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Enemy of the People: The Ghost of the F.C.C. Fairness Doctrine in the Age of Alternative Facts

by Ian Klein¹

“If you repeat a lie often enough, it becomes the truth.”
-Joseph Goebbels²

Abstract

The FCC Fairness Doctrine required that all major broadcasting outlets spend equal time covering both sides of all controversial issues of national importance. The Fairness Doctrine remained the standard for decades before it stopped being enforced during the Reagan administration, and was removed from the Federal Register during the Obama administration. Since the Fairness Doctrine’s disappearance, the perception by conservatives and progressives alike has been that major media outlets display overt biases towards one political affiliation or the other. As it becomes harder to determine real news from “fake news,” Americans’ trust in media is at an all-time low. An appreciable number of people of various political affiliations now want the Fairness Doctrine to be reintroduced in some form. The purpose of this article is threefold: first, to examine the modern analogues to legal and Constitutional issues that the Fairness Doctrine overcame in its infancy, as Section II explains. Second, to explore modern problems vis-à-vis media distrust, bias, and reliability, as Section III discusses. Third, to explain why a “Fairness Doctrine 2.0” would go a long way towards curbing the biases in broadcast news media and restoring the American public’s trust in journalism, outlined in Section IV. Finally, Section V will offer alternative solutions to the modern issues of media bias, public distrust of media, and “fake news.”

1. J.D. Candidate, Class of 2020, Texas A&M University School of Law. I would like to thank Professors Lisa A. Rich and H. Brian Holland for their constant support and guidance, academically and otherwise, and Texas A&M School of Law for giving a second chance to the lonely first-year who flunked out of school. Thanks, and Gig ‘Em!

2. Mihir Zaveri, *US High School Apologises for Publishing Nazi Quote in Yearbook*, INDEPENDENT (June 17, 2018, 4:43 PM), <https://www.independent.co.uk/news/world/americas/nazi-yearbook-quote-apology-massachusetts-andover-high-school-a8403136.html>.

Introduction

The Digital Age has seen mankind develop abilities that our forefathers would find indistinguishable from magic: we have created glass rectangles that, if touched in the right spots, will make pizza appear at our doors; we have engineered programs that effortlessly navigate a 600-ton flying machine from one part of the planet to another;³ perhaps most impressively, we have amassed archives containing several lifetimes worth of every flavor of pornography imaginable.⁴ Arguably the most powerful of these abilities, however, is the ability to instantaneously disseminate information—including misleading information—to a potentially unlimited number of people.

Humans have more access to information than ever before. The problem that such access creates, however, is that this information—including information relating to significant, controversial issues—is frequently presented in a very biased manner.⁵ An overwhelming majority of Americans believe that major media outlets are objectively biased, taking either an overtly liberal or overtly conservative position on major issues.⁶

This distrust of media reached a boiling point during and after the 2016 Presidential Election, with both President Donald J. Trump and then-candidate Hillary Clinton decrying various mainstream media outlets as “fake news” responsible for the widespread dissemination of “alternative facts.”⁷ While much of the fake news epidemic can be attributed to openly

3. EASA Approves New Autopilot TCAS Mode for Airbus A380, AEROSPACE TECHNOLOGY (Aug. 20, 2009), <https://www.aerospace-technology.com/uncategorised/news/62606-html/>.

4. Mark Ward, *Web Porn: Just How Much Is There?*, BBC (July 1, 2013), <https://www.bbc.com/news/technology-23030090> (estimating that as much as 37% of all data on the internet is pornography).

5. Jeffrey M. Jones, *Americans: Much Information, Bias, Inaccuracy in News*, GALLUP (June 20, 2018), https://news.gallup.com/opinion/gallup/235796/americans-misinformation-bias-inaccuracynews.aspx?g_source=link_NEWSV9&g_medium=TOPIC&g_campaign=item_&g_content=Americans%3a%2520Much%2520Misinformation%2c%2520Bias%2c%2520Inaccuracy%2520in%2520News.

6. Michael Barthel & Amy Mitchel, *Americans' Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RESEARCH CENTER (May 10, 2017), <https://www.journalism.org/2017/05/10/americans-attitudes-about-the-news-media-deeply-divided-along-partisan-lines/>.

7. Callum Borchers, *How Hillary Clinton Might Have Inspired Trump's 'Fake News' Attacks*, WASH. POST (Jan. 3, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/01/03/how-hillary-clinton-might-have-inspired-trumps-fake-news-attacks/>; Amber Jamieson, *'You Are Fake News: Trump Attacks CNN and BuzzFeed at Press Conference*, THE GUARDIAN (Jan. 11, 2017, 1:41 PM), <https://www.theguardian.com/us-news/2017/jan/11/trump-attacks-cnn-buzzfeed-at-press-conference>; Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Age of Alternative Facts*, WASH. POST (Jan. 22, 2017, 8:44 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-usherred-in-the-era-of-alternative-facts/>.

partisan sources such as Infowars and Occupy Democrats, the public perception of major media outlets—such as MSNBC, CNN, and Fox News—has gone from bad to worse; almost three quarters of Americans now not only believe that mainstream media displays overt biases, but reports information that the outlets know to be false or purposefully misleading—in other words, fake news.⁸ This perception of willful bias is pervasive, not only among the general public, but in our political leaders as well. President Obama decried the conservative Fox News as “destructive,” while in 2017, President Trump described what he called the “fake news” media as “the Enemy of the American people.”⁹

An electorate that overwhelmingly distrusts the media creates two problems: (1) an uninformed electorate which casts votes based on incomplete, biased, or fraudulent fact reporting, and (2) an increasingly-polarized population, whose pre-existing biases and political animosities are exacerbated by the consumption of factually-irreconcilable accounts of national and global affairs.¹⁰

A potential solution to the epidemic of media bias and distrust would be to re-implement the FCC Fairness Doctrine. The Fairness Doctrine required that holders of broadcast licenses devote a reasonable amount of their airtime to “controversial issues of public importance,” and that when such issues were presented, contrasting views on the issues had to be aired.¹¹ Re-implementing the Fairness Doctrine or implementing a similar rule would likely reduce the amount of overt bias in media—or at least the public perception of media bias, and resulting distrust of media—and foster a better-informed American people.

This article will examine the potential reimplementations of the FCC Fairness Doctrine (“Fairness Doctrine 2.0”) in response to the contemporary

8. Joe Concha, *Poll: 72 Percent Say Traditional Outlets ‘Report News They Know to Be Fake, False, or Purposely Misleading’*, THE HILL (June 27, 2018, 8:52 AM), <https://thehill.com/homenews/media/394352-poll-72-percent-say-traditional-outlets-report-news-they-know-to-be-fake-false>.

9. Erik Hayden, *Obama: Fox News’ ‘Point of View’ is ‘Destructive’*, THE ATLANTIC (Sept. 20, 2010), <https://www.theatlantic.com/politics/archive/2010/09/obama-fox-news-point-of-view-is-destructive/339970>; Donald J. Trump (@realDonaldTrump) TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> (decrying specifically the New York Times, NBC News, ABC, CBS, and CNN as “fake news” in reaction to unfavorable coverage of Trump himself. President Trump generally uses the phrase “fake news” to refer to bias in media, while for purposes of this article, “fake news” refers to factually false stories spread by objectively disreputable online outlets).

10. See generally Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. OF DEMOCRACY 2 (2017); Anthony M. Barlow, *Restricting Election Day Exit Polling: Freedom of Expression v. the Right to Vote*, 58 U. CIN. L. REV. 1003, 1006 (1990); *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1928-29 (1985).

11. KATHLEEN A. RUANE, CONG. RESEARCH SERV., R40009, FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES (2011).

fake news dilemma. Part II discusses the political and legal history of the Fairness Doctrine. Part III gives a detailed account of contemporary issues surrounding media bias and “fake news.” Part IV discusses the potential benefits and consequences of Fairness Doctrine 2.0, including the modern analogues to the legal dilemmas that the Fairness Doctrine created and overcame. Part V discusses several alternative methods of restoring the public’s trust in media. Ultimately, this article will discuss why implementing Fairness Doctrine 2.0 would go a long way towards curbing bias in broadcast news media, and likely restore some of the public’s trust in journalism.

Finally, the irony is not lost on me that, in writing an article about the biases of various news outlets, I cite to sources published by many of those very same outlets. To that end, I quote the first anonymous muse to utter these words into the vast, endless reaches of cyberspace: “[i]t really do be like that sometimes.”¹²

History of the Fairness Doctrine

Since the outset of broadcast regulation and jurisprudence, courts justified the regulation of broadcasters because of two overarching themes: the scarcity of broadcast frequencies and the right of the public to be informed.¹³

Early Regulation of Mass Communication

After World War I, and its contemporaneous technological advances, radio became the most efficient form of mass communication available to mankind. Accordingly, the United States passed the Radio Act of 1927 which, in addition to regulating radio in general, laid the groundwork for the Fairness Doctrine by (1) requiring licenses for radio broadcasters, and (2) mandating that the licensees “serve the public interest.”¹⁴

During the Roosevelt Administration, Congress passed the Federal Communications Act of 1934, which supplanted the Radio Act and created the Federal Communications Commission (“FCC”): the chief regulatory body governing radio (and later, communications generally), with a mission to “encourage the larger and more effective use of radio in the public interest.”¹⁵ While officially replacing the Radio Act, it is important to note

12. *It Really Do Be Like That Sometimes*, KNOW YOUR MEME, <https://knowyourmeme.com/memes/it-really-do-be-like-that-sometimes> (last visited Jan. 13, 2019).

13. JOHN S. BERRESFORD, FEDERAL COMMUNICATIONS COMMITTEE, No. 2005-2, *THE SCARCITY RATIONALE FOR REGULATING TRADITIONAL BROADCASTING: AN IDEA WHOSE TIME HAS PASSED* (2005).

