

## METHODOLOGY IN FREE SPEECH THEORY

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**M**Y remarks will focus on a few points of disagreement about how to approach free speech theory and how Professors Robert Post and James Weinstein frame their defenses of democracy-centered approaches. I will leave the defense of autonomy-centered theories to our other discussion.<sup>1</sup> I will not explicitly acknowledge the many places where I substantially agree with other commentators or the few points where I disagree.

I will start with some remarks on methodology.

### I. METHODOLOGICAL STANCE

A free speech theory can perform at least two functions. First, it may provide the theoretical foundations to understand our existing practices, cases, and our historical traditions and thereby offer explanatory and justificatory cohesion for them. Second, it may offer strong foundations for free speech protection from a more ideal, critical point of view.

For the best legal systems, these two functions will be fulfilled by the same theory. In most legal systems, the theories fulfilling these functions will diverge. Although I value the fulfillment of both functions, I focus on the second, while Post and Weinstein focus on the first.<sup>2</sup>

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<sup>1</sup> See Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 *Const. Comment.* (forthcoming 2011) [hereinafter Shiffrin, *Thinker-Based Approach*]; Seana Valentine Shiffrin, *Reply to Critics*, 27 *Const. Comment.* (forthcoming 2011).

<sup>2</sup> See Robert Post, *Participatory Democracy and Free Speech*, 97 *Va. L. Rev.* 477 (2011) [hereinafter Post, *Participatory Democracy*]; James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 *Va. L. Rev.* 491 (2011) [hereinafter Weinstein, *Participatory Democracy*].

A free speech theory that provides theoretical foundations that are independent of our actual historical tradition is essential to allowing us to assess which aspects of our historical tradition are worth valorizing and which should be amended or abandoned. Further, such a theory also supplies the resources to engage in the first function of understanding our extant traditions in their best light. An ideal theory of freedom of speech provides the resources to identify which aspects of our actual traditions should bear emphasis, which should be treated as central, and which aspects of our actual traditions should be treated as outliers or mistakes.<sup>3</sup>

Without the guidance of a background ideal theory (whether implicit or explicit), sifting through the tradition to separate out the chaff and to resolve conflicts within it seems prone to reflect features such as the frequency or recentness of citation, the path dependency of what is litigated, and what repression has been tolerated and not yet challenged or upended. These features are often morally arbitrary and thus ill-suited to bear much weight. Placing strong emphasis on the given points of the past, without an independent theoretical buttress, also seems to cut against the spirit of our democratic commitments.<sup>4</sup>

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<sup>3</sup> But see Weinstein, *Participatory Democracy*, *supra* note 2, at 507–10 (agreeing that past precedent contains substantial errors but evincing confidence that a backward-looking theory can identify and excise them).

<sup>4</sup> As helpfully emerged in our symposium at the University of Virginia School of Law, Post places priority on the first approach *because* he takes his audience to be judges and, for that reason, incorporates a strong fidelity to precedent within the foundations of his free speech theory. The motivation is understandable. Still, if the audience is what dictates the methodological approach, then this method raises the possibility that “correct” theories of freedom of speech, even of freedom of speech *in the United States*, that are aimed at different audiences might have different contents. Although Post conceded this consequence, I do not think it is a plausible position. There is no different theory of freedom of speech for judges than for citizens, for judges than for legislators, or for Supreme Court Justices than for lower court judges. Instead, whether it is an explanatory theory or a justificatory theory, that theory should be the same for all citizens or for all audiences. Our theory of judicial propriety and the significance of precedent may well suggest that judges should not issue rulings merely on the content of the best justificatory theory; rather, they must also show fidelity to precedent, a practice upon which explanatory or backward-looking theories may shed substantial light. Nonetheless, I take backwards-looking theories to depend, for the reasons discussed in the text, on well-developed ideal theories.

## II. MODEL CONSTRUCTION AND CHARITABLE INTERPRETATION

Nonetheless, whichever theoretical function one chooses to fulfill—that is, however we evaluate the dispute between autonomy-centered theories and democracy-centered theories—we should apply the same methods of model construction and the same amount of charity to each side. At points, I worry that both Post and Weinstein apply a more charitable standard of interpretation to the democracy position than to the autonomy position. I will offer two examples.

