

1-1-2006

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Gregory B. Phillips

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### Recommended Citation

Gregory B. Phillips, *Indecent Content on Satellite Radio: Should the FCC Step In*, 26 Loy. L.A. Ent. L. Rev. 237 (2006).

Available at: <https://digitalcommons.lmu.edu/elr/vol26/iss2/4>

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# INDECENT CONTENT ON SATELLITE RADIO: SHOULD THE FCC STEP IN?

## I. INTRODUCTION

In January 2006, Howard Stern uprooted his terrestrial radio roots and transplanted them into satellite radio's fertile ground.<sup>1</sup> Akin to MTV's prophecy in 1981 that "Video Killed The Radio Star,"<sup>2</sup> Stern claimed that "satellite radio will overtake terrestrial radio."<sup>3</sup> What motivated Stern to walk away from a broadcast radio show that boasted top rankings and over twelve million listeners nationwide?<sup>4</sup> According to Stern, the Federal Communications Commission ("FCC") and its censoring ways fueled his desire to leave terrestrial radio.<sup>5</sup> As it stands today, the FCC is not authorized to regulate indecent content on satellite radio broadcasts.<sup>6</sup> But, Congress is currently debating legislation that could create stepping stones for the FCC to impose indecency standards on satellite radio in the same manner that it regulates terrestrial radio.<sup>7</sup> Considering that the lure for consumers to abandon free broadcast radio and to subscribe to satellite radio is to hear Stern's no-holds-barred satellite program, this would be Stern's worst nightmare. Stern's employer, Sirius Satellite Radio, might even have more to lose, because without a substantial increase in satellite

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1. See Cynthia L. Webb, *Star-Power Surge for Satellite Radio*, WASHINGTONPOST.COM, Oct. 7, 2004, <http://www.washingtonpost.com/wp-dyn/content/article/2004/10/07/AR2005033003480.html>.

2. The Buggles' Lyrics to Video Killed The Radio Star, <http://www.80smusiclyrics.com/arts/buggles.html> (last visited Feb. 10, 2006) ("Video Killed The Radio Star stands today as an early synthpop gem, and the fact that it ushered in the video era as the first video ever played on MTV makes it an '80s page must.").

3. Webb, *supra* note 1.

4. See *id.*

5. *Id.* ("Stern portrayed his \$500 million dollar deal with Sirius as 'a response to 'censorship' efforts by the Federal Communications Commission' . . .").

6. See *generally* In the Matter of Litig. Recovery Trust, 17 F.C.C.R. 21852, 21856 (2002) (stating "subscription-based services do not call into play the issue of indecency").

7. Frank Ahrens, *Senator Bids to Extend Indecency Rules to Cable*, WASH. POST, Mar. 2, 2005, at E1 ("Sen. Ted Stevens (R-Alaska) told a group of broadcasters yesterday that he wants to extend that [FCC's] authority to cover the hundreds of cable and satellite television and radio channels that operate outside of the government's control . . . [which] include . . . XM and Sirius.").

subscribers, Sirius's \$500 million dollar investment in Stern's show would further expand the company's already mounting debt.<sup>8</sup>

Accordingly, the question presented in this article is simple: can the FCC impose indecency standards on subscription-based satellite radio companies? This article concludes that regulating satellite radio for indecent content would violate the right to free speech. As background, Part II outlines the FCC's origin and its role in regulating broadcast radio, defines how the FCC and federal courts classify decent, indecent, and obscene speech, and explains the method of judicial review for FCC rulings. Part III discusses satellite radio's origin, identifies the current players, and describes how one can obtain and subscribe to satellite radio. Part IV reviews the FCC's current policy towards satellite radio content and new legislation in Congress that could open the door for the FCC to restrict indecent content on satellite radio. Part V explores the reasons for limiting First Amendment free speech rights to free broadcast media and examines how these reasons apply to other media, such as cable television, the Internet, and telephone messaging services. Finally, Part VI concludes that the reasons for limiting free speech rights in the broadcast radio context do not apply to satellite radio because, unlike broadcast radio, there are less restrictive means to protect children from indecent content on satellite radio than government restrictions. Additionally, although satellite radio's mobility distinguishes it from cable television and the Internet, public nuisance laws would effectively address the issue.

## II. THE FCC – THE AIRWAVES' GUARDIAN FOR PUBLIC INTEREST

As radio's commercial and communication roles expanded in the twentieth century, radio broadcasters faced numerous growing pains that began in the 1920s.<sup>9</sup> Uncharacteristic of American industry, radio broadcasters sought help from the federal government to resolve the problems, which prompted then Secretary of Commerce Herbert Hoover to comment: "I think this is probably the only industry of the United States that is unanimously in favor of having itself regulated."<sup>10</sup>

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8. See Webb, *supra* note 1 ("Sirius, which has lost about \$1 billion since 1999, said it agreed to pay \$100 million a year [for five years] to fund the Stern show.").

9. See ERWIN G. KRASNOW & LAWRENCE D. LONGLEY, *THE POLITICS OF BROADCAST REGULATION* 9 (2nd ed. 1978).

10. *Id.*

### A. Creating the FCC

Although today broadcast radio is a vital vehicle for public communication and advertising, it initially developed from a purely maritime and military use. In 1910, radio law focused on maritime safety, requiring "all passenger vessels carrying 50 or more men" to possess radio equipment.<sup>11</sup> The law designated the Secretary of Commerce and Labor as administrator and the Bureau of Navigation as the enforcer.<sup>12</sup> The Radio Law of 1912, however, consolidated administrative and enforcement duties with the Secretary of Commerce and Labor.<sup>13</sup> Although adequate for the fledgling radio industry, the Secretary's role was limited to licensing and maintaining a specific frequency bandwidth for broadcasting.<sup>14</sup>

After World War I, radio morphed into an entertainment medium when broadcasters began to disseminate radio programs intended for the general public.<sup>15</sup> The public's appetite for radio grew so much in the 1920s that requests for radio licenses quickly overloaded the available bandwidth.<sup>16</sup> In response, Secretary Hoover added additional frequencies and limited each reception area to a single radio station.<sup>17</sup> Nevertheless, continued bandwidth overcrowding created substantial interference (one broadcaster's transmission overlapping another broadcaster's transmission), prompting the industry to seek government assistance.<sup>18</sup> Secretary Hoover convened a series of "radio conferences" from 1922 to 1924 to address the problems.<sup>19</sup> But headway was lost when an Illinois district court ruled that Congress, in enacting the Radio Law of 1912, "withheld from [the Secretary of Commerce] the power to prescribe additional regulations."<sup>20</sup> Accordingly, Hoover was denied authority "to

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11. See Robert Sears McMahon, *Federal Regulation of the Radio and Television Broadcast Industry in the United States 1927-1959, With Special Reference to the Establishment and Operation of Workable Administrative Standards* (1959), in *DISSERTATIONS IN BROADCASTING* 17 (Christopher H. Sterling ed., Arno Press Inc. 1979) (dissertation for the degree of Doctor of Philosophy from Ohio State University).

12. *Id.*

13. *Id.*

14. See *id.* at 18.

15. See *id.*

16. See *id.* at 19 (stating in 1923 "The number of broadcast stations in the United States jumped from 60 to 588 within a single year.").

17. See KRASNOW & LONGLEY, *supra* note 9, at 9.

18. See *id.* ("The industry had come to demand such [government] controls as the increase in stations continued unchecked.").

19. See *id.*

20. MCMAHON, *supra* note 11, at 21 (quoting *United States v. Zenith Radio Corp.*, 12 F.2d 616, 617 (1926)).

regulate radio frequencies, power, or hours of operation," which crippled his effort to maximize the radio industry.<sup>21</sup>

To overcome the Radio Law's shortcomings, Congress enacted the Radio Act of 1927, which established the Federal Radio Commission ("FRC") to administer and enforce the statute.<sup>22</sup> The FRC was comprised of five members appointed by the President and confirmed by the Senate, and the President designated one member as chairman.<sup>23</sup> As the "public convenience, interest, or necessity require[d]," the FRC was empowered to (1) classify broadcast power and hours of services, (2) regulate stations' broadcasting equipment, (3) draft regulations to "prevent or at least lessen interference between stations and establish zones which they were to serve," and (4) require broadcasters to keep accurate records regarding programs broadcast.<sup>24</sup> The FRC lacked the authority to censor radio broadcasts or "interfere with the right of free speech by means of radio."<sup>25</sup> Despite the FRC's good intentions, a lack of funding, an overwhelming workload, a resistance from broadcasters to follow its decrees, and continued congressional pressure prevented the commission from obtaining its goals.<sup>26</sup> Thus, in 1933, President Roosevelt requested Secretary of Commerce Daniel Roper to study and recommend a better system for regulating radio broadcasting.<sup>27</sup> Secretary Roper's subsequent report helped spawn the Federal Communications Act of 1934 ("FCA").<sup>28</sup>

The FCA combined the regulatory duties of the FRC, the Interstate Commerce Commission, the postmaster general, and the President into one administrative agency: the FCC.<sup>29</sup> Five commissioners appointed by the President and confirmed by the Senate comprise the FCC, one of whom the President designates as chairman.<sup>30</sup> The new Act granted broader government control "over all communications, including telephone and telegraph."<sup>31</sup> Further, although the FCA repealed the Radio Communications Act,<sup>32</sup> the new act contained several identical provisions, including the power to classify radio stations, assign bands of frequencies,

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21. KRASNOW & LONGLEY, *supra* note 9, at 10.

22. *See id.* at 11.

23. *Id.*

24. McMahon, *supra* note 11, at 40.

25. *Id.* at 41.

26. *See* KRASNOW & LONGLEY, *supra* note 9, at 11–13.

27. *See id.* at 13.

28. *See id.*

29. 47 U.S.C. § 151 (2000); *see also* KRASNOW & LONGLEY, *supra* note 9, at 13.

30. *Id.* § 154.

31. KRASNOW & LONGLEY, *supra* note 9, at 13.

32. *See* 47 U.S.C. § 602 (2000).

regulate broadcasting apparatus, draft regulations to prevent interference, establish zones for each broadcasting station, and suspend radio broadcasting licenses for violating the statute.<sup>33</sup> Most importantly, the new Act retained the broad public interest mandate, charging the FCC to “study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.”<sup>34</sup> This public interest provision transformed the FCC into a “‘Holy Grail’ agenc[y] . . . [with] the more controversial and difficult role of achieving some grand, moral, civilizing goal.”<sup>35</sup> The FCC found, embedded in this “public interest” goal, the authority to regulate indecent, obscene, and profane content in broadcasting.<sup>36</sup>

### *B. Classifying Speech: Decent, Indecent, or Obscene?*

The classic conflict between the FCC and broadcasters is whether questionable content is decent, indecent, or obscene.<sup>37</sup> Each category receives a different level of protection under the First Amendment’s Free Speech Clause. Of course, decent content is fully protected free speech.<sup>38</sup> On the other side of the spectrum, obscene speech is afforded no constitutional protection.<sup>39</sup> Accordingly, the question becomes clear: how do we determine what is obscene? Supreme Court Justice Stewart claimed in 1964, “I know it when I see it.”<sup>40</sup> After various permutations, the Court in *Miller v. California* solidified a three-element test:

33. See *id.* § 303.

34. *Id.* § 303(g).

35. See KRASNOW & LONGLEY, *supra* note 9, at 15.

36. See *infra* Part II.C.

37. *Anecdote: Bad Words v. Good Words*—Who decides that a certain word is “bad”? This question has always peaked my curiosity. Our language is full of synonyms for these bad words, so it is not the idea that is bad, but rather the word itself that carries the negative connotation. I distinctly remember from my late grade school days my mother telling my brother and me about the meaning of the “F-word.” We were in the car waiting for my father and I noticed the word spray painted on a wall. My mother asked if we knew what the word meant and we replied “no.” She then explained its meaning, which came as a surprise since I had heard the word before in its popular position preceding the word “you.” How could this phrase be physically possible? Whoever decides which words are bad should start teaching grammar as well.

38. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”); see also *Roth v. United States*, 354 U.S. 476, 484 (1957) (“All ideas having even the slightest redeeming social importance . . . have the full protection of the [constitutional] guaranties . . .”).

39. See *Roth*, 354 U.S. at 485 (“We hold that obscenity is not within the area of constitutionally protected speech or press.”); see also *Miller v. California*, 413 U.S. 15, 23 (1973) (“[It] has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.”).

40. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

(a) [W]hether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient<sup>41</sup> interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>42</sup>

Children are not to be included in the "community" when determining the standard.<sup>43</sup> Further, the Court specifically opined that the "community standard" of part (a) is contemporary and not national.<sup>44</sup> Considering the cultural diversity of the United States, defining a national test is "unrealistic." The Court confirmed that "triers of fact [should] draw on the standards of their community . . . ."<sup>45</sup> Therefore, what is determined obscene in Camden, Maine may not be judged obscene in Las Vegas, Nevada.<sup>46</sup>

Although Congress cannot establish a national standard for parts (a) and (b) of the *Miller* test, the contemporary community standard does not preclude a federal obscenity statute restricting content distributed nationally, such as via the Internet or satellite radio.<sup>47</sup> Because communities may differ on what material is obscene under parts (a) and (b), national distributors of adult content are unable to obtain an unequivocal answer on whether their material may violate a federal obscenity statute.<sup>48</sup> Despite this uncertainty, the onus is on the distributor to tailor its content to each community it chooses to serve, so that the material does not fall within that community's definition of obscenity.<sup>49</sup> Thus, "[t]here is no constitutional barrier under *Miller* to prohibiting communications that are obscene in some communities under local

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41. THE AMERICAN HERITAGE DICTIONARY, 1413 (4th ed. 2001) (Prurient defined as: "arousing or appealing to an inordinate interest in sex.").

42. *Miller*, 413 U.S. at 24 (citations omitted).

43. See *Pinkus v. United States*, 436 U.S. 293, 297 (1978).

44. See *Miller*, 413 U.S. at 30-31.

45. *Id.* at 30.

46. *Id.* at 32.

47. See *Ashcroft v. ACLU*, 535 U.S. 564, 584 (2002).

48. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 125 (1989).

49. See *id.* ("[T]he fact that 'distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.'" (quoting *Hamling v. United States*, 418 U.S. 87, 106 (1974))).

standards even though they are not obscene in others.”<sup>50</sup> But, the problem for national distributors is not insurmountable because it is likely that there is little discrepancy between communities on what is deemed obscene, since the “literary, artistic, political, or scientific value” in part (c) of the *Miller* test is “not judged by contemporary community standards.”<sup>51</sup> Rather, the test for “value” is “whether a *reasonable person* would find . . . value in the material,” thus creating “*as a matter of law*, a national floor for socially redeeming value.”<sup>52</sup> Accordingly, for example, the test does not allow a community to claim that material does not violate a federal obscenity statute simply because it meets the community’s less conservative standards.

