

The Right to Reject: The First Amendment in a Media-Drenched Society

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I. INTRODUCTION

In *Ashcroft v. ACLU*,¹ the Supreme Court ruled on Congress's second attempt to regulate minors' access to harmful material on the Internet. Congress's first attempt, the Communications Decency Act of 1996, was struck down in *Reno v. ACLU*.² In response to this ruling, Congress enacted the Child Online Protection Act (COPA), which tried to address the concerns articulated in *Reno* by forcing commercial vendors of pornographic Internet material to require a credit card for access to their sites.³ Nonetheless, the *Ashcroft* Court still found the COPA unconstitutional, on the grounds that it "was likely to burden some speech that is protected for adults" and that there were "plausible, less restrictive alternatives . . ."⁴ One such alternative, the Court speculated, would be for Congress to encourage the use of Internet filtering software that would screen out whatever material parents did not want their children accessing.⁵ This filtering software would permit adults to gain access to speech otherwise deemed harmful to minors "without having to identify themselves or provide their credit card information."⁶

Justice Breyer's dissent took a less stringent, one-sided view of the burdens issue. According to Justice Breyer, the regulations imposed only a "modest additional burden on adult access to legally obscene material . . ."⁷ Furthermore, in the dissent's view, filtering software did not amount to a viable "less restrictive alternative."⁸ First, because such software currently exists, it is part of the status quo that Congress sought to change—a status quo in which children were gaining significant

1. 124 S. Ct. 2783 (2004).

2. 521 U.S. 844, 849, 885 (1997) (holding the Communications Decency Act unconstitutional because it was not narrowly tailored to serve a compelling government interest and because less restrictive alternatives were available).

3. 47 U.S.C. § 231 (2000). The Communications Decency Act imposed criminal penalties for the knowing posting, for "commercial purposes," of internet content that is "harmful to minors." *Id.* §231(a). However, the Act provided an affirmative defense to commercial vendors who restricted access to prohibited materials by "requiring use of a credit card" or "any other reasonable measures that are feasible under available technology." *Id.* § 231(c)(1); *see* Communications Decency Act of 1996, 47 U.S.C. § 223 (2000); *Ashcroft*, 124 S. Ct. at 2789.

4. 124 S. Ct. at 2791.

5. *Id.* at 2792–93.

6. *Id.* at 2792. The Court ruled that the government had "failed to carry its burden" of proving that existing technologies were less effective than the restrictions in COPA. *Id.* at 2793. "The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective." *Id.*

7. *Id.* at 2801 (Breyer, J., dissenting).

8. *Id.* at 2801–04.

access to “harmful material” on the internet.⁹ Second, there was strong evidence that filtering software was not effective in blocking out undesirable material.¹⁰ Third, filtering software is expensive and hence not universally available.¹¹ Fourth, children could still gain access to harmful Internet material from computers at the homes of friends.¹² Consequently, as Justice Breyer noted, “a ‘filtering software status quo’ means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision.”¹³

The dissent emphasized the unique characteristics of the Internet, with its overwhelming supply of pornographic material accessible to children, but the majority relied upon the same old First Amendment doctrines that had been developed during an era of street-corner political protestors. Formulated in a time when speech was nowhere near as abundant or intrusive as it is now, the marketplace model seeks to maximize the amount of speech in the social communications system by eliminating any and all burdens on speaker freedoms. This one-sided focus, however, has become outmoded and even counterproductive in a time of media proliferation. It ignores the rights of people trying to avoid the flood of offensive and destructive speech.

II. THE MARKETPLACE MODEL

With enough quantity of speech, so the marketplace model holds, quality will naturally occur. In theory, limitless quantity creates a situation, much like the Adam Smith economy, of perfect competition among ideas. This competition, again like Adam Smith’s economic model, will ideally lead to truth, which in turn will lead to rational and enlightened self-government. No concern is put on the content or character of the speech involved, because such determinations are left up to the market.

Incorporated within this scheme is the notion that “good” speech will overcome “bad,” and that “truth” will then win out.¹⁴ The model even welcomes the entrance of so-called bad ideas, because only by competing against such ideas are the worthiness of good ideas

9. *Id.* at 2801–02.

10. *Id.* at 2802.

11. *Id.*

12. *Id.*

13. *Id.* at 2803.

14. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–50 (1936).

established. Consequently, even the most innocuous of regulations, if they create distinctions or burdens based on content, will likely be struck down.¹⁵ In the political speech arena, at least up until *McConnell v. FEC*,¹⁶ the Court has repeatedly focused on quantity rather than quality, and has overturned laws that in any way decrease the amount of speech existing in the electoral process.¹⁷

Over the years, the marketplace model has proved to be the dominant one employed in the Court's free speech jurisprudence—the model most used to decide First Amendment controversies.¹⁸ According to one legal scholar, the marketplace model “has dominated recent First Amendment discourse”¹⁹ Therefore, when the interests of willing or potentially willing listeners conflict with the interests of unwilling listeners, the former will almost always prevail in any constitutional analysis, no matter how few in number the willing listeners may be as compared to the unwilling.²⁰

Under the marketplace model, indecent and violent speech is protected as soundly as are political editorials: In *Sable Communications v. FCC*,²¹ the Court overturned a prohibition on dial-a-porn messages. In *United States v. Playboy Entertainment Group, Inc.*,²² it ruled unconstitutional a regulation that would force the Playboy Channel to show its sexually explicit programming only during late-night hours. And in *Reno v. ACLU*,²³ it used the marketplace model to give the highest level of constitutional protections to the Internet, no matter how much violent and pornographic and hate speech is found on that medium.

15. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418–28 (1993) (finding a municipal regulation's distinction between commercial and noncommercial publications to be content-based and therefore invalid); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231, 233 (1987) (striking down tax applicable to general interest magazines, but not newspapers or specialinterest magazines).

16. *McConnell v. FEC*, 540 U.S. 93 (2003).

17. Brian K. Pinaire, *A Funny Thing Happened on the Way to the Market: The Supreme Court and Political Speech in the Electoral Process*, 17 J.L. & POL. 489, 503 (2001).

18. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Time, Inc. v. Hill*, 385 U.S. 374, 382 (1967).

19. Ashutosh Bhagwat, *Of Markets and Media: The First Amendment, The New Mass Media, and the Political Components of Culture*, 74 N.C.L. REV. 141, 160–61 (1995).

20. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (“[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”).

21. 492 U.S. 115, 117 (1989).

22. 529 U.S. 803, 806–07 (2000).

23. 521 U.S. 844, 868–70 (1997) (deciding that the Internet was to be governed, in a First Amendment sense, by the highly protective print standard rather than the less protective broadcast standard).

III. A HISTORY OF THE MARKETPLACE MODEL

The marketplace of ideas metaphor was first expressed by Justice Holmes in his famous dissent in *Abrams v. United States*.²⁴ This view of free speech—that an open marketplace of many competing ideas will lead to the discovery of truth²⁵—had already been outlined in the early theories of John Milton and John Stuart Mill.²⁶ But the real accomplishment of Holmes was to elevate free speech above that of merely an individual interest, which was unlikely to prevail when balanced against important social interests.

Dissenting in *Abrams*, Holmes borrowed from the free speech theory of Zechariah Chafee: “that the true meaning of freedom of speech lie in its contribution to democratic society.”²⁷ According to Chafee, “the discovery and spread of truth on subjects of general concern constituted one of the most important purposes of society and government; and such discovery was only possible through free and unlimited discussion.”²⁸ This theory gave Holmes a “greater rationale—a democratic argument—for protecting speech.”²⁹ “No longer should speech be protected only because individuals should be free to say and do whatever they liked, free speech should be protected because it was necessary for the survival of democracy.”³⁰ For this reason, free speech could then weigh more heavily on the judicial balance with other social interests such as national security.³¹

In *Abrams*, the Court upheld the Sedition Act convictions of individuals charged with distributing pamphlets attacking the government’s expeditionary force to Russia and calling for a general strike.³² Holmes dissented with his now famous marketplace of ideas metaphor: “the best test of truth is the power of the thought to get itself accepted in the competition of the

24. 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

25. *Id.*

26. JOHN MILTON, *A Speech for the Liberty of Unlicensed Printing, To the Parliament of England*, in AREOPAGITICA AND OTHER PROSE WRITINGS 3, 23–28, 48–49 (William Haller ed., The Macmillan Co. 1927) (1644); JOHN STUART MILL, ON LIBERTY, 75–118 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

27. Patrick Garry, *Oliver Wendell Holmes and the Democratic Foundations of the First Amendment*, in GREAT JUSTICES OF THE U.S. SUPREME COURT 125, 135–36 (William D. Pederson & Norman W. Provizer eds., 1993).

28. *Id.* at 135.

29. *Id.* at 136.

30. *Id.*

31. *Id.*

32. 250 U.S. 616, 616–20, 624.

market . . .”³³ This theory advanced not only an individual liberty argument, but the notion that dissenting speech served important governmental interests, as the truthful basis of a government action could only be tested in the marketplace of ideas.

Holmes’s marketplace theory was to exert a profound impact on First Amendment law. Court decisions in the latter part of the twentieth century would generally adopt the view of the First Amendment as set forth in Holmes’s *Abrams* dissent.³⁴ Yet even though the marketplace model provided a substantial influence in the development of First Amendment doctrine, its role has changed in recent decades, especially as the majority of speech cases came to involve sexually explicit forms of entertainment rather than more traditional forms of political dissent.³⁵ Whereas the model used to rely, ultimately, on the quality of speech—namely, the achievement of truth—now it looks only to the quantity of speech, with little pretext at serving any larger cause. Now the marketplace model is not so much a rationale for protecting speech as it is a simple descriptor—that the law now protects as much speech as can be crammed into the media marketplace. But despite these changes in its role, the marketplace model, ever since Holmes’s articulation of it in 1919, believes in maximizing the amount of speech in the system.³⁶ The issue some eight decades later is whether, given the changed circumstances of America’s media age, a different view of the First Amendment is needed for the survival of a culture on which self-government depends.

A host of “changed circumstances” have eroded many of the underlying conditions of the marketplace metaphor. In general, the “speakers” in the contemporary marketplace of ideas are media conglomerates, selling their entertainment programming to a relatively passive public. Those conglomerates tend to see the public as a mere commodity, an audience to be delivered up to advertisers.³⁷ And to

33. *Id.* at 630.

34. Garry, *supra* note 27, at 139.

35. *See, e.g.*, *U.S. v. Playboy Entm’t Group, Inc.*, 529 U.S. 803 (2000) (addressing congressional regulations of adult programming on cable television); *Reno v. ACLU*, 521 U.S. 844 (1997) (involving a congressional act regulating indecent messages on the Internet); *Osborne v. Ohio*, 495 U.S. 103 (1990) (involving the constitutionality of a statute expansively defining child pornography); *Sable Comms. v. FCC*, 492 U.S. 115 (1989) (ruling on statutory ban on indecent telephone messages); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (involving a lewd and sexually explicit parody); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (addressing zoning ordinance governing the location of adult motion picture theaters); *New York v. Ferber*, 458 U.S. 747 (1982) (ruling on the constitutionality of a statute regulating the promotion of sexual performances by minors).

36. *See supra* text accompanying note 33.

37. *See* Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1166 (1996).

attract as large an audience as possible, the media designs entertainment programming that is aimed at the lowest common denominator.³⁸

In the world of Holmes's marketplace of ideas, no individual speaker played a dominant role. An equality of power existed among all potential speakers, and listeners could freely choose when to participate in the communications marketplace and when to remove themselves from it.³⁹ Because they could access this marketplace only one way, by going out into the public square and listening to it, they had greater control over the intrusion of public speech into their lives. But none of these conditions seem to exist today, in a communications marketplace dominated by the entertainment industry.

The one accomplishment of which the marketplace model can certainly boast is that of increasing the sheer volume of speech. The number of over-the-air television stations that the average U.S. household can receive has more than tripled over the last twenty years.⁴⁰ Moreover, cable television and direct broadcast satellite systems, which are now almost universally available, can provide hundreds of additional channels. Then there are personal video recorders and wireless local area networks and other emerging spread-spectrum technologies, as well as packet-switched networks, all of which will further increase the sources of speech. The FCC acknowledged this explosion in information sources as far back as 1987 when it eliminated the Fairness Doctrine.⁴¹ But this explosion in numbers of sources has not transformed the media into an Adam Smith type of marketplace in which truth always prevails.

Under the marketplace model, there is no effective solution to the enormous volume of ugly and offensive speech. The model simply asserts that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment."⁴² But this

38. *Id.* As one observer noted, "entertainment programs are generally mediocre at best." *Id.*

39. 250 U.S. at 630–31.

40. Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 279 (2003).

41. R. Randall Rainey, S.J., *The Public's Interest in Public Affairs Discourse, Democratic Governance, and Fairness in Broadcasting: A Critical Review of the Public Interest Duties of the Electronic Media*, 82 GEO. L.J. 269, 297 (1993). For an explanation of the Fairness Doctrine, see *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369–71 (1969).

42. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 774 (1994) (citing *Boos v. Barry*, 485 U.S. 312, 322 (1988)).

presumes that a public debate is occurring, that the speech in the public domain is even capable of debate, that this speech is more than mere images meant to manipulate emotions rather than contribute to some rational discussion, and that music videos are as communicative in a First Amendment sense as newspaper editorials.

The marketplace solution to any “harmful speech” is to simply have more speech, as if this additional speech will rectify and drive out the bad. But there is no logical speech that can somehow rectify the irrational impressions given by various forms of entertainment. Music videos are not debating partners; nor do these forms of entertainment allow for contemporaneous countervailing debate. A music video does not include space at the end of the video for opponents to engage in political debate. A video game does not give equal time to critics to make their point. Music videos and video games are monopolistic media—they allow for nothing other than their preordained programming.

