

# Taking Free Speech Sirius-ly: How the Modern Appearance of Personalities on Various Media Supports Overturning *Red Lion* and *Pacifica*

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*Cessante ratione legis cessat, et ipsa lex.*

Where the reason for the existence of a law ceases,  
the law itself should also cease.<sup>1</sup>

## TABLE OF CONTENTS

INTRODUCTION .....	134
I. THE SUPREME COURT DECISIONS ESTABLISHING THE CURRENT RULE .....	137
A. <i>From the Beginning</i> .....	137
B. <i>The Court Lays the Foundation for Pacifica</i> .....	138
C. <i>The Court Gets More Specific in Pacifica</i> .....	139
II. RATIONALES FOR THE MEDIA DISTINCTION DOCTRINE .....	141
A. <i>The Scarcity Rationale</i> .....	141
B. <i>The Pervasiveness Rationale</i> .....	142
1. An Overview of the Rationale .....	143
2. As to Children .....	144
III. THE CURRENT STATE OF FCC REGULATION ON BROADCAST MEDIA .....	144
A. <i>Howard Stern's Discussion of Private Parts</i> .....	144
B. <i>Janet Jackson's Halftime Super Bowl Show</i> .....	145
IV. CROSS-MEDIA PERSONALITIES .....	145
A. <i>New Technologies</i> .....	145
1. Satellite Radio .....	145
2. Smartphones and Tablets .....	146
3. Internet .....	146

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<sup>1</sup> BALLENTINE'S LAW DICTIONARY 188 (3d ed. 1969).

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4. Broadcast Radio .....	147
B. <i>Current Behaviors</i> .....	148
C. <i>Examples of Cross-Media Personalities</i> .....	148
D. <i>Proposal</i> .....	150
1. The Scarcity Rationale .....	150
2. The Pervasiveness Rationale .....	151
E. <i>Technological Innovations as Support for Pacifica?</i> .....	154
V. WHAT THE WORLD WOULD BE LIKE WITHOUT <i>RED LION</i> AND <i>PACIFICA</i> .....	154
A. <i>Overview</i> .....	154
B. <i>Examples</i> .....	155
VI. CONCLUSION .....	156

## INTRODUCTION

On a December morning in 2005, Howard Stern stood before a crowd in New York City.<sup>2</sup> Thousands of New Yorkers filled the nearby streets, hoping to be a part of a historic day for U.S. entertainment.<sup>3</sup> After over two decades of providing entertainment via broadcast radio, Stern—one of the most successful radio personalities of all time—addressed his audience for the last time on broadcast radio.<sup>4</sup> Stern was taking his show to satellite radio.<sup>5</sup> He decided to switch media primarily because of his inability to transmit his show via broadcast radio without being fined by the Federal Communications Commission (“FCC”).<sup>6</sup> When *The Howard Stern Show* was on broadcast radio, the FCC repeatedly fined the radio stations that aired the show for transmitting Stern’s infamously crude humor.<sup>7</sup> These repeated fines eventually prompted a dispute between Stern and his radio station in 2004, which led to Stern’s decision to leave broadcast radio for satellite.<sup>8</sup> That December, standing before members of his audience, Stern proclaimed, “Are we ever going to bow to the government? Hell no! . . . The government says clean up your act and we say, ‘never.’”<sup>9</sup> Although *The Howard Stern Show* successfully continues on SiriusXM today,<sup>10</sup> it is alarming that a government agency could effectively force one of the

<sup>2</sup> Liz Brown, *FLASHBACK: Howard Stern’s Last Day on Terrestrial Radio*, EXAMINER (Nov. 20, 2011, 12:06 PM), <http://www.examiner.com/article/flashback-howard-stern-s-last-day-on-terrestrial-radio>.

<sup>3</sup> *See id.*

<sup>4</sup> *See id.*

<sup>5</sup> *See id.*

<sup>6</sup> *See Howard Stern Suspended for Indecency*, CNN (Feb. 26, 2004, 1:15 PM), <http://www.cnn.com/2004/SHOWBIZ/News/02/25/stern.suspension/>.

<sup>7</sup> *See, e.g., id.* Often a single company will own multiple television or radio stations that broadcast the same content in different regions. *See id.* In this instance, Clear Channel owned the stations that broadcasted *The Howard Stern Show*. *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *The Howard Stern Show* (Clear Channel radio broadcast Dec. 15, 2005), available at <http://www.youtube.com/watch?v=p0cAuucFJ6o>.

<sup>10</sup> J.P. Mangalindan, *What Howard Stern’s \$400 Million Sirius Contract Means to the Street*, FORTUNE

most popular personalities in the history of broadcast radio to switch media because of the content of his show.

Should the government be permitted to do this? For several decades, the Supreme Court has continued to answer “yes.”<sup>11</sup> In 1978, the Supreme Court held in *Federal Communications Commission v. Pacifica Foundation* that the FCC may restrict speech that is “indecent”<sup>12</sup> on broadcast television and broadcast radio.<sup>13</sup> The Court reasoned that “each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”<sup>14</sup>

The notion that the FCC can restrict speech on broadcast media because of its offensiveness is so familiar today that its constitutionality is often taken for granted.<sup>15</sup> At times, commentators treat broadcast speech as being governed entirely by public opinion.<sup>16</sup> For example, one observer proclaimed in 2013 that “[t]he FCC is failing America’s families, giving broadcasters unfettered access to our children to peddle their vulgarity in the name of ‘freedom of speech.’ *We won’t stand for it.*”<sup>17</sup>

Still, the constitutionality of distinguishing between different types of media—*i.e.*, affording less protection to broadcast media than other media—is more controversial than it might appear.<sup>18</sup> In fact, at least two Supreme Court justices recently expressed a willingness to overturn *Pacifica*.<sup>19</sup> In 2009, Justice Thomas wrote in a concurring opinion in *Federal Communications Commission v. Fox Television Stations, Inc.*: “I write separately . . . to note the questionable viability of the two precedents that support the FCC’s assertion of constitutional authority to regulate the programming at issue in this case. . . . I am open to reconsideration of *Red Lion* and *Pacifica* in the proper case.”<sup>20</sup> Then, in 2012, Justice Ginsburg wrote a concurring opinion in which she stated: “In my view, the Court’s decision in *FCC v. Pacifica* was wrong when it was issued. Time, technological advances, and the Commission’s untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration.”<sup>21</sup>

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(Dec. 9, 2010, 4:06 PM), <http://archive.fortune.com/2010/12/09/news/companies/Sirius-Stern-400-million.fortune/index.htm>.

<sup>11</sup> See Fed. Commc’ns Comm’n v. *Pacifica Found.*, 438 U.S. 726, 748 (1978).

<sup>12</sup> “Indecent” is a term of art that is discussed in more detail in Part I.A.

<sup>13</sup> See *Pacifica*, 438 U.S. at 748.

<sup>14</sup> See *id.*

<sup>15</sup> See Penny Young Nance, *Hey, FCC, We Don’t Need More Nudity and Profanity on TV*, FOX NEWS (May 7, 2013), <http://www.foxnews.com/opinion/2013/05/07/hey-fcc-dont-need-more-nudity-and-profanity-on-tv/>.

<sup>16</sup> See *id.*

<sup>17</sup> See *id.* (emphasis in original).

<sup>18</sup> See, e.g., Josephine Soriano, Note, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion’s Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341, 343 (2006).

<sup>19</sup> Fed. Commc’ns Comm’n v. *Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring); Fed. Commc’ns Comm’n v. *Fox Television Stations, Inc.*, 556 U.S. 502, 530 (2009) (Thomas, J., concurring).

<sup>20</sup> 556 U.S. at 530, 535 (Thomas, J., concurring).

<sup>21</sup> *Fox Television Stations, Inc.*, 132 S. Ct. at 2321 (Ginsburg, J., concurring) (citation omitted).

