

Cato Institute Policy Analysis No. 270: Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting

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Executive Summary

Congress included the Communications Decency Act in the Telecommunications Act, which was signed into law on February 8, 1996. The CDA sought to outlaw the use of computers and phone lines to transmit "indecent" material and provided jail terms and heavy fines for violators. Proponents of the act argue that it is necessary to protect minors from undesirable speech on the burgeoning Internet. The CDA was immediately challenged in court by the American Civil Liberties Union, and the special three-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 with regulations designed to improve the content of "electronic" speech. For example, the Fairness Doctrine, imposed on radio and television stations until 1987, was an attempt to establish a standard of "fair" coverage of important public issues. The deregulation of content controls on AM and FM radio programming, first under the Carter Federal Communications Commission 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 have a "chilling effect" on free speech.

Introduction

Fearing that the anarchic nature of the Internet might unleash an "electronic red-light district," Sens. Jim Exon (D-Neb.) and Slade Gorton (R-Wash.) introduced the Communications Decency Act in February 1995. The CDA allows for fines of up to \$250,000 and two years imprisonment for anyone 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." Spurred 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 to 16. In a congressional conference committee, the language of the CDA survived several challenges, and it became law when President Clinton signed the Telecommunications Act on February 8, 1996. [\[1\]](#)

Several significant criticisms of the legislation have been raised. First, there are serious questions about the

constitutionality of the CDA. The act outlaws the transmission of "indecent" speech over the Internet, in spite of the fact that indecency is a category of speech that the Supreme Court has previously ruled deserving of protection under the First Amendment. Indecency differs 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." [\[2\]](#) Interestingly enough, the U.S. Department of Justice, 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." [\[3\]](#)

Indeed, the CDA had to overcome serious congressional resistance on the way to becoming law. Recognizing the difficulties of criminalizing a form of speech generally afforded First Amendment protection, many members of 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." [\[4\]](#) In an effort to sidestep constitutional concerns, Reps. Christopher Cox (R-Calif.) and Ron Wyden (D-Ore.) drafted a more moderate proposal, [\[5\]](#) and on August 4, 1995, the House voted 421 to 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 Rep. Bob Goodlatte (R-Va.) reinstated the indecency standard, which passed 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. Indeed, a broad coalition of civil libertarian groups and high-tech firms, for which the American Civil Liberties Union 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, [\[6\]](#) and on June 11 the three-judge panel issued its ruling, striking down the CDA on constitutional grounds. [\[7\]](#) The Department of Justice sequently announced that it would appeal to the Supreme Court.

Second, some people consider the CDA unnecessary legislation. The Department of Justice has argued that existing obscenity laws are sufficient to target pornographic material on the Internet. In fact, it 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." [\[8\]](#)

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 mid-1995 *Time* was forced to retreat from an incendiary cover story that drastically overstated the availability of pornography on the Internet. [\[9\]](#) Moreover, software programs that allow parents to exclude access to off-color material are available from a number of vendors. Subsequent reports suggest that X-rated material is not prolific on the Internet and that it is rarely available to browsing innocents. Usually, one must pay a fee to partake of more intimate images and language. [\[10\]](#) 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. [\[11\]](#) 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. [\[12\]](#)

Beyond those 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 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 for coverage of political candidates.

Because content regulation carries the danger of a "chilling effect" on speech, it has always walked a constitutional

fine line. Relying on a dubious analysis of "physical scarcity" and a fanciful history of the "chaos" in the 1920s radio market, [\[13\]](#) the Supreme Court has determined that the electronic press enjoys less protection from government regulation than does the print press. [\[14\]](#) The Court has also held, however, that its views of the matter would change markedly if evidence of a chilling effect of regulation were to be found.

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 airtime to individuals who wished to respond to a personal attack did not violate the First Amendment. The Court's eight-to-zero 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, there will be time enough to reconsider the constitutional implications. [\[15\]](#)

Several factors contribute to the potential "chill" of content regulation. Principal among them are that standards tend to be vague and broad (what constitutes "fairness" or "indecent"?) and economic penalties severe (broadcasters face potential loss of license for violating FCC rules; the CDA allows for up to \$250,000 in fines and two years in prison). With such a pairing of incentives, content providers will tend to self-censor to avoid getting anywhere near 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 transmitted, simply to avoid the risk of regulatory or legal sanction (and attendant litigation costs), thereby eliciting the chilling effect on speech the Court was concerned about. Indeed, 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. [\[16\]](#)

Since 1969 at least three compelling "events" have produced evidence that FCC content rules have a chilling effect on controversial speech on radio and television, evidence the Court could not find in *Red Lion*. First, Fred Friendly's 1975 book, *The Good Guys, The Bad Guys and the First Amendment*, showed that the very application of FCC regulation, at issue in *Red Lion*, was (unknown to the Supreme Court) an effort at suppressing free speech by filing Fairness Doctrine challenges. Second, the FCC itself issued a study in 1985 that demonstrated, under the "public interest" standard of the 1934 Communications Act, that the Fairness Doctrine had served as a disincentive to broadcasters' airing controversial news and public opinion programming. Finally, since FCC repeal of the Fairness Doctrine in 1987, we can observe the effect of deregulation on radio markets--a stunning increase in the provision of informational programming. As shown below, that explosion in news, talk, and public affairs formats, on 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. [\[17\]](#)

A recent case suggests that the indecency standard of the CDA might well extend its chill all the way into the dead center of social discourse. Consider the case of breast cancer discussion groups carried by America Online, the largest Internet service provider. In December 1995 AOL came under fire for declaring the word "breast" obscene and censoring user profiles and chat room titles devoted to breast cancer survivors. Apparently, however, that was not AOL's first encounter with that particular problem. Earlier in the summer, breast cancer survivors, blocked from

creating a forum with the word "breast" in the title, created a "hooter cancer survivor" forum. [\[18\]](#)

In an effort to comply with the anticipated indecency standard of the CDA, the company had decided to eliminate "vulgar" words such as breast from the network. That 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 harsher 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 has had on the provision of broadcast news and informational programming offered the American public--effects that suggest that federal regulation of content can sharply constrain the quality and quantity of public debate. Strong parallels can be drawn with the CDA; our previous experience with regulating electronic speech offers warning signals today.

