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"Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting


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“CHILLING” THE INTERNET? LESSONS FROM FCC REGULATION OF RADIO BROADCASTING

*Thomas W. Hazlett and David W. Sosa**

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EXECUTIVE SUMMARY

Congress included the Communications Decency Act (CDA) in the Telecommunications Act signed into law on February 8, 1996. The bill seeks to outlaw the use of computers and phone lines to transmit “indecent” material with provisions of jail terms and heavy fines for violators. Proponents of the bill argue it is necessary to protect minors from undesirable speech on the Internet. The CDA was immediately challenged in court by the American Civil Liberties Union, and the special 3-judge federal panel established to hear the case recently declared the Act unconstitutional. Yet, its ultimate adjudication remains in doubt. Ominously, the federal government has long experimented

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with regulations designed to improve the content of “electronic” speech. The Fairness Doctrine, for example, imposed on radio and television stations until 1987, was an attempt to establish a standard of “fair” coverage for important public issues. The deregulation of content controls for AM and FM radio programming, first under the Carter FCC in early 1981, and then under the Reagan FCC (which abolished the Fairness Doctrine in 1987), led to profound changes in radio markets. Specifically, the volume of informational programming increased dramatically immediately after controls were ended—powerful evidence of the potential for regulation to impose a “chilling effect” on free speech.

I. INTRODUCTION

Fearing that the anarchic nature of the Internet might unleash an “electronic red-light district,” Senators Jim Exon (D-NE) and Slade Gorton (R-WA) introduced the Communications Decency Act (CDA)¹ in February 1995. The CDA allows for fines of up to \$250,000 and two years imprisonment for someone who, “by means of a telecommunications device knowingly makes, creates, or solicits, and initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication.”² Spurred on by conservative groups such as the Christian Coalition, and reflecting a desire on the part of lawmakers to avoid being labeled “pro-smut,” the bill passed the Senate as an amendment to the Telecommunications Act of 1996, by a vote of 84–16.³ In a congressional conference committee the language of the CDA survived several challenges and became law when President Clinton signed the Telecommunications Act on February 8, 1996.⁴

Several significant criticisms against the legislation have been raised. First, there are serious questions about the constitutionality of the CDA. The bill proposes to outlaw the transmission of “indecent” speech over the Internet, in spite of the fact that indecency is a category of speech which the Supreme Court has previously ruled

1. 141 CONG. REC. S1944, 1953 (1995) (statement of Sen. Exon).

2. S. 652, 104th Cong., § 402(e)(1) (1995).

3. 141 CONG. REC. S8460, 8462 (1995).

4. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in various sections of 47 U.S.C.)

deserving of protection under the First Amendment. Indecency diverges from obscenity, which is not afforded First Amendment protection, in that while both appeal to the prurient, indecent speech, when considered in its entirety, possesses some "serious artistic, literary, political or scientific value."⁵ Interestingly enough, the Department of Justice (DoJ), which is now in the position of defending the CDA in a court challenge, previously held the position that the CDA might "threaten important First Amendment and privacy rights."⁶

Indeed, the CDA had to overcome serious congressional resistance on the way to becoming law. Recognizing the difficulties in criminalizing a form of speech generally afforded First Amendment protection, many in the House were initially not amenable to sponsoring a bill bordering on censorship. House Speaker Newt Gingrich (R-GA) declared the Exon amendment "clearly a violation of free speech and a violation of the right of adults to communicate with each other."⁷ In an effort to sidestep constitutional concerns, Representatives Chris Cox (R-CA) and Ron Wyden (D-OR) drafted a more moderate proposal,⁸ and on August 4, 1995 the House voted 421-4 to attach the Cox-Wyden amendment to the House Telecommunications Reform Bill. An attempt was made in conference committee to reconcile the House and Senate versions by replacing the indecency standard with a "harmful to minors" standard, but a last minute proposal by Representative Bob Goodlatte (R-VA) returned the indecency standard, passing by a one vote margin.

Anticipating legal challenges to the CDA, Congress provided for an abbreviated review of the rule in the Telecommunications Act. The first lawsuit was to be heard by a special three-judge panel in Philadelphia and any subsequent appeal would go directly to the Supreme Court.⁹ Indeed, a broad coalition of civil libertarian groups and high-tech firms, for which the ACLU was the lead plaintiff, filed a lawsuit seeking to overturn the CDA the day President Clinton signed the bill. On February 15, 1996 Judge Ronald Buckwalter granted the ACLU's request for a temporary restraining order against the CDA,¹⁰ and on

5. *Miller v. California*, 413 U.S. 15, 34 (1973).

6. Letter from Kent Markus, Acting Assistant Attorney General, to Senator Patrick Leahy, Democrat-Vermont (May 3, 1995) (on file with author).

7. Steven Levy, *No Place for Kids; a Parent's guide to Sex on the Net*, NEWSWEEK, July 3, 1995, at 47.

8. The Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., 1st Sess. (1995).

9. Telecommunications Act § 561.

10. *ACLU v. Reno*, 24 Media L. Rep. 1379 (E.D. Pa. 1996).

June 11 the three-judge panel issued its ruling, striking down the CDA on constitutional grounds.¹¹ The DoJ subsequently announced it would appeal to the Supreme Court.

Some see the CDA as unnecessary legislation. The DoJ has argued that existing obscenity laws are sufficient to target pornographic material on the Internet. In fact, the DoJ noted that "the Department's Criminal Division has, indeed, successfully prosecuted violations of federal child pornography and obscenity laws which were perpetrated with computer technology."¹²

A third problem with the legislation is that, while the Internet is not devoid of graphic discourse and erotic imagery, it may not be the smut hub that political alarmists allege. In 1995 *Time* magazine was forced to retreat from an incendiary cover story that drastically overstated the availability of pornography on the Internet.¹³ Moreover, software programs which allow parents to exclude access to off-color material is available from a number of vendors. Subsequent reports suggest that X-rated material is not prolific on the Internet, and, when available, is rarely available to browsing innocents without first extracting a fee to partake in more intimate images and language.¹⁴ In fact, the Senate had a choice between the CDA and a proposal by Pat Leahy (D-VT) to commission a study of Internet speech.¹⁵ The Leahy bill, which did not pass in the Senate, would have ordered the Department of Justice to evaluate whether pornography on the Internet was a problem that needed fixing.¹⁶

But beyond these oft-cited criticisms lies a more compelling argument against interfering with Internet speech, whether in the form of the CDA or some yet-to-be-crafted mandate that attempts to curb undesirable Internet communication. The CDA is the most recent incarnation of a regulatory tool typically applied to broadcasters: content regulation. Content regulations attempt to control the flow of information by

11. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

12. See Letter from Markus to Leahy, *supra* note 6.

13. Philip Elmer-Dewitt, *On a Screen Near You: It's Popular, Pervasive and Surprisingly Perverse, According to the First Survey of Online Erotica*, *TIME*, July 3, 1995, at 38. (The authors point out that the article was based on a discredited study by a Carnegie Mellon undergraduate).

14. The majority of sources of pornography on computer networks are bulletin board services which only allow access to paying customers. This places a generally insurmountable barrier between offensive material and the average child.

15. S. 714, 104th Cong., 1st Sess. (1995).

16. See Letter from Markus to Leahy, *supra* note 6. Indeed, the DoJ recommended "that a comprehensive review be undertaken of current laws and law enforcement resources for prosecuting online obscenity and child pornography, and the technical means available to enable parents and users to control the commercial and non-commercial communications they receive over interactive telecommunications systems."

imposing sanctions on content providers (licensees in broadcasting; networks and individuals on the Internet) should certain communications be deemed inappropriate. Previous content rules, as applied to broadcasters, range from "non-entertainment guidelines," to the Fairness Doctrine, to the "equal time" rule regarding coverage of political candidates.

Because content regulation carries the danger of a "chilling effect" on speech, it has always walked a fine constitutional line. Relying on a dubious analysis of "physical scarcity"¹⁷ and a fanciful history of the "chaos" in the 1920s radio market,¹⁸ the Supreme Court has determined that the electronic press enjoys less protection from government regulation than does the print press.¹⁹ The Court has also held, however, that its views of the matter would change markedly if evidence of a "chilling effect" from regulation were to surface.

