

SEANA SHIFFRIN'S THINKER-BASED
THEORY OF FREE SPEECH: ELEGANT
AND INSIGHTFUL, BUT WILL IT WORK IN
PRACTICE?

*James Weinstein**

INTRODUCTION

Seana Shiffrin offers a persuasive account of how free speech is essential to the realization of several profound interests that we have as thinkers. This approach avoids the usual sharp separation of speaker and listener interests, a dichotomy that, though useful in many ways, also shortchanges a full account of important free speech interests. Another advantage of Seana's theory is that the interests that underlie it are all relatively uncontroversial. Thus no one can reasonably deny that we have vital interests in "self-development, self-knowledge, knowledge of others, others' knowledge of and respect for oneself, knowledge of the environments in which they interact, opportunities for the exercise of one's intellectual capacities including the imagination, and the intellectual prerequisites of moral relations."¹ Similarly, there is no disputing that free speech is essential to the realization of these basic values.

With respect to the interests of being known and respected by others, Seana explains that "[i]f what makes one a distinctive individual qua *person* is largely a matter of the contents of one's mind," it follows that "to be known by others requires the ability to transmit the contents of one's mind to others."² As regards self-knowledge and related interests, Seana correctly observes that for many people "some thoughts may only be fully identified and known to themselves if made linguistically or

* Amelia D. Lewis Professor of Constitutional Law, Sandra Day O'Connor College of Law, Arizona State University.

1. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 291 (2011).

2. *Id.* (emphasis in original).

representationally explicit.”³ This tight connection between speech and its underlying values gives Seana’s theory both a firm foundation and commendable coherence. So aside from a few quibbles,⁴ I endorse Seana’s poignant account of a cluster of deep and abiding interests at the core of what makes us human and their relation to free speech.

Still, for all its advantages, Seana’s theory is not, in my view, a good theory of freedom of expression. In particular, I have grave concerns about its ability to generate doctrinal rules that will in practice adequately protect vital free speech interests, especially those most in need of protection from governmental suppression. Less fatally, but still a significant problem, Seana’s lack of concern for doctrinal fit also detracts from the utility of her theory. But before discussing these serious defects in Seana’s theory, I want to say a few more words about its relative strengths.

WAYS IN WHICH SEANA’S THEORY IS AN IMPROVEMENT OVER PREVIOUS FREE SPEECH THEORIES

Seana claims that her thinker-based theory provides “a stronger and more coherent foundation for the most important free speech protections than rival free speech theories, including the more common speaker-based or listener-based autonomy theories.”⁵ I am not sufficiently familiar with the various colorations of autonomy-based theories to comment on this claim as a global matter. I am confident, however, that Seana’s theory has a more solid foundation than, say, Martin Redish’s self-realization theory, which I have previously described as “hovering in mid-air.”⁶ And in addition to having a deep and secure philosophical foundation, Seana’s theory is, as I have

3. *Id.* at 292.

4. For instance, Seana’s claim that “speech and expression are the only precise avenues by which one can be known as the individual one is by others,” *id.*, is somewhat of an overstatement. Observation of what a person does, especially the way she treats other people, can often give us both a more precise and more accurate picture of “the individual one is” than what an individual says, especially about herself. Also, I wonder if Seana’s repeated emphasis on the importance of rationality and, in particular, her desire to protect “rational deliberation” may not be in some tension with the extension of her theory to encompass purely emotive expression. *Id.* at 300.

5. *Id.* at 284.

6. James Weinstein, *Fools, Knaves, and the Protection of Commercial Speech: A Response to Professor Redish*, 41 *LOY. L.A. L. REV.* 133, 160 (2007).

