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Categories and the First Amendment: A Play in Three Acts

Frederick Schauer*

I. PROLOGUE: THE CONCEPT OF CATEGORY

Categories are the tools of systematic thinking.¹ They enable us to organize our ideas, to draw analogies, and to make distinctions. In this respect categories are important in law because they are important in life. Categories, however, have a special prominence in legal reasoning, to a great extent because effective reasoning by example requires the creation and use of categories through which the lessons of the past can be channelled into service as precedent for the problems of the future. Legal rules not only prescribe results, but they also create (or recognize) the categories of conduct to which the rules apply. Without categories there could be no rules.²

All of this no doubt appears trivially true. Yet it is necessary to state the obvious, for failure to recognize the importance of categories, or failure to appreciate the importance of categorization, can and has led to the kind of platitudinous overgeneralization that is inconsistent with tight legal reasoning. Nowhere is this more apparent than in first amendment adjudication, in which the term "categorization" has unfortunately been used to refer to a specific technique of first amendment analysis, a technique most often presented as an alternative to "balancing."³ Casting first

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1. The philosophical orientation of some of this Article cautions me to point out here that throughout this Article I am using the word "category" in its ordinary and not its technical philosophical sense. I am not suggesting that the categories of which I speak are in some metaphysical way ultimate or fundamental.

2. Cf. Frantz, *Is The First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 750 (1963) (absoluteness in scope would render concept of a rule meaningless). Those familiar with the nomenclature of rules will note that the *protasis* of a rule, a necessary part of any rule, is that part that describes the category of facts to which the rule applies. See G. GOTTLIEB, *THE LOGIC OF CHOICE* 36, 43 (1968); W. TWINING & D. MIERS, *HOW TO DO THINGS WITH RULES* 51-55 (1976).

3. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 583-84, 602-05 (1978); Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amend-*

amendment theory as a choice between these alternatives, however, masks the full importance of categories in the structure of first amendment doctrine. This problem is not alleviated by showing, as Professor Ely has done,⁴ that categorization and balancing can be consistent and complementary, for even this approach focuses on but one aspect of the way in which categories are relevant to free speech problems.

I would thus like to cast aside any preconceptions about categorization as a first amendment technique and look instead at the way in which thinking about categories in general can help us to think clearly about a number of hard problems in first amendment methodology. One pervasive difficulty is that the term "categorization" is in this context ambiguous, since at least three distinct aspects of first amendment theory can be and have been referred to as "categorization." These three aspects of categorization, although separate, are related in an important and logical way. They are like three acts of the same play, and they provide the foundation for the tripartite structure of this Article.

It is in no way my intention to build a new theory of the first amendment. We have too many of those already.⁵ I want only to look at the first amendment through a different window. From that

ment Analysis, 88 HARV. L. REV. 1482 (1975); Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 746-47 (1980); Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 31 n.55 (1975).

4. Ely, *supra* note 3, at 1501. See also J. ELY, *DEMOCRACY AND DISTRUST* 111 (1980).

5. See, e.g., every third article or student note in every other issue of any law review selected at random. Frivolity aside, however, there have been major advances in first amendment theory in recent years, and we no longer preoccupy ourselves with debating the merits of "absolutism" and "balancing," at least not in the same naive way we did in the 1950s and 1960s. Although the structure of the first amendment is in large part dependent on its substantive underpinnings, it is still useful to note that some modern theorizing has concerned itself largely with the structure of first amendment doctrine. See, e.g., L. TRIBE, *supra* note 3, at 576-605; Ely, *supra* note 3; Farber, *supra* note 3; Fuchs, *Further Steps Toward a General Theory of the First Amendment*, 18 WM. & MARY L. REV. 347 (1976); Greenawalt, *Speech and Crime*, 1980 AM. B. FOUNDATION RESEARCH J. 645; Karst, *supra* note 3; Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 U.C.L.A. L. REV. 915 (1978). Other theorizing has been concerned with the equally important task of ascertaining the substantive underpinnings of the concept of free speech, without which it is impossible to develop a first amendment structure. See, e.g., Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. REV. 964 (1978); 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. FOUNDATION RESEARCH J. 521; Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974); Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204 (1972).

window we may see things we have not seen before, or at least see more clearly that which we have heretofore only dimly perceived. If others wish then to look through this same window in order to erect new theories of the first amendment, structural or substantive,⁶ I cannot stop them, but theory-building is beyond my present aims.

II. ACT ONE: THE QUESTION OF COVERAGE

Not every case is a first amendment case. This is hardly a controversial observation, but it reveals that the first amendment is itself a category, or, more accurately, that it covers a category of behavior. The boundaries of this category are frequently contested, and they are unclear even when there is general agreement as to broad principles. Yet the first amendment constrains only *some* governmental ends, and only *some* governmental means. It is not a universal prohibition on governmental action, and if it is to mean anything at all some boundary must circumscribe its coverage, however fuzzy that boundary may be.⁷ Thus, only a certain category of behavior is covered by the first amendment. It can therefore be helpful to look at the question of first amendment coverage as a category question: What marks off the category covered by the first amendment from those other categories of conduct that do not implicate free speech analysis?

Fortunately, the text of the first amendment gives some guidance in locating the boundaries of the category, but the guidance is relatively indeterminate. It would be more accurate to say that the text circumscribes the range of judicial choice rather than that it mandates any particular decision.⁸ The text gives few answers to many difficult questions, in part because of the complexity of the concept of free speech, in part because the language employed is both vague and ambiguous,⁹ and in part because of the diversity

6. See note 5 *supra*.

7. Frantz, *supra* note 2, at 750. See also Bork, *supra* note 5, at 21; Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 902-19 (1979).

8. See Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 637, 656 (1961). See also Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

9. Anyone who thinks that the language of the first amendment is precise, unambiguous, or self-defining has not examined it closely. It is undeniably strong, but it is far from clear. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 88 (1962); J. ELY, *supra* note 4, at 105; Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CALIF. L. REV. 821 (1962); Note, *The Speech and Press Clause of the First Amendment as Ordi-*

and continuing novelty of free speech problems.

The first amendment says that "Congress shall make no law . . . abridging the freedom of speech. . . ." ¹⁰ The substantive content marked off by this language is different from that which would be marked off by a first amendment that substituted, for the word "speech," the words "action," "travel," "property," or "contract." ¹¹ In this respect we can begin by saying that, in an important way, it is the category of "speech" that is set off by the first amendment for special protection. From this perspective it can be hypothesized that the act of categorization is the act of defining the word "speech." If the conduct at issue falls within that category, then the second question is whether a given action by a state or by the federal government did or did not abridge the freedom to engage in the conduct demarcated by the category of "speech." This second question is of course complex and difficult, but it logically follows the first question of categorization, the question of whether the conduct at issue constitutes "speech."

Delineating the category of "speech," determining what counts as "speech" for first amendment purposes, is implicit in every first amendment case. The question only comes to the surface, however, when the accepted or proposed category of "speech" diverges from the meaning of the word "speech" in ordinary language. ¹² Current obscenity doctrine is undoubtedly the most prominent example, ¹³ but we have in the past seen a similar approach in those decisions holding neither libel, ¹⁴ fighting words, ¹⁵ nor commercial advertising ¹⁶ to be speech in the constitutional sense. It is not correct, however, to assume that the Supreme Court's rejection of the "non-speech" treatment for libel, ¹⁷ commercial advertising, ¹⁸ and (most

nary Language, 87 HARV. L. REV. 374 (1973).

10. U.S. CONST. amend. I. I am intentionally excluding reference to or discussion of the Press Clause, although much of what is said here is applicable, *mutatis mutandis*, to the Press Clause as well.

11. See BeVier, *supra* note 5, at 321; Schauer, *supra* note 7, at 902-03.

12. Schauer, *supra* note 7, at 905-10.

13. 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). See generally F. SCHAUER, THE LAW OF OBSCENITY 30-48 (1976).

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

15. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

16. Valentine v. Chrestensen, 316 U.S. 52 (1942).

17. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). *Beauharnais* has never been specifically overruled, as Justices Blackmun, Rehnquist, and White have noted. Smith v. Collin, 439 U.S. 916 (1978) (Blackman, J., dissenting from denial of certiorari); Smith v. Collin, 436 U.S. 953 (1978) (Blackmun, J., dissenting from denial of application for stay). The holding, however, does seem to perish in, *e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969)

probably) fighting words¹⁹ leaves obscenity all alone as the only conduct that would or might be speech in ordinary language but that is not speech in the eyes of the Constitution. It is just that most of the other examples are rarely if ever litigated. If the president of manufacturer *A* suggests to the president of manufacturer *B* that they should both charge their customers *X* dollars per widget, *A*'s first amendment defense to a prosecution under the Sherman Act is nonexistent, despite the fact that everything that *A* has done would be considered speech in ordinary language.

Examples like this highlight an important fork in the road in free speech theory. Is the category of speech to be congruent with the denotation of the ordinary meaning of the word "speech," or is the word "speech" in the first amendment to be defined as a piece of technical language, whose definition is derived from the underlying theory of the first amendment? This choice between the ordinary language approach and the technical language approach is in turn contingent upon a more pervasive question of constitutional theory: Is constitutional language in general a form of technical language, to be interpreted in its unique context and with reference to its particular purposes, or is it ordinary language, to be interpreted by applying the ordinary language, or "dictionary," definitions of the terms it contains? It seems clear that only the former approach is defensible,²⁰ but I do not wish to argue the point here. Rather, I want to explore the implications of the latter approach in the particular context of the first amendment, proceeding by the method of *reductio ad absurdum*; that is, what happens if we try to interpret the word "speech" in the first amend-

(per curiam), and the methodology also is belied in every defamation case from *New York Times* to the present. Some, however, have refused to attend the funeral. See, e.g., Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281; Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

18. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

19. Although the *Chaplinsky* fighting words doctrine has never been explicitly repudiated, the standard that emerges after *Gooding v. Wilson*, 405 U.S. 518 (1972), and its progeny indicates that the Court now employs a variant of the context-dependent "clear and present danger" test to determine the constitutionality of fighting words prosecutions. See Karst, *supra* note 3, at 31; Shiffrin, *supra* note 5, at 944 n.191.

20. On legal language in general as a technical, context-dependent language, see e.g., G. GOTTLIEB, *supra* note 2, at 48; J. STONE, *THE PROVINCE AND FUNCTION OF LAW* 197-98 (1947); Chafee, *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 395 (1941); Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37 (1954); Stone, *Ratiocination Not Rationalisation*, 74 MIND 463 (1965). It may be that constitutional language ought to be interpreted more as ordinary language than is other legal language, but it will take some showing to convince me of that.

ment as meaning what it means in ordinary language—what it means to the “man in the street”?²¹

If we do define “speech” by reference to Webster’s dictionary, then many distinctly discordant cases would be considered first amendment cases, a circumstance occasioned by the pervasiveness of language (speech) in almost every facet of human activity. The antitrust example just mentioned is merely the tip of the iceberg. Not only do we fix prices with speech, but we also make contracts with speech, commit perjury with speech, discriminate with speech, extort with speech, threaten with speech, and place bets with speech.²² Is it possible to say that all of these cases and many more are covered by the first amendment?

If we do say that all of these cases are *covered* by the first amendment, we then must have a way of holding that these activities are not *protected* by the first amendment²³ unless of course we want to say that the first amendment makes, for example, all of contract law, most of antitrust law, and much of criminal law unconstitutional. This distinction can be made without doing undue violence to the text by saying that the first amendment is not even in its language absolute—in other words, that *the freedom of*²⁴ speech does not encompass freedom to fix prices, breach contracts, make false warranties, place bets with bookies, threaten, extort,

21. This approach is an expansion of the premise from which I have argued for the plausibility of the Court’s “nonspeech” approach to obscenity. Schauer, *supra* note 7, at 902-19. See also Schauer, *Response: Pornography and the First Amendment*, 40 U. PRR. L. REV. 605 (1979).

22. People have made first amendment claims in cases like these, but with predictably little success. See, e.g., *United States v. Moss*, 604 F.2d 569, 571 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980) (aiding and abetting tax evasion); *United States v. Frederickson*, 601 F.2d 1358, 1363 (8th Cir. 1979), *cert. denied*, 444 U.S. 934 (1980) (threatening President; application of *Watts v. United States*, 394 U.S. 705 (1969)); *United States v. Lincoln*, 589 F.2d 379, 382 (8th Cir. 1979) (threatening letter); *United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978) (harassing telephone call).