In reality, the “more speech” solution of the marketplace model has had a boomerang effect. By flooding individuals with inane, ugly, and indecent speech, it has dulled their senses and diminished their ability to discern quality, much less truth.⁴³ The “more speech” solution has also had a negative effect on the nation’s democratic process. A deluge of entertainment has had a crowding-out effect on political speech.⁴⁴ Audience time is limited, and all speech competes against each other for public attention.⁴⁵ Consequently, the greater supply of easy, hypnotic entertainment, the less demand for the more rigorous and thoughtful political speech. So in a way, the age of abundant media speech has produced a First Amendment scarcity problem—a scarcity of public attention to the speech of political and social issues on which a democracy must depend.

With the passage of time, the faults and shortcomings of the marketplace model have become apparent. If competition in the communications marketplace truly did correct all pernicious ideas, then there would not still be the violent, racist, hate-filled, and sexually exploitive speech that continues to thrive. Perhaps the reason why the good has not smothered

43. “[D]iscretion, a fragile virtue at best, is almost impossible to cultivate in a wholly uncensored culture like our own.” Diana West, *All That Trash*, 156 PUB. INT. 131, 132 (2004) (reviewing KID STUFF: MARKETING SEX AND VIOLENCE TO AMERICA’S CHILDREN (Diane Ravitch & Joseph P. Viteritti eds., 2003)).

44. One study of nightly network television news, for instance, revealed that in 1988 there was an average of thirty-eight minutes per month of coverage of entertainment stories. But just two years later, that average had almost doubled, to sixty-eight minutes. J. Max Robins, *Nets’ Newscasts Increase Coverage of Entertainment*, VARIETY July 18, 1990, at 3.

45. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 409.

the bad is because human beings do not arrive at all their attitudes and proclivities through a process of rational thought. Emotion and base instinct can play a crucial role. And it is to emotion and instinct that so much of the electronic media caters: to anger and lust and greed and insecurity and the pulsating feel of adrenaline. A primal appeal to these emotions and instincts is how so much of contemporary media entertainment is marketed. But this primal appeal also renders entertainment programming immune from competition with rational ideas. The two are as different as apples and sledgehammers.

Recognizing the primal characteristic of some forms of speech has led judges to carve out certain exceptions, like obscenity and fighting words. Because these forms of speech have no truth value, courts have denied them First Amendment protection. Such “low value” speech includes lewd or profane speech, which has “no essential part of any exposition of ideas,”⁴⁶ and “epithets or personal abuse,” which are “not in any proper sense communication of information or opinion safeguarded by the Constitution”⁴⁷

IV. THE MARKETPLACE MODEL AND THE DOCTRINE OF “CHANGED CIRCUMSTANCES”

In 2003, the Supreme Court handed down its decision on the McCain-Feingold campaign finance bill, which abolished “soft money” contributions to national party committees and placed restrictions on fundraising by federal officeholders and candidates.⁴⁸ Although the bill severely limited the rights of people and groups to engage in various types of political speech, the Court in *McConnell v. Federal Election Commission*⁴⁹ upheld it—a bill that clearly exceeded the existing limits of First Amendment doctrine, as laid down in various post-Watergate judicial opinions.⁵⁰ It is a decision that can be summed up in one phrase:

46. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

47. *Cantwell v. Connecticut*, 310 U.S. 296, 309–10 (1940).

48. *McConnell v. FEC*, 540 U.S. 93 (2003).

49. *Id.*

50. Perhaps the most important of these is *Buckley v. Valeo*, 424 U.S. 1, 12–59 (1976) (per curiam). For post-Watergate decisions concerning the attempted regulation of campaign speech, see, for example, *Buckley*, 424 U.S. at 39 (declaring that limitations on individual political expenditures restricted “political expression ‘at the core of our electoral process and of the First Amendment freedoms’”) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)); *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 788–95 (1978) (rejecting the systematic corruption argument as a rationale for restricting political

changed circumstances. According to the Court, the McCain-Feingold bill was designed “to purge national politics” of the “pernicious influence of ‘big money’ campaign contributions.”⁵¹ Thus, the Court approved of legislation that just several decades earlier would have been declared unconstitutional.⁵² But by the time the McCain-Feingold bill came to the Court, circumstances had changed from the era of *First National v. Bellotti*,⁵³ where the Court rejected the “systemic corruption” argument as a rationale for restricting political speech.

Just as with political campaign advertisements, there have been demands for new restrictions of indecent material appearing on radio, television, and the Internet, but the courts have steadfastly opposed any such restrictions. While changed circumstances have certainly occurred in the quantity and quality of media content, the courts have resisted making the type of doctrinal adjustments to entertainment speech that it made in *McConnell v. FEC* regarding political speech.

V. THE PERVASIVENESS OF INDECENCY

The vast majority of current free speech disputes involve entertainment speech that is accused of being vile, vulgar, or violent. Public complaints of broadcast indecency have multiplied exponentially.⁵⁴ The FCC Consumer and Governmental Affairs Bureau reported a “huge increase” in such complaints in 2003.⁵⁵ The FCC defines indecency as language that “depicts or describes, in terms patently offensive by contemporary community standards for the broadcast medium, sexual or excretory activities or organs.”⁵⁶

speech); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 291, 300 (1981) (striking down an ordinance placing ceilings on contributions to committees formed to support or oppose certain ballot measures); *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 608 (1996) (overturning various restrictions on the expenditures of political parties), *rev'd*, 533 U.S. 431 (2001).

51. *McConnell*, 540 U.S. at 93 (quoting *United States v. Int'l Union United Auto. Workers of Am.*, 352 U.S. 567, 572 (1957)).

52. Three decades earlier, the Supreme Court had declared that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.” *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Five years later, *Buckley* overturned limitations on individual political expenditures. 424 U.S. at 39–51. Five years after that, the Court struck down an ordinance limiting contributions to committees formed to support or oppose certain ballot measures. *Citizens Against Rent Control*, 454 U.S. at 300.

53. 435 U.S. at 788–92.

54. During the third quarter of 2003, consumer complaints about indecency in broadcasting increased from 351 to 19,920 complaints. Mark Wigfield, *FCC Reports Spike in Complaints About Broadcast Indecency*, DOW JONES NEWSWIRES, Nov. 21, 2003.

55. *Id.*

56. Milagros Rivera-Sanchez, *How Far is Too Far? The Line Between “Offensive” and “Indecent” Speech*, 49 FED. COMM. L.J. 327, 332 (1996). The Commission has also

One reason for all the public complaints is the unpredictability of indecency in the media. The entertainment industry tells unwilling viewers that the solution to offensive speech is not to watch it, to “avert one’s eyes” from it. But this presumes that the public knows in advance when and where such speech will occur. As evidenced by the 2004 Super Bowl halftime show, such predictability is no longer possible.⁵⁷ People cannot even watch the nation’s premier sporting event without seeing images they do not want, nor should expect, their children to see. Cable television, segments of the music industry, the Internet, and video games are “expanding the reach—and depths—of the media cesspool exponentially.”⁵⁸ Even on broadcast television, recreational sex is glorified about six times as often as it is criticized.⁵⁹

Unquestionably, the Internet is a democratizing medium, offering anyone with a computer the ability to speak and share her opinions. But it is also capable of conveying an almost unlimited amount of hate, pornography, violence, and vulgarity.⁶⁰ Contrary to the *Reno* Court’s assumptions, it is not difficult or complicated for children to log on to the Internet; nor is it difficult to find sites dedicated to pornography and violence.⁶¹ Even if a person did not intentionally look for those sites, they would find them anyway. Pop-up advertisements alert the user to such sites, inviting access through just a click of the mouse. Or, a user might just end up in one of those sites accidentally.⁶² And unlike many

ruled that indecency includes explicit references to sexual intercourse, orgasms, masturbation, and other sexual conduct, as well as patently offensive references to male or female genitalia. *Id.* at 334.

57. During the 2004 Superbowl half-time show, singer Janet Jackson bared her breast on a television broadcast, sparking national outcry. *Janet Jackson Superbowl Flash Sparks Outrage*, ABC NEWS ONLINE, at <http://www.abc.net.au/news/newsitems/s1036637.htm> (last updated Feb. 3, 2004).

58. West, *supra* note 43, at 131. The depravity of many music lyrics is illustrated by the group Nine Inch Nails’ song, *Big Man with a Gun*: “And I have a big gun. Got me a big old [expletive] and I, I like to have fun. Held against your forehead, I’ll make you suck it. Maybe I’ll put a hole in your head . . . I’m hard as [expletive] steel and I’ve got the power . . . I’m going to come all over you . . . me and my [expletive] gun.”

59. S. ROBERT LICHTER ET AL., PRIME TIME: HOW TV PORTRAYS AMERICAN CULTURE 404 (1994).

60. *Reno v. ACLU*, 521 U.S. 844, 854 (1997). The Court found that “[s]exually explicit material on the Internet . . . ‘extend[ed] from the modestly titillating to the hardest-core,’” and that this material could be accessed “unintentionally during the course of an imprecise search.” *Id.* at 853.

61. *United States v. Am. Library Ass’n*, 539 U.S. 194, 200 (2003).

62. For example, a slight mistype, “www.whitehouse.com” (instead of www.whitehouse.gov) will put the user right into a pornography site.

of the early predictions of the Internet, it is not used primarily for delivering text, thus posing less of a temptation to children.⁶³

Crucial to the Court's holding in *American Library Ass'n* was the finding that children could unintentionally be exposed to sexually explicit material on the Internet.⁶⁴ By this time, national surveys showed that a quarter of all school children had inadvertently downloaded pornography while at a public library.⁶⁵ This finding coincided with other studies that had been conducted on Internet pornography.⁶⁶ As the *Washington Post* described it, the Internet was "the largest pornography store in the history of mankind."⁶⁷ And contrary to the Court's implication in *Reno*, studies found that most children demonstrate a computer "proficiency that far surpasses that of their parents" and generally have little problem finding whatever material they want on the Internet.⁶⁸ Adolescents between the ages of twelve and seventeen have been cited as one of the "largest consumers of 'adult-oriented' material on the Internet."⁶⁹

Despite requiring a credit card for access, most pornography sites offer extensive free previews, thereby allowing children to see graphic sexual and violent images without going through any age verification process.⁷⁰ Furthermore, even though many pornographic sites carry disclaimers warning viewers that the material contains sexually explicit images, "these disclaimers 'are about as effective as constructing a retaining wall out of tissue paper.'"⁷¹ In addition, search engines have made it even easier for inexperienced users to find sexually explicit web sites; and because Internet searches take only a few seconds, they can easily be executed by a student in a classroom while the teacher is in a

63. See Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 35 (1995).

64. 539 U.S. at 200.

65. 144 CONG. REC. S8611 (1998). This contrasted sharply with the district court's finding in *Reno* that accidental encounters of content on the Internet rarely occur. See 521 U.S. at 869.

66. See generally Peter G. Drever, III, *The Best of Both Worlds: Financing Software Filters for the Classroom and Avoiding First Amendment Liability*, 16 J. MARSHALL J. COMPUTER & INFO. L. 659 (1998).

67. *Hearing on Crimes Against Children: The Nature and Threat of Sexual Predators on the Internet, Before the Crime Subcomm., House Comm. on the Judiciary*, 105th Cong. 1, 33 (Nov. 7, 1997) (statement of Cathy Cleaver, Director of Legal Policy, Family Research Council).

68. *Id.* at 32.

69. Elizabeth M. Shea, Note, *The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer?* 24 SETON HALL LEGIS. J. 167, 184 (1999).

70. *Id.* at 178-79.

71. *Id.* at 179 (quoting *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet Before the House Comm. On Commerce*, 105th Cong. 22 (Sept. 11, 1998)).

different part of the room, and the student can exit the site in a matter of seconds if an authority figure approaches.

The Internet is no replica of eighteenth-century town meetings, in which people openly shared and debated opinions. One big difference with the Internet is its anonymity feature.⁷² Speech can take on an entirely different character when it is being conducted anonymously, and it can more easily lead to the dangers of stalking, deception, and manipulation. During the eighteenth century, taking public responsibility for one's speech necessarily imposed some constraints on that speech.⁷³ A sort of social custom and decorum served to censor out the more violent or crude statements. But today, with the Internet, there is no social custom available. There is nothing except for the user's own ability to censor unwanted, offensive speech.

The marketplace model presumes that enough seeds of good speech will eventually choke out the weeds. But in reality, the opposite is occurring. Sexually graphic and brutally violent songs increasingly fill the airways. Imitators of Howard Stern⁷⁴ find new time slots for their raw dialogue. The rapper Eminem, now also an actor, shouts out: "[Expletive] that. Take drugs. Rape Sluts." He is called a revolutionary,⁷⁵ but he is certainly no Tom Paine.⁷⁶ If this is what results from free speech theories focused solely on the speaker, then perhaps what is needed are theories that instead look to the listener.

VI. A SHIFTING OF BURDENS

A. *The Futility of Averting One's Eyes*

Traditional First Amendment analysis focuses on all the possible burdens that any governmental regulation might place on speech.

72. In the 104th Congress, Senator Jim Exon introduced a bill to prohibit anonymous messages "with [the] intent to annoy, abuse, threaten, or harass any person . . . who receives the communication." S. 314, 104th Cong. § 2(a)(1)(B) (1995).

73. See STEPHEN BOTEIN, *Printers and the American Revolution*, in *THE PRESS AND THE AMERICAN REVOLUTION* 11, 21, 32, 37–40 (Bernard Bailyn & John B. Hench eds., 1980). See generally EDWIN EMERY & MICHAEL EMERY, *THE PRESS AND AMERICA* (4th ed. 1978); ARTHUR M. SCHLESINGER, *PRELUDE TO INDEPENDENCE* (1958).