Furthermore, under part (b) of the *Miller* test, not all sexual content is considered obscene.<sup>53</sup> The Court in *Miller* emphasized that only sexual content that appeals to a prurient interest is obscene, such as describing “ultimate sexual acts, normal or perverted, actual or simulated” or “masturbation, excretory functions, and lewd exhibition of the genitals.”<sup>54</sup> On the other hand, “portrayal of sex . . . in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.”<sup>55</sup> Accordingly, prurient or patently offensive material could invoke First Amendment protection *only* if it is proven to “have *serious* literary, artistic, political, or scientific value.”<sup>56</sup> In any event, regulations restricting or prohibiting obscene speech must be narrowly tailored such that they satisfy the legislature’s protective goal in a manner that only restrains obscene speech, leaving protected speech unscathed.<sup>57</sup>

In between decent and obscene speech is indecent speech—speech that most people consider offensive or distasteful but does not rise to the prurient level required for obscene speech.<sup>58</sup> In 1971, the Supreme Court addressed constitutional protection for indecent content in *Cohen v. California* when it reversed the appellant’s conviction for disturbing the

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50. *Id.* at 125–126.

51. See *Ashcroft*, 535 U.S. at 579 (quoting *Reno v. ACLU*, 521 U.S. 844, 873 (1997)).

52. *Id.* (quoting *Pope v. Illinois* 481 U.S. 497, 501 (1987) (emphasis added)).

53. See *Roth*, 354 U.S. at 487 (“[S]ex and obscenity are not synonymous.”).

54. *Miller*, 413 U.S. at 25.

55. *Roth*, 354 U.S. at 487.

56. *Miller*, 413 U.S. at 26 (emphasis added).

57. See *id.* at 23–24 (“We [Supreme Court] acknowledge, however, the inherent dangers of undertaking to regulate any form of expression.”).

58. See *FCC v. Pacifica Found.*, 438 U.S. 726, 727 (1978) (“[P]rurient appeal is an element of ‘obscene’ . . . .”).



peace.<sup>59</sup> The appellant's disturbance consisted of walking through the municipal courthouse hallway wearing a jacket affixed with the phrase "Fuck the Draft."<sup>60</sup> Because Cohen did not threaten violence, or invoke others to violence by wearing the jacket, his conviction rested on the exercise of his freedom of speech.<sup>61</sup>

Although expletive words can offend people, the speaker may have chosen the offensive words based on their "emotive force."<sup>62</sup> The Court in *Cohen* stated that the Constitution's Free Speech clause protects speech's emotive function because in some instances, it is "the more important element of the overall message sought to be communicated."<sup>63</sup> If the government was allowed to restrict or forbid specific words, there would be "a substantial risk of suppressing ideas in the process."<sup>64</sup> Therefore, the Court in *Cohen* opined that the state cannot regulate speech based on content, unless the regulation fits a recognized exception.<sup>65</sup> In other words, "a restriction on indecent speech will survive First Amendment scrutiny if the 'Government's ends are compelling [and its] means [are] carefully tailored to achieve those ends.'"<sup>66</sup> Exceptions that meet the narrow tailoring requirement include (1) restricting only the time, place, or manner that the speech is given, (2) prohibiting obscene speech, or (3) barring speech that would invoke violence by others (*e.g.* fighting words).<sup>67</sup> Because the California law did not meet an established exception, the appellant's conviction was reversed.<sup>68</sup>

Although the Supreme Court initially suggested a less than strict standard of review for indecent speech, the Court has nevertheless maintained the strict scrutiny standard when a content-based law restricts

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59. *Cohen v. California* 403 U.S. 15, 17 (1971).

60. *Id.* at 16.

61. *Id.* at 16–17, 19.

62. *Id.* at 26 ("In fact, words are often chosen as much for their emotive as their cognitive force.").

63. *Id.*

64. *Id.*

65. *See Cohen*, 403 U.S. at 24 ("[W]e cannot overemphasize that, in our judgment, most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions . . . to the usual rule that governmental bodies may not prescribe the form or content of individual expression.").

66. *Action for Children's Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (citing *Sable*, 492 U.S. at 126.).

67. *See Cohen*, 403 U.S. at 19–21.

68. *See id.* at 26 ("[A]bsent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense.").

indecent speech.<sup>69</sup> For example, the Court in *Playboy III* stated that although many adults may be offended by Playboy's adult programming, the material is not obscene and "adults have a constitutional right to view it."<sup>70</sup> Because Playboy's programming is protected speech and the restriction in question was content-based, the Court confirmed that the analysis called for a strict scrutiny standard.<sup>71</sup> For a content-based restriction to survive a constitutional attack under strict scrutiny, legislatures must narrowly tailor indecency statutes to correspond with the legislature's protective intent in a manner that is the least restrictive to free speech.<sup>72</sup> Also, after adopting the least restrictive means, the government is precluded from regulating when the restriction's negative impacts on protected speech outweigh the benefits obtained by enacting the law.<sup>73</sup> Furthermore, a content-based restriction on indecent speech is unconstitutional if its stated purpose is merely to "shield the sensibilities of listeners."<sup>74</sup>

In the context of broadcast radio, the landmark Supreme Court case *FCC v. Pacifica* addressed whether the FCC could punish radio broadcasters for transmitting indecent content.<sup>75</sup> In *Pacifica*, Pacifica Foundation's New York radio affiliate broadcasted, at two o'clock in the afternoon, a taped version of George Carlin's "Filthy Words" monologue.<sup>76</sup> The broadcast discussed the seven words that one could not utter on the

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69. See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 755 (1996) (comparing J. Stevens' and J. Powell's contrasting comments regarding the standard of review for indecent speech in *Pacifica*, 438 U.S. at 745-48, 761-62); *United States v. Playboy Entm't Group, Inc.* 529 U.S. 803, 813 (2000) [hereinafter *Playboy III*] ("Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.")

70. See *Playboy III*, *supra* note 69, at 811.

71. See *id.* at 814.

72. See *id.* at 813 ("If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest."); see also *Denver Area Educ.*, 518 U.S. at 755 (opining that the statute was inconsistent with the First Amendment because it was "not a 'least restrictive alternative' and [was] not 'narrowly tailored' to meet its legitimate objective . . .").

73. See *Carlin Commc'ns, Inc. v. FCC*, 749 F.2d 113, 121 (2nd Cir. 1984) [hereinafter *Carlin I*] ("State may not regulate at all if it turns out that even the least restrictive means of regulation is still unreasonable when its limitations on freedom of speech are balanced against the benefits gained from those limitations.")

74. See *Playboy III*, *supra* note 69, at 813 ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails, even where no less restrictive alternative exists.")

75. See *Pacifica*, 438 U.S. at 744 ("[T]he question is whether the First Amendment denies government any power to restrict the public broadcast of indecent language in any circumstances.")

76. See *id.* at 729-30.

“public airwaves.”<sup>77</sup> The Court confirmed the FCC’s conclusion that broadcasting Carlin’s monologue in the afternoon constituted an indecent broadcast, in violation of 18 U.S.C. § 1464.<sup>78</sup> In its decree against Pacifica Foundation, the FCC stated that:

‘[I]ndecent’ is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.<sup>79</sup>

Adopting the FCC’s definition, the Supreme Court in *Pacifica* noted that “‘indecent’ merely refers to nonconformance with accepted standards of morality.”<sup>80</sup> Carlin’s “Filthy Words” thus became the litmus test for indecency in broadcasting.<sup>81</sup>

Most importantly, the Court in *Pacifica* confirmed that compared to other forms of communication, public broadcasting receives the “most limited First Amendment protection.”<sup>82</sup> This conclusion is based on specific differences between broadcast media and other forms of

77. *Id.* at 751 (quoting George Carlin: “The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and . . . maybe, even bring us, God help us, peace without honor . . . and a bourbon.”).

78. *Id.* at 741.

79. *Id.* at 732; see also Consumer and Governmental Affairs Bureau, Federal Communications Commission, *Obscene, Profane & Indecent Broadcasts*, <http://www.fcc.gov/cgb/consumerfacts/obscene.html> (last visited Feb 8, 2006) (restating the FCC’s definition of broadcast indecency).

80. *Pacifica*, 438 U.S. at 740.

81. *Anecdote: SpongeBob SquarePants Knows Pacifica*—While watching cartoons with my seven-year-old son, surprisingly, the seven “dirty” words from *FCC v. Pacifica* arose. SpongeBob SquarePants, a hilarious and innocent-minded sea sponge, noticed a certain word written on the local trash dumpster. His friend Patrick, a very simple-minded starfish, told SpongeBob that the word was a “sentence enhancer.” Patrick claimed: “You use ‘em when you wanna talk fancy. You just sprinkle it over anything you say and whammo! You got yourself a spicy sentence sandwich!” When SpongeBob later used the word, however, his boss Mr. Krabs scolded him: “[T]hat’s Bad Word #11. In fact there are thirteen bad words you should never use.” SpongeBob replied, with deference to *Pacifica*: “Don’t you mean there are only seven?” “Not if you’re a sailor” retorted Mr. Krabs, a retired sailor. See Nickelodeon Television, [www.nick.com](http://www.nick.com) (last visited Oct. 27, 2005); SpongeBob SquarePants: Sailor Mouth (Nickelodeon television broadcast Sept. 21, 2001), <http://www.geocities.com/shadowstarnook/ep35a.html?2005> 27 (last visited Oct. 27, 2005). Since the fictitious “bad” word was bleeped out by dolphin noises, I asked my son if he knew what word they were talking about. He paused and then said: “Yes—dummyhead.” “Yes,” I replied, “that’s the one.” Bullet dodged and his innocence protected—at least for now.

82. *Pacifica*, 438 U.S. at 748.

communication.<sup>83</sup> Due to these differences, “radio and television broadcasts may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment.”<sup>84</sup> Although strict scrutiny applies to broadcast radio, such that the government must have a compelling reason for the restriction, the narrow tailoring requirement appears not as strict.<sup>85</sup> Therefore, crucial to the First Amendment analysis for broadcast radio is the context in which the indecent words were broadcast,<sup>86</sup> as well as the time of day they were broadcast.<sup>87</sup>

### *C. The Authority to Regulate but Not Censor*

Although the FCC has an assortment of administrative duties,<sup>88</sup> this article focuses on the FCC’s authority to regulate indecent and obscene content in terrestrial radio broadcasts.

The power to regulate against indecent, obscene, or profane<sup>89</sup> speech was not explicit in the Radio Law of 1912.<sup>90</sup> Nevertheless, the Secretary of Commerce in 1916 banned the “transmission of ‘profane or obscene words or language,’” and suspended one amateur radio operator for violating the decree.<sup>91</sup> The Radio Act of 1927 formalized the regulatory prohibition against broadcasting “obscene, indecent, or profane language,” and the FCA continued the statutory authority, codified as 18 U.S.C. § 1464.<sup>92</sup> Interestingly, although anti-profanity statutes are typically valid,<sup>93</sup> actions

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83. See *infra* Part V.

84. *Action for Children’s Television*, 58 F.3d at 660.

85. See *id.* (discussing broadcast radio and television: “While we apply strict scrutiny to regulation of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast medium.”).

86. See *Pacifica*, 438 U.S. at 746 (“Although these words ordinarily lack literary, political, or scientific value, they are not entirely outside the protection of the First Amendment. Some uses of even the most offensive words are unquestionably protected.”); see also *In the Matter of Industry Guidance on The Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8002–8004 (F.C.C.R. 2001).

87. See *Pacifica*, 438 U.S. at 750 (“The time of day was emphasized by the Commission.”).

88. See 47 U.S.C. § 303 (2000).

89. See THE AMERICAN HERITAGE DICTIONARY, *supra* note 41, at 1400 (Profane defined as: “Marked by contempt or irreverence for what is sacred.”).

90. See WILLIAM B. RAY, FCC THE UPS AND DOWNS OF RADIO-TV REGULATION 70 (1990).

91. See *id.*

92. See *id.*

93. See John Kimpflen, 12 AM. JUR. 2D BLASPHEMY AND PROFANITY § 12 (1997).

against profane speech rarely materialized. In one case the Supreme Court opined that “[i]t is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine.”<sup>94</sup> However, these statutes did initiate the FRC and FCC as “traffic cop[s] of the air” against indecent and obscene broadcast content.<sup>95</sup>

The FCC regulates broadcast content by administratively enforcing 18 U.S.C. § 1464, which declares civil fines or imprisonment for any entity broadcasting indecent, obscene, or profane content over the radio.<sup>96</sup> The FCC’s authority, granted by Congress, has withstood constitutional challenges. For instance, in 1931, the Ninth Circuit in *Duncan v. United States* confirmed Congress’ power under the Commerce Clause to regulate against indecent and obscene broadcast content.<sup>97</sup> Further, the Supreme Court in *Pacifica* ruled that the prohibition on censorship, discussed *infra*, “has never been construed to deny the [FCC] the power to review the content of completed broadcasts in the performance of its regulatory duties.”<sup>98</sup> Also, in *Reno v. ACLU*, the Supreme Court reinforced its commitment to the FCC’s regulatory power by stating, “some of our cases have recognized special justifications for regulation of the broadcast media . . . .”<sup>99</sup> The FCC claimed that regulating indecent and obscene content is also implicit in 47 U.S.C. § 303(g), which instructs the FCC to “encourage the larger and more effective use of radio in the public interest.”<sup>100</sup>

To combat section 1464 violations for broadcasting indecent, obscene, or profane content, the FCC could issue a warning,<sup>101</sup> a monetary fine,<sup>102</sup> or, where the case involves a repeat offender, revoke the offender’s

94. See RAY, *supra* note 90, at 71 (citing *Joseph Bursteyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952)).

95. See KRASNOW & LONGLEY, *supra* note 9, at 10–11.

96. 18 U.S.C. § 1464 (2000) (“Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.”); 47 C.F.R. § 73.3999 (2004) (FCC enforcement of 18 U.S.C. § 1464); see also *In the Matter of Industry Guidance on The Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. at 7999 (F.C.C.R. 2001).

97. See *Duncan v. United States*, 48 F.2d 128, 130–131 (9th Cir. 1931).

98. *FCC v. Pacifica Found.*, 438 U.S. 726, 735 (1978); see also *id.* at 738 (“We conclude, therefore, that § 326 does not limit the Commission’s authority to impose sanctions on licensees who engage in obscene, indecent, or profane broadcasting.”).

99. *Reno v. ACLU*, 521 U.S. 844, 868 (1997); see also *In the Matter of Industry Guidance on The Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8000 (F.C.C.R. 2001).

100. *Pacifica*, 438 U.S. at 731 (quoting 47 U.S.C. § 303(g)).

101. 47 U.S.C. § 312(b) (2000) (“Where any person . . . has violated . . . section . . . 1464 of Title 18 . . . the Commission may order such person to cease and desist from such action.”).

102. 18 U.S.C. § 1464 (2000).

broadcast license.<sup>103</sup> A “repeat offender” is defined as one who commits the violation more than once, or if the violation is continuous, for more than one day.<sup>104</sup> Because indecent material is granted limited First Amendment protection, the FCC only enforces the indecency standard on content broadcast between 6 a.m. and 10 p.m.<sup>105</sup> Obscene content, on the other hand, is completely banned.<sup>106</sup> The statute does contain an imprisonment penalty, but it is enforced by the Department of Justice.<sup>107</sup> In short, the FCC has the authority to regulate indecent and obscene content in radio broadcasting without violating the ban on censorship, which is discussed below.