23. On the distinction between coverage and protection, see R. DWORIN, *TAKING RIGHTS SERIOUSLY* 260-61 (1977) (“force” and “range”); J. FEINBERG, *SOCIAL PHILOSOPHY* 80 (1971) (“scope” and “incumbency”); BeVier, *supra* note 5, at 301 (“ambit” and “level”); Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, 1967 SUP. CT. REV. 267, 278 (“ambit” and “level”); Schauer, “Private” Speech and the “Private” Forum: *Givhan v. Western Line School District*, 1979 SUP. CT. REV. 217, 227-29; Shiffrin, *supra* note 5, at 916 n.17 (“scope” and “level”). See also text accompanying notes 48-67 *infra*.

24. Taking “the freedom of speech” as the appropriate unit of coverage has traditionally been the opening move of the “definers.” See, e.g., A. MEKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 19 (1948); Bork, *supra* note 5, at 21; Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 948 (1968).

and so on. But why doesn't it? It is not because these activities necessarily constitute something that looks like a clear and present danger or because the laws against such activity represent a compelling governmental interest. Verbal gambling, for example, is commonly thought to be unpleasant and undesirable (at least by legislatures), but it is bizarre to say that verbal betting presents a clear and present danger or a compelling interest in a way that racial epithets, advocacy of violent revolution, and disclosure of confidential government documents do not. If no first amendment and principle of free speech existed, would we say that a telephone bookie operation constitutes a greater danger of harm than the march of the American Nazi Party in Skokie?²⁵ I doubt it very much.

The upshot of this is that a literalist (dictionary, or ordinary language) approach presents yet another choice. We must either water down the test for protection, leaving in doubt the extent of constitutional protection for Collin,²⁶ Brandenburg,²⁷ and for that matter Debs,²⁸ or conclude that certain categories of speech are to

25. *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). See generally Goldberger, *Skokie: The First Amendment Under Attack by Its Friends*, 29 MERCER L. REV. 761 (1978). I am not, of course, suggesting that this means anything other than that it is impossible to understand the principles of free speech unless we recognize that free speech principles protect certain acts despite the harm they may or do cause. See Schauer, *supra* note 21.

26. See note 25 *supra*. Collin and the National Socialist Party of America announced plans to march in front of Village Hall in Skokie, Illinois, a Chicago suburb with a large Jewish population. In response, the Village enacted ordinances designed to prohibit the demonstration. The Seventh Circuit held that an ordinance prohibiting dissemination of materials that would promote hatred toward persons on the basis of their heritage was unconstitutional and that a permit for the proposed march could not be denied on the basis of anticipated violations of the ordinance.

27. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam). Brandenburg, leader of a Ku Klux Klan group, was convicted of violating the Ohio Criminal Syndicalism statute after giving a speech in which he suggested the possibility that the Klan would take some "revengeance" in order to accomplish its supremacist goals. In overturning the conviction, the Supreme Court held the statute unconstitutional because it punished "mere advocacy" and forbade "assembly with others merely to advocate the described type of action." *Id.* at 449. The Court stated that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.* at 447.

28. *Debs v. United States*, 249 U.S. 211 (1919). Debs, a leader of the Socialist Party, was convicted under the Espionage Act, based on an antiwar speech he had delivered. The Supreme Court affirmed, holding that the jury was warranted in finding that the speech went beyond the permissible bounds of the first amendment, having as its "natural and intended effect" the obstruction of recruiting for the armed forces. *Id.* at 215.

be tested under drastically different standards of protection. I would assume that this drastically different standard would be, for cases like antitrust law or contract law, identical to the minimal due process standard²⁹ now used to evaluate the constitutionality of such legislation.³⁰ This conclusion is unavoidable, unless we wish to say that contract law needs greater justification than nonverbal tort law solely because contracts use words and automobile accidents do not, a position quite difficult to defend.

At this point in the argument the literalist brings out his mirrors. Certain verbal conduct such as extortion, the literalist will say, is covered by the first amendment because it is "speech" in the ordinary language sense; we will subject its constitutionality (protection) to lowest-level scrutiny, however, because it does not look like the kind of thing the first amendment is supposed to protect. Why, then, hold that it was covered in the first place? The easy answer is that we do not want judges "redefining" the words in the constitutional text. The next question is, of course, why, if judges should not redefine the terms in the text of the constitution, those same judges should determine that certain classes of admittedly covered speech are subject to lowest-level scrutiny. I do not have an answer for that, and I doubt that the literalist does either. The literalist is forced by examples such as contract law to say that the heavier burden of justification implicit in the first amendment is reserved for a subcategory of verbal acts—which is exactly the same as saying that the word "speech" in the first amendment does not include all verbal acts.

The literalist is presented with a parallel problem in reference to those acts that are not speech in the ordinary language sense but are speech in the constitutional sense—armband wearing,³¹ communicative clothing,³² oil painting, political contribu-

29. See L. TRIBE, *supra* note 3, at 577 n.8.

30. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). In reference to *Ferguson*, it is useful to reinforce the point made in the text by noting that it is very hard to adjust a debt without speaking. In fact, it is also quite difficult, albeit not impossible, to fit a pair of eyeglasses without using words. Maybe *Lee Optical* should have claimed first amendment protection for the printed eye chart.

31. E.g., *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). It would be interesting to explore the extent to which constitutional adjudication influences the development of ordinary language; that is, are people more likely to think of armbands as "speech" in ordinary talk now that they are speech for constitutional purposes. The same might be hypothesized about flags after, for example, *Spence v. Washington*, 418 U.S. 405 (1974). Ordinary language changes for innumerable reasons, and there is no reason to suppose that public knowledge of constitutional doctrine is not among them.

32. *Schacht v. United States*, 398 U.S. 58 (1970).

tions,³³ photography, and so on. If these activities count as speech because they share relevant similarities with speech, then some *attributes* of speech must serve to trigger the guarantees of the first amendment. If that is so, then some verbal acts may not share these attributes, and thus are not "speech" in the constitutional sense. What emerges from all of this is the conclusion that the constitutional definition of the word "speech" carves out a category that is not coextensive with the ordinary language meaning of the word "speech."³⁴ When we define the word "speech," we are categorizing. This occurs regardless of the source of the definition, and in this sense categorization is implicit in *any* approach to the theory or structure of the first amendment.

In considering the boundaries of the category covered by the first amendment, I have been looking somewhat unnaturally at the single word "speech." It is perhaps more sensible to look not at the word but at the phrase, asking whether a given act was included within "the freedom of speech."³⁵ If that act were included, then it would be within the prohibition on abridgement, leaving for the second level of inquiry the question of what is an abridgement. Under this approach not every act of speech would be covered by the first amendment's prohibition on abridgement; only those acts that come within "the freedom of speech" would be covered. Here we substitute for the question, "What is speech?" the question, "What is 'the freedom of speech?'".

In one respect this alternative technique produces no change, for "the freedom of speech" is not the same as "the freedom of action" or "the freedom of contract." This second approach collapses into the first, for the initial question must still be, "What is 'speech?'". It is this category question that comes first in any first amendment case, regardless of what happens with speech once it is found. We must always first ask, "Is this speech?", regardless of whether we are going to determine thereafter if it is the *type* of speech that we deem to be free, protect absolutely, protect only strongly, or subject to a "balancing of the interests."

In another respect, however, the question of whether to look at the word "speech" in isolation as opposed to looking at the entire

33. *Buckley v. Valeo*, 424 U.S. 1 (1976). See Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976).

34. "A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

35. See note 24 *supra*.

phrase, "the freedom of speech," does produce an important distinction. In setting the boundaries of the category of conduct encompassed by the first amendment, those approaches commonly referred to as "definitional" combine close attention to defining the boundaries of the category with a desire to grant absolute protection within those boundaries.³⁶ The theories of Meiklejohn,³⁷ Frantz,³⁸ Emerson,³⁹ and Nimmer,⁴⁰ for example, all define "the freedom of speech" in their own purpose-oriented way (with which there is nothing wrong⁴¹) and then argue that conduct falling within the contours of the category is absolutely protected.

These "definitional-absolutist" theories treat all nonprotected speech identically. They treat especially harmful political speech ("Go burn down the draft board—NOW!!," uttered in front of an angry mob of torchbearing antidraft protestors fifty yards from the draft board) the same way as extortion, contract law, and advice or encouragement in the commission of a nonpolitical bank robbery. If we look at the reasons for the exclusion of these utterances from first amendment protection, however, we see that especially harmful political speech is excluded because of the extent and the immediacy of the danger; discussing the wisdom of burning down draft boards at a peaceful teach-in is protected.⁴² Yet contract law, antitrust law, and the like are excluded for reasons having little if anything to do with the extent or the imminence of the danger. They are excluded, and properly so, because they have nothing to do with what the concept of free speech is all about.

36. See, e.g., T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); J. FEINBERG, *supra* note 23, at 79-83; A. MEIKLEJOHN, *supra* note 24; EMERSON, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422 (1980); EMERSON, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); FRANTZ, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); NIMMER, *supra* note 24; KAUPER, Book Review, 58 MICH. L. REV. 619, 626 (1960).

37. See A. MEIKLEJOHN, *supra* note 24.

38. See Frantz, *supra* note 36.

39. See works of T. Emerson cited in note 36 *supra*.

40. See Nimmer, *supra* note 24.

41. Attempting to define words in the law without reference to context or purpose is what is known as formalism or conceptualism. See H.L.A. HART, *THE CONCEPT OF LAW* 126 (1961); J. STONE, *supra* note 20, at 149-58. The pull toward objectivity is perhaps especially strong in law, which people often expect to have a high degree of certainty and predictability. This pull is often evidenced by the use of determinate meanings from nonlegal contexts, such as ordinary language. See Hart, *Problems of Philosophy of Law*, in 6 *THE ENCYCLOPEDIA OF PHILOSOPHY* 264, 270 (P. Edwards ed. 1967).

42. This much at the very least is implicit in the advocacy/incitement distinction. See *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Yates v. United States*, 354 U.S. 298 (1957).

In thus trying to preserve an enclave of absoluteness, the definers must then construct a theory that treats irrelevant (to the first amendment) speech like verbal betting in the same way as relevant but unprotected speech like incitement to burn down draft boards. Reductionism, the urge to reduce complex phenomena to overly simple formulae, has been a pitfall throughout legal theory,⁴³ and no less so in relation to the first amendment. The efforts to create one formula that will generate an area of absolute protection have been heroic, but they have failed in one of two ways. Either they have, like Professor Emerson's distinction between expression and action,⁴⁴ simplified things to such an extent that the resultant formula has little if any analytical or predictive value,⁴⁵ or they have, like the Meiklejohn interpretation, achieved consistency and workability at the expense of excluding from coverage much that a full theory of freedom of speech ought to include.⁴⁶

The development of definitional-absolutist theories was encouraged largely by the desire to narrow the area of judicial discretion.⁴⁷ In searching for absolutism, however, theories of this type have collapsed the important distinction between coverage and

43. See Hart, *Dias and Hughes on Jurisprudence*, 4 J. SOC'Y PUB. TEACHERS OF L. (N.S.) 143, 145 (1958) (it is a mistake to impose a "spurious unity" on the diversity of facts).

44. See T. EMERSON, *supra* note 36; Emerson, *supra* note 36, 68 CALIF. L. REV. 422; Emerson, *supra* note 36, 72 YALE L.J. 877.

45. See L. TRIBE, *supra* note 3, at 579, 598-601; Ely, *supra* note 3, at 1495; Yacavone, *Emerson's Distinction*, 6 CONN. L. REV. 49 (1973).

46. "[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (footnote omitted). See also *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("religious, political, and ideological causes"); *Miller v. California*, 413 U.S. 15, 24 (1973) ("serious literary, artistic, political, or scientific value").

Of course the received wisdom may be wrong. Perhaps (although I doubt it) the only rationally justifiable theory of free speech is a political one, in which case the simplicity of the underlying justification could be reflected in a proportionately simple doctrinal structure. It is noteworthy, however, that Meiklejohn, in *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263, expanded his category to include far more than the political, on the theory that art, literature, and the like were all "relevant" to public decision making. Kalven called the expansion a "dialectic progression." Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221. Professor BeVier has avoided the limitations her theory would support by using "pragmatic concerns and institutional limitations" to allow protection of more than the political. BeVier, *supra* note 5, at 322. Alas, the enemy has surrounded the fort, and Professor Bork is the only one left at his post. Bork, *supra* note 5.

