

**PERVASIVE NEW MEDIA:
INDECENCY REGULATION AND THE END OF THE
DISTINCTION BETWEEN BROADCAST TECHNOLOGY
AND SUBSCRIPTION-BASED MEDIA**

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INTRODUCTION

After years of failing to meet expectations, both internet and satellite radio programming are finally challenging terrestrial radio¹ in a manner similar to cable's challenge to broadcast television a generation earlier; these new technologies threaten to hijack market share and revenue from a traditional broadcast medium much as cable did.² Broadband technology enables one to broadcast talk radio and music over the internet to reach listeners via their personal computers. Satellite broadcasters use a pay model, selling special radios for listeners to tune into digital satellite programming. Online and satellite stations are increasing their audiences while traditional radio has struggled for over a decade to maintain its audience. The recent high-profile signing of Howard Stern by Sirius Satellite Radio and the 43% average yearly growth in listeners that internet radio has experienced since 2000 have pushed these new media to the forefront of popular culture.³

As they continue to seek new listeners, online and satellite stations share an additional advantage over terrestrial broadcasters that again merits comparisons to cable—they are exempt from Federal Communications Commission (FCC) scrutiny for indecent programming. Satellite and internet radio fall into the same category for indecency regulation as cable television, which enjoys stronger First Amendment protections than the broadcast networks because of the legal distinction between free services and optional, subscription-based services, and because broadcasting uses limited public airwaves.⁴

While this distinction may once have enjoyed overwhelming public support, Congress has begun to examine the issue of eliminating the regulatory distinction between broadcast and non-broadcast media. Legislators have raised this issue with the hope of extending regulations to cable television,⁵ and some are even pushing for the inclusion of internet and satellite radio in new legislation.⁶ According to Adam Thierer, director

¹ "Terrestrial radio" is a term used to describe the traditional AM/FM dial.

² For statistics demonstrating cable's encroachment on broadcasting's market share, see Anthony Bianco, *The Vanishing Mass Market*, BUS. WK., July 12, 2004, at 60 ("[C]able continues to nibble away at its broadcast rivals [C]able now rules prime time, with a 52% share to broadcast's 44%").

³ Daren Fonda, *The Revolution in Radio*, TIME, Apr. 19, 2004, at 55.

⁴ Andrew Wallenstein, *Cable Industry on High Alert in Rush to Legislation*, HOLLYWOOD REP., Mar. 26, 2004, http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000473849.

⁵ See Liam Hurley, *Committee Rejects Cable Indecency Bill, Approves Violence Curb*, NEWS MEDIA UPDATE, Mar. 10, 2004, <http://www.rcfp.org/news/2004/0310hr3717.html>.

⁶ See Declan McCullagh, *Senator Suggests Targeting Net "Indecency"*, CNET NEWS.COM, Mar. 15, 2005, http://news.com.com/2100-1028_3-5618332.html (describing that Senator Ted Stevens (R-Alaska) wants to extend broadcast regulation to media "whether it's delivered by broadband, by VoIP, by whatever it is").

of telecommunications studies at the Cato Institute: “[T]he fight is hardly over. Several members of Congress have hinted that they will continue to push for traditional broadcast regulation to be imposed on new, subscriber-based media outlets.”⁷ Meanwhile, some still stand for the proposition that indecency should not be regulated at all.⁸ Both arguments compel a departure from the “public broadcasts/private subscriptions” and “public airwaves/private means of transmission” distinctions. Legal precedent, which emphasizes the pervasiveness of the medium in supporting the distinction,⁹ is so established that elimination of the distinction on which media programmers rely cannot be taken lightly.

However, after examining the history of broadcast regulation in Part I, this Note contends that the pervasiveness and growth of the unregulated newer media are sufficient to demonstrate that the two-tier system of First Amendment protections is increasingly outdated. The relationship between citizens and broadcasters has changed, and the logic that originally singled out broadcasting for strict indecency regulation as distinguishable from other media no longer withstands scrutiny. Part II makes the case that cable television is now sufficiently pervasive that it no longer merits special protection as a subscriber service. Part III describes how the “new media”—satellite and internet radio—share many characteristics with cable television. Satellite and internet radio, like cable, should occupy the same regulatory category as broadcasting, if not now then in the next few decades as their subscriber bases expand. Part IV anticipates and addresses counterarguments to this proposal. This Note is limited to the argument that the broadcasting/non-broadcasting distinction is no longer merited and should be eliminated. As the Conclusion implores, more scholarship is needed to determine whether eliminating this distinction should lead to regulation of indecency on non-broadcasting media or the elimination of indecency regulation of broadcasting.

I. BROADCAST REGULATION AND THE FIRST AMENDMENT

The First Amendment governs which types of speech the FCC can regulate. Because interpretations of the First Amendment and the ways in which electronic media have been regulated have changed over time, an examination of the history of regulating programming uncovers the reasoning behind the “public broadcasts/private subscriptions” distinction.

The formal regulation of broadcasting began with the Radio Act of 1927, which created the Federal Radio Commission (FRC) as a governing

⁷ Adam Thierer, *Howard Stern and the Future of Media Censorship*, TECHKNOWLEDGE NEWSL., Oct. 11, 2004, <http://www.cato.org/tech/tk/041011-tk.html>.

⁸ E.g., Mira T. Ohm, Note, *Sex 24/7: What’s the Harm in Broadcast Indecency?*, 26 WOMEN’S RTS. L. REP. 167 (2005) (arguing that the costs of regulating broadcasting indecency outweigh the benefits).

⁹ See *infra* Section II.A.

body to license radio programming and regulate broadcasts.¹⁰ Authors of the original legislation, realizing that the airwaves that enable radio transmission were limited, decided that these airwaves would not be privately owned but would remain in the public domain. The FRC was the government body first set up to regulate these public media and to license broadcasters to use them free of charge.¹¹ While lacking regulatory power over advertisements, the Radio Act included a provision that programming could not contain “obscene, indecent, or profane language.”¹² The FRC would consider the sensitivity of programming when deciding whether to renew licenses. The rationale for this regulatory power was that the airwaves were limited, and thus speech was limited and licenses were especially valuable.¹³ The limited number of airwaves has allowed regulators to control radio and later television in ways that would otherwise be gross violations of the First Amendment.¹⁴

In terms of restricting programming based on inappropriate content, the most well-known early instance of a license not being renewed was that of KFKB of Milford, Kansas, eternalized in *KFKB Broadcasting Ass’n v. Federal Radio Commission*.¹⁵ The FRC ruled that the station’s broadcaster, Dr. John Brinkley, was a danger to public health because he was prescribing medical remedies over the air without having examined the patient in person.¹⁶ Brinkley responded that the FRC ruling constituted illegal censorship of his radio programming under Section 29 of the Radio Act, which gave the licensing authority no “power of censorship over the radio communications or signals transmitted by any radio station.”¹⁷ The U.S. Court of Appeals for the District of Columbia Circuit ruled the FRC was not attempting to prevent the future content of Brinkley’s program but was only

¹⁰ Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162 (1927) (repealed 1934).