Conceptually, there is a distinct difference between regulating content and censoring it;<sup>108</sup> regulation is reactionary. For example, the FCC does not actively monitor radio broadcasts for violations.<sup>109</sup> Rather, “another licensee, a competitor, consumer, or some other interested party” submits a complaint to the FCC regarding the alleged violation.<sup>110</sup> Informal complaints in letter form must identify “the name of the party alleged to have violated the rule, location where the company or licensee operates, the specific rule alleged to have been violated, and must describe the specific

103. 47 U.S.C. § 312(a)(6) (2000) (“The Commission may revoke any station license . . . for violation of section . . . 1464 of Title 18.”).

104. *Id.* § 312(f)(2).

105. 47 C.F.R. § 73.3999(b) (2004); *see also* Consumer and Governmental Affairs Bureau, *supra* note 79.

106. 47 C.F.R. § 73.3999(a) (2004); *see discussion supra* Part II.B.

107. *See In the Matter of Industry Guidance on The Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8000 n.2 (F.C.C.R. 2001).

108. *Anecdote: Censorship*—In my grade school youth, my parents forbade my brother and me from watching *The Dukes of Hazzard*, a Nielson’s rating darling at the time. This was the first specific restriction that I recall, although in general we were not allowed to watch television after 8:00 p.m. (*i.e.* after bedtime). My parents’ compelling reason for the ban was that the show perpetuated content unfit for young minds. Not surprisingly, a district court judge in Utah echoed my parents’ sentiment, stating, “And if we’re concerned parents and we’re not overjoyed by the violence and stupidity of *The Dukes of Hazzard*, we turn it off and direct our children to something else.” *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987, 1001 (D. Utah 1982). Years later, as an adolescent unbridled by content-based parental restrictions, I came across the “Dukes” one night while channel surfing. My initial impression: this show is dumb and I did not miss anything. But, I did not see the reason for the overzealous parental concern. Then, Daisy Duke entered the scene, and I understood the restriction.

109. *See In the Matter of Industry Guidance on The Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 F.C.C.R. 7999, 8015 (F.C.C.R. 2001).

110. ROBERT L. PETTIT, PRACTICING LAW INSTITUTE, WORKING WITH THE FCC, ENFORCEMENT POLICY & PRACTICE 18 (2002).

circumstances surrounding the alleged violation.”<sup>111</sup> Complaints are also accepted via the FCC’s website—[www.fcc.gov](http://www.fcc.gov).<sup>112</sup> Further, broadcasters are encouraged to report their own violations, which may garner a lesser penalty based on the voluntary disclosure.<sup>113</sup> If the subject matter in the complaint is determined to be indecent, the FCC’s Enforcement Bureau issues either a Letter of Inquiry requesting additional information from the broadcaster or a Notice of Apparent Liability that is effectively a notice of a monetary fine.<sup>114</sup> Pursuant to 47 U.S.C. § 503(b), the broadcaster can respond to the notice and plead its innocence; however, if the FCC is not persuaded, it will issue a Forfeiture Order.<sup>115</sup> The broadcaster may appeal the order, or refuse to pay the fine, whereupon the Department of Justice may file suit in federal district court.<sup>116</sup>

On the other hand, censorship is proactive, granting an authority the “power to edit proposed broadcasts in advance and to excise material considered inappropriate for the airwaves.”<sup>117</sup> Pursuant to 47 U.S.C. § 326, however, the FCC is explicitly prohibited from censoring radio content.<sup>118</sup> Nevertheless, the distinction between the meaning of regulation and censorship is commonly blurred. For instance, note Stern’s comment that his move to satellite radio was a “response to ‘censorship’ efforts” by the FCC.<sup>119</sup> However, despite the widespread belief that the FCC is censoring radio, it is actually only regulating broadcast content.

Such strict FCC regulation, however, might foster self-censorship, which would effectively chill free speech.<sup>120</sup> For example, after the FCC issued several steep fines against radio and television broadcasters for indecent content, over sixty ABC television affiliates refused to air the

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111. *Id.*

112. See FCC, Form 475B, <http://svartifoss2.fcc.gov/cib/fcc475B.cfm> (last visited Jan. 23, 2006); see also Consumer and Governmental Affairs Bureau, *supra* note 79 (stating that complaints may also be filed by e-mail at [fccinfo@fcc.gov](mailto:fccinfo@fcc.gov)).

113. See PETTIT, *supra* note 110, at 19.

114. See In the Matter of Industry Guidance on The Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8015 (F.C.C.R. 2001).

115. See *id.* at 8016.

116. See *id.*

117. *Pacifica*, 438 U.S. at 735.

118. 47 U.S.C. § 326 (2000) (“Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station . . .”).

119. Webb, *supra* note 1.

120. See Katherine A. Fallow, *The Big Chill? Congress and the FCC Crack Down on Indecency*, 22 COMM. LAW 1, 26 (2004).

movie *Saving Private Ryan* due to its graphic nature.<sup>121</sup> Other examples include: CBS refusing to air a MoveOn.org commercial that criticized President Bush's policy on the federal deficit; CBS and NBC refusing to run a United Church of Christ commercial that implied that gay couples were welcome; PBS refusing to air an episode of *Postcards from Buster* that involved the main character, a rabbit, interacting with a gay couple; and PBS editing an episode of *Antiques Roadshow* by cutting out a scene regarding an antique nude lithograph.<sup>122</sup> Although the above examples illustrate how regulation can lead to self-censorship, the regulation's chilling effect does not violate the statutory prohibition on censorship. Overall, the FCC is granted enormous flexibility in how it regulates and enforces the statute; its policies and conduct, however, are not impervious to judicial review.

#### *D. Judicial Review of FCC Matters*

Charged with the important, albeit vague, concept of encouraging the more effective use of radio in the public interest,<sup>123</sup> as well as the difficult task of applying the indecent and obscene tests to broadcast content,<sup>124</sup> the FCC seeks guidance from the judicial system. Although the FCC is an autonomous agency, in reality it "operates within a political system involving . . . regulated industries, the public, the White House, the courts, the Congress, and the commission itself."<sup>125</sup> Given these political pressures, and the fact that a commissioner's term at the FCC is relatively short, FCC policy is not an "impersonal mechanical operation," but rather a flexible operation set to the current political environment.<sup>126</sup> Accordingly, judicial review is required to set precedent for the legal issues that intertwine with the flexible substantive issues in broadcast regulation.

The FCA established judicial review for FCC decisions.<sup>127</sup> Pursuant to 47 U.S.C. § 402, "[a]ppeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia. . . ."<sup>128</sup> Thus, a broadcaster not satisfied with a FCC ruling can

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121. See Rep. Bernie Sanders, Op-Ed, *No More Sopranos, No More Chris Rock*, VILLAGE VOICE, June 7, 2005, <http://www.villagevoice.com/news/0523,op-ed,64730,6.html>.

122. *Id.*

123. Communications Act 1934, 47 U.S.C. § 303(g) (2000).

124. See generally Consumer and Governmental Affairs Bureau, *supra* note 79 (describing the FCC's definition of indecency).

125. See KRASNOW & LONGLEY, *supra* note 9, at 7.

126. See *id.*

127. See 47 U.S.C. § 402 (2000).

128. *Id.* § 402(b).



appeal the matter in federal court. Additionally, if the FCC wants clarification on its statutory authority—as an alternative to requesting congressional action—it can turn to the federal court for legal interpretation.

In 1970, for example, the FCC in a matter of first impression fined a Philadelphia radio station for indecent content when it broadcast a swearword-laced interview with The Grateful Dead's Jerry Garcia.<sup>129</sup> The FCC fined the station one hundred dollars, and after conceding that there was no precedent for the ruling, invited the station to appeal the matter.<sup>130</sup> Because the Philadelphia station did not appeal, the FCC again tested the waters in 1973 by fining an Illinois station for indecency when it broadcast a listener's explicit description of her oral sex experiences.<sup>131</sup> Afterwards, the FCC stated that it "would welcome an appeal that would open the door to 'judicial consideration of our action.'"<sup>132</sup> Accordingly, both broadcasters and the FCC can utilize the federal court to clarify the FCC's regulatory authority.

Nevertheless, the federal court's role is limited. Under the Radio Act of 1927, the federal court's role in reviewing Radio Commission rulings "constituted a 'superior and revising agency in the same field' as that in which the Radio Commission acted."<sup>133</sup> However, when Congress enacted the FCA, it withdrew the federal court's administrative oversight role and "restricted [its authority] to purely judicial review."<sup>134</sup> Thus, the FCC determines substantive matters while the federal appeals court reviews only procedural errors.<sup>135</sup> The Supreme Court in *FCC v. RCA Communications* confirmed, stating:

Ours is not the duty of reviewing determinations of 'fact,' in the narrow, colloquial scope of that concept. Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the [vague], penumbral bounds expressed by the standard of 'pubic interest.' It is our responsibility to say whether the

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129. See RAY, *supra* note 90, at 73–74.

130. See *id.* at 75.

131. See *id.* at 77–79.

132. See *id.* at 79.

133. *FCC v. Pottsville Broad.*, 309 U.S. 134, 144 (1940) (quoting *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 467 (1930)).

134. *Id.*

135. See DANA ROYAL ULLOTH, *THE SUPREME COURT: A JUDICIAL REVIEW OF THE FEDERAL COMMUNICATIONS COMMISSION* 37, 63 (Christopher H. Sterling ed., Arno Press Inc. 1979) (dissertation for degree of Doctor of Philosophy from University of Missouri-Columbia) ("[I]t is the commission not the courts, which must be satisfied that the public interest will be served by renewing the license.").

Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest.<sup>136</sup>

It is the federal court's role to determine if the FCC acted "arbitrarily and capriciously" in its decisions.<sup>137</sup> It is Congress and the FCC that "set[s] the scope of broadcast regulation"; the court cannot "question the wisdom of their policy choices."<sup>138</sup>

Considering that the federal court is excluded from determining the scope of broadcast regulation and that Congress has not defined "public interest," the "courts have traditionally given the FCC wide latitude in determining what constitutes the 'public interest.'"<sup>139</sup> Based on the "public interest," FCC policies are treated as authoritative.<sup>140</sup> Therefore, it appears that the two concepts bootstrap each other in that the public interest mandate supports broadcast regulation, and broadcast regulation satisfies the FCC's burden to satisfy the public interest. Congress and the FCC's open-ended ability to regulate is critical to satellite radio, because the federal court can only stop them from regulating satellite radio content if the regulation violates a fundamental right guaranteed by the Constitution.<sup>141</sup>

### III. SATELLITE RADIO – THE NEWEST MEDIUM

Before the legal issues surrounding the regulation of satellite radio content are discussed *infra*, this section describes the concept of satellite radio, the two current satellite radio companies, and how a consumer receives satellite radio.

#### A. *What Is Satellite Radio?*

Satellite radio was created as the third radio broadcast medium to accompany the AM and FM frequencies.<sup>142</sup> In general, satellite radio studios, located on the ground, develop and then broadcast encrypted digitalized "shows" to the company's satellites,<sup>143</sup> located in elliptical or

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136. FCC v. RCA Commc'ns, 346 U.S. 86, 91 (1953).

137. See *Serafyn v. FCC*, 149 F.3d 1213, 1225 (D.C. Cir. 1998).

138. *Id.* at 1217.

139. See KRASNOW & LONGLEY, *supra* note 9, at 17.

140. See *id.*

141. See discussion *infra* Part V.

142. See XM Satellite Radio, Corporate Information, [http://www.xmradio.com/corporate\\_info/corporate\\_information\\_main.html](http://www.xmradio.com/corporate_info/corporate_information_main.html) (last visited Jan. 20, 2006).

143. See XM Satellite Radio, Fast Facts Technical, [http://www.xmradio.com/corporate\\_info](http://www.xmradio.com/corporate_info)

geostationary orbits in space.<sup>144</sup> The encrypted broadcast signals are then transmitted back to numerous terrestrial repeaters located on the ground.<sup>145</sup> The terrestrial repeaters then re-transmit the encrypted broadcast to home, car, or portable satellite radio receivers (antenna and radio) that decode the broadcast for the listener.<sup>146</sup> Although in unobstructed areas satellite receivers can directly obtain the broadcast signal from the satellite, in obstructed areas terrestrial repeaters are used as intermediaries between the satellite and the radio receivers to ensure that tall buildings and other surface obstructions do not block the transmitted broadcast.<sup>147</sup> Because the repeaters are located throughout the United States, a satellite subscriber can listen to the same channel no matter where the subscriber travels within the United States.<sup>148</sup> Further, because the satellite radio company generates income from subscriptions, the broadcast content is not interrupted by third-party advertisements.<sup>149</sup> In the event the satellite subscriber wants to revert back to terrestrial radio, however, the satellite radio receiver also accepts AM and FM radio broadcasts.<sup>150</sup>

The public demand for satellite radio derives from such benefits as national radio programming for “underserved” or “unserved” areas and population groups.<sup>151</sup> Satellite radio providers “may . . . offer niche channels that would serve listeners with special interests”<sup>152</sup> that normally would not generate enough advertisement revenue to warrant broadcasting on terrestrial radio. These niche programs could “fulfill a need for more educational programming, rural programming, ethnic programming, religious programming, and specialized musical programming.”<sup>153</sup> Further,

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/fast\_facts\_tech.html (last visited Jan. 20, 2006) (providing that XM Satellite Radio maintains two satellites that are positioned over the East and West coasts).

144. 47 C.F.R. § 25.201 (2004) (“A geosynchronous satellite [is a satellite] whose circular and direct orbit lies in the plane of the Earth’s equator and which thus remains fixed relative to the Earth; by extension, a satellite which remains approximately fixed relative to the Earth.”).

145. See XM Satellite Radio, Fast Facts Technical, *supra* note 143 (providing that XM Satellite Radio maintains “approximately 800 terrestrial repeaters located throughout the continental United States.”).

146. See *id.*

147. See *id.*

148. See XM Satellite Radio, Fast Facts Consumer, [http://www.xmradio.com/corporate\\_info/fast\\_facts\\_cons.html](http://www.xmradio.com/corporate_info/fast_facts_cons.html) (last visited Jan. 20, 2006) (“[Y]ou can drive from New York to Los Angeles without ever having to change your favorite channel . . .”).

149. See *id.* (“100% of XM Radio’s music channels are Commercial-Free!”).

150. See *id.*

151. See *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 Mhz Frequency Band*, 12 F.C.C.R. 5754, 5758 (1997).

152. See *id.* at 5756.

153. See *id.* at 5761.

satellite radio is available to the twenty-two million Americans who receive less than five FM stations in their area, which includes a population of 2.4 million Americans that receive only one or no FM stations.<sup>154</sup> With its national broadcast capabilities, satellite radio provides these remote Americans the opportunity to listen to mainstream and niche programs, as well as access to emergency information and services.<sup>155</sup>

### *B. The Players*

Currently, consumers in the United States have a limited choice in satellite radio providers: either XM Satellite Radio or Sirius Satellite Radio.<sup>156</sup>

In September 2001, XM Satellite Radio was the first company to broadcast satellite radio within the United States.<sup>157</sup> Although XM initially broadcasted only to subscribers in Dallas, Texas and San Diego, California, it began broadcasting nationally in November 2001.<sup>158</sup> By 2005, XM was broadcasting over 150 channels from its headquarters in Washington D.C., which XM brags is the nation's largest digital radio facility.<sup>159</sup> XM is a publicly traded company on NASDAQ<sup>160</sup> and claims Clear Channel, General Motors, and DIRECTV as heavy-weight investors.<sup>161</sup> XM offers a variety of music, Major League Baseball, NASCAR auto racing, The Weather Channel, CNN Headline News, and numerous other format options.<sup>162</sup> In addition, the following auto manufacturers offer XM radio as a factory-installed option: Acura, General Motors, Honda, Isuzu, Toyota, Volkswagen, Audi, Nissan, and Infiniti.<sup>163</sup> Finally, XM expected to have a

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154. See *id.* at 5760; see also XM Satellite Radio, Fast Facts Market, [http://www.xmradio.com/corporate\\_info/fast\\_facts\\_mkt.html](http://www.xmradio.com/corporate_info/fast_facts_mkt.html) (last visited Jan. 20, 2006).

