

# SUBSIDIZING THE PRESS

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## ABSTRACT

Through beat reporting and investigative journalism, reporters monitor the foundational institutions of our society. This reporting has value even to those who never buy a newspaper or read a website. For example, subscribers and nonsubscribers alike benefit when government officials respond to a critical news story by eliminating an abusive practice. Yet unfortunately, the professional press is experiencing a severe economic crisis. Layoffs are pervasive, and news organizations across the nation are on the brink of insolvency. As a result, a number of commentators have proposed government subsidies for the press. Yet if the press becomes financially dependent on the government, would they be deterred from monitoring and criticizing the government? If so, the subsidy would undercut some of the social benefits it is meant to preserve.

In response to this conundrum, this Article proposes a three-part analytical framework for evaluating press subsidies. The first step is to assess how effectively the subsidy safeguards press independence. The second criterion, which this Article calls “focus,” gauges how effectively a subsidy channels resources to externality-generating activities, as opposed to other uses. For example, a subsidy that induces press organizations to hire more reporters is superior to one that can be used, instead, to fund pay raises for the advertising staff. The third criterion is political feasibility. How likely is a subsidy to attract political support? And how much political support does it need? One that can be implemented under current law, for example, requires less political support than one that depends on broad new legislation.

Based on this framework, the principal recommendation of this Article is for news organizations to make greater use of the nonprofit form. By providing a subsidy through the charitable deduction, we would not empower the government to choose how much funding to allocate to each news organization. Instead, the charitable deduction allows the government to piggyback on the judgments of private donors about which nonprofits to support. In addition, this subsidy is feasible politically since it already can be used, to a significant extent, under current law.

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This Article also considers four alternative subsidy structures, highlighting their strengths and weaknesses and showing the tradeoffs they present.

## 1. INTRODUCTION

1 Through beat reporting and investigative journalism, reporters monitor the foundational institutions of our society. This reporting has value even to those who never buy a newspaper or read a website. For example, subscribers and nonsubscribers alike benefit when government officials respond to a critical news story by eliminating an abusive practice. Yet unfortunately, the professional press is experiencing a severe economic crisis. Layoffs are pervasive, and news organizations across the nation are on the brink of insolvency.

2 In response, a number of commentators have called for subsidies for reporting. After all, when an activity that generates positive externalities is undersupplied, the textbook policy response is a government subsidy. For investigative and beat reporting, however, a government subsidy carries a significant risk. If newspapers, websites, and news broadcasts become financially dependent on the government, would they be deterred from monitoring and criticizing the government? If so, the subsidy would undercut some of the social benefits it is meant to preserve.

3 In response to this conundrum, this Article proposes a three-part analytical framework for evaluating press subsidies. The first step is to assess how effectively the subsidy safeguards press independence, including the extent to which the First Amendment helps to achieve this goal—something that varies with the subsidy's structure. The second criterion, which this Article calls "focus," gauges how effectively a subsidy channels resources to externality-generating activities, as opposed to other uses. For example, a subsidy that induces press organizations to hire more reporters is superior to one that can be used, instead, to fund pay raises for the advertising staff. The third criterion is political feasibility. How likely is a subsidy to attract political support? And how much political support does it need? One that can be implemented under current law, for example, requires less political support than one that depends on broad new legislation.

4 Based on this framework, the principal recommendation of this Article is for news organizations to make greater use of the nonprofit form. By providing a subsidy through the charitable deduction, we would not empower the government to choose how much funding to allocate to each newspaper, website, or news broadcast. Instead, as I have written elsewhere, the

charitable deduction allows the government to piggyback on the judgments of private donors about which charities to support (Schizer 2009, 221). This means the press would not have a financial incentive to cultivate the government's good will. In addition, this subsidy is feasible politically since it already can be used, to a significant extent, under current law.

This Article also considers four alternative subsidy structures, highlighting their strengths and weaknesses and showing the tradeoffs they present. The first is a tax credit to encourage news organizations to hire more reporters. This structure would be effective at safeguarding press independence and, arguably, even more effective than the nonprofit form at focusing resources on externality-generating activities. But this tax credit would be quite difficult to administer. Also, it would be useful only to organizations with profits, unless the credit was either refundable (i.e., available to news organizations with net losses) or transferable (i.e., available to financial investors). Unlike the nonprofit model, moreover, this tax credit would require congressional action. Mobilizing the necessary political support is likely to be difficult.

The second alternative is a subsidy allocated by readers, such as a government-funded subscription. This approach is effective at safeguarding independence as long as the reader, instead of the government, chooses which news organization to support. Yet significant resources would be misdirected to the wrong press organizations and, in some cases, to fraud. In addition, like the tax credit for hiring reporters (and unlike use of the nonprofit form), this approach requires congressional action.

The third alternative is a government-funded board, modeled on the National Endowment for the Arts, which would make grants to selected newspapers, websites, and news broadcasts. In offering the government an active role in allocating funds, this model could prove particularly effective at focusing the subsidy on externality-generating activities, although much depends on how well run the process proves to be. Indeed, a poorly structured board could prove quite ineffective on this dimension. In any event, a more active government role obviously poses greater risks to press independence. In addition, this model would require congressional action, and thus is more difficult politically than the nonprofit model.

A similar analysis applies to the fourth alternative, a government-owned press organization, such as an American version of the British Broadcasting Corporation (BBC). It has the potential to provide a focused investment in externality-generating activities—if it is run well—but it

poses risks to press independence and faces significant political obstacles in the American political context.

- 9 Although much has been written about the economic crisis afflicting the press, and some commentators have recommended government subsidies of various types, most of this work has been done by journalists (*see generally* Leonard Downie & Michael Schudson 2009; Philip Meyer 2004; Victor Pickard, Josh Stearns & Craig Aaron, 2009; Paul Starr 2009; Robert McChesney & John Nichols 2010),<sup>2</sup> rather than by legal academics.<sup>3</sup> As a result, the existing literature does not focus on questions of institutional design or political economy. It does not provide an analytical framework for evaluating press subsidies, and it does not offer a sustained comparison between different subsidy structures that accounts for institutional detail across various legal regimes. The existing literature also does not illuminate the unique advantages of the nonprofit form in preserving independence and in requiring at most modest changes in current law. The goal of this Article is to fill these significant gaps in the literature, and thus to give guidance about the most promising mechanisms for enhancing the financial viability of the American free press.<sup>4</sup>

2 Both the FTC and the FCC are studying the issue as well. *See* FTC (2010); Bollinger (2010a) (mentioning FTC and FCC studies).

3 Three legal academics have made important contributions to this literature. First, Lee Bollinger has written an important book on the future of the press. *See* Bollinger (2010b). Although he supports government subsidies for the press (and is more supportive than I am of government grants and government-owned media organizations), his main focus is not the economic challenges facing the U.S. press, but the need for a strategy to promote free press values throughout the world. A second legal academic who has written on related issues is the late Professor Edwin Baker. He proposed a tax credit for hiring reporters, structured somewhat differently than the one I propose in Part 5.1. I respond to Baker's proposal there, but it is worth emphasizing that Baker's work generally focuses not on subsidies, but on media ownership and its implications for democracy. *See, e.g.,* Baker (2007). Finally, Professor Richard Schmalbeck (2009) has written about organizing newspapers as nonprofits. Schmalbeck's article focuses especially on doctrinal issues within the tax law, rather than on policy issues such as independence, focus, and political plausibility, which are the principal subject of this Article.

4 This Article focuses on subsidies for reporting. It is also possible, of course, to subsidize the transmission of news to those who do not have access to high speed Internet. These readers, representing approximately 40 percent of the population, are disproportionately elderly and poor, and it would be troubling, if only for distributional reasons, to cut off their access to information (Pickard, Stearns, & Aaron 2009, 9). The FCC's new "National Broadband Plan" is meant to expand access. These efforts may be complicated, though, by the questions recently raised by the DC Circuit about the FCC's authority to regulate the Internet. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). This issue is beyond the scope of this Article.

Part 2 offers background about why many commentators have proposed subsidies for the press, including a survey of positive externalities generated by beat reporting and investigative journalism and a discussion of the economic and technological trends reshaping the press's business model. Part 3 develops three criteria for evaluating various subsidy structures: independence, focus, and political feasibility. Part 4 applies these criteria to the principal recommendation of this Article, which is to use tax-deductible charitable contributions to subsidize beat and investigative reporting. Part 5 considers how four alternative structures fare under these criteria. Part 6 is the conclusion.

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## **2. MONITORING BY NEWSROOMS: A CHANGING LANDSCAPE**

By monitoring our most important public and private institutions, the press generates significant positive externalities. Yet its business model is in transition and a robust alternative may not be feasible without government support. To articulate the potential appeal of a government subsidy, Section 2.1 surveys positive externalities generated by investigative and beat reporting. Section 2.2 discusses economic and technological developments that have reduced the quality and supply of this reporting. Section 2.3 describes offsetting factors that can potentially increase the quality and supply of monitoring by journalists, while also showing the limitations of these offsetting factors. Section 2.4 briefly mentions alternative steps to enhance monitoring that do not involve press subsidies.

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### **2.1 Positive Externalities from Monitoring by Journalists**

It is well understood that institutions are truer to their mission when they are actively monitored. Whether in the public or private sector, they are less susceptible to incompetence, as well as to corruption, self-interested behavior, and other agency costs. While socially useful monitoring comes from a range of sources—from short sellers and securities analysts to prosecutors and professors—it is well known that journalists play a prominent role through investigative journalism and beat reporting. Corporate executives know that a negative press story can deprive them of market share, trigger a lawsuit, or even cost them their jobs (Starr 2009, 28). Likewise, government officials recognize the press's influence over voters, interest groups, and campaign donors. The press thus serves as

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both a watchdog and a scarecrow. Even if the press cannot monitor everyone, it has a positive influence as long as people *believe* they are being monitored.<sup>5</sup>

13 This monitoring benefits even those who never read a newspaper or a website—in the form of better products, more efficient capital markets, and more effective government (FTC 2010, 4–5). When the press motivates our leaders to discharge their responsibilities more capably, we are all better off. Even those who do not pay for this activity still benefit. This means we all have an incentive to free ride, hoping others will pay for the activity that benefits all of us. As a result, beat reporting and investigative journalism have the characteristics of a public good, so that, unfortunately, they are likely to be undersupplied.

14 This Article focuses on externality-generating journalism that monitors agency costs and incompetence in both the public and private sector. In using the terms “press” and “journalism,” this Article refers not only to newspapers, which currently offer the vast majority of beat and investigative reporting,<sup>6</sup> but also websites, and radio and TV broadcasts. The goal of this Article is not to protect traditional newspapers, but to protect investigative and beat reporting, whether this function is conducted by newspapers or by other media.

15 How large are the positive externalities from investigative and beat reporting? The answer depends on four factors. The first is the importance of the subject being investigated, and the policy and market outcomes it influences. For example, a news story revealing the incompetence or corruption of a candidate for national office is likely to have greater impact on social welfare than one reporting about a professional athlete’s extramarital affair. Second, the novelty of the information revealed is relevant. The five-hundredth reporter covering the Democratic National Convention is unlikely to add as much social value as the first journalist to disclose the poor safety record of a widely-used product. Third, the accuracy of reporting is significant. Indeed, just as accurate information can generate positive externalities, inaccurate reporting can yield *negative* externalities.

5 See Downie & Schudson (2009, 9) (discussing “the watchdog function of the press—reporting that is aggressive and reliable enough to instill fear of public embarrassment, loss of employment, economic sanctions, or even criminal prosecution”).

6 See FTC (2010, 2) (“Studies have shown that newspapers typically provide the largest quantity of original news to consumers over any given period of time.”).

Misleading claims can lead to costly mistakes. A well known example is the consensus among journalists that there were weapons of mass destruction in Iraq. Fourth, and relatedly, the credibility of reporting is important. Even if information is accurate, it will have less impact if people do not have confidence in the source. A news organization with an established reputation for accuracy, professionally trained journalists, and significant assets at risk if it deliberately prints false information is more likely to have influence than an obscure blogger whose motivations and expertise are unknown.

## 2.2. Economic and Technological Developments that Undercut Investigative and Beat Reporting

Unfortunately, it is well known that the professional press is in the midst of a profound economic crisis. “In the past couple of years alone,” Charles Lewis (2007, 32) wrote, “everything but a piano has fallen on the head of the serious press.”<sup>7</sup> The root of this crisis is that newspapers have lost the very lucrative monopoly they once held on information within a locality. As Warren Buffet has explained,

For most of the twentieth century, newspapers were the primary source of information for the American public. ... Just as important, their ads were the easiest way to find job opportunities or to learn the price of groceries at your town’s supermarkets. The great majority of families therefore felt the need for a paper every day, but understandably most didn’t wish to pay for two. Advertisers preferred the paper with the most circulation, and readers tended to want the paper with the most ads and news pages. ... Thus, when two or more papers existed in a major city (which was almost universally the case a century ago), the one that pulled ahead usually emerged as the stand-alone winner. After competition disappeared, the paper’s pricing power in both advertising and circulation was unleashed ... and the profits rolled in.<sup>8</sup>

7 A chorus of commentators is heralding the end of newspapers as we know them. See, e.g., Meyer (2004, 1) (“Journalism is in trouble.”); Sherman (2009) (“[T]he newspaper industry’s fortunes have gone from abysmal to apocalyptic.”); Pickard, Stearns, & Aaron (2009, 6) (“Journalism as an institution is collapsing before our eyes ...”); McChesney & Nichols (2010, 24) (“Investigative journalism was first on the endangered species list.”).

8 Starr (2009, 29) (quoting Warren Buffett’s 2006 letter to shareholders); see also Meyer (2004, 35) (“monopoly newspapers were the tollgates through which information passed between the local retailers and their customers”).

17 Yet with the advent of the Internet, Craigslist and a host of other sites now compete with newspapers for classified and other ads.<sup>9</sup> As a result, revenue from print ads fell by 23 percent industrywide from 2006 to 2008 and by another 30 percent in 2009. This is a body blow to the newspaper industry, since even the diminished total still represents 90 percent of all newspaper revenue (Pickard, Stearns, & Aaron 2009, 7).<sup>10</sup> Ad revenue was down again in 2010, although the rate of decline slowed.<sup>11</sup> In addition, the proliferation of online content is not helping; only 8 percent of the industry's advertising revenue comes from online ads, and the percentage has stopped growing (Starr 2009, 30).

18 Unfortunately, subscription revenue is plummeting as well (Meyer 2004, 17). The percentage of Americans who buy a daily newspaper is half of what it was in 1945, declining from 38 percent in 2006 to 30 percent in 2008 (Starr 2009, 30).<sup>12</sup> "If newspapers continue to lose circulation at a rate of 7 percent every six months," McChesney and Nichols (2010, 14) wrote, "they've got less than eight years to go before no one is reading them." Declines have continued in 2010, although the rate of decline has slowed somewhat (Peters 2010a).<sup>13</sup> While on-line readership is growing, most newspapers have been offering this content free of charge.

