The Needle and the Damage Done: The Pervasive Presence of Obsolete Mass Media Audience Models in First Amendment Doctrine

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I've seen the needle and the damage done / A little part of it in everyone.1

The Federal Communications Commission’s stern response to incidents like Janet Jackson’s “wardrobe malfunction”2 and Bono’s colorful Golden Globe Awards acceptance speech3 have made it plain that the Commission still sees its role as protecting the broadcast audience from indecent content. Meanwhile, Congress has toyed with increasing penalties for indecency violations in broadcasting4 and has attempted to extend broadcast-style content standards to the Internet.5 Indeed, despite widespread recognition that the traditional spectrum scarcity rationale for content regulation of broadcasting is all but a dead letter,6 content regulation of broadcasting persists in forms that would be patently unconstitutional if applied to print media.

The idea that broadcasting should receive less First Amendment protection than print and other media is, of course, not new. What is new is the explosion of new kinds of mass media outlets and the novel questions they raise about the constitutionality of broadcast-style content regulation. In response to these developments, several authors have criticized the persistence of the two-tiered print-versus-broadcasting First Amendment hierarchy as anachronistic in an age when print, broadcasting, cable, telephone, and Internet are converging rapidly.7 However, others offer a starkly

1. NEIL YOUNG, Needle and the Damage Done, on HARVEST (WEA 1972).
3. In re Complaints Against Various Broad. Licensees Regarding their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4982 (2004) (“We also take this opportunity to reiterate our recent admonition . . . . that serious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings . . . .”).
7. See, e.g., Erik S. Knutsen, Techno-neutrality of Freedom of Expression in New Media Beyond the Internet: Solutions for the United States and Canada, 8 UCLA ENT. L. REV. 87 (2001); Khaldoun Shobaki, Speech Restraints for Converged Media, 52 UCLA L. REV. 333 (2004). For a novel “structural” approach based on “regulation of the distribution of media assets, as differentiated from editorial control,” see Michael J. Burstein, Towards
different response: content regulation is needed now more than ever to protect audiences incapable of dealing with the mass media deluge by themselves.8

This tension between advocates of a new media-blind approach to content regulation and advocates of maintaining the status quo is not easily resolved on the terms of discussion advanced by these authors, because both camps make valid, mutually annihilating points. On the one hand, the technological convergence of media is no doubt rendering the old legal regime unworkable, as it is now possible to both read a newspaper and watch a television program by means of a third medium—the Internet. On the other hand, the ubiquity of new media means that we are unquestionably living in an age when audiences are exposed to more mass media than ever before, so that whatever legitimate reasons may exist for protecting audiences from mass media are likely to be even more relevant now.

All of which brings us back to the key questions of justification: Do audiences need the government’s protection from mass media? Or are they capable of choosing media and protecting themselves? For decades, judicial opinion on this issue developed in the form of judicial notice, speculation, and assumption.9 Yet during that time, a rich social science discipline was emerging that could have helped to address these issues based on empirical research about mass media effects and audiences.10 Given the renewed importance of this issue, it is time to bridge the gap between the law of mass media content regulation and the social science research into mass media consumption.11

To that end, this article presents an interdisciplinary critique of the law’s assumptions about the effects of mass media on the audience, the nature of that audience, and how those assumptions have shaped First Amendment doctrine. Part I reviews important

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8. See, e.g., Patrick M. Garry, The Right to Reject: The First Amendment in a Media-Drenched Society, 42 SAN DIEGO L. REV. 129, 144-45 (2005) (“The growth of a media society and the corresponding explosion of media speech have made the burdens of averting one’s eyes ever more onerous. Likewise, the demise of social customs which once imposed an unofficial censorship on offensive speech have put even more burdens on averting one’s eyes, to the point where it may be nearly impossible to avoid offensive speech. This lopsidedness of burdens has been a natural result of the marketplace [of ideas] metaphor, which focuses only on increasing the amount of social speech. But during an age of abundant speech, it is time to reconsider this dramatic inequality of burdens.”).

9. See discussion infra Part I.

10. See discussion infra Part II.

First Amendment rulings concerning content regulation of electronic media, as well as analogous cases involving non-broadcast speech. The goal is to identify the judicial assumptions used to justify giving less First Amendment protection to broadcasting than to other media. Part II critiques these assumptions against the conclusions of social science theorists who have been studying the question of mass communications effects and audiences since the early twentieth century. This critique shows that most of the law’s current assumptions about the nature of mass communications are based on an early, and now discredited, view of mass communications effects known as the “Hypodermic Needle Model.” More sophisticated models have since supplanted the Hypodermic Needle Model, which failed to account for the interactive and social dimensions of mass communication. Finally, Part III returns to the question of how new media should be treated under the First Amendment and analyzes the potential impact of the critique presented in Part II on the development of the law of content regulation in the twenty-first century.

I. THE MASS MEDIA, THE PASSIVE AUDIENCE, AND THE LAW

This section explores the law’s assumptions about the nature of mass media effects and audiences. Three areas of First Amendment jurisprudence are relevant to this exploration: compelled access to media, offensive speech, and Internet content regulation. In each of these areas, judicial opinion assumes that mass media consumers are passive, captive, and almost victim-like in their relationship with mass media, especially with broadcasting. As a result, courts tend to assume a paternalistic attitude when analyzing media effects generally and assign less First Amendment protection to broadcast media in particular because broadcasting is assumed to be more invasive than other forms of media. This discussion sets the stage for Part II’s critique of these assumptions in light of modern mass communication effects theory.