¹¹ See *NBC v. United States*, 319 U.S. 190, 213-14 (1943); Benjamin P. Deutsch, Note, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101, 1101, 1102 n.3 (1994).

¹² Radio Act of 1927 § 29.

¹³ See Keith Brown & Adam Candeb, *The Law and Economics of Wardrobe Malfunction*, 2005 B.Y.U. L. REV. 1463, 1474-75.

¹⁴ For the early history of broadcast regulation, see, for example, ROBERT MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA & DEMOCRACY: THE BATTLE FOR CONTROL OF U.S. BROADCASTING, 1928-1935* (1993) (tracing the emergence and consolidation of U.S. commercial broadcasting); PHILIP T. ROSEN, *THE MODERN STENTORS: RADIO BROADCASTERS AND THE FEDERAL GOVERNMENT, 1920-1934* (1980) (chronicling the early years of government regulation of radio); HUGH R. SLOTTEN, *RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920-1960* (2000) (detailing the history of American broadcast regulation from the 1920s through the 1950s).

¹⁵ 47 F.2d 670 (D.C. Cir. 1931).

¹⁶ *Id.* at 672; Erwin G. Krasnow & Jack N. Goodman, *The “Public Interest” Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 613 (1998).

¹⁷ Radio Act of 1927 § 29. The no-censorship provision was reenacted as Section 326 of the Communications Act of 1934. Communications Act of 1934, Ch. 652, § 326, 48 Stat. 1064, 1091 (1934) (codified as amended at 47 U.S.C. § 326 (2000)).

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making a determination not to renew his license based on past conduct, which the court did not consider censorship. Further, the court ruled broadcasting “is impressed with a public interest,” so that the FRC has the authority to “consider the character and quality of the service.”¹⁸ This important case paved the way for the government to regulate electronically transmitted expression in the public interest.

Indeed, few people at the time contested the government’s responsibility to regulate broadcasting so as to best serve the public interest. After it passed both houses of Congress, on June 18, 1934 President Franklin Roosevelt signed the Communications Act of 1934, which would consolidate regulation of wired and wireless services in one powerful body, the FCC.¹⁹ The uncontroversial passage of the Communications Act and the creation of the FCC confirmed the nation’s contentment with its systems for broadcasting and regulation. The act ran forty-five pages and was divided into six sections, or “titles,” which covered general provisions, common carrier regulation, broadcasting, administrative and procedural matters, penal provisions and forfeitures, and miscellaneous matters. In terms of penalties, beyond the power to revoke licenses, the FCC could impose fines on broadcast operators for airing programming that the FCC considered indecent.²⁰ This original legislation remains the cornerstone of U.S. broadcasting policy. It has been amended many times, including the Cable Communications Policy Act of 1984,²¹ but the Communications Act of 1934, which obliged the FCC to regulate broadcasting in the public interest,²² has not been substantially altered for seven decades.²³

¹⁸ *KFKB Broad. Ass’n*, 47 F.2d at 672.

¹⁹ See Joshua Dale, Note, *Televised Political Debates and Arkansas Educational Television Commission v. Forbes: Excluding the Public from Public Broadcasting*, 27 PEPP. L. REV. 629, 632 (2000); Livia Solange West, Comment, *Deregulating Telecommunications: The Conflict Between Competition and Universal Service*, 9 DEPAUL BUS. L.J. 159, 165 n.31 (1996); Christopher H. Sterling, U.S. Policy: The Communications Act of 1934, <http://www.museum.tv/archives/etv/U/htmlU/uspolicyc/uspolicyc.htm> (last visited Oct. 25, 2006).

²⁰ Communications Act of 1934 §§ 501-503; see also Sterling, *supra* note 19 (providing a summary of the Act’s provisions).

²¹ Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.); see also Peter J. Ansel, Comment, *The Cable Act of 1984 – Why the United States Circuit Courts Are Getting It Wrong in Right of Access Litigation*, 13 U. MIAMI ENT. & SPORTS L. REV. 257, 257 n.3 (1996) (“The general purpose of the Cable Act of 1984 is to establish a national policy concerning cable communications The Act also seeks to assure that cable communications provide a diversity of information sources and services to the public and promote competition in cable communications . . .”).

²² MARK SABLEMAN, MORE SPEECH, NOT LESS: COMMUNICATIONS LAW IN THE INFORMATION AGE 187 (1997).

²³ While the Communications Act of 1934 has not been substantially altered, it has faced many legal challenges. See, e.g., *CBS, Inc. v. FCC*, 453 U.S. 367, 397 (1981); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Columbia Broad. Sys., Inc. v. Democratic Nat’l*

As the twentieth century progressed, technical aspects of the broadcasting medium continued to justify regulating the content that it transmits. In *Red Lion Broadcasting Co. v. FCC*,²⁴ the Supreme Court reinforced the FCC's power to regulate free broadcasting because, distinguishable from other types of media, broadcasters were granted licenses on a scarce radio spectrum and the government had an interest in preserving fair and open news coverage. Red Lion Broadcasting had refused to allow an author, Dennis Cook, equal airtime to defend himself against a personal attack. Cook filed a complaint, and the FCC ruled that Red Lion was obligated to give him airtime under a now defunct rule called the fairness doctrine.²⁵ The Court, in an opinion by Justice Byron White, made two points that set the contours for U.S. broadcast regulation. First, the Court held that "although broadcasting is clearly a medium affected by a First Amendment interest, differences in the characteristics of new media justify differences in the First Amendment standards applied to them."²⁶ With this statement, the *Red Lion* case distinguished between technologies based on the ease with which the public could access the speech that was transmitted, a distinction that will prove important when considering the regulation of cable television, internet radio, and satellite radio. Second, the opinion stated that broadcasters have a generalized, enforceable obligation to serve the "public interest."²⁷ While the *KFKB Broadcasting* court had acknowledged this obligation, this statement marks the first time the Supreme Court reaffirmed that broadcasters are beholden to the public interest.