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mentioned, rooted in a basic commitment that would garner nigh unto universal consensus in any liberal society. As a sociological matter, it thus has a firmer foundation than do several other autonomy theories, including the theory Ed Baker defends in this Symposium, which Ed himself admits rests on a “wildly contested” account of autonomy.⁷ There is, as I elaborate in my response to Ed, considerable advantage in basing a theory of free speech in commitments that attract wide-spread acceptance by both legal actors and the American public.⁸

As I have also mentioned, Seana’s thinker-based theory avoids dividing us into speakers or listeners, as is typical of other theories, including the brilliant listener-based theory long ago proposed (but later retracted) by Tim Scanlon.⁹ Not only does Seana’s holistic approach more clearly identify interests that may have been obscured by the traditional dichotomy, but it also tends to make her theory more coherent than rival autonomy theories. For example, Seana’s theory offers a deeper, more satisfying explanation of the connection between free speech and abstract art or music than do the other autonomy-based theories with which I am familiar. And since autonomy theories as a group more readily explain this connection than do democracy-based theories, Seana’s thinker-based explanation increases this generic advantage.¹⁰

Despite these not insignificant advantages over other theories, Seana’s thinker-based theory is nonetheless not overall a very good theory of freedom of expression. First, by forswearing any concern with its fit with current practices, Seana’s theory is, despite its own admirable coherence, unlikely to help make current doctrine more coherent. In addition, and much more problematically, her theory would, if ever put into practice, dilute the rigorous protection that current doctrine provides political dissent. My disagreement with Seana is therefore not as much theoretical as it is meta-theoretical,

7. C. Edwin Baker, *Autonomy and Free Speech*, 26 CONST. COMMENT. 251, 269 (2011).

8. James Weinstein, *Free Speech and Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 383 n.80 (2011).

9. Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

10. This is not to say that abstract art and music cannot be plausibly explained in democratic terms, as Robert Post ably demonstrates. See Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 486 (2011). Although Robert’s explanation may not be as straightforward as those offered by Seana’s thinker-based theory or other autonomy theories, it is by no means “bizarrely indirect” as Seana alleges. Shiffrin, *supra* note 1, at 285.

stemming from our quite different conceptions of what a theory of free speech should accomplish.

THE PROBLEM WITH PURELY NORMATIVE FREE SPEECH THEORIES

Seana explains that it is not her goal in identifying the theoretical foundation of free speech to “provide the best theoretical account of *our system* or *our current practices* of protecting (or failing to protect, as the case may be) free speech.”¹¹ In her view, articulating a theory among “more ideal lines”¹² provides a framework for assessing whether current practices are justified, as well as supplying a measurement for reform. The implication here seems to be that a theory’s ability to normatively critique current practices and offer suggestions for reform will be diminished if, in addition to identifying a normatively appealing guiding value, it can also explain the basic features of current practices in terms of this value. I do not see why this should be the case.¹³ Indeed, as Vincent Blasi has aptly observed, in some respects just the opposite is true, for “[t]he explanatory project introduces one kind of discipline that can stimulate normative insights and judgments that might not be forthcoming in a zero-based normative inquiry.”¹⁴

More importantly, as Vince also notes, “rationalization can be a socially functional enterprise, at least when it does not entirely pre-empt or crowd out independent critical evaluation.”¹⁵ Echoing this view, I argue in my response to Ed that a normatively appealing theory that also explains a great deal of current doctrine can bring coherence to an area of the law badly in need of a basic organizing principle. So though Seana’s theory gets good marks for its own coherence, her lack of interest in the explanatory dimension undercuts its usefulness

11. Shiffrin, *supra* note 1, at 284 (emphasis in original).

12. *Id.*

13. For example, my view that a commitment to participatory democracy explains the pattern of free speech decisions better than any other free speech value did not hinder me from criticizing as wrongly decided the Supreme Court’s decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010). See James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 500–01 (2011).

14. Vincent Blasi, *Democratic Participation and the Freedom of Speech: A Response to Post and Weinstein*, 97 VA. L. REV. 531, 531 (2011).

