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The Constitution of Fear. By Schauer, Frederick. Read preview. Article excerpt. At various places along the Massachusetts Turnpike, a limited access toll road with a.

Kennedy School of Government, Harvard University, where he has served as academic dean and acting dean, and before that was a professor of law at the University of Michigan. He is also co-editor of The Philosophy of Law: A Reader , and author of numerous articles on constitutional law and theory, freedom of speech and press, legal reasoning and the philosophy of law. His work on rules, legal reasoning, constitutional theory and freedom of speech has been the subject of a book Rules and Reasoning: Program Transcript Jan Paynter: In reading over the amendments, I was very interested in the 9th Amendment which is for many people and most legal binds as you well know, we were discussing before the program, one of the most interesting of the initial 10 contained in the Bill of Rights. Understanding that for instance Robert Bork stated that this amendment is an ink blot, basically one in which you can see in it whatever you wish. Would you wade in a bit for us, Professor, toward an understanding of what this amendment means, presuming that the Founders put it in there for a reason. Okay, theâ€”it is as you know a very controversial issue about just whether what the Founders intended ought to guide us today. The words clearly ought to guide us today but whether the original intent behind those words ought to guide us today is one of the great controversies of constitutional theory. That is, the idea that the courts could strike down laws as unconstitutional. The 9th Amendment was written in , the first time that judicial review was established was in Marbury v. The second time it was used was not for 51 years later in the notorious Dred Scott case in so the 9th Amendment is not largely about courts and was not intended to be about courts. What it means in an era of courts as opposed to just something that informs political debate and ought to inform legislative action is a very open question and in fairness it is not just Judge Bork but people on both sides of the political spectrum or all parts of the political spectrum that are worried that the 9th Amendment is so open ended as to give carte blanche to virtually anybody to find whatever rights they may want in the Constitution and as a result it has become somewhat of a dead letter. What it was originally intended to mean remains some debate among historians. So when people talk about originalism, they talk about one of two things. Sometimes as I was just saying they talk about the original intentions, the original mental states of the people who wrote the documents. Not what they mean now but what they meant at the time that they were written. So people who argue for strict construction might be arguing for one of a number of things. As a result, strict construction is a term you rarely see in the academic literature. By definition an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. Well, money has always equaled speech. The Supreme Court decided in a case called Buckley v. Vallejo in the s that campaign expenditures were speech but long before Buckley v. Vallejo the great journalist A. Liebling said at the beginning of the 20th century, freedom of the press belongs to the man who owns one. That the ability to speak more and better if you have more resources is built into the 1st Amendment. The marketplace of an ideaâ€”ideas is after all a market. So Justice Kennedy is in part echoing a significant part of the 1st Amendment tradition but the real issue in Citizens United and other cases are are elections differentâ€”isâ€”should thereâ€”what is the range of special rules about the electoral process to prevent elections from being bought as opposed to broadly speaking is it useful to have more resources in the marketplace of ideas. The real issue in Citizens United is are elections different. As a result of this ruling, would further attempts at campaign finance reform potentially now violate the 1st Amendment right of free speech? Presidents from both sides of the political aisle or spectrum, Abraham Lincoln, Franklin Roosevelt, Ronald Reagan and others have argued that they have their own authority to make constitutional determinations, Congress makes the same claim. It might be useful to point out that the United States has roughly the shortest constitution in the world. Does thisâ€”does this give women enough protection under law or should we revisit the idea of ratifying the ERA Amendment which has been bottled up in committee for a long time? Nobody seriously claims that the 19th Amendment is a broad-based mandate of gender equality. There have been a large number of Supreme Court decisions starting in the early s recognizing sex

