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**PROFESSOR NIMMER MEETS PROFESSOR SCHAUER
(AND OTHERS): AN ANALYSIS OF “DEFINITIONAL
BALANCING” AS A METHODOLOGY FOR DETERMINING
THE “VISIBLE BOUNDARIES OF THE FIRST
AMENDMENT”**

*Norman T. Deutsch**

I. INTRODUCTION

Despite the fact that it is phrased in absolutist terms (Congress and, by incorporation into the Fourteenth Amendment, the States “shall make no law . . . abridging the freedom of speech”¹), the First Amendment does not “give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses.”² Indeed, as Professor Schauer has observed, there are large categories of “what would be called ‘speech’ in ordinary language” that are not encompassed within the First Amendment.³ He notes that the “important” difference between speech

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1. U.S. CONST. amends. I, XIV.

2. *Cohen v. California*, 403 U.S. 15, 19 (1971). *See also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942) (“[T]he right of free speech is not absolute at all times and under all circumstances.”).

3. Frederick Schauer, *The Boundaries of The First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1773, 1771 (2004) [hereinafter Schauer, *Boundaries*]. Professor Schauer refers to criminal law, “securities regulation, antitrust law, and labor law;” the law of copyright and trademark, sexual harassment, fraud, evidence, regulation of professionals; and a considerable portion of tort law. *Id.* at 1783-84. Further,

[i]f we do not restrict our inquiry to propositional speech—that is, if we include the speech by which we make wills, enter into contracts, render verdicts, create conspiracies, consecrate marriages, admit to our crimes, post warnings, and do much else—it becomes still clearer that the speech with which the First Amendment is even slightly concerned is but a small subset of the speech that pervades every part of our lives.

Id. at 1784. *See also* Frederick Schauer, *Categories and the First Amendment: A Play in Three*

that is included and speech that is excluded is “the . . . distinction between coverage and protection.”⁴ Speech that is included within the First Amendment may still be subject to regulation, but the regulation must meet First Amendment standards. However, regulation of speech that is excluded is not subject to First Amendment analysis.⁵

Professor Schauer also argues that “existing normative theories seem of little relevance to achieving a descriptive understanding of how the First Amendment came to look the way it does and how it came to include what it includes and exclude what it excludes.”⁶ He suggests “that the most logical explanation of the actual boundaries of the First Amendment might come less from an underlying theory of the First Amendment and more from the political, sociological, cultural, historical, psychological, and economic milieu in which the First Amendment exists and out of which it developed.”⁷ Nonetheless, once the issue has reached the level of litigation, a practical methodology is needed to determine what is a First Amendment speech case and what is not, or to use Professor Schauer’s words, to determine “[t]he [v]isual [b]oundaries of the First Amendment[.]”⁸

Professor Nimmer used the phrase “definitional balancing” to describe what he thought was the appropriate methodology for the United States Supreme Court to use in “defining which forms of speech are to be regarded as ‘speech’ within the meaning of the First Amendment.”⁹ However, the Court has never explicitly said that it

Acts, 34 VAND. L. REV. 265 (1981) [hereinafter Schauer, *Categories*].

4. Schauer, *Categories*, *supra* note 3, at 275-76.

5. See Schauer, *Boundaries*, *supra* note 3, at 1769-73. However, this is true only to the extent that such speech is proscribed, or otherwise regulated, based on the underlying reasons why such speech is excluded from the First Amendment. See *infra* notes 142-52 and accompanying text.

6. Schauer, *Boundaries*, *supra* note 3, at 1787.

7. *Id.*

8. *Id.* at 1774. Professor Schauer’s reference is to the fact that although many of the boundaries of the First Amendment are “[invisible] because they have been taken for granted[,] . . . the boundaries of the First Amendment have been highly visible” with respect to those categories of speech that have often been the subject of litigation. See *id.* at 1774-77.

9. Melville B. Nimmer, *The Right to Speak Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 & n. 24 (1968) (citing “various” authorities as precursors “of the doctrine of definitional balancing”). Definitional balancing is sometimes referred to as “categorical balancing.” See Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1138 n.175 (2005); John Rothchild, *Menacing Speech and the First Amendment: A Functional Approach to Incitement That Threatens*, 8 TEX. J. WOMEN & L. 207, 209 (1999); Jeffrey M. Shaman, *Constitutional Interpretation: Illusion and Reality*, 41 WAYNE ST. L. REV. 135, 162-63 (1994) [hereinafter Shaman, *Constitutional Interpretation*]; Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Standard Analysis in Constitutional Doctrine*, 45 HASTINGS L. REV. 867, 956 n.355 (1994); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47 & n.3 (1987). In addition the term “categorization” has been

applies such a methodology. Nonetheless, Professor Nimmer found its application implicit in the Court's decisions.¹⁰

Used as a methodology for defining the scope of speech that the First Amendment includes and excludes, definitional balancing involves striking a balance between competing speech and governmental regulatory interests,¹¹ based on First Amendment values,¹² and the creation of rules that can be applied in subsequent cases.¹³ Professor Nimmer viewed definitional balancing as a middle ground between absolutism (in the sense that "literally all speech is protected")¹⁴ and ad hoc balancing (a case by case weighing of the competing interests "for the purpose of determining which litigant deserves to prevail in a given case").¹⁵ Commentators, however, are divided over its nature, desirability, and application.

Some commentators view definitional balancing as a form of absolutist approach to the First Amendment,¹⁶ while others take the

used to describe what amounts to definitional balancing. See Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 53-59 (1994) (using both the terms "categorization" and "categorical balancing"); John Hart Ely, *Flag Desecration: A Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1500 & n.74 (1975). However, the term "categorization" has also been used to describe the creation of "a priori" categories in contrast to "[d]efinitional or categorical balancing [which] makes use of categories, though not a priori one." Jeffrey M. Shaman, *The Theory of Low Value Speech*, 48 SMU L. REV. 297, 343 (1995) [hereinafter Shaman, *Low Value Speech*]. To add to the confusion, Professor Redish, in contradiction to Professor Shaman, has described "categorical balancing" as the balancing of "competing interests in an a priori manner." Martin H. Redish, *Unlawful Advocacy and Free Speech Theory: Rethinking the Lessons of the McCarthy Era*, 73 U. CIN. L. REV. 9, 17 (2004).

10. Nimmer, *supra* note 9, at 943, 949.

11. The terms "government interests" and "societal interests" are often used interchangeably in the First Amendment context. See Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Expression*, 78 B.U. L. REV. 1275, 1307 (1998); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 981 n.231 (1987) (when he wrote this article, Dean Aleinikoff was a Professor of Law at the University of Michigan Law School; he has been Dean at Georgetown University Law Center since 2004).

12. Nimmer, *supra* note 9, at 948-50. See *infra* Part III.A. See also DONALD ALEXANDER DOWNS, *NAZIS IN SKOKIE* 7 (1985) ("Definitional Balancing . . . entails establishing the basic types of speech which are consistent with the First Amendment's purposes, and then protecting these forms of speech as fully and consistently as is possible.").

13. Nimmer, *supra* note 9, at 944-45.

14. *Id.* at 941.

15. *Id.* at 942. See generally *id.* at 935-42.

16. See WILLIAM COHEN ET AL., *CONSTITUTIONAL LAW* 1291 (12th ed. 2005) ("For a 'definitional balancer,' the proper rule in a particular context may be one of absolute protection for speech. . . ."); Heyman, *supra* note 11, at 1307-09, 1309 n. 180 (referring to definitional balancing as a form of absolutism); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2, at 792 (2d ed.1988) (same); Ely, *supra* note 9, 1482, 1500 n.74 (same); Schauer, *Categories*, *supra* note 3, at 274 (same). Cf. Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30

opposite view and think that there is little difference between definitional balancing and ad hoc balancing.¹⁷ Commentators are also divided on whether definitional balancing is a flexible methodology or whether it is too inflexible.¹⁸ Additionally, they disagree on the propriety of the underlying methodology to the extent that it is perceived as involving a comparative weighing of competing interests.¹⁹ The methodology itself is often described as a technique that limits the scope

UCLA L. REV. 671, 673, 674 n.9 (1983) (“Definitional balancing is theoretically distinguishable from non-absolutists categorical approaches” but “[t]he distinction . . . may be more methodological than substantive. . . .”); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 12 (1990) (“[T]he absolute preference for rules – definitional balancing – is overly absolute.”).

17. Isaac Molnar, *Resurrecting the Bad Tendency Test to Combat Instructional Speech: Militias Beware*, 59 OHIO ST. L.J. 1333, 1369 n.243 (1998) (asserting that “definitional balancing will essentially break down into ad hoc balancing as soon as the Court is willing to consider other interests of different degree from their previous decisions”); SHIFFRIN, *supra* note 16, at 16-17 (arguing that the difference between definitional balancing and ad hoc balancing “is not sharp”); Aleinikoff, *supra* note 11, at 980 (asserting that the distinction between ad hoc balancing and definitional balancing is “artificial”); Thomas I. Emerson, *First Amendment and the Burger Court*, 68 CAL. L. REV. 422, 439 (1980) (maintaining that “[w]hile the traditional criticisms of balancing apply more directly to ad hoc [balancing] than definitional balancing, the distinction between the two is of doubtful significance in formulating First Amendment doctrine”).

18. *Compare* Schlag, *supra* note 16, at 674 n.9 (flexible) (“Definitional balancing does not provide . . . a finished product: it remains subject to change if the state interest asserted prove to be novel and substantially less compelling or substantially more compelling than those state interest asserted in past balancing acts.”) *with* SHIFFRIN, *supra* note 16, at 15 (inflexible) (“The particular weakness of Nimmer’s methodology is its inflexibility.”); Aleinikoff, *supra* note 11, at 979 (inflexible) (discussing *New York v. Ferber*, 458 U.S. 747 (1982)).

19. Commentators questioning the desirability of balancing as a methodology include Aleinikoff, *supra* note 11, at 944 (“serious problems in the mechanics of balancing” exist); Emerson, *supra* note 17, at 439 (arguing that “legal doctrines should be designed to formulate categories based solely upon the characteristics of the conduct and value structure underlying the first amendment”); David L. Faigman, *Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1524 (1992) (asserting that considering the government’s interest in defining the scope of the constitutional right is “contrary to the fundamental operating assumptions of the Constitution”); Heyman, *supra* note 11, at 1279-80 (recommending that “First Amendment issues [should be] . . . conceived of . . . as conflicts of rights . . . [not] as clashes between free speech and ‘social interest’”); Frederick Schauer, *Commentary: The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 562 n.4 (1989) (favoring an approach that seeks to determine of the scope of the First Amendment by “asking whether this is an act, or an example of a type of act, that triggers the concerns of the first amendment . . . independently of an evaluation of the desirability of regulating that act”).

Other commentators think that balancing is an appropriate mode of First Amendment analysis. *See, e.g.*, Shaman, *Constitutional Interpretation*, *supra* note 9, at 175 (“[B]alancing is the only sound way to interpret the Constitution.”); Steven Shiffrin, *The First Amendment And Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251-52 (1983) (the Court “has been right in . . . balanc[ing] the impact of challenged regulations on first amendment values against the seriousness of the evil that the state seeks to mitigate”).

of First Amendment protection,²⁰ and some commentators think that it limits, or at least has the potential to limit, too much speech.²¹ On the other hand, others view definitional balancing as being speech protective,²² and some, at least implicitly, believe that it protects too

20. See Note, *Content Regulation and The Dimensions of Free Expression*, 96 HARV. L. REV. 1854, 1858 n.28 (1983) (“[D]efinitional balancing’ . . . exclude[s] from protection categories of expression whose social harm outweighs their value.”); William D. Deane, *COPA and Community Standards on the Internet: Should the People of Maine and Mississippi Dictate the Obscenity Standards in Las Vegas and New York*, 51 CATH. U. L. REV. 245, 249 n.24 (2001) (“The definitional approach simply categorizes certain speech as unprotected by the First Amendment because, as a rule the government’s interest outweighs the value of those particular classes of speech.”); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 671 (2002) (“Under that approach, a class of speech should not be protected if its social value is outweighed by the social harm that it causes.”); Yvonne C. Ocrant, *Constitutional Challenge to Encryption Export Regulations: Software Is Speechless*, 48 DEPAUL L. REV. 503, 522-23 (1998) (“[W]hen applying definitional balancing, the Court will uphold a regulation of speech if the Court is convinced that the class of speech in question is sufficiently harmful, even without a showing of actual harm.”); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 624 & n.115 (1982) (definitional balancing “allows fully protected speech to be superseded by overriding social interest”); Rothchild, *supra* note 9, at 209 (“Definitional, or categorical balancing, involves designating a particular category of speech[;] . . . [t]his . . . approach usually results in reduced protection for speech.”); Shaman, *Low Value Speech*, *supra* note 9, at 331 (“Definitional balancing is the primary method the Court uses for giving less constitutional protection to speech, such as libel, that the Court feels has less than full constitutional value.”); Werhan, *supra* note 9, at 56 (“As the Burger Court settled into place, that speech-protective spirit dissipated and the Justices embraced categorization as a method to restrict First Amendment protection.”).

21. Faigman, *supra* note 19, at 1523 (“Because the threshold question regarding the existence of constitutional rights has become infected with the government’s countervailing interests, those individual rights have lost much of their vitality, if not their very existence.”); Schauer, *Categories*, *supra* note 3, at 276 (“One danger of definitional-absolutist theories . . . is that [they may have the effect of] ‘constrict[ing freedom of speech].’”); Note *supra* note 20, 1858 n.28 (“[D]efinitional balancing’ which would exclude from protection categories of expression whose social harm outweighs their value is inadequate because it requires weighing interests of different sorts and violates autonomy of expression by restricting speech on the basis of its consequences.”).

22. See Aleinikoff, *supra* note 11, at 987 (“[B]alancing has proven to be a robust methodology for the creation and extension of rights.”); Ashutosh Bhagwat, *Purpose Scrutiny In Constitutional Analysis*, 85 CAL. L. REV. 297, 353 n.242 (1997) (definitional balancing lines are drawn “narrowly” so as to afford “some constitutional protection” to “even seemingly ‘unprotected speech’”); Ronald A. Cass, *Melville B. Nimmer Symposium: Article: The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. REV. 1405, 1475 n.206 (1987) (“The focus of definitional balancing . . . traditionally has been the mechanics of protecting speech. . . .”); Ely, *supra* note 9, at 1500 (“Categorization . . . [is] ‘more likely to protect expression in crisis times.’”); Rosemary C. Salomone, *Public Forum Doctrine and the Perils of Categorical Thinking: Lessons From Lamb’s Chapel*, 24 N.M. L. REV. 1, 14-15 (1994) (definitional balancing is a “categorical or formulaic approach . . . [that is] considered to be generally speech protective”); RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH, § 2:12, at 2-7 & n.1 (3d ed. 2004) (describing definitional balancing as being more speech protective than ad hoc balancing); TRIBE, *supra* note 16, § 12-2, at 793-94 (same).

much speech.²³ Sometimes commentators cannot even agree on whether definitional balancing was actually applied in a given case.²⁴ Others do not object to the methodology as such, but are critical of where the Court has drawn the definitional line in a particular context.²⁵ Finally, at least one commentator thinks that the term “definitional balancing” is potentially confusing;²⁶ he uses the term “heightened scrutiny” to describe the process.²⁷

This article examines definitional balancing as a methodology for determining the “visible boundaries of the First Amendment.” More specifically, it focuses on the Court’s use of definitional balancing, as a technique for drawing definitional lines within categories of speech, to distinguish between speech that is included within the First Amendment, and speech that is excluded so that it may be proscribed based on its

23. See, e.g., Heyman, *supra* note 11, at 1279 (“[F]ree speech is a right that is limited by the fundamental rights of other individuals and the community as a whole.”); Note, *supra* note 20, at 1862 (implying that the First Amendment only protects speech that is necessary “to promote the realization of ‘man’s spiritual nature’”). See also *infra* note 361 and accompanying text.

