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## Recent Developments

### The Fairness Doctrine Redux: Media Bias and the Rights of Broadcasters

Erik Ugland\*

Despite the ideological chasm that still divides Democrats and Republicans, members of both parties share a common conviction that the American mass media are biased against them. While Republicans fulminate about “the liberal press,” the sinister agendas of National Public Radio, and the “CBS Evening News,” Democrats blast media consolidation, Fox News, and the conservative talk-radio juggernaut.<sup>1</sup> This kind of media scapegoating is an enduring and generally harmless feature of American democracy. But when political attacks on the media are coupled with calls for government regulation of media content, it becomes something more than a simple sideshow.

Regulating media content—including news reporting—is precisely what some members of Congress are now proposing as a way to “restore fairness in broadcasting”<sup>2</sup> and counteract the “proliferation of highly partisan networks, news outlets, and ownership groups.”<sup>3</sup> The centerpiece of their campaign, featured in two House bills, is the resurrection of the Fairness Doctrine—the Federal Communications Commission (FCC) policy that from 1949 to 1987 compelled broadcasters to

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1. See, e.g., ERIC ALTERMAN, *WHAT LIBERAL MEDIA? THE TRUTH ABOUT BIAS IN THE NEWS* (2003); BERNARD GOLDBERG, *BIAS: A CBS INSIDER EXPOSES HOW THE MEDIA DISTORT THE NEWS* (2003).

2. Media Ownership Reform Act, H.R. 3302, 109th Cong. § 2(b)(2) (2005).

3. Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. § 2(4) (2005).

address issues of public importance and to air competing points of view on those issues. The Fairness and Accountability in Broadcasting Act,<sup>4</sup> introduced in February by Representative Louise Slaughter, would restore the Fairness Doctrine<sup>5</sup> as well as the FCC's old "ascertainment" policy,<sup>6</sup> which required broadcasters to elicit feedback from their communities about the issues that they should cover.<sup>7</sup> Another House bill, the Media Ownership Reform Act<sup>8</sup> proposed by Representative Maurice Hinchey, would also reinstate the Fairness Doctrine,<sup>9</sup> although as just one piece of a broader effort to limit the size and influence of media conglomerates.<sup>10</sup>

Both of these bills are currently in committee, and ideally, that is where they will stay. Although it may be tempting for politicians to use their power to reign in perceived enemies, and although there is a vast, bipartisan constituency of citizen-critics who would applaud the government's exercise of greater control over the media, it is both impractical and unconstitutional to ask government officials to serve as arbiters of ethics in journalism.

The old Fairness Doctrine forced the FCC to serve that role, and it was an abject policy failure, which is why the

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4. *Id.*

5. *See id.* § 2 ("Each broadcast station licensee shall, consistent with the purposes of this subsection, cover issues of importance to their local communities in a fair manner, taking into account the diverse interests and viewpoints in the local community.").

6. *See id.* ("Each broadcast station licensee shall hold two public hearings each year in its community of license during the term of each license to ascertain the needs and interests of the communities they are licensed to serve.").

7. *See* Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C.2d 650 (1971). The FCC freed radio broadcasters of these requirements in 1981. *See* Deregulation of Radio, 84 F.C.C.2d 968 (1981). It did the same for television broadcasters in 1984. *See* Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 49 Fed. Reg. 33,588 (1984).

8. H.R. 3302, 109th Cong. § 2(b)(2) (2005).

9. *See id.* § 3(a).

10. *See id.* § 4(a) (explaining that the bill would prevent a single company from owning more than five percent of the nation's full-power radio stations and would also impose stronger limits on radio ownership within individual markets). The bill would also codify many of the FCC's existing limits on media ownership, thereby thwarting the Commission's recent efforts to relax those restrictions. *See id.* § 5(c).

Commission abandoned it in 1987.<sup>11</sup> As the FCC explained, not only did the Fairness Doctrine permit “excessive and unnecessary intrusion into the editorial processes of broadcast journalists,”<sup>12</sup> it was also self-defeating. It rewarded broadcasters who eschewed controversial content and imperiled the licenses of those who did not. The Fairness Doctrine was also irregularly enforced and was occasionally abused by politicians seeking to manipulate broadcast content.<sup>13</sup>

Those seeking to establish a new Fairness Doctrine need to acknowledge this unpleasant record, and they need to offer a compelling regulatory rationale to justify such a wide-ranging usurpation of First Amendment rights.