In a landmark 1969 case, *Red Lion Broadcasting Co. v. FCC*, the Supreme Court ruled that provisions in the Fairness Doctrine obliging broadcasters to provide free air time to individuals who wished to respond to a personal attack does not violate the First Amendment. The Court's 8-0 decision assumed that the doctrine was effective in increasing the coverage of controversial issues by broadcasters, but it also noted the potential for a "chilling effect."

It is strenuously argued . . . that if political editorials or personal attacks will trigger an obligation in broadcasters to afford the opportunity for expression to speakers who need not pay for time and whose views are unpalatable to the licensees, then broadcasters will be irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective. Such a result would indeed be a serious matter, for should licensees actually eliminate their coverage of controversial issues, the purposes of the doctrine would be stifled. . . . And if experience with the administration of these doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage,

17. See generally Ronald Coase, *The Federal Communications Commission*, 2 J. L. & ECON. 1 (1959).

18. See generally Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum*, 33 J. L. & ECON. 133 (1990).

19. See, e.g., *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994). See David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 Duke L.J. 213 (1975) (compelling critiques of the state of the law); LUCAS POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987); and Robert Corn-Revere, 32 POL'Y ANALYSIS 1 (June 28, 1995).

there will be time enough to reconsider the constitutional implications.²⁰

Several factors contribute to the possible “chill” of content regulation. Principal among them are standards that tend to be vague and overly broad such as what constitutes “fairness” or “indecentcy.” In addition, severe economic penalties such as possible loss of license for broadcasters who violate FCC rules, and the CDA, which allows for fines up to \$250,000, and two years in prison. With such dual penalties looming, content providers will tend to self censor in order to avoid even approaching the fuzzy line between acceptable and unacceptable, or even criminal, speech. Thus it is possible that legitimate (i.e., constitutionally protected) speech will not be broadcast to avoid risk of regulatory or legal sanction, and the associated litigation costs, thereby producing the “chilling effect” on speech about which the Court was concerned. In issuing a temporary restraining order against the CDA, Judge Ronald L. Buckwalter, voiced his concern about the vague nature of the indecency standard:

Where I do feel that the plaintiffs [ACLU et al.] have raised serious, substantial, difficult and doubtful questions is in their argument that the CDA is unconstitutionally vague . . . This strikes me as being serious because the undefined word “indecent,” standing alone, would leave reasonable people perplexed in evaluating what is or is not prohibited by the statute. It is a substantial question because this word alone is the basis for a criminal felony prosecution.²¹

Since 1969, at least three compelling events have produced evidence that FCC content rules had a “chilling effect” on controversial speech in radio and television, evidence the Court did not find in *Red Lion*. First, the appearance of Fred Friendly’s 1975 book, *The Good Guys, The Bad Guys and the First Amendment*, illustrated that the application of FCC regulation was an effort to suppress free speech by filing Fairness Doctrine challenges (although this was unknown to the Supreme Court in *Red Lion*). Second, the FCC issued a study in 1985 which indicated, under the “public interest” standard of the 1934 Communications Act, that the Fairness Doctrine had served as a disincentive to broadcasters wishing to air controversial news and public opinion programming. Finally, following FCC repeal of the Fairness Doctrine in 1987, we can observe the effect of deregulation on radio

20. *Red Lion*, 395 U.S. at 393.

21. *Reno*, 24 Media L. Rep at 1379.

markets—a stunning increase in the provision of informational programming. As shown below, this explosion in news, talk and public affairs formats in both AM and FM is powerful evidence that the FCC's previous efforts to regulate broadcast content did indeed result in a "chilling effect." Thus, by the Supreme Court's own legal analysis, content controls on electronic speech should be unconstitutional.²²

A recent case suggests that the indecency standard of the CDA might well extend its "chill" to the very heart of social discourse. Consider the case of breast cancer discussion groups carried by America Online (AOL), the largest Internet service provider (ISP). In December, 1995, AOL came under fire for declaring the word breast obscene, censoring user profiles and chat room titles devoted to breast cancer survivors. This was not AOL's first encounter with this particular problem. Earlier in the year, breast cancer survivors who were blocked from creating a forum with the word "breast" in the title instead created a "hooter cancer survivor" forum.²³ In an effort to comply with the anticipated indecency standard of the CDA, the company sought to eliminate "vulgar" words such as breast from the network. This is an illustration of decent, constitutionally protected speech "chilled" by the mere anticipation of a vague indecency standard. The more uncertain the speaker (in this case AOL) is about whether or not a particular issue will trigger official sanction and the greater the anticipated sanction (in economic costs and legal penalties), the more likely the speaker is to self-censor.

This paper concentrates on the effects content regulation on the provision of broadcast news and information programming offered the American public. The effects suggest that federal regulation of content controls can sharply constrain the quality and quantity of public debate. Further, strong parallels from previous experience with regulating electronic speech can be extended to the CDA, offering warning signals today.

II. CONTENT REGULATION IN BROADCASTING

The 1927 Radio Act created the Federal Radio Commission (FRC), establishing federal control over the airwaves. The 1927 law,

22. It could be argued that the evidence proves only that such FCC broadcast content rules as the Fairness Doctrine should be illegal. We would be quick to point out that the ability of the courts to differentiate "chilling" content controls from innocuous ones is not sufficiently present to warrant such a conclusion.

23. Richard Knox, *Women go online to decry ban on 'breast,'* BOSTON GLOBE, December 1, 1995, at 12.

which was designed to be provisional, was renewed every year until 1934 when Congress passed the Communications Act, replacing the FRC with the Federal Communications Commission.²⁴ Spectrum access continues to be governed by the 1934 Act.²⁵

The FCC was charged with licensing and overseeing broadcasters according to “the public interest, convenience or necessity.” In addition to developing a federal licensing system for broadcasters,²⁶ the FRC (later the FCC) determined that certain types of speech were required by the public interest standard, as the Commission enunciated in its 1949 report, *Editorializing by Broadcast Licensees*.

It is axiomatic that one of the most vital questions of mass communication in a democracy is the development of an informed public opinion through the public dissemination of news and ideas concerning the vital issues of the day . . . The Commission has consequently recognized the necessity for licensees to devote a reasonable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community served by the particular station. And we have recognized, with respect to such programs, the paramount right of the public in a free society to be informed and to have presented to it for acceptance or rejection the different attitudes and viewpoints concerning these vital and often controversial issues which are held by the various groups which make up the community.²⁷

The FCC argued that in the absence of regulatory inducements, the broadcaster would not provide sufficient informative and/or controversial material. The agency’s 1949 report formalized this policy in the form of the Fairness Doctrine, which consisted of two requirements. First, licensees were required to provide coverage of “vital important controversial issues of interest in the community served by the broadcaster.”²⁸ Second, licensees received a mandate to “provide a

24. For a detailed account of the establishment of federal control over broadcasters, see Hazlett, *supra* note 18.

25. The 1996 Telecommunications Act left radio and TV station licensing virtually untouched.

26. AM radio was the only broadcasting service at the time of the 1934 Communications Act, with the FCC allocating spectrum for FM and television in subsequent years.

27. *Editorializing by Broadcast Licensees*, 13 F.C.C. Rep. 1246, 1249 (1949).

28. *The General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C. Rep. 2d 145, 146 (1985).

reasonable opportunity for the presentation of contrasting viewpoints on such issues."²⁹

The FCC had a two stage enforcement process for the Fairness Doctrine. In the first stage the Commission would request that a licensee respond to a complaint filed with the Commission. This could eventually lead to a hearing and a ruling by the Commission either in favor of the plaintiff or the licensee. The penalties associated with a Fairness Doctrine complaint ranged from the legal and research costs of responding to the Commission's inquiry, to giving the plaintiff free airtime.³⁰ The second stage of enforcement was the most potent weapon the FCC had, the power to revoke a license or refuse renewal for an uncooperative licensee.