24. Compare Aleinikoff, *supra* note 11, at 1001 (stating that the Court did not balance in *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)) with Adam M. Samaha, *Litigant Sensitivity In First Amendment Law*, 98 NW. U. L. REV. 1291, 1349-50 (2004) (stating that the Court applied definitional balancing in *Sullivan*) and Lee Levine, *Judge and Jury in the Law of Defamation: Putting the Horse Behind the Cart*, 35 AM. U. L. REV. 3, 8-11, 64 (1985) (same) and Nimmer, *supra* note 9, at 942, 949 (stating that the Court implicitly applied definitional balancing in *Sullivan*).

25. See Lori Weiss, *Is the True Threats Doctrine Threatening the First Amendment?* Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists *Signals the Need to Remedy an Inadequate Doctrine*, 72 FORDHAM L. REV. 1283, 1286 (2004) (there is “a need to revise true threats jurisprudence to cure its deficiencies”); O. Lee Reed, *The State is Strong But I am Weak: Why the ‘Imminent Lawless Action’ Standard Should Not Apply to Targeted Speech that Threatens Individuals with Violence*, 38 AM. BUS. L.J. 177, 207 (2000) (the imminent lawless action standard “is ill-suited as a general category defining harm both in the context of indictment or threat against the state and in the context of incitement, threat, intimidation, or harassment against individuals”); Rothchild, *supra* note 9, at 223-24 (the definitional line should be drawn so as to exclude “menacing” speech from the First Amendment); Alice Haemmerli, *Whose Who? The Case for a Kantian Right of Publicity*, 49 DUKE L.J. 383, 492 n.250 (1999) (in the context of a right of publicity, “[a]ttempts to predefine categories of use become so convoluted as to sacrifice the clarity that is the greatest benefit of a definitional approach”); Alon Harel, *Bigotry, Pornography, and the First Amendment*, 65 S. CAL. L. REV. 1887 (1992) (“Racist and pornographic speech . . . should be seen as falling into a comprehensive category of unprotected speech.”); Levine, *supra* note 24, at 14 (the definitional line the Court drew in defamation cases involving public figures “serves neither the first amendment guarantee of robust public debate nor the states’ interest in safeguarding individual reputation”). Even Professor Nimmer thought the Court drew the definitional line in the wrong place in *Time, Inc. v. Hill*, 385 U.S. 374 (1967), and in *Roth v. United States*, 354 U.S. 476 (1957). See Nimmer, *supra* note 9, at 948 n.39, 956-67.

26. SMOLLA, *supra* note 22, § 2:12, at 2-7 & n.1.

27. *Id.* at 2-7. In addition, Professor Schauer refers to “heightened standards” in referring to a case in which the Court appeared to have applied definitional balancing. Schauer, *Boundaries*, *supra* note 3, at 1776 (“[L]ibellous utterances are now tested against standards heightened by First Amendment coverage.”).

content.²⁸ Part II describes definitional balancing in Professor Nimmer's terms. Part III discusses the Court's application of definitional balancing and the issues raised by commentators.

II. PROFESSOR NIMMER'S ANALYSIS OF DEFINITIONAL BALANCING

Professor Nimmer viewed "definitional balancing"²⁹ as an alternative to both absolutism and ad hoc balancing. He rejected absolutism, in the sense "that the First Amendment must be interpreted and applied with absolute literalness," as being clearly untrue³⁰ because the laws regulating such things as copyrights, espionage, monopolies, and perjury are largely unaffected by the First Amendment even though they may involve speech.³¹ Since the First Amendment does not encompass all speech, some technique must be used to determine what is included and what is excluded. Professor Nimmer asserted that "[i]f such selection is to turn on rational rather than arbitrary considerations, it is obvious the selection process requires a balancing of competing interests."³² However, he thought that in making this determination, it was "essential" that courts use definitional balancing rather than ad hoc balancing "if freedom of speech is to be meaningful as constitutional doctrine."³³

As Professor Nimmer saw it, the differences between the two types of balancing include the process that is used, the fact that definitional balancing results in rules that can be applied in later cases, and that definitional balancing is likely to be more speech protective than ad hoc balancing.³⁴ He illustrated these differences in the context of *New York Times Co. v. Sullivan*.³⁵ In that case, the Montgomery Alabama police

28. The application of definitional balancing in other contexts is beyond the scope of this article. See, e.g., Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1219, 1226-30, 1235-37, 1242 (1984) (arguing that while definitional balancing may be "appropriate" for defining categories of speech that are excluded from the First Amendment, it is inappropriate for regulating speech with respect to "certain locations, media, or speakers"). Professor Shiffirin has also argued that definitional balancing is not the appropriate methodology for resolving all First Amendment issues. See SHIFFRIN, *supra* note 16, at 12, 15; Shiffirin, *supra* note 19, at 1253. See also *infra* notes 389-98 and accompanying text.

29. See Nimmer, *supra* note 9, at 942, 944 (using the language "balancing process on the definitional").

30. *Id.* at 935.

31. *Id.* at 937.

32. *Id.* at 941-42.

33. *Id.* at 967.

34. See generally *id.* at 939-45.

35. *N.Y. Times v. Sullivan*, 376 U.S. 255 (1964).

commissioner brought a libel action against the New York Times for publishing a paid civil rights advertisement that allegedly contained defamatory statements.³⁶ The plaintiff obtained a jury verdict based on common law defamation.³⁷ The Court reversed, holding that the First Amendment requires a “rule that prohibits a public official from recovering for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³⁸

According to Professor Nimmer, the Court in *Sullivan* “implicitly” engaged in balancing “but it was not ad hoc balancing.”³⁹ In ad hoc balancing, the Court weighs the competing interests “presented in the particular circumstances of the case before the court” . . . for the purpose of determining which litigant deserves to prevail in the particular case.⁴¹ Thus, “[i]f the Court had followed the ad hoc approach, it would have inquired whether ‘under the particular circumstances presented’ the interest of the defendants in publishing their particular advertisement outweighed . . . the seriousness of the particular resulting injury to the plaintiff’s reputation.”⁴² However, this is not what the Court did; instead, it engaged in definitional balancing.

In definitional balancing, in contrast to ad hoc balancing, “the Court employs balancing not for the purpose of determining which litigant deserves to prevail in the particular case, but only for the purpose of defining which forms of speech are to be regarded as ‘speech’ within the meaning of the first amendment.”⁴³ This inquiry takes place at a higher level of generalization. The question is whether “generally . . . the speech values”⁴⁴ at stake outweigh the government’s interest in regulating the type of speech at issue.⁴⁵ Thus, the question in *Sullivan* was not whether “the interest of the [particular] defendants in publishing

36. *Id.* at 256.

37. *Id.* Under the state’s defamation law, the defendant is strictly liable for defamatory statements and general damages are presumed even in the absence of proof of loss. *See id.* at 267. Punitive damages may also be awarded. *See id.* If “‘libel per se’ has been established the defendant has no defense as to stated facts unless he can persuade the jury that they were true in all their particulars.” *Id.*

38. *Id.* at 279-80.

39. Nimmer, *supra* note 9, at 943.

40. *Id.* at 944.

41. *Id.* at 942.

42. *Id.* at 943-44.

43. *Id.* at 942.

44. *Id.* at 945, 950.

45. *See id.* at 950-51.

their particular advertisement outweighed the interest of the [particular] plaintiff in the protection of his reputation."⁴⁶ Instead, the question was "whether the speech values justify the Court in sweeping away most of the law of defamation where the statement is made against a public figure."⁴⁷

As Professor Nimmer saw it, the "profound difference between ad hoc and definitional balancing lies in the fact that a rule emerges from definitional balancing which can be employed in future cases without the occasion for further weighing of interests."⁴⁸ Thus, in *Sullivan*, the Court created a rule that false statements, which injure the reputation of public officials, are constitutionally privileged unless they are made with actual malice; "that is, with knowledge that it was false or with reckless disregard of whether it was false or not."⁴⁹

However, "ad hoc balancing by hypothesis means that there is no rule to be applied, but only interests to be weighed."⁵⁰ Thus, "[i]n advance of a final adjudication by the highest court a given speaker has no standard by which he can measure whether his interest in speaking will be held of greater or lesser weight than the competing interests which opposes his speech."⁵¹ Professor Nimmer argued that while there can never "be complete certainty as how a given rule will be applied in a new situation, if there is no rule at all then there is no certainty at all."⁵² As he viewed it, "[t]he absence of certainty in the law is always unfortunate, but is particularly pernicious where speech is concerned because it tends to deter all but the courageous (not necessarily the most rational) from entering the market place of ideas."⁵³ However, the creation of a rule through definitional balancing "offers some measure of certainty [to First Amendment law] and minimizes speech deterrence."⁵⁴ It creates "a standard by which" a speaker "can measure" whether his speech is constitutionally protected.⁵⁵

In addition, Professor Nimmer argued that definitional balancing is

46. *Id.* at 943.

47. *Id.* at 950. *See also id.* at 943-44, 949-51. The Court focused on the fact that the speech at issue was a matter of public concern. *See Sullivan*, 376 U.S. at 270-83. Professor Nimmer argued that the speech values of "self expression" and "freedom of speech . . . [as] a necessary safety valve" were at also at stake in *Sullivan*. Nimmer, *supra* note 9, at 949.

48. Nimmer, *supra* note 9, at 944-45.

49. *Sullivan*, 376 U.S. at 279-80. *See Nimmer, supra* note 9, at 943.

50. Nimmer, *supra* note 9, at 939.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 945.

55. *See id.* at 939.

likely to result in greater protection for speech than ad hoc balancing. With respect to legislative encroachments, he noted that since definitional balancing creates a rule that defines the scope of the First Amendment, “such a rule should continue to be applicable notwithstanding subsequent enactment of new legislation which in some different manner attempts to protect an interest inimical to speech.”⁵⁶

With respect to the judiciary, Professor Nimmer argued that ad hoc balancing may skew the result in favor of the interest in regulating speech. This is true for two reasons. First, “[g]iven the assumption in our national heritage that most speech is to be tolerated, it is only those who espouse the most unpopular ideas, those against whom feelings run the highest that are likely to be the subject of repressive laws, and only they are likely to be prosecuted.”⁵⁷ In his view, “[i]t is too much to expect that our judges will be entirely untouched, consciously or otherwise, by strong popular feelings—feelings that have more than once reached the point of national hysteria—when they come to engage in the ‘delicate and difficult task’ of weighing the competing interests.”⁵⁸ Consequently, “at the very time when the right of freedom of speech becomes crucial, the scales may become unbalanced . . . [in favor of] the interest which opposes the speech.”⁵⁹ Secondly, ad hoc balancing may skew the result in favor of the interest in regulating speech because often a “court must balance the interest in speech against the compelling force of a particular legislative judgment as molded in law which has been violated.”⁶⁰ In such cases, “the court is likely to be swayed by their judgment in the weighing of interests.”⁶¹

However, Professor Nimmer maintained that the creation of definitional balancing “rule[s] makes it more likely that the balance originally struck will continue to be observed despite new and perhaps otherwise irresistible pressures.”⁶² He “concede[d] that neither definitional balancing nor any other technique can offer absolute assurance that a given court under sufficient internal or external pressure in some ‘hard’ case will not depart from a definitional rule.”⁶³ However, he argued that “definitional balancing can insulate a judge from legally irrelevant pressures to a considerable degree if the judge wishes such

56. *Id.* at 945.

57. *Id.* at 940.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 945.

63. *Id.*

insulation."⁶⁴

Professor Nimmer also conceded "that, *in vacua*, ad hoc balancing is more likely to consider fine nuances and therefore produce a more just result."⁶⁵ However, he argued that "this likelihood may be offset by the fact that in ad hoc balancing weight is likely to be given only to the particular speech involved and not to 'speech' generally, so that the speech side of the balance may be underweighed when compared with the immediate impact of a particular injury."⁶⁶ Furthermore, since speech cases do not arise in a vacuum, the "likelihood [that ad hoc balancing would reach a more equitable result] would be present only in an ideal world where ad hoc balancing would not be subject to distortion from public and legislative pressures."⁶⁷ Thus, in his view "[t]he argument that ad hoc balancing is preferable to definitional balancing because the former permits a more sensitive appreciation of the equities in each particular case may be more easily made in non-speech cases where public passions do not generally ride as high."⁶⁸

III. THE APPLICATION OF DEFINITIONAL BALANCING AND THE VIEWS OF COMMENTATORS

As Professor Schauer has noted, "[most] examples [of] conduct that would or might be speech in ordinary language but that is not speech in the eyes of the Constitution . . . are rarely if ever litigated."⁶⁹ However, in those areas that have been subject to litigation, the Court, without explicit acknowledgment, has applied definitional balancing as a technique for drawing definitional lines within categories of speech to distinguish between speech that is included within the First Amendment and speech that is excluded, so that it may be proscribed based on its content. For the most part, the Court has done so in the way that Professor Nimmer described it; the Court has sought to define the outer limits of the First Amendment by striking a balance between the competing interests based on First Amendment values.⁷⁰ However, as

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 947.

69. Schauer, *Categories*, *supra* note 3, at 269 (referring to antitrust laws); *see also* Schauer, *Boundaries*, *supra* note 3, 1771, 1774 (mentioning criminal law, securities regulation, antitrust law, and labor law; the law of copyright and trademark, sexual harassment, fraud, evidence, regulation of professionals, and a considerable portion of tort law).

70. *See supra* notes 43-47 and accompanying text; *see infra* notes 99-343 and accompanying text.

mentioned above, commentators are divided over its nature, desirability, and application.

A. To What Extent Does Definitional Balancing Involve Balancing?

As Professor Nimmer explained, definitional balancing is different than ad hoc balancing. In ad hoc balancing, the Court asks whether, in the context of the specific facts of the case, the government's regulatory interest outweighs the particular plaintiff's speech interest for the purpose of deciding which party should win.⁷¹ Whereas in definitional balancing the Court seeks to determine the extent to which the particular category of speech at issue is encompassed within the First Amendment for the purpose of creating rules that can be applied in later cases.⁷² However, definitional balancing is often described as a methodology that excludes speech from the First Amendment "if its social value is outweighed by the social harm that it causes."⁷³ This conception equates definitional balancing with ad hoc balancing in the sense of "the identification, valuation, and comparison of competing interests,"⁷⁴ albeit at a higher level of generalization than the latter.⁷⁵ Under this

71. See *supra* notes 39-42 and accompanying text.

72. See *supra* notes 43-48 and accompanying text.

73. See Heyman, *supra* note 20, at 671 (2002) ("Under that approach, a class of speech should not be protected if its social value is outweighed by the social harm that it causes."); see also other sources cited *supra* note 20. Cf. Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 435-36 (1992) ("Communitarian interest may represent important social values . . . and may occasionally outweigh free speech values in certain limited circumstances.").

