THE FAIRNESS DOCTRINE IN LIGHT OF HOSTILE MEDIA PERCEPTION

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I. INTRODUCTION

In ancient mythology the fabled phoenix dies and then emerges once again from the ashes. The resurrection of the Fairness Doctrine from the ashes of oblivion to a hot button issue in 2008 is one of the most astounding accounts in broadcast regulation. For decades, U.S. broadcast policy held inviolate the notion of forced message parity, a sort of censorship in reverse. Broadcast stations were required to provide opposing views of a given debate. A court case and a deregulatory-minded Federal Communications Commission ("FCC") changed all that in the 1980s when it discontinued the policy. Despite various feeble attempts to revive the Fairness Doctrine, it remained quite lifeless for the next two decades. Then in 2007, murmurs of resurrecting the Fairness Doctrine began to once again receive some serious consideration.

The Fairness Doctrine was the name given to a two-fold duty the FCC required of broadcasters from the 1940s through most of the 1980s. The first part demanded that broadcasters devote a reasonable amount of time to important public issues. The second part required fair coverage to provide opportunities for the presentation of contrasting views.† The Fairness Doctrine was repealed during the deregulatory period of the Reagan Administration, relegating the concept to near irrelevance. Although this policy was abandoned over 20 years...
ago, recent statements by public officials reasonably suggest that some have optimistic hopes that the doctrine will rise again.\(^2\)

Any discussion on the possible resurrection of the Fairness Doctrine should address the phenomena of hostile media perception ("HMP"). Hostile media perception refers to the observed phenomenon in which individuals perceive the media to be biased towards their viewpoint. This bias is prevalent with both conservative and liberal audiences. Much of the literature regarding HMP focuses on the question of press bias. This paper argues that this same phenomenon would also have implications if the Fairness Doctrine were ever reinstated. More specifically, due to HMP, viewers would merely discount any additional views resulting from enforcement of a "fairness doctrine" as media bias, neutralizing the intended effects of the Fairness Doctrine. Such a policy change would result in the additional cost of enforcement with little-to-no perceivable benefit to the public interest.

Part II introduces the Fairness Doctrine and provides a brief history. It then examines some of the problems involved with the original Fairness Doctrine comprising both constitutional and practical quandaries. Part III provides an overview of HMP. Part IV discusses the implications HMP has for any renewed calls for a fairness policy.

### II. THE FAIRNESS DOCTRINE: BACKGROUND

Given its controversial development and abundance of detractors, the likelihood of a serious revival of the Fairness Doctrine at one time seemed doubtful at best.\(^3\) Yet, until the 2010 midterms, revived political winds pointed toward such a possibility. Historically, Democrats have been seen as the strongest ad-

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\(^2\) See, e.g., Robert M. McDowell, Comm'n, Fed. Comm'n Comm'n, Address at the National Religious Broadcasters Capitol Hill Summit (Sept. 4, 2009) [hereinafter McDowell Address] (commenting on achieving the original doctrine's "viewpoint balancing objective through a different route"); *Her Royal Fairness*, THE AMERICAN SPECTATOR (May 14, 2007, 12:09 AM), http://spectator.org/archives/2007/05/14/her-royal-fairness (noting that prior to the 2008 Congressional elections, Democrat leaders Nancy Pelosi and Steny Hoyer proclaimed that they would "aggressively pursue reinstatement of the... Fairness Doctrine"); Alexander Bolton, GOP Prep for Talk Radio Confrontation, THE HILL, June 27, 2007, http://thehill.com/homenews/news/12407-gop-preps-for-talk-radio-confrontation (quoting Senator Dick Durbin (D-III.) as saying "It's time to reinstitute the Fairness Doctrine... I have this old-fashioned attitude that when Americans hear both sides of the story, they're in a better position to make a decision.").

\(^3\) See Josh Silver & Marvin Ammori, FREE PRESS, THE FAIRNESS DOCTRINE DISTRACTION 3-4 (2009), http://www.freepress.net/files/fp-FairnessDoctrine.pdf (providing a brief history of the political arguments between Democrats and Republicans since Congress repealed the Fairness Doctrine in 1987).
vocates for the Fairness Doctrine. With 2006 witnessing the election of a Democratic Congress, and the 2008 presidential election resulting in a Democratic White House, conservatives grew increasingly concerned that nothing stood in the way of bringing back the Fairness Doctrine. In June 2007, the Center for American Progress, a progressive think tank headed by John Podesta, released a report called, *The Structural Imbalance of Political Talk Radio*, which argued for a revival of broadcast content regulation to address the gap between the success of conservative talk radio and failure of liberal talk radio. President Obama’s assurances that he did not plan to reinstate the Fairness Doctrine did little to quiet such suspicion. While the primary opponents of

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the Fairness Doctrine are currently conservative, this is by no means a conservative issue. Historically, opponents from both the right and the left found the Fairness Doctrine to be problematic throughout most of its existence. The current partisan differences seem to have developed in the 1980s. Given bipartisan doubts, alarm over renewal of the Fairness Doctrine may be dismissed simply as fear mongering or political posturing. Yet, comments from experts and policymakers following the 2008 election lent a certain amount of credence to such claims.


A. Historical Development of the Fairness Doctrine

The basic principles of the Fairness Doctrine date back to the 1940s and the Mayflower Doctrine, but its fundamental principles trace back to the formative years of the FCC itself. Congress created the FCC and its predecessor, the Federal Radio Commission ("FRC"), in response to an untenable situation created by the explosion of innovative radio enthusiasts and the electromagnetic cacophony that followed. With the regulation of radio also came the responsibility of determining who received a license and who did not. Consequently, licensing regulation created a situation where the majority of Americans were prohibited from broadcasting their voices at the expense of the few who retained exclusive rights to the same. Hence, fairness was a primary preoccupation of the Commission from its inception, and was linked to the pursuit of the public interest. In the late 1920s, the FRC stated:

It would not be fair, indeed it would not be good service to the public to allow a one sided presentation of the political issues of a campaign. In so far as a program consists of discussion of public questions, public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies not only to addresses by political candidates but to all discussions of issues of importance to the public.

The Communications Act of 1934 consolidated regulation of various communication technologies into one agency. The FRC was abolished and much of its responsibilities, as well as conceptual frameworks such as "fairness," were rolled into the new Federal Communications Commission. As discussed be-
low, fairness was part and parcel of the FCC’s policy goals.

