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FREDERICK SCHAUER

CODIFYING THE
FIRST AMENDMENT:
NEW YORK v. FERBER

Words and pictures may serve an almost limitless variety of purposes. They may be the instruments with which a political pamphleteer urges a change in government policy, but they may also enable the child pornographer to display for the sexual pleasure of paying customers photographs of children engaged in sexual activity. The former is unquestionably at the core of the First Amendment's protection of freedom of speech and press.¹ The latter is equally clearly some distance from that core.² In *New York v. Ferber*³ the Supreme Court held child pornography to be so far from the core as to be unprotected by the First Amendment. *Ferber*

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¹ See, e.g., *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3426 (1982); *Citizens Against Rent Control v. Berkeley*, 102 S. Ct. 434, 437 (1981); *Carey v. Brown*, 447 U.S. 455, 467 (1980); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920) (Brandeis, J., dissenting); MEIKLEJOHN, *POLITICAL FREEDOM* (1960); BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RESEARCH J. 521; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REVIEW 191.

² "[F]ew of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (plurality opinion). Doctrinal or strategic considerations may lead us to treat all or part of the fringe as legally indistinguishable from the core, but this is distinct from identifying a theoretical, prelegal core.

³ 102 S. Ct. 3348 (1982).

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upheld a New York statute⁴ proscribing the dissemination of child pornography regardless of whether the materials were legally obscene under the *Miller* standards.⁵ Moreover, the Court was unanimous in reaching that conclusion,⁶ giving *Ferber* the distinction of being one of very few cases since 1919 in which not a single Justice dissented from a holding that an act of communication was unprotected by the First Amendment.⁷

It would be easy to explain the Court's unanimity of result by reference to the undeniably revolting nature of child pornography and those who trade in it.⁸ But this would be too easy. The Court's development of First Amendment doctrine has long been influenced by a willingness to protect that which would, standing alone, command little but condemnation. The course of the First Amendment has been shaped far less by the worthy dissident than by the likes of the Jehovah's Witnesses with their "astonishing powers of annoyance,"⁹ *Brandenburg* and his fellow Klansmen,¹⁰

⁴ N.Y. Penal Law § 263.15 (McKinney 1980).

⁵ *Miller v. California*, 413 U.S. 15 (1973). References to the "*Miller* standards" incorporate glosses from other cases. *E.g.*, *Pinkus v. United States*, 436 U.S. 293 (1978); *Splawn v. California*, 431 U.S. 595 (1977).

⁶ Justice White's opinion of the Court was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice O'Connor also wrote a concurrence. Justice Blackmun concurred in the result without opinion. Justice Brennan, joined by Justice Marshall, wrote an opinion concurring in the judgment, and Justice Stevens also wrote an opinion concurring in the judgment.

⁷ Although I have not conducted an exhaustive search, the only cases that come to mind are *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

⁸ Because of the doctrinal focus of this article, I do not deal extensively or critically with the underlying evidence relating to the nature of the child pornography industry. Well-documented discussions can be found in Protection of Children Against Sexual Exploitation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977); Sexual Exploitation of Children: Hearings Before the Subcomm. on Crime of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977); Sexual Exploitation of Children: Hearings Before the Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977); S. Rep. No. 438, 95th Cong., 1st Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 40; Shouvin, *Preventing the Sexual Exploitation of Children: A Model Act*, 17 WAKE FOREST L. REV. 535 (1981); Note, *Child Pornography Legislation*, 17 J. FAM. L. 505 (1979); Comment, *Preying on Playgrounds: The Exploitation of Children in Pornography and Prostitution*, 5 PEPPERDINE L. REV. 809 (1978); Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. ILL. L.F. 711; Note, *Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation*, 12 U. MICH. J.L. REF. 295 (1979). Additional materials from the medical and social sciences are cited in *Ferber*, 102 S. Ct. at 3355 n.9.

⁹ CHAFEE, FREE SPEECH IN THE UNITED STATES 399 (1941). *E.g.*, *Martin v. Struthers*, 319 U.S. 141 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1938).

¹⁰ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

Cohen's tasteless jacket,¹¹ and Frank Collin and the American Nazi Party.¹² People such as this have prevailed under the First Amendment not because what they in particular had to say furnishes the *raison d'être* for free speech, but because they have been the fortunate beneficiaries of a desire to preserve long-run First Amendment values by looking not at isolated instances of speech but at broad categories.¹³ They have benefited as well from a great reluctance, even in the face of extreme cases, to permit First Amendment protection to turn on the determination by any official body, even a court, of the comparative worth of particular utterances.¹⁴

Thus we must look beyond the unique repulsiveness of child pornography to locate an explanation for the Court's unanimity. And what appears on closer inspection of *Ferber* is a growing consensus within the Court on a doctrinal proposition of great importance in First Amendment theory—that the diversity of communicative activity and governmental concerns is so wide as to make it implausible to apply the same tests or analytical tools to the entire range of First Amendment problems. This premise provides the impetus for making First Amendment doctrine more precise and at the same time more complex, developing tools and tests that are greater in number but consequently applicable to increasingly smaller categories of First Amendment issues. And as the size of the categories shrinks, it becomes less necessary to protect that which ideally ought not be protected solely to ensure the protection of the potentially valuable.

From this perspective the virtues of subdividing and thereby

¹¹ *Cohen v. California*, 403 U.S. 15 (1971).

¹² *National Socialist Party of America v. Village of Skokie*, 434 U.S. 1327 (1977) (Stevens, J., as Circuit Justice, denying stay); *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (per curiam); *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), stay denied, 436 U.S. 953, cert. denied, 439 U.S. 916 (1978).

¹³ See Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979); Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981); Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A.L. REV. 915, 960–61 (1978). For an interesting philosophical contrast to the prevailing legal view, see Dworkin, *Non-Neutral Principles*, in *READING RAWLS* 124 (Daniels ed. 1975).

¹⁴ See, e.g., *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972); *Cohen v. California*, 403 U.S. 15 (1971). See generally Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). Cf. Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955).

codifying the First Amendment seem great. But equally important factors militate against the pull toward smaller categories and more precise tests. Extreme subdivision of the First Amendment magnifies the risk that an increasingly complex body of doctrine, even if theoretically sound, will be beyond the interpretative capacities of those who must follow the Supreme Court's lead—primarily lower court judges, legislatures, and prosecutors.¹⁵ Complex codes may generate numerous mistakes when applied, and First Amendment mistakes are more likely to be mistakes of underprotection than of overprotection.¹⁶ *Ferber*, in carving out yet another distinct category of material unprotected by the First Amendment, and for reasons that are relatively novel in First Amendment theory, is a significant milestone on the road toward elaborate codification of the First Amendment. At the same time it may warn us of the dangers of going much farther.

Although I want to focus on these doctrinal implications of *Ferber*, that is no excuse for ignoring the case's more immediate importance. Child pornography is a matter of great current concern, and *Ferber* establishes the framework for a likely wave of new legislation and litigation. I would be remiss to leap into broad doctrinal speculation without first paying attention to the need for specific analysis of these beginnings of a discrete body of constitutional law relating to child pornography. Justice White's majority opinion in *Ferber* admirably anticipates many of the issues that are likely to arise in its application. That precision and predictability, however, is a product of the Court's willingness to carve out a separate category for child pornography. Thus we cannot completely divorce the particular analysis of the holding from its broader doctrinal premises, and a close look at how the Court treated child pornography will greatly assist in tracing the Court's progress toward codification of the First Amendment.

I. THE CASE

Although forty-seven states and the federal government had at the time *Ferber* was decided enacted legislation specifically ad-

¹⁵ See Schauer, note 13 *supra*, at 305–7.

¹⁶ See TRIBE, *AMERICAN CONSTITUTIONAL LAW* 576–84 (1978); Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 887–93 (1963); Kalven, note 1 *supra*, at 213.

dressed to the problem of child pornography,¹⁷ not all of these laws presented the constitutional question posed in *Ferber*. Twelve states directed their legislative efforts solely to the *production* of material involving sexual acts by children.¹⁸ Absent any attempt to proscribe the dissemination of the films, books, or magazines so produced, the process of photographing an illegal act for eventual distribution creates no independent constitutional protection for the illegal act itself.¹⁹ The presence of a camera, a pen, or a typewriter does not clothe unprotected acts with First Amendment protection. For example, it would hardly be a defense to a citation for speeding on a public road that the speeding car was at the time being filmed for an episode of *The Dukes of Hazzard*. Conversely, material protected by the First Amendment does not shed that protection merely because it depicts or describes illegal activity.²⁰ These twelve states thus skirted any constitutional problem by regulating the production but not the dissemination of the material.