discrimination as a component of the equal protection of the laws. The degree of scrutiny to use the technical term is not quite the same as race but laws that discriminate on the basis of gender, perhaps most prominently around here the Virginia Military Institute decision of a few years ago, are if not suspect in the constitutional sense of that term at least suspicious. So many people have argued that even that is not enough but most people I think would say that the roots to moreâ€”even more effective constitutional protection of gender discrimination are likely to come from the Supreme Court rather than constitutional amendment. The reason is simple. It requires two thirds in Congress, three quarters of the states. That means that the 13 smallestâ€”that means that their majorities, and in some states not even that, their majorities in the 13 smallest states in the country can block a constitutional amendment. The changes are more likely to come as the Court increasingly recognizes sex discrimination. We have to take a break. This is Politics Matters. We will be back to you in a moment. Welcome back to Politics Matters. I thought it was interesting, the one most recently, the 27th, which took so long, of course has to do with congressional pay so that one went through. Actually the 27th Amendment was originally one of the first 12 amendments in the Bill of Rights. It took years more or lessâ€¦ Jan Paynter: So as I say, so difficult thatâ€”trying to amend the Constitution turns out to be a bad political strategy for anybody. I might mention as an aside here, in this original enumeration of 12, the 1st Amendment was not the first. I think it was third or fourth or something like that. I have to ask you, what amendments not discussed today are in your judgment most overlooked in terms of their impact on the lives of Americans and the way we live now? The 14th Amendment is not just about a post Civil War amendment that dealt with issues of race. It has become the vehicle for privacy, the vehicle for protection of forms of equality such as gender discrimination and many others other than just race discrimination. Most, but not all, of the interesting constitutional action these days comes in terms of interpretations of the 14th Amendment. Professor, what is the current state of legal debate in this age of emails, internet chat rooms, Facebook and Twitter, concerning the right of people to be secure in their persons, houses, papers and effects against unreasonable search and seizure as cited in the 4th Amendment? Okay, I think there areâ€”there are two very different issues here. A lot of times when people worry about privacy, they worry about it in the context of knowledge of or publication of information about them by broadly speaking, nongovernmental entities, whether it be credit bureaus or banks or newspapers or whatever. The privacy that is now understood to be part of the Constitution is a protection against the government and only against the government. In terms of privacy, most of the Supreme Court decisions about privacy have dealt with abortion, contraception and the like on the one hand or the protection of criminal defendants through the 4th Amendment that you quoted against unreasonable searches and seizures and the like. Most of the forms of privacy that people worry about do not involve either of those and whether the Constitution protects against for example government databases is something that the Supreme Court has never touched. It hinted that there might be some protection. How do you feel the Kagan nomination will go? I shouldâ€”people should not listen to anything that I have to say. She is a former colleague of mine at Harvard and a good friend so I am not even close to impartial on the issue, as with the Sotomayor proceedings of a year ago. The words are too vague, the precedents are too conflicting, the views of justicesâ€”the first order of political ideological attitudes of the justices matter. We saw litigants, the New Haven Firefighters, baseball pitchers who were involved in the baseball strike. When reading our Constitution, what strikes most people is the astonishing freshness of the document, the way in which our Founders foresaw, planned for and anticipated in the most prescient ways, the eventualities and crises which would arise for us as a nation. They produced a durable and elastic document programmed for growth and change. They strove for balance, fairness and humanity in our laws. They focused as well on the need to work together while anticipating the fractious nature inherent in a diverse democracy bristling with various points of view. The framers indeed summoned the better angels of our nature, understanding that we would fall, yet cheered us on in the getting up again. Inter cooperation shared goals and that very American drive to move ever forward, they bequeathed to us the aspiration for that perfect union in spite of the manifestation of our many differences. Thank you again very much, Professor Schauer for being with us today. Happy to do it. Thank you for listening to our conversation. We would like to hear from you with all questions and concerns. You can email us at info politicsmatters.

Chapter 2 : The Yale Law Journal - Frederick Schauer

This review essay for the Yale Law Journal of Robert Post's Citizens Divided: Campaign Finance Reform and the Constitution contrasts Post's hopeful and optimistic vision of discursive democracy, and its accompanying hopeful and optimistic visions of the Constitution and the First Amendment, with.

