

## FROM FAIRNESS TO FAKE NEWS: HOW REGULATIONS CAN RESTORE PUBLIC TRUST IN THE MEDIA

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*Journalists face a credibility crisis, plagued by chants of fake news and a crowded rat race in the primetime ratings. Critics of the media look at journalists as the problem. Within this domain, legal scholarship has generated a plethora of pieces critiquing media credibility with less attention devoted to how and why public trust of the media has eroded. This Note offers a novel explanation and defense. To do so, it asserts the proposition that deregulating the media contributed to the proliferation of fake news and led to a decline in public trust of the media. To support this claim, this Note first briefly examines the historical underpinnings of the regulations that once made television broadcasters “public trustees” of the news. This Note also touches on the historical role of the Public Broadcasting Act that will serve as the legislative mechanism under which media regulations can be amended.*

*Delving into what transpired as a result of deregulation and prodding the effects of limiting oversight over broadcast, this Note analyzes the current public perception of broadcast news, putting forth the hypothesis that deregulation is correlated to a negative public perception of broadcast news. This Note analyzes the effect of deregulation by exploring recent examples of what has emerged as a result of deregulation, including some of the most significant examples of misinformation in recent years. In so doing, it discusses reporting errors that occurred ahead of the Iraq War, analyzes how conspiracy theories spread in mainstream broadcast, and discusses the effect of partisan reporting on public perception of the media.*

*Finally, this Note proposes creating an Independent Broadcast Council under the regulatory authority of the Federal Communications Commission that would oversee the reintroduction of a revised Fairness Doctrine using the existing statutory framework from the Public Broadcasting Act. Lastly, this Note addresses the implications of reimplementing regulations on the media, including addressing the First Amendment counterarguments as well as U.S. Supreme Court and court of appeals cases that suggest courts would uphold this proposal.*

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## INTRODUCTION

“[W]herever the people are well informed they can be trusted with their own government.”<sup>1</sup> For Americans, broadcast news remains the most popular source from which to receive that information.<sup>2</sup> As a source of information to the American public, the importance of media credibility cannot be overstated. A public informed by objective facts can make educated decisions based upon those facts.

When the Federal Communications Commission (FCC) began licensing broadcast television stations, it did so under the premise that broadcasters were “public trustees” who had the privilege and responsibility of using public airwaves to inform the public.<sup>3</sup> This model and regulatory scheme ushered in half a century of public confidence in not only broadcast, but in the men and women who provided the news.<sup>4</sup> Yet, beginning with the FCC’s decision to abandon the Fairness Doctrine in 1987, broadcast underwent a significant deregulatory process throughout the 1980s and 1990s that eliminated many assurances the public had that information was fair and balanced.<sup>5</sup>

Public perception of media credibility in the United States reached its lowest level in polling history in 2016.<sup>6</sup> Almost two-thirds of Americans

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<sup>1</sup> *Thomas Jefferson to Richard Price*, THE LIBRARY OF CONG. (Jan. 8, 1789), <https://www.loc.gov/exhibits/jefferson/60.html>.

<sup>2</sup> Rick Edmonds, *Pew Research Finds That Broadcast is the Favorite Source for Local News*, POYNTER (March 26, 2019), <https://www.poynter.org/business-work/2019/pew-research-finds-that-broadcast-is-the-favorite-source-for-local-news-and-weather-is-the-most-valued-topic/>. According to a survey of 35,000 adults released by the Pew Research Center, thirty-eight percent of adults receive their news from broadcast television compared to twenty-two percent from radio and seventeen percent from the daily newspaper. *Id.*

<sup>3</sup> Priscilla Regan, *Reviving the Public Trustee Concept and Applying it to Information Privacy Policy*, 76 MD. L. REV. 1025, 1031 (2017).

<sup>4</sup> See generally *DRAFT Chapter 3: The New Media Landscape*, MEDIUM (June 27, 2018), <https://medium.com/trust-media-and-democracy/draft-chapter-3-the-new-media-landscape-4a3e8a89b661#05c9> [hereinafter *The New Media Landscape*]. In the mid-20th Century, with the rise of broadcast television and the implementation of the Fairness Doctrine, the definition of “news” was clear and there was less disagreement about what a “fact” was, but once the Fairness Doctrine was repealed the agreement began to disintegrate. *Id.* Trust in media began to erode as the line blurred between news reporting and news analysis. *Id.*

<sup>5</sup> See *infra* Part I. For a scholarly discussion on the possibility of extending regulations to cable news, which is beyond the scope of this Note, see Nareissa L. Smith, *Consumer Protection in the Marketplace of Ideas: A Proposal to Extend the News Distortion Doctrine to Cable Television News Programs*, 40 T. MARSHALL L. REV. 223, 228 (2015).

<sup>6</sup> Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <https://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>.

believe that the media publishes fake news.<sup>7</sup> Moreover, the perception of media credibility divides sharply among party lines.<sup>8</sup> This perception of fake news was bolstered in recent years by a politician who calls the press “the enemy of the people.”<sup>9</sup> “The Fake News Media has NEVER been more Dishonest or Corrupt than it is right now. There has never been a time like this in American History . . . Fake News is the absolute Enemy of the People and our Country itself!”<sup>10</sup> Nonetheless, the issue of credibility in the media transcends a political campaign or presidency. Though the reason for a decline in public perception of the media is varied, this Note proposes that regulating broadcast news would fundamentally contribute to a decline in the perception that the media is *fake news* by increasing accuracy and transparency in broadcast media.<sup>11</sup>

In the current regulatory environment, broadcast news is no longer under an obligation to provide contrasting viewpoints or discuss issues of public importance, though such a requirement was once a prerequisite to a broadcast license.<sup>12</sup> Despite challenges to its constitutionality, the Supreme Court upheld the requirement.<sup>13</sup> Moreover, existing legislation that created an independent corporation to uphold programming standards for viewers extended only to educational stations but was never intended to regulate broadcast news.<sup>14</sup>

This Note asserts the proposition that deregulating the media

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<sup>7</sup> Ian Buchanan, *The Media’s Credibility Crisis*, THE CHRONICLE (Sept. 27, 2017, 10:00 PM), <https://www.dukechronicle.com/article/2017/09/the-medias-credibility-crisis> (The data from the poll comes from a Harvard-Harris poll provided exclusively to The Hill); *See also* Jonathan Easley, *Poll: Majority Says Mainstream Media Publishes Fake News*, THE HILL (May 24, 2017, 10:10 AM), <https://thehill.com/homenews/campaign/334897-poll-majority-says-mainstream-media-publishes-fake-news>.

<sup>8</sup> Buchanan, *supra* note 7 (highlighting a 2016 Gallup poll showed that Democrats’ and Independents’ trust in the media decreased slightly while Republicans attribute unfair and negative coverage of Donald Trump to a sharp decline in trust, reaching only fourteen percent).

<sup>9</sup> Stephanie Sugars, *From Fake News to Enemy of the People: An Anatomy of Trump’s Tweets*, COMMITTEE TO PROTECT JOURNALISTS (Jan. 30, 2019, 10:00 AM), <https://cpj.org/blog/2019/01/trump-twitter-press-fake-news-enemy-people.php>.

<sup>10</sup> Donald Trump (@realdonaldtrump), TWITTER (March 19, 2019, 5:24 AM), <https://twitter.com/realdonaldtrump/status/1107981131012628481?lang=en> (capitalization emphasis in original).

<sup>11</sup> *See infra* Part III.

<sup>12</sup> *See infra* Part I.A.

<sup>13</sup> *See infra* Part I.B.

<sup>14</sup> *See infra* Part I.C.

contributed to the proliferation of fake news and led to a decline in public trust of the media. It asserts that to combat these issues and restore broadcasters to the role of “public trustees,” the government must reimplement a modern-day version of the Fairness Doctrine. To do so, this Note proposes creating an Independent Broadcast Council, independent of partisan politics, with a central focus of guaranteeing that broadcasters uphold their role as public trustees. It does so under framework consistent with existing law.<sup>15</sup>

Moreover, this Note proposes that amending the existing Public Broadcasting Act to expand the scope of legislation to encompass broadcast news and incorporate the key tenets of the Fairness Doctrine would significantly improve public perception of the media.<sup>16</sup> The revised legislation would define the term *fake news* and warn consumers when it aired by creating a rating system.<sup>17</sup>

This Note proceeds in three Parts. Part I lays out the historical background of broadcast regulation in the United States. In so doing, it examines the key legislative and judicial decisions that led to the current regulatory environment. Part II analyzes the premise of fake news and how it contributes to negative public perception of the media before evaluating three recent examples of circumstances in which the media portrayed stories in a biased or factually unclear way that materially contributed to a decline in public trust. Part III introduces the proposal for an Independent Broadcast Council and identifies the framework under which the council would function. Moreover, it analyzes the three examples discussed in Part II under the context of the newly proposed guidelines to hypothesize how the reporting may have led to a different outcome had the council had an oversight role. Finally, Part III examines how these regulations have succeeded in other countries and shows how a current Supreme Court would likely hold on challenges raised against the regulations by reconciling two cases.

## I. HISTORICAL BACKGROUND

This Part draws on historical research to trace the deregulation of broadcast television. Along the way, it reveals the genesis of the Fairness

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<sup>15</sup> See *infra* Part III.A.

<sup>16</sup> See *infra* Part III.B.

<sup>17</sup> See *infra* Part III.B.

Doctrine and the Public Broadcast Act. In so doing, this Note evaluates the repercussions of deregulating the broadcast industry and examines how courts and legislatures have struggled to balance the First Amendment guarantee of free speech against the public trustee obligations that broadcast media were once entrusted with to provide fair and balanced coverage.

#### A. *An Era of Broadcast Regulation*

The history of broadcast regulation in the United States is intricate and multifaceted. Even so, the evolution of the agencies charged with overseeing broadcast follows a relatively linear path. This Subpart provides an abbreviated history of broadcast regulation to help aid understanding about why certain regulations failed, why others succeeded, and what transpired as the result of deregulation.

The Radio Act of 1912 was the first act of legislation that required licenses for radio stations.<sup>18</sup> The Act's passage occurred following government concern that radio interference had contributed to a delay in the rescue of passengers on the Titanic the night it sank.<sup>19</sup> At the time of the Radio Act, the Commerce Department monitored radio, but with technological advances the government recognized a need for a regulatory body that could respond to the unique demands of radio at the time.<sup>20</sup> Shortly thereafter, Congress passed the Radio Act of 1927.<sup>21</sup> This revised legislation established the Federal Radio Commission, but by 1934 the regulatory body was supplanted by the Federal Communications Commission.<sup>22</sup>

A review of early legislation reveals the concern many in Congress had with the advent of television and radio and the potential this new technology possessed as a political tool.<sup>23</sup> Texas Representative Luther Johnson shared his concerns ahead of a debate on the Radio Act of 1927:

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<sup>18</sup> H.R. REP. NO. 741 (1912), <https://www.visitthecapitol.gov/exhibitions/artifact/s-6412-act-regulate-radio-communication-radio-act-1912-may-20-1912>.

<sup>19</sup> *Id.*

<sup>20</sup> Jennifer Davis, *Anniversary of the Radio Act of 1927, The Beginning of Broadcast Regulation*, LIBRARY OF CONGRESS (Feb. 23, 2016), <https://blogs.loc.gov/law/2016/02/anniversary-of-the-radio-act-of-1927-the-beginning-of-broadcast-regulation/>.

<sup>21</sup> Act of Feb. 23, 1927, Ch. 169; 44 Stat. 1162.

<sup>22</sup> See 47 U.S.C.A. § 151 (1996).

<sup>23</sup> But see Rebecca Ruiz, *Reaction to Regulation: 1934 vs. Today*, N.Y. TIMES (March 5, 2015, 6:32 PM), <https://bits.blogs.nytimes.com/2015/03/05/reaction-to-regulation-1934-vs-today/> (describing the reaction two senators had in 1934 to the proposed passage of the Communications Act of 1934, calling the legislation "overreaching" and an attempt to "censor the press").

American thought and American politics will be largely at the mercy of those who operate these stations, for publicity is the most powerful weapon that can be wielded in a republic.

And when such a weapon is placed in the hands of one person, or a single selfish group is permitted to either tacitly or otherwise acquire ownership or dominate these broadcasting stations throughout the country, then woe be to those who dare to differ with them. It will be impossible to compete with them in reaching the ears of the American people.<sup>24</sup>

The FCC emerged out of the Communications Act of 1934.<sup>25</sup> At that time, broadcast television was in its infancy, and the FCC was created to regulate and expand the availability of communication to people across the United States.<sup>26</sup>

The premise behind the Communications Act was simple: those who wished to broadcast on television or radio could do so only with a license, and Congress required that the FCC grant a license only to those who would serve the public interest.<sup>27</sup> To comply with this responsibility, the FCC showed a preference toward granting and renewing licenses to stations that presented more than one view.<sup>28</sup> That said, what began as a preference by the FCC evolved into a mandate after it published the report *In the Matter of Editorializing by the Broadcast Licensees*.<sup>29</sup> As a result, the guidelines that would govern broadcasters for nearly 40 years became known as the Fairness Doctrine.<sup>30</sup>

The Fairness Doctrine had two primary requirements for a broadcaster to obtain a license. First, “every licensee [must] devote a

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<sup>24</sup> Steve Rendall, *The Fairness Doctrine: How We Lost it and Why We Need it Back*, SISYPHUS (July 2018), <https://sisyphuslitmag.org/2018/07/the-fairness-doctrine-how-we-lost-it-and-why-we-need-it-back/>.

<sup>25</sup> *Id.* (stating that the purpose of the Communications Act was to “regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States”).

<sup>26</sup> *Id.*

<sup>27</sup> 47 U.S.C.A. § 307 (2004).

<sup>28</sup> See Kathleen Ann Ruane, *Fairness Doctrine: History and Constitutional Issues*, CONG. RES. SERV (2011).

<sup>29</sup> See Editorializing by Broadcast Licensees, 13 F.C.C.2d REP. 1246, 1246–70 (1949). The report was first iteration of the Fairness Doctrine, which set out the requirements for broadcasters to devote time to controversial issues and air opposing views. *Id.*

<sup>30</sup> *Id.* at 1264 (referring to the guidelines as “the doctrine of fairness.”).

reasonable portion of broadcast time to the discussion and consideration of controversial issues of public importance.”<sup>31</sup> Second, “in doing so [the broadcaster be] fair—that is, that [the broadcaster] affirmatively endeavor to make. . . facilities available for the expression of contrasting viewpoints held by responsible elements with respect to the controversial issues presented.”<sup>32</sup>

Additional requirements under the Fairness Doctrine were later imposed, including the “personal attack rule” which required broadcasters to notify a person who was the subject of a personal attack within one week and required the broadcaster to allow the individual an opportunity to respond on air.<sup>33</sup> The regulation also required broadcasters that endorsed a political candidate to allow other candidates an equal opportunity to respond.<sup>34</sup>

The premise of the Fairness Doctrine was based on the concept that television broadcasters were “public trustees.”<sup>35</sup> Unlike newspapers, the airwaves for broadcast television were believed to be finite.<sup>36</sup> This “scarcity concept” meant that broadcasters who used the public airwaves should provide a public service.<sup>37</sup> Because the federal government licensed broadcasters, the theory was that the networks should air competing perspectives designed to foster a fair debate on controversial issues.<sup>38</sup>

In many ways, it is unsurprising the Fairness Doctrine emerged in 1949. The political and media landscape in the United States in the early 1950s bred an atmosphere of distrust among the American public, and for the first time in American history, the coverage played out live across television.

In the early 1950s, Americans were told to fear Communism—to be

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<sup>31</sup> Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

<sup>32</sup> *Id.* (original punctuation preserved).

<sup>33</sup> 47 C.F.R. § 73.123–73.300 (1974).

<sup>34</sup> *Id.* (articulating that though the Fairness Doctrine required broadcasters to provide equal time to other candidates if the station endorsed a candidate, the rule was separate from the Equal Time rule which is still in effect); *see also* 47 C.F.R. § 73.1941 (1994).

<sup>35</sup> See, e.g., Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 117 (1973) (“[L]icensee’s role developed in terms of a ‘public trustee’ charged with the duty of fairly and impartially informing the public audience.”).

<sup>36</sup> Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 (1969); *see also* Josephine Soriano, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion’s Scarcity Rationale?* 15 B.U. PUB. INT. L. J. 341, 343 (2006) (explaining that broadcast media uses electromagnetic spectrum to transmit signal, and there are a limited number of signals that can occupy the spectrum).

