

Articles:

The Broken Branch: Capitalism, the Constitution, and the Press

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ABSTRACT

The First Amendment to the Constitution guarantees “freedom . . . of the press,” an explicit textual recognition of what the founding generation, informed by their immediate historical experience, frequently hailed as the most important political liberty—the “bulwark” upon which all other freedoms relied. From this fertile intellectual and legal soil, cultivated by generous subsidies, a thriving and vibrant institutional press emerged as an undeniable asset to American civil society.

Today, that press is dying. Industry revenues have declined by more than 70% in the last two decades, leaving tens of thousands of journalists without jobs and millions of Americans without meaningful access to quality journalism. The reason for this media apocalypse is simple: America has assigned to the free market the task of producing an adequate supply of a public good, with most of its value lying in externalities, that cannot be made profitable to the extent that it is

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desirable. As a result, American journalism is in a market-induced death spiral.

This Article argues that, given the Framers' correct understanding that a sustainable, powerful institutional press is a precondition to representative government, the market-driven collapse of the press is a constitutional crisis.

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“Four hostile newspapers are more to be feared than a thousand bayonets.”

– Napoleon Bonaparte¹

“The U.S. government’s inability, or unwillingness, to act decisively on climate change today has nothing to do with how it is covered in [t]he Times.”

– Nick Confessore, reporter, *New York Times*²

INTRODUCTION

American journalism is dying.

Between 2008 and 2019, the five major news industries—newspaper, radio, broadcast television, cable, and digital publishers—shed 27,000 jobs, or about 23% of industry employment.³ Newspaper employment alone declined 51% in that time, from 71,000 workers in 2008 to 35,000 in 2018.⁴ In 2018, 11,878 journalists lost their jobs.⁵ In 2019, an additional 7,800 journalism jobs disappeared.⁶ The year 2020 opened with news of more cuts as the industry’s collapse “pick[ed] up speed,”⁷ even prior to the economic downturn caused by the COVID-19 pandemic. The full consequences of that event remain to be measured, but they will undoubtedly be calamitous; industry analysts have already warned of a “media extinction event,”⁸ with “more than 30,000 media

1. *Napoleon I*, in OXFORD ESSENTIAL QUOTATIONS (6th ed. 2018), <https://bit.ly/3dS0cvr>.

2. Nick Confessore (@nickconfessore), TWITTER (June 22, 2019, 1:48 PM), <https://bit.ly/369Oiid>.

3. See Elizabeth Grieco, *U.S. Newspapers Have Shed Half of Their Newsroom Employees Since 2008*, PEW RESEARCH CTR. (Apr. 20, 2020), <https://pewrsr.ch/2NHLbnP>. This source is updated frequently; the numbers above reflect those available at the time of publication.

4. See *id.*

5. See Daniel Roberts, *2018 Was the Worst Year of Media Layoffs Since 2009*, YAHOO FIN. (Feb. 14, 2019), <https://yhoo.it/2LAYcf9>.

6. Benjamin Goggin, *7,800 People Lost Their Media Jobs in a 2019 Landslide*, BUS. INSIDER (Dec. 10, 2019, 5:05 PM), <https://bit.ly/2LCZKoM>.

7. See Ken Doctor, *Newsonomics: Worried About Alden Taking Control of Tribune? It’s Already Pulling Strings Inside*, NIEMANLAB (Jan. 14, 2020, 3:39 PM), <https://bit.ly/3fZjQri>.

8. Craig Silverman, *The Coronavirus Is a Media Extinction Event*, BUZZFEED NEWS (Mar. 23, 2020, 6:00 PM), <https://bit.ly/3dvysxd>. For example, the president of the *Los Angeles Times*, the nation’s fifth-largest newspaper, has reported that the paper’s advertising revenue has “nearly been eliminated” since the pandemic hit the U.S. in full force. See also Sara Guaglione, *LA Times, TheSkimm Announce Pay Cuts and Layoffs*, PUBLISHER’S DAILY (May 4, 2020), <https://bit.ly/3dZPIIdL>; Victor Pickard, *Coronavirus Is Hammering the News Industry. Here’s How to Save It.*, JACOBIN (Apr. 20, 2020),

company employees in the U.S. . . . subjected to layoffs, pay cuts or furloughs” since March 2020.⁹

