NOTES

PACIFICA IS DEAD. LONG LIVE *PACIFICA*: FORMULATING A NEW ARGUMENT STRUCTURE TO PRESERVE GOVERNMENT REGULATION OF INDECENT BROADCASTS

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I. INTRODUCTION

At 9:00 PM on April 7, 2003, Fox Broadcasting ("Fox") aired the penultimate episode of *Married by America*, a reality television show that allowed the public to select potential spouses for its contestants.[1] Six minutes of the episode detailed the remaining two couples' bachelor and bachelorette parties, during which strippers attempted to "lure participants

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1. Opposition to Notice of Apparent Liability for Forfeiture Submitted by Fox Broad. Co. at 1–2, Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on Apr. 7, 2003, 19 F.C.C.R. 20191 (Dec. 3, 2004), *available at* http://www.fcc.gov/eb/broadcast/Pleadings/Fox_Broadcasting_Company.pdf [hereinafter Opposition to Notice of Apparent Liability].

into sexual activities."[2] Of the five million people who watched the broadcast, ninety complaints were filed with the Federal Communications Commission ("FCC" or "Commission"),[3] the government agency that regulates television communications.[4] In October 2004, the FCC determined that the six-minute segment contained explicit and patently offensive depictions of sexual activities. It thus determined that the content was indecent and in violation of federal law.[5] For this violation, the FCC penalized both Fox and 169 Fox affiliates by issuing a Notice of Apparent Liability for $1,183,000 in fines.[6] At the time, this was the largest proposed fine, or "forfeiture," in FCC history.[7]

More recently, at 9:00 PM on December 31, 2004, the CBS Television Network ("CBS") aired an episode of *Without a Trace*, in which teenagers were shown in "various stages of undress" and engaged in "various sexual activities," although no nudity was shown.[8] The FCC held the scenes of the teenagers to be indecent and in violation of the law.[9] As a result, the Commission fined CBS and its affiliates the statutory maximum, $32,500

2. Complaints Against Various Licensees Regarding Their Broad. of the Fox Television Network Program "Married by America" on Apr. 7, 2003, 19 F.C.C.R. 20191, para. 11 (2004) (notice of apparent liability for forfeiture), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-242A1.pdf [hereinafter Notice of Apparent Liability].

3. Opposition to Notice of Apparent Liability, *supra* note 1, at v. *Contra* Notice of Apparent Liability, *supra* note 2, at para. 2 (stating that the FCC received 159 complaints following the Fox broadcast). According to the Opposition to Notice of Apparent Liability, several people submitted duplicate complaints and all but four complaints were identical. In all likelihood, the majority of complaints originated from or were sent via the Parents Television Council ("PTC"), an organization created to "to ensure that children are not constantly assaulted by sex, violence and profanity on television and in other media." PTC, About Us, http://www.parentstv.org/PTC/aboutus/main.asp (last visited Sept. 13, 2006). The PTC claims that over four thousand complaints were submitted through its website. Jeff Johnson, *FCC Accused of Discounting TV Indecency Complaints*, CNSNEWS.COM, Jan. 10, 2005, http://www.cnsnews.com/SpecialReports/archive/200501/SPE20050110a.html.

4. FCC, About the FCC, http://www.fcc.gov/aboutus.html (last visited Sept. 14, 2006).

5. Indecent content may not be broadcast between 6:00 AM and 10:00 PM. *See infra* Part IV.B.2.b.

6. Notice of Apparent Liability, *supra* note 2, at para. 1. Each affiliate was fined $7000. *Id.*

7. Frank Ahrens, *Fox Calls for Court Review of Standards*, WASH. POST, Dec. 4, 2004, at E1. *See* FCC Enforcement Bureau, EB—Obscene, Profane & Indecent Broadcasts: Notices of Apparent Liability, http://www.fcc.gov/eb/broadcast/NAL.html (last visited Sept. 14, 2006) [hereinafter Indecent Broadcasts].

8. Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without A Trace," 21 F.C.C.R. 2732, para. 11 (2006) (notice of apparent liability for forfeiture), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-18A1.pdf [hereinafter NAL: CBS].

9. *Id.* at para. 1.

per affiliate,[10] for a total forfeiture amount of $3,607,500.[11] This recent forfeiture is now the largest in FCC history.[12]

The actions against Fox and CBS are consistent with a new, aggressive posture taken by the FCC. In 2004, events and politics thrust the Commission into the spotlight and raised the stakes of broadcast indecency.[13] The year began with the controversy surrounding Janet Jackson's exposed breast at the Super Bowl and concluded with the U.S. House of Representatives voting 389-38 to raise the maximum fine for broadcasting indecent content from $32,500 to $500,000.[14] In 2006, Congress passed, and President George W. Bush signed into law, legislation increasing the maximum fine to $325,000.[15] Even without this increase in fine amounts, the FCC proposed nearly $8,000,000 in forfeiture penalties for indecent broadcasts in 2004, as compared to the $440,000 proposed in 2003.[16] This figure increased by over $3,000,000 upon the *Without a Trace* forfeiture.

Additionally, members of Congress are contemplating legislation to extend the FCC's jurisdiction to cable television, an idea that has circulated before.[17] Moreover, in March 2004, the Commission explicitly departed

10. *Id.* at para. 18.

11. Indecent Broadcasts, *supra* note 7. The forfeitures were later cancelled for eight affiliates. *Id.*

12. *Id.*

13. *See* Stephen Labaton, *Indecency on the Air, Evolution at F.C.C.*, N.Y. TIMES, Dec. 23, 2004, at E1.

14. *See* Frank Ahrens, *House Raises Penalties for Airing Indecency*, WASH. POST, Feb. 17, 2005, at E1.

15. Stephen Labaton, *Fines to Rise for Indecency in Broadcasts*, N.Y. TIMES, June 8, 2006, at C7; Press Release, The White House, President Signs the Broadcast Decency Enforcement Act of 2005 (June 15, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/06/20060615-1.html.

16. FCC, Indecency Complaints and NALs: 1993–2004 (Mar. 4, 2005), http://www.fcc.gov/eb/broadcast/ichart.pdf. These proposed forfeitures were meted out in response to over 1,400,000 complaints from the public. *Id.* About 500,000 of these complaints were in response to Janet Jackson's Super Bowl performance. Jonathan Curiel, *FCC Urged to Start Regulating Cable TV, but Free-Speechers Say Enough, Already*, S.F. CHRON., May 16, 2004, at E3. Although it is estimated that ninety-nine percent of non-Janet Jackson related complaints have originated from the PTC, a conservative organization whose sole purpose is to enforce decency standards, the important point is that the FCC acted on some of these complaints. Labaton, *supra* note 13, at E1.

17. Frank Ahrens, *Senator Bids to Extend Indecency Rules to Cable; Industry Defends Its Self-Policing Activities as Sufficient*, WASH. POST, Mar. 2, 2005, at E1; John Cook, *Will the FCC Go After Cable?*, CHI. TRIB., Feb. 8, 2004, at C1.

from its own precedent when it reversed an FCC Enforcement Bureau[18] order and held an isolated use of a profanity to be indecent.[19] Finally, Kevin J. Martin, the FCC Commissioner since 2005 and a favorite of conservative organizations,[20] has demonstrated that he intends to take a firm stand on indecency.[21]

As regulation of indecency increases and more punitive legislation is advanced, however, free speech advocates argue that the FCC should no longer have the authority to regulate indecent speech. The principles behind the Commission's authority, they claim, would no longer survive constitutional review.[22] In making this claim, opponents of indecency regulation contend that the argument structure used in the landmark Supreme Court case regulating indecency, *FCC v. Pacifica Foundation*,[23] has been eroded by technology and the expanding media marketplace.[24] Specifically, they argue that the introduction of self-filtering devices such as the v-chip renders *Pacifica* obsolete[25] and that the dramatic expansion of cable and satellite delivery systems in the media marketplace has made broadcasting's unique characteristics mundane.[26]

18. The FCC is organized into various bureaus. The Commission website describes the Enforcement Bureau as "the primary organizational unit within the Federal Communications Commission that is responsible for enforcement of provisions of the Communications Act, the Commission's rules, Commission orders and terms and conditions of station authorizations." FCC, Enforcement Bureau, http://www.fcc.gov/eb/ (last visited Sept. 14, 2006).

19. Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, para. 17 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/ attachmatch/FCC-04-43A1.pdf.

20. *See* Stephen Labaton, *Deal Maker Named by Bush to Lead F.C.C.*, N.Y. TIMES, Mar. 17, 2005, at C1.

21. *See* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004 Broad. of the Super Bowl XXXVIII Halftime Show; Complaints Regarding Various Television Broads. Between Feb. 2, 2002 and Mar. 8, 2005; Complaints Against Various Television Licensees Concerning Their Dec. 31, 2004 Broad. of the Program "Without A Trace," 21 F.C.C.R. 2760, 2781 (2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-18A2.pdf ("These decisions, taken both individually and as a whole, demonstrate the Commission's continued commitment to enforcing the law prohibiting the airing of obscene, indecent and profane material.").

22. *See* Petition for Reconsideration at 21–22, Complaints Against Various Broad. Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975 (Apr. 19, 2004), *available at* http://www.mediainstitute.org/content_wars/fcc/2004/GoldenGlobesPFR.pdf [hereinafter ACLU Petition].

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

24. Opposition to Notice of Apparent Liability, *supra* note 1, at 6–10.

25. *Id.* at 8. *See infra* Part V.C.

26. *See* Opposition to Notice of Apparent Liability, *supra* note 1, at 7–8; Letter from Laura W. Murphy, Director, ACLU Washington Legislative Office, to Congress (Feb. 15, 2005), *available at* http://www.aclu.org/Files/OpenFile.cfm?id=17492 [hereinafter Letter from Laura Murphy to Congress]; discussion *infra* Part V.C.

Fox has challenged the *Married by America* forfeiture on these grounds, creating a potential test case for a review of *Pacifica*.[27] Additionally, the four major broadcast networks have joined together to bring legal action challenging the FCC's authority to regulate indecent broadcasts.[28] Advocates on both sides of the issue recognize the potential impact of such a review.[29]

This Note assumes such an opportunity for the Court to review *Pacifica*. It will discuss why challengers should succeed in showing that *Pacifica* can no longer serve as the constitutional foundation for regulating indecency. Moreover, it will discuss why the scarcity rationale—the foundational argument structure that underlies the *Pacifica* opinion and traditionally has been used to regulate the broadcasting industry—is founded on a *non sequitur* and is thus conceptually unsustainable. Briefly stated, this *non sequitur* is exposed in the following question: if the *broadcast* spectrum is inherently scarce, why is it the *government's* role to regulate it?

Critically, this Note also assumes *arguendo* that the Supreme Court is not yet prepared to abdicate such government regulation and allow broadcasters to air indecent material at any time of the day with impunity. Moreover, it assumes that the Court is not yet prepared to abandon the scarcity rationale, despite scarcity's conceptual flaws. Accordingly, this Note presents a hypothetical imperative: *if* the Court wants to preserve government regulation of indecent content, it must base this regulation on a new argument structure that rationalizes such government participation.

This Note proceeds in eight parts. Part II briefly lays out the current definition of indecency and uses the Fox broadcast as an example of its application. Part III discusses core First Amendment principles and relevant constitutional argument structures. Part IV describes *Pacifica* and the scarcity rationale in more detail. Part V discusses conceptual, doctrinal, and technological challenges to these two related pillars of indecency regulation. Part VI discusses the evolving standard of review currently applied to broadcasting. Part VII posits a new argument structure that provides a missing component in the suggested *non sequitur*, thus

27. Ahrens, *supra* note 7, at E1.

28. Stephen Labaton, *TV Networks, with Few Friends in Power, Sue to Challenge F.C.C.'s Indecency Penalties*, N.Y. TIMES, Apr. 17, 2006, at C3.

29. *See* Ahrens, *supra* note 7, at E1; Stephen Labaton, *U.S. Backs Off Relaxing Rules for Big Media*, N.Y. TIMES, Jan. 28, 2005, at C1.

rationalizing the government's ability to regulate indecent content. Part VIII concludes.

II. DEFINING INDECENCY AND APPLYING THE INDECENCY STANDARD

Determining whether either of the broadcasts mentioned above was indecent is not the objective of this Note. This Note assumes the FCC's application of its indecency standard was correct.[30] Broadcasters and other advocates have argued, however, that the definition is unconstitutionally vague in light of the Court's ruling on a similar definition, as applied to the Internet.[31] Confusion surrounding the definition has caused broadcasters to withhold certain material, thus arguably chilling speech that is neither unprotected by the Constitution, such as obscenity, nor necessarily indecent.[32] Such editorial decisions, made out of fear of governmental sanctions, raise fundamental freedom of speech concerns. But while the potential vagueness of the definition and any resulting effect on *some* protected speech is a serious First Amendment issue, broadcasters' most significant argument is that regulating indecency, *by any definition*, is unconstitutional. Because the larger constitutional issue is the focus of this Note, the Note will not address a potential constitutional challenge to the definition itself or further address the "chilling" argument. Therefore, the following discussions of the definition and its application in the Fox case are presented solely as context in which to understand the depth of the FCC's power to judge and regulate content.

