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SITUATING SCHAUER

L.A. Powe, Jr.*

Three years ago, The University of Texas Law School hosted a two day symposium on Philip Bobbitt’s *Constitutional Interpretation*¹ and Fred Schauer’s *Playing by the Rules*.² At one point my colleague Bill Powers commented to me how different Philip and Fred were, and yet what extraordinarily able legal philosophers they were. I didn’t doubt Bill, but what a move up the academic food chain. The last time Fred had been at the law school for an extended time was a decade earlier when he was simply one of the best First Amendment scholars of his generation. At that time, Fred presented a paper identifying his First Amendment with Freddie Patek.

Patek wouldn’t have been my choice. When I think of the First Amendment, I think of George Anastaplo, Pat Tornillo, or Fred Cook. Anastaplo, a would-be lawyer, struck out with the Illinois Bar.³ Tornillo, a would-be state representative, struck out with the voters,⁴ but blamed the *Miami Herald*.⁵ Cook, a liberal freelance writer, struck out with the Reverends Billy James Hargis and John M. Norris, but, playing for the Democratic National Committee,⁶ hit major league home runs at the Federal Communications Commission and the United States Supreme Court.⁷ When Patek struck out, at least it was in the Bigs;⁸ he was a 5’5” shortstop (mostly) for the Kansas City

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* Anne Green Regents Chair, The University of Texas. I would like to thank my colleagues David Anderson, Doug Laycock, Sandy Levinson, and Bill Powers for their helpful comments on earlier drafts of this essay.

3 When I took Constitutional Law in the mid-1960s, no case outraged me so much as *In re Anastaplo*, 366 U.S. 82 (1961). Years later as a law professor, I felt privileged to be an outside reference on Anastaplo’s being tenured as a political science professor.
7 Cook was the complainant in *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).
8 In Patek’s fourteen-year career he struck out 787 times in 5530 official at bats.
Royals and the symbol of what Schauer believes the First Amendment should be, lean and mean.$^9$ Still, if Patek were a trump card, he’d be a six.

I

George Anastaplo was a very lucky martyr. He wasn’t mutilated or killed and he has been able to celebrate his martyrdom with friends and admirers for decades: ever since the United States Supreme Court placed its imprimatur on the Illinois Bar Association’s requirement that, to be admitted to that elite organization, Anastaplo had to tell them whether he was then or had ever been a member of the Communist Party. Although Anastaplo had passed the bar exam and had references detailing not just good, but superb moral character, the Illinois Bar wanted to know, because Anastaplo had raised a red flag on his application form by acknowledging his belief in the principles of the Declaration of Independence. The Bar’s personal history form asked applications to “State what you consider to be the principles underlying the Constitution of the United States.” Anastaplo gave a good paragraph that ended with “[a]nd, of course, whenever the particular government in power becomes destructive of these ends [Life, Liberty and the Pursuit of Happiness], it is the right of the people to alter or abolish it and thereupon to establish a new government.”$^{10}$ Because the Illinois Bar apparently believed that anyone believing the people have a right to alter or abolish a government denying the right to life, liberty or the pursuit of happiness sounded like a communist (now a Freeman, perhaps), they demanded that Anastaplo tell more. But Anastaplo believed that the First Amendment of that Constitution precluded inquiry into his beliefs, so he refused. He was denied admission to the bar and has never subsequently been admitted.$^{11}$

Timing is everything. Anastaplo would not have been martyred if his case had been heard by the Court just one year later. Instead he would have won (and he would now be a lawyer). Had his case been argued in 1962, it likely would have been paired with Florida’s effort to investigate whether the NAACP had been infiltrated by communists.$^{12}$ In that case, the anti-communist NAACP was not entirely convinced that Florida was truly interested in protecting the civil rights organization from communist influence. Florida’s request for the

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$^9$ Schauer has never reduced his Patek metaphor to print, but informs me he still uses it orally and continues to believe it is apt.


$^{11}$ Andrew Patner, The Quest of George Anastaplo, CHICAGO 185 (Dec. 1982).

NAACP's membership list looked, to the NAACP at least, suspiciously like the similar efforts of Alabama. A southern state would hope to obtain membership lists and then sit back and see if a little private action might happen to any of the listed people. The Supreme Court, however, had blocked Alabama's efforts to get the membership lists. Florida's case was different, however, because, adopting a newer strategy, it tied racism with red baiting and trusted that neutral principles of constitutional law would allow it to succeed where Alabama had failed. Florida was initially correct as the same five justices who voted against Anastaplo also voted against the NAACP, applying the same neutral principle—if a government sees red, the First Amendment runs up the white flag—to decide the case. But then Justice Frankfurter had his stroke and the case could not come down that year. When Arthur Goldberg replaced Frankfurter, the case was rear- gued and the NAACP won over an anguished dissent that could not figure out why neutral principles were being so wantonly sacrificed.

The NAACP victory—or Frankfurter's stroke, take your choice—signaled the beginnings of the true Warren Court, a grouping of five to six or seven votes for civil liberties or civil rights claimants that would last for a decade. Had Anastaplo's case been decided after Franfurter's stroke, there is no doubt that he would have won because all the domestic red cases came out that way. Indeed by 1967 the Court ruled that it was unconstitutional to ban a member of the communist party from employment at a defense facility!