In the last 16 years, more than one-fifth of local newspapers—that is, more than 1,800 newspapers—have disappeared.¹⁰ Half of the 3,143 counties in America have “only one newspaper, usually a small weekly,” and 200 counties have no newspaper at all.¹¹ Pittsburgh, with a population of more than 300,000, has no daily newspaper¹²—same with Youngstown,¹³ Birmingham,¹⁴ and innumerable others. Among those outlets that have survived, “countless . . . have become shells—or ‘ghosts’—of themselves.”¹⁵

The economic devastation is only half of the problem. The very legitimacy of the press as an institution is gravely imperiled. There is, obviously, President Donald Trump’s relentless “war on the press.”¹⁶ But Trump is merely piling on—beating a dead industry, as it were. From 1973 to 2020, the percentage of Americans expressing “very little” confidence in newspapers grew from 14% to 35%, while the percentage of Americans expressing a “great deal” or “quite a lot” of confidence

<https://bit.ly/2ZcCRR7> (arguing that the COVID-19 virus was “more an accelerant than a cause” of the collapse of commercial journalism).

9. Marc Tracy, *Newspaper’s Top Editor Is Now a ‘Homeless’ Blogger*, N.Y. TIMES (May 4, 2020), <https://nyti.ms/3fXiwFs>; see also Marc Tracy, *News Media Outlets Have Been Ravaged by the Pandemic*, N.Y. TIMES (Apr. 10, 2020), <https://nyti.ms/368IMIm> (reporting that the estimated number of affected employees is closer to 36,000). The Poynter Institute for Media Studies has kept a running tally of layoffs. See Kristen Hare, *Here Are the Newsroom Layoffs, Furloughs and Closures Caused by the Coronavirus*, POYNTER, <https://bit.ly/2yecdwj> (last updated Aug. 25, 2020).

10. See PEN AMERICA, *LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS* 24 (2019), <https://bit.ly/2zKKhAC>.

11. Penelope Muse Abernathy, *The Loss of Local News: What it Means for Communities*, UNC HUSSMAN SCH. OF JOURNALISM & MEDIA, <https://bit.ly/3cKGW2V> (last visited Aug. 30, 2020).

12. See Joe Concha, *Pittsburgh Becomes Largest US City Without a Daily Print Newspaper*, HILL (Aug. 27, 2018), <https://bit.ly/2WEzalD>. New Orleans held the title at one point, but the *Times-Picayune* recently restarted a modified daily schedule. See *The Times-Picayune Resumes Daily Delivery Monday*, NOLA.COM (June 30, 2019, 2:48 AM), <https://bit.ly/31zuMXZ>.

13. See Will Bunch, *How the First U.S. City with No Daily Newspaper Will Help Trump in 2020*, PHILA. INQUIRER (June 30, 2019), <https://bit.ly/3cFRnVr>; see also Joshua Benton, *So Youngstown Will Have a Daily Named The Vindicator After All. But It’s a Brand Surviving, Not a Newspaper.*, NIEMANLAB (Aug. 19, 2019), <https://bit.ly/2zIswSs> (reporting that the brand name and URL of the Youngstown daily newspaper, *The Vindicator*, had been purchased by a chain).

14. See Wade Kwon, *Dateline: The Second Biggest City in America Without a Daily Paper*, BIRMINGHAM BLOGGING ACAD. (Oct. 1, 2012), <https://bit.ly/3dPcZPm>.

15. Abernathy, *supra* note 11.

16. See generally MARVIN KALB, *ENEMY OF THE PEOPLE: TRUMP’S WAR ON THE PRESS, THE NEW MCCARTHYISM, AND THE THREAT TO AMERICAN DEMOCRACY* (2018) (discussing Trump’s war on the press and arguing that it is a threat to American democracy).

shrank from 39% to 24%.¹⁷ By the same metric, television news has fared even worse.¹⁸

The response to these crises has been bifurcated. Answers to the anti-press tirades of the President and his political allies contain no shortage of righteous constitutional rhetoric about the danger of undermining the constitutionally-guaranteed “freedom of the press.”¹⁹ For each screed about “fake news,” there is an equal and opposite citation to the First Amendment from journalists and constitutional scholars.²⁰