The fundamental premise underlying *Federal Communications Commission v. Pacifica Foundation*,<sup>22</sup> as well as *Red Lion Broadcasting Co. v. Federal Communications Commission*<sup>23</sup> (which can be seen as foundational to the *Pacifica* majority opinion), is that different media should be treated differently under the First Amendment, and that broadcast media should receive less protection than other media (hereinafter referred to as the “media distinction doctrine”).<sup>24</sup> Two main rationales exist for the media distinction doctrine.<sup>25</sup> First, under the scarcity rationale, the government must regulate broadcast media because of the limited nature of frequency wavelengths in broadcast media.<sup>26</sup> If the government did not regulate broadcast media, frequencies would become flooded and thus unusable.<sup>27</sup> As a result, the government can grant only a certain number of licenses to persons who want to air content on broadcast media.<sup>28</sup> The scarcity rationale thus maintains that it is fair for the government to place restrictions on those speakers who are fortunate enough to be granted broadcast licenses.<sup>29</sup>

A second rationale for the media distinction doctrine asserts that broadcast media enter the home in a uniquely pervasive manner.<sup>30</sup> Under the pervasiveness rationale, broadcasters push content into homes (because the broadcaster—not the viewer—chooses what to broadcast at a given time) and, unlike other media, the mere pressing of a button can cause the content to be seen or heard by those inside the home, even by children too young to read.<sup>31</sup> Thus, this second rationale alleges that the content is regulated to prevent people from having offensive content forced upon them or their children.<sup>32</sup>

This article explores both rationales from a practical, contemporary perspective. Specifically, many entertainers and public figures today are not limited to merely one medium, such as broadcast radio. Instead, new technologies have enabled such personalities to reach an audience through various media. For example, a fan of Howard Stern can currently access Howard Stern’s content on SiriusXM radio, on YouTube, in his movie, and (perhaps ironically) on broadcast television.<sup>33</sup> Stern is not alone in his accessibility; it is now commonplace for personalities to reach the public through multiple forms of media.<sup>34</sup> This article refers to such personalities as “cross-media personalities.”<sup>35</sup> In this article, I argue that, given the prevalence

<sup>22</sup> 438 U.S. 726 (1978).

<sup>23</sup> 395 U.S. 367 (1969).

<sup>24</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 375.

<sup>25</sup> See *infra* Part II.

<sup>26</sup> See *infra* Part II.A.

<sup>27</sup> See *infra* Part II.A.

<sup>28</sup> See *infra* Part II.A.

<sup>29</sup> See *infra* Part II.A.

<sup>30</sup> See *infra* Part II.B.

<sup>31</sup> See *infra* Part II.B.

<sup>32</sup> See *infra* Part II.B.

<sup>33</sup> See *infra* Part IV.A.

<sup>34</sup> See *infra* Part IV.C.

<sup>35</sup> The term “personality” here is used broadly, including individuals who may be considered entertainers, news pundits, sports figures, disc jockeys, and important political figures, and virtually anyone

of cross-media personalities today, and the change in media accessibility, neither rationale for affording less First Amendment protection to broadcast media is persuasive. Thus, the fundamental premise underlying both *Pacifica* and *Red Lion*—the media distinction doctrine—is no longer sound. Instead, the continued practice of providing less First Amendment protection to broadcast media today is cultural: it allows majority public opinion to condemn certain speech, directly contradicting the freedom of speech that is guaranteed by the First Amendment.<sup>36</sup>

Part I of this article examines the decisions in which the Supreme Court developed the media distinction doctrine. Part II explores the rationales underlying the media distinction doctrine. Part III considers the current state of FCC regulation of broadcast media. Part IV explores cross-media personalities, along with the broader role of broadcast radio and broadcast television in modern life in the United States. I argue that, since personalities often reach the public through various forms of media today, the particular medium on which a personality appears is largely irrelevant to viewers and listeners. The existence of cross-media personalities demonstrates that no strong rationale exists for affording less First Amendment protection to broadcast media than non-broadcast media. This article ultimately concludes that the media distinction doctrine is no longer justifiable, and that the decisions in which the media distinction doctrine was dispositive should be overturned. Finally, Part V considers the potential effect of overturning *Red Lion* and *Pacifica* and posits that market factors and other First Amendment doctrines sufficiently address the concerns of *Red Lion* and *Pacifica* supporters by preventing many types of offensive speech on broadcast media.

## I. THE SUPREME COURT DECISIONS ESTABLISHING THE CURRENT RULE

### A. *From the Beginning*

The events leading up to *Pacifica*<sup>37</sup>—the Supreme Court decision that allowed the FCC to fine Howard Stern and many other personalities—began long before satellite radio existed.<sup>38</sup> In 1927, Congress took the duty of providing access to radio frequencies from the private sector and placed it into the hands of the Federal Radio Commission.<sup>39</sup> As the Supreme Court later observed, “[b]efore 1927, the allocation of [broadcast] frequencies was left entirely to the private sector, and the result was chaos.”<sup>40</sup>

The Federal Radio Commission was established to allocate radio frequencies among the competing applicants.<sup>41</sup> In 1934, Congress replaced this entity with the

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else who might attempt to transmit speech to the public at large.

<sup>36</sup> U.S. CONST. amend. I.

<sup>37</sup> Fed. Commc’ns Comm’n v. *Pacifica Found.*, 438 U.S. 726 (1978).

<sup>38</sup> *The History of Satellite Radio*, SATELLITERADIOUSA, [http://satelliteradioua.com/satellite\\_radio\\_history.html](http://satelliteradioua.com/satellite_radio_history.html) (last visited Apr. 10, 2015) (“Digital Audio Radio Service (DARS) was established by the FCC in 1992 by establishing certain segments of radio frequency for satellite broadcast on radio.”).

<sup>39</sup> Jordan Butler, Comment, *The FCC in 2010: Seventy-Six Years of Obscenity, Indecency, and Inconsistency*, 39 CAP. U. L. REV. 621, 624 (2011).

<sup>40</sup> *Red Lion Broad. Co. v. Fed. Commc’ns Comm’n*, 395 U.S. 367, 375 (1969).

<sup>41</sup> PATRICIA MOLONEY FIGLIOLA, CONG. RESEARCH SERV., RL 32589, THE FEDERAL COMMUNICATIONS

Federal Communications Commission.<sup>42</sup> The FCC derives its power to regulate broadcast media from the Communications Act of 1934.<sup>43</sup> The Act also gave the FCC power to consider the public interest in regulating broadcast media, “specifically direct[ing] the FCC] to consider the demands of the public interest in the course of granting licenses, 47 U.S.C. §§ 307(a), 309(a); renewing them, 47 U.S.C. § 307; and modifying them.”<sup>44</sup> The federal courts were left to determine whether this grant of power was consistent with the First Amendment.<sup>45</sup>

Modernly, the FCC restricts speech on broadcast media by imposing fines on speech that is indecent but not obscene.<sup>46</sup> The FCC recently stated that “each radio and television licensee is required by law to operate its station in the ‘public interest, convenience, and necessity.’”<sup>47</sup> More specifically, the FCC stated that, consistent with the First Amendment, it can prohibit both “indecent material” and “profane material” between the hours of 6 a.m. and 10 p.m., due to the “reasonable risk that children may be in the audience.”<sup>48</sup> “Indecent programming” is defined 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 excretory organs or activities.”<sup>49</sup> Profane material is defined “to include language that is both ‘so grossly offensive to members of the public who actually hear it as to amount to a nuisance’ and is sexual or excretory in nature or derived from such terms.”<sup>50</sup> Similarly, at the time that *Pacifica* was decided, the FCC restricted speech on broadcast media by imposing fines on speech that was indecent but not obscene.<sup>51</sup>

## B. *The Court Lays the Foundation for Pacifica*

In 1969, the Supreme Court issued a decision that significantly impacted free speech in the context of broadcast media, not because of the decision’s holding, but

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COMMISSION: CURRENT STRUCTURE AND ITS ROLE IN THE CHANGING TELECOMMUNICATIONS LANDSCAPE 1 (2013).

<sup>42</sup> See *id.*

<sup>43</sup> 47 U.S.C. §§ 151-162, 301-386 (2014) (“[T]here is created a commission to be known as the ‘Federal Communications Commission’ . . . which shall execute and enforce the provisions of this chapter.”).

<sup>44</sup> *Red Lion*, 395 U.S. at 379-80.

<sup>45</sup> See *infra* Part II.

<sup>46</sup> *The Public and Broadcasting*, FED. COMM’NS. COMM’N, <http://www.fcc.gov/guides/public-and-broadcasting-july-2008> (last visited Apr. 10, 2015); see also Aurele Danoff, Comment, “*Raised Eyebrows*” *Over Satellite Radio: Has Pacifica Met Its Match?*, 34 PEPP. L. REV. 743, 769 (2007).

<sup>47</sup> *The Public and Broadcasting*, *supra* note 46.

<sup>48</sup> *Id.*; see also Abigail T. Rom, Note, *From Carlin’s Seven to Bono’s One: The Federal Communications Commission’s Regulation of Those Words You Can Never Say on Broadcast Television*, 44 VAL. U. L. REV. 705, 706-07 (2010).

<sup>49</sup> *The Public and Broadcasting*, *supra* note 46.

<sup>50</sup> *Id.* The calculation of fines imposed by the FCC is governed by regulation. See, e.g., 47 C.F.R. § 1.80(b)(1) (2013) (“[I]f the violator is determined by the Commission to have broadcast obscene, indecent, or profane material, the forfeiture penalty under this section shall not exceed \$350,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$3,300,000 for any single act or failure to act . . .”).