Freedom of Speech in the 21st Century. Does the First Amendment rest on a mistake? Indeed, not only the First Amendment but also any coherent principle of freedom of speech presupposes a meaningful distinction between the activities encompassed by the principle and those that are not. And because any non-vacuous account of a free speech principle is premised on the idea that being an act of speech in the relevant sense grants to that act a degree of protection from restriction not granted to non-speech acts causing equivalent consequences, 3See Frederick Schauer, Free Speech: Although the most obvious application of the distinction set out in the previous paragraph is with respect to a differential immunity from restriction for speech and non-speech behavior causing equivalent harm or other negative consequences, the distinction between speech and non-speech behavior, as articulated in the text, could also arise in the context of positive rather than negative consequences. For example, if there were an affirmative obligation on the part of government to subsidize speech-relevant activities, a free speech principle would generate a greater obligation to subsidize or otherwise support speech than to subsidize or support non-speech activities bringing equivalent benefits. What is key is the differential, and not whether the differential attaches to the restrictive as opposed to the supportive activities of the agent against whom the free speech claim is offered. But unless there are free-speech-relevant attributes that are possessed by speech but not by action, the distinction between speech and action, at least as a matter of free speech theory, cannot do the work that appears to be required of it. Although some kind of free-speech-relevant distinction between speech and action is thus a necessary condition for a meaningful free speech principle, it is by no means clear that such a distinction can be maintained. There is, to be sure, a difference between an actual fire and shouting fire in a crowded theater, 4Cf. United States, U. In some contexts, distinctions between words and things and between speech and action plainly exist. But the existence of such a distinction in some contexts does not entail the conclusion that the everyday distinction between speech and action will mark anything of free speech significance, nor that the distinction can carry the weight that any meaningful principle of free speech must demand of it. Controversies over the existence or not of a distinction between speech and action have occasionally appeared as weapons in contemporary debates about hate speech and pornography, with proponents of regulation questioning the distinction 6See, e. Philosophical Essays on Pornography and Objectification 27â€”37, â€”16 drawing on speech-act theory to consider speech as action rather than distinct from it ; Catharine A. MacKinnon, Only Words 29â€”41 characterizing the speechâ€”action distinction as legalistic ; Susan J. Theory 39, 56â€”61 challenging the distinction between the verbal and the physical ; Mary Ellen Gale, Reimagining the First Amendment: Racist Speech and Equal Liberty, 65 St. Stanley Fish also questions the distinction, but, given his skeptical stance about the ontology of distinctions in general, it is difficult to know what to make of his claims about the distinction between speech and action. Yet these debates have taken place in such a narrow and too often tendentious context that they have avoided confronting the most important foundational issues about freedom of speech. In fact, it is not uncommon for the defenders of a speechâ€”action distinction to take the existence of a free speech principle as a given and thus as the premise for the necessity of accepting the distinction. As a matter of positive law or political rhetoric such a strategy may well be defensible, but for engaging in a deeper exploration of the foundations of the very idea of free speech it is plainly unacceptable. In some contexts examining with an open mind whether a free speech principle is itself sound is an important task, 9Such contexts would include not only philosophical inquiry for its own sake, but also institutional and constitutional design in domains in which free speech principles are not yet accepted. One example would be countries with rudimentary free speech protection, and as to which foundational questions might thus be asked about how much free speech, if any, should be permitted. Another would be non-governmental settings corporations and private colleges and universities, for example in which free speech is considered in the context of institutional design decisions

