

**MANDATING DIGITAL PLATFORM SUPPORT FOR QUALITY  
JOURNALISM**

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## I. INTRODUCTION

Our democracy depends on a vibrant press dedicated to informing the electorate and holding the powerful to account. Yet American newsrooms have suffered a precipitous decline in recent years. Since 2004, more than 2,100 newspapers have closed up shop, leaving more than half of U.S. counties without a daily newspaper.<sup>1</sup> As Jill Lepore painfully laments, newspaper after newspaper “cut news coverage, or shrank the paper’s size, or stopped producing a print edition, or did all

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1. PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 9, 15 (2020); CHICAGO BOOTH STIGLER CTR. FOR THE STUDY OF THE ECON. AND THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT 10 (2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> [<https://perma.cc/9TJH-BUP7>] [hereinafter STIGLER COMMITTEE REPORT].

of that, and it still wasn't enough."<sup>2</sup> Indicative of the industry's severe economic distress, the market valuation of major daily newspapers, including the Boston Globe/Worcester Telegram & Gazette, Chicago Sun-Times, and Minneapolis Star Tribune, dropped by more than 90% between the 1990s and early 2010s.<sup>3</sup> Throughout the industry, newsroom employment fell by 47% from 2004 to 2018, and the hemorrhage has continued since.<sup>4</sup> Two areas of reporting that are vital to democratic governance have been especially hard hit: original, investigative journalism and local news coverage.<sup>5</sup>

Several factors have contributed to journalism's tailspin. They include debt-financed media conglomeration, the global financial collapse of 2008, a glut of online content, and the loss of classified advertising to Craigslist.<sup>6</sup> But in recent years one factor looms particularly large: the overwhelming market power of digital platforms, principally Google and Facebook.

As detailed below, digital platforms inflict multiple wounds on news publishers. First, Google and Facebook have devoured the advertising revenue upon which American news publishers have heavily depended for over a century.<sup>7</sup> Second, digital platforms have

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2. Jill Lepore, *Does Journalism Have a Future?*, NEW YORKER (Jan. 21, 2019), <https://www.newyorker.com/magazine/2019/01/28/does-journalism-have-a-future> [https://perma.cc/HQ5G-R88E].

3. JAMES T. HAMILTON, *DEMOCRACY'S DETECTIVES; THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 280 (2016) (citing a study from the Pew Research Center).

4. Michael Barthel, *Newspapers: Fact Sheet*, PEW RSCH. CTR. (July 9, 2019), <https://www.journalism.org/fact-sheet/newspapers> [https://perma.cc/FJT2-664D]. U.S. newsrooms cut an estimated 3,000 journalism jobs in 2019 and, in large part due to the severe economic downturn due to the COVID-19 pandemic, an additional 11,000 during the first half of 2020. See NUSHIN RASHIDIAN ET AL., *PLATFORMS AND PUBLISHERS: THE END OF AN ERA* 5 (2019) (providing 2019 estimate); Palash Ghosh, *U.S. Newsrooms Cut 11,000 Jobs in First Half of this Year, a Surge from Prior Years*, INT'L BUS. TIMES (July 16, 2020), <https://www.ibtimes.com/us-newsrooms-cut-11000-jobs-first-half-year-surge-prior-years-3012474> [https://perma.cc/J3CD-63HW].

5. See STIGLER COMMITTEE REPORT, *supra* note 1, at 148–49 (discussing local reporting); HAMILTON, *supra* note 3, at 175–78 (applying the numbers of Freedom of Information Act requests and entries in annual award contests of the Investigative Reporters and Editors organization to measure declines in investigative work between 2005 and 2010). Large newspapers have been able to retain a stronger commitment to investigative work than have news broadcasters and local newspapers. HAMILTON, *supra* note 3, at 185–87; see also Charles Angelucci & Julia Cagé, *Newspapers in Times of Low Advertising Revenues*, 11 AM. ECON. J. MICROECONOMICS 319 (2019) (finding robust evidence, based on an empirical study and modeling, that diminished advertising revenue correlates with a decrease in the amount of journalistic-intensive content).

6. Private equity firms and hedge funds began aggressively purchasing hundreds of distressed newspapers and chains following the 2008 recession. By 2016, six firms owned 15% of all papers in the country, including six of the ten largest newspaper chains. More recently, as advertising revenues have declined, private investors have sold, closed, and merged many of their highly leveraged newspaper holdings. ABERNATHY, *supra* note 1, at 31–35.

7. See *infra* notes 17–28 and accompanying text; see also Lepore, *supra* note 2. As a rough measure, not entirely associated with newspapers, Facebook garnered 40% of the digital display advertising revenue in 2018 and Google accounted for 12% of that market. Galen

become most newsrooms' principal gateway to readers. In so doing, the platforms usurp news publishers' traditional role of curators, editors, and distributors of journalists' work product, thus diminishing news publishers' ability and incentive to maintain a distinct brand representing the type of journalism that readers value.<sup>8</sup>

Commentators and policymakers have proposed various measures to salvage journalism from digital platforms' catastrophic impact. Their aim is not merely to shore up a troubled industry. Rather, they seek to ensure that news publishers, whether commercial, publicly funded, or non-profit, will continue to produce "quality journalism" of vital importance to democratic governance.<sup>9</sup> Media scholars define "quality journalism" as that which aims to uncover and educate readers about facts that are matters of public concern (and of interest to actual readers) and does so in keeping with journalistic ethics of independence, transparency, trustworthiness, and objectivity (or at least openness about bias).<sup>10</sup>

Some media scholars employ other terms to describe democracy-enhancing journalism. These include "civic," "public," and "accountability" journalism, each of which carries a different nuance.<sup>11</sup> But in this Article, I use the term "quality journalism," as defined

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Stocking, *Digital News Fact Sheet*, PEW RSCH. CTR. (July 23, 2019), <https://www.journalism.org/fact-sheet/digital-news> [<https://perma.cc/G6RM-Y5LP>].

8. See *infra* notes 29–40 and accompanying text.

9. For example, in providing for a new press publishers' right, the EU Copyright in the Single Digital Market Directive highlights the essential role of a "free and pluralist press" for "the proper functioning of a democratic society." Council Directive 2019/790, 2019 O.J. (L 130) 92, 103–04 [hereinafter "Digital Single Market Directive"]; see also Press Release, John Kennedy, Senator for Louisiana, The Journalism Competition and Preservation Act; Creating an Even Playing Field for the Free and Diverse Press (June 3, 2019), [https://www.kennedy.senate.gov/public/\\_cache/files/3/9/39db81a5-249f-4633-89a2-6b558829f47a/89AEE10C834522425A60056AFEF572B6.senate-fact-sheet---the-journalism-competition-and-preservation-act.pdf](https://www.kennedy.senate.gov/public/_cache/files/3/9/39db81a5-249f-4633-89a2-6b558829f47a/89AEE10C834522425A60056AFEF572B6.senate-fact-sheet---the-journalism-competition-and-preservation-act.pdf) [<https://perma.cc/LR6V-VE9G>] (discussing News Media Alliance support for empowering "news publishers to continue to reinvest in quality journalism" by enabling them to band together to negotiate with digital platforms).

10. See, e.g., Johanna Vehkoo, *What is Quality Journalism and How it Can be Saved?*, REUTERS INST. FOR STUDY JOURNALISM (2010), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/What%2520is%2520Quality%2520Journalism%2520and%2520how%2520can%2520it%2520be%2520saved%2527.pdf> [<https://perma.cc/NQH6-UFK4>]; Charlie Beckett, *What is Quality Journalism? The Most Important Question for News Organisations Today, But Do We Know What it Means?*, LSE BLOG (June 5, 2018), <https://blogs.lse.ac.uk/polis/2018/06/05/what-is-quality-journalism-the-most-important-question-for-news-organisations-today-but-do-we-know-what-it-means/> [<https://perma.cc/BT4E-NUXS>].

11. See Seong-Jae Min, *Conversation Through Journalism: Searching for Organizing Principles of Public and Citizen Journalism*, 17 JOURNALISM 567 (2016) (reviewing the public and citizen journalism movements of recent years); Jane Elizabeth, *Accountability Journalism: A Primer*, BETTER NEWS (Sept. 2017), <https://betternews.org/primer-accountability-journalism/> [<https://perma.cc/R5F8-LTHF>] (defining "accountability journalism" as "all journalistic efforts that strive to hold power people accountable for what they say, what they do and what they should be doing").

above, and I focus on two of its primary pillars: original, investigative reporting and local news.

This Article critically assesses three broad initiatives to bolster quality journalism that have recently gained traction.<sup>12</sup> The first accords news publishers an intellectual property right in aggregating and repackaging their news stories. The European Union has recently enacted such a news publishers' right in Article 15 of the EU's Directive on Copyright and Related Rights in the Digital Single Market of 2019.<sup>13</sup> The second initiative would aim to level the competitive playing field between digital platforms and news publishers. It would do so through revitalized antitrust enforcement against Google's and Facebook's anticompetitive business practices; providing news organizations with an exemption from antitrust law to permit them to negotiate collectively with digital platforms; or mandating digital platform bargaining with news publishers under threat of compulsory arbitration.<sup>14</sup> The third initiative involves sundry moves by Facebook and Google to provide support for the press, instituted in the face of public pressure from news publishers and the threat of regulatory intervention. As I detail below, the three initiatives — publishers' intellectual property rights, antitrust, and major platforms' seemingly voluntary moves — would be variously ineffective and conceptually off the mark. They are also insufficiently targeted at bolstering the quality journalism upon which our democracy depends.

I then proffer a distinct two-part blueprint for mandating digital platform support of quality journalism. First, I propose that the federal government should levy an excise tax on digital advertising revenues to help fund investigative journalism and local affairs reporting. As I explain, this proposal is a supplement to other proposals for public funding of news media, ranging from direct government subsidies to citizens' vouchers.<sup>15</sup>

Second, I propose various measures to support news publishers' efforts to bolster distinct brands for quality journalism. Public

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12. Commentators also propose various forms of public funding of journalism, see *infra* notes 189–193 and accompanying text, and express the hope that, through machine learning, crowd-sourcing, and big data analysis, news media can use digital technology to engage in effective investigative journalism at lower costs. See, e.g., HAMILTON, *supra* note 3, at 295–304 (discussing ways in which “computational journalism” can reduce the costs of investigative reporting); ANDREA CARSON, INVESTIGATIVE JOURNALISM, DEMOCRACY AND THE DIGITAL AGE 7, 176–78 (2019).

13. See generally Digital Single Market Directive, *supra* note 9.

14. The proposed antitrust exemption for press publishers is set out in the proposed Journalism Competition and Preservation Act of 2019, H.R. 2054, 116th Cong. (2019).

15. See, e.g., STEPHEN GILLERS, JOURNALISM UNDER FIRE; PROTECTING THE FUTURE OF INVESTIGATIVE REPORTING (2018); VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM? CONFRONTING THE MISINFORMATION SOCIETY 92 (2019); Brad A. Greenberg, *Comment: A Public Press? Evaluating the Viability of Government Subsidies for the Newspaper Industry*, 19 UCLA ENT. L. REV. 189 (2012); STIGLER COMMITTEE REPORT, *supra* note 1, at 176–84 (discussing citizens' vouchers).

recognition is vital for providing news publishers with an incentive to invest in costly, high-quality journalism. To that end, major digital platforms should be required to give priority and prominence to original journalism. Google and Facebook have each announced voluntary plans to favor original reporting over repackaged content in their feeds.<sup>16</sup> My proposal would deepen that proposed practice and would ground it in government regulation, applicable to all major digital platforms that distribute news stories. In addition, as I will explain, news publishers should have the right to demand that platform news feeds link to the news items on the publisher's website and display a certification of trustworthiness from a third-party media watchdog of the news publisher's choice. I explore two vehicles for furthering these brand fortification objectives: direct regulation of platforms' content curation algorithms and mandating that platforms provide open application interfaces ("API") that would enable news publishers to offer their own curated news content to platform users.

My argument proceeds as follows. Part II elucidates how digital platforms have harmed quality journalism. Part III reviews why professional, quality journalism remains critical for a functioning democracy, and explains why investigative journalism and local reporting are particularly vulnerable to digital platforms' displacement. Part IV critically assesses the three leading proposals for salvaging quality journalism: granting news publishers an intellectual property right in news content, leveling the competitive playing field through antitrust law, and the major platforms' own initiatives. Part V presents my proposal for an excise tax on digital advertising as a source for public funding of investigative journalism and local news coverage. Part VI presents my proposals for measures fortifying news publisher's brand identity to bolster publisher incentives to invest in quality journalism. Part VII addresses First Amendment issues that my proposals might raise. Part VIII concludes.

## II. HARM CAUSED BY PLATFORMS

Digital platforms harm quality journalism in two basic ways. They usurp news publishers' advertising revenue and they impede news publishers' ability and incentive to build a reputation for quality journalism. This Part considers each in turn.

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16. See Sara Fischer, *Exclusive: Facebook Changes Algorithm to Boost Original Reporting*, AXIOS (June 30, 2020), <https://www.axios.com/facebook-algorithm-original-reporting-e127c8b7-c749-4120-a65e-239b55d18758.html> [https://perma.cc/U5WY-6Y8X] [hereinafter Fischer, *Facebook Changes*]; Sara Fischer, *New Google Rules Aim to Boost Original Reporting in Search Results*, AXIOS (Sept. 12, 2019), <https://www.axios.com/google-news-algorithm-original-reporting-search-results-publishers-7a0314ed-1132-4535-a158-eac1aa8f008d.html> [https://perma.cc/2JZK-JYKV].

## A. Advertising

While Google and Facebook are known for their respective dominance of search and social network services, their primary source of revenue is digital advertising. Together, Google and Facebook reap over half of U.S. digital advertising revenue and over 90% of digital advertising growth.<sup>17</sup> The two technology company giants exercise extraordinary market power — and engage in considerable self-dealing — in various aspects of the complex digital advertising market.<sup>18</sup> They simultaneously attract advertiser dollars to their respective platforms, run electronic auction marketplaces for digital display ads, and act as brokers for website proprietors, including many news publishers, in selling display ad space to digital advertisers.<sup>19</sup>

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17. See *Google's US Ad Revenues to Drop for the First Time*, EMARKETER (June 22, 2020), <https://www.emarketer.com/newsroom/index.php/google-ad-revenues-to-drop-for-the-first-time> [<https://perma.cc/B4YK-XUNT>] (reporting on Google's, Facebook's, and Amazon's respective shares of U.S. digital advertising revenue in 2019) [hereinafter *Google's US Ad Revenues*]; MATTHEW HINDMAN, *THE INTERNET TRAP: HOW THE DIGITAL ECONOMY BUILDS MONOPOLIES AND UNDERMINES DEMOCRACY 4* (Princeton Univ. Press 2018) (noting that “[a]s of mid-2016, Google and Facebook together accounted for more than 73% of digital advertising in the United States”); Matthew Ingram, *How Google and Facebook Have Taken Over the Digital Ad Industry*, FORTUNE (Jan. 4, 2017), <https://web.archive.org/web/20200120073224/https://fortune.com/2017/01/04/google-facebook-ad-industry> [<https://perma.cc/V8UN-8PF7>] (reporting that Google and Facebook accounted for about 99% of the \$2.9 billion in digital advertising growth in the third quarter of 2016). Amazon is a newly emerging, if still a relatively small competitor. It earned more than 7.5% of net digital advertising revenue in 2019. See Nicole Perrin, *Facebook-Google Duopoly Won't Crack This Year*, EMARKETER (Nov. 4, 2019), <https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year> [<https://perma.cc/Y3WY-AU9Q>] (reporting that Amazon earned 7.6% of digital advertising revenue in 2019); *Google's US Ad Revenues*, *supra* (reporting that Google earned 7.85%).

18. See SUBCOMM. ON ANTITRUST, COM. AND ADMIN. LAW OF THE HOUSE COMM. ON THE JUDICIARY, *INVESTIGATION OF COMPETITION IN DIGIT. MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS* (2020) [hereinafter *COMPETITION IN DIGITAL MARKETS; MAJORITY STAFF REPORT*], at 170–73 (concluding that Facebook has market power in online advertising in the social networking market as well as in the supply of digital display advertising in the U.S. and other countries), 196–208 (detailing Google's market power in search advertising and in acting as an intermediary in electronic auction markets for digital display ads); UK COMPETITION & MKTS. AUTH., *ONLINE PLATFORMS AND DIGITAL ADVERTISING; MARKET STUDY FINAL REPORT* 211, 224, 231–37, 245–61, 271–72 (2020) [hereinafter *UK ONLINE PLATFORMS AND DIGITAL ADVERTISING REPORT*] (concluding that, in the UK digital advertising market, Google has market power in search advertising, Facebook has market power in display advertising, and Google has a dominant position in all aspects of the digital advertising intermediation market).

19. Display ads are sold through real-time online auctions, automated by computers using complex algorithms, and involving an intricate supply chain of various parties. See UK ONLINE PLATFORMS AND DIGITAL ADVERTISING REPORT, *supra* note 18, at 263–65. This so-called “programmatically displayed advertising” marketplace is dominated by Google Ad Manager. See *id.* at 270 (noting that in 2019 Google Ad Manager accounted for more than 90% of publisher digital display ads served in the UK). Facebook also acts as a broker and consultant to businesses in selling to advertisers in programmatic advertising auctions. It does so through its “Facebook Audience Network.” See Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 42–43 (2019). Facebook has sold

News publishers cannot compete with Google and Facebook's unparalleled advantages in digital advertising. The two platform giants offer advertisers unprecedented audience reach, state-of-the-art display and ad placement technology, and precise consumer targeting that draws on accumulated machine learning and vast droves of Internet users' personal information.<sup>20</sup> Digital advertisers will typically pay far more to post a micro-targeted display ad on one of the major digital platforms than on a news site.<sup>21</sup> Further, as display ad auctioneers and brokers, Google and Facebook siphon off up to 70% of what advertisers pay for news site display ads.<sup>22</sup>

The impact on journalism has been nothing short of catastrophic. Through the end of the 20th century, most newspapers earned some 80% of their revenue from advertising and only 20% from subscriptions.<sup>23</sup> But between 2005 and 2018, newspapers' advertising revenue plummeted by 72%, from \$50 billion to an estimated \$14 billion.<sup>24</sup> Much of that decline coincides with Google and Facebook's ascending duopoly control. From 2014 through 2018, Google and Facebook's combined U.S. digital advertising revenues increased an

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advertising on behalf of, while simultaneously competing for advertisers against, The Washington Post; Time, Inc.; the Hearst newspapers; and no doubt many other news publishers. *Id.* The fact that Google and Facebook both sell their own ad space and simultaneously operate an electronic display ad marketplace exacerbates their grip on digital advertising. See Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Policy Could Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55, 63–64 (2020).

20. See HINDMAN, *supra* note 17, at 1–37; C. Scott Hemphill, *Disruptive Incumbents: Platform Competition in an Age of Machine Learning*, 119 COLUM. L. REV. 1973, 1975–80 (2019) (describing platforms' machine learning advantages as an instrument of their market power).

21. For example, Google earns five times as much from advertising on Google-owned sites than from selling ads on external sites. Adrienne Jeffries and Leon Yin, *Surprise! It's Google*, MARKUP (July 28, 2020, 6:22 PM), <https://themarkup.org/google-the-giant/2020/07/28/google-search-results-prioritize-google-products-over-competitors> [<https://perma.cc/4QSM-LZTV>].

22. Studies show that news publishers earn only from 30% to 72% of what programmatic advertisers spend for newspaper website display ads. See David Pidgeon, *Where Did the Money Go? Guardian Buys Its Own Ad Inventory*, MEDIATEL NEWS (Oct. 4, 2016), <https://mediatel.co.uk/news/2016/10/04/where-did-the-money-go-guardian-buys-its-own-ad-inventory> [<https://perma.cc/RAH5-BGUP>] (finding that the Guardian earned as little as 30% of ad spending); Stephen Adshead et al., *Online Advertising in the UK*, A Report Commissioned by the Department for Digital, Culture, Media & Sport, at 12 (Jan. 2019) (finding that news publishers earn between 43% to 72% of programmatic advertiser spending on display ads).

23. FEDERAL TRADE COMMISSION STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM 2 (2010) [hereinafter FTC STAFF DISCUSSION DRAFT].

24. *Estimated Advertising and Circulation Revenue of the Newspaper Industry*, PEW RSCH. CTR. (June 13, 2018), <https://www.journalism.org/chart/sotmm-newspapers-newspaper-industry-estimated-advertising-and-circulation-revenue> [<https://perma.cc/ZYG7-HY28>].



astonishing 150%, from \$30.5 billion to \$77.8 billion.<sup>25</sup> During the same period, newspapers suffered a 35% decline in advertising revenue overall.

Tellingly, moreover, from 2014 through 2018, newspapers suffered a 12% drop in digital advertising revenue even as unique visits to newspaper websites increased by 41%.<sup>26</sup> Much of that disparity stems from Google and Facebook's multi-faceted dominance of digital advertising markets.<sup>27</sup> The fact that many news readers first encounter news stories on those platforms rather than on newspaper landing pages exerts an additional downward pressure on news sites' digital advertising revenues, even if platforms drive traffic to articles within news sites. The bottom line is that, despite a significant increase in online readership, newspapers' digital advertising revenues cannot come close to making up for newspaper losses in the shrinking print advertising market. Apart from news publications with niche, high-value audiences, "the days of advertising as a reliable, long-term source of funding for journalism are over."<sup>28</sup>

### *B. Gateway to Readers and Maintaining Brand for Quality Journalism*

Digital platforms have become most newsrooms' principal gateway to readers. A growing number of Internet users, especially younger users, get most of their news from social media feeds.<sup>29</sup> Indeed, Facebook is now the second largest news provider in terms of attention share in the United States.<sup>30</sup> As a result, news sites have become heavily dependent on digital platforms for traffic, both via Internet connected

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25. The numbers are derived from the 2020 10-K filings of Facebook and Google's parent company, Alphabet. Facebook, Annual Report (Form 10-K), at 42 (Jan. 30, 2020); Alphabet Inc., Annual Report (Form 10-K), at 26 (Feb. 4, 2020).

26. See PEW RSCH. CTR., *supra* note 24 (reporting overall decline); See Barthel, *supra* note 4 (reporting decline in digital advertising, increase in website visits, and that from 2014 to 2018 newspapers' digital advertising revenue as a percentage of their total advertising revenue increased from 21% to 35%).

27. See Srinivasan, *Why Google Dominates*, *supra* note 19, at 86–158 (detailing reasons for Google's domination over digital advertising).

28. SARA WATSON ET AL., THE FUTURE OF ADVERTISING AND PUBLISHING 6 (2018).

29. See Antonis Kalogeropoulos, *How Younger Generations Consume News Differently*, in NIC NEWMAN ET AL., REUTERS INST. DIGIT. NEWS REP. 55, 55–59 (2019) (reporting on primacy of social media and other algorithmically driven news feeds for younger readers).

