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# The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication

*Patrick M. Garry*

## I. INTRODUCTION

If one scans the radio dial during morning drive-time, or surfs the hundreds of television channels in the evening, one is hard-pressed to say that American entertainment media is laboring under a threat of censorship. On the other hand, it is in the world of media entertainment where most of the prominent censorship debates have taken place of late: the FCC fine against Howard Stern for his lewd dialogue,<sup>1</sup> Janet Jackson and her “wardrobe malfunction” incident during the 2004 Super Bowl half-time show,<sup>2</sup> and the FCC investigation of Bono’s utterance of the F-word during a live broadcast of the Golden Globe Awards.<sup>3</sup> In the current social mindset, free speech is increasingly being defined in terms of the freedom of celebrities to shock and defy what remains of any sense of cultural decorum. However, perhaps because of this focus on entertainment speech, a far more troubling threat to speech freedoms occurring far outside the gates of Hollywood studios is receiving relatively little notice.

Political speech, in its most traditional form, is being curtailed in ways unseen since perhaps the World War I era.<sup>4</sup> Individuals wishing to protest presidential policies are moved out of sight of the President and the press, while supporters are allowed to gather in close proximity. Groups wanting to demonstrate outside major party political conventions are herded into fenced areas far away from the convention itself. Rap artists demand First Amend-

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1. See Jacques Steinberg, *FCC to Fine Clear Channel \$495,000 Over Stern*, N.Y. TIMES, Apr. 9, 2004, at C3.

2. See Treasa Chidester, *What the #\$ is Happening on Television? Indecency in Broadcasting*, 13 COMM.LAW CONSPECTUS 135, 136, 167 n. 9 (2004).

3. See Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 258 (2003). In May of 2006, outraged television network executives protested the FCC’s fining of 111 television stations for running a program called “Without a Trace,” which according to the FCC depicted scenes from “a teen orgy” involving one teenage girl and three boys. William F. Buckley, Jr., *The Search for Decency*, NATL. REV., May 22, 2006, at 62.

4. See *infra* Part III.B.

ment freedom to blare out the most vile of lyrics, and yet anti-abortion protesters are not even allowed to confront abortion clinic patrons and employees.<sup>5</sup>

America's free speech attentions seem to be preoccupied with the glut of degrading media entertainment speech and the constant controversy it breeds, rather than with the kind that should warrant the highest of constitutional protections: political speech. Indeed, by its sheer volume, media entertainment speech seems to be subtly changing the cultural backdrop of the First Amendment, relegating political speech to a subordinate level within the general cultural awareness.<sup>6</sup>

Although the courts can do little about cultural priorities, they can and should address legal doctrines that, in effect, discriminate against traditional political speech in favor of media entertainment. Because of the ways in which First Amendment law has evolved in conjunction with the progression of technology, modern media entertainment speech possesses a certain constitutional advantage over such traditional forms of political speech as physical protest in a public venue. For instance, most permissible speech regulations fall under the category of content-neutral time, place, and manner regulations. However, these regulations apply almost exclusively to speech occurring within a particular physical place: the kind of speech historically characteristic of political protest. They are almost never applied to media entertainment, which essentially has no "place" identity, but is simply transmitted over video cable, telephone lines or satellite signals. Consequently, it is the classic form of political speech that becomes subject to the most regulations; regulations which can force protestors at the 2004 Democratic National Convention to be herded into what one judge called an "internment camp."<sup>7</sup>

The existing First Amendment doctrines have not kept pace with the development of modern mass media. Furthermore, the constant social and legal spotlight on complaints by entertainment celebrities concerning any restrictions on their "artistic freedom" has drawn attention away from what should

5. See *infra* notes 64-70 and accompanying text.

6. The argument is made that all the violent and indecent speech generated by the media entertainment industry will undermine public support for First Amendment values by eroding the public's commitment to free speech rights. See KEVIN SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 73 (2003). Indeed, it can be argued that political speech has been so compromised in the First Amendment hierarchy that in 2003 the Supreme Court upheld the McCain-Feingold campaign finance bill in *McConnell v. FEC*, 540 U.S. 93 (2003). Among its provisions, the bill abolished "soft money" contributions to national party committees, placed limitations on fundraising by federal officeholders and candidates, and curtailed certain political advertisements from being televised within 60 days of a general election. *Id.* at 142, 189. Because it restricted the rights of people and groups to engage in various types of political speech, the law was challenged on First Amendment grounds, especially since it exceeded the existing limits of First Amendment doctrine, as set forth in a series of post-Watergate judicial decisions, including *Buckley v. Valeo*, 424 U.S. 1 (1976).

7. See *infra* notes 78-79 and accompanying text.

be the core concern of the First Amendment: the protection of political speech. Both courts and culture seem to be defining free speech in terms of the “low level” speech of media entertainment, rather than the “high level” speech of political dissidents. Perhaps this is because so much speech – and indeed, so much “low value” speech – has been lumped into the First Amendment that the most valuable speech has suffered a dilution.<sup>8</sup>

This Article attempts to illustrate how media entertainment speech currently possesses a constitutional advantage over the traditional political speech of physical protest. Part I discusses current First Amendment doctrines relating to permissible types of speech regulation. Although these doctrines claim to be content-neutral, they effectively discriminate against the speech of on-site political protest. Part II examines how this discrimination comes into being. Since many of the constitutional doctrines relating to speech regulation are geared to the “place” where the speech occurs, these doctrines essentially let media entertainment off the hook, since the vast majority of that entertainment has no “place” of occurrence. Part III proposes a new First Amendment model that breaks sharply with all existing models. This new model advocates a constitutional distinction between political and non-political speech, with the former receiving the highest protections and the latter receiving a lower protection. According to this model, the regulation of certain non-political speech would be analyzed under the intermediate scrutiny now given to content-neutral time, place, and manner regulations, with particular emphasis on whether alternative avenues for the regulated speech exist. Thus, if a particular kind of non-political media speech is available through many different communications avenues, the regulation of just one of those avenues might not pose constitutional difficulties. This factor becomes especially important when dealing with mass media entertainment, since that form of speech can be conveyed through a near unlimited number of different avenues. Finally, Part IV presents a comprehensive analysis of why political speech should receive a heightened constitutional treatment, as well as why non-political media entertainment harmful to children should occupy a lower constitutional status.

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8. Under the First Amendment, indecency is accorded privileges not even given to religious speech. For instance, in *Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 271 (2000), the Court banned religious prayers from being recited over the public address system at high school football games, but in *Sable Commc'ns, Inc. v. FCC*, 492 U.S. 115 (1989) the Court overruled a congressional ban on pornographic pre-recorded telephone messages, also known as “dial-a-porn” services.

## II. CURRENT CONSTITUTIONAL DOCTRINES ON PERMISSIBLE SPEECH RESTRICTIONS

### *A. Exceptions to the Rule Against Content-Based Regulation*

#### 1. Content Discrimination by Medium

As a general rule, content-based regulation is strictly scrutinized by the courts.<sup>9</sup> However, content regulation has been allowed in certain mediums or conduits. Based on the notion of a scarce spectrum, for instance, the broadcast medium receives the lowest degree of content protections.<sup>10</sup>

Courts have used the technological differences among mediums to justify the differing constitutional protections for speech within each medium. As the Supreme Court has proclaimed: “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”<sup>11</sup> This assertion stems from Justice Jackson’s statement two decades earlier that each medium “is a law unto itself.”<sup>12</sup>

In *FCC v. Pacifica Foundation*, involving an FCC decision to require broadcasters to channel indecent programming away from times of the day when there is a reasonable risk that children may be in the audience, the Court found that the broadcast medium was an intrusive and pervasive one.<sup>13</sup> In reaffirming that this medium should receive the most limited of First Amendment protections, the Court held that the rights of the public to avoid indecent speech trump those of the broadcaster to disseminate such speech.

9. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (stating that “[c]ontent-based regulations are presumptively invalid”). With content-based regulations, the courts will apply the “most exacting scrutiny.” *Boos v. Barry*, 485 U.S. 312, 321 (1988).

10. See Jim Chen, *Conduit-Based Regulation of Speech*, 54 DUKE L.J. 1359, 1371-93 (2005). This diminished constitutional protection for broadcasting goes back to *Red Lion*, upholding a federal regulation called the Fairness Doctrine, which forced broadcasters to give a right-of-reply. *Id.* at 1379; see *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). This ruling subjected broadcasters to constraints that in any other medium would be unconstitutional. *Red Lion*, 395 U.S. at 369, 378; see also *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672-73 (1998). Exemplifying this print-broadcast dichotomy, the Court later struck down essentially the same kind of law as applied to the print medium. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a state right-of-reply law applied to newspapers). The rationale given for the lower constitutional status of broadcasting is that a limited spectrum confers upon the government the need and duty to regulate it for the common good. See *FCC v. Nat’l. Citizens Comm. for Broad.*, 436 U.S. 775, 779 (1978).

11. *Red Lion*, 395 U.S. at 386.

12. *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

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

The justifications for this ruling were two-fold. First, the regulations were necessary because of the pervasive presence of broadcast media in American life, capable of injecting offensive material into the privacy of the home, where the right “to be left alone plainly outweighs the First Amendment rights of an intruder.”<sup>14</sup> Second, the Court found that broadcasting “is uniquely accessible to children, even those too young to read.”<sup>15</sup> The Court dismissed the argument that the offended listener or viewer could simply turn the dial and avoid the unwanted broadcast, reasoning that because the broadcast audience is constantly tuning in and out, prior warnings cannot protect the listener from unexpected program content.<sup>16</sup>

The print and broadcast models lie at the two ends of the spectrum of constitutional scrutiny, with cable television somewhere in between. Even though cable does not have the same kind of scarcity issues that broadcasting does, the courts have nonetheless regulated it more than the print medium.<sup>17</sup>

In *Turner I*, the Court faced the dilemmas of whether to maintain the disparity in First Amendment treatment of the print and broadcast media, and then whether to apply the print or broadcast model to cable television.<sup>18</sup> Prior to *Turner I*, the First Amendment status of cable television had been in a sort of legal limbo, ever since *City of Los Angeles v. Preferred Communications Inc.*, when the Court stated that cable possessed First Amendment freedoms,

14. *Id.* at 748.

15. *Id.* at 749.

16. *Id.* at 748-49.

17. In *United States v. Southwestern Cable Co.*, 392 U.S. 157, 180-81 (1968), the Court held that the FCC had the power to regulate cable; however, the Court did not make clear exactly what constitutional model would be used to govern content regulations affected cable. This failure to designate a specific standard of review of regulations governing cable continued in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986). With cable, the Court has adopted an intermediate scrutiny standard, which allows the government more room to regulate an industry that often possesses a monopolistic power over video programming in the markets it serves. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (*Turner I*); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (*Turner II*). *Turner II* applied intermediate scrutiny to the must-carry rules. 520 U.S. at 195-213. This same type of intermediate scrutiny was applied to DBS in *Satellite Broadcasting & Communications Ass'n v. FCC*, 275 F.3d 337, 355 (4th Cir. 2001).

18. *Turner I* addressed the disparity in First Amendment treatment as reflected in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (conferring the most protective First Amendment status on the print media) and *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (granting a much less protective status on broadcasters). In *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), upholding a ban on broadcast/newspaper cross-ownership, the Court stated that “efforts to enhance[e] the volume and quality of coverage of public issues through regulation of broadcasting may be permissible where similar efforts to regulate the print media would not be.” *Id.* at 800 (alternation in original).

but did not specify the exact nature of those freedoms.<sup>19</sup> But even though the *Turner* Court affirmed that cable programmers are fully protected by the First Amendment, and that the scarcity rationale does not apply to cable, it nonetheless refused to apply the strict scrutiny used in the print model. Instead, the Court employed an intermediate level of scrutiny that amounted to a seeming compromise between the print and broadcast models.<sup>20</sup>

On remand, the Court in *Turner II* edged cable even closer to the broadcast model. Indeed, *Turner II* “shows a tolerance for speech-relevant regulatory constraints that is not far from the standard of *Red Lion*, notwithstanding the Court’s earlier holding that the *Red Lion* standard was inapplicable to cable.”<sup>21</sup> Factors that pushed cable toward the broadcast model and away from the print model include: the market power of cable operators, the fact that most cable systems operate as local monopolies, and the intrusiveness of television and its ability to exploit its audience.<sup>22</sup>

As with other cases in which the broadcast and print models clashed, the *Turner* cases tried to piece together a third model to apply to cable television. Though the Court did not want to place the same kind of content restrictions on cable that exist for broadcast, it nonetheless continued to see a difference between the print and television mediums, and between the impact that each medium has on its audience. This uncertainty over exactly what regulatory standard to adopt for cable also appeared in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,<sup>23</sup> where Justice Breyer’s plurality opinion retreated from any “rigid single standard” or analogy to any other media. However, Justice Breyer did state that the *Pacifica* rationales – pervasiveness, invasion of the home, ineffectiveness of warnings, and 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.<sup>24</sup> 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.<sup>25</sup>

19. *City of Los Angeles v. Preferred Comm’ns Inc.*, 476 U.S. 488 (1984).

20. *Turner I*, 512 U.S. at 662.

21. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 935 (1998).

22. *Turner I*, 512 U.S. at 633.

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

24. *Id.* at 744-45.

25. *Id.* at 755. Moreover, the fact that so many Americans have access to cable threatens the continued maintenance of two different standards, because broadcast channels end up airing increasingly racy programming to financially compete with the cable channels. Lynn Smith, *FCC Examining Indecency Laws*, MILWAUKEE J. SENTINEL, Jan. 27, 2004, at 3E.

With respect to the Internet, the Court has so far decided to treat it according to the print model.<sup>26</sup> Yet in *Ashcroft v. ACLU*, even though conferring the highest constitutional protections on the Internet, Justice Kennedy stated that the “unique characteristics” of “each mode of expression” should determine constitutional coverage of that medium.<sup>27</sup> According to Justice Kennedy, “[t]he economics and the technology of each medium affect both the burden of a speech restriction and the Government’s interest in maintaining it.”<sup>28</sup>

Many free speech activists argue that constitutional doctrines should not treat each medium separately, that all the media should be treated uniformly, since they are all part of a larger system of public communication.<sup>29</sup> How-

26. *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997).