A. Compelled Access to Media

1. Public Affairs Speech and the Fairness Doctrine: Banzhaf and CBS

We begin with the D.C. Circuit’s decision in Banzhaf v. Federal Communications Commission\(^\text{12}\) because it contains the seed language

\(^{12}\) 405 F.2d 1082 (D.C. Cir. 1968).
for subsequent Supreme Court case law addressing broadcast content regulation. In *Banzhof*, the D.C. Circuit upheld an FCC ruling under the so-called “Fairness Doctrine,” requiring broadcasters who aired cigarette advertising to also provide air time for anti-cigarette advocates.13

In affirming the FCC’s ruling, Judge Bazelon admitted that “[t]he First Amendment is unmistakably hostile to governmental controls over the content of the press,” but nevertheless reasoned that “there may still be a meaningful distinction between [print and broadcast] media justifying different treatment under the First Amendment.”14 In this passage, Judge Bazelon made clear what he perceived to be the relevant distinctions:

Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are “in the air.” In an age of omnipresent radio, there scarcely breathes a citizen who does not know some part of a leading cigarette jingle by heart. Similarly, an ordinary habitual television watcher can avoid these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word.15

This passage reflects the court’s critical assumptions about the nature of the broadcasting medium and its audience. The court uses words like “omnipresent,” “subliminal impact,” and “pervasive propaganda” to describe the power of broadcasting—all without reference to empirical research or other authority.16 These words suggest an assumption that the broadcast medium is capable of having a powerful effect on its audience because that audience is passive or even captive while subject to the medium. Judge Bazelon’s characterization of the “ordinary” television viewer as “habitual” in his

13. Id. at 1085. The Fairness Doctrine, which was largely abandoned by the FCC under the Reagan administration, see sources cited supra note 6, is probably the most familiar legal expression of the right-of-access philosophy advocated by Professor Jerome Barron and others. See generally Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). In a nutshell, these advocates argue that monopolistic mass media outlets should be compelled to give access to speakers addressing issues of public concern in order to preserve the marketplace of ideas that is central to our system of self-governance against a profit-driven mass media industry that is generally hostile to ideas.


15. Id. at 1100-01.

16. Indeed, the court seems to have viewed these kinds of conclusions as being largely beyond dispute. See, e.g., id. at 1101 n.77 (“[T]he effectiveness of the television commercial is hardly disputed, for it alone appeals to both of man’s most receptive senses – hearing and seeing.”).
or her use of television further underlines this view. The picture that emerges is of audience members unwilling or unable to exercise choice over the broadcast messages entering their lives.

Five years after Banzhaf, the Supreme Court adopted Judge Bazelon’s characterization of broadcasting—but with quite different results. In Columbia Broadcasting System v. Democratic National Committee (CBS), the Court considered whether the Fairness Doctrine’s “fairness” and “access” components could be used to compel television and radio stations to carry paid political advertisements. With approval, the Court quoted Judge Bazelon’s stark warning about the “subliminal impact of this pervasive propaganda,” and concluded:

The [FCC] is entitled to take into account the reality that in a very real sense listeners and viewers constitute a “captive audience.” The “captive” nature of the broadcast audience was recognized as early as 1924 when Commerce Secretary Hoover remarked . . . that “the radio listener does not have the same option that the reader of publications has—to ignore advertising in which he is not interested—and he may resent its invasion of his set.” As the broadcast media became more pervasive in our society, the problem has become more acute . . . .

It is no answer to say that because we tolerate pervasive commercial advertisements we can also live with its political counterparts.

The Court in CBS thus found that neither the Fairness Doctrine nor the First Amendment required broadcasters to carry such content. Remarkably, the court came to this conclusion using the same assumptions that drove the opposite result in Banzhaf. Specifically, these two cases employ a common underlying assumption about broadcasting and its audience: broadcasting has a pervasive presence and a special hold on its audience that other media do not. In Banzhaf, this assumption required that pro-smoking messages be “balanced” by compelled anti-smoking messages; in CBS, this same

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17. See id. at 1100.
20. 412 U.S. at 127-28 (citations and footnotes omitted).
21. See id. at 94.
22. This outcome was remarkable, because enforcing a right of access for political advertisements would seem to be an even higher expression of the access philosophy than forced anti-cigarette messages. Forcing broadcasting outlets to sell time to political speakers arguably would offset the broadcasters’ perceived antipathy, see Barron, supra note 13, at 1641, to such content even as it allowed the broadcasters to recoup the financial burden imposed by the corrective measure.
23. See 405 F.2d at 1086.
assumption was used to justify what might be viewed as a stand against political propaganda.24

2. Access and reply: Red Lion and Tornillo

Another component of the Fairness Doctrine was the “personal attack” rule which required stations to allow persons whose “honesty, character, integrity” or other personality traits were attacked to reply.25 The FCC required broadcasters to provide this right of access regardless of whether the person attacked could find a sponsor or afford to buy airtime, and in the Red Lion case the Supreme Court endorsed this system of subsidized access, ostensibly due to concerns that the scarcity of the electromagnetic spectrum might result in monopolization of the broadcast medium by just a few speakers:

It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of the market, whether by the government itself or a private licensee.26

The Court reached exactly the opposite conclusion in Miami Herald v. Tornillo, invalidating a state “right of reply” statute that required newspapers to devote column space to responses from individuals who were the subject of the newspaper’s editorials.27 Despite the defendant newspaper’s virtual monopoly in the Miami newspaper market, the Court found that the statute

[F]ails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.28

24. See 412 US at 128. The resulting irony of these cases is that the right of access—a supposed tonic for the ailing marketplace of ideas—does not extend to this most obviously political type of speech.
26. Id. at 390 (citations omitted).
28. Id. at 258.
Remarkably, *Red Lion* is not cited in *Tornillo*, even though the comparison was fully briefed by the parties. More remarkably, the *Tornillo* court implied that spectrum scarcity, which received extensive treatment in *Red Lion*, really is not the operative difference between newspapers and broadcasters on the right-of-reply question.

If scarcity does not explain the apparent inconsistency between *Red Lion* and *Tornillo*, what does? Perhaps it is this:

Although 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. . . .

Just as the Government may limit the use of sound-amplifying equipment potentially so may the Government limit the use of broadcast equipment. The right of free speech of a broadcaster, the user of a sound truck, or any other individual broadcaster, does not embrace a right to snuff out the free speech of others.

The Court's tepid observation that broadcasting is "affected by a First Amendment interest" contrasts sharply with its conclusion in *Tornillo* that requiring even a monopolistic newspaper to provide space for opposing viewpoints is inconsistent with "the First Amendment guarantees of a free press as they have evolved to this time." This contrast confirms, at a minimum, broadcasting's subordinate status under the First Amendment. More importantly, the Court's reliance on "differences in the character" between media and its questionable comparison of broadcasting to amplified sound.

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30. See 395 U.S. at 387-96.