<sup>51</sup> See *Fed. Commc’ns Comm’n v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

because of the reasoning the Court used to reach its holding.<sup>52</sup> In *Red Lion Broadcasting Company v. Federal Communications Commission*, the Supreme Court considered the constitutionality of the FCC's "fairness doctrine."<sup>53</sup> Under the fairness doctrine, the "Federal Communications Commission ha[d] for many years imposed on radio and television broadcasters the requirement that discussion of public issues be presented on broadcast stations, and that each side of those issues must be given fair coverage."<sup>54</sup> Red Lion argued that the fairness doctrine violated broadcasters' First Amendment rights.<sup>55</sup>

Red Lion reasoned that the First Amendment prohibits restricting a person from "publishing what he thinks," and that this right "applies equally to broadcasters."<sup>56</sup> In its opinion upholding the fairness doctrine, the Court rejected Red Lion's argument, stating that, "[a]lthough broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them."<sup>57</sup> Furthermore, the majority pointed out that "[t]he right of free speech of a broadcaster, the user of a sound truck, or any other individual does not embrace a right to snuff out the free speech of others."<sup>58</sup> Thus, the Court based its holding on the fact that the fairness doctrine regulated broadcast media, implying that restrictions could be imposed on broadcast media which could not be imposed on other media.<sup>59</sup> The Court thus set forth the media distinction doctrine in *Red Lion* which allowed the Court to then reach its holding in *Pacifica*.<sup>60</sup>

### C. *The Court Gets More Specific in Pacifica*

Nearly a decade after *Red Lion*, the Court again considered the First Amendment's Free Speech Clause in the context of broadcast media.<sup>61</sup> In *Pacifica*, the FCC had sanctioned a radio station for broadcasting a "satiric monologue" in the afternoon.<sup>62</sup> The broadcast consisted of a prerecorded stand-up comedy routine by George Carlin, in which Carlin discussed the nature of certain words<sup>63</sup> that he believed society had deemed inappropriate in all circumstances (and repeated them profusely in the process, thereby implying that society's denouncement of the words was unfounded).<sup>64</sup>

<sup>52</sup> See *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367 (1969).

<sup>53</sup> See *id.* at 369.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 386.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 386-87 (citation omitted).

<sup>58</sup> *Id.* at 387.

<sup>59</sup> See *id.*

<sup>60</sup> See *id.*

<sup>61</sup> See *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

<sup>62</sup> See *id.* at 726, 729.

<sup>63</sup> See Timothy Bella, *The '7 Dirty Words' Turn 40, But They're Still Dirty*, ATLANTIC (May 24, 2012, 8:32 AM), <http://www.theatlantic.com/entertainment/archive/2012/05/the-7-dirty-words-turn-40-but-theyre-still-dirty/257374/>.

<sup>64</sup> See *Pacifica*, 438 U.S. at 729; see also GEORGE CARLIN, *Seven Words You Can Never Say on*

Pacifica, which owned the sanctioned radio station, argued that its speech did not fall within the “obscenity” exception to First Amendment protection,<sup>65</sup> and contended further that the FCC’s restriction of the speech was not permitted by any other First Amendment doctrine.<sup>66</sup> Thus, the issue in the case became “whether the Federal Communications Commission has any power to regulate a radio broadcast that is indecent but not obscene.”<sup>67</sup> The Court quickly dismissed Pacifica’s first argument by noting that the FCC did not purport to act under the obscenity exception, but instead was regulating speech as indecent on broadcast media.<sup>68</sup> Still, the Court did concede that the inquiry into indecency is similar to an inquiry into obscenity, noting that “[t]hese words offend for the same reasons that obscenity offends.”<sup>69</sup> The majority then found that the FCC indeed had the power to regulate a radio broadcast that was indecent but not obscene.<sup>70</sup> Citing *Red Lion*, Justice Stevens noted that “[w]e have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.”<sup>71</sup> Thus, the Court expressly held what was implied in *Red Lion*: broadcast media receive the least protection compared to all other media.<sup>72</sup> The *Pacifica* opinion was based on two rationales, discussed below.<sup>73</sup>

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*Television, on CLASS CLOWN* (Atlantic Records 1972) (“I can dig why some of those words got in the list, like ‘cocksucker’ and ‘motherfucker’. . . . Those are heavyweight words, you know! There’s a lot going on there, man! Besides the literal translation, and the emotional feeling, I mean, they’re just busy words. There’s a lot of syllables to contend with. And those ‘K’s, those [a]gressive sounds, they jump out at you.”).

<sup>65</sup> The obscenity exception to First Amendment protection is discussed in more detail in Part V.A. The word “obscenity” as used in this article is a First Amendment term of art. *See Miller v. Cal.*, 413 U.S. 15, 24 (1973). The Supreme Court has deemed obscene speech to be unprotected by the First Amendment. *See id.* Speech is obscene if it satisfies three requirements: first, “[t]he average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest”; second, “[t]he work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law”; and finally, “[t]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.” *Id.*

<sup>66</sup> *See Pacifica*, 438 U.S. at 742.

<sup>67</sup> *Id.* at 729.

<sup>68</sup> *Id.* at 745-48.

<sup>69</sup> *Id.* at 746.

<sup>70</sup> *See id.* at 748-51.

<sup>71</sup> *Id.* at 748 (citation omitted).

<sup>72</sup> The *Pacifica* majority did not state exactly what standard applies to broadcast media. *Cf. Fed. Comm’n Comm’n v. League of Women Voters of Cal.*, 468 U.S. 364, 380 (1984) (noting that speech restrictions on broadcast media “have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial governmental interest . . .”). This is a lower standard than the general strict scrutiny standard for speech restrictions. *See id.* at 381.

<sup>73</sup> *See infra* Part II.

## II. RATIONALES FOR THE MEDIA DISTINCTION DOCTRINE

Given the significance of the media distinction doctrine, it is necessary to consider the doctrine's justifications as stated by the Supreme Court in *Red Lion* and *Pacifica*.

### A. *The Scarcity Rationale*

The *Red Lion* decision relied on the "scarcity rationale" for the media distinction doctrine in the context of the FCC's fairness doctrine.<sup>74</sup> In *Red Lion*, the Court wrote:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same "right" to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves. It would be strange if the First Amendment, aimed at protecting and furthering communications, prevented the Government from making radio communication possible by requiring licenses to broadcast and by limiting the number of licenses so as not to overcrowd the spectrum.<sup>75</sup>

In other words, the FCC must have the power to regulate who transmits speech on broadcast frequencies in order to facilitate broadcast communication.<sup>76</sup> Otherwise, any person would be permitted to broadcast over radio or television without any centralized organization.<sup>77</sup> The result would be that two people could broadcast over the same frequency, making both broadcasts imperceptible.<sup>78</sup>

<sup>74</sup> *Red Lion Broad. Co. v. Fed. Comm'n Comm'n*, 395 U.S. 367, 388-89 (1969). This rationale was previewed in 1943 in *National Broadcasting Co. v. United States*, 319 U.S. 190, 213 (1943), when the Supreme Court stated that there are:

certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum is simply not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another . . . . In enacting the Radio Act of 1927, . . . Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential.

See also Stuart Minor Benjamin, *The Logic of Scarcity: Idle Spectrum as a First Amendment Violation*, 52 DUKE L.J. 1, 1 (2002); John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Mar. 2005) (unpublished research paper), available at <http://transition.fcc.gov/ownership/materials/already-released/scarcity030005.pdf>.

<sup>75</sup> *Red Lion*, 395 U.S. at 388-89.

<sup>76</sup> See *id.*

<sup>77</sup> See *id.*; see also Thomas W. Hazlett, Sarah Oh, and Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 54 (2010).