47. Professor Emerson, for example, stresses the "importance of devising clear rules of law that will, so far as possible, limit the discretion of lower courts and prosecutors. . . ." Emerson, *supra* note 36, 68 CALIF. L. REV. at 429.

protection.⁴⁸ This distinction is important in separating the question of the category of action to which the right (any right) applies from the question of whether the right should prevail in cases of conflict with other interests, or for that matter other rights. No right can be unlimited in coverage, but it is at least plausible to imagine a right that is unlimited in protection (absolute) within the scope of coverage. As a matter more of political and sociological fact than of necessary logical correlation, rights can more plausibly be absolute when the range of coverage is narrow.⁴⁹ Conversely, rights whose coverage is too broad are likely to offer little in the way of protection. One danger of definitional-absolutist theories, then, is that the criteria of absolutism exerts an inward pull on the boundaries of coverage.⁵⁰ When a problematic case arises, it is tempting to pull in the boundaries so that the case is now totally outside the perimeter of the right, thereby eliminating the problem. The danger, however, is that the boundaries may eventually become far narrower than the underlying theory, resulting in a constriction of the right no less than if the protection within the boundaries of coverage had been defeasible within that range.⁵¹

It is always easier to ask one question than two, and this in part explains the recurrent appeal of definitional-absolutist theories. The effectiveness of such a scheme, however, depends on whether that one question can be answered. In this context, then, the question is "What is the definition of the category of conduct to which we can grant absolute protection under the first amendment?" To answer this question we must in turn develop an underlying theory of the principle of freedom of speech, and, if the protection is to be absolute, build into that theory all of the conceivable exceptions to the principle.⁵² This seems an impossible task.

Defining an area of absolute protection is likely to be impossible for two main reasons. First, it is unlikely that any *one* theory

48. See note 23 *supra* and accompanying text. The distinction is implicit in a theory that takes constitutional rights to be "presumptive." See, e.g., Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 627 (1980).

49. See R. DWORKIN, *supra* note 23, at 261; Emerson, *supra* note 36, 68 CALIF. L. REV. at 431.

50. See L. TRIBE, *supra* note 3, at 579, suggesting that the constricted territory is in addition likely in practice to be little stronger.

51. See Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 79-80.

52. My argument here has been aided by discussions with Alan Fuchs, who still disagrees.

can explain the concept of free speech, and no reason necessarily exists to suppose that it could. Freedom of speech need not have any one "essential" feature. It is much more likely a bundle of interrelated principles sharing no common set of necessary and sufficient defining characteristics.⁵³ It is quite possible that the protection of political discussion and criticism, the aversion to censorship of art, and the desire to retain open inquiry in science and other academic disciplines, for example, are principles not reducible to any one common core. Any attempt to do so is likely to be both banal and to distort all of the principles involved. The standard jurisprudential and linguistic metaphor of the core and the fringe⁵⁴ is useful in its place, but it is harmful if it leads us to search for only one core when there may in fact be several, or many.⁵⁵

The second difficulty in attempting to build all of the exceptions and qualifications into our definition of a right absolute in strength is that we simply do not know what all the exceptions and qualifications might be. Lacking omniscience, we can at best imperfectly predict the future. Rights whose shape incorporates all exceptions and qualifications would be extremely rough tools for dealing with the uncertainties of the future.⁵⁶ Instead, we wisely achieve finer tools for future use by combining a relatively vague definition of the coverage of the right (for example, all speech of public importance or all discussion) with a relatively vague specification of the weight of the right (for example, that it prevails in all cases in which the justification for the restriction is not a clear and present danger of great magnitude). It may seem odd that we use vagueness to give us *finer* tools for dealing with the future, but this should not be surprising.⁵⁷ Precision, not vagueness, forecloses al-

53. It seems quite likely that the underlying theoretical components of freedom of speech are joined together in a family-resemblance relationship. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65-78 (3d ed. G.E.M. Anscombe trans. 1967). See also W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 26-27 (1902). If this is correct, then the search for an "essence" of free speech is destined to be an exercise in futility. "One form of the craving for unity, then, is a craving for essences, and it is so strong that we tend to assume that everything actually has an essence. . . ." G. FITCHER, *THE PHILOSOPHY OF WITTGENSTEIN* 217 (1964). See also R. ROBINSON, *DEFINITION* 153-56 (1950).

54. Hart, *Scandinavian Realism*, 17 *CAMBRIDGE L.J.* 233, 239 (1959); Williams, *Language and the Law—II*, 61 *LAW Q. REV.* 179 (1945).

55. Type-governed classes, which do contain a core and fringe, are distinguished from indeterminate classes, which do not, in Chandler, *Three Kinds of Classes*, 3 *AM. PHIL. Q.* 77 (1966). Free speech is most likely the latter, but in any event it certainly has not yet been proved to be the former.

56. See Schauer, *Can Rights Be Abused?*, 31 *PHIL. Q.* — (1981). See also H.L.A. HART, *supra* note 41, at 125-26; Hart, *supra* note 41, at 270.

57. "In many areas our situation is such that we cannot make maximally precise state-

ternatives. "[A] painter with a limited palette can achieve more precise representations by thinning and combining his colors than a mosaic worker can achieve with his limited variety of tiles, and the skillful superimposing of vaguenesses has similar advantages over the fitting together of precise technical terms."⁵⁸ If we could specify in advance what will happen in the future and how we wish to deal with those circumstances, we would have no need for the distinction between coverage and protection.⁵⁹ We cannot hope to specify everything in advance, however, and so we properly distinguish between coverage and protection in order to maintain necessary flexibility. Any doubts on this score ought to have been settled by the decision in *United States v. The Progressive, Inc.*,⁶⁰ a perfect example of a case whose existence could not possibly have been foreseen in the not-too-distant past.⁶¹

The theoretical and practical difficulties of a definitional-absolute approach should not blind us to the importance of the coverage question even when the strength of the protection is less than absolute. If we look, for example, at that theory of the first amendment that focuses on the purposes of the governmental action—we might call this the *O'Brien*⁶²-Scanlon⁶³-Ely⁶⁴-Tribe⁶⁵ theory—we

ments without going far beyond the evidence." Alston, *Vagueness*, in 8 THE ENCYCLOPEDIA OF PHILOSOPHY 218, 219 (P. Edwards ed. 1967). "[T]he more precise our descriptive vocabulary, the more difficult it seems to become to make the discriminations demanded for its application." I. SCHEFFLER, BEYOND THE LETTER: A PHILOSOPHICAL INQUIRY INTO AMBIGUITY, VAGUENESS AND METAPHOR IN LANGUAGE 42 (1979). See also A.N. WHITEHEAD, ADVENTURES OF IDEAS 91 (1933) ("Insistence on clarity at all costs is based on sheer superstition as to the mode in which human intelligence functions.").

58. W.V.O. QUINE, WORD AND OBJECT 127 (1960). See also Christie, *Vagueness and Legal Language*, 48 MINN. L. REV. 885, 895-98 (1964).

59. See Martin & Nickel, *Recent Work on the Concept of Rights*, 17 AM. PHIL. Q. 165, 173-74 (1980).

60. 467 F. Supp. 990 (W.D. Wis.), *mandamus denied sub. nom.* Morland v. Sprecher, 443 U.S. 709, *dismissed*, 610 F.2d 819 (7th Cir. 1979) (preliminary injunction issued to enjoin publishers of the *Progressive* from publishing an article describing the method of manufacturing and assembling a hydrogen bomb).

61. Professor Scanlon's example of home-made nerve gas, however, was a demonstration of quite remarkable foresight. Scanlon, *supra* note 5, at 211.

62. *United States v. O'Brien*, 391 U.S. 367 (1968). The Court upheld the conviction under 50 U.S.C. app. § 462(b) (1965), which prohibits the knowing destruction of a selective service registration certificate, of defendant who burned his certificate in a public demonstration. The Court acknowledged an "incidental restriction" on first amendment freedoms but held that such a law is constitutional "if it furthers an important or substantial government interest," which in this instance was the assurance of a smoothly administered system for the raising of armed forces; "if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

63. Scanlon, *supra* note 5.

find the full strength of the first amendment's prescriptions reserved for those governmental actions that are "aimed at communicative impact."⁶⁶ Although this theory quite properly looks at the totality of the governmental action rather than at some isolated description of the objects of that action, the theory still requires a description of the category of coverage. Laws against price fixing, extortion, perjury, and solicitation to garden-variety, nonpolitical crimes are all "aimed at communicative impact," yet these too are laws intuitively and correctly held to be outside the coverage of the first amendment. This is not to say that the theory based on governmental action "aimed at communicative impact" is incorrect. On the contrary, that theory is a great contribution to understanding the structure of the first amendment and to providing guidance for judicial resolution of a wide variety of hitherto troublesome cases.⁶⁷ The theory is incomplete, however, unless it provides some guidance, derived again from the deep theory of the principle of free speech, in determining what species of communicative impact are covered and what species of communicative impact are not. In this respect we once again must answer the question that started all of this: What is "speech" in the constitutional sense?

At this point it is necessary to note two different ways of dealing with this question. In defining the category of coverage of the first amendment, we have a choice between "defining in" and "defining out." Under a "defining in" method, a definition of the cov-

64. Ely, *supra* note 3.

65. L. TRIBE, *supra* note 3, at 580-88. See also Frantz, *supra* note 36, at 1440; Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 U.C.L.A. L. Rev. 29, 44-46 (1973).

66. L. TRIBE, *supra* note 3, at 580. For criticism of the theory, see Farber, *supra* note 3, at 744-45 nn.93-94; Emerson, *supra* note 36, 68 CALIF. L. REV. at 472-74.

67. The theory's main virtue seems to be the way it enables us to avoid the hopeless search for a predominant feature, either speech or conduct, in the wide range of cases when communicative intent is coupled with conduct other than talking or writing. Much remains to be worked out, however, as can be seen in the quite different standards applied by Professors Tribe and Ely within the categories, or "tracks." Professor Ely, for example, would require "a clear and present danger of a serious evil" even in cases where the governmental action is *not* message-directed. J. ELY, *supra* note 4, at 116. Surely, however, this is unworkably stringent. What about, for example, the politically motivated litterer, who perhaps intentionally litters—maybe with apple cores or banana peels inscribed with the words, "Littering is Neat"—to advocate changes in the littering laws? If this activity cannot be prosecuted, something is seriously wrong, for all law violators could claim communicative intention. Surely this case by itself is not a "clear and present danger of a serious evil," at least as we have traditionally understood that standard. Of course, since Professor Ely would not employ a clear and present danger standard for the message-directed actions, he may not object to the dilution of the concept of clear and present danger.

erage of the first amendment is derived from the underlying theory of the first amendment. The category so defined will not, of course, be totally precise. Like all other categories it will have fuzzy edges where we are unsure whether the principle or rule applies. Were it otherwise we would need not judges but calculators.⁶⁸ The point is that we will have defined a category, and anything outside the category is not within the coverage of the first amendment.

The "defining in" approach assumes both that we can construct a workable definition reflecting the deep theoretical premises of the concept of free speech and that such a definition can be taught⁶⁹ to those who matter—the judges who must both apply it and refine its imprecision. If either of these assumptions is unwarranted, it may be preferable to adopt the alternative approach of "defining out." Here we initially construct a coarse and intentionally overbroad definition that is simple enough to be learned and applied easily and broad enough to encompass the full range of plausible theoretical justifications for a principle of freedom of speech. Some examples of such a category might be "all communications," or "everything that is 'speech' in ordinary language," or "all public discourse." Having created this intentionally overinclusive category, we then carve out subcategories of noncoverage, to take care of contract law, perjury, extortion, and so on. These subcategories too must be conceived within the framework of a theory of free speech, although the focus here is negative (no reason to grant special protection against the power of government) rather than positive (grant special protection here because . . .).

In a perfect world the "defining in" and "defining out" methods would yield identical results. Excluding the designated subcategories of noncoverage from the initial coarse category of coverage would leave us in the end with the same refined category we would have had if we had started with a definition of inclusion. In short, starting from the center and working out would produce the same results as starting from the outside and working in.

