When Well-Being Trumps Liberty: Political Theory, Jurisprudence, and Children's Rights

William Galston
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INTRODUCTION

As is so often the case, I find myself in sympathy with the broad thrust of Amitai Etzioni's argument. In this Article, therefore, I will try to dig a bit deeper in the soil Etzioni has already turned. I will suggest that common sense, liberal democratic theory, and constitutional jurisprudence come together to support his critique of First Amendment absolutism, certainly as it applies to minors.

I need to issue a caveat at the outset, however. Despite the best efforts of contemporary scholars obsessed with the alleged normativity of constitutional interpretation, there remains a significant gap between constitutional judgments and whatever brand of political and moral theory one prefers. A constitution is in part an aspect of positive law. As such, it may permit or, worse, command what normative theory forbids (and vice versa). Throughout U.S. history, African Americans have been more sensitive than others to this sad disjunction: whether or not Dred Scott was sound, it was impossible to deny that many fugitive slave laws fell within the four corners of the positive law of the Constitution. Morally sensitive citizens could find themselves legally required to cooperate in returning runaways to morally intolerable conditions.

Let me apply this idea to the considerably less apocalyptic questions before us now. It is perfectly true that First Amendment claims, or protections, are not "absolute." A substantial body of constitutional jurisprudence has worked out the circumstances in which (say) speech may be restricted and the rationales for such restrictions. It does not follow, however, that First Amendment guarantees are no

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weightier than other constitutionally relevant considerations. Writing
for the majority in *Prince v. Massachusetts*, Justice Rutledge denied
that "any of the great liberties insured by the First Article can be
given higher place than the others." He went on to insist, "[a]ll have
preferred position in our basic scheme." If so, we are not free simply
to balance speech, or religious free exercise, against considerations of
social utility.

Given the fact that some constitutional norms enjoy special
status, those who seek to restrict them labor under a significant bur-
den of proof. In recognition of this, the Court has developed tests to
shape the process of deliberative balancing that reflect the asymmet-
rical constitutional force of the competing considerations. The ques-
tion is whether, and how, restraints on speech directed at minors can
meet such tests.

The laws and practices that can pass constitutional muster may
not be fully congruent with plausible conceptions of wise policy, even
those guided by compelling visions of a good society. Professor Etzi-
oni is one of the world's foremost communitarian thinkers. I am a
liberal pluralist with communitarian sympathies. Neither of us can
assume that the Constitution entails, or even permits, all aspects of
his preferred position. To do so would be to repeat the error of schol-
ars who labored more honorably than wisely to locate John Rawls's
Difference Principle within the penumbras and emanations of the
Fourteenth Amendment.  

I. A COMMONSENSE UNDERSTANDING OF INFANTS AND
CHILDREN

Infants are born vulnerable and dependent, with an ensemble of
vital interests that they cannot defend through their own efforts. As
they mature, children raised in moderately favorable circumstances
gradually develop their capacity for "agency": that is, the ability to
internalize key social rules and to coexist on reasonable terms with
other members of their society, to frame for themselves a conception
of the life they wish to lead, and to reflect sensibly on the means re-
quired for that life. Over the years from birth to (say) age twenty-one,

4. Id. (emphasis added).
5. For a skeptical but open-minded exploration of this issue, see Frank I. Michelman, *In
external institutions (states, families, associations) gradually yield their temporary power to act on behalf of children, defining and defending children's interests. Young adults, however, are presumed to have the capacities of agency needed to do this on their own.

This developmental perspective has important moral and theoretical consequences. At birth, infants have powerful claims (on other individuals and on the political community) based on their welfare or well-being, but almost no claims based upon their agency. As children mature, the morally appropriate balance between welfare claims and agency claims gradually shifts, as does the locus of responsibility for both defining and attaining the content of welfare. By the age of maturity, young people are presumed to be able to define for themselves, within broad limits, a conception of well-being, and efforts on the part of others to do so for them are regarded as (at best) misguided paternalism. At the same time, young adults are presumed to be far more able than minors to provide for themselves the wherewithal for moving toward their preferred understanding of well-being. In short, their enhanced agency implied both agency-rights and agency-responsibilities.6

Taking as his point of departure this commonsense developmental perspective, Etzioni rightly points out that social orders can go wrong in two opposite ways, which have in common the failure to take seriously the distinction between adults and children. If children are treated as mini-adults, the law puts them at risk by failing to recognize their distinctive needs, vulnerabilities, and dependencies. On the other hand, if adults are treated as overgrown children, the law slips into an unwarranted paternalism that is at best condescending and at worst tyrannical.

