FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS. By Martin H. Redish.[1] Charlottesville, Va.: The Michie Company. 1984. Pp. xi, 276. $19.50.

NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT. By Melville B. Nimmer.[2] New York: Matthew Bender. 1984. Pp. xv, 510. Looseleaf, $80.00; Paper, $17.50.

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The Supreme Court's 1964 decision in *New York Times v. Sullivan* inaugurated an era of increasingly complex first amendment categories and catchwords. First amendment lawyers today speak of public and private figures, actual malice or negligence, the four-part *Central Hudson* test,[4] the three-step *O'Brien* analysis,[5] and type one, two, and three public fora. Judge Bork recently criticized this tendency "to adhere to sharply-defined categories" in first amendment adjudication. Scholars and judges, he mused, "enunciate such things as four-factor frameworks, three-pronged tests, and two-tiered analyses in an effort, laudable by and large, to bring order to a universe of unruly happenings." But this "mechanical jurisprudence," he warned, falters when "life . . . bring[s] up cases whose facts simply cannot be handled by purely verbal formulas."[6]

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2. Late Professor of Law, University of California, Los Angeles. The author and editors note with sadness the death of Professor Nimmer while this book review was in preparation.

3. Assistant Professor of Law, University of Illinois. I wish to thank Andrew Lloyd Merritt and John E. Nowak for their helpful comments.

4. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980).

5. United States v. O'Brien, 391 U.S. 367, 377 (1968). Although *O'Brien* mentioned four factors, the first (whether the challenged regulation "is within the constitutional power of the Government") has been disregarded as trivial. *See, e.g.*, Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1483-84 n.10 (1975). Compounding its numerology, O'Brien has given birth to the "two-track" theory of first amendment jurisprudence. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2 (1978).

6. Ollman v. Evans, 750 F.2d 970, 994 (D.C. Cir. 1984) (en banc) (Bork, J., concurring), *cert. denied*, 105 S. Ct. 2662 (1985).

Two recent books by first amendment scholars pursue this debate between those who would loosen the bonds of first amendment jurisprudence and those who approve of the Court's current codification. Martin Redish, in a volume collecting six of his law review articles, joins Bork in deploring "judicial or scholarly attempts to seek rigid, unbending answers to issues too complex for such solutions."[7] Instead, Redish urges the adoption of "more flexible guidelines" that will "foster the value served by free speech more fully and reconcile competing social interests more effectively."[8] He applies this approach to five recurrent first amendment problems: defining the function of free speech, distinguishing between content-based and content-neutral regulations, judging prior restraints, punishing advocacy of illegal conduct, and evaluating overbroad statutes.

Melville Nimmer's new first amendment treatise, on the other hand, painstakingly elaborates many of the canons and conventions developed by the Supreme Court during the last twenty years.[9] Although Nimmer criticizes some of the Court's specific results, he embraces the Court's approach to first amendment adjudication. Cases are sorted according to type, subjected to specified standards, and analyzed with the appropriate factors. Nimmer's theoretical perspective on the first amendment thus offers a marked contrast to Redish's methodology.[10]

I

Redish begins his quest for a flexible jurisprudence by rejecting

7. M. REDISH, *supra*, at 4. Redish's agreement with Bork on this point does not portend agreement on other first amendment issues. Redish vehemently disagrees with Bork's scholarly work advocating that only "explicitly political" speech merits constitutional protection. *Compare* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971), *with* M. REDISH, *supra*, at 15-19, 22-26.

8. M. REDISH, *supra*, at 4.

9. Portions of Nimmer's treatise, like Redish's book, are drawn from previously published law review articles. Again like Redish, Nimmer does not purport to treat comprehensively all free speech issues. Although labeled a "treatise," the book "deals primarily with the theory of the First Amendment." M. NIMMER, *supra*, at vii. The most notable omissions from Nimmer's coverage are his failure to discuss commercial speech, obscenity, and speech threatening national security.

