SPEECH RESTRAINTS FOR CONVERGED MEDIA

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Courts have regularly relied on the "special characteristics" of radio and television broadcasts to justify government regulation of the content in those media that has never been allowed for the print media. However, the convergence of media delivery platforms (print, broadcast, telephone, cable, and Internet) has put a severe strain on the viability of this medium-centric model for speech restraints. This Comment proposes an analytical framework that eliminates the need to characterize speech in converged media as more "like print" or "like broadcast" to determine the degree of protection that it merits.

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INTRODUCTION

Imagine four scenarios: First, on broadcast television a popular star uses profane language during hours when young children are in the audience. Second, you are eating dinner and receive a telephone call; the voice on the other end of the line mispronounces your name, asks if you read the *L.A. Times*, and tries to sell you a newspaper subscription. Third, you check your e-mail in the morning and find your account overflowing with unsolicited messages. Fourth, you mistype an address in your web browser, and suddenly your computer screen is filled with graphic pop-up images of pornography and advertisements that seem impossible to close.

Each of these scenarios involves speech that is constitutionally protected by the First Amendment.[1] According to the United States Supreme Court, the degree of protection afforded such speech depends on the medium (or platform)[2] by which it is delivered.[3] Although the medium-specific model of First Amendment protection has suffered sustained criticism, courts continue to employ it, leading to seemingly inconsistent results.[4] For example, the Supreme Court has applied a more permissive regime of First Amendment law to content-based government restrictions of broadcast radio and television speech than to similar restrictions on printed speech. The 1978 case of FCC *v. Pacifica Foundation*[5] illustrates this diminished constitutional protection. The relatively light scrutiny that the *Pacifica* Court applied in allowing a restriction on profanity in radio stands in stark contrast with the Court's attitude towards printed profanities in its famous

1. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726 (1978) (broadcasting); FCC v. Sable Communications, 492 U.S. 115 (1989) (telephony); Reno v. ACLU, 521 U.S. 844 (1997) (*Reno I*) (Internet). *See generally* Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899 (1998) (discussing the state of First Amendment protection in various media).

2. This Comment uses the word platform instead of medium as much as possible. The distinction is a subtle, yet important one that underlies the morass of media regulation. On any given *platform*, a number of different types of content can be delivered. The traditional notion of a medium is a pairing of platform and content; for instance, the medium of television is a combination of the broadcast platform with audio and visual messages. The radio medium is a pairing of the same platform with audio messages only.

3. *See* Robinson, *supra* note 1, at 902–04; *see also* Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring) ("The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself, and all we are dealing with now is the sound truck.").

4. *See infra* part I.C.

5. 438 U.S. at 748 (introducing the idea of media pervasiveness as a reason for content regulation). Pervasiveness is discussed further *infra* Part I.A.2.

decision in *Cohen v. California*.[6] The fact that the government could not restrict the use of profanity[7] on Cohen's jacket, but could criminalize "utter[ing] any obscene, indecent, or profane language by means of radio,"[8] reflects very different judicial and social attitudes towards the freedom to be afforded these two types of speech.

The question of how much constitutional protection should be afforded speech in different media has never been more important than now. Unperturbed by possible First Amendment problems, the Federal Trade Commission (FTC) is leaping legal hurdles to implement the national Do-Not-Call-Registry,[9] a list intended to protect fifty million citizens from the annoyance of unwanted telemarketing calls.[10] The threat of a ban on calling members of the registry has set off a political and legal firestorm that is moving towards the Supreme Court.[11] Congress and the Federal Communications Commission (FCC) have recently made aggressive moves to sanction stations that broadcast indecent speech.[12] Incendiary debates are raging in the area of anti-spam legislation enacted at the state and federal levels.[13] These new laws and lawsuits are

6. 403 U.S. 15 (1971). Cohen was arrested under a California law for "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." *Id.* at 16 (quoting CAL. PENAL CODE § 415) (alterations in original). While in the Los Angeles County Courthouse, Cohen wore a jacket that read "Fuck the Draft." *Id.* The Court reversed his conviction, stating that "while the particular four-letter word being litigated here is perhaps . . . distasteful . . . it is largely because government officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Id.* at 25.

7. Profanity is protected speech. Contrast profanity with *obscenity* which is not speech as contemplated by the First Amendment. *See* Miller v. California, 413 U.S. 15, 23–24 (1973) (creating a three part test for obscenity).

8. 18 U.S.C. § 1464 (2000). The FCC invoked this statute in *Pacifica*, 438 U.S. at 731.

9. *See* Jube Shiver, Jr., *FTC Wins Court Okay for Registry*, L.A. TIMES, Oct. 8, 2003, at C1.

10. *See* National Do-Not-Call-Registry Act, Pub. L. No. 108-82, 117 Stat. 1006 (2003) (ratifying the authority of the FTC to establish the Do-Not-Call-Registry); *see also* Shiver, *supra* note 9.

11. *See* Jube Shiver, Jr., *Another Hang-Up for 'Do Not Call,'* L.A. TIMES, Sept. 26, 2003, at A1 (describing legal strategies and quoting President George Bush stating that "[u]nwanted telemarketing calls are intrusive, annoying and all too common").

12. *See* Frank Ahrens, *FCC Chairman Seeks Reversal on Profanity*, WASH. POST, Jan. 14, 2004, at E1 (describing efforts by FCC Chairman Michael Powell to implement a categorical ban on the broadcast of the word "fucking" as a result of pop star Bono using the word on the air in the phrase "fucking brilliant"); Doug Saunders, *Wanna Hear the F-Word? Fuhgeddaboutit!*, GLOBE & MAIL (Toronto), Jan. 13, 2004, at A3 (recounting the use of profanity on a live Fox broadcast by a young starlet). "It really is about the children . . . . If they can't say those things in schools any more, they shouldn't be hearing it on prime-time television." *Id.* (internal quotation marks omitted) (quoting a representative of the Parents' Television Council); *see also* H.R. 3687, 108th Cong. (2003) (proposing to add eight new words and phrases and their "other grammatical forms" to a list of taboo words for broadcasters that are punishable by FCC fine); Matthew Quirk, *Air Pollution: FCC Fines for Indecency and Obscenity*, ATLANTIC MONTHLY, May 2004, at 36 (cataloging and explaining the ten largest FCC fines levied since 1999).

13. *E.g.*, Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, Pub. L. No. 108-187, 117 Stat. 2699 (2003) (codified in scattered sections of 15

harbingers of increasing litigation of First Amendment challenges to content-based regulation of speech in the media. The Internet and technology-driven changes in other media are rapidly altering the speaker-listener relationship, much as changes in broadcast media did in the years preceding *Pacifica*.

At the same time, the explosive evolution of telecommunications technology threatens to expose grave flaws in the Court's jurisprudence. In a world where various forms of media are increasingly converging—where mobile telephones (mobiles) are capable of sending text messages, taking photographs, and logging into the Internet—a legal model that hinges on neat classifications by medium cannot persist.[14] This Comment proposes an alternative to the medium-centric legal analysis of the twentieth century, advocating a model that separates the platform from the message and the context in which it is delivered.

Part I of this Comment shows that the current regulation of media is fractured along medium-centric lines, with broadcast receiving far less protection than media delivered over other platforms. Part II focuses on the increasing convergence of media, using the Internet as an example. This part explains how the convergence of media is undermining the viability of the Court's medium-centric model for First Amendment law. In particular, the *Pacifica* Court's concern with pervasiveness—the ability of a message to spread without meaningful control—is raised by the whole range of traditional media as they converge. Part III explains the speech restriction rationales that populate past court decisions and distills a platform-independent model for testing speech restrictions.[15] This model addresses the concerns of the courts in this area of regulation. The first tier of inquiry examines the initiation of communication between the listener and the speaker. It also requires analysis of the scope of content authorized by the listener. The second tier asks about

U.S.C.) (creating criminal sanctions for a number of spam-related activities); CAL. BUS. & PROF. CODE § 17538.45 (West Supp. 2003) (implementing restrictions on unsolicited e-mail advertising).

14. *See* Owen Fiss, *In Search of a New Paradigm*, 104 YALE L.J. 1613 (1995). Professor Owen Fiss wrote this short piece as an introduction for a symposium titled *Emerging Media Technology and the First Amendment*. Most of the articles in the symposium offer interesting analyses on the periphery of the topics addressed in this Comment. *See, e.g.*, Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757 (1995) (discussing the government role in fostering democracy through regulation of converged media). Thomas G. Krattenmaker and Lucas A. Powe address some of the First Amendment difficulties posed by converged media, but their treatment is primarily focused on democracy in the media. Moreover, unlike this Comment, they present no concrete solutions to the problems they observe. *See* Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719 (1995).