Interestingly, the two prongs of the Fairness Doctrine yield distinct economic incentives for broadcasters. The first prong can be characterized as an affirmative obligation on the part of broadcasters to increase the amount of informational programming. However, the Commission was careful to point out in most Fairness Doctrine proceedings that licensees had broad discretion over how they chose to satisfy this aspect of the rule.³¹ The second prong, on the other hand, had more dramatic effects on format choice. The equal access provision, while intended to ensure that audiences were exposed to more than one viewpoint, had the perverse effect of penalizing broadcasters for airing controversial programming by leaving them vulnerable to litigation and demands for free air time to voice opposing opinions.

While we might consider that the first prong had a potentially "warming" effect on the supply of controversial speech, the second prong had tremendous potential to "chill" constitutionally protected speech. In the following sections, we review some of the more notable abuses of the Fairness Doctrine which suggest that the net effect of the Fairness Doctrine on controversial speech was "chilling" rather than "warming."

29. *Id.*

30. The original directive that broadcasters provide "reasonable opportunity" for the discussion of various viewpoints evolved into the equal access provision in the early 1960s. Equal access required broadcasters to grant respondents free air time if no one was willing to pay.

31. 13 F.C.C. Rep. 1246, 1251; *Fairness Report*, 48 F.C.C. Rep. 2d 1, 33 (1974); 102 F.C.C. 2d 145, 160.

III. CONTENT REGULATION PRE-“FAIRNESS”

Efforts to use content regulation as a form of political control began with the advent of radio regulation. In 1928 the Federal Radio Commission renewed the license for WEVD, owned by the Socialist Party, but with the stern warning that the New York station must “operate with due regard for the opinions of others.”³² Regulators had determined that programming which reflected the Socialist Party’s agenda was not in the public interest. The following year the FRC refused an application by the Chicago Federation of Labor to increase the power and hours of its station WCFL, because the station was run “for the exclusive benefit of organized labor.” The FRC ruled that since only a limited number of stations could broadcast, “all stations should cater to the general public and serve the public interest as against group or class interest.”³³

A decade later, conservative broadcasters were pressured when the FCC sought to protect President Roosevelt from pro-business commentators. The regulatory target then was a regional network in New England, the unabashedly right-wing Yankee Network, which controlled three radio stations, and ran commentary from the likes of Father Charles Coughlin, a controversial figure of the far right, who was fond of referring to FDR as “Franklin Double-crossing Roosevelt.”³⁴ In 1939, the Mayflower Broadcasting Company submitted a competing application to be granted a license to operate WAAB, one of the Yankee Network’s Boston stations.³⁵ The license renewal challenge charged that Yankee broadcast political endorsements and partisan coverage of controversial issues with no concern for fairness or balance. Although the Mayflower application was thrown out for misrepresentation, the FCC took the opportunity to review Yankee’s record in a formal hearing. The Commission’s finding asserted that it was protecting the public from the unbalanced coverage, noting that:

The record shows without contradiction that . . . it was the policy of Station WAAB to broadcast so-called editorials from time to time urging the election of various candidates for political office or supporting one side or another of various questions in public controversy. Radio can serve as an instrument of democracy

32. 2 F.R.C. 156 (1928).

33. *Great Lakes Broadcasting Co.*, 3 F.R.C. 36 (1929).

34. Powe, *supra* note 19, at 109.

35. One of the owners of Mayflower Broadcasting Company was a former employee of the Yankee network who had previously complained to the FCC about WAAB’s editorial policy.

only when devoted to the communication of information and the exchange of ideas fairly and objectively presented. Indeed, as one licensed to operate in the public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias. The public interest—not the private—is paramount.³⁶

Yankee managed to retain its license by promising no further editorialization. This ruling gave birth to the Mayflower Doctrine, which forbade broadcasters from editorializing, until the Commission reversed course and virtually imposed an obligation to editorialize in the 1949 report, *Editorializing by Broadcast Licensees*.³⁷ During this time, the Commission’s decision shielded Roosevelt’s New Deal from broadcast criticism.

IV. RED LION: THE REST OF THE STORY

From the Supreme Court’s perspective in 1969, the *Red Lion* case began with a feisty octogenarian Reverend John Norris, owner of the Red Lion Broadcasting Company, in Red Lion, Pennsylvania. On November 25, 1964, Norris’ station WGCB broadcast a commentary by the Reverend Billy James Hargis, an Oklahoma evangelist preacher. Hargis’ “Christian Crusade” was carried on many stations catering to the religious right. During the 15-minute broadcast, Hargis unleashed a scathing 2-minute attack on a liberal journalist, Fred Cook, in response to Cook’s recently published book, *Goldwater: Extremist on the Right*. Cook subsequently wrote to several stations that had carried Hargis’ program requesting free airtime to respond under the personal attack rules of the Fairness Doctrine.³⁸ Rev. Norris refused to grant Cook free airtime, though he did offer him access at the same rate paid by Hargis (\$7.50 for a quarter-hour). Cook subsequently filed a Fairness Doctrine complaint with the FCC, which ruled that WGCB was obligated to give Cook free airtime. By 1969 the case had found its way to the Supreme Court.

In a landmark decision, the Court upheld the Commission’s ruling, ordering WGCB to give Cook free time to respond to the attack. In the majority opinion, Justice Byron White concluded that, “the specific application of the Fairness Doctrine in *Red Lion* . . . enhance[s] rather than

36. *Mayflower Broadcasting Co.*, 8 F.C.C. 333, at 340 (1940).

37. 13 F.C.C. 1246.

38. The personal attack rules were an addition to the Fairness Doctrine introduced in the 1960s.

abridge[s] the freedoms of speech and press protected by the First Amendment.”³⁹ This conclusion of the Court appears to be uninformed of the well-orchestrated campaign by the Democratic National Committee (DNC) to silence pro-Goldwater forces prior to the 1964 presidential elections which had brought this case before them.

In 1962, President Kennedy’s policies were under sustained attack from conservative broadcasters across the country. Of particular concern to the President were vocal right-wing opponents of the nuclear test-ban treaty being considered by the Senate at the time. The administration and the DNC seized upon the Fairness Doctrine as a way to counter the “radical right” in their battle to pass the treaty. The Citizens Committee for a Nuclear Test Ban Treaty, which was established and funded by the Democrats, orchestrated a very effective protest campaign against hostile radio editorials, demanding free reply time under the Fairness Doctrine whenever a conservative broadcaster denounced the treaty. Ultimately, the Senate ratified the treaty by a resounding two-thirds majority.⁴⁰

Flush with this success, the DNC and the Kennedy-Johnson Administration decided to extend use of the doctrine to other high-priority legislation and the impending 1964 elections. Democratic Party funding sources were used to establish a professional listening post to monitor right-wing radio. The DNC also prepared a kit explaining “how to demand time under the Fairness Doctrine,” which was handed out at conferences.⁴¹ As Bill Ruder, an Assistant Secretary of Commerce under President Kennedy, noted: “Our massive strategy was to use the Fairness Doctrine to challenge and harass right-wing broadcasters in the hope that the challenges would be so costly to them that they would be inhibited and decide it was too expensive to continue.”⁴²

The Democrats’ “fairness” campaign was considered a stunning success by November 1964, when Johnson beat Goldwater in a landslide. The effort had produced 1,035 letters to stations, resulting in 1,678 hours of free airtime.⁴³ A critical factor in the campaign was that much of the partisan commentary came from small, rural stations. In a confidential report to the DNC, Martin Firestone, a Washington attorney and former FCC staffer explained:

39. 395 U.S. 367, at 375.

40. FRED FRIENDLY, *THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT* (1975).

41. *Id.* at 35.

42. *Id.* at 39.