A. DEFINING INDECENCY

The FCC defines indecent content as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or

30. Fox has challenged the ruling that the content was indecent. Opposition to Notice of Apparent Liability, *supra* note 1, at 25–36.

31. *Id.* at 10–15. *See* Letter from Laura Murphy to Congress, *supra* note 26. The Court discussed a similar definition in *Reno v. ACLU*, 521 U.S. 844, 870–74 (1997).

32. *See* ACLU Petition, *supra* note 22, at 17–21; Letter from Laura Murphy to Congress, *supra* note 26.

excretory activities or organs."[33] In determining what is patently offensive, the Commission often balances three, nonexclusive factors:

> (1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; [and] (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*.[34]

No single factor is sufficient or necessary to support a finding that material is patently offensive.[35] Finally, the community standard is "not a local one and does not encompass any particular geographic area. Rather, the standard is that of an average broadcast viewer or listener and not the sensibilities of any individual complainant."[36] Thus, unlike the obscenity standard, which judges what is "patently offensive" on a community-by-community basis,[37] in the indecency formulation, the *nation* is believed to share common values about what is offensive and what is decent.[38]

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33. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 & Enforcement Policies Regarding Broad. Indecency, 16 F.C.C.R. 7999, para. 4 (2001), *available at* http://www.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf [hereinafter FCC 2001 Guidelines].

34. *Id*. at para. 10.

35. *Id*.

36. *Id*. at para. 8 (quoting WPBN/WTOM License Subsidiary, Inc., 15 F.C.C.R. 1838, 1841 (2000)).

37. The standard for obscenity is:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. California, 413 U.S. 15, 24 (1973) (internal citation omitted) (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

38. *Cf. id.* at 30 ("To require a State to structure obscenity proceedings around evidence of a *national* 'community standard' would be an exercise in futility.").

B. THE INDECENCY STANDARD APPLIED

As noted above, the purpose of this section is not to dissect the FCC's application of its indecency standard to a specific broadcast, but to elucidate the government's power to regulate indecent material. The following, therefore, is presented as an example of what the current constitutional argument structures permit and, thus, of power the government may lose if the Court were to overturn *Pacifica*.

In judging a portion of *Married by America* indecent, the FCC rejected Fox's claim that the broadcast did "not depict or describe sexual or excretory organs or activity" and that the "editing . . . avoided any such depictions."[39] Despite Fox's efforts to digitally obscure any nudity, the FCC found that "the sexual nature of the scenes [was] inescapable."[40] The Commission addressed each of the patently offensive factors and found them satisfied. First, the party scenes were "sufficiently graphic and explicit to be indecent" because editing could not hide their "overtly sexual and gratuitous nature."[41] Thus, "even a child would have known that . . . sexual activity was being shown."[42] Second, the Commission rejected Fox's assertion that the scenes were "fleeting" and ruled that the six-minute segment "focus[ed] on the . . . parties, and strippers [were] featured prominently throughout the accompanying scenes attempting to lure participants into sexual activities."[43] Accordingly, "[u]nder any reasonable interpretation, the material plainly dwell[ed] on matters of a sexual nature."[44] Finally, the Commission rejected Fox's contention that the scenes were integral to character development and storyline, finding instead that the "episode depict[ed] the prolonged appearance of strippers attempting to sexually arouse the party-goers and certainly [went] well beyond that necessary for the 'character development' of the various participants."[45] As a result, "[t]he material [was] gratuitous, vulgar, and clearly intended to pander to and titillate."[46]

39. Notice of Apparent Liability, *supra* note 2, at para. 8.
40. *Id.*
41. *Id.* at para. 10.
42. *Id.*
43. *Id.* at para. 11.
44. *Id.*
45. *Id.* at para. 12.
46. *Id*.

III. FIRST AMENDMENT PRINCIPLES AND ARGUMENT STRUCTURES

The FCC's ability to judge and sanction the content of speech contravenes the general principles of the First Amendment, which famously prohibits the government from "abridging the freedom of speech."[47] If the First Amendment were an absolute rule, the FCC action against Fox would not survive constitutional review because the broadcast was clearly "speech."[48] But the First Amendment is not an absolute rule, and the Supreme Court has developed First Amendment argument structures that vary depending on the content and context of the speech.

A. OVERVIEW

As a general rule, restrictions directed at the content of speech are subject to strict scrutiny, the most stringent standard of constitutional review. Under strict scrutiny, the government action must serve a compelling interest and be narrowly tailored to serve that interest—that is, the action must be the least restrictive alternative available. But some types of speech, such as obscenity,[49] fighting words,[50] and incitement of imminent illegal activity,[51] are categorically excluded from First Amendment protection on account of their content.[52] According to the Supreme Court, such speech may be proscribed by government action because any value such speech possesses is thought to be per se outweighed by other societal concerns.[53] Thus, such speech may be deemed "unprotected" by the First Amendment.[54]

Indecent speech, however, is not excluded from First Amendment protection in this manner.[55] The Court distinguishes indecent speech from

47. U.S. CONST. amend. I.

48. *See* FCC v. Pacifica Found., 438 U.S. 726, 744 (1978).

49. Miller v. California, 413 U.S. 15, 23–24, 36 (1973).

50. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–73 (1942).

51. Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

52. Government action against these varieties of speech is subject to the most minimal constitutional review: the action must be only rationally related to a legitimate government interest. R.A.V. v. St. Paul, 505 U.S. 377, 406 (White, J., concurring).

53. *See, e.g.*, *Chaplinsky*, 413 U.S. at 572 ("It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

54. *See Miller*, 413 U.S. at 23, 36.

55. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

obscenity, and any attempt to regulate indecent speech is a content-based "abridgement" of protected speech that should be subject to strict scrutiny. It should be noted that some justices, most notably Justice Stevens, have attempted to attach a lower standard of review to indecent speech, or remove such speech from First Amendment protection altogether, by analogizing it to such "low value" speech as fighting words and obscenity.[56] Such arguments, however, have not been accepted by a majority of the Court and strict scrutiny remains the presumptive standard of review.

Strict scrutiny notwithstanding, however, while adults have a constitutional right to see and hear indecent speech, the Court has consistently ruled that society has "a compelling interest in protecting the physical and psychological well-being of minors" and that "[t]his interest extends to shielding minors" from indecent speech.[57] Under strict scrutiny, therefore, any regulation seeking to restrict indecent speech would have to achieve a difficult constitutional balance between protecting children and not unnecessarily infringing on adults' rights. Under existing precedent, however, the FCC's actions against Fox and CBS, because they involved *broadcasting*, would not be subject to such stringent review.

B. THE BROADCASTING STANDARD OF REVIEW

The Court has historically reviewed government regulation of the broadcasting industry under a lower standard of review than that traditionally applied to content-based restrictions in other communications media.[58] As a result, the First Amendment rights of adults are afforded less weight in the balancing test between these rights and the interest the government action seeks to advance. In the broadcasting context, this lower standard of review draws its theoretical support from the scarcity rationale, discussed in depth below,[59] and from *Pacifica*, which applied—and *extended*—the scarcity rationale to indecency,[60] thus placing broadcasting in a distinct sphere of First Amendment jurisprudence.

56. *See* FCC v. Pacifica Found., 438 U.S. 726, 746 (1978); discussion *infra* Part IV.B.2.

57. *Sable*, 492 U.S. at 126. *See also* Reno v. ACLU, 521 U.S. 844, 869 (1997) (quoting the same); Ginsberg v. New York, 390 U.S. 629, 639–40 (1968).

58. *See Pacifica*, 438 U.S. at 748. *See also infra* Part IV.B (discussing the FCC's constitutional authority to regulate broadcasting).

59. *See infra* Part IV.B.

60. *See Pacifica*, 438 U.S. at 748–50.

The basic theory of scarcity posits that because the broadcast spectrum is uniquely physically limited in capacity, all willing speakers cannot use it simultaneously without interfering with each other's speech and preventing listeners from effectively receiving the communications that they wish to receive.[61] Accordingly, the theory maintains, those who do gain access to the spectrum, and the concomitant right to use it, have content-based obligations to the public that outweigh their individual First Amendment rights.[62] The argument structure derived from scarcity is thus as follows: because the spectrum is scarce, content-based regulation is permissible to serve the interests of the public.

In *Pacifica*, the Court applied a lower standard of review to a challenge of the FCC's authority to regulate the broadcasting medium.[63] Under this lower standard, the Court affirmed the FCC's ability to sanction broadcast licensees for airing indecent content at times when children are likely to be in the audience.[64] The Court applied a lower standard of review, in part, because it believed broadcasting to be "uniquely pervasive" and "uniquely accessible to children."[65] Importantly, these two "unique" characteristics served as reasons why spectrum licensees could violate their public obligations imposed by the scarcity rationale. Presupposing scarcity as an underlying factor in the broadcasting context, therefore, the argument structure derived from *Pacifica* is as follows: because broadcasting may be distinguished from other media—*especially because it is uniquely pervasive and uniquely accessible to children*—government may restrict broadcasters' actions when to do so would serve the public interest.

Because the case dealt specifically with broadcast indecency, the reasoning in *Pacifica* has become the constitutional foundation on which the regulation of indecency is based. Although it was an extremely narrow holding—with the Court emphasizing that "context is all-important" and that its opinion dealt only with transmissions into the home at specific times of the day[66]—it perpetuated the significant constitutional distinction mentioned above: government may legally proscribe protected speech in one communications medium (broadcasting) but not necessarily in another (for example, cable or Internet). As exemplified by a comparison of the Fox and CBS forfeitures to a 9:00 PM HBO broadcast of *Sex and the City*,

61. The background of the scarcity rationale is discussed in more detail in Part IV.B.1, *infra*.
62. *See infra* Part IV.B.1.
63. *Pacifica*, 438 U.S. at 748.
64. *Id.* at 748–50.
65. *Id. See also infra* Part IV.B.2 (discussing the *Pacifica* Court's "unique" rationales in detail).
66. *Pacifica*, 438 U.S. at 750.

in which sexual situations are frequent and overt, this distinction is very much in effect today.

A brief discussion of the relationship between scarcity and *Pacifica* might be helpful here. Scarcity's premise has historically justified increased government regulation of the broadcast medium.[67] It thus serves as a rationale upon which other policies and legal arguments may be based. In turn, the *Pacifica* case relied on the fundamental underpinning of scarcity—that because of scarcity, the government may regulate broadcasting in order to serve the public interest—and articulated specific, relevant reasons why broadcasting might violate the public interest.[68] The *Pacifica* argument could not have stood on its own; rather, it required the foundation of scarcity to build an argument based on the public interest. Accordingly, this Note may appear to conflate a rationale with a case *relying* on that rationale if it discusses the two individually. On the contrary, scarcity and *Pacifica* are distinct entities, but are inextricably linked in justifying regulation of broadcast indecency.

The factors comprising the two argument structures mentioned here are discussed in more detail below.[69] But this subsequent discussion reveals that neither argument structure remains conceptually viable today, bolstering the claims of those who argue that broadcasting should not be subject to a lower standard of review than other media.[70] As a result, if the Court wishes to preserve the FCC's ability to regulate indecent speech, it will have to develop and articulate a new argument structure for broadcast speech.

IV. REGULATING INDECENCY: THE FCC'S STATUTORY AND CONSTITUTIONAL AUTHORITY

A. STATUTORY AUTHORITY

In the Communications Act of 1934 ("Act"),[71] Congress empowered the federal agency that is now the FCC to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."[72]

67. *See infra* Part IV.B.1.
68. *See Pacifica*, 438 U.S. at 748.
69. *See infra* Part IV.B.
70. *See infra* Part V.
71. Communications Act of 1934, 47 U.S.C. §§ 151–615 (2000).
72. 47 U.S.C. § 303(r) (2000).

