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A New First Amendment Model for Evaluating Content-Based Regulation of Internet Pornography: Revising the Strict Scrutiny Model To Better Reflect the Realities of the Modern Media Age

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In the modern media age, the number of media venues, along with the types of information and programming those venues carry, is exploding. Nowhere is that explosion more evident rhan with the Internet. On the positive side, the Internet offers a wealth of information and communications opportunities. But, on the negative side, it brings a boundless store of harmful material within easy access of children. In recognition of the destructive effects of such material—especially obscenity and pornography—Congress on several occasions has tried to curb the accessibility of this material to children. The Supreme Court, however, has struck down each attempt using a strict scrutiny approach.[1]

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1. In *Ashcroft v. ACLU*, 542 U.S. 656 (2004), the Court ruled on Congress's second attempt to regulate minors' access to harmful material on the Internet. Congress's first attempt, the Communications Decency Act, was struck down in *Reno v. ACLU*, 521 U.S. 844 (1997). In response to this ruling, Congress enacted the Child Online Protection Act (COPA) in an effort to address the concerns articulated in *Reno* by forcing commercial vendors of pornographic Internet material to require a credit card for access to their sites. 47 U.S.C. § 231 (2000). The Act imposed criminal penalties for the knowing posting, for "commercial purposes," of Internet content that is "harmful to minors" but provided an affirmative defense to commercial vendors who restricted access to prohibited materials by "requiring use of a credit card" or "any other reasonable measures that are feasible under available technology." *Id.* § 231(a)(1), (c)(1). Congress apparently considered this requirement a less restrictive alternative to the provisions in the Communications Decency Act, which had imposed an outright prohibition on any online conveyance of harmful material to minors. Communications Decency Act of 1996, 47 U.S.C. § 223; *Ashcroft*, 542 U.S. at 661. Nonetheless, the *Ashcroft* Court still found the COPA unconstitutional on the grounds that it "was likely to burden some speech that is protected for adults" and that there were "plausible, less restrictive alternatives." *Ashcroft*, 542 U.S. at 665. Justice Breyer's dissent took a less one-sided view of the burdens issue. According to Justice Breyer, the regulations imposed only a "modest additional burden on adult access to legally obscene material." *Id.* at 683 (Breyer, J., dissenting). Furthermore, in the dissent's view, filtering software did not amount to a viable less restrictive alternative since there was strong evidence that filtering software was not

For example, in *Ashcroft v. ACLU*,[2] the Court struck down Congress's most recent attempt to limit children's exposure to pornographic material through the Internet—the Child Online Protection Act (COPA).[3] The Act imposed criminal penalties for knowingly posting, for "commercial purposes," of Internet content that is "harmful to minors" but provided an affirmative defense to commercial vendors who restricted access to prohibited materials by "requiring use of a credit card" or "any other reasonable measures that are feasible under available technology."[4] Even though Congress had written COPA less restrictively than its prior attempts to regulate child access to pornography, the *Ashcroft* Court still found COPA unconstitutional on the grounds that it "was likely to burden some speech that is protected for adults" and that there were "plausible, less restrictive alternatives."[5]

The Court's majority opinion in Ashcroft is an excellent example of current First Amendment doctrine, which requires that any content-based regulation of speech—regardless of the actual burdens it imposes—be subjected to strict scrutiny by the courts. Under this approach, regulations like COPA almost never survive. As Gerald Gunther once put it, strict scrutiny is "'strict' in theory and fatal in fact."[6]

The CP80 proposal, as outlined in Professor Preston's article, is creative and promising.[7] But if enacted, it would most likely be subject to strict scrutiny by the courts. Even though Professor Preston makes a strong case for why the proposal should survive strict scrutiny,[8] it is likely that the Court will strike down the CP80 scheme under its traditional application of the strict scrutiny test.

effective in blocking out undesirable material and since filtering software is expensive and hence not universally available. *Id.* at 683–86. As Justice Breyer noted, "'a filtering software status quo' means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision." *Id.* at 686.

2. 542 U.S. 656 (2004).

3. 47 U.S.C. § 231 (2000).

4. *Id.* § 231(a)(1), (c)(1).

5. *Ashcroft*, 542 U.S. at 661, 665; Communications Decency Act of 1996 (prior attempt).

6. Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

7. *See generally* Cheryl B. Preston, *Making Family-friendly Internet a Reality: The Internet Community Ports Act*, 2007 BYU L. REV. 1471.

8. *See generally id.*

However, such a prospect should not automatically condemn CP80 to the storage room of unimplemented creative ideas; instead, the novelty of CP80 should prompt a rethinking of existing First Amendment doctrines, particularly the strict scrutiny approach. In fact, CP80 presents an opportunity to refocus First Amendment jurisprudence in a way that better recognizes the realities of the modern media world.

Part I of this Article outlines the case against the Court's current use of strict scrutiny. This approach hinges on a single factor: whether or not a regulation of speech hinges on a content distinction. Once such a distinction is found, the law is almost always struck down, regardless of the speech burdens actually imposed by the law, whether the subject speech is in plentiful supply in other media venues, or whether the laws would result in a banishment of certain ideas from the public discourse. This myopic focus on content discrimination is outmoded in today's multimedia world and prohibits regulations of speech even when the burdens imposed by the law are slight and the speech remains available and accessible in the broader marketplace of ideas.

Part II of the Article proposes a new judicial model for evaluating content-based laws regulating media programming that is not political speech.[9] This new model examines the actual burdens placed on the subject speech. It also considers perhaps the most vulnerable freedom in the current media environment—the freedom of the unwilling recipient to avoid unwanted and offensive media speech. Furthermore, the new model—a variation of the intermediate scrutiny approach now used for so-called content-neutral regulations of speech—takes into account and incorporates the realities of the modern media world. It does so by recognizing that there is a vast array of media channels through which any one type of speech can flow, and that a restriction of speech in one venue may not rise to the level of an unconstitutional censorship.

Under this proposed model of First Amendment scrutiny of speech regulations, the CP80 scheme should pass constitutional muster. It would burden certain types of non-political speech in only

9. The model proposed in this Article is not offered as an alteration of the First Amendment but as a rethinking of First Amendment doctrines that began to evolve nearly a century ago and were in response to speech and media conditions that no longer exist. For a discussion of this evolution, see generally PATRICK GARRY, REDISCOVERING A LOST FREEDOM: THE FIRST AMENDMENT RIGHT TO CENSOR UNWANTED SPEECH (2006).

certain venues (the Internet's community ports) while leaving that speech completely unrestrained in the remainder of the Internet's 65,000 ports.[10]

I. THE PROBLEM WITH STRICT SCRUTINY

A. The Strict Scrutiny Approach

Current First Amendment doctrine requires that any content-based regulation of speech be subject to strict scrutiny by the reviewing court.[11] Although this approach seems to suggest that content regulations might be upheld if they were narrowly drawn and supported by a compelling governmental interest, in reality it allows virtually no content-based speech restriction to survive.[12] Indeed, over the past several decades, every content-based law to which the Court has applied strict scrutiny has been overturned.[13]

This rule of content neutrality—automatically condemning any restriction in which a content distinction can be found—developed in an era where the types of speech, and the numbers of media through which that speech was available, were much more limited than today. The only mass media was the print media, which, due to technological and social factors, contained very little sexually explicit or graphically violent material. In this environment, a content-based restriction then was more likely to bring about a complete censorship of that speech; meanwhile, there was less concern that striking down

10. Preston, *supra* note 7, at 1476–77. The CP80 proposal would impose penalties for those who publish obscenity or pornography on the community-designated Internet port. *See* Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1431–34.

11. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (stating that "[c]ontent-based regulations are presumptively invalid"); Sable Comme'ns v. FCC, 492 U.S. 115, 126 (1989) (stating that content restrictions must promote a compelling government interest and be the least restrictive means of achieving that interest); Boos v. Barry, 485 U.S. 312, 321 (1988) (stating that with content-based regulations, courts will apply the "most exacting scrutiny").

12. The principle of content neutrality, according to the Court, is needed to preserve the free marketplace of ideas. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972).

13. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (overturning restrictions on cable providers of sexually explicit programming); Simon & Schuster, Inc. v. State Crime Victims Bd., 502 U.S. 105 (1991) (striking down a law regulating the earnings of convicted criminals who write tell-all books about their crimes); Texas v. Johnson, 491 U.S. 397 (1989) (striking down a flag-burning law).

content-based regulations would result in morally offensive or dangerous speech being forced on children or otherwise unwilling information consumers.

A host of "changed circumstances" have eroded many of the underlying conditions of the marketplace metaphor, which advocates maximizing the amount of speech in the media marketplace and has provided much of the doctrinal direction of First Amendment jurisprudence since the mid-twentieth century.[14] In the world of Holmes's marketplace of ideas, individuals could access this marketplace only one way, by going out into the public square and listening to it. Consequently, they had greater control over the intrusion of public speech into their lives. Furthermore, compared to conditions existing when the marketplace model was first articulated, there is currently an abundance of media speech. For instance, cable television and direct broadcast satellite systems, which are now almost universally available, can provide hundreds of television channels. But this explosion in numbers of sources has not transformed the media into an Adam Smith type of marketplace in which truth always prevails. Just as in the economic marketplace, there are market failures in the marketplace of ideas—an increased volume of competing speech has failed to drive out the harmful and destructive speech. Under the marketplace model, there is no effective solution to the enormous volume of ugly and offensive speech. The model simply asserts that "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate "breathing space" to the freedoms protected by the First Amendment.'"[15] But this presumes that a public debate is occurring, that the speech in the public domain is even capable of debate, that this speech is more than mere images meant to manipulate emotions rather than contribute to some rational discussion, and that music videos are as communicative in a First Amendment sense as newspaper editorials.[16] Moreover, the

14. The arguments contained in the following two paragraphs were first presented in another article by the author. For a more in-depth discussion of these differences, see Patrick Garry, *The Right To Reject: The First Amendment in a Media-Drenched Society*, 42 SAN DIEGO L. REV. 129, 131–34 (2005).

15. *Boos*, 485 U.S. at 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

16. For an argument in support of the proposition that modern media technology is often associated with low value speech, see generally NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS (1985).

marketplace model and the ensuing strict scrutiny approach were developed to protect political dissent but are now being used to shield commercial vendors of pornography.

Today, the fruits of the marketplace model—the content neutrality doctrine—often deprives a democratic community of the ability to address problems caused by the new types of so-called speech (or, more accurately, media programming aimed not at communicating bur at titillating) emanating from new types of media venues that uniquely threaten to harm children.[17] The content neutrality doctrine has become a constitutional straitjacket, preventing society from addressing serious social problems brought on by a rapidly changing media environment that aggressively markets its products to children.

Although the content neutrality doctrine strives to be a bright-line rule, it is nonetheless based on very subjective and unpredictable determinations.[18] For instance, in order to sustain various speech

17. One example is the judicial frustration of legislative attempts to address the problems caused by graphically violent video games played by young children. *See* Patrick Garry, *Defining Speech in an Entertainment Age: The Case of First Amendment Protection for Video Games*, 57 SMU L. REV. 139, 144–49 (2004).

18. *See, e.g.*, City of Los Angeles v. Alameda Books, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (describing the categorization of zoning regulations governing adult entertainment establishments as content-neutral as "a fiction"). Indeed, regulating the locations of adult entertainment businesses under the secondary effects doctrine appears to violate the rule that laws are content-nentral only when their restrictions on speech are unrelated to the content of that speech. *See* Philip Prygoski, *Content Neutrality and Levels of Scrutiny in First Amendment Zoning Cases*, 25 WHITTIER L. REV. 79, 80 (2003). By focusing only on the secondary effects of adult entertainment businesses, courts have designated certain zoning regulations as content-neutral, thereby evaluating them under a lower level of scrutiny. Clay Calvert & Robert Richards, *Stripping Away First Amendment Rights*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 287, 295 (2004). However, it is unquestioned that such regulations affect "theaters that specialize in adult films differently from other kinds of theaters." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). For a general description of the secondary effects doctrine, see *City of Los Angeles*, 535 U.S. at 425 (addressing the city's use of a zoning ordinance to limit the number of adult businesses that could operate in a single building); *City of Renton*, 475 U.S. at 47 (upholding a local law requiring adult movie theaters 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). Of course, this secondary effects doctrine reflects a sort of bipolar logic. It asserts that pornography is low value speech that warrants lower protection because of its social effects; however, if the nndesired social effects result from the communicarive impact of the pornography, then the regulations are judged nnder the highest level of scrutiny. *See Boos*, 485 U.S. at 314; *Young*, 427 U.S. at 70. The secondary effects doctrine has been extended in such cases as *Brentwood Academy v. Tennessee Secondary School Athletics Ass'n*, 262 F.3d 543, 551 (6th Cir. 2001) and *Connection Distribution Co. v. Reno*, 154 F.3d 281, 290–91 (6th Cir. 1998), *summary judgment granted, injunction dismissed sub nom.* Connection Distrib. Co. v.

restrictions under a more permissive review than strict scrutiny, an intermediate level of scrutiny has been used for time, place, and manner regulations found to be content-neutral.[19] However, in its use of the content neutrality rule as a prerequisite for employing intermediate scrutiny, the Court has often found that laws effectively singling out certain types of speech were in fact content-neutral.[20] For instance, laws governing the location of sexually explicit entertainment businesses;[21] expressive activities of abortion protestors;[22] the solicitation of funds and membership by religious groups (even though such solicitation lies at the core of these

Gonzalez, U.S. Dist. LEXIS 29506 (N.D. Ohio 2006). In *Brentwood*, the court used the secondary effects doctrine to uphold a regulation banning contact between coaches and prospective student-athletes, finding the regulation to be content-neutral. In *Connection Distribution*, the court found that a law mandating detailed recordkeeping about the age and identity of any person portrayed in sexually explicit behavior was content-neutral, ruling that the law was aimed at the secondary effects of preventing child pornography and not at the content of the speech itself, even though the law appeared on its face to be content based.

19. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989). The Court in *Ward* outlined a test for applying intermediate scrutiny: that the regulations be "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)). The "narrowly tailored" prong demands only that the statutory restrictions not be "substantially broader than necessary to achieve the government's interest"; they do not have to be the least restrictive means. *Id.* at 800; *see also* Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981) (upholding a law requiring that the distribution of literature at a state fair be conducted only from fixed locations, finding that the law satisfied intermediate scrutiny insofar as it served a significant government interest and left open amply alternative channels for communication of the information). 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). 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. 512 U.S. 753 (1994). This level of scrutiny is more deferential to legislative regulation than is the strict scrutiny approach. Intermediate scrutiny generally causes an invalidation of speech restrictions only when those restrictions end up banning or censoring the speech altogether, leaving no channels of communication open to it. *See* City of Ladue v. Gilleo, 512 U.S. 43 (1994) (overturning a law found to result in a near total ban on the display of signs on one's own property).

20. *See* Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model that Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. (forthcoming 2007).

21. *See City of Renton*, 475 U.S. at 41. Under the secondary effects doctrine, a regulation is seen to be content-neutral if it "serves purposes unrelated to the content of [the] expression . . . , even if it has an incidental effect on some speakers or messages." *Ward*, 491 U.S. at 791.

22. *See* Hill v. Colorado, 530 U.S. 703 (2000).

groups' religious beliefs);[23] the sale of "target marketing lists" by credit reporting agencies;[24] and those governing the type of television programming cable operators must carry free of charge[25] have all been held to be content neutral. Even though these laws and regulations were evaluated under the more deferential intermediate standard of review, they were effectively aimed at very specific groups of speakers—seemingly the very thing the conrent distinction test was designed to prevent. Consequently, even though the appeal of the content-neutral principle lies in its promise of objectivity and consistency, its subjective and inconsistent application jeopardizes both it and the strict scrutiny standard that emanates from it.[26]

23. *See* United States v. Kokinda, 497 U.S. 720 (1990); *Heffron*, 452 U.S. at 640.

24. *See* Transunion Corp. v. FTC, 267 F.3d 1138, 1140 (D.C. Cir. 2001).

25. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 643 (1994) (holding that the must-carry rules were content-neutral and hence subject to the intermediate level of scrutiny, even though the rules imposed a direct burden on the freedom of cable operators).

26. Moreover, 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." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969). This assertion stems from Justice Jackson's statement two decades earlier that each medium "is a law unto itself." Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring). 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 intrusive and pervasive. 438 U.S. 726 (1978). 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. 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." *Id.* at 748. Second, the Court found that "broadcasting is uniquely accessible to children, even those too young to read." *Id.* at 749. 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. *Id.* at 748–49. In addition, 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 is regulated. 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, 520 U.S. 180, 197 (1997) (*Turner II*); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655 (1994) (*Turner I*). *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, 352 (4th Cir. 2001).

B. The Failure of Strict Scrutiny to Consider Actual Burdens on Speech

In addition to the inconsistencies in its application, the strict scrutiny standard is problematic because it fails to consider the actual extent of the burdens imposed by a speech restriction that the Court determines is content-based. Currently, the use of strict scrutiny depends primarily on whether a court determines that a speech regulation is content-neutral. Once a content distinction is detected, strict scrutiny is applied—and once strict scrutiny is applied, the law is destined to be struck down.

Missing from the process, however, is any consideration of the actual burdens imposed on the subject speech by the subject law. Indeed, what could be more important when evaluating laws affecting individual rights than to examine the actual burdens being placed on the exercise of those rights? Not only does the Court refuse to take into account the actual degree of burden, but it also refuses to distinguish between whether the law imposes a mere burden or a complete ban on the speech.[27] While, in reality, there is a substantial difference between a law merely burdening speech and a law that completely silences a message or speaker, the Court's current strict scrutiny analysis ignores this commonsense distinction.[28]

The refusal of the strict scrutiny approach to consider the actual burdens on speech can be seen in the Court's decisions in *Denver Area* and *Playboy Entertainment*. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[29] the Court addressed the constitutionality of regulations in the Cable Act of 1992, which required cable operators to place indecent programs on a separate channel, to block that channel, and to unblock it within thirty days of a subscriber's written request for access.[30] In holding these regulations unconstitutional, the Supreme Court focused primarily on the inconveniences to would-be viewers of indecent

27. *See* United States. v. Playboy Entm't Group, Inc., 529 U.S. 803, 812 (2000) ("The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans.").

28. Not only are the courts indifferent as to whether a burden or ban is being imposed, but they are also indifferent as to whether that burden or ban is occurring in one of many media venues through which the speech is available.

29. 518 U.S. 727 (1996).

30. *Id.* at 754.

programming, including the viewer who might want a single show, as opposed to the entire channel; the viewer who might want to choose a channel without any advance planning (the "surfer"); or the one who worries about the danger to his reputation that might result if he makes a written request to subscribe to the channel.[31] However, none of these burdens presented insurmountable obstacles. Each one of these types of viewers could obtain access to the desired programming by simply following the established procedures. Furthermore, even though the Court recognized that the Act served the compelling interest of protecting minors, the Court still struck it down.

Further exemplifying the gross imbalance of burdens currently being allocated between commercial vendors of indecent programming and unwilling recipients of such programming is the Court's decisions in *United States v. Playboy Entertainment Group, Inc.*[32] *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' those channels or to limit their transmission to the hours between 10 p.m. and 6 a.m.,' when children are unlikely to be among the viewing audience.[33] 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, finding that it constituted 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.[34] This alternative required that the objecting parent request her cable operator to block any channel she "[did] not wish to receive."[35]

31. *Id.*

32. 529 U.S. 803 (2000).

33. *Id.* at 806–07 (quoting 47 U.S.C. § 561(a) (Supp. III 1994)).

34. *Id.* at 809.

35. *Id.* at 810.

Additionally, for this alternative to work, the cable operator would have [had] to provide "adequare notice" to their subscribers that certain channels would broadcast sexually-oriented programming, that signal bleed might occur, that children might then see portions of the programming, and that parents could contact the cable operator to request a channel blocking device.[36] This notice, apparently, would have been provided as an insert in the monthly cable bills.

In dissent, Justice Breyer 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, "adults may continue to watch adult channels, though less conveniently, by watching at night, recording programs with a VCR, or by subscribing to digital cable with better blocking systems."[37] Second, he observed that the law applies only to channels that "broadcast 'virtually 100% sexually explicit' material."[38] And finally, he recognized that because of signal bleed, up to twenty-nine million children could be exposed each year to sexually explicit programming.[39]

According to Justice Breyer, where tens of millions of 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."[40] 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.[41] 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[42]—problems that come as no surprise to anyone who has ever tried to get their cable company to fix something. He argued that the First Amendment was not

36. *Id.* (quoting Playboy Entm't Group, Inc. v. United States, 30 F. Supp. 2d 702, 719 (D. Del. 1998)).

