Fake News as a Threat to the Democratic Media Environment:

Past Conditions of Media Regulation and Their Contemporary Applicability to New Media in the United States of America and South Korea

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Abstract

This study uses a comparative case study policy analysis to evaluate whether the media regulation standards that the governments of the United States of America and South Korea used in the past apply to fake news on social media and the Internet today. We first identify the shared conditions based on which the two governments intervened in the free press. Then, we examine media regulation laws regarding these conditions and review court cases in which they were utilized. In each section, we draw similarities and differences between the two governments' courses of action. The comparative analysis will serve useful in the conclusion, where we assess the applicability of those conditions to fake news on new media platforms in each country and deliberate policy recommendations as well as policy flow between the two countries.

Keywords: censorship, defamation, democracy, falsity, fairness, freedom of speech, intention, journalistic truth, news manipulation, objectivity

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Introduction

Purpose of the Study

In recent years, many democratic countries have faced an increase in the dissemination of false information under the façade of legitimacy, primarily through newly introduced platforms, mainly social media and the Internet. Citizens of democratic societies often refer to such news information as “fake news,” distinguishing them from filtered and propagated news that serve the public interest. Fake news is a threat to the democratic system that utilizes the media as the fourth estate. The potential of falsity in news information takes away the public’s agency to participate in the government judiciously, disposing of the very reason the media exists in a democratic environment in the first place. Especially during elections, false information can distort the democratic process as it hinders citizens from accessing the necessary information to formulate educated opinions about their candidates.

However, fake news possesses qualities that make it inevitably appealing to the public. The often provocative and extreme nature of fake news content feeds on “fundamental human tendencies that lead to the embracing of false news and information over true news and information” (Napoli, 2018, p.14-19). Moreover, due to the advancement of media technology and accessibility across the world, social media platforms and other online platforms can deliver news – whether truthful or not – quickly, easily, and universally.

Despite the potential threat fake news presents to the democratic system, few democratic countries have legally combatted the issue. Governments of countries such as Malaysia and France put into place laws to punish creators and distributors of fake news. Other countries like Germany implemented policies that place responsibility on social media institutions to filter fake news, as they’ve been proven to be the main platform on which fake news distribution occurs

(Henley, 2018). Even the Russian government, which was accused of interfering in the 2016 United States presidential election by disseminating false news, introduced a bill to fine companies producing false news information (Breland, 2018).

The United States of America and South Korea (Republic of Korea) are amongst the democratic countries that have been exposed to a major onslaught of fake news in recent years but have not yet taken noticeable legislative action. Both countries experienced the propagation of fake news during each country's most recent presidential elections. The main source of hesitance in introducing regulatory policies and laws stems from the democratic ideals of free press and free speech. These two principles are not only inseparable with each other, but considered the core pillars in an effectively functioning democracy (Freedom House). As a result, democratic countries that have implemented anti-fake news laws have faced constant backlash from journalists, opposition parties, and concerned citizens for such reasons.

Nevertheless, there have been cases in the past during which the governments of the United States and South Korea intervened in media affairs. In these instances, the government acted in response to suspicion that a particular media institution was pursuing a private agenda instead of public interest, hence failing to meet the standards of journalistic ethics necessary for the media to serve the role of the fourth estate. Likewise, regulatory media laws exist in both countries despite the free press ideal, and they have been enforced when the governments recognized a potential threat to their democratic system. Why is it then that fake news, even with its democratically ominous qualities, is not yet managed in the same manner? This study explores the different dimensions of this question and conclusively, provides a framework to potential policy changes respecting the future of journalism in the digital age.

Methodology

This qualitative study will focus on generating a hypothesis rather than testing an existing one. The goal is not to formulate a hypothesis based on concrete measurements of applicability but rather make policy recommendations by questioning the current state of affairs. We will focus on answering the main question: What are the conditions in which the governments of the United States of America and South Korea regulated traditional media outlets, and do those conditions apply to fake news on new media platforms today? We will first assess the role of the media in a democracy to identify their rights and responsibilities. Then, we examine past court cases in which the governments of each country intervened on the basis that the media failed to meet their expected duties. Lastly, the study will hypothesize the applicability of those regulatory conditions to fake news on social media and the Internet.

Research Method

This study will use a comparative case study policy analysis to evaluate whether the conditions in which the United States and South Korean governments regulated the media in the past apply to fake news in each country today. We will focus on democratic countries, as opposed to autocratic ones, to examine how fake news has grown under fundamentally upheld values of democracies: freedom of speech and press. The United States and South Korea were selected as the subjects of this study in light of their recent high profile cases of fake news dispersion, the United States during the 2016 election and South Korea during the 2017 impeachment of President Geunhae Park. Both countries have an open media environment, defined by the freedom of press clauses explicitly outlined in each of their constitutions. Moreover, both countries have active social media and Internet usage with a growing number of

citizens identifying social media, the primary source of fake news distribution, as their main source of news consumption (Mitchell et al., 2018).

The study develops through three sections: literature review, empirical analysis, and conclusion. In the literature review, we will scrutinize the history of the free press ideal to comprehend the two democratic countries' long-standing cultures of fearing any form of censorship and subsequently unfold the shortcomings of the ideal. We will then review literature on the responsibilities of the media in a democracy, highlighting key components of the study including the conflict between the rights of journalists and that of the people, the public interest-oriented model of the media, and the significance of journalistic truth. In assessing the boundaries of journalistic truth for this study, we identify the standards of journalistic truthfulness as fairness and defamation. We will likewise define fake news based on these two conditions. It is important to clarify, however, that for both conditions, we determine truthfulness not by the ends but the means; recognizing the impossibility of absolute objectivity, we focus on the pursuit of unbiased, truthful reporting. Under the same logic, we will define potentially defamatory reports based on facts about a public figure's actions as truthful. On the contrary, filtering or manipulating news information indicates an intention to strip away the public's right to holistic knowledge about their society and therefore, we will deem not truthful. The discussion will transition into the assessment of fake news in the contemporary media environments of the two countries.

The empirical analysis section is threefold. First, we will provide an overview of the legal landscape pertaining to media regulation. We will detail the existing media regulation facilities, regulatory laws, and court procedures of each country, providing context for the following policy analysis and comparative case studies. We will also review the constitutional foundations of free

speech and free press to understand their conflict with regulatory action. The crux of this first section lies in the policy analysis, which outlines and evaluates media regulation policies related specifically to fairness and defamation. Despite that both the United States and South Korea constitutionally guarantee the freedom of the press, both have regulatory media policies in place that are standardized by these two conditions. Namely, the Fairness Doctrine in the United States and the Broadcast Law in South Korea ensure objective and impartial coverage of subject matters. Defamation laws are also commonly enforced in both countries' media environment to protect citizens from wrongful attacks on their characters.

Second, we will perform case studies on past court cases in which fairness and defamation were at the center of debate. This portion consists of a total of 4 case studies. The case studies used for examining fairness regulation are *Red Lion Broadcasting Company v. Federal Communication Commission (FCC)* and *Munhwa Broadcasting Company (MBC) v. Korea Communications Commission (KCC)* in the United States and South Korea respectively. For defamation regulation, we will review *New York Times v. Sullivan* in the United States and *Korea Broadcasting System (KBS) v. Korea Communications Commission (KCC)* in South Korea. The court cases were selected based on the following criteria:

- Whether fairness or defamation was a defining component utilized in the case;
- Whether fairness and defamation was defined and called to regulatory action by a governmental media regulation institution, such as the FCC and KCC;
- Whether the regulatory boundaries based on fairness or defamation utilized in the case remain relevant in the current realm of fake news in both countries.

The selected cases brought significant societal and political impact upon each country at the time of its ruling in addition to leaving behind legislative legacies that have shaped the contemporary media environment. The selected American cases occurred in the 1960s whereas the South Korean cases in the 2000s, given that South Korea only recently stabilized a democratic system of governance, after which topics regarding freedom of speech and press surfaced (National Museum of Korean Contemporary History). We will take this into consideration as we compare the two countries' democratic media environment and practices.

The last portion of the empirical analysis consists of a comparative analysis between the two countries, drawing similarities and differences in the interpretation and administration of media regulation based on fairness and defamation. This section compares the two countries' stances on each condition as well as the motives behind regulatory action. We will take into account the historical context of each democracy's media environment as we pinpoint the two governments' differing approaches in managing their fourth estates. This comparative approach aims to activate discussions among media and communications scholars in different democratic countries as they tackle the common threat of fake news to each and all of their democratic media environments. Moreover, the study provides a basis for the potential migration of media policy solutions among different governments.

Based on the empirical analysis, we will deduce the applicability of fairness and defamation as conditions of regulation to manage fake news distribution on social media and the Internet. The conclusion redefines the scope of the media to appoint online platforms used for news distribution with the same standards and expectations imposed on traditional media outlets. We review the legacies of the cases from the empirical analysis and their function in the current media climate involving the growth of fake news dispersion. The study ultimately arrives on

policy recommendations applicable to both countries in addition to suggesting policy flow that can help each country build a functional democratic media environment in the age of new media.

Data Collection and Analysis

Policy analysis in this study will draw from legal documents that were produced by each country's government. Laws and policies will be drawn from government websites and archives including the official websites of the FCC and the KCC. To examine the history and usage of each law, we will review books, journals, and articles written by professors and scholars with expertise in journalism, media, and media law. These readings will be collected via academic databases such as Duke University's online library, jstor, and DBpia.

The comparative case study will draw from congressional records documenting the history of media laws and policies in each country. We will access each court case through each country's judiciary branch archives. As for the analytical portion, we will collect data from the aforementioned academic databases to review previous case studies and analyses by media and law scholars on the corresponding cases. To perform standardized comparisons between the two countries, we will assess quantitative data gathered by organizations that conduct research on a global scope: Freedom House, Edelmen, and Reuters Institute for Journalism. We will look at information about fake news either directly published by journalism research centers such Pew Research Center, Poynter, the Korea Press Foundation, and Freedom House or from news articles that reference these institutions and have performed extensive investigations on the topic. Because fake news is a newly studied topic, we will attempt to draw from data that is most up-to-date.

We will present the data in a sequential manner, following a logical flow of first understanding the historical background of the free press and its significance in a functional

democracy, reviewing the conditions of media regulation and its application in each country through case studies, and utilizing the analyses to derive policy recommendations of regulating new media in contemporary democracies. Data on past cases of media regulation will allow us to determine the grounds on which each country's government will take regulatory action going forward. The data analysis will then be applied to the case of fake news in the current and future media climates. The conclusion will suggest the best policy approaches for the two countries, independently and collectively, based on the data presented and analysis performed.

The Democratic System and the Media Environment

United States

The United States' social and political systems have long upheld a strong protection of free speech, free expression, and free press. Freedom House has consistently accredited the nation in the category of media independence with the highest rankings for the past decade. The First Amendment of the U.S. Constitution plays a key role in maintaining robust media freedom. Under this constitutional clause, the judiciary branch "has repeatedly issued rulings that uphold and expand the right of journalists to be free of state control" in instances where the media came under pressure of censorship (Freedom House).

However, the well-founded democratic media environment has recently faced crisis from political polarization and alleged corruption in the electoral process. The Freedom House ratings for America's Press Freedom has increased within the past decade, and the evolving media environment played "a prominent role in both creating this crisis as well as combatting" the increment (Freedom House; Reuters). During the 2016 presidential campaign, Republican candidate Donald Trump frequently attacked media outlets that reported negatively about him, labeling their work as "fake news." He continued to do so after he took office, although he did

not take any official legal action against the press (Newman et al., 2018). Meanwhile, the American public grew concerned by the lack of regulation on new media platforms where they noticed unknown "news" outlets spread indisputably unfactual information.

Nevertheless, mainstream media outlets like the New York Times, the Washington Post, and CNN continued to conduct investigations on the administration in spite of the administration's disapproval. Consequently, "digital subscriptions for leading newspapers have increased, and ratings for cable news networks have surged" since 2016 (Newman et al., 2018). As many citizens worried about government oppression of the media and the growing prominence of fake news, the majority of Americans continued to rely on big-name media outlets and traditional platforms, television in particular (Alcott & Gentzkow, 2017, p.210).

South Korea

South Korea's democratic system is preserved by regular rotations of power and political pluralism. Notions of free speech and free press are well protected under the constitution with the exception of pro-North Korean coverage, which is restricted by The National Security Law; but even prosecutions on pro-North Korean speech have declined since 2016. Nevertheless, Freedom House labeled South Korea "Partly Free" in both categories of Press Freedom and Net Freedom in 2017. The Korean press, while generally unregulated, face both official and unofficial obstacles in achieving the level of freedom American news outlets retain. For one, regulatory laws against the media are relatively more frequently and easily enforced. But there have also been high profile cases covering journalists that have faced underhanded interference while investigating federal and corporate corruption, sometimes even resulting in a forced resignation (Freedom House).

The Korean public therefore has a higher degree of skepticism toward both the media and the government. Although direct control dwindled after the 1980s when dictatorship was discarded, many following administrations have continued to proactively intervene in media affairs. President Myungbak Lee famously fired employees at major news stations and newspapers that reported him under a negative light during his presidency from 2008 to 2013 (Haggard & You, 2015). As a result grew a culture of fear and caution surrounding completely unrestricted journalism activities within the Korean media environment.

Amid the most recent election of Geunhae Park as well as the political scandal that resulted in her impeachment, the public's trust in the media slightly increased as the media became bolder in reporting against the government. During her campaign in 2013, the government itself was considered "a purveyor of fake news" when allegations of media manipulation spread; there were allegations that The National Intelligence Services (NIS) "created thousands of fake user profiles in order to distribute election advertising" in her favor (Freedom House). Even so, the media remained shy in political coverage. It was not until reports of potential corruption began to surface in 2017 that this changed. Mainstream media outlets, including traditionally conservative platforms that initially protected Park, started providing extensive coverage of her corrupt political actions and the entire impeachment process (Lee, 2017). However, it is possible that the media only felt comfortable doing so because by that point, it was universally agreed upon amongst both the government and the public that Park was no longer a competent president. The media's breakaway from its traditionally reserved coverage cannot thus be regarded as a reflection of improved press freedom but rather a politically calculated decision.

Literature Review

Free Press and the Media's Social Responsibility

The beginning of free press could be traced to the 18th century, when intellectuals including Voltaire, Franklin, Jefferson, and Madison "took away the stamps of church and state censors" and sparked the Enlightenment (Jansen, 2010, p.3-4). The underlying belief of the Enlightenment was to abolish government censorship to allow free discourse, which was deemed the key to making intellectual discoveries that would overall contribute to the advancement of society. Democratic countries that are enrooted in the Enlightenment have since strived to enforce the ideal of free press as a fundamental principle of governance (Jansen, 2010, p.4).

Media law scholar Andrei Richter, in his UNESCO publication *Post-Soviet Perspective on Censorship and Freedom of the Media*, supports the opposing stance against censorship. He claims that even soft censorship is a slippery slope to the debasement of democracy. He enumerates the dangerous consequences of political censorship as the following: (a) degradation of democratic principles that promise free exchange of ideas, (b) self-censorship by journalists, resulting in reduced political coverage also known as "the chilling effect" and (c) declining public trust in the media and the government which leads to "increasing alienation between society and state" (Richter, 2008, p.314).