31. *Tornillo*, 418 U.S. at 256-57 (stating: "[i]t is correct, as appellee contends, that a newspaper is not subject to the finite technological limitations of time that confront a broadcaster but it is not correct to say that, as an economic reality, a newspaper can proceed to infinite expansion of its column space to accommodate the replies that a government agency determines or a statute commands the readers should have available.").

32. *Red Lion*, 395 U.S. at 386-87 (citations omitted) (emphasis added). The Court's analogy between broadcasting and soundtrucks seems odd, to say the least, given that people cannot turn-off a blaring soundtruck like they can a radio or television. See infra note 62. It is also hard to understand the import of the observation that the rights of one broadcaster do not embrace the right to "snuff out the free speech of others," *Red Lion*, 395 U.S. at 387, when arguably it is the Court's decision in *Red Lion* which snuffed out the right of broadcasters to exercise the same editorial prerogative as the newspaper editors whose discretion is lionized in *Tornillo*.

33. Id. at 386 (emphasis added).

34. 418 U.S. at 258.

trucks that “snuff out” the speech of others suggests the powerful grip of the passive/captive audience assumption upon the Court’s imagination.

B. Offensive Speech

The flipside of the access cases are cases addressing limits on offensive speech. Instead of trying to force more “good” speech into the marketplace of ideas, as in the access cases, the concern here is whether “bad” speech can be kept out. Nevertheless, the analysis still reflects the same kinds of passive audience assumptions, with broadcast media again receiving markedly less protection than other forms of expression.

1. Nonbroadcast Offensive Speech: Cohen and Miller

In Cohen v. California, the defendant was arrested for wearing a jacket emblazoned with the slogan “Fuck the Draft” in the Los Angeles County Courthouse. Overturning the conviction, the Supreme Court noted:

In arguments before this court much has been made of the claim that Cohen’s distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant’s crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . . “[W]e are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of the government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in

36. Id. at 387.
37. Even more ironic is that the “right of access” to mass media was originally advocated as a solution to the problem of monopoly newspapers, see Barron, supra note 13, yet it emerged successfully only in the already-regulated broadcast medium. Indeed, Red Lion and Tornillo are paired together in many mass communications law textbooks precisely because they illustrate the Court’s willingness to treat broadcasting differently than other media under the same First Amendment scenarios.
38. A word of caution is necessary: The goal here is not to try to pin down the meaning of terms like “obscene” and “indecent.” Instead, the focus is on the fact that the Court sees a viable distinction between such terms and found it appropriate to craft two, media-dependent answers to what is really the same question: When is offensive speech protected by the First Amendment?
40. 403 U.S. 15, 16 (1971).
other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.41

The court further recognized that a speaker often chooses words precisely for their emotional impact and that this component of communication “may often be the more important element of the overall message,” and therefore merits constitutional protection.42

Although Cohen established that states cannot place a blanket ban on indecent speech,43 the Court’s concern with speech that creates an “essentially intolerable” invasion of “substantial privacy interests”44 left the door open to some regulation of indecent speech and, in fact, would foreshadow the Supreme Court’s subsequent analysis of indecent broadcast speech. Before that happened, however, the holding in Cohen was further refined in Miller v. California, where the Court held that obscenity—as distinct from indecency—was not at all protected by the First Amendment.45 In Miller, the Court established a test for identifying obscenity that included a “prurient interests” element,46 in keeping with earlier precedent (including Cohen) that “[obscene] expression must be, in some significant way, erotic.”47

2. The Broadcasting Exception: Pacifica

Just two years after Miller, the government successfully asserted its right to define and regulate non-obscene speech in broadcasting in FCC v. Pacifica Foundation, the famous Seven Dirty Words case.48 In Pacifica, the Court upheld FCC sanctions against a radio station which broadcast a George Carlin monologue entitled “Filthy Words.”49 The sanctions were based on an FCC order in which “the FCC attempted to authoritatively construe the term ‘indecent’ for the broadcast medium . . . as ‘language that describes, in terms patently offensive as measured by contemporary community

41. Id. at 21 (citations and footnotes omitted) (quoting Rowan v. Post Office Dept., 397 U.S. 728, 738 (1970)).  
42. Id. at 26.  
43. Reiss, supra note 39, at 436.  
44. Cohen, 403 U.S. at 21.  
45. 413 U.S. 15, 23 (1973).  
46. Id. at 24.  
47. Cohen, 403 U.S. at 20 (citing Roth v. U.S., 354 U.S. 476 (1957)).  
48. 438 U.S. 726 (1978). Those seven words, including the word that was at issue in Cohen, are reproduced in the Court’s appendix to the Pacifica decision. Id. at app.  
49. Id. at 738.
standards for the broadcast medium, sexual or excretory activities and organs." 50

In *Pacifica*, the government attempted to regulate speech that was merely indecent and not obscene, as the FCC’s order lacked the requisite “prurient interest” factor enunciated in the *Miller* obscenity formulation; in fact, the district court struck the order down for this reason, and because of a concern that the order was vague and overbroad.51 Nevertheless, the Supreme Court upheld the order.52 In his plurality opinion, Justice Stevens cited *Cohen* for the proposition that speech can both offend and have “social value.”53 Yet unlike *Cohen*, where the “social value” of the profanity-emblazoned jacket outweighed its offensiveness,54 the *Pacifica* Court held that the impact of George Carlin’s offensive speech outweighed its value as social commentary.55 Why did the Court see fit to depart from *Cohen* in this fashion?

One answer lies in the Court’s assumptions about the captive nature of the broadcasting audience and the resulting penetration of broadcast messages. Noting that “it is undisputed that the content of *Pacifica*’s broadcast was ‘vulgar,’ ‘offensive,’ and ‘shocking,’ ”56 the Court determined that the level of protection afforded such speech depended on the “context” of the speech; by “context” the Court appears to have meant “medium”:

> The broadcast media have established a uniquely pervasive presence in the lives of all Americans. 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. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by

50. Reiss, supra note 39, at 437 (citing *In re Citizen’s Complaint Against Pacifica Found. Station WBAI*, 56 F.C.C.2d 94, 98 (1975) [hereinafter *In re Pacifica*]).