27. 535 U.S. 564, 594-95 (2002) (Kennedy, J., concurring).

28. *Id.* at 595. This statement is an offshoot of *Red Lion*’s ruling 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) (footnote omitted). According to the scarcity rationale, “there are not enough opportunities for speakers to express themselves, and that the government has a role to play in ensuring that these limited opportunities be put to the most valuable uses for society.” Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 44 (2002). Subsequent to *Red Lion*, another rationale justifying the lower constitutional status of broadcasting appeared in *FCC v. Pacifica Foundation*, which based its holding that the FCC could regulate broadcast indecency on a finding that the broadcast media was “uniquely pervasive” and “uniquely accessible to children.” 438 U.S. 726, 748-49 (1978).

29. For decades, free speech advocates have been pushing for all media technologies to have the same constitutional status as does the print medium. Ithiel Poole argued that media convergence and the democratizing aspects of the new media should bring about a convergence of constitutional treatment and that under the First Amendment all media should be governed by the print model. See generally ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* (1983). These advocates point out, correctly it seems, that the new technologies offer opportunities for a dramatically increased array of viewpoints. JEFFREY ABRAMSON ET AL., *THE ELECTRONIC COMMONWEALTH: THE IMPACT OF NEW MEDIA TECHNOLOGIES ON DEMOCRATIC POLITICS* 46, 57, 121-22 (1983). They argue, again correctly, that the new technologies render obsolete the old scarcity rationale that once justified broadcast regulation. Yet while these advocates focus on likening cable and other technologies to print, in a regulatory and constitutional sense, they ignore the intrinsic differences in those mediums. These differences are summarized by Robert Hughes:

TV favors a mentality in which certain things no longer matter particularly: skills like the ability to enjoy a complex argument, for instance, or to perceive nuances, or to keep in mind large amounts of significant information, or to remember today what someone said last month, or to consider strong and carefully argued opinions in defiance of what is conventionally called “balance.” Its content lurches between violence of action, emotional hyperbole, and blandness of opinion.

Robert Hughes, *Why Watch It, Anyway?*, N.Y. REV. OF BOOKS, Feb. 16, 1995, at 38.



ever, as will be discussed later in this Article, segmentation of media by type is exactly what these same activists do when assessing the burdens placed on speech by any medium-specific regulations. They assess these burdens as if the speech at issue is being conveyed only through that particular medium and not through any of the other media existing within society's multimedia structure. In other words, each single medium, from the perspective of measuring any burdens placed on speech within that medium, is viewed as if it is the only source of the subject speech.

## 2. A Conglomeration of Non-Speech Classifications

Throughout the history of First Amendment jurisprudence, the courts have carved out certain exceptions to protected speech, like obscenity and fighting words.<sup>30</sup> Such "low value" speech includes lewd or profane speech, which has "no essential part of any exposition of ideas,"<sup>31</sup> and "epithets or personal abuse," which are "not in any proper sense communication of information or opinion safeguarded by the Constitution."<sup>32</sup> But the judicial creation of such "low value" categories is the exception rather than the rule, and it is confined to relatively narrow and isolated categories of speech.

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What is so often ignored is that the different technologies have different ways of intruding and delivering unwanted speech or images. While so much focus is put on ending the differing constitutional treatment of television and print, for instance, the reality still remains that television is drastically different from print in both content and the way in which that content is delivered. To most viewers, there is no difference between cable and broadcast. They are just channels on a television set. Many viewers do not even know which of the channels are broadcast and which are cable. Thus, perhaps the only standard that should be used to craft constitutional doctrines is not the technological features of the medium, but the ability of viewers to exert control over what content they are exposed to. Perhaps, as media speech continues to proliferate and become ever more pervasive, First Amendment regulatory models should focus on listener rights, rather than on increasingly obsolete technological distinctions between the different mediums. 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." 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).

30. See, e.g., *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words). With respect to obscenity, the Court has ruled that the legitimate governmental interests in regulation include: "the interest of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973). These interests prevail even in the absence of any "scientific data which conclusively demonstrate that exposure to obscene material adversely affects men and women or their society." *Id.* at 60.

31. *Chaplinsky*, 315 U.S. at 572.

32. *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940).

The consequence of excluding certain types of speech from the First Amendment is that the regulation of those types does not need to undergo any constitutional scrutiny. For instance, speech that is likely to incite imminent lawless action falls outside the protection of the First Amendment.<sup>33</sup> Furthermore, in addition to these non-speech categories, the courts have also created other categories of speech that, while warranting some constitutional protection, can be more easily regulated in the name of competing social interests. Examples of such categories include commercial speech,<sup>34</sup> speech that places individuals in a “false light,”<sup>35</sup> speech that discloses the private details of another person,<sup>36</sup> and child pornography.<sup>37</sup>

### B. Content-Neutral Regulations

Courts have allowed “restrictions on the time, place, or manner of protected speech,”<sup>38</sup> as long as those regulations are deemed to be content-neutral and leave open alternative means for communicating the regulated expressions.<sup>39</sup> For instance, in *Heffron v. International Society for Krishna Con-*

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

34. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771-73 (1976) (recognizing that only truthful, non-deceptive commercial speech about a lawful product deserved constitutional protection).

35. See *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1966) (including within First Amendment coverage only the “false light” speech that pertains to matters of public concern and that is made without actual malice).

36. See *Cox Broad. v. Cohn*, 420 U.S. 469, 487 (1975) (recognizing that society has an interest in restricting speech that violates the “zone of privacy surrounding every individual”). The Court stated that an individual’s “right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities” remains “plainly rooted in the traditions and significant concerns of our society.” *Id.* at 489, 491.

37. See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (stating that the governmental interest in protecting children was “of surpassing importance”). However, the Court also recognized that “laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.” *Id.* at 756. Consequently, the Court acknowledged that there were “limits on the category of child pornography” that was “unprotected by the First Amendment.” *Id.* at 764. As the Court stated, since “the nature of the harm to be combated” is the sexual exploitation of children, only material “that *visually* depict[s] sexual conduct by children below a specified age” falls outside the coverage of the First Amendment. *Id.* (footnote omitted).

38. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (stating that the regulations must also be “narrowly tailored to serve a significant government interest”).

39. *Id.* However, the Court might not allow a content-neutral regulation if it is seen as completely shutting off an entire means of communicating an idea. See *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). In *Gilleo*, the Court struck down an ordinance that prohibited homeowners from displaying any and all political signs, holding that

*sciousness*, the Court upheld a statute which forbade members of a religious sect from distributing their religious material in face-to-face encounters with State Fair attendees, ruling that the First Amendment “does not guarantee the right to communicate one’s views . . . in any manner that may be desired.”<sup>40</sup> In *Madsen v. Women’s Health Center, Inc.*, the Court sustained an injunction preventing protestors from entering a 36-foot buffer zone around abortion clinics.<sup>41</sup> And in *Members of the City Council v. Taxpayers for Vincent*, the Court upheld an ordinance that completely prohibited the posting of signs (even political posters) on public property.<sup>42</sup> The Court has even upheld zoning restrictions aimed specifically at adult entertainment businesses, finding that the “secondary effects” of these businesses are valid objects of government regulation.<sup>43</sup>

Geographic restrictions on where speech may occur are given only an “intermediate” level of scrutiny by the courts.<sup>44</sup> Even though developed during an era when perhaps the most disruptive and threatening of speech occurred in physical venues such as parks and streets, the time-manner-place doctrine has never envisioned a connection between the content of speech and

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the ordinance eliminated an entire channel of expressing constitutionally protected speech. *Id.* at 54-59. Indeed, the Court did not even address the issue of whether the ordinance was content-based or content-neutral. *Id.* at 51-53.

40. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 645, 647 (1981). Similarly, in *International Society for Krishna Consciousness v. Lee*, a regulation prohibiting Society members from soliciting at airports was upheld. 505 U.S. 672 (1992).

41. 512 U.S. 753 (1994).

42. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

43. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 52 (1986) (upholding a local law requiring adult movie theatres to be a certain distance from residential neighborhoods, churches, parks and schools); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63 (1976) (upholding ordinance banning a concentration of adult businesses). *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) (addressing the city’s use of a zoning ordinance to limit the number of adult businesses that could operate in a single building). But if government can regulate the physical location of speech based on its secondary effects, why not consider the secondary effects of media speech?

44. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (stating that the government “may impose reasonable restrictions on time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a governmental interest, and that they leave open ample alternative channels for communication”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (stating that content-neutral time, manner, place constraints are valid if they serve an important government interest and leave open ample alternative channels of communication). However, this intermediate level of scrutiny “is little more than a weak strain of rationality review.” Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 583 (2006) (footnote omitted).

a particular physical venue; *e.g.*, that the content of speech outside an IRS office would most likely be protest of government tax policies.<sup>45</sup> Indeed, all the courts require is that some venue of communication be left open to the speakers: parade marchers do not have to be given the freedom to march down every street, just one street.

Another way in which speech has traditionally been regulated is through the public forum doctrine.<sup>46</sup> This is yet another area in which speech can be regulated according to the needs and classifications of a particular physical space. According to the public forum doctrine, certain physical locales can be defined as either open or closed to public speech.<sup>47</sup> As with the time-place-manner doctrine, the public forum doctrine perceives no connection between the content of speech and any particular physical venue, even though the kind of speech that most often occurs in front of government buildings or outside political conventions or in the audience of presidential visits is the speech of political dissent. Moreover, “[b]ecause alternative channels are never fully adequate” when it comes to speech protesting a particular event occurring at a particular time and place, “all regulations of public ‘forums will entirely suppress speech with respect to some potential audience and with a particular cognitive and emotive impact.’”<sup>48</sup>

### III. THE EFFECTS OF CURRENT FIRST AMENDMENT DOCTRINES

#### A. *The Overprotection of Non-vital Speech*

Perhaps the most significant difference between the free speech cases heard by the courts prior to 1970 from those after 1970 is that the former tended to involve political speech expressing specific political ideologies, whereas the latter more frequently involved vulgar or sexually explicit speech. Whereas the former group involved individuals trying to convert people to an unpopular political creed, the latter involve speech that is part of an entertainment-for-profit endeavor. As Professor Sunstein notes, although the major First Amendment cases in the 1940s, 1950s and 1960s were brought by political dissidents, many of the current cases involve complaints by commercial entertainment distributors.<sup>49</sup> Nonetheless, this entertainment

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45. For an argument setting forth the connections between place and manner restrictions and the content of speech, *see generally* Zick, *supra* note 44.

46. Distinctions are made between public forums, nonpublic forums and “designated” public forums. *See* Lillian BeVier, *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 SUP. CT. REV. 79 (1992).

47. *See, e.g.*, Calvin Massey, *Public Fora, Neutral Governments, and the Prism of Property*, 50 HASTINGS L.J. 309 (1999); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987).

48. Chen, *supra* note 10, at 1372-73.

49. Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 258 (1992).

speech has availed itself of all those constitutional protections developed to protect the inclusion of dissident voices in the nation's political discourse.<sup>50</sup> And yet, 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 of demands of more traditional political speech.

The vast majority of current free speech disputes involve entertainment speech that is accused of being graphically violent or sexually explicit. Public complaints of broadcast indecency have skyrocketed. The FCC Consumer and Governmental Affairs Bureau reported a "huge increase" in such complaints in 2003.<sup>51</sup> As *TIME* magazine observes, from the "unwanted porn e-mail" to the "hamburger commercial with a woman lasciviously riding a mechanical bull," people today "feel mugged by pop culture."<sup>52</sup> According to the executive secretary of the Iowa Freedom of Information Council, American children "are swimming around in this pop culture that is becoming a sort

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50. In 1919, *Schenck v. United States* presented the Supreme Court its first opportunity to interpret and apply the First Amendment. 249 U.S. 47 (1919). The case marked the first time in the Court's 130-year history that anyone attempted to use the First Amendment as a shield against government prosecution, and it was the first time the Court evaluated federal legislation in connection with the right of free speech. *Schenck* involved an appeal from a conviction of socialists who, in violation of the Espionage Act, had circulated antiwar leaflets urging men to resist being drafted into the military. *Id.* at 48-49. The Court upheld the conviction, ruling that the leaflets created a clear and present danger to the nation's military recruitment during a time of war. *Id.* at 52.

Throughout the decades following *Schenck*, First Amendment speech cases continued to come before the Court. With the start of the Cold War and the American stand-off against the Soviet Union, laws were passed that specifically targeted the speech freedoms of communist activists in the United States. In *Dennis v. United States*, the Court sustained these laws, finding that Communist party leaders advocating overthrow of the U.S. government posed a clear and present danger of the kind Congress was empowered to regulate. 341 U.S. 494, 516-17 (1951).

Eventually, however, the tide started turning. In the 1957 case of *Yates v. United States*, the Court ruled in favor of free speech rights, overturning the Smith Act convictions of fourteen "lower echelon" Communist party members. 354 U.S. 298, 300-03, 45 (1957). Similar rulings occurred in *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), *Noto v. United States*, 367 U.S. 290 (1961) and *United States v. Robel*, 389 U.S. 258 (1967). These rulings reflected the growing influence of the marketplace argument: that a democratic government could survive only if its prevailing "truth" was continually questioned by dissident views. This argument became the foundation from which sprang the free speech revolution of the 1960s. Underlying this shift was the realization that political disagreement was vital to a democracy as diverse as America's. See generally *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Hess v. Indiana*, 414 U.S. 105 (1973).

