UNITED STATES V. PLAYBOY ENTERTAINMENT GROUP, INC.

By Jennifer L. Polse

> We are creating a world where anyone, anywhere may express his or her beliefs, no matter how singular, without fear of being coerced into silence or conformity.[1]

> Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.[2]

Technological developments of the recent past have transformed the way we live, the way we work, the way we speak. Where once only those with a printing press could reach the masses, now anyone with a computer can publish online to millions of potential readers;[3] and where once television audiences could choose between ABC, NBC and CBS, now cable and satellite systems offer viewers a vastly-expanded and ever-growing menu of channels. But while new technologies bring expansive benefits to society, they also strain existing legal paradigms to the breaking point.

Nowhere is this strain more apparent than in the Supreme Court's First Amendment jurisprudence, which depends heavily on the nature of the medium of expression being regulated.[4] In the area of cable television programming in particular, the Court has struggled both to define an appropriate First Amendment standard[5] and to articulate precisely why and

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1. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, (Feb. 8, 1996), *available at* http://www.eff.org/pub/Misc/Publications/John_Perry_Barlow/barlow_0296.declaration.

2. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1889 (2000).

3. *See* Reno v. ACLU, 521 U.S. 844, 853 (1997).

4. *Id.* at 868; FCC v. Pacifica Found., 438 U.S. 726, 748 (1978). *See generally* Jarrod V. Henshaw, Note, *Denver Area Educational Telecommunications Consortium, Inc. v. FCC: Reconciling Traditional First Amendment Media Jurisprudence with Emerging Communications Technologies*, 41 ST. LOUIS U. L.J. 1015, 1037-38 (1997) (discussing the Court's discomfort with applying First Amendment doctrines to emerging media).

5. *Compare* Turner Broad. Sys. v. FCC, 512 U.S. 622, 639 (1994) (holding that cable's physical characteristics "do not require the alteration of settled principles of our

how the cable standard should differ from that applied to broadcast television. In *United States v. Playboy Entertainment Group, Inc.*, the Court finally defined a standard for cable regulations, holding that laws restricting speech on cable networks should be subject to the same searching scrutiny applied to regulations of the print media.[6]

Playboy provides further evidence of an emerging trend in the Court's First Amendment jurisprudence: reliance on technological solutions as an alternative to intrusive government regulation.[7] In reaching its holding, the *Playboy* Court relied heavily on cable systems' ability to support technology allowing individual control of programming accessibility.[8] This reliance demonstrates a sea change in the Court's approach to emerging technologies: When broadcast was in its infancy, the Court reacted to the newness of the technology by validating intrusive government regulations in the name of furthering the First Amendment rights of the public;[9] now, in contrast, the Court relies on technological, market-based solutions to increase the First Amendment protection it affords new media.[10] The difference in treatment between the two very similar media of broadcast and cable television illustrates how far the Court has come in recognizing technology's ability to "expand[] the capacity to choose,"[11] and ultimately to create a world in which diverse voices can speak freely "without fear of being coerced into silence or conformity."[12]

First Amendment jurisprudence" and applying print media standards to cable) *with* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 741-42 (1996) (plurality opinion) (considering a regulation of indecent cable speech under an ad hoc balancing test and declaring that "no definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard . . .").

6. *Playboy*, 120 S. Ct. at 1886.

7. *See Reno*, 521 U.S. at 877 (noting that user-based filtering software presents a less restrictive alternative to expansive censorship of indecent online content); Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128-31 (1989) (finding a total ban on indecent dial-a-porn messages unconstitutional because a less restrictive scrambling-based technological solution existed).

8. *See Playboy*, 120 S. Ct. at 1887, 1890-91.

9. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

10. *See, e.g.*, *Reno*, 521 U.S. at 877.

11. *Playboy*, 120 S. Ct. at 1889.

12. Barlow, *supra* note 1.

I. BACKGROUND

A. First Amendment Standards for Conventional Broadcast Media

The history of First Amendment protection for television and radio has been one of deviation from the standards applied to other media. For broadcast media in particular, the Court has interpreted the First Amendment to provide far less protection from government regulation than that it affords the print media.[13] This lack of First Amendment solicitude dates from the early days of radio broadcasting[14] and is best illustrated in the television context by the Court's decision in *Red Lion Broadcasting Co. v. Federal Communications Commission*.[15]

The *Red Lion* Court rejected a broadcaster's First Amendment challenge to the fairness doctrine,[16] which required broadcasters to give equal time to both sides of controversial public issues.[17] The broadcaster had argued that the fairness doctrine violated the First Amendment by inhibiting its discretion to air the issues it chose, with the slant it chose—a right the First Amendment guarantees to other speakers.[18] The Court, however, refused to treat broadcasters identically to other speakers, because "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[19]

The technological characteristics of the broadcast medium led the Court to uphold the fairness doctrine.[20] The Court argued that historically, the scarcity of broadband frequencies created an environment in which multiple speakers attempting to use similar frequencies created too much

13. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388-90 (1969). *See generally* Jonathan Weinberg, *Broadcasting and Speech*, 81 CALIF. L. REV. 1101 (1993) (discussing and explaining the disjunction between traditional First Amendment doctrines and broadcasting regulation); Henshaw, *supra* note 4, at 1020-27 (comparing relaxed First Amendment treatment of broadcast media with other media).

14. Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943). *See generally* Laurence H. Winer, *The Red Lion of Cable, and Beyond?*—Turner Broadcasting v. FCC, 15 CARDOZO ARTS & ENT. L.J. 1, 8 n.15 (1997).

15. 395 U.S. 367 (1969).

16. *Id.* at 400-01.

17. Weinberg, *supra* note 13, at 1126-27.

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

19. *Id.* at 386.

20. Because it is based in broadcast technology itself, the *Red Lion* rationale does not extend to the print media. Indeed, in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a right-of-reply statute for newspapers that attempted to create a statutory right similar to that created by the fairness doctrine in the broadcast context. *See* 418 U.S. 241, 256 (1974).

interference for any one speaker to be heard.[21] To end the resulting chaos, Congress created the Federal Communications Commission ("FCC") to license and monitor broadcast frequencies.[22] But because not every speaker could obtain a broadcast license, the *Red Lion* Court held that successful licensees owed a "proxy or fiduciary" duty to the public to present all sides of a controversy rather than just their own view.[23] In the Court's eyes, the First Amendment rights of viewers and listeners trumped those of the broadcasters themselves.[24] Though heavily criticized,[25] the *Red Lion* scarcity rationale has never been overruled,[26] and the Court has continued to rely on broadband scarcity to justify regulations of broadcast that would rarely be upheld as applied to print media and most other speakers.[27]

The Court's approval of government regulation of indecent programming provides the best illustration of the reduced First Amendment protection afforded broadcast relative to other media.[28] In *FCC v. Pacifica Foundation*,[29] the Court considered an FCC determination that a daytime

21. *Red Lion*, 395 U.S. at 388. Commentators have disagreed with the Court's historical analysis of early broadcasting. Professor Hazlett, for example, describes the historical situation as one of orderly distribution of broadcast licenses on a first-come, first-served basis. Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 913 (1997). Under this theory, the Radio Act providing for public interest-based assignment of broadcast licenses grew out of a desire to regulate who would control the airwaves, rather than from a desire to remedy the nonexistent problem of broadcast interference. *Id.*

22. *Red Lion*, 395 U.S. at 388.

23. *Id.* at 389.

24. *Id.* at 390.

25. *E.g.*, Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J.L. & ECON. 133, 137-38 (1990); Weinberg, *supra* note 13, at 1106. Ronald H. Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959).

26. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994) (noting that "we have declined to question [the *Red Lion* rationale's] continuing validity as support for our broadcast jurisprudence, and see no reason to do so here." (citation omitted))

27. *See* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 813 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part); FCC v. League of Women Voters, 468 U.S. 364, 375-76 (1984) (considering the First Amendment implications of a restriction on editorial content applied to broadcasters under the more relaxed *Red Lion* standard and noting that they "would not hesitate to strike . . . down" a similar restriction applied to print media).

28. For an overview of the Court's approach to regulation of indecent broadcasts, see Robert E. Riggs, *Indecency on the Cable: Can It Be Regulated?*, 26 ARIZ. L. REV. 269, 279-85 (1984).

29. 438 U.S. 726 (1978).

radio broadcast of George Carlin's "Filthy Words" monologue[30] could be administratively sanctioned and that broadcasts of patently offensive material must be limited to times during which children would unlikely be listening.[31] On appeal, the Supreme Court affirmed the propriety of the FCC's order against Pacifica's statutory and First Amendment challenges.[32] Pacifica contended that the First Amendment precluded government regulation of its broadcast unless the monologue could be characterized as obscene.[33] The Court conceded that while the words at issue "ordinarily lack literary, political, or scientific value"[34] and typically constitute "no essential part of any exposition of ideas,"[35] they did not fall completely outside the protection of the First Amendment, and their use could be protected from government censorship in other circumstances.[36] Nevertheless, the Court ultimately held that in the broadcast context, regulation of indecent language did not offend the First Amendment when, as was the case in *Pacifica*, children could be listening to the broadcast.[37]

To support its decision to treat broadcast differently from other media, the Court noted initially that "each medium of expression presents special First Amendment problems," and that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[38] In the context of the indecent programming at issue in *Pacifica*, the Court limited broadcasters' First Amendment protection based on two

30. The twelve minute monologue, which contained Carlin's thoughts on so-called filthy words that couldn't be broadcast on public airwaves, repeated those words continuously throughout the monologue. *Id.* at 729.

