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Author

Selbst, Andrew D

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THE JOURNALISM RATINGS BOARD: AN INCENTIVE-BASED APPROACH TO CABLE NEWS ACCOUNTABILITY

Andrew Selbst*

The American establishment media is in crisis. With newsmakers primarily driven by profit, sensationalism and partisanship shape news coverage at the expense of information necessary for effective self-government. Focused on cable news in particular, this Note proposes a Journalism Ratings Board to periodically rate news programs based on principles of good journalism. The Board will publish periodic reports and display the news programs' ratings during the programs themselves, similar to parental guidelines for entertainment programs. In a political and legal climate hostile to command-and-control regulation, such an incentive-based approach will help cable news fulfill the democratic function of the press.

INTRODUCTION

The decline of modern mass media is well documented.¹ In its most recent catastrophic failings, mass media have missed the case against war in Iraq,² missed the signs of the mortgage crisis and financial meltdown,³ and helped convince a substantial portion of the American populace that President Obama is secretly from

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1. For criticisms by traditional journalists and bloggers, see, for example, LEONARD DOWNIE, JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* (2002); Glenn Greenwald, *Jeffrey Rosen, TNR and the Anonymous Smears Against Sonia Sotomayor*, SALON (May 5, 2009, 6:52 AM), http://www.salon.com/news/opinion/glenn_greenwald/2009/05/05/tnr. Many of Greenwald's other posts in this blog address the same issues.

2. See generally GREG MITCHELL, *SO WRONG FOR SO LONG: HOW THE PRESS, THE PUNDITS—AND THE PRESIDENT—FAILED ON IRAQ* (2008) (arguing that American establishment media failed to objectively evaluate political justifications for the Iraq war).

3. E.g., David Bauder, *Abrams Research Survey: Financial Journalists Say Media Dropped Ball on Crisis*, HUFFINGTON POST (Jan. 8, 2009, 3:52 PM), http://www.huffingtonpost.com/2009/01/08/abrams-research-survey-fi_n_156369.html; Dan Gillmor, *The Media's Role in the Financial Crisis*, TPMCAFÉ (Jan. 23, 2009, 09:40 AM), http://tpmcafe.talkingpointsmemo.com/2009/01/23/the_medias_role_in_the_financial_crisis.

Kenya⁴ and that he wants to euthanize seniors as part of his health-care agenda.⁵ The Sunday cable talk shows continue to host public figures who have lied repeatedly without correction.⁶ Major media outlets employed “independent” military analysts during the debates about war in Iraq and Afghanistan, without disclosing that they were receiving talking points from the Pentagon,⁷ and then subsequently blackballed the Pulitzer-Prize winning stories that disclosed this practice.⁸ That these are substantial failings of the media is beyond debate.⁹ In addition, many smaller problems pervade the media daily. Those problems include an overreliance on anonymous sources¹⁰ and “horse-race” political reporting, in which news programs discuss the effect of policy positions on politicians’ popularity at the expense of discussing the positions and issues themselves.¹¹

It is often said that the First Amendment’s guarantee of freedom of the press guarantees the freedom for the press to be irresponsible.¹² This view has left the press to self-regulate under ethical codes of conduct, much like lawyers¹³ and doctors.¹⁴ However, various laws and private remedies prevent doctors and lawyers from straying from their ethical codes, while the Constitution bars any

4. Sam Stein, *New Poll: Less than Half of Republicans Believe Obama Was Born in U.S.*, HUFFINGTON POST (July 30, 2009, 01:01 PM), http://www.huffingtonpost.com/2009/07/31/new-poll-less-than-half-o_n_248470.html.

5. Greg Sargent, *Poll: Nearly Half of Americans Believe “Death Panel” Falsehood*, THE PLUM LINE (Aug. 19, 2009, 11:23 AM), <http://theplumline.whorungov.com/political-media/poll-nearly-half-of-americans-believe-death-panel-falsehood>.

6. See, e.g., Steve Benen, *The Never-Ending Disappointment of the Sunday Shows*, POLITICAL ANIMAL (Mar. 6, 2010, 8:00 AM), http://www.washingtonmonthly.com/archives/individual/2010_03/022732.php. The problem has become so pervasive that a recent movement has arisen with the specific purpose of fact-checking Sunday news programs. See *infra* notes 136, 274–276 and accompanying text.

7. David Barstow, *Behind TV Analysts, Pentagon’s Hidden Hand*, N.Y. TIMES, Apr. 20, 2008, at A1.

8. Glenn Greenwald, *The Pulitzer-Winning Investigation that Dare Not Be Uttered on TV*, SALON (Apr. 21, 2009, 8:27 AM), <http://www.salon.com/opinion/greenwald/2009/04/21/pulitzer/index.html>.

9. Although most, if not all, of the examples cited here are of problems that originated under a conservative administration, the complaints about media are decidedly not complaints about conservative news media, but rather establishment media outlets at large. The prominence of examples of conservative origin merely reflects the fact that a conservative administration has occupied Washington for the much of the past decade.

10. E.g., Greenwald, *supra* note 1; see also *infra* notes 177–181 and accompanying text.

11. Lili Levi, *In Search of Regulatory Equilibrium*, 35 HOFSTRA L. REV. 1321, 1327 (2007).

12. See, e.g., *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

13. See MODEL RULES OF PROF’L CONDUCT (2009).

14. See AMA CODE OF MED. ETHICS (2010).

such deterrence in journalism.¹⁵ Most of the problems mentioned above, and indeed the entire crisis of journalism and democracy, would not have happened if the press had not systematically disregarded its obligation to the public in search of profit.¹⁶ The view that the First Amendment only allows the media to police themselves, therefore, while still popular, cannot be correct as an absolute proposition. The press is just too important.

So if some restrictions on individual press freedom are necessary, what form can they take? Because the media's primary responsibility is to function as a watchdog over those in power, there are obvious dangers in giving the government authority to regulate the media.¹⁷ Attempts to regulate media content will be subject to strict scrutiny¹⁸ and, as is proper, be struck down by the courts. Even the Fairness Doctrine, which once required the airing of multiple sides of political debates on broadcasts, has been abandoned in the face of intense political and constitutional battles.¹⁹ Recognizing the dangers of direct content regulation, several commentators have suggested incentive-based regulation to promote quality journalism.²⁰ This Note proposes one such approach.

First, this Note proposes legislation that would create the Journalism Ratings Board (JRB), a new sub-agency within the Federal Communications Commission (FCC). The JRB would periodically grade the quality of the news according to foundational journalistic principles, and issue regular reports on the quality of cable news programs. Second, the same legislation would require news programs to display their JRB ratings during each broadcast, similar in form to parental guidelines for entertainment programs.²¹ This would directly provide news consumers with concrete information

15. Cf. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a newspaper can be liable for tortious libel against a public figure only upon a showing of “actual malice”).

16. See *infra* Part I.C.

17. See *infra* Part II.C.

18. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994).

19. See *infra* Part I.B.

20. Ellen P. Goodman, *Media Policy out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 *BERKELEY TECH. L.J.* 1389, 1463–67 (2004); Levi, *supra* note 11, at 1336–37; see also Robert M. Entman, *The Nature and Sources of News*, in *THE PRESS* 48, 54 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (identifying “[c]hecks on pure profit maximization” as a central guideline for good journalism).

21. FAQs About the TV Parental Guidelines, *THE TV PARENTAL GUIDELINES*, <http://www.tvguidelines.org/faqs.htm#faq1> (last visited Sept. 29, 2010) (“A ratings icon appears in the upper left corner of the TV screen during the first 15 seconds of the program. If the program is more than one hour, the icon will reappear at the beginning of the second hour. Many broadcast and cable television networks also display the rating after each commercial break.”).

about the quality of the program's journalism, forcing the news networks to compete on quality rather than merely on sensationalism and partisanship.

This Note limits the scope of the proposal to cable news. There are three reasons for this limitation. First, the media's problems are too big, and no one solution will be a panacea.²² Therefore, any proposal must be limited. While scholars have proposed the general idea of incentive-based reforms, few specific proposals have been made.²³ Alternative solutions proposed by various scholars include establishing a right of access,²⁴ structural regulations that increase diversity of ownership,²⁵ and reliance on the democratizing power of the internet.²⁶ A variety of approaches are required to "fix" the media, and this Note proposes just one.

22. See State of the News Media 2009: Overview—Major Trends, PEW PROJECT FOR EXCELLENCE IN JOURNALISM (2009), http://www.stateofthemedias.org/2009/narrative_overview_majortrends.php?media=1&cat=1; Levi, *supra* note 11, at 1324. Professor Levi suggests four experimental ideas for media reform:

1) structural regulations designed to promote journalistic values; 2) a requirement that broadcasters spend a certain percentage of their gross advertising revenues on news and public affairs production and programming; 3) . . . a requirement that broadcasters devote a percentage of their advertising time to advocacy advertising . . . ; and 4) audience empowerment, including disclosure-oriented requirements designed to foster audience activism and strategies to engage an audience whose attention is claimed by an unprecedented abundance of content.

Levi, *supra* note 11, at 1324.

23. The only incentive-based proposals I have seen discussed are government subsidies of media, analyzed in Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. ON TELECOMM. & HIGH TECH. L. 217 (2002). Professor Levi also identifies a role for incentive-based reform through "structural regulations designed to promote journalistic values," *supra* note 11, at 1324, but she stops short of proposing a specific incentive-based reform. *Id.* at 1337 ("Incentive-based approaches should also be explored, but the details of such approaches are beyond the scope of this Article."). This Note combines the principle of an incentive-based reform with a form of disclosure-based audience empowerment, Levi's fourth suggestion. See Levi, *supra* note 11, at 1324.

24. See Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1666–78 (1967).

25. Levi, *supra* note 11, at 1323. See generally C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2007) (exploring problems associated with concentrated media ownership).

26. The idea that open access to the internet will naturally solve many media problems is a common but flawed view. See Robert W. McChesney, *The Emerging Struggle for a Free Press*, in *THE FUTURE OF MEDIA: RESISTANCE AND REFORM IN THE 21ST CENTURY* 9, 17 (Robert W. McChesney et al. eds., 2005) [hereinafter *THE FUTURE OF MEDIA*]. While the internet is fundamentally changing the public's interaction with information, it cannot do so by its mere existence. The battle for so-called "net neutrality" will determine the future democratic nature of the internet. See, e.g., Tim Wu, *Why You Should Care About Network Neutrality*, SLATE (May 1, 2006, 4:35 PM), <http://www.slate.com/id/2140850/>. To date, only heavy government subsidy and open-access policies have ensured that the internet is the wide

Second, cable news is the only news source consistently gaining market share and influence. In 2008, the only forms of news media to increase revenues were the internet and cable news, but internet revenues have increased at a slower rate than in previous years.²⁷ Advertising revenue, which drives profitability, increased on the internet by 10.6%²⁸ and on cable news by 33%²⁹ in 2008. Moreover, in a recent survey, about half of Americans reported watching television as their primary news source, compared with 15% who use the internet, and 10% who read newspapers.³⁰ Finally, cable news is given significantly more weight in national policy debates because politicians and staffers watch it all day, every day.³¹ Because cable news is such a dominant news source for Americans, reforming cable news would have a notable effect on public discourse.

A third reason for this limitation is purely practical. Attempting to define the “media” as a whole is a daunting, if not impossible, task.³² A solution that attempts to solve all the problems at once will be convoluted and long enough to merit a multi-volume treatise.

open forum of the present, where everyone has equal ability to publish and obtain information. McChesney, *supra*. The promise of open access is one reason many observers believe that the internet will resolve most of the tensions in media access. *Id.* Only time will tell if the policies continue to favor openness or not and what effect that has on media access.

Similarly, critics suggest that any media reform that does not take into account the substantial and unique impact of new media, like the internet, is fundamentally unsound. Leonard M. Niehoff, *Rationing the Infinite*, 107 MICH. L. REV. 1019, 1030 (2009) (reviewing BAKER, *supra* note 25). Without addressing new media, the argument goes, regulation will only affect a small portion of the essentially infinite content that exists, an attempt to “ration an infinite resource.” *Id.* at 1038. However, consumers have only a finite amount of time to absorb news. Goodman, *supra* note 20, at 1392–93. We have reached a juncture where the infinite content surpasses people’s capacity to absorb news, and the attention of news consumers becomes a new limiting resource. *Id.* Given this reality, a proposal aimed at a particularly dominant news source is relevant.