<sup>37</sup> John W. Berresford, The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Past, 2 MEDIA BUREAU STAFF RES. PAPER (2005).

<sup>38</sup> *See* Ruane, *supra* note 28.

watchful of their neighbors, their teachers, their news anchors.<sup>39</sup> The Red Scare and Cold War dominated nightly news in the late 1940s and early 1950s.<sup>40</sup> Despite the rampant fear that swept across the nation and consumed the public and public figures alike, Americans largely trusted broadcast news.<sup>41</sup> Perhaps this is why when Edward R. Murrow, a renowned and respected journalist for CBS, spoke on March 9, 1954, on his television program *See it Now* and warned against the dangers of McCarthyism, the audience listened.<sup>42</sup> In this broadcast, Murrow looked directly into the camera and condemned McCarthy and his claim of rampant Communism:

We proclaim ourselves, as indeed we are, the defenders of freedom—what's left of it but we cannot defend freedom abroad by deserting it at home. The actions of the junior Senator from Wisconsin have caused alarm and dismay amongst our allies abroad and given considerable comfort to our enemies. And whose fault is that? Not really his. He didn't create this situation of fear. He merely exploited it, and rather successfully. Cassius was right: "The fault, dear Brutus, is not in our stars, but [i]n ourselves."<sup>43</sup>

The more illustrative point to Edward R. Murrow's speech condemning Joseph McCarthy during the infamous *See it Now* broadcast is not that the American public listened,<sup>44</sup> though they did, but that in spite of the fear and distrust in America at that time, people trusted the news.<sup>45</sup> Moreover, Murrow and others like him could speak out against Communism, the Vietnam War,

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<sup>39</sup> Landor Storrs, *McCarthyism and the Second Red Scare*, OXFORD RES. ENCYCLOPEDIA AM. HIST. 1 (July 2015).

<sup>40</sup> *Id.*

<sup>41</sup> See *The New Media Landscape*, *supra* note 4.

<sup>42</sup> Joseph Wershba, *Murrow v. McCarthy: See it Now*, N.Y. TIMES (March 4, 1979), <https://www.nytimes.com/1979/03/04/archives/murrow-vs-mccarthy-see-it-now.html>.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* Following Murrow's address to the country, CBS said it received the largest response in broadcast history from the American public: 12,348 phone calls within a few hours. Though McCarthy's reputation had begun to decline, Murrow's public address is largely credited with demonstrating the role that television journalism once had in shaping American society. See Edward Walsh, *When Television Took on Joe McCarthy*, WASH. POST (March 11, 1994), <https://www.washingtonpost.com/archive/lifestyle/1994/03/11/when-television-took-on-joe-mccarthy/46f3f817-b0a8-432f-8c68-db4f906a5b01/>.

<sup>45</sup> See *Edward R. Murrow*, FILM & HISTORY (June 20, 2016), <http://www.uwosh.edu/filmandhistory/documentaryamericanhistory1/murrow.php> (referring to Edward R. Murrow at the time of McCarthy broadcast as "the most trusted man in America").

and culturally significant events in the 1950s, 1960s, and 1970s *without* violating the Fairness Doctrine.

Even so, some have argued that the Fairness Doctrine chilled free speech;<sup>46</sup> this was and remains the primary motive for its repeal.<sup>47</sup> Yet the Supreme Court has never held that the Fairness Doctrine was unconstitutional or contravened the First Amendment rights of broadcasters.<sup>48</sup> In part, this is because of the medium.

The FCC licenses broadcasters to use the airwaves, and though they have the right to speak, the right is confined by the mechanism.<sup>49</sup> Yet a wave of challenges and policy concerns throughout the 1980s would ultimately lead the FCC to abandon the Doctrine, and with it, the ideal that broadcasters had a responsibility to serve as public trustees.

#### B. Challenging Constitutionality

In 1985, the FCC issued a report entitled the 1985 Fairness Report.<sup>50</sup> The report was published as an evaluation of the Fairness Doctrine.<sup>51</sup> The Commission concluded that the “fairness doctrine . . . disserve[d] the public interest.”<sup>52</sup> The FCC also concluded that the second prong of the Doctrine, which required broadcasters to air opposing viewpoints, had a chilling effect on news coverage.<sup>53</sup> Even so, the Commission did not repeal the Doctrine after that conclusion because the FCC was under the mistaken assumption that the Doctrine had been codified in a 1959 amendment to Title 47 of the United States Code, section 315.<sup>54</sup>

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<sup>46</sup> See Adam Thierer, *Why the Fairness Doctrine is Anything But Fair*, THE HERITAGE FOUNDATION (Oct. 29, 1993), <https://www.heritage.org/government-regulation/report/why-the-fairness-doctrine-anything-fair> (arguing that the Fairness Doctrine put too much regulatory power under FCC control and allowed for arbitrary enforcement); see also Robert Mulholland, *The Fairness Doctrine is Unfair to the Public*, CHICAGO TRIBUNE (May 30, 1989), <https://www.chicagotribune.com/news/ct-xpm-1989-05-30-8902050312-story.html> (suggesting that the Fairness Doctrine allowed the government to control what content a station aired).

<sup>47</sup> Ruane, *supra* note 28, at 5.

<sup>48</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>49</sup> See *infra* Part I.B. (highlighting in the subsequent court decisions the court’s rationale in determining that broadcast is different than print media).

<sup>50</sup> 102 F.C.C.2d REP. 145 (1985).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 148.

<sup>53</sup> *Id.* at 155.

<sup>54</sup> See Communications Act, 47 U.S.C. § 315 (1959). In 1959, Congress amended the Communications Act of 1934. Congress revised section 315 to include language that stated

Yet, the report, critical of the Fairness Doctrine and suggestive of its negative implications on the First Amendment, set the stage for a series of court challenges that ultimately empowered the FCC to repeal it in 1987.<sup>55</sup>

### 1. *Red Lion Broad. Co., Inc., v. FCC*

Before the FCC's abandonment of the Fairness Doctrine in 1987, the policies that governed broadcast licenses for the second half of the twentieth century faced intense scrutiny in the courts.<sup>56</sup> Yet, in 1969, the Supreme Court demonstrated it was willing to uphold the principles behind the Fairness Doctrine.<sup>57</sup> *Red Lion Broad. Co., Inc. v. FCC* involved two cases that challenged the constitutionality of the Fairness Doctrine and the statutory basis that had supported it.<sup>58</sup>

The case centered on a man named Fred J. Cook who had authored a book entitled *Goldwater—Extremist on the Right*.<sup>59</sup> Red Lion Broadcasting was licensed to operate a radio station, and the station broadcast a segment by Reverend Billy James Hargis that discussed Cook's book.<sup>60</sup> During the broadcast, Hargis made a series of allegations against Cook, including alleging that he had been fired for making false statements, that he worked for a publication associated with Communism, that he attacked the Central Intelligence Agency, and that his book was an attempt to destroy Barry Goldwater.<sup>61</sup>

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a broadcaster shall afford a reasonable opportunity to discuss conflicting views. That said, the FCC relied on a D.C. Circuit Court decision, *Telecom. Research and Action Ctr. v. FCC*, 806 F.2d 1115 (D.C. Cir. 1986), which stated, “[h]ad Congress affirmatively intended to make the fairness doctrine a statutory command, it surely would have employed a more direct and less offhanded approach...” *Id.* at 1119. The dissent strongly maintained that the Fairness Doctrine had been codified, stating, “[a]s Judge Robinson explained for the court, ‘[the] language placed in Section 315(a) in 1959. . . codifies the fairness doctrine formulated by the Commission in 1949.’ *Kennedy for President Committee v. FCC*, 636 F.2d 432, 438 (D.C. Cir. 1980) (citing *Red Lion*, 395 U.S. at 377–78, 89 S. Ct. at 1799–1800).” *Id.* at 1117. Even so, the FCC elected to discontinue adherence to the Doctrine determining that it was never codified.

<sup>55</sup> See *In re Syracuse Peace Counsel*, 2 FCC RCD. 5043, 5050 (1987).

<sup>56</sup> See *Green v. FCC*, 447 F.2d 323, 333 (D.C. Cir. 1971) (declining to reverse the ruling of the FCC that rejected a complaint by groups under the fairness doctrine); *Banzhaf v. FCC*, 405 F.2d 1082, 1085 (D.C. Cir. 1968) (affirming a ruling by the FCC to requiring television and radio stations to devote equal airtime to present a case against cigarette smoking).

<sup>57</sup> See generally *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969).

<sup>58</sup> *Id.* at 370.

<sup>59</sup> *Id.* at 371.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

After the broadcast, Cook sought to invoke his free reply time, determining he had been personally attacked on air.<sup>62</sup> Despite the FCC policy mandating the air time, Red Lion refused.<sup>63</sup> Following an exchange between Cook, Red Lion, and the FCC, the FCC determined that Cook was entitled to a chance to respond.<sup>64</sup>

The Supreme Court went through an exhaustive history of the Doctrine and detailed the legislative intent behind it.<sup>65</sup> The Court reasoned that the Fairness Doctrine was a “legitimate exercise of congressionally delegated authority” to the FCC.<sup>66</sup> Specifically, the Court addressed the First Amendment issues raised by broadcasters and the contention that the First Amendment protected broadcaster’s right to exclude who they choose from the broadcast, holding that no person can be prevented from publishing what he thinks and that such a right extends equally to broadcasters.<sup>67</sup>

Yet it was this comparison of broadcast to other mediums of publication in an argument of First Amendment protection in which the Court disagreed.<sup>68</sup> There were differences in how the First Amendment applied to the medium of broadcast, the Court determined.<sup>69</sup> The Court pointed to the government’s ability to limit sound-amplifying equipment, but suggested that in so doing, the government was not impeding free speech.<sup>70</sup>

Underpinning the Court’s rationale behind *Red Lion* was the scarcity argument.<sup>71</sup>

If 100 persons want broadcast licenses but there are only 10 frequencies to allocate, all of them may have the same ‘right’ to a license; but if there is to be any effective communication by radio, only a few can be licensed and the rest must be barred from the airwaves.<sup>72</sup>

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<sup>62</sup> *Id.* at 372; see also *In re Amendment of Part 73*, 8 F.C.C.2d 721, 722 (1967) (highlight that the FCC codified its longstanding personal attack and political editorial rules which allowed a person to invoke airtime in the context of the discussion of a controversial issue if a personal attack occurred).

<sup>63</sup> *Red Lion Broad. Co.*, 395 U.S. at 372.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 375–387.

<sup>66</sup> *Id.* at 385.

<sup>67</sup> *Id.* at 386.

<sup>68</sup> *Id.* at 387.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

<sup>71</sup> *Id.* at 388–89.

<sup>72</sup> *Id.*

Moreover, the Court determined it was “the right of the viewers and listeners, *not* the right of the broadcasters,” that was important.<sup>73</sup> In its reasoning, the Court acknowledged that the FCC could have required broadcasters to share the frequencies.<sup>74</sup> Instead, the Court recognized that the government elected to bestow upon the broadcasters selected for a license a responsibility to act as a public trustee—a requirement that in exchange for the free use of public airwaves, the licensee would offer reasonable time to those with a different view or those who had been publicly attacked.<sup>75</sup> The Court reasoned that the First Amendment granted no right to a licensee that enabled them to prevent others from speaking on the broadcast and granted no unconditional use of a resource to which others had been denied access.<sup>76</sup>

The Court emphasized the use of licenses in its *Red Lion* opinion to uphold the constitutionality of the Fairness Doctrine. “Licenses to broadcast do not confer ownership of designated frequencies, but only the temporary privilege of using them.”<sup>77</sup> The *Red Lion* Court upheld the constitutionality of the Fairness Doctrine,<sup>78</sup> and held that the FCC’s regulations in the Doctrine were authorized by statute and the Constitution.<sup>79</sup> Though the Court’s decision has never been directly challenged, subsequent appellate decisions undermined its rationale.

## 2. *Telecom. Research and Action Ctr. v. FCC*

In 1986, a case called *Telecom. Research and Action Ctr. v. FCC* (*TRAC*) came before the United States Court of Appeals, D.C. Circuit.<sup>80</sup> Judge Robert Bork and future Supreme Court Justice Antonin Scalia questioned the legitimacy of the Fairness Doctrine in the opinion.<sup>81</sup> The decision, written by Judge Bork, challenged the Supreme Court to “one day revisit this area of law and either eliminate the distinction between print and broadcast media . . . or announce a constitutional distinction that is more usable than the present one.”<sup>82</sup>

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<sup>73</sup> *Id.* at 390 (emphasis added).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 391.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 394 (citing 47 U.S.C. § 301 (1934)).

<sup>78</sup> *Id.* at 396.

<sup>79</sup> *Id.* at 401.

<sup>80</sup> See generally *Telecom. Research and Action Ctr. v. FCC*, 801 F.2d 501 (D.C. Cir. 1986).

<sup>81</sup> See generally *id.*

<sup>82</sup> *Id.* at 509.

The case centered on a challenge to the FCC's decision not to apply the regulations of the Fairness Doctrine to a technology known as teletext.<sup>83</sup> The FCC argued that the Fairness Doctrine should not extend to a technology that did not exist when the Doctrine was created and maintained that applying the Doctrine was at the sole discretion of the Commission.<sup>84</sup> The FCC also argued that teletext was a hybrid of print and broadcast, which did not subject it to the scarcity rationale outlined in *Red Lion*.<sup>85</sup>

Unlike *Red Lion*, which was concerned exclusively with broadcast, the FCC sought to distinguish the argument in *TRAC* by claiming that regulating teletext implicated the First Amendment because it regulated print media, which the Court had determined in a prior decision was not subject to right-of-reply.<sup>86</sup> The FCC attempted to differentiate teletext from broadcast in *TRAC* by arguing that textual media, unlike airwaves, was not scarce. However, that argument was unconvincing to the D.C. Circuit.

The court determined that “[t]he dispositive fact is that teletext is transmitted over broadcast frequencies that the Supreme Court has ruled scarce and this makes teletext's content regulable.”<sup>87</sup> Though the FCC lost the appeal,<sup>88</sup> the court struck the first major blow to the Doctrine by holding that the Doctrine was not statutory law, but rather was created by the FCC and as such, could be repealed by the FCC.<sup>89</sup> This was the first recognition that the Doctrine had not been codified.

### 3. *Meredith Corp. v. FCC*

The FCC's last barrier to eliminating the Fairness Doctrine was removed by the D.C. Circuit Court of Appeals the next year in *Meredith Corp. v. FCC*.<sup>90</sup> A station owned by Meredith Corp. was accused of violating the Fairness Doctrine for refusing to allow response time to a public attack.<sup>91</sup>

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<sup>83</sup> *Id.* at 502 (noting that teletext was a new technology that transmitted graphics onto television screens for home viewing).

<sup>84</sup> *Id.* at 504.

<sup>85</sup> *See id.*

<sup>86</sup> *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a statute that applied to newspapers requiring editorial columns to provide a right to reply).

<sup>87</sup> *Telecom. Research and Action Ctr.*, 801 F.2d at 508.

<sup>88</sup> *Id.* at 502.

<sup>89</sup> *Id.* at 517.

<sup>90</sup> *See Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

<sup>91</sup> *Id.* at 865–66.

Concurrent to the case, the FCC's Fairness Report was issued.<sup>92</sup> The report concluded that the Doctrine did not serve the public interest, but the Commission failed to repeal the Doctrine at that time.<sup>93</sup> The D.C. Circuit questioned the Commission's unwillingness to declare where it stood on the policies that had long governed broadcasters:

[T]he Commission refused to decide whether the fairness doctrine was self-generated pursuant to its general congressional authorization or specifically mandated by Congress. Of course, the fair inference to be drawn from the Commission's report was that the Commission believed the doctrine was not specifically mandated; otherwise, it would have been irresponsible for the Commission gratuitously to cast constitutional doubt on a congressional command. Nonetheless, because the Commission felt intense political, if not legal, pressure from Congress, it chose not to reach a final conclusion regarding the origins of the doctrine. We think, however, the Commission was obliged to resolve that issue, at least in the context of an enforcement proceeding in which a party raises a constitutional defense.<sup>94</sup>

The D.C. Court of Appeals remanded the case to the FCC to consider the constitutional arguments, noting, "the Commission need not confront that issue if it concludes that in light of its Fairness Report it may not or should not enforce the doctrine because it is contrary to the public interest."<sup>95</sup>

Despite the Supreme Court's holding in *Red Lion*, once the Fairness Report was published, the FCC elected to stop enforcing the Doctrine under the Reagan administration in 1987.<sup>96</sup> That year, Congress voted to codify the regulations embodied in the Doctrine, but Reagan vetoed the measure, stating "[t]his type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed by the First Amendment."<sup>97</sup>

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<sup>92</sup> See 1985 Fairness Report, 102 F.C.C.2d REP. 145 (1985).