155. See *In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 Mhz Frequency Band*, 12 F.C.C.R. at 5761.

156. See XM Satellite Radio, Corporate Information, *supra* note 142 (XM is "[o]ne of only two companies with a license for this new national audio service . . ."); XM Satellite Radio, <http://www.xmradio.com> (last visited Jan. 20, 2006); Sirius Satellite Radio, <http://www.sirius.com> (last visited Jan. 20, 2006).

157. XM Satellite Radio, History, [http://www.xmradio.com/corporate\\_info/history\\_main.jsp](http://www.xmradio.com/corporate_info/history_main.jsp) (last visited Jan. 20, 2006).

158. *Id.*

159. XM Satellite Radio, Fast Facts, [http://www.xmradio.com/corporate\\_info/fast\\_facts.html](http://www.xmradio.com/corporate_info/fast_facts.html) (last visited Jan. 20, 2006).

160. *Id.* (NASDAQ trading symbol XMSR).

161. XM Satellite Radio, History, *supra* note 157.

162. XM Satellite Radio, Fast Facts Consumer, *supra* note 148.

163. XM Satellite Radio, Fast Facts Highlights, [http://www.xmradio.com/corporate\\_info/fast\\_facts\\_highlights.html](http://www.xmradio.com/corporate_info/fast_facts_highlights.html) (last visited Jan. 20, 2006).

customer base of six million subscribers by the end of 2005.<sup>164</sup>

Sirius Satellite Radio, on the other hand, boasts "125 digital-quality channels, including 68 channels of 100% commercial-free music."<sup>165</sup> Headquartered in New York City's Rockefeller Center, Sirius's Chief Executive Officer is entertainment industry giant Mel Karmazin, a former President and Executive Officer at Viacom and CBS.<sup>166</sup> Sirius also offers a variety of music formats, as well as Howard Stern, Martha Stewart, E! Entertainment, Maxim, CNBC, National Football League, National Basketball Association, National Hockey League, and numerous college sporting events.<sup>167</sup> Sirius is the only satellite radio offered by auto manufacturers DaimlerChrysler, Ford, and BMW, and the Sirius system is also available in vehicles from Audi, Dodge, Infiniti, Jeep, Lincoln-Mercury, Lexus, Mazda, Mercedes-Benz, MINI, Nissan, Porsche, Scion, Volkswagen, and Volvo.<sup>168</sup> Further, Hertz provides Sirius Satellite Radio in a variety of its rental cars.<sup>169</sup> In June 2005, Sirius reported that it had nearly two million subscribers, a significant jump from less than five hundred thousand in June 2004.<sup>170</sup>

### C. How Can I Get Satellite Radio?

The motto in the mid-1980s was "I want my MTV."<sup>171</sup> Today, satellite radio envisions a new song clamoring for satellite radio. The process to obtain satellite radio from either XM or Sirius is basically the same. First, the listener must purchase a satellite receiver and antenna either directly from XM or Sirius, or an outside vendor, such as Best Buy, Circuit City, Wal-Mart, Staples, Radioshack, or Target.<sup>172</sup> Satellite

164. *Id.*

165. Sirius Satellite Radio, Corporate Overview, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/Page&c=FlexContent&cid=1036686189730> (last visited Sept. 28, 2005).

166. *Id.*; Sirius Satellite Radio, Mel Karmazin, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=BioAsset&cid=1100707192159> (last visited Jan. 20, 2006).

167. Sirius Satellite Radio, Corporate Overview, *supra* note 165.

168. *Id.*

169. *Id.*

170. Sirius Satellite Radio Inc., Quarterly Report (Form 10-Q), at 16 (Aug. 3, 2005).

171. Songfacts, *Money for Nothing by Dire Straits*, <http://www.songfacts.com/detail.php?id=1091&> (last visited Jan. 20, 2006) (providing lyrics from Dire Straits' *Money for Nothing* and line from MTV's promotional campaign).

172. XM Satellite Radio, XM Radio Store, <http://shop.xmradio.com/landing.aspx> (last visited Nov. 19, 2005); XM Satellite Radio, Where to Buy, [http://www.xmradio.com/dealer\\_locator/retail\\_locator.jsp](http://www.xmradio.com/dealer_locator/retail_locator.jsp) (last visited Nov. 19, 2005); Sirius Satellite Radio, Buy Online, <http://shop.sirius.com/> (last visited Nov. 19, 2005); Sirius Satellite Radio, Find a Store, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/>

receivers come in various shapes and sizes, depending on whether the device is used in the car, boat, home, or in connection with a portable radio, and range in price from \$49.99 for a portable receiver to \$299.99 for a home receiver.<sup>173</sup> After obtaining the satellite receiver and antenna, the listener chooses a subscription plan with either XM or Sirius. Both XM and Sirius offer several different subscription plans, varying in subscription length. For instance, XM currently offers a one-year subscription for \$11.87 per month, or various multi-year subscriptions, such as a five-year subscription for \$9.99 per month.<sup>174</sup> Sirius currently offers a month-to-month subscription for \$12.95 per month, a one-year subscription for \$142.45 (approximately \$11.87 per month), a two-year subscription for \$271.95 (approximately \$11.33 per month), and a lifetime membership for \$499.99.<sup>175</sup> Both XM and Sirius require subscribers to be at least eighteen-years-old to obtain a subscription.<sup>176</sup> Further, a minor may use the service provided a parent or guardian assumes all responsibility for a minor's use of the satellite service.<sup>177</sup>

Once the satellite radio service is activated, the subscriber has access to all available satellite channels on either XM or Sirius, except XM's Playboy Radio costs an additional \$2.99 per month.<sup>178</sup> Both XM and Sirius offer channel blocking, which allows the subscriber to completely block out certain channels from that subscriber's receiver.<sup>179</sup> This censoring

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Page&c=Page&cid=1065475754234 (last visited Nov. 19, 2005).

173. Sirius Satellite Radio, All Radios, [http://shop.sirius.com/edealinv/servlet/ExecMacro?url=control/StoreDirectory.vm&ctl\\_nbr=2640&catLevel=1&catParentID=7870&scId=7870&oldParentID=7870](http://shop.sirius.com/edealinv/servlet/ExecMacro?url=control/StoreDirectory.vm&ctl_nbr=2640&catLevel=1&catParentID=7870&scId=7870&oldParentID=7870) (last visited Nov. 19, 2005); XM Satellite Radio, All Receivers, [http://shop.xmradio.com/product\\_category.aspx?cat=10](http://shop.xmradio.com/product_category.aspx?cat=10) (last visited Nov. 19, 2005).

174. XM Satellite Radio, Service & Subscription, [http://www.xmradio.com/service\\_subscription/service\\_subscription.jsp](http://www.xmradio.com/service_subscription/service_subscription.jsp) (last visited Nov. 19, 2005).

175. See Sirius Satellite Radio, Choose a Plan, Plans and Services, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/ Page&c=Page&cid=1065475754240> (noting a lifetime membership offer valid until Jan. 31, 2006) (last visited Nov. 19, 2005).

176. Sirius Satellite Radio, Terms & Conditions, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1019257316747> (last visited Nov. 19, 2005); XM Satellite Radio, Customer Service Agreement, [http://www.xmradio.com/get\\_xm/customer\\_service.html](http://www.xmradio.com/get_xm/customer_service.html) (last visited Nov. 19, 2005).

177. Sirius Satellite Radio, Terms & Conditions, *supra* note 176; XM Satellite Radio, Customer Service Agreement, *supra* note 176.

178. XM Satellite Radio, Listen Large//America's Largest Playlist, [http://www.xmradio.com/pdf/channel\\_guide.pdf](http://www.xmradio.com/pdf/channel_guide.pdf) (listing Playboy Radio as a "premium" channel for an additional \$2.99 per month) (last visited Nov. 19, 2005).

179. Telephone interviews with XM Satellite Radio Customer Service (Nov. 9, 2005) and Sirius Satellite Radio Customer Service (Nov. 9, 2005) [hereinafter *Telephone Interviews*]; see also XM SATELLITE RADIO, OVER 150 CHANNELS OF MUSIC, NEWS, SPORTS, & TALK ("Please call XM Listener Care at 1-800-XM-RADIO (1-800-967-2346) for Parental Control/Blocking

feature is discussed in more detail in Part VI.C. *infra*.

#### IV. PROPOSED LEGISLATION WOULD EMPOWER FCC TO REGULATE SATELLITE RADIO

The FCC has declined to extend its regulations regarding indecent content to satellite radio.<sup>180</sup> Notwithstanding, new legislation, if enacted by Congress, could push the FCC's regulatory duty into the satellite radio market.

##### *A. FCC's Current Policy Towards Satellite Radio Content*

The FCC has explicitly stated that it currently does not have the authority or the basis to regulate satellite radio content.<sup>181</sup> Saul Levine, a California broadcast radio station owner, petitioned the FCC to extend its indecency standards to satellite radio.<sup>182</sup> In a letter responding to Levine dated December 14, 2004, W. Kenneth Ferree, the FCC's Media Bureau Chief, stated that "[b]oth SDARS licensees [XM and Sirius] . . . are providing service on a subscription basis" and that "[t]he Commission has previously ruled that 'subscription-based services do not call into play the issue of indecency.'"<sup>183</sup> Therefore, Mr. Levine's petition was denied.<sup>184</sup>

But, will this laissez-faire approach to satellite radio content continue? If Howard Stern pushed the envelope far enough on broadcast radio to draw fines for indecent content,<sup>185</sup> undoubtedly he will push forward on satellite radio's unregulated airwaves with content that the FCC would deem indecent, or perhaps even obscene. Accordingly, there have

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Option.") (available at [http://www.xmradio.com/pdf/channel\\_guide.pdf](http://www.xmradio.com/pdf/channel_guide.pdf)).

180. See Letter from W. Kenneth Ferree, FCC Media Bureau Chief, to Saul Levine, President of Mt. Wilson FM Broadcasters, Inc. (Dec. 14, 2004), [http://hraunfoss.fcc.gov/edocs\\_public/attachMatch/DA-04-03907A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachMatch/DA-04-03907A1.pdf) (last visited Sept. 11, 2005).

181. See *id.*

182. See *id.*

183. See *id.* (citing In the Matter of Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 Mhz Frequency Band, , 12 F.C.C.R. 5754, 5788 (1997) and In the Matter of Litig. Recovery Trust, 17 F.C.C.R. 21852, 21856 (2002)).

184. *Id.*

185. See In the Matter of Industry Guidance on The Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8004 (F.C.C.R. 2001) (listing content from the "Howard Stern Show" radio broadcast that the FCC ruled as indecent); see also Associated Press, *Clear Channel to Pay Record \$1.75 Million to Settle Indecency Claims*, FIRST AMENDMENT CENTER, June 10, 2004, <http://www.firstamendmentcenter.org/news.aspx?id=13506> (discussing settlement of proposed \$495,000 fine in response to Stern's on-air comments).

been requests for satellite radio content regulation.<sup>186</sup>

### *B. Proposed Legislation*

Although no current federal legislation specifically regulates satellite radio content, a current bill proposes expanding FCC content regulation to markets that arguably resemble satellite radio. On March 14, 2005, Senators John D. Rockefeller and Kay Bailey Hutchison introduced to the Senate the Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005.<sup>187</sup> If enacted, this legislation would expand the FCC's authority to regulate "violence and indecency on *all* TV programming, including *cable* and *satellite*."<sup>188</sup> Accordingly, the bill expands the FCC's authority in two areas: content and media. For content, the bill expands the current indecent and obscene material standard to include "graphic and gratuitous violence."<sup>189</sup> What is important for satellite radio, however, is that the bill expands its media reach to cable and satellite broadcasts, instead of just broadcast television.<sup>190</sup> Would this bill's enactment give Congress a stepping stone to regulate other non-traditional media, such as satellite radio? The bill exempts from the regulation "premium and pay-per-view services,"<sup>191</sup> or in other words, subscription services. But, considering media convergence, the bill may create a "slippery slope" scenario in that "an attack on one type of media is increasingly an attack on all forms of media."<sup>192</sup> Satellite radio could be next.

FCC and congressional rumblings about regulating satellite television and radio content have permeated the airwaves. Senator Ted Stevens has opined that the FCC's authority to regulate against indecent material should extend to satellite television and radio.<sup>193</sup> Stevens believes that it is unfair that only broadcasters are held to indecency standards, especially since "most viewers don't differentiate between over-the-air and cable" and that

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186. See Chris Baker, *On the Offensive at the FCC*, WASH. TIMES, Feb. 6, 2005, Special Reports, <http://www.washingtontimes.com/specialreport/20050206-123643-9541r.htm>.

187. S. 616, 109th Cong. (2005); Press Release, Sen. John D. Rockefeller IV, Rockefeller Works to Reduce Violence and Indecency on Television (Mar. 14, 2005) (<http://rockefeller.senate.gov/news/2005/pr031405.html>).

188. See Press Release, Sen. John D. Rockefeller IV, *supra* note 187 (emphasis added).

189. *Id.*

190. See *id.*

191. S. 616, § 4(c)(2)(B).

192. Adam Thierer, *Thinking Seriously About Cable & Satellite Censorship: An Informal Analysis of S. 616, the Rockefeller-Hutchison Bill*, at 2-3, 18-19 (The Progress and Freedom Foundation, Progress on Point Release 12.6, 2005), <http://www.pff.org/issues-pubs/pops/pop12.6cablecensorship.pdf>.

193. See Ahrens, *supra* note 7.



“[c]able is a greater violator in the indecency arena.”<sup>194</sup> In addition, prior to his appointment as FCC Chairman, Kevin Martin discussed in February 2004 his belief that Congress should consider whether satellite radio and cable television should adhere to the same indecency standards as their broadcast equivalents.<sup>195</sup> Martin explained that broadcasters complain that the “rules have to be fair to everyone who is in this medium [radio or television],” and stated his own belief that satellite radio content regulation is “a legitimate issue.”<sup>196</sup>

Therefore, considering America’s current conservative political majority, it is possible that Stevens could mount enough support in Congress to enact legislation empowering the FCC—a likely willing companion considering FCC Chairman Martin’s past comments—to regulate indecent content on satellite radio. One theory articulates that if satellite radio becomes popular enough to draw in a majority of American subscribers, then the media is pervasive, mirroring the free broadcast media model.<sup>197</sup> According to the proposed theory, to level the playing field with broadcasters and protect children from indecent material, “speech on these new media outlets must be tightly controlled, much as broadcast television and radio have been for decades.”<sup>198</sup> Nevertheless, as detailed below, federal legislation regulating indecent content on satellite radio would not survive a constitutional challenge.