37. *Id.* at 845 (Breyer, J., dissenting).

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

39. *Id.*

40. *Id.* at 842.

41. *Id.* at 841.

42. *Id.* at 843.

intended to leave millions of parents helpless in the face of media technologies that bring unwanted speech into their children's lives.[43]

Under current First Amendment analysis, courts consider all the possible burdens that any governmental regulation might place on the access to or delivery of speech, but turn a blind eye to the actual and severe burdens borne by those wishing to prevent their children from being exposed to harmful and offensive speech. With respect to listeners who wish to avoid certain offensive speech, the courts require that they bear the full burden of averting their eyes or ears,[44] regardless of the weight, cost, or feasibility of that burden. In *United States v. American Library Ass'n*, however, the Supreme Court tried to effectuate a more balanced placement of burdens.[45] In upholding a law requiring public libraries to install filtering software on their Internet computers, the Court ruled that the law did not impose a complete ban on a patron's Internet access to certain types of material but did require any adult wishing to view such material to ask a librarian to unblock the desired site. 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."[46] Thus, in *American Library Ass'n*, the goal of protecting children from unwanted speech overshadowed the small burden on adults who could still access pornography with a mere request to the librarian. The Court, by considering the relative burdens involved, bucked the trend followed in *Playboy Entertainment*, in which just about any burden on an adult's access to indecent speech, no matter what the risk to children, was seen as unconstitutional.

The strict scrutiny approach treats all content-based regulations the same; it makes virtually no effort to determine if a particular law

43. *Id.* at 846.

44. *See* Boler v. Youngs Drug Prods. 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); Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (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" (quoting Cohen v. California, 403 U.S. 15, 21 (1971)); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that the U.S. Postal Service could not screen out communist mail from foreign sources and require potential recipients to request its delivery affirmatively).

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

46. *Id.* at 209.

imposes the kind of burden that threatens to drive an idea out of the marketplace of ideas.[47] Contrary to the approach taken by the Court in abortion-rights jurisprudence, for instance, there is no consideration of whether the regulation imposes an "undue burden" on the particular speech.[48] This ignoring of the degree of actual burden has resulted in the nullification of laws providing various child-protection safeguards on commercially-provided pornography,[49] as well as laws requiring fundraisers to reveal what percentage of the money they raise is actually given to the charities for which they are working.[50] It has also led courts to overturn every

47. This contrasts with the situations in which a court deems a law content-neutral, and will sustain that law even though the burdens on speech caused thereby are readily apparent. In *Hill v. Colorado*, 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. 530 U.S. 703, 723, 726 (2000) (quoting Schenck v. Pro-Choice Network of W. New York, 519 U.S. 357 (1997)). Despite recognizing that the speech of the abortion protestors was protected by the First Amendment and that the public sidewalks governed by the statute were "quintessential" public forums for free speech, the Court nonetheless esteemed the "significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication." *Id.* at 715–16. It noted that the protection normally afforded to offensive speech would not always apply when the unwilling audience was unable to avoid the speech. In elaborating on the "right to be let alone," the Court stated that the case law has "repeatedly recogniz[ed] 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 (quoting Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970)). 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 the governmental interest in protecting people from unwanted communications had never before been extended to speech on public sidewalks. *Id.* at 756 (Scalia, J., dissenting). Moreover, as the dissent argued, the speech burdens imposed on the protestors were significant. *Id.* at 756. 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—or should." *Id.* at 757–58.

48. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992). In *Stenberg v. Carhart*, the Court struck down a Nebraska law outlawing partial birth abortion as violating the "undue burden" test. 530 U.S. 914, 930 (2000). Such a balancing approach is also used in freedom of association cases involving conduct that facilitates expression. *See* Barry McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right To Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 260 (2004). In such cases, the courts weigh the severity of the burdens imposed on the freedom of expressive association before deciding how strict or deferential a standard of review to apply to the law. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 586 (2005).

49. *See, e.g.*, Ashcroft v. ACLU, 542 U.S. 656, 673 (2004); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 803 (2000).

50. *See* Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781, 795–

state regulation aimed at preventing young children from being exposed to a powerful new media product—graphically violent video games.[51] Laws requiring parental consent before minors can obtain graphically violent video games have been overturned because those laws make content distinctions, even though the only burden imposed is on the ability of commercial vendors to sell those games to children without their parents' knowledge or consent.[52]

Not only does the strict scrutiny approach fail to consider the actual burdens imposed on those who deliver speech, it also fails to consider the burdens such speech imposes on those wishing to avoid exposure to it.[53] The Court does not attempt to compare the relative burdens of those wishing to access the speech with those wishing to avoid the speech; nor does the strict scrutiny approach consider how easy it is for an adult to overcome whatever burdens are placed on his or her access to sexually explicit speech, compared with how easy it is for parents to shield their children from such speech without the aid of the subject regulations.[54] Thus, using strict scrutiny, the courts do not adequately take into account what has become perhaps the most vulnerable and fragile freedom in today's media environment: the freedom to avoid being exposed to offensive and unwanted commercial media programming.[55]

What is missing from the Court's strict scrutiny approach is a recognition that the right of an individual to avoid unwanted speech

801 (1988) (imposing strict scrutiny after finding the law to be content-based).

51. *See generally* Garry, *supra* note 17.

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

53. *See* discussion *infra* Part I.D.

54. The question raised here is, why should First Amendment doctrine favor adults over children, especially when adults can overcome slight burdens to access speech, more easily than parents can keep such speech away from their young children? Furthermore, the consequence of potential psychological harm to children overshadows a slight delay for adults in obtaining the speech. Justice Breyer made this point in his *Playboy* dissent that while the time-channeling law placed a relatively insignificant burden on those wishing to obtain the sexually explicit programming, it provided an invaluable aid to those parents who would be almost helpless to prevent their children's exposure to the programming if not for the law. For a discussion of the harms to children, see Garry, *supra* note 20.

55. *See* GARRY, *supra* note 9, at 38–39, 42–48. Indeed, the new First Amendment challenge is to protect the right of recipient control, just as the challenge under the marketplace model was to protect the right of speaker control. *See id.* at 22–27. In other words, the modern First Amendment challenge is to correct the one-sided approach of the marketplace model.

is as strong as the right of the individual to speak.[56] Current free speech doctrine assumes that this needs no judicial protection since the unwilling recipient can avoid exposure simply by averting his or her eyes. The Court has not, however, fully explored whether this key assumption underlying the development of its First Amendment framework remains true—whether one's eyes can be easily averted in a modern world where the media that is virtually unrestrained by state regulation permeates every aspect of life.