The world, however, is not perfect. Human beings make mistakes, and the entire apparatus of presumption and burden of proof, in any area of law, is designed to reflect an ordering of values in an imperfect world.⁷⁰ When we use presumptions and allo-

68. Or, as Professor Gottlieb puts it, "subsumption machines." G. GOTTLIEB, *supra* note 2, at 16.

69. See text accompanying notes 190-97 *infra*.

70. For an application to another aspect of first amendment theory, see Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685

cate the hurden of proof, we attempt to ensure that decisions under uncertainty will be biased away from restriction of those values we hold to be of greatest importance. In the context of the choice between defining in and defining out, it seems to follow that we can avoid more errors of underinclusion by defining out rather than defining in. Thus, perhaps the preferable course is to begin with the presumption that all communication is covered by the first amendment and then create areas of noncoverage, regarding which the burden of proof of nonapplicability of first amendment principles can be met.⁷¹

This perspective provides an explanation, for example, for the commercial speech cases.⁷² If we started from the center, or core, the question would be whether that category of coverage, derived from the theoretical foundations of the first amendment, included commercial advertising. Neither space nor need exists to answer that question here, but it seems not altogether unlikely that the answer would be "No," just as it had been in the past.⁷³ If instead we have a process of defining out, we would *assume* that all communication is covered by the first amendment and exclude a subcategory of commercial advertising only if it could be *shown to be unrelated* to the purposes of a principle of freedom of speech. A close reading of the Supreme Court's opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*⁷⁴ shows this focus, for the primary question there was not, "Should commercial speech be covered?", but in effect rather, "Why shouldn't commercial speech be covered?"⁷⁵ The questions are different, and it is not unreasonable to conclude that the Court was

(1978).

71. See Shiffrin, *supra* note 5, at 956-57.

72. *E.g.*, *Bates v. Arizona State Bar Ass'n*, 433 U.S. 350 (1977); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). See generally Farbor, *Commercial Speech and First Amendment Theory*, 74 Nw. U.L. REV. 372 (1979); Schiro, *Commercial Speech: The Demise of a Chimera*, 1976 SUP. CT. REV. 45; 44 U. CHI. L. REV. 205 (1976).

73. See Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 IOWA L. REV. 1 (1976); Jackson & Jeffries, *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1 (1979). "It is by no means self-evident that commercial speech will fit into the system of freedom of expression at all." Emerson, *supra* note 36, 68 CALIF. L. REV. at 640.

74. 425 U.S. 748 (1976).

75. Note the Court's formulation of the issue in terms of whether there is an "exception" for commercial speech, *id.* at 760, or whether the commercial nature of the interest "disqualifies" the advertiser from first amendment protection. *Id.* at 762. The strong indication is that an exception, rather than inclusion, bears the burden of justification.

simply not persuaded that commercial advertising was sufficiently different⁷⁶ to justify carving out a special area of noncoverage.

As this first act draws to a close, it is useful to summarize by noting that categorization in this first sense refers to the *inevitable* process of delineating the range of coverage of the first amendment. Although various methods are available for defining that category—from ordinary language, philosophy, or history;⁷⁷ from the outside in or the inside out; with a view towards absolute protection or towards strong but not absolute protection; and so on—it is impossible to avoid the process. In this sense categorization can scarcely be called a first amendment *technique*, because it cannot be avoided. The only question is *how* the category will be drawn.

III. ACT TWO: THE VARIETIES OF SPEECH

Our first look at categorization and the first amendment focused on the first amendment as itself constituting a category. From this perspective the conclusion that categorization in this sense is unavoidable was inevitable. The question now is whether we can or should go further in the process of categorization; that is, does the category of conduct covered by the first amendment in turn contain further subcategories? Having concluded that the first amendment covers a particular set of circumstances, do we then apply a uniform test to determine whether the first amendment protects the act, or do we apply differing tests depending upon the subcategory within the first amendment into which the particular case falls?

Hostility toward the creation of subcategories within the first amendment has been a pervasive, albeit not invariably determina-

76. "Our question is whether speech which does 'no more than propose a commercial transaction,' . . . is so removed from any 'exposition of ideas,' . . . and from 'truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government,'" that it lacks all protection. Our answer is that it is not." *Id.*

77. It is common to equate interpretivism with either literalism or historicism. See, e.g., Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 712-13 (1975). This is a mistake. Many of the terms of the Constitution, such as "freedom of speech" and "equal protection of the laws," are theory-laden, and an explication of those terms, guided by a philosophical theory, can avoid the pitfalls of both literalism and historicism without abandoning the strong attractions of even a clause-bound interpretivism. Exploring how this is to be done, however, is far beyond the scope of this Article. Indeed, it is not entirely clear that Professor Grey himself does not endorse such an explicatory interpretivism as a commendable form of noninterpretivist review. See Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 844 n.8 (1978).

tive, theme in contemporary free speech doctrine.⁷⁸ This hostility can be embodied in a bipolar structure of no protection and full protection.⁷⁹ "Full protection" refers not necessarily to absolute protection but only to the maximum level of protection that the first amendment provides, which may, for example, be only the use of some form of a "clear and present danger" standard. If we were to refuse to recognize any subcategories within the first amendment, we would determine first whether the facts of the case fell outside or inside the coverage of the first amendment. If they fell outside, there would be no protection, at least not by the first amendment.⁸⁰ If they fell inside, the full protection of the first amendment, however much that might be, would attach to the conduct in question. Implicit in this all-or-nothing approach is an extreme reluctance to assign differing values to the speech that is covered by the first amendment. The works of Shakespeare have the same first amendment value as *Playboy*, which in turn has the same first amendment value as wearing a black armband or arguing for the virtues of Nazism.

At bottom this conscious refusal to subcategorize is founded in the belief that first amendment protection should not turn on whether a statement is on one side or the other of a particular question.⁸¹ If an argument for the roundness of the Earth is protected, then arguments for flatness are protected to the same extent. If arguments for capitalism are to be protected, then so too must arguments for socialism. Moreover, as can be seen from cases like *Brandenburg* and *Skokie*, if arguments for racial equality are protected, so are arguments for racial hatred and intolerance.⁸²

78. This has usually been expressed in terms of the question of content regulation. See generally Farber, *supra* note 3; Karst, *supra* note 3; Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81 (1978). See also Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PRR. L. REV. 519, 537-42 (1979); Buchanan, *Autonomy and Categories of Expression: A Reply to Professor Scanlon*, 40 U. PRR. L. REV. 551, 557-59 (1979).

79. See Stone, *supra* note 78, at 82-83. Note that some, such as Professor Emerson, equate "full protection" with absolute protection within a defined scope. See Emerson, *supra* note 36, 68 CALIF. L. REV. at 433-35.

80. It is a mistake to assume that heightened judicial scrutiny for a verbal act necessarily arises only from the first amendment. One who believed, for example, that the fourteenth amendment contained privacy aspects that protected private homosexuality could argue for the constitutional protection for obscenity without challenging the conclusion that obscenity was not speech in the constitutional sense. Had *Lochner* still been good law, *Virginia Pharmacy* could conceivably have been decided on those grounds alone.

81. See Stone, *supra* note 78, at 83, discussing viewpoint-based content regulation. See also Farber, *supra* note 3, at 733-37.

82. See notes 25 & 27 *supra*. The most important feature of the *Skokie* litigation was

Certainly there can be little quarrel with this, for the decision not to allow free speech protection to turn on the point of view adopted by the speaker goes to both the epistemological and political cores of free speech theory.⁸³

It has frequently been thought to be only a small step from the aversion to regulation based on the point of view espoused to an equal aversion to regulation based on the subject matter of the speech. The classic statement is that of Justice Stewart in *Kingsley International Pictures Corp. v. Regents of University of New York*:⁸⁴ "[The Constitution] protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."⁸⁵ There is a difference, however, between saying that advocacy of capitalism is permitted and advocacy of socialism is not and saying that discussion of economic policy is permitted but discussion of sexual morality is not. However loose the boundaries may be, distinctions drawn on the basis of viewpoint are importantly different from distinctions drawn on the basis of subject matter.⁸⁶

Despite the differences, however, strong reasons remain for expanding the hostility to viewpoint-based regulation to include subject matter-based regulation as well. Subject matter restrictions are rarely viewpoint-neutral.⁸⁷ For example, no restrictions existed on public condemnation of adultery at the time *Kingsley* was decided or at any other time. Indeed, New York acknowledged as much in *Kingsley* when it argued that the problem was the conflict between what the film portrayed and "the moral standards, the re-

the fact that it was an *easy* case. The efforts by the town to force the situation into categories like "fighting words" or "verbal assaults" demonstrate just how bizarre it would be to suggest that it might be relevant under the first amendment to argue that Nazis are bad people espousing hateful ideas. There can, of course, be principled distinctions between Nazis and other people. It is just that our justified fears of viewpoint-based discrimination block any other distinguishing features that might be available. For example, although it is now irrelevant under the first amendment that the speaker either does not believe in or wishes to eliminate the system of free speech, such a distinction has some philosophical plausibility. See Schauer, *Free Speech and the Paradox of Tolerance*, in *VALUES IN CONFLICT* 228 (B. Leiser ed. 1981).

83. Both the "marketplace of ideas" theory and the Meiklejohn "argument from democracy" are premised at the very least on the inability of government to determine questions of truth or falsity within the appropriate spheres. Viewpoint-based content regulation is no less than just this type of a determination.

84. 360 U.S. 684 (1959).

85. *Id.* at 689.

86. See Farber, *supra* note 3, at 733-37; Stone, *supra* note 78, at 83-84, 108.

87. See Stone, *supra* note 78, at 101-03, 109-11.

ligious precepts, and the legal code of its citizenry.”⁸⁸ Thus, Justice Stewart’s analogy to advocacy of socialism and the single tax was in one sense inapt, for the case could conceivably have permitted a prohibition on the subject matter of adultery so long as the viewpoint-based regulation was eliminated. This result would have been bizarre, largely because the kind of suppression that offends the first amendment can often be accomplished as conveniently and as effectively by excluding an area from discussion as by excluding a particular point of view. Placing an entire subject outside the range of discussion not only prevents discussion of that subject but also serves quite effectively to entrench the status quo. Restrictions on subject matter limit knowledge within that subject to what is then known, and this freezing of existing knowledge is hardly different from a viewpoint-based restriction.

The more serious objection to not moving from viewpoint neutrality to subject matter neutrality, however, is that the distinction finds no basis in the theoretical foundations of the first amendment. There are an infinite number of ways of drawing distinctions and therefore an infinite number of potential categories. The correctness of a category cannot be evaluated in the abstract, but only in the context of the purposes for creating a category.⁸⁹ Distinguishing among speakers on the basis of the loudness of their voices or on the basis of their accents is fine if we are conducting auditions for a theatrical performance; it is of course impermissible if we are attempting to create differences in the amount of protection available under the first amendment. If the first amendment is in fact designed in theory to protect discussion over a wide area, a subject matter restriction is no more justifiable than a viewpoint restriction. The problem with a subject matter restriction is that it is inconsistent with the theoretical underpinnings of the first amendment.

Much the same can be said for categories based on the manner of presentation, for once again restrictions on the manner of presentation could quite likely exclude from public discussion much of the diversity of opinion that the first amendment so prizes. When Justice Harlan said in *Cohen v. California*⁹⁰ that “one man’s vul-

88. 360 U.S. at 688.

89. “Different purposes require different classifications and hence different distinctions.” Singer, *Moral Rules and Principles*, in *ESSAYS IN MORAL PHILOSOPHY* 160, 160 (A.I. Melden ed. 1958).

90. 403 U.S. 15 (1971).

garity is another's lyric,"⁹¹ he quite correctly warned of the dangers to diversity of viewpoint that could result from attempting to channel public debate into preexisting patterns. As a result, we have tended to assume that once an act has been found to be within the coverage of the first amendment, the extent of its protection should not vary with the position expressed, the subject matter dealt with, or the mode of expression employed by the speaker.

Still, at least four arguments can be marshalled in favor of categorization within the first amendment. First, if we take the "full protection within" rule as the standard, there may be pressure to keep troublesome categories completely outside. When the choice is all or nothing, the difficulties of "all" may lead courts to choose "nothing." Thus, it may be that one of the reasons for the historical exclusion of commercial advertising⁹² was the potential for problems, especially in terms of truth and falsity,⁹³ that would exist if commercial advertising were treated in the same manner as advocacy of adultery or the single tax. If the creation of a separate category within the first amendment is precluded, a tempting solution is merely to keep the speech that would constitute that category outside first amendment protection. Similar observations seem also applicable to the pre-*New York Times*⁹⁴ exclusion of defamatory speech from the coverage of the first amendment.⁹⁵

Second, not all forms of speech are necessarily amenable to the same analytic approach.⁹⁶ The tests and tools created to deal

91. *Id.* at 25. This quotation is generally taken out of context. Justice Harlan said that "it is nevertheless often true that one man's vulgarity is another's lyric." *Id.* (emphasis added). That seems to suggest that the distinction between vulgarity and lyric is also often something other than a subjective judgment. I doubt that this is correct, but we should not attribute too much subjectivism to Justice Harlan.