Content Regulation in Broadcasting

The 1927 Radio Act created the Federal Radio Commission, establishing federal control over the airwaves. The 1927 law, which was designed to be provisional, was renewed every year until 1934 when Congress passed the Communications Act, which replaced the FRC with the Federal Communications Commission. [\[19\]](#) Spectrum access continues to be governed by the 1934 act. [\[20\]](#) 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, [\[21\]](#) the FRC, later the FCC, determined that certain types of speech were required by the public interest standard, as the FCC 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. [\[22\]](#)

The FCC argued that, in the absence of regulatory inducements, broadcasters would underprovide informative or controversial material, or both. The agency's 1949 report formalized its policy in the form of the Fairness Doctrine, which consisted of two requirements. First, licensees were required to provide coverage of "vitally important controversial issues of interest in the community served by the broadcaster." Second, licensees received a mandate to "provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues." [\[23\]](#)

The FCC had a two-stage enforcement process for the Fairness Doctrine. In the first stage the FCC would request that a licensee respond to a complaint filed with the commission. That could eventually lead to a hearing and a ruling by the FCC either in favor of the plaintiff or in favor of the licensee. The penalties associated with a Fairness Doctrine complaint ranged from the legal and research costs of responding to the FCC's inquiry to giving the plaintiff free airtime. [\[24\]](#) 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 yielded 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 FCC was careful to point out in most Fairness Doctrine proceedings that licensees had broad discretion over how they chose to satisfy that aspect of the rule. [\[25\]](#) 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 airtime 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 that suggest that its net effect on controversial speech was chilling rather than warming.

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 FRC renewed the license for WEVD, owned by the Socialist Party, only with the stern warning that the New York station must "operate with due regard for the opinions of others." [26] Regulators had determined that programming that 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." [27]

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." [28] 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. [29] 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 FCC's finding asserted that it was protecting the public from the unbalanced coverage.

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 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. [30]

Yankee managed to hang on to its license only by promising no further editorialization. The ruling in that case gave birth to the Mayflower Doctrine, which forbade broadcasters to editorialize, until the FCC reversed course and virtually imposed an obligation to editorialize in the 1949 report, *Editorializing by Broadcast Licensees*. [31] In the meantime, the FCC's decision shielded Roosevelt's New Deal from broadcast criticism.

Red Lion: The Rest of the Story

From the Supreme Court's perspective in 1969, the Red Lion case began with a feisty octogenarian, the Reverend John Norris, owner of the Red Lion Broadcasting Company, in Red Lion, Pennsylvania. On November 25, 1964, Norris's station, WGCB, broadcast a commentary by the Reverend Billy James Hargis, an Oklahoma evangelist preacher. Hargis's "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's program requesting free airtime to respond under the personal attack rules of the Fairness Doctrine. [32] 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 FCC'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* . . . enhances rather than abridges the freedoms of speech and press protected by the First Amendment." [33] The logic of the Court's decision in *Red Lion* has been thoroughly examined by legal scholars and economists and is well beyond the scope of this paper. What is important, however, is that the Court did not know at the time that the case before it was the product of a well-orchestrated campaign by the Democratic National Committee to silence pro-Goldwater forces before the 1964 presidential elections.

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. [34] 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 far more than the necessary two-thirds majority.

Flush with 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. [35] 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." [36]

By November 1964, when Johnson beat Goldwater in a landslide, the Democrats' "fairness" campaign was considered a stunning success. The effort had produced 1,035 letters to stations, resulting in 1,678 hours of free airtime. [37] Critical to the campaign was the fact 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,

The right-wingers operate on a strictly cash basis and it is 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. [38]

Democratic Party operatives were part of the *Red Lion* Fairness Doctrine challenge from the very beginning. 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*. [39] 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. [40]

The DNC also funded Cook's book on Goldwater, preordering 50,000 copies to ensure publication. When Hargis attacked Cook on the air, it was the DNC, not Cook himself, 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's commentary, thus providing the very chilling effect the Supreme Court had failed to find evident in the case. [41]

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 response. However, by October 1969, Nixon's chief of staff, H. R. Haldeman, recognized that the countercriticism campaign was ineffective and the administration was rapidly falling behind. It needed a more targeted approach--what White House aide Jeb Magruder dubbed the "rifle" approach to the media. That 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 meetings and phone calls with top executives at CBS, NBC, and ABC. Second, the Republican National Committee initiated a private campaign of direct pressure on broadcasters through Fairness Doctrine complaints and license renewal challenges.