C. Strict Scrutiny's Isolated-Media View

Another way in which the strict scrutiny approach ignores the realities of the modern media world is in its refusal to recognize the significance of the fact that a plethora of media channels often exist for any one type of speech.[57] In modern society, violent and sexually explicit speech is in great supply. And not only is it in great supply, but it is accessible to the point of unavoidability. Because of the proliferation of so many different communication mediums, the Court should view speech regulations in terms of the whole media spectrum. For instance, if sexually graphic songs are restricted from being played on broadcast radio, they will still be available on CDs, music videos, special television channels, satellite radio, and at concerts. While not all media are created equally—for example, global availability via the Internet is plainly distinguishable from local availability in a small-town newspaper—it seems clear that burdening speech is not necessarily tantamount to silencing it. Consequently, a restriction on speech in one medium may be permissible if that speech remains accessible through other mediums. The CP80 proposal is just such a restriction; while it restricts pornographic speech transmitted through port 80, it still leaves tens of thousands of other ports free to carry that speech to consenting adults.

Prior to the modern growth of new communication technologies, the restriction of speech in a particular medium (or of a particular way of conveying an idea or information) more or less amounted to a complete censorship of that idea or information.[58]

56. For a discussion of this right, see *id.* at 31–33, 38–39.

57. Strict scrutiny not only fails to consider the nominal degree to which some content-based regulations burden speech, it disregards whether such a burden merely exists in one of many communication channels.

58. *See* GARRY, *supra* note 9, at 96–97 (recognizing that up until the 1970s, the only real mass media were the print and broadcast mediums).

Today, that is not the case. Therefore, when addressing restrictions placed on a particular kind of output or imagery of one communication medium, courts should look to the media as a whole, to see if that one restriction really prevents that speech from entering, via any media channel, the social marketplace of ideas.[59]

Indeed, the availability of alternative sources of the regulated speech played an important role in *Action for Children's Television v. FCC*,[60] 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.[61] The court concluded that the time-channeling rule for indecent broadcasts did not "unnecessarily interfere with the ability of adults to watch or listen to such materials both because [adults] are active after midnight and . . . have so many alternative ways of satisfying their tastes at other times."[62]

A constitutional model recognizing the reality of the modern mass media would look at the media marketplace as a whole, with all mediums considered together, to see if a restriction in one venue amounts to an effective ban on the speech. An effective model would assess a regulation's true impact on free speech by looking at all speech mediums in concert rather than at a single medium, as if each medium contained a complete supply of speech in and of itself.[63]

In an era of 500 digital television channels, twenty-four hour cable, and an Internet on which information-carriage increased ten-fold from 1997 to 2000 alone,[64] the problem—at least in terms of low value speech—is that there is too much, rather than too little,

59. *See, e.g.*, Cohen v. California, 403 U.S. 15, 19 (1971) (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.").

60. 58 F.3d 654 (D.C. Cir. 1995).

61. *Id.* at 669–70 (D.C. Cir. 1995). Here, the court recognized the harmful effects of pornography to children, and yet First Amendment doctrines allow for regulation of pornography only on the broadcast medium, which in today's media world is diminishing in importance.

62. *Id.* at 667.

63. This is an offshoot of the recognition 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), and that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 386 (1969) (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

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

speech.[65] The Internet contains a plentiful supply of pornography, violence, vulgarity, and hate speech. All this becomes more worrisome since "ninety percent of children between the ages of five and seventeen . . . now use computers."[66] Furthermore, the amount of adult content continues to grow at the approximate rate of 200 new pornographic web sites each day.[67] Not surprisingly, the Court in *American Library Ass'n* held crucial the finding that children could easily and unintentionally be exposed to sexually explicit material on the Internet.[68] Given the multiplicity of speech venues, and the dangers associated with unfettered access through a particular venue (such as the Internet), courts should not view speech restrictions in venue-isolation but should instead consider the availability of the regulated speech in the media as a whole.

D. In Today's Multimedia Environment, Strict Scrutiny Imposes All of the Burdens of Offensive Speech on Unwilling Consumers

By failing to address any harm caused by new modes of delivering various commercial media products, the strict scrutiny approach can essentially deny the very freedom that speech is supposed to facilitate—the freedom of the democratic process. An exclusive focus on content neutrality, especially in an age of media proliferation, shoves aside all other issues surrounding the basic concern of whether a law governing some aspect of speech has violated the values and principles served by the First Amendment.[69]

65. EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES, PROBLEMS, CASES AND POLICY ARGUMENTS 114–17 (2d ed. 2005). According to a recent Kaiser Family Foundation study, "one in every seven shows (again, this includes all genres other than daily newscasts, sports, and children's shows) has at least one scene in which intercourse is depicted or strongly implied . . . ." KAISER FAMILY FOUNDATION, SEX ON TV 3: EXECUTIVE SUMMARY 7 (2003), *available at* http://www.kff.org/entmedia/upload/Sex-on-TV-3-Executive-Summary.pdf. From 1998 to 2005, the number of television scenes with sexual content increased by ninety-six percent. *Numbers*, TIME, Nov. 21, 2005, at 24. In recent years, with sexually exploitive reality shows becoming ever more prominent, public complaints to the FCC about indecent programming have soared. *FCC Chief: TV Gets Too Racy*, CINCINNATI POST, Nov. 22, 2002, at A2.

66. 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).

67. H.R. REP. NO. 105-775, at 10 (1998).

68. Am. Library Ass'n v. FCC, 539 U.S. 194, 194 (2003).

69. The values include the discovery of social truths needed for self-government, the maintenance of an open system of public debate needed for a participatory democracy, and the

Moreover, the strict scrutiny approach fails to take into account how the captive audience doctrine should apply to the modern media world.

The captive audience doctrine suggests that unwilling audiences should not have to be involuntarily exposed to unwanted speech.[70] However, the doctrine proffers its protection primarily in terms of a physical place, thus becoming imprecise at best, and obsolete at worst, in an era characterized by an omnipresent electronic media, which currently produces the vast majority of offensive and harmful speech.[71] It has never been applied to violent and indecent entertainment programming intruding into the home through the electronic media.[72] The rationale is that individuals, and primarily parents, have the responsibility of averting their eyes, and particularly their children's eyes, from such programming. While this argument

existence of a safety valve that can allow people to express their dissatisfaction through speech rather than violent action. *See* GARRY, *supra* note 9, at 18–21. However, the issue remains whether a rigid content-neutrality approach better fulfills these values than would an approach that allows for a more constructive balancing consideration of the actual burdens imposed on speech by laws recognizing the diminishing control people today have over being exposed to unwanted speech, and the harms caused by new media venues for socially destructive speech.

70. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474, 484–85 (1988).

71. The primary place to which the captive audience doctrine has been applied is an individual's home. *See, e.g.*, *id.* (describing the home as a hallowed sanctuary, where individuals are entitled to respite from the bombardments of social life); Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 736 (1970) (upholding the right of people in their homes "to be free from sights, sounds, and tangible matter we do not want . . . ."); United States v. On Lee, 193 F.2d 306, 315–16 (2d Cir. 1951), *aff'd*, 343 U.S. 747 (1952) (A "sane, decent, civilized society must provide some . . . oasis, some insulated enclosure, some enclave, some inviolate place—which is a man's castle.").