### THE EVOLUTION OF THE FAIRNESS DOCTRINE

The first intimation of a “fairness” obligation on the part of broadcasters did not come from the FCC, but from its predecessor, the Federal Radio Commission (FRC). In 1929, the FRC held that failing to address controversial issues and to present multiple points of view would “not be fair” and “would not be good service.”<sup>14</sup> The policy remained somewhat formless until 1949 when the FCC outlined more plainly the twin obligations of broadcast licensees: (1) “to provide a reasonable amount of time for the presentation . . . of programs devoted to the discussion and consideration of public issues”<sup>15</sup> (Prong One), and (2) “to encourage and implement the broadcast of all sides of controversial public issues”<sup>16</sup> (Prong Two). On several occasions the FCC reexamined and sought to clarify its

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11. See *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *reconsideration denied*, 3 F.C.C.R. 2035 (1988), *review denied*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

12. *Id.* at 5052.

13. See *Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcasting Licensees*, 102 F.C.C.2d 143, 190-194 (1985) [hereinafter 1985 Fairness Report].

14. See *Great Lakes Broad. Co.*, 3 F.R.C. 32, 33 (1929), *aff'd in part, rev'd in part*, 37 F.2d 993 (D.C. Cir. 1930), *cert. dismissed*, 281 U.S. 706 (1930). The Commission declared that the “public interest requires ample play for the free and fair competition of opposing views, and . . . the principle applies not only to addresses by political candidates but to all discussions of issues of public importance.” *Id.*

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

16. *Id.* at 1251.

Fairness Doctrine policy,<sup>17</sup> but it did not relax the requirements or question the legitimacy of their enforcement. That changed in 1985 when the Commission engaged in a comprehensive inquiry into the Fairness Doctrine and concluded that the policy was unnecessary, counterproductive, and constitutionally suspect.<sup>18</sup> The Commission did not immediately rescind the policy, however, because it was unclear whether it could do so without Congressional approval.<sup>19</sup> A year later, the D.C. Circuit Court of Appeals held that the FCC had the authority to unilaterally rescind the Fairness Doctrine,<sup>20</sup> which it did in its 1987 *Syracuse Peace Council* decision.<sup>21</sup> Since then, there have been two unsuccessful attempts by Congress to reinstate the Fairness Doctrine.<sup>22</sup>

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17. See, e.g., *The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1 (1974); *Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598 (1964).

18. See 1985 Fairness Report, *supra* note 13.

19. In some ways, it seemed that the Fairness Doctrine had been transformed from an FCC policy to a federal law by Congress's 1959 amendments to section 315 of the Communications Act. That section defines the equal opportunity rule, stating that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." 47 U.S.C. § 315 (2000). Section 315 also outlines some exceptions to this general rule, and adds that "[n]othing in [the exceptions] shall be construed as relieving broadcasters . . . from the obligation . . . to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." *Id.* Some argued that this language essentially, if somewhat indirectly, codified the Fairness Doctrine, and therefore the FCC lacked the jurisdiction to rescind it. *But see* *Telecommunications Research & Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986) (holding that this statutory language was merely an acknowledgement of the existence of the FCC's Fairness Doctrine policy, not a codification of it), *reh'g denied*, 806 F.2d 1115 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 919 (1987). This opened the door for the FCC to officially repeal the rules.

20. See *Telecommunications Research & Action Ctr.*, 801 F.2d at 518.

21. See *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *reconsideration denied*, 3 F.C.C.R. 2035 (1988), *review denied*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Two related provisions, the personal attack rule, 47 C.F.R. § 73.1920 (2000), and the political editorial rule, 47 C.F.R. § 73.1930 (2000), both avoided this FCC scrutiny and remained in effect for another thirteen years. *But see* *Radio Television News Dirs. Ass'n v. FCC*, 229 F.3d 269 (D.C.Cir. 2000) (holding that the FCC had not provided a sufficient evidentiary foundation to justify continued enforcement of the rules, and the rules were therefore suspended).