## V. BASES FOR REGULATING BROADCAST RADIO CONTENT

In reviewing different forms of communication, the Supreme Court has opined that broadcast media receives the most limited First Amendment protection.<sup>199</sup> Interpreting the Supreme Court’s narrow decision in *FCC v. Pacifica*, the FCC has more leeway to impose restrictions against indecent content on broadcast radio because (1) there is a scarcity of broadband space, (2) the content is available to everyone (pervasive), although the listener may be unduly surprised by the broadcast

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194. Brooks Boliek, *Pay TV Targeted by Pols*, HOLLYWOODREPORTER.COM, Mar. 2, 2005, [http://hollywoodreporter.com/thr/article\\_display.jsp?vnu\\_content\\_id=1000819253](http://hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000819253).

195. Jeremy Pelofsky, *FCC’s Martin Ponders Indecency on Pay TV*, Feb. 26, 2004, <http://www.dslreports.com/shownews/39581>.

196. *Id.*

197. See Thierer, *supra* note 192, at 2–4, 18–19 (articulating and arguing against the proposed “popularity equals pervasiveness” standard).

198. See *id.* at 3.

199. See *Action for Children’s Television v. FCC*, 58 F.3d 654, 659 (D.C. Cir. 1995) (citing *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978)).

content (intrusive), and (3) children may be listening.<sup>200</sup> Accordingly, broadcast radio and television “may properly be subject to different—and often more restrictive—regulation than is permissible for other media under the First Amendment.”<sup>201</sup> As technology creates new communication mediums, Congress, the FCC, and ultimately the Supreme Court, must decide if the *Pacifica* rationales apply to the new medium. If so, Congress and the FCC are granted a broader brush to restrict indecent content on that medium. The following sections examine the rationales set forth in *Pacifica* and analyze how they were applied to cable television, the Internet, and telephone messaging services, thereby providing some insight into how *Pacifica* might affect satellite radio.

### A. The Broadband Scarcity Argument

Historically broadband scarcity was a primary reason for broadcast regulation; however its significance has waned over the years. The rationale of broadband scarcity dates back to the broadcast industry’s original intent in requesting regulation, namely, that too many radio stations were overlapping frequencies, which caused substantial interference.<sup>202</sup> Although the Court opined that “[t]he underlying reason for allowing greater regulation of the broadcast media is that, given its limited nature, the spectrum of broadcast frequencies is a scarce resource . . . ,”<sup>203</sup> scholars have argued various reasons why the broadband scarcity argument does not justify governmental regulation. For instance, paper resources are also scarce and we have not yet developed higher broadband frequencies.<sup>204</sup> Further, technological advances, especially digital and wireless communications, have recently persuaded the FCC that broadband scarcity is not a significant factor to support current regulatory policies.<sup>205</sup> Thus, broadband scarcity is no longer a significant factor to support regulating broadcast content.

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200. See Stanley D. Tickton, *Obscene/Indecent Programming: The FCC and WBAI*, in CENSORSHIP, SECRECY, ACCESS, AND OBSCENITY 59, 66–67, (Hon. Theodore R. Kupferman ed., Meckler Corporation 1990).

201. *Action for Children’s Television*, 58 F.3d at 660.

202. See discussion *supra* Part II.A.

203. *Adventure Commc’ns, Inc. v. Ky. Registry of Election Fin.*, 191 F.3d 429, 439 (4th Cir. 1999) (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 387–89 (1969)).

204. See MATTHEW L. SPITZER, SEVEN DIRTY WORDS AND SIX OTHER STORIES 13 (1986) (discrediting theories of scarcity).

205. See Michael K. Powell, Chairman, FCC, Remarks at the Silicon Flatirons Telecommunications Program at the University of Colorado at Boulder, “Broadband Migration III: New Directions in Wireless Policy,” (Oct. 30, 2002), <http://www.fcc.gov/Speeches/Powell/2002/spmcp212.html>.

*B. Pervasive and Intrusive*

At any moment during the day or night, people can listen to free radio broadcasts in their home, car, or anywhere with a portable receiver. Consequently, the Supreme Court in *Pacifica* claimed that broadcast radio presents a "uniquely pervasive presence in the lives of all Americans."<sup>206</sup> This "automatic and unabridged intrusion" concerned the FCC when it proposed anti-indecency legislation in 1976.<sup>207</sup> It was assumed that if radio broadcast content was left unchecked, a person turning on the radio could subject himself or herself to obscene or indecent material without his or her permission. In particular, the Supreme Court was concerned about intrusions into the privacy of one's home because the right to privacy trumps the radio broadcaster's free speech right.<sup>208</sup> Furthermore, a broadcaster's warnings to listeners regarding subsequent offensive programming are ineffective for those listeners who tune in late or perhaps were flipping through radio channels.<sup>209</sup> Once the indecent or obscene content is realized by the listener, the harm is done and turning off the radio will not cure the offense.<sup>210</sup> The harm could be exponential when children comprise the audience.<sup>211</sup> Regulating radio broadcast's content would significantly reduce the risk of unwanted obscene or indecent material intruding one's privacy.

Nevertheless, this pervasive and intrusive argument has drawn criticism. In his dissent in *Pacifica*, Justice Brennan argued that a radio listener voluntarily listens to the broadcast, which constitutes "a decision to take part, if only as a listener, in an ongoing public discourse."<sup>212</sup> If offended, the listener needs only to switch channels or turn the radio off.<sup>213</sup> The listener is not held hostage to the radio's broadcast, but in fact is the one controlling what, if any, broadcast content is heard in his or her home.<sup>214</sup> Therefore, the radio broadcast is not an intruder but rather an

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206. FCC v. *Pacifica Found.*, 438 U.S. 726, 748 (1978).

207. See Tickton, *supra* note 200, at 59.

208. See *Pacifica*, 438 U.S. at 748 (citing *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970)).

209. See *id.*

210. See *id.* 748-49 (comparing turning off the radio after hearing indecent speech to running away from an assault after first blow).

211. See *infra* Part V.C.

212. *Pacifica*, 438 U.S. at 765 (Brennan, J., dissenting).

213. See *id.* at 765-766.

214. See GEORGE H. SHAPIRO, ET AL., "CABLESPEECH" THE CASE FOR FIRST AMENDMENT PROTECTION 35 (1983).

invited guest.<sup>215</sup> Justice Brennan's dissent in *Pacifica* is in accordance with the Supreme Court's earlier decision in *Rowan v. United States Post Office Department*,<sup>216</sup> where the Court upheld a homeowner's right to instruct the United States Post Office to order an advertiser to remove the homeowner from the mailing list.<sup>217</sup> The Court in *Rowan* directly compared the homeowner's right to block unsolicited mailings to radio listeners who change the channel to bar an offensive program.<sup>218</sup> It is the person, not the government, who should take the initial step to bar speech. Further, whatever "minimal discomfort" the broadcast radio listener may have experienced in coming across indecent material does not support a conclusion to completely bar a broadcaster's right to send, and other listeners' right to hear, speech protected by the First Amendment.<sup>219</sup>

Justice Brennan's opinion has merit with respect to adults. What adult has not overheard indecent speech while walking down the street, at a stadium, a park, or at work? Adults are conditioned to grow thick skins outside the home, so a logical presumption would conclude that briefly overhearing indecent content while flipping through the radio dial at home would not cause significant, if any, emotional distress. Nevertheless, radio's easy access draws underage listeners and whether one considers radio broadcasts as an invited guest or an intruder, indecent or obscene radio content could adversely affect children. This factor is considered next.

### *C. Most Importantly, Protect the Children*

Emphasizing the importance of protecting children, the FCC in 2001 acknowledged that enforcing the indecency and obscenity standards requires the Commission to balance two competing goals: (1) to prevent indecent program material from being broadcast during times when children are likely to hear it and (2) to not violate broadcasters' free speech rights.<sup>220</sup> This section analyzes what age group constitutes children, addresses the presumption that indecent or obscene radio content is bad for children, and outlines the balance in shielding children from content

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215. See Thierer, *supra* note 192, at 3.

216. *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970).

217. *Id.* at 740.

218. See *id.* at 737.

219. See *Pacifica*, 438 U.S. at 765–66.

220. See In the Matter of Industry Guidance on The Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999, 8000–01 (2001).

without barring adults from consuming the content.<sup>221</sup>

### 1. Radio Regulation's Age of Minority

Law and society generally transform children into adults at the age of eighteen.<sup>222</sup> But, when considering how to shield children from indecent and obscene content, should the definition of "children" include junior high and high school students? Presumably, America's teenagers are already privy to Carlin's seven dirty words, as well as numerous other combinations. From my own experience, if swear words are only proper for sailors, my junior high playground was Annapolis.<sup>223</sup> Further, a teenager's life is centered on independence from parental supervision, which effectively weakens the motive to advocate censorship of this youth from adult content. Accordingly, shielding teenagers from indecent radio content would likely not reflect life's realities. Thus, the FCC initially defined "children" as those individuals under twelve.<sup>224</sup> The FCC concluded in 1976 that "it would be virtually impossible for a broadcaster to minimize the risk of exposure to 18-year-olds."<sup>225</sup> Thus, "children" were defined as those in elementary school or younger, leaving America's teenagers out of the mix.<sup>226</sup>

In the 1990s the FCC broadened its efforts to combat what it believed was indecency in broadcasting, redefining "children" as "ages 17 and under."<sup>227</sup> The FCC's decision was supported by the following conclusions: (1) other statutes enacted to protect children used the same

221. *Anecdote: G-Rated Entertainment*—My wife and I were taking the kids to Disneyland, a place parents know is filled with "kid-friendly" fun. To set the ambiance, during our short drive to the park we listened to Radio Disney, another youth-based entertainment form. When we arrived at the park's entrance, the line was longer than expected, particularly since it was a Wednesday in early October. As we got in line, a couple filed in behind, and the gentleman exclaimed: "Wow, this is a f...ing long line"—So much for the sanitized atmosphere. Perhaps self-regulation is more appropriately needed than government regulation. Do I need to keep earphones on the kids with "It's A Small World" pumping constantly? (My apologies to the reader if you now have "It's A Small World" playing in your head.) Besides, the line was not that long—come back to the park on a Saturday in July and I'll show you a "f...ing" long line.

222. See U.S. CONST. amend. XXVI, §1 (right to vote for those eighteen and over); RESTATEMENT (SECOND) OF CONTRACTS § 14 (2002) (only able to create voidable contracts before day after eighteenth birthday)..

223. No offense to the United States Naval Academy.

224. See *Action for Children's Television v. FCC*, 852 F.2d 1332, 1342 (D.C. Cir. 1988) ("The FCC reasoned: 'Age 12 was selected since it is the accepted upper limit for children's programming in the industry and at the Commission.'"), *superseded in part by* 58 F. 3d 654 (D.C. Cir. 1995); see also Tickton, *supra* note 200, at 61.

225. *Action for Children's Television*, 852 F.2d at 1342.

226. See *Action for Children's Television v. FCC*, 58 F.3d 654, 664 (D.C. Cir. 1995).

227. *Id.*

age limit; (2) most states have criminalized the dissemination of explicitly sexual material to youth under seventeen; (3) the Supreme Court has affirmed the constitutionality of statutes protecting children ages seventeen and under; and (4) "there is a reasonable risk that significant numbers of children ages 17 and under listen to radio and view television at all times of the day or night."<sup>228</sup> The District of Columbia Circuit confirmed the FCC's decision, stating that "the Commission was fully justified in concluding that the Government interest extends to minors of all ages."<sup>229</sup> Accordingly, "children" now also includes teenagers.

## 2. Working Presumptions: Indecent Content Harms Children and Parents Should Determine Its Role in Their Household

The presumption is that when children hear or view indecent or obscene content, it harms their physical and psychological well-being.<sup>230</sup> In 1968, the Supreme Court in *Ginsberg v. New York* noted that although no concrete scientific data showed a causal link that obscene content impairs a youth's ethical and moral development, no contrary study showed that a causal link did not exist.<sup>231</sup> However, in 1986, the Attorney General's Commission on Pornography, the Meese Commission, concluded that "'non-violent and non-degrading,' sexually explicit material[] . . . is harmful when it falls into the hands of children."<sup>232</sup> In 1996, the district court's decision in *Playboy I* cited the Meese Commission's report, but invited the parties to supply evidence to support or contradict these findings if subsequent litigation were to ensue.<sup>233</sup> Accepting the invitation in *Playboy II*,<sup>234</sup> a psychiatrist specializing in psychosexual development testified for Playboy that no "available research . . . supported the notion that exposure to sexual explicitness is psychologically harmful to youth."<sup>235</sup> Acknowledging Playboy's expert testimony, the district court noted that the

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228. *Id.*

229. *Id.*

230. *See Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126 (1989) ("We have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.").

231. *Ginsberg v. New York*, 390 U.S. 629, 641-42 (1968).

232. *See Playboy Entm't Group v. United States*, 945 F. Supp. 772, 786 (D. Del. 1996) [hereinafter *Playboy I*], *aff'd*, 520 U.S. 1141, (quoting U.S. Dep't of Justice, *Attorney General's Commission on Pornography*, July 1986, at 343-44).

233. *See id.* at 786 n.25; *see also* MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY," CENSORSHIP, AND THE INNOCENCE OF YOUTH 191 (Hill & Wang 2001).

234. *Playboy Entm't Group v. United States*, 30 F. Supp. 2d 702 (D. Del. 1998) [hereinafter *Playboy II*].

235. *See HEINS*, *supra* note 233, at 191.

evidence to support a causal link was very limited.<sup>236</sup> Nonetheless, the district court opined that Supreme Court precedent set forth a presumption that obscene and indecent material is harmful to children without requiring empirical evidence.<sup>237</sup> This presumption dates back to the Supreme Court's decisions in *Ginsberg* for indecent magazines and *Sable Communications of California v. FCC*<sup>238</sup> for indecent telephone messaging services, both cases described in more detail below.<sup>239</sup> Accordingly, barring a scientific study to the contrary, the presumption is that indecent and obscene material harms children.

Absent concrete evidence that a causal link exists, perhaps a better presumption is that parents have the right to determine when to teach their child the facts of life—facts typically exaggerated in content deemed indecent and obscene. The Supreme Court in *Ginsberg* acknowledged this parental right, stating that “constitutional interpretation has consistently recognized that the parents’ claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.”<sup>240</sup> The *Ginsberg* decision reflects the concept that family constitutes a “self-determined communicative environment[,]” where the family members “can selectively choose what will and will not enter their communicative environment.”<sup>241</sup> Through this primary group communication, “[c]hildren create their first ordered and unified conceptions of the world,” which helps them mature and understand the world as a whole.<sup>242</sup> The government may assist parents with their right by barring, or at least making it more difficult for children to obtain obscene or indecent material without parental consent.<sup>243</sup> This parental right creates a compelling interest that can support a government-sponsored prior

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236. See *id.* (“[T]he court was still faced with what it candidly described as ‘a paucity’ of positive evidence of harm.”).

237. See *Am. Amusement Mach. Ass’n v. Kendrick*, 115 F. Supp. 2d 943, 960 (S.D. Ind. 2000) (“None of the three [Supreme Court] decisions indicated that a government would need definitive research results . . .”), *rev’d and remanded* by 244 F.3d 572 (7th Cir. 2001); HEINS, *supra* note 233, at 192.

238. *Sable Comm’n’s*, 492 U.S. at 126.

