

# Notes and Comments

## LEGAL REMEDIES FOR SAVING PUBLIC INTEREST JOURNALISM IN AMERICA

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### INTRODUCTION

To say that newspapers have fallen on difficult times would be a tremendous understatement. As the vultures have started to circle, telling headlines have captured the state of the industry. *Business Insider* dubbed 2009 “the year the newspaper died.”<sup>1</sup> The *New Yorker* proclaimed that the

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<sup>1</sup> Preethi Dumpala, *The Year the Newspaper Died*, BUS. INSIDER (July 4, 2009), <http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7>.

news business was going “out of print.”<sup>2</sup> *NPR* published an article, *Chronicling the Death of American Newspapers*.<sup>3</sup> The plight of the newspaper industry has received so much coverage that “almost everyone knows[] the economic foundation of the nation’s newspapers, long supported by advertising, is collapsing, and newspapers themselves, which have been the country’s chief source of independent reporting, are shrinking—literally.”<sup>4</sup> This trend should be alarming not only because of the obvious job losses but also because of the broader repercussions for American democracy.

In this Comment, I show that the government has a policy imperative to protect American public interest journalism, which is withering as a direct result of the newspaper crisis.<sup>5</sup> Such a relationship between the government and press has clear precedent and purpose. As the Framers recognized,<sup>6</sup> a free press helps expose corruption and gives people the information they need to be active citizens.<sup>7</sup> Notably, newspapers are more effective at achieving these twin pillars of public interest journalism than other news media. This is largely because newspaper reporters are responsible for producing the vast majority of original journalism content in this country, feeding derivative news media like the Internet, radio, and television.<sup>8</sup>

This Comment is divided into four Parts. Part I describes the rapid decline of the newspaper industry. Part II explores newspapers’ unique role in American democracy and discusses the implications of their shrinking budgets for public interest journalism. Part III reasons that government support for public interest journalism is necessary and appropriate. Part IV discusses existing proposals for government involvement. Various scholars have proposed a range of legal remedies that Congress could use to help protect the public’s interest in newspapers. The proposals can be grouped into three primary categories. First, Congress could expand newspapers’ intellectual property rights to better protect them against online aggregators who appropriate their work. Second, Congress could fund them through direct spending, or a newspaper “bailout.” Third, Congress could extend a tax subsidy to newspapers.

The Comment concludes by advocating for a tax subsidy for public interest journalism. Such a subsidy would effectively lower subscription costs, encouraging public interest news consumption. It would also make

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<sup>2</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>3</sup> Linton Weeks, *Chronicling the Death Of American Newspapers*, NPR (Mar. 2, 2009), <http://www.npr.org/templates/story/story.php?storyId=101237069>.

<sup>4</sup> Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Nov.–Dec. 2009, at 28.

<sup>5</sup> See *infra* Part II.D.

<sup>6</sup> See *infra* Part III.A.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part II.A.

consumers more aware of the societal value of public interest journalism, decreasing their likelihood of accepting other news products as substitutes. Finally, a tax subsidy could help usher in a new era of news production that would increasingly entrust the public's interest in journalism to nonprofit news organizations.

### I. WITHERING NEWSPAPERS

The financial state of the newspaper industry is indeed bleak. Print newspaper revenue dropped by 23% in 2007 and 2008, and by more than 25% in 2009.<sup>9</sup> Although these changes have come at a time of broad economic turbulence, industry experts believe that newspaper troubles are systemic rather than cyclical and will persist even after the economy improves.<sup>10</sup>

A precipitous decline in print circulation is largely responsible for newspapers' revenue problems. In 2008, for the first time in history, more people got their news for free online than paid for it in paper form.<sup>11</sup> Print circulation among daily newspapers decreased 9% from 2006 to 2008 and then experienced an even sharper drop of 10.6% in 2009.<sup>12</sup> These circulation figures are critical because they drive advertising rates,<sup>13</sup> and advertising spending comprises the bulk of newspaper revenues.<sup>14</sup> Total print newspaper advertising spending has decreased in every quarter since the first quarter of 2007<sup>15</sup> and nearly 50% in total from 2007 through 2009.<sup>16</sup> Thus, newspaper advertising revenues have evaporated in line with circulation.

It may seem intuitive that growth in online news readership would help to balance out print losses, but that has not been the case.<sup>17</sup> Early optimism about online news advertising appears to have been "illusory," as evidenced

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<sup>9</sup> Project for Excellence in Journalism, *Economics*, STATE OF THE NEWS MEDIA (2010), <http://stateofthemediamedia.org/2010/newspapers-summary-essay/economics/>.

<sup>10</sup> 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>; Project for Excellence in Journalism & Rick Edmonds, Poynter Inst., *Newspapers: Introduction*, STATE OF THE NEWS MEDIA (2009), <http://stateofthemediamedia.org/2009/newspapers-intro/>.

<sup>11</sup> Walter Isaacson, *How to Save Your Newspaper*, TIME, Feb. 16, 2009, at 30.

<sup>12</sup> Project for Excellence in Journalism, *Audience*, STATE OF THE NEWS MEDIA (2010), <http://stateofthemediamedia.org/2010/newspapers-summary-essay/audience/>.

<sup>13</sup> Circulation size is responsible for 88% of the variance in newspaper advertising rates. See PHILIP MEYER, *THE VANISHING NEWSPAPER* 52 (2004).

<sup>14</sup> SUZANNE M. KIRCHHOFF, CONG. RESEARCH SERV., R40700, *THE U.S. NEWSPAPER INDUSTRY IN TRANSITION I* (2009) (noting that advertising is responsible for about 80% of print revenues).

<sup>15</sup> *Advertising Expenditures*, NEWSPAPER ASS'N OF AM., <http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx> (last visited Jan. 9, 2011) (click "Quarterly").

<sup>16</sup> Project for Excellence in Journalism, *supra* note 9.

<sup>17</sup> See JONATHAN A. KNEE, BRUCE C. GREENWALD & AVA SEAVE, *THE CURSE OF THE MOGUL: WHAT'S WRONG WITH THE WORLD'S LEADING MEDIA COMPANIES* 90 (2009) (reporting that newspapers still make less than 10% of their revenue on the Internet).

by a pricing bubble that recently burst.<sup>18</sup> Online ad prices dropped 48% in 2008, even as traffic at the top fifty news sites increased by 27%.<sup>19</sup> Perhaps more than any other factor, the emergence of Craigslist as a free alternative to newspaper classified ads has significantly impaired both print and online advertising efforts.<sup>20</sup>

In response to these plummeting revenues, newspaper publishers have increasingly tried to pare down costs.<sup>21</sup> Many newspaper publishers started by targeting their primary expense: labor.<sup>22</sup> Newsroom headcount was slashed by 25% from 2006 to 2009, the largest layoffs on record.<sup>23</sup> Nearly 15,000 newspaper jobs were lost in 2009 alone.<sup>24</sup> Other cost-cutting strategies have included shortening newspaper length<sup>25</sup> and reducing the number of days of print publication.<sup>26</sup>

In sum, the future for newspapers under the status quo is bleak. Already, some newspapers have buckled under industry pressures and shut down, while others have declared bankruptcy to restructure.<sup>27</sup> One industry analyst has projected that more than 50% of the daily newspapers in the

<sup>18</sup> Downie & Schudson, *supra* note 4, at 32.

<sup>19</sup> *The Future of Newspapers: The Impact on the Economy and Democracy: Hearing Before the J. Econ. Comm.*, 111th Cong. 7 (2009) [hereinafter *Future of Newspapers*] (statement of Tom Rosenstiel, Director, Pew Research Center Project for Excellence in Journalism), available at <http://jec.senate.gov/public/index.cfm?p=HearingsCalendar> (at "Browse by" enter "September" and "2009"; then click "Go"; then click the link for the testimony of "9/24/10"; then select a statement).

<sup>20</sup> See Ryan Chittum, *Newspaper Industry Ad Revenue at 1965 Levels*, COLUM. JOURNALISM REV. (Aug. 19, 2009, 4:40 PM), [http://www.cjr.org/the\\_audit/newspaper\\_industry\\_ad\\_revenue.php](http://www.cjr.org/the_audit/newspaper_industry_ad_revenue.php); see also KNEE, GREENWALD & SEAVE, *supra* note 17, at 87–88 (offering an overview of the impact of the Internet on newspaper advertising); Nicholas Carlson & Kamelia Angelova, *Chart of the Day: Newspaper Billions Become Craigslist Millions*, BUS. INSIDER (June 12, 2009, 2:48 PM), <http://www.businessinsider.com/chart-of-the-day-craigslist-vs-newspaper-2009-6> (comparing an approximate projected 75% decrease in newspaper classified ad sales from 2006–2009 with a corresponding approximately 285% increase in Craigslist revenue).

<sup>21</sup> Downie & Schudson, *supra* note 4, at 32.

<sup>22</sup> KIRCHHOFF, *supra* note 14, at 4.

<sup>23</sup> Project for Excellence in Journalism & Rick Edmonds, Poynter Inst., *Newspapers—Summary Essay*, STATE OF THE NEWS MEDIA (2010), <http://stateofthemediamedia.org/2010/newspapers-summary-essay/>. Newspaper jobs fell by 15% in 2008, the steepest cut by a wide margin since the American Society of Newspaper Editors began keeping track of such statistics in 1978. Robert Hodieme, *Is There Life After Newspapers?*, AM. JOURNALISM REV., Feb.–Mar. 2009, at 21, 21–22, available at <http://www.ajr.org/Article.asp?id=4679>.

<sup>24</sup> Erica Smith, *2009 Layoffs and Buyouts at U.S. Newspapers*, PAPER CUTS, <http://newspaperlayoffs.com/maps/2009-layoffs/> (last visited Jan. 9, 2011); see also *Future of Newspapers*, *supra* note 19, at 1 (statement of Rep. Carolyn Maloney). Smith's early year-end figures for 2010 suggest that nearly 3000 more jobs were cut last year. Erica Smith, *Looking Back: 2010 Newspaper Layoffs*, PAPER CUTS (Jan. 10, 2011), <http://newspaperlayoffs.com/2011/01/looking-back-2010-newspaper-layoffs/>.

<sup>25</sup> KIRCHHOFF, *supra* note 14, at 4.

<sup>26</sup> Downie & Schudson, *supra* note 4, at 32 ("More than one hundred daily papers eliminated print publication on Saturdays or other days each week.").

<sup>27</sup> KIRCHHOFF, *supra* note 14, at 4.

country will go out of business in the next decade.<sup>28</sup> Others have taken a more moderate stance, noting that some newspapers have stayed profitable through the downturn.<sup>29</sup> However, these papers have generally preserved margins by slashing headcount, irrespective of its effects on the public interest.<sup>30</sup> Although some newspapers will undoubtedly remain profitable and survive, the raw numbers illustrating the industry's declining advertising, circulation, and revenues speak for themselves.

Moreover, we can be sure that the newspaper industry's contraction will significantly affect the amount and quality of news coverage in this country.<sup>31</sup> And we can be even more confident that the amount of public interest reporting will decline considerably.

## II. WHY PUBLIC INTEREST JOURNALISM IS CRITICAL FOR AMERICAN DEMOCRACY

If newspapers were typical businesses, these job losses and industry turmoil might be considered collateral damage of the broader economic recession. The downturn, after all, affected most industries.<sup>32</sup> However, the newspaper industry's plight threatens the country on a much more fundamental level than merely unemployment. Newspapers serve the public interest in this country in a way that is inexorably intertwined with American democracy. As this Part demonstrates, newspapers are the foundation of the entire news industry. They accomplish the twin public interest goals of the Free Press Clause of the First Amendment by facilitating political participation and checking the government to a degree that other news media simply do not. Therefore, the "death" of the newspaper industry would be a significant blow to the functioning of our democracy.

### A. Newspapers Support the Entire News Industry

Newspaper critics are fond of arguing that newspapers have simply been outmoded by digital technology and that the market will naturally re-

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<sup>28</sup> *Id.* at 1 (citing Vin Crosbie, *Transforming American Newspapers (Part 1)*, CORANTE (Aug. 20, 2008), [http://rebuildingmedia.corante.com/archives/2008/08/20/transforming\\_american\\_newspapers\\_part\\_1.php](http://rebuildingmedia.corante.com/archives/2008/08/20/transforming_american_newspapers_part_1.php)).

<sup>29</sup> *See, e.g.*, ALEX S. JONES, LOSING THE NEWS 161 (2009); Downie & Schudson, *supra* note 4, at 34.

<sup>30</sup> Victor Pickard, Josh Stearns & Craig Aaron, *Saving the News: Toward a National Journalism Strategy*, FREE PRESS, 7–8 (May 19, 2009), [http://www.freepress.net/files/saving\\_the\\_news.pdf](http://www.freepress.net/files/saving_the_news.pdf). The press's ability to be a successful watchdog and catalyst for political participation is tied to its visibility and coverage, which are both related to the number of reporters. For further elaboration on this point, see *infra* Part II.D.

<sup>31</sup> *See infra* Part II.D.

<sup>32</sup> Conor Dougherty, *Unemployment Rises in Every State*, WALL ST. J., Jan. 28, 2009, at A3, available at <http://online.wsj.com/article/SB123307958229020395.html> ("[T]he recession has spared few industries or regions.").

place them with other news media sources.<sup>33</sup> Survey data suggest that a majority of the American public agrees.<sup>34</sup> However, these critics generally fail to recognize the extent to which modern newspaper organizations support the entire news industry.

In fact, newspaper journalists generate the vast majority of the original reporting in America with one estimate pegging their content contribution at as much as 85%.<sup>35</sup> As the foundation of the news industry, newspapers employ three times as many journalists as any other single news medium.<sup>36</sup> Other news media, such as blogs, radio, and television, typically “piggy-back” on newspapers’ original coverage, repackaging the content for distribution through their respective channels.<sup>37</sup> Industry analysts report that these other media channels simply lack the resources and expertise to fill the void that would be left by the widespread demise of the newspaper industry.<sup>38</sup>

The potential viability of citizen journalism is illustrative. Some have argued that amateur bloggers and citizen journalists could supplant newspapers.<sup>39</sup> While these contributions are undoubtedly valuable, most evidence

<sup>33</sup> See Daniel Lyons, *Don’t Bail Out Newspapers—Let Them Die and Get out of the Way*, NEWSWEEK TECHTONIC SHIFTS (Sept. 27, 2009, 10:59 AM), <http://blog.newsweek.com/blogs/techttonicshifts/archive/2009/09/27/don-t-bail-out-newspapers-let-them-die-and-get-out-of-the-way.aspx>; Jack Shafer, *Saving Newspapers from Their Saviors*, SLATE (Sept. 21, 2009, 6:39 PM), <http://www.slate.com/id/2229092> (“Propping up troubled papers has a cost. It weakens the enterprises that are rising from below to compete with them to deliver advertising and, yes, deliver news.”); *Why Newspapers Can’t Be Saved, but the News Can*, N.Y. TIMES OPINIONATOR (Mar. 16, 2009, 4:29 PM), <http://opinionator.blogs.nytimes.com/2009/03/16/why-newspapers-cant-be-saved-but-the-news-can/>.