The FCC put forth four arguments to support its asserted power to sanction, stating:

> Broadcasting requires special treatment because of four important considerations: (1) children have access to radios and in many cases are unsupervised by parents; (2) radio receivers are in the home, a place where people’s privacy interest is entitled to extra deference; (3) unconsenting adults may tune in a station without any warning that offensive language is being or will be broadcast; and (4) there is a scarcity of spectrum space, the use of which the government must therefore license in the public interest.

52. *Pacifica*, 438 U.S. at 751.

53. Id. at 747.


56. Id. at 747.
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. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.57

As in Banzhaf, this language strikingly depicts an audience almost helpless in the face of broadcasting’s power and reach, with the result being the invention of “pervasive presence”58 as a new rationale for broadcast content regulation completely independent of the traditional spectrum scarcity rationale.59 Further, the opinion approved the regulation of non-obscene, merely indecent speech in broadcasting, freeing the FCC from “the clash between its statutory mandates and the first amendment rights of broadcasters” and giving it “the regulatory flexibility to apply either the obscenity definition under Miller or the indecency rationale under Pacifica.”60

3. Discussion

Despite their contrasting outcomes, concerns about the effect of speech on a potentially captive audience link Cohen to Pacifica. While striking down a ban on indecent speech, the Cohen Court noted that audiences are often “captives” of others’ speech and observed that circumstances might exist where speech invades “substantial privacy interests” in an “essentially intolerable manner,” thus justifying otherwise unconstitutional efforts to protect “unwilling or unsuspecting viewers.”61 This budding rationale for content regulation blossomed in Pacifica, when the Court suggested that broadcasting’s “uniquely pervasive presence” haunts apparently helpless audience members in their own homes, taking on the characteristics of an “intruder,” justifying regulation of indecent broadcast speech.62

57. Id. at 748-49 (citation omitted).
58. Id. at 748.
59. See Hsiung, supra note 51, at 47.
60. Id.
61. Id.
63. See 438 U.S. at 748-49. The Court’s choice of words in these cases is intriguing, because neither “captivity” nor “privacy” would seem at first blush to fit. Unlike speech in public spaces, speech in private places like homes and cars does not ordinarily enter without some affirmative act by the recipient – televisions and radios must at least be turned on, newspapers at least unfolded and read, even an offensive slogan on a jacket remains outside unless the jacket’s wearer is invited in. Captivity may be an appropriate way to think about these media in the public forum context, but besides the occasional soundtruck, this concept doesn’t really fit the private space context very well; likewise, it cannot be “privacy” in the traditional sense that the Court is concerned about, since privacy arguably includes the right to listen to George Carlin in one’s own home. In fact, a good argument can be made that, if physical captivity is the real worry in these cases, then the
These cases thus suggest that the Court generally (i.e., even in the nonbroadcast context) views audience members as either passive receivers of mass media, unwilling or unlikely to disengage from speech media freely, or as outright captives simply unable to disengage freely. The Court also assumes that broadcast speech exacerbates this problem because of the uniquely “pervasive presence” of television and radio, which in turn implies the need for greater concern and regulation than in other media “contexts.”

C. Content Regulation of the Internet

The last stop in this review of cases is *Reno v. ACLU*, a case in which the Supreme Court struck down legislation aimed at curbing “indecency” on the Internet. At first blush, this case appears to run counter to the themes of this article, given that the *Reno* Court outcomes in *Cohen* and *Pacifica* are exactly backwards: Cohen’s fellow citizens in the courthouse truly are physically captive, because while radios and TVs can be turned off or tuned to different programs to at least interrupt the flow of unwelcome speech, there really is no other place to transact courthouse business except at the courthouse, and thus no real option but to encounter firsthand any potentially offensive slogans that may be emblazoned upon the jackets of other courthouse visitors.

Justice Douglas made a similar point about a decade earlier in his dissent in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952). There, the Court upheld a city bus company’s authority to use the public address systems on its buses to play news, music, and commercials, on the theory that persons who used the buses implicitly waived their privacy interest in avoiding unwanted speech. See id. at 463-64 (“However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance.”) Justice Douglas disagreed, writing, “[o]ne who tunes in on an offensive program at home can turn it off or tune in another station, as he wishes. One who hears disquieting or unpleasant programs in public places, such as restaurants, can get up and leave. But the man on the streetcar has no choice but to sit and listen, or perhaps to sit and try not to listen.” Id. at 469 (Douglas, J., dissenting). Curiously, just four years before its holding in *Pacifica*, the Court seemed to catch up with Justice Douglas’s thinking, upholding a local ban on political advertising in city buses because the viewer or listener is captive and the degree of captivity makes it impractical for the unwilling viewer to avoid exposure. See generally *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). More curious still is the fact that Judge Bazelon made essentially the same point in his circuit court concurrence striking down the FCC’s order in *Pacifica*: “Unlike the sound truck whose noise cannot be eliminated from the home even if desired, radio makes no sound unless a person voluntarily purchases it, bring[s][sic] it home and then switches it ‘on.’ ” *Pacifica Found. v. FCC*, 556 F.2d 9, 26 (D.C. Cir. 1977), rev’d, 438 U.S. 726 (1978).


64. In this light, it is interesting to note that the Court in *Pacifica* recognized the validity of the comparison between *Red Lion* and *Tornillo*, but only in a tautological way: The Court noted the existence of these two cases as evidence that broadcasting is afforded less protection than print. 438 U.S. at 748.

conferred upon an emerging electronic medium the kind of speech freedom that is traditionally associated with print media rather than broadcast media. However, a closer look reveals that, in arriving at that result, the Court generalized from *Pacifica* and concluded that the constitutionality of content regulation of a given medium depends in significant measure on whether that medium is used passively or interactively.

The two statutory provisions invalidated in *Reno* prohibited persons from knowingly transmitting “obscene or indecent” content, or making such content available, to persons younger than 18 years of age. The government argued that *Pacifica* and its “pervasive presence” rationale applied to this emerging medium, an argument that is particularly fascinating in the context of the present analysis:

The approach Congress enacted is constitutional under *Pacifica*. Like broadcast stations, the Internet is establishing an increasingly “pervasive presence” in the lives of Americans. Like indecency presented on broadcast stations, indecent material presented over the Internet “confronts the citizen . . . in the privacy of the home.” Like broadcast stations, the Internet “is uniquely accessible to children.”