30. STIGLER COMMITTEE REPORT, *supra* note 1, at 9. As of 2018, about two-thirds of American adults report getting at least some news on social media, including 43% on Facebook, even though a majority say that they expect the news they see on social media to be largely inaccurate. Elisa Shearer & Katerina Eva Matsa, *News Use Across Social Media Platforms 2018*, PEW RSCH. CTR. (Sept. 10, 2018), <https://www.journalism.org/2018/09/10/news-use-across-social-media-platforms-2018/> [<https://perma.cc/XEU8-GBMM>].

computers and, increasingly, mobile devices.<sup>31</sup> In that vein, Google and Facebook are together the source of 70% of external traffic to news websites and just over a third of overall news site traffic when direct visits to news site home pages and internal traffic within the news site are taken into account.<sup>32</sup>

That platform dominance over online news traffic brings far-reaching ramifications for the practice of journalism. As platform algorithms select and push individual news items to users' feeds, the digital platforms usurp newsrooms' traditional role as curators, editors, and distributors of journalists' output. As one study concludes, the platforms "now control what audiences see and who gets paid for their attention, and even what format and type of journalism flourishes."<sup>33</sup>

In supplanting newsrooms' traditional functions, digital platforms undermine quality journalism in several ways. First, digital platforms lack incentives to prioritize quality news content or to provide links to news sites that might take platform users off the platform. The platforms' overriding incentive is to keep their users engaged on the platform as long as possible in order to sell more micro-targeted advertising.<sup>34</sup> And platform user engagement typically flows from sensationalist, emotive content and "buzzy" news stories likely to go viral on social media, not from presenting informative, quality journalism.<sup>35</sup>

Second, newsrooms' need to reach prospective readers through platforms' webpages and news feeds diminishes their ability — and thus incentive — to maintain a distinct brand representing quality journalism.<sup>36</sup> Like any business, news publishers have little incentive to invest in a costly, high quality product if consumers do not recognize and identify the news publisher as the source of the product.<sup>37</sup> Yet,

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31. See RASHIDIAN ET AL., *supra* note 4, at 4 (noting Facebook's "outsized effect on [news publishers'] audience and revenue numbers"); Annika Berström & Maria Jervelycke Belfrage, *News in Social Media: Incidental Consumption and the Role of Opinion Leaders*, 6 DIGIT. JOURNALISM 583 (2018).

32. NICHOLAS DIAKOPOULOS, *AUTOMATING THE NEWS; HOW ALGORITHMS ARE REWRITING THE MEDIA* 179 (2019).

33. EMILY BELL & TAYLOR OWEN, *THE PLATFORM PRESS: HOW SILICON VALLEY REENGINEERED JOURNALISM* 9 (2017), [https://www.cjr.org/tow\\_center\\_reports/platform-press-how-silicon-valley-reengineered-journalism.php](https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php) [https://perma.cc/Y6PT-NBRA]. News publishers have recently begun to push back, focusing on building a core of loyal, paying readership, instead of pinning hopes on scale-based digital platforms to reach new potential readers and generate advertising revenue. But the digital platforms remain as powerful as ever, and it is far from clear whether news publishers will succeed. See RASHIDIAN ET AL., *supra* note 4, at 8, 11–14.

34. See STIGLER COMMITTEE REPORT, *supra* note 1, at 8–9, 12–13, 150.

35. *Id.* at 10.

36. See BELL & OWEN, *supra* note 33, at 13, 20.

37. Numerous commentators note that a primary goal of trademark law, which protects the producer of trademarks and brands to identify the source of goods and services, is to support producer incentives to invest in superior, or at least consistent, product quality. See, e.g., Mark A. Lemley & Mark P. McKenna, *Owning Mark(ets)*, 109 MICH. L. REV. 137, 173–74 (2010);

studies show that when users reach a news website through a search engine or social media news feed, “most users cannot recall the name of the website’s news brand after their visit.”<sup>38</sup>

Finally, digital platforms have also had a deleterious *qualitative* impact on the practice of journalism and the social value ascribed to it. Desperate to reach audiences and to garner some share of digital advertising revenue, newsrooms have veered towards clickbait and online metrics dictated by Facebook, Google, and other platforms, leading them to select and tailor news stories as will best optimize the stories’ chances of going viral on social media and attaining prominent placement in search engine results.<sup>39</sup> In parallel, social media platforms promote the notion that anyone can be a journalist — that individuals’ postings are no less a vital source of information and discourse than investigative news stories reflecting years of experience, training, and professional judgment, as well as many, many hours of arduous work, fact checking, and editing. As one keen media observer describes, “[e]levation of the personal is a key aim of social media, and an erasure of signals of other authority is a consequence of this goal.”<sup>40</sup>

### III. QUALITY JOURNALISM

#### A. *The Fourth Estate*

The harms that digital platforms inflict on news publishers’ have profound societal ramifications, far beyond the economic dislocation of a discrete industry. Commentators have long posited that democracy would not be possible without a vibrant, free press: the proverbial Fourth Estate.<sup>41</sup> Rightly so. In a world of multiple concentrations of

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Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2107 (2004).

38. STIGLER COMMITTEE REPORT, *supra* note 1, at 156 (citing REUTERS INST., DIGITAL NEWS REPORT 2017 (2017)).

39. Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1071–72 (2019); JILL ABRAMSON, MERCHANTS OF TRUTH: THE BUSINESS OF NEWS AND THE FIGHT FOR FACTS (2019); Robyn Caplan and danah boyd, *Isomorphism Through Algorithms: Institutional Dependencies in the Case of Facebook*, BIG DATA & SOCIETY, January-June 2018, at 1. For an illuminating exploration of how digital streaming platforms and harvesting data about consumer preferences shape creative decisions across industries, see Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1555–56 (2019).

40. SARA WATSON ET AL., THE FUTURE OF ADVERTISING AND PUBLISHING 15 (2018).

41. *See, generally*, Neil W. Netanel, *The Commercial Mass Media’s Continuing Fourth Estate Role*, in THE COMMODIFICATION OF INFORMATION 317 (Niva Elkin-Koren & Neil W. Netanel eds., 2002). *See also* C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317, 317–18 (1998) (asking “[w]hat type of free press does democracy need and why does democracy need it?”). The term “Fourth Estate” to connote the press was coined in 1787 by the Scottish philosopher and writer Thomas Carlyle. Carlyle opined that the reporters’ gallery in Parliament was more important than all the three Parliamentary estates identified

political, associational, and corporate power, only an equally powerful press can consistently act as a watchdog, ferreting out misuses of power and exposing them to the light of public opinion. An independent, civic-minded press also serves a vital function of catalyzing and, to a degree, embodying public opinion in the face of government authority and corporate fiefdom.<sup>42</sup> No less importantly, in its news stories, op-ed pages, pundit debates, cultural reviews, and reader comments, the best of the institutional press presents a forum for deliberation and debate, a place where citizens encounter a diversity of views presenting arguments based in fact.<sup>43</sup> Finally, although they are far from infallible, journalistic enterprises that engage in original, investigative reporting share a professional commitment to uncovering and providing factually accurate information.<sup>44</sup>

The once vibrant advertiser-supported press now facing its death knell arose in the United States in the late nineteenth century. Plentiful advertising revenue enabled newspapers of that era to gain financial independence from political party patronage.<sup>45</sup> In the ensuing decades, Progressive Era journalists articulated professional objectivity norms. Informed by those codes of journalist ethics, the non-party-affiliated, advertiser-supported news media came to constitute the dominant core and ideal of the Fourth Estate in this country.<sup>46</sup>

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by Edmund Burke — the commons (House of Commons), the nobility, and the clergy (House of Lords). CARSON, *supra* note 12, at 10.

42. See generally DAVID L. PROTSS ET AL., *THE JOURNALISM OF OUTRAGE: INVESTIGATIVE REPORTING AND AGENDA BUILDING IN AMERICA* (1991).

43. NEIL WEINSTOCK NETANEL, *COPYRIGHT'S PARADOX* 96–98 (2008); CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* 12 (2017) (noting that, in contrast to social media echo chambers, daily newspapers and network television are forums where “people frequently come across views and materials that they would not have chosen in advance”).

44. See, e.g., SOCIETY OF PROFESSIONAL JOURNALISTS' ETHICS COMMITTEE, *MEDIA ETHICS: A GUIDE FOR PROFESSIONAL CONDUCT* (Fred Brown ed., 5th ed. 2020).

45. Maria Petrova, *Newspapers and Parties: How Advertising Revenues Created an Independent Press*, 105 AM. POL. SCI. REV. 790, 790 (2011). In other democratic countries, “much of newspaper journalism . . . is still partisan, subsidized by or closely allied with political parties.” Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV. (Oct. 19, 2009), [https://archives.cjr.org/reconstruction/the\\_reconstruction\\_of\\_american.php](https://archives.cjr.org/reconstruction/the_reconstruction_of_american.php) [<https://perma.cc/P36A-A7ZD>].

46. See Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149, 162–63 (2001). The definition and contours of the objectivity norm are much debated, especially regarding issues of racial justice and coverage of the Trump administration. See, e.g., Wesley Lowery, *A Reckoning Over Objectivity, Led by Black Journalists*, N.Y. TIMES (June 23, 2020), <https://www.nytimes.com/2020/06/23/opinion/objectivity-black-journalists-coronavirus.html> [<https://perma.cc/63H7-FXYB>]; Mathew Ingram, *Objectivity Isn't a Magic Wand*, COLUM. JOURNALISM REV. (June 25, 2020), <https://www.cjr.org/analysis/objectivity-isnt-a-magic-wand.php> [<https://perma.cc/UZ4P-XJMA>]; see also Michael Luo, *How Can the Press Best Serve a Democratic Society?*, NEW YORKER (July 11, 2020), <https://www.newyorker.com/news/the-future-of-democracy/how-can-the-press-best-serve-democracy?> [<https://perma.cc/VH6T-3M5F>].

That is not to say that commercial, advertiser-supported media fully embody the Fourth Estate ideal. Indeed, news media critics have charged for decades that commercial, advertiser-supported media are themselves implicated in the hierarchical power structure that, in theory, the press is supposed to check.<sup>47</sup> In particular, Ed Baker famously argued that the commercial news media's reliance on advertising leads it to suppress reporting that would cast advertisers in a bad light, generally skews content towards middle-of-the-road avoidance of offense, and contributes to inequality by catering to those most likely to buy advertiser products.<sup>48</sup> Critics have proffered various proposals to vitalize and democratize the news media, including through combatting media concentration, providing citizens with rights of access to express their views on newspaper pages, imposing taxes on newspapers' advertising revenues to subsidize reader subscriptions, and public funding of journalism.<sup>49</sup>

With that backdrop, the emergence of the World Wide Web spawned a utopian vision that online platforms would empower individuals to shunt aside the elitist institutional press.<sup>50</sup> After all, Facebook, YouTube, Twitter, Reddit, and Google provide Internet users with ready access to a wealth of news and information from an infinite variety of sources, as well as the wherewithal to create and disseminate news and information on their own. Who needs the mainstream, corruptible commercial news media when citizens can be journalists? Why look to the institutional press to define public opinion and agendas when citizens can directly participate in calling authority to account and building a critical, self-reflective, and democratic culture?

Digital technology and online social media indeed provide a vibrant breeding ground for bottom-up social movements ranging from #BlackLivesMatter to the alt-right. They also provide valuable

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47. See, e.g., BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (1993); C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* 3 (1994); ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* (2010); PICKARD, *supra* note 15, at 92; see also JURGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE* 171–86 (1992) (presenting an influential critique from a historical, social theory perspective).

48. See BAKER, *supra* note 41, at 21–70.

49. See, e.g., Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641–42 (1967) (proposing a right of access to mass media); BAKER, *supra* note 41, at 85 (proposing a tax on newspapers' advertising revenues); PICKARD, *supra* note 15, at 136–63 (proposing public funding of journalism).

50. Media and communications scholars Philip Napoli and Victor Pickard each cite, as prime examples of that early utopian vision: YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); and CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* (2008). See PHILIP M. NAPOLI, *SOCIAL MEDIA AND THE PUBLIC INTEREST; MEDIA REGULATION IN THE DISINFORMATION AGE* 208 n.79 (2019); see PICKARD, *supra* note 15, at 92.

opportunities for citizens to expose abuses of power and to call news media to account for their failings and biases. But, whatever the many benefits of citizen journalism, the last several years of rampant misinformation, manipulation, hate speech, filter bubbles, conspiracy theories, and extremist rhetoric on social media have laid waste to the notion that individuals' untrammelled online speech provides a promising, democracy-enhancing substitute for the traditional media in constituting the Fourth Estate.<sup>51</sup>

Importantly, the devastating failures of the online public square are not random happenstance. Rather, they flow systematically from underlying digital platform economics, both for those who post content on social media and for the platforms themselves. Social media platforms enable low-cost distribution, large aggregations of audiences, and ready access to advertising revenue through online auctions. These features favor the dissemination of hyper-partisan rhetoric and fabricated news stories, which are far cheaper to produce and far more conducive to viral distribution on social media than is quality journalism constrained by a professional commitment to accurately reporting current events.<sup>52</sup>

Further, online platforms are far from benign, neutral fora where everyday citizens engage in rational discourse to shape a democratic culture.<sup>53</sup> The platforms' algorithms actively promote ideological echo chambers populated with inflammatory vitriol and conspiracy theories in order to maximize user engagement and thus boost the platforms' advertising revenue.<sup>54</sup> To the same end, social media platforms employ time-tested persuasive technology to exploit user vulnerability to addiction, spurring users repeatedly to click on likes and shares and to scroll to the next content stimuli, in a state of dissociative mindlessness.<sup>55</sup>

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51. See, e.g., Soroush Vosoughi et al., *The Spread of True and False News Online*, 359 SCIENCE 1146, 1146 (2018) (showing that false rumors diffuse far more rapidly and broadly than accurate information on Twitter, due primarily to human spreading, not bots).

52. See NAPOLI, *supra* note 50, at 92–95.

53. See generally SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* (2019) (detailing — and decrying — platforms' systematic use of data about users' online activity to tailor content feeds, addict users to the platform, and sell personalized advertising).

54. See DIPAYAN GHOSH, *TERMS OF DISSERVICE: HOW SILICON VALLEY IS DESTRUCTIVE BY DESIGN* 127–61 (2020); TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* 15 (2018); Julia Carrie Wong, *Down the Rabbit Hole: How QAnon Conspiracies Thrive on Facebook*, *GUARDIAN* (June 25, 2020), <https://www.theguardian.com/technology/2020/jun/25/qanon-facebook-conspiracy-theories-algorithm> [<https://perma.cc/4CFP-T9JA>] (presenting an investigative report uncovering that Facebook's algorithms actively recommend QAnon conspiracy theory groups to users who might not otherwise have been exposed).

55. See Sofia Grafanaki, *Social Media as Persuasive Technology* (June 2020) (unpublished manuscript) (on file with author).

At the same time, the evisceration of advertiser revenue for commercial media presents an opportunity to mitigate the principal concerns of news media critics. Given adequate alternative sources of funding, news media — both commercial and nonprofit — might well serve their venerable Fourth Estate role without the drawbacks of advertiser-dependent commercial news media that Ed Baker and others have highlighted. The news media's profound financial crisis highlights the need for a public response, both regulatory and fiscal, to an acute market failure: the inadequacy of market support for quality journalism. As numerous media scholars and policy studies have concluded, two types of quality journalism are especially worthy and needing of public support: investigative reporting and reporting on local affairs.<sup>56</sup>

*B. Especially Valuable and Vulnerable Quality Journalism*

News publishers generate a wide variety of work product. For example, the New York Times and Washington Post feature articles on business, science and technology, health, sports, arts and entertainment, the weather, lifestyle, food, and travel, as well as politics, government, natural and man-made disasters, and opinion. Journalism also has different communicative functions. Most journalism involves what might be termed “routine,” “conventional,” or “daily news” reporting. Some routine reporting simply relays news of the day in a fairly direct manner, like presenting raw tabulations of election results, reporting the daily weather, and featuring schedules of current cultural events. But much conventional reporting contains explanation as well. It elucidates concepts, developments, contending positions, and complex facts. Typically, newspapers do not just convey the bare election results; they also present politicians' and pundits' postmortem analysis. As ProPublica president, Richard Tofel, describes, explanatory reporting “announces, transmits or explicates something which someone (whether powerful or powerless) is seeking straightforwardly to have disseminated — from public meetings and political campaigns to financial and commodities markets, to news conferences, press

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56. See, e.g., STIGLER COMMITTEE REPORT, *supra* note 1, at 145 (stating that “[s]pecial consideration should be given to the funding of local journalism”); see PICKARD, *supra* note 15, at 39 (contending that “public service journalism” that focuses on local coverage and watchdog reporting has always been in tension with the advertiser-dependent news business); GILLERS, *supra* note 15, at 159–66 (advocating public funding of investigative journalism); ROBERT MCCHESENEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM (2010); Downie, Jr. & Schudson, *supra* note 45, at 845 (“What is under threat is independent reporting that provides information, investigation, analysis, and community knowledge, particularly in the coverage of local affairs”).

releases and promotional events of all kinds, to cultural, entertainment or sporting events.”<sup>57</sup>

At its best, such reporting bolsters democracy by analyzing complicated issues, events, processes, and official communications in clear language.<sup>58</sup> To identify, grasp, and explain a complex situation to a broad public requires considerable skill and investment. Fittingly, since 1985, explanatory reporting has had its own Pulitzer Prize category.<sup>59</sup> Nonetheless, there are good reasons to allocate limited public funds specifically to investigative reporting and reporting on local government.

## 1. Investigative Journalism

### *a. Definition and Import*

Investigative journalism is that which “seeks to reveal something that someone with some modicum of power (a person, group or institution) seeks to keep a secret.”<sup>60</sup> As Stephen Gillers adds, it is not just “*any* secret that investigative reporters seek to reveal” but rather a particular type of secret: those “that conceal abuses of power, threats to democratic institutions, and dangers to the lives, health, safety, freedoms, or livelihoods of others by private or public actors.”<sup>61</sup> Media scholar Andrea Carson further enumerates five characteristic features of investigative journalism. In order to qualify as investigative journalism, she posits, (1) the news story must set the public agenda and/or be exclusive to the publication in which it appears, (2) the story must provide evidence of skills and techniques of active, original reporting, (3) the news organization must be able to produce evidence of time, research, and effort in the story, or series of stories, (4) the story must investigate, verify, and weigh facts, rather than rely on a compilation of opposing viewpoints, and (5) the information revealed

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57. RICHARD J. TOFEL, NON-PROFIT JOURNALISM: ISSUES AROUND IMPACT, *PROPUBLICA* 5 (2013).

58. See generally Downie, Jr. & Schudson, *supra* note 45.

59. Winners in this category may entail investigative reporting as well as merely explanatory. The 2020 winner for “a distinguished example of explanatory reporting that illuminates a significant and complex subject, demonstrating mastery of the subject, lucid writing and clear presentation, using any available journalistic tool” was the Staff of the Washington Post for “a groundbreaking series that showed with scientific clarity the dire effects of extreme temperatures on the planet.” A trio of New York Times reporters garnered the 2019 prize “for an exhaustive 18-month investigation of President Donald Trump’s finances that debunked his claims of self-made wealth and revealed a business empire riddled with tax dodges.” *Explanatory Reporting*, PULITZER, <https://www.pulitzer.org/prize-winners-by-category/207> [<https://perma.cc/H8WQ-4G6H>].

60. Tofel, *supra* note 57, at 5.

61. GILLERS, *supra* note 15, at 6.



must be in the public interest as opposed to merely exposing prurient details from the private sphere.<sup>62</sup>

Investigative journalism arguably lies closer to the heart of the press' critical Fourth Estate role than does other daily news reporting.<sup>63</sup> It is through investigative journalism that the press acts as a check on abuses of power. Investigative reporting strikes a fear of negative publicity among the powerful. It can also trigger public debates about issues involving the use and misuse of power and the information that the powerful private and public actors seek to conceal.<sup>64</sup> By contrast, conventional, daily news reporting often simply conveys what the powerful (and their publicists) wish to have conveyed.

*b. Economics*

Given the need to uncover secrets and engage in extensive fact checking and analysis, investigative reporting is far more expensive to produce than is conventional reporting and is thus far less likely to be produced without financial subsidy. As Brant Houston, former executive director of IRE, a leading nonprofit association of investigative reporters and editors, explains: investigative reporting "is a different kind of reporting . . . . It generally requires more time, more interviews, and more documents than other stories do."<sup>65</sup> Thus, ProPublica journalists devoted two years, at a cost of \$750,000, to uncover the health dangers of Tylenol's main active ingredient, acetaminophen, and the fact that both Tylenol and the Federal Drug Administration knowingly concealed those dangers while Tylenol's marketing trumpeted the drug's safety.<sup>66</sup> Similarly, in 1999 the Washington Post published a five-part investigative report on deadly shootings by the D.C. police, revealing that the D.C. police shot and killed more people per capita than did police in other major U.S. cities. The series won the Pulitzer Prize for Public Service. The Post devoted a team of at least nine reporters, editors, and specialists, taking eight

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62. See CARSON, *supra* note 12, at 65–78.

63. See CARSON, *supra* note 12, at 3 (taking what she describes as the "somewhat controversial view that investigative journalism is a distinct genre of reporting that must be considered and measured separately when studying the news media in democracies"); see also JAMES S. ETTEMA & THEODORE LEWIS GLASSER, *CUSTODIANS OF CONSCIENCE: INVESTIGATIVE JOURNALISM AND PUBLIC VIRTUE* (1998) (illuminating the moral dimensions of investigative reporting and how it differs from daily news reporting).

64. See MICHAEL SCHUDSON, *WHY DEMOCRACIES NEED AN UNLOVABLE PRESS* 14–15 (2008).

65. CARSON, *supra* note 12, at 54.

66. Peter Osnos, *These Journalists Spent Two Years and \$750,000 Covering One Story*, ATLANTIC (Oct. 2, 2013), <https://www.theatlantic.com/national/archive/2013/10/these-journalists-spent-two-years-and-750-000-covering-one-story/280151/> [<https://perma.cc/LF3A-6H9W>].

months to produce the report, which cost an estimated \$487,000.<sup>67</sup> And, in 2016, the non-profit news magazine Mother Jones spent some \$350,000 to produce an in-depth investigation exposing the brutal working conditions for inmates in private prisons.<sup>68</sup> The blockbuster story, to which the magazine devoted more than 18 months to reporting, fact-checking, video production, and legal review, attracted more than a million readers and triggered a Department of Justice announcement that it would end its use of private prisons.<sup>69</sup> Despite the piece's impact, Mother Jones earned only \$5,000 in revenue from the banner ads that ran with the piece.<sup>70</sup>

Investigative reporting also carries risks that conventional reporting typically does not. News organizations must allocate considerable time and money to investigations that might ultimately prove fruitless. And published stories that reveal secrets that a powerful person or entity seeks to conceal carry a risk of lawsuits and, at times, a loss of advertisers. The costs of defending stories in court can be prohibitive for many news organizations.<sup>71</sup>

Further, fundamental economic principles teach us that investigative journalism is unlikely to pay for itself. Investigative reporting yields significant positive externalities that would not likely be captured in the price consumers would pay for access to it or in consumer attention that could be metered to bear on advertising pricing.<sup>72</sup> Investigative reporting may result in millions of dollars of benefits to society by inducing policy changes, educating the public about previously hidden health dangers, and sparking stricter law enforcement. It also yields unquantifiable benefits of checking abuses of power and contributing to a better functioning democracy.<sup>73</sup> But

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67. James T. Hamilton, *Accountability Journalism: A Cost-Benefit Analysis*, NIEMAN REPS. (July 22, 2016), <https://niemanreports.org/articles/accountability-journalism-a-cost-benefit-analysis/> [<https://perma.cc/J734-9426>]. Hamilton has calculated that print news publishers devoted an average of six months to reporting, writing, and editing each investigative news story submitted for the annual IRE awards competition for the best investigative journalism, with news stories uncovering corruption and official misconduct demanding the largest number of working days. HAMILTON, *supra* note 3, at 155–60. IRE, which stands for Investigative Reporters and Editors (and intentionally uses the abbreviation “ire,” meaning a sense of outrage), is an association devoted to supporting investigative journalism.