### *A. Subjectivity and Conflict*

First, both Post and Weinstein argue that an advantage of the democracy view is that it avoids some of the subjectivity, disagreement, or conflict associated with the application of the autonomy view.<sup>5</sup> I am doubtful. Even if we agree that we should judge in light of the history of our normative commitments, there is plenty of disagreement within our own tradition about the point of democracy, the form democracy must take, and what does or does not further democratic values. To take just one example, there has been plenty of controversy about whether *Buckley v. Valeo*<sup>6</sup> was correct and whether the ruling furthered democratic values or

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<sup>5</sup> Post, *Participatory Democracy*, supra note 2, at 479–81; Weinstein, *Participatory Democracy*, supra note 2, at 513. To be fair, Weinstein's defense of the democracy view preceded, by a year, Professor Baker's and my articulation of the autonomy view. I believe that our dialogue has persuaded Weinstein of the point that the autonomy view is no more contentious than the democracy view, although from his perspective, this is at the objectionable cost of an uncomfortable lack of fit with doctrine. See James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 Va. L. Rev. 633, 633–35 (2011).

<sup>6</sup> 424 U.S. 1 (1976). Compare Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Cal. L. Rev. 1045, 1054–55 (1985) (arguing that political giving and spending are fundamental First Amendment freedoms and campaign finance laws should be subject to strict scrutiny), and Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 Utah L. Rev. 311, 313–15 (1998) (defending *Buckley*), with C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L. L. Rev. 1, 2–3 (1998) (arguing that campaign speech is an institutionally bound subcategory of political speech and may be regulated as necessary to increase the democratic quality of elections), and Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1282–89 (1994) (asserting that current campaign finance structure harms candidates, who must devote significant time and energy to fundraising).

jeopardized them. A related debate about the significance of *Citizens United v. Federal Election Commission* has begun to emerge.<sup>7</sup> There is plenty of controversy over whether copyright protection undermines or promotes democratic values.<sup>8</sup> There is also substan-

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<sup>7</sup> 130 S. Ct. 876 (2010). Compare Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y. Rev. Books, May 13, 2010, at 63–64 (arguing that *Citizens United* will exacerbate political inequality and further distort the relation between the political debate and what people care about), Donna F. Edwards, *A Call to Bold Action*, Boston Rev., Sept./Oct. 2010, at 23 (contending that *Citizens United* will worsen representative dependence on corporations who will now be “able, literally, to buy our elections”), Lawrence Lessig, *Democracy After Citizens United*, Boston Rev., Sept./Oct. 2010, at 11–12, 15–16 (arguing that the effects of *Citizens United* will exacerbate worries about and perceptions of institutional corruption), and Nancy Rosenblum, *The Losing Role of Political Parties*, Boston Rev., Sept./Oct. 2010, at 21–22 (arguing that *Citizens United* “put[s] parties at a disadvantage,” thereby reducing the power of crucial democratic agents), with Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118, 142 (2010) (arguing that *Citizens United* is “a distraction of limited consequence”), David Bossie, *In Defense of the First Amendment*, Boston Rev., Sept./Oct. 2010, at 19–20 (arguing that *Citizens United* “gave citizens another venue to let their voices be heard over the entrenched voices of Washington lobbyists”), Alison R. Hayward, *The Flawed Iceberg Model*, Boston Rev., Sept./Oct. 2010, at 24–25 (asserting that a “healthy political system . . . includes competition among many ‘interests’”—including contributors), and Will Wilkinson, *Where is the Evidence?*, Boston Rev., Sept./Oct. 2010, at 17–18 (doubting evidence of corruption resulting from contributions is sufficient to “justify the abridgment of a fundamental constitutional right . . . to alter public opinion through speech”).

<sup>8</sup> See, e.g., Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 199–206 (2004) (arguing that overly restrictive copyright laws make common activities illegal and thereby encourage citizens to disrespect the rule of law); Neil Weinstock Netanel, *Copyright’s Paradox* 154–68 (2008) (arguing that property-based copyright protections hinder free speech and democratic discourse); C. Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891, 947–50 (2002) (arguing that copyright protection disproportionately benefits the speech of centralized media enterprises over the speech of individual citizens); Christopher L. Eisgruber, *Censorship, Copyright, and Free Speech: Some Tentative Skepticism About the Campaign to Impose First Amendment Restrictions on Copyright Law*, 2 J. Telecomm. & High Tech. L. 17, 22 (2003) (distinguishing copyright from government-imposed content or viewpoint-based censorship); David McGowan, *Why the First Amendment Cannot Dictate Copyright Policy*, 65 U. Pitt. L. Rev. 281, 315–18 (arguing that copyright, by discouraging copying, encourages diversity of expression); Mark P. McKenna, *Intellectual Property, Privatization and Democracy: A Response to Professor Rose*, 50 St. Louis U. L.J. 829, 829, 835–38 (2006) (contending that “copyright protection shifts control over the content of creative expression away from the government and into the market. . . . [thereby] encourag[ing] development of a pluralistic and independent culture”); Eugene Volokh, *The Trouble with “Public Discourse” as a Limitation on Free Speech Rights*, 97 Va. L. Rev. 567, 568–571 (2011) (emphasizing the role of copyrighted speech in public discourse).

tial controversy about whether norms of participatory democracy should hold within workplaces and other economic organizations or whether those sites belong solely to the “managerial domain.”<sup>9</sup>

I think one side of these disputes is correct, but for that matter, I also think there are answers to many of the disputes Post and Weinstein identify for the autonomy view.