92. *E.g.*, *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

93. Professor Ely rightfully attributes much of this to "an epistemological 'sophistication' that seems excessive." J. ELY, *supra* note 4, at 233. The vast majority of advertising claims are simply more verifiable than ethical or political claims, and to hold otherwise seems most peculiar. This is not to say, however, that there may not be problems if we try to make too much of a distinction between fact and opinion. Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978).

94. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

95. Similarly, falsehoods about individuals are quite frequently demonstrable in a way that statements about morals, politics, art, and sex are not. This much seems implicit in the Court's granting factual falsehood no more than "strategic" protection. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). See also *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301 (1971) (White, J., concurring).

96. See Greenawalt, *supra* note 5, at 785; Shiffrin, *supra* note 5, at 946; Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565, 609-12 (1980).

with the likes of *Brandenburg*, *Whitney*, *Schenck*, and *Debs*,⁹⁷ for example, may not be those most appropriate for dealing with problems of a quite different kind. Neither false advertising nor false attacks on private reputation fit easily into anything even close to a "clear and present danger" formula—nor, for that matter, does speech that offends rather than causes harm in a narrower sense. We are accustomed to thinking in terms of *levels* of protection, but it may be that different categories of speech should be treated *differently*, which does not necessarily entail more or less.

Third, and somewhat related to the second argument, most first amendment theory is formulated around the "advocacy" paradigm. When statements of fact are concerned, for example, many of the skeptical presuppositions of the first amendment are either irrelevant or highly attenuated.⁹⁸ It is true that many statements of fact contain statements of opinion as well⁹⁹ and that factual determinations are often erroneous, but the differences between "this car has a six-cylinder engine" and "socialism is wonderful" are apparent to all but the most resolute skeptic. Some people may have so little confidence in their own factual judgments that they always sit down gingerly for fear that the chair they see is only an apparition, but we hardly need tailor first amendment doctrine around them. It may be, therefore, that appropriate categories could recognize the differences in the extent to which first amendment principles are applicable to the variety of speech acts, of which advocacy and factual description are but two.¹⁰⁰

Finally, the refusal to categorize is frightfully counter-intuitive. Many commentators¹⁰¹ have strongly criticized Justice Stevens' observation in *Young v. American Mini Theatres, Inc.*¹⁰²

97. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). These are generally considered to be the landmark cases in the development of first amendment doctrine relating to political advocacy.

98. See notes 93 & 95 *supra*.

99. Schauer, *supra* note 93, at 276-300. See also Greenawalt, *supra* note 5, at 677-78.

100. It appears, for example, that the whole range of "performative" utterances, see J.L. AUSTIN, *Performative Utterances*, in *PHILOSOPHICAL PAPERS* 233-52 (3d ed. J.O. Urmson & G.J. Warnock eds. 1979), could within one unifying principle be excluded from the first amendment, but developing that principle must wait for another time. See Greenawalt, *supra* note 5, at 680-83.

101. See Schauer, *The Return of Variable Obscenity?*, 28 *HASTINGS L.J.* 1275 (1977); Stone, *supra* note 78, at 96-100. See also Friedman, *Zoning "Adult" Movies: The Potential Impact of Young v. American Mini Theatres*, 28 *HASTINGS L.J.* 1293 (1977).

102. 427 U.S. 50 (1976).

that "few 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;"¹⁰³ but he was right. We would not, if that were all we were protecting. The difficulty comes in describing the behavior, and therefore the category of behavior, at the appropriate level of generality, but most people do believe that there are "commonsense differences"¹⁰⁴ between different categories of utterances. Moreover, most people believe that some categories are more important than others, with great agreement about many questions of relative worth. Political argument is simply more important than "Specified Sexual Activities," and *Hamlet* is simply better literature than "Dance With the Dominant Whip" or "Cult of the Spankers."¹⁰⁵ Anyone who holds otherwise is just plain wrong. Of course, things are not this simple. Our commonsense categories have fuzzy edges, and there is much more agreement that *Hamlet* is good literature and "Dance With the Dominant Whip" is bad literature than there is about in which category to put *Memoirs of a Woman of Pleasure*¹⁰⁶ or George Carlin's "Seven Dirty Words" monologue.¹⁰⁷ While we might be quite confident in saying that political argument is more important than idle gossip about absent acquaintances, the relative merits of political argument, art, ancient history, and philosophy are far more debatable.

If the categories we would employ in subcategorizing were more well-defined, we would perhaps be more comfortable with subdividing the first amendment. Unfortunately, however, the categories of political speech, entertainment, and literature, for example, have such loose and overlapping boundaries that the dangers of miscategorization are particularly strong. The same applies even to many distinctions between fact and opinion.¹⁰⁸ Moreover, the problem is compounded by the difficulty in determining the appro-

103. *Id.* at 76. This part of the *Young* opinion did not command a majority of the Court. Only the Chief Justice, Justice White, and Justice Rehnquist joined Justice Stevens on this part of the opinion. See also *FCC v. Pacifica Foundation*, 438 U.S. 726, 743 (1978) ("while some of these references may be protected, they surely lie at the periphery of First Amendment concern.").

104. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

105. These are among the more suggestive titles among the materials at issue and listed by the Court in *Mishkin v. New York*, 383 U.S. 502 (1966).

106. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

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

108. See note 93 *supra*.

ropriate level of generality for the description of a category and by the fact that we are forced to describe these categories in words that are at best ill-suited to the purpose. Absent the ability to create a new technical vocabulary for every category in law, we face a high risk of conceptual vagueness in using ordinary language to convey complex and technical concepts.¹⁰⁹ *Young* would have been far less troublesome had it been possible to describe with some precision the category of materials subject to restriction but not to outright prohibition. It was not, however—although the Court's efforts fell especially short of the ideal¹¹⁰—and as a result, cases like *FCC v. Pacifica Foundation*¹¹¹ followed shortly thereafter. The problem with *Young* was not as much the result as the possibility it created for restrictions on speech with considerably more value, which is precisely what occurred in *Pacifica*.¹¹² Were it possible to articulate a stopping point, or had the Court even *tried* to specify some more precise boundary for the *Young* category, *Young* itself would have been somewhat less troublesome.

Much of this problem has in the past been discussed under the rubric of an aversion to "content regulation."¹¹³ This description is of course deceptively broad. We engage in a form of content regu-

109. For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which could convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.

Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897). The extraneous associations to which Holmes refers, however, are only part of the problem. More serious is that the distinctions of importance to the law are not necessarily embedded in ordinary language, at least not in single words or short phrases. They are most likely explainable in ordinary language only at the expense of the brevity and emotional force often thought to be admirable facets of a judicial opinion.

This problem of the inaptness of ordinary language to law is in turn merely an instance of the larger problem of new uses in general. "Men will always be finding themselves with a new thing to express and no word for it, and usually they will meet the problem by applying whichever old word seems nearest, and thus the old word will acquire another meaning or a stretched meaning." R. ROBINSON, DEFINITION 55 (1950).

110. That is the problem with the clever phrase. Justice Stevens' commentary about the circumstances in which he would send his children to war is a nice turn of phrase, especially if you agree with his conclusion. It cannot, however, plausibly function as a standard of guidance for lower courts and future cases, which is presumably at least one of the purposes of a Supreme Court opinion. See Schauer, *supra* note 23, at 217-19.

111. 438 U.S. 726 (1978). See Krattenmaker & Powe, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1228-37, 1265-75, 1279-88 (1978).

112. Schauer, *supra* note 70, at 716 n.147.

113. See authorities cited at note 78 *supra*.

lation when we say, as we must, that some communicative acts are inside the first amendment and others are outside. What we mean when we express animosity towards content regulation is that we should not create subcategories within the first amendment that are inconsistent with the theoretical premises of the concept of freedom of speech.¹¹⁴ Moreover, we do not wish to create subcategories that, either because of the inherent indeterminacy of the category or because of the difficulty in verbally describing that subcategory, create an undue risk of oversuppression. While these are powerful reasons, they are not so conclusive that they should prevail in every case. When strong reasons for creating a subcategory present themselves, and when the dangers can be minimized or eliminated, the mechanized uttering of "content regulation" need not prevent the embodiment in first amendment doctrine of the plain fact that there are different varieties of speech. This is best illustrated by a few examples.

One obvious subcategory in contemporary first amendment doctrine is that of commercial speech.¹¹⁵ This subcategory seems on balance to be rather well-conceived, at least if we accept the far from obvious premise¹¹⁶ that commercial speech is within the first amendment at all. Commercial speech is different in important ways from most of the speech that is within the first amendment. It embodies factual statements generally quite easily verifiable,¹¹⁷ it is regulated for reasons both less suspect and less capable of abuse than those reasons used to justify restrictions of speech on political, moral, and related issues,¹¹⁸ and its inclusion within the

114. Had this distinction been clearer, the Court would have been less likely to use decisions delineating the general category of the first amendment to justify the creation of subcategories *within* the first amendment, as it did in both *Young* and *Pacifica*. Once we appreciate the difference between categorization, and categorization, the fallacy of this move is exposed.

115. One thing that makes commercial speech so obviously a special subcategory is the Court's specific pronouncements to that effect. *See, e.g.,* *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456, 462 n.20 (1978); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976).

116. *See* authorities cited at note 73 *supra*.

117. *See* note 93 *supra*.

118. One powerful justification for a principle of freedom of speech is what I have called "the argument from negative implication." Schauer, *supra* note 82. It may be that there is nothing especially valuable about speech as compared to other valuable forms of conduct, but that the *regulation* of speech entails particular dangers. We thus erect a principle of free speech to guard against these special dangers, dangers particularly apparent in the area of political speech. "Courts must police inhibitions on expression and other political activity because we cannot trust elected officials to do so; ins have a way of wanting to

first amendment is based on reasons quite distinct from those applicable to other forms of communication.¹¹⁹ Commercial speech is also a category relatively easy both to identify and to describe, and it demands the use of analytic tools different from those used for, say, political speech. For example, in most other areas of the first amendment we expect appellate courts to undertake what is essentially *de novo* factual review.¹²⁰ Surely, however, it would be bizarre to suggest the same when an issuer of securities challenges a finding of the SEC that a registration statement is false or misleading.¹²¹ The precise ways in which commercial speech doctrine will reflect the "commonsense differences"¹²² between it and other speech within the first amendment remain to be developed in the cases, but there seems little reason to suggest that the effort is misguided.

Similar arguments support the creation of a subcategory to deal with defamatory speech, another area in which different standards of protection are employed. The subcategory is easily identifiable,¹²³ the interest in protecting individuals from the publication of demonstrable falsehoods about them is not inconsistent with the theoretical foundations of the first amendment,¹²⁴ and the

make sure the outs stay out." J. Elx, *supra* note 4, at 106. This seems much less of a danger in respect to the regulation of commercial advertising. *But see* Scanlon, *supra* note 78, at 540-42.

119. The consumer protection rationale espoused in *Virginia Pharmacy* seems only remotely related to most other sources of free speech doctrine.

120. *See* *Old Dominion Branch 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970); *Jacobellis v. Ohio*, 378 U.S. 184, 188-90 (1964) (opinion of Brennan, J.); *Roth v. United States*, 354 U.S. 476, 497-98 (1957) (Harlan, J., concurring in part and dissenting in part).

121. *See* Schauer, *supra* note 93, at 298-99.

122. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). *See also* *Bates v. State Bar of Ariz.*, 433 U.S. 350, 381 (1977).

123. Defamation is easily separable because the application of the subcategory is triggered by the plaintiff's recourse to a relatively discrete and well-defined common-law cause of action. But when, as in, for example, *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), the standards for a defamation action are transposed to quite different settings, the question of identification becomes more difficult.

124. *See, e.g.*, Feinberg, *Limits to the Free Expression of Opinion*, in *PHILOSOPHY OF LAW* 135 (J. Feinberg & H. Gross eds. 1975); Ingber, *Defamation: A Conflict Between Reason and Decency*, 65 Va. L. Rev. 785 (1979). My references to the "theoretical foundations of the first amendment" are woefully incomplete—indeed platitudinous—but they serve a purpose. It is important that we recognize just how much of the legal structure of first amendment doctrine is determined by the first amendment's substantive philosophical foundations. We may choose to draw these philosophical foundations from the Framers' view of them, or we may (preferably, in my view) choose to construct a theory of free speech not constrained by the views of those long dead. In any event, we must do something. At-

problems presented do not fit neatly into a "clear and present danger" type standard of review. It may be that the rules now in force for dealing with defamatory statements are either too strict or too lenient,¹²⁵ but that is not the point. Regardless of which particular rules we choose, there seems little cause not to embody in first amendment doctrine our intuitive belief that defamation of an individual is not the same as urging a socialist revolution.

