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## THE AWARENESS DOCTRINE

The state of news media leaves much to be desired. Traditional broadcast mediums are dominated by a select few voices that overwhelmingly push partisan viewpoints. The internet grows increasingly partisan as well, algorithmically pushing viewers into “bubbles” in which they are exposed to only one perspective. Everywhere, media presenting itself as news fails to distinguish between fact and opinion<sup>1</sup> — and has little aspiration to do so. To quell this worsening problem, some scholars and lawmakers have called for a resurrection and extension of the Fairness Doctrine, which required that coverage of “controversial issues” be presented with contrasting points of view.<sup>2</sup>

Between its uncertain constitutionality and grave policy concerns, however, such a course of action would be unwise. Instead, advocates should turn their attention to a subtler model: quasi-self-regulation. This Note proposes an “Awareness Doctrine,”<sup>3</sup> under which content distributors are directed to create — with Federal Communications Commission (FCC) approval — a rating system to distinguish reporting from opinion and to inform the public when it is watching one or the other. Rather than a cable news segment rolling seamlessly into an opinionated talk show, a brief label would appear in the corner of the television screen informing the viewer that they are now watching “Opinion” content, not factual journalism. Later, when a clip of that talk show is shared online through social media, embedded tags with the same “Opinion” label would accompany the hyperlink in much the same way that a thumbnail already does. Such a system would allow viewers to pick what kind of content they watch, impact how viewers follow up on independent fact-checking, bolster public trust in reporting, and perhaps disincentivize the production of opinionated news commentary.

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<sup>1</sup> This Note relies heavily on the concept of “fact” versus “opinion.” To define these terms and their differences, this Note borrows from the definitions provided by the Pew Research Center in its research on similar topics; a factual statement is one in which “the statement could be proved or disproved based on objective evidence,” whereas an opinion statement is one in which the statement is “based on the values and beliefs of the journalist or the source making the statement, and could not definitively be proved or disproved based on objective evidence.” AMY MITCHELL ET AL., PEW RSCH. CTR., DISTINGUISHING BETWEEN FACTUAL AND OPINION STATEMENTS IN THE NEWS 6 (2018), [https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2018/06/PJ\\_2018.06.18\\_fact-opinion\\_FINAL.pdf](https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2018/06/PJ_2018.06.18_fact-opinion_FINAL.pdf) [<https://perma.cc/GJ47-JR2L>].

<sup>2</sup> See, e.g., Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499, 545 (2018).

<sup>3</sup> This author’s previous unpublished work in conceptualizing an Awareness Doctrine has been credited in MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 126 & 214 n.83 (2021). This Note elaborates on the concept.

This Note proceeds in three Parts. Part I gives a brief history of the Fairness Doctrine. Part II analyzes the issue of news and internet media partisanship in the twenty-first century and explains the legal and pragmatic objections to using the Fairness Doctrine to address that problem. Finally, Part III proposes a new solution: an “Awareness Doctrine” modeled on the quasi-self-regulation scheme embodied by the TV Parental Guidelines of section 551 of the Telecommunications Act of 1996.

### I. A BRIEF HISTORY OF THE FAIRNESS DOCTRINE

The Fairness Doctrine traces its origins from the regulation of radio in the early 1920s<sup>4</sup> through policies promulgated by the FCC and the now-defunct Federal Radio Commission (FRC) in subsequent decades.<sup>5</sup> The Radio Act of 1927<sup>6</sup> authorized the FRC to grant limited radio licenses and to assign frequencies to prevent broadcasts from interfering with each other.<sup>7</sup> This government-imposed scarcity raised new concerns. Critics worried that “powerful private entities [would] utiliz[e] their frequencies to further their own partisan and/or materialistic ends” and that, if monopolized, radio would no longer serve “the interests of the public in receiving information.”<sup>8</sup> A number of regulations through the 1930s and ’40s made tentative efforts to address these problems.<sup>9</sup> By 1948, however, the ensemble of FRC and FCC rulings had become a confusing mess, and the FCC felt compelled to “clarify its position[] ‘with respect to the obligations of broadcast licensees in the field of broadcast of news, commentary, and opinion.’”<sup>10</sup>

After eight days of hearings, the FCC codified the Fairness Doctrine in a 1949 report.<sup>11</sup> In its report, the FCC emphasized a finding that, when it came to “programs devoted to new commentary and opinion,” the needs of the public were best served by “making available to them for their consideration” a wide range “of varying and conflicting

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<sup>4</sup> See generally Steven J. Simmons, *Fairness Doctrine: The Early History*, 29 FED. COMM. COMM. BAR J. 207, 213–36 (1976). Many problems produced by the early years of radio had curious similarities to those prompted by the internet. As regularly broadcasting radio stations exploded from a mere three to over 570 in a five-year period, *id.* at 213–14, listeners contended with fraudulent schemes, false medical advice, offensive advertising, and monopolization by a few prominent companies, *id.* at 216.

<sup>5</sup> The precise birth date of the Fairness Doctrine is a matter of some dispute, generally depending on the import granted to developments prior to and throughout the 1940s. See *id.* at 242–43.

<sup>6</sup> Pub. L. No. 69-632, 44 Stat. 1162.

<sup>7</sup> Simmons, *supra* note 4, at 218–19, 225.

<sup>8</sup> *Id.* at 224–25.

<sup>9</sup> *Id.* at 242–44.

<sup>10</sup> Thomas J. Houser, *The Fairness Doctrine — An Historical Perspective*, 47 NOTRE DAME LAW. 550, 558 (1972) (quoting Editorializing by Broad. Licensees, 13 F.C.C. 1246, 1246 (1949)); see Simmons, *supra* note 4, at 268.

<sup>11</sup> Simmons, *supra* note 4, at 268 (citing Editorializing by Broad. Licensees, 13 F.C.C. at 1246).

views.”<sup>12</sup> Because the number of stations was capped, the FRC concluded that “there is no place for a station catering to any group[;] . . . all stations should cater to the general public and serve public interest as against group or class interest.”<sup>13</sup> The Fairness Doctrine thus contained two key elements: First, broadcast licensees “must devote a reasonable percentage of [their] broadcast time to the coverage of public issues.”<sup>14</sup> Second, the “coverage of these issues must be fair in the sense that it provides an opportunity for the presentation of contrasting points of view.”<sup>15</sup>

The Fairness Doctrine did not go unchallenged. In 1964, the FCC ruled that a Pennsylvania radio station had an obligation to grant a book author reply time after the station aired a “personal attack” against him.<sup>16</sup> The broadcasters appealed, arguing that the First Amendment protected “their desire to use their allotted frequencies continuously to broadcast whatever they choose, and to exclude whomever they choose from ever using that frequency” under the principle that “[n]o man may be prevented from saying or publishing what he thinks, or from refusing in his speech or other utterances to give equal weight to the views of his opponents.”<sup>17</sup> The Seventh Circuit, in another case, held the Doctrine unconstitutional for vagueness, emphasizing that because the First Amendment freedoms “need breathing space to survive, government may regulate in the area only with narrow specificity.”<sup>18</sup> Because the licensee’s obligations were uncertain and open to interpretation, the panel held, the Doctrine impermissibly infringed on the freedom of the press.<sup>19</sup>

Consolidating these cases in 1969, the Supreme Court upheld the constitutionality of the Fairness Doctrine in *Red Lion Broadcasting Co. v. FCC*.<sup>20</sup> Writing for a unanimous court,<sup>21</sup> Justice White agreed that the First Amendment “has a major role to play,” which “forbids FCC

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<sup>12</sup> Editorializing by Broad. Licensees, 13 F.C.C. at 1247.

<sup>13</sup> Simmons, *supra* note 4, at 250 (quoting Chi. Fed’n of Lab. v. Fed. Radio Comm’n, 3 F.R.C. Ann. Rep. 36 (1929), *aff’d*, 41 F.2d 422 (D.C. Cir. 1930)).

<sup>14</sup> Fairness Report Regarding Handling of Public Issues, 39 Fed. Reg. 26,372, 26,374 (July 18, 1974).

<sup>15</sup> *Id.*

<sup>16</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 371–72 (1969).

<sup>17</sup> *Id.* at 386.

<sup>18</sup> *Radio Television News Dirs. Ass’n v. United States*, 400 F.2d 1002, 1011 (7th Cir. 1968) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)); *see also id.* at 1014–16.

<sup>19</sup> *See id.* at 1014–16.

<sup>20</sup> 395 U.S. 367. The Court heard consolidated appeals from the D.C. Circuit (which upheld the Fairness Doctrine as constitutional) and the Seventh Circuit (which found the Doctrine unconstitutional under the First Amendment). *Id.* at 372–73.