74. Aleinikoff, *supra* note 11, at 945.

75. See Bhagwat, *supra* note 22, at 353 n.242 ("Definitional balancing requires the Court to balance free speech interests against the strength of government objectives with regard to an entire category of speech, rather than with regard to specific burden on speech, as is the case with ad hoc balancing."); Daniel O. Conkle, *Free Speech and the Indiana Constitution: First Thoughts on Price v. State: The Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857, 858 (1994) ("[T]he judicial definition of unprotected categories is almost inevitably based upon a more abstract balancing process, one that evaluates an entire type or category of speech and weighs the value of this speech against the governmental interest that might support its regulation."); Peter Krug, *Symposium: The Life and Jurisprudence of Justice Thurgood Marshall: Justice Marshall and New Media Law: Rules Over Standards?*, 47 OKLA. L. REV. 13, 19 (1994) ("[A]t the definition stage . . . categori[es] [are] defined by the type of facts presented, the constitutional right at issue, or the nature of the right or interest advanced by the government."); Reed, *supra* note 25, at 185 (stating that in "definitional balancing . . . the Court balances speech values against competing interests only in an initial case that defines a category of speech which is constitutionally unprotected"); Salomone, *supra* note 22, at 14-15 (stating that in "definitional balancing . . . the Court balances the weight of the right against the state interest at the macro level and applies the result to all future cases"); Shaman, *Constitutional Interpretation*, *supra* note 9, at 161-62 (stating that the balancing of the "pertinent" interests "focuses on the general category rather than on the particular instance involved in the case"); Douglas Wells, *Thurgood Marshall and "Individual Self-*

view, the Court identifies the First Amendment values and the government regulatory interest at stake "and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interest."⁷⁶ In such balancing, "[t]he focus is directly on the interests or factors themselves[;] [e]ach interest seeks recognition on its own and forces a head-to-head comparison with the competing interests."⁷⁷

Dean Aleinikoff is the principal critic of balancing as a process of valuation and comparison. He maintains that in this regard there is little difference between ad hoc and definitional balancing,⁷⁸ and they are both subject to the same criticisms.⁷⁹ These include both "an internal critique"⁸⁰ and "an external critique."⁸¹

His internal critique relates to "how interests are identified, valued and compared."⁸² He asserts that "the Court has no objective criteria for valuing or comparing the interests at stake."⁸³ Furthermore, in theory, "[t]he task [in balancing] is seen as requiring the consideration of all relevant interests, whether traceable to the Constitution or to society at

Realization" in *First Amendment Jurisprudence*, 61 TENN. L. REV. 237, 243 (1993) ("Definitional balancing . . . requires the judge to weigh the values underlying the particular category of speech against the asserted government interest.").

76. Aleinikoff, *supra* note 11, at 945.

77. *Id.* For commentators who conceive of definitional balancing as a comparison and evaluation of competing interests, see sources cited *supra* notes 20, 75. See also Jeffrey Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1301-02 (1983) (stating that the Court, in applying "definitional balancing[,] . . . contrasts the societal benefit of protecting a given type of activity with the costs entailed in the abandonment of regulatory interests sacrificed by according protection"); Faigman, *supra* note 19, at 1536 ("[In] definitional balancing . . . the Court assesses the weight of the right implicated by a particular government action against the gravity of the government's interest in acting."); see also Emerson, *supra* note 17, at 439 ("Both [ad hoc and definitional] balancing undertake to weigh the individual and social interests in free expression against other interests of a different kind and therefore are subject to the same objections.").

78. See Aleinikoff, *supra* note 11, at 980 n.230. Dean Aleinikoff bases his assertion that definitional and ad hoc balancing are similar on the fact that the Court has created different definitional rules in defamation cases, based on the difference in the underlying facts. See *infra* Part III.E.

79. Aleinikoff, *supra* note 11, at 948. See also Emerson, *supra* note 17, at 439 ("Both [ad hoc and definitional] balancing undertake to weigh the individual and social interests in free expression against other interest of a different kind, and therefore are subject to the same objections.").

80. See Aleinikoff, *supra* note 11, at 972-83.

81. See *id.* at 984-95.

82. *Id.* at 972.

83. *Id.* Dean Aleinikoff says that "[b]alancing must demand the development of a scale of values external to the Justices' personal preferences." *Id.* at 973. However, although "[i]n the search for an external scale . . . the modern Court has relied upon several sources that seem sensible[,] [n]othing in the 'external' sources offers a clue about how to compare differently derived values." *Id.* at 974-75.

large [but] . . . in practice the Court never makes a full inventory of the relevant interests,”⁸⁴ and often fails to “place the interests of [all] holders of the relevant interests . . . on the scale.”⁸⁵ In addition, “[b]alancing opinions typically pit individual against government interests, [but] [t]his characterization . . . is arbitrary [because] [i]nterests may be conceived of in both public and private terms.”⁸⁶

He also argues that there are external issues with balancing that “implicate[] deeper questions about the role of the Court and the nature of judicial review.”⁸⁷ First, there is the role of the Court in assigning value to legislation.⁸⁸ Second, “[b]alancing . . . undermine[s] our usual understanding of constitutional law as an interpretive enterprise;”⁸⁹ among other things, it “does not require the Court to develop and defend a theoretical understanding of a constitutional provision.”⁹⁰ Finally, he asserts that balancing often “has the effect of distancing us from . . . discourse . . . [on] the basic questions of social and political justice—such as the meaning of liberty, fairness, and justice—through the discussion of constitutional issues.”⁹¹

84. *Id.* at 977. He maintains that “taking balancing seriously would seem to demand the kind of investigation of the world that courts are unable or unwilling to undertake.” *Id.* at 978.

85. *Id.* at 978. This would include non-parties, but Dean Aleinikoff says to include them would result in “an unwieldy litigation process . . . and the cost of constitutional litigation would skyrocket.” *Id.* Consequently, to “mak[e] balancing work, the Court has adopted a truncated form that ought not to be acceptable to the conscientious balancer.” *Id.* at 978-79.

86. *Id.* at 981. Dean Aleinikoff argues that “[t]he individual interest in commutating one’s ideas to others may also be stated as a societal interest in a diverse marketplace of ideas.” *Id.* Thus, where “public and private interests appear on both sides, there is little sense in seeing the balance in terms of individual versus government interests.” *Id.*

87. *Id.* at 984.

88. *See id.* at 984-86. He asserts that “[e]ven if the balancing court purports to accept the value that the legislature places on its own output, it cannot simply factor the legislature’s determination into a constitution calculus.” *Id.* at 986. Instead, “it must first convert the constitutional value and the legislative value into a common currency.” *Id.* The problem is “[h]ow does a court decide how ‘important’ a legislative or administrative policy is?” Aleinikoff, *supra* note 11, at 986. He maintains that “[b]alancers . . . must suggest reasons why judgments assigning a social value to legislation are within the capacity of courts.” *Id.*

89. *Id.* at 988. He says that [b]alancing is transforming constitutional discourse into a general discussion of the reasonableness of government conduct.” *Id.* at 987. It also “undermines the checking and validating functions of constitutional law.” *Id.* at 991.

90. *Id.* at 988. Instead, “the Court searches the landscape for interests implicated by the case, identifies a few, and reaches a reasonable accommodation among them.” Aleinikoff, *supra* note 11, at 988. By “so doing, the Court largely ignores the usual stuff of constitutional law interpretation—the investigation and manipulation of texts (such as constitutional language, prior cases, even-perhaps-our ‘ethical tradition’).” *Id.*

91. *Id.* at 988. This is so because “[i]n recent years – perhaps due to nagging criticisms about the problem of assigning weights - the Court has resorted with increasing frequency to the jargon of economics and policy science in an attempt to look non-wilful, scientific, and objective.” *Id.* at 992. However:

Furthermore, Dean Aleinikoff argues that balancing is not necessary since other methodologies exist for resolving conflicts that arise in constitutional cases that do not involve balancing.⁹² For example, "exception[s]" in constitutional cases "may best be understood not as resulting from a balance but as resting upon a principle internal to the constitutional provision" at issue.⁹³ Other commentators agree that, in defining the scope of the First Amendment, the Court should not engage in balancing in the sense of a "head to head comparison"⁹⁴ of government and speech interests. Instead, the determination should be made solely on whether the speech at issue is consistent with First Amendment values.⁹⁵ Such values are derived from "the historical, political, and philosophical purposes that underlie the First Amendment."⁹⁶ The Court may employ "a number of interpretive techniques . . . [such as] text, structure, precedent, consequences, history, intent, our 'ethical tradition,' [and] fundamental values,"⁹⁷ but the determination should be made "independently of an evaluation . . . of the state's regulatory goals."⁹⁸

The problem with this criticism is that, as a general rule, definitional balancing, when used as a methodology for determining the scope of the First Amendment speech clause, does not involve the kind of balancing that Dean Aleinikoff and many other commentators ascribe

Scientifically styled opinions, written to answer charges of subjectivity, make us spectators as the Court places the various interests on the scales. The weighing mechanism remains a mystery, and the result is simply read off the machine. Scientific balancing decisions are neither opinions nor arguments that can engage us; they are demonstrations.

Id. at 993.

92. *Id.* at 998.

93. Aleinikoff, *supra* note 11, at 1000.

94. *Id.* at 945.

95. See Schauer, *supra* note 19, at 562 n.4 (favoring an approach that seeks to determine of the scope of the First Amendment by "asking whether this is an act, or an example of a type of act, that triggers the concerns of the first amendment . . . independently of an evaluation of the desirability of regulating that act"); Emerson, *supra* note 17, at 439 (similar); Faigman, *supra* note 19, at 1524 (asserting that considering the government's interest in defining the scope of the a constitutional right is "contrary to the fundamental operating assumptions of the Constitution").

96. See Geoffrey Stone, *Content Regulations and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983).

97. Aleinikoff, *supra* note 11, at 1002. See also Faigman, *supra* note 19, at 1530-31 (arguing that in determining whether a constitutional right exists, the Court should look primarily to the text, but may also look at "supplemental authorities . . . as necessary to fill gaps in the text, including original intent (history), precedent, constitutional fact finding, constitutional scholarship, and contemporary values").

98. See Schauer, *supra* note 19, at 562 n.4.

to it.⁹⁹ More specifically, it does not involve balancing in the sense of “the identification, valuation, and . . . head-to-head comparison”¹⁰⁰ of government regulatory and First Amendment interests. Instead, definitional balancing involves striking a balance between the competing interests based on First Amendment values.¹⁰¹ The difference is between balancing as a process and balancing as the result of a non-balancing interpretive technique. This point is illustrated by the different senses in which Dean Aleinikoff and Professor Nimmer use the term “balancing” and its application in *New York Times Co. v. Sullivan*.¹⁰²

Dean Aleinikoff cites *Sullivan* as an example of a case that used “a non-balancing approach.”¹⁰³ He asserts that the Court “clearly” did not engage in “balancing.”¹⁰⁴ It “did not – as it has done in subsequent libel cases – balance First Amendment interests against interests in preserving reputation.”¹⁰⁵ Instead, “[i]t settled on a ‘malice’ test . . . because it deemed such protection of the press necessary to effectuate fully the purposes of the Amendment.”¹⁰⁶ Defamatory statements “based on ‘knowing falsehood’ and ‘reckless disregard’ are not protected by the decision because they are not the types of speech that further First Amendment goals.”¹⁰⁷

It is true that the Court in *Sullivan* did not engage in balancing in the sense that Dean Aleinikoff uses the term. It did not reach its decision by a process of “identification, valuation, and comparison of competing interests.”¹⁰⁸ In other words, as Professor Nimmer said, the Court did not engage in ad hoc balancing.¹⁰⁹ However, the Court did engage in

99. See *supra* notes 20, 75, 77-98 and accompanying text.

100. Aleinikoff, *supra* note 11, at 945.

101. See Nimmer, *supra* note 9, at 950 (“[T]he threshold question must be whether . . . speech values justify sweeping away [the government’s regulations].”). Cf. Stone, *supra* note 96, at 194 [T]he Court begins with the presumption that the first amendment protects all communications and then creates areas of nonprotection only after it affirmatively finds that a particular class of speech does not sufficiently further the underlying purposes of the first amendment. . . . In attempting to strike the appropriate ‘balance’ . . . the Court considers a number of factors, including relative value of the speech and the risk of inadvertently chilling ‘high’ value expression.

Id. See *infra* notes 104-343 and accompanying text.

102. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964). See *supra* notes 39-49 and accompanying text; see *infra* notes 103-119 and accompanying text.

103. Aleinikoff, *supra* note 11, at 1001; *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

104. Aleinikoff, *supra* note 11, at 1001.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 945.

109. Nimmer, *supra* note 9, at 943.

balancing in the sense that Professor Nimmer used the term.

According to Professor Nimmer, the issue that the Court faced in *Sullivan* was "which segment of defamatory speech lies outside the umbrella of the First Amendment."¹¹⁰ The answer to this question inherently involves "competing policy considerations."¹¹¹ On the one hand, there is "society's interest in protecting reputations,"¹¹² on the other hand, there is the First Amendment interest in free expression.¹¹³ In drawing the definitional line, the Court "implicitly" weighed the interest and struck a balance between them.¹¹⁴ However, in striking the balance, the Court's focus was, as Professor Nimmer said it "must be," on "whether the speech values justified . . . sweeping away most of the law of defamation where the statement is made against a public figure."¹¹⁵

Professor Nimmer agreed with Dean Aleinikoff's conclusion that *Sullivan* was correctly decided because "speech values . . . are inapplicable to speech which the speaker knows to be false."¹¹⁶ In other words, in drawing the definitional line the Court did not "balance" the competing interests by a process of "identification, valuation, and comparison of [the] competing interests,"¹¹⁷ nor did it define the constitutional right based the government's interest in regulation.¹¹⁸ Instead, it struck a definitional balance between the competing interests based on its understanding of what the First Amendment requires. This is precisely the kind of non-balancing interpretive technique that Dean Aleinikoff and others argue is the appropriate way to interpret the Constitution.¹¹⁹ Consequently, definitional balancing does not raise the

110. *Id.*

111. *Id.*

112. *Id.* at 949.

113. *Id.*

114. *See id.* at 943, 948-51. *Cf.* TRIBE, *supra* note 16, § 12-2, at 792-93

Any exclusion of a class of activities from first amendment safeguards represents an implicit conclusion that the government interests in regulating those activities are such as to justify whatever limitation is thereby placed on the free expression of ideas. . . . The question is whether the 'balance' should be struck for all cases in the process of framing particular categorical definitions, or whether the 'balance' should be calibrated anew on a case-by-case basis.

Id.

115. Nimmer, *supra* note 9, at 950.

116. *Id.* at 951; *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

117. Aleinikoff, *supra* note 11, at 945.

118. *See* Faigman, *supra* note 19, at 1524, 1555-62 (asserting that in practice the Court has applied definitional balancing in a way that defines the scope of the First Amendment speech clause based on the government's regulatory interest and that to do so is "contrary to the fundamental operating assumptions of the Constitution"). *See also infra* notes 271-93 and accompanying text.

119. *See supra* notes 92-98 and accompanying text.

kind of issues that so concern the critics of conventional balancing.

B. How Has the Court Applied Definitional Balancing?

For the most part, in other instances where the Court has applied definitional balancing as a technique for drawing definitional lines within categories of speech, it has done so in the way it did in *Sullivan*. It has recognized, either explicitly or implicitly, that competing speech and governmental regulatory interests were at stake, but it has struck the definitional balance between them based on its understanding of First Amendment principles.¹²⁰ Furthermore, contrary to the view of many commentators,¹²¹ it has struck the balance in a way that has expanded the scope of speech included within the First Amendment rather than restricted it.

1. Fighting Words

Fighting words are one category of speech that is considered to be outside the scope of the First Amendment. In *Chaplinsky v. New Hampshire*, Chaplinsky was convicted of violating a state statute that made it a crime to “address any offensive, derisive, or annoying word to any other person who is lawfully in any . . . public place . . . [or to] call him any offensive or derisive name. . . .”¹²² He had exclaimed to the City Marshal: “‘You are a God damned racketeer’ and ‘a damned Fascist and the whole government of Rochester are Fascist or agents of Fascists.’”¹²³ In upholding Chaplinsky’s conviction, the Court stated in a well known dictum:

There are certain well-defined and narrowly limited classes of speech, the prevention, and punishment of which has never been thought to raise any Constitutional problems. These include the lewd and obscene, the profane, the libelous and the insulting or ‘fighting words’ – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order

120. Cf. Schauer, *Boundaries*, *supra* note 3, at 1777 n.52 (“[In] obscenity, commercial advertising, and defamation cases . . . the initial determination that speech was not covered by the First Amendment was seemingly made solely on the basis of the absence of First Amendment value, without regard to the strength of the state’s interest in regulation.”).