The necessity of free press is also often explained under an economic framework: the marketplace of ideas. The theory proposes that "the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market" (*Abrams v. United States,* 1919). John Milton, a scholar of the Enlightenment era, supports this theory in his book *Areopagitica* by suggesting that censorship in media content would only weaken people's ability to discern truth, a qualification people must

cultivate by practicing sorting information themselves (Milton, 1927). Per Adam Smith's economic belief that a free market will prosper without regulations, the hypothesis behind the marketplace of ideas is that the result of hands-free competition of unrestrained discourse will lead to the most favorable outcome – the triumph of the best quality information, followed by a well-informed public (Smith, 2009).

The product of the long-standing culture of antagonism towards government intervention in the media was the hidebound fear of censorship in any form or circumstance. Censorship, in liberal democracies with their foundational seeds in Enlightenment ideals, became a "devil term" – anything related to media regulation would be received under a pejorative context (Jansen, 2010, p.4). Within this scope of thought, liberal democracies mercilessly reject "the slightest suggestion that the press should be subject to regulation, even by a regulator independent of the state" (Petley, 2012, p.352). The United States of America and South Korea both fall under this umbrella and have, correspondingly, devised media environments that glorify the freedom of expression, speech, and publication.

Shortcomings of the Free Press Ideal

French philosopher and journalist Albert Camus once stated that "a free press can, of course, be good or bad, but, most certainly without freedom, the press will never be anything but bad" (Park, 1991, p.91). Indeed, the necessity of a fourth estate independent from governmental control is seldom disputed in democratic states. But with freedom, as the old adage goes, comes responsibility.

Sue Curry Jansen, professor of media and communication at Muhlenberg College, challenges the notion of absolute freedom of the press. She asserts that the Enlightenment did not get rid of power but instead gave birth to new forms of censorship that liberal political theories

tend to deny. While she acknowledges the Enlightenment's role in successfully liberating the press from autocratic control to a certain degree, she clarifies that "no revolutionary compact in human history has gotten rid of…the knot between power and knowledge" (Jansen, 2010, p.7-10). She asserts that because "reason can never free itself from the fetters of human concerns," liberal democratic citizens should strive to develop self-awareness to interact with existing censorship and participate in creating rules of censorship that justly reflect and protect public opinion, rather than to trying to abolish censorship as a whole (Jansen, 2010, p.5).

Julian Petley, a scholar of media censorship, raises an important distinction between free press and free speech. She declares that the two concepts are often readily conflated but in reality, must be distinguished from each other. Unlike freedom of speech, he claims that freedom of the press should be regarded as:

> an instrumental good, that is, good insofar as it results in the press acting in the public interest and reinforcing democratic ideals, but not good insofar as it suppresses diversity, impoverishes public debate, makes it impossible for citizens to judge matters for themselves, systematically prevents certain individuals or groups from speaking or routinely distorts what they have to say, exacerbates social divisions and gives rise to a particularly poisonous form of anti-political populism (Petley, 2012, p.537).

In other words, the rights of the audience to be well-informed is prioritized above the rights of the press to broadcast whatever they want. Without this hierarchization, the rights of the media would be prioritized over general citizens, annulling the public interest-oriented purpose of the media's role in a democracy as the fourth estate.

Strictly speaking, this is a means versus ends debate; which should be prioritized when the media's right to free speech clashes with the media's goal of spawning an informed

citizenry? This question could be answered through the individualist interpretation and the collectivist interpretation of the rights to free speech. The individualist interpretation focuses on the rights of individuals whereas the collectivist interpretation emphasizes how speech collectively impacts society. The individualist interpretation would generally be adopted to ensure the protection of each and every citizen's rights. However, the collectivist interpretation better applies to the media due to the role it holds in democratic societies, as "the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment" (Napoli & Sybli, pg8).

In reference to the marketplace of ideas, there are multiple shortcomings in the groundworks of absolute free press. The economic interpretation of this principle applied to news and information is the following: the good is unmediated journalism, a public good; the positive externality is "an informed citizenry and an effectively functioning democratic process," characteristics that are "not peripheral" but "fundamental" in a democracy; the negative externality is false speech (Napoli, 2018, pg43). There are various assumptions behind this principle. First, it assumes individuals are capable of discerning between true and false information. It hopes that the collective citizenry is capable of distinguishing between true and false news and information, "just as participants in the traditional product market are capable of distinguishing between high value products over low value products." Secondly, it assumes that the public values truthful news and information over false ones, just as the marketplace sets values on the quality of products (Napoli, 2018, pg8). These two assumptions draw on Milton's belief that the truth will ultimately prevail because people will choose to select and are capable of deducting truth by the use of reason (Milton, 1927). Lastly, it assumes that there is no such

thing as too much speech, and if oversupply becomes problematic, the invisible hand will regulate it (Napoli, 2018, pg8).

Park, writer of *Freedom, Responsibility, and Ethics of the Press*, explains the problems with the assumptions regarding people's ability to self-regulate. He explains that people have a tendency to prefer provocative news. He adds that people also prefer ideologically aligning information. When there is demand, there is supply; thus, these two natural human tendencies become incentives for news producers to create news that will draw attention regardless of accuracy (Park, 1991, p.93). Likewise, when the market is left completely unregulated and left to its own devices, it can fail to deliver what democratic citizens require (Petley, 2012, p.533). The unintentional consumption of fake news could be interpreted as the bounded rationality of the news consumer, resulting from inadequate information, which is a recognized source of market failure. The marketplace of ideas cannot function efficiently "if consumers lack the information necessary to make well-informed decisions about the relative value of the products and services available to them" (Napoli, 2018, p.47). Therefore, a degree of regulation is necessary under this economic principle, the purpose being not to muzzle the press but to ensure that it meets the democratic obligations of serving the public with necessary information.

Many liberal democracies are currently following a model of soft censorship of the media, based on these shortcomings of an absolutely free press. The two subject countries of this paper – the United States of America and South Korea – are among the democratic countries that have adopted this model (Freedom House). In the empirical section, we will review in further detail the way in which the two countries' governments intervene when these shortcomings arise in the current media environment.

Responsibility of the Media to Inform Truth

The debate on soft censorship, having developed within the context of "normative, religious, ideological, and political disagreements," focus on determining the status of the media while ignoring the discussion on its responsibilities to inform the truth. Truth as a general concept is put on a pedestal in society, and for a good reason. The human search for truth is a natural desire attached to the need to know and process the world one lives in. But truth is held on different levels of importance depending on the status of the speech. For instance, parents lie about Santa Claus or the tooth fairy to their children without much moral conflict; but exposing somebody's personal information is frowned upon and even illegal past a certain degree, even when it is factual. Likewise, the value of truthfulness declines when the exposure of it results in harming other societally valuable attributes such as children's innocence or basic human dignity (Schauer, 2014, p.901).

In the same pattern, the value of truthfulness upholds – possibly to an absolute degree – when the absence of it can and most likely will harm society. The regulation of false information in selling goods, services, and other financial instruments is a good example. In Miltonian terms, such restrictions would be impermissible for a thriving democracy because any kind of restriction could be interpreted as a form of censorship (Milton, 1927). But because there is no way citizens could determine the falsity of products or services prior to consumption, the government steps in to ensure consumer safety. In this case, government intervention occurs to protect society and public interest, not to suppress expression and the freedom of the market.

Truthfulness is elemental in news and information along the same logic. According to James Curran (1992), the three traditional conceptions of the function of journalism in a liberal democracy are the following: (a) as the public watchdog, the media monitors authorities and

public figures to prevent or expose “incompetence and abuse of power,” (b) as the fourth estate, the media represents the voice of the public, and (c) as the “primary source of information for an electorate,” the media discharges even the most basic information (as cited in Fox, 2013, p.259). Dependent on the media to serve these functions properly, participants of liberal democracies expect journalists to be truthful. Journalistic truth provides them “the sense of security that grows from awareness” in the world they live in (Kovach & Rosenstiel, 2001, p.50). Only with faith in their journalistic institutions could people safely utilize news and information to determine the ways in which they manage their individual lives and approach issues beyond, whether it’s the daily weather forecast or breaking news on a political scandal.

Much of the literature on journalistic truth incorporates a philosophical debate on the definition and parameters of truth. However, it is not necessary to define the abstract details of truth in order to “arrive at the workable guidelines” for truthful journalism in a functional sense (Jacquette, 2017). Because journalism is, by nature, reactive and practical rather than philosophical, a journalist’s obligation to report the truth could be evaluated in regards to the influence of their work on citizens’ abilities to “operate on a day-to-day basis” (Kovach & Rosenstiel, 2001, p.54-56). Thus, as Julian Baggini stated in his paper “The Philosophy of Journalism,” this paper will not be “preoccupied with the truth of particular claims” under vague expectations for truth itself (as cited in Fox, 2013, p.259).

Defining Journalistic Truth

Truth and Objectivity

The Correspondence Theory of Truth presents a simple methodology of determining truthfulness: a comparison of the substance of the claims made and of reality itself. For instance, if a journalist claims that two people were killed and six more were injured, we can simply

identify the victims and categorize their injuries to evaluate truthfulness (Fox, 2013, p.260). This theory could easily be utilized to fact-check statements that are more black-and-white like the preceding example. Under this definition, "fake news" is an appropriate label to news and information that clearly misalign with the actual objects or states of affairs.

However, there is an area of journalism that the theory does not serve adequately to determine truthfulness. The interpretive dimension of journalism, including but not limited to opinion editorials and investigative reports, is often accused of prejudice and as a result, labeled "fake" news. Objectivity, along with analogous terms like fairness and nonpartisan, is a commonly used measurement for journalistic truth because it is the element that motivates journalists to put aside their personal agenda to properly serve the public's interests. Because objectivity has been ingrained as a necessity in the journalistic psyche of democratic societies where the media has the responsibility to fairly represent all the voices of an ideologically diverse public body, many journalists strive to remain neutral and fair-minded despite knowing that complete objectivity is difficult due to human beings' inevitable subjectivity (as cited in Fox, 2013, p.259; Cunningham, 2003, p.26).

Brent Cunningham, a core member of The Columbia Journalism Review, in his article "Re-thinking Objectivity" accuses the principle of objectivity for the failure in the press. He states that accepting objectivity as imperative in journalism has made us "passive recipients of the news, rather than aggressive analyzers" (as cited in Berry, 2005, p.15). He highlights the core argument of like-minded objectivity critics: it is impossible for human beings to completely eliminate their personal bias, so to expect objectivity in journalism is idealistic and impractical.

It is important to formulate that the presence of subjective opinion doesn't equal corrupt journalism or, presumably, outright falsity. In fact, adding additional explanation and analysis to

objective information is part of the journalistic process (as cited in Berry, 2005, p.16). Carl Fox, an award winning scholar in the intersection amongst ethics, political theory and communications, accepts Cunningham's conception that it is rather bold and naïve to believe that "human beings have the capacity to perceive and experience reality precisely as it is, unmediated or conditioned by the process of perception or the nature of experience" (Fox, 2013).

Pulitzer Prize winning investigative journalist Steve Barry suggests the necessity of a more concrete, scientific criteria to judge objectivity in journalism. He details that such methods should devise interview techniques that could gather information, meticulously choose sources based on the tangibility and credibility of the evidence provided, and to recognize and be wary of the existing viewpoints of the varying sources. In other words, as long as there is evidence of an attempt to create a method in the analytical process "to deal with personal biases and external manipulation," the journalistic activity is still truthful. The ultimate purpose of applying a detailed and systematic method to the journalistic process is to motivate and help journalists "see facts as accurately as human frailty follows" instead of punishing them for having personal opinions (Berry, pg16). In this manner, he accepts Cunningham's pessimistic view on objective journalism but clarifies that, in determining truthfulness, what is important is not the standard of objectivity but rather the pursuit of it.

Intentional Falsity in Journalism

Pursuit, or intention, is also crucial in defining journalistic truth because of the possibility of unintentional mistakes. Sometimes journalists mistakenly put forward inaccurate news. Immediately branding them as distributors of "fake news" would be unreasonable, for they would completely lose their credibility from one mistake. In February of 2017, publisher Jae Seaton of the Grand Junction Daily Sentinel stated that he would sue Ray Scott, a Republican

member of Colorado's State Senate, for calling his newspaper “fake news.” Seaton emphasized that legitimate media sources do not put their reputation at stake by intentionally disseminating false information as facts. He acknowledged that these sources could make mistakes, in which case they publicly apologize, and that journalists within these institutions identified for intentionally publishing false information are terminated. By this reasoning, he declared that it was unfair that he, an established journalist, was accused of reporting “fake news” (Fkues, 2018).

Also known as news manipulation**,** intentional falsity entails ignoring the responsibility for journalistic truth and pursuing a private agenda rather than acting for public interest. Two common procedures are defamation (명예훼손 in Korean) and propaganda (여론몰이 in Korean), given that both are calculated actions. They could be driven by a media institution or individual journalist’s personal hatred or for private benefits attached to the actions, benefits that are often political or financial; for instance, media institutions or individual journalists could be paid to report positively about certain politicians, administrations, or corporations.

Propaganda is an alarming concern for democratic citizens as the media holds the power to set the public agenda. From the abundance of information in the world, the media selects which stories to highlight and presents them in ways to shape public perceptions of the matters at hand. Indeed, all facts and figures “have to be selected and presented then analyzed” before being incorporated in news reports (Fox, 2013, p.259). Therefore, if the media is driven by personal agendas, the public can do nothing but become victims to their manipulation.

Herman and Chomsky (2002) states that it is impossible for the press to be free of propaganda because “propaganda filters have been built into the very process of news selection and presentation” (as cited in Fox, 2013, p.261). To a degree, this is true – the agenda-setting process gives journalists the power to decide which issues will be publicly debated and how.

This is precisely the reason that the media must be strongly motivated to be truthful, to avoid bias and set aside personal agendas to the best of their abilities, in order to properly serve their given role in democratic societies.

Intention is difficult to accurately ascertain, even via carefully scrutinizing the editing and publication process. Nevertheless, because the public interest orientation is the most important journalistic responsibility, the intention discussion must be incorporated when distinguishing journalistic truth and falsity. This paper will thus narrow the definition of fake news as information spread by sources that have regularly published fabricated information as facts or have displayed patterns of attempting to shift public opinion in exchange for private gain. The routine nature indicates the lack of intention to meet the standards of journalistic truth. Furthermore, as defamation and fairness are two of the standards by which journalistic truth is most frequently measured, this study will focus on analyzing how these particular values performed and will perform as conditions of regulation in democratic media environments.

Definition of Fake News

We have established that news and information meet the standards of journalistic truth when it proves to have pursued accuracy, objectivity, and public interest-orientation. Proportionally, this paper defines falsity in news and information refers to those that fail to meet those standards. We define fake news as news and information that don't abide by the correspondence theory of truth or practice defamatory and biased reporting with intentions that do not concern public interest.

In contemporary society, there is not yet a universally accepted definition of fake news. The compound noun, while seemingly self-explanatory, is interpreted in a multitude of ways. Merriam-Webster's dictionary defines "fake news" as "material reported in a newspaper or news

periodical or on a newscast" that is "not true, real, or genuine" (Merriam-Webster). But what is "true, real, or genuine" is widely open to interpretation. The term has become highly politicized, assigned to media outlets that have pursued journalistic truth as defined in this paper, and inconsistently applied to any reporting the applier is unsatisfied by.