15. *Id.* Vince also observes that “the kind of normative analysis that law professors undertake is almost inevitably of the second-best variety. For lack of training and temperament, few of us are capable of the purest forms of truth seeking.” Though I heartily agree with this criticism, it does not apply to Seana, a trained moral philosopher.

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for bringing coherence to free speech doctrine. I will not, however, attempt here to comprehensively assess how well her thinker-based theory fits or deviates from current doctrine but will merely note two basic shortcomings in its explanatory power.

First, like most autonomy-based theories, it cannot easily explain the especially rigorous protection that current doctrine primarily reserves for political speech and other forms of public discourse.¹⁶ More profoundly, unlike most democracy-based theories of free speech, as well as Ed's autonomy theory, which focus on the proper relation between the individual and the state, Seana's theory would have a difficult time explaining why free speech restrictions apply exclusively to state action and not to private conduct.¹⁷ In any event, further examples are not necessary to demonstrate that Seana's theory is not nearly as descriptively powerful a theory as one grounded in participatory democracy.¹⁸ I turn now to a much more serious defect in Seana's theory: the inadequate protection it would likely provide vital speech that is most in need of constitutional protection.

WEAKENING OF THE STRINGENT PROTECTION NEEDED TO PROTECT POLITICAL DISSENT

Seana writes that “a decent regime of freedom of speech must provide a *principled* and *strong* form of protection for political speech and, in particular, for incendiary speech and other forms of dissent.”¹⁹ I couldn't agree more. And this is one of several reasons why I favor a theory that easily explains the particularly rigorous protection that free speech doctrine

16. “[Speech] concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983); see *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (repeating the above quotation with minor deletions); see also Weinstein, *supra* note 13, at 499.

17. In her reply, Seana offers a plausible, though somewhat complicated and tentative, explanation of how her theory might incorporate a state action requirement. Seana Valentine Shiffrin, *Reply to Critics*, 27 CONST. COMMENT. 417 (2011). In contrast, the participatory democracy theory that I propose can easily explain the state action requirement: the legitimacy of the legal system depends on government not preventing individuals from participating in the speech by which public opinion is formed. Weinstein, *supra* note 13, at 497–98. The ease with which a free speech theory can explain a desirable doctrinal feature should count in its favor. See *supra* text accompanying notes 10–11.

18. See, e.g., Post, *supra* note 10, at 482–89; Weinstein, *supra* note 13, at 497–501.

19. Shiffrin, *supra* note 1, at 285 (emphasis added).

currently provides political speech and other types of expression essential to democratic self-governance, expression that the Supreme Court and commentators have referred to as “public discourse.”²⁰ Seana’s theory would, however, afford “strong” protection not just for public discourse but also

for religious speech, for fiction, art—whether abstract or representational—and music, for diaries and other forms of discourse meant primarily for self-consumption, and for that private speech and discourse, e.g. personal conversations and letters, crucial to developing, pursuing, and maintaining personal relationships.²¹

She specifies, moreover, that “all of these forms of expression should enjoy foundational protection, by which I mean there should not be a lexical hierarchy of value between them.”²² But in attempting to extend strong speech protection this widely, and with no lexical hierarchy, the rigorous protection currently afforded “political speech and, in particular, for incendiary speech and other forms of dissent”²³ will inevitably be weakened.

Current doctrine rigorously shields public discourse from content regulation and provides such expression virtually absolute protection from viewpoint discrimination.²⁴ As I explain in my response to Ed,²⁵ the extraordinary strength of this protection is in service of political legitimacy, a crucial democratic value that is impaired when government excludes individuals from expressing their views in public discourse. Reflecting the foundational importance of the political legitimacy it serves, this rigorous protection extends even to public discourse that is likely to cause serious harm. For example, Americans have a First Amendment right to

20. See, e.g., *Cohen v. California*, 403 U.S. 15, 22 (1971); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

21. Shiffrin, *supra* note 1, at 285. Some of this speech, for instance religious speech by a preacher in a public square or from the pulpit, will easily come within the scope of public discourse, as will fiction, art and music that is either overtly political, or a commentary on social conditions or practices. In contrast, other forms of religious speech, such as a teacher-initiated prayer in a public school, would not be considered public discourse. See James Weinstein, *An Overview of American Free Speech Doctrine and its Application to Extreme Speech*, in *EXTREME SPEECH AND DEMOCRACY* 82–83 (Ivan Hare & James Weinstein, eds., 2009).

