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.¹

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INTRODUCTION

On a December morning in 2005, Howard Stern stood before a crowd in New York City.² Thousands of New Yorkers filled the nearby streets, hoping to be a part of a historic day for U.S. entertainment.³ 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.⁴ Stern was taking his show to satellite radio.⁵ 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”).⁶ 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.⁷ 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.⁸ 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.’”⁹ Although The Howard Stern Show successfully continues on SiriusXM today,¹⁰ it is alarming that a government agency could effectively force one of the


³ See id.

⁴ See id.

⁵ See id.


⁷ 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.

⁸ See id.


¹⁰ 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.” In 1978, the Supreme Court held in Federal Communications Commission v. Pacifica Foundation that the FCC may restrict speech that is “indecent” on broadcast television and broadcast radio. 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.”

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. At times, commentators treat broadcast speech as being governed entirely by public opinion. 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.”

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. In fact, at least two Supreme Court justices recently expressed a willingness to overturn Pacifica. 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.”

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.”


12 “Indecent” is a term of art that is discussed in more detail in Part I.A.
13 See Pacifica, 438 U.S. at 748.
14 See id.
15 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/.
16 See id.
17 See id. (emphasis in original).
20 556 U.S. at 530, 535 (Thomas, J., concurring).
21 Fox Television Stations, Inc., 132 S. Ct. at 2321 (Ginsburg, J., concurring) (citation omitted).
The fundamental premise underlying *Federal Communications Commission v. Pacifica Foundation*, as well as *Red Lion Broadcasting Co. v. Federal Communications Commission* (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”). Two main rationales exist for the media distinction doctrine. First, under the scarcity rationale, the government must regulate broadcast media because of the limited nature of frequency wavelengths in broadcast media. If the government did not regulate broadcast media, frequencies would become flooded and thus unusable. As a result, the government can grant only a certain number of licenses to persons who want to air content on broadcast media. 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.

A second rationale for the media distinction doctrine asserts that broadcast media enter the home in a uniquely pervasive manner. 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. Thus, this second rationale alleges that the content is regulated to prevent people from having offensive content forced upon them or their children.

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. Stern is not alone in his accessibility; it is now commonplace for personalities to reach the public through multiple forms of media. This article refers to such personalities as “cross-media personalities.” In this article, I argue that, given the prevalence
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.36

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 Pacifica37—the Supreme Court decision that allowed the FCC to fine Howard Stern and many other personalities—began long before satellite radio existed.38 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.39 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.”40 The Federal Radio Commission was established to allocate radio frequencies among the competing applicants.41 In 1934, Congress replaced this entity with the

36 U.S. CONST. amend. I.
41 PATRICIA MOLONEY FIGLIO, CONG. RESEARCH SERV., RL 32589, THE FEDERAL COMMUNICATIONS
Federal Communications Commission. The FCC derives its power to regulate broadcast media from the Communications Act of 1934. 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.” The federal courts were left to determine whether this grant of power was consistent with the First Amendment.

Modernly, the FCC restricts speech on broadcast media by imposing fines on speech that is indecent but not obscene. 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.’” 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.” “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.” 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.” 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.

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
because of the reasoning the Court used to reach its holding. In *Red Lion Broadcasting Company v. Federal Communications Commission*, the Supreme Court considered the constitutionality of the FCC’s “fairness doctrine.” Under the fairness doctrine, the “Federal Communications Commission had 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.” Red Lion argued that the fairness doctrine violated broadcasters’ First Amendment rights.

Red Lion reasoned that the First Amendment prohibits restricting a person from “publishing what he thinks,” and that this right “applies equally to broadcasters.” 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.” 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.” 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. The Court thus set forth the media distinction doctrine in *Red Lion* which allowed the Court to then reach its holding in *Pacifica*.

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. In *Pacifica*, the FCC had sanctioned a radio station for broadcasting a “satiric monologue” in the afternoon. The broadcast consisted of a prerecorded stand-up comedy routine by George Carlin, in which Carlin discussed the nature of certain words 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).

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53 See id. at 369.
54 Id.
55 Id. at 386.
56 Id.
57 Id. at 386-87 (citation omitted).
58 Id. at 387.
59 See id.
60 See id.
62 See id. at 726, 729.
64 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, and contended further that the FCC’s restriction of the speech was not permitted by any other First Amendment doctrine. 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.” 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. 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.” The majority then found that the FCC indeed had the power to regulate a radio broadcast that was indecent but not obscene. 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.” Thus, the Court expressly held what was implied in Red Lion: broadcast media receive the least protection compared to all other media. The Pacifica opinion was based on two rationales, discussed below.