<sup>93</sup> See *supra* Part I.B.

<sup>94</sup> *Meredith Corp.*, 809 F.2d at 872–73.

<sup>95</sup> *Id.* at 874.

<sup>96</sup> Tim Dickinson, *So Long, Fairness Doctrine*, ROLLING STONE (Aug. 24, 2011, 6:11 PM), <https://www.rollingstone.com/politics/politics-news/so-long-fairness-doctrine-75444/>.

<sup>97</sup> Penny Pagano, *Reagan's Veto Kills Fairness Doctrine Bill*, L.A. TIMES (June 21, 1987,

The political landscape of broadcast networks changed almost immediately. According to the Media Access Project, after the repeal of the Fairness Doctrine there has been less coverage of issues; television news had decreased locally and nationally.<sup>98</sup> The Federal Communications Law Journal determined that 25 percent of broadcast stations no longer offer any local news or public affairs programming.<sup>99</sup> But more disconcerting is the proliferation of partisan reporting. Less than a year after the FCC abolished the Fairness Doctrine, Rush Limbaugh launched his talk radio show, polarizing talk radio.<sup>100</sup> Rising out of the demise of the Doctrine are names such as Sean Hannity and Bill O'Reilly.<sup>101</sup>

### C. A New Standard of Regulation: Public Broadcasting Act

Whereas most of the legislation addressed in Part I of this Note is in reference to repealed regulations, this Subpart addresses the passage of legislation that imposed regulation on broadcasters. Though seemingly disconnected from the Fairness Doctrine, the history of this legislation is critical to understanding the proposal discussed *infra* Part III.<sup>102</sup>

In 1967, Congress passed Public Law 90-129 to amend the Communications Act of 1934.<sup>103</sup> The amendment became known as the Public Broadcasting Act of 1967.<sup>104</sup> The Act provided federal aid to public broadcasting, but more importantly, it created the Corporation for Public Broadcasting (CPB) and the Public Broadcasting Service (PBS).<sup>105</sup> The CPB

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<sup>98</sup> 12:00 AM), <https://www.latimes.com/archives/la-xpm-1987-06-21-mn-8908-story.html>.

<sup>99</sup> Rendall, *supra* note 24.

<sup>100</sup> *Id.*

<sup>101</sup> Mark Gunther, *The Transformation of Network News*, NIEMAN REPORTS (June 15, 1999), <https://niemanreports.org/articles/the-transformation-of-network-news/>.

<sup>102</sup> *Id.* The demise of the Fairness Doctrine saw the emergence of major conservative voices. For additional discussion regarding potential reasons for this, see Nicole Hemmer, *The Conservative War on Liberal Media Has a Long History*, THE ATLANTIC (Jan. 17, 2014), <https://www.theatlantic.com/politics/archive/2014/01/the-conservative-war-on-liberal-media-has-a-long-history/283149/> (“Conservatives saw the media landscape differently. . . . Because of this, the right believed fairness did not require a response to conservative broadcasts; conservative broadcasts were the response. Unable to bring the FCC around to their position, conservatives increasingly saw the commission as a powerful government agency dedicated to maintaining media’s liberal tilt.”).

<sup>103</sup> See *infra* Part III.

<sup>104</sup> An Act of Nov. 7, 1967 Pub. L. No. 90-129, 81 Stat. 365.

<sup>105</sup> See *id.*; see also Robert Avery, *Why Public Broadcasting?*, NAT'L COMM. ASS'N (Oct. 1, 2007), <https://www.natcom.org/communication-currents/why-public-broadcasting>. The Act also created National Public Radio (NPR). *Id.*

was funded by the federal government as a conduit of federal funding for the public media.<sup>106</sup> The corporation functioned as an umbrella organization to support public media operations, but did not, and does not, operate broadcast stations.<sup>107</sup> On the other hand, PBS was established under the Act as a membership organization to work in partnership with other stations and provide public programming and educational programming.<sup>108</sup> By design, PBS is limited to educational programming.<sup>109</sup>

Though the legislation was intended to create a public broadcasting network that rivaled the British Broadcasting Corporation (BBC), it had fundamental flaws that prevented it from ever reaching the idealism envisioned by drafters.<sup>110</sup> First, the governing body of the CPB was intended to be nonpartisan, with the objective that the Board of Directors would protect the organization from political interference.<sup>111</sup> Yet, when the Act passed, the legislation required a fifteen-member Board whose appointees would be decided by the president.<sup>112</sup> Second, the intended funding mechanism for the Act did not make it into the bill.<sup>113</sup> The result was a struggle to obtain congressional funding each fiscal year.<sup>114</sup>

Despite its flaws, the Public Broadcasting Act has existed for more than fifty years. Since its founding, it adopted a code of integrity, code of ethics, and charter that govern both the media organizations overseen by the corporation and the employees within the corporation.<sup>115</sup> Members of the CPB adopted a charter outlining principles aimed at strengthening trust and integrity of the public media. The charter specifies a commitment to “[a]im for transparency in news gathering, reporting, and other content creation and share the reasons for important editorial and programming choices.”<sup>116</sup>

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<sup>106</sup> *CPB FAQ*, CORP. FOR PUB. BROADCASTING, <https://www.cpb.org/faq#1-2> (last visited Mar. 7, 2020).

<sup>107</sup> *Id.*

<sup>108</sup> *Mission*, IDAHO PUB. TELEVISION, <http://www.pbs.org/about/about-pbs/mission-statement/> (last visited Mar. 7, 2020).

<sup>109</sup> *Overview*, IDAHO PUB. TELEVISION (Aug. 2018), <http://www.pbs.org/about/about-pbs/overview/> (last visited Mar. 7, 2020).

<sup>110</sup> Avery, *supra* note 105.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Ombudsman*, CORP. FOR PUB. BROADCASTING, <https://www.cpb.org/ombudsman/about> (last visited Mar. 7, 2020).

<sup>116</sup> *Code of Integrity*, CORP. FOR PUB. BROADCASTING, <http://www.codeofintegrity.org/> (last

Moreover, the public media seeks to “[p]romote the common good, the public interest, and these commitments to integrity and trustworthiness in organizational governance, leadership, and management.”<sup>117</sup>

Of note, the CPB charter established the position of ombudsman as an independent observer of public broadcasting. The position is independent of the CPB and was created in 2005 as the result of a “clear need for a ‘system-wide process of exerting upward pressure on the standards of taste and performance.’”<sup>118</sup> The ombudsman works to encourage high standards in public broadcasting.<sup>119</sup> The benefit of public broadcasting is difficult to overstate. Research shows that, unlike its commercial counterpart, the public news audience is better-informed<sup>120</sup> and more likely to vote.<sup>121</sup> The audience also has smaller disparities in knowledge between social groups.<sup>122</sup>

## II. REPORTING LIVE FROM THE PROBLEM

The preceding history is crucial for understanding the current deregulated culture within broadcast news. More importantly, it juxtaposes the current media landscape and demonstrates that it was once possible for the public to have trust in broadcast news. Whereas big government, labor, and business have traditionally suffered low public opinion, the public largely viewed broadcast news in a positive light since its inception, finding broadcasters trustworthy and credible.<sup>123</sup>

Part II of this Note examines the current scope of the issue. By first analyzing the concept of *fake news* and how that concept impacts public perception of the media, this Note delves into recent scenarios that meet the definition of *fake news* and examines why recent attempts to regulate the

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visited Mar. 7, 2020) [hereinafter *Code of Integrity*].

<sup>117</sup> *Id.*

<sup>118</sup> *Charter Establishing the CPB Office of the Ombudsman*, CORP. FOR PUB. BROADCASTING (Feb. 1, 2011), <https://www.cpb.org/ombudsman/charter> [hereinafter *Charter*].

<sup>119</sup> *Id.*

<sup>120</sup> See Stuart Soroka et al., *Auntie Knows Best? Public Broadcasters and Current Affairs Knowledge*, 43 B. J. POL. S. 1, 4–5 (Oct. 2013).

<sup>121</sup> See Susan Banducci, Holli A. Semetko, *Media, Mobilization and European Elections*, FIFTH FRAMEWORK RES. PROGRAMME (Mar. 10, 2003), [http://www.ucd.ie/dempart/working\\_papers/media.pdf](http://www.ucd.ie/dempart/working_papers/media.pdf).

<sup>122</sup> See James Curran et. al., *Media Systems, Public Knowledge and Democracy: A Comparative Study*, 24 EUROPEAN JOURNAL OF COMMUNICATION 1, 5–26 (2009), <https://pcl.stanford.edu/research/2008/curran-mediasystems.pdf>.

<sup>123</sup> *Confidence in Institutions*, GALLUP, <https://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Mar. 7, 2020).

media have failed.

#### A. *Defining the Problem*

This Subpart explains how fake news affects public perception of the media and how that perception affects public trust of broadcast news. In so doing, it elucidates a general definition of the term *fake news* that serves as a basis from which to evaluate broadcast news stories. A general definition is necessary to identify stories that fall within the confines of *fake news* and to separate those that fall outside those confines.

Examining the pervasiveness of an issue presents a challenge when no universal definition exists for what constitutes an instance of that issue. One scholar defined *fake news* as the “deliberate presentation of [ ] false or misleading claims as news, where the claims are misleading by design.”<sup>124</sup> Yet another study conducted a meta-analysis of 34 academic articles to define the term.<sup>125</sup> The authors of the study recognized that it was clear that *fake news* “undermine[s] journalism’s legitimacy . . .”<sup>126</sup> Yet, the phrase *fake news* is typically not limited to circumstances in which a journalist “deliberately” presents false or misleading claims. This term has been repurposed to describe news that is unflattering or unfair.<sup>127</sup> Even so, this is not to suggest that *fake news* is a widespread issue within the mainstream media. Instances of false or misleading broadcast news are rare, but they do occur.<sup>128</sup> These occurrences, however isolated, compound the issue of media credibility.

Perhaps more concerning is not the proliferation of fake news but the belief that it is so pervasive.<sup>129</sup> Such a belief creates the same net effect: a distrust of the media. A study conducted by the University of South Carolina on the perceived effects of fake news found a “positive link between partisan

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<sup>124</sup> Axel Gelfert, *Fake News: A Definition*, 38 INFORMAL LOGIC 84, 86 (Mar. 15, 2018), <https://doi.org/10.22329/il.v38i1.5068>.

<sup>125</sup> See generally Edson Tandoc, Jr. & Zheng Lim, Richard Ling, *Defining “Fake News” A Typology of Scholarly Definitions*, 6 DIGITAL JOURNALISM 137 (Aug. 30, 2017), <https://doi.org/10.1080/21670811.2017.1360143> (categorizing fake news into six distinct subsets: news satire, news parody, news fabrication, photo manipulation, advertising and public relations, and propaganda).

<sup>126</sup> *Id.* at 147.

<sup>127</sup> See David Klein & Joshua Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 5, 6–13 (April 2017), <https://ssrn.com/abstract=2958790>.

<sup>128</sup> See *infra* Part II.B.1–3.

<sup>129</sup> See S. M. Jang & J. K. Kim, Third Person Effects of Fake News: Fake News Regulation and Media Literacy Interventions, 80 COMPUTERS HUM. BEHAV. 295 (2018).

identity and TPP [third-party perception]. In other words, those with greater identity with their own partisan groups (either Republican or Democrat) showed greater self-other disparity over the perceived influence of fake news.”<sup>130</sup> Moreover, the study’s authors concluded that the finding “leads to growing concerns of false consensus among partisan citizens. . . . As partisans tend to show this perceptual bias regarding the effect of fake news, the role of information providers, such as news organizations . . . should be highlighted as an effort of fighting fake news.”<sup>131</sup>

In many ways, the concept of *fake news* is not difficult to understand. Extending beyond the medium of broadcast, when an individual wants an idea to be accurate, confirmation bias can lead the person to believe the idea is true. Confirmation bias refers to a psychological phenomenon in which a person seeks or interprets evidence in a manner that supports existing beliefs.<sup>132</sup> More than seeking information that supports what a person already believes, people will seek out information that confirms their belief in a particular way.<sup>133</sup> Moreover, people will be less likely to believe factual accounts that challenge a narrative dissimilar to the beliefs they hold.

Researchers with the Annenberg School of Communication examined the effects of exposing listeners to one-sided news broadcasts and found that “[l]isteners who are exposed to more conservative talk evaluate[d] Democrats more negatively and Republicans more positively. . . .”<sup>134</sup> The study sought to demonstrate the effect of exposure on political attitudes.<sup>135</sup> The researchers determined that as exposure to a message increased, so too did the degree of agreement with the messenger.<sup>136</sup> On the other hand, the researchers tried to correlate the same finding with listener’s knowledge, a result that a prior study had posited.<sup>137</sup> The researchers concluded that knowledge of a subject was not as great an indicator as exposure to a one-sided message.<sup>138</sup> Put

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<sup>130</sup> *Id.* at 299.

<sup>131</sup> *See id.*

<sup>132</sup> See Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175 (1998).

<sup>133</sup> *Id.* at 177.

<sup>134</sup> Gangheong Lee & Joseph Capella, *The Effects of Political Talk Radio on Political Attitude Formation: Exposure Versus Knowledge*, 18 POL. COMM. 369, 378 (2001), <https://pdfs.semanticscholar.org/d0ad/9c2ba66a64d25372e144a2734f230fad8031.pdf>.

<sup>135</sup> *See id.* at 385.

<sup>136</sup> *Id.* at 386.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 387.

another way, “when an audience is exposed to an intense, one-sided message, their agreement with the positions advocated increases as exposure and reception increase.”<sup>139</sup>

In the context of *fake news*, this suggests that a consumer who continually observes biased news reporting is more likely to increase the degree of agreement with the conclusions of that report than to seek out other sources of information that would provide a balanced account of the facts. It also suggests that reporting that challenges a view already adopted by a viewer is more likely to be rejected as *fake news*. This has occurred before, and the consequences are disconcerting.

#### B. *Fake News in the Real World*

This Subpart analyzes several disreputable instances of *fake news* that have rightly contributed to the poor public perception of the media’s credibility. This Subpart examines an initial story reported by a broadcaster and discusses the institutional failures that allowed misinformation or inaccurate reporting to occur.

##### 1. *The Iraq War*

Mistakes in reporting are inevitable, but when the news reports only one side of the story it can create a perception of a reality that does not exist. Nothing in the subsequent section is meant to suggest that broadcast news was responsible in whole or in part for the Bush administration’s decision to invade Iraq. That said, it is worth theorizing how media coverage pre-Iraq war significantly influenced the public to support the war without evidence.

One study conducted a content analysis of ABC, CBS, and NBC in the year before the United States’ invasion of Iraq. The study’s authors identified 1,434 stories from ABC, CBS, and NBC over a period of seven and a half months before the invasion.<sup>140</sup> The study preliminarily suggested that Americans likely learned and formed much of their initial opinions about the

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<sup>139</sup> *Id.* at 389 (finding that Democrats and Independents developed negative attitudes toward Bill Clinton after listening to conservative talk radio).

<sup>140</sup> Danny Hayes & Matt Guardino, *Whose Views Made the News? Media Coverage and the March to the War in Iraq*, 27 POL. COMM. 59, 66 (Feb. 3, 2010), <https://doi.org/10.1080/10584600903502615> (The study used six criteria to identify stories for inclusion. Those criteria were: “(a) primary topical focus, (b) secondary topical focus, (c) identity of each source, (d) source category, (e) directional thrust of each source’s statement in relation to the Bush administration’s position of Iraq, and (f) directional thrust of the story as a whole.”).

Iraq war from broadcast news and were influenced by the coverage.<sup>141</sup>

The coverage leading up to the invasion from ABC, CBS, and NBC focused heavily on Iraq's suspected possession of weapons of mass destruction (WMD).<sup>142</sup> At that time, the networks also broadcast stories about the level of support from the international community and aired segments about how likely it was the United States would succeed in its efforts against Iraq.<sup>143</sup>

Among one of the most frequent criticisms of the broadcast news coverage of Iraq was its failure to question claims from the Bush administration about initial assertions that Iraq had WMD.<sup>144</sup> Moreover, commentators suggest that the American public was told why the United States should invade Iraq, but the counter views were largely shut out. Yet, from a statistical perspective, the data suggests that counterpoints were provided adequate coverage.<sup>145</sup> Does this suggest that the media provided fair and balanced coverage of the pre-Iraq war invasion? Perhaps not, because of who provided the divergent viewpoints.