74. Stern hosts a radio show that has been the frequent subject of indecency complaints.

75. Matt Mulder, *Self Destruction by Anger*, 21 MICH. REV. Issue 7, at <http://www.michiganreview.com>.

76. In a song titled "Kill You," presumably about his mother, Eminem raps: "Just bend over and take it like a slut, ok Ma? . . . Bitch, I'ma kill you." Eminem, *Kill You*, on *THE MARSHALL MATHERS LP* (Interscope Records 2000).

This exclusive focus is illustrated by *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*.⁷⁷ At issue in *Denver Area* were provisions in the Cable Television Consumer Protection and Competition Act of 1992 requiring cable operators to place indecent programs on a separate channel, to block that channel, and to unblock it within thirty days of a subscriber's written request for access.⁷⁸ In holding these regulations unconstitutional, the Supreme Court was concerned with inconveniences and burdens to would-be viewers of indecent programming, including, for instance, the viewer who might want a single show, as opposed to the entire channel, or the viewer who might want to choose a channel without any advance planning (the "surfer"), or the one who worries about the danger to his reputation that might result if he makes a written request to subscribe to the channel. However, none of these burdens presented insurmountable obstacles. Each one of these types of viewers could obtain access to the desired programming by simply following the established procedures. Furthermore, even though the Court recognized that the purpose of the regulations was to protect minors, a compelling purpose, and that the regulations only applied to sexual material (and not the kind of vitally important political information present, for instance, in the "Pentagon Papers" case),⁷⁹ the Court still struck them down, focusing exclusively on the provisions' burdensome impact on the programming available to adults. In doing so, the Court affirmed the principle of *Butler v. Michigan*⁸⁰ in that the Constitution does not permit the state to reduce the material available to adults to the level of what is appropriate for children. The Court followed this principle even though, in terms of relative burdens, it may be easier for adults to access indecent material than it is for parents to

77. 518 U.S. 727 (1996).

78. *Id.* at 732–35. In addition to these restrictions, the regulations also required the programmers of leased channels to alert cable operators of their intent to broadcast indecent material before the scheduled broadcast date. *Id.* at 735.

79. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (affirming the D.C. Circuit's injunction against the *New York Times* and *Washington Post* from publishing the contents of a classified study entitled, "History of U.S. Decision-Making Process on Viet Nam Policy").

80. 352 U.S. 380 (1957). In striking down a Michigan statute making it a misdemeanor to sell or make available to the general reading public any book containing obscene language, the Court stated,

The State insists that . . . by thus quarantining the general . . . public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely this is to burn the house to roast the pig. . . .

We have before us legislation not reasonably restricted to the evil with which it is said to deal. The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.

Id. at 383–84.

have their children avoid it. And even though the Court, as it did in *Pacifica*, acknowledged the invasive nature of television, it refused to let this feature justify the regulations, which still did not amount to a complete ban on the subject speech.⁸¹

Continuing with the exclusive speaker-focus of *Denver Area*, the Court ruled in *Playboy Entertainment* that audiences are generally expected to assume the burden of averting their eyes whenever they are confronted with unwanted or offensive speech.⁸² *Playboy* involved a challenge to a provision in the Telecommunications Act of 1996⁸³ which required cable television operators providing channels “primarily dedicated to sexually-oriented programming” to either “fully scramble or otherwise fully block” those channels or to limit their transmission to the hours between 10 p.m. and 6 p.m., when children are unlikely to be among the viewing audience.⁸⁴ Even before the enactment of this provision, cable operators used signal scrambling to limit access to certain programs to paying customers.⁸⁵ But this scrambling was imprecise and often led to signal bleed, so the time-channeling regulation was intended to shield children from hearing or seeing images resulting from such signal bleed.⁸⁶ Yet even though the Court recognized the strong state interest in shielding young viewers from such programming, it still struck down the law, holding that it constituted too great a burden on adult viewers.⁸⁷

The potential burdens on adults wishing to view sexually explicit programming was the only side of the speech equation at which the Court really looked. The programming confinement was intended to help shield children from indecent programming, but the Court did not

81. The *Denver Area* Court could not arrive at a majority opinion defining the standard of review for regulations of indecent cable programming. 518 U.S. at 741–42. Justice Breyer, in his plurality opinion, refused to define “a rigid single standard” for cable, stating that it would not be prudent to set a standard amidst all the “changes taking place in the law, the technology, and the industrial structure related to telecommunications.” *Id.* at 742. This amounted to an explicit recognition of “changed circumstances,” and gives further support to a private right to censor that would not rely on “rigid single standards” but would allow individuals the ability to regulate cable programming for themselves.

82. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Cohen v. California*, 403 U.S. 15, 21 (1971)).

83. 47 U.S.C. § 561 (2000).

84. *Playboy*, 529 U.S. at 806.

85. *Id.*

86. *Id.*

87. *Id.* at 807.

(other than by assumptions) consider any burden to a parent's private right to censor such material if the regulations were struck down. Instead, the Court passed over the whole issue by simply stating that it was the duty of the listener to "avert [their] eyes."⁸⁸ In so doing, the Court placed the burden entirely on those wishing to exercise their private right to censor within their own home.

Justice Breyer's *Playboy* dissent focused particularly on the issue of relative burdens. First, Justice Breyer noted that the law in question placed a burden on adult programmers, not a ban.⁸⁹ Second, he observed that the law applies only to channels that "broadcast 'virtually 100% sexually explicit' material."⁹⁰ And third, he recognized that, because of signal bleed, approximately twenty-nine million children were potentially exposed each year to sexually explicit programming.⁹¹ Given the compelling interests of child protection at issue, Justice Breyer concluded that the majority's proposed alternative was not at all an effective one.⁹² In support of this conclusion, he cited evidence reflecting many problems people had experienced in trying to get their cable operator to block certain channels—problems that come as no surprise to anyone who has ever tried to get their cable company to fix something.⁹³

The growth of a media society and the corresponding explosion of media speech have made the burdens of averting one's eyes ever more onerous. Likewise, the demise of social customs which once imposed an unofficial censorship on offensive speech have put even more burdens on averting one's eyes, to the point where it may be nearly impossible to avoid offensive speech. This lopsidedness of burdens has been a natural result of the marketplace metaphor, which focuses only on increasing the

88. *Id.* at 813 (rejecting the government's attempted restrictions, and holding that those offended by such programming should simply avert their eyes). For other cases, see, for example, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206, 217 (1975) (striking down an ordinance prohibiting drive-in movie theaters from exhibiting nudity as an infringement against First Amendment rights). The Court placed the burden of eluding exposure to the speech on the viewer, opining that "the burden normally falls upon the viewer to . . . 'avert[] [his] eyes.'" *Id.* at 210–11 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)). Similarly, in *Cohen v. California*, the Court refused to permit censorship of the message "[Expletive] the Draft" that was printed on the back of a jacket worn in the public corridors of the Los Angeles courthouse, even though passersby would be involuntarily exposed to the message. 403 U.S. at 16, 26 (1971).

89. According to Justice Breyer, "[a]dults may continue to watch adult channels, though less conveniently, by watching at night, recording programs with a VCR, or by subscribing to digital cable with better blocking systems." *Playboy*, 529 U.S. at 845 (Breyer, J., dissenting).

90. *Id.* at 839 (quoting *Playboy Entm't Group, Inc. v. United States*, 30 F. Supp. 2d 702, 707 (D. Del. 1998)).

91. *Id.*

92. *Id.* at 841, 847.

93. *Id.* at 843–44.

amount of social speech. But during an age of abundant speech, it is time to reconsider this dramatic inequality of burdens.

The judicial striving for a burden-free environment regarding access to speech not only makes private censorship nearly impossible, but also contradicts the experience of the constitutional period. During the late eighteenth century, people did not have immediate and unconstrained access to social speech.⁹⁴ They had to expend great effort to receive their news and political opinions.⁹⁵ Social speech was not like a faucet that could be turned on and off whenever the urge hit; it was not like the raging flood that it is today.

It is a perversion of the First Amendment to think of freedom of speech as a flooding of speech. It is a mistake to think of free speech as effortless or automatic speech. And it is a violation of people's speech and privacy rights to make parents disconnect all televisions just so that other adults do not have to wait until ten o'clock to watch the Playboy Channel. Adults have almost unlimited access to indecent speech: adult video and book stores; adult theaters; adult mail-order outlets; adult telephone services; Internet pornography sites. To limit a cable channel's indecent programming to certain hours of the day, while greatly aiding a family's private right to censor, poses relatively minute burdens on an adult's ability to receive sexually explicit speech.

Under the marketplace model of the First Amendment, the parents and children bear all the burdens. The recent Supreme Court decision in *United States v. American Library Ass'n*, however, illustrates a more balanced placement of burdens.⁹⁶ In upholding a law requiring public libraries to install filtering software on their Internet computers, the Court ruled that the law did not impose a complete ban on a patron's Internet access to pornography, but it did require any adult wishing to view such material to ask a librarian to unblock the desired site.⁹⁷ Opponents of the law argued that this requirement was overly restrictive, as some patrons might be too embarrassed to approach a librarian with

94. See generally THOMAS C. LEONARD, *THE POWER OF THE PRESS: THE BIRTH OF AMERICAN POLITICAL REPORTING* (1986); PATRICK M. GARRY, *THE AMERICAN VISION OF A FREE PRESS* (1990).

95. LEONARD, *supra* note 94.

96. *United States v. Am. Library Ass'n*, 539 U.S. 194 (2003).

97. *Id.* at 209. At issue was Congress's Child Internet Protection Act, which forbids public libraries to receive federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing harmful material to them.

their request.⁹⁸ Dismissing this argument, the Court ruled that “the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment.”⁹⁹

This decision, in its rational look at the relative burdens involved, bucked the trend followed in *Playboy Entertainment*, in which just about any burden on an adult’s access to indecent speech, no matter what the risk to children, is seen as unconstitutional. In *American Library Ass’n*, the goal of protecting children from unwanted speech, while allowing them access to the wealth of information on the Internet, overshadowed the small burden on adults who could still access pornography with just a request to the librarian. It was a decision that finally elevated the filtering rights of parents above a mere interest that always gets shoved aside in First Amendment jurisprudence.

A more balanced approach to burdens, as well as a greater recognition of the rights of viewers and listeners can also be found in *Kovacs v. Cooper*, where the Court upheld an ordinance prohibiting the use on public streets of sound trucks that emitted “loud and raucous noises.”¹⁰⁰ According to Justice Frankfurter, citizens in their homes should be protected from “aural aggression.”¹⁰¹ Although the statute essentially created a regulatory wall that blocked otherwise constitutionally protected speech, the Court noted that the “unwilling listener is . . . practically helpless to escape this interference with his privacy by loud speakers except through the protection of the municipality.”¹⁰² It did not matter to the Court that not every person in the community wanted to keep out the information broadcast by the sound trucks, or that some might actually want to receive the information. The Court found it sufficient that “some” in the community found the sound trucks objectionable.¹⁰³ Likewise, in a later case, the Court upheld a regulation designed to prevent disturbance of nearby residents by requiring that music performers in a Central Park band shell use a sound system provided by the city.¹⁰⁴

Under the marketplace metaphor, courts dealing with free speech issues have traditionally required an opt-out scheme rather than an opt-in one.¹⁰⁵ Unwilling listeners must opt-out of the unwanted speech

98. *Id.*

99. *Id.*

100. 336 U.S. 77, 86 (1949).

101. *Id.* at 89 (Frankfurter, J., concurring).

102. *Id.* at 86–87.

103. *Id.* at 81.

104. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

105. The ruling in *Reno v. ACLU* was consistent with this pattern, holding that government may not require listeners to opt in to speech that is deemed offensive by the majority when individual opt out is feasible. *Reno v. ACLU*, 521 U.S. 844 (1997); *see*

environment. The burden is on them to leave, to extricate themselves. They must either constantly monitor their children on the Internet, or else they must pull the plug. They have to hope and pray as they surf through the cable channels, or else they must disconnect the television. An opt-in requirement on certain kinds of “low value” speech, however, would attempt to balance the burdens. If an adult wishes to view indecent programming, he or she must make some effort to opt into it, to access it with some personal identification number, or to subscribe to a special channel. With such an opt-in requirement for indecent speech, especially given the pervasiveness of it in a media society, there is no decrease in the amount of speech in the system, just a step required before accessing it.

Even though the Court has taken the position that the First Amendment requires opt-out,¹⁰⁶ it has never examined precisely how feasible it is for unwilling viewers or listeners to opt out, certainly not in the same way that it has examined all the potential burdens placed on those wishing to opt in. Furthermore, making opting-out even more difficult with the Internet, the government cannot zone cyberspace—certainly not as it can do when restricting adult theaters to a red light district or requiring adult magazines to be sold in plain brown wrappers. But is it fair that parents of limited resources be compelled to bear the burden of purchasing filters, just so the producers and patrons of pornography not incur the least inconvenience? Is it fair to make parents bear the sole burden of monitoring their children’s every interaction with an all-pervasive media, just so that the unfettered freedom of pornographers not be compromised in any way?

also Cohen v. California, 403 U.S. 15, 21, 26 (1971) (holding that, in the public square, persons are presumed able to avert their eyes from speech they find offensive and move on); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that the government may not screen out “communist political propaganda” mail materials in advance and require potential recipients to opt in); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 61 (1983) (holding that the federal government could not ban the unsolicited mailing of contraceptive advertisements, thus declaring a law that required opt in unconstitutional).

106. The courts in the past have been hostile to opt-in schemes. The guiding doctrine of First Amendment decisions has been that the government may not require listeners to opt in to speech deemed offensive by the majority when individual opt-out is physically or socially feasible. Courts have essentially assumed that the First Amendment requires opt-out. *See Lamont*, 381 U.S. at 305 (holding that the Post Office could not screen out communist mail from foreign sources and require potential recipients to request affirmatively its delivery (or opt in)); *Mainstream Loudoun v. Bd. of Trustees*, 2 F. Supp. 2d 783, 797 (E.D. Va. 1998) (finding the requirement that adult patrons wishing to view indecent materials on the Internet submit a written request to the library staff as having a severe chilling effect on First Amendment freedoms).