<sup>21</sup> Justice Douglas took no part in the Court’s decision.

interference with ‘the right of free speech by means of radio communication.’”<sup>22</sup> Nevertheless, the Court held that the FCC had the right to regulate broadcast content “[i]n view of the scarcity of broadcast frequencies, the Government’s role in allocating those frequencies, and the legitimate claims of those unable without governmental assistance to gain access to those frequencies for expression of their views.”<sup>23</sup> Justice White emphasized that “[s]carcity [was] not entirely a thing of the past.”<sup>24</sup> The Court’s opinion noted that although subdivision of the frequency spectrum had grown more efficient with advances in technology, the number of uses had increased proportionally, leaving radio broadcast frequencies a fundamentally limited resource that the government had a compelling public interest in regulating.<sup>25</sup> Justice White also emphasized that the government’s efforts in mandating fair representation of controversial viewpoints were justified in part by the government’s hand in creating the existing heavyweights in the broadcasting world: because “existing broadcasters have often attained their present position because of their initial government selection in competition with others before new technological advances opened new opportunities[,] . . . [s]ome present possibility for new entry by competing stations is not enough, in itself, to render unconstitutional the Government’s effort.”<sup>26</sup>

The Fairness Doctrine had its share of both advocates and critics in the years following the Supreme Court’s decision in *Red Lion*,<sup>27</sup> reaching a peak in the mid-1980s, by which point the majority of broadcasters objected to the Fairness Doctrine as an “overly burdensome” infringement on free speech made obsolete by the growth of the media industry.<sup>28</sup> The FCC stopped enforcing the policy entirely in 1987.<sup>29</sup>

<sup>22</sup> *Red Lion Broad. Co.*, 395 U.S. at 389–90 (quoting 47 U.S.C. § 326).

<sup>23</sup> *Id.* at 400.

<sup>24</sup> *Id.* at 396.

<sup>25</sup> *See id.* at 396–98.

<sup>26</sup> *Id.* at 400.

<sup>27</sup> *See, e.g.*, George Waas, *How Fair Is the Fairness Doctrine?*, 49 FLA. BAR J. 246, 247–49 (1975) (listing common defenses and criticisms of the Fairness Doctrine). A thorough discussion of the arguments for and against the Fairness Doctrine in its original application is beyond the scope of this Note; for a brief overview of present-day advocacy for the Fairness Doctrine and this Note’s criticisms of those propositions, see *infra* section II.B, pp. 1914–18.

<sup>28</sup> Camille Caldera, *Fact Check: Fairness Doctrine Only Applied to Broadcast Licenses, Not Cable TV Like Fox News*, USA TODAY (Nov. 28, 2020, 10:46 AM), <https://www.usatoday.com/story/news/factcheck/2020/11/28/fact-check-fairness-doctrine-applied-broadcast-licenses-not-cable/6439197002> [<https://perma.cc/EQ66-LRA4>]; *see also* Dominic E. Markwordt, *More Folly than Fairness: The Fairness Doctrine, the First Amendment, and the Internet Age*, 22 REGENT U. L. REV. 405, 405 (2010).

<sup>29</sup> *Syracuse Peace Council v. FCC*, 867 F.2d 654, 655–57 (D.C. Cir. 1989). The FCC found that the Fairness Doctrine “did not serve the public interest” and was unconstitutional, and refused to enforce the Doctrine. *Id.* at 655–56. The D.C. Circuit determined that there was an independent basis for the FCC’s decision on policy grounds and affirmed without reaching the constitutional

The Fairness Doctrine was officially eliminated from FCC regulations in 2011.<sup>30</sup>

## II. THE FAIRNESS DOCTRINE AND THE MODERN MEDIA LANDSCAPE

The decades following *Red Lion* saw rapid changes to the media landscape, due in part to the Fairness Doctrine's demise and the technological advances of cable TV and the internet. Section A explores the changes to modern news media, which culminated in viewers almost exclusively viewing "news" that blurs the line between fact and opinion. Section B then explores contemporary scholarship that proposes to fix this problem by balancing the partisan slant through resurrecting the Fairness Doctrine and criticizes those proposals.

### *A. Modern News Media's Blurred Lines Between Fact and Opinion*

The news media landscape of 2022 looks nothing like that of the 1940s, when the Fairness Doctrine was established, or even that of the late 1980s, when the FCC abandoned the Doctrine.

Several developments since the late '80s led to this transformation. First, the elimination of the Fairness Doctrine meant that broadcasters no longer had to offer competing views on the same broadcast, thus opening the door to the creation of modern-day political talk radio.<sup>31</sup> Some commentators noted that the repeal of the Fairness Doctrine engendered a dramatic reduction in news and public-affairs programming in general, accompanied by an "immense volume of unanswered conservative opinion heard on the airwaves."<sup>32</sup>

Second, the technology underpinning how news is consumed fundamentally changed. While traditional TV broadcasts declined steadily in

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question. *Id.* at 656. The FCC left provisions regulating editorials and personal attacks in effect until 2000. Caldera, *supra* note 28.

<sup>30</sup> Dylan Matthews, *Everything You Need to Know About the Fairness Doctrine in One Post*, WASH. POST (Aug. 23, 2011), [https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ\\_blog.html](https://www.washingtonpost.com/blogs/ezra-klein/post/everything-you-need-to-know-about-the-fairness-doctrine-in-one-post/2011/08/23/gIQAN8CXZJ_blog.html) [<https://perma.cc/A5MW-FJYH>].

<sup>31</sup> Keach Hagey, *Fairness Doctrine Fight Goes On*, POLITICO (Jan. 16, 2011, 4:23 PM), <https://www.politico.com/story/2011/01/fairness-doctrine-fight-goes-on-047669> [<https://perma.cc/7SSW-K54L>]. The most obvious beneficiaries were conservative political commentators. *Id.*; see also Steve Rendall, *The Fairness Doctrine: How We Lost It, and Why We Need It Back*, FAIR (Jan. 1, 2005), <https://fair.org/extra/the-fairness-doctrine> [<https://perma.cc/P557-C8FA>] ("Nationally, virtually all of the leading political talkshow hosts are right-wingers . . . . The same goes for local talkshows. One product of the post-Fairness era is the conservative 'Hot Talk' format, featuring one right-wing host after another and little else."). *Contra* Tom Rosentiel, *Is the Fairness Doctrine Fair Game?*, PEW RSCH. CTR. (July 19, 2007), <https://www.pewresearch.org/2007/07/19/is-the-fairness-doctrine-fair-game> [<https://perma.cc/3EHP-AZSH>] (attributing the rise of talk radio to national syndication rather than the fall of the Fairness Doctrine).

<sup>32</sup> Rendall, *supra* note 31.

viewers,<sup>33</sup> cable and satellite television became an important source of news for many Americans.<sup>34</sup> The internet also radically reshaped how Americans watched television, read the news, and listened to the radio.<sup>35</sup> In 2008, eighty percent of adults rated the internet as “an important source of information,” a rate higher than any other information source.<sup>36</sup> Americans were also exposed to more news sources, as “eighty-three percent of online news consumers use[d] search engines” and “[n]o single news website or set of news websites ha[d] a large market share.”<sup>37</sup>

This combination of policy and technological changes has left the media landscape simultaneously fragmented in places and consolidated in others. On the television and radio side, mergers and acquisitions have largely displaced local media in favor of national political messaging owned by a select few companies (especially the right-wing Sinclair Broadcast Group).<sup>38</sup> On the internet, those seeking out political news and commentary have received information from an increasingly diverse range of sources.<sup>39</sup> Despite the diversity of these sources, however, consumers of online news increasingly view “news sites with a partisan slant.”<sup>40</sup>

Regardless of whether a medium is dominated by umbrella networks, as radio and television are, or partitioned into countless sources, as the internet is, they all face a common problem: a muddling of factual reporting and partisan commentary.<sup>41</sup> The causes are varied: With radio, the demise of the Fairness Doctrine allowed for partisan news.<sup>42</sup> Cable news networks, such as Fox News, were deliberately created to

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<sup>33</sup> Markwordt, *supra* note 28, at 442 (noting that traditional TV broadcast networks “lost half their viewers in the period from 1980 to 2009”).

<sup>34</sup> *Id.* at 443.

<sup>35</sup> See *id.* at 445–46; see also Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 57–58.

<sup>36</sup> Markwordt, *supra* note 28, at 446.

<sup>37</sup> *Id.*

<sup>38</sup> See MINOW, *supra* note 3, at 17.

<sup>39</sup> AARON SMITH, PEW RSCH. CTR., THE INTERNET’S ROLE IN CAMPAIGN 2008 46–72 (2009), [https://www.pewresearch.org/internet/wp-content/uploads/sites/9/media/Files/Reports/2009/The\\_Internets\\_Role\\_in\\_Campaign\\_2008.pdf](https://www.pewresearch.org/internet/wp-content/uploads/sites/9/media/Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf) [<https://perma.cc/DZC8-XUGP>].