<sup>34</sup> *61% Are Confident Online and Other Sources Can Replace Newspapers*, RASMUSSEN REPORTS (Apr. 2, 2009), [http://www.rasmussenreports.com/public\\_content/lifestyle/general\\_lifestyle/march\\_2009/61\\_are\\_confident\\_online\\_and\\_other\\_sources\\_can\\_replace\\_newspapers](http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/march_2009/61_are_confident_online_and_other_sources_can_replace_newspapers).

<sup>35</sup> *Frontline: News War* (PBS television broadcast Feb. 27, 2007) (statement of John Carroll, former editor of the *L.A. Times*), transcript available at <http://www.pbs.org/wgbh/pages/frontline/newswar/etc/script3.html>; see also *Future of Newspapers*, *supra* note 19, at 7 (statement of Tom Rosenstiel) (“A good deal of what is carried on radio, television, cable and wire services comes from newspaper newsrooms. These media then disseminate it to broader audiences. In every community in America I have studied in 26 years as a press critic, the newspaper in town has more boots on the ground—more reporters and editors—than anyone else—usually than all others combined.”); Pickard, Stearns & Aaron, *supra* note 30, at 8 (noting that the “overwhelming majority of reporting, whether online, broadcast or cable, still originates with newspapers”). For raw data showing that newspaper reporters outnumber all other reporters by a significant sum, see U.S. BUREAU OF LABOR STATISTICS, *News Analysts, Reporters, and Correspondents*, in OCCUPATIONAL OUTLOOK HANDBOOK 346 (2010–2011 ed. 2010), available at <http://www.bls.gov/oco/pdf/ocos088.pdf>.

<sup>36</sup> U.S. BUREAU OF LABOR STATISTICS, *supra* note 35, at tbl.27-3020.

<sup>37</sup> KIRCHHOFF, *supra* note 14, at 9.

<sup>38</sup> *Id.*; Downie & Schudson, *supra* note 4, at 34–35.

<sup>39</sup> *The Future of Journalism: Hearing Before the Subcomm. on Commc’ns, Tech. and the Internet of the S. Commerce, Science, and Tech. Comm.*, 111th Cong. 67 (2009) [hereinafter *Future of Journalism*] (statement of Arianna Huffington, Co-founder, the *Huffington Post*), available at 10 CIS S 16122 (LexisNexis Congressional Universe) (“[T]he importance of citizen journalism cannot be overestimated.”); *Why Newspapers Can’t Be Saved, but the News Can*, *supra* note 33.

suggests that citizen journalism is a grossly inadequate substitute for a professional press.<sup>40</sup> As the Pew Project for Excellence in Journalism recently found, “[E]ven the most established citizen sites are not in a position to take on the job of traditional news outlets.”<sup>41</sup> Volunteer journalists would be hard-pressed to maintain the consistent, visible presence needed to check the government in the way that the free press has traditionally done.<sup>42</sup> Furthermore, without a significant army of professional reporters, organized online news collectives and startups are also unlikely to provide this check.<sup>43</sup> As one recent empirical study demonstrated, these organizations are reliant upon the traditional press for its original news coverage, which they then help to discuss and distribute.<sup>44</sup> Although this service is an important complement to the development of original content, it is by no means a substitute.<sup>45</sup> In sum, the claim that alternate news sources are capable of filling the important roles that newspapers have in modern American society—as original news reporters, catalysts for political participation, and watchdogs—is dubious at best.

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<sup>40</sup> JONES, *supra* note 29, at 193–94; Downie & Schudson, *supra* note 4, at 39–41. “New-media entities are not yet able to truly cover—day after day—the society, culture, and politics of cities, states, and nations. And until new models emerge that are capable of paying reporters and editors to do such work—in effect becoming online newspapers with all the gravitas this implies—they are not going to get us anywhere close to professional journalism’s potential.” David Simon, *Build the Wall*, COLUM. JOURNALISM REV., July–Aug. 2009, at 36, 38.

<sup>41</sup> Project for Excellence in Journalism & Pew Internet & Am. Life Project, *Online Summary Essay*, STATE OF THE NEWS MEDIA (2010), <http://stateofthemediamedia.org/2010/online-summary-essay/>.

<sup>42</sup> See, e.g., *Future of Journalism*, *supra* note 39, at 66–67 (statement of David Simon, author, television producer, and former newspaperman) (“The day I run into a *Huffington Post* reporter at a Baltimore zoning board hearing is the day that I will be confident that we’ve actually reached some sort of equilibrium.”). See *infra* Part II.B for elaboration on why effective watchdogs need to have a consistent, visible presence.

<sup>43</sup> John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Apr. 6, 2009, at 12, 14 (“Just about every serious journalist involved in an online project will readily concede that even if these ventures pan out, we will still have a dreadfully undernourished journalism system with considerably less news gathering and reporting, especially at the local level.”); Project for Excellence in Journalism, *New Media, Old Media: How Blogs and Social Media Agendas Relate and Differ from the Traditional Press* (May 23, 2010), <http://www.journalism.org/sites/journalism.org/files/NMI%20Year%20in%20Review-Final.pdf>.

<sup>44</sup> See, e.g., *How News Happens: A Study of the News Ecosystem of One American City 2*, PEW PROJECT FOR EXCELLENCE IN JOURNALISM (Jan. 11, 2010), [http://www.journalism.org/sites/journalism.org/files/Baltimore%20Study\\_Jan2010\\_0.pdf](http://www.journalism.org/sites/journalism.org/files/Baltimore%20Study_Jan2010_0.pdf) (noting that “of the stories that did contain new information” in an empirical case study of the news ecosystem in Baltimore “nearly all, 95%, came from traditional media—most of them newspapers”). The study reports that “the expanding universe of new media, including blogs, Twitter and local websites . . . played only a limited role: mainly an alert system and a way to disseminate stories from other places.” *Id.* The key finding is that the vast majority of new media sources are not actually creating news; they are just distributing and discussing it.

<sup>45</sup> See Stephen Lacy et al., *Citizen Journalism Web Sites Complement Newspapers*, NEWSPAPER RES. J., Spring 2010, at 34, 42, available at <http://aejmc.org/topics/wp-content/uploads/2010/05/Lacy.pdf> (“[D]ata indicate that citizen journalism Web sites (news and blog sites) are generally not acceptable substitutes for daily newspaper Web sites.”).

*B. Newspapers as Watchdogs*

The media's protected position as a government watchdog is an integral part of the American political tradition. As the Framers knew,<sup>46</sup> the presence of an active press benefits society by alerting the public to governmental wrongdoing and deterring such transgressions as a result.<sup>47</sup> James Madison, the author of the First Amendment, strongly believed in the importance of an independent press that could expose government officials who had abused their power.<sup>48</sup> In this vein, the "primary purpose" of the Free Press Clause of the First Amendment was to establish an independent Fourth Estate, a watchdog to check the three branches of the government.<sup>49</sup> The Supreme Court has affirmed this critical role of the press on multiple occasions.<sup>50</sup>

While newspapers' watchdog role is traditionally associated with checking the government, the press also performs a similar function against private actors.<sup>51</sup> Fear of exposure in the press can have a powerful chilling effect on behavior.<sup>52</sup> The media often expose the suspect behavior of private entities that have not been deterred from wrongdoing. For instance, journalists cautioned against the dangerous lending practices of several

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<sup>46</sup> During the Framers' formative meetings, "the value of checking misconduct by public officials remained one of the central concerns in virtually every discussion of freedom of the press." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 535.

<sup>47</sup> This social good has been dubbed the "checking value." *Id.*

<sup>48</sup> Madison wrote that "it is natural and proper, that, according to the cause and degree of their faults, they should be brought into contempt or disrepute, and incur the hatred of the people." THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON 338 (Marvin Meyers ed., 1973); see also Anthony Lewis, *Anthony Lewis on the Framers, the 1st Amendment, and Watchdog Reporting*, NIEMAN WATCHDOG (Apr. 8, 2004), <http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=0024> ("Madison thought a press that kept watch on government was essential to the survival of the new form of government he and his colleagues had created, a federal republic.").

<sup>49</sup> Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

<sup>50</sup> See, e.g., *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) ("The press plays a unique role as a check on government abuse . . ."); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 584–85 (1983) (noting that a "basic assumption of our political system" is "that the press will often serve as an important restraint on government") (citing Stewart, *supra* note 49, at 634); *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1965) (writing that the press "guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism"); *Near v. Minnesota*, 283 U.S. 697, 719–20 (1931) (emphasizing the "primary need of a vigilant and courageous press" to combat the government's "malfeasance and corruption").

<sup>51</sup> C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 325 (1998).

<sup>52</sup> Joseph Pulitzer observed that "[m]ore crime, immortality and rascality is prevented by the fear of exposure in newspapers than by all the laws, moral and statute, ever devised." W. Lance Bennett & William Serrin, *The Watchdog Role of the Press*, in MEDIA POWER IN POLITICS 328 (Doris A. Graber ed., 5th ed. 2007).



banks before the recent recession struck.<sup>53</sup> Similarly, *Fortune*'s Bethany McLean was widely credited with identifying some of Enron's dubious financials before its collapse.<sup>54</sup> With private financial institutions that are "too big to fail,"<sup>55</sup> the existence of an independent watchdog that can alert government investigators and the public to such failures has become even more significant in recent years.

In practice, as Floyd Abrams has observed, "the press is the *only* institution that can serve on a continuing basis as an open eye of the public."<sup>56</sup> The history of American watchdog reporting is relatively well known, and it is beyond the scope of this Comment to examine it here.<sup>57</sup> However, it should be noted that as a deterrence mechanism, watchdog journalism is designed to be overtly visible to the public only in extreme circumstances.<sup>58</sup> Thus, a watchdog's success should be measured as a product of its presence and consistency rather than by the sheer number of explosive headlines in the news.

Newspapers play an integral role in the media's ability to act as a consistent, reliable watchdog. With the lion's share of reporters on the street, who are in turn responsible for writing the vast majority of original investigative stories,<sup>59</sup> newspapers are the primary media watchdogs that deter and uncover inappropriate behavior.<sup>60</sup> Indeed, at least two different studies pre-

<sup>53</sup> Chris Roush, *Unheeded Warnings*, AM. JOURNALISM REV., Dec. 2008–Jan. 2009, at 34, 36, available at <http://www.ajr.org/Article.asp?id=4668>.

<sup>54</sup> *Id.* at 38.

<sup>55</sup> David Cho, *Banks "Too Big to Fail" Have Grown Even Bigger*, WASH. POST, Aug. 28, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/27/AR2009082704193.html>.

<sup>56</sup> Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 592 (1979). Abrams argues that the press's special role in practice is precisely why it deserves constitutional protection. *Id.* at 591–92.

<sup>57</sup> For a robust history of the successes of watchdog reporting and investigative journalism, see generally SHAKING THE FOUNDATIONS: 200 YEARS OF INVESTIGATIVE JOURNALISM IN AMERICA (Bruce Shapiro ed., 2003). For more critical perspectives, see Bennett & Serrin, *supra* note 52, at 326–35, which suggests that the media overly aggrandizes itself in watchdog reporting, and Warren Francke, *The Evolving Watchdog: The Media's Role in Government Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 109, 121 (1995), which argues that the media could be a more effective watchdog.

<sup>58</sup> Abrams, *supra* note 56, at 592.

<sup>59</sup> See *supra* note 35 and accompanying text.

<sup>60</sup> Alan D. Mutter & Jeff Jarvis, Op-Ed., *Put Print News on Death Watch?*, L.A. TIMES, Mar. 18, 2009, <http://www.latimes.com/news/opinion/opinionla/la-oe-mutter-jarvis18-2009mar18,0,4408371>. story ("The potential loss of all those 'feet on the street' poses a significant threat to our democracy, as there never has been a point in history that a free and vigorous press has not served as a watchdog on the government."); see also *Future of Newspapers*, *supra* note 19, at 8 (statement of Tom Rosenstiel) (emphasizing the importance of watchdog journalists who "show up week after week, sit in the front row, and bear[] witness, and who, simply by their presence, say to those in power on behalf of all the rest of us, you are being watched").

sent data to support this conclusion, showing that increases in newspaper circulation are correlated with decreases in political corruption.<sup>61</sup>

### C. *Newspapers and Political Participation*

In addition to protecting the public's watchdog, the Free Press Clause has a broader democratic purpose: facilitating political participation.<sup>62</sup> As Madison recognized, information is a predicate to a fully functioning democracy.<sup>63</sup> The press provides information that citizens need to participate directly in government, whether by communicating with their elected representatives or by voting.<sup>64</sup> Additionally, the press can reduce participation costs; if journalists did not consistently observe and report on government actions, citizens would have to incur significantly higher individual monitoring costs to stay civically engaged. By lowering and spreading such costs, the media can effectively democratize political access. Justice Powell articulated this value of the press in his dissenting opinion in *Saxbe v. Washington Post Co.*, writing:

No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.<sup>65</sup>

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<sup>61</sup> See Alicia Adserà, Carles Boix & Mark Payne, *Are You Being Served? Political Accountability and Quality of Government*, 19 J.L. ECON. & ORG. 445, 457 (2003) (reporting that "free circulation of newspapers has a very strong effect on the level of corruption"); Mathew Gentzkow, Edward L. Glaeser & Claudia Goldin, *The Rise of the Fourth Estate: How Newspapers Became Informative and Why it Mattered* 31 (Nat'l Bureau of Econ. Research, Working Paper No. 10781, 2004), available at <http://www.nber.org/papers/w10791.pdf> (concluding that it is reasonable to associate the rise of the information press with the decrease in corruption during the Gilded Age in U.S. history).

<sup>62</sup> See Doris A. Graber, *Press Freedom and the General Welfare*, 101 POL. SCI. Q. 257, 258 (1986) (noting that a free press can improve the general welfare in four ways beyond serving as a watchdog: creating a forum for discussion, disseminating information helpful for citizenship, communicating with elected officials, and presenting minority views).