Fifteen other states and the federal government did prohibit the dissemination of material depicting children engaged in sexual activity, but limited the prohibition on dissemination to material that was obscene under *Miller*.²¹ Because *Miller*-tested obscenity is wholly outside the First Amendment,²² these statutes also avoided any constitutional problem under current doctrine. With only a rational basis required for dealing with obscenity,²³ imposing special sanctions on child pornography that is also obscene presents no previously unsettled questions.

New York, however, was one of twenty states that desired to go further.²⁴ Like the previously mentioned jurisdictions, these states

¹⁷ The statutes are listed in *Ferber*, 102 S. Ct. at 3351 n.2.

¹⁸ *Id.*

¹⁹ This is merely an instance of the more general proposition that a possible, probable, or even inevitable First Amendment use does not immunize otherwise illegal activity. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); *United States v. Reidel*, 402 U.S. 351 (1971); *Associated Press v. United States*, 326 U.S. 1 (1945). Cf. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978); *New York Times Co. v. United States*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring).

²⁰ So much is implicit in the view that even advocacy of illegal conduct is protected. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Yates v. United States*, 354 U.S. 298 (1957).

²¹ 102 S. Ct. at 3351 n.2.

²² *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

²³ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).

²⁴ 102 S. Ct. at 3351 n.2.

banned the dissemination as well as the production of child pornography. But these states did not require that the material be obscene. New York, for example, made it unlawful to disseminate "any performance which includes sexual conduct by a child less than sixteen years of age."²⁵ Because a distinct section of the same law provided a separate sanction for material that was also obscene,²⁶ it was apparent that the first-mentioned section intended to disclaim any necessity for a finding of obscenity.

Paul Ferber was tried for selling two films "devoted almost exclusively to depicting young boys masturbating."²⁷ Had he been tried only under that section of the New York statute requiring obscenity, Ferber might have been convicted under that constitutionally noncontroversial section. Indeed, Ferber's counsel conceded in oral argument before the Supreme Court that a jury finding of obscenity for Ferber's wares would have been consistent with *Miller*.²⁸ But Ferber was tried under *both* statutes, enabling the jury to acquit on the obscenity charge while convicting under the section not requiring legal obscenity.²⁹ Perhaps fortuitously, therefore, the issue was presented starkly: Could Ferber be convicted for selling films depicting sexual acts by children where those films were not legally obscene?

The New York Court of Appeals reversed Ferber's conviction, holding the statute unconstitutional primarily for want of any precedent for denying constitutional protection to nonobscene material.³⁰ The Court of Appeals also relied on the statute's overbreadth. Even if the statute might constitutionally be applied to Ferber and his films, the statute's potential inclusion of medical and educational materials rendered it fatally overbroad.³¹

²⁵ N.Y. Penal Law § 263.15 (McKinney 1980). I use "disseminate" in place of the statute's comprehensively defined "promote." N.Y. Penal Law § 263.00-5 (McKinney 1980).

²⁶ N.Y. Penal Law § 263.10 (McKinney 1980).

²⁷ 102 S. Ct. at 3352.

²⁸ *Id.* at 3365 n.1 (Brennan, J., concurring).

²⁹ *Id.* at 3352.

³⁰ *People v. Ferber*, 52 N.Y.2d 674 (1981). A federal court had previously relied on similar reasoning to enjoin enforcement of the statute against a particular publication, *St. Martin's Press, Inc. v. Carey*, 440 F. Supp. 1196 (S.D.N.Y. 1977), but that decision was overturned because the plaintiff had failed to show any real threat of prosecution. *St. Martin's Press, Inc. v. Carey*, 605 F.2d 41 (2d Cir. 1979).

³¹ 52 N.Y.2d at 678.

The Supreme Court's nine-to-zero reversal of the New York Court of Appeals upheld the facial validity of the statute as well as Ferber's conviction under it.³² Although Justice White's majority opinion acknowledged that the decision of the Court of Appeals "was not unreasonable in light of our decisions,"³³ the Court departed from those decisions to the extent of allowing the states "greater leeway in the regulation of pornographic depictions of children"³⁴ than existed when juveniles were not portrayed. In reaching this conclusion, the Court relied on a mélange of justifications drawn from diverse strands of existing First Amendment doctrine.

The Court began by acknowledging the "compelling" interest in protecting children.³⁵ Unlike almost every other free speech case, the focus of state concern was not on the harm that the communication would cause to its recipients or to society. *Ferber* contains not a single word addressed to the effect of child pornography on its viewers, or the effect that a proliferation of child pornography might have on a community. Rather, the concern was for the children used in producing the material.³⁶

Although the state interest was therefore in the production and not the dissemination of the material, the Court agreed with New York that this harm could not be dealt with adequately by a restriction limited to the use of children in the production process.³⁷ Legislation so limited would fail to address the special harm that came to children from knowing that there was a permanent public record of their acts.³⁸ Moreover, controls limited to production

³² *New York v. Ferber*, 102 S. Ct. 3348 (1982). For the lineup of the opinions, see note 6 *supra*.

³³ 102 S. Ct. at 3352. The only court outside of New York to confront the issue had held a similar statute unconstitutional. *Graham v. Hill*, 444 F. Supp. 584 (W.D. Tex. 1978). Two state courts upheld relatively noncontroversial statutes limited to production. *Griffin v. State*, 396 So.2d 152 (Fla. 1981); *Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981).

³⁴ 102 S. Ct. at 3354.

³⁵ *Id.* On the Court's use of the particular term "compelling," see text accompanying notes 110-15 *infra*.

³⁶ 102 S. Ct. at 3355.

³⁷ *Id.* at 3355-56.

³⁸ *Id.* at 3355. The Court relied in part on the "privacy interests involved." *Id.* at 3356 n.10. But nothing in *Ferber* is helpful in determining the circumstances under which this type of interest in avoiding publicity will be applied in the future. See Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUPREME COURT REVIEW 173.

would likely be ineffective. Pornographic materials are produced clandestinely, and attempting to deal with child pornography by going after only the producers would be an exercise in futility.³⁹ The solution, to New York and other states, was to destroy the market by prohibiting dissemination. The Court agreed with the State that the unquestioned interest in protecting children from exploitation could be served only by a restriction on dissemination.

The Court also agreed that the interest in protecting children could not be met by a dissemination restriction limited to the legally obscene.⁴⁰ The Court correctly noted that the *Miller* formulation, directed toward excluding the totally worthless from the coverage of the First Amendment, proceeds from different premises than does the concern for those who will be photographed for films and books. The perceived dangers to the children involved may be equally great if the material contains some serious literary, artistic, political, or scientific value, if it does not as a whole appeal to the prurient interest, or if it does not as a whole offend contemporary community standards.⁴¹ For example, a by-and-large faithful rendition of *Romeo and Juliet* that depicted a fourteen-year-old Romeo engaged in a variety of sex acts with a twelve-year-old Juliet would not be obscene under *Miller*, but might produce the same harms for the child actors that were central to New York's concern.

Having accepted New York's strong interest in restricting material hitherto held to be within the protection of the First Amendment, the Court proceeded to assess the First Amendment implications of the restriction, concluding that:⁴²

The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimus*. We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. . . . [I]f it were necessary for literary or artistic

³⁹ 102 S. Ct. at 3356. See also *TRIBE*, note 16 *supra*, at 666 n.62.

⁴⁰ 102 S. Ct. at 3356-57.

⁴¹ *Id.* Influenced perhaps by the particular result at trial in *Ferber*, the Court implicitly discounted the fact that most child pornography is plainly obscene under *Miller*. See Note, *Child Pornography, the First Amendment, and the Media: The Constitutionality of Super-Obscenity Laws*, 4 *COMMENT L.J.* 115 (1981).

⁴² 102 S. Ct. at 3357.

value, a person over the statutory age who perhaps looked younger could be utilized.

This approach is in some tension with *Cohen v. California*.⁴³ The use of the word "fuck" might also not have been an "important and necessary" part of Cohen's message of opposition to the Selective Service System, but that did not prevent the Court from allowing Cohen to determine what method of making his statement he determined to be most effective.

Cohen may be distinguished in part because the state's interest in protecting children against sexual exploitation seems greater than the state's interest in protecting the public against exposure to vulgar language. But the Court relied on the fact that the type of material employing children engaged in sexual acts is likely to be less central to the First Amendment. Drawing support from *Young*,⁴⁴ *Pacifica*,⁴⁵ and the defamation cases,⁴⁶ the Court reasserted that an investigation into the content of categories of speech was an appropriate way of determining that certain categories should be unprotected by the First Amendment.⁴⁷ The Court therefore concluded that because the category of child pornography contained limited speech value, and because there was a great state interest in regulating that category, the category would be deemed unprotected by the First Amendment.⁴⁸

Thus, it is not rare that content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that cov-

⁴³ 403 U.S. 15 (1971).

