \textit{See id. at 6.}

In any event, it is incongruous to encounter a discussion of judicial supremacy given the book’s major proposal. If we take the Constitution away from the courts, judicial supremacy will fall, \textit{a fortiori}.
action. These structural safeguards would then provide a space within which effective, deliberative self-government could address whatever crises might face the new nation in a way that would adhere to the principles of the thin constitution.

Practice under this system, according to Tushnet, has shown that judicial review is insidious. It distorts deliberation by both the public and political leaders by forcing them to focus on what the court thinks. More importantly, it causes politicians to neglect their role as constitutionalists. They do not think about whether a given piece of legislation is consistent with the principles of the thin constitution, or the thick constitution for that matter, because that is the courts' job. Political leaders thus avoid making difficult decisions regarding the meaning of these principles, abdicating that role to the courts.¹³⁸

By now, Tushnet has argued that public commitment flows to the principles of the thin constitution rather than the arcana of the thick constitution, that the political branches enjoy priority in the development and application of the principles of the thin constitution, and that the courts are not particularly able at construing these principles. Why then should the judiciary's interpretations of the thick constitution ever be allowed to trump the considered judgments of the political branches as expressed in legislative or executive action?¹³⁹

One important response is that the political branches, in fact, do a bad job of protecting long-term commitments embodied in the thick constitution, including the freedoms embodied in the Bill of Rights, against the political pressures of the moment. Judicial review is an attempt by "Philip sober to control Philip drunk."¹⁴⁰ It was this concern that led the founding generation to demand a Bill of Rights complete with judicial review to make those rights meaningful, and

¹³⁸ See id. at 54–71.
¹³⁹ By executive action, I mean to encompass the action of administrative agencies. Tushnet does not discuss where the independent regulatory agencies, such as the Federal Reserve, fit into his scheme. On the one hand, they are paradigmatically undemocratic. On the other hand, Congress and the President have agreed that these entities do not violate any norms found in the thin constitution and that in fact they promote the general welfare. See, e.g., Humphrey's Executor v. United States, 295 U.S. 602 (1935). If they should become tools of oppression, Congress and the President remain fully able to respond.
even Madison came around to the view that a judicially enforceable Bill of Rights would be an improvement.

Tushnet has a quiver full of arrows to shoot at this common rationale for judicial review. First, he denies that there is an important tension between long-term commitment and short-term political pressures. The derisive label, "short-term political pressures," masks what is often the political motive: to secure the general welfare against a perceived immediate threat. This is a value wholly within the thin constitution. On this view, the short-term concern is as legitimate as the long-term commitment. This situation calls for balancing the commitments of the thin constitution, which is the process by which we continue to refine our national identity and is not a process that should be abdicated to judges.

Second, Tushnet denies that judicial review acts as a significant restraint on political forces; it amounts to "noise around zero." He cites approvingly the studies concluding that, over time, the Court's jurisprudence follows election results. This is to be expected since the Constitution establishes that federal judges are appointed by the President subject to confirmation by the Senate.

For proponents of judicial review, *Brown v. Board of Education* is a compelling counterpoint. Drawing on the work of Professor Michael Klarman, Tushnet topples this sacred cow. A cold look at the aftermath of *Brown* reveals that the court's opinion had astonishingly little effect on the segregation of public schools. In 1964, ten years after *Brown*, a miniscule percentage of public schools in the south were desegregated. It was not until political leaders adopted the view that racial segregation violated the thin constitution's equality principle and enacted legislation to effectuate this view that meaningful progress was made. If *Brown* is judicial review's shining
moment, it demonstrates just how little judicial review is capable of achieving.\textsuperscript{148}

Tushnet also points out that judicial review is not a necessary condition for protecting values such as individual liberty. Other countries, such as Great Britain, have proven just as capable as the United States at securing values of the sort in our thin constitution without granting their judiciaries the power to declare laws void as unconstitutional.\textsuperscript{149}

This comparative perspective raises a related observation. Even if it is descriptively accurate to contend that political leaders do not pay attention to constitutional considerations,\textsuperscript{150} thick or thin, this may be due to judicial review. If judges were not standing by to enforce constitutional values, the political branches might be more responsible when constitutional issues arise. More generally, judicial review leads legislators and the public to defer to the judiciary as to the meaning of even the thin Constitution and so their capacity to engage in constitutionalism has atrophied. Tushnet refers to these pernicious effects of judicial review as the "judicial overhang."\textsuperscript{151} Having never inhabited this universe without judicial review, we cannot know how the political branches would respond.

