RE-EVALUATING MEDIA REGULATION IN A MEDIA ENVIRONMENT OF NEARLY UNLIMITED ENTERTAINMENT PROGRAMMING AND AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION[†]

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INTRODUCTION

The outline for this Symposium posed several questions. With respect to its focus on regulation of media outlets, the outline asked whether some additional regulation of political speech is desirable. For instance, should lawmakers revive some form of the Fairness Doctrine and apply it to talk radio? Conversely, with respect to indecent media entertainment, the outline suggested that perhaps regulation in this area has become too restrictive or outmoded.

In stepping back and taking a broader view of the questions posed in this Symposium, a certain irony becomes apparent. Even while exploring new ways to regulate political speech, some question the old ways of regulating indecent commercial media entertainment. In effect, it almost seems as if political speech occupies a lower rung on the ladder of constitutional importance than does indecent commercial media entertainment.[1] Consequently, the regulation of political speech—for example, campaign finance regulations—seems to have more legitimacy than the regulation of indecent media entertainment.[2] But of course, such a scenario contrasts sharply with traditional free speech notions.[3]

In addition to prominent constitutional theories relating to the importance of political speech, the Supreme Court on countless occasions has stated that political speech, or speech relating to the conduct of self-government, is the kind of speech with which the First Amendment is

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[1] Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 491–502 (2007) [hereinafter Garry, *Exploring a Constitutional Model*].

[2] *Id.*

[3] *See id.*

most concerned and should most protect.[4] Under current First Amendment jurisprudence, however, not only do some constitutional doctrines fail to favor political speech, but at times political speech actually receives more disadvantageous treatment than does indecent commercial media entertainment.[5] This Essay examines some ways in which this has occurred, along with the reasons for such disadvantageous treatment. Such an examination will involve the legacy of First Amendment doctrines born nearly a century ago and under a much different media environment than what exists today. Using the marketplace metaphor that was first articulated by Justice Holmes nine decades ago in his dissent in *Abrams v. United States*,[6] this Essay argues that the Court has articulated First Amendment doctrines that end up greatly benefiting nonpolitical media entertainment—sometimes at the expense of political speech.

Failing to adopt a First Amendment model specifically singling out and elevating political speech threatens the autonomy and freedom of such speech.[7] First, supposedly content-neutral regulations can have a disproportionate effect on uniquely political speech.[8] Second, the vast increase in sexually explicit and graphically violent speech can have a desensitizing effect on political speech.[9] When the public witnesses increasing levels of outrageous or offensive speech in commercial media entertainment, it often concludes that all speech receives sufficient protection, and sometimes the public will even believe that all speech, including political speech, requires more restraints.[10] Current First Amendment doctrines can give the illusion, by protecting the vilest and most vulgar of speech, that speech in general is overly protected, which in turn results in a backlash that can spill over to political speech.[11] Thus, perhaps all the cultural focus on the need to protect violent and indecent media entertainment speech has somewhat blinded the public, and even the courts, to the status of political speech.[12] In fact, Steven

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[4] Connick v. Myers, 461 U.S. 138, 160–62 (1983) (Brennan, J., dissenting) (quoting Saxbe v. Wash. Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting); Mills v. Alabama, 384 U.S. 214, 218–19 (1966); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Stromberg v. California, 283 U.S. 359, 369 (1931)).

[5] Garry, *Exploring a Constitutional Model*, *supra* note 1.

[6] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[7] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 524.

[8] *Id.* at 485–87.

[9] *Id.* at 489–90.

[10] *Id.* at 490.

[11] *Id.*

[12] *See id.*

Heyman suggests that the repeated influx of media violence and indecency has made Americans less prone to accept vigorous free speech protections.[13]

In examining the evolution of First Amendment doctrines, this Essay also explores the meaning of free speech and censorship in today's media society. Does censorship mean any burden applied on one type of speech in any one media venue, even if that speech is in plentiful supply in various other media venues? Furthermore, is there a difference between censorship, which seeks to eliminate a certain kind of speech from the social discourse, and legislative measures, which seek to facilitate freedom of choice for those who wish to avoid the offensive, nonpolitical speech that has become almost inescapable in today's media world?

I. HOW CURRENT FIRST AMENDMENT DOCTRINES DISADVANTAGE POLITICAL SPEECH

A. Political Speech as the Primary Concern of the First Amendment

There are several different purposes and values that justify the protection of free speech: the truth value, the self-fulfillment value, the safety-valve value, and the democratic self-governance value.[14] The latter value can often be found in the writings of Alexander Meiklejohn.[15] While Meiklejohn did seem to promote an absolute protection of free speech, the protection he promoted was limited to political speech.[16] Meiklejohn characterized political speech as "speech which bears, directly or indirectly, upon issues with which voters have to deal."[17] Although the Supreme Court has highlighted the importance of political speech numerous times,[18] it has never mandated that the speech at issue

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[13] Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 532–33 (2003). According to Professor Heyman, "In the ongoing culture wars, few battlegrounds are more contested than freedom of expression. In recent decades, the First Amendment has been at the heart of controversies over antiwar demonstrations, pornography, hate speech, flag burning, abortion counseling, anti-abortion protests, and the National Endowment for the Arts." *Id.* (citations omitted).

[14] GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1017–24 (2d ed. 1991).

[15] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25–26 (Lawbook Exchange, Ltd. 2004) (1948).

[16] For an analysis of Meiklejohn's views, see PATRICK M. GARRY, THE AMERICAN VISION OF A FREE PRESS: AN HISTORICAL AND CONSTITUTIONAL REVISIONIST VIEW OF THE PRESS AS A MARKETPLACE OF IDEAS 74–80 (1990) (citing MEIKLEJOHN, *supra* note 15, at 26–27, 88–89).

[17] MEIKLEJOHN, *supra* note 15, at 94.