43. *Id.*

The right-wingers operate on a strictly cash basis and it for this reason that they are carried by so many small stations. Were our efforts to be continued on a year-round basis, we would find that many of these stations would consider the broadcasts of these programs bothersome and burdensome (especially if they are ultimately required to give us free time) and would start dropping the programs from their broadcast schedule.⁴⁴

Democratic Party operatives were part of the Red Lion Fairness Doctrine challenge from the very genesis of Fred Cook's Goldwater. Cook had been retained by the Democrats to write several "controversial" pieces about the right including "Hate Clubs of the Air," a critical profile of conservative broadcasters, which appeared in *The Nation*. Wayne Phillips, a DNC staffer who had worked with Cook, recalled:

Thousands of copies of Cook's article were sent to state Democratic leaders and to every radio station in the country known to carry right-wing broadcasts, together with a letter from Sam Brightman of the DNC pointing out that claims for time would be made in the event of attacks on Democratic candidates or their programs.⁴⁵

The DNC also funded Cook's book on Goldwater, preordering 50,000 copies to ensure publication. When Rev. Hargis attacked Cook over the air it was the DNC, not Fred Cook, who was listening. Cook was alerted to the broadcast and received considerable help from the DNC in filing Fairness Doctrine complaints. The efforts paid off; the majority of stations stopped carrying Hargis' commentary, thus providing the very "chilling effect" the Supreme Court had failed to find evident in the case.⁴⁶

V. NIXON'S "CHILL"

Soon after the 1968 elections, the Nixon administration adopted a policy of responding to all media reports deemed unfair or inaccurate. Staffers wrote weekly press analyses entitled "Little Lies," which detailed unfavorable media coverage and assigned responsibility for an official

44. *Id.* at 42.

45. *Id.* at 38.

46. For the remainder of his career, the Fairness Doctrine made Hargis a potential liability to all broadcasters. In fact, over a decade after the historic broadcast Hargis remarked that "many stations are still afraid to run [my program]." (*Id.* at 76).

response. However, by October, 1969, Nixon's Chief of Staff H.R. Haldeman recognized that the countercriticism campaign was ineffective and they were rapidly falling behind. The administration needed a more targeted approach—what White House aide Jeb Magruder dubbed the “rifle” approach to the media. This strategy, the cornerstone of which was the Fairness Doctrine, was twofold. First, in an attempt to affect network programming, administration staffers used threats of Fairness Doctrine challenges in direct meetings and phone calls with top executives at CBS, NBC and ABC. Second, the Republican National Committee (RNC) initiated a private campaign of direct pressure on broadcasters through Fairness Doctrine complaints and license renewal challenges.

The first component of this campaign was initiated by White House aide Charles Colson. With the approval of Haldeman and the President himself, Colson visited the New York headquarters of the three television networks in September 1970, and for the next two and a half years Colson called CBS chairman William Paley or president Frank Stanton about once a month, occasionally arranging meetings in Washington or New York as well. He called ABC and NBC executives as well, albeit less frequently. In a July, 1971 White House meeting between Stanton and Colson, “Colson chuckled that he could never hope for constant fairness from CBS, but maybe they could agree on an ‘occasional fairness doctrine.’ Stanton smiled appreciatively and said he wanted Colson to feel free to pick up the phone any time he felt he had reason to complain.”⁴⁷ Later in 1972, Colson phoned Stanton to inform him that the administration was considering a five-point plan of action against the networks which included a proposal to license the networks themselves⁴⁸ and a campaign to upset the license renewal process for television stations.⁴⁹

The strategy was to directly intimidate broadcast executives in the hope that they would eventually tone down their unfavorable coverage of the administration by their news units, and in mid-1973 the effort finally paid off. Following a meeting at the White House between

47. DANIEL SCHORR, *CLEARING THE AIR* 48 (1977).

48. The FCC has licensed broadcast outlets—radio and television stations—but not the national networks that supply programming. However, each of the networks owns several TV stations in the largest markets; hence, the government does have some leverage over programmers through station license renewal and transfers. *Id.*

49. Until 1981 radio and television licenses were issued for three year periods. When the license expired, the licensee was required to file a renewal application with the FCC. At this point any third party could file a competing application for the license. Although renewals were, as a rule, granted, a competitive application would generally delay the renewal procedure and substantially raise the cost of renewal to the licensee through additional research and legal fees. *Id.*

Paley and Haldeman, CBS announced plans to drop its policy of presenting news analysis immediately following presidential statements. Although it was widely believed that CBS had been “silenced, or intimidated, or subverted” by the administration,⁵⁰ Paley denied this, stating that his only objective was “better, fairer, more balanced” coverage.⁵¹

In a 1972 hearing before the Senate constitutional rights subcommittee on freedom of the press, CBS correspondent Dan Schorr summed up the effects of the Nixon administration’s pressure on broadcasters. “. . . I do not think that many reporters will be directly intimidated. We generally cannot be deterred by Government, but only by our employers. And it is our employers who feel the real pressure—especially in the regulated broadcast industry, where networks can be subjected to pressure in many ways . . .”⁵²

The first element of Magruder’s “rifle” strategy was all the more effective because of the second element, real rather than threatened Fairness Doctrine challenges to broadcast licensees. In early January, 1970, White House staffers began organizing a campaign to monitor the media and challenge the license renewals of “unfriendly” broadcasters. The strategy, developed by Magruder, involved having FCC chairman “Dean Burch ‘express concern’ about press objectivity,” and organizing “outside groups [to] petition the FCC and issue public ‘statements of concern’ over press objectivity.”⁵³ One early outcome of this campaign was a Fairness Doctrine complaint against CBS mounted by the Republican National Committee (RNC).

After five televised speeches by Nixon on Vietnam policy, CBS offered airtime to the Democratic National Committee to respond.⁵⁴ Following the first DNC broadcast, the RNC, arguing that the DNC had addressed issues other than Vietnam, demanded time for rebuttal under the Fairness Doctrine. The petition was refused by CBS and the case went before the Commission, which ruled in favor of the RNC.

50. John Pastore, head of the Senate Communications Subcommittee. (Quoted in SCHORR, *supra* note 47, at 62).

51. Roger Mudd wrote a balanced but critical commentary of the network’s decision, which was to be aired on CBS Radio the day after the announcement. It too was eliminated. Only after a memo outlining the meeting between White House staffers and Paley was leaked four and a half months later did CBS resume to the practice of instant analysis of presidential speeches. (POWE, *supra* note 19, at 139).

52. SCHORR, *supra* note 47, at 74.

53. *Id.* at 42.

54. During his first eighteen months in office Nixon made 14 televised speeches, as many as the total for Eisenhower, Kennedy and Johnson combined over a comparable period. Columbia Broadcasting Sys. Inc. v. Federal Communications Comm’n, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

The D.C. Circuit later overturned the FCC's ruling in a blistering opinion, noting that "the [FCC] is functioning in the midst of a fierce political battle, where the stakes are high and the outcome can affect in a very real sense the political future of our nation."⁵⁵

The principal targets of license renewal challenges were the five television stations owned and operated by CBS and the three television stations owned by the Washington Post. While the Administration, in private meetings with network executives, repeatedly threatened to make CBS's renewals more expensive, the Post felt the most pressure, largely because of its aggressive Watergate reporting. Although the newspaper's publishing operations were relatively immune to political retaliation, President Nixon recognized that their broadcast properties—two television stations in Florida and one in Washington, D.C.—were vulnerable. Nixon remarked to Haldeman in 1972, "The main thing is the Post is going to have damnable, damnable problems out of this one [Watergate coverage]. They have a television station . . . and they're going to have to get it renewed."⁵⁶ The Post's Florida stations survived three costly challenges during the Nixon years, mounted by Administration allies.⁵⁷

Thus, CBS, the Washington Post and other Nixon "media enemies" felt pressure because the Executive branch was able to manipulate the federal broadcast licensing system, "punishing" those whose coverage was deemed unfavorable through Fairness Doctrine challenges and competitive applications at the time of license renewal.

VI. EXTENDING THE "CHILL" BEYOND WASHINGTON POLITICS

Exploitation of the Fairness Doctrine was not limited to presidents or the major political parties. Many public interest groups used the doctrine to influence the debate on local and regional issues as well as commercial speech. For example, the 1985 FCC proceedings on the Fairness Doctrine recount a battle that ensued over a California referendum on a glass recycling program. The beverage industry prepared an advertising campaign in opposition to the bottle bill. When the bottle bill lobby learned of the advertisements, they wired 500 stations demanding twice the amount of airtime free from any station accept-

55. 454 F.2d at 1027.