Chronology is not destiny, of course. Some individuals in their early teens are capable of making for themselves a wide range of adult decisions. The law cannot make individualized determinations and instead establishes age thresholds as general norms for the exercise of agency in areas such as marriage, voting, and military service. Conversely, some individuals are congenitally unable to develop adult agency, while others suffer diminution of their capacities through accident, disease, or unwise choices. In such cases, the law does attempt to make individualized judgments. Because the determination

6. For a sophisticated discussion along these general lines, see Harry Brighouse, What Rights (if Any) do Children Have?, in THE MORAL AND POLITICAL STATUS OF CHILDREN 31 (David Archard & Colin M. Macleod eds., 2002).
that an individual suffers from diminished agency typically entails a loss of liberty, parties urging such decisions must discharge a significant burden of proof.

Although I cannot argue the point at length here, I would suggest that legal and cultural changes over the past generation have combined to increase this burden. For example, it is far more difficult than it once was to institutionalize mentally ill individuals involuntarily. Similarly, it is more difficult for adults to restrict minors' freedom of speech and expression, or to exercise disciplinary authority over minors without granting them a wide range of due process rights.⁷

The question Professor Etzioni raises is whether these and related developments have gone so far to become inconsistent with the well-being of minors and, if so, whether the U.S. legal system has the resources to strike a more reasonable balance. I shall argue that the balance already struck in settled case law is well suited to resolve, in a sensible manner, the kinds of cases Etzioni considers. But first, I want to approach the question from a more theoretical standpoint.

II. FROM CONSTITUTIONAL LAW TO POLITICAL THEORY AND BACK AGAIN: LIBERAL PLURALISM AND BALANCING BASIC VALUES

In recent years, a number of political theorists have been working to reconceptualize liberalism in a manner that incorporates Isaiah Berlin's important insights concerning value pluralism.⁸ In this section I want to (1) set forth the essentials of value pluralism, (2) trace the implications of value pluralism for our understanding of constitutions, and (3) bring this theory to bear on the U.S. Constitution.

A. Value Pluralism

I will summarize the essentials of value pluralism in four propositions. First, value pluralism is not relativism. The distinction between good and bad, good and evil, and right and wrong is objective and rationally defensible.

⁸ For my contribution to this genre, see William A. Galston, Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice chs. 1 & 6 (2002).
Second, objective goods cannot be fully rank-ordered. This means that there is no common measure for all goods, which are rather qualitatively heterogeneous. It means that there is no *summum bonum*, that is, the chief good for all individuals. It means that there are no comprehensive lexical orderings among types of goods. It also means that there is no "first virtue of social institutions," but rather a range of public goods and virtues whose relative importance will depend on circumstances.

Third, some goods are basic in the sense that they form part of any choice-worthy conceptions of a human life. To be deprived of such goods is to be forced to endure the great evils of human existence. All decent regimes do what they can to minimize the frequency and scope of such deprivations.

Fourth, beyond this parsimonious list of basic goods, there is a wide range of legitimate diversity, of individual conceptions of good lives, and also of public cultures and purposes. This range of legitimate diversity defines the appropriate zone of individual liberty, of deliberation and public decision making, and of constitutional design.

**B. Pluralist Constitutionalism**

Every political community assumes a distinctive form and identity through its constitution. A constitution, we may say, represents an authoritative partial ordering of public values. It selects a subset of worthy values, brings them to the foreground, and subordinates others to them. These preferred values then become the benchmarks for assessing legislation, public policy, and even the condition of public culture. Various aspects of this definition require further elaboration.

Within the pluralist understanding, to begin, there is no single constitutional ordering that is rationally preferable to all others—certainly not across differences of space, time, and culture, and arguably not even within a given situation. Nonetheless, the worth of a constitution can be assessed along three dimensions, call them realism, coherence, and congruence. A constitution is realistic if the demands it places on citizens are not too heavy for them to bear. A constitution is coherent if the ensemble of values it represents is not too diverse to coexist within the same community. A constitution is congruent if its broad outlines correspond to the moral sentiments of the community and to the situation that community confronts.

A constitution represents only a "partial ordering" of value in three senses. In the first place, there is no guarantee that a commu-
nity's distinctive constitutional values will always be consistent with the minimum requirements of public order, or that in cases of conflict, public order must yield to constitutional values. Second, it is not the case that constitutional values will always dominate an individual's ensemble of personal values. There are circumstances in which it is not unreasonable for individuals to place the values at the core of their identity above the requirements of citizenship.