Today, the FCC is authorized to do so when the "public convenience, interest, or necessity requires."[73] Consistent with this charge, the FCC is authorized to use this standard when issuing or renewing broadcast licenses[74] and in pursuing the more general purpose of "encourag[ing] the larger and more effective use of radio in the public interest."[75]

The FCC is thus authorized to enforce 18 U.S.C. § 1464, which prohibits broadcasting "any obscene, indecent, or profane language."[76] This statutory language was originally enacted as part of 47 U.S.C. § 326.[77] As originally written, § 326 prevented the other provisions of the Act from being construed to permit censorship by the FCC but specifically allowed FCC review of obscene, indecent, or profane language.[78] The Supreme Court has affirmed that § 1464 does not constitute censorship, and enforcement of the statute is a valid exercise of the FCC's authority.[79] As a result, Commission action against indecent speech is currently authorized by § 1464.[80]

B. CONSTITUTIONAL AUTHORITY

As briefly discussed above, the FCC derives its constitutional authority to regulate indecency from the scarcity rationale and from *Pacifica*.[81] These constitutional foundations are discussed in turn below.

1. The Public Interest Standard and Scarcity

After the passage of the Communications Act of 1934, the Court interpreted the "public convenience, interest, or necessity" language of 47 U.S.C. § 303 in its review of FCC actions.[82] In doing so, the Court focused on the "interest" language, and the "public interest standard" became a part

73. 47 U.S.C. § 303 (2000).

74. 47 U.S.C. § 307(a) (2000). *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 379–80 (1969).

75. 47 U.S.C. § 303(g) (2000).

76. 18 U.S.C. § 1464 (2000).

77. Act of June 25, 1948, ch. 645, 62 Stat. 769 (codified as amended at 18 U.S.C. § 1464 (2000)). *See* FCC v. Pacifica Found., 438 U.S. 726, 737–38 (1978).

78. 47 U.S.C. § 326 (1940). *See Pacifica*, 438 U.S. at 735–38.

79. *Pacifica*, 438 U.S. at 735–38.

80. 47 U.S.C. § 503(b)(1)(D) (2000) authorizes the FCC to impose a financial penalty, termed a forfeiture, on those who violate § 1464. Such action is part of the Commission's self-proclaimed "responsibility for administratively enforcing 18 U.S.C. § 1464." FCC 2001 Guidelines, *supra* note 33, at para. 2.

81. *See* discussion *supra* Part III.

82. NBC v. United States, 319 U.S. 190, 216 (1943).

of the broadcasting lexicon. This standard is inherently linked to scarcity. Indeed, as the Court held in *NBC v. United States*,

> The "public interest" to be served under the Communications Act [of 1934] is thus the interest of the listening public in "the larger and more effective use of radio." The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts."[83]

As articulated in *NBC*, and famously affirmed in *Red Lion Broadcasting Co. v. FCC*,[84] the scarcity and public interest theories traditionally formed the backbone of the FCC's broadcast regulation. The two theories have been connected from the beginning of such regulation, with scarcity serving as the reason why broadcast licensees are obligated to act in the public interest. When Congress incorporated the "public convenience, interest, or necessity" language into the Act,[85] it also adopted the supporting scarcity rationale from legislation enacted in 1927 to address the chaotic early period of radio, during which an excess of broadcasters operated simultaneously on a limited amount of available spectrum.[86] Therefore, as the Court has explained, "the justification for . . . broadcast regulation rests upon the unique physical limitations of the broadcast medium."[87]

The most relevant limitation is the finite number of frequencies available to would-be broadcasters and the resulting concern that "if two broadcasters were to attempt to transmit over the same frequency in the same locale, they would interfere with one another's signals, so that neither could be heard at all."[88] To prevent this interference, and because the spectrum could not accommodate all would-be broadcasters, Congress placed the spectrum in "public trust"[89] and gave the FCC the authority to

83. *Id.* (quoting FCC v. Pottersville Broad. Co., 309 U.S. 134, 138 (1940)).

84. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

85. 47 U.S.C. § 303 (2000).

86. *See* Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 609–10 (1998); Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J. L. SCI. & TECH. 1, 12–17 (2004).

87. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637 (1994).

88. *Id*.

89. *See* Thomas W. Hazlett, *Physical Scarcity, Rent Seeking, and the First Amendment*, 97 COLUM. L. REV. 905, 909 (1997).

allocate spectrum space to those who would use it appropriately.[90] Congress did so on the theory that those who were granted monopolies on spectrum space must serve the interest of the public, which would, absent scarcity, receive additional and, perhaps, more desirable content as well as necessary information and ideas.[91]

As the Court has written, given spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting "those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves."[92] Moreover, scarcity has enabled Congress to "seek to assure that the public receives through [the broadcast] medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."[93] As a result, the Court has deemed it reasonable to affirmatively require the lucky few who gain access to the spectrum to air such desirable content.[94]

The resulting public interest responsibilities imposed on broadcasters include performing affirmative obligations—diverse programming that provides the public with socially responsible content,[95] such as public affairs coverage, political content, locally oriented programs, and children's programming[96]—and accepting negative restrictions, including restrictions on the times of day during which indecent material may be broadcast.[97]

While the FCC's enforcement of these requirements has not been superb, and broadcasters have arguably barely satisfied their affirmative obligations,[98] Congress and the FCC continue to require broadcasters to act in the public interest, especially with regard to children. For example, section 551 of the Telecommunications Act of 1996 required, in the service

90. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 383 (1969) (citing S. REP. NO. 86-562, at 8–9 (1959)).

91. *See id. See also* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 799–800 (1978); *Red Lion Broad.*, 395 U.S. at 376 n.5, 389.

92. *Red Lion Broad.*, 395 U.S. at 389.

93. FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984).

94. *See id.*

95. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 567 (1990); *Red Lion Broad.*, 395 U.S. at 390–91. *See also* FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978); ACLU v. Reno, 929 F. Supp. 824, 873–74 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997).

96. Varona, *supra* note 86, at 33–39; Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 264–65 (2003).

97. *See* Varona, *supra* note 86, at 39; Yoo, *supra* note 96, at 260–63.

98. *See, e.g.*, Varona, *supra* note 86, at 5–7, 33–40.

of the public interest, the implementation of blocking technology for broadcast television.[99] Also, the FCC recently announced new guidelines that digital broadcasters must follow in order to meet their programming obligations toward children.[100] Recognizing that it had long acknowledged that "as part of their obligation as trustees of the public's airwaves, broadcasters must provide programming that serves the particular needs of children,"[101] the Commission tied the amount of required "core" children's programming to additional spectrum capacity utilized by the digital broadcasters.[102] This ongoing concern for children's programming thus serves interests articulated by the Court and is reflected in both affirmative obligations and in the desire to shield children from indecent content.[103]

In *Red Lion*, the major case upholding the public interest standard and explicitly affirming the supporting scarcity rationale, the Supreme Court rejected a First Amendment challenge to affirmative obligations.[104] The obligation at issue was the Fairness Doctrine, an FCC-imposed requirement that broadcasters offer equal time to both sides of issues of public importance.[105] Upholding the Fairness Doctrine, the Court affirmed that the "mandate to the FCC to assure that broadcasters operate in the public interest is a broad one, a power 'not niggardly but expansive,' whose validity we have long upheld."[106]

Addressing whether the obligations violated the First Amendment, the Court famously wrote that "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to

99. Telecommunications Act of 1996, Pub. L. 104-104, sec. 551, 110 Stat. 56, 139–42 (codified at 47 U.S.C. § 303 (2000)). *See infra* Part V.C.

100. *See* Children's Television Obligations of Digital Television Broadcasters, 19 F.C.C.R. 22943, para. 1 (2004) (report and order and further notice of proposed rule making), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-221A1.pdf [hereinafter FCC Children's Television Obligations].

101. *Id.* at para. 5.

102. *Id.* at paras. 10–11. Core programming is defined by the FCC as "regularly scheduled, weekly programming of at least 30 minutes duration, aired between 7:00 a.m. and 10:00 p.m., that has serving the educational and informational needs of children ages 16 and under as a significant purpose." *Id.* at para. 11. Digital television and its potential to increase spectrum capacity is discussed in greater length in Part V.A, *infra*.

103. *See* FCC Children's Television Obligations, *supra* note 100, at paras. 60–65.

104. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969).

105. *Id.* at 369–71.

106. *Id.* at 380 (internal citation omitted) (quoting NBC v. United States, 319 U.S. 190, 219 (1943)).

the right of every individual to speak, write, or publish."[107] The Court not only held scarcity-based restrictions permissible under the First Amendment but also believed them necessary in order to protect the First Amendment right of the public to receive a multitude of information and viewpoints. This, the Court reasoned, would prevent monopolization of content and preserve the "marketplace of ideas."[108] The Court held:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[109]

Scarcity, therefore, has led to a greater focus on the needs and rights of the people than on the rights of speakers.

As an important justification for government action, it is understandable that scarcity itself has been parsed and critically analyzed. Indeed, scarcity has several meanings, each resting on a different theoretical underpinning. The two primary meanings are easily understood by the terms used at times by the FCC and reviewing courts: numerical scarcity and allocational scarcity.[110] The difference between the two has been concisely summed up as follows: "[n]umerical scarcity focuses on the number of broadcast outlets available to the public, while allocational scarcity focuses on the number of individuals who want to broadcast relative to the number of available frequencies."[111] While simple enough on its face, the distinction between numerical and allocational scarcity has caused significant debate and confusion.[112] The distinction is critical, however, when considering whether scarcity's argument structure is

107. *Id.* at 388. *See also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994) (quoting the same).

108. *Red Lion Broad.*, 395 U.S. at 390.

109. *Id*.

110. *See* Syracuse Peace Council v. FCC, 867 F.2d 654, 682 (D.C. Cir. 1989) (Starr, J., concurring); Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y., 2 F.C.C.R. 5043, para. 37 n.106 (1987); Daniel Patrick Graham, *Public Interest Regulation in the Digital Age*, 13 COMMLAW CONSPECTUS 97, 129 (2003). These two terms also have been called "static technological scarcity" and "excess demand scarcity." MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 10 (1986).

111. Graham, *supra* note 110, at 129.

112. *See id.* at 129–34.

conceptually viable. Furthermore, the distinction has great importance for any new argument structure applied to indecent broadcasts.[113]

As it stands today, scarcity remains a baseline justification for a lower standard of review; the Court has not only refused multiple opportunities to revisit it over the past twenty years[114] but also has repeatedly invoked the rationale since 1990.[115] Notwithstanding the Court's apparent acceptance of scarcity, however, it has been widely criticized and even cast in hesitant terms in some Court decisions.[116] At one point, in renouncing the Fairness Doctrine, the FCC itself challenged the Court to renounce scarcity as a justification for a lower standard of review.[117] It is not uncommon, however, for these critics to agree that scarcity, despite its flaws, remains the rationale used by the Court to justify continued regulation of broadcasting.[118]

2. *FCC v. Pacifica Foundation*

Pacifica is the seminal Supreme Court case authorizing the FCC to restrict content over the airwaves.[119] The case dates back to 1973, when a complaint was filed with the FCC concerning a New York radio station's afternoon broadcast of George Carlin's "Filthy Words" monologue.[120] Carlin's routine involved varied but repeated use of "the words you couldn't say on the public . . . airwaves."[121] In upholding the FCC's conclusion that the broadcast was indecent and that the station could be sanctioned by the FCC, the Supreme Court articulated a "new" argument

113. *See infra* Part VII.C.

114. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994); FCC v. League of Women Voters of Cal., 468 U.S. 364, 376 & n.11 (1984).

115. *See* Reno v. ACLU, 521 U.S. 844, 868 (1997); Metro Broad., Inc. v. FCC, 497 U.S. 547, 566–67 (1990).

116. *See infra* Part V.A. *See also Turner Broad.*, 512 U.S. at 638; *League of Women Voters*, 468 U.S. at 376 n.11; Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 508–09 (D.C. Cir. 1986); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 200–09 (1987); SPITZER, *supra* note 110, at 9–27; Yoo, *supra* note 96, at 267–70.

117. Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y., 2 F.C.C.R. 5043, paras. 71–94 (1987).

118. *See, e.g.*, Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 41 (2002).

119. *See* FCC v. Pacifica Found., 438 U.S. 726, 729, 744 (1978).

120. Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94, paras. 3–5 (1975).