22. See H.R. 315, 101st Cong. (1989); S. 742, 100th Cong. (1987).

## CONSTITUTIONAL PROBLEMS

Content-based restraints of speech and press are subject to strict scrutiny,<sup>23</sup> the highest standard of constitutional review, and are nearly always held to violate the First Amendment.<sup>24</sup> Indeed, if the government extended the Fairness Doctrine requirements to communicators using any other medium—print,<sup>25</sup> cable,<sup>26</sup> or Internet<sup>27</sup>—they would be struck down posthaste.

However, because radio and television broadcasters still occupy a disfavored place in the courts' First Amendment jurisprudence, Fairness Doctrine supporters see no constitutional obstacle. They are emboldened by the Supreme Court's 1969 decision in *Red Lion Broadcasting v. FCC*,<sup>28</sup> which upheld the constitutionality of the old Fairness Doctrine. But supporters of the new Fairness Doctrine proposals do not acknowledge that the Court's *Red Lion* framework, and indeed the FCC's entire regime of broadcast regulation,<sup>29</sup> is built upon

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23. The "strict scrutiny" standard requires that the government show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

24. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its messages, its ideas, its subject matter or its content.").

25. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a content-based right-of-reply statute aimed at newspapers, resulting in substantial autonomy for the print media under the First Amendment).

26. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) (distinguishing cable from broadcast television regulation and holding that while content-neutral regulation of cable television should be analyzed under the intermediate rather than the strict scrutiny standard, content-based restrictions will still be analyzed using strict scrutiny), *aff'd*, 520 U.S. 180 (1997).

27. *See Reno v. ACLU*, 512 U.S. 844 (1997) (striking down regulation of indecent content on the Internet and providing protection for online speech equivalent to the protections afforded the print media).

28. 395 U.S. 367 (1969).

29. Examples of broadcast regulations include: broadcasters must provide reasonable opportunities for political candidates to air advertising on their stations; they must give equal time to political candidates if their opponents are allowed use of that broadcast station; they must air three hours of programming each week that is designed to serve the educational interests of children; they must not air advertising for tobacco products; and they must not air content that is indecent. For a general discussion of these requirements, see MASS MEDIA BUREAU, FCC, *THE PUBLIC AND BROADCASTING* (1999),

the “scarcity rationale”—the archaic notion that the broadcast spectrum is a scarce resource, and should therefore be subject to governmental regulation to ensure the public interest is served.

The Supreme Court first endorsed spectrum scarcity as a rationale for broadcast regulation at a time when television viewers were fortunate to receive three or four channels of programming.<sup>30</sup> The broadcast landscape had not changed significantly by the time the Court decided *Red Lion* in 1969. But in the thirty-six years since then, television and radio technology has developed dramatically. Today’s media marketplace bears almost no resemblance to the one the Supreme Court justices knew in the late 1960s. Society’s dramatic movement from media scarcity to media abundance has eviscerated the factual predicates underlying *Red Lion*. *Red Lion*’s force started to decay in the mid-1980s when the FCC declared that scarcity was an untenable basis for broadcast regulation,<sup>31</sup> and it has continued to weaken over the subsequent two decades.

Some proponents of broadcast regulation make a distinction between numerical scarcity and allocational scarcity,<sup>32</sup> arguing that even if there are sufficient broadcast licensees in a market to provide diverse programming, the electromagnetic spectrum is still a finite resource, so the government must choose who is allowed to use that resource. Although the spectrum is finite, it certainly does not necessitate or justify government micromanagement of private political speech. Surely the FCC can address the technical dilemmas posed by finite spectrum without assuming the

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[http://www.fcc.gov/mb/audio/decdoc/public\\_and\\_broadcasting.html](http://www.fcc.gov/mb/audio/decdoc/public_and_broadcasting.html).

30. *NBC v. United States*, 319 U.S. 190, 216 (1943) (“The facilities of radio are not large enough to accommodate all who wish to use them.”).