As Professor Nachbar notes, “[v]ery few parents have the time to supervise all of the time that their children spend on the Internet.”¹⁰⁷ Nor is parental monitoring “a real alternative for families in which both parents must, or choose, to work, or for those headed by a single parent.”¹⁰⁸ Furthermore, “unless the parent were, for example, to open each [web] page with the child looking away and only allow the child to view the page after a parental preview, there is no way to keep the child from taking in the content while the parent is evaluating its appropriateness.”¹⁰⁹ Given these problems, however, and given the recent revisionist thinking in *American Library Ass’n*, the courts may now be willing to consider applying a *Pacifica*-type approach to the Internet that gives added weight to user and viewer interests.¹¹⁰

In his *Playboy* dissent, arguing in support of the time-channeling requirement for sexually explicit programming, Justice Breyer favored an opt-in scheme over an opt-out one.¹¹¹ The opt-in scheme would essentially require that those adults wishing to view the adult programming take affirmative steps to obtain or subscribe to such programming.¹¹² A realization of the quantity and accessibility of indecent speech, as well as the potential effects of such speech on minors, has seemed to make the courts more willing to follow the opt-in approach proposed by Justice Breyer in his *Playboy* dissent. Whereas in *Denver Area* the Court ruled as overly burdensome a requirement that people had to make a specific request from their cable operator to receive indecent programming,¹¹³ in *American Library Ass’n* the Court upheld a requirement that adults approach librarians in person to have the

107. Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet’s Unregulated Character*, 85 MINN. L. REV. 215, 220 (2000).

108. *Id.*

109. *Id.* at 221.

110. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

111. *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 837, 841–42 (2000) (Breyer, J., dissenting). An opt-in scheme also reflects a more balanced middle ground than the usual dichotomy characterizing traditional free speech thought. Under that dichotomy, there are two polar-opposite systems of expression. One is a system in which “top-down regulation of expression is the exception,” and the other is a system in which “top-down regulation is the rule.” Steven G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 232 (1996). A system in which top-down regulation is the exception is similar to the marketplace model, in which speech is maximized; whereas a system in which top-down regulation is the rule is one in which government or elites makes all decisions about content. *Id.*

112. An illustration of an opt-in scheme is the school voucher program upheld by the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The opt-in scheme helps facilitate choice, by giving individuals the power to choose an option they may not have otherwise had.

113. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 755–56 (1996).

blocking software disabled so that they could access sexually explicit sites.¹¹⁴ As long as the burdens do not amount to a complete ban, they may be allowable under this new opt-in scheme that seems to be gaining strength and to which *American Library Ass'n* gave impetus.¹¹⁵

Opt-in communication schemes, which require listeners to take some affirmative action to access certain kinds of speech, impose no greater constitutional costs than do opt-out schemes, which require that unwilling listeners assume all the burdens of avoiding unwanted speech. The First Amendment does not mandate that speakers incur absolutely no obstacles or burdens in exposing listeners to their speech, just as it does not mandate listeners to be virtually powerless to determine the images and speech to which they are exposed.¹¹⁶ As it stands now, however, the marketplace model completely favors the speaker; it completely favors the unwanted speech. It holds that speakers should incur no burdens in speaking, and that willing listeners should have to make no effort to receive. But the unwilling listeners are left helpless, forced to bear the entire burden of dealing with all the garbage produced by the American media. This is not the message of the First Amendment: that freedom is somehow advanced when citizens cannot use their democratic power to demand that others not be given license to bombard society with degrading images and corrupt their children with brazen impunity.

The First Amendment, as far as speakers go, means that people can speak without penalty and that their speech cannot be banned just because the government does not like it. It does not mean that listeners never have to work to be exposed to any and all kinds of speech, nor does it mean that unwilling listeners have no constitutional rights amidst a pervasive media.

114. *United States v. Am. Library Ass'n*, 539 U.S. 194, 209 (2003).

115. *Id.* In a case addressing restrictions placed on unsolicited fax advertisements, the Ninth Circuit held that the government has a substantial interest in preventing the shift of advertising costs from sender to recipient. *Destination Ventures, Ltd. v. FCC*, 46 F.3d 54, 56 (9th Cir. 1995). Those costs included paper and toner expenses, as well as interfering with the receipt of desired faxes. This refusal to make recipients bear the full burden of unwanted speech can also be extended beyond the economic realm. And just because a speaker no longer enjoys a completely unburdened right to speak does not mean that her First Amendment liberties have been erased, particularly when those new burdens are necessary to give the recipients a greater level of freedom.

116. And just as the First Amendment recognizes a right to “non-religion,” so too should it recognize a right to “non-speech.”

B. *The First Amendment Right of Communicative Control*

Fundamentally, the First Amendment is not just about increasing the volume and plentitude of speech. It goes much deeper than that, to the roots of human liberty. The First Amendment speech clause is about individual control. It is about the control of one's communicative process.¹¹⁷ For the speaker, this means the freedom to state her opinions without government punishment. It means the freedom to put those opinions into some avenue of public circulation. Although the courts have steadfastly protected this right of control,¹¹⁸ they have not gone full circle. They have not, aside from isolated situations, given any control to the listener.¹¹⁹ They have not recognized any legal right to be selective in the speech to which she is exposed, certainly not to the degree that the courts have given rights to speakers to expose others to their opinions. In this regard, the courts have failed to recognize the communicative aspect of speech; they have only focused on its delivery.

Any viable communicative interchange, which after all is the whole point of protecting speech, involves an exchange of ideas between a willing speaker and a willing listener.¹²⁰ But in the great majority of cases, whenever these two are in conflict, whenever a willing speaker confronts an unwilling listener, the courts yield to the rights of the former, ignoring those of the latter. Thus, it is only the willingness of the speaker that has been given real constitutional significance. However, in a time of such pervasive media, when the individual listener is increasingly losing her control to be selective about the media diet that

117. See Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1621 (1995) (making the argument that the way to an open, interactive communication system is through "user control"—giving individuals a right of shut off).

118. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) [hereinafter *Turner I*], *aff'd*, 520 U.S. 180 (1997) [hereinafter *Turner II*].

119. *Id.* Giving people the ability to decide or control what ideas or information is appropriate for them was an underlying goal of the V-chip, which resulted from the Telecommunications Act of 1996, mandating that televisions be equipped with a chip that will permit programs with certain ratings to be blocked from a person's home TV set. 47 U.S.C. § 330(c)(1)–(4) (2000). In December of 1996, industry lenders announced a ratings system that would be used with the V-chip. Lawrie Mifflin, *TV Industry Leaders Unveil Technique of Rating Shows*, N.Y. TIMES, Dec. 20, 1996, at A18. This development of a ratings system means that the V-chip law will probably not be challenged in court. But if it were challenged, the constitutionality "[would] turn on who establishes the rating system and who determines the rating for a particular program." Howard M. Wasserman, *Second-Best Solution: The First Amendment, Broadcast Indecency, and the V-Chip*, 91 NW. U. L. REV. 1190, 1225 (1997).

120. For the Court's views on the notion of willing speaker, see *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), and for the existence of some rights of a willing listener, see *Pell v. Procunier*, 417 U.S. 817, 821–22 (1974).

she and her children end up consuming, the notion of a First Amendment right of listener control certainly seems warranted by the doctrine of changed circumstances.

Underlying any individual freedom or right is the ability to control. As Steven Heyman argues, liberty of speech should be understood “as part of the right to control one’s own person.”¹²¹ It is the individual’s right to control that confers freedom. This is the fundamental test of liberty. Control defines individual autonomy, and individual autonomy is at the very root not only of the personal freedoms laid out in the Bill of Rights, but also in the very essence of democracy.

As has been so often stated by both courts and scholars, the free speech clause of the First Amendment serves to guarantee individual autonomy in matters of speech and personal beliefs. According to C. Edwin Baker, the key principle underlying the First Amendment is the “respect for individual integrity and autonomy . . . to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values.”¹²² In the past, this notion of autonomy has been applied primarily to speakers, protecting them in their freedom to define and develop themselves through their individual speech.¹²³ But autonomy can also be applied to listeners, especially because most people in connection with the public domain spend more time taking in the speech of others than in putting out their own speech. Consequently, for many, personal growth and self-realization will be determined more by the ideas and images they receive from other speakers than by those they express themselves.

Speech is a component of something larger—the communicative process. Outside this process, speech is a useless and irrelevant endeavor. Moreover, speech is not just an individual act; it is a social act as well. Freedom of speech, then, is the liberty to engage in the social act of communication and to form certain social relationships.¹²⁴ So in the course of protecting speech, the First Amendment really protects this social, communicative process. Therefore, to analyze speech, one must look to the broader context of this process. And if

121. Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 568 (2003).

122. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989).

123. Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1326 (1998).

124. *Id.* at 1348.

speech is viewed within this larger communicative process, then the speaker cannot be given exclusive privilege. Nor can the self-realization of the speaker be allowed to dominate over the self-realization of the other participants in the process.¹²⁵

If a free and open communicative process is to have any meaning, it must be a process involving autonomous participants.¹²⁶ For the listener, this means the ability to decide for herself what ideas she will incorporate into forming her convictions—what images and opinions she will consider in deciding what is good in life, bad in politics, false in faith and beautiful in art. If autonomy is synonymous with self-determination, and the First Amendment seeks to ensure individual autonomy, then an autonomous individual should also have the right to choose what images and ideas from the outside world to reject in the formation of one's character. Just as a person has the right to speak or be silent, so too should a listener have the right to listen or reject.¹²⁷ Under such an equality, speakers should not have a greater right to force their speech on unwilling listeners than those unwilling listeners have to reject and avoid that speech. Thus, speakers should not be given the right to dominate the communicative process in such a way that unwilling listeners are forced to simply relent.

Some scholars propose a complete shift from a speaker-centered view of free speech to an audience-centered view.¹²⁸ This proposal would cast freedom of expression strictly as a right of audiences to receive the speech, not as a right of speakers to speak. But this exclusive focus on audiences has the same fault as the more traditional and singular focus on speakers. They both fail to incorporate the two-sided nature of communication. Indeed, the constitutional guarantee of free speech is

125. *Id.*

126. Just as a speaker should be free to achieve self-fulfillment through expressing his thoughts, a listener should be free from being exposed to speech that violates her sense of autonomy and self-realization. Just as a person should be free from emotional distress at the hands of another, so too should she be free from the unwanted intrusion of speech that violates that which sets the self apart from others—her sense of self dignity and integrity. *Id.* at 1332. A truly free communicative process means that both speakers and listeners are equal in their ability to participate.

127. See Byron Rohrig, *No-Call Plaintiff Mulls Options*, EVANSVILLE COURIER, July 9, 2002, at B1. In a case in which an Indiana state court judge rejected a constitutional challenge to Indiana's "no-call" list, Circuit Court Judge Carl Heldt stated: "Although the First Amendment imposes strict limitations on government actions that interfere with the free exchange of ideas, the First Amendment does not stand as an impediment to private decisions to give audience to certain types of speech while avoiding others." Associated Press, *Judge: Indiana's No-Call List Doesn't Violate Free Speech*, at <http://www.freedomforum.org/templates/document.asp?documentID=16516> (last visited Feb. 20, 2005).

128. T. Scanlon, *A Theory of Freedom of Expression*, in *THE PHILOSOPHY OF LAW* 153, 167–68 (R.M. Dworkin ed., 1977).

undermined by excluding consideration of the interests of either speaker or listener. Instead, what is needed is a more balanced First Amendment approach, one that encompasses both speaker and listener rights. Just as protecting the ability of individuals to speak, the First Amendment should also seek to safeguard an individual's desire to reject unwanted communications. Such a balanced approach, mindful of listener autonomy, is especially needed given the changed circumstances caused by the pervasiveness of indecent media speech in modern society.

VII. PROTECTING THE SPEECH OF THE INARTICULATE

Given the realities of the modern world, most people will never publish op-ed pieces in newspapers or host their own political talk show on television. For most people, their speech acts will involve selecting and rejecting those ideas or expressions with which they agree or disagree. Expressive freedom means that people should be free to reject certain unwanted speech and to disassociate themselves and their families from what they consider socially or morally repulsive speech. This expansion of individual control may mean that the speaker does not have absolute control over all the destinations of her speech, and that willing listeners may have to make some effort to receive all the different kinds of speech they desire.

For most individuals, unable to inject their voice into the stream of mass media programming, censorship is their only way of participating in the marketplace of public communications. In the modern world, censorship is the speech of the inarticulate, the media-outsiders. The only way to voice one's opinion about a particular message or image in the social marketplace may be to simply accept or reject it. But even this simple opinion may not be so easy to register or voice. Take, for instance, messages appearing on television.¹²⁹ Approximately eighty percent of households subscribe to cable. Therefore, once the cable is hooked up, the installation fee is paid, and the automatic bill payment is set up through the consumer's bank, all the messages and images conveyed through all the cable and broadcast channels are already accepted. The real challenge becomes how to reject those images and ideas that are found offensive or revolting. There is no easy way to do

129. As the Supreme Court has recognized, broadcast and cable programming exert a uniquely pervasive presence in the lives of American children. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996).

that, no automatic system of rejection similar to the automatic bill payment system.

The vast majority of Americans will never utter an opinion through the mass media. Nor will they possess the technology nor the time to individually edit out all of the unwanted and offensive images coming into their home from mass media. Instead, their only real exercise of control will be to censor such images in advance. But this ability to censor must be real.