19 As a result, newspaper stock prices have plummeted.<sup>14</sup> Established papers such as the *Rocky Mountain News* and *Ann Arbor News* have shut their doors, while the *LA Times*, *Chicago Tribune*, and the owner of the *Philadelphia Inquirer* and *Daily News* have entered bankruptcy (*see also*

9 Downie & Schudson (2009, 3) ("The Internet's easily accessible free information and low-cost advertising have loosened the hold of large, near-monopoly news organizations on audiences and advertisers."); *see also* Meyer (2004, 61) ("technology can separate advertising from its traditional role of supporting socially useful editorial content. The Internet can be a perpetual catalog ...").

10 *See also* Starr (2009, 28) (citing Barclays study indicating that revenue was down by 25 percent over three years at the end of 2008, and that it would be down another 17 percent in 2009 and 7.5 percent in 2010); FTC (2010, 2) (noting that newspaper ad revenue has declined approximately 45 percent since 2000).

11 Perez-Pena (2010a) (Moody's predicts 5 to 10 percent decline in ad revenue in 2010).

12 *See also* Joseph Plambeck (2010) (citing recent figures from the Audit Bureau of Circulations).

13 Circulation in the third quarter of 2010 was 5 percent below the level of circulation in the third quarter of 2009; but this decline is less steep than the 10.6 percent decline between 2008 and 2009. *See* Peters (2010a, B4).

14 Starr (2009, 30), (noting that newspaper stocks are down by 80 percent).



Pickard, Stearns, & Aaron 2009, 5).<sup>15</sup> Many industry analysts expect at least one major U.S. city to be without a metropolitan daily paper soon (Fitzgerald 2008). Meanwhile, approximately 50 newspapers closed in 2008 alone.<sup>16</sup>

As newspaper finances deteriorate, so does the quality of coverage (Lewis 2007, 32). The press becomes more vulnerable to pressure not to pursue controversial stories (Starr 2009, 29). In addition, as Lewis (2007, 32) has written, “[t]here are simply fewer and fewer professional reporters monitoring power in America and the world . . . .” According to the “paper cuts” blog, approximately 16,000 journalists lost their jobs in 2008, and another 17,000 in 2009 (McChesney & Nichols 2010, 19–20). The newsroom was reduced by half at the *LA Times*, by 45 percent at the *Newark Star Ledger* (Starr 2009, 28), from 450 to 150 at the *Baltimore Sun*, and from 500 to 200 at the *San Francisco Chronicle* (Downie & Schudson 2009, 17).

In the long run, it is costly for news organizations to compromise the quality of their reporting, since accurate and insightful coverage can justify a premium from advertisers and readers.<sup>17</sup> Yet in the short run, strapped news organizations tend to favor cost-cutting over building their long-term reputation. According to Donald Graham (2007, A17), the CEO of the *Washington Post*, “It isn’t guaranteed that anyone owning the [*New York Times*] would spend more than \$200 million on its newsroom budget or deploy dozens of foreign correspondents around the world. Sending any one of those reporters overseas costs lots of money and doesn’t add a penny to this year’s circulation or advertising revenue.”<sup>18</sup>

15 Pickard, Stearns, & Aaron (2009) assert that many newspapers are profitable if their debt service is not taken into account. While it is useful to know that newspapers can still generate this level of cash flow, debt service is as real a cost as the payroll. Capital is not free, and so if newspapers cannot generate enough revenue to cover this cost, they obviously are not profitable.

16 McChesney & Nichols (2010, 20) (“More than four dozen newspapers folded in 2008.”).

17 Meyer (2004, 7) (“A front page that pretends to depict a presidential candidate chatting with an alien from outer space is going to attract only that limited subset of advertisers that depends on the most naively credulous subset of the population.”). Meyer offers empirical support for the proposition that newspapers can profit economically from offering high-quality reporting, which he calls “the influence model.” He shows that the paper that is more trusted tends to outcompete its competitors. *Id.*, 21–33, 52–53, 202–204.

18 Likewise, Knight Ridder’s stock price declined on the day the chain won seven Pulitzer prizes in 1986. When the company’s director of corporate relations expressed surprise, a Wall Street Analyst replied, “You win too many Pulitzers” (Meyer 2004, 6).

22 Coverage of state and local news and international coverage has been hit especially hard. For example, the number of reporters covering Trenton has declined from 50 to 15 in the past decade (Starr 2009, 31), and the number covering all state capitals has fallen by 32 percent, from 524 in 2003 to 355 in 2009 (Downie & Schudson 2009, 18). State and local perspectives on national news have also become more scarce.<sup>19</sup> Likewise, the number of foreign correspondents declined 30 percent between 2002 and 2006, and a number of prominent media outlets have closed their last foreign bureaus, including the *Philadelphia Inquirer*, the *Baltimore Sun*, and the *Boston Globe* (Starr 2009, 30–31). The column inches dedicated to foreign coverage are also shrinking, an unsettling trend in an increasingly global world.<sup>20</sup>

23 The broadcast media is unlikely to pick up this slack, since it faces the same economic challenges. In fact, 90 percent of its stories are about crime, accidents, and scheduled events.<sup>21</sup> The typical half-hour TV news show runs ten to twelve stories, in contrast to the typical metropolitan daily that runs 70 stories on business, national, and local news, and another 30 on sports and entertainment (Starr 2009, 28). According to McChesney and Nichols (2010, 15), reporting on TV news has become even scarcer since 2008 because “local TV news has been clobbered by cuts ... along the lines similar to those seen in newspapers.”<sup>22</sup> Indeed, 205 stations now use content produced by other stations in the same city (Downie & Schudson 2009, 26). The trend in radio news is similar.<sup>23</sup> Commercial

19 See also Starr (2009, 31) (noting that fewer journalists from regional papers are covering DC, which is a particular loss since “journalists from regional papers perform a special service for their readers, monitoring their representatives in Congress and reporting on federal programs from a local angle”; DC reporters for *San Diego Union-Tribune* won a Pulitzer Prize in 2006 for exposing corruption of Rep. Randall “Duke” Cunningham but, since then, the bureau was closed).

20 Starr (2009, 31) (discussing 2008 Pew study which found that two-thirds of news executives surveyed said they had reduced foreign coverage in past three years); see also Lewis (2007, 32). CBS News once had 24 foreign bureaus; it now has 6, with none in Latin America or Africa.

21 Downie & Schudson (2009, 26).

22 They note that over 1200 TV newsroom jobs were lost in 2008, representing a 4.3 percent industry decline in one year.

23 McChesney & Nichols (2010, 16) (“And local radio news, a significant producer of local journalism in the 1960s and 1970s, when nearly all AM stations had news directors and often reporters, has all but disappeared, a casualty of deregulation.”).

radio does almost no reporting, although public radio is an important source for certain types of news (Ibid., 28).

### 2.3. Offsetting Factors That Can Enhance Monitoring and Their Limitations

Yet the picture is not uniformly bleak. Although the Internet has undercut key aspects of the press's traditional business model, it also has enhanced the productivity of reporters and has dramatically reduced barriers to entry. This Section describes these positive developments, as well as their limitations.

#### 2.3.1. Enhanced Productivity of Professional Journalists

Technology is enhancing the productivity of professional reporters in at least four ways. First, the Internet itself is a fertile source of information. Search engines offer a cheap and powerful means of researching background for a story, and useful data is now available on the websites of government agencies and watchdog groups (Downie & Schudson 2009, 68–69). Rumors on the Internet sometimes prove to be valuable leads, which professional reporters can either confirm or discredit. Anyone with a digital camera can post images of breaking news on the Internet (Benkler 2009; Downie & Schudson 2009, 2).

Second, news organizations are using technology to take greater advantage of amateur reporters. Formal collaborations between professionals and amateurs—the so-called “pro-am” model—are especially effective for “hyperlocal” coverage of crime, traffic, and the like (Pickard, Stearns, & Aaron 2009, 20).<sup>24</sup> Similarly, an organizer can create a website with a research mission, providing the relevant database and inviting readers to post answers. For example, one nonprofit organized its readers to identify members of Congress who put their spouses on the campaign payroll (Benkler 2009, 60). Wikipedia obviously is based on a similar approach (Starr 2009, 33).

Third, the work of reporters can be posted instantaneously on the web, ensuring that their reporting is timely. Fourth, and relatedly, the Internet allows readers to comment immediately on a story, a process that helps catch errors and enhances the accuracy of reporting.

24 See also Downie & Schudson (2009, 43–44) (describing such initiatives in Seattle, New Haven, and northern New Jersey).

### 2.3.2. Lower Barriers to Entry

28 Distributing news online in this way obviously is not only much faster than a print edition, but also much cheaper. There is no need for presses, paper, ink, trucks, or the workforce that operates them. This savings can be significant for an established news organization. By putting out only an online edition, as the *Christian Science Monitor* has done, a news organization can save approximately 40 to 50 percent of its costs (Starr 2009, 32).<sup>25</sup> Cutting home delivery on certain days, a strategy chosen by Detroit's two metropolitan papers, can offer cost savings as well (Starr 2009, 32).

29 This savings is even more significant for startups. Obviously, the ability to post news on the Internet dramatically lowers barriers to entry. Anyone can create a blog. To the extent that these new websites engage in investigative and beat reporting, and to the extent that they are economically self-sustaining, they can help offset the deterioration of the traditional press.

### 2.3.3. Limitations of Online News Sites

30 Yet unfortunately, the contribution of these new players to investigative and beat reporting has been limited, at least so far. Relatively few Internet sites engage in original reporting; between 85 percent and 95 percent of all professionally reported news still originates with daily newspapers.<sup>26</sup> Many websites are "aggregators" that post stories written by print journalists.<sup>27</sup> Instead of reporting, blogs often focus on commentary (Starr 2009, 28), which is not in scarce supply, and which contributes less directly to monitoring externalities than does investigative and beat reporting.<sup>28</sup> Some blogs that purport to engage in reporting, moreover, merely peddle rumors and self-interested propaganda (Starr 2009, 33).<sup>29</sup>

25 FTC (2010, 3) (by moving to an online-only edition, newspaper can avoid 50 percent of its costs).

26 FTC (2010, 17) (citing study by Harvard's Alex Jones).

27 McChesney & Nichols (2010, 16) ("The information discussed online is still gathered by newspaper and broadcast reporters."); see also Pickard, Stearns, & Aaron (2009, 8) ("[W]hile blogs are carving out an increasingly important role in shaping and reporting the news, ... the overwhelming majority of reporting whether online, broadcast, or cable, still originates with newspapers.").

28 Downie & Schudson (2009, 8) ("[A]dvocacy journalism is not endangered—it is growing.").

29 See also Michael Massing (2009) ("the polemical excesses for which the blogosphere is known remain real" and the Internet "remains a hothouse for rumors, distortions, and fabrications").

While there are certainly online sites that are run by professional reporters and are developing a reputation for accuracy (Downie & Schudson 2009, 52; Dotinga 2008),<sup>30</sup> these professional organizations, unfortunately, are facing the same economic challenges that burden the traditional press. According to Joel Kramer, founder of *MinnPost*, a highly-regarded online site, “I am reporting back from the frontline of this digital journalism revolution that making it happen is no picnic” (Kramer 2009). Whether they are startups or online versions of traditional newspapers, online news sites are notoriously unsuccessful at generating revenue.<sup>31</sup> Indeed, print editions generate 90 percent of the industry’s revenue. Needless to say, cutting costs by even 50 percent—which is roughly what a newspaper can do through distributing content online only—is still a losing proposition if accompanied by a 90 percent decline in revenue.

Why is revenue so scarce? In creating online editions, most newspapers posted content for free, hoping to attract a flood of online ad revenue. Unfortunately, this revenue has not materialized. Only 8 percent of the industry’s advertising revenue comes from online ads, and the percentage has stopped growing (Starr 2009, 30). Online ads are thought to have less impact than print ads, since they are considered less successful at catching a reader’s eye. According to one industry analyst, “[t]he notion that the enormous cost of real news-gathering might be supported by the ad load of display advertising down the side of the page, or by the revenue share from having a Google search box in the corner of the page, or even by a 18-second teaser from Geico prior to a news clip, is idiotic on its face.”<sup>32</sup>

The most promising source of online ad revenue is “smart” advertising, which takes account of a reader’s interests and responds by posting a

30 For example, Josh Marshall’s *Talking Points Memo* combines traditional news reporting with an ideological perspective. It won the George Polk award for its investigation of firings of U.S. Attorneys. Likewise, *Chi-Town Daily News* broke the story of Chicago officials who were pushing through a 10 percent tuition increase at city colleges without public notice, and *Voices of San Diego* exposed the inaccuracy of a police chief’s crime statistics and the fact that a school board president was out of town one-third of the time. Scharfenberg (2009).

31 Starr (2009, 28) (“No online enterprise has yet generated a stream of revenue to support original reporting for the general public comparable to the revenue stream that newspapers have generated in print.”).

32 Carr (2009) (quoting Craig Moffett of Bernstein Research).

related ad. Yet unfortunately for the press, search engines control this market (Meyer 2004, 62). News organizations are seeking better terms from Google and other search engines, but they lack the necessary leverage (Pickard, Stearns, & Aaron 2009, 30–31). For example, Rupert Murdoch has threatened to take *The Wall Street Journal* out of *Google News*, and to negotiate exclusive access for Microsoft's Bing search engine, but this threat arguably is not credible since he would lose access to a significant volume of readers (Perez-Pena & Arango 2009, B1).

34 Another strategy to offer advertising that is tailored to readers' interests—but without having to compete with search engines—is through specialized sites. For example, hyperlocal sites are especially appealing to local merchants, and websites covering the federal government are attractive to advertisers who want to influence policymaking.<sup>33</sup>

35 An alternative to advertising is, of course, subscription revenue. In theory, a publication with a reputation for quality content should be able to charge online, just as it charges for print. The success story here is *The Wall Street Journal*, which claims to have one million online subscribers who pay a monthly subscription fee (Downie & Schudson 2009, 19). Other business publications also have successful online subscription programs.<sup>34</sup> Perhaps the most encouraging recent development is the successful paywall installed by *The Times of London*. They attracted 50,000 regular subscribers in the first four months after they launched the site in June 2010.<sup>35</sup>

36 Yet aside from *The Times of London* and business publications, most online content has been free, and it has been very difficult to persuade consumers to pay for it.<sup>36</sup> *The New York Times* tried and failed to charge for

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33 Downie & Schudson (2009, 48–49).

34 Seltzer (2010) (*Financial Times* claims to have 120,000 online subscribers); Starr (2009, 30) (“sources of financial news have always been able to set higher prices than other news media because of the value that business readers derive from reliable, up-to-the-minute information”); Carr (2009, 32) (*Consumer Reports* and *Cooks Illustrated* charge for online subscriptions). Politico is also planning to launch a subscription news service, Politico Pro, focusing on health care, energy, and technology. See Peters (2010b).

35 Pfanner (2010) (“The company said “around half” of these [100,500 subscribers] were regular, active subscribers to the newspapers’ Web sites, iPad application or Amazon Kindle edition. The rest are occasional purchasers.”).