\textsuperscript{148} Tushnet recognizes the symbolic importance of Brown, which energized the civil rights movement. Nevertheless, he questions whether this was ultimately vital to the movement's successes. This question is "unanswerable," but "[i]t seems quite likely that something would have happened in the South without Brown." Id. at 146.

\textsuperscript{149} Great Britain may not provide much solace. It has increasingly integrated its legal system with that of the European Union. It has adopted the European Convention on Human Rights into domestic law, along with judicial review.


\textsuperscript{151} See Tushnet, supra note 27, at 57–65. The prospect of lifting the judicial overhang leaves Tushnet almost giddy. He speculates that "[f]reed of concerns about judicial review, we might also be able to develop a more robust understanding of constitutional social welfare rights." Id. at 169. These would include the right "to employment, to housing, to a minimally decent standard of living, and the like." Id. To paraphrase Tushnet's rhetorical question to Shiffrin, I want simply to ask, Trent Lott? Dick Armey? Tom DeLay? See supra note 116.
Tushnet makes an affirmative case for political construction. He argues that the Constitution's structure actually lends support to the notion that the political branches will do a good job of constitutional interpretation. This is because the Constitution's structure is incentive compatible. We do not need judicial scrutiny of the arrangements that the political branches make because the Constitution structures the incentives of political actors in a way that will lead them to comply with the Constitution. Since the incentives run toward constitutional compliance, we can safely consider the Constitution to be self-enforcing.\footnote{152 Tushnet analogizes to car dealerships. A car dealership does not scrutinize the actions of its sales staff to see whether salespeople are giving maximum effort to sell cars. Instead, it makes each salesperson's compensation depend on how many cars he or she sells. The commission-based incentive structure ensures that the dealership's interest and the salesperson's interest are the same, selling as many cars as possible. This identity of interest renders the arrangement self-enforcing and obviates any need for meddling scrutiny. Tushnet, supra note 27, at 95–96.}

Because the Constitution is self-enforcing, it is safe to take the Constitution away from the courts. Freed from the judicial overhang, wide-ranging public discussion of the Constitution will be possible and democratically accountable branches of government will be able to construe the Constitution and effectuate their constitutional judgments. Through this continuing process of populist constitutional law, the people construct the national identity; the people thus become "the People."\footnote{153 See id. at 50–53, 181–82.}

At the level of generality at which Tushnet makes his proposal, it is bold and elegant. Considering how the proposal might work, however, raises difficult questions. First, how do we know when a political actor is engaging in populist constitutional law? Tushnet clearly believes, for example, that populist constitutionalism would entail legislative deliberation different from that which we observe in Congress, suffering under the judicial overhang. Populist constitutional law is "law oriented to realizing the principles of the Declaration of Independence and the Constitution's preamble . . . [and] committed to universal human rights justifiable by reason in the service of self-government."\footnote{154 Id. at 181.} Tushnet's use of "reason" is very strange. He does not tell us what he means by reason, although we have seen that he believes that "enlightenment rationality has run its course."\footnote{155 See supra note 125 and accompanying text.}

A populist constitutionalist would, according to Tushnet, make an "all-things-considered judgment" about what would "establish Jus-
tice, promote the general Welfare, and secure the Blessings of Liberty to . . . posterity within a framework committed to the principles of equality and inalienable rights embodied within the Declaration of Independence." This may have been precisely what Governor Orval Faubus thought he was doing when he attempted to block desegregation of Central High School in Little Rock. Tushnet declares that Faubus's position was wrong as a construction of the thin constitution, as indeed it was. But nothing in the preceding paragraphs allows us to declare Faubus's all-things-considered judgment "wrong." All we can say is that we disagree. Tushnet's regime allows us to conclude that Faubus's position was wrong only because Faubus lost. Had his position prevailed, he would have been, from the standpoint of populist constitutional law, right. There is obvious cause to be skeptical whether such victor's constitutionalism would inspire conscientious adherence to principle.

This mirrors the problem that doctrinal reform encounters: how does the thin constitution meaningfully constrain or guide the individuals and institutions charged with engaging in populist constitutional law? An absence of constraint does not create a legitimacy crisis in populist constitutional law because populist constitutionalism is not anti-democratic. It may give rise to a crisis nevertheless. If the thin constitution yields no constraint, then it means whatever those engaged in populist constitutionalism say it means. At this point, one is left to ask what remains of the Constitution, thick or thin? It is not obviously more than an incantation that must be invoked before political actors call upon their powers.