In terms of indecent content, the question remained, however: what is the public interest? The federal government and the states had long been permitted to restrict obscene material, which does not have First Amendment protection.²⁸ Yet, what about speech that is only indecent or

Comm., 412 U.S. 94 (1973); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). This Note discusses *Red Lion Broadcasting* and *Pacificafra* in this Part.

²⁴ 395 U.S. 367 (1969).

²⁵ *Id.* at 371-72. The fairness doctrine stated that all broadcasting networks needed to give equal airtime for opposing viewpoints of political editorials and personal attacks. It went beyond the scope of the "equal time doctrine," which holds that networks must give equal time to political candidates only. The fairness doctrine is outside the scope of this Note, but for more information see S. REP. NO. 101-141, at 4 (1989) (establishing the requirements that the fairness doctrine places on broadcasters); and *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 8 (1974).

²⁶ *Red Lion*, 395 U.S. at 386.

²⁷ *Id.* at 383.

²⁸ See, e.g., *Redrup v. New York*, 386 U.S. 767, 769 (1967); *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949); *Prince v. Massachusetts*, 321 U.S. 158, 169-170 (1944). In 1973, the Supreme Court in *Miller v. California* decided that "community standards," not national standards, would be applied when judging whether speech is obscene based on

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profane? There is another crucial question for examining cable, internet radio, and satellite radio: for which types of media can offensive language be regulated, and what will be the test to determine whether a certain medium fits into the regulated category?

FCC v. Pacifica Foundation,²⁹ decided in 1978, marked the first time the Supreme Court sought to address these questions. The FCC had fined Pacifica, a historically leftist organization that supports free speech in radio, in response to a listener's complaint about a Pacifica radio station in New York airing George Carlin's "filthy words." The U.S. Court of Appeals for the District of Columbia Circuit reversed the fine, with one judge on the three-judge panel holding that the FCC ruling represented censorship and another that the fine violated the First Amendment.³⁰ The Supreme Court granted certiorari and deliberately distinguished broadcast speech from other forms of expression.³¹ The Court ruled for the FCC that such speech was indecent on afternoon programming.³² Most interesting for the comparison of broadcast programming with cable television, internet radio, and satellite radio is the Court's statement that "each medium of expression presents special First Amendment problems."³³

The Court in *Pacifica* presented two reasons for why broadcast speech is different. First, it concluded that broadcast media had established a "uniquely pervasive presence" in the lives of Americans.³⁴ Unlike other forms of speech that can be shut out from one's home, broadcasting seeps into the home, and one can never know when tuning into a program whether he/she will hear indecent speech.³⁵ Second, the Court justified regulating indecent broadcasting but not other forms of expression because of "[t]he ease with which children may obtain access to broadcast material broadcasting."³⁶ Other sources of expression, such as books and movies, may be restricted from children by sellers and parents. The pervasiveness of broadcasting, unchecked, leaves youths exposed to indecent speech and parents unable to protect them.³⁷ This reasoning justified broadcast radio and television being subject to strict regulation.³⁸

whether it contains serious literary, artistic, political or scientific value. 413 U.S. 15, 23-25 (1973).

²⁹ 438 U.S. 726 (1978).

³⁰ *Id.* at 733.

³¹ *Id.* at 748-50. These distinctions would later prove important in distinguishing cable television, satellite radio, and internet radio.

³² *See id.* at 750-51.

³³ *Id.* at 748.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 750.

³⁷ *Id.* at 749.

³⁸ The FCC found the power to regulate indecent programming in two statutes: 18 U.S.C. 1464 (1976), which forbids the use of "any obscene, indecent, or profane language by means of radio communication," and 47 U.S.C. 303(g) (1974), which requires the

Today, the FCC continues to regulate indecent broadcast media.³⁹ The legal precedent holds that there must be a compelling government interest to regulate speech based on content. There is a compelling government interest to regulate broadcast speech that is indecent, meaning it describes sexual or excretory activities in a manner that offends contemporary community standards.⁴⁰ The FCC takes the need to protect children into account when deciding what is indecent, which is why they can only respond to programming that occurs from six o'clock a.m. to ten o'clock p.m. The FCC is not proactive in searching for indecent broadcasting but rather investigates complaints from the public before deciding whether to fine a broadcast network.⁴¹

II. THE CASE FOR ELIMINATING THE CABLE/BROADCAST DISTINCTION

Meanwhile, the FCC is powerless to regulate indecency on cable television. By the time of the *Pacifica* decision, cable television was a force that had altered the First Amendment landscape.⁴² Section A of this Part briefly examines the development of cable television, the reasons why it was not regulated like broadcasting, and subsequent case law supporting this regulatory distinction. Then, Section B makes the case for dispensing with the distinction.

A. EXPLICATING THE CABLE/BROADCAST REGULATORY DISTINCTION

Cable programming has always been a private, subscription-based service. Households have the option to buy certain cable packages, organized into “tiers,” with different subscriber charges for different tiers. Cable television’s development challenged the Communications Act of 1934, which had not anticipated such a hybrid system incorporating broadcasting techniques into a subscription-based service. Unlike broadcast media, cable television transmits its programming to broadcasters through privately fixed coaxial cables or fiber optic cables rather than over the

Commission to “encourage the larger and more effective use of radio in the public interest.”

³⁹ While the FCC is limited in regulating indecent speech, obscenity cannot be transmitted over any medium. “Obscenity” refers to sexual content that the average person, applying contemporary community standards, finds “appeals to the prurient interest,” and “lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973).

⁴⁰ For more on the “compelling governmental interest” standard for restricting content-based expression, see *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

⁴¹ Michael K. Powell, *Don’t Expect the Government to be a V-Chip*, N.Y. TIMES, Dec. 3, 2004, at A29.