Moreover, in important ways, there is a stronger justification for the restriction at issue here than there was for the one approved in *Pacifica*. Because millions of people disseminate information on the Internet without the intervention of editors, network censors, or market disincentives, the indecency problem on the Internet is much more pronounced than it is on broadcast stations . . . .

The Supreme Court’s rejection of this argument is also intriguing because of the doors it leaves open:

[The Federal Communications] Commission’s order [in *Pacifica*] applied to a medium which as a matter of history had “received the most limited First Amendment protection,” in large part because warnings could not adequately protect the listener from unexpected program content. The Internet, however, has no comparable history. Moreover, the District Court found that the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.

The import of the Court’s “history” observation seems unclear. Either the Court is speaking tautologically (it is okay to subordinate the First Amendment rights of broadcasters because we have always done so) or it is making a suggestion (if the government can establish some history of regulation of the Internet, then maybe content regulation will be okay later). Additionally, the idea that the Internet

66. See id.
67. See id. at 869-70.
68. Id. at 859 (emphasis added) (quoting 47 U.S.C. § 223(a), (d) (Supp. II 1997)).
70. *Reno*, 521 U.S. at 867 (citations omitted).
is “safer” because it requires more “affirmative” steps to get to indecent material than other media is open to criticism, both empirically and as a doctrinal matter. Nevertheless, what is clear is that Reno reaffirms the Court’s medium-is-the-message approach to the First Amendment, with the Court ruling that because audiences use the Internet more like a newspaper than a television—that is, interactively rather than passively—the Internet receives essentially the same high level of First Amendment protection as newspapers.72

D. Summary

From Banzhaf to Red Lion to Pacifica to Reno, courts have expressed an assumption that broadcast audiences are particularly vulnerable because they are passive rather than interactive, captive rather than in control, and even victims rather than knowing users. As Part II demonstrates, however, these key assumptions are based more on science fiction than social science research.

II. THE MASS MEDIA, THE AUDIENCE, AND MASS COMMUNICATIONS RESEARCH

Part I demonstrates that judicial assumptions about the media audience explain why the Supreme Court endorses a two-tier First Amendment hierarchy, with traditional electronic media receiving less protection than print and Internet media. In this section, these

71. See Knutsen, supra note 7, at 104-06 (“Likening one media form to another based on the complexity of required affirmative steps to receive the communication seems to be a way to differentiate between whether or not inappropriate content would be accessible by children. However, one only has to think about the actual act of listening to a radio broadcast, dialing a telephone, or logging on to the Internet. The affirmative steps required to place a telephone call are really not that much more onerous than turning a radio dial or clicking a mouse. The degree of accessibility issue as it affects children is perhaps more salient in the court’s mind, yet it forsakes the governmental objective of protection by assuming that only adults could perform more complex steps to access controversial media.”).

72. Judicial analysis of cable and direct broadcast satellite (DBS) has been more ambiguous in this regard, although the trend appears to be in the direction of imposing less restriction on these media than upon broadcasting. See also Joel Timmer, The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment, 10 COMM. L. & POLY 179, 196-204 (2005) (noting conflicting holdings by lower courts as to whether the scarcity rationale applies to DBS, which provides for roughly four times the channels as most cable systems and 40 times as many channels as ordinary broadcasting). Compare Denver Area Educ. Telecomm. Consortium, Inc., v. FCC, 518 U.S. 727 (1996) (plurality decision finding that cable is has attained a “pervasive presence in the lives of all Americans”) with U.S. v. Playboy Entm’t Group, 529 U.S. 803 (2000) (citing Reno and apparently applying strict scrutiny to cable indecency regulations, with no mention of “pervasive presence”).
assumptions are critiqued, using the work of sociologists and mass communications researchers who have studied issues relating to mass media effects, audiences, and uses since the early 20th Century.

A. Early Mass Communications Theory

The origins of mass communications effects theory lie in “early concerns that propaganda transmitted through the mass press or over radio could have a nearly universal effect . . . and could lead to a mass or mob reaction.”73 To fully understand why this concern was once paramount, one must appreciate the historical context from which the earliest mass communications theories emerged:

The initial assumption about the effects of mass media by social scientists in the 1920s and 1930s was that mass communication techniques were quite potent. For example, in an analysis of mass communication during World War I, Lasswell (1927) concluded that “propaganda is one of the most powerful instrumentalities in the modern world.” During this period, there were several salient examples of seemingly effective mass communication effects. These included the panic following the 1929 stock market crash; the well-publicized mass hysteria following the radio broadcast of Orson Wells’ War of the Worlds in 1938; and the rise in popularity of individuals such as Adolf Hitler in Germany, and the right wing Catholic priest Father Coughlin, and Louisiana Senator Huey Long in the United States.74

Two theoretical constructs abetted these views of mass communications effects: the Mass Audience and the Hypodermic Needle Model of mass communication (the latter also known as the Direct Effects Model).75 The Mass Audience concept has four characteristics associated with the sociological definition of the term “mass”:

First, its membership may come from all walks of life, and from all distinguishable social strata . . . . Secondly, the mass is an anonymous group, or more exactly, is composed of anonymous individuals. Third, there exists little interaction or exchange of experience between the members of the mass . . . . Fourth, the mass is very loosely organized and is not able to act with the concertedness or unity that marks the crowd.76

76. Herbert Blumer, Collective Behavior, in Principles of Sociology, 185-86 (Alfred McClung Lee ed., 1946) (emphasis added) (also quoted in Wright, supra note 75, at 85).
The view of the audience as “separate atoms that together comprise the whole”77 was coupled with the Hypodermic Needle Model of the communications process which holds that:

[T]he mass media affect all audience members directly by reaching each person as a socially isolated individual, directly influencing his or her knowledge, opinions, attitudes, beliefs, and behavior. . . . Each individual in the mass audience is regarded as directly and personally “struck” by the medium’s message. Once the message has struck someone, it may or may not have influence, depending on whether or not it is potent enough to “take.”78

Not surprisingly, a stark and even sinister view of mass communications in general, and broadcasting in particular, emerged from this period. This view was crystallized by the assumption that “the audience was captive, attentive, and gullible . . . the citizenry sat glued to the radio, helpless victims”79 and that “propaganda could be made almost irresistible.”80