56. SCHORR, *supra* note 47, at 52.

57. The Post's Jacksonville station survived a license challenge in 1970 by the man who became the finance chairman of Nixon's 1972 campaign in Florida. The Miami station survived challenges, in 1970 and 1972, by Nixon allies. POWE, *supra* note 19, at 131.

ing the commercials. Two-thirds of the stations subsequently refused the bottle industry's ads.⁵⁸

The Fairness Doctrine went beyond public affairs, affecting commercial speech as well. Anti-smoking activists filed a successful fairness complaint against CBS in response to cigarette advertising⁵⁹ and the environmental group Friends of the Earth waged a fairness campaign against luxury automobile advertising. The Fairness Doctrine was invoked against advertisements for everything from snowmobiles and trash compactors to Crest toothpaste.⁶⁰

VII. THE FCC LIFTS RADIO REGULATION, 1979-87

By the 1970s, such egregious abuses of the system by both politicians and special interest groups were eroding support for content regulation of radio and television. In the final years of the Carter administration, the FCC reversed its position on broadcast regulation by arguing for more reliance on marketplace forces and less on content controls.⁶¹ The Commission substantially reduced the burdens on broadcasters with the "Deregulation of Radio" in 1981,⁶² which comprised the following:

NON-ENTERTAINMENT PROGRAM REGULATION. The FCC eliminated "guidelines" indicating how much informational programming each station should render to have its license renewed, replacing it with "a generalized obligation for commercial radio stations to offer programming responsive to public issues."

ASCERTAINMENT. Elimination of formal documentation of "community needs."

COMMERCIALS. Abolition of FCC guidelines on maximum commercial time allowed on radio stations.

58. General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C.2d 143, 176 (1985).

59. *Banzhaf v. Federal Communications Comm'n*, 405 F.2d 1082 (1968).

60. WILLIAM B. RAY, *FCC: THE UPS AND DOWNS OF RADIO-TV REGULATION* 100 (1990).

61. A leading force in this was President Carter's Assistant Secretary of Commerce for Telecommunications, Henry Geller. A former FCC General Counsel who had avidly pursued content controls through licensing, Geller came to the view that, "Behavioral regulation sucks. The one thing that works is competition, and that's what I keep pushing for." *Who Are You Gonna Call? Here Are The Bell Ringers*, NAT'L L.J., May 1, 1995, at A24.

62. In *Matter of Deregulation of Radio*, *Deregulation of Radio: Report and Order*, 84 F.C.C.2d 968 (1981).

PROGRAM LOGS. Elimination of program logs, to be replaced by “an annual listing of five to ten issues that the licensee covered together with examples of programming offered in response thereto.”⁶³

The non-entertainment guidelines required AM stations to offer 8% non-entertainment programming and FM stations to offer 6%. In simple terms, informational programs (i.e., non-entertainment) were considered to be news, talk, and public affairs, while entertainment programming consisted of music. The ascertainment process required stations to survey “community leaders” to determine issues of importance to their listeners, and then to document the stations’ response to these concerns. The commercial guidelines set an upper limit on commercials: no more than 18 minutes per hour. The program logging rule required stations to record all programs broadcast.

The 1981 deregulation was important because it represented a sea change within the Commission. It now advocated a reliance on marketplace forces to achieve public interest goals, rejecting the viability of regulation. In its 1981 Report and Order implementing the regulatory reforms the Commission stated:

We believe that, given conditions in the radio industry, it is time to . . . permit the discipline of the marketplace to play a more prominent role . . . Simply stated, the large number of stations in operation, structural measures, and listenership demand for certain types of program (and for limitations on other types of programming, to wit: commercials) provide an excellent environment in which to move away from the content/conduct type of regulation that may have been necessary for other times, but that is no longer necessary in the context of radio broadcasting to assure operation in the public interest.⁶⁴

The Commission recognized, as noted by Commissioner James Quello, “the process of license renewal appears to be a very expensive, time-consuming method of ferreting out those few licensees who have failed to meet a subjective ‘public interest’ standard of performance.” The principal objective of the 1981 deregulation was to streamline this renewal process, with the conviction that, “the enormous savings in time and money could be used for more constructive purposes in programming and news.”⁶⁵

63. 84 F.C.C.2d at 971. The Commission lifted the same rules applying to television station licenses in 1984.

64. *Id.* at 1014.

65. In the Matter of Deregulation of Radio, 73 F.C.C.2d 457, 594 (1979).

While the 1981 deregulation represented a substantial change in broadcast policy, it left intact the most important form of content control, the Fairness Doctrine.⁶⁶ Yet by 1984, the Commission had begun an inquiry into the Fairness Doctrine, questioning its constitutionality and effectiveness. In 1985 the FCC issued a report, concluding, "[W]e no longer believe that the fairness doctrine, as a matter of policy, serves the public interest."⁶⁷ The primary evidence relied on was testimony from broadcasters, including this statement from CBS reporter and anchorman Dan Rather:

When I was a young reporter, I worked briefly for wire services, small radio stations, and newspapers, and I finally settled into a job at a large radio station owned by the Houston Chronicle. Almost immediately on starting work in that station's newsroom, I became aware of a concern which I had previously barely known existed—the FCC. The journalists at the Chronicle did not worry about it; those at the radio station did. Not only the station manager but the newspeople as well were very much aware of this Government presence looking over their shoulders. I can recall newsroom conversations about what the FCC implications of broadcasting a particular report would be. Once a newsperson has to stop and consider what a Government agency will think of something he or she wants to put on the air, an invaluable element of freedom has been lost.⁶⁸

In an extension of the logic behind the 1981 deregulation, the Commission concluded that, "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today . . ."⁶⁹ Furthermore, based on the "voluminous factual record," the FCC concluded there was strong evidence that the fairness doctrine "actually inhibits the presentation of controversial issues of public importance . . ."⁷⁰

The report concluded that although the first prong was an affirmative obligation to cover controversial issues, the licensees had broad discretion in determining how to comply with the requirement. However, the second prong which required broadcasters to provide equal access for the presentation of opposing viewpoints, did have a

66. Judge David Bazelon argued in 1975 that the Fairness Doctrine was "the most overt form of program regulation in which the FCC engages." Bazelon, *supra* note 19, at 219.

67. Fairness Doctrine, 102 F.C.C.2d 142, at 147.

68. *Id.* at 171.

69. *Id.* at 147.

70. *Id.*

“chilling effect” on controversial speech. This was because any programming on a controversial subject would expose the broadcaster to potential Fairness Doctrine challenges or demands for free air time under the equal access provisions. The Commission summarized the net effect of the doctrine:

[T]he fairness doctrine in its operation encourages broadcasters to air only the minimal amount of controversial issue programming sufficient to comply with the first prong. By restricting the amount and type of controversial programming aired, a broadcaster minimizes the potentially substantial burdens associated with the second prong of the doctrine while remaining in compliance with the strict letter of its regulatory obligations . . . [I]n net effect the fairness doctrine often discourages the presentation of controversial issue programming.⁷¹

This analysis is all the more significant in that it comes from the agency responsible for writing and enforcing broadcast regulation. That the FCC should determine in 1981 and 1985 that content regulation was counter-productive to achieving public interest goals would suggest that the notion of effective content regulation had been thoroughly discredited.

VIII. DID THE FAIRNESS DOCTRINE “WARM” OR “CHILL”?

Despite the complaints leveled against content regulation, a critical litmus test is whether it achieves its objectives. In 1987 Senate hearings for the ill-fated Fairness in Broadcasting Act, Senator Ernest Hollings (D-SC) noted that there are two important considerations in the regulation of broadcasters according to a public interest standard. “First, the regulation must be effective. It should accomplish the purpose for which it was designed. If not, it should be amended or replaced. Second, the regulation should be narrowly tailored so as to impose the minimal burden on the licensee.”⁷² The 1981 and 1987 events offer a unique window onto the effects of content regulation, as

71. *Id.* at 160. However, because of uncertainty over the Commission’s authority to abolish the Fairness Doctrine, the rule remained in effect until August 1987 when it was finally eliminated. Congress later attempted to codify the fairness doctrine, which would have effectively reimposed the FCC’s own regulation. H.R. 1934 / S. 749, 100th Cong., (1987).