14. Radio Act of 1927, H.R. 9971, 69th Cong. §§ 11, 21 (1927); 47 U.S.C. §§ 81-119 (repealed 1934).

15. Communications Act of 1934, 47 U.S.C. § 303(g) (1946).

that the Communications Act retained the Radio Act's requirements of licensure and "serving the public interest."¹⁶ The FCC's initial purpose was not censorship and regulation of what media outlets could publish or broadcast, but to issue and renew broadcast licenses.¹⁷ The FCC believed that broadcasters had a duty to the public because of their position as gatekeepers of the news, that a democratic society should be given maximum opportunity to express diverse viewpoints on controversial issues, and, importantly, maximum opportunity to hear and read the conflicting view of others.¹⁸

In addition to creating the FCC, the Communications Act established public ownership of all broadcast channels—that is, broadcast channels belonged to the state as a representative body of the people.¹⁹

The FCC lived a relatively peaceful existence until 1938 when, like so many facets of American life before and since,²⁰ that peace was disrupted by Bostonians: namely Lawrence J. Flynn and John Shepard III.²¹ Flynn, a former employee of the Yankee Network (an ironically-named Boston-based radio news network that existed from 1929-1964), challenged the licenses of two Yankee Network affiliate stations that Shepard owned—WNAC and WAAB—claiming that the stations were being used to air one-sided political viewpoints, and broadcast attacks (including editorials) against local and federal politicians that Shepard opposed.²²

The FCC requested that Shepard provide details about these programs, and in response, the Yankee Network agreed to drop the editorials.²³ Flynn then created a company called Mayflower Broadcasting, and petitioned the FCC to award him WAAB's license.²⁴ The FCC refused Mayflower's request to take over Yankee Network's WAAB license because of Flynn's difficulty in obtaining adequate financing for his proposed outlet.²⁵ The FCC reluctantly renewed WAAB's license, and in so doing, laid the groundwork for the Fairness Doctrine.²⁶

The FCC took issue with Shepard's one-sided editorials that, in the FCC's words, "made no pretense at objective, impartial reporting . . .

16. *The Mayflower Doctrine Scuttled*, 59 YALE L.J. 759, 762 (1950).

17. *Id.*

18. *Id.* at 760.

19. 47 U.S.C. § 301.

20. *See generally* EDWARD COUNTRYMAN, *THE AMERICAN REVOLUTION* (1985).

21. VICTOR PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* 104 (2014); STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 37 (1978).

22. STEVEN J. SIMMONS, *THE FAIRNESS DOCTRINE AND THE MEDIA* 37 (1978).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

[revealing] a serious misconception of [WAAB's] duties and functions under the law."²⁷ The FCC explained that a "truly free radio" could not be used solely to advocate causes, political candidacies, and principles which the licensee regarded favorably.²⁸ "In brief," the FCC explained, "[t]he broadcaster cannot be an advocate."²⁹ Importantly, the FCC laid out its policy considerations for condemning WAAB's one-sided editorials:

Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. *Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions fairly, objectively and without bias. The public interest—and not private—is paramount.* These requirements are inherent in the conception of public interest set up by the Communications Act as the criterion of regulation.³⁰

The non-advocacy requirement of the FCC's Mayflower decision, as well as the public need to receive fair interpretations of all meaningful sides of important issues, came to be known as the Mayflower Doctrine.³¹ Basically, the ruling said that a broadcaster could not be an advocate through personal editorials.³²

Although the intent of the Mayflower decision was to increase discussion of various issues of public importance, the broadcasting industry decided to avoid any potential trouble from the non-advocacy requirement by avoiding discussing controversial issues altogether.³³ In mid-1945, the FCC sought to resolve the dilemma by requiring licensees to present controversial issues; the FCC explained that "the operation of any station under the extreme principles that no time shall be sold for the discussion of controversial public issues . . . is inconsistent with the concept of public interest established by the Communications Act as the criterion of radio regulation."³⁴ The Commission not only rejected the practice of avoiding discussions of issues over the air, but affirmatively indicated that a licensee

27. *Mayflower Broadcasting Corp.*, 8 F.C.C. 333, 339 (1941).

28. *Id.*

29. *Id.*

30. *Id.* (emphasis added) (creating precedent for the FCC regulating the content of editorials, rather than exclusively informative news).

31. SIMMONS *supra* note 23, at 38.

32. *See generally* 8 F.C.C. 333.

33. *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1259 (1949) (noting that the Mayflower decision "fully and completely suppressed and prohibited the licensee from speaking in the future over his facilities in behalf of any cause").

34. *United Broadcasting Co.*, 10 F.C.C. 515, 518 (1945).

was, in fact, obligated to present such programs if it were to meet its requirements vis-à-vis the public interest standard.³⁵

Further elaboration of broadcaster obligations to promote fair discussions of issues soon followed in the Commission's rulings on the separate petitions filed by Robert Scott and Sam Morris in 1946. In the Scott case, the Commission took the significant step of ruling that even one side of popularly accepted ideas could not be presented. Scott, an atheist, requested, and was denied, time in which to refute the ideas advanced by religious programming over the stations of which he complained in his petition.³⁶ The Commission denied his petition because the problem was "broader in scope than the complaint against the particular stations . . . involved."³⁷ "If freedom of speech is to have meaning," the Commission stated, "it cannot be predicated on the mere popularity or public acceptance of the ideas sought to be advanced. It must be extended as readily to ideas which we disapprove or abhor as to ideas which we approve."³⁸

The Commission held in *In re Robert Harold Scott* that while an issue or personality may not seem to be important, it "may be projected into the realm of controversy by virtue of being attacked."³⁹ The holders of a belief should not be denied the right to answer attacks upon them or their belief solely because they are few in number.⁴⁰ In *In re Sam Morris*, the Commission suggested that even advertising was not beyond the reach of fairness treatment.⁴¹ The Commission held that, while the normal advertising of a product or service does not usually raise issues of importance, it must be recognized that under some circumstances it may well do so; the fact that the occasion for the controversy happens to be an advertisement does not diminish the duty of the broadcaster to treat it as an issue of public interest.⁴²

While the *Scott* and *Morris* decisions elaborated on a broadcaster's obligations, broadcast licensees needed more clarity in order to ensure that they understood the FCC's public interest and non-advocacy requirements, and in the light of these compelling needs, the Commission initiated a study to clarify its position with respect to the obligations of broadcast licensees in the field of broadcast of news, commentary, and opinion.⁴³ The result of this inquiry was the opinion that would include the Fairness Doctrine.

35. *Id.*

36. *In re Petition of Robert Scott*, 11 F.C.C. 372, 376 (1946).

37. *Id.*

38. *Id.*

39. *Id.* at 374.

40. *Id.* at 376.

41. *In re Petition of Sam Morris*, 11 F.C.C. 197, 198 (1946).

42. *Id.* at 198-99.

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

Enter the Fairness Doctrine

The FCC laid out the Mayflower Doctrine during the height of World War II, when restrictions on radio broadcasts were essentially unassailable (after all, “loose lips sink ships”). As the national willingness to sacrifice certain liberties for the sake of the war effort decreased, broadcast licensees’ disillusionment with the lack of clarity flowing from Mayflower-era FCC decisions manifested itself. In response, in 1949, the FCC published a report—*In the Matter of Editorializing by Broadcast Licensees*—which contained the two provisions that would come to be known as the Fairness Doctrine.⁴⁴

The report interpreted the “public interest” provisions of the Radio Act and the Communications Act as a mandate to promote “a basic standard of fairness” in broadcasting.⁴⁵ Accordingly, licensees had the duty to devote airtime to objective, nonpartisan coverage of controversial issues that were of interest to their home communities.⁴⁶ Additionally, licensees had to provide an opportunity to reply for individuals such as political candidates or public officials who were the subject of editorials or who perceived themselves to be the subject of unfair attacks in the licensees’ news programming.⁴⁷ Similarly, opposing candidates for public office were entitled to equal airtime to express their platforms and promote their campaigns.⁴⁸ In the words of the FCC, the second of these requirements mandated that broadcasters’ coverage of controversial issues “must be fair in the sense that [the coverage of the issue] provides a reasonable opportunity for the presentation of contrasting points of view.”⁴⁹ Conspicuously absent, however, was a concrete method of determining whether an issue was “controversial,” what constituted a “reasonable opportunity to respond,” and a guideline for what amount of programming devoted to important, controversial issues would be considered reasonable.⁵⁰

The Fairness Doctrine was predicated on the right of the public to be informed, as opposed to a right shared by the Government, broadcast licensees, and individual citizens to broadcast their exclusive views over the airwaves; in other words, it was focused on the collective good rather than on individual rights.⁵¹ This concept limited licensees’ discretion to some extent, but it also advanced a more important goal—that of an informed

44. SIMMONS, *supra* note 23 at 9.

45. *Id.*; 13 F.C.C. 1246.

46. 13 F.C.C. at 1249.