In 1991, the Pennsylvania state legislature passed a law regulating the size of vulgarities on bumper stickers.¹³⁰ The statute limited the height and width of letters used to spell six specific words describing bodily functions and sex acts. Threatening suit to challenge the constitutionality of this statute, an ACLU spokesperson offered this advice to motorists caught behind a car with a vulgar bumper sticker: “You can look at traffic, the trees, the cars around you.”¹³¹ This is the averting your eyes solution to offensive speech. In reality, though, how can a motorist possibly avert her eyes from the car in front of her? If that is the extent of her ability to censor, then she really has no such ability. Likewise, parents cannot realistically chase their children around all day to monitor the television they watch, the music they listen to, and the video games they play. The media is too pervasive for parents to keep up with it. They need some help to perform their parental duties, just as they need safety caps on medicine bottles, age limits for purchasing cigarettes, and ingredient labels on food items.

Modern information technology offers not only more speech, but more ways to deliver that speech. Consequently, ways are being explored to combat the constant surge of unwanted information and to help the receiver control what he or she receives.¹³² Do-not call lists are set up for people who wish to avoid being contacted by telemarketers. Laws are considered that would require Internet providers to furnish filtering software, as well as make cable and broadcast television channels carry outside ratings services to be used in connection with the V-chip.

130. WILLIAM A. DONOHUE, *TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU* 190 (1994).

131. *Id.*

132. Many of the public complaints or worries regarding the Internet involve sexually explicit material. *Time* magazine devoted a special issue to “cyberporn.” See Philip Elmer-Dewitt, *On a Screen Near You: Cyberporn*, *TIME*, July 3, 1995, at 38. President Clinton spoke of “horror stories about the inappropriate material for children that can be found on the Internet,” and described how “children can be victimized over the Internet.” *Remarks Announcing Steps to Make the Internet Family-Friendly*, 33 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS 1077, 1077 (July 21, 1997). Other critics worry about new communication technologies and their invasion of personal privacy. See, e.g., Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 *VAND. L. REV.* 1609, 1612–13 (1999).

Indeed, many Internet users spend as much time avoiding speech as retrieving it, for nowhere is the abundance of speech more evident than in the overload of information the Internet is injecting into contemporary life.¹³³

In a world of five hundred digital television channels, twenty-four hour cable, and an Internet on which information-carriage increased ten-fold from 1997 to 2000,¹³⁴ the problem is not too little speech, but too much—and especially, in terms of the kind of speech needed for an informed self-government, too much of the low value speech.¹³⁵ There has been an explosion in entertainment and advertising, and in speech that is vulgar and sexually and violently graphic.¹³⁶ And with the explosive growth of the Internet, “it is clear that society is demanding some method for shielding itself, or at the very least for shielding children”¹³⁷

The Internet contains a plentiful supply of pornography, violence, vulgarity, and hate speech.¹³⁸ This is a particularly worrisome problem, as “[n]inety percent of children between the ages of five and

133. The deep Web, or invisible Web (made up of information stored in databases), is estimated to be 400 to 550 times larger than the commonly defined World Wide Web (or visible Web). The deep or invisible Web contains nearly 550 billion individual documents. Bright Planet, *Deep Content*, at http://www.brightplanet.com/deepcontent/deep_web_faq.asp (2004). For a discussion on the abundance of speech and information over the Internet, see Monroe E. Price, *The Newness of New Technology*, 22 CARDOZO L. REV. 1885, 1910–12 (2001), which discusses the abundance of the Internet and the consequences of “information overproduction.” For an overall discussion on information overload in contemporary society and its effects, see generally KRISTAN J. WHEATON, *THE WARNING SOLUTION: INTELLIGENT ANALYSIS IN THE AGE OF INFORMATION OVERLOAD* (2001); DAVID SHENK, *DATA SMOG: SURVIVING THE INFORMATION GLUT* (1997); NEIL POSTMAN, *TECHNOPOLY: THE SURRENDER OF CULTURE TO TECHNOLOGY* (1992); RICHARD SAUL WURMAN, *INFORMATION ANXIETY* (1989).

134. MADELEINE SCHACHTER, *LAW OF INTERNET SPEECH* 16 (2d ed. 2002).

135. See EUGENE VOLOKH, *THE FIRST AMENDMENT* 114–17 (2001) (discussing “low value” speech).

136. During a lifetime, most people will devote a full year and one-half to watching commercials. RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* 78 (1996). Pornography has become a \$14 billion a year business. PAUL S. BOYER, *PURITY IN PRINT* 345 (2d ed. 2002). Studies have shown that most adult-oriented commercial web sites do not use age verification measures, and that about a quarter of them employ practices like mouse trapping that keep users from exiting the site. Mitchell P. Goldstein, *Congress and the Courts Battle Over the First Amendment: Can the Law Really Protect Children From Pornography on the Internet?*, 21 J. MARSHALL J. COMPUTER & INFO. L. 141, 144 (2003). Moreover, approximately three quarters of them displayed adult content on the first page, which was accessible to everyone. *Id.* at 145.

137. Nachbar, *supra* note 107, at 218.

138. See *supra* note 132.

seventeen . . . now use computers.”¹³⁹ Almost seventy percent of the current traffic on the Internet is adult-oriented material,¹⁴⁰ and approximately two hundred new pornographic web sites are created each day.¹⁴¹ In addition to this overwhelming supply, online pornography cannot be neatly cordoned off from where children can gain access to it. Online pornography is just a mouse-click away from coming into anyone’s home. It does not require as much deliberate or educated action as the courts seem to believe.¹⁴²

Instead of creating new rules for each different technology, the courts should rely on the compelling interest of enhancing listener and viewer control. Instead of basing First Amendment doctrines on the pervasiveness and intrusiveness of the medium, the courts should look to the pervasiveness and intrusiveness of the content. If the indecent content at issue is itself pervasive, it should not matter whether the medium conveying that content is pervasive. As Professor Polivy argues, the Court should analyze speech restrictions according to the degree and type of filtering and exclusion which individuals (readers, viewer, listeners) can perform for the medium in question.¹⁴³

VIII. THE FAILURE OF PUBLIC AND INDUSTRY CONTENT STANDARDS

Over the years, and in an effort to stem the content decline, there have been a number of attempts to regulate television programming. These efforts have ranged from channeling the broadcast of certain adult-themed programming to times when children are less likely to be viewing,¹⁴⁴ to blocking indecent programming completely,¹⁴⁵ to creating a “family hour” during which programming not suitable for children is

139. Goldstein, *supra* note 136, at 143.

140. Shea, *supra* note 69, at 174.

141. *Id.*; see also H.R. REP. NO. 105-775, at 10 (1998).

142. See *Reno v. ACLU*, 521 U.S. 844, 853–55 (1997).

Computer networks, bulletin boards, and electronic e-mail are largely inaccessible to children. These technologies are used overwhelmingly for delivering text, so there is less concern . . . that a child . . . may see an image . . . that is offensive. Moreover . . . computerized information is less likely to enter the home “accidentally.” Enough affirmative steps must be taken, and sufficient control must be exercised over what information is received, to reduce the chance of surprise by an “indecent” image or sound

Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 44 (1995).

143. Denise R. Polivy, *Virtue By Machine: A First Amendment Analysis of the V-chip Provisions of the Telecommunications Act of 1996*, 29 CONN. L. REV. 1749, 1791 (1997).

144. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

145. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

not shown.¹⁴⁶ Yet despite all these regulatory attempts, the Parents Television Council found that, during just the one-year period from 2002 to 2003, sexual content on television had become more sexually explicit and vulgarity had become significantly more common, even during prime time.

According to numerous commentators, the FCC has been lax in its oversight of programming content since the 1980s.¹⁴⁷ When, for instance, the singer Bono slipped the “F word” past censors during the 2003 broadcast of the Golden Globe Awards, the FCC took no action, ruling that the utterance was used as an adjective rather than a verb describing a sexual act. And despite the number of public complaints, the FCC continues to grant the vast majority of renewal applications by radio and television broadcasters.¹⁴⁸ This enforcement laxity, however, stands in sharp contrast to FCC Chairman Newton Minow’s threat to broadcasters in 1961 of more regulatory enforcement if they did not act to counter the “vast wasteland” of television—and Chairman Minow’s warning occurred when the Commission’s activity was near its peak.¹⁴⁹ Indeed, a glance back at the television standards promulgated by the FCC in 1960 shows just how poorly the Commission has been in maintaining its once-minimum expectations of television quality.¹⁵⁰ The initial FCC rules and guidelines were also designed to suppress music that glorified drug use, to suppress dirty words and discussions of sex, to limit commercials, and to increase educational programming that children should watch.¹⁵¹

146. *Writers Guild of Am., West, Inc. v. FCC*, 423 F. Supp. 1064, 1072 (C.D. Cal. 1976).

147. CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 81–88 (1993); Adelman, *supra* note 37, at 1163.

148. Yoo, *supra* note 40, at 258.

149. Newton N. Minow, *Address to the National Association of Broadcasters, May 9, 1961*, in NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND: CHILDREN, TELEVISION, AND THE FIRST AMENDMENT* 185, 185–96 (1995).

150. There was a time when the FCC gave precise guidelines to broadcasters about their public interest obligations. The most detailed were contained in the *En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960). In this statement, the FCC identified a list of program categories that it considered to be part of a balanced portfolio of programming, including: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, etc. *Id.* at 2314. But this list now seems largely irrelevant. The FCC no longer requires from licensees, as it once did, a detailed specification of program types and the amount of time devoted to each, although children’s programming continues to be regulated pursuant to Congress’s mandate in the Children’s Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996.

151. See THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., *REGULATING BROADCAST PROGRAMMING* 61–136 (1994).

The reluctance of the FCC to take action is illustrated by one listener's relentless crusade. In 1999, David Smith began complaining to the Commission about the indecency of a Chicago drive-time radio show, "Mancow's Morning Madhouse."¹⁵² Over the next five years, Mr. Smith filed more than seventy complaints.¹⁵³ Each time, the FCC dismissed the complaint, stating that Mr. Smith had not provided sufficient detail. Smith eventually went to the expense of providing the Commission with a transcript of the entire show in which indecent segments were aired.¹⁵⁴ Finally, the FCC took action, sanctioning the radio station for a program featuring an adult-film entertainer describing graphic sexual techniques, and another one called "B___ Radio," in which women talked about sexual activities to the accompaniment of moaning.¹⁵⁵

But if the FCC has not been successful in preventing broadcast indecency, neither have the courts been successful in enforcing obscenity laws. Despite the Court's opinion in *Miller v. California*, which expanded the reach of governmental regulation of obscenity to include materials offensive to the moral standards of the local rather than national community,¹⁵⁶ "pornography grew like weeds in a vacant lot."¹⁵⁷ Eventually, obscenity cases stopped coming to the courts, partly because government agencies abandoned any censorship efforts, and partly because local censorship attempts were "easily evaded by national channels of communication such as mail service, telephone, and the [I]nternet."¹⁵⁸

Coinciding with this lax regulatory approach has been a steady decline in the broadcast industry's efforts at self-regulation.¹⁵⁹ Sexual content

152. Sarah McBride, *One Man's Campaign to Rid Radio of Smut is Finally Paying Off*, WALL ST. J., May 13, 2004, at A1, A8.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Miller v. California*, 413 U.S. 15, 30-34 (1973).

157. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2346 (2002).

158. *Id.* The notion of community, as used in *Miller*, implies the existence of commonly held morals or ethics or cultural values, and that these commonly held beliefs are tied to a geographic location. *See Miller*, 413 U.S. at 30-34. However, tightly-knit communities of people holding similar values and beliefs are no longer a characteristic of modern-day America. Given the mobility of persons and families, as well as the relative isolation of people within defined geographic boundaries, the concept of "community standard" is a difficult concept to apply. Community does not mean what it did when *Miller* was decided. Now, people may live in one community, work in another, go shopping and recreate in a third community, and educate their children in yet another.

159. Many critics have predicted, and concluded, that if broadcasters were left to their own discretion, they would pander to the lowest common denominator, decreasing the quality of important information while simultaneously increasing commercialization. *See Public Interest in Broadcasting: Hearings Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Energy and Commerce*, 102d Cong. 117-18, 120 (1991)

and graphic violence and vulgar language are more prevalent than ever before, and the vast majority of “reality television shows” are sliding down to the Jerry Springer level—shows that pay homage to the trinity of sexual shock, defiance and an “in-your-face” attitude. After years of agreeing not to air liquor advertisements, for instance, broadcast television has not only begun airing them, but has laced those advertisements with raw sexual appeal, such as two women mud wrestling in their underwear.¹⁶⁰ Broadcasters are also showing no willingness to self-regulate the advertisement of sexual-aid products, such as impotency drugs, thus forcing parents to discuss with children topics perhaps considered inappropriate. Finally, with respect to the V-chip, the television industry is proving to be anything but cooperative. Despite demands from parent groups, the industry has refused to adopt a ratings system that would expressly identify the amount of sex, violence, and vulgar language in each program.¹⁶¹ Children’s advocacy groups oppose the current “age-appropriateness” rating system as ineffective, because it does not provide parents with enough information.¹⁶² Such a system, however, is more attractive to broadcasters, who do not then have to focus on any one aspect of a program’s content but only have to make a general statement about the program.¹⁶³ The V-chip is typically not even mentioned in operating manuals for televisions that contain the chip.¹⁶⁴ Consequently, parents rarely use the V-chip.¹⁶⁵

The failure to self-regulate is not confined to television. Video game makers likewise have a self-imposed ratings system,¹⁶⁶ yet studies have

(statement of Tracy Westen, Assistant Professor, Annenberg School for Communication). Despite presidential calls for the electronic media to regulate itself, PRESIDENT WILLIAM J. CLINTON & VICE PRESIDENT ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE 18 (1997), the Federal Trade Commission has reported that such self-regulation has not been successful. *See, e.g.*, FTC, PRIVACY ONLINE: A REPORT TO CONGRESS 41 (June 1998); *see also* Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 717–19 (1999) (discussing the criticisms of media self-regulation).