Due to the absence of a clear definition, sources of fake news are not currently incorporated in the scope of "media" as legally defined. Often unlicensed, these sources are not subject to the existing media laws; regulatory conditions of defamation and fairness apply lightly or do not apply at all. In addition, these sources often utilize social media and other online platforms, where information not only travels faster than via traditional media platforms but is seldom filtered for fact-checking purposes (Aral et al., 2018). The emergence of fake news itself presents a threat to democratic societies that depend on the media to inform the truth. The failure to disassociate fake news with truthful reporting, as well as the absence of tools designed to regulate it, may inevitably contribute to the danger of "declining public trust in the media and the government" as Richter cautioned (Richter, 2008, p.314).

Fake News in the Contemporary Media Environment

Emergence and Influence of Social Media and the Internet as News Sources

The means to reach a mass audience has been revolutionized thanks to technological advancements; in the past, people had to "be rich enough to own a newspaper or get a broadcast license." But today, "anyone with a phone or laptop could immediately reach every other Internet user in the world" (Chemerinsky, 2018, p.291). In both the United States and South Korea, social media and the Internet became increasingly accessible to the general public. The internet penetration is an overwhelming 96 percent and 93 percent for the U.S. and South Korea

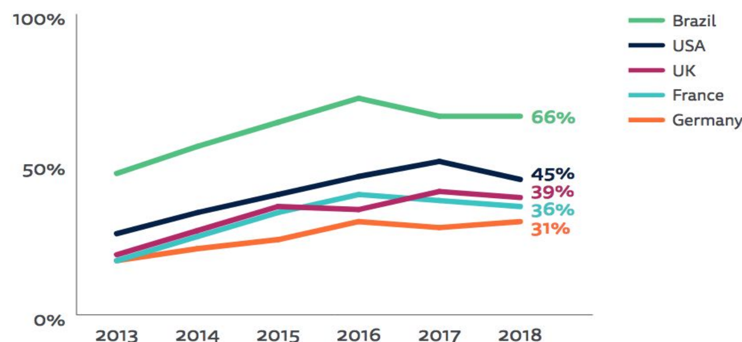
respectively. In parallel, online platforms have also grown to become main sources of news consumption within the past decade (Newman et al., 2018).

The Reuters Institute for the Study of Journalism conducted research on the degree and ways the online platforms are utilized for news in a variety of countries including the United States and South Korea. In their 2018 report, they surveyed a demographically diverse group of 2,401 Americans and 2,010 South Koreans that had consumed news within the past month. Reuters regarded the surveyed sample representative of the total population, considering that a great majority of both countries have access to the Internet (Newman et al., 2018). Below, we report key findings in the two countries specifically as well as those in a global context.

United States According to the report, the United States showed continuous growth in numbers of the population utilizing social media as a news source. Numbers consistently rose from 27 percent in 2013 to a peak of 51 percent in 2017. But in the most recent 2018 report, for the first time in a decade, the number declined six percentage points from the previous year. Reuters deducted that the fall represented "a readjustment after the social media frenzy around the Trump inauguration" in 2017 (Newman et al., 2018).

Figure 1

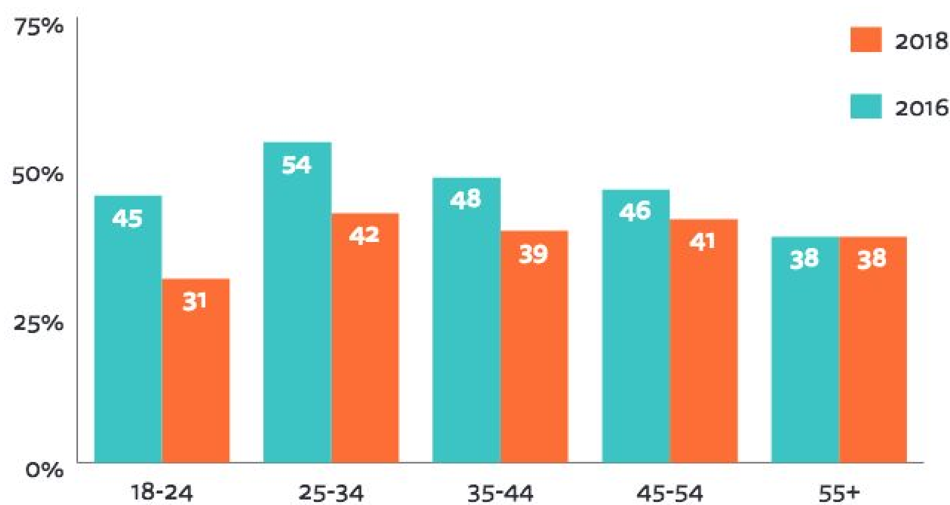
Use of Social Media as News Source in the United States and Other Countries



News consumption through Facebook declined for most age groups in the United States during the last two years. Facebook usage, in contrast, remained static on average since 2015, showing that the reliance of the platform for general use and news consumption use does not parallel. The report suggests that this contrast may be a result of either “a fall in general engagement or a reduction in exposure to news by the Facebook algorithm, as the company prioritizes interactions with family and friends and tries to limit the impact of fake news. News reliance on alternative platforms such as WhatsApp, Instagram, and Snapchat continued to follow an upward trend (Newman et al., 2018).

Figure 2

Proportion that Used Facebook for News in the Last Week by Age (2016-2018) - U.S.



Q12B. Which, if any, of the following have you used in the last week for news? *Base: 18–24/25–34/35–44/45–54/55+: 2016 = 175/329/377/300/1016, 2018 = 232/386/441/355/987.*

South Korea In South Korea, usage of online platforms as a news source has continued to increase over the past 5 years. Naver and Daum, two of the most popular search engines, are dominant players. 47 percent, nearly half of the surveyed population, answered that they utilized these search engines to search for news and 30 percent used them as a news aggregator. Only 5

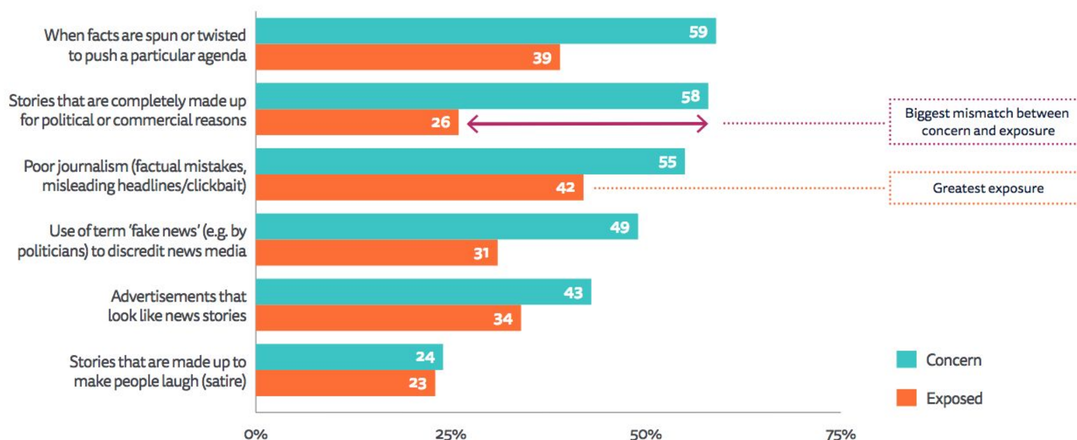
percent said they preferred to go directly to a news website or app, which was by far the lowest number in this category among all countries that surveyed. As a result, Korean news publishers "find themselves much more dependent on third-party platforms to access audiences" than in other countries like the United States. In addition, 39 percent answered that they accessed news through Kakao Talk, the most prominent messaging app in Korea (Newman et al., 2018). Kakao Talk is also the most popular social media platform among the elderly population, within which conservative groups are concentrated (Lee, 2017).

Current Fake News Climate

The 2018 Reuters Report portrays the increasing public concern about false news and information on online platforms. 64 percent of the surveyed in the United States agreed or strongly agreed that they were "concerned about what is real and fake on the Internet" (Newman et al., 2018).

Figure 3

Proportion Who Say They Are Very or Extremely Concerned about Each, and Proportion Who Say They Saw Each in the Last Week - All Markets



Q_FAKE_NEWS_2. To what extent, if at all, are you concerned about the following. Q_FAKE_NEWS_3. In the last week which of the following have you personally come across? *Base: Total sample in all markets.*

According to an experiment performed by a team at Massachusetts Institute of Technology, “it took the truth about six times as long as falsehood to reach 1,500 people” and the spread of fake news was not by bots but by real people. In their report, they reviewed 126,000 tweets on news stories tweeted more than 4.5 million times by about 3 million people, and that fake news was 70 percent more likely to be retweeted than true stories were (Aral et al., 2018; Fox, 2013).

With these concerns in mind, we will explore questions such as the following throughout this study: Are social media and the Internet considered as part of “the media” for which the public expects credible information and if so, should democratic governments demand journalistic responsibility from these platforms? We will explore the answer in the following empirical analysis by scrutinizing the ways in which the free press had been regulated in the past.

Empirical Analysis

Legal Background of Media Regulation

Media Regulation Facilities

United States The Federal Communications Commission (FCC) was created by the Communications Act of 1934. With the introduction of new mediums – mainly television – the FCC replaced the existing Federal Radio Commission to regulate communications by radio, television, wire, satellite, and cable in the United States and its foreign territories. The Act entitled the FCC to cable exceptionalism: regulating those who broadcast over airwaves because the people own the frequencies. Although the FCC is an independent government agency, the facility is overseen by Congress. According to its website, the FCC's function is "ensuring an appropriate competitive framework for the unfolding of the communications revolution, revising media regulations so that new technologies flourish alongside diversity and localism" and "providing leadership in strengthening the defense of the nation's communications infrastructure," amongst many others. Its goals include promoting competition in the communication industry, encouraging the best possible use of frequencies domestically and internationally (FCC).

South Korea The Korea Communications Commission (KCC) was established in 2008. Modeled after the FCC in the United States, the KCC is responsible for regulating the South Korean media and ensuring that they meet journalistic expectations. Article 10 of the Broadcasting Act outlines the criteria and procedures for granting license to broadcasters that recognize public responsibility and impartiality. Article 18 states that when a broadcaster fails to meet those standards of impartiality and objectivity, the license will be subject to revocation. Following clauses detail the role of the KCC in overseeing the media "to suit the purposes of

impartiality, public nature, diversity, balance, truth" and to "ensure a well-balanced presentation of subject matters" in different fields such as politics, economy, society and culture (Broadcasting Act, 1987; KCC).

Constitutional Limitations of Free Speech and Free Press

United States The United States Constitution broadly describes the rights to free speech and free press. The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The clause does not specify cases in which the execution of this right clashes with other constitutional rights. Furthermore, while it grants the right to speak and express whatever one desires, it does not address whether the rights to an audience are entailed to the rights to the speech.

South Korea Article 21 of the South Korean Constitution specifies the freedom of the press in different areas. The article outlines, "all citizens shall enjoy freedom of speech and the press, and freedom of assembly and association." The article goes on to state that "the standards of news service and broadcast facilities and matters necessary to ensure the functions of newspapers shall be determined by Acts." The Acts that were passed in order to ensure this service will be discussed in the following section on regulatory media laws based on fairness and defamation. The last portion of the article then conditions the aforementioned statements:

> Neither speech nor the press shall violate the honor or rights of other persons nor undermine public morals or social ethics. Should speech or the press violate the honor or rights of other persons, claims may be made for the damage resulting therefrom."

The Constitution does not clarify the terms that define "public morals" or "social ethics," but the reference to violating honor implicates the country's antipathetic attitude towards defamation.

Media Laws on Fairness and Objectivity

United States The Fairness Doctrine was passed in 1949 when Congress dictated that the media had an active duty to present a spectrum of views on matters of public importance. The FCC thus started enforcing the doctrine as a criterion of obtaining and maintaining a broadcast license (Matthews, 2011). The rule mandated that broadcasters devote some of their programming to controversial issues of public importance and allow the airing of opposing views on those issues by requiring them to "alert anyone subject to personal attack in their programming" and providing them a chance to respond (FCC). The Fairness Doctrine was the subject of much debate. The requirement that broadcasters had to regulate their programming and present views they did not support conflicted with their First Amendment rights. The Fairness Doctrine was only applied to broadcast and not other mediums of news such as newspapers.

The Federal Communications Act of 1934 provided general guidelines of the media's social responsibility. Section 315 clarifies that the freedom granted to broadcasters in the name of free press does not relieve them from the obligation imposed upon them under this Act "to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." The Act goes on to declare that the media

should act “by virtue of the public interest standard” and introduces “the public trusteeship concept” which declared the media always put the public’s interests first (Communication Act, 1934).

South Korea The Broadcasting Act embodies all conditions for broadcast regulation in South Korea. It was passed in 1987 when South Korea went through a media reformation after finally being liberated from an autocratic government. Article 6 of the Act, titled “Impartiality and Public Interest of Broadcasting,” outlines broadcasters’ obligation to remain impartial, objective, and nondiscriminatory. The article subsequently details the reasoning behind the significance of objectivity and impartiality. It highlights broadcast media’s responsibility to represent the voice of the public by respecting “the ethical and emotional sentiments of people” and striving to “faithfully reflect the interests of the groups or classes that are relatively small in number or at a disadvantage in realization of the pursuit of their interests” just as much as the majority. It states that a broadcast shall, through this process, “contribute to the safeguard of the fundamental rights of people and the advancement of international friendship” as well as “protect and enhance people's right to knowledge and freedom of expression.” The Act demands that broadcasters “provide an equal opportunity to other groups having different opinions, and also endeavor to maintain a balance in organizing the broadcast programs with respect to each party of political interests,” which parallels the ideals of the United States’ Fairness Doctrine (Broadcasting Act, 1987).

Separate from broadcast, print media functions under the Act on the Guarantee of Freedom and Functions of Newspapers. This law applies to periodicals published both on paper and online. Article I enumerates the law’s purpose, which includes guaranteeing free press while enforcing its social responsibilities, forging democratic public opinion, and enhancing public

welfare (The Act on The Guarantee of Freedom and Functions of Newspapers, 2005). Article V is dedicated to print media's duty to maintain fairness (공정성) and serve public interest (공익성). The first clause of the article explicitly states that "reports carried by periodicals shall be fair and objective." The remaining articles specify fairness as the following: (a) not being unreasonably discriminative on the grounds of genders, ages, occupations, beliefs, strata, regions, races, (b) work to reflect the interests of minority groups or those in adverse conditions to seek the interests of their own, (c) work to attain the balanced development of local communities and national culture, and (d) work to provide groups of different opinions with equal opportunities to expound their different opinions when they publish the policies of the government, political parties or specific groups, and (e) to maintain the balance in their reports on parties to political interests. Article IV directs periodicals to "enhance national reconciliation, harmoniously develop the country, hear various views of the people from all walks of life, foster neither obscenity, decadence or violence harmful to juveniles nor frictions among regions, generations, strata and genders, and enhance the people's rights to know and freedom of expression" (Act on The Guarantee of Freedom and Functions of Newspapers, 2005).

