

2011

Comment on Baker's Autonomy and Free Speech

T.M. Scanlon

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Scanlon, T.M., "Comment on Baker's Autonomy and Free Speech" (2011). *Constitutional Commentary*. 1070.
<https://scholarship.law.umn.edu/concomm/1070>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Constitutional Commentary collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

COMMENT ON BAKER'S AUTONOMY AND FREE SPEECH

*T.M. Scanlon**

In approaching this comment I am conflicted in two ways. First, I have always been a great admirer of Ed Baker and his work, but I will be focusing mostly on those points on which we disagreed. Second, my relation to the autonomy theories of freedom of speech is ambiguous. I agree with Ed Baker in taking autonomy theories to be superior to democracy-based accounts, which are their main systemic rival, and I myself once offered a theory of freedom of expression that gave a central place to autonomy. But I have come to believe that theory to be mistaken in important respects, and, more generally, to believe, for reasons that I will explain, that the concept of autonomy is not a helpful one.

The idea that there is a right of freedom of speech depends on the belief that important interests are threatened if the state has unregulated power to restrict expression. The interests in question are, on the surface at least, various. Some of these interests are political in the sense of having to do with elections, legislation and so forth. These include, at least, the interests of participants' expression in having opportunities to criticize public officials, to influence public policy and legislation, and to participate in electoral politics. Beyond these narrowly political interests, people also have interests in having opportunities to communicate with others who share their values having to do with art, religion, science, philosophy, sex and other important aspects of personal life, and in having opportunities to express these values to others who may not share them, in hopes of influencing them, and thereby shaping the mores of their society, or just in order to bear witness to these values by giving them public expression. People also have interests, as audience members, in having access to information and opinion and to

* Alford Professor of Natural Religion, Moral Philosophy, and Civil Polity, Harvard University.

expression by others on all the subjects I have listed. Finally, people have interests, as third parties, in having the political, economic, and social benefits of a society in which our fellow citizens' participant and audience interests are fulfilled.

One central task of theoretical reflection on freedom of speech is that of clarifying these interests: understanding what they are, why they are important, and in what ways they are at stake when restrictions on expression are in question. Two types of theories offer systematic characterizations of these interests. Democracy-based theories identify the interests at stake in freedom of expression as based in the preconditions of democratic government, or in the conditions required for us to fulfill our roles as citizens. Autonomy-based theories identify these interests as reflecting the value of individual autonomy, and see the right of freedom of speech as something required by respect for autonomy.

Systematic accounts offer two possible advantages. First, they may provide a more secure foundation for freedom of speech by grounding the interests in question in a single value that it is more difficult to doubt or deny. Second, by providing a unified account of these apparently diverse interests they may provide a clearer understanding of their nature and importance, which may provide guidance in cases in which they need to be balanced against one another or against other concerns.

Democracy-based theories in particular can seem appealing for the first of these reasons. By grounding the restrictions on majority rule that a right of freedom of expression involves in the conditions of legitimacy of the democratic process itself, they counter the objection that these restrictions are illegitimate because they are "counter-majoritarian." I agree with Ed Baker's conclusion that, despite this appeal, democracy-based theories cannot account for the full range of expressive activities protected by freedom of speech. The requirements of democratic rule comprise one important class of interests protected by freedom of speech. But they are not the whole story.¹ An autonomy-based theory does much better in this regard. All, or at least almost all, of the interests I listed above as being at stake in freedom of speech could plausibly be called interests in autonomy. So in that respect the position I want to defend could be called an autonomy-based theory, in contrast to

1. See Ed Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 270 n.28 (2011).

a democracy-based theory. Such a theory—one based simply on the importance of protecting and advancing these interests—would, if I understand him correctly, be what Baker calls a *substantive* autonomy theory.² Calling all of these diverse interests matters of autonomy strikes me as not very helpful.