Similar although necessarily less drastic moves were apparent across the First Amendment spectrum. Libel, wholly unprotected, not only became protected, it was deemed to implicate the central meaning of the First Amendment. Obscenity law moved so fast that

15 Justices Frankfurter, Clark, Harlan, Whittaker, and Stewart.
during Frankfurter's last three years the Court had to decide whether the theme of the movie version of *Lady Chatterley's Lover* was obscene,\(^{23}\) while at the end of the decade *I Am Curious (Yellow)* became the first mass audience X-style movie, and it would have been held constitutionally protected if Justice Douglas were not forced to recuse himself during Gerald Ford's effort to impeach him.\(^{24}\) While *Miller*\(^ {25}\) cut back on the seeming *Redrup-**Stanley*\(^ {27}\) protection of obscenity (whatever it was), the law and the country had changed. Something equally apparent was involved in the Court's new synthesis in *Brandenburg*\(^ {28}\) that virtually moved all subversive advocacy into protected speech. *Cohen v. California*\(^ {29}\) completed the sweep. Words that everyone "knew" could not be used in public, could; indeed they could be used in a courthouse—or at a school board meeting.\(^ {30}\) Then, in a Bicentennial celebration, that Court found commercial speech constitutionally protected\(^ {31}\) and the key provisions of the sweeping post-Watergate campaign finance regulations unconstitutional.\(^ {32}\) Holmes to the contrary notwithstanding, freedom of speech was an abstraction that was deciding hard cases.

II

Schauer's First Amendment scholarly career can best be understood as a thoughtful reaction to what he perceived as the Warren and Burger Court excesses and the cheerleading of the period's two leading First Amendment scholars, Thomas Emerson and Harry Kalven. Schauer was the first of his generation to conclude that the Court went too far. He has articulated the view that First Amendment jurisprudence ought not be abstract while at the same time recognizing that abstraction has been "central . . . to the operation of the First Amendment."\(^ {33}\) Thus, his First Amendment scholarly corpus looks to a more restrained First Amendment than the Court has created. To

\(^{29}\) 403 U.S. 15 (1971).
\(^{30}\) Rosenfeld v. New Jersey, 408 U.S. 901 (1972).
\(^{32}\) Buckley v. Valeo, 422 U.S. 1 (1976).
be sure, the First Amendment is a trump, but equally surely it is not the ace of trumps. Hence Freddie Patek.

For those coming into the field after the Warren Court, as well as Kalven’s and Emerson’s explications, there were two major avenues their scholarship could take: a doctrinal area (commercial speech, libel, mass communications, etc) or theory. Schauer began with the former, but quickly moved to theory, and subsequently his First Amendment focus gave way, in the late 1980s, to the even broader issue of legal theory generally.

Schauer’s initial writing was on the newly created law of obscenity. He first wrote a short treatise and then followed with a thought provoking article in the Georgetown Law Journal that completely split him from the prevailing academic orthodoxy. He began with heresy—the Burger Court got it right: “The Supreme Court can be right and prevailing academic criticism can be wrong about the same substantive issue.” He rejected the conclusion that the Court had not gone far enough in protecting sexually explicit speech; instead he argued that obscenity (and hard core pornography) were not speech at all and therefore deserved no constitutional protection.

Schauer’s views on obscenity can best be understood within the perspective of a contemporaneous article he wrote on the chilling effect. This article, written twenty years after Justice Brennan’s Speiser v. Randall was a true rarity (in print at least) for its understanding that Speiser had been a major, if ignored, First Amendment contribution. The importance of Speiser was Brennan’s recognition that First Amendment rights could be lost to good faith but erroneous fact finding. To use an easy example, it is unfortunate if a jury finds a motorist was doing thirty-five in a thirty when the motorist wasn’t driving that fast. Unfortunate, but not a constitutional wrong; there is no constitutional right to drive at any speed. But if a jury finds that advocacy of speeding was really an incitement to speed or that Carnal Knowledge is hard core pornography, it is more than unfortunate because in these cases the fact finder has erroneously turned constitutionally protected

34 Frederick Schauer, Free Speech: A Philosophical Inquiry 9 (1982) [hereinafter Free Speech].
36 Frederick Schauer, Speech and “Speech”—Obscenity and “Obscenity”, 67 GEO. L.J. 899 (1979) [hereinafter Schauer, Obscenity].
37 Id. at 899.
speech into unprotected speech. The speaker is therefore punished for doing what the Constitution gives her a complete right to do.