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. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 81, 87–89, 102 (1949) (upholding an ordinance prohibiting the use of sound trucks, on the belief that citizens in their homes should be protected from the invasion of loud and raucous noises beyond their control as long as "some" in the community found the speech objectionable).

Although the courts have been most sensitive to audience rights inside the home, they have also recognized the rights of captive audiences outside the home to be free of unwanted speech. *See, e.g.*, 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); Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (finding that streetcar riders were a captive audience deserving protection from certain material that could be played over onboard speaker systems).

72. The doctrine, however, has arguably been applied in a limited fashion. *See* Bland v. Fessler, 88 F.3d 729, 731 (9th Cir. 1996) (upholding a California law prohibiting the use of automatic dialing and announcing devices unless a live operator first identified the calling party and obtained the called party's consent to listen to the prerecorded message).

has often negated the application of the captive audience doctrine to speech occurring outside the home, it oversimplifies the problem of realistic self-protection from unwanted Internet content.[73] If it is as easy as the Supreme Court says it is to access indecent speech on the Internet,[74] then parents have practically no way to adequately content-block. In a similar sense, if the Internet is indeed an integral and substantial part of contemporary life, then is it realistic or feasible to expect people to avert their eyes from all sexually explicit speech that invites itself onto a viewer's computer screen?

Because it can be accessed anywhere, with or without wires, the Internet has essentially erased the boundaries between public and private spaces.[75] Therefore, the captive audience doctrine should not focus on isolated spaces like the home but should more generally address those types of media that can have particularly captivating effects, especially on children.[76] As Professor Nachbar notes, not only do very few parents have the time to supervise every moment that their children spend on the Internet, but "unless the parent were, for example, to open each [web] page with the child looking away and only allow the child to view the page after a parental preview, there is no way to keep the child from taking in the content while the parent is evaluating its appropriateness."[77]

In modern society, for both adults and children, accessing the Internet has become a basic function of everyday life, as much as

73. Given the ease with which children can access or be exposed to pornography on the Internet, and given the essential role the Internet has come to play in education, it is arguably futile to expect that somehow parents can count on the children to simply avert their eyes from Internet pornography. Indeed, if, as Justice Breyer asserted in his *Playboy* dissent, it is futile to expect parents to keep their children from viewing pornography on cable television simply by an averting-their-eyes approach, then it is even more unrealistic to contend that such an approach would succeed against the Internet.

74. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 200 (2003) ("[T]here is also an enormous amount of pornography on the Internet, much of which is easily obtained [and] 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.").

75. *See* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1675 (1998).

76. As Justice Breyer's plurality opinion suggests in *Denver Area Educational Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), perhaps the *Pacifica* rationales—pervasiveness, invasion of the home, ineffectiveness of warnings, and accessibility to children—should apply equally to all the other electronic media, thus justifying a less protective level of scrutiny than that typically associated with content-based regulations. *Id.* at 744–45, 755.

77. Thomas Nachbar, *Paradox and Structure: Relying on Government Regulation To Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 220–21 (2000).

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.[78] In *Bethel School District 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."[79]

The strict scrutiny approach requires that unwilling audiences avert their eyes.[80] But this expectation has become unrealistic, given the pervasiveness of the modern media. Even though the Court has taken the position that the First Amendment requires a person to opt out, it has never examined how feasible it is for unwilling viewers or listeners to opt out, certainly not in the same way that it has examined all the potential burdens placed on those wishing to opt in.

78. Because of the pervasiveness of communications technologies, unwanted speech will increasingly be thrust upon unwilling audiences, even in public places, and some of this speech will be sexually explicit. *See* Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 26 (2007). According to Professor Zick, numerous "complaints have already been raised by drivers who were subjected to a nearby car's playing of a pornographic DVD, which is clearly visible, especially during evening hours." *Id.* As a result of the mobility of communications technologies, previously private forms of expression will increasingly become a matter of public concern. *Id.* at 27–28 (stating that "private offensive expression will move closer and closer to unwilling or undecided audiences. . . . The pornographic magazine will be digitized and transported onto the subway or bus, or into a public park, airport terminal, or other public place"). However, since the captive audience doctrine evolved long before the electronic media revolution, it currently is of little help to unwilling audiences who find themselves "captive" to new media technologies. Yet the Court recently has become more sensitive to new ways in which people in public places can find themselves captive to unwanted speech. *See* Hill v. Colorado, 530 U.S. 703, 750–52 (2000). However, *Hill*'s protections for unwilling recipients have never been applied to the non-broadcast electronic media. In *Denver Area*, the Court overturned essentially the same type of segregate-and-block approach later approved in *Hill*. 518 U.S. at 727.

79. Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986) (upholding a school's restriction on an indecent speech at a school assembly).

80. *See* Boler v. Youngs Drug Prods. 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); Cohen v. California, 403 U.S. 15, 26 (1971) (holding that, in the public square, listeners are presumed able to avert their eyes and ears from speech they find offensive and move on.); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (holding that the government may not screen out sexually offensive materials in advance and require potential recipients to opt in).

It is not fair, nor does the First Amendment require, that parents of limited resources be compelled to bear the burden of purchasing filters, just so the producers and patrons of pornography do not incur the least inconvenience. Neither does the First Amendment require that parents bear the sole burden of monitoring their child's every interaction with an all-pervasive media just so that the unfettered freedom of pornographers is not compromised in any way.[81] The First Amendment allows for the balancing of burdens in situations where regulations impact only the ease or means of accessibility and in no way excise a certain class of speech from the marketplace of ideas.

II. A NEW APPROACH FOR JUDICIAL EVALUATION OF SPEECH REGULATIONS

An approach that better allows courts to weigh the relative burdens involved in any speech regulation is the intermediate scrutiny approach taken with content-neutral laws such as time, place, and manner regulations. Under an intermediate scrutiny approach, the law must serve a substantial governmental interest and leave open alternative avenues of communication.[82] This approach would reflect a more realistic view of how speech is accessed and disseminated in the modern age. It would abandon the fiction that any restraint on speech in just one media venue automatically rises to the level of an unconstitutional censorship even if that speech is unrestrained in various other venues.[83] Indeed, it seems silly to examine the issue of whether an unconstitutional censorship has occurred by only looking at one media venue and ignoring how plentiful the speech still is in the media system as a whole. Thus, under this approach, a restriction of speech in one medium may be

81. An opt-in requirement on certain kinds of "low value" speech would attempt to balance the burdens. If an adult wishes to view indecent programming, he or she must make some effort to opt into it, to access it with some personal identification number, or to subscribe to a special channel. But even with such an opt-in requirement, there is no decrease in the amount of speech in the system, just a step required before accessing it.

82. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) (setting forth the standard and collecting Supreme Court cases).

