

CONFRONTING THE CHANGED CIRCUMSTANCES OF FREE SPEECH IN A MEDIA SOCIETY

PATRICK M. GARRY*

In 2003, the Supreme Court handed down its much-awaited decision on the McCain-Feingold campaign finance bill.¹ Among its provisions, the bill abolished “soft money” contributions to national party committees,² placed restrictions on fundraising by federal officeholders and candidates,³ and curtailed certain political advertisements from being televised within sixty days of a general election.⁴ As it severely limited the rights of people and groups to engage in various types of political speech, the bill’s constitutionality was challenged on First Amendment grounds.⁵ But to the surprise of many, the Court in *McConnell v. Federal Election Commission* upheld the bill⁶—a bill that clearly exceeded the existing limits of First Amendment doctrine, as laid down in various post-Watergate judicial opinions.⁷ The Court’s decision in *McConnell*, which runs 166 pages, would require an entire book to exhaustively analyze. In short, the decision can be summed up in one phrase: changed circumstances.

Since the last major Supreme Court opinion on campaign finance and political speech, circumstances were seen to have changed. The costs of political campaigns were spiraling.⁸ Fundraising scandals had plagued the Clinton presidency.⁹ The public was becoming exasperated by the perceived influence of money in politics. The appearance of corruption had, in the view of both Congress and the Court, reached crisis levels.¹⁰ And so, because of these changed circumstances, the Court’s doctrinal

Copyright © 2005, Patrick M. Garry.

* J.D., Ph.D.

¹ See *McConnell v. FEC*, 540 U.S. 93 (2003).

² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 101, 116 Stat. 82 (to be codified at 2 U.S.C. 441i).

³ *Id.* §§ 313, 302, 303, 304, 309 (to be codified in scattered sections of 2, 18 U.S.C.).

⁴ *Id.* § 201 (to be codified at 2 U.S.C. 434).

⁵ *McConnell*, 540 U.S. 93.

⁶ *McConnell*, 540 U.S. at 224 (upholding the soft money ban and the regulation of electioneering communications).

⁷ Perhaps the most important of these is *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁸ See Russell D. Feingold, *Representative Democracy: How Soft Money Erodes the Principle of “One Person, One Vote,”* 35 HARV. J. ON LEGIS. 377, 377 n.2 (1998).

⁹ See Bronwen Maddox, *Cash Scandal Undermines Gore’s Hopes* (March 8, 1997), at <http://www.freerepublic.com/forum/a1001148.htm>.

¹⁰ See *McConnell*, 540 U.S. 93.

approach changed. It approved of legislation that just several decades earlier would have been declared unconstitutional.¹¹

Just three decades earlier, however, the Supreme Court had declared that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office.”¹² Five years later, the *Buckley* decision overturned limitations on individual political expenditures, reasoning that such limitations restricted “political expression ‘at the core of our electoral process and of the First Amendment freedoms.’”¹³ Five years after that, the Court struck down an ordinance placing ceilings on contributions to committees formed to support or oppose certain ballot measures.¹⁴ And as recently as 1996, the Court ruled unconstitutional various restrictions on the expenditures of political parties.¹⁵

In *Buckley*, the Supreme Court stated that the speech freedoms of one person could not be curtailed in an effort to level the political playing field and remove any financial advantages enjoyed by that person over another.¹⁶ Similarly, in *First National Bank of Boston v. Bellotti*,¹⁷ the Court rejected the “systemic corruption” argument as a rationale for restricting political speech.¹⁸ Nonetheless, by the time the McCain-Feingold bill came to the Court, circumstances had changed. According to the Brennan Center for Justice, the bill was a needed legal adjustment to “changing circumstances and the most pressing problems.”¹⁹ But as the dissent in *McConnell* argued, the end result of the decision is that what was formerly the most protected of speech—political speech—now carried more restrictions than virtual child pornography, sexually explicit cable programming, tobacco advertising, and nude dancing.²⁰

Just as with political campaign advertisements, there have been escalating calls for new restrictions of indecent material appearing on radio, television, and the internet, but the courts have steadfastly opposed any such restrictions.²¹ Even though changed circumstances have certainly

¹¹ Compare *McConnell*, 540 U.S. 93, with *Buckley*, 424 U.S. 1.