31. *See* *Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), *reconsideration denied*, 3 F.C.C.R. 2035 (1988), *review denied*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). Here, the court stated:

We no longer believe that there is scarcity in the number of broadcast outlets available to the public. Regardless of this conclusion, however, we fail to see how the constitutional rights of broadcasters – and indeed the rights of the public to receive information unencumbered by government intrusion – can depend on the number of information outlets in particular markets.

*Id.* at 5054.

32. *See id.* (describing the difference between these two rationales and why neither is a sufficient basis for broadcast regulation).

editorial duties of a station manager or news director.

This is not to say that the First Amendment completely prohibits FCC enforcement of public interest standards for broadcasters. The FCC has a duty to ensure that spectrum space is not wasted by delinquent licensees.<sup>33</sup> But content-related judgments should only be made during the license renewal process, and the standard should be set so high—gross abuse—that broadcasters have the autonomy needed to make unorthodox programming choices. For example, the FCC might be justified in denying a renewal request from a licensee whose programming lineup consisted of a single episode of “Leave it to Beaver” broadcast on a continuous loop. But the same would not be true of a broadcaster whose programming challenged the precepts of a certain religion or addressed radical political philosophies.

Proponents of broadcast regulation occasionally lean on a third rationale: because broadcasters use public property, the government has a right to attach public-service conditions to their license.<sup>34</sup> There is nothing unique, however, about broadcasters’ use of public property. All mass media use public property. Newspapers use city sidewalks and public buildings for their news racks, and cable system operators and Internet service providers use public rights-of-way (public land and publicly owned telephone polls) to connect to subscribers. Some non-broadcast media, such as satellite providers and wireless Webcasters, even use the electromagnetic spectrum, and yet they are free from the public-service obligations and content-based regulatory burdens imposed upon broadcasters.

The regulatory rationales that undergird broadcasters’ second-class status are no longer viable. They are either specious on their face or their factual foundations have deteriorated to the point that they cannot be credibly applied. The whole regime of restrictions to which broadcasters are subject is ripe for a constitutional challenge. But at the very least, the imposition of a new content-based law—even one motivated by a good-faith desire to ensure “fairness”—cannot be tolerated as a matter of policy and cannot stand as a matter of First Amendment law.

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33. See *NBC*, 319 U.S. at 216 (“The facilities of radio . . . cannot be left to wasteful use without detriment to the public interest.”)

34. See 47 U.S.C. § 309(a) (2000) (explaining that broadcasters are obliged under the Communications Act of 1934 to serve the “public interest, convenience, and necessity”).



## PRACTICAL PROBLEMS

Setting aside the Fairness Doctrine's constitutional imperfections, there are a number of practical problems that supporters of the Hinchey and Slaughter bills will also have to confront. It should be made clear that neither of the two bills before Congress represents a reconceptualization of the old Fairness Doctrine. No attempt is made to modify its purposes or application. They simply call for a reactivation of the same policy that the FCC assailed, and ultimately repealed, two decades ago. All of the problems identified by the FCC in its 1985 Fairness Report and in its ruling in *Syracuse Peace Council* would persist today.

One of the absurdities of the Fairness Doctrine is that it allows a group of political appointees to make delicate judgments about the fairness of news reporting. Although the FCC is an Independent Regulatory Agency (IRA), it is by no means nonpartisan. Each of the five commissioners is appointed by the President, and each identifies with a political party. The President also determines the balance of power on the Commission, with a three-member majority sharing the same political party as the President. In addition, the FCC is heavily lobbied,<sup>35</sup> and its policies have a significant influence on the political process.<sup>36</sup>

Giving political appointees this kind of responsibility creates obvious risks of either unintended bias or overt abuse. Will commissioners be influenced by their own political affiliations and loyalties? Will party leaders pressure them to rule a certain way on Fairness Doctrine appeals? Will *quid pro quo* arrangements be made between elected officials and either broadcasters or FCC officials? It would be easy for Fairness Doctrine supporters to dismiss these as hypothetical concerns, but there is a history of government intimidation of broadcasters that cannot be overlooked.<sup>37</sup> In the 1970s, the

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35. See Bob Williams, *Behind Closed Doors: Top Broadcasters Met 71 Times with FCC Officials*, CENTER FOR PUBLIC INTEGRITY, May 29, 2003, <http://www.publicintegrity.org/telecom/report.aspx?aid=83> (discussing how FCC Chairman Michael Powell had said in a 2003 interview with CNBC that he believed the FCC was the second most heavily lobbied federal institution after the U.S. Congress).