about who should be allowed or encouraged to say what, even apart from questions of positive law. And of course the groundings of the idea of free speech are plainly relevant to questions arising in the interpretation of the First Amendment itself, as is apparent both from the fact that much of existing free speech theory has been developed in the context of the First Amendment and from the frequency with which the Supreme Court makes reference to foundational principles in deciding First Amendment cases. Democracy, Community, Management 15â€”16 ; Steven H. Rather, when we inquire into whether there can be a sound free speech principle at all, we must subject to critical analysis just what it means to draw a distinction between speech and action, whether the distinction can actually be drawn, and whether the distinction, even if it can be drawn, can provide the basis for a principle of freedom of speech. Thus, unburdened by any assumptions from existing positive law or political historyâ€”including but not limited to the law and history of the First Amendmentâ€”I examine here whether the kind of distinction between speech and action that is necessary to any principle of free speech can in fact be sustained. Much of the focus will be on issues of autonomy and freedom of thought, and even more particularly on arguments grounded in respect for the decision-making capacities of autonomous agents whose volitional decisions are often thought to be a necessary mediating step between speech and harmful action. But my goal is broader than that, for in questioning the viability of a speechâ€”action distinction in this context I hope to raise questions about the speechâ€”action distinction in other free speech contexts as well, and thus ultimately about the deep soundness of any free speech principle at all. On the Structure of a Free Speech Principle Although my inquiry is pre-constitutional and pre-doctrinal, the structure of American constitutional doctrine illuminates the basic idea and the principal problem. And according to that doctrine, government regulation of most of the vast universe of human behavior need only satisfy the minimal scrutiny of the rational basis test. Lee Optical of Okla. New York, U. In practice, the American baseline rule is a test of virtually no stringency, 11See also N. Sunstein, Naked Preferences and the Constitution, 84 Colum. See generally Scott H. But under the baseline rule that actually exists, the government may, as long as it meets extremely minimal standards of rationality, regulate most aspects of personal 13See Washington v. At one time the rational basis standard applied to sexual conduct, but no longer. Hardwick, but not specifying the standard of review ; Bowers v. And thus, continuing to adhere to the preliminary terminology noted above, we can say that existing doctrine establishes that the government may regulate action subject only to the negligible scrutiny of the rational basis standard. When the state seeks to regulate speech, however, it must show something more. See New York v. Much the same can be said about the existing crystallization of the clear and present danger standard in Brandenburg v. Free Speech and the Precautionary Principle, 36 Pepp. More general examinations of the strength of the Brandenburg standard include, notably, Hans A. Dissonance in the Brandenburg Concerto, 22 Stan. Indeed, even when the heightened burden of justification embodies a degree of scrutiny less stringent than the compelling interest test, as for example with the so-called intermediate scrutiny applied to commercial speech, 17Cent. The Central Hudson test remains the applicable standard today. Tribe, American Constitutional Law 2d ed. The roles of government purpose and motive in First Amendment adjudication are analyzed comprehensively in Elena Kagan, Private Speech, Public Purpose: Without the gap between free speech scrutiny and the scrutiny of some larger or other category, free speech would be merely an instance of some larger category, and it would be a conceptual error to think that there was a right to free speech in any meaningful sense. Implicit in the foregoing analysis and conclusion is a conception of rights as entities or principles that raise the standard of justification for restriction of the activities covered by the right above what it would otherwise be under some baseline standard of justification. For example, in the United States the justification for regulating the activity of operating a pushcart need only satisfy the rational basis baseline standard. According to the conception of rights offered here, therefore, we can say that there is no constitutional right to operate a pushcart. But if the justification for regulating pushcarts were required to be different from and higher than the standard for regulating everything else, we could then conclude that there was a right to operate a pushcart. And so too with speech. Because the standard for regulating speech, unlike the standard for regulating pushcarts, is indeed higher than the baseline now associated with rational basis scrutiny, there exists a constitutional right to speak in a way that there is not, as a matter of existing constitutional doctrine, a right to

operate a pushcart. The argument for such a right to liberty, developed as an objection to Dworkin, is set out in Douglas N. The structure of American constitutional doctrine can thus illuminate this conception of just what it is for a right to exist, but this conception of rights is by no means limited to the United States, or even to the rights created by positive law at all. Consequently, even outside the domain of American constitutional law, the structure of the putative right to freedom of speech is the same. As a pre-constitutional or extra-constitutional question of moral or political philosophy, for example, the idea of a right to free speechâ€"or a free speech principleâ€"similarly rests on the existence of a difference between what happens when the right or principle applies and when it does not. Indeed, even if, contra Ronald Dworkin, 25See Dworkin, supra note Barnett, Restoring the Lost Constitution: The Presumption of Liberty 4 rev. Barnett, The Structure of Liberty: Justice and the Rule of Law 14â€"15 2d ed. Rather, when we refer to a right to free speech we are designating something structurally different from, and stronger than, the myriad forms of behavior that would be subsumed by a right to liberty simpliciter. And because that differential strength manifests itself primarily in the way in which the right to free speech encompasses behavior whose arguable negative consequences would otherwise justify intervention or restriction even under a general right to liberty, 27See supra note 3 and accompanying text. A False Start with a Revealing Premise Among the first attempts to grapple with the distinction between speech and action was one that was also, and notoriously so, among the least successful. Emerson, The System of Freedom of Expression 6â€"20 Thomas Emerson attempted to work out a system of absolute but bounded speechâ€"a principle of free speech structured such that it covered only a small portion of the universe of communicative or expressive activity but which granted absolute protection to that which it covered. On the distinction between what the First Amendment covers and the degree of protection it offers to what it does cover, see Frederick Schauer, The Boundaries of the First Amendment: Although the Supreme Court has often conflated questions of coverage and questions about the degree of protection, it has more recently appeared to recognize the distinction and its importance. See United States v. On Drawing Lines, 82 Harv. For slightly more recent expressions of the same concern, see Barnes v. Emerson, supra note Indeed, the elusive nature of the distinction between speech and conduct facilitates labeling or perceiving an act as one or the other depending on the outcome preferences of the labeler. Second, and more importantly, Emerson appeared to recognize that the positive values of searching for truth, facilitating democratic governance, and fostering self-expression could also be served by non-expressive as Emerson understood it conduct. Moreover, Emerson might even be charitably interpreted to have acknowledged that even the regulation of conduct might be plagued by the same pathologies that affected the regulation of expression. As a result, he understood that it was both difficult yet necessary to offer a distinction between expression and conduct, a distinction implicit in the idea of freedom of speech and thus in the First Amendment itself. It generally has less immediate consequences, is less irremediable in its impact. Some Remarks, 5 Prolegomena , â€" ; C. Still, other-regardingness is a necessary condition for harm to someone other than the actor. Rather, Emerson argued that on average, or in the aggregate, the category of speech, qua category, was less other-regarding than the category of action, 52To the same effect, see Michael D. Redish, Freedom of Expression: A Critical Analysis 19 n. Redish, Fear, Loathing, and the First Amendment: And, perhaps most prominently, Ronald Dworkin, especially in Dworkin, supra note 24, at â€"03 using freedom of speech as an exemplar of a broadly conceived personal liberty based on a right to equal concern and respect. By assuming that the category of speech is less harmful than the category of action, 53See supra note 49 and accompanying text. For an iconic critique of this move, see Robert H. First, the category of speech is better understood as the category of communication. Thus, what we may at times understand as a distinction between speech and action is better conceived as a distinction between communicative and non-communicative conduct. And, second, the category of communication, according to Emerson, is, as a category, less likely to produce negative consequences than the category of non-communicative conduct. It is these two ideasâ€"that communication as a category is different from non-communicative conduct in a free-speech-relevant way, and that communication as a category is less harmful than non-communicative conductâ€"to which we must now turn. Is Thinking Different from Doing? For Emerson, there is an important distinction between thinking or contemplating or reflecting on something,