83. As Dean Kagan notes, in today's media world the danger of many content-based regulations is minimized given "the small quantity of speech affected, combined with the ready availability of alternative means to communicate the 'handicapped' idea . . . ." Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 446 (1996).

permissible if that speech remains accessible through other mediums.[84]

Courts have implicitly approved this approach (and explicitly for so-called content-neutral regulations) by upholding statutes that restrict speech in one venue while leaving open alternative channels of communications.[85] In *Capital Broadcasting Co. v. Mitchell*, the court held that a statute restricting advertising in certain media did nor violate the First Amendment, since advertising in other media was still available.[86] In *Hill v. Colorado*, the Court upheld a "buffer zone" regulation restricting the speech rights of abortion protestors, finding that the only restricted avenue of communication was face-to-face dialogue and that the regulation left open ample alternative channels of communication.[87] Even though the statute at issue in *Hill* seemed clearly directed at abortion-related speech, the Court considered the availability of alternative channels of communication, just as it would for a content-neutral time, place, or manner restriction. Similarly, in *Schenck v. Pro-Choice Network*, the Court noted that although speakers had to keep a distance from their intended audience, they remained "free to espouse their message" in various ways from that greater distance.[88] Through cases like *Hill* and *Schenck*, the Court seems to say that what is important is that the potential for communicative interchange be preserved between speakers and willing listeuers. Consequently, speech restrictions are valid if willing listeners can still seek out and obtain the speech through an alternative channel.[89]

84. Prior to the explosion of communications technologies, the censorship of a particular medium (or of a particular way of conveying an idea or information) amounted more or less to a complete censorship of that idea or information. But now, that is not the case. *See* GARRY, *supra* note 9, at 96–97. Therefore, when addressing the restrictions placed on one kind of output or imagery of one medium, courts should look at the whole of the media society to see if that one restriction is really an unconstitutional infringement on speech. When the First Amendment was ratified, there was essentially one medium for speech. Therefore, it can be argued that a speaker only has a right to have his or her speech accessible in some medium(s), but not every medium. To be free, speech does not have to be completely uninhibited in all venues or forums.

85. Frisby v. Schultz, 487 U.S. 474, 484 (1988); *see also* Moser v. FCC, 46 F.3d 970, 973 (9th Cir. 1995) (noting that a ban on auto-dialing machines still left abundant alternatives open to advertisers).

86. Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971).

87. Hill v. Colorado, 530 U.S. 703, 726 (2000).

88. Schenck v. Pro-Choice Network, 519 U.S. 357, 385 (1997).

89. In *Urofsky v. Gilmore*, where a group of university professors challenged the

Some courts have indeed given increased importance to listener rights regarding certain new technologies. Both the Second and Ninth Circuits have sustained restrictions on access to dial-a-porn services because such restrictions were necessary to protect the children of parents who did not wish them to hear this particular kind of speech.[90] These restrictions—e.g., requiring telephone companies to block all access to dial-a-porn services unless telephone subscribers submit written requests to unblock them—were enacted in response to an earlier Supreme Court decision striking down a complete ban on dial-a-porn services.[91] As the court in *Information Providers' Coalition* suggested, restrictions that merely shift the burdens of access, rather than banning the speech altogether, are permissible.[92]

The intermediate scrutiny approach proposed here should incorporate a kind of balancing test, in which the substantial government interest underlying the statute is weighed against the actual speech burdens imposed by the statute.[93] Indeed, this balancing approach, which is sometimes used by the courts,[94] coincides with the approach taken by a natural rights theory.

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constitutionality of a statute restricting state employees from accessing sexually explicit material on computers owned by the state, the court noted that the statute did not prohibit all access to such materials, since an employee could always get permission from their agency head to access the material. 167 F.3d 191, 194 (4th Cir. 1999). The crucial distinction is whether the law places an outright ban on the speech, or simply just a manageable burden.

90. In *Dial Information Services v. Thornburgh* and *Information Providers' Coalition v. FCC*, the Second and Ninth Circuits ruled that the restrictions in the so-called "Helms Amendment," 47 U.S.C. § 223(b), (c) (2001), did not violate the First Amendment. Dial Info. Servs. v. Thornburgh, 938 F.2d 1535 (2d Cir. 1991); Info. Providers' Coalition v. FCC, 928 F.2d 866 (9th Cir. 1991).

91. Sable Comm. v. FCC, 492 U.S. 115, 131 (1989).

92. *Info. Providers' Coalition*, 928 F.2d at 878.

93. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 835–47 (2000) (Breyer, J., dissenting). The First Circuit has also depicted intermediate scrutiny as a type of balancing test. *See* Casey v. City of Newport, 308 F.3d 106, 116 (1st Cir. 2002). Moreover, Professor Geoffrey Stone has similarly described the intermediate scrutiny approach as a form of balancing. *See* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 58 (1987).

94. In the following cases, the courts, using a sort of a balancing approach, upheld regulations affecting highly protected speech. In *National Federation of the Blind v. FTC*, 420 F.3d 331, 341–42 (4th Cir. 2005), the court upheld restrictions on professional telephone fundraisers acting on behalf of charitable organizations. Although admitting that the affected speech was of the type highly protected by the First Amendment, the court justified the restrictions nonetheless because of the need to prevent fraud and protect the privacy of home-dwellers. *Id.* at 349. In *Republican National Committee v. Federal Election Commission*, 76

A natural rights model does not envision constitutional rights as automatically trumping all laws that might affect their exercise.[95] According to Randy Barnett, the "individual natural rights model would not end all regulation, but would instead scrutinize a regulation of liberty to ensure that it is reasonable and necessary, rather than an improper attempt by government to restrict the exercise of [liberty]."[96] The only thing forbidden by the natural rights model is the outright prohibition, as opposed to mere regulation, of rightful exercises of liberty.[97] Regulations of liberty, under a natural rights theory, are permissible as long as they do not "unduly burden" that liberty.[98] Thus, under this theory, rights do not serve as the complete disabler of democratic government, as they do under the strict scrutiny approach.

Admittedly, it is a big step in First Amendment jurisprudence to even contemplate adopting a lower standard of judicial scrutiny for

F.3d 400 (D.C. Cir. 1996), the court upheld a rule mandating political committees, in furtherance of their duty to provide government regulators with information on donors who contribute over $200, to send follow-up requests for information to those donors who do not supply it upon the initial request. In so ruling, the court found that the burden of sending out these follow-up requests was not high enough to violate the political committees' First Amendment rights. *Id.* at 409.

95. *See* Randy E. Barnett, *The Ninth Amendment: It Means What It Says*, 85 TEX. L. REV. 1, 14 (2006).

96. *Id.* (stating that a proper law is not a prohibition on the exercise of liberty, but rather it "proscribes the manner by which a particular liberty is to be exercised to protect the rights of others").

97. *Id.* at 15, 78. As Mill recognized, an individual's natural rights terminated when his actions brought harm to others. *See* JOHN STUART MILL, ON LIBERTY 140 (Legal Classics Library ed., Penguin Books 1992) (1859). This principle has also been recognized by the Supreme Court. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973) (stating that government has a valid interest in preventing people from being harmed by an individual's exercise of his or her rights). Moreover, under a balancing of liberties approach, the burden placed on a person's right to access speech should be balanced against a person's right to avoid that speech. But strict scrutiny fails to consider any burdens on the latter.