31. *Id.* at 722-23.

32. *Id.* at 750-51.

33. *Id.* at 744. The First Amendment does not require any heightened scrutiny of obscene speech. Roth v. United States, 354 U.S. 476, 485 (1957). In *Miller v. California*, 413 U.S. 15 (1973), the Court defined obscenity as material that (a) under contemporary community standards "taken as a whole, appeals to the prurient interest;" (b) "depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (1973).

34. *Pacifica*, 438 U.S. at 746.

35. *Id.* (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 769 (1942)).

36. *Id.* at 746-47. For example, concurring separately in *Pacifica*, Justice Powell noted that he did "not think Carlin, consistently with the First Amendment, could be punished for delivering the same monologue to a live audience composed of adults who, knowing what to expect, chose to attend his performance." *Id.* at 756 (Powell, J., concurring). Indeed, the Court has extended protection to similar language in other contexts. *E.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) (holding that the First Amendment bars prosecution of an individual for wearing a jacket bearing the words "Fuck the Draft").

37. *Pacifica*, 438 U.S. at 750-51.

38. *Id.* at 748.

purported characteristics of broadcast media: (1) their "uniquely pervasive presence in the lives of all Americans;"[39] and (2) their "unique[] accessib[ility] to children, even those too young to read."[40] Unlike material contained in print media, for example, due to their "unique pervasiveness," patently offensive broadcasts "confront[] 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."[41] And, in contrast to *Cohen v. California*, in which the Court admonished offended viewers of a "Fuck the Draft" slogan on Cohen's jacket simply to avert their eyes rather than rely on the government to censor the message,[42] the *Pacifica* Court declared that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[43] The Court also noted that offensive material in other media, such as books and movies, could be withheld from children by prohibiting its sale to minors. However, in the Court's view, the invasive nature of broadcast rendered such restrictions unworkable, and prevention of reception by minors therefore required "restricting the expression at its source."[44]

B. First Amendment Limitations on Regulation of Cable "Broadcasting"

Due to its obvious similarities to broadcast television, cable television potentially could be regulated under the same paradigm that informs broadcast regulation. However, the medium-dependent nature of the Court's First Amendment jurisprudence,[45] coupled with technological differences between cable and broadcast,[46] offered the possibility of a different level of scrutiny for the cable industry.[47] But until *Playboy*, the Court's attempts to define a specific standard of review for cable were less than illuminating.[48] Prior to the Court's decision in *Turner Broadcasting Sys-*

39. *Id.*
40. *Id.* at 749.
41. *Id.* at 748.
42. Cohen v. California, 403 U.S. 15, 21 (1971).
43. *Pacifica*, 438 U.S. at 748-49.
44. *Id.* at 749-50.
45. Reno v. ACLU, 521 U.S. 844, 868 (1997) (distinguishing Internet from broadcast regulations, and noting that "[e]ach medium of expression . . . may present its own problems." (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (alterations in original))).
46. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640 (1994).
47. *See* Riggs, supra note 28, at 288.
48. Indeed, in a 1996 opinion Justice Thomas complained:

tem, Inc. v. FCC,[49] courts applied various standards to cable, including both the broadcast and print media standards.[50]

In *Turner*, the Court soundly rejected the government's attempt to apply the *Red Lion* standard to cable operators.[51] *Turner* involved a First Amendment challenge to the "must-carry" provisions of the Cable Act,[52] which required cable operators to use a certain number of their channels to transmit local broadcast television stations. Justice Kennedy, writing for the Court, concluded that because "cable television does not suffer from the inherent limitations that characterize the broadcast medium," the *Red Lion* standard, based as it was in the scarcity of broadband frequencies, could not apply to the cable medium.[53]

Turning to the appropriate level of scrutiny for the must-carry provisions, the Court seized upon the general First Amendment principles applicable to print media, which base the level of scrutiny on whether or not a law regulates speech on the basis of its content. Laws that "suppress, disadvantage, or impose differential burdens upon speech because of its content," including those "[l]aws that compel speakers to utter or distribute speech bearing a particular message" receive strict scrutiny.[54] Content-neutral laws, in contrast, receive only intermediate scrutiny.[55] The Court ultimately held that the must-carry provisions were content-neutral, and thus could be sustained if they further "an important or substantial governmental interest . . . unrelated to the suppression of free expression; and

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> [o]ur First Amendment distinctions between media, dubious from their infancy, placed cable in a doctrinal wasteland in which regulators and cable operators alike could not be sure whether cable was entitled to substantial First Amendment protections afforded the print media or was subject to the more onerous obligations shouldered by the broadcast media.

Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 813-14 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part) (citations omitted).

49. 512 U.S. 622 (1994).

50. Henshaw, *supra* note 4, at 1024.

51. *Turner*, 512 U.S. at 637.

52. 47 U.S.C. § 534 (1994 & Supp IV 1998).