47. *Id.*

48. *Id.*

49. SIMMONS, *supra* note 23 at 9; 13 F.C.C. at 1250.

50. SIMMONS, *supra* note 23 at 9; 13 F.C.C. at 1250.

51. 13 F.C.C. at 1250.

citizenry.⁵² The Commission told its licensees that it would provide fairness guidelines on a case-by-case basis.⁵³

In short, the Fairness Doctrine required that (1) broadcast licensees devote a reasonable amount of their airtime to “controversial issues of public importance,” and (2) when such issues were presented, contrasting views on the issues had to be aired.⁵⁴

The “Personal Attack” Rule

In the decade following the Fairness Doctrine’s birth, the FCC dealt with “fairness problems” on an *ad hoc* basis.⁵⁵ One aspect of the general fairness concept dealt with equality in treatment of political candidates.⁵⁶ In a case involving a candidate seeking the office of Mayor of Chicago, the FCC was petitioned to provide for equal time under Section 315 of the Communications Act.⁵⁷ The unfortunately-named mayoral candidate, Lar Daly,⁵⁸ claimed that his political opponents had been given exposure to the public in station newscasts.⁵⁹ The broadcasters felt that Section 315 should not apply to bona fide newscasts; however, the Commission held that Daly was entitled to equal time.⁶⁰ Based on Lar Daly’s case, Congress amended Section 315(a) of the Communications Act to exempt bona fide newscasts from fairness requirements.⁶¹ The added portion reflected reaction to the Lar Daly decision and recognized the goals of the Fairness Doctrine. Following the revision, some stations presented both sides of controversial issues; others were still unclear what to do vis-à-vis the fairness requirements; others attempted to avoid fairness obligations altogether.⁶²

One such attempt to circumvent the Fairness Doctrine occurred during the 1962 California gubernatorial election, where a California network—KTTV-TV—presented continuous, slanted commentaries by one of their newsmen in support of one gubernatorial candidate.⁶³ More than twenty of these allegedly biased commentaries degraded the opposing party and the

52. *Id.*

53. *Id.*

54. SIMMONS, *supra* note 23 at 9; 13 F.C.C. at 1250.

55. 13 F.C.C. at 1250.

56. Lar Daly, 18 Radio Reg. 238 (1959) (examining 47 U.S.C. § 315(a)); Federal Communications Act, 47 U.S.C. § 305(a).

57. 47 U.S.C. § 315(a).

58. 18 Radio Reg. at 238 (seriously, who looks at their newborn baby—the heir to their legacy, monument to their family name, and testament to billions of years of genetic success—and says, “I shall call him ‘Lar?’”).

59. *Id.*

60. *Id.*

61. 47 U.S.C. § 315(a).

62. *Id.*

63. Thomas J. Houser, *Fairness Doctrine—A Historical Perspective*, 47 NOTRE DAME L. REV. 550, 561 (1972).

opposing candidate; only twice was the opposing candidate allowed to appear on KTTV, and each time his presentation was followed by a rebuttal.⁶⁴ The FCC ruled that under the Fairness Doctrine, when a commentator on a broadcast licensee's program attacks one candidate or supports another, the station should send a transcript of the pertinent continuity in each program to the appropriate candidates immediately and should offer a comparable opportunity for an appropriate spokesman to answer the broadcast.⁶⁵ The FCC's rationale was that a continuous opportunity for one side to express their views and a minimal opportunity afforded to opposite views violates the rights of the public to a fair and balanced presentation of the issues.⁶⁶

The personal attack provision required stations airing attacks on the "honesty, integrity, character, or the like qualities" of a person to send the person a tape, script, or accurate summary of the broadcast, a notification as to the time of the broadcast, and an open invitation to respond to the broadcast within one week of the attack—except in the case of "political broadcasts," in which cases the person must be notified within 24 hours.⁶⁷

The Red Lion Decision and the Scarcity Principle

After the "Personal Attack Rule" came into existence, it seemed that broadcast licensees had finally had enough of the FCC's regulations. In 1969, the United States Supreme Court reviewed both the Personal Attack Rule and the Fairness Doctrine itself in the case of *Red Lion Broadcasting Co. v. Federal Communications Commission*.⁶⁸

In *Red Lion*, Reverend Billy James Hargis "personally attacked" Fred Cook during one program in a series of "Christian Crusades."⁶⁹ Cook wrote WGCB—the licensee that broadcast the attack—asking for time to respond to Hargis's statements.⁷⁰ In its response, WGCB suggested that Cook could only respond if he paid WGCB, or obtained some other kind of sponsorship.⁷¹ Cook responded with a proverbial "oh hell no," and petitioned the FCC for Fairness Doctrine consideration.⁷² The Commission ordered the station to provide time for Mr. Cook's reply.⁷³ The station appealed the decision to the Supreme Court, which unanimously sustained

64. *Id.*

65. *Id.* (citing Times-Mirror Broadcasting Company, 24 Radio Regs. 404 (1963)).

66. *Id.*

67. Houser, *supra* note 63 at 561.

68. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969).

69. *Red Lion*, 395 U.S. at 369.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

the validity of the Commission's personal attack rules.⁷⁴ The Court ruled that broadcasters must make time available at their own expense in order to meet their fairness obligations, and at their own initiative if content is not available from other sources.⁷⁵ Importantly, the Court noted:

[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.⁷⁶

The crux of the *Red Lion* decision was that because of the scarcity of radio frequencies with which broadcasters of any kind could relay information (the "Scarcity Principle"), the FCC could constitutionally mandate broadcasters to present important issues of public concern in as unbiased a manner as possible.⁷⁷ In fact, the Fairness Doctrine passed Constitutional muster in part *because* of the right of the public to be informed of controversial issues, as this complied with the spirit and purpose of the First Amendment.⁷⁸ Consistent with the FCC's early rationale for regulating mass communication, the *Red Lion* Court was keen to emphasize the right of the public to be informed, and to receive information free from unnecessary bias.⁷⁹ While the Scarcity Principle was the backbone of the *Red Lion* decision, the public's right to information was its heart and soul.

In the decades following *Red Lion*, the Supreme Court examined and upheld the Fairness Doctrine numerous times, but repeatedly declined to extend its broadcast limitations to print media.⁸⁰

The overarching theme of the FCC's and Supreme Court's decisions regarding the Fairness Doctrine was the reiteration of the public's right to be informed, to hear important and controversial issues, and to have these issues presented in a fair and objective manner.⁸¹

74. *Red Lion*, 395 U.S. at 401 (Justice Douglas did not participate in the decision, as he was not present for oral arguments, but the remaining Justices voted unanimously.).

75. *Id.* at 369.

76. *Id.* (emphasis added).

77. *Id.*

78. *Id.*

79. *Red Lion*, 395 U.S. at 369.

80. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *Telecomm. Research & Action Ctr. v. F.C.C.*, 801 F.2d 501 (D.C. Cir. 1986).

81. See *supra* notes 11-79.

Farewell, Fairness Doctrine

In 1980, Ronald Reagan won the presidency, giving control of the executive branch to the Republican Party, which generally opposed the Fairness Doctrine. Five years later (in 1985), under FCC Chairman Mark S. Fowler (a communications attorney who had served on Ronald Reagan's presidential campaign staff in 1976 and 1980), the FCC released its report on General Fairness Doctrine Obligations, which argued that the doctrine hurt the public interest and violated free speech rights guaranteed by the First Amendment.⁸² The FCC ultimately abolished the Fairness Doctrine by a 4-0 decision in *Syracuse Peace Council*.⁸³ The D.C. Circuit upheld the Fairness Doctrine's abolition, but was keen to note that it reached its decision without addressing the First Amendment issues that the FCC raised.⁸⁴

The Fairness Doctrine lay dormant on the Federal Register for decades, through Republican and Democratic administrations alike, before meeting its demise in 2011 during the Obama Administration.⁸⁵ In the years that the Fairness Doctrine lay dormant, public trust in media declined rapidly.⁸⁶ Before the *Syracuse Peace Council* decision, 72% of Americans had a "great deal" of trust in the news media; by 2000, that number had dipped to 51%.⁸⁷ By 2016, that number had halved to 26%.⁸⁸

Contemporary Issues in Media Distrust

In the Digital Age, the two foremost issues surrounding media distrust are the perception of media outlets as biased, and—especially when it comes to Internet-only sources—the widespread publication of false information presented as news (i.e., "fake news").⁸⁹ An electorate that overwhelmingly

82. General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35418 (Aug. 30, 1985).

83. See generally *In re Complaint of Syracuse Peace Council against Television Station WTVH Syracuse, New York*, 2 F.C.C. Rcd. 5043 (1987).

84. *Syracuse Peace Council v. Fed. Communications Commission*, 867 F.2d 654, 656 (D.C. Cir. 1989).

85. Broadcast Applications and Proceedings; Fairness Doctrine and Digital Broadcast Television Redistribution Control; Fairness Doctrine, Personal Attacks, Political Editorials and Complaints Regarding Cable Programming Service Rates, 76 Fed. Reg. 55817, 55818-19 (Sept. 9, 2011).

86. Darren K. Carlson, *Trust In Media*, GALLUP (Sept. 17, 2002), <https://news.gallup.com/poll/6802/trust-media.aspx> ("[T]he American public is more skeptical of the media's ability to report news fully, accurately, and fairly than it was in the 1970s.").

87. Jeffrey M. Jones, *Americans' Trust in the Mass Media*, GALLUP (Apr. 20, 2004), <https://news.gallup.com/poll/11428/americans-trust-mass-media.aspx> (Gallup did not track this data between 1977 and 1996.).

88. 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>.

89. See Concha, *supra* note 7; Art Swift, *Six in 10 in U.S. See Partisan Bias in News Media*, GALLUP (Apr. 5, 2017) <https://news.gallup.com/poll/207794/six-partisan-bias-news-media.aspx>.

distrusts the media creates two problems: (1) an uninformed electorate, casting votes based on incomplete, biased, or fraudulent fact reporting, and (2) an increasingly polarized population, whose preexisting biases and political animosities are exacerbated by the consumption of factually irreconcilable accounts of national and global affairs.⁹⁰

Media Bias

America's trust in the media reached an all-time low in 2016.⁹¹ Leading up to the 2016 Presidential Election, only 32% of American adults expressed either a "great deal" or a "fair amount" of trust in mass media, compared to over half of American adults expressing similar sentiments following the highly controversial 2000 Presidential Election.⁹² Among surveyed individuals aged 18-49 years—the heirs apparent to American policymaking and voter impact with the impending deaths of older demographics—only 26% of those surveyed had a great deal or even fair amount of trust in mass media in 2016.⁹³

Gallup points out that the recent crater in media trust can be attributed largely to the 2016 election itself. The perception among many Republican voters was (and to a very large extent still is) that mainstream media outlets such as CNN spent too much time focusing on controversial statements made by then-candidate Donald Trump, while spending far less time reporting on controversial issues surrounding the Clinton campaign.⁹⁴

Generally speaking, Democratic voters trust media outlets more so than Republican voters; 67% of polled Republican voters perceived a great deal of political bias in mainstream media outlets, as opposed to 46% of Independent voters, and only 26% of Democratic voters.⁹⁵ By the same token, only 13% of polled Republican voters believed that most media outlets are careful to separate fact from opinion, compared to 27% of Independent voters, and 53% of Democratic voters.⁹⁶ In fact, according to Gallup, out of seventeen newspapers, network or cable news stations, radio networks, and Internet sites included in its survey, Republican voters saw all but two—Fox News and the Wall Street Journal—as biased.⁹⁷

90. See generally Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. OF DEMOCRACY 2 (Apr. 2017); Anthony M. Barlow, *Restricting Election Day Exit Polling: Freedom of Expression v. the Right to Vote*, 58 U. CIN. L. REV. 1003, 1006 (1990); *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927, 1928-29 (1985).