In contrast, few scholars have identified any *constitutional* problem with the complete economic collapse of American journalism.²¹ Perhaps this silence is understandable; after all, there are few rules so well-established as the one that says that only government action can violate the First Amendment.²² And the press is in an especially vulnerable constitutional position: Despite the First Amendment’s separate and

17. See *Confidence in Institutions*, GALLUP, <https://bit.ly/3bCnuX> (last visited Aug. 30, 2020).

18. See *id.* (indicating that those expressing a “great deal” or “quite a lot” of confidence in television news shrank from 46% in 1993 to 18% in 2020, while those expressing “very little” confidence in television news grew from 16% to 43% over the same period).

19. See, e.g., David Smith, *Fox Host Lambasts Trump Over ‘Most Sustained Assault on Press Freedom in US History’*, GUARDIAN (Dec. 11, 2019, 10:22 PM), <https://bit.ly/2WCByt5>, (noting that Fox News host Chris Wallace described Trump’s attacks on the press as “undermin[ing] the US constitution”).

20. See Terri R. Day & Danielle Weatherby, *Shackled Speech: How President Trump’s Treatment of the Press and the Citizen-Critic Undermines the Central Meaning of the First Amendment*, 23 LEWIS & CLARK L. REV. 311, 313 (2019) (arguing that “Trump’s distaste for and resulting censorship of both private speakers and the ‘fake news’ media have resulted in a devastation of the central meaning of the First Amendment”); RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. UNIV. L. REV. ONLINE 567, 568 (2017) (“Journalists and scholars have rightly warned us that President Trump’s disrespect for the Fourth Estate is troubling and that it threatens to harm the vitality of this important check on our democracy.”).

21. For a discussion of the constitutional problem, see Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499, 543–44 (2018). See also Jones & West, *supra* note 20, at 576–78 (arguing that the press’s declining economic strength has “eroded” a “critically important pillar holding up American press freedom”); RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 570–611 (2011) (detailing ways other than the loss of newsgathering—such as the role that newspapers play in lobbying for open-records laws—that the disappearance of newspapers will undermine democracy).

22. See, e.g., *Fed. Agency of News LLC v. Facebook, Inc.*, 395 F. Supp. 3d 1295, 1308 (N.D. Cal. 2019) (“[I]t is axiomatic that the ‘constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state.’ Thus, it is ‘undisputed that the First Amendment of the United States Constitution only applies to government actors; it does not apply to private corporations or persons.’”) (citation omitted).

explicit guarantee of press freedom,²³ the Supreme Court has concluded that the Amendment contains no special protections for the press above or beyond the right to speak freely, which is shared by individuals and other organizations.²⁴ Thus, the Press Clause has been erased by judicial fiat.²⁵

The lack of attention paid to the constitutional ramifications of the press's economic crisis is troubling. The press plays an integral role in America's constitutional structure, which is premised on the existence of a sustainable, independent, and informative press that functions in essence as a fourth branch of government,²⁶ intended to check "private and public centers of power and influence within society"²⁷ in unique and irreplaceable ways. As the country is already beginning to witness, the system—the constitutional order, the government created by it, and the society governed by it—was not intended to, and cannot, function without a free press any more than it can function without a Senate or a Supreme Court.²⁸ Accordingly, as this Article argues, the economic crisis facing journalism is a constitutional crisis.²⁹

This Article does not argue that the Press Clause imposes any affirmative obligations on the government or is generative of any positive rights.³⁰ My argument is simply that the institutional press is critically important in the constitutional structure, and that it is dying for reasons that have nothing to do with intentional censorship by the government and everything to do with market capitalism. Not every constitutional problem necessarily has a judicially-enforceable solution.³¹ But, broadly speaking, *somebody* should do *something* about this one.

23. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . .").

24. See *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 797–98 (1978) (Burger, C.J., concurring).

25. See Sonja West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–28 (2011).

26. Potter Stewart, "Or of the Press", 26 HASTINGS L.J. 631, 634 (1975).

27. Randall P. Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731, 732 (1977).

28. See Victor Pickard, *American Journalism is Dying. Its Survival Requires Public Funds*, GUARDIAN (Feb. 19, 2020, 8:34 AM), <https://bit.ly/2LTlexR> ("Maintaining public media infrastructure should be non-negotiable for a democratic society.").