⁴⁴ *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

⁴⁵ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

⁴⁶ *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Beauharnais v. Illinois*, 343 U.S. 250 (1952). Although the Court cited *Beauharnais* for a methodological rather than substantive proposition, the reference does keep alive the question of the case's vitality. See *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun, J., dissenting from denial of certiorari).

⁴⁷ 102 S. Ct. at 3358. In this respect the Court perpetuated its failure to distinguish content inquiry directed at determining the boundaries of the first amendment from content inquiry within those boundaries. See Schauer, note 13 *supra*, at 290 n.114; Stephan, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203 (1982). But see Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 117 (1981).

⁴⁸ 102 S. Ct. at 3358.

ered by § 263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

It remained for the Court to specify the contours of this unprotected category. Curiously, *Ferber* contains no initial description of the category itself, but it is fair to conclude that the category is described by reference to the New York statute—material containing sexual conduct by a child.⁴⁹ *Ferber*'s other requirements can be viewed as qualifications or elaborations on this basic standard. First among these is that the category is limited to visual portrayals of sexual activity by children. In almost every imaginable case this will be a photographic portrayal.⁵⁰ This limitation follows from the particular state concerns involved, because a simulated or linguistic description of sexual conduct would not involve real children in the production. Moreover, the proscribed depictions of sexual conduct must be specifically described in the relevant state law, and the Court clearly had in mind a specificity requirement such as that set forth in *Miller*.⁵¹ Although the Court indicated that the same types of sexual conduct specified in *Miller* would apply to child pornography, it is possible to argue that a more expansive definition of those acts could apply to child pornography. Given that *Ginsberg v. New York*⁵² permits an adjusted application of the obscenity standard when materials are sold to children, application of *Ginsberg* by

⁴⁹ The language quoted in the text accompanying note 48 *supra* supports the conclusion that the Court intended the constitutional definition of child pornography to be coextensive with New York's statutory definition, subject to those qualifications found elsewhere in *Ferber*.

⁵⁰ The exact language is "live performance or photographic or other visual reproduction of live performances." 102 S. Ct. at 3358.

⁵¹ 102 S. Ct. at 3358. The relevant age must also be specified, and *id.* at 3358 n.17 implies that any age up to and including eighteen would be constitutionally permissible. The same footnote mentions, with neither approval nor condemnation, statutes that "define a child as a person under age 16 or who appears as a prepubescent." *Id.* (emphasis added). Because the Court specifically approved the use of "a person over statutory age who perhaps looked younger," *id.* at 3357, this standard may raise problems. But the lack of an "appearance" alternative might raise substantial proof problems in an action against a distributor or exhibitor. Because puberty tends to have a standard common law meaning of fourteen for boys and twelve for girls, *e.g.*, *State v. Pierson*, 44 Ark. 265 (1885), there seems nothing wrong with an appearance alternative as long as it is sufficiently below the specified age that there will be no deterrent effect on use of older people to simulate those more youthful.

⁵² 390 U.S. 629 (1968).

analogy would seem to permit an adjusted definition of the conduct that may not be portrayed when engaged in by children. Mere nudity is undoubtedly insufficient, but there may be some flexibility with respect to what is to count, for example, as a lewd exhibition of the genitals.

Ferber adopted two other facets of settled obscenity doctrine. The *scienter* requirement of *Smith v. California*⁵³ is made applicable to child pornography,⁵⁴ and thus a defendant must be shown to have had knowledge of the character of the materials.⁵⁵ And the Court also made clear that it would engage in independent constitutional review of particular materials found by lower courts to be unprotected.⁵⁶ Although commonly associated with obscenity doctrine,⁵⁷ independent review applies to the full range of material lying just outside the borders of First Amendment protection,⁵⁸ and thus this aspect of *Ferber* breaks no new ground.

The resultant category of child pornography plainly bears little resemblance to the category of obscenity delineated by *Miller*. The Court in *Ferber* explicitly held that child pornography need not appeal to the prurient interest, need not be patently offensive, and need not be based on a consideration of the material as a whole.⁵⁹ This last aspect is most important, because it means that the presence of some serious literary, artistic, political, or scientific matter will not constitutionally redeem material containing depictions of sexual conduct by children.

The Court referred to the foregoing factors in terms of having "adjusted" the *Miller* test, but that is like saying that a butterfly is an adjusted camel. The category of child pornography is quite unlike the category of obscenity, although in practice the materials encompassed by the two categories will likely be similar. The dif-

⁵³ 361 U.S. 147 (1959).

⁵⁴ 102 S. Ct. at 3358-59.

⁵⁵ *Hamling v. United States*, 418 U.S. 87, 119-24 (1974). See generally SCHAUER, *THE LAW OF OBSCENITY* 222-26 (1976).

⁵⁶ 102 S. Ct. at 3364 n.28.

⁵⁷ *E.g.*, *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974); *Miller v. California*, 413 U.S. 15, 29-30 (1973); *Jacobellis v. Ohio*, 378 U.S. 184, 188 (1964) (plurality opinion).

⁵⁸ *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Other cases are collected in *NAACP v. Claiborne Hardware Co.*, 102 S. Ct. 3409, 3427 n.50 (1982).

⁵⁹ 102 S. Ct. at 3358.

ference in the legal description of the categories, however, will be very noticeable in litigation. The prosecution will prevail in a child pornography case if it proves no more than that the material contains photographic depictions of children engaged in sexual activity, that the conduct is specified in the governing statute, and that the defendant knew the character of the materials. Under such a simple standard, prosecutors will not have nearly the difficulties in proving child pornography as they have had in proving legal obscenity.⁶⁰

The problem with this streamlined definition, however, is that it encompasses material that is hardly pornographic at all. Although the Court held that the material need not be considered as a whole, it emphasized that it was not deciding whether the law could be constitutionally applied to serious works such as medical books or *National Geographic*.⁶¹ This potential reach of the statute suggests overbreadth, but the Court barred *Ferber* from raising the claim, relying on the "substantial overbreadth" standard of *Broadrick v. Oklahoma*.⁶² Because the possibility of medical book and similar applications was so remote when compared to the constitutional reach of the statute, the Court held the statute not to be substantially overbroad and thus not subject to a facial attack by one whose own conduct was clearly subject to prohibition.⁶³

As Justice Stevens pointed out in his concurrence, the majority's approach to the substantive question made the overbreadth issue easy.⁶⁴ By eliminating the "taken as a whole" requirement, thus permitting prosecution of material with some serious value, the majority gave the statute a broad reach. Most of the space that under a narrower holding would be overbroad was thereby filled with constitutional applications. Overbreadth problems are likely to arise when a constitutional rule significantly limits the reach of

⁶⁰ See Project, *An Empirical Inquiry into the Effects of Miller v. California on the Control of Obscenity*, 52 N.Y.U.L. REV. 810, 910-25 (1977).

⁶¹ 102 S. Ct. at 3363.

⁶² 413 U.S. 601 (1973).

⁶³ 102 S. Ct. at 3359-63. *Ferber's* restatement of overbreadth principles, as well as its important clarification that *Broadrick* applies to cases other than those containing major nonspeech elements, is more significant than my brief treatment might suggest. A comprehensive and critical recent treatment of overbreadth is Monaghan, *Overbreadth*, 1981 SUPREME COURT REVIEW 1.

⁶⁴ 102 S. Ct. at 3367 (Stevens, J., concurring).

state power. Conversely, it is hard for a statute to be overly broad if the constitutional rule permits broad application. Justice Stevens would have preferred a more guarded approach, delaying until it arose the question of material with some serious value,⁶⁵ rather than deciding in this case that the presence of some serious value would not prevent a finding of nonprotection.