22. Shiffrin, *supra* note 1, at 285.

23. *Id.*

24. See Weinstein, *supra* note 21, at 83, 85–86.

25. See Weinstein, *supra* note 8, at 380–84.

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vehemently condemn their nation's involvement in a war, even if such protests are likely to discourage our troops and encourage the enemy; or to express racist or homophobic ideas that can inflict emotional injury on minorities or encourage others to discriminate against them.²⁶ Crucially, any attempt to extend the protection currently afforded public discourse, either across the board to all expression, as many commentators urge,²⁷ or even to the more limited but still capacious range of speech encompassed by Seana's theory, will inevitably end up diluting the fierce protection currently provided "incendiary speech and other forms of dissent."²⁸

To see how trying to protect, without hierarchical distinction, all the expression encompassed by Seana's theory will dilute the rigorous protection currently afforded speech that radically challenges the status quo, let's first consider "forms of discourse meant primarily for self-consumption."²⁹ Suppose that a scientist, who has no interest in actually producing an especially virulent biotoxin, wants purely out of intellectual curiosity to figure out the process for doing so. As Seana correctly notes, "thoughts may only be fully identified and known to [the thinker] if made linguistically or representationally explicit."³⁰ Accordingly, this scientist wants to reduce her thoughts about how to produce the toxin to written formulas, drawings, and charts. But suppose further that Congress, concerned that terrorist organizations might gain access to such writings, has enacted a law forbidding anyone from making their thoughts about a certain class of biotoxins "linguistically or representationally explicit" in these ways.

Under Seana's thinker-based theory such a governmental restriction on scientific research would be a core breach of the thinker's right that she so ably describes. Due to the grave risk to public safety that this research might produce, however, even if the legal community were to accept Seana's theory of the First Amendment, most courts would likely uphold the restriction. Indeed, I think Seana might agree that despite the "strong"

26. See Weinstein, *supra* note 21, at 84–88.

27. See Weinstein, *supra* note 6, at 140; see also *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

28. Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the [First] Amendment's guarantee with respect to the latter kind of speech.").

29. Shiffrin, *supra* note 1, at 285.

30. *Id.* at 292.

protection that her theory provides for externalizing the content of one's mind, the government might legitimately suppress the externalization of thoughts in this and similar cases presenting a manifest risk of serious harm.³¹

If, however, this risk of harm is sufficient to justify suppression of core thinker-based speech, then why would it not also be sufficient, as courts in this country once thought it was,³² for government to ban anti-war demonstrations likely to interfere with this country's war effort? Or, as is the case in most European countries, why is it not grounds for banning the expression of racist ideas,³³ or the view that homosexuality is sinful,³⁴ in order to prevent the spreading of "poison that leads to violence and discrimination"³⁵ against minorities and homosexuals? But if Seana's theory would permit the suppression of scientific research that threatens public safety, then without some "lexical hierarchy" in terms of the level of protection between political speech and "the discourse meant primarily for self-consumption" involved in scientific research, there would seem to be no "principled" way to protect anti-war demonstrations, racist or anti-homosexual speech, or any other type of "incendiary speech and other forms of dissent"³⁶ that can be shown to pose a serious risk of harm.