The first component of that 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 and occasionally arranged meetings in Washington or New York. 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." [\[42\]](#) Later in 1972 Colson phoned Stanton to inform him that the administration was considering a five-point plan of action against the networks. The plan included a proposal to license the networks themselves [\[43\]](#) and a campaign to disturb the license renewal process for television stations. [\[44\]](#)

The strategy was to directly intimidate broadcast executives in the hope that they would eventually tone down the unfavorable coverage of the administration by their news units, and in mid-1973 the effort finally paid off. After a meeting at the White House between Paley and Haldeman, CBS announced plans to drop its policy of presenting news analysis immediately after presidential statements. Although it was widely believed that CBS had been "silenced, or intimidated, or subverted" by the administration, [\[45\]](#) Paley denied it, stating that his only objective was "better, fairer, more balanced" coverage. [\[46\]](#)

In a 1972 hearing before the Senate Constitutional Rights Subcommittee on Freedom of the Press, CBS correspondent Daniel 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." [\[47\]](#)

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." [\[48\]](#) One early outcome of the campaign was a Fairness Doctrine complaint against CBS brought by the RNC.

After five televised speeches by Nixon on Vietnam policy, CBS offered airtime to the DNC to respond. [\[49\]](#) After 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 FCC, which ruled in favor of the RNC. 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." [\[50\]](#)

The principal targets of license renewal challenges were the five television stations owned and operated by CBS and 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 its broadcast properties--two television stations in Florida and one in Washington, D.C.--were vulnerable. As 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." [\[51\]](#) The Florida stations survived three costly challenges, mounted by administration allies, during the Nixon years. [\[52\]](#)

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.

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 debates 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 accepting the commercials. Two-thirds of the stations subsequently refused the bottle industry's ads. [\[53\]](#)

The Fairness Doctrine went beyond public affairs; it affected commercial speech as well. Anti-smoking activists filed a successful fairness complaint against CBS in response to cigarette advertising, [\[54\]](#) and the environmental group Friends of the Earth waged a fairness campaign against luxury automobile advertising. The Fairness Doctrine was invoked against ads for everything from snowmobiles and trash compactors to Crest toothpaste. [\[55\]](#)

The FCC Lifts Radio Regulation, 1979-87

By the 1970s such egregious abuses of the system by both politicians and special-interest groups were lessening 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. [\[56\]](#) The FCC substantially reduced the burdens on broadcasters with its *Deregulation of Radio* in 1981, [\[57\]](#) which comprised the following:

- Nonentertainment program regulation. The FCC eliminated "guidelines" indicating how much informational programming each station should carry 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.
- 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." [\[58\]](#)

The nonentertainment guidelines required AM stations to offer 8 percent nonentertainment programming and FM stations to offer 6 percent. In simple terms, informational programs (i.e., nonentertainment) 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 to then document the station's response to those 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 FCC. 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 FCC 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. [\[59\]](#)

The FCC recognized that, as Commissioner James Quello noted, "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 the renewal process, with the conviction that "the enormous savings in time and money could be used for more constructive purposes in programming and news." [\[60\]](#)

While the 1981 deregulation represented a substantial change in broadcast policy, it left intact the most important form of content control, the Fairness Doctrine. [\[61\]](#) Yet by 1984 the FCC had begun an inquiry into the Fairness Doctrine, questioning its constitutionality and effectiveness. In 1985 the FCC issued a report, concluding, "We no longer believe that the fairness doctrine, as a matter of policy, serves the public interest." [\[62\]](#) 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. [\[63\]](#)

In an extension of the logic behind the 1981 deregulation, the FCC concluded that "the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today." [\[64\]](#) Furthermore, on the basis of the "voluminous factual record," the FCC concluded that there was strong evidence that the Fairness Doctrine "actually inhibits the presentation of controversial issues of public importance." [\[65\]](#)

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 chilling effect on controversial speech. That was because any programming on a controversial subject would expose the broadcaster to potential Fairness Doctrine challenges or demands for free airtime under the equal access provisions. The FCC summarized the net effect of the doctrine:

The 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. . . . In net effect the fairness doctrine often discourages the presentation of controversial issue programming. [\[66\]](#)

However, because of uncertainty over the FCC's authority to abolish the Fairness Doctrine, the rule remained in effect until August 1987 when it was finally eliminated. [\[67\]](#)

That analysis is all the more significant in that it comes from the agency responsible for writing and enforcing

broadcast regulation. That the FCC determined in 1981 and 1985 that content regulation was counterproductive to achieving public interest goals would suggest that the notion of effective content regulation has been thoroughly discredited.

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 on the ill-fated Fairness in Broadcasting Act, Sen. Ernest Hollings (D-S.C.) 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." [68] The events of 1981 and 1987 offer a unique window onto the effects of content regulation, as judged by the behavior of broadcasters before and after the changes. If content controls did provide diversity in programming and initiate informative debate on controversial subjects, their merits might balance the potential for abuse. Did they? The postderegulation radio market offers a unique opportunity to answer that question with marketplace evidence. [69]

Programming Trends in Radio: 1975-95

There was a great deal of controversy surrounding the 1981 and 1987 deregulations. Many people argued that dropping content rules would drastically reduce the overall supply of informational programming and end balanced coverage of important public issues. [70] Yet radio has recently enjoyed a resurgence as both an influential medium for the discussion of policy issues and a dynamic business sector. [71] 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. [72]

In examining the U.S. radio market over the past two decades, there are three important "events" to consider. First, there was rapid growth in the overall number of radio stations, with the growth coming primarily in the FM band. FM, which had been long suppressed by FCC policy, [73] finally came into its own in the 1960s (after the FCC's authorization of stereo broadcasting on FM in 1961) and passed AM in listening share in 1979. [74] The increasing number of stations was a function of two interactive forces: public policy (more licenses were supplied by the FCC) and market demand (more stations were economically viable). The second "event" was the 1981 deregulation of radio, and the third was 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 those 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 1975-95. [75] The formats for AM radio are summarized in Table 1.