Third, a constitution is only a partial ordering because the plurality of values that it establishes as preferred will unavoidably come into conflict with one another. Such conflicts are a familiar feature of U.S. constitutionalism. Public purposes understood in the consequentialist manner ("domestic tranquility") may clash with individual rights understood deontologically (a "fair trial"). And individual rights may themselves come into conflict; consider the tension between the right to a fair trial and freedom of the press.

From a pluralist standpoint, it is inevitable that many of these conflicts will have no single rationally compelling solution. Reasonable men and women may well disagree about the relative weight to be attached to competing values, and many will be able to make legitimate appeal to different features of the constitutional framework. There are no strict lexical orderings, even in theory, among basic values.

In *The Federalist No. 51*, James Madison poses a famous rhetorical question: "[W]hat is government itself but the greatest of all reflections on human nature?" And he continues, "If men were angels, no government would be necessary." A philosophical pluralist must disagree. Even if every individual were angelic in Madison's sense—perfectly capable of subordinating ambition and self-interest to reason and public spirit—nonetheless the incapacity of human reason to fully resolve clashes among worthy values means that authoritative mechanisms for resolving disputes remain indispensable. The more reasonable individuals are, the more clearly they will understand the need for such mechanisms. This is true even if there is broad public consensus on constitutional matters—that is, on the ensemble of values that are to be brought into the foreground.

From a pluralist standpoint, individuals vested with the power to make authoritative decisions—whether judicial, legislative, or executive—must understand that many of the controversies they are called

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10. *Id.*
on to resolve represent the clash not of good and bad, but rather of good and good. This means that these individuals must carry out their duties in a particular spirit: to the maximum extent feasible, their decisions should reflect what is valuable, not only to the winners, but also to the losers. Sometimes this will not be possible. But when not required by the logic of the matter to be resolved, winner-take-all decisions needlessly (and therefore wrongfully) diverge from the balance of underlying values at stake.

C. Pluralist Constitutionalism and Presumption

It may appear that pluralist constitutionalism yields a degree of indeterminacy fatal to the rule of law. I shall argue that this indeterminacy is constrained within practical bounds through a structure of relationships between values that I shall call presumption.

More than three decades ago, the noted student of jurisprudence Chaim Perelman observed that few philosophers have explored analogies between philosophy and law. Starting with Plato, many have suggested parallels between philosophy and mathematics. More recently, others have tried to refashion philosophy along the lines of natural science. But important structural similarities between philosophy and law have been neglected, Perelman suggests.¹¹

In law, reasonable and honest people can reach differing conclusions (unlike mathematics) such that additional evidence cannot suffice to overcome their differences (unlike the sciences). The ubiquity of reasonable disagreement in the law suggests a conception of rational decision that is neither determined by truth nor driven by arbitrary will, and it makes necessary structures of decision that can give authoritative force to one reasonable view over others. Indeed, Perelman argues, the very coherence of the idea of authority rests on this conception of decisions that are consistent with but not required by reason. Authority is superfluous, or at best derivative, in spheres in which reason compels a unique result.¹²

Perelman's account of reasonable disagreement is more than a little reminiscent of Aristotle's discussion of deliberation. Aristotle begins, and proceeds, by enumerating the matters about which we do not deliberate: mathematical truths, law-governed regularities of na-

¹². Id. at 107.
nature, matters of chance, or particular facts, among others. Instead, we deliberate about matters of human agency in which actions do not generate fully predictable results, matters in which "though subject to rules that generally hold good, are uncertain in their issue." \(^{13}\) So deliberation is the effort to choose the best course, all things considered, in circumstances in which reason shapes but does not fully determine that course.

Perelman takes Aristotle's argument one important step farther. The nature of law, and of practical deliberation more generally, points toward the necessary ground of human freedom:

Only the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom, a state in which a reasonable choice can be exercised. If freedom was no more than necessary adherence to a previously given natural order, it would exclude all possibility of choice; and if the exercise of freedom were not based on reasons, every choice would be irrational and would be reduced to an arbitrary decision operating in an intellectual void.\(^{14}\)

In short, neither Spinoza's determinism nor Sartre's decisionism can explain human freedom as we experience and practice it. Freedom operates in a zone of partial but not complete regularity, a discursive arena in which some reasons are better than others but none is clearly dominant over all the rest in every situation. If ethics and politics are part of this zone, as they evidently are, then their substance will reflect this ceaseless interplay of strong but not compelling reasons grappling with the variability of practical circumstances.