The scholarly study conducted by Hayes and Guardino examined the time broadcasters provided for contrasting views but found the issue was not in the *time* devoted to opposing views. Rather, it was that those who provided the opposing views carried the most persuasive tone to the segment.<sup>146</sup>

For example, George Bush was the source for 53 percent of the quotes given in favor of the invasion.<sup>147</sup> The study found that opposition to the invasion was largely spoken for on behalf of Iraqi officials: 19 percent of all quotes were from Saddam Hussein.<sup>148</sup> Many of the other voices of opposition came from foreign leaders who were openly opposed to George Bush.<sup>149</sup> Contrast the credibility of Bush at this time to the weight the American public

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<sup>141</sup> *Id.* at 68.

<sup>142</sup> *Id.* at 69.

<sup>143</sup> *Id.*

<sup>144</sup> See Howard Kurtz, *Media's Failure on Iraq Still Stings*, CNN (March 11, 2013, 1:29 PM), <https://www.cnn.com/2013/03/11/opinion/kurtz-iraq-media-failure/index.html> (examining the media's failure to question the Bush administration on allegations that Iraq had WMD and suggesting that the public's low confidence in the media stems from what occurred in 2003).

<sup>145</sup> Hayes & Guardino, *supra* note 140, at 72.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 75.

<sup>149</sup> *Id.* (citing current and former European leaders, including French president Jacques Chirac, German chancellor Gerard Schroeder, and Russian president Vladimir Putin).

gave to those who spoke out against the war.<sup>150</sup>

The content of coverage coming from ABC, NBC, and CBS at the time was also a subject of the study. Though the authors found that ABC did remain largely objective in its coverage, they also determined that CBS and NBC did not.<sup>151</sup> In a review of transcripts during the time before the war, correspondents on both CBS and NBS portrayed a war with Iraq as inevitable and necessary.<sup>152</sup> The study's conclusions found that criticisms of network broadcasts were justified and that the author's "findings support the view that media's performance did not live up to the democratic standards most journalists hold themselves to, much less those expected by their critics."<sup>153</sup>

In the context of *fake news*, the failure by broadcasters to cover or provide equal and adequate coverage to opposing sides of the issue ahead of the U.S. invasion into Iraq contributed to the public distrust of the media. Broadcasters recognized early in the coverage that the U.S. would invade Iraq and failed to challenge the government on the rationale behind that decision. According to Howard Kurtz, a CNN reporter who was among the journalists that failed to question the Bush administration's decisions, "[t]he low level of public confidence in the media has many causes, but one of them stems from what happened back in 2003."<sup>154</sup>

The media's failure to cover the war objectively in Iraq remains one of the more notable illustrations of what can occur when a story's conclusion is presumed, but it is not the only example.

## 2. *Seth Rich Conspiracy*

At the height of the 2016 presidential election, misinformation about both candidates was pervasive.<sup>155</sup> Yet one *fake news* story seemed to gain more traction than others, and the story ultimately led to a lawsuit. Mathew

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<sup>150</sup> Following the terrorist attacks of September 11, 2001, George Bush's approval rating reached its highest in Gallup history. There was widespread support among the public for a war on terrorism. See David Moore, *Bush Job Approval Highest in Gallup History, Widespread Public Support for War on Terrorism*, GALLUP (Sept. 24, 2001), <https://news.gallup.com/poll/4924/bush-job-approval-highest-gallup-history.aspx>.

<sup>151</sup> Hayes & Guardino, *supra* note 140, at 76.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 80.

<sup>154</sup> Kurtz, *supra* note 144.

<sup>155</sup> See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211 (2017), <https://web.stanford.edu/~gentzkow/research/fakenews.pdf>.

Ingram of Columbia Journalism Review examined the origins of the Seth Rich conspiracy story, which alleged that the young Democratic National Committee staff member killed in a botched robbery was actually assassinated by a contract killer working for Hillary Clinton.<sup>156</sup> The origins of the conspiracy are difficult to trace, but have largely been attributed to the Internet Research Agency, a Russian entity that disseminated propaganda in the U.S. during the 2016 campaign.<sup>157</sup> Unlike other stories that were circulated in 2016, the alleged assassination of Seth Rich grew into a conspiracy, in part, because it entered mainstream news. A local Fox affiliate broadcast the story and claimed it had confirmed the details that had previously only circulated online. The story resulted in a lawsuit.<sup>158</sup>

Ed Butowsky brought a claim for disparagement and conspiracy against National Public Radio (NPR) and David Folkenflik.<sup>159</sup> The claim also centered on the local Fox News affiliate—Fox 5 DC.<sup>160</sup> Butowsky was an expert in the financial services industry and made frequent appearances on television and radio.<sup>161</sup> In 2017, Butowsky contacted the family of Seth Rich and offered to help the family solve their son's murder; he offered money to hire a private investigator.<sup>162</sup> Later, Butowsky contacted a man named Rod Wheeler to see if he would be willing to investigate the murder on behalf of the Rich family.<sup>163</sup> In March 2017, Wheeler appeared on the local Fox affiliate to discuss his theory behind Rich's death, including his theory that Rich may have been planning to hand documents about Hillary Clinton over to WikiLeaks.<sup>164</sup>

Following Wheeler's appearance on Fox 5, he remained in contact

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<sup>156</sup> Matthew Ingram, *Getting to the Bottom of the Seth Rich Conspiracy Theory*, COLUM. JOURNALISM REV. (July 10, 2019), [https://www.cjr.org/the\\_media\\_today/seth-rich-conspiracy-theory.php](https://www.cjr.org/the_media_today/seth-rich-conspiracy-theory.php).

<sup>157</sup> *Id.*

<sup>158</sup> Butowsky v. Folkenflik, 4:18CV442, 2019 WL 2518833, at \*1 (E.D. Tex. Apr. 17, 2019).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at \*3.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; see also Steve Inskeep, *The Origins of the Seth Rich Conspiracy Theory*, NPR (July 11, 2019, 5:22 AM), <https://www.npr.org/2019/07/11/740608323/the-origins-of-the-seth-rich-conspiracy-theory> (explaining the conspiracy of Seth Rich, an employee of the Democratic National Committee in 2016, who died in the early morning hours of July 10, 2016, and whose death sparked conspiracy theories that Hillary Clinton was behind his death because he had evidence that would be detrimental to her campaign; however the rumors are unverified).

<sup>163</sup> *Butowsky*, 2019 WL 2518833, at \*3.

<sup>164</sup> *Id.* at \*4.

with a reporter for the broadcast network, at one point alleging in an email: “I’m ready to say that Seth’s [sic] Death was not a botched robbery and there appears to be a coverup within the D.C. Gov’t related to his death.”<sup>165</sup> According to the court filings, the Fox 5 reporter remembered that Wheeler was in contact with the Rich family and had expressed interest in exploring the story.<sup>166</sup> On May 15, 2017, Wheeler told a different reporter with Fox 5 that there were various sources within the FBI that had linked Rich to WikiLeaks: “Absolutely, yeah, and that’s confirmed.”<sup>167</sup> The next day, Fox 5 published a story on its website called, “Seth Rich, slain DNC staff, had contact with Wikileaks, say multiple sources.”<sup>168</sup>

Within a day, the conspiracy theory became widely publicized and circulated. The cable news shows *Fox & Friends* aired two segments based on the Fox 5 report.<sup>169</sup> Despite the story being discredited within hours, Fox allowed the story to remain published.<sup>170</sup> Newt Gingrich, a Fox contributor on the cable network, spoke on air about the story. Sean Hannity similarly discussed the story and promoted it on his radio program despite requests from the family of Seth Rich to cease speaking about their son.<sup>171</sup>

In the aftermath of the reporting, Wheeler claimed Fox had taken him out of context and published an incomplete version of what he said.<sup>172</sup> More importantly, the reporters responsible for the misinformation continue to report at Fox News—one now works as a managing editor for the online publication.<sup>173</sup>

Unlike the coverage of the Iraq war, which demonstrated how *fake*

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*; see also Malia Zimmerman, *Seth Rich, Slain DNC Staffer, Had Contact with WikiLeaks, Say Multiple Sources*, FOX News (May 16, 2017), <http://web.archive.org/web/20170516133954/http://www.foxnews.com/politics/2017/05/16/slain-dnc-staffer-had-contact-with-wikileaks-investigator-says.html> (alleging in this archived version of the article by Fox 5 that Seth Rich had contact with WikiLeaks; whereas the original article was removed and the story was later retracted).

<sup>169</sup> Oliver Darcy, *Exclusive: The Chaos Behind the Scenes of Fox News’ Now Retracted Seth Rich Story*, CNN (April 17, 2017, 6:37 PM), <https://money.cnn.com/2017/08/10/media/seth-rich-fox-news-timeline/index.html> [hereinafter *Chaos Behind the Scenes*].

<sup>170</sup> *Id.*

<sup>171</sup> Oliver Darcy, *Seth Rich’s Brother Pleads with Hannity to Stop Spreading Conspiracy Theories*, CNN (March 23, 2017), <https://money.cnn.com/2017/05/23/media/seth-rich-family-letter-hannity-fox-news/>.

<sup>172</sup> *Chaos Behind the Scenes*, *supra* note 169.

<sup>173</sup> *Id.*

*news* can occur in biased or one-sided reporting, the story of Seth Rich presents a different type of *fake news*. The reporting on the conspiracy theory behind Seth Rich's murder represented disinformation, and more importantly, disinformation by a foreign government.<sup>174</sup>

### 3. *Sinclair Broadcast Group*

The preceding Subparts address individual stories that demonstrate what transpires when the media lacks objectivity or accuracy in reporting. Those Subparts show the variances in *fake news*, from biased reporting to disseminating disinformation. Yet sometimes this issue transcends a singular broadcast or event. This Subpart addresses the results when the network itself lacks objectivity in its reporting, affecting all stories the network reports.

In December 2017, the FCC issued a Notice of Proposed Rulemaking and requested comments on a rule that would affect the maximum national audience of television broadcast licensees.<sup>175</sup> Sinclair Broadcast Group submitted comments in support of eliminating the national ownership cap.<sup>176</sup> Throughout most of the 20th century, regulation would have prevented Sinclair from reaching its current size; Sinclair Broadcast Group already owned 200 local television stations in 100 markets.<sup>177</sup>

Under a prior FCC rule called the "rule of seven," broadcast stations were prohibited from owning more than seven AM stations, FM stations, and TV stations in a single market.<sup>178</sup> The rule of seven was adopted in 1953 to promote diversity among broadcast ownership, but the number increased to

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<sup>174</sup> WikiLeaks has long been identified as a conduit to the Russian government, whether wittingly or unwittingly. See Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election*, U.S. DEPT. 1, 4 (March 2019), <https://www.justice.gov/storage/report.pdf> ("The GRU later released additional materials through the organization WikiLeaks.").

<sup>175</sup> FCC, MB DOCKET NO. 17-318, AMENDMENT OF SECTION 73.3555(E) OF THE COMMISSION'S RULES, NATIONAL TELEVISION MULTIPLE OWNERSHIP RULE, (proposed Dec. 18, 2017); see also National Television Multiple Ownership Rule, 83 Fed. Reg. 3661-02, WL 555423 (Jan. 26, 2018).

<sup>176</sup> FCC, MB Docket No. 17-318, Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, Comments of Sinclair Broadcast Group, (March 19, 2018).

<sup>177</sup> Alvin Chang, *Sinclair's Takeover of Local News, in One Striking Map*, VOX (Apr. 6, 2018, 8:20 AM), <https://www.vox.com/2018/4/6/17202824/sinclair-tribune-map>.

<sup>178</sup> Alex Jones, *FCC Raises Limit on Total Stations Under One Owner*, N.Y. TIMES (July 27, 1984), <https://www.nytimes.com/1984/07/27/business/fcc-raises-limit-on-total-stations-under-one-owner.html>.

12 stations in 1984 to increase media competition.<sup>179</sup> The Telecommunications Act of 1996 further eroded the limitation.<sup>180</sup> Even so, competition and diversity never arose after a relaxation on broadcast ownership; instead, it led to media monopolies.<sup>181</sup>

In 2017, Sinclair Broadcast Group required local news anchors on each of its 193 stations to recite from the same script on air.<sup>182</sup> The unusual nature of the segment extended beyond the words spoken in unison across 193 markets. The segment was peculiar because it was produced to appear sincere, as though the evening news anchor was sharing his or her earnest belief about the dangers of *fake news*. A portion of the segment that aired stated:

We are extremely proud of the quality, balanced journalism that [the news station] produces.

....

Unfortunately, some members of the media use their platforms to push their own personal bias and agenda to control ‘exactly what people think....’ This is extremely dangerous to a democracy.<sup>183</sup>

When the segment aired on individual stations, viewers did not appear to

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<sup>179</sup> *Id.*

<sup>180</sup> The Telecommunications Act was signed by Bill Clinton in 1996 intending to create competition among broadcasters. It was the largest communications bill signed since the Communications Act of 1934. But the bill never functioned as intended and as a result of the legislation, corporations could form large monopolies in the media industry. As a result of the act, ownership of the media decreased from approximately fifty companies controlling ninety percent of the media to only five companies controlling the same market share. See Eric Boehlert, *One Big Happy Channel?*, SALON (June 28, 2011, 11:30 PM), [https://www.salon.com/2001/06/28/telecom\\_dereg/](https://www.salon.com/2001/06/28/telecom_dereg/); Katerina Matsa, *The Acquisition of Binge in Local TV*, PEW RES. CTR. (May 12, 2014), <https://www.pewresearch.org/fact-tank/2014/05/12/the-acquisition-binge-in-local-tv/>; Derek Turner, *Dismantling Digital Deregulation: Toward a National Broadband Strategy*, FREEPRESS, [https://www.freepress.net/sites/default/files/2018-05/Dismantling\\_Digital\\_Deregulation.pdf](https://www.freepress.net/sites/default/files/2018-05/Dismantling_Digital_Deregulation.pdf) (last visited Mar. 7, 2020).

<sup>181</sup> See Kevin Carty, *Sinclair’s Vast Media Merger Threatens Democratic Ideals. Congress Must Fight It*, GUARDIAN (Nov. 24, 2017, 6:00 AM), <https://www.theguardian.com/commentisfree/2017/nov/24/sinclair-tribune-media-merger-free-speech>.

<sup>182</sup> Jacey Fortin & Jonah Bromwich, *Sinclair Made Dozens of Local News Anchors Recite The Same Script*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html>.

<sup>183</sup> Erik Wemple, *The Real Problem with Sinclair’s ‘Fake’ News Script*, WASH. POST (April 2, 2018), [https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/04/02/the-real-problem-with-sinclairs-fake-news-script/?utm\\_term=.d82983989129](https://www.washingtonpost.com/blogs/erik-wemple/wp/2018/04/02/the-real-problem-with-sinclairs-fake-news-script/?utm_term=.d82983989129).

notice the forced script, but the video director at Deadspin weaved together a video clip that later went viral showing hundreds of anchors across the United States reading the words in unison.<sup>184</sup>

Though that incident was the most publicized, Sinclair had required its broadcasters to air what the network deemed “must-runs” before.<sup>185</sup> According to a former newscaster for Sinclair, the segments “were a little slanted, a little biased. . . . Packages of this nature can make journalists uncomfortable.”<sup>186</sup> Sinclair has required newscasters to include pre-approved content on stories ranging from terrorism to messages in support of President Trump.<sup>187</sup>

But Sinclair’s must-runs include more than just commentary by newscasters decrying *fake news*. These short segments are received daily at television stations across the country, and newsrooms must air the segments within 24 to 48 hours.<sup>188</sup> In one example, during the 2016 campaign, Sinclair mandated its local news stations air a must-run in which its anchors suggested voters not vote for Hillary Clinton because the Democratic Party was historically pro-slavery.<sup>189</sup> Current and former reporters for Seattle KOMO broadcast station have also complained about Sinclair’s programming requirements and the use of mandated daily polls that the reporter’s described as asking “leading questions.”<sup>190</sup>

Yet the allegations against Sinclair predate the 2016 election. In 2004, Sinclair Broadcast Group declared it would air a documentary on 62 of its stations weeks before the 2004 presidential campaign that criticized John Kerry’s record in Vietnam.<sup>191</sup> Many of the local stations were in swing states and were instructed by Sinclair to air the broadcast.<sup>192</sup> Kerry’s campaign

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<sup>184</sup> Fortin & Bromwich, *supra* note 182; Timothy Burke, *How America’s Largest Local TV Owner Turned Its News Anchors Into Soldiers in Trump’s War on the Media*, DEADSPIN (Mar. 31, 2018, 3:45 PM), <https://theconcourse.deadspin.com/how-americas-largest-local-tv-owner-turned-its-news-anc-1824233490>

<sup>185</sup> Fortin & Bromwich, *supra* note 182.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Sydney Ember, *Sinclair Requires TV Stations to Air Segments That Tilt to the Right*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/business/media/sinclair-broadcast-komo-conservative-media.html>.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Drew Clark, *How Fair is Sinclair’s Doctrine?* SLATE (Oct. 20, 2004, 4:07 PM), <https://slate.com/news-and-politics/2004/10/whatever-happened-to-the-fairness-doctrine.html>.