The question of serious value produced the other two opinions in the case. Justice Brennan, joined by Justice Marshall, would not permit the application of a child pornography statute to "depictions of children that in themselves do have serious literary, artistic, scientific or medical value."⁶⁶ And Justice O'Connor emphasized just the opposite—that the Court's holding did not require New York to except from the reach of its statute material with some serious value.⁶⁷

Justice O'Connor's concurrence seems to have been prompted by some ambiguity surrounding the majority's reservation of the question relating to medical books and *National Geographic*. But the majority's explicit holding that the material need not be taken as a whole supports the conclusion that the presence of some serious value will not preclude prosecution. Even this conclusion, however, leaves two situations unaddressed by the *Ferber* majority. In one case a depiction of children engaged in sexual conduct might

⁶⁵ *Id.* The desire to delay a constitutional ruling may be based on two different but often confused rationales, elements of both of which are found in Justice Stevens's opinion. On the one hand we may wish a case-by-case approach to a particular issue, focusing on the contextual factors found in the particular case. See *id.* at 3366. Apart from this, however, we may still choose a less contextual, more categorical, approach to a particular issue, such as the serious value issue in child pornography cases, but wish to delay specific formulation of that categorical rule until the case arises that presents the issue most clearly. *Id.* at 3367. The former approach goes more specifically to questions of First Amendment approach, while the latter is based on more general considerations relating to the exercise of the function of constitutional review. See *Ashwander v. TVA*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). The principle of delaying a constitutional ruling until necessary, although based on undeniably important factors relating to the role of the Court and the necessity of a good record, is too often overestimated. The Court's role as adjudicator should not blind us to its role as guider of lower courts and legislatures and setter of standards. See Schauer, "Private" Speech and the "Private" Forum: *Groban v. Western Line School District*, 1979 SUPREME COURT REVIEW 217, 217–18. As the Supreme Court gives plenary consideration to a smaller percentage of the cases presented to it, as the number of lower courts increases, as the amount of lower court litigation increases, and as there are greater delays before the Supreme Court finally decides an issue, then to that extent the consequences of a failure to give advance guidance become more severe. If this is true, then the *Ashwander* and related principles should be treated more as suggestive than as dispositive.

⁶⁶ 102 S. Ct. at 3365 (Brennan, J., concurring).

⁶⁷ *Id.* at 3364 (O'Connor, J., concurring).

itself have serious value,⁶⁸ a situation to be distinguished from the case in which a valueless depiction is part of a larger work containing value elsewhere.⁶⁹ The other and more likely case is that in which the work is predominantly serious, rather than merely containing some serious value.⁷⁰

One way to resolve these problems would be to establish a *per se* rule prohibiting without exception the use of children engaged in sexual acts. But that solution sacrifices too much of the First Amendment on the altar of predictability, for there *are* situations in which such depictions might serve important artistic or educational goals.⁷¹ If and when presented with such a case, the Court should establish a First Amendment-derived affirmative defense for such material.⁷² Under such a defense, a disseminator could avoid conviction by proving by clear and convincing evidence⁷³ that the material, taken as a whole, is predominantly a serious literary, artistic, political, scientific, medical, or educational work⁷⁴ and that the depictions of children engaged in sexual conduct are reasonably necessary⁷⁵ to the work as a whole. This affirmative defense would satisfy the most serious First Amendment concerns, especially with

⁶⁸ Some artistic works might fit this category, as well as material dealing expressly with the sexuality of children.

⁶⁹ A clever pornographer, for example, might publish an illustrated version of the *Ferber* opinion, or perhaps of this article. Cf. *Hamling v. United States*, 418 U.S. 87 (1974).

⁷⁰ A serious but occasionally explicit version of *Romeo and Juliet* would seem to fit this description.

⁷¹ See notes 68 & 70 *supra*. Where the work is not predominantly pornographic, the humiliation-embarrassment-publicity harm seems to be less. 102 S. Ct. at 3365 (Brennan, J., concurring). Moreover, a predominantly serious publication is not likely to be produced clandestinely, and thus it would be easier to reach the producer for the actual practice of using children, thus eliminating one of the Court's major justifications for permitting actions against dissemination as well as use of children.

⁷² Establishing this factor as an affirmative defense, rather than part of the prosecution's burden of proof, creates no due process problems. See *Engle v. Isaac*, 102 S. Ct. 1558 (1982).

⁷³ Proof beyond a reasonable doubt would give too little respect to the First Amendment considerations behind the affirmative defense. A simple preponderance standard seems to go too far in the other direction, but this estimate is subject to reevaluation based on experience in actual trials.

⁷⁴ The Court's specific mention of medical and educational works, 102 S. Ct. at 3363, suggests that they be specifically included along with the *Miller* list.

⁷⁵ "Reasonably necessary" is a compromise standard between "essential" and "reasonably related." The former would get the courts too far into second-guessing literary, artistic, and similar judgments, but the latter might be so relaxed as to be inconsistent with the major tenor of the *Ferber* holding.

independent constitutional review at the trial and appellate levels,⁷⁶ while at the same time not presenting the prosecution with the major proof problems that would ensue if the prosecution were required to prove that the material was not predominantly serious.⁷⁷

II. THE PATHS TO NONPROTECTION

Perhaps the most intriguing feature of *Ferber* is its doctrinal ambiguity. Although it is clear that the Court was determined to reach the result of nonprotection, it is difficult to track the Court's doctrinal route to that destination. I use "nonprotection" in a broad and simple sense merely as a characterization of a result: it is constitutionally permissible to restrict utterance *x* in circumstances *y*. But there are numerous doctrinal paths to nonprotection, and the multiplicity of means to the same end reflects the increasing complexity of First Amendment doctrine. *Ferber* is the ideal vehicle for exploring the various paths to nonprotection, because it does not follow any one of them exclusively. Rather, the majority reaches the result of nonprotection by almost randomly picking elements of each of the methods the Court has at times used to justify the conclusion that an utterance is subject to restriction. In sorting out these multiple paths to nonprotection, we may make major progress toward understanding both *Ferber* and the increasingly complex nature of the First Amendment.

A. INCIDENTAL RESTRICTIONS OF SPEECH

Certain instances of communication may be unprotected if their regulation is merely the incidental by-product of a more general state interest. *United States v. O'Brien*⁷⁸ and the important commentary it inspired⁷⁹ have established that state interests unrelated to

⁷⁶ See notes 56–58 and accompanying text *supra*. The notion of independent review at the trial level refers to a judge's plainly required task of withdrawing a case from consideration by the jury if a conviction would violate the Constitution.

⁷⁷ *Cf. Miller v. California*, 413 U.S. 15, 22–25 (1973).

⁷⁸ 391 U.S. 367 (1968). See also *Spence v. Washington*, 418 U.S. 405, 414 n.8 (1974).

⁷⁹ Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975). See also TRIBE, note 16 *supra*, at 580–601. For criticisms, to me unsuccessful, of this approach, see Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 470–74 (1980); Farber, *Content Regula-*

the communicative impact of the speech may presumptively be served if no less restrictive alternative is available and if there is no excess effect on communication in fact.⁸⁰ Determination that a restriction on communication is only incidental to a state regulatory purpose unrelated to communicative impact is therefore one path to nonprotection.

The *Ferber* majority relied on *Giboney v. Empire Storage & Ice Co.*⁸¹ for the proposition that speech may be restricted where it is an integral part of some other plainly regulable act, but this line of argument received little more than an en passant mention.⁸² Perhaps this is best explained by the logical flaws of the speech-combined-with-action rationale. All communication has some relation with some course of conduct. Child pornography is an integral part of an illegal act in the sense that an illegal act gives rise to the communication and because the publication exists solely because there is an illegal act to portray. But these cannot be sufficient conditions for nonprotection, for were that the case then both *Pentagon Papers*⁸³ and *Landmark Communications, Inc. v. Virginia*⁸⁴ should have been decided differently. The political content in both of those cases may provide a distinction, but then it is a difference in the value of the speech rather than its connection with illegal activity that justifies nonprotection in *Ferber*.

If the Court in *Ferber* had relied on *O'Brien* rather than *Giboney*, and therefore looked to the State's justification for regulation, this approach may have been more fruitful. The state interest in regulating child pornography is not based on communicative impact. The state is not concerned, for example, with whether viewers of child pornography will as a result set out to exploit or molest children. Nor is the state concerned with the effect that viewing child pornography might have on community environment or morals. Rather, the state is concerned with protecting those children that might be employed in the production process. This is an interest in

tion and the First Amendment: A Revisionist View, 68 GEO. L.J. 727, 742-47 (1980); Redish, note 47 *supra*.

⁸⁰ United States v. O'Brien, 391 U.S. 367, 377 (1968). The import of the commentary, note 79 *supra*, is that the general *O'Brien* approach is not limited to symbolic speech.

⁸¹ 336 U.S. 490 (1949).

⁸² 102 S. Ct. at 3357.

⁸³ New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

⁸⁴ 435 U.S. 829 (1978).

restricting commerce in a product that is created with the use of clearly regulable noncommunicative conduct. Perhaps the most appropriate analogy, therefore, is to the use of child labor in the publication of a newspaper, and to the question of whether a newspaper so produced could be restricted as contraband.⁸⁵ If we answer that question in the affirmative,⁸⁶ then we must ask whether anything distinguishes the child pornography case.