27. State of the News Media 2009: Online—Economics, PEW PROJECT FOR EXCELLENCE IN JOURNALISM (2009), http://www.stateofthemediamedia.org/2009/narrative_online_economics.php?media=5&cat=3. This report also concludes that there is not yet a workable revenue model for internet news. Without a workable model, it is unclear if new media will ever overtake cable news as the public’s dominant news source. *Id.*

28. *Id.* The reported advertising revenue refers to all websites, including news and others. *Id.* Notably, this is a big step down from the previous year’s 26%. *Id.*

29. State of the News Media 2009: Cable TV—Economics, PEW PROJECT FOR EXCELLENCE IN JOURNALISM (2009), http://www.stateofthemediamedia.org/2009/narrative_cabletv_economics.php?media=7&cat=3.

30. *State of the First Amendment 2009, FIRST AMENDMENT CTR.*, 1 (2009), <http://www.firstamendmentcenter.org/pdf/SOFA2009.analysis.tables.pdf>.

31. Atrios, *The Cable News Problem*, ESCHATON (Mar. 9, 2010), <http://www.eschatonblog.com/2010/03/cable-news-problem.html>; Matthew Yglesias, *The Cable News Problem*, THINK PROGRESS (Mar. 9, 2010, 5:31 PM), <http://yglesias.thinkprogress.org/archives/2010/03/the-cable-news-problem.php>.

32. Niehoff, *supra* note 26, at 1030.

By limiting the scope of the issue, this Note proposes a full solution to a smaller problem.

Part I of this Note describes the current state of media regulation and its governing constitutional framework. Parts II and III lay out the details of the proposed reform, assuming its constitutionality. Part II discusses the structure of the JRB, including the proper sources of journalism standards and strategies for reducing the likelihood of partisan takeover and regulatory capture. Part III describes the legal process and utility of displaying “news consumer guidelines” on the screen during the news programs themselves. Part IV discusses the constitutionality of the proposal, concluding that it would be constitutional.

I. THE CURRENT STATE OF MEDIA REGULATION

In order to demonstrate the necessity of incentive-based regulation such as that proposed by this Note, this Part lays out the current shape of media regulation and the constitutional space it occupies. As mass media have progressed from political pamphletting to the modern-day newspaper, radio, broadcast television, cable, and internet, the public’s relationship to the press has changed drastically. At the drafting of the First Amendment to the United States Constitution,³³ protecting the press from the government was the primary concern.³⁴ But improvements in technology have created more powerful and influential mass media institutions, which have the power to choose who may or may not be heard, inhibiting individual speech in ways the drafters of the First Amendment could have never imagined.³⁵ Despite this potential inhibition of individual speech, however, First Amendment doctrine and political realities have combined to protect mass media corporations at the expense of the forum for individual speech. Notwithstanding the Supreme Court’s 1969 pronouncement that “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,”³⁶ both First

33. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”).

34. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977); see also DOWNIE & KAISER, *supra* note 1, at 15; JAMES FALLOWS, *BREAKING THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY* 48 (1996) (discussing partisan political function of newspapers in early American history).

35. See *infra* Part I.A.3.

36. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

Amendment doctrine and the political climate have become hostile to regulation designed to effectuate those rights.

A. A Brief Historical Tour of the First Amendment's Press Clause

The Framers of the Constitution realized that the press was essential to a functioning democracy. Thomas Jefferson famously said, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."³⁷ At the time of the First Amendment's drafting, the Framers' primary concern was protecting the press from the government. As the structure of the press has changed over time, so have Supreme Court doctrine and the public's understanding of the press clause. Underlying each step of this evolution is the principle that a free press is primarily valuable for its service to democracy. This Part discusses the evolution of the press clause and how well the press has served democracy over time.

1. Partisan News

When the First Amendment was drafted, the government's ability to silence journalists posed the greatest threat to the press's ability to inform public debate. Journalists were an important check on government, necessary to root out the ugly parts of law-making that the people in power might otherwise want hidden.³⁸ At the same time, it was inconceivable that any one news source could drown out the rest and shape public debate by itself; eighteenth century technology prevented any large-scale market dominance.³⁹ Journalists were instead the "little guys" standing up to government.

In the early days of the country, protecting the press *was* protecting political debate. Newspapers were simply arms of the political

37. Letter from Thomas Jefferson to Colonel Edward Carrington (Jan. 16, 1787), in 2 MEMOIR, CORRESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 84, 85 (Thomas Jefferson Randolph ed., 1829).

38. Blasi, *supra* note 34, at 527, 533, 534.

39. The federal government did not even consider *private* power to overwhelm debate—as opposed to government interference—until the FCC promulgated chain broadcasting regulations in 1941. See *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 198 (1943) ("Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin.").

parties.⁴⁰ Despite the propensity for these papers to perform the worst sorts of journalism—smearing opponents and spreading scandal—the Framers decided that even this version of the press was so important that it warranted constitutional protection.⁴¹ The protection proved necessary. Some of the very same people who drafted the First Amendment later passed the Sedition Act of 1798, penalizing speech critical of the government.⁴² This law was never challenged in the Supreme Court, but had the law not expired in 1801, it certainly would have been struck down.

For over a century, the public interest needed no protection, primarily because news outlets faced competition and were locally owned; knowing where to find the owners ensured accountability.⁴³ As an additional consequence of local ownership, when law and policy makers gathered, each brought news from disparate sources, making it difficult for a single news source to dominate the public discourse.

2. Professional Journalism and Self-Regulation

By the 1830s and 1840s, newspapers had left the partisan model to become more independent.⁴⁴ A few New York papers—in particular, the *Herald*, the *Tribune*, and the *Times*—began reporting more unbiased and in-depth coverage of public affairs.⁴⁵ “[T]he first quality newspapers” began to appear by the turn of the century, and journalism standards grew as the trade became more professional.⁴⁶ In the 1920s, competition from radio, which could report breaking news earlier, forced newspapers to focus more on “better-informed and more interpretive reporting on politics, economics, labor relations, science, medicine and agriculture.”⁴⁷

Between the Great Depression and the early 1950s, however, newspapers began to lose their watchdog role, reflecting establishment views more often than holding the powerful accountable.⁴⁸ Media subservience to government peaked in the

40. DOWNIE & KAISER, *supra* note 1, at 15; FALLOWS, *supra* note 34, at 48.

41. DOWNIE & KAISER, *supra* note 1, at 15.

42. Sedition Act of 1798, ch. 74, 1 Stat. 596.

43. See DOWNIE & KAISER, *supra* note 1, at 23.

44. *Id.* at 15; FALLOWS, *supra* note 34, at 48.

45. DOWNIE & KAISER, *supra* note 1, at 16; FALLOWS, *supra* note 34, at 48.

46. DOWNIE & KAISER, *supra* note 1, at 17–18.

47. *Id.* at 19.

48. *Id.* This period in journalism presented problems that seem to mirror today's. See, e.g., Glenn Greenwald, *New Study Documents Media's Servitude to Government*, SALON

1950s as many newspapers stood silent while Senator Joseph McCarthy ruined many lives.⁴⁹ However, as McCarthyism faded, the proliferation of television brought dramatic live events such as speeches, press conferences, and eventually the civil rights marches and anti-war protests of the 1960s into American living rooms.⁵⁰ Television ushered in what many consider the “Golden Age” of journalism.⁵¹

As the “Golden Age” engendered increasing resentment against the media by the powerful, the Supreme Court was called upon to protect the media. In 1964, the Court decided *New York Times Co. v. Sullivan*, in which a political candidate sued the New York Times for libel.⁵² Ruling for the New York Times, the Court held that absent “actual malice,” defined as intentional or reckless disregard for the truth of a statement, the First Amendment permits newspapers to print any information regarding public officials.⁵³ The late 1960s brought a sustained attack on the press by President Richard Nixon,⁵⁴ requiring the Supreme Court to once again protect the New York Times, this time for releasing the Pentagon Papers.⁵⁵ Ten years later, in *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida statute requiring newspapers to print a political candidate’s response to published allegations.⁵⁶ The Court reasoned that even a limited right-of-reply statute amounted to compelled speech and an impermissible infringement on editorial autonomy.⁵⁷ In 1973, the plurality in *Columbia Broadcasting System, Inc. v. Democratic National Committee* nicely summed up the Court’s attitude about newspapers’ autonomy: “The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure

(June 30, 2010, 5:31 AM), http://www.salon.com/news/opinion/glenn_greenwald/2010/06/30/media.

49. Jordan Michael Smith, *Stenography Machines: Attention, Mr. Perlstein: There’s Nothing New About ‘He Said/She Said,’* COLUM. JOURNALISM REV. (Aug. 25, 2009, 8:00 AM) http://www.cjr.org/behind_the_news/stenography_machines.php.

50. DOWNIE & KAISER, *supra* note 1, at 20.

51. *Id.* at 21 (discussing the popularity of journalism as a university major and increase of investigative reporting during the 1960s and 1970s); *cf.* ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM* 43 (2010) (acknowledging, though not accepting, the common conception of a “Golden Age”).

52. 376 U.S. 254 (1964).

53. *Id.* at 279–80.

54. DOWNIE & KAISER, *supra* note 1, at 20–21.

55. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

56. 418 U.S. 241, 258 (1974).

57. *Id.* at 254.

financial success; and, second, the journalistic integrity of its editors and publishers.”⁵⁸

Because most of the Supreme Court precedent regarding newspapers developed during the “Golden Age” of journalism, newspapers enjoy near absolute editorial freedom primarily as an accident of history.⁵⁹ The Court relied on journalistic integrity to preserve the public interest.⁶⁰ The Court did *not* reason that editorial autonomy and free speech are ends unto themselves, but rather that they are means to enhance public discourse. Illustrating this was the Court’s emphasis on the need for multiple voices is public discourse:

The constitutional safeguard [created by the First Amendment] . . . “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” . . . The First Amendment, said Judge Learned Hand, “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”⁶¹

This decision was rendered when competition among news organizations was much greater than it is today.⁶² Each newspaper was considered merely one voice among the desired multitude, and the First Amendment was asked only to protect a newspaper’s ability to speak. As competition within cities has dwindled and news organizations have consolidated, few voices now exist where there once were many. Nevertheless, the doctrine of editorial autonomy persists.

58. 412 U.S. 94, 117 (1973).

59. See *DOWNIE & KAISER*, *supra* note 1, at 21.

60. See *Columbia Broad. Sys.*, 412 U.S. at 117.

61. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964) (citations omitted) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931); *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

62. *BAKER*, *supra* note 25, at 1–4; see also *DOWNIE & KAISER*, *supra* note 1, at 23.

3. Broadcast Media and the Scarcity Rationale

The proliferation of radio changed media regulation for good, as would each subsequent new technology. In 1934, Congress created the FCC and granted it the power to regulate all “interstate and foreign commerce in communication by wire or radio.”⁶³ Shortly after the creation of the FCC, the Court acknowledged that the Commission was “empowered to deal . . . with [more than] technical and engineering impediments to the ‘larger and more effective use of radio in the public interest.’”⁶⁴ *National Broadcasting Co. v. United States* was the first case to address the new unilateral nature of communications and democratic debate that emerged with broadcasting. Against a statutory and First Amendment challenge, the Court upheld chain-broadcasting regulations, ownership restrictions the FCC placed on broadcasters who owned multiple radio stations in various locales.⁶⁵ Rejecting the claim that the regulations were arbitrary and capricious, the Court found the FCC had amassed significant evidence that radio station conglomerates were increasingly able to dominate the airwaves, effectively crowding out smaller independent stations.⁶⁶

National Broadcasting also marked the first appearance of the scarcity rationale. Rejecting the First Amendment claim, the Court explained that “[f]reedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation.”⁶⁷ The facilities were limited because the FCC carved up broad ranges of frequencies and licensed them to avoid interference between stations broadcasting too close in frequency.⁶⁸ The Court reasoned that because the government must already regulate licenses to prevent complete suppression of speech through interference,

63. Communications Act of 1934, ch. 652, § 1, 48 Stat. 1064, 1064 (codified as amended at 47 U.S.C. § 151 (2006)).

64. *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943) (internal quotation marks omitted).

65. *Id.* The rules themselves were implemented to preserve competition in different local markets, and to protect smaller stations' ability to start up. Comment, *The Impact of the FCC's Chain Broadcasting Rules*, 60 YALE L.J. 78, 85 (1951). Specifically, the rules prohibited 1) ownership of more than one station in any single market or 2) ownership by a chain broadcaster of any station in a market that was not otherwise adequately served. *Id.* at 86.

