



The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It

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ABSTRACT

Newspaper executives have been struggling for the past decade to slow the sharp and unprecedented decline of their industry. While no effort has worked, one promising business model would be to charge for access to online content. But only the rarest industry leaders have felt comfortable making the move to a paid-content model without industry-wide agreement, and such an agreement would be a per se violation of U.S. antitrust law. Unlike in other areas of the law, antitrust law does not permit courts to make policy judgments and approve of “good” agreements to restrain trade or fix prices, even when such a move would further antitrust policy interests. Exemptions can only come from Congress. This Comment argues that, because of the newspaper industry’s vital role in generating new information that supports American democratic society, Congress should pass a narrow and temporary exemption from the collusion and price-fixing prohibition in Section 1 of the Sherman Act. Such an exemption would allow newspaper executives to work together on a sustainable online business model for the press, thereby preserving the American corps of professional newsgatherers. That, in turn, would stabilize contributions to the marketplace of information and ideas and would slow the consolidation and concentration of newspaper ownership. Both of these outcomes would advance a primary goal of antitrust law—increase in consumer options.

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TABLE OF CONTENTS

INTRODUCTION	416
I. NEWSPAPERS' DOWNWARD SPIRAL	418
A. The Press's Problem	420
B. How an Industry-Wide Paywall Would Help	424
C. An Antitrust Exemption to Overcome the Press's Coordination Problem	428
II. PUBLIC POLICY AND THE PRESS	430
A. Old Media vs. New Media	434
1. The End of Professional Newsgathering?	436
2. Newspaper Ownership Consolidation and Contraction	439
B. Precedent for Congressional Intervention	442
1. The Post Office Act of 1792	442
2. Twentieth-Century Efforts to Strengthen Media	443
C. Congress Should Act to Support Old Media Anew	444
III. ANTITRUST LAW AND THE NEWSPAPER INDUSTRY	446
A. Sherman Act Restricts All U.S. Businesses Lacking an Exemption	447
B. Antitrust Exemptions Are Pervasive	450
1. Narrow Exemptions From the Price-Fixing and Collusion Prohibition	451
2. Broad Exemptions for the Failing Newspaper in a Two-Newspaper Town	452
IV. A NEW EXEMPTION	457
A. An Explicit, Narrow, and Temporary Exemption	458
B. The Exemption Would Serve Stated Policy Interests	461
CONCLUSION	465

INTRODUCTION

The newspaper industry is in an unprecedented period of decline.¹ Newspaper executives have tried various measures to offset falling print publication revenue, but the only effective approach has been to repeatedly cut staff and reduce product quality.² Meanwhile, advertisers and readers have defected to the internet—and it appears unlikely that they will be returning to print.³ While online news sites are appropriately reaping the benefits of their innovation, the demise of the newspaper industry portends problems for American democratic society.⁴ Newspapers continue to be central in setting the agenda for public discourse, in connecting individuals with their community, and in serving as a watchdog on elected officials, business leaders, and any other misbehaving person in a position of power.⁵ It is not clear that online media⁶ can bear that burden—at least not to the same degree. For the sake of protecting the national corps of professional newsgatherers that are employed by newspapers,

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1. It is difficult to overstate this point. See *infra* Part I. The press is undergoing a seismic shift, thanks primarily to the digital revolution and changes in individual news consumption patterns. Ad revenue and circulation have plummeted, while printing and delivery costs have risen. Newspapers have responded by dramatically reducing staff, consolidating with competitors, and filing for bankruptcy. Some have decided to stop the presses permanently.
 2. See Mathew Ingram, *Newspaper Staff Cuts: Good News?*, NIEMAN JOURNALISM LAB (Feb. 2, 2009, 5:39 PM), <http://www.niemanlab.org/2009/02/newspaper-staff-cuts-good-news> (arguing that newspaper executives are making misguided cuts without a realistic plan for future success and that “many newspapers are cutting in arguably the wrong places”). Between January 2008 and November 2010, at least 33,658 newspaper jobs were cut. See *Looking Back: 2009 Newspaper Layoffs*, PAPER CUTS (Jan. 1, 2010), <http://newspaperlayoffs.com/2010/01/looking-back-2009-newspaper-layoffs>. For a running tally of newspaper layoffs, see also PAPER CUTS, <http://papercuts.graphicdesignr.net> (last visited Oct. 6, 2011).
 3. See Bradley Johnson, *Revenue Rising, and a New No. 2 Ad Medium: Internet*, ADVERTISING AGE, Dec. 20, 2010, <http://adage.com/article/news/advertising-internet-2-ad-medium/147740> (reporting that in 2010, online media surpassed newspapers in ad revenue); see also *infra* notes 28–30; *infra* Part I.A.
 4. Newspapers play an integral role in filling the ranks of the professional corps of newsgatherers. See *infra* Part II. This cadre of professional newsgatherers has helped the press influence politics and act as an agent of accountability outside of formal governmental institutions, making the press the archetypical Fourth Estate. See Matthew Gentzkow et al., *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered* (Nat’l Bureau of Econ. Research, Working Paper No. 10,791, 2004), available at <http://www.nber.org/papers/w10791>. This idea of a Fourth Estate might be overly romantic, but professional newsgatherers significantly reduce the cost of monitoring elected officials and educate citizens about their community.
 5. See *infra* notes 155–157.
 6. For the purposes of this Comment, “online media,” the *newest* new media, is an all-inclusive phrase used to refer to everything from online-only news organizations to blogs to social networks to citizen journalists.

thereby preserving the primary source of new information that is crucial to democratic self-governance, the federal government should intervene to help the newspaper industry.

Charging for online content is a promising business model to replace decreasing print ad revenue, but it is impracticable without industry-wide support. Though the *Wall Street Journal* has had success putting content behind a paywall⁷ and the *New York Times* launched on March 28, 2011⁸ a paywall that charges for monthly access beyond a limited number of viewings, substantial impediments remain for newspapers without the professional audience of the *Wall Street Journal* or the market leadership of the *New York Times*. Most other major metros and local dailies seem to be paralyzed from charging for online content by a fear that readers will just shift to a free competitor.⁹ Any attempt by competitors to agree on standards for charging for online content would run afoul of Section 1 of the Sherman Antitrust Act.¹⁰ Thus, if the newspaper industry is going to be able to save itself by finding a subscription price point for online content that both consumers will pay and newspapers can survive on, it is going to need a statutory exemption permitting newspaper executives to collaborate and devise an industry-wide model.

Much of what has been written about antitrust exemptions for the newspaper business¹¹ has focused on media mergers and the broad exemptions provided by the largely unpopular Newspaper Preservation Act of 1970,¹² a federal law that legalized joint operating agreements, through which competing

7. A paywall restricts access to a website's content to those who have paid to enter.

8. See *infra* notes 49–53 and accompanying text.

9. See Paul Farhi, *A Costly Mistake*, AM. JOURNALISM REV., Apr./May 2009, <http://www.ajr.org/Article.asp?id=4730> (“The obvious difficulty in all of these newspaper pay proposals is that news has become a commodity, widely and freely available just about everywhere on the Web. The simplest and most persuasive argument against charging for news is this: If you won’t offer it to me for free, another site surely will.”); Tim Rutten, *Newspapers Need an Antitrust Exemption*, L.A. TIMES, Feb. 4, 2009, <http://articles.latimes.com/2009/feb/04/opinion/oe-rutten4> (stating that as long as some major newspapers are giving away their content for free, “nobody can risk charging for theirs”).

10. Section 1 of the Sherman Antitrust Act prohibits competitors from agreeing or attempting to agree to restrain or attempt to restrain trade. 15 U.S.C. § 1 (2004). The Sherman Act is discussed throughout this Comment. In particular, how the Act has been interpreted by the courts and how it applies to the newspaper industry is analyzed primarily in Part III.

11. See, e.g., Richard Brand, *All the News That's Fit to Split: Newspaper Mergers, Antitrust Laws and the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 1 (2008); Jason A. Martin, *Reversing the Erosion of Editorial Diversity: How the Newspaper Preservation Act Has Failed and What Can Be Done*, 13 COMM. L. & POL'Y 63, 76 (2008); Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. COLLOQUY 115 (2010) [hereinafter Stucke & Grunes, *Antitrust Immunity for the Media*].

12. 15 U.S.C. §§ 1801–1804.

newspapers combined business operations but maintained independent editorial operations. Legal scholars have broadly objected to the relaxation of ownership rules, which are covered, in the antitrust context, by Section 2 of the Sherman Act and Section 7 of the Clayton Act.¹³ This Comment similarly seeks to prevent media mergers, which give rise to monopoly power. It proposes doing so via a narrow and temporary exemption to the collusion and price-fixing prohibition in Sherman Act, Section 1. Antitrust law has no mechanism for balancing competing policy goals;¹⁴ such an exemption would have to come from Congress.

Part I of this Comment details the sharp and unprecedented decline of the U.S. newspaper industry. Part II explains why the multitude of voices sprouting up online will not fill the void left in the marketplace of information and ideas by massive losses to the national corps of professional newsgatherers and articulates why it is appropriate for Congress to pass special interest legislation that benefits the press at the expense of other types of media. Part III discusses relevant antitrust laws, surveys existing exemptions, and examines why the Newspaper Preservation Act struggled to achieve its stated purpose. Finally, Part IV makes the case for a narrow antitrust exemption that would permit newspapers to collude on a paywall model for online content. This Part argues that Congress should act because regulators and courts cannot give ad hoc approval of such an exemption due to antitrust law's rigid parameters that provide no waivers to advance public policy goals or to further the interest underlying another antitrust provision.

I. NEWSPAPERS' DOWNWARD SPIRAL¹⁵

In May 2009, the Newspaper Association of America invited newspaper executives to a discreet gathering in Rosemont, Illinois. The meeting was

13. *Id.* § 12.

14. In discussing an antitrust exemption for the newspaper industry, the policy goal of promoting contributions to the marketplace of information and ideas conflicts with the goal of promoting economic competition between newspapers.

15. The "downward spiral" is a term legal scholars have used to discuss the interplay between falling newspaper circulation and decreasing advertising rates. See Eric J. Gertler, Michigan Citizens for an Independent Press v. Attorney General: *Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers?*, 39 AM. U. L. REV. 123, 133 (1989) ("Because of its smaller circulation, the newspaper attracts less advertising than its larger competitor, and thus generates less revenue and has fewer resources to devote to the newspaper's editorial content. As circulation declines, advertising decreases and declining advertising makes the newspaper less attractive to readers, which causes a further deterioration in circulation. Newspapers that enter this downward spiral rarely are able to reverse the process.").

titled “Models to Monetize Content,” and the focus was on identifying a monetary messiah for the newspaper industry.¹⁶ One session discussed a proposed service to charge for online access to newspaper content. James Warren, who broke the news on his blog for *The Atlantic* magazine, observed:

The stark reality is that the industry will have to soon start demanding payment for at least some of its online handiwork. There are various ways to go about it, and one size won't fit all. During their days of print advertising plenty, the people in this room, or their predecessors, made the catastrophic, myopic decision to not charge. They gave away their expensive efforts for free. They by and large misjudged the significance of the internet.¹⁷

Warren's premises seem accurate: Newspapers made a costly mistake in giving content away for free when the internet was relatively young, and charging for online access could occur in various ways. But what Warren did not mention is that, under current U.S. antitrust law, newspaper executives cannot legally get together and agree on a paywall model. Section 1 of the Sherman Act explicitly prohibits any agreement between competitors to restrain trade.¹⁸ Collaborating on a model that competitors could use to charge for online content would violate this section because of both its collusive and its price-fixing characteristics. “It doesn't matter if the industry is ailing or if collusion would be ‘good’ for society or necessary to preserve democracy. An agreement regarding pricing is ‘per se’—automatically—illegal under Section 1 of the Sherman Act, the main federal antitrust law,” Ben Sheffner, a journalist and entertainment lawyer, wrote for the online magazine *Slate*.¹⁹

Of course, the newspaper industry has been declining for a while,²⁰ with average daily circulation in the United States falling year over year since 1987.²¹ The *San Francisco Chronicle* provides a stark example of the newspaper industry's hemorrhaging: Between mid-2000 and 2006, the Hearst flagship ran at a loss of

16. James Warren, *Shhhh. Newspaper Publishers Are Quietly Holding a Very, Very Important Conclave Today. Will You Soon Be Paying for Online Content?*, ATLANTIC, May 28, 2009, <http://www.theatlantic.com/culture/archive/2009/05/shhhh-newspaper-publishers-are-quietly-holding-a-very-very-important-conclave-today-will-you-soon-be-paying-for-online-content/18409>.

17. *Id.*

18. Sherman Act, 15 U.S.C. § 1.

19. Ben Sheffner, *Collusion Course*, SLATE, May 28, 2009, <http://www.slate.com/id/2219260>.

20. Thomas C. Marvin, *Above the Law? Dealing With the Abuse of Joint Operating Agreements Under the Newspaper Preservation Act*, 42 WAYNE L. REV. 1719, 1719 (1996) (noting that, when the article was written fifteen years ago, newspaper readership was already “at its lowest point in history”).

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

about \$1 million per week.²² And that was when the newspaper business was still relatively lucrative. Print ad revenue plummeted between 2006 and 2010, from \$47 billion to \$24 billion, and while online ad revenue has been growing, “it still amounts to just 10 percent of what papers make from print.”²³ Accounting for inflation, the last time newspapers took in ad revenue that little was nearly half a century ago.²⁴ In fall 2009, circulation hit its lowest mark in seven decades,²⁵ with analysts expecting newspaper economics to get worse.²⁶

A. The Press’s Problem

The press’s problem is primarily nonlegal: Its business model has been shattered into, or, more aptly, by, a million bits. Americans still consume news.²⁷ But far fewer pay for it, contributing to the downward spiral of newspapers—dropping subscription revenue and ad revenue fueling each other’s decline. Three primary forces can be credited with this decline: (1) online ads are worth less to

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22. Jon Fine, *When Do You Stop the Presses?*, BUS. WK., July 23, 2007, http://www.businessweek.com/magazine/content/07_30/b4043029.htm.
 23. Mathew Ingram, *What Does the Future Hold for Newspapers?*, GIGAOM, Mar. 28, 2010, <http://gigaom.com/2010/03/28/what-does-the-future-hold-for-newspapers>.
 24. Ryan Chittum, *Newspaper Ads Tumbled to 1963 Levels Last Year*, COLUM. JOURNALISM REV., Mar. 25, 2010, http://www.cjr.org/the_audit/newspaper_ads_tumbled_to_1963.php.
 25. See Ahrens, *supra* note 21 (reporting that between April and September of 2009, daily newspaper circulation fell another 10.6 percent to 30.4 million and that only about 13 percent of Americans bought a daily newspaper, compared to 31 percent in 1940).
 26. See Richard Pérez-Peña, *Newspapers Have Not Hit Bottom, Analysts Say*, N.Y. TIMES, Sept. 20, 2009, http://www.nytimes.com/2009/09/21/business/media/21papers.html?_r=2&ref=business (noting that the freefall in profits appears to be slowing but not over); Tom Rosenstiel & Amy Mitchell, Pew Res. Ctr.’s Project for Excellence in Journalism, *Overview*, THE STATE OF THE NEWS MEDIA 2011, <http://stateofthemediamedia.org/2011/overview-2> (last visited Oct. 6, 2011) (reporting that 2010 marked the first time that more Americans got their news online than from a printed newspaper).
 27. In many cases, newspapers now reach more readers on a weekly basis online and in print than they did in recent years simply via print. See, e.g., *Top 25 Newspapers in Growth of Total Audience (Print and Online) in 2010*, THE STATE OF THE NEWS MEDIA 2011, <http://www.stateofthemediamedia.org/files/2011/01/13-Top-25-Newspapers-in-Growth-of-Total-Audience-Print-and-Online-in-2010.png> (last visited Oct. 6, 2011); see also Rosenstiel & Mitchell, *supra* note 26 (“The internet now trails only television among American adults as a destination for news, and the trend line shows the gap closing. Financially the tipping point also has come. When the final tally is in, online ad revenue in 2010 is projected to surpass print newspaper ad revenue for the first time. The problem for news is that by far the largest share of that online ad revenue goes to non-news sources, particularly to aggregators.”); *Americans Spending More Time Following the News*, PEW RES. CTR. (Sept. 12, 2010), <http://people-press.org/2010/09/12/americans-spending-more-time-following-the-news> (noting that while Americans are spending more than seventy minutes a day watching, reading, and listening to news, they are increasingly doing so online, with more than a third of respondents saying they consumed news online in the previous twenty-four hours).