68. Monika Bauerlein & Clara Jeffery, *This Is What's Missing From Journalism Right Now*, MOTHER JONES (Aug. 17, 2016), <https://www.motherjones.com/media/2016/08/whats-missing-from-journalism/> [<https://perma.cc/9PGZ-E4J2>] (explaining the cost and impact of the story as part of a pledge drive).

69. *Id.*

70. *Id.*

71. CARSON, *supra* note 12, at 67.

72. HAMILTON, *supra* note 3, at 10, 23, 111–35.

73. HAMILTON, *supra* note 3, at 25; Jonathan Stray, *Metrics, Metrics Everywhere: How Do We Measure the Impact of Journalism?*, NIEMAN LAB (Aug. 17, 2012), <https://www.niemanlab.org/2012/08/metrics-metrics-everywhere-how-do-we-measure-the-impact-of-journalism/> [<https://perma.cc/D6HM-95C6>].

those societal benefits are likely to arise regardless of whether any individual citizen pays with his or her money or time to read the relevant story. While the best investigative reporting tells a gripping story, many readers would prefer to peruse sports or entertainment stories even though they share in the social returns delivered by investigative reporting. Put another way, individual citizens have greater interest in the story having impact than they as consumers might have in taking the time to read it.<sup>74</sup>

In print newspapers, investigative reporting is bundled together with light entertainment. As a result, print advertising revenues and subscriptions effectively cross-subsidize investigative reporting even if readers spend far more time reading entertainment.<sup>75</sup> But digital technology greatly diminishes newsrooms' ability to bundle, particularly when individual news stories are distributed through digital platforms like Google and Facebook. In that regard, studies show that social media users primarily read consumer, business, and entertainment news, not original investigative reporting on matters of public concern. In a study of news shared on Facebook, researchers found that only 13% of news stories shared by Facebook users were "'hard' news (such as national news, politics, or world affairs)."<sup>76</sup> The researchers classified the remainder as "'soft' content," including sports, entertainment, or travel.<sup>77</sup>

Finally, investigative reporting suffers from inadequate market support because news publishers cannot exclude others from exploiting the social value of such reporting. The primary expense of producing investigative reporting lies in uncovering, checking, and assessing facts. And once a press outlet breaks its original, investigative news story, the reported facts are typically repurposed and rewritten by other news outlets for a fraction of the cost of creating the original story.<sup>78</sup> Such aggregators include social media oriented sites like BuzzFeed and Breitbart.<sup>79</sup> But in today's fast paced digital news ecosystem, iconic news organizations like the New York Times and Wall Street Journal

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74. See HAMILTON, *supra* note 3, at 18–25. The public goods/positive externalities paradox arises with all public affairs journalism. See FTC STAFF DISCUSSION DRAFT, *supra* note 23, at 4–5 (2010) (noting that consumer demand for public affairs reporting may be suboptimal because each consumer decides that his or her vote will make no difference and, accordingly, chooses to remain "rationally ignorant" regarding public affairs). But the gap between positive externality and consumer demand is especially pronounced for investigative reporting, given investigative reporting's especially high cost and significant public impact.

75. HAMILTON, *supra* note 3, at 17.

76. Eytan Bakshy et al., *Exposure to Ideologically Diverse News and Opinion on Facebook*, 348 SCIENCE 1130 (2015).

77. *Id.*

78. See generally MARK CODDINGTON, *AGGREGATING THE NEWS; SECONDHAND STORYTELLING AND THE CHANGING WORK OF DIGITAL JOURNALISM* (2019).

79. BuzzFeed began entirely as a news aggregator, but it now engages in considerable original reporting and investigative journalism as well. See ABRAMSON, *supra* note 39, at 13–41, 103–46, 301–45.

also rework and post summaries of stories that are trending on social media.<sup>80</sup> As rewritten, the story often circulates on the Internet almost as soon as the original is released.

In one representative study, Jonathan Stray of Neiman Journalism Lab tracked a story, first reported by the New York Times, about an apparent hacking of Google by attacks originating at two Chinese schools.<sup>81</sup> Stray found that of the 121 distinct versions of the story listed on Google News, only 11% included any original reporting and just 6% obtained the full story completely independently.<sup>82</sup> The vast majority simply rewrote the facts from one of the small number of newsrooms doing original reporting.<sup>83</sup>

As discussed below, news publishers do not have an exclusive right to publish facts that they uncover.<sup>84</sup> Nor should they. Society benefits from the free circulation of information on matters of public importance initially uncovered by investigative reporting.

In that regard, news aggregation sites have become a primary source for readers to encounter at least a summary of the matters uncovered by investigative reporting. People increasingly read news online rather than in print, and online readers spend less time reading news than do print readers.<sup>85</sup> In that context, news aggregation sites that summarize original, investigative reporting, as well as the ease at which news dispatches can be effectively cut and pasted online, further eviscerates newsroom's ability to monetize the positive externalities that their investigative reporting generates.<sup>86</sup> They provide yet another reason for establishing an external source for funding the investigative journalism that undergirds the Fourth Estate, as well as for bolstering news publishers' ability to maintain distinct brands for originating investigative journalism.

80. CODDINGTON, *supra* note 78, at 9.

81. See Jonathan Stray, *The Google/China Hacking Case: How Many News Outlets Do the Original Reporting on a Big Story?*, NIEMAN LAB (Feb. 24, 2010), <http://www.niemanlab.org/2010/02/the-googlechina-hacking-case-how-many-news-outlets-do-the-original-reporting-on-a-big-story/> [https://perma.cc/4W9P-NLA5].

82. *Id.*

83. Similarly, a 2010 Pew Research Center study found that 80% of news stories covering major local issues in Baltimore contained no new information, but simply repeated previously published news. CODDINGTON, *supra* note 78, at 8.

84. See *infra* notes 121–125 and accompanying text.

85. FRANCES CAIRNCROSS, *THE CAIRNCROSS REVIEW: A SUSTAINABLE FUTURE FOR JOURNALISM* 24 (2019), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/779882/021919\\_DCMS\\_Cairncross\\_Review\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf) [https://perma.cc/7A7A-ZY3B]. This was an independent report commissioned by the UK Dept. for Digital, Culture, Media & Sport.

86. One commentator disturbingly describes the transition from print to digital: “[I]n a society in which information can be reproduced in real time at no cost, the incentives to do deep reporting (and to bear the necessary investigative costs) have all but disappeared.” JULIA CAGÉ, *SAVING THE MEDIA; CAPITALISM, CROWDFUNDING, AND DEMOCRACY* 38 (Arthur Goldhammer trans., 2016).

## 2. Local Journalism

### *a. Definition and Import*

Local reporting ranges from coverage of municipal government meetings to investigative reporting on local official malfeasance and local industry violations of environmental laws. Studies indicate that a dearth of local reporting has severe adverse impacts on local governance, including a rise in public corruption and a decline in citizen engagement.<sup>87</sup> One such study found that local newspaper closures led to higher borrowing costs for municipalities as local governments faced diminished accountability for their public financing decisions.<sup>88</sup> Another found that when fewer reporters cover a local area, fewer people run for mayor and fewer vote.<sup>89</sup> A third study found that newspapers provide more coverage to state politics when the state capital is located in a major urban center housing a large circulation newspaper than when the capital is isolated.<sup>90</sup> Consequently, the study suggested, states with isolated capitals are associated with higher levels of corruption and substandard provision of public goods.<sup>91</sup>

### *b. Economics*

Local journalism has been especially hard hit by the move to digital distribution and the dominance of digital platforms.<sup>92</sup> In the print era, local newspapers earned a premium on marketing to local advertisers. Print era advertisers ascribed a higher value per person to local audiences than national audiences, even if the local audiences were smaller overall. Further, local media dominated the market in selling space for geographically targeted advertising.

But with the advent of data mining and digital platforms' immense inventories of Internet user information, digital advertising campaigns on large websites with national and even international reach, targeting individuals based on prior online viewing and consumption behavior, are far more efficient and effective than targeting audiences who happen to live in the same local area. Media and public affairs scholar

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87. See PICKARD, *supra* note 15, at 99–101 (canvassing studies); STIGLER COMMITTEE REPORT, *supra* note 1, at 148–49 (same).

88. Pengie Gao et al., *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance*, 135 J. FIN. ECON. 445 (2020).

89. Meghan E. Rubado & Jay T. Jennings, *Political Consequences of the Endangered Local Watchdog: Newspaper Decline and Mayoral Elections in the United States*, 56 URB. AFFS. REV. 1327, 1327 (2019).

90. Filipe R. Campante & Quoc-Anh Do, *Isolated Capital Cities, Accountability, and Corruption: Evidence from US States*, 104 AM. ECON. REV. 2456, 2456 (2014).

91. *Id.*

92. See ABERNATHY, *supra* note 1, at 7–30; MARGARET SULLIVAN, GHOSTING THE NEWS: LOCAL JOURNALISM AND THE CRISIS OF AMERICAN DEMOCRACY 9 (2020).

Matthew Hindman labels this phenomenon the “advertising inversion.”<sup>93</sup> He trenchantly concludes: “There is nothing newspapers can do to change this: it is simply the way the math works. The fact that data mining gets more accurate with larger audiences is as indelible as  $2 + 2 = 4$ .”<sup>94</sup>

Digital platforms have also rendered local news largely irrelevant to digital advertisers. News sites overall get only about 3% of web traffic. And of that 3%, the vast majority of web user traffic goes to national news outlets.<sup>95</sup> Only about one-sixth of news traffic — half a percent overall — goes to local news websites, and that half a percent is split between newspapers (which engage in most original local news reporting) and television stations.<sup>96</sup> Despite its importance for democratic governance, local newspaper traffic amounts to only about five minutes per capita per month in web users’ attention.<sup>97</sup> By contrast, U.S. internet users spend an average of two hours and three minutes every *day* on social media.<sup>98</sup> As Matthew Hindman again aptly notes: “Local newspaper traffic is just a rounding error on the larger web. The bottom line is that [local] newspapers cannot monetize an audience they do not have.”<sup>99</sup>

Nor have local news sites been able to look to paid subscribers to make up for lost advertising revenue. A recent study finds that the New York Times and Washington Post each draw more paid digital readers than all local newspaper websites combined.<sup>100</sup> Only 14% of Americans pay for local news, and of those who prefer getting local news via social media, the percent of those who pay drops to 8%.<sup>101</sup> By comparison, 53% of Americans pay for news overall, including by subscribing to newspapers or magazines, paying for news apps, and

93. HINDMAN, *supra* note 17, at 134–35.

94. *Id.*

95. *See id.* at 134.

96. *Id.* at 11. Local newspapers have historically employed many more reporters, and have produced more original reporting, than television and radio. *See* ABERNATHY, *supra* note 1, at 18.

97. HINDMAN, *supra* note 17, at 134.

98. H. Tankovska, *Daily Time Spent on Social Networking by Internet Users Worldwide from 2012 to 2020*, STATISTA (Feb. 8, 2021), <https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide> [<https://perma.cc/AYY7-8N43>].

99. HINDMAN, *supra* note 17, at 134.

100. NIC NEWMAN ET AL., REUTERS INSTITUTE DIGITAL NEWS REPORT 2020, 22–23 (2020) [hereinafter REUTERS DIGITAL NEWS REPORT 2020] (finding that, of those who subscribe to online news, 39% subscribe to the New York Times, 31% to the Washington Post, and 30% to a local paper).

101. PEW RSCH. CTR., FOR LOCAL NEWS, AMERICANS EMBRACE DIGITAL BUT STILL WANT STRONG COMMUNITY CONNECTION 35–38 (2019), <https://www.journalism.org/2019/03/26/for-local-news-americans-embrace-digital-but-still-want-strong-community-connection/> [<https://perma.cc/M97K-BRQ9>].

donating to public media,<sup>102</sup> and 20% of Americans pay for online news (about half to the New York Times or Washington Post).<sup>103</sup>

In short, without some mechanism for funding local journalism, local news deserts will undoubtedly multiply. As with investigative journalism, local news reporting brings social value that far exceeds the price consumers are willing to pay to receive it. Its loss would have immeasurable political, social, and economic consequences for our democracy and our society.

#### IV. LEADING INITIATIVES FOR SALVAGING QUALITY JOURNALISM

Recent legislative initiatives for salvaging the press fall within two basic categories: according news publishers an intellectual property right that they can assert against digital platforms that display news story headlines, photos, and links, and leveling the competitive playing field between platforms and news publishers through antitrust law. I consider each in turn. Finally, I briefly examine recent initiatives to support quality journalism, launched by Google and Facebook to ward off regulatory intervention.

##### *A. Intellectual Property*

News publishers have long sought to assert intellectual property protection against digital platforms, online news aggregators, and news clipping services that display links, headlines, excerpts, photographs, and/or summaries of the publishers' original news stories. As News Corporation Chair Robert Murdoch famously proclaimed: "Their almost wholesale misappropriation of our stories is not fair use. To be impolite, it's theft."<sup>104</sup>

Murdoch's claim notwithstanding, news publishers have met with limited success in U.S. courts on the two primary types of intellectual property protection they have asserted: copyright and misappropriation of hot news. Further, the publishers have thus far failed in lobbying Congress to grant them additional intellectual property rights.

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102. MEDIA INSIGHT PROJECT, PAYING FOR NEWS: WHY PEOPLE SUBSCRIBE AND WHAT IT SAYS ABOUT THE FUTURE OF JOURNALISM 3–6 (2017), [http://mediainsight.org/PDFs/Pay%20for%20News/Media%20Insight%202017%20-%20Pay%20for%20News\\_final.pdf](http://mediainsight.org/PDFs/Pay%20for%20News/Media%20Insight%202017%20-%20Pay%20for%20News_final.pdf) [https://perma.cc/JL6D-TWSC].

103. REUTERS DIGITAL NEWS REPORT 2020, *supra* note 100, at 22–23.

104. David Sarno, *Murdoch Accuses Google of News "Theft"*, L.A. TIMES (Dec. 2, 2009), <http://articles.latimes.com/2009/dec/02/business/la-fi-news-google2-2009dec02> [https://perma.cc/GY7R-R5MM].

However, the European Union has recently created a press publishers' right that might serve as a model for U.S. legislation in the future.<sup>105</sup>

I briefly elucidate each of these intellectual property rights and explain why none of them are appropriate for salvaging quality journalism. As we will see, in their current form, the rights are too narrow to provide news publishers with effective redress against digital platforms for distributing and repurposing news content. Moreover, even robust intellectual property rights in news content would miss the mark. They would not address the root harms that news publishers suffer at the hands of digital platforms: publishers' dramatic loss of advertising revenues and dependence on the platforms to reach prospective readers.

### 1. Copyright

News publishers typically hold the copyright in original news stories they publish. As such, they have the exclusive right to publicly display and distribute their news stories.<sup>106</sup> A digital platform that displayed all or more than a trivial portion of a news story without the news publisher's permission would infringe the publisher's copyright, absent a defense to infringement such as fair use. Further, social media platforms like Facebook may be held secondarily liable for their users' postings of copyright-protected content. As a result, the platforms generally take advantage of a safe harbor from such liability under the Digital Millennium Copyright Act ("DMCA"), which is available only for social media websites that remove infringing user postings upon receiving notice from the copyright owner identifying the location of that content on the social media site.<sup>107</sup>

Nonetheless, copyright is ill-suited to enabling news publishers to extract revenues from digital platforms. First, copyright protection does not extend to the facts reported in news stories.<sup>108</sup> News publishers may assert copyright to prevent copying, distribution, and display of the language they use to convey reported facts, and possibly also to prevent a close paraphrase of substantial portions of a news article. But copyright law does not give news publishers an exclusive right to summarize or rework reported facts using different language. Hence,

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105. *See infra* notes 127–135 and accompanying text.

106. 17 U.S.C. § 106 (setting out exclusive rights of public display and public distribution, as well as the exclusive right to reproduce copies).

107. *See* 17 U.S.C. § 512 (setting out DMCA safe harbor provisions for internet service providers).

108. It is a cardinal principle of copyright law that copyright extends to the author's expression, not to the ideas or facts that the author communicates. *See* 17 U.S.C. § 102(b); *see also* *Nihon Keizai Shimbun, Inc. v. Comline Bus. Data, Inc.*, 166 F.3d 65, 70 (2d Cir. 1999) (stating that the reporting of facts is not protectable under the Copyright Act since facts are "never original to an author").



copyright gives news publishers no right to prevent news aggregators and clipping services from distributing summaries or substantially rewritten accounts of the facts that an original news story presents — even facts that a news organization has devoted months of time and hundreds of thousands of dollars in uncovering. Nor does copyright law give publishers any right to prevent digital platforms from redistributing such summaries and rewrites.

Second, news feed aggregators like Google News likely have a fair use defense for displaying news article headlines and story ledes, so long as those short excerpts contain a link that leads interested readers to the news publisher's website. News publishers have sued news feed aggregators for copyright infringement on a few occasions. In 2005, the first such lawsuit, the news wire service Agence France Press ("AFP") claimed that Google infringed AFP's copyrights by displaying AFP's photographs, headlines, and ledes on the Google News site. After some two years of litigation and before any judicial ruling on the merits of AFP's copyright claims, AFP and Google settled the case, entering into a licensing deal that gave Google the right to display AFP content, including news stories and photos, on Google News and other Google sites.<sup>109</sup> A parallel Associated Press ("AP") lawsuit against Google also settled prior to any judicial ruling on the merits.<sup>110</sup>

Although the infringement actions against Google settled without a substantive determination, more recent fair use rulings would strongly support news feed aggregators' fair use defense to such a claim, so long as the news feed aggregator (1) operates as a search engine available to the public at large, (2) displays just enough of each news story to give readers an idea of what it is about, and (3) provides a link that leads interested readers to the news publisher's website. Notably, the Second Circuit held that Google made fair use of millions of books that it scanned to create a searchable database of book texts.<sup>111</sup> The Court emphasized that Google copied the books to provide an information location tool to enable internet users to determine which books were relevant to their search queries.<sup>112</sup> As the Court also noted, Google took care to avoid providing a substitute for buying the book by displaying only short snippets of books in relation to users' search queries and

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109. Chris Nuttall, *AFP and Google Settle Lawsuit*, FIN. TIMES (Apr. 7, 2007), <https://www.ft.com/content/bc639eb2-e48b-11db-9115-000b5df10621> [<https://perma.cc/JE8M-J4RS>].

110. *Id.* (discussing AP settlement); Kimberly Isbell, *The Rise of the News Aggregator: Legal Implications and Best Practices*, BERKMAN CTR. FOR INTERNET & SOC'Y HARV. UNIV. (Aug. 30, 2010), [https://cyber.harvard.edu/publications/2010/news\\_aggregator\\_legal\\_implications\\_best\\_practices](https://cyber.harvard.edu/publications/2010/news_aggregator_legal_implications_best_practices) [<https://perma.cc/M9VD-Q27R>] (discussing these lawsuits).

111. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 205 (2d Cir. 2015).

112. *Id.*

providing links to sites where interested readers could buy the book.<sup>113</sup> By contrast, a district court held that Meltwater, a subscription-only online news clipping service, did not make fair use of news stories for which it displayed verbatim extracts that were twice as long as extracts displayed in Google News, and where service subscribers rarely clicked-through to the original news article.<sup>114</sup> Further, the Second Circuit held that TVEyes, a video media monitoring service that provided subscribers with ten-minute clips of TV news programs relevant to subscribers' search queries, did not make fair use of the original programs. The Court reasoned that, in contrast to the Google Book Search snippets, the video monitoring service's ten-minute clips could substitute for the original news stories.<sup>115</sup> Given these rulings, Google News's display of news headlines and ledes would most likely qualify as fair use.

Third, as discussed further below, even if news publishers could assert copyright against digital platforms, the publishers are in an extraordinarily weak bargaining position vis-à-vis the platforms. As we have seen, digital platforms hold a dominant position in serving as a gateway to prospective readers.<sup>116</sup> And news articles represent just a tiny percentage of overall web traffic flowing through the digital platforms.<sup>117</sup> Consequently, news publishers would be exceedingly unlikely to be able to insist on receiving substantial copyright license fees in exchange for allowing the platforms to continue to distribute the publishers' copyright-protected content.

## 2. Misappropriation of Hot News

News publishers have also brought claims against news aggregators under the legal doctrine of misappropriation of hot news. In its much-discussed 1918 ruling, *International News Service v. The Associated Press*, the Supreme Court ruled, as a matter of federal common law, that a news organization that has invested effort and expense in gathering time-sensitive factual information may prevent a competitor from misappropriating that information's economic value by distributing the information under the false pretense that the competitor itself had gathered it.<sup>118</sup> *International News Service*

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113. *Id.* In addition, the Ninth Circuit held that Google's display of low-resolution thumbnail versions of copyrighted images on its Google Image Search page qualified as fair use because Google's display serves as a socially valuable electronic reference tool. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1147 (9th Cir. 2007).

114. *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 553–55 (S.D.N.Y. 2013).

115. *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 179–81 (2d Cir. 2018).

116. *See supra* notes 30–33 and accompanying text.

117. *See supra* notes 95–96 and *infra* notes 143–146 and accompanying text.

118. 248 U.S. 215, 222 (1918).

involved two competing news wire services, the plaintiff Associated Press (“AP”) and defendant International News Service (“INS”). INS regularly lifted factual stories from AP bulletins and sent them by wire to INS newspapers. The INS papers would then publish the stories as if the stories were their own. At the time, news stories were not protected by copyright law. But the Supreme Court held that INS’s conduct was a common-law misappropriation of AP’s quasi-property right in its hot news.

Since *International News Service*, the Supreme Court has abrogated federal common law and thus the hot news misappropriation tort arises only under state statute or common law.<sup>119</sup> The tort is recognized in only a handful of states.<sup>120</sup> Moreover, courts have narrowly limited *International News Service*, holding that federal copyright law’s cardinal rule that facts may be freely copied preempts applications of the hot news misappropriation tort in cases that are not on all fours with the 1918 ruling.<sup>121</sup>

For example, the Second Circuit has held that a hot news misappropriation claim will survive copyright preemption only where:

- (i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant’s use of the information constitutes free-riding on the plaintiff’s efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or

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119. The Supreme Court abrogated federal common law twenty years after its ruling in *International News Service v. Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State”).

120. See John C. McDonnell, *The Continuing Viability of the Hot News Misappropriation Doctrine in the Age of Internet News Aggregation*, 10 NW. J. TECH. & INTEL. PROP. 255, 262 (2012) (noting that New York, Pennsylvania, Missouri, California, and Illinois have adopted the hot news misappropriation tort as part of state unfair competition law and that the claim has also been asserted in Massachusetts and Washington D.C., without a ruling on the merits).