91. Swift, *supra* note 87.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Swift, *supra* note 87.

97. Jones, *supra* note 4.

Regardless of political leanings, studies indicate that two-thirds of American adults believe that mainstream media outlets do a poor job of separating facts from opinions.⁹⁸

What most of these surveys do not account for is the direction the people surveyed perceive the mainstream media to be biased—that is, whether the survey takers believed overall mainstream media to have pro-Democratic or pro-Republican bias. The natural presumption is that Republican survey takers who perceived a media bias believed that the mainstream media favored a more Democratic agenda, and that Democratic voters perceived a Republican-leaning bias, but the studies are unclear in this regard.

Regardless of public perception, there is no question that there are major media outlets expressing pro-Republican and pro-Democratic biases alike. The biases of various media outlets' biases are perhaps best illustrated by patent attorney Vanessa Otero, who has meticulously compiled a spectrum of the reliability of a wide variety of media outlets, both in terms of bias and in terms of objective, truthful fact reporting.⁹⁹ Otero has developed a methodology (Figure 1¹⁰⁰) that grades a source's content based on its veracity (how factually accurate each claim is, with a value of 1 being wholly accurate and 5 being completely false) and expression (whether a source presents facts wholly objectively, with 1 being fact-only and 5 being opinion-only). An algorithm then places the sources along an X-Y axis, with the Y-axis indicating factual accuracy, and the X-axis reflecting objectivity.¹⁰¹

As Otero points out, two examples of perceived and objective media bias can be seen in the conservative-leaning Fox News, and the progressive-leaning MSNBC.¹⁰² Economists at Stanford University further objectified the existence, and explored the effects, of the biases of Fox and MSNBC.¹⁰³ They found that if Fox News was removed from the cable news market, Republican candidates across the board would have received 6.3% fewer votes during the 2008 election.¹⁰⁴ For reference, this would be nearly nine million fewer votes, which is more votes than there are people in all but eleven U.S. States.¹⁰⁵ Regardless of whether someone considers that a good or a bad thing, the ability to influence millions of votes undeniably connotes a significant amount of power.

98. *Id.*

99. *Media Bias Chart 5.0*, AD FONTES MEDIA, <http://www.adfontesmedia.com> (last visited Mar. 3, 2019).

100. *Id.*

101. *Id.*

102. Gregory J. Martin & Ali Yurukonglu, *Bias in Cable News: Persuasion and Polarization*, 109 AM. ECON. REV. 2565, 2570 (2017).

103. *Id.*

104. *Id.* at 4.

105. FED. ELECTIONS COMM'N, FED. ELECTIONS 2008 (2009).

Notwithstanding the biases of individual networks, a prime example of bias in media can be found in the Sinclair Broadcast Group (“Sinclair”): the largest media conglomerate in the United States, owning over 200 stations across the country, and providing broadcasting to nearly 40% of American households.¹⁰⁶ Sinclair has been criticized for using its many stations to push Republican presidential candidates since at least 2004, when it announced it would air a documentary critical of Democratic candidate John F. Kerry’s service in the Vietnam War, but backed down amid pressure.¹⁰⁷ It drew criticism from Democrats on the eve of the 2012 election when its stations in several battleground states aired a half-hour news special that faulted then-President Obama for his handling of the economy, his spearheading of the Affordable Care Act, and the terrorist attack on a U.S. installation in Benghazi, Libya.¹⁰⁸ It is important to note that among the sources describing Sinclair as having a conservative bias is the Wall Street Journal: one of only two mainstream outlets that Republican (i.e. conservative) voters in a Gallup poll perceived to be an unbiased source.

Fraudulent Online “News”

*“Do you really think someone would do that—
just go on the Internet and tell lies?”¹⁰⁹*

What Republican and Democratic voters can agree on, however (and it is increasingly rare that they agree on anything at all) is that fraudulent online content purporting to be news is a problem; 71% of Democratic voters that Gallup surveyed in 2018 believed that the spread of inaccurate information on the Internet is a major problem, as did 75% of Republican voters.¹¹⁰ There is, moreover, a stark disparity between Americans’ overall trust in traditional media outlets (television, radio, etc.), and Americans’ overall trust in news promulgated predominately via social media, and the Internet at large. Per the Pew Research Center, only 5% of Americans have “a lot of trust” in news that they see on social media.¹¹¹

106. SINCLAIR BROADCASTING, 2016 Annual Report, 4 (2016).

107. Paul Farhi, *Here’s What Happened The Last Time Sinclair Bought a Big-City Station*, WASH. POST (May 8, 2017), https://www.washingtonpost.com/lifestyle/style/heres-what-happened-the-last-time-sinclair-bought-a-big-city-station/2017/05/08/92433126-33f7-11e7-b4ee-434b6d506b37_story.html?utm_term=.542df2c52d13.

108. *Id.*

109. ARTHUR: BUSTER THE MYTH MAKER (PBS 2005).

110. Kimberly Fitch, *Both Sides of the Aisle Agree: The Media is a Problem*, GALLUP (Jan. 29, 2018), <https://news.gallup.com/opinion/gallup/226472/sides-aisle-agree-media-problem.aspx>.

111. Kristin Bilalik, *Key Trends in Social and Digital News Media*, PEW RESEARCH CENTER (Oct. 4, 2017), <http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/>.

In other words, voters who would argue that the world is flat just to spite the other side, are in agreement that websites propagating intentionally false or misleading information are a massive problem.

A prime example of intentionally false or misleading online content holding itself out as news is the group of websites run by conspiracy theorist Alex Jones: namely, InfoWars, NewsWars, and PrisonPlanet.

Alex Jones and his variety of online outlets entered the spotlight during the 2016 Presidential Election with the infamous “Pizzagate” event. Pizzagate originated in the weeks leading up to the Election, as WikiLeaks released emails from Clinton campaign advisor Chuck Podesta, including correspondence between Podesta and the owner of Comet Pizzeria in Washington, D.C. discussing a potential Clinton fundraiser event.¹¹² Essentially, Jones and a variety of other site runners and bloggers alleged that the word “pizza” in these emails was code for a child prostitution ring—run and personally participated in by Hillary Clinton—being operated beneath the pizzeria, and that the fundraisers at issue were going to be gang-rapes of children.¹¹³ Not only were these allegations completely untrue, as no evidence of a child prostitution ring was ever found, but they prompted a gunman to fire shots inside the pizzeria in the process of “checking on” the allegations.¹¹⁴

Although InfoWars is not a household name in the same way that Fox News and CNN are, it carries considerable weight online in terms of page views; the website receives nearly four million monthly page views, making it more commonly-viewed than reputable sources like Newsweek and The Economist.¹¹⁵ Though InfoWars is possibly the most well-known fake news site, there are more fake news sites than can be counted.

“Who would actually believe most of these stories?”

The trouble is that many fake news websites disguise themselves as bone a fide news, and many do so fairly convincingly. Anecdotally, most people would glance at a poorly-thrown-together website clearly made by some random guy eating Cheetos in his basement, and dismiss it as . . . well, nonsense written by some random guy Cheetos in his basement. The fact of the matter is that many fake news websites are not only professionally made,

112. Joshua Gillan, *How Pizzagate Went From Fake news to a Real Problem for a D.C. Business*, POLITIFACT (Dec. 5, 2016), <https://www.politifact.com/truth-o-meter/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/>.

113. *Id.*

114. *Id.*

115. *Infowars.com*, QUANTCAST (Nov. 12, 2018), <https://www.quantcast.com/infowars.com>; *cf. Newsweek Media Group Network*, QUANTCAST (Nov. 11, 2018), <https://www.quantcast.com/measure/p-YYVuetP9buYQZ#trafficCard>.

but are given names such as “World News Daily Report” or “The Boston Tribune” that carry the connotation of being legitimate news.

For example, when scrolling through their newsfeed in the months following the 2016 Election, a person may have seen a headline from ABC News announcing that President Obama had just signed an executive order declaring an investigation into voter fraud, and that the Election was to be held again in several weeks.¹¹⁶ As ABC News is a reputable source,¹¹⁷ this person would likely give this claim a good deal of credence. The problem, however, is that no such executive order was ever given, and “ABC News” was not the same ABC News that has come to be a household name.¹¹⁸ The fraudulent “ABC News” site uses a logo that is strikingly similar to that of the real ABC News, and is located at the domain “abcnews.com.co” rather than simply “abcnews.com.”¹¹⁹

One way that fake news outlets like the imposter “ABC News,” as well as other fake news sites like the Boston Tribune and World News Daily Report, escape responsibility for publishing outright false information is by placing very inconspicuous disclaimers on their web pages, purporting themselves to be “parodies.”¹²⁰ However, unlike actual parody news sites like The Onion, which makes it clear that its stories are satirical, the content, tone, and presentation of the above-mentioned “fake news” sites are such that it is clear that they intend their content to be received as fact, rather than satire. World News Daily Report’s website, for example, is adorned with the tagline “News You Can Trust,” which intentionally implies authenticity.¹²¹ The fact that World News Daily Report—a microcosm of the fake news epidemic—places this misleading statement prominently, but essentially hides its satire disclaimer, makes it abundantly clear that its publishers intend its content to be perceived as fact.