<sup>192</sup> *Id.*

argued that airing the segment would invoke a right to equal time for Kerry to rebut the accusations made in the documentary.<sup>193</sup> Moreover, Sinclair had instructed stations to preempt regular programming to air the report, which alleged that testimony by Kerry before Congress contributed to the torture of soldiers held in Vietnam.<sup>194</sup> The allegations were unverified.

Sinclair ultimately backed out of airing the documentary, but Reed Hundt, the former chair of the FCC, remarked, “If broadcasters start to behave to the degree [ ] Sinclair is uniquely behaving, the whole industry will find that they’ll be on the short end of the political stick.”<sup>195</sup> Sinclair’s behavior did not improve, however. Thirteen years later, Sinclair has amassed a larger market share and its behavior has become more brazen.<sup>196</sup>

### C. Attempts to Reinstate Regulations

Efforts to prevent broadcasters from disseminating biased news or failing to verify facts before air are challenging because the FCC’s own guidelines provide that it “cannot interfere with a broadcaster’s selection and presentation of news or commentary,”<sup>197</sup> but for some narrow areas in which the FCC has the regulatory authority to penalize licensees for knowingly broadcasting false information.<sup>198</sup>

The FCC provides a consumer guide that identifies “rigging or slanting the news” as the “most heinous act against the public interest.”<sup>199</sup> Yet despite the complaint process in place, the FCC will not revoke a broadcaster’s license “unless the extrinsic evidence of possible deliberate distortion of staging of the news which is brought to our attention, involves the licensee, including its principals, top management or news management.”<sup>200</sup> But as the instances of broadcast misinformation discussed

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<sup>193</sup> Andrea Walker, *Sinclair fallout could linger*, BALT. SUN (Oct. 24, 2004), <https://www.baltimoresun.com/news/bs-xpm-2004-10-24-0410230302-story.html>.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> Sinclair recently attempted to increase its market share further in a controversial \$3.9 billion-dollar merger with Tribune Media but withdrew from negotiations in 2018 after the FCC announced serious concerns about the deal. See Marguerite Reardon, *Sinclair’s Merger with Tribune Official Dead*, CNET (Aug. 9, 2018, 12:50 PM), <https://www.cnet.com/news/sinclair-broadcast-group-merger-with-tribune-media-is-dead/>.

<sup>197</sup> *Consumer Facts: Complaints About Broadcast Journalist*, FCC (Jan. 5, 2008), <http://www.fcc.gov/cgb/consumerfacts/journalism.pdf>.

<sup>198</sup> *See id.*

<sup>199</sup> *Id.*

<sup>200</sup> Memorandum Opinion, *In re CBS Program ‘Hunger in America’*, 20 F.C.C.2d 143, 22

*supra* Part II.B. demonstrate, top management and news management are often unaware of reporting inaccuracies until after publication, and by then, it can be difficult to contain a false story. Or, as in the case of Sinclair, the information broadcast is not misinformation per se, but rather slanted or biased information that fails to provide consumers a balanced account of events.

As a result, virtually since the abolishment of the Fairness Doctrine, legislators have sought to reimpose its regulations in some form on broadcast media. For example, in 2005, New York Representative Maurice Hinchey introduced legislation that would reinstate the Doctrine.<sup>201</sup> The bill was deemed the “Hush Rush” bill, in reference to Rush Limbaugh.<sup>202</sup> The year before, Senator Richard Durbin called for the Doctrine to be reinstated.<sup>203</sup> Then, when Barack Obama was elected, concern among conservative radio voices intensified that the Doctrine may actually be reinstated. The Center for Individual Freedom circulated fundraising alerts with the headline, “Hannity and Limbaugh to be kicked off the air.”<sup>204</sup> Even so, the panic never came to fruition.

But 2005 was not the first time Congress sought to revive the Fairness Doctrine. Immediately after the FCC eliminated the Doctrine in 1987, Congress attempted to codify its principles into law.<sup>205</sup> The bill passed the House and the Senate but President Reagan vetoed it.<sup>206</sup> A few years later, as Rush Limbaugh emerged as a conservative radio host, the bill passed the House again, but President George Bush threatened to veto the legislation.<sup>207</sup>

Similar attempts to revive the legislation did not emerge until 1993 with the hope that a democratic president, Bill Clinton, would usher in the regulations.<sup>208</sup> By that time, Limbaugh had portrayed the bill as an “attempt by the United States Congress to legislate against [him] and talk radio

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WL 16650 (Oct. 15, 1969).

<sup>201</sup> Stephanie Mencimer, *Are The Dems Plotting To Hush Rush?*, MOTHER JONES (Nov. 11, 2008), <https://www.motherjones.com/politics/2008/11/are-dems-plotting-hush-rush/>.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Jeff Cohen, *The ‘Hush Rush’ Hoax*, FAIRNESS & ACCURACY IN REPORTING (Nov. 1, 1994), <https://fair.org/extra/the-quothush-rushquot-hoax/>.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

hosts.”<sup>209</sup> Not only did Bill Clinton never revive the Fairness Doctrine, but he passed the Telecommunications Act, further deregulating the broadcast industry.<sup>210</sup>

### III. INDEPENDENT BROADCAST COUNCIL

Though regulating broadcasters presents challenges, the current deregulated atmosphere weighs against allowing broadcast to exist in perpetuity without additional oversight. To combat fake news and restore the perception of public trust to the media, this Note proposes creating an Independent Broadcast Council (Council) to administer and monitor broadcast regulation, including a revised version of the Fairness Doctrine.

Stated simply, the Council would operate under the guidance of the FCC as a voluntarily regulatory oversight committee in much the same format and function that the American Bar Association operates in its oversight of lawyers. That said, unlike the FCC, as an independent body, this Council would operate without political pressure to monitor broadcasters for compliance with revised regulations that seek to ensure fair and balanced coverage.

This Part proposes that the Council would be structured under the framework of existing legislation that established the Public Broadcasting Act. The Council would operate under a charter adopted to implement the key tenets of the Fairness Doctrine. By incorporating both aspects of this proposal, this Note argues that revised broadcast regulations would be less susceptible to partisan influence and would increase public perception of the media, while its independent and voluntary nature would ensure that it remained within the confines of the First Amendment.

Media regulation can occur in essentially one of two forms: self-regulation or government regulation.<sup>211</sup> This concept is, itself, somewhat misleading. There are various forms of regulation possible from complete state control to “consensus regulation.”<sup>212</sup> Yet, unlike countries that have

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<sup>209</sup> *Id.*

<sup>210</sup> See *Telecommunications Act of 1996*, FCC (June 20, 2013), <https://www.fcc.gov/general/telecommunications-act-1996>.

<sup>211</sup> R. FINKELSTEIN, REPORT OF THE INDEPENDENT INQUIRY INTO THE MEDIA AND MEDIA REGULATION (2012), available at [http://www.abc.net.au/mediawatch/transcripts/1205\\_finkelstein.pdf](http://www.abc.net.au/mediawatch/transcripts/1205_finkelstein.pdf).

<sup>212</sup> BRONWEN MORGAN & KAREN YEUNG, AN INTRODUCTION TO LAW AND REGULATION: TEXT AND MATERIALS 92–96 (2007).

proposed or implemented sweeping media regulations, United States citizens are protected under the First Amendment, limiting government intrusions on freedom of the press.<sup>213</sup> Even so, a hybrid alternative may be possible. Enforced self-regulation of broadcast news would bring together a regulatory body of stakeholders; the government's role would be to ensure enforcement of the self-imposed regulations under the FCC.<sup>214</sup>

#### A. *The Proposal*

This Subpart examines how reimplementing broadcast regulation should be administered, how the Fairness Doctrine should be updated, and how the United States can replicate the successful efforts of other countries in creating an independent agency to oversee broadcast news. Along the way, this Subpart elucidates the potential design that can keep broadcast regulation within the purview of the First Amendment while upholding the role of broadcasters as public trustees that was once envisioned under the Fairness Doctrine.

##### 1. *Creating a Broadcast Council: The Framework*

The framework for an Independent Broadcast Council already exists under the legislation for the Public Broadcasting Act.<sup>215</sup> Even so, the current Act encompasses solely public broadcasters. But it is, by itself, the product of nearly a century of congressional amendments and legislative change.<sup>216</sup> Given the congressional propensity to amend and expand this legislation, the Public Broadcasting Act can similarly be amended to expand the scope of the existing framework to encompass commercial broadcasters.

Despite the flaws, the Public Broadcasting Act serves as a significant

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<sup>213</sup> See U.S. CONST. amend. I; see also U.S. CONST. amend. XIV (highlighting that though citizens are protected against the *federal* government from intrusions of free speech under the First Amendment, it is the Due Process Clause of the Fourteenth Amendment that incorporates this protection to citizens against state and local governments).

<sup>214</sup> In Australia, following a request for proposals on media regulations, a former Australian federal court judge developed a statutory model proposing a media council that would self-regulate the media but be enforced by the Australian government. See Mark Pearson, *The Media Regulation Debate in a Democracy Lacking a Free Expression Guarantee*, 18 PAC. JOURNALISM REV. 89, 90–91 (2012). The Finkelstein Model called for an independent system of regulation that allowed broadcasters to participate in creating the standards. *Id.* Important to note that unlike the United States, Australia does not have freedom of the press, which would enable more sweeping media reforms than the United States could impose. *Id.*

<sup>215</sup> See 47 U.S.C.A § 396 (2018).

<sup>216</sup> See *infra* Part I.

first step in the effort to remedy the faults in America’s broadcast and its framework can be revised to incorporate the vision of restoring credibility to broadcast news. There are significant advantages to working within an existing piece of legislation rather than trying to create the Council under an entirely new regulatory scheme. First, the Public Broadcasting Act was passed in 1967.<sup>217</sup> Second, in the more than 50 years since its passage, public broadcasters have adhered to the statutory mandate of “strict adherence to objectivity and balance” resulting in a high public trust of public television.<sup>218</sup> Third, if the United States were to codify aspects of the Fairness Doctrine in this legislation and expand the standards that organizations such as PBS and NPR voluntarily follow under the Act, the United States could implement the successful aspects of the Public Broadcasting Act while remaining within the confines of the First Amendment.

## 2. *The Structure*

Borrowing from both concepts of international broadcast regulatory authority and existing attempts in the United States to establish public broadcasting, the process of creating an Independent Broadcast Council would begin through legislation. An amendment to the Public Broadcasting Act could largely achieve these goals.

In its current form, the Public Broadcasting Act states, in part: “it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, will constitute an expression of diversity and excellence. . . .”<sup>219</sup> The governing body of the Corporation created under the Act consists of a Board of Directors, and the “term of each office of each member of the Board appointed by the President shall be 6 years. . . .”<sup>220</sup> After presidential appointment, each member of the CPB must undergo Senate confirmation.<sup>221</sup> Moreover, the Public Broadcasting Act established a Treasury fund that appropriated financial support for public broadcasting.<sup>222</sup>

This structure presents both the potential to rectify some concerns and some immediate flaws. First, the political appointment process of board

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<sup>217</sup> See 47 U.S.C.A § 396 (2018).

<sup>218</sup> Accuracy in Media, Inc. v. FCC, 521 F.2d 288, 290 (D.C. Cir. 1975).

<sup>219</sup> 47 U.S.C.A. § 396(a)(5) (2018).

<sup>220</sup> 47 U.S.C.A. § 396(c) (2018).

<sup>221</sup> CPB FAQ, *supra* note 106.

<sup>222</sup> 47 U.S.C.A. § 396(k)(1)(A) (2018).

members to the CPB creates the opportunity for partisan influence. By permitting presidential appointments, the organization is vulnerable to leadership that is sympathetic to partisan policy views. This potential would be magnified if the Corporation were expanded.<sup>223</sup> On the other hand, public broadcasting is intended to serve the public interest. In many ways CPB has met this lofty ambition; for the 16th consecutive year, Americans rated PBS as the most trusted institution, above the court and legal system.<sup>224</sup> American's perception of trust in public broadcasting is significantly higher than that of traditional broadcast,<sup>225</sup> but to expand the Act, changes will have to occur.

As such, the existing Public Broadcasting Act would function as both a springboard for amended legislation and an opportunity to improve legislation. Regardless of the specifics adopted, the broad features of any regulatory scheme imposed under the Council would include: (1) an organizational structure for the Council, (2) a funding mechanism, (3) mechanisms for implementing and enforcing decisions, (4) and accountability measures.<sup>226</sup>

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<sup>223</sup> See DAVID LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS, POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008)

<sup>224</sup> For the 16th Consecutive Year Americans Rate PBS and its Member Stations Most Trusted Institution, PBS (Feb. 2, 2019), <https://www.pbs.org/about/blogs/news/for-the-16th-consecutive-year-americans-rate-pbs-and-its-member-stations-most-trusted-institution/>.

<sup>225</sup> For the 17th Consecutive Year, Americans Name PBS and Member States as Most Trusted Institution, PBS (Feb. 10, 2020), <https://www.pbs.org/about/blogs/news/americans-rate-pbs-and-its-member-stations-most-trusted-institution-for-the-15th-consecutive-year/> (Americans rated PBS highest in public trust at thirty percent, followed by courts of law at fifteen percent and commercial broadcasting at thirteen percent).

<sup>226</sup> See Finkelstein, *supra* note 211, at 276. The Independent Broadcast Council could fill the role for broadcasters that the American Bar Association fills in the legal community. As the American Bar Association has developed model rules of conduct for lawyers, oversees the accreditation of law schools, and promotes activities related to professional development, so too could the Independent Broadcast Council fulfil a similar role within the media to promote journalistic integrity through a voluntary membership. As the Bar makes recommendations to state courts and state bars for enforcement procedures and ethical standards, the Council could function in much the same way in coordination with the Federal Communications Commission to recommend licensing revocation and renewals. See *Model Rules of Professional Conduct*, ABA (last visited Mar. 7, 2020), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/); see also *The Model Federal Rules of Disciplinary Enforcement*, ABA (Feb. 14, 1978), <http://ethics.iit.edu/codes/ABA%201978.pdf>.

### 3. *How to Amend the Act*

This Subpart will first describe the process of amending the Public Broadcasting Act and then elucidate the reason for these steps.

The process to amend the Public Broadcasting Act would work as follows: A bill would propose the amendment to the existing Public Broadcasting Act. Because the intended purpose of revised legislation would be to amend existing law, the proposed bill would clearly articulate its relation to the preexisting Public Broadcasting Act.<sup>227</sup> To amend a law, a proposed bill may add, strike, or add and strike new text.<sup>228</sup> The purpose of an amendment to the Public Broadcasting Act would likely be to both add and strike new text from the existing legislation.<sup>229</sup> In so doing, the amendatory bill would identify the specific alterations in the existing law that it will modify.<sup>230</sup>

Following the amended version of the bill, a comparative print between the revised version and the Public Broadcasting Act would be provided.<sup>231</sup> According to House Rule XIII, clause 3(e)(1) (the Ramseyer Rule) and Senate Rule XXVI (the Cordon Rule), when a bill is reported out of committee that amends existing law, the committee must provide a comparative print that demonstrates how the amendment modifies existing law.<sup>232</sup>

Next, the amended legislation would revise the corporate structure under the existing Public Broadcasting Act to eliminate the process of political appointees. The political appointment of board members serves to undermine public trust in the media rather than bolster it. Whether intentional or inadvertent, appointing political figures to the board who are subsequently responsible for programming decisions, can impact how news is covered and impact the objectivity of reporters.