One quick answer is that a regulatory purpose unrelated to communicative impact is shown in the child labor case by applications of the statute to entities in no way involved with communication.⁸⁷ Child pornography is different because the specific sanctions, although not based on communicative impact, are limited to communication. In this sense the analogy might be to the situation where only newspapers were subject to the child labor laws. *Grosjean v. American Press*⁸⁸ now comes to mind, but *Grosjean* was in fact a simple viewpoint discrimination case in which the tax was levied solely in reaction to the particular position espoused by the majority of newspapers covered by the new tax.

Although *Ferber* is therefore not controlled by *Grosjean*, its result cannot be justified by a simple reference to *O'Brien*. For *Ferber* as well as *Young* present the special situation in which communicative impact does not explain the state's regulatory purpose, but in which only communication of a certain form is subject to regulation. *Ferber* and *Young* thus present an issue also lurking in the background of *Metromedia, Inc. v. City of San Diego*.⁸⁹ How are we to deal with the case in which certain industries or certain formats of communication present problems unrelated to communicative impact but still peculiar to a particular form of communication?⁹⁰ Similar prob-

⁸⁵ Cf. *United States v. Darby*, 312 U.S. 100 (1941).

⁸⁶ See *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946); *Associated Press v. NLRB*, 301 U.S. 103 (1937).

⁸⁷ Conversely, the absence of such applications would tend to rebut an assumption that no intent to regulate communication existed. Cf. Redish, note 47 *supra*, at 145.

⁸⁸ 297 U.S. 233 (1936). See Stephan, note 47 *supra*, at 215-18.

⁸⁹ 453 U.S. 490 (1981).

⁹⁰ I would thus modify the standard distinction between viewpoint discrimination and subject-matter discrimination to include a new and separate problem of format discrimination. The issue is presented by the question reserved in *Metromedia* of whether a total and content-neutral ban on all billboards would be permissible. 453 U.S. at 515 n.20. Implications of a negative answer come from *Metromedia* itself, *id.*, as well as *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). But a different conclusion might be reached regarding a restriction of all structures of a certain size, where that restriction included all billboards as well as many other structures.

lems would arise if it were found that child labor was a problem only in the motion picture industry, or that newsprint contained a toxic chemical justifying special safety precautions.

Ferber and *Young* are somewhat stickier in that the industry in these cases is characterized not only by its communicative nature but also by the particular nature of the communication. Here an industry-oriented regulation is also a form of content regulation.⁹¹ But where, as in *Ferber*, the state interest is not with the effect of that content on viewers, the special dangers of content regulation are absent, and the case is one more of format discrimination than content discrimination.⁹² Although the *Ferber* majority did not follow through with its suggestion that this was more a conduct case than a speech case, it could have arrived at the result of nonprotection by concentrating more closely on the state's interest in controlling an evil unrelated to communicative impact.

B. UNCOVERED SPEECH

Under the *O'Brien* route, state concerns unrelated to communicative impact can produce the result of nonprotection. But even if the state interest is characterized as in some way related to communicative impact, nonprotection may be reached by determining that the type of communication involved is totally unrelated to the purposes of the First Amendment.⁹³ Some forms of speech are not protected by the First Amendment because they are not even covered by the First Amendment.⁹⁴ For such verbal or pictorial acts, the First Amendment's protective devices never come into play. The non-coverage path to nonprotection justifies treating perjury, price fixing, solicitation to nonpolitical crime, and contract law, for example, as outside the First Amendment, for these are all categories of speech in which the state's justification for restriction is not

⁹¹ Thus the analogue to *Young* would be a regulation of all theaters, or all bookstores, but based on *Young's* premises.

⁹² See note 90 *supra*.

⁹³ Because I have previously discussed the matter at length, I will not repeat here the argument that such a methodology can be intellectually justified as well as located in existing doctrine. Schauer, note 13 *supra*, at 267–82; Schauer, *Can Rights Be Abused?* 31 PHIL. Q. 225 (1981); Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899 (1979).

⁹⁴ *Id.* See also BeVier, note 1 *supra*, at 301; Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUPREME COURT REVIEW 267, 278; Shiffrin, note 13 *supra*, at 916 n.17.

measured against a First Amendment standard.⁹⁵ In terms of issues actually coming before the Court, this same methodology is present in *Roth-Paris*,⁹⁶ in *Beauharnais*,⁹⁷ and in *Valentine v. Chrestensen*.⁹⁸ It is also supported by some but not all of the language in *Chaplinsky*.⁹⁹ Of these cases only the obscenity cases survive today,¹⁰⁰ but we can nevertheless identify a methodology by which the First Amendment is relevant only in the sense that we must look to its boundaries. Once a class of utterance is determined to be outside those boundaries, the First Amendment inquiry ends.

The Court in *Ferber* refers to child pornography as a category outside the First Amendment, and its citation to *Chaplinsky*, *Beauharnais* (!), and the obscenity cases seemingly supports the inference that child pornography is treated as totally uncovered by the First Amendment.¹⁰¹ But citations and superficial appearances can be deceiving, and closer inspection reveals that the denial of coverage is not the path the Court follows to nonprotection in *Ferber*.

One characteristic of the classic noncoverage cases is that the determination of lack of coverage is made solely on the basis of the First Amendment value of the utterance itself, without regard to possible justifications for restriction.¹⁰² For if the utterances involved are totally unrelated to the purposes of the First Amendment, there is no need to consider, except under a rational basis standard, why the state might want to regulate them. *Ferber*, how-

⁹⁵ See generally Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RESEARCH J. 645; Schauer, note 13 *supra*, at 267-72.

⁹⁶ *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

⁹⁷ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

⁹⁸ 316 U.S. 52 (1942).

⁹⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). To the extent that *Chaplinsky* talks about "classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.* at 571-72, it is consistent with the discussion in the text. But in referring to "no essential part of any exposition of ideas" and to a "slight social value as a step to truth," *id.* at 572 (emphasis added), and in referring to this slight value as having been "outweighed," *id.*, by other interests, *Chaplinsky* seems of a different genre.

¹⁰⁰ I assume that the original *Chaplinsky* approach is virtually unrecognizable after, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972). *Valentine* perished in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and *Beauharnais* in a combination of *Brandenburg* and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁰¹ 102 S. Ct. at 3358.

¹⁰² See Greenawalt, note 95 *supra*, at 784.

ever, does not separate the question of speech value from the question of the strength of the state's regulatory interest. The two are considered together, and the Court never determines that child pornography, in isolation, is totally beyond the normative functions of the First Amendment. Moreover, the discussion of state interest in *Ferber* seems premised on emphasizing the particularly overwhelming nature of that interest, and no such showing would be required if child pornography itself were not encompassed by the First Amendment.

The Court's delineation of the category is consistent with the interpretation that the category is not beyond the purview of the First Amendment. If the Court had in fact followed the noncoverage path to nonprotection, we would expect to see, as suggested in *Chaplinsky*¹⁰³ and applied in the obscenity cases, a carefully delimited category whose definition was designed to ensure that only material with no First Amendment significance was included. But because there is no necessary connection between the harm at issue here and total First Amendment worthlessness,¹⁰⁴ the category that results from *Ferber* is not defined by the absence of First Amendment value. And so long as there is acknowledged First Amendment value, even if small, in the resultant category, the differences between *Ferber* and the obscenity and other noncoverage cases seem more significant than the similarities.

C. OUTWEIGHING THE FIRST AMENDMENT

The *Beauharnais-Roth-Paris* path to nonprotection proceeds from the assumption that some utterances receive no First Amendment protection at all. Another path to nonprotection proceeds from the opposite assumption—that even the maximum First Amendment protection is less than absolute.¹⁰⁵ Speech that is covered by the First Amendment is not necessarily protected by it, and covered speech will go unprotected if the state can demonstrate a sufficiently strong reason for restriction. Although it might be pos-

¹⁰³ 315 U.S. at 571 ("certain well-defined and narrowly limited classes of speech").

¹⁰⁴ 102 S. Ct. at 3356–57.