Next, let's consider "that private speech and discourse, e.g. personal conversations and letters, crucial to developing, pursuing, and maintaining personal relationships."³⁷ Even more so than with speech meant primarily for self-consumption, the protection afforded this wide array of communication cannot plausibly be afforded the rigorous protection currently afforded core political speech. Suppose, for instance, that Melvin is

31. Somewhat to my surprise, Seana states in her reply that she thinks such writings should be protected. Shiffrin, *supra* note 17, at 435. Indeed, she apparently would not only protect the production of these writings but their publication as well. *Id.* For a fuller discussion of the constitutional limitations on governmental restrictions of scientific research, see James Weinstein, *Democracy, Individual Rights and the Regulation of Science*, 15 *SCI. & ENGINEERING ETHICS* 407 (2009).

32. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919) (upholding against First Amendment challenge the conviction of anti-war protestors for distributing leaflets that the Court found created a "clear and present danger" of obstructing the draft during World War I).

33. See Weinstein, *supra* note 21, at 84–85.

34. See *Hammond v. DDP*, [2004] EWHC 69 (Eng. & Wales Admin).

35. Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 *HARV. L. REV.* 1596, 1642 (2010).

36. Shiffrin, *supra* note 1, at 285.

37. *Id.*

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interested in “developing and pursuing” a personal relationship with women he finds particularly attractive whom he encounters in public, be it on the street, in the park, or on the bus. The problem is that Melvin wants to pursue the possibility of such relationships by expressing in graphic detail to these women the nature of his sexual attraction and the specific ways he would like to act on this attraction.

Would courts applying Seana’s theory find Melvin’s speech protected? Would Seana? Or would they, as would I, find that despite the “strong” protection that should be afforded speech by which people seek to “develop and pursue” relationships, revealing in this way “the contents of one’s mind”³⁸ can nonetheless be prohibited because of the harm it would likely cause its intended audience? And if the harm to women to whom Melvin expresses his thoughts were somehow deemed insufficient to overcome this protection, would Melvin also have the right to reveal his thoughts to underage girls whom he meets on the bus or in the park?³⁹ And what about speech of this type directed from an employer to an employee; from a professor to student; or from a doctor to a patient?

If (as I suspect they would) courts and Seana were to find that at least some, if not all, of this expression could be prohibited because of the harm that it would likely cause, then, for the reasons explained above, the rigorous protection currently afforded political speech, especially “incendiary speech and other forms of dissent,” would be significantly diluted. In contrast, under the democracy-based theory I have defended,⁴⁰ such dilution would not occur: because Melvin’s speech is not part of the expression by which people in a democratic society govern themselves, it is not entitled to the truly strong protection reserved for public discourse. Rather, it should be entitled to the somewhat less rigorous protection befitting important autonomy interests which can be outweighed by sufficiently weighty countervailing state interests, including the protection of individual autonomy interests of a different genus such as those imperiled by Melvin’s expression.⁴¹

38. *Id.* at 391.

39. Seana expressly declines to exclude children as relevant agents covered by her theory. *Id.* at 287 n.9.

40. Weinstein, *supra* note 13.

41. Seana does not specify in her opening statement the precise level of protection her theory would provide expression that her thinker-based principle encompasses. Her reply, however, makes clear that the “strong protection” she has in mind is, like the protection against viewpoint-based restrictions on public discourse provided by current

THE POSSIBILITY OF INTERNAL LIMITATIONS

The dilution concern is premised on the view that both the scientific and sexually-graphic expression discussed above is within the scope of expression protected by Seana's thinker-based free speech principle. The scientific expression would seem plainly within this thinker-based principle. But perhaps there are one or more internal limitations on this principle that would deny protection to the sexually-graphic speech directed to others in the contexts I described. Consistent with Seana's caveat that she is offering just a sketch and not a detailed statement of a thinker-based theory,⁴² she does not in her paper systematically discuss such limitations. We can, however, infer some limitations from her explanation for excluding "commercial and non-press, business corporate speech"⁴³ from her thinker-based principle. But none of these limitations would seem to apply to Melvin's sexually-graphic speech.