36 Perez-Pena & Arango (2009, B1) (“Over more than a decade, consumers became accustomed to the sweet, steady flow of free news, pictures, video and music on the Internet. Paying was for suckers and old fogeys. Content, like wild horses, wanted to be free.”).

online content in 2007, and will try again in 2011.<sup>37</sup> It is especially difficult to charge for content when competitors do not. *Newsday*, which has the eleventh largest circulation in the nation, is a much more discouraging precedent than *The Times of London*. It hoped to attract a host of paying subscribers to its website—in addition to those who already had free online access (e.g., by subscribing to the print edition)—but they attracted only thirty-five paying subscribers after three months.<sup>38</sup> A further problem with “paywalls” is that they are porous. Although nonsubscribers cannot browse through *The Wall Street Journal* online, they can still access particular articles through *Google News*.<sup>39</sup>

Alternatively, instead of charging a flat fee for everything on the site, press organizations can charge readers for each article they download (Brill 2009).<sup>40</sup> This “micropayments” approach is modeled on iTunes, a service offering downloadable songs that many credit with reviving the recording industry. To read this downloaded material, readers could use the new Apple iPad, which was launched with much fanfare (Stone & Clifford 2010, B1),<sup>41</sup> as well as other devices, including Amazon’s Kindle<sup>42</sup> and Sony’s “make believe” reader for *The Wall Street Journal*.<sup>43</sup> *The Times of London* has had some success with this strategy as well (Pfanner 2010). Yet this strategy should not be oversold. Even with iTunes, nearly three times as many songs are pirated each year as are legally downloaded.<sup>44</sup>

37 Perez-Pena & Arango (2009, B2) (noting that “conventional wisdom among media companies has swung hard from the belief that pay walls would only curb traffic and stifle ad revenue, to the view that media businesses need to try something new, because the current path appears to lead to extinction”); Adams (2010a, B6); Adams (2010b, B10) (offering print subscribers free access online, and giving those who aren’t print subscribers free access to a designated number of hits, but charging once the reader has exceeded that minimum; plan announced to begin in 2011); Perez-Pena (2010b, B2).

38 Koblin (2010) (noting that those holding print subscriptions and those subscribing to Optimum Cable already have free online access and, according to *Newsday*, this group represents 75 percent of Long Island households).

39 Carr (2009) (noting that it is possible to get *WSJ* articles for free but people still pay).

40 See also Walter Isaacson (2009) (advocating micropayments).

41 See also Yukari Iwatani Kane & Ethan Smith (2010, B1) (noting Steve Job’s ambition to reshape newspaper and other media businesses).

42 Shafer (2009a) (criticizing Kindle as unattractive and cumbersome).

43 The reader was the subject of a full page ad on January 26, 2010 in *The Wall Street Journal*: “Now you can get a 7-inch window with an unobstructed view of Wall Street.”

44 Sherman (2009) (noting that 14 billion copies of songs are legally downloaded per year, while 40 billion are pirated).

Also, paying for a song, which can be played many times, may prove more appealing than paying for an article, which will be read only once.<sup>45</sup> Again, this is all the more true if competitors are offering news for free.<sup>46</sup>

## 2.4. Potential Alternatives to a Subsidy

38 To sum up, then, in this time of transition, competing trends are influencing the magnitude of monitoring externalities from investigative and beat reporting. On one hand, the press's traditional business model is failing. Advertising and subscription revenue have plummeted, a substantial number of newspapers have failed, and thousands of reporters have lost their jobs. On the other hand, technology is enhancing the productivity of reporters and is also lowering barriers to entry. It is hard to say definitively what the net effect of these competing trends has been, or what it will be in the future.

39 Yet the very fact that investigative and beat reporting yields positive externalities is, in and of itself, a reason to think it is being undersupplied. A further cause for concern is the reality that online news sites face many of the same economic challenges as the traditional press. So too is the consensus among journalists that investigative and beat reporting are in crisis.

40 This Article does not seek to test the empirical validity of this consensus. Instead, it considers the second-order question of what policy responses are appropriate if, in fact, investigative and beat reporting are being under-supplied. When an externality-generating activity is too scarce, the textbook response is a subsidy. A number of commentators have, in fact, been calling for press subsidies.<sup>47</sup> This Article's goal is to analyze tradeoffs associated with such subsidies, and to consider alternative subsidy models.

41 Yet before turning to this subject in Part 3, it is worth mentioning other policy responses that do not involve government funding for the press. Although these steps are beyond this Article's scope, four are worth mentioning briefly. First, stronger property protections can be afforded to the press for the information they uncover, so that positive externalities from investigative and beat reporting can be internalized to a greater extent.

45 Sherman 2009.

46 Cf. Jarvis (2009) ("Once news is known, that knowledge is a commodity and it doesn't matter who first reported it. There's no fencing off information, especially today, when the conversation that spreads it moves at the speed of links.").

47 For citations, see the text accompanying footnote 2.



Under current law, a news organization is able to copyright a story, but not the facts reported in it.<sup>48</sup> As a practical matter, this means a reporter who scoops a story cannot stop other news organizations from rewriting and selling it. The common law “hot news” doctrine offers some protection for reporting, but its scope is limited (see Victoria Elkstrand 2005).<sup>49</sup> In theory, stronger protections could enhance the profitability of reporting.<sup>50</sup> Yet this strategy could prove counterproductive. News reporting is an incremental process, in which reporters build on information already uncovered by other reporters. Although a stronger hot news doctrine could increase the revenue from reporting, it could also increase the costs of reporting if other reporters have to be compensated for earlier stories.<sup>51</sup>

48 FTC (2010, 6) (noting that copyright does not protect underlying information). The Supreme Court has rejected “sweat of the brow” copyright theories that would protect the work of those uncovering or assembling information. *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 US 340 (1991) (holding that telephone database is not protected by copyright if it is not a “compilation,” in which the collector uses an act of creativity or expression in establishing criteria).

49 The doctrine, first developed in a law suit by the Associated Press against Hearst, is meant to keep news agencies from appropriating each other’s work, and thus “render[ing] publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return.” *International News Service v. The Associated Press*, 248 US 215, 241 (1918). The doctrine was reaffirmed under New York law when the NBA sued Motorola for offering NBA scores. Yet the NBA lost on the facts even as it won on the law, a result that suggests how difficult “hot news” claims are to establish. *National Basketball Association v. Motorola*, 105 F.3d 841 (2d Cir. 1997); see also *Morris Communications Corp. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322 (M.D. Fla. 2000), *aff’d* in 364 F.3d at 1288 (2004) (allowing PGA to require anyone publishing golf scores using their data to impose 30 minute delay). The Second Circuit held that a cause of action would be established if: “(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 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 service that its existence or quality would be substantially threatened.” *NBA*, 105 F. 3d at 845. The doctrine was applied again recently in the financial news setting to delay republication of stock recommendations. See *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310 (S.D.N.Y. Mar. 18, 2010); see also *Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454 (S.D.N.Y. 2009) (allowing an Internet news misappropriation claim to go forward).

50 See, e.g., Jane C. Ginsburg (1996, 341–42) (suggesting Congress has the authority to adopt limited property rights for “information compilers”).

51 FTC (2010, 6, 10–11) (noting concern that news organizations could be hurt by stronger property protections, given their heavy reliance on previously reported news for source information). Cf. Heller (2008).

42 Second, a broader antitrust exemption could allow competing news organizations to coordinate, either in negotiating with search engines for a share of “smart” advertising revenue or in charging readers for access to websites.<sup>52</sup> In fact, Speaker Pelosi asked the Justice Department in 2009 to consider a broader antitrust exemption for the newspaper industry (Eggerton 2009), but the Justice Department opposes this step. In any event, a potential downside of a broader antitrust exemption is that the press might use enhanced pricing power to generate more profits, instead of more reporting.

43 Third, news organizations would not need government support if they could attract new owners who were willing to run them at a loss—just as some owners lose money on sports teams—in exchange for prestige or other nonfinancial benefits from owning a “trophy” property. For example, *Newsweek*’s new owner, 92-year old billionaire Sidney Harman, probably had nonfinancial motivations in acquiring this highly regarded magazine.<sup>53</sup> Yet unfortunately, other billionaires have not shown a similar inclination to buy news organizations without a plan to turn a profit.

44 Fourth, if the government wishes to support monitoring, it does not have to do so through the press. Instead, it can increase the budgets of prosecutors and inspectors general, provide grants to think tanks, academic institutions, and research analysts, authorize more private rights of action in order to enlist the private bar as monitors, and the like. Obviously, each of these steps involves a mix of costs and benefits, an analysis of which is beyond this Article’s scope. Yet it is worth noting that these other monitors have traditionally relied on the press, in many cases, to identify issues that are worth pursuing. For example, prosecutors and plaintiff’s lawyers often investigate matters that first come to their attention through press coverage.

### 3. CRITERIA FOR JUDGING A SUBSIDY

45 Part 2 showed that there are significant uncertainties about whether the market will support as much beat and investigative reporting as society

52 FTC (2010, 14) (discussing antitrust exemption to facilitate creation of pay walls). There already is a limited antitrust exception for newspapers, known as the Newspaper Preservation Act of 1970, which tried to prevent newspapers from forming local monopolies by allowing more than one paper to share costs and revenue through joint operating agreements.

53 According to one commentator, “Sidney Harman is not doing this for the best possible financial return on investment. He is doing this for the best psychic and civic return on his investment. If he loses a few million on the way, he will still have more joy doing it than sailing a yacht around the Mediterranean.” Bernstein (2010) (quoting Walter Issacson).

needs. When a public good is undersupplied, a standard response is a government subsidy. In this context, a subsidy of approximately \$2.5 billion per year would make an extraordinary difference. This would be enough to cover the cost of rehiring the 33,000 reporters who lost their jobs in 2008 and 2009, assuming the total annual cost of a reporter is approximately \$75,000.<sup>54</sup> Although this is a substantial amount of money, to be sure, it represents less than \$10 per year per American, and would constitute only a tiny fraction of the federal budget. The amount is also in line with support provided to the press in other countries.<sup>55</sup>

Yet subsidies obviously have costs as well as benefits, and can be crafted in different ways. This Part offers a framework for evaluating a particular subsidy by developing three criteria for assessing its effectiveness. First, does the subsidy preserve the independence of the press, so that reporters still feel free to write stories that are critical of the government? Second, is the subsidy sufficiently focused on the activity that generates the positive externalities—that is, accurate reporting that monitors key institutions in the public and private sector? Or are significant resources redirected to other uses, such as low quality reporting or pay increases for the advertising staff? Third, can the subsidy attract enough political support to be implemented? As we shall see, different types of subsidies present various tradeoffs among these criteria. After Part 3 delineates these criteria, Parts 4 and 5 apply them to a menu of different subsidies.

### 3.1. Independence

A subsidy for the press presents a unique challenge: any financial support that the government provides cannot be allowed to compromise the press's independence. After elaborating on this problem, this Section describes different design features that can be incorporated in a subsidy in order to protect the press's independence, some of which are more effective than others. In order to establish the importance of these institutional design questions, this Section goes on to show that current First

54 According to McChesney and Nichols, 16,000 journalists lost their jobs in 2008, and 17,000 lost their jobs in 2009 (2010, 19–20). Note that they advocate a subsidy with the substantially higher price tag of \$35 billion. *Id.* at 206.

55 For instance, in 2006 Sweden spent over \$65 million subsidizing its newspapers. At the same per capita rate, that would represent over \$2 billion per year in the United States. The per capita rate in Norway is even higher, translating to \$4 billion annually in the United States. McChesney & Nichols (2010, 166–167).

Amendment doctrine, in and of itself, does not provide complete protection for press independence in many circumstances. Since the First Amendment is not an all-purpose remedy, we need to protect press independence in other ways, which have to be hard-wired into the design of the subsidy.

### 3.1.1. *Risks to Independence*

48 An essential goal of any press subsidy is to maintain the press's watchdog function. But can the press still monitor the government while depending on it for funding? There are three related versions of this concern. First, in using its power of the purse, the government might seek to control the press's viewpoint about government policy, as well as the content of what it publishes. Second, even if the government does not actively seek to exercise control in this way, the mere possibility that it *might* do so could influence the press. Reporters and editors could become motivated to ingratiate themselves with the government in order to secure funding in a competitive atmosphere, and thus would pull their punches. Third, the mere fact that readers *believe* the press is beholden to the government—even if it isn't true—could undercut the press's credibility on important stories. This “appearance of impropriety” can be a problem even if there is no substance behind it.

49 Although these risks are minimized when the press is funded only by its readers—such that its sole incentive is to provide them with the most accurate and interesting information—questions about press independence arise whenever funding comes from other sources. Indeed, we already have the issue with investors and advertisers. It is awkward for the newsroom to run a story criticizing a key financial supporter of the newspaper. This is why leading U.S. news organizations have a firewall separating the newsroom from business operations. Yet the firewall is constantly under pressure,<sup>56</sup> and this pressure is growing as ad revenue becomes even more scarce, further motivating press organizations to please their funders.<sup>57</sup>

56 For example, Philip Meyer showed that in the 1980s, when the press's finances were much more secure than they are today, “editors representing 79% of daily newspaper circulation in the United States reported sometimes getting pressure from advertisers that was serious enough to require a newsroom conversation to resolve the issue. One in four said it happened at least once a month.” Meyer (2004, 226).

57 Even the most prestigious news organizations are not immune. *The Washington Post* recently was contemplating a series of intimate dinners offering access to its reporters for lobbyists and their clients. After a flood of negative publicity, the *Post* cancelled this series before it ever began. Shafer (2009b).

Yet although investors and advertisers can undercut press independence, the government poses a unique risk by virtue of its vastly greater size and financial muscle. A news organization will never want to lose any investor or advertiser, but if it loses one, it knows there are other fish in the sea. Indeed, even though running a story critical of Toyota could antagonize Toyota, it might well cultivate good will with Ford or Nissan. The concern about the government, though, is that it would occupy too dominant a position.

This is not to say that the government is monolithic. Perhaps a story critical of one official who has influence over allocation of the subsidy could, at the same time, ingratiate a rival official who also has influence; for example, a story criticizing the president might please congressional leaders of the other party, and vice versa. Yet the pool of potential advertisers and investors is likely to be larger and more diverse than the number of players within the government who would have influence over funding decisions.

Of course, the risk to independence from government funding will depend on how much funding there is, both in absolute terms and as a percentage of the news organization's budget. If the government is merely one source of funding among many—for instance, because the government enacts only a very modest program and permanently caps its size in a credible way—then the risks to independence are more modest. Yet this seems unlikely. After all, the government has a lot more money than any single advertiser or philanthropist. The prospect of getting more, in and of itself, could be a temptation.

The details of how the funding is allocated obviously are important—as, more generally, are details about who the decisionmakers are, who controls their appointment and reappointment, and what their bureaucratic incentives are. After all, some government offices have proved to be relatively independent from political influence even though they are funded by Congress, such as the Treasury Inspector General for Tax Administration,<sup>58</sup> but there obviously are unfortunate counterexamples as well.