¹² *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

¹³ *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

¹⁴ *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981).

¹⁵ *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996).

¹⁶ *Buckley*, 424 U.S. at 49 n.55.

¹⁷ 435 U.S. 765 (1978).

¹⁸ *Id.* at 790.

¹⁹ Brennan Center for Justice, *Summary of Supreme Court Rulings in McConnell v. FEC* (2003), at http://www.brennancenter.org/programs/downloads/bcra_supct_summ.pdf.

²⁰ *McConnell*, 540 U.S. at 248 (Scalia, J., dissenting); *Id.* at 265 (Thomas, J., dissenting).

²¹ See Cynthia L. Web, *Court Pours Cold Water on Porn Law*, WASHINGTON (continued)

occurred over the years in the quantity and quality of media content, the courts have resisted making the type of doctrinal adjustments to entertainment speech that it made in *McConnell v. FEC* regarding political speech. Indeed, over the past half-century, few areas of American life have changed to the degree that media content and pervasiveness have changed.

If changed circumstances can justify regulation of the kind of speech that lies at the core of the First Amendment, then they should likewise lead to changes in the doctrines applying to the plethora of vile, vulgar, and violent entertainment speech increasingly filling the modern media. Violent and sexually explicit video games are marketed to children under the age of ten.²² Pornographic and hate-speech sites on the internet can be accessed with just a click of the mouse. The radio, which is perhaps the medium most available to young children,²³ can contain truly repugnant speech. The Opie & Anthony show on WNEW in New York broadcasts a contest in which it awarded points for play-by-play descriptions of couples having sex in public places such as the zoo, a toy store, and St. Patrick's Cathedral.²⁴ On another occasion, the show featured a graphic song about a father having oral sex with his daughter.²⁵ The Deminski & Doyle Show in Detroit asked callers to be as graphic as they could when narrating their favorite sexual practices.²⁶

Television is just as bad. A morning news program in San Francisco had as its guest a cast member of the theatrical production *Puppetry of the Penis*, who during his brief appearance exposed himself while engaging in dramatic fondling of his genitalia.²⁷ Even national rituals like the Super Bowl are no longer safe for a family audience. Public outrage occurred after the 2004 Super Bowl halftime show when singer Justin Timberlake tore away the clothing covering co-singer Janet Jackson's breast.²⁸ But amidst the uproar over this flesh-baring incident, attention seemed diverted from the lyrics of the song being performed at the time: "I'm gonna have

POST.COM, June 30, 2004, available at 2004 WLNR 5672017.

²² See generally Federal Trade Commission, Marketing Violent Entertainment to Children, A Report to Congress 20-28 (July 2004), available at <http://www.ftc.gov/os/2004/07/040708kidsviolencept.pdf>.

²³ *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978).

²⁴ Matthew Quirk, *Air Pollution: FCC Fines for Indecency and Obscenity*, THE ATLANTIC, May 2004, at 36.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Bill Carter & Richard Sandomir, *Pro Football: Halftime-Show Fallout Includes F.C.C. Inquiry*, N.Y. TIMES, Feb. 3, 2004, at D1.

you naked by the end of this song.”²⁹ Such public speech certainly did not exist when the First Amendment was ratified, nor during much of the twentieth century when the current doctrines covering free speech were being formulated by the courts.

Another strikingly changed circumstance involving media speech is its sheer prevalence. Those who wish to avoid violent and offensive speech can hardly do so because it can appear anywhere and at anytime, with little advance warning. Using the seek key on the radio to find a clear station in an unfamiliar market may suddenly produce a Howard Stern monologue on anal sex. Surfing the cable television stations will bring to the screen a couple discussing their most recent sexual encounter. Walking through the mall, past a music store, may expose the passerby to the crude and violent lyrics of a rap artist. Pop-up advertisements on the internet can interrupt a child’s research session with an invitation to join a sexual chat line. Unsolicited emails containing sexually explicit material can be waiting in the internet mailboxes of unsuspecting users. Patently offensive music lyrics can be heard from someone else’s CD player in a park or even while waiting for a traffic light to change.