As Schauer resurrected Speiser from its undeserved obscurity, he demonstrated that a key function of the chilling effect doctrine is to preclude erroneous fact finding; this is done by overprotecting speech (and, especially after Bose,\(^4^0\) vigorous appellate fact review). Even though some categories of speech are unprotected, the Court protects a portion of that unprotected speech to guarantee that truly protected speech is never found unprotected. Visually this can be illustrated (as Schauer did) by a line divided at the midpoint between constitutionally protected and unprotected speech. Application of the chilling effect requires a redrawing into (say) thirds where only the final third can be punished. The sixth (sorry for the math) that is on the unprotected side of the middle but nevertheless judicially protected from sanction is that "breathing space" Brennan concluded that speech needed to survive.\(^4^1\) It also represents the cost to legitimate state interests of the overprotection of speech.\(^4^2\)

The Court's obscenity opinions were so terrible that it is difficult\(^4^3\) Was the Court marching hand in hand with society's sexual revolution? Or was the Court trying to ensure that society's censors, always years behind the times, were prevented from blocking access to (arguably) worthwhile materials? At least prior to Miller\(^4^4\) (and maybe after), it seems impossible to tell. Schauer, however, was sure that only the latter was proper, that Jenkins v. Georgia\(^4^5\) guaranteed its effectuation, and that this—despite the Court's opinions\(^4^6\)—was what the Court was doing. From Schauer's (as well as the Court's) perspective, nothing of constitutional significance was included within the obscenity definition. Schauer understood, seemingly better than anyone else, that there had been a glacial shift away from the days when one worried whether Henry Miller's Tropic of Cancer might fall prey to the censor.\(^4^7\)

Because of his chilling effect analysis, Schauer had no concern over the inherent vagueness of obscenity terminology. The Court pro-

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\(^4^2\) Schauer, Perils of Particularism, supra note 33, at 407.
\(^4^3\) Whether this comes from confusion or Brennan's penchant for gobbledygook compromises remains unclear. Given Brennan's refusal to use Stanley v. Georgia, 394 U.S. 557 (1969), I think it is the former.
\(^4^6\) Schauer, Obscenity, supra note 36, at 900.
scribed “hard core pornography.” Justice Stewart had gained fame for assuming the term was obvious. Schauer thought so too. His operative definition concluded that even though depictions need not include sexual acts, they could still be hard core pornography and that this was a class of materials readily distinguishable from “mere nudity,” as if these were the only possibilities. In Schauer’s view, consistent with the First Amendment, a lot of existing sexually oriented materials could be proscribed. Thus Schauer rejected Brennan’s newfound vagueness concerns because they had already been dealt with in setting the constitutional line. Any difficulties of interpretation necessarily came on the fringe, and the fringe was already covered via the definition of obscenity.

Prior to the McKinnon-Dworkin discovery of the harms imposed by sexually oriented materials (that they disapprove of), the dominant assumption, as expressed by the 1970 United States Commission on Pornography and Obscenity, was that obscenity caused no harms. Paris Adult Theatre I v. Slaton unintentionally underscored the conclusion when it ascribed an environmental quality-of-life harm to obscenity and then naturally found that that harm justified regulation. Paris Adult simply proved the problem with obscenity as perceived by the academic critics. If such a soft rationale for regulation can trump a speech claim, then, logically, it can do so everywhere and the entire speech-protective edifice could be destroyed. Schauer, by contrast, found harm irrelevant. “The fact that there may be no good reason for regulating obscenity does not ipso facto render it protected speech.”

Obscenity was Schauer’s wedge into the ultimate free speech issues of “why” we protected speech. Because the Constitution singles out speech (and not giraffes), the Court must supply a definition of speech, one that (presumably) will distinguish it from the broad range of (other) human activity. For Schauer, speech in the constitutional sense was about “the communication of a mental stimulus” and ob-

48 Miller v. California, 413 U.S. 15 (1973), says so five times.
51 Id. at 112.
52 Schauer, Obscenity, supra note 36, at 909.
54 413 U.S. 49 (1973).
55 Schauer, Obscenity, supra note 36, at 914.
56 Id. at 911.
57 Id. at 921.
scenity was therefore not speech because it was nothing beyond a sex-aid: the communication of a physical stimulus. *Carnal Knowledge* was not (and could not be) obscene because it engaged the mind; *Deep Throat* was obscene because it engaged only the sex organs.

III

Schauer's obscenity scholarship in the 1970s led him in three directions. First, and most importantly, it led him to seek a philosophical basis for freedom of speech, and it is here that his reputation as a premier scholar was fully established. This, in turn, led him to legal theory generally where he has emerged, again, as head of the field. But, third, it led him to the 1986 Attorney General's Commission on Pornography and the writing of the key parts of its report. This gave him more controversy than scholars normally enjoy.

The Report defined pornography as sexually explicit materials intended primarily for purposes of sexual arousal, but definition was not the key point. The point was rather a new (and novel) classification that the Commission felt better described the available materials. Sexually oriented materials fell into one of four classes: the violent, the degrading, the nondegrading (consensual sex based on equality), and nudity without a significant sexual message. Category three, the nondegrading, was, in the Commission's view, virtually a null set; there just wasn't much of it in existence. This set the tone; there was too much sexually explicit material available and it was just the wrong kind.