121. *Pacifica*, 438 U.S. at 729. The full transcript of the Carlin monologue is appended to the *Pacifica* decision. *George Carlin, Filthy Words* (Pacifica Foundation radio broadcast Oct. 30, 1973), *reprinted in Pacifica*, 438 U.S. at 751 [hereinafter *Carlin, Filthy Words*].

structure for restricting broadcast indecency.[122] This new argument structure, which focused on the unique characteristics of broadcasting, articulated reasons why broadcasters could violate the public interest, a standard imposed by the scarcity rationale.[123] As a result, *Pacifica* leveraged and extended the scarcity rationale in its discussion of regulating broadcast indecency.[124]

Justice Stevens authored the *Pacifica* opinion. Before addressing the physical characteristics of broadcasting, he attempted to attach the "low value" attributes of constitutionally excluded speech, such as obscenity, to indecent speech.[125] This was not a new argument for Justice Stevens. He had made a similar argument a few years earlier in *Young v. American Mini Theatres, Inc.*[126] In that case, the Court upheld a City of Detroit ordinance dispersing adult entertainment establishments so that such establishments were not clustered in one area of the city.[127] Justice Stevens, writing for himself and three other Justices, wrote:

> [I]t is manifest that society's interest in protecting [erotic but not obscene] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.[128]

As a result of the targeted speech's perceived lower value, a plurality of the Court[129] subjected the ordinance to a lower standard of review, one that was satisfied by the city's interest in preserving the "quality of urban life."[130]

In *Pacifica*, Justice Stevens argued that indecent speech "offend[s] for the same reasons that obscenity offends"[131] and invoked language from *Chaplinsky v. New Hampshire*[132] to argue that indecent speech holds "no essential part of any exposition of ideas, and [is] of such slight social

122. *See Pacifica*, 438 U.S. at 748–50.
123. *See id.*; discussion *supra* Part III.B.
124. *See Pacifica*, 438 U.S. at 748; discussion *supra* Part III.B.
125. *Pacifica*, 438 U.S. at 744–46.
126. Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976).
127. *Id.* at 72–73.
128. *Id.* at 70.
129. Justice Powell concurred in the judgment but did not agree with the notion that "nonobscene, erotic materials may be treated differently under First Amendment principles from other forms of protected expression." *Id.* at 73 n.1 (Powell, J., concurring).
130. *Id.* at 71.
131. FCC v. Pacifica Found., 438 U.S. 726, 746 (1978) (Stevens, J., dictum).
132. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

value . . . that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality."[133] As in *Young*, Justice Stevens failed to receive four other justices' votes for this part of his opinion.[134] Consequently, the "low value" argument structure—in which content-based restrictions on speech of "slight social value" may be subjected to a standard of review lower than strict scrutiny—has not been accepted by a majority of the Court.

In the most important part of the *Pacifica* opinion joined by the majority, part IV.C, the Court clearly stated that broadcasting "has received the most limited First Amendment protection."[135] As a result, compared to other speakers, only broadcasters could lose their licenses if the FCC determined it would be in the public interest,[136] and only broadcasters could be obligated to carry certain content.[137] While the Court stated that the *reasons* for these "distinctions [were] complex"[138] (likely a reference to the long history of the scarcity rationale, given the Court's explicit reference to the "public interest"),[139] the Court determined that two were particularly relevant: broadcasts were "uniquely pervasive" and "uniquely accessible to children."[140] Thus, while the plurality rejected Justice Stevens's attempt to associate indecent speech with the low value characteristics of obscenity, it accepted his comparatively brief argument that these two unique features distinguished broadcasting from other media and justified subjecting broadcasting to a lower standard of review.

a. Uniquely Pervasive

Pacifica concluded that broadcasting was a "uniquely pervasive presence in the lives of all Americans" because it "confronts the citizen, not only in public, but also in the privacy of the home."[141] In just one short paragraph, the Court applied a privacy argument and determined that the

133. *Pacifica*, 438 U.S. at 746 (Stevens, J., dictum) (quoting *Chaplinsky*, 315 U.S. at 572).

134. Justice Powell concurred in the judgment, but wrote a separate opinion, joined by Justice Blackmun, because he disagreed with the "low value" argument in part IV of Justice Stevens's opinion. *Id.* at 761. He stated that he rejected "the theory that the Justices of this Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." *Id.* (Powell, J., concurring).

135. *Id.* at 748 (opinion of the Court).

136. *Id*.

137. *See id*.

138. *Id*.

139. *Id.*

140. *Id.* at 748–49.

141. *Id.*

privacy rights conferred by "the home" outweighed the First Amendment rights of the broadcaster who intrudes on that home.[142] The Court also held that the pervasive nature of the medium could not be mitigated by content warnings; because people were "constantly tuning in and out," broadcasting subjected people to "unexpected" content.[143]

b. Uniquely Accessible to Children

The Court's second element in *Pacifica's* argument structure was derived from the first. Justice Stevens quickly concluded that given society's interest in protecting children, "[t]he ease with which children may obtain access to broadcast material . . . amply justif[ies] special treatment of indecent broadcasting."[144] The Court's focus on children is also evident in the nuisance theory explicitly underlying the opinion.[145] Rather than completely ban the indecent speech, the nuisance theory sought to "channel" the intrusive speech to a time when "the fewest unsupervised children would be exposed to it."[146] This time-channeling system is currently in effect today. Broadcasters enjoy a "safe-harbor" between 10:00 PM and 6:00 AM, during which they may air indecent content with impunity.[147]

Pacifica's most notable contribution to First Amendment jurisprudence is its clear statement that the FCC's enforcement of indecency restrictions is constitutional. Not surprisingly, the Commission's 2001 Policy Statement cites *Pacifica* as the "judicial foundation" for such enforcement,[148] and critics of the FCC's current policies, including Fox, dissect the case to support their argument that FCC regulation is no longer permissible.[149]

Pacifica's other lasting contribution is its narrowness. While Justice Stevens explicitly "emphasize[d] the narrowness of [the] holding,"[150] his

142. *Id*. While the *Pacifica* opinion speaks in terms of pervasiveness, it reads in terms of intrusiveness. Imagery raised by language in the opinion (confronting the listener, invading the privacy of the home, unexpected content) suggests that the pervasiveness that concerned the Court was the constant penetration of the content into the home. *See id.*

143. *Id*. at 748.

144. *Id.* at 750.

145. *See id*. (noting that "[t]he Commission's decision rested entirely on a nuisance rationale").

146. *Id.* at 757 (Powell, J., concurring). *See also* Citizen's Complaint Against Pacifica Found. Station WBAI (FM), New York, N.Y., 56 F.C.C.2d 94, paras. 11–12 (1975).

147. Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654, 669–70 (D.C. Cir. 1995). *See infra* Part VI.

148. FCC 2001 Guidelines, *supra* note 33, at para. 4.

149. Opposition to Notice of Apparent Liability, *supra* note 1, at 6–10.

150. *Pacifica*, 438 U.S. at 750.

explanation was somewhat murky. The best explanation of what he meant by "narrow" is likely that the factual context of *Pacifica*—which involved a *broadcast* at times during which children were likely to be listening—dictated the results, and that the result might be different in other situations.[151] An aspect of the narrowness of the holding is evident in the Court's refusal to extend *Pacifica*'s argument structure to other media such as telephones, cable television, and the Internet.[152]

V. CHALLENGES TO THE ARGUMENT STRUCTURES: THEORETICAL, DOCTRINAL, AND TECHNOLOGICAL

A. THEORETICAL CRITIQUES OF SCARCITY

Courts and scholars have widely criticized the theoretical and empirical support for the use of scarcity to defend broadcast regulation. They have argued that the broadcast spectrum is not scarce and that scarcity, even if acknowledged, does not necessitate regulation in the form it historically has taken.

The first major criticism levied against scarcity is that the spectrum is simply not scarce.[153] This argument is based largely on numerical scarcity; critics claim the expansion of cable, the Internet, satellite, and technological enhancement of the broadcast spectrum *itself*[154] have dramatically increased the number of outlets available to speakers and the quantity of ideas available to the public.[155] The Court's broad language concerning the Internet in *Reno v. ACLU* (nine years of Internet expansion ago) supports the critics' argument, as the Court believed the Internet to be

151. *See id.*

152. *See* discussion *infra* Part V.B. Justice Stevens likely intended "narrow" to include other aspects as well. For example, he suggested that the content of the speech itself may not be "indecent" if such content is not likely to attract and negatively affect children in the audience. *Pacifica*, 438 U.S. at 750 & n.29.

153. *See, e.g.*, Varona, *supra* note 86, at 59 (discussing critics' attacks on the scarcity rationale).

154. While this may appear to raise *allocational* scarcity concerns, here, the expansion of the spectrum simply resulted in more stations. Of course, the two senses of scarcity are closely related, and a decrease in numerical scarcity may reduce but likely not eliminate allocational scarcity.

155. *See* JONATHAN W. EMORD, FREEDOM, TECHNOLOGY, AND THE FIRST AMENDMENT 283–84 (1991); Yoo, *supra* note 96, at 279–80. Technological improvements in the spectrum tripled the number of over-the-air stations available to the average household between 1980 and 2000. Yoo, *supra* note 96, at 279. While the statistic sounds impressive, Yoo's footnote reveals that the real number increased to only thirteen stations. *Id.* at 279 n.175.

"as diverse as human thought"[156] and believed that "any person with a phone line can become a town crier . . . [and] the same individual can become a pamphleteer."[157] Add to broadcasting and the Internet the unscarce medium of cable,[158] and communications *outlets* across a range of technologies are readily available, not "scarce."

But because it is content regulation of *broadcasting* that is at stake, and because the Court has varied its review depending on the medium in what some have termed a "technology-specific approach to the First Amendment,"[159] the scarcity of the *broadcasting spectrum* should be considered independent of other media. While there is no normative reason for the independent analysis—that is, communications media could be lumped together and deemed "unscarce"—arguing for a change in the Court's existing broadcasting precedent requires accepting the Court's historical distinctions between media and, thus, formulating broadcast-specific arguments. Here, too, critics of scarcity argue that the spectrum is no longer sufficiently constrained to warrant regulation.[160] And it is here that their arguments are potentially most effective in rebutting the need for regulation, for if the spectrum *itself* was expanded to where it could provide content as "diverse as human thought," many more people could broadcast without interference (allocational) and there would be no lack of outlets for diverse voices (numerical).

A timely example of the technological pressures on the scarcity rationale in the broadcasting context is the eventual transition from analog to digital television ("DTV"). The Telecommunications Act of 1996[161] and subsequent FCC rulings[162] established guidelines for the transition to DTV. The guidelines specified that existing licensees will be granted additional spectrum space[163] for DTV purposes and will be obligated to return their

156. Reno v. ACLU, 521 U.S. 844, 870 (1997) (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

157. *Id.* at 870.

158. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638–39 (1994).

159. *See* Yoo, *supra* note 96, at 248.

160. *See id*. at 280.

161. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C. (2000)).

162. *See, e.g.*, Advanced Television Sys. & Their Impact upon the Existing Television Broad. Serv., 12 F.C.C.R. 12809 (1997) (fifth report and order) [hereinafter FCC DTV].

163. *See id.* at paras. 8–17. Each licensee currently controls six megahertz for analog transmission and will receive the use of an additional six megahertz for the purpose of transitioning to DTV.

existing analog channel to the government once the transition is complete.[164]

DTV also has the potential to expand the spectrum via multicasting,[165] the transmission of up to five standard definition signals ("SDTV") and an enhanced digital signal on the same amount of spectrum currently used for one analog signal.[166] As long as broadcasters air a primary, free digital signal that is "comparable" in quality to and aired at the same time as the current analog signal, licensees will have flexibility in determining how much of this additional spectrum they use at any one time.[167] The transition to DTV thus has the potential to increase spectrum capacity in two main ways. First, returned analog spectrum could be utilized by additional speakers. Second, multicasting technology could increase available broadcast avenues by a factor of six using the same amount of spectrum space.[168]

The second, and most powerful, criticism of scarcity is an economic rather than a physical critique.[169] It suggests that even if the spectrum is a scarce resource and that scarcity results in interference, this fact alone does not justify government regulation—especially not content regulation.[170] In his famous critique of the public interest obligations, Ronald Coase argued

164. *See id*. at para. 2.

165. Multicasting technology allows broadcasters to "split" their allocated spectrum and provide more content. In other words it enables broadcasters to "air two, four or more digital channels at once in spectrum . . . that could previously accommodate only a single analog channel." Steve Behrens, *Multicasting—the Practical Engine That's Driving Public TV's Digital Transition*, CURRENT, Apr. 22, 2002, *available at* http://www.current.org/dtv/dtv0208multicast.html.

166. FCC DTV, *supra* note 162, at para. 20; BENTON FOUNDATION, CITIZEN'S GUIDE TO THE PUBLIC INTEREST OBLIGATIONS OF DIGITAL TELEVISION BROADCASTERS 2, *available at* http://www.benton.org/pioguide/PDFs/citizensguide.pdf (last visited Sept. 14, 2006). The enhanced digital signal quality does not match the HDTV standard but is superior to any analog signal.

167. FCC DTV, *supra* note 162, at paras. 19–30. Thus, a network could not broadcast the primary, free signal overnight and use daytime hours for pay-services, pay-movies, etc. For a good overview of the DTV technology and its impact on consumers, see FCC, Digital Television (DTV), http://www.dtv.gov (last visited Sept. 14, 2006).