51. Mark Wigfield, *FCC Reports Spike in Complaints About Broadcast Indecency*, DOW JONES NEWSWIRES, Nov. 21, 2003.

52. James Poniewozik, *The Decency Police*, *TIME*, Mar. 28, 2005, at 31.

of sewer.”<sup>53</sup> Moreover, a 2004 study by the Kaiser Family Foundation and the Children’s Digital Media Centers concluded that there has been “an explosion in electronic media marketed at the very youngest children in our society.” The study also confirmed that young people “have become viewing, listening and surfing addicts,” and that eight- to eighteen-year-olds “live media-saturated lives.”<sup>54</sup> A Harvard University study likewise concludes that American children watch television more than they partake in any other activity except sleeping.<sup>55</sup> The average child watches nearly three hours of television a day, in addition to the more than five hours devoted each day to other electronic entertainment.<sup>56</sup>

Even though media entertainers frequently compare any public backlash to their flaunting behavior as oppression of the highest constitutional order, this ploy only diminishes the true and most important role of the First Amendment and its free speech protections. When radio shock jock Howard Stern was fined by the FCC for on-air statements about anal sex and other sexual activities, he accused the government of conducting a “McCarthy-type witch hunt.”<sup>57</sup> Stern compared the FCC fine to “Nazi-era censorship.”<sup>58</sup> A *Los Angeles Times* media critic said that when a Las Vegas audience walked out on singer Linda Ronstadt’s anti-American tirade during a performance “the most fundamental of liberties came under assault.”<sup>59</sup> But as Professor Sunstein notes, most entertainment shows are “not a contribution to democratic deliberation, or even a means of self-expression, but instead a fairly ordinary business decision. . . . for which the First Amendment was designed to provide protection.”<sup>60</sup>

The deluge of entertainment through the mass media has had a crowding-out effect on political speech. One study of network television news, for instance, revealed that in 1988 there was an average of 38 minutes per month of coverage of entertainment stories. But just two years later, that average had

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53. *Id.* at 30.

54. Robert Dodge, *Study: Kids Addicted to Media*, ARGUS LEADER, Mar. 10, 2005, at 4A.

55. Renee Boynton-Jarrett et al., *Impact of Television Viewing Patterns on Fruit and Vegetable Consumption Among Adolescents*, 112 PEDIATRICS 1321, 1321 (2003).

56. Diana West, *All That Trash*, PUBLIC INTEREST, Summer 2004, at 131, 132.

57. Jacques Steinberg, *FCC to Fine Clear Channel \$495,000 For Sex Talk*, N.Y. TIMES, Apr. 9, 2004, at C3.

58. Sarah McBride, *Clear Channel Dumps Stern After Big Fine*, WALL ST. J., Apr. 9, 2004, at B1. As a *New York Times* columnist described the FCC crackdown on indecency, “[t]his is McCarthyism, ‘moral values’ style.” Frank Rich, *Bono’s New Casualty: ‘Private Ryan,’* N.Y. TIMES, November 21, 2004, at AR1.

59. Steven Zak, Op-Ed., *‘Censorship’ Whining*, WASH. TIMES, Aug. 2, 2004, at A17.

60. Sunstein, *supra* note 49, at 293.

almost doubled, to 68 minutes.<sup>61</sup> In a way, the age of abundant media speech has produced its own First Amendment scarcity problem: a scarcity of public attention to the speech of political and social issues on which a democracy must depend.

Not only may the flood of entertainment speech be crowding out political speech, but it also could be causing a public backlash against any kind of controversial speech, including political speech. Since the public has become so desensitized to the constant crusade against censorship by entertainment celebrities, it has grown indifferent to the censorship dangers facing political speech, as illustrated by the relative lack of public outrage to the establishment of “free-speech zones” on university campuses and surrounding political conventions. With the rising public disgust over the prevalence of vile, vulgar and violent entertainment, censorship increasingly becomes more appealing, and this attraction naturally spills over into the area of political speech. Moreover, the exploding volume of speech through the modern media may also be causing a backlash that is spilling over to political speech. For instance, in two political speech cases – *FEC v. Massachusetts Citizens for Life, Inc.*,<sup>62</sup> and *Austin v. Michigan State Chamber of Commerce*<sup>63</sup> – the Court, at least in dicta, suggested that the marketplace of ideas may be regulated so as to temper the domineering voices of a few speakers.

In another political speech case, the Court upheld a Colorado statute creating a “floating buffer zone” prohibiting anyone from coming within eight feet of another person outside of an abortion clinic for the purpose of passing out a leaflet or engaging in oral protest or counseling.<sup>64</sup> Even though recognizing that the speech of the abortion protestors was protected by the First Amendment and that the public sidewalks covered by the statute were “‘quintessential’ public forums for free speech,” the Court nonetheless relied on the “significant difference between state restrictions on a speaker’s right to address a willing audience and those that protect listeners from unwanted communication.”<sup>65</sup> It noted that the protection normally afforded to offensive speech would not always apply when the unwilling audience was unable to avoid the speech.<sup>66</sup>

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61. J. Max Robins, *Nets’ Newscasts Increase Coverage of Entertainment*, VARIETY, July 18, 1990, at 3, 63.

62. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

63. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

64. *Hill v. Colorado*, 530 U.S. 703, 723, 726 (2000).

65. *Id.* at 715-16.

66. In elaborating on the “right . . . to be let alone,” the Court stated that the case law has “repeatedly recognized the interests of unwilling listeners in situations where the ‘degree of captivity makes it impractical for the unwilling viewer . . . to avoid exposure.’” *Id.* at 718. Thus, according to the Court, the rights of the listener to be free of offensive speech “must be placed in the scales with the right of others to communicate.” *Id.*

The dissent in *Hill* argued that “[t]he right to be let alone” was a right that was conferred only as against the government, not as against private protestors.<sup>67</sup> The dissent also asserted that the governmental interest in protecting people from unwanted communications had never before been extended to speech on public sidewalks.<sup>68</sup> Moreover, as the dissent argued, the speech burdens imposed on the protestors were significant.<sup>69</sup> Yet despite the burdens, the Court ruled in favor of the privacy interests of people in a public forum wishing to be shielding from the speech of other individuals. Despite the speech at issue being clearly political speech, the Court still allowed a supposedly content-neutral time, place, and manner regulation to virtually suppress that speech.<sup>70</sup>

### *B. The Prejudice Against Traditional Political Speech*

Perhaps all the cultural focus on the need to protect violent and indecent media speech has somewhat blinded the public, and even the courts, to the status of political speech. Perhaps the high-profile protections given to outrageous entertainment speech fosters the illusion that all speech, even political speech, possesses more than sufficient protections. However, an analysis of the ways in which various First Amendment doctrines are connected with the place or site of the speech, and in turn how the place or site of speech may be related to its content, reveals just how political speech may be insufficiently protected, while non-political speech may be overly protected.

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67. *Id.* at 751 (Scalia, J., dissenting).

68. *Id.* at 753 n.3.

69. *Id.* at 756. The dissent noted that eight feet was not a normal conversational distance, especially when the goal is 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 756-57. The availability of bullhorns and loudspeakers, as the majority proposed, 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.* at 757. As the dissent argued: “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.

70. In *Hill*, the issue of compelling state interest did not arise, since the Court characterized the buffer-zone regulation as a content neutral time, place and manner regulation. *Id.* at 725-26. However, the issue of public safety did play a role in the passage of the law. *Id.* at 713-14. As the Colorado Supreme Court recognized, the law was enacted “in part, because the General Assembly was concerned with the safety of individuals seeking wide-ranging health care services” at the clinics. *Id.* The United States Supreme Court also acknowledged that the states’ interest in protecting the safety of their citizens justified “a special focus on unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests” of the type associated with abortion clinics. *Id.* at 715.



Current First Amendment doctrines actually serve to disadvantage the most valuable of speech – political speech – in a number of ways. First, it results in an overprotection of speech, protecting so many other kinds of speech that end up crowding out political speech from the marketplace of social expression. Second, by protecting the most violent and sexually explicit speech, it gives the illusion that speech in general is overly protected. This in turn results in a backlash that often spills over to political speech. Indeed, according to Steven Heyman, the continued onslaught of media violence and indecency have made Americans less embracing of a vigorous free speech protections.<sup>71</sup> Finally, the regulatory focus on “place,” even though appearing on the surface to be content-neutral, actually exerts a disproportionate restraint on political speech.

Largely because of the war on terror and the heightened concerns of national security, increasing restrictions have been imposed on political protest. These restrictions have been tolerated because they occur under the guise of content-neutral time, place and manner regulations. Yet in reality, these regulations are hardly content-neutral; to the contrary, they appear to have a particularly repressive effect not only on political speech but on a certain kind of political speech: political protest.

At the 2004 Democratic National Convention, protestors were confined to a free-speech cage surrounded by chain-link fences and coiled razor wire.<sup>72</sup> During the 1999 World Trade Organization meetings in Seattle, all protests within a 25-block “restricted zone” were banned.<sup>73</sup> A nearly one-block “bubble” zone shielded New York City Mayor Michael Bloomberg from union

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71. See Steven J. Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 532 (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 anti-war demonstrations, pornography, hate speech, flag burning, abortion counseling, anti-abortion protests, and the National Endowment for the Arts.” *Id.* at 532-33 (footnotes omitted).

72. *Coal. to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 66 (D. Mass. 2004), *aff’d sub nom.* *Black Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004). Four years earlier, at the 2000 Democratic National Convention in Los Angeles, the “free speech” zone kept protestors almost 300 yards from any convention delegate. See *Serv. Employee Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 972 (C.D. Cal. 2000) (enjoining the use of this zone, not because it was designed to restrict protest but because its size was insufficiently tailored to the state’s interest). Additionally, individuals arrested at protests during the 2004 Republican National Convention, not all of whom were protestors, were subjected to unusually thorough procedures that resulted in wait times of over 32 hours before arrestees were permitted to see a judge. During the same period of time, arrestees not associated with the convention protests were subjected to a wait of only an average of 5 hours before coming before a judge. See Jim Dwyer, *Records Show Extra Scrutiny of Detainees in ’04 Protests*, N.Y. TIMES, Feb. 8, 2007, at B3.

73. See *Menotti v. City of Seattle*, 409 F.3d 1113, 1124-26, 1167 (9th Cir. 2005).

protestors at the 2004 Republican National Convention.<sup>74</sup> Outside abortion clinics, speech-free zones in which protestors are prohibited have been enacted and upheld.<sup>75</sup>

All these regulations impacting traditional political speech fall under the category of time-manner-place restrictions. Because on their face these regulations focus only on the place of the speech, they are seen to be content-neutral. However, while one of the most powerful and traditional forms of political protest often occurs in unique and focused physical locations – e.g., outside government buildings and political conventions – indecent and violent speech tends increasingly to occur irrespective of any physical location, emanating instead from the electronic or cyber world of the modern media.<sup>76</sup> Thus, supposedly content-neutral time, manner, and place restrictions end up having a selective effect not only on political speech, but on the speech of political protest. For instance, the “free speech” zones set up by the Secret Service to shield the President are geared not to supporters, who often may be given much closer access to the President, but to protestors, who are kept at a significant distance.<sup>77</sup> In *Coalition to Protest the Democratic National Convention v. City of Boston*, the court upheld the city’s use of a “designated demonstration zone” in which to contain protestors, even though the court admitted that this fenced-in demonstration zone resembled “an internment camp.”<sup>78</sup> Justifying this decision was the court’s finding that the “demonstra-

74. Julia Preston, *Court Backs Police Department in Curbs on Labor Tactics*, N.Y. TIMES, Aug. 26, 2004, at B7.

75. See *Hill v. Colorado*, 530 U.S. 703 (2000). The Court upheld a state law requiring protestors to stay eight feet away from anyone entering or leaving an abortion clinic. *Id.* at 719 (holding this law to be a content-neutral “regulation of the places where some speech may occur”). In *Madsen v. Women’s Health Center*, the Court approved a speech-free “buffer zone” banning all protests within 36 feet of an abortion clinic. 512 U.S. 753, 770 (1994). This regulation essentially banned all anti-abortion protestors, and yet the Court still ruled that, as a time, manner, place restriction it did not violate the First Amendment. *Id.* at 770.

76. 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 government interest, and that they leave open ample alternative channels for communication of the information”).

77. See James Bovard, *Free-Speech Zone: The Administration Quarantines Dissent*, AM. CONSERVATIVE, Dec. 15, 2003. See also 18 U.S.C. § 1752(a)(1)(ii) (2000). (prohibiting entry into any designated “posted, cordoned off, or otherwise restricted area” around the President); *United States v. Bursley*, 416 F.3d 301, 309 (4th Cir. 2005) (sustaining the conviction of protestor who had intruded into the restricted presidential zone). See also Michael Hampson, *Protesting the President: Free Speech Zones and the First Amendment*, 58 RUTGERS L. REV. 245, 256 (2005) (noting examples of how people wishing to protest against the President have been confined to “free speech zones” where neither the President nor the press will see or hear them).

78. 327 F. Supp. 2d 61, 66-68, 74 (D. Mass. 2004).

tion zone” resulted from a content-neutral regulation governing the mere location of speech.<sup>79</sup>

Universities have also set up designated speech zones, under the theory that such zones are content-neutral.<sup>80</sup> As Professor Zick notes, “there is no reason to believe that courts will treat these speech zones as anything other than content-neutral regulations of the place of expression.”<sup>81</sup> However, these free-speech zones tend to be relatively small in comparison to the remainder of the campus that is speech-restricted.<sup>82</sup>

The restrictions on speech allowed by traditional First Amendment theory rely heavily on the physical site of the speech.<sup>83</sup> This “live” approach

79. *Id.* at 74-76 (stating that “given the constraints of time, geography, and safety, I cannot say that the design itself is not narrowly tailored in light of other opportunities for communication available under the larger security plan”). However, these alternative opportunities were not available in physical “places” for the protestors to gather, but in conveying their messages through the mass media. *See Black Tea Soc’y v. City of Boston*, 378 F.3d 8, 14 (1st Cir. 2004).

80. *See, e.g., Roberts v. Haragan*, 346 F. Supp. 2d 853, 864 (N.D. Tex. 2004) (ruling that a university had legitimate safety concerns in restricting speech to certain areas). Generally, the zoning of public areas into areas in which speech may not occur has been upheld by the courts. *See, e.g., ISKCON Miami, Inc. v. Metro. Dade County*, 147 F.3d 1282, 1290 (11th Cir. 1998) (approving the designation of eight “First Amendment zones” for literature distribution in an airport); *United States v. Lowe*, 654 F.2d 562, 567 (9th Cir. 1981) (upholding a 250-foot speech-free zone surrounding a submarine base); *Grider v. Abramson*, 180 F.3d 739, 750-51 (6th Cir. 1999) (approving a buffer zone surrounding a courthouse). This type of free-speech zoning is measured by an intermediate level of scrutiny appropriate to content-regulations, but this scrutiny is a rather minimal one. *See Susan Williams, Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 644 (1991) (likening the intermediate scrutiny to the “rational basis standard” of review).