121. See, e.g., *Barclays Cap. Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 898–901 (2d Cir. 2011); *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 852 (2d Cir. 1997); *Agora Financial LLC v. Samler*, 725 F.Supp.2d 491 (D. Md. 2010). See also Shyamkrishna Balganes, *“Hot News”: The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 472–76 (2011) (arguing that hot news misappropriation can survive federal preemption only if narrowly configured as an unjust enrichment claim against a competitor, not an intellectual property right).

service that its existence or quality would be substantially threatened.<sup>122</sup>

As the Second Circuit has applied that test, “free-riding” means appropriating news gathered by the plaintiff and selling it as the defendant’s own, as was the case in *International News Service*. Under that understanding, a defendant does not free-ride when it provides attribution to the plaintiff as the source of the news.<sup>123</sup> Accordingly, digital platforms, news aggregators, and news monitoring services that provide attribution to the source of the news stories they display and distribute, and certainly those that provide links to the original story, would appear to be immune from hot news misappropriation claims.<sup>124</sup> To hold otherwise might render actionable the unexceptional behavior of the traditional news media in reporting competitors’ breaking news stories with proper attribution to the story’s source.<sup>125</sup>

### 3. Legislating a News Publishers’ Right

News organizations have lobbied for legislation to secure their rights in news stories as a means to extract revenue from online news aggregators.<sup>126</sup> Congress has yet to enact, or even hold hearings on, such proposals. However, the European Union has recently enacted a news publishers’ right that could serve as a model — and impetus — for similar legislation in the United States.

#### *a. Article 15 Press Publisher’s Right*

The European Union has sought to ensure the sustainability of news organizations by granting them an intellectual property right in

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122. *Nat’l Basketball Ass’n*, 105 F.3d at 852; see also *Barclays Cap.*, 650 F.3d at 898–901 (2d Cir. 2011) (criticizing various formulations of the five-part test as inconsistent and confusing but applying the test nonetheless).

123. *Barclays Cap. Inc.*, 650 F.3d at 903–04.

124. See *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 399 (S.D.N.Y. 2014) (holding that plaintiff TV news organization’s hot news misappropriation claim against a video monitoring service that provided its subscribers clips from TV news programs was preempted by copyright law because the monitoring service did not try to pass off the TV news content as its own). On the other hand, in *Barclays Capital*, the Second Circuit speculated in dicta that the tort might apply if the defendant were competing with the plaintiff in presenting financial news, without mentioning whether the defendant’s failure to attribute would also be required. *Barclays Cap. Inc.*, 650 F.3d at 906; see also Shyamkrishna Balganesha, *The Uncertain Future of “Hot News” Misappropriation after Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134 (2012).

125. See FTC STAFF DISCUSSION DRAFT, *supra* note 23, at 10–11 (noting that “[e]xpanding hot news protection to limit unauthorized borrowing of facts from news sources could . . . impede the routine practice of journalism by all news organizations, not just aggregators”).

126. *Id.* at 9–13.

certain uses of their news stories by daily news feed aggregators and online media monitoring services. Article 15 of the EU Copyright in the Single Digital Market Directive, adopted in April 2019, provides that EU Member States must grant “publishers of press publications,” meaning European news publishers and news agencies, an exclusive right vis-à-vis “information society service providers” to reproduce and make available to the public copies and extracts of “press publications” online.<sup>127</sup> The Directive defines “press publications” as news stories published in any media as part of a newspaper or news magazine under the initiative and editorial responsibility of a news publisher or news agency.<sup>128</sup> “Information society service providers” would include search engines; daily news feeder aggregation sites, like Google News, Apple News, and Squidapp; and online media monitoring services, like Meltwater.<sup>129</sup>

The Article 15 press publishers’ right stands independently of, and in addition to, the copyright in the news story, which is typically held by the publisher or, less commonly, the journalist who authored the story. The press publishers’ right expires two years after the news story was published, calculated from January 1 of the year following publication.<sup>130</sup> The press publishers’ right does not apply to private or non-commercial uses of news stories by individuals.<sup>131</sup> Nor does it apply to acts of hyperlinking or to the use of individual words or “very short extracts” of a news story.<sup>132</sup> Finally, the right does not extend to the facts that are reported in the news story, meaning that information society service providers are free to rewrite those facts in their own words.<sup>133</sup>

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127. See Digital Single Market Directive, *supra* note 9, at 118.

128. See *id.* at 113.

129. See *id.* at 103–04. Article 15 was not intended to target social media and user-generated content platforms. But it is possible that such platforms could be impacted, nonetheless. Article 17(1) of the Digital Single Market Directive provides that online content-sharing service providers (“OCSSPs”) perform an act of public communication or of making available to the public when they provide public access to copyrighted content posted by their users, and that such an act requires permission from the copyright owner. An OCSSP is defined as a service provider of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected content uploaded by its users, which it organizes and promotes for profit-making purposes. YouTube clearly falls within that definition. Facebook contends that it does not because its overriding purpose is to facilitate user communication, not to store and give the public access to copyright-protected works. Regardless, in the United States, Facebook faces potential secondary liability for its user posts of copyright-protected works and, accordingly, readily removes copyright-protected material upon its receipt of a DMCA take-down notice identifying that material as infringing and employs content filters to block the upload of content that might infringe copyright. I thank Bernt Hugenholtz for clarifying to me the potential impact of Articles 15 and 17 on Facebook.

130. See Digital Single Market Directive, *supra* note 9, at 119.

131. *Id.* at 118.

132. *Id.*

133. *Id.* at 104.

The Directive's preambles set out the rationale for this new, sui generis intellectual property right. Paragraph 54 trumpets the essential role of a "free and pluralist press" for "the proper functioning of a democratic society."<sup>134</sup> It further notes "the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue." And it states that news publishers "are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments." Paragraph 55 adds that news publishers' organizational and financial investment must "be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information."<sup>135</sup>

Scholarly commentators have harshly criticized the Article 15 press publishers' right.<sup>136</sup> They maintain that the new right merely adds a burdensome, superfluous layer of transaction costs without providing much, if any, benefit to press publishers. They point out that press publishers typically already hold the copyright in news stories appearing in their publications by virtue of copyright assignments, employment contracts, or collective bargaining agreements. The critics also note that similar press publishers' rights previously enacted in Germany and Spain have spectacularly failed to benefit news media.

#### *b. Ineffectiveness of Press Publishers' Right*

News publishers' experience in Germany and Spain, indeed, presents a cautionary tale. In Germany, Google announced at the time the news publishers' right was enacted that any news publishers wishing to be indexed in Google News had to grant Google a royalty free license to display extracts of their news articles.<sup>137</sup> Most German news publishers immediately acceded to Google's demand, but publishers associated with VG Media, including Axel Springer, declined. In response, Google News and other German news

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134. *Id.* at 103–04.

135. *Id.* at 104.

136. *See, e.g.*, Letter from Lionel Bently (on behalf of thirty-seven professors and leading scholars of intellectual property, information law, and digital property) to Baroness Neville-Rolfe of the UK Copyright Policy Directorate, responding to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market (Dec. 5, 2016), <https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/ipomodernisingipprofresponsepresspublishers.pdf> [https://perma.cc/E2TW-PPML].

137. *See* Doh-Shin Jeon, *Economics of News Aggregators* 8–10 (Toulouse Sch. of Econ., Working Paper No. 18-912, 2018) (surveying the literature and events in Germany and Spain), [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp\\_tse\\_912.pdf](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2018/wp_tse_912.pdf) [https://perma.cc/T5WY-4AJW].

aggregators stopped displaying images, video, and any text exceeding very short excerpts from VG Media news sites. The hold-out publishers immediately experienced a significant reduction in Internet traffic. Axel Springer estimated that Google's downgrading of the publisher's Google News listings resulted in a loss of nearly 40% of its web traffic.<sup>138</sup> Within two weeks, VG Media joined their fellow German news publishers in granting Google royalty-free licenses to include their articles in Google News. By contrast, since the German law took effect on August 1, 2013, smaller German daily news aggregators such as GMX, Web.de, and T-Online, have not been able to obtain royalty free licenses from news publishers and thus have sharply reduced or discontinued their services.<sup>139</sup>

In Spain, the new law accorded news publishers a non-waivable compulsory remuneration right against digital platforms that post links or excerpts of their news articles. In response, Google closed its entire Google News site in Spain. Studies show that Internet traffic to Spanish publishers' websites then decreased by 6% on average and 14% for small publishers in the ensuing months.<sup>140</sup> Overall, the net effect of the Google News shut-down for the top twenty Spanish news sites was neutral or slightly positive. The shut-down did not change overall traffic to those sites but resulted in an increase of web traffic to the sites' landing pages, visits for which news publishers can generally reap higher advertising revenues than for visits directly to a particular article. By contrast, the Google News shut-down reduced overall traffic to below top twenty news sites without a commensurate increase in visits to their landing pages. Thus, if anything, the net effect of the press publishers' right law in Spain was to increase media concentration, favoring large news publishers' websites over small publishers' sites. In addition, the removal of Google News from Spain reduced overall news consumption by about 20%, and users read less breaking news, hard news, and news that was not covered by their favorite news publishers.<sup>141</sup>

It is highly unlikely that EU Member States' implementation of Article 15 will result in more favorable results than news publishers experienced in Germany and Spain. The cases of Germany and Spain strongly suggest that, overall, news article listings in Google News provide more benefit than harm for news publishers — and significantly more benefit for news publishers than for Google. Google News does seem to impose some cost on larger news publishers by

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138. See Joan Calzada & Ricard Gil, *What do News Aggregators Do? Evidence from Google News in Spain and Germany*, 39 MKTG. SCI. 134, 139 (2019).

139. Susan Athey et al., *The Impact of Aggregators on Internet News Consumption* 3 (Stanford Bus. Sch., Working Paper No. 3353, 2017).

140. See Jeon, *supra* note 137, at 9.

141. Athey et al., *supra* note 139, at 3–4; see also Calzada & Gil, *supra* note 138, at 1–2.

driving readers directly to the web pages displaying the articles listed in Google News, thus bypassing the news publishers' landing page. That negatively impacts large news publishers' advertising revenue and may decrease the news publishers' incentive to invest in the quality of their curation and brand.<sup>142</sup> But, in Germany, even large news publishers granted Google royalty-free licenses rather than be delisted from Google News. It would thus appear that the net impact of Google News on large news publishers is between ambiguous and slightly positive, while it is clearly positive for small publishers, thus enhancing media diversity.

The same is almost certainly true regarding Facebook. Facebook reports that only 4% of its News Feed posts are news articles.<sup>143</sup> And much to the consternation of news publishers, in January 2018 Facebook changed its News Feed algorithm to deprioritize news in favor of updates from friends and family. Referral traffic to news sites from Facebook shrank sharply. Indeed, the online news magazine *Slate* lost 87% of its traffic from Facebook.<sup>144</sup> Facebook's head of global news partnerships blithely dismissed news publishers' anticipatory and, ultimately, well-founded worries about how the change would impact them: "If anyone feels this isn't the right platform for them, they should not be on Facebook."<sup>145</sup> In short, news is fairly marginal to Facebook's bottom line. In stark contrast, many news publishers continue desperately to try to tailor their news stories to go viral on Facebook.<sup>146</sup>

Moreover, Google and other such news aggregators could avoid the EU press publishers' exclusive right by displaying only bare news story listings, consisting of no more than headlines, very short extracts, and hyperlinks to the respective publishers' webpages. Indeed, "very short extracts" might include low-resolution thumbnail images that reproduce a photograph from the original news story as well. Germany's proposed law designed to implement Article 15 includes such images within its definition of permissible "very short extracts."<sup>147</sup>

142. See *id.* at 16.

143. See STIGLER COMMITTEE REPORT, *supra* note 1, at 173.

144. See RASHIDIAN ET AL., *supra* note 4, at 21; Josh Constin, *Why the Facebook News Tab Shouldn't Be Trusted: 10 Years of Abusing Publishers*, TECHCRUNCH (Oct. 25, 2019), <https://techcrunch.com/2019/10/24/facebooks-news-not-yours> [https://perma.cc/C8RS-T826].

145. RASHIDIAN ET AL., *supra* note 4, at 4.

146. See Caplan and Boyd, *supra* note 39, at 5–6 (describing news publishers' efforts to alter their news stories to comport with Facebook's content prioritization algorithm).

147. Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Ersten Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts [Federal Ministry of Justice and Consumer Protection, Draft of a First Law to Adapt the Copyright to the Digital Single Market Needs] 9 (Jan. 15, 2020), [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz\\_I\\_Anpassung-Urheberrecht-dig-Binnenmarkt.html](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_I_Anpassung-Urheberrecht-dig-Binnenmarkt.html) [https://perma.cc/JW9Q-CLFN].



Google would prefer an even more expansive carve-out from the press publishers' right.<sup>148</sup> But news publishers probably stand to lose most from a legal regime that gives news aggregators an incentive to display no more than bare listings. Readers might be more likely to click on a news story link to read the story on the publisher's website if the listing includes a story lede informing the reader what the story is about.

It appears that the sole possibly effective regulatory vehicle for inducing platforms to pay for linking to news articles is to fashion a requirement under competition law that platforms with market dominance must negotiate for a license to display news content. I discuss that avenue below.<sup>149</sup>

### *c. Off Target*

At bottom, the Article 15 press publishers' right aims to provide financial support for press publishers by targeting the wrong issue. News aggregators' listings and extracts of news articles are not the primary cause of news publishers' declining advertising revenues. If anything, news aggregators like Google News appear to generate greater traffic to news publishers' websites overall, not appropriate news publishers' business by listing news stories. The same appears to be the case regarding user posts and links to news articles on Facebook. Indeed, as noted above, news publishers invest considerable effort in crafting articles and headlines that will go viral on Facebook and other social media.

Thus, treating the issue as one of misappropriation of intellectual property in news story links, extracts, or even entire news articles is both conceptually and practically off-the-mark. Rather, the news publishers' severe financial woes stem primarily from the duopoly control over digital advertising held by Internet giants Google and Facebook. The news publishers cannot compete with Internet giants' far superior online and mobile technology, massive user base, and individualized data for millions of Internet users. Nor can they build advertising revenue in the face of the digital platforms' dominance and self-dealing in digital advertising auction markets. Google and Facebook would siphon off the advertising revenue that long served to

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148. See Diskussionsentwurf des Bundesministeriums der Justiz und für Verbraucherschutz (BMJV) für ein Erstes Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarkts [Draft Discussion of the Federal Ministry of Justice and Consumer Protection (BMJV) for a First Law to Adapt the Copyright to the Requirements of the Digital Single Market] (Jan. 31, 2020), [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz\\_I\\_Anpassung-Urheberrecht-dig-Binnenmarkt.html](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Gesetz_I_Anpassung-Urheberrecht-dig-Binnenmarkt.html) [https://perma.cc/F9BR-8SG6].

149. See *infra* notes 167–179 and accompanying text.

undergird the Fourth Estate even if they did not display any news story content.

### *B. Leveling the Competitive Playing Field*

Proposals to level the competitive playing field between news publishers and digital platforms take three forms. One, which has already come to fruition, is to assert antitrust law more aggressively against the platforms. The second, as expressed in the proposed Journalism Competition and Preservation Act, is to give news publishers an exemption from antitrust law to enable them to bargain collectively with digital platforms to demand payment for the use of news stories online. The third, which has garnered interest outside the U.S., is to employ competition law (as antitrust law is called in other countries) to require, under threat of mandatory arbitration, that platforms negotiate and reach agreement with news publishers for the platforms' display of news content. None of the three approaches provide a long-term solution to salvaging quality journalism.

#### 1. Asserting Antitrust Against Platforms

Proposals for greater antitrust enforcement against digital platforms range from breaking up technology company giants to imposing "structural separation" by proscribing dominant digital platforms' entry into markets for goods and services that depend on access to the platform.<sup>150</sup> Such sentiments have recently found expression in several antitrust actions brought against Google and Facebook. In October 2020, the Department of Justice sued Google for employing an interlocking web of exclusionary agreements and other business deals designed to foreclose potential competition to its search engine.<sup>151</sup> In December 2020, the Federal Trade Commission and more than 40 states sued Facebook for acquiring potential rivals like Instagram and WhatsApp with the express purpose of suppressing competition.<sup>152</sup> A week later, ten states sued Google for abusing its

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150. See Matt Stevens, *Elizabeth Warren on Breaking Up Big Tech*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html> [<https://perma.cc/AR4G-EES7>]; see Hemphill, *supra* note 20 (advocating that antitrust law should generally prohibit a dominant platform's acquisition of a nascent competitor as a form of illegal monopolization but should grant leeway to acquisitions by other platform incumbents that might enhance inter-platform competition); see also Khan, *supra* note 39 (advocating structural separation); see generally Rory Van Loo, *In Defense of Breakups: Administering a "Radical" Remedy*, 105 CORNELL L. REV. 1955 (2020).

151. Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03010 (D.D.C., Oct. 20, 2020), ECF No. 1. Notably, the business deals that are subject to the antitrust complaint include Google's payment to Apple to make the Google search engine the default option on Apple devices. *Id.*

152. Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C., Jan. 13, 2021), ECF No.1.

monopoly over programmatic advertising technology to overcharge publishers for advertisements and maintain market power over the digital advertising market.<sup>153</sup> That lawsuit also alleges that Google and Facebook colluded to manipulate online advertising auctions.<sup>154</sup>

The antitrust lawsuits reach far beyond digital platforms' deleterious impact on the press. As such, an analysis of the complex doctrinal and policy issues they raise exceeds the scope of this Article.<sup>155</sup>

It is important to note, however, that antitrust enforcement is highly unlikely to obviate the need for forward-looking regulatory measures to foster competition and protect consumers of goods and services that dominant digital platforms currently provide.<sup>156</sup> Nor is antitrust enforcement against digital platforms likely to substitute for the measures I advocate in this Article for salvaging quality journalism.

For one, the antitrust lawsuits face highly uncertain outcomes.<sup>157</sup> And even if ultimately successful, antitrust enforcement against digital economy giants Google and Facebook will likely take years.

153. Complaint, Texas et al. v. Google LLC, No. 4:20-cv-957 (E.D. Texas, Dec. 16, 2020), ECF No.1.

154. *Id.* at ¶¶ 2, 12–14. Of note, West Virginia-based news publisher, HD Media, has recently brought an antitrust lawsuit against Google and Facebook alleging that the digital platforms' anticompetitive practices and collusion in the digital advertising market have robbed newspapers of their vital advertising revenue. See Complaint and Jury Demand, HD Media Company, LLC v. Google, LLC and Facebook, Inc., No. 3:21-cv-00077 (S.D.W. Va., Jan. 29, 2021).

155. For a survey of such issues, see generally Thomas B. Nachbar, Platform Effects, (Rsch. Pub. No. 2021-10, Jan. 12, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3775205](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3775205) [<https://perma.cc/AE9W-4F5Q>]; Philip Verveer, *Platform Accountability and Contemporary Competition Law: Practical Considerations* (Shorenstein Center on Media, Politics and Public Policy, Discussion Paper, Nov. 2018).

156. See HAROLD FELD, THE CASE FOR THE DIGITAL PLATFORM ACT: MARKET STRUCTURE AND REGULATION OF DIGITAL PLATFORMS 48–66 (2019) (arguing for industry specific regulation of digital platforms, in addition to antitrust enforcement, to further competition, consumer protection, and expressive diversity); see also Bill Baer, *Assessing the DOJ Lawsuit Against Google*, BROOKINGS INST. TECHTANK BLOG (Oct. 21, 2020), <https://www.brookings.edu/blog/techtank/2020/10/21/assessing-the-doj-lawsuit-against-google> [<https://perma.cc/5USD-CAY2>]; Tom Wheeler, *The Justice Department's Lawsuit Against Google Will not Stop Big Tech's Abuses*, BROOKINGS INSTITUTION TECHTANK BLOG (Oct. 20, 2020), <https://www.brookings.edu/blog/techtank/2020/10/20/the-justice-departments-lawsuit-against-google-will-not-stop-big-techs-abuses> [<https://perma.cc/FS9Z-Q52N>]; Gene Kimmelman & Charlotte Slaiman, *Only Regulation Can Jumpstart Competition in Big Tech*, FORTUNE (July 16, 2019), <https://fortune.com/2019/07/16/big-tech-regulation-antitrust> [<https://perma.cc/NLM8-6RKP>].

157. See Mike Isaac & Cecilia Kang, "It's Hard to Prove": Why Antitrust Suits Against Facebook Face Hurdles, N.Y. TIMES (Dec. 10, 2020), <https://www.nytimes.com/2020/12/10/technology/facebook-antitrust-suits-hurdles.html?referringSource=articleShare> [<https://perma.cc/4QVJ-QPFM>] (noting that the antitrust "cases against Facebook are far from a slam dunk"); Brent Kendall, *Google, U.S. Government Each Face Challenges in Court Fight; Former CEO Eric Schmidt Takes Aim at Justice Department Antitrust Suit*, WALL ST. J. (Oct. 21, 2020), <https://www.wsj.com/articles/google-u-s-government-each-face-challenges-in-court-fight->

Further, even over the long term, greater antitrust enforcement over dominant digital platforms would face severe obstacles. Digital platform markets are characterized by a confluence of features that push those markets towards monopolization by a single company.<sup>158</sup> As a leading study enumerates, those features include:

“i) strong network effects (the more people use a product, the more appealing this product becomes for other users); ii) strong economies of scale and scope (the cost of producing more or of expanding in other sectors decreases with company’s size); iii) marginal costs close to zero (the cost of servicing another consumer is close to zero); iv) high and increasing returns to the use of data (the more data you control, the better your product); and v) low distribution costs that allow for a global reach.”<sup>159</sup>

Although some of those features appear in other markets as well, all of these features appear together in digital platform markets.

The combination of these features means that digital platform markets are winner-take-all markets. They naturally tend towards a single, very dominant player, as evidenced by Google’s market power in online search, Facebook’s in social media, and Amazon’s in e-commerce, leading to the companies’ shared dominance in digital advertising (with Amazon still a considerably smaller, late entrant in that sector). Further, digital platform markets are even more prone to tipping given that Internet users tend to flock to services that offer even slightly better ease and speed of use — and incumbent platforms can exercise their economies of scale (including the ability to test thousands of different digital service configurations), superior technology, and data control to bolster those consumer friendly features.<sup>160</sup> Absent a radical break-up of dominant platforms or aggressive, narrowly targeted regulatory intervention in specific platform services and practices, those market characteristics present insurmountable barriers to entry for would-be competitors.

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11603324647 [<https://perma.cc/U9VX-G6BF>] (discussing the major challenges and uncertainties that the Justice Department faces in its antitrust lawsuit against Google); Bhaskar Chakravorti, *5 Questions about the Antitrust Case against Google that You Should not be Afraid to Ask*, FOREIGN POL’Y (Oct. 30, 2020), <https://foreignpolicy.com/2020/10/30/google-antitrust-big-tech-monopoly-wrong> [<https://perma.cc/7DR6-Q55W>] (noting that “[a]ntitrust lawsuits are notoriously hard to win”).

158. See STIGLER COMMITTEE REPORT, *supra* note 1, at 7–8.

159. *Id.*

160. See HINDMAN, *supra* note 17, at 15–37; Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325, 325–30 (2018).

## 2. Antitrust Exemption for News Media

On the other side of the coin, news organizations have advocated for enactment of an antitrust exemption that would permit them to collaborate in negotiating with digital platforms for a greater share of revenues attributed to platforms' distribution of news stories.<sup>161</sup> In that vein, the proposed Journalism Competition and Preservation Act would provide "news content creators" with a temporary safe harbor from antitrust liability for coordinating with one another to collectively withhold content from, or negotiate licensing terms with, a digital platform that has at least one billion monthly active users worldwide.<sup>162</sup> The proposed Act defines news content creators as print or digital news organizations employing a dedicated professional editorial staff that creates and distributes original news on at least a weekly basis and is commercially marketed through subscriptions, advertising, or sponsorship. The proposed Act would require, as a condition to the safe harbor, that news content creator negotiations with the digital platform must not be limited to price, must apply in a nondiscriminatory manner to all similarly situated news content creators, and must directly relate to quality, accuracy, branding, and interoperability of news.