66. *Nat'l Broad. Co.*, 319 U.S. at 235.

67. *Id.* at 226.

68. *Id.* at 215.

the government was also justified in imposing restrictions to further the ends of diversity in speech.⁶⁹

The scarcity rationale formed the basis for *Red Lion v. FCC*, the greatest Supreme Court victory for media access to date.⁷⁰ In *Red Lion*, the Court upheld the Fairness Doctrine,⁷¹ the FCC's principal attempt to regulate broadcasters in the public interest.⁷² As summarized by one scholar, the Fairness Doctrine "required broadcasters to cover issues of public importance and to do so in a balanced manner, giving both sides of the story (or as many sides as there might be)."⁷³ Applying the doctrine to newspapers would have amounted to compelled speech and violated the First Amendment. But according to the Court, the scarcity rationale meant the First Amendment applied differently to broadcasting than to newspapers.⁷⁴ Strikingly, the Court, in its most famous sentence regarding media access, again used strong language that would seem to indicate support of the public's speech rights generally: "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."⁷⁵ The tone was similar to other statements the Court had made with regard to the public interest. For example, the Court has stated that the "widest possible dissemination of information from diverse and antagonistic sources" was a goal of the First Amendment.⁷⁶

Today, however, *Red Lion* is an outlier in First Amendment law governing the media.⁷⁷ Cable television did not require broadcast licenses, and was analyzed differently as a result. The leading case regarding cable regulations is *Turner Broadcasting System, Inc. v. FCC* (*Turner I*).⁷⁸ At issue in *Turner I* were the "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of

69. *Turner Broad. Sys., Inc. v. FCC* (*Turner I*), 512 U.S. 622, 663 (1994) ("[Speech diversity] has long been a basic tenet of national communications policy . . ." (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (internal quotation marks omitted))). For further discussion about diversity in media policy, see Goodman, *supra* note 20, at 1395–99.

70. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). For additional discussion of *Red Lion* in historical context, see Angela J. Campbell, *A Historical Perspective on the Public's Right of Access to the Media*, 35 HOFSTRA L. REV. 1027, 1029–35 (2007).

71. *Red Lion*, 395 U.S. at 400–01.

72. OWEN M. FISS, *THE IRONY OF FREE SPEECH* 56 (1996).

73. *Id.*

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

75. *Id.*

76. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (quoted in *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978)). Professor Goodman provides more examples of similarly strong statements. See Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 HOFSTRA L. REV. 1211, 1230 (2007).

77. Goodman, *supra* note 76, at 1227.

78. 512 U.S. 622 (1994).

1992.⁷⁹ The provisions required cable operators that carried nationally broadcast channels to carry local broadcast channels as well.⁸⁰ The FCC worried that as cable became the dominant television source, cable companies would have an unfair advantage over local broadcast stations. Because only one cable line goes into each residence, cable companies controlling those lines could have prevented local programming from entering a home.⁸¹ This, the FCC argued, would lead to the demise of local broadcast television.⁸² Turner Broadcasting Systems argued that the provisions were content-based and benefited local stations at Turner Broadcasting's expense.⁸³ Eventually, after rejecting that argument, developing a new level of scrutiny for content-neutral cable regulations, and remanding the case for more evidentiary support, the Court sided with the FCC and upheld the provisions in *Turner II*.⁸⁴

Turner I illustrates three important points about the constitutional framework outside the scarcity rationale. First, all media regulation must survive fairly rigorous scrutiny. The *Turner I* Court began its analysis by restating the proposition that content-based regulations are subject to strict scrutiny.⁸⁵ It then decided that content-neutral regulation of cable providers must be considered under less rigorous scrutiny, described by one commentator as "intermediate-plus."⁸⁶ While the Court explained that intermediate scrutiny, typically a very deferential test, governs content-neutral regulation of cable providers,⁸⁷ it also required that the FCC provide "substantial evidence" in support of any regulation.⁸⁸ Accordingly, cable networks have almost the same editorial control as newspapers, and even indirect regulations, such as ownership restrictions⁸⁹ and must-carry regulations, are inherently suspect. Any regulation will be invalidated absent plentiful justifying evidence.

The second point illustrated by *Turner I* is the dichotomy in treatment between speech regulation and economic regulation. Aside from the rare scarcity rationale cases, courts have only

79. 47 U.S.C. §§ 534(b)(1)(B), 534(h)(1)(A), 535(a) (2006).

80. *Id.*

81. *Turner I*, 512 U.S. at 646–47.

82. *Id.*

83. *Id.* at 646.

84. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185–89 (1997).

85. *Turner I*, 512 U.S. at 642.

86. Goodman, *supra* note 76, at 1219.

87. *Turner I*, 512 U.S. at 642.

88. *Id.* at 666.

89. *See infra* Part I.C.

upheld economic regulations of the media.⁹⁰ Professor Ellen Goodman has observed that the dichotomy between economic and speech regulation is so firmly entrenched that it predictably shapes current litigants' arguments around First Amendment rights and values.⁹¹

Finally, *Turner I* affirmed the First Amendment's commitment to preserving content diversity. The Supreme Court confirmed that the public's ability to understand its local community, to hear different voices, and to share different perspectives is vital to a well-functioning democracy.⁹²

B. The Political Lessons of the Fairness Doctrine's Demise

Political realities have played an important role in shaping media regulation. The demise of the Fairness Doctrine is a good example. Merely five years after *Red Lion* upheld the Fairness Doctrine in order to protect the public interest, the Court ignored the doctrine in *Tornillo*. Despite multiple briefs asking the Court to overturn *Red Lion*, the *Tornillo* Court reached a diametrically opposed outcome without even mentioning *Red Lion*.⁹³ *Red Lion* was rendered "at best a crippled precedent,"⁹⁴ and *Tornillo* gave the Reagan Administration's FCC enough ammunition to abolish the Fairness Doctrine in 1987.⁹⁵ The administration pointed to the invention of cable television and reasoned that it could not support the Doctrine; the scarcity rationale no longer applied because television no longer depended on spectrum licensing.⁹⁶ Congress's later efforts to legislate the Doctrine were vetoed by President Reagan.⁹⁷

In 2000, the personal attack rules, a "corollary to the [F]airness [D]octrine" mandating that broadcasters provide an opportunity for public figures attacked on the air to reply in kind, were also

90. See Goodman, *supra* note 76, at 1223–24. The line between economic and substantive regulation is not always clear. For example, ownership restrictions, while often considered economic in nature, limit the speech capabilities of broadcasters. The real lesson here is that when the Court wants to uphold a regulation, it will characterize it as economic. *Id.* at 1231.

91. *Id.*

92. *Turner I*, 512 U.S. at 663–64.

93. Jerome A. Barron, *Access to the Media—A Contemporary Appraisal*, 35 HOFSTRA L. REV. 937, 943 (2007).

94. Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 965 (1998).

95. FISS, *supra* note 72, at 59; Robinson, *supra* note 94, at 966.

96. FISS, *supra* note 72, at 59.

97. *Id.*

repealed.⁹⁸ Today, any mention of the Fairness Doctrine in Congress incites hysteria among conservatives.⁹⁹ The political lesson drawn from the history and current disfavor of the Fairness Doctrine and similar regulation is that any attempt to regulate speech directly is infeasible. Media regulation is viewed cynically as “government interference in order to prevent government interference,” rather than an attempt to foster a fuller, richer debate; free-market principles reign supreme. Subtler, weaker forms of regulation must suffice unless and until this attitude changes.

C. Current Media Regulation

While the current problems with journalism are uniformly recognized, considerably less agreement exists about the causes of those problems, and accordingly, the correct solutions. The political and constitutional constraints prevent any sweeping regulation, requiring reform to instead address very specific causes. The cause most cited by media critics is the consolidation of media ownership into corporate giants.¹⁰⁰ When news organizations were principally owned by individuals or small families, the primary goal of owners was not profits, but rather enhancing the outlet’s public-interest contributions.¹⁰¹ Owners of large corporations, however, tend to view their news outlets as profit-making divisions.¹⁰² So profit-centric is modern media that television networks demand individual news *programs* to be profitable.¹⁰³

Because many critics believe consolidation is a major problem, much current regulation deals with media ownership; the courts

98. Barron, *supra* note 92, at 943; *see also* Radio-Television News Dirs. Ass’n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000) (issuing a writ of mandamus requiring the FCC to repeal the personal attack rules because the Commission never provided adequate justification).

99. *See, e.g.*, Michael Calderone, Sen. Harkin: ‘We Need the Fairness Doctrine Back,’ POLITICO (Feb. 11, 2009, 09:08 AM), http://www.politico.com/blogs/michaelcalderone/0209/Sen_Harkin_We_need_the_Fairness_Doctrine_back_.html; Brian Maloney, *Dem Senator Outlines Vindictive Plan to Eliminate Talk Radio*, RADIO EQUALIZER (Oct. 22, 2008, 2:11 PM), <http://radioequalizer.blogspot.com/2008/10/new-mexico-democrat-will-push-to.html>. The hysteria is evident in the conservative characterizations within these blog posts, describing the Fairness Doctrine as a “vindictive plan to eliminate talk radio,” as well as other Senators’ responses. *See, e.g.*, Dan Riehl, *Boehner Challenges Bingaman on So-Called “Fairness” Doctrine*, RIEHL WORLD VIEW (Oct. 23, 2008, 04:31 PM), <http://www.riehlworldview.com/carnivorous-conservative/2008/10/boehner-challenges-bingaman-on-so-called-fairness-doctrine.html>.

100. *See, e.g.*, BAKER, *supra* note 25, at 1–4.

101. DOWNIE & KAISER, *supra* note 1, at 25–26.

102. Levi, *supra* note 11, at 1324–25.

103. *Id.* at 1325.

view such regulation as an acceptable economic restriction.¹⁰⁴ Another school of thought, however, questions whether media consolidation is a problem at all.¹⁰⁵ This school rejects regulation as a solution to any of media's failings. Proponents of this view believe that when media companies merge, they increase their ability to capitalize on economies of scale.¹⁰⁶ Thus, they argue, the companies could devote more resources to news and less to competition.¹⁰⁷ Even under this view, however, profit remains the companies' ultimate concern, and profit-maximizing measures are likely to trump better journalistic practices. It is because financial considerations drive editorial decision-making that an incentive-based approach is required.

The profit motive has created various problems for the press.¹⁰⁸ The focus on the bottom line has significantly reduced the resources spent on news gathering and reporting.¹⁰⁹ Cutbacks in staffing lead to larger workloads for the remaining reporters.¹¹⁰ Editors therefore seek out the easiest stories, and reporters tend to rely more on government press releases.¹¹¹ Investigative journalism, the most resource-intensive form of journalism, is often eliminated first.¹¹² Ultimately, cost reductions induced by unbridled concern for profit significantly undermine the press's ability to perform its watchdog duties.¹¹³

For electronic media in particular, the profit focus has discouraged controversial news unpopular with advertisers, and has instead incentivized programming directed at advertisers' preferred audience demographics.¹¹⁴ The news programs have cut the amount of news in each broadcast to allow for more advertising and have reduced coverage of government significantly.¹¹⁵ The

104. See generally BAKER, *supra* note 25 (exploring problems associated with concentrated media ownership).

105. See, e.g., THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 292-94 (1994); LUCAS A. POWE, JR., AMERICAN BROADCASTING AND THE FIRST AMENDMENT 205-07 (1987); Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003).

106. E.g., KRATTENMAKER & POWE, *supra* note 105, at 72-73, 215.

107. *Id.*

108. See ALEX S. JONES, LOSING THE NEWS 18 (2009) ("News organizations are trying, rationally, to save their business, but that is not the same thing as saving the news."). Levi discusses these problems with respect to electronic media, but her arguments apply more generally. Levi, *supra* note 11, at 1324-30.

109. Levi, *supra* note 11, at 1324-30.

110. *Id.* at 1326.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 1327.

115. *Id.*

“blurring of news and entertainment” has led to the airing of extreme viewpoints as a substitute for good, factual reporting.¹¹⁶ It is clear that the focus on profit has deleterious effects on the quality of the journalism.