81. Zick, *supra* note 44, at 603-04.

82. *See HARVEY A. SIVERGLATE ET AL., FIRE’S GUIDE TO FREE SPEECH ON CAMPUS* 142-43 (2005) (noting that free speech zones account only for one percent of West Virginia University).

83. For a comprehensive analysis of the Court’s “place” focus in its First Amendment jurisprudence, see generally Zick, *supra* note 44. According to Professor Zick, the Court has never recognized the “power of place to facilitate First Amendment freedoms.” *Id.* at 613. And, according to Zick, because of the relationship between the place of speech and the content of speech, not all place regulations are content-neutral in their effect. “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, within a First Amendment analysis, place is not “merely a form of property,” it is also connected to and facilitates the expression of certain kinds of speech. *Id.* at 613, 617. “Each type of place raises discrete speech issues, touches upon different expressive traditions, and constitutes a distinct part of our expressive topography.” *Id.* at 618. Furthermore, while place used to be the site of speakers, now the only identifiable place is the site of listeners.

contemplates the regulation of speech at the place where the speaker is located, putting primary emphasis on the needs or desires of the audience and community surrounding the speaker. This approach – implicitly recognizing the relationship between the speaker, the speech and the immediate physical surroundings – came about because during the nearly century and a half preceding and following adoption of the First Amendment there was one primary place where dissident or controversial speech took place: 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, such as a tax collector’s office. And because this public square was the primary venue for socially disruptive speech, constitutional doctrines developed so as to allow the government to control or minimize the disruption. At the same time, to make these time-manner-place restrictions palatable, the courts had to confer high content protections on speech, because if speakers were denied a voice in the public square they really had no other venue through which to speak. However, the question now arises as to whether a “place” focus is even appropriate in an electronic media world, where the vast majority of the public speech has no real physical location and needs no relationship with a particular physical location so as to convey its message. While it is primarily political protest that occurs in connection with specific places – e.g., at the site of political events – media entertainment has no connection to place, and hence goes unregulated by time, place and manner restrictions.

The public forum doctrine can also be used to prohibit speech from occurring within those venues designated as non-public forums. But again, most of the speech that needs to occur within a certain physical space is political protest. Moreover, the rationale behind the public forum doctrine holds that, because there are so many other places or venues for speech, the government can restrict access to those places it designates as non-public. This was generally the reasoning of the First Circuit when it stated that protestors at the Democratic National Convention could resort to mass media coverage as an alternative to the physical act of protesting at the convention.<sup>84</sup> Of course, even if the protestors did opt for the mass media route, there would be no guarantee as to how the media would portray or edit their message. Nor would there be any guarantee that their intended audience – the convention delegates – would be watching television at the exact time the protestors’ message was aired. Nor would there be any guarantee that the opportunity to shout and chant for fifteen seconds to a television camera would be sufficiently appealing to attract a sizeable crowd of protestors.<sup>85</sup>

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84. See *Black Tea Soc’y*, 378 F.3d at 14 (arguing that, given the option of expressing their protest messages through the mass media, “viable alternative means existed to enable protestors to communicate their messages to the delegates”).

85. Forcing convention protestors to resort to the mass media to convey their messages could well violate the First Amendment freedom of association. See U.S. CONST. amend. I; see also 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 196

Although the public forum doctrine can be used to limit the expression of political speech, it has effectively no impact on media entertainment speech, which is far more plentiful and far less vital to a democracy than political speech. Indeed, physical space is much different than “space” in the mass media. In a world of 1,000 television channels, there are virtually no constraints on electronic “space.” But this is not so with physical space, which is much more limited. As recognized by Professor Zick, “[t]he shrinking and segmenting of public space that is open to expression undermines many of the foundational premises of freedom of expression.”<sup>86</sup> Thus, if a particular venue is denied to political protestors, there are significantly fewer alternatives in terms of the kind of message they can express; whereas if one television channel is denied to media violence and indecency, there are many similar channels through which that speech can travel.

Another way in which place-oriented First Amendment doctrines favor media entertainment is in the operation of the captive audience doctrine. This doctrine, which strives to relieve listeners from being held captive to unwanted speech, is defined only in terms of physical place, which is not where media violence and indecency occur.

The primary place to which the captive audience doctrine has been applied is an individual’s home.<sup>87</sup> Again, however, this doctrine only tends to restrict speech that comes in some physical form, such as an uninvited speaker at the door, a demonstration outside one’s house, or the delivery of unwanted mail. According to the Court, “home is one place where a man ought to be able to shut himself up in his own ideas if he desires.”<sup>88</sup> In *Rowan v. United States Post Office*, the Court upheld a statute that permitted individuals, with the assistance of the postal service, to prevent the delivery of certain offensive mail.<sup>89</sup> Although conceding that the statute impeded the flow of ideas, the Court held that this impediment was subordinate to the right of people in their homes “to be free from sights, sounds, and tangible matter we do not want.”<sup>90</sup>

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(Phillips Bradley trans., Vintage Books 1990) (1840) (stating that the “most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them”).

86. Zick, *supra* note 44, at 647 (arguing that “[p]ublic space is a rapidly diminishing resource,” especially the space that qualifies for “the so-called public forums”).

87. See *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (describing the home as a hallowed sanctuary, where individuals are entitled to respite from the bombardments of social life); *United States v. On Lee*, 193 F. 2d 306, 315-16 (2d Cir. 1951) (a “sane, decent civilized society must provide some . . . oasis . . . some insulated enclosure, some enclave, some inviolate place—which is a man’s castle”).

88. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619 (1976).

89. 397 U.S. 728, 736 (1970).

90. *Id.* (finding that the law preserved individual autonomy by granting people some control over their exposure to offensive materials).

Expanding on the rights of home-dwellers to shield themselves from unwanted speech, the Supreme Court in a case involving the permissibility of restrictions on picketing in residential neighborhoods ruled that protestors had “no right to force speech into the home of an unwilling listener.”<sup>91</sup> Thus, under the captive audience doctrine, the right to free speech does not extend to speakers invading the privacy of residents who are essentially captives in their homes.

In certain situations, the courts have upheld home censorship regulations even when those regulations affect speech flowing to the mass public rather than just to specified individuals. Examples of such regulations include those that protect communities from auditory or visual clutter.<sup>92</sup> In *Kovacs v. Cooper*, the Court upheld an ordinance prohibiting the use of sound trucks, stating that citizens in their homes should be protected from the invasion of loud and raucous noises beyond their control.<sup>93</sup> 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.”<sup>94</sup> 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 many persons might actually want to receive the information. The Court found it sufficient that merely “some” in the community found the sound trucks objectionable.<sup>95</sup> Likewise, in a later case, the Court sustained a regulation designed to prevent the disturbance of nearby residents by requiring that music performers in a Central Park band shell use a sound system provided by the city.<sup>96</sup>

Although the courts have been most sensitive to listener rights inside the home, they have also recognized the rights of captive audiences outside the home to be free of unwanted speech. As Professor Balkin argues, the captive audience doctrine should not focus solely on the home, but “should regulate particular situations where people are particularly subject to [unwanted speech].”<sup>97</sup> In *Lehman v. City of Shaker Heights*, finding that streetcar riders were a captive audience, the Court upheld restrictions on material that could be played over speaker systems in public transit vehicles.<sup>98</sup> As the Court recognized, individuals riding in a moving vehicle for an extended period of

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91. *Frisby*, 487 U.S. at 485.

92. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507 (1981).

93. *See* 336 U.S. 77 (1949).

94. *Id.* at 86-87.

95. *Id.* at 81.

96. *See Ward*, 491 U.S. 781.

97. J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2312 (1999).

98. 418 U.S. 298 (1974).

time are unable to avoid objectionable speech.<sup>99</sup> In a more recent decision relying upon *Lehman* and upholding the authority of a public transit commission to ban advertisements for the legalization of marijuana, the court stated that “[i]t would be unacceptable” to subject “captive audiences of commuters, tourists, and schoolchildren to all sorts of graphic advertisements . . . that could not be regulated for content.”<sup>100</sup>

The captive audience doctrine, however, has never been applied to violent and indecent entertainment programming intruding into the home through electronic media.<sup>101</sup> The rationale is that individuals, and primarily parents, have the opportunity to avert their and their children’s eyes, from such programming. This is the argument that has often negated the application of the captive audience doctrine to speech occurring outside the home: that the unwilling listener or viewer could fairly easily avert their eyes from the offensive speech. If a drive-in movie theater was playing a movie with offensive scenes in it, one could avoid driving by it during the two hours that the movie was playing. If a speaker in a town park was yelling out offensive speech, one could cross the street and walk the other way. But it is quite another matter with, for example, the Internet. If it is as easy as the Court in *United States v. 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 con-

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99. See, e.g., *Young v. Am. Mini-Theaters*, 427 U.S. 50, 63 (1976) (finding that the neighborhood constituted a captive audience); *United States v. Kokinda*, 497 U.S. 720 (1990) (upholding a postal service regulation that prohibited political and commercial solicitation on a sidewalk near a post office entrance).

100. *Change the Climate, Inc. v. Mass. Bay Transp. Auth.*, 214 F Supp. 2d 125, 133 (D. Mass. 2002).

101. The doctrine, however, was arguably applied in a limited fashion in *Bland v. Fessler*, where the court upheld a restriction on telemarketers’ use of automatic dialing and announcing devices (ADADs) unless a live operator first identified the calling party and obtained the called party’s consent to listen to the prerecorded message. 88 F.3d 729, 731 (9th Cir. 1996). 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.” *Id.* at 733. The court then held that the regulation at issue did not amount to an absolute ban on speech, since the use of ADADs were permitted so long as the called party consented to the message (although it is difficult to imagine that many people would ever so consent). *Id.* at 735-36. 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. *Id.* at 736. 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, 210-11 (1975). 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.

tent-block, and if the Internet is indeed an integral part of contemporary life, then is it even feasible to expect people to avert their eyes from all the sexually explicit speech that pops up on the Internet?<sup>102</sup> Indeed, it is so much easier to avoid an offensive speaker in the park than it is to ensure that one's children avoid offensive speech over mass media.

Because it can be accessed anywhere, the Internet has essentially erased the boundaries between public and private spaces.<sup>103</sup> Therefore, the captive audience doctrine should not focus on particular spaces like the home; rather, it should regulate "particular situations where people are particularly subject to" unwanted speech.<sup>104</sup> Captivity in this sense is "about the right not to have to flee, rather than the inability to flee."<sup>105</sup> As Professor Nachbar notes, not only do very few parents have the time to supervise all the time their children spend on the Internet, but "unless the parent were, for example, to open each . . . [w]eb page with the child looking away and only allow the child to view

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102. In *United States v. American Library Ass'n*, the Court was presented with a constitutional challenge to the Children's Internet Protection Act ("CIPA"), which required all public libraries receiving federal assistance for Internet access to install filtering software that would block pornographic material from appearing on any computer terminal. 539 U.S. 194 (2003). Facing the Court was a host of concerns, including the availability and amount of pornographic material on the Internet, the ability of children to access that pornography, the interest of parents in shielding children from Internet pornography, and the difficulties in doing so without some outside assistance. *Id.* In the years leading up to the *American Library Ass'n* decision, the use of filtering software in libraries had become "the biggest free speech controversy since" the Communications Decency Act. Julia M. Tedjeske, *Mainstream Loudoun and Access to Internet Resources in Public Libraries*, 60 U. PITT. L. REV. 1265, 1265 (1999). The Court recognized that "there is 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." *American Library Ass'n*, 539 U.S. at 200. Furthermore, according to the Court, library patrons would "expose others to pornographic images by leaving them displayed on Internet terminals or printed at library printers." *Id.* By upholding the filtering requirement, the *American Library Ass'n* Court saw the librarian more as an editor and selector than as a provider of unlimited information: "The librarian's responsibility . . . is to separate out the gold from the garbage, not to preserve everything." *Id.* at 204 (omission in original). The Court did not see librarians as serving a recipient's right to view everything existing within the marketplace of information. *Id.* at 204. "[B]ecause of the vast quantity of material on the Internet, and the rapid pace at which it changes, libraries cannot possibly segregate, item by item, all the Internet material that is appropriate for inclusion from all that is not." *Id.* at 208.

103. See Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1675 (1998); Balkin, *supra* note 97, at 2311.

104. Balkin, *supra* note 97, at 2312.

105. *Id.*



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.”<sup>106</sup>

Accessing the Internet has become a basic function of everyday life, as much as having to commute to work on city buses or having to walk past an adult theater on the way to school. Therefore, children at a computer screen could be seen as a captive audience, being where they have every right to be, where they have to be in terms of their educational development, and where their parents really have no way of effectively shielding them from unwanted or offensive images or material. In *Bethel School District No. 403 v. Fraser*, the Court recognized the state’s legitimate desire “to protect children – especially in a captive audience – from exposure to sexually explicit, indecent, or lewd speech.”<sup>107</sup>

Even though electronic media pose the greatest dangers to minors, in terms of exposure to violent and sexually explicit material, this venue is far more difficult to control than are the “physical-place” suppliers of such material. For instance, adult theaters and bookstores can restrict entry to anyone without a valid ID, and stores selling adult magazines can stock those magazines behind the counter or place them in sealed plastic bags, prohibiting access to children.<sup>108</sup> In connection with the sales of sexually explicit materials from retail locations, states have followed a two-pronged approach: the use of zoning laws to regulate the location of “adult-oriented establishments”; and the requirement of age identification to enter those establishments.<sup>109</sup> However, similar methods of regulating minor’s access to indecency are virtually nonexistent with electronic media,<sup>110</sup> and end up allowing children access to

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106. 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).