Tushnet also regards taking the Constitution away from the courts to be an anti-elitist move. This seems erroneous. Once the Constitution is taken away from the courts, the political branches (especially Congress) become the institutions primarily charged with conducting constitutionalism. Members of Congress are accountable in that they can be voted out of office. But they are not effectively less elitist because they are far less accessible to individuals than are the courts. By filing a lawsuit, an individual with a constitutional griev-

156 Id. at 51-52.
157 Tushnet actually labels Faubus's position "implausible." Id. at 14 ("Governor Faubus could not plausibly have claimed that his actions advanced the Declarations' project.") Throughout the book, however, he frames the resolution of thin constitutional questions in terms of right and wrong. For example, he repeatedly asks whether the courts are more likely than Congress to yield right answers.
158 See id. at 66-67 (discussing hypothetical counterterrorism legislation in a way that seems to endorse the view that whatever position prevails is correct, at least at the time it prevails).
ance will receive a forum with considerable process and opportunity to be heard and considered. Indeed, the courts lend their name to the common phrase for a fair opportunity to be heard and to have one's arguments considered; such is to "have one's day in court." A person with a constitutional grievance who files a petition with Congress, however, has no rational basis for expecting to receive anything like his or her day in court. Tushnet's proposal in fact changes one elite (the courts) for another (Congress).  

The world on which populist constitutional law would operate, moreover, is so complicated that Tushnet cannot make a persuasive case for a complete elimination of judicial review. These seemingly unavoidable exceptions may overwhelm Tushnet's proposal. I plan to explore five exceptions.

First, meaningful participation in the political process is a necessary condition to populist constitutional law, yet, as history bears out, the political process cannot guarantee such participation. Tushnet accepts that, ideally, judicial review would be available for cases of exclusion from political participation. Nevertheless, Tushnet rejects judicial review for such cases because "we are likely to get judicial review that is really small, dealing only with formal exclusions and pariah groups, or really big, dealing with informal exclusions resulting from economic circumstances." Tushnet believes that politics empowers even discrete and insular minorities because minority groups can band together with other groups and become a necessary component of a majority bloc. Regarding African-Americans specifically, Tushnet observes that "[b]y becoming a core constituency in the New Deal and Great Society political coalitions, African-Americans have been able to obtain a fair amount of the legislation they sought."  

This paints far too simple a picture. African-Americans did not secure "legislation they sought" simply by exercising the vote as members of a coalition. African-Americans participated heroically in the political process by speaking, protesting, marching, petitioning the government, and organizing, among other means. All of these forms of participation were necessary to securing legislation. More to the

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159 Rather than making constitutionalism less elitist, Tushnet's proposal would likely render constitutional participation a collective rather than an individual activity. Because individuals typically cannot expect to receive the attention of Congress, they must band together into interest groups in order for their positions to be heard and acted upon by Congress. This is preferable, Tushnet believes, because collective action is conducive to progressive reforms, where individual action is inimical to them. See id. at 142.

160 Id. at 160.

161 Id. at 159.
point, these forms of participation are preconditions to populist constitutional law. The civil rights movement sought to bring about an understanding of the principles of the thin constitution. The political process would not have allowed the civil rights movement a full and fair opportunity to make its case. It was judicial review that secured the rights of meaningful participation that are a necessary precondition to populist constitutional law.

In this context, Tushnet's treatment of Brown is interesting. That case is undeniably important, perhaps talismanically so, to proponents of judicial review. Pointing out that Brown did very little to bring about school desegregation, however, does nothing to minimize the central role that the Court's legions of civil rights decisions played in securing the ability of African-Americans and proponents of civil rights generally to exercise fundamental rights of political participation other than voting. Without these decisions, it is impossible to imagine meaningful legislative successes. Consider two examples.

In NAACP v. Alabama ex rel. Patterson,\(^\text{162}\) Alabama made a discovery request during an injunction proceeding that the NAACP disclose the names and addresses of all members residing in Alabama. The trial court ordered the NAACP to divulge the information. Fearing for the safety of its members, the NAACP refused. The court held the NAACP in contempt and fined it $100,000. The Supreme Court of the United States held that the order to divulge the membership information was unconstitutional as a violation of the right of association. Had the order been upheld, the NAACP would have faced an impossible choice: either continue to defy this and other court orders and be fined into bankruptcy or comply and be harassed into submission.