II. GRADING THE NEWS: THE JOURNALISM RATINGS BOARD

The reform proposed in this Note accepts the premise that modern journalism is focused on the bottom line, and it attempts to use that fact to incentivize better journalism. Additionally, an incentive-based approach naturally straddles the divide between economic and substantive regulation, and thus is one of the strongest means of reform that will still be constitutional.¹¹⁷ To realign incentives, cable news profit must be tied to quality journalism. Generally, cable news profit is based on audience size.¹¹⁸ People primarily watch news to be better informed, and are more likely to watch news programs they feel most accurately report the news.¹¹⁹ Informing viewers of the news programs’ journalistic value enables consumers to make the most informed decision about which programs to watch. Knowing that this information will be instantaneously available to their viewers, cable news companies will have to compete on quality in order to retain a profitable market share. To facilitate such competition, the JRB will rate the journalistic value of cable news shows based upon well-founded principles of good journalism, publishing the ratings through reports and “news consumer guidelines” (NCGs).

This Part outlines parameters for the JRB’s implementation, fleshing out its two overarching goals: maximizing the usefulness of the ratings and minimizing the capacity for abuse. The metrics used to define good journalism must achieve a balance between simplicity and completeness, and between objective standards and expert opinion. This Part begins by choosing the rating system structure. Next, it discusses which metrics should be used and

116. *Id.*

117. *See supra* notes 89–92 and accompanying text.

118. Advertising sales drive profit. *See supra* notes 28–29 and accompanying text. A greater audience size means advertisers will pay more, creating more profit.

119. THE PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AMERICANS SPENDING MORE TIME FOLLOWING THE NEWS 53 (2010), *available at* <http://people-press.org/report/?pageid=1795> (All reasons listed in the chart except for “entertainment” constitute a general desire to be better informed. Aside from the two Comedy Central programs, which do not bill themselves as news, “entertainment” received at most an 18% share of reasons to consume news. This means, in the worst case—the morning shows—82% of people consume news to be better informed).

where they come from. Finally, this Part concludes with strategies to reduce the possibility for abuse of the ratings. Obviously, government control of media operation is inherently troubling, so having various checks to reduce the potential for abuse is crucial. Concerns about the selection and appointment process, term length, and partisan versus non-partisan components must be addressed in the creation of the JRB.

A. The Choice of Rating Systems

Rating systems are used in many different contexts to stimulate competition based on quality.¹²⁰ The federal government rates financial institutions¹²¹ and energy consumption in appliances.¹²² Zagat Survey and Consumer Reports rate restaurants¹²³ and products.¹²⁴ Since the advent of the internet, user ratings have become important parts of our collective decision-making processes.¹²⁵ So-called “democratic news aggregators”¹²⁶ reddit¹²⁷ and Digg¹²⁸ use ratings to determine what news links make it to the front page. Rating systems are being proposed to improve public agencies, too. Professor Heather Gerken has proposed the Democracy Index to rate state election systems and polling places so that state funding agencies and poll-watchers may know best where to focus their re-

120. See DAVID ROODMAN, BUILDING AND RUNNING AN EFFECTIVE POLICY INDEX: LESSONS FROM THE COMMITMENT TO DEVELOPMENT INDEX 1 (2006), available at http://www.cgdev.org/files/6661_file_Essay_2.pdf (“Indexes, which distill large amounts of information into a few numbers, appear to be gaining popularity among policy advocates and researchers.”).

121. *FDIC Mission, Vision, and Values*, FDIC, <http://fdic.gov/about/mission/index.html> (last updated May 4, 2009).

122. *About Energy Star*, ENERGY STAR, http://www.energystar.gov/index.cfm?c=about.ab_index (last visited Sept. 29, 2010).

123. *Overview*, ZAGAT SURVEY, <http://www.zagat.com/About/Index.aspx?menu=companyOverview> (last visited Sept. 29, 2010).

124. *Our Mission*, CONSUMER REPORTS, <http://www.consumerreports.org/cro/aboutus/mission/overview/index.htm> (last visited Sept. 29, 2010).

125. See, e.g., *Detailed Seller Ratings*, EBAY.COM, <http://pages.ebay.com/help/feedback/detailed-seller-ratings.html> (last visited Oct. 23, 2010); GLASSDOOR.COM, <http://www.glassdoor.com/index.htm> (last visited Oct. 23, 2010) (jobs); METACRITIC, <http://www.metacritic.com> (last visited Oct. 23, 2010) (movies, television, games, and music); ROTTEN TOMATOES, <http://www.rottentomatoes.com> (last visited Oct. 23, 2010) (movies); YELP, <http://yelp.com> (last visited Oct. 23, 2010) (restaurants and other businesses).

126. These are also called “social news aggregators.” See, e.g., Lauren Dugan, *3 Social News Aggregators You’ll Actually Use*, SOC. TIMES (July 14, 2010, 1:10 PM), <http://www.socialtimes.com/2010/07/3-social-news-aggregators-youll-actually-use/>.

127. *Frequently Asked Questions*, REDDIT, <http://www.reddit.com/help/faq#WhatIsreddit> (response to “What Is reddit?”) (last visited Sept. 29, 2010).

128. *What Is Digg?*, DIGG, <http://about.digg.com/about> (last visited Sept. 29, 2010).

sources on Election Day.¹²⁹ The Environmental Protection Index (EPI), championed by Professor Dan Esty, has changed environmental debates around the world.¹³⁰

Three broad questions arise when designing a rating system. First, what type it will be—centralized or decentralized, government or private? Second, on what will the ratings be based? Third, how will the ratings induce the desired effect? This Part addresses the first question, the second question is the subject of Part II.B, and the third is the subject of Part III.

There are many possible structures for rating systems. This Note characterizes them in two dimensions: “centralized” versus “decentralized” and public versus private. Centralized ratings are compiled by experts with the requisite credentials and disseminated to the public. Decentralized ratings are based on aggregated lay opinion. Due mostly to the scale made possible by internet, decentralized ratings have grown in popularity. Expert ratings persist, however, in book and movie reviews published by newspapers, ratings of financial institutions, the EPI, and Gerkin’s Democracy Index, for example. The public-private distinction rests on whether the government has sponsored the ratings, as in the FDIC ratings of financial institutions, or has not, as is true of the EPI.

In choosing between centralized and decentralized ratings, the determinate question is whether lay people possess the collective capability to generate useful ratings. Capability hinges on whether particular expertise is required in ratings, whether consumers possess all the information necessary to make proper judgments, and whether lay people encounter the phenomenon being rated regularly enough to generate statistically relevant pool of ratings. Today, decentralized ratings and paid critics exist side by side for consumer electronics,¹³¹ restaurants,¹³² and movies.¹³³ Other areas, however, do not lend themselves to decentralization. Banks do not willingly

129. See HEATHER K. GERKEN, *THE DEMOCRACY INDEX* 5 (2009).

130. Alan Bisbort, *New Index Grades Countries on Current Environmental Performance*, ENVIRONMENTAL YALE, Spring 2006, at 14, available at <http://environmental.yale.edu/topics/2136>; GERKEN, *supra*, note 129, at 55.

131. See, e.g., *Apple iPhone 4 Review*, CNET, <http://reviews.cnet.com/iphone-4-review?tag=contentMain;contentBody> (last visited Sept. 29, 2010) (showing examples of centralized and decentralized ratings together).

132. *Compare Dining & Wine*, N.Y. TIMES, <http://www.nytimes.com/pages/dining/index.html> (last visited Sept. 29, 2010) (displaying examples of centralized food critic ratings), with YELP, <http://www.yelp.com> (last visited Sept. 29, 2010) (displaying examples of decentralized food critic ratings from lay users).

133. *Compare* ROBEREBERT.COM, <http://rogerebert.suntimes.com> (last visited Sept. 29, 2010) (displaying examples of centralized movie ratings from professional film critic Roger Ebert), with YAHOO!MOVIES, <http://www.movies.yahoo.com> (displaying examples of decentralized movie ratings from lay users).

publish the information necessary to rate them, and most lay people would not understand it anyway.¹³⁴ Most lay people, having access only to localized anecdotes, also lack the ability to perform big-picture analysis and could not generate ratings like the EPI, which analyzes data from 136 countries.¹³⁵

The JRB's ratings must be centralized. The JRB is premised on the idea that the public needs a rating system to evaluate the quality of the news they are watching, precisely because it is so difficult to discern. Separating news from spin, and understanding what is *not* being reported is near impossible; the average American simply does not have the time or resources to investigate the veracity of every news report. Additionally, any lay rating of news would suffer from the same ideological separation affecting blogs: each side of a debate would merely decry the others' facts as spin and inaccurate reporting.¹³⁶ If lay people could, even in the aggregate, accurately report on the quality of the news, profit and quality journalism might already be aligned, making this proposal unnecessary.

Whether the centralized system should be public or private depends in part on the mechanics of how the ratings will be disseminated to the public. This question is the subject of Part III, but the conclusion is important for the purposes of rating system selection. If, as Part III argues, more than mere publication of the ratings is required to achieve the desired effect, the ratings will require the force of law and therefore some government involvement. In addition, it will be very easy for either side of a highly charged political environment to tarnish any private rating system with accusations of partisanship, regardless of the veracity of that charge. The possibility of built-in partisan dilution, transpar-

134. One need only look at all eleven sections and eight appendices of the Trust Examination Manual, just a part of the examination undertaken by the FDIC, to be convinced that the average financial consumer could not adequately evaluate the financial stability of banks. *Trust Examination Manual*, FDIC, <http://www.fdic.gov/regulations/examinations/trustmanual/index.html> (last updated May 12, 2005).

135. See YALE CTR. FOR ENVTL LAW AND POL'Y ET AL., 2010 ENVIRONMENTAL PERFORMANCE INDEX: EXECUTIVE SUMMARY (2010), available at http://www.ciesin.columbia.edu/repository/epi/data/2010EPI_summary.pdf.

136. See CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 71–75 (2001) (discussing the phenomenon of group polarization). A growing movement for pure fact-checking of the Sunday talk shows is actually testing this idea. Meet The Facts, a new website dedicated to fact-checking the show *Meet the Press*, has recently decided to try community based fact-checks. *Help Fact-Check the 5/2 Meet the Press*, MEET THE FACTS (May 2, 2010, 10:14 PM), <http://meetthefacts.com/2010/05/02/help-fact-check-the-5-2-meet-the-press/>. Fact-checking is receiving a positive response from the news consuming public. See, e.g., Greg Sargent, *Who Woulda Thunk It: Fact-Checking Is Popular!*, THE PLUM LINE (May 19, 2010, 12:53 PM), http://voices.washingtonpost.com/plum-line/2010/05/who_woulda_thunk_it_fact-check.html (discussing the popularity of an emerging fact-checking movement). However, there is more work to do than just basic fact-checking of Sunday shows.

ency, and public accountability take a great deal of force out of this criticism, and thus further support a government-run ratings board.

Once the federal government is involved, three choices present themselves as structural possibilities for the Board: an independent agency, a sub-agency within the FCC (which is itself independent), and a federal advisory committee under the FCC's control. Each possibility would function in similar fashion, publishing reports and inserting the NCGs into television programs.

Three considerations suggest a preference for a sub-agency within the FCC: partisanship in the appointment process, the ability to mandate the publication of the ratings and NCGs, and transparency and ethical requirements. First, avoiding partisan appointments to the JRB is important both to ensure as unbiased an evaluation of news as possible and to ensure the public *believes* that the evaluation is unbiased.¹³⁷ This consideration points away from a full agency, which would be subject to Presidential appointment and Senate confirmation.¹³⁸ However, neither an advisory committee nor a sub-agency within the FCC would have such a problem.¹³⁹

The second consideration—the ability to mandate publication—eliminates the federal advisory committee. An advisory committee has no authority to regulate and only gives advice. Because it can only give advice, there will necessarily be an extra step between the JRB's evaluation of the news program and the implementation of the grades by the FCC. This would allow a FCC opposed to implementation to ignore the JRB's recommendations. While the extra separation could ease constitutional concerns by further removing the power to rate the news from any editorial control, the JRB is constitutional even without this extra separation.¹⁴⁰

Finally, the third consideration—transparency and ethical requirements—also factors into public trust. This consideration,

137. Generally, aside from a few rare moments of uproar, the FCC is not seen by the public as intensely political. See Russell Newman & Ben Scott, *The Fight for the Future of Media*, in *THE FUTURE OF MEDIA*, *supra* note 26, at 21, 21.

138. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”).

139. *Id.* (“[B]ut the Congress may by Law vest Appointment of such inferior Officers, as they think proper . . . in the Heads of Departments.”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) (holding in part that the SEC's ability to appoint members of the Public Company Accounting Oversight Board does not violate the Appointments Clause and that “whether one is an ‘inferior’ officer depends on whether he has a superior”).