With the materials categorized, the Commission turned to harm. There is significant social science evidence that combining violence with *any* sexual material causes harms, especially illegal aggression against women. In the most controversial aspect of the Report, Schauer, while expressing less confidence in the conclusion, extrapolated from the evidence on violent materials to conclude that the same harmful effects came from degrading materials (by far the largest class of materials in the Commission's view) as well. This conclusion has not set well with those who know the social science literature.

Although Schauer has taken grief for the Report, he did not change his earlier views to pander to the right. What he appears to have done is make more explicit what was already implicit in his ear-

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59 There is also a lot of social science evidence that violence *without* sexual materials causes harms. *See Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming* 120–32 (1994).
lier work. In his Georgetown article he stated that “pornography, particularly pictorial pornography, is covered, if at all, only at the fringes of the First Amendment.”60 Under Schauer’s approach that meant that the materials had little or no appeal to the cognitive functions and therefore were valueless (even if accidentally protected). It goes without saying that Schauer has a contested view of the value of pornography (however defined). One does not see any recognition of potentially utopian (even if to treat it as dystopian) aspects of comprehending a new freedom. Nor is there any statement compatible with that of Robin West who noted that women’s “experiences of pornography have been more than just diverse, they have been profoundly contradictory” ranging from “damaged, brutalized, or more generally simply oppressed by it” to “on occasion be[ing] liberated by [it].”61

Given Schauer’s views that pornography was of no value, he could have, and should have, found harm irrelevant in his large category of degrading materials. In his post-mortem on the Report, he stated that he read the Report to limit obscenity prosecutions “to the sexually violent. . . . [I]t is that message, about the relationship between sexual violence and the legitimating images of sexual violence that are all around us, that the Report, in the final analysis, is all about.”62 That has not been the common reading of the Report, but after an initial flurry of (hostile) commentary, the Report dropped from view (and reading). Rather than continue the futile debate, Schauer immediately returned to the broader philosophical issues he had staked out earlier.

IV

Schauer was the first of his generation63 to suggest that the Court was right on obscenity and the first to suggest it had gone too far generally in protecting speech. He was also first and instrumental in creating the awareness that speech was not costless; it imposed harms on its targets. When virtually everyone (indeed, maybe virtually is unnecessary) was cheerleading for the press, Schauer wrote a devastating (and to my knowledge unanswerable and unanswered) critique of the Court’s public figure libel jurisprudence. His point can be summarized instantly: an elected official may be able to save himself from an

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60 Schauer, Obscenity, supra note 36, at 909 n.62 (emphasis added).
63 The cohort to enter law teaching in the warm afterglow of the Warren Court.
attack by the press; but a run-of-the-mill public figure (it could be a
law professor charged with sexual misconduct by the National Law
Journal) cannot; and furthermore, the story about the public figure is
nowhere as likely to be at the core of the First Amendment as one
about a public official.\textsuperscript{64} This doctrinal critique has not been an-
swered. Mention it and you will hear the words “chilling effect.”

By contrast, Schauer’s philosophical work came rather late in the
First Amendment debates. Until the mid-1960s the dominant ques-
tion about freedom of speech was “how much” protection should it
receive. The Warren Court breakthrough answered that question by
“plenty”—as close to “no law” as possible—and possibly, following
Redrup and Stanley, not even excepting obscenity. This turned the rel-
evant question to “how?” By what means should expression be pro-
tected? The switch in questions made explicit what had been implicit
for a long time. Freedom of speech enjoyed a very special position in
our constitutional hierarchy. Indeed, only Robert Bork, arguing that
no one could take the First Amendment literally and that its history
was unhelpful, had raised the question of why all this speech was pro-
tected.\textsuperscript{65} Bork’s explicit point, which served him poorly at his Confi-
rmation hearings, was that it shouldn’t be. By the mid-1970s, others
were looking to sources other than language, history, and experience
to justify the Court’s expansive reading of the First Amendment’s
guarantees.

Frank Michelman had pioneered the idea that the Constitution
(or at least the Fourteenth Amendment) was best interpreted accord-
ing to the precepts of moral philosophy (very specifically John
Rawls’s). By the time Schauer’s obscenity work appeared, First Amend-
ment scholars were also turning to philosophy for interpretive gui-
dance. Schauer’s contribution here was not originality; it was
thoroughness. No one has done it better.

For years the critics of the Court’s obscenity decisions had asked
“why do we regulate this?” and the Court either could not or would not
answer. When it finally offered its environmental-quality rationale in
Paris Adult that answer was, to virtually all but Schauer, unsatisfying
(because, if applied generally, it would swallow protected speech).
When Schauer approached the issue, he inverted the question, mak-
ing it “why do we protect this?”—especially when the “this” (including
the material in the breathing space) was, in his opinion, nothing but a
sex aid.

\textsuperscript{64} Frederick Schauer, Public Figures, 25 WM. & MARY L. REV. 905 (1984).
\textsuperscript{65} Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971).
Following the path already laid out, Schauer had no trouble rejecting Holmes' marketplace of ideas as a possibility. Hard core pornography was a physical stimulus, not an idea. Similarly, obscenity was not a discussion of public affairs such that it could gain protection through the need of the polity to be able to engage in discussions of all aspects of public policy.