Media Laws on Defamation

United States Defamation laws in the United States differ by state, but the underlying principles remain the same. A successful defamation case requires a plaintiff to prove (a) a false and defamatory statement concerning the plaintiff, (b) an unprivileged publication to a third party, (c) fault amounting to at least negligence on the part of the publisher, and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication (Socha, 2004, p.475). The third and fourth guidelines are also referred to as "the actual malice standard." This is arguably the crux of American defamation law; the standard

evaluates whether somebody intended to harm the reputation of an individual or a body without any public benefit. This standard was established via *New York Times v. Sullivan* (1964), one of the court cases we will review in the case study section.

South Korea Defamation in South Korea is constitutionally prohibited under chapter 33, titled Crimes Against Reputation. The chapter outlines two different instances of defamation. The first is the defamation of a living being, in which penalties range from a fine to arrest. Defamation of living beings includes the libel or slander through both true or false information, although the punishment is generally more severe when the information is false. The second is the defamation of a dead being, in which case only false information is considered. Defamation is also mentioned in the Broadcasting Act and the Act on The Guarantee of Freedom and Functions of Newspapers by similar standards mentioned in the Constitution.

Comparative Analysis of Legal Backgrounds

Freedom of the Press In both countries' Constitutions, free press and free speech are grouped together. The association of these two ostensibly similar but different values have led people to fear any kind of censorship related to expression, regardless of the status of the source as well as their scope of influence. With this association, the public may fail to recognize that the freedom granted to the press comes with additional responsibilities that an individual's speech does not entail. We must acknowledge, however, that individuals have too been given the power to influence just as much as the media through the introduction of social media and the Internet. This phenomenon will be further discussed in the following sections of the paper.

A noticeable difference between the two countries is the specificity of the South Korean constitutional freedom of speech clause compared to the American First Amendment. The First Amendment grants absolute freedom of speech – or at least is not elaborated otherwise. In

contrast, the Korea Constitution specifies the conditions by which the right may not be granted; it specifically mentions that speech shall not violate neither "the honor and rights" of another person nor "public morals" or "social ethics." The vagueness of the language provides a window for a potentially more aggressive approach to regulation, which would not be as well received in the United States where free speech and free press are regarded as almost sacred.

Fairness and Objectivity Laws regarding fairness and objectivity in the press are similar in their purpose in that they were established to guarantee the representation of all voices and to stimulate public discourse. However, the South Korean regulatory clauses do not detail the methods and specific standards by which fairness will be measured and regulated as done in the Fairness Doctrine. The Fairness Doctrine was repealed in 1987, whereas South Korean laws enforcing fairness in media sustain today.

Defamation Both countries' defamation laws aim to prevent reckless and malicious statements that could not only harm the mental and physical wellbeing of individuals, but also provoke needless public concern. The main difference between the two countries' defamation laws is the basis of truth; truth is considered an absolute defense to a libel or slander action in the United States, while in South Korea, statements could be deemed defamatory even with factual basis. The upside of regulating defamation regardless of truth is filtering unnecessary malice. There have been multiple cases in which victims of defamation have committed suicide because of public humiliation. Jihoon Kim explained that defamation in the digital era must be regulated because of the speed and scale public humiliation could occur (Kim, 2018). But Korea University Law School Professor Kyung-shin Park refuted that one could rebut defamatory statements made online to protect one's reputation just as fast and extensively as the attack (as cited in Kim, 2018). The downside of the South Korean approach to regulating defamation is a

potential chilling effect. Scholars speculate that the Me-Too Movement was not as active in South Korea because victims of sexual harassment feared a potential defamation suit (Kim, 2017).

Court Procedures

United States The United States judiciary branch operates independently from the executive and legislative branches that are responsible for passing federal laws. The judicial branch "decides the constitutionality of federal laws and resolves other disputes about federal laws." The Court system operates under federalism, so there are a separate set of state courts that review specific matters such as probate, juvenile, and family court. But the Constitution applies to both federal and state courts as the supreme law of the country (United States Courts).

The lowest level of the judicial hierarchy is the District Courts, also referred to as trial courts. A District Court comprises a district judge, a magistrate judge and a jury. In district courts, witnesses give testimonies and the judge or jury determines liability. If the losing side of the trial has issues with the court proceedings, they may issue an appeal to the Appellate Courts, also known as the U.S. Courts of Appeals, which come next in the hierarchy. While the grounds to appeal vary, the most common reasoning is an unfairly conducted trial or the misapplication of a law or the Constitution. Unlike District Courts, Appellate Courts have three judges and no juries. The highest level of the federal court system is the Supreme Court, which consists of nine Justices appointed by the President. As a last resort, the losing side may file a petition called the "writ of certiorari" requesting that the U.S. Supreme Court to review the case. The Supreme Court will only agree to hear a case if the Justices consider it dealing with an extraordinarily important legal principle, or when two or more federal Appellate Courts have interpreted a law differently (United States Courts).

South Korea South Korea has the same three-branch government structure as the United States. The judiciary branch is responsible for carrying out in court federal laws passed by the legislative and executive branch. Case trials are ordained by a single judge or a panel of three judges. All hearings are open to the public, unless “there is any possibility that opening of hearings to the public could be subject to impairing national security, public peace and order, or be contrary to good morals.” In these cases, the court may decide to close the hearings to the public (The Judiciary of South Korea).

The Korean court procedure also follows a similar hierarchical system to that of the United States and titled the Three Instance Trial System. The first trial occurs at a district court. District courts sometimes establish branch courts, municipal courts or registration offices if additional support is deemed necessary. The second trial occurs at the high courts. The third and last trial occurs at the Supreme Court, which comprises 13 justices, 12 of which are appointed by the President with the consent of the National Assembly. The exception to the three instance trial system is grave constitutional matters such as presidential impeachment; these issues are dealt with at the Constitutional Court (The Judiciary of South Korea).

Case Studies

Defamation – United States – New York Times v. Sullivan (1964)

Background The Thirteenth Amendment which constitutionally banned slavery and involuntary servitude was one of the greatest steps for reconstructing the United States following the Civil War. But it did little to impact the economic, political, and social climate of the South. In 1896, the Supreme Court in *Plessy v. Ferguson* upheld the “separate but equal” doctrine, which legalized racial segregation of public facilities including school, housing, and transportation. This doctrine was enforced up to the 1940s until *Brown v. Board of Education*,

when the Court deemed the doctrine's application to public education unconstitutional (Lewis & Ottley, 2014).

Even after the doctrine was overturned, however, Black Americans continued to face governmental discrimination. Some state laws banned Black Americans from certain public facilities and restricted their opportunities to participate in the political process, with many states not even granting them the right to vote (Lewis, 1983). This mentality was considered natural during this time in the South. Calling it "the Southern way of life," the majority of white Southerners dismissed any attempts to challenge the system by demonstrators and the Northern press, going so far as to labeling them "communists." As a result, Northern journalists not only became the subject of criticism, criminal indictments, and civil lawsuits for "bias and unfairness" but also received threats and violent attacks (Roberts & Klibanoff, 2006).

Martin Luther King Jr. took charge in leading the civil rights movement against racial discrimination in the South. King led campaigns and protests in nonviolent manners, but still became an enemy of Southern authorities. He was arrested four times within four years: In 1956, he was convicted for his efforts to desegregate Montgomery buses and for speeding; in 1958, for loitering; two years later, he "became the first person in Alabama history to be charged with felony tax evasion." Following his final arrest, the Committee to Defend Martin Luther King and the Struggle for Freedom in the South was formed in New York. That year, the committee funded a full-page advertisement in *the New York Times* entitled "Heed Their Rising Voices" to support his efforts against racial injustice (Lewis & Ottley, 2014).

The advertisement first claims that Southern Negro students were being met by "an unprecedented wave of terror" by Southern authorities for "non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution

and the Bill of Rights." It then details specific incidents: In Orangeburg, South Carolina, the advertisement states, 400 students "were forcibly ejected, tear-gassed, soaked to the skin in freezing weather with fire hoses, arrested en masse and herded into an open barbed-wire stockade to stand for hours in the bitter cold" after attempting to peacefully purchase food at lunch counters in the business district. At Alabama State College in Montgomery, Alabama, students sang "My Country, Tis of Thee" on the State Capitol steps and were punished with expulsion, tear-gas, and starvation from pad-locking the dining hall. It states that teenagers who "boldly stepped forth as protagonists of democracy" in Southern cities had to face "the entire weight of official state apparatus and police power" (The New York Times, 1960).

The fifth paragraph of the advertisement "Southern violators of the Constitution" have assaulted Rev. Dr. Martin Luther King, the leader of the right-to-vote movement. It states:

> "Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times-for "speeding." "loitering" and similar "offenses." And now they have charged with "perjury"-a I under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize Negro Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South" (The New York Times, 1960).

The advertisement concluded with encouraging readers to not only offer moral support for risking their lives "in a glorious re-affirmation of our Constitution and its Bill of Rights" but also by donating money. It labels supporters of students and Dr. King as "decent-minded Americans" and "men and women of goodwill." Directly under the text was a list of sixty-four people who comprised the Committee to Defend Martin Luther King and the Struggle for Freedom in the South, including leader of the African-American labor union A. Philip Randolph, former First Lady Eleanor Roosevelt, African-American singer Eartha Kitt, actor Marlon Brando, and John Lewis, the youngest of the referred "Big Six" of the civil rights movement. Below was a list of residents and ministers in the South that endorsed the appeal (The New York Times, 1960).

On April 8, 1960, the three city commissioners of Montgomery wrote to the Times and the four Alabama ministers listed to retract the statements in the advertisements. The Time declined, claiming that the assertions had been checked and true. The commissioners, led by L.B. Sullivan, decided to take legal action and filed a series of civil lawsuits in both federal and Alabama state courts against the Times, the ministers, King, and the Columbia Broadcasting System (Lewis & Ottley, 2014).

Government Legal Reaction The climate of the jury trial that lasted three days starting November 1, 1960, was not favorable to The Times. In addition to an all-white jury, the Judge of the trial, Judge Walter B. Jones, set a pro-segregation atmosphere beginning the trial demanding "no integrated seating in this courtroom…for the orderly administration of justice and the good of all people coming here lawfully." He also referred to white attorneys present in the courtroom as "mister" whilst withdrawing that title referring to the black attorneys (Lewis, 1983).

Sullivan presented evidence to show that the statements The Times published in their advertisement were false. Addressing the events that took place at Alabama State college, he presented evidence that “(1) although police were stationed near the campus on three occasions, they did not “ring” the campus; (2) student leaders were not expelled for singing on the Capitol steps but rather for their participation in lunch counter sit-ins; (3) less than the “entire student body” protested by not reregistering; and (4) the dining hall had not been padlocked in an effort to starve the students into submission.” He added that Dr. King had only been arrested four times, not seven as the Times had printed (Lewis & Ottley, 2014).

Sullivan also testified that the statements were defamatory to him specifically. He claimed that if people believed what had been written, “they would have thought that Sullivan was improperly carrying out the duties of his office and would have believed that the police were guilty of serious misbehavior” (as cited in Lewis & Ottley, 2014). The Times’ denied that they had targeted Sullivan. They stated that he or any of the city commissioners were not mentioned by name. They added that if the advertisement damaged anybody’s reputation, it was the Montgomery Chief of Police, not Sullivan. Moreover, the Times denied liability for defamation, as the advertisement was not based on malicious intent (Lewis & Ottley, 2014).

Prior to the jury’s decision making, Judge Jones declared that the statements made about police actions at Alabama State College and against Dr. King were “libelous per se.” He allowed the jury to assess punitive damages because under Alabama’s state law, punitive damages could be claimed when a retraction of the statements was requested and refused. After only two hours of deliberation, the jury came to a verdict for Sullivan in the amount of $500,000, not mentioning whether the damages were actual or punitive.

The Times and the four ministers subsequently filed a motion for a new trial on the basis of unfairness, alleged errors, and violation of the Constitution. Judge Jones denied their motion and stated that the four ministers had waited too long for a new trial to be considered. The federal courts also declined reviewing the state court's decision through collateral injunctive action. Thus, the Times and the four ministers directly appealed to the Alabama Supreme Court.

The Alabama Supreme Court agreed to review the decision under the question of whether the advertisement was "libelous per se." However, it rejected their argument that the statements were not directed at Sullivan, claiming it was common knowledge that municipal agents act under the guidance of the city's governing body or single commissioner. The Court said Sullivan was indeed the main figure of impact because "in measuring the performance or deficiencies of such groups, praise or criticism is usually attached to the official in complete control of the body." Responding to the Times' constitutional arguments, it claimed that defamatory publications are not protected by the First Amendment and "the Fourteenth Amendment is directed against State action and not private action." Conclusively, it approved of the trial court jury's decision. While it was a temporary loss for the Times, the rejection was an opportunity for them to bring the case to the United States Supreme Court.

Unlike the State Court, the Supreme Court consisted of a progressive, anti-segregation majority of judges. The Supreme Court during this time, defined by Philip Kurland in his Harvard Law Review report on the 1963 Supreme Court term, marked the climax of "the egalitarian revolution" amid which equality was the foundation to many constitutional decisions and changes in the federal system (as cited in Lewis & Ottley, 2014). The Court denied the Alabama State Supreme Court's statement that "the Fourteenth Amendment is directed against State action, and not private action," accusing the State Court of applying this rule "to impose

invalid restrictions on their constitutional freedoms of speech and press." The second contention the Court raised was against Sullivan's argument that the advertisement was commercial. The Court declared that classifying this advertisement as commercial would discourage newspapers from carrying advertisements which serve as outlets for citizens who do not have access to publishing facilities to exercise their freedom of speech (*New York Times v. Sullivan*, 1964).

In response, Sullivan referenced numerous cases in which the First Amendment had not protected defamation. But the Court rejected his analogies because none of them had dealt with "the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials." The only previous case that presented the question in hand was *Schenectady Union Pub. Co. v. Sweeney* in 1942, when the U.S. Court of Appeals for the Second Circuit was equally divided and thus did not arrive at a decision that would provide guidelines possibly applicable to Sullivan's case. The Court, however, carefully noted that the criminal libel statute "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel," for public men are "public property." It stated that "discussion cannot be denied, and the right, as well as the duty, of criticism must not be stifled" (*New York Times v. Sullivan*, 1964).

The Court then proceeded to analyze the role the First Amendment should play in regulating defamation. It established that the Court's previous decisions have always met the general proposition that the First Amendment secures free expression upon public officials, and that the constitutional safeguard "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." It emphasized the significance of liberating political speech, stating:

> 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. It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion" (*New York Times v. Sullivan*, 1964).

In emphasizing the importance of political discussion, the Court also raised the question of whether falsity contributes to healthy political discussion. Quoting James Madison, who had said "some degree of abuse is inseparable from the proper use of everything," it claimed that erroneous statements must be protected under the First Amendment so as to provide “breathing space” for free debate. The only circumstance in which repression of speech can be justified, it claimed, was the detection of “a clear and present danger of the obstruction of justice.” The Court emphasized the importance of protecting even false statements, "half-truths," and "misinformation" for the long-term security of free speech (*New York Times v. Sullivan*, 1964).