<sup>40</sup> *Id.* at 66–67 (“This increase is driven in large part by partisans on both sides of the political spectrum.”). Even when internet users don’t actively look for partisan news sources, they may be funneled into them anyway by an elaborate series of algorithms and frameworks relied on by digital platforms to create a tailored information “bubble” for each user. MINOW, *supra* note 3, at 19.

<sup>41</sup> JENNIFER KAVANAGH & MICHAEL D. RICH, TRUTH DECAY 1–3 (2018) (describing four related, broad trends of (1) “increasing disagreement about facts and analytical interpretation of facts and data,” *id.* at 3, (2) “a blurring of the line between opinion and fact,” *id.*, (3) “the increasing relative volume, and resulting influence, of opinion and personal experience over fact,” *id.*, and (4) “declining trust in formerly respected sources of factual information,” *id.*).

<sup>42</sup> See *supra* note 31.

push ideological positions in the guise of journalism.<sup>43</sup> Even sources that traditionally partitioned content into “news” and “opinion” sections, such as newspapers, have suffered from a lack of differentiation on the internet.<sup>44</sup> As newspapers moved online, it became increasingly easy to access and share an article independently of its context: “With many readers coming to news sites from social media links, they may not pay attention to the subtle clues that mark a story published by the opinion staff.”<sup>45</sup> Newspaper websites themselves also became less clear about labeling whether a piece was fact or opinion.<sup>46</sup> Further, the digitalization of newspapers saw an explosion in the number of newspaper op-eds, making such content close to the norm, rather than the exception.<sup>47</sup>

The end result is that many Americans can — intentionally or unintentionally — consume vast amounts of media without ever being exposed to a news source that “aspir[es] to distinguish fact and opinion.”<sup>48</sup> This is a problem with very real consequences. Professors Jennifer Kavanagh and Michael D. Rich, in their work on “truth decay,” identify several significant consequences to the blurring between fact and opinion. For one, it undermines civil discourse because “[w]ithout a common set of facts, and with a blurring of the line between opinion and fact, it becomes nearly impossible to have a meaningful debate about important policies and topics.”<sup>49</sup> This phenomenon is not limited to members of the public but holds true for legislative officials as well.<sup>50</sup> Kavanagh and Rich also find that the “blurring of the line between opinion and fact and resulting uncertainty about who and what to believe” has exacerbated disengagement from major institutions, including the media, potentially contributing to the rejection of news media altogether.<sup>51</sup>

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<sup>43</sup> See Jonas Heese & Vishal P. Balaria, *Research: The Rise of Partisan Media Changed How Companies Make Decisions*, HARV. BUS. REV. (Oct. 30, 2017), <https://hbr.org/2017/10/research-the-rise-of-partisan-media-changed-how-companies-make-decisions> [<https://perma.cc/8K3E-CYCL>].

<sup>44</sup> See Kevin M. Lerner, *Journalists Believe News and Opinion Are Separate, But Readers Can't Tell the Difference*, THE CONVERSATION (June 22, 2020, 8:17 AM), <https://theconversation.com/journalists-believe-news-and-opinion-are-separate-but-readers-cant-tell-the-difference-140901> [<https://perma.cc/H26F-MJPZ>] (describing the creation of the dedicated op-ed page in 1970 as the high-water mark for public differentiation between opinion and factual reporting).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*; see also Rebecca Iannucci, *News or Opinion? Online, It's Hard to Tell*, POYNTER (Aug. 16, 2017), <https://www.poynter.org/ethics-trust/2017/news-or-opinion-online-its-hard-to-tell> [<https://perma.cc/K9KX-BG5W>] (finding “inconsistent terminology and a lack of labeling” in a survey of forty-nine news publications “to determine how many consistently use labels to indicate article types”).

<sup>47</sup> See Lerner, *supra* note 44.

<sup>48</sup> MINOW, *supra* note 3, at 70.

<sup>49</sup> KAVANAGH & RICH, *supra* note 41, at 192.

<sup>50</sup> *Id.* at 200.

<sup>51</sup> *Id.* at 207–08.

### B. Reviving the Fairness Doctrine?

To address the issue, at least one prominent legal scholar has proposed a modern regulation on news carriers, including cable and internet platforms.<sup>52</sup> These proposals suggest that the federal government implement “a new Fairness Doctrine” that would “requir[e] digital platforms to relate and deliver ways to provide readers with contrasting views.”<sup>53</sup> Others — including some Democratic lawmakers<sup>54</sup> — have proposed a more straightforward revival of the Doctrine without modification from how it originally existed.<sup>55</sup>

Although calls to resurrect the Fairness Doctrine have been reinvigorated in recent years, it is hardly a novel proposal. Even prior to the widespread use of the internet,<sup>56</sup> lawmakers in the early 1990s were advocating for a statutory restoration of the Fairness Doctrine as applied to television and radio.<sup>57</sup> And, by the mid-1990s, academics were proposing Fairness Doctrine–like models that would have applied to internet service providers or the most popular websites, “determined by the number of hits over a given period.”<sup>58</sup> Nevertheless, increasing issues in the media landscape demand that attention return to the question of whether to resurrect the Fairness Doctrine.

Despite the undeniable problems posed by the modern media landscape, however, bringing back the Fairness Doctrine — in its original form or with expanded scope — makes little sense for both legal and policy reasons.

To address the most obvious legal objection, the fundamental rationale of scarcity under which the Fairness Doctrine was upheld in *Red Lion* no longer exists. When *Red Lion* was decided in 1969, nearly every part of

<sup>52</sup> See, e.g., Minow, *supra* note 2, at 545.

<sup>53</sup> *Id.* at 545–46.

<sup>54</sup> See, e.g., *Restore the Fairness Doctrine Act Would Require Broadcasters Give Airtime to All Sides of an Issue*, GOVTRACK (Oct. 22, 2019), <https://govtrackinsider.com/restore-the-fairness-doctrine-act-would-require-broadcasters-give-airtime-to-all-sides-of-an-issue-1f3117e20d03> [https://perma.cc/FP7M-M94N]; Sasha Leonhardt, *The Future of “Fair and Balanced”: The Fairness Doctrine, Net Neutrality, and the Internet*, 8 DUKE L. & TECH. REV. ¶ 18 (2009).

<sup>55</sup> See generally, e.g., Rendall, *supra* note 31.

<sup>56</sup> See Citron & Franks, *supra* note 35, at 57 (noting that in 1996, “[o]nly 20 million American adults had internet access, and these users spent less than half an hour a month online”).

<sup>57</sup> *Broadcasters and the Fairness Doctrine: Hearing Before the Subcomm. on Telecomms. & Fin. of the H. Comm. on Energy & Com.*, 103d Cong. 1 (1993) [hereinafter *Markey Statement*] (statement of Rep. Edward J. Markey, Chairman, Subcomm. on Telecomms. & Fin.) (“Not one of the technological or economic developments that have transformed television and radio over the past half century has altered the essential need for the Fairness Doctrine’s guarantee of even-handed treatment of controversial issues. . . . [T]herefore we must address this issue by statute.”).

<sup>58</sup> W. Mike Jayne, *Fairness Doctrine 2.0: The Ever-Expanding Definition of Neutrality Under the First Amendment*, 16 FIRST AMEND. L. REV. 466, 500 (2018) (citing Andrew Chin, *Making the World Wide Web Safe for Democracy: A Medium-Specific First Amendment Analysis*, 19 HASTINGS COMM’NS & ENT. L.J. 309, 330–31 (1997)).

the radio frequency spectrum was already in use, and “[a]ny new use of [radio frequency] ha[d] to take spectrum away from someone else.”<sup>59</sup> By contrast, cable television is plentiful: in 2013, the average American household received 189 cable channels,<sup>60</sup> and the FCC may require any cable system with more than thirty-six channels to “carry all local non-commercial educational television stations which request carriage.”<sup>61</sup> With nearly two billion websites on the internet, about 300 million of which are active,<sup>62</sup> the internet is magnitudes larger. Consequently, Justice White’s assertion that “[s]carcity is not entirely a thing of the past”<sup>63</sup> is entirely inapplicable to the media landscape of today.

Because there are no longer “substantially more individuals who want to broadcast than there are frequencies to allocate,” it is no longer “idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”<sup>64</sup> But Fairness Doctrine proponents do not find this hurdle insurmountable. While advocates acknowledge the lack of scarcity, they contend that the Doctrine could be upheld on other grounds, such as the rights of listeners to receive information.<sup>65</sup>

Extending a version of the Fairness Doctrine to the internet raises other logistical issues, however, including the unclear analogy between traditional broadcasters — which exclusively air content chosen by that broadcaster — and the roles played by internet service providers, web hosts, and websites, which are far more user driven.<sup>66</sup> Suffice to say that the current Supreme Court is unlikely to uphold a revitalization of the Fairness Doctrine. The newly solidified conservative majority on the Court<sup>67</sup> is likely to be already suspicious of the Fairness Doctrine,<sup>68</sup>

<sup>59</sup> Bill Ruck, *The Radio Frequency Spectrum Puzzle*, PROD. SOUND & VIDEO, Spring 2016, at 14, 15.