In its *Mayflower* decision, the FCC prohibited editorializing by stations under the tacit presumption of fairness.\(^7\) Mayflower Broadcasting Corporation unsuccessfully applied for a frequency already in use by WAAB, owned by Yankee Network, Inc., but WAAB faced heavy FCC scrutiny with its own renewal application.\(^8\) Though it did ultimately grant the renewal, the Commission found that the station had violated the Commission’s non-advocacy policy. It stated, “[t]ruly free radio cannot be used to advocate the causes of the licensee. It cannot be used to support the candidacies of his friends. It cannot be devoted to the support of principles he happens to regard most favorably.”\(^9\)

With the *Mayflower* decision, the FCC began to shape the two prongs of the Fairness Doctrine. It also marked one of the FCC’s most restrictive and possibly controversial eras of the policy.\(^20\) However, the heavy-handed policy of the “Mayflower Doctrine” soon proved to be unworkable and in a 1949 policy statement, known as the *Report on Editorializing*, the FCC softened its stance on editorializing and “returned to its ‘balanced program’ view.”\(^21\) The Commission stated, “The most significant meaning of freedom of the radio is the right of the American people to listen to this great medium of communications free from any governmental dictation as to what they can or cannot hear and free alike from similar restraints by private licensees.”\(^22\) Nevertheless, broadcaster’s speech rights were to be balanced with the American people’s right to listen, and that editorializing was still subject to a standard of “overall fairness.”\(^23\) The 1949 report is generally recognized as the formalization of the FCC’s Fairness Doctrine.\(^24\) In 1959, Congress amended the Communications Act of 1934 to exempt newscasts from the requirement to provide equal airtime to federal candidates.\(^25\) Lest the amended language create the presumption

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17 *In re Mayflower Broadcasting Corp.* 8 F.C.C. 333, 341 (1941).
18 *Id.* at 333-334.
19 *Id.* at 340.
21 Horwit, supra note 13, at 159.
23 *Id.* at 1246, ¶ 1.2.
24 See Jung, supra note 4, at 9 (explaining that “[m]ost agree this 1949 commission report formalized” the Fairness Doctrine policy); Simmons, supra note 20, at 45.
25 See H.R. Rep. No. 1069 (1959), reprinted in 1959 U.S.C.C.A.N. 2582, 2583. Congress voted to amend section 315(a) of the Communications Act of 1934 “to provide that the equal-time provisions with respect to candidates for public office shall not apply to news and other similar programs”).

The 1959 Amendment stemmed from worries newscasts would not cover federal candi-
of weakening the Fairness Doctrine, Congress included language reaffirming broadcasters’ continued responsibility to act in the public interest and “afford reasonable opportunity for the discussion of conflicting views on issues of public importance.”26 A decade later, in its landmark Red Lion decision the Supreme Court affirmed the Doctrine’s constitutionality and recognized Congress’s statutory approval of the rule in the 1959 Amendment.27

The 1980s ushered in the deregulatory policies of the Reagan Revolution in general and renewed attacks on the Fairness Doctrine from the Fowler Commission in particular. This raised intense political debates over whether the Doctrine was in fact codified by the 1959 Amendment28 and affirmed by Red Lion29,30. In 1985, the FCC issued its Fairness Report, which asserted that the doctrine was no longer achieving its intended effect but actually chilled speech on controversial issues and unduly interfered with freedom of the press.31 An additional purpose of the report was to demonstrate that the Red Lion had relied on incorrect assertions that the Fairness Doctrine did not inhibit coverage or important and controversial issues32 and that the Court’s decision in Red Lion was based on a marketplace that no longer existed due to significant technological innovations.33 The FCC sidestepped the question of whether it had the requisite statutory authority to eliminate the doctrine,34 instead deferring that to Congress in light of the new information it had provided. A seismic shift in the debate seems to have occurred in a case challenging the FCC’s interpretation that Section 315(1) did not compel it to apply the Fairness Doctrine to new teletext technologies if it deemed it would inhibit development of

dates for fear of having to provide the same amount of coverage to their opponents demonstrating that congress at least tacitly recognized the potential chilling effect of the Fairness Doctrine. FRED W. FRIENDLY, THE GOOD GUYS, THE BAD GUYS, AND THE FIRST AMENDMENT: FREE SPEECH vs. FAIRNESS IN BROADCASTING 25-26 (1976).

26 Id. at 2584.
28 See Jung, supra note 4, at 60-62,91,96.
29 Id. at 40, 93, 235.
31 In re Section 73.1910 of the Commission’s Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, Report, 102 F.C.C. 2d 142, 145 (1985) (stating the Commission “no longer believe[s] that the fairness doctrine, as a matter of policy, serves the public interest” and that the doctrine has an “impermissible ‘chilling’ effect’ on the free expression of ideas.”).
32 Jung, supra note 4, at 114.
33 Id.
the technology. In his opinion, Federal Appeals Judge Robert Bork, joined by Judge Anton Scalia, wrote that the 1959 Amendment did not compel the FCC to enforce the policy but merely ratified the FCC's position at that time that the Fairness Doctrine served the public interest.\textsuperscript{35} Two years later, the courts clarified \textit{Red Lion}, explicitly declaring that the doctrine was not mandated by Congress and the FCC was not \textit{required} to enforce it.\textsuperscript{36} On August 4, 1987, the FCC officially repealed the Fairness Doctrine.\textsuperscript{37}

\subsection*{B. Previous Problems with the Fairness Doctrine}

An overarching problem of the Fairness Doctrine was the basic premise of the doctrine itself: the enforcement of "fairness." Former NBC correspondent and attorney Ford Rowan illustrates the dilemma by posing a hypothetical: "Suppose the government, in an effort to promote this ideal, enacted a Goodness Doctrine requiring that citizens be good."\textsuperscript{38} Such a goal is certainly laudable, and the implementation, though inconvenient, could possibly be justified by the potential benefits. However, such a law would create issues of its own:

There would be immediate practical problems, however, in implementing the Goodness Doctrine. Aside from those who are downright evil, most people fail to be good all the time. Few would measure up to a Goodness Standard. Moreover, honest people can disagree about what's good in a particular situation. The vagueness inherent in legislating goodness would, of necessity, leave a lot of discretion to the individual. Many people might act reasonably, in good faith, only to find the government regulator's idea of goodness did not correspond to their own. On the other hand, some would take advantage of the flexibility built into such a doctrine to try to rationalize heinous behavior.

The resulting disparity in conduct would cry out for government action. People would not know what was expected of them; abuses would be highlighted. Before long it would become clear that government policy is inadequate and inconsistent when it requires adherence to a vague standard of right conduct. Vigorous regulation would risk unacceptable infringement upon individual freedom.\textsuperscript{39}

\textsuperscript{36} Meredith Corp. v. FCC, 809 F.2d 863, 869, 872 (D.C. Cir. 1987).
\textsuperscript{38} Rowan, \textit{supra} note 20, at 1.
\textsuperscript{39} \textit{Id.} at 1-2.
Many societies aspire to be "good" societies and rely on laws dictated by the norms and precepts of their cultures to do so. Yet aspiration turns to folly when societies attempt to prescriptively enforce virtue through law, and laws are best when they are proscriptive rather than prescriptive. Rowan notes that the same problems that make such a hypothetical untenable similarly plagued attempts to enforce the public virtue, and public interest, of "fairness." From its inception, the Fairness Doctrine was controversial. During its 38 years in existence, the Fairness Doctrine has faced an extensive barrage of legal and academic debates focusing on a myriad of economic, social and constitutional issues. Never during this time did it achieve any degree of affirmative consensus. Criticism of the doctrine fell into two main categories, constitutional concerns and enforcement issues.