For reasons discussed above, it seems unlikely that news organizations would attain a significantly stronger bargaining position if they were allowed to band together in negotiating with dominant digital platforms.<sup>163</sup> News is marginal to Facebook's and Google's bottom line and market strategies. It makes up just 3% of web traffic and a tiny percentage of the digital giants' business.<sup>164</sup> Further, the proposed legislation would not prevent leading global news publishers, like News Corp., from reaching individual licensing deals with the platforms, leaving only small publishers that generate a truly negligible portion of the platforms' overall business to bargain collectively.

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161. See FTC STAFF DISCUSSION DRAFT, *supra* note 23, at 13–14. See also Jack Shafer, *Newspapers' Embarrassing Lobbying Campaign*, POLITICO (June 10, 2019), <https://www.politico.com/magazine/story/2019/06/10/newspapers-embarrassing-lobbying-campaign-227100> [https://perma.cc/9MNY-GP32] (sharply criticizing the proposed antitrust exemption).

162. The Act was initially proposed as H.R.2054, 116th Congress (2019–2020). As of this writing, it has been reported that a similar bill will be introduced in 2021. See Diane Bartz and Helen Coster, *Coming Bill Would Allow U.S. News Publishers to Team Up When Negotiating with Facebook, Google*, REUTERS (Feb. 19, 2021), <https://www.reuters.com/article/australia-media-facebook-us/exclusive-coming-bill-would-allow-us-news-publishers-to-team-up-when-negotiating-with-facebook-google-idUSL1N2KO3KQ> [https://perma.cc/APR6-97YK].

163. See *supra* notes 137–146 and accompanying text.

164. See HINDMAN, *supra* note 17, at 134 (noting that news sites get only about 3% of web traffic); Athey et al., *supra* note 139, at 16 (noting that Facebook reports that only 4% of its News Feed posts are news articles).

By contrast, most news organizations remain heavily dependent on web referral traffic from Facebook and Google.<sup>165</sup> For them, withholding their content from the digital platform giants is not a viable option, even as they have lost hope that the platforms will deliver newsrooms meaningful, consistent revenue.<sup>166</sup> It is thus hard to imagine that news organizations' collective licensing would do much to even the competitive playing field.

### 3. Mandating Platform Bargaining

In the wake of the E.U.'s enactment of a press publishers' right under Article 15, a couple of countries have drawn upon competition law to require that major platforms bargain in good faith with publishers to pay publishers for the platforms' display of news content. That approach is being considered in other countries outside the U.S. as well.

France adopted this approach in direct response to the ineffectiveness of the new press publishers' right given news publishers' lack of bargaining power versus the major platforms. After France became the first EU country to implement Article 15 into national law, Google announced that, as a default rule, it would display only bare listings of its French news search results and thus avoid the news publishers' right.<sup>167</sup> Further, any news publisher that wished to have Google display a story lede or image would have to grant Google a royalty-free license to do so. However, the French Competition Authority ruled that Google's take-it-or-leave-it strategy amounted to an unlawful abuse of its dominant market position.<sup>168</sup>

The French Competition Authority ruling has been criticized as lacking support in either Article 15 or European competition law.<sup>169</sup>

165. See *supra* notes 29–33 and accompanying text.

166. See NUSHIN RASHIDIAN, PLATFORMS AND PUBLISHERS: THE GREAT PANDEMIC FUNDING PUSH (2020), [https://www.cjr.org/tow\\_center\\_reports/platforms-publishers-pandemic-funding-news.php](https://www.cjr.org/tow_center_reports/platforms-publishers-pandemic-funding-news.php) [<https://perma.cc/GW7W-WJUZ>] (detailing platform initiatives).

167. See Laura Kayali, *Google Refuses to Pay Publishers in France*, POLITICO (Sept. 25, 2019), <https://www.politico.eu/article/licensing-agreements-with-press-publishers-france-google/> [<https://perma.cc/FR79-JTBT>]; Sam Schechner, *Google Refuses to Pay for News Links in France*, WALL ST. J. (Sept. 25, 2019), <https://www.wsj.com/articles/google-refuses-to-pay-for-news-links-in-france-11569409735> [<https://perma.cc/YZZ8-9VFP>].

168. Thibault Larger & Laura Kayali, *French Publishers Win Decisive Battle Against Google*, POLITICO (Apr. 9, 2020), <https://www.politico.eu/article/french-publishers-win-decisive-battle-against-google> [<https://perma.cc/T7J4-X9GC>].

169. See Giuseppe Colangelo, *Enforcing Copyright Through Antitrust? A Transatlantic View of the Strange Case of News Publishers Against Digital Platforms*, STANFORD-VIENNA TRANSATLANTIC TECH. LAW FORUM 12–19 (TTLF Working Paper No. 66, Oct. 27, 2020), <https://law.stanford.edu/publications/no-66-enforcing-copyright-through-antitrust-a-transatlantic-view-of-the-strange-case-of-news-publishers-against-digital-platforms> [<https://perma.cc/6P6Y-3X7V>].

Indeed, the German Competition Authority found that Google's similar take-it-or-leave proposition in Germany gave no cause for objection under competition law because Google displays bare listings even for news publishers who decline to grant royalty-free licenses for a more robust display.<sup>170</sup> Nonetheless, the French ruling prompted Google to negotiate with French news publishers for a license, with the result that Google has recently agreed to pay members of an alliance of some 285 French daily newspapers for Google's display of extracts from members' news stories.<sup>171</sup>

More recently, the Australian Parliament has enacted legislation that, along similar lines, "seeks to address a bargaining power imbalance that exists between digital platforms and Australian news businesses."<sup>172</sup> The new law subjects digital platforms and news media to a mandatory bargaining code under Australia's Competition and Consumer Act 2010.<sup>173</sup> The law requires that the parties negotiate in good faith for a voluntary agreement for sharing revenue generated by the platforms' display of Australian news content.<sup>174</sup> If the platforms and news publishers fail to come to terms, affected parties may bring the matter of platform remuneration to compulsory arbitration under the auspice of the Australian Communications and Media Authority.<sup>175</sup>

Australia's mandatory bargaining code has considerably less teeth as enacted than as originally proposed. Facebook reacted to the proposed legislation by removing all Australian news content from its platform.<sup>176</sup> In response the Australian government revised the proposed legislation to provide that the Australian Competition and Consumer Commission may exempt from mandatory bargain and arbitration those digital platforms that reach commercial bargains with news businesses outside the mandatory code.<sup>177</sup> For their part, Google and Facebook have announced commercial agreements to feature content from the largest Australian news sites, including those within

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170. *See id.* at 20–21 (describing the German Competition Authority's decision not to open formal proceedings against Google).

171. Natasha Lomas, *Google Inks Agreement in France on Paying Publishers for News Reuse*, TECHCRUNCH (Jan. 21, 2021), <https://techcrunch.com/2021/01/21/google-inks-agreement-in-france-on-paying-publishers-for-news-reuse> [<https://perma.cc/DJ7J-CPBH>].

172. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (Australia), Bills Digest No. 48, 2020–21, Feb. 15, 2021.

173. Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code 2021) Bill 2021 (Australia) [hereinafter Bargaining Code].

174. *Id.* §§ 52ZD et seq.

175. *Id.* §§ 52ZK et seq.

176. Kelly Buchanan, *Australia: New Legislation Establishes Code of Conduct for Negotiations between News Media and Digital Platforms over Payments for Content*, LIBR. CONG. GLOB. LEGAL MONITOR (Feb. 26, 2021), <https://www.loc.gov/law/foreign-news/article/australia-new-legislation-establishes-code-of-conduct-for-negotiations-between-news-media-and-digital-platforms-over-payments-for-content/> [<https://perma.cc/KUV8-C6QH>].

177. *Id.*

the News Corp and Nine Entertainment media empires.<sup>178</sup> In the meantime, Canada and the U.K. are reportedly considering similar legislation that would require digital platforms to pay for displaying news content.<sup>179</sup>

France's and Australia's application of competition law to compel digital platforms to share revenues with news publishers have shown greater promise than either the Article 15 press publishers' right or U.S. antitrust initiatives in mandating digital platform support for the press. But neither regime earmarks funding specifically for the support of quality journalism. Indeed, nothing stops News Corp from using platform remuneration to issue dividends to its shareholders rather than devoting those funds for investigative and local reporting. As I have argued, our policy objective should be to salvage the quality journalism that is vital to democratic governance, not merely to prop up a troubled industry. Regulators should thus mandate digital platform support that is appropriately targeted to that end.

### C. Facebook and Google Initiatives

Facebook and Google have each launched some voluntary initiatives to support news publishers and original journalism, largely in response to public pressure from news publishers and the threat of regulatory intervention. Google has recently launched a news aggregation site called Google News Showcase. The company announced that it will make an initial \$1 billion investment "in partnerships with news publishers" for the publishers to create and curate high-quality content for the site.<sup>180</sup> For its part, Facebook has rolled out a news story aggregation feature called Facebook News and has struck deals with news publishers to pay licensing fees of up to more than a million dollars a year to host their content.<sup>181</sup> Facebook's

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178. See *Facebook to Pay News Corp for Content in Australia*, BBC NEWS (March 16, 2021), <https://www.bbc.com/news/world-australia-56410335> [<https://perma.cc/54JR-9YHP>]; Alex Hern, *News Corp Agrees Deal with Google over Payments for Journalism*, GUARDIAN (Feb. 17, 2021), <https://www.theguardian.com/media/2021/feb/17/news-corp-agrees-deal-with-google-over-payments-for-journalism> [<https://perma.cc/L5PK-WK5K>]; Amanda Meade, *Nine Agrees to Join Google News Showcase in Australia for Reported \$30m a Year*, GUARDIAN (Feb. 17, 2021), <https://www.theguardian.com/media/2021/feb/17/nine-agrees-to-join-google-news-showcase-in-australia-for-reported-30m-a-year> [<https://perma.cc/C8HH-WY6S>].

179. See Buchanan, *supra* note 176.

180. Sundar Pichai, *Our \$1 Billion Investment in Partnerships with News Publishers*, GOOGLE BLOG (Oct. 1, 2020), <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase> [<https://perma.cc/9MX2-WXAT>].

181. See Campbell Brown & Mona Sarantakos, *Introducing Facebook News*, FACEBOOK (Oct. 25, 2019), <https://about.fb.com/news/2019/10/introducing-facebook-news> [<https://perma.cc/MXQ2-Q3WH>]; Cristiano Lima, *Why Facebook's Plan to Rescue Journalism May Not be Enough*, POLITICO (Oct. 25, 2019),



partners include major news outlets like The New York Times, The Los Angeles Times, Conde Nast, and ABC News (but also right-wing news aggregation site Breitbart).<sup>182</sup> The social media company announced that its news feed will showcase local reporting as well, even if initially limited to local publications from the largest major metropolitan areas.<sup>183</sup>

Further, Facebook and Google have each held boot camps for local news publishers and have pledged funding grants for newsrooms in the United States and other countries totaling roughly \$1.8 billion over the next several years.<sup>184</sup> As further discussed in Part VI, the two digital platform giants have also separately announced changes to their respective algorithms to give priority to original reporting over sources that rewrite or heavily abridge the original story.<sup>185</sup>

Facebook's and Google's initiatives to support the press might be a salutary development. But the news industry is understandably skeptical that the initiatives amount to anything more than public-relations moves designed to stave off government regulation and antitrust enforcement.<sup>186</sup> News publishers cite years of contradictory public statements by the platforms, as well as opaque, abrupt changes in the algorithms that drive referral traffic, of which Facebook's 2019 demoting of news content is just the latest, most egregious example.<sup>187</sup> Regardless of Facebook's and Google's voluntary initiatives, it is they who control the information ecosystem, leaving the press to adapt the best it can. When spread over several years, as planned, even one billion dollars of funding grants for local newsrooms amounts to little more than a rounding error compared to the advertising revenues that the digital platforms have siphoned from news publishers. As a 2019 study concludes: "The lesson of platform unreliability, particularly when it comes to revenue, has never been more clear to publishers."<sup>188</sup>

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<https://www.politico.com/news/2019/10/25/facebook-news-tab-058003>  
[<https://perma.cc/S8GM-BE8E>].

182. Lima, *supra* note 181.

183. Brown & Sarantakos, *supra* note 181.

184. See RASHIDIAN ET AL., *supra* note 4, at 7–8.

185. See Fischer, *Facebook Changes*, *supra* note 16; Sara Fischer, *New Google Rules Aim to Boost Original Reporting in Search Results*, AXIOS (Sept. 12, 2019), <https://www.axios.com/google-news-algorithm-original-reporting-search-results-publishers-7a0314ed-1132-4535-a158-eac1aa8f008d.html> [<https://perma.cc/K2VL-47U2>].

186. RASHIDIAN ET AL., *supra* note 4, at 11–13. See also PICKARD, *supra* note 15, at 171 (characterizing Google's and Facebook's support for journalism as a woefully insufficient public relations initiative); Lima, *supra* note 181.

187. See RASHIDIAN ET AL., *supra* note 4, at 5–8.

188. *Id.* at 6.

*D. Conclusion*

Granting news organizations intellectual property rights in their news stories, leveling the competitive playing field through antitrust law, and relying on digital platforms' voluntary initiatives are unlikely to provide newsrooms with appreciable, dependable revenue or brand control. Nor do they adequately target quality journalism for support. Other forms of government regulation are required to salvage quality journalism. I now proffer two additional proposals for such government intervention.

## V. EXCISE TAX ON DIGITAL ADVERTISING REVENUE

*A. Background: Public Funding of News Media*

The news media's dire financial straits have sparked calls for various forms of public funding of the Fourth Estate, ranging from direct government subsidies, to favorable tax treatment for news publishers, to vouchers that citizens can allocate to news media of their choice.<sup>189</sup> As Stephen Gillers cogently argues, given the press' vital watchdog role in our democracy, public funding for investigative journalism should be seen as a government obligation, embedded in the structure of our Constitution. Government funding for newsrooms' investigations of illegal conduct and other abuses of power, he argues, "should be no different from funding the judiciary, the Library of Congress, or the National Institutes of Health."<sup>190</sup>

Other commentators point to an additional benefit of public funding of journalism. They view public funding as a means to reduce the influence of advertisers and wealthy patrons on news content. Echoing Ed Baker's seminal critique, Victor Pickard castigates advertiser-supported commercial media for "contributing to inequality, skewed content, market censorship, concentrated media ownership, and other deleterious outcomes."<sup>191</sup> Pickard also cites the limited resources

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189. See, e.g., Lee Bollinger, *Journalism Needs Government Help*, WALL ST. J. (July 14, 2010), <https://www.wsj.com/articles/SB10001424052748704629804575324782605510168> [<https://perma.cc/H78H-94HL>]; Downie, Jr., & Schudson, *supra* note 45 (calling for favorable tax treatment for independent news organizations substantially devoted to public affairs reporting and federal grants for local news); GILLERS, *supra* note 15, at 152–66 (advocating public funding); Greenberg, *supra* note 15; MCCHESENEY & NICHOLS, *supra* note 47, ch. 4 (calling for increased funding for public service broadcasting, conversion of failing newspapers to nonprofit status, and a "Citizenship News Voucher," through which "every American adult gets a \$200 voucher she can use to donate money to any nonprofit news medium of her choice"); PICKARD, *supra* note 15, at 170 (mentioning tax vouchers as a possible source of public funding for the media); STIGLER COMMITTEE REPORT, *supra* note 1, at 176–84 (proposing citizens vouchers).

190. GILLERS, *supra* note 15, at 159.

191. PICKARD, *supra* note 15, at 158.

and what he characterizes as the elite orientation of wealthy benefactors who support a relatively small but burgeoning sector of nonprofit investigative newsrooms, such as ProPublica and The Texas Tribune.<sup>192</sup> He calls, accordingly, for a new autonomous public media system, generously backed by public funds and devoted to public service, which would stand alongside commercial and nonprofit, benefactor-supported news media.<sup>193</sup>

As public funding advocates emphasize, the United States has a long history of funding news media, harkening back to the early Republic. Beginning with the Post Office Act of 1792, Congress accorded news publications a postal subsidy that reduced postage fees by as much as 90%.<sup>194</sup> Congress also provided for free newspaper delivery, maintained postal roads for printers' use, and awarded newspaper publishers lucrative government printing contracts.<sup>195</sup> In today's dollars, those subsidies would amount to several billion dollars a year.<sup>196</sup>

News publications still enjoy a limited postal subsidy — and broadcasters continue to receive free use of the broadcast spectrum. But direct federal fiscal support for the domestic news media today is largely limited to the Corporation for Public Broadcasting, which receives congressional appropriations of \$445 million a year (increased to \$465 million for the fiscal year of 2022).<sup>197</sup> That paltry contribution amounts to just over two-thirds of the Pentagon's annual public relations budget.<sup>198</sup> In its relative dearth of public funding for news

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192. *Id.* at 96. ProPublica was founded in 2007, largely through the philanthropy of San Francisco billionaires Herbert and Marion Sandler. Richard Tofel & Stephen Engelberg, *The Man Who Made ProPublica Possible*, PROPUBLICA (June 5, 2019), <https://www.propublica.org/article/herb-sandler-the-man-who-made-propublica-possible> [https://perma.cc/5GR6-R89V]. The Texas Tribune was seeded with a \$1 million contribution from venture capitalists John and Julie Thornton. SULLIVAN, *supra* note 92, at 56. In 2019, the Tribune received a \$2,500,000 contribution from the Facebook Journalism Project. Evan Smith, *T-Squared: We're Creating Our First-Ever Local News Revenue and Training Lab*, THE TEXAS TRIBUNE (Dec. 2, 2019), <https://www.texastribune.org/2019/12/02/revenue-training-lab> [https://perma.cc/SXJ8-42DV]. In late 2019, the two digital newsrooms announced that they would join forces to engage in government-accountability, investigative reporting in Texas. See SULLIVAN, *supra* note 92, at 29.

193. PICKARD, *supra* note 15, at 161.

194. See Will Meyer, *The American Experiment was Built on a Government-Supported Press*, COLUM. JOURNALISM REV. (May 7, 2018), <https://www.cjr.org/opinion/government-subsidy-facebook.php> [https://perma.cc/DN5H-TWB2].

195. See PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MASS COMMUNICATIONS* 83–94 (2004).

196. PICKARD, *supra* note 15, at 158 (citing Ed Baker's calculation that the early postal subsidies alone would equal approximately \$6 billion per year in today's dollars).

197. The Corporation for Public Broadcasting received an annual appropriation of \$445 million for each fiscal year from 2015 through 2021. It has received an advance appropriation of \$465 million for the fiscal year of 2022. See *Federal Appropriation*, CORP. FOR PUBLIC BROAD., <https://www.cpb.org/appropriation/history> [https://perma.cc/75JY-XUZY].

198. PICKARD, *supra* note 15, at 158.

media, the United States is an outlier among democratic developed countries. The United States spends approximately \$1.40 per capita per year to fund public media. By contrast, Japan spends nearly \$60 per capita, and the United Kingdom spends more than \$80. Denmark and Finland each spend nearly \$100 per citizen on publicly supported media every year.<sup>199</sup>

The minimal public funding of news media in the United States comports with the negative liberty understanding of free speech and, more generally, the strong libertarian streak in this country.<sup>200</sup> Many Americans would deeply distrust extensive public funding of the media, particularly of newspapers. They would strongly suspect that public funding would entail direct government involvement in independent news reporting. Possibly with good reason. As media scholars are aware, U.S. government patronage of antebellum newspapers was, indeed, thoroughly partisan.<sup>201</sup>

However, studies of post-World War II publicly funded media in other democracies largely belie concerns of untoward government entanglement or of public media timidity towards those in power. The studies show, indeed, that public media tend to be more independent, ideologically diverse, and critical of dominant policy positions than are commercial news media.<sup>202</sup> Research also finds that strong public media systems promote greater knowledge of public affairs and of social trust, correlating with higher levels of voting and democratic engagement.<sup>203</sup> Public funding regimes for the Corporation for Public Broadcasting, as well as for the arts, humanities, and sciences in the United States, also suggest that it is possible to establish mechanisms that generally (albeit not perfectly) insulate funding agencies from undue partisan intrusion.<sup>204</sup>

### *B. An Excise Tax on Digital Advertising Revenue*

In that light, I propose that the federal government impose an excise tax of 2.5% on digital advertising revenue earned in the United States and that tax proceeds be earmarked for a Fourth Estate Trust

199. See Meyer, *supra* note 194; STIGLER COMMITTEE REPORT, *supra* note 1, at 174–75.

200. Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 60 STAN. L. REV. 1389 (2017).

201. See STARR, *supra* note 195, at 141–42 (describing the system of government-subsidized newspapers during the period between 1828 and 1860 as one in which “presidents and congressional majorities routinely used printing contracts and other means to subsidize friendly newspapers.”).

202. See PICKARD, *supra* note 15, at 159–60 (discussing comparative research).

203. *Id.*

204. SUE GARDNER, PUBLIC BROADCASTING: ITS PAST AND ITS FUTURE, KNIGHT FOUNDATION 5–6 (2017), <https://knightfoundation.org/public-media-white-paper-2017-gardner> [<https://perma.cc/6PXM-D26D>].

Fund for the support of investigative and local journalism.<sup>205</sup> To avoid imposing entry barriers on relatively small digital advertising companies, those that earn less than 5% of total domestic digital advertising revenue would be exempt from the excise tax. The Fourth Estate Trust Fund would supplement other sources of federal funding for quality journalism and public media. As discussed below, the trust fund structure might also provide an additional layer of protection against political influence.

How much would such an excise tax yield? As of this writing, the tax would apply to digital advertising revenues earned by Google, Facebook, and Amazon. In 2019, U.S. digital advertising revenue totaled \$132.4 billion.<sup>206</sup> Of that amount, Google earned \$41.8 billion (31.6% of the total), Facebook \$29.95 billion (22.7% of the total), and Amazon \$10.32 billion (7.85% of the total).<sup>207</sup> The three digital platform giants thus earned combined revenues of \$82.07 billion from the U.S. digital advertising market in 2019. A 2.5% excise tax on that U.S. digital advertising revenue would yield slightly more than \$2 billion per year.