107. 478 U.S. 675, 684 (1986) (upholding a school’s restriction on an indecent speech at a school assembly).

108. See, e.g., *Crawford v. Lungren*, 96 F.3d 380, 382 (9th Cir. 1996) (finding no constitutional violation with a statute, seeking to prevent exposing minors to indecent material, that banned the sale of “harmful matter” from unsupervised, sidewalk vending machines, unless identification cards were required). In *American Booksellers Ass’n v. Webb*, a statute was upheld that banned the display in any public place where minors might be present of materials “harmful to minors.” 919 F.2d 1493 (11th Cir. 1990).

109. Elizabeth M. Shea, *The Children’s Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEG. J. 167, 172-73 (1999).

110. Glenn E. Simon, *Cyberporn and Censorship: Constitutional Barriers to Preventing Access to Internet Pornography by Minors*, 88 J. CRIM. LAW & CRIMINOLOGY 1015, 1043 (1998). Even though some adult-material Web sites charge for access to their sites, children can get a healthy dose of the material before they are ever required to input a credit card number. *Id.*

material that state pornography laws prohibit them from purchasing at retail stores.<sup>111</sup>

Not only is mass media entertainment programming more in need of some type of “captive audience” regulation, but it is also more conducive to such regulation than is place-focused political protest. Unlike the protestors at the 2004 Democratic National Convention, whose confinement in a guarded, free-speech pen far away from the convention delegates was justified by the argument that the protestors had other ways of communicating to the delegates (e.g., through possible television coverage), speech that originates from the electronic mass media has a wealth of different venues through which to reach an audience. For instance, the number of broadcast television stations the average U.S. household receives has more than tripled over the last twenty years.<sup>112</sup> Moreover, cable and direct broadcast satellite television can provide hundreds of additional channels. Then there are personal video recorders, wireless local area networks, and other emerging spread-spectrum technologies, as well as packet-switched networks, all of which further increase the sources and channels of electronic media speech.

According to the Court, alternative venues need only be theoretically available to the speaker to be considered “ample.”<sup>113</sup> Indeed, as the “adequate alternative channels of communication” test is applied, “it is the rare case that

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111. In *Action for Children's Television v. FCC*, the court emphasized the impossibility of real parental control over what television broadcasting their children saw, and reaffirmed that the government “has an independent and compelling interest in preventing minors from being exposed to indecent broadcasts.” 58 F.3d 654, 663 (D.C. Cir. 1995) (en banc). This same analysis would also apply to the ability to supervise computer use. In fact, given the speed with which one can access and exit Internet sites, it is most likely more difficult to supervise computer use than television viewing.

A captive audience doctrine covering electronic media, and applying strictly to unwanted entertainment speech, might be modeled after the decision in *Pacifica*, where the Court upheld FCC rules restricting the broadcast of indecent material to hours when children would less likely be in the audience. *FCC v. Pacifica Found., Inc.*, 438 U.S. 726 (1978). In his plurality opinion in *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 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. 518 U.S. 727, 744-45 (1996). In terms of intrusiveness and pervasiveness, Breyer found little difference between cable and broadcast television. 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. *Id.* at 755.

112. Yoo, *supra* note 3, at 279.

113. Zick, *supra* note 44, at 640.

fails this particular element of the time, place and manner test.”<sup>114</sup> This is because in many cases “a regulation of place will not wholly prevent a speaker from communicating elsewhere.”<sup>115</sup> But this is far truer for electronic media speech than for political protest at specific events or locations. With electronic media, the avenues of communication have exploded; whereas for political protest, the available physical spaces has shrunk.

#### IV. A NEW FIRST AMENDMENT MODEL

##### *A. Introducing the Parameters*

The proposed First Amendment model set forth in this Article confers the highest constitutional protections only upon political speech. A lower protection is envisioned for certain non-political speech that meets a four-part test. First, the speech must be that to which children would likely be exposed. Second, the speech must be of a type from which the government has a legitimate interest in shielding children, such as graphic violence and sexually explicit programming. Third, the speech must be pervasive and not easily avoided by unwilling listeners: speech that unwilling recipients need some assistance in avoiding. And fourth, the speech must be available through several venues or channels, so that the regulation of one does not cut-off its supply to willing adults.

Under this proposed model, regulations of non-political speech meeting the four-part test stated above would be given the intermediate scrutiny now accorded to content-neutral time, place and manner regulations. In *Ward v. Rock Against Racism*, the Court stated that this level of scrutiny required speech regulations be narrowly tailored to serve a significant governmental interest and that alternative channels of communication remain open.<sup>116</sup> Intermediate scrutiny was also used to evaluate the “floating bubble” law at issue in *Hill v. Colorado*.<sup>117</sup>

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114. *Id.* at 645; see also *Blair v. City of Evansville*, 361 F. Supp. 2d 846, 859 (S.D. Ind. 2005).

115. *Zick*, *supra* note 44, at 645.

116. *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 802 (1989). This test reflects an intermediate level of scrutiny, known as the *Ward/O'Brien* balancing test. See *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

117. Employing a balancing test, the Court found that the regulations in *Hill* were narrowly tailored to serve significant state interests in protecting listeners from unwanted speech. 530 U.S. 703, 725-30 (2000). The Court further found that the regulations did not ban speech altogether, but only regulated the places where it could occur. *Id.* at 731. Based on these findings, the Court approved the floating bubble law which enabled clinic patients to avoid the speech of abortion protestors. *Id.* at 735. For more information on this distinction, see *infra* notes 210-23 and accompanying text.

The political/non-political speech distinction employed here, and further discussed in Part IV below, relies on the theories of Alexander Meiklejohn. According to Meiklejohn, only political speech – speech that is essential for self-government – should receive the highest constitutional protections.<sup>118</sup> Meiklejohn’s self-governance theory seeks to base First Amendment freedoms on a rationale that transcends individual self-fulfillment, which fails to provide an adequate foundation for First Amendment freedoms since it fails to distinguish speech in any lasting, constitutional sense.<sup>119</sup> Because individuals may experience self-fulfillment in any number of ways, *e.g.*, participating in an athletic event, traveling to new places, sharing the friendship of another, speech becomes no different than many other kinds of human activities.

One of the benefits of making this political-nonpolitical speech distinction is a simplification of the current, often ambiguous, multi-layered hierarchy of speech, which contains various levels of “low value” speech. As it stands now, obscenity, commercial speech, broadcast indecency and “fighting words” all receive different but lesser degrees of constitutional protection. Even though courts have recognized that not all speech has the same constitutional importance, the snag in this recognition is how the hierarchy of speech will be distinguished.<sup>120</sup> This is a problem largely remedied by a single dividing line between only two different types of speech: political and non-political.

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118. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) [hereinafter *FREE SPEECH*]; ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965) [hereinafter *POLITICAL FREEDOM*]. Robert Post proposes a variation on Meiklejohn’s theory, arguing that a prime function of free speech is democratic legitimization; thus, laws that prohibit potential speakers from engaging in the debate through which public policy is formed “threaten to alienate citizens from their government.” Robert Post, *The Constitutional Status of Commercial Speech*, 48 *UCLA L. REV.* 1, 14-15 (2000).

119. 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.” C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989). 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. See Steven Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 *B.U. L. REV.* 1275, 1326 (1998). The Court has also stated that the ability to avoid unwanted communications is a vital component of “individual autonomy.” *Rowan v. United States Post Office Dep’t*, 397 U.S. 728, 736 (1970).

120. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).

### B. *The Availability of Alternative Communication Venues*

With any regulation of non-political speech, the courts must ensure that those regulations not amount to a complete suppression of the subject speech.<sup>121</sup> Such a ban can be avoided if that speech remains accessible through alternative avenues or formats.

Speech portraying sex, violence and vulgarity is in great supply. And not only is it in abundant supply, but it is accessible to the point of being unavoidable. Thus, restrictions on indecent 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 being played at certain times on broadcast radio, they will still be available on CDs, music videos, special television channels, satellite radio, and at concerts. Because of the proliferation of so many different communications media, non-political speech restrictions should be viewed in terms of the whole media spectrum. Consequently, a restriction of non-political speech in one medium may be permissible if that speech remains accessible through other media.

Prior to the explosive 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. But now, that is not the case. Therefore, when addressing restrictions placed on a particular kind of output or imagery of one medium, courts should look to the media as a whole, to see if that one restriction is really an unconstitutional infringement on speech.<sup>122</sup>

The availability of alternative sources of regulated speech played an important role in *Action for Children's Television v. FCC*, where the D.C. Circuit upheld the "safe harbor" provisions of the Public Telecommunications Act of 1992 permitting indecent broadcasts only between 10 p.m. and 6 a.m.<sup>123</sup> The court concluded that the time-channeling rule for indecent broad-

121. Courts have implicitly approved this approach by upholding statutes that restrict speech in one venue while leaving open alternative channels of communications. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988); *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). In *Capital Broadcasting Company v. Mitchell*, the court held that a statute restricting advertising in certain media did not violate the First Amendment, since advertising in other media was still available. *Capitol Broadcasting Co. v. Mitchell*, 333 F. Supp. 582, 584 (D.D.C. 1971).

122. Indeed, courts have long distinguished between laws that suppress ideas and laws that only suppress particular expressions of those ideas. *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").

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

casts 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.”<sup>124</sup>

A constitutional model that recognizes the reality of the modern mass media would look, when assessing the constitutionality of any restrictions on non-political speech, at the media marketplace as a whole, with all media considered together, to see if a restriction in one venue causes a complete ban on the speech. The issue is to look at all mediums together regarding the impact on speech, not at just each medium separately, and not as if each single medium has to carry a complete supply of speech, as if no other medium exists.<sup>125</sup> Although the public may once have gotten its speech through just one or two mediums, back when First Amendment doctrines took their modern shape, now there are many mediums. Indeed, there are so many media venues for non-political entertainment speech that such expression could easily withstand some kind of regulation.<sup>126</sup>

Electronic media venues are much more plentiful and accessible than are physical speech venues. Therefore, if the latter can be regulated, certainly the former could also be. In a world of 500 digital television channels, twenty-four hour cable, and an Internet on which information-carriage increased ten-fold from just 1997 to 2000,<sup>127</sup> the problem is not too little speech, but too much. In terms of the kind of speech needed for an informed self-government, there is especially too much of the “low value” kind of speech.<sup>128</sup> According to a recent Kaiser Family Foundation study, one out of every seven television programs, excluding sporting events and children’s shows, contains “at least one scene in which intercourse is depicted or strongly implied.”<sup>129</sup> From 1998 to 2005, the number of television scenes

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

125. Justice Kennedy recognizes this when he argues that the “unique characteristics” and “distinct attributes” of “each mode of expression” should guide First Amendment analysis. *Ashcroft v. ACLU*, 535 U.S. 564, 594-95 (2002) (Kennedy, J., concurring). This mirrors *Red Lion*’s ruling 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).

126. Indeed, if a particular kind of non-political media speech is pervasive, so as to meet the four-part test set out above, then by definition there would have to be an array of alternative venues for that speech.

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

128. EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES, & POLICY ARGUMENTS* 114-17 (2001). For a discussion of low value speech, see generally Jeffrey M. Shaman, *The Theory of Low Value Speech*, 48 SMU L. REV. 297 (1995).

129. HENRY J. KAISER FAMILY FOUNDATION, *SEX ON TV 3: EXECUTIVE SUMMARY* 7 (2003), available at <http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=14278>.

with sexual content increased by 96 percent.<sup>130</sup> In recent years, with sexually exploitive reality shows becoming ever more prominent, public complaints to the FCC about indecent programming have soared.<sup>131</sup> The number of complaints to the FCC rose to more than 1.4 million in 2004.<sup>132</sup> And in just the first six months of 2005, the number of television and radio shows drawing complaints was more than 500, compared with 314 for all of 2004.<sup>133</sup>

The Internet contains an even more plentiful supply of pornography, violence, vulgarity and hate speech, which is a particularly worrisome problem, since “[n]inety percent of children between the ages of five and seventeen . . . now use computers.”<sup>134</sup> Almost 70 percent of the current traffic on the Internet is adult-oriented material,<sup>135</sup> and approximately 200 new pornographic Web sites are created each day.<sup>136</sup> Moreover, online pornography cannot be neatly cordoned off from where children can gain access to it.<sup>137</sup>

Crucial to the Court’s holding in *American Library Ass’n* was the finding that children could easily and unintentionally be exposed to sexually explicit material on the Internet.<sup>138</sup> In addition, national surveys showed that a quarter of all school children had inadvertently downloaded pornography while at a public library.<sup>139</sup> According to studies, adolescents between the ages of 12 and 17 are one of the largest consumers of adult-oriented material on the Internet.<sup>140</sup>

### *C. Balancing the Burdens Involved with Non-Political Speech*

A unified view of the media marketplace, as set forth above, conforms with the reality of how listeners and viewers access speech. For instance, to most viewers there is no difference between cable and broadcast; they are just

130. TIME, Nov. 21, 2005, at 24.

131. *FCC Chief: TV Gets Too Racy*, CINCINNATI POST, Nov. 22, 2002, at A2.

132. Stephen Labaton, *Knowing Indecency Wherever He Sees It*, N.Y. TIMES, Mar. 28, 2005, at C1.

133. Amy Schatz, *Why Indecency, Once Hot at FCC, Cooled*, WALL ST. J., Nov. 16, 2005, at B1.

134. 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, 143 (2003).

135. Elizabeth M. Shea, *The Children’s Internet Protection Act of 1999: Is Internet Filtering Software the Answer?*, 24 SETON HALL LEGIS. J. 167, 174 (1999).

136. *Id.*

137. Goldstein, *supra* note 134, at 144.

138. *American Library Ass’n v. FCC*, 539 U.S. 194, 194 (2003).

139. 144 CONG. REC. S8611 (daily ed. July 21, 1998) (statement of Sen. Murray).