These early fears pervade the case law, sometimes explicitly so. Commerce Secretary Hoover’s observation about the inability of the radio listener to escape advertising—which the Supreme Court quoted with approval in CBS—date from this era and came just three years before Lasswell’s study of World War I propaganda noted above.81 From Banzhaf’s references to “pervasive propaganda,” “omnipresent radio,” and broadcasting’s “subliminal impact . . . greater than the impact of the written word,”82 to Pacifica’s warnings about the “pervasive presence” of broadcasting,83 all the way to Reno’s effort to determine the First Amendment status of the nascent Internet based on the degree of interactivity required to reach indecent materials84—the case law is laden with early Twentieth Century concerns about audience passivity and broadcasting’s resulting special power to directly implant messages in this audience, necessitating government oversight, not unlike the way the government regulates illegal drugs in order to prevent drug addiction and abuse.85 But while the law has

77. WRIGHT, supra note 75, at 86.
78. Id. (footnote omitted).
82. Banzhaf v. FCC, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968).
85. Similarly, the fact that early models of mass communications effects were inspired by early concerns about broadcast political propaganda helps to make sense of the
continued to cling to these very early assumptions, mass communications theorists began to question them almost immediately.

B. Early Critiques

The first major challenges to the Hypodermic Needle Model came as a result of empirical research that questioned the assumption that media have the power to directly produce effects among audience members, such as inciting them to mob violence or compelling them to favor a particular political candidate.\(^{86}\) These researchers concluded that mass communications is better understood as an “indirect” process, mediated by factors including audience members’ prior attitudes and social relations.\(^{87}\) A 1948 study of the 1940 presidential election concluded that “the media appeared to reinforce people’s already existing attitudes rather than producing new ones,” and subsequent research suggested that changes in people’s attitudes could be the result of a “two-step” process in which mass media first influence the beliefs of “opinion leaders” who in turn were responsible for changing the views of the masses through more traditional, social means of persuasion.\(^{88}\)

This revised view of mass communications, which developed through the 1950s and 1960s has been referred to as the “transactional model,” and it concludes that the old assumptions about a passive audience and powerful media were both overblown and simplistic, as they ignored the interactive character of the media/audience relationship:

In contrast to the earlier “hypodermic needle” or “bullet” model that posited strong communications effects, the essential notion of the transactional model is that mass media effects are quite limited. Individual characteristics, attitudes, experiences, and predispositions all mediate mass media effects. As some have put it, the conceptual shift was to change the focus from “what media do to people,” to “what people do to mass media.”\(^{89}\)

In sum, the “general failure of researchers to demonstrate clear and direct effects of media content on social behavior” led to the

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\(^{86}\) Petty, supra note 74, at 157.
\(^{87}\) Id.
\(^{88}\) Id. at 158 (citations omitted).
widespread abandonment of the Hypodermic Needle model among social scientists, whose attention increasingly turned to models that consider variables reflecting the social nature of media consumption, such as “[i]ndividual differences, group differences, the role of influential peers, [and] stages of cognitive development.”

C. One Modern Approach: The Uses and Gratifications Model

The strongest expression of the modern, interactive approach to studying the mass communications process is the Uses and Gratifications Model:

In this model, people, even young children, are not passive recipients of or reactors to media stimuli; rather they are purposive and conscious selectors of messages that fulfill personal needs . . . . This approach turns the old stimulus-response model on its head. It suggests that it is not so much that the media affect people, as it is that people selectively use, and thereby affect, the media.

The Uses and Gratifications approach emerged from the conceptual shifts of the 1950s and 1960s and came into its own in the 1970s and 1980s. Uses and Gratifications research demonstrates that “audience members exhibit some independence and diversity in linking gratifications to media messages,” thus revealing a much more active audience than the discredited passive-audience models previously assumed.

Indeed, Uses and Gratifications research poses a stark contrast to the old Hypodermic Needle assumptions reflected in the case law suggesting that mass media audiences are monolithically passive or even captive. In Uses and Gratifications, audience activity “is the core concept,” tempered by the observation that audiences are “variably – not universally – active; they are not equally active at all times.” For example, a study of television audiences in the 1980s described two kinds of television use, Escapism and Information Seeking/Education. The Escapist user “uses television out of habit

90. MEYROWITZ, supra note 73, at 13.
91. Id. at 14.
and to pass the time . . . because television viewing provides amusement and enjoyment." 96 In comparison, the Information Seeking user

[U]ses television to seek information or to learn, and not for escape . . . . It highlights the active seeking of messages to gratify certain needs and provides a contrast to the habitual, entertainment motivational structure that found gratification in increased television watching, but not in specific program content. The informational viewers are obviously not trying to escape from an information environment, but rather, are using television – and specific genres of informational programming – in order to learn about people, places, and events . . . . 97

Thus, far from being passive or “captive” victims of broadcasting, modern studies, like this one, suggest that people are more or less active users of broadcasting. This study, in particular, suggests two ways people actively seek out and use broadcasting: escape and education. The escape use depends on the aesthetic qualities of the television medium, while the education use depends on informational content of the message (and, we may suppose, to some degree on the aesthetic advantages of the medium in conveying that information). The former seek gratification from the aesthetic qualities of television, while the latter seek out the messages that television carries. Nevertheless, both are conscious uses of the medium.

A second example of 1980s Uses and Gratifications research makes the point even more clearly. An examination of religious television viewers found that “[a]s with their secular television viewing counterparts, many regular viewers of religious programs appear to be purposeful and selective information seekers.” 98 The study posits a third type of television user:

According to these findings, there exists a type of viewer who is generally dissatisfied with commercial television programming and typically avoids such fare. Seeking the spiritual guidance and moral support not typically found in secular programming, these viewers purposefully select religious television as an alternative. They have chosen . . . to seek an alternative to the plethora of available commercial programming as a response to their general dissatisfaction.

It should be noted that there is evidence to suggest that this type of viewer is not unique to religious television . . . . 99

This identification of the “reactionary” 100 user (or simply a reactionary use) further undermines the passive audience assumption.