10. In addition to differing over these theoretical issues, Nimmer and Redish disagree over the most basic problem of first amendment jurisprudence: Redish discusses the "first amendment" while Nimmer analyzes the "First Amendment." In this debate, Redish has scholarly authority on his side. *See* A UNIFORM SYSTEM OF CITATION § 8, at 32 (13th ed. 1981). But Nimmer appeals to principles of natural justice. "As everyone knows," Nimmer declares, "—with the glaring exception of law review editors—it is the First Amendment, not the first amendment." He then incites all "[t]hose who believe in freedom of speech" to "begin by rejecting the tyranny of the Uniform System of Citation." M. NIMMER, *supra*, at vii.

attempts to tie speech to a single, narrowly defined function or to a rigid hierarchy of functions. He maintains instead that freedom of speech serves a broad interest in "individual self-realization." This self-realization takes two forms: development of the individual's intellectual powers and achievement of control over decisions affecting the individual's life. Freedom of speech "fosters the former goal *directly* in that the very exercise [of] one's freedom to speak, write, create, appreciate, or learn represents a use, and therefore a development, of an individual's uniquely human faculties." The same freedom "fosters the latter value *indirectly* because . . . it *facilitates* the making of [life-affecting] decisions."[11]

Because Redish defines the value of free speech so broadly, his definition of protected speech is correspondingly broad. Indeed, he claims to "extend the reach of the first amendment protection further than does virtually any other commentator."[12] Commercial speech, corporate communications, strings of obscenities, and perhaps even primal screams qualify as speech under Redish's theory.[13] Redish, moreover, insists that courts should not differentiate among these varieties of speech on the basis of their value. He ardently rejects the Supreme Court's recent attempts to calibrate levels of first amendment protection according to the perceived worth of the speech.[14] For Redish, the string of obscenities and classic political speech have the same first amendment status. To distinguish between the two kinds of speech, he contends, conflicts with the notion of free will "inherent in the self-realization principle."[15] Individuals, rather than societal censors, must determine the value of particular communications; otherwise individuals can neither

11. M. REDISH, *supra*, at 21-22 (emphasis in original).

12. *Id.* at 7.

13. *Id.* at 30, 57-60, 60-68.

14. *See, e.g.*, Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985) (plurality opinion); FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion). In *Dun & Bradstreet*, a plurality of the Court referred to this differentation as an established principle of first amendment law. The plurality opinion observed that Supreme Court decisions had "long recognized that not all speech is of equal First Amendment importance" and cited a litany of decisions demonstrating that fact. 105 S. Ct. at 2945 & n.5. The plurality added to that line of cases by holding that defamatory speech "on matters of purely private concern" deserves less constitutional protection than defamatory statements involving issues of public concern. *Id.* at 2946. The Chief Justice and Justice White, concurring separately in the judgment, endorsed the latter distinction. *Id.* at 2948 (Burger, C.J., concurring in the judgment); *id.* at 2954 (White, J., concurring in the judgement). Neither Justice, moreover, disputed the plurality's statement that Supreme Court precedents recognize a hierarchy of types of speech based upon the importance of the message. Thus, a majority of the Court currently appears comfortable with a first amendment stratified on the basis of the importance or value of the speech.

15. M. REDISH, *supra*, at 12.

fully develop their intellectual capacities nor choose the information relevant to their own decisions.