1. Constitutional Criticisms

At the heart of the constitutional debate is the question of to what extent did the policy and its implementation constitute an abridgement of speech? Due to the technological limitations that prevent everyone from using the limited electromagnetic resource, the government stepped in to choose who could have access. Broadcasters became trustees of a "public resource." University of California San Diego communication professor Robert Horwitz states,

In theory, they had to accommodate the views, tastes, and concerns of those excluded from the airwaves. Broadcast licensees were entrusted with a piece of public domain, and were to act as fiduciaries on behalf of the public, as proxies for those who did not have access to the airwaves.

Thus, broadcasters could not expect absolute First Amendment privileges. Still, as Horwitz notes, broadcasters were not common carriers; yet

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40 See id. at 2 (noting the difficulties of quantifying and measuring fairness similarly made it difficult for the Government to enforce its Fairness Mandate).
41 See FRIENDLY, supra note 25, at 12-77 (providing an overview of the academic and legal challenges of the Fairness Doctrine from its implementation through its demise in 1987). See discussion infra Part II.B.1.
42 See FRIENDLY, supra note 25, at 15-16 (describing the government's constitutional context for regulating the airwaves).
43 HORWITZ, supra note 13, at 119-120.
44 Id. at 120.
45 Id. at 119.
46 The Communications Act of 1934 provides for the classification of common carrier. A distinguishing characteristic of common carriers is they provide a service to the public indiscriminately See FCC v Midwest Video Corp., 440 U.S. 689 (1979). See also Eli M. Noam, Beyond liberalization II: The impending doom of common carriage, 18.6 TELECOMMUNICATIONS POLICY, 435-452 (Aug. 1994). The distinction between common
Broadcast regulation essentially represented an uneasy compromise between formal First Amendment protections and a narrow form of common carrier obligations. The broadcaster had to provide equal opportunity of air time to candidates for political office and were generally obliged to present balanced programming. (This general obligation was later codified into the FCC’s fairness doctrine.)

This left regulators with the equivalent of “walking a constitutional tightrope,” as noted by the Supreme Court:

This role of the Government as an “overseer” and ultimate arbiter and guardian of the public interest and the role of the licensee as a journalistic “free agent” call for a delicate balancing of competing interests. The maintenance of this balance for more than 40 years has called on both the regulators and the licensees to walk a “tightrope” to preserve First Amendment values written into the Radio Act and its successor, the Communications Act.

While the Fairness Doctrine still operated as good law, the courts struggled with various competing First Amendment considerations. U.S. Court of Appeals Judge Skelly Wright observed:

In some areas of the law it is easy to tell the good guys from the bad guys. In the current debate over the broadcast media and the First Amendment, however, each debater claims to be the real protector of the First Amendment, and the analytical problems are much more difficult than in ordinary constitutional adjudication.

For example, in its Mayflower decision, while arguably enacting its most repressive restrictions on broadcasters’ free speech, the FCC used a free speech rationale to justify its actions:

Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a 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.

carrier and content provider in telecomm law dates back to a contractual agreement on July 1, 1926 to resolve various intra-industry battles between the “Radio Group” led by RCA and the “Telephone Group” led by AT&T. The agreement averted potentially paralyzing competition between the two groups and in effect created the division between broadcasting, which would have editorial authority, albeit somewhat limited, over content; and telecommunications, which transmitted messages for others, irrespective of the content. HORWITZ, supra note 13, at 115-117. This has had legal implications in terms of differing rights and responsibilities of producers versus distributors. See Cubby, Inc. v. CompuServe Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995); 47 U.S.C. § 230.

47 Id. at 120.
48 ROWAN, supra note 20, at 17.
50 Judge Skelly Wright, Commencement Address at The George Washington University National Law Center (June 3, 1973) quoted in FRIENDLY, supra note 25, at IX.
51 In re Mayflower Broadcasting Corp. 8 F.C.C. 333, 340 (1941).
Some contended the Fairness Doctrine (unlike censorship) added to the number of voices.52 Even assuming such were the case, the doctrine raised a First Amendment issue of forcing speech, which was seen as problematic regardless of the professed benefits.53 Yet many journalists and broadcasters argued that the policy was an unconstitutional intrusion of government into content and complained that FCC enforcement pushed stations to be circumspect in their coverage of controversial issues.54 Such was the case in 1980 when all three television networks refused to air an issue ad produced by Mobil Oil for fear it would prompt Fairness Doctrine requests.55 On another occasion, ABC canceled airing the halftime show of a college football game over concerns that a planned anti-war protest would trigger Fairness complaints.56

The Fairness Doctrine reached beyond the national debate, delving into state politics as well. During the 1978 California campaign, which included the ratification of California Supreme Court Chief Justice Rose Bird, opponents aired two ads critical of Bird.57 Her supporters urged TV stations not to carry the advertisement, invoking the Fairness Doctrine under the argument that judicial ratification differed from traditional political campaigns and the Equal Opportunity rule.58 Thus, they contended, stations should also air pro-Bird ads at no cost. The result was that no television stations in the state’s two largest markets—the Bay Area and the Los Angeles basin—accepted the ads, effectively ending the campaign against her after stripping opponents of their most effective form of communication.59 Whether such threats were an appropriate appli-

52 See ROWAN, supra note 25, at 32.
53 Id.
54 See FRIENDLY, supra note 25, at 13-15 (describing how writer and critic Gilbert Seldes called Journalist Edward R. Murrow’s coverage of Senator Joseph R. McCarthy was more of an unfair attack, and less about fairness in coverage); JUNG, supra note 4, at 9-10 ; ROWAN, supra note 20, at 15 et seq.
56 In re Complaint of Student Assoc. of the State Univ. of New York, Memorandum Opinion and Order, 40 F.C.C. 2d 510, 511 (1973).
57 See PREBLE STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT 49 (1981). One ad featured a disturbing rape scenario, where the announcer’s voice announced “Next May that rapist could be on the streets again because Rose Bird and the Supreme Court reversed an appellate court decision and said they did not think the victim had experienced ‘great bodily injury’.” Id. The second ad urged voters to “vote ‘no’ on Rose Bird”, accusing the Judge of ignoring the educational and social needs of neighborhood children. Id.
58 See id. (noting that supporters argued that the ads were “particularly unfair and inappropriate” as well as “false and misleading”).
59 Id. at 49-50.
cation of the Fairness Doctrine or would even have been successful if indeed carried out is irrelevant. The focus from a policy and regulation standpoint is the actual impact of the doctrine. As with the other above mentioned cases, the mere threat of the Fairness Doctrine had a chilling effect upon speech and debate of controversial issues.