That sum pales in comparison to advertising revenue losses suffered by U.S. newspapers during the last decade. But \$2 billion dollars per year would provide nontrivial support for investigative and local journalism, nonetheless. By comparison, the relatively well-heeled New York Times earned total revenues from all sources of \$1.81 billion in 2019.<sup>208</sup> Further, as noted above, Congressional appropriations for the Corporation for Public Broadcasting amount to \$445 million per year, increased to \$465 for the fiscal year of 2022. And Facebook's and Google's pledged voluntary contributions to support local journalism amount to (just) \$1 billion total, to be distributed incrementally over several years.<sup>209</sup>

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205. For a similar proposal, see Timothy Karr & Craig Aaron, *Beyond Fixing Facebook: How the Multibillion Dollar Business Behind Online Advertising Could Reinvent Public Media, Revitalize Journalism, and Strengthen Democracy*, FREE PRESS (Feb. 2019), <https://www.freepress.net/sites/default/files/2019-02/Beyond-Fixing-Facebook-Final.pdf> [<https://perma.cc/7DXY-NCMG>]. See also PICKARD, *supra* note 15, at 171 (proposing a “public media tax” of 1% on Facebook’s and Google’s earnings to subsidize publicly-funded media); CHRISTIAN FUCHS, *THE ONLINE ADVERTISING TAX AS THE FOUNDATION OF A PUBLIC SERVICE INTERNET* (2018) (advocating a digital advertising tax to fund a public service Internet). Back in the era when the commercial press still earned significant, if declining, revenues from advertising, several scholars and media reform NGOs proposed imposing a tax on commercial media’s advertising income, as well as on privately held broadcast spectrum and various consumer electronics, to fund public service media. See, e.g., MCCHESENEY & NICHOLS, *supra* note 47, at 209–12.

206. See *Google’s US Ad Revenues*, *supra* note 17.

207. *Id.*

208. The New York Times Co., Annual Report (Form 10-K) 20 (Feb. 27, 2020).

209. A further point of comparison: David Chavern, chief executive of the newspaper trade association, the News Media Alliance, claimed that Google and Facebook made an estimated \$4.7 billion in revenue from news content in 2018. SULLIVAN, *supra* note 92, at 64.

Excise taxes are taxes on particular items and sources of revenue.<sup>210</sup> Federal excise taxes have a storied history in the United States, stemming back to the founding of the Republic, when they were the primary source of federal revenue. Notable federal excise taxes in current law include those on gasoline and diesel fuel, passenger air travel, tobacco, alcohol, and interstate and international end-user telecommunications revenues. While some excise tax proceeds help to fund the general public fisc, legislation establishing excise taxes often provides that tax proceeds are to be deposited in a trust fund for a particular purpose.<sup>211</sup> For example, the Telecommunications Act of 1966 requires telecommunications service providers to contribute a percentage of their pertinent revenues to the Universal Service Fund, which supports telecommunications access for rural, low-income, and high-cost regions; advanced telecommunications services for schools, health care, and libraries; and other services that the Federal Communications Commission sets as priorities for universal telecommunications service.<sup>212</sup> Likewise, the excise tax on gasoline and diesel fuel funds the Highway Trust Fund to finance the interstate highway system and mass transit.<sup>213</sup>

Congress earmarks excise tax proceeds to trust funds for funding particular policy goals to insulate that funding from future political pressure and from the fiscal imperatives that are part and parcel of annual Congressional appropriations from the general budget. With the hope of guaranteeing such long-term financial support, the Carnegie Foundation report that sparked legislation to create the Corporation for Public Broadcasting proposed that the Corporation be funded with proceeds of an excise tax on television sets, to be deposited in a trust fund dedicated to public broadcasting.<sup>214</sup> Much to critics' consternation, the Public Broadcasting Act of 1967, as enacted by Congress, instead subjects public broadcasting to the general budgeting

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210. JOINT COMM. ON TAX'N, PRESENT LAW AND BACKGROUND INFORMATION ON FEDERAL EXCISE TAXES, 31 (2011), <https://www.jct.gov/publications.html?func=startdown&id=3721> [<https://perma.cc/ZW7L-M9VL>].

211. See generally ERIC M. PATASHNIK, PUTTING TRUST IN THE US BUDGET: FEDERAL TRUST FUNDS AND THE POLITICS OF COMMITMENT (2000); CONG. RES. SERV., FEDERAL TRUST FUNDS AND THE BUDGET 1 (2014), [https://www.everycrsreport.com/files/20140227\\_R41328\\_530fc041e54005c503c1ae05ba80367eaa6791e4.pdf](https://www.everycrsreport.com/files/20140227_R41328_530fc041e54005c503c1ae05ba80367eaa6791e4.pdf) [<https://perma.cc/8BGV-CJA3>].

212. See *Universal Service*, FED. COMM'N COMM'N, <https://www.fcc.gov/general/universal-service> [<https://perma.cc/NC34-XEU2>] (describing the history, legal mandate, and funding of the Universal Service Fund).

213. See PATASHNIK, *supra* note 211, at 8; JOINT COMM. ON TAX'N, *supra* note 210, at 2.

214. Robert K. Avery, *A Look Back at a Pivotal Moment for Public Broadcasting*, CURRENT (March 8, 2016), <https://current.org/2016/03/a-look-back-at-a-pivotal-moment-for-public-broadcasting> [<https://perma.cc/3PRJ-844B>].

and appropriations process.<sup>215</sup> The Corporation for Public Broadcasting has struggled to secure adequate funding, year after year, ever since.

While excise tax supported trust funds are no guarantee of long-term adequate funding, they do serve to provide a degree of insularity from the kinds of political and budgetary pressure that has plagued the Corporation for Public Broadcasting. That protection would be especially important for guaranteeing federal funding of journalist watchdogs investigating abuses of public and private power.

### *C. Allocation of Tax Proceeds*

I propose that the Fourth Estate Trust Fund allocate half the annual digital advertising excise tax proceeds to original, investigative journalism and half to reporting on local public affairs, although there might well be overlap between the two categories. The Trust Fund would dispense grants through a council structured to ensure that it is nonpartisan, expert, diverse, free from conflict of interest, and transparent. Stephen Gillers has helpfully detailed how such a council might be structured, based on the model of the National Council on the Humanities.<sup>216</sup> Council members would be appointed by the president for staggered terms with the advice and consent of the Senate. No more than half the council members could belong to the same political party. The majority of council members would have to have had substantial experience in journalism, but none could be recently employed by a news organization.

To be eligible for funding for an investigative journalism project, the applicant would have to be an eligible news organization. Building upon the definition of “news content creator” in the proposed Journalism Competition and Preservation Act, that would include any print, video, television, radio, streaming, or digital news organization that (1) has a dedicated professional editorial staff that creates and distributes original news and related content concerning local, national, or international matters of public interest on at least a weekly basis; (2) provides editorial content consisting of not less than 25% original current news; and (3) pledges to use best efforts to comply with the Code of Ethics of the Society of Professional Journalists regarding accurate and fair reporting: treating sources, subjects, colleagues, and members of the public with respect; avoiding conflicts of interest; and maintaining practices of accountability and transparency.<sup>217</sup>

Of note, contrary to some proposals for public funding of investigative journalism, eligible news organizations should include

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<sup>215</sup> *Id.*

<sup>216</sup> See GILLERS, *supra* note 15, at 166.

<sup>217</sup> SPJ Code of Ethics, SOCIETY OF PROFESSIONAL JOURNALISTS (Sept. 6, 2014), <https://www.spj.org/ethicscode.asp> [<https://perma.cc/H5R2-VZ5H>].

commercial media as well as nonprofit newsrooms. Leading commercial newsrooms such as the New York Times, Washington Post, Wall Street Journal, and CBS's 60 Minutes have proven expertise, experience, and track records in generating high-impact, cutting-edge investigative journalism. To be certain, the Fourth Estate Trust Fund council should aim to dispense funds to a wide range of eligible and worthy news organizations and might favor projects in which commercial media collaborate with nonprofit newsrooms. But to disqualify commercial news media now facing significant losses of advertising revenue would unnecessarily undercut effective, high-quality investigative journalism. And to the extent we see commercial media's continuing reliance on advertising revenue as undesirable, providing public funding for investigative reporting would help to lessen that reliance and bolster commercial newsrooms' commitment to quality journalism.

Eligible news organizations could apply for funding for investigative journalism projects expected to yield a single news story or a series of stories that shed light on a given topic, such as the ProPublica-WNYC Studios multi-part investigation of Donald Trump's business enterprises and whether he and his family kept their promise to separate the Trump Organization from the Trump White House.<sup>218</sup> To qualify, proposed projects would have to meet the definition and criteria for original, investigative journalism set out in Part III above. Basically, funded projects would have to entail original reporting that seeks to uncover what some person or entity attempts to keep secret and that conceals abuses of power, threats to democratic governance, or dangers to life, health, and safety. In addition to criteria aimed at funding a diversity of newsrooms and fostering collaborative projects, the primary criteria for funding should be the expected policy impact, novelty, and feasibility of the proposed project. The council might also favor funding for projects making use of potential revelatory and cost saving technologies for investigative journalism, such as big data analysis, online data scraping, and machine learning.<sup>219</sup>

Fourth Estate Trust Fund distributions for local reporting would follow a different model. First, while commercial news organizations are central to investigative reporting, local commercial watchdog news reporting is an irretrievably vanishing species. As discussed above, it has fallen victim both to the Internet's "advertising inversion," in which

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218. The series, titled *Trump, Inc.: Exploring the Business of Trump*, a joint reporting project of WNYC Studios and ProPublica, was distributed online and via podcast. *Trump, Inc.*, PROPUBLICA, <https://www.propublica.org/series/trump-inc> [<https://perma.cc/7FL9-8W8P>].

219. CARSON, *supra* note 12, at 171–72, 175–77 (discussing applications of such technologies); HAMILTON, *supra* note 3, at 282–83 (discussing "computational journalism"); DIAKOPOULOS, *supra* note 32, at 41–55 (describing applications and advantages of journalistic data mining).



data mining of large national audiences is far more valuable for advertisers than targeting individuals living in geographic proximity, and to the sharply diminishing readership of most local newspapers. Recent studies reveal hundreds of hyper-partisan media outlets — often funded and operated by national PACs, political candidates, government officials, and political party operatives — capitalizing on the vacuum by masquerading as local news sites.<sup>220</sup> Second, while investigative reporting on local matters remains a vital component of public affairs reporting, local news organizations have traditionally also played a vital watchdog role by simple government beat reporting: sending reporters to attend meetings of the city council and other agencies of local government.

Accordingly, the Fourth Estate Trust Fund should support local reporting by earmarking funds for coverage of local government, to be distributed to the Corporation for Public Broadcasting for distribution entirely to publicly-owned local TV and radio stations. Recipients could use the funds for local investigative reporting, and would be entitled to collaborate with nonprofit news sites like The Texas Tribune and ProPublica in doing so. But recipients of local news funding would be expected to engage in local government beat reporting as well.

#### D. Parallels in Other Countries

Of note, my proposal for a digital advertising excise tax to fund quality journalism has rough parallels in some European countries. Since 2018, France has levied a 2% tax, colloquially called the “YouTube tax,” on revenues earned by online video-on-demand providers from distributing content in France.<sup>221</sup> France uses the tax proceeds to help fund the production and promotion of French cinema. Germany recently imposed a similar tax, in the amount of 2.5%, to subsidize German video production.<sup>222</sup> Such a tax has been proposed in South Korea and Poland as well.<sup>223</sup>

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220. Jessica Mahone & Philip Napoli, *Hundreds of Hyperpartisan Sites are Masquerading as Local News. This Map Shows if There’s One Near You*, NIEMAN LAB (July 13, 2020), <https://www.niemanlab.org/2020/07/hundreds-of-hyperpartisan-sites-are-masquerading-as-local-news-this-map-shows-if-theres-one-near-you> [https://perma.cc/37KL-M9EP].

221. Sheena Scott, *New Video Tax In France For Netflix And Amazon Helps Finance French Cinema*, FORBES (Mar. 12, 2019), <https://www.forbes.com/sites/sheenascott/2019/03/12/new-video-tax-in-france-for-netflix-and-amazon-helps-finance-french-cinema/#762cfe853289> [https://perma.cc/3QRY-XV75].

222. Case T-818/16, *Netflix Int’l & Netflix v. Comm’n*, ECLI:EU:T:2018:274 (May 16, 2018) (dismissing lawsuit challenging the tax).

223. Song Su-hyun, *ICT Ministry Initiates Discussion on Taxing YouTube*, KOREA HERALD (Aug. 15, 2019), <http://www.koreaherald.com/view.php?ud=20190815000165> [https://perma.cc/9Z6V-NWLW]; Jan Stojaspal, *Poland Floats Tax on Streaming Giants to Fund Film Institute*, BLOOMBERG TAX (Apr. 28, 2020), <https://news.bloombergtax.com/daily-tax-report-international/poland-floats-tax-on-streaming-giants-to-fund-film-institute> [https://perma.cc/FG2K-JX7J].

Finally, several European countries have also imposed, or are considering imposing, taxes of between 2% and 5% on revenues attributed to providing digital services in those countries, including digital advertising revenues. For example, France imposed a 3% tax on digital advertising revenues and digital interface revenues from technology companies with gross revenues from digital activities over €750 million globally and over €25 million in France.<sup>224</sup> The U.K., Spain, and Austria have also enacted legislation for such taxes. The enactment of such digital services taxes has been considered at the European Union level and is now before the OECD.<sup>225</sup>

For the most part, European digital services taxes are meant as general revenue producing measures. But Austria, which has imposed a 5% tax on targeted digital advertising revenues, has allocated a part of the proceeds to funding the modernization of Austrian media companies.<sup>226</sup>

#### *E. Comparison with Other Public Funding Proposals*

Like my proposal, digital advertising taxes that earmark proceeds for particular purposes enjoy a degree of insularity from the vagaries of the general legislative budget process. Granted, as one study contends, a digital advertising tax to support journalism might give news publishers an incentive to support the power and revenues of major digital platforms in the publishers' lobbying and even reporting.<sup>227</sup> After all, if a percentage tax on platforms' digital advertising revenues becomes an important funding source for quality journalism, it would be in news publishers' financial interest that those revenues be maintained at high levels. To my mind, however, the benefits of securing public funding for quality journalism, and insulating that

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224. U.S. TRADE REPRESENTATIVE, REPORT ON FRANCE'S DIGITAL SERVICES TAX 1 (2019),

[https://ustr.gov/sites/default/files/Report\\_On\\_France%27s\\_Digital\\_Services\\_Tax.pdf](https://ustr.gov/sites/default/files/Report_On_France%27s_Digital_Services_Tax.pdf) [<https://perma.cc/P5PS-Z4ZV>].

225. Org. for Econ. Cooperation & Dev., Statement by the OECD/G20 Inclusive Framework on BEPS on the Two-Pillar Approach to Address the Tax Challenges Arising from the Digitalisation of the Economy ¶ 10, at 8 (Jan. 29–30, 2020), <https://www.oecd.org/tax/beps/statement-by-the-oecd-g20-inclusive-framework-on-beps-january-2020.pdf> [<https://perma.cc/TXT4-KH8S>]. The United States has rigorously opposed imposition of such taxes on U.S. technology companies. Indeed, after the U.S. threatened retaliation, France suspended collection of its digital service tax through the end of 2020. The sides are now reportedly trying to negotiate a deal through the OECD. Agence France-Presse, *US Suspends Tariffs on French Goods in Digital Tax Dispute*, YAHOO NEWS (Jan. 7, 2021), <https://sg.news.yahoo.com/us-suspends-tariffs-french-goods-180928526.html> [<https://perma.cc/HSU9-55CT>].

226. Daniel Bunn, *Austria Makes Mid-Stream Adjustment on Digital Tax Efforts*, TAX FOUND. (Apr. 3, 2019), <https://taxfoundation.org/austria-digital-tax-efforts/> [<https://perma.cc/83SN-Y43T>].

227. STIGLER COMMITTEE REPORT, *supra* note 1, at 196.

funding from political and annual budgetary pressures, far outweigh the risk of generating that perverse incentive.

My proposal, I would argue, is also superior to another proposed vehicle for insulating public funding of journalism from the political process: granting each citizen a voucher to allocate to the news outlet of his or her choice.<sup>228</sup> Citizen voucher funding would be susceptible to the excesses of populism, hyper-partisanship, and the rampant inability to distinguish sources of truthful reporting from misinformation that plague social media. Rather, in line with my proposal for a Fourth Estate Trust Fund council, the allocation of public funds for quality, watchdog journalism requires expertise. An important precept of public funding is that the press is not merely a consumer good, but a watchdog of democracy. As media scholar, Michael Schudson cogently argues, “democracies need an unlovable press,” one that challenges conventional preferences and one whose power and persuasiveness lies in professional authority and specialized knowledge, not merely the ability to rack up social media “likes” or their voucher equivalents.<sup>229</sup> The Fourth Estate is more akin to an institution of representative than direct democracy.

## VI. SUPPORT FOR NEWS PUBLISHER BRANDS

Maintaining a widely recognized, distinct brand for quality journalism is vital for both commercial and nonprofit news organizations. News organizations rely on brand recognition to attract new audiences and to build a core of loyal paying subscribers or contributors. Brand recognition provides an important incentive for investing in breaking news stories and in quality, watchdog journalism.<sup>230</sup> Indeed, since investigative journalism is expensive, risky, and rarely profitable, its primary benefit, for both news organizations and individual journalists, lies in building reputation and brand awareness.<sup>231</sup> News organizations are less likely to invest in socially valuable investigative journalism if they are not able to capitalize on it to stand out from their competition.

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228. See, e.g., BRUCE ACKERMAN, *One Click Away: The Case for the Internet News Voucher*, in WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS?; THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT at 299–306 (Robert W. McChesney & Victor Pickard eds., 2011); STIGLER COMMITTEE REPORT, *supra* note 1, at 176–84; cf. CAGÉ, *supra* note 86, at 89, 114–22 (proposing a new model for the news media, the “Nonprofit Media Organization,” based on “crowdfunding and power-sharing” rather than the market, foundation funding, or press subsidies).

229. See generally SCHUDSON, *supra* note 64.

230. See HAMILTON, *supra* note 3, at 18–19 (discussing importance of brand and product differentiation for investigative reporting).

231. See STIGLER COMMITTEE REPORT, *supra* note 1, at 156.

However, online news aggregators and digital platforms sharply diminish newsrooms' ability to maintain a distinct brand representing quality journalism. Online news aggregators summarize and disseminate breaking news stories, increasingly through the use of automated content production, at a fraction of the cost of original, investigative journalism.<sup>232</sup> And to the extent short news summaries are more likely to capture platform users' attention than are complete news stories, platform algorithms will tend to favor news aggregators over newsrooms' original work product.<sup>233</sup> Indeed, Facebook is itself reportedly developing an artificial intelligence assistant tool that can summarize news articles in bullet points or even just answer user questions about current events so that users need not encounter original news articles.<sup>234</sup> The tool is called TLDR, a common online acronym for "too long, didn't read."

In addition, news publishers' reliance on referral traffic from digital platforms supplants their historic role as news curators and weakens user loyalty to any single news outlet. As noted above, when users reach a news website through a search engine or social media news feed, most cannot remember the name of the website's news brand after their visit.<sup>235</sup>

Finally, platform algorithms' overriding focus on what is trending fosters a herd mentality, further eroding newsroom incentives to invest in expensive original reporting. As one journalist put it:

“We are telling stories that other outlets aren't telling, which is almost to our detriment in the world of viral news. When it comes to the way Facebook and Twitter currently surface trending content and

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232. DIAKOPOULOS, *supra* note 32, at 102 (describing use of automated content production to produce summaries or a set of important take-aways from a news story). Napoli aptly refers to this practice as “parasitic journalism,” and notes that it has become a thriving business model. NAPOLI, *supra* note 50, at 91–92.

233. To their credit, Facebook and Google have recently announced initiatives to alter their algorithms to favor original reporting. See *infra* notes 240–243 and accompanying text. It remains to be seen whether and how these initiatives will take shape.

234. Ryan Mac, *Facebook is Developing a Tool to Summarize Articles So You Don't Have to Read Them*, BUZZFEED NEWS (Dec. 15, 2020), <https://www.buzzfeednews.com/article/ryanmac/facebook-news-article-summary-tools-brain-reader> [<https://perma.cc/CV57-WU8X>]; Isobel Asher Hamilton, *Facebook is Reportedly Building a Tool Called 'TLDR' That Will Read and Summarize News Articles for You*, BUS. INSIDER (Dec. 16, 2020), <https://www.businessinsider.com/facebook-tldr-ai-tool-read-news-articles-for-you-2020-12> [<https://perma.cc/QKS6-BU5E>].

235. See STIGLER COMMITTEE REPORT, *supra* note 1, at 156 (citing REUTERS INST., DIGITAL NEWS REPORT 2017 (2017)). See also Kristen Bialik & Katerina Eva Matsu, *Key Trends in Social and Digital News Media*, PEW RSCH. CTR. (Oct. 4, 2017), <https://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/> [<https://perma.cc/8CTS-BYH5>] (when a news link came directly from a news organization, the recipient could name the source 78% of the time, as compared to 52% of the time when the link came through social media).

breaking news, it's not about the story that no one has.  
It's about the story that everyone has."<sup>236</sup>

There are limits to how the law can address the weakening of news organizations brand recognition at the hands of online news aggregators and digital platforms. Certainly, the law cannot and should not block the free flow of news and information through such entities. In particular, Internet users' ability to follow the news through a number of platforms and to rely on multiple news outlets for information and opinion might yield benefits for expressive diversity, even if it diminishes user loyalty to particular news brands. As noted above, studies suggest that Google News increases readership for smaller news outlets even as it undercuts larger brands.<sup>237</sup>

Yet Congress could enact legislation to support news publisher incentives to invest in quality journalism without impeding the free flow of information from diverse sources. To that end, Congress should authorize the Federal Trade Commission to issue regulations designed to counter digital platforms' systematic erosion of news publisher brands.<sup>238</sup> Such regulations would (1) require platforms to prioritize original reporting over derivative summaries, (2) require platforms to give prominent placement to original reporting in feeds and search results, and (3) accord news publishers the right to require that platforms' news listings and feed include a link to the publisher's website and display a third-party media trustworthiness certification.

The Commission could achieve those objectives through either or both of two distinct regulatory approaches. First, the Commission could directly regulate major platform algorithms and practices in each of the three areas. Second, the Commission could require major platforms to open their application programming interfaces ("API") to news publishers to enable the publishers themselves to design a curated news story feed that platform users could choose to receive on top or instead of the standard feed generated by the platform's own content algorithm.

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236. RASHIDIAN ET AL., *supra* note 4, at 39–40.

237. *See supra* notes 140–141 and accompanying text.

238. It is possible that the FTC could regulate pursuant to its existing power to enforce Section 5 of the Federal Trade Commission Act, which broadly prohibits "unfair methods of competition." 15 U.S.C. § 45. The FTC is understood to have considerable leeway in determining what constitutes "unfair methods of competition" and how to remedy them. Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 227–29 (2014). Nonetheless, my proposal would push the boundaries of FTC practice authority under existing law. Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1680–81 (2020) (noting that despite its broad mandate and expansive set of tools to police "unfair methods of competition," the "FTC has largely neglected to play an administrative, norm-creating role, instead opting to pursue antitrust enforcement exclusively through adjudication."). To effect such regulations, Congress could instead expand the jurisdiction of the Federal Communications Commission or create a new agency empowered to regulate digital platforms. *See FELD, supra* note 156, at 188–95 (discussing some of the pros and cons of each approach).

The open API approach builds on proposals to require platform interoperability to reduce the dominant platforms' gatekeeping power over content and services and to provide consumers with greater choice.<sup>239</sup> But my proposal would focus specifically on enhancing the online prominence of the original news reporting that is vital to democratic governance.

I first describe how direct regulation might require major platforms to prioritize original reporting, make original reporting more visible and salient, and make news publisher websites and media trustworthiness certifications more readily accessible. I then outline how open APIs for news publishers would serve those objectives.