Although Redish defines "speech" broadly, he by no means insists on absolute protection. On the contrary, he "frankly recognize[s] the need for the judiciary to reconcile the free speech right with competing governmental interests."[16] His prescription for that reconciliation again evidences his commitment to flexibility and case-by-case adjudication. Rather than erecting categorical rules—like the *New York Times* actual malice standard—to resolve broad classes of first amendment claims, Redish pleads for "a significant degree of judicial discretion in balancing competing social interests, often in individual cases."[17]

This is a novel suggestion, especially for a writer billing himself as a first amendment "protectionist." The traditional wisdom holds that judicial discretion and balancing allow the courts too much freedom to penalize unpopular speakers. Redish challenges this orthodoxy, noting that any method of first amendment adjudication ultimately depends upon the judiciary's willingness to protect first amendment values in the face of popular opposition. Even the "use of rigid categories . . . cannot effectively guard against a judiciary either insensitive to free speech concerns or caught up in a nation's paranoia."[18] The supposed benefits of categorical rules are therefore imaginary, but the costs are weighty; Redish argues with some justification that rigid tests are unworkable, deceptive, and underprotective of first amendment freedoms.[19]

Redish's cost-benefit analysis, however, may underestimate the danger that case-by-case balancing will accelerate the Court's current tendency to distinguish among speakers based on the supposed value of their messages. Unfortunately for Redish's thesis, some of the same Justices who have attempted to sidestep the Court's cate-

16. *Id.* at 8.

17. *Id.* at 260. Although Redish merely sketches the outlines of his balancing process, it is not as formless as his rhetoric first suggests. Instead, his "case-by-case judicial flexibility" contains a number of familiar doctrinal ingredients: a presumption in favor of free expression, the requirement of a compelling governmental interest, and a search for least restrictive means to implement that interest. *Id.* at 261. Redish admits, moreover, that in certain situations "more narrow formulations," such as the clear-and-present-danger test, should replace indeterminate balancing. Even relatively rigid rules, such as the actual malice standard, may play some role in this restructured first amendment jurisprudence. *Id.* at 261-62. Still, Redish advocates a significant change of emphasis in first amendment adjudication. He would begin analysis of every claim with a commitment to flexibility, rather than with the current determination to pigeonhole the claim into a preexisting category. For Redish, tests and formulae seem to be convenient shortcuts, employed only occasionally and only when a controversy clearly fits the pattern of previous cases.

18. *Id.* at 262.

19. *Id.* at 261-62.

gorical rules and deliver narrow pronouncements tailored to the controversies at hand have also shown the greatest affinity for ranking speech according to its value.[20] These characteristics may be related: the very individuality of the analysis in these cases may have contributed to the Justices' willingness to consider the value of the speech before them.

Even more radical than Redish's advocacy of balancing is his rejection of any distinction between content-based and content-neutral regulations. Redish argues that the supposed difference between content-based and content-neutral regulations is illusory. In support of this claim, he points to flag desecration statues and prohibitions on the use of profanity in public—both of which can be defensibly characterized as content-neutral restrictions on the manner of expression or as content-based bans of particular expressive symbols. The status of subject matter restrictions on speech, such as bans of commercial advertising or obscenity, is also uncertain under the content distinction. Pursuing this elusive distinction between content-based and content-neutral regulations, Redish concludes, "only obscures the appropriate inquiry in a sea of semantics."[21]

Of even greater concern to Redish than these practical problems is the theoretical inconsistency he perceives between the content distinction and fundamental principles of first amendment thought. No matter what function one ascribes to free speech, Redish reasons, any lessening of speech—no matter how content-neutral—frustrates that goal. Indeed, a content-neutral ban on *all* expression is more likely to retard self-fulfillment, self-government, the search for truth, the checking value, or any other first amendment function than is a content-based restriction on only some expression. "In a perverse sense . . .," Redish observes, "it appears that the more expression we prohibit, the closer we come" to avoiding suspect content distinctions.[22]

In light of these difficulties, Redish admonishes the courts to reject the content distinction and to subject all infringements of free speech to a uniform analysis. Whether or not a law regulated speech on the basis of content, he would require the government to establish a compelling interest and to show that " 'feasible' less restrictive alternatives [were] inadequate to accomplish [its] end." If these prerequisites were met, a court employing Redish's test would

20. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion); Young v. American Mini Theatres, 427 U.S. 50 (1976) (plurality opinion).