140. Shea, *supra* note 135, at 184. 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. *Id.* at 178-79.

channels on a television set. Consequently, the only standard that should be used to craft constitutional doctrines is not the technological features of the individual medium, but the ability of viewers to exert control over the content to which they are exposed.<sup>141</sup> As media speech continues to proliferate and becomes ever more pervasive, First Amendment regulatory models should focus on listener control over non-political offensive speech, rather than on increasingly obsolete technological distinctions between the different media venues. Instead of basing First Amendment doctrines on the pervasiveness and intrusiveness of a single medium, the courts should look to the pervasiveness and intrusiveness of the content.<sup>142</sup> Given the array of venues through which media entertainment speech is now available, First Amendment doctrines should reconsider whether all the burdens of avoiding minors' exposure to harmful and offensive speech should be placed on the parents.

Current First Amendment analysis considers all the possible burdens that any governmental regulation might place on the access to or delivery of speech. With respect to listeners who wish to avoid certain offensive speech, however, the courts require that they bear the full burden of "averting their eyes or ears,"<sup>143</sup> regardless of the weight or cost of that burden. In *United States v. American Library Ass'n*, the Supreme Court tried to effectuate a more balanced placement of burdens.<sup>144</sup> Although the opponents of the filtering law argued that some patrons might be too embarrassed to ask a librarian to unblock certain sites, the Court ruled that "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."<sup>145</sup> Thus, in *American Library Ass'n*, the goal of protecting

141. The classic argument against such media regulation, that the user has ultimate control regarding exposure, could be applied here. However, the proposed theory recognizes the pervasiveness of media, as articulated in *Pacifica*. Given this pervasiveness and the burdens it causes to those who wish to avoid it, this theory looks at relative burdens: the burdens on those who wish to avoid unwanted speech vs. the burdens on those who wish to access certain regulated speech.

142. As the Supreme Court has recognized, broadcast and cable programming exert a uniquely pervasive presence in the lives of American children. See *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 744-45 (1996). 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." Nachbar, *supra* note 106, at 218 (footnote omitted).

143. See *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) (striking down an ordinance prohibiting drive-in movie theaters from exhibiting nudity and holding that the burden falls upon the unwilling viewer to "avert[] (his) eyes"); *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 request affirmatively its delivery (or opt-in)); *Boler v. Youngs Drug Products Corp.*, 463 U.S. 60, 61 (1983) (holding that the federal government could not ban the unsolicited mailing of condom ads – a law which required opt-in).

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

145. *Id.* at 209.



children from unwanted speech overshadowed the small burden on adults who could still receive access to restricted content with just a request to the librarian.

Exemplifying the gross imbalance of burdens currently being allocated between speakers and potential recipients of non-political media entertainment is the Court's decisions in *United States v. Playboy Entertainment Group*.<sup>146</sup> *Playboy* involved a challenge to a provision in the Telecommunications Act of 1996 requiring cable channels "primarily dedicated to sexually-oriented programming" to either "fully scramble or otherwise fully block" their 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.<sup>147</sup> Long before the enactment of this provision, cable operators used signal scrambling to limit programming access to paying customers; however, since this scrambling was imprecise and often led to signal bleed, the time-channeling regulation was intended to shield children from hearing or seeing images resulting from such signal bleed. 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.

In reaching its decision, the *Playboy* Court more or less assumed that a less restrictive alternative was available to parents who wished to keep their children from watching indecent programming.<sup>148</sup> This alternative required that the objecting parent request her cable operator to block any channel she did not wish to receive.<sup>149</sup> For this alternative to work, however, the cable operator would have to provide "adequate notice" to their subscribers that certain channels would broadcast sexually-oriented programming, that signal bleed may occur, that children might then see portions of the programming, and that parents should contact the cable operator to request a channel blocking device.<sup>150</sup> This notice, apparently, would be provided as an insert in the monthly cable bills.

Such a solution does not present a reasonable and workable alternative. This was the point made in dissent by Justice Breyer, who focused particularly on the issue of relative burdens. First, Justice Breyer noted that the law in question placed only a burden on adult programmers, not a ban. 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."<sup>151</sup> Second, he observed that the law applies only to channels that "broadcast 'virtually 100%

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146. 529 U.S. 803 (2000).

147. *Id.* at 806-07.

148. *Id.* at 809-10, 816.

149. *Id.* at 809-10.

150. *Id.*

151. *Id.* at 845.

sexually explicit material.”<sup>152</sup> And third, he recognized that because of signal bleed approximately 29 million children were exposed each year to sexually explicit programming. According to Justice Breyer, where over 28 million children have no parents at home after school, and where children may spend afternoons and evenings watching television outside of the home with friends, the time-channeling law offered “independent protection for a large number of families.”<sup>153</sup> Given the compelling interest of child protection at issue, Justice Breyer concluded that the majority’s proposed alternative was not at all an effective one.<sup>154</sup> In support of this conclusion, he cited evidence reflecting all the problems people had experienced in trying to get their cable operator to block certain channels;<sup>155</sup> problems that come as no surprise to anyone who has ever tried to get their cable company to fix something.

#### *D. Harmful Speech and the Protection of Children*

Almost every attempted regulation of violent or indecent media speech stems from the goal of protecting children.<sup>156</sup> Yet even though the courts have gone to great lengths to carve out special constitutional protections for children,<sup>157</sup> the concern with shielding minors from indecent speech often erodes when it comes in conflict with the rights of adults to obtain burden-free speech. Indeed, few measures shielding minors from indecent speech are upheld if they have any restraining effect on the ability of adults to access such speech.<sup>158</sup> Consequently, the child protection interest frequently loses out to the idea that any burden on speech, in any form, is the equivalent of an unconstitutional infringement.

Notwithstanding its frequent defeat to the free speech rights of adults, child protection interests are underlaid with strong policy and legal supports. In *Bellotti v. Baird*, Justice Powell articulated the reasons for why individual rights should be modified when child-protection interests are at issue: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-

152. *Id.* at 839.

153. *Id.* at 842.

154. *Id.* at 841.

155. *Id.* at 843-44.

156. There can also be “adult” purposes behind such regulations, including preventing sex or pornography addiction, family break-up, and child pornography and abuse. *See generally* PAMELA PAUL, *PORNIFIED: HOW PORNOGRAPHY IS TRANSFORMING OUR LIVES, OUR RELATIONSHIPS, AND OUR FAMILIES* (2005).

157. *See New York v. Ferber*, 485 U.S. 747, 757 (1982); *Ginsberg v. New York*, 390 U.S. 629, 641-43 (1968) (upholding requirements that restricted the distribution even of printed matter to children).

158. *See Butler v. Michigan*, 352 U.S. 380, 383 (1957) (opining that the limits on child protection restrictions have always been that they must not reduce adults to reading “only what is fit for children”).

rearing.”<sup>159</sup> Moreover, as Kevin Saunders argues, child-protection censorship does not actually contradict the First Amendment’s role in promoting democratic processes, since children are not participants in this process anyway.<sup>160</sup>

In recognizing that society has a strong interest in enabling parents to raise their children according to their personal beliefs, courts have upheld laws prohibiting the distribution of pornographic materials to children under a particular age, preventing children from obtaining abortions without parental notification, and precluding persons under a certain age from purchasing alcohol and cigarettes.<sup>161</sup> The Supreme Court has specifically ruled that government has an interest in facilitating parental control over what their children see and hear.<sup>162</sup> This interest seeks to empower parents’ rights to control the communications environment of their children and to direct their children’s education as they see fit.<sup>163</sup>

Aside from this interest in empowering parental child-rearing, 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.<sup>164</sup> As the Supreme Court has acknowledged, a democratic government requires “the healthy, well-rounded growth of young people into full

159. 443 U.S. 622, 634, 635 (1979) (explaining that children lack the “experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them” (footnote omitted)). The government has an interest in helping parents fulfill their child-raising duties – an interest that can be served by restricting children from materials their parents do not want them to see. See *Ginsberg*, 390 U.S. at 639.

160. See KEVIN SAUNDERS, *SAVING OUR CHILDREN FROM THE FIRST AMENDMENT* 21-22 (2003) (arguing that the “importance of free speech to self-government is that those who are to make the decisions have all the information and will be able to convince each other of the wisest course[, but c]hildren are not among those who make the decisions . . .”).

161. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987); *State v. Trudell*, 1998 WL 213517, \*1 (Wash. Ct. App. 1998). Because of the importance of the child-rearing process, the Constitutional demands of free speech must be “applied with sensitivity . . . to the special needs of parents and children.” *Bellotti*, 443 U.S. at 634.

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

163. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). One counterargument, that parents should ultimately bear the burden to avoid the exposure of their children to unwanted content, does not provide an answer to the conundrum provided by the ubiquitous pervasiveness of media. Instead, this theory attempts to equalize the ability to avoid and access certain speech. Indeed, even though it gives assistance to those parents trying to avoid undesired speech, it still requires them to take steps to do so. See *infra* notes 194-196 and accompanying text.

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

maturity as citizens, with all that implies.”<sup>165</sup> This includes the inculcation of certain civic values that in turn will mold individual character so as to instill a sense of public duty.<sup>166</sup> And one way to achieve this character development is to prevent childhood exposure to harmful speech and images.<sup>167</sup> 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.”<sup>168</sup> This balancing, for instance, has justified the restriction of sexually graphic speech expressed during a high school assembly.<sup>169</sup>

For these reasons, speech protected by the First Amendment as to adults may not necessarily be protected as to children. In *Ginsberg v. New York*,<sup>170</sup> a statute prohibiting the sale to minors of otherwise constitutionally protected pornography was upheld. The Court declared that the governmental interest in protecting the well-being 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.<sup>171</sup> Even though the *Ginsberg* Court questioned 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 stated that such certainty was not needed.<sup>172</sup> This same approach was taken in *ACT III*, where the court, in upholding broadcast decency regulations, stated that “a scientific demonstration of psychological harm is [not] required in order to establish the constitutionality of measures protecting minors from exposure to indecent speech.”<sup>173</sup> According to the court, the harmful effects of indecent programming on chil-

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

166. Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment Institutional Contexts*, 69 TEX. L. REV. 1, 73 (1990).

167. Heyman, *supra* note 71, at 609.

168. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

169. *Id.* at 685-86.

170. 390 U.S. 629 (1968).

171. *Id.* at 641-42.

172. *Id.* The Court rejected the need to rely on scientific evidence about the impact of sexually explicit speech that did not rise, or perhaps more accurately sink, to the level of obscenity. *Id.* at 642-43. Deferring to the legislative judgment, the Court upheld the New York law because the Court could not find that the law had “no rational relation to the objective of safeguarding” children. *Id.* at 643. Subsequent courts have since followed this approach, presumptively concluding that sexually explicit speech is detrimental to children. See *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 743 (1996); *Sable Comms. v. FCC*, 492 U.S. 115, 126 (1989). Thus, after *Ginsberg*, the harmfulness of sexual material to minors is now “a matter of common sense.” See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 579 (7th Cir. 2001).

173. *Action for Children’s Television v. FCC*, 58 F.3d 654, 661-62 (D.C. Cir. 1995).

dren are so obvious and apparent that legislators do not even need to acquire scientific evidence of harm before regulating such speech.<sup>174</sup>

Notwithstanding this judicial indifference to scientific evidence, an array of studies have documented the actual harm inflicted on children by violent and sexually explicit speech. According to congressional findings, the average child witnesses approximately 10,000 acts of violence on television by the time that child completes elementary school,<sup>175</sup> and researchers have shown that viewing violent programming fosters violent behavior.<sup>176</sup> As Professor Saunders notes, the “view of the scientific community seems to be that the debate is over and that it is clear that there is a connection between media violence and aggression in the real world.”<sup>177</sup> A joint statement issued by the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychological Association, the American Medical Association, the American Academy of Family Physicians, and the American Psychiatric Association states that over 1000 studies “point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.”<sup>178</sup> The President of the American Academy of Pediatrics testified before Congress that of the more than 3,500 research studies addressing the connection between “exposure to media violence and subsequent violent behavior[] [a]ll but 18 have shown a positive correlation.”<sup>179</sup>

Aside from the effects of media violence, studies have found that children who frequently watch television “with a high degree of sexual content were more likely to engage in sexual intercourse” than those who watched shows with less sexual content.<sup>180</sup> These studies have also demonstrated a link between viewing violent media and aggressive behavior toward

174. *Id.* at 662-63. The court also seemed to attribute a decline in the character and upbringing of contemporary youth to the exposure to indecent material, indicating that a certain level of character is needed to function as a democratic citizen and that restrictions on indecent material are thus justified by the interest in preserving the democratic process. *Id.*

175. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 140.

176. See SAUNDERS, *supra* note 6, at 44-46; Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 36-37 (2004).

177. SAUNDERS, *supra* note 6, at 45.

178. American Academy of Pediatrics, Joint Statement on the Impact of Entertainment Violence on Children (July 26, 2000), available at <http://www.aap.org/advocacy/releases/jstmtevc.htm>.

179. *Marketing Violence to Children: Hearing Before the S. Comm. on Commerce, Science, and Transportation*, 106th Cong. 119 (2000) (statement of Donald E. Cook, President, American Academy of Pediatrics). According to the statement, scientific researchers had found “exposure to violent media” to be a contributing factor in half the homicides committed each year in the U.S. For references to other studies linking violent behavior to violent media consumption, see Shankar Vedantam, *Study Ties Television Viewing to Aggression*, WASH. POST, Mar. 29, 2002, at A1.

180. YOUTH, PORNOGRAPHY, AND THE INTERNET 154 (Dick Thornburgh & Hebert S. Lin eds., 2002).

women.<sup>181</sup> Research has further shown that children are especially vulnerable to media advertising of “vice” products. The Surgeon General, for instance, has found that cigarette advertisements “play a significant and important contributory role” in the decisions of minors to use tobacco products.<sup>182</sup>

Polls show that a vast majority of Americans believe there is too much violence, vulgarity and sexually explicit content on television.<sup>183</sup> However, the “widespread availability of such material in the larger society makes it virtually impossible for parents to act effectively on their own.”<sup>184</sup> For this reason, most parents strongly support the efforts of Congress to protect children from harmful and offensive entertainment speech.<sup>185</sup> Yet almost all attempts to do so have been foiled by the courts’ strict focus on unimpeded adult access to violent and indecent speech in *each separate* medium.