[18] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the

relate to self-government in order to qualify for the highest levels of constitutional protection. In *Garrison v. Louisiana*, however, the Court did maintain that "speech concerning public affairs is more than self-expression; it is the essence of self-expression; it is the essence of self-government."[19] As stated by the Court, there exists "'practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.'"[20] The Court in *FCC v. League of Women Voters* noted that "editorial opinion on matters of public importance . . . is entitled to the most exacting degree of First Amendment protection,"[21] and that the speech the "Framers of the Bill of Rights were most anxious to protect" was speech "that is 'indispensable to the discovery and spread of political truth.'"[22] According to the Court, "[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values."[23]

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people.'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (alteration in original)); Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."). Still, constitutional protection, as laid out by the Court, does not rely upon a meaning of public discourse that differentiates "speech about 'matters of public concern' from speech about 'matters of purely private concern.'" Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 667 (1990) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion)).

[19] 379 U.S. 64, 74–75 (1964).

[20] Burson v. Freeman, 504 U.S. 191, 196 (1992) (quoting *Mills*, 384 U.S. at 218).

[21] 468 U.S. 364, 375–76 (1984).

[22] *Id.* at 383 (quoting Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

[23] *Id.* at 381 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (internal quotation marks omitted)). In general, indecent speech is also part of that category of speech entitled to full protection under the First Amendment. The Code of Federal Regulations identifies indecency as that which focuses on sexual and excretory activities or organs. *See* 47 C.F.R. § 76.701 (2009) (allowing cable operators to prohibit programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner"). Strict scrutiny applies to any governmental attempt to impose a content-based restriction on indecent speech, requiring both a compelling governmental interest and the absence of any less restrictive means of achieving that interest. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 874 (1997). Under certain circumstances, however, indecency descends in importance to a "low-value" category. As an example, indecent speech in the broadcast medium receives a lower level of constitutional protection. FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (referring to the "'slight social value'" of indecent speech (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942))). On a similar note, the Supreme Court in *Bethel School District No. 403 v. Fraser* approved a school district's sanctioning of student speech that contained sexual innuendo and profane language, and, in doing so, the Court clearly distinguished between that speech and a more serious message of political protest, which would be protected. *See* 478 U.S. 675, 680 (1986) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). In discussing the lower court's reliance on *Tinker v. Des Moines Independent Community School District*, the

B. Disadvantages Faced by Political Speech

While the Court has consistently articulated the value of political speech, it has never issued a specific constitutional rule or model focused on political speech.[24] One primary reason for this is that the Court has been unwilling to draw any definitional distinction between political and nonpolitical speech.[25] As a result, however, the Court might actually be treating political speech less favorably than nonpolitical media entertainment.[26]

Political protest is traditionally and uniquely connected to physical space; therefore, it is uniquely susceptible to time, place, and manner regulations regarding that physical space.[27] Since America's beginnings, political protest has frequently focused on certain physical venues, such as government buildings or offices, or the site of particular public events or actions.[28] The following example illustrates this connection.

The War on Terror and heightened national security concerns have brought with them increasingly stringent restrictions upon political protest.[29] Because these restrictions occur under the guise of content-neutral time, place, and manner regulations, they seem innocuous. But these regulations can be content-neutral in appearance only and, in reality, have a particularly repressive effect on political protest.[30] At the 2004 Democratic National Convention, for instance, law enforcers confined protesters to a free speech cage surrounded by chain-link fences and coiled razor wire.[31] And during the 1999 World Trade Organization

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Court in *Bethel* dismissed the lower court's opinion that the political speech at issue in *Tinker* (wearing a black armband to protest the Vietnam War) equated with the sexually suggestive speech in *Bethel*. *Id.* As observed by Cass Sunstein, "[I]t seems clear that all the categories of low-value speech are nonpolitical." Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 302 (1992).

[24] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 524.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 485–86 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[28] *See id.* (citing Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 791–93, 815 (1984); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 645, 647 (1981)).

[29] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 492.

[30] *Id.*

[31] *Id.* (citing Coal. to Protest the Democratic Nat'l Convention v. City of Boston, 327 F. Supp. 2d 61, 66–67 (D. Mass. 2004), *aff'd sub nom.* Bl(A)ck Tea Soc'y v. City of Boston, 378 F.3d 8 (1st Cir. 2004)). At the 2000 Democratic National Convention in Los Angeles just four years earlier, there was a proposed "free speech" zone that would have essentially kept protesters almost 300 yards away from any convention delegate. Serv. Employee Int'l Union v. City of Los Angeles, 114 F. Supp. 2d 966, 972, 975 (C.D. Cal. 2000) (enjoining the use of this zone and ordering the defendants to reconfigure the zone to comply with the

meetings in Seattle, officials banned all protests within a twenty-five square block, designating the area a "restricted zone."[32]

Such limitations on traditional political speech qualify as time, place, and manner restrictions. These restrictions, on their face, focus only on the place and manner of the speech; therefore, they are seen as content-neutral.[33] But herein lies the problem. Most traditional forms of political protest often occur in chosen physical locations, such as outside government buildings and political conventions. Yet indecent and graphically violent speech tends, increasingly, to derive from the electronic or cyber world of the modern media, occurring irrespective of any physical location. As a result, supposedly content-neutral time, manner, and place restrictions often end up affecting exclusively or primarily the speech of political protest.

In *Coalition to Protest the Democratic National Convention v. City of Boston*, the court upheld Boston's use of a designated zone of demonstration to contain protesters at the 2004 Democratic National Convention while simultaneously admitting that this fenced-in zone resembled "an internment camp."[34] The court found that the demonstration zone resulted from content-neutral regulations that simply governed the location of the protesters.[35] On appeal, the First Circuit affirmed this decision on the argument that the protesters, even if confined to the demonstration zone, could still resort to mass media coverage as an alternative to the physical act of protesting at the site of the convention.[36] The problem with using mass media, however, was that it provided no guarantees as to how the media would portray or edit their message. Another problem with using mass media was that it provided no guarantee that the convention delegates—their intended audience—would even see the protesters' message aired across television. Furthermore, there was no guarantee that the opportunity to shout and chant for fifteen seconds to a television camera would be enough to draw in a significant crowd of protesters. In reality, denying

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terms set forth by the court, not because it was designed to restrict protest, but because its size was insufficiently tailored to the government's interest and it "burden[ed] more speech than [was] necessary").