Nor did we need to protect obscenity to (over)compensate for government propensity to undervalue the materials, because the chilling effect doctrine had already done that. Protecting obscenity could be justified only by a liberty-autonomy rationale for the First Amendment. Bork's famous *Neutral Principles* article had already undermined that rationale.66 Lots of things—education, travel, drugs—could fall under that liberty-autonomy rationale, and they could not be reasonably distinguished from speech in this respect. Accordingly, the rationale was too broad and had to be rejected.

Having shown how the rationales worked with obscenity, Schauer turned to them more generally in his powerful synthesis, *Free Speech: A Philosophical Inquiy.*67 No one could read this tight book without concluding that, first, Schauer was exceptionally rigorous and, second, in his hands the case for a strong protection of freedom of speech didn't seem all that strong. The rationales for protection were dissected, one by one, and found, in most cases, wanting.

Because Milton, Mill and Holmes all supported freedom of speech as a means of determining what is true, the universal starting point of a theory of free speech is the argument from truth which Holmes tied into his "marketplace of ideas." Implicit in the argument from truth is that truth is both knowable and valuable. While the latter seems more or less self-evident (but consider naming a rape victim), the former is quite contested. Whatever the allure of scientific (or philosophical) truth, what most people talk and write about—say the nature of poverty or why baseball is in a long term decline—are mushy. Furthermore, the analysis presupposes a level of rationality that may only be achievable in certain areas and by certain individuals. Worse, once the marketplace enters, so do market imperfections like entry barriers and oligopolistic power. Truth may be ascertainable when discussing a falling object, but it is less so when discussing the nature of campaign finance.

As Schauer notes, the argument from truth therefore works best with Galileo. It also highlights the important question of who gets to decide: the people as individuals or the authoritative few (or many)

66 Id.
67 Schauer, *Free Speech*, supra note 34.
who hold power. Schauer demonstrates that truth is a frail reed for freedom of speech and this explains why those invoking it (in some form) typically now use it as a justification for abridging, not protecting, speech.

A stronger, perhaps the strongest, justification for free speech is that it is a necessary precondition for democratic government. The people need to deliberate all policies, criticize those in power, and make wise decisions in the voting booth. Free speech is central to each.

But what about speech that is not about governing? This, of course, was Schauer’s entry into the area; obscenity has nothing to do with speech about government. But the problem goes deeper; neither does commercial speech, nor Shakespeare, Darwin, nor something truly important like a strike in professional sports.68 If speech is protected only when it directly relates to public policy, then the vast range of speech and writing of most Americans is left without any constitutional protection. It would be ironic if the demand that government not abridge freedom of speech meant that government could—if it wished—censor virtually at will so long as it left speech about public policy alone. Even Alexander Meiklejohn, with whom protection only for speech about governing is most closely identified, balked at this, although in so doing he eviscerated his own distinction between public and private speech by placing everything in the former category.69 Schauer correctly noted that the “narrowness of the argument from democracy is also its greatest strength”70 and Meiklejohn’s switch sapped the idea of its cogency. For Schauer, unlike some who followed him, the theory behind emphasizing speech about government was to offer higher protection for certain speech, not to eliminate protection for the speech most people engage in.

Both the argument from truth and from government speech saw free speech as instrumental, and instrumental arguments can always be trumped. Thus in the 1970s there was an effort to place free speech on a more secure footing by making it an end instead of just a means. That was the allure of the liberty-autonomy rationale. Free speech is an inherent aspect of human dignity necessary for individual self-fulfillment. Schauer’s obscenity writing had rejected this possibil-

68 If the strike is in baseball, many will mistakenly believe that it implicates baseball’s antitrust exemption and therefore is about government policy. But instead of thinking “antitrust exemption,” the observer should be thinking “Coase Theorem.” L.A. Powe, Jr., What Does Bo Know?, 82 Va. L. Rev. 1369, 1378, 1380 n.81 (1996).
70 Schauer, Free Speech, supra note 34, at 44.
ity because it failed to distinguish speech from other activities. Never-

theless *Free Speech* split his discussions into two chapters, one on

speech “and the good life,” the other on speech and individual auton-

omy. This allowed Schauer to follow Tim Scanlon’s recognition that

there ought to be individual autonomy in “deciding what to believe

and weighing competing reasons for action.” Schauer saw this as

limiting the rationale to speech as opposed to the whole host of inter-

ests that surround liberty generally, and wisely recognized (as his ear-

lier work did not) that autonomy was a contribution to free speech

theory. After all (although he did not use this example) when one

justifies *West Virginia State Board of Education v. Barnette* on speech

(rather than religious) grounds autonomy has a more realistic ring

than government speech.