<sup>60</sup> Megan Geuss, *On Average, Americans Get 189 Cable TV Channels and Only Watch 17*, ARS TECHNICA (May 6, 2014, 3:07 PM), <https://arstechnica.com/information-technology/2014/05/on-average-americans-get-189-cable-tv-channels-and-only-watch-17> [<https://perma.cc/VZP7-8P48>] (“In 2013, the number of channels received increased 46 percent, but the number of channels viewed only increased 1 percent.”)

<sup>61</sup> *Cable Television*, FCC (June 15, 2021), <https://www.fcc.gov/media/engineering/cable-television> [<https://perma.cc/KQ68-WRMA>].

<sup>62</sup> Radoslav Ch., *How Many Websites Are There? How Many Are Active in 2021?*, HOSTING TRIBUNAL, <https://hostingtribunal.com/blog/how-many-websites> [<https://perma.cc/UFL2-YFZC>].

<sup>63</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 396–97 (1969).

<sup>64</sup> *See id.* at 388.

<sup>65</sup> *See, e.g.*, MINOW, *supra* note 3, 70–72.

<sup>66</sup> Leonhardt, *supra* note 54, ¶¶ 21–22. Leonhardt also discusses the logistical issues raised by the sheer scale of the internet. *Id.* ¶ 22.

<sup>67</sup> *See* Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020, 8:07 PM), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court> [<https://perma.cc/7LVY-B9S8>].

<sup>68</sup> *See* Victor Pickard, *The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse*, 12 INT’L J. COMM’N 3434, 3436, 3443 (2018) (noting that conservatives view the Fairness Doctrine as a tool to suppress right-wing views).

especially given the Roberts Court's focus on an expansive reading of the First Amendment.<sup>69</sup> The current Court may be far more open to industry arguments that the freedom of the press prevents any compulsion of speech from broadcasters than the *Red Lion* Court was.<sup>70</sup> Combined with the absence of *Red Lion*'s underlying rationale of scarcity, it's difficult to imagine the Fairness Doctrine in any form being upheld as constitutional by the current Supreme Court.

Setting aside the legal and logistical issues, there are also compelling policy reasons against resurrecting the Fairness Doctrine. To begin, there's little point in adopting the Fairness Doctrine unchanged from the 1980s, as some lawmakers have proposed.<sup>71</sup> Admittedly, simply restoring the Doctrine to how it was holds the appeal of legislative simplicity and the judicial momentum of a Supreme Court opinion upholding it. But although the demise of the Fairness Doctrine arguably influenced the rise of partisan news media by normatively indicating that "fairness" was unnecessary,<sup>72</sup> the Fairness Doctrine of 1987 had no concrete mechanisms to address the problems seen in media today. The Fairness Doctrine would have had no power over the rise of partisan news giants like Fox News,<sup>73</sup> as the Doctrine regulated only broadcasters, not cable networks,<sup>74</sup> and certainly had no sway over internet platforms.

Assume then that the Fairness Doctrine is modified to cover the sources that the majority of the public receives news coverage from: not only traditional broadcast, but also cable and the internet. As a baseline presumption, a new Fairness Doctrine would have to extend to individual websites because "while there are plenty of internet sites that individually offer a politically narrow set of perspectives, the internet as a whole certainly does not prevent users from accessing multiple viewpoints."<sup>75</sup> But the interactivity of websites makes them fundamentally

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<sup>69</sup> See MINOW, *supra* note 3, 73–74 (describing the Roberts Court's aggressive approach to the First Amendment); see also *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (accusing the Court of "weaponizing" the First Amendment); *Nat'l Inst. of Fam. & Life Advoc. v. Becerra*, 138 S. Ct. 2361, 2381–83 (2018) (Breyer, J., dissenting) (comparing the Roberts Court's First Amendment approach to *Lochner v. New York*, 198 U.S. 45 (1905)).

<sup>70</sup> See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969) (describing similar arguments advanced by broadcasters at the time).

<sup>71</sup> See, e.g., *Markey Statement*, *supra* note 57.

<sup>72</sup> Cf. MINOW, *supra* note 3, at 67–68 (noting that the Fairness Doctrine "amplified an ideal of nonpartisanship and neutrality embraced by some leading broadcasters").

<sup>73</sup> THEDA SKOCPOL & VANESSA WILLIAMSON, *THE TEA PARTY AND THE REMAKING OF REPUBLICAN CONSERVATISM* 125 (2012).

<sup>74</sup> Caldera, *supra* note 28.

<sup>75</sup> John Villasenor, *Why Creating an Internet "Fairness Doctrine" Would Backfire*, BROOKINGS: TECHTANK (June 24, 2020), <https://www.brookings.edu/blog/techtank/2020/06/24/why-creating-an-internet-fairness-doctrine-would-backfire> [https://perma.cc/6YW3-HSVN].

different from a radio or television broadcast.<sup>76</sup> With a traditional broadcast, one simply “tunes in” and sees or hears whatever is being broadcast. With a website, in contrast, the user typically has more sway in deciding what they see. Advocates for a new Fairness Doctrine have proposed a number of technological solutions to this problem. Professor Martha Minow, for instance, proposes that algorithms could be used to allow users “to see (or not see) a broader array of content than what their own history would generate.”<sup>77</sup> Artificial intelligence could also be used to assess political ideology and then “provide users with news stories and opinion articles from opposite points of view.”<sup>78</sup> At the most ambitious level, Minow proposes that “the law could require the internet platform companies to give users options for receiving information that diverges in point of view from their habitual sites.”<sup>79</sup> The problem with these proposals is that they make it significantly more difficult for courts to determine whether a website has fulfilled its duties under the Doctrine. How is a court to adjudicate whether an algorithm has broadened a user’s horizons sufficiently? Suppose *no one* on a user-created content platform like Twitter posted about one side of a controversial issue. Would Twitter have an obligation to post and promote that content itself? Does a state mandate to peer into a user’s internet history in order to show them articles from the opposite side of the political spectrum raise privacy issues? The breadth of these directives invites the new Fairness Doctrine to be struck down simply as void for vagueness.<sup>80</sup>

Other concerns raised by the prospect of a new Fairness Doctrine are not unique to the internet, but are no less important for it. What *is* the other side in a multifaceted issue? How does one avoid problems of overcorrection to the point of false equivalency?<sup>81</sup> How is it determined

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<sup>76</sup> See Leonhardt, *supra* note 54, ¶ 21.

<sup>77</sup> MINOW, *supra* note 3, at 127.

<sup>78</sup> *Id.*; see also, e.g., FRANCIS FUKUYAMA ET AL., STANFORD CYBER POL’Y CTR., MIDDLEWARE FOR DOMINANT DIGITAL PLATFORMS: A TECHNOLOGICAL SOLUTION TO A THREAT TO DEMOCRACY (2021), [https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-middleware\\_ff\\_v2.pdf](https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/cpc-middleware_ff_v2.pdf) [<https://perma.cc/C7MU-AYU8>] (proposing a third-party “middleware” to provide curated online experiences for dominant digital platforms); MIT CTR. FOR CONSTRUCTIVE COMM’N, <https://www.ccc.mit.edu> [<https://perma.cc/L26L-H7DB>] (proposing a number of machine-driven AI solutions to social fragmentation).

<sup>79</sup> MINOW, *supra* note 3, at 128.

<sup>80</sup> *Cf.* Radio Television News Dirs. Ass’n v. United States, 400 F.2d 1002, 1011 (7th Cir. 1968), *rev’d sub nom.* Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (striking down the original Fairness Doctrine as void for vagueness).

<sup>81</sup> *Cf.*, e.g., Amy Westervelt, *How the Fossil Fuel Industry Got the Media to Think Climate Change Was Debatable*, WASH. POST (Jan. 10, 2019), <https://www.washingtonpost.com/outlook/2019/01/10/how-fossil-fuel-industry-got-media-think-climate-change-was-debatable> [<https://perma.cc/P3AJ-582U>] (discussing how news media inclusion of climate change deniers during coverage of climate change presented “widely debunked” theories and “lies” as equivalent to established science, “transform[ing] climate change into a partisan issue”).

whether an issue is controversial?<sup>82</sup> What is fair? And how much sway does the federal government get in answering these questions? It's hard to imagine that advocates for the Fairness Doctrine would have wanted the Trump Administration at the helm of dictating which issues were controversial and required an alternate viewpoint be presented; for instance, President Trump insisted that he won the 2020 election and half of Republicans believed him.<sup>83</sup> Surely, if it were within his power, Trump would have claimed that this issue was controversial enough that carriers should be required to report his side of the issue. Another issue stems from the current public distrust in the media. Should there be widespread perception — accurate or not — that an administration was tampering with news media, it could further decay trust in mainstream media or cause viewers to seek out smaller (and potentially less reliable) sources of news.

