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# A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry

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*Despite the availability of information from online news organizations and new media outlets, newspapers remain the primary contributor of new content to the marketplace of information and ideas—integral in setting the agenda for public discourse, connecting readers with their communities, reducing the costs of citizen oversight on elected officials, and producing investigative and local news reports. But newspaper economics have sparked massive reductions in editorial operations and threaten the press’s role in American democratic society. The strong public interest in preserving the newspaper industry should compel Congress to stabilize the press.*

*Journalists, politicians, and legal scholars have discussed many possible solutions. This Comment evaluates the practical and constitutional questions raised by two potential public subsidy programs—direct government funding and indirect support by facilitating newspaper conversion to nonprofit status—and whether such programs could be administered without jeopardizing the Fourth Estate’s independence. This Comment argues that direct subsidies, though they could be tailored to survive constitutional challenge and to protect editorial independence, cannot deliver a feasible long-term solution. Indirect subsidies likely would only be available to newspapers following an amendment to the U.S. tax code and even then would provide limited benefit to qualifying newspapers until they have developed a fundraising base. Yet, this Comment concludes that subsidies could stabilize the press practically if Congress combined direct funding and tax-based incentives into a hybrid similar to that utilized by public radio.*

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\* Editor-in-Chief, *UCLA Entertainment Law Review*, vol. 19. J.D. Candidate, UCLA School of Law, 2012. Special thanks to Professors Curt Hessler and Eugene Volokh; my former newspaper colleague and classmate Dan Laidman; my *ELR* colleagues, especially David McGrath and Elena Grieco; Stephanie Turner; and my family. This Comment is for every journalist still fighting the good newspaper fight.

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## I. INTRODUCTION

The newspaper business is broken.<sup>1</sup> Circulation started slipping after hitting its peak in 1987 and began its plummet with the turn of the millennium and the rise of the digital age.<sup>2</sup> Yet, newspapers remain the primary contributor of new content to the marketplace of information

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<sup>1</sup> It would be difficult to overstate just how unprecedented the press's decline has been. See *infra* Part II. The digital age has dramatically changed individual news consumption behavior. As newspaper circulation has fallen, advertisers have taken their dollars to the Internet. Diminished revenue has forced newspapers to cut staff repeatedly, shrink their printed editions, consolidate with competitors, and, in some cases, stop the presses.

<sup>2</sup> See Frank Ahrens, *The Accelerating Decline of Newspapers*, WASH. POST (Oct. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/26/AR2009102603272.html>.

and ideas.<sup>3</sup> Without the contributions of newspapers, the marketplace will suffer and, in turn, so will democratic self-governance. Long recognized as the Fourth Estate, newspapers remain integral in setting the agenda for public discourse, connecting readers with their communities, reducing the costs of citizen oversight on elected officials, and producing investigative and local news reports.<sup>4</sup> Despite the success of many online news organizations—often start-ups with leaner staffs and lower budgets—newspapers remain critical to American democratic society.<sup>5</sup>

Because of this public interest, Congress should act to stabilize the press. Journalists, media watchers, academics, and politicians have discussed many possible solutions. This Comment assesses the appropriateness and viability of direct and indirect government subsidies for the press. Part II discusses the newspaper industry's financial situation, focusing on how economic changes have dramatically reduced the nation's corps of professional newsgatherers and, in turn, contributions to the marketplace of information and ideas. Part III details the government's previous attempts to stabilize the press and the public policy rationale for doing so. In Part IV, this Comment evaluates the legal questions raised by two potential public subsidy programs—direct government funding and indirect support by facilitating newspaper conversion to nonprofit status—and whether the government could administer such programs without jeopardizing the Fourth Estate's independence. Finally, Part V concludes that neither direct nor indirect subsidies alone could sufficiently support the press and protect it from political interference. The best subsidy model would combine patronage and tax-exempt benefits to do for newspapers what NPR has done for public radio. This model would include some annual federal funding but would primarily be supported by readers motivated by tax incentives to donate—all the strengths of each form of subsidy and fewer weaknesses.

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<sup>3</sup> This is primarily due to the role newspapers play in supplying an audience to the nation's corps of professional newsgatherers. *See infra* Part III.

<sup>4</sup> The press is the archetypical Fourth Estate: influencing politics and holding government officials accountable from outside government's three branches. *See infra* Part III; *see also* Matthew Gentzkow et al., *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, Nat'l Bureau of Econ. Research, Working Paper No. 10,791, 2004), available at <http://www.nber.org/papers/w10791>.

<sup>5</sup> *See infra* Part III.A.1.

II. STOPPING THE PRESS<sup>6</sup>

Monitoring the press has become a macabre endeavor.<sup>7</sup> For decades, newspapers were cash cows, “a kind of license to print money.”<sup>8</sup> No longer. Most newspapers have struggled during the past decade to eke out any profit—and often have done so only by reducing newsroom expenses, unloading assets, and getting creative with their accounting.<sup>9</sup> Print ad revenue plummeted almost 50 percent between 2006 and 2010, from \$47 billion to \$24 billion.<sup>10</sup> Despite gains, online ad revenue still accounts for only 10 percent of what papers make from print ad sales.<sup>11</sup> Accounting for inflation, the last time newspaper ad revenue was that low was nearly half a century ago.<sup>12</sup>

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<sup>6</sup> Portions of the discussion in Part II.A and Part III are adapted from Brad A. Greenberg, *The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It*, 59 UCLA L. REV. 414 (2011).

<sup>7</sup> See, e.g., NEWSPAPER DEATH WATCH, <http://newspaperdeathwatch.com/> (last visited Nov. 9, 2011).

<sup>8</sup> Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER, Mar. 31, 2008, at 48, available at [http://www.newyorker.com/reporting/2008/03/31/080331fa\\_fact\\_alterman](http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman).

<sup>9</sup> The decline of the Tribune Company—which, among other media assets, currently owns eleven newspapers, including the *Chicago Tribune*, *Los Angeles Times*, and *Baltimore Sun*—has been among the most public. It includes several rounds of substantial staff cuts and repeated efforts to achieve short-term infusions of revenue by selling off valuable assets. See Paul Gillin, *Tribune Co. Gambles with Deep Newsroom Cuts*, NEWSPAPER DEATH WATCH (June 26, 2008, 11:09 AM), <http://newspaperdeathwatch.com/tribune-co-gambles-with-deep-newsroom-cuts/>; John Koblin, *Los Angeles Times Cuts Staff for Third Time This Year; 10 Percent of Newsroom Let Go*, N.Y. OBSERVER (Oct. 27, 2008, 5:36 PM), <http://www.observer.com/2008/media/1-times-cuts-staff-third-time-year-10-percent-newsroom-let-go>; see also Ameet Sachdev, *Tribune Sells Cubs to Ricketts Family*, L.A. TIMES (Aug. 22, 2009) <http://articles.latimes.com/2009/aug/22/sports/sp-tribune-cubs-sale22>; *Tribune Co. Sells \$84 Million in Assets*, N.Y. TIMES (Nov. 3, 2006), <http://www.nytimes.com/2006/11/03/business/media/03tribune.html>.

<sup>10</sup> Mathew Ingram, *What Does the Future Hold for Newspapers?*, GIGAOM (Mar. 28, 2010, 9:00 AM), <http://gigaom.com/2010/03/28/what-does-the-future-hold-for-newspapers/>.

<sup>11</sup> *Id.*

<sup>12</sup> Ryan Chittum, *Newspaper Ads Tumbled to 1963 Levels Last Year*, COLUM. JOURNALISM REV. (Mar. 25, 2010, 9:24 AM), [http://www.cjr.org/the\\_audit/newspaper\\_ads\\_tumbled\\_to\\_1963.php](http://www.cjr.org/the_audit/newspaper_ads_tumbled_to_1963.php); see also Ahrens, *supra* note 2 (reporting that between April and September of 2009, daily newspaper circulation fell another 10.6 percent to 30.4 million and that only about 13 percent of Americans bought a daily newspaper, compared to 31 percent in 1940). And analysts expect newspaper economics to worsen. See Richard Pérez-Peña, *Newspapers Have Not Hit Bottom, Analysts Say*, N.Y. TIMES (Sept. 20, 2009), [http://www.nytimes.com/2009/09/21/business/media/21papers.html?\\_r=2&ref=business](http://www.nytimes.com/2009/09/21/business/media/21papers.html?_r=2&ref=business) (noting that the freefall in profits appears to be slowing but is not over); Tom Rosenstiel & Amy Mitchell, PEW RES. CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM, STATE OF THE NEWS MEDIA 2011: OVERVIEW, available at <http://stateofthemediamedia.org/2011/overview-2/> (last visited Feb. 16, 2012) (reporting that 2010 marked the first time that more Americans got their news online than from a printed newspaper).

Publishers primarily have lowered expenses by shrinking page sizes, reducing newsgathering budgets, and repeatedly cutting staff, leaving fewer reporters to cover the communities they serve and to uncover issues of public interest.<sup>13</sup> As the newspaper columnist Molly Ivins articulated in lamenting newspaper publishers' and top editors' decisions: "For some reason, they assume people will want to buy more newspapers if they have less news in them and are less useful to people."<sup>14</sup>

The *Los Angeles Times*, for example, still publishes and delivers daily—more than some newspapers can say<sup>15</sup>—but has stopped actively covering many parts of the community. It currently employs fewer than 600 journalists, which represents barely half the *L.A. Times*'s editorial staff in the 1990s.<sup>16</sup> Where the newspaper used to have a 115-person newsroom<sup>17</sup> in the San Fernando Valley, going toe-to-toe with the Valley's *Daily News*, it now has one reporter.<sup>18</sup> Coverage of Los Angeles City Hall is down to two reporters.<sup>19</sup> And for years no one has been assigned to cover the largest U.S. port.<sup>20</sup> Empirically, it is difficult to measure the correlation between loss of editorial staff at the *L.A. Times* and reduction in the newspaper's editorial output, but a regular reader is all too familiar with the

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<sup>13</sup> See Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. 4 (Oct. 19, 2009), [http://www.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php?](http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?). Over the past decade, newspapers in most cities dramatically reduced the number of reporters assigned to investigative reporting and to covering city hall, schools, local businesses, arts and culture and specialized issues like urban affairs and the environment. "Most large newspapers eliminated foreign correspondents and many of their correspondents in Washington. . . . [N]ewspaper reporters covering state capitals full-time fell from 524 in 2003 to 355 at the beginning of 2009. A large share of newspaper reporting of government, economic activity, and quality of life simply disappeared." *Id.*

<sup>14</sup> Molly Ivins, *Wall Street to Newspapers: Drop Dead*, TEX. OBSERVER (Apr. 6, 2006), <http://www.texasobserver.org/archives/item/14781-2179-molly-ivins-wall-street-to-newspapers:-drop-dead>.

<sup>15</sup> See William Yardley & Richard Perez-Pena, *Seattle Paper Shifts Entirely to Web*, N.Y. TIMES (Mar. 16, 2009), <http://www.nytimes.com/2009/03/17/business/media/17paper.html>; see also Brad Lendon, *Detroit Newspapers to End Daily Home Delivery*, CNN (Dec. 16, 2008), [http://articles.cnn.com/2008-12-16/us/detroit.newspapers\\_1\\_detroit-newspapers-daily-circulation-home-delivery?\\_s=PM:US](http://articles.cnn.com/2008-12-16/us/detroit.newspapers_1_detroit-newspapers-daily-circulation-home-delivery?_s=PM:US).

<sup>16</sup> See Downie & Schudson, *supra* note 13.

<sup>17</sup> Twitter Exchange with John Arthur, former Editor of the *Los Angeles Times*'s Valley edition, to author (Dec. 2, 2010), <http://twitter.com/#!/jarthur47/status/10556495561236481>.

<sup>18</sup> Los Angeles Times Editorial Staff, L.A. TIMES, [http://www.latimes.com/about/mediagroup/la-mediacenter-editorial\\_staff,0,3058915.htmlstory](http://www.latimes.com/about/mediagroup/la-mediacenter-editorial_staff,0,3058915.htmlstory) (last visited Nov. 30, 2010).

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

<sup>20</sup> That would be the Port of Los Angeles. Curiously, the *L.A. Times* temporarily added a beat for "marijuana politics." See *id.*

consequences of the newspaper's fiscal woes.<sup>21</sup>

The trend continues across the industry. Gannett Company, the largest U.S. newspaper publisher, which between 2005 and 2010 shed about 60 percent of its 53,000 employees, began 2012 by offering early retirement packages to 665 employees in its U.S. Community Publishing division of 82 newspapers, including the *Arizona Republic*, *Detroit Free Press*, and *Indianapolis Star*.<sup>22</sup> Some newspapers have taken more drastic business measures by consolidating with competitors or simply closing.<sup>23</sup> Fewer than half of newspaper executives surveyed in 2010 were confident that their operations would survive another decade without substantial changes to their business models; nearly a third thought their newspapers would cease publication within five years.<sup>24</sup> Analysts have predicted the death of print newspapers to occur as early as 2016.<sup>25</sup>

#### A. *Consuming News, But Not Buying a Newspaper*

The problem for the press is not that Americans no longer demand news. In fact, Americans now spend on average about seventy minutes consuming news each day.<sup>26</sup> But only a small minority of Americans

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<sup>21</sup> See, e.g., Laurie Winer, *Zell to L.A. Times: Drop Dead*, L.A. REV. OF BOOKS (Nov. 9, 2011), <http://lareviewofbooks.org/post/12555828808/zell-to-l-a-times-drop-dead> (recounting the tumultuous "fall of a major newspaper" and the consequences thereof).

<sup>22</sup> Samuel Weigley, *USA Today Publisher Gannett Offers Buyouts to 665 Employees*, INT'L BUS. TIMES, (Feb. 13, 2012, 10:01 AM), <http://www.ibtimes.com/articles/297707/20120213/gannett-buyouts-usa-today-washington-post.htm>.

<sup>23</sup> See generally Downie & Schudson, *supra* note 13; see also Ken Doctor, *Newspaper Companies in Bankruptcy: 14*, NEWSONOMICS (May 4, 2010), <http://newsonomics.com/newspaper-companies-in-bankruptcy-14/>.

<sup>24</sup> See Pew Res. Ctr.'s Project for Excellence in Journalism, *News Leaders and the Future*, JOURNALISM.ORG (Apr. 12, 2010), [http://www.journalism.org/analysis\\_report/news\\_leaders\\_and\\_future](http://www.journalism.org/analysis_report/news_leaders_and_future).

<sup>25</sup> Anthony Ha, *USC's Jeffrey Cole Predicts the Death of Newspapers in Five Years*, VENTUREBEAT (Apr. 12, 2011, 7:40 PM), <http://venturebeat.com/2011/04/12/death-of-newspapers-jeffrey-cole/>; see also PHILIP MEYER, *THE VANISHING NEWSPAPER: SAVING JOURNALISM IN THE INFORMATION AGE* 16 (2004) (predicting that in 2043 the final copy of the final printed newspaper will land with a thud on a driveway somewhere).

<sup>26</sup> *Americans Spending More Time Following the News*, PEW RES. CTR. (Sept. 12, 2010), <http://people-press.org/2010/09/12/americans-spending-more-time-following-the-news/> (noting that while Americans are spending more than seventy minutes a day watching, reading, and listening to news, they are increasingly doing so online, with more than a third of respondents saying they consumed news online in the previous twenty-four hours); see also Rosenstiel & Mitchell, *supra* note 12 ("The internet now trails only television among American adults as a destination for news, and the trend line shows the gap closing. Financially the tipping point also has come. . . . [O]nline ad revenue in 2010 is projected to surpass print newspaper ad revenue for the first time."). This is true despite the disparity between the value of online and print advertisements, see *infra* note 11, because the measurement of online advertising revenue includes all online advertisements, not just those on news sites.

actually buys a newspaper.<sup>27</sup> When print readership drops, newspapers become less attractive to advertisers, resulting in a downward spiral of both subscription and ad revenues accelerating each other's plummet.<sup>28</sup> Readers and advertisers have abandoned print for the Internet,<sup>29</sup> and newspaper revenue has fallen accordingly each year since peaking in 2005, with the decline in print ad revenue far outpacing the gains in online ad revenue.<sup>30</sup>

Current laws provide no solution to the press's problems. Copyright law protects how news is expressed<sup>31</sup>—the literal sequence of words that form the author's creative expression—but not a story's

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<sup>27</sup> See Ahrens, *supra* note 2 (reporting that in mid-2009, about 30.4 million Americans bought a newspaper Monday through Friday).

<sup>28</sup> The “downward spiral” describes the interplay between falling newspaper circulation and decreasing advertising rates. See Eric J. Gertler, Michigan Citizens for an Independent Press v. Attorney General: *Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers?*, 39 AM. U. L. REV. 123, 133 (1989) (“Because of its smaller circulation, the newspaper attracts less advertising than its larger competitor, and thus generates less revenue and has fewer resources to devote to the newspaper’s editorial content. As circulation declines, advertising decreases and declining advertising makes the newspaper less attractive to readers, which causes a further deterioration in circulation.”). Once a newspaper has entered the downward spiral, it is unlikely that it will be exiting it.

<sup>29</sup> Three primary forces can be credited with this decline: (1) online ads are worth less to advertisers—digital dimes versus print dollars—because their audience is perceived to be less captive; (2) at the same time, the internet has lured from newspapers the advertisers who prefer to purchase smaller advertising spots or want to target a narrower audience, possibly in a time-sensitive manner, and now pay substantially less to market online; and (3) the newspaper cash cow of classifieds—effectively a natural monopoly for decades—has been slaughtered by Craigslist, eBay, and sites like Monster.com. See David S. Evans, *The Economics of the Online Advertising Industry*, 7 REV. NETWORK ECON. 359, 380 (2008) (“The key technological difference between traditional display advertising and online display advertising involves the ability to target ads to particular consumers in real time.”); Philip Weiss, *A Guy Named Craig*, N.Y. MAG. (Jan. 8, 2006), <http://nymag.com/nymetro/news/media/internet/15500/>. Long before the social media revolution or even the advent of the *Huffington Post*, and a mere thirteen months after the creation of Google, the Internet was already seen as a major threat to traditional media. “Like some raging computer virus, the Net seems to be devouring the media culture, shattering the usual definitions of news and eclipsing more traditional subjects. The so-called old media are invading this brave new world with near-revolutionary fervor, fueling a growth industry that might be called e-news.” Howard Kurtz, *All Aboard the E-Train*, WASH. POST (Oct. 21, 1999), <http://www.washingtonpost.com/wp-srv/style/features/daily/net102199.htm>.