15. This model is partially inspired by Professor Jerry Kang's "taxonomy" for communications in cyberspace. *See* Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1147–48 (2000). Professor Kang's Communications Law & Policy course at UCLA also provided an excellent introduction to many of the issues that form the foundation of this Comment.

the scope of the audience; was it a one-to-one or a one-to-many communication? Finally, the third tier examines the level of interactivity in the communication. Did the listener have some significant input on the course and content of the dialogue? Part IV applies the platform-independent model to the facts of an actual cable television case and to a few hypothetical scenarios.

I. MEDIA SPEECH RESTRAINTS: THE STATE OF THE LAW

The reverence for the freedoms of speech and the press[16] in the United States is enshrined in the Bill of Rights.[17] If a government speech regulation is content-based, then the law will be subject to constitutional review under strict scrutiny.[18] To pass muster under strict scrutiny, a law must implicate a compelling government interest, and it must be narrowly tailored to serve that interest.[19] Content-neutral restrictions on speech, on the other hand, must only serve a substantial government interest, and they need do so in a less rigorously tailored manner.[20] The result of this constitutional scheme is that government attempts to curtail speech based on its content or communicative impact are rarely upheld by the courts. The strict scrutiny standard of review usually signals doom for speech restrictions.[21]

When deciding cases involving speech restrictions on the media, courts regularly examine the characteristics of the relevant medium as part of the First Amendment analysis. The level of constitutional scrutiny applied by a court has traditionally depended on which existing medium

16. Justice Potter Stewart expressed the opinion that the First Amendment contains a structural requirement that the press receive a special variety of speech protection, since it serves as the "fourth estate" in democratic government. *See* Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975). This view is not explored by the Supreme Court in its First Amendment jurisprudence.

17. U.S. CONST. amend. I.

18. *See, e.g.*, Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 657 (1990); Boos v. Barry, 485 U.S. 312, 334 (1988). Content-based regulation is regulation of speech based on the message that the speaker is conveying.

19. *See* FCC v. Sable Communications, 492 U.S. 115, 126 (1989) (invoking the strict scrutiny language of compelling interests and narrow tailoring to strike down a speech restriction); *see also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2418–25 (1996).

20. *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984) ("We have often noted that [content-neutral restrictions] are valid provided that they . . . are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." (citing collected cases)).

21. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) ("If a statute is subject to strict scrutiny, the statute always, or nearly always, is struck down." (citing Korematsu v. United States, 323 U.S. 214 (1944))).

category the restrictions applied to: broadcast, print, cable or telephony. When examining speech restrictions in a new medium, courts analogize to past holdings that rest on this categorization. Deciding which existing medium serves as the basis for the analogy has a major impact on the degree of scrutiny applied, particularly if the medium is found to be analogous to print.

A. Broadcast

The most familiar forms of broadcast media are radio and television. Broadcast media are subject to relatively intense government regulation of content. In regulating broadcast, the FCC has the statutory duty to "generally encourage the larger and more effective use of [the spectrum] in the public interest."[22] Government regulation of broadcast content is discussed by the Court using strict scrutiny language, but the decisions in broadcast cases are frequently more expansive in their interpretations of "compelling government interests" than decisions in other contexts.[23] At the same time, the Court has permitted regulations that would never pass the narrow tailoring requirements as interpreted in print cases.[24] This differing treatment is predicated on the special characteristics of the medium—the technological features of broadcast are incorporated into the law as a rationale for permitting greater regulation.

These special characteristics have long served to justify regulation of more than just content, and they merit explanation to help contextualize the law. Broadcast media depend on electromagnetic waves to carry a signal from the sender to the receiver.[25] There is a limited range of frequencies (the spectrum) that can be used to transmit signals. Until recently, the laws of physics appeared to place a limit on the number of people who could transmit simultaneously without causing interference and blotting out each other's

22. 47 U.S.C. § 303(g) (2000) (describing the powers and duties of the FCC).

23. *See* discussion *infra* Part I.A.2 and accompanying notes.

24. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (White, J., concurring) (stating that the barriers presented by strict scrutiny in the print context are "virtually insurmountable"); *see also infra* Part I.B.

25. Visible light is an example of electromagnetic waves, and sending a message visually via semaphore is a type of broadcast. The sender *encodes* their message into a series of signals, which are transmitted via visual light to the viewer, who *decodes* them to understand the message. Radio and television broadcasts are similar, but involve more intricate encoding and decoding algorithms that are performed by electronic circuits. *See* ROGER L. FREEMAN, FUNDAMENTALS OF TELECOMMUNICATIONS ch. 2 (1999) (providing an overview of the role of electromagnetic waves in communication); *id.* at 28 fig.2.2.6 (illustrating the allocation of frequency bands by the FCC).

transmissions.[26] Confronted with the perceived immutable laws of nature, Congress reasoned that a central authority on spectrum use was needed to avoid anarchy.[27] This need was filled with the creation of the FCC as part of the Communications Act of 1934.[28] The FCC allocates frequency blocks for different uses and issues licenses to broadcast on those frequencies.[29] By licensing the use of the spectrum, it is possible to ensure that users do not interfere with each other. The net result of this framework in the realm of broadcast is the fact that there are, in a given geographical area, a limited number of frequencies (or channels) available for broadcast; this limited number of channels creates scarcity.

Scarcity serves as one of the two "special characteristics" that courts have used to justify FCC restraints on speech in broadcast media. Pervasiveness—the ability of the message to spread without meaningful control—is the other. Unless one is in a specially shielded location, one is surrounded by the spectrum of invisible waves carrying broadcast signals.[30] All that is required to tune in to these signals is the appropriate receiver.[31]

1. Scarcity

Scarcity of the spectrum is one justification accepted by the Supreme Court for content-based regulation of broadcasters. In *Red Lion Broadcasting Co. v. FCC*,[32] the Court considered the fairness doctrine, an FCC-enforced

26. *See* David Weinberger et al., Open Spectrum FAQ (ver. 1.1.2, Jan. 20, 2003), *at* http://www.greaterdemocracy.org/OpenSpectrumFAQ.html. New developments in technology mean that interference probably no longer significantly limits the possible number of broadcasters who can operate at any one time. *See id.* *See generally* GEORGE GILDER, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD (2000) (criticizing, albeit somewhat euphorically, the entire concept of spectrum regulation and extolling the potential virtues of deregulation); Nicholas Negroponte, *Being Wireless*, WIRED, Oct. 2002, at 116.

27. The first act asserting government control over the regulation of the airwaves was the Radio Act of 1912, Pub. L. No. 62-264, § 287, 37 Stat. 302 (1912). The passage of this law was motivated in large part by the Navy, whose efforts to aid the sinking Titanic had been complicated by interference from amateur radio transmissions. *See* THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 5–7 (1994) (detailing the Titanic disaster and the subsequent genesis of broadcast regulation).

28. Pub. L. No. 73-416, § 1, 48 Stat. 1064.

29. The decision to create the FCC continues to draw criticism. *See* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 149 (1990) (noting the choice to create a new system for issuing licenses in lieu of allowing a system of regulation to develop from the common law).

30. *Cf.* 1 RICHARD P. FEYNMAN ET AL., THE FEYNMAN LECTURES ON PHYSICS ch. 28 (1964) (discussing the nature of electromagnetic radiation).

31. Different receivers, like mobile phones, radios, televisions, and satellite dishes simply tune into different ranges of the spectrum.

32. 395 U.S. 367 (1969).

requirement that broadcasters air replies from individuals personally criticized on the radio. *Red Lion* involved a variety of allegations made against author Fred Cook on a radio station. The FCC agreed with Cook that the statements made against him were a personal attack that entitled him to an on-air reply under the fairness doctrine.[33] The Supreme Court reviewed the history of the FCC and declared that the public interest aspect of the agency's role as a regulator of the airwaves was "a broad power," which "[the Court] ha[s] long upheld."[34] The Court went on to uphold the fairness doctrine and state that "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest . . . *differences in the characteristics of new media* justify differences in the First Amendment standards applied to them."[35] The Court accepted spectrum scarcity as a justification for FCC oversight of content, but conceded that the scarcity rationale could be made moot by advances in broadcasting technology.[36]

2. Pervasiveness

In *FCC v. Pacifica Foundation*,[37] the Court used an argument based on the pervasiveness of radio broadcasts to justify speech restraints, without even mentioning scarcity. The pervasiveness of broadcast was sufficient in and of itself to justify content-based regulation.[38] *Pacifica* involved the airing of a twelve-minute monologue by comedian George Carlin, titled "Filthy Words."[39] Spurred by a listener complaint, the FCC issued a declaratory order stating that Pacifica "could have been the subject of administrative sanctions."[40] Although there was no further action taken against Pacifica by the FCC, this declaration was a threat to the radio station's license to broadcast.[41]

33. The fairness doctrine required that Red Lion "send a tape, transcript, or summary of the broadcast to [the person criticized on air] and offer him reply time; and that the station must provide reply time whether or not [he] would pay for it." *Id.* at 372.