Finally, a revival of the Fairness Doctrine misses the point. Scarcity and lack of access to alternative viewpoints are no longer the problem.<sup>84</sup> What modern audiences struggle with is not so much access to both sides of an argument, but news media that presents the underlying facts without an argument at all — or any way to differentiate a source that does rely exclusively on factual reporting from one that does not. The Fairness Doctrine, by requiring additional opinion, not only fails to address this problem, it magnifies it.

The Fairness Doctrine is thus not viable. Rather than trying to force news media to balance coverage, a better solution is to cut to the heart of the problem: disentangle factual reporting from partisan commentary by alerting viewers when they are consuming one or the other.

### III. THE AWARENESS DOCTRINE

The solution proposed by this Note is modeled on the Telecommunications Act of 1996<sup>85</sup> (“the Act”), which, among other things, directed the establishment of a TV Rating Code. This Part proceeds in two sections: First, this Part will briefly outline the Act and illustrate the benefits of the Act's model of “quasi-self-regulation.” This Part then applies this quasi-self-regulation model to the issues posed by

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<sup>82</sup> Cf. Waas, *supra* note 27, at 249 (noting the FCC's and courts' difficulty determining whether the effects of cigarette smoking on health or the effects of automobile engines on the environment were “controversial issue[s] of public importance”).

<sup>83</sup> Alexa Lardieri, *Half of Republicans Believe President Trump Won Election, Poll Finds*, U.S. NEWS (Nov. 18, 2020), <https://www.usnews.com/news/politics/articles/2020-11-18/half-of-republicans-believe-president-trump-won-election-poll-finds> [<https://perma.cc/K2XE-4Y8R>].

<sup>84</sup> See *supra* notes 60–63 and accompanying text.

<sup>85</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

modern news media by outlining a solution dubbed “the Awareness Doctrine.”

A. *The TV Parental Guidelines and Quasi-Self-Regulation*

In the Act, Congress directed “distributors of video programming” to voluntarily establish, within one year, “rules for rating video programming that contains sexual, violent, or other indecent material” and to “broadcast signals that contain ratings of such programming.”<sup>86</sup> Should the industry have failed to develop a satisfactory system before the deadline, the FCC was directed to devise one itself.<sup>87</sup> Within one year, “all segments of the video programming industry” agreed to create a rating system, which they submitted to the FCC as “The TV Parental Guidelines.”<sup>88</sup> The Guidelines established six categories of programming, with detailed descriptions and subcategories to indicate what qualified a piece of programming for each category.<sup>89</sup> Although ratings were generally assigned by the producers of the broadcasted material, the industry established an Oversight Monitoring Board, comprised of members from content industries and advocacy groups, to oversee the rating system and ensure that it was carried out uniformly.<sup>90</sup> Finally, the industry agreed to display the rating in the upper left-hand corner of the screen at the beginning of each broadcast and following any commercial breaks, as well as undertake a campaign to inform viewers of the symbols’ meanings.<sup>91</sup> These symbols are now the broadly familiar warnings that rate programs as “TV Y14” or “TV MA” at the beginning of televised content.<sup>92</sup>

The TV Parental Guidelines have been a wide success in terms of adoption. Despite not being beholden to the initial congressional

<sup>86</sup> *Id.* § 551(e)(1).

<sup>87</sup> *Id.* § 551(b); see also Joel Timmer, *Television Violence and Industry Self-Regulation: The V-Chip, Television Program Ratings, and the TV Parental Guidelines Oversight Monitoring Board*, 18 COMM’N L. & POL’Y 265, 269–70 (2013).

<sup>88</sup> Letter from Jack Valenti, President & CEO, Motion Picture Ass’n of Am., Decker Anstrom, President & CEO, Nat’l Cable Television Ass’n, & Eddie Fritts, President & CEO, Nat’l Ass’n of Broads., to William F. Caton, Sec’y, FCC (Jan. 17, 1997) [hereinafter Letter from Industry], [https://transition.fcc.gov/Bureaus/Cable/Public\\_Notices/1997/fc97034a.pdf](https://transition.fcc.gov/Bureaus/Cable/Public_Notices/1997/fc97034a.pdf) [<https://perma.cc/Q76N-AZAB>].

<sup>89</sup> See generally *id.*; see also Timmer, *supra* note 87, at 271–72 (noting that although the industry’s initial submission included only age-based ratings, content-based categories were later added under pressure from Congress). For example, a warning at the beginning of a program that lists “TV Y7 FV” would indicate that the following material was suitable for children ages seven or older, and included fantasy violence. *The Ratings at a Glance*, TV PARENTAL GUIDELINES, <http://www.tvguidelines.org> [<https://perma.cc/XZ4M-LTNP>].

<sup>90</sup> Timmer, *supra* note 87, at 272–73; Letter from Industry, *supra* note 88, at 4.

<sup>91</sup> Letter from Industry, *supra* note 88, at 3–5.

<sup>92</sup> See *The Ratings at a Glance*, *supra* note 89.

directive, online television services such as Amazon,<sup>93</sup> Netflix,<sup>94</sup> HBO Max,<sup>95</sup> and Disney+,<sup>96</sup> as well as digital video vendors such as Google Play,<sup>97</sup> have adopted the Guidelines. The success of the Parental Guidelines can be attributed to the model that they follow: a scheme of quasi-self-regulation under threat of direct regulation from the FCC.

Self-regulation schemes traditionally fall into three categories.<sup>98</sup> First are “voluntary” systems of self-regulation, “characterized by the absence of direct government intervention.”<sup>99</sup> Second, “sanctioned” self-regulation permits industries to create rules “subject to government approval.”<sup>100</sup> Finally, “mandated” self-regulation occurs when the government requires industries to establish rules.<sup>101</sup> The quasi-self-regulation embodied by the Act falls somewhere between sanctioned and mandated. The Act did not *require* industry to develop a ratings system, but instead merely *directed* the FCC to develop one of its own if the industry failed to do so.<sup>102</sup> Nevertheless, this threat of direct regulation provided industry with a “strong incentive” to create guidelines that the FCC found acceptable before the FCC did so itself.<sup>103</sup> This quasi-self-regulation mode has also been described as “coerced self-regulation.”<sup>104</sup>

Quasi-self-regulation captures a number of the advantages of traditional self-regulation. Even though quasi-self-regulation can be considered coercive, the industry still acts on its own, which removes direct constitutional concerns. To return to the Act, because the TV Parental Guidelines are at least facially voluntary, they do not raise justiciable First Amendment issues.<sup>105</sup> Self-regulation also has potential for increased efficiency, particularly when applied to the internet.<sup>106</sup> As a

<sup>93</sup> *Maturity Ratings*, PRIME VIDEO, [https://www.primevideo.com/help/ref=atv\\_hp\\_nd\\_srchr?nodeId=GFGQU3WYEG6FSJFJ](https://www.primevideo.com/help/ref=atv_hp_nd_srchr?nodeId=GFGQU3WYEG6FSJFJ) [<https://perma.cc/6DHK-8VT9>].

<sup>94</sup> *Maturity Ratings for TV Shows and Movies on Netflix*, NETFLIX, <https://help.netflix.com/en/node/2064> [<https://perma.cc/S7BB-2XTX>].

<sup>95</sup> *Set HBO Max Parental Controls*, HBO MAX, <https://help.hbomax.com/us/Answer/Detail/000001260> [<https://perma.cc/3R34-5ZJZ>].

<sup>96</sup> *Content Ratings on Disney+*, DISNEY+, [https://help.disneyplus.com/csp?id=csp\\_article\\_content&article=content-ratings](https://help.disneyplus.com/csp?id=csp_article_content&article=content-ratings) [<https://perma.cc/5K6G-P7KA>].

<sup>97</sup> *About Movie & TV Show Ratings*, GOOGLE PLAY HELP, <https://support.google.com/google-play/answer/2733842#zippy=%2Cus-tv-ratings> [<https://perma.cc/6BPQ-WK2X>].

<sup>98</sup> Saule T. Omarova, *Rethinking the Future of Self-Regulation in the Financial Industry*, 35 BROOK. J. INT'L L. 665, 677 (2010).

<sup>99</sup> *Id.*

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

<sup>101</sup> *Id.*

<sup>102</sup> Timmer, *supra* note 87, at 270.

<sup>103</sup> *Id.*

<sup>104</sup> See, e.g., Julia Black, *Constitutionalising Self-Regulation*, 59 MOD. L. REV. 24, 27 (1996).