In New York Times v. Sullivan,\(^\text{163}\) the Alabama Public Safety Commissioner, L.B. Sullivan, sued the New York Times for libel on the basis of an ad the paper had printed. The ad was an open letter signed by prominent civil rights leaders and celebrities involved in the movement describing some of the abuses committed by Alabama law enforcement authorities against civil rights protesters. Sullivan cited a number of factual errors, each trivial, that he claimed had defamed him. The Alabama state trial court entered the jury's verdict awarding Sullivan over $500,000. The Supreme Court held the verdict unconstitutional as a violation of the First Amendment right of free speech in a landmark opinion establishing a very high burden on public offi-

\(^{162}\) 357 U.S. 449 (1958).
\(^{163}\) 376 U.S. 254 (1964).
of officials who sue for defamation. According to Anthony Lewis, the verdict threatened to bankrupt the newspaper.\textsuperscript{164}

I do not mean to ignore the many other cases where the judiciary protected a specific march, rally, speech, or boycott, or where it protected an individual as opposed to a group or corporation. Without organizations like the NAACP, whose very existence was at stake, and without searching national coverage of the civil rights movement, which was in jeopardy had the Supreme Court not ruled as it did in \textit{New York Times}, political participation in the sense necessary for populist constitutional law would have been lacking. Tushnet fails to present any discussion of how we can be confident of having come through the civil rights struggle without judicial review.\textsuperscript{165}

A second exception is quite a bit narrower. Tushnet's account of the Constitution's structure cannot explain why judicial review is unnecessary for separation of powers controversies where the branch encroached upon is the judiciary, rather than the President or Congress. Indeed, when fully fleshed out, his account of structure appears to demand judicial review in this circumstance.

First, it bears emphasizing that eliminating judicial review would not mean eliminating the judicial power. The federal courts, for example, would still resolve diversity controversies\textsuperscript{166} as well as those that properly raise a federal question.\textsuperscript{167} In doing so, the courts could not decline to enforce a law because it is unconstitutional. They would still interpret and apply state and federal law to the cases and contro-

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\item \textsuperscript{165} At the outset of his abbreviated consideration of this issue, he contends that "presenting the argument in all its glory would be extraordinarily tedious." Tushnet, \textit{supra} note 27, at 158. On the contrary, the demonstration that judicial review was not necessary to achieving the basics of political participation during the civil rights movement would be extraordinarily riveting. Perhaps Tushnet believes that, in the absence of judicial review, Congress would have responded. This is not obvious, however. Even if there had been a clear majority in each house to statutorily reverse the state court rulings, and the President agreed, the availability of filibuster in the Senate and the power of Southern committee chairmen in the House, most notably Chairman Howard Smith of the Rules Committee, would have been formidable obstacles to legislative response. See generally Charles Whalen & Barbara Whalen, \textit{The Longest Debate: A Legislative History of the Civil Rights Act of 1964} (1985). Moreover, if judicial review amounts to "noise around zero," as Tushnet elsewhere argues, Tushnet, \textit{supra} note 27, at 158, what is the harm in keeping this security blanket?
\item \textsuperscript{166} See 28 U.S.C § 1332 (1994).
\item \textsuperscript{167} See \textit{id.} § 1331 (1994). Tushnet's proposal would also leave the Supreme Court's original jurisdiction intact.
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versies brought before them. Tushnet's proposal leaves a vital role for the federal judiciary.

The Constitution does not draw bright-line boundaries between the branches. As Madison explained in *The Federalist*, such "parchment barriers" would prove no security against encroachment in practice.¹⁶⁸ Instead, the Constitution assumes that each branch will be vigilant against encroachments by the others and equips each branch with the means to defend itself against encroachments.¹⁶⁹ As we have seen, Tushnet bases his proposal on this component of the Constitution's structure.

If the judiciary is deprived of the power of judicial review, however, it has no other constitutional power to resist the encroachments of the political branches. The political process can offer some protection for the judiciary, as the rejection of President Franklin Roosevelt's court-packing plan showed.¹⁷⁰ Nevertheless, Madison's theory would anticipate that the political branches would periodically band together in order to take control of the judicial power, and experience has demonstrated that concern. By 1791 the federal courts refused to adjudicate claims for federal invalid pensions because judicial decisions were subject to suspension by the Secretary of War and to revision by Congress. Recognizing this as an attempt by the political branches to exercise the judicial power, the Supreme Court's judgment in *Hayburn's Case*¹⁷¹ is understood to establish that the political branches may not review the judicial decisions of the courts.¹⁷² This is no antiquated aberration. From time to time throughout our history, Congress and the President have sought to exercise the judicial power. More recently, Congress disagreed with the Supreme Court's interpretation of the statute of limitations for securities fraud under Rule 10b-5. Congress passed and the President signed a statute expanding the limitations period for such claims and applied the expansion retroactively, even to cases that had been finally adjudicated. Thus, the statute reopened final judgments. The Supreme Court used its power of judicial review to strike down the statute and protect