21. M. REDISH, *supra*, at 91-92, 111, 114-16.

22. *Id.* at 111.

balance the state's regulatory interest against the restriction on the speaker's opportunities to speak: restrictions imposed on speakers with few alternative means of communication would require greater governmental justifications.[23]

Redish's provocative arguments persuaded me that the courts' use of the content distinction has become overly mechanical and rigid. The content distinction should not operate as a jurisprudential watershed, fortuitously channeling some claims to the harsh waters of strict scrutiny while washing others into a warm sea of *O'Brien* balancing. Such a rigid classification does divert the courts' attention from more meaningful issues and can lead to arbitrary results in particular cases.

I am less convinced, however, by Redish's suggestion that the courts should virtually abandon the content distinction.[24] The extent to which a regulation targets specific speakers or messages often signals the legislature's motive in enacting the law. When a law is "content-neutral," or applicable to a wide variety of speakers, it is unlikely that the government adopted the restriction simply to suppress unpopular messages.[25] Since the legislators themselves (and the majority they represent) must abide by any content-neutral regulation, they must have perceived an overwhelming need for the law—one that would justify even restrictions on the majority's liberty. Under these circumstances, the courts may give some weight to the legislature's determination that a compelling interest supported the regulation. On the other hand, when a law restrains only a few speakers or messages, this political check is weaker. The legislature may have undervalued the interest of those speakers, or may have acted specifically to suppress their speech. Hence, the courts should scrutinize the legislature's actions more closely and demand a stronger justification for the action than they would for a content-neutral regulation.

Thus, although the content distinction need not rigidly constrain first amendment analysis, it should at least influence a court's

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23. *Id.* at 117-18.

24. At one point, Redish admits that the "content factor" is not "always irrelevant" to first amendment adjudication. *Id.* at 120. His only concrete suggestion for use of the concept, however, is in cases in which the government claims a content-neutral justification for a law but the law itself distinguishes speech on the basis of content. In such cases, the government destroys its own case, because the language of the regulation "will reveal that the government does not really believe that its asserted content-neutral justification is valid."

25. As Justice O'Connor recently explained: "When the State imposes a generally applicable [restriction], there is little cause for concern. We need not fear that a government will destroy a selected group of [citizens] by burdensome [regulation] if it must impose the same burden on the rest of its constituency." Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 585 (1983).

assessment of the constitutionality of a particular regulation. An appropriate place to account for the content distinction appears in the last stage of Redish's unified analysis. When courts "balance the compellingness of the state interest served by the law against the availability of alternative means of expression to the speaker,"[26] they could also consider the extent to which the law singles out particular speakers or messages. Laws that disproportionately affect a few speakers or messages, like laws that leave few alternative channels of communication, should require stronger government justifications. By adding this weight to the balance, courts could more fully realize Redish's promise of a first amendment jurisprudence tailored to the facts of the particular case.

II

While Redish attacks the roots of the Supreme Court's verdant first amendment jurisprudence, Melville Nimmer happily arranges the leaves and fruit of that garden. Like a nineteenth century naturalist, he diligently identifies the myriad species of first amendment controversies and organizes them into a taxonomy of first amendment thought. Along the way, he enthusiastically collects many of the distinctions and categories rejected by Redish.

At the outset, Nimmer posits a fixed hierarchy of discrete values served by the first amendment; this contrasts sharply with Redish's expansive concept of self-realization. For Nimmer, the most important function of free speech is enlightenment. Only by maintaining "open channels of communication" can citizens pursue "the search for all aspects of knowledge and the formulation of enlightened opinion on all subjects." A second function, self-fulfillment, is analogous to the component of Redish's self-realization value relating to development of the individual's mental faculties. In Nimmer's scheme, however, that function enjoys only a subordinate role. Still less important is the safety valve function, which rests upon the assumption that "men will be less inclined to resort to violence to achieve given ends if they are free to express themselves through speech advocating such ends." These last two interests, Nimmer suggests, will rarely overcome social interests in regulating speech, except when combined with a threat to the enlightenment function.[27]