The recent "offensive speech" cases evidence the establishment of yet another subcategory. After *Cohen*,¹²⁶ *Erznoznik v. City of Jacksonville*,¹²⁷ and *Southeastern Promotions Ltd. v. Conrad*,¹²⁸ it was commonly supposed that the offensiveness, without more, of an utterance was insufficient reason to justify any difference in treatment from nonoffensive speech. After *Young* and *Pacifica*, however, it certainly appears that offensive speech is a subcategory

tempting to apply the first amendment without some theoretical vision of free speech is mere stumbling in the dark. See also Scanlon, *supra* note 78, at 535 (discussing relationship among "foundational level," "level of rights," and "level of policy").

125. See generally Anderson, *Libel and Press Self-Censorship*, 53 TEX. L. REV. 422 (1975); Christie, *Injury to Reputation and the Constitution: Confusion Among Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Ingber, *supra* note 124; Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

126. *Cohen v. California*, 403 U.S. 15 (1971). Defendant peacefully walked through the Los Angeles County Courthouse wearing a jacket displaying the words "Fuck the Draft" and was convicted under the California Penal Code of disturbing the peace by offensive conduct. The Supreme Court noted that this was not an obscene expression, that the words were not likely to provoke violent reaction, and that any offended bystander could avoid the expression by simply averting his eyes. The Court acknowledged first amendment protection of the "emotive" aspect of speech represented by such language and warned that to forbid the use of any particular word was to create a risk of the suppression of ideas. California's prohibition of the "mere public display" of this language was therefore held to violate the first and fourteenth amendments.

127. 422 U.S. 205 (1975). A Jacksonville ordinance prohibited the showing of a film containing nudity when the screen was visible from a public place. The Court held the ordinance invalid on its face as an unjustifiable restriction of first amendment freedoms. The ordinance was seen as a possible deterrence of legitimate expression since it was not aimed exclusively at sexually explicit nudity and discriminated among films solely on the basis of content without clear reasons for the distinction. Furthermore, the public's privacy interest was not endangered since an offended viewer simply could avert his eyes.

128. 420 U.S. 546 (1975). The promoter of the musical "Hair" sought a permanent injunction enjoining the denial of its application to use a city-owned auditorium by the directors of the auditorium. The district court found that the objectionable conduct in the production, nudity and simulated sex, was pure conduct and completely separate from the musical's speech elements and was therefore not entitled to first amendment protection. The Sixth Circuit affirmed, and the Supreme Court reversed on the ground that the director's action constituted a prior restraint in violation of the first amendment because of the lack of procedural safeguards to ensure an accurate determination of whether "Hair" was entitled to first amendment protection from regulation.

in which restrictions will be permitted so long as those restrictions do not have the effect of a de facto prohibition on dissemination of the material at issue.¹²⁹ This subcategory, however, is far more troublesome than the subcategories for either commercial speech or defamation, but we need to probe further in order to locate the source of those troubles.

First, a subcategory must have some relationship to a permissible first amendment purpose. Legal categories are not natural in the way that other categories may be.¹³⁰ Human beings create legal categories to serve a purpose, and the category can be no more permissible than the purpose. It should be apparent here that offensiveness *simpliciter* as a category is hardly consistent with most of the antimajoritarian premises of the first amendment.¹³¹ A wide range of utterances, such as "God is dead," "Hitler was a great man," and "The American flag is a symbol of oppression," are quite likely to cause offense to many people, yet *Young* and *Pacifica* do not (it is hoped) indicate that any of these utterances may in any way be restricted.¹³² If so, it is more than mere offense that is the defining feature of this subcategory. It is offense of a certain kind, or offense plus something more. If it is offense of the sexual or scatological variety, the continuing validity of *Cohen* is called into question, for Carlin's words were no more likely to stimulate than were Cohen's.¹³³ On the other hand, perhaps the definition of the subcategory is in terms of sexual or scatological offense combined with an absence of "important" content. Again, however, it is hard to discern why Carlin's commentary about language is less important than Cohen's commentary about the Selective Ser-

129. On the availability of the materials from other sources, see *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 n.28 (1978), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 62 (1976).

130. Whether categories or classes exist in the world or are just creatures of our form of conceptualization is a controversy of recurrent philosophical interest, but is fortunately not germane to this Article.

131. See Shiffrin, *supra* note 5, at 951 ("... if 'offensiveness' were the test, majority rule would replace the first amendment.").

132. "Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *FCC v. Pacifica Foundation*, 438 U.S. 726, 745-46 (1978).

133. "The belief that these words are harmless does not necessarily confer a First Amendment privilege to use them while proselytizing, just as the conviction that obscenity is harmless does not license one to communicate that conviction by the indiscriminate distribution of an obscene leaflet." *Id.* at 746 n.22. The very comparison between obscene (in the ordinary sense) words and obscene (in the constitutional sense) material shows not only confusion, but also just how shaky the pedestal is on which *Cohen* now rests.

vice System, and it is equally hard to discern why a radio broadcast is more intrusive than activity in the courthouse lobby.¹³⁴ I cannot imagine why one could not switch off the radio, but there may be quite good reasons for having to remain with Cohen in the courthouse. Turning off a radio is much easier than averting your eyes from someone who is in the same room. Just try it sometime.

This criticism of *Pacifica* is hardly novel,¹³⁵ and I do not wish to belabor the matter here. The point I wish to make is that the creation of a category must be justified by reasons underlying the features distinguishing that category from others. When those reasons are not applied in all cases in which they are, by their own terms, applicable, then the attempt to create a category has misfired. In traditional terminology we would say that the category-creating case was unprincipled.¹³⁶ It is, however, impossible for a case to be unprincipled in isolation. What makes a case unprincipled is the refusal in future cases to treat cases alike within the articulated category. If *Cohen*, *Spence v. Washington*,¹³⁷ and their ilk are to survive, then *Pacifica* and *Young* have not created a subcategory at all. If *Cohen*, *Spence*, and others are to be overruled or limited on the authority of *Young* and *Pacifica*, then *Young* and *Pacifica* have indeed created a subcategory within the first amendment that is to be treated differently. In that case *Young* and *Pacifica* could no longer be taken to be unprincipled, but would simply be wrong. There *is* a difference.¹³⁸

Moreover, a subcategory based in part on offensiveness will be notoriously vague. Vagueness probably cannot be completely eliminated in any area of law, but that is no excuse for failing to recognize degrees of vagueness.¹³⁹ "Where do you draw the line?" arguments are usually as wrong as they are tiresome.¹⁴⁰ The inability to

134. Had *Pacifica* been based on the scarcity rationale of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), few people would have been independently exercised about *Pacifica*. It is the conspicuous eschewal of scarcity doctrine in *Pacifica* that legitimizes the fears that *Pacifica* has great import for the regulation of any speech found to be offensive.

135. See, e.g., Krattenmaker & Powe, *supra* note 111, at 1228-37, 1265-75, 1279-88.

136. See generally Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35 (1963).

137. *Spence v. Washington*, 418 U.S. 405 (1974).

138. "Principled legal judgment is not so much a matter of content as it is of form." Golding, *supra* note 136, at 42.

139. On degrees of vagueness, see M. BLACK, LANGUAGE AND PHILOSOPHY 32-49 (1949); L.J. COHEN, THE DIVERSITY OF MEANING 265-76 (1st ed. 1962); I. SCHEFFLER, *supra* note 57, at 42-49, 62-63; Khatchadourian, *Vagueness*, 12 PHIL. Q. 138, 148-49 (1962); Russell, *Vagueness*, 1 AUSTRALASIAN J. PSYCH. & PHIL. 84, 90 (1923).

140. The fallacy inherent in refusing to make distinctions when no bright line of de-

draw a precise line cannot sensibly be used to justify the refusal to draw lines. Nevertheless, the opposite error is equally dangerous. It is a mistake to assume that because all lines are fuzzy, fuzziness cannot vary or can never constitute an objection to the creation of a legal category. When, as with "offensiveness," the category is so inherently and extremely indeterminate and so linguistically ill-defined, a serious risk exists that the category will in practice be misapplied, and a powerful argument therefore arises against the creation of the category. In the first amendment, as in all of law, the task of the judge is to classify the particular facts of the case within the appropriate category.¹⁴¹ Increasing the number of categories may involve an increased risk of misclassification,¹⁴² even if the categories are theoretically sound. When the error of misclassification is likely to occur in derogation of constitutionally preferred values,¹⁴³ categorization in the sense of creating additional subcategories is a technique to be employed with only the greatest of caution.

For these reasons the notion of a presumption is once again useful, just as it is useful in choosing between "defining in" and "defining out."¹⁴⁴ If we accept the principle that the first amendment seeks to protect that which may at first sight (or even upon further reflection) seem worthless, then we must guard against the pressure to create subcategories that will leave to judges in a particular case the determination of either the truth or the social util-

marcation is present is most vividly illustrated by the *sorites* ("the heaper") paradox. Just because one grain does not make a heap and just because the addition of any one grain does not mark the point at which we can say there is now a heap, the conclusion is not mandated that there are no such things as heaps. See generally M. BLACK, *MARGINS OF PRECISION* 2-12 (1970); Gillespie, *Abortion and Human Rights*, 87 *ETHICS* 237, 238-43 (1977); Williams, *Language and the Law—II*, 61 *LAW Q. REV.* 179, 181-85 (1945). What makes law unique, however, is the extent to which the relatively indeterminate decision on "where to draw the line" in the first case becomes a concrete rule of decision for the next case.

141. See Hart, *Theory and Definition in Jurisprudence*, 29 *PROC. ARIST. SOC. (SUPP.)* 239, 259 (1955). There is an important difference between "what happened" and "how are we to characterize it." J. WISDOM, *PHILOSOPHY AND PSYCHO-ANALYSIS* 251-52 (1953). Moreover, even the question of "what happened" is in almost every case theory-dependent. G. GOTTLIEB, *supra* note 2, at 54 (notions of "materiality" are derived from preexisting theoretical standards); Goodhart, *Determining the Ratio Decidendi of a Case*, 40 *YALE L.J.* 161, 169 (1930); Stone, *The Ratio of the Ratio Decidendi*, 22 *MOD. L. REV.* 597 (1959).

142. See I. SCHEFFLER, *supra* note 57, at 41-42, 63-65.

143. This can occur either if there is a greater frequency of errors of oversuppression, as is likely with a counter-intuitive value such as freedom of speech, or if the proportion of errors is inconsistent with the relative harms of the respective errors. See generally Schauer, *supra* note 70.

144. See text accompanying notes 68-76 *supra*.

ity of a covered communicative act. We can accomplish this best by creating a presumption, albeit rebuttable, against the creation of subcategories within the first amendment.¹⁴⁵ When, as in the case of commercial advertising and defamation, it can be affirmatively demonstrated that it is possible to create a subcategory that is consistent with the theoretical foundations of the first amendment, that is capable of principled definition and application, and that is sufficiently determinate that the dangers of incorrect application are manageable, then the presumption against creating subcategories may be overcome. The subcategory foreshadowed by *Young and Pacifica* is particularly unfortunate because it exhibits none of these features. Thus, it is a compound error, for any one of these factors should be sufficient to defeat the proposed subcategory.

IV. ACT THREE: RULES

Having determined that a set of facts lies within the coverage of the first amendment and having placed those facts within the appropriate subcategory of the first amendment, the question finally arises of just how we will decide the case, or, more accurately, how the judge will decide the case. It is at this stage that we can no longer escape facing up to the recurrent question of ad hoc balancing.¹⁴⁶ The question at this stage is what the rules of guidance for the judge will look like within a given first amendment category.

Here the question of categorization takes on a somewhat different color. The question is the extent to which we can anticipate the categories into which future factual situations will fall. If we knew what the future would bring, we could prescribe outcomes in advance for each of those cases. The judge would observe the facts as presented in court, pick those facts out of a list of factual settings and prescribed results, and then announce the result that

145. See also Farber, *supra* note 3, at 748-49. I presuppose some considerable strength for the general level of first amendment protection. If that level falls, however, it may be wise to consider the creation of subcategories of particularly strong protection. The foundation for this has been laid in the Court's references to political speech as lying at the "core" of the first amendment. See, e.g., *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). See also Buchanan, *supra* note 78, at 557-59; Scanlon, *supra* note 78, at 537-42.