#### *A. Prioritizing Original Reporting*

Google and Facebook have recently announced changes in their respective algorithms that purport to prioritize original reporting in their respective news feeds.<sup>240</sup> Facebook will use artificial intelligence to analyze groups of news articles on a particular story topic and identify those articles most often cited as the original source. Google will rely on both its algorithm and human editors to favor "significant original reporting" over derivative stories posted by news aggregators. Google will also keep original reporting in a highly visible position in its search results for a longer time.

Following on Google's and Facebook's reported initiatives, all major social media and news feed aggregation sites, whether on the web or through a mobile app, should be required to identify and give priority to original reporting among the news stories on a given topic provided to a particular user.<sup>241</sup> A "major" site would be one that exceeds a given number of unique visits, as FTC regulators would determine from time to time. Ideally, as set out in Google's guidelines for its human search quality evaluators, original reporting should be that which provides information that would not have been known had the article not reported it.<sup>242</sup> As the Google guidelines recognize, such original, investigative reporting demands considerable skill, time, and

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239. See *infra* notes 245–254 and accompanying text.

240. See Fischer, *Facebook Changes*, *supra* note 16; Will Fischer, *Google is Finally Changing its Algorithm to Boost Original Reporting, Which is Something that Facebook and Apple News Still Aren't Great At*, BUS. INSIDER (Sept. 14, 2019, 9:42 AM), <https://www.businessinsider.com/google-changes-algorithm-original-reporting-2019-9> [<https://perma.cc/4M36-VZ2B>].

241. On the importance of search engine results and presentation for branding, see Wenyu Dou et al., *Brand Positioning Strategy Using Search Engine Marketing*, 34 MIS Q. 261, 261 (2010). Proposed legislation in Australia would somewhat similarly require major digital platforms to develop proposals for "recognis[ing] original covered news content when it makes available and distributes that content." See Bargaining Code, *supra* note 173, § 52X.

242. GOOGLE, SEARCH QUALITY RATERS: GENERAL GUIDELINES § 5.1 (2020).

effort.<sup>243</sup> For that reason, as discussed above, we would expect newsrooms to under-invest in producing it unless they can capture the reputational benefits and monetizable brand identity that original, investigative reporting yields.

A regulatory codification of Google and Facebook's announced practice would have to set out objective, generally realizable criteria for what qualifies as original reporting without discriminating on the basis of editorial viewpoint (and, even then, such regulation would give rise to the First Amendment issues discussed below).<sup>244</sup> In that regard, journalistic practices should provide a basis for artificial intelligence to differentiate between original and derivative reporting, and perhaps even to identify investigative reporting that provides information that would otherwise have been unknown. Facebook states it will rely on artificial intelligence to identify original reporting by determining which articles about a particular news topic are most often cited as an original source.<sup>245</sup>

Important for such algorithmic determinations, newsrooms typically provide attribution to competitors' original reporting as required by journalistic ethics.<sup>246</sup> Online news sites, like Newser, that consist largely or entirely of derivative, summary rewrites of newsrooms' original reporting almost universally cite the original newsroom source as well.<sup>247</sup> Whether or not such sites deem themselves

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243. *Id.*

244. Of note, the new State Treaty on the Modernization of Media Legislation in Germany requires that search engines, social media platforms, news aggregator sites, and other online "media intermediaries" refrain from unfairly discriminating among providers of journalistic editorial content to the extent the intermediary potentially has a significant influence on the providers' visibility. See Staatsvertraglicher Neuregelungen zu Rundfunkbegriff / Zulassungspflicht, Plattformregulierung und Intermediäre [New State Treaty Regulations on the Concept of Broadcasting / Licensing Requirements, Platform Regulation and Intermediaries], Art. 53(e), discussed in *New State Treaty on Media to Replace Treaty on Broadcasting and to Create Legal Framework for a Changed Media Landscape*, OSBORNE CLARKE (June 24, 2020), <https://www.osborneclarke.com/insights/new-state-treaty-media-replace-treaty-broadcasting-create-legal-framework-changed-media-landscape> [https://perma.cc/DJZ4-CLWR]; Natali Helberger et al., *Germany Proposes Europe's First Diversity Rules for Social Media Platforms*, LONDON SCH. ECON. BLOG (May 19, 2019), <https://blogs.lse.ac.uk/medialse/2019/05/29/germany-proposes-europes-first-diversity-rules-for-social-media-platforms> [https://perma.cc/F4HK-XHY6]. However, the German regulation does not require that such online media intermediaries prioritize original reporting or otherwise to alter their content feeding algorithms.

245. See Fischer, *Facebook Changes*, *supra* note 16. According to Google, its search quality evaluators (whom it calls "Search Quality Raters") help Google to evaluate changes in its search algorithm, "but they don't directly impact how [their] search results are ranked." *How Our Quality Raters Make Search Results Better*, GOOGLE SEARCH HELP, <https://support.google.com/websearch/answer/9281931?hl=en> [https://perma.cc/ME3T-VK43].

246. *SPJ Code of Ethics*, SOC'Y PROF. JOURNALISTS (Sep. 9, 2014, 4:49 PM), <https://www.spj.org/ethicscode.asp> [https://perma.cc/QC6W-Z6EQ] ("Never plagiarize. Always attribute.").

247. Newser, *Headline News Summaries, World News, and Breaking News*, <https://www.newser.com> [https://perma.cc/6N55-MEHA]. See, e.g., Rob Quinn, *USPS Shuts*

bound by journalist ethics of attribution, they cite the original news story as a source of authority for their news accounts, much like investigative journalists reference documentary evidence and human witnesses to lend authority and credibility to their reporting.<sup>248</sup> As noted above, providing attribution to the original story may also serve as a defense to any claim for misappropriation of hot news.<sup>249</sup>

In addition to counting citations to a news story, artificial intelligence programs might identify original reporting by assessing the types of references and citations within each story. News content that provides descriptions of and quotations from primary sources, in addition to and apart from references to original reporting from other newsrooms, is more likely to constitute original reporting than stories that merely cite other sources. Journalist bylines and information about editorial staff might also be indicia of news content that is more likely the product of original reporting. In that regard, Facebook announced that its algorithm will down-rank news stories that lack bylines or that reside on websites that present no information about a news organization's editorial staff.<sup>250</sup> Over time, machine learning tools should be able to determine which indicia are the strongest predictors of original reporting.<sup>251</sup> They should also be able to distinguish between opinion pieces and those that purport to offer breaking news presenting factual reporting.

Government regulators could require that digital platforms further develop and apply such machine learning tools. Concomitantly, regulators should impose a transparency requirement on platforms' algorithmic criteria for the aggregation, selection, and presentation of news content. The platforms' algorithmic criteria, including machine learning tools, should be maintained in a manner that is readily perceptible and directly accessible to regulators and news organizations.<sup>252</sup> Ultimately, regulators should set quantitative targets for platform accuracy in identifying original news stories over derivative stories and more heavily weighting original reporting in news content feed and should evaluate platform algorithms. They

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*Down 131-Year-Old Post Office After Request for \$600 a Month*, NEWSER (Mar. 16, 2021), <https://www.newser.com/story/303762/usps-shuts-down-po-after-request-to-pay-workers-more-than-833-per-hour.html> (citing a Seattle Times article and two Chinook Observer columns as original sources).

248. CODDINGTON, *supra* note 78, at 77–78 (describing how derivative aggregators rely on their newsroom sources for authority and credibility).

249. *See supra* notes 123–125 and accompanying text.

250. *See* Fischer, *Facebook Changes*, *supra* note 16.

251. *Cf.* James Baker, *Machine Learning Versus the News*, TOWARDS DATA SCI. (Jan. 31, 2019), <https://towardsdatascience.com/machine-learning-versus-the-news-3b5b479d8e6a> [<https://perma.cc/8MZV-54MY>] (applying Natural Language Processing techniques to determine which news articles cover the same story and how they differ in reporting it).

252. Germany's new media and media intermediary regulations impose similar transparency requirements. *See* Helberger et al., *supra* note 244.



should do so with input from news publishers to ensure that the platforms are using best efforts to meet those targets.

Of note, in addition to favoring original over derivative reporting, Facebook also assigns scores to news publishers based on “signals about the quality of their journalism.”<sup>253</sup> Facebook does not reveal its signals for determining quality journalism. Nor does it reveal the extent, if any, to which original reporting is more likely to be deemed quality journalism than derivative reporting. In any event, Facebook’s news quality scores generally play a minor role in determining what appears in users’ feeds.

However, in the face of an avalanche of false claims casting the November 2020 presidential election as rigged, Facebook temporarily altered its algorithm to give more weight to news quality scores. In turn, that algorithm change caused mainstream authoritative news sources to appear more prominently, while posts from hyper-partisan pages became relatively less visible. That change was short-lived. Indeed, Facebook executives insisted that the change was never intended to be permanent, apparently in light of concerns that giving greater weight to news quality would reduce user engagement.

It is perhaps tempting to require major platforms to give greater weight to “news quality” in addition to favoring reporting identified as original. But to do so would require that government regulators be involved in overseeing platforms’ criteria for determining news quality. Such regulation would entail a minefield of editorial judgments regarding criteria for which there is almost certainly no objective standard. Platforms should be required to provide their users with the opportunity to tailor their feed to give greater prominence to quality news. But that would best be accomplished not through direct regulation of platforms’ own content curation but rather by mandating open APIs, as discussed below.

### *B. Prominence for Original Reporting*

To support news publishers’ branding for quality journalism, FTC regulations should not merely require platforms to prioritize original over derivative reporting. The FTC should also promote greater prominence for original reporting on major digital platforms. To that end, it should require that the platforms display links to original reporting, at least as the default setting for users.

At present, Facebook’s stated intention to prioritize original reporting will not fundamentally alter its News Feed algorithm.

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253. My discussion of Facebook’s scoring and weighting of news quality in this paragraph and the next draws on Kevin Roose et al., *Facebook Struggles to Balance Civility and Growth*, N.Y. TIMES (Nov. 24, 2020), <https://www.nytimes.com/2020/11/24/technology/facebook-election-misinformation.html> [<https://perma.cc/VS2D-WYSV>].

Facebook will still only showcase stories from news outlets that users and their friends follow, even if it might prioritize original reporting within that subset. Similarly, Google's response to any given search query need not list any news publisher content, whether original reporting or derivative.

FTC regulations should require that platforms' default setting be configured to prominently display original reporting unless the user chooses to alter that setting. Accordingly, as a default setting, social media sites like Facebook would feature original reporting on topics of interest to the user even if the user has not chosen to follow the news outlet that is the source of the story. For example, the FTC regulation might require that in the default setting, for every five items of sponsored content that appears on a user's News Feed, Facebook must include one reference and link to original reporting on a topic that Facebook's algorithm has identified is of interest to the user. In other words, Facebook should be required to alter its algorithm to generate original reporting of likely interest to the user, not just micro-targeted advertising, in its News Feed. At the same time, Facebook would be required to display original reporting that broadly meets a user's areas of interest even if doing so deviates from content that Facebook's algorithm would otherwise select as providing the strongest emotional hook to maximize user engagement.<sup>254</sup>

Likewise, as a default setting, Google would be required to include a Top News Stories feature, displaying links to original news content of relevance to the user's search query on the first response page when Google's algorithm identifies original reporting of relevance. Of note, a recent study of 15,000 popular Google search queries found that 41% of the organic search results appearing on the first page of results on mobile devices link to Google's own products or to "direct answers" that Google culls from other sources, rather than relevant external websites.<sup>255</sup> That result is not surprising: Google earns "five times as much revenue through advertising on its own properties as it does selling ad space on third-party sites."<sup>256</sup> In addition, Google has increased the number of ad listings that appear above the organic results, thus further favoring listings that bring revenue for Google and demoting organic search results to external sites.<sup>257</sup>

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254. Cf. Abraham Bernstein et al., *Diversity in News Recommendation*, ARXIV (May 19, 2020), <https://arxiv.org/abs/2005.09495> [<https://perma.cc/N896-KA6D>] (setting out an agenda for multi-faceted interdisciplinary research to develop news recommendation algorithms that would foster Internet user engagement with a diversity of news sources).

255. Jeffries and Yin, *supra* note 21.

256. *Id.* (citing Alphabet, Inc.'s 10-K tax form from 2019).

257. See COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT, *supra* note 18, at 197–204 (describing Google's addition of a fourth ad above organic listings in 2016 and the deleterious impact that addition has had on external sites, advertisers, and users).

Google's self-preferencing is devastating for external sites, including news sites.<sup>258</sup> In placing its own content at the top of its organic search results, Google systematically demotes external sites to the bottom of the first search result page or pushes them off the first page altogether. According to recent studies, the top two to three organic results on the first search engine response page typically garner over 50% of overall user click traffic, while results that do not appear on the first page receive only 5% click traffic in total.<sup>259</sup> My proposed regulation would partly override Google's self-preferencing practice. It would require that Google devote space on the first page of its search result to links to original news stories of relevance to the search query unless the user affirmatively declines that default setting.

### *C. News Publishers' Rights to Linking and Trustworthiness Rating*

Finally, the publisher of original reporting listed on a major digital platform or news feed site should have the right to require that the listing include (1) a link taking the user to the news publisher's own website to read, view, or listen to the story (as the case may be) and (2) a prominent indication of the news publisher's trustworthiness rating by a third party media watchdog of the news publisher's choice, with a link to that watchdog's website.<sup>260</sup> Platforms and news feeds have every incentive to keep users on their own sites. Indeed, news aggregation apps such as Apple News are regularly configured to keep readers within the app when they click on an article rather than transporting the reader to the news publisher's own app or website.<sup>261</sup> But the public interest in facilitating newsrooms' ability to build brand awareness should override that incentive. Further, a prominent certification of trustworthiness from a third-party media watchdog such as NewsGuard can serve to enhance the power of a newsroom's brand

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258. See *id.* at 187–92 (detailing the anticompetitive impacts of Google's "self-preferencing" in search results).

259. *Why Page 2 of Google Search Results is the Best Place to Hide a Dead Body*, DIGIT. SYNOPSIS, <https://digitalsynopsis.com/tools/google-serp-design> [https://perma.cc/3K95-H7B8] (reporting research results of online ad network Chitika); Matt Southern, *Over 25% of People Click the First Google Search Result*, SEARCH ENGINE J. (July 14, 2020), <https://www.searchenginejournal.com/google-first-page-clicks/374516/#close> [https://perma.cc/5P4Y-HYYZ] (reporting on study by Sistrix of "over 80 million keywords and billions of search results").

260. A possible model for the trustworthiness rating feature is the "Bias Finder" Google Chrome browser extension, which automatically displays the bias rating of the media watchdog news feed AllSides when a user visits a news source website. *Apps & Extensions*, ALLSIDES, <https://www.allsides.com/apps-extensions> [https://perma.cc/94T8-9TD6].

261. See Anthony Ha, *iOS 14 Redirects Web Links from News+ Publishers Directly to the Apple News App*, TECHCRUNCH (Aug. 10, 2020, 3:20 PM), <https://techcrunch.com/2020/08/10/apple-news-plus-redirects/?guccounter=1> [https://perma.cc/3UGT-X74V].

to stand for trustworthy, quality journalism.<sup>262</sup> News publishers could seamlessly signal the exercise of their rights to require linking and/or trustworthiness certification through embedding a metadata message to that effect in their news stories.<sup>263</sup>

#### D. Open API

Application programming interfaces (APIs) are software tools that enable an application, website, or service to readily communicate with a platform using a uniform set of commands, with the goal of sharing data and functionality.<sup>264</sup> Facebook maintains APIs that enable numerous third-party applications, ranging from Flixter to Flickr, to reside on Facebook. YouTube provides APIs for broadcasters such as the BBC to maintain a channel on the video sharing platform. Apple's mobile operating system features a rich set of APIs for outside developers to create applications for the iPhone.<sup>265</sup>

Digital platforms typically restrict access and use of their APIs to complementary services that attract consumers to the platform, not services that might compete with the platform's core features.<sup>266</sup> However, advocates of greater competition in online platform services have argued for requiring dominant platforms to open their APIs to enable competing services to operate through the dominant platform and to enable platform users to communicate with and use services on competing platforms.<sup>267</sup> Under such a fully interoperable, open API

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262. NewsGuard asserts that it rates "6,000+ news websites that account for 95% of online engagement with news." It provides scores of news websites' performance regarding nine criteria designed to assess basic practices of credibility and transparency. NEWSGUARD, <https://www.newsguardtech.com/> [<https://perma.cc/399V-FNUP>]; see also STIGLER COMMITTEE REPORT, *supra* note 1, at 172, 190 (advocating that news sources voluntarily participate in a trustworthy news source labeling scheme administered by an independent news monitor).

263. Schema.org is one commonly shared metadata language that might be employed for that purpose. See DAVID WEINBERGER, *THE RISE, FALL, AND POSSIBLE RISE OF OPEN NEWS PLATFORMS* 29–31 (2015).

264. See *Appendix J: Facebook Platform and API Access in UK ONLINE PLATFORMS AND DIGITAL ADVERTISING REPORT*, *supra* note 18, at J1; Jemima Kiss, *The Nutshell: A Beginners' Guide to APIs*, *GUARDIAN* (Dec. 14, 2007, 6:44 AM), <https://www.theguardian.com/media/pda/2007/dec/14/thenutshellabeginnersguide> [<https://perma.cc/Q49N-JJRD>].

265. See Christopher S. Yoo, *Modularity Theory and Internet Regulation*, 2016 U. ILL. L. REV. 1, 57–59 (2016) (summarizing some of the benefits and drawbacks of mandating open APIs for innovation, flexibility, and competition).

266. See *COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT*, *supra* note 18, at 166–70 (detailing instances Facebook has "weaponized" access to its platform, cutting off complementary applications perceived to pose a competitive threat); *Appendix W: Assessment of Pro-Competitive Interventions in Social Media in UK ONLINE PLATFORMS AND DIGITAL ADVERTISING REPORT*, *supra* note 18, at W2.

267. See generally, IAN BROWN, *INTEROPERABILITY AS A TOOL FOR COMPETITION REGULATION* (2020) (describing how interoperability would operate and assessing various proposals for platform service interoperability); FELD, *supra* note 156, at 81–82 (advocating

regime, for example, users of Facebook Messenger could send messages to users of iMessage, Signal, and Telegram, as well as Facebook's own WhatsApp, and vice-versa. In that regard, the European Commission's proposed Digital Markets Act would require that dominant platform "gatekeepers" make their core platform services interoperable with third party applications and allow users to access the third-party applications without having to employ the gatekeeper's own core platform services in doing so.<sup>268</sup>

Some digital platform competition advocates have also called for open APIs in connection with platforms' content curation and personal data collection.<sup>269</sup> They propose that dominant platforms should be required to provide APIs through which third-party services could customize platform users' content curation preferences, thus supplanting platform algorithms that are optimized to feed users content that maximizes user engagement on the platform and elicits commercially valuable personal data for targeted advertising. Under that open API regime, for example, Facebook users might be able to choose among a wide range of third-party services, each of which effectively causes Facebook to provide service subscribers with content devoted primarily or entirely to a particular subject or viewpoint, as a substitute or supplement to the personalized content feed generated by Facebook's own content algorithm. A comedy service might use the API to populate its subscribers' Facebook feed with stand-up comedy routines on topics of subscribers' interest. An Audubon Society service might channel content regarding birds and their habitat. Under such an open API regime, Facebook would have to enable a plethora of third-

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open APIs for certain purposes, subject to agency regulation, despite the security risks such open APIs might pose); STIGLER COMMITTEE REPORT, *supra* note 1, at 118 (claiming interoperability will stimulate robust competition by enabling users to choose which service they prefer).

268. See *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, COM(2020) 842 final, Art. 6(1)(c) (Dec. 15, 2020); see also COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT, *supra* note 18, at 383–86 (recommending data interoperability and portability as a complement to vigorous antitrust enforcement in digital markets characterized by strong network effects and winner-take-all markets). The proposed Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019 would impose similar interoperability and data portability obligations on major platforms in the U.S. See S. 2658, 116th Cong. (2019).

269. See, e.g., Report with Recommendations to the Commission on a Digital Services Act: Adapting Commercial and Civil Law Rules for Commercial Entities Operating Online, EUR. PARL. DOC. A9-0177/2020, ¶¶ 14, 22 (2020); see also EUROPEAN DIGITAL RIGHTS, PLATFORM REGULATION DONE RIGHT: EDRI POSITION PAPER ON THE EU DIGITAL SERVICES ACT 22 (2020) (proposing third-party content moderation plug ins); Cory Doctorow, *Interoperability: Fix the Internet, Not the Tech Companies*, ELEC. FRONTIER FOUND. (July 11, 2019), <https://www.eff.org/deeplinks/2019/07/interoperability-fix-internet-not-tech-companies> [<https://perma.cc/PX64-B9RJ>] (advocating barring Facebook from shutting out services that let users communicate with one another without using Facebook's tools).

party content curation services even when they do not optimize Facebook's advertising revenue.

Proposals for such open APIs for platform user content curation are worthy of consideration. However, if platforms were effectively converted to common carriers for any third-party content curation services that wish to use them, they would quickly be populated with the kind of extremist hate speech, unhinged conspiracy theories, and violent incitement that have come to dominate unmoderated social media platforms like Parler and Gab.<sup>270</sup> Even if third-party feeds were subject to major platforms' prohibitions against such speech, unlimited third-party curation would further burden social media content moderation regimes, which are already overwhelmed.<sup>271</sup>

For those reasons, I propose only that major platforms be required to provide an open, royalty-free API for the distribution of a curated news content feed consisting of original reporting to any platform users who opt to receive it. Such a feed could be compiled and distributed by, or on behalf of, any news publishers eligible for Fourth Estate Trust Fund funding for investigative or local reporting, as discussed in Part V, including commercial, publicly funded, and nonprofit newsrooms.<sup>272</sup> Eligible news publishers would be entitled to use the API to provide platform users with the publishers' own curated news content feed. If they wish, news publishers could establish consortia for that purpose. They could also license third party providers to curate and provide original news content feeds from multiple news sources.

The content curation objectives of such open APIs for news publishers would largely comport with those I have proffered with respect to direct regulation of platform's own news content algorithms. It would enable eligible news publishers to develop and apply a content curation algorithm that provides greater priority, prominence, and

270. See John Bergmayer, *What Makes a Common Carrier, and What Doesn't*, PUB. KNOWLEDGE BLOG (Jan. 14, 2021), <https://www.publicknowledge.org/blog/what-makes-a-common-carrier-and-what-doesnt> [<https://perma.cc/VM4A-CYE4>] (arguing that regulators should not treat social media networks as common carriers given that unmoderated networks would be "overwhelmed with low quality content, abusive users, spam, and . . . groups organizing themselves for mass violence").

271. See generally Sarah T. Roberts, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOWS OF SOCIAL MEDIA 134–69 (2019) (discussing the human cost of subjecting thousands of content moderators to savagely violent, hateful, and cruel content); Jackie Snow, *Can AI Win the War Against Fake News?*, MIT TECH. REV. (Dec. 13, 2017), <https://www.technologyreview.com/s/609717/can-ai-win-the-war-against-fake-news> [<https://perma.cc/FS63-JLC8>] (questioning whether machine learning algorithms can identify and weed out misinformation). Cf. Niva Elkin-Koren & Maayan Perel, *Separation of Functions for AI: Restraining Speech Regulation by Online Platforms*, 24 LEWIS & CLARK L. REV. 857, 885–93 (2020) (describing platforms' use of AI both to moderate content and to target content and advertising to platform users and arguing that platforms should be required to separate these AI functions, in order to ensure that platforms' use of AI for speech regulation that should be subject to public law limitations is distinct from the platforms' use of AI for their own commercial advantage).