First, Seana notes that commercial speech and the like does "not involve in any direct or straightforward fashion the revelation of individuals' mental contents."⁴⁴ In contrast, the problem with Melvin's speech is that it reveals the contents of his mind in *too* direct and straightforward a fashion. Next, Seana observes that with commercial and ordinary corporate business speech, "environmental pressures render more tenuous any charitable presupposition that such speech is sincere, authentic, or the product of autonomous processes."⁴⁵ Uninhibited expres-

doctrine, very rigorous indeed, perhaps even absolute. Shiffrin, *supra* note 17, at 425. Thus, she would apparently protect the right of scientists to publish formulas for virulent bio-toxin. *Id.* at 435. Significantly, Seana does not disagree with my prediction that courts applying her theory might not protect this and other types of harmful speech within the ambit of her free speech principle, and concedes that my fear about dilution of core political speech may be accurate. *Id.* at 426–27. She insists, however, that "[t]here is something quite strange about criticizing the *content* of a theory on the ground that it will be misunderstood, defied, or ignored in a particular institutional context or by particular institutional actors." *Id.* at 426. But the view that not all speech within the scope of a thinker-based free speech principle must be protected regardless of consequences need not necessarily reflect misunderstanding, etc. of her theory. Rather, it could well represent reasonable disagreement about the strength of the protection such a capacious principle can plausibly afford speech in the real world. I should also clarify that the participatory democracy theory of free speech that I embrace is not as Seana suggests just some strategically "barber[ed]" version of her theory, *id.*, but rather a theory grounded in a different basic value commitment. See Weinstein *supra* note 13, at 497–504.

42. Shiffrin, *supra* note 1, at 283.

43. *Id.* at 286.

44. *Id.* at 296.

45. *Id.* at 297.

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sion of sexual attraction and carnal desire, it is true, is an extremely poor strategy for pursuing or developing a personal relationship with a stranger; it is also true that, especially in the workplace, men have too often regaled women with their sexual thoughts and desires, not as a sincere or authentic means of pursuing relationships, but as a way to make women feel unwelcome in previously all-male environments or to assert power over them. Still, for some misguided men the boorish expression of sexual attraction and desire might nevertheless represent an authentic and sincere attempt to pursue a sexual relationship,⁴⁶ and in all events there is no reason to believe that such expression is anything other than “the product of autonomous processes.”

The uninhibited expression of sexually graphic thoughts and desires is but one example of types of speech that some might use to pursue or develop relationships, but which the intended audience would usually find highly disturbing. There are, it is true, other internal limitations on Seana’s thinker-based theory that would exclude problematic expression from the strong protection her theory provides. For example, Seana explains that “a thinker-based view of freedom of speech provides no foundational protection for speech that aims to distort and control the thinker’s rational processes of tracking and understanding her environment.”⁴⁷ To the extent, however, that this limitation is applicable to public discourse, the very dilution of protection that would result from lack of any internal limitations reoccurs.

American political debate has always has been fraught with distortion of just this sort and indeed such distortion is unfortunately inevitable in political debate on hotly contested topics. Recent examples include the discussion of health care reform (recall the “death panel” scare),⁴⁸ abortion (where both sides routinely distort the facts),⁴⁹ immigration reform (where a

46. *Cf. id.* at 300 n.39. Here Seana criticizes Tim Scanlon’s Millian Principle for failing to distinguish “between false beliefs that result from fraud or intentional misrepresentation and false beliefs that result from sincere communication (but poor judgment, understanding or perception on the part of the speaker or the listener).” *Id.* She states that the former (but apparently not the latter) should count as harms under a thinker-based theory. *Id.*

47. *Id.* at 21 n.39.