121. See *supra* note 20 and accompanying text.

122. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942).

123. *Id.*

and morality.¹²⁴

This dictum seems to have been the origin of the notion that definitional balancing is a technique that limits the scope of the First Amendment through a comparative balancing of competing speech and government regulatory interests.¹²⁵ However, the clear import of the dictum is that fighting words are excluded from the First Amendment because they are insufficiently related to the speech values of an "exposition of ideas" and the search for "truth."¹²⁶ This is reinforced by the Court's additional observation that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."¹²⁷ As the Court in a later case said, such words "embod[y] a particularly intolerable (and socially unnecessary) *mode of expressing whatever* idea the speaker wishes to convey."¹²⁸

For present purposes, it is irrelevant whether the Court was correct in its interpretation of the First Amendment.¹²⁹ The point is that the Court excluded fighting words from the First Amendment not because on "balance" they were outweighed by the "social interest in order and morality," but rather the Court excluded them from the First Amendment because it thought that such speech lacked sufficient speech value.¹³⁰

124. *Id.* at 571-72 (citing ZACHARIAH CHAFEE, *FREE SPEECH IN THE UNITED STATES* 149 (1941)). Shortly after *Chaplinsky*, the Court added commercial advertising to the categories of speech that are excluded from the First Amendment. See *Valentine v. Chrestensen*, 316 U.S. 52 (1942), *overruled by Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).

125. See sources cited *supra* notes 20, 75, 77.

126. See Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 631 (1985) (in *Chaplinsky*, "[t]he Court excluded [fighting words] from the Constitution's protection because protecting it would be inconsistent with the values and goals of the First Amendment"). Cf. TRIBE, *supra* note 16, § 12-8, at 837 ("The premise that speech has special value only in the context of dialogue underlies the dictum of . . . *Chaplinsky*. . .").

127. *Chaplinsky*, 315 U.S. at 572. See TRIBE, *supra* note 16, § 12-8, at 839 ("The overriding idea in *Chaplinsky* is . . . the isolation of those 'utterances [that] are no essential part of any exposition of ideas [and] of . . . slight social value as a step to truth.'") (brackets and ellipsis in original).

128. *R.A.V. v. St. Paul*, 505 U.S. 377, 393 (1992).

129. See, e.g., Redish, *supra* note 20, at 626 ("[F]ighting words' represent a significant means of self-realization, whether or not they can be considered a means of attaining some elusive 'truth.'"); Emerson, *supra* note 17, at 443 ("The *Chaplinsky* dictum . . . is totally incompatible with modern first amendment theory . . . [because] [i]t makes the exclusions turn on whether the expression has 'social value as a step to truth.'").

130. *But cf.* Schauer, *Boundaries*, *supra* note 3, at 1777, 1777 n. 52.

To the Court, the fighting words *Chaplinsky* uttered were regulable not because the state interest in controlling them was so powerful as to trump the First Amendment, but because the words lay entirely outside the scope of the First Amendment." However, "Chaplinsky is not quite as clean a case on this score . . . because the *Chaplinsky* language makes reference both to the degree of the injury and to the lack of First Amendment value.

On its face, the fighting words doctrine seems speech restrictive. Chaplinsky's rant certainly can be viewed as a "means of self-realization"¹³¹ as well as legitimate government criticism.¹³² In any event, by today's standards his words seem mild, if not quaint. However, since *Chaplinsky*, the Court has actually expanded the scope of protection afforded to such speech, by "narrow[ing]" the definitional line between fighting words that are excluded from the First Amendment and speech that remains included.¹³³

To constitute excluded fighting words, the words must do more than merely "annoy or offend,"¹³⁴ they must be "inherently inflammatory."¹³⁵ They also must amount to "a direct personal insult" that is "directed to the person of the hearer"¹³⁶ and must "have a direct tendency to cause acts of violence [by that person]"¹³⁷ so as "to incite an immediate breach of the peace."¹³⁸ The question is whether the words are such as "to provoke the average person to retaliation."¹³⁹ Furthermore, statutes that purport to punish such speech must be narrowly drawn.¹⁴⁰ Under these standards, the Court has refused to sustain any fighting words convictions in post *Chaplinsky* cases, many of which involved speech more provocative than Chaplinsky's.¹⁴¹

Perhaps the most significant narrowing of the definitional line occurred in *R.A.V. v. St. Paul*.¹⁴² In that case a teenager, along with others, burned a cross on the property of a black family.¹⁴³ He was prosecuted under an ordinance that provided "[w]hoever places on . . .

Id.

131. Redish, *supra* note 20, at 626.

132. See Stephen W. Gard, *Fighting Words As Free Speech*, 58 WASH. U. L.Q. 531, 542 (1980).

133. See TRIBE, *supra* note 16, § 12-10 at 850 ("More recent Supreme Court decisions . . . made clear that the 'fighting words' exception . . . must be narrowly construed."); *id.* at 850-51 nn.5-6 (collecting cases).

134. See *Houston v. Hill*, 482 U.S. 451, 465 (1987).

135. *Street v. New York*, 394 U.S. 576, 592 (1969).

136. *Cohen v. California*, 403 U.S. 15, 20 (1971) (quoting in part *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940)).

137. *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

138. *Id.* at 525 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

139. *Street*, 394 U.S. at 592 (quoting *Chaplinsky*, 315 U.S. at 574).

140. See, e.g., *Gooding*, 405 U.S. at 519 (discussing overbreath).

141. See, e.g., *id.* at 519 n.1 (addressed to police officers: "White son of a bitch, I'll kill you." "You son of a bitch, I'll choke you to death." "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces.") (statute held overbroad); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (words not addressed to any particular person included "We'll take the fucking streets later" or "We'll take the fucking streets again").

142. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

143. *Id.* at 379.

private property . . . a burning cross . . . which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor."¹⁴⁴ The majority held that statute was unconstitutional on its face, even if it applied only to proscribable fighting words, because it was content based.¹⁴⁵

In reaching its conclusion, the majority created a definitional rule based on an interpretation of the First Amendment. They held that categories of speech that are otherwise excluded from First Amendment protection are not "entirely invisible to the Constitution."¹⁴⁶ First Amendment values prohibit government regulation of speech simply because the government does not like the content of a speaker's message, and this limitation applies even to otherwise unprotected speech.¹⁴⁷ In other words, "the First Amendment imposes . . . a 'content discrimination limitation' upon a State's prohibition of proscribable speech."¹⁴⁸

Thus, government may only proscribe such speech if does so for the reasons that such speech is excluded from the First Amendment; it may not proscribe such speech because it does not like the content of the message expressed.¹⁴⁹ The ordinance at issue was unconstitutional because the city did not proscribe fighting words for the reasons why such words are outside the scope of the First Amendment. Instead, "it . . . proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance," i.e. it only proscribed fighting words that expressed a message it did not like.¹⁵⁰

144. *Id.* at 380.

145. *Id.* at 381. Four Justices concurred in the result, but rejected the majority's analysis. *Id.* at 397 (White, J., concurring); *Id.* at 415 (Blackmun, J., concurring); *Id.* at 416 (Stevens, J., concurring).

146. *Id.* at 383 (majority).

147. *See id.* at 383-84.

148. *Id.* at 387. The majority reasoned as follows:

[T]he exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication. Fighting words are thus analogous to a noisy sound truck: Each is . . . a 'mode of speech' . . . ; both can be used to convey an idea; but neither has, in and of itself, a claim on the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.

Id. at 386.

149. *See id.* at 382-90.

150. *Id.* at 393-94. The city "assert[ed] that a general 'fighting words' law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the

This, the majority held, the city could not do under the First Amendment.¹⁵¹

Although *R.A.V.* arose in the context of fighting words, the rule applies to all categories of speech that are otherwise deemed not speech in the constitutional sense. Thus, such speech is not included within the First Amendment only to the extent of the underlying reasons why such speech is excluded.¹⁵² This seems a very speech protective way of drawing the definitional line between speech that is encompassed within the First Amendment and speech that is not.

2. Speech That Provokes a Hostile Audience

Speech that provokes a hostile audience is another category of speech that is not included within the First Amendment. However, the Court has drawn the definitional line between such speech that is excluded, and speech that is included, based on speech values and in a speech protective way. The Court has said that government may proscribe speech that provokes a hostile audience where there exists a “clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order.”¹⁵³ Thus, speech is unprotected where “the speaker passes the bounds of argument or persuasion and undertakes incitement to riot.”¹⁵⁴ On the other hand, speech that “stir[s] people to anger, invite[s] public dispute, or [brings] about a condition of unrest”¹⁵⁵ is protected since “a function of free speech under our system of government is to invite dispute.”¹⁵⁶ In such cases “the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker.”¹⁵⁷

‘group hatred’ aspect of such speech ‘is not condoned by the majority.’” *Id.* at 392.

151. *See id.* at 391-94.

152. This slightly modifies the assertion made *supra* text accompanying note 5.

153. *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

154. *Feiner v. New York*, 340 U.S. 315, 321 (1951).

155. *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 5 (1949)).

156. *Terminiello*, 337 U.S. at 4.

157. *Feiner*, 340 U.S. at 320. Applying the standards set out in the text, the Court has reversed convictions in the following situations: (1) where the speaker “aroused animosity” but there was “no . . . clear and present menace to public peace and order,” *Cantwell*, 310 U.S. at 311; (2) the speaker was convicted for inviting a “dispute,” *Terminiello*, 337 U.S. at 3; (3) “there was no violence or threat of violence [by demonstrators] or . . . the crowd watching them [and] police protection was ‘ample,’ *Edwards*, 372 U.S. at 236; *Cox v. Louisiana*, 379 U.S. 536, 550-51 (1965) (same); and (4) where “onlookers became unruly” but there was “no evidence [available] that petitioner’s conduct was disorderly.” *Gregory v. Chicago*, 394 U.S. 111, 111, 112 (1969). However, in *Feiner*, the Court thought that “the speaker [had] passe[ed] the bounds of argument or

3. Advocacy of Illegal Action

The Court has also drawn, in a speech protective way, based on speech values, the definitional line between advocacy of illegal action that is included, and such speech that is excluded, from the First Amendment. In *Brandenburg v. Ohio*, the Court created the definitional rule 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."¹⁵⁸ However, the Court did not expressly explain why it drew the line at this point, but it did indicate that the rule had its roots in prior decisions.¹⁵⁹ Those cases indicate that the *Brandenburg* rule is based on the speech values at stake as articulated in the classic opinions of Judge Hand and Justices Holmes and Brandeis¹⁶⁰

The prevailing view in the pre-*Brandenburg* cases was that, in proscribing advocacy of illegal action, "it was not essential that . . . immediate execution should be advocated"¹⁶¹ and that "success or probability of success [was not] the criterion."¹⁶² This position was often based on the government's interest in self preservation.¹⁶³ On the other hand, Judge Hand argued that only "direct advocacy" of illegal action could be proscribed.¹⁶⁴ He thought that a lesser standard would have "as a consequence the suppression of all hostile criticism, and of all

persuasion and undert[ook] incitement to riot" and that "disorder" was "imminen[t]." *Feiner*, 340 U.S. at 321.

158. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

159. *Id.*

160. See TRIBE, *supra* note 16, § 12-10, at 848 (*Brandenburg* is a "synthesis, combining the best of Hand's views with the best of Holmes' and Brandeis'").

161. *Gitlow v. New York*, 268 U.S. 652, 671-72 (1925).

162. *Dennis v. United States*, 341 U.S. 494, 509-10 (1951).

163. *Gitlow*, 268 U.S. at 669. Thus, it was argued that:

[U]tterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion . . . Such utterances, by their very nature, involve danger to the public peace and to the security of the State. They threaten breaches of the peace and ultimate revolution. And the immediate danger is none the less real and substantial because the effect of a given utterance cannot be accurately foreseen. . . . It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.

Id.

164. *Masses Publ'g Co. v. Patten*, 244 F. 535, 541 (S.D.N.Y. 1917), *rev'd* 264 F. 24 (2d Cir 1917).

opinion except what encouraged and supported the existing policies, or which fell within the range of temperate argument.”¹⁶⁵

In addition to Judge Hand, Justices Holmes and Brandeis thought that “[e]very idea is an incitement.”¹⁶⁶ The drafters of the Constitution were themselves revolutionaries.¹⁶⁷ They “were not cowards.”¹⁶⁸ “They did not fear political change [and] [t]hey did not exalt order at the cost of liberty.”¹⁶⁹ Instead:

They valued liberty both as an end and as a means. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. . . . Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.¹⁷⁰

Consequently, “[f]ear of serious injury cannot alone justify suppression of free speech and assembly.”¹⁷¹ “Only an emergency can justify repression.”¹⁷² “The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression.”¹⁷³ “Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of law, not abridgement of the rights of free speech and assembly.”¹⁷⁴ Thus,

165. *Id.* at 539-40.

166. *Gitlow*, 268 U.S. at 673 (Holmes, J., joined by Brandeis, J., dissenting).

167. *See*, *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

168. *Id.*

169. *Id.*

170. *Id.* at 375-76.

171. *Id.* at 376.

172. *Id.* at 377. *See also* *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., joined by Brandeis, J., dissenting).

173. *Whitney*, 274 U.S. at 378 (Brandeis, J., joined by Holmes, J., concurring).

174. *Id.*

in the Holmes and Brandeis view:

To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable grounds to believe that the evil to be prevented is a serious one.¹⁷⁵

Obviously the Court in *Brandenburg* concluded that the speech values at stake, that Hand and Holmes and Brandeis articulated, required that advocacy of illegal action be proscribed only where there is advocacy of immediate action, and there is a likelihood of success. Consequently, under *Brandenburg*'s definitional rule, speech that advocates overthrowing lawful government, or other illegal action, is speech within the meaning of First Amendment, provided that "such advocacy is [not] directed to inciting or producing imminent lawless action [or] is [not] likely to incite or produce such action."¹⁷⁶ Again, this seems a very speech protective way of drawing the definitional line between advocacy of illegal action that is encompassed within the First Amendment and such speech that is not.

4. Threatening Speech

Threatening speech is another category of speech that is not considered speech in the constitutional sense. Here, too, the Court has drawn, in a speech protective fashion, based on speech values, the definitional line between threats that are proscribable based on their content, and speech that remains included within the First Amendment. The Court has recognized that government has a strong interest in protecting its citizens from threats.¹⁷⁷ However, it has also recognized that the definition of constitutionally proscribable threats must be made in light of the speech values at stake.¹⁷⁸ These values include "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks."¹⁷⁹

Consequently, the Court has held that it is only "true 'threat[s]'"

175. *Id.* at 376.

176. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

177. *See R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992).

178. *See Watts v. United States*, 394 U.S. 705, 707 (1969).

179. *Id.* at 708 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

that are outside the scope of the First Amendment.¹⁸⁰ Such threats “encompass those statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to an individual or a group of individuals.”¹⁸¹ Furthermore, “[t]he speaker need not actually intend to carry out the threat.”¹⁸² Instead, “a prohibition against true threats ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’”¹⁸³ Thus, “intimidation . . . where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death”¹⁸⁴ is also a true threat.