168. The shift to DTV will not necessarily expand the broadcast spectrum. There is speculation that the transition to DTV will take much longer than expected, thus delaying the return of the analog spectrum. Adam Thierer, *Sen. McCain's Plan to Liberate the Broadcast Spectrum*, TECHKNOWLEDGE NEWSLETTER, Sept. 30, 2004, http://www.cato.org/tech/tk/040930-tk.html. Moreover, there is no guarantee that these licensees will use their new spectrum to multicast. *See* Jeffrey K. Oberg, Facing the Digital Future, Darkly: Television Station Managers' Approach Towards the Implementation of Digital Broadcasting 7–9 (paper for Broadcast Education Association 2000 Convention), *available at* http://www.beaweb.org/bea2000/papers/oberg.pdf (last visited Sept. 13, 2006).

169. *See* Hazlett, *supra* note 89, at 910–11.

170. *See generally* R.H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959); Hazlett, *supra* note 89, at 910–11.

that the marketplace is a more effective and more efficient manager of rivalrous goods (a resource in which use by one person reduces the availability to others) than the government. Because the marketplace has better information, he suggested, it can more efficiently allocate spectrum space to the most effective operators.[171]

As a result, Coase's proposal was to treat the spectrum like any other rivalrous good and, following an initial allocation, to implement a system of individual property rights.[172] His theory thus reflects a desire for individuals to work within a legal system to define and transfer privately owned property, the use and effectiveness of which is subject only to the market. As an illustration, one may look to the well-known problem of the commons, in which unlimited goods that are not privately held may be used by all, but efficient use of rivalrous goods requires rationing, either by "quantitative allocation, or by levying a charge for their use" to prevent overutilization.[173] Coase thus suggests that the government should only define and enforce personal rights, thus avoiding the problem of the commons, but not dictate how those rights must or must not be exercised.[174] This is in direct contrast to the Court's pronouncement in *NBC* that the government's role regarding the scarce spectrum is not only to prevent interference but also to help determine the proper use of the spectrum.[175]

Coase's argument relies on the fact that the broadcast spectrum is not *uniquely* scarce.[176] He and others have argued that all economic goods, such as land, labor, ink, paper, trucks, and computers are all limited to a finite number.[177] Moreover, if a valuable resource is initially allocated at no cost to the recipient, as was the spectrum to licensees, there will always be more demand than supply.[178] The Court's assertion that intolerable interference would result if everyone used the spectrum simultaneously,[179] therefore, while conceded to be true,[180] arguably does not distinguish the

171. Coase, *supra* note 170, at 17–34.

172. *Id. See also* SPITZER, *supra* note 110, at 11–12.

173. JOHN BLACK, A DICTIONARY OF ECONOMICS 67 (2003).

174. *See* Hazlett, *supra* note 89, at 910–11.

175. NBC v. United States, 319 U.S. 190, 215–16 (1943).

176. Coase, *supra* note 170, at 14.

177. Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, J., dissenting); Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986); EMORD, *supra* note 155, at 282; Coase, *supra* note 170, at 14.

178. *See, e.g.*, SPITZER, *supra* note 110, at 14.

179. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–76 (1969); *NBC*, 319 U.S. at 213.

180. SPITZER, *supra* note 110, at 11; Benjamin, *supra* note 118, at 41.

spectrum, as the same could be said of every finite resource.[181] Because the spectrum is no different from these other resources, it is argued, property rights used to define control of other resources can also be used to define control of the spectrum.[182]

These arguments expose a critical flaw in the scarcity argument structure. If there is no scarcity, the rationale collapses. But even if scarcity exists, that fact alone does not justify content regulation. The *non sequitur* is thus as follows: content-based, government-imposed public interest obligations do not necessarily follow from scarcity. After an initial allocation, why does the government need to *regulate* the use of the spectrum? The Court has never fully answered this question. But it must in order for any argument structure based on scarcity to be sound.

B. THE COURT'S REFUSAL TO APPLY *PACIFICA* TO OTHER MEDIA: A DOCTRINAL CRITIQUE

Since *Pacifica*, the Court has refused to apply the case's argument structure with its lower standard of review to other communications technologies.[183] This refusal has multiple implications in the present discussion. First, the Court has relied in part on its belief that other media are not scarce like the broadcast spectrum, entrenching scarcity as a justification for distinguishing between media. Second, the Court's approach toward broadcasting has increasingly become an outlier in First Amendment law. As the distinctions between media break down, the pressure has increased on the Court to rethink the anomaly that is its broadcasting jurisprudence. The following sections explore the Court's refusal to extend *Pacifica* and highlight these effects.

1. Telephone

In *Sable Communications of California v. FCC*, the Court applied strict scrutiny to legislation that prohibited communicating indecent

181. SPITZER, *supra* note 110, at 11.

182. Coase, *supra* note 170, at 25–30.

183. *But see* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 735–48 (1996) (plurality opinion). *Denver* involved a three-part regulation that targeted indecent speech on cable television. *Id.* at 732. A plurality upheld the provision that allowed cable operators to choose whether to air the programming on channels they must by law lease to other parties. *Id.* at 737–48. The provision was upheld in part on the grounds that it was permissive not mandatory and that *Pacifica*'s argument structure could be applied to cable in service of the compelling interest in protecting children. *Id.* The Court later changed the argument structure applicable to cable in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000). *See infra* Parts V.B.3, C.

messages via telephone. The Court noted that the telephone service did not share the "unique" characteristics of the broadcast medium and required the consumer to take affirmative steps to acquire the message.[184] Telephone service thus would not surprise an unwilling person with unexpected or unwanted content.[185] As a result, the telephone service was not nearly as pervasive (or intrusive) as the broadcast medium. Ultimately, the Court struck down the legislation because there was a less restrictive and, in the Court's mind, very effective alternative: "credit card, access code, and scrambling"[186] technology that would likely have prevented all but the "most enterprising and disobedient young people" from gaining access to the adult-oriented content.[187]

2. The Internet

Similarly, the Internet was thoroughly distinguished from broadcasting in *Reno v. ACLU*, in which legislation criminalizing the intentional transmission of indecent content to minors via the Internet was held to violate the First Amendment.[188] The Court determined that the Internet did not share the "special justifications" that enabled the Court to "qualify[]" its level of scrutiny when analyzing broadcast media.[189] These missing justifications included extensive historical regulation, which on its face may be a self-fulfilling "tradition" argument. But here, in light of the Court's citation to *Red Lion*,[190] historical regulation is a euphemism for scarcity and the entrenched public interest responsibilities of existing broadcasters, whose "preferred position[s] [were] conferred by the Government."[191]

The section of *Red Lion* cited by the *Reno* Court to distinguish the Internet from broadcasting thus perpetuates the unique connection between scarcity and government regulation in broadcasting. By doing so, the *Reno* Court accepted the "historical" justification that "[i]n view of the scarcity of broadcast frequencies, the Government's role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression

184. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 127–28 (1989).
185. *Id.*
186. *Id.* at 128.
187. *Id.* at 130.
188. Reno v. ACLU, 521 U.S. 844, 885 (1997).
189. *Id.* at 868–71.
190. *Id.* at 868.
191. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 400 (1969).

of their views," public interest regulation in broadcasting is constitutional.[192] The Internet, the Court found, has no such physical limitations and no resulting history of government regulation.[193] Rather, it could "hardly be considered a 'scarce' expressive commodity."[194] While the *Reno* Court expressly mentioned scarcity as a separate "special justification," it likely had little additional need to do so.[195]

The *Reno* Court's final "special justification" referenced *Pacifica* and the invasiveness rationale. The Court distinguished the Internet on this point, as it had distinguished telephone service in *Sable*, and accepted the district court's finding that "communications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident'" and "[a]lmost all sexually explicit images are preceded by warnings as to the content."[196] In this manner, *Reno* explicitly reaffirmed that broadcasting receives lower scrutiny because of the differences inherent in the medium.

Like the legislation in *Sable*, the legislation in *Reno* failed strict scrutiny because it burdened content that "adults have a constitutional right to receive"[197] and was not narrowly tailored; less restrictive alternatives were likely "as effective as" the regulation in keeping adult content away from children.[198] In particular, the Court cited the district court's finding that "[d]espite its limitations, currently available user-based software suggests that a reasonably effective method by which *parents* can prevent their children from accessing sexually explicit and other material which *parents* may believe is inappropriate for their children will soon be widely available."[199]

192. *Id.*

193. *Reno*, 521 U.S. at 868, 870.

194. *Id.* at 870.

195. When expressly referencing scarcity, the *Reno* Court's citation to *Turner* adds little new material, with the exception of the following: "Although 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." Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 638 (1994) (internal citations omitted). This criticism was discussed in Part IV.B.1, *supra*.

196. *Reno*, 521 U.S. at 869 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).

197. *Id.* at 874.

198. *Id.* at 879.

199. *Id.* at 877 (quoting *ACLU*, 929 F. Supp. at 842). For a discussion of the efficacy of self-help in blocking offensive content, see generally Tom W. Bell, *Internet Privacy and Self-regulation: Lessons from the Porn Wars*, 65 CATO INST. BRIEFING PAPERS (2001), *available at* http://www.cato.org/pubs/briefs/bp65.pdf.

3. Cable

The 2000 *United States v. Playboy Entertainment Group, Inc*. decision followed the 1996 decision in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, in which a plurality applied the *Pacifica* standard of review to cable.[200] Without explaining why, however, the *Playboy* Court unanimously applied strict scrutiny to the regulation of indecent content[201] shown on cable.[202] The legislation at issue in *Playboy* required cable networks "primarily dedicated to sexually-oriented programming" to either fully scramble the broadcast or to channel the content to the 10:00 PM to 6:00 AM time period.[203] The goal of the legislation was to prevent "signal bleed," whereby children whose parents did not subscribe to the channel might still be exposed to the content.[204] Emphatically declaring that the legislation was directed at content, the Court stated that with such a regulation "the answer should be clear: The standard is strict scrutiny."[205] Adhering to this standard, the Court held technology that allowed subscribers to ask the cable provider to completely block or scramble any given channel to be a sufficiently effective and less restrictive alternative.[206] Thus, because the offensive speech could be blocked rather than banned, the ban was unconstitutional.[207]

In addition, the Court rejected the counterargument that "voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time," leaving children exposed to the content.[208] Importantly, the Court noted that courts "should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act."[209] This statement has great significance for the current broadcasting context, as discussed in detail below.[210]

200. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 744–48 (1996).

201. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811 (2000) ("[A]ll parties bring the case to us on the premise that Playboy's programming has First Amendment protection[;] . . . it is not alleged to be obscene . . . .").

202. *Id*. at 814, 836. *See* Yoo, *supra* note 96, at 300–01.

203. *Playboy*, 529 U.S. at 806.

204. The Court described "signal bleed" as the result of a failure to completely scramble the picture. Sounds and images may be perceived even though the channel is not subscribed to. *Id*.

205. *Id*. at 814.

206. *Id*. at 815–16.

207. *Id*. at 815.

208. *Id*. at 824.

209. *Id*.

210. *See* discussion *infra* Part V.C.

Finally, in a strong defense of its choice to apply stringent First Amendment scrutiny, the Court noted that "[i]f television broadcasts can expose children to the real risk of harmful exposure to indecent materials, even in their own home and without parental consent, there is a problem the Government can address. It must do so, however, in a way consistent with First Amendment principles."[211]

4. Summary

The impact of the Court's refusal to extend *Pacifica* is two-fold. First, the subsequent cases have reaffirmed the Court's long-held belief that "each medium of expression presents special First Amendment problems"[212] and reaffirmed the notion that "the First Amendment has a special meaning in the broadcasting context."[213] These decisions reflect a continued acceptance of the historical justifications for applying a lower standard of review to broadcasting. While one could argue that this parsing of the media is inappropriate and that the media should be grouped together in First Amendment jurisprudence because of their *impact on the recipient*—that is, they create visual images and auditory perceptions—such an argument is beyond the scope of this Note. For this Note's purpose, suffice it to say that the Court's decisions perpetuate what is evidently a constitutional anomaly. Second, the subsequent cases have forced the Court to distinguish broadcasting from the other forms of communication, an exercise that has further isolated the broadcasting argument structure from those applied to other media. This, in turn, has limited the Court's options with regard to evaluating broadcasting cases, as technology has developed and the distinctions between media have become less and less apparent.

C. TECHNOLOGICAL EROSION OF *PACIFICA*'S ARGUMENT STRUCTURE

The social perception of broadcasting, relied on by the Court in *Pacifica*, as a uniquely pervasive and accessible medium is arguably anachronistic. And in its appeal of its forfeiture, Fox aptly argues that the "uniquely pervasive" and "uniquely accessible" elements of the *Pacifica* argument structure "have been profoundly undermined by the subsequent 25 years of technological and marketplace changes."[214] These changes and

211. *Playboy*, 529 U.S. at 826–27.
212. FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).
213. *Id*. at 741–42 n.17.
214. Opposition to Notice of Apparent Liability, *supra* note 1, at 7.

their effect on *Pacifica*'s argument structure are valid considerations that weigh against applying a lower standard of review to broadcasting.