<sup>105</sup> Timmer, *supra* note 87, at 274–75.

<sup>106</sup> See Matthew J. Feeley, Note, *EU Internet Regulation Policy: The Rise of Self-Regulation*, 22 B.C. INT'L & COMPAR. L. REV. 159, 172 (1999) (observing that legal commentators in 1999 felt that “self-regulation may be the only viable regulatory option [for the Internet] because traditional

general matter, industry insiders are likely to have “a greater degree of expertise and technical knowledge” compared to government officials, and self-regulation allows for “quick adaption of rules . . . and internalized costs.”<sup>107</sup> Whereas the FCC must go through a lengthy notice-and-comment process to promulgate new rules, an industry panel, such as the Guidelines’ Oversight Monitoring Board, is subject to no such constraints.<sup>108</sup> Finally, as demonstrated by the Guidelines’ broad adoption by internet-television media, self-regulation is conducive to voluntary adoption by emerging members of the industry.<sup>109</sup>

Quasi-self-regulation also retains some of the benefits of mandatory self-regulation or even direct governmental regulation. The primary criticism of purely voluntary self-regulation is that it is subject to industry capture.<sup>110</sup> This raises the concern that self-interested industries will never burden themselves with effective regulation, but instead merely adopt “‘an illusion’ meant to deflect calls for government oversight.”<sup>111</sup> The threat of direct regulation mitigates this worry, however, by compelling industry to create regulations that are actually effective, lest the FCC impose a standard that is even more burdensome. In the words of one observer, “self-regulation is most effective when accompanied by ‘a huge threat of legislation.’”<sup>112</sup> Or, to borrow a more colorful metaphor: “For self-regulation to be effective, government must play a residual role, keeping a shotgun ‘behind the door, loaded, well-oiled, cleaned and ready for use but with the hope that it would never have to be used.’”<sup>113</sup>

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regulatory regimes . . . will most likely prove futile because Internet operation respects neither geographical nor governmental boundaries”).

<sup>107</sup> *Id.* at 172–73.

<sup>108</sup> See Timmer, *supra* note 87, at 276.

<sup>109</sup> See *id.* at 276–77.

<sup>110</sup> See Steven Irwin et al., *Self-Regulation of the American Retail Securities Markets — An Oxymoron for What Is Best for Investors?*, 14 U. PA. J. BUS. L. 1055, 1067 (2012) (describing self-regulation as akin to the proverbial “fox guarding the henhouse”).

<sup>111</sup> *Id.* (quoting BOS. CONSULTING GRP., SECURITIES AND EXCHANGE COMMISSION: ORGANIZATIONAL STUDY AND REFORM 25 (2011), <https://www.sec.gov/news/studies/2011/067study.pdf> [<https://perma.cc/X2C4-TJRN>]).

<sup>112</sup> Catherine Louisa Glenn, Note, *Protecting Health Information Privacy: The Case for Self-Regulation of Electronically Held Medical Records*, 53 VAND. L. REV. 1605, 1629 (2000) (quoting Malcolm Maclachlan, *Self-Regulation Needed to Ensure Privacy*, TECHWEB (Mar. 13, 1998, 7:07 PM), <https://web.archive.org/web/19981203115919/http://www.techweb.com:80/wire/story/TWB19980313S0018> [<https://perma.cc/KX5E-TSC6>]); see also Mark M. MacCarthy, *Broadcast Self-Regulation: The NAB Codes, Family Viewing Hour, and Television Violence*, 13 CARDOZO ARTS & ENT. L.J. 667, 695 (1995) (“The conventional wisdom regarding broadcast self-regulation . . . is that ‘the broadcasting industry agrees to meaningful self-regulation only when its leaders are convinced that the government will act if they don’t.’” (quoting GEOFFREY COWAN, SEE NO EVIL: THE BACKSTAGE BATTLE OVER SEX AND VIOLENCE ON TELEVISION 90 (1979))).

<sup>113</sup> Irwin et al., *supra* note 110, at 1055 (quoting WILLIAM O. DOUGLAS, DEMOCRACY AND FINANCE 82 (James Allen ed., 1940)).

### B. *The Proposed Doctrine*

1. *The Proposal.* — The Act’s TV Rating Code directive serves as an illuminating model for regulating news media, both on traditional broadcasts and on cable and internet. As previously described, one of the primary problems with the current media landscape is that sources fail to distinguish between factual reporting and opinion.<sup>114</sup> Fox News host Sean Hannity, for example, has claimed that “I’m not a journalist, I’m a talk show host.”<sup>115</sup> But whether the public is always clear on this distinction seems doubtful, with talk-show analysts appearing to break stories (that are often baseless) and with shows like *Hannity* rarely labeled as commentary.<sup>116</sup> While the news networks claim that there is a “clear line” between their news sides and opinion sides, network representatives often demur when asked whether a specific individual is considered a journalist or not.<sup>117</sup> Blurring the lines further, cable news frequently pairs opinion hosts, such as MSNBC’s Rachel Maddow, with news anchors, such as Brian Williams.<sup>118</sup> To quote former CNN anchor Frank Sesno:

One of the dangers is thinking that people know the difference between the editorial page and the front page, between a commentator or pundit commenting on something alongside a reporter who’s supposed to be providing facts. In this environment, when you have news, talking points and opinions all colliding, it can be really disorienting to the audience.<sup>119</sup>

Rather than compelling discussion on both sides of an issue, which raises significant practical and legal concerns,<sup>120</sup> a more elegant solution is simply to alert the public as to when it’s viewing “news” that contains partisan opinion rather than simply reporting. Call it the Awareness Doctrine.

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<sup>114</sup> *Supra* section II.A, pp. 1911–13.

<sup>115</sup> Daniel Marans, *Sean Hannity: “I’m Not a Journalist. I’m a Talk Show Host.”*, HUFFPOST (Apr. 14, 2016), [https://www.huffpost.com/entry/sean-hannity-not-a-journalist\\_n\\_570fc4f3e4boffa5937e6cd2](https://www.huffpost.com/entry/sean-hannity-not-a-journalist_n_570fc4f3e4boffa5937e6cd2) [<https://perma.cc/2DTS-T3XT>]. Hannity himself, however, has not always been consistent on this position. See, e.g., Matthew Shaer, *How Far Will Sean Hannity Go?*, N.Y. TIMES MAG. (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/magazine/how-far-will-sean-hannity-go.html> [<https://perma.cc/3KEK-X82V>].

<sup>116</sup> Paul Farhi, *Sean Hannity Thinks Viewers Can Tell the Difference Between News and Opinion. Hold On a Moment.*, WASH. POST (Mar. 28, 2017), [https://www.washingtonpost.com/lifestyle/style/sean-hannity-thinks-viewers-can-tell-the-difference-between-news-and-opinion-hold-on-a-moment/2017/03/27/eboc5870-1307-11e7-9e4f-09aa75d3ec57\\_story.html](https://www.washingtonpost.com/lifestyle/style/sean-hannity-thinks-viewers-can-tell-the-difference-between-news-and-opinion-hold-on-a-moment/2017/03/27/eboc5870-1307-11e7-9e4f-09aa75d3ec57_story.html) [<https://perma.cc/2SEU-VGAX>].

<sup>117</sup> Paul Farhi, *Is Sean Hannity a Journalist or Not? Here’s Why It Matters.*, WASH. POST (Apr. 18, 2018), [https://www.washingtonpost.com/lifestyle/style/is-sean-hannity-a-journalist-or-not-heres-why-it-matters/2018/04/18/ca6b6bc2-431e-11e8-8569-26fda6b404c7\\_story.html](https://www.washingtonpost.com/lifestyle/style/is-sean-hannity-a-journalist-or-not-heres-why-it-matters/2018/04/18/ca6b6bc2-431e-11e8-8569-26fda6b404c7_story.html) [<https://perma.cc/3XH8-Y8ZF>].

<sup>118</sup> Farhi, *supra* note 116.

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

<sup>120</sup> See *supra* section II.B, pp. 1914–19.

