# BAKER'S AUTONOMY THEORY OF FREE SPEECH

*Anne Marie Lofaso*[*]



## I. INTRODUCTION

My purpose today is to summarize Ed Baker's autonomy theory of free speech as it was last articulated in an article he wrote for *Constitutional Commentary* and that is forthcoming later this month.[1] When using Baker's words, I am quoting from a draft of that article.[2]

* Professor of Law and Associate Dean for Faculty Research and Development, West Virginia University College of Law. Thanks to Robert Bastress, Vince Blasi, Jim Weinstein, and Jim Heiko, who have conversed with me about the contents of this Transcript. Thanks to the *West Virginia Law Review* editors, especially Sarah Massey and Shereen Compton, for their valuable assistance and to the Hodges Faculty Research Grant for its support of this project. All errors are the Author's.

1 C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251 (2011). It should be noted that this presentation was given on Oct. 10, 2011.

2 For purposes of this article, the *West Virginia Law Review*, with the author's permission, has cited to the final publication.

Baker believed that the law's legitimacy required the law to respect its citizens' formal autonomy. Today I examine Baker's autonomy theory of free speech by presenting Baker's answers to the following three questions. One, what is formal autonomy? Two, why is formal autonomy constitutionally foundational to legal legitimacy? In answering this question, Baker also explores the question why both constitutional democracy and a broad speech freedom encompassing non-political speech are necessary to protect formal autonomy from majoritarian or popular encroachment. Three, does Baker's conception of formal autonomy fit First Amendment doctrine, by providing "relatively determinate answers to important First Amendment issues,"[3] and does doctrinal fit matter? In exploring that question, Baker shows that protecting formal autonomy best exemplifies reflective equilibrium among competing free speech theories.

## II. DECONSTRUCTING BAKER'S AUTONOMY THEORY OF FREE SPEECH

### *A. Formal Autonomy*

Let me start with Baker's definition of formal autonomy. Because government requires citizens to obey its laws, free speech must receive constitutional protection to ensure that government respects citizens' autonomy.[4] This is Baker's conception (or at least one formulation) of the government's coercive authority over its citizens. Baker recognizes, however, that, like most values, autonomy is a "slippery" term subject to interpretation and manipulation.[5] Accordingly, formal autonomy must be defined, Baker posits, in a way that is difficult to misinterpret or manipulate if it is to have any force as a core value underlying a free speech theory.[6]

Baker's formal conception of autonomy is "a person's authority (or right) to make decisions about herself—her own meaningful actions and usually her use of her resources—as long as her actions do not block others' similar authority or rights."[7] Because formal autonomy is a right, citizens can claim this right from, in this case, the government.[8] There are, however, three limitations to this right. Formal autonomy cannot, one, interfere with another person's equally valid formal autonomy; that is, harm is permissible only in

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3 Baker, *supra* note 1,at 251.

4 *Id.*at 253–54.

5 *Id.* at 251.

6 *Id.* at 254.

7 *Id.; see also* C. Edwin Baker, *Autonomy and Informational Privacy, or Gossip: The Central Meaning of the First Amendment*, 21 SOC. PHIL. & POL'Y 215 (2004).

8 *Id.*

cases where the harm does not interfere with another's formal autonomy.[9] Two, formal autonomy cannot violate certain moral constraints on majority rule.[10] For example, slavery is morally wrong even when adopted through a democratic vote embodying formal autonomy. And three, formal autonomy cannot undermine the integrity of another's "decision-making authority."[11] For example, free speech does not protect "violent, coercive or manipulative actions."[12]

In positing his conception of formal autonomy, Baker rejects the three main alternatives: (1) "doing whatever [you] choose[];"[13] (2) "a laissez faire economic order;"[14] and (3) substantive autonomy or the "capacity to pursue successfully the life [you] endorse[]."[15] As an initial matter, Baker rejects the "doing whatever [you] choose[]" conception of autonomy as "an intellectually lazy way to avoid thinking through the legal implications of a state commitment to respect autonomy, mak[ing] the term virtually meaningless."[16] Baker then moves on to the two extreme views of autonomy—autonomy as laissez fair economic and autonomy as substantive autonomy. Baker rejects the laissez faire economics conception of autonomy as ideologically expedient to right-wing libertarians, but otherwise "intellectually indefensible."[17] Finally, Baker rejects substantive autonomy as incomplete because it cannot absolutely protect certain kinds of speech but rather—depending on the presence and distribution of "material resources, psychological resources, and other natural and social conditions"—increases one person's autonomy at the expense of another's.[18] Although Baker acknowledges that such trade-offs are unavoidable in politics, he believes that the pursuit of substantive autonomy "should only use means that respect a more formal conception of autonomy of each person."[19]

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9 Baker, *supra* note 1, at 254–55.