Perelman observes that every system of law embodies a presumption in favor of past decisions. The new and the old do not have to be treated in the same fashion; law teaches us to abandon existing rules only if good reasons justify their replacement. This presumption is not absolute, but the burden of proof falls on those advocating change.\(^{15}\) In a similar spirit, the nineteenth-century scholar Richard Whately, one of the founders of the modern study of argumentation,


\(^{15}\) \textit{Perelman, supra} note 11, at 104; \textit{see also Perelman & Olbrechts-Tyteca, supra} note 14, at § 17.
contended that while the majority of existing institutions and practices are susceptible of improvement, nonetheless
the "Burden of proof" lies with him who proposes an alteration;
simply, on the ground that since a change is not a good in itself, he
who demands a change should show cause for it.16

The reasoning underlying this stance is straightforward. The merits and defects of the status quo are well known. Unless the status quo is so intolerable that any change would be for the better, or at least not for the worse, then there is a possibility that a proposed change could produce a state of affairs that is even less desirable than the admittedly defective status quo. That is why the burden of proof is on the advocate of change to show why the proposed reform is unlikely to make matters worse, all things considered, and that those at greatest risk of harm are situated well enough to take a hit without suffering a devastating loss that no one would reasonably accept.

In an important article, Judge J. Harvie Wilkinson III elaborates on the conception of presumption in a legal context. As a backdrop, he sketches two opposed pure notions of judging: strict adherence to rules, without exception, and equity-based jurisprudence that takes its bearings from the facts of each case. The problem with strict rules is that they will inevitably run up against exceptional cases in which their application will appear harsh and unreasonable. The problem with unfettered equity is that it provides little predictability or uniformity, diluting the principal advantages of the rule of law.17 (For purposes of this discussion, I will follow Wilkinson in presupposing that the result or meaning of applying rules to particular cases is not in doubt. The frequent uncertainty of interpreting rules raises other questions that I want to set aside for now.)

Against this backdrop, the jurisprudence of presumptions emerges as an attempt to combine the advantages of rules—clarity, predictability, uniformity—with those of flexibility, prudence, and common sense. The strength of a legal presumption, Wilkinson declares, "lies in its rootedness in the rule of law; its vulnerability lies in the inability of the drafter of any legal rule to anticipate all the factual circumstances to which it may be applicable."18

18. Id. at 908.
In a famous discussion, Aristotle suggests that this combination of strength and vulnerability is inherent in the nature of law and law-making itself:

Law is always a general statement, yet there are cases which it is not possible to cover in a general statement. In matters therefore where, while it is necessary to speak in general terms, it is not possible to do so correctly, the law takes into consideration the majority of cases, although it is not unaware of the error this involves. And this does not make it a wrong law; for the error is not in the law nor in the lawgiver, but in the nature of the case: the material of conduct is essentially irregular. When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question.\textsuperscript{19}

Because the tension between generality and particularity is inherent in the nature of law, there are, Wilkinson suggests, no exceptionless absolute principles in law. Those that may appear absolute are, in fact, strong presumptions that may be overcome in specific circumstances. Not that rebutting a strong presumption is easy; one may understand it as a well-defended fortress that would require a powerful assault to conquer.

Some presumptions are stronger than others. In American constitutional law, the presumption in favor of free political speech can be overcome only by the most compelling public interest; in criminal cases, the presumption of innocence can be overcome only by evidence of guilt beyond a reasonable doubt, a difficult standard to meet. The burden of proof in civil cases is less stringent—the preponderance (that is, the greater part) of the evidence is required to sustain the plaintiff's claim.

In part, the variation among standards governing the burden of proof in different categories of cases reflects differences among the goods and values at stake. In a criminal case, for example, an individual's life and liberty are at stake. The prosecution's burden of proof beyond a reasonable doubt is designed to minimize the chances that individuals will be wrongfully deprived of these very great goods, which enjoy the status of natural as well as civil rights in American civic philosophy. The system cannot wholly eliminate the possibility of such wrongful deprivation, however. The only way to do so is never

\textsuperscript{19} ARISTOTLE, \textit{supra} note 13, at 1137b12–24.
to convict anyone of a felony, which would deprive the entire society of the advantages of the rule of law. In a universe of plural and competing goods, highly demanding protections for accused persons may impose excessive costs along other key dimensions of public value.