29. Cf. Michael J. Gerhardt, *Crisis and Constitutionalism*, 63 MONT. L. REV. 277, 280 (2002) (noting that "there is no consensus on any standards for determining what constitutes a crisis in constitutional law" and defining constitutional crises as "instances in which the limits of written constitutionalism are not just reached but also breached" because "the Constitution cannot answer the critical problem at hand").

30. Indeed, unlike most recent literature arguing for a reinterpretation of the Press Clause, I do not necessarily argue for the recognition of any negative rights, either. See, e.g., West, *supra* note 25, at 1043–44 (arguing for recognition of newsgathering rights).

31. See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) ("[T]he fact that [partisan] gerrymandering is 'incompatible with democratic principles,' does not mean

This Article proceeds in three parts. Part I details the ongoing collapse of the institutional press, explains that the collapse is an inevitable result of asking the market to produce journalism, and questions the viability of emerging “solutions.” Part II demonstrates the importance of the institutional press in the constitutional structure, both as a matter of original understanding and as a normative matter in recognition of the critical functions the press serves in a representative democracy. Part III explains the theoretical importance of sustainability as a precondition of press freedom and demonstrates several ways that economic insecurity can undermine the critically important functions the press plays in American society.

I. THE MARKET & THE PRESS

“[The best journalists have regarded] their work more as a profession than as a business—more as an opportunity to make ideas prevail than as a chance to win money. . . . They have mixed their ink with conviction; they have run their presses with conscience.” – Charles R. Williams, editor, *Indianapolis Star*, 1894³²

“[T]he business model for media . . . is like, ‘Hey, . . . write an article that everyone hates . . . so we make, like, a few coupons of ad revenue.’” – Felix Biederman, host, *Chapo Trap House*³³

Warren Buffett is the avatar of American capitalism; a living embodiment of its highest virtues and its ugliest vices.³⁴ He began his

that the solution lies with the federal judiciary.”) (citation omitted). That said—although I leave the issue for a later time—the understanding of the Press Clause advanced in this Article does imply the constitutional permissibility of certain actions, such as stricter limits on corporate ownership of press organizations, that would be unconstitutional under current free speech doctrine.

32. RONALD R. RODGERS, *THE STRUGGLE FOR THE SOUL OF JOURNALISM: THE PULPIT VERSUS THE PRESS, 1833–1923* xiv (2018).

33. Felix Biederman, *Twisted Tales*, CHAPO TRAP HOUSE, at 49:39 (Sept. 3, 2019), <https://bit.ly/3ec8zID>.

34. See Jonathan Tepper & Denise Hearn, *Where Warren Buffett and Silicon Valley Billionaires Agree*, BARRON’S (Dec. 11, 2018), <https://bit.ly/3g7MGFW> (describing Buffett as “an icon for Americans and capitalists everywhere” and a “folk hero”). *But see* Robin Harding, *How Warren Buffett Broke American Capitalism*, FIN. TIMES (Sept. 12, 2017), <https://on.ft.com/2MJI0Y3> (critiquing Buffett’s abuses of monopoly power).

legendary investment career by purchasing newspapers.³⁵ In 1977, he purchased the *Buffalo Evening News*, then used the paper's market power to drive the competing *Buffalo Courier-Express* out of business, thereby establishing a local monopoly and massively increasing profits.³⁶ A friend would later quote Buffett as comparing owning a local newspaper to an unregulated toll bridge: “[Y]ou have relative freedom to increase rates when and as much as you want.”³⁷ Until Jeff Bezos purchased the *Washington Post* in 2013, Buffett held as much as 21% of *Post* stock on the belief that it “would be printing money along with the paper for a long time.”³⁸

Buffett's long history as a newspaper man explains why, at a time when the news industry was increasingly grappling with its dire economic situation, his decision in 2012 to purchase more than 63 local newspapers across the country was met with elation.³⁹ Buffett was “saying all the right things”⁴⁰—he said that “there is no more important institution than the local paper”⁴¹ and promised that local newspapers “will have a good future.”⁴² He offered hope to an industry with none: if Warren Buffett believed in the business of the news, surely there was reason to believe.⁴³

Which is why it was so gutting when, on January 29, 2020, Buffett announced that he was selling his papers.⁴⁴ Buffett was “giving up on the

35. See Tepper & Hearn, *supra* note 34 (“[H]is initial business purchases were newspapers in towns with no competition.”).