53. *Turner*, 512 U.S. at 638-39.

54. *Id.* at 642. Under strict scrutiny, the government may regulate protected speech only to further a compelling interest, and it must choose the least restrictive alternative that furthers its purpose. Sable Communications of Cal. v. FCC, 492 U.S. 115, 126 (1989).

55. *Turner*, 512 U.S. at 642. Content-neutral laws "confer benefits or impose burdens on speech without reference to the ideas or views expressed. . . ." *Id.* at 643.

if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[56]

The question of the proper standard for cable regulations, which courts and commentators thought had been settled by *Turner*, became a moving target once again just two years later. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,[57] the Court considered three sections of the Cable Television Consumer Protection and Competition Act of 1992[58] that permitted cable operators to censor patently offensive material on leased and public access channels.[59] Despite its ringing endorsement of print media standards for cable television just two years earlier in *Turner*, the *Denver* Court could not arrive at a majority opinion defining the standard of review for regulations of indecent cable speech. Justice Breyer, writing for a plurality, explicitly refused to define "a rigid single standard" for cable, reasoning that it would be unwise to set a standard in the face of ongoing "changes taking place in the law, the technology, and the industrial structure related to telecommunications. . . ."[60] Instead, the plurality subjected the content-based restriction to "close judicial scrutiny,"[61] under which the statute could stand if "it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech."[62] This view did not, however, command a majority of the Court. Justices Kennedy and Ginsburg would have treated the leased and public access channels as common carriers and public fora respectively, and would have applied strict scrutiny.[63] Justice Thomas, writing for the Chief Justice and Justice Scalia, appeared to endorse strict scrutiny for content-based regulations affecting cable operators,[64] but decided that the cable viewers and leased access programmers attacking the law had not asserted interests protected by the First Amendment.[65]

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56. *Id.* at 662 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

57. 518 U.S. 727 (1996) (plurality opinion).

58. 47 U.S.C. §§ 532(h), 532(j), and note following § 531 (1994).

59. *Denver Area Educ. Telecomm.*, 518 U.S. at 733.

60. *Id.* at 742 (opinion of Breyer, J.).

61. *Id.* at 741 (opinion of Breyer, J.).

62. *Id.* at 743 (opinion of Breyer, J.).

63. *Id.* at 783 (opinion of Kennedy, J., concurring in part, concurring in the judgment in part and dissenting in part).

64. *Id.* at 816-17 (opinion of Thomas, J., concurring in the judgment in part and dissenting in part).

65. *Id.* at 824 (opinion of Thomas, J., concurring in the judgment in part and dissenting in part).

Following *Denver*, there appeared to be no well-defined standard of review for content-based restrictions of indecent cable speech. Arguably, however, the *Denver* case muddied the waters by presenting a law that merely authorized, rather than required, private censorship by cable operators. In contrast, *Playboy* squarely presented the Court with a mandatory content-based restriction of offensive, but protected, cable speech, and the *Playboy* Court at last defined a clear standard of review for cable.

II. CASE SUMMARY

A. Facts and Procedural History

Playboy Entertainment Group prepares sexually explicit programming for broadcast on adult television networks, including Playboy Television and Spice.[66] Cable operators transmit such networks to monthly subscribers and to other viewers on a pay-per-view basis.[67] Because recipients of premium channels like Spice pay to receive the programming, cable operators naturally block nonsubscribers from receiving such channels.[68] However, due to imperfections in the scrambling technology used to block the receipt of premium channels, the audio, and occasionally the video, portions of the programming can be viewed by nonsubscribers. This technological imperfection, known as signal bleed, led directly to the speech restrictions at issue in *Playboy*.[69]

Congress addressed the growing concern over the possibility of children viewing indecent or obscene cable programming through signal bleed in section 505 of the Communications Decency Act of 1996 ("CDA").[70] Section 505 presents cable operators with a choice regarding "sexually explicit adult programming or other programming that is indecent on any channel . . . primarily dedicated to sexually-oriented programming. . . ."[71] Cable operators may either fully scramble such channels so that no signal bleed occurs in either the audio or video signal, or they must "limit the access of children to the programming . . . by not providing such programming during the hours of the day . . . when a significant number of children are likely to view it."[72] The FCC, to whom Congress delegated

66. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1883 (2000).

67. *Id.*

68. Playboy Entm't Group, Inc. v. United States, 30 F. Supp. 2d 702, 707 (D. Del. 1998), *aff'd* 120 S. Ct. 1878 (2000).

69. *See Playboy*, 120 S. Ct. at 1883.

70. 47 U.S.C. § 561 (Supp. IV 1998).

71. *Id.* § 561(a).