<sup>30</sup> PEW RES. CTR.’S PROJECT FOR EXCELLENCE IN JOURNALISM, STATE OF THE NEWS MEDIA 2010: PRINT VS. ONLINE AD REVENUE, NEWSPAPERS (2010), available at <http://stateofthemediamedia.org/2010/newspapers-summary-essay/economics/> (last visited Feb. 16, 2012). Print ad revenue for newspapers was about \$47.4 billion in 2005, while online ad revenue was just over \$2 billion. In 2008, print ad revenue fell to \$34.7 billion, but online ad revenue rose to \$3.1 billion. Although online ad revenue increased by more than 50 percent in the three years, the gain was dwarfed by the roughly \$13 billion that print ad revenue lost. See *id.*

<sup>31</sup> See Copyright Act, 17 U.S.C. § 102(a) (2006).

facts or its quotes.<sup>32</sup> Once digitized for distribution online, the expression of a news story becomes easy to infringe by republishing and distributing online; in addition, it is costly for newspapers to monitor for verbatim copying of their stories and to enforce against such infringements.<sup>33</sup> More significantly, even word-for-word copying cannot be blamed the newspaper industry's anemia. Such copying is primarily committed by bloggers, whose readership may be nominal and who may defend their infringement as fair use;<sup>34</sup> news aggregators like Google typically copy just the headlines, which generally are considered ineligible for copyright protection,<sup>35</sup> and, when copying text, copy just a line or two. Finally, although facts are costly for newspapers to gather, those facts are not copyrightable and there is no federal "hot news" doctrine<sup>36</sup> that would enable newspapers to hold

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<sup>32</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

<sup>33</sup> Rémy Y. Chang, *Rejecting Auscape Int'l v. Nat'l Geographic Soc'ty for a Uniform Civil Copyright Lawsuit Discovery Rule of Accrual*, 44 U.C. DAVIS L. REV. 1381, 1404 (2011) (noting that large companies expend significant resources monitoring for infringement and that the costs are often prohibitive for smaller companies and individuals). *But cf.* LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 162 (2004) (noting that technological advances have decreased the high costs of monitoring and stopping copyright infringements).

<sup>34</sup> See *Righthaven, LLC v. Jama*, No.2:10-CV-1322 (LRL), 2011 WL 1541613, at \*5 (D. Nev. Apr. 22, 2011) (holding, as a matter of law, that an Oregon nonprofit's wholesale copying of a *Las Vegas Review-Journal* news article was fair use). Righthaven formed in 2010 to enforce newspaper copyrights by obtaining newspaper copyrights and then suing in their own right, with an agreement to share with the assigning newspaper any judgment against infringers. Righthaven was quickly derided as pioneering the patent troll model in the copyright context, and many followers of the development lamented the idea of a newspaper preventing a community from having a conversation with itself. Many legal scholars also thought that Righthaven's claims would succeed. However, the effort has failed miserably. See Brad A. Greenberg, *The Quick Rise and Fall of the Copyright Troll—and How One Accidentally Expanded Fair Use* (Working Paper 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1947601](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947601); see also Steve Green, *Righthaven Says It Might Have to File for Bankruptcy*, VEGAS INC. (Sept. 9, 2011), <http://www.vegasinc.com/news/2011/sep/09/righthaven-says-it-might-have-file-bankruptcy/>; Brendan McKenna, *Righthaven's House of Cards*, LAW.COM (Sept. 15, 2011), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202514423358&slreturn=1>. *But cf.* Joe Mullin, *Stop the Presses: Will Copyright Suits Save Newspapers?*, LAW.COM (Sept. 10, 2010), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202471854735> (discussing the wisdom of a "sue first" strategy for newspapers in combating infringement).

<sup>35</sup> See KIMBERLEY ISBELL, BERKMAN CTR. FOR INTERNET & SOC'Y, *THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES* 8–9 (2010) (noting that the argument against the copyrightability of headlines is that headlines are highly factual and thus their expressive nature merges with their factual nature and makes them uncopyrightable).

<sup>36</sup> See FTC STAFF DISCUSSION DRAFT, *POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM* 8–9 (2010); Shyamkrishna Baganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 419 (2011).

liable online news sites that scrape<sup>37</sup> the facts that the former invested resources in reporting.

B. *Subsidies for a Public Press?*

Recognizing the press's role in American society and its inability to utilize current laws to cure its ails, the Federal Trade Commission in June 2010 discussed several actions that would aid the newspaper industry and "support the reinvention of journalism."<sup>38</sup> One of the possibilities discussed was government subsidies for newspapers—both direct funding and indirect support via tax benefits.<sup>39</sup>

The government could provide direct funding as a one-time gift or as ongoing support. Such funding could apply uniformly across the newspaper industry or be tailored to provide greater support based on the degree to which a newspaper serves the public interest with local and investigative reporting. Indirect support could be provided with a tax break for the press or by enabling general-interest newspapers to receive tax-exempt status. Either indirect benefit would be ongoing and would be enhanced by individuals being able to contribute tax-deductible donations to the nonprofit newspaper of their choice. Both types of subsidies—and the multiple permutations of each—would infuse the newspaper industry with much-needed good news and improve its fiscal outlook, enabling newspapers to reinvest in news-gathering efforts that benefit the public.

Though federal subsidies for private industries generally are

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<sup>37</sup> "Scraping" is a technical term that refers to an automated bot harvesting valuable content from the Internet. See Bill Flook, *Web Scraping Hits Home*, WASH. BUS. J. (July 12, 2010, 12:00 AM), <http://www.bizjournals.com/washington/stories/2010/07/12/focus1.html>; see also Richard Posner, *The Future of Newspapers*, BECKER-POSNER BLOG (June 23, 2009, 7:37 PM), <http://www.becker-posner-blog.com/2009/06/the-future-of-newspapers--posner.html> (discussing the heightened problem of free riders in the dissemination of news published online compared to that published in print).

<sup>38</sup> FTC STAFF DISCUSSION DRAFT, *supra* note 36.

<sup>39</sup> See *id.* at 15–30. Although the FTC discussed numerous possible methods of government intervention, it made no recommendations. Other possible congressional actions presented in the FTC draft were: passing laws that would establish a federal "hot news" doctrine or limit the applicability of copyright's fair use defense for copying of news articles by aggregators or amending copyright law to create a content license fee for news articles; permitting collaborative action among newspaper competitors; providing governmental funding for newspapers; and, amending the tax code to encourage news organizations to obtain tax-exempt status. *Id.* at 9–30. Passing a temporary and narrow antitrust exemption enabling newspapers to collude on a model to charge for access to online news is the best move that Congress could make. See generally Greenberg, *supra* note 6. However, in the alternative, direct and indirect government subsidies would substantially aid the ailing newspaper industry. This Comment focuses on such subsidies as a next-best option.

unpopular,<sup>40</sup> there is a strong public policy interest in the federal government stepping in to prop up the Fourth Estate. Parts IV and V of this Comment explore the different subsidy options available to Congress. Before discussing those subsidies and the associated legal implications, Part III articulates why it is appropriate for Congress to aid the press and why Congress has seen fit to do so in the past. The chief public policy interest at the heart of this Comment is the preservation of newsgatherers, whose contributions to the marketplace of information and ideas are integral to democratic self-governance and the free exchange of ideas. Accordingly, Congress should not support just those newspapers that still deliver a printed paper every morning. Some metropolitan newspapers have already transitioned to online only, and, as discussed in the next Part, digital is the future—even for the *New York Times*.

### III. THE PRESS AND AMERICAN DEMOCRATIC SOCIETY

The press has long played an integral role in American democratic society; saving the newspaper industry is about more than a romantic notion of smudgy news ink and reading the paper at the breakfast table. Even before the nation's founding, the press was pivotal in setting the agenda for public discourse, informing Americans about their communities, and acting as a watchdog over government officials.<sup>41</sup> As Justice Black wrote for the Supreme Court in 1966:

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the

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<sup>40</sup> This is especially true in the current economic climate. See Paul Krugman, *Behind the Curve*, N.Y. TIMES, Mar. 9, 2009, at A23, available at <http://www.nytimes.com/2009/03/09/opinion/09krugman.html> (remarking on the “deeply unpopular bank bailouts”); Mark Trumbull, *Obama: Detroit Auto Bailout Was Unpopular, But It Worked*, CHRISTIAN SCIENCE MONITOR (July 30, 2010), <http://www.csmonitor.com/USA/Politics/2010/0730/Obama-Detroit-auto-bailout-was-unpopular-but-it-worked>.

<sup>41</sup> The framers of the Constitution sought to protect both the flow of information to the public and the existence of an institution that would act as an outside check on government actors. See Neil Weinstock Netanel, *New Media in Old Bottles? Barron's Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 963 (2008) (“[D]espite the mass media’s painfully evident flaws, its fourth estate function remains indispensable even in the age of networked peer communication.”); see also Nick Gamse, *Legal Remedies for Saving Public Interest Journalism in America*, 105 NW. U. L. REV. 329, 336–39 (2011) (discussing the newspaper industry’s watchdog role and U.S. Supreme Court jurisprudence recognizing the press’s role in encouraging political participation).

people responsible to all the people whom they were selected to serve.<sup>42</sup>

Though the Press Clause is an unsettled area of the law,<sup>43</sup> newspapers today remain the primary publishers of new information—information now being consumed more than ever before<sup>44</sup>—and provide substantially more investigative and local beat reporting than other media.<sup>45</sup> They also remain critical to monitoring elected officials and educating citizens about their communities.<sup>46</sup> In particular, newspapers continue to be best at performing the type of newsgathering that generates the greatest positive externalities: investigative and local reporting.<sup>47</sup> Those are also the types of newsgathering that are suffering the most.<sup>48</sup>

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<sup>42</sup> *Mills v. Alabama*, 384 U.S. 214, 219 (1966); see also Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975) (arguing that the purpose of guaranteeing a free press was “to create a fourth institution outside the Government as an additional check on the three official branches”).

<sup>43</sup> See Eugene Volokh, *Freedom of Speech and of the Press*, in THE HERITAGE GUIDE TO THE CONSTITUTION 311–15 (Edwin Meese III et al. eds., 2005); see also Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 462 (2012) (noting that while some have argued that freedom of the press is specific to the press as an industry, others, including the majority in *Citizens United v. FEC*, 130 S.Ct. 876, 905 and 928 n.6 (2010), “have argued that the ‘freedom . . . of the press’ does not protect the press-as-industry, but rather protects everyone’s use of the printing *press* (and its modern equivalents) as a *technology*”). Whether this constitutional designation conferred special rights and privileges on the institutional press has been debated at the highest level of American jurisprudence. See Stewart, *supra* note 42, at 633 (“The publishing business is, in short, the only organized private business that is given explicit constitutional protection.”). *But cf.* *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 798–801 (1978) (noting “two fundamental difficulties” with such a reading of the Press Clause: first, the history of the clause does not suggest that the authors contemplated giving the press special privileges, and second, it would be practically difficult to define the group that deserved such “special status”).

<sup>44</sup> See PEW RES. CTR., *supra* note 26.

<sup>45</sup> See Netanel, *supra* note 41, at 955–56 (noting that traditional media, particularly newspapers, “still supply an invaluable and unequaled layer of accreditation, fact checking, agenda setting, and wide-ranging and systematic investigative reporting, while reaching a mass audience and representing public opinion before powerful decisionmakers”); *infra* notes 46–47; see also *Who Killed the Newspaper?*, ECONOMIST (Aug. 24, 2006), <http://www.economist.com/node/7830218> (“At their best, newspapers hold governments and companies to account. They usually set the news agenda for the rest of the media.”).

<sup>46</sup> Adam Candebub, *Media Ownership Regulation, the First Amendment, and Democracy’s Future*, 41 U.C. DAVIS L. REV. 1547, 1547 (2008); see also *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (noting that “[t]he press plays a unique role as a check on government abuse” and acts “as a watchdog of government activity”).

<sup>47</sup> See Netanel, *supra* note 41; Downie & Schudson, *supra* note 13. For a definition of these terms, see *infra* note 125.

<sup>48</sup> See Downie & Schudson, *supra* note 13. In particular, the rise of citizen journalism has not offset losses in local newspaper reporting. John Timmer, *Citizen Journalism Not Making Up for Loss of Local Newspapers*, ARS TECHNICA (July 2010), <http://arstechnica.com/media/news/2010/07/citizen-journalism-not-making-up-for-loss-of-local-newspapers.ars>.

While the Internet has proven adept at providing a publishing platform for a diversity of voices and serves as a valuable complement to the institutional press, the Internet cannot fulfill the institutional press's Fourth Estate role<sup>49</sup> as the primary provider of new contributions to the marketplace of information and ideas.<sup>50</sup> Further, even with the addition of online journalists, the national newsgathering corps has continued to wither. In 2007, the first year that the American Society of Newspaper Editors counted online journalists, there were 57,000 "newsroom" employees. In 2009 that number fell to 46,700.<sup>51</sup>

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<sup>49</sup> See generally C. EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007) (using democratic and economic theory to articulate why concentration of ownership is bad and to debunk the myth that the Internet can replace what is being lost as newspapers collapse). Baker argues that the Internet business model has less capacity to support quality journalism and that online advertising, unlike its print counterpart, is not primarily dedicated to supporting journalism. *Id.* at 116–18. He continues, "Virtually no careful analysis actually shows that the internet significantly reduces, much less eliminates, any of the major reasons for concern with concentration of ownership of the major producers of news and culture." *Id.* at 123. Of course, there are media watchers who think the end of the institutional press is a good thing and see much greater promise for the journalism being produced by start-ups news organizations and individuals online. See, e.g., Jeff Jarvis, *The Last Mogul Moments*, BUZZMACHINE (July 26, 2011, 9:02 AM), <http://www.buzzmachine.com/2011/07/26/the-last-mogul-moments/> (listing "many reasons to dance on the moguls' grave," like "the breaking up of the mogul's monopoly control of the means of distribution, now that we all have a Gutenberg press in our pockets").

<sup>50</sup> The marketplace is a concept that goes back to colonial America and "has been called 'one of the earliest and most influential contributions to First Amendment doctrine' and 'one of the basic tenets of our national communications policy.'" Allusions to it appear in 126 Supreme Court opinions and in 87 policy documents of the Federal Communications Commission." Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSP. 133, 133–34 (2008) (arguing that that the relevant definition of economic competition in media markets differs from traditional economic competition and that the value of government intervention in enforcing competition is "probably limited"). The Court's marketplace support for broader free speech is often traced to Justice Holmes's dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ("[T]he 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, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."). Because developing ideas relies on the availability of information, this Comment refers to the marketplace of information and ideas.

<sup>51</sup> See VICTOR PICKARD, JOSH STEARNS & CRAIG AARON, FREE PRESS, SAVING THE NEWS: TOWARD A NATIONAL JOURNALISM STRATEGY 5 (2009), available at [http://www.freepress.net/files/saving\\_the\\_news.pdf](http://www.freepress.net/files/saving_the_news.pdf). Though not as severe, broadcast news staffs also have suffered cutbacks. See Associated Press, *ABC Cuts 25 Percent of Its News Staff, Restructures*, SYRACUSE POST-STANDARD (Feb. 26, 2010, 8:45 AM), [http://www.syracuse.com/news/index.ssf/2010/02/abc\\_cuts\\_25\\_percent\\_of\\_its\\_new.html](http://www.syracuse.com/news/index.ssf/2010/02/abc_cuts_25_percent_of_its_new.html) (reporting that ABC News planned to lay off as many as 350 employees); Sam Schechner, *Cuts at TV-News Divisions Signal Leaner Approach*, WALL ST. J. (Feb. 26, 2010), <http://online.wsj.com/article/SB10001424052748703795004575087860950247660.html> (reporting that shrinking profits are leading broadcast news to look for ways to cut newsgathering costs and radically "transform[]" the way they do business). This Comment, however, limits its discussion to the newspaper

Fewer news reporters leads both to fewer newsgatherers to actively cover important beats and to overworked reporters having less time to research the news that they are on deadline to report or to investigate tips about misbehaving public officials.

A. *The Changing Media Landscape*

Much of what newspapers produce can be thought of as a public good. Investigative and beat reporting generate nonrivalrous<sup>52</sup> and nonexcludable<sup>53</sup> information crucial to community involvement. This information, which primarily comes from newspapers,<sup>54</sup> benefits the public. Conversely, much of the content produced by online news sites relies heavily on content from old media.<sup>55</sup> Though new media is changing the news-consumption landscape, online news providers generally do not supply significant new contributions to the marketplace of information and ideas.<sup>56</sup> Thus, reductions in newspaper editorial operations carry a corresponding loss in the creation of the independent

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industry because it accounts for the vast majority of original information gathering and reporting.

<sup>52</sup> New information is nonrivalrous in that it can be consumed simultaneously by an infinite number of people. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 120 (4th ed. 2004).

<sup>53</sup> Once uncovered, new information becomes public knowledge; consumers can be excluded from access to the expression of that information but not from the benefits of the information. See *id.*

<sup>54</sup> The Federal Communications Commission (FCC) has recognized that newspapers and television are more important than other forms of media, particularly the Internet, in the dissemination of breaking news. In the Matter of 2006 Quadrennial Regulatory Review, 23 F.C.C. R. 2010, 2042 (2008). “Data shows that consumers rely mostly on newspapers and television for news and information. The record demonstrates that traditional media still represent the most important source for local news for the majority of individuals.” *Id.*; see also Benjamin L. Cardin, *A Plan to Save Our Free Press*, WASH. POST (Apr. 3, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/02/AR2009040203310.html> (noting that a typical metro newspaper runs seventy stories a day while a half-hour TV news program includes only ten to twelve).

<sup>55</sup> To be sure, some online-only news organizations are producing entirely original content. For example, John Marshall’s *Talking Points Memo*, a liberal blog with a small reporting staff, uncovered the story about U.S. attorneys being fired for political reasons. See Paul McLeary, *How TalkingPointsMemo Beat the Big Boys on the U.S. Attorney Story*, COLUM. JOURNALISM REV. (Mar. 15, 2007, 1:53 PM), [http://www.cjr.org/behind\\_the\\_news/how\\_talkingpointsmemo\\_beat\\_the.php](http://www.cjr.org/behind_the_news/how_talkingpointsmemo_beat_the.php). But they are the exception, not the rule.

<sup>56</sup> Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector’s Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 115–16 (2009) (recommending that Congress lead the way in forming a national media policy, that government find ways to provide media access, and that antitrust analysis be expanded to include anticompetitive effects on the marketplace of ideas).

information that the Framers sought to protect.<sup>57</sup> Of particular concern are two related phenomena: the shrinking corps of professional newsgatherers and the consolidation and contraction of the newspapers that once employed them.

### 1. Fewer Professional Newsgatherers

The *Huffington Post* and *Daily Beast* are at the top of the online-only news industry.<sup>58</sup> They are general-interest news magazines that operate on the twenty-four-hour news cycle. Like many successful online-only news sites, they specialize in reporting on entertainment and national politics and in providing commentary. They perform little investigative reporting. A few nonprofit para-news organizations<sup>59</sup> have stepped in to supplement newspapers' investigative reporting, which has dropped considerably as budgets have plummeted.<sup>60</sup> But one of those organizations, the Center for Public Integrity, reduced its staff by about 20 percent in December 2011 to help close a \$2 million budget shortfall.<sup>61</sup> A success story is Pro Publica, which continues to add to an esteemed staff that has received two Pulitzer Prizes<sup>62</sup> since

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<sup>57</sup> See *supra* notes 41–46. It is possible that online-only news sites and nonprofit para-news organizations can rise to greater prominence and carry the torch, but there has been little evidence that they will be able to. At best, the future of newsgathering would be uncertain, and that poses too big a risk for the vitality of American democratic society.