Nimmer's pyramid of speech values leads him to provide different levels of protection to different speakers. While Redish be-

26. M. REDISH, *supra*, at 118.
27. M. NIMMER, *supra*, §§ 1.02 to 1.04.

lieves that all speech, whatever its source, has the same potential to promote self-realization, Nimmer concludes that some speakers foster enlightenment to a greater extent than other speakers. His defense of this position, however, proves somewhat ambivalent. For example, since speech by the media reaches more listeners than does speech by private individuals, Nimmer argues that media defendants merit more protection in defamation suits than do nonmedia defendants.[28] He forthrightly acknowledges, however, that there is no proof that media communications enlighten public opinion more significantly than do private conversations. Indeed, Nimmer credits the private "marketplace of ideas operating outside of the media" for reversing public opinion on the Vietnam War when the media still supported the War.[29] Furthermore, he admits that even when the media originate an idea, acceptance of the concept (and true enlightenment) may come only through private discussion and criticism.[30] Given Nimmer's own reservations on this subject, it is not surprising that the Supreme Court recently rejected the distinction he advocates.[31]

Nimmer joins Redish in insisting that any absolute interpretation of the first amendment "simply will not wash."[32] Rather than endorsing balancing on a case-by-case basis, however, Nimmer advocates "definitional balancing." In definitional balancing, he explains, a court balances competing social interests "not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining" what level of protection that type of speech deserves under that type of circumstance.[33] As in *New York Times v. Sullivan*, the court thus

28. *Id.* § 2.05[C][1], at 2-53 through 2-55; § 2.08[E], at 2-125 through 2-127.

29. *Id.* § 1.02[D], at 1-18.

30. Nimmer's colleague, Steven Shiffrin, has made this point succinctly: "The issue, if influence is to be the test, is whether the communication to five million people is more influential than the communications of the five million people who discuss that communication at breakfast tables, at work, in taxicabs, in bars, in universities, and elsewhere." Shiffrin, *Defamatory Non-Media Speech and First Amendment Methodology*, 25 UCLA L. REV. 915, 931-32 (1978). In response to the suggestion that enlightenment may follow as much from private individuals discussing media communications as from the media communications themselves, Nimmer argues only that "the impact of five million individual communications is comparable to a single media communication to five million listeners or viewers only if each of the five million individuals convey essentially the same message." M. NIMMER, *supra*, § 2.05[C][1], at 2-55. This curious rejoinder seems to assume that enlightenment is most complete if everyone hears the same message and adopts the same view. For most issues, however, such complete consensus is impossible. Under these circumstances, it seems that the richness and diversity of five million private conversations would produce more understanding and knowledge than would a single platitude uttered by a newscaster during the evening news.

31. Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985).

32. M. NIMMER, *supra*, § 2.01, at 2-4.

33. *Id.* § 2.03, at 2-15.

strikes the balance between free speech interests and competing social values for a broad class of cases. The advantages of definitional balancing, according to Nimmer, are that it (1) promotes certainty by generating a rule applicable to a whole category of claims; (2) encourages the courts to think generally about the values of free speech rather than about the merits of the particular speech at issue; and (3) insulates judges from popular pressure to decide specific cases against unpopular speakers.[34]

It would be impossible to decide here whether definitional balancing produces "better," more principled, or more libertarian decisions than case-by-case decisionmaking. During the last few years, however, the Supreme Court has decided at least two significant first amendment cases by engaging in a rather explicit form of definitional balancing.[35] If the Court continues to move in this direction, scholars and practitioners need to understand the premises and effects of that technique. Nimmer's defense of definitional balancing—especially when read together with Redish's contrary plea for more individual decisionmaking—provides a firm foundation for further exploration of these questions.