72. *Id.* § 561(b).

the task of determining the hours during which the channels may be broadcast if not fully scrambled,[73] limited the safe-harbor hours to between 10:00 p.m. and 6:00 a.m.[74] Congress also enacted section 504, complementary to section 505, which requires cable operators to block fully any channel upon request by a subscriber.[75]

Concerned about the potential burden section 505 would place on its ability to transmit sexually explicit programming, Playboy mounted a facial challenge to section 505, arguing that it violated the First Amendment's guarantee that "Congress shall make no law . . . abridging the freedom of speech."[76] Playboy sought, and obtained, a temporary restraining order enjoining enforcement of section 505.[77] Pursuant to section 561(a) of the CDA, a three judge district court convened to determine the constitutionality of section 505(a).[78] The district court denied Playboy's motion for a preliminary injunction and lifted the temporary restraining order, holding that section 505 was sufficiently narrowly tailored to survive strict scrutiny and therefore met First Amendment requirements.[79] The FCC subsequently announced that it would begin enforcement of section 505 on May 18, 1997.[80]

Over a year after the FCC began enforcement, the district court invalidated section 505, holding that it violated the First Amendment rights of cable network providers such as Playboy.[81] The government argued that the statute only regulated signal bleed, a secondary effect of speech, and

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73. *Id.*

74. In re Implementation of Section 505 of the Telecommunications Act of 1996, 11 F.C.C.R. 5386 (1996).

75. 47 U.S.C. § 560(a) (1994) (providing that "[u]pon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it."); Playboy Entm't Group, Inc. v. FCC, 30 F. Supp. 2d 702, 708 (D. Del. 1998).

76. U.S. CONST. amend. I; *Playboy*, 30 F. Supp. 2d at 705-06. Playboy also argued that the Act violated the Fifth Amendment by singling out networks that primarily broadcast sexually explicit programming, instead of applying to all cable broadcasts of sexually oriented programming. *Id.* The court never reached the equal protection issue. *Id.* at 720 n.24.

77. Playboy Entm't Group, Inc. v. United States, 918 F. Supp. 813, 822-23 (D. Del. 1996).

78. *Playboy*, 30 F. Supp. 2d at 705.

79. Playboy Entm't Group, Inc. v. United States, 945 F. Supp. 772, 792 (D. Del. 1996), *aff'd mem.*, 520 U.S. 1141 (1997).

80. In re Implementation of Section 505 of the Telecommunications Act of 1996, 12 F.C.C.R. 5212, 5214 (1997).

81. *Playboy*, 30 F. Supp. 2d at 720.

was therefore content-neutral.[82] However, the court rejected the secondary effects argument, noting that while regulation of signal bleed may be content-neutral, the statute applies only to signal bleed from a subset of cable networks determined by reference to the content of the programmers' speech.[83] Such content-based restrictions must be examined under strict scrutiny and can be upheld only if the government shows that the statute is narrowly tailored to achieve a compelling government interest.[84] Beginning its strict scrutiny of the statute, the district court recognized that section 505 addresses three compelling government interests: (1) protecting children from harm suffered through viewing explicit sexually-related programming; (2) supporting parental authority by allowing parents to decide what moral beliefs to teach their children; and (3) ensuring individual privacy by preventing indecent programming from intruding into nonconsenting households through signal bleed.[85] Section 505 could properly further these interests only if it "is narrowly tailored to serve that end and . . . is the least restrictive alternative."[86]

The district court ultimately accepted Playboy's contention that the voluntary blocking required by section 504 offers a less restrictive means of serving the government's compelling interests in regulating the speech at issue.[87] The court first noted the large burden section 505's enforcement had placed on Playboy's freedom of speech. During the time the FCC enforced section 505, the "vast majority" of cable operators opted to time-channel Playboy's programming to the safe-harbor times of 10:00 p.m. to 6:00 a.m., rather than to use the more expensive technological solution of complete blocking.[88] Because between thirty and fifty percent of adult programming is viewed before 10:00 p.m., the time-channeling significantly restricted Playboy's speech.[89] The court reasoned that because section 504 requires blocking only upon request, it restricts less speech than section 505.[90] But pointing to the paucity of subscribers who had exercised their section 504 rights, the government argued that while it may be less

82. *Id.* at 714.

83. *Id.* at 714-15.

84. *Id.* at 715; Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989) (noting that "[t]he Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest").

85. *Playboy*, 30 F. Supp. 2d at 715.

86. *Id.* at 717.

87. *Id.*

88. *Id.* at 711.