Nevertheless, even when something actually *is* satirical, or otherwise presented purely for entertainment, it is not uncommon for consumers of that media to perceive it as factual reporting. Even as long ago as 1938, when Orson Welles’s infamous “War of the Worlds” broadcast, an appreciable number of people—as many as a third of listeners—gleamed from the broadcast that a Martian attack on the Earth was underway.¹²²

116. *Don’t Get Fooled By These Fake News Sites*, CBS NEWS, <https://www.cbsnews.com/pictures/dont-get-fooled-by-these-fake-news-sites/3/>.

117. *Media Bias Chart 5.0*, *supra* note 99.

118. *Don’t Get Fooled By These Fake News Sites*, *supra* note 116.

119. *Id.*; *cf.* ABC NEWS, <http://www.abcnews.com> (last visited Jan. 20, 2019).

120. *See, e.g.*, WORLD NEWS DAILY REPORT, <https://worldnewsdailyreport.com/> (scroll to the very bottom of the page).

121. *Id.* (just beneath the name “World News Daily Report” at the top of the page).

122. A. Brad Schwartz, *Orson Welles and the Birth of Fake News*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/opinion/orson-welles-war-of-the-worlds-fake-news.html> (explaining that while the public’s reaction to the Welles broadcast has been

“Who actually goes to these sites?”

Other than the odd conspiracy theorist who goes out of his way to visit them, most of these websites’ views result from links shared on social media platforms such as Facebook and Twitter.¹²³ One person (often either a robot or a starving twenty-something-year-old in a freezing apartment in Saint Petersburg) shares the article from the source, their friends and subscribers see and share the article, and then these users’ friends share the article, and so the proverbial wheels on the bus go ‘round and ‘round.’¹²⁴

While it is true that many of these articles are reshared *ad nauseum* by the above-mentioned robots and Russians, the majority of fake news article “shares” came from verified human users within the United States, according to research done by Professor Sinan Aral of the Massachusetts Institute of Technology.¹²⁵ Predictably, elderly users are the most susceptible to sharing fake news on social media, as they accounted for over seven times the shares of fake news articles during the 2016 election cycle as did their younger counterparts.¹²⁶

Concerningly, Professor Aral noted that fake news articles spread much more rapidly on social media than bona fide news from reputable sources.¹²⁷ According to Aral, “[f]alsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information, and the effects were more pronounced for false political news than for false news about terrorism, natural disasters, science, urban legends, or financial information.”¹²⁸ In fact, Aral’s study found that true information took almost six times as long as false information to reach a sample of 1,500 people.¹²⁹

With the widespread distrust of the American people for mainstream news media, the United States faces a vacuum of reliable information. Unfortunately, that vacuum is being filled by websites like InfoWars and World News Daily Report, which are replacing biased information with outright false information. The result is a less and less-informed electorate, and until a solution presents itself, that problem will only get worse. A

embellished over the years, a significant number of people still interpreted the broadcast as fact reporting on an ongoing extraterrestrial attack).

123. Sinan Aral, *The Spread of True and False News Online*, 359 *SCIENCE* 1146, 1147 (2018).

124. *Id.*

125. *Id.*

126. Niraj Chokshi, *Older People Shared Fake news on Facebook More Than Others in 2016 Race, Study Says*, *N.Y. TIMES* (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/us/politics/facebook-fake-news-2016-election.html>.

127. Aral, *supra* note 123 at 1147.

128. *Id.*

129. *Id.*

potential solution to that problem would be to reinstate the FCC Fairness Doctrine.

Re-Implementing the Fairness Doctrine?

The American public's wholesale distrust of media could potentially be remedied by re-implementing the Fairness Doctrine in some form.

Practical Effects

As statistics plainly show, Americans' trust in broadcast media was at its highest during the life of the Fairness Doctrine and has been on the decline since the Fairness Doctrine's demise.¹³⁰ That decline coincides with a quantifiable bias in media,¹³¹ which fuels the public's distrust of mainstream media.¹³²

If Fairness Doctrine 2.0 required outlets like Fox and MSNBC to objectively present opposing points of view on important issues, it would be relatively easy to overcome both the perceived and objective components of bias. MSNBC having to present objective information on the Republican point of view on a given issue, for example, would have the twofold benefit of (1) increasing objectivity and reducing bias, and (2) increasing the outlet's credibility among the public. In other words, this would not only be beneficial for viewers, who would suddenly be receiving both sides of a story rather than an extremely slanted view, but it would help outlets, as their credibility (and, theoretically, views) would increase.

Furthermore, if the Personal Attack Rule were to make a resurgence as part of Fairness Doctrine 2.0, outlets like Sinclair would be unable to air derogatory content without giving the subjects of that content the chance to respond.¹³³ This would by no means prevent outlets from presenting this information, but would afford the subjects of these attacks opportunity to respond, which could either validate or refute whatever the outlet said.

The following sections explain the practical and legal obstacles that Fairness Doctrine 2.0 would have to overcome in order to have an impact on the problems of bias and fake news.

Support and Opposition

As the American public grew more and more disillusioned with mainstream media throughout the 1990s and 2000s, support grew among the public and legislators alike for the reimplementation of the Fairness Doctrine. Interestingly, despite Democratic voters having a greater trust in the media and a lower perception of overall bias in the media, support for

130. See *supra* notes 85-87.

131. *Media Bias Chart 5.0*, *supra* note 99.

132. See *supra* notes 90-96.

133. Houser, *supra* note 63 at 561.

reimplementing the Fairness Doctrine has been much higher among Democratic voters and policymakers than among their Republican counterparts.

In 2005, Democratic Congresswoman Louise Slaughter introduced a bill to create a “Fairness and Accountability in Broadcasting Act,” which would reduce the length of a broadcast license from eight to four years, and require broadcast licensees to cover important issues fairly, hold local public hearings about its coverage twice a year, and document to the FCC how it was meeting its obligations; essentially, reviving and codifying the Fairness Doctrine.¹³⁴ That same year, Democratic Congresswoman Maurice Hinchey introduced the “Media Ownership Reform Act of 2005,” which would have implemented rules almost identical to the Fairness Doctrine.¹³⁵ However, neither bill made it out of its respective committee.¹³⁶ Other prominent Democratic figures such as former President Bill Clinton and former Secretary of State John Kerry have also publicly expressed interest in the Fairness Doctrine’s reimplementation.¹³⁷

Predictably, since Democratic lawmakers tend to support Fairness Doctrine 2.0, Republican lawmakers generally oppose a new Fairness Doctrine; notwithstanding the Supreme Court’s decision in *Red Lion*, many Republicans and Libertarians see the Fairness Doctrine as an attack on First Amendment protections for speech and the press.¹³⁸ In 2007, then-Congressman Mike Pence co-sponsored a bill that would have become the Broadcaster Freedom Act, purporting to prohibit the FCC, or any other federal commission, from “prescrib[ing] any rule, regulation, policy, doctrine, standard, or other requirement that has the purpose or effect of reinstating . . . the requirement that broadcasters present opposing viewpoints on controversial issues of public importance, commonly referred to as the Fairness Doctrine.”¹³⁹

Outside of the ivory towers of Capitol Hill’s patrician class, the plurality of the plebian wretches across the United States supports re-implementing the Fairness Doctrine in some form. According to a study by Rasmussen Reports, a 47% plurality of surveyed Americans supported

134. Fairness and Accountability in Broadcasting Act, H.R. 501, 109th Cong. (2005).

135. Media Ownership Reform Act of 2005, H.R. 3302, 109th Cong. (2005).

136. H.R. 501; H.R. 3302.

137. John Eggerton, *Bill Clinton Talks of Re-Imposing Fairness Doctrine or At Least “More Balance” in Media*, BROADCASTING CABLE (Feb. 13, 2009), <https://www.broadcastingcable.com/news/bill-clinton-talks-re-imposing-fairness-doctrine-or-least-more-balance-media-55678>; John Eggerton, *Kerry Wants Fairness Doctrine Re-Imposed*, BROADCASTING CABLE (June 27, 2007), <https://www.broadcastingcable.com/news/kerry-wants-fairness-doctrine-reimposed-83146>.

138. *Fairness is Censorship*, WASHINGTON TIMES (June 17, 2008), <https://www.washingtontimes.com/news/2008/jun/17/fairness-is-censorship/>.

139. Broadcaster Freedom Act of 2007, H.R. 2905, 110th Cong. (2007).

reimplementing the Fairness Doctrine in some form.¹⁴⁰ This is to say nothing of the vast majority who believe that bias is a serious problem in mainstream news media.¹⁴¹

First Amendment Concerns—Red Lion and The Scarcity Principle

The biggest concern surrounding Fairness Doctrine 2.0 is the issue of the First Amendment—namely, the concerns of restricting freedom of the press and free speech.¹⁴² Right off the bat, assuming Fairness Doctrine 2.0 made no updates to its predecessor, it would have Supreme Court precedent on its side regarding First Amendment concerns. As mentioned above, the Supreme Court’s decision in *Red Lion* expressly held that because of the public’s right to receive important and controversial information, the Fairness Doctrine not only survived the First Amendment challenge, but actually *advanced* the interests that the First Amendment was designed to protect.¹⁴³

While courts were reluctant to apply the Fairness Doctrine to written editorials instead of exclusively informative broadcasts,¹⁴⁴ there is precedent for extending the Doctrine to editorials. The Mayflower Doctrine, the Fairness Doctrine’s predecessor, was born out of a case concerning biased editorials.¹⁴⁵ The reception would, of course, not be glowing, but there is certainly historical precedent for a Fairness Doctrine 2.0 being extended to editorials.