On the other hand, speech that amounts to “political hyperbole,”¹⁸⁵ “creat[es] anger or resentment,”¹⁸⁶ or is “insulting, or even outrageous,”¹⁸⁷ or that is “menacing”¹⁸⁸ may not, in and of themselves, amount to constitutionally proscribable true threats. For example, burning a cross at a Ku Klux Klan rally may be treated as “core political speech” within the scope of the First Amendment,¹⁸⁹ even though it has been argued that “[i]n our culture, cross burning has almost invariably meant lawlessness and understandably instills in its victims well-grounded fear of physical violence.”¹⁹⁰ The fact that such a cross burning “arouses a sense of anger or hatred” is not enough to make it a

180. *Id.*

181. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

182. *Id.* 359-60.

183. *Id.* at 360 (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)).

184. *Id.*

185. *See Watts v. United States*, 394 U.S. 706, 707-08 (1969) (A potential draftee stated that if he was drafted and given a gun “the first man I want to get in my sights is L.B.J”).

186. *Black*, 538 U.S. at 366 (cross burning).

187. *Madsen v. Women’s Health Ctr.*, 512 U.S. 753, 774 (1994) (abortion protesters approaching patients at an abortion clinic).

188. Rothchild, *supra* note 9, at 223. Rothchild makes the point that certain speech that he calls “menacing,” such as that involved in the Nuremberg Files case may not amount to true threats. *Id.* In that case, anti-abortion activists, among other things, created and posted on the internet a poster that listed the names, addresses, and phone numbers of abortion providers, exclaimed that abortion is like a “war crime,” proclaimed that the providers were “GUILTY of crimes against humanity,” and “offer[ed] a \$ 5,000 reward” for “information leading to the arrest, conviction and revocation of license to practice medicine.” *Planned Parenthood v. Am. Coalition of Life Activists*, 23 F. Supp. 2d 1182, 1186 (D. Or. 1998). Subsequently, the Ninth Circuit Court of Appeals sitting *en banc* held 6-5 that the Nuremberg Files amounted to a proscribable threat. *Planned Parenthood v. Am. Coalition of Life Activists*, 290 F.3d 1058 (9th Cir. 2002), *cert. den.* 539 U.S. 958 (2003).

189. *Black*, 538 U.S. at 365.

190. *Id.* at 391 (Thomas, J. dissenting).

true threat.¹⁹¹

5. Offensive Speech

Offensive, non-erotic speech is another category of speech where the Court has created a definitional rule, based on speech values, that has expanded the scope of speech included within the First Amendment. In *Cohen v. California*,¹⁹² Cohen wore a jacket in the hallway outside a courtroom in a county courthouse that bore the term "Fuck the Draft."¹⁹³ He was convicted of violating a statute that "prohibit[ed] 'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by offensive conduct.'"¹⁹⁴

In *Chaplinsky*, the Court mentioned profane speech as a category of speech that was not included within the First Amendment; it said that the relationship between such speech and the First Amendment values of the "exposition of ideas" and search for "truth" was "slight."¹⁹⁵ However, the Court in *Cohen* engaged in a more detailed analysis of whether speech that some might find offensive, which presumably would include profanity,¹⁹⁶ is consistent with First Amendment values.

The Court recognized that government might have some interest in "maintain[ing] . . . a suitable level of discourse within the body politic."¹⁹⁷ However, it held that speech values required that offensive speech be included within the First Amendment. The Court noted that, as a general "rule . . . governmental bodies may not proscribe the form or content of individual expression."¹⁹⁸ The reason for this rule is that:

[T]he constitutional right of free expression] is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no approach would comport with the premise of

191. *See id.* at 366.

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

193. *Id.* at 16.

194. *Id.* (quoting CAL. PENAL CODE § 415 (West 1971)) (ellipsis in original).

195. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942). *See supra* text accompanying note 124.

196. *See* *Shaman, Low Value Speech*, *supra* note 9, at 312-13 (equating profanity with offensive speech).

197. *Cohen*, 403 U.S. at 23.

198. *Id.* at 24.

individual dignity and choice upon which our political system rests.¹⁹⁹

Furthermore, although “[t]o many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance[,] [t]hese are . . . in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve.”²⁰⁰ Consequently, “so long as the means are peaceful, the communication need not meet standards of acceptability.”²⁰¹

More specifically, the Court held that there was “no readily ascertainable general principle”²⁰² for determining what speech is offensive. “[O]ne can[not] forbid particular words without also running a substantial risk of suppressing ideas,” and the Constitution is “solicitous” of both the “cognitive content” and “emotive function” of words.²⁰³ Thus, as a result of the definitional balance struck in *Cohen*, offensive speech is deemed to be speech in the constitutional sense.²⁰⁴

6. Commercial Speech

Commercial speech is another category where the Court has created a definitional rule, based on speech values, that has expanded the scope of speech that is deemed speech within the meaning of the Constitution. Initially, the Court assumed that commercial speech was a category of speech that was entirely excluded from the First Amendment.²⁰⁵

199. *Id.* (citing *Whitney v. California*, 274 U.S. 357, 375-77 (1927) *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

200. *Id.* at 24-25.

201. *Id.* at 25.

202. *Id.*

203. *Id.* (quoting *Org. for Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

204. Government’s attempts to regulate constitutionally protected offensive speech has had mixed results. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (affirming the granting of a preliminary injunction enjoining the enforcement of the Child Online Protection Act, 112 Stat. 2681-736); *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727 (1996) (upholding section 10 (a), and striking down sections 10 (b) and (c) of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 532 (h), (j), 531 (1988)); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding the FCC’s authority to regulate indecent and profane radio broadcasts); *Reno v. ACLU*, 521 U.S. 844 (1997) (holding unconstitutional the Communications Decency Act of 1996, 47 U.S.C. § 223 (Supp. II 1994)); *Sable Commc’ns, Inc. v. FCC*, 492 U.S. 115 (1989) (holding that the amendment to the Communications Act of 1934, 47 U.S.C. § 223(b) (1998), was unconstitutional to the extent that it prohibits dial-a-porn telephone messages that are indecent, but not obscene); *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (upholding the District Court’s conclusion that section 5 of the Telecommunications Act of 1996, 47 U.S.C. § 561 (2000), violated the First Amendment).

205. *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), *overruled by Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984) (“[T]he constitution imposes no . . . restraint[s] on government as respects purely commercial advertising.”).

However, in *Virginia State Board Of Pharmacy v. Citizens Consumer Council*²⁰⁶ the Court recognized the "substantial" speech values inherent in commercial speech.²⁰⁷

The case involved a challenge to a state law that prohibited licensed pharmacists from advertising prescription drug prices. In considering the speech values involved in such advertisements, the Court concluded that "speech which does 'no more than propose a commercial transaction' . . . is [not] 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."²⁰⁸ It reasoned that individuals and society in general had a "strong interest in the free flow of [such] commercial information."²⁰⁹ Buyers have an interest in "where their scarce dollars are best spent."²¹⁰ In addition, society has an interest in "intelligent and well informed" decision making with respect to the buying and selling of goods.²¹¹ In this regard, "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system."²¹² Such information "is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered."²¹³ The Court concluded that "even if the First Amendment were to be thought to be primarily an instrument to enlighten public decision-making in a democracy, we could not say that the free flow of information does not serve that goal."²¹⁴

The Court recognized the State's rationale for prohibiting such advertisements.²¹⁵ The State argued that such a ban was necessary to preserve "a high degree of professionalism on the part of licensed pharmacists."²¹⁶ It maintained that advertising would result in "aggressive price competition"²¹⁷ that would put the "painstaking and

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

207. *Id.* 762-66; cf. Eberle, *supra* note 73, at 453 (noting that in *Virginia State Bd. of Pharmacy* "[t]he Court employed a web of interdependent values . . . [including] [t]ruth, self-realization, and autonomy . . . which support and are supported by democracy, self-government, dignity, equality and liberty").

208. *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (internal citations omitted).

209. *See id.* at 763-65.

210. *Id.* at 763.

211. *Id.* at 765.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See id.* at 766-70.

216. *Id.* at 766.

217. *Id.* at 767.

conscientious pharmacist . . . out of business,” increase drug costs, destroy the “stable pharmacist-customer relationship” which would make it “impossible” to monitor patients drugs, and “reduce the pharmacist’s status to that of a mere retailer.”²¹⁸ However, the Court noted that there was “an alternative to this highly paternalistic approach.”²¹⁹ A better way to look at the problem was “to assume that this information is not itself harmful, that people will perceive their own best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.”²²⁰ Nonetheless, it held that “the choice among these alternative approaches is not ours to make or [the state’s;] [i]t is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.”²²¹

The Court drew the definitional line at truthful, non-deceptive commercial speech about a lawful product, as compared to all commercial speech.²²² In doing so, the Court noted the differences between commercial speech and political speech. It pointed out that the former is “more easily verifiable by its disseminator . . . [who] presumably knows more about [it] than anyone else” and that because of the profit motive, it is also “more durable” and thus “there is little likelihood of its being chilled by proper regulation and foregone entirely.”²²³ Consequently, “the greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker,” and it “may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”²²⁴ Whether or not the Court drew the definitional line in the appropriate place,²²⁵ there can be no

218. *Id.* at 768.

219. *Id.* at 770.

220. *Id.*

221. *Id.*

222. *See id.* at 773.

223. *Id.* at 772 n.24.

224. *Id.*

225. Commentators are divided on whether and to what extent commercial speech should be deemed speech in the constitutional sense. For example, *compare* Emerson, *supra* note 17, at 460 (“It is by no means self-evident that commercial speech will fit into the system at all. Commercial speech does not promote the underlying values of the system in the same manner as does other expression.”) *with* Redish, *supra* note 20, at 635 (“Even though . . . analysis may justify many forms of regulation of false and misleading advertising, it does not support attempts to draw additional distinctions between commercial and other forms of expression.”).

doubt that in holding that truthful, non-deceptive commercial speech about a lawful product was speech in the constitutional sense, the Court expanded the scope of speech included within the First Amendment, and that it did so based on speech values rather than on a comparative balancing of interest.²²⁶

7. Intentional Infliction of Emotional Distress

The Court has also created a definitional rule, based on speech values, that has expanded the scope of speech encompassed within the First Amendment with respect to the tort of intentional infliction of emotional distress. In *Hustler Magazine v. Falwell*,²²⁷ the Court recognized that the government has an important interest in compensating the victims of the tort. "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'"²²⁸

However, the Court drew the definitional line based on the important speech values at stake even with speech that meets the elements of intentional infliction of emotional distress.

The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are 'intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.'²²⁹

In such debates "many things [are] done with motives that are less than admirable."²³⁰ Nonetheless, the First Amendment protects speech "even when a speaker or writer is motivated by hatred or ill-will."²³¹

The reason for this protection is to encourage public debate on public issues.²³² Such debate "will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of

226. The current standards for government regulation of constitutionally protected truthful, non-deceptive commercial speech about a lawful product are set out in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

227. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

228. *Id.* at 53.

229. *Id.* at 51 (quoting *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring)).

230. *Id.* at 53.

231. *Id.*

232. *Id.*

hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth.”²³³ Consequently, the Court held that “public figures and public officials may not recover for the tort of intentional infliction of emotional distress . . . without showing . . . that the publication contains a false statement of fact which was made with ‘actual malice.’”²³⁴ Such a rule is “necessary to give adequate ‘breathing space’ to the freedoms protected by the First Amendment.”²³⁵

8. Invasion of Privacy

a. False Light Privacy

The Court has also applied definitional balancing in a speech protective way, based on speech values, to expand the scope of constitutionally protected speech with respect to the tort of invasion of privacy by placing the plaintiff in a false light. Government has an obvious interest in protecting its citizens “from society’s searching eye.”²³⁶ However, in *Time, Inc. v. Hill*, the Court held that the speech values at stake required a definitional rule that such speech is included within the scope of the First Amendment with respect to matters of public concern unless published with actual malice.²³⁷

The Court reasoned that the First Amendment “guarantees for speech and press are not the preserve of political expression,” but instead also generally apply to matters of public concern.²³⁸ Just as in the former, false statements are “inevitable” in the latter.²³⁹ Consequently, freedom of speech needs “‘breathing space’ . . . ‘to survive.’”²⁴⁰ Otherwise speakers might be deterred from commenting on matters of public concern because of fear of law suits.²⁴¹

In addition, the Court thought that it would “create a grave risk of serious impairment of the indispensable service of a free press . . . [to] saddle the press with the impossible burden of verifying to a certainty the facts associated in news articles with a person’s name, picture or

233. *Id.* (quoting *Garrison v. Louisiana*, 379 U.S. 64, 73 (1964)).

234. *Id.* at 56.

235. *Id.*

236. Nimmer, *supra* note 9, at 958.

237. *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1966).

238. *Id.* at 388.

239. *Id.*

240. *Id.* (quoting *N.Y. Times v. Sullivan*, 376 U.S. 255, 271-72 (1964)).

241. *See id.* at 389.

portrait, particularly as related to a nondefamatory matter."²⁴² Even "[a] negligence test would place on the press the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait."²⁴³

b. Disclosure of Private Facts

Applying definitional balancing, the Court again expanded the scope of speech encompassed within the First Amendment, based on First Amendment values, with respect to the privacy tort of disclosing private facts. In *Cox Broadcasting v. Cohn*, a reporter, in violation of a state statute, broadcasted the name of a rape victim that he had obtained from public records.²⁴⁴ The Court recognized that government has an interest in restricting such speech. It said that "there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity."²⁴⁵ It also noted that a person's "right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities"²⁴⁶ is "plainly rooted in the traditions and significant concerns of our society."²⁴⁷

Nonetheless, it drew the definitional line based on First Amendment values. It noted the interest of a "free press . . . [was also] plainly rooted in the traditions and significant concerns of our society."²⁴⁸ Furthermore:

The publication of truthful information available on the public record contains none of the indicia of those limited categories of expression, such as 'fighting' words, which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'²⁴⁹

To the contrary, the Court reasoned that:

242. *Id.*

243. *Id.* However, Professor Nimmer thought that the Court protected too much speech in *Hill*. See Nimmer, *supra* note 9, at 956-67. See also *infra* Part III.C.

244. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471-73 (1975).

245. *Id.* at 487.

246. *Id.* at 489.

247. *Id.* at 491.

248. *Id.*

249. *Id.* at 495 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.²⁵⁰

In addition, the Court was “reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man.”²⁵¹ “Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law . . . [and] would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public.”²⁵²

Consequently, the Court created the definitional rule that “the state may [not] impose sanctions on the accurate publication of the name of a rape victim obtained from public records – more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection.”²⁵³ In subsequent cases, the Court has broadened the definitional rule so that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order.”²⁵⁴ Clearly, a rule that defines First Amendment speech to include the invasion of personal privacy, by publishing the name of rape victims, must be viewed as being quite speech protective.

c. Appropriation of Private Property

Appropriation of private property is one of the few instances in which the Court has struck the definitional balance in a way that has

250. *Id.* at 491-92.

251. *Id.* at 496.

252. *Id.*

253. *Id.* at 491.

254. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979) (juvenile offender). *See also* *Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (intercepted cellular phone conversation); *Florida Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (rape victim).

narrowed the scope of speech included within the First Amendment. Here too, however, the Court based its decision on an interpretation of the First Amendment, rather than by a comparative balancing of interests. Thus, in *Zacchini v. Scripps-Howard Broadcasting*, a broadcast station, as part of a newscast, televised a performer's an entire fifteen second act of him being shot out of a cannon.²⁵⁵ The Court held that under the circumstances the "First and Fourteen Amendments do not immunize the media when they broadcast a performer's entire act without his consent."²⁵⁶

In reaching this conclusion, the Court recognized that there were competing interests involved. It noted that the press needs "breathing room,"²⁵⁷ that "entertainment, as well as news, enjoys First Amendment protection, and entertainment itself can be important news."²⁵⁸ On the other hand, it recognized that "[t]he broadcast of a film of [the entertainer's] entire act poses a substantial threat to the economic value of that performance . . . [which] is the product of [his] own talents and energy, the end result of much time, effort, and expense."²⁵⁹ "[U]njust enrichment" would result if others could broadcast the entertainer's act without paying for it.²⁶⁰ The Court could see "[n]o social purpose . . . served by" such an occurrence.²⁶¹ Furthermore, "protecting the proprietary interest of the individual in his act²⁶² . . . provides an economic incentive for him to make the investment required to produce a performance of interest to the public."²⁶³ This is in contrast to false light privacy, the invasion of which is constitutionally protected in the absence of actual malice, where what is at stake is "reputation, with the same overtones of mental distress."²⁶⁴

In the end, however, the Court based its decision on an interpretation of the First Amendment.²⁶⁵ It held that:

The Constitution no more prevents a state from requiring [the press] to compensate [an entertainer] for broadcasting his act on television than

255. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 563-64 (1977).