[32] *See* Menotti v. City of Seattle, 409 F.3d 1113, 1124–26, 1167 (9th Cir. 2005).

[33] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (holding that place restraints on political protests "are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information").

[34] 327 F. Supp. 2d at 74–76.

[35] *Id.*

[36] *Bl(A)ck Tea Soc'y,* 378 F.3d at 14.

the most relevant physical venue to political protesters limits the kind of message they can convey, whereas if one television channel denies access due to media violence and indecency, there are numerous similar channels through which that speech can travel.

Time, place, and manner restrictions on speech focus on the physical site of the speech.[37] This approach to time, place, and manner restrictions recognizes the relationship between the speech and the immediate physical surroundings, and it came about during the nearly century and a half preceding adoption of the First Amendment, and during the century following ratification of the First Amendment.[38] At that point in time, a primary location where political protest took place was out in the public square, where the speaker could attract as large an audience as possible and where the speaker could amplify his or her message by coupling it with a relevant physical backdrop.[39]

Constitutional doctrines eventually developed so as to allow the government to control potentially disruptive speech common to the public square, which was the primary venue for such disruptions.[40] But it is mainly political protest that occurs in connection with specific places, such as at the site of political events. Electronic commercial media entertainment, conversely, lacks a connection to a physical site; consequently, it proceeds uninhibited by time, place, and manner restrictions. Such speech has no real physical location and needs no relationship with a particular physical location in order to convey its message.[41]

In another political speech case, *Hill v. Colorado*, the Court upheld a Colorado statute creating a "floating buffer zone" of eight feet that prevented anyone from approaching another person outside of an abortion clinic for the purpose of leafleting or engaging in oral protest or counseling.[42] The Court so ruled despite recognizing that First Amendment protections extended to the speech of the abortion

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[37] For a comprehensive analysis of the Court's "place" focus in its First Amendment jurisprudence, see generally Timothy Zick, *Speech and Spatial Tactics,* 84 TEX. L. REV. 581 (2006). Professor Zick asserts that, due to the connection between the place of speech and the content of speech, not all place regulations achieve a content-neutral outcome. "The time, place, and manner doctrine applies only where the state is neutral with regard to content, the presumption being that place itself has nothing to do with the substance of speech." *Id.* at 616. To Professor Zick, place is connected to and facilitates the expression of certain kinds of speech. *Id.* at 617.

[38] Garry, *Exploring a Constitutional Model*, *supra* note 1, at 495.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] 530 U.S. 703, 723, 726 (2000).

protesters, and that the public sidewalks covered by the statute were "'quintessential' public forums for free speech."[43] But the dissent in *Hill* argued that the Court had never before extended a governmental interest in protecting people from unwanted communications to speech on public sidewalks.[44] Additionally, the dissent maintained that the Colorado statute imposed considerable burdens on the protesters' "right to speak."[45] Yet the Court still allowed a supposedly content-neutral time, place, and manner restriction to virtually suppress that speech, regardless of its being clearly political speech.

The Court's decision in *Hill*, involving political speech in a traditional public forum, can be contrasted with an earlier decision involving sexually explicit speech on cable television. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the Court addressed the constitutionality of regulations in the Cable Act of 1992, requiring that cable operators place indecent programs "on a separate channel; to block that channel; to unblock the channel within [thirty] days of a subscriber's written request for access; and to reblock the channel within [thirty] days of a subscriber's request for reblocking."[46] In holding these regulations unconstitutional—despite recognizing that they served the compelling purpose of protecting minors—the Court focused on the inconveniences to would-be viewers of such programming.[47] None of these burdens, however, presented insurmountable obstacles. Viewers could still access the desired programming simply by following the established procedures.

Both cases—*Hill* and *Denver Area*—involved segregate-and-block schemes. In *Denver Area*, cable operators segregated indecent television programming to certain channels, with those channels blocked to anyone

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[43] *Id.* at 715.

[44] *See id.* at 741–55 (Scalia, J., dissenting).

[45] *Id.* at 756. The dissent noted that an eight-foot zone of separation made it practically impossible to have a normal conversation, especially when the goal was not to protest but to engage in counseling and educating—activities that "cannot be done at a distance and at a high-decibel level." *Id.* at 757. The use of bullhorns and loudspeakers, which was recommended by the majority, would be of "little help to the woman who hopes to forge, in the last moments before another of her sex is to have an abortion, a bond of concern and intimacy that might enable her to persuade the woman to change her mind and heart." *Id.* As argued by the dissent, "It does not take a veteran labor organizer to recognize . . . that leafletting will be rendered utterly ineffectual by a requirement that the leafletter obtain from each subject permission to approach . . . . That simply is not how it is done, and the Court knows it." *Id.* at 757–58.

[46] 518 U.S. 727, 753–54 (1996) (citing Cable Act of 1992 § 10(b), 47 U.S.C. § 532(j) (2006)).

[47] *Id.* at 755–57.

who did not voluntarily request access.[48] In *Hill*, law enforcement officers segregated abortion protesters off at a distance from clinics and blocked them from having access to all people going in and out of those clinics, except those who voluntarily chose to speak to the protesters.[49] But even though both cases involved segregate-and-block schemes, the Court upheld the political speech restrictions and not the indecent media entertainment restrictions. Moreover, a simple request made to a cable provider easily overcame the burden imposed in *Denver Area*, whereas the burden imposed in, for instance, the Boston Democratic National Convention case, was impossible to overcome.

The irony is that the constitutional protections for sexually explicit and graphically violent media entertainment arose out of the political speech cases. When the Supreme Court developed its current free speech doctrines, largely during the period from the 1930s to the 1970s, most of the controversies involved dissident political speech[50]—for example, socialists and communists trying to convey their political ideas to a largely unreceptive public. Such is not the case, however, with most of the current speech controversies. Most controversial speech now involves offensive entertainment programming packaged and sold by large media corporations. Therefore, perhaps we should reconsider the assumption that a primary reason we protect low-value indecent media entertainment is to ensure the continued protection of high-value political speech.