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¹⁷¹ 2 U.S. (2 Dall.) 409 (1792).
itself from what it perceived to be a significant encroachment on the judicial power by the political branches.\textsuperscript{173}

Tushnet may be correct that judicial review is unnecessary to safeguard against encroachments by the President and Congress on one another, but Madison’s theory of checks and balances (to which Tushnet subscribes) and practice demonstrate that judicial review is necessary to safeguard the judiciary against encroachments.\textsuperscript{174} Without the power of judicial review in this category of cases—those where one or both of the political branches encroach upon the courts—the judiciary ceases to be a coequal branch. At this point, it no longer has “the constitutional means . . . to resist encroachments of the others.”\textsuperscript{175} If we are to preserve the theory underlying the design of checks and balances, as Tushnet claims to do, then judicial review must be available to allow the courts to protect themselves.\textsuperscript{176}

The third exception involves the common law.\textsuperscript{177} Tushnet would eliminate judicial review in order to allow the political branches to enact laws based on their judgments about the substance and scope of the principles of the thin constitution. This tells us nothing of what to do when the source of law is not the political branches, but the courts

\textsuperscript{174} See, e.g., The Federalist No. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (“Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control for the judge would then be the legislator.” (quoting Montesquieu)).
\textsuperscript{175} The Federalist No. 51, supra note 169, at 321–22 (James Madison) (Clinton Rossiter ed., 1961). The elided portion of the quote reads, “and personal motives.” The judiciary would presumably retain these, but without the ability to effectuate them.
\textsuperscript{176} The judiciary’s track record using judicial review in this area has been overwhelmingly encouraging. In the main, it has allowed the political branches to determine how best to structure the judiciary and to experiment with alternative forms of adjudication. See, e.g., Mistretta v. United States, 488 U.S. 361 (1989); Commodity Futures Trading Corp. v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods., 473 U.S. 568 (1985); Schweiker v. McClure, 456 U.S. 188 (1982).
\textsuperscript{177} By common law, I mean to refer to any rule of law created by a court, the substance of which is not clearly suggested by the Constitution, a legislative enactment, or a valid administrative rule or regulation. This definition is generalized from Professor Martha Field’s definition of federal common law. See Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 890 (1986). This definition excludes Bivens actions, causes of action for money damages brought directly under the Constitution—without congressional authorization—against federal officials who violate federal rights. See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Tushnet does not consider this class of cases directly, but it seems fairly implicit in his proposal that it is improper for the courts to recognize such causes of action without authorization from the political branches.
themselves. It is hornbook law that "[t]here is no federal general common law." That, of course, is not to say that there is no federal common law. Even if Tushnet were to abolish federal common law, diversity jurisdiction would bring questions of state common law to the federal courts. As nothing in Tushnet's proposal advocates the elimination of diversity jurisdiction, the federal courts will continue to hear common law cases.

As long as the federal courts continue to hear common law cases, they will unavoidably face questions of constitutional law. First, lawsuits will inevitably raise the question of whether a given rule or application of common law violates the Constitution—for example, whether the standard of proof in a libel action is lower than the First Amendment allows, or whether a particular award of punitive damages is so high and arbitrary as to violate the Due Process Clause. It is not clear from Tushnet's presentation whether the courts should decide these claims. On the one hand, state and federal common law can be understood as implicitly authorized by the political branches. If the political branches of the relevant jurisdiction disapprove of a given rule of common law, they can repudiate or revise it by ordinary legislation. On this understanding, common law rules should be understood as standing on the same footing as statutory law and the courts should not exercise judicial review to determine whether the rule of common law is constitutional. On the other hand, the persistence of a rule of common law may not represent political assent. The constitutional structure of state and federal governments alike places obstacles in the path of action. Thus, a rule of common law may owe its vitality not to the considered assent of the political branches but to either their failure to consider the matter at all, or to the inability of an actual majority to overcome the obstacles to legislating a repudiation or revision of the rule. On this understanding, there is nothing in Tushnet's thesis that would require the courts to refrain from exer-

178 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
181 See BMW v. Gore, 517 U.S. 559 (1996). This case actually involved a statute that had codified the common law. Such a situation and one involving uncodified common law present similar questions. Cf. The Federalist No. 37, at 228 (James Madison) (Clinton Rossiter ed., 1961) (discussing the obscurity of the boundary between statutory and common law).
cising judicial review. Indeed, in one articulation of his proposal, he limits its scope to *statutory* law.\(^{182}\)

Whether judicial review is proper with respect to existing rules of common law, the courts cannot avoid interpreting the Constitution where they face questions of first impression. In this setting, a court is called upon to decide what the rule of common law will be.\(^{183}\) Imagine a situation where there are two possible rules and one is plainly unconstitutional while the other just as plainly complies with the Constitution. There is nothing to be gained by instructing the judiciary to pick between the two rules without regard to the Constitution.

