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# One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation

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"[L]et me say it again as clearly as I can. This FCC is not going to regulate the Internet."[1]

The Internet has experienced rapid expansion in recent years. In 1997 twenty-three percent of Americans used the Internet.[2] Today, forty-one percent of the adult population in America use the Internet.[3] The World Wide Web has likewise seen drastic expansion.[4] As the Web has increased in popularity, Web technologies have blossomed. Currently, a Web user can access a virtually unlimited amount of information.[5] In addition to text and still graphics, streaming video and audio are now available through the Web.[6] These new developments allow Web content providers to "broadcast" information much like their counterparts in the radio and television industries.

The courts have consistently protected the print media against government

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[1] *Remarks by William E. Kennard Chairman, Federal Communications Commission Before Legg Mason Washington, D.C.* (Mar. 11, 1999) <http://www.fcc.gov/Speeches/Kennard/ spwek910.html> [hereinafter *Kennard*].

[2] *See* Pew Research Center for the People & the Press, *Online Newcomers More Middle-Brow, Less Work-Oriented: The Internet News Audience Goes Ordinary* (Jan. 14, 1999) <http://www.people-press.org/tech98sum.htm>.

[3] *See id.*

[4] *See* Adam Clayton Powell III, *Net demographics starting to even out, survey finds* (Apr. 29, 1998) <http://www.freedomforum.org/asne/edge/29netuse.htm> ("The Web has grown from 13 million U.S. adult users in the fall of 1995 to more than 58 million adults this winter, which means 30% of U.S. adults are now online.").

[5] *See* American Civil Liberties Union v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996) (finding that "the content on the Internet is as diverse as human thought").

[6] *See* Cara E. Sheppard, Comment, *Cyberpoliticking*, 4 COMMLAW CONSPECTUS 129, 129 (1996) (citing Dean Goodman, *The Stones Hit Cyberspace*, DETROIT NEWS, Nov. 14, 1994, at 2A; Daniel Akst, *Take Me Out to the Internet*, LOS ANGELES TIMES, Sept. 6, 1995, at D1); *see also* Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997) (stating that the Internet "includes not only traditional print and news services, but also audio, video, and still images").

regulation.[7] A free and open press is often regarded as crucial to the effective operation of our democracy.[8] Over the years, however, the Supreme Court has determined that the government may regulate the electronic media - radio, television and cable.[9] The Court and commentators have set forth various rationales to explain this differential regulation. At the same time, the Court has indicated an unwillingness to expand these principles of broadcast regulation to the Internet,[10] and the Federal Communications Commission seems similarly unwilling to engage in Internet regulation[11] even though the communicative capacity of the Internet is identical to that of the broadcast media. Is this differential willingness to regulate the broadcast media and the Internet justifiable?

This paper will argue that many of the current rationales used to support regulation of the broadcast media are unpersuasive in light of the fact that the unregulated Internet and the regulated broadcast media share many of the same features. In Part I, this paper examines the rationales courts have used to justify subjecting broadcast media to greater regulation than print media. Part II focuses on the reasons behind the Court's seeming unwillingness to expand its regulatory framework to the Internet. Part III illustrates that the Internet shares with the broadcast media most of the characteristics used to support broadcast regulation. Part IV discusses possible justifications for the differential regulation but concludes that none of these additional rationales are sufficiently persuasive. Finally, Part V suggests that, given the similarities between the Internet and the broadcast media, the Court, Congress and the FCC must agree to regulate both, regulate neither or develop a new regulatory framework and rationale to justify the differential treatment.

## Part I - The Differential Regulation of Print and Broadcast Media

### A. *Red Lion* and *Tornillo*

The print media have traditionally received greater protection from the Court against content regulation by the government than have the broadcast media. This

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[7] *See* LEE C. BOLLINGER, IMAGES OF A FREE PRESS 21 (1991) ("From the Warren Court to the Burger Court to the Rehnquist Court, the press has achieved a record of success matched by few other litigants before the Court. It is true today, and has been true for some time, that whenever public regulation touches the press the alarm will be sounded. And the now conventional cry will issue that, when it comes to the press, the government must keep its hands off.").

[8] *See id.* at 1 ("The principal justification for this manner of organizing society is the necessity of a free press in a democratic political system. Without it the public cannot receive all the information it needs - about government actions or public issues - to exercise its sovereign powers.").

[9] *See infra* Part I.

[10] *See generally* Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[11] *See Kennard*, *supra* note 1; *see also* Sheppard, *supra* note 6, at 129.

differential treatment can be illustrated by comparing *Red Lion Broadcasting Co. v. Federal Communications Commission*[12] to *Miami Herald Publishing Co. v. Tornillo*.[13]

*Red Lion* involved a challenge to the fairness doctrine. The fairness doctrine was an FCC regulation that required broadcasters to provide balanced coverage of controversial subjects.[14] The fairness doctrine also required broadcasters to offer individuals who had been personally attacked over their airwaves an opportunity to respond to the statements at issue.[15] In *Red Lion*, the FCC ordered a radio station to provide air time to an author who had been the subject of an on-air personal attack.[16] The broadcaster challenged the constitutionality of the fairness doctrine on First Amendment grounds.[17] In upholding the constitutionality of the fairness doctrine against the First Amendment challenge, the Court stated that,

> only a tiny fraction of those with resources and intelligence can hope to communicate by radio at the same time if intelligible communication is to be had, even if the entire radio spectrum is utilized in the present state of commercially acceptable technology. . . . Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.[18]

This concept, that broadcast regulation is justified by the fact that only a finite number of radio and television frequencies are available for use,[19] is commonly referred to as the

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[12] 395 U.S. 367 (1969).

[13] 418 U.S. 241 (1974).

[14] *See* Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5058 n.2 (1987). The FCC repealed portions of the fairness doctrine in 1987. *See id.* at 5043.

[15] *See* Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 373-74 (1969).

[16] *See id.* at 372.

[17] *See id.* at 386.

[18] *Id.* at 388-89.

[19] As early as the mid-1920s, it became clear that interference on the radio airwaves caused by the presence of more broadcasters than there were available frequencies was becoming a major problem. Radio broadcasters themselves began requesting that the government regulate the airwaves in order to alleviate this problem. Congress made a step in the regulatory direction by passing the Radio Act of 1927 and creating the Federal Radio Commission (FRC), whose job it was to decide which radio broadcasters were entitled to use the airwaves. *See* DWIGHT L. TEETER ET AL., LAW OF MASS COMMUNICATIONS 581 (9th ed. 1998). The FRC was replaced by the FCC under the Communications Act of 1934. *See id.* at 584.

spectrum scarcity rationale of broadcast regulation.[20]

In *Tornillo*, the *Miami Herald* published an editorial criticizing a political candidate. When the newspaper refused to publish the candidate's reply, the candidate sued under Florida's "right of reply" statute.[21] The statute, which required newspapers to publish the replies of candidates who were personally attacked in their pages,[22] was quite similar to the fairness doctrine's personal attack rule that was upheld in *Red Lion*.[23] Yet, the Court in a unanimous opinion held that "the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors."[24] The Court made no mention of *Red Lion*, which had been decided only five years prior.[25] Commentators who have analyzed *Tornillo* suggest that the Court chose to issue a short, unambiguous, forceful statement in order to establish a clear rule relating to the print media and reduce the likelihood of future litigation.[26] Had the *Tornillo* Court attempted to explicitly distinguish *Red Lion*, the Court would not have arrived at a unanimous decision.[27] Whatever the reason behind the Court's approach to *Tornillo*, the divergence between *Red Lion* and *Tornillo* demonstrates in striking fashion that "as in other circumstances, the First Amendment's shield prove[s] stronger for printed journalism than for broadcasting."[28]

Although the *Tornillo* Court did not explicitly say so, at least seven Justices apparently believed that *Red Lion* and *Tornillo* could be differentiated based on the

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[20] This was not the first time that the Court had discussed the spectrum scarcity rationale. Twenty-six years before *Red Lion*, the Court upheld a regulation that limited the amount of network programming a radio station affiliate was permitted to carry on the grounds that "the radio spectrum simply is not large enough to accommodate everybody." National Broad. Co. v. United States, 319 U.S. 190, 213 (1943).