¹⁰⁵ Apart from the especially stringent protection against prior restraints, which is still not absolute, *e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976), the maximum protection under the First Amendment is found in the less than absolute protection of *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (*per curiam*).

sible to construct First Amendment doctrine so that all covered speech was *eo ipso* protected,¹⁰⁶ we have not followed this strategy of carefully defined absolutes. Even speech at the core of the First Amendment may be restricted if the state interest is sufficiently strong. Although we normally associate this high but not absolute level of protection with the *Brandenburg-Hess*¹⁰⁷ formulation of the clear and present danger standard,¹⁰⁸ it is possible that *Brandenburg-Hess* is representative rather than exclusive. Not every enormous state interest can fit neatly into *Brandenburg*'s incitement-immediacy-inevitability formula, and other versions of the general clear and present danger formula may remain viable for special or novel circumstances.¹⁰⁹

If we accept that there may be dangers so momentous as to outweigh the First Amendment, yet not capable of characterization in *Brandenburg* terms, then *Ferber* can be viewed as partially relying on this "covered but outweighed" path to nonprotection. Although the Court does not cite any cases of the clear and present danger genre, it does describe the interest in protecting children as both "compelling" and "surpassing."¹¹⁰ It may be that "compelling" means something less here than it does in its more established equal protection context,¹¹¹ but it seems more sensible, especially in light of *Globe Newspaper Co. v. Superior Court*,¹¹² to interpret that language as describing a state interest equal in force but different in kind

¹⁰⁶ E.g., EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REVIEW 245; Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).

¹⁰⁷ *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). I take the two together because the force of *Brandenburg*'s imminence and likelihood requirements cannot be fully appreciated without the *Hess* application.

¹⁰⁸ See generally Linde, "Clear and Present Danger" Reexamined: *Dissonance in the Brandenburg Concerto*, 22 STAN. L. REV. 1163 (1970); Strong, *Fifty Years of "Clear and Present Danger": from Schenck to Brandenburg—and Beyond*, 1969 SUPREME COURT REVIEW 41.

¹⁰⁹ See especially *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979), mandamus denied *sub nom.* *Morland v. Sprecher*, 443 U.S. 709 (1979), dismissed, 610 F.2d 819 (7th Cir. 1979). See also Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107 (1982).

¹¹⁰ 102 S. Ct. at 3354, 3355.

¹¹¹ E.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹¹² 102 S. Ct. 2613, 2621 (1982). The suggestion in *Globe Newspapers* is that the "compelling" interest in protecting minors might in some circumstances justify overriding First Amendment considerations more vital than those at issue in *Ferber*.

from the *Brandenburg-Hess* standard. Reports of the demise of *Dennis* may have been premature.¹¹³

Ferber is therefore important in hinting that interests other than preventing disorder may justify restricting even speech at the core of the First Amendment. But here the Court backed off. For although it has held that speech other than political is entitled to full protection,¹¹⁴ child pornography is not put in this class. Although technically within the First Amendment, it is held to be much closer to the fringe than the core.¹¹⁵ With that determination the Court avoided the question of whether the interest in protecting children might outweigh speech at the core of the First Amendment, and thus the references to "compelling" and "surpassing" interests seem more rhetorical than doctrinal.

D. LESS VALUABLE SPEECH

A final path to nonprotection recognizes that not all speech covered by the First Amendment deserves the same level of protection, some forms being subject to control under standards less stringent than clear and present danger in any form. Recognition of these different levels, especially in the offensive speech¹¹⁶ and commercial speech¹¹⁷ cases, is one of the most important recent developments in First Amendment methodology.

Within the broad approach of identifying speech entitled to some but not full First Amendment protection, two approaches are possi-

¹¹³ *Dennis v. United States*, 341 U.S. 494, 510 (1951). The first inclinations that there were stirrings in the corpse of *Dennis* came from its employment in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976). For a powerful demonstration that the current standard is the *Dennis* formula subject to a clear and present danger threshold, see Van Alstyne, note 109 *supra*.

¹¹⁴ See *Abood v. Detroit Bd. of Educ.* 431 U.S. 209, 231 (1977).

¹¹⁵ 102 S. Ct. at 3357-58.

¹¹⁶ *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). For opposing views of this development, compare Farber, note 79 *supra*, with Stone, note 14 *supra*.

¹¹⁷ *E.g.*, *Central Hudson Gas & Elec. Co. v. Public Service Comm.*, 447 U.S. 557 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). Academic criticisms of the offensive speech developments has tended in the direction of objecting to the use of a lower standard, *e.g.*, Stone, note 14 *supra*, but most objections to the commercial speech cases have been along the lines that commercial speech should have remained outside the First Amendment. *E.g.*, Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Emerson, note 79 *supra*; Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979).

ble. One is to determine *a priori*, without reference to potential justifications for restriction, that speech within a given category is entitled to a particular level of protection. A test is then formulated that applies to any putative restriction within that category. This approach characterizes the recent commercial speech cases, with the four-part standard of *Central Hudson*¹¹⁸ being applied to a wide range of possible restrictions of commercial speech.

Alternatively, a more particular test may be established by reference not only to the value of the speech within the category, but also to a particular justification for regulating that category. It is this approach that is seen in the fighting words cases,¹¹⁹ the offensive speech cases,¹²⁰ and the defamation cases.¹²¹ Thus the Court has never said that all factually false speech is to be measured against the same standard, or that all offensive speech is to be treated alike. Instead it weighs speech value against the strength of a particular state justification, such as that in protecting reputation in the defamation cases and in preventing urban decay in *Young*. It is tempting to follow the accepted wisdom and say that the Court balances the interests involved, but the balancing metaphor seems inapt, because it suggests, as with real scales, that one side simply does or does not outweigh the other. But this does not seem completely accurate in the First Amendment context, for in none of the cases under discussion does one interest win and the other lose. Rather, the Court attempts to accommodate worthy but conflicting interests in a way that both interests survive to some extent. The resulting accommodation rule, when applied in particular cases, will—as in defamation, fighting words, and offensive speech—often produce the result of nonprotection, but here that result flows from a rule that is in turn premised on the determination that some forms of speech are entitled to only partial First Amendment protection.

Once we recognize this distinction between ways of dealing with

¹¹⁸ *Central Hudson Gas & Elec. Co. v. Public Service Comm.*, 447 U.S. 557, 563–66 (1980). The wording of the test is slightly different in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

¹¹⁹ *E.g.*, *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

¹²⁰ See note 116 *supra*. See also *Schad v. Mount Ephraim*, 452 U.S. 61 (1981).

¹²¹ *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

partially protected speech, the path followed by the Court in *Ferber* becomes apparent. As with commercial speech, some offensive speech, and some factually false speech, the Court holds child pornography to be within the First Amendment, but deserving less than maximum First Amendment protection. Unlike the commercial speech cases, however, the Court does not take this as justification for establishing a general rule applicable to any regulation of that category. Rather, it follows the defamation cases, and to some extent the fighting words cases,¹²² in custom tailoring an accommodation rule to a specific state interest.

III. CODIFYING THE FIRST AMENDMENT

Although the *Ferber* methodology thus seems closest to that employed in the defamation and fighting words cases, it takes some effort to isolate this path to nonprotection from the Court's repeated references to cases and standards supporting a number of different doctrinal approaches. In large part this process of extracting bits and pieces from different strands of First Amendment doctrine is explained by *Ferber's* presentation of an issue that was both factually and doctrinally novel. Given this novelty, it is neither surprising nor cause for criticism that the Court felt compelled to rely on many cases and doctrines of only indirect relevance.

The product of this process was the creation of yet another comparatively distinct area of First Amendment doctrine. The rules relating to child pornography now take their place alongside the equally distinct rules relating to obscenity, defamation, advocacy of illegal conduct, invasion of privacy,¹²³ fighting words, symbolic speech,¹²⁴ and offensive speech. Moreover, each of these areas contains its own corpus of subrules, principles, categories, qualifi-

¹²² I refer not only to the recent cases, note 119 *supra*, but also to the "slight value" interpretation of *Chaplinsky*. See note 99 *supra*.

¹²³ Although the Supreme Court has yet to decide a pure invasion of privacy case not involving either aspects of falsity or commercial misappropriation, suggestions of a distinct approach are found in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). Moreover, a rather discrete standard of "newsworthiness" can be discerned in lower court cases. *E.g.*, *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975).

¹²⁴ The extent to which symbolic speech is a separate doctrinal category depends on whether the Court is taken at its word in limiting the *O'Brien* test to cases involving symbolic speech. See note 80 *supra*.

cations, and exceptions. There are also special principles for particular contexts, such as government employment,¹²⁵ the public forum,¹²⁶ and electronic broadcasting,¹²⁷ and in addition we have the pervasive tools of First Amendment analysis, such as chilling effect,¹²⁸ prior restraint,¹²⁹ vagueness,¹³⁰ overbreadth,¹³¹ and the least restrictive alternative.¹³² Finally, there is the additional overlay of numerous broad approaches to a First Amendment issue. When we take all of this together it becomes clear that the First Amendment is becoming increasingly intricate, which has prompted one scholar to observe pejoratively that First Amendment doctrine is beginning to resemble the Internal Revenue Code.¹³³ The metaphor rings true, and maybe we are moving toward codification of the First Amendment. Whether this is cause for concern requires a closer look.