When the Supreme Court developed its current free speech doctrines, largely during the period from the 1950s to the 1980s, most of the controversies involved dissident political speech: socialists and communists trying to convey their political ideas to a largely unreceptive public. Though unpopular, the ideas were nonetheless politically relevant. However, such is not the case with most of the current speech controversies. These disputes have very little to do with politics, even radical politics. Most controversial speech now takes the form of entertainment programming being packaged and sold by large media corporations that profit off the peddling of raunchy shows. The conflicts are not, contrary to the image often created by self-martyred artists, connected with political issues or causes; they are not at all similar to the government crackdowns on suspected communists Senator Joseph McCarthy instigated during the early 1950s.³⁰

Despite the claims of multi-millionaire entertainers seeking victim status, popular art is not being stifled by any fear of government censorship. Instead, it is being driven by an accelerating race to the bottom with each artist trying to outdo the other in outrageousness. When entertainers do come under scrutiny, as Howard Stern did from the Federal Communications Commission (FCC) during its briefly increased vigilance following the Janet Jackson Super Bowl incident, they argue that they are being singled out for political reasons and are being punished for

²⁹ JUSTIN TIMBERLAKE, *Rock Your Body*, on JUSTIFIED (Jive Records 2002).

³⁰ See Censure of Senator Joseph McCarthy, at <http://usinfo.state.gov/usa/infousa/facts/democrac/60.htm> (last visited May 16, 2005).

advocating views critical of the government.³¹ But if anyone has ever listened to Howard Stern, they know that political commentary is not a characteristic of his show. Granted, there might be a passing phrase lambasting the government, thrown into a thirty-minute trash-talk on lesbian sex, but it is nothing more than a quip, a filler of some dead air-time.

A disconnect has occurred between the speech that actually exists in the American media and the law governing that speech—a disconnect between reality and legal doctrine. As Oliver Wendell Holmes once wrote: “The life of the law . . . has been experience.”³² The Supreme Court’s campaign finance decision in *McConnell* reflects this pronouncement. Because of “changed circumstances” in the reality of political campaigns, the Court reacted with a change in the law. Other constitutional rights have similarly undergone such changes. The Second Amendment right to bear arms has been curtailed because of the prevalence of guns and violence in America.³³ An assault weapon ban was enacted into law,³⁴ as were various gun registration requirements.³⁵ The Fourth Amendment freedom from search and seizure has been modified to allow law enforcement officials to conduct warrantless searches of homes if they suspect evidence is about to be destroyed or a crime committed.³⁶ The Equal Protection prohibition against racial targeting has been altered so as to permit affirmative action programs aimed at assisting specific racial groups.³⁷ But despite all the changes in American’s media environment, constitutional law has failed to adapt. The doctrines governing free speech remain virtually unchanged, stuck in an era preceding cable television and rap music and pornographic web sites and shock-jock radio—stuck in an era in which the most controversial public speech was the political criticisms of socialists and pacifists.

In defending the McCain-Feingold bill, one of the attorneys argued that the Court should not construe the First Amendment as a straitjacket

³¹ George Lerner, *Stern Lambastes Bush, FCC: “I Criticize Bush and then I’m Fired,”* (June 30, 2004), at www.cnn.com/2004/ALLPOLITICS/06/30/stern.bush.

³² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown and Company 1881).

³³ See generally Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987).

³⁴ Public Safety and Recreational Firearms Use Protection Act, Pub. L. No. 103-322, 108 Stat. 1801 (1994) (repealed 2004).

³⁵ See 18 U.S.C. §§ 921-922 (2000).

³⁶ See, e.g., *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

³⁷ See *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

preventing Congress from addressing an urgent social problem.³⁸ But this same argument could be made regarding speech that is much further from the core concern of the First Amendment—media entertainment that is filled with raw violence and gratuitous sex. Because of all the changed circumstances surrounding media content, the rationales for protecting vile and vulgar and violent speech no longer seem to fit. They do not fit because they all stem from a constitutional model that has become irrelevant and outmoded.