256. *Id.* at 575.

257. *Id.* at 570 (quoting *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 461 (1976)).

258. *Id.* at 578.

259. *Id.* at 575.

260. *Id.* at 576.

261. *Id.*

262. *Id.* at 573.

263. *Id.* at 576.

264. *Id.* at 573.

265. *Cf. TRIBE, supra* note 16, § 12-14, at 888 ("[I]nterests in property and livelihood continue to rest on a powerful constitutional base . . .").

it would privilege [the press] to film and broadcast a copyrighted dramatic work without liability to the copyright owner, or to film and broadcast a prize fight, or a baseball game, where the promoters or the participants had other plans for publicizing the event.²⁶⁶

Furthermore, the Court reasoned, the fact that the First Amendment excludes the television station's broadcast, even as part of a newscast, would not deprive the public of an opportunity to view the entertainment,²⁶⁷ "the only question is who gets to do the publishing."²⁶⁸ This is in contrast to false light privacy where "the only way to protect the interest involved is to attempt to minimize publication of the damaging matter."²⁶⁹

9. Obscene Speech

The Court has also applied definitional balancing in obscenity cases. *Chaplinsky* specifically mentioned obscene speech as one of the categories of speech that is excluded from the First Amendment.²⁷⁰ Nonetheless, the Court has drawn the definitional line with respect to obscenity in a way that actually expands the scope of constitutional protection given to sexually explicit speech. In addition, while the Court has recognized that competing interests are at stake, it has struck the definitional balance between them based on its understanding of First Amendment values.

However, Professor Faigman maintains that the Court excluded obscenity from the First Amendment based on the government's regulatory interest rather than on its lack of speech value.²⁷¹ He relies on *Roth v. United States*²⁷² and *Paris Adult Theatre I v. Slaton*²⁷³ to support his position. He asserts that in *Roth*, the Court engaged in "balancing" and that it "advanced the 'social interest in order and morality' to *define* speech."²⁷⁴ He bases his argument primarily on the

266. *Zacchini*, 433 U.S. at 575 (internal citations omitted). For a copyright case see *Harper & Roe Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985) ("[W]e see no warrant for expanding the doctrine of fair use to create what amounts to a public figure exception to copyright.").

267. *Zacchini*, 433 U.S. at 578.

268. *Id.* at 573.

269. *Id.*

270. See *supra* note 124 and accompanying text.

271. See David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 677-81 (1994); Faigman, *supra* note 19, at 1555-62.

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

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

274. Faigman, *supra* note 19, at 1558-59 (emphasis added).

fact that the Court in *Roth* quoted the *Chaplinsky* dictum that "obscene utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."²⁷⁵ The problem with this analysis is that, as noted earlier, the essence of the *Chaplinsky* dictum is that obscenity is not speech within the meaning of the First Amendment, not as the result of a comparative balancing of interests, but because obscene speech is inconsistent with the speech values of "an exposition of ideas" and the search for "truth."²⁷⁶

Furthermore, the proposition that the Court in *Roth* defined obscenity as outside the scope of constitutionally included speech based on an analysis of the First Amendment, rather than on a comparative balancing of the government's regulatory interests and speech values, is reinforced by the Court's reasoning:

The guaranties of freedom of expression in effect in 10 of the 14 states which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes. . . . In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. . . . The protection given speech and the press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress. . . .²⁷⁷

Professor Faigman recognizes that this reasoning is consistent "with traditional principles" and is "based . . . on the content of the First

275. *Id.* at 1558 (quoting *Roth*, 354 U.S. at 485 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942))).

276. *See supra* notes 124-27 and accompanying text.

277. *Roth*, 354 U.S. at 482-85.

Amendment,” but dismisses it on the ground that it “suffers many weaknesses.”²⁷⁸ However, for present purposes it is irrelevant whether the Court’s reasoning was strong or weak. The point is that the Court based its decision on its view of “the content of the First Amendment,” and not on an assessment of the government’s regulatory interest.

Any doubt that obscenity is excluded from the First Amendment because of its lack of First Amendment value and not because of the government’s interest in regulation, was seemingly dispelled in *Miller v. California*,²⁷⁹ a case that Professor Faigman does not discuss. In that case, the Court observed that the “First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value, regardless of whether the government or a majority of the people approve of [them].” It was designed “to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people.”²⁸⁰ It was not designed to protect “the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain.”²⁸¹ The Court thought that “to equate the free and robust exchange of ideas and political debate with the commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom.”²⁸²

Despite *Miller*, Professor Faigman argues that in *Paris Adult Theatre I*, which was a companion case to *Miller*, “it [was] the government interests themselves that led the Court to define speech so as not to encompass obscenity.”²⁸³ Other commentators also have viewed *Paris Adult Theatre I* as a case in which the Court excluded obscenity from the First Amendment based on the government’s regulatory interests.²⁸⁴ However, the Court in *Paris Adult Theatre I* did not define

278. Faigman, *supra* note 19, at 1557-58. His argument is that “[i]f [the Court’s] . . . historical argument . . . alone supported the exclusion of obscenity from First Amendment protection, profanity and blasphemy too should be excluded. But the Court has not, and is not likely to, read this history so conclusively.” *Id.* at 1558.

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

280. *Id.* at 34-35 (quoting *Roth*, 354 U.S. at 484).

281. *Id.* at 35 (emphasis added).

282. *Id.* at 34.

283. Faigman, *supra* note 271, at 678. See also *id.*, at 678 n.156; Faigman *supra* note 19, at 1560-62.

284. See SHIFFRIN, *supra* note 16, at 22 (“*Paris Adult Theatre I v. Slaton* asserts that the distribution of obscene material is not protected under the first amendment because it debases human personality; it violates social interest in morality; it interferes with the state’s right to maintain a decent society.”) (emphasis removed); TRIBE, *supra* note 16, § 12-16 at 916-17 (similar); Redish, *supra* note 20, at 637-39 (similar).

obscenity as outside the scope of the First Amendment. The Court had already reached that conclusion in *Miller* on the ground that it lacks First Amendment value.²⁸⁵ In fact, *Paris Adult Theatre I* was not a First Amendment case at all.

Just because speech is excluded from the First Amendment does not mean that it is devoid of all constitutional protection. Like all legislation, regulations of speech that are excluded from the First Amendment must still pass "minimal due process" review.²⁸⁶ Thus, since *Miller* had reaffirmed that obscenity is excluded from the First Amendment, the government regulations in *Paris Adult Theatre I* did not have to meet First Amendment standards, they only had to meet rational basis review. Consequently, the issue in *Paris Adult Theatre I* was whether the government had "a legitimate interest" in regulating obscenity with respect to consenting adults.²⁸⁷ The Court held that the government did have legitimate interests in regulating such speech. "These include the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and possibly, the public safety itself."²⁸⁸ This was so even if "there [was] no scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society."²⁸⁹ The reason was that "[i]t [was] not for the Court to resolve empirical uncertainties underlying state legislation, save in the exceptional case where that legislation plainly impinges upon rights protected by the Constitution."²⁹⁰ In other words, since *Miller* reaffirmed that obscenity is not a First Amendment speech "right," the Court in *Paris Adult Theatre I* could, and did, simply defer to the government's judgment of obscenity's harms for purposes of rational basis review. Therefore, since *Paris Adult Theatre I* was not a First Amendment case, it does not undermine the proposition that the Court defined obscenity outside the scope of the First Amendment, as stated in *Miller*, because of obscenity's lack of First Amendment value, rather than on the basis of a comparative analysis of the government's

285. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973). In *Paris Adult Theatre I*, the Court cited *Miller* for the proposition that "[w]e have today reaffirmed the basic holding of [*Roth*] that obscene material has no protection under the First Amendment." *Id.*

286. See *TRIBE*, *supra* note 16, §§12.2 at 792, 12.8 at 832. See also *id.* § 12.2 at 836 (noting that regulations of speech excluded from the First Amendment are "subject only to the barest due process scrutiny").

287. See *Paris Adult Theatre I*, 413 U.S. at 69.

288. *Id.* at 58.

289. *Id.* at 60.

290. *Id.*

regulatory interests.

Furthermore, not only did the Court strike the definitional balance based on First Amendment values, but it also drew the definitional line in a way that gives considerable protection to sexually explicit speech. The Court recognized “the inherent dangers of undertaking to regulate any form of expression.”²⁹¹ Therefore, the Court drew the definitional line narrowly so as to “confine the permissible scope of . . . regulation.”²⁹² Thus, under the so-called *Miller* test, obscenity is defined as sexually explicit material that

‘the average person, applying contemporary community standards’ would find . . . , taken as a whole, appeals to the prurient interest; depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and . . . taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁹³

Consequently, under the definitional line drawn in *Miller*, the commercial exploitation of “[p]atently offensive representations or descriptions of ultimate sex acts, . . . masturbation, excretory functions, and lewd exhibitions of the genitals” are all deemed to be speech within the meaning of the First Amendment – provided only that the “work, taken as a whole, [does not] lack[] serious literary, artistic, or scientific value.”²⁹⁴ This seems very speech protective.²⁹⁵

10. Child Pornography

In *New York v. Ferber*,²⁹⁶ the Court applied definitional balancing in a speech protective manner, to create a definitional rule with respect to child pornography. However, whether the Court based its decision on a consideration of First Amendment values, rather than on a comparative balancing of competing interests, is somewhat problematical. Some commentators have taken the latter position.²⁹⁷

291. *Miller v. California*, 413 U.S. 15, 23 (1973).

292. *Id.* at 24.

293. *Id.*

294. *Id.* at 24-25.

295. Government may still regulate constitutionally protected adult entertainment but the regulations must meet First Amendment standards. See *Erie v. Pap’s A.M.*, 529 U.S. 277 (2000) (regulation of the secondary effects of nude dancing); *Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (regulation of the secondary effects of adult bookstores and video arcades).

296. *New York v. Ferber*, 458 U.S. 747 (1982).

297. See Aleinikoff, *supra* note 11, at 946 (*Ferber* is an example of a case where “the Court places the interest on a set of scales and rules the way the scales tip”); Faigman, *supra* note 19, at 1537 (Court balanced the value of child pornography against harm to children). Cf. *TRIBE*, *supra* note 16, at § 12-18, at 939 (In *Ferber* “[t]he Court engaged in generalized balancing to assess the

In *Ferber*, the Court did say, with respect to child pornography, that “the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake.”²⁹⁸ It also observed that child pornography causes harm to children and that government’s interest in protecting children was one “of surpassing importance” and “compelling.”²⁹⁹ The reason is that the use of real children in pornography implicates the “sexual exploitation and abuse of children”³⁰⁰ that is “harmful to the physiological, emotional, and mental health of the child.”³⁰¹ Such “materials . . . are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.”³⁰² Furthermore, from the abused child’s perspective, it does not matter “whether or not the material . . . has . . . literary, artistic, political, or social value,”³⁰³ or otherwise does, or does not, meet the definition of obscenity.³⁰⁴

Notwithstanding the foregoing, it does not necessarily follow that the Court upheld the statute in *Ferber* because the evil of child pornography *outweighed* its expressive value. This statement seems to have been merely part of the Court’s observation that the “balance of competing interests” had been “struck” in favor of regulation.³⁰⁵ Instead, at least arguably, the Court seems to have based its decision on the lack of First Amendment value of such speech. It specifically held that the First Amendment does not include the visual depictions of child pornography that can cause harm to real children because “[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*.”³⁰⁶ Thus, the mere fact that the Court recognized that the government wanted to regulate such speech for the same reason that the First Amendment excludes it (i.e., it causes real harm to real children) does not mean the Court based its decision on a balancing of interests rather than on the fact that such speech is not the kind of speech that the

constitutional value of the entire category of speech, rather than weighing the merits of the particular restriction on expression in an ad hoc way”).

298. *Ferber*, 458 U.S. at 763-64.

299. *Id.* at 756-57.

300. *Id.* at 757.

301. *Id.* at 758.

302. *Id.* at 759.

303. *Id.* at 761 (quoting Memorandum of Assemblyman Lasher in Support of N.Y. PENAL LAW § 263.15 (McKinney 1980)).

304. *Ferber*, 458 U.S. at 761.(second set of ellipsis in original).

305. *See id.* at 764.

306. *Id.* at 762. The Court noted that if “visual depictions of children performing sexual acts or lewdly exhibiting their genitals . . . were necessary for literary or artistic value, a person over the statutory age who . . . looked younger could be utilized.” *Id.* at 763.

First Amendment was designed to include.

In any event, the Court, in creating the definitional rule, was cognizant of the fact that “laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.”³⁰⁷ Thus, it held that “[t]here are . . . limits on the category of child pornography [that] . . . is unprotected by the First Amendment.”³⁰⁸ Since “the nature of the harm to be combated” is the sexual exploitation and abuse of real children, it is only “works that *visually* depict sexual conduct . . . [that is suitably limited and described] by children below a specified age”³⁰⁹ that is outside the scope of the First Amendment. Consequently, “the distribution of descriptions or other depictions of sexual conduct [by minors], not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection.”³¹⁰ This includes paintings, computer generated images, as well as film or videos of adults who appear to be minors.³¹¹ Again, the Court seems to have drawn the definitional line in a very speech protective way.

11. Defamation

Chaplinsky also specifically mentioned libel as one of the categories of speech that was excluded from the First Amendment.³¹² However, beginning in *New York Times Co. v. Sullivan*,³¹³ the Court has created definitional rules that have incorporated a large portion of speech that injures reputation into the First Amendment. Furthermore, it has done so mostly based on speech values rather than on a balancing of interest.³¹⁴ In *Sullivan*, the Court held that “[l]ibel can claim no talismanic immunity from constitutional limitations[;] [i]t must be measured by standards that satisfy the First Amendment.”³¹⁵

Government has an obvious interest in compensating its citizens

307. *Id.* at 756.

308. *Id.* at 764.

309. *Id.*

310. *Id.* at 764-65.

311. *See* *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (striking down government’s attempt to regulate such constitutionally protected speech in the Child Pornography Prevention Act of 1996, 18 U.S.C. § 2551 et. seq. (2000)).

312. *Chaplinsky, v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

313. *N.Y. Times v. Sullivan*, 376 U.S. 255 (1964).

314. *But see infra* notes 328-37 (discussing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

315. *Sullivan*, 376 U.S. at 269.

whose reputations have been injured by falsehoods.³¹⁶ Under common law defamation, the injured party may recover compensatory, presumed, and punitive damages without having to prove fault and without having to prove actual monetary loss.³¹⁷ However, the Court in *Sullivan* held that the speech values at stake required a definitional “rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”³¹⁸

The Court reasoned that there was a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”³¹⁹ The fear of civil liability might inhibit free debate by causing speakers to engage in “self censorship.”³²⁰ The Court was particularly concerned that critics of public officials not be “deterred” from voicing their criticism “because of doubt whether it can be proved in court or fear of the expense of having to do so.”³²¹ Thus, even false statements, which are “inevitable in free debate . . . must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”³²² Therefore, “the constitutional guarantees require” a limitation on the cause of action in order to protect “the vigor and . . . the variety of public debate.”³²³

Subsequently, in *Curtis Publishing Co. v. Butts*, the Court extended the *Sullivan* definitional rule to include public figures as well as public officials.³²⁴ In his concurring opinion, Chief Justice Warren explained that society “has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’”³²⁵ “[P]ublic figures’ like ‘public officials’ often play an influential role in ordering society[;] [a]nd . . . as a class . . . have as ready access as ‘public officials’ to mass media . . . to

316. See Nimmer, *supra* note 9, at 949.

317. See *Sullivan*, 376 U.S. at 267.

318. *Id.* 279-80.