Nimmer's treatment of other first amendment issues, such as his approval of the content distinction, follows the same pattern of adopting and elaborating doctrinal tools eschewed by Redish. The most dramatic manifestation of Nimmer's affinity for categories and classifications, however, appears in his organization of the treatise. Nimmer organizes all first amendment issues under three questions: What is speech? What is abridgement? What interests justify the abridgement of speech?[36] This tripartite scheme departs from the

34. *Id.* at 2-17 through 2-18. Nimmer concedes that, as Redish argues, unscrupulous judges may be able to manipulate definitional rules as easily as ad hoc balances. He contends, however, that definitional rules help judges who want to avoid political pressure in individual cases. "How much easier it would be for a conscientious judge to explain to the members of the Lions Club that he found as he did becasue that was 'the rule,' " Nimmer notes, "rather than because upon a weighing of the interests involved he found weightier the side that public opinion opposed." *Id.* at 2-18.

35. Dun & Bradstreet v. Greenmoss Builders, 105 S. Ct. 2939 (1985) (plurality opinion) (concluding that plaintiffs need not prove actual malice before recovering presumed and punitive damages for defamatory statements involving no matters of public concern); New York v. Ferber, 458 U.S. 747 (1982) (placing child pornography outside the first amendment).

36. Thus chapter 3, entitled *On What Constitutes "Speech" Within the Meaning of the First Amendment*, discusses problems such as nonpolitical speech, private speech, false speech, emotive speech, and symbolic speech. Chapter 4, entitled *On What Constitutes "Abridging" the Freedom of Speech*, addresses matters such as the state action requirement, the distinction between prior restraints and subsequent punishment, the imposition of unconstitutional conditions, and the denial of access to public fora. Chapter 2, which corresponds to the problem I have labeled "what interests justify the abridgement of speech," is actually entitled *On Determining the Limits of "the Freedom" Guaranteed by the First Amendment*. That chapter discusses the concept of definitional balancing at length and then considers

traditional organization of first amendment casebooks and treatises, which tend to treat serially a dozen or more discrete first amendment issues.

Some readers may find this organization confusing, but I found it a useful means of stressing the parallels between frequently separate areas of first amendment law. The question whether libel is "speech" is similar to the question whether a red flag is "speech." Both questions require a court to determine whether the alleged speech furthers the values underlying the first amendment, whether it fits the category of "speech" envisioned by the amendment's framers, and whether the speech can be distinguished from other activities that the court clearly considers conduct. Similarly, a protester complaining that she was denied permission to pass out handbills on a street corner has something in common with a public school teacher claiming that he was fired after writing an editorial for the local paper; both assert that their capacity for speech has been abridged through the withholding of an important government benefit. Although recognition of these similarities is not new, Nimmer highlights them through his meticulous organization of the Supreme Court's first amendment jurisprudence.

III

The tension between fixed rules and flexible decisionmaking runs throughout the law. More than fifty years ago, Justice Holmes declared that "when the standard is clear it should be laid down once for all by the Courts."[37] Seven years later, Justice Cardozo rejected Holmes's rule, which would have required motorists to alight from their vehicles when necessary to reconnoitre at railroad crossings, as "artifically developed" and "imposed from without."[38] Today, some scholars and jurists similarly have begun to challenge the first amendment rules "laid down once for all" during the last twenty years. Others defend those principles as bulwarks against censorship. As the controversy gains momentum, Martin Redish and Melville Nimmer offer readers a stimulating preview of the main theoretical arguments in the debate.

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several specific issues such as the extent to which the interests in copyright or reputation should outweigh the interest in free speech.

37. Baltimore & O.R.R. v. Goodman, 275 U.S. 66, 70 (1927).

38. Pokora v. Wabash Ry., 292 U.S. 98, 105 (1934) (limiting *Baltimore & O.R.R. v. Goodman* to its facts).