We can go farther, Judge Wilkinson suggests, towards a precise account of how the jurisprudence of presumptions operates in practice.\(^{20}\) First, the adjudicator must identify the relevant rule of law. Second, the "presumptive strength" of that rule must be identified. As we have seen, some rules enjoy a preferred position in our constitutional system, while others are secondary or tertiary. Third, the adjudicator must assess the "degree of stress" that an unforeseen circumstance imposes on that rule. In the case of political speech, for example, not only must the countervailing state interest be powerful as a matter of principle, but the facts of the particular case must also clearly bring that interest into play. Fourth, the adjudicator must specify, so far as possible, the costs of departing from the rule laid down, including not only the costs in the particular case, but also the longer-term damage to the credibility of the rule itself. Finally, the decision-maker must explain why the result achieved by making an exception to the rule is preferable, all things considered, to following the rule.\(^{21}\)

I want to underscore two features of this schema. First, it does not identify some neutral point of equipoise between the jurisprudence of rules and the jurisprudence of equity. Legal rules enjoy a status very different from that of (say) propositions advanced in a dialogue. If laid down by those duly empowered to create them, the rules have presumptive authority flowing from their source. There is a presumption—stronger in some cases than others, but always powerful—in favor of applying the rules laid down. The burden of proof lies on those who would relax the rules or carve out exceptions to them. In these circumstances, it would not suffice to show that making an accommodation would yield an outcome just as good, all things considered, as following the rule. A preponderance of considerations must point toward the exception being sought. Just how strong of a preponderance will depend on the nature of the rule in question.

Second, the process of justifying the exception often takes place in a context of multiple values. The rule in question, let us say, seeks to promote a particular public value. The case for granting an excep-

\(^{20}\) Wilkinson, supra note 17, at 914.
\(^{21}\) Id.
tion will typically appeal to a different value; if allowed to operate without modification in pursuit of its intended value, it may be alleged, the rule will exact too high a price as measured along another important dimension of value that the system of law cannot reasonably ignore.

In the next section of this Article, I will argue that legal disputes over the application of First Amendment freedoms to children exemplify this way of thinking about conflicts among values. Specifically, a settled tradition of case law identifies an independent and significant state interest in the well-being of minors, an interest that modifies both the interpretation and the scope of rights as normally understood in the context of adults.

III. THE WELL-BEING AND RIGHTS OF MINORS: SOME LEADING CASES

Consider, first, *Prince v. Massachusetts*, decided in 1944.22 The facts were these: A Massachusetts statute prohibited minors from selling newspapers, periodicals, or other articles of merchandise in public places, including streets. The same statute made it unlawful for any adult to furnish to a minor any article that the adult knows the minor intends to sell in a public place. Sarah Prince, a Jehovah's Witness and the aunt and guardian of a nine-year-old girl, provided her ward with religious literature and accompanied her as she sold it in the streets. Arrested and convicted pursuant to the statute, she appealed on the grounds that it contravened the Fourteenth Amendment by abridging her freedom of religion and violating the principle of equal protection of the laws.23

The Supreme Court denied Ms. Prince's appeal for relief. Delivering the opinion of the Court, Justice Rutledge began (as we have already seen) by adverting to the preferred position First Amendment liberties enjoy in our constitutional scheme. For that reason, he observed, "To make accommodation between these freedoms and an exercise of state authority always is delicate," especially when those freedoms substantially apply to minors as well as adults.24 And they do. In particular, the rights of children to exercise their religion and of parents and guardians to direct the religious upbringing of their chil-

22. 321 U.S. 158.
23. *Id.* at 159-61.
24. *Id.* at 165.
dren have received recognition on numerous occasions. Nonetheless, Rutledge continued, "neither rights of religion nor rights of parenthood are beyond limitation." The challenge then becomes to determine the appropriate standard for distinguishing between appropriate and inappropriate limitations.

One thing is clear, Rutledge states: a law similar to the disputed Massachusetts statute but applying to adults rather than minors would be invalid. Given the preferred position of religious freedom, the claim supporting state intervention against adult conduct must involve some "clear and present danger," which is manifestly absent in this case. "But the mere fact a state could not wholly prohibit this form of adult activity... does not mean it cannot do so for children... The state's authority over children's activities is broader than over like actions of adults." The reason is this: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection." Though relevant, the presence of a parent or guardian directing and supervising the child is not decisive. Not only are parental rights themselves subject to limitation, but also, there is no guarantee that parental presence will suffice to forestall the evils the state seeks to prevent.