There was a pronounced upward trend in the number of format categories reported over the period. Throughout the period, music was the dominant broad category. [76] In 1975 the music category was 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 aggregate the raw data into five broad format categories: music, information, religious, foreign language/ethnic, and mixed. [77] 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.

In Figures 1 and 2 we have omitted the music shares, which form the residual category. While there appears to be an

upward trend in each of the nonmusic categories over the entire 1975-95 period, the trend in informational programming is most dramatic. The share of informational formats on FM increased from 4.64 percent in 1975 to 7.39 percent in 1995, but the more dramatic increase was in the AM band where the share of informational programming went from 4.29 percent to 27.60 percent. Particularly impressive is the increase--20.89 percentage points--in the AM informational share between 1987 and 1995.

Figures 3 and 4 show the breakdown of the informational category into news, news/talk, public affairs, and talk. [\[78\]](#) We see that on AM the news/talk format drove the increases in informational programming. Interestingly, on the FM band it was a surge in news formats that drove the rise in the information category.

Table 1
Number of AM Radio Stations Broadcasting Various Formats, 1975 and 1995

Format	1975	1995	Format	1975	1995	Format	1975	1995
Adult Contemporary	944	583	News	75	295	Native American	5	3
Beautiful Music	52	94	News/Talk	0	854	Filipino	0	1
Big Band	1	129	Public Affairs	10	18	Foreign/Ethnic	9	55
Black	165	108	Talk	130	396	French	3	3
Bluegrass	0	16	Gospel	0	315	Greek	2	5
Blues	0	21	Religious	142	597	Italian	3	1
Classical	21	17				Japanese	2	2
Classic Rock	0	48				Polish	2	4
Country	1199	1221				Portuguese	0	6
Disco	0	1				Spanish	62	286
Folk	0	1				Agriculture	13	66
Jazz	5	22				Children	0	16
Middle of the Road	1404	333				Comedy	1	1
New Age	0	7				Drama/Literature	1	0
Nostalgia	0	85				Educational	0	19
Oldies	67	486				Other	0	34
Polka	4	4				Sports	0	325
Progressive	47	15						
Rock/AOR	168	53						
Top-40	254	70						
Urban Contemporary	0	102						
Variety	216	122						

Source: Broadcasting & Cable Yearbook. 1975, 1995.