⁴² See MEGAN MULLEN, RISE OF CABLE PROGRAMMING IN THE UNITED STATES: REVOLUTION OR EVOLUTION? 64-127 (2003).

public airwaves.⁴³ Based on *Pacifica*, the FCC could couple the manner of transmission with cable's subscription-based business model to justify treating the medium as free from broadcast-style regulation.⁴⁴

The distinction between public broadcasting services that can be regulated and subscription-based services that cannot was strengthened in 2000 in *United States v. Playboy Entertainment Group, Inc.*⁴⁵ The Telecommunications Act of 1996 contained a requirement, Section 505, that cable television operators dedicated primarily to sexually-oriented programming must scramble or block those channels or limit their transmission to the hours from ten o'clock in the evening to six o'clock in the morning.⁴⁶ Playboy filed suit, challenging the statute as unnecessarily restrictive content-based legislation that violates the First Amendment because it does not serve a compelling government interest. According to the Supreme Court rule, "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."⁴⁷ In its decision, the Court ruled for Playboy that Section 505 does not satisfy strict scrutiny for content-based speech restriction because there is "a key difference between cable television and the broadcasting media. . . . Cable systems have the capacity to block unwanted channels on a household-by-household basis."⁴⁸ The private and non-universal nature of cable, according to the Court, is sufficient to make content-based regulation of cable virtually impossible. Today, with *Playboy* standing as the last word on the matter, the FCC is left without the ability to regulate indecent non-broadcast media.

B. CABLE AS A PERVASIVE MEDIUM INDISTINGUISHABLE FROM BROADCASTING

Yet, in the face of increased political pressure,⁴⁹ government actors have taken up the issue of regulating non-broadcast media, and specifically cable television. In 2004, the U.S. Senate Commerce Committee narrowly defeated a bill to increase the FCC's authority over cable programming;⁵⁰

⁴³ See Miles W. Hughes, Comment, *Telecommunications Reform and the Death of the Local Exchange Monopoly*, 24 FLA. ST. U.L. REV. 179, 193-95 (1996).

⁴⁴ See *FCC v. Pacifica Found.*, 438 U.S. 726, 748-49 (1978).

⁴⁵ 529 U.S. 803 (2000).

⁴⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, § 505, 110 Stat. 56 (1996).

⁴⁷ *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).

⁴⁸ *Playboy*, 529 U.S. at 815.

⁴⁹ See, e.g., Frank Ahrens, *Senator Bids To Extend Indecency Rules to Cable*, WASH. POST, Mar. 2, 2005, at E1; David B. Wilkerson, *TV Station Groups: Regulate Cable*, CBS.MARKETWATCH.COM, Feb. 21, 2004, <http://www.marketwatch.com/News/Story/Story.aspx?guid=%7B374D632B-DCAE-4EA5-82DC-DC6933FD0FAF%7D&siteid=mktw>.

⁵⁰ Hurley, *supra* note 5.

some in the Senate would like to revisit the issue. Former FCC Chairman Michael Powell—who once supported a deregulatory agenda of reevaluating “rules governing ‘indecenty’ in broadcasting”⁵¹—has severely criticized current trends in cable television, and he appeared to be leaning toward asking Congress to expand the regulatory powers of the FCC until recently.⁵² In a 2004 *New York Times* editorial, Powell reshaped his position again to favor the status quo, stating, “I believe that any effort to extend regulation of content to other media would be contrary to the Constitution.”⁵³ Some have suggested that Powell’s attitude toward indecenty regulation has changed because of political pressures.⁵⁴ Regardless, in his ultimate position, he relies on the old arguments that broadcasting is uniquely pervasive and is susceptible to regulation because it is transmitted via public airwaves.⁵⁵

By relying on these old arguments, Michael Powell’s comments fail to take into account the changes that have altered the contours of the debate, and his conclusion is ultimately inadequate. The first important change that repudiates the broadcast/cable distinction is the way content itself is chosen. The relationship between broadcasters and citizens has changed fundamentally, and the legal reasoning that defines this relationship no longer applies. Cable programmers have seldom considered community needs, but, in the past, broadcasters ascertained community needs and competitive hearings were held in the community to determine which prospective licensee was the best qualified to serve local interests.⁵⁶ In part because of competitive pressures and the national nature of unregulated media, however, broadcasters have lost sight of the “community needs” requirement.⁵⁷ In fact, traditional broadcasters are now offending communities as never before. According to Michael Powell, complaints have reached a fevered pitch.⁵⁸ One can no longer distinguish between broadcasting and cable based on how content is chosen. It is not appropriate to base media regulation on old legal precedent that no longer reflects the realities of programming.

⁵¹ Nick Gillespie et al., *The Reluctant Planner: FCC Chairman Michael Powell on Indecency, Innovation, Consolidation, and Competition*, REASON ONLINE, Dec. 2004, <http://www.reason.com/news/show/36417.html>.

⁵² See Reed Hundt, *Regulating Indecency: The Federal Communication Commission’s Threat to the First Amendment*, 2005 DUKE L. & TECH. REV. 13, ¶¶ 6-7.

⁵³ Powell, *supra* note 41.

⁵⁴ Gillespie et al., *supra* note 51; Hundt, *supra* note 52, at ¶¶ 6-7.

⁵⁵ Powell, *supra* note 41.

⁵⁶ Michael J. Copps, Commissioner, Fed. Commc’ns Comm’n, Remarks at FCC Hearing on Localism and License Renewal (Jan. 28, 2004), <http://tap.gallaudet.edu/FCC/CoppsComments.htm> (“Since the 1980s, fundamental protections of the public interest have weakened and withered—requirements like meeting with members of the community to determine the needs of the local audience . . .”).

⁵⁷ *Id.*

⁵⁸ Powell, *supra* note 41.

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The increasing availability of cable (and the potential pervasiveness of satellite and internet radio⁵⁹) leads to another reason why the “public broadcasts/private subscriptions” distinction based on consumer choice is becoming less relevant. In terms of cable, many people would argue that it is more difficult to receive only the main broadcast networks than it is to subscribe to basic cable. Few stores still sell television antennas. Setting up and maintaining an antenna is more difficult than having the local cable service handle all maintenance and repairs. Also, in today’s America, cable television is so important to modern culture that money seldom stands in the way of even the poorest Americans making cable a priority. One need only walk by an unemployment or welfare line and ask how many people have cable TV to understand its importance. A recent report found that 62% of households below the poverty line have cable or satellite TV.⁶⁰ Choice is quickly being eliminated from the debate; cable television is becoming a socio-cultural necessity for American households.