In sum, the opinion of the Court stands for two propositions: that there is a difference between children and adults; and that this difference rightly affects the balance to be struck between liberty and welfare. In jurisprudential terms, the balance is shaped by the test courts employ to determine the validity of a contested state intervention. The majority opinion in Prince suggests that it is enough for the state to show a rational relationship between some important aspect of children's well-being and its proposed restraints on their liberties.

It was certainly possible to dissent from this line of reasoning, and Justice Murphy did so. While he conceded the abstract proposition that the power of the state over children is greater than over adults, he proposed a much stricter test for legitimate state intervention. It is not enough to show that an intervention was reasonable. If

25. Id. at 166.
26. Id. at 167.
27. Id.
28. Id. at 168.
29. Id.
30. Id. at 169.
we truly believe what we profess, that First Amendment freedoms are central to our system of ordered liberty, then we cannot accept their infringement for any reasons other than the weightiest: "If the right of a child to practice its religion in that manner is to be forbidden by constitutional means, there must be convincing proof that such a practice constitutes a grave and immediate danger to the state or to the health, morals or welfare of the child." The state had manifestly failed to discharge this burden in this case.

While this test is demanding, it is not impossible to meet. For example, the state may intervene against parents who withhold medical treatment from a child with a life-threatening illness, even if sincere religious belief lies at the heart of the parents' stance. But it would be much harder for the state to act consistently with Justice Murphy's test in cases involving "morals" rather than health, for two reasons: the definition of morals may be at issue, and the requisite evidence concerning the link between parental behavior (or state policy) on children's moral well-being may be much harder to adduce. If Professor Etzioni's article accurately represents the current state of social science on such questions, it might well be possible, consistent with Justice Murphy's standard, to sustain limits on violence in media to which children are exposed. It would probably not be possible to sustain comparable limits on the depiction of sexual behavior.

There was another possible position on the issue before the Court, and three members led by Justice Jackson adopted it. Concurring in the majority's result, Jackson emphatically rejected the grounds of their opinion. The crucial issue, he argued, was not whether adults or children are conducting the activity whose regulation is in question, but rather whether the activity falls within the public or private sphere. "Religious activities which concern only members of the faith," he asserted, "are and ought to be free—as nearly absolutely free as anything can be." State-imposed limits operate legitimately "whenever activities begin to affect or collide with liberties of others or of the public." In setting aside the distinction between public and private action, he argued, the majority risked legitimating a wide range of state intrusions into activities that should be immune. If minors may not sell literature in public, may they carry collection plates in churches? If minors can be forbidden to engage in

31. Id. at 173–74 (Murphy, J., dissenting).
32. Id. at 177 (Jackson, J., concurring in result).
33. Id.
paid construction work, may they also be forbidden to participate in barn-raisings that churches organize for their members? Surely not.

Assuming that the condition of external effects is satisfied, Justice Jackson continued, the remaining question is whether the state regulation is even-handed or discriminatory. It cannot be directed against specific religious activities. Nor can it be arbitrary and capricious. The regulation stands if it is consistent with equal protection of the laws, as it is in the case of Massachusetts's prohibition of public commercial activities on the part of minors. Unlike (say) race, age is not a suspect classification. Far from being constitutionally questionable, child labor laws are perfectly reasonable. Given the "publicness" of the cases Professor Etzioni presents, Justice Jackson's standard would seem to validate state action, at least in those cases in which it is possible to constrain collateral damage in the form of spillovers within acceptably narrow limits.

I turn now to the second case I wish to examine, Ginsberg v. New York. The plaintiff in this case operated a luncheonette that also sold periodicals of various sorts. After he personally sold a sixteen-year-old boy two "girlie" magazines in violation of a New York statute forbidding such sales to minors, he was prosecuted and convicted. In his appeal, he argued that the scope of constitutionally protected freedom of expression cannot depend on the age of the citizen. If the material in question is not considered obscene (and therefore outside the ambit of constitutional protection) for non-minors, then it is unconstitutional to restrict its distribution to minors.