10 *Id.* at 255.

11 *Id.* at 255–56.

12 *Id.* at 256.

13 *Id.* at 252.

14 *Id.*

15 *Id.* at 253.

16 *Id.* at 252.

17 *Id.* at 252, 272–74; *see also* C. Edwin Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976) (arguing that First Amendment theory requires complete denial of protection for commercial speech); *see infra* Part III.C.

18 Baker, *supra* note 1, at 253.

19 *Id.* at 254.

### *B. The Basis of a Constitutional Theory of Free Speech: Establishing Legal Legitimacy*

I now turn your attention to why, in Baker's view, formal autonomy is constitutionally foundational to legal legitimacy. A constitutional theory of free speech requires (1) "a theory of constitutional interpretation" and (2) "specific . . . speech protections."[20] Baker correctly observes that the "great value(s) of speech cannot [themselves] explain or identify [speech's] constitutional status. . . . An explanation is needed to explain why—and which—speech to treat differently."[21] To do that, Baker needs a theory of interpretation, which I will now summarize for you.

#### 1. Interpretation

Baker's argument begins with Professor H.L.A. Hart, who persuasively claimed that for law to be legitimate it must be acceptable.[22] The "rule of recognition" is the most important factor in determining the validity of the legal system.[23] Baker next identifies American rules of recognition.[24] In his view, they are the text of the Constitution and judicial interpretation of the text.[25] Baker observes that constitutional text (absent the amendment process) is unchanging, but interpretations can change.[26] Notwithstanding this characteristic difference between text and interpretation, constitutional text and the Supreme Court of the United States' decisional law have equal status.[27] Text and interpretation are equal parts to our "rule of recognition." Constitutional interpretation and judicial practice are two parts of the same conversation.[28] Neither is superior to the other.[29] Baker also believed that the Constitution should be understood as establishing a legitimate and functional government.[30] Legitimacy is crucial to Baker's theory.[31]

Therefore, judicial interpretation of the Constitution should support that understanding of the Constitution—that it must be understood as

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20 *Id.* at 259.

21 *Id.*

22 *Id.* at 261. *See generally* H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994).

23 Baker, *supra* note 1, at 260–62.

24 *Id.* at 260.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* (citing C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 272–83 (1989)).

31 *Id.*

establishing a legitimate and functional government.[32] As Baker explains, "those who . . . exercise power under the constitution [Members of Congress, the President, and Supreme Court Justices] have an obligation toward dissenters—those whom they ask to obey—to show why the legal/constitutional order is one that the dissenters should or at least reasonably could accept."[33] This is the key to legitimacy—explaining to dissenters why they should accept the legal and constitutional order.[34] It should be noted, however, that Baker's observations about how interpretation works do not explain interpretative change—when and why particular doctrines are properly rejected.

### 2. Legitimacy

This brings us to Baker's main point—legitimacy. Baker once again starts with Hart's point—that law is about acceptance and empowerment.[35] Baker, in agreement with Hart, claims that law's legitimacy depends less on coercion and more on acceptance.[36] Baker then asks—what is required for a legal order to be legitimate and therefore to create real obligations?[37]

Baker examines a "thin" version of democracy, a purely procedural form of democracy, and a stronger version of democracy, ultimately rejecting the thin or procedural version for the stronger version.[38]

I begin with a description of a thin version of democracy and Baker's critique of it. A thin version of democracy contains authoritative "behavioral norms" that are enforced as described by law:

> There will always be dissent to the favored norms. All specifications of legal rules inevitably produce losers, those who claim other rules would be better. A democratic process, however, in one sense "equally" respects people as properly having a "say" in the rules they live under. (Though "equally" only in a formal sense of "voice"—in another way, democracy gives those in the majority more than it gives losers whose objections potentially have no effect on resulting norms.) . . . .

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32 *Id.*

33 *Id.* at 261.

34 *Id.*

35 *Id.* at 262.

36 *Id.*

37 *Id.*

38 *Id.* at 262–65.