319. *Id.* at 270.

320. *Id.* at 279.

321. *Id.*

322. *Id.* at 271-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

323. *Sullivan*, 376 U.S. at 279.

324. See *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

325. *Id.* at 164 (Warren, C.J. concurring).

influence policy and to counter criticism of their views and activities.”³²⁶ Furthermore, since public officials are not subject “to the restraints of the political process, . . . public opinion may be the only instrument by which society can attempt to influence their conduct.”³²⁷

Dean Aleinikoff agrees that the Court in *Sullivan* based its decision on speech values rather than a comparative balancing of competing interests.³²⁸ However, he has asserted that the opposite was true in the post *Sullivan* cases *Gertz v. Robert Welch, Inc.*³²⁹ and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*³³⁰ His assertion seems correct as to *Gertz*, but incorrect as to *Dun & Bradstreet, Inc.*

In *Gertz*, the Court held that a different definitional rule than that created in *Sullivan* was required in defamation cases involving private persons with respect to matters of public concern. The rule that the Court created for such cases was that private persons may recover compensatory damages without having to meet the actual malice standard required of public figures as long as recovery is not based on liability without fault.³³¹ However, such plaintiffs must prove actual malice to recover presumed and punitive damages.³³²

In drawing this definitional line the Court observed that the First Amendment value at issue was not the speech itself. False statements of fact made intentionally or negligently have little First Amendment value and are “not worthy of constitutional protection.”³³³ Instead, the speech value at issue was the “need to avoid self-censorship by the news media”³³⁴ and “to assure the freedoms of speech and press that ‘breathing space’ essential to their fruitful exercise.”³³⁵ However, the Court did not base its decision, that the actual malice standard applicable to public officials and public figures did not apply to private parties, on the ground that the speech values at issue are different depending on the status of the plaintiff. Rather, it reached this decision based on a recognition of the strong “legitimate state interest in compensating private individuals for injury to reputation,” as compared to the state’s

326. *Id.*

327. *Id.*

328. See Aleinikoff, *supra* note 11, at 1001.

329. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); see Aleinikoff, *supra* note 11, at 1003 n.327.

330. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); see Aleinikoff, *supra* note 11, at 947 n. 21.

331. See *Gertz*, 418 U.S. at 347-48.

332. *Id.* at 349-50.

333. *Id.* at 340.

334. *Id.* at 341.

335. *Id.* at 342.

interest in compensating public officials and figures.³³⁶ This reasoning does seem to support Dean Aleinikoff's position that the Court created the definitional rule based on a comparative balancing of interests. However, it is worth noting that the Court did draw the definitional line as to damages based on First Amendment values. It held that private parties can only recover presumed and punitive damages upon a showing of actual malice because they "unnecessarily exacerbate[] the danger of media self-censorship."³³⁷

However, in *Dun & Bradstreet, Inc.*, the Court did create the definitional rule based on speech values rather than on a balancing of interest. In that case, the Court held that a different definitional line than those created in *Sullivan* and *Gertz* was required in defamation cases brought by private persons involving matters of private concern.³³⁸ It held that, in such cases, plaintiffs may recover presumed and punitive damages, as well as compensatory damages, without having to prove actual malice.³³⁹

In reaching this conclusion, Justice Powell's plurality opinion did phrase the issue in terms of balancing. He said that to decide the case "we must . . . balance the State's interest in compensating private individuals for injury to their reputations against the First Amendment interest in protecting . . . expression."³⁴⁰ Nonetheless, he based his decision on an interpretation of the First Amendment. He concluded that "[i]t is speech on 'matters of public concern' that is 'at the heart of the First Amendment protection[;]' . . . [i]n contrast, speech on matters of purely private concern is of less First Amendment concern."³⁴¹ The reason is that with respect to matters of private concern "there is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-

336. *Gertz*, 418 U.S. at 348. The Court concluded that private individuals are in a different position than public officials and public figures. *See id.* at 344. They are "more vulnerable to injury" because they may have less "access" to the media "to counteract false statements." *Id.* In addition, public officials and public figures have assumed "the risk of closer public scrutiny . . . [and] 'the communications media are entitled to act on the assumption that . . . [they] have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them.'" *Id.* at 344-45. Consequently, the Court concluded that less a demanding rule was appropriate because "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery." *Id.* at 345.

337. *Gertz*, 418 U.S. at 350. However, the Court also said that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." *Id.*

338. *See Dun & Bradstreet, Inc.*, 472 U.S. at 757-61 (plurality opinion).

339. *Id.* at 751.

340. *Id.* at 757.

341. *Id.* at 758-59.

government; and there is no threat of liability causing a reaction of self-censorship by the press.”³⁴² Thus, despite the balancing rhetoric, it appears that the Court struck the definitional balance between the competing interests based on First Amendment values, rather than on a process of comparative balancing.

12. Summary

The Court has implicitly applied definitional balancing as a methodology for determining whether, and to what the extent, particular categories of speech are speech in the constitutional sense. In making this determination, the Court has generally struck the definitional balance between the competing speech and government interests based on what it believed to be the First Amendment imperatives at stake, rather than by a process of comparative balancing. The principal exceptions to this are the definitional line drawn in *Gertz*, with respect to private plaintiffs in cases of public concern, and perhaps in *Ferber*, with respect to child pornography, albeit the latter seems more problematical than the former.³⁴³

Furthermore, the Court’s definitional rules have generally expanded the scope of constitutionally included speech. The Court has excluded from the First Amendment speech that appropriates private property by broadcasting an entertainer’s entire act³⁴⁴ and speech that injures the reputation of private persons on matters of private concern.³⁴⁵ However, it has held that the First Amendment includes speech that annoys or offends, provided that it does not amount to an inherently inflammatory personal insult directed at the hearer that has a tendency to cause a breach of the peace,³⁴⁶ stirs a hostile audience to anger, invites public dispute, and brings about a condition of unrest, provided the speaker does not undertake indictment to riot,³⁴⁷ advocates illegal action, including overthrowing the United States government by force and violence, provided that such advocacy is not directed at imminent action and is not likely to succeed,³⁴⁸ and causes anger and resentment and is

342. *Id.* at 759-60 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (1977)).

343. *See supra* notes 328-37 and accompanying text (discussing *Gertz*); *supra* Part III.B.10. (discussing *Ferber*).

344. *See supra* Part III.B.8.c.

345. *See supra* notes 338-39 and accompanying text.

346. *See supra* Part III.B.1.

347. *See supra* Part III.B.2.

348. *See supra* Part III.B.3.

insulting and outrageous, and is perhaps even menacing, such as the Ku Klux Klan burning a cross, provided such speech does not amount to a true threat.³⁴⁹

In addition, under the Court's definitional rules, the First Amendment includes speech that is offensive, such as F . . . the draft;³⁵⁰ exploits explicit sexual and excretory functions, provided that the speech does not lack serious literary, artistic, political value;³⁵¹ and portrays child pornography, provided the portrayal is not obscene and does not use a real child.³⁵² Also included is truthful nondeceptive commercial speech about a lawful product.³⁵³

Moreover, speech that injures the reputation of, or inflicts emotional distress upon, public officials and public figures is speech within the meaning of the First Amendment, provided that the speaker does not act with actual malice.³⁵⁴ Other categories of speech that are deemed to be speech in the constitutional sense are speech that injures the reputation of a private person on matters of public concern, provided the speaker acts reasonably, and if not, the speaker is only liable for compensatory damages, unless he acts with actual malice;³⁵⁵ and speech that invades privacy either by placing a person in a false light with respect to a matter of public concern, unless the speaker acts with actual malice,³⁵⁶ or discloses private facts, such as disclosing the name of rape victims, provided it is lawfully obtained truthful information about a matter of public concern, unless the government has an interest of the highest order.³⁵⁷ Finally, even if a particular category of speech is otherwise outside the scope of the First Amendment, government may not proscribe, or otherwise regulate it, unless the government does so for the reasons that such speech is proscribable.³⁵⁸

C. Has Definitional Balancing Caused the Court to Include Too Much or Too Little Speech Within the First Amendment?

Since *Chaplinsky*, the Court's definitional rules clearly have expanded the scope of speech that is included within the First

349. See *supra* Part III.B.4.

350. See *supra* Part III.B.5.

351. See *supra* notes 291-95 and accompanying text.

352. See *supra* notes 307-11 and accompanying text.

353. See *supra* Part III.B.6.

354. See *supra* notes 312-27 (reputation); Part III.B.7. (emotional distress).

355. See *supra* notes 329-32 and accompanying text.

356. See *supra* Part III.B.8.a.

357. See *supra* Part III.B.8.b.

358. See *supra* notes 142-52 and accompanying text.

Amendment. However, there is no shortage of commentators who are dissatisfied with where the Court has drawn the definitional lines.³⁵⁹ Some think that the Court has not included enough speech;³⁶⁰ others think the Court has included too much speech.³⁶¹ For example, Professor Redish, who is neutral on the “merits” of definitional balancing,³⁶² has argued “that the constitutional guarantee of free speech ultimately serves only one true value which [he has] labeled ‘individual self-realization.’”³⁶³ This has led him to the conclusion, among other things, that obscenity should be included within the First Amendment because “it is not for external forces – Congress, state legislatures, or the Court itself – to determine what communications or forms of expression are of value to the individual; how an individual is to develop his faculties is a choice for the individual to make.”³⁶⁴

On the other hand, Professor Heyman, who criticizes definitional balancing on the ground that it does not provide an adequate explanation for which speech is included and which speech is excluded from the First Amendment,³⁶⁵ has argued that the question should be resolved based on a “rights-based theory of free expression.”³⁶⁶ His “central thesis is that free speech is a right that is limited by the fundamental rights of other individuals and the community as a whole.”³⁶⁷ Consequently, “the First Amendment permits regulation of speech where necessary to protect the autonomy or rights of others.”³⁶⁸ Thus, under his theory, the First Amendment would exclude invasions of privacy such as disclosing the name of rape victims,³⁶⁹ regulations of commercial speech “to promote the common welfare,”³⁷⁰ “some forms of hate speech,”³⁷¹ and

359. See sources cited *supra* note 25.

360. See, e.g., TRIBE, *supra* note 16, § 12-16, at 919 (obscenity); Redish, *supra* note 20, at 635-40 (same).

361. See, e.g., Rothchild, *supra* note 9, at 223-24 (“menacing” speech); Shiffrin *supra* note 19, at 1223-51 (discussing various commentators whose theories exclude commercial speech from the scope of the First Amendment); Sionaioh Douglas-Scott, *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305 (1999) (hate speech).

362. Redish, *supra* note 20, at 624 n.115.

363. *Id.* at 593.

364. *Id.* at 637.

365. See Heyman, *supra* note 20, at 669-72; Heyman, *supra* note 11, at 1307-13.

366. Heyman, *supra* note 11, at 1313. See *id.* at 1313-69.

367. *Id.* at 1279.

368. Heyman, *supra* note 20, at 653.

369. See Heyman, *supra* note 11, at 1364-66; Heyman, *supra* note 20, at 685 (“[When viewed] from a rights-based perspective . . . privacy is no less deserving of protection than is reputation[;] society should be based on respect for [individual autonomy].”).

370. Heyman, *supra* note 11, at 1317 n.227 (stating that commercial speech may be regarded

pornography to the extent that it "unjustifiably violates the right of others."³⁷²

However, whether the Court has included too much, or too little, speech is not really a function of definitional balancing. Indeed, even Professor Nimmer, although touting the benefits of definitional balancing, thought that the Court had included too little speech with respect to obscenity,³⁷³ but had included too much speech with respect to false light privacy.³⁷⁴ As others have noted, the methodology can be applied in either a speech protective or a speech restrictive manner, depending on who is applying it.³⁷⁵ Definitional balancing requires the Court to strike a balance between the competing interests based on the speech values at stake in a given context, but it does not mandate any particular result. The real quarrel that commentators such as Professors Heyman and Redish, and for that matter Professor Nimmer, have with the Court's definitional line drawing is that the Court has not adopted their view of First Amendment speech values. If the Court's view of such values has caused it to interpret the First Amendment too broadly,

as a "nonfundamental right").

371. Heyman, *supra* note 20, at 696. *See also id.* at 689-99, 710-15; Heyman, *supra* note 11, at 1375-90.

372. Heyman, *supra* note 20, at 702. For an analysis similar to Professor Heyman's *see* Note, *supra* note 20, at 1873, 1858 n.28.

[T]he goal of the first amendment [is] the fullest development of man's intellect and spirit [;] . . . 'definitional balancing' which would exclude from protection categories of expression whose social harm outweighs their value . . . is inadequate because it requires weighing interest of different sorts and violates autonomy of expression by restricting speech based on its consequences.

Id. Cf. Shiffrin, *supra* note 19, at 1261, 1251-52 (asserting that "[s]peech is important, but so are the values of privacy, security, and reputation," but arguing that the Court "has been right in . . . balanc[ing] the impact of challenged regulations on first amendment values against the seriousness of the evil that the state seeks to mitigate").

373. Nimmer, *supra* note 9, at 948 n.39 ("One can agree with the method and still believe that the Court was wrong in drawing the definitional line in such a manner as to completely exclude the 'obscene' from first amendment protection.").

374. Nimmer, *supra* note 9, 956-67 (discussing *Time, Inc. v. Hill*, 385 U.S. 374 (1967)).

375. *See* Schauer, *Categories*, *supra* note 3, at 303 ("[I]t is important to remember that there is no necessary correlation between the approach employed and the strength of the first amendment protection. 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."); Shaman, *Constitutional Interpretation*, *supra* note 9, at 162 ("[T]here is nothing about the nature of either [categorical or ad hoc] balancing that would dictate [a particular] result."); SHIFFRIN, *supra* note 16, at 14 (different people using the same "methodology" can reach different results). *Cf.* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293,308 (1992) ("The structural choice between [categorization and balancing] is neutral as to outcomes; how either is to be used will be driven by a substantive political theory external to it.").

or not broadly enough, definitional balancing as such has not compelled the result.

D. Is Definitional Balancing an Absolutist Approach that is Too Inflexible?

As previously noted, Professor Nimmer rejected those absolutist theories that would include all speech within the First Amendment on the ground that they were demonstrably false.³⁷⁶ However, definitional balancing is itself absolutist, but in a different way. One of definitional balancing's principal attributes is that it creates rules that can be applied in later cases without further balancing.³⁷⁷ Speech that falls on one side of the definitional line is included within the First Amendment; speech that falls on the other side of the line is excluded.³⁷⁸ In this sense, definitional balancing does have some of the characteristics of absolutist theories.³⁷⁹

Professor Schauer has argued that such absolutist theories have the potential to restrict too much speech.³⁸⁰ Taking the exact opposite view, Professor Heyman, at least implicitly, has argued that such theories may protect too much speech.³⁸¹ However, neither one of their concerns is borne out with respect to definitional balancing as a methodology for defining the First Amendment speech clause. As Part III B herein has demonstrated, the Court's application of definitional balancing has overall expanded the scope of constitutionally included speech, not restricted it, and as pointed out in Part III C, if the Court has protected too much speech, or not enough speech, it is not so much a function of the method, as it is that the Court has had a different view of First

376. See *supra* notes 29-31 and accompanying text.

377. See *supra* notes 48-64 and accompanying text.

378. See *supra* notes 120-358 and accompanying text.

379. For commentators who refer to definitional balancing in absolutist terms, see *supra* note 16.

380. See Schauer, *Categories*, *supra* note 3, at 274-76. Professor Schauer argues as follows: [One danger of] definitional-absolutist theories . . . is that the criteria of absolutism exerts an inward pull on the boundaries of coverage. 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 the range.