In talking about "codification," neither I nor anyone else is suggesting that the First Amendment itself should be codified. It is just fine as written—brief, elegant, and desirably vague, while still eloquently suggesting great strength and breadth. Nor would we want to organize the surrounding doctrine in a form that could be literally codified in a way that the Internal Revenue Code is. That approach would sacrifice too much flexibility for only a slight increase in precision.

It does not follow from the foregoing, however, that First Amendment doctrine should be as simple and vague as the Amendment itself. The arguments for textual simplicity do not apply with

¹²⁵ *E.g.*, *Pickering v. Board of Education*, 391 U.S. 563 (1968). See also *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977).

¹²⁶ See generally Stone, *Fora Americana: Speech in Public Places*, 1974 SUPREME COURT REVIEW 233; Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUPREME COURT REVIEW 1. The most recent case is *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981).

¹²⁷ *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

¹²⁸ See generally Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U.L. REV. 685 (1978).

¹²⁹ *E.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam); *Near v. Minnesota*, 283 U.S. 697 (1931).

¹³⁰ *E.g.*, *Smith v. Goguen*, 415 U.S. 566 (1974); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968).

¹³¹ See *Ferber*, 102 S. Ct. at 3359–64.

¹³² *E.g.*, *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2622 (1982); *United States v. O'Brien*, 391 U.S. 367 (1968).

¹³³ Conversation with William Van Alstyne.

equal or even any force to doctrinal simplicity. A characteristic feature of American law is drafting simple textual instruments with the expectation that courts will use the open-ended text as the touchstone for creating, in modified common law style, a complex and comprehensive doctrinal structure.¹³⁴ This feature pervades not only constitutional law but American statutory law as well.¹³⁵

That tradition alone suggests that great complexity in First Amendment doctrine is no cause for surprise. Moreover, taking *Schenck* as the starting point,¹³⁶ we have now had sixty-four years' experience with First Amendment problems. As time goes on situations repeat themselves. We are then more able to discern patterns, and these patterns enable us to group recurring features into legal rules and categories. The more we have seen, the less likely we are to be surprised, and open-ended flexibility becomes progressively less important. In the face of this, we must shift the burden and ask whether there is any reason for treating the First Amendment specially in terms of doctrinal simplicity.¹³⁷

The desire for simplicity in First Amendment doctrine is often expressed in terms of a search for "coherence."¹³⁸ The contemporary way to praise a theory (especially your own) is to describe it as "coherent," and coherence, in the sense of everything fitting together without inconsistencies, seems on its face to be a worthy goal.¹³⁹ But coherence need not produce simplicity. An intricate

¹³⁴ Cf. LEVI, AN INTRODUCTION TO LEGAL REASONING (1949).

¹³⁵ Examples of simple and vague statutory language that have generated enormously complex doctrines include Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1976), and the Securities and Exchange Commission's Rule 10b-5, 17 C.F.R. § 240.10b-5(a) (1981).

¹³⁶ *Schenck v. United States*, 249 U.S. 47 (1919). To take *Schenck* as the starting point seems justifiable, but it is an oversimplification. See Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981).

¹³⁷ The desire for simplicity need not be unique to the First Amendment. See *Craig v. Boren*, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) ("There is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases").

¹³⁸ E.g., HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 425 (1981); Emerson, note 79 *supra*, at 474; Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 592 (1982); Stark, *Book Review*, 17 HARV. C.R.-C.L. L. REV. 271, 272 (1982).

¹³⁹ Much of modern legal, political, and moral theory is based on a coherence perspective, in the sense of assuming or arguing that all of our values do, can, or should fit together. E.g., DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RAWLS, *A THEORY OF JUSTICE* (1971); RICHARDS, *A THEORY OF REASONS FOR ACTION* (1971); GEWIRTH, *REASON AND MORALITY* (1978). But maybe our values do not, or can not, fit together. See BERLIN, *CONCEPTS AND CATEGORIES: PHILOSOPHICAL ESSAYS* (Hardy ed. 1979); Williams, *Conflicts of Values*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN* 221 (Ryan ed. 1979).

doctrinal structure might still fit together like a jigsaw puzzle, with each principle fitting neatly into the exceptions in another.¹⁴⁰ But that approach requires enormous foresight to produce such precision in rules designed to govern the future. A coherent but complex doctrinal structure, devoid of gaps or inconsistencies, attempts to follow the model of a pure civil law system.¹⁴¹ Attempting to formulate such a doctrinal system suffers from the same deficiency that has led the pure civil law model to be only a futile dream; no matter how carefully we define our concepts, new situations will arise that just do not fit. First Amendment doctrine serves the normative function of guiding future action, and we cannot incorporate into our standards intended to guide the future every contingency because we just do not know what they will be. Because "we are men, not gods,"¹⁴² we can at best imperfectly predict the future, and the uncertainty of the human condition places insurmountable obstacles in the way of formulating a coherent and complete system of highly specific norms that will cover every situation likely to arise. *Ferber* itself is a perfect example, because the phenomenon of child pornography is so new that it would have been impossible to predict even ten years ago. And there is no reason to believe that ten years from now we will not be presented with First Amendment issues that we have no way of foreseeing today.

But we should not be too quick to dismiss the search for coherence. For coherence is more commonly urged as a simple and unitary principle of the First Amendment,¹⁴³ with more specific rules and doctrines being no more than applications of the one unifying principle. If the First Amendment is taken "really" to mean x , and x is simple, we have a coherent principle by definition. But will any single principle help in deciding cases? One would think, after all, that that is a major purpose of the exercise.

A single principle, defined at a high level of abstraction, certainly assists in terms of flexibility. An abstract single principle will be

¹⁴⁰ Such a view is implicit in, e.g., BARRY, *POLITICAL ARGUMENT* (1965); FRIED, *RIGHT AND WRONG* (1978).

¹⁴¹ See BENTHAM, *OF LAWS IN GENERAL* (Hart ed. 1970).

¹⁴² HART, *THE CONCEPT OF LAW* 125 (1961).

¹⁴³ See note 138 *supra*. See also Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A.L. REV. 964 (1978); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974). The various theories referred to differ in degree of complexity, but they hold in common a commitment to a single strong unifying theme.

able to accommodate almost any foreseeable and unforeseeable change in the nature of First Amendment problems. But that very flexibility is a crippling weakness, for unitary abstract principles can also accommodate any more particularized intuition of the designer or applier of the principle. Use of a single principle to deal with all of our problems produces application that is more likely to be conclusory than principled.

As an example, let us take the single principle of "self-realization," which at the moment is enjoying a good run in the arena of First Amendment theory.¹⁴⁴ Faced with the problem in *First National Bank of Boston v. Bellotti*¹⁴⁵ whether to grant First Amendment protection to corporate speech, one self-realization theorist has argued against the result in that case because self-realization is a right of individuals and does not apply to corporations.¹⁴⁶ But another, starting from the same principle, has reached the opposite conclusion by emphasizing the self-realization goals served by the receipt of information.¹⁴⁷ Similarly, self-realization could produce opposite results in *Gertz*,¹⁴⁸ depending on whether we focused, on the one hand, on the effect on self-realization of being the subject of false statements or, on the other hand, on the self-realization of the defamer in being unfettered in his communicative acts. And self-realization might lead to either of opposing conclusions about *Ferber*, varying with whether we focused on the self-realization of the children or the producers. I have picked self-realization only as an example, for a similar lack of predictive value could be identified in any other single principle of equivalent abstraction.¹⁴⁹

The problem of excess abstraction does not surround every single-principle theory. A sufficiently narrow principle could serve the function of influencing if not completely determining the deci-

¹⁴⁴ *E.g.*, Baker, note 143 *supra*; Redish, note 138 *supra*; Richards, note 143 *supra*. Others take self-realization or a very similar value (*e.g.*, self-fulfillment) as important but not exclusive. *E.g.*, EMERSON, note 106 *supra*, at 6-7; TRIBE, note 16 *supra*, at 578-79.

¹⁴⁵ 435 U.S. 765 (1978).

¹⁴⁶ Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982).

¹⁴⁷ Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982).