Figure 1

Selected AM Format Categories: Nationwide, 1975-95

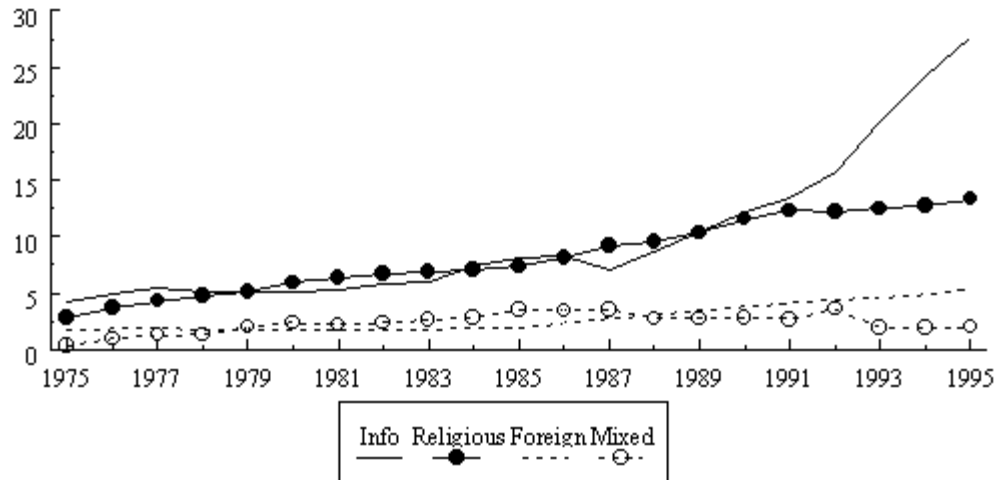


Figure 2

Selected FM Format Categories: Nationwide, 1975-95

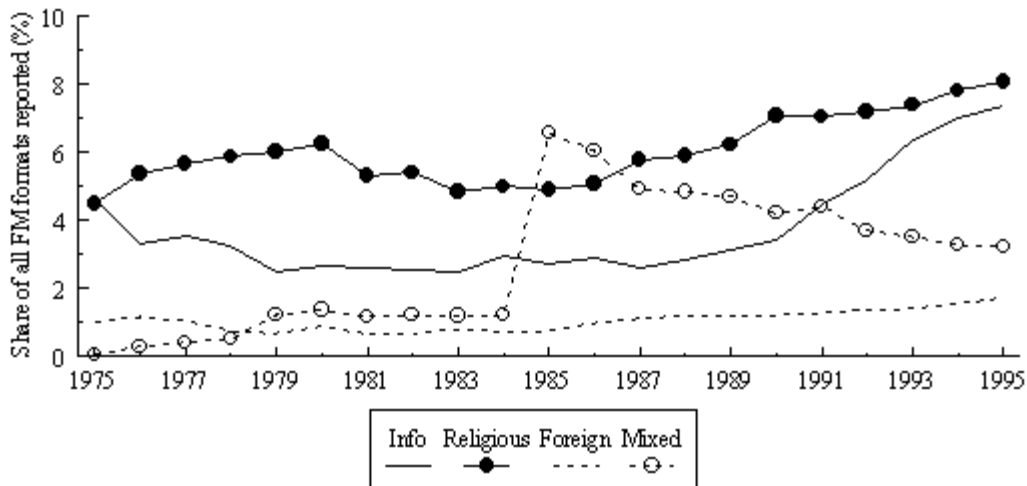
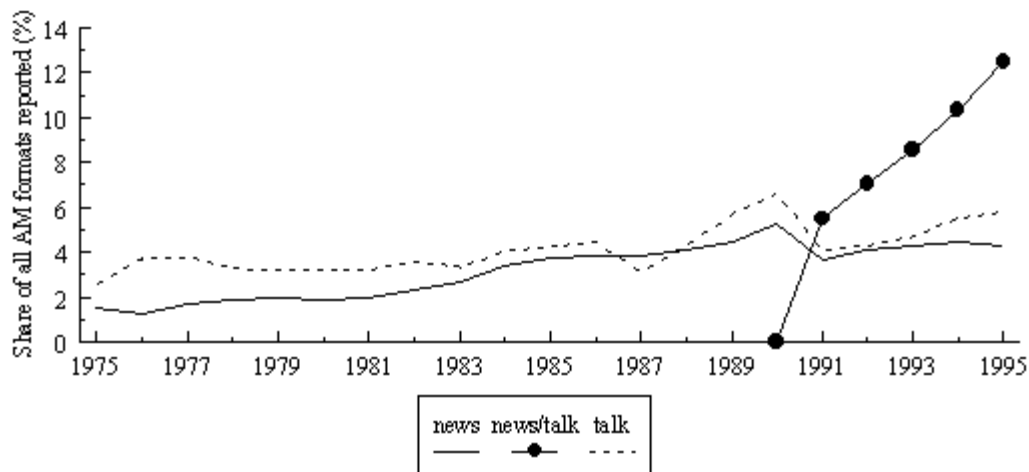


Figure 3

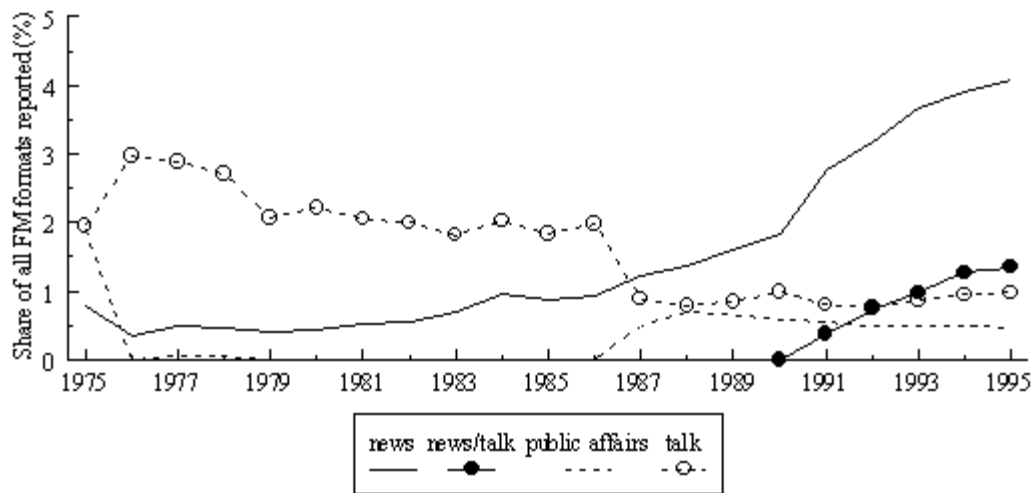
AM Information Formats: Nationwide, 1975-95



NB: The share of public affairs programming is negligible

Figure 4

FM Information Formats: Nationwide, 1975-95



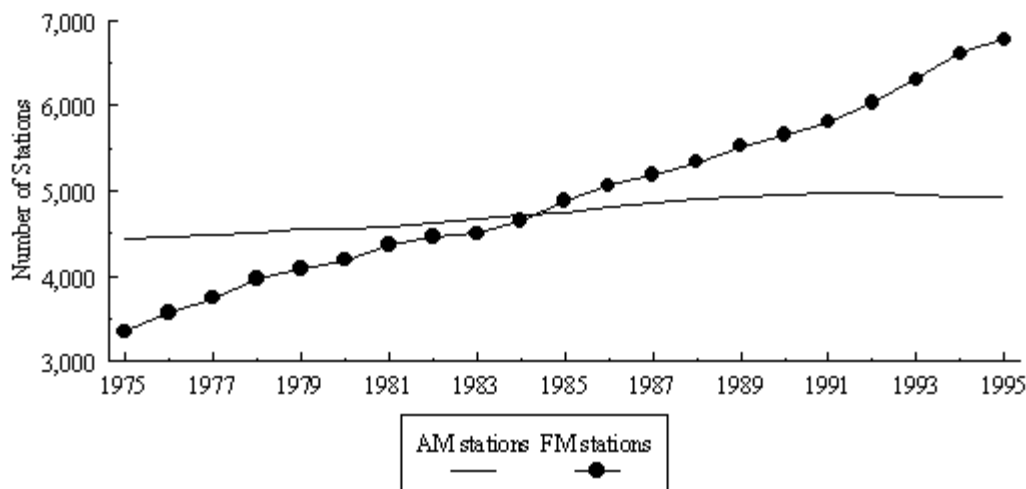
The FCC's Economic Model

In its 1979 Notice of Proposed Rulemaking, 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. [79] Competition was hypothesized to result from a sharp increase in the supply of radio licenses, especially for FM stations, due to more liberal FCC licensing policies. Between 1975 and 1995 the number of AM stations increased by 11.1 percent, and the number of FM stations increased by 102 percent (see Figure 5).