In denying efforts to regulate indecent speech accessible to children, the courts have relied on the principle that in seeking to protect youth the government cannot “reduce the adult population . . . to reading only what is fit for children.”<sup>186</sup> But this ignores reality: that so much of the violent and sexually graphic speech today is aimed not at adults but at children.

The argument against child-protection media restrictions asserts that “[t]he fact that parents have a constitutional right to control their children’s upbringing does not necessarily imply that they have a right to state censorship.”<sup>187</sup> But this argument presumes that a restriction of speech in one medium that is especially accessible to children will completely deny adults any access to that speech.<sup>188</sup> To the contrary, the model proposed in this Article

181. *Id.* at 152.

182. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 558 (2001).

183. See James Poniewozik, *The Decency Police*, TIME, Mar. 28, 2005, at 28-29 (stating that a majority of Americans want the government to regulate more strictly sex and violence on television). A majority of Americans even believe that implied sex without nudity and advertising for sexual-potency drugs should not be broadcast during times when children would most likely be watching television. *Id.*

184. Heyman, *supra* note 71, at 608.

185. *ACLU v. Reno*, 31 F. Supp. 2d 473, 498 (E.D. Pa. 1999).

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

187. Alan E. Garfield, *Protecting Children From Speech*, 57 FLA. L. REV. 565, 617 (2005).

188. This approach – restricting speech in one medium as long as adults could access that speech in other mediums – has not been followed by the Court. In *Reno v. ACLU*, the Court suggested that adults’ free speech rights are denied whenever adults are prevented from accessing speech in any one medium. 521 U.S. 844, 879-80 (1997); see also *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939) (stating that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place”). *Schneider*, however, held that a ban on political speech in one city park could not be justified by the freedom to give the same speech in some other park. 308 U.S. at 163. Thus, this decision not only involved political speech, but it dealt with physical public venues, which are in much shorter supply than electronic media venues. Given the vast number of

envisions a restriction of non-political media entertainment only when alternative avenues for such entertainment exist.<sup>189</sup>

Ironically, the courts seem to be far more eager to repress non-entertainment 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.<sup>190</sup>

## V. POLITICAL SPEECH AND THE FIRST AMENDMENT

### A. *The Constitutional Distinction Between Political and Non-political Speech*

The argument that political speech lies at the heart of the First Amendment is based on both original intent and constitutional logic. Not only was political debate and opinion vital to the American crusade for independence, but in the late eighteenth century political speech was really the only kind of speech existing in the public domain. The vast majority of newspaper and pamphlet content was devoted to matters of political importance.<sup>191</sup> Thus, it can be argued that when the framers decided to protect the public expression of speech, they obviously intended such speech to be political. Even aside from this original intent, however, constitutional logic dictates that the indispensable role of political speech in sustaining self-government provides the only compelling rationale for the free speech clause.

Despite its prominence in modern free speech theory, individual self-actualization or autonomy cannot provide a sound basis for the First Amendment,<sup>192</sup> especially since this rationale can apply to non-speech activities as

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media outlets devoted to nonpolitical entertainment speech, this Article's proposed model states that the First Amendment rights of adults should not be defined for each single medium as if it existed in a communications isolation.

189. Another argument used against child-protection censorship is that the control of a child's exposure to speech should be a matter left strictly to parents. However, this argument presumes that in the contemporary world of pervasive media parents can effectively or adequately control their children's exposure to unwanted, 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." *Action for Children's Television v. FCC*, 58 F.3d 654, 663 (D.C. Cir. 1995).

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

191. Patrick Garry, *The American Vision of a Free Press: An Historical and Constitutional Revisionist View of the Press as a Marketplace of Ideas* 54 (1990).

192. For a discussion of the individual autonomy rationale, see *supra* note 119.

much as it can to speech. For instance, individual autonomy and self-fulfillment can just as easily result from winning a game or succeeding at a hobby or even enjoying a meal. Self-fulfillment and self-realization are not uniquely characterized by speech; “[t]hey [can] be accomplished through virtually all voluntary conduct, including one’s choice of profession, dress, and consumer goods.”<sup>193</sup> Furthermore, there is absolutely no evidence that the framers of the First Amendment were at all concerned with self-realization. Nor is it clear that self-realization is even something to be constitutionally desired. To some people, the promotion of self-realization may mean the freedom to take target practice at other people, or the freedom to destroy a public statue, or the freedom to shout epithets at others. Indeed, self-realization may mean “nothing more than a glorification of self-gratification or social irresponsibility.”<sup>194</sup>

The identity-crisis of the First Amendment today is not the result of any constitutional deficiency or inadequacy of vision on the part of the framers; instead, the crisis is a result of all the cultural concerns that have attached themselves to the free speech clause.<sup>195</sup> The self-realization movement has demanded freedom for whatever expressive conduct individuals wish to make. The crusade for the breakdown of all sexual restraints or behavioral standards has injected into the public domain a type of speech that, prior to the 1960s, had never been there before. It is movements such as these that have tried to erode the longstanding distinction between protected political speech and other types of “private” speech.

Opponents of the “political speech” interpretation of the First Amendment argue that it gives insufficient protection to various kinds of “non-political” speech.<sup>196</sup> And yet, whenever these opponents argue against any

193. Inger, *supra* note 166, at 19 (footnote omitted).

194. *Id.* at 20. As Professor Inger argues, “none of the traditional justifications of free speech is likely to be convincing when viewed exclusively from an individualist perspective.” *Id.* (footnote omitted). According to Inger, the moral relativism of the self-realization thesis hides beneath the illusion that the competition of the marketplace “will shed the bad and save the good.” *Id.* at 41 (footnote omitted).

195. If individual autonomy is to justify speech protections, if everyone has an equal right to express anything, then speech itself has ceased being something special. When everyone has an equal right to utter anything, then speech “becomes the equivalent of noise, and free speech theory becomes unintelligible.” G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 391 (1996).

196. See Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449, 474 (1996) (stating that the terms obscenity and pornography “tend to be used as epithets to stigmatize expression that is politically or socially unpopular” and that “[o]bscenity laws have been enforced against individuals who have expressed disfavored ideas about political or religious subjects”).

Recent major obscenity prosecutions have targeted expressions by or about members of groups that are powerless and unpopular, including rap



restrictions on graphically violent television programming or sexually offensive music lyrics, they cite as their justification the need to protect controversial and unpopular political speech. They rarely argue that violent and sexually explicit entertainment should be protected for its own sake. Therefore, why not codify this position into First Amendment doctrine? Why not specifically state that all controversial and unpopular political speech is indeed fully protected by the First Amendment, but that all non-political speech is subject to a lower standard of scrutiny?

Unquestionably, the task of defining political speech is a daunting one. The temptation is to define it too broadly, so as to leave room for any and all contingencies; but this temptation must be avoided. Political speech is that speech having a reasoned, cognitive connection to some identifiable political issue that has the potential of entering the legislative arena.<sup>197</sup> It is speech capable of being logically debated, and expressed in a form that can lead to some level of rational debate.<sup>198</sup> It is speech whose primary purpose is to contribute to a public debate, not to be bought and sold as an entertainment commodity having little or no connection to the democratic dialogue. It must be an expression of ideas, rather than a mere product like music CDs, bought primarily for their audio qualities or their maker's celebrity persona, sold in

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music of young African-American men and homoerotic photographs and other works by gay and lesbian artists. Likewise, the National Endowment for the Arts (NEA) has been subject to many political attacks for its funding of art exploring feminist or homoerotic themes.

*Id.* (footnotes omitted). The argument has been made that "laws permitting the suppression of sexually-oriented information have often been used to suppress information essential for women's rights, including reproductive freedom." *Id.* at 470.

197. Cass Sunstein defines political speech as speech "both intended and received as a contribution to public deliberation about some issue." CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 130 (1993).

198. "The only difference between speech and other behavior is speech's capacity to communicate ideas in the effort to reach varieties of truth." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH* 148 (1996).

According to Professor Weinstein, previous case law has held that if a particular medium is essential to democratic communication, then any particular message in that medium is essential to democratic communication and is thus constitutionally protected. James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from Nike v. Kasky*, 54 *CASE W. RES. L. REV.* 1091, 1120-21 (2004). But this presumes that any communication in a medium essential to democratic rule will "convey information relevant to democratic decisionmaking." *Id.* at 1121. Furthermore, for the medium to serve its democratic purpose, it must appeal to the rationality of its audience and must not mislead its audience into matters "unconnected with democratic decisionmaking." *Id.* It is assumed "that the audience of media essential to public discourse consists of independent rational agents involved in a dialogue about how we should govern ourselves, rather than dependent and vulnerable persons addressed monologically." *Id.* at 1122. This also assumes that the medium is capable of facilitating rational, interactive debate.

display cases and organized not by any kind of political message but by type of music.<sup>199</sup>

Political speech must be communicated “for its expressive content” and for injecting an idea into the marketplace of ideas.<sup>200</sup> Pornography, on the other hand, is not communicated for the purpose of injecting an argument into the marketplace of ideas; it is merely “a tool for sexually arousing people.”<sup>201</sup> Moreover, pornography is private rather than public in nature; its “purpose is not to contribute to political, social, and cultural debate, but to stimulate or fulfill the sexual desires of individuals.”<sup>202</sup>

### *B. Political Speech and the Self-Governance Rationale of the First Amendment*

Various purposes and values justify the protection of free speech. There is the truth value, the self-fulfillment value, the safety-valve value, and the democratic self-governance value.<sup>203</sup> This latter value is often associated with the writings of Alexander Meiklejohn.<sup>204</sup>

Although Meiklejohn advocated an absolute protection of free speech, he limited that protection to political speech.<sup>205</sup> Meiklejohn defined political speech as “speech which bears, directly or indirectly, upon issues with which voters have to deal.”<sup>206</sup> Essentially, Meiklejohn took a Madisonian view of the First Amendment, seeing its protections as existing primarily to serve democratic processes.<sup>207</sup> Meiklejohn’s theory also distinguished public speech from private speech.<sup>208</sup>

199. Professor Sunstein would not give constitutional protection to words or expressions that are made “in a way that is not plausibly part of social deliberation about an issue.” Sunstein, *supra* note 49, at 312. Ultimately, it is the courts that must make the fine distinction as to what this exactly entails.

200. Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People From Speaking About You*, 52 STAN. L. REV. 1049, 1099 (2000).

201. *Id.*

202. Steven Heyman, *Ideological Conflict and the First Amendment*, 78 CHI.-KENT L. REV. 531, 605 (2003).

203. GEOFFREY STONE, CONSTITUTIONAL LAW 1017-24 (2d ed. 1991).

204. See generally MEIKLEJOHN, FREE SPEECH, *supra* note 118; MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 118.

205. For an analysis of Meiklejohn’s views, see Garry, *The American Vision*, *supra* note 198 at 74-80.

206. MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 118, at 79.

207. The First Amendment model of Alexander Meiklejohn views the U.S. constitutional system as one of deliberative democracy. It seeks to promote reflective and deliberative debate. This Madisonian model sees the right of free expression as a key part of the system of public deliberation. Consequently, government may impose some controls on the information market that seek to sustain and uplift our system of deliberative democracy. In particular, it may promote political speech at the expense

Meiklejohn's instrumentalist view regarding the First Amendment's focus on political speech has been adopted by other free speech scholars,<sup>209</sup> and most recently by Professors Cass Sunstein,<sup>210</sup> John Hart Ely,<sup>211</sup> and Owen Fiss.<sup>212</sup> Judge Robert Bork likewise argues that the First Amendment should be limited to protecting only explicitly political speech.<sup>213</sup> Freedom for non-political literature, for instance, would depend not on constitutional mandates but upon the "enlightenment of society and its elected representatives."<sup>214</sup> Yet even if a book was banned because of a lessened First Amendment protection, there would still be full constitutional protection for any protest that arose over that decision. In other words, while the book itself might not constitute political speech covered by the First Amendment, any protest over a book-banning law would certainly be protected speech.<sup>215</sup> The advantage of

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of other forms of speech; and it may discourage some forms of entertainment, if such entertainment comes to crowd out political speech. Obviously, in the Madisonian view, educational and public-affairs programming has a special place. The marketplace view, however, can confuse notions of the individual as consumer with those of the individual as citizen. To Meiklejohn, the First Amendment "is not the guardian of unregulated talkativeness." *Id.* at 26.

208. *Id.* at 94. It gave First Amendment protection only to that speech which is truly part of the public arena, and not to speech that is pursued merely for private purposes. See RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH 2-30 (2003).

209. See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) (declaring that "the First Amendment should protect and indeed encourage speech so long as it serves to make the political process work"); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 358 (1978) (contending that "the sole legitimate [F]irst [A]mendment principle protects only speech that participates in the process of representative democracy"); Harry Kalven, Jr., *The New York Times Case: A Note on the "Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 208 (arguing that the First Amendment "has a central meaning – a core of protection of speech without which democracy cannot function").

210. Sunstein advocates a "two-tier First Amendment," in which courts would subject restrictions on political speech to the strictest scrutiny, while applying a lower level of scrutiny to lower value, nonpolitical speech. Sunstein, *supra* note 49, at 301-12.

211. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

212. See generally Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986).

213. See generally Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971). According to Bork, courts must focus the First Amendment on political expression in order to avoid the judicial activism that protecting any less constitutionally grounded categories of expression would entail. *Id.*

214. *Id.* at 28.

215. Professor Sunstein makes a similar argument. He argues that "[r]estrictions on political speech have the distinctive feature of impairing the ordinary channels for

this approach is that it gives communities the ability to deal flexibly with troublesome media like violent video games, whereas the everything-is-protected message of existing First Amendment jurisprudence has helped to dull society's duty to make judgments about the state of civilized discourse in the public arena.