160. For a discussion of these commercials, see Michael McCarthy, *Miller Lite’s “Catfight” Ad Angers Some Viewers*, at http://www.usatoday.com/money/advertising/2003-01-14-beer_x.htm (last updated Mar. 5, 2003).

161. Lawrie Mifflin, *Groups Gearing Up to Fight for More Precise TV Ratings*, N.Y. TIMES, Dec. 11, 1996, at A1.

162. *Id.*; *see also* Mifflin, *supra* note 119.

163. Wasserman, *supra* note 119, at 1227.

164. Dan Hunter, *Philippic.com*, 90 CAL. L. REV. 611, 666 (2002) (reviewing CASS SUNSTEIN, *REPUBLIC.COM* (2001)).

165. *Id.*

166. Rupal Ruparel Dalal, *Congress Shall Make No Law Abridging Freedom of Speech—Even If It Causes Our Children to Kill?*, 25 SETON HALL LEGIS. J. 357, 368 (2001).

shown that these manufacturers actively market toward children ultra-violent games rated for users seventeen years and older.¹⁶⁷ The Federal Trade Commission has found that the music industry's rating system fails to provide enough information for parents to make intelligent decisions pertaining to which music their children listen.¹⁶⁸ Moreover, in addition to the recording industry's "basically useless" labeling system, there was also an alarming absence of enforcement of these ratings at the retail level.¹⁶⁹

The movie industry has shown similar disregard for ratings. Even though the majority of filmgoers are children, Hollywood has turned out more than five times as many R-rated films as G, PG, or PG-13 films since the year 2000.¹⁷⁰ Whereas 2146 films have received R ratings, only 137 films have been rated G and 252 rated PG.¹⁷¹ Furthermore, the movie industry has been steadily growing more lenient in its ratings, allowing "increasingly more extreme content in any given age-based rating category over time."¹⁷² A study by the Harvard School of Public Health has found that a decade of "ratings creep" has permitted more violent and sexually explicit content into films.¹⁷³ In addition, according to the study, "[a]ge-based ratings alone do not provide good information about the depiction of violence, sex, profanity and other content."¹⁷⁴ And if those increasingly lenient and ineffective ratings are not enough, theater chains have recently begun selling "R-cards," which allow teenagers to attend R-rated movies without being accompanied by a parent or guardian. Critics denounce these R-cards as yet another "maneuver around the movie rating system."¹⁷⁵

167. *Id.* at 367.

168. FTC, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN: A REVIEW OF SELF-REGULATION AND INDUSTRY PRACTICES IN THE MOTION PICTURE, MUSIC RECORDING & ELECTRONIC GAME INDUSTRIES* 27 (Sept. 2000).

169. Senate Commerce, Science, and Transp. Comm., *Marketing Violent Entertainment to Children: A Review of Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries*, FED. NEWS SERV., Sept. 13, 2000, at 3. The FTC conducted a "secret shopper" survey which showed that children were successful in purchasing music label recordings 85% of the time. *Id.*

170. Philip F. Anschutz, *Whatever Happened to the Family Film?*, 33 *IMPRIMIS* 1 (June 2004), available at www.hillsdale.edu/newimprimis/2004/june/default.htm (last visited Feb. 20, 2005).

171. *Id.*

172. Sharon Waxman, *Study Finds Film Ratings Are Growing More Lenient*, N.Y. TIMES, July 14, 2004, at E1.

173. *Id.*

174. *Id.* The Harvard study is available at <http://www.medscape.com/viewarticle/480900>.

175. Micheline Maynard, *Youth Who Like Films Rated R, But Not Chaperones, Get a Card*, N.Y. TIMES, June 26, 2004, at B7.

IX. THE FIRST AMENDMENT AND THE PRESERVATION OF CENSORSHIP

The United States did not banish censorship with the ratification of the First Amendment. Nongovernmental censorship continued to thrive, just as it had prior to adoption of the Bill of Rights. Cultural codes strictly regulated the expressive behavior of late-eighteenth century Americans. Religion and social customs discouraged speech that was rude, offensive, degrading, or insulting. But the law played a relatively minor role—the great majority of the censorship was culturally imposed.

The influence of social shame also served to regulate public speech.¹⁷⁶ This shame was particularly effective given the small size and isolation of local communities, the intimacy of individuals living in those communities, the fear of being ostracized by the community, and the strict adherence to parental and social authority.¹⁷⁷ As Professor Leonard Levy observes, eighteenth-century Americans did not consider freedom of speech to include the expression of “obnoxious or detestable ideas.”¹⁷⁸

According to free speech theories prevailing at the time, the First Amendment was not aimed at maximizing the amount of public speech. To the contrary, the types of expression qualifying for protection were limited. Levy argues that the framers of the First Amendment generally adhered to the philosophy of William Blackstone concerning free speech.¹⁷⁹ Under the Blackstonian theory, speech that was defamatory, immoral, subversive, or disturbing of public peace and good order should not be protected.¹⁸⁰ The liberty of speech, like practically every other liberty, was subject to the common good and bounded by the rights of others.¹⁸¹ “For Blackstone, the function of society was not merely to

176. Phaedra Athena O’Hara Kelly, Comment, *The Ideology of Shame: An Analysis of First Amendment and Eighth Amendment Challenges to Scarlet-Letter Probation Conditions*, 77 N.C. L. REV. 783, 804–05 (1999).

177. *Id.* at 805.

178. FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON xxix (Leonard W. Levy ed., 1966).

179. *Id.* at liv.

180. 5 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–53 (St. George Tucker ed., Augustus M. Kelley 1969) (1803).

181. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 125 (St. George Tucker ed., Augustus M. Kelley 1969) (1803); Heyman, *supra* note 121, at 569. Under eighteenth-century notions of natural law, freedom of speech existed only as long as it was not used to injure or control the rights of another. 1 John Trenchard & Thomas Gordon, *Of Freedom of Speech: That the Same is Inseparable from Publick Liberty*, LONDON J., Feb. 4, 1720, reprinted in 1 CATO’S LETTERS NO. 15, at 110 (Ronald Hamowy ed., Liberty Fund 1995).

protect natural rights but also to civilize human beings,”¹⁸² as morality and public order were the only solid foundations of civil liberty.¹⁸³

Eighteenth-century Americans adhered to a kind of “morality of language,” recognizing the link between words and social relationships.¹⁸⁴ This morality of language encompassed a belief in civility. It dictated that people should not engage in speech that insults or offends another person.¹⁸⁵ As one eighteenth-century American writer opined, freedom of speech should be confined to the limits set by truthfulness, good taste, and “what is not against Morals or Good Manners.”¹⁸⁶ According to Joseph Story, perhaps the foremost nineteenth-century constitutional historian, the claim that the First Amendment “was intended to secure to every citizen an absolute right to speak, or write, or print, whatever he might please, without any responsibility, public or private, therefor [sic], is a supposition too wild to be indulged by any rational man.”¹⁸⁷

Since the settlement of America’s first colonies, and persisting until the latter half of the twentieth century, the censorship of morally offensive speech was a consistent occurrence.¹⁸⁸ During the colonial period, authorities regulated speech so as to maintain a moral society.¹⁸⁹ But even after ratifying the Bill of Rights, most states had statutes banning blasphemy and profanity.¹⁹⁰ The first obscenity conviction occurred in the United States in 1815. In *Commonwealth v. Sharpless*, the court ruled that the for-profit showing of a picture of a man and woman in an “indecent posture” constituted a common law offense against public decency.¹⁹¹ Six years later, Vermont enacted the first law making sexual obscenity a crime distinct from religious and political libel.¹⁹² And in 1873, Congress passed an anti-obscenity law known as the Comstock Act.¹⁹³ Thus, when profanity became a constitutional

182. Heyman, *supra* note 123, at 1285.

183. *Id.* at 1287. And in this regard, eighteenth-century Americans were in agreement with Blackstone. *Id.* at 1288. Even Thomas Jefferson agreed with this Blackstonian view that free speech was limited by the rights of others. *Id.* at 1291.

184. Debora Shuger, *Civility and Censorship in Early Modern England*, in *CENSORSHIP AND SILENCING* 89, 98 (Robert C. Post ed., 1998).

185. *See id.*

186. LEONARD W. LEVY, *LEGACY OF SUPPRESSION* 115 (1960).

187. 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1874, at 731–32 (DaCapo Press 1970) (1833).

188. H. Franklin Robbins, Jr. & Steven G. Mason, *The Law of Obscenity—or Absurdity?* 15 *ST. THOMAS L. REV.* 517, 520 (2003).

189. LARRY D. ELDRIDGE, *A DISTANT HERITAGE: THE GROWTH OF FREE SPEECH IN EARLY AMERICA* 9 (1994).

190. Robbins & Mason, *supra* note 188, at 540.

191. *Commonwealth v. Sharpless*, 2 Serg. & Rawle 91, 101 (Pa. 1815).

192. 1821 Vt. Acts & Resolves, Ch. 1, § 23.

193. Comstock Act, ch. 258, 17 Stat. 598 (1873).

right in *Cohen v. California*¹⁹⁴ and indecency became fully protected by the First Amendment, they became rights “without any tradition behind [them],” leaving us with “no norms to govern [their] use.”¹⁹⁵

Contrary to current First Amendment doctrines, the focus of free speech theories during the constitutional period was not exclusively on the speaker. As much focus was placed on the harms caused by speech as on the benefits secured by free speech. But over time, the harms caused by unfettered speech became constitutionally demoted, eventually being characterized as mere social interests.¹⁹⁶ Thus, when First Amendment conflicts now arise between speakers and unwilling listeners, it is the latter who lose out because they can only assert a “social interest” against a constitutional right. Furthermore, contemporary free speech doctrines have generally abandoned the natural rights foundation of the First Amendment, in which free speech was limited by the rights of others.¹⁹⁷ This eighteenth-century natural law principle gave way in the twentieth century to the marketplace model, in which exclusive focus was placed on the speaker and all the possible benefits of speech, rather than on any harms of that speech to listeners.

Because of the nature of public communications in the eighteenth century, listeners did not have to worry about averting their eyes from offensive speech. Not only was such speech effectively constrained by private and cultural censorship practices, but the public communications system was not even remotely as pervasive as today. There were only two forms of media: the newspaper, and the public lecturn. If someone wished to read a newspaper, they had to go out and find one. It was not delivered to their doorstep. If someone wanted to hear a public lecture or debate, they had to walk to the town hall, early enough to secure a seat. They knew ahead of time the general content of what they were about to read or listen to, and they had to take very deliberate and strenuous efforts to receive that information. Later, as the mass media began to evolve in the late nineteenth century, listeners were still able to avoid an “averting their eyes” problem. For during the Victorian era, it was still considered taboo to engage in any kind of crude or offensive expression.¹⁹⁸

194. 403 U.S. 15 (1971).

195. STEPHEN L. CARTER, *CIVILITY* 69 (1998).

196. Heyman, *supra* note 123, at 1306.

197. *Id.* at 1299.

198. CARTER, *supra* note 195, at 138.

Early Americans also seemed to have drawn a distinction between political speech and offensive, nonpolitical speech. Many eighteenth-century state laws specifically prohibited profanity, blasphemy, and lewdness.¹⁹⁹ Moreover, state licensing laws censored entertainment, even though a similar censorship of the press was considered unconstitutional. Laws regulating stage performances and theatrical productions were even passed by the Continental Congress.²⁰⁰ And throughout the nineteenth century, state regulators continued to monitor the theater.²⁰¹ As one scholar has noted, “[w]hatever the First Amendment meant to Madison, Hamilton, Jefferson, or Story, it did not have sufficient reach to bar the . . . [censorship] of theatrical presentations.”²⁰²

X. JUDICIAL RECOGNITION OF AUDIENCE RIGHTS OVER SPEAKER RIGHTS

If a free communicative process is at the heart of the First Amendment, then listener protections should apply equally in public as well as in the home, especially because in a media-filled world, the boundaries of “home” are less important and less definable than they once were.

One area of case law in which the courts have given precedence to listener rights in connection with public speech has involved the regulation of offensive art confronting an unsuspecting viewer. In *Close v. Lederle*,²⁰³ for instance, the court found that a display of sexually explicit paintings in the corridor of a university’s student union amounted to an “assault upon individual privacy.” A similar finding in another case justified the relocation of a prominent display of “sexually explicit and racially insulting art.”²⁰⁴ Likewise, a “vulgar, shocking and tasteless painting” was removed on the grounds that it “was displayed in the direct line of vision of everyone who entered the Federal Courthouse.”²⁰⁵ Yet even aside from vulgarity and offensiveness, courts have upheld listener rights in the removal or diminishment of speech that overclutters the public domain.²⁰⁶

199. ELDRIDGE, *supra* note 189, at 6.

200. Jon M. Garon, *Entertainment Law*, 76 TUL. L. REV. 559, 633–35 (2002).

201. *Id.* at 634.

202. *Id.* at 635.

203. 424 F.2d 988, 990 (1st Cir. 1970).

204. *Piarowski v. Ill. Cmty. Coll.*, 759 F.2d 625, 632 (7th Cir. 1985).

205. *Claudio v. United States*, 836 F. Supp. 1230, 1235 (E.D.N.C. 1993), *aff’d*, 28 F.3d 1208 (4th Cir. 1994).

206. In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court found that a municipal ordinance prohibiting the posting of signs on public property was not unconstitutional even as applied to political campaign speech. *Id.* at 796–807. While acknowledging that the ordinance diminished the total quantity of speech, the Court ruled that it was justified by the city’s interest in maintaining the aesthetic appeal of the community. *Id.* at 805.