advertisers—digital dimes versus print dollars—because their audience is perceived to be less captive; (2) at the same time, the internet has lured from newspapers the advertisers who prefer to purchase smaller advertising spots or want to target a narrower audience, possibly in a time-sensitive manner, and now pay substantially less to market online; and (3) the newspaper cash cow of classifieds—effectively a natural monopoly for decades—has been slaughtered by Craigslist, eBay, and sites like Monster.com.²⁸ After peaking in 2005, newspaper revenue has fallen steadily each year, with the decline in print ad revenue far outpacing the gains in online ad revenue.²⁹ Print ad revenue for newspapers was about \$47.4 billion in 2005, while online ad revenue was just over \$2 billion. In 2008, print ad revenue fell to \$34.7 billion, but online ad revenue rose to \$3.1 billion. Though online ad revenue increased by more than 50 percent in the three years, the gain was dwarfed by the roughly \$13 billion that print ad revenue plummeted.³⁰ Moreover, editors and publishers made the mistake in the 1990s of giving content away for free online and recently have struggled against the information-wants-to-be-free culture of the internet.³¹

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28. See David S. Evans, *The Economics of the Online Advertising Industry*, 7 REV. NETWORK ECON. 359, 380 (2008) (“The key technological difference between traditional display advertising and online display advertising involves the ability to target ads to particular consumers in real time.”); Philip Weiss, *A Guy Named Craig*, N.Y. MAG., Jan. 8, 2006, <http://nymag.com/nymetro/news/media/internet/15500>. Long before the social media revolution or even the advent of the *Huffington Post*, and a mere thirteen months after the creation of Google, the internet was already seen as a major threat to traditional media. “Like some raging computer virus, the Net seems to be devouring the media culture, shattering the usual definitions of news and eclipsing more traditional subjects. The so-called old media are invading this brave new world with near-revolutionary fervor, fueling a growth industry that might be called e-news.” Howard Kurtz, *All Aboard the E-Train*, WASH. POST, Oct. 21, 1999, <http://www.washingtonpost.com/wp-srv/style/features/daily/net102199.htm>.
29. See Pew Res. Ctr.’s Project for Excellence in Journalism, *Print vs. Online Ad Revenue, Newspapers*, THE STATE OF THE NEWS MEDIA 2010, <http://stateofthemediamedia.org/2010/newspapers-summary-essay/economics> (last visited Oct. 6, 2011).
30. *Id.*
31. See Alan Mutter, *Mission Possible? Charging for Web Content*, REFLECTIONS OF A NEWSOSAUR (Feb. 8, 2009, 8:00 PM), <http://newsosaur.blogspot.com/2009/02/mission-possible-charging-for-content.html> (referring to the decision to give newspaper content away for free online as “Original Sin”); see also Farhi, *supra* note 9. The idea that “information wants to be free” is based on the premise that technology and creation build upon what already exists, and thus society suffers when information is under lock and key, only available to be copied and distributed by those who pay. See *The Free Software Definition*, GNU OPERATING SYS., <http://www.gnu.org/philosophy/free-sw.html> (last visited Oct. 6, 2011). This phrase has been “a rallying cry against our system of intellectual property, both the status quo and the perceived expansionist future.” R. Polk Wagner, *Information Wants to Be Free*, 103 COLUM. L. REV. 995, 1033 (2003). Stewart Brand is widely credited with coining the phrase. See STEWART BRAND, *THE MEDIA LAB: INVENTING THE FUTURE AT MIT* 202 (1989); see also John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, <http://www.wired.com/wired/archive/2.03/economy.ideas.html> (crediting Brand as the progenitor of the ethos, and claiming that the phrase

For decades, quality journalism was underwritten by advertisers.³² Online media, following an old pattern for each era's emerging media, has disrupted the American media marketplace; for many advertisers, newspapers have lost their appeal.³³ A recent study by Morgan Stanley analyst Mary Meeker that compared media consumption time to advertising spending found a substantial disparity between the proportion of media consumption that involved printed media and the percentage of media ad spending on print.³⁴ In 2009, print accounted for 12 percent of total media consumption time but 26 percent of media ad spending. By comparison, the internet accounted for 28 percent of total media consumption time but only received 13 percent of media ad spending. This gap created what Meeker called a "\$50 billion global opportunity."³⁵ The question, however, is: For whom? As of now, the answer does not appear to include traditional newspapers.

Compounding the press's problems, the internet has transformed everyone into a journalist.³⁶ For example, the Federal Election Commission has granted all bloggers the media exemption that "ensures that journalists have an unfettered ability to access and cover candidates for national office, and [that] stems from a historic, national belief that the press facilitates a desirable and robust exchange of ideas on public issues."³⁷ However, many online-media journalists and organizations free ride, providing lots of new commentary but little new information. For this reason, traditional media members often refer to news aggregators and popular blogs as parasitic.³⁸

"recognizes both the natural desire of secrets to be told and the fact that they might be capable of possessing something like a 'desire' in the first place").

32. Jeff Klein, Exec. in Residence at USC Annenberg Ctr. on Comm'n Leadership & Policy, Speaking to UCLA Digital Wars Class (Oct. 28, 2010) ("Newspapers, almost by accident, have been funded by advertisers to serve a community function, ferreting out stories.").
33. See *supra* notes 27–43 and accompanying text.
34. Dan Frommer, *Mary Meeker's Awesome Web 2.0 Presentation About the State of the Web*, BUS. INSIDER, Nov. 16, 2010, <http://www.businessinsider.com/mary-meekers-web-2010-11#-15> (follow "Click here to flip through Mary Meeker's awesome presentation" hyperlink).
35. *Id.*
36. See 2010 PRWeek/PR Newswire Media Survey: *Longer Hours, Heavier Workloads Persist; But Fears Over Further Job Erosion Moderate*, PR NEWswire, Apr. 1, 2010, <http://multivu.prnewswire.com/mnr/prnewswire/43321> [hereinafter *2010 Media Survey*] (finding that most bloggers—about 52 percent—consider themselves "journalists").
37. Neil Pandey-Jorin, *Is Everyone Now a Journalist?: How the FEC's Application of the Media Exemption to Bloggers Weakens FEC Regulation*, 60 ADMIN. L. REV. 409, 411 (2008) (noting that this designation gives bloggers "the same privileges and rights as journalists").
38. See Robert Niles, *Are Blogs a 'Parasitic' Medium?*, OJR: ONLINE JOURNALISM REV., Mar. 2, 2007, <http://www.ojr.org/ojr/stories/070301niles>; see also *infra* Part II.A. Often, the parasitic characterization is fair—and I say that as the creator of a blog that in 2007 and 2009 was honored by the Los Angeles Press Club as the best individual blog in Southern California. See Brad A. Greenberg, *The God Blog Is Again SoCal's Best Blog*, THE GOD BLOG (June 27, 2010, 10:02 PM),

The disruption of the newspaper business model has devastated the institutional press. Newspapers have significantly reduced staff and sacrificed morale,³⁹ given up column inches and regular features,⁴⁰ consolidated with competitors, and closed.⁴¹ At least fourteen newspaper companies have declared bankruptcy,⁴² and many newspaper leaders expect the future to be worse. The Pew Research Center's Project for Excellence in Journalism reported last spring that fewer than half of newspaper executives surveyed were confident their operations would survive another decade without substantial new sources of revenue. Nearly a third thought judgment day would occur within the next five years.⁴³

The press's answer cannot be found in current law. Copyright protects the expression of a news story from the moment it is written down,⁴⁴ but that expression, once in digital form, is easy to infringe. Additionally, it is costly for newspapers to monitor and enforce against such infringements. More importantly, the illicit use of copyrighted stories is not the primary cause of the industry's financial failings. Direct copying is primarily committed by bloggers, whose readership may be nominal and whose infringement may be defensible

http://www.jewishjournal.com/thegodblog/item/the_god_blog_is_again_socals_best_blog_20100627.

39. See *supra* note 2; see also *2010 Media Survey*, *supra* note 36 (reporting that "over 70% of respondents in this year's survey indicate a heavier workload as compared to last year, with the majority (58%) stating that the number of stories for which they are responsible has increased over the past two years").
40. See Katharine Q. Seelye, *Wall St. Journal to Shrink Page Size, Joining Trend to Cut Newsprint Costs*, N.Y. TIMES, Oct. 12, 2005, <http://www.nytimes.com/2005/10/12/business/media/12paper.html> (reporting that the *Wall Street Journal* was joining the *Washington Post*, *Los Angeles Times*, and *USA Today* in shrinking the width of the newspaper from fifteen inches to twelve); see also Sarah Pulliam, *Religion Sections Deleted*, CHRISTIANITY TODAY, Mar. 7, 2007, <http://www.christianitytoday.com/ct/2007/april/2.19.html> (reporting that, in response to financial challenges, many newspapers had killed their weekly pages devoted to religion).
41. See generally Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. JOURNALISM REV., Oct. 19, 2009, http://www.cjr.org/reconstruction/the_reconstruction_of_american.php?.
42. See Ken Doctor, *Newspaper Companies in Bankruptcy: 14*, NEWSONOMICS, May 4, 2010, <http://newsonomics.com/newspaper-companies-in-bankruptcy-14>.
43. See Pew Res. Ctr.'s Project for Excellence in Journalism, *News Leaders and the Future*, JOURNALISM.ORG (Apr. 12, 2010), http://www.journalism.org/analysis_report/news_leaders_and_future.
44. See Copyright Act, 17 U.S.C. § 102(a) (2006).

as fair use.⁴⁵ Additionally, news aggregators typically copy just the headlines, which generally are considered ineligible for copyright protection,⁴⁶ and, if copying text, just a line or two. Further, while newspapers have a moral argument concerning the unjust enrichment of online news sites that scrape the facts⁴⁷ that are costly for newspapers to gather, those facts are not copyrightable⁴⁸ and there is no federal “hot news” doctrine⁴⁹ to protect them.

B. How an Industry-Wide Paywall Would Help

A paywall restricting online content to subscribers would aid newspapers by providing a substantial new stream of revenue to offset the print advertising revenue lost to shrinking circulation and the downward spiral of newspaper

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45. See *Righthaven, LLC v. Jama*, 2011 WL 1541613, at *5 (D. Nev. Apr. 22, 2011) (holding, as a matter of law, that an Oregon nonprofit’s wholesale copying of a *Las Vegas Review-Journal* news article was fair use). Righthaven formed in 2010 to enforce newspaper copyrights by obtaining newspaper copyrights and then suing in their own right, with an agreement to share with the assigning newspaper any judgment against infringers. Righthaven was quickly derided as pioneering the patent troll model in the copyright context, and many followers of the development lamented the idea of a newspaper preventing a community from having a conversation with itself. Many legal scholars also thought that Righthaven’s claims would succeed. However, the effort has failed miserably. See Brad A. Greenberg, *The Quick Rise and Fall of the Copyright Troll—and How One Accidentally Expanded Fair Use* (Working Paper 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1947601; see also Steve Green, *Righthaven Says It Might Have to File for Bankruptcy*, VEGAS INC, Sept. 9, 2011, <http://www.vegasinc.com/news/2011/sep/09/righthaven-says-it-might-have-file-bankruptcy>; Brendan McKenna, *Righthaven’s House of Cards*, LAW.COM, Sept. 15, 2011, <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202514423358&slreturn=1>. But cf. Joe Mullin, *Stop the Presses: Will Copyright Suits Save Newspapers?*, LAW.COM, Sept. 10, 2010, <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202471854735> (discussing the wisdom of a “sue first” strategy for newspapers in combating infringement).
46. See KIMBERLEY ISBELL, BERKMAN CTR. FOR INTERNET & SOC’Y, *THE RISE OF THE NEWS AGGREGATOR: LEGAL IMPLICATIONS AND BEST PRACTICES* 8–9 (2010) (noting that the argument against the copyrightability of headlines is that headlines are highly factual and thus their expressive nature merges with their factual nature and makes them uncopyrightable).
47. “Scraping” is a technical term that refers to an automated program harvesting valuable content from the internet. See Bill Flook, *Web Scraping Hits Home*, WASH. BUS. J., July 12, 2010, <http://www.bizjournals.com/washington/stories/2010/07/12/focus1.html>.
48. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).
49. A judicially created doctrine devised to protect incentives for gathering and reporting information valuable to the public, “hot news” provides a cause of action for the misappropriation of time-sensitive factual information by a free-riding competitor. See FTC STAFF DISCUSSION DRAFT, *POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM* 8–9 (2010); Shyamkrishna Balganes, *“Hot News”: The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011); see also *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 852–53 (2d Cir. 1997) (holding that a narrow hot news doctrine in New York survives preemption by federal copyright law).

economics.⁵⁰ It is yet unclear how significantly charging for online content would help a newspaper's bottom line. In part, that depends on how much a newspaper could charge. It also depends on the individual newspaper and its readership loyalty. Though few newspapers enjoy the drawing power of the *Wall Street Journal* or the *New York Times*,⁵¹ these isolated examples demonstrate how a paywall could be developed, implemented, and effective. The *New York Times* paywall cost \$40 million to build⁵² and industry watchers anticipate it could generate about \$35 million per year while simultaneously slowing the decline of print subscriptions.⁵³ That would not cover the *Times's* \$200 million newsroom budget,⁵⁴ but the revenue would help and would otherwise be forfeited under the free-access model.⁵⁵ Steven Brill, whose start-up Journalism

50. See *supra* Part I.A.

51. The ultimate success of the *Times* paywall will not be known for years. However, early indications are that the paywall is working. See Seth Mnookin, *The Kingdom and the Paywall*, N.Y. MAG., July 24, 2011, <http://nymag.com/news/media/new-york-times-2011-8>; Jeremy W. Peters, *Times Company Reports a Profit*, N.Y. TIMES, Oct. 20, 2011, http://www.nytimes.com/2011/10/21/business/media/the-new-york-times-company-reports-a-profit.html?_r=1 (reporting that after six months, the *Times* had added 324,000 paid subscribers to its various digital editions and, buoyed by the sale of the company's stake in the group that owns the Boston Red Sox, turned a third quarter profit). On the heels of that early success, the *Boston Globe*, which is owned by the *New York Times's* parent company, moved its website behind a paywall in September 2011. See Rebecca J. Rosen, *Can a Paywall Stop Newspaper Subscribers From Canceling?*, ATLANTIC, Sept. 12, 2011, <http://www.theatlantic.com/technology/archive/2011/09/can-a-paywall-stop-newspaper-subscribers-from-canceling/244932>.

52. See Ryan Chittum, *The New York Times Paywall Looks Good*, COLUM. JOURNALISM REV., Mar. 17, 2011, http://www.cjr.org/the_audit/the_new_york_times_paywall_loo.php. It is difficult to understand why the *Times's* paywall was so expensive to build. Presumably, other newspapers could make the move for much less. For example, *Newsday* spent only \$4 million to erect a paywall. See *infra* note 66.

53. Chittum, *supra* note 52; see also Felix Salmon, *More NYT Paywall Math*, REUTERS, Jan. 23, 2010, <http://blogs.reuters.com/felix-salmon/2010/01/23/more-nyt-paywall-math>. Chittum notes that the *Times's* paywall will allow free access to twenty article views per month before charging \$15 a month for unlimited web access, \$20 for iPhone or iPad access, and \$35 for all three; visits from referring links on Google, Facebook, Twitter, or other non-NYTimes.com sites will not count toward the twenty-story limit. "What the Times is doing with its paywall is asking its heaviest readers to pay while still profiting off the junk traffic." Chittum, *supra* note 52.

54. Chittum, *supra* note 52.

55. Not surprisingly, there were media watchers who were quick to criticize the *Times's* move, particularly before the specifics were sketched out. See, e.g., Felix Salmon, *Running the Numbers on the NYT Paywall*, REUTERS, Jan. 20, 2010, <http://blogs.reuters.com/felix-salmon/2010/01/21/running-the-numbers-on-the-nyt-pawall> (claiming that paywalls cannot make newspapers profitable and only serve to boost print subscriptions). But to others the move to charge for content was long overdue. See John Gapper, *Charge for News or Bleed Red Ink*, FIN. TIMES, Jan. 20, 2010, http://www.ft.com/cms/s/0/9ee5b516-060f-11df-8c97-00144feabdc0.html?nclink_check=1#axzz1HviQnSPY ("General newspapers, however, must take the plunge. If the metrics of the link economy—visitors, page impressions, etc—had enough value, then *The Guardian* (35 [million] unique users a month globally, 13 [million] in the UK) or *The New York Times* (17 [million] in the US) would be in fine shape. Editorially, they are doing very well;

Online offers newspapers a common platform for charging for online content,⁵⁶ told newspaper editors and publishers in 2009 that 5 to 10 percent of monthly unique visitors would be willing to pay for content.⁵⁷ Brill estimated that a newspaper with a print circulation of 330,000—about the size of *Newsday* or the *Philadelphia Inquirer*⁵⁸—could increase revenue by \$7.7 million in year one and \$14.1 million in year two by charging \$60 a year or \$6 a month for unlimited access or accepting micropayments of \$0.25 per article for a minimum of six articles per month.⁵⁹ Additionally, the potential for making money online is growing for newspapers. Though print circulation continues to decline, online news readership continues to grow⁶⁰ and traditional news outlets still set the agenda of top news on social media sites.⁶¹

However, aside from a small subset of papers with niche audiences or unparalleled market power, newspaper executives generally do not feel comfortable unilaterally charging for online content.⁶² The reason is simple: With news being reported by multiple outlets, if one newspaper starts charging, readers

economically, they are in crisis.”). Even the satirical newspaper *The Onion* mocked the fact that charging for content is so painfully avoided in the newspaper business. *NYTimes.com’s Plan to Charge People Money for Consuming Goods, Services Called Bold Business Move*, THE OILION, Mar. 28, 2011, <http://www.theonion.com/articles/nytimescoms-plan-to-charge-people-money-for-consum,19847>.