Many of the current First Amendment doctrines are based on the marketplace model. This model strives to inject as much speech as possible into the public domain, to encourage the production of maximal amounts of speech. The underlying assumption of the marketplace model is that the competition of ideas will lead to the attainment of truth. The marketplace model, according to its defenders, offers democratic society a road map for how to govern itself. The magic formula is abundance. If the law is oriented to maximize the volume of speech, the natural functioning of the marketplace of ideas will work everything out; it will produce the truth and guidance that society needs; it will preserve the best ideas and eventually discard all the useless and harmful ones.

The problem with the marketplace model is that in the modern world, the one thing of which there is no shortage is volume of speech. Over eighty percent of U.S. households have cable or digital television capable of receiving hundreds of channels.³⁹ Another problem lies with the nature and source of speech that does fill the media. The marketplace model envisions speech coming from the “street corner speaker”—the idealized image of the eighteenth century citizen voicing his political opinions in the town square. But in the twenty-first century, the massively overwhelming amount of public speech does not emanate from “street corner speakers,” even if the internet has allowed for greater public participation in political dialogue. By far, most of the speech comes from media corporations. And instead of the political views of concerned “street corner speakers,” the vast majority of contemporary media speech is mere entertainment, which is essentially a mass-produced commodity, no different from a set of golf clubs or a new bicycle or a CD player.

Since most public speech is entertainment rather than political or informative, the controversies it generates are different from the controversies generated by “street corner speakers.” While the orator in the town square might anger government officials by his criticisms of tax policy or his demands for investigation of public corruption, the modern

³⁸ The Brookings Institution, *The Legal and Political Impact of McConnell v. FEC* (Dec. 11, 2003), at <http://www.brookings.edu/comm/op-ed/20031211cfr.htm>.

³⁹ Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 345 (2003).

entertainer offends society by flouting whatever public decency standards remain. The controversy does not arise because of government-initiated censorship of the speech, but because the average citizen is outraged by what their children see on television or listen to on the radio. Nor is it an answer to that outrage to state that the only solution permitted by the First Amendment is to allow more speech, especially if that addition will only be more indecent or offensive entertainment. Indeed, if any speech is plentiful in America today, it is the speech of sex and violence and vulgarity. Under current First Amendment doctrines, indecency is accorded privileges not even given to religious speech. In *Sante Fe Independent School District v. Doe*,⁴⁰ the Court banned religious prayers from being recited over the public address system at high school football games,⁴¹ but in *Sable Communications, Inc. v. FCC*,⁴² the Court overruled a congressional ban on pornographic pre-recorded telephone messages, also known as “dial-a-porn” services.⁴³

For all practical purposes, the media industry has monopolized the First Amendment in the modern age. It has become an insurmountable wall of immunity shielding entertainment companies from any accountability for the products they market. The First Amendment has become such an impenetrable shield that the media has become shameless in its hypocrisy. It condemns gun manufacturers for contributing to violence in America, even as it continues to spew out entertainment content that glorifies raw, gratuitous violence. It seeks changes to the Second Amendment that would allow those gun manufacturers to be sued by victims of gun violence, even as it successfully resists any lawsuits by parents whose children have been victimized by aggressors acting under the influence of violent movies and video games. It proclaims that the warning labels on cigarette cartons should not protect tobacco companies from liability, even as it evades and undermines its own largely ineffective rating system for video games, music lyrics, and television programming. It condemns fast-food restaurants for causing obesity in America, even as it argues that any responsibility for indecent and violent forms of entertainment lie exclusively with parents who allow their children access to such entertainment.

Under the shield of the First Amendment, Hollywood has been steadily growing more raw and shameless in its entertainment programming. The courts’ answer to this violent, vulgar, and sexually graphic programming is that offended viewers should simply “avert their eyes.”⁴⁴ This solution fits

⁴⁰ 530 U.S. 290 (2000).

⁴¹ *Id.* at 295, 312-13, 317.