<sup>63</sup> Madison wrote, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." 9 JAMES MADISON, THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

<sup>64</sup> Adam Candeub, *Media Ownership Regulation, the First Amendment, and Democracy's Future*, 41 U.C. DAVIS L. REV. 1547, 1585–86 (2008).

<sup>65</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

The Supreme Court has recognized the importance of the press as a catalyst for political participation on other occasions as well.<sup>66</sup>

Additionally, there is a significant amount of research showing that newspaper readership is directly linked to civic engagement. Although it is notoriously difficult to prove a causal relationship,<sup>67</sup> researchers have found correlations between newspaper readership and political efficacy,<sup>68</sup> voting,<sup>69</sup> and interest in political participation<sup>70</sup>—even when controlling for age, education, and rootedness.<sup>71</sup> Newspapers are unique among the various media in their connection to political engagement; other news media do not appear to have similarly strong civic ties.<sup>72</sup> For example, one famous study showed that as readers substituted television for newspapers, they became much less likely to vote.<sup>73</sup> This may be because newspapers typically have more political coverage, which is positively correlated with political participation.<sup>74</sup>

*D. The Newspaper Industry's Turmoil Is Damaging the Press's Effectiveness as a Watchdog and Catalyst for Political Participation*

The newspaper industry's recent cost reductions<sup>75</sup> have had, and will likely continue to have, a disproportionate impact on public interest journalism. Although publishers were willing and able to support public interest journalism when business was good,<sup>76</sup> they have started to aggressively raze such low-margin operations over the past few years.<sup>77</sup> For example, several

<sup>66</sup> LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 170 (1991) (“Both *Near* and *New York Times* were designed to facilitate the informed citizen’s full participation in the country’s governance.”).

<sup>67</sup> See ROBERT PUTNAM, *BOWLING ALONE* 218 (2000) (describing how it is difficult for researchers to distinguish between selection effects and media effects).

<sup>68</sup> Tien-Tsung Lee & Lu Wei, *How Newspaper Readership Affects Political Participation*, *NEWSPAPER RES. J.*, Summer 2008, at 8, 11, available at <http://aejmc.org/talk/wp-content/uploads/2008/09/lee.pdf>.

<sup>69</sup> PUTNAM, *supra* note 67, at 218; Candeub, *supra* note 64, at 1597–98; Lee & Wei, *supra* note 68, at 11.

<sup>70</sup> Leo W. Jeffres et al., *Newspaper Reading Supports Community Involvement*, *NEWSPAPER RES. J.*, Winter 2007, at 6, 19.

<sup>71</sup> PUTNAM, *supra* note 67, at 218. “Rootedness” refers to entrenchment in a certain community.

<sup>72</sup> Jeffres et al., *supra* note 70, at 19.

<sup>73</sup> Candeub, *supra* note 64, at 1597–98 (summarizing the work of Matthew Getzkow).

<sup>74</sup> *Id.* at 1597 (“[S]tudies tend to show that [media] access per se does not increase voting; rather, access to media that is likely to cover political news increases political participation.”).

<sup>75</sup> See *supra* text accompanying notes 21–26.

<sup>76</sup> JONES, *supra* note 29, at 45–46; Graber, *supra* note 62, at 272 (noting the “many instances when public service has strained media resources but has been carried on nonetheless because the business was otherwise profitable”). Until recently, successful newspapers in the United States operated with margins upwards of 20%. JONES, *supra* note 29, at 159–60.

<sup>77</sup> Bennett & Serrin, *supra* note 52, at 327–28. Investigative journalism is extremely expensive and has no guaranteed payout, so it is a difficult proposition for publishers with heightened scrutiny on their profit margins. See HUGO DE BURGH, *INVESTIGATIVE JOURNALISM: CONTEXT AND PRACTICE* 7 (2000) (describing how investigative journalism is the “most expensive type of journalism” and “the risks of

papers have reduced the size of their Washington bureaus or eradicated them entirely.<sup>78</sup> “As bureaus shrink, they cut back on in-depth and investigative projects and from having reporters assigned to cover specific federal agencies.”<sup>79</sup> These reductions have not been isolated to the federal level. A recent report in the *American Journalism Review* revealed a 32% decrease in statehouse reporters since 2003.<sup>80</sup>

The cuts can help to distinguish the profit-maximizing motives of corporate news organizations from the public service interests that they were traditionally willing to support.<sup>81</sup> The net impact of such reductions is that both readers and the broader public are getting less coverage about civic and political issues, especially from informed local reporters who are best-equipped to hold their representatives accountable.<sup>82</sup> This reduction in coverage will likely have two very troubling effects on American society.

First, as reporters, stories, and even whole newspapers are lost and the amount of political coverage decreases, the public will likely become increasingly politically apathetic.<sup>83</sup> One recent empirical study illustrates this point. Researchers found that after the December 31, 2007 newspaper closing of the *Cincinnati Post*, “[f]ewer people voted in elections for city council, city commission and school board; fewer candidates sought those seats; the remaining candidates spent less money on their campaigns; and, for

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investigative journalism are too great for the publishers”); see also JONES, *supra* note 29, at 162 (“With revenues dropping, the only way to bolster profits is to cut expenses, and they are lopping off anything that doesn’t clearly add to the bottom line. Accountability news, alas, does not come attached to a clear base of advertisers, like sports and entertainment news.”). These cuts are also necessary to support heavy debt burdens that were assumed during several large newspaper acquisitions, such as Sam Zell’s 2007 purchase of the *Chicago Tribune*. JONES, *supra* note 29, at 161; KIRCHHOFF, *supra* note 14, at 7.

<sup>78</sup> Richard Pérez-Peña, *Big News in Washington, but Far Fewer Cover It*, N.Y. TIMES, Dec. 18, 2008, at A1, available at <http://www.nytimes.com/2008/12/18/business/media/18bureaus.html> (“The times may be news-rich, but newspapers are cash-poor, facing their direst financial straits since the Depression. Racing to cut costs as they lose revenue, most have decided that their future lies in local news, not national or international events. That has put a bull’s-eye on expensive Washington bureaus.”); see generally Jennifer Dorroh, *Endangered Species*, AM. JOURNALISM REV., Dec. 2008–Jan. 2009, at 20 (describing how several regional newspapers have laid off their Washington reporters).

<sup>79</sup> Pérez-Peña, *supra* note 78. See also Joe Strupp, *Watchdogs Still Awake?*, EDITOR & PUBLISHER, Oct. 2009, at 16, 16–20 (noting that budget and staff cuts are hurting the media’s ability to serve its role as a watchdog).

<sup>80</sup> Jennifer Dorroh et al., *AJR’s 2009 Count of Statehouse Reporters*, AM. JOURNALISM REV., Apr.–May 2009, at 22, 30, available at <http://www.ajr.org/article.asp?id=4722>.

<sup>81</sup> See *supra* text accompanying note 30.

<sup>82</sup> Pérez-Peña, *supra* note 78. As an example of the kinds of public service reporting undertaken by the Washington bureaus of regional papers, consider that Washington reporters from the *San Diego Union-Tribune* won a Pulitzer Prize for uncovering a corruption scandal involving California Representative Randall Cunningham in 2006. Nevertheless, the bureau was closed in 2008. See *id.*; see also Downie & Schudson, *supra* note 4, at 30 (“What is under threat is independent reporting that provides information, investigation, analysis, and community knowledge, particularly in the coverage of local affairs.”).

<sup>83</sup> See Candeub, *supra* note 64, at 1597 (“[A]ccess to media that is likely to cover political news increases political participation.”).

councils and commissions, incumbents' chances of retaining office improved."<sup>84</sup> When political coverage in newspapers decreases, people will simply get less of the information that they need to be active citizens.<sup>85</sup>

Second, the media's ability to consistently observe and report on the government will significantly diminish as the number of reporters declines, threatening its potential as a meaningful watchdog.<sup>86</sup> The success of the media watchdog is partially a product of the number of reporters who are physically available to serve as the public's "eye" against wrongdoing<sup>87</sup> and remain visible enough to the government to effectively deter wrongful behavior.

Some critics contend that newspapers have not lived up to their billing as watchdogs,<sup>88</sup> which might provoke questions of whether society will suffer any great loss if a substantial number of them go out of business. Floyd Abrams has insightfully preempted that question by observing that while the newspaper watchdog might not be perfect, it is the only one society has (or can have).<sup>89</sup> His argument echoes a similar one made by Madison, who

<sup>84</sup> Sam Schulhofer-Wohl & Miguel Garrido, *Do Newspapers Matter? Evidence from the Closure of the Cincinnati Post* 1–2 (Nat'l Bureau of Econ. Research, Working Paper No. 14817, 2009), available at <http://www.nber.org/papers/w14817.pdf>. The study is particularly illustrative for the purposes of this paper, because the *Cincinnati Post* "survived as long as it did thanks to an implicit government subsidy for newspaper competition" under the 1970 Newspaper Preservation Act. *Id.* at 2–3. These results were consistent with previous studies that have shown that partisan or competing newspaper coverage can increase turnout in elections. See MICHAEL E. MCGERR, *THE DECLINE OF POPULAR POLITICS* 116–35 (1986).

<sup>85</sup> See Dorroh, *supra* note 78, at 22 ("If we talk about a government as Abraham Lincoln did—'of the people, by the people, for the people,'—then that democracy is in trouble. The people in power are the only ones informed about what is happening and how to control it." (quoting Bill Kovach, former Washington Bureau Chief of the *New York Times*)).

<sup>86</sup> See Leonard Pitts, Jr., Op-Ed., *No Mourning from Crooks over Demise of Newspapers*, *BALT. SUN*, Mar. 23, 2009, at 13A ("[O]nly the local paper performs the critical function of holding accountable the mayor, the governor, the local magnates and potentates, for how they spend your money, run your institutions, validate or violate your trust. If newspapers go, no other entity will have the wherewithal to do that."). Some critics have suggested that the role of investigative journalists is overblown because they frequently rely on tips from inside the government power structure rather than nose-to-the-ground investigations. See James Curran, *What Democracy Requires of the Media*, in *THE PRESS* 121 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005). However, this position conspicuously ignores the extent to which reporters are responsible for facilitating tips by cultivating relationships with sources. See Benjamin L. Cardin, Op-Ed., *A Plan to Save Our Free Press*, *WASH. POST*, Apr. 3, 2009, at A19 ("[N]ewspaper reporters forge relationships with people; they build a network, which creates avenues to information."). It also ignores the important deterrent effect of a sizable, visible press. See *supra* notes 60–62 and accompanying text.

<sup>87</sup> "There is no question that as newspapers have shrunk their staffs, one of the things that has [been lost] is investigative reporting. . . . [W]ith fewer reporters, watchdog journalism suffers." Strupp, *supra* note 79, at 17 (quoting Robert Rosenthal, Executive Director of the Center for Investigative Reporting in Berkeley, California).

<sup>88</sup> See, e.g., Francke, *supra* note 57, at 118–21 (arguing that the media could be a more effective watchdog); Graber, *supra* note 62, at 270–71 (writing that the news media have frequently been too passive in serving the watchdog role).

<sup>89</sup> Abrams, *supra* note 56, at 592.

was frustrated by some negative aspects of the press but still recognized its central importance to American democracy.<sup>90</sup> Plus, it is no secret that some of the industry's failings as a watchdog have come as a result of an increasingly narrowed focus on the bottom line (at the expense of the public interest).<sup>91</sup> Fortunately, as Part IV.C will show, a tax subsidy for public interest news coverage could both protect newspapers and mitigate some of the profit-driven tensions that have limited investigative reporting in recent years.

### III. THE GOVERNMENT'S ROLE IN PROTECTING PUBLIC INTEREST JOURNALISM

In response to the troubles facing the newspaper industry, some have argued that the government should play no role, preferring a market-based solution instead.<sup>92</sup> This Part demonstrates that, contrary to these critics' contentions, the problems facing public interest journalism are ripe for government action. Indeed, the American government has a long history of supporting journalism in a content-agnostic way that is consistent with First Amendment free press principles. Furthermore, newspaper industry dy-

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<sup>90</sup> In the *Report on the Virginia Resolution*, Madison wrote,

Some degree of abuse is inseparable from the proper use of every thing, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression . . . ?

6 MADISON, *supra* note 63, at 389. Madison's writings on this subject contributed to the Supreme Court's ruling in *Near v. Minnesota*, 283 U.S. 697, 717–18 (1931), which noted that Madison's words "described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions."

<sup>91</sup> See Bennett & Serrin, *supra* note 52, at 334 (observing that "[t]he business climate of many newspapers today is not fully supportive" of accountability journalism); see also *supra* notes 77–82 and accompanying text (describing the corporate shift away from public interest journalism).

<sup>92</sup> See L. Brent Bozell III, Op-Ed., *Government Has No Business Bailing Out Newspapers the People Don't Want*, U.S. NEWS & WORLD REP., May 4, 2009, <http://www.usnews.com/opinion/articles/2009/05/04/government-has-no-business-bailing-out-newspapers-the-people-dont-want> ("[I]t's none of the government's business to support newspapers, and newspapers can only have their public trust damaged by government support."); John Aloysius Farrell, *No Bailout for Newspapers: Dinosaurs, Meet Capitalism and the First Amendment*, U.S. NEWS & WORLD REP. THOMAS JEFFERSON STREET BLOG (May 7, 2009), <http://www.usnews.com/blogs/john-farrell/2009/05/07/no-bailout-for-newspapers-dinosaurs-meet-capitalism-and-the-first-amendment.html> (arguing that the government has no place helping newspapers because "[t]he First Amendment works both ways. We get to say and believe what we want, and the government gets to keep its big and blundering good intentions, with all their unintended consequences, to itself. . . . American journalists need to learn how to make money online"); Editorial, *Ink-Stained Politicians*, WALL ST. J., May 16, 2009, at A10 (arguing that the government should not get involved in saving newspapers); Seth Lipsky, Op-Ed., *All the News That's Fit to Subsidize*, WALL ST. J., Oct. 22, 2009, at A21 (suggesting that a government subsidy can hurt the integrity and independence of news media).

namics are riddled with collective action problems for both newspapers and subscribers that necessitate outside intervention.