Surprisingly, in a book subtitled *A Philosophical Inquiry*, Schauer

turned lastly to what he saw as psychological utilitarian defense of free

speech. Those in power have the most to lose from open discussion

and it is hardly surprising that they will take steps—including censor-

ship—to keep what they have. Thus Schauer states that “[e]xperience arguably shows that governments are particularly bad at censorship, that they are less capable of regulating speech than they are of regulating other forms of conduct.” Schauer saw this justification as negative; it is not so much that free speech is very valuable; rather it is that it is more valuable than those in government think. They will misweigh the costs and benefits to the detriment of society and hence protection of speech is “necessary merely to counter the tendency towards over-regulation.” Others, especially Vincent Blasi and myself, would have gone farther. Schauer might have relabelled this chapter to speak in terms of history and tradition rather than psychology, but that was not Schauer’s approach. Had he been more interested in history, he might have further addressed whether judges

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71 *Id.* at 69 (relying on Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972)).

72 *Id.* at 71.

73 319 U.S. 624 (1943).

74 As John Roche so nicely put it: “Power corrupts, but fear of losing power corrupts absolutely.” Quoted in PowE, *supra* note 20, at 238.

75 *Schauer, Free Speech*, *supra* note 34, at 81.


are capable of protecting speech or other civil liberties during crisis times or whether speech is a good times civil liberty.\textsuperscript{78}

It was possible (I know because at the time I did) to read \textit{Free Speech} as stating that which ever rationale the reader chose, there is less to the protection of speech than was thought. Basically Schauer seemed to say "choose a unitary rationale and face the consequences." That was not his point, however, and \textit{Free Speech} should be read in conjunction with three law review essays published immediately in its wake. Indeed these articles \textit{Codifying the First Amendment: New York v. Ferber},\textsuperscript{79} \textit{Must Speech Be Special?},\textsuperscript{80} and \textit{An Essay on Constitutional Language}\textsuperscript{81} are best seen as part and parcel of the book.

\textit{Codifying the First Amendment} made clear that Schauer believed we have "several First Amendments" and thus a unitary theory was not the sole option.\textsuperscript{82} Each of the various theories generated justifications for protecting certain types of speech. Government speech generates cases such as \textit{New York Times Co. v. Sullivan}.\textsuperscript{83} Truth explains academic freedom cases like \textit{Sweezy}\textsuperscript{84} and \textit{Pico}.\textsuperscript{85} Excessive censorships creates \textit{Jenkins}\textsuperscript{86} or \textit{Southeastern Promotions};\textsuperscript{87} indeed these were "perhaps even based in part on notions of self-realization."\textsuperscript{88} These examples were "representative rather than exhaustive" but they showed Schauer did not limit himself to a preferred theory of protection. There is nothing

\textsuperscript{78} My position is that it is the latter. See \textit{Dennis v. United States}, 341 U.S. 494 (1951), or any of the wartime cases. Indeed, I can think of no case during times of great strain when the Court has protected civil liberties in an unpopular decision. To this proposition, my distinguished colleague Charles Alan Wright dissents, and cites \textit{Ex parte Merryman}, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487), and \textit{West Virginia State Board of Education v. Barnette}, 319 U.S. 624 (1943). Neither makes it. \textit{Merryman} was decided by Chief Justice Taney to facilitate Maryland's secession from the Union. \textit{Barnette} overruled \textit{Minersville School District v. Gobitis}, 310 U.S. 586 (1940), which was a hugely unpopular decision. I love the \textit{Barnette} opinion too, but do not find it an act of courage or a decision going against popular belief. My view is that if Wright could have thought of a third example, he would have.


\textsuperscript{80} Frederick Schauer, \textit{Must Speech Be Special?}, 78 N.W.U. L. Rev. 1284 (1984) [hereinafter Schauer, \textit{Special}].

\textsuperscript{81} Frederick Schauer, \textit{An Essay on Constitutional Language}, 29 UCLA L. Rev. 797 (1982) [hereinafter Schauer, \textit{Constitutional Language}].

\textsuperscript{82} Schauer, \textit{Codifying the First Amendment}, supra note 79, at 313.

\textsuperscript{83} 376 U.S. 254 (1964).


\textsuperscript{88} Schauer, \textit{Special}, supra note 80, at 1904.
to indicate that he thought the various theories were reinforcing, creating a sum greater than the whole of their parts. Emerson had come to this conclusion and it is my own view as well, but I doubt Schauer agrees. If speech comes within the sweep of one of the theories, he will protect it; but he doesn’t stretch and if the speech doesn’t come within one, he wouldn’t.

_Free Speech_ left two important points open. First, why should we protect speech and not other self-actualizing activities? In the words of his article, “must speech be special?” Is it special? Second, what did the book have to do with the First Amendment? _Constitutional Language_ dealt with this second question.

“Must speech be special?” had been Schauer’s theme for several years. He closed the essay of the same name with an apt description of where his philosophy had taken him during that time:

As we reject many of the classical platitudes about freedom of speech and engage in somewhat more rigorous analysis, trying to discover why speech—potentially harmful and dangerous, often offensive, and the instrument of evil as often as good—should be treated as it is, our intuitions about the value of free speech, solid as they may be, are difficult to reconcile with this analysis. The ache, it seems to me, is caused by the fact that although the answer to “Must speech be special?” is probably “Yes,” the answer to “Is speech special?” is probably “No.”

That conclusion was probably the driving force behind his scholarship. His blunt statement that “over-inclusive First Amendment rulemaking is accompanied by an under-inclusive accommodation of legitimate state interests” is one I would associate with no one else.