The counterargument would be that the *Red Lion* holding revolved around the Scarcity Principle, and that the Court upheld the Fairness Doctrine because of the necessity of regulating the finite number of radio frequencies available to broadcasters.¹⁴⁶ Proponents of this argument would likely point to the fact that when *Red Lion* was decided, the ability of broadcast licensees to broadcast was actually quite limited (i.e., scarce), while in the Digital Age, infrastructure and access to information are exponentially better, creating many, many more pathways through which information can reach viewers, listeners, or whatever verb a given person is

140. *47% Favor Government Mandated Political Balance on Radio, TV*, RASMUSSEN REPORTS (Aug. 14, 2008), http://www.rasmussenreports.com/public_content/politics/general_politics/august_2008/47_favor_government_mandated_political_balance_on_radio_tv.

141. *See supra* notes 68-72.

142. *See supra* note 13; Brendan Sasso, *Republicans Claim FCC Working on ‘Fairness Doctrine 2.0,’* THE HILL (Dec. 11, 2013), <https://thehill.com/policy/technology/192774-republicans-claim-fcc-working-on-fairness-doctrine-20>.

143. *Red Lion*, 395 U.S. at 369.

144. *Columbia Broadcasting*, 412 U.S. at 113.

145. *See supra* notes 20-23.

146. *Red Lion*, 395 U.S. at 369.

engaging in to receive said information.¹⁴⁷ Thus, the argument would conclude that the Scarcity Principle that was the backbone of *Red Lion* would preclude a Fairness Doctrine 2.0 for the same reason that it allowed its predecessor.

The rebuttal to that notion is twofold. First, “scarcity” need not apply to the radio frequencies themselves. Rather, “scarcity” could be expanded to the modern equivalent of finite resources in the journalism industry: broadcast timeslots, channel placement, and viewership share.¹⁴⁸ As Gregory Martin and Ali Yurukonglu observe, the ordering of a channel in the lineup (channel 1 versus channel 100, for instance) can have significant effects on the viewership of news channels, with lower channels tending to be far more popular.¹⁴⁹ Furthermore, there are a finite number of viewers, each of whom has a finite amount of time to consume news. This is significant because it creates both a supply-side and a demand-side scarcity.¹⁵⁰ Broadcasters are competing for the limited demand of the market (i.e., viewers and/or listeners), and consumers must choose which sources of media they consume in their limited time, and therefore—consciously or unconsciously—the biases to which they will be subject. Furthermore, as explained at great length in the foregoing sections, broadcast communication has a long history and tradition of Congressional and Administrative regulation because of the right of the public to be informed.¹⁵¹

This scarcity and long history of regulation, combined with the legal fiction of broadcast spectrum scarcity explained in the following paragraphs, is likely enough to overcome this *Red Lion* hurdle.

Second, and more importantly, in the context of the *Red Lion* holding and the history of broadcast regulation, the concept of scarcity serves to underline the duty of the federal government to make sure that the public has access to objective coverage of important issues.¹⁵² *Red Lion* was the culmination of a decades-long administrative, legislative, and judicial adaptation to the evolving nature of mass communication, during which every branch of the federal government emphasized the right of the public to

147. *F.C.C. v. Fox Television Stations, Inc.*, 566 U.S. 502, 533 (2009) (acknowledging that “broadcast spectrum is significantly less scarce than it was 40 years ago”).

148. Martin & Yurukoglu, *supra* note 100.

149. *Id.* at 2569, 2575.

150. See, e.g., *F.C.C. v. League of Women Voters of California*, 468 U.S. 364, 376 (1984) (“we have long recognized that Congress, acting pursuant to the Commerce Clause, has power to regulate the use of this scarce and valuable national resource.”); *Southwestern Bell Wireless, Inc. v. Johnson Cty. Bd. Of Cty. Com’rs*, 199 F.3d 1185, 1194 (10th Cir. 1999) (“Congress can regulate communications pursuant to the Commerce Clause.”).

151. See, e.g., H.R. 9971 §§ 11, 21; 47 U.S.C. §§ 81-119 (repealed 1934); 47 U.S.C. §§ 303(g), 315(a).

152. *Red Lion*, 395 U.S. at 369.

be informed over the right of broadcasters to disseminate information.¹⁵³ Since the Radio Act of 1927, broadcasting has been regulated because the public has a right to receive information.¹⁵⁴ When the Communications Act supplanted the Radio Act, Congress was determined to require that the newly-created FCC had a duty to “serve the public interest.”¹⁵⁵ The F.C.C. noted during its infancy that a democratic society should be given maximum opportunity to express diverse viewpoints on controversial issues, and, importantly, maximum opportunity to hear and read the conflicting view of others.¹⁵⁶

As Justice White later wrote for the unanimous *Red Lion* Court, “[i]t is the right of the public to receive suitable access to social, political, esthetic [sic], moral, and other ideas and experiences which is crucial here . . . [t]hat right may not constitutionally be abridged either by Congress or by the FCC.”¹⁵⁷ That right of access, based on the history and tradition of the decisions of both the Court and the FCC, extends not only to access to that information, but to the objective presentation of this information.¹⁵⁸ Furthermore, “access” referred to the ability of broadcasters to broadcast information vis-à-vis the chilling effect and self-censorship that opponents of the Fairness Doctrine feared. However, as the *Red Lion* Court noted, “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”¹⁵⁹ The fact that the notion of the public’s right to information was reiterated so often and so prevalently indicates that courts and lawmakers did not consider it incidental to their decisions, but as the governing principle necessitating the entire body of broadcast regulation.

Furthermore, as legal scholars such as Mark Lloyd and John Berresford theorize, *Red Lion’s* Scarcity Principle was not only secondary to the emphasis on the public’s right to be informed, but was intended as dicta, which subsequent courts misinterpreted as the crux of the opinion.¹⁶⁰ Lloyd suggests that the scarcity principle was merely “[d]ictum that suggests the Court was aware of the spectrum [of broadcast frequencies] as a public resource,” and that the *Red Lion* opinion was only about the constitutionality of FCC authority over broadcast licensees.¹⁶¹ According to Lloyd, the *Red Lion* Court’s determination that there was a scarcity of broadcast frequencies

153. See, e.g., *Mayflower Broadcasting Corp.*, 8 F.C.C. at 339; *United Broadcasting Co.*, 10 F.C.C. at 518; 47 U.S.C. § 301; *Red Lion*, 395 U.S. at 390.

154. See *supra* note 10.

155. 47 U.S.C. § 303(g).

156. *The Mayflower Doctrine Scuttled*, *supra* note 16 at 760.

157. *Red Lion*, 395 U.S. at 390 (emphasis added).

158. See Aral, *supra* note 123.

159. *Red Lion*, 395 U.S. at 390.

160. Mark Lloyd, *Red Lion Confusions*, 60 ADMIN. L. REV. 869, 872-73 (2009) (citing *Nat’l Broadcasting Co. v. United States*, 319 U.S. 190, 224 (1943)).

161. *Id.* at 873.

was not the conclusion of an engineering or economic analysis, but was the result of a purely legal analysis based on precedent and the record that centered on previous challenges to FCC authority.¹⁶²

This is significant because, as Berresford points out in his 2005 FCC Research Paper, “[t]he Scarcity [Principle] appears to assume that there is a physical thing . . . of which there is a scarce amount . . . ‘the radio frequency spectrum,’ however, has no discrete physical existence . . . [t]he Scarcity [Principle] thus appears to be based on fundamental misunderstandings of physics.”¹⁶³ Arbitrary rules made up by dead racists are nothing compared to the physical laws governing the reality of the known universe. The question of scarcity was thus “dislodged from the question before the Court” in *Red Lion*: Whether the FCC could constitutionally enforce the Fairness Doctrine.¹⁶⁴

If the Scarcity Principle is a legal fiction (based on a scientific one), then *Red Lion*’s precedential value in upholding Fairness Doctrine 2.0 must rest solely on the end that the very nature of broadcast regulation sought to further from its inception:¹⁶⁵ the right of the public to receive objective information.¹⁶⁶

Legal Issues Surrounding Online News and Social Media

Admittedly, the Fairness Doctrine was the product of a time when radio and television was the primary means of mass communication, and the concept of the Internet was as foreign to human civilization as originality is to young adult fiction. While the Fairness Doctrine existed on the Federal Register until 2011¹⁶⁷—well past the advent of the Internet and 24-hour news cycle—the FCC stopped enforcing it in 1987,¹⁶⁸ at a time when the world had not yet been introduced to *The Simpsons*, let alone mediums like Facebook and Twitter. Setting aside the evolving nature of Internet law, which is outside the scope of this article, Fairness Doctrine 2.0 would have to overcome the Scarcity Principle to apply to online-based news and fake news.

162. *Id.* at 874.

163. BERRESFORD, *supra* note 13 (concluding that the Scarcity Principle is no longer valid).

164. *Id.*

165. *Id.*

166. *See supra* notes 145-46.

167. Broadcast Applications and Proceedings; Fairness Doctrine and Digital Broadcast Television Redistribution Control; Fairness Doctrine, Personal Attacks, Political Editorials and Complaints Regarding Cable Programming Service Rates, 76 Fed. Reg. 55817, 55818-19.

168. Fed. Comm. Commission, General Fairness Doctrine Obligations of Broadcast Licensees, Report, 50 Fed. Reg. 35418 (Aug. 30, 1985).