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.”).

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.

See Pacifica, 438 U.S. at 742.

Id. at 729.

Id. at 745-48.

Id. at 746.

See id. at 748-51.

Id. at 748 (citation omitted).

The Pacifica majority did not state exactly what standard applies to broadcast media. Cf. Fed. Commc’ns 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.

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.74 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.75

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

74 Red Lion Broad. Co. v. Fed. Commc’ns 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.


75 *Red Lion*, 395 U.S. at 388-89.

76 See id.

77 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).

78 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 (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.79 This is especially true considering that many stations are already used by large-scale broadcasters such as major news stations.80 Either some people will be prevented from speaking or people will broadcast over a frequency that is already being used, making both broadcasts imperceptible.81 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.82

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.83 Put differently, it is conceivable that the FCC could limit who can use broadcast media without restricting broadcast media more heavily than other media.84 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.85

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.86

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.87

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79 See Red Lion, 395 U.S. at 388-89.
81 See Red Lion, 395 U.S. at 388-89.
82 See id.
83 See, e.g., Hazlett et al., supra note 77, at 51-52.
84 See id.
85 Red Lion, 395 U.S. at 389.
86 See id.
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.88

Thus, the Court in *Pacifica* reasoned that the intrusive nature of broadcast media sets them apart from other media.89 To make this point clearer, consider George Carlin’s “Filthy Words” standup routine that was at issue in *Pacifica*.90 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.91 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.92 By broadcasting the performance on its radio station, however, the broadcaster removed the person’s choice to become a listener.93

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.94 After all, nobody is forced to listen to a particular station.95 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.96 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.97

88 *Id.*
89 See *id.*
90 See *id.*
91 See *id.*
92 See *id.*
93 See *id.*
94 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.
95 See *id.*
96 See *id.*
97 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.98

2. As to Children

Relatedly, the *Pacifica* majority opinion emphasized its belief that broadcast media could uniquely harm children.99 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.”100 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.101

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.102 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.”103 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 . . . .”104 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

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98 See id.
99 See id. at 749-50.
100 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.
101 See *Pacifica*, 438 U.S. at 748-49.
103 Id. at 5036.
104 Id. at 5037.
frame relevant to an indecency determination . . . “. Therefore, the FCC imposed a fine under its framework.106

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.107 The FCC again applied its indecency analysis.108 First, the material “must describe or depict sexual or excretory organs or activities . . . “109 Second, the content of the broadcast “must be patently offensive as measured by contemporary community standards for the broadcast medium.”110 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.”111

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.112 There are now several different communications media beyond broadcast radio that are widely accessible by the public.113 This section explores some of those technologies.

1. Satellite Radio

The first terrestrial114 car radio was introduced in 1922.115 Today, roughly two thirds of new cars come equipped with SiriusXM in addition to AM and FM ra-

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105 Id.
106 Id. at 5038.
107 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. This is- sue is not relevant, however, to the authority of the FCC to impose such policies. See id.
108 See Super Bowl XXXVIII Halftime Show, supra note 107, at 19234-36.
109 Id. at 19234.
110 Id.
111 Id. at 19235.
113 See, e.g., id.
114 The term “terrestrial radio” is often used to refer to broadcast radio when comparing it to satel- lite 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?ref=newssearch (discussing the viability of “terrestrial radio” given the increasing popularity of satellite radio).
dio.\textsuperscript{116} 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.\textsuperscript{117} While SiriusXM requires a subscription, subscriptions are becoming more common.\textsuperscript{118} Many new and used cars come with a free trial of SiriusXM,\textsuperscript{119} and as of 2013, SiriusXM had approximately 24.4 million subscribers.\textsuperscript{120}

2. Smartphones and Tablets

Smartphones have become commonplace, typically providing access to Internet content, television stations, satellite radio, and terrestrial radio.\textsuperscript{121} Today, around sixty percent of adults in the United States own smartphones.\textsuperscript{122} 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.\textsuperscript{123} The rise of smartphones and tablets does not extend solely to adults.\textsuperscript{124} One recent study indicates that thirty-eight percent of children two years old or younger have used tablets or smartphones.\textsuperscript{125}