98. *See* Randy E. Barnett, *Who's Afraid of Unenumerated Rights?*, 9 U. PA. J. CONST. L. 1, 19 (2006). The judicial inquiry should be whether "the regulation can be justified as necessary to protect the rights of others." *Id.* Indeed, under the Court's jurisprudence, many constitutional rights can be regulated for the sake of a sufficiently important public purpose. In *Grutter v. Bollinger*, for instance, the Court held that a state's interest in educational diversity supported an infringement on an individual's right of racial equal protection. 539 U.S. 306, 346 (2003). Even though previous Court rulings had established an equal protection right against discrimination on the basis of race, *see* Richmond v. J.A. Croson, 488 U.S. 469, 493 (1989), *Grutter* allowed that right to be infringed upon for the sake of an important government interest.

content-based speech regulation.[99] However, there are two important considerations that make such a step acceptable. First, in order to receive the lower level of scrutiny, the content distinctions cannot be viewpoint distinctions; they would have to be subject matter distinctions. In this regard, the parameters of the CP80 proposal would pass muster, since restrictions on pornography or graphic violence are based on subject matter distinctions.[100] Indeed, there is nothing viewpoint-oriented about sexually explicit images.[101] And, as Professor Stone argues, subject matter distinctions are less troublesome or dangerous than viewpoint distinctions, since the former are less likely to distort the public debate.[102]

Second, to qualify for a lower judicial scrutiny, the speech restrictions could not involve political speech—i.e., laws aimed at political protest or at particular political ideologies. Any laws singling out any type of political speech must continue to be strictly scrutinized by the courts because political speech is the kind of speech for which the First Amendment grants the highest protection and because political speech is vital to the functioning of self-government.[103] Once again, however, the CP80 proposal should not be affected by this consideration, since pornography and obscenity would not qualify as political speech.[104]

99. Perhaps it is not a huge step since the Court has already sanctioned speech restrictions singling out political campaign speech. *See* McConnell v. FEC, 540 U.S. 93, 245 (2003) (upholding a ban on electioneering communications prior to an election). In addition, in connection with religious exercise rights, the Court has accepted facial distinctions in laws affecting First Amendment freedoms. *See* Locke v. Davey, 540 U.S. 712, 720 (2004) (recognizing that Washington's ban on state scholarships used for theological instruction was not "facially neutral with respect to religion").

100. *See generally* Preston, *supra* note 7.

101. To have a viewpoint distinction, one must essentially have speech that expresses a defined, debatable viewpoint. But the kind of pornography to which CP80 would apply is more of a media commodity, meant only to arouse certain physiological reactions.

102. Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 241 (1983).

103. The basis for this political speech argument is laid out in detail in GARRY, *supra* note 9, at 59–60, 113–27.

104. For a definition of political speech, see GARRY, *supra* note 9, at 115–16. As a third consideration, it should be noted that during the constitutional period, and throughout most of American history, there has been no experience with burden-free access to speech. Only during the modern media age has speech delivery become so pervasive as to make speech access a virtually effortless endeavor. *See id.* at 41.

III. CONCLUSION

Strict scrutiny, by automatically trumping the judgments of democratic legislatures, undermines the ability of people to have input into the practices and values that influence their individual and communal lives. In essence, it undermines our democratic culture. Culture is an important source of identity, and in a democratic society individuals should have a role in shaping the cultural forces that affect them.[105] Hardly any aspect of modern culture is more pervasive and influential than the media. It is continually changing, offering a wide array of media "products" in a wide variety of forms. But these "products" are often a far cry from the kind of speech vital to self-government, and they present social problems unimagined by the framing generation. Indeed, each new communication medium seems to carry its own unique set of problems, from the behavioral effects of violent video games to the psychological dysfunctions caused by Internet pornography.[106]

The current state of First Amendment doctrine, in which strict scrutiny is automatically applied whenever any content distinctions are made, evolved in response to historical conditions that no longer exist. A century ago, the only content distinctions that were subject to First Amendment scrutiny were political distinctions aimed at dissident speech; other kinds of speech, such as pornography or graphic violence were either restricted by social custom or by technological inadequacy.

A century ago, most content-based speech restrictions distinguished on viewpoint rather than subject matter. A century ago, there were very few communications mediums available for speech, and a restriction in one medium more or less meant a complete prohibition of that speech. A century ago, children were not nearly so vulnerable to every kind of speech and media imagery imaginable; they were not a readily available audience for the most harmful and destructive media imagery. A century ago, pornography and graphic violence were not so pervasive through the many mediums that make such speech particularly manipulative and influential on children. Therefore, to have First Amendment

105. John G. Palfrey, Jr. & Robert Rogoyski, *The Move to the Middle: The Enduring Threat of Harmful Speech to the End-to-End Principle*, 21 WASH. U. J. L. & POL'Y 31, 60 (2006).

106. *See generally* Garry, *supra* note 51.

doctrines that blindly prohibit any content distinctions, no matter what the actual censorship effects of those distinctions are, is to completely ignore the ways in which the modern media society has evolved and the ways in which democratic culture is being affected by that media.

The Court's current strict scrutiny approach to the First Amendment also ignores the overall aim of the Amendment. As Akhil Amar argues, the traditional understanding that the Bill of Rights reflected the framers' fear that majoritarian governments would oppress minorities is flawed.[107] Instead, what worried the framers the most was that an unchecked centralized government would infringe on the liberties of all its citizens.[108] Thus, according to Amar, the framers' main impetus for the Bill of Rights was not that the government would be too controlled by a majority but that the government would not be representative enough of the majority.[109]

The CP80 proposal offers not a censorship of ideas but a realistic and effective choice to people who wish to free themselves from the barrage of pornography.[110] It does not bar pornography on the Web, insofar as it leaves approximately 65,000 Internet ports open to pornography; instead, it tries to give power to those who have every right to reject being exposed to pornography. It grants freedom to those who might otherwise have no way of keeping pornography out of their lives, while at the same time not banning pornographic speech to those who desire it. What CP80 offers, particularly to those seeking greater control in protecting their children from pornography, is not censorship, but a real freedom of choice.

107. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132 (1998).

108. *Id.* at 1132–33.

109. *Id.*

110. What CP80 offers is a protection of one of the most timeless of freedoms—the freedom to resist and avoid. It is not only a basic freedom, but sometimes a vital necessity, as reflected by the story of Ulysses in *The Odyssey*. HOMER, THE ODYSSEY (Albert Cook trans., Norton & Co. 2d ed. 1993) (cir. 600 BC). Aware of stories of ships being dashed against the rocks in pursuit of the beautiful and seductive voices of the Sirens, Ulysses knew that he and his crew would not be able to resist those voices if they ever heard them. Therefore, to protect his ship, he put wax in the ears of his crew and ordered himself to be bound to the mast of the ship and not to be released until the ship had sailed out of hearing range of the Sirens.