140. See *infra* Part IV.

however, does not point in any particular direction. The Federal Advisory Committee Act (FACA) mandates a high level of transparency and ethics enforcement.¹⁴¹ However, these standards can and should simply be adopted by Congress in the JRB's implementing legislation, regardless of the specific structure. Taking the three factors together, a sub-agency within the FCC is the best structure for the JRB.

B. Defining Good Journalism: Choosing the JRB's Metrics

What is "good" journalism? The question has no single answer. It is axiomatic that a journalist's first obligation is to the truth.¹⁴² However, beyond the basic phrase "getting the facts right," no one can seem to agree what "truth" means.¹⁴³ Is it really more or less "true" to write a news story more sympathetic to one side of a political debate, or to omit a minor, mundane detail due to a word limit? Because journalism is a profession dedicated to finding such an elusive concept as truth, defining the best practices is a challenge, with no "right" answer. However, as Professor Gerken put it when discussing her new rating system, "[a]s a practical matter, the only way to settle these debates is to settle them."¹⁴⁴ This sub-part discusses nine specific principles, which together function as one proposal to settle the debate. In reality, the debate will be settled when the legislation creating the JRB is passed and rehashed whenever the ratings are revised.

Scholars substantially agree on most principles of "good journalism."¹⁴⁵ Professor Jay Rosen, however, has proposed the most

141. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 495–500 (1997).

142. See BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM* 37 (2d ed. 2007).

143. *Id.*

144. GERKEN, *supra* note 129, at 96.

145. Professors Dan Gillmor and Jay Rosen have proposed similar criteria. See Dan Gillmor, *The End of Objectivity (Version 0.91)*, DAN GILLMOR ON GRASSROOTS JOURNALISM, ETC. (Jan. 20, 2005), http://dangillmor.typepad.com/dan_gillmor_on_grassroots/2005/01/the_end_of_obje.html; Jay Rosen, *Eight Key Terms for Determining Legitimacy in Journalism*, JAY ROSEN: PUBLIC NOTEBOOK (Mar. 1, 2010), <http://jayrosen.posterous.com/eight-key-terms-for-determining-legitimacy-in>. The main difference between Gillmor's and Rosen's proposals is that six of Rosen's principles cover the same ground as Gillmor's four, but, as Gillmor acknowledges, are better separated. See Gillmor, *supra* ("Maybe this is part of accuracy or thoroughness, but it seems to fit here, too."). Bill Kovach and Tom Rosenstiel's list of ten elements overlap with Rosen's list, though they are mostly focused on breaking down journalism's utility to self-governance, rather than the *act* of journalism. See KOVACH & ROSENSTIEL, *supra* note 142, at 5–6. Finally, Alex Jones provides a list of five principles, though it is not comprehensive enough. See JONES, *supra* note 108, at 43. The weakness in

comprehensive and manageable list of principles, making it the most appropriate basis for the JRB's definition.¹⁴⁶ Rosen's eight principles include veracity, accuracy, transparency, intellectual honesty, inquiry, polyphonicity, currency, and utility.¹⁴⁷

"Veracity" is the standard call for journalists to tell the whole truth even when unpopular.¹⁴⁸ Rosen notes that this is the main principle from which all others are derived, which fits with his view that journalistic authority is derived not from credentials, but from the ability to say, "I was there, you weren't, let me tell you about it."¹⁴⁹ The second principle, "accuracy," is again uncontroversial, referring to getting the facts right.¹⁵⁰

"Transparency" and "intellectual honesty," Rosen's third and fourth principles, take the place of the traditional idea of "objectivity."¹⁵¹ Journalism is undergoing a sea change in its understanding of objectivity.¹⁵² The idea itself is a recent construct, becoming the norm around the same time as codes of ethics in the 1920s, when journalism was trying to become a more respected profession.¹⁵³ Today, however, the meaning of objectivity has been corrupted.¹⁵⁴ In its proper meaning, objectivity is a method akin to the scientific method, a way of looking at the facts and then coming to a conclusion.¹⁵⁵ The *journalist* was never supposed to be objective or devoid of opinion.¹⁵⁶ However, that is how the word is usually understood today.

The result of misunderstood objectivity is "he-said/she-said" journalism, where "[n]o real attempt is made to assess clashing truth claims in the story, even though they are in some sense the

Jones' proposal, as well as Kovach and Rosenstiel's, is the reliance on involved definitions of objectivity. See *infra* text accompanying notes 154–155. Because a desire for objectivity is assumed, some of the explicit principles advocated by Gillmor and Rosen are left out. Kovach, Rosenstiel and Jones would probably agree that if journalists cannot be "objective," Rosen's and Gillmor's proposals are the next best thing. See KOVACH AND ROSENSTIEL, *supra* note 142, at 81 (citing Gillmor, *supra*).

146. Rosen, *supra* note 145.

147. *Id.*

148. *Id.*

149. Jay Rosen, *Foreword* to ETHAN CASEY, 09/11 8:48 AM: DOCUMENTING AMERICA'S GREATEST TRAGEDY, at v, vii (2001).

150. Rosen, *supra* note 145.

151. Gillmor, *supra* note 145; Rosen, *supra* note 145.

152. JONES, *supra* note 108, at 82 ("[T]he concept that news should be objective is increasingly treated within the profession as old-fashion and outdated.").

153. *Id.* at 87.

154. KOVACH & ROSENSTIEL, *supra* note 142, at 81.

155. See *id.* at 81–82.

156. *Id.* at 83.

reason for the story.”¹⁵⁷ The “symmetry . . . puts the reporter in the middle between polarized extremes,” purportedly achieving objectivity by not taking a side.¹⁵⁸ In “he-said/she-said” reporting, stories put forth exactly two points of view and no more.¹⁵⁹ Giving voice to the “other side” has its roots in methodological objectivity, but should apply only to claims that were “not verifiable by direct observation.”¹⁶⁰ However, in “he-said/she-said” reporting, both sides will be treated as equally credible even where one side is actually lying outright about a verifiable fact.¹⁶¹ Moreover, there are often *more* than two points of view on an issue, and any view outside of the two establishment views (in political reporting, the views of Republicans and Democrats) are ignored.¹⁶² This is the “discredited face of objectivity.”¹⁶³

Many journalists recognize that no human is capable of observing “objective truth,” as the corrupted definition of objectivity requires.¹⁶⁴ Accordingly, Rosen replaces objectivity with the more concrete and accessible principles of “transparency” and “intellectual honesty.” Transparency means knowing where journalists are “coming from and what [their] stake is in the matter under review,” and intellectual honesty means relaying information in good faith, being sure to accurately paraphrase statements and not to distort meaning.¹⁶⁵ Even Professor Alex Jones, who believes objectivity is still essential, states that “authentic objectivity” requires “playing it straight” with sources, rather than “creat[ing] the illusion of fairness” by ignoring the outcome “when the weight of truth is clear.”¹⁶⁶

Furthermore, as a practical matter, credible objectivity is difficult to maintain. Jones is correct to point out that the appearance of objectivity has more persuasive value than even transparent subjective journalism.¹⁶⁷ However, once the perception of objectivity is

157. Jay Rosen, *He Said, She Said Journalism: Lame Formula in the Land of the Active User*, PRESSTHINK (Apr. 12, 2009, 11:46 AM), http://archive.pressthink.org/2009/04/12/hesaid_shesaid.html.

158. *Id.*

159. PHILIP MEYER, *ETHICAL JOURNALISM* 51 (1987).

160. *Id.*

161. “*You Can’t Just Say the President Is Lying*”: *The Limits of Honesty in the Mainstream Press*, FAIR (Jan.–Feb. 2005), <http://www.fair.org/index.php?page=2481>.

162. MEYER, *supra* note 159, at 51.

163. JONES, *supra* note 108, at 83.

164. *Id.*

165. Rosen, *supra* note 145. Gillmor suggests transparency and “fairness,” though his use of the word “fairness” is broader, encompassing both intellectual honesty and Rosen’s “veracity.” Gillmor, *supra* note 145. Distinguishing veracity from intellectual honesty, as Rosen does, provides clarity.

166. JONES, *supra* note 108, at 82–83.

167. *Id.* at 94.

undermined, “objective” journalism loses all credibility. This is where the news is today, as Jones acknowledges, noting that news consumers cry “political bias” in response to any disagreement with or simple error in a news story.¹⁶⁸ The appearance of objectivity, therefore, is an unstable all-or-nothing proposition. Transparency does not suffer from the same difficulty.

Rosen’s next two principles are “inquiry” and “polyphonicity.”¹⁶⁹ Inquiry refers to the “drive to find out, to inquire and reveal more than what lies on the surface.”¹⁷⁰ Journalism fails if it merely repeats claims of officials, be they of government or of public relations. The journalistic commitment to inquiry is most familiarly embodied in the exposé. Rosen uses polyphonicity to mean presenting a “plurality of voices.”¹⁷¹ This principle is important enough that, according to the Supreme Court, it has “long been a basic tenet of national communications policy.”¹⁷² Polyphonicity is also necessary to obtain perspectives from the different cross-sections of society, rather than just the affluent, white, male perspective that has historically dominated the media.¹⁷³

Rosen’s final two principles, “currency” and “utility,” capture the canonical definition of newsworthiness: that which is “timely and relevant.” Currency means “keep[ing] us up to date with a shifting world,” and utility refers to the information’s usefulness to the public.¹⁷⁴ Neither of these principles is controversial. Most of the ten “elements of journalism” central to Bill Kovach and Tom Rosenstiel’s book by the same name essentially measure utility. Journalism’s “first loyalty,” they write, “is to citizens.”¹⁷⁵ News must “provide people with the information they need to be free and self-governing.”¹⁷⁶

All of Rosen’s principles are sound, but one needs to be added in order to complete the set: source transparency. Rosen discusses transparency as disclosing the *journalist’s* perspective, but source transparency is also necessary. As Gillmor has argued, source transparency requires a link between reporting and source

168. *Id.* at 26–27, 115.

169. Gillmor would agree with both these principles, as the two combine to form Gillmor’s concept of “thoroughness.” Gillmor, *supra* note 145.

170. Rosen, *supra* note 145.

171. *Id.*

172. *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion), *quoted in* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663–64 (1994).

173. CLINT C. WILSON II ET AL., *RACISM, SEXISM AND THE MEDIA: THE RISE OF CLASS COMMUNICATION IN MULTICULTURAL AMERICA* 134 (3d. ed. 2003).

174. Rosen, *supra* note 145.

175. KOVACH & ROSENSTIEL, *supra* note 142, at 12.

176. *Id.*

material.¹⁷⁷ The most common criticism of today's media is wanton grants of anonymity to sources.¹⁷⁸ Sources need to be identified and have their biases aired for exactly the same reasons that journalists do: news consumers must be able to decide for themselves how much to credit sources. There is value to anonymous reporting,¹⁷⁹ but sources should be granted anonymity only for extremely important information, with good reason, and as a last resort.¹⁸⁰ Finding a different source to go on the record is preferred.¹⁸¹ This is a question of reliability, operating very similarly to hearsay evidence rules; the journalist is the witness, and unless the third-party source can be properly examined, his testimony cannot be trusted.

One obvious question about the principles discussed is why they are not based on ethics codes, particularly given that ethics codes are well accepted among establishment journalists.¹⁸² There are three reasons for this. First, the codes and the idea of objectivity came into prominence around the same time, and are inextricably intertwined.¹⁸³ To reject objectivity is to reject much of the codes. Second, a great deal of the codes' content is "abstract in character

177. Gillmor, *supra* note 145. Gillmor meant this literally in the online context, as in providing a hyperlink.

178. See JONES, *supra* note 108, at 82 (stating that journalists should betray their sources more); Alicia C. Shepard, *Anonymous Sources*, AM. JOURNALISM REV., Dec. 1994, at 20; Andrew Alexander, *Ignoring the Rules on Anonymous Sources*, WASH. POST, August 16, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/14/AR2009081401928.html>. But see Tom Rosenstiel, *A Downward Trend in Use of Anonymous Sources: Surveys of Journalists and Public Opinion Place the use and Need for Anonymous Sources in a Broader Context*, NIEMAN REP., Summer 2005, at 38, 38, available at <http://www.nieman.harvard.edu/reportsitem.aspx?id=101105> ("In cable, which is a more extemporaneous medium with very few news packages and most of the time is spent in live interviews, only nine percent of the stories have anonymous sources."). Rosenstiel, however, does not believe this is a "reflection on more transparency, necessarily, as much as [a result of] the kind of storytelling." Transcript of Fifth Annual Hurley Symposium, MO. SCH. OF JOURNALISM (Mar. 17, 2005), <http://journalism.missouri.edu/news/2005/related/03-17-hurley-transcript.html> (remarks of Tom Rosenstiel). Additionally, even if cable news utilizes fewer anonymous sources than print, any grant of anonymity with no good basis is poor practice.