34. *Id.* at 380 (citations omitted).

35. *Id.* at 386 (emphasis added).

36. *Id.* at 396–98.

37. 438 U.S. 726 (1978).

38. *Id.* at 748.

39. *Id.* at 729. For a complete transcript of the monologue, see the appendix to *Pacifica*. *Id.* at 751. Carlin's synopsis is that it consisted of "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever." It was played on a weekday afternoon by a New York radio station owned by Pacifica. *Id.* at 729–30.

40. *Id.* at 730 (quoting 56 F.C.C.2d 94).

41. Such demerits were an important part of the broadcast license renewal process, and thus put Pacifica's future license renewal in real jeopardy. *Id.* at 730 & n.1. FCC sanctions continue to be a tool for controlling media content. *See, e.g.*, Press Release, FCC, Commission Proposes to Fine Clear Channel Communications $755,000 for Apparent Violations of Indecency and Public

The pervasiveness of radio broadcasts was the driving force behind the Court's holding: "Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder."[42]

In *Pacifica*, the Court also discussed an argument that can be inferred from pervasiveness: the danger of harm to children.[43] This danger is readily apparent with any medium that is pervasive—and thus by definition easily accessible to all people, including children. The Court took as a given that the state has a compelling interest in the "'well-being of its youth' and in supporting 'parents' claim to authority in their own household.'"[44] Because broadcast signals like Pacifica's can be received by a child who simply turns the switch on a radio or television, the Court found that the FCC's threat was narrowly tailored to serve the interest in protecting children.[45]

The decision in *Action for Children's Television v. FCC (ACT III)*,[46] demonstrates the weight of the concern for children.[47] In *ACT III* the court evaluated the validity of FCC time-channeling regulations for indecent content on broadcast television.[48] Despite the lack of empirical evidence

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Inspection File Rules (Jan. 27, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243249A1.pdf. In upholding this content-based decision, the Court reiterated that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." *Pacifica*, 438 U.S. at 748.

42. *Pacifica*, 438 U.S. at 748 (citing Rowan v. United States Post Office Dep't, 397 U.S. 728 (1970)). The Court also tied this argument to an assertion that there may not be sufficient advance warning to allow persons likely to be offended by a broadcast to change the station or turn the radio off. *Id.*

43. *Id.* at 749–50. Some have interpreted the Court's concern to include warning the viewer about impending content, rather than simply protecting children. *See* KRATTENMAKER & POWE, *supra* note 27, at 132–41.

44. *Pacifica*, 438 U.S. at 749 (quoting Ginsberg v. New York, 390 U.S. 629 (1968)).

45. *Id.* at 750. The narrow tailoring requirement in *Pacifica* was not enforced as rigorously as in normal strict scrutiny situations. This weakened strict scrutiny appears to use a tailoring test more similar to that used in evaluating content-neutral speech restrictions. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1988) (upholding an ordinance banning residential picketing).

46. 58 F.3d 654 (D.C. Cir. 1995) (*ACT III*). There were two preceding cases and decisions rendered in this matter, *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*) and *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*).

47. "[R]adio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment. While we apply strict scrutiny to regulations of this kind . . . our assessment . . . must necessarily take into account *the unique context* of the broadcast medium." *Act III*, 58 F.3d at 660 (emphasis added).

48. Time channeling is the practice of requiring certain types of programming to be shown only at certain times of the day. The most common form of time channeling is the mandated limitation of adult-content broadcasts to between the hours of midnight and six in the morning.

that children were harmed by content,[49] and a lack of narrow tailoring,[50] time channeling was found constitutional.

B. Print

Print is the oldest of the regulated media, and the only medium explicitly implicated in the text of the First Amendment.[51] Content-based attempts to regulate the print media are subject to strict scrutiny analysis and are almost sure to be held unconstitutional by courts. Print has also played an important role in shaping the current judicial attitude towards content restrictions on the Internet. If a form of communication can be credibly argued to be "like print," the likelihood of the government successfully imposing content-based restrictions on that medium is very low. *Miami Herald Publishing Co. v. Tornillo*[52] provides an excellent illustration of the Court's reluctance to allow content-based regulation of print media.

In *Miami Herald* the Supreme Court examined a Florida right-of-reply statute[53] that required a newspaper to "grant[ ] a political candidate a right to equal space [in its pages] to reply to criticism and attacks on his record."[54] In 1972, Pat Tornillo was a candidate for the Florida House of Representatives, and the *Miami Herald* published editorials criticizing his candidacy.[55] Tornillo sought to have the newspaper publish verbatim his responses to the editorials under the statute.[56] Tornillo's core legal argument was based on the concept of scarcity that the Court had enunciated and used to uphold

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49. "Congress does not need the testimony of psychiatrists and social scientists in order to take note of the coarsening of impressionable minds that can result from a persistent exposure to sexually explicit material just this side of legal obscenity." *Act III*, 58 F.3d at 662.

50. *Id.* at 664–65. The court conceded that a significant number of teenagers actually watched television during the time-channeled hours where indecent programming was shown. Interestingly, the court then proceeded (for narrow tailoring reasons) to widen by two hours the time window during which indecent programming could be shown.

51. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech or of the *press* . . . ." (emphasis added)).

52. 418 U.S. 241 (1974).

53. The statute required that:

> If any newspaper in its columns assails the personal character of any candidate . . . or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to.

FLA. STAT. ch. 104.38 (1973) (repealed 1975), *reprinted in Miami Herald*, 418 U.S. at 244 n.2.

54. *Miami Herald*, 418 U.S. at 243.

55. *Id.* at 243 n.1.

56. *Id.* at 242–43.

the constitutionality of a similar right-of-reply statute for broadcast radio in *Red Lion Broadcasting Co. v. FCC*.[57]

Tornillo argued that at the time the First Amendment was enacted, the barriers to publication were low, and an individual could defend himself on equal footing by publishing his own rejoinder.[58] This environment fostered the marketplace of ideas commonly posited as one of the goals of the First Amendment. The concentration of newspapers into national chains, and the proliferation of "one-newspaper towns" arguably created a monopoly in the control of access to the means of disseminating rejoinders like Tornillo's.[59] While the Court accepted the fact that the news media did not provide equal access to all speakers, it unanimously struck down the Florida law as an infringement on the editorial freedom of newspapers—even if there was no cost or other harm incurred in the publication of the reply.[60]

The message sent by the Court is in one respect very clear: "[T]he First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned."[61] The Court's hostility towards government regulation of print media is far-reaching and has thwarted many regulations targeted at newspapers, beyond obvious attempts to control content like the statute at issue in *Miami Herald*.[62]

C. Cable

As a technology that arose after the establishment of the print/broadcast distinction, cable television arrived in the courts as a medium seeking a metaphor. Despite the obvious link to television, courts have given cable television strong First Amendment protection, much closer to the deference shown to print. Cable signals reach viewers through their namesake coaxial cable. These signals do not arrive through the air, and thus cannot be deemed pervasive or scarce in exactly the same physical manner as electromagnetic

57. 395 U.S. 367 (1969); *see* discussion of *Red Lion*, *supra* Part I.A.1. Amazingly, the *Miami Herald* Court managed to dispose of Tornillo's case without even mentioning *Red Lion*, decided just five years earlier. *See Miami Herald*, 418 U.S. 241.

58. *Miami Herald*, 418 U.S. at 247–48.

59. *Id.* at 250.

60. *Id.* at 258.

61. *Id.* at 259 (White, J., concurring); *cf.* Stewart, *supra* note 16.

62. For example, the Court has found unconstitutional a law that imposed taxes on the ink and paper needed to publish a newspaper. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); *see also* City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750 (1988) (striking down a city newsrack ordinance that gave government officials plenary power in approving permits for newsracks).

waves.[63] Scarcity arguments appear in cable speech cases,[64] but as in print cases, they rarely convince courts to significantly reduce speech protection.[65] *United States v. Playboy Entertainment Group, Inc.*[66] illustrates the problem of cable content restrictions.