96. Id. at 48.
97. Id. at 50.
99. Id.
100. Id.
When people did not like what they saw on TV, they changed the channel to find something they did.\textsuperscript{101}

Although the notion that audiences are active is the \textit{sine qua non} of the Uses and Gratifications approach, researchers in this area have cautioned against simplistic depictions of audience members as “superational and very selective”\textsuperscript{102} and have noted that

[T]heoretical active audience models have increasingly emerged that range from high audience activity to low levels of involvement. For example, both dependency and deprivation theories suggest that some individuals under certain conditions such as confinement to the home, low income, and some forms of stress form high levels of attachment to media.\textsuperscript{103}

Still, even this kind of “dependent use” of mass media represents a \textit{use} of mass media, as opposed to a mass media use of audiences, and thus this use model stands in contrast to the Hypodermic Needle Model assumptions that the mass media audience is a monolithic and passive audience, wholly at the mercy of broadcasters.

\textit{D. Summary}

Most mass media researchers would regard the current judicial assumptions about media audiences as anachronistic and lacking in empirical support. Modern approaches to mass communications research, such as the Uses and Gratifications approach, examine media in its social setting and uncover an interactive media/audience relationship, not a passive one.\textsuperscript{104} These conclusions raise questions

\textsuperscript{101} At this point, the reader may be reminded of the Court’s observation in \textit{Pacifica}: “To 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.” FCC v. Pacifica Found., 438 U.S. 726, 748-49 (1978). Thus, it might be argued, even if reactionary viewers exercise some choice in finding other programs to watch, the “damage” has already been done. In response, it has to be asked how this experience is any different from reading an unexpectedly profane quote in a newspaper article. The answer is that it is not—except for the medium involved. And that is the point: The assumption in \textit{Pacifica} that even a fleeting exposure to George Carlin’s dirty words \textit{over the radio} could result in some kind of unacceptable psychic injury smacks of the Hypodermic Needle model fears about the sinister power of broadcasting, especially when the rules governing similar content in print are so much more permissive.

\textsuperscript{102} Rubin, supra note 94, at 534 (quoting S. Windahl, \textit{Uses and Gratifications at the Crossroads}, 2 MASS COMMS. REV. Y.B. 176).

\textsuperscript{103} Ruggiero, supra note 92, at 8.

\textsuperscript{104} It should be understood that Uses and Gratifications is but one approach to the study of mass communications. Another, more traditional approach (or collection of approaches), is referred to as the “media effects” approach. “The primary difference between the two traditions is that a media-effects researcher ‘most often looks at the mass communication process from the communicator’s end,’ whereas a uses [and gratifications] researcher begins with the audience member.” Rubin, supra note 94, at 533 (quoting
about the continued viability of the current judicial approach to content regulation.


Mass communications researchers have understood for decades that audience members are not anonymous, passive victims of mass media. They are variably active users within diverse social contexts. These conclusions contrast significantly with the passive, monolithic audience assumptions underlying decades of media regulation case law. What impact, if any, might the application of more current understandings of mass media have upon the future of the law? To illustrate the possibilities of this line of interdisciplinary analysis, this section returns to the likely flashpoint for future content regulation debates—the Internet and related new media—and argues that the empirical findings of Uses and Gratifications researchers may be effective in redefining the First Amendment analysis.

Although congressional efforts to regulate indecent Internet speech within Reno’s constitutional limits have been largely unsuccessful to date, the Court may be more receptive to such measures in the future, for the simple reason that much of Reno’s reasoning was based on the state of the Internet circa 1996. At that time, the Court could plausibly describe the Internet as “comparable, from the readers’ viewpoint, to . . . a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.” But that description hardly scratches the surface of what the Internet and related technologies provide today. The wider availability of broadband Internet access means more and more people receive bandwidth-intensive, broadcast-like content on their computers, which in some cases is preferred to

Windahl, supra note 102, at 176). Rubin notes that some have called for the synthesis of these approaches, arguing that despite their differing orientations, both “seek to explain the outcomes or consequences of mass communication.” Id. In any case, the important point is that there is little disagreement about the obsolescence of the original Hypodermic Needle model’s frightening vision of mass media producing direct effects in a mass audience. For example, one scholar who argues that media are capable of “strong” effects concedes that such effects are “relatively rare” and, more importantly, are not direct but rather the product of “intermedia processes” such as interpersonal communications inspired by especially spectacular media content. See Everett M. Rogers, Intermedia Processes and Powerful Media Effects, in MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 199, 211 (Jennings Bryant, Dolf Zillmann eds., 2002).


“ordinary” broadcast content of the same subject. 107 This “TV on the Internet” phenomenon raises the “risk of encountering indecent material by accident,” if such material is contained in an Internet “broadcast.” 108 Similarly, the advent of podcasting and video blogging (vlogging) revive the government’s expressed concerns about the absence of “editors, network censors, or market disincentives” 109 capable of informally constraining the content of the new medium. Meanwhile, WiFi, distributed computing, popups, and convergence devices are giving new meaning to the phrase “pervasive presence.” 110

Taken together, these innovations and others to come make it pretty clear that when the Reno Court chose to base its reasoning on the state of Internet technology, it ensured the obsolescence of its own reasoning. 111 As a result, what appeared to be a landmark free speech case will likely come to be regarded as a quaint historical artifact, addressing the constitutional status of a medium that no longer exists. 112 And so long as the assumptions that drove Banzhaf, Red Lion, and Pacifica – that passive audiences need protection from “pervasive” media – remain unquestioned, greater content regulation of tomorrow’s Internet is a significant possibility. 113