The Court rejected Ginsberg's argument. In the opinion of the Court, Justice Brennan cited Prince in support of the proposition that the power of the state over minors' conduct reaches farther than that over adults. The question, then, was whether New York's exercise of its power had a reasonable basis, rooted in the difference between minors and adults. Brennan insisted that it did. As a general matter, he stated, the state has "an independent interest in the well-being of its youth," independent, that is, both of other state interests and even of parental interests. Quoting Mishkin v. New York, Brennan argued

34. Id. at 178.
35. 390 U.S. 629 (1968).
36. Id. at 636.
37. Id. at 638.
38. Id. at 640. Brennan observed that the New York statute could also be justified as supporting parents in the discharge of their interest in the well-being of their children. Id. at 639. This provided the entering wedge for Justice Fortas' dissent. The majority's decision, he ob-
that the contested statute merely "adjusts the definition of obscenity 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests...' of such minors."39

To be sure, New York was not free simply to assert the relevant difference as the basis of its statute. A subsection of the disputed law stated a legislative finding that the material prohibited to minors is "a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state."40 As Brennan dryly noted, "It is very doubtful that this finding expresses an accepted scientific fact."41 But the absence of scientific proof is not fatal. Unlike efforts to restrict protected expression, where a showing of grave or imminent danger would be essential, in the case of obscenity, it is only necessary for the Court to determine that it is "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."42 In short, the strength of the state's interest in the well-being of minors, coupled with the diminished protection for speech deemed obscene, has the effect of significantly reducing the burden of justification the state must discharge.

Justice Stewart concurred in the result but offered a different argument. He began by noting that while a "doctrinaire, knee-jerk application of the First Amendment would... dictate the nullification of this New York statute," attention to the purposes and presuppositions of that amendment allow us to avoid that result.43 The Constitution, Stewart wrote, "secures... the liberty of each man to decide for himself what he will read and to what he will listen. The Constitution guarantees, in short, a society of free choice. Such a society presupposes the capacity of its members to choose."44

Suppose that the capacity to make a choice is absent. Under such circumstances, Stewart pointed out, government regulation of expression is not only consistent with, but may actually implement, First

39. Id. at 638 (quoting Mishkin v. New York, 383 U.S. 502, 509 (1966)).
40. Id. at 641.
41. Id.
42. Id.
43. Id. at 648–49 (Stewart, J., concurring).
44. Id. at 649 (emphasis added).
Amendment guarantees. For example, the Constitution itself prohibits anyone from foisting his uninvited and unwelcome views on a "captive audience." 45 This line of argument, Stewart reasoned, has important consequences for minors: "a State may permissibly determine that, at least in some precisely delimited areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." 46 It is only on that basis, Steward concludes, that a state may legitimately deprive minors of other rights, such as the right to marry or to vote, the denial of which would be "constitutionally intolerable" for adults. 47

The third case I will review is *FCC v. Pacifica Foundation.* 48 The facts were as follows: On a Tuesday afternoon at around two o'clock, a radio station aired a satiric humorist's long monologue which, under the guise of exploring words that could not be used on the public airwaves, proceeded to list and repeat various expressions related to sexual and excretory functions. A man who had heard the broadcast while driving with his young son complained to the FCC, which subsequently issued both an order holding that the station had exposed itself to administrative sanctions and an opinion declaring and clarifying its power to regulate "indecent" broadcasts. 49

By a slim and divided majority, the Supreme Court ultimately ruled in favor of the FCC. The opinion of the Court, different parts of which were joined by different justices within the majority, noted that the FCC's objections to the broadcast were based in part on its content. If the First Amendment prohibits all content-related restriction on speech (as the defendant argued), then clearly the FCC's action must fail. But the First Amendment does no such thing. The Court has repeatedly found that certain words uttered in certain contexts stand outside the ambit of constitutional protection. There is no right to shout fire in a crowded theater, no right to speech calculated to provoke a fight, no right to obscenity. 50

The constitutional analysis of speech is complicated by the diversity of media. "We have long recognized," said the Court, that "each medium of expression presents special First Amendment problems.

45. *Id.*
46. *Id.* at 649–50.
47. *Id.*
49. *Id.* at 729–31.
50. *Id.* at 744–745.
And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection. There are two principal reasons for this special treatment. First, the broadcast media are uniquely pervasive and intrusive, even penetrating the privacy of the home, where the citizen's right to be left alone is a powerful counterweight to freedom of expression. Second, "broadcasting is uniquely accessible to children, even those too young to read... The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in Ginsberg, amply justify special treatment of indecent broadcasting.