Playboy involved restriction of sexually-oriented content in cable programming. Section 505 of the Telecommunications Act of 1996 requires that during hours when children are likely to be watching cable television, the content of channels showing sexually-oriented content be either "fully scramble[d] or otherwise fully block[ed]."[67] Some of Playboy's content was not sufficiently scrambled due to technical deficiencies (known as signal bleed) at the cable television distribution point.[68] Since the law targeted *only* transmission of adult content, it was a content-based speech restriction, and the Supreme Court applied the strict scrutiny standard in evaluating its constitutionality.[69] The Court acknowledged the compelling interest in protecting children from leakage of explicit audio or video due to the poor scrambling.[70] However, the Court found that there were numerous less-restrictive solutions than the blanket ban on transmission of the scrambled Playboy content.[71] The existence of these less restrictive alternatives led the Court to strike down the federal regulation, despite the threat to children.

D. Telephony

Telephony differs from the other media because the entity providing the platform is not a speaker for First Amendment purposes.[72] The speakers

63. As more people are connected to cable television or television-like services over the Internet in lieu of broadcast, the argument that television in general is pervasive becomes attractive.

64. *E.g.*, Cmty. Communications Co. v. City of Boulder, 660 F.2d 1370, 1376–79 (10th Cir. 1981) (rejecting the argument that there was scarcity in cable despite the fact that the number of channels is limited, and cable companies have monopoly status in their markets via a state-granted franchise).

65. *Compare Miami Herald*, 418 U.S. 241 (rejecting scarcity in print), *and Cmty. Communications Co.*, 660 F.2d 1370 (rejecting scarcity in cable), *with* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (endorsing scarcity in broadcast).

66. 529 U.S. 803 (2000).

67. Telecommunications Act of 1996, Pub. L. No. 104-104, § 505, 110 Stat. 56, 136 (codified at 47 U.S.C. § 561).

68. *Playboy*, 529 U.S. at 809–10. Signal bleed refers to the situation where the audio signal is not scrambled and the video signal may at times also show through.

69. *Id.* at 812.

70. *Id.* at 811.

71. *Id.* at 816–17. These alternatives included a sister provision in the 1996 Act. This alternative provides for total blocking on a per-channel basis at the customer's request.

72. The telephone service provider enables the interconnection of speakers, but does not actually take part in the dialogue; thus, the service provider is not a speaker.

involved are the individuals who use the telephone line to communicate with each other. Despite the heavy business regulation of telephony by the FCC,[73] courts have blocked government regulations from reaching the contents of such communications.

Government regulation of the contents of telephone calls did arise in *FCC v. Sable Communications*,[74] a case involving dial-a-porn.[75] Sable was a company that provided dial-a-porn services for a fee. To protect itself from liability under a law "impos[ing] an outright ban on *indecent* as well as obscene interstate commercial telephone messages," Sable sought declaratory relief.[76] Prior to enacting this law, the FCC had made numerous failed attempts to regulate the dial-a-porn business, including time channeling.[77] The *Sable* Court examined *Pacifica* and found that the special properties of a broadcast medium did not exist in telephony.[78] The Court applied strict scrutiny and struck down the regulation because it "reduce[d] the adult population . . . to . . . only what is fit for children."[79] The over-inclusive nature of the law, along with the presence of less-restrictive alternatives like age verification via credit card, provided ample reason for the Court to scupper the law under strict scrutiny review.[80]

E. Print Remains the Dominant Paradigm

The First Amendment analysis in broadcast cases stands in stark contrast to that applied in print cases. An indecent print publication cannot be

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73. *See* 47 U.S.C. §§ 201–275 (2000) (creating a range of economic, service, and interconnection requirements for telephone service providers). *See generally* JERRY KANG, COMMUNICATIONS LAW AND POLICY ch. 3 (2001); JOHN THORNE ET AL., FEDERAL BROADBAND LAW ch. 5 (1995).

74. 492 U.S. 115 (1989).

75. Dial-a-porn is a service that provides "sexually oriented prerecorded telephone messages" for a fee. *Id.* at 117–18. This was a booming business in the 1980s. According to Sable's parent company, the New York dial-a-porn service received "six to seven million calls a month for the 6-month period ending in April 1985." *Id.* at 120 n.3.

76. *Id.* at 117 (emphasis added). This portion of the law was added by a 1988 amendment. Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, 102 Stat. 130.

77. *Sable Communications*, 492 U.S. at 121 (citing Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984) (rejecting time channeling)).

78. *Id.* at 127–28. The court noted that the telephone lacked the intrusiveness of a television broadcast, and the "affirmative steps" necessary for a user to use dial-a-porn. *Id.*

79. *Id.* at 128 (quoting Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 73 (1983) (quoting Butler v. Michigan, 352 U.S. 380, 383 (1957))). *But cf.* Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995) (upholding time channeling in broadcast and downplaying ramifications for access to content by adults).

80. *Sable Communications*, 492 U.S. at 130–31 & n.10.

subjected to content-based regulation, even if some harm is done by the publication. Conversely, even the possibility of offense due to indecent broadcast programming is sufficient to allow government regulation of content. These two views represent the extremes of media speech protection, from print (most protected) to broadcast (least protected).

The cases discussed demonstrate how over the last fifty years, the strong print model of First Amendment thinking has widely won out over the reduced protection of the broadcast model. The courts have at times seemed uncomfortable with the Hobson's choice between the two models.[81] But, until the advent of technological innovations like the Internet and widespread wireless telephony, the choice of law based on medium seemed to be a workable compromise.

II. CONVERGENCE DESTABILIZES THE LAW

A. The Internet Defies Metaphors

The breakneck pace of development in the world of technology has blurred the boundaries between different media. The evolution of the law regulating the media lags behind the evolution of technology. Even with the revolutionary changes implemented in the Telecommunications Act of 1996, the FCC regulatory framework remains byzantine. For example, telephone companies are required as common carriers[82] to allow their competitors to use their networks to provide competing services.[83] By contrast, cable companies have relatively free rein in terms of network exclusivity.[84] Currently, both telephone and cable companies are deploying high-speed (broadband) Internet connections to their subscribers. Telephone companies providing broadband service are required to allow their competitors to use segments of their network to compete with them in the broadband arena.[85] Cable companies are under no such onus, and have successfully defended their proprietary closed networks in the Ninth Circuit.[86]

81. *See, e.g.*, United States v. Playboy Entm't Group, Inc., 529 U.S. 803 (2000) (demonstrating serious concerns about the impact of programming on children, yet still ruling against the regulation because it dealt with cable television and not broadcast); *see also* Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 76 (1976) (warning against "mechanically applying doctrines developed in other contexts").

82. *See* 47 U.S.C. § 201 (2000).

83. *See* KANG, *supra* note 73, at 102–13 (explaining history of common carrier regulation).

84. *See id.* at 490–96.

85. 47 U.S.C. § 251(c)(3).

86. *See* AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000). This disparity in regulation gives the cable companies a marked competitive advantage, whose benefits they have

As the conflict over this regulatory regime between cable and telephone companies suggests, the pace of change is challenging existing companies to adapt and change the services that they provide.[87] The quirky differences in regulation across media industries are unlikely to remain in place, given the consolidation of companies and market power that has paralleled the convergence of media.[88] As these boundaries erode, the identities of the various media merge even further. The justifications for the differing constitutional treatment given to speech rights based on the medium similarly melt away.

The true obsolescence of communications law is brought into stark relief when one considers the capabilities of a broadband Internet connection. Whether it comes from a telephone company, a cable company, or a wireless provider, a broadband connection gives access to many new Internet-based services that have begun to strongly resemble other media. Voice-over-IP allows users to place telephone calls via the Internet. Video-on-demand services are beginning to provide the same kind of content that is available on broadcast television and cable.[89] Streaming music and Internet radio stations provide access to familiar radio programs. The broadband-equipped computer is an adaptable media appliance that facilitates media convergence and obliterates traditional media boundaries.[90]

When confronted with content-based speech restrictions involving the Internet, courts have asked: Is the Internet more like broadcast or more like print? The answer to that question has shaped the contours of speech protection on the Internet. The early adoption of the print metaphor assured that content-based regulation of Internet speech would face the brick wall of

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reaped in recent years. *See* Tim Richardson, *DSL Growth Outstrips Demand for Cable*, REGISTER (U.K.), Sept. 19, 2003, *at* http://www.theregister.co.uk/content/22/32929.html.

87. *See, e.g.*, Mark Cooper, *Open Access to the Broadband Internet: Technical and Economic Discrimination in Closed, Proprietary Networks*, 71 U. COLO. L. REV. 1011, 1019–20 & n.15 (2000) ("[E]ven Wall Street analysts recognize the special treatment of communications networks and the media.").