56. Though a private entrepreneur like Steven Brill does not violate antitrust law when trying to sell his model for charging for online content, this mechanism does not obviate the need for an antitrust exemption. Newspaper executives could not use Brill’s private service as a vehicle for getting assurances from competitors about moving to a paywall at or around the same time; such activity would still violate Section 1 of the Sherman Act and likely not skirt liability. Newspapers would still encounter the prisoner’s dilemma of not wanting to move content behind a paywall without knowing that their competitors generally also were making that move.
57. Zachary M. Seward, *How Steve Brill Pitched Newspaper Executives on Charging for Online Content—and Why They’re Buying It*, NIEMAN JOURNALISM LAB, June 2, 2009, <http://www.niemanlab.org/2009/06/how-steve-brill-pitched-newspaper-executives-on-charging-for-online-content-and-why-theyre-buying-it>.
58. See Jeremy W. Peters, *Newspaper Circulation Falls Broadly but at Slower Pace*, N.Y. TIMES, Oct. 25, 2010, <http://mediadecoder.blogs.nytimes.com/2010/10/25/newspaper-circulation-falls-broadly-but-at-slower-pace> (reporting figures from the Audit Bureau of Circulations regarding the top twenty-five newspapers by circulation).
59. See Seward, *supra* note 57. Using the same payment model, a larger paper with the circulation of the *Los Angeles Times* could increase revenue by \$15.6 million in year one and \$32.7 million in year two; a smaller paper, with circulation similar to the *San Antonio Express-News* or *Nashville Tennessean*, could increase revenue by \$2.8 million in year one and \$4.3 million in year two. *See id.*
60. *See supra* note 27.
61. See John C. Abell, *Traditional Media Dominates the Twitter News Agenda: Study*, WIRED, Feb. 15, 2011, <http://www.wired.com/epicenter/2011/02/traditional-media-twitter> (reporting that a Hewlett-Packard study found that traditional media has “a decidedly greater impact” on influencing what becomes a “trending topic” on Twitter).
62. *See supra* note 9.

might relocate to a newspaper site that does not. Even though digital readership is worth less than comparable print readership,⁶³ papers do not want to sacrifice the online readers who have already stopped buying the print newspaper. As Jonathan Rauch explained in the *National Journal*, “Newspaper publishing confronts what economists call a coordination problem. The industry would be healthier if it moved to a pay-to-read business model, but whoever goes first takes a bath.”⁶⁴ A prime example of this is *Newsday*.⁶⁵ The owners of the Long Island newspaper spent \$4 million to redesign and relaunch *Newsday*’s website behind a paywall. Anyone who wanted to read stories on the site and was not already a subscriber to either the print edition or sister-company Interactive Optimum Cable, had to pay \$5 a week, or \$260 a year. After three months, thirty-five people had signed up. The paywall was \$3.99 million in the red.⁶⁶ It is unclear whether *Newsday*’s paywall struggled to generate revenue because readers left rather than pay for access or because of unrelated reasons, like the bundling of access for sister-company Optimum cable subscribers.⁶⁷ But other isolated efforts at transitioning to a paid-content system have also failed, even when it appeared that they might succeed.⁶⁸

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63. This is based on the premise that online readers are less captive than print readers and less likely to be influenced by advertisements. See Stephen Brook, *One Newspaper Reader Worth Up to 100 Online Users in Ad Revenue*, GUARDIAN, Feb. 27, 2006, <http://guardian.co.uk/media/2006/feb/27/pressandpublishing.newmedia>. The phenomenon is a matter of digital dimes versus print dollars.
64. Jonathan Rauch, *How to Save Newspapers—and Why*, NAT’L J., June 14, 2008, http://nationaljournal.com/njmagazine/st_20080614_5036.php.
65. John Koblin, *After Three Months, Only 35 Subscriptions for Newsday’s Web Site*, N.Y. OBSERVER, Jan. 26, 2010, <http://www.observer.com/2010/media/after-three-months-only-35-subscriptions-newsdays-web-site>.
66. *Id.*
67. Optimum and *Newsday* are both owned by Cablevision, and some saw the bundling of access as Cablevision “using *Newsday.com* as an enticement to Optimum subscribers to stick with Optimum, rather than move to the encroaching competitor Verizon.” See Christopher Twarowski & Michael Patrick Nelson, *How Cablevision Is Destroying Newsday*, LONG ISLAND PRESS, Mar. 4, 2010, <http://www.longislandpress.com/2010/03/04/how-cablevision-is-destroying-newsday>.
68. Jack Shafer discusses these failures—such as the *New York Times* giving up TimesSelect even though the service charging for online access to columnists and archives was bringing in \$10 million a year and the *Los Angeles Times* making free its CalendarLive section for arts, reviews, and listings—in an article arguing that all successful paid-content sites have at least one of three attributes: “1) They are so amazing as to be irreplaceable. 2) They are beautifully designed and executed and extremely easy to use. 3) They are stupendously authoritative.” Jack Shafer, *Not All Information Wants to Be Free*, SLATE, Feb. 18, 2009, <http://www.slate.com/id/2211486>. It remains to be seen whether the *San Francisco Chronicle*, which reportedly is considering a paywall, has enough of these attributes to successfully implement one without waiting for other general-interest newspapers to move to a fee-for-access model. Gerry Shih, *Chronicle to Charge for Online Content*, BAY CITIZEN, Apr. 1, 2011, <http://www.baycitizen.org/media/story/>

C. An Antitrust Exemption to Overcome the Press's Coordination Problem

The time may now be right for newspapers to start charging for access to online news.⁶⁹ But to do so the press will need to overcome its coordination problem. Collaboration among competitors would be a per se violation of the Sherman Act, and courts cannot ad hoc permit an antitrust violation merely because coordination provides a public benefit. Congress, however, can.

In its June 2010 hearing on what, if any, action the federal government should take to “support the reinvention of journalism,” the Federal Trade Commission noted that there was interest in exploring an antitrust exemption and that newspaper-industry supporters had testified that “[p]ublishers are rightly fearful that erecting paywalls will only be effective if it can be accomplished industry-wide, and they need an exemption to accomplish these reasonable policies.”⁷⁰ Newspaper executives and media critics have repeatedly lobbied for an exemption from the collusion prohibition,⁷¹ and some politicians have

chronicle-charge-online-content (reporting that the paper has told newsroom employees of plans to implement a hard paywall that would completely limit access to specific stories from nonsubscribers, unlike the *New York Times's* metered paywall). Based on the experience of *Newsday*, it seems unlikely that the *Chronicle* will be pleased with the results of going this road alone.

69. Vivian Schiller, former CEO of National Public Radio and head of NYTimes.com, referenced this phenomenon in an April 2011 speech at the 12th International Symposium on Online Journalism:

Back in 2007, that's a generation ago in Internet time, I was at NYTimes.com and a free content absolutist. That was the year my colleagues and I led the effort to end TimesSelect. . . . I was an anti-paywall zealot, and for good reason—based on the conditions of that time. But times have changed.

Jim Romenesko, *The Conditions Are Finally Right to Give Newspaper Paywalls a Fair Shake*, POYNTER, Apr. 4, 2011, <http://www.poynter.org/latest-news/romenesko/126462/the-conditions-are-finally-right-to-give-newspaper-paywalls-a-fair-shake>.

70. FTC STAFF DISCUSSION DRAFT, *supra* note 49, at 13–14. The Federal Trade Commission made no recommendations but mentioned the potential for an antitrust exemption in its discussion draft. Other potential proposals included in the draft were: passing federal hot news legislation, creating statutory limits to fair use, licensing the news, granting direct and indirect government subsidies, and modifying the tax code to encourage formation of new news organizations that would operate as nonprofits. *Id.* at 9–30.

71. See, e.g., Rutten, *supra* note 9. Much of this lobbying, aimed directly at the need to work on a paywall model, sounded like this from Brian Tierney, CEO of Philadelphia Newspapers LLC: “Newspaper publishers will need the flexibility to explore new approaches and innovative business models without the delay, burdens and uncertainty created by the competition laws. The enforcement of the antitrust laws has not yet caught up to current market realities.” Laurie Kellman, *New Antitrust Relief for Newspapers Opposed*, NEWSVINE, Apr. 31, 2009, http://www.newsvine.com/_news/2009/04/21/2713974-new-antitrust-relief-for-newspapers-opposed (quoting Tierney); see also David Lazarus, *Pay-to-Play Is One Way to Help Save Newspapers*, S.F. CHRON., Mar. 14, 2007, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/03/14/BUG4COKGDU1.DTL> (arguing that newspapers need “to stop giving away the

shown interest in an antitrust exemption.⁷² Examples of exemptions are pervasive across sectors of the U.S. economy.⁷³ Though there are no uniform characteristics among industries that have received antitrust exemptions, in several instances Congress passed an exemption in response to “a quondam concern for the economic weakness of isolated groups, such as farmers, laborers, or small businessmen.”⁷⁴ Clearly, the newspaper industry has become economically weak.⁷⁵ Further, there are similarities between the circumstances surrounding the need for a price-fixing and collusion exemption for newspapers and the circumstances surrounding previous antitrust exemptions limited to price-fixing or creating a cartel.⁷⁶ Before addressing those similarities, the next Part of this Comment articulates why it would be appropriate for Congress to provide such special interest legislation to newspapers.

store” and that to do so they will need an antitrust exemption allowing them to collaborate on an online paywall model). *But cf.* Downie & Schudson, *supra* note 41 (expressing their belief that an antitrust exemption is neither desirable nor necessary and would not do much to support independent reporting).

72. See Oliver Burkeman, *U.S. House Speaker Urges Easing Competition Laws for Newspapers*, GUARDIAN, Mar. 17, 2009, <http://www.guardian.co.uk/media/2009/mar/17/pelosi-newspapers-anti-trust-leniency> (quoting then-House Speaker Nancy Pelosi as saying that Congress “must ensure that our policies enable news organizations to survive and to engage in the newsgathering and analysis that the American people expect”). However, other politicians have not supported the proposal. See Kellman, *supra* note 71 (reporting that the Obama administration through an antitrust official at the U.S. Department of Justice opposed further relaxing of antitrust laws for media). But there seems to be confusion about what type of antitrust exemption politicians thought newspapers were looking for. Stories have focused on government responses to an exemption from media merger scrutiny; newspaper executives, however, have not been pushing for a merger exemption. *Cf.* Chad Eric Watt, *DMN Publisher Argues for Antitrust Exemption*, DALLAS BUS. J., May 6, 2009, <http://www.bizjournals.com/dallas/stories/2009/05/04/daily41.html> (reporting that *Dallas Morning News* publisher James Moroney had testified before the U.S. Senate subcommittee on Commerce, Science, and Transportation that newspapers need an antitrust exemption “to work together to find a way of making money putting the work of its journalists online”).
73. Industry-specific exemptions are discussed in Part III, *infra*.
74. LOUIS ALTMAN & MALLA POLLACK, 1 CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4.4 (4th ed. 2007).
75. See *supra* notes 15–43 and accompanying text.
76. See ABA SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW 39–43 (2007) (discussing, among other congressional actions that resulted in antitrust exemptions, the Anti-Hog Cholera Serum Act and the Television Program Improvements Act of 1990); see also *infra* Part III.B.1.

II. PUBLIC POLICY AND THE PRESS

[W]ere it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

—Thomas Jefferson⁷⁷

Newspapers' problem is not with their product, but with their lack of profit. Indeed, Americans are spending more time following the news than ever before.⁷⁸ Historically, newspapers have served as the agenda setter for public discourse and even today remain the primary publisher of new information. They also provide substantially more investigative and beat reporting than other media.⁷⁹ This was not always the case,⁸⁰ but even when the press

77. Letter From Thomas Jefferson to Edward Carrington (Jan. 16, 1787), available at <http://www.let.rug.nl/usa/P/tj3/writings/brf/jefl52.htm>.

78. See *supra* note 27.

79. See *infra* notes 98, 155–157. See also *Who Killed the Newspaper?*, ECONOMIST, Aug. 24, 2006, <http://www.economist.com/node/7830218> (“At their best, newspapers hold governments and companies to account. They usually set the news agenda for the rest of the media. But in the rich world newspapers are now an endangered species.”).

80. According to *Slate's* media critic Jack Shafer:

When Thomas Jefferson said he preferred newspapers without government to government without newspapers, he wasn't referring to anything we'd recognize as our local paper, says Stephen Bates, professor of journalism at the University of Nevada–Las Vegas and *Slate* contributor. The pre-modern press was captive of political parties, and their pages were filled with partisan fodder. What Jefferson was applauding was the newspapers' capacity as a forum for debate (and sometimes slander), not exposé.

Jack Shafer, *Democracy's Cheat Sheet?*, SLATE, Mar. 27, 2009, <http://www.slate.com/id/2214724>. Scholars put the emergence of the professional journalist around the late 1800s. See WILLIAM A. HACHTEN, *THE TROUBLES OF JOURNALISM* 44 (3d ed. 2005) (pinpointing Adolph Ochs's 1896 purchase of the *New York Times* as “the real beginning of modern serious journalism”); MICHAEL SCHUDSON, *DISCOVERING THE NEWS* 65–71 (1978) (comparing the “old reporter,” who is a “drunk” and a “hack,” to the “new reporter,” who is “energetic” and “sober” and sees himself as a scientist “uncovering the economic and political facts of industrial life more boldly, more clearly, and more ‘realistically’ than anyone had done before”); see also FRANK LUTHER MOTT, *AMERICAN JOURNALISM: A HISTORY: 1690–1960*, 411–737 (3d ed. 1962) (detailing the rise of the independent press following the Civil War and the establishment of the then-modern newspaper beginning around the start of World War I). Two early models emerged for newspapering: journalism as entertainment, as embodied by Joseph Pulitzer's *New York World*, and journalism as information, as demonstrated by Ochs's *New York Times*. SCHUDSON, *supra*, at 88–120. The two biggest changes were in how professional journalists saw themselves—the emergence of a quasi-public servant self-perception and the rise of objective factfinding—and in the expense of publishing a paper. HACHTEN, *supra*, at 44.

cared more about advancing publishers' interests than serving the public interest,⁸¹ newspapers still were recognized as a vital part of American democratic society. An independent and free press has always been the primary vehicle for informing Americans about their communities and acting as a watchdog on government officials.⁸² As Justice Black wrote for the Court in 1966:

The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.⁸³

The Press Clause, however, is a debated area of the law, and it is unclear what the founders meant by “freedom of speech, or of the press.”⁸⁴ Whether this designation conferred special rights and privileges on the institutional press has been debated at the highest level of American jurisprudence,⁸⁵ but its resolution is not critical to whether Congress should pass an antitrust exemption favoring the newspaper industry.

Privileged or not, newspapers continue to serve a critical role in reducing the costs of monitoring elected officials and educating citizens about their

81. See generally MOTT, *supra* note 80; see also MARK WAHLGREN SUMMERS, *THE PRESS GANG: NEWSPAPER POLITICS, 1865–1878* (1994) (identifying newspapers during the post-war period as organs of the partisan politics supported by their publishers); W.A. SWANBERG, *CITIZEN HEARST* (1961) (demonstrating how William Randolph Hearst used his newspaper ownership to push his political interests and increase his personal power).

82. The framers of the Constitution sought to protect both the flow of information to the public and the existence of an institution that would act as an outside check on government actors. See *infra* note 83; see also Nick Gamse, *Legal Remedies for Saving Public Interest Journalism in America*, 105 NW. U. L. REV. 329, 336–39 (2011) (discussing the newspaper industry's watchdog role and U.S. Supreme Court jurisprudence recognizing the press's role in encouraging political participation).