3. Internet

Since \textit{Pacifica}, the Internet has become common in households and is a fundamental part of people’s daily routines.\textsuperscript{126} Today, approximately seventy-three percent

\begin{itemize}
  \item [\textsuperscript{116}] \textit{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.”).
  \item [\textsuperscript{117}] See id.
  \item [\textsuperscript{118}] David Lieberman, \textit{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/.
  \item [\textsuperscript{122}] Sterling, \textit{supra} note 121.
  \item [\textsuperscript{123}] Kathryn Zickuhr, \textit{Tablet Ownership 2013}, PEW RES. CENTER (June 10, 2013), http://www.pewinternet.org/2013/06/10/tablet-ownership-2013/.
\end{itemize}
of American adults have an Internet connection at home.\textsuperscript{127} For some people, the Internet has completely replaced old methods of accessing content.\textsuperscript{128}

4. Broadcast Radio

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

\textsuperscript{127} 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.

\textsuperscript{128} 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. \textit{See id.}


\textsuperscript{130} 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/.


\textsuperscript{134} Id.

\textsuperscript{135} See \textit{id.}

\textsuperscript{136} See \textit{id.}

\textsuperscript{137} See supra note 7 and accompanying text.

\textsuperscript{138} See Whitaker, \textit{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.\(^{139}\)

**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.\(^{140}\) Of those sixty hours, here is how the average person in the United States divides the time:\(^{141}\)

<table>
<thead>
<tr>
<th>Activity</th>
<th>Hours spent engaging in activity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Watching traditional television(^{142})</td>
<td>35.1</td>
</tr>
<tr>
<td>Listening to broadcast radio</td>
<td>14.0</td>
</tr>
<tr>
<td>Browsing the Internet on a computer</td>
<td>5.1</td>
</tr>
<tr>
<td>Watching videos on the Internet</td>
<td>1.5</td>
</tr>
<tr>
<td>Playing video games on video game consoles(^{143})</td>
<td>1.5</td>
</tr>
<tr>
<td>Watching videos on mobile devices</td>
<td>1.3</td>
</tr>
<tr>
<td>Watching DVD and Blu-ray movies</td>
<td>1.3</td>
</tr>
</tbody>
</table>

**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.\(^{144}\) Some instances of this phenomenon are obvious.\(^{145}\) Howard Stern hosts *The Howard Stern Show* on SiriusXM satellite radio,\(^{146}\) is a judge on *America’s Got Talent* on broadcast television,\(^{147}\) and has also starred in a major motion picture\(^{148}\) based on one of his two

\(^{139}\) *See supra* Part IV.A.1-4.

\(^{140}\) *See A LOOK ACROSS MEDIA 5, supra note 129.

\(^{141}\) *See id.*

\(^{142}\) 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.*

\(^{143}\) Video game consoles include devices such as PlayStation and Xbox. *See id.*


\(^{145}\) *See, e.g., Howard Stern, http://www.howardstern.com/ (last visited Apr. 10, 2015).*

\(^{146}\) *Howard Stern Show, http://www.siriusxm.com/howard100 (last visited Apr. 10, 2015).*


\(^{148}\) *PRIVATE PARTS (Paramount Pictures 1997).*
books.149 Similarly, Ryan Seacrest hosts a radio show on broadcast radio,150 and hosts *American Idol* on broadcast television.151 Bill O’Reilly hosts a Fox News show on cable television152 and, until 2009, hosted a broadcast radio show.153

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

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.161 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.162 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.163

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149 HOWARD STERN, PRIVATE PARTS (1st ed. 1993); see also HOWARD STERN, MISS AMERICA (1st ed. 1995).
154 See, e.g., *id.*
155 See supra notes 145-49.
159 See, e.g., *id.*
161 See supra notes 145-49.
163 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. Con- 
tinuing 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. 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.

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 technol-
ogy, 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 spec-

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. But *Red Lion* and *Pacifica* only considered the physical limitations of broadcast media—not their popularity. 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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164 *See supra* Part IV.A-B.


166 *See supra* Part IV.A.

167 Berresford, *supra* note 74.

168 *See supra* Part IV.A.