89. *Id.*

90. *Id.* at 718.

restrictive, section 504 does not provide an equally effective means of preventing children from viewing signal bleed as does section 505.[91] Rejecting the government's ineffectiveness argument, the court noted that either lack of adequate notice or a general consensus that signal bleed does not present a large problem could explain the low number of requests for blocking under section 504.[92] Coupled with adequate notice, section 504 could be equally effective at blocking signal bleed for those parents who are concerned about the problem. Because section 504 offered a less restrictive, but potentially equally effective means of blocking signal bleed, the court declared section 505 an unconstitutional restriction on speech.[93]

B. The Supreme Court's Decision

On appeal, a divided Court affirmed the district court in a ringing opinion by Justice Kennedy.[94] All nine justices agreed that as a content-based restriction on protected speech,[95] section 505 could be sustained only if it survived strict scrutiny:[96] the regulation must be "narrowly tailored to promote a compelling Government interest," and the government must use a less restrictive alternative if one exists.[97] According to the majority, the nature of the cable television medium helped legitimize the government's interest in regulating Playboy's speech; citing the Court's fractured plurality opinion in *Denver*,[98] the majority explained that "[c]able television, like broadcast media, presents unique problems which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts."[99] The intrusiveness of cable broadcasting therefore justified the government's interest in

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91. *Id.* at 719.

92. *Id.*

93. *Id.* at 719-20.

94. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1893 (2000).

95. All the parties to the litigation proceeded on the assumption that the speech at issue did not fall under the legal definition of obscenity, as defined in *Miller v. California*, 413 U.S. 15, 24 (1973). *See Playboy*, 120 S. Ct. at 1885.

96. *Playboy*, 120 S. Ct. at 1886 (holding that "[s]ince § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny"); *id.* at 1898 (Breyer, J., dissenting) (noting that "[t]he basic, applicable First Amendment principles are not at issue" and applying strict scrutiny to the statute). While Justice Scalia joined Justice Breyer's dissent, his separate dissent indicates his willingness to apply a lower level of scrutiny to the speech at issue by finding that the statue "regulates the business of obscenity" rather than regulating speech per se. *Id.* at 1895 (Scalia, J., dissenting).

97. *Id.* at 1886.

98. Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727 (1996) (plurality opinion).

99. *Playboy*, 120 S. Ct. at 1886.

regulating indecent cable network programming in order to prevent children from accessing such programs absent parental consent.[100]

Although the Court accepted the government's compelling interest, it nevertheless held section 505 unconstitutional because a less restrictive means of regulating the speech existed: voluntary blocking.[101] Unlike broadcast, "[c]able systems have the capacity to block unwanted channels on a household-by-household basis."[102] Section 504 presented such an alternative means of regulation, and according to the majority, the government failed to demonstrate its ineffectiveness.[103] Throughout its opinion, the majority relied upon technology's ability to provide alternatives to blanket restrictions on speech.[104] Section 504, together with "market-based solutions such as programmable televisions, VCR's, and mapping systems" can prevent receipt of signal bleed by those who deem it problematic, without restricting Playboy's ability to transmit its programming during the day to those who wish to receive it.[105] Due to the existence of such alternatives, which the Court held could be equally effective at furthering the government's interest, the overly-restrictive section 505 violated the First Amendment.

III. DISCUSSION

Playboy's primary significance lies in the strong First Amendment protection the Court afforded cable speech, a level of protection that stems in large part from cable's ability to support technology facilitating individual subscribers' efforts to shape their viewing experience. Justice Kennedy acknowledged that the government possessed a compelling interest in protecting children from the effects of viewing indecent programming through signal bleed without their parent's consent.[106] Instead of relying on the broad governmental ban on the speech at issue in *Playboy*, however, parents who are concerned about signal bleed must employ blocking

100. *Id.*

101. The Court also approved of the district court's alternative grounds for finding the statute unconstitutional: that the government failed to meet its burden in showing that signal bleed presented a "pervasive, nationwide problem justifying its nationwide daytime speech ban." *Id.* at 1891.

102. *Id.* at 1887.

103. *Id.* at 1888.

104. *See id.* at 1887 (noting that "the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests").

105. *Id.* at 1890.

106. *Id.* at 1886.

technology such as lock boxes and VCRs with channel-blocking capability.

A. The Old Approach: Emerging Technology as a Justification for Reduced First Amendment Protection

The Court's reliance on technology's ability to provide an alternative to government regulation differs significantly from its earlier approach to emerging media typified by *Red Lion*, *Pacifica*, and *Denver*. In all three cases, the Court reacted to rapid technological change with what could charitably be called extreme uneasiness but at times seemed more akin to fear or misunderstanding.

The scarcity rationale advanced in *Red Lion* rests on the scientific reality that only a limited number of broadcast frequencies exist and posits that in the absence of regulation only chaos would result.[107] While broadband scarcity may be an unavoidable truth, the Court's reaction to this technological fact contravenes basic First Amendment principles regarding prior restraints.[108] The Court generally treats prior restraints as presumptively unconstitutional and subjects them to heavy scrutiny even if content-neutral.[109] But since the FCC relied on a highly subjective public interest standard to allocate broadcast licenses,[110] the *Red Lion* Court upheld a blatantly content-based licensing scheme—largely because it failed to appreciate that the "chaos" of multiple entities seeking to broadcast would be better left to market forces and improved technological responses.[111]

The scarcity rationale rings even more hollow today than it did when first conceived. The rise of cable, the Internet, and the potential for digital television and radio to replace conventional broadcasting all combine to make scarcity moot.[112] While there will always be only a limited number

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107. As noted earlier, it is not clear that any actual chaos ever existed. *See supra* note 21.