36. For example, the FCC enforces the equal opportunity rule and the equal time rule of the Communications Act, which political candidates depend upon to reach voters with their messages. 47 U.S.C. § 315(a) (2000).

37. See RICHARD E. LABUNSKI, *THE FIRST AMENDMENT UNDER SIEGE*:

Nixon Administration, often at the direction of Nixon himself,<sup>38</sup> sought to tame broadcasters by threatening nonrenewal of licenses or the imposition of sanctions by the Securities and Exchange Commission<sup>39</sup> or the Justice Department.<sup>40</sup> Additionally, the Kennedy and Johnson Administrations organized campaigns to flood broadcasters with complaints and demands for free air time in an attempt to force broadcasters to abandon their more right-wing programming.<sup>41</sup> There are scores of other examples of this kind of pressure being put on broadcasters, who have always been more vulnerable to outside influence than their print counterparts.<sup>42</sup>

Even without evidence of actual abuse, risks are still present. As the FCC noted in its 1985 Fairness Report: “[T]he fairness doctrine provides governmental officials with the dangerous opportunity to abuse their position of power in an attempt either to stifle opinion with which they disagree or to coerce broadcasters to favor particular viewpoints which further partisan political objectives.”<sup>43</sup> Because these dangers are not merely conceptual, because they implicate core First Amendment principles, and because they threaten the integrity of both journalism and the political process, it would be foolish to simply trust this matter to the good will of the FCC, particularly in today’s divisive political environment.

Supporters of the Hinchey and Slaughter bills clearly put a lot of trust in the FCC’s ability to be fair and to resist outside

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THE POLITICS OF BROADCAST REGULATION 134-37 (1981).

38. See David L. Bazelon, *FCC Regulation of the Telecommunications Press*, 1975 DUKE L.J. 213, 247-51 (quoting an Oct. 17, 1969, memo for H.R. Haldeman from J.S. Magruder in which Magruder describes twenty-one instances in a thirty-day period in which President Nixon directed his staff to take action in response to unfair news coverage).

39. See LABUNSKI, *supra* note 37, at 135 (quoting White House Special Counsel Charles Colson as saying to CBS Vice-Chairman Frank Stanton, “We’ll bring you to your knees on Wall Street . . .”).

40. See *id.* at 135-36 (noting that the Nixon Justice Department brought several suits against the networks for alleged violations of antitrust laws, most of which were “quickly dismissed” by the courts); see also Bazelon, *supra* note 38, at 248 (quoting H.R. Haldeman’s proposal that the White House use the IRS to investigate media companies and the antitrust laws to “investigate various media,” as he believed “[e]ven the possible threat of anti-trust action . . . would be effective in changing their views”).

41. FRED W. FRIENDLY, *THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT* 40-42 (1976).

42. See generally LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987).

43. 1985 Fairness Report, *supra* note 13, at 192.

influence, but their biggest leap of faith is in believing that a new Fairness Doctrine will actually solve, or in any way alleviate, the problem of media bias. Experience with the old Fairness Doctrine suggests otherwise.

The old Fairness Doctrine did not enhance either the amount or the substantive balance of broadcast programming on public-affairs issues, and in many cases it encouraged broadcasters to avoid such content.<sup>44</sup> In 1985, the FCC presented statements from dozens of broadcasters who concluded that the best way to elude an FCC enforcement proceeding was to simply abandon controversial content altogether.<sup>45</sup> Because the FCC did not take any action against a broadcaster unless a member of the audience complained, and because most people were only motivated to complain when they perceived a violation of Prong Two (when a station fails to present all sides of controversial issues), the result was that broadcasters sanitized rather than expanded their content. The old Fairness Doctrine, then, was not merely unhelpful; it exacerbated the problems it was created to solve.