239. See *Am. Amusement Mach.*, 115 F. Supp. 2d at 962.

240. *Ginsberg*, 390 U.S. at 639.

241. See John Kamp, *Obscenity and the Supreme Court* (1980), in CENSORSHIP, SECRECY, ACCESS, AND OBSCENITY 124–25, (Hon. Theodore R. Kupferman ed., 1990).

242. *Id.* at 125.

243. See *Action for Children’s Television v. FCC*, 11 F.3d 170, 177 (D.C. Cir. 1993) (“The government’s interest in helping parents supervise their children has been repeatedly recognized as sufficiently important to justify restrictions on First Amendment activities.”), *superseded in part* by 58 F.3d 654 (D.C. Cir. 1995).

restraint against indecent and obscene speech.<sup>244</sup> The opportunity to control exposure does not last forever, and parents through the ages have faced an epic race: explain the facts of life on their terms or acquiesce and let their child learn them on the schoolyard blacktop.

Nevertheless, the harm created by indecent and obscene content erodes as a child grows older.<sup>245</sup> The child's maturation process must include exposure to ideas and subjects that are increasingly complex.<sup>246</sup> Accordingly, the Supreme Court in *Erznoznik v. City of Jacksonville* stated that although the government can prohibit children's exposure to indecent and obscene material, minors are nonetheless entitled to a significant degree of First Amendment rights.<sup>247</sup> Unless the material is objectively determined obscene or indecent when applied to minors, a legislature cannot deny minors' access to content just because it subjectively deems the material unsuitable.<sup>248</sup> For instance, not all nudity is obscene. Films that contain brief nudity in an artistic or educational manner rather than catering to a prurient interest are often not viewed as obscene.<sup>249</sup> The Fifth Circuit opined that "[w]hile we recognize the interest of society in protecting children, we find even the child's freedom of speech too precious to be subjected to the whim of the censor."<sup>250</sup> The District of Columbia Circuit in *Action for Children's Television v. FCC*, however, inferred that *Pacifica* limited these First Amendment rights where "very young children" are concerned.<sup>251</sup> The government has an independent objective, albeit complementary with the parental rights, in protecting the well being of minors.<sup>252</sup> Overall, the legislature's intent for restricting content available to minors must be rational.<sup>253</sup> Although this test is less rigid than the strict scrutiny warranted by content-based regulations against

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244. See *Kamp*, *supra* note 241, at 124–25.

245. See *Action for Children's Television*, 11 F.3d at 178 ("[T]he grounds for restricting a minor's First Amendment rights . . . fade as the minor matures.").

246. See *Kamp*, *supra* note 241, at 127.

247. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212–13 (1975).

248. See *id.* at 213–14.

249. See *id.* at 213.

250. *Am. Amusement Mach.*, 115 F. Supp. 2d at 968 (quoting *Interstate Circuit, Inc. v. City of Dallas*, 366 F.2d 590, 598–99 (5th Cir. 1966)).

251. See *Action for Children's Television*, 11 F.3d at 179.

252. See *Action for Children's Television v. FCC*, 58 F.3d 654, 661 (D.C. Cir. 1995) ("[W]e believe the Government's own interest in the well-being of minors provides an independent justification for the regulation of broadcast indecency.").

253. See *Ginsberg*, 390 U.S. at 641 ("To sustain state power to exclude [obscene] material . . . requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors.").



adults, it does not give the legislature absolute control.<sup>254</sup>

### 3. Shielding Children Without Barring Adults

The government can regulate constitutionally protected speech, including indecent speech, only if the regulation takes the narrowest form to achieve the government's interest.<sup>255</sup> As detailed above, the Supreme Court has acknowledged that protecting the well-being of minors is a compelling government interest.<sup>256</sup> In casting its net to keep indecent material from children, however, the government must not "unduly restrict[] the First Amendment rights of adults."<sup>257</sup> To survive a constitutional challenge, the regulation must be narrowly tailored, such that it does not restrict adults' access to protected speech, which includes content that is not obscene by adult standards.<sup>258</sup> The government must not reduce adults' free speech rights to content that is only acceptable for a child.<sup>259</sup>

The federal court has examined this tailoring issue on several occasions. In *Ginsberg*, a New York statute forbade the sale of magazines that contained pictorials of nude women to youth under seventeen years of age.<sup>260</sup> The Supreme Court ruled that the statute was narrowly drafted because it did not forbid the magazine's sale to adults.<sup>261</sup> Further, the district court in *American Amusement Machine Ass'n v. Kendrick* opined that an Indianapolis ordinance forbidding minors from playing or watching coin-operated video games that containing strong sexual content or graphic violence did not violate the First Amendment because it was "carefully tailored."<sup>262</sup> The ordinance did not bar or significantly restrict adults from enjoying the video games.<sup>263</sup> Subsequently, the Seventh Circuit reversed the lower court's decision not to issue a preliminary injunction on behalf of

254. See *Am. Amusement Mach.*, 115 F. Supp. 2d at 956.

255. *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 126-27 (1989) (citing *Butler v. Michigan*, 352 U.S. 380 (1957)).

256. *Id.* at 126.

257. *Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 961 (S.D. Ind. 2000) ("[S]trict scrutiny will likely be fatal to the challenged restrictions.").

258. See *Sable Commc'ns*, 492 U.S. at 126 ("It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."); see also *Kamp*, *supra* note 241, at 122 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965)).

259. See *Sable Commc'ns*, 492 U.S. at 126-27 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)).

260. *Ginsberg v. New York*, 390 U.S. 629, 631, 633 (1968)..

261. *Id.* at 634-35.

262. See *Am. Amusement Mach.*, 115 F. Supp. 2d at 946.

263. *Id.*

the video game manufacturers, stating that animated graphic violence does not fit under typical obscenity laws.<sup>264</sup> In contrast, the Supreme Court in *Sable Communications* ruled that a 1988 amendment to the FCA, which prohibited sexually oriented prerecorded telephone messages, was a “flat-out ban of indecent speech contrary to the First Amendment” because it forbade adults from accessing the content.<sup>265</sup> Thus, legislatures must not overstep their authority in protecting children by barring otherwise protected speech from adults.

The FCC is also required to walk this line, and it must allow content that is not obscene to adults to be broadcasted at a time when it is unlikely that children are listening.<sup>266</sup> The FCC’s “safe harbor” time period permits television and radio broadcasters to air indecent or profane content, but not obscene content, between 10:00 p.m. and 6:00 a.m.<sup>267</sup> For instance, the FCC and the Supreme Court have suggested that broadcasting the Carlin monologue at issue in *Pacifica* in the evening, rather than at 2:00 p.m., may not have violated the FCC’s regulation against indecent content.<sup>268</sup> Therefore, the FCC’s regulations against broadcasting indecent and profane content are tailored to protect children without barring adults from hearing protected speech.

#### *D. On the Other Hand: Media Whose Content is Not Regulated by the FCC*

The reasons for limiting free speech rights for broadcast radio content discussed above, however, do not extend to all other media.<sup>269</sup> Adults need forums to exchange ideas that are considered indecent. As Miles (Curtis Armstrong) said to Joel (Tom Cruise) in *RISKY BUSINESS*: “every now and then say, ‘What the fuck.’ ‘What the fuck’ gives you freedom. Freedom brings opportunity. Opportunity makes your future. . . . If you can’t say it, you can’t do it.”<sup>270</sup> The federal court and FCC have analyzed and

264. See *Am. Amusement Mach. Ass’n v. Kendrick*, 244 F.3d 572, 574 (7th Cir. 2001) (“Violence and obscenity are distinct categories of objectionable depiction . . . .”) (citing *Winters v. New York*, 333 U.S. 507, 518–20 (1948)).

265. See *Sable Commc’ns*, 492 U.S. at 119.

266. See *Action for Children’s Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) (rejecting total ban on indecent material); see also Consumer and Governmental Affairs Bureau, *supra* note 79 (“[C]ourts have held that indecent material is protected by the First Amendment and cannot be banned entirely.”).

267. See Consumer and Governmental Affairs Bureau, *supra* note 79.

268. See *FCC v. Pacifica Found.*, 438 U.S. 726, 732 n.5, 750 n.28 (1978).

269. See *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (“[T]he special interest of the Federal Government in regulation of broadcast media does not readily translate into a justification for regulation of other means of communication.”).

270. *RISKY BUSINESS* (Warner Home Video 1983).

precluded content regulation in connection with other media, which provides precedent that regulating content on satellite radio is unjustified and unconstitutional.

### 1. Basic and Pay-Per-View Cable Television

There are direct comparisons between satellite radio and cable television. Cable television's inception in the 1940s was a means to provide television to communities that could not obtain clear broadcast television services.<sup>271</sup> The cable industry grew during the subsequent decades and by 1975, cable operators began to distribute programs nationally via satellite, including Home Box Office ("HBO").<sup>272</sup> With its success, the legislature considered restricting indecent content on cable television based on the reasons given in *Pacifica* for broadcast media, namely, home intrusion, pervasive, signal scarcity, and ready availability to minors.<sup>273</sup> Initially, the federal courts found specific differences between cable television and broadcast television, concluding that cable television qualified for full First Amendment protection rather than the limited protection granted to public broadcasters in *Pacifica*.<sup>274</sup> For instance, cable television is a pay-subscription-based service and is, therefore, an invited guest rather than an "intruder."<sup>275</sup> Further, in 1982, the district court in *Community Television of Utah, Inc. v. Roy City* stated that cable has a subscripitive nature, such that it is "not in the air, present everywhere" and not available to all, thus rendering it not pervasive.<sup>276</sup> Because in theory there is "no physical limitation on the number of [cable] wires available to carry electronic signals," the district court figured that signal scarcity does not apply to cable television.<sup>277</sup> Finally, the Eleventh Circuit's 1983 decision in *Cruz v. Ferre* stated that cable television presents a "significantly weaker" threat to children because (1) parents decide to subscribe to cable, (2) parents decide to pay extra to receive premium channels, such as HBO, known for showing adult subject matter, and (3) cable provides parents, at no charge, "lockbox" or "parental key" devices to

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271. See SHAPIRO, *supra* note 214, at 1.

272. See *id.* at 2 n.3.

273. See *id.* at 44.

274. See *Cnty. Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167 (D. Utah 1982).

275. See *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) ("Cablevision . . . does not 'intrude' into the home."); see also SHAPIRO, *supra* note 214, at 44.

276. See *Roy City*, 555 F. Supp. at 1169 ("[P]ervasiveness[:]. . . Literally it means ever-present.").

277. *Id.*

bar access to specified channels.<sup>278</sup> Accordingly, in the 1980s, the reasons to restrict indecent speech outlined in *Pacifica* did not apply to cable television.

Nevertheless, cable television subscriptions grew significantly in the 1990s; by 1996, over half of the homes in America were cable subscribers.<sup>279</sup> This growth triggered a reversal of thought in 1996, when the Supreme Court in *Denver Area Educational Telecommunication Consortium v. FCC* opined that although scarcity is not a concern with cable television,<sup>280</sup> cable television is just as pervasive and accessible to children as broadcast television.<sup>281</sup> The significant increase in cable subscriptions weakened the argument mentioned above, that pay subscription-based cable is not available to all. Further, considering the abundance of channels cable offers and the cable viewer's propensity to surf these channels without looking at the program guide, indecent content could "intrude" and surprise a cable viewer in the same manner as indecent content affects a broadcast television viewer.<sup>282</sup> Therefore, "[basic] cable and broadcast television differ little, if at all."<sup>283</sup> The Court found the regulation at issue in *Denver Area Educational* analogous to the FCC's regulation in *Pacifica*.<sup>284</sup> Therefore, in some cases, basic cable may receive the limited First Amendment protection afforded broadcast television and radio.

In restricting indecent speech, however, the government does not have carte blanche. The First Amendment requires that when the "designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails."<sup>285</sup> But, because cable television, particularly basic cable, presents the same "unique problems" detailed in *Pacifica*, the speech restriction may be justified despite the general rule.<sup>286</sup> Although in practice

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278. See *Cruz*, 755 F.2d at 1420–21.

279. See *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 745 (1996) (citing research stating that in 1996, 63% of American homes subscribed to cable television).

280. See *Denver Area Educ.*, 518 U.S. at 748 (referring to the inapplicability of the spectrum scarcity problem to cable) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637–41 (1999)).

281. See *id.* at 744 ("All [the *Pacifica*] factors are present here.").

282. See *id.* at 745.

283. *Id.* at 748.

284. *Id.* at 747–748.

285. *Playboy III*, *supra* note 69, at 813.

286. See *id.* ("Cable television, like broadcast media, presents unique problems, which inform our assessment of the interests at stake, and which may justify restrictions that would be unacceptable in other contexts.").

a medium that falls under the *Pacifica* factors receives a more limited First Amendment protection,<sup>287</sup> the content-based restriction on speech still “must be narrowly tailored to promote a compelling Government interest.”<sup>288</sup> Most importantly, if a less restrictive alternative to achieve the government’s goal is available and effective, the government must abandon the statute and adopt the alternative.<sup>289</sup>

In cable television, such an alternative is available. Cable providers have the ability to block unwanted channels, which significantly distinguishes cable television from broadcast television.<sup>290</sup> This ability to block channels pursuant to a subscriber’s request presents a less restrictive alternative that allows strict scrutiny, even under the *Pacifica* analysis, to void the content-based speech restriction enacted by Congress.<sup>291</sup> The lockbox or parental key promotes parental censorship, which is not prohibited by the Constitution, and eliminates the compelling need for legislative regulation.

If the government can prove that the less restrictive alternative is ineffective, however, it can rebut the presumption that the alternative renders the restrictive content-based regulation unconstitutional.<sup>292</sup> The burden is on the government to prove that the problem it seeks to rectify is widespread and serious, and that the recommended alternative to censorship would not sufficiently remedy the problem.<sup>293</sup> Showing mere flaws in the alternative does not meet the government’s burden to prove that the alternative is ineffective.<sup>294</sup> For example, in *Playboy III*, § 505 of the Telecommunications Act of 1996 required cable broadcasters to fully scramble or fully block sexually-oriented programming, such as the Playboy Channel, or limit their transmission to hours between 10:00 p.m.

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287. See *Action for Children’s Television v. FCC*, 58 F.3d 654, 673 (D.C. Cir. 1995) (Edwards, J., dissenting) (arguing against the “[B]ifurcated approach—applying a relaxed level of scrutiny to content-based regulations of broadcast and a strict level of scrutiny for . . . non-broadcast media. . .”).

288. *Playboy III*, *supra* note 69, at 813.

289. See *id.*; see also *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (“[T]he court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.”).

290. See *Playboy III*, *supra* note 69, at 815.

291. See *id.* (“[B]locking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.”); see also *Ashcroft*, 542 U.S. at 670 (“Absent a showing that the proposed less restrictive alternative would not be as effective . . . the more restrictive option preferred by Congress could not survive strict scrutiny”) (citing *Playboy III*, *supra* note 69, at 826).