The impact of enhanced radio competition, which forced stations to tailor their programs to narrower audiences, was already evident by--and a motivating factor in--the Deregulation of Radio proceeding. As the FCC noted in 1979,

The growth of a viable FM presence has important policy implications. . . . If 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. [80]

Figure 5
Number of AM and FM Stations: Nationwide, 1975-95



Econometric analysis of the data suggests that the FCC was correct in its observation that competition between broadcasters was an effective means of delivering public interest outputs. [81] The 1981 deregulation appears to have had little effect on the provision of informational programming. However, the elimination of the Fairness Doctrine in

1987 coincided with a statistically significant change in the structure of the AM radio market. [\[82\]](#) 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. [\[83\]](#)

Most fundamentally, the quantitative evidence strongly suggests that repeal of the Fairness Doctrine led to large increases in informational programming, an outcome entirely consistent with the FCC's 1985 conclusion that the doctrine constrained broadcasters by making the presentation of controversial issues economically risky. Marketplace evidence suggests that content controls imposed a tax on controversy by increasing the odds that a given radio station would be challenged for not providing adequate access to alternative viewpoints and be made to grant free airtime. 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 format data show that they did provide more--lots more.

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 impose sanctions on "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, [\[84\]](#) it is equally improbable that a diverse society can settle upon a clear definition of indecent speech.

The behavioral incentives of the CDA are similar to those of the Fairness Doctrine. Both operate by imposing economic penalties on networks or program providers that violate vague legal standards. We have already seen how various groups used the Fairness Doctrine to impose sanctions on controversial speech. In the case of the CDA, controversial speech will be a significant liability, not only to Internet service providers, but also to individuals posting content on the Internet. Whether the standard is "fairness" or "indecenty," the end result can be a frigid chill on constitutionally protected speech, as fear of litigation discourages individuals from producing and disseminating controversial speech.

Moreover, the Fairness Doctrine has taught us to expect that political and public interest groups will be queuing up to exploit the vague indecency standard, assaulting those who offend them with legal challenges. 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." [\[85\]](#) In a democracy, however, robust public debate always involves 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 sanction.

Furthermore, content rules tend to silence the small players first, something also observed in the abuse of the Fairness Doctrine. The drafters of the CDA went to considerable lengths 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] . . . will harm the very people who have made cyberspace the incredibly rich source of information it is today. [\[86\]](#)

In that manner, content regulation deprives the audience of the very diversity of opinion that is often a policy objective.

Those factors imply that 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 service providers and

speakers, large and small, would choose to self-censor to steer wide of CDA sanctions, and such self-censorship is the most costly aspect of content regulation. For example, during the recent court case involving the CDA, AOL announced that if the law was upheld, the company would consider eliminating chat groups from its service. [\[87\]](#) Chat rooms, which allow subscribers to engage in written "real-time" conversation, are one of the most popular features of AOL service.

The potential for such far-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 voices where so few once spoke. Content regulation was justified on the premise that access to the airwaves was physically limited. [\[88\]](#) 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-multi-point (broadcasting) and two-way point-to-point communications. One home page, news group, or bulletin board can reach millions of people with one-way communications, and the message is much richer than that of traditional broadcasting: text, sound, images, and full-motion video are all possible. Once outfitted with a computer and a phone line, anyone can find his way to the on-ramp and cruise the much-vaunted information superhighway. As Cox and Wyden 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 discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." [\[89\]](#)

In the case of the Internet, content regulation is proposed, not for reasons of scarcity, but because of abundance: one person can communicate with any other. As with most powerful new communications technologies, there is a political reflex action to rein in the threat to existing paradigms. It was just such a reflex, however, that the stricture, "Congress shall make no law abridging freedom of speech, or of the press," was alertly crafted to control.

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 Department of Justice 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 thereby 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 as the special three-judge panel in Philadelphia issued a ruling. In a splintered decision, the judges found the CDA unconstitutional, relying upon the notion of differential treatment for communications media. [\[90\]](#) Thus, Judge Stewart Dalzell labored to place the internet somewhere on 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 on-line." [\[91\]](#)

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 the 1934 Communications Act. Those laws advanced the notion of differential treatment (namely, lessened free press protections) for broadcasting because of its use of spectrum. That rationale, which blossomed as the "physical scarcity" (of spectrum) doctrine in the 1943 *NBC* case, [\[92\]](#) was used consistently by the judicial branch for several decades, even as evidence mounted against it. [\[93\]](#) The differential treatment approach to media had new life breathed into it by the Supreme Court's 1978 *Pacifica* decision. [\[94\]](#) In that case, the Court upheld the FCC's authority to regulate indecent programming on radio and television on the grounds that broadcasting is "uniquely pervasive." That approach has been applied in subsequent cases involving cable television and dial-a-porn. [\[95\]](#) 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. [\[96\]](#)

While defenders of free speech on the Internet may well wish to play the differential treatment game, and may even be successful in arguing a "special case" for unregulated communications (as in the victory with the three-judge panel), it is a very risky contest. 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 Department of Justice 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. [\[97\]](#)

In its defense of the CDA, Justice 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." [\[98\]](#) 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.

Notes

[1]. Telecommunications Act, 47 U.S.C. § 223 (1996).

[2]. *Miller v. California*, 413 U.S. 15, 34 (1973).