⁴² 492 U.S. 115 (1989).

⁴³ *Id.* at 126.

⁴⁴ See *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 (1975) (quoting *Choen v.* (continued)

in perfectly with the marketplace model since it does nothing to diminish the quantity of speech. It puts no obstacles or duties on the speaker or in the path of the speech. But again, this solution of “averting one’s eyes” is completely disconnected from the realities of the modern media world. It is a solution that, because of the “changed circumstances” of the information age, has become unworkable.

Today, there is no way to erect a firewall between children and selected aspects of popular culture—the ubiquity of the media renders personal selectivity nearly impossible. As Diana West observes, “Turning off your own TV set—or DVD player, or Internet connection—is a little like pulling the shade on one window of a large apartment building: The effect is zilch on where you live.”⁴⁵ Even if parents impose strict rules on music listening, their children are going to know who Eminem and Christina Aguilera are. Even if the television is not turned on that night, their children will learn the juicy details of “The Victoria’s Secret Fashion Show” and its lingerie-clad models. Even if the parents do not allow any video games in the house, there are plenty of arcades between home and school. Even if parents strictly monitor television programs their children are allowed to watch, there is absolutely no telling what kind of commercials will air during those programs; nor will parents be able to monitor all the public venues where large video screens will be tuned into MTV, with its singers more absorbed in simulating sex than mouthing the lyrics to a song. Moreover, the difficulty of monitoring a child’s media exposure is exponentially magnified if both parents are working, or if the household is run by a single parent (notwithstanding Hollywood’s glorification of single parenthood).

Besides the sheer pervasiveness of the modern media, much of contemporary entertainment is designed precisely to prevent any “averting of eyes.” There is a reason children sit so motionlessly in front of the television, a reason why teenagers unthinkingly echo the words of a song, a reason why eyes become so glued to video games. The reason, of course, is that these forms of entertainment, unlike the “street corner speaker,” aim not to logically persuade but to psychologically capture and entice. They seek not to inspire debate but to prompt an addiction.⁴⁶ Expecting people to constantly avert their eyes from so much of popular entertainment, which is designed to appeal to the temptation-prone vulnerabilities of people, is like leaving a bowl of candy sitting out on the table and

California, 403 U.S. 15, 21 (1971)).

⁴⁵ Diana West, *All That Trash*, THE PUBLIC INTEREST, Summer 2004, at 131.

⁴⁶ As Cass Sunstein writes, First Amendment protections are now “giving the name ‘freedoms’ to the most flagrant enslavements of our minds and wills.” Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 255 (1992) (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 104-05 (Harper & Brothers 1948)).

somehow expecting sweet-toothed children to “avert their eyes” (and stomachs).

The courts place all the burdens of cleaning up public expression on the listener and viewer, even after the media has invested millions of dollars to make their entertainment products addictive and unavoidable. But it is just as unreasonable to set down a bottle in front of a recovering alcoholic and expect him to refrain as it is to think that violent and sexually explicit forms of entertainment are entirely free-chosen. History has shown that human beings have a weakness, a vulnerable attraction, to instinctual urges toward sex and violence. Up until recent times, human history has been a story of people trying to control these urges and temptations. Whole civilizations and cultures of civilized practices were built up over centuries to control such urges and temptations. But this centuries-long effort is being quashed by the modern media’s exploitation of sex and violence.

The unrealistic expectation that people should simply avert their eyes might be more palatable if the speech from which eyes had to be averted qualified as speech necessary or even helpful to democratic governance. There would be stronger justification for keeping unpopular speech front-and-center if it concerned advocacy of an unwanted war or the raising of opposed taxes or the continuation of a discredited juvenile justice program. But this is not what the vast majority of media entertainment is all about. In fact, the vast majority of media entertainment has no such social significance or importance. It is simply like the candy bar that sits out on the table—it simply cannot be avoided.