### 3.1.2. *Functional Safeguards for Independence*

The surest way to structure a subsidy that safeguards the press's independence is for the government to authorize the expenditure of funds for the

58 I am grateful to Joe Bankman for this observation.

broad goal of subsidizing reporting, but to play no role in deciding which news organizations receive this money. Under this approach, the government plays only a passive role, offering funding automatically to any claimant that complies with designated conditions. Of course, the government retains the option to pull the plug on the entire program, but it cannot single out individual news organizations that run critical stories.

55 Although this sort of passive government role helps safeguard press independence, it also limits the government's ability to focus the subsidy on externality-generating activities. For example, if every entity that calls itself a news organization is automatically entitled to claim the subsidy, some money is likely to be wasted on tabloids that do not meaningfully contribute to monitoring. To manage this tradeoff, the government will want to impose conditions on those claiming the subsidy. Some types of conditions would threaten press independence, and thus should be avoided, but others would not. The analysis is different, depending on whether the conditions are based on viewpoint, content, or quality.

56 *Viewpoint.* Obviously, any conditions based on viewpoint would be problematic. To ensure that independence is not compromised, the government must be barred from conditioning benefits on viewpoint. Admittedly, this means that news organizations espousing offensive views cannot be denied government funding on this basis.<sup>59</sup>

57 *Content.* In contrast, conditions relating to content generally would not undercut the press's watchdog function. For example, there would be no threat to independence in denying the subsidy to sports and entertainment coverage. The same is true of confining the subsidy to state and local coverage, or to international coverage, or, for that matter, to the cost of hiring reporters, but not advertising staff. An advantage of content-based lines is that we generally can tell whether the government applies them consistently. If a less generous line is applied to news organizations that are critical of the government, that can be verified.

58 Although the government generally would not be able to use content-based parameters to punish its critics, the hard cases will be about whether a subject matter has been excluded because the government wishes to avoid scrutiny about it. For instance, if Congress declines to subsidize reporting

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59 See Seth Lipsky (2009) (opposing subsidies for the press and emphasizing risk that the government would be asked to fund the modern equivalent of Jay Neal's anti-Catholic, anti-Semitic, and racist *Saturday Press*).

about battlefield casualties, there is room to wonder whether Congress is trying to discourage media criticism of a war. In this way, some topics could become proxies for viewpoint. Similarly, a commitment to subsidize coverage in some regions of the United States but not others might be a proxy for viewpoint-based discrimination. After all, we would not want the government to favor “blue” or “red” state perspectives. To sum up, then, the government must not be allowed to make judgments about content that are, in reality, disguised judgments based on viewpoint.

*Quality.* Government judgments about quality can also pose a risk of disguised viewpoint discrimination. Admittedly, some elements of quality journalism are objective, such as the number of factual errors per issue. Yet other aspects are subjective, including whether a newspaper covers the right stories, whether its continuing focus on a particular story shows thoroughness or poor judgment about priorities, whether its headlines are clever or tacky, whether its news analysis is insightful, creative, sensible, and so on. Because some aspects of judgments about quality are hard to verify, there is a risk that the government, in purporting to make judgments about quality, will be influenced by inappropriate factors such as viewpoint, politics, or personal connections. Indeed, it does not seem implausible to predict that Republicans will praise the quality of *The Wall Street Journal*, while Democrats will defend the quality of *The Washington Post*.

Put another way, will an editor who is seeking a grant from the government feel completely unconcerned about running a story critical of the government if quality is the criterion for awarding the subsidy? Or will the press be tempted to cultivate the good will of the decision makers? Those of us who grade students for a living—judgments that are supposed to be based only on quality—can attest that students seem to want our good will, even though it is meant to be irrelevant to the way they are evaluated. Empowering the government to make funding judgments based on quality, then, can serve, at least to an extent, to undercut the independence of the press.

There is a potential tradeoff, then, between safeguarding independence, on one hand, and focusing the subsidy on externality generating activities, on the other. If safeguarding independence is the priority, then the government’s role in allocating funding must be quite limited, as noted above. Yet a different way to manage this tradeoff, of course, is to favor focus over independence by assigning the government a more active role in funding decisions. For example, the government can itself own and operate a media organization, or it can create a program to dispense grants to

privately owned press outlets. In either of these approaches, funding decisions can in principle be made by Congress, by members of the executive branch, or even by an independent board or agency. While each of these approaches creates risks that the press organization will not be independent, these risks can be magnified or diminished, depending upon how the arrangement is structured. The devil is in the details, including who is empowered to allocate the subsidy, how these decision makers are appointed, renewed, and compensated, and the like.

### 3.1.3. *Constitutional Analysis*

62 At first blush, we might think that these structuring details don't matter—and, more fundamentally, that the independence of even a subsidized press is not at risk—because the First Amendment will provide the necessary protection. Yet this is not the case. To develop this point, a very brief survey is offered here of the relevant rule, the doctrine of unconstitutional conditions. The goal is not to formulate a theory of what the cases ought to say, but merely to give a brief sense of the legal landscape. The doctrine is somewhat muddled because it implicitly balances two competing principles. On one hand, the government is not allowed to use subsidies to pressure people to give up their First Amendment rights. On the other hand, the government is allowed to subsidize some activities, but not others, in order to make judgments about priorities. In a given case, then, the court will have to decide whether the government is inappropriately exerting pressure, or appropriately setting priorities about what it wishes to fund, and the answer often varies with the context. The bottom line, therefore, is that the First Amendment provides only partial protection, which can vary with the details of the subsidy. In this Subsection, we survey the three types of judgments, discussed above, that the government might wish to make: those based on viewpoint, content, and quality.

63 *Viewpoint.* As noted above, viewpoint-based judgments pose a particular threat to press independence. Yet although the Court says repeatedly in dictum that government benefits cannot be conditioned in a manner that “aim[s] at the suppression of dangerous ideas,”<sup>60</sup> the protection is not absolute.

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60 *Regan v. Taxation with Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)).



It is strongest when the government is seeking to create a public forum, such as a state university program funding all student groups<sup>61</sup> or, by analogy, a federal program funding any press organization that applies. Yet if the government is not creating a public forum, it has discretion to make viewpoint-based judgments.

As Robert Post has observed, the government has especially broad discretion to support a particular viewpoint when it itself is speaking, for instance, through its own employees: Cabinet officials can be fired for publicly disagreeing with the president, public defenders can be required to defend (rather than prosecute) their clients, and the like (Post 1996, 164).<sup>62</sup> In this spirit, a government-owned media organization—such as Voice of America or the U.S. equivalent of the BBC, if one were created—presumably would be permitted some discretion under the First Amendment to determine which viewpoints to promote.<sup>63</sup>

Just as the government can influence the viewpoints expressed by its employees, it can also do so with private parties who receive government grants, as long as the purpose of the grant is not to create a public forum. For example, when the government funds family planning services, doctors and counselors who work for federally funded programs can be prevented from counseling about abortion.<sup>64</sup> Likewise, in making grants, the National Endowment for the Arts can be directed to “tak[e] into consideration general standards of decency and respect for the diverse beliefs

61 *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (if a state university creates a fund to support student publications of all types, it cannot single out religious publications as ineligible for funding); see also *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001) (when government supports speech of private parties within the judiciary (i.e., by funding legal services attorneys), it is not free to deprive speakers of their ability to make certain arguments (i.e., challenging the constitutionality of government welfare laws), even though the judiciary is not a public forum).

62 See also *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.”).

63 Congress can choose to constrain this discretion in some contexts, for example, with policies promoting equal time and equal access. Cf. *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969) (upholding Congress’s ability to impose fairness doctrine on privately owned broadcasters under First Amendment).

64 *Rust v. Sullivan*, 500 U.S. 173 (1991).

and values of the American public.”<sup>65</sup> By analogy, a national endowment for journalism presumably could also be directed to apply a comparable values-infused standard in choosing which press organizations to fund.

67 *Content.* While the government has some ability to condition funding on viewpoint, it generally is freer to base these judgments on content. This is appropriate, since content-based conditions are less likely to undercut independence, as noted above.

68 The point is easy to see in the context of a government-owned press organization. It would be uncontroversial for the U.S. equivalent of the BBC to make judgments about how many reporters to assign to state and local coverage as opposed to sports and entertainment. Likewise, if the congressional committee overseeing appropriations to this entity influenced this balance—for instance, by giving priority to foreign affairs reporting—that also would be uncontroversial. The government, as noted earlier, has particular discretion to make this sort of judgment about its own employees.

69 The government can also draw content-based distinctions when subsidizing private parties. For example, the Court upheld Congress’s decision not to subsidize lobbying by nonprofits except in the case of veterans organizations.<sup>66</sup> Subsidizing some speech but not others, the Court said, is ordinarily “a matter of policy and discretion not open to judicial [review].”<sup>67</sup> On this theory, Congress can also subsidize reporting about some topics but not others (e.g., foreign affairs, but not sports), or within some media but not others (e.g., print but not online publications).

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65 Congress was responding to the controversies surrounding homoerotic photographs by Robert Mapplethorpe and a photograph by Andres Serrano depicting a crucifix immersed in urine. Writing for the majority, Justice O’Connor rejected a facial challenge to this language (while leaving open the possibility of an as-applied challenge). She downplayed the potential for viewpoint discrimination inherent in this language, which requires these considerations merely to be “taken into consideration” but does not require them to be dispositive. *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (holding that the challenged provision “merely adds ‘considerations’ to the grant-making process; it does not preclude awards to projects that might be deemed ‘indecent’ or ‘disrespectful,’ or even specify that those factors be given any particular weight in reviewing an application”). In contrast, Justice Scalia, concurring in the judgment, argued that this language “unquestionably constitutes viewpoint discrimination”—since art that is “decent” and “respectful” is more likely to be funded—but concluded that this sort of judgment about what to fund is constitutional, since it leaves other artists free to continue their work without receiving public funding.

66 *Regan v. Taxation with Representation*, 461 U.S. 540 (1983).

67 *Id.* at 549.

In choosing not to subsidize a particular type of private speech, the government is on safer First Amendment ground if private actors remain free to engage in this speech with their own resources. Nonprofits can still lobby, for instance, but they must do so through unsubsidized affiliates. In contrast, the Court struck down an effort by Congress to deny subsidies to broadcasters that engage in editorializing. The difference emphasized by the Court was that a “station that receives 1% of its overall income from [the government] is barred absolutely from all editorializing,” even editorializing that is not funded by the government.<sup>68</sup> Put another way, the government can choose not to pay for particular content, but it cannot keep the press from generating this content on its own.

*Quality.* Likewise, under the First Amendment, the government is free to make judgments based on quality, even though, as noted above, this gives the government a lever that can undermine the independence of grantees. For example, the Court upheld the ability of the National Endowment for the Arts to make judgments based on quality, reasoning that the NEA has an “inherently content-based excellence threshold.”<sup>69</sup> Similarly, the Court held that public libraries are also not public forums, and thus are entitled to “collect only those materials deemed to have ‘requisite and appropriate quality.’”<sup>70</sup> Thus, libraries can be required to filter pornography as a condition of receiving public funding because libraries themselves engage in filtering. The Court reasoned that the government is freer to impose its own funding criteria in contexts in which potential grantees are already themselves picking and choosing.<sup>71</sup>

Obviously, news organizations are inherently selective in this way. Not everyone gets to write for *The New York Times*, and so news organizations are not, in and of themselves, public forums. Indeed, news organizations seem quite analogous to libraries, and it is not much of a stretch to compare journalists with artists. Under recent precedents, then, a government program that allocates grants to the press presumably would be allowed to make judgments based on quality, including creativity, anticipated public interest, contemporary relevance, educational value, appeal to

68 *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984).

69 *National Endowment for the Arts v. Finley*, 524 U.S. 569, 586 (1998).

70 *United States v. American Library Ass’n*, 539 U.S. 194, 206 (2003).

71 *Id.* at 194 (“Although they seek to provide a wide array of information, their goal has never been to provide ‘universal coverage.’”).

special audiences, and the other factors that the Court listed as relevant to arts funding.<sup>72</sup> This would give government grant-makers a great deal of discretion over what to fund—discretion that could, unfortunately, give news organizations the incentive to ingratiate themselves with these decision makers. Of course, a news organization that failed to receive a grant could launch an “as applied” challenge, arguing that the negative judgment about it was actually based on viewpoint, instead of quality.<sup>73</sup> Yet the evidentiary hurdles and the cost of bringing such a challenge render it an imperfect remedy at best.

73 The bottom line, then, is that if the government subsidizes the press, the First Amendment, by itself, will not necessarily safeguard press independence. In a government-owned media organization, for instance, the doctrine of unconstitutional conditions has less force. Even when the government is funding private speech, moreover, the government can structure the program so that it has discretion to make judgments based on quality, content, and even viewpoint. This means that we need to consider how the First Amendment applies to a particular subsidy structure, while also looking to other institutional mechanisms to safeguard the independence of a subsidized press.

### 3.2. Focus

74 Thus, it is essential to tailor any press subsidy in a way that safeguards the press’s independence. But this obviously is not the only goal. We also want the subsidy to be as effective as possible in creating the relevant positive externalities.

75 As noted above, reporting creates greater externalities when it uncovers new information about important issues and is accurate and credible.<sup>74</sup> An ideal subsidy, then, would not be directed at tabloids, or to sports and entertainment coverage. The subsidy also should be cheap to administer,

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72 *National Endowment for the Arts v. Finley*, 524 U.S. 569, 587 (1998) (concluding that the NEA is entitled to “fund particular projects for a wide variety of reasons, ‘such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work’s contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community or even simply that the work could increase public knowledge of an art form’”).

73 *Id.*

74 See Part 2.1 above.

and not easily diverted to other uses within a press organization, such as raises for the advertising staff. This Article uses the term “focus” to describe the extent to which the subsidy approaches this ideal by directing dollars to maximize the relevant positive externalities and minimize leakage to inaccurate reporting, sports and entertainment coverage, overhead, and the like. Obviously, this ideal is not fully achievable, but some subsidies will come closer than others, and it is useful to compare them on this dimension.

After all, a range of incentive and information problems make it difficult to prevent this sort of leakage. For example, managers may try to use a subsidy to increase their own pay, instead of hiring more reporters. Even if the government formally requires the subsidy to be used to hire reporters, moreover, management can reroute it by applying it to the salaries of reporters who would have been on even an unsubsidized payroll. If a subsidy funds inframarginal expenses in this way, its real effect is simply to increase the news organization’s discretionary budget.

Managing these incentive problems is especially challenging because the necessary information can be in short supply. For example, how can the government know what a press organization would have done without a subsidy? Without this (unattainable) information, it is hard to police whether the subsidy is creating the desired incentive or merely funding inframarginal activity.

Likewise, the government will be hard pressed to anticipate all the scenarios that either deserve, or do not deserve, to be subsidized. For example, new technologies are constantly being developed, but government officials are not well positioned to determine which technologies to support, and government programs do not always change with the times. Indeed, one of the most important press subsidies already in place—the discounted postal rate for newspapers sent through the U.S. mail (see Richard R. John 1995)—favors perhaps the most primitive method of delivering content, while providing essentially no value to the web-based press. Instead of this backward looking subsidy, we should favor ones that are at least neutral as to new technology.