Conclusively, the Court contrived *the actual malice standard* to be utilized in determining the circumstances in which the repression of free speech is justified. It said the current standard not only deterred false speech but burdened those claiming factual speech that may be libelous. Hence, it declared that public officials be prohibited from “recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” It believed this standard would grant the people with qualified privilege that extended to criticizing matters of public concern, public men, and

candidates for office unless proven to have shown "actual malice or go remediless." The Court demanded that critical discussion must be privileged considering that "the public benefit from publicity is so great, and the chance of injury to private character so small" that "occasional injury to the reputations of individuals must yield to the public welfare." This was the first time the Court set a scripted guideline by which defamation would be evaluated (*New York Times v. Sullivan*, 1964).

Justice Black, Goldberg, and Douglas – all of whom stood at the left of the Court's ideological spectrum – believed that the Times should be entitled to absolute, unconditional privilege, unlike the majority of the Court that supported qualified privilege. Justice Black, with whom Justice Douglas joined, presented a concurring opinion that "the majority did not go far enough to provide adequate protection for critics of official conduct." Justice Black clarified that the basis of his stance did not regard the falsity of the advertisement or malicious intentions but signified the dangers of powerful individuals regulating the voices of the people. He stated, "if Alabama has constitutional power to use its civil libel law to impose damages on the press for criticizing the way public officials perform or fail to perform their duties, I know of no provision in the Federal Constitution which either expressly or impliedly bars the State from fixing the amount of damages" (*New York Times v. Sullivan*, 1964).

Justice Goldberg's concurrence, which Justice Douglas also joined, expanded on the right for citizens and the press to criticize official conduct with protection under the Constitution. He suggested that despite the potential harm, this right "should not depend upon a probing by the jury of the motivation of the citizen or press" and elaborated:

> "The theory of our Constitution is that every citizen may speak his mind and every newspaper express its view on matters of public concern, and may not be barred from

> speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious. In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel" (*New York Times v. Sullivan*, 1964).

In addition, he specified the exemption of defamatory statements in the context of private conduct. He stated that whether directed at a public official or private citizen, "purely private defamation has little to do with the political ends of a self-governing society" and therefore, "does not abridge the freedom of public speech or any other freedom protected by the First Amendment" (*New York Times v. Sullivan*, 1964).

Important Takeaways As Justice Goldberg outlined in his concurring statement, the Court was "writing upon a clean slate" that had to be "particularly careful, therefore, adequately to protect the liberties which are embodied in the First and Fourteenth Amendments." While the Court was protecting free speech, even the occasional false speech, it did not protect deliberate and malicious false statements that "have no conceivable value as free speech" (*New York Times v. Sullivan*, 1964).

Prior to this case, the editing process in journalism was irrelevant to libel cases because the only matters at hand were the content that was eventually published. But since the establishment of the actual malice standard, the editing process became key to determining liability. This standard – putting weight on the efforts and intentions behind speech – is one of the most influential legacies to persist in the American media environment today (Lewis, 1983).

It is also important to consider the political climate of the United States during which this trial occurred. In the midst of the Civil Rights Movement, the Supreme Court as well as the people were aware of the implications of court decisions on the country's stance on racial justice. What was at stake in the Sullivan case was not just the fate of the newspaper, but "the ability, or the willingness, of the American press to go on covering the racial conflict in the South" (Lewis, 1983). In fact, the Supreme Court mentioned the chilling effect that Alabama libel laws had caused on topics of race relations, stating it did not want to take the same steps against the fight for minority rights. It stipulated that deeming the media liable for publishing about relevant public issues would diminish "the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes" (*New York Times v. Sullivan*, 1964).

Defamation – South Korea – MBC v. KCC (2008)

Background In 2003, the South Korean government banned the imports of American beef after news broke of possible health issues associated with the meat. But five years later, in 2008, President Myungbak Lee lifted the import bans in accordance with his efforts to promote "business friendly and growth-oriented economic policies" (Park, 2018). Shortly after his decision, Munhwa Broadcasting Company (MBC), one of South Korea's three major broadcasting networks, aired a report through its investigative journalism program "PD Notebook" disclosing that "the beef imported under the new agreement could be infected with mad cow disease" (Kim & Lim, 2012).

The 50-minute report was televised on April 28, 2008 with the title "Is U.S. Beef Safe from Mad Cow Disease?" The program raised many questions hinting at the possibility and risks of infection from the imported beef. It included footage such as unhealthy cows falling over, an interview of an American mother stating her daughter died from the human version of mad cow

disease, and graphics illustrating statistics that showed a 94 percent risk rate of Korean people catching Jakob disease (CJD) from consuming the beef. The program concluded by imposing the responsibility of these public health risks on the Lee administration (MBC).

The report sparked anger amongst the public, a majority of which had already been skeptical about the administration and its policies. After it aired, Lee's approval ratings plummeted and mass candlelight vigils protesting the import were held across the entire country. The vigils were the largest nationwide demonstration in South Korea since the June Democratic Movement in 1987, which demanded the resignation of president Doohwan Chun's authoritarian regime (Kim & Lim, 2012).

Government Legal Reaction The Korean Communications Commission (KCC) first filed a complaint to the Seoul Central District Court, claiming that MBC's "PD Notebook" violated the fairness and objectivity clauses of their Broadcasting Standards. It pointed out the program's multiple factual errors and exaggerations, demanding an apology from the network. MBC admitted to making mistakes in the process of translation and acknowledged that they had "mistakenly identified images of cattle that cannot stand or walk as cattle driven insane by mad cow disease" (Park, 2018).

The Lee administration's Minister of Agriculture issued a counterstatement to the program in a press interview, claiming that the beef imported came from facilities of which authorities confirmed safety. He added that "all Americans eat American beef" and that there have been "no cases of mad cow disease in the U.S. since 1997 when they prohibited the use of the animal feed." In June 2008, President Lee announced in a press conference that "the government will no longer import the meat of cows aged over 30 months...considering the major

anxieties the people expressed about mad cow disease." But neither of these efforts successfully calmed the public, and the nationwide candlelight vigils continued (Park, 2018).

On January 20, 2010, the Seoul Central District Court declared the MBC journalists innocent, claiming that the report was not false and had not intended malice. The prosecution as well as members of the Conservative Party – Lee's political party – strongly protested against this decision. The Court came to the same decision 2 months later on December 2, 2010 in the second round of trial, deeming the journalists not guilty, but changed its stance on the falsity of the report; it concluded that the program's report was indeed partially false (Hankyoreh, 2010; *MBC v. KCC*, 2008).

Unsatisfied with the District Court's ruling, the KCC took the case to the Seoul High Court. But the High Court also declared the journalists not guilty, despite agreeing on the partial falsity of the report. The Court explained that "for issues that have critical social implications, the limit for the freedom of speech should be relaxed and not be made hesitant on the expression by the criminal restrictions" (*MBC v. KCC*, 2008). The KCC attempted, one last time, to overturn the decision by taking the case to the Supreme Court. However, in September 2011, the Supreme Court upheld the Seoul High Court's ruling, ultimately finding the journalists involved in the program not guilty (Bae, 2011; *MBC v. KCC*, 2008).

Important Takeaways The Supreme Court's final ruling indicated the judiciary's support for the rights to free press. This case highlighted the debate between journalistic freedom and governmental intervention for content declared journalistically unethical. This case was also the first high profile case considering media regulation in which the significance of the free press ideal was highlighted (Bae, 2011).

The case also presented the necessity of political apologies through policy change. Following the report, the Lee administration apologized for concerning the public regardless of whether they believed the report was truthful. But the public was not receptive; the candlelight vigils persisted and Lee's public rating continued to decline. Perhaps Korean citizens were wary that the administration only apologized to "protect reputation, defend policy decisions, and justify motives and intentions" rather than from genuine regret. Public chaos diminished only after Lee finally decided to ban cow meat imported from the U.S. (Edwards, 2005; Gold, 1978).

Fairness – United States – Red Lion v. FCC (1969)

Background In the 1960s, broadcasting was still considered fairly novel in the American media environment but rapidly gaining popularity. In addition to the establishment and growth of public broadcasting stations such as the Public Broadcasting Service channel (PBS) and National Public Radio (NPR), privately owned stations came about at fast paces as well. Because of this fast growing influence, however, the government struggled to navigate the guidelines for usage of this new and powerful medium (Freedom House).

In 1969, Reverend Billy James Hargis discussed Fred J. Cook's book *Goldwater – Extremist to the Right* on a Pennsylvania radio station WGCB, which was operated by the Red Lion Broadcasting Company. During the program, Hargis claimed that Cook had been "fired from the newspaper where he worked because he had filed false charges against city officials." He added that Cook "had supported Communist sympathizer Alger Hiss, had worked for a Communist publication, had criticized J. Edgar Hoover and the CIA, and had written the Goldwater book to smear his reputation." Cook demanded reply time in response to this presentation, but WGCB refused. After a series of letters denied, Cook filed a complaint with the FCC, which was quick to respond (Hedblom, 1989).

The FCC declared that the Red Lion Broadcasting Company had failed to comply with the obligations of the Fairness Doctrine, which requires that broadcast media notify a subject of public attacks and provide them free reply time in addition to a tape, transcript, or summary of the presentation – none of which Red Lion had done for Cook. It also suggested that a rule be made to allow more systematic enforcement of the Fairness Doctrine. However, Red Lion refuted that "this application of the fairness doctrine was unconstitutional under the First Amendment" (*Red Lion Broadcasting v. FCC*, 1969).

Government Legal Reaction The United States Court of Appeals in the District of Columbia Circuit approved to hear the case on March 9, 1965. The main issue at hand was evaluating the constitutionality of the Fairness Doctrine on the basis of the First and Fifth Amendments. Red Lion claimed that the Fairness Doctrine confined their rights to free speech and press, a violation of "political editorial rules on conventional First Amendment grounds." They insisted that the First Amendment should protect their desire to assign frequencies to broadcast the content of their choice and to withhold frequencies to those they do not wish to allot them to. The FCC defended the constitutionality of The Fairness Doctrine. It demanded that the rule be applied to this case, just as it had in previous cases in which media institutions failed to meet the standards of fairness they should be, and legally were, required to (*Red Lion Broadcasting Co., Inc. v. FCC*, 1967).

First, the Court called to attention Red Lion's failure to notify Cook upon the attack. It claimed that holding such information in addition to denying his opportunity to respond was "inconsistent with the foregoing procedural requirements." It then touched on matters specific to the First Amendment's application to the doctrine. It stated that the government guarantees broadcast stations the freedom to cover whatever matter they wish as the First Amendment

grants; but the doctrine "recognizes and enforces the free speech right of the victim of any personal attack made during the broadcast" instead of "limiting the petitioners' right of free speech." In other words, broadcast stations had the right to free speech under the First Amendment to independently select the issue and spokesman to cover the issue, only as much as the right of a viewer – the target of the issue covered, in this specific case – to respond to the coverage and defend themselves. It added that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society" (*Red Lion Broadcasting Co., Inc. v. FCC*, 1967).

The Court also deemed it Red Lion's responsibility to have reached out to Cook in advance and offered him sponsorship, for Cook was not obliged to report whether he was financially capable of paying for his own reply time. It emphasized that broadcast frequencies belong to and exist to serve the American people. The government authorizes broadcasters to utilize frequencies "for the service of the public interest, convenience, or necessity" and not to communicate – and only communicate – their private concerns. The Court made clear that its decision in favor of the FCC was not to give the Commission the obligation or authority to determine right and wrong in controversial issues of public interest, but rather to legitimize its efforts to grant anybody who seeks to practice their right to free speech under the protection of the First Amendment (*Red Lion Broadcasting Co., Inc. v. FCC*, 1967).

To assess fairness in cases regarding media regulation, the Supreme Court's first protocol was to evaluate the media institution's accessibility – its scope of influence over public opinion. If the institution didn't have the means to reach many citizens, scrutinizing the fairness of its content was considered unnecessary. In the past, the Supreme Court calculated the number of

broadcast outlets the institution possessed for this assessment (Donahue, 1999). But in this particular case, the Court used viewers as the unit of measurement. The reasoning behind this decision was based on the scarcity of available broadcast frequencies. It claimed that broadcast was "uniquely pervasive" compared to other media outlets such as newspapers, and broadcasters were privileged with access to that power. It stated that there were more individuals that wanted to broadcast than there were "available frequencies, or available technology, permitted." The Court hence claimed it had the responsibility and authority to regulate its distribution; otherwise, "the medium [broadcast] would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard" (*Red Lion Broadcasting v. FCC*, 1969).

The Court deemed it would be unfair for broadcast and technological innovation to have complete control over news and public affairs. It believed that giving the licensed the privilege to use scarce radio frequencies only for their own benefit and agenda was allowing an oligarchy – a system in which the First Amendment rights of the privileged were put before those to whom licenses were not provided. Given the discrepancy in power between those licensed and not, the Court declared that broadcasters be "obligated to give suitable time and attention to matters of great public concern" because the licenses they were given did not "confer ownership of designated frequencies, but only the temporary privilege of using them" (*Red Lion Broadcasting v. FCC*, 1969).

Prior to this case, the First Amendment was typically utilized to tip the scales in favor of the freedom of the press when it came to media regulation. Whenever broadcast or radio stations were filed for inappropriate content, this constitutionally-based argument often granted them the unquestionable upperhand. The Court's traditional approach to dealing with cases related to broadcasting and the First Amendment was first, to "determine the appropriate standard of

review – *content-based* or *content-neutral*. If the prior, the Court reviewed whether “regulation is the least restrictive means of serving a compelling governmental interest,” and if the latter, whether “regulation is narrowly tailored to serve a substantial governmental interest” (Campbell, 2008). Either way, its underlying belief was minimum regulation to substantially protect free speech. But in the Red Lion case, the Court never discussed the standard; it claimed that the “differences in characteristics of new media” – back then, radio and broadcast – legitimized the differences in the standards of applying the First Amendment. It stated the application of free speech is paramount to “the right of the viewing and listening public, and not the right of the broadcasters.” It alleged that the government stands by protecting the First Amendment’s purpose more so than the concept itself:

> “To condition the granting or renewal of licenses on a willingness to present representative community views on controversial issues is consistent with the ends and purposes of those constitutional provisions forbidding the abridgment of freedom of speech and freedom of the press. Congress need not stand idly by and permit those with licenses to ignore the problems which beset the people or to exclude from the airways anything but their own views of fundamental questions. The statute, long administrative practice, and cases are to this effect” (*Red Lion Broadcasting v. FCC*, 1969).

The Court differentiated other circumstances in which the FCC’s regulations would have been unconstitutional, including the refusals (a) “to permit the broadcaster to carry a particular program or to publish his own views,” (b) “of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves,” (c) “of government censorship of a particular program contrary to,” or (d) “of the official government view dominating public broadcasting.” It accentuated that its ruling should not, therefore, be

understood or construed "to give the Commission the power of censorship" over public communication mediums but to recognize that:

> "Television and radio frequencies are in the public domain, that the license to operate in such frequencies requires operation in the public interest, and that, in newscasts, news interviews, news documentaries, on-the-spot coverage of news events, and panel discussions, all sides of public controversies shall be given as equal an opportunity to be heard as is practically possible" (*Red Lion Broadcasting v. FCC*, 1969).