48. Sharon Begley, *The Five Biggest Lies in the Health Care Debate*, NEWSWEEK, September 7, 2009, at 42.

49. See, e.g., Dan Nowicki, *Kyl’s ‘Corrected’ Figures on Abortion Faulty, too*, ARIZ. REPUBLIC, April 17, 2011, at B3 (recounting how in retracting a wildly inaccurate claim that he had made about the percentage of Planned Parenthood’s business involved

misleading claim by Arizona's governor about crimes committed by illegal aliens⁵⁰ was matched by a *New York Times* editorial's gross exaggeration of the scope of Arizona's misguided attempt to limit illegal immigration).⁵¹ But far more unfortunate than the existence of such political distortions would be their punishment whenever a prosecutor could prove that the speaker intended to "distort and control the thinker's rational processes of tracking and understanding her environment."⁵² Such an approach to free speech would represent a giant step backward toward the darkest days for civil liberties in our nation's history, a time in which courts routinely upheld convictions of anti-war protestors, including for intentionally making "false" statements about the reasons for American involvement in World War I.⁵³

An important criterion for judging a free speech theory is whether it provides adequate protection for speech, "and, in particular, for incendiary speech and other forms of dissent."⁵⁴ Since the early days of the Republic there has been unremitting pressure on popularly-elected officials, especially in times of crisis, to suppress speech that vehemently challenges the status quo. And, of course, these officials need no impetus from the electorate to suppress speech critical of them or their policies. In contrast, government in this country has not nearly as frequently tried to suppress speech needed to effectuate "self-development, self-knowledge, knowledge of others"⁵⁵ or expression essential to "opportunities for the exercise of one's intellectual capacities including the imagination."⁵⁶ This is not to say, of course, that the thinker-based expression is never in danger of illegitimate suppression by the government. Laws forcing students to salute

abortions, Senator Jon Kyl then proceeds to make a misleading claim about these figures); Marie McCullough, *The Facts Behind 'Partial-Birth' Debate as the Senate Prepares to Take up the Abortion Issue Again, Some Questions Are Answered*, PHILA. INQUIRER, September 16, 1998, at A01 (noting that Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, confessed that he had "lied through his teeth" in claiming that partial-birth abortions are only rarely performed).

50. Rob Margetta, *Borderline Confusion: Defining 'Safe'*, 68 CQ WEEKLY 1802 (2010).

51. See Editorial, *Another Bad Idea from Arizona*, N.Y. TIMES, June 20, 2010, at WK7.

52. Shiffrin, *supra* note 1, at 300 n.39.

53. See, e.g., *Pierce v. United States*, 252 U.S. 239, 251 (1920) (upholding the conviction of socialists for declaring, among other allegedly false statements, that America entered World War I to protect J.P. Morgan's loans to the Allies).

54. Shiffrin, *supra* note 1, at 285.

55. *Id.* at 291.

56. *Id.*

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the flag discussed by Seana are a good example of undue interference with the realm of thought.⁵⁷ But such illegitimate intrusions into the realm of thought and intellect can be prevented by meaningful protection far more flexible than the fierce and unyielding protection currently afforded political dissent.

CONCLUSION

For all its elegance and insight, Seana's theory is not a good theory of free speech, let alone the best one, if measured by the free speech doctrine it will likely produce. A much better theory is one that reserves the most rigorous protection for the speech by which individuals participate in the democratic process, while at the same time providing meaningful but more flexible protection for other important free speech values, including important autonomy interests.⁵⁸ Though Seana's theory cannot be counted on to afford adequate protection for political dissent and other forms of public discourse, it does render an admirably coherent and particularly appealing account of the autonomy interests that should be—and for the most part already are—protected by the First Amendment.⁵⁹ To this extent, Seana's thinker-based theory does make a valuable contribution both to the understanding and proper functioning of the American system of freedom of expression.

57. Shiffrin, *supra* note 1, at 301 (discussing *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

58. See Weinstein, *supra* note 13.

59. Or perhaps more appropriately by the Court's substantive due process jurisprudence. *See id.* at 655–56.