Similarly, it will be difficult for the government to anticipate which types of coverage to support, and to define these categories with precision. It would certainly be desirable, for example, to support only high quality press organizations, but not all stories are broken by *The New York Times*. John Edwards’s affair, for example, was exposed by the *National*

*Enquirer*. Defining which news organizations offer high quality reporting is a difficult mission, even aside from the risk, discussed above, that such authority could be abused.

80 Nor will it always be easy to decide which stories have an important impact on social welfare. What about the Tiger Woods scandal? The story certainly had the flavor of unimportant gossip about a sports figure, but it also had implications for the economics of the PGA tour, the media firms that cover it, and the companies that had hired Woods to advertise their products and services.

81 It is quite a challenge, then, to design a subsidy that is neither over- nor under- inclusive, is inexpensive to administer, and also preserves press independence. There will inevitably be tradeoffs. To focus the subsidy more effectively, we might want the government to vet the quality of the news organization<sup>75</sup> and perhaps even the importance of the particular story to be subsidized. Yet such an active role for government raises questions about press independence, as well as about the government's capacity to make this sort of judgment effectively.

82 Instead of empowering the government to make these judgments, we could empower others to do so. But this just puts the analysis back a level, without eliminating the tradeoffs. What role will the government play in choosing the decision maker? Is the government well positioned to designate the right person? Will the decision maker remain independent, if chosen by the government?

83 At the other end of the spectrum, we could favor a passive role for the government, so that the subsidy is automatically available to any press organization that meets certain preset criteria. A passive government role poses fewer risks to independence, but could provide an insufficiently focused subsidy. In order to sharpen the subsidy's focus, we could make the preset criteria more detailed and nuanced. Yet this greater specificity can add to the subsidy's administrative cost, leading to a tradeoff between focus and administrability.

### 3.3. Political Feasibility

84 In addition to considering the policy merits of different subsidy structures, we should also be mindful of whether they vary in their political feasibility.

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75 Scharfenberg (2009) (advocating a \$100 million federal fund to seed low-cost Internet news organizations).

This issue should not be overemphasized, since it is worth knowing about strong proposals, even if they would encounter stiff political opposition. It also can be hard to predict what is politically plausible and what is not, and these calculations can shift over time. As a result, the observations about politics here are meant to be more suggestive than definitive.

In assessing the political plausibility of an idea, this Article focuses on two sets of factors: first, the incentives of influential players; second, institutional hurdles that must be overcome. 85

With respect to incentives, at first blush we might assume that journalists would be the most enthusiastic source of support for press subsidies: more money for their sector should translate into more jobs and higher pay. Yet the reality is that many U.S. journalists are uneasy about a government subsidy, fearing it will undercut their independence.<sup>76</sup> Owners, meanwhile, will consider the effect of any subsidy on their ownership interests' value, something that could vary with a subsidy's structure. For example, owners will not be interested if a subsidy is available only if they surrender their interest (e.g., to the government or to a nonprofit). As the economic condition of news organizations becomes increasingly precarious, though, journalists and owners are likely to reconcile themselves to some sort of subsidy. 86

Will others offer their political support? The geographical dispersion of the press is helpful. All over the country, prominent metropolitan papers are at risk, including hometown papers of a great many congressional districts. As every member of Congress knows, newspaper readers are disproportionately likely to vote, and might well be grateful to members who help save the local paper. 87

But a "bailout" for news organizations will not appeal to everyone. Journalists do not fare especially well in opinion polls. In addition, politicians may well be ambivalent (at best) about helping the press monitor the government. The political class's narrow self-interest is for the press to be weak and, therefore, less able to scrutinize the conduct of politicians. If politicians were to support a subsidy, moreover, they might well *want* it to abridge press independence. In this respect, the self-interest of politicians 88

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76 Bollinger (2010b, 132) ("there is ... at least among print journalists, a sense that government funding is antithetical to the spirit of an independent press"). See, e.g., Lipsky (2009) (expressing strong opposition to subsidies for the press).

is at odds with the externality-generating goal of monitoring the government.

89 One possible implication of this interest group analysis is that a subsidy tailored narrowly for news organizations is less likely to pass than a program that is offered more broadly, so that the press is allied with other interest groups in lobbying for it. To take an extreme example, a tax cut for journalists only (e.g., so that their wages are taxed at capital gains rates) is politically implausible.

90 In addition to interest groups, institutional hurdles can also be a barrier. In this regard, doing less is easier than doing more. Anything that can be done under current law generally is easier than something that requires changing the law. After all, it can take a great deal of time and effort to persuade both houses of Congress and the president to support a change in law. This is not to say that operating under current law is a bulletproof strategy. If an existing law is used in a new way, which attracts attention, powerful players may become motivated to change the law. But to do so, they will have to overcome institutional inertia, so that this factor serves to *entrench* the press subsidy, instead of standing in its way.

91 For analogous reasons, an incremental change to a program that already exists probably is easier politically than launching something new. For example, a modest increase in the postal subsidy is probably easier than launching a new program. In this spirit, a change in regulations is likely to be easier than a change in legislation, since fewer decisionmakers need to be persuaded.

#### 4. NEWS ORGANIZATIONS AS TAX EXEMPTS

92 In light of these various criteria, subsidies are not all created equal. They offer different mixes of costs and benefits. Some are more successful at securing the press's independence, while others focus more precisely on generating positive externalities, and still others are more plausible politically. Part 4 offers the principal recommendation of this Article, which is for news organizations to make greater use of the nonprofit form, modeling themselves on other great cultural institutions such as universities and museums.

93 News organizations collect this subsidy in the form of two tax advantages. First, as tax exempts, they can accept tax-deductible contributions, which means that the government in effect matches private contributions



(i.e., by reducing the tax bill of those who give, thereby encouraging them to give more). Second, to the extent that tax-exempt news organizations earn a profit—less likely in today’s environment, but still a possibility—they are not subject to corporate tax.

In general, to qualify for these tax benefits, a news organization must pursue one of the exempt purposes listed in Section 501(c)(3). The closest fit is “educational,” which the regulations define to include “instruction of the public on subjects useful to the individual and beneficial to the community.”<sup>77</sup> A press organization that pursues this educational purpose has to pass two further tests. The first, the “organizational” test, requires the organization’s articles of organization to limit it to this educational mission.<sup>78</sup> The second, the “operational” test, generally requires the organization to focus on its exempt purpose, not to generate “private benefits” for its economic stakeholders, and not to engage in lobbying.<sup>79</sup>

An important caveat is that even if a news organization satisfies these tests, some of its revenue—most notably, advertising revenue—still will be taxable as “unrelated business taxable income” or so-called “UBTI.” Income is classified as taxable UBTI if it derives from a business that is not “substantially related” to the organization’s exempt purposes (in this case, educating the public),<sup>80</sup> such that it does not “contribute importantly to the accomplishment” of this purpose.<sup>81</sup> Under this standard, it is well settled that subscription revenue is tax exempt (i.e., not UBTI).<sup>82</sup> Revenue from charitable contributions obviously is tax exempt as well. In contrast,

77 Treas. Reg. 1.501(c)(3) – 1(d)(3)(b). The government has ruled a number of times that organizations can pursue their educational purpose under Section 501(c)(3) by publishing their findings and analyses. *See* Rev. Rul. 67-4, 1967-1 C.B. 121 (organization engaged in publishing scientific and medical literature qualifies for tax exempt status); *see also* Rev. Rul. 74-615, 1974-2 C.B. 165 (exempt organization that monitors quality of press coverage periodically publishes its findings); Rev. Rul. 66-255, 1966-2 C.B. 210 (exempt organization uses publications to educate public about particular method of painless childbirth); Rev. Rul. 72-228, 1972-1 C.B. 148 (exempt organization publishes handbook on equal rights for women as part of its efforts to combat discrimination against women).

78 Treas. Reg. 1.501(c)(3) – 1(b).

79 Treas. Reg. 1.501(c)(3) – 1(c).

80 Treas. Reg. 1.513-1(a). To be taxed as UBTI, the income must also be from a trade or business that is carried on regularly. *Id.*

81 Treas. Reg. 1.513-1(d)(2).

82 Treas. Reg. 1.513-1(d)(4)(iv) (example 6) (sale of subscriptions by a professional journal does not give rise to UBTI).

advertising revenue generally is taxable as UBTI because it is too removed from the nonprofit's educational mission. Although ads furnish information, their purpose ordinarily is to sell products, rather than to inform.<sup>83</sup> Yet this revenue can be sheltered, to an extent, with deductions associated with generating this revenue.<sup>84</sup>

96 How does use of the nonprofit form fare under the criteria developed in Part 3? As we shall see, it is strong on safeguarding press independence from government influence. It is less successful in focusing resources solely on externality-generating activities, although some variations are better than others. A particular strength of this approach is that it is politically attainable, since some versions of it are already feasible, and others require only modest changes in current law.

#### 4.1. Independence and Constitutionality

97 As I have written elsewhere, the deduction for charitable contributions is a way of privatizing the allocation of funding for public goods, so the government piggybacks on the judgments of private philanthropists (see

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83 As a result, ad sales by a nonprofit publication do not contribute importantly to the publication's educational mission, and are thus offered in regulations as an example of UBTI. Treas. Reg. 1.513-1(d)(4)(i) (examples 6 & 7) ("While the advertisements contain certain information, the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products. . ."). Interpreting this regulation, the Supreme Court has held that advertising revenue is UBTI even if the nonprofit publication, in this case a scholarly journal of internal medicine, accepts "only advertisements containing information about the use of medical products, and screens proffered advertisements for accuracy and relevance to internal medicine." See *United States v. American College of Physicians*, 475 U.S. 834, 835 (1986). The Court emphasized that the journal's goal was commercial, rather than educational, as evidenced by the fact that "[t]hose companies willing to pay for it got it; others did not." *Id.* at 853. This sort of commercial standard will apply to almost all advertising revenue generated by a nonprofit news organization, so it almost always will be UBTI. But the Court concluded that the regulation does not provide a *per se* rule. "By coordinating the content of the advertisements with the editorial content of the issue, or by publishing only advertising reflecting new developments in the pharmaceutical market, for example, perhaps the College could satisfy the stringent standards erected by Congress and the Treasury." *Id.* at 854. It will be rare, I suspect, for nonprofit news organizations to show that their advertising is educational in this way. One (relatively uncommon) example, offered by the IRS, is the revenue a legal publication receives "in publishing legal notices, as required by the state in connection with legal proceedings such as the administration of estates." This revenue is not UBTI because the "purpose [of this advertising] is to inform the general public of significant legal events rather than to stimulate demand for the products or services of an advertiser" (IRS 2010, 5).

84 To the extent that ad revenue is deemed to be UBTI, the IRS has offered guidance about how to allocate deductible expenses to offset this income (2010, 10–13).

Schizer 2009). Beyond making judgments about the broad category of activities that can receive tax deductible contributions, the government is not involved in allocating funds.

This model is especially appealing when it is problematic for the government to allocate the funds. In order to safeguard the separation of church and state, for example, we do not want the government to decide which religious organizations to fund. Instead, we delegate to individuals the ability to make tax deductible contributions to their religious organization of choice.

The same approach can be used to safeguard the “separation of press and state.” A nonprofit news organization is not owned by the government, and it does not have to ask the government for funding. As long as it can attract private donations, government funding comes indirectly and automatically. Because Congress plays no role in allocating this money, reporters and editors should not be deterred from investigating or criticizing the government.

One potential chink in the armor of press independence, though, is the ability of the government to decide whether a particular press organization qualifies as tax-exempt under Section 501(c)(3). The government must not be able to penalize organizations for criticizing the government or airing unpopular views.

A notable example of this risk—and, ultimately an important bulwark against it—is *Big Mama Rag, Inc. v. United States*.<sup>85</sup> In that case, a publication focused on women’s issues was denied tax-exempt status. According to the publication’s counsel, IRS officials said at an early stage in the process that the publication could be approved only if the organization “agree[d] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal.”<sup>86</sup> Eventually, more senior IRS officials offered a different theory. In denying the application, they relied on a Treasury Regulation providing that a publication could not be “educational”—and thus did not have the necessary charitable purpose—if it “advocates a particular point of view” and does not “present a sufficiently full and fair exposition of the pertinent facts.” In other words, a so-called

85 631 F.2d 1030 (DC Cir. 1980).

86 *Id.* at 1040.

“advocacy” publication had to pass an extra test, showing that it did not offer “unsupported opinion” but instead offered a “full and fair exposition” of issues it was covering.

102 Although the district court affirmed the IRS’s judgment, the DC Circuit reversed, striking down the regulation’s “full and fair exposition” test as unconstitutionally vague. “Applications for tax-exemption must be evaluated on the basis of criteria capable of neutral application,” Judge Mikva wrote. “The standards may not be so imprecise that they afford latitude to individual IRS officers to pass judgment on the content and quality of the applicant’s views and goals and therefore to discriminate against those engaged in protected First Amendment activities.”<sup>87</sup> *Big Mama Rag*, therefore, serves as an important safeguard for the independence of nonprofit news organizations under current law, keeping the government from conditioning tax-exempt status on viewpoint.

103 The government can still exclude some press organizations from tax-exempt status, as long as the criteria are clear and unrelated to viewpoint. For example, the publication could be required to dedicate a minimum percentage of column inches to reporting (as opposed to advertising), or to particular types of coverage (e.g., state and local, but not sports and entertainment).

104 Admittedly, this subsidy model presents a different concern about independence: the risk that private donors will influence which stories are covered and which viewpoints are expressed. Yet there is nothing new about the risk that private funders might seek to influence editorial matters. For-profit news organizations have controlling shareholders (e.g., the Sulzberger family, Rupert Murdoch) as well as advertisers, all of whom can try to use their financial leverage to influence editorial decisions. It is not clear why philanthropic donors pose a risk that is more significant or, indeed, particularly different than owners and advertisers.<sup>88</sup>

105 The main change is that a third class of financial supporters (donors) is added to the other two (owners and advertisers). If we judge the risk to independence as increasing with the number of players who provide

87 *Id.* at 1040.

88 Meyer (2004, 226) (“So let us be blunt. Allowing charitable foundations to pay for the news might be risky, but it is probably no worse than a system in which advertisers pay for it.”). For instance, Fox News was recently faulted for running a series of stories criticizing a California ballot initiative that would impose significant costs on its parent company; indeed, the parent company had contributed over \$1 million to defeat the initiative (Stelter 2010, B7).

financial support, then this is a step in the wrong direction. Yet this analysis is oversimplified since, as noted above, increasing the number of financial supporters can lend diversification to the news organization, reducing the leverage of any individual and thus her ability to influence editorial matters. For instance, if a news organization is a nonprofit supported by fifty (or even five) donors, each donor will have less influence than a controlling shareholder would have.

It can be argued that donors will all have certain interests in common—since they are likely to be relatively wealthy—and so this perspective, monolithic among donors, will distort coverage. Yet if this is a concern, we presumably have it already with controlling shareholders. The reality, moreover, is that philanthropists (and owners) are a diverse group. George Soros has little in common with the Koch brothers. A story that displeases one is likely to please another.