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

84. See generally Eugene Volokh, *Freedom of Speech and of the Press*, in *THE HERITAGE GUIDE TO THE CONSTITUTION* 311–15 (Edwin Meese III et al. eds., 2005).

85. Stewart, *supra* note 83, at 633 (“The publishing business is, in short, the only organized private business that is given explicit constitutional protection.”). *But cf.* *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 798–801 (1978) (noting “two fundamental difficulties” with such a reading of the Press Clause: First, the history of the clause does not suggest that the authors contemplated giving the press special privileges, and second, it would be practically difficult to define the group that deserved such “special status”).

communities.⁸⁶ According to Justice Douglas, this service, at a minimum, explains the press's presence in the Constitution:

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to *bring fulfillment to the public's right to know*. The right to know is crucial to the governing powers of the people, to paraphrase Alexander Meiklejohn. Knowledge is essential to informed decisions.⁸⁷

Some argue that online media can take the institutional press's place,⁸⁸ but, for a variety of reasons discussed in this Part, the information coming from online media only can add to, but not substitute for, the traditional press's contributions to the marketplace of information and ideas.⁸⁹

The internet has proven very good at providing opinions, but it has generally not fulfilled the role that Justice Douglas saw for the press. He was concerned with well-sourced and sifted knowledge, which online media (new media) does not generate as efficiently as traditional media, particularly newspapers (old media), does. Such information comes primarily from the nation's corps of professional newsgatherers, which likely will continue to

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

87. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) (emphasis added).

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

89. This marketplace of ideas is a concept that goes back to colonial America and "has been called 'one of the earliest and most influential contributions to First Amendment doctrine' and 'one of the basic tenets of our national communications policy.'" Allusions to it appear in 126 Supreme Court opinions and in 87 policy documents of the Federal Communications Commission." Matthew Gentzkow & Jesse M. Shapiro, *Competition and Truth in the Market for News*, 22 J. ECON. PERSP. 133, 133–34 (2008) (arguing that the relevant definition of economic competition in media markets differs from traditional economic competition and that the value of government intervention in enforcing competition is "probably limited").

shrink as the newspaper industry declines.⁹⁰ Even with the addition of online journalists, the national newsgathering rolls have continued to wither. In 2007, the first year that the American Society of Newspaper Editors counted online journalists, there were 57,000 “newsroom” employees. In 2009 that number fell to 46,700.⁹¹ As this national corps of professional newsgatherers continues to shrivel, American democratic society will suffer.

The American press, as Lee Bollinger notes, is one of the United States’s greatest accomplishments and the journalistic envy of the world.⁹² But Bollinger, a First Amendment scholar and, as president of Columbia University, member of the Pulitzer Prize Board, also warns: “How American journalism can sustain its autonomy, sense of mission, and a workable financial model has become one of the urgent questions of our time.”⁹³

90. Leonard Downie, Jr., and Michael Schudson detailed the decline and its consequences in a lengthy proposal for rebuilding American journalism:

In just a few years’ time, many newspapers cut their reporting staffs by half and significantly reduced their news coverage. The *Baltimore Sun’s* newsroom shrank to about 150 journalists from more than 400; the *Los Angeles Times’s* to fewer than 600 journalists from more than 1,100. Overall, according to various studies, the number of newspaper editorial employees, which had grown from about 40,000 in 1971 to more than 60,000 in 1992, had fallen back to around 40,000 in 2009. In most cities, fewer newspaper journalists were reporting on city halls, schools, social welfare, life in the suburbs, local business, culture, the arts, science, or the environment, and fewer were assigned to investigative reporting. Most large newspapers eliminated foreign correspondents and many of their correspondents in Washington. The number of newspaper reporters covering state capitals full-time fell from 524 in 2003 to 355 at the beginning of 2009. A large share of newspaper reporting of government, economic activity, and quality of life simply disappeared.

Downie & Schudson, *supra* note 41, at 4.

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

92. LEE C. BOLLINGER, *UNINHIBITED, ROBUST, AND WIDE-OPEN 1–2* (2010).

93. *Id.* at 2.

A. Old Media vs. New Media

Though many major newspapers have lowered their standards on newsworthiness and the quality of coverage in recent years,⁹⁴ they still serve the same important public interest, albeit a bit less frequently. The more that public interest is served, the more the behavior serving it should be fostered. Though journalists at times have been criticized for an unnecessary sense of self-importance,⁹⁵ much of what newspapers produce can be thought of as a public good. Investigative and beat reporting generates nonrivalrous⁹⁶ and nonexcludable⁹⁷ information important to community involvement. This information, which primarily comes from newspapers,⁹⁸ benefits the public. However, as is the case with many public goods, gathering quality information is something only a few beneficiaries would personally pay for if they could obtain it elsewhere for free. Thus, the case for government subsidies for newspapers has been likened to the public policy behind funding vaccine programs: “The value you place on one dose of a vaccine (you won’t get sick and die) is lower than the value society places on the vaccine (you won’t make everyone else die either).

94. See Anthony L. Fargo & Laurence B. Alexander, *Testing the Boundaries of the First Amendment Press Clause: A Proposal for Protecting the Media From Newsgathering Torts*, 32 HARV. J.L. & PUB. POLY 1093, 1134 (2009) (noting “the increased use of tabloid tactics by ‘serious’ news organizations”).

95. I speak personally, having spent five years as a full-time newspaper reporter. See also Jon Katz, *The Morals Squad*, N.Y. MAG., Apr. 11, 1994, at 10 (attacking “journalistic notions of self-importance”).

96. New information is nonrivalrous because it can be consumed simultaneously by an infinite number of people. See ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 120 (4th ed. 2004).

97. Once uncovered, new information becomes public knowledge; consumers can only be excluded from access to the expression of that information but not from the benefits of the information. See *id.*

98. The Federal Communications Commission (FCC) has recognized that newspapers and television are more important than other forms of media, particularly the internet, in the dissemination of new news. In a 2008 report, the FCC stated that

there is relatively unanimous support for the position that consumers continue predominantly to get their local news from daily newspapers and broadcast television. Data shows that consumers rely mostly on newspapers and television for news and information. The record demonstrates that traditional media still represent the most important source for local news for the majority of individuals.

In re 2006 Quadrennial Regulatory Review, 23 FCC Rcd. 2010, 2042 (2008); see also Benjamin L. Cardin, *A Plan to Save Our Free Press*, WASH. POST, Apr. 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/02/AR2009040203310.html> (noting that a typical metro newspaper runs seventy stories a day while a half-hour TV news program includes only ten to twelve).

The government can and should close the gap between the individual value and the social value.”⁹⁹

Of course, there are news professionals and industry watchers who would rather watch institutional journalism burn and see the government support whatever rises out of the ashes.¹⁰⁰ “Newspapers have been printing money for 100+ years, and if the market is now putting an end to that, such is life,” Nicholas Carlson wrote for the internet news start-up *Business Insider*.¹⁰¹ Carlson’s nine reasons why a “bailout is a terrible idea” included “it’s bad to reward outdated businesses based on outdated tech” and “just because newspapers go away doesn’t mean sources will.” Yet *Business Insider* is like most online-only news sites: It generally does not provide original reporting. Instead, most online news sites, particularly aggregators and blogs, heavily rely on content from old media.¹⁰² As Maurice Stucke and Allen Grunes put it:

New technologies are bringing dynamic innovations, but the available evidence still points to the continuing importance of traditional media, especially newspapers and broadcast television, to the marketplace of ideas. . . . The workhorse for gathering the news and investigating stories, as the FCC recently found from its available data, remains the local daily newspaper, followed by the local television station. The record before the FCC demonstrated that “traditional media still represent the most important source for local news for the majority of individuals.”¹⁰³

Thus, lost from the marketplace would be the primary producer of the type of independent information that the Constitution sought to protect.¹⁰⁴

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99. Conor Clarke, *Why We Shouldn't Let Newspapers Die*, ATLANTIC, Apr. 6, 2009, <http://www.theatlantic.com/politics/archive/2009/04/why-we-shouldnt-let-newspapers-die/7260>.
100. Jeff Jarvis, *FTC Protects Journalism's Past*, BUZZMACHINE (May 29, 2010, 11:10 AM), <http://www.buzzmachine.com/2010/05/29/ftc-protects-journalisms-past>.
101. Nicholas Carlson, *Obnoxious Newspaper Bailout Begins*, BUS. INSIDER, May 12, 2009, <http://www.businessinsider.com/outrageous-newspaper-bailout-begins-2009-5>.
102. In stark contrast, John Marshall’s *Talking Points Memo*, a liberal blog with a small reporting staff, broke and continued to push forward the story about U.S. attorneys being fired for political reasons. See Paul McLeary, *How TalkingPointsMemo Beat the Big Boys on the U.S. Attorney Story*, COLUM. JOURNALISM REV., Mar. 15, 2007, http://www.cjr.org/behind_the_news/how_talkingpointsmemo_beat_the.php.
103. Maurice E. Stucke & Allen P. Grunes, *Toward a Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies That Support the Media Sector's Unique Role in Our Democracy*, 42 CONN. L. REV. 101, 115–16 (2009) [hereinafter Stucke & Grunes, *Better Competition Policy*] (recommending that Congress lead the way in forming a national media policy, that government find ways to provide media access, and that antitrust analysis be expanded to include anticompetitive effects on the marketplace of ideas).
104. See *supra* notes 82–85. It is possible that online-only news sites and nonprofit para-news organizations can rise to greater prominence and carry the torch, but there has been little

The symptoms would show in primarily two forms: professional newsgatherers losing their jobs and the consolidation and contraction of newspapers that could employ them.

1. The End of Professional Newsgathering?

It is difficult to speak in generalities because the internet truly is a limitless medium that has resulted in an immense range of not only online news interests but also online news business models.¹⁰⁵ Leaders in the online-only news business include the *Huffington Post* and *Daily Beast*, general interest news magazines operating on the twenty-four-hour news cycle. Their strengths, as is the case with many successful start-up online news sites, are entertainment, national politics, and commentary. These interests have served them well, both driving readership and building up editorial ranks.¹⁰⁶ But the sites do little-to-no investigative or local beat reporting. A few nonprofit para-news organizations¹⁰⁷ have stepped in to supplement newspapers' investigative reporting, which has dropped considerably as budgets have plummeted. The Center for Investigative Reporting and Pro Publica continue to add staff,¹⁰⁸ and Pro Publica has already received two Pulitzer Prizes, one of which they shared with the *New York Times*.¹⁰⁹ But investigative newsrooms like Pro Publica require substantial

evidence that they will be able to. At best, the future of newsgathering would be uncertain, and that poses too big a risk for the vitality of American democratic society.

105. See *supra* note 28.

106. See Howard Kurtz, *Huffington Snags N.Y. Times Star*, WASH. POST, Sept. 21, 2010, http://voices.washingtonpost.com/howard-kurtz/2010/09/huffington_snags_ny_times_star.html. Two weeks later, Kurtz, "a Washington media institution" in his own right, left the *Washington Post* for the upstart online publication the *Daily Beast*. Keach Hagey & Patrick Gavin, *Howard Kurtz Leaves Washington Post for Daily Beast*, POLITICO, Oct. 5, 2010, <http://www.politico.com/news/stories/1010/43166.html>.

107. For the purposes of this Comment, the phrase "para-news organizations" refers to organizations that independently gather new information but typically publish in cooperation with a traditional mainstream media organization.

108. Tazine Vega, *Pooling Resources, Two Newsrooms Merge*, N.Y. TIMES, Oct. 18, 2010, <http://www.nytimes.com/2010/10/19/business/media/19nonprofit.html> (reporting that the Center for Public Integrity had absorbed the HuffPo Investigative Fund, bringing the center's headcount to more than fifty and "making it one of the largest nonprofit investigative newsrooms in the country").

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

philanthropy to get started. Pro Publica has thirty-two full-time journalists, an editor-in-chief who earned \$570,000 in 2008,¹¹⁰ and an annual operating budget of about \$9 million¹¹¹—second in the nonprofit news world only to National Public Radio. Some newspapers, like the *Christian Science Monitor* and the *Seattle Post-Intelligencer*, have made the transition to online only, thereby preserving at least a leaner version of their former selves.¹¹² However, transitioning to online only is no panacea because revenue from online ads still does not cover expenses for operating an online-only newspaper.¹¹³ One promising model to offset losses in local coverage from newspapers is the online-only local publication that is subsidized by civically engaged philanthropists, like *Voice of San Diego*, a nonprofit with a dozen reporters.¹¹⁴

Indeed, online news alternatives are sprouting up rapidly, some on soil that had already proven dry for a predecessor,¹¹⁵ and many show promise. But

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110. See David Carr, *Nonprofit Journalism: Not Necessarily on the Cheap*, N.Y. TIMES MEDIA DECODER (Sept. 30, 2009, 8:28 AM), <http://mediadecoder.blogs.nytimes.com/2009/09/30/nonprofit-journalism-not-necessarily-on-the-cheap>.
111. Alan Mutter, *Size Matters in Non-Profit News*, REFLECTIONS OF A NEWSOSAUR (Sept. 29, 2009, 4:00 AM), <http://newsosaur.blogspot.com/2009/09/size-matters-in-non-profit-news.html>.
112. The *Christian Science Monitor* has run at a loss for years and continues to be subsidized by the Church of Christ, Scientist. See David Cook, *Monitor Shifts From Print to Web-Based Strategy*, CHRISTIAN SCIENCE MONITOR, Oct. 29, 2008, <http://www.csmonitor.com/USA/2008/1029/p25s01-usgn.html>. The *Seattle Post-Intelligencer* is still publishing online almost three years after ending its print edition. But to remain viable, the newspaper had to cut its staff of 165 to about 20 and now relies on partnering news organizations, like KOMO TV, for much of its local news. See William Yardley & Richard Pérez-Peña, *Seattle Paper Shifts Entirely to the Web*, N.Y. TIMES, Mar. 16, 2009, <http://www.nytimes.com/2009/03/17/business/media/17paper.html>; see also SEATTLE PI, <http://www.seattlepi.com>.
113. See David M. Schizer, *Subsidizing the Press*, 3 J. LEGAL ANALYSIS 1, 12 (2011) (“Although print editions are more expensive to produce, they generate 90% of the industry’s revenue. Needless to say, cutting costs by 50% is still a losing proposition if accompanied by a 90% decline in revenue.”).
114. Many of these nonprofit news outlets joined forces to create the Investigative News Network (INN), which aims to leverage investigative reporting “by maximizing revenue streams for sustainability, incubating and fostering new non-profit newsrooms, providing opportunities for editorial collaboration, and creating distribution channels to reach the widest audience possible.” INVESTIGATIVE NEWS NETWORK, <http://investigativenetwork.org> (last visited Oct. 6, 2011). Eight months after forming, the INN bore its first fruit, a series on college campus sexual assault. See generally *Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY, http://www.publicintegrity.org/investigations/campus_assault/about (last visited Oct. 6, 2011).
115. For example, in 2009, the nonprofit news site *Chi-Town Daily News* shut down after its founder failed to raise the full \$300,000 needed to cover an annual budget that included five reporters. During four years, the *Daily News’s* founder managed to raise only \$600,000 total. Mutter, *supra* note 111. That same year, another nonprofit news organization, the Chicago News Cooperative, formed. Primarily funded by the John D. and Catherine T. MacArthur Foundation, the Chicago News Coop employs former stars from the Tribune Co. and disseminates its coverage beyond Chicago via a partnership with the *New York Times*. *Chicago*

even with the success of investigative para-news organizations like Pro Publica and local online-only newspapers like *Voice of San Diego*, it is not clear that online news outlets can offset newsgathering losses in the newspaper industry. Even in the nation's capital, successful online news outlets like *Daily Beast* and *Politico*¹¹⁶ fall far short of replacing the massive losses to the Washington press corps that have resulted from Washington bureau closures and consolidation.¹¹⁷ Some commentators point to the information freely flowing to the internet via blogs, Twitter, cell phone cameras, etc., as something that can be cheaply aggregated to allow for crowd-sourced newsgathering. That proved beneficial during the Iranian election protests of 2009.¹¹⁸ Yet, while it is possible that a decade from now this model could be refined to become a good source of information, the future of online-only newsgathering remains unclear. Further, finding value in that aggregated information would still require individuals to sift through lots of material and thus would not account for the press's role of reducing the time and costs of monitoring government and discerning what information is valuable.

As Leonard Downie, Jr., and Michael Schudson noted:

Accountability journalism, particularly local accountability journalism, is especially threatened by the economic troubles that have diminished so many newspapers. So much of the news that people find, whether on television or radio or the Internet, still originates with newspaper reporting. And newspapers are the source of most local news reporting, which is why it is even more endangered than national, international or investigative reporting that might be provided by other sources.¹¹⁹

Report, N.Y. TIMES, <http://nytimes.com/top/news/national/usstatesterritoriesandpossessions/illinois/chicago-news-cooperative/index.html> (last visited Oct. 6, 2011).