Instead, in the same manner that the existing Public Broadcasting Act established the Corporation for Public Broadcasting as a nonprofit entity, the board of directors under the Independent Broadcast Council should be

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<sup>227</sup> Richard Beth, *How Bills Amend Statutes*, CONG. RES. SERV. (Aug. 4, 2003), <https://fas.org/sgp/crs/misc/RS20617.pdf>.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

selected from stakeholders within broadcasting and confirmed by peers. This process would mirror the method by which the Act currently mandates only two members be selected: “[o]ne member shall be selected from among individuals who represent the licensees and permittees of public television stations, and one member shall be selected from among individuals who represent the licensees and permittees of public radio stations.”<sup>233</sup>

The benefit to this change is two-fold. First, it eliminates the political appointment process. Second, and perhaps more importantly, it creates a vested interest in the success of the Council for stakeholders. Moreover, amended legislation would call for a board seat filled by a member of the public; a member that is selected from within the board to serve on a rotating basis that provides insight into the communities the media is meant to serve.

With the corporate structure addressed, the amended Public Broadcasting Act would next add language from the Fairness Doctrine. This language would largely need to be revised to address First Amendment trepidations.

For example, the Public Broadcasting Act currently states, “it is in the public interest to encourage the growth and development of public radio and television broadcasting, including the use of such media for instructional, educational, and cultural purposes. . . .”<sup>234</sup> Amended legislation could be revised to include language that the broadcaster must make every effort to present contrasting views and inform the general public.<sup>235</sup> Similarly, whereas the current legislation mandates that public broadcasting “furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people[,]” revised legislation may suggest that in so doing, licensees devote a reasonable portion of the broadcast to the discussion of issues of public importance.<sup>236</sup> Lastly, current legislation mandates that public television “encourage the development of programming . . . and that addresses the needs of unserved and underserved audiences . . .”<sup>237</sup> but revised legislation could expand this mandate to meet these goals for all audiences in an objective and transparent manner.<sup>238</sup> This

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<sup>233</sup> 47 U.S.C.A. § 396 (2018).

<sup>234</sup> *Id.*

<sup>235</sup> See generally Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

<sup>236</sup> *Id.*

<sup>237</sup> 47 U.S.C.A. § 396 (2018).

<sup>238</sup> Such proposed changes to the legislation are merely intended as suggestion and are not

serves two goals. First, it codifies the Fairness Doctrine, which, as the D.C. Circuit Court of Appeals determined in *TRAC v. FCC*, had never occurred.<sup>239</sup> Second, it resolves the constitutionally suspect language that led the FCC to abandon the doctrine in the 1980s.<sup>240</sup>

Subpart D, subsection (a) of the Public Broadcasting Act identifies ten congressional declarations of policy, including the establishment of the private Corporation.<sup>241</sup> Revised legislation would create the entity known as the “Independent Broadcast Council,” replacing the existing Corporation for Public Broadcasting. The need to create a new entity under the Act arises under the nature of the revised legislation; the revised Act would greatly expand the purpose of the Public Broadcasting Act to encompass all broadcast media, not just public telecommunications. Revising the entity would clarify the role and the purpose of the Council and contrast it from the existing Corporation. Even so, nothing in the revised legislation should be interpreted to suggest that participation is mandated. The Council would function as a voluntary self-regulatory body.

The organization would operate independent of, but in cooperation with, the FCC.<sup>242</sup> The Council would also operate under a charter and code of ethics. Coordination between the Council and the FCC in the United States would be crucial.<sup>243</sup> Most importantly, involving key media stakeholders in the Council significantly diminishes the likelihood of challenges to the regulatory framework.

Such a proposed charter and code of integrity is not dissimilar to the current manner in which the Corporation for Public Broadcasting functions.<sup>244</sup> Yet the existing charter and code of integrity is largely targeted

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meant to suggest that the Note proposes adopting precise language to replace existing statutory language.

<sup>239</sup> See *Telecom. Research and Action Ctr.*, 801 F.2d at 517.

<sup>240</sup> See *supra* Part I.

<sup>241</sup> 47 U.S.C.A. § 396(D) (2018).

<sup>242</sup> In several appellate cases, the issue of whether the FCC oversees the CPB has arisen. The D.C. Circuit Court of Appeals has interpreted Section 398 of the Public Broadcasting Act as barring FCC jurisdiction over the CPB. (“[W]e were of the view that Section 398 of the Public Broadcasting Act expressly barred FCC jurisdiction over CPB.”); *see Network Project v. Corp. For Pub. Broad.*, 561 F.2d 963, 973 (D.C. Cir. 1977).

<sup>243</sup> *See generally id* (“The corporation envisioned by the Commission would support local stations, yet (would) be restrained from control or the appearance of control over them.”) (internal quotations omitted).

<sup>244</sup> *See* 47 U.S.C. 396 (2018) (establishing the existence of the Corporation for Public Broadcasting); Code of Integrity, *supra* note 116; Charter, *supra* note 118; *see also* Code of

toward public and educational broadcasting and would need to be revised to address the wider scope of the Act. As such, the standards of conduct and code of integrity implemented under the Independent Broadcast Council should be developed by the members of the Council and could be based on the existing codes. Nevertheless, the revised standards should, at a minimum, contain a commitment to fairness and accuracy in reporting.<sup>245</sup> Once created, the Council would use the standards of conduct and code of integrity to create a rating system.

#### 4. *Rating System*

The revised Public Broadcasting Act would call for a new rating system of broadcast news to help viewers assess the creditability of the coverage. The existing television rating system was put into place by Congress with the passage of the Telecommunications Act to allow parents to block objectionable content from children.<sup>246</sup> This same concept and technology can be used objectively to assess the credibility of news coverage.

The rating system would assign a numerical value to broadcast news stations and rate the station on a quarterly or semi-quarterly basis. The metrics for the rating could be based upon credibility, trustworthiness, objectivity, and the variety of stories covered. Though the individual components to the rating system would vary, it would likely be crucial to have a multi-factor rating system so as to not cause significant fluctuations in a station's rating from one quarter to the next, but rather an objective metric that considered multiple factors. Moreover, much like the program content warning system that airs before a television program, this proposed system could warn viewers about news content with a history of providing unverified claims.

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Ethics and Business Conduct for Employees of the Corporation for Public Broadcasting, CPB (April 21, 2010), [https://www.cpb.org/files/board/governance/Governance\\_Policies\\_\(Code\\_of\\_Ethics\\_for\\_employees\).pdf](https://www.cpb.org/files/board/governance/Governance_Policies_(Code_of_Ethics_for_employees).pdf); *Code of Ethics for Directors of the Corporation for Public Broadcasting*, CPB (May 1, 2006) [https://www.cpb.org/files/board/governance/Governance\\_Policies\\_\(Code\\_of\\_Ethics\\_and\\_Conflicts\\_Policy\\_for\\_Board\).pdf](https://www.cpb.org/files/board/governance/Governance_Policies_(Code_of_Ethics_and_Conflicts_Policy_for_Board).pdf); Roles and Responsibilities of the Board of Directors, Chair of the Board, and President in Directing the Affairs of the Corporation for Public Broadcasting, CPB (May 1, 2006), [https://www.cpb.org/files/board/governance/Governance\\_Policies\\_\(Roles\\_of\\_Board,\\_Chair,\\_CEO\).pdf](https://www.cpb.org/files/board/governance/Governance_Policies_(Roles_of_Board,_Chair,_CEO).pdf).

<sup>245</sup> See Finkelstein, *supra* note 211.

<sup>246</sup> Amy Nathanson & Joanne Cantor, *Protecting Children from Harmful Television: TV Ratings and the V-Chip*, PARENTHOOD AM. (1998), <https://parenthood.library.wisc.edu/Nathanson/Nathanson.html>.

A rating system solves two problems. First, it remedies the issue of mandating broadcasters to participate in the Independent Broadcast Council. It does so because participation in the Council would be voluntary, but by electing not to follow the standards and code of ethics adopted under the Council, broadcasters would see a decline in the numerical value assigned through the rating system. Second, the rating system remedies the issue of rendering the Council ineffective through voluntary participation. Functioning under the same mechanism that the existing television rating system allows, a credibility rating system is merely one proposed regulation to combat *fake news*.

#### B. *How Regulations Combat Fake News*

Having clarified how the Council would be created and structured, this Subpart addresses how such a Council would work to combat *fake news*. Specifically, this Subpart shows how regulation would begin to restore credibility to the media.

##### 1. *Defining the Problem*

There is no clear definition of the phrase *fake news*. As analyzed *supra* Part II, this contributes, in part, to the extent of the problem. Depending on the source, the definition ranges from information that is clearly false to information that is sensationalized. According to one dictionary, the term is defined as “false, often sensational, information disseminated under the guise of news reporting.”<sup>247</sup> The term was popularized in 2016 when then-presidential candidate Donald Trump began to use the term, but while Trump may have popularized the phrase, the concept existed long before he brought it into the mainstream.<sup>248</sup>

By the end of the 2016 election cycle, when important stories began to percolate to the top of the news cycle regarding Russian interference in the campaign, a large swath of Americans had become largely disconnected from the news, finding it too polarizing.<sup>249</sup> Even more were beginning to accept

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<sup>247</sup> *Fake News*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/fake-news> (last visited Mar. 7, 2020).

<sup>248</sup> Tom Standage, *The True History of Fake News*, ECONOMIST (June 2017), <https://www.1843magazine.com/technology/rewind/the-true-history-of-fake-news>.

<sup>249</sup> See Lee Raine, Scott Keeter & Andrew Perrin, *Trust and Distrust in America*, PEW RES. CTR. (July 22, 2019), <https://www.people-press.org/2019/07/22/trust-and-distrust-in-america/>.

Trump's characterization that the news was "fake."<sup>250</sup> President Trump has a propensity for using the term *fake news* to describe stories he finds unfavorable, but for his supporters, the term invokes feelings of media bias and unfairness.<sup>251</sup>

Nevertheless, like Trump, what many people describe as *fake news* is merely less objective news or news with which they do not agree.<sup>252</sup> What results from the latter is a cycle of seeking out information that confirms preexisting beliefs. "One of the biggest risks often imputed to the current media environment, in which audiences can pick and choose news outlets that agree with them, is that people will become more and more siloed, cutting themselves off from information that they don't like or that contradicts their prior assumptions."<sup>253</sup>

More than 53 percent of respondents to a Pew study placed the blame for *fake news* squarely on the media.<sup>254</sup> Even so, had the media been more regulated from the beginning, and the coverage been more balanced, perhaps consumers would have been more receptive to the coverage. Pew Research found that six in ten Democrats have dropped a media outlet over the perception that the outlet was covering *fake news*; up to 70 percent of Republicans have done the same.<sup>255</sup>

Implementing the Independent Broadcast Council could define *fake news* and take proactive steps to address it, much like the French did ahead

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<sup>250</sup> See Tim Alberta, *The Deep Roots of Trump's War on the Press*, POLITICO (April 26, 2018), <https://www.politico.com/magazine/story/2018/04/26/the-deep-roots-trumps-war-on-the-press-218105> (describing the point in 2016 at which hatred of the media reached new heights and the concept that the media was the "enemy of the people" began to occur).

<sup>251</sup> Daniel Bush, *When Trump Says 'Fake News,' This is What Supporters Say They Hear*, PBS (Oct. 31, 2018, 10:31 PM), <https://www.pbs.org/newshour/politics/when-trump-says-fake-news-this-is-what-supporters-say-they-hear> (noting that when supporters were asked after a Trump rally what they believed the term "fake news" meant after President Trump had called the media "fake" and "enemy of the people" the concept of fairness and balance was a repeated theme).

<sup>252</sup> *Id.*

<sup>253</sup> David Graham, *Some Real News About Fake News*, ATLANTIC (June 7, 2019) <https://www.theatlantic.com/ideas/archive/2019/06/fake-news-republicans-democrats/591211/>.

<sup>254</sup> *Id.*

<sup>255</sup> Amy Mitchel & Jeffrey Gottfried, et al., *Many Americans Say Made-Up News is a Critical Problem that Needs to be Fixed*, PEW RES. CTR. (June 5, 2019), <https://www.journalism.org/2019/06/05/many-americans-say-made-up-news-is-a-critical-problem-that-needs-to-be-fixed/>.

of election interference in the French elections in November 2018.<sup>256</sup> Identifying the problem is the first step to addressing it; without a unified definition from which broadcasters can work to identify what *fake news* is, there is little to suggest that broadcasters can remedy the issue.<sup>257</sup>

An Independent Broadcast Council cannot provide fair and objective reporting if no standard exists by which to measure objective reporting. The concept is quite nebulous. If this Council is to succeed, it can only do so under clear guidelines. Thus, though the phrase *fake news* is often used in scholarly articles to imply an intent to deceive or misinform,<sup>258</sup> this Note uses the term to mean bias or unfair reporting, though such a definition would not preclude an intent to deceive. The reason for a broader definition is that any attempt to restore public trust of the media cannot begin by putting a standard in place that does not address the public's concern.

In fact, the disparity in the definition of *fake news* may contribute to the misinformation over how prolific the issue truly is. While some use the term to refer to inaccurate stories, others use the phrase to refer to unfavorable stories.<sup>259</sup> Lack of uniformity in the definition contributes to misinformation and perpetuates the cycle.

## 2. *Creating a Process to Fix the Problem*

The Independent Broadcast Council could operate to manage complaints and oversee the objectivity of broadcasters under its purview. Such a process could operate as follows: A complaint or observation of inaccurate or biased reporting is brought to the attention of the Council.<sup>260</sup> The Council would then notify the station of the complaint in an attempt to resolve the complaint. If the offending station were to refuse to remedy the error, the Council would have the authority to notify the FCC which could result in a decrease to the station's credibility rating. On the other hand,

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<sup>256</sup> Alexander Ricci, *French Opposition Parties Are Taking Macron's Anti-Information Law to Court*. POYNTER (Dec. 4, 2018), <https://www.poynter.org/fact-checking/2018/french-opposition-parties-are-taking-macrons-anti-misinformation-law-to-court/>.

<sup>257</sup> See THE PSYCHOLOGY OF PROBLEM SOLVING 1–4 (Janet Davidson & Robert Sternberg eds. 2003) (describing problem solving as a cycle where the first step begins with recognizing and *Identifying* the problem).

<sup>258</sup> See generally Gelfert, *supra* note 124; Klein & Wueller, *supra* note 127; Tandoc, *supra* note 125.

<sup>259</sup> Graham, *supra* note 253 (noting that when Trump supporters use the phrase "fake news," they are typically referring to news they dislike while others are referring to misinformation).

<sup>260</sup> Finkelstein, *supra* note 211, at 287 (recommending a complaint handling procedure).

should the station abide by the Council's recommendation to remedy the issue, the station would be provided one of several choices to revise the story. For example, if the allegation involved bias, the station could remedy the issue by providing equal airtime to the issue on the opposing side. Conversely, if the complaint involved an allegation of misinformation, the station could air a correction.

The primary benefit to the Council is that it establishes a dialogue between broadcasters and presents an opportunity for the station to refuse the recommendation of the Council but creates consequences for doing so, namely a negative consequence to the credibility rating of the station. Though the First Amendment would prohibit the agency from censoring a broadcast station, regulations could be adapted to fine the station, or to provide warnings to viewers that the information was unverified. More importantly, creating a unified definition and standard under which broadcasters operate would provide the public with a standard against which to hold the media accountable and likely aid in restoring public trust.

### *C. Potential Applications for an Independent Broadcast Council*

Having established how the Independent Broadcast Council would function, this Subpart identifies how the Council would operate in a regulatory environment. Specifically, this Subpart shows how this Council would enable the media to regain credibility from the American public and combat allegations of *fake news*.

The advantage to creating an Independent Broadcast Council under the umbrella of the FCC is that such co-regulation provides sufficient independence from the government, as is the case with the existing Public Broadcasting Act, while still providing regulatory oversight. Such enforced self-regulation retains the benefits of self-regulation while ensuring an effective operation of the system.<sup>261</sup> Establishing an independent regulatory body would not only improve journalistic standards, but it would also increase transparency and provide the public with a mechanism through which to voice concerns about inaccurate and biased reporting. This proposal would also increase accountability. Moreover, the Supreme Court has previously demonstrated its openness to a variation of such regulation.<sup>262</sup>

To illustrate, consider how the Independent Broadcast Council would

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<sup>261</sup> See Finkelstein, *supra* note 211, at 297.

<sup>262</sup> See *infra* Part III.D.

have functioned in the examples discussed *supra* Part II.

### 1. *The Iraq War—Revisited*

First, given the process elucidated *supra* Part III.B.2, it is worth analyzing how the scheme would have functioned on coverage leading up to the Iraq war. The coverage analyzed *supra* was for a period of seven and a half months. Imagine a complaint was filed during that period. Alternatively, the Council itself could have observed inaccurate or biased reporting. Consider the process had a complaint been filed relating to the amount of airtime then-president George Bush received in support of the view that Iraq had WMD as opposed to the amount and quality of time the commentators received who spoke out against that view.