Diversity in the donor pool helps not only to reduce pressure on any *single* news organization, but it also can help increase the number of news organizations and promote healthy competition among them. Now that technology has lowered barriers to entry, if one news organization is perceived to represent a particular point of view, another can be created and funded to represent a competing point of view. Soros can support one, and the Koch brothers can respond by supporting another. In this way, the diversity of philanthropic donors can help to prevent nonprofit news organizations as a whole from being captured by a particular perspective.

Obviously, the advantages of diverse funding sources—both within a single news organization and for the industry as a whole—do not arise if the government itself is allocating the funds. Perhaps in a divided government, in which different parties control the purse strings for different organizations, this diversity of funding sources can be simulated to an extent, but it is unlikely to approach the level of diversity that exists in the philanthropic community. In essence, donors are easier to defy because, like advertisers, there are many of them, whereas there is only one federal government.<sup>89</sup>

Even so, procedural safeguards are needed to minimize donor influence. For example, press organizations should disclose who their major donors

89 Of course, the First Amendment is an offsetting factor—since it shields the press from the government, but not from private owners, advertisers, or donors—but, as discussed above, First Amendment protection varies with the context and, in many cases, is partial at best. See Part 3.1.3.

are, so that readers will know of potential conflicts. If a particular story has been supported by a donor, this should be disclosed as well. This issue arose recently when the *Washington Post* ran a story about budget deficits, but failed to disclose that the nonprofit working with them on the story was funded by Peter G. Peterson, a prominent public critic of deficits.<sup>90</sup>

110 Although donors should not be allowed to influence viewpoint, their preferences to support particular content generally can be accommodated,<sup>91</sup> just as donors to universities are allowed to support particular types of programs. Giving donors this control is likely to inspire greater donations. Although there is a risk that only “sexy” topics will draw donor support, advertising and subscription revenue can fill in the gaps. NPR seems to strike the right balance. “Grants narrowly restricted to coincide with a donor’s economic or advocacy interest are not allowed,” Philip Meyer (2004, 225–226) has written of NPR. “However, funders can suggest broad themes, and the news director puts out a wish list of projects that NPR would like to do if funders find them worthy.”

111 A more restrictive step would be to condition nonprofit status (and thus the deductibility of contributions) on the participation of a minimum number of donors. For instance, a news organization with fewer than a minimum number of donors would not qualify under 501(c). Relatedly, the level of deductible contributions could be capped either in absolute terms or as a percentage of the budget of the news organization in order to reduce the potential influence of any single donor. The downside of these approaches is that they might discourage contributions that otherwise would be made. There is a potential tradeoff, therefore, between minimizing donor influence in this way (i.e., by limiting donor contributions), on one hand, and maximizing contributions, on the other. If the donor pool is diverse and barriers to entry are low, as argued above, then the threat of donor influence should not be severe enough to justify limits on contributions. Yet given the empirical uncertainties here, it is plausible to defend the opposite conclusion as well.

90 Perez-Pena (2010c, B3) (describing controversy when *Washington Post* ran story prepared by Fiscal Times, funded by Peter G. Peterson).

91 Foer, Freedman, & Wilner (2009) (noting that philanthropists might find it appealing to be able to post on website that serves as online intermediary “topics of which they would like to sponsor coverage”).

#### 4.2. Focus

While tax-exempt status assures news organizations a stream of government revenue that is unlikely to compromise their independence, it is worth asking whether there will be enough revenue. A tax-exempt entity, after all, must forgo one potential source of capital (private or publicly-traded equity) with the hope of attracting another (tax deductible contributions). Also, will this revenue be used in the right way?

It is encouraging that news nonprofits are already attracting significant support, including \$128 million from foundations between 2005 and 2009.<sup>92</sup> To raise additional money, these organizations will have to invest more in fundraising infrastructure, something that is beginning to happen as well.<sup>93</sup> One can imagine billionaires making substantial contributions<sup>94</sup> and also large numbers of readers making small donations, paralleling the “major gift” and “annual fund” efforts of universities, museums, and the like.

The potential of nonprofit news organizations is further demonstrated by successful precedents already in existence. Perhaps the most notable is National Public Radio, which attracts 40 percent of its budget from foundation and corporate sponsors (Meyer 2004, 225). Indeed, NPR recently received a \$1.8 million grant from the Open Society Foundation to add 100 journalists who will cover state government, an area that, until now, has not been a focus of NPR’s coverage.<sup>95</sup> Other well known news nonprofits include *Harper’s Magazine*, *Foreign Affairs*, *Foreign Policy*, *Washington Monthly*, *Ms. Magazine*, *Mother Jones*, *Consumer Reports*, and *National Geographic* (Lewis 2007, 34; Pickard, Stearns, & Aaron 2009, 14).

One advantage of this subsidy model is that it is neutral as to new technology. Unlike the postal subsidy, which applies only to print editions, tax

92 Downie & Schudson (2009, 64) (describing results of study by J-Law at American University).

93 For example, “Investigative News Network” was formed in 2009 to help news nonprofits collaborate on fundraising, legal matters, and other administrative functions (Downie & Schudson 2009, 47–48). Likewise, websites have been formed to bring donors and freelancers together. *Id.* at 64 (describing “Spot Us,” which as raised \$40,000 from over 800 people for 30 stories).

94 Swensen & Schmidt (2009) (calling on “enlightened philanthropists” to endow great newspapers); Coll (2009) (former managing editor of *Washington Post* argues that \$2 billion endowment could secure future of its newsroom).

95 Jensen (2010, B5) (describing new “Impact on Government” initiative supported by George Soros).

exempt status is equally available to print, online, radio, and television journalism. Indeed, some of the most promising online startups are tax exempts, including *Voices of San Diego*, which has a dozen reporters focusing on local investigative and beat reporting, receives 100,000 hits per month, and has a \$1 million annual budget (Downie & Schudson 2009, 35–36). “We don’t count on mass traffic, but rather a level of loyalty,” said publisher Scott Lewis. “We’re seeking loyal people like those who give to the opera, museums, or the orchestra because they believe they should be sustained” (36). A similar model is used by *Minnpost*,<sup>96</sup> the *St Louis Beacon* (38–39), *Real News Project, Inc.*,<sup>97</sup> the *Center for Investigative Reporting*, and the *Center for Public Integrity* (Lewis 2007, 34–35), among others.

116 Will the subsidy find its way to the highest quality news outlets? To determine which organizations receive government funding, this model relies on donors, instead of on readers, government officials, or a government-appointed board of experts. Although donors will vary in their sophistication, the fact that they are investing their own money will focus their minds, motivating them to think carefully about which organization deserves their support (Schizer 2009).

117 This process not only prevents the government from influencing media outlets, but also promotes diversity. Unlike a political process, which tends to empower the median voter, the charitable deduction empowers any individual—including someone with views outside of the mainstream—to direct government funds to her cause of choice, merely by making a contribution (Schizer 2009).

118 Notwithstanding these advantages of the nonprofit form, which help the subsidy to be more focused, this structure has disadvantages as well. One limitation is that the size of the subsidy is determined, somewhat obliquely, by the donor’s marginal tax rate.<sup>98</sup> Every time a donor contributes a dollar,

96 Downie & Schudson (2009, 40) (“sustaining support must come from readers through donations, big and small, like museums, orchestras, and other community cultural necessities”) (quoting founder Joel Kramer).

97 Form 1023 on file with author.

98 The fact that a charitable contribution is deductible means that the donor’s tax bill is reduced by a portion—but only a portion—of the contribution. This percentage is determined by the taxpayer’s marginal tax rate. A taxpayer whose marginal rate is 35 percent reduces her tax bill by 35 cents for every dollar she contributes; obviously, then, she is still paying 65 cents out of her own pocket.



the government contributes the amount of tax it otherwise would have collected on this dollar. If the marginal tax rate is 35 percent, then that is the share borne by the government.<sup>99</sup> In determining the tax rate, the government considers many factors, including its effect on the willingness of taxpayers to work, the political environment, the government's revenue needs, and the desired distribution of tax burdens. But one factor that is never considered is the level of government support needed both to motivate, and to supplement, private contributions to news organizations. As a result, there is no particular reason to think that the subsidy is set at the optimal level. In theory, as I have written elsewhere, the level of government support provided to particular charities can be calibrated more precisely—for instance, through a tax credit that can be set at different levels for different types of charities. Yet it is doubtful that the government has the information and expertise to find this optimal level (Schizer 2009) and, in any event, it is politically implausible for Congress to single out news organizations for special treatment.

A further limitation of this subsidy structure is that tax-exempt news organizations would be barred from an important function performed by for-profit newspapers: the endorsement of political candidates. This would almost surely be viewed as an impermissible “attemp[t] to influence legislation.”<sup>100</sup> This result is unfortunate, since the endorsement of candidates is a valuable function, but changing it would require us to amend Section 501(c)(3) (Schmalbeck 2009, 12). There is some risk that the Treasury or Congress would invoke this doctrine to set further limits on tax-exempt news organizations—for instance, by claiming that editorials supporting or opposing particular policies are impermissible. Yet other nonprofits, such as universities and think tanks, have been generating this sort of analysis for years. Any effort to change this practice—or to apply a stricter rule against the press—would raise issues under the First Amendment.

Ideally, the subsidy would support only externality-generating activities, but this is difficult to achieve. Contributions might support not just

99 To be precise, if the donor contributes appreciated stock, the government's share is somewhat higher, reflecting the fact that the taxpayer never pays capital gains tax on built-in appreciation in the stock.

100 FTC (2010, 25) (quoting one panelist as saying that political endorsements are “an absolute no, no for 501(c)(3). It's not even a gray area.”).

reporting on issues that have a significant impact on social welfare, but other expenses of the news organization, including salaries for advertising staff, printing press operators, gossip columnists, sports reporters, and the like. In this way, the tax-exempt model is less focused than, for instance, a tax credit or government grants targeted at the cost of hiring additional reporters.

121 There are two ways to give the tax-exempt model greater focus. Each involves denying tax-exempt status to a full service news organization, and instead offering the status only to an entity with a narrower mission, which is dedicated entirely, or at least almost entirely, to externality-generating activities.

122 The first alternative, the “nonprofit newsroom,” is an independent entity that engages only in reporting, but does not actually publish a newspaper. Instead, it shares its stories with other news organizations.<sup>101</sup> *Pro Publica*, the best known example of this type of organization, was the first online news organization to win a Pulitzer prize, which it shared with the *New York Times* in 2010 (Reuters 2010). *Pro Publica* is funded in part with a \$30 million gift from Herbert and Marion Sandler.<sup>102</sup> It has three dozen reporters and has given stories (at no charge) to the *N.Y. Times*, the *Washington Post*, the *Los Angeles Times*, the *Chicago Tribune*, the *Denver Post*, CNN, ABC, CBS, NBC, WNYC Radio, and *Huffington Post* (Downie & Schudson 2009, 40–41). After giving these news outlets a period of exclusivity, *Pro Publica* publishes its stories on its own website. Since *Pro Publica* engages only in investigative reporting, donor contributions and government resources are focused effectively on this externality-generating activity (with only modest amounts diverted to the organization’s overhead).

123 The second alternative is to segregate externality-generating activities into a separate entity that, unlike *Pro Publica*, actually is affiliated with a

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101 The government has ruled that a nonprofit can distribute its work product through for-profits without jeopardizing its nonprofit status. See, e.g., Rev. Rul. 74-587, 1974-2 C.B. 162 (exempt organizations can distribute their work through for-profits as long as the for-profits are merely “instruments by which the charitable purposes are sought to be accomplished”); Rev. Rul. 67-342, 1967-2 C.B. 187 (nonprofit that produces educational films can distribute them on commercial television without jeopardizing nonprofit status); see also Rev. Rul. 68-489, 1968-2 C.B. 210 (organization does not jeopardize exemption even though it distributes grants to nonexempt organizations); Priv. Let. Rul. 9223054 (nonprofit could make grant to for-profit foreign newspaper to help it obtain news service).

102 In the interest of full disclosure, Herbert Sandler is a graduate of Columbia Law School. I have met him only once, although he has provided some financial support to Columbia Law School.

particular for-profit news organization. The *N.Y. Times*, for example, could create a nonprofit affiliate that accepts tax-deductible contributions to support beat and investigative reporting. The nonprofit affiliate could also focus even more narrowly, for instance, on international news or on covering state and local government. Although the *Times* obviously has not taken this step, *Huffington Post* created the *Huffington Post Investigative Fund*, a legally separate nonprofit with a dozen investigative journalists (Downie & Schudson 2009, 58), which later merged with another news nonprofit, *The Center for Public Integrity*.

Under current law, this sort of joint venture between a for-profit and a nonprofit is scrutinized to ensure that the for-profit is not deriving a “private benefit” from the nonprofit.<sup>103</sup> To avoid this problem under current law, the nonprofit has to share its stories with other press organizations, and not just with its for-profit affiliate (which actually was a motivation for the merger of *Huffington*’s nonprofit with *The Center for Public Integrity*). This is somewhat awkward, since the *Washington Post* might be reluctant to run a story if doing so requires them to credit the *N.Y. Times* tax exempt affiliate, and the *Times* itself will be unenthusiastic about sharing scoops with rivals. Yet the appeal of deductible contributions should motivate news organizations to overcome this hurdle, and obviously these organizations already are willing to credit wire services such as the Associated Press, at least for minor stories. Even so, in theory it is tempting to encourage the government to scrutinize news organizations less carefully for private benefits in order to avoid this problem. But ultimately that would be unwise, since it would set a precedent that could be problematic in other contexts.

As an example, assume that a news organization has advertising and subscription revenue of \$100 million, and costs of \$101 million. If it can shift \$3 million of its costs to the non-profit affiliate—for instance, a group of reporters and the infrastructure needed to support them—then its for-profit affiliate will shift from a \$1 million loss to a \$2 million profit. The key to this strategy, obviously, is to net \$3 million per year in charitable contributions. A development staff will have to be hired and senior management will have to devote time to fundraising—and, of course, additional contributions will be needed to cover the cost of this fundraising

103 *Plumstead Theatre Society, Inc. v. Commissioner*, 74 T.C. 1324 (1980) (permitting, but scrutinizing, joint venture between not-for-profit and for-profit); GCM 39005 (1983) (monitoring joint venture to ensure for-profit is not deriving private benefit).

overhead—but universities and cultural institutions obviously have been able to tap this revenue source quite successfully. To avoid a problem under the private benefit doctrine, the nonprofit affiliate will have to share its content with other news outlets. In a sense, the affiliate would look like a nonprofit version of the Associated Press, creating content placed in many publications.

#### 4.3. Political Feasibility

126 An important advantage of the tax-exempt model is that it already is available, to a significant extent, under current law. The nonprofit form is already being used by independent newsrooms specializing in investigative reporting, such as *Pro Publica*, as well as by National Public Radio and a range of websites and public affairs magazines.<sup>104</sup> The fact that no change in law is needed in order for this approach to come into wider use means that there is no need to sell the public on a bailout for news organizations. Unlike with other subsidy models, it is not necessary to single out news organizations for special treatment or to authorize a separate budget line for subsidizing them. The relevant tax benefit exists under current law, and is offered not just to news organizations, but to a broad class of institutions, from religious organizations and universities to orchestras and museums.