<sup>78</sup> See Hazlett et al., *supra* note 77, at 51-52. Consider the following hypothetical scenario: your next-door neighbor buys a new Ford Mustang and is so happy with her purchase that she announces she will host a day-long radio broadcast the following day in which she discusses the various features of her car. Residents of your town can hear the broadcast by tuning their radios to AM 510. Your neighbor across the street, a Chevrolet enthusiast, is furious and soon announces that he will have a competing broadcast on AM 520 on the same day. Soon nearly every person in town is participating in the discussion, and engaging in his or her own radio broadcast. See *Set Up a Pirate Radio Station*, WIRED (Jan. 18, 2011), [http://howto.wired.com/wiki/Set\\_Up\\_a\\_Pirate\\_Radio\\_Station](http://howto.wired.com/wiki/Set_Up_a_Pirate_Radio_Station) (explaining the feasibility of creating a "pirate"

The scarcity rationale thus maintains that if broadcast media were not regulated as they presently are, it would often be impossible for everyone who wants to speak to find an unused portion of the electromagnetic spectrum with which to broadcast their radio or television programs.<sup>79</sup> This is especially true considering that many stations are already used by large-scale broadcasters such as major news stations.<sup>80</sup> Either some people will be prevented from speaking or people will broadcast over a frequency that is already being used, making both broadcasts imperceptible.<sup>81</sup> Therefore, because non-broadcast media do not have the physical and technological constraints that are inherent in the electromagnetic spectrum, they should remain less regulated than broadcast.<sup>82</sup>

A natural argument against the scarcity rationale is that the existence of physical limitations on the number of people who can use these media does not justify regulating the people who are able to use these media in a different way than on other media.<sup>83</sup> Put differently, it is conceivable that the FCC could limit who can use broadcast media without restricting broadcast media more heavily than other media.<sup>84</sup> The Court in *Red Lion* seemed to provide a response to this argument:

[A]s far as the First Amendment is concerned those who are licensed stand no better than those to whom licenses are refused. A license permits broadcasting, but the licensee [*sic*] has no constitutional right to be the one who holds the license or to monopolize a radio frequency to the exclusion of his fellow citizens.<sup>85</sup>

In short, the scarcity rationale for the media distinction doctrine holds that because of the unique nature of broadcast media, which limits the number of speakers, it is fair to require those who are fortunate enough to speak through broadcast media to take into account the interests of the public.<sup>86</sup>

## B. *The Pervasiveness Rationale*

The pervasiveness rationale of *Red Lion* and *Pacifica* posits that broadcast media uniquely pervade into the home and that, once in the home, offensive language on broadcast media cannot be stopped until some offensive language has already been heard.<sup>87</sup>

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radio station from one's home).

<sup>79</sup> See *Red Lion*, 395 U.S. at 388-89.

<sup>80</sup> See, e.g., *California Stations*, COAST TO COAST AM, <http://www.coasttocoastam.com/stations/california> (last visited Apr. 10, 2015).

<sup>81</sup> See *Red Lion*, 395 U.S. at 388-89.

<sup>82</sup> See *id.*

<sup>83</sup> See, e.g., Hazlett et al., *supra* note 77, at 51-52.

<sup>84</sup> See *id.*

<sup>85</sup> *Red Lion*, 395 U.S. at 389.

<sup>86</sup> See *id.*

<sup>87</sup> Fed. Comm'n's Comm'n v. *Pacifica Found.*, 438 U.S. 726, 748 (1978).

## 1. An Overview of the Rationale

As to the first concern, the Court stated in *Pacifica*:

[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.<sup>88</sup>

Thus, the Court in *Pacifica* reasoned that the intrusive nature of broadcast media sets them apart from other media.<sup>89</sup> To make this point clearer, consider George Carlin's "Filthy Words" standup routine that was at issue in *Pacifica*.<sup>90</sup> The Court essentially reasoned that, although the same exact recording of Carlin's performance was available on a vinyl record, nobody could force the vinyl record to be played in someone's home.<sup>91</sup> At the time of *Pacifica*, a person could make the conscious decision to walk into a record store, purchase the record and become a listener, but she was also free to determine whether she would find the record's content offensive and decide whether or not to purchase it.<sup>92</sup> By broadcasting the performance on its radio station, however, the broadcaster removed the person's choice to become a listener.<sup>93</sup>

The most obvious response to this argument is that if listeners do not like what they hear on the radio, they are free to change the station.<sup>94</sup> After all, nobody is forced to listen to a particular station.<sup>95</sup> In that sense, the decision to listen to a radio station broadcasting George Carlin seems similar to the decision a person makes by walking into a record store and purchasing a George Carlin record.<sup>96</sup> Responding to this argument, the *Pacifica* majority went on to state:

Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.<sup>97</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.*

<sup>93</sup> *See id.*

<sup>94</sup> *See id.* at 765-66 (Brennan, J., dissenting) ("Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the 'off' button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection."). The same response would apply to broadcast television; this argument focuses on broadcast radio only for clarity of analysis.

<sup>95</sup> *See id.*

<sup>96</sup> *See id.*

<sup>97</sup> *See id.* at 748-49.

Thus, unlike buying a George Carlin record, which allows the customer to anticipate whether she will find the content of the record offensive *before* listening, the scenario broadcast radio creates is more equivalent to a record without a cover or label: the customer must first listen to the content to determine whether she finds it offensive and, if she does, then she has already been exposed to at least some content that she finds offensive.<sup>98</sup>

## 2. As to Children

Relatedly, the *Pacifica* majority opinion emphasized its belief that broadcast media could uniquely harm children.<sup>99</sup> The majority noted that “broadcasting is uniquely accessible to children, even those too young to read. Although [a] written message might have been incomprehensible to a first grader, *Pacifica*’s broadcast could have enlarged a child’s vocabulary in an instant.”<sup>100</sup> This reasoning underscores the general pervasiveness rationale: some members of the unwilling audience will be children—as well as parents who do not want to expose their children to offensive language—but parents should have a choice as to what they allow their children to be exposed to.<sup>101</sup>

### III. THE CURRENT STATE OF FCC REGULATION ON BROADCAST MEDIA

To understand how the FCC fines speech that is indecent but not obscene, consider the following recent examples of actual fines imposed by the FCC.

#### A. *Howard Stern’s Discussion of Private Parts*

In 2004, the FCC fined Infinity Broadcast Operations, a broadcast radio station, when *The Howard Stern Show* discussed humorous nicknames for sexual acts.<sup>102</sup> The FCC found that Howard Stern’s “description of the sexual and excretory organs and activities in the complained of material is graphic and explicit,” and that the tone was “not clinical.”<sup>103</sup> Next, the FCC rejected the argument that “due to profound changes in social mores, the range of acceptable topics and words for broadcast discussion has changed dramatically . . . .”<sup>104</sup> Finally, the FCC noted that “[i]t is undisputed that the complained-of material was broadcast within the 6 a.m. to 10 p.m. time

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 749-50.

<sup>100</sup> See *id.* at 749 (referring to *Cohen v. California*, 403 U.S. 15 (1971), where the Supreme Court overturned a conviction for disturbing the peace on free speech grounds where a man wore a jacket that read “Fuck the Draft”). The Court seems to have had a narrow age group in mind, as “[a]t age 5, most kindergartners become able to . . . [b]egin to match spoken words with written ones.” See *Typical Language Accomplishments for Children, Birth to Age 6*, U.S. DEP’T OF EDUC. (Sept. 1, 2003), <http://www2.ed.gov/parents/academic/help/reader/part9.html>.

<sup>101</sup> See *Pacifica*, 438 U.S. at 748-49.

<sup>102</sup> Infinity Broad. Operations, Inc., 19 F.C.C. Rcd. 5032, 5040-41 (2004).

<sup>103</sup> *Id.* at 5036.

<sup>104</sup> *Id.* at 5037.

frame relevant to an indecency determination . . . .”<sup>105</sup> Therefore, the FCC imposed a fine under its framework.<sup>106</sup>

### B. *Janet Jackson’s Halftime Super Bowl Show*

The FCC also imposed fines on television stations for the now infamous 2004 Super Bowl halftime show in which one of Janet Jackson’s breasts was exposed.<sup>107</sup> The FCC again applied its indecency analysis.<sup>108</sup> First, the material “must describe or depict sexual or excretory organs or activities . . . .”<sup>109</sup> Second, the content of the broadcast “must be patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>110</sup> Being that the first prong was clearly met, the analysis focused on the second prong, and the FCC concluded that “in context and on balance, the on-camera exposure of Ms. Jackson’s breast is patently offensive as measured by contemporary community standards for the broadcast medium.”<sup>111</sup>

## IV. CROSS-MEDIA PERSONALITIES

### A. *New Technologies*

A lot has changed technologically since the Court set forth the media distinction doctrine in *Red Lion* and *Pacifica*.<sup>112</sup> There are now several different communications media beyond broadcast radio that are widely accessible by the public.<sup>113</sup> This section explores some of those technologies.

#### 1. Satellite Radio

The first terrestrial<sup>114</sup> car radio was introduced in 1922.<sup>115</sup> Today, roughly two thirds of new cars come equipped with SiriusXM in addition to AM and FM ra-

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 5038.

<sup>107</sup> Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broad. of the Super Bowl XXXVIII Halftime Show, 19 F.C.C. Rcd. 19230, 19235 (2004) [hereinafter Super Bowl XXXVIII Halftime Show]. The fines were later overturned on the ground that inadequate notice of an FCC policy change had been provided. See Anahad O’Connor, *Court Throws Out Super Bowl Fine*, N.Y. TIMES (July 22, 2008), [http://www.nytimes.com/2008/07/22/business/media/22FCC.html?\\_r=0](http://www.nytimes.com/2008/07/22/business/media/22FCC.html?_r=0). This issue is not relevant, however, to the authority of the FCC to impose such policies. See *id.*

<sup>108</sup> See Super Bowl XXXVIII Halftime Show, *supra* note 107, at 19234-36.