I am also unclear about how the democracy view will avoid the disputes about what counts or should count or may come to count as public discourse and what is private.<sup>10</sup> Post and Weinstein are acutely aware of these interpretative disagreements.<sup>11</sup> What I am unsure about is why they think the problem is categorically different for the autonomy view. Without a further argument about why the democracy view is less subject to interpretative disputes than the autonomy view and why that putative fact should exert so much weight, I think this issue should be laid aside. Instead, we should evaluate the more determinate versions of the views we believe to be correct.

### *B. Interpreting the Autonomy View Less Narrowly and More Charitably*

Post and Weinstein work from a fairly atomistic and politically and economically (as opposed to civilly) libertarian version of an autonomy view from which some of their criticisms flow. This is an uncharitable, narrow view of the value of individual autonomy. A more charitable view would recognize a more robust, intimate, and complex relation between individual autonomy, interpersonal relations, and democratic self-rule.<sup>12</sup> The autonomy view need not, for

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<sup>9</sup> Robert Post, *Constitutional Domains: Democracy, Community, Management* 260 (1995) (defending *Connick v. Myers*, 461 U.S. 138 (1983), as compatible with a democracy-oriented view of the First Amendment); Steven H. Shiffrin, *The First Amendment, Democracy, and Romance* 74–80 (1990) (criticizing *Connick v. Myers* as inconsistent with a dissent-centered approach necessary to serve democratic and other values).

<sup>10</sup> Eugene Volokh explores these ambiguities well in this symposium. Volokh, *supra* note 8.

<sup>11</sup> See, e.g., Post, *Participatory Democracy*, *supra* note 2, at 484–86; Weinstein, *Participatory Democracy*, *supra* note 2, at 491–94.

<sup>12</sup> See, e.g., C. Edwin Baker, *Human Liberty and Freedom of Speech* 27–31, 48–50, 210 (1989); Susan H. Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* 130–72 (2004); Shiffrin, *Thinker-Based Approach*, *supra* note 1;

instance, champion the satisfaction of individual desires over all democratic outcomes. Sophisticated understandings of individual autonomy recognize that the ability to participate in effective self-government must include the ability to participate in (and the obligation to abide by) effective collective self-government regarding social affairs.<sup>13</sup> Hence, those who hold the autonomy view need not regard market transactions—and the speech directly involved in their promotion and enactment—as private and individual.<sup>14</sup> A more charitable and richer picture of autonomy will also articulate an interest in a sphere of privacy, at least in part because that sphere is a requisite for the exercise of a reasonable measure of control over one's thoughts.<sup>15</sup> Such an account would thereby have some resources to distinguish between the treatment of those figures who relinquished their privacy and those who retained it, thereby dissipating the “puzzle” about defamation.<sup>16</sup>

Notably, the versions of the democracy position Post and Weinstein endorse are not narrow or simplistic. For example, on Post's view, the democratic foundations of the First Amendment may yield protection for abstract art because of its relation to independent citizens and how independent citizens contribute to de-

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Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association?*, 99 *Nw. U. L. Rev.* 839, 867–79 (2005).

<sup>13</sup> See, e.g., John Rawls, *A Theory of Justice* 195–333 (1971) (acknowledging political liberties as among the basic liberties owed to free and equal persons while also advocating institutional economic design to ensure roughly economically egalitarian institutions); see also Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *Philosophy, Politics, Democracy: Selected Essays* 16, 25–28 (2009) [hereinafter Cohen, *Selected Essays*] (discussing the connection between individual autonomy and democracy); Robert Hughes, *A Moral Interest in Democracy* (Nov. 26, 2010) (unpublished manuscript, on file with the Virginia Law Review Association) (arguing that access to political participation is essential for individual autonomous agents to satisfy their compulsory moral ends).

<sup>14</sup> See, e.g., Baker, *supra* note 12, at 202–06; C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 *Ind. L.J.* 981, 985–87 (2009). Of course, some autonomy theorists are so inclined. See, e.g., Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 *Loy. L.A. L. Rev.* 67, 68 (2007); Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 *Geo. Wash. L. Rev.* 429, 430, 443–44 (1971).