> The pay-off for the First Amendment is the possibility that a theory of democracy can ground a theory of free speech.[39]

Baker offers the following three-part critique of the thin version of democracy. First, the answer "democracy" does not really tell us much other than "one person, one vote" and majority rule.[40] Accordingly, "the proper conception of democracy needs specification."[41] Second, "[t]he specification cannot be merely sociological or historical but must rely on moral or ethical considerations."[42] Third, we need to explain "[b]oth the status and source of these moral considerations."[43]

Baker next examines a purely procedural version of democracy. Baker asks why we should not build a democracy on purely procedural grounds, which "gives majority rule a more expansive authority to restrict at least non-political speech."[44] Additionally, "[a] procedural theory that asserts that democracy implies authority to decide any question by 'majoritarian processes' . . . is overtly question begging. Why accept a mere procedural theory? And how does one determine and why should one accept specific majoritarian processes?"[45] Baker explains:

> Even if a procedural conception were favored, logically it requires freedom (of speech) only to propose an issue for democratic vote. After certain proposals are made, for example, after a proposal to eliminate an existing ban of talking about a particular issue, procedure rules could require an immediate "call of the question." This procedural view presumably allows majoritarian decisions to prohibit or regulate any speech, including public discourse—except for guaranteeing the right of legislators to propose and then vote, maybe immediately, on proposals to repeal an existing restriction.[46]

Consequently, Baker advocates his own stronger version of democracy that does not always yield to majority will.[47] Baker explains: "[C]onstitutional democracy could make the legitimacy of majority decision-making depend on

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39 *Id.* at 263.

40 *See id.* at 263–64.

41 *Id.* at 263.

42 *Id.*

43 *Id.*

44 *Id.* at 264.

45 *Id.*

46 *Id.*

47 *Id.* at 263.

the process not making any decisions violating particular substantive rights—rights which might include some form of voice within the process or which might include legal respect for individuals' general authority to make autonomous speech choices."[48] As Baker points out, "[m]any believe that something like the second conception of democracy[—where substantive due process places some limit on pure majority rule—]is accepted in the United States and many other constitutional democracies."[49] In summary, Baker does not assume that a constitutional democracy must always yield to majority will.[50] In Baker's view, a constitutional democracy can place constraints on majority will, such as substantive due process, and remain legitimate.[51]

## III. DOCTRINAL FIT AND REFLECTIVE EQUILIBRIUM

Baker acknowledges that our First Amendment doctrine is "robust" although "uneven."[52] As he explains, "[t]he crucible of litigation, social movements, and scholarly debate have left us with a robust, though somewhat uneven, First Amendment doctrine that . . . overall is best justified by [Baker's own] autonomy theory."[53]

Baker has some reservations about adhering too strictly to doctrinal fit. Baker laments:

> [A]cademic thought sinks to its lowest depths when its methodological ambition is to be an apologist for the status quo. The measure of the appeal of a First Amendment theory should not be the extent that it conforms to existing doctrine but the quality of its explanation of those aspects of existing doctrine that should be approved and, while linking meaningfully to existing constitutional discourse, the persuasiveness of its critique of aspects of doctrine that should be rejected. Though some scholars see their task to explain the at least legal correctness of [cases such as] *Dred Scott*, *Plessy*, or *Lochner*, or more relevant to us, *Dennis*, at least at the time they were decided, with their task and theory requiring change as doctrine twists and turns, [Baker's] hope is that [he] would have been one who, at the time of these decisions, would offer

48 *Id.*

49 *Id.* at 263–64.

50 *Id.* at 268–69.

51 *See id.*

52 *Id.* at 270.

53 *Id.*

> a legal critique, as the dissenters on the Court attempted, in addition to a political critique.[54]

With these reservations in mind, let's consider doctrinal areas, which in Baker's opinion, best justify or are best critiqued by autonomy theory.

### *A. Flag Salute*—West Virginia State Board of Education v. Barnette

The Court in *West Virginia State Board of Education v. Barnette* [55] endorsed the view that a school child has a liberty right to abstain from saluting the flag.[56] As Baker points out, the Court relied on the speakers' right to express themselves—a Bakerian formal autonomy construct, not on the listeners' right, which forms a basis of the marketplace of ideas theory and democratic discourse theory.[57] The right to express oneself is by definition an aspect of one's formal autonomy—it allows the speaker to decide for herself whether she wishes to salute the flag, free from the coercive power of the state. *Barnette* then justly takes its place as the "poster child of autonomy theory."[58]

### *B. Art and Music*

I think that Baker is correct in noting that liberty is the best explanation for protecting art and music as free expression.[59] Baker cogently states that it is "the liberty of the creators or performers and their audiences . . . [that is] at stake . . . [and that] should be legally respected."[60] Once again, for Baker, art and music are expressive forms that allow the "speaker" to express her own thoughts and emotions. Relying on reflective equilibrium, Baker points out that abstract art and compositional music require a stretch to justify as political speech or truth propositions necessary to test the free market of ideas.[61] Baker further points out that, while some art might further public discourse, as Robert Post suggests as the basis for First Amendment theory, "this is seldom the aim of the communication and this ground for protection surely feels far from the heart of why most people engage in these forms of expression."[62]

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54 *Id.* (citing Dennis v. United States, 341 U.S. 494, 516–17 (1951) (holding that legislation preventing the formation of a Communist Party did not violate the First Amendment)).