272. See *SPJ Code of Ethics*, *supra* note 217 and accompanying text.

brand recognition to original, quality journalism. But under the open API regime, news content curation services would be provided by or on behalf of the news publishers themselves rather than the major platforms. Platforms could choose to continue to provide their own news content feed as well, but they would be required to offer their users the opportunity to receive a news publisher curated feed in addition or instead. Accordingly, while regulators would need to oversee the open API regime, to ensure that news publishers' curated news content feed can operate seamlessly on top of the platform's feed without impairing platform operations and security, there would likely be less need to directly regulate platforms' own news curation algorithms.

## VII. POSSIBLE FIRST AMENDMENT OBJECTIONS

My proposals for an excise tax on digital advertising to fund the Fourth Estate Trust Fund and for requiring major digital platforms to give priority and prominence to original reporting, whether through their own news curation algorithms or open API for news publishers, aim to further what many would regard as a vital free speech interest, that of supporting a free and robust press capable of producing quality journalism on matters of public concern. But even regulations that avowedly aim to further free speech interests may run afoul of First Amendment limitations on government regulations of speech.<sup>273</sup>

In that regard, my proposals could conceivably raise several First Amendment objections. To varying degrees, those objections might find support in the courts — especially given that, as numerous commentators have bemoaned, recent decades have seen a weaponization of the First Amendment as a tool for countering commercial regulation.<sup>274</sup> Nonetheless, the better view is that the regulations I propose should withstand First Amendment scrutiny. This Part briefly explains why.

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273. See Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 188–89 (1998) (noting that “many . . . speech restrictions may be seen as furthering free speech values”).

274. See, e.g., Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1953 (2018); Weiland, *supra* note 200, at 1389; Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 133 (2016); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 25–26 (2004).

*A. Excise Tax on Digital Advertising to Support Investigative and Local Journalism*

My proposal for an excise tax on digital advertising to fund the Fourth Estate Trust Fund might be subject to two basic First Amendment objections. First, the proposal envisions that a government agency dispense federal funds to some news publishers for certain news projects and not to others. Second, the proposal might be said to discriminate among media by levying an excise tax on digital platforms but not on other entities that disseminate expression. Both objections should be easily dismissed.

## 1. Discriminating Among News Publishers and Projects

It is well settled that Congress may selectively fund a program to encourage certain speech that Congress believes to be in the public interest and that government agencies may dispense such funds to those speakers that it determines merit the funding, based on general criteria set out in the statute. Acting as a patron, government has far greater leeway to discriminate among types and content of speech than it does in regulating privately funded speech.

In the leading case of *National Endowment for the Arts v. Finley*, the Supreme Court rejected a facial First Amendment challenge to a statute that accorded the National Endowment for the Arts (“NEA”) substantial discretion in awarding financial grants to support the arts.<sup>275</sup> *National Endowment for the Arts* involved a statutory provision that directed the NEA to ensure that “artistic excellence and artistic merit are the criteria by which [grant] applications are judged, taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”<sup>276</sup> The petitioners challenged the provision as void for vagueness and as impermissible viewpoint discrimination in violation of the First Amendment. In rejecting the challenge, the Court held that the provision merely admonished the NEA to take “decency and respect” into consideration.<sup>277</sup> The Court did not perceive the provision to pose a reasonable danger of being used to preclude or punish the expression of particular views.<sup>278</sup>

Within those parameters, the federal government regularly dispenses federal funds to various speakers, including through the NEA, the National Endowment for the Humanities, the National Institutes for Health, and, of course, the Corporation for Public

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<sup>275</sup> 524 U.S. 569, 569 (1998).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* at 581–82.

<sup>278</sup> *Id.* at 583.



Broadcasting. There should be no inherent First Amendment limit on establishing and funding a Fourth Estate Trust Fund council, modeled on the NEA and National Endowment for the Humanities, and empowered to award grants for investigative reporting, so long as the funds are dispensed without regard to the recipients' particular political orientation and views. The same argument applies to my proposed earmarking of excise tax proceeds for public broadcasters' local affairs reporting.

## 2. Imposing an Excise Tax on Platforms' Digital Advertising Revenue

The Supreme Court has repeatedly stated that imposing sales and use taxes in ways that discriminate among media or among different speakers within a single medium may present serious First Amendment concerns. In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, for example, the Court held that a use tax imposed on the paper and ink used in printing newspapers violated the First Amendment.<sup>279</sup> It reasoned that the tax applied only to the press and that, in practical application, the tax fell upon only a small number of newspapers.<sup>280</sup> In *Arkansas Writers' Project, Inc. v. Ragland*, the Court held that a sales tax scheme violated the First Amendment's guarantee of freedom of press by "taxing general interest magazines but exempting newspapers and religious, professional, trade and sports journals."<sup>281</sup>

However, in a later case, *Leathers v. Medlock*, the Court rejected a First Amendment challenge to a state's taxation of cable television services, even though print media and "scrambled satellite broadcast television services" were exempted from the tax.<sup>282</sup> *Leathers* held that the fact that a law singles out a certain medium, or even the press as a whole, "is insufficient by itself to raise First Amendment concerns."<sup>283</sup> The Court distinguished the state tax exemption for print media and scrambled satellite broadcast, but not cable television, from the taxes that were invalidated in *Minneapolis Star* and *Arkansas Writers' Project*. Unlike the tax at issue in *Leathers*, the Court ruled, the taxes in *Minneapolis Star* and *Arkansas Writers' Project* targeted a small number of speakers, and thus threatened to "distort the market for ideas."<sup>284</sup> As a result, those taxes raised suspicions that their objective was the suppression of certain ideas.

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279. 460 U.S. 575, 575 (1983).

280. *Id.*

281. 481 U.S. 221, 221 (1987).

282. 499 U.S. 439, 439 (1991).

283. *Id.* at 452.

284. *Id.* at 448.

Given *Leathers*, the imposition of a federal excise tax on digital advertising revenue should readily avoid First Amendment invalidation. First, the tax would be imposed on any company, of any type, that garners 5% or more of total domestic digital advertising revenue in any given year. It would not tax any media or press as such. Indeed, companies subject to the tax may or may not be media companies. Digital platforms would be taxed in their role as purveyors of digital advertising, not for their dissemination of expressive content. Second, a 2.5% tax on the digital advertising revenues of companies that enjoy market power in that market hardly threatens to distort the marketplace of ideas or appears to be aimed at favoring or suppressing certain viewpoints.

*B. Requiring Digital Platforms to Accord Priority and Prominence to Original Reporting and to Maintain APIs for News Publishers*

Regulations that require major digital platforms to design their search and news feed algorithms to give priority and prominence to original reporting, or to maintain APIs for news publishers to offer the publishers' own curated original news content to platform users, might also be vulnerable to First Amendment challenge. Platforms would likely contend that their algorithms are the mechanism through which they "speak," by deciding which content to favor and which to disfavor, and thus that government regulation of platform algorithms and content feed abridges the platforms' freedom of speech.<sup>285</sup> In particular, the platforms would argue that my proposed priority and prominence regulations would constitute "compelled speech." With some qualifications, the First Amendment protects against being forced to speak by the government just as it protects against government suppression of persons' chosen speech.<sup>286</sup> Regulation that requires individuals to convey a particular message favored by the government may thus constitute an unconstitutional abridgement of freedom of speech.

Nonetheless, for the reasons I now outline, my proposed regulations should meet First Amendment muster.

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285. See Balkin, *supra* note 274, at 20 ("[B]usinesses argue [that] regulation of the distribution network is a regulation of the freedom of speech of the network owner, because the network owner 'speaks' through its decisions about which content to favor and disfavor.").

286. See Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 355 (2018). Government mandated disclosures of factual information in commercial speech are one exception, almost always passing First Amendment muster. See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 230 (2010). See also Valerie C. Brannon, Cong. Rsch. Serv., R45700, *Assessing Commercial Disclosure Requirements under the First Amendment* 1, 1 (2019), <https://fas.org/sgp/crs/misc/R45700.pdf> [<https://perma.cc/5G4S-YKAR>] ("Commercial disclosure requirements have largely withstood constitutional scrutiny in part because, historically, commercial speech has received less protection under the First Amendment than other speech.")

## 1. Not Compelled “Speech”

First, it is questionable whether platform algorithms and platforms’ use of those algorithms to generate personalized aggregations of content qualify as protected speech under the First Amendment.<sup>287</sup> Platforms do not use their algorithms to express their viewpoint, opinion, message, artistic conception, or any other expressive purpose.<sup>288</sup> Rather, viewed most starkly, platform algorithms are designed entirely to generate feed that, combined with the overall user interface, will psychologically manipulate users to remain on and return to the platform for as long and as often as possible in order to exploit the users’ attention through selling micro-targeted advertising.<sup>289</sup> Nor can platform users be said to have an expressive interest in receiving an aggregation of content designed to keep them on the platform, especially when they have no say over or knowledge of how the platform algorithm selects their personalized feed.

In its compelled speech jurisprudence, the Supreme Court has held unconstitutional government requirements that would alter or otherwise interfere with a person’s chosen expressive message. For example, the Court struck down a state statute requiring newspapers to provide free space in their pages for political candidates to reply to newspaper criticism.<sup>290</sup> It also invalidated a state law that required a parade to include a group whose message the parade organizers found repugnant.<sup>291</sup>

But the Court has upheld government compulsions that merely implicate the burdened party’s commercial considerations, property-management, or other non-expressive choices. Thus, in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Court held that the government does not abridge law schools’ free speech rights when

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287. As of this writing, there is no published case on point. An unpublished district court ruling held that Google does enjoy First Amendment protection for its ranking of search results. *Search King, Inc., v. Google Tech., Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at \*4 (W.D. Okla. May 27, 2003).

288. In arguing that Google’s search query results and rankings should qualify as First Amendment protected speech, Eugene Volokh and Donald M. Falk state that the First Amendment protects editorial choices about what to include in one’s speech product, the use of an algorithm to realize those choices, and the aggregation of materials authored by others. Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL’Y 883, 886 (2012). What they miss, I believe, is that the aggregation of materials chosen for no expressive purpose, but rather only to keep recipients engaged within the platform to sell advertising, does not qualify as such protected speech. See also Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 27, 2018), <https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy> [<https://perma.cc/8E5H-84WE>] (questioning Volokh’s and Falk’s effort to analogize search engine search results to newspapers’ editorial decisions).

289. See *supra* notes 54–55 and accompanying text.

290. *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 241 (1974).

291. *Hurley v. Irish–American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 566 (1995).

it requires them to include military recruiters in law schools' recruiting services for their students.<sup>292</sup> It reasoned that law schools "are not speaking when they host interviews and recruiting receptions."<sup>293</sup> Rather, law schools facilitate recruiting to assist their students in obtaining jobs. Thus, a law school's "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."<sup>294</sup>

Likewise, in *Turner Broadcasting System, Inc. v. FCC*, the Court upheld the federal "must-carry" rule, requiring cable operators to carry local broadcasters' channels at no charge, if the broadcasters so desire.<sup>295</sup> Among other grounds for its decision, the Court reasoned that cable operators are perceived not as speakers who convey a chosen message, but merely as conduits for others' speech.<sup>296</sup> Unlike newspaper editors or parade organizers, cable operators do not select which channels or programming to provide their subscribers in order to convey any viewpoint or common theme. Rather, as the Supreme Court later explained, the cable line-up consists of "individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience."<sup>297</sup> As the *Turner* Court concluded, there thus "appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."<sup>298</sup>

Similarly, digital platform algorithms generate a personalized news feed designed to promote the platform's commercial objectives without any intent to convey or endorse a viewpoint or message.<sup>299</sup> Nor do platform users believe that their personalized news feed reflects any endorsement of ideas or messages by the platform. The platforms regularly insist that they are speech-neutral conduits, not media

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292. 547 U.S. 47, 47 (2006).

293. *Id.* at 64.

294. *Id.*

295. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 622 (1994) [hereinafter *Turner I*]; *Turner Broad. Sys., Inc., v. FCC*, 520 U.S. 180, 180 (1997) [hereinafter *Turner II*].

296. *Turner I*, 512 U.S. at 655.

297. *Hurley*, 515 U.S. at 558.

298. *Turner I*, 512 U.S. at 655.

299. Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1528 (2013) (arguing that Google is not like a newspaper that selects and endorses the articles that appear on its pages — Google's search engine merely "helps its users find websites, but it does not sponsor or publish those websites").

presenting an editorial voice.<sup>300</sup> Their users can be expected to view them accordingly.<sup>301</sup>

Neither can platform users be said to have a speech interest as listeners in platforms' personalized news feeds. Users do have an interest in gaining access to news and information that they believe is valuable to them. But they have no speech interest in being the recipient of content designed to subconsciously manipulate them to remain on the platform and reveal their consumption preferences so the platform can better sell micro-targeted advertising to digital advertisers.

The sole exception to the above might be those instances — now growing in number — in which digital platforms alter or override their algorithm in response to political and public pressure to ban, demote, or elevate certain types of speech based on the speech's character or message, including speech that incites racism, violence, and sexual harassment. As lower courts have held, instances in which a search engine intentionally delists certain websites from its search results because it chooses to deny a forum to the website proprietor and content might also be treated as an editorial decision, protected by the First Amendment.<sup>302</sup> The same might apply to the recent move by Facebook and Google to prioritize original, quality reporting over hyper-partisan news items that are more likely to go viral. To the extent a platform redesigns its algorithm to implement intentional expressive choices about which types of viewpoints and speakers the platform wishes to favor or disfavor, the content generated by the algorithm would likely qualify as protected speech, even if the platform altered its algorithm in response to public pressure and as part of a strategy to avoid regulation.

But again, the First Amendment should not protect the platform's news feed and other search results that implement the platform's business model rather than expressive choices. To the extent platform algorithms push content designed entirely to maximize user engagement, neither the algorithms themselves nor the mix of content they generate should qualify as First Amendment protected speech. In

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300. See Philip M. Napoli & Robyn Caplan, *Why Media Companies Insist They're Not Media Companies, Why They're Wrong, and Why it Matters*, FIRST MONDAY (May 2, 2017), <https://journals.uic.edu/ojs/index.php/fm/article/view/7051/6124> [<https://perma.cc/PSB9-KAN6>] (noting that digital platform companies such as Google, Facebook, and Twitter have regularly insisted that they should be thought of purely as technology companies, not media companies).

301. See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1197 (2008) (arguing that "[j]ust as Internet users do not associate the content of specific websites with the Internet Service Provider that enabled access, users also do not associate website content with the search engine that guided the user").

302. See *e-ventures Worldwide, LLC v. Google*, 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016) (comparing Google's delisting of search engine optimization company to newspaper's editorial decision of what content to publish and suggesting this could be protected speech); *Zhang v. Baidu.com*, 10 F. Supp. 3d 433, 443 (S.D.N.Y. 2014) (holding that a Chinese search engine's intentional delisting of pro-democracy websites was protected speech).

that regard, courts have held that newspapers may be prohibited from engaging in illegal commercial speech by running advertisements for housing and employment that discriminate on the basis of race or sex and that such prohibitions do not run afoul of First Amendment protections for freedom of speech and the press that apply to newspapers' editorial content.<sup>303</sup> So, too, may digital platforms' news feed algorithms enjoy First Amendment protection only when and to the extent that they embody the platforms' deliberate editorial choices, as opposed to generating a mix of content designed entirely to keep users within the platform and sell micro-targeted advertising.

## 2. Must-carry Analogy

Even if the platforms' news feed algorithms qualify as protected speech, regulations requiring that they give priority and prominence to original reporting — whether directly or by enabling news publishers to offer their own curated news content to platform users — should be seen as the digital network equivalent of the must-carry requirements at issue in *Turner Broadcasting*. As such, the regulations I propose should pass First Amendment muster under the intermediate scrutiny test applicable to content-neutral speech regulations.

In upholding the must-carry requirements against First Amendment challenge, the *Turner* Court reasoned that even if cable systems' channel line-up is speech, the must-carry requirements are content-neutral speech regulations, which regulate speech without regard to its viewpoint or subject matter, as opposed to content-based speech regulations, which target particular viewpoints or subject matter.<sup>304</sup> Content-based speech regulations are subject to the most exacting First Amendment scrutiny and rarely pass First Amendment muster.<sup>305</sup> By contrast, the Court held that the must-carry requirements, as content-neutral speech regulations, need only meet a test of intermediate scrutiny. To satisfy intermediate scrutiny, a regulation

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303. *Pitt. Press Co. v. Hum. Rels. Comm'n*, 413 U.S. 376, 389–91 (1973) (holding that employment ads appearing in a newspaper that discriminated on the basis of sex were illegal activity and thus unprotected commercial speech in contrast to speech reflecting the newspaper's editorial judgment); *Ragin v. N.Y. Times Co.*, 923 F.2d 995, 1002–04 (2d Cir. 1991) (rejecting the newspaper's argument that enforcing the newspaper fair housing law prohibitions against racial discrimination in advertising for housing would unduly burden freedom of the press).

304. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642–46 (1994) [hereinafter "*Turner I*"].

305. *See, e.g., Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2222 (2015) (holding that municipal sign ordinance that imposed stricter limitations on the size and manner of display of certain signs based on the subject matter of the sign's message constituted a facially content-based speech regulation and failed to satisfy the applicable strict First Amendment scrutiny); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (stating that "[c]ontent-based regulations are presumptively invalid.").

must “further[] an important or substantial governmental interest . . . unrelated to the suppression of free expression” and must not “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>306</sup>

In enacting the must-carry provisions, Congress had declared that they served three interrelated interests: (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.<sup>307</sup> The *Turner* Court readily concluded that each was an important governmental interest. Further, the Court held, “none of [those] interests [were] related to the ‘suppression of free expression,’ or to the content of any speakers’ messages.”<sup>308</sup> In that regard, the Court emphasized, laws that favor one set of speakers over another are subject to strict scrutiny under the First Amendment only if “they reflect the Government’s preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say).”<sup>309</sup> In that vein, held the Court, the must-carry provisions were “justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television.”<sup>310</sup> As the Court noted: in enacting the must-carry provisions, “Congress found that the physical characteristics of cable transmission, compounded by the increasing concentration of economic power in the cable industry, are endangering the ability of over-the-air broadcast television stations to compete for a viewing audience and thus for necessary operating revenues.”<sup>311</sup>

In its second *Turner* ruling, following a remand for further findings of fact, the Court held that substantial evidence, coupled with the appropriate due deference that must be accorded to Congress’s evaluation of that evidence, supported Congress’s conclusion that the must-carry requirement would, indeed, serve the important governmental interests that Congress wished to promote.<sup>312</sup> In particular, the Court held that substantial evidence supported Congress’s conclusion that local broadcast stations denied carriage on

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306. *Turner I*, 512 U.S. at 662 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

307. S. REP. NO. 102-92, at 58 (1991); H.R. REP. NO. 102-628, at 63 (1992); Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(8)–(10), 106 Stat. 1460, 1461 (1992).

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

309. *Id.* at 658.

310. *Id.* at 661.

311. *Id.* at 632–33.

312. *Turner Broad. Sys., Inc., v. FCC*, 520 U.S. 180, 181 (1997).

cable systems would be at serious risk of financial difficulty and would deteriorate or fail.<sup>313</sup>

Similarly, as discussed above, the major digital platforms enjoy bottleneck market power over access to news readers and the advertisers upon which news publishers have long depended. Original, investigative reporting faces serious financial difficulty as a result. Regulations that require digital platforms to give priority and prominence to original reporting in their news feed, whether by regulating the platforms' content curation algorithms or by requiring platforms to maintain open APIs to enable news publishers to offer the publishers' own curated original news content to platform users, would bolster news publishers' ability to build a brand reputation for quality, original journalism and would encourage platform users to visit news publishers' websites.

To be certain, the regulations I propose would evince a preference for original over derivative reporting. But that preference would not render the regulations content-based. After all, in enacting the cable system must-carry requirements, Congress also sought to further a preference for local news broadcasts and a multiplicity of information sources over the programming that cable operators might have otherwise chosen to provide. But akin to the must-carry provisions, the digital platform regulations would promote news publishers' investment in original and investigative reporting regardless of the particular viewpoint held or expressed in any news story and regardless of the particular subject matter of any news story. The enhanced brand reputation and increased traffic the regulations would engender would help both commercial and non-profit news publishers, as a sector, to continue to invest in quality journalism while remaining economically viable.

Granted, the regulations would favor those news publishers who invest in original, investigative reporting over those that do not. Further, according to one study, news publishers that invest heavily in investigative journalism tend to have a more liberal political orientation than do news publishers that produce less investigative reporting.<sup>314</sup> But as the Supreme Court has held, a "regulation that serves purposes

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313. *Id.*

314. See HAMILTON, *supra* note 3, at 182, 191–92 (finding that newspapers submitting articles to the IRE prize competition for the best investigative journalism were more likely to generate content using words associated with Democratic rather than Republican lawmakers). See also Yochai Benkler, *The Political Economy of the Origins of Asymmetric Propaganda in American Media*, in *THE DISINFORMATION AGE: POLITICS, TECHNOLOGY, AND DISRUPTIVE COMMUNICATION IN THE UNITED STATES* 43, 49 (W. Lance Bennet & Steven Livingston eds., 2020) (concluding that left and centrist mainstream media share a strong professional commitment to accurate reporting and police one another for factual errors, while right-wing media police each other for ideological purity, not factual accuracy).



unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”<sup>315</sup>

At bottom, the digital platform equivalent to the must-carry provisions at issue in *Turner* would serve the vital public — and governmental interest — in supporting a thriving, vibrant watchdog press. It should readily pass First Amendment muster.

## VIII. CONCLUSION

The continuing demise of American newsrooms is deeply worrying. Without government intervention, the press’s ability to fulfill its still vital Fourth Estate role will be severely compromised. Through their dominance over digital advertising and news publishers’ access to readers, digital platforms have been a primary cause of newsrooms’ decline in recent years.

This Article thus proposes legislative initiatives to mandate digital platform support for quality journalism. Finding current proposals and platform initiatives to bolster quality journalism wanting, it sets out blueprints for an excise tax on digital advertising to fund investigative journalism and local reporting as well as mechanisms for bolstering newsroom brands by mandating that platforms give original reporting prominent placement in news feeds and search results. In addition, news publishers should have the right to require platforms to include a link taking users to the publisher’s website and to display a third-party media watchdog trustworthiness rating of the publisher’s choice. Finally, this Article proposes that major platforms be required to enable news publishers to offer their own curated original news content to platform users. As we have seen, those measures should survive First Amendment scrutiny.

My proposals might not be enough to salvage quality journalism in and of themselves. But they would be an important springboard for further government intervention in an ongoing market failure with dire consequences for democratic governance.

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315. *Hastings Christian Fellowship v. Martinez*, 561 U.S. 661, 662, 695–96 (2010) (holding that a law school’s policy of requiring officially recognized student groups to allow any student who wishes to become a voting member of the group, even if the student disagrees with the group’s stated mission, was a content neutral speech regulation notwithstanding that it might impose a greater burden on student groups whose viewpoints are out of favor with the campus mainstream).