179. See CECILIA FRIEND & JANE B. SINGER, ONLINE JOURNALISM ETHICS 90–91 (2007).

180. See HOMER L. HALL & LOGAN H. AIMONE, HIGH SCHOOL JOURNALISM 82 (5th prtg. 2009). Good reasons potentially include protecting the source from physical, psychological, or professional harm; protecting the source's relatives; and protecting the source's privacy or reputation if needed. *Id.*

181. See, e.g., Don Ohlmeyer, *Root of All Evil?*, ESPN (May 25, 2010), http://sports.espn.go.com/espn/columns/story?columnist=ohlmeyer_don&id=5220492 ("In theory, anonymous sources are a last resort. Reporters are challenged to get people to speak on the record, but sometimes that's just not possible. If the source remains unnamed, it must be a trade-off for candor and quality of information.").

182. Elliot D. Cohen, *Codes of Journalism Ethics*, in JOURNALISM ETHICS 139, 139–40 (Elliot D. Cohen & Deni Elliott eds., 1997).

183. JONES, *supra* note 108, at 86.

and prescribe[s] positive, aspirational goals (ideals) rather than well-defined (negative) requirements.”¹⁸⁴ Thus, even when they are correct, they are more difficult to apply than the principles discussed here. Third, the codes are not written from normative principles, but rather stem from specific organizations’ past mistakes.¹⁸⁵ Therefore, it is difficult to tell if a particular code is silent on an issue because its authors disagree with other codes, or if the organization writing the code has simply not encountered the problem.

Rather than journalism ethics codes, the JRB’s metrics should be based on the principles discussed in this sub-part. The principles are undoubtedly all important, but the precise weighting and the specific grading scheme are beyond the scope of this Note. The question of how often the ratings should be refreshed or how deep the analysis will go are similarly important, but also beyond the scope of this Note.

C. Minimizing the Dangers

The dangers inherent in a government body having any control over journalism are too obvious to miss. The risks can be divided into two categories: (1) the standard skepticism about regulatory agencies in general, and (2) particularly worrisome for the JRB, the risks of partisan influence. These dangers cannot be completely neutralized, but the important question is whether they can be minimized to the point where this proposal achieves a result better than the status quo. This sub-part argues that the dangers can be diluted enough, and the perils of inaction are grave enough, that creating the JRB is justified.

1. General Criticisms of Regulation

There are many critics of regulation as a governing principle. General criticisms of administrative agencies often revolve around regulatory capture, a process in which the regulated industry inserts friendly regulators into the agency or otherwise induces industry-friendly policies.¹⁸⁶ However, it is unclear that regulatory

184. Cohen, *supra* note 182, at 140.

185. MEYER, *supra* note 159, at 19 (“In all professions, codes tend to follow the form of past abuses.”).

186. STEVEN P. CROLEY, REGULATION AND PUBLIC INTERESTS 26 (2008).

capture as an independent theory is as strong as its proponents suggest.¹⁸⁷

The prevailing view of regulation is public choice theory, the theory that regulatory capture is inevitable because regulators are only motivated by their own selfish needs.¹⁸⁸ Because industry interest groups finance the legislators who control the budgets and existence of the regulatory agencies, regulators have an incentive to align their agency with industry interests to retain their jobs.¹⁸⁹ In addition, because industry companies may hire regulators after their government service—the so-called “revolving door” problem—regulators have an incentive to adopt policies favorable to their future suitors.¹⁹⁰ Either way, the theory goes, regulator self-interest ensures industry capture of the agency.

This theory, however, has both empirical and conceptual flaws. For example, evidence shows that many administrators are motivated by a philosophical commitment to the mission of the agency, and are not motivated by pure self-interest.¹⁹¹ Accordingly, a guarantee of regulatory capture appears overly cynical.¹⁹² However, even accepting *arguendo* that industry interest groups control agencies, there also exists well-organized “public interest” lobbying on behalf of the public.¹⁹³ When industry and public interest groups conflict (or industry groups conflict with each other), one group’s view *must* be better for society than the other.¹⁹⁴ Therefore, regulators, principled or not, have more political cover and incentive to choose the option better for the public.¹⁹⁵

While public choice theory seems too simple a theory of regulatory ineffectiveness, there may exist other problems with administrative agencies. Nevertheless, the public has decided to live with them; agencies continue to make up a large part of the federal government. Therefore, to the extent regulatory capture or any other problems exist, it is hard to see why they pose any greater threat to the JRB than to other agencies.

187. *Id.* at 14–25, 53–76.

188. *Id.* at 26–27.

189. *Id.* at 17.

190. *Id.* at 49.

191. *Id.* at 44–47, 49.

192. *Id.* at 49–51.

193. *Id.* at 39.

194. *Id.*

195. *Id.*

2. Removal of Partisan Influence

The dangers that pertain more specifically to the JRB lie in partisan influence on the Board or individual viewpoint censorship on a single issue. With most regulatory agencies, we accept a change in agency philosophy as a consequence of elections. Given the media's ability to affect public opinion, however, it is crucial that JRB member appointments, reports, and NCGs are not made on a partisan basis, and that there is no viewpoint censorship. There must be structural safeguards built into the JRB to prevent amplification of a partisan redefinition of "news."

Congress can embed transparency and independence requirements into the JRB's enacting legislation. The powers and responsibilities of an agency "are limited . . . chiefly by congressional imagination,"¹⁹⁶ and imposing strict transparency and ethics requirements is certainly permitted.¹⁹⁷ Though the JRB is a sub-agency, and not a federal advisory committee, FACA provides a useful guide to transparency and independence.¹⁹⁸

FACA requires all committee members to be selected in compliance with the Ethics in Government Act of 1978 (EGA),¹⁹⁹ which mandates that before appointing a member, a committee must check for conflicts of interest and activity as a foreign principal,²⁰⁰ and weigh them against the value of the individual's service.²⁰¹ The particular degree to which agencies must enforce these ethics mandates is flexible. As Professor Steven Croley writes, "[w]hether advisory-committee members should be required to file conflict-of-interest reports which disclose their financial interest, and, *a fortiori*, whether members' reports should be available to the public, requires balancing administrative efficiency against openness and even-handedness."²⁰² With regard to the JRB, public trust is the most important factor, for without it the ratings will be ignored and the JRB will have no effect. Therefore, the selection process should

196. JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 15 (6th ed. 2009).

197. There is, however, a limit to independence: inferior officers cannot be solely beholden to an already independent agency. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010).

198. *See generally* Croley & Funk, *supra* note 141, at 495–500.

199. Ethics in Government Act of 1978 § 402, 5 U.S.C. App. § 402 (2006).

200. Defined as a foreign government or political party, a foreign citizen not domiciled in the United States, a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country. *See* 22 U.S.C. § 611(b) (2006).

201. Croley & Funk, *supra* note 141, at 496–97.

202. *Id.* at 498–99.

adhere to the highest standards of ethics. The legislation creating the JRB should specify such measures.

Additionally, FACA creates selection criteria for the committee as a whole, namely, “fair balance.”²⁰³ Once again, this is ill-defined, but advisory groups often try to keep themselves balanced on a wide variety of criteria, including among other things, political party, race, age, religion, ethnic, gender, and geography, as well as representatives of industry and public interest groups.²⁰⁴ This aligns exactly with the goals of the JRB and should be codified into its enacting legislation.

Congress must also directly insert transparency requirements into the law creating the JRB. Transparency would involve recording most or all meetings, having them open to the public and providing transcripts online, and allowing public access to all reports, including a write-up of the reasoning behind all the grades. These transparency requirements would allow private watchdog groups to keep the JRB honest.

The composition of the Board itself is a more difficult question to answer. Should it be bipartisan, nonpartisan, or some combination? How long should the terms be for JRB members? Are there other employees and if so, what are their functions? Who will be appointed? Many of these details, while not unimportant, will depend on budget and the form of the final legislation. But there are lessons to be taken from current independent administrative agencies.

The JRB should be based on a bipartisan model, similar to the Federal Election Commission (FEC) and the Securities and Exchange Commission (SEC). And while there are benefits to an even or odd number of voting Board members—the FEC has six²⁰⁵ and the SEC five,²⁰⁶ and in neither agency can more than three be of the same party²⁰⁷—the JRB must have an odd number of board members. The FEC’s six-member structure was implemented so that one political party could not launch an investigation on another without at least one vote from the other side.²⁰⁸ However, deadlocks, while not common, have affected important cases,²⁰⁹

203. *Id.* at 499.

204. *Id.* at 500.

205. Federal Election Campaign Act of 1971 § 307, 2 U.S.C. § 437c(a)(2)(A) (2006).

206. Securities Exchange Act of 1934 § 4, 15 U.S.C. § 78d(a) (2006).

207. 2 U.S.C. § 437c(a)(2)(A).

208. No independent or member of a third party has ever been appointed. Bradley A. Smith & Stephen M. Hoerstring, *A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission*, 1 ELECTION L.J. 145, 158 n.97 (2002).

209. See Vassia Gueorguieva, *Election Administration Bodies and Implementation Tools*, 13 GEO. PUB. POL’Y REV. 95, 101–02 (2008).

and are a source of criticism of the FEC.²¹⁰ While prohibiting one political party from attacking another is a worthy consideration, the JRB's functionality is very different from the FEC. Because the FEC responds to complaints, non-action—essentially equivalent to dismissing the claim—is a permissible outcome. But because the JRB issues regular reports based on current information, lack of action does not approximate a permissible outcome; the only permissible outcome is generating a current report. Accordingly, there must be an odd number of members despite the risk of partisan attack. Other partisan safeguards will protect the agency against partisan takeover; equal representation need not accomplish non-partisanship itself.

Although a bipartisan JRB could look more favorably upon reporting that dismisses third-party political candidates, that criticism does not fatally discredit a bipartisan JRB. The current dominance of the two political parties is not in question, so bipartisanship is the best approximation of non-partisanship.²¹¹ Additionally, all suspicions of administrator partisan motivation implicitly rely on the premise that regulators are selfishly motivated, a notion not universally agreed upon.²¹² Accordingly, bipartisan membership would best protect against partisan capture.

The JRB should also emulate agencies that have used longer, rotating terms to alleviate partisanship. For example, the SEC's five members are appointed in staggered five-year terms so that one will be replaced each year. This ensures that in a single presidential term, at least one commissioner will be held over. The Federal Reserve Board of Governors (The Fed) takes this a step further. Its seven members are appointed to fourteen-year terms, which expire every two years.²¹³ Absent premature vacancies, a single sitting president may replace at most half of The Fed, severely limiting possibilities for full partisan takeover. Moreover, The Fed's board members cannot be re-nominated, further insulating them from the whims of any given administration.²¹⁴ Given the importance of removing partisanship in the context of the JRB, these examples should be followed, though the particulars of term length are beyond the scope of this Note.

Finally, there must be a robust appeals process. After the FCC adopts the grades, a ruling should be administratively

210. See, e.g., Smith & Hoersting, *supra* note 208, at 158.

211. Another option could be a nine-person board with three members from both the Republican and Democratic parties, and three appointed by outside groups.

212. CROLEY, *supra* note 186, at 26–27.

213. Federal Reserve Act § 10, 12 U.S.C. § 242 (2006).

214. *Id.*

challengeable as unfairly content-based or for other reasons. This would further guard against ideological corruption of the JRB.

In sum, there are ways of addressing the threat of partisanship within the JRB. By incorporating the general structure advocated above and ensuring transparency, the JRB can reliably serve its function of improving cable news over today's status quo.

III. NEWS CONSUMER GUIDELINES

The JRB has, by design, only a limited capacity to affect journalism. Because any direct control over content would be unconstitutional, a market-based approach is required. Markets rely on complete information reaching consumers, and thus the JRB's potential will be reached only by including a mechanism for delivering the different ratings. This Part proposes that Congress give the FCC the power to require cable news programs to provide "news consumer guidelines" (NCGs) based on regular reports issued by the JRB.