<sup>15</sup> See Shiffrin, *Thinker-Based Approach*, *supra* note 1.

<sup>16</sup> See Post, *Participatory Democracy*, *supra* note 2, at 480; Weinstein, *Participatory Democracy*, *supra* note 2, at 513 n.98.

mocratic flourishing.<sup>17</sup> If this sort of wide interpretation of the scope of the democratic view is endorsed (and I am sympathetic to it), then a similar wide, charitable interpretative stance should be directed toward the autonomy view.

### III. JUSTIFICATION AND EMPHASIS

If we accept those methodological points, the important issues between the two theories may be less about what the democracy view or the autonomy view includes within the scope of protection and more about whether their justifications and emphases are the right ones. For instance, the democracy view defended by Post and Weinstein<sup>18</sup> seems unable to give a *direct* justification for the *free speech* protection of abstract art generated for private enjoyment or for personal diaries, letters, or conversations between individuals about their daydreams or their personal relations.<sup>19</sup> Autonomy

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<sup>17</sup> Post, *Participatory Democracy*, supra note 2, at 486. But see Cass R. Sunstein, *Democracy and the Problem of Free Speech* 134–35, 152–54, 164 (1993) (distinguishing between art with political content that should receive the highest protection and nonpolitically infused art whose regulation should be subject to intermediate scrutiny); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 26–27 (1971) (arguing that art should not receive the same protection as political speech); Weinstein, *Participatory Democracy*, supra note 2, at 496 n.45 (expressing doubts as to this justification).

<sup>18</sup> Joshua Cohen offers a far less narrow democratic account of free expression, one grounded in his deliberative democratic approach. His approach shows sensitivity to the interests of the citizen qua thinker, and his approach provides a more plausible grounding for art, religious speech, erotic speech, and other forms of speech that are not explicitly or even indirectly political. See Joshua Cohen, *Freedom of Expression*, in Cohen, *Selected Essays*, supra note 13, at 98, 113–20; Joshua Cohen, *Democracy and Liberty*, in Cohen, *Selected Essays*, supra note 13, at 223, 248–54; Cohen, *Deliberation and Democratic Legitimacy*, supra note 13, at 16, 32–34.

Although our approaches are fairly congenial, Cohen's case for rights of personal, nonpolitical expression is usually voiced in terms of what the citizen "reasonably takes to be compelling considerations" or "substantial reasons" for expression. See, e.g., Cohen, *Freedom of Expression*, supra, at 98, 115–17; Cohen, *Democracy and Liberty*, supra, at 248–50. By contrast, I find unnecessary and overdemanding his stress upon agents' having substantial, compelling, or obligatory reasons for their particular expression. Putting aside the peculiarly intense drive of the single-minded artist, many citizens' reasons for most of their speech, including a variety of images, melodies, and artistic or quotidian thoughts, lack that charge. Nonetheless, in my view, they present no weaker a case for protection.

<sup>19</sup> As Post (startlingly) muses in his Reply, he even regards it as a close call "whether family conversations about presidential politics should be protected as public discourse . . ." Robert Post, *Participatory Democracy as a Theory of Free Speech: A*

theories can provide a direct justification for these protections. The main issue is whether an indirect justification will suffice for such central forms of human expression.

True, democracy theories may have the resources to extend First Amendment protection to the arts on the contingent and instrumental grounds that protection is necessary to foster functioning, independent citizens who can serve the polity. Alternatively, it may be claimed that we must have access to the forms of expression others engage in and deem important in order to understand one another and to form a conception about what should be a public matter.<sup>20</sup> This justification, however, is circuitous and parasitic upon others first developing the art form (which now we must have access to in order to understand them and their preferences). It either does not provide foundational support for their freedom to develop it, or if it does, the argument lacks a specifically *democratic* form that is independent of and logically prior to an appeal to the interests of the autonomous thinker.

Strangely, Post and Weinstein's account also has difficulty giving a *direct* free speech justification for the protection of speech about the content of one's religious views (or at least for religious speech that is not offered as relevant to or bearing on political discourse). That is, since we take our religious views to be exempt from the project of collective self-government, we cannot claim that we need to allow (nonpolitical) speech about religious views in order to decide how to legislate about them.<sup>21</sup> We may need information about

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Reply, 97 Va. L. Rev. 617, 623 (2011) [hereinafter Post, Reply]. With respect to abstract art, Weinstein offers a refreshingly candid admission of this difficulty. Weinstein, Participatory Democracy, *supra* note 2, at 496 n.45.