on the one hand, and actually taking an action, on the other.

Chapter 3 : An Introduction to Legal Reasoning, Levi, Schauer

Schauer, Frederick (University of Minnesota Law School,) View/ Download file. calendrierdelascience.com (Kb application/pdf) The Constitution of Fear.

Kennedy School of Government, Harvard University, where he has served as academic dean and acting dean, and before that was a professor of law at the University of Michigan. He is also co-editor of The Philosophy of Law: A Reader , and author of numerous articles on constitutional law and theory, freedom of speech and press, legal reasoning and the philosophy of law. His work on rules, legal reasoning, constitutional theory and freedom of speech has been the subject of a book Rules and Reasoning: We began politics matters focusing on the idea that people are their principles and our politics should reflect the concept and yet as we all know, it frequently does not. Today we begin a special program on the amendments to the Constitution with the idea that it might prove useful at this moment in our history to consider why they were written and of course, what they are, how interpretations of individual amendments have evolved over time, and which ones are particularly relevant. Certain amendments, such as the First Amendment, guaranteeing free speech, freedom of press, religion, etc. Are there amendments to the Constitution which could be better understood and discussed in order for all of us to comprehend our laws, rights, and privileges more thoroughly? Kennedy School of Government, served as academic dean and acting dean and also taught courses in evidence and the First Amendment at Harvard Law school. Thank you, delighted to be here. Before we begin, tell us, if you would, what motivations or events brought you to the study of law, in essence, what law and politics mean to you. The first one is a little easier than the second, I think as with most people, I arrived at undergraduate education with only dimly formed idea of what I wanted to do with my life. Once I realized that my initial preference for medicine was not for me intellectually or in any other way, my interests in things verbal, my interests in the forms of argument and all of that led me to think about law. So it is something I have been focused on since I was about 20 years old, I guess. To begin our discussion of the amendments to the Constitution, give us, if you would, some of the history behind their inception. The first 10 amendments, the ones that we called the Bill of Rights, were part of a, in a way, compromise enacted or adopted or agreed upon at the time of the original ratification of the Constitution in Some people wanted rights to be included in the Constitution, some did not want them to be included in the Constitution, but the Bill of Rights, , four years after the original Constitution, was part of this compromise; some people agreed to go along on the assumption that shortly thereafter there would be a Bill of Rights. The important thing to remember about the Bill of Rights is that it was originally intended solely as a restriction on the federal government and not as a restriction on the states. Freedom of speech, the rights of criminal defendants, freedom of religion, and all of this were originally thought of solely in terms of federal power; the states can do what they wanted. The states could establish religions, restrict speech, or do anything else, that do not change until the 14th amendment in and subsequent judicial interpretations which made clear later that the Bill of Rights by use of the 14th amendment also protected rights against state encroachment. But originally it was just a limitation on federal power, it is only largely in the 20th century and now there after that they have been understood as restrictions on the states as well. That is what was going to be my next question, how has that evolved and changed, how do we think of them now? Now we think of it as restrictions both on the states and on the federal governments. As I said, this is largely a function of judicial interpretations of the 14th amendment which protects life, liberty, or property without due process of law. The courts have said that the protectionâ€" virtually all of the protections of the Bill of Rights are incorporated, the technical term, incorporated in the due process clause of the 14th amendment. So since, more or less, the s or 30s, we have understood and the courts have understood that pretty much the same protections apply against the states as to apply against the federal government. The principal of the high school had some objections to it, as everyone knows, sited some typos, some various other reasons, not entirely disclosed, the paper ran minus the article and the young woman was alleging that her right of free speech and freedom of the press was violated. So, having said all of that, what do you think, pro and con, about this issue. Does the principal in the school have a point? Does the editorial writer have a point? It might