[21] *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243 (1974).

[22] *See id.* at 241, 244-45 n.2.

[23] *See* Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 373-74 (1969).

[24] *Tornillo*, 418 U.S. at 258.

[25] The Court decided *Red Lion* in 1969 and *Tornillo* in 1974.

[26] *See* L. A. Powe, Jr., *Tornillo*, 1987 SUP. CT. REV. 345, 393 ("A succinct rejection was the best way to demonstrate that the old constitutional rights were still valid. Further discussion would just have opened the door to further litigation, and the point of the Court's opinion was that no matter how compelling a right of reply might seem, further litigation was not needed because, as Justice Jackson noted in a different context, the First Amendment 'was designed to avoid these ends by avoiding these beginnings.'").

[27] *See* FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT 195 (1976) ("[T]he inclusion of language in *Tornillo* reaffirming *Red Lion* as being a different problem because of the scarcity issue would have cost the votes of Douglas and Stewart. . . . Douglas . . . made it clear that he would not vote for an opinion which would have the effect of strengthening the Fairness Doctrine.").

[28] TEETER, *supra* note 19, at 70.

spectrum scarcity rationale.[29] The speech at issue in *Red Lion* was broadcast over the airwaves, a medium that suffers from scarcity, while the speech in *Tornillo* was published in a newspaper, a medium that is not subject to a scarcity argument.

### B. Spectrum Scarcity - A Closer Look

The spectrum scarcity rationale has been the subject of increasing scrutiny.[30] The Court in *Red Lion* noted that technological advances had led to greater efficiency in the use of the broadcast spectrum but suggested that demand for spectrum space had increased apace with the increased supply.[31] In *Federal Communications Commission v. League of Women Voters*,[32] the Court wrote that "[t]he prevailing rationale for broadcast regulation based on spectrum scarcity has come under increasing criticism in recent years. Critics . . charge that with the advent of cable and satellite technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete."[33]

The *Red Lion* opinion also suggested an additional scarcity argument beyond technological scarcity. The Court opined that "[l]ong experience in broadcasting, confirmed habits of listeners and viewers, network affiliation, and other advantages in program procurement give existing broadcasters a substantial advantage over new entrants, even where new entry is technologically possible."[34] This argument, sometimes referred to as economic scarcity, suggests that regulation of the broadcast media is acceptable where regulation of the print media is not because, even if technological scarcity were not an impediment, many who would like to broadcast do not have the economic resources to do so. The economic scarcity rationale is, however, not persuasive as a means of justifying differential regulation between the print and broadcast media. Justice Douglas pointed out that,

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[29] *See* FRIENDLY, *supra* note 27, at 195.

[30] "Scarcity seems to provide little justification for treating broadcasters differently than newspaper publishers under the First Amendment." Charles W. Logan, Jr., *Getting Beyond Scarcity: A New Paradigm for Assessing the Constitutionality of Broadcast Regulation*, 85 CAL. L. REV. 1687, 1689 (1997). *See also* Phillip Taylor, *Has Red Lion lost its roar?* (May 28, 1998) <http://www.freedomforum.org/speech/1998/5/28redlion.asp> ("[S]ome argue that government can no longer derive its regulatory power from the scarcity of the spectrum. Such power should come into play only when there's an absence of other effective media, they say, noting that this clearly isn't the case today.").

[31] *See* Red Lion Broad. Co. v. Fed. Communications Comm'n, 395 U.S. 367, 396-97 (1969).

[32] 468 U.S. 364 (1984).

[33] *Id.* at 364 n.11.

[34] *Red Lion*, 395 U.S. at 400.

> the daily papers now established are unique in the sense that it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era. The result is that in practical terms the newspapers and magazines, like TV and radio, are available only to a selected few.[35]

In light of questions regarding the continuing relevance of the technological scarcity rationale and the weakness of the economic scarcity doctrine, differential regulation is becoming increasingly difficult to justify.[36]

In addition, the history of cable regulation casts further doubt over the future of broadcast regulation. As a starting point, cable television does not use the broadcast spectrum and, therefore, the spectrum scarcity argument is inapplicable in the cable context.[37] While early Court decisions upheld FCC regulations that affected cable television, the Court indicated that the regulations were acceptable only to the extent that the influence on cable systems was incidental to the FCC's regulation of broadcasting.[38] By the early 1980s, however, it became "apparent that the federal courts were no longer sympathetic with FCC efforts to impose content controls of any kind upon cable TV systems."[39]

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[35] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 159 (1973) (Douglas, J., concurring).

[36] At least one commentator would seem to disagree: "[The] statement that the resource broadcasting needs in order to communicate is too limited, too finite in amount, so that too few people . . . are able to communicate by that medium . . . is not an irrational or illogical assertion at all. . . . The only difficulty lies in the implication of this *for the print media*. The question is whether the print media - and especially daily newspapers - are not equally, or even more, restricted in numbers of outlets than broadcast stations. If that is so, then this new rationale for broadcast regulation might apply equally to the regulation of newspapers. . . Rarely is it realized that the real question is not whether the print media (however defined) are more numerous, or less restricted, than broadcasting but whether they, too, exceed the allowable level of concentration for purposes of deserving autonomy status under the First Amendment." BOLLINGER, *supra* note 7, at 93-94 (emphasis in original). It would seem that Bollinger is making an economic scarcity argument - that media regulation can be justified, not because of the spectrum scarcity doctrine, but rather because media outlets are owned by a relative few. The concentration of ownership concern is discussed in more detail in Part IV D, *infra*.

[37] *See* Turner Broad. Sys., Inc. v. Fed. Communications Comm'n, 512 U.S. 622, 639 (1994) (stating that cable systems do no suffer from scarcity because "soon there may be no practical limitation on the number of speakers who may use the cable medium").

[38] *See* United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) ("[T]he authority which we recognize today . . . is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.").

[39] TEETER, *supra* note 19, at 589.

In discussing what it saw as the potential demise of the spectrum scarcity rationale, the Court in *League of Women Voters* stated that it was "not prepared . . . to reconsider our long standing approach without some signal from . . . the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[40] That signal may have arrived. After the Court began expressing its antipathy to regulation of cable television,

> the FCC began moving in the opposite regulatory direction. . . . [T]he FCC started rescinding every radio and television rule of its own that no longer seemed justified by the less active regulatory role in broadcasting it intended to play in the future. . . . The underlying policy objective of both deregulation and new media system authorization has been to create such a vast electronic media marketplace of viewing and listening alternatives for American audiences that there will be no need for any further intervention on the part of the federal government to protect public interests in electronic mass communication.[41]

In addition, the FCC has explicitly questioned the continuing viability of the scarcity doctrine.[42] It would appear, therefore, that for all intents and purposes, the spectrum scarcity rationale is dead.

Despite the demise of the scarcity rationale, the FCC still regulates some broadcast content. Although current FCC Chairman William Kennard has made it clear that his FCC "will never seek to inject [itself] into the content of news coverage,"[43] the FCC apparently is still willing to regulate other types of content. For example, the FCC continues to regulate content that it considers indecent. As recently as 1995, the FCC

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[40] Fed. Communications Comm'n v. League of Women Voters, 468 U.S. 364 n.11 (1984). *See generally* TEETER, *supra* note 19, at 589.

[41] TEETER, *supra* note 19, at 589. *See also* JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 234 (1991) ("During the Reagan years, the FCC eliminated many regulations over what could be broadcast.").