<sup>58</sup> See Jessica Aldred et al., *The World's 50 Most Powerful Blogs*, *GUARDIAN* (Mar. 8, 2008), <http://www.guardian.co.uk/technology/2008/mar/09/blogs> (ranking the *Huffington Post* as the most powerful blog in the world); *Newsweek and the Daily Beast Combine*, *DAILY BEAST* (Nov. 12, 2010, 1:40 AM), <http://www.thedailybeast.com/articles/2010/11/12/newsweek-daily-beast-merge-announcement.html> (reporting that only two years after being founded by Tina Brown, one of the most famous magazine editors in the world, the *Daily Beast* had grown its monthly readership to about 5 million and had been rated by *Time* magazine as one of the five best online news sites in the United States); Jeremy W. Peters & Verne G. Kopytoff, *Betting on News, AOL Is Buying the Huffington Post*, *N.Y. TIMES*, Feb. 7, 2011, at A1, available at <http://www.nytimes.com/2011/02/07/business/media/07aol.html> (noting that the *Huffington Post* “has grown into one of the most heavily visited news Web sites in the country”).

<sup>59</sup> For the purposes of this Comment, “para-news organizations” refers to organizations that independently gather new information but typically publish in cooperation with a traditional mainstream media organization.

<sup>60</sup> See Downie & Schudson, *supra* note 13.

<sup>61</sup> Alicia Shepard, *CPI Reduces Staff to Compensate for \$2 Million Budget Hole*, *POYNTER* (Dec. 9, 2011, 3:58 PM), <http://www.poynter.org/latest-news/mediawire/155573/cpi-reduces-staff-to-compensate-for-2-million-budget-hole/>. The move came little more than a year after the Center for Public Integrity absorbed the HuffPo Investigative Fund, bringing the center's headcount to more than fifty and “making it one of the largest nonprofit investigative newsrooms in the country.” Tanzine Vega, *Pooling Resources, Two Newsrooms Merge*, *N.Y. TIMES*, Oct. 18, 2010, at B2, available at <http://www.nytimes.com/2010/10/19/business/media/19nonprofit.html>.

<sup>62</sup> Pro Publica shares one of these awards with the *New York Times*. *2010 Pulitzer Prize*

first publishing in June 2008.<sup>63</sup> But investigative newsrooms like Pro Publica require substantial philanthropy to get started,<sup>64</sup> as do online-only local newspapers like *Voice of San Diego*, a nonprofit with about a dozen reporters and a significant benefactor.<sup>65</sup>

Further, even with the success of investigative para-news organizations like Pro Publica and online-only local newspapers like *Voice of San Diego*, it is not clear that online news outlets can offset newsgathering losses in the newspaper industry. In the nation's capital, successful news outlets like *Daily Beast* and *Politico*<sup>66</sup> fall far short of replacing the massive losses to the Washington press corps caused by Washington bureau closures and consolidation.<sup>67</sup> These reductions are of even greater concern when it comes to local news reporting because newspapers remain the greatest source of local information.<sup>68</sup>

While organizations like Pro Publica should be lauded for the work they do, and newspapers should continue to partner with the

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*Winners: Investigative Reporting*, PULITZER PRIZES, <http://www.pulitzer.org/citation/2010-Investigative-Reporting> (last visited Oct. 6, 2011) (honoring Pro Publica's Sheri Fink "for a story that chronicles the urgent life-and-death decisions made by one hospital's exhausted doctors when they were cut off by the floodwaters of Hurricane Katrina"); *2011 Pulitzer Prize Winners: National Reporting*, PULITZER PRIZES, <http://www.pulitzer.org/citation/2011-National-Reporting> (last visited Oct. 6, 2011) (lauding Pro Publica's Jesse Eisinger and Jake Bernstein "for their exposure of questionable practices on Wall Street that contributed to the nation's economic meltdown").

<sup>63</sup> *About Us*, PRO PUBLICA <http://www.propublica.org/about/> (last visited Nov. 3, 2011).

<sup>64</sup> Pro Publica has thirty-two full-time journalists, an editor-in-chief who earned \$570,000 in 2008, and an annual operating budget of about \$9 million—second in the nonprofit news world only to NPR. See David Carr, *Nonprofit Journalism: Not Necessarily on the Cheap*, N.Y. TIMES MEDIA DECODER (Sept. 30, 2009, 8:28 AM), <http://mediadecoder.blogs.nytimes.com/2009/09/30/nonprofit-journalism-not-necessarily-on-the-cheap/>; Alan D. Mutter, *Size Matters in Non-Profit News*, REFLECTIONS OF A NEWSOSAUR (Sept. 29, 2009, 4:00 AM), <http://newsosaur.blogspot.com/2009/09/size-matters-in-non-profit-news.html>.

<sup>65</sup> See VOICE OF SAN DIEGO, <http://www.voiceofsandiego.org/> (last visited Feb. 16, 2012); see also James Rainey, *At Voice of San Diego, a Newsroom Flourishes*, L.A. TIMES (Feb. 15, 2009), <http://articles.latimes.com/2009/feb/15/nation/na-onthemedial5> (reporting that retired venture capitalist co-founder Buzz Woolley donated \$355,000 to get the news organization started).

<sup>66</sup> An anomaly, *Politico* started as online only, became a must-read staffed with defectors from the best papers in the country, and later added a profitable print edition.

<sup>67</sup> See Richard Pérez-Peña, *Big News in Washington, but Far Fewer Cover It*, N.Y. TIMES (Dec. 18, 2008), <http://www.nytimes.com/2008/12/18/business/worldbusiness/18iht-18bureaus.18782976.html> (noting that the *San Diego Union-Tribune*, like many smaller big-city metros, closed a Washington bureau that only three years before included eleven people and garnered a Pulitzer Prize for uncovering corruption by a San Diego-area Congressman). Said a former Washington bureau chief for another newspaper's defunct bureau: "I think the cop is leaving the beat here, and I think it's a terrible loss for citizens. But I can't argue with the business decision that Cox has made, at a time when papers can't even find the resources to cover the local zoning board." *Id.*

<sup>68</sup> Downie & Schudson, *supra* note 13.

investigative news nonprofit when practical, Pro Publica is an anomaly. It cannot fill the gaps in coverage that will widen as the newspaper industry continues its downward spiral. In particular, Pro Publica cannot be expected to offset the loss in local news coverage, and few philanthropists have stepped forward to back online-only local news organizations like *Voice of San Diego*.<sup>69</sup>

## 2. Consolidating and Closing Newspapers

Another concern is that media consolidation and newspaper contraction<sup>70</sup> will lead to a loss in editorial diversity and a rise in market dominance by a few newspaper chains.<sup>71</sup> In arguing that media ownership should be subjected to additional regulations to curb this decline, C. Edwin Baker wrote, “The general democratic goal is increased pluralism of sources and viewpoint as well as of content or subject categories.”<sup>72</sup> Judge Learned Hand once voiced a similar sen-

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<sup>69</sup> See *infra* note 263 and accompanying text.

<sup>70</sup> Consolidation concerns newspaper mergers that result in the combining of staffs under common ownership, while contraction concerns newspapers that close shop and disappear from the marketplace. Both lessen the diversity of voices in the marketplace of ideas, but contraction is, at least in the short term, more harmful to the amount of new information being reported. Over the past few decades, newspaper chains that once fiercely competed against other newspapers within even smaller cities achieved common ownership or consolidation across wide regions and scattered pockets of the country. See John Morton, *Partnering to Improve Newspaper Profits*, AM. JOURNALISM REV. (Mar. 1999), <http://www.ajr.org/article.asp?id=3318>.

<sup>71</sup> After the Tribune Company filed Chapter 11, *Business Week* reported that newspaper executives feared the “Great Capitulation” was coming for American newspapers, which would be marked by catastrophic consolidation. Jon Fine, *Zell’s Tribune: The Canary in a Scary Mine*, BUS. WK. (Dec. 9, 2008, 5:58 PM), [http://www.businessweek.com/magazine/content/08\\_51/b4113000569807.htm](http://www.businessweek.com/magazine/content/08_51/b4113000569807.htm). Along with the continuing decline of newspaper staffs and the closure of some newspapers, efforts to consolidate newspaper companies have continued during the past three years. See Russell Adams, *Consolidation Weighed for Newspaper Publishers*, WALL ST. J. (Jan. 18, 2011), <http://online.wsj.com/article/SB10001424052748703954004576090360936814594.html> (reporting that after emerging from bankruptcy, MediaNews Group, Inc., owner of more than fifty daily U.S. newspapers, was in talks to merge with one or more newspaper companies).

<sup>72</sup> C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 919 (2002). This article was published before the creation of YouTube, Twitter, or Facebook and before citizen journalism and blogs like the *Huffington Post* had taken off. Still, as discussed throughout this Comment, nontraditional online media neither generate the same positive externalities nor make the same contributions of new information that newspapers do, and they cannot supplant newspapers’ role in democratic society. For a contrary viewpoint arguing that though not a complete substitute for the press’s contributions, non-professional “citizen journalists fulfill, at a minimum, the same functions as traditional journalists,” see Stephanie B. Turner, Note, *Protecting Citizen Journalists: Why Congress Should Adopt a Broad Federal Shield Law*, 30 YALE L. & POL’Y REV. (forthcoming 2012) (arguing that “citizen journalists constitute a significant source of the news today and often fulfill the same functions as traditional journalists in society” and that a federal shield law protecting reporters

timent about the newspaper industry:

[T]hat industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.<sup>73</sup>

Judge Hand went on to note the substantial role of the newsgatherer in shaping the news and opined that “two accounts of the same event will never be the same.”<sup>74</sup>

It is unlikely that the multitude of new voices finding an audience online will offset losses in editorial diversity. In fact, while they increase opportunities for democratic participation,<sup>75</sup> they simultaneously reduce viewpoint exposure. While the Internet has given every pundit a platform and a printing press, it has also made it much easier for individuals to avoid exposure to viewpoints that they do not share.<sup>76</sup> This compartmentalization does not support democratic interests.<sup>77</sup> While niche news sites and many blogs often preach to the choir, newspapers at least strive to be unbiased in their newsgathering and reporting.<sup>78</sup> Furthermore, by presenting a range of voices on their

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from disclosing confidential sources should extend to even those who are not paid for their online news writing).

<sup>73</sup> United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

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

<sup>75</sup> See generally DAN GILMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (2006).

<sup>76</sup> CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at xii (2007); see also Ted Koppel, *Ted Koppel: Olbermann, O'Reilly and the Death of Real News*, WASH. POST (Nov. 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/12/AR2010111202857.html> (“The need for clear, objective reporting in a world of rising religious fundamentalism, economic interdependence and global ecological problems is probably greater than it has ever been. But we are no longer a national audience receiving news from a handful of trusted gatekeepers; we’re now a million or more clusters of consumers, harvesting information from like-minded providers.”).

<sup>77</sup> SUNSTEIN, *supra* note 76, at xii (“Democracy does best with what James Madison called a ‘yielding and accommodating spirit,’ and that spirit is at risk whenever people sort themselves into enclaves in which their own views and commitments are constantly reaffirmed. . . . [S]uch sorting should not be identified with freedom, and much less with democratic self-government.”).

<sup>78</sup> See S. ROBERT LICHTER, STANLEY ROTHMAN & LINDA S. LICHTER, *THE MEDIA ELITE: AMERICA’S NEW POWERBROKERS* (1990). “There are few ideologues in major media newsrooms. The American press has a longstanding tradition of fairness and non-partisanship, and a journalist whose news judgments stem blatantly from their politics are unlikely to survive

opinion pages and in reported stories, they expose readers to a diverse range of viewpoints.<sup>79</sup> Such diversity is lost as newspapers reduce reporting staff or permanently stop the presses. The case for government intervention is not about traditional media subjugating new media—it is about saving traditional media, preserving thereby an essential contributor to American democratic society.

For these reasons, any government assistance should focus on members of the traditional press. Beneficiaries, however, need not publish a newspaper that lands on a subscriber's doorstep each morning.<sup>80</sup> Digital publication—with its lower expenses, broader reach, and greener footprint—is the future. Even Bill Keller, executive editor of the *New York Times* from 2003 to 2011, has believed for at least several years that “eventually” the *New York Times*'s primary business will be online: “[T]he Web audience is growing at a great clip, while print circulation is not. And online revenues are growing faster, too, albeit from a smaller base. If the trend continues, there is little doubt that—‘eventually’—online becomes the main business.”<sup>81</sup> But newspapers cannot survive on online ad revenue alone—at least not yet.<sup>82</sup> And American democratic society cannot afford to allow its Fourth Estate to be fundamentally weakened before news executives stabilize their future.

### B. *Congress's History of Helping the Press*

In looking to prop up the Fourth Estate, the government need not strain to find precedent for such congressional action. From the Post Office Act of 1792 to the Newspaper Preservation Act of 1970, Congress has passed several laws that favor the press—and disfavor other forms of media—in an effort to increase news publication and dissemination. These efforts were motivated by a belief that an informed citizenry is essential to American democratic society.

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long in mainstream news organizations.” *Id.* at 54. It is, however, more difficult to argue that newspapers are truly objective because the selection and reporting of news stories are shaped by the judgments and experiences of editors and reporters.

<sup>79</sup> To be sure, some papers do a better job of this than others.

<sup>80</sup> Thus, the *Seattle Post-Intelligencer*, which now publishes online only, could receive aid.

<sup>81</sup> Patrick Phillips, *Bill Keller: 'The New York Times Is Not Immutable'*, I WANT MEDIA (July 16, 2007) <http://www.iwantmedia.com/people/people68.html>; see also MEYER, *supra* note 25, at 16.

<sup>82</sup> See David M. Schizer, *Subsidizing the Press*, 3 J. LEGAL ANALYSIS 1, 12 (2011) (“Although print editions are more expensive to produce, they generate 90% of the industry’s revenue. Needless to say, cutting costs by 50% is still a losing proposition if accompanied by a 90% decline in revenue.”).

1. Post Office Act of 1792

Shortly after the nation's founding, Congress saw a need to subsidize the press to encourage the dissemination of news across newly united states. With the Post Office Act of 1792, Congress, seeking to provide citizens access to the information that would aid their political decision-making,<sup>83</sup> set a nominal fee for the circulation of newspapers via mail.<sup>84</sup> All newspapers qualified for the subsidy and, regardless of weight, were to be delivered for one cent if traveling fewer than one hundred miles and for one and a half cents if traveling farther. Thus, in 1794 newspapers constituted 70 percent of mail weight but produced only 3 percent of postal revenue.<sup>85</sup> Four decades later, newspapers accounted for 95 percent of postal weight but still contributed only 15 percent of revenue.<sup>86</sup> Moreover, because Congress wanted the Postal Service to be independently funded, the Postal Service had to raise letter rates to compensate for the reduced newspaper rate. The newspaper postal rate has increased over the years but still favors the press.<sup>87</sup>

2. Public Broadcasting Act of 1967

In the mid-twentieth century, Congress passed two acts to assist traditional media in an effort to ensure access to information that would aid citizens in community engagement and political decision-making.<sup>88</sup> The first was the Public Broadcasting Act of 1967 (PBA),<sup>89</sup>

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<sup>83</sup> See Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 694–95 (2007).

<sup>84</sup> RICHARD JOHNS, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 36 (1998).

<sup>85</sup> *Id.* at 38.

<sup>86</sup> *Id.*

<sup>87</sup> Additionally, Congress never placed upon newspapers the kind of special tax that English papers were required to pay. CULVER H. SMITH, *THE PRESS, POLITICS, AND PATRONAGE: THE AMERICAN GOVERNMENT'S USE OF NEWSPAPERS 1789–1875*, at 8 (1977). However, it is not clear Congress could place a special tax on the press without violating the U.S. Constitution. In 1967, Minnesota tried to impose a tax on paper and ink products used by newspapers, but the U.S. Supreme Court struck it down for violating the First Amendment. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983). The Court was worried that taxes, or the threat of taxes, would chill the press. *Id.* “[E]ven without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions.” *Id.* at 588.

<sup>88</sup> Clay Calvert, *Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661, 668 (2009).

which authorized the creation of the Corporation for Public Broadcasting (CPB). The PBA promoted a multitude of diverse voices and high-caliber content by establishing a support system for publicly owned radio and television stations (later known as the affiliates of NPR<sup>90</sup> and Public Broadcasting Service (PBS)) to improve the quality and quantity of educational and cultural news programs available to the public.<sup>91</sup> In 2010, the CPB received \$420 million in federal funding.<sup>92</sup>

### 3. Newspaper Preservation Act of 1970

Three years later, Congress passed the Newspaper Preservation Act of 1970 (NPA).<sup>93</sup> The NPA valued editorial diversity—more voices contributing to the marketplace of ideas—over economic efficiency. The result was a broad antitrust exemption that remains in place today. In seeking to preserve two-newspaper towns, the NPA permitted qualifying newspaper competitors to enter into a joint operating agreement and combine business operations, thereby reducing costs and boosting profits.<sup>94</sup> Competing newspapers were allowed to share printing, delivery, and advertising employees and expenses.<sup>95</sup> They just needed to maintain separate editorial staffs.<sup>96</sup>

Congress was motivated by a concern that newspapers were losing economic viability and without government aid would continue to permanently stop their presses, resulting in a loss of editorial diversity and information availability.<sup>97</sup> The NPA's opening language makes a similar appeal to "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States."<sup>98</sup> The public interest that the Act refers to is one

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<sup>89</sup> 47 U.S.C. § 396 (2006).

<sup>90</sup> Formerly known as National Public Radio.

<sup>91</sup> See S. REP. NO. 90-222, at 2 (1967). The Corporation for Public Broadcasting (CPB) will be discussed further in Part IV.

<sup>92</sup> CORP. FOR PUB. BROADCASTING, FY 2010 OPERATING BUDGET, [http://www.cpb.org/aboutcpb/leadership/board/resolutions/090915\\_fy10OperatingBudget.pdf](http://www.cpb.org/aboutcpb/leadership/board/resolutions/090915_fy10OperatingBudget.pdf) (last visited Oct. 6, 2011).

<sup>93</sup> 15 U.S.C. §§ 1801–1804 (2006).

<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

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

<sup>97</sup> See H.R. REP. NO. 91-1193, at 1 (1970).

<sup>98</sup> 15 U.S.C. § 1801. The full text of this provision states:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a

that American leaders have recognized since the founding of the United States.<sup>99</sup>

*C. Congress Should Act to Help Now*

Despite the arrival of online media, newspapers remain the gold standard and it is unlikely that something new online will measure up.<sup>100</sup> Without government assistance, the newspaper industry likely will continue to dwindle. Four decades ago, when the NPA was passed, Congress feared that the loss of two-newspaper towns would deprive “the public of diverse and independent editorial viewpoints and news policies.”<sup>101</sup> The threat of diminished contributions to the marketplace of information and ideas is even greater now.