#### A. Foundations for Government Newspaper Support

The American government has a long tradition of supporting the newspaper industry and public interest journalism. Although the Framers were staunch advocates of a free press, they largely believed that the government should help to facilitate the distribution of news and information throughout the country.<sup>93</sup> Consequently, postal subsidies for newspapers garnered widespread support in the early Congress.<sup>94</sup>

Under the Post Office Act of 1792, newspapers were given a significant subsidy for postal delivery.<sup>95</sup> Depending upon distance, newspaper postage ranged from one cent to one and a half cents, whereas regular letters cost anywhere from six to twenty-five cents to mail.<sup>96</sup> These prices remained essentially fixed for half a century<sup>97</sup> in spite of rising costs.<sup>98</sup> Additionally, newspapers were permitted to ask subscribers to pay for the newspapers' postage themselves, another mechanism which helped reduce upfront costs for publishers.<sup>99</sup>

The liberally phrased Post Office Act subsidy was open to all newspapers<sup>100</sup> (it was content-neutral) and was compatible with the Free Press Clause that the Framers had designed.<sup>101</sup> As they recognized, there is a substantial difference between regulation and legal subsidization: regulation abridges the freedom of the press, whereas subsidy supports it.<sup>102</sup> The postal subsidy they designed became an integral part of newspaper distribution, helping newspapers advance political discourse throughout the country.<sup>103</sup>

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<sup>93</sup> Richard B. Kielbowicz, *The Press, Post Office, and Flow of News in the Early Republic*, 3 J. EARLY REPUBLIC 255, 255–56, 278 (1983). Kielbowicz makes a point to distinguish that this fact “tends to confute the arguments of journalists and historians who believe that the free press clause was intended to prohibit any government involvement with the press.” *Id.* at 278.

<sup>94</sup> *Id.* at 257–58.

<sup>95</sup> Act of Feb. 20, 1792, ch. 7, § 22, 1 Stat. 232, 238.

<sup>96</sup> *Id.*

<sup>97</sup> Kielbowicz, *supra* note 93, at 263.

<sup>98</sup> For example, in 1798 the Postmaster General authorized the purchase of three ships to help deliver newspapers. *Id.* at 276.

<sup>99</sup> *Id.* at 259.

<sup>100</sup> *Id.* at 270.

<sup>101</sup> Notably, James Madison and other prominent Framers believed that the government should subsidize newspaper delivery *entirely*. *Id.* at 260.

<sup>102</sup> Downie & Schudson, *supra* note 4, at 44 (“While the First Amendment forbade the federal government from abridging freedom of the press, the founders’ commitment to broad circulation of public information produced policies that made a free press possible.”).

<sup>103</sup> The close relationship between the subsidy and the press contributed to John Calhoun’s declaration in Congress that “[t]he mail and the press are the nerves of the body politic.” Kielbowicz, *supra*

The government's support of news media was not limited to the country's formative years. Congress still provides special treatment to the media through antitrust exemption and various subsidies.<sup>104</sup> For example, the government directly subsidizes public radio and television.<sup>105</sup> In recent years, Congress has consistently appropriated approximately \$400 million annually to the Corporation for Public Broadcasting (CPB).<sup>106</sup> Both the amount of funding and the number of stations receiving federal support through the CPB have increased substantially since the CPB's founding in 1967.<sup>107</sup>

The government has intervened on behalf of newspapers in the modern era as well. In 1970, Congress passed the Newspaper Preservation Act,<sup>108</sup> which was designed to relieve competitive pressure on same-city newspapers by offering a limited antitrust exemption so that they could share various financial services while still maintaining independent editorial staffs.<sup>109</sup> In response, many newspapers entered into Joint Operating Agreements (JOAs), although the number has declined in recent years.<sup>110</sup>

In sum, the government has a substantial track record of supporting the press. More than 230 years of congressional practice support the idea that it is appropriate for the government to step in when the welfare of the Fourth Estate and public policy demand intervention.

### B. *Emerging Economic Reasons for Government Involvement*

The crisis facing the newspaper industry is ripe for government intervention for one more reason: a multifaceted collective action problem. Although news media typically solve a societal collective action problem for citizens by helping them spread information acquisition costs,<sup>111</sup> that relationship has recently been turned on its head. In fact, there is a compound collective action problem plaguing the industry and affecting both readers at one level and newspaper publishers at another.

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note 93, at 280 (citing KENDRIC CHARLES BABCOCK, *THE RISE OF AMERICAN NATIONALITY*, 1811–1819, at 252 (1906)).

<sup>104</sup> KIRCHHOFF, *supra* note 14, at 1.

<sup>105</sup> *Future of Newspapers*, *supra* note 19, at 9 (statement of Dr. Paul Starr, Woodrow Wilson School at Princeton University).

<sup>106</sup> Downie & Schudson, *supra* note 4, at 35.

<sup>107</sup> GLENN J. MCLOUGHLIN, CONG. RESEARCH SERV., RS22168, *THE CORPORATION FOR PUBLIC BROADCASTING: FEDERAL FUNDING FACTS AND STATUS 2–4* (2007).

<sup>108</sup> 15 U.S.C. § 1801 (2006).

<sup>109</sup> KIRCHHOFF, *supra* note 14, at 3.

<sup>110</sup> *Id.* The reduction in JOAs may be a product of the failure of the Newspaper Preservation Act to make a substantial difference. See POWE, *supra* note 66, at 219 (writing that, despite Congress's intentions, the Newspaper Preservation Act "does not appear to have done much to harm or to help newspaper competition").

<sup>111</sup> Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 26 (1996) ("Newspapers help people overcome collective action problems in acquiring information, a classic public good."); see also *supra* note 65 and accompanying text.



The first collective action problem is that mainstream newspapers are stuck in an unprofitable prisoner's dilemma: most give away content for free online (and lose money as a result) but are unable to change because of the ubiquity of free news elsewhere online. Although niche content providers like the *Wall Street Journal* are able to demand revenue for their content, they are the exception to the rule.<sup>112</sup> Most papers are unable to act individually on this issue, especially because of the extent to which much of the news is inherently fungible.<sup>113</sup> These newspapers are acutely aware that most consumers will simply switch to other free news sources if they are asked to pay for news content.<sup>114</sup> To the extent that private market actors like Google have started to experiment with new monetization strategies in this arena, there is little evidence that they show any promise for monetizing public interest journalism specifically.<sup>115</sup>

The second collective action problem is that citizens recognize the value of news but no longer want to pay for it. Public opinion data highlight this disparity. Although 62% of Americans think that the press helps to keep politicians from doing "things that should not be done,"<sup>116</sup> only 33% say that they would "miss reading the local newspaper a lot if it were no longer available," including online news,<sup>117</sup> and only 14% would "ever pay to read newspaper articles online."<sup>118</sup> The proliferation of ubiquitous free

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<sup>112</sup> Downie & Schudson, *supra* note 4, at 33. The *Wall Street Journal* has a different audience than a general interest newspaper because of its orientation within the financial sector. See Jessica E. Vascelaro & Elizabeth Holmes, *Niche Web Sites Buck Media Struggles*, WALL ST. J., Mar. 2, 2009, at B5 (explaining growth in small websites that cater to focused, niche subjects and audiences).

<sup>113</sup> KIRCHHOFF, *supra* note 14, at 16 ("Without joint action, readers will simply turn to other online information."); see also Simon, *supra* note 40, at 37 ("No one can act [to put up a pay wall] if the [*New York Times*] and the [*Washington Post*] do not; the unique content of even a functional regional newspaper—state and municipal news, local sports and culture—is insufficient to demand that readers pay online.").

<sup>114</sup> Simon, *supra* note 40, at 36–37. For public opinion data showing that Internet users will not pay for content, see *83% Won't Pay for Newspaper Articles Online*, S.F. PENINSULA PRESS CLUB (Aug. 20, 2009, 12:14 AM), <http://sfppc.blogspot.com/2009/08/83-wont-pay-for-newspaper-articles.html>; and see Robert Andrews, *PCUK/Harris Poll: Only Five Percent of Readers Would Pay For Online News*, PAIDCONTENT:UK, (Sept. 20, 2009, 7:00 PM), <http://paidcontent.co.uk/article/419-pcukharris-poll-only-five-percent-of-readers-would-pay-for-online-news/>, which reports that only 5% of users in Britain would pay for online news, and that 74% would simply turn to free news alternatives instead.

<sup>115</sup> See James Fallows, *How to Save the News*, ATLANTIC, June 2010, at 44, 56 (describing how Google's work on news monetization has ignored the "vast" problem "which involves the public function of the news in the broadest sense").

<sup>116</sup> Pew Research Ctr. for the People & the Press, *Strong Support for Watchdog Role, Despite Public Criticism of News Media*, PEW RESEARCH CTR. (Oct. 2, 2009), <http://pewresearch.org/pubs/1364/strong-support-for-watchdog-role-despite-public-criticism-of-news-media>.

<sup>117</sup> Press Release, Pew Research Ctr. for the People & the Press, *Many Would Shrug if Their Local Newspaper Closed* (Mar. 12, 2009), <http://people-press.org/reports/pdf/497.pdf>. Note the stark contrast between this number and the statistic that "75% of adults read the paper weekly in print or online." KIRCHHOFF, *supra* note 14, at 13.

news online has made it significantly easier to free-ride on paying subscribers.

Part of this issue undoubtedly stems from the fact that public policy benefits in the form of watchdog reporting and political participation are not easily commercialized. As C. Edwin Baker observed:

Some of the media's major contributions, such as deterring corruption, do not even produce a product for it to sell. When the media's negative and positive contributions are external to market exchanges, market-oriented media enterprises will not, or at least not fully, take account of the value that people place on the media's contribution to what each person considers a well-functioning democratic order.<sup>119</sup>

In that same vein, another contributing factor is likely that the public is simply unaware of the extent to which newspapers support the entire news infrastructure in America.<sup>120</sup> The preponderance of free content shields the public from the true costs of news production.<sup>121</sup> As a result, citizens may be unreasonably confident that other news media could satisfy their needs (whether for basic content or more abstract services like watchdog reporting) if newspapers were to go out of business.

Given the importance of public interest journalism, this situation is ripe for government action. Law and economics literature prescribes that free-rider problems require government intervention in order to avoid underproduction of information in the market.<sup>122</sup> Because the public good in question is inherently difficult for the market to value, government intervention is especially necessary in the case of newspapers.

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<sup>118</sup> S.F. Peninsula Press Club, *supra* note 114. More robust studies on the subject have been performed in the United Kingdom. One found that only 5% of U.K. residents would consider paying for news content online, and that 74% would simply turn to another free site instead. Andrews, *supra* note 114. Another study found that 91% were unwilling to pay. Sara Kimberley, *UK Consumers Won't Pay for Web News, Report Says*, *MEDIAWEEK* (Oct. 20, 2009, 11:05 AM), <http://www.mediaweek.co.uk/news/rss/946829/UK-consumers-wont-pay-web-news-report-says/>. In contrast, one study found that up to 40% of users might be willing to pay for news content. Press Release, J.D. Power & Assocs., *Online Commentary Indicates Consumer Willingness to Pay for Online News* (Mar. 18, 2009), <http://businesscenter.jdpower.com/JDPACContent/CorpComm/News/content/Releases/pdf/2009042.pdf>. However, this report focused on a heavily Internet-savvy part of the population (bloggers), making it much less predictive of the broader market than the other, less optimistic surveys.

<sup>119</sup> Baker, *supra* note 51, at 360.

<sup>120</sup> See *supra* Part II.A.

<sup>121</sup> This is especially true since derivative content users are able to piggyback on newspapers, which shoulder the bulk of reporting costs. KIRCHHOFF, *supra* note 14, at 9; see also Dan Marburger & David Marburger, *Reviving the Economic Viability of Newspapers and Other Originators of Daily News Content* 34–35 (2009) (unpublished manuscript), <http://www.bakerlaw.com/files/Uploads/Documents/News/Articles/MainAnalysis.pdf> (explaining this problem in the particular case of online news aggregators).

<sup>122</sup> ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 112–16 (1986).

#### IV. PROPOSED LEGAL REMEDIES TO SAVE NEWSPAPERS AND PUBLIC INTEREST JOURNALISM

Considering the significance of the newspaper industry's problems, it is not surprising that Congress has contemplated action on the issue. Both the Joint Economic Committee and the Senate Subcommittee on Communications, Technology, and the Internet have held hearings to discuss the future of newspapers and journalism.<sup>123</sup> In March 2009, Senator Benjamin Cardin introduced the Newspaper Revitalization Act in the Senate<sup>124</sup> while Representative Carolyn Maloney introduced companion legislation in the House.<sup>125</sup> The bill aimed to assist struggling newspaper companies by allowing them to easily convert into § 501(c)(3) nonprofit status.<sup>126</sup> However, the legislation was fairly controversial<sup>127</sup> and stalled in Congress.<sup>128</sup>

Many other public policy proposals have emerged for addressing the newspaper crisis. These ideas have been advanced through blogs,<sup>129</sup> books,<sup>130</sup> white papers,<sup>131</sup> law review articles,<sup>132</sup> periodicals,<sup>133</sup> and, of

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<sup>123</sup> *Future of Journalism*, *supra* note 39; *Future of Newspapers*, *supra* note 19.

<sup>124</sup> Newspaper Revitalization Act, S. 673, 111th Cong. (2009).

<sup>125</sup> Newspaper Revitalization Act, H.R. 3602, 111th Cong. (2009).

<sup>126</sup> 155 CONG. REC. S3659 (daily ed. Mar. 24, 2009) (statement of Sen. Benjamin Cardin).

<sup>127</sup> *See, e.g., Ink-Stained Politicians*, *supra* note 92.

<sup>128</sup> Downie & Schudson, *supra* note 4, at 34 (noting that the Newspaper Revitalization Act has "not moved anywhere in Congress").

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

<sup>130</sup> *See, e.g., Jones*, *supra* note 29; ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* (2010).

<sup>131</sup> *See, e.g., Downie & Schudson*, *supra* note 4, at 29; Marion R. Fremont-Smith, *Can Nonprofits Save Journalism? Legal Constraints and Opportunities*, JOAN SHORENSTEIN CENTER ON PRESS, POL. & PUB. POL'Y (2009), [http://www.hks.harvard.edu/presspol/publications/papers/can\\_nonprofits\\_save\\_journalism\\_fremont-smith.pdf](http://www.hks.harvard.edu/presspol/publications/papers/can_nonprofits_save_journalism_fremont-smith.pdf); Marburger & Marburger, *supra* note 121; Pickard, Stearns & Aaron, *supra* note 30.