Perhaps the most prominent example of listener-based restrictions on speech directed to a mass audience involves FCC regulations on indecent broadcast programming.²⁰⁷ In *Pacifica*, the Court upheld FCC rules restricting the broadcast of indecent material to hours when children would less likely be in the audience.²⁰⁸ The justifications for this ruling were two-fold.²⁰⁹ First, the regulations were necessary because of the pervasive presence of broadcast media in American life.²¹⁰ Relying on the captive audience doctrine, the Court stated that indecent broadcast material confronts the individual in the privacy of her own home, where the right “to be left alone plainly outweighs the First Amendment rights of an intruder.”²¹¹ Second, the Court found that broadcasting “is uniquely accessible to children, even those too young to read.”²¹² Thus, channeling indecent material into hours when children were unlikely to be listening was the only effective way of shielding children from such material.

Stressing the need to preserve the home as a sanctuary, safe from unwanted speech or images, the *Pacifica* Court compared the broadcast audience to the home-dwellers in *Kovacs* who were unable to escape the loudspeaker intrusion.²¹³ Consequently, like the *Kovacs* home-dwellers, broadcast listeners and viewers also needed some government protection, as they could tune into the middle of a program and without warning be exposed to offensive, indecent speech.²¹⁴ In *Pacifica*, the Court held that the rights of the public to avoid unwanted speech trump those of the broadcaster to disseminate such speech.²¹⁵ The Court found unpersuasive the argument that the offended listener or viewer could quite simply turn the dial and tune out the unwanted broadcast, reasoning that because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.²¹⁶

207. Similar to the speech in *Kovacs*, television programming constitutes speech emanating from a single source and directed to a large audience of listeners. See *supra* note 101.

208. *FCC v. Pacifica Found.*, 438 U.S. 726, 749–51 (1978).

209. *Id.* at 748.

210. *Id.*

211. *Id.* (citing *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 736 (1970)).

212. *Id.* at 749.

213. *Id.* at 748–49.

214. *Id.*

215. *Id.*

216. *Id.*

Prior to *Pacifica*, the Supreme Court had stated that it is “the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”²¹⁷ This focus on listeners, in contrast to the marketplace model’s exclusively speaker-centered view of the First Amendment, also appeared in Justice Breyer’s plurality opinion in *Denver Area*, which involved a challenge to a federal statute restricting the transmission of indecent speech on cable television.²¹⁸ Justice Breyer stated that the *Pacifica* rationales—pervasiveness, invasion of the home, ineffectiveness of warnings, accessibility to children—applied with equal force to cable television, thus justifying a less protective level of scrutiny than that typically associated with content-based regulation.²¹⁹ In terms of intrusiveness and pervasiveness, Breyer found little difference between cable and broadcast television.²²⁰ Justice Breyer even implied that *Pacifica* might extend to all media, noting that the question of whether “*Pacifica* does, or does not, impose some lesser standard of review where indecent speech is at issue” is still open.²²¹

To this day, *Pacifica*’s recognition of the power and intrusiveness of television (and by extension—the Internet) still rings true.²²² Due to their “uniquely pervasive presence,” patently offensive broadcasts “confront[] the citizen, not only in public, but also in the privacy of the home”²²³ In a later case, the Court likewise applied this pervasiveness factor to cable, which in turn rendered cable more susceptible to regulation.²²⁴ In addition to the “pervasive” nature of cable, another factor which justified compromising cable operators’ speech interests to further those of listeners was the economic power of cable operators, who face “little competition” and can constitute “a kind of bottleneck that controls the range of viewer choice.”²²⁵

Reflecting the *Pacifica* approach, the D.C. Circuit in *Action for Children’s Television v. FCC* upheld the safe harbor provisions of the

217. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

218. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 732 (1996).

219. *Id.* at 744–45.

220. *Id.* at 744, 748.

221. *Id.* at 755.

222. *See Turner I*, 512 U.S. 622, 627 (1994), *aff’d*, 520 U.S. 180 (1997). Even in *Sable Communications v. FCC*, which struck down a ban on dial-a-porn telephone messages, the Court recognized that broadcasting “can intrude on the privacy of the home without prior warning as to program content, and is ‘uniquely accessible to children, even those too young to read.’” 492 U.S. 115, 127 (1989) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978)).

223. *Pacifica*, 438 U.S. at 748.

224. *Turner II*, 520 U.S. at 195–215. Justice Breyer, in evaluating the regulations, recognized that occasionally some speech has to be restricted in order to further other speech and that only a reasonable balance had to be achieved between the speech-restricting and speech-enhancing elements. *Id.* at 227–28 (Breyer, J., concurring in part).

225. *Id.* at 227–28 (Breyer, J., concurring in part).

Public Telecommunications Act of 1992 permitting indecent broadcasts only between 10 p.m. and 6 a.m.²²⁶ In its ruling, the court recognized that the prevalence of televisions rendered real parental control impossible.²²⁷ The court also found that those parents who wished to expose their children to indecent programming would “have no difficulty in doing so through the use of subscription and pay-per-view cable channels, delayed-access viewing using VCR equipment, and the rental or purchase of readily available audio and video cassettes.”²²⁸ The court then concluded that the time-channeling rule for indecent broadcasts did not “unnecessarily interfere with the ability of adults to watch or listen to such materials both because [adults] are active after midnight and . . . have so many alternative ways of satisfying their tastes at other times.”²²⁹

Even more importantly, nothing can prevent children from watching television at the homes of their friends, whose parents may allow uncontrolled viewing. Moreover, technologically-challenged parents may have difficulty programming the V-chip and hence may shy away from using it entirely. Technologically sophisticated children, on the other hand, may be able to crack the system. But the safe harbor rules would prevent children from watching indecent programming anywhere and anytime during a good part of the day. While such rules would greatly assist parents in controlling the media input their children receive, they would impose a mere inconvenience on adults desiring to access indecent programming.²³⁰ Furthermore, safe harbor regulations are consistent with the ruling in *Crawford v. Lungren*, where the court upheld a statute restricting the ways in which sexually-oriented print material could be distributed, so as to prevent exposure of it to minors.²³¹ The court found no constitutional violation with a statute banning the sale of “harmful material” from unsupervised sidewalk vending machines.²³²

Some courts have given increased importance to listener rights

226. *Action for Children’s Television v. FCC*, 58 F.3d 654, 669–70 (D.C. Cir. 1995) (en banc).

227. *Id.* at 661.

228. *Id.* at 663.

229. *Id.* at 667. The decision, however, only applied to broadcast television, not to cable.

230. *Id.* at 659–67.

231. *Crawford v. Lungren*, 96 F.3d 380, 389 (9th Cir. 1996).

232. *Id.* at 385–89.

regarding certain new technologies.²³³ Both the Second and Ninth Circuits have sustained restrictions on access to dial-a-porn services, finding that such restrictions were necessary to protect the children of parents who did not wish them to hear this particular kind of speech.²³⁴ These restrictions—e.g., requiring telephone companies to block all access to dial-a-porn services unless telephone subscribers submit written requests to unblock them—were enacted in response to an earlier Supreme Court decision striking down a complete ban on dial-a-porn services.²³⁵ Thus, an important factor leading the courts in *Dial Information Services* and *Information Providers' Coalition* to rule as they did was the fact that the restrictions did not amount to a complete ban on the indecent speech, but merely shifted the burdens of accessing such speech.

In *Bland v. Fessler*,²³⁶ the Ninth Circuit Court of Appeals upheld a restriction on telemarketers' use of automatic dialing and announcing devices (ADADs). It ruled that ADADs were much more disruptive than door-to-door solicitors, and “‘more of a nuisance and a greater invasion of privacy’ than telemarketing with live operators”²³⁷ The court then held that the regulation at issue did not amount to an absolute ban on speech, because the use of ADADs were permitted so long as the called party consented to the message²³⁸ (although it is difficult to imagine that many people would ever so consent). The court also found that a do-not call list was not a less restrictive means of accomplishing the government's objective because such a list would place the burden on the public to stop disruptive ADAD calls from arriving at their

233. As the Supreme Court once observed, because of “constantly proliferating new and ingenious forms of expression, ‘we are inescapably captive audiences for many purposes.’” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (quoting *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 736 (1970)). Communications technologies are continually exposing people to new kinds of unwanted speech. Sitting in the computer section of the library, a person can glance around and see the screen of someone else as they view a sexually graphic web site. Television programs prohibited by parents are graphically advertised during other programs. Huge video screens run day and night in public places. Internet terminals are waiting and ready in coffee houses and even fast-food restaurants.

234. In *Dial Information Services Corp. v. Thornburgh* and *Information Providers' Coalition v. FCC*, the Second and Ninth Circuits ruled that the restrictions in the so-called “Helms Amendment,” 47 U.S.C. §§ 223(b) and (c), did not violate the First Amendment. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535, 1536–40 (2d Cir. 1991); *Info. Providers' Coalition v. FCC*, 928 F.2d 866, 868, 879 (9th Cir. 1991).

235. *Sable Comms. v. FCC*, 492 U.S. 115, 117 (1989).

236. 88 F.3d 729 (9th Cir. 1996). The case involved a challenge to a California law regulating automatic dialing and announcing devices. The law prohibited the use of the devices unless a live operator first identified the calling party and obtained the called party's consent to listen to the prerecorded message. *Id.* at 731.

237. *Id.* at 733.

238. *Id.*

homes.²³⁹ Nor did the court accept the argument that people should be left to themselves to combat ADADs, by turning off their ringers or screening their calls or simply hanging up on the prerecorded calls.²⁴⁰ In other words, the court did not impose an “averting one’s eye’s” burden on the recipients of the calls; it did not place the entire burden on the recipient to opt-out.

XI. THE ALTERNATIVE CHANNELS DEFENSE

In today’s society, speech portraying sex, violence and vulgarity is in great supply. Not only is it in abundant supply, but it is accessible to the point of being unavoidable. As Justice Powell noted nearly three decades ago in his *Pacifica* concurrence: “I doubt whether today’s decision will prevent any adult who wishes to receive Carlin’s message in Carlin’s own words from doing so”²⁴¹ Indeed, as the Court observed, if an adult wished to hear vulgarity-laced humor, they could do so through tapes, records, nightclubs, and late-night broadcasts.²⁴²

Pacifica suggests that any restrictions on speech should be viewed in light of the total supply or expression of that speech through the entire media, not just through the one medium being subjected to restriction. For instance, if sexually graphic songs are restricted from broadcast radio, they are still available through CDs, music videos, special television channels, and live concerts. There has been no ban on such songs, just a re-channeling of them in a way that facilitates the rights of unwilling listeners. Likewise, a family hour requirement regarding television programming would still leave open a host of other entertainment options for adults, who “have so many alternative ways of satisfying their tastes at other times.”²⁴³ Because of the proliferation of so many different communications mediums, censorship should be viewed in terms of the whole spectrum of media. Restriction of speech in one medium may be permissible if that speech remains accessible through other mediums.

239. *Id.* at 736.

240. *Id.*

241. *FCC v. Pacifica Found.*, 438 U.S. 726, 762 (1978) (Powell, J., concurring). George Carlin was the “satiric humorist” whose recorded 12 minute monologue entitled “Filthy Words” was broadcast in the afternoon by *Pacifica*, a New York radio station. *Id.* at 729–30.

242. *Id.* at 750 n.28.

243. *Action for Children’s Television v. FCC*, 58 F.3d 654, 667 (D.C. Cir. 1995) (en banc).

Prior to the explosion of communications technologies, the censorship of a particular medium (or of a particular way of conveying an idea or information) amounted more or less to a complete censorship of that idea or information. But now, that is not the case. Therefore, when addressing the restrictions placed on one kind of output or imagery of one medium, courts should look at the whole of the media society, to see if that one restriction is really an unconstitutional infringement on speech. In a media society bulging with unlimited media content, courts should approach censorship issues as they do issues of statutory construction or interpretation—they should look at the whole scheme. They should examine whether the one particular restriction amounts to an effective censorship, in the society at large, of an idea or piece of information.²⁴⁴

When the First Amendment was ratified, there was essentially one medium for speech. Therefore, it can be argued that a speaker only has a right to have his or her speech accessible in some medium(s), but not every medium. To be free, speech does not have to be completely uninhibited in all venues or forums.

Courts have implicitly approved this approach by upholding statutes that restrict speech in one venue while leaving open alternative channels of communications.²⁴⁵ In *Capital Broadcasting Co. v. Mitchell*, the court held that a statute restricting advertising in certain media did not violate the First Amendment, as advertising in other media was still available.²⁴⁶ In *Hill v. Colorado*, the Court upheld a “buffer zone” regulation restricting the speech rights of abortion protestors, finding that the only restricted avenue of communication was face-to-face dialogue and that the regulation left open ample alternative channels of communication.²⁴⁷ Similarly, in *Schenck v. Pro-Choice Network*, the Court noted that although speakers had to keep a distance from their intended audience, they remained “free to espouse their message” in various ways from that greater distance.²⁴⁸ Through cases like *Hill* and

244. Courts can distinguish between laws that suppress ideas and laws that only suppress particular expressions of those ideas. See *Cohen v. California*, 403 U.S. 15, 19 (1971) (stating that the First Amendment has “never been thought to 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”). For instance, a lot of books and movies express violence—so do we really need a video game expression of the same thing (and in a way that has a particularly harmful effect on children)?

245. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); see also *Moser v. FCC*, 46 F.3d 970, 975 (9th Cir. 1995) (noting that a ban on auto-dialing machines still left abundant alternatives open to advertisers).

246. 333 F. Supp. 582, 584 (D.D.C. 1971), *aff’d*, 405 U.S. 1000 (1972).

247. 530 U.S. 703, 726–27 (2000).