<sup>20</sup> Post gestures in this direction. See Post, Reply, *supra* note 19, at 621 ("So long as *Brokeback Mountain*, and indeed all forms of communication that sociologically we recognize as art, form part of the process by which society ponders what it believes and thinks, it is protected under a theory of the First Amendment that stresses democratic participation.").

<sup>21</sup> Of course, the Free Exercise Clause of the First Amendment would directly protect this speech. Some might claim it is an advantage of the democracy approach that it removes some redundancy between the clauses of the First Amendment. I regard redundancy about individual rights as rather welcome and think it is already splayed all over the First Amendment (for example, the Petition Clause and the Free Speech Clause or the Speech and Press Clauses). On the other hand, it is unthinkable that speech about religion, metaphysics, epistemology, or symbolic logic is not directly covered by a strong freedom of speech protection and, instead, depends upon the Religion Clause or upon instrumental connections to "public discourse."

particular religious tenets to know how to accommodate them, but the communicated affirmation or condemnation of those tenets could not find direct justification.<sup>22</sup> Their views may be able to provide an indirect justification such as: governmental intrusion would involve a bureaucracy that would violate privacy rights or that would be so comprehensive as to chill (or risk chilling) core political speech or that developing the private discourse on these subjects might spark insights about public discourse. However true, these justifications strike me as convoluted and overly indirect reasons to protect such elemental speech.

The larger reason these justifications strike me as unacceptably indirect is that I do not understand how democracy and group self-rule are to be justified unless we also affirm a suitable and sensible commitment to individual self-rule.<sup>23</sup> Unless we subscribe to merely pragmatic justifications for democracy, which do not really support the more idealistic appeals to the concept (for example, “It’s the lesser evil,” or “It’s the only way to control Big Government’s potential for excess”), the justifications for a strong commitment to democracy will implicitly appeal to several concerns. These include citizens having control over their minds and lives, being the sorts of agents who deserve to do so, having thoughts and ideas of interest and relevance to others, and having the opportunity to develop the sorts of relations among themselves that are respectful, chosen, and sincere. If anything along these lines is in the ballpark, the non-pragmatic justifications for democracy will implicitly depend upon some picture of the value of individual autonomy that involves at least some sort of individual mental autonomy. It is hard to understand why it is foundationally important to have unconstrained

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<sup>22</sup> Joshua Cohen’s democratic theory is not subject to this criticism. See Cohen, *Freedom of Expression*, supra note 18, at 98, 114–16; Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in Cohen, *Selected Essays*, supra note 13, at 154, 165–69; related discussion supra note 18.

<sup>23</sup> There is an ambiguity in how the autonomy view is conceived. We might consider, on the one hand, a narrower form of individual, mental self-rule—one that governs the contents of one’s mind, its externalization, and its communication to others. On the other hand, we might consider a wider form that covers a wider sphere of action in addition to freedom of thought. Those who think speech is special in some way may develop an individual autonomy conception that places special emphasis on the former. Hence, I do not think Post’s claim that autonomy “extends to the full libertarian protection of personal action” is self-evident. Post, *Participatory Democracy*, supra note 2, at 479; see also Shiffrin, *Thinker-Based Approach*, supra note 1.

thoughts, and the ability to externalize and share them, when those thoughts are about our form of social organization and its projects. It is not as foundationally important, however, for an agent to have unconstrained thoughts that she may communicate about herself, her mortality, her metaphysical status, her personal relations with friends and strangers, or her aesthetic sense. Why would we care about the former if we did not also care about the latter? Indeed, why would we have *categorical* reasons to respect the free communications of agents about social, democratic life if, at the same time, we denied we had such categorical reasons to respect their free communications about matters outside of public discourse?

To put it more simply, what justification for the centrality of democracy would escape the implication that the autonomy foundations of free speech are also central? If it can be constructed to avoid that implication, will that constructed justification be inspiring? Could it possibly correspond to and explain the strength of our conviction in the free speech protection?<sup>24</sup>

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<sup>24</sup> In his Reply, Post claims that it is not incoherent to value one but not the other and, to the contrary, that “[d]emocracy creates forms of social solidarity and social peace that cannot be reduced to individual autonomy.” Post, *supra* note 19, at 627. I suspect that this is because he imagines “individual autonomy” as entailing economic libertarianism and an utter absence of moral civility. As I suggest above, I think this is an inapt picture of what respect for autonomy involves. Indeed, a comprehensive commitment to mental autonomy and to freedom of thought and speech, in both personal relations and the public sphere, is a prerequisite for developing the full moral agency between equals, upon which a flourishing democratic and just society depends. See Shiffrin, *Thinker-Based Approach*, *supra* note 1.