Id. at 276.

381. See *supra* notes 365-72 and accompanying text (describing Professor Heyman's implicit view that the Court has protected too much speech); Heyman, *supra* note 11, at 1307-09 (referring to definitional balancing as a form of absolutism).

Amendment values than some commentators.

In addition, Dean Aleinikoff has argued, in effect, that the fact that definitional balancing is somewhat absolutist makes the methodology too inflexible. He supposes the case of a child pornographer who "argues that he produces his work with less harm to the child subjects [than that supposed by the Court in *Ferber*] and with greater First Amendment benefits."³⁸² He says that "[u]nder definitional balancing, such arguments are ruled out of bounds; these factors supposedly were considered in deriving the first rule."³⁸³ However, he asks, "[i]f the pornographer . . . is correct about the harms and benefits of his work, why should he be burdened by the earlier rule?"³⁸⁴

The problem with Dean Aleinikoff's analysis is his assumption that the supposed child pornographer's work would be excluded from the First Amendment. Although definitional balancing may be absolutist in the application of the definitional rules that it creates, it is quite flexible in the creation of those rules themselves. This is illustrated by the defamation cases in which the Court has drawn different definitional lines based on the perceived differences in the underlying facts.³⁸⁵ Consequently, there is no reason to believe that the Court would not be willing to create a different definitional rule if it were really true that the nature of the harms to children were different than those articulated in *Ferber*.³⁸⁶ Furthermore, the precise definitional rule with respect to child pornography is that it is only "works that *visually* depict sexual conduct" by real children that is considered not to be speech in the constitutional sense.³⁸⁷ As long as Dean Aleinikoff's child pornographer does not use real children, his works are entitled to First Amendment protection.³⁸⁸

382. Aleinikoff, *supra* note 11, at 979.

383. *Id.*

384. *Id.* The fact that his hypothetical pornographer might be subject to the original rule indicates to Dean Aleinikoff that definitional balancing is not "a panacea[,] [and] [a]ny gain in certainty it provides come at the price of reduced coherence." *Id.*

385. See *supra* notes 312-42 and accompanying text. Dean Aleinikoff recognizes that the Court has created different definitional rules in the defamation cases based on differences in the underlying facts, but for him this flexibility indicates that there is little difference between definitional and ad hoc balancing. See *supra* note 78 and accompanying text. Nonetheless, there are important differences between the two. See *supra* notes 39-68, 99-119; *infra* Part III.E.

386. Cf. Schlag, *supra* note 16, at 574 n.9 ("Definitional balancing does not provide . . . a finished product: it remains subject to change if the state interest asserted prove to be novel and substantially less compelling or substantially more compelling than those state interest asserted in past balancing acts."); Wells, *supra* note 75, at 243 (same, relying on Schlag).

387. *New York v. Ferber*, 458 U.S. 747, 764 (1982).

388. See *supra* notes 307-11 and accompanying text.

From an entirely different perspective, Professor Shiffrin insists that definitional balancing “is overly absolute”³⁸⁹ and is too “inflexibl[e]”³⁹⁰ to the extent that there is an “absolute preference for rules”³⁹¹ . . . for everything touching [F]irst [A]mendment freedoms.”³⁹² He agrees that definitional balancing “has some appeal”³⁹³ and “that the absence of rules is costly and that the costs are of [F]irst [A]mendment importance.”³⁹⁴ Nonetheless, he maintains that “ad hoc balancing is [not] *always* wrong.”³⁹⁵ In fact, he argues that “in some context, ad hoc decisionmaking can advance first amendment values more than a regime of rules is able to do[,]”³⁹⁶ and “sometimes . . . the cost [of not having rules] are worth absorbing.”³⁹⁷ Whether or not definitional balancing is the most appropriate methodology for resolving all First Amendment questions is beyond the scope of this article. However, none of the instances that Professor Shiffrin cites in support of his assertion involve the use of definitional balancing in the present context, i.e., as a technique for drawing definitional lines within categories of speech to distinguish between speech that is included within the First Amendment and speech that is excluded so that it may be proscribed based on its proscribable content.³⁹⁸

E. Are There Really any Practical Differences Between Ad Hoc and Definitional Balancing?

As previously noted, definitional and ad hoc balancing involve different types of balancing.³⁹⁹ The former seeks to strike a balance between speech and government regulatory interests based on First Amendment values, whereas the latter involves “the identification, valuation, and . . . head-to-head comparison”⁴⁰⁰ of the competing

389. SHIFFRIN, *supra* note 16, at 12.

390. *Id.* at 15.

391. *Id.* at 12.

392. *Id.* at 15.

393. *Id.*

394. Shiffrin, *supra* note 19, at 1253.

395. SHIFFRIN, *supra* note 16, at 15.

396. *Id.*

397. Shiffrin, *supra* note 19, at 1253.

398. *See id.* at 1253 nn. 258-60 and accompanying text (referring to *Island Trees Free School Dist. v. Pico*, 457 U.S. 853 (1982) (removal of books from public school library); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976) (prior restraint); *Branzburg v. Hays*, 408 U.S. 665 (1972) (reporter’s privilege); *N.Y. Times v. United States*, 403 U.S. 713 (1971) (injunction). *See also* SHIFFRIN, *supra* note 16, at 15-16 (discussing *Branzburg*).

399. *See supra* Part III.A.

400. Aleinikoff, *supra* note 11, at 945.

interests. Nonetheless, some commentators believe that there is little practical difference between the two.⁴⁰¹ For example, Dean Aleinikoff argues that the fact the Court has created different definitional rules in the defamation cases, based on differences in the underlying facts, illustrates "[t]he 'un-definitionalness' of 'definitional balancing.'"⁴⁰² In his "view, it is simply a matter of taste whether one views these cases as illustrations of 'definitional' or 'ad hoc' balancing."⁴⁰³ He also makes the broader assertion, although not in the context of the First Amendment, that the distinction between the two is "artificial[.];" "[i]f . . . [n]ew situations [that] present new interests and different weights for old interest . . . are allowed to re-open the balancing process, then every case becomes one of 'ad hoc' balance, establishing a rule for that case only."⁴⁰⁴

In addition, Professor Shiffrin has argued that "the distinction between rules and ad hoc balancing is not a sharp one in practice"⁴⁰⁵ because the application of definitional rules requires an ad hoc analysis.⁴⁰⁶ He too uses the defamation cases to illustrate his point. He asserts that the "rule formulated in *Gertz v. Robert Welch, Inc.* . . . substituting fault for strict liability is in actuality the authorization for ad hoc balancing."⁴⁰⁷ Such balancing is necessary, he argues, to answer questions such as "[w]hat does it mean to say that plaintiff must show fault, [and], [a]ssuming that fault is lack of reasonable care, how does one determine what is reasonable?"⁴⁰⁸ The answer, he says, is "[p]resumably, by examining the circumstances of concrete cases, by making a judgment, by proceeding to compare cases in the future, by identifying factors to be considered, by forming rules where possible in concrete contexts - in short by the common law process."⁴⁰⁹ Similar ad hoc judgments are required, he asserts, to determine whether a particular plaintiff is a public figure who may not recover in a defamation action without showing actual malice.⁴¹⁰

401. See *supra* note 17 and accompanying text.

402. Aleinikoff, *supra* note 11, at 980 n.230.

403. *Id.*

404. *Id.* at 980-81 (discussing *New York v. Quarles*, 467 U.S. 649 (1984) (Fifth Amendment)). See also Molnar, *supra* note 17, at 1369 n. 243 (quoting Professor Aleinikoff).

405. SHIFFRIN, *supra* note 16, at 16.

406. See *id.* at 16-17.

407. *Id.* (referring to *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974). For a discussion of *Gertz*, see *supra* notes 329-37 and accompanying text).

408. *Id.*

409. *Id.* at 16-17.

410. See *id.* at 17. As Professor Shiffrin says, the application of definitional rules in the defamation cases does require ad hoc judgments concerning such issues as the standard of care and

Nevertheless, neither the fact that the Court has created different definitional rules within subcategories of defamation, nor the fact that the application of definitional rules requires ad hoc decision making, means that there are not important differences between ad hoc and definitional balancing. The differences are the ones that Professor Nimmer articulated.⁴¹¹ These include the fact that ad hoc balancing involves a case by case comparative balancing of the speech and government regulatory interests in the context of the specific facts at issue, for the purpose of determining which party should prevail in a given case⁴¹² whereas definitional balancing involves striking a balance between the category of speech at issue and the government's interest in regulation, based on First Amendment values, for the purpose of creating rules that can be applied in later cases.⁴¹³ As Professor Nimmer said, such rules are beneficial because they provide a degree of "certainty [that] minimizes speech deterrence,"⁴¹⁴ and provide speakers with "a standard" to judge whether their speech is within the First Amendment.⁴¹⁵ Further, they provide greater protection against judicial⁴¹⁶ and legislative⁴¹⁷ encroachment than does ad hoc balancing and "can insulate a judge from legally irrelevant pressures to a considerable degree if the judge wishes such insulation."⁴¹⁸

Additionally, as Professor Nimmer emphasized, definitional rules have the effect of limiting ad hoc decision making by "narrow[ing] . . . the . . . question" presented.⁴¹⁹ Professor Schauer has made the same point. He has noted that determining who is a public figure, for purposes of applying the definitional rules in defamation cases, "is by no means an easy task."⁴²⁰ However, this "variability in what remains to be decided should not blind us to the extent to which issues have been

whether the plaintiff is a public figure. *See supra* notes 318-32 and accompanying text. Other examples where the application of definitional rules requires ad hoc judgments include obscenity which requires ad hoc judgments concerning whether the work has artistic, political, or scientific value; and advocacy of illegal action which requires ad hoc judgments as whether the speaker advocated imminent lawless action and if so whether there was a likelihood of success. *See supra* notes 158, 293 and accompanying text.

411. *See generally* Nimmer, *supra* note 9, at 939-45.

412. *See supra* notes 39-42, 78-119 and accompanying text.

413. *See supra* notes 43-47, 78-119 and accompanying text.

414. Nimmer, *supra* note 9, at 945.

415. *See id.* at 939.

416. *See id.* at 939-40.

417. *Id.* at 945.

418. *Id.*

419. Nimmer, *supra* note 9, at 952.

420. Schauer, *Categories*, *supra* note 3, at 301.

removed from consideration in the particular case."⁴²¹ He says "for example [a]ll of the [F]irst [A]mendment issues . . . have been predetermined at the rulemaking level[;] [i]t 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."⁴²² Furthermore, "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."⁴²³ Even Professor Shiffrin concedes that although definitional "[r]ules . . . leave plenty of opportunity for subjective manipulation and for arbitrary decisionmaking,"⁴²⁴ "[t]hey usually provide more predictability than ad hoc balancing" and "can confine discretion."⁴²⁵ Consequently, there really are significant practical differences between ad hoc and definitional balancing.

F. Should the Term Definitional Balancing be Abandoned Because It Is Potentially Confusing?

In his treatise, which is the successor to Professor Nimmer's,⁴²⁶ Professor Smolla has "abandoned . . . [t]he term 'definitional balancing'" because it "has not caught on and . . . suffers from using the word balancing, which can cause confusion with the far less speech-protective 'ad hoc balancing' approach."⁴²⁷ Instead, he uses the term "heightened scrutiny" to describe the process.⁴²⁸

Properly understood, the term definitional balancing is an accurate description of the process the Court has used to determine the extent to which particular categories of speech are speech in the constitutional sense. It has "defined" the scope of the First Amendment by striking a "balance" between the competing interests based on its view of the speech values at stake.⁴²⁹ Nevertheless, there is no question that the term

421. *Id.*

422. *Id.*

423. *Id.*

424. Shiffrin, *supra* note 19, at 1253.

425. SHIFFRIN, *supra* note 16, at 17. Cf. Susan M. Gilles, *Public Figures and Private Facts: Should the "Public Figure" Doctrine Be Transplanted into Privacy Law*, 83 NEB. L. REV. 1204, 1238 (2005) ("[T]he presence of rules permits a greater degree of predictability than an individualized, ad hoc approach where each case is treated as unique.").

426. See SMOLLA, *supra* note 22, at ix.

427. *Id.* § 2:12, at 2-7 & n.1.

428. *Id.* at 2-7.

429. See *supra* notes 99-119 and accompanying text.

has caused confusion. As previously noted, many commentators view the process as involving a “head-to-head comparison”⁴³⁰ of speech values and government regulatory interests as in ad hoc balancing, albeit at a higher level of generalization.⁴³¹

However, Professor Smolla’s solution is also potentially confusing. The problem is that it “collapse[s] the important distinction between coverage and protection.”⁴³² The term “heightened scrutiny” implies that the question is whether the government’s interest in regulating constitutionally protected speech survives the applicable level of scrutiny. By contrast definitional balancing seeks to answer the threshold question of whether the speech at issue is “speech” that is subject to any First Amendment scrutiny. Consequently, the proper solution to the confusion is not to abandon a useful and accurate term in favor of one that suffers from its own conceptual difficulties. Instead, the proper solution is to explain the difference to those who might be misled. The term definitional balancing should not be abandoned.

IV. CONCLUSION

Without explicit acknowledgment, the Court has applied definitional balancing as a technique for drawing definitional lines within categories of speech, so as to distinguish between speech that is included within the First Amendment and speech that is excluded so that it may be proscribed based on its proscribable content. For the most part, it has done so in the way that Professor Nimmer described it. It has recognized, either explicitly or implicitly, that competing speech and government regulatory interests were at stake but it has struck the balance between them based on its understanding of First Amendment values, rather than on a comparison of the competing interests as many commentators assert.

Furthermore, contrary to the view of many commentators, the Court has struck the balance between the competing interests in a way that has expanded the scope of speech included within the First Amendment, not restricted it. Nonetheless, many commentators are dissatisfied with where the Court has drawn the definitional lines in particular contexts. However, definitional balancing is neutral as to outcomes; if the Court has used definitional balancing to include too much, or too little, speech within the First Amendment, the methodology as such has not compelled

430. Aleinikoff, *supra* note 11, at 945.

431. *See supra* notes 71-77 and accompanying text.

432. Schauer, *Categories*, *supra* note 3, at 275-76.

the result.

Definitional balancing is absolutist in the sense that once the definitional lines are drawn, speech on one side of the definitional line is included within the First Amendment and speech on the other side of the line is excluded. Both types of speech may be regulated, but regulation of the former must meet First Amendment standards while the regulation of the latter does not, provided that it is being regulated for the reasons that such speech is excluded from the First Amendment. Furthermore, although definitional balancing may be absolutist in the application of the definitional rules that are created, it is quite flexible in the creation of the rules themselves; different underlying facts can give rise to different rules.

The application of definitional rules requires ad hoc judgments but the creation of the rules themselves does limit the amount of ad hoc decision making in First Amendment litigation by narrowing the issues to be decided. The term definitional balancing has caused some confusion among commentators who view it as a comparison of competing interests, although at a higher level of generalization than ad hoc balancing. However, despite the confusion of some, definitional balancing is an accurate and useful term to describe the Court's efforts to "define" the scope of the First Amendment by striking a "balance" between competing interests based on speech values. As such the term should be retained.