¹⁴⁸ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

¹⁴⁹ *E.g.*, "human rights," "liberty," and "autonomy."

sion of actual cases. Meiklejohn's original theory was both narrow and single-principled,¹⁵⁰ a feature shared by other political interpretations of the First Amendment.¹⁵¹ But a precise single principle must be consequently narrow, and the problem then is that much seems to have been left out of the First Amendment.¹⁵²

But why must we assume that the First Amendment has a unitary essence? The First Amendment might instead be the simplifying rubric under which a number of different values are subsumed.¹⁵³ We wish to prevent government from silencing its critics, but we wish as well to prevent an imposed uniformity in literary and artistic taste, to preserve open inquiry in the sciences and other academic fields, and to foster wide-ranging argument on moral, religious, and ethical questions. This list is representative rather than exhaustive, but it shows that the concept of freedom of speech may not have one central core.¹⁵⁴ And each distinct but interrelated foundational principle may generate its own rules of application. Professor Thomas Emerson identifies several justifications for the First Amendment but then argues that a single principle of application can reflect all of those diverse values.¹⁵⁵ But this seems counterintuitive, for if a number of diverse values are served by the First Amendment, it would seem more likely that an equally diverse doctrinal structure would result.

Although doctrinal simplicity is also thought to minimize the opportunity for interpretive error, this is questionable. As the number of available categories increases, so does the frequency of opportunity for putting a case in the wrong category. But with this comes a decrease in the possibility of error within a category. Larger categories minimize the risk of picking the wrong category, but smaller and more numerous categories lessen the chance of judicial flexibility or manipulation within a category.

¹⁵⁰ MEIKLEJOHN, note 1 *supra*.

¹⁵¹ See Bork, note 1 *supra*. Professor BeVier uses strategic considerations for broadening coverage. BeVier, note 1 *supra*.

¹⁵² See TRIBE, note 16 *supra*, at 578–79. Cf. Shiffrin, note 13 *supra*.

¹⁵³ Presumably these different values have some relationship with each other, but that does not mean that there must be one unifying factor or common theme. The relationship may be that of a "family resemblance." See WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65–72 (2d ed. Anscombe trans. 1958).

¹⁵⁴ See SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 14 (1982).

¹⁵⁵ EMERSON, note 106 *supra*; Emerson, note 79 *supra*.

Moreover, a strategy of fewer and larger categories is likely to be less protective of speech. If *Brandenburg* were applicable to utterances within the First Amendment, leaving the courts with a simple "in-or-out, all-or-nothing" choice, recognition of some strong interests, as we inevitably must, would leave large categories of speech totally unprotected by the First Amendment. Defamation, commercial speech, fighting words, and invasion of privacy, for example, would still be on the outside of the First Amendment fighting to get in if the only choice were to give full protection along *Brandenburg* lines.¹⁵⁶

Categorization, in the sense of treating different forms of speech differently,¹⁵⁷ thus is not necessarily speech restrictive. It is inconceivable that we will ignore such well-established governmental concerns as safety, reputation, protection against fraud, and protection of children. If we try to force all cases within the First Amendment into some sort of a clear and present danger mold, we would likely discover that clarity need not be so clear, immediacy not be so immediate, and danger not be so dangerous. Certain state interests are inevitably going to be recognized, and the alternatives then are diluting those tests that are valuable precisely because of their strength, or formulating new tests and categories that leave existing standards strong within their narrower range.

I do not mean that creating any new category is desirable for its own sake. Unsound categories can be created; the "offensiveness" category of *Young* and *Pacifica* is a prime example.¹⁵⁸ But taking the creation of one bad category as a warrant to condemn all creation of new categories is an exaggerated deployment of the already over-used "slippery slope" principle.¹⁵⁹ Some slopes are slipperier than others, and one of the functions of the courts is to place handholds on the slopes for the very purpose of preventing a slide all the way to the bottom.¹⁶⁰ Although it requires a bit of an act of faith, it is

¹⁵⁶ With respect to fighting words, however, the standard that emerges after *Gooding v. Wilson*, 405 U.S. 518 (1972), and its progeny has significant *Brandenburg* overtones.

¹⁵⁷ On the multiple uses of the term "categorization" in First Amendment analysis, see Schauer, note 13 *supra*.

¹⁵⁸ See Gunther, *The Highest Court, the Toughest Issues*, STANFORD MAGAZINE, Fall-Winter 1978, at 34; Shiffrin, note 13 *supra*, at 951.

¹⁵⁹ Overuse of "slippery slope" and "abuse of power" arguments is hardly new, nor is reaction against it. See *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 344-45 (1816).

¹⁶⁰ "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J.).

possible to create new categories within the First Amendment without entirely eating away the principles of free speech. A narrow but strong First Amendment, with its strong principle universally available for all speech covered by the First Amendment, has much to be said for it. First Amendment protection can be like an oil spill, thinning out as it broadens. But excess precautions against this danger might lead to a First Amendment that is so narrow as to thwart its major purposes.

From this perspective it appears likely that the Court chose the proper approach to *Ferber*. Had it focused more on the “compelling” or “surpassing” interest in children and thus decided the case along clear and present danger lines, *Brandenburg* might have been diluted, with unfortunate consequences if that dilution were then available to assess the probability and immediacy of the danger presented by the Communist Party. And if the Court had focused exclusively on the “noncovered” approach and decided the case along *Beauharnais-Roth-Paris* lines, the current notion of virtually complete worthlessness in a First Amendment sense might similarly have been diluted, with dangers to other forms of speech having some but not central First Amendment value.

Ferber reflects the Court’s continuing recognition of the diversity of speech and the diversity of state interests. It is unrealistic to expect that one test, one category, or one analytical approach can reflect this diversity. As the First Amendment is broadened to include the hitherto uncovered, diversity within the First Amendment increases. In addressing different problems separately, the Court is doing nothing more than following the common law model. Contract and tort are distinct because they address different concerns, and changes in the world and the broadening of the First Amendment make it likely that it will encompass problems as diverse as the difference between tort and contract. A unitary approach is likely to be both counterproductive and futile.

It is, of course, possible to go too far. Because no two speech acts or governmental concerns are identical, categorization is in one way artificial.¹⁶¹ This would suggest an *ad hoc* approach to First Amendment adjudication, with unfortunate consequences. Although it is not a necessary truth that *ad hoc* determinations lead to excess deference to legislative determinations of the dangers posed by speech,

¹⁶¹ See Stephan, note 47 *supra*, at 214 n.49.

such a conclusion is empirically sound.¹⁶² Many First Amendment values are counterintuitive,¹⁶³ and many First Amendment litigants are despicable individuals with ridiculous or offensive things to say. Judges are human, and rather large categories still seem the best precaution against First Amendment standards being eroded by the passions of the moment.

Even without case-by-case adjudication, there are dangers in excess complexity. Doctrines can become so complex that they go beyond the interpretive and comprehensive abilities of those who must apply them. We should not become so concerned with doctrinal beauty at the Supreme Court level that we lose sight of the more important role of the Court as provider of guidance for lower courts and legislatures.¹⁶⁴

Doctrinal complexity inevitably requires the courts to evaluate the relative worth of particular categories of speech. Some degree of this is both necessary and desirable, but again we can go too far. I remain to be convinced that there is a clear line of demarcation between viewpoint and subject-matter discrimination,¹⁶⁵ because subject-matter discrimination can, by entrenching the status quo, be viewpoint discrimination in sheep's clothing. Excess categorization can thus indirectly increase the likelihood of viewpoint discrimination, thereby producing some of the very dangers the First Amendment was designed to prevent.

Finally, excess categorization can reduce flexibility. Any rule or doctrine buys flexibility with the currency of predictability, but the converse is equally true.¹⁶⁶ Making First Amendment doctrine more precise makes it easier both to decide cases and to predict the outcome of First Amendment litigation. But that ease of decision reduces our ability to deal with new forms of communication or new state interests. The *Ferber* approach to novelty was to create a new category, but too much precision in existing doctrine will

¹⁶² See Shiffrin, note 13 *supra*, at 961. Compare Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972). See generally Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387 (1979); Henkin, *Infallibility under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

¹⁶³ See EMERSON, note 106 *supra*, at 12.

¹⁶⁴ See Corr, *Retroactivity Revisited: A Case Study in Supreme Court Doctrine "As Applied,"* 61 N.C.L. REV. — (1983).

¹⁶⁵ See Stone, note 14 *supra*.

¹⁶⁶ See generally HART, note 142 *supra*.

make such a course difficult. In that case the response to novelty may be a dilution of existing standards unless there is sufficient flexibility. If the fringe is not loose, we may discover too late that the core has been jeopardized.

The increasing complexity of First Amendment doctrine, as most recently demonstrated by *Ferber's* creation of another distinct doctrinal category, is in itself not a cause for criticism, but rather the inevitable by-product of broadening the First Amendment. It is also the expected offspring of the increased sophistication that comes from our increasing familiarity with settled factual patterns in the First Amendment. But it is possible to become so sophisticated that we lose sight of first principles. *Ferber* is an especially noteworthy step on the route to complexity. That is no cause for alarm, but it is time to look a bit further down the road.