Regardless of whether the Press Clause granted newspapers special rights and privileges or is limited to protecting the press from restraint, there is a First Amendment interest in slowing or even reversing the newspaper industry’s decline. The First Amendment is premised upon the belief that among the fruits of freedom of speech and of the press is an engaged and dynamic civic conversation that flows from the outpouring of information; these freedoms do not merely protect or promote opinions. Traditional media, particularly newspapers, “still supply an invaluable and unequalled layer of accreditation, fact checking, agenda setting, and wide-ranging and systematic investigative reporting, while reaching a mass audience and representing public opinion before powerful decision-makers.”<sup>102</sup> But traditional media is amid an unprecedented period of decline, and as newspapers continue to shrink in size or disappear through consolidation or contraction, the measurable losses to the marketplace of information and ideas will expand. To prevent these losses and ensure that Americans have the information necessary for informed political decision-making, Congress can and should act to aid the newspaper industry.

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joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

*Id.*

<sup>99</sup> See *supra* notes 41–46.

<sup>100</sup> See *supra* Part III.A.

<sup>101</sup> H.R. REP. NO. 91-1193, at 1.

<sup>102</sup> Netanel, *supra* note 41, at 965–66.

## IV. DIRECT AND INDIRECT GOVERNMENT SUBSIDIES

Any practical subsidy program could not subsidize all worthy newsgatherers and likely would benefit some newsgatherers who are less deserving than those not benefited.<sup>103</sup> But for the reasons discussed in Parts II and III, the proposals discussed below are aimed at benefiting only traditional members of the newspaper industry. Defining this category could be challenging. There are general-interest daily newspapers that generate few of the positive externalities that Congress should be interested in subsidizing, and there are weekly niche papers that produce substantial amounts. However, to avoid creating a new bureaucracy, it seems that the federal government would do well to use bright-line criteria for admittance to such a program—possibly mirroring the Newspaper Association of America standards of membership<sup>104</sup>—and to only apply benefits to all qualifying newspapers in existence at the time the program would take effect. Moreover, to avoid a potential challenge that the law is vague and thus susceptible to viewpoint discrimination, the authorizing statute should expressly identify recipient newspapers.<sup>105</sup> Such a move would leave out worthy candidates—both those already in existence and those later to be formed—but creating an administrative agency to evaluate subsidy applications would only complicate the political plausibility of preserving the nation’s corps of newsgatherers.<sup>106</sup>

Such favoring of newspapers over other media does not pose a policy problem. For example, the Post Office Act<sup>107</sup> has been on the books since almost the founding of the United States, and it is difficult to think of a more archaic medium than news delivered from a satchel.<sup>108</sup> Additionally, the federal government has repeatedly chosen

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<sup>103</sup> Or subsequently burdened by the competitive disadvantage.

<sup>104</sup> The Newspaper Association of America, representing about 2,000 daily and weekly newspapers, requires that “member newspapers are published at least one time per week, bear a 25 percent editorial content of both local and general interest and carry a minimum of 70 percent paid circulation.” *Membership*, NEWSPAPER ASSOCIATION OF AMERICA, <http://www.naa.org/About-NAA/Membership.aspx> (last visited Jan. 26, 2012).

<sup>105</sup> See *infra* notes 146–154 and accompanying text.

<sup>106</sup> However, such limitations are more significant in a direct-funding program than a tax-based system, which could provide broader benefits to newsgatherers, whether old media or new media, subject to an applicant receiving IRS approval. For these purposes, Congress would need to define the qualities it is looking for so that the benefits would be available to the thriving online newsrooms that do not currently qualify for 501(c)(3) status.

<sup>107</sup> *Supra* Part III.B.1.

<sup>108</sup> Whether people still receive the news via postal mail is a different matter. See U.S. POSTAL SERV., THE HOUSEHOLD DIARY STUDY MAIL USE & ATTITUDES IN FY 2008, [http://about.usps.com/studying-americans-mail-use/household-diary/usps-hds-fy08.htm#\\_](http://about.usps.com/studying-americans-mail-use/household-diary/usps-hds-fy08.htm#_)

to benefit one medium of communication at another's expense.<sup>109</sup> While there are many ways that the government could subsidize newspapers, this Part focuses on direct funding and tax-based incentives. This Comment addresses each type of subsidy's basic structure and the degree to which it would: (1) achieve the desired goals of encouraging local news and investigative reporting; (2) survive First Amendment challenges; (3) preserve editorial independence; and (4) win Congress's favor.<sup>110</sup>

### A. *Direct Government Funding*

The government is no stranger to funding private industry. Two conspicuous and recent beneficiaries were Detroit automakers and Wall Street bankers. In fall 2008, the federal government stepped in to stop an escalating credit crisis that reshaped Wall Street in the course of a few weeks and threatened to plunge the U.S. economy into a deep depression.<sup>111</sup> Congress passed the Troubled Asset Relief Program (TARP), which allocated \$245 billion of the \$700 billion TARP fund to troubled banks, about \$205 billion of it going to purchase preferred stock in the banks.<sup>112</sup> TARP recipients were not required to use funds for a particular purpose but had to meet numerous other conditions.<sup>113</sup>

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Toc234218537 (last visited Nov. 14, 2011) (reporting that the average number of newspapers received per household by postal mail each week declined between 1987 and 2008 from 0.6 to 0.2, with about half being daily newspapers).

<sup>109</sup> For example, broadcast stations are heavily subsidized by must-carry regulation requiring cable providers to carry broadcast signals and "have also received gifts of free spectrum." See Candeub, *supra* note 46, at 1609.

<sup>110</sup> Each factor is important, but the significance of a program's political plausibility cannot be underemphasized at a time when members of Congress seem more intent on frustrating their colleagues' efforts than on accomplishing their own goals. See, e.g., Eleanor Clift, *LaHood: GOP Doesn't Care About Jobs*, DAILY BEAST (Oct. 31, 2011), <http://www.thedailybeast.com/articles/2011/10/31/ray-lahood-for-gop-colleagues-obama-defeat-more-important-than-jobs.html> (reporting that U.S. Transportation Secretary Ray LaHood, the lone Republican in President Obama's cabinet, believes his fellow Republicans are more interested in defeating Obama than creating jobs); Stephanie Condon, *Bernie Sanders Holds Old-School Filibuster Against Obama-GOP Tax Cut Deal*, CBS NEWS (Dec. 10, 2010, 5:51 PM), [http://www.cbsnews.com/8301-503544\\_162-20025382-503544.html](http://www.cbsnews.com/8301-503544_162-20025382-503544.html); Alan Silverleib, *Senate GOP Pledges to Block All Bills Until Tax Dispute Resolved*, CNN (Dec. 1, 2010, 2:35 PM), <http://www.cnn.com/2010/POLITICS/12/01/gop.senate.demands/index.html?hpt=T1>.

<sup>111</sup> See ROGER LOWENSTEIN, *THE END OF WALL STREET* (2010); Jon Hilsenrath, Serene Ng & Damian Paletta, *Worst Crisis Since '30s with No End in Sight*, WALL ST. J., Sept. 18, 2008, at A1.

<sup>112</sup> Lissa Lamkin Broome, *The Dodd-Frank Act: TARP Bailout Backlash and Too Big to Fail*, 15 N.C. BANKING INST. 69, 70–71 (2011).

<sup>113</sup> This included quarterly dividend payments to the federal government of 5 percent, a limitation on quarterly dividend payments to common stockholders of 1 percent, and restrictions on executive compensation. *Id.* at 72.

Though heavily criticized for encouraging moral hazard<sup>114</sup> by bailing out bankers who over-leveraged assets and failed in their dangerous gambles, “[t]he TARP program has been remarkably successful, in terms of cost to the government and in its goal to help stabilize the financial system.”<sup>115</sup>

Congress was not done with TARP after saving the financial industry. In late 2008 and early 2009, the federal government sent \$49.5 billion and \$10.8 billion of TARP funds to GM and Chrysler, respectively.<sup>116</sup> Automaker funds were marked by different conditions, including developing a plan to return to profitability and submitting to the oversight of a national car czar. The government also took a significant ownership interest in GM.<sup>117</sup> As with Wall Street, the Detroit bailout was a success.<sup>118</sup>

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<sup>114</sup> Moral hazard, which exists when an actor is protected from the consequences of his actions, is ever present in a financial industry in which bankers make a profit regardless of the outcome of investments they make with other people’s money. See generally Kevin Dowd, *Moral Hazard and the Financial Crisis*, 29 CATO J. 141 (2009); Frank Ahrens, ‘Moral Hazard’: Why Risk is Good, WASH. POST (Mar. 19, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031802873.html>.

<sup>115</sup> Broome, *supra* note 112, at 72; see also Robert J. Samuelson, *Why TARP Has Been a Success*, WASH. POST (Mar. 27, 2011), [http://www.washingtonpost.com/opinions/why-tarp-has-been-a-success-story/2011/03/25/AFugJ4oB\\_story.html](http://www.washingtonpost.com/opinions/why-tarp-has-been-a-success-story/2011/03/25/AFugJ4oB_story.html) (“We need to remember that TARP was a desperate program for desperate times. It’s had its failures: The Obama administration’s forecast that it would provide mortgage relief to 3 million to 4 million homeowners has fallen well short (the current number is about 600,000). But the larger purpose of helping calm financial markets succeeded. Costs have been lower than predicted because aid was extended at the panic’s height, when expectations of losses were greatest. As the economy has recovered, the gloomiest predictions proved exaggerated.”); Ben Smith, *TARP: A Success None Dare Mention*, POLITICO (Sept. 14, 2010, 2:01 PM), <http://www.politico.com/news/stories/0910/42135.html> (quoting Douglas Elliott of the Brookings Institution saying that “TARP is probably the most effective large-scale government program that the public has vehemently decided was a bad idea, and, therefore, has only the most tepid political defenders”).

<sup>116</sup> David Welch, *Doing the Math on Obama’s Detroit Bailout*, BUS. WK. (Aug. 2, 2010), [http://www.businessweek.com/autos/autobeat/archives/2010/08/doing\\_the\\_math\\_on\\_obamas\\_detroit\\_bailout.html](http://www.businessweek.com/autos/autobeat/archives/2010/08/doing_the_math_on_obamas_detroit_bailout.html).

<sup>117</sup> See Greg Gardner, *Ex-Auto Czar: Auto Bailout Will Cost Taxpayers \$14 Billion*, USA TODAY (Dec. 17, 2011), <http://content.usatoday.com/communities/driveon/post/2011/12/gm-general-motors-chrysler-auto-bailout-loss-obama/1>; David M. Herszenhorn & Jackie Calmes, *Detroit Bailout Is Set to Bring More U.S. Oversight*, N.Y. TIMES, Dec. 7, 2008, at A1, available at <http://www.nytimes.com/2008/12/08/washington/08autos.html>.

<sup>118</sup> Welch, *supra* note 116 (“So far, it is tough to argue that the bailout hasn’t worked. GM is in the black, having reported an \$865 million profit in the first quarter with black ink looking likely for the rest of the year. GM’s results are strong enough that the company is preparing for an initial public offering that should start selling stock in November. Chrysler is at least making an operating profit, which puts the company in much better shape than most analysts thought it would be a year ago. With much lower costs, both companies should be able to make money going forward.”).

Likewise, some commentators have suggested a government bailout of the newspaper industry: Automakers and banks were considered too big to fail—why not the press?<sup>119</sup> But it is unclear whether these bailouts provide a model for aiding the newspaper industry. Newspapers do not have nearly as tangible a connection to the U.S. financial system or workforce and, more significantly, it would raise constitutional questions if the government took in newspapers the kind of ownership interests that it took in banks and automakers.<sup>120</sup> Further, any simple bailout, regardless of structure, would be flawed on many levels. Newspapers were rich with cash only five years ago.<sup>121</sup> The press's problems are systemic, and any meaningful direct funding would need to be substantial and ongoing to serve worthy public policy goals.<sup>122</sup> How much and for how long are difficult questions to answer, but David Schizer has suggested an annual subsidy of \$2.5 billion:

This would be enough to cover the cost of rehiring the 33,000 reporters who lost their jobs in 2008 and 2009, assuming the total annual cost of a reporter is approximately \$75,000. Although this is a substantial amount of money, to be sure, it represents less than \$10 per year per American, and would constitute only a tiny fraction of the federal budget. The amount is also in line with support provided to the press in other countries.<sup>123</sup>

Assuming that the total annual cost includes more than just a reporter's salary, that figure sounds accurate.<sup>124</sup> But, regardless of exact numbers,

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<sup>119</sup> In advocating for a one-time, content-neutral government bailout, Clay Calvert notes that such an action could be perceived as transforming the press's First Amendment rights beyond a negative right that prohibits government interference to a positive right that entitles the press to government aid. But Calvert argues that protecting newspapers is of substantial public interest and, thus, the aid is in furtherance of our democratic society and is no more indicative of a positive right than the bailouts for GM and Wall Street. Calvert, *supra* note 88, at 670–71.

<sup>120</sup> These constitutional questions would be more serious than those raised by direct or indirect subsidies, which are discussed at length in Part IV.A.2.

<sup>121</sup> Alan D. Mutter, *Fat Newspaper Profits Are History*, REFLECTIONS OF A NEWSOSAUR (Oct. 21, 2008, 9:32 PM), <http://newsosaur.blogspot.com/2008/10/fat-newspaper-profits-are-history.html> (discussing the quick decline in the newspaper industry's annual operating earnings from an average of 27.3 percent between 2000 and 2007).

<sup>122</sup> We can assume that newspapers would see more benefit from subsidies spread out over several years than from a one-time budgetary boost. Whether the benefit lasted six years or ten is not within the scope of this Comment.

<sup>123</sup> Schizer, *supra* note 82, at 19.

<sup>124</sup> I speak from personal experience, having spent five years as a full-time newspaper reporter. See also U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL EMPLOYMENT AND WAGES, MAY 2009: 27-3022 REPORTERS AND CORRESPONDENTS (2009), available at <http://www.bls.gov/oes/2009/may/oes273022.htm> (reporting a median annual wage of \$43,270, with

Congress should avoid relying solely on this type of assistance because doing so would not provide sustainable long-term relief and could threaten editorial independence. Getting congressional support for such a program also would pose a problem.

1. Ability to Target Local and Investigative Reporting<sup>125</sup>

The purpose of any subsidy for newspapers should be to encourage and preserve local beat and investigative reporting. Sports and entertainment reporting do not need the help. They are big business and Americans do not depend on newspapers to provide this content; unlike local and investigative reporting, sports and entertainment news is amply and adequately available on television and online.<sup>126</sup> Even if sports and entertainment reporting needed help, public policy would not endorse such aid because such reporting does not play the integral democratic role of local and investigative reporting.

But restricting public subsidies to only specific newspaper expenses would be challenging and potentially cost-prohibitive. Newspapers would face the practical challenges of either (1) segregating editorial expenses and demonstrating how subsidies were only used for qualifying costs (e.g., local and investigative reporting) or (2) applying for grants in a prize-based system. Additionally, such a program likely would require Congress to create a new agency either to monitor the use of newspaper subsidies and audit expense reports or to

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newspaper reporters make on average less and broadcast news analysts making on average more).

<sup>125</sup> These are admittedly squishy categories. Generally, local news is that which either emanates from within a newspaper's delivery area or involves members of that community, including politicians, businesses with ties to the community, and locals making news while outside the region. While a global event is likely to resonate locally—war, natural disaster, geopolitical conference—it generally would not qualify as local news unless a member of the local community was involved in the global event. Similarly, investigative news cannot be neatly defined. It is rarely as mysterious as Woodward and Bernstein meeting Deep Throat in a dark parking garage. Generally, investigative reporting involves stepping off the path of daily breaking news and, at times, spending weeks or months of pressing sources for tightly held information, exploring unsubstantiated tips, and poring over court documents and government records. Like with identifying recipient newspapers, it might be necessary for a subsidy program to explicitly state the types of reporting that would qualify as local or investigative to avoid potential vagueness challenges. *See infra* notes 146–154 and accompanying text.

<sup>126</sup> *See, e.g.*, Douglas A. McIntyre, *TMZ.com Valuation Tops \$100 Million*, MARKETWATCH (June 3, 2010, 6:56 PM), <http://www.marketwatch.com/story/tmzcom-valuation-tops-100-million-2010-01-03>; David B. Wilkerson, *Disney Profits Jump 11% on ESPN*, PARKS, MARKETWATCH (Aug. 9, 2011, 4:57 PM), <http://www.marketwatch.com/story/disney-profit-jumps-11-on-espn-parks-2011-08-09>.

review grant applications and make quality judgments.<sup>127</sup> The agency could target subsidies to produce more local and investigative reporting. But the agency would cost money to create and operate—money that would come out of the newspaper-subsidy program. Thus, while a prize-based system would better correlate newspaper subsidies with public policy interests by enabling the government to better target the newspaper operations to which it allocated funds, a prize-based system would be burdened by its own wasted resources.

Alternatively, Congress could provide a blanket, readership-based subsidy for newspapers.<sup>128</sup> If, for example, Congress set the subsidy at \$1 million annually per 100,000 daily print-equivalent readers, a paper that averaged 380,000 daily readers would receive a \$3.8 million annual subsidy. This would be simpler to administer than a prize-based system, though it would inevitably allocate subsidies that newspapers could use on their sports desk or for increasing executive pay.<sup>129</sup>

There are tradeoffs to both approaches, and any criteria are bound to be under- and over-inclusive of worthy recipients. In the interest of administrative ease and avoiding the costs of creating another bureaucracy, a blanket subsidy tied to newspaper readership would make more sense.<sup>130</sup> But a prize-based system would better achieve the public policy goals of a newspaper subsidy program. The more narrowly tailored the program could be to rewarding local news reporting and watchdog journalism, the better.

## 2. Constitutional Concerns

Though creating a new agency to oversee newspaper subsidies is not ideal for the reasons just discussed, Congress could still choose to go this route. If so, how would basing funding on content implicate the First Amendment? Free speech is among the most recognized constitutional rights, and the United States Supreme Court has “held that the government may not deny a benefit to a person because he

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<sup>127</sup> To be sure, though more efficient in ensuring that subsidies encourage the type of reporting that benefits the public, creating a new bureaucracy would be unpopular and make direct subsidies even less politically plausible.

<sup>128</sup> A formula would be needed to calculate a newspaper’s print-equivalent readership by fractionally weighing online readership and multiplying daily circulation by the number of people who typically read a single copy.

<sup>129</sup> See Schizer, *supra* note 82, at 29.

<sup>130</sup> Generally, the larger a newspaper’s readership, the greater its primary coverage area and the more editorial staff required to adequately cover the news in that area.

exercises a constitutional right.”<sup>131</sup> But punishing disfavored speech is treated quite differently than rewarding speech that the government favors. Unlike content-based regulations, which must survive strict scrutiny, content-based subsidies are subjected to significantly less scrutiny.<sup>132</sup> The primary rationale for different standards is that subsidies, unlike regulations, do not wield the coercive power of the state.