72. ERNEST F. HOLLINGS, FAIRNESS IN BROADCASTING ACT OF 1987, S. Rep. 100-34 at 14, (1987).

judged by the behavior of broadcasters before and after the changes. If content controls did provide diversity in programming, and initiate informative debate over controversial subjects, their merits might balance the potential for abuse. Did they? The post-deregulation radio market offers a unique opportunity to answer that question with marketplace evidence.⁷³

A. Programming Trends in Radio: 1975–1995

A great deal of controversy surrounded the 1981 and 1987 deregulations. Many argued that dropping content rules would drastically reduce the overall supply of informational programming and end balanced coverage of important public issues.⁷⁴ Yet, radio has recently enjoyed a resurgence as both an influential medium for the discussion of policy issues and a dynamic business sector.⁷⁵ For example, in a major 1993 poll about talk radio, the Times Mirror Center for The People & The Press reported that one in six adults regularly listens to telephone talk shows about current events, issues and politics. One in four adults had listened to a talk show the day Times Mirror called or the day before, and another quarter said they sometimes listen.⁷⁶

In examining the U.S. radio market over the past two decades, there are three important “events” to consider. First, there is rapid growth in the overall number of radio stations, the bulk of the growth coming in the FM band. FM, which had been long suppressed by FCC policy,⁷⁷ finally came into its own in the 1960s (following the FCC’s authorization of stereo broadcasting on FM in 1961), and passed AM in listening share in 1979.⁷⁸ The increasing number of stations was a function of two interactive forces: public policy (more licenses were

73. See also Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine a “Chilling Effect”? Evidence for the Post Deregulation Radio Market*, 26 J. LEGAL STUD. 279 (1997).

74. The FCC received thousands of comments during its 1979–81 proceedings. For example, the ACLU and the National Organization of Women argued that, “consumer satisfaction is not the appropriate criterion for judging performance of radio markets. Rather . . . public ‘need’ as distinguished from public ‘want’ should be the criterion . . .” (84 F.C.C. 2d 968, at 1015). Likewise, the 1987 elimination of the Fairness Doctrine sparked a maelstrom of protest from groups as diverse as the ACLU, Mobil Oil and the NAACP, as well as conservative commentator Pat Buchanan.

75. VINCENT M. DITINGO, *THE REMAKING OF RADIO* (1995).

76. Douglas Davidoff, *Rock to talk: Indiana AM radio saved by the gift of gab*, 37(10) INDIANA BUSINESS 21 (1993).

77. See generally LAWRENCE LESSIG, *A MAN OF HIGH FIDELITY: EDWARD HOWARD ARMSTRONG*, 257–292 (1956) (discussing the developmental setbacks suffered by FM stations in the period after World War II).

78. DITINGO, *supra* note 75, at 18, 60.

supplied by the Commission) and market demand (more stations were economically viable). The second “event” is the 1981 “Deregulation of Radio,” and the third is the FCC’s abolition of the Fairness Doctrine in August 1987.

One of the advantages of studying radio markets is that stations typically have a distinct format throughout the daily program schedule, and these formats are reported by established industry sources. Hence, published format data can reveal what changes are taking place in radio programming over a given period.

To analyze the effects of content regulation on broadcasters’ format choices, we obtained data on radio programming for both AM and FM broadcasters nationwide over the period 1975–1995.⁷⁹ These formats are summarized for AM radio in Table 1.

79. BROADCASTING AND CABLE YEARBOOK (1995). The Yearbook publishes detailed information on broadcasters, including a list of stations by principal format. A principal format (as defined by the Yearbook) is one that the station broadcasts for more than twenty hours per week. Under this definition, it is possible for a station to have more than one principal format. Our data series begins in 1975 because this was the first year the Yearbook compiled comprehensive data on radio stations by format.

TABLE I (CONTINUED)

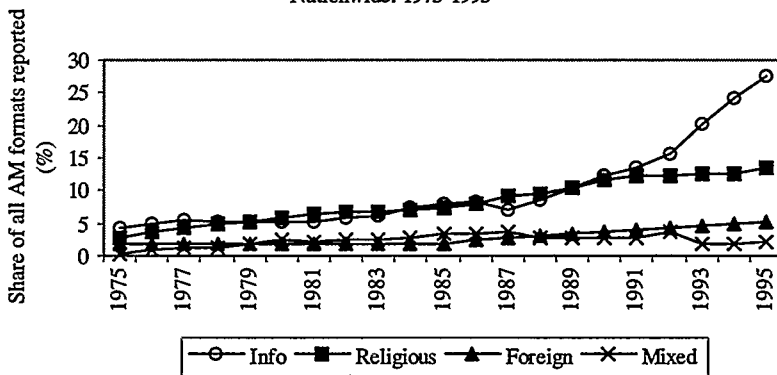
	<i>Music</i>		<i>Informational</i>		<i>Religious</i>		<i>Foreign/Ethnic</i>		<i>Mixed</i>	
	1975	1995	1975	1995	1975	1995	1975	1995	1975	1995
Oldies	67	486								
Polka	4	4								
Progressive	47	15								
Rock/AOR	168	53								
Top 40	254	70								
Urban	0	102								
Contemporary										
Variety	216	122								

Source: Broadcasting & Cable Yearbook, 1975, 1995.

There is a pronounced upward trend in the number of format categories reported over this period. Throughout the interval, music is the dominant broad category.⁸⁰ In 1975 the music category is dominated by a few specific format types, such as country-western and adult contemporary. By 1995 the music category consisted of over 15 specific formats, including for example, urban contemporary, new age, and bluegrass.

We can aggregate the raw data into five broad format categories: music, information, religious, foreign language/ethnic, and mixed.⁸¹ Consolidating the formats into five broad groups minimizes sampling error associated with categorizing programming. Using such broad categories over the entire period also protects against biasing a measure of diversity due to changes in format definitions.

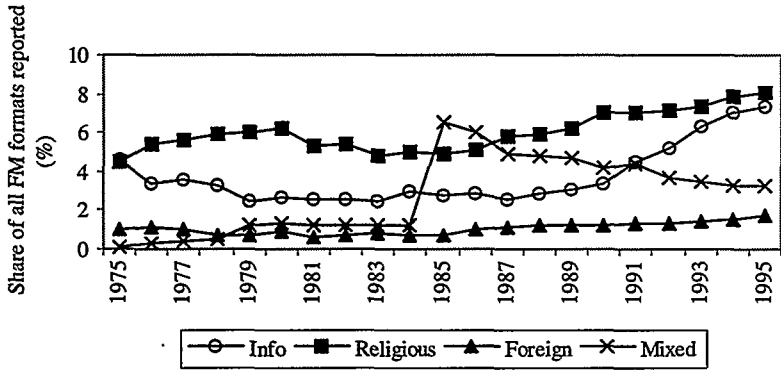
FIGURE 1: SELECTED AM FORMAT CATEGORIES
Nationwide: 1975-1995



80. Music accounted for 90.8% of AM programming in 1975, falling to 51.7% in 1995. In FM the share of music formats fell from 89.8% to 79.6% over the period. *Id.*

81. The "mixed" category consists of formats such as agriculture and drama/literature that neither fit well into another category nor have any clear relationship between one another.

FIGURE 2: SELECTED FM FORMAT CATEGORIES
 Nationwide: 1975-1995



Figures 1 and 2 omit the music shares, which form the residual category. While an upward trend is apparent in each of the non-music categories over the entire 1975–1995 range, the increase is most noticeable in informational programming. The share of informational formats on FM increases from 4.64% in 1975 to 7.39% in 1995, but the more dramatic increase is in the AM band where the share of informational programming rises from 4.29% to 27.60%. Particularly impressive is the 20.89 percentage point increase in AM informational share between 1987 and 1995.

Figures 3 and 4 show the breakdown of the informational category into four sub-categories: news, news/talk, public affairs and talk.⁸² In AM radio, the news/talk sub-category drives the later increases in informational programming. Conversely, a surge in news formats drives the rise in the information category in the FM band.

82. News/talk was introduced as a format in 1990. It appears, logically enough, to have drawn from both news and talk formats.