The appearance of the NCGs will closely mirror parental guidelines in entertainment programs.²¹⁵ Parental guidelines are unobtrusive, brief, and easy to ignore, but provide important information about the program the viewer is about to watch. The rating appears in a small black box on the upper-left corner of the screen for fifteen seconds at the start of the program and often upon return from each commercial break.²¹⁶ Because the ratings are not mandated by law,²¹⁷ there is significant variation in style and length between networks.²¹⁸ However, the different networks' parental guidelines all provide the same basic information.²¹⁹ The NCGs would adopt a similar scheme—fifteen seconds at the start of each half hour and at least a brief appearance after each commercial break.

The NCGs should also include sub-ratings because a simple letter grade is not informative enough. Two possibilities for the sub-ratings' presentation are either a format similar to that used in

215. See generally *About the TV Ratings and the V-Chip*, THE TV PARENTAL GUIDELINES, <http://www.tvguidelines.org/> (last visited Sept. 3, 2010).

216. *TV Parental Guidelines: Design Variations*, SERVING HIST., http://www.servinghistory.com/topics/TV_Parental_Guidelines::sub::Design_Variations (last visited Sept. 3, 2010) [hereinafter *Design Variations*].

217. *TV Parental Guidelines*, SERVING HIST., http://www.servinghistory.com/topics/TV_Parental_Guidelines (last visited Sept. 3, 2010).

218. *Id.*

219. *Design Variations*, *supra* note 216.

parental guidelines²²⁰ or a color-coding scheme. Parental guidelines include a letter to indicate the various elements that make up the rating.²²¹ For example, if intense violence is an element in a TV-14 rating, a small “V” appears underneath the “TV-14” rating.²²² If violence is not a factor or only a moderate factor, no “V” appears.²²³ Similarly, the different JRB metrics should be labeled with a letter and posted underneath the JRB assigned grade if the metrics contribute to a reduction in the grade. The color-coding option would amount to presenting all the metrics and coloring them green and red for positive and negative contributions. Either way, the information is disseminated in an easily consumable form.

Packaging the ratings with the news programs themselves is important. Media watchdog groups currently publish a great deal of media criticism and ratings for viewers who seek it.²²⁴ However, most news consumers do not know to look for that information, so providing it in a form that does not require extra effort is crucial. This same concern was the impetus for congressionally imposed disclosures on drugs and other consumer products. The health risks associated with cigarettes were known before Congress placed a Surgeon General’s warning on cigarette packets and advertisements.²²⁵ Rather than leave the consumers to access and assess that information themselves, Congress deemed it necessary to include a Surgeon General’s warning to ensure an “adequately informed” public.²²⁶

A more recent example illustrating the necessity of labeling is New York City’s law mandating disclosure of calorie contents of food in fast food restaurants.²²⁷ The FDA already required fast food restaurants to have the information available,²²⁸ but New York City

220. See, e.g., *id.*

221. *Understanding the TV Ratings*, THE TV PARENTAL GUIDELINES, <http://www.tvguidelines.org/ratings.htm> (last visited Sept. 3, 2010).

222. *Id.*

223. See *id.*

224. See Open Directory Project Watchdogs, DMOZ, <http://www.dmoz.org/News/Media/Watchdogs/> (last updated Mar. 24, 2010) (listing thirty-two watchdog groups and linking to their websites).

225. Mark Parascandola, *Public Health Then and Now: Cigarettes and the US Public Health Service in the 1950s*, 91 AM. J. PUB. HEALTH 196, 196–97 (2001) (describing the early skepticism and eventual acceptance of the health risks of cigarettes by the late 1950s). The Surgeon General’s warning was not implemented until 1965. See Federal Cigarette Labeling and Advertising Act § 2, Pub. L. No. 89–92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. § 1331(1) (2006)).

226. Federal Cigarette Labeling and Advertising Act § 2.

227. N.Y.C., N.Y., 24 HEALTH CODE § 81.50 (West 2010) (section of New York City Health Code requiring posting of calorie information).

228. See *Fast Food Nutrition Facts*, BUZZLE.COM, <http://www.buzzle.com/articles/fast-food-nutrition-facts.html> (last visited Sept. 29, 2010).

determined that mere availability of the information was not enough.²²⁹ Three studies have attempted to discern the effects of the law, and all three have determined that the information has changed consumers' behavior at least to a minor degree.²³⁰ Similarly, the NCGs will have an effect on consumer behavior, and it seems very unlikely that the JRB's market-based approach would be as effective without them.

IV. THE JOURNALISM RATINGS BOARD AND THE CONSTITUTION

As First Amendment doctrine stands, most forms of media reform will be constitutionally suspect. Accordingly, this Note must consider whether the JRB and its authority to embed the NCGs in news programs are constitutional. The First Amendment question must be broken down into three separate parts: 1) whether the JRB's mandate is content-discriminatory or content-neutral; 2) whether the JRB suppresses speech in such a way as to violate intermediate scrutiny; and 3) whether the NCGs amount to unconstitutional compelled speech. This Section argues that the JRB's mandate is content-neutral and does not suppress speech; accordingly, the NCGs are constitutional.

Without the NCGs, the proposal would not pose any First Amendment difficulty, as the government is free to opine publicly on a subject. Additionally, as this Part will argue, assuming their content-neutrality, the NCGs are easy to recognize as constitutional by analogy to required posting of nutrition information and surgeon general's warnings on cigarette packaging. Therefore, the difficult First Amendment question lies in the combination—if the NCGs are based on disapproval of particular content or viewpoints, the analogy to nutrition information breaks down. Once the JRB ratings are deemed content-neutral, a regulation based on them will receive intermediate scrutiny, and thus must be shown not to suppress speech or unduly infringe on other First Amendment rights. Accordingly, this Part first discusses the content-neutrality of the JRB to assess the difficult question. It then demonstrates that

229. N.Y.C., N.Y., 24 R.C.N.Y. § 81.50.

230. Marion Nestle, *New York's Calorie Counts: A Good National Model*, NEWSWEEK, Apr. 30, 2010, <http://www.newsweek.com/id/237199>. The varying degrees of effectiveness are probably a result of unintended consequences such as consumers trying to get the most calorie value for their money. No similar "best value for the money" principle would apply in the cable news context.

the JRB does not suppress speech and content-neutral NCGs are indeed constitutional.

A. The JRB: A Content-Based Yet Content Neutral Policy

The first constitutional question is whether the JRB's ratings are "content-based," as the term is used in *Turner I*.²³¹ Content-based policies are generally subject to strict scrutiny, and are invariably struck down.²³² However, the law surrounding content-based and content-neutral policies is far from clear.²³³ In order to understand the meaning of the phrase "content-based," it is important to first understand the hierarchy of viewpoint and content discrimination in First Amendment doctrine.

A speech regulation occupies one of three spaces: viewpoint-discriminatory, content-discriminatory, or content-neutral. A viewpoint-discriminatory law bases its regulation on approval of a particular message. ("You are permitted to speak only if you say that abortion is wrong.") Viewpoint-discriminatory policies are inherently problematic and will always be subject to strict scrutiny.²³⁴ Content-discriminatory policies base their regulation on whether a topic is discussed at all. ("You may speak as long as you do not mention abortion.") Content-discriminatory policies tend to receive strict scrutiny except in certain limited cases when speech is completely unprotected.²³⁵ Finally, content-neutral policies do not depend on the speech content in any way. ("You may speak in the town hall after 8PM.") These regulations are subject to intermediate scrutiny, a level of scrutiny between strict scrutiny and rational basis review.²³⁶

The *Turner I* Court used the term "content-based" in a way that most closely resembles either viewpoint- or content-discrimination:

231. *Turner Broad. Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 642 (1994).

232. *E.g.*, LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, *FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION* 33 (2004).

233. *Id.* at 35.

234. *E.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) ("Viewpoint discrimination is censorship in its purest form . . ." (internal quotation marks omitted)).

235. *E.g.*, *R.A.V.*, 505 U.S. at 390.

236. *Turner I*, 512 U.S. at 662. Content-neutral regulations like this may alternatively receive no scrutiny at all if they are unrelated to speech. *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986) (holding that the First Amendment was not implicated where an anarchist bookstore was closed under a law banning public sex acts rather than for speech-related reasons).

[T]he “principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.”

As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based. By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral.²³⁷

The first part of the Court’s analysis mistakenly equates content-based regulation with viewpoint discrimination, but the phrase “without reference to the ideas or views expressed,” goes beyond mere viewpoint neutrality to content neutrality.²³⁸ Therefore, the ultimate effect of *Turner I* on the doctrine is unclear.

However, it is clear that mere *examination* of content in decision-making does not render a policy “content-based.” In *Turner I*, Congress specifically justified the must-carry provisions at issue by reference to the importance of the local content available in broadcast programming.²³⁹ The Court flatly rejected the proposition that this justification renders the provisions content-based.²⁴⁰ Similarly, policies encouraging viewpoint diversity require some content-based analysis.²⁴¹ It would make no sense for all such policies to be immediately suspect, especially considering the Court has indicated that viewpoint diversity is itself an important First Amendment interest.²⁴²

Because the JRB evaluates news programs based on the quality of the news, the creation of the JRB is a content-based policy in the typical linguistic sense. But the JRB is not legally content-based. The JRB’s ratings are similar to the must-carry provisions in *Turner I* in that they do examine the content. However, just as the local

237. *Turner I*, 512 U.S. at 642–43 (alteration in original) (citations omitted) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

238. Justice O’Connor pointed this out in her *Turner II* dissent, stating that the questions of content and viewpoint neutrality are mutually independent, and claiming that the Court was improperly confusing the two. *Turner Broad. Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180, 257 (1997) (O’Connor, J., dissenting). The Court has on numerous other occasions considered viewpoint and content neutrality as separate issues. *See, e.g.*, *Virginia v. Black*, 538 U.S. 343, 361–62 (2003); *R.A.V.*, 505 U.S. at 388–90.

239. *Turner I*, 512 U.S. at 648.

240. *Id.* at 648–49.

241. *See* LIDSKY & WRIGHT, *supra* note 232, at 37.

242. *Turner I*, 512 U.S. at 663; *see supra* note 69 and text accompanying *supra* note 61.

nature of the programming was irrelevant to the content neutrality analysis, the metrics upon which the JRB bases its decisions do not render it content-based; ratings will not be based on whether or not certain individual topics are carried. The JRB will focus on content only in the limited context of evaluation according to the various metrics (e.g., veracity and accuracy). While this is an aspect of content, it is more appropriately termed “meta-content.”

While the term “meta-content” does not appear in First Amendment case law, it accurately describes several different occurrences. For example, aesthetics are a permissible reason for zoning regulations.²⁴³ So while a city may not ban “For Sale” signs, a city may ban *all* signs.²⁴⁴ However, few people would argue that in the context of the art world or how one dresses each day, aesthetics are not protected speech.

Defamation law provides another example, in that “truth is an absolute defense.”²⁴⁵ In this context it is clear that truth or falsehood is not merely a content-laden value judgment, but rather something that can remove itself from the process. In a libel action, other forms of content determine things like damages, but truth is a threshold question that disposes of the matter entirely.²⁴⁶ The JRB’s approval of the particular messages will not influence the grades they receive, except that the JRB will disapprove of deception and intentional distortion of debate. As defamation law makes clear, a law that reacts to the veracity of claims is a permissible form of content-based regulation, specifically, meta-content-based, and is distinguishable from viewpoint or content discrimination.²⁴⁷

Because the JRB’s ratings are neither viewpoint- nor content-discriminatory, they are appropriately considered content-neutral and must survive intermediate scrutiny.²⁴⁸ Intermediate scrutiny is satisfied if the law “furthers an important or substantial governmental interest; if the governmental interest is unrelated to the

243. *Linmark Associates v. Willingboro*, 431 U.S. 85, 93 (“The township has not prohibited all lawn signs or all lawn signs of a particular size or shape in order to promote aesthetic values or any other value unrelated to the suppression of free expression.” (internal quotation marks omitted)).

244. *Id.*

245. *See, e.g., Smith v. Greyhound Lines, Inc.* 614 F. Supp. 558, 561 (E.D. Pa. 1984).

246. *Id.*

247. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that constitutional protections for speech require, among other characteristics, a “falsehood” in order to find tortious libel).

248. The JRB must really survive “intermediate-plus” scrutiny, *see supra* text accompanying note 86, but the heightened scrutiny merely adds a Congressional record of evidence showing that such a measure is necessary, and does not change the *a priori* analysis. *See Turner I*, 512 U.S. at 666.

suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”²⁴⁹ It is unlikely there will be much debate about the first criterion; the institutional integrity of the press and the public’s right to receive diverse sources of information necessary to self-government are substantial government interests.²⁵⁰ The next two sub-parts deal with the questions of speech suppression and incidental restriction of other First Amendment freedoms.