146. See generally Bogen, *Balancing Freedom of Speech*, 38 MD. L. REV. 387 (1979); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963); Gunther, *In Search of Judicial Quality on a Changing Court: The Case of Justice Powell*, 24 STAN. L. REV. 1001 (1972); Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022 (1978).

corresponded with the facts.

Because we cannot, of course, know what is to happen in the future, this solution will not work. Lacking the evidence to make maximally precise statements, we write our rules as generalizations rather than specifications. It is, however, still useful to look at this stylized conception of adjudication, because it guides us in the choices we must make with respect to the types of rules we wish to employ within the first amendment. The more we are able to anticipate the future, the more possible it becomes to prescribe at the rulemaking level the outcomes we wish in each of the future cases.¹⁴⁷ The problem develops when the unanticipated case arises, because the result in that case is likely to be less than ideal if the case must be forced into a category designed for something quite different. The problem in the *Progressive* case,¹⁴⁸ for example, is that those quite bizarre and unexpected facts just did not fit into a rule, derivable from *Brandenburg* and from the prior restraint cases,¹⁴⁹ that was designed for quite different circumstances. As we embody more of our particular visions of the future into categorial (which are not necessarily categorical¹⁵⁰) rules, we are more likely to find ourselves in trouble when the case that we did not antici-

147. We may not always wish to eliminate vagueness, but any *identifiable* vagueness is in theory eliminable. Open texture, on the other hand, refers to that which we cannot foresee and is therefore in theory never eliminable. Waismann, *Verifiability*, in *LOGIC AND LANGUAGE* (FIRST SERIES) 117 (A.G.N. Flew ed. 1951). "Vagueness can be remedied by giving more accurate rules, but open texture cannot because we cannot predict future borderline cases." A. LACEY, *A DICTIONARY OF PHILOSOPHY* 148 (1976).

148. *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), was in reality clouded by controversy about the extent to which the material to be published was previously available to the public, and about the extent to which the material would or would not provide important and hitherto unknown (to the readers) information for constructing a hydrogen bomb. For my purposes here these are irrelevant side issues, for it is now possible to foresee a case in which neither of these clouding factors would be present; *i.e.*, when the publication of hitherto unknown and unavailable information would provide information undeniably helpful to a hostile or unstable government presently in the process of attempting to construct a hydrogen bomb.

149. *E.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 691 (1931). Even if one takes the doctrine of prior restraint as a given, that too was somewhat of a red herring. The important question is what could be done to *The Progressive* after publication, and *when* it could be done (*i.e.*, upon publication?; upon evidence of the construction of a hydrogen bomb by Colonel Qadafi?; or only upon detonation of a hydrogen bomb on American territory?).

150. A *categorial* rule is one that deals with or in categories. A *categorical* rule is mandatory, or unconditionally incumbent, within its scope of application. Categorial rules may be more or less categorial, and categorial rules can occur regardless of the particularity or generality of their ambit of application.

pate does not fit within the description of the category, or if the unanticipated case does fit within the existing verbal description of the category but does not produce a result that is at this time consistent with our idea of what the result ought to be.¹⁵¹

Thus, the *Brandenburg* test can be rephrased in categorical terms: If the act is directed toward and is likely to incite or produce imminent lawless action of significant magnitude,¹⁵² then deny protection; if the act lacks any one or more of these four factors—words of incitement, likely effect, imminence, great danger—then allow protection under the first amendment. This categorical rule is drawn on the *assumption* that if a speech act does not contain all of these elements, it could not present a threat great enough to outweigh the first amendment value in unfettered communication of matters relating to public issues. When, however, a case of the *Progressive* sort arises, we see that we were wrong. Lo and behold, cases in which one or more of those factors are absent¹⁵³ can present a threat so great that we wish to deny protection. Yet the rules do not accommodate the situation. The judge then has two choices. He can say that there are no words of incitement and perhaps no likely effect, and therefore allow protection, perhaps with disastrous results. Alternatively, he can change the rules (retroactively) to produce a desirable outcome in the case at hand.¹⁵⁴

The choice comes down to the amount of flexibility we wish to allow the judge to deal with a particular case whose existence we did not and quite possibly could not have foreseen. If we grant

151. These two difficulties parallel Hart's "ignorance of fact" and "indeterminacy of aim." H.L.A. HART, *supra* note 41, at 125.

152. The "significant magnitude" factor is derived from the opinion of Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring). Whatever the defects and present status of the "gravity of the evil discounted by its improbability" standard of *Dennis v. United States*, 341 U.S. 494, 510 (1951), *Dennis* is the original source for presuming the "significant magnitude" factor to be implicit in any contemporary version of the clear and present danger test. 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 SUP. CT. REV. 41.

153. In *Progressive* there were certainly no words of incitement, probably no imminence, and a somewhat lower probability of likelihood.

154. The "prior restraint" posture of the *Progressive* case made it seemingly easier to decide the case, in large part because of the helpful "disclosure of troop movements" example in *Near v. Minnesota*, 283 U.S. 691, 716 (1931). Prior restraint doctrine is, however, supposed to create an especially high standard of scrutiny, and it would be paradoxical if that standard were available to justify restrictions in cases in which *Brandenburg* was insufficient.

little or no flexibility, we increase the likelihood of anomalous results, the inevitable consequence of attempting to fit the unanticipated future into categories based on suppositions that did not include that event.¹⁵⁵ We can, of course, accommodate the possibility of unanticipated future cases by granting greater flexibility to the judge, who can then look at how the interests are reflected in the particular case and reach what he perceives to be the proper accommodation of those interests.

This flexibility, though, entails two substantial costs. A problem of notice can occur because the more flexibility that the trial court has, the less certain anyone can be in advance of the likely result in a particular case.¹⁵⁶ Lack of predictability in the law is always troublesome, and it is even more so when the inevitable caution that unpredictability yields will induce self-censorship ("chilling") of that which may very well be important.¹⁵⁷ Moreover, the judge might just decide incorrectly. The greater the flexibility that is built into the governing standards, the less the judge is constrained by rules even for the type of case we *can* anticipate. The less the judge is constrained, the more likely there are to be errant results.

It is by now hardly a novel observation that particularized balancing of interests by the judge in respect to the case at hand (ad hoc balancing) is not a technique with a monopoly on the weighing of interests.¹⁵⁸ We balance when we formulate rules for mechanical or categorical application. Nor is it a simple question of a choice between balancing at the rulemaking level or at the level of application. There is a spectrum rather than a dichotomy. The question is not *whether* to permit judges to balance in the particular case, but rather *how much* authority the governing rule should allocate to the judge to take account of the particular circumstances of the case at hand. Although this allocation could take place in the form of a specific grant of authority, it is much more common for it to exist implicitly in the degree of specificity of the governing rule.¹⁵⁹

155. See G. GOTTLEB, *supra* note 2, at 46; Hart, *supra* note 41, at 270.

156. If we define "justice" here as reaching the optimally fair result in the individual case, we can describe the problem of discretion as the problem of accommodating the conflicting desiderata of certainty and justice. See Bridwell, Book Review, 1978 DUKE L.J. 907, 907.

157. See Schauer, *supra* note 70.

158. See authorities cited at note 36 *supra*; Fried, *supra* note 146.

159. Generality and particularity in legal texts are verbal tools for allocating discretion, power, and authority among legal agencies or persons in legal relationships to each other. In other words, roles and functions are assigned by the tightness or loose-

When categorization is presented as a first amendment technique in opposition to balancing, what is in fact being advocated is the establishment of rules leaving little if any discretion to the judge in the particular case.¹⁶⁰ The more a rule predetermines the outcome that flows from easily determinable facts, or the more a rule excludes certain facts from consideration by the judge, the less discretion is available to the judge and the more we can call the rule categorical.¹⁶¹ When a rule describes a category of facts with some specificity and when that rule mandates the results that flow from inclusion or exclusion from the specifically defined category, the judge has merely to place the case in the proper category in order to determine the correct result. Things will never be quite this simple, but it is possible to reduce or minimize the degree of discretion, although this comes at the cost of an increased proportion of potentially nonideal results in cases unforeseen at the time the rule was formulated.¹⁶² In formulating a categorical rule, we isolate what we in our best judgment determine to be the facts on

ness of language. An order, if vague, increases the discretion on the tier of authority below that of the giver of the order.

Friedman, *Law and Its Language*, 33 GEO. WASH. L. REV. 563, 573 (1964).

160. See Ely, *supra* note 3, at 1490; Emerson, *supra* note 36, 68 CALIF. L. REV. at 429.

161. Like most disputes about whether something is "really" this or "really" that, the debate about whether the clear and present test is "really" a balancing test is quite tiresome. To the extent that the requirements of clarity, immediacy, and magnitude of the danger constrain the exercise of particularized judgment in the individual case, there exists something different from free-wheeling or unconstrained balancing. To the extent that the vagueness of the terms and the variety of experience leave room for judicial discretion or manipulation, there exists something removed from a discretion-eliminating rigid categorical rule. I see little point in trying to say something more about the right label to be applied, as such disputes all too often deflect thought away from the difficult issues of evaluation involved.

162. "It is not the fault of any creed, but of the complicated nature of human affairs, that rules of conduct cannot be so framed as to require no exceptions, and that hardly any kind of action can safely be laid down as either always obligatory or always condemnable."

J.S. MILL, *UTILITARIANISM* 37 (1901). *But cf.*:

It seems, then, that with regard to any rule which is *generally* useful, we may assert that it ought *always* be observed, not on the ground that in *every* particular case it will be useful, but on the ground that in *any* particular case the probability of its being so is greater than that of our being likely to decide rightly that we have an instance of its disutility. In short, though we may be sure that there are cases where the rule should be broken, we can never know which the cases are, and ought, therefore, never to break it.

G.E. MOORE, *PRINCIPIA ETHICA* 162-63 (1954). In the context of the first amendment, Moore's rule-governed approach has much to commend it, but only so long as we can live with the consequences of the occasional aberrant result that this approach must inevitably generate. Unfortunately, we cannot know in advance whether we can live with the consequences of an aberrant result we cannot envisage.

which we wish and expect future cases to turn. In doing so we suppose that these facts will recur and that they will recur in substantially similar contexts—but we might be wrong.

Perhaps the most extreme form of a categorical rule in first amendment doctrine is in the law of defamation. The court has “merely” to determine whether the plaintiff was a public figure or a public official and then apply the appropriate standard of culpability.¹⁶³ This is by no means an easy task,¹⁶⁴ but the variability in what remains to be decided should not blind us to the extent to which issues have been removed from consideration in the particular case. All of the first amendment issues, for example, have been predetermined at the rulemaking level.¹⁶⁵ It is not for the court in the particular case to determine whether the plaintiff has available adequate fora for a response, or if the particular words spoken are harmful or helpful to the process of public deliberation. Moreover, even the factual determinations are constrained by rule, at least to the extent that the concepts of “publicness” and “actual malice” have become more precise through a combination of rule language and interpretive case law.

At the opposite end of the spectrum are what have often been called content-neutral¹⁶⁶ regulations of time, place, and manner,¹⁶⁷ whose permissibility turns on factors such as the availability of alternative fora and the strength of the governmental interest.¹⁶⁸ These determinations involve bringing first amendment considerations down to the level of application, a feature absent in the defamation cases, and they also involve a relatively unconstrained approach to the determination of the relevant facts.

Comparing these two extremes shows that locating the point

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

164. See, e.g., *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). See generally *Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975).

165. See *Schmidt, Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431, 458-69 (1977).

166. I use “content-neutral” in its broadest sense, to refer to any governmental action whose aim is not the message or communicative impact of a particular utterance or class of utterances. The definition is broad enough to deny the content-neutrality of a total prohibition on all communication for the purpose of preventing an evil which is thought to flow from the communicative impact of the conduct. See *J. ELY, supra note 4*, at 232.

167. Again, I refer to “time, place, and manner” only to comport with conventional terminology. The key is any governmental interest not based on communicative impact, a category substantially broader than “time, place, and manner.”