In conclusion, the Court asserted that the First Amendment does not protect the usage of scarce resources by federally licensed broadcasters. Red Lion declined to respond to the Court's assessment on the First Amendment. The Supreme Court Justices unanimously upheld the FCC's enforcement of the Fairness Doctrine which they declared did not violate the First Amendment and was therefore, not unconstitutional (*Red Lion Broadcasting v. FCC*, 1969).

Important Takeaways The Supreme Court's ruling for the FCC's enforcement of the Fairness Doctrine signified the possibility of censorship while evading restrictions of the First Amendment. The Red Lion case thus marked one of the most "expansive types of regulation of news in U.S. history" (Napoli, 2018). The Court's discussion centered not around the contradictions of the First Amendment or its essence, namely "democratic deliberation, individual liberty, and perhaps the search for truth," but on monopolization, concern that Red Lion or other broadcasters would dominate the marketplace of ideas (Powe, 2009).

The case also highlighted the new application of the trustee model on broadcast. Unlike other mediums like newspapers, broadcasters were given licenses by the government in order to distribute news and information. The Court labeled broadcasters as a "fiduciary with obligations," indicating the power dynamic between the government and broadcasters in which

the trustee (government) was allowed to legally enforce obligations on the beneficiary (broadcaster) in exchange for trusting the beneficiary with a license. This model "invites and requires the government to play a central role in broadcast regulation" (Powe, 2009). Under this model, the Court "reduced broadcasters to public proxies from their earlier status as public trustees," saddling broadcasters with "contingent access or common-carrier-like obligations, which they had avoided historically" (Donahue, 1999). Essentially, the Court established an order for First Amendment guarantees by which the public's right to information outranked that of speakers. So instead of addressing constitutionality of regulation, three words – license, licensed, and licensee – dominated the discussion during the case in determining liability.

Moreover, the case raised the question of how much power the audience has on the receiving end of news and information funneled through the media. The opinion in the Red Lion case ruling essentially illustrated that broadcasters must provide opinions they have no intention of believing whereby "listeners could tune out, viewers could switch, and readers could cease" (Powe, 2009). This argument suggests that the audience not only has the right to speak but also the right to choose what they hear. Broadcasters' rights to free speech were to become of secondary nature in exchange for the privilege of possessing spectrum frequencies.

It is arguable that during the era of Red Lion, the privilege of frequencies was indeed a privilege. *FCC v. Fox Television Station Inc.* in April 2009 highlighted the ways in which media policy and its application evolves. The FCC issued notices to Fox for broadcasting the profane language during the screening of the annual Billboard Music Awards. The Circuit Court took Fox's side; but the Supreme Court deemed Fox liable. Within a split court, Justice Thomas directly referred to the Red Lion case and its immateriality in the current media climate. The decision was "unconvincing when they were issued," he stated, "and the passage of time has

only increased doubt regarding their continued validity." He raised two disputes against the Red Lion Court's decision: First, the Court relied on "transitory facts" to determine the applicability of Constitutional rights that are "enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or even future judges think that scope too broad." Second, dramatic technological advances in communication mediums have nullified the factual assumptions made based on the scarcity of broadcast frequencies 50 years ago (*Red Lion Broadcasting v. FCC*, 1969; *FCC v. Fox Television Stations, Inc*., 2009) Likewise, it is difficult to apply the frequency argument used in Red Lion to the contemporary media environment.

Nearly half a decade has passed since the Red Lion case, and the media environment has changed immensely since. Frequencies are no longer scarce and news travels faster and farther than ever before, mainly through the Internet. Frequencies are no longer lacking. Today, most broadcasted content is available online. Although it could be argued that not all regions of the United States have the same level of access to the Internet, the Internet itself is available to all. Just as the Red Lion Court decided to apply different standards because of the newly introduced nature of the medium (broadcast), it is time we consider re-evaluating the significance of fairness in media and the application of the First Amendment to the "new media" of today. This will be further discussed in the conclusion that deliberates the dispersion of fake news in the current media environment.

Furthermore, the Fairness Doctrine, contrary to what the Red Lion Court had believed, resulted in the chilling of speech in the media. The chilling effect, which will also be further discussed in the conclusion, refers to the decrease in news coverage in general instead of the increase in diverse coverage for which the doctrine was intended. The only way to justify the

chilling effect was if the benefits of enforcing the doctrine “outweigh the harms caused by the chill” (Powe, 2009). In *FCC v. League of Women Voters of California* (1984), Justice Brennan stated that if the FCC proved that the doctrine reduced instead of enhanced speech, the Court would indeed reconsider the doctrine’s constitutional basis. But the Court would not reconsider the doctrine without discussing it with the FCC and the Congress (*FCC v. League of Women Voters,* 1984). In response, the FCC published in their 1985 Fairness Report that it did not have the power to repeal the doctrine because “it was codified by the 1959 amendment to section 315 of the Federal Communications Act,” leaving decisive matters to Congress (Fairness Report; *FCC v. League of Women Voters,* 1984). While the FCC and the Court repetitively played hot potato with the responsibility of making the final call on the doctrine’s repeal, neither referenced the constitutionality of the doctrine, in fear of giving any implication that censorship of speech was justified (*FCC v. League of Women Voters,* 1984).

In *Meredith Corporation v. FCC* (1987), both the FCC and the Court of Appeals ultimately declared that the Fairness Doctrine was “violative of the First Amendment.” But neither wanted to explicitly suggest its repeal, aware that the Congress pushed strongly for fairness as a statutory obligation of the media. On August 4, 1987, the FCC finally abolished the doctrine on the basis of this court case. Their reasons were the following: (a) the Fairness Doctrine chills speech; (b) the Fairness Doctrine is not narrowly tailored to achieve a substantial governmental interest; (c) dramatic changes in the electronic marketplace provide a basis for Supreme Court reconsideration of the diminished protection provided to the electronic media; and (d) societal roles of print and electronic media are identical, the same first amendment principles should be applied to each (*Meredith Corporation v. FCC.*, 1987). In the decision to abolish the doctrine, the Supreme Court upheld the FCC’s decision but once again “tiptoed

around the First Amendment issue" (Barron, 1967). Nevertheless, the debate among lawmakers, scholars, and others about a tangible standard to determine fairness in the media and its "impact on the availability of diverse information to the public" continued (Ruane, 2011; Hazlett & Sosa, 1997).

Fairness – South Korea – KBS v. KCC (2010)

Background December 2007 marked the end of the "democratic revolution" of South Korea as conservative representative Myungbak Lee took victory in South Korea's 17th presidential elections. So when Lee was elected in 2008, public concern naturally arose, with increasing fear of the traditionally oppressive attitude conservative representatives had taken toward both the public and the media. However, because Lee was a moderate amongst the conservative party candidates, the public did not expect drastic changes in approach to the media. The Cheonan Naval Ship scandal proved them wrong (Lee, 2010).

On March 26, 2010, the South Korean Naval Warship *Cheonan* suddenly submerged in the midst of US–South Korea joint naval exercises, taking the lives of forty-six men. The public criticized the government and demanded an explanation. In response, The Lee Administration formally announced on May 20, 2010, that the sinking resulted from a torpedo attack by a North Korean midget submarine (You, 2015). The Joint Investigation Group (JIG), led by the South Korean military, provided evidence that supported this argument. The Lee Administration declined when the North Korean government, which denied the accusations, proposed running their own investigation (BBC).

But critics were skeptical. One of the most compelling pieces of evidence that JIG presented was a torpedo fragment with a blue "No. 1" mark, which had been found on a previous North Korean torpedo. Many experts, however, questioned how the blue ink mark survived the

enormous heat of the explosion whereas the paint of the external surface of the torpedo diminished (Lee, 2010). The Russian investigative team concluded that the discovered torpedo parts had been under water for more than six months prior to the incident. The corrosion of the torpedo parts seemed as not a result of an explosion but an absorption of old, corroded aluminum. The condition of both the soldiers that survived and died also indicated otherwise; they bore no impact from the shockwave that would have been produced from an explosion (Lee & Yang, 2010). Scientists Hwang-su Kim and Mauro Caresta reported that the seismic spectra of the incident were also inconsistent with an “outside bubble-jet explosion” as the JIG had reported, but consistent with a collision with a 113-meter-long submarine. Other critics including Sang-cheol Shin presented evidence of the possibility of a collision instead of an explosion, referring to the shape of the propeller screw that indicated the ship ran aground. Most corpses from the sinking showed few external injuries such as burns or penetrations and instead showed signs of having died from drowning (Caresta & Kim, 2014).

The Board of Audit and Inspection (BAI) reviewed the failure of the South Korean navy to prevent the attack, but it did not publically release its final report. Such lack of transparency of the investigation carried by federally connected sources contributed to the increase of public skepticism. In addition, the JIG refused to disclose their communication records, the navigation route of the Cheonan, and the recorded images of the warship’s sinking (Lee, 2011).

The Lee administration decided to make sure that public skepticism didn’t spiral into chaos by oppressing dissenting views. The Supreme Prosecutors’ Office declared that it would “strictly punish those who spread malicious rumors about the incident on the Internet” (Money Today, 2010). Subsequently, the KCC launched numerous defamation investigations against Cheonan-related reports found on the Internet (You, 2015). Upon police request, The Korea

Communications Standards Commission (KCSC) pressed Korean web portals such as Daum and Naver to remove posts critical of the government's investigation of the Cheonan. One man was fined approximately $1,000 and sentenced to prison for 10 months with two years of probation for posting online that the ship sank due to a collision with a US nuclear submarine. The Constitutional Court declared the arrest unconstitutional (Chosun Ilbo. 2011). But this didn't stop the government; by December 2010, approximately forty people had been investigated, ten indicted, and a soldier referred to the military for prosecution (You, 2015).

The Lee administration used criminal defamation as its main weapon. The standard of defamation, existing to enforce the media's responsibilities in a democratic system, became a political tool to suppress opposition. The government and the conservative media "mainly used the rhetoric of national security to denounce the critics—calling them pro–North Korea or anti-state." Although not many subjects were actually indicted, the attempts still produced an overall chilling effect in the media. Both civilians and journalists hesitated to express, report, or publish anything that hinted at distrusting the government's version of the incident. But the chilling effect did not affect the Korean Broadcasting System's (KBS) investigative sector (You, 2015).

On November 17, 2010, KBS aired in their investigative documentary show "In-depth 60 Minutes" a program titled "The Mysterious Cheonan Ship, Did the Controversies End?" The program suggested multiple suspicions over the report released by the government. It reported that the adhesive material found in the vessel and torpedo fragments was not Alxoy, a residue from the explosion as the JIG had claimed, but amorphous basaluminite, which must have been accumulated over a long period of time. It also elucidated the fact that the government concealed lots of important information including the weapons loaded on the warship, which were "hastily

discarded." Lastly, the report raised the possibility of witnesses having perjured themselves from government pressure and suggested that "we need a second look into the case all over again" (Bae, 2011).

Government Legal Reaction The KCC imposed severe disciplinary action against KBS, filing a warning under the terms that it violated fairness and objectivity standards of public broadcasting. The first trial was held at the Seoul Administrative Court. The Court responded that fairness was based not on the issue of balancing different political views, but the presence of a "practical equal opportunity" to present dissenting views (*KBS v. KCC*, 2010).

The Court made clear that fairness and objectivity in investigative reporting should not be evaluated the same way it is in covering elections or factual components of events in which the fair balance of political views and presenting facts objectively is crucial. In reports like the matter in hand, it prioritized evaluating whether the program's purpose benefited "the maintenance and improvement of democratic values as well as the public's right to know." It concluded that KBS abided by the fairness and objectivity standards because KBS not only offered JIG the opportunity to counter the arguments presented in the program but the program itself did not seem to have maliciously intended to manipulate or modified any information for other purposes than to inform the public (*KBS v. KCC*, 2010).

The second trial was reviewed by the Seoul High Court, which reviewed the fairness and objectivity standards with more detail. It stated that to evaluate whether the broadcast objectively handled facts, it must consider the broadcast's "objective content, the common definition of the used vocabulary, and connection of the phrases, and the impression that these categories comprehensively leave the audience." The Court added that it must also consider the significance that these categories hold in the current social and political climate. Thus, the considerate amount

of effort that KBS contributed in the investigative process before publicly reporting their findings implies that the broadcast's intention was to fact-check the scientific data the government reported, as a media institution should. It concluded that KBS "carried out the reporting process with sufficient discretion and satisfied its responsibility to objectivity" by simply presenting a logical argument regarding questionable public affairs (*KBS v. KCC*, 2010).

The Court accentuated that monitoring and criticizing the government's actions stands at the core of the free press. It stated that if the government had a problem with the content, the administration had the option to simply present a counter argument. Unless the information presented is false or has the possibility of being misconceived, the government must be very careful in regulating the content of the media. In addition, the Court directly referred to The United States Supreme Court decision in *New York Times v. Sullivan* to emphasize the importance of press freedom:

> "Under basic order granted by our constitution, public discourse is our government's fundamental principle as well as political duty, as suggested in the United States' Sullivan decision. Such discourse includes the vehement and harsh, sometimes even unpleasant, attacks against the government and public officials but shall never be suppressed, rather encouraged to occur vigorously and at a wide-scope. The necessity to protect press freedom is even greater if the reported information about a governmental institution's official report carries social significance and serves public interest. By providing space for truthful, transparent, diverse, and free open debate, we substantiate the supremacy of a liberal democratic political system, and such patent system with guaranteed freedom of the press is the best way to assure national security within a global society, where global citizens communicate beyond physical borders thanks to the social

and technological development of diverse communication mediums" (*KBS v. KCC*, 2010).

The High Court ultimately declared that because the report dealt with matters concerning public interest, securing the freedom of the press should be prioritized over addressing the government's concern for national security. Moreover, the program instigated public discourse and necessary investigation for the development of public trust and hence, KBS did not violate the fairness and objectivity standards as the KCC suggested. The KCC tried to take the case to the Supreme Court, but the Supreme Court agreed to the High Court's decision. In July 2015, the Supreme Court officially declared that KBS was not guilty (*KBS v. KCC*, 2010).

Important Takeaways The KBS case portrayed the way in which the political climate influences people's perception of the media. The public, already concerned about Lee's oppressive ways of government, questioned the fact that the incident occurred 2 months before the elections. After the JIG announced its report blaming North Korea, the Lee Administration took extensive measures against North Korea. It suspended trade exchanges, banned their merchant ships in South Korean waters, and set up loudspeakers in the demilitarized zone between the two countries (DMZ). The Lee government also sought a United Nations Security Council's (UNSC) resolution to "intensify international sanctions against the North Korean regime as the culprit for the Cheonan sinking" (You, 2015).

Whether the government purposefully blamed North Korea with the upcoming elections in mind, the plan backfired. The percentage of people who believed the government's version of the sinking incident was significantly low (Institute for Peace and Unification Studies, 2012). The government's authoritative response to the press did nothing but increase both domestic and international criticism. Following the event, the South Korean stock market as well as the value

of the Korean won plunged; the heightened military tensions with North Korea had negatively impacted the South Korean economy (You, 2015). In addition, Freedom House's ratings for South Korea in the freedom category fell greatly (Freedom House).