[42] *See* Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 WAKE FOREST L. REV. 1, 38-39 (1995) (citing Syracuse Peace Council v. Television Station WTVH, 2 F.C.C.R. 5043, 5048 (1987) (mem. opinion and order) ("[T]he extraordinary technological advances that have been made in the electronic media since the 1969 *Red Lion* decision, together with a consideration of fundamental First Amendment principles, provides an ample basis for the Supreme Court to reconsider the premise or approach of its decision in *Red Lion*.")); *see also* EMORD, *supra* note 41, at 234 (stating that the Reagan FCC "abandon[ed] the central underpinning for broadcast regulation, spectrum scarcity").

[43] *Remarks of William E. Kennard Chairman, Federal Communications Commission to the Radio-Television News Director Association Annual Convention San Antonio, Texas* (Sept. 25, 1998) <http://www.fcc.gov/Speeches/Kennard/spwek829.html>.

fined Infinity Broadcasting, the company responsible for syndicating the radio show of "shock jock" Howard Stern, $1.7 million. The FCC claimed that some of the material broadcast by Stern was indecent.[44] Furthermore, the FCC continues to indirectly regulate the content of children's television programs pursuant to the Children's Television Act of 1990, which authorizes the FCC to consider the extent to which a television broadcaster has provided educational programs for children when reviewing license renewal applications.[45] Therefore, although the scarcity rationale is defunct, some forms of broadcast content regulation survive.

## Part II - Internet Regulation

The Supreme Court has stymied government attempts to regulate the Internet. Congress, through the Communications Decency Act of 1996 ("CDA"), sought to criminalize the transmission of indecent material to minors via the Internet.[46] The Court in *Reno v. American Civil Liberties Union*,[47] held that the CDA violated the First Amendment. The Court discussed many factors that influenced its decision but, for the purposes of this discussion, the analysis that the Court employed to distinguish *Federal Communications Commission v. Pacifica Foundation*[48] is paramount.

### A. *Pacifica*

In *Pacifica*, a radio station owned by Pacifica Foundation aired a monologue by George Carlin that contained several offensive words in the middle of a weekday afternoon.[49] A parent, who was listening to the radio station in the presence of his young son, filed a complaint with the FCC. The FCC determined that the radio station was subject to sanction and placed the letter of complaint in Pacifica's file.[50] Arguing that the

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[44] *See* Paul Farhi, *Stern 'Indecency' Case Settled*, The Washington Post, Sept. 2, 1995, at F1.

[45] *See* Children's Television Act of 1990, 47 U.S.C. § 303b(a)(2) (1994) ("[T]he Commission shall, in its review of any application for renewal of a commercial or noncommercial television broadcast license, consider the extent to which the licensee . has served the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.").

[46] The CDA prohibited on pain of fine and/or imprisonment "the transmission [via the Internet] of, any comment, request suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age." 47 U.S.C.A. § 223(a) (Supp. 1997).

[47] 521 U.S. 844 (1997).

[48] 438 U.S. 726 (1978).

[49] *See* Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 729-30 (1978).

[50] *See id.* at 730.

broadcast was indecent, the FCC based its authority to regulate on a statute which forbade the broadcast of indecent material by radio.[51] Pacifica challenged the FCC's action on First Amendment grounds.[52]

The Court, in a plurality opinion, rejected Pacifica's First Amendment arguments and upheld the FCC's action. The Court pointed out that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection."[53] Comparing *Red Lion* to *Tornillo*, the Court stated that "although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, it affords no such protection to broadcasters."[54] Therefore, the Court implicitly utilized the spectrum scarcity doctrine, which is at the heart of the distinction between *Red Lion* and *Tornillo*,[55] as a backdrop for its decision.[56]

The Court then went on to set forth several additional factors that distinguish broadcast media from print media and justify differential regulation.

> First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans. . . . [M]aterial presented over the airwaves confronts the citizen . . . in the privacy of the home . . . . [In addition,] because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content.[57]

Furthermore, the Court emphasized that "broadcasting is uniquely accessible to children, even those too young to read. . . . Pacifica's broadcast could have enlarged a child's vocabulary in an instant."[58] In sum, then, the *Pacifica* Court set forth four rationales to justify the differential regulation of the broadcasting media and print media:

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[51] *See id.* at 731 (citing 18 U.S.C. § 1464).

[52] *See id.* at 742.

[53] *Id.* at 748.

[54] *Id.* (citations omitted).

[55] *See supra* Part I A.

[56] One article that discussed the *Pacifica* case stated that the *Pacifica* Court "neglected to mention spectrum scarcity as the foundation of broadcast regulation." Jonathan Wallace and Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press and Freedom of Speech*, 20 SEATTLE U. L. REV. 711, 726 (1997). This author contends that the Court implicitly "mentioned" the scarcity doctrine through its references to *Red Lion* and *Tornillo*, since the scarcity doctrine is apparently the only way to explain the difference between those two cases.

[57] *Pacifica*, 438 U.S. at 748.

[58] *Id.* at 749.

1) broadcast spectrum scarcity, 2) the pervasiveness of broadcasting, 3) the inability to adequately warn the broadcast audience about potentially offensive content and 4) broadcasting's unique impact on children.

### B. The New *Pacifica* Rationales and Their Interaction With the Scarcity Doctrine

Notably, the *Pacifica* opinion did not clearly indicate whether the second, third and fourth rationales were linked to and dependent upon the validity of the spectrum scarcity rationale. If so, then *League of Women Voters* could have, in theory, nullified the entire *Pacifica* opinion.[59] If, on the other hand, the four factors are independent of one another, then the *Pacifica* Court apparently developed three new rationales to account for differential regulation that can be applied in all future broadcasting cases.

One possible reading of the new *Pacifica* rationales would suggest that differential regulation is appropriate whenever the government seeks to regulate any "medium [that] is as pervasive and accessible to children as broadcasting."[60] *Turner Broadcasting System, Inc. v. FCC,*[61] however, cast doubt on that proposition. In *Turner*, cable operators challenged the FCC's "must-carry" provisions, which required that cable operators make local broadcast stations available through their services.[62] Even though "cable television is arguably as pervasive and accessible . . . as broadcast television," the Court refused to treat cable like broadcast television because cable is not a scarce medium.[63] Therefore, one could read *Turner* as supporting the proposition that the new *Pacifica* rationales support differential regulation only where the medium in question suffers from spectrum scarcity.[64] In essence, this theory would suggest that the new *Pacifica* rationales add nothing to the analysis and the debate over differential regulation would still turn exclusively on the scarcity doctrine. If this is the case, then *Pacifica* may

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[59] This is true if one assumes that *League of Women Voters* and the FCC's ensuing deregulatory posture have signaled the end of the scarcity doctrine. *See supra* note 40 and accompanying text.

[60] Charles Neeson and David Marglin, *The Day the Internet Met the First Amendment: Time and the Communications Decency Act*, 10 HARV. J.L. & TECH. 113, 117 (1996).

[61] 512 U.S. 622 (1994).

[62] *See id.* at 630.

[63] Neeson & Marglin, *supra* note 60, at 117-18.