II. DRAWBACKS OF THE MARKETPLACE MODEL IN FIRST AMENDMENT JURISPRUDENCE

A. The Failure of Courts to Consider Actual Burdens on Speech

Current First Amendment doctrines stem from the marketplace of ideas metaphor, first expressed by Justice Holmes in his dissent in *Abrams v. United States*.[51] Objecting to the Court's decision to uphold Sedition Act convictions of individuals charged with distributing pamphlets attacking the government's expeditionary force to Russia, Holmes articulated his now-famous metaphor: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[52] Holmes's marketplace metaphor exerted a profound influence

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[48] *See supra* note 46 and accompanying text.

[49] *See supra* notes 42–45 and accompanying text.

[50] *See* Garry, *Exploring a Constitutional Model*, *supra* note 1, at 487 (citing Sunstein, *supra* note 23, at 258).

[51] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[52] *Id.*

on First Amendment doctrines throughout the twentieth century.[53] Essentially, the marketplace metaphor seeks to increase the quantity of speech without regard to the content or quality of that speech—it strives to protect as much speech as can be crammed into the media marketplace.[54]

But the role or application of the marketplace model has changed over time, especially as the type of free speech cases coming to the courts have changed. This change occurred around the 1970s. Although political dissidents brought the major First Amendment cases during the mid-twentieth century, many of the later cases involved complaints by commercial entertainment distributors.[55] Thus, the desire to indiscriminately increase the supply of political speech in the early to mid-part of the twentieth century eventually worked to indiscriminately increase the amount of commercial entertainment in the latter part of the twentieth century. Commercial media entertainment speech was able to take advantage of all the constitutional protections that had developed to protect political dissent.[56] But "because most of the recent cases interpreting the Free Speech Clause have involved media entertainment, constitutional doctrines have been influenced by the demands and conditions of that speech, not by the needs [or] demands of more traditional political speech."[57]

The marketplace model makes two assumptions that may very well be erroneous in today's society. First, it assumes that there is a shortage of, or social blockage to, speech. Second, it 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

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[53] *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 885 (1997) (rejecting the argument that the Internet's unregulated availability of indecent or offensive material drives "countless citizens away from the medium" because the "phenomenal" growth of the Internet reflects a "dramatic expansion of this new marketplace of ideas"); Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 769 (1996) (Stevens, J., concurring) ("Congress should not be put to an all or nothing-at-all choice in deciding whether to open certain cable channels to programmers who would otherwise lack the resources to participate in the marketplace of ideas."); Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (noting that the First Amendment extends protection to advertising because "[t]he relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas").

[54] *See supra* note 53.

[55] Sunstein, *supra* note 23, at 258.

[56] *See* Garry, *Exploring a Constitutional Model*, *supra* note 1, at 487–88 & nn.50–51.

[57] *Id.* at 488.

Amendment sense as newspaper editorials.[58]

The marketplace solution to harmful speech is simply to increase the amount of speech, as if more speech will somehow remedy or nullify the "bad" speech. Still, it seems highly unlikely that there is logical speech capable of somehow rectifying the irrational impressions given by different types of entertainment.

The marketplace model has worked somewhat to overprotect indecent media entertainment relative to political speech. One of the ways it has done so is the content-neutrality rule. This rule focuses almost entirely on indiscriminately increasing the supply of speech. But in doing so, it does not sufficiently look at the actual burdens being imposed, or not imposed, on particular speech.

The Supreme Court's current free speech jurisprudence depends primarily on whether a particular regulation is content-neutral.[59] The Court does not really take into account the actual degree of the burden; furthermore, the Court fails to make a distinction of whether the law imposes a mere burden or a complete ban on the speech.[60] In reality, however, there is a substantial difference between a mere burden placed on speech being expressed in just one of many media channels and a complete ban that effectively silences that speech in all communications venues. The courts are indifferent as to whether a burden or ban is occurring in just one of many media venues through which the speech is available. But the First Amendment does not mandate that speakers incur absolutely no obstacles or burdens in exposing listeners to their speech.

By treating all content-based regulations the same, courts make virtually no effort to determine if a particular law imposes the kind of burden that threatens to drive an idea out of the marketplace of ideas. In other situations, however, a court may determine a law to be content-neutral and will sustain the law notwithstanding the apparent burdens on speech caused by that law. Unlike the approach taken by the Supreme Court in some other situations, such as its abortion-rights jurisprudence, no thought goes to whether the regulation imposes an

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[58] Patrick M. Garry, *The Right to Reject: The First Amendment in a Media-Drenched Society*, 42 SAN DIEGO L. REV. 129, 136 (2005) [hereinafter Garry, *Right to Reject*].

[59] *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (citing Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)); *see also* Patrick M. Garry, *A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography*, 2007 BYU L. REV. 1595, 1603.

[60] *See, e.g., Playboy Entm't Group, Inc.*, 529 U.S. at 812 ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

"undue burden" on the particular speech.[61] This disregard of the degree of actual burden has resulted in courts overturning every state regulation that purports to shield young children from exposure to a powerful new media product—graphically violent video games.[62] Courts have overturned laws that require parental consent before minors can obtain graphically violent video games based on the rationale that those laws make content distinctions, even though the only burden imposed is on the ability of commercial vendors to sell those games to children without their parents' knowledge or consent.[63]

The Court's decision in *United States v. Playboy Entertainment Group, Inc.*[64] illustrates the gross imbalance of burdens currently being allocated between commercial vendors of indecent programming and unwilling recipients of such programming. *Playboy Entertainment* involved a challenge to a provision in the Telecommunications Act of 1996 that required cable operators with channels "primarily dedicated to sexually-oriented programming" to either completely block the channels or limit the broadcast of those programs to the hours between 10 p.m. and 6 a.m., when children are not likely to be among the viewing audience.[65] Long before this provision went into effect, cable operators used signal scrambling to ensure that only paying customers had access to certain programming; but, because this scrambling was subject to signal bleed, the time-channeling regulation endeavored to shield children from hearing or seeing images resulting from such signal bleed.[66] Still, the Court refused to uphold the provision because it posed

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[61] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992). In *Stenberg v. Carhart*, the Court held that a Nebraska law outlawing partial birth abortion was unconstitutional because it violated the "undue burden" test. 530 U.S. 914, 945–46 (2000). Freedom of association cases, involving conduct that facilitates expression, also use this type of balancing approach. *Cf.* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 260 (2004). Prior to determining how strict or deferential the standard of review to apply to the law, the courts in these cases take into account the severity of the burdens imposed on the freedom of expressive association. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 586–87 (2005); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358 (1997).