The most obvious of these changes is the expansion of other analogous media outlets that bring video, audio, static images, and similar content into the house. These outlets are collectively labeled multichannel video programming distributors ("MVPDs") and include cable, satellite, and broadband technologies.[215] As of mid-2004, over eighty-five percent of U.S. television households subscribed to an MVPD.[216] Accordingly, fewer than fifteen percent of American households relied *solely* on over-the-air broadcasting for their television content.[217] As a result, broadcasting is arguably not unique in its interaction with the consumer. If broadcasting in *Pacifica* was "uniquely pervasive," in that it alone "confronts the citizen" in public *and* in the "privacy of the home," the growth of alternate distribution methods, the MVPDs, likely erodes this broadcasting distinction.[218] Accordingly, as Judge Edwards of the D.C. Circuit has argued,

> [T]he pervasiveness of its programming hardly distinguishes broadcast from cable. . . . [C]able is pervasive: a majority of television households have cable today, and this percentage has increased every year over the last two decades. The intrusiveness rationale, that the material confronts the citizen in the privacy of his or her home, likewise, does not distinguish broadcast from cable, nor account for the divergent First Amendment treatment of the two media.[219]

If so, then broadcast and cable (to focus on the most prevalent MVPD) are arguably indistinguishable on this point.[220] When one turns on the television, broadcast and cable or satellite transmissions are equally always on and may be accessed or alternated between with the push of a button. Simply put, broadcasting is still always available and still invades the home, but it is not alone in doing so.[221]

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215. FCC, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 FCC ANN. REP. para. 3 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf.

216. *Id.* at para. 8.

217. *Id.* at para. 81.

218. Of course, one could argue that there remains a distinction outside of the home, but this again would necessitate answering the problem regarding the inside of the home, on which this debate has focused.

219. Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654, 676 (D.C. Cir. 1995) (Edwards, J., dissenting) (internal citations omitted).

220. *Id*.

221. *See id*.

Other technological advances challenge the viability of *Pacifica*'s "uniquely accessible to children" rationale. Certainly, the MVPDs are also highly accessible to children. But the Court ruled in *Playboy* that cable service could be tailored at the household level to meet the viewing choices of the public.[222] Therefore, by distinguishing cable from broadcast in this manner, the *Playboy* decision implicitly suggested a world in which cable (and other MVPD) channels may be blocked while broadcast channels continue to transmit unimpeded. This is no longer necessarily true. The Telecommunications Act of 1996[223] and subsequent FCC decisions[224] mandated that every television with a screen of thirteen inches or greater manufactured after January 1, 2000 be equipped with v-chip "blocking technology,"[225] which allows similar household-level control over viewable content.

Specifically, the 1996 Act required that a ratings system be implemented in conjunction with the v-chip so that parents could be provided "with timely information about the nature of upcoming video programming and with the technological tools that allow them easily to block violent, sexual, or other programming that they believe harmful to their children."[226] The system, subsequently developed by the television industry,[227] enables each show to be encoded with a rating similar to the now-familiar movie ratings.[228] Parents can then program the v-chip to

222. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000).

223. Telecommunications Act of 1996, Pub. L. 104-104, sec. 551, 110 Stat. 56, 139–42 (codified at 47 U.S.C. § 303 (2000)).

224. Technical Requirements to Enable Blocking of Video Programming Based on Program Ratings: Implementation of Sections 551(c), (d), & (e) of the Telecommunications Act of 1996, 13 F.C.C.R. 11248, para. 23 (1998), *available at* http://www.fcc.gov/Bureaus/Engineering_Technology/Orders/1998/fcc98036.pdf.

225. *Id*.

226. *Id*. at para. 2 (quoting Pub. L. No. 104-104, sec. 551(a)(9), 110 Stat. 56 (1996)).

227. *See* Implementation of Section 551 of the Telecommunications Act of 1996: Video Programming Ratings, 13 F.C.C.R. 8232, para. 1 (1998), *available at* http://www.fcc.gov/Bureaus/Cable/Orders/1998/fcc98035.pdf. *See also* TV Parental Guidelines Council, Navigating Your Way Through the Parental Guidelines and V-chip, *available at* http://www.tvguidelines.org/brochure.pdf (last visited Sept. 12, 2006).

228. The ratings, labeled the *TV Parental Guidelines*, are listed on the FCC website as the following:

> TV-Y, (All Children) found only in children's shows, means that the show is appropriate for all children; TV-7, (Directed to Older Children) found only in children's shows, means that the show is most appropriate for children age 7 and up; TV-G (General Audience) means that the show is suitable for all ages but is not necessarily a children's show; TV-PG (Parental Guidance Suggested) means that parental guidance is suggested and that the show may be unsuitable for younger children (this rating may also include a V for violence, S for sexual situations, L for language, or D for suggestive dialog); TV-14 (Parents Strongly Cautioned) means that the show may be unsuitable for children under 14 (V, S, L, or D may accompany a rating of TV-14); and TV-MA (Mature Audience Only) means that the show is for mature

block broadcast television at a household-by-household level.[229] The major networks were encoding their programming by early 2000.[230]

These household-by-household controls suggest that all of broadcasting's content is no longer either uniquely pervasive or uniquely accessible to children. Because parents may prevent unwanted broadcasting content from entering the house, broadcasting is no longer capable of the dangers that so concerned the Court in *Pacifica*. And the controls allow strong analogies to the cable medium as described by the Court in *Playboy*. As discussed above, the crucial point in *Playboy* was that cable could "block unwanted channels on a household-by-household basis."[231] Applying strict scrutiny, the *Playboy* Court held that banning content was unconstitutional if blocking it was an effective alternative.[232] The advent of the ratings system and v-chip technology likely represent as effective an alternative in the broadcast context.[233]

D. SUMMARY

The challenges to scarcity and to the more specific *Pacifica* argument structure that scarcity supported take multiple forms. One significant challenge to scarcity is that it can be questioned whether the spectrum is actually scarce, given the potential return of analog space and the enhanced capacity created by multicasting. Critically, there also exists a serious *non sequitur* in that scarcity does not logically necessitate content regulation. For *Pacifica*, the challenge is also two-fold. First, the Court's refusal to extend *Pacifica* isolates and focuses attention on broadcasting's historically

audiences only and may be unsuitable for children under 17 (V, S, L, or D may accompany a rating of TV-MA).

FCC, The V-chip: Putting Restrictions on What Your Children Watch, Even When You're Not There (Sept. 26, 2005), http://www.fcc.gov/cgb/consumerfacts/vchip.html.

229. *See id.*

230. Press Release, FCC, FCC V-chip Task Force Updates V-chip Encoding Survey app. B (Feb. 9, 2000), *available at* http://www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/ nrm0003b.doc.

231. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000).

232. *Id*.

233. *Playboy*'s assertions that the blocking need not be perfect, and that courts should not assume that parents will not act if properly informed, undercut a potential counterargument that parents will not act to block programming. *Id*. at 821–22, 824. Yet, a recent survey revealed that only fifteen percent of parents have used the v-chip technology, and sixty-five percent of parents either did not have a v-chip in their television or were not aware of whether their television had a v-chip. The ratings system fared better, with fifty percent of parents reporting that they have used the system. VICTORIA RIDEOUT, KAISER FAMILY FOUND., PARENTS, MEDIA AND PUBLIC POLICY: A KAISER FAMILY FOUNDATION SURVEY 4, 7 (2004), *available at* http://www.kff.org/entmedia/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=46689.

unique characteristics (some of which are challenged by attacks on scarcity itself). Second, some of these unique features have been eroded by the prevalence of other technologies that accompany broadcasting into the home and technology that allows parents to take action to prevent harm to their children. In light of technological change, therefore, broadcasting is no longer either *uniquely* pervasive or *uniquely* accessible to children.

As a result of the attacks on scarcity, especially the *non sequitur*, and the erosion of *Pacifica*, neither of these historical "justifications" in fact justifies applying a lower standard of review to broadcasting.

VI. THE EVOLVING STANDARD OF REVIEW: CAN INDECENCY REGULATIONS SURVIVE STRICT SCRUTINY?

The next question is whether regulation of indecency could survive strict scrutiny—in any medium. Despite its emphatic pronouncement of adherence to general First Amendment principles, the *Playboy* Court made an important doctrinal move with regard to *Pacifica*, a move that may have implications for future review of the broadcast medium. In explaining its decision to apply strict scrutiny to cable, the majority distinguished broadcasting, and by implication *Pacifica*, by stating that "a key difference between cable television and the broadcasting media, which is the point on which this case turns," is that a less restrictive alternative blocking technology existed for cable but not for broadcasting.[234] This statement might be interpreted as applying strict scrutiny to both media but acknowledging that a content-based regulation in broadcasting would pass scrutiny for lack of a less restrictive alternative, while a similar regulation aimed at cable would fail due to the presence of such an alternative. Alternatively, the Court might have been tacitly accepting the historical argument that the unique characteristics of broadcasting *inherently preclude* a less restrictive alternative and, thus, at the threshold, broadcasting should be subject to a lower standard of review. This, however, would be a dramatic, conclusory doctrinal move and was not factually accurate at the time of the *Playboy* decision.

While the *Playboy* opinion does not suggest that its discussion should be applied to media other than cable, for the Court to state that the *key* difference between the two media is that one has an alternative to content-based regulation and the other does not would be more doctrinally correct if the Court was evaluating the two media under similar standards of

234. *Playboy*, 529 U.S. at 815.

review.[235] The very comparison between the strict least restrictive alternative situation in each medium presupposes that both are subject to strict scrutiny—the only way to generate the most *rigorous* least restrictive alternative form of narrowing requirement.

In fact, courts may already be applying a higher standard of review to broadcasting. The D.C. Circuit addressed the constitutionality of the indecency definition and time-channeling in a series of decisions brought, in part, by Action for Children's Television ("ACT"). In these cases, known as *ACT I*,[236] *ACT II*,[237] and *ACT III*,[238] the D.C. Circuit spoke consistently in terms evocative of strict scrutiny. In *ACT I*, Justice Ruth Bader Ginsburg, now a member of the Supreme Court, wrote that content-based restrictions must be a "precisely drawn means of serving a compelling state interest"[239] and concluded that prohibiting indecent content before midnight was not a "reasonable" response to the need to show respect to the "high value our Constitution places" on freedom of speech.[240]

ACT II went even further, citing *Sable* in support of its position that the FCC's actions must satisfy strict scrutiny.[241] As such, it vacated an FCC order, made pursuant to Congressional action, permitting the FCC to enforce § 1464 on a twenty-four hour basis.[242]

ACT III, in holding a midnight to 6:00 AM safe harbor unconstitutional,[243] acknowledged the traditionally recognized differences between broadcasting and other media but still explicitly applied strict

235. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 518–20 (2d ed. 2002).

236. Action for Children's Television v. FCC (*ACT I*), 852 F.2d 1332 (D.C. Cir. 1988).

237. Action for Children's Television v. FCC (*ACT II*), 932 F.2d 1504 (D.C. Cir. 1991).

238. Action for Children's Television v. FCC (*ACT III*), 58 F.3d 654 (D.C. Cir. 1995).

239. *ACT I*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) (quoting Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 540 (1980)).

240. *Id*. at 1344.

241. *ACT II*, 932 F.2d at 1509. Oddly, the D.C. Circuit made no mention of the Supreme Court's distinctions between the telephone and broadcasting.

242. *See id.* at 1507, 1510 (citing Pub. L. No. 100-459, § 608, 102 Stat. 2228 (1988)).