Though subsidies provide a vehicle by which the government may influence the content produced by media outlets without running afoul of the First Amendment, there are two primary constitutional constraints on the use of government subsidies to encourage certain speech. First, a condition cannot be “aimed at the suppression of dangerous ideas.”<sup>133</sup> But Congress can structure a subsidy to encourage speech that it favors:

To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect. When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, 22 U.S.C. § 4411(b), it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.<sup>134</sup>

So long as Congress does not engage in viewpoint discrimination, it may send the message that it wants to send when allocating taxpayer dollars to promote public policy.<sup>135</sup> Or as the Court said in *Rosenberger v. Rector and Visitors of University of Virginia*: “When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the

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<sup>131</sup> *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545 (1983) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

<sup>132</sup> See *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 587–88 (1998); *Rust v. Sullivan*, 500 U.S. 173 (1991); Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217, 219–20 (2002) (“Speech regulations, even if they are content neutral, are presumptively invalid under the First Amendment review that has emerged in the last thirty years. By contrast, burdens on speech that are part of a discretionary speech benefit may be treated as presumptively valid exercises of government largesse. Whereas the review of regulations favors the regulated, the review of speech subsidies favors the government.”).

<sup>133</sup> *Rust*, 500 U.S. at 208 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

<sup>134</sup> *Id.* at 194.

<sup>135</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

grantee.”<sup>136</sup> For instance, the National Endowment for the Arts may “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public,”<sup>137</sup> and Congress may prohibit family-planning counselors from giving abortion-related advice while administering a federally funded program.<sup>138</sup>

Second, the government cannot coerce private speakers into saying what it wants them to say. The Court clearly articulated this in *Miami Herald Publishing Co. v. Tornillo*,<sup>139</sup> a non-subsidy case in which the Court deemed unconstitutional a requirement that a newspaper publish content the government deemed necessary, even if for public policy reasons.<sup>140</sup> The Court later extended this restriction to media receiving content-based subsidies in *FCC v. League of Women Voters of California*.<sup>141</sup> In *League of Women Voters*, the Court stated that the government could not prohibit a broadcast station that received federal funding from “editorializing.”<sup>142</sup> Such a restriction would unconstitutionally restrain “important journalistic freedoms which the First Amendment jealously protects.”<sup>143</sup>

Because the Constitution empowers Congress to reward speech content that it permissibly favors, Congress could structure a newspaper subsidy to favor local and investigative reporting and provide incentives for newspapers to publish more of these types of speech. At the same time, Congress could not withdraw subsidies from a newspaper that published an investigative story into a congressional scandal or anything else that a member of the federal government would object to. Doing so would be perceived as penalizing a newspaper for publishing speech that the government—or government officials—did not like.<sup>144</sup> Together, these constitutional rules

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

<sup>137</sup> *Finley*, 524 U.S. at 592.

<sup>138</sup> *Rust*, 500 U.S. at 175.

<sup>139</sup> *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

<sup>140</sup> *Id.* Newspapers have historically been the most protected media, and this decision ran contrary to a Court opinion five years prior that had approved a government requirement that broadcast stations, which transmit over a limited spectrum and only under government licenses, provide air time to “discuss both sides of controversial public issues.” *See Red Lion Broad. Co. v. FCC* 395 U.S. 367, 380 (1969).

<sup>141</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984).

<sup>142</sup> *Id.* at 366.

<sup>143</sup> *Id.* at 402.

<sup>144</sup> A speech penalty is presumptively impermissible and must pass strict scrutiny because it tends to invade an individual’s freedom of expression. *See, e.g., Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 27 (1986) (stating that “the deterrent effect of a penalty is very much like direct suppression”).

simultaneously provide authority for Congress to favor certain newspaper speech and protect newspapers from improper government interference.

However, the program's structure might raise a different constitutional question. It is clear that under a prize-based model, à la *National Endowment for the Arts v. Finley*,<sup>145</sup> the government may make value judgments. In fact, the *Finley* Court held that the "decency and respect" criteria for National Endowment for the Arts funding was not void for vagueness despite being "undeniably opaque."<sup>146</sup> The Court reasoned: "In the context of selective subsidies, it is not always feasible for Congress to legislate with clarity. Indeed, if this statute is unconstitutionally vague, then so too are all Government programs awarding scholarships and grants on the basis of subjective criteria such as 'excellence.'"<sup>147</sup> Thus, if a government agency reviewed newspaper grant applications and chose to subsidize only those newspapers that it deemed to be of highest quality, there likely would be little doubt about the program's constitutionality. But, as mentioned earlier, while a prize-based system would enable the government to better target funding to support editorial operations that produced local and investigative news reports, it also would displace significant resources in reviewing applications and would lead to frequent fights over what qualified as worthy.

While Congress could avoid such disputes over quality judgments with a blanket-subsidy program, it is less clear how courts would react to such a program that is ostensibly open to all newspapers within a certain category—for example, those publishing local news stories—without quality judgments. Such a program might turn a recipient newspaper into a designated public forum.<sup>148</sup> If so, courts might be

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<sup>145</sup> 524 U.S. 569 (1998).

<sup>146</sup> *Id.* at 588 ("The terms of the provision are undeniably opaque, and if they appeared in a criminal statute or regulatory scheme, they could raise substantial vagueness concerns. It is unlikely, however, that speakers will be compelled to steer too far clear of any 'forbidden area' in the context of grants of this nature.").

<sup>147</sup> *Id.* at 589.

<sup>148</sup> A "designated public forum" is one that, though not generally open to the public, the state has specifically opened up to certain groups or topics. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). A school auditorium opened to public organizations or a university fund that supports student groups are typical examples. RUSSELL L. WEAVER & DONALD E. LIVELY, *UNDERSTANDING THE FIRST AMENDMENT* § 6:03 (2d ed. 2006). Newspapers also might become a designated public forum when subsidized by the government. *See Hosty v. Carter*, 412 F.3d 731, 737 (7th Cir. 2005). To an extent, by funding newsgathering operations and stabilizing a newspaper institution, the government would be developing or maintaining a public forum like that established by Congress with the Public Broadcasting Act. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 404 (1984)

concerned about the vagueness of funding criteria—in particular, the blurred edges of what qualifies as news<sup>149</sup> or as local or investigative reporting.<sup>150</sup> Though the void-for-vagueness doctrine generally is less strict when the government is acting as subsidizer, the Court might not be as relaxed when the subsidized outlet is a designated public forum and not a judgment-based grant recipient like in *Finley*. The doctrine demonstrates particular judicial concern that a vague law “may trap the innocent by not providing fair warning” and “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis.”<sup>151</sup> The latter makes speakers with unpopular viewpoints vulnerable to being discriminated against by government officials and penalized by judges and juries.<sup>152</sup> But the Supreme Court has not addressed vagueness standards for limited or designated public fora,<sup>153</sup> and the lower federal courts appear to have not addressed it in the context of government as subsidizer of a limited or designated public forum.<sup>154</sup>

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(“Congress’ vision was that public broadcasting would be a forum for the educational, cultural, and public affairs broadcasting which commercial stations had been unable or unwilling to furnish. . . . [T]o further that vision, in 1967 Congress passed the Public Broadcasting Act . . .”). In considering whether a designated public forum has been created, federal circuit courts generally have cited to *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), and stated that courts should look to the policies and practices of the government, the nature of the property and its compatibility with expressive activity, and whether the property is compatible with the expressive activity. *Id.* at 802–03; *see, e.g.*, *Perry v. McDonald*, 280 F.3d 159, 167 (2d Cir. 2001); *Children of the Rosary v. Phoenix*, 154 F.3d 972, 976 (9th Cir. 1998); *Sentinel Commc’ns Co. v. Watts*, 936 F.2d 1189, 1202 (11th Cir. 1991).

<sup>149</sup> For example, when an athlete is accused of a crime, that story often runs in the sports section, though the content is news, whereas when the local sports team wins a championship, the story often runs on the front page of the newspaper, though the content is sports. Further, the Court has stated that, depending on the circumstances, “entertainment itself can be important news.” *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 578 (1977).

<sup>150</sup> *See supra* note 125.

<sup>151</sup> *Grayned v. Rockford*, 408 U.S. 104, 108–09 (1972).

<sup>152</sup> And the Court has stated that “the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

<sup>153</sup> *Cornelius*, might have provided an opportunity, but the Court was able to resolve the limited public forum case without addressing the vagueness challenges, which had been dismissed as not ripe and were not appealed. 473 U.S. at 796.

<sup>154</sup> For example, in *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998), the appellate court held that the transit authority’s advertising policy had created a designated public forum that heightened scrutiny regarding whether the government’s advertising requirements were unconstitutionally vague. The court found that the criteria—in particular, the requirement that ads not be “controversial” and that they be “aesthetically pleasing”—were unconstitutionally vague as regulations. *Id.* at 360. But the court acknowledged that when the government acts as subsidizer, it may permissibly employ provisions that are “undeniably opaque” and would be

While the void-for-vagueness question appears open, there is a simple way to avoid it: Narrow the availability of funds to well-defined editorial operations. Instead of generally subsidizing “local” and “investigative” reporting, the program could limit subsidies to specific reporting jobs—for example, covering city council meetings or reviewing government documents. This cautious approach would reduce the reach of government subsidies, but it would preserve the program by skirting an apparently open constitutional question.<sup>155</sup>

### 3. Editorial Independence

Even if the First Amendment alone ensured the editorial independence of a newspaper receiving public funds, many journalists would still oppose government funding out of a principled concern that accepting such funds would jeopardize editorial independence. One study found that 75 percent of newspaper executives have “serious reservations” about receiving direct government subsidies.<sup>156</sup> As Lee Bollinger, a member of the Pulitzer Prize Board and an eminent First Amendment scholar, notes: There is, “at least among print journalists, a sense that government funding is antithetical to the spirit of an independent press. This view needs to change, and the whole subject of public funding must be more thoughtfully considered.”<sup>157</sup> Bollinger suspects that, due to the severe declines in revenue and profitability and the continued defections of readers to Internet news sources, public subsidies “will prove to be the only way to sustain a free press over time.”<sup>158</sup>

Indeed, fears over threats to editorial independence are likely overblown.<sup>159</sup> First, the Constitution would prohibit Congress from removing subsidies from newspapers that publish articles that the

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unconstitutionally vague as part of a regulatory scheme. *Id.* at 359 (citing *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998)). The appellate court did not discuss whether there exists a different vagueness standard for designated public fora that are government subsidized.

<sup>155</sup> Of course, doing so would force newspapers to solve the practical challenge of separating a reporter’s job into subsidizable and non-subsidizable reporting duties.

<sup>156</sup> Pew Res. Ctr.’s Project for Excellence in Journalism, *supra* note 24. *But cf.* Rosa Brooks, *Bail Out Journalism*, L.A. TIMES (Apr. 9, 2009), <http://articles.latimes.com/2009/apr/09/opinion/oe-brooks9> (arguing as a journalist that Americans should fund newspapers with taxpayer money rather than sit idly, “wringing our hands, as more and more top journalists are laid off or bail out, leaving us with nothing in our newspapers but ads, entertainment features and crossword puzzles”).

<sup>157</sup> LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN 132 (2010).

<sup>158</sup> *Id.*

<sup>159</sup> This is not the first time someone has suggested that the media can blow issues out of proportion.

government dislikes.<sup>160</sup> Though the First Amendment is not a complete bar on government influence, it is a significant limitation that protects newspapers, and by extension the public, from the chilling effect of government officials otherwise being able to punish newspapers that reveal important information about government malfeasance, misappropriation and misadventures.

Second, the federal government has shown that it can fund the arts, humanities, and sciences without impermissibly chilling the recipients' independence. Though news media are more likely to draw negative government attention than artists and scientists, news media also have accepted subsidies without losing editorial independence, in particular the freedom to criticize the government. The creation of CPB has particularly shown that while federal government officials may occasionally politick over the content produced by the media they subsidize, they are not likely to substantially influence that content.<sup>161</sup> One of CPB's subsidiaries, NPR, is prime example. NPR and its member stations receive about 10 percent of their budgets from the federal government.<sup>162</sup> Member stations, in turn, pay healthy subscriber fees to NPR<sup>163</sup> and are supported by "listeners like you."<sup>164</sup> While receiving government support has made NPR more vulnerable to unfair attacks of alleged bias than unsubsidized news outlets,<sup>165</sup>

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<sup>160</sup> See Part IV.A.2. Though, as noted, Congress could withhold funding from newspapers that do not meet the content-based conditions that Congress could set for output in local and investigative reporting.

<sup>161</sup> CPB's federal funding structure includes an unusual safeguard: Funds traditionally are allocated two years in advance. See JOHN M. SPRATT, JR., DEMOCRATIC CAUCUS OF H.R. BUDGET COMM., SUMMARY AND ANALYSIS OF THE PRESIDENT'S FISCAL YEAR 2007 BUDGET 82 (2006), available at <http://democrats.budget.house.gov/sites/democrats.budget.house.gov/files/documents/07%20Budget%20Summary%20and%20Analysis.pdf>. This structure delays any effort of Congress to remove funding in response to CPB content that Congress does not like.

<sup>162</sup> The proportion of revenue is higher for member stations in rural areas. See *Public Radio Finances*, NPR, <http://www.npr.org/about/aboutnpr/publicradiofinances.html#npr> (last visited Jan. 6, 2012); see also Danielle Deabler, *NPR President and CEO Delivers Keynote Speech at National Press Club Today*, NPR (Mar. 7, 2011, 2:03 PM), <http://www.npr.org/blogs/thisisnpr/2011/03/07/134311071/npr-president-and-ceo-delivers-keynote-speech-at-national-press-club-today> (transcribing the president and CEO's remarks regarding NPR's mission and funding structure).

<sup>163</sup> See *Public Radio Finances*, *supra* note 162.

<sup>164</sup> See MAINE PUBLIC BROADCASTING NETWORK, <http://www.publicbroadcasting.net/mpbc/ppr/index.shtml> (last visited Jan. 6, 2012).

<sup>165</sup> For example, in a forum at the University of Delaware, Karl Rove interrupted fellow panel member Howard Dean to excoriate NPR, which Dean had been lauding for journalistic accuracy and earnestness. Rove head-scratchingly responded: "45 percent of NPR listeners were Saddam Hussein." Kenneth P. Vogel, *Karl Rove Blasts NPR and New York Times*, POLITICO (Oct. 26, 2010, 1:56 PM), <http://www.politico.com/news/stories/1010/44190.html>.

efforts to reorganize NPR's editorial leadership or otherwise influence its content repeatedly have failed.<sup>166</sup> NPR, even more than the CPB's other subsidiary, PBS, remains a robust news organization that vibrantly contributes to the national dialogue.

While the audience for public radio of about 28 million listeners each week is just over one-third of the 75 million weekly viewers of public television, it has been growing substantially for several decades, driven largely by its national news programs. NPR's *Morning Edition* and *All Things Considered* are the most popular programs on public radio or television. And *Morning Edition*'s audience of nearly 12 million listeners alone has been about a third larger than that for NBC's *Today*. Although NPR also has lost revenue during the recession and laid off staff for the first time in a quarter century, it recently launched an ambitious Web site with national news updates and stories. It also hired its first editor for investigative reporting, Brian Duffy, who is working on accountability journalism projects with reporters at NPR and local public radio stations. NPR has seventeen foreign bureaus, more than all but a few American newspapers, and six U.S. regional bureaus.<sup>167</sup>

NPR remains one of the most respected news organizations in the country, and the continued independence of the forty-three-year-old CPB shows that the concerns of a newspaper bailout threatening editorial independence or providing a financial entrée toward state-controlled media should not overwhelm the public interest in a newspaper subsidy program.<sup>168</sup>

Third, concerns about threats to editorial independence would be

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To be sure, all news outlets are attacked to varying degrees for their allegedly biased viewpoints, but NPR has more frequently been the target of partisan attacks. See, e.g., *Talk of the Nation: Public Broadcasting Funds Caught in Budget Battle*, NPR (Feb. 17, 2011), <http://www.npr.org/2011/02/17/133842355/Public-Broadcasting-Funds-Caught-In-Budget-Battle>; Matea Gold & Kathleen Hennessey, *PBS and NPR Executives Fear Steep Cuts in Federal Funding*, L.A. TIMES (Mar. 11, 2011), <http://articles.latimes.com/2011/mar/11/entertainment/la-et-npr-funding-20110312>. This ongoing tension over what amounts to a small proportion of NPR's budget is one reason that some inside NPR want to phase out all government support.

<sup>166</sup> Even when Republicans have successfully gotten a ban on NPR funding through the House, the Democrat-controlled Senate has not joined in supporting such a bill. Kathleen Hennessey, *House Votes to Cut Off NPR Funding*, L.A. TIMES (Mar. 17, 2011), <http://articles.latimes.com/2011/mar/17/nation/la-na-npr-20110318>; see also Bernie Becker, *Move to Cut NPR Funding Is Defeated in House*, N.Y. TIMES (Nov. 18, 2010, 3:26 PM), <http://thecaucus.blogs.nytimes.com/2010/11/18/move-to-cut-npr-funding-defeated-in-house/>.

<sup>167</sup> Downie & Schudson, *supra* note 13, at 30–31.

<sup>168</sup> See Calvert, *supra* note 88, at 681–82 (“Both of these fears, of course, are speculative and represent mere metaphorical marchers in a possible parade of horrors. . . . What we do know, however, is that the sad reality of the current economic situation already does not allow journalists from print newspapers to properly play their watchdog role. . . .”).

even less of a concern if Congress chose a blanket-subsidy program.<sup>169</sup> Such subsidies would ensure that the government's role remain passive, thereby severely limiting the government's ability to condition benefits on editorial content or viewpoint.<sup>170</sup> Further, while a passive subsidy program might have an indirect distorting effect—for example, causing a newspaper to worry about publishing an exposé on a politician who could influence the cancellation of the entire subsidy program—the economic marketplace arguably has had an even greater and more direct distorting effect on newspaper editorial decisions.<sup>171</sup> After Dan Neil, the Pulitzer-Prize winning automotive critic, wrote a column for the *Los Angeles Times* that was brutally critical of General Motors, the automaker pulled all of its ad buys from the *L.A. Times*—valued at about \$21 million annually.<sup>172</sup> While Neil and the newspaper's editors stuck to their guns, the paper's business executives needed to smooth out the situation with General Motors.<sup>173</sup> At a news-

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<sup>169</sup> However, while a passive government would pose fewer risks to independence, it would be less efficient in focusing subsidies on generating the desired positive externalities of investigative and local reporting. See *supra* Part IV.A.1; see also Schizer, *supra* note 82, at 25.

<sup>170</sup> Public education about the effects on independence might be a different matter. L. Brent Bozell, president of the conservative Media Research Center, demonstrated how misinformed even those who follow the media can be when he said that newspapers accepting government funding would be engaging in “intellectual prostitution” and predicted it would lead to the end of American democracy. “Since when did our Founding Fathers envision that . . . you could exercise your right to freedom of speech provided you had a license from the federal government? This is the kind of stuff you have revolutions about,” he told FOX News. Obama Appointee Suggests Radical Plan for Newspaper Bailout, FOXNEWS.COM (Apr. 16, 2009), <http://www.foxnews.com/politics/2009/04/16/obama-appointee-suggests-radical-plan-newspaper-bailout/>. Bozell did not clarify that government licenses would not be required to publish or that newspapers would not be required to accept government subsidies.