55 319 U.S. 624 (1943).

56 *Id.* at 642; Baker, *supra* note 1, at 270–71.

57 Baker, *supra* note 1, at 270.

58 *Id.*

59 *Id.* at 272.

60 *Id.*

61 *Id.* at 271–72.

62 *Id.* at 272.

### *C. Commercial Speech*[63]

Baker views commercial speech as "a clear battle ground for free speech theories."[64] Baker acknowledges that the ideas and information in commercial advertisements can make some contribution to the market place of ideas and also to a person's substantive autonomy.[65] Accordingly, constitutional protection operates effectively in a market place of ideas theory of free speech.[66] Moreover, if the democratic discourse theory focuses on information that is relevant to or can affect self-government, Baker acknowledges that protection also follows; this seems to fit into the case law.[67] Baker notes, however, that "[i]f . . . democratic discourse focuses on citizens' participation in the public sphere or her aim to contribute to public opinion, denial of constitutional protection would follow."[68] Here is where Baker uses reflective equilibrium to depart from doctrinal fit: "Democratic legitimacy involves empowering citizen governors, not commercial entities."[69] But "[t]his second democratic argument . . . is essentially a restricted autonomy-based theory—one limited to the political sphere."[70]

Baker provides three reasons why the First Amendment does not protect commercial speech. First, neither liberty nor autonomy is at stake to the extent that the free market compels market participants to seek profit maximization, for "money, not communicative action, provides the steering mechanism."[71] Second, businesses are "legally constructed, instrumentally valued, artificial entit[ies]."[72] Accordingly, "the moral/constitutional autonomy-based justification for protecting speech of flesh and blood people is simply not at stake here."[73] Third, "market exchanges use property as power . . . to get the other party to do something that she otherwise would not want to do—give the

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63 For a more in-depth argument regarding commercial speech, see C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 981–85 (2009).

64 Baker, *supra* note 1, at 272 (citing Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432 (1971)).

65 *Id.*

66 *Id.* (citing Martin H. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432 (1971)).

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.* at 273.

73 *Id.*

speaker her money, property, or service."[74] Here, Baker is pointing out what the dissent in *First National Bank of Boston v. Bellotti*[75] advanced—the nature of the coercive effect of private sources of power:

> [W]hat some have considered to be the principal function of the First Amendment, the use of communication as a means of self-expression, self-realization, and self-fulfillment, is not at all furthered by corporate speech. It is clear that the communications of profitmaking corporations . . . do not represent a manifestation of individual freedom or choice.[76]

While, as Baker points out, this point was subsequently adopted by *Austin v. Michigan Chamber of Commerce*,[77] it was overruled by *Citizens United v. Federal Election Commission*,[78] about six weeks after Baker's death.

### *D. Press*

Baker notes that the "arguments to deny protection to the speech of commercial entities immediately put into question the status of the press, which today is largely constituted by large market-oriented entities."[79] Baker had previously observed that press clause jurisprudence is "incoherent without the assumption that the press clause has an independent meaning."[80] For example, this independence explains giving media corporations different speech rights than other corporations.[81] The press's role in democratic discourse justifies the separate constitutional significance of the press and the differences between its treatment and the treatment of either individuals or other corporations.[82] The press's different and instrumental role in democratic discourse does not justify less or more affirmative speech rights for media than for individuals, but it does justify some forms of special protection.[83]

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74 *Id.*

75 435 U.S. 765, 803–28 (1978) (White, J., dissenting).

76 Baker, *supra* note 1, at 274 (quoting *First Nat'l Bank of Boston*, 435 U.S. at 804–05).

77 *Id.* (citing Austin v. Mich. Chamber of Commerce, 494 U.S. 652 (1990) (holding that corporate speech may be banned in certain circumstances)).

78 558 U.S. 50 (2010).

79 Baker, *supra* note 1, at 274.

80 *Id.* at 275 (citing C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 193–213 (2002); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007); C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 (1994)).