A “changed circumstance” of the modern media world is that the so-called bad or “low value” speech is no longer the exception. Coinciding with the marketplace model’s assumption that “good” speech can only be assured through the protection of “bad” speech, the parties in some of the twentieth century’s most noteworthy First Amendment cases have been pornographers,⁴⁷ murderers,⁴⁸ and members of the Ku Klux Klan.⁴⁹ The validity of this all-or-nothing assumption, however, is being questioned during a time of abundant speech and when government seems to have removed itself from the business of political censorship.

Disillusion with the marketplace model has occurred even with many liberals who have long been some of the strongest supporters of free speech. The continued existence of hate-speech, which can sabotage racial harmony, and pornographic speech, which feminists claim objectifies women, have prompted liberals to modify their positions on what speech

⁴⁷ See, e.g., *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁴⁸ See, e.g., *Abu-Jamal v. Price*, 154 F.3d 123, 131 (3d Cir. 1998).

⁴⁹ See, e.g., *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

should be protected and how it should be protected. But if such attitudes continue to grow, the real danger is that a sweeping backlash against free speech freedoms may occur. If nothing is done to address some of the most harmful speech elements existing today, as well as the relative helplessness of individuals to counteract the pervasive presence of media speech, the First Amendment may face even greater challenges in the future.⁵⁰ The question then becomes as follows: if direct government intervention in the communications marketplace is unacceptable, what else can be done? The answer may lie at the very heart of the First Amendment—the notion of individual control over his or her communications process.

In First Amendment terms, the issue of individual control currently prevailing is not the issue that prevailed during the 1950s or the World War I era. The issue is not the individual's right to speak as she pleases. There is virtually nothing that individuals cannot say, aside from shouting "Bomb" in a crowded airport.⁵¹ Nor is the issue an individual's right to obtain speech—not only is speech plentiful, but there are many different sources for each type of speech sought. Instead, the one issue of individual control that is most in need of addressing is the issue of how individuals can avoid having themselves and their children bombarded with speech they consider degrading and destructive. This control cannot realistically be achieved through simply "averting one's eyes," nor should individuals in the modern information age be forced into an all-or-nothing position. They should not have to unplug the television or disconnect the internet access just because they wish to avoid graphic violence and lurid sexuality. Such an approach would certainly not help to build a citizenry engaged in the modern world.

No one claims that the First Amendment, for the sake of promoting speech, should require someone to listen to a speech she does not want to hear, nor view a program she does not want to watch, nor subscribe to a newspaper she finds distasteful. And yet, because of the pervasiveness of the modern media and the concerted attempt by an entire industry to "hook" the American public on certain kinds of entertainment, individuals may not be able to so easily draw away from speech that their rational minds tell them they should avoid. Individuals may need help regaining

⁵⁰ The acceptance by some constitutional scholars of a "less elevated constitutional and cultural role for speech," according to Professor White, "signals the deeply paradoxical and problematic status of modernist-driven free speech jurisprudence." G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 310 (1996).

⁵¹ See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919) (stating that the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic).

some semblance of control in a media-saturated society, especially as the media slides further and further into the peddling of degradation. But as long as this control rests in the individual, even if it is aided by some governmental assistance, and as long as there is not a denial of speech to desiring listeners or viewers, then nothing in the First Amendment should prevent such control from being possessed.

The First Amendment states that speech shall not be repressed by the government.⁵² This means that the government can neither stop people from speaking nor keep their speech from reaching a willing audience. But over time, the courts have employed the marketplace model to give a much more expansive reading to the First Amendment speech clause. They have interpreted the clause to mean not just that the speaker be free, but that her speech must flow to every corner of the social marketplace without any diversions whatsoever. The courts have ruled that free speech means that any listener or viewer must be able to access that speech without any inconveniences or burdens.⁵³ Yet this was not how speech operated during the constitutional period. Then, people had to make a great effort to avail themselves of news and opinion. They had to gather in the cold and rain as an orator spoke in the town square; they had to walk to the public houses to read a copy of one of the few newspapers available. In the modern age, however, the presumption is that speech must flow to every potential listener with barely an ounce of effort exerted by that listener—just sit down in a restaurant or airport lounge and succumb to all the surrounding television screens. But this approach has led to a problem unthinkable in the eighteenth century—the problem of listeners being deluged with speech they do not want and cannot seem to avoid.