<sup>109</sup> *Id.* at 19234.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 19235.

<sup>112</sup> See, e.g., *Pandora Breaking Sirius XM’s Hold of Car Dashboard*, SEEKING ALPHA (June 26, 2013, 3:51 AM), <http://seekingalpha.com/article/1521402-pandora-breaking-sirius-xms-hold-of-car-dashboard> [hereinafter *Car Dashboard*].

<sup>113</sup> See, e.g., *id.*

<sup>114</sup> The term “terrestrial radio” is often used to refer to broadcast radio when comparing it to satellite radio. See, e.g., *Terrestrial Radio Strikes Back*, CNN (July 20, 2006, 10:42 AM), <http://www.cnn.com/2006/SHOWBIZ/Music/07/20/terrestrial.radio/index.html?iref=newssearch> (discussing the viability of “terrestrial radio” given the increasing popularity of satellite radio).

<sup>115</sup> Bill DeMain, *When the Car Radio Was Introduced, People Freaked Out*, MENTAL FLOSS (Jan. 3, 2012, 1:53 PM), <http://mentalfloss.com/article/29631/when-car-radio-was-introduced-people-freaked-out>.

dio.<sup>116</sup> In cars that have both, the button the driver presses to turn on SiriusXM radio is typically located next to the button to turn on AM or FM radio, suggesting that drivers give little thought when they push either button to whether the medium they are accessing is broadcast.<sup>117</sup> While SiriusXM requires a subscription, subscriptions are becoming more common.<sup>118</sup> Many new and used cars come with a free trial of SiriusXM,<sup>119</sup> and as of 2013, SiriusXM had approximately 24.4 million subscribers.<sup>120</sup>

## 2. Smartphones and Tablets

Smartphones have become commonplace, typically providing access to Internet content, television stations, satellite radio, and terrestrial radio.<sup>121</sup> Today, around sixty percent of adults in the United States own smartphones.<sup>122</sup> Similarly, ownership of tablet devices is rapidly increasing. In 2013, thirty-four percent of Americans eighteen years of age or older owned a tablet device—an increase from eighteen percent in 2012.<sup>123</sup> The rise of smartphones and tablets does not extend solely to adults.<sup>124</sup> One recent study indicates that thirty-eight percent of children two years old or younger have used tablets or smartphones.<sup>125</sup>

## 3. Internet

Since *Pacifica*, the Internet has become common in households and is a fundamental part of people's daily routines.<sup>126</sup> Today, approximately seventy-three percent

<sup>116</sup> *Car Dashboard*, *supra* note 112 (“One of the strengths of Sirius XM Radio . . . has been its pre-eminent position in car dashboards. [It is] currently installed in two thirds of new vehicles sold or leased in the US.”).

<sup>117</sup> *See id.*

<sup>118</sup> David Lieberman, *Sirius XM Q1 Subscriptions Hit New Record as Jim Meyer Named CEO*, DEADLINE HOLLYWOOD (April 30, 2013, 4:38 AM), <http://deadline.com/2013/04/sirius-xm-q1-earnings-486499/>.

<sup>119</sup> *Vehicle Availability*, SIRIUSXM, <https://www.siriusxm.com/vehicleavailability> (last visited Apr. 10, 2015).

<sup>120</sup> Georg Szalai, *Sirius XM Reports Record Quarterly Revenue*, HOLLYWOOD REP. (Feb. 4, 2014, 4:14 AM), <http://www.hollywoodreporter.com/news/sirius-xm-reports-record-quarterly-676898>.

<sup>121</sup> *See* Aaron Smith, *Smartphone Ownership 2013*, PEW RES. CTR. (June 5, 2013), <http://www.pewinternet.org/2013/06/05/smartphone-ownership-2013/>; *see also* Greg Sterling, *Pew: 61 Percent in US Now Have Smartphones*, MKTG. LAND (June 5, 2013, 10:52 AM), <http://marketingland.com/pew-61-percent-in-us-now-have-smartphones-46966>.

<sup>122</sup> Sterling, *supra* note 121.

<sup>123</sup> Kathryn Zickuhr, *Tablet Ownership 2013*, PEW RES. CENTER (June 10, 2013), <http://www.pewinternet.org/2013/06/10/tablet-ownership-2013/>.

<sup>124</sup> Mike Krumboltz, *Study: 38 Percent of Kids Under 2 Use Smartphones or Tablets*, YAHOO! (Oct. 28, 2013, 5:25 PM), <http://news.yahoo.com/blogs/sideshow/38--of-kids-under-2-use-smartphones-or-tablets-study-212548190.html>.

<sup>125</sup> *Id.*; Victoria Rideout, *Zero to Eight: Children's Media Use in America 2013*, COMMON SENSE MEDIA (Oct. 28, 2013), <http://www.commonsensemedia.org/sites/default/files/research/zero-to-eight-2013.pdf>.

<sup>126</sup> *Home Internet Access*, PEW RES. CTR. (May 1, 2013), <http://www.pewresearch.org/data-trend/media-and-technology/internet-penetration/>.

of American adults have an Internet connection at home.<sup>127</sup> For some people, the Internet has completely replaced old methods of accessing content.<sup>128</sup>

#### 4. Broadcast Radio

Considering the aforementioned technological breakthroughs, none of which were prevalent at the time *Pacifica* was decided, it is somewhat surprising that broadcast radio remains a hugely popular medium for content.<sup>129</sup> One report indicates that over ninety percent of United States residents listen to broadcast radio on a weekly basis.<sup>130</sup> While many have theorized as to why broadcast radio remains popular, one common answer is that people listen to their radio while driving.<sup>131</sup> By one estimate, nearly one half of all broadcast radio listening occurs in the car.<sup>132</sup> Another common explanation is that broadcast radio provides a smaller community experience, while other media typically provide content nationwide, or even worldwide.<sup>133</sup> “[T]raditional terrestrial radio offers what those other medi[a] can’t—an intimate experience listening to music spun by a local DJ.”<sup>134</sup> Thus, a person who listens to a song on the radio recognizes that others in her community are listening to the same song.<sup>135</sup> Similarly, when a person hears a point of view stated on a radio talk show, he feels that the point of view reflects the sentiments of those in his community.<sup>136</sup> Although large companies own some of these radio stations,<sup>137</sup> people nonetheless distinguish broadcast radio from other media on this basis.<sup>138</sup> Still, even with its enduring popularity, the role of broadcast radio in the United States is much different now than it

<sup>127</sup> *Id.* (distinguishing between broadband and dialup connections, and noting that seventy percent of Americans have a broadband connection, while three percent of American adults have a dialup connection); see also *Household Broadband Adoption Climbs to 72.4 Percent*, NAT’L TELECOMM. & INFO. ADMIN. BLOG (June 6, 2013), <http://www.ntia.doc.gov/blog/2013/household-broadband-adoption-climbs-724-percent>.

<sup>128</sup> See Sean Patterson, *Cable Households Dropping, Over-the-Air Households Down to 7%*, WEB-PRONEWS (July 30, 2013), <http://www.webpronews.com/cable-households-dropping-over-the-air-households-down-to-7-2013-07>. For example, four percent of households today use *only* the Internet to access television content. See *id.*

<sup>129</sup> See A LOOK ACROSS MEDIA: THE CROSS-PLATFORM REPORT 3 (2013), available at <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2013%20Reports/The-Cross-Platform-Report-A-Look-Across-Media-3Q2013.pdf> [hereinafter “A LOOK ACROSS MEDIA”].

<sup>130</sup> See *id.*; see also Caroline May, *Nielsen: More Than 90 Percent of Americans Listen to Radio Each Week*, DAILY CALLER (Dec. 3, 2013, 3:34 PM), <http://dailycaller.com/2013/12/03/nielsen-more-than-90-percent-of-americans-listen-to-radio-each-week/>.

<sup>131</sup> Zac Estrada, *AM/FM Radio Is Still Popular Thanks to Cars*, JALOPNIK (Apr. 4, 2014, 7:00 PM), <http://jalopnik.com/am-fm-radio-is-still-popular-thanks-to-cars-1558692811>.

<sup>132</sup> John McDuling, *The Remarkable Resilience of Old-Fashioned Radio in the US*, QUARTZ (Apr. 4, 2014), <http://qz.com/195349/the-remarkable-resilience-of-old-fashioned-radio-in-the-us/#/h/59098,1,2/>.

<sup>133</sup> See, e.g., Dave Whitaker, *Why Radio Still Matters*, POPMATTERS (June 27, 2013), <http://www.pop-matters.com/column/172628-why-radio-still-matters/>.

<sup>134</sup> *Id.*

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See *supra* note 7 and accompanying text.