[64] "But is seems equally plausible that the *Turner* Court failed to extend *Pacifica's* pervasiveness and accessibility rationales not because the scarcity rationale is the only one in *Pacifica* that really counted, but because the other two rationales make sense only, as in *Pacifica*, when the Government is restricting speech in order to keep potentially offensive material away from children -- not when, as in *Turner* and the pre-*Pacifica* scarcity rationale cases, the Government is requiring that certain speech be carried." *Id.* at 118.

have died along with the scarcity doctrine.[65] It is important to note, however, that the *Turner* Court did not explicitly throw out the scarcity rationale.[66] Rather, the Court declined to rule on the issue, stating that,

> [a]lthough courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence, and see no reason to do so here. The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium.[67]

Furthermore, a subsequent case, *Denver Area Educational Telecommunications Consortium v. FCC*,[68] held that the new *Pacifica* rationales were, indeed, independent of the scarcity rationale, at least in cases "involv[ing] the effects of television viewing on children."[69] In *Denver*, a case that arose out of regulations requiring cable operators to block channels that showed indecent material,[70] "four justices explicitly endorsed 'pervasiveness' as a rationale to justify government intervention in speech, even if spectrum scarcity was inapplicable to the medium in question."[71] After *Denver*, therefore, it would appear that the new *Pacifica* rationales for differential regulation - the pervasiveness of broadcasting, the inability to adequately warn the broadcast audience about potentially offensive content and broadcasting's unique impact on children - were alive and well as the Court prepared to hear *Reno*.

### C. *Reno*

In *Reno*, the government argued that the CDA was constitutional under *Pacifica*.[72] In distinguishing *Pacifica*, the Court pointed out that,

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[65] *See supra* Part II B.

[66] *See* Turner 512 U.S. at 637 (stating that"[t]he justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium"); *see also* Logan, *supra* note 30, at 1704 ("While the Court dodged the bullet yet again, *Turner I* certainly cannot be read as a ringing endorsement of *Red Lion* or the scarcity rationale.").

[67] *Turner*, 512 U.S. at 638-39.

[68] 518 U.S. 727 (1996).

[69] *Id.* at 748.

[70] *See id.* at 732-33.

[71] Wallace & Green, *supra* note 56, at 729. *See also* Neeson & Marglin, *supra* note 57, at 119 (stating that, in *Denver*, "Justice Breyer explicitly tied the holding in *Pacifica* to the pervasiveness and accessibility of broadcast").

[72] *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 864 (1997).

> the order in *Pacifica* [was] issued by an agency that had been regulating radio stations for decades [and that] the Commission's order applied to a medium which as a matter of history had "received the most limited First Amendment protection" . . . . [Furthermore,] [n]either before nor after the enactment of the CDA have the vast democratic fora of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry.[73]

It would seem apparent that this "historical" argument has its roots in the spectrum scarcity doctrine. The broadcast media have been subject to years of government regulation because of spectrum scarcity.[74] Yet, surprisingly, the Court addressed the spectrum scarcity issue separately from its discussion of the history of broadcast regulation. Only after concluding that the broadcast media historically has been subject to regulation did the Court state that "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity."[75] This distinction in the Court's analysis is relevant for two reasons. First, it suggests that the Court views a "long history of regulation" and spectrum scarcity as distinct grounds for differential regulation. If that is the case, the Court may be suggesting that differential regulation can be justified on "historical" grounds even if the spectrum scarcity doctrine that underlies the history of regulation is no longer valid. Second, the fact that the Court discussed scarcity independent of its analysis of *Pacifica* indicates that the *Reno* Court, like the *Denver* Court, believed that the new *Pacifica* rationales for differential regulation stand alone and are not inextricably linked to the scarcity doctrine.

The *Reno* Court explained that the new *Pacifica* rationales do not apply to the Internet:[76]

> [T]he Internet is not as "invasive" as radio or television. . . . "[C]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' . . . [A]lmost all sexually explicit images are preceded by warnings as to the content [and] 'odds are slim'

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[73] *Id.* at 868-69 (quoting Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978)).

[74] *See supra* Part I A.

[75] *Reno*, 521 U.S. at 870.

[76] The *Pacifica* Court seemingly treated the new rationales - the pervasiveness of broadcasting, the inability to warn and broadcasting's impact on children - as distinct elements. In *Reno*, on the other hand, the Court appears to have collapsed the rationales into a single element labeled "invasiveness." *See id.* at 868.

that a user would come across a sexually explicit sight by accident."[77]

"Moreover, . . . the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material."[78] In sum, then, *Reno* held that the Internet, unlike the broadcast media, is not invasive because a user must take affirmative steps to access Internet content and is, therefore, unlikely to come across offensive content accidentally.

## Part III - Similarities Between the Internet and Broadcasting

The Internet is not as different from the broadcast media as the *Reno* Court suggests. Technological advances, such as "[s]oftware [that] facilitates the delivery of live, or real-time, audio and video over the Internet"[79] have enabled Internet content providers to offer the same services as broadcasters. Indeed, "[t]hese advancements blur the distinction between a computer and a television."[80]

Furthermore, commentators have suggested that the Court's reasoning in *Reno* is flawed because "the Internet does, in fact, share [the] unique characteristics of the broadcast medium."[81] First comes the Court's conclusion that the Internet is different from broadcasting because an Internet user must take affirmative steps to access Internet content.[82] *Reno* pointed to *Sable Communications v. Federal Communications Commission*,[83] which determined that the government could not ban "dial-a-porn" services using a *Pacifica*-based theory because, unlike the broadcast media, "the dial-in medium requires the listener to take affirmative steps to receive the communication [and] [p]lacing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message."[84] On close examination, one realizes that a dial-a-porn customer will not be surprised by the content of the message he encounters because the source from which he obtained the phone number, such as a print or broadcast advertisement, will

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[77] *Id.* at 869 (quoting American Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

[78] *Id.* at 867.

[79] Sheppard, *supra* note 6, at 129. *See also* Reno, 521 U.S. at 870 (stating that the Internet "includes not only traditional print and news services, but also audio, video, and still images").

[80] Sheppard, *supra* note 6, at 137.

[81] Debra M. Keiser, Note, *Regulation of the Internet: A Critique of Reno v. ACLU*, 62 ALB. L. REV. 769, 782 (1998). From this proposition, Keiser concludes that the Internet should be regulated. *See id.* at 770. This paper, however, will suggest that the similarities between the Internet and broadcast media call into question the rationales underlying broadcast regulation. *See infra* Part V.

[82] *See supra* note 78 and accompanying text.

[83] 492 U.S. 115 (1989).

[84] *Id.* at 128.

clearly indicate the content of the phone message. The telephone customer who takes the affirmative action touted by the *Sable* Court *already knows* what type of content he will receive before he places the phone call. It is highly unlikely that a telephone user will accidentally dial a combination of numbers belonging to a dial-a-porn service and hear offensive content that he was not expecting.

The affirmative actions required by an Internet user, on the other hand, are not necessarily coupled with the foreknowledge possessed by the dial-a-porn customer. In order to locate content on the Internet, most users utilize search engines.[85] The Internet user enters a word or phrase into the search engine and is then presented with a list of Internet sites whose description contains that word or phrase.[86] Seemingly innocuous searches can return lists of sites that contain indecent material.[87] While it is true that the user must then take the additional step of clicking on the link in order to actually visit the site, the written descriptions of the sites themselves may contain material that some find offensive or indecent.[88] In addition, unlike the sites themselves, many of which display pages to warn users that the site contains sexually explicit content,[89] no such warning will precede the written list of sites returned by the search engine.[90]

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[85] Popular search engines include Excite (<http://www.excite.com>), InfoSeek (<http://infoseek.go.com>), Lycos (<http://www.lycos.com>), Snap (<http://home.snap.com>), WebCrawler (<http://www.webcrawler.com>) and Yahoo! (<http://www.yahoo.com>).

[86] *See* Yahoo!, *Learn about Yahoo!* (visited Apr. 10, 1999) <http://howto.yahoo.com/chapters/ 7/1.html>.