127 Admittedly, if members of Congress or officials in the Treasury do not want the press to use Section 501(c)(3), they can try to modify the law.<sup>105</sup> Yet changes in law require time, effort, and the requisite political support and, in this scenario, institutional inertia is sheltering the press subsidy, instead of standing in its way. In addition, the First Amendment could offer some protection as well, depending on the details of what Congress or the Treasury tries to do in excluding the press (or particular news organizations) from 501(c)(3).

128 The main challenge under current law is to distinguish news organizations that are eligible for exempt status from those that are not. Two published rulings help illuminate this line. A 1967 ruling offers four requirements for an organization that issues publications to qualify as a nonprofit:

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104 See text accompanying notes 92 to 97.

105 I am grateful to Anne Alstott for this point.

(1) [T]he content of its publication is educational, (2) the preparation of material follows methods generally accepted as “educational” in character, (3) the distribution of the materials is necessary or valuable in achieving the organization’s educational or scientific purposes, and (4) the manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing.<sup>106</sup>

Although the first three elements of this test should not be difficult to satisfy for news organizations that engage in investigative and beat reporting, the fourth—the need to distinguish its distribution efforts from those of for-profit news organizations—is a potential sticking point. This was the theory offered in a 1977 revenue ruling denying exempt status to a full service newspaper: Without offering details to illuminate its reasoning, the government held that its operations were “indistinguishable from ordinary commercial publishing practices. Accordingly, it is not operated exclusively for charitable and educational purposes.”<sup>107</sup>

To differentiate themselves from for-profits, nonprofit news organizations can find guidance in rulings and cases distinguishing nonprofit and for-profit hospitals. There is no magic bullet, since both types of hospitals engage in similar activities.<sup>108</sup> To determine whether a hospital is pursuing commercial goals or the public good, courts look at the totality of the circumstances. Does the hospital provide care to patients who cannot pay? Does it distribute excess earnings or reinvest them in treatment and research? Is the hospital run by a board controlled by independent representatives of the community?<sup>109</sup> By analogy, a news organization can strengthen its case for exempt status by charging less than its costs for its stories,<sup>110</sup> by prioritizing stories based on their relevance to the public good instead of their commercial potential, by reinvesting any excess

106 Rev. Rul. 1967-4, 1967-1 C.B. 121.

107 Rev. Rul. 77-4, 1977-1 C.B. 141.

108 Schmalbeck (2009) (noting that for-profit and nonprofit hospitals are “not distinguishable except by reference to whether their managers were seeking to make a profit”); see also *Goldsboro Art League v. Commissioner*, 75 T.C. 337 (1980) (holding that art gallery could be treated as not-for-profit even though its activities resembled activities of for profit); Schmalbeck (2009, 10) (discussing *Goldsboro*).

109 See Rev. Rul. 69-545, 1969-2 C.B. 117; *St David’s Health Care System v. United States*, 349 F. 3d 232 (5th Cir. 2003) (describing so-called “community benefit” standard).

110 See Rev. Rul. 1967-4, 1967-1 C.B. 121 (upholding exempt status for publishing organization that charges less than its cost for content).

earnings in its journalistic mission instead of distributing them, and by having community representatives instead of economic stakeholders on its board of directors.

131 A boutique dedicated solely to investigative journalism, such as *Pro Publica*, can adopt these features more easily than a full service news organization. The latter will have a broad range of stories, including ones with commercial appeal, and will secure a significant volume of its revenue from advertising.<sup>111</sup> It is not clear that a full service news organization can qualify as a nonprofit under the government's 1977 ruling.<sup>112</sup> Senator Ben Cardin has proposed legislation to ensure this result,<sup>113</sup> but guidance from the IRS would render legislation unnecessary.<sup>114</sup>

132 Although the tax law is generally favorable here, there are still hurdles to using exempt status that are internal to the profession of journalism. Some journalists worry that nonprofit news organizations will not be sufficiently ambitious. Yet this concern is at odds with the experience of great nonprofit hospitals, universities, and other cultural institutions, which compete vigorously with each other and produce work of the highest quality in their fields.

133 Obviously, owners will resist turning their news organizations into nonprofits, since this means their ownership interests would be wiped out. Yet owners of insolvent news organizations are wiped out anyway and, unfortunately, this condition is likely to become increasingly common. In any event, the affiliate model would allow owners to preserve their ownership in a for-profit entity, while enabling the activities conducted by the nonprofit affiliate to be subsidized.

134 Another way to preserve for-profit ownership while allowing the news organization to benefit from tax-deductible contributions, at least from foundations, is the so-called low-profit limited liability company, or

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111 Advertising revenue generally will be UBTI, *see* text accompanying notes 82 to 84 above, and an organization's tax exempt status can be called into question if too high a percentage of its revenue constitutes UBTI.

112 Schmalbeck (2009, 19) ("There does not appear to be a definitive answer to this question [of whether a metropolitan daily would qualify for exempt status]. The IRS position ... is generally negative.").

113 *See* Cardin (2009). One change from current law that Cardin advocates is treating advertising revenue as tax exempt, instead of as UBTI: ("Advertising and subscription revenue would be tax exempt ..."). Full text of bill available at: <http://cardin.senate.gov/pdfs/newspaperbill.pdf>.

114 Schmalbeck (2009, 21) ("Unilateral declaration by the IRS, in the form of a ruling, would almost certainly be enough.").

L3C. This approach offers a different way to separate for-profit owners from nonprofit supporters. Instead of housing the activities they support in different entities—the approach of the “affiliate” model, discussed above—the L3C houses all these activities within a single entity, but one that has a tiered capital structure. The most junior capital comes from foundations in the form of program-related investments.<sup>115</sup> This model has the advantage of avoiding the private benefit issue, discussed above, that is inherent in pairing a for-profit with a separate tax-exempt entity. But unlike the pairing of for-profit and tax-exempt affiliates, the L3C does not focus the government subsidy on externality-generating activities, since all activities of the news organization would be conducted through the L3C. Also, although the L3C could accept contributions from foundations, it could not accept tax-deductible contributions from individuals.<sup>116</sup> In any event, until the IRS gives guidance that news organizations qualify for program-related investments, the L3C model is unlikely to come into broad use.

## 5. OTHER SUBSIDY MODELS

Although organizing newsrooms as tax-exempts is a promising approach, other subsidy models have their own advantages, and reasonable minds can disagree about which mix of costs and benefits is most desirable. Part 5 discusses four other possibilities: tax credits for hiring additional reporters; subsidies allocated by readers; government grants to privately owned news organizations; and publicly-owned news organizations. The judgment about which model to favor depends in part upon our priorities, as well as on empirical questions about the extent of the tradeoffs among these priorities. The optimal strategy, moreover, is not necessarily to choose only one alternative. There may be wisdom in managing tradeoffs by employing multiple approaches, so that different goals are pursued in various ways.<sup>117</sup>

115 See Pickard, Stearns, & Aaron (2009, 16) (describing L3C as a “compelling alternative”).

116 Although in theory the foundation could accept some contributions from individuals, it generally is limited in its ability to do so, at least while maintaining its status as a private foundation.

117 Bollinger makes a similar point about using different regulatory models for print and broadcast journalism. See Bollinger (2010b, 64) (“having multiple approaches to the conflicting benefits and risks of a wholly independent press is the best way to achieve our ultimate goal of creating an overall press that is both robust and responsible to the public good”).

### 5.1. Tax Credits for Hiring Additional Reporters

- 136 One alternative is a tax credit to offset the cost of hiring more reporters. Under this approach, if a news organization increases the number of reporters on staff (or, alternatively, the total payroll for reporters), it would receive a tax credit covering a portion of this incremental cost. Such a tax credit would be modeled on the research and development credit currently in the tax code, which also encourages incremental expenditures.<sup>118</sup> As we shall see, this approach is strong on preserving press independence. In theory, it also is particularly effective at encouraging additional positive externalities (i.e., by inducing growth in the volume of reporting). In practice, though, this approach offers limited quality control and would be difficult to administer. In requiring a change in law, this approach is more difficult politically than using the nonprofit form.

#### 5.1.1. Independence and Constitutionality

- 137 If the government plays a passive role in allocating the credit, this approach is effective at safeguarding independence. In this spirit, the government would make the tax credit available to any company that qualifies under a broad definition of “news organization” and is hiring reporters who engage in investigative and beat reporting (or, if a narrower category is desired, international news, state and local government, or any other favored category). The government would then exercise no discretion about which qualifying organizations can claim the subsidy.
- 138 Yet under this approach, quality control is limited. The credit would be available to any qualifying news organization hiring additional reporters who will cover the designated set of issues. The *Weekly World News* would be on par with the *New York Times*, as long as it can pay its share of the new reporters’ salaries. Unlike the tax-exempt model, this approach does not allow the government to piggyback on the judgment of charitable donors. Instead, the government can piggyback, to an extent, on the judgment of readers and advertisers, since a news organization cannot afford to pay even *some* of the cost of new reporters unless it has some subscription or advertising revenue. Yet this positive signal about quality probably is not as strong as the one a donor sends in making a charitable contribution; someone who donates money to a publication is likely to be especially devoted to it. In theory, of course, the government could play a more active

118 See 26 U.S.C. §41.



role in screening for quality, but this creates greater risks to press independence. Either way, there should be no issues about the constitutionality of the program.

### 5.1.2. Focus

Although this approach offers only limited quality control (assuming we limit the government's role in allocating funding), it has other strengths in focusing government resources on externality-generating activities. Like the tax-exempt approach, it is neutral as to new technology.

An important advantage over the nonprofit model, moreover, is that it can, at least in principle, be structured to motivate news organizations to hire *more* reporters, and not only to keep the ones they have. The idea is to cover a portion not just of the cost of *all* reporters, as Baker (2009) has proposed, but to cover the cost of *new* reporters. This should create an incentive, at the margin, to *increase* the overall level of externality-generating reporting.

Of course, preserving existing jobs also has value, and this proposal should encourage that as well, if only because news organizations cannot show the necessary net increase in hiring without preserving existing jobs. But funding the preservation of jobs that actually *are not at risk* is a waste of government resources. If a news organization is allowed to claim a portion of the cost of reporters they are *going to keep anyway*, then the credit becomes, in effect, free money, which the news organization can use however it wants, including for activities that do not generate externalities.

Yet actually implementing a credit focused at the margin is quite difficult. For one thing, some money will be wasted on news organizations that were going to hire additional reporters anyway. In addition, news organizations might engage in strategic behavior to maximize their credit. What if they fire all their reporters, wait a minimum period of time (or create a new entity), and then rehire or replace them? If this is feasible, it allows news organizations to claim the credit without actually increasing their reporting staff.

More generally, the credit would encourage news organizations to backload their new hiring, in order to show the necessary increases over time. There are other ways to manipulate the credit, depending upon whether it is based on the total number of reporters, or the total dollar level of their payroll. For example, if the latter trigger is used, then the credit could fund

raises for existing reporters, instead of an increased number of reporters. If instead the credit turns on the number of reporters, then organizations would have an incentive to fire more experienced (and expensive) reporters and replace them with a larger number of more junior reporters at the same payroll cost. Either way, there will be pressure on the definition of “reporter,” since news organizations will want to reclassify every new hire as having this status, including photo journalists, columnists, editors, and the like. All of this will add administrative costs to the system, imposing compliance burdens on taxpayers and requiring the government to monitor and refine the rules.

144 It is worth emphasizing, moreover, that these burdens would add expense and complexity to the tax system, in pursuit of goals that are unrelated to that system’s core mission of generating revenue. Using the tax system in this way is controversial among academics, although it obviously has become increasingly common in recent years.

145 A particular problem with this tax expenditure is that it could be claimed only by news organizations that are otherwise profitable enough to pay taxes. Yet many news organizations are losing money, so that tax savings is not high on their list of priorities. One way to address this concern is to make the credit refundable (so that the government makes payments even to news organizations with net losses), and another is to make it transferable (so that news organizations can in effect sell the tax credit to investors). By analogy, the low-income housing credit is structured so that financial investors receive tax credits in return for investing, and perhaps an analogous market could develop here.<sup>119</sup>

### 5.1.3. *Political Feasibility*

146 Even if we could implement the program effectively and at reasonable cost, its political prospects are uncertain at best. The strongest political argument for it is that it would likely be more appealing to the industry than some other models. For example, news organizations would not have to reorganize as nonprofits, and owners would preserve their ownership stake.

147 Yet unlike the nonprofit model, this program requires a change in law. It also has the disadvantage of being for journalists alone. Unlike the tax-exempt model, which applies to a broad range of activities and thus is

119 See 26 U.S.C. §42. I thank Jack Coffee for this insight.

protected by a coalition of interest groups, this program is specific to news organizations. A “low income housing” model would be a somewhat easier sell, since financial investors who could benefit from the credit would join news organizations in petitioning for its enactment. Yet it still requires more political support than the nonprofit model, which is already feasible under current law.

## 5.2. Subsidies Allocated by Readers

Another model is a subsidy allocated by readers. The French government, in a program called *Mon Journal Offert* or “my complimentary paper,” offers 200,000 18- to 24-year olds a yearlong subscription to the newspaper of their choice (Tagliabue 2010). The U.S. government could adopt a similar program, for example, through a tax credit for subscriptions to newspapers or websites (presumably for every household, not just for 18-to 24-year olds). Or, similarly, the U.S. government could allow taxpayers to direct federal money to the media outlet of their choice by checking a box on their tax return, just as taxpayers can choose to support political parties in elections.<sup>120</sup> Yet these approaches pose their own tradeoffs between independence and focus, and are likely to encounter significant politically resistance in the United States.

### 5.2.1. Independence and Constitutionality

If the government plays no role in choosing which news organizations can be supported with the credit, press independence is safeguarded. As with tax exempts and the tax credit for reporters described above, the government would not choose how much money to allocate to each news organization.

### 5.2.2. Focus

Although this program has the advantage of being neutral as to technology and of allowing the government to piggyback on the preferences of readers, it would lead to considerable waste for four reasons. First, the program would not control how the news organization uses any extra revenue that it receives. There is no assurance, for example, that the press would use it to fund more reporting. Second, if the government plays no role

120 McChesney and Nichols recommend this approach, which they call “Citizenship News Vouchers” (2020, 201–206).

in deciding which news organizations can be supported, there obviously is a risk of financing low quality news organizations. Although there is a similar issue under the tax-exempt model—since donors under that program could support low quality news organizations with tax-deductible contributions—the risks are probably greater here. Even those who would take seriously where they direct their charity are likely to spend less time, or to prioritize different values, in deciding which publication to buy at government expense or which to support through a check-off that requires no matching money from them. Of course, we could address this problem by empowering the government to designate a list of approved news organizations, but this would pose greater risks to press independence. Third, fraud can be an issue when the government offers a credit for relatively small expenditures. Finally, if the subsidy funds subscriptions, it could end up financing a large number of subscriptions that would have been purchased anyway.<sup>121</sup> In these cases, the subsidy would not increase the revenue of news organizations, but would merely increase the discretionary income of inframarginal subscribers.