B. Speech Suppression

The analogy to of the JRB to defamation law must be fleshed out a little further because *New York Times Co. v. Sullivan* protects the press from libel against public figures absent “actual malice.”²⁵¹ The Court’s reasoning however, is a practical one: If public figures could sue in libel, then publishers would be afraid to criticize, and such a rule would “dampen[] the vigor and limit[] the variety of public debate.”²⁵² Notably, the Court did not say merely that truth was not a separate consideration, as defamation of private individuals works the same as it ever has. So the question for the JRB, then, is whether the ratings will dampen the ardor of debate in the same way that a libel suit would. This is one way to rephrase the intermediate scrutiny requirement that the “governmental interest [be] unrelated to the suppression of free expression.”²⁵³

The difference between a libel suit and the JRB is obvious. A libel suit, with the potential for millions of dollars in damages based on one incident, is extremely coercive. The JRB, on the other hand is an incentive-based approach. Instead of civil penalties, the ratings merely alert viewers that the program has engaged in poor journalism in the past. The proposal, even at its most successful, would work only by inducing behavior through competition.

There are two reasons that the JRB’s ratings do not reach the level of coercion of a libel suit. First, unlike a libel suit, no news programs could receive a bad grade because of a single error in a story. If the ratings worked that way, there would be wild swings in ratings that would undermine their utility. Therefore, in order to

249. *Turner I*, 512 U.S. at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

250. *Id.* at 663.

251. 376 U.S. 254, 279–80 (1964).

252. *Id.* at 279.

253. *O’Brien*, 391 U.S. at 377.

receive a bad grade based solely on misreporting, there must be a sustained pattern of misreporting. And that sustained pattern should create enough of an inference of “actual malice” to satisfy *Sullivan*, assuming the “actual malice” standard must be met.²⁵⁴ Second, even if the inference of malice is inappropriate, a libel suit is a much more coercive form of punishment than publicly announcing that inaccuracies occurred. Thus even a grade based on a single lie should not violate *Sullivan* per se. Accordingly, the JRB would not suppress speech as *Sullivan* suggests.

When *Near v. Minnesota* banned prior restraints on publications, the Court left open the question of whether *subsequent* punishment would be allowed for what had already been printed.²⁵⁵ To suggest that the type economic regulation proposed here is coercive enough to reach the debate-dampening level of *Sullivan* is to suggest that the window between *Sullivan* and *Near* must be closed and no regulation of news is possible. The First Amendment has not been held to mean that,²⁵⁶ and such an interpretation would make the press, in the control of a few media companies, completely unaccountable legally. This would certainly be an intolerable result.

Rather than suppressing free expression outright, the JRB ratings affect speech to no greater degree than governmental subsidization of programming, and in the same way: economically. Like government subsidies, the JRB ratings are constitutional under the “subsidized speech doctrine,” an offshoot of the better known “unconstitutional conditions doctrine.”²⁵⁷ To be sure, economic incentives designed to alter speech cannot be entirely disconnected from censorship. Rather, there is a spectrum along which such policies reside.²⁵⁸ Specifically, the government cannot condition a benefit on the abdication of some First Amendment right.²⁵⁹ For example, a law that conditioned a property-tax exemption on one’s

254. The standard for “actual malice” is met with “reckless disregard of whether [the reporting is] false or not.” *Id.* at 280. This is a less exacting standard than that of racial discrimination cases under the equal protection clause, which requires intent. Yet the use of repeated discriminatory effects is commonly used in proving even intent. *See, e.g., Washington v. Davis*, 426 U.S. 229, 242 (1976) (“[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”).

255. *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713–14 (1931).

256. The Court has stated dicta that “[a] responsible press is an undoubtedly desirable goal, but press responsibility . . . cannot be legislated.” *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). However, as with many overly sweeping statements by the Court, this is not the law, and would be absurd if taken literally.

257. Goodman, *supra* note 23, at 231–38; Goodman, *supra* note 20, at 1462–65.

258. *See* Goodman, *supra* note 23, at 235–36 (discussing “subsidized speech doctrine”); *see also* LISKY & WRIGHT, *supra* note 230, at 37.

259. 1 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW 97 (1999).

willingness to sign a loyalty oath was ruled unconstitutional even though it could be considered an economic incentive.²⁶⁰ The problem with the tax exemption was that the conditioned oath was “aimed at the suppression of dangerous ideas.”²⁶¹ Suppressing “dangerous ideas” discriminates based on content. Thus, whether an economic incentive is constitutional under the subsidized speech doctrine depends on whether the condition is content-discriminatory. While the rating provided by the JRB can be considered a government benefit with a corresponding economic value, it does not condition that benefit on content discrimination, as discussed in the previous sub-part. Accordingly, the JRB’s ratings do not even approach the unconstitutional extreme of subsidized speech spectrum, and the speech-suppression prong of intermediate scrutiny is satisfied.

C. The NCGs are Constitutionally Permissible Compelled Speech

As the previous two sub-parts demonstrated, the JRB and its reports are content-neutral and do not suppress speech. The only remaining question is whether a law requiring the publication of NCGs is also constitutional. It is the third prong of intermediate scrutiny—incidental restrictions on other First Amendment freedoms—that governs the compelled broadcasting of the NCGs. And just as speech suppression and prior restraint do not invalidate the JRB, the compelled speech doctrine will not invalidate the NCGs.

As a general matter, there is a “constitutional equivalence of compelled speech and compelled silence in the context of fully protected expression.”²⁶² For the First Amendment to protect freedom of thought, freedom to refrain from speaking out against one’s own beliefs must be protected as well as freedom to speak.²⁶³ Despite this rationale, the protection extends to disclosure of facts as well as subjective opinions.²⁶⁴

Compelled commercial speech, on the other hand, is far less troublesome. The Court has noted that the Constitution “accords a lesser protection to commercial speech than to other constitution-

260. *Speiser v. Randall*, 357 U.S. 513 (1958).

261. Goodman, *supra* note 23, at 254–55 (quoting *Speiser*, 357 U.S. at 519 (internal quotation marks omitted)).

262. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988).

263. Jennifer L. Pomeranz, *Compelled Speech Under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159, 172 (2009).

264. *Id.* at 172–73.

ally guaranteed expression.”²⁶⁵ Working markets depend on consumers having enough information to make good choices. It is for this reason that misleading advertisements receive no constitutional protection whatsoever.²⁶⁶ Similarly, various areas of federal law require mandatory disclosure of information. Nutrition information, drug warnings, and earnings of public corporations are just a few. As one commentator pointed out, the purpose of these mandatory disclosures are to “put more information in the commercial marketplace because the absence of this information can be confusing, deceptive, or just plain incomplete.”²⁶⁷

The incompleteness of information about the quality of news programs is the problem this entire proposal addresses. Aside from any questions about the methods or propriety of determining an answer to that question, once an answer exists—the result of a functioning and content-neutral JRB—a requirement that cable news outlets disclose the information is not a difficult constitutional question. In cases where mandatory disclosure is justified, the “reasonable relationship” standard of scrutiny, the most lenient constitutional standard, applies.²⁶⁸ Under this standard, the Court merely asks “whether the regulation [bears] a reasonable relationship to the government’s stated interest in passing the regulation.”²⁶⁹

Once the ratings are recognized as content-neutral, the requirement that cable news programs air the NCGs closely parallels requirements that food manufacturers disclose nutrition information so that consumers may know what they are eating.²⁷⁰ It also mirrors the New York City law mandating that chain restaurants post the calorie content of their food; the information is necessary so that consumers may choose a healthier, more nutritious meal.²⁷¹ The disclosures about news programs are necessary so that consumers may choose a healthier, more nutritious news source, rather than “brain candy.” Of course, not everyone will do so, but the information must be out there to even raise the possibility, and thus the Constitution will not bar its mandatory disclosure.

265. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 563 (1980).

266. *Id.*

267. Pomeranz, *supra* note 263, at 178.

268. *Id.* at 174.

269. *Id.*

270. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 343-q, 343-1 (2006).

271. N.Y. State Rest. Ass’n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2d Cir. 2009) (affirming the district court, which upheld the law using the rational basis test).

CONCLUSION: WHILE NO SOLUTION CAN SINGLY FIX THE MEDIA,
THE JRB WILL IMPROVE THE QUALITY OF CABLE NEWS

For self-government to work as intended, the American public must be informed enough to make intelligent decisions. The media has failed in this mission for too long. Given the diverse types of media, creating a universal solution is impossible. The First Amendment further limits possibilities, even for solutions with restricted scope. An incentive-based approach that aligns the economic incentives of cable news with quality journalism is both constitutional and a worthy start.

The JRB is one such solution. By rating the quality of journalism and relaying that information to the public, news consumers can make more informed choices about what to watch, and news producers will be forced to respond with better quality. Nine principles make up the foundation of proper journalism: veracity, accuracy, transparency, intellectual honesty, inquiry, polyphonicity, currency, utility, and source transparency. These core principles must be the foundation upon which the JRB develops the exact metrics for rating cable news.

The JRB would take the form of sub-agency within the FCC, empowered specifically to generate reports and to publicize the results via the NCGs. The implementing law would include ethics restrictions and measures to ensure independence. It will also include a rigid structure that would enhance public trust of the ratings over those of a private agency, and guard against partisan abuses. Additionally, requiring news programs to display the NCGs is a necessary step to truly alter consumers' behavior and, as a result, the behavior of cable news journalists.

Even if Congress does not implement the JRB, merely its proposal could spur the news industry to better regulate itself. When Congress originally proposed parental guidelines for entertainment programs, the television industry developed and imposed its own guidelines to avoid Congressional interference.²⁷² As a result, the Telecommunications Act of 1996 left the task of designing the parental guidelines to the industry.²⁷³ Just as the television industry responded to threats of Congressional action, so too might the news industry.

272. *V-Chip: Viewing Television Responsibly*, FED. COMM. COMMISSION, <http://www.fcc.gov/vchip/#history> (last visited Sept. 2, 2010).

273. Fact Sheet: Evolution of Cable Television, FED. COMM. COMMISSION (June 2000), <http://www.fcc.gov/mb/facts/csgen.html>.

In fact, there is already some evidence of such self-regulation. In December 2009, Professor Rosen proposed fact-checking Sunday news programs and posting the results online the following Wednesday.²⁷⁴ After the idea circulated on the internet for a few months, *This Week* teamed with the *St. Petersburg Times*' *Politifact* to install it for their show.²⁷⁵ In response, and not to be outdone, CNN had media critic Howard Kurtz do the same thing.²⁷⁶ If this small amount of pressure began moving the news industry toward corrective action, proposing the JRB could do the same.

The Supreme Court has said, "[a] responsible press is an undoubtedly desirable goal, but press responsibility . . . cannot be legislated."²⁷⁷ The crisis in journalism is deep enough, and the dangers to the foundations of democracy grave enough, that we must challenge this idea in any way the Constitution will permit. If the industry cannot be spurred to action on its own, the creation of the JRB would create an incentive structure that would push cable news networks to perform journalism's necessary democratic function.

274. Jay Rosen, *My Simple Fix for the Messed up Sunday Shows*, JAY ROSEN: PUBLIC NOTEBOOK (Dec. 27, 2009), <http://jayrosen.posterous.com/my-simple-fix-for-the-messed-up-sunday-shows>.

275. Jake Tapper, *This Week Joins with Politifact to Fact-Check the Newsmakers*, ABCNEWS (Apr. 8, 2010, 4:49 PM), <http://blogs.abcnews.com/politicalpunch/2010/04/this-week-joins-with-politifact-to-factcheck-the-newsmakers.html>.

276. Eric Boehlert, *The (Potential) Problem with Fact-Checking the Sunday Morning Shows*, MEDIA MATTERS (Apr. 26, 2010 9:16 AM), <http://mediamatters.org/blog/201004260009>; Jamison Foser, *Howard Kurtz Doesn't Know What "Fact-Checking" Is*, MEDIA MATTERS (Apr. 26, 2010, 10:52 AM) <http://mediamatters.org/blog/201004260013>; Jamison Foser, *Howard Kurtz Doesn't Understand Fact-Checking (Con't)*, MEDIA MATTERS (Apr. 26, 2010, 2:00 PM), <http://mediamatters.org/blog/201004260027>.

277. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974).