116. An anomaly, *Politico* started as online only, became a must-read staffed with defectors from the best papers in the country, and later added a profitable print edition.
117. See Richard Pérez-Peña, *Big News in Washington, but Far Fewer Cover It*, N.Y. TIMES, Dec. 18, 2008, <http://www.nytimes.com/2008/12/18/business/worldbusiness/18iht-18bureaus.18782976.html> (noting that the *San Diego Union-Tribune*, like many smaller big-city metros, closed a Washington bureau that only three years before included eleven people and garnered a Pulitzer Prize for uncovering corruption by a San Diego-area Congressman). Said a former Washington bureau chief for another newspaper's defunct bureau: "I think the cop is leaving the beat here, and I think it's a terrible loss for citizens. But I can't argue with the business decision that Cox has made, at a time when papers can't even find the resources to cover the local zoning board." *Id.*
118. See Jared Keller, *Evaluating Iran's Twitter Revolution*, ATLANTIC, June 18, 2010, <http://www.theatlantic.com/technology/archive/2010/06/evaluating-irans-twitter-revolution/58337>.
119. Downie & Schudson, *supra* note 41.

Because newsgatherers are so important to American democratic society, and because newspapers are the primary source of newsgathering and online news organizations are unlikely to fill the gap left by press reductions, government action is both appropriate and necessary.

2. Newspaper Ownership Consolidation and Contraction¹²⁰

While contributions to the marketplace of information and ideas will be lost if newspapers disappear altogether and take with them newsgathering positions, a more immediate concern is that media consolidation and newspaper contraction will lead to a loss in editorial diversity and a rise in market dominance by a few newspaper chains.¹²¹ Stucke and Grunes, former U.S. Justice Department antitrust lawyers, believe that consolidation will place too much market power in too few hands and will result in three primary threats to the media's Fourth Estate role: (1) higher prices, (2) reduced access to information and viewpoints, and (3) undesirable media self-censorship.¹²²

This is Justice Douglas's "Curse of Bigness"¹²³ as applied to the newspaper industry. Here antitrust and First Amendment goals substantially overlap. The

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

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

122. See Stucke & Grunes, *Better Competition Policy*, *supra* note 103, at 103, 118–19; see also Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249, 283–85 (2001) [hereinafter Stucke & Grunes, *Marketplace of Ideas*].

123. See *United States v. Columbia Steel Co.*, 334 U.S. 495, 535–36 (1948) (Douglas, J., dissenting) (defining the "Curse of Bigness," and stating that the Sherman Act is "founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it").

Justice Department clearly has seen media concentration as a problem,¹²⁴ as have scholars. In arguing that media ownership should be subjected to additional regulations to slow the tide of contraction and consolidation, C. Edwin Baker wrote, “The general democratic goal is increased pluralism of sources and viewpoint as well as of content or subject categories.”¹²⁵ Almost seventy years ago, Judge Learned Hand voiced a similar sentiment about the newspaper industry in an oft-cited opinion:

[T]hat industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.¹²⁶

Judge Hand went on to note the substantial role of the newsgatherer in shaping the news and opined that “two accounts of the same event will never be the same.”¹²⁷

There are questions about just how bad the “bigness” of newspaper chains is for the public interest. While Daniel Ho and Kevin Quinn found, in a limited empirical study of big city newspapers, that consolidation of ownership did not substantially threaten viewpoint diversity, they found that the contraction that resulted from the merger of the *Atlanta Constitution* and the *Atlanta*

124. In a 2006 Competitive Impact Statement, the Justice Department alleged that a merger of the McClatchy Company and Knight Ridder, Inc. would result in antitrust violations in the Minneapolis–St. Paul region, where their papers competed. The Justice Department claimed:

[T]he combination of these two daily newspapers would substantially reduce or eliminate competition for readers of local daily newspapers and newspaper readers in the Minneapolis/St. Paul metropolitan area would be likely to pay higher prices and to receive lower levels of quality and service. In addition, the combination of these two daily newspapers would substantially reduce or eliminate competition for advertising in local daily newspapers in the Minneapolis/St. Paul metropolitan area.

Clay Calvert, *Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis*, 40 MCGEORGE L. REV. 661, 678 (2009).

125. C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 919 (2002). This article was published before the creation of YouTube, Twitter, or Facebook and before citizen journalism and blogs like the *Huffington Post* had taken off. Still, as discussed throughout this Comment, nontraditional online media do not generate the same positive externalities nor make the same contributions of new information and cannot supplant newspapers’ role in democratic society.

126. *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

127. *Id.*

Journal harmed viewpoint diversity.¹²⁸ The current crisis in the news industry is more like the contraction of the *Journal* and *Constitution* into the *Atlanta Journal-Constitution* than it is like the ownership consolidation that accompanied the New York Times Co. buying the *Boston Globe*.¹²⁹ This is particularly the case with the acquisition of all but the largest newspapers. When, for example, the Tribune Co. acquires a major metropolitan newspaper, teams of newsgatherers and editorial voices might disappear from the national landscape as Washington offices and foreign bureaus are restructured and combined.¹³⁰ Consolidation of ownership can pose a similar problem when commonly owned newspapers across a region share editorial resources, further reducing the ranks of professional newsgatherers.¹³¹

Online media's multitude of new voices likely will not offset those losses in editorial diversity. If anything, it is, quite counterintuitively, reducing viewpoint exposure. While the internet has given every pundit a platform and a printing press, it has also made it much easier for individuals to avoid viewpoints they do not share. In *Republic.com 2.0*, constitutional scholar and media watcher Cass Sunstein identifies the personalization of news and individualized niches on the internet as a threat to American democracy: "Democracy does best with what James Madison called a 'yielding and accommodating spirit,' and that spirit is at risk whenever people sort themselves into enclaves in which their own views and commitments are constantly reaffirmed. . . . [S]uch sorting should not be identified with freedom, and much less with democratic

128. Daniel E. Ho & Kevin M. Quinn, *Viewpoint Diversity and Media Consolidation: An Empirical Study*, 61 STAN. L. REV. 781, 786 (2009) ("There is no evidence of convergence—i.e., a decrease in the difference of political viewpoints—between newspapers already owned by the acquiring party and the *Los Angeles Times*, the *Arizona Republic*, and the *San Francisco Chronicle*. Second, for two cases of consolidation, we detect marked shifts in editorial viewpoints that are consistent with convergence and, counterintuitively, divergence. Under common ownership (but with separate editorial boards), the *Atlanta Journal* and *Atlanta Constitution* diverged sharply in editorial viewpoints prior to the merger of their editorial boards. This provides some evidence for monopoly diversification. Yet upon merging, the editorial viewpoint of the *Atlanta Journal-Constitution* fell squarely between the positions of its parent papers, providing strong evidence for convergence. Lastly, while ideologically indistinguishable preacquisition, after consolidation of ownership the *New York Times* and the *Boston Globe* separated sharply into liberal and (relatively) centrist newspapers, respectively, suggesting diversification instead of convergence.").

129. *See id.*

130. This was the case when the Tribune Co., owner of the *Chicago Tribune*, *Los Angeles Times*, and *Baltimore Sun*, among others, shuttered each paper's Washington bureau, totaling about seventy reporters and editors, and left in place a combined bureau of thirty-two. *See* Pérez-Peña, *supra* note 112.

131. *See infra* Part IV for further discussion.

self-government.”¹³² Indeed, unlike niche news sites and many blogs, which often preach to the choir, newspapers at least strive to be objective and unbiased in their newsgathering and reporting. Furthermore, by presenting a range of voices on their opinion pages and in reported stories, they expose readers to a diverse range of viewpoints.¹³³ Such diversity is lost as newspapers reduce reporting staff or permanently stop the presses. The case for government intervention is not about traditional media subjugating new media; it is about saving traditional media, preserving thereby an essential contributor to American democratic society. The policy behind antitrust law supports the preservation of multiple players in the newspaper market and the prevention of market dominance by the few that survive these tough times for the newspaper business.

B. Precedent for Congressional Intervention

1. The Post Office Act of 1792

The Post Office Act of 1792 provides a strong precedent for congressional intervention to support the newspaper industry. With this Act, Congress set a nominal fee for the dissemination of newspapers through the mail.¹³⁴ Congress did not limit this subsidy to a chosen few newspapers; regardless of weight, any newspaper would be delivered for one cent if traveling less than one hundred miles and for one and a half cents if traveling farther. This subsidy meant that in 1794, when newspapers constituted 70 percent of the weight of mail, “newspapers generated a mere 3 percent of postal revenue.”¹³⁵ Four decades later, newspapers contributed only 15 percent of postal revenue while accounting for 95 percent of total weight.¹³⁶ No other class of mail enjoyed such basement rates. In fact, because Congress wanted the Postal Service to be independently funded, the Postal Service had to raise letter rates to

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

133. To be sure, some papers do a better job of this than others.

134. RICHARD JOHNS, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* 36 (1998).

135. *Id.* at 38.

136. *Id.*

compensate for the reduced newspaper rate.¹³⁷ This underwriting of the newspaper subsidy by letter writers led one Congregationalist minister to fume: “There does not appear to have been a man in Congress who suspected that newspapers had not a divine right to some exclusive privilege at the post-office.”¹³⁸ Congress was motivated, at least in part, by a sense of responsibility to ensure that citizens had access to information that would aid their political decisionmaking.¹³⁹ The newspaper postal rate has increased over the years but still favors the press.¹⁴⁰ Additionally, Congress never placed upon newspapers the kind of special tax that English papers were required to pay.¹⁴¹ Minnesota tried in 1967 to impose a tax on paper and ink products used by newspapers, but the U.S. Supreme Court struck it down for violating the First Amendment.¹⁴²

2. Twentieth-Century Efforts to Strengthen Media

In the mid-twentieth century, Congress passed two pieces of legislation to support public policy goals of ensuring access to information that would aid citizens in political decisionmaking: the Public Broadcasting Act of 1967 (PBA),¹⁴³ which created the Corporation for Public Broadcasting, and the Newspaper Preservation Act of 1970 (NPA).¹⁴⁴ The PBA and NPA both were “designed to promote, preserve, or otherwise prop up a multiplicity of voices/views and a desired quality of content.”¹⁴⁵ The PBA did so by establishing a support system for publicly owned radio and television stations (later known as the affiliates of National Public Radio and Public Broadcasting Service) to

137. *Id.* at 39–40.

138. *Id.*

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

140. Whether people still receive the news via postal mail as opposed to email is a different matter. See U.S. POSTAL SERV., THE HOUSEHOLD DIARY STUDY MAIL USE & ATTITUDES IN FY 2008, http://about.usps.com/studying-americans-mail-use/household-diary/usps-hds-fy08.htm#_Toc234218537 (last visited Nov. 14, 2011) (reporting that between 1987 and 2008, the average number of newspapers received per household by postal mail each week declined from 0.6 to 0.2, with about half being daily newspapers).

141. CULVER H. SMITH, *THE PRESS, POLITICS, AND PATRONAGE: THE AMERICAN GOVERNMENT'S USE OF NEWSPAPERS 1789–1875*, at 8 (1977).

142. The Court was worried that taxes, or the threat of taxes, would chill the press. “[E]ven without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for the threat of sanctions may deter the exercise of First Amendment rights almost as potently as the actual application of sanctions.” *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 103 U.S. 575, 588 (1983).

143. 47 U.S.C. § 396 (2006).

144. 15 U.S.C. §§ 1801–1804 (2006).

145. Calvert, *supra* note 124, at 668.

improve the quality and quantity of educational and cultural news programs available to the public.¹⁴⁶ In 2010, the Corporation for Public Broadcasting received \$420 million in federal funding.¹⁴⁷

While the PBA was passed to increase the availability of information, the NPA was passed to *preserve* the level of information already being generated (hence the name Newspaper Preservation Act). The NPA valued editorial diversity—more voices contributing to the marketplace of ideas—over economic efficiency. In seeking to preserve two-newspaper towns, the NPA gave qualifying newspaper competitors a broad antitrust exemption to enter into a joint operating agreement and combine business operations, thereby reducing costs and boosting profits.¹⁴⁸ The NPA permitted competing newspapers to share printing, delivery, and advertising employees and expenses, but required them to maintain separate editorial staff. Congress's stated reason, via the House Report, was a concern that newspapers were losing economic viability and without government aid would continue to permanently stop their presses, resulting in a loss of editorial diversity and information availability.¹⁴⁹ The opening language of the NPA makes a similar appeal to "the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States."¹⁵⁰ The public interest that the Act refers to is the same one American leaders have recognized since the founding of the United States.¹⁵¹

C. Congress Should Act to Support Old Media Anew

Despite the arrival of online media, newspapers remain the gold standard and it is unlikely that something new online can measure up.¹⁵² Like at the time of the passage of the PBA, there is a need to shore up the availability of information that contributes to the American cultural and political

146. See S. REP. NO. 90-222, at 2 (1967).

147. CORP. FOR PUB. BROADCASTING, FY 2010 OPERATING BUDGET, http://www.cpb.org/about/cpb/leadership/board/resolutions/090915_fy10OperatingBudget.pdf (last visited Oct. 6, 2011).

148. See 15 U.S.C. §§ 1801–1804.

149. See H.R. REP. NO. 91-1193, at 1 (1970).

150. 15 U.S.C. § 1801 ("In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.").

151. See *supra* notes 82–85.

152. See *supra* Part II.A.

conversation.¹⁵³ And as was the case when Congress passed the NPA, the newspaper business is in crisis and, without government assistance, likely will continue to dwindle, leading to what the NPA House Report said would be the inadvisable loss “to the public of diverse and independent editorial viewpoints and news policies.”¹⁵⁴

Regardless of whether the Press Clause granted newspapers special rights and privileges obligating others to act (a positive right) or whether its benefit is limited to protecting the press (a negative right), there is a constitutional interest in slowing or even reversing the decline of the newspaper industry. The First Amendment is premised upon the belief that among the fruits of the freedom of speech and of the press are an engaged and dynamic civic conversation that flows from the outpouring of information and not just opinions. Editorial diversity is favored because it increases the representation of voices and the range of new information being contributed to the marketplace by newsgatherers. Editorial and, in turn, viewpoint diversity are important because freedom of the press has never truly extended to everyone. “Freedom of the press is limited to those who own one,” as the *New Yorker* writer A.J. Liebling famously remarked.¹⁵⁵ Online media has changed the paradigm. The digital age has provided a microphone for anyone with an internet connection, but it is less clear that an individual’s voice will be heard.¹⁵⁶ Traditional media, particularly newspapers, “still supply an invaluable and unequalled layer of accreditation, fact checking, agenda setting, and wide-ranging and systematic investigative reporting, while reaching a mass audience and

153. As discussed in notes 98–103, *supra*, and accompanying text, the wealth of new content generated by nonprofessional journalists online is based overwhelmingly on underlying information that mainstream media outlets, primarily newspapers, have invested time and money to gather, edit, publish, and disseminate.

154. H.R. REP. NO. 91-1193, at 1.

155. Noam Cohen, *Surviving Without Newspapers*, N.Y. TIMES, June 6, 2009, <http://www.nytimes.com/2009/06/07/weekinreview/07cohen.html>. Similarly, James A. Barron wrote in 1967 of the need to recognize a new First Amendment right: access to the press. See James A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967). As Neil Weinstock Netanel has noted, Barron’s egalitarian principle may be best met today by government ensuring “meaningful opportunities to bypass the mass media.” Neil Weinstock Netanel, *New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age*, 76 GEO. WASH. L. REV. 952, 953 (2008). However, Netanel was aware of the downsides of relying entirely on citizen journalists and cyberspeakers for the same contributions that professional journalists have traditionally made. He argued, then, that the preservation of traditional media is important—in part because its “nonegalitarian expressive power” enables it to set a public agenda, act as a watchdog, and represent public opinion—as long as forums for unorthodox expression exist too. *Id.* at 958, 963–64. “[D]espite the mass media’s painfully evident flaws, its fourth estate function remains indispensable even in the age of networked peer communication.” *Id.* at 963.

156. See *supra* note 132 and accompanying text.

representing public opinion before powerful decisionmakers.”¹⁵⁷ But traditional media is in an unprecedented state of decline, and the future of professional newsgatherers, who are primarily supplied by print newspapers, is severely threatened. Because of the important role professional newsgatherers play in American democratic society, Congress can and should act to aid the newspaper industry. For the reasons discussed in Parts III and IV, this assistance should come in the form of a narrow and temporary exemption from antitrust’s collusion and price-fixing prohibition.