According to Horwitz, constitutional rationales for a modified First Amendment status for broadcasting developed post hoc through judicial opinions. During the 1920's radio was seen more as an entertainment medium, much like motion pictures and was not considered to be part of the press. The general acceptance of media effect theories (such as the hypodermic needle theory\(^{60}\)) provided ample reason for legislators to place limitations on the power of broadcasters in the Radio Act of 1927, and later in the Communications Act of 1934.\(^{61}\) It was not until Red Lion that the Court actually affirmed the constitutionality of the doctrine.\(^{62}\) The ruling was based in large part on the scarcity argument.\(^{63}\) Furthermore, the Court found that under the so-called “personal attack” rule, broadcasters could be compelled to allow individuals a reasonable opportunity to respond to attacks broadcast by the station.\(^{64}\) Red Lion also contains an oft forgotten caution from the Court, if the rule ever resulted in the restraint of speech, then the rule’s legality should be revisited.\(^{65}\)

A few years later, in Miami Herald v. Tornillo, the Court ruled that the Fairness Doctrine had a chilling effect on speech.\(^{66}\) Interestingly, the Court did not overturn the constitutionality of the Fairness Doctrine. In 1984, the Court did find that the original assumptions of scarcity were flawed and that the rule was

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\(^{60}\) The hypodermic needle theory (sometimes referred to as “magic bullet theory”) was a behaviorist influenced media effects theory during the mid-twentieth century that posited mass media had a direct, immediate and powerful effect on mass audiences, which were viewed as passive receivers with very few mental barriers against the persuasive power of mass media. As a result media could uniformly and directly influence large groups of people. Persuasive messages could in effect be injected directly into the audience’s minds to mold people’s thoughts, behaviors and attitudes. JENNINGS BRYANT & SUSAN THOMPSON, FUNDAMENTALS OF MEDIA EFFECTS, 36-42 (McGraw Hill 2002).

\(^{61}\) HORWITZ, supra note 13, at 120.

\(^{62}\) See ROWAN, supra note 20, at 4.

\(^{63}\) See Red Lion Broadcasting Co., 395 U.S. at 400-401. The scarcity argument has been a primary rationale for the FCC’s regulation of broadcasting in general and broadcast content in particular. It posits that since the electromagnetic spectrum is limited and thus insufficient to allow everyone access to accommodate everyone’s voice, government may and should intrude into the message content. See John W. Berresford, Regulating Traditional Broadcasting: An Idea Whose Time Has Passed. (FCC Media Bureau Research Paper, Mar. 2005), available at http://www.fcc.gov/ownership/materials/already-released/scarcity030005.pdf.

\(^{64}\) Red Lion Broadcasting Co., 395 U.S. at 377-378.

\(^{65}\) Id. at 373-375.

chilling free speech." 67

2. Enforcement Criticisms

The second problem created by the Fairness Doctrine was its enforcement. During its tenure as accepted policy, the FCC faced several logistical and practical problems. One of the biggest issues was the amount of time required to deal with the massive amount of viewer complaints. 68 Costs cannot be limited to the taxpayer alone because stations and networks spent a great deal of capital and energy to protect themselves from potential regulatory action, in addition to the potential of losses of creativity and programming from concerns of falling afoul of the FCC. This concern was further exacerbated by the remarkably small number of cases in which the FCC actually overruled stations’ editorial decisions. 69 For example, in 1980, of the 10,301 Fairness Doctrine complaints the FCC received, only twenty-eight were found to have cause and only six cases were decided against the station. 70 Former University of California at Irvine law professor and former Broadcasting Board of Governors member Steven J. Simmons notes similar disparities between the number of complaints and actual violations. As with the constitutional problems, this disparity illustrates a significant chasm between intended and actual outcomes of the policy. The administrative complications created by actual enforcement of the Fairness Doctrine produced an end result quite different from the original noble objectives behind the policy. 71

In dealing with fairness complaints, the FCC first had to determine whether a “view” had been shared, and if so, whether the issue was sufficiently controversial or of public importance to merit invoking the Fairness Doctrine. 72 This proved to be difficult in practice. Ideas had to be “popular” in order to merit recognition. 73 Excluded were eccentric ideas or those from small groups or

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68 See ROWAN, supra note 20, at 51 (noting that in 1980, the FCC received 21,563 Fairness Doctrine complaints).
69 Id.
70 See id. (noting that “out of more than 20,000 complaints, broadcasters ‘lost’ only six.”).
71 See SIMMONS, supra note 20, at 11 (describing the disparity between the large volume of complaints and the problems of enforcement).
72 See id. at 154 (“once the issues raised in a broadcast have been identified, it still must be determined whether they are ‘controversial’ and of ‘public importance’”).
73 See id. at 159 (giving the example that “if a lone pariah’s ideas or those of a small group are scoffed at by the rest of the community, there is no debate and therefore no fairness requirement.”).
individuals since there was no "debate."74 The FCC's guidelines for determining an issue were vague, and their inconsistent application by the FCC resulted in no reliable precedent.75 Furthermore, throughout several cases, the FCC failed to articulate whether an issue was controversial or of public importance.76 This left licensees with very little guidance on how to avoid running afoul of Fairness Doctrine requirements, which had the natural consequence of causing stations to become overly cautious in their programming decisions.77

If it were determined that a case merited scrutiny, the FCC was then faced with a series of additional questions of staggering complexity. First, what contrasting viewpoint should be shared? Most issues do not consist of an either/or problem but rather a confluence of additional factors, issues and problems. Second, who should be the appropriate spokesperson to share this view? Not all spokespersons are created equal. Some are more articulate; others less. Some are more ardent in their views or partisanship (i.e. the appellation of "moderate"). Third, when will the counter view be shared so as to ensure fair coverage of the issues? Fourth and fifth are corollaries of the third question. How often will the view be shared? Further, how much total time allotted would be considered fair? These last three issues often involved inconsistent calculations to determine equitable reach and audience size.78

C. Heuristics & Behavior

Faced with increasing complexity and uncertainty, human beings tend to rely on heuristics to help reduce cognitive overload.79 Over the years, given the complexity inherent in trying to enforce something as ambiguous as "fairness," the Commission ultimately came to rely on a philosophy of balance. The problem with balance is two-fold. First, it relies on an oversimplified and unrealistic two-sided model of conflict, which fails to neatly map onto many multi-dimensional issues. Second, balance is next to impossible to determine. Even if it is assumed that all players are playing fair and with the best of intentions,
balance is a concept detached from context or rationality. For instance, what would be the appropriate balance to covering the war on drugs, Prohibition, ERA, the nuclear arms race, abortion, illegal immigration, Vietnam, or the War on Terrorism? Each involves contesting participants. In addition, myriads of third and even fourth parties are affected or hold views related to the issues surrounding these hot political topics. Who should represent these views, and how much time should they get? Furthermore, as Simmons points out, "by manipulating format, a licensee can favor one spokesman or viewpoint over another and be deemed reasonable by the FCC." For instance, in a discussion panel, contrasting views representing both sides of an issue may be presented, but the composition of panelists would influence both the discussion as well as the perceived outcomes. Factors such as the ratio of panelists with a certain viewpoint as well as the halo effect would have an impact from a practical sense but not necessarily a regulatory sense.