Under the Awareness Doctrine, Congress would direct news-media producers and distributors to create a system of ratings to be displayed in the corner of news or opinion broadcasts at the beginning of programming. These ratings could include categories such as “Reporting,” “News Analysis,” or “Opinion.”<sup>121</sup> These categories could also have content-based subcategories and definitions, such as indicating that a discussion panel features pundit commentary, in much the same way that the TV Parental Guidelines clarify that a rating was given because a program features fantasy violence.<sup>122</sup> This directive would include both producers of news and news-commentary content, such as cable news networks or online talk shows, as well as third-party distributors of that content, such as YouTube when it hosts news clips on verified news accounts. This would be similar to how digital distributors of content like YouTube TV already comply with the TV Parental Guideline ratings.<sup>123</sup>

Implementation of such a system would also be very simple for sites such as Twitter or Facebook to incorporate because the rating would be given on the content producer’s end. For example, imagine ABC News produces an analytical piece on the auto industry for online distribution. Prior to publication, ABC would determine how the piece was categorized in an agreed-upon industry standard — perhaps as “analysis” — and would embed the rating on the article’s webpage. Thereafter, whenever a media consumer visited the webpage or played the video there, a rating would briefly appear in the corner, informing the consumer that they were viewing material that contained analysis. Now say a consumer decides to share the article on their Twitter feed. It would be a simple matter for Twitter to tag, as an automated practice, the resulting tweet with the same rating that ABC selected for the piece, similar to the way that Twitter already automatically generates a picture thumbnail and a lead sentence on every hyperlink posted.

Like the Parental Guidelines’ Oversight Monitoring Board, the Awareness Doctrine’s ratings categories and their definitions could be created and overseen by a board of representatives from participating industries and advocacy groups.<sup>124</sup> Likewise, the Awareness Doctrine’s Board would meet to “review complaints sent to the Board, discuss current research, and . . . facilitate[] regular calls among industry standards

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<sup>121</sup> Print newspapers have long distinguished reporting from opinions or editorials. *See, e.g., News vs. Opinion*, SAN DIEGO UNION-TRIB., <https://www.sandiegouniontribune.com/our-journalism-explained/news-vs-opinion> [<https://perma.cc/PG8B-5PP4>]; *News. Opinion.*, WALL ST. J., <https://newsliteracy.wsj.com/news-opinion> [<https://perma.cc/3ZRD-3WKN>].

<sup>122</sup> *The Ratings at a Glance*, *supra* note 80.

<sup>123</sup> *Filter Content to TV-Y, TV-Y7 & TV-G Shows and G & PG Films*, YOUTUBE TV HELP, <https://support.google.com/youtubetv/answer/7454855?hl=en> [<https://perma.cc/8G4U-ZKUV>].

<sup>124</sup> In the Oversight Monitoring Board, five public-interest representatives are appointed by the Board Chairman. *About Us*, TV PARENTAL GUIDELINES, <http://www.tvguidelines.org/aboutUs.html> [<https://perma.cc/3YRX-5U6Z>].

and practices executives to discuss pending and emerging issues in order to promote ratings consistency.”<sup>125</sup> This arrangement would ensure that ratings are being applied uniformly across mediums, while remaining efficient by letting the industry work out the details.<sup>126</sup> The Board should also “regularly conduct focus groups and commission quantitative studies to determine whether the [ratings] are in fact providing useful information . . . [and] consider any needed changes to them.”<sup>127</sup>

2. *Efficacy.* — Since compliance with this rating system would be quasi-self-regulated, there is less fear of noncompliance, negative perception of the policy, or government abuse. Additionally, should the system gain widespread adoption, smaller news sources and new technologies may choose to opt into the Awareness Doctrine of their own accord to garner the legitimacy conferred by compliance, much as digital content creators and distributors have opted into the Parental Guidelines.<sup>128</sup> This confers an advantage over regulation like the Fairness Doctrine, which can be left behind by the development of mediums outside of its narrow scope or may require continual litigation for compliance relying on increasingly aged statutes. While the original Fairness Doctrine could not plausibly address issues like private cable,<sup>129</sup> the Awareness Doctrine would have the flexibility to incorporate whatever new technologies the future holds.

More importantly, if the Awareness Doctrine saw widespread adoption as anticipated, there is good reason to believe it would work. In 2020, researchers conducted an empirical study in which participants were presented with a Twitter post with a link to a news article, each identical except that the article was presented as being from one of several sources, and the first word in the story was presented in all capital letters, identifying the story as “Breaking, Opinion, Fact Check, [or] Exclusive.”<sup>130</sup> The study found that the story-type tag was a “powerful predictor” of how audiences rated a story’s “news-ness” and their likelihood to verify the tweet’s content on their own, entirely “independently from both source cues and party affiliation.”<sup>131</sup> Another study found that prominently placed labels on YouTube, Facebook, and Twitter identifying videos as originating from foreign states were able to mitigate the effect of viewing election misinformation from those sources.<sup>132</sup> These studies suggest that so long as labels are applied uniformly and

<sup>125</sup> *Id.*

<sup>126</sup> Timmer, *supra* note 87, at 275–76.

<sup>127</sup> Letter from Industry, *supra* note 88, at 4.

<sup>128</sup> See *supra* pp. 1919–20.

<sup>129</sup> See, e.g., Caldera, *supra* note 28.

<sup>130</sup> Stephanie Edgerly & Emily K. Vraga, *That's Not News: Audience Perceptions of “News-ness” and Why It Matters*, 23 MASS COMM’N & SOC’Y 730, 738–39 (2020).

<sup>131</sup> *Id.* at 731.

<sup>132</sup> Jack Nassetta & Kimberly Gross, *State Media Warning Labels Can Counteract the Effects of Foreign Disinformation*, HARV. KENNEDY SCH. MISINFORMATION REV., Oct. 2020, at 1, 1.

accurately, the Awareness Doctrine could have significant effects on how audiences perceive a given piece of news media, its objectivity, and whether independent evaluation is necessary. Such awareness on the part of news media consumers could mitigate the harms of unfiltered partisan news and increase trust in the media as a whole.

Historical precedent also weighs in favor of the Awareness Doctrine's efficacy. The TV Parental Guidelines, which the Awareness Doctrine is modeled after, have been very effective at informing parents about the content their children watch. The most recent national survey among parents of children between the ages of two and seventeen found that 89% found the Guidelines helpful, 77% reported using the system often or sometimes, and 95% expressed satisfaction with the accuracy of ratings for TV shows overall.<sup>133</sup> At least one empirical study on the TV Parental Guidelines has also demonstrated successful discrimination between categories for sex, gory violence, and — to a lesser extent — substance use.<sup>134</sup>

Even more directly, distinguishing factual reporting from opinion is a proven model in print media. Newspapers have long distinguished factual reporting from opinion through the use of clearly labeled distinctions between reporting, editorials, op-ed pages, and so forth.<sup>135</sup> This was not always the case, however: newspapers of the early nineteenth century were openly partisan.<sup>136</sup> But over the decades, journalists began to emphasize their independence and objectivity, culminating in the creation of separate editorial and op-ed pages in the 1970s.<sup>137</sup> This change did not go unnoticed among the public, and Americans are now accustomed to objectivity in reporting.<sup>138</sup>

The Awareness Doctrine may have further advantages in resolving the blurred line between opinion and fact by not only informing viewers,

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<sup>133</sup> HART RSCH. ASSOCS., KEY FINDINGS FROM 2020 TV RATINGS RESEARCH AMONG PARENTS 1 (2020), <http://www.tvguidelines.org/resources/KeyFindings2020Research.pdf> [<https://perma.cc/9GSL-G7NN>].

<sup>134</sup> See Joy Gabrielli et al., *Industry Television Ratings for Violence, Sex, and Substance Use*, PEDIATRICS, Sept. 2016, at 1, 1. Notably, the study found that the Guidelines failed to discriminate on violence generally. See *id.* at 5–6. This Note does not consider these results concerning, however. The study considered all violence under the umbrella definition of the “depiction of the use of force by people or anthropomorphized characters that physically harmed animate beings as well as any credible threat of physical force intended to harm animate beings.” *Id.* at 2. Prevalence of violence was then measured by the total seconds of violence, as defined, per minute of the episode. *Id.* at 3. The study consequently concluded that the children’s cartoon *SpongeBob SquarePants* contained more violence than TV-MA shows. *Id.* at 6. But see Emily Ashby, *SpongeBob SquarePants*, COMMON SENSE MEDIA, <https://www.commonsensemedia.org/tv-reviews/spongebob-squarepants> [<https://perma.cc/LB8U-RZ3L>] (reviewing media appropriateness and recommending *SpongeBob SquarePants* for ages six and up).

<sup>135</sup> See *supra* note 121.

<sup>136</sup> Lerner, *supra* note 44.