III. ANTITRUST LAW AND THE NEWSPAPER INDUSTRY

Antitrust laws are, as the Supreme Court has said, “the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”¹⁵⁸ Antitrust laws protect free enterprise and Court, “The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts . . . ‘Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.’”¹⁵⁹ This faith includes belief that promoting competition benefits society by dispersing market power, which in turn improves economic efficiency and forces businesses to compete on matters of interest to consumers like price, innovation, and product quality.¹⁶⁰ Particularly relevant for the

157. Netanel, *supra* note 155, at 965–66.

158. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

159. *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 248–49 (1951) (quoting *A.E. Staley Mfg. Co. v. F.T.C.*, 135 F.2d 453, 455 (7th Cir. 1943)).

160. *See* U.S. DEPT. OF JUSTICE AND FTC, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 1.0 (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.htm>. There is debate about just whose interests the drafters of U.S. antitrust laws, starting with the Sherman Antitrust Act of 1890, had in mind when they sought to protect competition—the public or the less powerful competitors—but it is well accepted now that the policy goals behind antitrust laws are the promotion of the public welfare. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 906 (2007) (“The purpose of the antitrust laws, by contrast, is ‘the protection of *competition*, not *competitors*.’” (citation omitted)); JOHN H. SHENEFIELD & IRWIN M. STELZER, *THE ANTITRUST LAWS: A PRIMER* 10–12 (4th ed. 2001) (noting that the Sherman Act seemed more concerned with protecting consumers, while the Robinson-Patman Act was “clearly motivated by a purpose to protect the Jeffersonian model of small dealers and competitors”). *But cf.* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION*, vol. I, ¶ 101 (1997) (“Although drafters of the Sherman Act were concerned about injury to consumers, they were significantly more concerned about various kinds of injury to competitors. Nearly every member of Congress who spoke on the issue suggested that consumer lawsuits would be ineffectual because individual consumer injuries were too small.”).

purposes of this Comment are Sections 1 and 2 of the Sherman Act and, to a lesser extent, Section 7 of the Clayton Act.

A. Sherman Act Restricts All U.S. Businesses Lacking an Exemption

Section 1 of the Sherman Act prevents anticompetitive behavior by declaring illegal any “contract, combination . . . or conspiracy, in restraint of trade.”¹⁶¹ A violation requires two or more parties acting in concert.¹⁶² Section 2 protects against the creation of monopolies by declaring illegal any action by one party to “monopolize, or attempt to monopolize, or combine or conspire with other person or persons, to monopolize . . .”¹⁶³ Not all monopolies violate Section 2; only those that use anticompetitive measures to attain market dominance do. Section 7 of the Clayton Act adds an explicit safeguard against the creation of monopolies by prohibiting mergers and acquisitions that may “substantially . . . lessen competition, or tend to create a monopoly.”¹⁶⁴

These prohibitions on anticompetitive behavior operate quite differently. When looking at Section 2 violations, courts have accepted that not all big companies, even those with substantial market power, threaten competition values. In these cases, courts apply the rule of reason, which prohibits only the unreasonable acquisition or maintenance of a monopoly.¹⁶⁵ Similarly, Section 1 prohibits all agreements or attempts to unreasonably restrain trade.

161. Sherman Act, 15 U.S.C. § 1 (2006).

162. However, not all collaborations between competitors violate this provision, only those in “restraint of trade.” Thus, a joint venture between competitors that is not in restraint of trade—for example, collaborating on a new product—likely does not violate Section 1. But an agreement among competitors to jointly raise prices would violate Section 1. Of course, it is possible that a joint venture between competitors could survive Section 1 scrutiny but still fail Section 2 if that joint venture created a monopoly power, as discussed *infra*. Hulu, the entertainment video distribution website, demonstrates this phenomenon. Hulu was founded in 2007 as a joint venture of NBC Universal and News Corp., owner of Fox Television. See Press Release, NBC Universal and News Corp. Announce Deal With Internet Leaders AOL, MSN, MySpace and Yahoo! to Create a Premium Online Video Site With Unprecedented Reach (Mar. 22, 2007), available at http://www.hulu.com/press/new_video_venture.html. This venture did not violate Section 1 because, though the parties involved were competitors in the entertainment market, their collaboration did not restrain trade. In fact, Hulu was created as a competitor to YouTube. See Nat Worden, *Google's New Foe: Hulu*, THE STREET, Aug. 29, 2007, <http://www.thestreet.com/s/googles-new-foe-hulu/newsanalysis/mediaentertainment/10376991.html>. However, after Disney signed on and agreed to also provide content, concern crested that Hulu was becoming too powerful in the market for online entertainment, attracting more antitrust attention. See Cynthia Littleton, *Disney Joins Hulu*, VARIETY, Apr. 30, 2009, <http://www.variety.com/article/VR1118003024?refCatId=14>.

163. 15 U.S.C. § 2.

164. Codified at 15 U.S.C. § 18.

165. United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911).

Reasonableness, however, is not the standard for all activities covered by Section 1; price-fixing and collusion, for example, constitute per se antitrust violations.¹⁶⁶ The Supreme Court has attributed this distinction in strictness to differences in the nature of the anticompetitive behavior.¹⁶⁷ While Section 1 violations require concerted anticompetitive behavior between at least two competitors, Section 2 can be violated unilaterally.¹⁶⁸

With the exception of congressional carveouts¹⁶⁹ (and the unusual case of Major League Baseball¹⁷⁰), antitrust laws apply *uniformly* to everyone doing business in the United States. They are applied rigidly and without consideration for whether their application serves the policy goals that underlie the law. Even the rule of reason is designed to weigh the competitive significance of a

166. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 61–62 (1911). An exception to a per se rule for Section 1 is vertical price-fixing. The Supreme Court articulated in *Leegin* that such schemes are subject to the rule of reason. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overturning the Supreme Court's nearly century-old ruling in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), which originally established that vertical price-fixing was a per se violation). The Court did not extend a reasonableness standard to horizontal price-fixing, which remains a per se violation, because vertical restraints, according to the Court, are just as likely to have procompetitive justifications as anticompetitive ones. See *Leegin*, 551 U.S. at 889–91. Before *Leegin*, the Supreme Court had established that horizontal and vertical restraints were different. See *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 734 (1988) (reiterating that the Court had rejected a “notion of equivalence between the scope of horizontal per se illegality and that of vertical per se illegality”); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977) (holding that a horizontal agreement to divide territories is a per se violation while a vertical agreement to divide territories is not).

167. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

168. *Id.* at 768–69 (“Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.”).

169. These carveouts include both explicit exemptions, like the statutory labor exemption that “protects the right of workers to act collectively to seek better wages,” and implicit exemptions, like the nonstatutory labor exemption, which “serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions.” See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253–54 (1996); see also *infra* notes 181–186.

170. See generally *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922) (holding that the business of baseball was a purely intrastate affair that did not fall under Congress's commerce power and, therefore, was not subject to federal antitrust laws). This is a curious opinion that the Supreme Court has since criticized but refused to overrule, leaving baseball the only professional sport exempt from antitrust laws. See *Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Douglas, J., dissenting) (stating that the baseball exemption is “a derelict in the stream of law”).

restraint, not to balance the equities of public policy interests.¹⁷¹ As one commentator put it, “antitrust has no mechanism by which to evaluate or prioritize variety and quality to suit particular social goals over the diversity and quality levels that consumers demand.”¹⁷²

The First Amendment does not shield newspapers or other forms of media from antitrust laws.¹⁷³ Freedom to publish does not give publishers the freedom to collude with competitors or to monopolize their market power. In fact, one can argue convincingly that antitrust laws serve First Amendment policy interests when they protect the marketplace of ideas.¹⁷⁴ The Supreme Court first articulated the reach of antitrust laws to news organizations in a 1945 case involving the Associated Press (AP).¹⁷⁵ The federal government had sued the AP for making it difficult for newspapers to become AP members and for prohibiting members from selling or sharing stories with nonmembers. The news organization argued that it had a First Amendment protection from antitrust liability. The Court rejected that claim, with Justice Black writing for the majority:

Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press

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171. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (stating that the purpose of the rule of reason “is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry”).
172. Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Merger Standards Protect the Public Interest?*, 94 CALIF. L. REV. 371, 399 (2006).
173. See MARC A. FRANKLIN ET AL., MASS MEDIA LAW: CASES & MATERIALS 146–51 (6th ed. 2000). See generally *Associated Press v. United States*, 326 U.S. 1, 19–20 (1945) (holding that the First Amendment does not shield newspapers from antitrust’s reach); S. CHESTERFIELD OPPENHEIM & CARRINGTON SHIELDS, *NEWSPAPERS AND THE ANTITRUST LAWS* (1981); Harriet Liza Moses, *Antitrust and the Media*, 1984 ANN. SURV. AM. L. 723 (1984). See also Rauch, *supra* note 64 (quoting a media lawyer at Baker Hostetler’s Washington office as saying that the federal government has “tunnel vision in applying antitrust laws” and that “[b]roader values don’t enter the equation”).
174. See *Associated Press*, 326 U.S. at 20 (“The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public”); Glenn B. Manishin, *An Antitrust Paradox for the 1990s: Revisiting the Role of the First Amendment in Cable Television*, 9 CARDOZO ARTS & ENT. L.J. 1, 5 (1990) (“While the first amendment has often been defended with the ‘marketplace of ideas’ metaphor, the actual marketplace operations of first amendment speakers—in areas including corporate acquisitions and mergers, product distribution, and anticompetitive or exclusionary practices—have always been addressed under the antitrust laws.”).
175. *Associated Press*, 326 U.S. at 20.

from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.¹⁷⁶

Instead, any immunity must come in the form of an antitrust exemption.

B. Antitrust Exemptions Are Pervasive

Across the U.S. economy, antitrust exemptions are pervasive, though generally disfavored. Stucke and Grunes say the consensus among academics is that “antitrust exemptions are rarely a good thing” because they reduce competition, which “can hinder the economy and often harms consumers.”¹⁷⁷ The Supreme Court has stated that antitrust immunity “is not lightly implied.”¹⁷⁸ Nonetheless, approximately 20 percent of U.S. economic activities are not bound by competition laws.¹⁷⁹ “Although the reasons for these exemptions are sometimes economic, sometimes political, and more often social, one rationale remains impliedly dominant: the belief that in a particular economic area, free competition as such is not workable, some sort of governmental regulation being more in the public interest.”¹⁸⁰ Presently, broad exemptions exist for public utilities,¹⁸¹ security and commodity traders,¹⁸² the insurance industry,¹⁸³ farmers¹⁸⁴ and Major League Baseball,¹⁸⁵ among others. The Noerr-Pennington doctrine also ensures private individuals an antitrust exemption when lobbying for enforcement or passage of laws, even if that lobbying has an anticompetitive effect.¹⁸⁶

176. *Id.*

177. Stucke & Grunes, *Antitrust Immunity for the Media*, *supra* note 11, at 118.

178. *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962).

179. *ALTMAN & POLLACK*, *supra* note 74, § 4:4.

180. *Id.*

181. 9 EARL W. KINTNER & JOSEPH P. BAUER, *FEDERAL ANTITRUST LAW* § 66 (1989).

182. *Id.* § 69.

183. *Id.* § 70.

184. *Id.* § 71.

185. *Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922). Baseball is the only professional sport or member of the entertainment industry generally to enjoy an antitrust exemption. “This anomalous situation can only be explained by the Court’s desire to help organized baseball.” HEINRICH KRONSTEIN ET AL., *MAJOR AMERICAN ANTITRUST LAWS* 19 (1965).

186. *See United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965) (holding that the Sherman Act does not apply to a “concerted effort to influence public officials regardless of intent of purpose”); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) (holding that it was not illegal for railroad companies to lobby government adverse to the

The authority to establish these exemptions belongs to Congress, not the courts.¹⁸⁷ Even the judicially created exemption for the business of baseball has been upheld as authorized through Congress's positive inaction.¹⁸⁸ Further, in barring a merger of two major shoe manufacturers, the Supreme Court said in *Brown Shoe Co. v. United States*¹⁸⁹ that Congress has the authority to choose, as a matter of policy, to favor certain businesses—in that case, smaller, locally owned businesses—over others.¹⁹⁰

1. Narrow Exemptions From the Price-Fixing and Collusion Prohibition

In addition to broad antitrust exemptions, Congress has passed exemptions specific to Section 1 of the Sherman Act. Particularly relevant to this Comment are the Anti-Hog Cholera Serum Act,¹⁹¹ the Motor Carrier Safety Improvement Act of 1999,¹⁹² and the Television Program Improvement Act of 1990.¹⁹³ These narrow exemptions, which permitted the creation of cartels and allowed for price-fixing, demonstrate how Congress can address a specific public policy interest without abrogating all of antitrust law for a single industry.

In the interest of public health, the Anti-Hog Cholera Serum Act authorized the formation of a cartel of anti-hog cholera serum manufacturers and handlers with whom the Secretary of Agriculture was authorized to enter into marketing agreements.¹⁹⁴ These marketing agreements between competitors included regulations for price and other sales conditions.¹⁹⁵ Similarly, the Motor Carrier Safety Improvement Act, passed in response to concern about

interests of trucking companies because people have a right to advise their government of their desires and it is natural for those desires to advantage the person lobbying).

187. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

188. *Flood v. Kuhn*, 407 U.S. 258, 283 (1972) (finding that though the reasoning in *Federal Baseball* made little sense, Congress had considered abrogating it with legislation but declined to do so, thereby tacitly giving legislative approval for the exemption).

189. 370 U.S. 294 (1962).

190. *Id.* at 315–16. Looking specifically at Congress's rationale, the Court stated: "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure." *Id.* at 333.

191. 7 U.S.C. § 851 (2006).

192. 49 U.S.C. § 113 (2006).

193. 47 U.S.C. § 303a (2006).

194. 7 U.S.C. § 852.

195. ABA SECTION OF ANTITRUST LAW, *supra* note 76, at 39.

trucking safety,¹⁹⁶ gave competing motor carriers an exemption to set through routes and joint rates, the price for the transportation of household goods, and rate adjustments, among other things.¹⁹⁷ Finally, in response to growing fears about the social effects of violence on television, the Television Program Improvement Act contained a narrow and temporary antitrust exemption for members of the television industry to collaborate on “developing and disseminating voluntary guidelines to alleviate the negative impact of violence” on television for a three-year period.¹⁹⁸ Central to each of these laws was a policy interest in the physical and psychological health of the public. As discussed throughout this Comment, newspapers are essential to the health of American democracy.

2. Broad Exemptions for the Failing Newspaper in a Two-Newspaper Town

Four decades ago, Congress made a policy decision to favor some members of the newspaper industry. Joint operating agreements (JOAs) had existed since 1933 and nearly two dozen had been implemented by 1969,¹⁹⁹ when the Supreme Court declared the Tucson, Arizona, JOA invalid under antitrust law.²⁰⁰ The problem, from an antitrust perspective, was that joint operating agreements facilitated—arguably even fed upon—price-fixing, market dominance, and, in the Tucson case, profit pooling.²⁰¹

The two Tucson papers—the *Arizona Daily Star* and the *Tucson Citizen*—had entered into a JOA in 1940, at which time the newspapers had similar circulation, but the *Star* operated at a profit while the *Citizen* ran at a loss. In the late 1960s, the federal government sued, alleging an unreasonable restraint of trade by two parties in violation of Section 1 of the Sherman Act and the creation of a monopoly in violation of Section 2 of the Sherman Act and Section 7 of the Clayton Act.²⁰² The district court found the JOA rife with per se antitrust violations, and the Supreme Court affirmed.²⁰³ Neither court

196. See 145 CONG. REC. S15206-07 (1999).

197. 49 U.S.C. § 13703.

198. 47 U.S.C. § 303c.

199. See Robbie Steel, Comment, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PA. L. REV. 275, 279 (1989).

200. *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 135–36 (1969).

201. *Id.* at 134.