108. Reno, 521 U.S. at 867.
110. Moreover, this technological convergence is accompanied by “increasing integration of the media industry such that large companies now play multiple roles in the content production and delivery process.” Burstein, supra note 7, at 1045.
111. Indeed, the Court has already signaled its sensitivity to the impact of rapid technological change in its internet case law. See Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 671-72 (2004). In Ashcroft, the Court justified upholding a preliminary injunction on COPA (Congress’s follow-up to the CDA) and remanded for further fact-finding, in part due to the fact that “the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet.” Id. at 671. The Court found it “reasonable to assume that . . . technological developments important to the First Amendment analysis” may have occurred between the time that enforcement of the statute was first enjoined in 1999 and the Supreme Court’s decision five years later. Id.
112. Instead, we can expect problems like this: Suppose I plug my iPod into my iMac, surf over to the Atlantica Internetwork site, and click download on their podcast of the day, which, unbeknownst to me, includes a program on race relations featuring a searing excerpt from a Chris Rock monologue. I take my iPod and my go for a drive with my four-year-old son, and you know what happens next. The scenario is indistinguishable from Pacifica when examined in terms of the supposed harm—exposure of children to offensive speech. With regard to the intentionality or passivity of the audience, it is also indistinguishable, in that I could not have a complete idea of what was contained in the podcast until I listened to it.
113. At least under the law; it is an open question whether as a practical matter this global medium can be effectively regulated.
If, however, these judicial assumptions are proven false, then the outcome could be very different, in two related respects. First, it becomes easier to argue that *Pacifica* was wrongly decided. *Pacifica* represents an exception to the general First Amendment rule, and if it can be shown to be based on unsubstantiated assumptions about mass communications effects, then there is no demonstrated basis for departing from the default First Amendment protections afforded to non-broadcast media.  

Second, it becomes possible to affirmatively argue in favor of extending the highest level of First Amendment protection to all media based on the empirically-demonstrable conclusion that audiences actively use media.  

114. Indeed, without the cover of “pervasive presence” and all the rest of the discredited Hypodermic Needle Model-inspired language, the print/broadcast dichotomy becomes a patent absurdity. For example, in America today, a notably outspoken rock musician cannot lawfully describe the honor of receiving a Golden Globe Award as, “really, really, fucking brilliant” – at least, not on prime-time television. Yet one can lawfully read about what the singer illegally said here in this article, or in a music magazine, or, for that matter, in the FCC’s own decision in this matter posted on its website, in which it found the word “fucking” to be impermissibly “profane” regardless of the context in which it is uttered (except, presumably, when that context is an FCC decision posted on a website accessible to adults and children.) See Complaints Against Various Broad. Licensees Regarding Their Airing of the Golden Globe Awards Program, 19 F.C.C.R. 4975 (2004).  

115. As noted above, some have responded to the development of new media by arguing that the line on content regulation should be held and maybe even strengthened in a media saturated society. See Garry, supra note 8. But even advocates of “platform-neutral” approaches seem to have some difficulty getting past the old passive audience assumptions. See e.g. Shobaki, supra note 7, at 353-56. Shobaki argues that speech questions should be analyzed based upon several factors which seem to be aimed at exactly the question of whether media consumption is active or passive and which the article argues are generically applicable to all media, including “initiation of communication,” “scope of authorization,” “scope of audience,” and “level of interactivity.” Id. Yet the application of these ideas raises questions about whether they offer new outcomes or simply new rationales for the status quo. For example, Shobaki argues that  

There are two basic forms of communication initiation: pull and push. . . . 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. Id. at 353. These categories seem to be euphemisms for “active” and “passive” media use, a process of categorization that, in the absence of some rigorous empirical method, is likely to result in some arbitrary judgments. For example, it is not clear whether this typology regards the act of receiving a phone call as a pull or push communication. Nor is it clear why turning on the television in order to obtain news is not an act of “pulling content.” Shobaki’s discussion of “scope of authorization” raises similar problems. The article argues, “[i]f 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.*” Id. at 354. But how can it be that persons who turn on a radio and tune in to a specific frequency have not “sought out contact?” The article also argues that, on the “pull” side,
Already, Uses and Gratifications research regarding Internet use has provided conclusions that lend support to these kinds of legal innovations. For example, an empirical study of 308 individuals’ use of political websites concludes that:

When individuals connect to political sites, it is likely they do so with goal-oriented purposes rather than just for the sake of entertainment gratifications offered by the Web at large. Therefore, guidance and information seeking/surveillance needs may be linked to more purposeful uses of the Web than just connecting for the sake of idle surfing. These findings support the work of [other Uses and Gratifications researchers] who have suggested that people use the Internet instrumentally rather than as a habit or to simply pass time.116

Another study notes that the Internet is used as a response to dissatisfaction with other media channels, a finding that is reminiscent of the 1980s study of religious television users discussed in Part III and a further illustration of the active nature of the audience.117

These studies and those described in Part II directly challenge the discredited assumptions that audiences are uniformly passive and captive. Instead, the research demonstrates that audiences tend to use media purposefully to gratify desires as diverse as the individuals themselves. Those conclusions should represent a major obstacle to any future reliance on Pacifica as a basis for content regulation of new media—or any media, for that matter, including broadcasting.

IV. CONCLUSION

This article demonstrates that antiquated mass communications theories played a significant role in the Court’s

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[A] speaker who attends a George Carlin 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 the scope of authorization. Id. at 354-55. But the principal reason that one does not expect to hear indecent speech on the radio is because it is unlawful (at least during daylight hours), not because there is something intrinsic to the radio medium that makes such content unexpected. As for “level of interactivity,” Shobaki’s assertion that “[i]n classic broadcast television, there is no user interaction,” is debatable at least in its mechanical meaning, as turning the television on and off and changing the channel are all interactions (limited ones in comparison to the internet but at least on a par with print). Id. at 356.


117. Zizi Papacharissi and Alan M. Rubin, Predictors of Internet Use, 44 J. BROADCASTING & ELECTRONIC MEDIA 175 (2000) (“The relationships between Internet motives and the social and psychological antecedents support the use of the Internet as a functional alternative for Internet users for whom other channels were not as available or rewarding.”).
creation of a two-tier First Amendment analysis. That analysis continues to subordinate broadcasting based on its “pervasive presence” and the assumed impact of that presence on a mass audience that is passive and captive. While these assumptions pervade the law, social scientists studying mass communications have dispelled fears of direct media effects and have uncovered more active, purposeful patterns of mass media consumption. These findings undermine the “pervasive presence” rationale that currently sustains content regulation of broadcasting and harmonize with traditional, liberal approaches to free speech as manifested in the Court’s treatment of print media and (so far) the Internet.

Today, with the Internet and other new media poised to assume many of the roles formerly assumed by broadcast media, policy makers are looking with renewed vigor at justifications like “pervasive presence” to perpetuate broadcasting-like content regulation into the future. Modern mass communications research, not to mention the command and purpose of the First Amendment, counsels otherwise.