[87] *See* Keiser, *supra* note 81, at 787 (citing Joan Biskupic, *Internet Indecency: High Court Indecency Case Could Direct Internet's Future Course*, STAR TRIBUNE NEWSPAPER OF THE TWIN CITIES (Minneapolis-St. Paul, Minn.), Mar. 18, 1997, at 14A). Keiser relates, from her personal experience, the ease of encountering indecent material and also discusses the case of a seventh grade student who stumbled across indecent content on the Internet while conducting research for a book report on *Little Women*. *See id.*

[88] For example, the author searched the Yahoo! search engine for the word "dreams." The search engine returned a large list of sites including a link to a site titled *Oral Dreams*. Next to the *Oral Dreams* link was a written description, in what some may consider vulgar terms, of the site's sexually explicit content. Yahoo!, *Yahoo! Search Results* (visited Apr. 10, 1999) <http://search.yahoo.com/search?p=dreams&hc=29&hs=2027&h=s&b=72>. Notably, *Oral Dreams* was listed on the same page as a link to a site titled *Dreams of Space*, which contains information about "depictions of space in children's books." *See id.*

[89] *See* Oraldreams, *Oraldreams* (visited Apr. 10, 1999) <http://www.oraldreams.com>; Pink Dreams, *PINK DREAMS DISCLAIMER* (visited Apr. 10, 1999) < http://www.ctc.pinkdreams. com/cgi-bin/ctc/ctc.cgi?91847683>; Teendreams, *Warning!* (visited Apr. 10, 1999) <http://www.teendreams.com>.

[90] Furthermore, the *Reno* Court's suggestion that "'almost all sexually explicit images are preceded by warnings as to the content,'" Reno v. American Civil Liberties Union, 521 U.S. 844, 869 (1997), is simply not accurate. For example, it took the author but a few minutes to locate the following sexually explicit Web sites, all of which contain no warning or display explicit images and a warning concurrently: Hollywoodwhores, *Hollywoodwhores 100% Free Membership Today* (visited Apr. 10, 1999) <http://www.hollywoodwhores.com/free.html> (displaying several images of women in various states of

The *Reno* Court's "affirmative steps" rationale is, therefore, suspect. An Internet user must, indeed, take quantitatively more steps in order to access content than a radio listener or television viewer. Both types of users must turn on the respective equipment before accessing content. An Internet user, though, must take approximately one to five additional steps before he can retrieve content.[91] In none of these additional steps, however, does the Internet user possess the knowledge of the dial-a-porn customer. The Internet user does not know that the content he is about to receive may be offensive until he receives it and, by then, it is already too late. The affirmative steps taken by the Internet user are not the same, from a foreknowledge standpoint, as the affirmative steps taken by a dial-a-porn customer. In sum, any additional steps that an Internet user must take in comparison to a radio listener or television viewer could easily be grouped together under the rubric of "turning on" the equipment rather than described as "affirmative steps" by the user.

In distinguishing *Pacifica*, the *Reno* Court also emphasized the improbability of encountering offensive Internet content by accident. The Internet user is, however, just as likely to encounter unexpected offensive content as the radio listener or television viewer. As discussed above, searching the Web for ostensibly harmless terms can return

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undress with no warning page); Oral Desires, *Oral Desires...* (visited Apr. 10, 1999) <http://oral.free-teen.com/page.html> (displaying numerous sexually explicit photos with no warning page); Swedish-Erotica, *The World of Swedish Erotica* (visited Apr. 10, 1999) <http://www.swedish-erotica.com> (displaying sexually explicit images with no warning page); Teenage Pleasures, *Welcome to Teenagepleasures the No.1 Teen Site on the Net* (visited Apr. 10, 1999) <http://www.teenagepleasures.com/index.phtml?a998> (displaying several extremely explicit images with no warning page). One should note that it would be difficult for an Internet user who was not seeking out explicit content to accidentally access the above-mentioned Web sites. The Web addresses (URLs) alone are a good indication of the content. In that regard, the URL itself may serve as a "warning." However, as discussed below, some URLs are not so obvious and, in fact, are specifically designed to lure unsuspecting users. *See infra* notes 93-96 and accompanying text.

[91] An Internet user must first establish a connection to the Internet. A user who accesses the Internet directly through his phone line must run software that connects him to an Internet Service Provider (ISP), although he can configure his computer to automatically connect to the ISP when he turns on the computer. A user who has access to the Internet through a local network is already connected to the Internet and can forego this step altogether. The user must then run another program, commonly referred to as a browser, in order to access the Web. The user can configure his computer so that the browser opens automatically when he turns the computer on, thus eliminating this step as well. The user must then enter the address or "URL" of a Web search engine. Again, the user can configure the browser to automatically load the search engine when the browser opens. Finally, the user must enter the word or phrase for which he is searching. With a properly configured system, then, an Internet user can access content with only one additional step, namely performing a Web search. In addition, one cannot argue that, by configuring his system as described above, an Internet user has initially taken more affirmative steps than a radio listener or television viewer because many modern radios and televisions require the user to program available stations into the unit.

potentially offensive material.[92] In addition, some Web content providers purposely attempt to take advantage of common mistakes made by Internet users. For example, the official White House Web Page is located at "www.whitehouse.gov."[93] Users who are looking for the White House Web Page may accidentally enter "www.whitehouse.com" into their Web browsers.[94] Knowing this, the authors of a for-profit Web site that contains pornographic material use the name "www.whitehouse.com."[95] This example illustrates that a Web user can easily stumble across content that he finds offensive.[96]

Contrary to the Court's conclusion in *Reno*, the new *Pacifica* rationales also apply to the Internet. Given this fact, are there any other rationales that can justify differential regulation between of Internet and broadcast media?

## Part IV - Other Potential Rationales for Differential Regulation

### A. Scarcity

The *Reno* Court considered the spectrum scarcity doctrine in its analysis of the CDA and concluded that "the Internet can hardly be considered a 'scarce' expressive commodity."[97] For this very reason the Court, much like the *Turner* and *Denver* Courts,[98] did not find it necessary to reevaluate the spectrum scarcity doctrine as it applies to the broadcast media, because that question was not before it. As discussed in detail above, however, spectrum scarcity may no longer be a valid rationale for regulating the broadcast media.[99] The Court in *League of Women Voters* was "not prepared . . . to reconsider [the spectrum scarcity doctrine as applied to the broadcast media] without some signal from . . . the FCC that technological developments have advanced so far that some revision of

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[92] *See supra* notes 87-90 and accompanying text.

[93] *See* The White House, *Welcome to the White House* (visited Apr. 10, 1999) <http://www. whitehouse.gov>.

[94] *See Whitehouse.com bares Feelings For Netscape*, NEWSBYTES PM, Nov. 9, 1998 ("Sites like whitehouse.com take advantage of the fact that people often type in the wrong generic Top Level Domain (gTLD), such as .com, .org, .net and the more institutionalized domains .edu, .gov and .mil.").

[95] *See* The WhiteHouse.com, *White House* (visited Apr. 10, 1999) <http://www. whitehouse.com>.

[96] For example, "the leader of a Girl Scout Troop . . . catastrophically wound up at the [whitehouse.com] porn site during an Internet demonstration for the troop." Richard Kelly Heft, *Network: Dial the White House for hard porn: 'Stealth' web sites use famous names to lead surfers to porn pages*, THE INDEPENDENT (LONDON), July 20, 1998.

[97] Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997).

[98] *Turner* and *Denver* both dealt with cable television, a medium that does not suffer from spectrum scarcity. *See supra* notes 61-71 and accompanying text.

[99] *See supra* Part II B.

the system of broadcast regulation may be required."[100] Given the FCC's recent move towards deregulation of broadcasting,[101] it is not unreasonable to suggest that, if a broadcast regulation case came before the Supreme Court today, the Court might be inclined to explicitly put the spectrum scarcity doctrine to rest. However, given that very deregulatory climate, it is unlikely that such a case would come before the Court. We are, therefore, left with a long but potentially lame-duck line of cases in which broadcast regulation is supported by the scarcity doctrine.[102] In today's world, spectrum scarcity is a weak reed on which to justify differential regulation of the Internet and broadcast media.