202. *Id.*

203. *Id.* at 134–35. There was no intermediate court ruling in *Citizen Publishing* because the Supreme Court had probable jurisdiction to hear the case on appeal from the U.S. District Court for the District of Arizona. *Citizen Publ'g Co. v. United States*, 393 U.S. 911 (1968).

found that the *Citizen* had met either prong of the failing company defense, which requires that the firm reached the risk of expiration and that the owners considered selling.²⁰⁴

The decision did not invalidate all JOAs, or even the Tucson one, but stipulated that a JOA must not involve price-fixing, profit pooling, or market control. That still posed a major blow to the newspaper industry, which responded with heavy lobbying.²⁰⁵ The result was the Newspaper Preservation Act of 1970 (NPA). The statute's stated goal was to preserve two-newspaper towns by allowing competitors to combine noneditorial operations.²⁰⁶ In addition to exempting competing newspapers from antitrust liability, the law set a much lower bar for competing newspapers to enter into JOAs than the previous failing company requirement. The NPA has only two criteria that an applicant must meet: (1) The newspapers seeking to enter into a JOA must obtain the written consent of the U.S. attorney general; and (2) at least one of the two newspapers must satisfy the more lenient failing newspaper test.²⁰⁷

Before the NPA's passage, there were questions about whether the statute would be appropriate. The Board of Governors of the American Bar Association, at the urging of its Antitrust Division, had strongly opposed the legislation, as did the Committee on Trade Regulation of the Association of the Bar of the City of New York.²⁰⁸ Early on, it appeared the critics might have been misguided. After all, twenty JOAs still remained when Eric Gertler

204. *Citizen Publ'g Co.*, 394 U.S. at 136–39. Under that defense, “a proposed acquisition may be approved despite its anticompetitive effect, if the resources of the target company are so depleted and the prospect of rehabilitation so remote that it faces the grave probability of business failure.” 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 156 (2009). It is not enough that the company would be closed if the owner were not allowed to sell; the company must be facing nearly certain demise.

205. The story behind this lobbying effort is fascinating and highlights the conflict of interests that can exist when the media is given special-interest legislation. See Steel, *supra* note 199, at 288–92.

206. See 15 U.S.C. § 1801 (2006).

207. Newspaper Preservation Act, *id.* § 1803(b). This is a much lower standard than the traditional failing company defense to antitrust violations. Under the NPA's failing newspaper requirement, a newspaper need not face certain failure before it can enter a JOA with a competitor. Instead, the NPA requires “probable danger” of financial failure, and this assessment is based only on the financial figures of the individual paper, regardless of the health of the company that owns the failing newspaper. See 58 AM. JUR. 2D *Newspapers, etc.* § 78; see also Martin, *supra* note 11, at 76 (noting that “[t]he official reasoning provided for the widened definition of ‘failing’ was the recognition of the ‘unique difficulties’ the newspaper industry faced in combating the downward spiral effects of profits”).

208. See Robert L. Knox, *Antitrust Exemptions for Newspapers: An Economic Analysis*, 1971 L. & SOC. ORDER 3, 10; see also Steel, *supra* note 199, at 280–81 (“Exemptions to the antitrust laws traditionally have been granted only upon a showing of urgency and dire need; in the case of the NPA, however, both the necessity of such an exemption and the effectiveness of antitrust exemptions in achieving editorial diversity are unsubstantiated.”).

argued in 1989 that the existence of failed JOAs did not point to a fundamental flaw in the NPA itself.²⁰⁹ He wrote: “In two of these cases, the JOAs prolonged the existence of the dying paper. In two other cases, both newspapers survived as independent publications after the JOA’s termination. Moreover, new JOAs have saved newspapers in four cities since the enactment of the NPA in 1970.”²¹⁰ But time has favored the NPA’s critics.²¹¹ Last year, Stucke and Grunes identified the NPA as the poster child for “why antitrust immunity for the media is a bad idea.”²¹²

Much of the criticism has focused on lax enforcement of the already relatively low failing newspaper requirement and the near rubber-stamp approval that has come from the U.S. Attorney General, allowing even profitable papers like the *Detroit News* and *Detroit Free Press*, both then-owned by two of the most profitable newspaper chains in the industry, to form a JOA.²¹³ Jason Martin sums up the sentiment of many legal scholars who have written about the NPA:

The NPA, which held as its original stated aim the preservation of editorial diversity but instead has arguably helped cannibalize competition, has failed due to the desire of newspaper owners who have massaged the NPA’s lack of specificity about JOA ownership transfer, reapportioning, operation and termination for their own benefits to establish monopolies both financial and informational. They have benefited from a judiciary that has heard few cases regarding existent or folding JOAs, and has shown no evidence of attempting to delve into the NPA at all beyond surface fiscal requirements. Likewise, inaction by the Justice Department, which initially opposed the

209. Gertler, *supra* note 15, at 139 n.86.

210. *Id.* at 138–39.

211. Robert Neuwirth, *Death Toll Mounts as Weak JOA Papers Die Anyway*, EDITOR & PUBLISHER, Apr. 18, 1998, at 18, available at <http://www.allbusiness.com/services/business-services-miscellaneous-business/4702444-1.html> (reporting that the NPA has repeatedly failed to protect JOA members, and quoting journalism scholar Robert Picard saying that “[t]he law was a failure from the start”).

212. Stucke & Grunes, *Antitrust Immunity for the Media*, *supra* note 11, at 120–28 (taking a broad view of media antitrust exemptions, and focusing specifically on mergers and cross-ownership).

213. See generally *Mich. Citizens for Indep. Press v. Att’y Gen. of the U.S.*, 695 F. Supp. 1216 (1988) (affirming that the Attorney General had not acted arbitrarily in determining, contrary to the determination of the administrative judge he appointed, that the *Detroit Free Press* was a failing newspaper because, though profitable, it was locked in a price war with the *Detroit News*), *aff’d by an equally divided court*, 493 U.S. 38 (1989); Gertler, *supra* note 15 (analyzing the NPA and legal standard of a failing newspaper via the test case of the Detroit JOA); Thomas A. Jacobson, *Print Media Monopolies*, 40 *DRAKE L. REV.* 207 (1991) (arguing that, although the *Free Press* was not in the downward spiral of dropping circulation and ad dollars, the Attorney General’s decision to permit a JOA was reasonable).

NPA, by benign or malign neglect, has enabled dominant JOA partners' activities to make them even more dominant. Additionally, Congress has never revisited or attempted to amend an obviously flawed piece of legislation since its passage almost four decades ago.²¹⁴

Since Gertler's article, two developments have supported the broad criticism. First, it became common for profitable JOAs to kill off one member for the benefit of both members, a strategy that gained popularity after Cox Enterprises closed its *Miami News* in 1988 and *Miami Herald* owner Knight Ridder agreed to continue their JOA until 2021, with Knight Ridder sharing profits from the *Herald*.²¹⁵ This ended up being a lucrative deal for both parties: Cox continued making money in the Miami newspaper market, but without the expenses of running a newspaper, and Knight Ridder eliminated its primary competitor for readership in one stroke.²¹⁶ The Justice Department made an inquiry into the deal but did not force Cox to try to sell the *Miami News* before shutting it down.²¹⁷ The Miami JOA was not the first to try killing one member for the benefit of both. Virtually the same thing had happened in St. Louis in 1983 when Newhouse Newspapers closed the *Globe-Democrat* but, under its JOA with Pulitzer Publishing Co., continued to share in the profits of Pulitzer's *Post-Dispatch*.²¹⁸ But the Miami affair was the first in which a newspaper in a profitable JOA was closed without federal intervention.²¹⁹ In the following two decades, other JOAs succeeded in following the Miami model. The second development that has triggered broad criticism is the apparent failure of JOAs to sustain newspapers. After reaching a high of twenty-eight JOAs in the late 1970s,²²⁰ only six of them have survived—as

214. Martin, *supra* note 11, at 65.

215. *Id.* at 78.

216. As journalist Stephen Barnett put it:

Cox greased the deal by buying \$100 million of Knight Ridder stock in a veiled takeover threat. When Justice later sued Cox for failing to disclose the purchase, Cox consented to a fine of \$1,750,000—not too painful, considering the estimated \$165 million to \$300 million that Cox will draw from the *Herald*'s profits under the renegotiated JOA.

Stephen R. Barnett, *Anything Goes*, AM. JOURNALISM REV., Oct. 1993, <http://www.ajr.org/article.asp?id=1264> (discussing whether the Clinton administration would look upon JOAs with more scrutiny than the previous administrations).

217. *See id.*; Martin, *supra* note 11, at 78.

218. Barnett, *supra* note 216.

219. Paul Farhi, *The Death of the JOA*, AM. JOURNALISM REV., Sept. 1999, <http://www.ajr.org/article.asp?id=317>.

220. *Id.*

of 2011.²²¹ There were still twelve in 2004,²²² but since then the Cincinnati JOA expired and five others (Albuquerque, Birmingham, Denver, Seattle, and, four decades after *Citizen Publishing* was decided, Tucson) ended when one of their members stopped the presses permanently.

It is difficult to say whether the NPA was to blame. As Gertler noted, entering into a JOA may have extended the now-defunct newspaper's lifespan long beyond what it would have otherwise been. In towns where that was the case, the NPA would have achieved its policy goals. Further, the NPA has no provision for adjusting to the newspaper industry's digital age challenges.²²³ Some JOA papers, like the *Rocky Mountain News* in Denver,²²⁴ likely would have closed regardless of whether they were locked in a JOA or not.

Regardless of whether it deserves the blame, the NPA has soured many on the idea of a new newspaper antitrust exemption.²²⁵ President Obama and his Attorney General have both voiced vague support for legislation aiding the news business.²²⁶ But when it comes to an antitrust exemption, Federal Trade Commission (FTC) Chairman Jon Leibowitz said in 2010 that "government

221. JOAs still exist in Charleston, West Virginia; Detroit, Michigan; Fort Wayne, Indiana; Las Vegas, Nevada; Salt Lake City, Utah; and York, Pennsylvania.

222. *Facts About Newspapers 2004*, NEWSPAPER ASS'N OF AM., <http://web.archive.org/web/20110526083616/http://www.naa.org/info/facts04/joa.html> (last visited Oct. 6, 2011).

223. See Daniel Gross, *JOA DOA?*, SLATE, May 8, 2003, <http://www.slate.com/id/2082745> (arguing that JOAs "don't address the cultural, economic, and technological trends that are hurting daily newspapers" and are a "government obstacle to free enterprise").

224. Bob Diddlebock, *Who Really Killed the Rocky Mountain News?*, TIME, Mar. 6, 2009, <http://www.time.com/time/business/article/0,8599,1883345,00.html> (blaming the E.W. Scripps newspaper chain's "suits in Cincy" for squandering the *Rocky's* market dominance of the 1980s and not preparing for the future).

225. Much scholarship on newspaper antitrust exemptions has focused on relaxation of ownership restrictions and the perceived failures of the NPA and on whether there is reason to again broadly exempt a portion of the media from antitrust law. See, e.g., Stucke & Grunes, *Antitrust Immunity for the Media*, *supra* note 11, at 123 ("[T]he beneficiaries of the NPA were often the very opposite of those it intended to help. JOAs have generally aided large newspaper chains, such as Hearst, E.W. Scripps, Gannett Co., and MNG Group (MNG)—the very newspapers that did not need antitrust immunity to succeed.")

226. See Randall Mikkelsen, *U.S. Law Chief Open to Antitrust Aid for Newspapers*, REUTERS, Mar. 18, 2009, <http://www.reuters.com/article/2009/03/18/industry-us-media-usa-newspapers-idUSTRE52H81K20090318> (quoting Attorney General Eric Holder as saying that he "think[s] it's important for this nation to maintain a healthy newspaper industry[, s]o to the extent that we have to look at our enforcement policies and conform them to the realities that that industry faces, that's something that I'm going to be willing to do"); Michael O'Brien, *Obama Open to Newspaper Bailout Bill*, HILL'S BLOG BRIEFING ROOM (Sept. 20, 2009, 4:24 PM), <http://thehill.com/blogs/blog-briefing-room/news/59523-obama-open-to-newspaper-bailout-bill> (reporting that President Obama was "open" to bailing out the newspaper industry, and quoting the President as saying that the press is "critical to the health of our democracy"). *But cf.* Kellman, *supra* note 71 (reporting that Obama opposed another newspaper antitrust exemption).

shouldn't be picking winners and losers and [any proposal] should be platform neutral."²²⁷ However, the FTC's desire to be "platform neutral" overlooks the disparity across mediums in generating both new information and information useful for democratic self-governance.²²⁸

Assuming the NPA failed to achieve its stated goals, Congress now has a chance to revise the NPA with a narrowly tailored antitrust exemption that is unlikely to have the same shortcomings. Part IV of this Comment discusses how the exemption would work and why its contours would be appropriate.

IV. A NEW EXEMPTION

Antitrust laws employ at times conflicting means for common policy goals of economic efficiency and consumer protection.²²⁹ Circumstances exist in which strict enforcement of one antitrust provision undercuts the principles behind another, even when the strict enforcement of, say, Provision X is unnecessary in protecting the interest served by that provision and is enforced at the expense of the interest served by Provision Y. But even when an antitrust violation would serve another public policy goal, regulators and courts cannot give ad hoc approval. As Stucke explains: "Enforcers or the courts cannot rank antitrust's multiple social goals based on their ideology, by prosecuting only bad cartels (bid-rigging on milk) versus good cartels (cigarette manufacturers, where a reduction in output may be desirable)."²³⁰ Regulators and courts could not simply look the other way or make an exception for liability for price-fixing or collusion among newspaper executives, even though it seems certain that without the ability to collaborate on a paywall model many newspapers will continue to cease publication. Their disappearance, in turn, will continue to diminish the national corps of professional newsgatherers and will leave fewer newspapers in the market, harming editorial diversity, thinning contributions to the marketplace of information and ideas, and giving those newspapers that survive monopolistic market power.

In light of the newspaper industry's struggles, Congress will be making an affirmative policy judgment about the press whether it passes a new exemption

227. Juliana Gruenwald, *FTC Report Will Detail Ways to Help Journalism Survive*, NAT'L J., Sept. 29, 2010, <http://techdailydose.nationaljournal.com/2010/09/ftc-report-will-detail-ways-to.php>.

228. *See supra* Part II.

229. The means are prohibiting cooperation between competitors and preventing attempts to gain market dominance.

230. Maurice E. Stucke, *Better Competition Advocacy*, 82 ST. JOHN'S L. REV. 951, 954 (2008) (discussing the greater flexibility of competition authorities, like the Federal Trade Commission, in comparison to antitrust authorities).

or not. If it exempted newspapers from Section 1 of the Sherman Act, permitting them to price-fix access to online content, Congress would be favoring the principles behind Section 2 (preventing monopoly and limiting market power) over the principles of Section 1 (promoting competitive prices, product quality, and economic efficiencies). If Congress chose not to pass an anticollusion exemption for papers, it would be choosing, through positive inaction, to favor the principles behind Section 1 over those of Section 2. Whereas the NPA gave broad antitrust exemptions in the interest of preserving two-newspaper towns, this Comment proposes an explicit, narrow, and temporary antitrust exemption. The purpose is not to preserve two-newspaper towns or even multi-newspaper regions—but simply to preserve newsgatherers.²³¹

A. An Explicit, Narrow, and Temporary Exemption

Competing newspapers need to collaborate if they are going to overcome their prisoner's dilemma²³² and move toward charging for online content. If the rule of reason applied to such collaboration, the antitrust analysis would look to whether such anticompetitive behavior significantly restrained competition in a relevant market and either outweighed legitimate procompetitive justifications or was not the least restrictive means available.²³³ Under this analysis, it is unlikely that newspapers' paywall collusion would be deemed reasonable.²³⁴

231. See *supra* Part I.A. The newspaper market is collapsing at such a substantial rate that some media critics and analysts think that one newspaper chain could soon own every paper in a greater metropolitan area. For example, *Los Angeles Times* media writer James Rainey had a sobering article in February 2011 about the prospect of one newspaper chain owning every paper in Southern California. James Rainey, *On the Media: Consolidation Seen as Inevitable for Southern California's Newspapers*, L.A. TIMES, Feb. 5, 2011, <http://www.latimes.com/entertainment/news/la-et-onthemedial-20110205,0,7190710.column>. With common ownership could come substantially shared editorial resources. That is the model that the Los Angeles Newspaper Group (LANG), which is owned by MediaNews Group, has employed. Its nine papers share a sports desk, copy editors, and designers, but each paper maintains its own news desk and outward appearance. See Kevin Roderick, *LANG Newspapers Begin the Inevitable Consolidation*, LA OBSERVED (Oct. 21, 2011, 12:20 PM), http://www.laobserved.com/archive/2011/10/lang_papers_begin_the_ine.php (reporting that the top editor of the *Daily News* was taking over as executive editor of the *Press-Telegram* in Long Beach, California, and the *Daily Breeze* in Torrance, California); Kevin Roderick, *Singleton Speaks*, LA OBSERVED (Oct. 18, 2007, 9:25 AM), http://www.laobserved.com/archive/2007/10/singleton_speaks.php (publishing a status report from the head of MediaNews Group to employees that touted the sharing of resources among commonly owned newspapers).

232. See Rauch, *supra* note 64.

233. See, e.g., *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 239–41 (1918) (applying the rule of reason to an anticompetitive restraint in the grain market).

234. The first step in this analysis would be to identify the relevant market. Research has shown that consumers do not see all media as interchangeable. JOEL WALDFOGEL, FCC, CONSUMER

Worse yet, horizontal price-fixing and collusion are per se violations regardless of reasonableness. Thus, a statutory exemption is necessary if liability is to be avoided.