Even if one still believes families retain a legitimate choice between broadcast and cable television, the lack of educational programming on broadcast networks makes stations like the Disney Channel, The Learning Channel, The History Channel, and Nickelodeon desirable for families. Parents choose to subscribe to a variety of basic cable packages to gain access to educational programming. To access these networks, though, parents are also forced to pay for channels they do not want. They have to protect their children from the much more explicit fare on MTV, FX, Comedy Central, etc.⁶¹ Senator John McCain proposed a solution to this “tier” system in “a la carte” cable.⁶² Such a system would allow consumers to order only the specific channels they would like, rather than being forced into buying a package.⁶³ Current FCC chairman Kevin Martin supported the proposed legislation, but the cable lobby in Washington put much time and money into halting this legislation, and the Senate Commerce Committee rejected the proposal in June 2006.⁶⁴ Until “a la carte cable” becomes a

⁵⁹ See *infra* Part III.

⁶⁰ ROBERT E. RECTOR & KIRK A. JOHNSON, THE HERITAGE FOUND., UNDERSTANDING POVERTY IN AMERICA I (2004), <http://www.heritage.org/Research/Welfare/bg1713.cfm>.

⁶¹ For examples of how raunchy the content of cable television programming has become, see PARENTSTV.ORG, BASIC CABLE AWASH IN RAUNCH: A CONTENT ANALYSIS OF EXPANDED BASIC CABLE’S ORIGINAL PRIME TIME SERIES 6, 10 (2004), <http://www.parentstv.org/PTC/publications/reports/2004cablestudy/main.asp>.

⁶² Frank Ahrens, *FCC Asked to Examine a la Carte Cable TV*, WASH. POST, May 20, 2004, at E4.

⁶³ Leslie Cauley, *Study: A la Carte Cable Would Be Cheaper*, USA TODAY, Feb. 9, 2006, at 1B.

⁶⁴ JOHN DUNBAR, CTR. FOR PUB. INTEGRITY, ANATOMY OF A LOBBYING BLITZ: CABLE INDUSTRY ENLISTS DIVERSE CROWD IN HIGH LEVEL INFLUENCE CAMPAIGN (2004), <http://www.publicintegrity.org/telecom/report.aspx?aid=395> (describing the cable lobby’s efforts to oppose the legislation); Wayne Friedman, *Senate Committee Rejects McCain’s A La Carte Cable Provision*, MEDIA DAILY NEWS, June 29, 2006,

reality, the grouping of educational children's networks with the most indecent fare in basic cable packages contributes to the "public broadcasts/private subscriptions" distinction being less relevant to today's debate because parents who want the most educational programming for children have little choice.⁶⁵

One more change in the television industry has further compromised the legal reasoning that led to current precedent. In 1940, FCC rules held that a single company could not own more than three television stations; the limit was extended to five in 1944 and to twelve television stations or control of 25% of the national audience for television station owners in 1984.⁶⁶ The Clinton administration alleviated the restrictions further, allowing companies to own more than twelve stations and control up to 35% of the national audience,⁶⁷ which contributed to the diminution of the distinction between broadcast programmers and cable programmers. Now, major companies like General Electric, which owns NBC, Viacom, which owns CBS, and Disney, which owns ABC, also own multiple cable networks.⁶⁸ The regulation of broadcasting barely affects these companies for two reasons. First, while they have grown recently,⁶⁹ FCC fines against programming on NBC, ABC, and CBS remain minuscule for such large companies.⁷⁰ Second, because they own so many cable networks, these companies can reserve their more racy fare for the cable networks while advertising for these programs on their broadcast networks. When the same companies control the content on broadcast and cable television, it is difficult to argue that there is a meaningful distinction in terms of the

http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=45098.

⁶⁵ The FCC has adopted rules requiring all television screens larger than thirteen inches to be equipped with V-chip technology to block programs based on program ratings and parental preference. FCC, V-Chip: Viewing Television Responsibly, <http://www.fcc.gov/vchip/> (last visited Nov. 25, 2006). However, the rating system on which the V-chip technology is based has been criticized as "inaccurate." *E.g.*, Erica Ogg, *Parents Group Derides V-Chip Ads*, CNET NEWS.COM, July 27, 2006, http://news.com.com/Parents+group+derides+V-Chip+ads/2100-1028_3-6099408.html. The V-chip does not solve the problem of the television industry churning out increasingly raunchy content, and it does not aid parents in protecting their children from pervasive, inappropriate content outside of their homes.

⁶⁶ Henry Geller, *Ownership Regulatory Policies in the U.S. Telecom Sector*, 13 CARDOZO ARTS & ENT. L.J. 727, 728-32 (1995).

⁶⁷ PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM – LOCAL TV (2004), http://www.stateofthenewsmedia.org/narrative_localtv_ownership.asp?cat=5&media=6.

⁶⁸ PROJECT FOR EXCELLENCE IN JOURNALISM, THE STATE OF THE NEWS MEDIA 2004: AN ANNUAL REPORT ON AMERICAN JOURNALISM – NETWORK TV (2004), http://www.stateofthenewsmedia.org/narrative_networktv_ownership.asp?cat=5&media=4.

⁶⁹ Frank Ahrens, *The Price for On-Air Indecency Goes Up: Congress Approves Tenfold Increase in Fines FCC Can Assess*, WASH. POST, June 8, 2006, at D1.

⁷⁰ See Frank Ahrens, *Delays, Low Fines Weaken FCC Attack on Indecency*, WASH. POST, Nov. 10, 2005, at A1.

pervasiveness of the different media. The consolidation of program ownership again demands the rethinking of legal precedent.

These changes—the relative ease of subscribing to cable as opposed to the difficulty of buying and maintaining an antenna, the grouping of educational programming with indecent programming, and the new ownership requirements that allow a few players to control most of television—highlight pervasiveness as an important factor in considering whether cable television should be distinguished from broadcasting. There is little question that cable is a pervasive medium and is accessible to children. Cable has been the dominant multi-channel provider in terms of viewers and revenue for quite some time, having contributed to the substantial drop in broadcast network viewing from 1983 to 1994. Cable programs are among the most heavily viewed as 90% of people get their television through cable.⁷¹ Even if an individual decides that she does not desire cable programming for herself or her children, she cannot avoid it. Most of her child’s friends will have cable in their homes. Cable programming is commonly visible in restaurants, stores, hotels, and many more locales that one cannot avoid in day-to-day life. While many owners and managers of such establishments are smart enough not to show hardcore porn in places that children frequent, the unregulated nature of cable makes arguably inappropriate programming available on channels commonly shown in public places, such as ESPN and TBS.⁷² Because cable is available in so many places accessible to children, and seems to be even more visible than broadcast television, it has rendered the argument supporting special regulation of broadcast media irrelevant.