<sup>137</sup> See *id.*

<sup>138</sup> See *id.*

but also incentivizing further separation between opinion and fact on the production end. Because the public would be more likely to favor news segments that feature only “reporting” as opposed to also featuring “opinion,”<sup>139</sup> content carriers would be internally incentivized to delineate clearly between their opinion sections and factual sections, in order to display the more objective rating before a segment. Other networks could follow through a sort of “peer pressure,” to the extent that rivals come to be seen more favorably as a result of consistently broadcasting “reporting” material.<sup>140</sup>

The counterargument to this line of reasoning is that, even if media consumers profess to prefer objective reporting, humans are not perfectly rational. Many have emphasized the risks of cognitive biases in the rise of objectively false information and conspiracy theories.<sup>141</sup> While there is some truth to these claims, they should not be dispositive of the Awareness Doctrine’s potential efficacy. For one thing, the cognitive-bias problem may be rather overstated. The “backfire effect,” for instance, claims that having a belief fact-checked actually strengthens that previously held belief.<sup>142</sup> But although much has been made of the backfire effect in media,<sup>143</sup> the effect is actually a myth, and fact-checking is generally effective at changing false beliefs.<sup>144</sup> Other cognitive biases could be combatted by the Awareness Doctrine itself, as the skepticism and fact-checking impulses prompted by labeling could help

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<sup>139</sup> Cf. Michael Barthel & Jeffrey Gottfried, *Majority of U.S. Adults Think News Media Should Not Add Interpretation to the Facts*, PEW RSCH. CTR. (Nov. 18, 2016), <https://www.pewresearch.org/fact-tank/2016/11/18/news-media-interpretation-vs-facts> [<https://perma.cc/THD6-UPLZ>] (finding that the public prefers their news generally free from opinion); MEDIA INSIGHT PROJECT, AMERICANS AND THE NEWS MEDIA: 6–7 (2018), <https://www.americanpressinstitute.org/wp-content/uploads/2018/06/Americans-and-the-News-Media-2018.pdf> [<https://perma.cc/424D-FB9P>] (same).

<sup>140</sup> Label-only systems have had regulatory effects through market forces in other areas as well. See, e.g., Kate Sheridan, *Here’s Why Everything Gives You Cancer in California*, NEWSWEEK (Feb. 3, 2018, 9:00 AM), <https://www.newsweek.com/heres-why-everything-gives-you-cancer-california-798750> [<https://perma.cc/2SWV-BH8V>] (noting that although California’s Proposition 65 requires only a warning label about potential carcinogens, the law has prompted “an extraordinary amount of change” as “companies have been trying to remove any offending chemical to avoid being required to apply a warning label”).

<sup>141</sup> See, e.g., M. Anne Britt et al., *A Reasoned Approach to Dealing with Fake News*, 6 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCIS. 94, 95–96 (2019) (listing common cognitive biases contributing to the rise of fake news).

<sup>142</sup> See *id.* at 96.

<sup>143</sup> See, e.g., Kalev Leetaru, *The Backfire Effect and Why Facebook’s “Fake News” Warning Gets It All Wrong*, FORBES (Mar. 23, 2017, 3:31 PM), <https://www.forbes.com/sites/kalevleetaru/2017/03/23/the-backfire-effect-and-why-facebooks-fake-news-warning-gets-it-all-wrong> [<https://perma.cc/ARJ9-JHTB>].

<sup>144</sup> Brendan Nyhan, *Why the Backfire Effect Does Not Explain the Durability of Political Misperceptions*, PROCEEDINGS NAT’L ACAD. SCIS., Apr. 9, 2021, at 1; Laura Hazard Owen, *The “Backfire Effect” Is Mostly a Myth, a Broad Look at the Research Suggests*, NIEMANLAB (Mar. 22, 2019, 8:48 AM), <https://www.niemanlab.org/2019/03/the-backfire-effect-is-mostly-a-myth-a-broad-look-at-the-research-suggests> [<https://perma.cc/WM73-2F6Z>].

prevent the spread of false information and the irrational biases that accompany it.<sup>145</sup> Finally, the Awareness Doctrine does not aspire to end false or opinionated content altogether; there will always be an audience that seeks out talk shows or analysis of news, be it InfoWars or NPR's Fresh Air. The Doctrine simply attempts to separate these from factual reporting, which is bound by journalistic codes of ethics that encourage accuracy and fairness,<sup>146</sup> and give media consumers a clear choice.

Finally, the Awareness Doctrine neatly sidesteps First Amendment issues. Industry routinely asserts that the First Amendment restricts direct FCC regulation of ratings because film and television ratings reflect speech-protected "'editorial judgement' based on various factors,"<sup>147</sup> and courts seem to agree.<sup>148</sup> Although some scholars have argued that media ratings could survive even strict scrutiny,<sup>149</sup> the Awareness Doctrine — like the TV Parental Guidelines before it — avoids these issues entirely by being ostensibly voluntary.<sup>150</sup>

3. *Implementation.* — So how would the Awareness Doctrine be implemented? The first step is congressional action: a directive to the industry to develop a system, and an order that the FCC do so if the industry fails to act satisfactorily. Here, the Fairness Doctrine may have one final use in ushering in the Awareness Doctrine. Quasi-self-regulation requires the "shotgun" behind the door: the "huge threat of legislation" that spurs industry to embrace a less burdensome alternative.<sup>151</sup>

<sup>145</sup> See *supra* p. 1924.

<sup>146</sup> See, e.g., *SPJ Code of Ethics*, SOC'Y PRO. JOURNALISTS (Sept. 6, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/8WKN-KEJQ>] (providing a model set of journalistic ethics standards). Although the SPJ Code of Ethics is legally unenforceable under the First Amendment, *id.*, many news organizations enforce a similar set of standards on their reporters, see, e.g., *Ethical Journalism: A Handbook of Values and Practices for the News and Opinion Departments*, N.Y. TIMES, <https://www.nytimes.com/editorial-standards/ethical-journalism.html> [<https://perma.cc/FW3X-C3XG>]. These rules typically include lower standards for opinion employees than reporters. See *id.* (noting that "[o]pinion writers enjoy more leeway than others" in maintaining some aspects of journalistic neutrality "because their business is expressing opinions"); see also Farhi, *supra* note 117.

<sup>147</sup> Courtney Leavitt, *Tobacco and the Small Screen: Why the TVOMB Should Restructure the Parental Guidelines*, 44 HASTINGS COMM'NS & ENT. L.J. 119, 128 (2021) (quoting FCC, DA-19-423, REPORT ON TELEVISION RATINGS AND THE OVERSIGHT MONITORING BOARD 9 (2019)).

<sup>148</sup> See, e.g., *Forsyth v. Motion Picture Ass'n of Am., Inc.*, No. 16-cv-00935, 2016 WL 6650059, at \*4 (N.D. Cal. Nov. 10, 2016).

<sup>149</sup> See, e.g., Leavitt, *supra* note 147, at 128. However, these arguments are often based on the Supreme Court's recognition of "a compelling interest in protecting the physical and psychological well-being of minors," *id.* (quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)), a rationale that applies to the TV Parental Guidelines but not the Awareness Doctrine.

<sup>150</sup> Timmer, *supra* note 87, at 274-75.

<sup>151</sup> See Irwin et al., *supra* note 110, at 1055; Glenn, *supra* note 112, at 1629 (quoting Maclachlan, *supra* note 112).

There is an obvious counterargument: If the current Supreme Court is indeed unlikely to hold the Fairness Doctrine constitutional, why would the media industry ever view it as a potent enough threat to forestall it through voluntary cooperation? The answer lies in the same reason that litigation tends to result in settlement: expediency and certainty of outcome. Even if the media industry believes the Fairness Doctrine would be unconstitutional, they cannot know for sure, and the possibility that it would be upheld — along with extended litigation on the matter — may be sufficient to ensure compliance with the Awareness Doctrine. To return to the Telecommunications Act: even supporters of the Act in Congress seemed skeptical that a direct implementation of a guidelines rating system would be constitutional,<sup>152</sup> and legislators took pains to emphasize the voluntary nature of the directive.<sup>153</sup> The entertainment industry likewise continues to insist that the FCC could never *force* them to create a ratings system because of the First Amendment,<sup>154</sup> but nevertheless complied with the 1996 Telecommunications Act out of fear that the FCC would try.<sup>155</sup> Similarly, although the Fairness Doctrine likely has little practical value in reality, even the implicit threat of its unlikely implementation may serve as a powerful incentive to the industry to embrace a new era of Awareness.

#### CONCLUSION

The modern media landscape is a mess of one-sided information. Nevertheless, bringing back the Fairness Doctrine, with its legal and practical problems, is not a viable solution. Instead, Congress should embrace a successful model of quasi-self-regulation, incentivizing fairer behavior from content distributors by simply giving the public Awareness of whether they are viewing fact or opinion.

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<sup>152</sup> Leavitt, *supra* note 147, at 128; *see also* Conference Report on S. 652, Telecommunications Act of 1996, H.R. REP. NO. 104-353, at H1155 (1996) (Conf. Rep.) (transcribing the skepticism of Representative Jack Fields of Texas).

<sup>153</sup> Timmer, *supra* note 87, at 275.

<sup>154</sup> *See* Leavitt, *supra* note 147, at 128.

<sup>155</sup> *Cf.* Timmer, *supra* note 87, at 293 (attributing the success of the Act's directive to "a very concrete threat of government regulation should the industry fail to develop a rating system").