[62] *See generally* Patrick M. Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139 (2004) [hereinafter Garry, *Defining Speech*] (explaining how current First Amendment application prevents regulation on the distribution of violent video games).

[63] *See* Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 956 (8th Cir. 2003); Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034, 1037 (N.D. Cal. 2005).

[64] 529 U.S. 803 (2000).

[65] *Id.* at 806 (quoting 47 U.S.C. § 561(a) (2006)).

[66] *Id.*

too great a restriction on speech, even though the Court recognized the state interest in shielding young viewers from such programming.[67]

In dissent, Justice Breyer focused particularly on the issue of relative burdens.[68] Justice Breyer noted that the law in question did not prohibit adult programming; instead, it merely placed a burden on the speech.[69] According to Justice Breyer, "Adults 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."[70] Additionally, he observed that the law only extends to channels that "broadcast 'virtually 100% sexually explicit' material."[71] Justice Breyer also pointed out that signal bleed exposed approximately twenty-nine million children to sexually explicit programming.[72] Taking into account the fact that tens of millions of children have no parents at home after school and some children may spend afternoons and evenings watching television outside of the home with friends, Justice Breyer asserted that the time-channeling law offered "independent protection for a large number of families."[73] Justice Breyer also cited evidence reflecting all the difficulty people encountered while trying to get their cable operator to block sexually explicit channels—difficulty which comes as no surprise to those who have previously tried to get their cable company to fix something.[74] According to Justice Breyer, the Framers did not intend the First Amendment to leave millions of parents helpless in the face of media technologies that bring unwanted speech into their children's lives.[75]

Under the content-neutral approach of the marketplace model, not only does the Court fail to closely scrutinize the actual degree of burden imposed upon media entertainment speech, but it also does not really consider the burdens on those who wish to avoid such speech. Even though speech and communication is a two-way process, the Court looks only at the rights of those commercial entities seeking to deliver indecent entertainment programming, ignoring the rights of those individuals who wish to prevent exposing their children from such programming.

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67 *See id.* at 825.

68 *Id.* at 838 (Breyer, J., dissenting).

69 *Id.*

70 *Id.* at 845.

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

72 *Id.*

73 *Id.* at 842.

74 *Id.* at 843–44.

75 *See id.* at 846.

III. THE MARKETPLACE MODEL DOES NOT CONSIDER THE BURDENS ON THOSE WISHING TO AVOID INDECENT COMMERCIAL ENTERTAINMENT PROGRAMMING

In *Denver Area*, the Court was concerned only with inconveniences to would-be viewers of indecent programming—for example, a viewer who might want to choose a channel without any advance planning, or the one who worries about any embarrassment he might feel if he makes a written request to subscribe to the channel.[76] The Court ruled in *Playboy Entertainment* that audiences should generally expect to assume the burden of averting their eyes whenever unwanted or offensive media programming confronts them.[77] The Court previously articulated this expectation that unwilling viewers must avert their eyes in *Cohen v. California*, where the Court refused to permit the censorship of an expletive-laced political message printed on the back of a jacket worn in the Los Angeles courthouse, even though passersby may be involuntarily exposed to this message.[78] In *Cohen*, the Court placed the burden of avoiding the speech entirely on the viewer.[79] The Court imposed this same burden in *Erznoznik v. City of Jacksonville* when it struck down an ordinance prohibiting drive-in movie theatres from exhibiting nudity.[80] But a careful reading of Justice Breyer's *Playboy Entertainment* dissent makes clear that one's ability to avert one's eyes differs significantly between the various media. It is one thing to turn one's eyes away from an expletive printed on someone's jacket in a public place or to avoid driving by an outdoor movie theatre, and it is quite another thing to prevent one's children from viewing sexually explicit material on television—a medium that is everywhere and constantly accessible.[81] Thus, with respect to such modern media venues as cable television and the Internet, the "avert one's eyes" expectation stated in *Cohen* becomes a fallacy.

Because current First Amendment analysis is often virtually blind to the actual burdens borne by parents wishing to prevent their children from being exposed to indecent media entertainment, most of the time the courts require that those parents bear the full burden of "averting

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[76] Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 753–54 (1996).

[77] *Playboy Entm't Group, Inc.*, 529 U.S. at 813 (citing Cohen v. California, 403 U.S. 15, 21 (1971)).

[78] *Cohen*, 403 U.S. at 16, 26.

[79] *Id.* at 21.

[80] 422 U.S. 205, 206, 210 (1975).

[81] *See Playboy Entm't Group, Inc.*, 529 U.S. at 842 (Breyer, J., dissenting).

their eyes or ears," regardless of the degree or cost of that burden.[82] In *United States v. American Library Ass'n*, however, the Supreme Court tried to more effectively balance the placement of burdens.[83] The Court upheld a law requiring public libraries to install filtering software on their Internet computers, stating that the law did not require a total ban on a patron's Internet access to certain types of material but did require any adult wishing to view such material to ask a librarian to unblock the desired site.[84] The slight burden on adults who could still access the material with just a request to the librarian gave way to the goal of protecting children from pornography. In considering the relative burdens involved, some viewed this decision as bucking the trend followed in *Playboy Entertainment*, where just about any burden on an adult's access to indecent speech, no matter what the risk to children, was found to be unconstitutional.[85]

The finding that children could easily access sexually explicit material on the Internet was crucial to the Court's holding in *American Library Ass'n*.[86] But if it is as easy as the Court in *American Library Ass'n* says it is to access indecent speech on the Internet, and if there is no way for parents to adequately site or content-block, and if the Internet is indeed an integral part of contemporary life, then is it feasible to expect people to avert their eyes from all the sexually explicit

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[82] *Cf.* 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 ads); *Erznoznik*, 422 U.S. at 210–11 (holding that the burden falls upon the unwilling viewer to avoid offensive speech "'simply by averting [his] eyes'" (quoting *Cohen*, 403 U.S. at 21) (alteration in original)); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that the Post Office could not screen out communist mail from foreign sources and require potential recipients to affirmatively request its delivery).