Under the process identified, the next step would be for the Council to reach out to the station. For the coverage of Iraq, those stations were NBC, CBS, and ABC.<sup>263</sup> Once the Council notified the station of the complaint, the station would have the opportunity to resolve the issue. Here, that would result in either providing more credible commentators to speak in opposition to the theory that Iraq had WMD (recall the primary opposition voice at the time was Saddam Hussein) or to provide an analysis of the opposing viewpoint from network commentators.

The concept is not radical. Opposing viewpoints existed at the time from credible sources. Massachusetts Senator Ted Kennedy spoke in September 2002, stating, “[i]nformation from the intelligence community over the past six months does not point to Iraq as an imminent threat to the United States or a major proliferator of weapons of mass destruction.”<sup>264</sup> The Chief United Nations weapons inspector, Hans Blix, said in 2003, “[t]he commission has not at any time during the inspection in Iraq found evidence of the continuation or resumption of programs of weapons of mass destruction or significant quantities of proscribed items, whether from pre-1991 or later.”<sup>265</sup>

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<sup>263</sup> Hayes & Guardino, *supra* note 140.

<sup>264</sup> Eric Alterman & George Zornick, *Iraqi Weapons of Mass Destruction: Did “Everyone” Agree?* CTR. FOR AM. PROGRESS (June 12, 2008, 9:00 AM), <https://www.americanprogress.org/issues/general/news/2008/06/12/4534/think-again-iraqi-weapons-of-mass-destruction/>.

<sup>265</sup> *Id.*

The purpose of the Independent Broadcast Council in a situation such as the one described above is not to suggest that had it existed, the United States would not have relied on false intelligence. Rather, it is to suggest that it could have created a dialogue between broadcasters and the public sooner or shined a light on what was occurring. Years later, as the full extent of the media operation to sway public opinion in favor of a war became clear, journalists who unknowingly participated expressed regret. Kenneth Allard, a former NBC military analyst recalled, “I felt we’d been hosed.”<sup>266</sup>

“Internal Pentagon documents repeatedly refer[ed] to the military analysts [who the networks booked as commentators] as ‘message force multipliers’ or ‘surrogates’ who could be counted on to deliver administration ‘themes and messages’ to millions of Americans ‘in the form of their own opinions.’”<sup>267</sup> It is difficult to hypothesize whether an Independent Broadcast Council could have remedied the mass media failure that contributed to the disinformation of the Iraq war, but it would have acted as a final arbiter between broadcasters and the public and could have aided in providing a more balanced approach to the coverage. More importantly, it could have provided the public the opportunity to weigh both sides of the issue for and against military action—an opportunity the public was denied.

## 2. *Seth Rich—Revisited*

Second, the conspiracy that arose from Seth Rich’s murder presents another example for how an Independent Broadcast Council would function, yet it does so in a drastically divergent manner than the preceding scenario. Here, when Fox 5 published the story, the credibility of it was not immediately clear.<sup>268</sup> The environment in place at the broadcasting network when this story aired was not conducive to preventing the publication of disinformation. According to the complaint filed after the broadcast: “Revelations about Fox News’ role in concocting a baseless story on the death of a young Democratic staffer has problematic echoes for the network’s controlling owner . . .”<sup>269</sup> This type of disinformation spreads quickly, as evidenced by the speed at which the Seth Rich story circulated after its

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<sup>266</sup> David Barstow, *Behind TV Analysts, Pentagon’s Hidden Hand*, N.Y. TIMES (April 20, 2008), <https://www.nytimes.com/2008/04/20/us/20generals.html>.

<sup>267</sup> *Id.*

<sup>268</sup> See generally Butowsky v. Folkenflik, 4:18CV442, 2019 WL 2518833, at \*3–\*5 (E.D. Tex. Apr. 17, 2019).

<sup>269</sup> *Id.* at \*10.

publication on Fox 5.<sup>270</sup>

Under the framework identified before, in a case of disinformation the Independent Broadcast Council could have reached out to Fox 5 that day and requested a retraction. If Fox 5 refused, the Council would have alternatives available that may have limited the reach of the story and the impact on the Rich family.

First, other member organizations of the Council could have clarified the story.<sup>271</sup> It is worth noting that this may not be an ideal solution to slow the spread of disinformation, however. An effort to clarify a false story by other networks could inadvertently bring more attention to the story, thus increasing the speed with which it circulates. Alternatively, the Council could notify the FCC. Under the proposed rating system, the FCC would have the ability to reduce the station's rating, signaling to viewers that the station's credibility is diminished. For the station to improve its rating, it would have to demonstrate to the Council that it had published a retraction of the story and that a period of time had elapsed without similar untruthful reporting.

Of note, had standards been in place, adopted under a charter of ethics and code of conduct that members of the Council agreed to abide by, including individual broadcast stations, it may have prevented this journalistic malpractice from occurring. Even so, assuming arguendo that the existence of a Council could not have prevented the publication of this story, it may have limited its impact.

It is also worth noting that, though the process identified here would require the Council to notify the FCC of proposed violations of the charter, this does not negate the need or value of the Council as an oversight body. The FCC has jurisdiction over all interstate and international communications by radio, television, cable, and satellite.<sup>272</sup> As such, the FCC cannot manage the content on individual local stations, but an Independent Council, centered in the individual communities it served, likely could.

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<sup>270</sup> See *id.* at \*4 (the following day the story was aired by Sean Hannity, and Wheeler later appeared on Fox Business with Lou Dobbs to discuss the investigation).

<sup>271</sup> This Note does not propose that a Broadcast Council would force the network to remove the story, even if it was a demonstrated falsity because of First Amendment protections. Rather, the purpose of the Broadcast Council in relation to improving public perception of the media is increasing accountability and awareness of the problem and providing a singular location that the public can reach out to report instance of false news.

<sup>272</sup> *What We Do*, FCC, <https://www.fcc.gov/about-fcc/what-we-do> (last visited Mar. 7, 2020).

### 3. *Sinclair Broadcast Group—Revisited*

Finally, the circumstances involving Sinclair Broadcast Group present yet another hypothetical by which to examine the effectiveness of an Independent Broadcast Council. Unlike both of the stories addressed *supra*, Sinclair is demonstrable of a network that has shifted its reporting style away from objectivity, rather than a single story or group of stories that lack objectivity. Even so, such a circumstance can be illustrative for how the Council would operate. Imagine that, given the size of Sinclair Broadcast Group and its significant influence, it elected not to participate in the Independent Broadcast Council. In several ways, such a decision would not significantly diminish the effect of the proposed Council.

First, because the proposed Council operates under the FCC, it would assume much of the regulatory oversight of the FCC. Second, despite the size of Sinclair, it still operates at a market share of roughly 39 percent.<sup>273</sup> This is because, under the FCC Broadcast Ownership Rules, a station group cannot reach more than 39 percent of all U.S. households.<sup>274</sup> As such, other station groups would comprise the remaining 61 percent of the market.<sup>275</sup>

This is relevant to the effectiveness of the Council for several reasons. Once implemented, stations that elect not to participate in the Council would have a lower credibility rating than those that voluntarily participate. This would stem from oversight and cooperation with the Council and adherence to standards to provide credible and accurate reporting. Though the Council cannot mandate participation, the net effect is a warning to consumers that the information they receive from a network that elects not to participate in the Council has not been verified or authenticated.

Though Sinclair Broadcast Group could elect not to participate in the Council or abide by the standards the Council adopts, the purpose of the Council would remain intact. The objective of the Council's framework is to provide the public a unified standard against which to measure the objectivity and credibility of broadcast news. Above all else, because the proposed

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<sup>273</sup> Alvin Chang, *Sinclair's Takeover of Local News, In One Striking Map*, VOX (Apr. 6, 2018, 8:20 AM), <https://www.vox.com/2018/4/6/17202824/sinclair-tribune-map>.

<sup>274</sup> *FCC Broadcast Ownership Rules*, FCC, <https://www.fcc.gov/consumers/guides/fccs-review-broadcast-ownership-rules> (last visited Mar. 7, 2020).

<sup>275</sup> This would suggest that all remaining station members other than Sinclair would participate in the Independent Broadcast Council. The number, in reality, may be closer to half or two-thirds, but would still place the market share above that of Sinclair.

standards largely function within existing law, the courts would likely uphold the standards as constitutional.

#### D. *Reconciling the Law*

Commentators opposed to reinstating regulation on broadcasters, particularly a reiteration of the Fairness Doctrine, maintain that the regulation had a chilling effect on the First Amendment.<sup>276</sup> The FCC itself raised this concern in its 1985 Fairness Report.<sup>277</sup> For several reasons, this argument does not stand as an immobile obstacle to re-implementing any reiteration of the Fairness Doctrine on broadcasters. First, in *Red Lion Broad. Co. v. FCC*, the United States Supreme Court upheld the constitutionality of Fairness Doctrine.<sup>278</sup> The Court held that free speech was “the right of the viewers and the listeners, not the right of the broadcasters.”<sup>279</sup> Second, the Doctrine never mandated what broadcaster covered. Instead, it required broadcasters to provide balanced coverage of controversial issues. Moreover, the Supreme Court differentiated broadcast on the basis of its licensing requirements; because the FCC licensed broadcasters, the Court determined it did not present a First Amendment issue:

It does not violate the First Amendment to treat licensees given the privilege of using scarce radio frequencies as proxies for the entire community, obligated to give suitable time and attention to matters of great public concern. To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press.<sup>280</sup>

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<sup>276</sup> Karen Beth Gray, *Fairness Doctrine Termination: Extinction of an Unenforceable Theory*, 22 SUFFOLK U. L. REV. 1057, 1058 (1988) (arguing that First Amendment challenges revealed the doctrine as an ineffective and outmoded regulation); Richard E. Labunski, *May It Rest in Peace: Public Interest and Public Access in the Post-Fairness Doctrine Era*, 11 HASTINGS COMMUN. & ENT L.J. 219, 225 (1989) (“If Congress were to pass a new Fairness Doctrine, it would inevitably become mired in the constitutional and policy issues that plagued the original Fairness Doctrine throughout its forty-year history. . . Even if the constitutional obstacles could be overcome, the FCC would still be unable to successfully enforce the Doctrine.”).

<sup>277</sup> See 1985 Fairness Report, 102 F.C.C.2d REP. 145 (1985).

<sup>278</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969).

<sup>279</sup> *Id.* at 390.

<sup>280</sup> *Id.* at 394.

This nuance is often overlooked, but it is an important facet of the original Fairness Doctrine that speaks to the constitutionality of the legislation. Even so, following the *Red Lion* decision, discussed *supra* Part I, several appellate court cases challenged the doctrine on First Amendment grounds.<sup>281</sup>

It is likely that if the Doctrine were resurrected in its prior form, opponents to the legislation would immediately mount a court challenge. In part, this would be justified. The Doctrine was drafted by the FCC in 1949, barely a decade after the FCC itself emerged.<sup>282</sup> Television broadcast was in its infancy and not much was understood about the concept of the radio spectrum.<sup>283</sup> As such, the rationale behind reinstating a version of the Fairness Doctrine today is not supported by the scarcity rationale that the Supreme Court used to justify upholding the Doctrine in 1969; instead, the rationale is supported by a recognition that the Fairness Doctrine helped preserve civility in broadcast journalism and created an ethical standard for the public to hold broadcasters to. It would be this standard—the concept that broadcasters were intended to serve as public trustees—coupled with the voluntary nature of the Independent Broadcast Counsel, which would likely withstand revised regulations.

In a broader context, even considering the extensive proposal made, it is unlikely that an Independent Broadcast Council would run afoul of the First Amendment. Rather, the Supreme Court would likely uphold such legislation. Consider *FCC v. League of Women Voters of California* in which the Supreme Court examined the First Amendment implications of the Public Broadcasting Act.<sup>284</sup>

In its original iteration, section 399 of the Act prohibited editorializing on public broadcasting stations.<sup>285</sup> In asserting this argument before the Court, the government maintained that such a ban on public broadcasting networks was necessary to protect educational broadcasting from coercion from becoming the target of government propaganda as a result of federal financing.<sup>286</sup> Unlike the Court's decision in *Red Lion* which upheld editorializing, section 399 prohibited broadcasters from addressing

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<sup>281</sup> See *supra* Part I.B.

<sup>282</sup> See Berresford, *supra* note 37.

<sup>283</sup> Berresford, *supra* note 37.

<sup>284</sup> See *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984).

<sup>285</sup> 47 U.S.C. § 399 (recognized as unconstitutional by *Hill v. Kemp*, 645 F.Supp.2d 992 (N.D. Okla. 2009)).

<sup>286</sup> *League of Women Voters of California*, 468 U.S. at 385.

issues of public importance, irrespective of whether it was done in a fair and balanced way.<sup>287</sup>

The Court determined that section 399's ban on editorializing exceeded what was necessary to protect public broadcasting from coercion by government influence.<sup>288</sup> The government also argued that section 399 prevented public broadcasting stations from becoming "a privileged outlet for the political and ideological opinions of station owners and managers . . .".<sup>289</sup> Even so, the Court was unconvinced. The Court invoked the requirements of the Fairness Doctrine as a regulatory mechanism to ensure that public broadcast would remain fair and balanced, reasoning:

[T]he public's interest in preventing public broadcasting stations from becoming forums for lopsided presentations of narrow partisan positions is already secured by a variety of other regulatory means that intrude far less drastically upon the journalistic freedom of noncommercial broadcasters. The requirements of the FCC's fairness doctrine, for instance, which apply to commercial and noncommercial stations alike, ensure that such editorializing would maintain a reasonably balanced and fair presentation of controversial issues.<sup>290</sup>

Moreover, the Court reasoned that its holding in *Red Lion* contemplated the same justification argued by the government:

The solution to this problem offered by § 399, however, is precisely the opposite of the remedy prescribed by the FCC and endorsed by the Court in *Red Lion*. Rather than requiring noncommercial broadcasters who express editorial opinions on controversial subjects to permit more speech on such subjects to ensure that the public's First Amendment interest in receiving a balanced account of the issue is met, § 399 simply silences all editorial speech by such broadcasters. Since the breadth of § 399 extends so far beyond what is necessary to accomplish the goals identified by the Government, it fails to satisfy the First Amendment standards

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<sup>287</sup> *Id.* at 386.

<sup>288</sup> *Id.* at 395.

<sup>289</sup> *Id.* at 396.

<sup>290</sup> *Id.* at 397-98 (internal citation omitted).

that we have applied in this area.<sup>291</sup>

The Court held that there was no reason to deny public broadcasters the right to speak on issues of public concern.<sup>292</sup> Unfortunately, the principle of the Fairness Doctrine that the Court assumed would protect public broadcasting was abandoned by the FCC within five years of the ruling in *League of Women Voters*.<sup>293</sup>

The holding of this case is important for several reasons, but namely because of the Court's treatment of *Red Lion*. *League of Women Voters* came before the Court 15 years after *Red Lion*. The Court had the opportunity to distinguish public broadcasting from commercial broadcasting or to separate the principles of the Fairness Doctrine from broadcasters that receive public funding, but it elected not to do so, instead embracing the Doctrine as a "guard against one-sided presentation of controversial issues . . .".<sup>294</sup> In so doing, the Court demonstrated that it is possible, if not likely, that the Public Broadcasting Act could be amended to encompass not only the guiding principles of the Fairness Doctrine, but also broadened to include commercial broadcasters, having found that the same regulations apply equally to both.

Along similar lines, consider the more recent case of *Serafyn v. FCC*.<sup>295</sup> This case is of particular interest because it originates out of the D.C. Circuit—the court that was instrumental in providing the FCC its rationale in abandoning the Fairness Doctrine.<sup>296</sup> In *Serafyn*, the petitioner requested the FCC deny CBS a license renewal after the station aired a news segment that the petitioner alleged "intentionally distorted the situation in Ukraine by claiming that most Ukrainians are anti-Semitic."<sup>297</sup> In recounting the policy outlined by the FCC during the 1960s, the court quoted the FCC as stating: "[I]f the allegations of staging. . . simply involve news employees of the station, we will, in appropriate cases. . . inquire into the matter, but unless our investigation reveals involvement of the licensee or its management there will be no hazard to the station's licensed status. . .".<sup>298</sup>

The segment at issue in *Serafyn* involved a piece called "The Ugly

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<sup>291</sup> *Id.* at 398.