243. *ACT III*, 58 F.3d at 667, 669 ("We thus conclude that, standing alone, the midnight to 6:00 a.m. safe harbor is narrowly tailored to serve the Government's compelling interest in the well-being of our youth."). The midnight to 6:00 AM safe harbor itself was held unconstitutional because the FCC impermissibly distinguished between public and private broadcasters, applying a broader 10:00 PM to 6:00 AM safe harbor to public broadcasters and the more restrictive midnight to 6:00 AM safe harbor to private broadcasters. As such, the more restrictive safe harbor was held unconstitutional. *See id.* at 667–69. The FCC subsequently amended its policy to implement the 10:00 PM to 6:00 AM safe harbor. *See* Enforcement of Prohibitions Against Broad. Indecency in 18 U.S.C. § 1464, 10 F.C.C.R. 10558, paras. 1–2 (1995).

scrutiny.[244] Noting that the particularities of broadcasting may affect whether the regulation survived the review,[245] the *ACT III* court continued the line of reasoning of its predecessors and concluded that channeling indecent content was an appropriately tailored[246] means of serving society's compelling interests.[247] A 10:00 PM to 6:00 AM safe harbor provision, thus, has survived strict scrutiny as a least restrictive alternative.[248]

And again, the Supreme Court itself may already be leaning toward applying strict scrutiny to broadcasting. First, while not dispositive, the Court denied certiorari to *ACT II*[249] and *ACT III*.[250] Second, as discussed above,[251] the Court in *Playboy* seemed to suggest that both cable and broadcast were subject to strict scrutiny, but broadcast regulations would pass and cable regulations would fail.[252]

The uniform application of strict scrutiny is appealing as it erases a constitutional anomaly of holding content-based regulations in one medium to a lower standard of review than in others. And what may be seen as a decisive doctrinal move by the Court does not automatically ensure that the outcome under strict scrutiny will be different from that under a lower standard of review, a comforting thought to supporters of regulation. The presence of the safe harbor, already held to be a suitable alternative by the D.C. Circuit, demonstrates that under stringent review, regulation of indecent content might conceptually remain viable.

The problem, however, is that in moving toward strict scrutiny while continuing the technology-specific approach—holding one way *because* broadcasting has X attribute and cable does not, or vice versa—*Playboy* and the tacit acceptance of the *ACT* decisions have potentially written the Court into a corner. With the increasing technological similarities between

244. *ACT III*, 58 F.3d at 659–60.

245. *Id*. at 660.

246. *See id.* at 667.

247. *See id.* at 660–63. The D.C. Circuit again expressed its commitment to strict scrutiny in another 1995 ACT case, *Action for Children's Television v. FCC*, 59 F.3d 1249, 1253 (D.C. Cir. 1995).

248. *See* sources cited *supra* note 243 and accompanying text.

249. Action for Children's Television v. FCC (*ACT II*), 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992).

250. *ACT III*, 58 F.3d at 654, *cert. denied*, 516 U.S. 1043 (1996).

251. *See supra* Part VI.

252. *See* United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811–15 (2000). The Court's discussion of the standard of review in *Playboy* was made without reference to the traditional justifications for the technology-specific analysis. If the Court is less concerned with the preeminent role of these justifications, it might be easier for it to accept an argument that they are no longer viable.

the media, especially with blocking technology now available to broadcasting, the safe harbor may no longer be *the* least restrictive alternative.

The Court may have acknowledged as much when it wrote in *Playboy* that "[t]he option to block [at the household level] reduces the likelihood, so concerning to the Court in *Pacifica* . . . that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem."[253] Here, the Court may effectively be saying that subjecting all indecency regulations to "traditional First Amendment scrutiny"—that is, strict scrutiny applicable to content-based regulations—would not leave the nation powerless to prevent the negative effects of indecent content. The purpose of the content-based regulations, if such regulations failed strict scrutiny due to the presence of a less restrictive alternative, might permissibly be achieved by congressionally mandated implementation *of that alternative*. In this manner, household-by-household blocking might adequately serve the government's interest in protecting children from indecent broadcasts.

Returning to the argument structures, the hypothetical imperative facing the Court—that if it wants to preserve government regulation of indecent content, it must base this regulation on a new argument structure—may now be further clarified. If scarcity is conceptually flawed, if *Pacifica*'s reasons why broadcasters *alone* can violate the public interest no longer apply, and if the marketplace has developed an effective alternative (household blocking technology) that precludes indecency regulation from surviving traditional strict scrutiny, the Court must find a new argument structure in order to continue regulating indecent content in broadcasting *at the source*. That is, it must do so if it seeks to maintain government-imposed time, place, and manner restrictions rather than deferring to parental control.

Here we face the underlying assumption of this Note: that the Supreme Court will not choose to allow broadcasters unlimited license at all times of the day. Congressionally mandated blocking technology would thus be legally but not politically sufficient. Indeed, this is a political assumption, one that measures the pulse of the political climate, as exemplified by the Commission's recent enforcement of the indecency regulations, the recent increase in permissible fines, and the recent

253. *Id.* at 815.

confirmations of Justices Roberts and Alito.[254] It is also a cultural assumption. As a society we are sensitive about sex, especially about exposing children to it and, thus, are likely ill-prepared to take the drastic step of removing government broadcast regulation. Carlin was likely correct when he labeled his seven dirty words simply the words "you can't say."[255]

VII. TOWARD A NEW ARGUMENT STRUCTURE: ARTICULATING EXISTING COMMUNITARIAN OBLIGATIONS

A. REATTACHING SCARCITY TO INDECENCY

Since *Pacifica*, the "uniquely pervasive" and "uniquely accessible to children" rationales have formed the primary argument structure used in favor of regulating the broadcast industry.[256] Interestingly, some have gone so far as to claim that scarcity had nothing to do with the *Pacifica* decision.[257] If this were the case, the erosion of *Pacifica*'s argument structure would leave the government with no other articulated rationale for subjecting broadcasted indecency to different standards from those applied to other media. But this is not the case. As discussed throughout this Note, scarcity lies beneath the *Pacifica* decision.[258] Although scarcity has suffered from critiques of its own, if the Court is able to defend the application of scarcity to content regulation, scarcity offers rationales for regulating indecency that survive *Pacifica*.

As discussed above, in *Pacifica*, Justice Stevens articulated why broadcasting is different from other media. The reasons he gave were presented as *reasons* why *broadcasters* might violate the public interest when others might not and why broadcasters' licenses were uniquely subject to government review.[259] But in the context of communications media, there are arguably no enforceable public interest obligations without scarcity. The articulated distinctions in *Pacifica*, therefore, were reasons why broadcasters could violate the public trust obligations imposed on them *as a condition of their privileged use of a scarce resource*.[260] As a

254. *See supra* Part I.
255. *Carlin, Filthy Words*, *supra* note 121.
256. *See* FCC 2001 Guidelines, *supra* note 33, at para. 4.
257. *See, e.g.*, POWE, *supra* note 116, at 208; Benjamin, *supra* note 118, at 46.
258. *See* discussion *supra* Parts III.B, IV.B.2.
259. *See* FCC v. Pacifica Found., 438 U.S. 726, 731 n.2, 748–50 (1978).
260. *See id.* at 748.

result, one might conclude that there is an explicit connection between scarcity, to the extent it justifies government regulation, and limiting indecent programming.[261]

But this conclusion brings the discussion back to scarcity's conceptual flaw. The Coasian critique of scarcity argues that a scarce resource, even if subject to interference if too many parties attempt to use it, requires only an initial allocation to prevent interference but not subsequent regulation.[262] This argument exposes the *non sequitur* in the scarcity rationale: content-based, government-imposed public interest obligations do not necessarily follow from scarcity. This logical gap has never been explained by the Court, which has followed precedent in holding that scarcity "require[s] some adjustment in traditional First Amendment analysis" in order to serve the public interest.[263]

To effectively apply scarcity to the regulation of indecent speech, the Court must eliminate this *non sequitur*. It must provide an additional premise that logically connects scarcity to public interest obligations. Without this additional premise, the Court's reliance on scarcity is fundamentally and perpetually flawed.

B. TOWARD A NEW ARGUMENT STRUCTURE

First it must be noted that the Court has not recently questioned the application of scarcity to broadcasting. It did notoriously signal, however, that it might reconsider scarcity if the FCC or Congress acted first.[264] In *FCC v. League of Women Voters of California*, the Court wrote in a footnote that it was "not prepared . . . to reconsider [its] longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[265] Here, the Court may be expressing its preference for clarification from the other branches of government with respect to constitutional facts, like the existence of scarcity, which would be subject to ultimate review by the Court.[266]

261. Affirmatively requiring substantive content in children's programming, for instance, to promote education, traditionally has been required in service of the public interest. Given Congress's and the Court's long-held belief that protecting children is a compelling interest, it follows that negative restrictions aimed at protecting children are similarly permitted.

262. *See* discussion *supra* Part V.A.

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

264. FCC v. League of Women Voters of Cal., 468 U.S. 364, 376–77 n.11 (1984).

265. *Id.* at 377 n.11.

266. *See Turner Broad. Sys.*, 512 U.S. at 665–66.

Even though the FCC (not Congress itself) did signal that scarcity was no longer justified,[267] scarcity remains a part of the Court's jurisprudence. For example, in *Turner Broadcasting Systems, Inc. v. FCC*, the Court cited *Red Lion* and "declined to question [scarcity's] continuing validity."[268] And in *Reno*, the Court listed scarcity as a unique characteristic of broadcasting and distinguished the Internet in part because the Internet "can hardly be considered a 'scarce' expressive commodity."[269]

From this recent precedent, it is tempting to conclude that the Court will similarly decline to question scarcity in a challenge to *Pacifica*, thus perpetuating the fallacy that scarcity alone justifies regulation. In an attempt to eliminate the *non sequitur* that follows from a simple reliance on scarcity, this Section proposes adding an additional premise to the scarcity argument structure.

Note, however, that doing so does not save scarcity from all of the critiques discussed above. Rather, the point is that *if* scarcity is still relevant and *if* the Court wishes to logically perpetuate the theory, an additional premise may serve to rationalize the government's at-the-source regulation.

An additional premise sufficient to eliminate the *non sequitur* might be found in communitarian obligations that underlie the existing scarcity rationale and constitutional argument structures. By unpacking the implications of the scarce spectrum in the community, the Court can identify a role for the government in regulating a scarce commodity beyond an initial allocation *where the marketplace cannot meet the goals of society*. It can posit that individuals with access to such a commodity in such a situation have obligations to the community founded on shared values.

Communitarian philosophies hold that "individual rights should be balanced by responsibilities: responsibility to the needs of the larger community and responsibility for one's personal behavior."[270] They hold that promoting—and achieving—what is good for the community is (at least presumptively) legitimate and necessary.[271] In the communitarian

267. Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, N.Y., 2 F.C.C.R. 5043, paras. 71–94 (1987).

268. *Turner Broad. Sys.*, 512 U.S. at 638.

269. Reno v. ACLU, 521 U.S. 844, 870 (1997).

270. SAMUEL WALKER, THE RIGHTS REVOLUTION: RIGHTS AND COMMUNITY IN MODERN AMERICA 144 (1998).

271. Amitai Etzioni, *Communitarianism*, *in* 1 ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD 224–28 (Karen Christensen & David Levinson eds., 2003).

framework, fundamental shared values and actions taken to achieve them counter "irresponsible self-indulgence."[272]

Communitarianism is frequently compared to liberal philosophies, such as that articulated by John Rawls in *A Theory of Justice*, which stresses the individual as an "inviolable" source of rights "that even the welfare of society as a whole cannot override."[273] In contrast, a communitarian philosophy stresses the importance of individuals' relationships with the community and shared commitment to the common good.[274] Individuals in a society substantially affected by a communitarian philosophy, therefore, inherently possess obligations to the community.

In the context of the law and our constitutional democracy, scholars have borrowed communitarian themes and developed what has become known as Civic Republicanism.[275] For example, Civic Republicans would agree with Stevens's "low value" theory of according lower judicial scrutiny to regulation of words that "contribute nothing to the process of 'deliberative democracy.'"[276] Communitarianism and Civic Republicanism thus share the belief that individual rights may be tempered by responsibility to the greater good.

While communitarian ideas often stir controversy in self-sufficient, individualized America,[277] the results of such a philosophy are evident in Congress's and the Court's efforts to protect the public interest. Moreover, the public interest standard embodies societal values when it posits that having an appropriately informed public is important to the nation. As such, it is an articulated common good, a goal toward which the nation should strive. And, perhaps, achieving that goal is a shared responsibility powerful enough to temper individual rights.

But this alone does not eliminate the *non sequitur*. The fact that an articulated common good exists does not necessitate *government* regulation to achieve that societal goal. There remains the question: why is it the government that must obligate individuals to meet community obligations?

272. WALKER, *supra* note 270, at 144.

273. JOHN RAWLS, A THEORY OF JUSTICE 3 (rev. ed. 1999).

274. *See* Etzioni, *supra* note 271, at 224–28.

275. *See e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 428 (1987). *See also* Dan M. Kahan, *Symposium: Democracy Schmemocracy*, 20 CARDOZO L. REV. 795, 796–97 (1999).

276. WALKER, *supra* note 270, at 146. *See* CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 241–52 (1993).

277. Mary Ann Glendon, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 BYU L. REV. 385, 405.

After all, Coase's critique of the scarcity rationale is based on individual concerns and one-to-one contacts between property holders.[278] It argues that the marketplace is more effective than the government at attaining an optimal use of resources.[279]

A potential answer lies in a reanalysis of scarcity in our modern society, where allocational scarcity alone remains relevant, and the marketplace cannot serve the societal goal of protecting children from indecent content.