<sup>138</sup> See Whitaker, *supra* note 133.

was when *Pacifica* was decided: most people who used to rely on broadcast radio for news, commentary and entertainment now have the option of accessing this content through many other communications media.<sup>139</sup>

### B. *Current Behaviors*

Given the overall use of each medium, it is helpful to also consider how the average person in the United States utilizes these media. According to Nielsen's "Cross-Platform Report," the average person in the United States consumes sixty hours of content every week.<sup>140</sup> Of those sixty hours, here is how the average person in the United States divides the time:<sup>141</sup>

Activity	Hours spent engaging in activity
Watching traditional television <sup>142</sup>	35.1
Listening to broadcast radio	14.0
Browsing the Internet on a computer	5.1
Watching videos on the Internet	1.5
Playing video games on video game consoles <sup>143</sup>	1.5
Watching videos on mobile devices	1.3
Watching DVD and Blu-ray movies	1.3

### C. *Examples of Cross-Media Personalities*

Because of the rise in different forms of widely used media, personalities have started to make their content available through various media.<sup>144</sup> Some instances of this phenomenon are obvious.<sup>145</sup> Howard Stern hosts *The Howard Stern Show* on SiriusXM satellite radio,<sup>146</sup> is a judge on *America's Got Talent* on broadcast television,<sup>147</sup> and has also starred in a major motion picture<sup>148</sup> based on one of his two

<sup>139</sup> See *supra* Part IV.A.1-4.

<sup>140</sup> See A LOOK ACROSS MEDIA 5, *supra* note 129.

<sup>141</sup> See *id.*

<sup>142</sup> This includes broadcast and cable television, as well as time-shifted television. See *id.* at 18. Unfortunately, the study does not distinguish between broadcast and non-broadcast television. See *id.*

<sup>143</sup> Video game consoles include devices such as PlayStation and Xbox. See *id.*

<sup>144</sup> Compare HOWARD STERN, <http://www.howardstern.com/> (last visited Apr. 10, 2015) (describing Howard Stern's satellite radio show) with AMERICA'S GOT TALENT, <http://www.nbc.com/americas-got-talent/about> (last visited May 7, 2014) (describing Howard Stern's role as a judge on a broadcast television show).

<sup>145</sup> See, e.g., HOWARD STERN, <http://www.howardstern.com/> (last visited Apr. 10, 2015).

<sup>146</sup> HOWARD STERN SHOW, <http://www.siriusxm.com/howard100> (last visited Apr. 10, 2015).

<sup>147</sup> AMERICA'S GOT TALENT, <http://www.nbc.com/americas-got-talent/about> (last visited Apr. 10, 2015).

<sup>148</sup> PRIVATE PARTS (Paramount Pictures 1997).

books.<sup>149</sup> Similarly, Ryan Seacrest hosts a radio show on broadcast radio,<sup>150</sup> and hosts *American Idol* on broadcast television.<sup>151</sup> Bill O'Reilly hosts a Fox News show on cable television<sup>152</sup> and, until 2009, hosted a broadcast radio show.<sup>153</sup>

But there are also less obvious examples of this phenomenon.<sup>154</sup> Consider again Howard Stern: as discussed above, he makes content available on satellite radio and broadcast television.<sup>155</sup> A consumer can also access SiriusXM on her smartphone or computer,<sup>156</sup> and can stream old and new clips of *The Howard Stern Show* on YouTube.<sup>157</sup> Furthermore, websites exist today that provide access to broadcast radio stations nationwide via the Internet.<sup>158</sup> In this sense, nearly every personality who appears on broadcast radio is a cross-media personality today, including lesser-known, regional personalities.<sup>159</sup> Similarly, many broadcast television companies make versions or segments of their shows available online after a person appears on their stations.<sup>160</sup>

While these personalities may tailor their content to fit different shows (for example, Howard Stern likely tailors his content on *America's Got Talent* to a much different audience than *The Howard Stern Show*), the particular medium seems irrelevant as to how the personality tailors his or her content.<sup>161</sup> Using the same example, it is conceivable that Stern could appear on a broadcast television show aimed at a more mature audience, while hosting a satellite radio show designed for families.<sup>162</sup> Aside from the FCC's regulations, there are no inherent features of these media that require Stern to clean up his content for his broadcast television show.<sup>163</sup>

<sup>149</sup> HOWARD STERN, *PRIVATE PARTS* (1st ed. 1993); see also HOWARD STERN, *MISS AMERICA* (1st ed. 1995).

<sup>150</sup> ON AIR WITH RYAN SEACREST, <http://www.kiisfm.com/onair/ryan-seacrest-52241/> (last visited Apr. 10, 2015).

<sup>151</sup> AMERICAN IDOL, <http://www.americanidol.com/bio/ryan-seacrest> (last visited Apr. 10, 2015).

<sup>152</sup> THE O'REILLY FACTOR, <http://www.foxnews.com/on-air/oreilly/index.html> (last visited Apr. 10, 2015).

<sup>153</sup> See David Hinckley, *Bill O'Reilly to Give Up Radio Show, One of the Nation's Most Listened To*, N.Y. DAILY NEWS (Dec. 4, 2008, 5:40 PM), <http://www.nydailynews.com/entertainment/tv-movies/bill-oreilly-give-radio-show-nation-listened-article-1.353592>.

<sup>154</sup> See, e.g., *id.*

<sup>155</sup> See *supra* notes 145-49.

<sup>156</sup> See, e.g., SIRIUSXM, <https://www.siriusxm.com/ios> (last visited Apr. 10, 2015).

<sup>157</sup> See, e.g., *Howard Stern - Beetlejuice in Camo*, YOUTUBE, <http://www.youtube.com/watch?v=Ec69RKZyt-CA> (last visited Apr. 10, 2015).

<sup>158</sup> See, e.g., iHEARTRADIO, <http://www.iheart.com> (last visited Apr. 10, 2015).

<sup>159</sup> See, e.g., *id.*

<sup>160</sup> See, e.g., *Videos*, NBC, <http://www.nbc.com/video> (last visited Apr. 10, 2015). For example, if Arnold Schwarzenegger appears on *The Tonight Show*, he also appears on the Internet. See TONIGHT SHOW STARRING JIMMY FALLON, <http://www.nbc.com/the-tonight-show/segments/3131> (last visited Apr. 10, 2015).

<sup>161</sup> See *supra* notes 145-49.

<sup>162</sup> See, e.g., HOWARD STERN, <http://www.howardstern.com/> (last visited Apr. 10, 2015).

<sup>163</sup> See, e.g., *id.*

## D. *Proposal*

Given the technological changes that have occurred since *Pacifica* and *Red Lion*, the justifications for the media distinction doctrine should be reexamined.<sup>164</sup> Continuing to apply the media distinction doctrine—distinguishing among media for First Amendment purposes, and affording less protection to broadcast media than all other media—makes little sense if the rationales underlying this doctrine are no longer sound given the current state of technology. Thus, each rationale must be considered in light of the technological advancements made since *Pacifica*.

### 1. The Scarcity Rationale

The scarcity rationale underlying *Red Lion* and *Pacifica* was grounded on the premise that scarcity of broadcast frequencies actually affected peoples' ability to communicate.<sup>165</sup> However, new media developments have rendered the scarcity rationale irrelevant.

When *Pacifica* was decided, a person who was denied a radio license had few, if any, alternative means to broadcast his or her content. Today, people who wish to reach the public have access to alternative forms of media. For example, a person who is denied a permit from the FCC can still reach the public by creating a YouTube channel or launching a website.<sup>166</sup>

Due to the prevalence of new broadcast media, the scarcity rationale is no longer convincing and should be abandoned. Otherwise, given the current state of technology, the scarcity rationale could be expanded to include any medium:

At times in American history, paper has been in very short supply, but [the G]overnment has not considered either licensing newspapers or granting rights of access to them. Thus, the fact that possible spectrum use is finite makes a weak foundation for [t]he [s]carcity [r]ationale and for any regulation of spectrum use beyond allocation and "traffic control."<sup>167</sup>

Based on these technological developments, the FCC should no longer be permitted to restrict a licensee's speech in the same way that the FCC was permitted to when *Pacifica* was decided.

Some object that despite these new media, broadcast radio remains popular.<sup>168</sup> But *Red Lion* and *Pacifica*<sup>169</sup> only considered the physical limitations of broadcast media—not their popularity.<sup>170</sup> Thus, this objection cannot save the scarcity rationale, as it does not address the concerns on which the scarcity rationale was found-

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<sup>164</sup> See *supra* Part IV.A-B.

<sup>165</sup> See *supra* Part IV.A-B; see also *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 388-89 (1969).

<sup>166</sup> See *supra* Part IV.A.