A related exception deals with statutory law. Federal and state statutes are often, perhaps inevitably, ambiguous. Resolving these ambiguities bears a strong similarity to developing and applying the common law.\(^{184}\) Not unsurprisingly, the courts often face a circumstance where one or more of several competing reasonable interpretations of a statute would be unconstitutional or, to use the judicial euphemism for unconstitutionality, would raise a serious constitutional question. It is a well established canon of statutory construction that, if fairly possible, a court will adopt the interpretation that avoids the serious constitutional question.\(^{185}\) Applying this canon requires the court to determine whether a given construction would be unconstitutional or

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\(^{182}\) Tushnet hypothesizes that the Supreme Court might declare, "[W]e will no longer invalidate statutes, state or federal, on the ground that they violate the Constitution." Tushnet, supra note 27, at 154.

\(^{183}\) This will be the case whether the court formulates the issue as a matter of interpreting existing common law or creating a new rule within an existing body of common law.

\(^{184}\) For an important argument that statutory interpretation should not resemble common law decision making, see Antonin Scalia, *A Matter of Interpretation* (1997).

\(^{185}\) For a particularly attenuated reading of a statute in order to avoid a serious constitutional question, see *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989). In separation of powers and federalism cases the Court often invokes a clear statement rule, holding that it will not construe a generally worded statute to apply to the President or to state judges, for example, unless the statute plainly and specifically expresses this application. See, e.g., Franklin *v. Massachusetts*, 505 U.S. 788 (1992) (holding that the Administrative Procedure Act does not apply to the President); Gregory *v. Ashcroft*, 501 U.S. 452 (1991) (holding that the Age Discrimination in Employment Act does not apply to state court judges). Professor Frederick Schauer has criticized avoidance canons because they are often used to reach a construction that is contrary to the intention of those who enacted the law and thus is not obviously less offensive to majoritarian principles than judicial review is thought to be. See Frederick Schauer, *Ashwander Revisited*, 1995 SUP. CT. REV. 71. Schauer makes this argument against the backdrop of commitment to judicial review and to a strong version of judicial supremacy. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).
would raise a serious constitutional question. If the courts abandon this avoidance canon along with judicial review, then they may arrive at interpretations that violate the Constitution, even though the statute itself was ambiguous and did not reflect a judgment by the political branches that the particular interpretation represents a proper effectuation of the substantive principles of the thin constitution.

Of course, Congress can overturn by ordinary legislation any statutory interpretation. Thus, if the court's interpretation, in the judgment of the political branches, violates the Constitution, the political branches can enact corrective legislation. This contention, however, runs into the same concern highlighted with respect to common law interpretation. The political branches can be prevented from reacting, or enacting, by factors other than agreement with the court's interpretation. The committee system, procedural rules, and filibuster can all be deployed to prevent the considered judgment of a strong majority within the political branches that a given statutory construction is unconstitutional. Given that these factors could cement in place unconstitutional decisions, it would be intolerable to instruct the judiciary to construe statutes without regard for whether a given interpretation would violate the Constitution.

Finally, judicial review must be available in the context of actions by subordinate officials that do not clearly and directly effectuate the statutorily enacted determinations of politically accountable officials or institutions. A leading example is law enforcement activities. Federal law enforcement officials operate under extremely broad grants of authority to investigate specified violations of the law. These officials thus enjoy very broad latitude in selecting targets for investigation and in conducting the investigation. In exercising this discretion outside the clear and express commands of a statute, they operate without the specific and considered judgment of the political branches as to whether a given exercise of law enforcement discretion is unconstitutional. So, for example, a police officer may be generally authorized to pull over drivers who violate traffic regulations, but the law will not, and cannot, codify all of the factors the officer is to consider when deciding whether to exercise that discretion.