C. SCARCITY TODAY: A FOCUS ON ALLOCATIONAL SCARCITY

Allocational scarcity should be the focus of future scarcity discussions surrounding broadcasting. The original scarcity concept announced by Congress and the Court[280] essentially holds that there are more speakers who wish to use the spectrum than the spectrum can efficiently accommodate. As a result, practically speaking, not every speaker can use the spectrum without causing unacceptable and inefficient interference. To preserve order, only a limited number of people may broadcast. In this situation, *Red Lion* stressed the need for speakers to act as proxies for those who cannot speak, thus presenting content that is representative of the community.[281] This, of course, is subject to the *non sequitur* discussed above.

Conversely, numerical scarcity represents a limit on the number of outlets available for speech and grew out of the Court's pronouncement in *Red Lion* that the paramount interest of the First Amendment is to protect the marketplace of ideas, and the most important consideration is the "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[282] According to this view, regulating broadcasting has thus arguably been about preserving the public's exposure to the maximum number of *viewpoints*.[283]

278. *See* discussion *supra* Part V.A.

279. *See id.*

280. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–38 (1994); Repeal or Modification of the Personal Attack & Political Editorial Rules, 15 F.C.C.R. 19973, para. 18 (2000). *But see* Repeal or Modification of the Personal Attack & Political Editorial Rules, *supra*, at 19994–95 (Powell, Comm'r, dissenting).

281. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 389 (1969).

282. *Id*. at 390.

283. Note, *The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1074–77 (1994).

As more people still want to *broadcast* than are able to, allocational scarcity of the *broadcast spectrum* remains true today. But the rationale behind numerical scarcity has been eroded by other technologies. The growth of other media formats, such as MVPDs and the Internet, expand the overall number of outlets available for speech. The marketplace of ideas is thus enabled as a great many viewpoints are expressed across communications media.

The twin objectives of presenting content that is representative of the community and preserving the public's exposure to the maximum number of viewpoints, however, do not coincide in all cases and may in fact be sharply opposed. As a result, reconciling the two forms of scarcity may lead to different outcomes, as has happened in the case of indecent content.

In this situation, the lack of numerical scarcity has resulted in a broad range of viewpoints. But the public interest encompasses more than viewpoints. The community has decided that exposing children to indecent content does not serve the common good. As such, exposing children to such content is not an act *representative* of the community. But the expanding marketplace, while it may provide increased access to multiple ideas, cannot adequately serve in this fiduciary capacity. It cannot appropriately represent the public and adhere to negative restrictions on content. In fact, it actively works against this goal.[284] The lack of numerical scarcity, therefore, has not helped attain and has arguably hindered the community's objective of shielding children from indecent content. Consequently, as long as we continue to accept the core notion of allocational scarcity and (assuming we solve the *non sequitur*) that the government has a defensible role in protecting the public interest, we must question which public interest obligations remain relevant in an allocation scarcity-only world.

D. PUBLIC INTEREST OBLIGATIONS TODAY: A FOCUS ON NEGATIVE RESTRICTIONS

In light of the marketplace's inability to serve both societal goals, the public interest obligations should be parsed: the marketplace adequately serves the societal goal of exposing the public to multiple viewpoints but does not serve the second goal of keeping offensive material away from children.

284. *See* discussion *infra* Part VII.D.

Government-imposed affirmative obligations have sought to provide the public with socially responsible content such as public affairs coverage and children's programming.[285] But the growth of other media has created a wealth of content that does a better job of informing and educating the public. Market forces have recognized demand and led to Internet sites and cable and satellite networks dedicated to such subjects as news, politics, children's programming, history, and education. Conversely, critics of the FCC's public interest enforcement point out that the broadcast networks have largely failed to meet meaningful affirmative public interest obligations.[286] The marketplace, therefore, seemingly possesses a superior ability to provide such content when one considers the entire range of communications media. In Coase's terms, individual rights in an efficient marketplace provide adequate affirmative content absent government regulation.

An efficient market, however, does not necessarily serve society's interest in protecting children. Rather, the opposite is likely true. The marketplace signals the demand for programming that is "affirmatively harmful to children."[287] Broadcasters are businesses seeking to appeal to the widest possible audience, and adult-driven ratings largely dictate what broadcasters currently air (outside of existing public interest obligations). Left to the devices of the marketplace, networks will air content aimed at the widest possible *adult* audience. In pursuit of more ratings and faced with more competition, broadcasters push the boundaries of the existing indecency rules, in spite of FCC regulation. Such decisions will necessarily limit less profitable programming aimed at audiences such as families and children and maximize content aimed solely at adults: violence and sex.[288] In this manner, a completely efficient and unregulated marketplace—perhaps even today's regulated marketplace—might be labeled a market failure due to its inability to produce a desired social outcome. Here,

285. *See* discussion *supra* Part IV.B.

286. *See generally* Varona, *supra* note 86.

287. Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2116 (1997).

288. *See id.* at 2116, 2130–33.

individual rights in an efficient marketplace evidently fail to serve the societal goal of providing content appropriate to children.[289]

As a result, the traditional template of public interest obligations, in which broadcast licensees are subject to affirmative obligations and negative restrictions, needs reworking. To the extent public interest obligations are defensible at all, they should be limited to negative restrictions alone. The market has proven that it can produce adequate viewpoints but that it cannot protect children from indecent content. To achieve this latter goal, public interest obligations must remain in place. Due to the *non sequitur*, however, this requires a new argument structure to logically derive government-imposed public interest obligations from allocational scarcity.

E. A NEW ARGUMENT STRUCTURE

When individuals monopolize a scarce resource, as broadcast licensees do with particular frequencies on the broadcast spectrum, and the one-to-one market interactions of property holders fail to serve a societal goal (here, the protection of children), it is fair to suggest that the government has a role to play in ensuring that the societal goal is met. Otherwise, the societal goal, the common good articulated by the community, is without substance. Such a situation would make the community and its values subservient to the market. In a sense, it is analogous to a collective action problem, in which the community does together what individuals cannot achieve separately.[290]

To avoid this situation, the government might articulate and enforce individuals' inherent communitarian obligations where critical scarce resources are monopolized and market forces fail to preserve the common good. In such a situation, the monopolist, in this case those granted access to the broadcast spectrum, is the holder of rights initially qualified by embedded communitarian obligations. In the context of the broadcast

289. A relevant argument is that private property tends to wind up in the hands of the highest bidders and, in the case of a scarce resource, the highest bidders are effectively monopoly owners. But the public importance of broadcasting is too great to risk the concentration of the spectrum, and the resulting content decisions, in the hands of a few. Benjamin, *supra* note 118, at 42–43 n.144. Such a property-based system, without regulation, may then result in a "race to the bottom," appealing to the least common denominator in society. Many believe broadcasters are even now engaged in such a race in order to maximize profitability and asset values. *See, e.g.*, *FCC Chairman to Congress: TV, Radio Must Clean Up Act*, ASSOCIATED PRESS, Feb. 11, 2004, *available at* http://www.firstamendmentcenter.org/news.aspx?id=12661.

290. I thank Professor Michael Shapiro for this insight.

spectrum, these obligations include the responsibility to promote the public interest that cannot be assured by the efficient market. The First Amendment rights of such a monopolist, while substantial, are tempered by this responsibility. The Court, therefore, may weigh the monopolist's free speech rights less heavily. That is, the Court might be less concerned with abridging such rights because those rights contain an inherent qualification: the monopolist, and another similarly situated speaker, is part of a community working toward the common good. In other words, the free speech right has an embedded qualification, one originating in communitarian obligations and required in certain situations. Alternatively, one might characterize the argument not in terms of "embedding" a right but qualifying a right after the fact. The result of either characterization of rights is a standard of review weaker than strict scrutiny and one which might logically uphold government regulation designed to channel indecent material away from children.

There are a number of serious problems with this argument. Critics might argue that it endangers *all* fundamental rights through some built-in or added-on communitarian constraint. Additionally, critics might argue that it promotes only confusion to embed countervailing considerations into the *very structure* of a right. We have accepted as a society, however, that it is plausible to limit some rights in certain contexts—as in prisons, for example.[291] Moreover, the qualification of rights in *this* context is arguably confinable to situations involving market failures generated by a set of monopolies. Despite these reservations, the proposed arguments are functionally equivalent to what the Court has been doing since *NBC* and *Red Lion.*

Critically, with the proposed arguments, the *non sequitur* disappears because the communitarian obligation is either embedded within the concept of a constrained right or the right is constrained simply by being expressly juxtaposed with a limitation (for example, free speech rights + monopolized scarce resource + market failure). *The very installation of intermediate scrutiny arguably reflects the qualification of the broadcaster's speech rights by a communitarian premise, however set forth*, and so the reconstructed argument here is simply an effort to make this more explicit. It is a necessary *rationalization* of intermediate scrutiny under the hypothetical imperative facing the Court.

291. *See* Turner v. Safley, 482 U.S. 78, 89 (1987).

In general then, it is only because the government has a *necessary* role in ensuring the preservation of the common good, given that this role cannot be filled by the market, that the government is able to do what amounts to a reification of these communitarian obligations.

Accepting the argument proposed above, the standard of review thus presupposes the preexisting communitarian obligations of broadcast licensees in its formulation. Assuming an articulated community good, therefore, and the embedded obligations qualifying the speech right, the *rationalized* argument structure would look as follows:

Scarce Resource & Inherent Community Obligations & Failure of the Market to Satisfy the Public Interest Justifies a Lower Standard of Review that permits more content regulation and more stringent time, place, and manner regulations.

Indeed, such a theory already underlies the compelling interest test in constitutional argument structures. If the government identifies a compelling interest, it has decided that a societal goal outweighs the costs imposed by *necessary* government action, and parties are thus obligated to act in furtherance of the interest. This is equally as goal-oriented as reified communitarian obligations: the community articulates a shared value and strives to achieve it with obligations of shared responsibility.

The final step for the Court would be to distinguish broadcasting from other media that receive strict scrutiny. Importantly, scarcity presupposes crucial differences between broadcasting and other media.[292] Of course, one could argue, as noted above, that there is no strong reason *even to make the distinction between broadcast and nonbroadcast*. However, this Note merely argues that *if*, for cultural or political reasons, the Court wants to preserve *government* protection of children from inappropriate, *broadcasted* material, it will have to rationalize its existing intermediate scrutiny argument structure; blocking technologies, approved of in *Playboy*,[293] likely preclude a successful defense of such regulation under strict scrutiny. Agreeing to distinguish among media, therefore, we can accept scarcity's presupposition and continue a media-by-media approach.

292. *See* discussion *supra* Parts IV.B, V.B.

293. United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 815 (2000).

VIII. CONCLUSION

Admittedly, the new argument structure presented here does not stand on completely firm ground. Among other problems, it is subject to severe criticism about the nature of government in our society. And as noted above, accepting embedded qualifications within rights might threaten all fundamental rights; once the government has such authority, it may continue not only to exercise it but also to expand it. But this Note has attempted to cabin its argument to a specific situation, one containing an articulated common good, a monopolized scarce resource, and the presence of market failure. Moreover, critics would have to address the similarities between communitarian interests and the current compelling interest test. To reject the idea of a component of communitarian obligation in formulating threshold rights and applying standards of review is to risk the *very idea* of a compelling *state or government* interest for a full-strength fundamental right. Finally, critics would have to acknowledge that a logically coherent but potentially flawed argument structure is preferable to one founded on a *non sequitur*.

As we have seen, technology has eroded *Pacifica*'s argument structure. New communications media are virtually indistinguishable, from the public's standpoint, from broadcast technology. Moreover, household-level blocking technology provides parents with near absolute control over what content enters the home. Despite these facts, this argument structure alone continues to be used to justify applying a lower standard of review to broadcasting. In addition, the underlying premise of scarcity is susceptible to varied criticisms of its own and cannot, on its own, logically justify government regulation. Without a replacement argument structure, the Court would be left to reiterate the conceptual fallacy of inferring government power to regulate content from the fact of scarcity.

Selectively reifying embedded communitarian obligations might not be the optimal solution but might serve to close a critical gap in First Amendment jurisprudence. Without such an additional premise, whether embedded within our understanding of the speech right or entered as a new, separate premise, scarcity's *non sequitur* cannot be eliminated. Absent a plausible alternative to the existing argument structure, the existing doctrine, when challenged in the Court, may fail to preserve the *compelling interest* of protecting children from indecent broadcasts. Communitarian obligations, however, may contribute to a new argument structure that provides a plausible, logical alternative in a changed society that strives to adequately serve its common good.