<sup>132</sup> *See, e.g., Clay Calvert, Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661 (2009); Candeub, *supra* note 64; Ryan T. Holte, Comment, *Restricting Fair Use to Save the News: A Proposed Change in Copyright Law to Bring More Profit to News Reporting*, 13 J. TECH. L. & POL'Y 1 (2008).

<sup>133</sup> *See, e.g., Isaacson*, *supra* note 11, at 30–33; Nichols & McChesney, *supra* note 43; Ken McIntyre, *Death of Newspapers Does Not Mean Death of Journalism*, U.S. NEWS & WORLD REP., May 8, 2009, <http://www.usnews.com/articles/opinion/2009/05/08/death-of-newspapers-does-not-mean-the-end-of-journalism.html>.

course, newspapers themselves.<sup>134</sup> Regrettably, there has been surprisingly little comparative analysis to help evaluate these ideas.<sup>135</sup>

In general, leading proposals can be organized into three primary groups. First, Congress could expand misappropriation and copyright law to more fully protect news content online, or both. Second, Congress could extend direct spending (or a “bailout”) to the newspaper industry. Third, Congress could take a more muted approach by extending a tax subsidy.

### A. *Property Law*

1. *Marburgers’ Proposal.*—One idea that has attracted attention in legal circles is the suggestion that Congress should extend the intellectual property rights of newspapers. Although various scholars have discussed this proposal in slightly different forms,<sup>136</sup> it has been most thoroughly advanced by David and Daniel Marburger.<sup>137</sup> The Marburgers argue that newspapers do not have an adequate remedy to combat the growing number of Internet sites that post newspapers’ content with only negligible alterations or original commentary.<sup>138</sup> They refer to such websites as “parasitic aggregators” because the sites are effectively able to siphon ad revenue from the newspapers by free-riding on their original journalism.<sup>139</sup>

While it may seem intuitive that newspapers would have copyright recourse for such appropriations of their content, they do not. The 1976 Copyright Act protects an author’s original expression of information but not the ideas or facts themselves.<sup>140</sup> Although a compilation of facts may be

<sup>134</sup> See, e.g., Michael Kinsley, *You Can’t Sell News by the Slice*, N.Y. TIMES, Feb. 9, 2009, at A27; Bruce W. Sanford & Bruce D. Brown, *Laws that Could Save Journalism*, WASH. POST, May 16, 2009, at A15, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/15/AR2009051503000.html>; David Swensen & Michael Schmidt, Op-Ed., *News You Can Endow*, N.Y. TIMES, Jan. 27, 2009, at A31.

<sup>135</sup> The most regarded comparative study, which was commissioned by the Columbia School of Journalism, resulted in no fewer than six proposals of its own. See Downie & Schudson, *supra* note 4, at 45–51. Other reports make few, but very broad, recommendations. See, e.g., GEOFFREY COWAN & DAVID WESTPHAL, PUBLIC POLICY AND FUNDING THE NEWS 3 (2010), available at [http://fundingthenews.usc.edu/docs/Funding%20the%20News\\_report-optimized.pdf](http://fundingthenews.usc.edu/docs/Funding%20the%20News_report-optimized.pdf).

<sup>136</sup> See Holte, *supra* note 132, at 3 (suggesting that journalists and their companies be allowed to own 98% of their researched and uncovered facts for twenty-four hours after publication); David Marburger & Dan Marburger, Op-Ed., *Internet Parasites: Websites Protected by Copyright Law Are Killing Newspapers by Sucking Up Content that Is Gathered at a Hefty Cost*, L.A. TIMES, Aug. 2, 2009, at A28 (discussing the need for Congress to prevent free-riding by media competitors); Sanford & Brown, *supra* note 134 (proposing a “recovery act” to help the newspaper industry); Posner, *supra* note 10 (proposing an expansion of copyright law to prevent online access of, or reference to, copyrighted materials without the consent of the copyright holder).

<sup>137</sup> Marburger & Marburger, *supra* note 121.

<sup>138</sup> *Id.* at 1.

<sup>139</sup> *Id.*

<sup>140</sup> 17 U.S.C. § 102(b) (2006); see also 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11[A] (2009) (explaining that facts are not considered to be “created by an act of au-

sufficiently original to be copyrighted,<sup>141</sup> the Supreme Court has held that derivative users may nevertheless copy facts directly from a source without infringing upon its copyright.<sup>142</sup> Moreover, the Copyright Act explicitly allows the fair use of copyrighted materials for the purposes of “news reporting.”<sup>143</sup> In sum, existing copyright law does not prevent parasitic aggregators from free-riding on original newspaper journalism.<sup>144</sup>

Instead, the Marburgers turn to misappropriation law.<sup>145</sup> They draw upon the seminal Supreme Court case *International News Service v. Associated Press*<sup>146</sup> as evidence that misappropriation law could help resolve such free-riding problems. In that case, employees at the International News Service (INS), a competitor to the Associated Press (AP),<sup>147</sup> took stories from the early editions of AP newspapers and then copied or rewrote them before selling them to INS subscribers.<sup>148</sup> The Court ruled that AP had a quasi-property right in its stories that it could use against INS, even after the news had been published for public consumption.<sup>149</sup> Consequently, the Court affirmed the appellate court’s decision that AP should have a limited

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thorship” and are thus not protectable by copyright). This prohibition on copyright for facts includes the “news of the day.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 348 (1991).

<sup>141</sup> *Feist*, 499 U.S. at 348.

<sup>142</sup> *Id.* at 349 (“Notwithstanding a valid copyright, a subsequent compiler remains free to use the facts contained in another’s publication to aid in preparing a competing work, so long as the competing work does not feature the same selection and arrangement. As one commentator explains it: “[N]o matter how much original authorship the work displays, the facts and ideas it exposes are free for the taking . . . . [T]he very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers, even if the author was the first to discover the facts or to propose the ideas.” (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990))).

<sup>143</sup> 17 U.S.C. § 107. It should be noted, however, that the statute identifies factors for consideration to determine whether a particular case qualifies as a fair use, including “whether such use is of a commercial nature or is for nonprofit educational purposes.” *Id.* § 107(1). This factor could potentially be used to argue that, as competing commercial entities, parasitic aggregators do not deserve fair use protection. See Collette Leland, Note, *All’s Fair in Love and News: How the Current Application of the Fair Use Doctrine Favors the Traditional Media over Amateur Providers of News Content*, 8 WAKE FOREST INTELL. PROP. L.J. 226, 248–54 (2008) (describing how the Ninth Circuit has narrowly interpreted the scope of “news reporting” fair use in cases of unauthorized uses of video news content by competing news organizations). But see Marburger & Marburger, *supra* note 121, at 15–16, 21–22 (describing how parasitic aggregators rewrite stories, thereby skirting any protection of copyright in the first place, since they are no longer using the original language of the original news source).

<sup>144</sup> Marburger & Marburger, *supra* note 121, at 21–22.

<sup>145</sup> Misappropriation is “the common-law tort of using the noncopyrightable information or ideas that an organization collects and disseminates for a profit to compete unfairly against that organization, or copying a work whose creator has not yet claimed or been granted exclusive rights in the work.” BLACK’S LAW DICTIONARY 1088 (9th ed. 2009).

<sup>146</sup> 248 U.S. 215 (1918).

<sup>147</sup> The Court explained that “the parties are in the keenest competition between themselves in the distribution of news throughout the United States.” *Id.* at 230.

<sup>148</sup> *Id.* at 231.

<sup>149</sup> *Id.* at 236.

monopoly over its news, which should last until the stories' commercial value was exhausted.<sup>150</sup>

Thus, the Court's decision in *INS v. AP* effectively recognized a new misappropriation cause of action.<sup>151</sup> After the opinion, the term "hot news" was coined to describe the kinds of breaking news that were at issue in the case, the news that deserved protection because it still had value.<sup>152</sup> Although the Court declined to specify how long AP's limited monopoly should last (i.e., how long the news was "hot"),<sup>153</sup> later courts have shed light on that issue.<sup>154</sup>

As the Marburgers note, there is some ambiguity about whether misappropriation law is still valid today.<sup>155</sup> At the federal level, it is not; federal misappropriation doctrine was eradicated along with the rest of federal common law by the landmark *Erie* decision.<sup>156</sup> The more complex issue is the extent to which state misappropriation law<sup>157</sup> is preempted by the 1976 Copyright Act.<sup>158</sup>

Section 301 of the Copyright Act preempts "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright."<sup>159</sup> Although Congress originally had an exemption for misappropriation law in its drafts for section 301, Congress removed it upon the

<sup>150</sup> *Id.* at 245.

<sup>151</sup> *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 532 (1935) (writing that the *INS v. AP* decision expanded the common law of unfair competition "to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor"); see also Howard B. Abrams, *Copyright, Misappropriation and Preemption: Constitutional and Statutory Limits of State Law Protection*, 1983 SUP. CT. REV. 509, 513 (describing how *INS v. AP* "is usually regarded as firmly establishing the misappropriation doctrine").

<sup>152</sup> Rex Y. Fujichaku, Note, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421, 421–22 & n.5 (1998) (describing the development of the concept of "hot news").

<sup>153</sup> *Int'l News Serv.*, 248 U.S. at 245.

<sup>154</sup> See, e.g., *NBA v. Motorola, Inc.*, 105 F.3d 841, 853 (2d Cir. 1997) (ruling that information must be "time-sensitive" in order to receive protection); *Fin. Info., Inc. v. Moody's Investors Serv.*, 808 F.2d 204, 209 (2d Cir. 1986) (holding that information which is ten days old is not hot news); *X17, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1106 (C.D. Cal. 2007) (agreeing with the *NBA* interpretation of hot news and highlighting that "the value of 'hot news' depends entirely on its being timely published").

<sup>155</sup> Marburger & Marburger, *supra* note 121, at 45–46.

<sup>156</sup> See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74 (1938) (putting an end to federal common law).

<sup>157</sup> See Edmund J. Sease, *Misappropriation Is Seventy-Five Years Old: Should We Bury It or Revive It?*, 70 N.D. L. REV. 781, 801–02 (1994) (identifying fourteen states which at one time have adopted misappropriation doctrine).

<sup>158</sup> See NIMMER, *supra* note 140, § 1.01[B][1][f] (discussing state law misappropriation preemption generally); see also Katherine F. Horvath, Comment, *NBA v. Motorola: A Case for Federal Preemption of Misappropriation?*, 73 NOTRE DAME L. REV. 461, 480–83 (1998) (comparing contrasting misappropriation verdicts).

<sup>159</sup> 17 U.S.C. § 301(a) (2006).

advice of the Justice Department.<sup>160</sup> However, the ensuing debate and House Report leave unresolved the question of whether Congress intended to preempt state common law.<sup>161</sup> Further complicating the issue, the Supreme Court later asserted in dicta that *INS v. AP* had been decided on “noncopyright grounds,” suggesting that misappropriation claims should not be preempted after all.<sup>162</sup> The Marburgers argue that this has left misappropriation doctrine cloudy.<sup>163</sup>

Most courts have followed the Second Circuit’s influential *NBA v. Motorola, Inc.*<sup>164</sup> decision and imposed an “extra element” requirement to qualify for hot news protection.<sup>165</sup> These factors considerably narrow the scope of hot news misappropriation doctrine.<sup>166</sup> However, not all courts have looked favorably upon the extra element test,<sup>167</sup> and others never recognized misappropriation to begin with.<sup>168</sup> Thus, the Marburgers contend that “[t]he question remains murky . . . and for that reason is expensive to litigate and too unpredictable.”<sup>169</sup>

In response to this uncertainty, the Marburgers champion a return to a form of misappropriation protection for newspapers. They propose that Congress amend section 301 to clearly exempt state misappropriation law

<sup>160</sup> Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 424 (1983); Marburger & Marburger, *supra* note 121, at 45.

<sup>161</sup> Baird, *supra* note 160, at 424 (citing the confusing floor debate, 122 CONG. REC. 32,015 (1976)); *see also* Katherine F. Horvath, *supra* note 158, at 477 (citing the House Report in question, H.R. REP. NO. 94-1476 (1976), at 132, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5748). For an excellent summary of the peculiar legislative history of Section 301, *see* Abrams, *supra* note 151, at 537–48.

<sup>162</sup> *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 n.\* (1991).

<sup>163</sup> Marburger & Marburger, *supra* note 121, at 45–46.

<sup>164</sup> *NBA v. Motorola, Inc.*, 105 F.3d 841, 850–53 (2d Cir. 1997).

<sup>165</sup> The extra element test looks for an extra element that “changes the nature of the action so that it is *qualitatively* different from a copyright infringement claim” (thereby distinguishing it from preemption). *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985); *see also* 2 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 15:8 (4th ed. 2005) (writing that the extra element test has become “almost universal”); NIMMER, *supra* note 140, § 1.01[B][1] (2009) (describing the development of the extra element test). Although there have been relatively few hot news cases since the *NBA* decision, for more recent examples *see XI7, Inc. v. Lavandeira*, 563 F. Supp. 2d 1102, 1107 (C.D. Cal. 2007), which relied on the extra element test; and *Fred Wehrenberg Circuit of Theatres, Inc. v. Moviefone, Inc.*, 73 F. Supp. 2d 1044, 1049 (E.D. Mo. 1999), which concluded from the legislative history that Congress did not intend for federal copyright law to preempt state doctrines protecting hot news from misappropriation.

<sup>166</sup> VICTORIA SMITH EKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE 142–43 (2005).

<sup>167</sup> *See, e.g., Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 271 F. Supp. 2d 737, 756 (D. Md. 2003) (writing that the extra factors are not meaningful because they “merely define pre-existing conditions”).

<sup>168</sup> *See, e.g., Triangle Publ’ns, Inc. v. New Eng. Newspaper Pub. Co.*, 46 F. Supp. 198, 203 (D. Mass. 1942) (“Except where there has been a breach of trust or contract it is not unfair competition in Massachusetts to use information assembled by a competitor.” (citations omitted)).

<sup>169</sup> Marburger & Marburger, *supra* note 121, at 46; *see also* EKSTRAND, *supra* note 166, at 149 (“[B]ecause free-riding is about copying, the question of preemption will also linger.”).

from preemption,<sup>170</sup> arguing that such a change would force parasitic aggregators to appropriately license content or face debilitating injunctions.<sup>171</sup>

2. *The Problems of the Property Law Approach.*—The Marburgers’ proposal thoroughly examines the plight of the newspaper industry and offers a novel, straightforward congressional solution based upon prior Supreme Court doctrine.<sup>172</sup> Unfortunately, there is little evidence to suggest that parasitic aggregators actually have a significant effect on ad revenue for newspaper websites,<sup>173</sup> indicating that the proposal would not be a meaningful remedy for the newspaper crisis. In addition, the application of hot news protection is extremely problematic in the digital space, where traditional news consumption patterns no longer apply.