These judgments, such as whether there is probable cause for a search, can directly implicate the Constitution, as well as thin constitu-

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187 There has been a great deal of attention paid recently to the use of race as a factor in law enforcement decisions. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997).
tional principles. Yet there will have been no occasion for a populist constitutional law determination of whether the action is or is not constitutional. This problem is not limited to the actions of police. Discretion inheres in all executive and administrative action. It would also be preposterous to imagine that a legislature could so thoroughly anticipate and codify every possible circumstance in advance and so render all executive and administrative action ministerial. From its first session on, Congress has delegated authority and discretion to the executive branch to deal with contingencies. This approach is reflected in legislation on subjects as diverse as regulation of securities, the environment, the banking industry, agriculture, funding for the arts and sciences, and the administration of welfare programs. Even copiously codified subjects, such as federal income tax, are effectuated only through additional executive discretion. If we are to have an effective government, Congress must retain the ability to legislate broadly and leave enforcement and administrative discretion to the executive branch. But there must also be some mechanism for ensuring that this discretion is exercised within the bounds of the Constitution. In other words, there must be judicial review of executive and administrative action.

Tushnet recognizes this problem. He suggests that the courts borrow from European countries, such as Great Britain and the Netherlands, a vigorous doctrine of ultra vires. Under this doctrine, the courts strictly construe statutory grants of authority and invalidate any act beyond the narrow bounds of the granted authority. Instead of ruling that a search violates the Fourth Amendment, a court could rule that the officer lacked statutory authority to conduct the search. It is not at all clear that this suggestion does more than pour the old wine of constitutional law into a new skin. As Tushnet puts it, "A great deal of what we in the United States know as constitutional law parades in Great Britain as . . . a reasonably robust law of ultra vires." As was the case with statutory interpretation, the application of an ultra vires doctrine may depend on constitutional interpretation by the judiciary. When will the Court regard an FBI agent to have

188 This is a value that itself falls within the thin constitution by virtue of its embrace of the Constitution's Preamble, and so, of promoting the general welfare.

189 TUSHNET, supra note 27, at 163.

190 The Supreme Court has declared that ultra vires acts are not necessarily unconstitutional. See Dalton v. Specter, 511 U.S. 462 (1994). This seems plainly wrong. The Constitution's structure establishes that the federal government is one of limited and enumerated powers. As a corollary, all official federal acts must be authorized by the Constitution, a treaty, or a statute. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). The major source of executive and administrative authority is
acted beyond his or her statutory authority to conduct a search? One possible answer is when that search violated the Fourth Amendment.

Why should we want to construct this facade? Tushnet's implicit response appears to be that by changing the label, we would free those engaged in populist constitutional law—the public and the political branches—from the distorting effects that judicial pronouncements about the Constitution inevitably have. But it is not obvious that the public and the political branches would be so easily fooled. Moreover, even an ultra vires doctrine that perfectly tracks constitutional protections would work one significant change from the current system of judicial review. The change would be undesirable and, judging from the presentation in the book, unintended. Federal courts would no longer be able to review the actions of state law enforcement officers. The doctrine of ultra vires looks to whether an official act is authorized by law. In the case of state law enforcement action, this is a question of state statutory law. Lacking a federal question, direct appeal to the Supreme Court is unavailable. For the same reason, the federal courts would not be available for a collateral attack.¹⁹¹

In fairness, Tushnet intends the shift to an ultra vires approach to accomplish more than merely relabeling judicial review. He means for the courts to construe grants of authority narrowly apparently without regard to constitutional considerations. Applied this way, the doctrine becomes pernicious. An aggressive doctrine of ultra vires requires the legislature to contemplate in advance all of the possible decisions that might confront a government official and to define precisely how that official is to act. This is simply not a feasible or effective way to run a federal government. As such, it would undermine the values of populist constitutionalism by diminishing the ability of the democratic branches from effectuating their conscientious judgments.

¹⁹¹ The federal courts may grant a writ of habeas corpus, for example, only where there is a violation of the Constitution or federal law. See 28 U.S.C. § 2241 (1994).
This form of the ultra vires doctrine is a terribly blunt instrument. It requires the courts to strike down broad categories of activities or none at all. In this case, the more likely consequence of a shift from judicial review to a doctrine of ultra vires is that the doctrine would be rarely invoked and Tushnet's promise of protection would evaporate.\(^\text{192}\)

If we accept populist constitutional law, we accept that the public—by and through its elected representatives in Congress and the President, and their state counterparts—engages in constitutional interpretation and the court should not strike down the actions of those political leaders. The last three exceptions to judicial review—for common law decisions, statutory interpretation, and administrative and executive action—all deal with a common problem with Tushnet's proposal. In each of these cases, governmental power is exercised by an actor outside the framework of populist constitutional law: the judiciary and subordinate executive and administrative officials. While it follows from Tushnet's case for populist constitutional law that judicial review should not be exercised to strike down a federal or state statute, it does not follow that judicial review of these other categories of governmental action is inappropriate. Because the decisions and actions of these political officials are not "incentive compatible," Tushnet's own theory does not justify eliminating judicial review for these categories.\(^\text{193}\) As I have attempted to show, often on the basis of Tushnet's own reasoning, extending the repudiation of judicial review to these categories carries tremendous costs and risks, for it would lack the political safeguards that operate against the President and Congress.