<sup>171</sup> The *New York Times* hesitated with going public in the 1960s, concerned about its ongoing ability to control the newspaper's editorial destiny if those on the business side would be worried about Wall Street interests. ELLIS COSE, *THE PRESS* 216 (1989). The *Times*, however, both went public and maintained its editorial independence—occasionally contrary to the U.S. government's wishes. In part, this was accomplished by employing an unusual tiered stock structure that enabled the Sulzberger family to retain control of the newspaper—in a sense, a hybrid public-private structure. Never was the *Times*'s independence more apparent than with the publishing of the Pentagon Papers. *Id.* at 219–23; see also Conor Clarke, *Why We Shouldn't Let Newspapers Die*, ATLANTIC (Apr. 6, 2009, 11:41 AM), <http://www.theatlantic.com/politics/archive/2009/04/why-we-shouldnt-let-newspapers-die/7260/> (arguing that the government should step in to subsidize newspapers, and claiming that patronage would have no more a distorting effect on journalistic independence than do traditional market forces).

<sup>172</sup> Kevin Roderick, *GM vs. LAT*, LA OBSERVED (Apr. 11, 2005, 11:32 AM), [http://www.laobserved.com/archive/2005/04/gm\\_vs\\_lat.php](http://www.laobserved.com/archive/2005/04/gm_vs_lat.php).

<sup>173</sup> Eventually, General Motors decided that it needed to advertise in the *L.A. Times* and brought its checkbook back. See Dan Neil, *Dan Neil Reflects: Bob Lutz and Me*, L.A. TIMES (Feb. 10, 2009, 6:17 PM), [http://latimesblogs.latimes.com/money\\_co/2009/02/dan-neil-](http://latimesblogs.latimes.com/money_co/2009/02/dan-neil-)

paper with a more porous firewall between the editorial and business departments or more significant budgetary concerns than the *L.A. Times* had in 2005, it is foreseeable that the newspaper might opt against publishing an article that would alienate its biggest advertiser. Thus, this tension between news value and business interests already exists, and it is likely that newspapers could continue to publish independently and with readers' interests as the primary concern, even when those interests would disrupt the newspaper's relationship with a funder—in this case the federal government.

Finally, even if Congress chose a prize-based system, the government has long demonstrated that it can fund the arts and media without undue influence on editorial independence. Beyond current examples of the National Endowment for the Arts and NPR, the government has been engaged in such market intervention since at least the Post Office Act of 1792 and the early patronage of papers that printed laws and governmental announcements:

All classes of patronage . . . were in effect government subsidies of newspapers, approved by those receiving them and without which many papers could not have survived. These subsidies were in line with the attitude eventually adopted toward railroad construction, in which government support was partly justified on grounds of public welfare. Newspapers came to be regarded not strictly as a private business, but as a public service. Newspapers, like the railroads, supplied some urgent needs; they provided the best solution to the problem of communication between the government and the citizen. . . . Furthermore, lawmakers found newspapers useful for their political purposes.<sup>174</sup>

The law of supply and demand would suggest that if editors and publishers nationwide fought over relatively few government contracts,<sup>175</sup> then the government could limit contracts to government-friendly newspapers, which would not bode well for press independence. Yet, despite the corrupt nature of government patronage and the quid pro quo that often came with it, even then “the press as a whole remained free to criticize public officials and government policies.”<sup>176</sup>

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reflects-bob-lutz-and-me.html; Dennis Romero, *L.A. Times Loses Nation's Top Automotive Journalist*, L.A. WEEKLY (Feb. 4, 2010, 3:47 PM) [http://blogs.laweekly.com/informer/2010/02/times\\_loses\\_dan\\_neil.php](http://blogs.laweekly.com/informer/2010/02/times_loses_dan_neil.php) (reporting that the ad pull was temporary and that “in hindsight, Neil was right, and many of those suits who blamed the messenger have since been booted from GM headquarters.”).

<sup>174</sup> SMITH, *supra* note 87, at 11.

<sup>175</sup> *Id.* at 81 (noting that, with the growth of the federal government, these contracts became lucrative—both in terms of pay and prestige).

<sup>176</sup> *Id.* at 247–48.

#### 4. Political Plausibility

Journalists are not alone in their aversion to the idea of direct government subsidies. Bailouts, whether one-time or long-term, are generally unpopular, especially in the wake of the too-big-to-fail bailouts of Detroit's automakers and Wall Street's market manipulators.<sup>177</sup> Moreover, reporters do not fare well in public-opinion polls, regularly listed among the ten least-trusted professions.<sup>178</sup> *Consumer Reports* found that 42 percent of survey respondents trust newspapers and television news just "some of the time" or "never."<sup>179</sup> More surprisingly considering the role newspapers play in engaging readers with their communities and educating them about their leaders' decisions, a 2009 study by the Pew Research Center found that only 43 percent of Americans said losing their local newspaper would hurt civic life in their community "a lot."<sup>180</sup> Only 33 percent of those surveyed said they would personally miss their local paper.<sup>181</sup> Finally, newspapers represent a much smaller fraction of the workforce and GDP than Detroit or Wall Street. With that in mind, a direct-funding program likely would be difficult to sell to the public. Further, politicians do not appear interested in direct subsidies,<sup>182</sup> with the U.S.

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<sup>177</sup> See *supra* notes 112–116 and accompanying text.

<sup>178</sup> In a poll looking for the ten least-trusted professions, journalist came in at No. 9—worse than police officer but better than celebrity (No. 8), lawyer (No. 4) and used-car salesman (No.1); politician ranked No. 2. Neil Springer, *Top 10 Least Trusted Professions*, JOBBOOM.COM (Dec. 21, 2007), <http://career.jobboom.com/workplace/challenges/2007/12/19/4732266-ca.html>; see also Carroll Doherty, *The Public Isn't Buying Press Credibility*, NIEMAN REPORTS (Summer 2005), <http://www.nieman.harvard.edu/reports/article/101115/The-Public-Isn't-Buying-Press-Credibility.aspx> ("Credibility ratings for individual news sources also have declined since the mid-1980's, according to surveys by the Pew Research Center. In 1985, just 16 percent of the public gave low credibility ratings to their daily newspaper; by last year that number had nearly tripled to 45 percent.").

<sup>179</sup> PRINCETON SURVEY RESEARCH ASSOCS. INT'L, CONSUMER REPORTS WEB WATCH, LEAP OF FAITH: USING THE INTERNET DESPITE THE DANGERS 23 (2005).

<sup>180</sup> *Stop the Presses? Many Americans Wouldn't Care a Lot If Local Papers Folded*, PEW RES. CTR. (Mar. 12, 2009), <http://pewresearch.org/pubs/1147/newspapers-struggle-public-not-concerned>.

<sup>181</sup> *Id.*

<sup>182</sup> In 2010, the chairman of the Federal Trade Commission said that a tax on electronics for subsidizing journalism would be "a terrible idea." Jeremy W. Peters, *Government Takes on Journalism's Next Chapter*, N.Y. TIMES, June 13, 2010, at B7, available at <http://www.nytimes.com/2010/06/14/business/media/14ftc.html>; see also Michael Calderone, *Papers Won't Get Bailout Anytime Soon*, POLITICO (Mar. 23, 2009, 4:29 AM), <http://www.politico.com/news/stories/0309/20350.html> (quoting U.S. Rep. Jim McDermott as saying, "We'll bail out AIG and Goldman Sachs, companies that have no redeeming social value whatsoever, but we are letting our newspapers go down the drain as if they were only good for the bottom of the birdcage.").

economy still down and the federal deficit remaining a serious problem.<sup>183</sup> While direct subsidies would advance the policy goals behind propping up the Fourth Estate, it is not the best type of subsidy that Congress could provide.

### B. *Tax-Based Incentives*

Alternatively, the U.S. tax code provides a vehicle for subsidizing newsgathering. Such a subsidy could manifest itself either as a lower tax rate for newspapers or in treating newspapers like hospitals, churches, and charitable organizations.<sup>184</sup> The former—a tax break—would provide broad and uniform relief.<sup>185</sup> Washington State made such a move in 2009 with the passage of House Bill 2122.<sup>186</sup> Approved by a 46–2 margin, the law reduced newspapers’ tax liability by 40 percent through 2015.<sup>187</sup> But Washington State was unique because it started with a gross-receipts tax, which encumbered newspapers with a disproportionately high tax liability compared to businesses making comparable profits in other industries.<sup>188</sup> Thus, a federal tax reduction for newspapers may not result in the kind of cost savings that it did in Washington State. It is also a politically inopportune time to push for a new tax cut.<sup>189</sup> When it comes to tax-based incentives, legal comm-

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<sup>183</sup> The annual funding Congress already commits to the CPB was a contentious part of the 2011 budget battle and some members of the House, in moving to halt such funding, argued that it inefficiently contributes to the nation’s \$14 trillion deficit. See *Public Broadcasting: The Debate Over Federal Funding*, 90 CONG. DIG. 129, May 2011. It is likely that such sentiments would translate to any proposal for new media subsidies.

<sup>184</sup> See Candeub, *supra* note 46, at 1610 (“Rather than direct subsidies, political reporting perhaps should be treated as artistic and charitable institutions currently are.” (emphasis added)).

<sup>185</sup> It would, however, be limited in its ability to encourage the public-interest journalism discussed in Part III.

<sup>186</sup> See Engrossed H. B. 2122, 61 Leg., Reg. Sess. (Wash. 2009).

<sup>187</sup> See *id.*; see also Associated Press, *Wash. Legislature OKs Newspaper Tax Cut*, OREGONIAN (Apr. 26, 2009, 9:45PM), [http://www.oregonlive.com/news/index.ssf/2009/04/wash\\_legislature\\_oks\\_newspaper.html](http://www.oregonlive.com/news/index.ssf/2009/04/wash_legislature_oks_newspaper.html).

<sup>188</sup> See Joseph Henchman, *Washington State Slashes Gross Receipts Tax on Newspapers*, *Tax Policy Blog*, TAX FOUND. (Apr. 29, 2009), <http://www.taxfoundation.org/blog/show/24672.html> (“Since gross receipts taxes are based on receipts instead of profits, and levied on every layer of production, such taxes result in taxes imposed on earlier taxes (pyramiding) and are especially harmful to low-margin, high-volume industries like grocery stores and newspapers.”).

<sup>189</sup> In his 2012 State of the Union speech, President Obama called economic fairness “the defining issue of our time” and said that there would be no more bailouts for the financial industry. See Jennifer Epstein, *Obama State of the Union Speech: ‘No Bailouts, No Handouts, and No Copouts’*, POLITICO (Jan. 24, 2012, 6:31 PM), <http://www.politico.com/news/stories/0112/71911.html>. Republican presidential candidates have been campaigning on proposals to trim a federal debt estimated at \$15 trillion. Wyatt Andrews et al., *Candidates Lay Out Plans*

entators and journalism academics and advocates have focused instead on abolishing taxes for qualifying newspapers by making them nonprofits.<sup>190</sup> This Part focuses on the latter.

Granting newspapers 501(c)(3) status<sup>191</sup> would exempt qualifying papers from paying taxes on profits and would also permit them to accept tax-deductible contributions.<sup>192</sup> Tax exemption and deductible contributions have similar effects to government cash grants. With a tax exemption, the government gifts to the nonprofit the amount of taxes it would have had to pay. Deductible contributions work similarly, but the government's gift to the nonprofit is indirect<sup>193</sup> and carries an added benefit: The government's subsidy "piggybacks on the judgments of private philanthropists."<sup>194</sup> Such a subsidy could benefit newsgatherers in all media, and two models—Pro Publica's independent newsroom and the online-only local newspaper of the likes of the *Voice of San Diego*—stand out as 501(c)(3) successes. However, achieving tax-exempt status would be challenging for traditional print newspapers because without modifications to tax law or typical organizational structure, newspapers do not fit nicely into a tax-exempt category.<sup>195</sup>

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*to Trim Federal Debt*, CBS NEWS (Jan. 2, 2012, 7:09 PM), [http://www.cbsnews.com/8301-18563\\_162-57351014/candidates-lay-out-plans-to-trim-federal-debt/](http://www.cbsnews.com/8301-18563_162-57351014/candidates-lay-out-plans-to-trim-federal-debt/); Bill McGuire, *U.S. Debt Tops \$15 Trillion Mark Today*, ABC NEWS (Nov. 16, 2011, 1:02 PM), <http://abcnews.go.com/blogs/business/2011/11/u-s-debt-will-top-15-trillion-mark-today/>. A newspaper tax break would add a yet unknown amount to that debt without subsequently raising other taxes or cutting spending on other government programs to offset the newspaper tax break.

<sup>190</sup> Philip Meyer, professor emeritus of journalism at University of North Carolina, may have been on to something when six years ago he wrote these words in *The Vanishing Newspaper*: "The only way to save journalism is to develop a new model that finds profit in truth, vigilance, and social responsibility." Bill Buzenberg, *Understanding the Value of Investigative Reporting*, NIEMAN REPORTS (Spring 2008), <http://www.nieman.harvard.edu/reports/article/100066/Understanding-the-Value-of-Investigative-Reporting.aspx> (citing MEYER, *supra* note 25).

<sup>191</sup> This segment of the tax code provides exempt status for corporations, funds, foundations, or organizations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes" so long as the entity does not inure any earnings to the benefit of a private individual or shareholder, no substantial part of the entity's activities involve lobbying, and it is not involved in electioneering. I.R.C. § 501(c)(3) (2006).

<sup>192</sup> *See id.* § 170(c)(2)(D).

<sup>193</sup> *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 544 (1983).

<sup>194</sup> Schizer, *supra* note 82, at 34.

<sup>195</sup> Though nonprofit success stories have long-existed for print media, those examples are not of independently owned, full-service newspapers operating as 501(c)(3)s. *See* PICKARD, STEARNS & AARON, *supra* note 51, at 14. The *St. Petersburg Times* is typically considered a glowing example of how a newspaper can operate as a nonprofit, but the paper is a for-profit that is owned and operated by a nonprofit, the Poynter Institute. "The paper covers all of its

Under current law, there are three primary ways for a news organization to attain nonprofit status: (1) start an independent newsroom;<sup>196</sup> (2) create a joint venture between an existing for-profit newspaper and a nonprofit affiliate that accepts tax-deductible contributions and spends those contributions solely on, for example, investigative or local reporting; or (3) transform a for-profit newspaper into a nonprofit. No more than a few current newspapers could utilize the independent-newsroom model because the independent newsroom relies on the existence of other newspapers that will publish the stories that the independent newsroom investigates.<sup>197</sup> Joint ventures are of limited value because the law requires that the for-profit not derive a “private benefit” from the nonprofit, which means the nonprofit must share its stories with media other than just its partner in the joint venture.<sup>198</sup> However, converting an existing newspaper to a 501(c)(3) is appealing because it would enable newspapers to save money and accept tax-deductible donations as a nonprofit while costing taxpayers relatively little.

Converting newspapers to 501(c)(3) status would necessitate shoehorning newspapers into an exempted category and ensuring that they abide by restrictions on tax-exempt organizations. There are four primary restrictions for nonprofits under this subsection of the tax code: They (1) must be “organized and operated exclusively for” an exempt purpose; (2) must not “inure” any benefit to a private individual or shareholder; (3) must not devote substantial efforts to lobbying; and (4) must not electioneer.<sup>199</sup> Most newspapers would struggle with the first, second, and fourth prongs.

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own operating expenses, pays taxes on its profits, and even returns a dividend to the Poynter Institute.” *Id.* Pickard notes that there are similar examples of for-profit news outlets that are owned by nonprofits, “including the *Christian Science Monitor*; the Manchester, N.H., *Union Leader*; *The Day* in New London, Conn.; the *Delaware State News*; and Alabama’s *Anniston Star*. Other longstanding examples of nonprofit news organizations include *Harper’s Magazine*, the *Washington Monthly*, *Ms. Magazine* and *Mother Jones*.” *Id.*

<sup>196</sup> Pro Publica is the best-known independent newsroom. *Supra* notes 62–64 and accompanying text. Pro Publica focuses on broad-impact fields like healthcare, environmental issues, military affairs, politics, and schools, and it shares each investigative report free of charge and for an exclusive period with one major newspaper or television outlet. “Since Pro Publica engages only in investigative reporting, donor contributions and government resources are focused effectively on this externality-generating activity (with only modest amounts diverted to the organization’s overhead).” Schizer, *supra* note 82, at 42.

<sup>197</sup> Independent newsrooms are also expensive to launch and, at least so far, have required substantial charitable support. *See supra* note 64.

<sup>198</sup> Schizer argues that “the appeal of deductible contributions” should be sufficient for them to overcome their reluctance in sharing and running stories that require them to credit their competitor’s tax-exempt affiliate. Schizer, *supra* note 82, at 42.

<sup>199</sup> I.R.C. § 501(c)(3) (2006).

Though probably the easiest hurdle to overcome, the requirement that newspapers stop making political endorsements on candidates, legislative measures, or anything having to do with a campaign would undercut a historic newspaper function. As Joseph Klapach has written: “Before a charity can save the world, enlighten the masses, or promote spiritual harmony, it first must make a deal with the devil and file for tax exemption under § 501(c)(3) of the tax code.”<sup>200</sup> This is the Faustian deal that nonprofits strike with the Internal Revenue Service (IRS). It is an absolute prohibition, and, unlike the lobbying restriction, no amount of electioneering is permitted—“no matter how insignificant.”<sup>201</sup>

[I]n order to violate § 501(c)(3)’s prohibition, an exempt organization either must support or oppose a candidate. In many instances, the nature of the activity itself establishes the organization’s support or opposition of a particular candidate. Sometimes, however, the IRS must proceed by implication, basing its finding of favoritism or bias on the manner of presentation, the manner of distribution, or the timing of the distribution. As a result, this factor has the practical effect of dividing political campaign activities into two categories—those campaign activities in which a charity may never take part and those activities in which it may take part so long as it does so in a neutral fashion.<sup>202</sup>

Reporting on political campaigns would be appropriate; endorsements would not. Evaluations strike a middle ground between reporting and opinion, but are prohibited—even when they employ neutral criteria.<sup>203</sup> The prohibition would leave a newspaper vulnerable to attacks from candidates who did not like their treatment. While the IRS notoriously under-enforces this prohibition,<sup>204</sup> it is more than conceivable that newspapers—with their public prominence and the evidentiary ease that would accompany any electioneering—would have their tax-exempt status stripped if they issued outright endorsements.<sup>205</sup> Moreover, they likely would find themselves con-

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<sup>200</sup> Joseph S. Klapach, *Thou Shalt Not Politic: A Principled Approach to Section 501(c)(3)’s Prohibition of Political Campaign Activity*, 84 CORNELL L. REV. 504, 504 (1999).

<sup>201</sup> *Id.* at 510.

<sup>202</sup> *Id.* at 524.

<sup>203</sup> See *Ass’n of the Bar of N.Y. v. Comm’r*, 858 F.2d 876 (2d Cir. 1988) (holding that “ratings, by their very nature, necessarily will reflect the philosophy of the organization conducting such activities”).

<sup>204</sup> Klapach, *supra* note 200, at 518.

<sup>205</sup> There is an exception for when activities relating to a political campaign “support the desired social goals underlying the exemption” for that organization, though it is unlikely that this exception would apply to newspapers. See *id.* at 528–30.

stantly defending their status against unsubstantiated charges of politicking in their news coverage.