[3]. Kent Markus, acting assistant attorney general, letter to Sen. Patrick Leahy (D-Vt.), May 3, 1995.

[4]. Quoted in Steven Levy, "No Place for Kids?" *Newsweek*, July 3, 1995, p. 47.

[5]. Internet Freedom and Family Empowerment Act, H.R. 1778 (1995).

[6]. *ACLU v. Reno*, 24 Media L. Rep. 1379 (1996).

[7]. *ACLU v. Reno*, 929 F. Supp. 824 (1996).

[8]. Markus.

[9]. See Philip Elmer-Dewitt, "On a Screen Near You," *Time*, July 3, 1995, p. 38. The article was based on a discredited study by a Carnegie Mellon undergraduate.

[10]. The majority of sources of pornography on computer networks are bulletin board services that allow access only to paying customers. That places a generally insurmountable barrier between offensive material and the average child.

[11]. Patrick Leahy, "Study on Means of Restricting Access to Unwanted Material in Interactive Telecommunications Systems," S. 714, 104th Cong., 1st sess., *Congressional Record* 141, no. 65, (April 7, 1995): S 5549.

[12]. Indeed, Justice 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." Markus.

[13]. See Thomas W. Hazlett, "The Rationality of U.S. Regulation of the Broadcast Spectrum," *Journal of Law &*

Economics 33 (1990): 133.

[14]. For example, see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); and *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994). For compelling critiques of the state of the law, see David L. Bazelon, "FCC Regulation of the Telecommunications Press," *Duke Law Journal* (1975): 213; Lucas Powe, *American Broadcasting and the First Amendment* (Berkeley: University of California Press, 1987); and Robert Corn-Revere, "New Age Comstockery: Exon vs. the Internet," *Cato Institute Policy Analysis* no. 232, June 28, 1995, p. 1.

[15]. *Red Lion*, at 393.

[16]. *ACLU v. Reno*, 24 Media L. Rep. at 1379.

[17]. 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 in evidence to warrant such a conclusion.

[18]. Richard Knox, "Women Go Online to Decry Ban on 'Breast,'" *Boston Globe*, December 1, 1995, p. 12.

[19]. For a detailed account of the establishment of federal control over broadcasters, see Hazlett.

[20]. The 1996 Telecommunications Act left radio and TV station licensing virtually untouched.

[21]. AM radio was the only broadcasting service at the time of the 1934 Communications Act. The FCC allocated spectrum for FM and television in subsequent years.

[22]. Federal Communications Commission, *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1249 (1949).

[23]. Federal Communications Commission, *The General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C. 2d 145, 146 (1985) (citing Federal Communications Commission, *Editorializing by Broadcast Licensees*).

[24]. 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 airtime if no one was willing to pay.

[25]. Federal Communications Commission, *Editorializing by Broadcast Licensees* at 1251; Federal Communications Commission, *Fairness Report: The Handling of Public Issues under the Fairness Doctrine and the Public Interest Standard of the Communications Act*, 48 F.C.C. 2d 33 (1974); and Federal Communications Commission, *The General Fairness Doctrine Obligations of Broadcast Licensees* at 160.

[26]. Federal Radio Commission, *Order*, 2 F.R.C. 156 (1928).

[27]. Federal Radio Commission, *Great Lakes Broadcasting Co.*, 3 F.R.C. 36 (1929).

[28]. Powe, p. 109.

[29]. One of the owners of Mayflower Broadcasting Company was a former employee of Yankee Network who had previously complained to the FCC about WAAB's editorial policy.

[30]. Federal Communications Commission, *Mayflower Broadcasting Co.*, 8 F.C.C. 333, 340 (1940).

[31]. Federal Communications Commission, *Editorializing by Broadcast Licensees* at 1246.

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

[33]. *Red Lion* at 375.

[34]. Fred Friendly, *The Good Guys, The Bad Guys, and the First Amendment* (New York: Random House, 1976), p. 33.

[35]. *Ibid.*, p. 35.

[36]. Quoted in *ibid.*, p. 39.

[37]. *Ibid.*

[38]. Quoted in *ibid.*, p. 42.

[39]. Quoted in *ibid.*, p. 38.

[40]. Quoted in *ibid.*, p. 38.

[41]. 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]." Quoted in *ibid.*, p. 76.

[42]. Daniel Schorr, *Clearing the Air* (Boston: Houghton Mifflin, 1977), p. 48.

[43]. 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.

[44]. 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 that 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.

[45]. John Pastore, head of the Senate Communications Subcommittee, quoted in Schorr, p. 62.

[46]. Roger Mudd wrote a balanced but critical commentary on the network's decision, to be aired on CBS Radio the day after the announcement, but 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 return to the practice of instant analysis of presidential speeches. Powe, p. 139.

[47]. Schorr, p. 74.

[48]. *Ibid.*, p. 42.

[49]. During his first 18 months in office Nixon made 14 televised speeches, as many as the total for Eisenhower, Kennedy, and Johnson over a comparable period. *Columbia Broadcasting System Inc. v. FCC*, 454 F.2d 1018, 1020 (D.C. Cir. 1971).

[50]. *Ibid.* at 1027.

[51]. Quoted in Schorr, p. 52.

[52]. The Post's Jacksonville station survived a license challenge in 1970 by the man who would be finance chairman of Nixon's 1972 campaign in Florida. The Miami station survived challenges, in 1970 and 1972, by Nixon allies. Powe, p. 131.

[53]. Federal Communications Commission, *The General Fairness Doctrine Obligations of Broadcast Licensees* at 143, 176.

[54]. *Banzhaf v. FCC*, 396 U.S. 842 (1969).