88. Some commentators suggest that the appropriate response to convergence is to eliminate the FCC entirely. *E.g.*, PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM 141 (1997).

89. *See, e.g.*, Movielink, Homepage, *at* http://www.movielink.com (delivering online feature films); Major League Baseball, Homepage, *at* http://www.mlb.com (delivering baseball highlights online).

90. For example, wireless telephones are rapidly supplanting landlines. *See* FCC, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 18 F.C.C.R. 14,783 (2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-150A1.pdf. The television industry has also realized that online video and advertisement-skipping devices are a tremendous threat. *See, e.g.*, Jesse Hiestand, *Study: PVRs Threatening TV Ad Base*, HOLLYWOOD REP., Sept. 23, 2003. The upheaval that MP3s and file-sharing have caused in the music world is only the tip of the iceberg.

strict scrutiny analysis.[91] In *Reno v. ACLU (Reno I)*,[92] the Supreme Court again confronted the compelling state interest of protecting children, in the context of the Communications Decency Act (CDA), and its prohibition on transmission or display of obscene and indecent materials to minors via the Internet.[93] The Court compared the CDA provisions with *Pacifica*, and drew several distinctions. First, the CDA ban, unlike that in *Pacifica*, was a categorical one, not a time-channeling one.[94] Second, the Court reiterated that broadcast is a medium traditionally afforded a lower degree of protection.[95] The Court also revisited the scarcity argument from *Red Lion* and declared that there was no scarcity on the Internet.[96] The Court held that there was "no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."[97] On the heels of the CDA failure, Congress passed the Child Online Protection Act (COPA),[98] an upgraded version of the CDA that was intended to remedy its constitutional deficiencies. COPA is still making its way through the legal system.[99]

The basic difficulty that the Internet presents from a lawmaking standpoint is the wealth of interactions that it enables. As a whole, interactions on the Internet are not readily shoehorned into a model that corresponds to any existing medium. Some interactions are analogous to print, some to broadcast, and others to telephony.[100] The Internet thus embodies the difficulty of applying old law and definitions to convergent media. To date, legislators have repeatedly failed to draft laws that adequately deal with the multiple communication modes on the Internet and also respect First Amendment boundaries.

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91. *See* Reno v. ACLU, 521 U.S. 844 (1997) (*Reno I*) (analogizing the Internet to a vast library and finding the Communications Decency Act unconstitutional).

92. *Id.*

93. The CDA was Title V of the Telecommunications Act of 1996. *See generally* Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51 (1996).

94. *Reno I*, 521 U.S. at 867.

95. *Id.*

96. *Id.* at 870. Again, this is a question of definitions. There are plausible arguments that there is scarcity in terms of bandwidth and names for domains, among other things. The proliferation of the Internet onto wireless devices and public access terminals is making the medium as pervasive as broadcast television or radio.

97. *Id.* However, the CDA was a poorly written statute, unsurprisingly torn apart under strict scrutiny. *See* Cannon, *supra* note 93, at 64–73 (discussing the passage of the CDA).

98. Pub. L. No. 105-277, § 1403, 112 Stat. 2681, 2681-736 (1998) (codified at 47 U.S.C. § 231).

99. Ashcroft v. ACLU, 124 S. Ct. 2783 (2004) (upholding the grant of a preliminary injunction against COPA and remanding to district court for a decision in the underlying case).

100. For example, reading a newspaper online is much the same as reading one in print, and listening to Internet radio is akin to listening to broadcast radio.

B. Converged Media in Light of *Pacifica*

As demonstrated in Part I, the Supreme Court is loath to apply the reasoning of *Pacifica* outside of broadcast media, and it has relied on the special characteristics of broadcast to justify this reluctance. The early Internet cases demonstrate the Court's reluctance to accept the pervasiveness rationale outside of broadcast. For example, the district court in *ACLU v. Reno* asserted:

> [O]peration of a computer is not as simple as turning on a television, and that the assaultive nature of television is quite absent in Internet use. . . . [W]arnings and headings . . . will normally shield users from immediate entry into a sexually explicit Web site or newsgroup message. The Government may well be right that sexually explicit content is just a few clicks of a mouse away from the user, *but there is an immense legal significance to those few clicks.*[101]

This conception of the Internet as an environment where interactions are solely sought out by the user rapidly became antiquated as the Internet was commercialized.[102] The growth of serious advertising and business on the Internet very quickly changed the nature of interactions from the halcyon days that courts cling to in their rulings.

When in *Pacifica* the Court finally addressed the conceptual gulf between *Tornillo* (print) and *Red Lion* (broadcast), it attempted to reconcile the logic in those decisions. The Court explained that broadcast differs from print because of the "uniquely pervasive presence" of broadcast media, and the fact that "broadcasting is uniquely accessible to children."[103] The scarcity argument did not enter the equation in *Pacifica* at all, and the Court did not rely on some of the other prior arguments made regarding the regulation of broadcast as a public good or trust.[104] The focus in *Pacifica* was squarely on the pervasiveness of broadcast—in particular, its possible impact on children. The Court seemed to be grasping at a privacy rationale to justify curtailing the rights of speakers who are able to project their speech into the very homes of listeners.[105]

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101. ACLU v. Reno, 929 F. Supp. 824, 876 n.19 (E.D. Pa. 1996) (citations omitted) (emphasis added).

102. *Cf.* Eun S. Bae, Note, *Pop-Up Advertising Online: Slaying the Hydra*, 29 RUTGERS COMPUTER & TECH. L.J. 139, 139–45 (2003) (describing in detail how aggressive advertisements often appear on users' screens without having been requested).

103. FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978).

104. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (relying in part on the notion that the spectrum belongs to citizens); *see also supra* Part I.A.1 and accompanying notes.

105. *Pacifica*, 438 U.S. at 749 n.27 ("Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away.").

The Court made it clear that the FCC was not free to sanction every instance of indecent broadcast content.[106] To this end, the Court explained various other broadcast scenarios where it would presumably not apply the same lower standard of First Amendment review.[107] One example that the Court gave is that of a "two-way radio conversation between a cab driver and a dispatcher."[108] This example was probably selected as an illustration of a conversation likely to contain language offensive to many listeners. Implicit to the example is the assumption that members of the public are not readily able to listen to two-way radio communications (CB) in the same way that they can listen to normal radio. The devices that one needs to use CB are specialized, and anyone who chooses to tune into a conversation on a CB channel is likely to expect some degree of coarseness. Further, because children are not likely to have access to or to operate CB equipment, the risk to children posed by this source is more attenuated than the risks posed by television or radio.

But the media in today's world are much more pervasive than they were when the Court decided *Pacifica*. Mobiles are emblematic of both media convergence and pervasiveness. Mobiles are hybrids of telephony and broadcast. They travel with you everywhere, and provide access not only to the normal spectrum of telephone-like services, but also to text messaging, web access, e-mail, photography, and video conferencing.[109] Mobiles are even beginning to include systems that allow geographical tracking of the user.[110] Some mobile service providers are now able to send localized text messages to telephones informing the user of news or events relevant to their local area. With further developments in technology, the messages that are sent to users, whether solicited or not, are likely to evolve to a form akin to the advertising and programming currently associated with television.[111] Moreover, mobiles are increasingly the only telephone that many users own,[112]

106. *Id.* at 750–51.

107. *Id.*

108. *Id.* at 750.

109. *See* FCC, Third Generation Wireless Systems, *at* http://www.fcc.gov/3G (discussing the advanced capabilities of third-generation mobile phones).

110. *See* Request by Cellular Telecomm. & Internet Ass'n to Commerce Rulemaking to Establish Fair Location Info. Practices, 17 F.C.C.R. 14,832 (2002) (FCC order mandating implementation of global positioning system capabilities in mobile telephones as part of enhanced 911 initiative), *available at* http://www.epic.org/privacy/wireless/FCC_order.pdf.

111. Indeed, the FCC has recently codified rules against sending unsolicited spam to mobile phones and pagers. *See* Press Release, FCC, FCC Takes Action to Protect Wireless Subscribers From Spam (Aug. 4, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-250522A3.pdf.

112. The number of mobile telephone users is growing much more quickly than the number of landline users. *See* FCC, *supra* note 90. This change is likely to accelerate now that the FCC

and a growing number of children carry them.[113] The analogy to *Pacifica*-style pervasiveness is inescapable.[114]

As noted previously, telephone and cable service are also rapidly morphing into broadband providers. Some cable companies are offering telephone service via their cable lines, and many of these companies are also players in the mobile telephony market. The logical end-state of this evolution is a single cable or wireless connection to the home that carries the range of content services we currently associate with individual media. Even the venerable print medium is not immune from change; a new type of "paper" in development can have variable content loaded onto it in much the same way that images appear on a computer screen or television.[115] This is what the digital revolution has delivered—any form of information can be broken down into a stream of ones and zeros and delivered via a number of different platforms. The content traditionally delivered via one type of platform is no longer bound to that "medium."