292. See *Playboy III*, *supra* note 69, at 816.

293. See *id.* at 818–19.

294. See *Ashcroft*, 542 U.S. at 669.

and 6:00 a.m. when children are not watching.<sup>295</sup> During this time, the scrambling process was imprecise, so that occasionally the picture or audio would briefly become unscrambled, a phenomenon known as “signal bleed.”<sup>296</sup> Because signal bleed prevented cable broadcasters from *fully* scrambling the programming, § 505 would force them to only broadcast the adult content during the allotted timeframe. In the alternative, however, the Supreme Court noted that § 504 of the Act required cable broadcasters, *upon a subscriber’s request*, to fully scramble or fully block any channel specified by the subscriber.<sup>297</sup> Because § 504 placed the restrictive power in the subscriber’s hands, it provided a less restrictive alternative to the content-based speech restriction in § 505.<sup>298</sup> Although the government argued that § 504 was ineffective because very few people requested the adult content blocked, the Court deferred to the district court’s conclusion that it could be made effective with adequate notice to the public.<sup>299</sup>

Furthermore, the government did not submit consumer surveys or field tests to prove that signal bleed was a pervasive problem that § 504 could not address.<sup>300</sup> Although the government is not required to compile iron-clad proof prior to passing speech restrictive legislation, it “must present more than anecdote and supposition.”<sup>301</sup> Further, the problem addressed must be real, such that the government “may not rely solely on speculation and conjecture.”<sup>302</sup>

Overall, cable television presents a medium that, theoretically, justifies restrictions on indecent speech based on the limited First Amendment analysis discussed in *Pacifica*. Nevertheless, lockboxes and parental keys provide subscribers with ways to prevent unwanted exposure to adult content, preempting the need for government regulation.

## 2. Internet

The Internet commingles decent content with a vast collection of indecent and obscene material,<sup>303</sup> which prompted Congress to establish

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295. See *Playboy III*, *supra* note 69, at 806.

296. See *id.*

297. See *id.* at 809–10.

298. See *id.* at 810.

299. See *id.* at 816.

300. See *id.* at 819–20.

301. See *Playboy III*, *supra* note 69, at 822.

302. See *Denver Area Educ.*, 518 U.S. at 774 (Stevens, J., concurring).

303. *Anecdote: Baseball Season*—It was spring and I was excited to take my son to his first baseball game. At the time, the local team was called the California Angels, which eventually became the Anaheim Angels, and then became the Los Angeles Angels of Anaheim. (I do not

restrictions under the Communications Decency Act ("CDA"). But, in reviewing the CDA's criminalization of transmitting indecent or obscene content to minors over the Internet, the Supreme Court in *Reno v. ACLU* determined that the special justifications enunciated in *Pacifica* for regulating indecent broadcast media content do not apply to the Internet.<sup>304</sup> For instance, the Internet's history does not contain instances of government regulation regarding content.<sup>305</sup> Further, scarcity is not a concern because the World Wide Web provides "relatively unlimited, low-cost capacity" for millions of people to exchange diverse content.<sup>306</sup> The Internet also is not intrusive because it does not "invade" the home.<sup>307</sup> Unlike broadcast media, access to Internet content requires deliberate, affirmative steps, such as searching a topic via a web browser.<sup>308</sup> The Supreme Court in *Reno v. ACLU* agreed with the lower court's finding that "[a]lmost all sexually explicit images are preceded by warnings as to the content" and "'odds are slim' that a user would enter a sexually explicit site by accident."<sup>309</sup> Although protecting children from indecent content is compelling, only a sophisticated child with the ability to read could search and obtain this content on the Internet.<sup>310</sup> With respect to pervasive, on the other hand, if it is measured by volume of cable television subscribers as in *Denver Area Educational*, then the Internet is pervasive since it is used by millions.<sup>311</sup> The Supreme Court did not address the pervasiveness factor in *Reno v. ACLU*. Accordingly, the Court in *Reno v. ACLU* agreed with the district court's conclusion that the special *Pacifica* reasons do not apply to the Internet and thus, the Internet receives full First Amendment protection under strict scrutiny.<sup>312</sup>

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know what the team's geographic location will be next year, but that is beyond this article's scope.) So, I ventured onto the World Wide Web to check the team's schedule and buy tickets. Logically, I set the Internet browser to "www.californiaangels.com." Well, let's just say that these "angels" were not playing baseball. Maybe that is why the baseball team dropped the "California" reference. One does need to be cautious while surfing the web.

304. See *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997) ("Those [*Pacifica*] factors are not present in cyberspace."); see also *ACLU v. Reno*, 217 F.3d 162, 173 n.18 (3d Cir. 2000) ("[T]he Supreme Court has also recognized that these same elements, which justified heightened regulation of the broadcast medium, do not exist in cyberspace.").

305. See *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997).

306. See *id.* at 870.

307. See *id.* at 869.

308. See *id.* at 854.

309. See *id.*

310. See *id.*

311. See *Reno*, 521 U.S. at 850 ("About 40 million people used the Internet at the time of trial [1996]. . . .").

312. See *id.* at 870 ("We agree with its [district court's] conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this

Strict scrutiny does not preclude the government from regulating Internet content entirely so long as the government proves that its restriction is narrowly tailored, such that it is the least restrictive method available.<sup>313</sup> Or, alternatively, the government must prove that the suggested alternatives are ineffective to achieve the compelling state interest.<sup>314</sup> The Supreme Court in both *Reno v. ACLU* and *Ashcroft v. ACLU* discussed filtering software as an effective and less restrictive way to protect minors from indecent and obscene content.<sup>315</sup> Parents can block indecent or obscene Internet content by enabling the filtering software, but can disable the filter when they want to access adult content.<sup>316</sup> Accordingly, filtering software is the Internet's version of cable television's lockbox. Filtering software is less restrictive and more effective than the government's content restrictions because parents, rather than the government, determine the Internet content their children view. In addition, adults without children are not precluded from viewing content barred by a restriction aimed at protecting children.<sup>317</sup> In *Ashcroft v. ACLU*, the Court opined that the government failed to provide specific evidence that filtering software was less effective than the content restrictions embodied in the Child Online Protection Act ("COPA").<sup>318</sup> Therefore, filtering software presents a less restrictive alternative to regulation, preventing Congress from restricting indecent content on the Internet.

### 3. Telephone Messaging Services

Like the Internet, telephone messaging services do not fit under the special *Pacifica* attributes. In the 1980s, in a series of cases between Carlin Communications and the FCC, as well as in *Sable Communications*, the Supreme Court reviewed federal statutes that restricted obscene or indecent content on prerecorded telephone messaging services.<sup>319</sup> These fee-based

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medium.").

313. See *Ashcroft v. ACLU*, 542 U.S. 656, 665–66 (2004).

314. See *id.*

315. See *Reno v. ACLU*, 521 U.S. 844, 879 (1997); and *Ashcroft*, 542 U.S. at 666–68 ("Blocking and filtering software is an alternative that is less restrictive . . . and . . . likely more effective as a means of restricting children's access . . .").

316. See *Ashcroft*, 542 U.S. at 667.

317. See *id.*

318. See *id.* at 668–69.

319. *Carlin I*, *supra* note 73, at 115–16; *Carlin Commc'ns, Inc. v. FCC*, 787 F.2d 846, 847 (2d Cir. 1986) [hereinafter *Carlin II*]; *Carlin Commc'ns, Inc. v. FCC*, 837 F.2d 546, 548–49 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988) [hereinafter *Carlin III*]; and *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 117 (1989).



services, referred to as "dial-a-porn," provide sexually explicit messages that consumers access by calling the designated telephone number.<sup>320</sup> Using a quantitative approach to pervasiveness, the messaging service would likely not meet the standard since the service reviewed in *Carlin II* received nearly seven million calls per month in a six-month period in 1985.<sup>321</sup> This number of callers is far less than the thirty-nine million cable subscribers discussed above in *Playboy III*.<sup>322</sup>

On the other hand, telephone messaging services are not intrusive since the fee-based service requires the listener to take affirmative steps to obtain the content.<sup>323</sup> The caller is not a "captive audience" that could be surprised by indecent content and one could easily avoid the content by not calling the telephone number.<sup>324</sup> The issue of scarcity was addressed neither in *Carlin Communications* nor in *Sable Communications*, but the assumption is that there are enough telephone numbers to accommodate everyone. Accordingly, telephone messaging services do not qualify under the *Pacifica* reasons for limiting the First Amendment protection on free speech.<sup>325</sup>

Further, the Supreme Court in *Sable Communications* affirmed the Ninth Circuit's conclusion that requiring callers to pay by credit card or have an approved access code (provided only to those callers who proved that they were adults) to unscramble the sexually explicit telephone message were effective and available alternatives that were less restrictive than regulation.<sup>326</sup> The government could not provide evidence that the alternatives were less effective than the statute in barring minors' access to the telephone messages.<sup>327</sup> Also, because the statute in *Sable Communications* was effectively a complete ban on telephone communications, the statute was not narrowly tailored.<sup>328</sup> Therefore, because less restrictive alternatives were available and the statute was

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320. See *Carlin I*, *supra* note 73, at 114.

321. See *Carlin II*, *supra* note 319, at 848.

322. *Playboy III*, *supra* note 69, at 820 (citing government evidence that "39 million homes . . . had the potential to be exposed to signal bleed . . .").

323. See *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 127-28 (1989); see also *Carlin I*, *supra* note 73, at 120 ("[T]elephone service that requires dialing on the part of the would-be listener, as opposed to . . . other means of expression . . . [where] the receiver has no chance to withhold his or her consent.").

324. See *Sable Commn'cs*, 492 U.S. at 128 ("Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message.").

325. See *id.* at 127 ("The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*.").

326. *Id.* at 128.

327. *Id.* at 128-131.

328. *Id.* at 131.

overbroad, the statute did not survive strict scrutiny.<sup>329</sup>

Overall, the FCC and federal courts' analyses in comparing cable television, the Internet, and telephone messages to broadcast media provide excellent precedent to conclude that satellite radio does not qualify under the *Pacifica* rationale for limited First Amendment free speech protection. This argument is outlined in the next section.

## VI. REGULATING SATELLITE RADIO CONTENT WOULD VIOLATE THE FIRST AMENDMENT

As a communication medium, satellite radio is not equivalent to broadcast media. As detailed below, satellite radio is not pervasive in the United States, nor does the subscription-based service intrude on one's personal privacy at home. Further, the medium is not confronted with broadcast spectrum scarcity. Most importantly, satellite radio has created ways for parents to shield their children from satellite radio content, without preventing parents or other adults from enjoying the content. Accordingly, satellite radio content is not fit for government imposed indecency regulation.

### *A. Satellite Radio is Not Pervasive*

Satellite radio is not pervasive, regardless of whether pervasiveness is measured by the delivery format or the number of subscribers. Satellite radio programs are transmitted through the air like broadcast radio.<sup>330</sup> But, in contrast to broadcast radio, the satellite transmissions are scrambled and only accessible to paid subscribers. Therefore, satellite radio is not in the air for all to receive. Satellite radio is delivered as a private commercial transaction, which contrasts to broadcast radio's public service or public interest goal that is explicit in 47 U.S.C. § 303(g).<sup>331</sup>

Furthermore, satellite radio is not pervasive even when it is measured by the number of subscribers. Sirius and XM combined boast only seven million subscribers—a number that is considerably lower than the Los Angeles population alone.<sup>332</sup> In comparison, the telephone messaging service in *Carlin Communications II*, which the court held did not qualify

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329. *Id.*

330. *See supra* Part III.A.

331. 47 U.S.C. § 303(g) (2000).

332. U.S. Census Bureau, State & County QuickFacts, <http://quickfacts.census.gov/qfd/state/s/06/06037.html> (last visited Nov. 17, 2006) (stating Los Angeles County's population estimate in 2004 was 9,937,739 persons).

under *Pacifica*, had nearly seven million users per month.<sup>333</sup> If telephone messaging services were not pervasive with only seven million users, then satellite radio would not qualify as pervasive with the same number of subscribers. To obtain a “pervasive” level, the popularity of satellite radio use would need to expand like cable television. Initially, the district court in *Roy City* declared cable television was not pervasive, but later deemed pervasive in *Denver Area Educational* when the cable industry reported that it provided services to over half the homes in America.<sup>334</sup> At that time, cable television reported thirty-nine million cable subscribers.<sup>335</sup> This number significantly dwarfs satellite radio’s current number of only seven million subscribers. Accordingly, satellite radio’s delivery method does not render the service pervasive, nor does its number of subscribers.

### *B. Satellite Radio Does Not Intrude Upon the Home*

In addition, satellite radio does not invade one’s home. It is an invited guest, not an intruder. Sirius and XM subscribers must take affirmative steps to acquire the service by (1) purchasing the satellite radio receiver, (2) installing the receiver in the home or car, and (3) by contacting Sirius or XM by phone or through the Internet to subscribe to the pay service.<sup>336</sup> Only adults are able to subscribe to satellite radio because subscribers must provide evidence to Sirius or XM that they are at least eighteen-years old.<sup>337</sup> Both Sirius and XM provide programming guides that detail the genre for each channel. In fact, XM’s channel guide lists the symbol “XL” next to those channels that “[m]ay include frequent explicit language.”<sup>338</sup> Therefore, after completing these steps and reviewing the respective channel guide, a subscriber could not complain that he or she was surprised by the content broadcast on satellite radio.

Satellite radio’s affirmative steps mirror the required steps adults needed to take to obtain other media that did not qualify under *Pacifica*. For instance, the telephone messaging services in *Carlin Communications*

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333. See *Carlin II*, *supra* note 319, at 848.

334. *Cnty. Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1169 (D. Utah 1982) [explaining that pervasiveness is automatically available to all]; *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 745 (1996) (providing research finding that in 1996, 63% of American homes subscribed to cable television).

335. See *Playboy III*, *supra* note 69, at 820 (indicating that in 1998, thirty-nine million homes subscribed to cable television).

336. See *supra* Part III.C.

337. See generally XM Satellite Radio, Customer Service Agreement, *supra* note 176; Sirius Satellite Radio, Terms & Conditions, *supra* note 176.

338. See XM SATELLITE RADIO, OVER 150 CHANNELS OF MUSIC, NEWS, SPORTS, & TALK, *supra* note 179.

and *Sable Communications* required the consumer to pick up the phone and dial the specific number.<sup>339</sup> Because the caller sought out the service, he or she is not surprised by the telephone message's content. The Internet provides the same sequencing to obtain content, specifically requiring Internet users to (1) obtain a computer or other device to access the Internet, (2) subscribe to an Internet service provider, which is a fee-based service, (3) search for the specific content by contemplating and entering a search phrase into a search engine, and (4) choosing which websites to view from the search engine results.<sup>340</sup> In the case of indecent or obscene content, the Internet user would likely also need to click through a page that warns the viewer that the connected sight contains adult content.<sup>341</sup> Considering this lengthy process, which requires the Internet user to think and develop a search strategy, the user could not claim undue surprise when faced with indecent or obscene content.