The last thing someone does during a flood is to water the lawn, but that is the judicial response to the flooding of violent and sexual speech that the media age has brought. There have been regulatory stabs made at this problem, but they have not succeeded. Ratings have been placed on gruesomely violent video games, but the manufacturers still market the games to young children, and the stores still sell them.⁵⁴ The FCC has been charged with enforcing decency standards on broadcast radio and television, but the current state of programming on those media testify as to the lack of success the agency has had. Government regulation has not worked, but what might work is greater control given to the individual to do his or her own censoring of media content. What might be the answer is to return to individuals the power they possessed two hundred years ago—the power to reject intrusive and offensive speech.

⁵² U.S. CONST. amend. I.

⁵³ See, e.g., *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 754 (1996).

⁵⁴ See Federal Trade Commission, *supra* note 22, 20-28.

Speech means more than words flying out of someone's mouth. Fundamentally, speech is a process of communication. But communication is a two-way street. The listener is as much a part of the process as is the speaker. Consequently, for the courts to focus their First Amendment doctrines strictly on the speaker or the sheer volume of speech is to ignore the whole other side of the equation.⁵⁵

Given the realities of the modern world, most people will never publish op-ed pieces in newspapers or host their own political talk-show on television. For most people, their speech acts will involve selecting, and rejecting, those ideas or expressions with which they agree or disagree. In the modern world, censorship is the speech of the inarticulate—and for them to have expressive freedom, they should be free to reject certain unwanted speech and to disassociate themselves and their families from what they consider socially or morally repulsive speech. Given the flood of media speech that exists in the modern world, individuals should be able to privately and effectively censor speech. Given the “changed circumstances” that have developed in the media world, the First Amendment should be interpreted to recognize such a private right of censorship.

The past several decades have witnessed a “rights explosion.” Under the First Amendment, there is a right to speak, a right not to speak, and a right to listen.⁵⁶ The only remaining right is the right not to listen.⁵⁷ It is a right made necessary by the realities of the information world. It is a right that seeks to expand the power of control possessed by all the individuals who have been rendered increasingly passive by the overwhelming weight and pervasiveness of the modern media. In seeking to give the listener more power, a private right to censor may place diversions in the path of speech; it may mean that the speaker does not have absolute control over all the destinations of her speech; it may mean that willing listeners will have to make some effort to receive all the different kinds of speech they desire. But a private right to censor will not overrule the right of speech. It will not shut down speech or silence speakers. It will simply give listeners some individual control amidst the growing tide of speech that washes in on them every day of their lives.

A private right to censor would justify regulations that aim to help people avoid unwanted speech and yet that do not impose a complete ban on speech. The recent case of *Ashcroft v. ACLU* involved such regulations.⁵⁸ In *Ashcroft*, the Supreme Court overruled Congress' second

⁵⁵ See generally Leslie Gielow Jacobs, *Is There an Obligation to Listen?*, 32 U. MICH. J.L. REFORM 489 (1999).

⁵⁶ *Id.* at 489.

⁵⁷ *Id.*

⁵⁸ 124 S. Ct. 2783 (2004).

attempt to regulate minors' access to harmful material on the Internet.⁵⁹ The Court struck down its first attempt, the Communications Decency Act,⁶⁰ in *Reno v. ACLU*.⁶¹ In response to this ruling, Congress enacted the Child Online Protection Act (COPA),⁶² which tried to address the concerns articulated in *Reno* by forcing commercial vendors of pornographic Internet material to require a credit card for access to their sites.⁶³ Congress 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.⁶⁴ Nonetheless, the *Ashcroft* Court still found COPA unconstitutional on the grounds that it "was likely to burden some speech that is protected for adults."⁶⁵ If parents did not want their children to be exposed to online pornography, the Court stated, they should install Internet filtering software that would screen out such material.⁶⁶

In his dissent, Justice Breyer took a position not dissimilar to that of a private right to censor.⁶⁷ He argued that the regulations imposed only a "modest additional burden on adult access to legally obscene material."⁶⁸ Furthermore, he added, filtering software was not a viable alternative.⁶⁹ Not only is there strong evidence that filtering software was not effective in blocking out undesirable material, but filtering software is expensive and hence not universally available.⁷⁰ In addition, children could still gain access to harmful internet material from computers at the homes of friends.⁷¹

⁵⁹ *Id.* at 2789.