But Baker's use of this term goes beyond this labeling of interests. The formal autonomy theory he advocates holds that although "promoting *substantive autonomy*, along with matters of collective self-definition, should be a major aim of the state and the legal order," the "pursuit of this and other state aims should *only* use means that respect a more *formal* conception of autonomy of each person."³ This formal conception of autonomy "consists of 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."⁴ The requirement to respect formal autonomy thus operates as a "side constraint" on governmental policies aimed to promote substantive autonomy or other goods.⁵

When does a government policy fail to respect formal autonomy? The most obvious examples would be cases of attempted "thought control" in which governments attempt to interfere with individuals' thought processes. The requirement of respect that Baker has in mind would rule out such interventions, but it would also demand more. Autonomy as he understands it includes not only exercising the capacity for making up one's own mind but also "self-expressive rights that include, for example, a right to seek to persuade or unite or associate with others—or to offend, expose, condemn, or disassociate with them."⁶ Expressive activities count as exercises of formal autonomy, however, only if they involve the honest representation of what the speaker believes to be true. Lies and threats are thus excluded.

So not every policy that limits expressive activities disrespects formal autonomy. Expressive activities can be restricted (without disrespecting formal autonomy), Baker says, when these activities would otherwise interfere with the formal autonomy of others. "Generally," he says, "respect for autonomy involves respect for a person's choices about herself and,

2. *Id.* at 272.

3. *Id.* at 253–54 (emphasis added).

4. *Id.* at 254.

5. *Id.* at 253.

6. *Id.* at 254.

maybe, her resources up until her choice involves taking choice away from another about himself or his resources.”⁷ Expressive activities are not purely “self-regarding.” They can affect others and can make them worse off. It matters, however, in what way these harms occur. One person’s speech cannot be restricted on the ground that it harms others by persuading them of things that are false or bad, but can be restricted on other grounds, such as when it involves threats, coercion or violence.⁸

The common thread here is that government disrespects the formal autonomy of its citizens when it substitutes its judgment for their own and restricts expression on this basis. When government restricts a person’s speech on grounds other than its effect on others, it is doing so on what it judges to be the merits of the thoughts expressed, and is thus failing to respect the judgment, and hence the formal autonomy, of the speaker. When it restricts speech on the ground that it harms others by persuading them to adopt mistaken attitudes, government fails to respect the judgment, hence the formal autonomy, of those who are so affected.

I myself once proposed a theory of freedom of expression that had as its centerpiece a similar autonomy-based side constraint on the harms that can justify the regulation of expression.⁹ I later rejected this theory because this restriction seemed to me too tight. It fails to distinguish between restrictions on political speech, justified by the alleged fact that it would lead citizens to form mistaken views about the wisdom of governmental policies, and restrictions on cigarette advertising, or false and misleading advertising for other products.¹⁰ All of these justifications involve an element of “substituted judgment,” but they are not all illegitimate.

In order to determine which are and which are not legitimate, we need to take into account the various interests that individuals have in the forms of expression and kinds of information in question, and the degree to which these interests would be threatened by government regulation.¹¹ In the case of

7. *Id.* at 257–58.

8. *Id.*

9. See Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213–15 (1972), reprinted in T.M. SCANLON, *THE DIFFICULTY OF TOLERANCE* 6, 14–15 (2003).

10. See T.M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 534 (1979), reprinted in *THE DIFFICULTY OF TOLERANCE*, *supra* note 9, at 84.

11. The same is true of paternalistic legislation restricting behavior other than

allegedly false or misleading expression regarding political issues, individuals' interests, both as potential speakers and potential audiences, are very significant, and the danger is great that the power to regulate expression on these grounds, if it were granted, would be misused in a partisan way that would damage these interests. On the other hand, the interests of sellers of goods in having greater opportunities to influence potential buyers are less urgent.¹² The interest of buyers in the information they may get from advertising varies from case to case, and is in some cases not insignificant, although not as urgent as comparable interests in political speech. And, finally, there is less reason than in the case of political speech to believe that governmental powers to ban false and misleading commercial advertising would be overused in ways that would threaten these interests. Not that there is no reason to be concerned about regulation in this case, but certainly there is less reason.