Although the Supreme Court has repeatedly emphasized the importance of political speech, it has never ruled that to qualify for the highest levels of constitutional protection the speech at issue must relate to self-government.<sup>216</sup> However, in *Garrison v. Louisiana*, the Court did state that "speech concerning public affairs is more than self-expression; it is the essence of self government."<sup>217</sup> According to the Court, there exists "practically universal agreement that a major purpose of [the First] Amendment [is] to protect the free

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political change." Sunstein, *supra* note 49, at 306. As long as there is freedom of political speech, controls on other kinds of speech can always be protested. For instance, if "the government bans violent pornography, citizens can continue to argue against the ban. But if the government forecloses political argument, the democratic corrective is unavailable. Controls on nonpolitical speech do not have this uniquely damaging feature." *Id.*

216. SMOLLA, *supra* note 215, at 2-33. See also *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) ("The First Amendment affords the broadest protection to such political expression . . ."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("To permit the continued building of our politics . . ."); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) ("the essence of self-government"); *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."); *Roth v. United States*, 354 U.S. 476, 484 (1957) ("The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."); *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) ("There can be no doubt that the expenditures at issue in this case [expenditures by independent political committees supporting reelection of President Reagan] produce speech at the core of the First Amendment.").

In *Connick v. Myers*, an action brought by an ex-government employee who claimed she was fired in retaliation for criticisms she made about her employer, the Court focused on whether the speech was political in character and whether it addressed "a matter of public concern." 461 U.S. 138, 146 (1983). The Court examined whether the subject matter of the speech was one upon which "free and open debate is vital to informed decision-making by the electorate." *Id.* at 145 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571-72 (1968)). The Court stated that if the speech was not of public concern, there was no First Amendment protection against dismissal. *Id.* at 146. But the Court has not built upon the "public concerns" approach used in *Connick*. It has not rested constitutional protection upon a definition of public discourse that distinguishes "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, 667-69 (1990) (footnote omitted).

217. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

discussion of governmental affairs.”<sup>218</sup> In *FCC v. League of Women Voters of California*, the Court ruled that “editorial opinion on matters of public importance . . . is entitled to the most exacting degree of First Amendment protection,” and that the “Framers of the Bill of Rights were most anxious to protect . . . speech that is ‘indispensable to the discovery and spread of political truth.’”<sup>219</sup> It stated that “expression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’”<sup>220</sup>

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218. *Burson v. Freeman*, 504 U.S. 191, 196 (1992); *Garrison*, 379 U.S. at 74-75 (stating that “speech concerning public affairs is more than self-expression; it is the essence of self-government”).

219. 468 U.S. 364, 375-76, 383 (1984).

220. *Id.* at 381. First Amendment jurisprudence has created somewhat of a hierarchy in the constitutional protection of speech: “[c]ore political speech occupies the highest, most protected position; commercial speech and nonobscene, sexually explicit speech are regarded as a sort of second-class expression; [and] obscenity and fighting words receive the least protection of all.” *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992). See also EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS* 114-17 (2001) (discussing “low value” speech).

Generally, indecent speech has also fallen in that category of speech entitled to full First Amendment protection. The Code of Federal Regulations defines indecency as focusing on sexual and excretory activities or organs. See 47 C.F.R. § 76.701 (1998) (noting that an indecent program is one that “describes or depicts sexual or excretory activities or organs in a patently offensive manner”). Any government attempt to impose a content-based restriction on indecent speech is strictly scrutinized, requiring a compelling governmental interest and the absence of any less restrictive means of achieving that interest. *Reno v. ACLU*, 521 U.S. 844, 874 (1997). Indecent speech is speech that “borders on obscenity.” *Alliance for Cmty. Media v. FCC*, 56 F.3d 105, 130 (D.C. Cir. 1995) (Wald, J., dissenting). It also includes “patently offensive” material that nonetheless has some literary or artistic merit. *Id.* at 130; cf. *Action for Children’s Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988) (noting that work’s serious merit does not necessarily imply that material is not indecent).

However, in certain contexts, indecency falls to a “low-value” category. In the broadcast medium, for instance, indecent speech receives a lower level of constitutional protection: the *Pacifica* Court referring to the “slight social value” of indecent speech. *FCC v. Pacifica Found.*, 438 U.S. 726, 746 (1978). Likewise, in approving a school district’s sanctioning of a student speech containing sexual innuendo and profane language, the Supreme Court drew a clear distinction between that speech and a more serious message of political protest, which would be protected. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986). In discussing the lower court’s reliance on *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the *Bethel* Court dismissed that lower court’s equation with the political speech at issue in *Tinker* (wearing a black armband to protest the Vietnam War) with the sexually suggestive speech in *Bethel*. *Id.* As Cass Sunstein notes, “it seems clear that all the categories of low-value speech are nonpolitical.” Sunstein, *supra* note 49, at 302.

### C. Defining the Distinction

Very few First Amendment scholars would disagree with the assertion that political speech occupies the pinnacle of the First Amendment hierarchy. The problem is not valuing political speech, but in distinguishing political speech from all other kinds of speech. It is largely because of this problem that critics dismiss a First Amendment model that protects only political speech. As difficult a task as it is, however, the job of clarifying the parameters and characteristics of the kind of speech protected by the First Amendment is one that needs to be done, especially as the amount of “speech” in our media society increases so rapidly.<sup>221</sup>

In response to the claim that judges cannot possibly make the kind of speech distinctions necessitated by Meiklejohn’s theory, the first argument is that the Supreme Court has stated that absolute precision is not required in constitutional doctrines.<sup>222</sup> Even the most stringent vagueness test does not “expect mathematical certainty from our language.”<sup>223</sup> The second argument is that, even though the courts have shied away from attempting any clear differentiation between political and nonpolitical speech, they are well accustomed to making content distinctions in First Amendment case law. Just as courts have had to define concepts as amorphous as religion, so too have they carved out definitions of various kinds of speech categories. In defamation actions, for instance, a court must distinguish between fact and opinion; a distinction that is rarely clear-cut.<sup>224</sup> The court must also, in ruling whether a statement is defamatory, determine the often ambiguous issue of whether that statement has diminished the reputation of the plaintiff “in the eyes of the community.”<sup>225</sup>

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221. As Professor Sunstein notes, “there is no way to operate a system of free expression without drawing lines. Not everything that counts as words or pictures is entitled to full constitutional protection. The question is not whether to draw lines, but how to draw the right ones.” Sunstein, *supra* note 49, at 308.

222. *Kolender v. Lawson*, 461 U.S. 352, 361 (1983). This does not justify the exclusion of some amount of political speech, especially since it is the very speech that requires the highest degree of constitutional protection. However, it is an acknowledgement that the system cannot and will not be flawless.

223. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (footnote omitted).

224. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990).

225. *Tucker v. Fischbein*, 237 F.3d 275, 283 (3d Cir. 2001). The distinction between “public concern” speech and “private concern” speech also relates to First Amendment limitations on defamation suits. If defamatory speech involves a public figure, the highest of First Amendment protections apply according to *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967), but if the speech addresses a purely private concern, then the defamation law operates without any First Amendment limitations. *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761-63 (1985). Furthermore, the special constitutional protections for speech on matters of public concern has also been extended to the criminal law area, where penalties for illegally intercepting cell phone conversations have been held to depend on whether the inter-

The field of copyright law is strewn with content distinctions. Facts and ideas may not be copyrighted, but “creative expression” may be, thus necessitating a distinction between copyrightable expression and uncopyrightable facts and ideas.<sup>226</sup> Copyright law also distinguishes originality from repetition.<sup>227</sup> In determining copyright status, courts must decide whether a work is “original” or whether it is simply “interpretive” or “viewpoint expressive.” Obviously, trying to determine whether a work is sufficiently “original” from everything that has preceded it is fraught with uncertainty and ambiguity.

Courts must likewise make content distinctions in cases involving commercial speech. In contrast to political speech, commercial speech occupies a “subordinate position . . . in the scale of First Amendment values.”<sup>228</sup> Consequently, commercial speech is not given full constitutional protection.<sup>229</sup> To assess the degree of protection given to commercial speech, courts must determine whether the speech is false or misleading, or just advertising “puffery.”<sup>230</sup>

In a long line of cases involving speech distinctions similar to the political-nonpolitical distinction, courts have had to rule on whether certain expressions constitute matters of public or private concern. This issue arose in *Diaz v. Oakland Tribune*, a disclosure of private facts tort case.<sup>231</sup> *Diaz*, the first female student body president at a community college, sued the Oakland Tribune after it published the fact that she was a transsexual. In determining whether the case could proceed, the court had to rule on the newsworthiness of this fact, on whether it was a matter of public interest or mere private con-

cepted conversation was “truthful information of public concern.” *Bartnicki v. Vopper*, 532 U.S. 514, 533-34 (2001).

226. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556, 560 (1985).

227. Rebecca Tushnet, *Copyright as a Model for Free Speech Law*, 42 B.C. L. REV. 1, 49 (2000) (stating that the “further an author gets from what has gone before, the more protection he will get”).

228. *United States v. Edge Broad. Co.*, 509 U.S. 418, 430 (1993).

229. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). Courts have “upheld the ability of government to categorically exclude ordinary business corporations from participation in core political speech, an exclusion that would be unthinkable with respect to an individual citizen wishing to participate in a public debate.” Weinstein, *supra* note 205, at 1115-16.

230. *44 Liquormar, Inc., v. Rhode Island*, 517 U.S. 484, 504 (1996). In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, the Supreme Court decided that want ad column-headings in a newspaper’s classified section – “Male Help Wanted” and “Jobs-Female Interest” – amounted to the kind of commercial advertising that did not deserve any constitutional protection. 413 U.S. 376, 391 (1973). Even though the Court in *Cohen v. California* had ruled that “Fuck the Draft” can convey information and send an effective opinion, the Court in *Pittsburgh Press* nonetheless rejected the newspaper’s right to express to its readers certain assumptions about their job interests.

231. *Diaz v. Oakland Tribune, Inc.*, 188 Cal. Rptr. 762 (Cal. Ct. App. 1983).

cern. A similar issue existed in *Briscoe v. Reader's Digest Ass'n*, in which Reader's Digest was held liable for revealing that eleven years earlier Briscoe had been convicted of armed robbery.<sup>232</sup> Even though ruling that the information was newsworthy, the court found that revealing Briscoe's identity eleven years after the crime was not "of legitimate public interest."<sup>233</sup>

Courts have also adopted a public/private speech distinction in cases involving the government's ability as employer to discipline its employees. In *Connick v. Myers*, the Court held that the government may restrict the speech of its employees if that speech deals with matters of private concern.<sup>234</sup> Likewise, in *Urofsky v. Gilmore*, where a group of state university professors challenged the constitutionality of a law restricting them from accessing sexually explicit material on computers owned by the university, the court stated that the applicability of the First Amendment depended on whether the speech at issue (the sexually explicit material) touched "upon a matter of public concern."<sup>235</sup>

This public versus private concern distinction has similarly been employed in libel cases. In *Dun & Bradstreet v. Greenmoss Builders*, for instance, the Court ruled that in cases involving false statements on matters of purely private concern, plaintiffs may be awarded punitive and presumed damages, without a showing of actual malice.<sup>236</sup> Such content distinctions are not only possible, but given the rapidly increasing volume and diversity of speech, are becoming vital. Without singling out political speech from the vast sea of entertainment speech, the danger is that the public and the courts will lose sight of the unique and special needs of the former, as illustrated in the way time-manner-place regulations have been allowed to impact political speech more than non-political media entertainment speech.

An explosion in its growth contradicts the claims that sexually explicit speech is a fragile and vulnerable speech, easily "spooked" by repressive community attitudes, its existence dependant on the highest levels of constitutional protection. For instance, of all the different kinds of academic or social-concerns journals that could be started, students at Harvard University initiated a magazine devoted to "a subject that just doesn't get enough attention:

232. *Briscoe v. Reader's Digest Ass'n Inc.*, 483 P.2d 34 (Cal. 1971).

233. *Id.* at 43. For cases in which courts make speech distinctions in the area of privacy law (e.g., deciding when speech is newsworthy or of a public interest), see both *Arrington v. New York Times Co.*, 434 N.E. 2d 1319, 1322 (N.Y. 1982) (ruling on the newsworthy privilege in a false light publicity claim) and *Messenger v. Gruner + Jahr Printing & Publishing*, 727 N.E. 2d 549 (N.Y. 2000) (denying plaintiff's right to privacy claims because the photograph at issue concerned a matter of public interest).

234. 461 U.S. 138 (1983).

235. 167 F.3d 191, 194-96 (4th Cir. 1999). See also *Connick*, 461 U.S. at 146 (stating that "speech involves a matter of public concern when it affects a social, political or other interest of a community").

236. 472 U.S. 749 (1985).



sex.”<sup>237</sup> Furthermore, the “increasing leniency on pornography in the past three decades . . . does not seem to have corresponded with an increased quality of debate on ‘public’ issues,” thus attesting to the argument that sexually explicit speech “bears little connection to the core values of the [F]irst [A]mendment.”<sup>238</sup>

## VI. CONCLUSION

The courts have long resisted making a formal distinction between political and non-political speech. This resistance is often attributed to the desire to protect speech more broadly and more comprehensively. However, as illustrated in this Article, a failure to focus on political speech has led inadvertently to First Amendment doctrines that actually discriminate against political speech. This discrimination has occurred because of the way in which speech regulations are tied to the location of that speech, and because political speech is often much more dependent on place than is media entertainment speech, which essentially occupies no physical space.

This Article not only advocates eliminating the doctrinal disadvantages suffered by traditional political protest, but argues that political speech in general should receive a more protective constitutional treatment than non-political speech. In constructing a new First Amendment model for non-political speech, this Article relies heavily on a rule that has evolved out of the time-manner-place doctrine, *e.g.*, the availability of alternative communication venues. Given the wealth of channels through which media entertainment speech can currently travel, regulations on just one of those channels is unlikely to actually deny willing adults the opportunity to receive that speech. Indeed, one of the most dramatic ways in which the public speech environment has changed since the eighteenth century is the proliferation of alternative channels for communication. To refuse to recognize this development is to keep First Amendment jurisprudence from effectively addressing the pressing issues of modern society.

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237. Barbara Kantrowitz, *Dropping the H Bomb*, NEWSWEEK, June 7, 2004, at 45.

238. See John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L.Q. 1157, 1212 (2000).