### 5.2.3. *Political Feasibility*

- 151 Like the tax credit for hiring reporters, this subsidy requires a change in law and supports only journalism. As a result, this approach is less plausible politically than the tax-exempt model, which is available under current law.<sup>122</sup>

## 5.3. Government Grants

- 152 Still another model is for the government to give grants to support investigative journalism and beat reporting at selected private media outlets. This sort of direct subsidy for the press is common in Europe (Downie & Schudson 2009, 72). It also resembles other federal programs.<sup>123</sup> For

121 This risk is not presented if the taxpayer does not receive anything in return, as in the “Citizenship News Voucher” program.

122 Indeed, Starr gives Sarkozy’s program no chance of being enacted in the United States. “In America this would be a joke,” Starr wrote, “though depending on how many teenagers chose one of our racier tabloids, it could give added meaning to the concept of a ‘stimulus package’” (2009, 34).

123 For example, the National Endowment for the Humanities gives \$140 million in grants each year, and the National Endowment for the Arts dispenses \$160 million. Pickard, Stearns, & Aaron (2009, 26). Likewise, the National Science Foundation has a \$6 billion annual budget, while the National Institute of Health awards \$28 billion each year. Downie & Schudson (2009, 91).

example, the Corporation for Public Broadcasting awards \$400 million per year to fund overhead of public radio and TV stations and some programming (28), but virtually no investigative reporting (29).<sup>124</sup> Another alternative would be to provide grants to young journalists, and then to place them at selected press outlets.<sup>125</sup>

This grant-making approach gives government officials more control than they have in the other models discussed so far. They (or their appointees) have to decide not only whether particular news organizations are eligible for funding—a determination that must be made even in the tax-exempt model—but also *how much* each news organization should receive. As a result, this model poses greater risks to press independence, although the extent of these risks depends on the details of the allocation process.

With this greater risk comes a potential reward: By playing a more active role in allocating the funds, the government, in principle at least, may be able to focus the subsidy more precisely on externality-generating activities, although, again, the devil is in the details. Unlike the tax-exempt approach, but like the tax credit for hiring reporters and for buying subscriptions, this model faces the political challenge of requiring a change in law and of being specific to journalism.

### 5.3.1. *Independence and Constitutionality*

Allowing the government to allocate this funding obviously puts pressure on press independence. The extent of this pressure depends on the details of the program. Who will the decision makers will be? What process will they use? It is not hard to imagine members of Congress wanting to allocate this money themselves, along with other earmarks. Yet involving elected officials directly in this process is problematic. As one commentator put it, once federal funds were committed to public television, “every two-bit politician felt compelled or obliged or somehow able to say, ‘I’m not going to vote money for the kind of garbage that fellow is speaking on public television.’”<sup>126</sup>

Instead of elected officials, we would be better off relying on a board of independent experts like the boards of the NEA and NEH, which are nominated by the President and confirmed by the Senate (Pickard, Stearns,

<sup>124</sup> See also Lewis (2007, 34) (noting that NPR does virtually no investigative reporting).

<sup>125</sup> McChesney & Nichols (2010, 169–70) (advocating inclusion of journalists in AmeriCorps program).

<sup>126</sup> Stone (1985, xvii) (quoting Peter Lisagor).

& Aaron 2009, 26). But Congress and the executive branch would still oversee the process—for example, holding hearings about how the subsidy was being allocated—and they could threaten to discontinue funding if their direction was not followed. The political branches would have further influence through the process of nominating, confirming, and reappointing these experts. This political screening would favor politically attuned candidates, and would motivate them to please those who control their reappointment.

157 This is not to say that the government will inevitably abuse its funding authority. For example, both state and private universities receive a great deal of money from various levels of government but, overall, academics remain quite willing to criticize government policy (Bollinger 2010b, 133; McChesney & Nichols 2010, xiv). Even this context is not wholly immune, though, as evidenced by the recent efforts of state legislators to limit the activities of law school clinics (*see* N.Y. Times 2010).<sup>127</sup>

158 In any event, the track record of public funding for broadcasting and the arts is less reassuring. From the beginning, the process periodically has become highly politicized. Within months after the Johnson administration created public television, as David Stone (1985, xviii) has written, “Nixon and his closest aides wanted to take control of public television—or get rid of it altogether.” Indeed, the Nixon administration ultimately vetoed the CPB authorization bill in 1972, prompting one senator to charge that President Nixon “would have *Sesame Street* and *Mr. Rogers* as his puppets.”<sup>128</sup> There was perhaps “poetic symmetry” in the fact that PBS prominently aired the Watergate hearings (Stone 1985, 341), but this act of defiance against a wounded president does not negate the fact that Nixon and his allies in Congress launched a determined and at least temporarily successful assault on public television.

159 Likewise, a political firestorm erupted in 1989 around NEA funding for the homoerotic art of Robert Mapplethorpe, as well as for Andres Serrano’s “Piss Christ,” a photo of a small plastic crucifix submerged in the artist’s urine. In response, a bipartisan group of 23 senators—including liberals and moderates such as Bob Kerry, Arlen Specter, and Harry Reid—sent a letter to the head of the NEA “to express our outrage and to suggest in

127 I am grateful to Eva Subotnik for this point.

128 Stone (1985, 173) (quoting Senator Frank Moss of Utah).

the strongest terms that the procedures used by the Endowment to award and support artists be reformed” (D’Amato et al. 1989). Serrano “is not an artist, he is a jerk ...,” said Senator Jesse Helms, “It is all right for him to be a jerk but let him be a jerk on his own time and with his own resources. ... I resent it and I think the vast majority of our American people resent the National Endowment for the Arts spending the taxpayers’ money to honor this individual” (Koch 2008). Congress reacted with legislation, discussed above, incorporating a “community values” test in NEA funding decisions.<sup>129</sup>

Similarly, there has been a recurring political battle about whether the Corporation for Public Broadcasting displays political bias in its funding decisions. For example, in 2005 CPB Chairman Kenneth Tomlinson commissioned a controversial study showing liberal bias on the part of CPB-supported programming.<sup>130</sup> In response, congressional Democrats mounted the countercharge that Tomlinson was imposing Republican ideology on programming. In calling for him to resign, they distributed a “wanted” poster featuring the Muppet Elmo and the caption, “Red Fur May Indicate Communist Leanings” (Gilgoff 2005). A similar controversy in the 1990s surrounded NPR, prompting it to add more conservative voices (Downie & Schudson 2009, 73–74).

These precedents raise questions about whether American political institutions, which tend to be more reflective of popular opinion than their counterparts in Europe and Asia, will be able to keep politics out of public funding for the press. After all, it is hard to conclude that these incidents are unique or that, in this era of vituperative politics and “culture wars,” they are unlikely to recur. Even if high-profile controversies erupt only every few years, they are likely to be constantly on the minds of those who petition for public money. The cost to independence is hard to calculate, but it is positive and likely to be nontrivial.

### 5.3.2. *Focus*

On the positive side of the ledger, this model could, in theory at least, empower the government to focus the subsidy more effectively on externality-generating activities. Instead of piggybacking on the judgment

<sup>129</sup> See note 65 above and accompanying text.

<sup>130</sup> One of the study’s findings was that 92 of the 136 segments run on Bill Moyers’s show, *Now*, were critical of the Bush administration, while none of the others were supportive; they were either neutral or nonpolitical (Farhi 2005).

of donors or readers, the government could rely on its own designated experts to make judgments about the topics most in need of support, and about which press organizations are most capable of providing high quality coverage. If government grant makers are systematically more effective at making these judgments than donors and readers, then we face a tradeoff between these advantages and the costs to political independence described above.

- 163 Again, though, the devil is in the details. Would the government appoint the dean of Columbia Journalism School to make these judgments, or a politically connected media consultant? Would news organizations be chosen for the accuracy and objectivity of their reporting, or for being in the district of a senior member of Congress? With the wrong process, we could have the worst of both worlds: a program that compromises press independence, while wasting money on mediocre but politically connected grantees.

#### 5.3.3. *Political Feasibility*

- 164 As a result, much depends on what the program would actually look like once it was enacted. Yet there obviously is a threshold question of whether it actually *could* be enacted. Unlike the tax-exempt model, this approach requires a change of law, and would be for journalists only.

- 165 If enacted, this initiative could involve the creation of a new bureaucracy, such as a “National Endowment for Journalism.”<sup>131</sup> Yet it probably is politically easier to engraft this initiative onto an existing program. As Downie and Schudson (2009, 86–87) have proposed, the Corporation for Public Broadcasting could be given enhanced funding and a broader mission, such as to support local newsgathering.

#### 5.4. **Government-Owned News Organization**

- 166 Finally, government resources could be dedicated to news organizations that are owned and operated by the federal government, perhaps modeled on the BBC. Indeed, other commentators have recommended this approach (*see, e.g.*, Bollinger 2010b; Pickard, Stearns, & Aaron 2009, 45). As with a government grants program, the details here matter in determining how independent this organization would be and how focused it would be on externality-generating activities. Yet the challenges here arguably are even greater than with government grants.

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131 Pickard, Stearns, & Aaron (2009, 27) (describing idea proposed by Eric Klinenberg).



#### 5.4.1. *Independence and Constitutionality*

A government-owned news organization faces the same threats to independence as private organizations supported by government grants, but arguably more so. Care would have to be taken in defining the role of elected officials in deciding how much funding is given and in shaping editorial content. Just as we would want an independent board to decide how to dispense government grants to private organizations, we would likewise want an independent board to run a government news organization.

With a government-owned entity, a larger percentage of the budget is likely to come from the government than with a private entity receiving a government grant. If this proves to be the case, the risks to independence are all the greater. In addition, the First Amendment arguably provides less protection. As noted above, the doctrine of unconstitutional conditions applies less strictly when the government is itself speaking, so that the government arguably has more leeway over viewpoint and content with its own employees (Post 1996, 164).

This is not to say that a government-owned press organization must inevitably be captive to the government. The BBC is an important counterexample. Although it is owned by the British government and supported by British taxpayers, it offers high quality coverage and can be quite critical of British government policy.<sup>132</sup> The BBC's independence is reinforced by the manner in which it is funded, the structure of its board, and the language of its charter, and these features could, in principle, be replicated in the United States. The fact that the BBC has a designated source of funding—a special tax on television ownership—is helpful to its independence, although the point should not be overstated, since Parliament has the power to repeal the tax or to redirect this funding. The fact that the BBC is governed by an independent board of trustees is also a positive, although again the point should not be overstated, since the trustees are appointed by the government. BBC's charter contains language about its independence.<sup>133</sup> Notably, though, BBC World Service does not have the same formal guarantees of independence. It is funded by the Foreign

132 See Bollinger (2010b, 101) (“The BBC World Service is known for its very strong commitment to editorial independence from the British government.”).

133 See Bollinger (2010b, 99) (“The BBC shall be independent in matters concerning the content of its output, the times and manner of which this is supplied, and in the management of its affairs”) (quoting BBC Royal Charter).

and Commonwealth Office, instead of by license fees, and it is explicitly directed to consult with the Foreign Secretary about “the policies of Her Majesty’s Government in its international relations” (Bollinger 2010b, 100).

170 In any event, the four press organizations owned and operated by the U.S. government—Voice of America, Radio Free Europe, Radio and TV Marti, and Al Hurra—do not share the BBC’s reputation for independence or otherwise inspire confidence in the ability of the U.S. government to operate a high quality independent news organization. As Lee Bollinger (2010b, 102) has observed, “These broadcast channels have walked an uneasy line between propagandistic purposes and attempts to provide objective reporting and information to regions of the world that lack an independent media.” Perhaps surprisingly, these organizations have formal structures and charters that are not especially different from those of the BBC. For example, like the BBC, they are operated by an independent board (the so-called “Broadcasting Board of Governors”) and their charters contain language about objectivity.<sup>134</sup> Yet notwithstanding these formal trappings of independence, these organizations generally disseminate the U.S. government’s point of view, so much so that they are not permitted to broadcast within the United States.<sup>135</sup>

171 This is not to say that it would be impossible for the U.S. government to create a high quality news organization that offers an independent perspective.<sup>136</sup> But the same political culture that periodically politicizes funding to the NEA and CPB is likely also to create issues for a government-owned news organization.

#### 5.4.2. *Focus*

172 If such an organization were created, could it successfully focus its resources on externality-generating activities? The analysis here is generally the same as for a government grant program. In principle, the government could hire its own experts to run a first-rate organization, but there is

134 For example, the charter of Radio Free Europe directs it “to promote democratic values and institutions by disseminating factual information and ideas,” and to provide “objective news, analysis, and discussion of domestic and regional issues crucial to successful and democratic free market transformation.” Bollinger (2010b, 102–103) (quoting charter).

135 *Id.* at 104 (describing constraints imposed by Smith-Mundt Act).

136 As a favorable precedent, Bollinger (2010a) mentions public defenders who are government employees but who nevertheless put the government’s case against defendants to the test.

also the risk that a government-owned enterprise would become a source of pork, and would be run quite badly.

Unlike a grants program, moreover, a government-run organization would have to create its own administrative infrastructure. This means government resources would not be limited to funding only reporting—the ideal in a government grants program, in which grantees would presumably be expected to fund their own office space, advertising departments, and administrative support. Instead, a government-owned news organization would have to create its own administrative departments, so that government resources would be diverted from reporting.

#### 5.4.3. *Political Feasibility*

Finally, the politics of creating a government-owned news organization are potentially quite challenging. Unlike the tax-exempt model, this requires a change in law, and would be a journalism-specific initiative. A news organization would have to be created, and it would have to bear the additional burden of justifying government ownership in an industry that traditionally has been privately owned, something that is controversial in American political culture.

## 6. CONCLUSION

News organizations play a crucial role in a democratic society, so the collapse of their traditional business model is cause for concern. Hopefully, the press will find a new path to profitability. Yet there is a significant risk that beat and investigative reporting will be undersupplied, since many who derive substantial benefits from this activity never buy (or even read) a newspaper.

Although activities that generate positive externalities generally warrant a government subsidy, the analysis is more complicated for the press for three reasons. First, we cannot allow a subsidy to jeopardize the press's independence, since this would undercut the very social benefits we are trying to preserve. Second, we do not want to waste money in subsidizing press infrastructure and functions that are at some remove from reporting. Third, we need a model that is politically plausible—and, ideally, one that is available without substantial (and thus politically daunting) changes in the law.

To address these three challenges, the principal recommendation of this Article is for the press to make greater use of the nonprofit form. It

safeguards press independence because the government does not allocate the subsidy. This approach also focuses the subsidy on reporting, as long as the tax-exempt entity engages only (or at least primarily) in this externality-generating activity. This strategy is largely feasible under current law, and can be implemented even more broadly with only modest changes in the relevant tax regulations and I.R.S. rulings.

178 Of course, this approach can be supplemented with (or even supplanted by) other subsidy strategies, including targeted tax credits, government grants, and the creation of government-owned press organizations. Although this Article approaches these alternatives with some skepticism, they could in theory prove successful. The devil is in the details, and a further contribution of this Article is to identify their potential advantages, as well as their pressure points and vulnerabilities.

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