If this seems problematic in theory, imagine the application of such principles. Case studies demonstrate the FCC was inconsistent in both practice and theory when it came to addressing such questions. The Commission’s lack of clarity regarding how stations were to determine a proper balance or demonstrate compliance further aggravated consistent application of the doctrine. Indeed, the only noteworthy aspect about the FCC’s fairness guidelines was their lack of specificity. Several statements from the FCC reflect this notion. In 1974, the Commission acknowledged “the road to predicting Commission decisions in this area is not fully and completely marked,” though it claimed there were “signposts which should be recognizable to all concerned parties.”

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80 Id. at 195.
81 The “halo effect” refers to the long established cognitive phenomenon in which the attributes of a more easily observable trait influence judgment of the other less observable traits. For example, people who are more beautiful or have a recognized celebrity status may also be perceived as more intelligent. Thus, the status of a spokesperson plays a significant role in the impact of their position. The choice of such a spokesperson is often the discretion of the journalist or producer, making the whole thing subject to manipulation. Furthermore, while the FCC might be able to tabulate responses in a sort of scorekeeper fashion, it would be unable to determine the actual impact of each response, essentially rendering the whole process moot.
83 See SIMMONS, supra note 20, at 55 (describing how “licensees were left adrift in a sea of uncertainty as to precisely what was expected of them under the Fairness Doctrine.”).
FCC Fairness/Political Branch Chief Milton Gross stated, “You have to look at the entire picture. There’s no one thing . . . [but] time of day, frequency, things like that . . . are taken into consideration.” Simmons notes that several commissioners, “refused to state any personal formula for determining a set ratio of time that was so out of proportion that it violated the fairness doctrine.” Commissioner Benjamin Hooks stated, “We don’t have a written rule” to determine the amount of time that should be allocated for each side. Rather, commissioners relied on general heuristics to judge each proceeding on a case-by-case basis much like the notion of the “reasonable man” standard relied on by courts. Yet, as Simmons points out, “reasonable” is a vague and idiosyncratic notion. What is reasonable for one may seem preposterous to the other. In other words, like beauty, reasonable is in the eye of the beholder. Or rather, what is reasonable is a matter of perception.

Perhaps most troubling is the incredible paucity of evidence that the policy had any impact on removing bias from reporting. Rowan observes that a primary key to such a problem lies in the inherent subjectivity of the consumer as well as the producer of news. Thus, he contends:

No amount of government regulation, short of the kind of censorship currently prohibited by Section 326 of the Communications Act, would remedy problems of such subjectivity . . . Many factors account for the shortcomings of subjectivity, shallowness, and sensationalism in news reporting, and none are susceptible to cure by government intervention.

Indeed, the one impact the Fairness Doctrine had on news reporting behavior was its chilling effect.

III. HOSTILE MEDIA PERCEPTION & AUDIENCES

A. Perception and Effect

A third difficulty exists beyond the constitutional and logistical problems of enforcing the Fairness Doctrine. While scholars have analyzed the Fairness Doctrine from the perspective of government, media outlets and public speak-

85 SIMMONS, supra note 20, at 196.
86 Id. at 233 n.58.
87 Id. at 196.
88 See Commissioner Charlotte Reid’s remarks in SIMMONS, supra note 20, at 233 n.58.
89 See id. at 196. Hooks comments that “[n]obody has ever defined that standard with exactitude, and yet we have existed for two hundred years in the courts, using that standard.”.
90 Id.
91 ROWAN, supra note 20, at 126.
92 Id.
ers, much of the research has failed to consider the core group for whom the doctrine was created in the first place—the audience. Given research in the past 25 years in the realm of media psychology, the Fairness Doctrine, from a cost-benefit analysis, becomes even less desirable.

The hostile media effect, or hostile media perception, is a viewer-centric phenomenon. While traditionally media effects theories have argued that the media influences the viewer, HMP instead views the media receiver as the primary shaper of a message’s meaning. More specifically, HMP posits that as individuals increase in levels of partisanship, they also increase in the perception that the media is hostile towards their group or position. HMP can occur not only with political partisans in election coverage, but with individuals strongly attached to religious groups, citizens from opposing countries, people on opposing sides of a labor issue, sports fans, soldiers fol-

93 Id.
96 See generally Amarina Ariyanto, Matthew J. Hornsey, & Cindy Gallois, Group Allegiance and Perceptions of Media Bias: Taking Into Account Both the Perceiver and the Source, 10 GROUP PROCESSES & INTERGROUP RELATIONS 266 (2007). Authors set-up an experiment where two groups, one Muslim and one Christian, read a newspaper article describing religious conflict. They found that when the article was attributed to a Muslim paper, then groups found it biased towards Muslims; and when attributed to a Christian paper, groups found it biased towards Christians. Id.
99 See Laura M. Arpan & Arthur A. Raney, An Experimental Investigation of News Source and the Hostile Media Effect, 80 JOURNALISM & MASS COMM. Q. 265 (2003) (finding strong support for hostile media effect "among sports news consumers" in an experiment where sports fans read a "a balanced story about their home-town college football team in one of three newspapers: the home-town, the cross-state rival university’s town, or a
lowing war coverage, and those invested in controversial issues covered by the media, such as the use of animals in laboratory experiments. Even if the media content is apparently neutral, partisans from both sides exposed to the same information will perceive the media as biased against their side. An examination of HMP requires a look at its necessary prerequisites, the mechanisms behind how HMP actually occurs, and the consequences of HMP.

B. The Potential Causes of HMP

The necessary conditions of HMP are still contested, though many scholars see involvement as a key factor in triggering HMP. Defining involvement encompasses ideas such as salience, personal relevance, partisanship, and opinion extremity. Value-relevant involvement references “the psychological neutral-town paper.”).

100 See Richard J. Pinder, Dominic Murphy, Stephani L. Hatch, Amy Iversen, Christopher Dandeker, & Simon Wessely, A Mixed Methods Analysis of the Perceptions of the Media by Members of the British Forces During the Iraq War, 36 ARMED FORCES & SOC. 131, 132 (2009). The authors explored how modern warfare provides new methods for soldiers to acquire news about the wars they are personally fighting in. They found that factors such as the soldier’s family’s views (who often times provided soldiers with news about the war) played an important role in a soldier’s media perception. Id.