be useful to point out that the United States has roughly the shortest constitution in the world. Constitution is about 12 pages long, the Constitution of South Africa about , Brazil about , so we have a constitution with very little detail and it is up to the courts to fill in the blanks. On the question of freedom of press things are no different; the blanks have been filled in in terms of student speech and student press only four times. The Supreme Court has decided only four cases dealing with student freedom speech rights, one was a case named Tinker vs. The Desmoines School District in , protecting the rights of students to wear protest arm bands in class. One very recently upholding the right of the school to discipline students who engaged in, again, drug related protests, bong hits for Jesus was the actual sign that the students displayed, and in between those there was a case dealing with student newspapers and dealing with the student press in which the Supreme Court said on the facts of that case that the student press or student newspapers, in that case, were largely part of the curriculum and the ability of school administrators to restrict the content of student newspapers was not dramatically different from the ability of school administrators to give students good grades or bad grades, depending on how they performed in written exercises. I was just thinking, is this an issue, do you feel, that is going to continue to come up because it would seem that way. It comes up a lot in the lower courts and the Supreme Court is very reluctant to decide cases dealing with it. It is one of the most commonly litigated issues in lower courts that is student speech, student dress, off-color t-shirts, Nazi T-shirts, Klan t-shirts, sexually suggestive apparels, student protests and so on. The Supreme Court, as I said, decides roughly one case every ten years, so it remains somewhat of a grey area. The lower courts are all over the map. There are also Supreme Court cases saying that the university based student press has most, if not all, of the protections of the independent and private press. That is interesting that younger people are actually penalized. I wouldâ€”penalized is not a word that I would use in this context. There is a distinction in terms of all dimensions of academic freedom between the primary and secondary school on the one hand and colleges and universities on the other. There are things that I am constitutionally protected in saying in class as a professional at a state university then I would not be protected if I said them in class at the primary and secondary level. This distinction between primary and secondary and university applies to teacher speech, student speech on the basis of the existing doctrine of student newspapers, exactly how this newspaper would be treated, I am not sure. But there is a difference between universities on the one hand than junior high schools, high schools, and elementary schools on the other. That is really fascinating, I am afraid personally that I would come out on the side of the kids on this because I think they are our future leaders and citizens. But also in the news recently, something in the USA Today about a young man, year old 7th grader, who wore rosary beads outside his shirt in honor of a deceased family member. It was interpreted potentially as a gang symbol by the school. His mother alleged that his free speech and free expression rights were violated. What do you think about that? Again, the cases on student apparel, some of them dealing with gang apparel, some Nazi apparel, some sex related apparel, some Klan related apparel, there has never been a Supreme Court case on the issue other than the protest arm band of The lower court cases go both ways depending on particular facts but more often than not, the ability of school administrators to restrict is upheld at the primary and secondary level even though not at the university level. Obviously when it is rosary beads there are different issues of religion and freedom of religion that might come in but just the ability of schools to restrict student apparel that students claim to be expressive is a very frequently contested issue, if it is outside of the school there is no question whatsoever that students and teenagers, like everyone else, can wear whatever they want. Once they are inside the school, the authority of the school administrators wins more often than not. Another interesting case that has been in the news lately, issues of protectionâ€”allowing people to investigate terroristic activities, there was a humanitarian group, that I am sure you read about, who wanted to explore and give some advice to a group as to peaceful means of resolving disputes because they were dealing with terrorist, the ruling came down on the side that they were actually kind of aiding and abetting. What do you feel about that? I think, again, the Supreme Court case on this is very recent, highly controversial; I think it is important to understand broadly speaking, two-sides of the issue. One, it is in the United States, even if not in virtually every other country in the world, legal to advocate illegal action, it is okay to advocate illegal action, it is okay to advocate overthrow of the government, it is okay to advocate terrorism, the U. On the other side