⁶⁰ Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133 (1996).

⁶¹ 521 U.S. 844 (1997).

⁶² Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681-736 (1998) (codified at 47 U.S.C. § 231).

⁶³ *See Reno*, 124 S. Ct. at 2789. 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." 47 U.S.C. § 231(c)(1).

⁶⁴ Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 133; *see also Ashcroft*, 124 S. Ct. at 2789.

⁶⁵ *Ashcroft*, 124 S. Ct. at 2791.

⁶⁶ *Id.* at 2793.

⁶⁷ *See id.* at 2800-01 (Breyer, J., dissenting).

⁶⁸ *Id.* at 2801.

⁶⁹ *Id.* at 2802.

⁷⁰ *Id.*

⁷¹ *Id.*

Justice Breyer acknowledged that the statute imposed minor burdens on some adults wishing to view pornographic material on the internet, but he argued that those burdens could be “overcome at modest cost.”⁷² Furthermore, those burdens were more than offset by the statute’s ability to protect children “from exposure to commercial pornography.”⁷³ As the culmination of eight years of legislative effort, two congressional statutes and three Supreme Court cases, COPA had been drafted so as to “meet each and every criticism of the predecessor statute that this Court set forth in *Reno*.”⁷⁴

The dissent emphasized the unique characteristics of the Internet, with its overwhelming supply of pornographic material accessible to children,⁷⁵ but the majority relied upon the same old First Amendment doctrines that had been developed during an era of street-corner political protestors.⁷⁶ Formulated in a time when speech was nowhere near as abundant or intrusive as it is now, the marketplace model seeks to maximize the amount of speech in the social communications system by eliminating any and all burdens on speaker freedoms. This one-sided focus, however, has become outmoded and even counter-productive in a time of media proliferation. It ignores the rights of people trying to avoid the flood of offensive and destructive speech. Moreover, the marketplace model has turned the First Amendment primarily into a shield for one kind of speech—the offensive and degrading output of the entertainment industry.

As demonstrated in *Ashcroft*, the modern information age poses an entirely different challenge than that which existed earlier in the twentieth century when the current First Amendment doctrines were developed. Then, the challenge was to break down the barriers to political speech protecting the status quo. Now, however, the challenge is to give a media-captive public some degree of freedom to reject or avoid all the vile, vulgar, and violent entertainment programming that is flooding society.

If the Supreme Court in *McConnell v. FEC*⁷⁷ is right, changed circumstances should allow a democratic society some leeway in shaping its constitutional commands. There should be some freedom of experimentation accorded to democratic legislatures to address pressing social problems. Such freedom may now be necessary in connection with the increasingly harmful types of entertainment to which children are being exposed. Modern society may have reached the point where the assumption of the marketplace model must finally be put to the test: does

⁷² *Id.* at 2804.

⁷³ *Id.*

⁷⁴ *Id.* at 2804-05.

⁷⁵ *See id.* at 2801-03.

⁷⁶ *See id.* at 2788-95.

⁷⁷ 540 U.S. 93 (2003).

all the “bad” speech have to be protected so as to keep the “good?” As former FCC chairman Newton Minow observes,

If we accept the notion that the First Amendment prohibits us from trying to protect our children from the mass media, . . . we have committed the perverse error of divorcing our commitment to free speech—the gift by which the Founding Fathers intended us to deliberate on the public interest—from our commitment to the public interest itself.⁷⁸

⁷⁸ West, *supra* note 45, at 135 (quoting Newton Minow & Nell Minow, *The Role of Government in a Free Society*, in *KID STUFF: MARKETING SEX AND VIOLENCE TO AMERICA’S CHILDREN* 240, 252 (Diane Rayitch & Joseph P. Viteretti eds., John Hopkins University Press 2003)).