101 See Albert C. Gunther, Cindy T. Christen, Janice L. Liebhart, & Stella Chich-Yun Chia, Congenial Public, Contrary Press, and Biased Estimates of the Climate of Opinion, 65 PUB. OPINION Q. 295 (2001) (supporting the notion that “partisans on each side of the issue judged news articles to be biased in a disagreeable direction relative to judgments of those on the other side.”).


104 See generally Richard E. Petty, John T. Cacioppo & Rachel Goldman, Personal Involvement as a Determinant of Argument-Based Persuasion, 41 J. OF PERSONALITY & SOC. PSYCHOL. 847 (1981) (exploring the role of “personal relevance” and “personal relevance manipulation” in communication to persuade an individuals viewpoint).

105 See generally Christen, Kannaovakun & Gunther, supra note 98; Kimberly Matheson & Sanela Dursun, Social Identity Precursors to the Hostile Media Phenomenon: Partisan Perceptions of Coverage of the Bosnian Conflict, 4 GROUP PROCESSES & INTERGROUP RELATIONS 116 (2001) (finding that the “hostile media effect is a mechanism for enhancing a positive and distinct in-group identity”, that “reflects a form of in-group bias.”).

state that is created by the activation of attitudes that are linked to important values.”

Values are fundamental to how individuals both perceive themselves and their world, and thus are related to such concepts as ego or “self-picture.” Impression-relevant involvement deals with “holding an opinion that is socially acceptable to potential evaluators.” Thus, while the focus of value-relevant involvement was internal, the focus of impression-relevant involvement is external. Outcome-relevant involvement is more utilitarian in nature as it refers to the degree to which a message is “salient to...the relevance of an issue to [individuals’] currently important goals or outcomes.” In sum:

[Involvement is the motivational state induced by an association between an activated attitude and some aspect of the self-concept. For value-relevant involvement, the pertinent aspect of the self is one’s enduring values: The persuasive message activates an attitude that was linked to one’s values prior to the experiment or that became linked during the experiment. For impression-relevant involvement, the pertinent aspect of the self is the public self or the impression one makes on others: The issue on which one expects to express an attitude after receiving a persuasive message is linked to the public self by the anticipation that this attitude will be known to an evaluative audience. For outcome-relevant involvement, the pertinent aspect of the self is one’s ability to attain desirable outcomes: The information that the persuasive message provides and the attitude one forms on the basis of this information are made to appear relevant to the attainment of these outcomes.]

Applying these potential models to the Fairness Doctrine, it would seem that it is either value-relevant or outcome-relevant involvement that is most accurate. Political ideology is very much intertwined with one’s personal values and identity. Unlike other potential areas of media coverage that would trigger

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110 Id.

111 Id. at 293.
values, such as religion, politics also has a competitive aspect where outcomes are very important. It is not clear that a sharp distinction can be drawn between the two different involvement types, since the success of individuals (candidates), groups (parties), or issues (legislation, policies, or court cases) that society intimately identifies with due to similar values can have an impact on our self-concept similar to the way, but potentially on a deeper level, sports fans appear to experience a temporary increase in self-worth when their team is triumphant.\footnote{Id. at 5.}

Another condition that can lead to HMP is a pre-existing belief about the ideological orientation of a media outlet. Political Scientists Matthew Baum and Phil Gussin performed an experiment where viewers were shown a news report regarding the 2004 presidential election and were either told the report came from CNN, Fox News, or a TV station that was actually fictional.\footnote{Id. at 5.} The authors found that viewers utilized the cognitive shortcut of a media outlet’s reputation to make judgments about media content, which led to the perception of bias where none existed.\footnote{See generally Matthew A. Baum & Phil Gussin, In the Eye of the Beholder: How Information Shortcuts Shape Individual Perceptions of Bias in the Media, 3 Q. J. of Pol. Sci. 1 (2007).} Baum and Gussin note:

If, as we contend, ideologues distinguish between differing media outlets, this raises the possibility that they may assess the content of those outlets in part through reliance on a relatively simple heuristic: the outlet label. Hence, if a conservative ideologue believes that, say, CNN has a liberal bias, this facilitates the discounting (or rejection) of information from CNN. This also increases the likelihood of perceiving balanced coverage on CNN as having a liberal slant. Alternatively, if the same conservative believes that FOX has a conservative bias, this facilitates greater acceptance of information from FOX. Either way, the brand name functions as an information shortcut, allowing ideologues to assume that the news presented by CNN and FOX is either hostile or sympathetic to their ideological orientation. By assuming that information from a given outlet is “probably dissonant” or “probably consonant” through reference to a single, easy-to-use information shortcut, an individual can save substantial time and cognitive energy.\footnote{Joel Turner, The Messenger Overwhelming the Message: Ideological Cues and Perceptions of Bias in Television News, 29 Pol. Behavior. 441 (2007).}

Political Scientist Joel Turner performed a similar experiment, finding that the labels of CNN and Fox News “function as ideological signals to the viewer, with this signal being most pronounced among ideologues whose views are supposedly at odds with those attributed to the network.”\footnote{William P. Eveland & Dhavan V. Shah, The Impact of Individual and Interpersonal Factors on Perceived News Media Bias, 24 Pol. Psychol. 101, 102 (2003) (concluding that “perceptions of media bias were unrelated to the overall amount of discussion but were positively related to conversations with ideologically like-minded individuals.”).} Interest-

\footnote{112 William P. Eveland & Dhavan V. Shah, The Impact of Individual and Interpersonal Factors on Perceived News Media Bias, 24 Pol. Psychol. 101, 102 (2003) (concluding that “perceptions of media bias were unrelated to the overall amount of discussion but were positively related to conversations with ideologically like-minded individuals.”).}

\footnote{113 See generally Matthew A. Baum & Phil Gussin, In the Eye of the Beholder: How Information Shortcuts Shape Individual Perceptions of Bias in the Media, 3 Q. J. of Pol. Sci. 1 (2007).}

\footnote{114 Id.}

\footnote{115 Id. at 5.}

ingly, when a network label was not attached to the same news story, viewers found no ideological bias, leading Turner to conjecture that “ideological bias in television news is merely an artificial construction that has become so ingrained in American culture that the organization presenting the news has become more important than the news product it presents.”

Scholars have theorized four differing cognitive mechanism behind HMP. Some have argued that HMP is caused by *selective categorization*, wherein opposing partisans exposed to the same material will mentally code the information with different valences, finding neutral or even supporting information as hostile. Others have posited that HMP results from *selective recall*, with partisans focusing more on media content opposing their position, increasing the content’s salience, and thus resulting in the hostile content having a more dominant place in memory. A third proposed avenue for HMP is *different standards*, which contends that partisans of opposite sides will agree on the content’s proportions and valence, but view opponents’ claims as invalid or lacking in relevance, and thus unworthy of inclusion in news content. Since opponents’ invalid and irrelevant views are included, the content therefore becomes biased and hostile. A fourth suggestion for how HMP can be explained is the *perceived reach of the information*, with partisans less likely to experience HMP if they don’t feel that the content will be wide-reaching and thus influence the broader public. In attempting to explain this fourth potential causal mechanism of HMP, scholars theorize that:

When viewing mass media, partisans may don a particular set of lenses—lenses with a social-level focus. If the mass media context causes partisans to think about the influence of content on a broader audience...that audience perspective may steer their interpretation and evaluation of content toward hostile latitudes. The media channel may prompt partisans to consider interpretations or implications they think could be misleading to a naïve and vulnerable audience of others. Hence, they interpret the same information in a different, and more disagreeable, way.