[83] 539 U.S. 194, 208 (2003).

[84] *Id.* at 209.

[85] *See supra* notes 64–75 and accompanying text.

[86] *Am. Library Ass'n*, 539 U.S. at 200 (citing Am. Library Ass'n v. United States, 201 F. Supp. 2d 401, 406, 419 (E.D. Pa. 2002)). National surveys illustrated that a quarter of all school children had unintentionally accessed pornography while at a public library. Elizabeth M. Shea, *The Children's Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEGIS. J. 167, 185 & n.92 (1999). Studies show that adolescents between the ages of twelve and seventeen are one of the largest consumers of adult-oriented material on the Internet. *Id.* at 184 (citing *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing on H.R. 3783, H.R. 774, H.R. 1180, H.R. 1964, H.R. 3177, and H.R. 3442 Before the Subcomm. on Telecomm., Trade, & Consumer Prot. of the H. Comm. on Commerce*, 105th Cong. 22 (1998) (statement of Rep. Ernest J. Istook, Jr.) [hereinafter Istook Statement]). Most pornography sites do not require a credit card to access their extensive free previews, thus permitting children to see graphic sexual and violent images without going through any age verification process. *Id.* at 178–79 (citing Istook Statement, *supra*, at 22).

speech that pops up on the Internet?[87]

The courts fail to scrutinize fully the ease or difficulty for an adult to overcome whatever burden is placed on his or her access to sexually explicit speech, compared with the ease or difficulty for parents to safeguard their children from such speech; in other words, the courts put minimal effort into comparing the relative burdens of those who wish to access the speech with those who wish to avoid the speech.[88] An opt-in requirement on specific types of "low value" nonpolitical speech, however, would venture to equalize those burdens. Rather than decreasing the amount of speech in the system, it would simply create an additional step before someone could access the speech. Justice Breyer made this point in his *Playboy Entertainment* dissent: the time-channeling law provided invaluable assistance to those who wished to avoid the sexually explicit programming, while placing a relatively insignificant burden on those who wished to obtain the programming.[89]

When using the content-neutral approach, the Court does not effectively contemplate the freedom to avoid being subjected to offensive and unwanted commercial entertainment—possibly one of the most vulnerable and fragile freedoms in today's media environment.[90] Not

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[87] The Court in *United States v. American Library Ass'n* acknowledged that "there is also an enormous amount of pornography on the Internet, much of which is easily obtained," and that the "accessibility of this material has created serious problems for libraries, which have found that patrons of all ages, including minors, regularly search for online pornography." 539 U.S. at 200 (citing *Am. Library Ass'n*, 201 F. Supp. 2d at 406, 419). As observed by Professor Nachbar, very few parents have the time to supervise their children's access to the Internet, and "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." Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 220–21 (2000).

[88] The question raised here is why should First Amendment doctrine favor adults over children, especially when adults can access speech, even with slight burdens, more easily than parents can keep such speech away from their young children, and especially when the consequences are so much different: potential psychological harm to children versus a slight delay in obtaining the speech for adults? For a discussion of the harms to children, see generally Garry, *Exploring a Constitutional Model*, *supra* note 1.

[89] *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 841–42 (2000) (Breyer, J., dissenting).

[90] *See* PATRICK M. GARRY, REDISCOVERING A LOST FREEDOM: THE FIRST AMENDMENT RIGHT TO CENSOR UNWANTED SPEECH 38–39, 42–48 (2006) [hereinafter GARRY, REDISCOVERING A LOST FREEDOM]. The purpose of the new challenge under the First Amendment may be to safeguard the right of recipient control, just as the purpose of the challenge under the marketplace model was to safeguard the right of speaker control. *See id.* at 22–27. Basically, the purpose of the modern First Amendment challenge may be to adjust the one-sided approach of the marketplace model.

only has the Court failed to realistically analyze how feasible it is for parents to "avert" their children's eyes from electronic commercial media entertainment, but the Court has, in some cases, applied the "avert one's eyes" standard more leniently in political speech matters than in indecent media entertainment matters. And if the Court applies that standard more leniently in political speech matters, it allows for more speech regulation, thus serving the interests of the unwilling audience. In *Hill v. Colorado,* for instance, the Court favored the interests of the unwilling listener—the person going in and out of the abortion clinic—by restricting the speech of the protesters. In finding that it was difficult for the patrons or employees of the clinic to "avert their eyes" from the protesters, the Court significantly limited the protest speech.[91] Conversely, in *Denver Area*, a case involving indecent television entertainment programming, the Court gave no consideration to the unwilling audience—namely, those parents who did not wish to expose their children to such programming.[92]

IV. THE COURTS' ISOLATED-MEDIA VIEW

The courts must make certain that regulations of nonpolitical speech do not amount to a total ban on that speech. But as long as that speech remains accessible through other avenues or in other formats, courts can avoid such a ban.

Current free speech doctrines ignore the realities of the modern media world by refusing to recognize the plethora of media channels that exist for any one type of speech.[93] In this respect, First Amendment jurisprudence is stuck in the early twentieth century when, due to the few media venues available, a burden or ban in one venue essentially meant a complete censorship of the subject speech. When First Amendment doctrines were born, there was effectively only one mass media outlet—the print media.[94] But now, in the twenty-first century, there are many different media venues. Thus, in a multiple media world, the question arises as to whether a speech burden in one venue amounts to an unconstitutional censorship, even if the particular speech remains plentiful in other venues—in other words, the speech is still available

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[91] Hill v. Colorado*,* 530 U.S. 703, 723, 726 (2000).