The exemption this Comment proposes would give newspaper executives a limited window within which to gather and collectively develop a definitive model to charge for access to online content. Participants could collude on the exact date to put content behind a paywall and decide on the application of the paywall (1) to all online content or only certain sections of the newspapers, (2) to readers from the moment they visit a newspaper's website or only after a reader exceeds his or her gratis limit, and/or (3) to stories individually or to the entire bundle of newspaper content on a subscription basis. Newspaper executives would be free to set that price at whatever point they felt the market would support, and government oversight would be limited to ensuring that newspapers did not exceed the scope of the exemption (by, for example, price-fixing print ad rates or colluding on a paper boycott to reduce supply costs). Because the exemption would be both narrow and temporary, the exemption would avoid the types of criticisms that have followed unpopular antitrust exemptions, such as the NPA.²³⁵

The biggest challenges to the exemption, aside from getting on the congressional agenda, would be appropriately limiting the eligible group and getting sufficient newspaper industry buy-in. First, if the group were too broad—for example, all online media—the exemption could have drastic anticompetitive consequences that would not be offset by the same public policy interests that should motivate Congress to create an exemption for newspapers. Second, if there were not broad industry buy-in, both at the point of collaboration and in erecting individual paywalls based on that collaboration, then the exemption would be less effective at protecting newspapers charging for online content from losing readers to a competitor who saw an opportunity to poach massive numbers of new readers by going back to the free-access model. Though, unsurprisingly, newspaper executives have supported an exemption from the

SUBSTITUTION AMONG MEDIA (2002), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A8.pdf (finding that consumers do not consider all media to be the same and consider only some forms as suitable substitutes for others). Thus, the relevant market would not be all news or even all online news; it likely would be only online news from traditional media, and it may be limited to media covering the same types of stories. The restraint, therefore, would be significant. Survival is not a recognized procompetitive justification.

235. A major criticism of antitrust exemptions is that, in addition to benefiting one industry at the expense of consumers and other industries, they typically have no terminus.

collusion prohibition,²³⁶ that does not mean all industry members would support the specific model that most later agree upon.

The first challenge seems solvable by limiting the exemption to dailies that both print a newspaper and also put their news online. Weeklies would be excluded because they primarily have a different focus to their coverage and are typically not seen as a substitute for news common to dailies. Thus, weeklies do not need to collaborate on a paywall model—they can unilaterally act without worrying about losing readers—and the viability of daily newspapers' charging for online content would not be significantly affected by whether weeklies charged. Online news sites like CNN.com and MSNBC.com need not be included because they are primarily national news sites and, like weeklies, are not a total substitute for news published by local daily papers, even major metro dailies. Additionally, by excluding major online publishers of national news, the anticompetitive restraint is lessened without undercutting the exemption's ability to support local and investigative reporting.

As for the second challenge, the decision of whether to charge for online content implicates the reach and amplification of a newspaper's editorial voice. Any attempt by the government to regulate participation in a paywall model would likely run into a serious First Amendment challenge.²³⁷ Instead, the best measure for enforcing buy-in would likely be to get newspapers to contractually agree to certain terms regarding implementing a paywall. The contract would bind all participants with each other and could provide for the creation of a temporary paywall oversight body and liquidated damages for breaching. This would be legally permissible specifically because the antitrust exemption would lift the prohibition on such contracts in restraint of trade. However, it is possible that newspapers would be willing to commit to a pay-for-access model but would not want to be bound by law. If so, social norms could be incredibly effective in prohibiting legal but undesirable behavior, particularly when the relevant group is made up of close-knit and like-minded repeat players.²³⁸ Those characteristics describe the U.S. professional journalism

236. See *supra* note 71.

237. It seems likely that such a challenge would be successful. "Speech regulations, even if they are content neutral, are presumptively invalid under the First Amendment review that has emerged in the last thirty years." Ellen P. Goodman, *Bargains in the Information Marketplace: The Use of Government Subsidies to Regulate New Media*, 1 J. TELECOMM. & HIGH TECH. L. 217, 219 (2002). That question, however, is not pertinent to this Comment.

238. See Michael D. Birnhack, *Hebrew Authors and English Copyright in Mandate Palestine*, 12 THEORETICAL INQUIRIES L. 201, 240 (2011) (describing the social dynamics that enabled Mandate Palestine Hebrew literature to thrive in the absence of copyright legal enforcement). Of course, regulation via social norms can backfire when social norms are not in tune with the interests of some group members. See Daniel J. Gervais, *The Price of Social Norms: Towards a*

community.²³⁹ Thus, this measure, while less effective at generating buy-in, would likely limit papers from giving up on the paywall model when tempted by the prospect of poaching new readers with free online content. If a newspaper stole readers in that manner, as opposed to via competition in the market for news, the newspaper would be shunned by the journalism community. That, in turn, would harm that newspaper's credibility, which could weaken the newspaper's relationship with its loyal readers and would make it more difficult to recruit top journalists.

B. The Exemption Would Serve Stated Policy Interests

Tailored in the manner described above, the exemption would be explicit, narrow, and expediently administered.²⁴⁰ As Judge Easterbrook wrote in discussing an antitrust exemption that permitted professional sports leagues to sell TV packages to broadcast networks:

The Sports Broadcasting Act is special interest legislation, a single-industry exception to a law designed for the protection of the public. . . . Recognition that special interest legislation enshrines

Liability Regime for File-Sharing, 12 J. INTELL. PROP. L. 39, 50 (2004) (arguing that, though the law prohibits unauthorized person-to-person (P2P) file-sharing, P2P users likely see a greater cost to compliance with the law than noncompliance and that this "gap between the legal and the social norm means that a large percentage of internet users have not, and are unlikely to, internalize the prohibition that the music industry is trying to enforce").

239. Newspaper journalism is a small world in which reporters, editors, and publishers frequently interact with and rely on fellow journalists they worked with in the past. Though scattered across the United States, the almost two thousand newspapers represented by the Newspaper Association of America constitute a close-knit community. *About NAA*, NEWSPAPER ASS'N OF AM., <http://www.naa.org/About-NAA.aspx> (last visited Nov. 14, 2011). This is particularly true at the major metropolitan papers, which would have the most harmful effect on charging for online content if they defected. Newspaper editors and publishers are also like-minded because of a common desire, at least purportedly, to serve the public good by providing information that the public has a right and need to know. See Bryon Calame, *Scoops, Impact or Glory: What Motivates Reporters?*, N.Y. TIMES, Dec. 3, 2006, <http://www.nytimes.com/2006/12/03/opinion/03pubed.html> (arguing that reporters and editors are not motivated by politics but, among other things, with being first with new facts or insights, breaking stories of impact, and getting on the front page). While publishers are, of course, motivated by the bottom line, they also care about having the respect of their peers.
240. In part, this need is precautionary. As noted in *Callmann on Unfair Competition, Trademarks, and Monopolies*, courts are not as receptive to claims of antitrust immunity as they once were, and "even long-established exemptions (express as well as implied) are now carefully reexamined, artfully whittled down, and then limited in practical application to specific situations in which the subordination of national antitrust policy was either clearly mandated or pragmatically warranted." ALTMAN & POLLACK, *supra* note 74, § 4:18.

results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.²⁴¹

In our case, the results serve a greater goal—one that has been esteemed since the founders opened the Bill of Rights with a specific protection for the press²⁴²—and the exemption would be narrow and temporary. Narrow in that the exemption would only apply to a subset of the media (newspapers) and only to two provisions of Section 1 of the Sherman Act (collusion and price-fixing), not all antitrust laws; temporary in that the exemption would only last as long as Congress deemed necessary.²⁴³ The exemption would also balance policy goals in which the democratic interest in a rich marketplace of ideas and a healthy Fourth Estate collides with the economic interest in promoting competition.

Newspaper contraction and ownership consolidation both lead to fewer newspapers in a market and to regional newspaper monopolies, carrying the same threats to price and other consumer options that the collusion prohibition is concerned with. Additionally, media monopolies also hurt editorial diversity and the revelation of new information. Antitrust law already struggles with regulating media ownership.²⁴⁴ Not addressing the newspaper industry's need to collaborate on a paywall model would only exacerbate those struggles and further stress interests underlying Section 2 of the Sherman Act and Section 7 of the Clayton Act, as well as the First Amendment. Generally, the goals of antitrust law “parallel a major objective of the [F]irst [A]mendment”: maximizing editorial diversity.²⁴⁵ But, at times, a tension arises between the promotion of editorial diversity and competition laws, as Howard Shelanski notes:

Antitrust is by its nature primarily concerned with competition and economic performance defined in terms of prices and quantities of goods (or services) in a given market. Antitrust asks how effectively markets provide consumers with the products they want on the terms they want. The democracy model of the public interest, in contrast, sees diversity and quality of programming as values in themselves, whether or not the market demands them or would prefer something

241. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 671–72 (7th Cir. 1992).

242. *See supra* notes 82–85.

243. The important point is that the exemption would not be in perpetuity. Whether it would last six months or six years should be left to congressional judgment and based on further study and evidence from newspaper executives.

244. *See generally* Shelanski, *supra* note 172 (arguing that antitrust is concerned with competition and economic performance, while the “democracy” model for the public interest is concerned with noneconomic factors, which antitrust is too rigid to evaluate).

245. Moses, *supra* note 173, at 723.

else. . . . In many cases, antitrust would count certain outcomes as inefficient market failures, but democracy-oriented policy would see those outcomes as successfully achieving public interest goals.²⁴⁶

When this tension arises in the news business, the competing policy interests tend to favor “preserving competitors rather than promoting competition.”²⁴⁷ In the media context, preserving competitors promotes valuable viewpoint diversity while promoting competition keeps prices down, but that is less of a concern with an information good like news than it is with widgets and labor. That judgment, though, is for Congress to make.

In addition to the public policy rationale for the exemption discussed in Part II, further public policy support can be found in arguments that have been made regarding how poorly equipped antitrust analysis is for evaluating noneconomic factors, which are often central in newspaper cases.²⁴⁸ Antitrust applies to newspapers the same price- and competition-based analysis with which it scrutinizes other industries. In fact, it also should factor an activity’s effect on the marketplace of information and ideas because newspapers compete in this information market much more broadly than they compete in the product market.²⁴⁹ Stucke and Grunes articulate why:

[M]arket failure in the marketplace of ideas may not manifest itself simply with higher prices. Newspapers and other types of information-heavy media are what economists refer to as “credence goods.” Their actual quality is difficult to determine in isolation even after being purchased and consumed; it must be taken to some degree on faith. A news channel may claim to be “fair and balanced” or “the most trusted name in news,” but consumers may be ill-equipped to ascertain the veracity of these assertions regarding specific stories. Thus, competition allows “consumers to judge quality more accurately

246. Shelanski, *supra* note 172, at 397. Shelanski’s analysis argues that “in media markets antitrust is unlikely to further the FCC’s democracy objectives and also faces serious obstacles to protecting even the economic, efficiency-oriented public interest objectives that are much closer to antitrust law’s core purpose.” *Id.* at 371.

247. Moses, *supra* note 173, at 724.

248. Again, this antitrust analysis is only used when the potential violation is subject to the rule of reason and therefore would not be applied to a price-fixing or collusion allegation. However, discussion of these shortcomings is relevant to arguing that antitrust laws are poorly tailored for the newspaper industry and that it is appropriate for Congress to revise their applicability to newspapers.

249. Gentzkow & Shapiro, *supra* note 89, at 149–50; *see also* Stucke & Grunes, *Marketplace of Ideas*, *supra* note 122, at 258–67 (arguing that the legislative history of the Sherman and Clayton Acts supports expanding antitrust analysis of media mergers to include anticompetitive restraints on the marketplace of ideas and that the holdings of the two leading Supreme Court media merger cases are not inconsistent with this).

because they can benchmark one firm's reporting against the other."
 Less competition thus may diminish the quality of reporting.²⁵⁰

Additionally, newspapers are not all of equal weight,²⁵¹ and just because an alternative news source exists does not mean it serves as an adequate substitute.²⁵²

Over the past decade, the newspaper industry has seen massive consolidations and contractions. Newspapers that have survived these seismic shifts are now owned primarily by a handful of newspaper chains. Often, the ownership is clustered in regions.²⁵³ James Rainey, a *Los Angeles Times* media reporter, recently predicted a catastrophe for diversified newspaper ownership in Southern California, starting with the *Orange County Register* being listed for sale:

Publishing executives and financial managers who own parts of the region's dominant newspaper companies believe that the sale of the Register will be just the first in a series of consolidations. They predict that eventually could result in what once would have been unthinkable—a single owner for most of Southern California's substantial daily newspapers.²⁵⁴

There are only three newspaper owners in Southern California that could buy the *Register* and merge noneditorial operations: owners of the *San Diego Union-Tribune*, the *Los Angeles Times*, and the Los Angeles Newspaper Group papers. In the long run, a sole owner for most Southern California dailies could have catastrophic consequences for the contribution of new information about local life. Reporter beats likely would continue to be regionalized,

250. Stucke & Grunes, *Better Competition Policy*, *supra* note 103, at 116–17.

251. *Id.* at 134–35. Neil Averitt and Robert Lande argue for a “consumer choice” approach to antitrust, which would take into consideration not only price, but also variety, innovation, quality, and other forms of nonprice competition. Neil W. Averitt & Robert H. Lande, *Using the “Consumer Choice” Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007). However, a choice model would still have a problem with price-fixing or a cartel “because this distorts or eliminates certain price options that consumers value and it unfairly transfers consumer wealth to firms with market power. However, the choice model posits that consumers are also entitled to the mixed price/quality and price/variety levels that the competitive market would provide.” *Id.* at 185.

252. WALDFOGEL, *supra* note 234.

253. Take, for example, LANG, which is comprised of nine dailies throughout the region. LANG is owned by MediaNews Group, which owns fifty-seven newspapers across the country, including the *Denver Post*, *Detroit News*, and a cluster of papers in the San Francisco Bay Area. This leads to the sharing of editorial resources and the overall reduction of contributions to the marketplace of information and ideas. Rainey, *supra* note 231.

254. *Id.* (“A merger between the Register and either The Times, Union-Tribune or MediaNews would have the same broad outlines: The individual newspapers would maintain their identities, names, news staffs and editorial boards, in an effort to hold on to loyal readers. They would combine all other operations: ad sales, printing, distribution, human resources and publicity.”).

leaving fewer reporters—in many cases only one reporter—to act as a watchdog on regional governments and businesses. Additionally, newspapers in noncompetitive markets tend to invest less in editorial resources and do not push as hard to uncover bigger stories or report them first;²⁵⁵ reporters in those markets also are more accountable to their readers via the pressure that comes from competing with another newspaper's reporters to break meaningful news. Commonly owned newspapers in a market where competitors do not exist for regional, let alone local, news would not feel the healthy stresses of editorial competition. Communities would suffer first as the quality of local and regional reporting decline. Presumably, statewide and national reporting would eventually be similarly affected.

To be sure, there is no evidence that common ownership is inevitable for most of Southern California's newspapers. There is not even evidence that such mergers would survive antitrust analysis, though, as discussed, antitrust regulation by itself has not been effective in regulating media and preserving diversity of newspaper ownership. Without an exemption, it appears, newspapers will continue to dwindle and die, leaving fewer competitors in an already winnowed market. Though consumers would be protected from potential pains of collusion and price-fixing by Section 1 of the Sherman Act, they would suffer the ills of media consolidation, which are much broader and threaten the goals of Section 2 of the Sherman Act, Section 7 of the Clayton Act, and the First Amendment.

CONCLUSION

For the past decade, newspaper executives have struggled to slow the sharp and unprecedented decline of the press. Yet the industry remains in great peril. The consequences of this media shift will be much greater than the loss of smudgy pages and the tradition of reading the newspaper at the breakfast table; for society, this decline represents the ongoing loss of the nation's corps of newsgatherers. Such a decline would threaten a key role in American democratic society—that of the professional newsgatherers who are integral to the monitoring of elected officials and education of the citizenry. Though online media contributes in this arena, it likely cannot fill the void being left by newspaper cuts and closures.

For these reasons, Congress should amend the Newspaper Preservation Act. A narrow and temporary exemption permitting collusion to create a

255. See Gentzkow & Shapiro, *supra* note 89, at 135–43; Martin, *supra* note 207, at 68–69.

paywall for online content would serve the policy goals that Congress purportedly had in mind four decades ago when enacting the NPA and would not be susceptible to the same abuses that the NPA's authorization of JOAs incurred. There may be no silver bullet for the newspaper industry, but newspaper executives see promise in charging for access to online content, and it is in the American democratic interest to help the press get over its coordination problem.