170 *See Pacifica*, 438 U.S. at 748; *Red Lion*, 395 U.S. at 388-89.
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.172

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,173 as it is no longer true that one medium is more pervasive than the others.174 Many devices now provide access to multiple media.175 For example, many modern cars have both terrestrial radio and satellite radio.176 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.177 Similarly, millions of television sets provide access to cable television and Internet video178 (commonly through Netflix),179 as well as broadcast television.180 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.181 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

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171 See Pacifica, 438 U.S. at 748; Red Lion, 395 U.S. at 388-89.
172 See supra Part IV.B.
173 See Pacifica, 438 U.S. at 748.
174 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”).
175 See Thierer, supra note 174.
177 See Pacifica, 438 U.S. at 748; Red Lion, 395 U.S. at 388-89.
178 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/DhQ4mBz9QWNPsDxor5MCFK/story.html (“Netflix has . . . 33.4 million US subscribers, 5 million more than HBO has domestically.”).
180 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 (“To watch cable, the television must be on one setting; to browse Netflix, it has to be on another.”).
181 See Pacifica, 438 U.S. at 748; Red Lion, 395 U.S. at 388-89.
station’s reputation and genre. 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. 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, 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). 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. 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. Similarly, Pandora

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183 See id.

184 See *Pacifica*, 438 U.S. at 748-49.


187 See supra Part IVA. 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.


and Spotify, automatically select songs based on the user’s preferences without any forewarning to the user.

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. 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. In fact, this distinction would cut against the media distinction doctrine; 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 . . . .” 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.

b. As to Children

Those who support Red Lion and Pacifica argue that the current rule is justified by the need to protect children. Today, however, children do not have easier access to broadcast media when compared to other media. As noted above, approximately thirty-eight percent of children less than two years old have used a smartphone or tablet. 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. 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. Regardless, parents, not the FCC, are

191 See id.; What is Pandora?, supra note 189.
194 See Red Lion, 395 U.S. at 390.
195 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.
196 See id.
197 See Nance, supra note 15.
198 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).
199 See supra Part IV.A.
200 See supra Part IV.A.
201 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.202

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.203 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.204 This argument ignores the reasoning of Pacifica and Red Lion, however.205 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.206 It is this lack of justification that undermines the media distinction doctrine.207

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.”208 Under the obscenity doctrine, speech is unprotected if three requirements are satisfied.209 First, the average person, applying contemporary community standards, must find that the work, taken as a whole, appeals to a prurient interest.210 The Supreme Court defines the “prurient interest” as a “shameful or morbid interest in sex . . . .”211 Second, “the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . .”212 Lastly, “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”213


203 See supra Part IV.A.

204 See supra Part IV.A.


206 See Pacifica, 438 U.S. at 748; Red Lion, 395 U.S. at 388-89.

207 See Pacifica, 438 U.S. at 748; Red Lion, 395 U.S. at 388-89.

208 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.

209 Miller, 413 U.S. at 24.

210 Id.


212 Miller, 413 U.S. at 24.

213 Id.
Notwithstanding the obscenity doctrine, many broadcast radio stations and television stations would be unlikely to broadcast content currently prohibited by the FCC. Public majority opinion is persuasive to broadcasters, who seek to please listeners and viewers for commercial gain. 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. Although this station is not required by any government agency, SiriusXM created it in response to market demand.

B. Examples

To more fully consider a post-Pacifica world, it is helpful to return to the two examples mentioned above. 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. 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. 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.” Second, the work unequivocally describes sexual acts. Finally, the work, taken as a whole, likely contains serious artistic and political value. Howard Stern is arguably commenting on the repressed nature of sexuality by discussing sexual acts in an over-the-top fashion.

I will next address the question of Janet Jackson’s Super Bowl halftime show. Here too, in a post-Pacifica world, it would be unconstitutional for the FCC to fine the television stations that aired this performance. 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. Janet Jackson’s

214 See id.
216 See id.
217 See id.
218 See supra Part III.
220 See id.
222 Miller, 413 U.S. at 24.
223 See id.
224 See id.
225 See supra Part III.
226 Miller, 413 U.S. at 24.
227 See id.
act was merely a display of the human body. 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. 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.

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. 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.*”

As reflected by this quotation, many people today view broadcast media as a First Amendment-free zone. 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.

The problem, however, is that the First Amendment does not allow for such First Amendment-free zones. 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. 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. For these reasons, the media distinction doctrine underlying *Pacifica* and *Red Lion* should be overturned.

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228 See *id.*
229 See *id.*
230 See *id.*
233 See, *e.g.*, *id.*
234 See, *e.g.*, *id.*
235 See U.S. CONST. amend. I.
236 See Whitaker, *supra* note 133.
237 See *id.*; see also *supra* Part IV.A.4.
238 See Whitaker, *supra* note 133; see also *supra* Part IV.A.4.