Nevertheless, the Lee administration continued to pursue an aggressive regulatory approach to opposition. A high ranking official that worked for the administration reported to liberal newspaper Hangyeorae in 2018 that the government created a blacklist of online users who frequently attacked and questioned the government's stance on the incident. He stated that from March 25 to April 5 in 2011, the Department of Cyber Command held investigations by giving points to users based on the degree and frequency of anti-government posts made. He claimed that this black-book was passed on to the Secretary of Defense, International Strategy, New Media Service, and other federal departments with the title of "Daily Cyber Trends" or "Cyber Correspondence Activity Report." They eventually identified 20 users, who they then unofficially harassed by sending notes, commenting on their posts, and sparking debates with online. The online activities of the 20 users decreased after the harassment (Ha, 2018). There was no other evidence presented to confirm the validity of this official's testimonial. However, he suggested the possibility of unlawful media regulation, which is even more dangerous because there are no guidelines by which online users can defend themselves.

Indeed, this case highlighted the way in which Korean democracy still falls behind in terms of freedom. While the Korean government follows the American three-branch model, in reality, the president has so much authority that "few checks and balances are prosecuted by the legislative and judicial branch." Moreover, as a country still technically at war with its northern neighbor, the executive branch has often utilized issues involving North Korea as a political tool to regulate opposition and bend rules to their favor. Such behavior somewhat parallels the United

States shutting down pro-communist speech during the Red Scare during the 1960s for "national unity" (You, 2015).

Comparative Analysis

The following diagram summarizes the similarities and differences between the court cases of each country based on each condition:

Figure 4

Similarities and Differences between American and South Korean court cases

Similarities	▪ Defamation: Constituionally guaranteed free press was core of decision. Free speech was prioritized over factuality. ▪ Fairness: Programs were aired through frequencies (radio and television).
Differences	▪ Defamation: NYT was against an individual whereas Korea against the gov. Frequencies were not mentioned in Korea. ▪ Fairness: Fairness wouldn't have mattered as much in U.S. print media because FD only applies to broadcast.

In both defamation cases, the United States and South Korea Court ruled in favor of the defendant – the media. These decisions highlighted the way in which the free speech ideals stood at the core of the decision. It was evident that in both cases, the Court made an effort to avoid making a precedent for limiting free speech of free press for any reason. Truthfulness in the reports the media put out was not a significant concern – at least not significant enough to be the center of the decision.

The difference in the decisions of the fairness related cases between the two countries illustrate how powerful a role the Fairness Doctrine played in media regulation in the United States. While the media institutions in both cases publicized their voice through mediums using frequencies, the spectrum scarcity was the center of the discussion in the Red Lion case whereas the topic was not even broached in the KBS case. It is important to consider, however, that the

South Korean case happened quite recently when the scarcity of frequencies was no longer an issue.

Conclusion

Free Press Then and Now: Changes in the Media Environment

Definition of Media

In a traditional media institution, we picture a newsroom of journalists who strive to provide the public with news information and keep the government in check. But in the current media environment, social media has that power to. Greg Marra, the engineer for Facebook's News Feed, claimed that Facebook does not want to be involved in the journalistic process. "We don't want to have editorial judgment over the content that's in your feed," he stated. "You've made your friends, you've connected to the pages that you want to connect to and you're the best decider for the things that you care about" (Somaiya, 2014).

Whether they want to or not, however, social media and other online platforms like Facebook now possess the same level of power to influence the public as traditional media outlets once did. This is dangerous, considering that their power is unregulated, contrary to outlets deemed as part of the media which are bound by regulatory laws to ensure they serve their public interest purpose. Thus, this paper declares that it is necessary to define media by the very role it serves: any platform or source that publically broadcasts or publishes information labeled as news, regardless of quality and truthfulness, with the purpose of communicating to the public about publically relevant matters.

Some may argue that the title of the press should only apply to journalists that have been recognized by awards or certifications for their journalistic practices or have reputations for their credibility and accuracy. This is partially valid; producers and distributors of fake news do not deserve the honorary title of the media, for they possess neither the same intentions of serving the public's best interests nor the same level of self-enforced journalistic integrity as established

journalists do. Nevertheless, we must include them in the definition of media because regardless of their journalistic unethical motives, they now have the ability to reach and influence a large audience thanks to technological advancements. And without including them in the definition, there is no foundation on which any regulatory policy could be constituted in the case that their influence grows out of control.

We must, in this manner, broaden the scope of what defines the media in order to consider any kind of policy regarding fake news on social media and the Internet. The definition of the media should also not be limited to the possession of licenses provided by the government. In fact, many newspapers as well as online news sites are not licensed but are still highly regarded news sources. The licensee model, as discussed in our previous section, only applies to a handful of mass communication mediums including some radio and television stations. The government is able to more easily regulate licensed stations by media laws that apply specifically to the licensed, since they broadcast their reports using the frequencies provided by the government. As media and communications policy professor Philip Napoli detailed, "an additional layer of complexity and interconnectivity is folded onto the always-evolving digital news ecosystem, and yet another category of tech company may need to start thinking like – and being treated like – a media company" (Napoli, 2019, p.8).

Existing Policies that Regulate Social Media and the Internet

United States In terms of content regulation, the United States has federal laws that ban online fraud, children's access to excessive violence or pornography, sex-trafficking, illegal trading with foreign enemies, copyright, and other content deemed indecent to the degree of being harmful to society. In addition, different states have their own Internet regulation laws that

vary along these lines. But they do not have any laws that extensively regulate speech or give the government access to an individual's information, possibly infringing upon his or her privacy.

The Communications Decency Act of 1996 grants everybody with immense, unrestricted power to select and share information with the intent to influence public opinion and yet, have no responsibility from the possibly harmful consequences (Communications Decency Act, 1996). Under the terms of this act, "online speakers cannot be held responsible for disseminating the speech of others, even if they intentionally chose to disseminate that speech knowing the information presented was false and harmful" (Ku, 2017, p.29). By protecting individuals who act like the media but simultaneously avoid the duties entailed, this act invalidates the trustee system of the democratic media environment, which grants the media the power to influence with the premise of satisfying their duties.

In addition, there have been multiple bills recently proposed to regulate information online. Facebook's Cambridge Analytica scandal led to the introduction of the bipartisan Social Media Privacy Protection and Consumer Rights Act of 2018, which required transparency from social media companies on the types of user data they collect and share. The Democrats also introduced the Customer Online Notification for Stopping Edge-provider Network Transgressions (CONSENT) Act, which had requirements similar to that of the Social Media Privacy Protection and Consumer Rights Act (Napoli, 2019, p.25). Although the government does not restrict political or social engagement over the internet, there are also allegations of unofficial regulation imposed by the government. The search-engine giant Google reported that requests from government entities at the local, state, and federal levels for removal of content had risen steadily in recent years (Freedom House).

South Korea According to Michael Breen, censorship in South Korea is rooted in the South Korean government's historical tendency to see themselves as “the benevolent parent of the masses.” Defamation Laws in South Korea apply to online users just as much as they do for journalists in broadcasting or newspapers. The anti-North Korean sentiment also exists in the same way. The OpenNet Initiative categorized pro-North Korean content as pervasive to national security. For both defamation and pro-North Korean speech, it declares that “any person who praises, incites or propagates the activities of an anti-government organization...with the knowledge of the fact that it may endanger the existence and security of the State or democratic fundamental order, shall be punished by imprisonment for not more than seven years” (Haggard & You, 2015).

The Telecommunications Business Act (TBA), passed in 1995, created the Internet Communications Ethics Committee (ICEC) to monitor the Internet and determine which content should be removed. The ICEC pursued criminal prosecutions of those who made unlawful statements and blocked several foreign websites. In 2008, following the election of President Lee, created a new agency called the Korea Communications Standards Commission (KCSC) which replaced The ICEC. In addition to previous authorities of The ICEC, the government allowed The KCSC to “suspend or delete any web posting or articles for 30 days as soon as the complaint is filed,” claiming that their main reasoning was to remove offensive comments to combat cyberbullying (The Telecommunications Business Act, 1995).

The Real-name registration system was established to require websites with over 100,000 daily visitors to require their users to register their real name and social security numbers (Fish, 2009). The introduction of this law raised concerns that the government was collecting information on citizens and invading privacy. As for content regulation, The Korea Internet

Safety Commission (KISCOM) was established in 2005 to order internet service providers to filter "subversive communication, materials harmful to minors, cyber defamation, sexual violence, cyber stalking, and pornography and nudity." Between 2008 and 2011, KISCOM blocked or removed over 53,000 posts online (Chung, 2008).

Integrating Media Regulation Conditions to the Fake News Discussion

Importance of the Technological Characteristics of the Medium The Court in the Red Lion case emphasized the privilege of owning frequencies. Justice Brennan's stance on free speech in Red Lion was inconsistent with his opinion in *New York Times v. Sullivan*. In the Times case, he had utilized the possibility of the effect as a core argument in favor of protecting NYT's rights to free speech. It is as if he assumed that "broadcasters were of a hardier breed" than newspapers (Powe, 2009). Moreover, even if the frequency scarcity argument was to be justified back then, it is questionable why the Fairness Doctrine was only applied to broadcasting media back then when print media existed too. As Justice Thomas suggested, "it is unclear why that fact [frequency scarcity] justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media" (*New York Times v. Sullivan*, 1964; *Red Lion Broadcasting v. FCC*, 1969).

The Court pointed out in Red Lion, however, that this spectrum-based regulation may be re-evaluated when and if the media environment changes. Perhaps now is the right time to do that, considering that the main platform of fake news dispersion - social media and the internet - neither uses frequencies nor is lacking in accessing the public in any way. That is not to argue that social media and the internet have the same effect as does broadcast. Research shows that they don't reach as many viewers. But that is a "yet" kind of question. Although television and print media remains the most critical source of news for many, annual audience rates have

continued to decline, raising "questions about the future role of public broadcasters and their ability to attract the next generation of viewers" (Newman et al., 2018). That said, this may be the apt time to consider preventing issues that the Court based the Red Lion decision on – the media abusing their power to broadcast content based on personal agenda and performing unfair reporting – before unregulated platforms become as influential as traditional media outlets.

Danger of Media Regulation's Chilling Effect Just five years after the Red Lion case, the Court declared in *Miami Herald Publishing Co. v Tornillo* (1974) that the Fairness Doctrine "inescapably dampens the vigor and limits the variety of public debate." It recognized the possibility of the Doctrine reducing both volume and quality of coverage, in which case they would "reconsider the constitutional implications." In this case, it claims reconsideration is justified since "the purposes of the doctrine would be stifled." But the Court concluded that the chilling effect was unlikely and "at best, speculative." To their knowledge, the communications industry had "taken pains to present controversial issues in the past" and nonetheless, had "never abandoned their efforts." It said it would have plenty of time to reconsider the Doctrine when, if ever, the effect arises in actuality (*Miami Herald Publishing Co. v. Tornillo*, 1974).

But alas, the chilling effect resulting from the doctrine was quite evident in news coverage trends. From the Red Lion case to the early 1980s, the American media faced one of the most aggressively restrictive times in history (Powe, 2009). The doctrine intended to increase diverse speech instead reduced all speech because the media was so fearful of regulation. For media institutions, facing charges was not just a matter of their broadcasted content coming under attack, but also suffering from both timely and costly trials against the FCC in addition to losing their institution's reputation for legitimate journalism (Powe; Hazlett & Sosa, pg287). Moreover, informational programming increased dramatically as soon as the doctrine was

repealed in 1987. For instance, the radio AM informational share rose from 7.11 percent in 1987 to 27.60 percent by 1995 (Hazlett & Sosa, pg295). Although correlation is not casualty, the correlation is strong enough to suggest that "the old rules indeed provided a disincentive to broadcasting" (pg301).

The chilling effect continues to be a grave concern in the consideration of social media and Internet regulation. However, the Fairness Doctrine put emphasis on the absolute objectivity of publicized products instead of on the pursuit of objectivity, which we clarified in the Literature Review was a more defining and fair standard of journalistic truth. Because of the virtually impossible nature of reporting with complete elimination of bias and the lack of credit given to the effort towards remaining objective, it is reprehensible that the media started to fear speech in general. On the other hand, fake news as we defined, in terms of upright falsity and perverted intention, more ostensibly violates the standards of truth.

The Power of the Media The MBC case stimulated the first large-scale candlelight vigil in South Korea, which has since become a tradition of citizen participation in the democratic process. The candlelight vigil based on the U.S. beef ban scandal began on May 24, 2008, but numbers of participants exponentially increased after the MBC PD Notebook broadcast. At its peak, the number of attendees at these vigils reached approximately 80,000 (ABC News).

The 2008 scandal not only highlighted the power of traditional media outlets, but also shed light on the growing influence of social media. Protestors used social media platforms, referred to as "SNS" (Social Networking System) in South Korea, to mobilize people in their networks. Provocative pictures and videos spread quickly and widely (Herskovitz & Rhee, 2008). Likewise, the most recent candlelight vigil advocating the impeachment of President Park was also highly publicized via social media platforms (Lee, 2018). Particularly, Facebook's

mobilizing power played a great role in forming a crowd that reached a peak of 2.3 million protesters (Ock & Bak, 2017). In view of the fact that both old and new media platforms have such a great power over public opinion, it is necessary to be wary of instances in which these influential platforms broadcast false news and information.

Moreover, the media during this incident even provoked policy change. Thanks to the impact of MBC's report, the public was not very receptive when the Lee administration simply apologized. It was not until the administration acted via policy change, deciding to temporarily decrease U.S. beef imports, that the chaos simmered down. More recently, the combination of intense media coverage on former President Park's corruption as well as the candlelight vigils contributed to her eventual impeachment.

Media's Acclimation to Social, Political, and Technological Evolution The social climate during the Times case played a great role in the Court's ruling. The liberal Supreme Court justices supported the Civil Rights movement prior to the case, and their already established beliefs as well as their understanding of what would make sense and benefit the American public at the time influenced their final decision.

The KBS case showed that political climate affects public perception of the media's role and credibility. With the end of the democratic revolution from Lee's election, the Korean public was already skeptical of the government. It would have been a strategically senseless choice in political terms to rule against KBS in this kind of political climate; the government would be accused of manipulating the media and the media would be scrutinized for not being able to hold its ground against the government when necessary as it should. There must be no collusion between the government and the media; as two different branches of governance, they shall act

as checks and balances. Hence, public trust in the government and traditional media outlets heavily depends on the government and media's relationship.

Considering the social and political climate of the United States and South Korea in the status quo, it can be argued that the emergence of fake news during the most recent elections could be argued to have created a platform to consider regulation. If public distrust in the media increases or, in Korea's case, continues to increase, this would be a good socio-political background-driven incentive to propose policies. A skeptical public is harmful to the democratic process in both countries.