<sup>167</sup> Berresford, *supra* note 74.

<sup>168</sup> See *supra* Part IV.A.

<sup>169</sup> See *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Red Lion*, 395 U.S. at 388-89.

<sup>170</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.

ed.<sup>171</sup> Moreover, it would be strange to justify a constitutional rule with the notion that the Internet, and podcasts accessible on smartphones, may be slightly less popular than broadcast media.<sup>172</sup>

## 2. The Pervasiveness Rationale

### a. *As Generally Applied*

The pervasiveness rationale centers on the notion that broadcast media intrude into the home in a unique way. The pervasiveness rationale is no longer relevant or persuasive,<sup>173</sup> as it is no longer true that one medium is more pervasive than the others.<sup>174</sup> Many devices now provide access to multiple media.<sup>175</sup> For example, many modern cars have both terrestrial radio and satellite radio.<sup>176</sup> Under the current state of the law, when a person listens to terrestrial radio, the content that she hears receives less First Amendment protection than if she listened to satellite radio.<sup>177</sup> Similarly, millions of television sets provide access to cable television and Internet video<sup>178</sup> (commonly through Netflix),<sup>179</sup> as well as broadcast television.<sup>180</sup> Under the current state of the law, when a person presses one button on his remote, the content that he views receives less First Amendment protection than the content he would view if he pressed a different button on the same remote.<sup>181</sup> This distinction is arbitrary and unnecessary.

Moreover, people who tune into a broadcast radio or broadcast television station can often quickly determine what sort of content the station broadcasts based on the

<sup>171</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.

<sup>172</sup> See *supra* Part IV.B.

<sup>173</sup> See *Pacifica*, 438 U.S. at 748.

<sup>174</sup> See *supra* Part IV.A.; see also Adam Thierer, *Pacifica Anniversary Week, Part 4 (Pervasiveness is Moot)*, TECH. LIBERATION FRONT (July 1, 2008), <http://techliberation.com/2008/07/01/pacifica-anniversary-week-part-4-pervasiveness-is-moot/> (arguing that modern parental controls and an overall increase in available content indicate that “it is illogical to claim that any one media platform or provider should have a unique regulatory status relative to the many other competing media outlets and technologies in the marketplace”).

<sup>175</sup> See Thierer, *supra* note 174.

<sup>176</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion Broad. Co. v. Fed. Comm’n*, 395 U.S. at 388-89.

<sup>177</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.

<sup>178</sup> See David Carr and Ravi Somaiya, *Flush with Success, Netflix Jousts with HBO*, BOS. GLOBE (Feb. 17, 2014), <http://www.bostonglobe.com/business/2014/02/17/punching-above-its-weight-upstart-netflix-tweaks-hbo/DhQ4mBz9QWNPsDx0r5MCFK/story.html> (“Netflix has . . . 33.4 million US subscribers, 5 million more than HBO has domestically.”).

<sup>179</sup> Mike Flacy, *Netflix’s Popularity Surpassed All Broadcast and Cable Networks During June*, DIGITAL TRENDS (July 3, 2012), <http://www.digitaltrends.com/home-theater/netflixs-popularity-surpassed-all-broadcast-and-cable-networks-during-june/#!JT6Kj>.

<sup>180</sup> See Brian Stelter, *Netflix, as Easy as Changing the Channel*, N.Y. TIMES (Oct. 14, 2013), [http://www.nytimes.com/2013/10/15/business/media/netflix-as-easy-as-changing-the-channel.html?\\_r=0](http://www.nytimes.com/2013/10/15/business/media/netflix-as-easy-as-changing-the-channel.html?_r=0) (“To watch cable, the television must be on one setting; to browse Netflix, it has to be on another.”).

<sup>181</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.

station's reputation and genre.<sup>182</sup> Consider the following example: a radio listener wants to listen to a radio station that does not contain references to sexual conduct. If the listener were to tune to a station that is broadcasting underground rap music, he would likely be able to ascertain that the station is more likely to contain references to sexual conduct than, for instance, a radio station that reports only on weather and traffic in the area. Thus, the listener can change to a weather or news station.<sup>183</sup>

Even if *Pacifica* were correct in finding that people cannot stop offensive speech over broadcast media until the "first blow" of offensive speech has been delivered, this is true of other media today as well.<sup>184</sup> Consider an example that is similar to the above example: a person wants to browse the Web, but does not want to visit a website that contains profane words. That user would likely be able to determine almost immediately, based on the genre and reputation of a website, whether that website will expose her to profane words if she continues surfing it. For instance, the person would likely be able to predict that sexual references will appear sparingly on a news website like FoxNews.com,<sup>185</sup> but will be used more gratuitously on GeorgeCarlin.com (which would likely discuss the content of Carlin's comedy and may be operated by a supporter of Carlin).<sup>186</sup> In this example, as in the above example regarding broadcast radio, there is a risk that a person might hear a reference to sexual conduct or a profane word before determining that he or she will find the content on the radio station or website offensive. Yet, in the two examples, broadcast radio is the only platform that receives less First Amendment protection.

One counterargument is that using the Internet is distinguishable from listening to broadcast radio or watching broadcast television because a person surfing the Web must seek out content by typing in a search term or domain name, while a person listening to AM or FM radio merely tunes to a station and allows content to flow from the broadcaster.<sup>187</sup> This is not true of all media outside of broadcast media, however. SiriusXM radio operates identically to AM and FM radio in this respect: a listener tunes to a station and content flows to the listener.<sup>188</sup> Similarly, Pandora<sup>189</sup>

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<sup>182</sup> See, e.g., *Favorite Radio Station*, CITY-DATA, <http://www.city-data.com/forum/los-angeles/898882-favorite-radio-station.html> (last visited Apr. 10, 2015) (discussing the reputations of FM radio stations in the Los Angeles area).

<sup>183</sup> See *id.*

<sup>184</sup> See *Pacifica*, 438 U.S. at 748-49.

<sup>185</sup> FOX NEWS, <http://www.foxnews.com/> (last visited Apr. 10, 2015).

<sup>186</sup> GEORGE CARLIN, <http://georgecarlin.com/> (last visited Apr. 10, 2015) (displaying quotes from George Carlin).

<sup>187</sup> See *supra* Part IV.A. Typically, Internet users do not simply access a website and then view whatever content the owner of that website chooses to include; hyperlinks and headlines limit what an Internet user is unwillingly exposed to.

<sup>188</sup> See *What is SiriusXM?*, SIRIUSXM, <http://www.siriusxm.com/whatisirsiriusxm> (last visited Apr. 10, 2015).

<sup>189</sup> See *What is Pandora?*, PANDORA, <http://help.pandora.com/customer/portal/articles/182180-what-is-pandora-> (last visited Apr. 10, 2015).

and Spotify<sup>190</sup> automatically select songs based on the user's preferences without any forewarning to the user.<sup>191</sup>

Another counterargument is that access to broadcast media is free (assuming the listener or viewer has the necessary equipment), while access to many non-broadcast services is not, and it is therefore logical to require people to look to non-broadcast media for speech that is unavailable on broadcast radio or broadcast television.<sup>192</sup> The Supreme Court did not distinguish, however, between speech offered for free and speech that consumers have to pay for when considering the pervasiveness rationale for the media distinction doctrine in *Red Lion* and *Pacifica*.<sup>193</sup> In fact, this distinction would cut against the media distinction doctrine,<sup>194</sup> Justice White's majority opinion in *Red Lion* itself noted that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."<sup>195</sup> Thus, if the payment distinction were relevant, it seems that the Court would be particularly concerned with facilitating this "marketplace of ideas" over a medium that is free to the public.<sup>196</sup>

*b. As to Children*

Those who support *Red Lion* and *Pacifica* argue that the current rule is justified by the need to protect children.<sup>197</sup> Today, however, children do not have easier access to broadcast media when compared to other media.<sup>198</sup> As noted above, approximately thirty-eight percent of children less than two years old have used a smartphone or tablet.<sup>199</sup> While it does not necessarily follow that they have access to media on these smartphones and tablets, this data demonstrates that many children have access to devices that will play radio or television broadcasts.<sup>200</sup> If a child is capable of operating a device that plays broadcast radio or broadcast television, as the pervasiveness rationale seems to presume, then the child is likely capable of operating a device that plays satellite radio or cable television.<sup>201</sup> Regardless, parents, not the FCC, are

<sup>190</sup> See *Spotify Radio*, SPOTIFY, <https://support.spotify.com/us/learn-more/guides/#!/article/Spotify-Radio> (last visited Apr. 10, 2015) ("Spotify Radio lets you sit back and listen to the music you love.").

<sup>191</sup> See *id.*; *What is Pandora?*, *supra* note 189.