Given this degree of convergence, the idea that the reasoning of *Pacifica* should be tied only to broadcast becomes absurd. Either the ideals that motivated the Court in *Pacifica* must be abandoned altogether, or a medium-neutral model for speech regulation embracing those ideas must be found. While the decision in *Pacifica* was grounded in part on the strictures of existing technology, the notion of putting reins on pervasive and invasive use of communications technology continues to resonate. Thus a medium- and platform-neutral model is the preferable choice.

III. A PLATFORM-NEUTRAL MODEL

A. Rationales Underlying the Test

Given the disappearing boundaries between media, a new test for content-based restrictions of speech is needed. The seeds of this new test are strewn

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has enforced local number portability (LNP). LNP allows users to keep their telephone number if they change to a different mobile service provider—and it also provides for the transfer of landline numbers to mobile telephones. *See* Cal. Pub. Utils. Comm'n Telecomm. Div., Report on the Status of Wireless LNP, Dec. 18, 2003, *at* http://www.cpuc.ca.gov/published/report/32674.htm.

113. *See* Mobile Youth, Homepage, *at* http://www.mobileyouth.org (collecting statistics on mobile phone usage patterns of youth in various parts of the world).

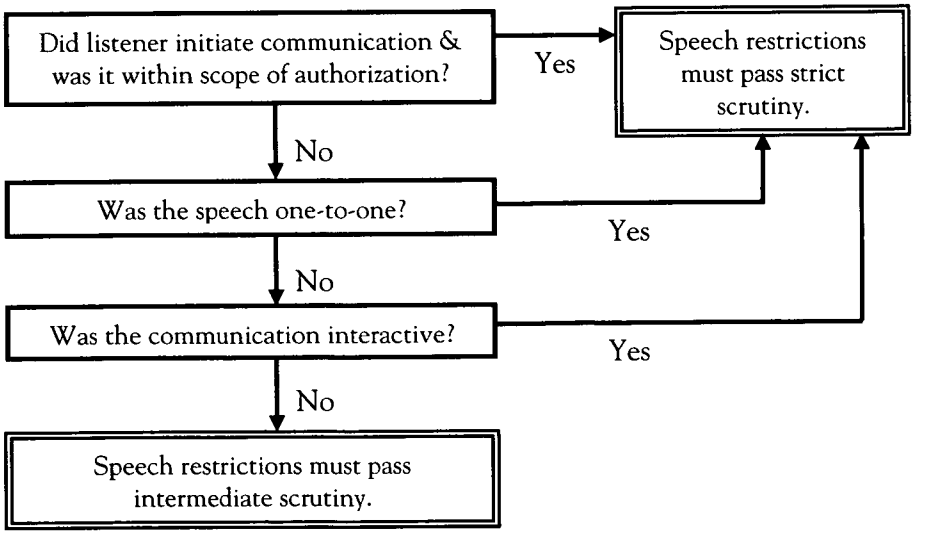
114. While *Pacifica* mentioned ideas of privacy in the home, the specific facts of the case involved a man who was listening to the radio in his *car*. FCC v. Pacifica Found., 438 U.S. 726, 729–30 (1978). Thus, translating the logic of the Court to situations outside of the home is not a massive leap in reasoning.

115. *See* Steve Silberman, *The Hot New Medium: Paper*, WIRED, Apr. 2001, at 62.

throughout the existing jurisprudence and need only be located and organized into a coherent structure. The test proposed in this Comment does just that; it builds on the reasoning and concerns expressed by the courts and structures them into a three-tiered test for media speech restrictions. The first tier focuses on the initiation and authorized scope of communication; it asks whether contact was initiated by the speaker or listener. Communication initiated by the listener tends to be granted greater protection; but if the speaker exceeds the scope of authorization granted by the listener, the speech will be less protected. The second tier of analysis examines the scope of the audience. If the communication is made by a speaker to a large audience, it is granted reduced protection. The third tier examines the level of interactivity between the speaker and the listener. When the listener has little input into the direction of the content, the speech is granted reduced protection.

Failure to satisfy one of these tiers alone is not sufficient to trigger reduced speech protection. Conversely, if speech meets the test at any tier, it is afforded maximum protection. The tiers are organized into a layered structure; failure at one level leads to the application of the next tier of analysis. Only if every tier is failed does the speech in question become subject to regulation under a lower standard of scrutiny. The specifics of each tier in the analysis are explained below.

FIGURE 1
PLATFORM-NEUTRAL TEST FLOWCHART



1. Initiation of Communication

Every communication is initiated by one of the parties involved in it. When the listener initiates, it is assumed that he initiated communication with the speaker in order to receive the message that the speaker delivered. Communications initiated by the listener are subject to protection under the strict scrutiny standard unless they exceed the scope of authorization (see *infra* III.A.2). When the speaker initiates communication, the speech may be subject to reduced protection, and the next tier of analysis is applied. Determining which party initiated communication requires a model for initiation.

There are two basic forms of communication initiation: pull and push. Pull interactions are those in which a listener seeks out communication from speakers. Browsing the web, reading a newspaper and making a phone call are all examples of pulling content. Push interactions are those in which a speaker makes contact with a listener. The speaker organizes and provides content. Television, radio, streaming Internet content, pop-up ads, and spam are examples of push.[116] A single communication session between two parties may involve both push and pull components, for example, making a phone call to a weather information line. By calling the information line, the caller initiates the communication and seeks to pull content. However, after initiating contact, the listener falls into a passive push mode where he hears a recording with the information about the weather.

The push/pull inquiry is consistent with courts' examination of the invasive aspect of pervasive communications. Courts have expressed a sentiment that listeners, particularly in the privacy of their homes, should not be subjected to the speaker's message without the ability to stop listening. The choice of whether to listen or not is embodied in the push/pull distinction. The Court in *Playboy* discussed the ability of cable subscribers to opt out of adult channels entirely as a means of controlling access, and in essence decided that cable was a pull medium.[117] One extreme version of push is a sound truck blaring in a residential area;[118] this example contrasts with the subtle push content of platforms like billboards that are the subject of

116. *See* Kevin Kelly & Gary Wolf, *Push! Kiss Your Browser Goodbye: The Radical Future of Media Beyond the Web*, WIRED, Mar. 1997 at 12, *available at* http://www.wired.com/wired/archive/5.03/ff_push.html.

117. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 823–26 (2000); *see also* discussion *supra* Part II.C.

118. *See, e.g.*, Kovacs v. Cooper, 336 U.S. 77, 97–98 (1949) (Jackson, J., concurring) (upholding limitations on the use of sound amplifying equipment).

contentious regulation debates.[119] Courts have employed implicit push/pull reasoning in both the sound truck and billboard debates. The fact that both of these communications are push does not mean that they should be *per se* subject to regulation—instead, the appropriateness of the communication in context must be examined.

Conversely, when a communication is initiated as a pull interaction, there is a strong presumption that the listener was actually seeking out speech. Indeed, courts have flirted with idea of a similar "right to receive information."[120] Speech that is pulled, like telephone calls or newspapers taken from the rack and read, tends to fall within the realm requiring maximum protection, both in court decisions and scholarly rhetoric.

2. Scope of Authorization

The scope of authorization analysis is applied simultaneously with the initiation of communication inquiry. If the listener did not authorize the speaker to communicate with him, the speech could be subject to reduced protection, depending on the outcomes in the second and third tiers of the test. The core premise underlying scope of authorization is whether the listener got what he expected from the speaker. Total absence of authorization for contact is part of what defines a communication as push. If the listener has not sought out contact, there can be no authorization. Lack of authorization for push interactions raises the privacy concerns that the Court expressed in *Pacifica*. At the same time, it is possible to have an authorized push interaction, such as a regularly scheduled news broadcast requested by a user and authorized on an ongoing basis.

When the interaction is pull, the question of authorization shifts to whether the listener got what he expected. This is not a concept explored explicitly in any depth by the courts, but it is clearly implicated in *Pacifica* by the discussion of notice or warning to listeners about the content of a broadcast. The analysis of listener expectations is by necessity somewhat subjective, since the expectations that a listener may have for the contents of a message vary with context. Thus, a speaker who attends a George Carlin

119. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 555 (1981) (Burger, C.J., dissenting) (supporting the power of a municipality to make content-based laws banning certain types of billboards).