If Congress prohibited newspapers from making political endorsements, would the public care? Unlike newsgathering, there are not substantial sunk costs to forming an opinion. It requires no specialized skill, other than the ability to read critically and think independently (and, preferably, communicate persuasively). New media has filled this niche well for statewide and national elections.<sup>206</sup> Furthermore, the danger of intellectual isolationism that Cass Sunstein fears in *Republic.com 2.0* is not as present in limiting exposure to political endorsements and opinions as it is in the general sharing of information and agenda-setting.<sup>207</sup> Thus, it is unlikely that the public would miss newspaper endorsements for statewide and national candidates, at least not in the long term.

But there is still a need for endorsements in local races. The importance of endorsements in these races has grown as coverage of local institutions and races has decreased. With less local coverage—the result of fewer reporters spread thinly over more beats and their subsequent inability to provide in-depth coverage of local issues—citizens who vote in local elections (admittedly a small population in and of itself) rely more heavily on newspaper endorsements. Unlike with statewide and national elections, new media does not consistently provide much commentary on local elections—in part because there is much less foundational information about who is running for school board or public works commissioner or superior court judge to base opinions on.

The purpose of subsidies would be to increase local and investigative reporting. Improving local news reporting likely would lead to readers being more informed about local issues, including elections. Thus it is possible that subsidies, and their consequence of increasing knowledge of local issues, would reduce the need for endorsements in local elections too. However, assuming that a valuable public good would be lost, Congress could amend the tax code to exempt nonprofit newspapers from the electioneering ban.<sup>208</sup> This type of an amend-

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<sup>206</sup> The *Huffington Post*, for example, provides more commentary regarding national politics than most people have time to read and also invites citizen journalists to help cover presidential campaigns with its OffTheBus project. See Howard Fineman, *HuffPost Launches OffTheBus Citizen Journalism Project Ahead of 2012 Elections*, HUFFINGTON POST (July 7, 2011), [http://www.huffingtonpost.com/howard-fineman/offthebus-huffington-post\\_b\\_891921.html](http://www.huffingtonpost.com/howard-fineman/offthebus-huffington-post_b_891921.html) (discussing the project's launch during the 2008 presidential race and its return this election season).

<sup>207</sup> See *supra* note 76 and accompanying text.

<sup>208</sup> This allowance of electioneering could be broad (all races and initiatives) or limited (just

ment would treat these newspapers more favorably than other nonprofits, such as advocacy groups and religious organizations, that publish a paper. But the Supreme Court has previously permitted such unequal treatment.

In *Regan v. Taxation With Representation of Washington*,<sup>209</sup> the IRS had denied tax-exempt status for an organization that promoted specific federal tax policy because the IRS thought that a substantial portion of the organization's efforts would be dedicated to attempting to influence legislation. The organization sued, claiming that IRS policy violated the First Amendment by placing an undue burden on receipt of tax-deductible contributions and the Fifth Amendment by denying equal protection.<sup>210</sup> The Supreme Court disagreed. The Court said that Congress had not violated the Equal Protection Clause by subsidizing the substantial lobbying activities of veterans' organizations but not the substantial lobbying activities of other nonprofits.<sup>211</sup> Further, the Court articulated that statutes are not subjected to strict scrutiny whenever they "affect First Amendment rights on a discriminatory basis" but only when they discriminate against classes of speakers based on race or national origin.<sup>212</sup> Because 501(c)(3) did not discriminate against suspect classes, it only needed to be rationally related to Congress's purpose, which the Court said it was.<sup>213</sup>

A second, bigger challenge for newspapers trying to obtain 501(c)(3) status would be crafting their operations to an exempted purpose. Under this provision, a newspaper must be "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . ." <sup>214</sup> In a vacuum, the "educational" category would best apply to a general-interest newspaper. To qualify as an educational organization, a newspaper would need to limit operations to those supporting the newspaper's educational mission

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municipal candidates and matters). Unlike with statewide and national elections, in which candidates may be the same individuals who control the distribution of the newspaper subsidy, local officials would have no control and likely minimal influence over federal newspaper subsidies.

<sup>209</sup> *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1980).

<sup>210</sup> *Id.* at 542–43.

<sup>211</sup> *Id.* at 547–50.

<sup>212</sup> *Id.* at 548.

<sup>213</sup> *Id.* at 549–50.

<sup>214</sup> I.R.C. § 501(c)(3) (2006).

and not to those generating “private benefits.”<sup>215</sup> But most general-interest newspapers would have trouble satisfying the IRS’s four-prong test for publications seeking 501(c)(3) status as an educational entity that: (1) the published content is educational; (2) the preparation of the materials occurs in a manner generally accepted as educational in character; (3) publication and distribution of materials is necessary or beneficial to achieving the organization’s educational purposes; and (4) “the manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing practices.”<sup>216</sup>

To start, it is unclear what constitutes educational news or whether newspapers could continue to publish non-educational material—for example, the latest Lindsay Lohan scandal or a recap of *The Bachelor*<sup>217</sup>—without losing nonprofit status. Moreover, most general-interest newspapers would find it difficult to operate in a way that the IRS could distinguish from “ordinary commercial publishing practices.” If a newspaper’s operations were not distinguishable, then the newspaper would not qualify for 501(c)(3) status.<sup>218</sup> The IRS considers a newspaper to be employing ordinary commercial publishing practices when it is:

- (1) conducting as its sole activity publishing activities using standard commercial techniques which generate ongoing profits;
- (2) pricing its materials “competitively” with other commercial publications or to return a profit;
- (3) conducting an enterprise in a manner in which all participants expect to receive a monetary return;
- (4) publishing its materials almost exclusively for sale, with only a de minimis amount of material donated to charity;
- (5) existing or accumulating large profits; and accumulating profits from sales activities which are greatly in excess of the amounts expended for educational programs.<sup>219</sup>

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<sup>215</sup> See *id.*

<sup>216</sup> Rev. Rul. 67-4, 1967-1 C.B. 121. The IRS developed the test in a case involving an organization specifically formed to encourage scientific research and disseminate educational info about physical and mental disorders. The organization accomplished this mission by selling a journal, below cost, to the public, which the IRS said was sufficiently distinct from “ordinary commercial publishing practices.” *Id.*

<sup>217</sup> The blurred edges of what constitutes news could further complicate this calculus. See *supra* note 149.

<sup>218</sup> See Rev. Rul. 77-4, 1977-1 C.B. 141 (denying tax-exempt status because an applicant’s only activities were preparing and publishing a newspaper, soliciting advertising and selling subscriptions in a manner that the IRS deemed to be “indistinguishable from ordinary commercial publishing practices”); see also Nikki Usher & Michelle D. Laysner, *The Quest to Save Journalism: A Legal Analysis of New Models for Newspapers from Nonprofit Tax-Exempt Organizations to L3Cs*, 2010 UTAH L. REV. 1315, 1352 (2011) (discussing challenges to commercial newspapers seeking tax exemption).

<sup>219</sup> In re: Whether an Educational Publisher Can Become a Section 501(c)(3) Organization

The operation of a “trade or business as a substantial part of its activities” is not fatal to an organization’s tax-exempt application, but if the commercial purpose is substantial it will threaten tax-exempt status.<sup>220</sup> Distribution of published content “without regard to the realization of a net profit [i]s important evidence that the publishing process is being used as a vehicle for accomplishing exempt purposes.”<sup>221</sup>

Thus, a newspaper could strengthen its case for 501(c)(3) status by distributing the newspaper or its articles online below publication costs, focusing on news of public interest, and reinvesting in its journalistic mission instead of accumulating profits. Still, the totality of circumstances necessary to attain 501(c)(3) status remains unclear, and it is possible that a full-service news organization could never qualify. Congress could remove the uncertainty and provide a path for newspapers to qualify for tax-exempt status by amending tax law with an explicit category for newspapers that meet the other three requirements outlined in the beginning of Part IV.B.1. By amending the tax code, newspapers no longer would need to try to shoehorn their practices into current exempted categories.

The final primary challenge is that even if a newspaper could fit into a 501(c)(3) category (current or newly adopted), it would lose tax-exempt eligibility “if even a small part of its income inures to a private individual.”<sup>222</sup> Nonprofits may pay reasonable salaries to officers, but if salaries are excessive and unreasonable, then private inurement exists and the organization might lose its tax-exempt status.<sup>223</sup> The nonprofit may earn a profit, but that profit needs to be “destined to be used for exempt purposes.”<sup>224</sup> For newspapers, that would mean reinvesting in the newspaper’s educational mission, not paying out

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Through a Change in Operations, 1982 WL 204252 at \*5 (I.R.S. Gen. Couns. Mem. 38,845 (May 4, 1982)).

<sup>220</sup> In *Church of Scientology of California v. Commissioner*, 83 T.C. 381 (1984), the tax court applied the commerciality doctrine in denying the organization’s application because the “the goal of making money permeated virtually all of petitioner’s activities—its services, its pricing policies, its dissemination practices, and its management decisions.” *Id.*

<sup>221</sup> In re: Whether an Educational Publisher Can Become a Section 501(c)(3) Organization Through a Change in Operations, 1982 WL 204252 at \*6.

<sup>222</sup> *Orange Cnty. Agr. Soc., Inc. v. Comm’r*, 893 F.2d 529, 534 (2d Cir. 1990); *see also Church of Scientology of Cal. v. Comm’r*, 823 F.2d 1310, 1316 (9th Cir. 1987).

<sup>223</sup> *Mabee Petroleum Corp. v. United States*, 203 F.2d 872, 876 (5th Cir. 1953) (“The familiar principle that corporate net earnings may not be channeled to officers in the form of excessive and unreasonable salaries is too well settled to require citation of authority.”).

<sup>224</sup> *People’s Educ. Camp Soc. Inc. v. Comm’r*, 331 F.2d 923, 932 (2d Cir. 1964).

bonuses to executives.<sup>225</sup>

Additionally, advertising revenue and some other revenue would still be taxable as unrelated business taxable income (UBTI).<sup>226</sup> Revenue is UBTI if it does not “contribute importantly to accomplishment”<sup>227</sup> of an organization’s tax-exempt mission. Charitable contributions and subscription revenue are understood to be tax exempt, but “advertising revenue generally is taxable as UBTI because it is too removed from the nonprofit’s educational mission. Although ads furnish information, typically their primary purpose is to sell products rather than to inform. Yet this revenue can be sheltered, to an extent, with deductions associated with generating this revenue.”<sup>228</sup> While it is unlikely in all but the rarest cases that a newspaper could show that the advertisements it carries are educational, newspapers might be able to skirt the UBTI distinction by framing advertisers as “corporate underwriters.” In other words, newspapers could argue that some advertisements are not advertisements but space reserved for thanking donors—similar to the airtime that public radio takes to acknowledge its underwriters. This argument, however, is shaky at best, and there is no legal precedent to support it.

The Newspaper Revitalization Act,<sup>229</sup> introduced in 2009 by Senator Benjamin Cardin, attempted to create a new 501(c)(3) category specifically for newspapers. The law would define all contributions, subscription revenue, and advertising revenue (to a point) as tax-

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<sup>225</sup> Newspaper companies have, in recent years, drawn protest for handing lavish bonuses to executives while responding to massive budgetary deficits by reducing staff and forcing those who remain to take a payout. See David Carr, *Why Not Occupy Newsrooms?*, N.Y. TIMES, Oct. 23, 2011, at B1, available at [http://www.nytimes.com/2011/10/24/business/media/why-not-occupy-newsrooms.html?\\_r=1](http://www.nytimes.com/2011/10/24/business/media/why-not-occupy-newsrooms.html?_r=1) (noting that when Craig A. Dubrow resigned as Gannett CEO after a disastrous six-year-tenure, he was rewarded with “\$37.1 million in retirement, health and disability benefits,” in addition the \$16 million in salary and bonuses that he earned over the previous two years—despite Gannett’s stock plummeting from a high of about \$75 the day after he took over to \$10 and the company’s number of employees at its 82 newspapers falling from 52,000 to 32,000); Ryan Chittum, *Gannett’s Multimillionaires Regret to Inform 700 Workers of Their Layoffs*, COLUM. JOURNALISM REV. (June 22, 2011, 1:42 AM), [http://www.cjr.org/the\\_audit/gannetts\\_multimillionaires\\_reg.php](http://www.cjr.org/the_audit/gannetts_multimillionaires_reg.php) (reporting that in 2010 Gannett’s CEO earned \$9.4 million, its COO \$8.2 million, and four other executives more than \$2 million each, and speculating that Gannett executives could have saved “40 percent of the fired by becoming lowlier millionaires”); Thomas B. Edsall, *Bonuses to New York Times Execs Under Fire*, HUFFINGTON POST (May 23, 2009), [http://www.huffingtonpost.com/2009/04/22/bonuses-to-new-york-times\\_n\\_189909.html](http://www.huffingtonpost.com/2009/04/22/bonuses-to-new-york-times_n_189909.html).

<sup>226</sup> Treas. Reg. § 1.513-1(a) (1967).

<sup>227</sup> *Id.*

<sup>228</sup> Schizer, *supra* note 82, at 34 (citing IRS Publication 598, Tax on Unrelated Business Income of Exempt Organizations 5 (Mar. 2010)).

<sup>229</sup> Newspaper Revitalization Act, S. 673, 111th Cong. § 1 (2009).

exempt<sup>230</sup> and would remove the need for finessing newspapers into the “educational” category by creating a 501(c)(3) category for a “qualified newspaper corporation.”<sup>231</sup> When Cardin introduced the bill, he noted that in-depth reporting primarily comes from newspapers and that other forms of media generally follow news that was gathered and reported by newspaper reporters.<sup>232</sup> “It is in the interest of our nation and good governance that we ensure they survive.”<sup>233</sup>

Cardin’s legislation, however, could cause more problems than it would solve.<sup>234</sup> Media economics expert Robert Picard identified three particularly problematic provisions. First, the requirement that newspapers contain “local, national, and international news stories”<sup>235</sup> could exclude many newspapers, particularly non-daily neighborhood and community papers that do not typically publish national or international news, and some national newspapers like *USA Today* that typically do not carry local news. This provision also fails to require the creation of local content and could be satisfied by publishing local news from wire services like the Associated Press, “thus allowing publishers to fill a paper only with syndicated material or other content produced elsewhere.”<sup>236</sup> Second, capping at 50 percent of a newspaper’s content the amount of advertising that would not be deemed UBTI would severely restrict the bill’s applicability. The content of most dailies and non-dailies is two-thirds to three-quarters advertising.<sup>237</sup> Thus, as much as one-third of ads would still be taxed as UBTI. Finally, as Picard noted, the bill would not limit payments to a nonprofit newspaper’s employees, including executives, opening the

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<sup>230</sup> Advertising revenue only would be tax exempt “to the extent that the space allotted to all such advertisements in such newspaper does not exceed the space allotted to fulfilling the educational purpose of such qualified newspaper corporation.” *Id.* § 1(c).

<sup>231</sup> *Id.* § 1(a). A “qualified newspaper corporation” would be defined as one: (1) “publishing on a regular basis a newspaper for general circulation” that (2) “contains local, national, and international news stories of interest to the general public and the distribution of such newspaper is necessary or valuable in achieving an educational purpose and (3) the material contained within follows “methods generally accepted as educational in nature.” *Id.* § 1(b).

<sup>232</sup> Press Release, Sen. Benjamin L. Cardin, Senator Cardin Introduces Bill That Would Allow American Newspapers to Operate as Non-Profits (Mar. 24, 2009), available at <http://cardin.senate.gov/news/record.cfm?id=310392>.

<sup>233</sup> *Id.*

<sup>234</sup> See Robert G. Picard, *Analysis of the Newspaper Revitalization Act*, MEDIA BUSINESS (Mar. 25, 2009, 10:08 AM), <http://themediabusiness.blogspot.com/2009/03/analysis-of-newspaper-revitalization.html>.

<sup>235</sup> S. 673, § 1(b)(2).

<sup>236</sup> Picard, *supra* note 234.

<sup>237</sup> *Id.* (“Indeed the regulations governing Post Office (USPS) distribution limit advertising to 75 percent.”).

door for abuse. “A small commercial publisher could use the mechanism to become ‘non profit’ to avoid company taxes by not taking compensation from profits but taking a higher salary instead—effectively letting tax payers subsidize his/her income.”<sup>238</sup>

Cardin recognized some of his bill’s shortcomings as well. He freely admitted that his bill would appeal only to “local newspapers serving communities, not large newspaper conglomerates.”<sup>239</sup> But if not them, then whom? The overwhelming majority of newspapers today are owned by large newspaper conglomerates, many of which are publicly owned,<sup>240</sup> and converting any of those properties to non-profits would require raising substantial funds to buy out shareholders.<sup>241</sup> Further, the remaining small number of family-owned newspapers that could take advantage of nonprofit status might find it “financially and emotionally difficult” to trade family ownership for money.<sup>242</sup> Thus, it is not surprising that nearly three years after being introduced and attracting significant interest, Cardin’s bill has not moved in Congress.

#### 1. Ability to Target Local and Investigative Reporting

Focusing tax-based incentives to maximize encouragement of local and investigative reporting would likely be easier with independent newsrooms and start-ups than with traditional newspapers converting to nonprofits. That is because full-service newspapers are not nearly as nimble and are likely to dedicate more than a nominal amount of editorial resources to sports, entertainment, and other matters that do not produce the positive externalities of local and investigative reporting. Generally though, the government could limit the tax deductibility of donations to funds dedicated at preferred types of reporting (such as local and investigative news). For tax-exempt status, Congress could amend the tax code to require that nonprofit newspapers dedicate a certain percentage of their reporting time or

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<sup>238</sup> *Id.*

<sup>239</sup> Cardin, *supra* note 54.

<sup>240</sup> See Usher & Layser, *supra* note 218, at 1352 (discussing the Gannett Company Inc., which at the time owned eighty-four daily newspapers; The New York Times Company, which owned eighteen dailies, including the *New York Times* and the *Boston Globe*; and the Hearst Corporation, which owned fifteen dailies, including the *Houston Chronicle* and *San Francisco Chronicle*). Other examples include the Tribune Company and MediaNews Group. See *supra* notes 9 and 71; see also Greenberg, *supra* note 6, at 464.

<sup>241</sup> *Id.*; see also Downie & Schudson, *supra* note 13, at 22 (“[T]he bill, which has not moved anywhere in Congress, does not address how a newspaper that is losing money, especially one saddled with significant debt or other liabilities, could be converted into a viable nonprofit.”).