<sup>192</sup> See, e.g., *How Much Does It Cost?*, SIRIUSXM, <http://m.siriusxm.com/newtosiriusxm/howmuchdoesitcost> (last visited Apr. 10, 2015).

<sup>193</sup> See *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 748 (1978); *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 388-89 (1969).

<sup>194</sup> See *Red Lion*, 395 U.S. at 390.

<sup>195</sup> *Id.* Thus, speech that is accessed for free facilitates a "marketplace of ideas" more effectively than speech that costs money because more people can access it. See *id.*

<sup>196</sup> See *id.*

<sup>197</sup> See Nance, *supra* note 15.

<sup>198</sup> See *supra* Part IV.A; see also Blake Lawrence, Comment, *To Infinity and Beyond: FCC Enforcement Limiting Broadcast Indecency From George Carlin to Cher and Into the Digital Age*, 18 UCLA ENT. L. REV. 148, 149 (2011).

<sup>199</sup> See *supra* Part IV.A.

<sup>200</sup> See *supra* Part IV.A.

<sup>201</sup> See Rideout, *supra* note 125.

ultimately responsible for the content to which their children are exposed. Therefore, distinguishing between media on this basis seems unfounded.<sup>202</sup>

### E. *Technological Innovations as Support for Pacifica?*

When considering the technological innovation since *Pacifica*, it is tempting to conclude that technological innovation supports distinguishing between media for First Amendment purposes.<sup>203</sup> Specifically, it might seem more fair to restrict a personality from saying something on broadcast radio if, due to new technology, he now has the option to make that statement on a different medium.<sup>204</sup> This argument ignores the reasoning of *Pacifica* and *Red Lion*, however.<sup>205</sup> Those decisions were based on the fact that there are inherent features of broadcast media—scarcity and pervasiveness—that make those media unique, not that there were no other alternatives to broadcast media.<sup>206</sup> It is this lack of justification that undermines the media distinction doctrine.<sup>207</sup>

## V. WHAT THE WORLD WOULD BE LIKE WITHOUT *RED LION* AND *PACIFICA*

### A. *Overview*

Even without *Pacifica* and *Red Lion* in place, speech on broadcast and other media could still be prohibited if it is “obscene.”<sup>208</sup> Under the obscenity doctrine, speech is unprotected if three requirements are satisfied.<sup>209</sup> First, the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to a prurient interest.<sup>210</sup> The Supreme Court defines the “prurient interest” as a “shameful or morbid interest in sex . . . .”<sup>211</sup> Second, “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . .”<sup>212</sup> Lastly, “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”<sup>213</sup>

<sup>202</sup> See Alan Mozes, *Think You Know What Your Child's Up to Online? Think Again*, HEALTHDAY (Oct. 30, 2013), <http://consumer.healthday.com/kids-health-information-23/bullying-health-news-718/think-you-know-what-your-child-s-up-to-online-think-again-681557.html>.

<sup>203</sup> See *supra* Part IV.A.

<sup>204</sup> See *supra* Part IV.A.

<sup>205</sup> Fed. Commc'ns Comm'n v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 388-89 (1969).

<sup>206</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.

<sup>207</sup> See *Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.

<sup>208</sup> *Miller v. Cal.*, 413 U.S. 15, 24 (1973); see also EUGENE VOLOKH, *THE FIRST AMENDMENT AND RELATED STATUTES* 114 (4th ed. 2011). Speech on any medium can be prohibited if the speech is deemed obscene. *Miller*, 413 U.S. at 24.

<sup>209</sup> *Miller*, 413 U.S. at 24.

<sup>210</sup> *Id.*

<sup>211</sup> See *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

<sup>212</sup> *Miller*, 413 U.S. at 24.

<sup>213</sup> *Id.*

Notwithstanding the obscenity doctrine, many broadcast radio stations and television stations would be unlikely to broadcast content currently prohibited by the FCC.<sup>214</sup> Public majority opinion is persuasive to broadcasters, who seek to please listeners and viewers for commercial gain.<sup>215</sup> As an example of how broadcasters would behave if *Pacifica* were overturned, consider SiriusXM, which currently has a “Family Talk” station that listeners can tune into without fear of hearing offensive language.<sup>216</sup> Although this station is not required by any government agency, SiriusXM created it in response to market demand.<sup>217</sup>

## B. *Examples*

To more fully consider a post-*Pacifica* world, it is helpful to return to the two examples mentioned above.<sup>218</sup> First, in a post-*Pacifica* world, it would be unconstitutional for the FCC to fine Infinity Broadcast Operations for the speech engaged in by Howard Stern in 2004.<sup>219</sup> Applying the obscenity test, the average person applying contemporary community standards would likely not find that the work taken as a whole appeals to the prurient interest. Howard Stern referred to sexual acts in a humorous way.<sup>220</sup> Because this first prong embodies a community standard, there are perhaps some regions in which Howard Stern’s content might be viewed differently. Nevertheless, it still seems to be a stretch to frame Howard Stern’s jokes as appealing to a “shameful or morbid interest in sex.”<sup>221</sup> Second, the work unequivocally describes sexual acts.<sup>222</sup> Finally, the work, taken as a whole, likely contains serious artistic and political value.<sup>223</sup> Howard Stern is arguably commenting on the repressed nature of sexuality by discussing sexual acts in an over-the-top fashion.<sup>224</sup>

I will next address the question of Janet Jackson’s Super Bowl halftime show.<sup>225</sup> Here too, in a post-*Pacifica* world, it would be unconstitutional for the FCC to fine the television stations that aired this performance.<sup>226</sup> Applying the obscenity doctrine, the average person, applying contemporary community standards, would not find that the work, taken as a whole, appeals to the prurient interest.<sup>227</sup> Janet Jackson’s

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<sup>214</sup> *See id.*

<sup>215</sup> *See Channel Lineup*, SIRIUSXM, <http://www.siriusxm.com/channellineup/> (last visited Apr. 10, 2015).

<sup>216</sup> *See id.*

<sup>217</sup> *See id.*

<sup>218</sup> *See supra* Part III.

<sup>219</sup> *Miller v. Cal.*, 413 U.S. 15, 24 (1973).

<sup>220</sup> *See id.*

<sup>221</sup> *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

<sup>222</sup> *Miller*, 413 U.S. at 24.

<sup>223</sup> *See id.*

<sup>224</sup> *See id.*

<sup>225</sup> *See supra* Part III.

<sup>226</sup> *Miller*, 413 U.S. at 24.

<sup>227</sup> *See id.*

act was merely a display of the human body.<sup>228</sup> Further, the work did not depict any sexual conduct, and a live performance of a song as a whole contains serious artistic value, even if parts of the performance contain nudity.<sup>229</sup> Again, however, the fact that prohibiting this speech would be unconstitutional does not mean that broadcast companies would willfully engage in such speech, considering potential offense to viewers.<sup>230</sup>

## VI. CONCLUSION

Given the lack of support for the continued application of *Pacifica* and *Red Lion*, the vitality of these decisions has correctly been called into question by the Supreme Court.<sup>231</sup> The current public sentiment involving broadcast media might be summarized using the quotation mentioned above: “The FCC is failing America’s families, giving broadcasters unfettered access to our children to peddle their vulgarity in the name of ‘freedom of speech.’ *We won’t stand for it.*”<sup>232</sup>

As reflected by this quotation, many people today view broadcast media as a First Amendment-free zone.<sup>233</sup> Under this view, despite all of the potential speakers who wish to share their potentially offensive speech with others, the FCC continues to provide “safe” media that people can enjoy without fear of hearing something offensive.<sup>234</sup>

The problem, however, is that the First Amendment does not allow for such First Amendment-free zones.<sup>235</sup> Given the enduring popularity of broadcast media—particularly radio—it is crucial that they receive the same amount of First Amendment protection as other media.<sup>236</sup> This is especially true in light of the fact that people tend to give added weight to the views that they hear on broadcast radio as reflecting the views of their community.<sup>237</sup> For these reasons, the media distinction doctrine underlying *Pacifica* and *Red Lion* should be overturned.<sup>238</sup>

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<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

<sup>230</sup> See *id.*

<sup>231</sup> See Fed. Commc’ns Comm’n v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2321 (2012) (Ginsburg, J., concurring); Fed. Commc’ns Comm’n v. Fox Television Stations, Inc., 556 U.S. 502, 530 (2009) (Thomas, J., concurring).

<sup>232</sup> Nance, *supra* note 15.

<sup>233</sup> See, e.g., *id.*

<sup>234</sup> See, e.g., *id.*

<sup>235</sup> See U.S. CONST. amend. I.

<sup>236</sup> See Whitaker, *supra* note 133.

<sup>237</sup> See *id.*; see also *supra* Part IV.A.4.

<sup>238</sup> See Whitaker, *supra* note 133; see also *supra* Part IV.A.4.