117 *Id.* at 455.


120 *Id.*

121 *Id.*


Scholars studying HMP have found numerous normative implications for democracy. Partisans who experience HMP tend to gravitate towards news programs that support their ideological leanings, creating isolated factions of the public that are decreasingly exposed to other points of view. Scholars have labeled this tendency self-selective exposure. This, coupled with the tendency of those experiencing HMP to experience “media indignation,” which subsequently leads to increased willingness to engage in discourse with others over the issue perceived to be treated with bias by the media, could lead to a proliferation of citizen encounters wherein both sides feel wronged and the need to correct media bias, but both sides also have only limited exposure to opposing viewpoints.

Additionally, researchers have found that those holding minority group opinions often deem alternative media sources, such as the Internet, more trustworthy in order to find viewpoints similar to their own, which reinforces their existing opinions. Similarly, the most active consumers of the news—political junkies—are nearly four times more likely to view Internet blogs as more accurate than mainstream media than to see the mainstream media as more accurate than blogs.


126 See Hyunseo Hwang, Zhongdang Pan & Ye Sun, Influence of Hostile Media Perception on Willingness to Engage in Discursive Activities: An Examination of Mediating Role of Media, 11 Media Psychology 76, 78 (2008) (describing “media indignation” as the negative emotions of “injustice or unfairness”, carrying “strong elements of condemnation” towards the media source).

127 See Junho H. Choi, Jamiies H. Watt & Michael Lynch, Perceptions of News Credibility about the War in Iraq: Why War Opponents Perceived the Internet as the Most Incredible Medium, 12 J. OF Computer-Mediated Comm. 209, 217-223 (2006) (examining how critics of the Iraq War (whom the authors call “a minority partisan group because their position differs from the Government) gravitated towards Internet news sources to provide them information they deemed more credible than traditional, mainstream media sources).

128 See Richard Davis, Typing Politics: The Role of Blogs in American Politics 159-161 (2009). Interestingly, “conservative political views” were found to be one of several factors increasing the likelihood an individual would select self-exposure to articles with counter-attitudinal messages, though it is unclear if that is due to confidence in one’s own views, a desire to evaluate opposing information, or some other reason. Holding “lib-
IV. HMP'S IMPLICATIONS FOR THE FAIRNESS DOCTRINE

A. How HMP undermines the Fairness Doctrine

At first glance, the Fairness Doctrine might appear to be a plausible solution to two problems identified by current media scholars: actual media bias and self-selective exposure. By forcing media outlets to cover both sides of the story, both of these problems would seemingly be solved. Yet, the hostile media perception undermines this claim. As discussed, viewers attach an ideological slant to media outlets which biases their perceptions of the media content produced by that outlet, regardless of whether the content is neutral or not. Thus, even if Fox News or CNN were required to provide angles on stories in contrast to the outlets overall ideological reputation, viewers would merely discount such cross-cutting ideological content. Similar effects would likely be seen in other mediums, such as talk radio or print journalism. Given that people are gravitating towards alternative forms of media, the effort required

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131 See generally Baum & Gussin, supra note 113.

132 See PRIOR, supra note 130, at 150 et. seq (noting that traditional news outlets are trending downward in use, and that online newspapers and Web sites have increasingly larger audiences).
to enforce the Fairness Doctrine, including ongoing media monitoring, would seem hardly worth the negligible to non-existent effects it would likely have on an increasingly smaller portion of the populace.

As previously discussed, the cost-to-benefit ratio for enforcing the original Fairness Doctrine was prohibitive. The FCC faced staggering amounts of paper work, although only a few of those complaints were found to have cause.\(^\text{133}\) One explanation for this disparity was that the public confused the Fairness Doctrine with The Equal Time rule. The Equal Time rule mandated that if a licensee allowed a legally qualified candidate to broadcast via their facility, it must offer equal time to any other legally qualified candidate running for that same office.\(^\text{134}\) Such a one-to-one formula was not a part of the enforcement of the Fairness Doctrine. In Fairness complaints the FCC attempted to determine whether the licensee’s programming as a whole was balanced, though in practice this proved next to impossible to achieve. Furthermore, unlike the Equal Time Rule, licensees had broad editorial discretion in selecting contesting views. This was further complicated by attempts to use the Fairness Doctrine as a “crude tool for obtaining access to the airwaves” by just about anybody with an agenda.\(^\text{135}\) HMP offers an additional explanation for the high number of “false” complaints. Individuals with high levels of involvement in an issue or group are more likely to experience HMP, causing them to see media bias where even neutral or “fair” content exists.\(^\text{136}\) Thus, the fact that individuals with the highest levels of involvement are both those most likely to take the time and effort to file a report with the FCC, as well as those most likely to experience HMP and therefore perceive a violation of the Fairness Doctrine by the media, results in the potential perfect storm where the FCC would experience a deluge of complaints.\(^\text{137}\) Regulators dealt with this onslaught of paperwork by creating barriers to the public through the use of forms and bureaucratic procedures intended to discourage complaints.\(^\text{138}\) This resulted in increased confusion and frustration on the part of the public. It also served to work against the original intent of the policy to make access to the airwaves fair and democratic.\(^\text{139}\)

It has been observed that the partisanship in the U.S. has not only increased

\(^{133}\) See discussion supra Part II.B.2.
\(^{135}\) ROWAN, supra note 20, at 6.
\(^{136}\) HAMILTON, supra note 132, at 73.
\(^{137}\) See discussion, supra Part II.A-B.
\(^{138}\) SIMMONS, supra note 20, at 208-210.
\(^{139}\) Id. at 220-221.
but become increasingly more intense in the past three decades.\textsuperscript{140} Furthermore, the literature on HMP demonstrates that as partisanship increases, people are more susceptible to increased hostile media perception.\textsuperscript{141} Thus, media consumers, armed with the knowledge that media outlets must be fair in their presentation of opposing sides to a story, would turn into non-deputized extensions of the FCC. Furthermore, so-called watchdogs would see unfairness whenever a media outlet of an opposing ideological reputation tried to present their side of the story. It is not difficult to imagine a liberal (or conservative) feeling Fox News’ (or CNN’s) treatment of their position to have not been “fair.” The result would be a flood of complaints to the FCC over violations of the Fairness Doctrine.