The absence of historical litigation in states that have traditionally recognized hot news misappropriation (in spite of the 1976 Copyright Act) suggests that the Marburgers’ assessment of the threat posed by parasitic aggregators may be exaggerated. For example, New York has clearly recognized hot news misappropriation ever since 1986.<sup>174</sup> Yet in spite of that record, it appears that only one lawsuit has been brought against a news aggregator under that cause of action.<sup>175</sup> It seems unlikely that there would be only one suit brought if newspapers were truly at risk of being forced out of

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<sup>170</sup> Marburger & Marburger, *supra* note 121, at 46. They suggest that law should be substantively changed to say “[t]he Copyright Act does not preempt statutory or common law unfair competition or remedy for unjust enrichment, regardless of whether contested publication infringes copyright.” *Id.* at 4.

<sup>171</sup> *Id.* at 47–48.

<sup>172</sup> The Marburgers’ proposed change to the Copyright Act could be made by adding only one sentence. See Marburger & Marburger, *supra* note 136.

<sup>173</sup> See, e.g., Nick Bilton, *The A.P.’s Real Enemies Are Its Customers*, N.Y. TIMES BITS (Apr. 7, 2009, 2:05 PM), <http://bits.blogs.nytimes.com/2009/04/07/the-aps-real-enemies-are-its-customers/> (explaining that it is unlikely that aggregators are responsible for anything more than a “meager” amount of revenue loss).

<sup>174</sup> *Fin. Info., Inc. v. Moody’s Investors Serv.*, 808 F.2d 204, 209 (2d Cir. 1986) (noting that hot news misappropriation is “a branch of the unfair competition doctrine not preempted by the Copyright Act according to the House Report”).

<sup>175</sup> See *Associated Press v. All Headline News Corp.*, 608 F. Supp. 2d 454, 461 (S.D.N.Y. 2009) (recognizing a hot news misappropriation cause of action against a news aggregator but citing no prior cases involving news aggregators). This case was settled out of court. See Press Release, Associated Press, AP and AHN Media Settle AP’s Lawsuit Against AHN Media and Individual Defendants (July 13, 2009), [http://www.ap.org/pages/about/pressreleases/pr\\_071309a.html](http://www.ap.org/pages/about/pressreleases/pr_071309a.html). In their recent amicus filing in a case related to hot news protection for financial information, a collection of newspapers cited only this single case in which hot news was used as a cause of action. Brief Amici Curiae of Advance Publications, Inc., et al., Not in Support of Any Party at 10, *Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, No. 10-1372-cv (2d Cir. argued Aug. 6, 2010), 2010 WL 2589767, at \*10.



business,<sup>176</sup> even if confusion about the hot news doctrine did have a chilling effect on litigation.<sup>177</sup>

Misappropriation is meant to address free-rider problems associated with news aggregators, but the lack of activity under misappropriation theory suggests that the negative impact of aggregators may be overstated. Indeed, many analysts in the online community have observed that news sites get a considerable amount of traffic from aggregator referrals<sup>178</sup> and actually take steps to *give* aggregators their content.<sup>179</sup> This seems consistent with emerging digital intellectual property theory, which posits that content owners would profit more by leveraging digital technology and engaging with new markets, rather than by trying to police their intellectual property rights against ever growing numbers of digital users.<sup>180</sup>

A second challenge in applying misappropriation theory is that the concept of hot news does not reasonably fit within the digital context, where content derives “long tail” value.<sup>181</sup> News consumption is very different via the Internet today than it was via the newspaper eighty years ago. News consumers no longer have to wait from one day’s paper to the next to get their news; now they can obtain it on demand from the Internet. As a result, news consumption is becoming a more gradual, curiosity-driven process, as people increasingly follow links from e-mails or websites to get their news rather than turning to news organizations as a first point of contact.<sup>182</sup> Thus, news tends to spread “virally” online, a fundamental shift in

<sup>176</sup> The Marburgers suggest that the impact of continued aggregation will be the bankruptcy of newspapers generally. See Marburger & Marburger, *supra* note 121, at 38 (“If the law does not change, newspapers continually will diminish their journalistic resources until they can subsist only by under-producing news or until they go out of business.”).

<sup>177</sup> See *supra* note 169 and accompanying text.

<sup>178</sup> See Heather Dougherty, *Online News Aggregators—Friend or Foe?*, HITWISE (Apr. 8, 2009, 3:41 PM), [http://weblogs.hitwise.com/heather-dougherty/2009/04/online\\_news\\_aggregators\\_friend.html](http://weblogs.hitwise.com/heather-dougherty/2009/04/online_news_aggregators_friend.html) (“Although several of the online aggregators are at the heart of the content distribution argument, they do successfully send visits to news properties rather than keeping them upon their own websites.”).

<sup>179</sup> As the Marburgers admit, many newspapers willingly distribute their content via RSS feeds with the hope of driving up greater hit rates. Marburger & Marburger, *supra* note 121, at 17–18.

<sup>180</sup> Olufunmilayo B. Arewa, *YouTube, UGC, and Digital Music: Competing Business and Cultural Models in the Internet Age*, 104 NW. U. L. REV. 431, 473 (2010) (“[R]ather than using copyright to attempt to smash unauthorized black markets, industry players would likely profit more from acknowledging the existence of such markets, taking such markets as indicators of what users actually want, and developing business models to accommodate user desires.”).

<sup>181</sup> Chris Anderson originally coined the term “long tail” in 2004 to describe how the Internet enables content companies to cheaply deliver older, sometimes niche content to consumers, whereas it would not have been practical for them to do so in a brick and mortar environment. See Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, at 170, available at <http://www.wired.com/wired/archive/12.10/tail.html>.

<sup>182</sup> PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, AUDIENCE SEGMENTS IN A CHANGING NEWS ENVIRONMENT: KEY NEWS AUDIENCES NOW BLEND ONLINE AND TRADITIONAL SOURCES 17–18 (2008), available at <http://people-press.org/reports/pdf/444.pdf> (describing this shift broadly). A “solid

news distribution.<sup>183</sup> Whereas “[t]raditional news cycles are linear, viral news cycles are jagged and unpredictable as stories work their way through a complex mesh of social media nodes.”<sup>184</sup>

Innovative new research shows the significant variability in online news consumption. Recently, researchers at Cornell tracked more than 90 million articles and blog posts to measure how news memes (i.e., ideas) travel through the Internet, the first study of its kind.<sup>185</sup> While their data show that blogs (and aggregators) cover news stories closely behind traditional news sources, they reveal that blog traffic declines much more slowly for such stories.<sup>186</sup> Most stories continue to attract significant traffic for at least several days after they are posted.<sup>187</sup> This trend supports a long tail interpretation of news consumption, in which readership volume is spread over a longer period of time, rather than peaking when released and then dropping off quickly.<sup>188</sup> Additionally, in aggregate, news stories become popular and die out at various rates, especially relative to their coverage peaks.<sup>189</sup> Taken in light of viral-media scholarship that suggests spikes in online interest are largely erratic, these data are further evidence that online news consumption is both unique and very difficult to predict.

Accordingly, the common law understanding of linear hot news lacks relevance for the modern Internet news cycle. The variability associated with long tail patterns of online news consumption makes determination of the scope and length of the proposed hot news monopoly challenging.<sup>190</sup>

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majority” (64%) of young people “graze” news through links rather than specifically going to individual news sites. *Id.* at 24.

<sup>183</sup> See generally BILL WASIK, AND THEN THERE’S THIS: HOW STORIES LIVE AND DIE IN VIRAL CULTURE (2009) (discussing the emergence of “viral” phenomena in online and offline culture).

<sup>184</sup> Kirk Biglione, *The Viral News Cycle*, OXFORD MEDIA WORKS (Sept. 10, 2007), <http://oxfordmediaworks.com/blog/the-viral-news-cycle/>; see also WASIK, *supra* note 183, at 5 (describing the “vertiginous rises and falls” in online news cycles).

<sup>185</sup> Steve Lohr, *Key Words Tell the Life Cycle of a News Bit*, N.Y. TIMES, July 12, 2009, at B1, available at <http://www.nytimes.com/2009/07/13/technology/internet/13influence.html>.

<sup>186</sup> JURE LESKOVEC ET AL., MEME-TRACKING AND THE DYNAMICS OF THE NEWS CYCLE 7 fig.8 (2009), <http://memetracker.org/quotes-kdd09.pdf>.

<sup>187</sup> *Id.*; see, e.g., WASIK, *supra* note 183, at 2–3 (offering an example of a viral news story that continued to attract traffic for months).

<sup>188</sup> Wasik writes that on the Internet the “abundant, cheap distribution of facts means an abundant, cheap, and unlimited variety of narratives, on demand, all the time.” WASIK, *supra* note 183, at 167–68.

<sup>189</sup> LESKOVEC ET AL., *supra* note 186, at 5 fig.4. The authors describe how “the distribution of popular threads and their co-occurrence in time can be highly nonuniform, with periods lacking in high-volume threads punctuated by the appearance of popular threads close together in time.” *Id.* at 6.

<sup>190</sup> These problems extend both to commentators who advocate hot news extensions to misappropriation law, like the Marburgers, as well as to commentators who suggest hot news changes in copyright law. See Eric B. Easton, *Who Owns “The First Rough Draft of History?”: Reconsidering Copyright in News*, 27 COLUM. J.L. & ARTS 521, 553 (2004) (proposing an embargo of twenty-four hours or until the next issue is published, whichever comes later); Holte, *supra* note 132, at 32–33 (proposing a twenty-four-hour hot news embargo on fair use of news reporting); Marburger & Marburger, *supra* note 121, at 47 (writing that protection should last only “for a brief duration”). The underlying

The Marburgers might counter that they would leave it up to the courts to determine how long an embargo should last in each case, making their proposal slightly more flexible.<sup>191</sup> However, that argument is not persuasive because the variability of online news consumption would prevent the development of stable, predictable common law doctrine.<sup>192</sup> In other words, the erratic, viral nature of online news consumption would likely make a common law hot news embargo period just as capricious as a statutory one.

## B. Direct Spending

1. *Calvert Proposal.*—In the wake of Congress’s Wall Street “bail-out,” some scholars have argued that the newspaper industry deserves similar treatment, in the form of direct spending.<sup>193</sup> For example, media law scholar Clay Calvert has called for a one-time, lump-sum newspaper payout.<sup>194</sup> The idea is billed as a short-term, emergency solution.<sup>195</sup> Direct spending proposals are not merely exercises in academic postulating; at

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problem with both approaches is that courts have defined hot news as a linear concept, *see supra* note 154 and accompanying text, that does not adequately represent online news usage.

The topic of hot news enforcement also raises one other provocative problem: the “illicit” spread of factual information during an embargo. A hot news regime could result in a bizarre dichotomy where users could distribute breaking news content through largely unregulated viral sources during the embargo period (like e-mail and social networking sites) but could not easily read the content through mainstream, reliable news sources.

<sup>191</sup> Marburger & Marburger, *supra* note 121, at 46 (“We do not advocate enacting a statute that decrees some fixed period of time during which no one can rewrite an originator’s news report . . .”). They later note that “the body of common law made by judicial decisions ‘allows for a far greater variation to meet different circumstances.’ . . .” *Id.* at 49–50 (quoting Rudolph Callman, *He Who Reaps Where He Has Not Sown: Unjust Enrichment in the Law of Unfair Competition*, 55 HARV. L. REV. 595, 609 (1942)). *But see* Connie Shultz, *News Thefts Ought to Be Illegal: Tighter Copyright Laws Could Save Newspapers*, PLAIN DEALER (Cleveland), June 28, 2009, at G1 (reporting that the Marburgers favor a twenty-four-hour embargo specifically).

<sup>192</sup> This argument is further supported by several noteworthy critiques of common law misappropriation doctrine more broadly. *See, e.g.*, Richard A. Posner, *Misappropriation: A Dirge*, 40 HOUS. L. REV. 621, 639–41 (2003) (broadly critiquing misappropriation doctrine and asserting that a federal statutory misappropriation law would be preferable to common law); Fujichaku, *supra* note 152, at 475 (“Common law misappropriation, because of its potential to interfere with access to public domain material, its discredited ‘sweat of the brow’ theoretical justification, and its general amorphous nature, should be abolished in favor of a national statutory system which would take into account these concerns.”).

<sup>193</sup> *See* Calvert, *supra* note 132, at 666–67 (advocating for a one-time cash newspaper bailout); Lee C. Bollinger, *Journalism Needs Government Help*, WALL ST. J., July 14, 2010, at A19, available at <http://online.wsj.com/article/SB10001424052748704629804575324782605510168.html> (making the case for greater government spending on media); Rosa Brooks, *Bail Out Journalism*, L.A. TIMES, Apr. 9, 2009, at A31 (arguing for direct government support of newspapers).

<sup>194</sup> Calvert, *supra* note 132, at 661.

<sup>195</sup> *Id.* at 667.

least one direct spending subsidy has already been instituted at the state level.<sup>196</sup>

The most common concern with direct public media spending is that putting the press on the government's payroll would threaten its independence.<sup>197</sup> Indeed, Calvert acknowledges the potential for government intrusion into the editorial autonomy and independence of the press.<sup>198</sup> He contends, however, that the subsidy could be distributed in a content-neutral fashion, suggesting that the government could divide its relief grant among newspapers proportionally by circulation size (thereby eliminating opportunities for politicization in the allocation of money).<sup>199</sup> He also suggests that any resulting loss of watchdog independence<sup>200</sup> would still be a net positive when compared to the alternative of losing the watchdog altogether.<sup>201</sup>

2. *The Problems of the Bailout Approach.*—There are three primary reasons why direct spending to support newspapers is inadvisable. First, newspapers' funding needs are so great that the government would have to provide intensive oversight of the funds, which would necessitate involvement in the industry's operations. Although Calvert does not specify a spending target in his proposal, the government would almost certainly have to allocate billions of dollars to have a measurable impact on the industry. After all, the industry's revenue shortfall was projected to reach more than \$20 billion in 2010.<sup>202</sup>

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<sup>196</sup> The State of New Hampshire agreed to guarantee 75% of a \$250,000 loan to help support a local newspaper, the *Eagle Times*. John P. Gregg, *State to Fund Loan to Save Ailing Newspaper*, NASHUATELEGRAPH.COM (Nov. 10, 2009), <http://www.nashuatelegraph.com/News/427626-196/state-to-fund-loan-to-save-ailing.html>. Similarly, French President Nicolas Sarkozy announced a €600 million "bailout" for French newspapers that included doubling government advertising and free one-year newspaper subscriptions to French teenagers on their eighteenth birthdays. Angelique Chrisafis, *Sarkozy Hands €600m Aid to Press*, GUARDIAN, Jan. 24, 2009, at 24.