[92] *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 753–54 (1996) (describing only the statute's restrictive effects upon the willing audience).

[93] Strict scrutiny not only fails to consider whether a content-based regulation imposes only a slight or narrowly confined burden on speech, but it also does not consider whether this burden only exists in just one of many communication channels.

[94] Aside from the fact that there were very few different media venues, there was also, in the early twentieth century, very little sexually explicit or graphically violent media speech due to social customs as well as technological restraints.

and remains not banned.

Violent and sexually explicit speech is in great supply in today's society. Thus, courts should view restrictions on such speech in light of the total supply of that speech in the entire media, rather than through the effects of those restrictions on just one media avenue. Because there is an abundance of so many different communications mediums, courts should view speech regulations in terms of the total media spectrum. Thus, a regulation of speech in one media venue may be permissible if that speech remains available through other media venues. Courts, in analyzing measures to help those wishing to avoid their children's exposure to harmful speech—measures aimed at facilitating freedom of choice on behalf of the avoider—should consider the media as a whole, instead of just considering individual media venues in isolation.[95]

Before the modern growth of new "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."[96] But now, that is not the case. For that reason, courts should look at the media in its entirety to determine

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[95] The problem with courts treating each single media venue as if it constituted the media as a whole is not only that ideas are expressed in all the different media venues, but that each different media venue may have some unique influences on children. For instance, the idea of violence is expressed in all the different media venues; however, the way that violence is depicted in graphically violent video games, for instance, has been shown to have particular and long-ranging negative effects on children's behavior. Garry, *Defining Speech*, *supra* note 62, at 139. Therefore, a restriction that applies only to graphically violent video games—for example, a restriction on very young children buying certain games without parental knowledge—may serve to accomplish a valuable child protection interest, while at the same time not causing a ban on the message or idea of violence. The distinctions between various media venues have been recognized by Professor Frederick Schauer:

> When we are compelled to treat mass distribution of detailed instructions for causing harm in the same way that we treat an individual speaking to a live audience, we face a different kind of problem: too much protection rather than too little. And when First Amendment doctrine insists that the Internet, cable television, telephone, newspapers, magazines, and books are for many purposes indistinguishable, serious questions arise as to whether courts have overlooked important historical, structural, economic, and cultural differences among the various channels and institutions of communication.

Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1271 (2005) (citing Rice v. Paladin Enters., 128 F.3d 233, 239 (4th Cir. 1997)). According to Professor Schauer, the Court's First Amendment jurisprudence rests on the basis of content of the speech or communication; the Court has paid relatively little regard to the institutional environment or media venue in which the speech occurs. *Id.* at 1256. Thus, the Supreme Court has been reluctant to draw any lines around communicative institutions or media venues; it has instead focused almost exclusively on looking at what type of speech is at issue. *Id.* at 1263.

[96] *See* GARRY, REDISCOVERING A LOST FREEDOM, *supra* note 90, at 96–97.

whether restrictions on a particular kind of output or imagery of one communications medium do in fact preclude such speech from altogether entering the social marketplace of ideas through another communications medium.[97] Because our current society is swelling with media content, courts should examine whether a specific regulation of speech in one venue is equivalent to a total censorship of that idea or piece of information in society at large.[98] It appears absurd to only examine one media venue in hopes of discovering whether an unconstitutional censorship has occurred while ignoring the abundance of speech that is still in the media system as a whole.

The accessibility of alternative venues for regulated speech played a significant part in *Action for Children's Television v. FCC*, where the D.C. Circuit Court of Appeals upheld the "safe harbor" provisions of the Public Telecommunications Act of 1992, which restricted indecent programming to the hours between midnight and 6 a.m.[99] The court came to the conclusion that the time-channeling rule for indecent transmissions 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."[100] Likewise, the Second and Ninth Circuits upheld restrictions on access to dial-a-porn services—such as requiring telephone companies to block all access to dial-a-porn services unless telephone subscribers submit written requests to unblock them—finding that such restrictions merely shifted the burdens of accessing the indecent speech, rather than amounting to a total ban of such speech.[101]

A constitutional model that recognizes the reality of the modern

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[97] *See, e.g.*, 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").

[98] Courts are able to differentiate between laws that suppress actual ideas and laws that suppress only individual expressions of those ideas. *Id.* For example, do we really need the expression of violence in a video game—and in a way that has a particularly harmful effect on children—when we have lots of books and movies that express the same thing?

[99] 58 F.3d 654, 667 (D.C. Cir. 1995) (citing Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a), 106 Stat. 949, 954 (codified at 47 U.S.C. § 303 (2006))). The court in *Action for Children's Television* recognized the harm of pornography to children, and yet First Amendment doctrines allow for regulation of pornography only on the broadcast medium, which in today's media world is a diminishing medium.

[100] *Id.*

[101] In *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535, 1537 (2d Cir. 1991), and *Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866, 879 (9th Cir. 1991), the Second and Ninth Circuits, respectively, ruled that the restrictions in the so-called "Helms Amendment," 47 U.S.C. § 223(b)–(c) (2006), did not infringe on the First Amendment.

mass media would look at the media marketplace in its entirety to determine whether a requirement in one venue equates to a total ban of the speech. The key is to not look at each medium in a vacuum or as if each single medium has to carry a complete supply of speech on its own; rather, the issue is to look at all mediums together when considering the impact on speech.[102]