Tushnet regards, with some justification, judicial review as a cancer on our politics. Remove the overbearing specter of how the judiciary interprets the Constitution and people will be free to think for themselves about the meaning of fundamental values like equality and liberty. Eliminate judicial review and political leaders will be required to act more responsibly, no longer able to abdicate to the judiciary the duty to consider whether legislation violates constitutional principles. But judicial review is deeply and firmly entrenched and, as I have suggested, Tushnet's book fails to offer a justification for eradicating it entirely. Even if judicial review is restricted to the five categories I have described, the judiciary's constitutional interpretations will con-

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\(^{192}\) This may be contributing to Britain's move to judicial review. See *supra* note 149.

\(^{193}\) Tushnet seems to accept this conclusion, although he regards "the question to be quite close." *Tushnet*, *supra* note 27, at 47.
to be a significant factor in American politics and to exert a powerful influence over the public and legislators.

IV. SYNTHESIS: THE PROGRESSIVE CHALLENGE

Professor Shiffrin's work seems to be driven by an abiding faith that the Supreme Court plays an important and worthy role in the American system of government and in American constitutionalism. The inability of Professor Tushnet's model to justify taking the Constitution away from the courts is a significant vindication of Shiffrin's faith. As we saw in connection with Shiffrin's project, the challenge for progressives is to develop an account of the legitimacy of judicial review.

There is reason to be pessimistic about the prospects for resolving the legitimacy crisis. But there are also reasons to be optimistic. First, there is no convincing rationale for eliminating judicial review. Second, there appears to be strong public and political support for judicial review. This was evident in the repudiation of attempts, led by House Majority Whip Tom DeLay, to impeach and remove four judges who had issued rulings that troubled political conservatives. The initiative was widely seen as threatening the independence of the judiciary, which is to say that the political branches might exercise control over the judicial interpretation of the Constitution. The emphatic repudiation of Representative DeLay's proposal, including opposition from members of his own party, demonstrate continuing support for the role of the judiciary in the American constitutional tradition. This event is analogous to, though not nearly so significant as, the repudiation of President Franklin Roosevelt's court-packing plan. A political official, acting during a time when the legitimacy of judicial review was subject to serious challenge, sought to divert control over constitutional interpretation to the political branches. The failure of each attempt confirms, albeit probably to differing degrees, public support for preserving judicial review within the constitutional tradition.

194 See Powell, supra note 8, at 292 (arguing that constitutionalism, as a tradition of rational inquiry, "seems fatally stricken").
196 The court-packing plan had a much higher profile than Representative DeLay's court-unpacking plan. In part, this stems from the former having been made by the President of the United States, even as powerful a member of Congress as Congressman DeLay cannot command the public eye as does the President. The court-packing plan also came in the context of an important and widely followed political
As I stated in the Introduction, I do not propose to solve the legitimacy crisis. Nevertheless, Professor Tushnet's book gives some indication of how judicial review would look should the crisis be resolved. It would seem that the greatest hope for establishing the legitimacy of judicial review is in the areas where its illegitimacy cannot be persuasively established. If so, post-crisis judicial review would accord broad deference to the judgments and actions of government officials and institutions except (at least) in the five instances discussed above where Tushnet has not established the illegitimacy of judicial constitutional interpretation. If so, then, much as the legitimacy crisis resembles the *Lochner* crisis, the resolution of the legitimacy crisis will resemble the resolution of the *Lochner* crisis.

This version of judicial review may not leave all progressives overjoyed. The scope of judicial constitutional interpretation would be quite limited and would preclude the sort of victories progressives won during the interval from *Eisenstadt v. Baird* until the Rehnquist Court. As Richard Rorty demonstrates, many progressives prefer a narrowly limited scope of judicial review. Moreover, even this limited version of judicial review would offer important protections for participation in the political process. As Professor Shiffrin notes, progressives rely upon grassroots and large-scale public mobilization. Such protections would be vital to progressives, just as they were during the civil rights movement.

The legitimacy crisis is a grave threat to the tradition of American constitutionalism. There is reason to believe that the crisis may be resolved. There is also reason to hope that it is.

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197 See supra notes 157–90 and accompanying text. I do not contend that the five categories discussed in the previous Section are the only categories that could survive the legitimacy crisis.


199 See supra notes 103–08 and accompanying text.