FIGURE 3: AM INFORMATION FORMATS
Nationwide: 1975-1995

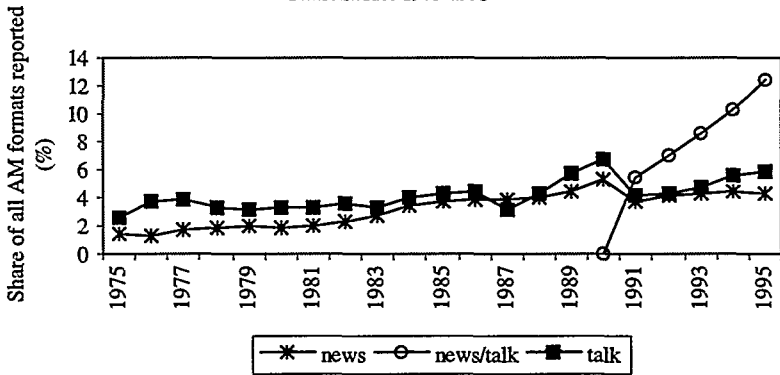
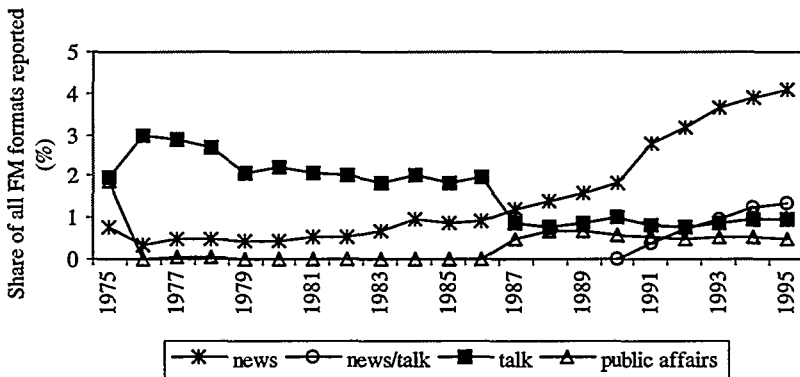


FIGURE 4: FM INFORMATION FORMATS
Nationwide: 1975-1995



B. The FCC’s Economic Model

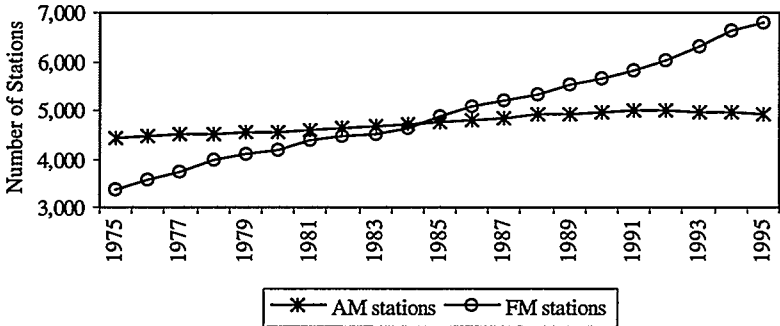
In a 1979 Notice of Inquiry and Proposed Rulemaking,⁸³ the FCC outlined a model of economic behavior in which competition among broadcasters would transform radio into a specialty medium, increasing the flow of diverse and controversial material and better serving the diverse American audience.⁸⁴ The FCC hypothesized that this competition

83. *In Re Deregulation of Radio*, 73 F.C.C.2d 457 (1979).

84. *Id.* at 491-525.

would result from a sharp increase in the supply of radio licenses, especially those granted to FM stations under more liberal Commission licensing policies. Indeed, between 1975 and 1995 the number of AM stations increased by 11.1% and the number of FM stations increased by 102%.

FIGURE 5: AM AND FM STATIONS
Nationwide: 1975-1995



Enhanced radio competition forced stations to tailor their programs to narrower audiences. This impact was already evident by the time of the Deregulation of Radio proceeding. In fact the changes were a motivating factor for the deregulation itself. As the Commission noted in 1979:

The growth of a viable FM presence has important policy implications. . . . [I]f the new stations can and do capture significant audience shares from existing stations, then the older dominant stations must be responsive to the challenge of competition. If successful, innovative stations with experimental formats would place strong competitive pressures on existing stations, and would affect market conduct and performance.⁸⁵

Econometric analysis of the data suggests that the Commission was correct in its observation that competition between broadcasters was an effective means of delivering public interest outputs.⁸⁶ The 1981 deregulation had little effect on the broadcast supply of informational programming. The elimination of the Fairness Doctrine in 1987, however, coincided with a statistically significant change in the structure of

85. *Id.* at 485.

86. Hazlett and Sosa, *supra* note 76.

the AM radio market.⁸⁷ More precisely, after 1987 we see a dramatic increase in the amount of informational programming as the share of news and talk formats rises steadily. Further quantitative analysis also suggests that the repeal of the Fairness Doctrine allowed AM radio to exploit its comparative advantage over FM by substituting talk formats for music.⁸⁸

Fundamentally, the quantitative evidence strongly suggests that repeal of the Fairness Doctrine led to significant increases in informational programming. This outcome is entirely consistent with the FCC's 1985 determination that the doctrine constrained broadcasters by making the presentation of controversial issues economically risky. The marketplace evidence suggests that content controls stifled programming on controversial issues, presumably by increasing the likelihood that a given radio station would be both challenged for not providing adequate access to alternative viewpoints, and forced to grant free air time. Once the doctrine was repealed, broadcasters were free to provide more informational programming, especially on controversial issues, without the fear of Fairness Doctrine challenges. The data show that, in fact, broadcasters provided much more informational programming once the controls were lifted.

IX. CONTENT CONTROLS AND THE INTERNET

The parallels between the content controls imposed via the FCC licensing process and the CDA are substantial. Fundamentally, both seek to sanction "bad" speech disseminated by a broadcaster or network provider. While the Fairness Doctrine sought to regulate biased news coverage, the CDA attempts to control "indecent" expression. However, just as it proved impossible for regulators, broadcasters and the public to develop a working definition of what constituted "fair" or even "local" media coverage,⁸⁹ it is equally improbable that a diverse society can settle upon a clear definition of indecent speech.

In addition, the behavioral incentives of the CDA are similar to those of the Fairness Doctrine. Both operate by imposing economic

87. We limited our quantitative analysis to AM radio because of changes in the way formats were reporting for FM during the sample period.

88. AM will have a comparative advantage over FM for talk formats due to differences in the cost of operations. AM delivers lower sound quality than FM, but this is more acceptable for talk formats as opposed to musical high-fidelity formats.

89. In 1979 the Commission admitted that "[a]lthough the Fairness Doctrine requires stations to provide coverage of controversial issues of interest to the community, we [FCC] have never defined the term 'community' as it applies to fairness issues." 73 F.C.C.2d at 517.

penalties on networks or program providers who violate vague legal standards. As discussed in the preceding sections of this article, various groups have used the Fairness Doctrine to impose sanctions on controversial speech. In the case of the CDA also, controversial speech will be a significant liability, not only to Internet service providers but also to individuals posting content on the Internet. Whether the liability standard is “fairness” or “indecent,” the end result will be a frigid “chill” on constitutionally protected speech because the fear of litigation discourages individuals from producing and disseminating speech that potentially may be found “unfair” or “indecent.”

Moreover, the just as the Fairness Doctrine exhibited the potential for abuse by political and public interest groups, we can expect that such groups will exploit the vague indecency standard of the CDA by assaulting their adversaries and opponents with legal challenges. Additionally, the vague standard may be abused by the government. As Steve Russell, a retired Texas state judge, noted in an article that was intended to violate the CDA; “You [Congress] have . . . handed the government a powerful new tool to harass its critics: a prosecution for indecent commentary in any district in the country.”⁹⁰ In a democracy, robust public debate always involves some modicum of offense. The CDA—much like the Fairness Doctrine before it—is an open invitation to respond to an opposing viewpoint not with an argument but with an economic sanctions.