120. *See* DAVID M. O'BRIEN, THE PUBLIC'S RIGHT TO KNOW: THE SUPREME COURT AND THE FIRST AMENDMENT (1981); *see also* Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (noting the impact of new media and proposing a vision of the First Amendment that is focused on maximizing access to the media and on the dissemination of a multiplicity of viewpoints).

comedy show should expect to hear humor that may be offensive. On the other hand, if a listener tunes in to a local news radio station, he would not expect to hear Carlin's monologue; hence, the broadcast would be outside of the scope of authorization.

3. Scope of Audience

The scope of audience inquiry is the second tier of the test. Speech that reaches this level has already displayed some attributes that suggest it may be subject to reduced protection. The scope of audience test examines whether the communication is made between a single speaker and listener (one-to-one), or a single speaker and multiple listeners (one-to-many). Restrictions on speech that is one-to-one are subject to full First Amendment scrutiny, while restrictions limited to speech that is one-to-many pass on to the third tier of analysis.

One of the most powerful changes wrought by communications technology is the creation of massive one-to-many capabilities. Through tools like broadcast and e-mail, a single speaker is capable of simultaneously sending a message to millions of listeners.[121] These types of communication are conceptually different from those between individuals. Mass communication capability has long been recognized as a powerful tool for propaganda and for strengthening democracy and public knowledge.[122] Historically, broadcast is the platform most associated with one-to-many communications. But not all broadcast technology implements a one-to-many model. For example, mobile telephony is a broadcast technology that operates in a one-to-one mode.

The most difficult communications to categorize are those that involve the use of a one-to-one mode serially to achieve the equivalent of one-to-many communication. A serial communication consists of sending multiple copies of the same message sequentially, in rapid succession, but not quite simultaneously. This sort of communication suggests the addition of a temporal aspect to the analysis. When a single speaker uses tools to disseminate a message rapid-fire to a large audience of listeners, that use should more properly be categorized as a one-to-many communication. Essentially, speaking to a

121. In the fifteenth century, the Gutenberg press had a similar revolutionary impact on communication. By allowing multiple cheap copies of a book to be printed, the press enabled the dissemination of ideas to a much wider audience. This communication technology is credited, among other things, with spurring the Protestant Revolution. *See* ALBERT KAPR, JOHANN GUTENBERG: THE MAN AND HIS INVENTION (Douglas Martin trans., 1996).

122. *See* ROBERT W. MCCHESNEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935 (1993).

hundred listeners in a row with an identical message is just like speaking to them all at the same time. A second definition complication arises in deciding where to draw the numerical boundary between a communication to several people and one to "many" people. Communication between small groups of individuals is conceptually different than the one-to-many model commonly associated with broadcast. Definition of scope at that level of granularity is a decision not readily made in the abstract, and is unnecessary as part of the proposed test.

4. Level of Interactivity

The third and final tier of analysis is geared towards the idea that even potentially unwelcome communications may be more strongly protected if they are sufficiently interactive. If the listener is able either to control or to contribute to the flow of the communication in a meaningful way, then the speech is fully protected. However, if the listener does not have such interactive input, the speech fails the proposed test, and restrictions on such speech should be evaluated under intermediate scrutiny.

Interactivity is a difficult concept to capture. The crux of the issue is whether during communication the listener has any control over the direction of the communication. In classic broadcast television, there is no user interaction. By contrast, in an activity like browsing the web, the user dictates with every click of the mouse the next phase in the interaction. Between these two poles there are pseudo-interactive communications. For instance, a touch-tone menu allows for some user input, but the ultimate goals or end-states of the communication are limited. The interactivity analysis is aimed at similar concerns as the initiation of communication inquiry, but it focuses on content once the communication is initiated.

Listening to a recording is an example of the lowest level of interactivity possible under this test. A heated philosophical conversation represents the other extreme, a situation where the course of the conversation could move in an almost infinite set of directions. The interactivity of a communication can be gauged by the number of possible end-states that it can reach. For example, the familiar telephone voice-mail menu offers a variety of choices that span out to lead eventually to a finite and predetermined set of end-states. Some communications also fall into this mold, particularly when the speaker is reading the content to the listener, or when the speaker is following a script.

5. Ordering the Tiers of Analysis

The three analyses that make up the tiers of this platform-neutral test reflect the concerns that the judiciary has expressed in its First Amendment jurisprudence. Instead of leaving those concerns as murky implicit concepts, these analyses make the rationales for regulating content explicit. The ordering of the tiers follows naturally from the order in which a communication is established.

The threshold issues of initiation and authorization are the topics most often addressed by courts, and are accordingly examined first. The nature of the relationship between the speaker and listener is closely tied to the manner in which communication was initiated, making initiation a logical starting point for analysis. The second tier addresses another aspect of communication that courts have afforded great weight: the scope of the audience. This analysis must come after the examination of authorization because courts frequently examine scope of audience only after having determined that the speech was not consented to. The final tier, which focuses on the level of interactivity, is the most difficult to quantify, and the least explored by courts—thus, while still vital to the analysis, it is the final question addressed. By placing these analyses in a clearly ordered hierarchy, the new test creates a template for courts to use in resolving First Amendment challenges.

B. Potential Objections

One objection that may be raised to this platform-neutral test is the counterproposal that new categorical exceptions from speech protection, akin to those for fighting words, could be created in lieu of the new test. This proposal would necessitate the creation of new exceptions each time that the law changed to adjust to some new use of media. This would entail almost constant tinkering with the law of exceptions, potentially leading to greater confusion. Contrast that solution with the platform-neutral test, which uses existing precedents to simply realign analysis. The implementation of the new test would not radically alter the landscape of First Amendment law, and would not sow chaos by generating a growing number of new exceptions to protection. Further, the new test eschews categorical judgments about types of speech, lending greater flexibility to the court in considering the facts and context of a particular case—flexibility that is vital to maintain a credible First Amendment jurisprudence.

Another possible objection to the new test is that it "exports" ideals of privacy traditionally linked to the home to places that are outside of the home. While many of the cases that have involved pervasive and invasive speech restrictions have discussed the notion of the home as a fortress,[123] this concept is a microcosm of the changing media world. The very same devices that are blurring the edges of media are blurring the boundaries of the home. The expectation of privacy from interception for conversations on a mobile phone is no different from that on a landline at home.[124] Is there a difference between watching television in the comfort of your home and in the back of your car? What about a portable television receiver watched on a public park bench? The communication that is occurring in all of these situations involves the same speakers, listeners, and content, despite the physical locale. They should thus always be subject to the same regulation. Again, technology has simply made it possible to move the implements of communication with you. To take this idea further, it is possible that the individual and his media appliances may constitute a new zone of privacy; replete with new concerns about the privacy of personal data.

A final objection is that the tiers of analysis in the new test involve qualitative evaluations of the merits of speech disguised as a neutral process-oriented test. The first response to this critique is that the courts have already relied on the content of speech in determining its legal status, and that such evaluation is part and parcel of First Amendment law. For example, in determining that certain language would be harmful to children, the Court has discussed the content of the speech. However, at a deeper level, the analysis proposed here avoids even the problem of evaluating the value or merits of the speech. The specific content of the speech is addressed *after* the platform-neutral test is applied, at the time when the court is evaluating the merits of the case under either strict or intermediate scrutiny. The analysis undertaken in the course of evaluating the communication has no relation to the content of the speech. Instead, it evaluates merely the context of the speech and provides a guide as to whether speech with those extrinsic noncontent features should be afforded the full protection of the First Amendment.

123. *See supra* Part I.A.1.

124. Modern mobile telephones use powerful digital encryption technology to ensure that the calls cannot be easily intercepted. *See* Mobile World, GSM Security, *at* http://www.mobileworld.org/gsm_faq_03.html (discussing mobile phone security).

IV. RAMIFICATIONS

A. Platform-Neutral Analysis of *Playboy*

The historical situations where this new analysis would have made the most difference are the cable cases. How would *Playboy* be decided if the regulation were analyzed under the platform-neutral model? Initiation of communication in this situation is done by the television viewer, since he decides to turn the television on and watch the content. Television is a classic push medium, with the only real pull decisions consisting of operating the television and changing channels. However, the scope of authorization that a television viewer gives is not likely to include exposure to offensive adult content. The viewer likely has no warning that he is going to be exposed to partially filtered adult content as he channel surfs.[125] Additionally, in the case of children, there may be no warning that is sufficient to give notice to a child of the contents of the channel. This lack of sufficient warning leads to the speech falling outside of the scope of authorization.[126] At the second tier of analysis, cable television is a stereotypical one-to-many communication, forcing application of the third tier. Again, cable programming has little space for interactivity, and thus the speech involved in cable television fails the platform-neutral test.