### B. Pervasiveness / Power

To justify differential regulation between the print and broadcast media, Justice Stevens, in his plurality opinion in *Pacifica*, pointed out that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans."[103] Since content broadcast over the airwaves can impinge on the senses of listeners without warning, there is little people can do to protect themselves from exposure to offensive material. Although a listener can turn off the broadcast, this option is not satisfactory because once he has been exposed to such content, the damage is done.[104] In stating that pervasiveness is unique to the broadcast media and justifies differential regulation, Stevens suggested that the print media are not as intrusive as broadcasting. In other words, a reader who encounters offensive material can protect himself by averting his eyes. Furthermore, Stevens apparently believes that it is easier for a reader to disregard indecent content that he chances upon than it is for a similarly situated listener or viewer.[105]

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[100] Fed. Communications Comm'n v. League of Women Voters, 468 U.S. 364, 376-77 n.11 (1984).

[101] *See* TEETER, *supra* note 19, at 589.

[102] Political considerations could prolong the life of the scarcity doctrine thought. "[T]he Democrats now lead both the White House and the Commission, both of which strongly advocate continued public interest regulation of broadcasting; indeed, the Commission recently adopted tighter rules in enforcing the Children's Television Act, invoking *Red Lion* and the scarcity rationale to fend off First Amendment objections to the new rules. . . . [I]t is quite possible that *Red Lion* and its scarcity rationale will continue to march on, albeit with a bit of a limp." Logan, *supra* note 30, at 1704.

[103] Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978).

[104] "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." *Id.* at 748-49. The Court likened an indecent broadcast to an obscene phone call: "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." *Id.* at 749.

[105] Some commentators disagree with this assertion and have opined that the pervasiveness doctrine is a "'legal time bomb' . . . . Pervasiveness is both a misleading and dangerous argument for regulation of indecent content. It is misleading because of what almost everyone concedes is a compelling government

As discussed above, Web publishers can provide the same content in the same format as their counterparts in the broadcast media.[106] Internet users, therefore, can be exposed to unexpected audio and video content.[107] Although an Internet user can turn off his browser, such action does not solve the problem identified by Justice Stevens since the Internet user, like a listener or viewer, is less able to ignore audio or video content than print content. Thus, the Internet is just as pervasive as the broadcast media.

In addition, the pervasiveness rationale may apply only to media that, like broadcasting, are widely available to the public.[108] The Internet falls into this category. The *Reno* Court, through a factual statement in its scarcity discussion, illustrated that the Internet is used by many: "The Government estimates that 'as many as 40 million people use the Internet today, and that figure is expected to grow to 200 million by 1999.'"[109] Indeed, the Internet has continued to grow since the *Reno* decision. A recent survey found that "Americans now turn to news on the Internet as often as they turn to radio for news .... [T]he audience for online news has now equaled or exceeded the audience for news in all media except newspapers and broadcast television."[110] If the pervasiveness rationale depends on widespread availability, the Internet is, once again, as pervasive as the broadcast media. Pervasiveness cannot be utilized to justify differential regulation of the Internet and broadcast media because the Internet, like broadcasting, is pervasive.

### C. History of Regulation

As previously discussed, one can read the *Reno* opinion to suggest that a "long history of regulation" may justify differential regulation even if the spectrum scarcity

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interest in protecting children from sexual material. Yet it is dangerous because it still does not provide any substantive basis for distinguishing between electronic media and print. A child is just as likely, if not more likely, to stumble upon indecent content by flipping through a copy of *Playboy* found in the bottom of a closet, discover a copy of *National Geographic* in the library, or indeed, to find a rape or dismemberment scene in the Old Testament as he is to find similar content on the Internet. The Bible may reasonably be called 'pervasive' in the sense that it is probably still found in more American households than are television sets." Wallace & Green, *supra* note 56, at 726-27 (citing ITHIEL DE SOLA POOL, TECHNOLOGIES OF FREEDOM 100 (1983)).

[106] *See supra* notes 79-80 and accompanying text.

[107] *See supra* notes 85-96 and accompanying text.

[108] Some authors have referred to this idea as the "power" rationale: "The fact that more people say they get their news and information from television than from print media has led some to suggest that the 'power' of the broadcast media alone justifies the imposition of some content regulation." MARC A. FRANKLIN AND DAVID A. ANDERSON, MASS MEDIA LAW 662 (5th ed. 1995).

[109] Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997).

[110] Adam Clayton Powell III, *MSNBC: Online news audience now equals radio news listeners*, (Jan. 26, 1999) <http://www.freedomforum.org/technology/1999/1/26onlinenews.asp>

doctrine is no longer valid.[111] This theory is troublesome because our legal system is supposedly designed to adapt to changes in circumstances. Blind adherence to precedent is not acceptable, especially when the facts underlying the case law no longer support the proposition in question.[112]

### D. Economic Scarcity / Monopoly

The economic scarcity doctrine posits that the broadcast media may be subjected to greater regulation than the print media because those who wish to broadcast cannot do so without significant financial resources. Since few will have access to the medium, the diversity of opinions expressed will be limited. Therefore, the argument goes, in order to ensure balanced and diverse programming, the government should regulate those few monopolies who have the requisite resources.[113]

While it has been suggested that economic scarcity is equally applicable to the print media,[114] unlike either the print or broadcast media, some suggest that "the Internet shows none of the attributes of a natural monopoly."[115] Since few economic resources are required to access and post content on the Internet, most anyone can do so. Indeed, "any person with a phone line can become a town crier with a voice that resonates farther then it could from any soapbox. . . . [T]he same individual can become a pamphleteer."[116]

Despite these grandiose statements, economic scarcity is also present on the Internet. Those content providers who have the funds to advertise the existence of their

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[111] *See supra* Part III C.

[112] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV 457, 469 (1897) ("It is revolting to have no better reason for a rule of law then that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

[113] *See supra* note 36.

[114] "Newspapers have become big business and there are far fewer of them to serve a large literate population. Chains of newspapers, national newspapers, national wire services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. . . . [T]he same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible." Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 249, 251 (1974).

[115] Fred H. Cate, *Indecency, Ignorance, and Intolerance: The First Amendment and the Regulation of Electronic Expression*, 1995 J. ONLINE L. art. 5, 27 (1995).

[116] Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997).

sites will, obviously, attract more visitors.[117] A hypothetical may help to illustrate this point. Suppose that CNN places an article on its Web site (CNN.com) in which the author, A, personally attacks B, another individual. B writes a response and submits it to CNN.com who, for whatever reason, declines to post the response on its Web site. B can now post his response on his personal Web page, but it is unlikely that those who read the original article on CNN.com will even know about the existence of B's personal page, let alone read the response. Even if B lists his Web page with several search engines, few will ever discover it. Unless B has the resources to advertise his site to the same extent and to the same audience that CNN.com can, he cannot hope to have his opinion heard.[118] Since the Internet, like the print and broadcast media, has economic barriers, the economic scarcity rationale does not justify differential regulation of the Internet and broadcast media.

### E. Public Ownership

In *Red Lion*, the Court held that since "the people as a whole retain their interest in free speech . . . and their collective right to have the medium function consistently with the ends and purposes of the First Amendment,"[119] the FCC could require broadcasters to air diverse opinions. This principle is often referred to as the public ownership rationale for differential regulation. The public ownership rationale, however, is tied inextricably to the spectrum scarcity doctrine. In the absence of spectrum scarcity, the theory goes, anyone wishing to broadcast would be able to do so. If this were the case, all opinions would be aired without the need for government intervention and the public ownership rationale would be unnecessary. It would appear, therefore, that the public ownership rationale cannot survive apart from the spectrum scarcity doctrine and has died with it.