Through all this Schauer had not seriously addressed his thesis that philosophy was an/the appropriate guide to the First Amendment. When it all came together, however, Schauer was articulating a philosophical imperialism. At least parts of law were not autonomous; rather they were a subdiscipline of philosophy. _Free Speech_ stated at the beginning that philosophy was necessary for legal analysis. Schauer thus bemoaned the prior lack of attention to the “philosophical foundations” of the area; it was both “philosophically disturbing” and “deficient legal analysis.” Thus without philosophy legal analysis of freedom of speech is necessarily incomplete.

Beginning with the obvious point that freedom of speech cannot be taken literally, Schauer turned to how to define it. It must be inter-

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89 Id. at 1306.
90 Schauer, _Perils of Particularism_, supra note 33, at 407.
91 SCHAUER, _FREE SPEECH_, supra note 34, at ix.
interpreted "in light of some underlying purpose or theory." Because freedom of speech is not self-defining, it is a theory-laden term that necessarily sends us "outside the legal domain and into the moral or the political." We must define it there, and in its definition we restrict its applications to the underlying theory. Thus even though a user of the term may be unaware of the underlying theory, "the speaker is committed to the theory . . . even if the speaker did not intend the result." If that is the case it is no wonder that Schauer detailed the limits of the underlying philosophies in *Free Speech* with such care. Justices and scholars may have been misusing the terms and giving the First Amendment a latitude that philosophical theory—and therefore constitutional law—did not justify.

V

So what's missing in Schauer's work? I think it is the United States of America. Schauer, quite intentionally I think, wrote about a free floating freedom of speech, as applicable in Estonia as in Evansville. My perspective is much more limited. I do not care how a system of freedom of expression works in Eastern Europe (or Western Europe for that matter); I am very much concerned about how it has worked in the United States. I am interested in how our Constitution operates. I thus have a limited temporal and geographic interest. Schauer does not.

If the question is what does our Constitution mandate (rather than what does free speech require), then we must answer the question as lawyers and not as philosophers. It is both trite and obvious that the framers and ratifiers of the First Amendment left no clues that their work could best be understood against a philosophical backdrop. Nor have there been any suggestions in the past 200 plus years that a philosopher would be a useful appointee to the Supreme Court (although Schauer, complete with a J.D., would). The Constitution is about the American experience, not the proceedings of the Cambridge Philosophical Union (no matter how learned).

Philip Bobbitt quite rightly describes doing constitutional law as applying the accepted techniques of constitutional interpretation to

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92 Schauer, *Special, supra* note 80, at 1298–99.
93 Schauer, *Constitutional Language, supra* note 81, at 827.
94 *Id.* at 825.
the problem at hand. Those techniques are applying text, history, structure, doctrine, consequentialism, and the meaning of the American experience. Philosophy enters, if at all, as a parasite on one of the other modalities of interpretation (typically consequentialism). Schauer quite obviously disagrees. It is undoubtedly true that Schauer sees his work as set against (and as supplementing) the backdrop of all the other scholarship emphasizing nonphilosophical approaches to the First Amendment. But that, I think, misses the point, for Schauer not only believes that philosophy is necessary for First Amendment analysis, he finds it an independent and superior modality of analysis.

From my perspective it is ironic that Schauer, the advocate of thinking small and the articulate opponent of abstracting issues, grounds his interpretation in philosophy. A better (and potentially, but not necessarily, more particularistic) method would be to discuss the tradition of free speech. Look to the Sedition Act controversy, World War I, McCarthyism, the civil rights movement, Vietnam, obscenity regulation, broadcast regulations, the political correctness movement; these offer a treasure of lessons and applications of the First Amendment that philosophy cannot hope to duplicate. Furthermore, these events are grounded in our history and are therefore part of our heritage.

Yet it seems no accident that history is missing from Schauer's writing. I suspect his disdain for history is matched only by my disdain for philosophy. When Schauer turns to the lessons drawn from experience, there usually aren't any lessons. When there are some, he notes that they are anecdotal and could be amplified by the tools of history or political science, but his interest is "more theoretical than empirical." Another time he wrote that "experience arguably shows," although that seems to understate the sweep of the American First Amendment experience. Emerson's work alone shows (and most First Amendment scholars agreed) that when American governments can regulate speech they will do so to favor their friends, censor

96 Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1982); Bobbitt, supra note 1.
97 Indeed, he said so at the symposium I mentioned in the opening paragraph. Philip Bobbitt, Reflections Inspired by My Critics, 72 Tex. L. Rev. 1869, 1911 (1994).
98 Schauer, Perils of Particularism, supra note 33, at 408.
99 I always thought Shakespeare got it wrong. Begin with the philosophers, then, if necessary, move to lawyers.
101 Schauer, Free Speech, supra note 34, at 81 (emphasis added).
their opponents, and in general use power in a most partisan fashion. My initial book on broadcast regulation was designed to show that the abuses postulated by Emerson and existing First Amendment theory for any regulatory regime, had, in fact, occurred in the regulation of radio and television. There were enough that I could write a book detailing them.