<sup>292</sup> *Id.* at 399.

<sup>293</sup> See *supra* Part I.B.

<sup>294</sup> *League of Women Voters of California*, 468 U.S. at 372.

<sup>295</sup> See *Serafyn*, 149 F.3d 1213 (D.C. Cir. 1998).

<sup>296</sup> See *supra* Part I.

<sup>297</sup> *Serafyn*, 149 F.3d at 1216.

<sup>298</sup> *Id.* at 1217 (quoting *Hunger in America*, 20 FCC 2d 143, 150, 151 (1969)).

Face of Freedom,” that aired on 60 Minutes. The broadcast suggested that Ukraine had a negative view toward Jews.<sup>299</sup> After the broadcast, CBS received letters from Ukrainian-Americans expressing their anger over the broadcast, including one which suggested it was “unbalanced” and “did not convey the true state of affairs in Ukraine.”<sup>300</sup> CBS argued that it would not investigate because any such investigation would “offend[] the protections of a free press.” As a result, the FCC determined that the incident did “not satisfy the standard for demonstrating intent to distort,” and that the petitioner had failed to demonstrate that CBS did not meet its public interest obligation.<sup>301</sup>

Before the court of appeals, the petitioner argued that:

[T]he Commission has never articulated a precise definition of extrinsic evidence and that its prior decisions suggest it is merely seeking objective evidence from outside the broadcast which demonstrates, without any need for the Commission to second-guess a licensee’s journalistic judgement or for the Commission to make credibility findings, that the licensee has distorted a news program.<sup>302</sup>

The court determined that the FCC made several errors that contravened its own policy, including that it required the petitioner to demonstrate evidence that CBS had engaged in a pattern of distortion, despite its policy requiring a complainant meet a lower threshold.<sup>303</sup> The court raised particular concern with the evidence of factual inaccuracies raised by the petitioner and disregarded by the FCC.<sup>304</sup> The petitioner argued that CBS misrepresented facts to the extent that its decision to broadcast portions of the segment suggests it intentionally distorted the news.<sup>305</sup> The court concluded that the FCC acted arbitrarily in denying the petitioner’s request to revoke CBS’s license, but did determine that CBS had not made a material

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<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 1218–19.

<sup>302</sup> *Id.* at 1219 (internal quotations omitted).

<sup>303</sup> *Id.* at 1220.

<sup>304</sup> *Id.* at 1223.

<sup>305</sup> One particularly egregious example discussed in the case was a translation “error” made by CBS in the report. *Id.* The report mistranslated the Ukrainian word “zhyd” as the highly anti-Semitic word, “kike.” *Id.* It was an incorrect translation, but nevertheless one that supported the overall tone of the broadcast. The word correctly translates in English to “Jew.” *Id.*

misrepresentation to the FCC.

Yet this case shows not only the benefit of having an Independent Broadcast Council but also the court's willingness to accept the oversight. The court's concern here was centered on the FCC's failure to oversee CBS, despite CBS's claim that such oversight would impede its First Amendment protections. Moreover, though the FCC possessed the regulatory power to revoke CBS's license following these complaints, it simply elected not to. An Independent Council could more consistently work with the complaints of the public to increase oversight over broadcasters and manage these exact issues.

#### E. Successful Regulatory Schemes in Europe

Those who oppose the reinstatement of regulations on the media maintain that it infringes on First Amendment protections and the freedom of the press.<sup>306</sup> Yet some of the most stringent regulations on the media exist in European countries that protect the freedom of the press. Even so, legislation to regulate *fake news* in Europe has rightly garnered concerns from the world press and human rights activists concerning free speech and press freedoms.<sup>307</sup> European countries are cognizant of balancing a citizen's right to be informed with a citizen's right to be *accurately* informed. Following a wave of nationalist elections and referendums in which disinformation played a large role, Europe is looking for a balance between free speech and objective reporting.<sup>308</sup>

Perhaps no greater contrast exists against the backdrop of the 2016 presidential election in which disinformation was so prevalent than in France where similar efforts failed. Following the United States' 2016 presidential election that Russia successfully infiltrated, then-French presidential candidate Emmanuel Macron became the target of Russian disinformation. However, unlike the United States, the structure of French media made it less susceptible to Russian inference. Like presidential candidate Hillary Clinton,

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<sup>306</sup> See Gray, *supra* note 276 (arguing that “[c]ourts should avoid promoting diverse coverage of controversial issues which risk infringing on broadcasters' first amendment rights”).

<sup>307</sup> Anya Schiffrin, *How Europe Fights Fake News*, COLUM. JOURNALISM REV. (Oct. 17, 2017), <https://www.cjr.org/watchdog/europe-fights-fake-news-facebook-twitter-google.php>.

<sup>308</sup> See Gareth Harding, *Media Lies And Brexit: A Double Hammer-Blow to Europe and Ethical Journalism*, ETHICAL JOURNALISM NETWORK, <https://ethicaljournalismnetwork.org/resources/publications/ethics-in-the-news/media-lies-and-brexit>. (describing an article *The Sun* ran on March 8, 2016 with the false headline “Queen Backs Brexit” based on anonymous sourcing).

Russia targeted Macron's emails ahead of the French election and intended for a mass release.<sup>309</sup> For two reasons, the emails did not gain traction in France in the same manner the release of Clinton's emails gained national attention in the United States. First, French electoral laws prohibit media outlets from news coverage of political candidates for forty-four hours ahead of the election.<sup>310</sup> Second, the media voluntarily abided by a request from the Macron campaign team the night the emails were hacked not to report on the content of the emails.<sup>311</sup> Moreover, some traditional broadcasters denounced the Russian efforts and called upon their viewers not to allow themselves to be manipulated.<sup>312</sup>

Contrast this with the response of broadcast news in the United States after the release of Hillary Clinton's emails. A study by the Columbia Journalism Review found that "the various Clinton-related email scandals—her use of a private email server while secretary of state, as well as the DNC and John Podesta hacks—accounted for more sentences than all of Trump's scandals combined (65,000 vs. 40,000). . . ."<sup>313</sup> More disconcerting, the study concluded, "these 65,000 sentences were written not by Russian hackers, but overwhelmingly by professional journalists employed at mainstream news organizations. . . ."<sup>314</sup>

At first blush, it may appear the dissimilarities between French and American media stem from ethics, not regulation. Put another way, American media sources could have voluntarily elected not to devote 65,000 sentences to Hilary Clinton's email scandals which perhaps would have contributed positively to Americans' perception of the media. Even so, this oversimplifies

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<sup>309</sup> Christine Schmidt, *How France Beat Back Information Manipulation (and How Other Democracies Might Do the Same)*, NIEMAN LAB (Sept. 19, 2018, 6:00 AM), <https://www.niemanlab.org/2018/09/how-france-beat-back-information-manipulation-and-how-other-democracies-might-do-the-same/>.

<sup>310</sup> Raphael Satter, *Media Blackout Ahead of Unpredictable French Election with Four Front-Runners*, SYDNEY MORNING HERALD (April 23, 2017, 3:08 PM), <https://www.smh.com.au/world/media-blackout-ahead-of-unpredictable-french-election-with-four-frontrunners-20170423-gvqnaj.html> (the French law dates back more than a century and prohibits politicians, journalists, and citizens from discussing political news ahead of the election).

<sup>311</sup> Schmidt, *supra* note 309.

<sup>312</sup> *Id.*

<sup>313</sup> Duncan Watts & David Rothschild, *Don't Blame the Election on Fake News. Blame It on the Media*, COLUM. JOURNALISM REV. (Dec. 5, 2017), <https://www.cjr.org/analysis/fake-news-media-election-trump.php>.

<sup>314</sup> *Id.*

broadcasting priorities on the networks, particularly those owned by large conglomerates such as Sinclair that mandate coverage to the local stations. While the United States has slashed regulation on the media in the last 30 years, France has upheld regulations on public broadcasters.<sup>315</sup> These regulations were passed following its prior success in combating Russian disinformation.<sup>316</sup>

In November 2018, under the initiative of French President Macron, France passed a law that defined the term *fake news*. The regulation defined the term as “[i]nexact allegations or imputations, or news that falsely report facts, with the aim of changing the sincerity of a vote.”<sup>317</sup> A second part of the law mandates that social media establish a tool for users to flag disinformation.<sup>318</sup> Moreover, the new legislation allows the Higher Audiovisual Council, the French broadcast regulator, to revoke the broadcast rights of television and radio stations found to be disseminating misinformation.<sup>319</sup>

After Macron was elected, despite efforts by the Russian government to elect his opponent, the French government issued a 200 page report concerning the danger of information manipulation aimed at informing other countries what it had learned as a result of Russian interference.<sup>320</sup> One striking conclusion was that “[o]ne of the reasons why the Macron Leaks failed to have an effect on the 2017 French presidential elections . . . is that the French media ecosystem is relatively healthy.”<sup>321</sup> The report also found that “distrust in institutions was one of the main reasons for the rise and effectiveness of attempts at information manipulation.”<sup>322</sup> In determining why the Russian disinformation campaign failed in France but succeeded in

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<sup>315</sup> Agnes Poirier, *France Can Be Proud of Its Resistance to Media Deregulation*, GUARDIAN (July 16, 2011, 5:00 AM), <https://www.theguardian.com/commentisfree/2011/jul/16/media-law-france-phone-hacking>.

<sup>316</sup> *Id.*

<sup>317</sup> Ricci, *supra* note 256.

<sup>318</sup> *Id.*

<sup>319</sup> Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Actions Around the World*, POYNTER (June 13, 2019) <https://www.poynter.org/ifcn/anti-misinformation-actions/>.

<sup>320</sup> See Jean Baptiste Jeangène Vilmer et al., *Information Manipulation: A Challenge for Our Democracies*, MINISTRY FOR EUR. & FOREIGN AFF. & MINISTRY FOR ARMED FORCES (August 2018), [https://www.diplomatie.gouv.fr/IMG/pdf/information\\_manipulation\\_rvb\\_cle838736.pdf](https://www.diplomatie.gouv.fr/IMG/pdf/information_manipulation_rvb_cle838736.pdf).

<sup>321</sup> *Id.* at 68.

<sup>322</sup> *Id.* at 69.

the United States, the report posited “[c]ompared with other countries, especially the US and the UK, France presents a less vulnerable [ ] media environment for a number of reasons.”<sup>323</sup> One reason may be that public trust of French media is high, a trust in which regulations, among other factors, play a role.

Perhaps no country is more cognizant of the affect disinformation can have on its citizens than Germany.<sup>324</sup> Under the Basic Law of the Federal Republic of Germany, codified after World War II, German citizens and press are guaranteed “the right freely to express and disseminate his opinions in speech, writing and pictures . . .”<sup>325</sup> The decision to protect freedom of the press was born out of the atrocities of World War II.<sup>326</sup> With the protections of the press and freedom of speech, Germany has also determined a fundamental need exists to guarantee diversity in mass media.<sup>327</sup>

Article 41 of the Treaty governs the programming principles of broadcasters, and it mandates that broadcasters must “respect human dignity as well as the moral, religious and ideological beliefs of others. They should promote social cohesion in unified Germany and international understanding and should work toward a non-discriminatory society.”<sup>328</sup> Article 56 mandates: “Providers of telemedia including journalistic edited offers . . . are required to include in their offers without delay the reply of the person or institution who is affected by an assertion of fact made in their offer at no cost to the person affected.”<sup>329</sup>

In Canada, under the Broadcasting Act, the broadcasting system should “serve to safeguard, enrich and strengthen the cultural, political, social

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<sup>323</sup> *Id.* at 116.

<sup>324</sup> See Randall L. Bytwerk, *Grassroots Propaganda in the Third Reich: The Reich Ring for National Socialist Propaganda and Public Enlightenment*, 33 GERMAN STUDIES REV., 93 (Feb. 2010) (once Hitler took power in Germany, he formed the Ministry for Public Enlightenment and Propaganda to take complete control over German media. Though the RMVP never became a large part of the Nazi party, it did demonstrate the potential affect and danger of widespread propaganda).

<sup>325</sup> *Basic Law for the Federal Public of Germany*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS., <https://fra.europa.eu/en/law-reference/basic-law-federal-republic-germany-10> (last visited Mar. 1, 2020).

<sup>326</sup> Katja Gloer, *Article 5: Freedom of Expression*, DEUTSCHLAND (May 15, 2019), <https://www.deutschland.de/en/topic/politics/the-german-basic-law-article-5-freedom-of-expression>.

<sup>327</sup> *Interstate Treaty on Broadcasting and Telemedia*, ASS’N OF ST. MEDIA AUTHORITIES FOR BROADCASTING IN GER. (Apr. 1, 2010).

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

and economic fabric of Canada.”<sup>330</sup> Canada requires that any station licensed to broadcast must “provide a reasonable opportunity for the public to be exposed to the expression of differing views on matter of public concern.”<sup>331</sup> This language in the Canadian Broadcasting Act is strikingly similar to what the United States’ Fairness Doctrine once required of broadcasters: “to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.”<sup>332</sup> Moreover, the Canadian Broadcasting Act requires that the broadcasting system “shall be effectively owned and controlled by Canadians;” enacted to enhance local content on Canadian broadcasting.<sup>333</sup>

Conversely, the absence of local content rules in the United States means that large media conglomerates, like Sinclair Broadcasting Group, can mandate national coverage in the local market. The Fairness Doctrine required broadcast licensees to “provide coverage of vitally important controversial issues of interest in the community served by the licensees . . . .”<sup>334</sup> However, each “must-run” that Sinclair mandates its local stations air focusing on national issues reduces the time the station has available to devote to local issues.

Yet one country stands above the rest in terms of public trust in the media. Denmark, regulated by the Press Council, was polled as the most transparent country in terms of distinguishing fact from fiction in reporting.<sup>335</sup> Denmark enjoys freedom of speech, guaranteed under Section 77 of its constitution.<sup>336</sup> Not unlike the United States, legal liability exists for libel, but the Danish press largely operates independent from government oversight.<sup>337</sup> The Danish media in broadcast, print, and online are regulated under the Danish Press Council; members are appointed by the Supreme

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<sup>330</sup> Broadcasting Act, S.C. 1991, c 11 (Can.).

<sup>331</sup> *Id.*

<sup>332</sup> *In re Inquiry into Section 73.1910*, 102 F.C.C.2d REP. 143, 146 (1985).

<sup>333</sup> Broadcasting Act, S.C. 1991, c 11 (Can.).

<sup>334</sup> *In re Inquiry into Section 73.1910*, 102 F.C.C.2d REP. at 146 .

<sup>335</sup> Nic Newman & Richard Fletcher, *Bias, Bullshit and Lies: Audience Perspectives on Low Trust in the Media*, DIGITAL NEWS PROJECT (2017), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-11/Nic%20Newman%20and%20Richard%20Fletcher%20%20Bias%2C%20Bullshit%20and%20Lies%20-%20Report.pdf>.

<sup>336</sup> *Denmark*, FREEDOM HOUSE, <https://freedomhouse.org/report/freedom-press/2016/denmark> (last visited Mar. 7, 2020).

<sup>337</sup> *Id.*

Court and journalist association.<sup>338</sup> Participation in the Council is mandatory and if a journalist is found by the Council to have committed an ethical violation, the journalist can be sentenced to a fine or jail, though such sanctions are rare.<sup>339</sup>

In each country, freedom of the press is guaranteed but regulations protect the public from disinformation and *fake news*. Regulating broadcast news in the United States could have similar results while remaining within the confines of the First Amendment.

#### CONCLUSION

Broadcast news can inform the public, but it also can spread disinformation. Under the Fairness Doctrine, broadcasters once served as “public trustees” charged with providing fair and objective news to consumers. Yet deregulation led to a steep decline in public trust of broadcasters. An Independent Broadcast Council could provide the solution. An amendment to the Public Broadcasting Act could expand its scope to encompass a voluntary regulatory council tasked with upholding the standards of fairness and accuracy in broadcast. The media’s role is to inform, but it cannot do so without credibility. An Independent Broadcast Council would serve as an initial step toward restoring public perception of the media, and the framework exists to implement it.

European countries have adopted legislation to combat *fake news* and address the “public trustee” component of broadcast news. The United States can follow the same approach and do so within existing law. Despite objections that regulating broadcasters would run afoul of the First Amendment, the United States Supreme Court has long held that free speech is the right of listeners, not broadcasters. Broadcasters have long had a duty to serve as “public trustees.” Yet the question remains whether broadcasters will choose to fulfil that duty or allow it to remain a relic of history.

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<sup>338</sup> *Id.*

<sup>339</sup> *Id.*