III. MODERN MEDIA AND THE UNWARRANTED DISTINCTION FROM BROADCAST TECHNOLOGY

Beyond cable, new, unregulated media—internet radio and satellite radio—have highlighted the distinction between broadcast and subscription-based services and brought the regulatory differences to the forefront of the national political discourse. Internet radio and satellite radio have increased in popularity to the point that they represent a real challenge to traditional broadcast media.⁷³ Much about the regulation debate suggests that cable, internet radio, and satellite radio can be grouped together for regulatory

⁷¹ Andrew Raff, *Are Indecency Regulations Obsolete?*, IPTAblog, Mar. 28, 2006, http://www.iptablog.org/2006/03/28/are_indecency_regulations_obsolete.html.

⁷² Even these seemingly benign channels frequently air explicit material. For example, on TBS, *Sex & The City* includes sexually explicit dialogue, and on ESPN, *Season on the Brink*, featuring basketball coach Bobby Knight, contained extremely explicit language. For the full-length dialogues, see PARENTSTV.ORG, *supra* note 61.

⁷³ E.g., Christopher Boyd, *Radio Under Siege: Satellite Services and Podcasters Are Among the Competitors Luring Listeners Away from the FM and AM Dials*, ORLANDO SENTINEL, May 1, 2005, at H1.

purposes. To frame the debate, this Part first considers the differences between the media themselves and the different ways in which they would potentially be regulated. It then makes the case for treating the newer technologies of satellite and internet radio like broadcast technology from an indecency regulatory standpoint, if not now, then soon.

Satellite radio is a service similar to cable. One must subscribe to the service and pay a monthly subscription fee. This fee represents satellite radio's primary revenue source; one reason it is attractive is that there are no commercials.⁷⁴ Also, because it is a subscription-based service, satellite radio is clear of FCC restrictions. In fact, the pioneers of satellite radio dismiss the model of large broadcast radio corporations as unappealing and prefer to emulate cable television specifically because of government regulation issues.⁷⁵ As with cable, no one is forced to sign up for satellite radio, and no one but a subscriber can access the scrambled signals.

Internet radio is different from satellite radio and cable in a few respects. First, it is a free service that earns revenue through advertisements and private donations. Also, the possibilities for disseminating internet radio are even more broad and global than the other media; a small local station can become an international player. There is no scarcity of frequencies, which was the government's original rationale for regulating broadcasts, so the number of internet radio stations that can exist seems to be infinite. By using hard disc memory, computers can "time-shift the play out" of internet radio transmissions.⁷⁶ Because of its potential reach, internet radio is well-suited to "niche content, such as education, specialist music," or programs aimed at certain social or ethnic groups, which may be of interest to a relatively small number of people who cannot justify using scarce spectrum for such programming.⁷⁷ One can argue that internet radio is no different from other unregulated content one can find on the internet, which is an argument that cable television and satellite radio cannot make.

The differences between cable, satellite radio, and internet radio, while important, should not greatly influence the larger regulatory debate. The differences do not influence the effect of the speech on society. Also, the distinctions between the media are blurry and becoming more blurred

⁷⁴ See Ryan D'Agostino, *Sound Advice*, CNN/MONEY, Jan. 24, 2006, http://money.cnn.com/magazines/moneymag/moneymag_archive/2006/02/01/8367541/index.htm; Earle Eldridge, *Satellite Radio Transmits Need for Funds*, USA TODAY, Aug. 27, 2002, at 5B; Mark Hamrick, *Satellite Radio Seeks Growth*, CBS.COM, Dec. 8, 2005, http://www.cbsnews.com/stories/2005/12/08/tech/main1110164.shtml?CMP=OTCRSSFeed&source=RSS&attr=Business_1110164 (describing monthly subscriber fees as the key source of revenue for satellite radio).

⁷⁵ Scott Woolley, *Freedom of Speech on Satellite Radio*, FORBES.COM, Oct. 6, 2004, http://www.forbes.com/home/services/2004/10/06/cx_sw_1006stern.html.

⁷⁶ Franc Kozamernik & Michael Mullane, *An Introduction to Internet Radio*, EUR. BROADCAST UNION TECHNICAL REV., Oct. 2005, at 2-3, available at http://www.ebu.ch/en/technical/trev/trev_304-webcasting.pdf.

⁷⁷ *Id.* at 3.

because of the versatility of new technologies. Terrestrial radio programs are now streaming over the internet as well as on the AM/FM dial.⁷⁸ Cable companies are popular providers of internet access to homes.⁷⁹ Soon the personal computer and the television set may be entirely interchangeable devices.⁸⁰ Satellite and internet radio should be viewed similarly to cable television as this debate plays out. They are all increasingly pervasive media.

The regulatory statuses of satellite and internet radio have recently become tied to the regulation of television largely because of two high-profile fines that the FCC imposed in 2004. In January 2004, during the Super Bowl halftime show, Janet Jackson's breast became exposed on CBS network television. The FCC instituted a \$550,000 fine.⁸¹ Also in 2004, the FCC imposed large fines on ClearChannel Communications for indecent speech that occurred on the Howard Stern Show.⁸² While both events occurred on broadcast media, they have had the effect of shedding light on the distinction between broadcast media and cable television, internet radio, and satellite radio.

The Janet Jackson incident led critics to contend that such incidents are commonplace on cable and to argue that cable channels should be regulated no differently than broadcast channels.⁸³ Furthermore, many people now cite the Janet Jackson Super Bowl incident as the beginning of the FCC's crackdown on terrestrial radio.⁸⁴ In large part because of this crackdown, Howard Stern announced in October that he would move his show to Sirius Satellite Radio precisely because satellite radio is not regulated and is out of reach of the FCC.⁸⁵ His announcement came on the

⁷⁸ See Wen Ren & Sylvia M. Chan-Olmsted, *Radio Content on the World Wide Web: Comparing Streaming Radio Stations in the United States*, 11 J. RADIO STUD. 6, 6 (2004).

⁷⁹ See Yuki Noguchi, *Cable Firms Don't Have To Share Networks, Court Rules*, WASH. POST, June 28, 2005, at D1.

⁸⁰ E.g., John Markoff, *How Will Apple's Marketing Maestro Marry the Computer and the Home TV?*, N.Y. TIMES, Sept. 11, 2006, at C1 ("The computer industry, under the banner of 'digital convergence,' has been looking longingly at the American living room for several years.").