While Fairness Doctrine jurisprudence predated the Internet, courts were extremely reluctant to extend the Fairness Doctrine or other limitations on freedom of the press to print media.¹⁶⁹ The reasoning was that unlike broadcast media and frequencies, there was nothing “scarce” being protected by applying the Fairness Doctrine to print media.¹⁷⁰ Because there was (and is) no shortage of paper, ink, and the necessary materials for newspaper, the Scarcity Principle could not apply to print media.¹⁷¹

The Internet is, for all intents and purposes, infinite.¹⁷² While access to online content depends on concerns like bandwidth allocation and access to the Internet in general, the potential for individuals and news outlets—genuine or otherwise—to share and see information online is effectively limitless.¹⁷³ Fairness Doctrine 2.0 could likely not reach the Internet based on the Scarcity Principle alone.

However, as discussed in the foregoing section, the underlying justification for the Fairness Doctrine was not the Scarcity Principle, but the long history and tradition of protecting the public’s right to be informed.¹⁷⁴ Coupling this principle with society’s increasing reliance on the Internet for information, extending Fairness Doctrine 2.0 to online outlets would likely pass Constitutional muster.

Potential Private Sector and Individual Solutions

So, what else can we do? The current news situation is less than ideal, and because Fairness Doctrine 2.0 may not be able to reach online outlets, fake news would still exist in that form. Regardless, we as a country can do more than implement Fairness Doctrine 2.0 in order to restore trust in the media.

The “Filter Bubble” and Confirmation Bias Problems

The problem is that despite there being a plethora of media outlets between television, the Internet, radio, and print, many Americans genuinely

169. *Telecomm. Research*, 801 F.2d at 507 (citing *Tornillo*, 418 U.S. at 247 (holding that a Florida “right to respond” statute bearing a stark similarity to the Fairness Doctrine, but applied to newspaper editorials, violated the First Amendment)).

170. *Id.*

171. *Id.*

172. *See, e.g., Total Number of Websites*, INTERNET LIVE STATS, <http://www.internetlivestats.com/total-number-of-websites> (estimating that there were approximately 2 billion unique websites as of 2017, noting a massive spike between 2016 and 2017); *Cf. The Size of the World Wide Web (Internet)*, WORLD WIDE WEB SIZE, <https://www.worldwidewebsite.com/> (estimating that number to be as high as 6 billion as of 2019, consistent with the upward trend between 2016-17); *Cf. John Koetsier, How Google Searches 30 Trillion Web Pages, 100 Billion Times a Month*, VENTURE BEAT (Mar. 1, 2013) (claiming that as of 2013, there were upwards of 30 trillion web pages).

173. *Id.*

174. *See supra* notes 147-65.

believe that there simply is no source of unbiased news; per Gallup, 51% of American adults cannot name a news source that they believe reports neutrally and objectively.¹⁷⁵ While some outlets such as the Associated Press and Reuters are generally seen as less biased than the likes of MSNBC and Fox News, the fact remains that a majority of Americans do not even consider these sources free from partisan bias.

One option is for people to self-police—get their news from left-leaning sources, right-leaning sources, and as neutral of a source as they perceive to exist. Not only are most people unlikely to do this, as it requires effort, but the nature of the evolving Internet makes it extremely difficult.¹⁷⁶ Online outlets like Google and Facebook have algorithms that present news and other content based on what a user has previously viewed, creating a veritable treadmill of one-sided sources.¹⁷⁷

Eli Pariser explores this phenomenon in his 2011 book *The Filter Bubble*.¹⁷⁸ These algorithms essentially learn an individual user's biases and preferences and agendas based on the user's frequent search terms, social media posts, preferences, and those of that user's friends, and tailor the search results, ads, and news feeds that this user sees to conform with those ideas.¹⁷⁹ The result is that this user will see content that mostly conforms to their political ideologies, and over time, exclusively such content.¹⁸⁰ The user is then left in a "filter bubble," seeing—through no fault or even awareness of their own—only information online that that conforms to their pre-existing beliefs.¹⁸¹ As Pariser phrased it, "[a] world constructed from the familiar is a world in which there's nothing to learn . . . [since there is] invisible autopropaganda, indoctrinating us with our own ideas."¹⁸² In other words, people truly have to go out of their way if (and that is a big "if") they want to see news that challenges their way of thinking. This seems unlikely to occur on a large enough scale to combat the fake news epidemic.

Even if people went out of their way to find news sources that challenge their points of view, the human mind is loath to accept ideas that it does not already agree with.¹⁸³ This phenomenon is called confirmation bias—the notion that people tend to give more credence to ideas and stories that

175. Jeffrey M. Jones & Zacc Ritter, *Americans See More News Bias; Most Can't Name Neutral Source*, GALLUP (Jan. 17, 2018), <https://news.gallup.com/poll/225755/americans-news-bias-name-neutral-source.aspx>.

176. *Invisible Sieve*, THE ECONOMIST (June 30, 2011), https://www.economist.com/books-and-arts/2011/06/30/invisible-sieve?story_id=18894910&fsrc=rss.

177. *Id.*; see also ELI PARISER, *THE FILTER BUBBLE: HOW THE PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK* (2012).

178. See PARISER, *supra* note 177 at 5.

179. *Id.* at 6.

180. *Id.*

181. *Id.*

182. *Id.* at 10.

183. SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* 233 (1993).

reinforce their preexisting beliefs than to ideas that contradict them.¹⁸⁴ In other words, people naturally believe what they want to—we are obstinate by design.

Any solution grounded in self-policing or reliance on the private sector rather than a regulatory solution would have to overcome the massive hurdles of the filter bubble and confirmation bias. For a nation like the United States that was founded—and prides itself—upon steadfastness and sticking to one’s convictions, these solutions would therefore likely be unsuccessful.

Social Networks Self-Policing—“The Market Will Regulate Itself”

As discussed above, the bulk of online fake news is distributed and consumed through links on social media sites like Facebook and Twitter.¹⁸⁵ Ordinarily, this is the type of thing that can be regulated by market forces rather than by government intervention. Theoretically, if a product is bad or a business provides poor services, consumers will simply switch to an alternative. Businesses seek to fix bad practices in order to keep existing customers and attract new ones. American history is replete with instances of market forces purging counterproductive and harmful business practices without the need for government intervention; slavery,¹⁸⁶ unsanitary food production,¹⁸⁷ child labor,¹⁸⁸ segregation,¹⁸⁹ and the use of asbestos¹⁹⁰ are prime examples of this.¹⁹¹

In the context of social media, if one platform becomes notorious for fake news, users will theoretically switch to a different platform, incentivizing the original platform to crack down on that fake news. However, this presupposes that alternatives exist. Facebook and Twitter combine for the overwhelming market share of social media¹⁹² (surprisingly, Pinterest accounts for over 16% of the social media market, but the same statistics

184. *Id.*

185. Aral, *supra* note 123 at 1147.

186. U.S. CONST. amend. XIII.

187. 21 U.S.C. § 601 (1907).

188. 29 U.S.C. § 212 (1938).

189. *See generally Brown v. Bd. Of Ed.*, 347 U.S. 483 (1954).

190. 15 U.S.C. § 2607 (1988).

191. This is obviously sarcasm. These problems all involved an economic paradigm that was financially beneficial to business owners but hugely detrimental to society for other policy reasons. All were solved by legislation, litigation, administrative action, or civil war. Businesses had no incentive to discontinue them, as moving away from these paradigms would (and did) cost a tremendous amount of money. Absent governmental action, these practices would have most likely continued far longer than they did, if not indefinitely.

192. *Social Media Stats Worldwide*, STAT COUNTER GLOBAL STATS, <http://gs.statcounter.com/social-media-stats>.

indicate that Pinterest users do not get news there).¹⁹³ Because there are so few major social media platforms, users have few real alternatives to switch to. Facebook and Twitter therefore have no economic incentive to take sweeping measures to remove fake news from their platforms.

Admittedly, in recent years, these sites have taken moderate steps to reduce the amount of fake news shared on their sites, such as deleting accounts that routinely share fake news articles.¹⁹⁴ Facebook has also put public service ads on users' feeds decrying fake news and the use of fake accounts.¹⁹⁵ In June 2018, Twitter announced that it would take efforts to increase transparency by disclosing who pays for political ads on its site, and how much those parties spend on those ads.¹⁹⁶

Facebook has implemented several journalistic efforts, including its partnership with fact-checking organizations, the Facebook Journalism Project—which is aimed at helping newsrooms get more digitally savvy—and the News Integrity Initiative, which Facebook helped in part to fund.¹⁹⁷ However, as Matthew Ingram notes, these seem to be more public relations stunts than anything else.¹⁹⁸

As Ingram points out, “Facebook focuses on engagement—time spent, clicks, and sharing—rather than quality or value.”¹⁹⁹ This is because, like most other social media sites, Facebook's revenue come predominately from advertising,²⁰⁰ which, online, is predicated around gathering views and clicks; the more pageviews or clicks a site gets, the more valuable its ad space is, and the more revenue it can generate through ad sales.²⁰¹ In other

193. Monica Anderson & Andrea Caumont, *How Social Media is Reshaping News*, PEW RESEARCH CTR. (Sept. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news/> (explaining that while 15% of those polled used Pinterest, none used Pinterest to get news).

194. Louise Matsakis, *Facebook Cracks Down on Networks of Fake Pages and Groups*, WIRED (Jan. 23, 2019), <https://www.wired.com/story/facebook-pages-misinformation-networks/>.

195. *Ctr. For Investigative Reporting v. Southeastern Pennsylvania Transp. Auth.*, 337 F. Supp. 3d 562, 583 (E.D. Penn. 2018).

196. Selina Wang, *Twitter Will Show Who Pays for Ads and How Much They Spend*, BLOOMBERG (June 28, 2018), <https://www.bloomberg.com/news/articles/2018-06-28/twitter-will-show-who-pays-for-ads-and-how-much-they-spend>.

197. Matthew Ingram, *The Facebook Armageddon*, COLUM. JOURNALISM REV. (Jan. 18, 2018), https://www.cjr.org/special_report/facebook-media-buzzfeed.php/.