168. See generally *L. TRIBE, supra note 3*, at 682-93.

between unfettered judicial discretion and mechanical application of categorical rules takes place not on one but on two planes. First, one must determine how much weighing of first amendment concerns against countervailing governmental interests is to take place at the level of application.¹⁶⁹ Second is the question of the extent to which the governing rules should channel the factual determination into relatively narrow observational categories. The two are of course related,¹⁷⁰ largely because selection of *relevant* facts always involves theory.¹⁷¹ Drawing the distinction, however, at least demonstrates the complexity of the task. Thus, for example, Professor Ely's characterization of a determination based on the message itself (the words, with reference to context) without regard to probable effect as categorization¹⁷² is but an example of a rule that reduces the facts available for consideration in the individual case. This can be accomplished in many ways, and it seems inaccurate, or at least stipulative, to describe only one as "categorization." One could, after all, make the rule even more categorical in Professor Ely's own sense by increasing the specificity of the description of the words that are included within the category. There are as many different messages as there are combinations of words and contexts, and thus the characterization of a message as "incitement," for example, still involves an individualized assessment. This is not to say that important differences do not exist between an approach that turns on effect and an approach that does not. There are differences. The mistake is in transposing a rough but useful classification into a logical boundary. Similarly, allowing the consideration of only some types of effect is in the same way *more* categorical than allowing the consideration of any effect.¹⁷³

169. *Id.* at 583.

170. "Thus a rule or principle may give us more or less rigid information as to the conditions under which it applies and as to the consequences it stipulates and this is so whether it consists of 'hard' descriptive terms or 'soft' evaluative terms."

Tur, *Principles and Rules*, in PERSPECTIVES IN JURISPRUDENCE 42, 60-61 (E. Atwell ed. 1977).

171. See note 141 *supra* and accompanying text.

172. Ely, *supra* note 3, at 1493 n.44.

173. From a Kelsenian perspective we might say that the application of first amendment norms to a particular case is the application of higher order norms. These higher order norms may, in the case of ad hoc balancing, be purely formal. They authorize the court in the particular case to create and to apply law without specifying the material content of the individual norm. Alternatively, the higher order norm can more or less specify the material content of the individual norm. The uncertainties of experience limit the extent of material authorization, but we can describe the extreme categorization first amendment technique as a maximum of content determinative material limitation. The first amendment is a frame that can be narrower or wider. Particularized adjudication takes place within this frame,

In seeking answers to these questions pertaining to the appropriate blend of guidance and discretion, it is important to remember that there is no necessary correlation between the approach employed and the strength of the first amendment protection.¹⁷⁴ Although ad hoc balancing has traditionally been associated with a puny first amendment and categorical rules with a powerful one, it could have been and still could be otherwise. It is possible, after all, to devise rigid rules that give little respect to free speech considerations. Consider, for example, a rule that said no first amendment protection was available when the speaker advocated violation of the law. What is or is not considered advocacy may in some cases be a close question. That is beside the point, however, for such a rule is substantially more categorical than the *Brandenburg* rule, which requires a contextual and therefore ad hoc determination of likely effect as well.¹⁷⁵ Similarly, it could have been the case that all judges with the power to balance the interests in the particular case had, even with little guidance or restriction of their discretion, found in favor of the speaker and against the restriction. If that had been our history, then the reflexive association of ad hoc balancing with limited first amendment protection might never have arisen. Ad hoc balancing gained its dismal first amendment reputation in large part because its chief proponent, Justice Frankfurter, held as well a theory of great deference to legislative determinations.¹⁷⁶ The two need not necessarily be conjoined. Indeed, it is arguable, contrary to what some have held,¹⁷⁷ that judges are better at this type of balancing than legislatures, because only the judge has at hand the specific facts of the particular case.

It is thus behavioral observation and speculation far more than inexorable logic that dictates the extent to which categorical rules should narrow the range of judicial choice. That does not mean, however, that we have nothing on which to base the choice.

and the scope of the power of the court is determined by the size of the frame. See generally H. KELSEN, *PURE THEORY OF LAW* 245, 349 (1967); Paulson, *Material and Formal Authorisation in Kelsen's Pure Theory*, 39 *CAMBRIDGE L.J.* 172 (1980); Tur, *supra* note 170, at 62-63.

174. See Frantz, *supra* note 36, at 1440.

175. See J. ELY, *supra* note 4, at 233.

176. See, e.g., *Dennis v. United States*, 341 U.S. 494, 524-25, 542 (1951) (Frankfurter, J., concurring); W. MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* 119-20 (1961).

177. See, e.g., L. HAND, *THE BILL OF RIGHTS* 66-67 (1958); W. MENDELSON, *supra* note 176.

Experience can guide us, and in this respect the virtues of particularized balancing are often quite hard to see. Freedom of speech is a long-term value not always fully appreciated in the case at hand.¹⁷⁸ In order fully to accommodate this long-term interest, we must often make what at first sight appear to be discordant short-term decisions. Moreover, as Professor Emerson has most notably reminded us, freedom of speech is a value that runs counter to many of our intuitions.¹⁷⁹ Psychological forces, if there are such things, run in favor of suppression. In a particular case the asserted governmental interest will often look far more appealing or even compelling than the first amendment interest. As a result, it is not at all surprising that discretion-limiting rules have traditionally provided far more in the way of first amendment protection than has particularized balancing. Illustrative of this point are the obscenity cases, in which the intellectually appealing variable obscenity approach¹⁸⁰ (allowing more judicial consideration of context than the more rigidly definitional *Roth*¹⁸¹-*Memoirs*¹⁸²-*Miller*¹⁸³ approach) has produced such gems as *Ginzburg*,¹⁸⁴ *Young*, and *Pacifica*.¹⁸⁵

This is not to say that the same approach to the constraints on and particularity of balancing must necessarily be employed throughout the first amendment. If there are to be subcategories within the first amendment, as there now are, then the reasons that prompted the creation of distinct subcategories will also often lead to different approaches to adjudicative style for the different subcategories.¹⁸⁶ This is most plain in reference to the subcategory of time, place, and manner regulations,¹⁸⁷ in which the issues involved must almost of necessity be evaluated on a case-by-case ba-

178. See Emerson, *supra* note 36, 72 YALE L.J. at 887-93.

179. *Id.*

180. The variable obscenity approach received its fullest articulation in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 68-88 (1960). See also Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834 (1964); Lockhart & McClure, *Obscenity Censorship: The Core Constitutional Issue—What is Obscene?*, 7 UTAH L. REV. 289 (1961).

181. *Roth v. United States*, 354 U.S. 476 (1957).

182. *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). See also text accompanying note 106 *supra*.

183. *Miller v. California*, 413 U.S. 15 (1973).

184. *Ginzburg v. United States*, 383 U.S. 463 (1966).

185. See Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7; Schauer, *supra* note 101.

186. See Shiffrin, *supra* note 5, at 946-47.

187. See note 166 *supra*.

sis.¹⁸⁸ It seems true as well for commercial speech, in which the complexity of the factual issues involved compels greater deference to administrative fact finding than would be permissible for most other forms of covered speech.¹⁸⁹

The choice of the appropriate point between unguided judicial discretion and rigid verbal rules, then, must be influenced not only by the balance between predictability and flexibility for unforeseen cases, but also by the psychological factors relating to the likely outcome of that discretion. It is a decision that takes place *within* a given first amendment subcategory. In turn, the decision to create subcategories takes place *within* the process of delineating the category of coverage of the first amendment. Each categorization decision takes place within another, somewhat like those sets of Russian wooden dolls. Each categorization decision, like each doll, can stand alone if necessary, but the full impact is achieved in the way they all fit together.

V. EPILOGUE: LEARNABILITY

In the foregoing pages I have attempted to flesh out three different aspects of what has been broadly called "categorization." Implicit in this project is the premise that it is often quite revealing to search for important differences in the face of superficial similarity. Very often, however, when we search for differences we may discover additional points of similarity that are not at first apparent. This seems to be the case here, in that one recurrent feature is what one might inelegantly call "learnability."¹⁹⁰

The concept of learnability is comprehensible only in the context of a separation of roles.¹⁹¹ Thus, if the only question that arises in the context of the advocacy of a code—whether legal, moral, or otherwise—is whether it is substantially good or bad, we need not be concerned with whether someone else can learn it. That is, however, an artificially truncated view of codes, for codes must in fact be applied to new situations by persons other than the ones who create or promulgate the code. The code must be capable of application by those who must apply it if it is to be called, in a

188. See L. TRIBE, *supra* note 3, at 584.

189. See text accompanying note 121 *supra*.

190. See Hare, *Principles*, 73 *Proc. Arist. Soc.* 1, 12-14 (1973) ("teachability"); Trianosky, *Rule-Utilitarianism and the Slippery Slope*, 75 *J. Phil.* 414, 421 (1978) (codes must be "learnable").

191. See Trianosky, *supra* note 190, at 418-19 (slippery slope arguments irrelevant in terms of a person who *accepts* a complete code).

larger sense, a "satisfactory" code.

In the context of constitutional adjudication, the question is whether a code—that is, a system of rules, principles, exceptions, and so on—can adequately be articulated by the Supreme Court and whether the code so articulated is then "learnable" by those judges and prosecutors at the level of application who have the major burden of responsibility in putting the code into practice. If the code is not fully "learnable," then we must look closer at the type of leakage that takes place between the formulation of the ideal code and its subsequent application.

Numerous justifications are given for a principle of freedom of speech. Because there are an infinite number of contexts in which speech can take place and because an infinite number of things can be done with language, the variety of speech may intersect in an infinite number of ways with the reasons behind a governmental regulation. Were we not concerned with learnability, we would attempt to fashion a complex code enabling us to deal adequately with all of the variations presented by particular cases. Every relevant and justifiable distinction, no matter how fine, would be built into the code. The resultant code would be a complex structure of broad principles, specific rules, detailed exceptions, and elaborate connecting relationships. Since we have assumed that each distinction is in itself justifiable in the theory, the only objection to such a code—and it is a conclusive objection—is that it would not work. "Certain very complex codes break down because ordinary people just can't keep all the distinctions, caveats, and exceptions straight in their heads."¹⁹²

Faced with this psychological phenomenon, which is compounded here by the fact that freedom of speech is itself so counter-intuitive that errors will most often be on the side of repression rather than permission,¹⁹³ we must abandon codes of great sophistication and consequent complexity in favor of simpler or more general codes.¹⁹⁴ We must sacrifice the advantages of dealing with the full variety of cases in optimum fashion in order to achieve the advantages, in terms of learnability, of general principles. We accomplish this by creating general or larger categories

192. *Id.* at 421.

193. See L. TRIBE, *supra* note 3, at 576-84; Emerson, *supra* note 36, 72 YALE L.J. at 887-93.

194. "Simplicity in principles often goes with generality; it is usually possible to express more general principles in fewer words than less general ones; but this is not always the case. . . ." Hare, *supra* note 190, at 3.

when ideally we might deal in smaller categories and finer distinctions. There is nothing unseemly about this, for a fully developed theory must incorporate the realities of applying that theory.¹⁹⁵

From this perspective we can understand the strong impetus in favor of the creation of large categories in the first amendment, an impetus that pervades each of the three faces of categorization I have discussed. The risk of misapplication of a general category of coverage leads us to define the category of coverage as broadly as possible, indeed somewhat more broadly than any underlying theory of free speech would warrant.¹⁹⁶ The risk of misapplication of numerous subcategories leads us to eschew subcategories within the first amendment, avoiding them even when a distinction seems justifiable. The risk of misapplication in individual cases, moreover, leads us to favor categorical rules over ad hoc balancing, even at the cost of recognizing important differences among individual cases. None of these choices is absolute. They are presumptions that may be overcome. Indeed, the presumptions ought ideally to get weaker as time goes by. The more that judges, prosecutors, and legislators become familiar with the full import and complexity of first amendment theory, the more it should be possible to go on and create smaller categories and finer distinctions, recognizing the theoretically significant differences that we now for good reason ignore. Learning is slow, but it is at least hopefully progressive. The end of this process, however, is a long way off.¹⁹⁷ Until we reach or even come close to this utopia, general categories are the most important way we have of incorporating the constitutionally mandated preference for free speech values into a legal system populated by human beings of less than perfect ability and less than perfect insight.

195. See I. KANT, *ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE* (E.B. Ashton trans. 1974).

196. It is a possible but not a necessary truth that the use of larger categories will increase the proportion of troublesome cases. An increase in generality need not carry with it an increase in vagueness. Some very general words, such as "insect," are indeed quite determinate.

197. Unfortunately, I have no great confidence that we are even heading in the right direction. The actions of some prosecutors and trial judges in first amendment cases, if not the occasion for total despair, are at least cause to wonder whether we (the legal establishment) are not much better at formulating rules than we are at either teaching the rules or teaching the values that support them.