Those problems would be writ large today. Over the past few years, broadcasters have become accustomed to censoring themselves in the wake of the FCC's confused crackdown on indecency,<sup>46</sup> and they have edited or jettisoned scores of programs fearing that they might provoke FCC forfeiture proceedings. ABC, for example, which has traditionally commemorated Veterans Day by airing an unedited version of the film "Saving Private Ryan," abandoned that practice in

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44. See Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postregulation Radio Market*, 26 J. LEGAL STUD. 279, 295-99 (1997) (noting that the amount of informational programming in radio increased substantially in the years following the Fairness Doctrine's repeal, suggesting that the Fairness Doctrine had created a disincentive to produce such programming and that, once freed of those limitations, broadcast station owners would begin increasing that type of content).

45. See 1985 Fairness Report, *supra* note 13, at 169-88.

46. Recently the FCC has imposed significant fines against broadcasters in several high-profile cases. It entered into a consent decree with Viacom for \$3.5 million as punishment for the CBS Super Bowl halftime show in which Janet Jackson's breast was exposed. It also entered into a consent decree with Clear Channel for \$1.75 million to settle several outstanding Notices of Apparent Liability (NALs). And it has fined several other broadcasters as a result of indecent speech by media celebrities such as rock star Bono and shock jock Howard Stern. See FCC, FCC Actions, <http://www.fcc.gov/eb/oip/Actions.html> (last updated Oct. 13, 2005).

2005 because it worried that the film's profanity might trigger FCC punishment.<sup>47</sup> For similar reasons, PBS substantially edited its program, "A Company of Soldiers," about the lives of troops in Iraq.<sup>48</sup> These are just a couple of examples of the kind of collateral damage that a regime of content-based intervention can produce.

As reluctant as broadcasters are to cross the line on indecency, they would likely be even more inhibited by punishments targeting political content. Even in the absence of Fairness Doctrine penalties, broadcasters have shown an increasing wariness of programs and advertisements that could potentially antagonize half of the audience. In 2004, for example, CBS rejected an ad from MoveOn.org to be run during the Super Bowl that criticized the Bush Administration's tax cuts,<sup>49</sup> several ABC affiliates refused to air an episode of "Nightline" in which anchor Ted Koppel read the names of American troops killed in Afghanistan and Iraq,<sup>50</sup> and both NBC and CBS, along with many of their affiliates, rejected an ad from the United Church of Christ that contained a split-second image of two men holding hands.<sup>51</sup> More recently, several broadcasters refused to air an ad from famed antiwar protester Cindy Sheehan in which she urged President Bush to withdraw troops from Iraq.<sup>52</sup>

Adding a new layer of FCC punishments would only encourage more editorial timidity. Although on its face Prong

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47. See Lisa deMoraes, "Saving Private Ryan:" A New Casualty of the Indecency War, WASH. POST, Nov. 11, 2004, at C1, available at <http://www.washingtonpost.com/wp-dyn/articles/A41464-2004Nov10.html>.

48. See PBS, Frontline: A Company of Soldiers—Frequently Asked Questions, <http://www.pbs.org/wgbh/pages/frontline/shows/company/faqs/> (last updated Feb. 22, 2005) (explaining that although Frontline edited the program, it nevertheless believed that some of the strong language kept in the piece "was an integral part of our journalistic mission: to give viewers a realistic portrait of our soldiers at war").

49. See Timothy Karr, *CBS Cuts MoveOn, Allows White House Ads During Super Bowl*, MEDIACHANNEL.ORG, Jan. 16, 2004, <http://www.mediachannel.org/views/dissector/affalert131.shtml>.

50. See *McCain Rebukes Sinclair 'Nightline' Decision*, CNN.COM, April 30, 2004, <http://www.cnn.com/2004/SHOWBIZ/TV/04/29/abc.nightline/>.

51. See Lynn Neary, *Some TV Networks Refuse to Run Church Ad*, NPR.ORG, Dec. 2, 2004, <http://www.npr.org/templates/story/story.php?storyID=4197277>.