198. *Id.*

199. *Id.*

200. *In Re Facebook, Inc. IPO Securities and Derivative Litigation*, 986 F. Supp. 2d 487, 493-94 (S.D.N.Y. 2013) (“[Facebook’s] advertising revenue accounted for 98%, 95% and 85% of the Company’s revenues in 2009, 2010, and 2011 respectively.”); *see also* Mansoor Iqbal, *Twitter Revenue and Usage Statistics (2018)*, BUSINESS OF APPS (Nov. 12, 2018), <http://www.businessofapps.com/data/twitter-statistics> (explaining that \$650 million out of Twitter’s \$758 million in 2018 revenue came from advertising).

201. *In re Facebook, Inc. PPC Advertising Litigation*, 282 F.R.D. 446, 450 (N.D. Cal. 2012).

words, Facebook and other social media sites gets paid based on their site's traffic, regardless of the authenticity of the content they host.²⁰²

Because there is no economic incentive for social media sites to take major steps towards purging fake news, it is very doubtful that the Social Media market will regulate away fake news.

Watchdog Agencies

Partially in response to the rising bias in media and the epidemic of fake news, entities like Politifact and Snopes appeared to fact-check claims by politicians and news agencies alike. Politifact publishes objective, fact-checked reports examining dubious claims from politicians and news sources to "give citizens the information they need to govern themselves in a democracy."²⁰³ Snopes got its start in the mid-1990s debunking urban legends and hoaxes, and has evolved into the Internet's largest fact-checking site.²⁰⁴ Both sites are replete with articles examining claims from politicians, news outlets, and even viral political memes, and cite to original sources to support their conclusions regarding a given claim's accuracy.²⁰⁵

Websites like Facebook and Twitter have used independent fact-checking organizations from across the political spectrum to identify false and misleading information.²⁰⁶ However, as explained in the foregoing section, these sites currently have no incentive to take lasting steps to keep fake news from their platforms.

One way for people to make sure that they do not fall victim to fake news is to cross-check media that they consume against reports on PolitiFact or another watchdog site. However, in addition to sheer human laziness, this does not take into account the issue of confirmation bias, where people are reluctant to accept the idea that a proposition that confirms their beliefs is incorrect.²⁰⁷ If people are loath to disbelieve stories with which they agree, they are extremely unlikely to go out of their way to disprove them, even if the stories are dubious on their face.

202. *Id.*

203. Angie Drobnic Holan, *The Principles of the Truth-O-Meter: PolitiFact's methodology for independent fact-checking*, POLITIFACT (Feb. 12, 2018, 12:00 PM), <http://www.politifact.com/about>.

204. *Snopes is the internet's definitive fact-checking resource*, SNOPEs, <https://www.snopes.com/about-snopes>.

205. See, e.g., Louis Jacobson, *Checking Kamala Harris on Tax Refunds and the GOP Tax Law*, POLITIFACT (Feb. 13, 2019), <https://www.politifact.com/california/statements/2019/feb/13/kamala-harris/checking-kamala-harris-tax-refunds-and-gop-tax-law>; Dan MacGuill, *Did Beto O'Rourke Say Old People and Wounded Veterans Should Be 'Thrown in the Trash'?*, SNOPEs (Jan. 2, 2019), <https://www.snopes.com/fact-check/beto-veterans-elderly-trash-garbage/>.

206. Regina Rini, *How to Fix Fake News*, N.Y. TIMES (Oct. 15, 2018) <https://www.nytimes.com/2018/10/15/opinion/facebook-fake-news-philosophy.html>.

207. See *supra* notes 178-79.

In short, people are not fans of being proven wrong, and will not seek out opportunities for such punishment.

Good Ol' Fashioned American Skepticism

We are, at the end of the day, each the masters of our own domain. We as consumers choose where we get our news, and what steps we take to ensure that the information we receive is legitimate. Whether or not Fairness Doctrine 2.0 ever sees the light of day, the American people bear the burden of seeking reliable journalism.

Although there is a ton of biased and otherwise unreliable journalism, there is also a ton of objective, fact-based journalism. As reflected in the foregoing discussion, news sources like the Associated Press, Reuters, and CBS do a much better job of separating fact from opinion than outlets like MSNBC and Fox News, and rarely (if ever) present stories that are simply not grounded in fact.²⁰⁸ Furthermore, none of the Associated Press, Reuters, and CBS require a paid membership to view their online content, so anyone with Internet access can get news from them.²⁰⁹

Americans should—and, if trust in journalism is to be restored, must—get more news from relatively unbiased sources like the Associated Press or Reuters, get less news from biased sources like MSNBC and Fox News, and completely avoid sources like Infowars and World News Daily Report, which are, in the words of Vanessa Otero, “nonsense damaging to public discourse.”²¹⁰

Additionally, notwithstanding confirmation bias, Americans should use fact-checking sites like Snopes and Politifact to corroborate or discredit questionable claims. As difficult as it may be to go off the beaten path to disprove a piece of ostensibly good news, the alternative is falling victim to fraudulent claims and basing decisions on misinformation. The solution is for us as consumers of media to swallow our pride and be skeptical of dubious claims. We need to dismiss suspect news reports based on our own sense of truth and falsity; if it sounds unlikely to have happened, it probably did not.

Americans need to consume less news over social media, where fake news spreads like wildfire. We should avoid websites like the Huffington Post and Breitbart, which are extremely biased.²¹¹ Even if these are people’s go-to news sites, it is not hard to set Chrome or Firefox to open to a set of news pages that the user designates. If people set their browsers to open

208. *Media Bias Chart 5.0*, *supra* note 99.

209. CBS NEWS, <https://www.cbsnews.com/>; ASSOCIATED PRESS NEWS, <https://www.apnews.com/>; REUTERS, <https://www.reuters.com/>.

210. *Id.*

211. *Media Bias Chart 5.0*, *supra* note 99.

up to news sites like Reuters or the Associated Press, they would immediately see news from reliable, objective sources.

Furthermore, it is imperative that we educate children to be skeptical of what they hear on the news or see online and encourage critical thinking skills. The fundamentals of media literacy should occupy a central place in middle school and high school curriculums, arming students with the critical mind-set today's media landscape demands.²¹² If children are able to differentiate reliable sources of information from unreliable ones, the next generation will be far better off in terms of finding good sources of news and fostering an informed electorate.

Regardless of Fairness Doctrine 2.0 or other regulations, the onus is ultimately on us to make sure that the news we consume is legitimate.

Conclusion

The United States is faced with a crisis of distrust in the media the likes of which it has never seen before. Abject media bias and online fake news have created a situation in which most Americans cannot even name an unbiased news source. Because of its ability to hold broadcasters accountable for the objectivity of their content, Fairness Doctrine 2.0 would go a long way towards healing the wounds that media bias and fake news have inflicted on American discourse.

At the end of the day, however, the burden to think critically, question suspect claims, get information from reputable sources, and hold media outlets accountable for the accuracy and objectivity of their reporting lies upon us as consumers of media. The solution—if one can possibly exist—is to heed the warnings of the elementary school computer lab teachers across the country: think critically, and do not believe everything we read online. As we scroll through Facebook or see an article come through our newsfeed, it is up to us to ask, “[i]s Hitler’s son *really* writing a sequel to *Mein Kampf*?”²¹³ “[d]id the Clinton campaign really have a Democratic National Committee employee murdered?”²¹⁴ “[a]re Navy SEALs really disallowed from wearing dark camouflage paint because of its similarity to blackface?”²¹⁵

212. Schwartz, *supra* note 122.

213. *Argentina: Alleged Son of Adolf Hitler Plans to Write Sequel to Mein Kampf*, WORLD NEWS DAILY REPORT (Nov. 10 2018), <https://worldnewsdailyreport.com/argentina-alleged-son-of-adolf-hitler-plans-to-write-sequel-to-mein-kampf/> (last visited Nov. 11, 2018) (claiming that Adolf Hitler’s ostensible biological son—born eight years after Hitler’s death—is writing a sequel to the infamous *Mein Kampf*).

214. Jonah Engel Bromwich, *How the Murder of a D.N.C. Staff Member Fueled Conspiracy Theories*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/us/seth-rich-dnc-wikileaks.html>.

215. Wob Weego, *Navy Seals No Longer Allowed To Wear Blackface*, DUFFELBLOG (Nov. 2, 2018), <https://www.duffelblog.com/2018/11/navy-seals-blackface>; *cf.* Dan Evon,

On February 3, 2019, the *Washington Post* aired a Super Bowl ad narrated by Tom Hanks, highlighting the importance of reliable journalism to protect our right to credible information in a time when facts are dispensable,²¹⁶ objective reporting is scarce,²¹⁷ and Americans' trust in news is at an all-time low.²¹⁸ I can think of no better way to conclude than to echo that sentiment:

When we go off to war, when we exercise our rights, when we soar to our greatest heights, when we mourn and pray, when our neighbors are at risk, when our nation is threatened, there's someone to gather the facts, to bring you the story, no matter the cost—because knowing empowers us. Knowing helps us decide. Knowing keeps us free.²¹⁹

Are Navy SEALs No Longer Allowed to Wear 'Blackface'?, SNOPE (Feb. 13, 2019), <https://www.snopes.com/fact-check/navy-seals-blackface/>.

216. Rebecca Sinderbrand, *How Kellyanne Conway Ushered in the Age of Alternative Facts*, WASH. POST (Jan. 22, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/how-kellyanne-conway-ushered-in-the-era-of-alternative-facts/>.

217. See, e.g., Art Swift, *Six in 10 in U.S. See Partisan Bias in News Media*, GALLUP (Apr. 5, 2017), <https://news.gallup.com/poll/207794/six-partisan-bias-news-media.aspx>; Martin & Yurokoglou, *supra* note 100.

218. See Jones & Ritter, *supra* note 175.

219. *Democracy Dies in Darkness*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html.