<sup>197</sup> Calvert describes this as the "perhaps the most troubling concern with any government infusion of monetary relief to the press." Calvert, *supra* note 132, at 680; see also Candeub, *supra* note 64, at 1610 ("Direct government involvement in media production produces controversial results . . .").

<sup>198</sup> Calvert, *supra* note 132, at 681.

<sup>199</sup> *Id.* at 679.

<sup>200</sup> Calvert admits that one of the primary concerns with direct spending is that newspapers will not want to bite the hands that feed them. *Id.* at 680–82. One recent study suggests that this is a very real concern. See Rafael Di Tella & Ignacio Franceschelli, *Government Advertising and Media Coverage of Corruption Scandals* 19–20 (Nat'l Bureau of Econ. Research, Working Paper No. 15402, 2009), available at <http://www.nber.org/papers/w15402.pdf> (reporting that the amount of unflattering newspaper coverage of the government went down as the amount of government newspaper advertising spending went up in Argentina). However, there is some question about the predictive value of such a study for the United States, which, unlike Argentina, does not have "high levels of corruption" and "weak legal systems." See *id.* at 19 ("The media is potentially important in exercising control over abusive government, particularly in countries with high levels of corruption and weak legal systems.").

<sup>201</sup> Calvert, *supra* note 132, at 682–83.

<sup>202</sup> Press Release, Outsell, Inc., Outsell, Inc. Projects Crippling \$20 Billion Revenue Shortfall for Newspaper Industry by 2010 (Oct. 23, 2006), [http://www.outsellinc.com/press/press\\_releases/newspaper\\_industry\\_faces\\_20\\_billion\\_revenue\\_shortfall](http://www.outsellinc.com/press/press_releases/newspaper_industry_faces_20_billion_revenue_shortfall).

The notion that Congress would be willing to extend so much money to newspapers with “no strings attached to editorial judgment or autonomy”<sup>203</sup> is almost unfathomable, especially considering the oversight measures that were imposed on both the auto and financial industries after their respective bailouts.<sup>204</sup> In both cases, the government has been heavily involved in restructuring, instituting bailout “czars” who have sweeping emergency powers. For instance, government “car czar” Steven Rattner personally fired General Motors CEO Rick Wagoner.<sup>205</sup> It would be irresponsible and unprecedented for the government to give billions of dollars of taxpayer money to private corporations without similar mechanisms for accountability and oversight. Yet an oversight relationship would undermine the newspapers’ ability to serve as independent watchdogs.

A second, more fundamental problem with the direct spending proposal is that Congress could not both respect the freedom of the press and ensure that newspapers maintain a commitment to public service journalism. As private corporations, newspapers have no legal obligation to act in the public interest; this has been demonstrated in practice by the disproportionate rate at which investigative journalists and political reporters have been fired during recent newspaper headcount reductions.<sup>206</sup> By suggesting that Congress should offer a subsidy with no content strings attached, Calvert assumes that the newspapers would resume spending on public service journalism, which is far from a foregone conclusion.

These issues are likely a driving force behind a third critical problem: direct spending on newspapers is politically impracticable. Neither newspaper publishers nor the general public wants government spending to support newspapers. As the President and CEO of the Newspaper Association of America (NAA), John Sturm, told the Joint Economic Committee, the NAA does not “believe direct government financial assistance is appropriate for an industry whose core mission is news gathering, analysis and dissemination.”<sup>207</sup> Public opinion data are even more damning, indicating that 80% of Americans oppose a newspaper bailout.<sup>208</sup> In sum, direct spending

<sup>203</sup> Calvert, *supra* note 132, at 684.

<sup>204</sup> See *About the Financial Stability Plan*, FINANCIALSTABILITY.GOV, <http://www.financialstability.gov/about/index.html> (last visited Oct. 26, 1010) (describing the Troubled Asset Relief Program (TARP) oversight structure). The Financial Stability Oversight Board and Special Inspector General for TARP provide general oversight of the TARP expenditures. See Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, §§ 104, 121, 122 Stat. 3765, 3770–71, 3788–89.

<sup>205</sup> Steven Rattner, *The Auto Bailout: How We Did It*, FORTUNE, Nov. 9, 2009, at 55, 64–66, available at [http://money.cnn.com/2009/10/21/autos/auto\\_bailout\\_rattner.fortune/index.htm?postversion=2009102109](http://money.cnn.com/2009/10/21/autos/auto_bailout_rattner.fortune/index.htm?postversion=2009102109).

<sup>206</sup> See *supra* notes 77–80 and accompanying text.

<sup>207</sup> *Future of Newspapers*, *supra* note 19, at 3 (statement of John Sturm, President and CEO, Newspaper Association of America).

<sup>208</sup> Mark Fitzgerald, *Little Public Support for Newspaper Industry Bailout, Poll Finds*, EDITOR & PUBLISHER (Sept. 23, 2009), <http://www.editorandpublisher.com/Departments/Top%20Stories/little-public-support-for-newspaper-industry-bailout-poll-finds-28668.aspx>.

is both an imprudent and implausible plan to combat the country's newspaper problem.

### C. Tax Subsidy

1. *The Newspaper Revitalization Act.*—Another congressional option for helping to protect newspapers is a tax subsidy. This approach has been the subject of multiple proposals to save the newspaper industry,<sup>209</sup> in part because of the U.S. government's tradition of subsidizing newspaper journalism.<sup>210</sup> The most prominent of these ideas is the Newspaper Revitalization Act, which was introduced in both the House<sup>211</sup> and Senate<sup>212</sup> in 2009.

The bill proposed to amend § 501 of the Internal Revenue Code to create “qualified newspaper corporations” as a new category of § 501(c)(3) nonprofits.<sup>213</sup> To be eligible for nonprofit status, newspapers would have to cover “local, national, and international news stories of interest to the general public” that were “educational in character.”<sup>214</sup> While qualified newspaper corporations would be allowed to include private advertisements under the bill, those ads could not exceed the amount of space given to educational content.<sup>215</sup>

Although there was very little congressional debate on the bill, both Representative Maloney and Senator Cardin offered commentary to contextualize it.<sup>216</sup> When he introduced the legislation, Senator Cardin noted that he did not expect qualified status to appeal to all newspapers since many would prefer to continue operating as for-profit corporations.<sup>217</sup> Those that were interested, however, could benefit from tax-exempt advertising and subscription revenues.<sup>218</sup> In return, Senator Cardin also noted, nonprofit newspapers would have to abide by a significant free speech limitation: they could not endorse political candidates, although they could still “freely report on all issues, including political races.”<sup>219</sup>

<sup>209</sup> See, e.g., Candeub, *supra* note 64, 1610–11 (suggesting a change in the tax code to allow charitable reporting driven by private contributions and tax deductions); Downie & Schudson, *supra* note 4, at 45–46 (arguing for broader interpretations of what kinds of news organizations would qualify for nonprofit status and advancing nonprofit journalism more broadly); Sanford & Brown, *supra* note 134 (advocating more favorable tax treatment for the press).

<sup>210</sup> See *supra* notes 93–103 and accompanying text.

<sup>211</sup> H.R. 3602, 111th Cong. (2009).

<sup>212</sup> S. 673, 111th Cong. (2009).

<sup>213</sup> *Id.* § 2(b).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* § 2(c).

<sup>216</sup> See 155 CONG. REC. S3659 (daily ed. Mar. 24, 2009) (statement of Sen. Cardin); *Future of Newspapers*, *supra* note 19, at 32 (statement of Rep. Maloney); Cardin, *supra* note 86.

<sup>217</sup> 155 CONG. REC. S3659 (statement of Sen. Cardin).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

2. *The Value of a Tax Subsidy Approach.*—A tax subsidy like the one in Senator Cardin’s plan carries significant advantages over the other proposals. First, it would not require a direct infusion of any taxpayer money,<sup>220</sup> which makes it significantly more politically palatable than direct spending.<sup>221</sup> Second, it would allow for a hybrid model of newspapers that could benefit from both ad revenue and private donations.<sup>222</sup>

Third, and most importantly, a nonprofit tax subsidy is most likely to ensure that overarching public policy goals are achieved. None of the other proposals has a substantive mechanism to ensure that the press continues to advance its twin aims of serving as a watchdog and facilitating political participation.<sup>223</sup> The IRS, though, has an established infrastructure in place to ensure that § 501(c)(3) organizations are serving the public good.<sup>224</sup> In other words, this tax subsidy strategy could focus directly upon the real policy issue at hand: the growing threat to public interest journalism. It is inherently optimized to help usher in a new era of journalism where the public’s interest in the Fourth Estate would not play second fiddle to shareholder desires for profit maximization.

A change to the tax code is necessary to ensure that newspapers may be viably structured as § 501(c)(3) organizations. Prior IRS rulings suggest that the agency would not otherwise recognize nonprofit newspaper publishing operations as distinguishable from commercial publishing practices.<sup>225</sup> Today, while some nonprofit newsgathering organizations do exist, they are structured in a way that distinguishes them from commercial news-

<sup>220</sup> Cardin, *supra* note 86.

<sup>221</sup> See *supra* note 204 and accompanying text.

<sup>222</sup> Donald Kimelman, Opinion, A “Hybrid” Path for Saving Newspapers, BOS. GLOBE, Apr. 20, 2009, at A11, available at [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/04/20/a\\_hybrid\\_path\\_for\\_saving\\_newspapers/](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/04/20/a_hybrid_path_for_saving_newspapers/).

<sup>223</sup> See *supra* notes 46–74 and accompanying text; see also *Future of Journalism*, *supra* note 39, at 86 (statement of David Simon) (“Newspapers actually shrunk prior to the arrival of the Internet, and they did so because they were not nonprofit. . . . The public interest, in their essence, was not the priority . . . . [T]o the extent that the nonprofit model can be brought to bear, that probably is the only future that’s going to get you there.”).

<sup>224</sup> Aside from a rigorous § 501(c)(3) application and approval process, the IRS maintains the Exempt Organizations Examinations program to monitor and audit tax-exempt organizations. See BRUCE R. HOPKINS, IRS AUDITS OF TAX-EXEMPT ORGANIZATIONS 2 (2008). The IRS has significant authority to police compliance. For example, it can retroactively revoke an organization’s tax-exempt status if it has engaged in a prohibited transaction that diverts the organization from its exempt purpose. *Id.* at 27 (citing I.R.C. § 7805(b)(8) (2006); Treas. Reg. § 301.7805-1(b) (1967); Treas. Reg. § 601.201(n)(6)(vii) (as amended 2002)).

<sup>225</sup> Richard Schmalbeck, *Financing the American Newspaper in the Twenty-First Century*, 35 VT. L. REV. 251, 255–56 (2010) (generally describing the IRS limitations regarding 501(c)(3) similarity to commercial entities); see also Memorandum from Cong. Research Serv. to Rep. Jim McDermott, Analysis of Whether a Newspaper Could Qualify as a § 501(c)(3) or § 501(c)(4) Organization 1–5 (Jan. 21, 2009) (writing that “the IRS and courts have previously denied tax-exempt status to organizations with significant publishing activities when those activities were indistinguishable from ordinary commercial practices”).

paper publishers. For example, the *Christian Science Monitor*, which, until recently, was published in print, “was operated as an educational and religious program of First Church of Christ, Scientist.”<sup>226</sup> Some newer startups maintain IRS separation from commercial publishers by publishing only on the Internet. For instance, the *MinnPost* and the *New Haven Independent* are § 501(c)(3) news organizations with public service missions that only publish content online.<sup>227</sup> Another startup, *ProPublica*, goes one step further: in addition to publishing investigative journalism stories on its website, it also gives them free of charge to corporate news media for wider distribution (including in print).<sup>228</sup>

These new startups, while encouraging, are all quite small<sup>229</sup> and are encumbered by the tax ambiguities surrounding the extent to which § 501(c)(3) news organizations can resemble their commercial counterparts.<sup>230</sup> They are also struggling to stay financially solvent, which is hardly surprising given their limited revenue streams of advertising, donations, and foundational support.<sup>231</sup> Critics suspect that under the status quo, these organizations will be limited in stature with few opportunities for growth.<sup>232</sup> This limitation should be a concern because of the important roles that size and presence play in the effectiveness of watchdog reporting.<sup>233</sup>

A variant of Senator Cardin’s bill could immediately help to improve those prospects by opening the channels for fully functional nonprofit media organizations. The government’s policy imperative to protect the public interest in news should easily outweigh any deference to the IRS’s ambiguous line of § 501(c)(3) demarcation. Indeed, the bifurcation of public interest journalism from commercial news media suggests that extending § 501(c)(3) benefits to qualified news organizations would protect public interest journalism without unduly threatening the for-profit media industry. The commercial news media have independently elected to cut down on public interest journalism precisely because it is too costly to produce.<sup>234</sup> Revising the § 501(c)(3) guidelines for news organizations would free these organizations from restrictions imposed by the IRS’s historical rulings,

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<sup>226</sup> Fremont-Smith, *supra* note 131, at 26.

<sup>227</sup> Memorandum from Cong. Research Serv. to Rep. Jim McDermott, *supra* note 225, at 4.

<sup>228</sup> Downie & Schudson, *supra* note 4, at 41.

<sup>229</sup> The largest, *ProPublica*, has a staff of fewer than three dozen people. *Id.* at 40–41.

<sup>230</sup> *See id.* at 46 (describing some of the outstanding questions about potential tax-exempt status for news organizations); *see also* Schmalbeck, *supra* note 225, at 263–65 (describing the tax “risks” that would confront a nonprofit news organization that tried to publish printed media).

<sup>231</sup> *See* Downie & Schudson, *supra* note 4, at 39.

<sup>232</sup> Nichols & McChesney, *supra* note 43, at 13–14.

<sup>233</sup> *See supra* note 86 and accompanying text.

<sup>234</sup> *See supra* Part II.D; *see also* Fallows, *supra* note 115, at 47 (describing the extent to which the unbundling of content on the Internet has caused newspapers to lose cross-subsidies from more profitable coverage that enabled them to support civic journalism).



which were issued in an earlier era when corporate news organizations were more dedicated to public interest journalism.