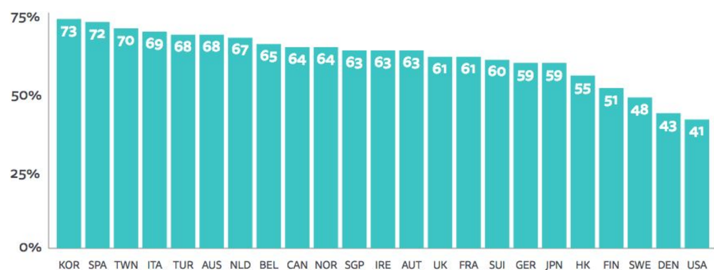
Possibility of Policy Change

Attitude Toward Government Intervention

According to the Reuter's annual report on digital news, many countries have expressed an appetite for fake news regulation. The United States and South Korea stood at opposite extremes in the survey. As Figure 5 shows, 73 percent of South Koreans supported the idea of government intervention along with other European and Asian countries' citizens. In contrast, only 41 percent of American subjects thought the government should do more. The U.S. had the lowest percentage of pro-censorship citizens amongst all countries (Newman et al., 2018).

Figure 5

Proportion Who Agree on Government Intervention Regulating Fake News on The Internet



Q_FAKE_NEWS_4_2_3. Please indicate your agreement with the following statements. The government should do more to make it easier to separate what is real and fake on the internet.
Base: Total sample in each market.

The United States' government is likely to be resistant to any kind of policy that regulates information on the Internet because of the country's robust reliance on the First Amendment. Contrarily, the Korean government is more likely to implement a regulatory policy because free speech isn't as valued as in the United States. Many Internet regulation laws, outlined in the previous section, are already in place and actively enforced (Haggard & You, 2015, p.9). Kim Su-yeon of the National Election Commission stated that "unlike the situation in America, where freedom of speech is sacrosanct, South Korea is of the opinion that some speech must be regulated" (Kretschmer). The reasoning behind this may be that the establishment of the constitution was not as sensational in the formation of South Korean democracy as it was for that of the United States. Moreover, South Korean democracy was formulated much more recently, so it is no surprise that key ideas such as free speech have not been set in stone and ingrained into Korean's cultural identity.

Determining Responsibility for Fake News

Even if the two countries decide to take policy action to regulate fake news, there is a danger of the question of whom to subject liability – producers, media platforms, or users – dominating the conversation over the true problem at hand – news manipulation and propaganda. Social media has the unique feature of boundless connectivity. The interactive nature of the platform supplies users with the ability to publicize whatever they want to whoever many people they want – a privilege only granted to media institutions such as newspapers and television stations in the traditional media environment. With features such as sharing and feeds that display ads and shared posts arbitrarily, the platform can effortlessly get a great number of networked individuals involved.

This system naturally increases the number of people involved in news dispersion, complicating matters of accountability. The traditional approach to which the trustee model is applied "balances the government interests served by the regulation against the free speech interests of the regulated party" in order to provide the public with truthful news (Campbell, 2008). But social media introduces the exceptionality of when the regulated party is not the only one involved in the creation and dissemination of content. Thus arises the question of who to blame when content deemed a threat – The platform? The writer? The sharer?

The question of who to subject blame to is important in the policymaking process. In Reuters' Report, the majority of respondents around the world believed that publishers (75 percent) and platforms (71 percent) have the biggest responsibility to fix problems of fake and unreliable news. The reasoning behind this poll was that a lot of biased and inaccurate news comes from foreign institutions, which the government cannot control (Newman et al., 2018). Even if they do, it would be much more complicated to open this conversation with other countries.

But we must be prudent in placing blame on corporations as well. Especially in the United States, there is precedent from *Citizens United v. Federal Election Commission* which decided that "corporations should have the same speech rights as individuals" (*Citizens United v. Federal Election Commission*, 2010). The question we must consider is whether social media companies should be considered as technology corporations or also part of the media. By this paper's definition of media, the answer is the latter. Social media companies now have the ability to reach as many people as media institutions do and serve the same functions of news distribution. They cannot avoid the responsibility imposed on media institutions either.

All in all, the answer to who is responsible for filtering fake news is simple: everybody. Every company capable of shifting public opinion should take this authority seriously. On the individual level, American and Korean citizens must educate themselves on how to determine what is true and false in their news consumption. Governments must recognize the threat of false news and information to their democratic system and take steps to not only manage the harm that has been done but also prevent the potential harm to come if new media is left completely unregulated.

Preventative and Reactive Approaches

Let's say that it is inevitable that fake news spreads to the degree that citizens can no longer trust any information from any source. The following are two timelines the governments of the U.S. and South Korea could follow. The first option is to take a preventative approach by creating and implementing a regulatory policy to stop fake news from growing any more than it has. However, considering the aggressive opposition that the American public has towards government intervention in free speech or free press, it is highly unlikely that the US government will introduce any kind of policy that regulates information on the Internet. Even if it does, it will more likely subject the platforms of fake news dispersion to responsibility than the individuals or group that published the information because they could continue to utilize the justification of violating the trustee model as they have with traditional media outlets.

The Korean government, on the other hand, may consider implementing a preventative regulation policy because free speech isn't as valued as in the United States, and Internet regulation laws are already actively implemented. However, Korean citizens must be wary of the Korean government's motives in the case they preventatively or reactively introduce a regulatory policy; considering the country's recent records of media oppression, they must ensure that the

government does not abuse the policy to muzzle opposition under the façade of public benefit and national safety as they have done in the past.

But in the status quo, neither country has a strong incentive to consider regulation because research shows fake news doesn't reach a great enough amount of people to impact political affairs. In the status quo, traditional media remains the most prominent source of political news in the United States. "Our survey suggests that 14 percent of Americans viewed social media as their "most important" source of election news." (Allcott & Gentzkow, 2017, p.2) So unless the viewership increases conspicuously, there is not a strong incentive for consideration of policy action.

While 14 percent may seem like a small number, when we consider that nearly a fifth of a population is misinformed and may base their political decisions on false information, the issue does not seem so minor. Additionally, because of the fake news epidemic's currency, there is not enough data to precisely hypothesize whether the problem will grow in the future, and worse, exponentially. The following section drafts possible policy recommendations provided that the governments introduce some form of regulatory policy. For each recommendation, we also detail limitations, in hopes that they are particularly cautious in regulating the free press within their democratic environments.

Policy Recommendations

Regulatory Approach

Implement Accreditation System for Legitimate Journalism When utilized correctly, social media and the Internet as a news source retain a great advantage, providing quick and easy access to an abundance of news and information from diverse sources. Nevertheless, to assure that the prominence of fake news does not eclipse these platforms' benefits, we propose the

implementation of an accreditation system that methodically filters content adverse to the democratic system. The system will essentially appoint ratings to news sources based on an established criterion for trustworthiness, and require media platforms to display each source's rating for the purpose of preserving the audience's rights to knowledge. Legal scholars Anna Gonzalez and David Schulz have supported the implementation of such system, detailing in their proposal a few fixed accreditation standards such as "being a generator of original content [that ascribes to] universal principles that define the goals and ethical practices of good journalism" and having "commitment to a generally reliable discipline of verification" (Gonzalez & Schulz in Napoli, 2019).

Social media and online companies such as Google, Facebook, and Twitter have begun to implement such systems in which they display "trust indicators" in the news posted on their platforms (Napoli, 2019, p.2-3). During the 2016 election, Facebook partnered with third-party fact-checkers to label individual stories in news feeds and created an algorithm that had users receive pop-up notifications of the story's falsity before being able to share the story. These efforts to systematically combat fake news will redistribute the power of knowledge seized by fake news producers and distributors back to the public who deserved these rights in the first place.

But there are multiple challenges in developing this system; Facebook abandoned their system after a year when they realized that it was not as effective in curbing the consumption or sharing of misinformation as they had hoped. Moreover, they found the labels "could sometimes backfire" as some users, suspecting that Facebook was attempting "to muffle conservative viewpoints," more pro-actively shared false stories (Napoli, 2019, p.4). Furthermore, mobilizing and persistently incentivizing third party regulators will require a great amount of resources and

time. Gathering funding and a labor force to implement a functioning system will require meticulous planning that the government may not be willing to invest in.

Redefine Scope of Existing Fairness and Defamation Laws Existing media laws can be amended to broaden their scope of jurisdiction to include social media and other online platforms that function like the media. As illustrated earlier, the definition of the media must base itself not on the format of their publication but their societal role and extent of influence over public opinion. This definition must be included in the revision of these laws.

However, imposing criminal sanctions on fake news producers and distributors may be difficult. Using technological advancements, “perpetrators of fake news may hide their identities to avoid sanctions”. Moreover, the justice system may not be incentivized to actively prosecute fake news producers and distributors because of the many complexities involved: first, culprits may be foreigners to whom domestic laws do not apply to. Secondly, determining liability for news distribution on social media and the Internet will be more complicated than when the existing media laws are applied to traditional media outlets (Ku, 2017, p.33).

Grass Roots Approach

Increase Autonomy of Communications Commissions Currently, members of the FCC and KCC are appointed by each country’s executive branch in addition to working closely with the governmental officials when making regulatory decisions. Such affinity contributes to the public’s skepticism towards any form of media regulation, which then hinders necessary intervention of the communications commissions in media affairs. However, expecting complete autonomy may not be realistic, considering that even now, both facilities are technically regulatory agencies that are independent from the government. Furthermore, there is also the question of who is to decide the members of the commissions if not the government. We would

have to ensure that whomever participates in the selection process does not appoint people based on personal agendas.

Promoting Education for a Knowledgeable Citizenry An educated citizenry capable of self-regulating false news is arguably the most effective factor to prevent fake news from crippling the democratic system. In fact, the 2018 Reuters' Report detailed the way in which those with high news literacy levels are able to filter fake news better than those with low levels. The preference for social media, the primary platform of fake news distribution, is slightly higher amongst low levels than high levels (15 percent compared to 10 percent). Although the difference between 15 percent and 10 percent is not significant, the study also portrayed the way in which higher level people interact with and interpret news found on social media differently. Compared to those with lower level news literacy, they pay more attention to "a range of different credibility cues such as the news brand, the headline, and the person who shared the story" (Newman et al., 2018).

Increasing news literacy is crucial because the more knowledgeable and attentive people are to the news development process, the better they will be in identifying its flaws and making educated judgements on the content of the information they consume. They should also be educated on the newly developing dynamic between the media and technology, understanding algorithmically-driven platforms such as the "echo chamber" or the 'filter bubble', which "lower level literacy people discuss less, or worse yet are not even aware of" (Newman et al., 2018). Therefore, the government should invest in education for self-regulation by creating new curriculums to help people better understand decision making and how to evaluate the information available in the digital age.

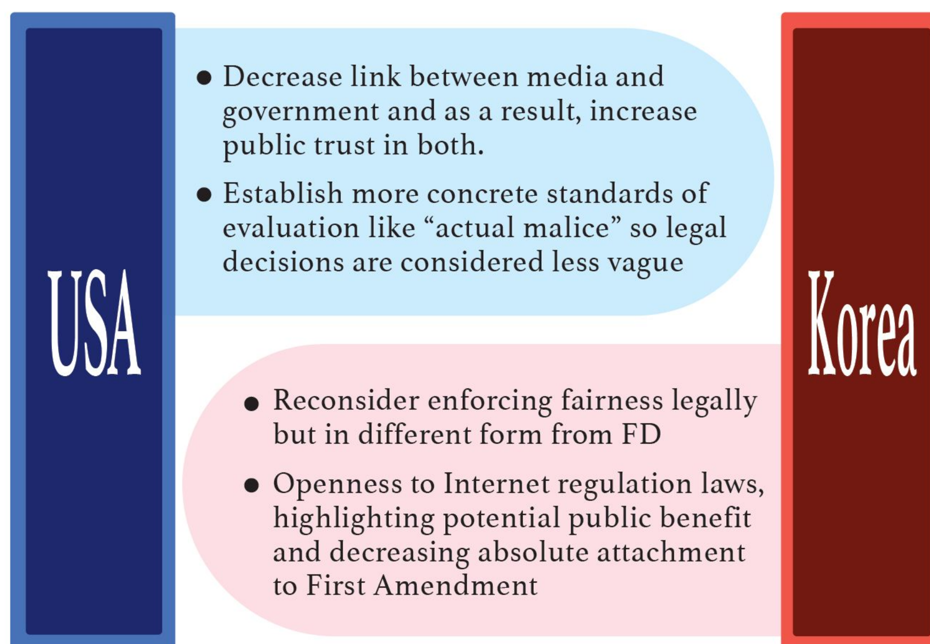
The greatest barrier to this policy action is the lack of a strong incentive to promote such education programs. Do enough people even care about consuming truthful news and information? Finding educators that specialize in this area, distributing them across the entire country, and developing an effective curriculum will necessitate substantial effort in gathering resources and funds. The matter of whether the public will be receptive to increasing taxes to implement this education policy needs additional evaluation.

Policy Flow Recommendations

As two countries that have both employed regulatory methods within their democratic media environments in the past, the United States and South Korea could reciprocally offer policy directions based on their past experiences to navigate the present-day challenge of fake news production and distribution. Figure 6 illustrates the possible policy flow between the United States and South Korea that could benefit each country:

Figure 6

Policy Flow Recommendations Between the United States and South Korea



The South Korean media environment has already adapted the American model in various aspects, as exemplified in the KBS court case reference to the New York Times case. In regards to the current state of affairs, the most significant policy flow from the U.S. to Korea recommended would be increasing public trust in both the government and the media by decreasing the link between the two. Compared to that of the United States, the South Korean media continues to be heavily monitored by the government and thus, political coverage lacks in its watchdog quality. Such corruption leaves the public to seek out different methods of obtaining news through platforms less fettered by the government, which unfortunately are also the main stage of fake news distribution. To lessen the chances of more citizens turning to what is currently somewhat a black market of news and information, it is vital that the media establish itself independent from federal influence and prove capable of providing the public what they need.

Conversely, the United States could adapt South Korea's bounded confidence in free speech. The First Amendment jurisprudence of the United States must recognize that, "despite the apparent free flow of news and information from diverse and antagonistic sources that the Internet has been seen to epitomize, the dissemination and consumption of news in the increasingly social-mediated online environment merits inclusion amongst those speech contexts in which reliance on counter-speech is increasingly ineffective and potentially damaging to democracy" (Napoli, 2019, p.29). The American society must honor the public-interest framework that defines the media's very existence, admitting the inferiority of the First Amendment's individualistic interpretation to the collectivist interpretation when applied to the democratic media.

Limitations and Future Potential Research Questions

The greatest limitation to this study is that the topic at hand – fake news – is a moving target. Because of the topic's contemporaneity, there is finite research done on the topic up-to-date. Hence, this study lacks in the background evaluation of the issue and is only able to hypothesize on its impact based on the limited data collected by this point. This limitation, however, incites much room and incentive for further research and discoveries, as there is an abundance of new data and experimentation that await. A future research question would focus on concretely determining the effects of fake news on democratic societies. Such a study would require media effects research, which we currently lack; we would need social media and search engine companies to submit data on their function as a news distribution platform so that we gain a comprehensive understanding of what is happening.

Furthermore, while the production and distribution of fake news is a globally relevant issue, this study only focuses on two countries among many others. With this in mind, a future research question would explore what we can learn from democratic countries other than the United States and South Korea. This study, extended, would certainly benefit in the future from observing the outcomes of countries that have already implemented fake news regulation such as Germany and analyzing their media environment in comparison to those of the two subject countries in this study.

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