A pay-per-view cable subscriber would also fare no better in claiming that he or she was surprised by the content broadcast on a premium channel, such as HBO or the Playboy Channel. To obtain access to these premium pay-per-view channels, a subscriber must specifically contact the cable provider and authorize the channel to be unscrambled for the subscriber's viewing and subsequently, pay a monthly service fee for access to the channel.<sup>342</sup> Because satellite radio subscribers seek content in a similar manner as people seeking telephone messages, websites, and pay-per-view television channels, satellite radio subscribers are also precluded from claiming the content intruded their privacy and rendered undue surprise. Further, XM mirrors cable television providers by requiring its subscribers to specifically request Playboy Radio, which as mentioned above, incurs an additional \$2.99 charge per month.<sup>343</sup>

Satellite radio's subscription-based nature provides weight that the media is not intrusive. By requiring consumers to pay a fee to obtain satellite radio content, more is required to obtain satellite radio than just a specific receiver. Amateur radio requires a special receiver to obtain its

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339. See *Sable Commc'ns of Cal. v. FCC*, 492 U.S. 115, 127–28 (1989); see also *Carlin I*, *supra* note 73, at 120 (“[T]elephone service that requires dialing on the part of the would-be listener, as opposed to . . . other means of expression . . . [where] the receiver has no chance to withhold his or her consent.”); see *supra* Part V.D.3.

340. See generally *Reno v. ACLU*, 521 U.S. 844, 850–53 (1997).

341. See *id.* at 869.

342. *Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (“Additionally, the subscriber must make the additional affirmative decision whether to purchase any ‘extra’ programming services, such as HBO.”).

343. XM Satellite Radio, *Listen Large//America's Largest Playlist*, *supra* note 178 (listing Playboy Radio as a “premium” channel for an additional \$2.99 per month).

broadcast content, but unlike satellite radio, it does not require the listener to pay a periodic fee to receive the broadcasts.<sup>344</sup> The FCC concluded *In re Hildebrand* that amateur radio fit under the *Pacifica* rationale to require stricter regulation because it was not a subscription-based service, had no program guide, did not provide a lockbox or other parental blocking feature, and consisted of “spontaneous multi-party communications without advance warning of the nature of the transmission.”<sup>345</sup> By requiring a subscription, satellite radio creates a private agreement, whereby the listener grants permission to Sirius or XM to broadcast its content to that listener. This permissive and private transmission is akin to a private two-way radio conversation, which the Supreme Court in *Pacifica* specifically excluded from its holding.<sup>346</sup>

Although the Supreme Court in *Denver Area Educational* found cable television intrusive despite being subscription-based, the Court’s conclusion on intrusiveness appears based on cable television’s pervasive nature.<sup>347</sup> This overlooks the fact that the cable subscriber, by paying the monthly fee, seeks and invites the content into his or her home. The FCC recognized this viewpoint when in 2002, it decided that pay-per-view movies telecast in hotels on a closed circuit network were not subject to regulation because “subscription-based services do not call into play the issue of indecency.”<sup>348</sup> The FCC expressly refused to expand its indecency restrictions to satellite radio because the medium is a subscription-based service.<sup>349</sup>

Further, one’s right of privacy is a significant factor that weighs on the intrusiveness issue. In *Pacifica*, the Supreme Court stated that when indecent content is pervasive, it “confronts the citizen, not only in public, but also in the privacy of the home.”<sup>350</sup> The right to privacy constitutes the “individual’s right to be left alone,” which the Court in *Pacifica* confirmed “plainly outweighs the First Amendment rights of an intruder.”<sup>351</sup> Thus, for a content-based regulation against speech to survive a constitutional attack, the government must show that the “speaker intrudes on the privacy of the home . . . or the degree of captivity makes it impractical for the

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344. In the Matter of David Hildbrand, 2 F.C.C.R. 2708, 2709 (1987).

345. *Id.*

346. FCC v. *Pacifica Found.*, 438 U.S. 726, 750 (1978).

347. *Denver Area Educ. Telecomm. Consortium v. FCC*, 518 U.S. 727, 745 (1996).

348. In the Matter of Litig. Recovery Trust, 17 F.C.C.R. 21852, 21856 (2002).

349. Letter from W. Kenneth Ferree, *supra* note 180; see *supra* Part IV.A.

350. *Pacifica*, 438 U.S. at 748.

351. *Id.* (citing *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970)).

unwilling viewer or auditor to avoid exposure.”<sup>352</sup> Satellite radio does not intrude on one’s right of privacy by invading the subscriber’s home because the subscriber sought and purchased the service. In the short term, the subscriber can easily avoid satellite radio’s content by turning off the receiver. Or, for permanent relief, the subscriber can merely cancel his or her subscription. Accordingly, satellite radio does not infringe on one’s right of privacy.

*C. Regulating Satellite Radio Content is Not the Least Restrictive Way to Protect Children*

Protecting children from obscene and indecent content is a compelling government interest.<sup>353</sup> Nevertheless, to meet this compelling goal, the government cannot restrict adults to content that is only appropriate for children.<sup>354</sup> In the *Ashcroft v. ACLU* and *Carlin I* courts’ treatment of content-based restrictions against cable television and Internet content, the decisions emphasized that a restriction against speech: (1) must constitute the least restrictive means to protect children, and (2) the benefits in enacting the restriction must outweigh the adverse effects on free speech.<sup>355</sup> Regulation against indecent speech broadcast on cable television and the Internet, however, did not survive strict scrutiny because parental controls, such as lockboxes and website filters were effective and available alternatives.<sup>356</sup> In keeping with these examples, both Sirius and XM provide subscribers with the ability to block out any channel offered by the company.<sup>357</sup> For instance, if a Sirius subscriber wanted to ensure that his or her child could not access the Howard Stern channel, the subscriber needs only to call Sirius and request that it block that channel from the subscriber’s receiver. Once Sirius or XM block the channel in this manner, the channel is not accessible by anyone through that

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352. See *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209–10 (1975) (citing *Rowan*, 397 U.S. 728 (1970); *Id.* at 210 (quoting *Cohen v. Cal.*, 403 U.S. 15, 21 (1971)) (“‘The ability of the government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.’”).

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

354. *Id.* at 126–27 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)).

355. See *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004); *Carlin I*, *supra* note 73, at 121.

356. See *Playboy III*, *supra* note 69, at 815; *Ashcroft v. ACLU*, 542 U.S. at 666–68.

357. Telephone Interviews with XM Satellite Radio Customer Service, *supra* note 179; see also XM SATELLITE RADIO, OVER 150 CHANNELS OF MUSIC, NEWS, SPORTS, & TALK, *supra* note 179 (“Please call XM Listener Care at 1-800-XM-RADIO (1-800-967-2346) for Parental Control/Blocking Option.”).

subscriber's receiver.<sup>358</sup> This is a less restrictive alternative since it leaves the channel open to subscribers that would like to access it. A federal regulation, on the other hand, would effectively bar access to the channel if its content were deemed indecent.

Further, the satellite receivers themselves have a "Channel Skip" feature, which allows the subscriber to prevent the receiver from tuning into certain stations.<sup>359</sup> If someone, perhaps a child, were to scan through the channels using the channel selection button, the receiver would scan the channels while skipping over those designated under the skip feature. If, however, the subscriber wanted to hear that channel, he or she could manually input the channel number and the receiver would then tune into that channel.<sup>360</sup> Although this feature is not foolproof for adolescents, it would prevent younger children from accidentally hearing a channel devoted to adult topics. Therefore, the "Channel Skip" feature provides a flexible censoring tool for the discerning parent.

Parental controls provide a less restrictive alternative to protecting children than a government content-based regulation against satellite radio content. In *Playboy Entertainment Group II*, *Reno v. ACLU*, and *Ashcroft v. ACLU*, lockboxes and website filters provided the less restrictive alternatives to bar regulations against indecent content on cable television and the Internet.<sup>361</sup> Similarly, the blocking feature provided by Sirius and XM, as well as the "Channel Skip" feature, provide effective and available alternatives to government regulations against indecent speech on satellite radio. The government might argue that these parental controls are not effective tools in protecting children from indecent content because they are not foolproof. However, considering that the government was unable to meet this burden in the cable television and Internet cases discussed above, it is unlikely that the government could compile material evidence that would prove the mentioned parental controls are ineffective. Therefore, despite the compelling interest for strict scrutiny, it is unlikely that the regulation would satisfy the narrow tailoring requirement in light of these parental controls.

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358. Telephone Interviews with XM Satellite Radio Customer Service, *supra* note 179; see also XM SATELLITE RADIO, OVER 150 CHANNELS OF MUSIC, NEWS, SPORTS, & TALK, *supra* note 179.

359. See generally DELPHI CORP., SKYFI OPERATING GUIDE § 4, at 11, available at [http://www.xmradio.com/manuals/skyfi\\_operations.pdf](http://www.xmradio.com/manuals/skyfi_operations.pdf) (2002).

360. See *id.*

361. See *Playboy III*, *supra* note 69, at 815; *Reno v. ACLU*, 521 U.S. 844, 879 (1997); *Ashcroft v. ACLU*, 542 U.S. at 666–68.

*D. Satellite Radio's Mobility Is Better Controlled Via Nuisance Laws*

Easy mobility is one noticeable distinction between satellite radio and its cable television and Internet predecessors. Although cellular phones provide limited mobile access to the Internet and broadcast television, both are predominantly used in the home or in a controlled environment (e.g. office, bar, club, restaurant, etc.). The content is easily monitored in these situations and can be censored when minors enter the room, or preemptively exclude minors all together. On the other hand, satellite radio currently provides a portable receiver that can go anywhere that the subscriber goes.<sup>362</sup> Satellite radio can also be installed in any car. With this mobility and transferability, the risk of children overhearing indecent content increases. Considering that restrictions on indecent content would not pass the strict scrutiny afforded content-based regulations, traditional public nuisance laws may provide a valid solution to combat, at least, the loud emission of satellite radio content from a "boom box" or car. This is not to suggest that the legislature craft a public nuisance law explicitly limiting only satellite radio audio, but rather listening to satellite radio at a loud level would fall under the typical "noise pollution" statute that covers all amplified sound.

Public nuisance laws that create time, place, or manner restrictions on speech must be "narrowly tailored to serve a significant governmental interest."<sup>363</sup> Regulations that solely limit (1) the time of day that the speech take place, (2) where the speech takes place, or (3) the manner in which the speech is delivered, are deemed content neutral, such that the law does not consider the specific viewpoint expressed by the speaker in approving or denying the right to speak.<sup>364</sup> When the regulation is content neutral and provides only a time, place, or manner restriction, the government need not prove that the regulation is the least restrictive or intrusive way to serve the government interest.<sup>365</sup> The regulation will survive a constitutional challenge, as long as it is not "substantially broader than necessary to achieve the government's interest."<sup>366</sup>

The government has a significant interest in ensuring the "well-being, tranquility, and privacy of the home" against excessive noise, which also expands to public forums.<sup>367</sup> Anti-noise statutes are common and have

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362. See *supra* Part III.C.

363. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989).

364. See *id.* at 791.

365. See *id.* at 798.

366. See *id.* at 800.

367. See *id.* at 796 (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988)).



survived constitutional analysis. In *Ward v. Rock Against Racism*, the Supreme Court upheld a New York City ordinance that required all performers using the Naumberg Acoustic Bandshell to use sound equipment and corresponding technicians provided by the city, who would monitor and limit the noise levels. In *Reeves I*, the Fifth Circuit upheld part of a Houston ordinance that limited the volume of sound amplified, so that the amplified speech was not “unreasonably loud, raucous, jarring, disturbing, or a nuisance to persons within the area of audibility.”<sup>368</sup> Further, a Pennsylvania state appellate court in *Hude v. Commonwealth* upheld a Pennsylvania Liquor Control Board regulation that forbid liquor licensees, such as bars, from emitting music or other entertainment noise at a level where it could be heard outside the establishment’s closed doors.<sup>369</sup> Accordingly, a public nuisance law that prohibits excessive noise by instituting a place or manner restriction on speech would effectively shift the responsibility of indecent or obscene content from the satellite radio distributor to the subscriber. Rather than restricting Sirius or XM from broadcasting indecent content, the law could place the responsibility of protecting children on subscribers.

If the government could prove that amplified speech, such as speaking through a bullhorn, equates to playing indecent or obscene content at a high volume from satellite radio or another source, such that the content created a “nuisance to persons within the area of audibility,”<sup>370</sup> the government could draft a public nuisance law that specifically penalized the indecent or obscene speech.<sup>371</sup> In *Reeves II*, the Fifth Circuit stated that since amplified speech is equivalent to broadcast media, under *Pacifica*, the government could strictly regulate obscene and indecent content with respect to amplified speech.<sup>372</sup> The Fifth Circuit cautioned, however, that the regulation must define “obscene” and “indecent” in keeping with the rulings in *Miller* and *Pacifica*.<sup>373</sup> Overall, it may prove difficult for the government to demonstrate that playing music or talk radio loudly constitutes amplified speech.

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368. *Reeves v. McConn*, 631 F.2d 377, 386 (5th Cir. 1980) [hereinafter *Reeves I*].

369. *Hude v. Commonwealth*, 423 A.2d 15, 16–17 (Pa. Commw. Ct. 1980).

370. *Reeves I*, *supra* note 368, at 386.

371. *See Reeves v. McConn*, 638 F.2d 762, 764 (5th Cir. 1981) [hereinafter *Reeves II*].

372. *Id.*

373. *Id.*

## VII. CONCLUSION

Satellite radio is the new media darling and with Howard Stern's initiation into the medium, the industry should grow in both content variety and number of subscribers. With its growth, however, it will likely garner congressional concern. But, satellite radio does not fall under the ruling in *Pacifica* because it is neither pervasive nor intrusive, does not face a problem with spectrum scarcity, and children cannot easily access its broadcasts. Therefore, a regulation restricting indecent content on satellite radio must pass strict scrutiny. Satellite radio provides its own parental controls, which present an effective and less restrictive way to protect children than content-based regulations. Accordingly, restricting indecent content on satellite radio would not survive strict scrutiny. As it currently stands, the FCC is not willing to expand its content regulating duties over satellite radio.<sup>374</sup>

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374. See Letter from W. Kenneth Ferree, *supra* note 180 (FCC declined a request to add an indecency provision to the rules that regulate Satellite Digital Audio Radio Services).

Despite this constitutional analysis, Congress may move forward with a content-based regulation that restricts indecent content on satellite radio. This is not unheard of, considering that in 1988, Congress passed legislation sponsored by Senator Helms that completely banned indecent content on broadcast radio by removing the safe harbor time period.<sup>375</sup> This legislation was endorsed by the Heritage Foundation's Bruce Fein, who wrote that although the complete ban was probably unconstitutional, Congress should pass the law and let the federal court decide the issue.<sup>376</sup> Fighting a constitutional legal battle, however, is not what the already indebted satellite radio industry wants. Alternatively, Sirius and XM should become vocal proponents for Senator Bernie Sanders' "Support the Stamp Out Censorship Act," which would amend 47 U.S.C. § 503 to hold only radio and television broadcast stations culpable for indecent utterances.<sup>377</sup>

*Gregory B. Phillips\**

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375. See HEINS, *supra* note 233, at 118.

376. See *id.*

377. See Press Release, Rep. Bernie Sanders, Support The Stamp Out Censorship Act (HR 1440) (Apr. 15, 2005), <http://bernie.house.gov/documents/releases/20050415125052.asp>.

\* This comment is dedicated to my beautiful wife Heather, whose love and support I could not live without. Further, a special thank you to my family and friends for supporting my children, wife, and me through this challenging time. Also, eternal thanks to all the editors and staff of the Entertainment Law Review, especially Mandy Schaffer, Evan Simon, Zach LaPrade, and Ciara Stephens, for their time and diligence in bringing this comment to publication. Finally, a special thank you to Professor Marcy Strauss for reviewing my comment and providing her insight.