108. For a recent example of the Court's treatment of prior restraints, see Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992).

109. Weinberg, *supra* note 13, at 1113.

110. *Id.* at 1114-30 (describing the operation of the public-interest based FCC licensing system).

111. Commentators have long argued that no legitimate reason exists for treating broadcast frequencies differently from other privately-owned natural resources. *See generally* Coase, *supra* note 25. Moreover, thanks to technological advances, many more broadcasters can operate without undue interference. In addition, the advent of cable and Internet-based alternatives to broadcast have decreased the necessity of procuring a "scarce" broadcast license in order to communicate through broadcast-like media.

112. *See* FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984).

of broadcast frequencies, that scarcity has no impact on ability to speak when other, directly-competitive replacement technologies exist that have virtually unlimited capacity. In *Turner*, the Court itself acknowledged that the scarcity rationale does not apply to the cable medium because it has much greater capacity to carry different channels.[113] Internet-based radio and television broadcasting offers potentially unlimited capacity to carry diverse voices. A speaker who has been frustrated in an attempt to receive a broadcast license thus can always resort to another virtually analogous medium.

The Court again displayed its discomfort with nonprint media in *Pacifica*, in which it approved an FCC limitation on the times at which indecent language could be broadcast.[114] Noting that "each medium of expression presents special First Amendment problems," the Court refused to subject the content-based restriction to the same searching scrutiny with which it would have treated a similar regulation of the print media—or most other speakers.[115] It based its loose First Amendment treatment principally on broadcast's "intrusiveness" and "pervasiveness."[116] The Court reasoned that innocent listeners, especially children, could be startled to turn on their radio midday and hear indecent language, regardless of whether that language rose to the level of obscenity.[117] Similarly, channel surfers could be shocked if they chance upon indecent shows.[118] A regulation on the timing of the broadcast of such language could thus be justified by the need to protect such listeners from unwanted intrusions.

While compelling, this rationale cannot justify lower First Amendment scrutiny for content-based regulations of "intrusive" media such as cable and broadcast; it merely presents the sort of compelling interest that may justify narrowly tailored regulations.[119] Moreover, the intrusiveness of ca-

113. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638-39 (1994).

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

115. *Id.* at 748.

116. *Id.* at 748-49.

117. *Id.* at 749 (noting broadcasts' "unique[] accesibil[ity] to children, even those too young to read").

118. *Id.* at 748 (noting that "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" (citations omitted)).

119. Indeed, this is the approach taken by Justice Breyer and the *Playboy* dissenters. They would find § 505 to be a narrowly tailored restriction to serve the compelling government interest in regulating indecent speech that intrudes into homes in which children may be watching television. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1903 (2000) (Breyer, J., dissenting).

ble and broadcast surely cannot be greater than that of the speech at issue in *Cohen*, in which Cohen startled unsuspecting members of the public by wearing a "Fuck the Draft" jacket where anyone could see him and be offended.[120] And while, unlike the message in *Cohen*, cable and broadcast media do intrude into the privacy of the viewers' homes, viewers invite the intrusion by purchasing a set and turning it on. Moreover, offended viewers can always change the channel or forbid their children access to television altogether if it proves to be an unsavory addition to the home. In short, no legitimate reason exists for the Court's insistence on subjecting new and intrusive media to different First Amendment standards than other forms of communication, and in *Playboy* the Court finally recognized that fact.[121]

B. Emerging Technology as a Tool to Support Private Choice

The *Playboy* Court emphatically embraced technology's ability to provide alternatives to government-mandated censorship of cable. Justice Kennedy's analysis of whether section 505 represented a narrowly tailored response to signal bleed depended heavily on the ability of "market-based solutions such as programmable televisions, VCR's, and mapping systems (which display a blue screen when tuned to a scrambled signal) . . . [to] eliminate signal bleed at the consumer end of the cable."[122] In the face of a less-restrictive alternative, the government may not resort to broad, content-based bans on protected speech.[123]

But perhaps the more important aspect of the Court's decision lies in its recognition that technological solutions do more than merely provide a less restrictive alternative to government regulation. By allowing individuals to shape their media-viewing experiences according to the dictates of their personal preferences, technological solutions empower individual consumers in the marketplace of ideas, thus furthering First Amendment interests far more than does the putative public-interest regulation of broadcast approved in *Red Lion*.

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120. Cohen v. California, 403 U.S. 15, 16-17 (1971).

121. *Playboy*, of course, does not change the current treatment of broadcast, which still receives lessened First Amendment protection, as illustrated in *Pacifica*.

122. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1890 (2000). For a description of the nature and operation of the principal technological means for restricting access to cable channels at the consumer end, including the V-chip, channel locking, lockboxes, and digital television, see Andrea K. Rodgers, United States v. Playboy Entertainment Group, Inc. *and Television Channel Blocking Technology*, 40 JURIMETRICS J. 499 (2000).

123. *Playboy*, 120 S. Ct. at 1891.

The Playboy Court's use of technology as a tool to further individual choice was foreshadowed by its opinions in *Sable Communications v. FCC*[124] and *Reno v. ACLU*.[125] In *Sable Communications*, the Court evaluated a Congressional attempt to ban obscene and indecent interstate commercial telephone messages, known as dial-a-porn.[126] Though the Court upheld the statute's ban of obscene messages,[127] it invalidated the ban on indecent messages based partly on the existence of a less-restrictive technological solution to the problem of restricting children's access to dial-a-porn.[128] Porn purveyors could require credit cards and access codes to exclude children from their systems.[129] More importantly, scrambling technology existed that allowed the message providers to send scrambled messages that could only be unscrambled by a box purchased by the consumer and sold only to adults.[130] The possibility that such a technological approach could effectively further the government's interest rendered the speech ban imposed by the statute unnecessarily overbroad.[131] Similarly, when explaining the CDA's failure to conform to the narrow tailoring required of content-based regulations, the *Reno* Court referenced, though did not rely upon, user-based filtering technology as an alternative to the CDA's broad ban on indecent Internet speech.[132] Thus, both *Sable Communications* and *Reno v. ACLU* demonstrate the Court's willingness to consider technology as an alternative to government speech regulations.

The *Playboy* Court did not merely accept technology as a less-restrictive alternative to government censorship. It explicitly recognized, perhaps for the first time, technology's ability to enhance personal freedom.[133] As the Court recognized, the First Amendment helps enforce government neutrality in the marketplace of ideas.[134] The government, "even with the mandate or approval of a majority," should not express judgments about the relative merits of various messages and ideas.[135] Such judgments are for the individual—both as a speaker and a listener.

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124. Sable Communications v. FCC, 492 U.S. 115 (1989).

125. 521 U.S. 844 (1997).

126. *Sable*, 492 U.S. at 117-18.

127. *Id.* at 124. The Court does not engage in any heightened First Amendment scrutiny of regulations of obscene speech. *See supra* note 33.

128. *Sable*, 492 U.S. at 126, 130-31.

129. *Id.* at 121-22.

130. *Id.* at 122.

131. *Id.* at 130-31.

132. Reno v. ACLU, 521 U.S. 844, 876 (1997).

133. United States v. Playboy Entm't Group, Inc., 120 S. Ct. 1878, 1889 (2000).

134. *Id.*

135. *Id.*

But the price society pays for such freedom can be high. As the Court noted in *Cohen*, "the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance."[136] And although the *Cohen* Court accepted as a sign of strength "[t]hat the air may at times seem filled with verbal cacophony"—an indication of robust public debate[137]—the immediate result of *Cohen* left many individuals unable to avoid speech to which they would personally prefer not to listen. At least for cable viewers, technology eliminates the concept of a captive audience, and empowers individuals to shape their own listening experience by blocking unwanted programming. At the same time, it allows those who wish to receive certain programming the freedom to do so. In this manner, technology is helping to create the world the *Red Lion* Court unsuccessfully sought when it approved the fairness doctrine in an attempt to validate the First Amendment rights of listeners and viewers. But while the *Red Lion* Court found it necessary to limit the rights of speakers in order to empower listeners, technological solutions allow individuals to shape their viewing experiences in conformity with their own tastes, without forcing speakers to censor their messages.

IV. CONCLUSION

In *Playboy*, the Court finally arrived at a First Amendment standard for cable speech. The Court could have adopted the same laissez-faire approach to cable regulations as it applies to broadcast. In rejecting that path and choosing to subject content-based regulations of cable to the same searching scrutiny it applies to similar regulations of the print media, the Court acknowledged the multiple roles technology can play in solving First Amendment dilemmas posed by invasive media such as television and radio. Individual blocking and filtering devices can prevent children from viewing material their parents find inappropriate with far greater precision than a broad government ban on all speech of a certain type. But far beyond merely providing a more narrowly-tailored alternative to government censorship, technology gives individual listeners the ability to shape their media experience to reflect their own tastes and desires. As Justice Kennedy put it, "[t]echnology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best

136. Cohen v. California, 403 U.S. 15, 24-25 (1971).

137. *Id.* at 25 (noting that "[w]e cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated").

positioned to make these choices for us."[138] By allowing individual choice, technology enhances the values the First Amendment was designed to protect.

138. *Playboy*, 120 S. Ct. at 1889.

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