<sup>242</sup> Usher & Layser, *supra* note 207, at 1353.

news space to stories that are not primarily about sports or entertainment.<sup>243</sup> This would be similar to the current 501(c)(3) restrictions on electioneering and substantial lobbying.<sup>244</sup>

## 2. Constitutional Concerns

For reasons discussed in Part IV.A.2, a government requirement that a qualifying newspaper dedicate a certain percentage of reporting or news space to non-sports and non-entertainment reporting likely would not raise a constitutional question. The constitutional analysis would be largely the same for tax-based incentives as it was for content-based subsidies, in which the government may condition subsidies on newspapers publishing permissibly favored speech.<sup>245</sup> Further, the Supreme Court has been unambiguous about Congress's ability to prohibit organizations benefitting from tax-exemption, particularly those accepting tax-deductible contributions, from certain behaviors that the First Amendment otherwise protects. In *Taxation With Representation*, the Court held that the IRS does not violate the First Amendment by denying 501(c)(3) status and privileges to nonprofits that participate in substantial lobbying efforts.<sup>246</sup> Likewise, a similar prohibition against electioneering by a nonprofit newspaper would survive a constitutional challenge because Congress would not be denying that newspaper the right to endorse candidates—simply refusing to use public money to pay for those endorsements.<sup>247</sup>

Because the allocation of public benefits is a policy question, the Court has long deferred to the wisdom of Congress.<sup>248</sup> In short, how

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<sup>243</sup> Again, here newspapers would encounter the difficult question of whether a story is primarily sports or entertainment and whether it sufficiently qualifies as news. *See supra* note 149.

<sup>244</sup> *See supra* Part IV.B.

<sup>245</sup> *See* Part IV.A.2.

<sup>246</sup> *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 540 (1983).

<sup>247</sup> *Id.* at 545.

<sup>248</sup> *United States v. Realty Co.*, 163 U.S. 427, 444 (1896) (Congress's "decision recognizing such a claim, and appropriating money for its payment, can rarely, if ever, be the subject of review by the judicial branch of the government. Upon the general principle, therefore, that the government of the United States, through congress, has the right to pay the debts of the United States, and that the claims in these cases are of a nature which that body might rightfully decide to constitute a debt payable by the United States upon considerations of justice and honor, we think the act of congress, making appropriations for the payment of such claims, was valid, without reference to the question of the validity or invalidity of the original act providing for the payment of bounties to manufacturers of sugar, as contained in the tariff act of 1890."). This rationale also supports the permissibility of Congress basing subsidies on favored content. *See supra* notes 134–138 and accompanying text.

the federal government disburses its money is for Congress to decide. This is true regardless of whether allocations are direct or tax-based.<sup>249</sup> So long as the denial of tax-exempt status is based on clear criteria and is unrelated to viewpoint, the federal government can exclude publishing organizations from receiving tax-exempt status without raising a constitutional concern.<sup>250</sup>

The rationale for this rule is simple: “[A]lthough government may not place obstacles in the path of a [person’s] exercise of . . . freedom of [speech], it need not remove those not of its own creation.”<sup>251</sup> A newspaper might want more money to amplify its speech, but the Court has repeatedly stated that the government is under no obligation to fund an organization’s efforts to increase its freedom of speech. “Where governmental provision of subsidies is not ‘aimed at the suppression of dangerous ideas,’ its ‘power to encourage actions deemed to be in the public interest is necessarily far broader.’”<sup>252</sup>

### 3. Editorial Independence

As with direct funding, a tax-based subsidy would raise questions about editorial independence.<sup>253</sup> The primary difference would be the

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<sup>249</sup> Appropriations, which the Court has said are comparable to tax exemptions and deductions, *Taxation With Representation*, 461 U.S. at 549, are “obviously a matter of policy and discretion not open to judicial review unless in circumstances which here we are not able to find.” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 317 (1937).

<sup>250</sup> See *Big Mama Rag, Inc., v. United States*, 631 F.2d 1030 (D.C. Cir. 1980) (holding that it was unconstitutionally vague to withhold tax-exempt status unless a publishing organization gave a “full and fair exposition” of issues that it was covering); see also Schizer, *supra* note 82, at 35 (citing *Big Mama Rag* as “an important bulwark against” the threat to editorial independence of the tax-exempt model). In *Big Mama Rag*, the IRS allegedly had told the feminist publication that it could only receive tax-exempt status if it “agree[d] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal.” *Big Mama Rag*, 631 F.2d at 1040. Schizer notes that, later, more senior IRS officials conveyed a different requirement: “In denying the application, they relied on a Treasury Regulation providing that a publication could not be ‘educational’—and thus did not have the necessary charitable purpose—if it ‘advocates a particular point of view’ and does not ‘present a sufficiently full and fair exposition of the pertinent facts.’” Schizer, *supra* note 82, at 35. The district court sided with the IRS’s denial of tax-exempt status to *Big Mama Rag*, but the circuit court reversed, noting that exclusions must be viewpoint neutral and that “standards may not be so imprecise that they afford latitude to individual IRS officials to pass judgment on the content and quality of an applicant’s views and goals and therefore to discriminate against those engaged in protected First Amendment activities.” *Big Mama Rag*, 631 F.2d at 1040.

<sup>251</sup> *Taxation With Representation*, 461 U.S. at 549–50 (citing *Harris v. McRae*, 448 U.S. 297, 316 (1980)).

<sup>252</sup> *Id.* (citing *Cammarano v. United States*, 358 U.S. 498, 513 (1959); *Maher v. Roe*, 432 U.S. 464, 476 (1977)).

<sup>253</sup> See *supra* Part IV.A.3.

source of the potential influence.<sup>254</sup> Newspapers would be independent from the need to satisfy shareholders and constantly improve the bottom line. Also, they largely would be free from governmental meddling because the government would not be choosing whom to fund. Because of the piggybacking nature of tax-based subsidies, the government indirectly would be obliged to financially support the newspapers that individuals choose to support. However, government could chill reporting by threatening, directly or indirectly, to hold up the approval process or by harassing the status of a newspaper that angers an official.<sup>255</sup>

Additionally, the concern with a business model that by definition loses money is that the motivations are quite different than those of for-profit newspapers, and benefactors might try to influence the content published by the newspapers that they support.<sup>256</sup> As media critic Jack Shafer explains:

Commercial outlets may reflect their owners' views, but this tendency is always tempered by the need to attract readers and viewers. Nonprofit outlets almost always measure their success in terms of influence, not audience, because their customers are the donors who've donated cash to influence politics, promote justice, or otherwise build a better world.<sup>257</sup>

Nonprofit newspapers would risk becoming bullhorns for major donors. That could be a good thing—but only if you agree with the type of world that the nonprofit wants to build. And, regardless, newspapers would not be serving the public interest if such advocacy occurred at the expense of the local and investigative reporting for which American democratic society relies on newspapers. Thus, the

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<sup>254</sup> See *supra* notes 171–173 and accompanying text.

<sup>255</sup> See PICKARD, STEARNS & AARON, *supra* note 51, at 15 (noting that it is easy to “imagine corporations, politicians or political groups that have been offended by a paper going after that paper by . . . complaining to the IRS that the paper is too conservative or liberal or is engaged in some kind of political agenda”).

<sup>256</sup> Though less unpopular than direct subsidies, more than a third of newspaper and broadcast executives reported “significant doubts about private donations” and 78 percent strongly resisted the idea of financing from interest groups. Pew Res. Ctr.’s Project for Excellence in Journalism, *supra* note 24; see also Jack Shafer, *The Downside of MinnPost, Voice of San Diego, Washington Independent, et al.*, SLATE (Sept. 30, 2009, 7:12 PM), <http://www.slate.com/id/2231009/> (noting that a few foundations and venture capitalists have stepped forward to start or save nonprofits news outlets). At the top of this short list are Pro Publica, *Voice of San Diego*, *MinnPost*, and *St. Louis Beacon*, which have received support from the Knight Foundation, and news and commentary sites in Washington, D.C., Iowa, Michigan, Colorado, Minnesota, and New Mexico that have been aided by the Center for Independent Media.

<sup>257</sup> Shafer, *supra* note 256.

tension between donor interests and newsworthiness could threaten both the independence of newspapers and their societal value. To protect against editorial interference, a donor-supported newspaper would need to add two ethical policies dealing with how to respond to a donor's editorial wish list<sup>258</sup> and how to handle reporting on donors.<sup>259</sup>

Another concern is the possibility that a nonprofit newspaper largely or entirely supported by a foundation would be less responsive to its readers' interests. As the president of the Rockefeller Foundation noted in its 1997 report: "Foundations lack the three chastising disciplines of American life: the market test, which punishes or rewards financial performance; the ballot box, through which the numbskulls can be voted out of office; and the ministrations of an irreverent press biting at your heads every day."<sup>260</sup>

Between 2005 and the start of 2009, foundations alone contributed about \$128 million to at least 115 "news and information initiatives" in seventeen states and the District of Columbia.<sup>261</sup> As one commentator wrote in a report on new media makers: "For the most part these foundations are not so much seeking to shore up commercial news enterprises as they are looking to shore up community knowledge sharing. They are looking to build community, not simply to cover it."<sup>262</sup> That good news is tempered by other reports that "foundations are not yet providing enough money to sustain those startups or to underwrite all of their journalism rather than only their reporting on subjects of special interest to each foundation or donor."<sup>263</sup> Uncertain fiscal security would make newspapers vulnerable during down economic times and, in turn, likely more susceptible to donor influence.

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<sup>258</sup> There is a difference between allowing donors to suggest general themes and permitting them to interfere with editorial operations and decision-making.

<sup>259</sup> Newspapers need not disclose whenever they report on any donor, but should be required, either by statute or newspaper policy, to disclose when reporting on a donor who has contributed beyond a floor that triggers the disclosure requirement.

<sup>260</sup> Robert Arno & Nadine Pinede, *Revisiting the 'Big Three' Foundations*, 33 *CRITICAL SOC.* 389, 422 (2007).

<sup>261</sup> JAN SCHAFFER, *J-LAB: THE INSTITUTE FOR INTERACTIVE JOURNALISM, NEW MEDIA MAKERS: A TOOLKIT FOR INNOVATORS IN COMMUNITY MEDIA AND GRANT MAKING I* (2009), available at [http://www.j-lab.org/new\\_media\\_makers.pdf](http://www.j-lab.org/new_media_makers.pdf).

<sup>262</sup> *Id.*

<sup>263</sup> Downie & Schudson, *supra* note 13, at 26. It remains a question whether foundations can make long-term commitments to building journalism institutions. See Charles Lewis, *The Nonprofit Road*, *COLUM. JOURNALISM REV.* 32, 36 (Sept./Oct. 2007) ("Can they overcome their sometimes short-term thinking and fickle, often idiosyncratic nature and make significant, multi-year commitments to strengthen or build pillars of journalism in their communities, the nation, and beyond? Can they think outside their own agendas and embrace the inherent value of accurate, nonpartisan information in our national discourse?").

#### 4. Political Plausibility

Politicians likely would be hesitant to place on their limited agenda a subsidy for the press that could prove inefficient. Still, the nonprofit model is significantly more politically plausible than a direct-funding program. Both likely would require new legislation, though, as discussed in this Part, it is possible that newspapers could be shoehorned into an existing 501(c)(3) category. Further, unlike direct funding, encouraging newspapers to become nonprofits would come at little cost to the federal government. Today's newspapers are faring terribly and taxable income is down—for some, way down.<sup>264</sup> The strength of a tax-based subsidy comes from the tax deductions available to individual donors. Those likely would not cost the government because charity is, to an extent, a zero-sum game for all but the absolute wealthiest Americans.<sup>265</sup> If Jim, who would contribute to his local newspaper should it become eligible, currently donates \$1000 annually across charities, Jim would, all other factors being equal, likely donate \$1000 across charities after his local newspaper turned nonprofit. The money going to his newspaper would come out of the pieces of the pie that went to other charities like the local homeless shelter, animal rescue, and the YMCA. Indeed, those reductions carry their own societal costs, and many individuals would likely choose charities other than the local newspaper. But these forces have been at play in public radio for decades and have not spelled the end for other charities.

#### V. THE HYBRID: A NATIONAL PUBLIC NEWSPAPER PARTNERING WITH LOCAL NONPROFIT NEWSPAPERS

This Comment has thus far chronicled the crisis in American newspapering, argued that it is in the public interest for Congress to preserve the nation's corps of professional newsgatherers, and evaluated two forms of subsidies—direct funding and tax-based incentives. Though both could be structured to skirt credible constitutional challenges and to avoid significant threats to editorial independence, neither program, on its own, is likely to save the

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<sup>264</sup> See *supra* note 23.

<sup>265</sup> Daniel Gross, *Zero-Sum Charity*, SLATE (Jan. 20, 2005, 4:56 PM), [http://www.slate.com/articles/business/moneybox/2005/01/zerosum\\_charity.html](http://www.slate.com/articles/business/moneybox/2005/01/zerosum_charity.html) (explaining why the 2004 tsunami in Indonesia that resulted in massive fundraising would likely lead to other charities seeing their donations decline).

newspaper industry from further decline.<sup>266</sup> Direct subsidies would be a temporary, and potentially expensive, stopgap; indirect subsidies would be less costly and have more long-term value but would only slow the newspaper industry's financial hemorrhaging—not stop it. For these reasons, neither direct nor indirect subsidies would likely garner enough political support to move through Congress.<sup>267</sup> It is possible, however, that a combination of the two could prop up the Fourth Estate enough to preserve the nation's corps of newsgatherers. Providing a stipend, like Congress does for CPB, while simultaneously facilitating the transition of general-interest newspapers to nonprofits eligible for tax-deductible contributions and free from paying taxes on much, if not most, revenue would stabilize the newspaper industry with governmental seed funding while newly minted nonprofit newspapers established a fundraising base. It would also mitigate volatility for newspaper publishers during down economic times. This model would do for local newspapers what NPR did for local, subscriber-supported public radio stations.

A national public newspaper organization would revolve around a parent newsroom providing national, international, and general-interest news stories to partnering local newspapers across the country. News would be available to the partnering local newspapers via annual agreements that would dictate the number of stories available to each partnering local newspaper and at what annual package price. This below-market cost would be contingent upon the local newspaper publishing a minimum ratio of self-reported local stories and sharing those with other partnering newspapers outside their immediate readership area. This requirement would be crucial to serving the policy goals discussed in Part III. This program would be more expensive than a solely tax-based subsidy for newspapers because it would require some direct funding, but that government funding would be amplified by tax-deductible contributions from individuals, foundations, and corporate sponsors, which would account for the vast majority of newspaper funding.<sup>268</sup> Further, Congress already has some

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<sup>266</sup> Even the editor of *Pro Publica* recognizes that “the not-for-profit model probably isn't the cure for what ails the news business [but] it might just be a much bigger part of what's next.” David Folkenflik, *A Nonprofit Panacea For Newspapers?*, NPR (Feb. 6, 2009), [www.npr.org/templates/story/story.php?storyId=100310863](http://www.npr.org/templates/story/story.php?storyId=100310863).

<sup>267</sup> This is especially true of direct subsidies. See *supra* notes 112–116 and 177 and accompanying text.

<sup>268</sup> NPR gets 40 percent of its budget from foundations and corporate sponsors. MEYER, *supra* note 25, at 225. The rest comes primarily from individual donors and membership subscriber fees. It was not always this way, though. Starting in the 1980s, NPR began “more aggressively seeking philanthropic contributions from private sources, foundations such as

of the infrastructure in place with CPB, and could utilize CPB's advance-funding structure to further protect subsidized newspapers from political pressure. The Public Broadcasting Act could be supplemented to call for the creation of a national public newspaper to operate, independently, alongside NPR and PBS, or at least used as a model for a new statute establishing a national public newspaper.

Constitutionality would not be a concern for the reasons outlined in Parts IV.A and IV.B. Further, though the means of publication would likely be a combination of print and Internet, that should not have legal implications for the permissibility of government subsidies. The nature of the medium has long been crucial to determining what constitutes permissible government treatment of a news organization utilizing that medium. Generally, government has taken a hands-off approach with print while the scarcity of broadcast spectrum and the "uniquely pervasive" nature of broadcast radio and television justified heightened governmental activism.<sup>269</sup> The Internet Era has threatened this paradigm, accelerating a collapse that began with the advent of cable television and has expanded with satellite radio.<sup>270</sup> But, regardless, the national public newspaper would call for a hands-off government approach, similar to the constitutional barriers that have long existed to keep the government out of newspaper editorial content as opposed to the more permissible intervention in broadcast radio and television.

There would, of course, be practical challenges.<sup>271</sup> Like NPR, a national public newspaper would at times face claims of bias from politicians,<sup>272</sup> which could threaten support to the network of public newspapers.<sup>273</sup> Newspapers that opted in also would need to figure out

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Carnegie, Ford, MacArthur, the Pew Charitable Trusts, and others, as well as from corporations. Lewis, *supra* note 263, at 34. That support was essential to sustaining and strengthening NPR's product. "A public need for such an institution was perceived and then duly addressed." *Id.*

<sup>269</sup> See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

<sup>270</sup> In fact, the Supreme Court may overrule the disparate treatment of different media this term in the rehearing of *FCC v. Fox Television Stations*, 131 S.Ct. 3065 (2011). In *Fox*, the Court granted cert to answer whether the FCC's "current indecency-enforcement regime violates the First or Fifth Amendment to the United States Constitution." *Id.* at 3066.

<sup>271</sup> Media critic Jack Shafer points them out quite bluntly. "If you like NPR and PBS, which are always complaining about being underfinanced, you'd love weakling newspapers cobbling their budgets together from philanthropic donations, foundation grants, membership drives, and (who can't see this coming?) government subsidies." Jack Shafer, *It's Time to Kill the Idea That Newspapers Are Essential for Democracy*, SLATE (Mar. 27, 2009, 6:05 PM), <http://www.slate.com/id/2214724/>.

<sup>272</sup> To be sure, most newspapers already do.

<sup>273</sup> For example, a recent survey found that 39 percent of Americans wanted to halt federal funding of NPR. That opinion was sharply influenced by political leanings: 54 percent of

a mechanism for raising donations.<sup>274</sup> But there is no reason to believe this model could not work for newspapers, regardless of whether the paper continued to be printed or transitioned to online-only.<sup>275</sup> If so, this could help preserve the nation's corps of professional newsgatherers and would do so without threatening editorial independence or raising a constitutional concern.

## VI. CONCLUSION

The newspaper industry is in peril. Years of unprecedented reductions to editorial operations and revenue, followed by consolidations and closures for some, threaten the press's ability to continue setting the agenda for public discourse, connecting readers with their communities, reducing the costs of citizen oversight on elected officials, and producing investigative and local news reports. But these functions are crucial to American democratic society, and newspapers are integral to their fulfillment. Thus, Congress should act to stabilize the Fourth Estate. If Congress chooses to aid the press by providing subsidies to newspapers, the best manner would be a hybrid of direct funding and tax-based incentives, centered around a national public newspaper and local partnering newspapers that would be newly converted to tax-exempts. Doing so would be more beneficial than solely providing direct or indirect subsidies, leveraging the strengths of both approaches but with fewer weaknesses.

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Republicans favoring pulling the plug while only 25 percent of Democrats and 38 percent of Independents shared the sentiment. Ted Iliff, *Americans Divided Over US Govt's NPR Funding*, POLL POSITION (Oct. 27, 2010), [http://pollposition.com/index.php/post/154/Americans\\_Divided\\_Over\\_US\\_Govts\\_NPR\\_Funding](http://pollposition.com/index.php/post/154/Americans_Divided_Over_US_Govts_NPR_Funding).

<sup>274</sup> That is a task difficult enough for public radio and would be complicated by the less-captive nature of a newspaper's audience.

<sup>275</sup> See *supra* note 15.