One could argue, however, that despite the vast increase in the number of media

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[117] For example, a Web site such as MSNBC, which regularly advertises its site through its cable news station, is likely to have significantly more visitors than an individual who creates a personal Web page. Indeed, MSNBC.com has a daily audience of 750,000. *See* Powell, *supra* note 110. Writing in 1993, when the Internet was still in its infancy, Jonathan Weinberg predicted that "[i]n the computer networks of the future . . . all information providers will not be equal, no matter how user-friendly the network is. Wealth will play a role in publicizing the availability and merits of documents or programs. It will play a role in producing speech in an attractive form. The networks, thus, may not provide a nonprivileged enclave after all." Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1103, 1203 (1993).

[118] It is worth noting that, pursuant to the fairness doctrine's personal attack rule, if a television station aired an opinion piece in which A personally attacked B, the television station would be required to provide B with air time for a response. *See* Red Lion Broad. Co., Inc. v. Federal Communications Comm'n, 395 U.S. 367, 373-74 (1969).

[119] *Id.* at 390.

outlets since the time of *Red Lion*, the broadcast media have not fulfilled the goals that underlie the First Amendment.[120] Therefore, the public ownership doctrine should still apply to the broadcast media even if scarcity is no longer a concern. If this is the case, the public ownership rationale should also apply to the Internet under the assumption that the economic realities discussed in the previous section similarly prevent the Internet from achieving the goals associated with the First Amendment. To conclude, regardless of whether or not the public ownership rationale has survived the scarcity doctrine, it does not justify *differential* regulation between the Internet and broadcast media.

### F. Protecting Children

Since the Internet shares all the capacities of the broadcast media and is as pervasive,[121] children are equally at risk from exposure to indecent material whether via the radio, television, or Internet. The *Denver* rationale, that scarcity is irrelevant when dealing with regulations designed to protect children from indecent content,[122] is equally applicable to the Internet. Protecting children, in general, is not a rationale that can be used to support differential regulation.

There is one caveat to this proposition, though. The *Pacifica* Court justified broadcast regulation on the grounds that broadcasting is "uniquely accessible to children, *even those too young to read.*"[123] Since the Internet is largely text-based, or at least requires some degree of textual input and understanding in order to access non-textual content, it is not accessible to pre-literate children. Therefore, one might justify regulating broadcasting while declining to regulate the Internet on the narrow ground that such differential regulation is necessary to protect pre-literate children. Such an argument seems spurious, however, in light of the fact that those who seek to protect children through broadcast regulation do not limit their crusade to only pre-literate children. Furthermore, there is no reason to believe that technology will not advance to the point where pre-literate children will become able to access the Internet through new user interfaces.

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[120] BOLLINGER, *supra* note 7, at 29-34. One should note that Bollinger himself does not use this theory to support the public ownership rationale. In fact, Bollinger writes that the rationale "fails as a distinction, for the simple reason that the print media also makes use of public property - the streets and sidewalks upon which newspapers and magazines are delivered." *Id.* at 90.

[121] *See supra* Part IV B.

[122] *See supra* notes 68-71 and accompanying text.

[123] Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 749 (1978) (emphasis added).

### G. Partial Regulation: Lee Bollinger

Lee Bollinger acknowledges the similarities between the print and broadcast media[124] and suggests that the Court's rationales for supporting differential regulation are less than persuasive.[125] Yet Bollinger supports differential regulation on the grounds that such regulation furthers First Amendment principles. Bollinger calls his theory "partial regulation":

> [T]he dual system of the press as it has evolved during this century, with unregulated print media and regulated electronic media, makes good sense in terms of public policy and First Amendment theory. . . . By permitting differential treatment of these institutions, the Court can promote realization of the benefits of two distinct constitutional values, both of which ought to be fostered: access in a highly concentrated press and minimal government intervention.[126]

Bollinger adds that "[o]ne advantage of a partial regulatory system is that the unregulated sector provides an effective check against each of the costs of regulation. A partial scheme offers some assurance that information not disseminated by the regulated sector will nevertheless be published by the unregulated press."[127]

Bollinger's theory has been criticized on several grounds. First, "[a]s newspapers decline in relative significance, their ability to serve as the unregulated safety valve envisioned by Bollinger will decline as well."[128] More critically, though, if "the differential treatment of [the print and broadcast media] has always been based on a deeply flawed view of broadcast, then Bollinger's argument serves to solidify and glorify a mistake, an immature and confused view of the electronic media."[129]

Furthermore, scholars have questioned the continuing validity of Bollinger's thesis in the modern day media environment.

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[124] Bollinger would, ostensibly, extend his theory to encompass differential regulation between the Internet and broadcast media as well.

[125] BOLLINGER, *supra* note 7, at 89 ("[T]here is a devastating - even embarrassing - deficiency in this analysis.").

[126] *Id.* at 109, 116.

[127] *Id.* at 114.

[128] Ronald W. Adelman, *The First Amendment and the Metaphor of Free Trade*, 38 ARIZ. L. REV. 1125, 1139 (1996).

[129] Uli Widmaier, *German Broadcast Regulation: A Model for a New First Amendment?*, 21 B.C. INT'L & COMP. L. REV. 75, 148 (1998).

> [B]roadcast and press . . . are developing wildly and explosively, propelled by technologies that were unimaginable only a few years ago. . . . In the process, they are becoming ever more like each other. . . . In order for a dual regime to make sense, the two branches must be significantly differentiated. Otherwise the duality is simply arbitrary.[130]

In other words, as the Internet and broadcast media become identical, for all intents and purposes, it makes little sense to regulate one but not the other in an effort to further First Amendment principles. Indeed, as Internet technologies advance, broadcasters will have little incentive to continue developing broadcast programming under the threat of regulation when they can disseminate the same content in the same format through the unregulated Internet. In conclusion, "the theory of partial regulation, whatever its merits for the circumstances of the last fifty years, will be unworkable in the media landscape of the future."[131]

### H. The Public Debate and Quid Pro Quo Rationales: Charles W. Logan, Jr.

Charles W. Logan, Jr. presents two alternative rationales for broadcast regulation that he argues can be used to replace the scarcity doctrine. First, Logan proposes that "government regulation of broadcasting as a means of fostering a more diverse and informative use of the nation's airwaves" is appropriate under the public debate model of the First Amendment, which "seeks to safeguard against government censorship and viewpoint discrimination but envisions an active role for the government in promoting public debate and democratic goals."[132] Logan believes that the public debate model supports broadcast regulation because the broadcast market "can result in the undersupply of certain types of socially beneficial programming, as well as a lack of diversity in programming."[133] In essence, Logan appears to set forth an economic scarcity or monopoly argument. As previously discussed, though, these economic arguments are not limited to the broadcast media.[134] The print media and the Internet are susceptible to similar criticisms. Therefore, Logan's public debate rationale does not support differential regulation.

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[130] *Id.* at 149.

[131] Adelman, *supra* note 128, at 1139. *See also* Widmaier, *supra* note 129, at 150 ("[Bollinger's] argument is most applicable to the time in which his two model cases, *Red Lion* and *Tornillo*, were decided. Sooner or later, however, the dual regime will lose its empirical basis by virtue of technological transformations, and we will be forced to make a choice between the two approaches to mass media law.").

[132] Logan, *supra* note 30, at 1718.

[133] *Id.* at 1720.

[134] *See supra* Part IV D.

Logan's second argument focuses on the government's scheme for licensing spectrum space to broadcasters. Logan notes that Congress could have chosen to auction off television and radio frequencies to the highest bidder. Rather than charging for the frequencies, though, Congress chose to give the frequencies away.[135] In exchange for this government privilege, which is not present in the print media context, broadcasters are explicitly required to "serve the public interest in operating their stations, including in the programming they air. These public interest obligations can this be justified as an in-kind payment - a quid pro quo - for the right to use the spectrum."[136] Logan believes that this quid pro quo rationale replaces the scarcity doctrine. The problem with Logan's argument, however, is that its roots ultimately lie in the scarcity doctrine. Congress has a choice between auctioning off broadcast frequencies and giving them away only because the broadcast spectrum is scarce. On close examination, then, Logan's quid pro quo rationale is nothing more than the scarcity doctrine in different clothing. The quid pro quo rationale does not support differential regulation.