Another issue that must be considered is the more direct impact of HMP upon the regulators themselves. It is unrealistic to assume that regulators operate in a protective bubble, free from partisan views and ideological leanings. Thus, it is important to consider in judging the “fairness” of any given complaint, regulators will likely have their own partisan views weigh in on their judgments.\textsuperscript{142} The use of heuristics in judging complaints could further increase the likelihood of biased decisions. This would lead to an even greater chilling effect as broadcasters would become even more reluctant to present anything that would deluge them with an onslaught of complaints and bureaucratic red tape.

B. Internet, New Media and the implications of HMP on the Fairness Doctrine

A Fairness Doctrine revival may not only repeat these problems, but could very well produce a magnified effect. Of course, the most obvious reason is the existence of the Internet. Accessibility to public officials via the Internet has led to the unavoidable reality of an information glut. Thus, a revival would likely give rise to a significantly higher number of complaints. This will be

\begin{footnotes}
\footnotetext[140]{See Joseph Bafumi & Robert Y. Shapiro, A New Partisan Voter, 71 J. of Pol. 1 3-4 (2009) (describing how “partisan polarization” has strengthened in recent years after a dealignment period in the late 1960’s).}
\footnotetext[141]{See discussion supra Part II.A and accompanying notes; see e.g., RonNell Anderson Jones, Media Subpoenas: Impact, Perception, and Legal Protection in the Changing World of American Journalism, 84 Wash. L. Rev. 317, 334 (2009); Ellen P. Goodman, No Time for Equal Time: A Comment on Professor Magarian’s Substantive Media Regulation in Three Dimensions, 76 Geo. Wash. L. Rev. 897 (2008).}
\footnotetext[142]{See Gregory P. Magarian, Substantive Media Regulation in Three Dimensions, 76 Geo. Wash. L. Rev. 845, 856-857 (describing the risk of government regulators influencing media content to advance their own ideological biases).}
\end{footnotes}
further amplified by HMP.

The changing landscape of the media also has implications for the Fairness Doctrine and the hostile media perception. From the 1950s into the 1970s, viewers had only three choices for news—the big three broadcasting companies—and the content for all three was fairly similar. Additionally, the nightly newscasts, aired prior to popular programming, had a somewhat captive audience as Americans tuned in before their desired programming. The lack of a remote control, coupled with the fact that all three stations tended to broadcast their news simultaneously meant if one wanted to watch television it was difficult to escape the news for a particular window of time every evening. However, with the advent of cable and satellite television, and then the Internet, the proliferation of choices meant Americans who did not have a strong desire to be exposed to the news could avoid it. In fact, they did, resulting in a news-watching audience that consisted mainly of news junkies, who tended to be highly partisan.

Hence, the irony exists in today’s media landscape that the very people for whom the Fairness Doctrine might have its intended impact because they are not as susceptible to HMP—non-partisans—are the very people who are tuning out the news and would therefore not be exposed to the results on news programming brought about by a restored Fairness Doctrine. Likewise, the very people for whom the Fairness Doctrine would have little to no effect because HMP causes these viewers to see unfairness even in “fair” content—strong partisans—are the very people who are watching the news today and would receive the “fair” news programming the Fairness Doctrine’s implementation would create. Only by erasing ideological reputations that media outlets have acquired, which would reduce the potential for perceiving media bias due to outlet labels, and forcing more of the American public to watch or listen to the news, which would bring more non-partisans within the Fairness Doctrine’s reach, could an environment be created where the Fairness Doctrine may begin to have its intended effect. Yet, it is unlikely that legislation could effectively accomplish those two criteria, due to both practical and legal obstacles. Such actions, however, would fail to address other causes of HMP and its continued potential to undermine the Fairness Doctrine. To create an environment where HMP does not exist would require altering the political ideology of Americans so that all were moderates, and clearly legislation cannot practically or legally bring about such a state.

Thus, the cost of implementing the Fairness Doctrine in the form of massive bureaucratic expansion—including pricy legal battles—far outweighs whatever

143 See PRIOR, supra note 130, at 15-17.
benefit might be derived, if any. The American public is not likely to notice much of an effect from the regulatory intervention since they are likely to perceive the new “fair” news as bias due to HMP or they may simply not watch the news altogether. If the constitutional and logistical problems with the Fairness Doctrine were not enough, the hostile media perception coupled with the changed media environment should sound the death knell for the antiquated idea that the government can make the news “fair.”

V. CONCLUSION

The Fairness Doctrine was once an important and controversial regulatory policy. Besieged by both constitutional and practical problems surrounding its enforcement, it was discontinued after four decades. With the 2008 elections placing Congress and the White House firmly in the hands of the Democratic Party, discussion of its revival emerged in both public and media venues. The political changes of fortune of the 2010 election and the emergence of competing crises such as health care, natural disasters and events in the Middle East have, at least for the time being, somewhat muted this debate. Yet, other events have not nullified the desire for its reinstatement by its proponents, and given the cyclical nature of politics it is not conceivable that the political stars will align again such that the possibility of its implementation becomes real and popular. Thus, any future debate surrounding the pros and cons of a reborn Fairness Doctrine must also take into account hostile media perception—the phenomena wherein people highly involved in a position or group see even neutral media content as biased against them.

HMP results in several potential problems that may undermine the effectiveness of the Fairness Doctrine’s re-implementation. First, HMP negates the effect of forcing “fair” or balanced media content as many viewers will still see media as unfair even with “fairness” regulated into coverage and programming. Additionally, a proliferation of media choices brought about by satellite and cable television, as well as the Internet, means fewer and fewer people will be exposed to the impact of the Fairness Doctrine as they can escape broadcast news and other programs that would come under the Fairness Doctrine’s reach. This would only leave news (and political) junkies who would be exposed to Fairness Doctrine-regulated media content, and these are the very people most susceptible to HMP. Furthermore, the increasingly polarized nature of the American populace, combined with the technological ease of communication, have the potential of creating a maelstrom of Fairness Doctrine complaints unlike anything the FCC has ever before experienced. Finally, FCC staff and
commissioners are also just as prone to HMP, which would lead to either bi-
ased decisions or a tentative agency that fails to enforce the Fairness Doctrine.
In the end, the view that "when Americans hear both sides of the story, they're
in a better position to make a decision"144 sounds good in theory but is naïve in
the face of the psychological reality of HMP and audience behavior in the new
media landscape, making the cost of attempting to bring back and enforce the
Fairness Doctrine to far outweighs any benefits that may be gained in the 21st
century American media world, assuming of course, that the Fairness Doctrine
actually produces any tangible benefits.

144 Bolton, supra note 2 (quoting Senator Dick Durbin (D-Ill.) as saying "It's time to
reinstitute the Fairness Doctrine . . . I have this old-fashioned attitude that when Americans
hear both sides of the story, they're in a better position to make a decision.").