It is not just that Schauer has not written a book about government abuses, he has not written an article either. He has shown concern that the Ocala Star-Banner, by its negligence, blocked Crystal River Mayor Leonard Damron's chance to be elected county tax assessor \(^{102}\) by identifying him (instead of his brother) as having been charged with perjury in federal court \(^{103}\). But there is nothing on the First Amendment paradigm of the lone dissenter, whether he be Thomas Patterson, Jacob Abrams, Dirk DeJonge, George Anastaplo, David O'Brien or even John Peter Zenger. Nothing. I believe this is truly unique in important First Amendment scholarship. One answer is that the First Amendment paradigm of the lone dissenter was obsolete during Schauer's career. The cutting edge issues were the electronic media, government speech, and campaign finance, yet he largely ignored them, as well (although that may be changing) \(^{104}\).

Finally, to come to what always has interested Schauer, harms, I wish he would reverse his focus just once. Nowhere does he seem as skeptical about the costs of speech as he does about its benefits. Maybe once this was a justified counter to preexisting dogma, but his own writings have transformed that dogma. That speech imposes harms is established. What remains at issue is how much harm (in a world where much is typically defined either criminally or in dollars).

In Uncoupling Free Speech \(^{105}\) he used his old favorite Damron and the Ocala Star-Banner. A jury awarded Damron $22,000—Schauer lets us know that fourteen times in the article \(^{106}\). Schauer also cites Olivia N. v. NBC \(^{107}\) a case where a California appellate court held that even if the television movie Born Innocent, describing a prison rape using a "plumber's helper," had caused a like rape of the nine-year-old defendant by teenage boys who had seen the movie days before, the

\(^{103}\) Schauer, Public Figures, supra note 64, at 910.
\(^{104}\) E.g., Schauer, Political Incidence, supra note 100; Schauer, Devices of Democracy, supra note 76.
\(^{105}\) Frederick Schauer, Uncoupling Free Speech, 92 Colum. L. Rev. 1321 (1992) [hereinafter Schauer, Uncoupling].
\(^{106}\) Id. (discussing Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971)).
Brandenburg test precluded liability. But for the First Amendment, Schauer states a jury would have been justified “in awarding damages to Olivia N. in the amount of, say, $20,000.” Stop right there. Why is Damron’s injury ten percent greater than Olivia N.’s? Is it that true that words wound more than physical force? Furthermore, Damron’s jury award is thirty years in the past, before the exponential explosion of tort damages. Today an “incalculable” injury may and often will mean “astronomical” instead of not capable of calculation. In Olivia N. $20,000,000 is a more likely verdict than $20,000. For Schauer to suggest $20,000 in 1992 shows that he has distanced himself completely from how the tort system now works. Put somewhat differently, this is a huge example of his one-sided examination of cost.

Neither Schauer nor I are constitutional perfectionists. We know the Constitution cannot weigh costs and benefits the way a perfect system might, and we both oppose that part of modern constitutional law scholarship that assumes the Constitution incorporates all that is right (and precludes all that is wrong). The First Amendment is hardly alone among constitutional provisions in imposing costs that those who must bear them most resent. Schauer’s First Amendment fine-tuning may be somewhat closer to a desire for perfection than he otherwise believes appropriate.

VI

So what’s Schauer’s contribution? Plenty. He is the critic that Emerson and Kalven did not have, but needed and would have respected. He is the person who would have deflated their views on the value of speech. And he is the person who would never let them forget that what they loved so much harmed others (often less powerful others).

Unlike Emerson’s and Kalven’s era, ours does not lack for First Amendment critics: MacKinnon, Matsuda, Fiss, Sunstein, to

108 Schauer, Uncoupling, supra note 105, at 1346.
109 I once asked Gerry Spence (who had won both trials) how Karen Silkwood’s lethal exposure to uranium could be worth the same as Kimerli Jayne Pring’s supposed injury from a Penthouse story never naming her, and I received an extraordinarily hostile nonanswer.
110 Schauer, Devices of Democracy, supra note 76, at 1344–46.
111 Just imagine how the relatives of victims of the Oklahoma City bombing would react if the trial judge excludes the evidence relating to Terry Nichols.
name just a few. But the former two seem unidimensional, seeing the universe through the prism of the single issue they care about. And the latter two each have created a principle outside the First Amendment, given it an evocative name, and then claimed the true constitutional issue was application of that principle to the problems at hand. Schauer is so different. His is a critique from within and from top to bottom.

Furthermore, if Freddie Patek is not an apt symbol for the First Amendment, he nevertheless offers the beginning of an apt description of a Schauer article. If not lean and mean, then hammering logic with no excess verbiage. Schauer chooses manageable topics and then manages them well—indeed, I can think of no one better able to spot worthwhile First Amendment topics. Yet unlike Patek, who struck out too often, Schauer always moves the runner along, often past home plate. He is what every scholar needs—and dreads: that consummate, hardheaded, but totally fair, critic. Thanks Fred.

116 One wonders why neither selected the “free speech fairness doctrine.”