Lingering concerns regarding the classification of fully functional public interest news organizations as nonprofits should be further mitigated by analogy to the tax treatment of universities. Like the news media, universities help to educate the public. They also receive tax-exempt status from the federal government<sup>235</sup> in spite of the fact that they publish works that arguably compete with commercial publishers.<sup>236</sup> In sum, the passage of the Cardin bill would help to resolve the unnecessarily ambiguous tax guidelines surrounding nonprofit newspaper status.

3. *Deficiencies in the Newspaper Revitalization Act.*—Unfortunately, Senator Cardin’s bill had four issues that will need to be addressed when crafting future proposals. The first is that nonprofit status alone, while providing some cost relief, fails to address a major underlying problem: declining readership.<sup>237</sup> Without a reader incentive in place, downward trends in readership and advertising will likely continue, forcing nonprofit newspapers to rely upon extremely limited charitable contributions and foundational support to remain afloat.<sup>238</sup> Therefore, Senator Cardin’s next proposal would be vastly improved if it allowed tax deductions for subscriptions in addition to the usual deductions for charitable contributions. Doing so would lower subscription costs for the public and presumably encourage readership while raising revenue.

Under existing tax law, individuals are typically only able to deduct charitable contributions for gifts beyond any value that they have received from the charity.<sup>239</sup> Since newspapers are priced below production cost (customer prices are effectively subsidized by advertising), readers cannot presently claim subscription-based deductions for nonprofit news. How-

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<sup>235</sup> See, e.g., BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 268–70 (9th ed. 2007) (providing an overview of the tax treatment for universities).

<sup>236</sup> For instance, the Yale University Press has placed numerous books on the *New York Times* best-seller list. See Robert Pranzatelli, *A Brief History of Yale University Press*, YALE U. PRESS, <http://yalepress.yale.edu/yupbooks/about.asp> (last visited Jan. 14, 2011).

<sup>237</sup> See *supra* notes 13–14 and accompanying text.

<sup>238</sup> Existing foundational support for journalism is very low—donations totaled only \$128 million from 2005 to 2009. Downie & Schudson, *supra* note 4, at 42. Note that this is a mere fraction of the cost of operating a single major newspaper. See Swensen & Schmidt, *supra* note 134 (estimating that a major newsroom would require \$200 million a year); see also Pickard, Stearns & Aaron, *supra* note 30, at 14–15 (writing that Senator Cardin is overly hopeful that “citizens or foundations in communities across the nation would be willing to step in and preserve their local papers” (quoting Cardin, *supra* note 86)).

<sup>239</sup> I.R.S. Publication 526, at 3–4 (2008); see also BRUCE R. HOPKINS, *THE TAX LAW OF CHARITABLE GIVING* 605–07 (2005) (summarizing the law governing charitable deductions when donors receive value in return for their gifts).

ever, Congress could easily make an exception to this rule, as it has for collegiate athletic donations.<sup>240</sup>

Congress should extend a similar exception to news subscriptions by making both print and digital subscriptions to qualified public interest news organizations fully tax deductible (i.e., not limited to contributions in excess of value received). With this addition, a bill could help encourage subscribership, which is critical to ensure stable, consistent funding for watchdog reporting.<sup>241</sup> Moreover, it would effectively mitigate the effects of the existing consumer collective action problem<sup>242</sup> in two ways. First, it would immediately lower the costs of subscribership for the public. Second, it would make consumers more aware of the public value of public interest news. To encourage even broader readership, Congress should extend these deductions to all taxpayers rather than just itemizers. Otherwise, most nonitemizers would benefit from no readership incentive whatsoever.<sup>243</sup>

In addition, any future legislation should not include an arbitrary advertising cap.<sup>244</sup> As long as the news organization is serving a charitable purpose—in this case, providing public interest journalism—little justification exists for setting an advertising limit. The more important goal of maximizing public affairs coverage should take precedence. The cap in Senator Cardin’s bill would have unnecessarily burdened the government by requiring it to compare educational content with advertisements at a micro level.<sup>245</sup> At any rate, excessive advertising will likely drive away readers, which should help limit advertising.

Future legislation should also eliminate Senator Cardin’s former bill’s requirement that qualified news organizations carry coverage of community, national, and foreign affairs news. This arbitrary restriction would have excluded focused news organizations, thereby detracting from the overall goal of providing more public affairs coverage.<sup>246</sup> For example, lo-

<sup>240</sup> I.R.C. § 170(2)(C)(c)(2)(B) (2006); *see also* HOPKINS, *supra* note 239, at 656 n.9 (“When an individual makes a payment for the benefit of a college or university, which would be deductible as a charitable contribution but for the fact that the individual receives the right to purchase seating at an athletic event at the institution’s athletic stadium, 80 percent of the payment may be treated as a charitable contribution.” (citing I.R.C. § 170(1))).

<sup>241</sup> *See supra* Part II.B (describing the importance of consistency and presence for an effective media watchdog).

<sup>242</sup> *See supra* notes 112–22 and accompanying text. *See also* Downie & Schudson, *supra* note 4, at 46 (recommending that Congress not limit advertising income for nonprofit newspapers).

<sup>243</sup> More than 70% of non-itemizers choose to take the I.R.S. standard deduction under § 63(e) rather than itemized deductions for charitable contributions. *See* WALTER W. POWELL, *THE NONPROFIT SECTOR: A RESEARCH HANDBOOK* 279 (2006).

<sup>244</sup> *See supra* note 215 and accompanying text.

<sup>245</sup> Zachary M. Seward, *Non-profit News Outlets Deserve a Tax Exemption for Ad Revenue*, NIEMAN JOURNALISM LAB (Mar. 26, 2009, 9:00 AM), <http://www.niemanlab.org/2009/03/non-profit-news-outlets-deserve-a-tax-exemption-for-ad-revenue/> (writing that the legislation’s existing language would “exclude some publications”).

<sup>246</sup> *See id.* (describing problems with this requirement).

cal newspapers without the resources to provide federal or international content would have been ineligible for qualified newspaper status under the bill even though they could still help to enrich community engagement and deter wrongdoing by local politicians.

As a final recommended change, new legislation should be expanded to cover any news organization that pursues public interest journalism, regardless of its medium. While newspapers have a heightened ability to serve democracy relative to other media,<sup>247</sup> the government should be primarily interested in achieving the public interest ends, not the means. Newspapers have *traditionally* been responsible for the bulk of original journalism in this country, but the government should be open to new media innovation and willing to subsidize new media organizations that produce original public interest journalism in a meaningful way.

4. *Misguided Criticisms of the Senator Cardin’s Bill.*—Before concluding the analysis of this recent proposal, a few public criticisms of Cardin’s proposal should be addressed. Various commentators charged that the bill would have stifled political speech, that it would not have helped debt-saddled newspapers, and that nonprofit newspapers would not be successful. Although these criticisms have some foundation, they are all, in the end, misguided.

First, some critics lambasted Senator Cardin’s bill for not tactically explaining “how a newspaper that is losing money, especially one saddled with significant debt or other liabilities, could be converted into a viable nonprofit.”<sup>248</sup> That may be true, but it is likely for good reason. There is a significant public policy incentive *not* to bail out newspaper owners who have accrued too much debt<sup>249</sup> for their poor financing decisions: it would create a moral hazard.<sup>250</sup> Unlike some Wall Street banks,<sup>251</sup> no individual newspaper is “too big to fail.” Rather, newspapers are too important to fail collectively.

Therefore, the government should not be obliged to save every news organization that is at risk of going bankrupt. Instead, news companies

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<sup>247</sup> See *supra* Part II.

<sup>248</sup> Downie & Schudson, *supra* note 4, at 34.

<sup>249</sup> See JONES, *supra* note 29, at 161 (describing the heavy debt burdens assumed by newspaper owners like Sam Zell).

<sup>250</sup> Newspaper owners might be too willing to take on inadvisable amounts of debt due to the prospect that they could recover losses by restructuring into a nonprofit. See BARRY RITHOLTZ, *BAILOUT NATION: HOW GREED AND EASY MONEY CORRUPTED WALL STREET AND SHOOK THE WORLD ECONOMY* 161 (2009) (defining a moral hazard as “the prospect that a party insulated from risk may behave differently from the way they would if they were otherwise fully exposed to that risk” (quoting Allard E. Dembe & Leslie I. Boden, *Moral Hazard: A Question of Morality?*, 10 *NEW SOLUTIONS* 257–59 (2000))).

<sup>251</sup> See generally ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* (2009) (explaining why some banks were identified as too important to the global financial system to lose).

should be allowed to restructure as § 501(c)(3) organizations as they emerge from bankruptcy. This would avoid a moral hazard problem altogether. It could also accommodate the purposeful fragmenting of newspapers by publishers who want to jettison public interest journalism and instead focus on their more profitable operations (like sports).<sup>252</sup> The tactical transition for newspapers should be relatively straightforward, as a recent report has indicated.<sup>253</sup>

Second, other detractors have objected to the bill's restriction on political endorsements.<sup>254</sup> Indeed, under Cardin's proposal, charitable tax-exempt organizations could not have made political endorsements of any kind,<sup>255</sup> which seemingly could threaten a role that newspapers have traditionally played. However, these criticisms lose sight of the extent to which nonprofit newspapers would still be able to "freely report on all issues, including political campaigns" and "editorialize and take positions on issues affecting their communities."<sup>256</sup> Moreover, the proliferation of nonprofit newspapers that could not take political positions would not inhibit the many other existing forums for endorsement, such as for-profit newspapers, radio, television, and, of course, Internet sites.<sup>257</sup> Thus, it seems that the concerns regarding the impact of the bill's restrictions on political speech were overblown. Of course, if the public were to determine that other news sources were not adequate and that nonprofit newspapers absolutely needed the ability to endorse candidates, then Congress could make an exception for newspapers.<sup>258</sup>

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<sup>252</sup> For other considerations regarding restructuring newspapers, see Pickard, Stearns & Aaron, *supra* note 30, at 7–8.

<sup>253</sup> See Fremont-Smith, *supra* note 131, at 36 (projecting that newspapers would be able to achieve § 501(c)(3) status with Senator's Cardin bill, so long as they accepted the accompanying limitations on political endorsements). Notably, the report also suggests that some newspapers might be able to qualify for nonprofit status without the bill. *Id.* at 3. But see Memorandum from Cong. Research Serv. to Rep. Jim McDermott, *supra* note 225, at 1–5 (presenting a more skeptical analysis regarding the feasibility of newspapers achieving tax-exempt status under existing law). Regardless, there is no doubt that Senator Cardin's bill would have made the process much simpler.

<sup>254</sup> See, e.g., McIntyre, *supra* note 133 (writing that the bill would "de-fang capitulating newspapers, which could no longer endorse candidates or freely question the party in power without risk of losing the protection").

<sup>255</sup> Specifically, charitable organizations "cannot endorse any candidates, make donations to their campaigns, engage in fund raising, distribute statements, or become involved in any other activities that may be beneficial or detrimental to any candidate." I.R.S. News Release IR-04-59 (Apr. 28, 2004), available at <http://www.irs.gov/newsroom/article/0,,id=122887,00.html> (stating that charities may not engage in political campaign activities).

<sup>256</sup> Cardin, *supra* note 86; see also Swensen & Schmidt, *supra* note 134 (noting that while "newspapers would need to refrain from endorsing candidates for public office, they would still be free to participate forcefully in the debate over issues of public importance").

<sup>257</sup> Swensen & Schmidt, *supra* note 134 ("The loss of endorsements seems minor in the context of the opinion-heavy Web.").

<sup>258</sup> See *Future of Newspapers*, *supra* note 19, at 3 (statement of Dr. Paul Starr) ("I believe, therefore, Congress should consider creating a new category of nonprofit journalistic organizations that are

Finally, some critics are concerned that nonprofit newspapers will become beholden to their donors or the government itself.<sup>259</sup> Yet there is no reason to think that news organizations would be any more biased by the government or donors under a nonprofit model than they are by advertisers and shareholders under a for-profit model. Advertisers and donors alike have the opportunity to advocate for their various messages; the newspapers are simply a conduit for these views. Furthermore, this argument actually advances another reason to allow individual deductions for subscriptions. By encouraging individual support of newspapers through such a tax subsidy, Congress would help to democratize the news organizations' revenue structures, ensuring that they were not overly beholden to any one entity.

#### CONCLUSION

As long as the United States has existed, newspapers have played an essential role in American democracy by checking the government and facilitating political participation. They should not be taken for granted. Newspapers, and their positive impact on democracy, are in serious jeopardy as a result of the industry's significant economic troubles. Financial pressures have forced several private newspaper owners to depart from the industry's longstanding commitment to public service journalism, focusing instead on more profitable coverage that is less significant to the health of the nation.

Maintaining the vitality of watchdog and public interest journalism is a critical public policy issue that demands government action. Congress has a long history of supporting the press, beginning with the founding of the country and the framing of the First Amendment. There are significant public policy issues at stake, such as the lasting viability of the Fourth Estate as an independent actor. Additionally, the issue is complicated by complex collective action problems that likely require government intervention for resolution.

Unfortunately, many analysts have lost focus in attempting to solve this problem, advancing a profusion of ideas that do not all pass muster. An expansion of intellectual property rights for newspapers would likely fail to generate significant revenue for the industry, and it is founded upon an outmoded theory of hot news misappropriation that has no place in a digital news landscape. Direct government spending on newspapers would be overly costly and politically impracticable.

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freed from traditional limitations on 501(c)(3) organizations. When Congress originally subsidized newspapers through the postal system, it did not require that they be nonpartisan; indeed, most of them were partisan. Neither should we require newspapers to limit their political expression in order to gain the advantages of nonprofit status.”)

<sup>259</sup> See, e.g., Jack Shafer, *Nonprofit Journalism Comes at a Cost*, SLATE (Sept. 30, 2009, 7:12PM), <http://www.slate.com/id/2231009/> (“No matter how good the nonprofit operation is, it always ends up sustaining itself with handouts, and handouts come with conditions.”).

In contrast, recent proposals for a new tax subsidy are quite promising. Senator Cardin's Newspaper Revitalization Act was an appropriate starting point but would have required significant changes to reach desired outcomes. In particular, nonprofit media subscriptions should be fully tax-deductible for all taxpayers, thereby democratizing their funding. Unlike other solutions, this could mitigate collective action problems that currently plague the industry. More importantly, it would improve the likelihood of success for a new press model that would inherently have the public's interest in watchdogs and political participation at heart.