This failure means that any content-based regulations on cable content need only satisfy an intermediate scrutiny test. The *Playboy* Court found a compelling state interest, but rejected the statute on narrow tailoring grounds. Intermediate scrutiny requires less stringent tailoring, and the requirement of a complete block on the Playboy channel would thus likely be upheld under the new model. Unlike the analysis that was done in the *Playboy* case, analysis under the platform-neutral test is straightforward. By focusing on the specific characteristics of the communication, what was formerly a convoluted analysis becomes tractable. The *Playboy* Court's concerns about the deleterious impact of the adult programming need no longer be blunted by the simple fact that it was not delivered on a broadcast platform.

125. If the user views programs at the beginning, he may receive some warning from the voluntary television rating system. However, if the viewer is changing channels in the middle of a program, he may not see these warnings.

126. One possible argument that Playboy's broadcast is within the scope of authorization is that the cable subscribers pay for their cable service and hence authorize the content implicitly. The difficulty with this view is that it would, by extension, apply to all content providers who provide their services for a fee, leading to the result that no for-pay service could be regulated.

B. Future Applications

1. Spam & Telemarketing

Spam and telemarketing, while differing in platform, are sufficiently similar to be analyzed together. A hypothetical law prohibiting these activities would likely allow listeners to either opt-in or opt-out; those who wish to receive spam and telemarketing could still choose to do so. Thus, the analysis would be limited to examining unsolicited contacts subjected to government content regulation. Under the first tier, these media should both be categorized as push and would require explicit authorization. Unsolicited e-mail and phone calls both represent situations where the speaker has relayed a message to the listener without any prior contact. In the absence of prior authorization for contact, these communications are push. Spam and telemarketing calls are also forms of content likely to be far removed from the authorization that most listeners intended to give, and would fail to satisfy the first tier authorization analysis.

The scope of audience should be deemed one-to-many for both of these types of content. First, in the case of e-mail, it is possible that all of the spam is actually sent out simultaneously to multiple recipients. Even if the message is sent to multiple recipients one at a time, it is the identical message, and the temporal separation between transmissions is likely to be small enough to qualify as a serial transmission. Thus, the analysis in spam would certainly progress to the third tier. In the case of telemarketing, the scope of audience determination is murkier. Since the speaker in this situation is an actual person, this is a one-to-one communication from a literal standpoint. However, telemarketing operations often operate predictive dialing[127] gear that is intended to keep their telephone lines busy communicating with prospective customers almost perpetually. This strategy makes the telemarketer appear more similar to the serial e-mailer, and hence subject to third tier scrutiny.

At first glance, e-mail does not appear to be an interactive medium. However, some e-mail messages allow the user to interact with the contents of the e-mail because they include links to web pages. These links generally direct the user to one or two external sites, and thus the scope of the interaction

127. Predictive dialing is a technique in which a computer dials numerous telephone numbers at the same time. If someone answers the telephone, the computer detects their presence on the line and connects them to a telemarketing operator. *See generally* ALEKSANDER SZLAM & KEN THATCHER, PREDICTIVE DIALING FUNDAMENTALS: AN OVERVIEW OF PREDICTIVE DIALING TECHNOLOGIES, THEIR APPLICATIONS, AND USAGE TODAY (1996).

between e-mail sender and recipient is limited to several scripted possibilities. Since the communication is scripted, spam does not satisfy the interactivity test. Thus, laws regulating the content of spam should be subject to intermediate scrutiny. The regulation of spam based on content would likely pass constitutional muster under the platform-neutral test, assuming that courts could identify appropriate intermediate scrutiny interests.

The level of interactivity analysis will also reveal that there is some degree of interactivity to a telemarketing interaction, since the call consists of a dialogue between the caller and listener. But this interaction has only a few end-states and could fail the final tailoring prong. Thus, a law that sought to outlaw scripted, but not extemporaneous, conversations could be subject to only intermediate scrutiny like spam. Such a law would need to be carefully drafted to satisfy the interactivity component of the platform-neutral test.

2. Pop-Up Ads

Pop-up ads in their simplest form are windows that appear unbidden on a user's computer screen during Internet browsing.[128] That variety of pop-up is clearly a push communication. Further, some such ads pop-up for every person who visits a certain web page. The speaker in this situation is the party who creates the pop-up windows, and the listener is the computer user. In the first tier analysis, this communication is push; the speaker initiates contact because the pop-up appears unbidden on the listener's screen. It also falls outside of the scope of speech authorized by the user, who is ostensibly seeking to view web pages or content other than pop-up ads. The repeated speech (the ad) is not truly a one-to-one communication. Rather, it is a serial communication—indeed, thousands of people may receive the same message simultaneously. If this is the case, then the scope of the audience in the second tier analysis appears to be one-to-many. However, there is an important difference between a pop-up ad and spam. While spam is often sent in a barrage and hence is clearly a one-to-many style communication, pop-up ads are triggered by user interaction and thus cannot as easily be termed one-to-many communications.

In analyzing the scope of the audience receiving a pop-up ad, the notion of "customization" may provide some guidance. A customized ad is one that has been tailored or targeted at a user based on details known about the user. For example, a customized ad for the fan of a specific baseball team may

128. *See* Bae, *supra* note 102, at 139–45 (describing in detail a number of variations on the pop-up ad).

advertise that team's jersey, with the fan's name emblazoned on the back.[129] If the message in a pop-up is customized for the specific user, then it is better defined as a one-to-one communication. This interaction with the user is similar to features implemented on some web sites that track the preferences of users and provide product recommendations.[130] Because the ads in both of these contexts are shaped specifically by analysis of the user, they should be defined as one-to-one and thus be fully protected speech. If the sender has actually analyzed the user and tailored the message to that user, the sender should be able to avoid categorization as a one-to-many communication.

In the final interactivity tier of analysis, pop-up ads appear to be similar to spam messages. The majority of pop-up ads will simply direct the user to the advertiser's web site if the user clicks on the ad. These ads have a single end-state and are not interactive. There is a breed of pop-up ads that allows the user to play a game while the user is connected to the advertiser's web site.[131] Because the user is interacting with the game, this type of pop-up appears to be interactive. However, the interactivity component in such games is very limited because the advertiser presumably wants the user to finish quickly and visit the site that is the object of the advertisement. Like the telemarketing call, even a somewhat interactive pop-up can be defined in terms of only a few end-states, and will thus fail the interactivity analysis. Based on current minimally customized pop-up ads, a law seeking to restrict the use of pop-ups would therefore need to satisfy only intermediate scrutiny.

CONCLUSION

Analogical reasoning is a foundation of our jurisprudence. But in cases involving media regulation and the First Amendment, this foundational principle has been a failure. Nevertheless, the foundation need not crumble entirely, because media regulation is a victim of the mischief that technology wreaks on the law. Most First Amendment cases have simply looked to the medium as a proxy for the underlying features of the content. Decisions that rely on this proxy analysis, like *Playboy*, reveal that while courts see the underlying problems, they seem hidebound to rely on platform as the sole determiner.

129. This sort of customization may seem somewhat futuristic, but it is achievable with current technology, and will likely be implemented. For even more intriguing visions of customization, see MINORITY REPORT (Dreamworks SKG 2002) (envisioning a world where billboards and holographic store clerks first identify individuals by scanning their retinas and then deliver customized sales pitches).

130. *See, e.g.*, Sarah Anne Wright, *Amazon Aims for New Types of Developers, Time for Some Nontechnical Stuff, Too*, SEATTLE TIMES, Jan. 18, 2004, at G1 (discussing efforts at Amazon.com to enhance customer personalization as a key part of its business strategy).

131. The discount airfare site http://www.orbitz.com commonly uses this strategy.

The fallacy in this reasoning is clear: The nature of a specific platform at any time is a moving target—new uses are constantly being developed. Thus, features thought to be unique to certain media, like pervasiveness in broadcast, are rapidly acquired by other platforms. Analogical reasoning based on medium is bound to be imprecise and incorrect due to the drifting characteristics of media platforms. By abstracting the content and context from the medium, courts will be able to draw on a wider body of First Amendment jurisprudence. This broadening of precedent lends itself to a greater homogenization and clarification of First Amendment ideals. It is clear that using the medium as a proxy for the character of a communication is no longer a viable or cogent manner in which to interpret the First Amendment. The model and test proposed in this Comment represent a coherent and flexible method for courts to analyze speech restraints in a platform-neutral manner. Only by applying this type of principled analysis can the courts prevent this area of First Amendment doctrine from losing meaning and sinking into the mire of ever-changing technology.

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