By upholding statutes that restrict speech in one venue while leaving open other venues for that speech, courts have implicitly approved this approach—and explicitly for so-called content-neutral regulations.[103] Because advertising in other media venues was still available, the court in *Capital Broadcasting Co. v. Mitchell* held that a statute restricting advertising in certain media venues did not infringe upon the First Amendment.[104] In *Hill v. Colorado*, the Court upheld a "buffer zone" regulation that restricted the speech rights of abortion protesters, reasoning that the statute merely restricted face-to-face dialogue while still leaving open other channels of communication.[105] The Court also observed in *Schenck v. Pro-Choice Network of Western New York* that speakers remained "free to espouse their message" in various ways, even though they were required to keep a distance from their intended audience.[106] Through cases like *Hill* and *Schenck*, the Court seems to suggest that it is essential to preserve the potential of communicative interchange between speakers and willing listeners. What is important is that willing listeners still be able to seek out and obtain the speech through an alternative channel.[107]

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[102] This is a derivative of the acknowledgment that the "unique characteristics" and "distinct attributes" of "each mode of expression" should direct First Amendment analysis, *Ashcroft v. ACLU*, 535 U.S. 564, 594–95 (2002) (Kennedy, J., concurring) (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975)), and that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

[103] 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).

[104] 333 F. Supp. 582, 584 (D.D.C. 1971) (citing Public Health Cigarette Smoking Act of 1969 § 6, Pub. L. No. 91-222, 84 Stat. 87, 89 (1970) (codified at 15 U.S.C. § 1335 (2006)).

[105] 530 U.S. 703, 727 & n.33 (2000) (citing *id.* at 780 (Kennedy, J., dissenting)).

[106] 519 U.S. 357, 385 (1997).

[107] 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 because an employee could always get permission from his or her agency head to access the material. 167 F.3d 191, 194 (4th Cir. 1999).

CONCLUSION: CHOICE FACILITATION VS. CENSORSHIP

Freedom of speech is, in reality, part of a larger freedom to control certain basic aspects relating to one's role within the communicative process. Indeed, speech is a component of something beyond just the individual; it is a component of the communicative process, and as such is both a social act as well as an individual act.[108] Seen in this light, a free individual should have not only the right to speak what he or she wishes to speak, but also the right to avoid or reject whatever offensive or harmful speech he or she wishes to reject.

Similar to this freedom, parents also have a right to control their children's upbringing. Part of the parental child-raising function relates to the kind of speech or images to which the parent wishes to expose the child. Constructing speech freedoms in such a way as to leave parents with little effective control over what nonpolitical media entertainment programming confronts their children severely erodes the right to control their children's upbringing. In that case, parents must choose between two equally objectionable options: acquiesce in their children's media exposure or remove their children entirely from the modern media society.

So often, opponents of any measures aimed at helping parents prevent their children's exposure to unwanted nonpolitical media entertainment cast those measures in terms of "censorship." And indeed, history has proven that censorship is a futile exercise and almost never accomplishes what its advocates hope to accomplish.[109] But not all speech regulations amount to censorship. Censorship tries to achieve a complete repression of a particular idea. This type of ban—the banishment of an idea from social discourse—is quite different from measures which simply help unwilling recipients avoid exposure to certain kinds of offensive, nonpolitical speech.

There is a middle ground between complete, unrestricted freedom of speech and censorship. That middle ground lies in regulatory measures, which strive to achieve choice facilitation. Choice facilitation is different from censorship. It still allows ideas or images to remain in the social discourse but provides greater power to those wishing to avoid certain offensive or harmful media programming. In a way, choice facilitation enhances freedom by giving more effective choice rights to the unwilling recipient. For instance, poor families need to have Internet access in their home for educational purposes. But why should they then have to

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[108] *See* Garry, *Right to Reject*, *supra* note 58, at 151.

[109] *See generally* PATRICK GARRY, AN AMERICAN PARADOX: CENSORSHIP IN A NATION OF FREE SPEECH (1993) (arguing that censorship in America has historically proven futile).

bear even more economic burdens through installing various filtering devices or software just to keep out all harmful material to which they do not wish to expose their children? Why should poor families have to bear such a burden or why should they be subjected to the difficult choice of either getting the Internet and accepting all the harmful material or rejecting the Internet and denying their children educational opportunities? Through narrowly drawn measures aimed at choice facilitation, poor families may be able both to have the Internet and avoid their children's exposure to certain harmful material.

Choice facilitation measures do not amount to a ban on speech because, given all the different media venues, whatever speech is regulated to provide choice facilitation in one venue should be in ample supply in other venues—otherwise, such measures would be struck down as unconstitutional. Thus, what occurs is not censorship but a balancing of rights between speakers and those wishing to avoid the speech. The goal of the choice facilitation measure is not to censor speech but to allow parents to prevent their children's exposure to certain kinds of nonpolitical media entertainment. One example of a choice facilitation measure that should be allowable under the First Amendment is the one that was at issue in *Denver Area*, where the segregate-and-block scheme strove to give parents the ability to avoid certain speech while also allowing willing adults to obtain that speech.[110] An analogy can be seen in the alcohol-free sections provided at major league ballparks across the country. Owners carve out one small section of a ballpark as alcohol-free while allowing adults to obtain alcohol in every other section of the park.[111] Clearly, such measures do not amount to a ban on alcohol but are merely an attempt to give parents the ability to choose the environment in which their children live.

Censorship has become a discredited endeavor, and arguably the great majority of society now believes in freedom of speech. The nature of that freedom, however, must extend to parents wishing to control the media environment of their children, at least as much as it extends to those media companies that wish to profit off of sexually explicit and graphically violent speech. By striving to effectuate the freedom of those parents wishing to exercise their right to control their children's upbringing, choice facilitation measures such as those at issue in *Denver Area* essentially seek to achieve a greater level of freedom in society.

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[110] *See supra* notes 46–48 and accompanying text.

[111] *See, e.g.*, Fenway Park A-to-Z Guide, http://boston.redsox.mlb.com/bos/ballpark/guide.jsp (follow "Non-Alcohol Sections" hyperlink) (last visited Apr. 14, 2010); Yankee Stadium A-to-Z Guide, http://newyork.yankees.mlb.com/nyy/ballpark/guide.jsp (follow "Alcohol-Free Seating" hyperlink) (last visited Apr. 14, 2010).