In a concurring opinion, Justice Powell took note of a special difficulty raised by this case, and others like it. In most instances, he observed, the dissemination of indecent material to children (printed and recorded materials, motion pictures, and live exhibitions in theaters) may be limited without also limiting the access of willing adults. Not so for broadcasting, at least during most broadcast hours, and certainly not in the afternoon. It may well be argued, continued Powell, that

despite society's right to protect its children from this kind of speech, and despite everyone's interest in not being assaulted by offensive speech in the home, the Commission's holding in this case is impermissible because it prevents willing adults from listening to [the] monologue over the radio in the early afternoon hours. It is said that this ruling will have the effect of 'reduc[ing] the adult population... to [hearing] only what is fit for children.' Powell acknowledged that this objection was not without merit and that it should affect the development of more precise standards. Under some circumstances, he implied, the effort to protect a relatively small number of children from a relatively modest harm could come at excessive cost to the liberty of adults. A common sense balancing strategy is appropriate, administratively and judicially, for evaluating such tradeoffs.55

Among other factors, this balancing test should take into account the ability of adults to readily obtain access to restricted materials in other ways. They could purchase the record containing the monologue, attend a live performance, or read a transcript. Moreover,

51. Id. at 748 (citation omitted).
52. Id. at 749–50.
53. Id. at 757–58 (Powell, J., concurring).
54. Id. at 760 (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957)).
55. Id. at 758–60.
there was nothing in the FCC’s order that would necessarily prevent the radio station from broadcasting the monologue during late evening hours when few children were likely to be within earshot. Once the high-order interests of children are pitted against First Amendment freedoms, our only sensible recourse is deliberation guided by context-specific patterns of facts and balances of benefits and burdens.  

Finally, I will review the Supreme Court’s decision in United States v. American Library Association, Inc.  
In a ruling handed down on June 23, 2003, all members of the Court appeared to find a compelling governmental interest in protecting minors from inappropriate material. Six justices found no constitutional impediment to the requirement of the Children’s Internet Protection Act that libraries must install anti-pornography “filtering” software on their Internet terminals as a condition for receiving various forms of federal assistance. Writing for a four-justice plurality, Chief Justice Rehnquist argued that public libraries are not pure public fora, but rather “necessarily consider content in making collective decisions” and enjoy a right to do so. A public library “does not have an obligation to add material to its collection simply because the material is constitutionally protected.” In his concurring opinion, Justice Breyer argued that a library’s exercise of its “editing” or “selection” function does not trigger the application of strict scrutiny—the most demanding test of constitutionality. The question then is not whether the filtering is the least restrictive means of protecting children, but whether it is reasonably related to that end and does not impose an undue burden on adults.

The plurality opinion also argued that the congressional mandate is not an unconstitutional condition on the receipt of federal funds: “[B]ecause public libraries have traditionally excluded pornographic materials from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs.” Finally, the Chief Justice noted that, to the extent that the software erroneously blocks access to protected speech, the remedy is straightforward: adult patrons may ask librarians to unblock the sites in ques-

56. Id. at 760–761.
58. Id. at 2304.
59. Id. at 2307 n.4.
60. Id. at 2311.
61. Id. at 2308.
tion. Justice Kennedy emphasized this possibility in his concurring opinion: If, as the government claims, libraries are both willing and able to unblock these sites, then the ability of adult users to have access to protected materials is not burdened to any significant degree.

In short, making use of a range of widely accepted constitutional standards, a solid majority of the Court was able to square the protection of children with the requirements of the First Amendment. In so doing, it affirmed and extended the basic thrust of the line of cases I discussed earlier in this Article.

CONCLUSION

As I said at the outset, I am sympathetic to the basic thrust of Professor Etzioni's analysis. That said, my inquiry leaves me less convinced than he appears to be that the constitutional status quo is inadequate to deal with the practical issues he raises. In particular, the principle that the meaning and weight of First Amendment rights varies with the age of individuals is well established, as is the existence of an independent, significant state interest in protecting the well-being of minors. Nor am I as skeptical as Etzioni appears to be about the viability of content restrictions on expression, especially within the framework of age-relative liberties. I agree with Etzioni that it is preferable to seek technological arrangements that, so far as possible, decouple the access and exposure of minors to forms of expression from that of adults. Still, settled law suggests that even when it is technically impossible to separate restraints on minors from restraints on adults, restrictions on expression may still be constitutionally valid. We are not, fortunately, in poor Shylock's position, forbidden to carve the flesh of restricted access to minors unless we can avoid shedding even a drop of blood of impeded access to adults.

62. Id. at 2306-07.
63. Id. at 2310.