248. 519 U.S. 357, 385 (1997), *cert. denied*, *Warren v. United States*, 540 U.S. 881 (2003). The Court upheld a provision imposing a fixed fifteen-foot “buffer zone.” *Id.*

Schenck, the Supreme Court seems to be saying that what is important is that the potential of communicative interchange be preserved between speakers and willing listeners. Thus, speech restrictions are valid if willing listeners can still seek out and obtain the speech through an alternative channel.²⁴⁹

XII. SOCIETY'S FUNDAMENTAL INTEREST IN THE UPBRINGING OF CHILDREN

In almost every case involving indecent speech, the courts address the most obvious purpose of any attempted restrictions on such speech: the protection of children.²⁵⁰ The courts have gone to great length to carve out special constitutional protections for children.²⁵¹ But this concern with shielding minors from indecent speech often erodes when it comes in conflict with the speech rights of adults and the interests of the marketplace model.²⁵² Few measures shielding minors from indecent speech are upheld if they have any restraining effect on the ability of adults to access such speech.²⁵³ Consequently, the child protection interest frequently loses out to the abundance goal, to the idea that any burden on speech is the equivalent of an unconstitutional infringement.

Despite this advantage enjoyed by the marketplace model, however,

249. And in *Urofsky v. Gilmore*, where a group of university professors challenged the constitutionality of a statute restricting state employees from accessing sexually explicit material on computers owned by the state, the court noted that the statute did not prohibit all access to such materials, as an employee could always get permission from their agency head to access the material. 167 F.3d 191, 194 (4th Cir. 1999), *adhered to, on reh'g*, 216 F.3d 401 (4th Cir. 2000) (en banc).

250. See *infra* note 251.

251. See *New York v. Ferber*, 458 U.S. 747, 757 (1982) (stating that the "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance"); *Ginsberg v. New York*, 390 U.S. 629, 631, 643 (1968) (upholding state requirements that restricted the distribution of printed matter to children, whether or not the material would be obscene to adults); *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (noting that the government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting); *Prince v. Massachusetts*, 321 U.S. 158, 159–61, 164–71 (1944) (upholding a statute prohibiting the use of a child to distribute literature on the street, notwithstanding the statute's effect on a First Amendment activity).

252. As Professor Shiffrin notes, "[c]hildren are the Achilles heel of liberal ideology." Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980). They are "more impressionable and . . . constitute a captive audience." *Id.* Therefore, it is understandable that the most difficult speech problems occur with children. See *id.*

253. See *Butler v. Michigan*, 352 U.S. 380, 383 (1957) (opining that child protection restrictions should not reduce adults to reading "only what is fit for children").

courts have recognized that society has a strong interest in enabling parents to raise their children according to their personal beliefs. Courts, for instance, have upheld laws prohibiting the distribution of pornographic materials to children under a particular age,²⁵⁴ preventing children from obtaining abortions without parental notification,²⁵⁵ and precluding persons under a certain age from purchasing alcohol and cigarettes.²⁵⁶ Because of the importance of the childrearing process, the Constitutional demands of free speech must be “applied with sensitivity . . . to the special needs of parents and children.”²⁵⁷ The Supreme Court has specifically ruled that government has an interest in facilitating parental control over what their children see and hear.²⁵⁸ This interest seeks to empower parents’ right to control the communications environment of their children and to direct their children’s education as they see fit.²⁵⁹

But in addition to this interest in empowering parental childrearing, the government possesses an independent interest in the mental and emotional development of children into mature citizens, regardless of the decisions made by their parents.²⁶⁰ As the Supreme Court has stated, a democratic government requires “the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”²⁶¹ One way to achieve this maturation is to prevent childhood exposure to harmful speech and images.²⁶² Consequently, where children are involved, freedoms of speech may have to be “balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”²⁶³ This balancing, for instance, has justified the restriction of sexually graphic speech expressed during a high school assembly.²⁶⁴

The Court has ruled that speech protected by the First Amendment as to adults may not necessarily be protected as to children. It upheld, in *Ginsberg v. New York*, a statute prohibiting the sale to minors of

254. *Ginsberg*, 390 U.S. at 633.

255. *Planned Parenthood v. Casey*, 510 U.S. 1309, 1309, 1314 (1994).

256. *See South Dakota v. Dole*, 483 U.S. 203, 205, 211–12 (1987); *State v. Trudell*, No. 21620-5-II, 1998 Wash. App. LEXIS 671, at *1–2, 5 (Wash. Ct. App. May 1, 1998).

257. *See Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

258. *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978).

259. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

260. *See Catherine J. Ross, Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 434–35 (2000).

261. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

262. Heyman, *supra* note 121, at 609. But the governmental interest in promoting the development of children into responsible citizens also includes the inculcation of certain civic values. These values serve to mold character in ways that instill a sense of public duty and public good. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 73 (1990).

263. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986).

264. *Id.* at 677–86.

otherwise constitutionally protected pornography.²⁶⁵ The Court declared that the governmental interest in protecting the wellbeing of children is not limited to protecting them from physical and psychological harm, but also extends to protecting them from material that may impair their ethical and moral development.²⁶⁶ Even though the *Ginsberg* Court doubted the scientific certainty of the legislative conclusion that the material banned by the statute did in fact impair the ethical and moral development of children, it noted that such a link had not been disproved.²⁶⁷ This same approach was taken in *Action for Children's Television v. FCC*, where the court, in upholding broadcast decency regulations, stated, “[we have] never suggested that a scientific demonstration of psychological harm is required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.”²⁶⁸

Many parents and citizens strongly support the “efforts of Congress to protect children from harmful” and offensive entertainment speech.²⁶⁹ According to congressional findings, the average child witnesses approximately 100,000 acts of violence on television by the time that child completes elementary school.²⁷⁰ There are many who believe that a community should have the authority to protect children from exposure to this kind of media output, and that the “widespread availability of such material in the larger society makes it virtually impossible for parents to act effectively on their own.”²⁷¹ Yet many attempts to do so have been foiled by a seemingly one-sided application of the First Amendment that looks only to the interests of media speakers.

265. 390 U.S. 629 (1968).

266. *Id.* at 641.

267. *Id.* at 641–42.

268. 58 F.3d 654, 661–62 (D.C. Cir. 1995) (en banc).

269. *ACLU v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000). For instance, best-selling music CDs include Grammy Award winner Alanis Morissette lamenting the loss of her lover to another woman, asking “[w]ould she go down on you in a theater?” and Nine Inch Nails singing “you let me violate you, you let me desecrate you, you let me penetrate you . . . I want to [expletive] you like an animal.” ALANIS MORRISETTE, *You Oughta Know*, on JAGGED LITTLE PILL (Maverick/Reprise Records 1995); NINE INCH NAILS, *Closer*, on THE DOWNWARD SPIRAL, (Interscope Records 1994).

270. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 139–40. The average child is exposed to twenty-five hours of television each week, and some are exposed to as much as eleven hours per day. *Id.* at 139. Given this barrage of media violence, perhaps it is not surprising that fourteen percent of all deaths of American children are the result of homicides. 145 CONG. REC. S5733 (1999).

271. Heyman, *supra* note 121, at 608.

In addressing the problem of access to pornography on the Internet, Congress has tried on several occasions to construct doorways that will seal off sexually explicit material from children. In 1996, it passed the Communications Decency Act, which prohibited the transmission over the Internet of indecent material to anyone under the age of eighteen.²⁷² This prohibition, however, was struck down by the Supreme Court as unconstitutional in *Reno*.²⁷³ Next, Congress passed the Child Online Protection Act (COPA).²⁷⁴ This statute forbade any person from using the World Wide Web to make “any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors”²⁷⁵ But the Court struck down this law in *Ashcroft v. ACLU*.²⁷⁶ Then, with the Child Pornography and Prevention Act, Congress expanded the federal prohibition on child pornography to include computer-generated images of minors engaging in sexually explicit conduct.²⁷⁷ Again, this law was overturned in *Ashcroft v. Free Speech Coalition*.²⁷⁸

In *Reno*, the Court agreed that there is “‘a compelling interest in protecting the physical and psychological well-being of minors’ which extended to shielding them from indecent messages”²⁷⁹ However, as the Court has done on so many previous occasions, it downgraded this interest when it conflicted with the rights of adults to access, burden-free, such messages.²⁸⁰

Naively holding to the marketplace model, the courts have denied efforts to regulate indecent speech accessible to children, relying on the principle that in seeking to protect youth the government cannot “reduce the adult population . . . to reading only what is fit for children.”²⁸¹ But

272. See 47 U.S.C. § 223(a), (d) (2000).

273. *Reno v. ACLU*, 521 U.S. 844, 874–85 (1997) (holding that the Act’s provisions were unconstitutionally vague and burdensome to the First Amendment rights of adults).

274. 47 U.S.C. § 231 (Supp. V 1994).

275. *Id.* § 231(a)(1).

276. 535 U.S. 564, 586 (2002), *aff’d*, 124 S. Ct. 2783 (2004).

277. 18 U.S.C. § 2256(8)(A)-(D) (2000).

278. 535 U.S. 234, 256–58 (2002).

279. *Reno v. ACLU*, 521 U.S. 844, 869 (1997) (quoting *Sable Comms. v. FCC*, 492 U.S. 115, 126 (1989)). And this interest cannot be served simply by relying upon parental supervision. See Nachbar, *supra* note 107, at 220–21. As Professor Nachbar notes, “[v]ery few parents have the time to supervise all of the time that their children spend on the Internet.” *Id.* at 220. Nor is parental monitoring “a real alternative for families in which both parents must, or choose, to work, or for those headed by a single parent.” *Id.* Furthermore, “unless the parent were, for example, to open each [web] page with the child looking away and only allow the child to view the page after a parental preview, there is no way to keep the child from taking in the content while the parent is evaluating its appropriateness.” *Id.* at 221.

280. *Reno*, 521 U.S. at 869–70.

281. *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

this ignores reality: that so much of the violent and sexually graphic speech today is aimed not at adults but at children. Furthermore, by adhering so steadfastly to the marketplace model, courts often make a cursory rejection of the government's proffered rationale for regulations infringing on the burden-free access to indecent speech.²⁸²

Ironically, the courts seem to be far more eager to repress nonentertainment forms of speech for the sake of protecting children. In *Bering v. SHARE*, for instance, the Washington Supreme Court found that the state's compelling interest in protecting children from disturbing speech justified an injunction limiting the speech of anti-abortion picketers. This injunction applied to the use of words such as "murder", "kill", and their derivatives" during demonstrations outside a medical building where abortions were performed.²⁸³

A greater focus on listener rights, as well as a stronger First Amendment recognition of the right of parents to control their family's communicative environment, would greatly help society in protecting children from harmful speech. As one court has admitted, "[i]t is fanciful to believe that the vast majority of parents who wish to shield their children from indecent material can effectively do so without meaningful restrictions on the airing of broadcast indecency."²⁸⁴

XIII. CONCLUSION

What has been lost amidst the marketplace model of the First Amendment is the notion that censorship is the flipside of speech. In terms of individual freedom, rejection is as important as expression; being forced to endure media entertainment that is vile and vulgar and violent can be just as repressive as being punished for voicing one's political views. Set in a time preceding America's media explosion and the breakdown of any social constraints on public speech, current First Amendment doctrines are no longer applicable to disputes involving restrictions on the escalating amounts of indecent entertainment

282. *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 755–56 (1996); *AIDS Action Comm. v. Mass. Bay Transp. Auth.*, 849 F. Supp. 79, 81, 84 (D. Mass. 1993) (holding that the goal of shielding children from advertisements that used sexual innuendos in promoting condom use was not sufficiently compelling to justify the rejection of those advertisements in public transit spaces), *modified by, aff'd*, 42 F.3d 1 (1st Cir. 1994).

283. *Bering v. SHARE*, 721 P.2d 918, 921 (Wash. 1986) (en banc).

284. *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc).

programming. Those doctrines are incapable of recognizing or protecting an individual's or society's desire for freedom from intrusive and offensive pornographic material.

As reflected in the Court's campaign-finance decision in *McConnell v. FEC*, constitutional doctrines are being adjusted to take into account the changed circumstances of modern life. Ironically, however, those adjustments are taking place with respect to the most protected kind of speech—political speech. Yet when it comes to the abundance and accessibility of online pornography, the Supreme Court has refused to re-think its free speech doctrines. As demonstrated in *Ashcroft v. ACLU*, the Court refuses to place any burdens in the path of individuals wishing to view pornography, even as it recognizes the harm that such material can cause to children.

Given the nature of the modern world, the real infringement on individual freedom does not come from government repression of a right to speak but from an intrusive media that pushes offensive material into the lives of unwilling recipients. Given the realities of the modern media, as well as the individual's role in that world, the First Amendment should be interpreted to protect the freedom to reject harmful, degrading, nonpolitical speech. Indeed, such a freedom is as vital to individual autonomy as is the freedom to speak; it may even be more important, especially because rejection is the only form of public speech available to most people in a mass-media-dominated society.

Under the prevailing marketplace model of the First Amendment, no burdens are allowed on an adult's access to speech, even if slight burdens are needed to protect children from exposure to violent or pornographic material. Under the marketplace model, the placement of burdens is greatly skewed toward the unwilling recipient of offensive speech. While this approach may have been proper during a time when indecent entertainment was neither so pervasive nor intrusive, it is no longer applicable to the most pressing issues concerning communicative freedoms in the modern world. Instead, a new First Amendment model is needed that recognizes the rights of the unwilling recipients of media entertainment, and that better balances the burdens of adults wishing to access indecent speech with the burdens of those wishing to avoid it.

In contrast to eighteenth-century America, there are now many different kinds of media and many different ways for individuals to gain access to speech. Thus, a burden placed on one form of media or on one avenue for accessing speech still leaves plenty of other unburdened sources of that speech. Given the historical and philosophical foundations of free speech, it seems a perversion of the First Amendment to interpret it in a way that states that any obstacle or inconvenience imposed on just one media venue of pornographic speech amounts to a constitutional violation.