Furthermore, content rules tend to silence small organizations and individuals first, a characteristic also observed in the abuse of the Fairness Doctrine. The drafters of the CDA went to considerable length to provide complex legal defenses to CDA challenges. But, as the ACLU noted in a December 4, 1995 letter to House conference committee participants:

Although corporations with large legal departments may fare better [under the CDA], the small independent content and access providers will be effectively frozen out of the [more complex] defenses, with a profound chilling effect on their own speech for fear of offending the vague prohibitions and being sent to prison. The same is true for the individual user who communicates in chat rooms and on bulletins. Thus, [the CDA]

90. Steve Russell, *The X-On Congress: Indecent Comment on an Indecent Subject*, February 8, 1996 (reprinted in *HARPER'S MAGAZINE*, May 1996, at 24). This profanity-filled condemnation of the CDA was originally published in the *American Reporter*, an online journal, on February 8, 1996 as a deliberate challenge to the CDA. To underscore arguments that the electronic media is treated differently than print, two magazines reprinted the article two months later, and found (obviously) no prosecution in the offing.

... will harm the very people who have made cyberspace the incredibly rich source of information it is today.⁹¹

In this manner, content regulation deprives the audience of the very diversity of opinion that policymakers often seek to create.

The introduction of the CDA could put controversial discourse on ice, reducing not only the breadth of speech but also the number of speakers, well beyond Congressional intentions. Most Internet service providers and other "speakers," large and small, would censor themselves in order to steer clear of potential CDA sanctions. This kind of self-censorship is the most costly aspect of content regulation. For example, during the recent court case involving the CDA, America Online, Inc. ("AOL") announced that if the law were upheld, the company would consider eliminating chat groups from its service.⁹² These chat "rooms" allow subscribers to engage in written "real time" conversation, and are one of the most popular features of AOL service.

The potential for such broad-reaching effects is hugely ironic in that the arguments in favor of content regulation in the early days of broadcasting are so completely overwhelmed by the expansiveness of the Internet, which allows so many a voice where so few once spoke. Content regulation was justified on the premise that access to the airwaves was physically limited.⁹³ Yet the ability to speak across the Internet is virtually unlimited—its crowning glory as a consumer service. The old regulator's saw that every broadcast voice cannot be heard does not apply to the Internet. The Internet is a medium for both one-way point-to-multipoint (broadcasting) and two-way point-to-point communications. One homepage, newsgroup or bulletin board can reach millions of people with one-way communications, and the message is much richer than traditional broadcasting: text, sound, images, and full-motion video are all possible. Once outfitted with a computer and a phone line, anyone can find their way to the on-ramp and cruise the much vaunted information superhighway. As Representatives Christopher Cox (R-CA) and Ron Wyden (D-WA) note in their proposed amendment to the telecommunications reform legislation, "the Internet and other interactive computer services offer a forum for a true diversity of political

91. Letter from Laura W. Murphy and Donald Haines of the ACLU to the House Conference Committee on Telecommunications Deregulation (Dec. 4, 1995) (available at <<http://www.aclu.org/congress/cybrltr.html>>, visited April 2, 1997).

92. Pamela Mendel, *AOL May Abandon Chats if Decency Law Stands*, N.Y. TIMES CYBERTIMES, April 2, 1996 <<http://www.nytimes.com/web/docsroot/library/cyber/week/0402decency.html>>.

93. This view has been thoroughly critiqued by economists and legal experts. See Coase, *supra* note 17; Hazlett, *supra* note 18; J. Gregory Sidak, *Telecommunications in Jericho*, 81 CAL. L. REV. 1209 (1993) (book review).

discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”⁹⁴

In the case of the Internet, legislators have proposed content regulation not to address a scarcity of access to information, but its abundance; on the Internet one person can communicate with any other. As with most powerful new communications technologies, the political reflex is to protect existing paradigms by attempting to rein in and control the new medium. It was just such a reflex, however, that the First Amendment was crafted to control.

X. CONCLUSION

The marketplace evidence that the Fairness Doctrine visibly “chilled” broadcast speech is a crucial lesson to learn. In making its case for the CDA, the DoJ has argued that the public interest in controlling access by minors to indecent material outweighs the speculative harm to free speech. Yet we have seen repeatedly that content regulation lends itself to abuse by political interest groups and imposes sharp disincentives on those who would air controversial opinions.

The first phase of the judicial review process for the CDA concluded on June 11, 1996 when the special three-judge panel in Philadelphia issued its ruling.⁹⁵ In a “unanimous”⁹⁶ decision in which the judges held the CDA unconstitutional, the judges applied the concept of differential treatment for different communications media.⁹⁷ Thus, Judge Stewart Dalzell labored to place the medium of the Internet somewhere in a continuum between print and television, and Judge Dolores Sloviter concluded that, “. . . Internet communication, while unique, is more akin to telephone communication . . . than to broadcasting . . . because, as with the telephone, an Internet user must act affirmatively and deliberately to retrieve specific information online.”⁹⁸

The origins of the theory of media difference can be traced back to the establishment of federal control over broadcasting with the 1927 Radio Act and 1934 Communication Act. These laws advanced the notion of differential treatment (namely, lessened free press protections) for broadcasting due to its use of spectrum. This rationale, which blos-

94. The Internet Freedom and Family Empowerment Act, H.R. 1978, 104th Cong., 1st Sess. (1995) (codified at 47 U.S.C. § 230(a) (1996)).

95. *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996).

96. *Id.* Although the outcome was unanimous, each judge wrote a separate opinion in the case.

97. Radio Act of 1927, 47 U.S.C. § 81 (1996) (original version at 44 Stat. 1162).

98. Communications Act of 1934, 47 U.S.C. §§ 151 (1996).

somed as the "physical scarcity" (of spectrum) doctrine in the 1943 NBC case,⁹⁹ was used consistently by the Judicial branch for several decades, even as evidence mounted against it.¹⁰⁰ The differential treatment approach to media was revived by the Supreme Court's 1978 decision in *FCC v. Pacifica Foundation*.¹⁰¹ In *Pacifica* the Court upheld the FCC's authority to regulate indecent programming in radio and television on the grounds that broadcasting is "uniquely pervasive."¹⁰² The approach has also been applied in subsequent cases involving cable television and dial-a-porn.¹⁰³ The following passage from the panel's CDA decision highlights the intention of the courts to create ad hoc theories for each type of speech protected under the First Amendment:

All parties agree that in order to apprehend the legal questions at issue in these cases, it is necessary to have a clear understanding of the exponentially growing, worldwide medium that is the Internet, which presents unique issues relating to the application of First Amendment jurisprudence and due process requirements to this new and evolving method of communication.¹⁰⁴

While defenders of free speech on the Internet may well wish to use the differential treatment framework, and may even be successful in arguing a "special case" for unregulated communications (as in the victory with the 3-judge panel), such a strategy can be very risky. The First Amendment, rather than offering blanket protection to free speech and a free press, must be petitioned on an individual basis. The scope for political compromise, and regulatory mischief, is apparent from the history of radio broadcasting.

The Justice Department has announced that the government will appeal to the Supreme Court, and the case will be decided in 1997. It is unclear what awaits the CDA. The highest court has recently shown itself to be confused and divided over the issue of First Amendment protections for electronic speech. In a case involving the Helms Amendment to the 1992 Cable Television Consumer Protection and Competition Act, the Court issued a contradictory ruling, permitting federal content regulation in some cases but not in others.¹⁰⁵

99. *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

100. *See, e.g., Coase, supra* note 17.

101. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

102. *Id.* at 748.

103. *See Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, (1994) (cable television), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (telephone communications).

104. 929 F. Supp. at 844.

105. *Denver Area Educ. Telecomm. Consortium v. FCC*, 116 S. Ct. 2374 (1996).

In its defense of the CDA, the Justice Department argued that the Internet should be treated like a broadcast medium for the purpose of content regulation, in part because “the Internet is becoming more like an entertainment medium.”¹⁰⁶ Given the government’s concession of failure in regulating broadcast content—and the ugly episodes of political abuse along the way—that assertion should send a chill through all of us.

106. *Print or Broadcast Model?; Judges Pressure Justice Department on Telecom Act Decency*, COMM. DAILY, May 13, 1996, at 1.