52. See Bill Wallace, *Sheehan's Anti-War Message Follows Bush Trail: 60-Second Ad Airs on Stations in Idaho, Utah*, S.F. CHRON., Aug. 27, 2005, at A10.

One—the “reasonable time” provision—might seem like a potential antidote to this problem, in practice it would be extremely difficult for a complainant or the FCC to make the case that a broadcast station’s programming is so devoid of public-affairs content that it should be fined or have its license revoked. In fact, under the old Fairness Doctrine, only one broadcaster was ever punished under Prong One.<sup>53</sup> The FCC would also be hard-pressed to establish sensible criteria for determining how much public-affairs programming is sufficient.

An even greater challenge would be identifying standards for assessing the “fairness” of programming. Would local newscasts be targeted for not presenting the viewpoints of foreign critics of the war in Iraq? Would broadcasters televising presidential press conferences be expected to provide response time to representatives of other parties? Would NBC affiliates be vulnerable for airing weekly episodes of “Will and Grace” without giving anti-gay bigots or Christian fundamentalists an opportunity to present their points of view about homosexuality? These are not merely practical concerns; they have a constitutional dimension as well. If the Fairness Doctrine requirements are so vague that broadcasters do not know how to stay within the bounds of the law, it violates their right to due process under the Fifth Amendment.<sup>54</sup>

Another problem for broadcasters would be determining which viewpoints merit their attention. Because it is impossible to air “all sides” of public issues, as is technically required by Prong Two, it is inevitable that broadcasters would seek to comply by clumsily matching liberal content with conservative content, pro-choice speech with pro-life speech, and so on. The complexities of being truly inclusive would be abandoned in favor of a perfunctory presentation of the most simple and accessible dichotomies. The Fairness Doctrine would reinforce the one-dimensional, red-blue template that has infected our political discourse, it would stamp out nuance,

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53. See *Mink*, 59 F.C.C.2d 987 (1976) (holding that a West Virginia radio station violated Prong One by refusing to air a congresswoman’s taped commentary on the hazards of strip-mining during a period when Congress was considering legislation on that practice).

54. See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (stating that the vagueness of a law limiting online indecency was problematic as both a matter of First Amendment free press law and as a matter of Fifth Amendment due process law).

and it would give excessive weight to certain points of view by dividing every issue into equal halves. One can imagine broadcasters diligently devoting equal time to pro and con perspectives on issues like global warming and evolution, even though most scientists believe in global warming and nearly every scientist subscribes to the theory of evolution.<sup>55</sup> Although the Fairness Doctrine seems to recognize that some points of view are not worthy of *equal* attention, in practice it would be hard for broadcasters to resist this kind of feckless neutrality.

### CONCLUSION

Whether the supporters of the Hinchey and Slaughter bills ultimately prevail, they have at least chosen an opportune time to advance their cause. With swelling public antipathy toward journalists and with forty-two percent of the public saying that the news media have “too much freedom,”<sup>56</sup> the conditions are ideal for Congressional action. This is a clear instance, however, where Congress must not slavishly march to the drumbeat of popular opinion and must instead protect the First and Fifth Amendment rights of broadcasters, while at the same time shielding the FCC from unnecessary administrative burdens.

The constitutional and logistical issues raised by resurrecting the Fairness Doctrine are so abundant, and the potential gain—even in the most optimistic scenario—is so miniscule, that Congress should follow the FCC’s lead, recognize that it is both unconstitutional and impractical to legislatively direct the editorial choices of broadcasters, and let the Fairness Doctrine rest in peace.

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55. See, e.g., Mike Fancher, *Finding Agreement About Global Warming*, SEATTLE TIMES, Oct. 9, 2005, available at [http://seattletimes.nwsourc.com/html/localnews/2002549334\\_fancher09.html](http://seattletimes.nwsourc.com/html/localnews/2002549334_fancher09.html); Stephen Jay Gould, *Evolution as Fact and Theory*, in HEN’S TEETH AND HORSE’S TOES 254 (1994), available at [http://www.stephenjaygould.org/library/gould\\_fact-and-theory.html](http://www.stephenjaygould.org/library/gould_fact-and-theory.html).

56. See FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT REPORT 24 (2004).