⁸¹ *CBS Hit with \$550K Super Bowl Fine: FCC Imposes \$27,500 on Each of 20 CBS-Owned Affiliates that Showed Broadcast of Half-Time Show*, CNN/MONEY, Sept. 22, 2004, http://money.cnn.com/2004/09/22/news/fortune500/viacom_fcc/.

⁸² *Clear Channel Nixes Howard Stern: Faced with a \$495,000 FCC Fine, The Radio Chain Drops Stern Show from Six Stations*, CNN/MONEY, Apr. 8, 2004, http://money.cnn.com/2004/04/08/news/fortune500/stern_fines/.

⁸³ Tom Dorsey, *Indecency Reformers Turn Eyes to Cable*, COURIER-JOURNAL (LOUISVILLE, KY), May 10, 2004, at 2C.

⁸⁴ See, e.g., Krysten Crawford, *Smackdown in Smut War?*, CNN/MONEY, Apr. 28, 2005, http://money.cnn.com/2005/04/27/fortune500/indecency_courts/.

⁸⁵ Howard Kurtz & Frank Ahrens, *Sirius Lands a Big Dog: Howard Stern*, WASH. POST, Oct. 7, 2004, at A1.

heels of another controversial radio program, Opie and Anthony, signing with Sirius' main competition, XM Satellite Radio.⁸⁶

An analysis of the pervasiveness and potential pervasiveness of these media sheds light on whether the distinction between broadcast and non-broadcast media should persevere. Internet radio is not quite as pervasive as cable television, but it is showing signs that it will reach that level. About thirty million people now listen to radio online at least once a week, up from twenty million in 2005.⁸⁷ New specialty radio stations are sprouting up and gaining loyal followers because of their commercial free programming of music that cannot be found on a terrestrial station. Furthermore, new initiatives like Al Franken's liberal Air America network are attracting listeners.⁸⁸ Internet radio appears set for an explosion in popularity as the U.S. youth grow older because their generation is generally familiar with the internet as a place to gather information, relies on the internet as a place to obtain music, is comfortable playing music on computers, and is no longer able to share files freely because of the recent crackdown against Napster and similar services.⁸⁹ Also, because of the many benefits of the internet, it would be difficult and not necessarily beneficial for a parent to choose not to subscribe to the internet solely to avoid indecent programming on internet radio. One can argue that the internet is already a pervasive medium accessible to children because of its availability in homes, in schools, and in public libraries. In fact, children have more control over the radio they listen to over the internet in these places than they have control of the terrestrial radio in their parents' cars because they are seldom in the car alone. As more people tune into internet radio stations, the pervasiveness of the medium suggests they should be treated in the same way as broadcast programming.

The case of satellite radio is more difficult because the technology is in its infancy. Nevertheless, many signs point to satellite radio becoming a pervasive medium. More people are switching to satellite radio after hosts such as Stern, Opie & Anthony, and Bob Edwards, formerly of National Public Radio, made the switch. Also, XM and Sirius are teaming with car companies to include satellite radio with the purchase of automobiles.⁹⁰

⁸⁶ *Id.*; *Opie & Anthony to XM Radio: Shock Jocks Sign Deal to Bring Their Show to Satellite Radio in October, Out of the FCC's Reach*, CNN/MONEY, Aug. 6, 2004, http://money.cnn.com/2004/08/06/news/midcaps/opie_anthony/.

⁸⁷ Marcelo Prince, *Internet Radio Stations Disagree Over How To Count Listeners*, WALL ST. J., Mar. 21, 2006, available at http://online.wsj.com/public/article/SB114184764257692831-0Gdtf_pTDltcl_oaHUF2jF0_G9U_20070320.html?mod=rss_free. All statistics are estimated because of the difficult nature of determining actual audiences. *Id.*

⁸⁸ Fonda, *supra* note 3.

⁸⁹ See Benny Evangelista, *Napster Runs Out of Lives—Judge Rules Against Sale*, S.F. CHRON., Sept. 4, 2002, at B1.

⁹⁰ Todd Leopold, *New Tricks for Old Broadcast Medium: Satellite Radio Reinvigorates the Sound of Entertainment*, CNN.COM, July 20, 2006,

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Although satellite radio is not yet nearly as intrusive as cable television or even internet radio, two occurrences suggest that legislators should group it with the other media sooner rather than later. First, public comments linking satellite radio to cable television⁹¹ will bring First Amendment restrictions for the newer medium to the fore as the cable regulatory debate plays out. Also, the move of Howard Stern has generated much controversy and may present a First Amendment test case for whether satellite radio will remain free from indecency regulation.⁹² The Howard Stern signing and the marketing schemes to put satellite radios in cars and other places accessible to children suggest satellite radio should not be distinguished from broadcasting in the coming decades.

IV. ADDRESSING COUNTERARGUMENTS TO ELIMINATING THE DISTINCTION

The main counterargument to proposed encroachments on the status quo is based on the scarcity rationale, which holds that frequencies, because they are scarce, must be regulated to ensure the public has access to diverse viewpoints and an uninhibited marketplace of ideas.⁹³ Proponents of this argument will contend that even if government should treat broadcasting like cable, satellite radio, and internet radio from a moral or ethical standpoint, it cannot do so because broadcasting is the only media that utilizes scarce frequencies. Yet, criticisms of the scarcity argument are now “legion.”⁹⁴ Some claim that the scarcity of broadcast frequencies is overstated.⁹⁵ More to the point, the rise of cable television undermines the scarcity argument. Cable television wiring is accessible to most homes in America. As J. M. Balkin posits, “If the government is really interested in reducing scarcity and increasing choices, it should simply subsidize cheap cable television for the remaining households instead of artificially limiting

<http://www.cnn.com/2006/SHOWBIZ/Music/07/20/radio/index.html> (“A number of auto companies have exclusive relationships with XM or Sirius . . .”).

⁹¹ E.g., Mark Glaser, *Will Satellite, “Podcasting” Bring a Renaissance to Radio Journalism?*, USC ANNENBERG ONLINE JOURNALISM REV., Oct. 12, 2004, <http://ojr.org/ojr/glaser/1097614994.php> (describing satellite radio as “coming on like cable TV with hundreds of niche channels for a monthly fee”).

⁹² Adam Thierer has suggested this possibility. Thierer, *supra* note 7 (“Howard Stern may provide us with the test case. He is jumping over to satellite radio with the expectation he will be free to speak his mind. Today, that is true, but will it be in the future?”).