[55]. William B. Ray, *FCC: The Ups and Downs of Radio-TV Regulation* (Ames: Iowa State University Press, 1990), p. 100.

[56]. 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 has come to the view that "behavioral regulation sucks. The one thing that works is competition, and that's what I keep pushing for." Quoted in "Who's Who: Who Are You Gonna Call? Here Are the Bell Ringers," *National Law Journal*, May 1, 1995, p. A24.

[57]. Federal Communications Commission, *Deregulation of Radio: Report and Order*, 84 F.C.C. 2d 968 (1981).

[58]. *Ibid.* at 971. The FCC subsequently lifted the same rules applying to television station licensees in 1984.

[59]. *Ibid.* at 1014.

[60]. Federal Communications Commission, *Deregulation of Radio: Notice of Proposed Rulemaking*, 73 F.C.C. 2d 457, at 594 (1979).

[61]. Judge David Bazelon argued in 1975 that the Fairness Doctrine was "the most overt form of program regulation in which the FCC engages." Bazelon, p. 219.

[62]. Federal Communications Commission, *The General Fairness Doctrine Obligations of Broadcast Licensees* at 147.

[63]. *Ibid.* at 171.

[64]. *Ibid.* at 147.

[65]. *Ibid.*

[66]. *Ibid.* at 160.

[67]. Congress later attempted (unsuccessfully) to codify the Fairness Doctrine, which would have effectively reimposed the FCC's own regulation.

[68]. Fairness in Broadcasting Act of 1987, S.R. 100-34

(1987).

[69]. See Thomas W. Hazlett and David W. Sosa, "Was the Fairness Doctrine a 'Chilling Effect?': Evidence from the Postderegulation Radio Market," *Journal of Legal Studies* (1997, forthcoming).

[70]. 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." Federal Communications Commission, *Deregulation of Radio: Report and Order* 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.

[71]. Vincent M. Ditingo, *The Remaking of Radio* (Boston: Focal Press, 1995).

[72]. Douglas Davidoff, "Rock to Talk: Indiana AM Radio Saved by the Gift of Gab," *Indiana Business*, October 1,

1993,

p. 21.

[73]. Lawrence Lessing, *Man of High Fidelity* (Philadelphia: Lippincott, 1956).

[74]. Ditingo, pp. 18, 60.

[75]. The source was the *Broadcasting and Cable Yearbook* (New Providence, N.J.: Bowker-Saur), which 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 20 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 that was the first year the yearbook compiled comprehensive data on radio stations by format.

[76]. Music accounted for 90.8 percent of AM programming in 1975 and fell to 51.7 percent in 1995. On FM the share of music formats fell from 89.8 percent to 79.6 percent over the period.

[77]. The "mixed" category consists of formats such as agriculture and drama/literature that neither fit well into one of the other categories nor have any clear relationship between them.

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

[79]. Federal Communications Commission, *Deregulation of Radio: Notice of Proposed Rulemaking* at 491-525.

[80]. *Ibid.*, at 485.

[81]. Hazlett and Sosa.

[82]. We limited our quantitative analysis to AM radio because of changes in the way formats were reported for FM during the sample period.

[83]. AM will have a comparative advantage over FM for talk formats because of differences in cost of operation and sound quality.

[84]. In 1979 the FCC admitted, "Although the Fairness Doctrine requires stations to provide coverage of controversial issues of interest to the community, we [the FCC] have never defined the term 'community' as it applies to fairness issues." *Deregulation of Radio: Notice of Proposed Rulemaking* at 517.

[85]. Steve Russell, "The X-On Congress: Indecent Comment on an Indecent Subject," *American Reporter*, February 8, 1996, reprinted in *Harper's*, May 1996, p. 24, and as "Here Comes the Judge: One Jurist's Lament over and Challenge to the Recently Enacted Telecommunications Act," *Philadelphia City Paper*, February 16, 1996, p. 6. The profanity-filled condemnation of the CDA originally appeared on *American Reporter*, an online journal, as a deliberate challenge to the law. To underscore arguments that the electronic media are treated differently than print, two print publications, *Harper's* and *Philadelphia City Paper*, carried the article and found (obviously) no prosecution in the offing.

[86]. American Civil Liberties Union, Letter to House conference committee, December 4, 1995, at <http://www.aclu.org/congress/cybrltr.html>.

[87]. Pamela Mendels, "AOL May Abandon Chat if Decency Law Stands," *New York Times*, April 1, 1996, at <http://www.nytimes.com/web/docsroot/library/cyber/week/0402decency.html>.

[88]. This view has been thoroughly critiqued by economists and legal experts. See Ronald H. Coase, "The Federal Communications Commission," *Journal of Law and Economics* 2

(1959): 1; Hazlett; and Gregory J. Sidak, "Telecommunications in Jericho," *California Law Review* 81 (1993): 1209.

[89]. Internet Freedom and Family Empowerment Act.

[90]. *ACLU v. Reno*, 929 F. Supp. 824. Although the decision was unanimous, each judge wrote a separate opinion in the case.

[91]. *Ibid.* at 851-52.

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

[93]. See, for example, Coase.

[94]. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[95]. For telephone service, see *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). For cable television, see *Turner Broadcasting* at 2459.

[96]. *ACLU v. Reno*, 929 F. Supp. at 844.

[97]. *Denver Area Consortium v. FCC*, 116 S. Ct. 2374 (1996).

[98]. "Print or Broadcast Model? Judges Pressure Justice Department on Telecom Decency Act," *Communications Daily*, May 13, 1996, p. 1.