81 *Id.*

82 *Id.*

83 *Id.*

### *E. Obscenity*

Existing doctrine denies protection to obscenity.[84] Baker views this as a theoretical battleground because obscene material is so widely available due to the Internet and even in urban newsstands.[85] Baker puts aside the issue of child pornography.[86] Baker points out, for example, that Justice Brennan's marketplace of ideas approach in *Roth v. United States*[87] would likely deny protection to obscenity because of the lack of any role it would play in the search for the truth.[88] Political speech theories would deny protection because of obscenity's lack of political effects.[89] Liberty theory, however, protects obscenity because of the objectionable nature of regulating speech involving "willing adult[s]" and "the right to exercise 'autonomous control over the development and expression of one's intellect, tastes, and personality.'"[90]

### *F. Speech and Government Secrecy*

Baker asks us to think about how we can distinguish in principle the government keeping specified information secret and prohibiting communication of that specified information to keep it unknown.[91] Many versions of the marketplace of ideas and substantive autonomy, both of which focus on the listeners' substantive autonomy, would have trouble distinguishing these two situations.[92] Baker's liberty theory and his press theory can easily make this distinction. This distinction follows easily from the speakers' or the press's formal freedom to say whatever they choose, given the knowledge or the imagination.[93] Baker's point: the government may very well have compelling reasons to keep information secret, but it can pursue these ends only by means that do not violate people's autonomy or the press's freedom in respect to speech.[94] Once again, unlike other forms of free speech theory, Baker's liberty theory values the rights of citizen's over the coercive power of the government.

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84 *Id.* at 276.

85 *Id.*

86 *Id.* at 277.

87 354 U.S. 476 (1957).

88 Baker, *supra* note 1, at 276.

89 *Id.* at 277.

90 *Id.* at 276 (citing Paris Adult Theatre I v. Slaton, 413 U.S. 49, 85 n.9 (1973) (Brennan J., dissenting) (quoting Doe v. Bolton, 410 U.S. 179, 211 (1973))).

91 *Id.* at 277.

92 *Id.*

93 *Id.* at 278.

94 *Id.*

### *G. Content Discrimination*

In Baker's view, "[h]ornbook doctrine . . . confus[es] . . . and routinely overstates the force of the doctrinal bar on content discrimination (and if, as [Baker] believe[d], Justice Kennedy is right, [hornbook doctrine] understates its proper force where it is applicable)."[95] Baker cites as his prime example the problem of content discrimination for those who value political speech over non-political speech.[96]

Baker claims that the Supreme Court's analysis in *Chicago Police Department v. Mosley*[97] demonstrates the superiority of his autonomy theory in fitting doctrine.[98] According to the Court,

> Although preventing school disruption is a city's legitimate concern, Chicago itself has determined that peaceful labor picketing during school hours is not an undue interference with school. Therefore . . . Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits.[99]

In other words, content discrimination must be justified. Baker writes in response:

> From the perspective of valuing autonomy, although government clearly must be permitted to use public property to advance public projects and, thus, to impose time and place limits on speech that constitute actual interferences with these projects, respect for individual expressive autonomy means that the expression must be allowed on public property when it does not constitute such an interference.[100]

For Baker then, the content discrimination rule is merely "ground for finding that this respect for autonomy is absent."[101] Unlike those who ground free speech theory in the political/non-political distinction, Baker's theory condemns content discrimination absent such a justification.

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95 *Id*.

96 *Id*.

97 408 U.S. 92 (1972).

98 Baker, *supra* note 1, at 278.

99 *Chi. Police Dep't*, 408 U.S. at 100.

100 Baker, *supra* note 1, at 280.

101 *Id.*

### *H. Public Employee Speech*

Baker's theory would once again generate a more protective conception of public employee speech than would current case law.[102] This is where Ed's autonomy theory of free speech and my labor theory promoting the autonomous dignified worker cross paths.[103] I leave that discussion open for another article.

## IV. CONCLUSION

Throughout his life, a life cut off in its prime, Baker developed a robust, coherent, and appealing free speech theory. That theory, grounded in the value of formal autonomy, accomplished more than mere doctrinal fit. To be sure, Baker's autonomy did in fact explain a good deal of current First Amendment jurisprudence. Baker's autonomy theory also cogently revealed places where our otherwise robust constitutional free speech jurisprudence was vulnerable. By capturing the essence of free speech value—to protect a person's right to make decisions about herself so long as her actions do not frustrate others' similar rights—Baker is able to put forth an appealing vision of the Free Speech Clause toward which our posterity can strive. In his life, Baker sought always to write about the kind of society he wished to live in—a society that enhanced and maximized self-authorship. His final words on free speech accomplish just that—a society in which we might all enjoy living and prospering.

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[102] *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983) (holding that discharge of former attorney for questioning her supervisors and opposing being transferred to another office did not violate attorney's constitutionally protected right of free speech).

[103] Anne Marie Lofaso, *Toward a Foundational Theory of Workers' Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1 (2007).