It is instructive to compare this approach to commercial speech, based on calculations about what is required to protect interests in what Baker calls substantive autonomy, with Baker's more wholesale account, based on formal autonomy. On the speakers' side, Baker says that when legally constituted business entities engage in communication, "the moral/constitutional autonomy-based justification for protecting speech of flesh and blood people is simply not at stake here."¹³ This seems to me correct, although I would put the point in terms of interests. The function of free speech principles is to protect the interests of individuals, as potential speakers, audiences and bystanders, and the relevant *speaker-related* interests are not at issue in commercial speech.

But there are also audience interests to be considered. On this side, Baker writes, "The instrumental value that a listener places in her responsiveness to the persuasiveness of commercial speech or a gun to her head contrasts to the substantive or

expression. Such legislation always involves an element of substituted judgment, but it is not for that reason always objectionable. Whether it is objectionable depends on the reasons individuals have for wanting certain aspects of their lives to depend on the choices they make under certain conditions, and the costs, including symbolic costs, of having these choices made by others. For more detailed discussion see T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 251–56 (1998).

12. In saying that these interests are "less urgent" I mean that they have less justificatory weight in determining what laws or policies are justified. This is not to deny that some people may in fact care more about what they buy than about whether they can vote. See T.M. Scanlon, *Preference and Urgency*, 72 *J. PHIL.* 655, 655–69 (1975), reprinted in *THE DIFFICULTY OF TOLERANCE*, *supra* note 9, at 70–83.

13. Baker, *supra* note 1, at 273.

solidarity value a listener places in her response to a solicitation for contribution. In second circumstance, but not the first, the listener comes to value the recipient having that with which she parts. And the speaker in the charitable solicitation seeks to persuade the listener on agreement in values while in the commercial speech or gun case only seeks behavior that the listener now instrumentally values because of how the speaker has changed her options.”¹⁴ This seems to me overly broad. Whatever the motives of advertisers may be, consumers do have reason to value information that they receive from advertising, about relative prices, technical details of products, and matters of style and fashion. These audience interests can be enhanced by regulation that makes this information more reliable (such as laws against false and misleading advertising) but they can also be threatened by over-regulation (such as outright bans on advertising, enacted at the behest of companies with dominant market share). So, while commercial speech differs from political speech in important ways, audience interests of the kind that freedom of speech is designed to protect are still in play.

If, then, I could be called an autonomy theorist, this is because the interests that I take to lie at the heart of freedom of speech might all be called interests in substantive autonomy. This label does not, however, seem to me helpful, particularly because it is important to recognize the diversity of the interests in question.

Bringing all of these interests under the general category of autonomy might, however, seem to offer an advantage of the first kind I mentioned at the beginning of this comment, the advantage of providing those interests with a secure normative foundation. If we cannot help seeing ourselves as autonomous—as making up our own minds what to think—then we might seem to be committed to the conditions required for us to do this, and hence to requirements of freedom of expression.

But even if the premise of this argument is accepted, it delivers less than might appear. It is true that we cannot avoid making up our own minds what to think, on whatever evidence is available to us that we deem relevant. Even in taking someone else’s word for a matter, we are making up our own minds in this sense, by deciding to take that person’s word for it. But as this example illustrates, even if we are committed to our own autonomy in this sense, nothing follows about how much we

14. *Id.* at 273–74.

2011] *SCANLON COMMENTS ON BAKER* 325

should be prepared to give up in order to put ourselves in a better position to make up our minds about any particular question. The answer to this, as I have argued in my comment on Seana Shiffrin's paper, depends on the subject matter in question.

So the best account of freedom of speech seems to me to be neither democracy-based, nor autonomy-based, but irreducibly pluralist.