⁹³ For discussions of the scarcity issue, see J. M. Balkin, *Media Filters, The V-Chip, and the Foundations of Broadcast Regulation*, 45 DUKE L.J. 1131, 1134 (1996); 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, 344-47 (2006).

⁹⁴ Balkin, *supra* note 93, at 1134 n.8. For some representative critiques, see LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 197-209 (1987); and Soriano, *supra* note 93, at 344-47.

⁹⁵ See, e.g., Balkin, *supra* note 93, at 1134.

access through the award of broadcasting licenses.”⁹⁶ Finally, as Ronald Coase articulated ten years prior to *Red Lion*, even though frequencies are scarce, government regulation is not the most efficient way to allocate scarce resources. It would be preferable to devise a system of property rights and utilize the price mechanism to divide the airwaves by frequency, time, place, and broadcasting power.⁹⁷ The scarcity rationale does not justify distinguishing broadcasting for special government regulation.

Another counterargument might arise based on the “opt-in” requirement for subscription-based services. While advocating that the distinction between broadcast and non-broadcast media should be eliminated does not necessarily mean that non-broadcast media should face strict regulation,⁹⁸ many believe that invalidating the distinction would result in strict regulations for cable television, satellite radio, and internet radio because of the current political climate.⁹⁹ Thus, they might contend that allowing the FCC access to private media would not only overturn years of legal precedent, but also that the customer has made an overt decision to purchase the service, and therefore she is operating under informed consent—she knows enough to expect indecent programming. Regardless of the result of eliminating the broadcasting/non-broadcasting distinction, this counterargument does not hold when a medium is so pervasive as to eliminate informed consent because the average citizen will still be exposed to the medium during her daily life. At that point the government can regulate electronic media if a compelling government interest is served, just as the FCC regulates broadcast radio and television. The pervasiveness of the cable medium, and the impending pervasiveness of internet and satellite radio, should be enough to repudiate the distinction.

CONCLUSION

As has been demonstrated, cable television should be treated in the same manner as broadcasting now, and internet radio and satellite radio should be treated in the same manner also, if not now then soon. It is time to abandon the legal precedent supporting the distinction between broadcasting and the newer media. When cable programming can be seen in local restaurants, in barber shops, in convenience stores, and at almost everyone’s home in the neighborhood, when it is easier to obtain cable than

⁹⁶ *Id.*

⁹⁷ R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1 (1959).

⁹⁸ Indeed, the elimination of indecency regulations for broadcasting is equally consistent with elimination of the distinction. *See infra* Conclusion.

⁹⁹ Recently, many have advocated for increased regulation of indecency and increased fines for violations. *See* Brian J. Rooder, Note, *Broadcast Indecency Regulation in the Era of the “Wardrobe Malfunction”*: *Has the FCC Grown Too Big for Its Britches?*, 74 FORDHAM L. REV. 871, 886-89 (2005); Hurley, *supra* note 5. Congress passed legislation increasing fines. Ahrens, *supra* note 69.

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it is to access the broadcast networks alone, and when the same players control broadcasting and cable, the distinction between broadcasting and non-broadcasting media has broken down. Similar scenarios appear likely for satellite radio and internet radio.

This Note does not make a case for what the FCC's role should be once the distinction is eliminated. There is merit to the First Amendment argument that not even broadcasting should face indecency regulation,¹⁰⁰ let alone the extension of regulation to non-broadcast media.¹⁰¹ On the other hand, for many, including members of Congress,¹⁰² the Howard Stern Show and Opie & Anthony completely unregulated and without any threat of a fine remains a scary proposition. What is clear is that the nation is involved in a culture war over "moral values."¹⁰³ With a polarized political climate,¹⁰⁴ advocates on either side of the indecency regulation issue are impassioned. Yet reasoned, non-partisan scholarship on the issue is lacking, and recent scholarship focuses on applying existing precedent rather than addressing the regulatory debate de novo in search of better solutions.¹⁰⁵ In making the case for discarding precedent and eliminating the broadcasting/non-broadcasting media distinction, this Note seeks to encourage scholars to address the next step: based on logic alone, should cable, satellite radio, and internet radio be subject to the same indecency regulations as broadcasting, or is the elimination of indecency regulations for broadcast technology the more desirable outcome?

¹⁰⁰ See Ohm, *supra* note 8.

¹⁰¹ See Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio?*, 30 S. ILL. U. L.J. 243 (2006); Jessica E. Elliott, Note, *Handcuffing the Morality Police: Can the FCC Constitutionally Regulate Indecency on Satellite Radio?*, 5 CONN. PUB. INT. L.J. 263, 283 (2006); Gregory B. Phillips, Note & Comment, *Indecent Content on Satellite Radio: Should the FCC Step In?*, 26 LOY. L.A. ENT. L. REV. 237 (2005/2006) (arguing that there is no constitutional basis for regulating satellite radio like broadcasting).

¹⁰² Hurley, *supra* note 5.

¹⁰³ "Moral values" is a politically charged term that often divides individuals on opposite sides of the political spectrum. See JOHN DANFORTH, FAITH AND POLITICS: HOW THE "MORAL VALUES" DEBATE DIVIDES AMERICA AND HOW TO MOVE FORWARD (2006) (describing the current debate, including the role of religion in politics and the separation of church and state).

¹⁰⁴ ADAM WOLFSON, BROOKINGS INST., RED AND BLUE NATION? CAUSES, CONSEQUENCES, AND CORRECTION OF AMERICA'S POLARIZED POLITICS (2006), <http://www.brookings.edu/views/papers/wolfson20060531.pdf>; David S. Broder, *Behind the Gridlock*, WASH. POST, Nov. 2, 2006, at A17.

¹⁰⁵ E.g., Corn-Revere, *supra* note 101; Joel Timmer, *The Seven Dirty Words You Can Say on Cable and DBS: Extending Broadcast Indecency Regulation and the First Amendment*, 10 COMM. L. & POL'Y 179 (2005); Elliott, *supra* note 101; Phillips, *supra* note 101; Rooder, *supra* note 99; Andrew Sperry, Student Article, *Smut in Space: The FCC and Free Speech on Satellite Radio*, 17 LOY. CONSUMER L. REV. 531 (2005). *But see* Joshua B. Gordon, Note, *Pacifica is Dead, Long Live Pacifica: Formulating a New Argument Structure to Preserve Government Regulation of Indecent Broadcasts*, 79 S. CAL. L. REV. 1451, 1495-97 (2006) (proposing a novel structure for considering indecency regulation).