## Part V - Resolutions

Since all of the rationales used to support broadcast regulation apply equally to the Internet, differential regulation of the two media is not appropriate. It would, therefore, appear that the government and the Court should follow one of three paths: 1) regulate both media, 2) regulate neither medium, or 3) develop new rationales that would justify differential regulation.

### A. Regulate Both Media

The government could choose to regulate both the Internet and broadcast media. As a first step, the government would acknowledge that the scarcity doctrine is no longer viable and does not support broadcast regulation, let alone Internet regulation.[137] On the theory that the *Pacifica* rationales are not inextricably linked to the scarcity doctrine, however, the government could, in effect, overrule *Reno* by acknowledging that the Internet is just as invasive as broadcasting.[138] In addition, the government could bolster

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[135] *See* Logan, *supra* note 30, at 1727. The very premise on which Logan bases his argument is no longer factually accurate. In September 1999, the FCC, for the first time, auctioned off broadcast spectra. Bill McConnell, *FMs heat up auction*, BROADCASTING & CABLE, Oct. 4, 1999, at 14, 16.

[136] *See* Logan, *supra* note 30, at 1731.

[137] *See supra* Part I B.

[138] *See supra* Part III.

its position by arguing that pervasiveness,[139] economic scarcity,[140] and ease of access by children[141] are problems that the Internet shares with the broadcast media.

As a practical matter, however, government regulation of the Internet would be quite difficult. In dealing with the broadcast media, the FCC has permitted the broadcast of indecent material at times of the day when children are less likely to be in the audience. For example, in *Pacifica*, after ruling that the radio station was subject to sanction, the FCC issued a clarifying opinion stating that the FCC "'never intended to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'"[142] After *Pacifica*, the FCC set forth regulations that would allow the broadcast of indecent material during certain "safe harbor" periods. After several challenges, the courts approved the FCC's safe harbor provisions, which shield broadcasters who play indecent material between the hours of 10 p.m. and 6 a.m.[143] The *Reno* Court distinguished the CDA from the FCC's regulation in *Pacifica* on the grounds that the "CDA's broad categorical prohibitions are not limited to particular times"[144] but, rather, ban all indecent content at any hour. The CDA, therefore, would have "suppresse[d] a large amount of speech that adults have a constitutional right to receive and to address to one another."[145]

Temporal channeling is not possible on the Internet.[146] For example, an Internet content provider in New York could take care to make indecent material available only between the hours of 10 p.m. and 6 a.m. in the Eastern time zone. An Internet user in Los Angeles, however, would have access to the material between the hours of 7 p.m. and 10 p.m. in the Pacific time zone. Since time has no meaning on the Internet, "safe harbor"

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[139] *See supra* Part IV B.

[140] *See supra* Part IV D.

[141] *See supra* Part IV F.

[142] Fed. Communications Comm'n v. Pacifica Found., 438 U.S. 726, 733 (1978) (citing 59 F.C.C.2d 892 (1976)).

[143] *See* TEETER, *supra* note 19, at 621-24.

[144] Reno v. American Civil Liberties Union, 521 U.S. 844, 867 (1997).

[145] *Id.* at 874.

[146] Other types of channeling may be available on the Internet, however. For example, the Child Online Protection Act would require commercial pornographers on the Internet to obtain credit card verifications from their users. This would, in theory, prevent minors from accessing indecent material. COPA would, therefore, "channel" indecent content away from minors while allowing adults to access the material at any time. A federal judge has issued a preliminary injunction preventing enforcement of COPA. *See* David Hudson, *Federal judge deals blow to COPA*, (Feb. 2, 1999) <http://www.freedomforum.org/speech/1999/2/2copa.asp>. The constitutionality of COPA is beyond the scope of this paper.

regulations are inapplicable to the Web.

In addition, "a regulation exercised in the United States will not prevent all indecent material from being placed on the Internet because much of the indecent material available on the Internet is received from foreign countries."[147] In response to this problem, some have suggested that "most laws intended to protect children are not infallible."[148] Apparently, this argument suggests that any reduction in offensive material on the Web is a step in the right direction. The better view, however, is that "[i]t is the first exposure that counts most when the concern is protecting the innocence of children."[149] If the government's purpose in regulating the Internet is to protect against the corruption of innocent children, then any regulation that does not prevent all indecent content from reaching children fails its essential purpose. Due to these practical and technological issues, a decision to regulate both the Internet and broadcast media is easier said than done.

### B. Regulate Neither Medium

The government could chose to regulate neither the Internet nor broadcasting. In light of the FCC's recent deregulatory stance,[150] the government may, in fact, be well on its way there.[151] Indeed, this option seems more likely than dual regulation given the FCC's clear proclamation that it has no intention of regulating the Internet.[152]

At least one commentator, Jonathan Weinberg, decries this option. Weinberg admits that "our broadcast regulatory scheme works badly."[153] According to Weinberg, however, applying the non-regulatory philosophy associated with the print media to

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147 Keiser, *supra* note 81, at 798 (citing American Civil Liberties Union v. Reno, 929 F. Supp. 824, 848 (1996)). In the context of the CDA, one commentator points out that the "impossibility of enforcing the CDA outside of our borders raises unsettling questions about its constitutionality, even beyond the knotty issues of pervasiveness, accessibility, and unsafe harbors." Neeson & Marglin, *supra* note 60, at 130-31.

148 Keiser, *supra* note 81, at 798.

149 Neeson & Marglin, *supra* note 60, at 131 ("If children searching the Web can come up with fat, juicy lists of indecent sites, what significant gain can there be from having merely cut the list down in size?").

150 *See* TEETER, *supra* note 19, at 589.

151 *But see supra* note 102.

152 *See Kennard*, *supra* note 1; *see also* Sheppard, *supra* note 6, at 134 ("According to Milt Gross, the former chief of the political programming branch of the FCC, . . . '[The Commission's] jurisdiction is only over broadcasters . . . . We're not concerned with the Internet. The First Amendment gives them the right to speak. It's only because of the scarcity of frequencies that Congress gave us the power to regulate broadcasters.'").

153 Weinberg, *supra* note 117, at 1206.

broadcasting will not solve the problem because the philosophy behind print non-regulation "systematically underestimates the degree to which private institutional and economic power can skew the reasoning processes of the community. It underestimates the dangers posed by concentrations of private power."[154] Yet, Weinberg is unable to state a solution to the problem[155] and instead leaves us with a set of broadcast regulations that are admittedly "blazingly inconsistent with the rest of our First Amendment philosophy."[156] Such a lamentable state of affairs certainly cannot continue.

### C. Develop New Rationales

Should the government continue to stay its course regarding differential regulation, it must develop new theories to support such regulation. As discussed throughout this paper, the rationales set forth to date are either outdated and apply to neither the Internet nor the broadcast media, or apply equally to both media. In order to justify continued differential regulation, then, the government must set forth new theories that, apparently, have yet to be developed.

## Conclusion

The spectrum scarcity doctrine in particular and broadcast regulation in general were in trouble well before the Internet become so popular. Now that Internet content providers can disseminate the same information as broadcasters in the same form, the already questionable rationales used to support differential regulation are weaker than ever. The time has arrived to rethink differential regulation and, barring the development of new supporting theories, lay it to rest.

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[154] *Id.*

[155] *See id.* at 1203-04 ("I present . . . no policy solution that will solve all of the problems of the broadcasting system. Rather, my ultimate argument . . . is that no such policy solution can exist.").

[156] *Id.* at 1204.