of that, outside of broadly speaking, the public political arena, there is a whole realm of speech that relates to criminal conspiracy, speech that relates to aiding and abetting a crime that does not come anywhere near the first amendment. So when we are outside of the public-political arena, person-to-person speech that is part of a criminal conspiracy or part of a criminal act has virtually nothing to do with the first amendment. Indeed, the conspirators of the first World Trade Center bombing, going back what 15 years ago maybe even more, some of the people prosecuted for conspiracy for the first World Trade Center bombing was basically prosecuting for organizing the conspiracy nobody even took seriously a First Amendment objection even know what the conspirators had done was encourage certain violent acts but they encouraged it in private settings, they provided assistance in private settings. All of that is to say that on the issue that the Supreme Court just decided, on the one side we have the very strong tradition of protecting advocacy of virtually everything, no matter how violent, no matter how encouraging of terrorism or illegal action it maybe. And on the other side, we have an equally long tradition that not every use of words comes close to the First Amendment and a whole range of non-public criminal conspiratorial activities have never been thought to raise First Amendment questions at all. From a legal point of view does one of the reasons, what you just said, obtain because if you are incite someone, it presumes an action. Is there some connection there legally? I can still be prosecuted for that act of inciting even though there was no subsequent act. So, under current law, incitement to illegal action or incitement to violence can be prosecuted if, and only if, there are explicit words of incitement, only if the incitement is to an act that is to occur immediatelyâ€”imminently is the term of art, and only if it is likely to happen. That is a very stringent standard which is why almost no body these days is prosecuted for this but the act does not have to actually occur. Does the Constitution specifically mention the right to privacy or is it implied in the Bill of Rights by the 3rd, 4th, or 5th Amendment? It does not specifically mention it at all, whether there is one has been controversial and if there is one, where it comes from has been controversial. When the Supreme Court in first said that there was a right to privacy in the context of a right to purchase contraceptives, Justice Douglas found it in some amorphous combination of the 1st, 3rd, 4th, 5th, and 9th Amendments. When in the Supreme Court decided Roe versus Wade, it found in the due process clause, it is not explicitly there. I want to come back to this, we have to take a break, we are talking with Professor Schauer, and we will be back to you. This is Politics Matters, we will be back to you in a moment. Welcome back to Politics Matters, I am Jan Paynter, we are talking today with Professor Frederick Schauer about Amendment Issues and before the break we were discussing the issue of right to privacy. Professor, what is the current state of legal debate in this age of email, internet chat rooms, Facebook, and twitter concerning the right of people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, as cited in the 4th Amendment? Okay, I think there areâ€”there are two very different issues here. A lot of times when people worry about privacy, they worry about it in the context of knowledge of or publication of information about them by broadly speaking non-governmental entities, whether it be credit bureaus or banks or newspapers or whatever. The privacy that is now understood as being a part of the Constitution is a protection against the government and only against the government. But the Constitution only protects us against government and not against non-governmental entities. In terms of privacy, most of the Supreme Court decisions about privacy had dealt with abortion, contraception, and the like on the one hand or the protection of criminal defendants through the 4th Amendment that you quoted against unreasonable searches and seizures and the like. Most of the forms of privacy that people worry about do not involve either of those and whether the Constitution protects against, for example, government databases, is something the Supreme Court has never touched; it hinted that there might be some protection, the hint was 20 years ago but direct Supreme Court decisions about government databases and all of this, lots of people are worried about, again is pretty much a blank slate. This is speculation, I realize for you, I wanted to probe a little bit more, why do you think the Supreme Court is so reluctant to weigh-in? That is a big question but oneâ€”let me make you a bigger question even bigger. It is a mistake to think that the Supreme Court deals with the most important issues of our times. Most of what the Supreme Court does important; most of what is important is not done by the Supreme Court. The Supreme Court has had virtually nothing to say about any of those and will not. Thank you again, Professor Schauer, for being with us today. Thank you for listening to our

conversation, we would like to hear from you with all questions and concerns. You can email us at info politicsmatters.

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