36. See *id.*; see also Harding, *supra* note 34 (describing the profitability of the monopolistic *Buffalo News*).

37. Tepper & Hearn, *supra* note 34. Buffett himself argued that even “your idiot nephew” could run a monopoly paper. *Id.* (internal quotations omitted).

38. JILL ABRAMSON, *MERCHANTS OF TRUTH: THE BUSINESS OF NEWS AND THE FIGHT FOR FACTS* 85 (2019).

39. See, e.g., Michael J. de la Merced, *Berkshire Bets Again on Newspapers With Media General Deal*, N.Y. TIMES DEALBOOK (May 17, 2012), <https://nyti.ms/30qY3Ug> (describing deal); see also Richard Connelly, *Warren Buffett Buys the Bryan-College Station Eagle*, HOUSTON PRESS (June 12, 2012), <https://bit.ly/2ykvXyk> (“Buffett has gone on a newspaper-buying spree, using his vast fortune to give hope to journalists.”); Tiffany Hsu, *Buffett and Berkshire Bet on Print, Buy 63 Media General Papers*, L.A. TIMES (May 17, 2012), <https://lat.ms/3bIvKmh> (describing the deal as “throwing the weight of Berkshire Hathaway Inc. behind the newspaper industry”).

40. Connelly, *supra* note 39.

41. Hsu, *supra* note 39.

42. Connelly, *supra* note 39.

43. See Joshua Benton & Ken Doctor, *Turns Out Warren Buffett Won't Be the Billionaire Who Saves Newspapers*, NIEMANLAB (Jan. 29, 2020), <https://bit.ly/2AN0Z2R> (“Circa 2012, one of the most popular lines among American newspaper journalists went something like this: ‘Newspapers can’t be that terrible of a business if Warren Buffett, the smartest investor in the world, wants in.’”).

44. See Michael J. de la Merced, *Warren Buffett Will Sell His Newspaper Empire*, N.Y. TIMES (Jan. 29, 2020), <https://nyti.ms/37ebFUc>.

news business,”⁴⁵ with his decision “taken as yet another sign that the industry is doomed.”⁴⁶ *Poynter* asked, “If one of the richest men on the planet has soured on newspapers, what chance do newspapers have?”⁴⁷ The “self-described lover of newspapers” who was “on the shortlist of the smartest business minds to ever live,” had “thrown up his hands and turned his back” on the industry.⁴⁸ The news business’s savior had abandoned it.⁴⁹

The dramatic saga of Buffett’s newspaper investments mirrors the uneasy marriage between American capitalism and American journalism. The task of producing journalism traditionally has been left to the free market.⁵⁰ As a result, journalism must pay its own way by generating profit in order to survive. As venture capitalist Marc Andreessen has argued, “The news business is a business like any business. It can and should be analyzed and run like a business.”⁵¹

But is it appropriate to allow journalism to live or die according to its profitability? The tension inherent in for-profit journalism is nothing new.⁵² But the question has become more urgent because journalism is, in fact, dying, and it is dying because it is unprofitable. There is no market case for journalism. The economics just do not work.

My argument is not that journalism can *never* be profitable; scattered few organizations—typically, large outlets that can rely on a national base of subscribers—will survive, and perhaps even thrive.⁵³ But

45. *Id.*

46. Alex Shephard, *Warren Buffett Was a Terrible Newspaper Owner*, NEW REPUBLIC (Jan. 31, 2020), <https://bit.ly/2LKaQsq>.

47. Tom Jones, *Warren Buffett Sold off His Newspapers—and a Lot of Optimism About the Industry Went with Them*, POYNTER (Jan. 30, 2020), <https://bit.ly/3g1f0Kp>.

48. *Id.*

49. *See id.* (“That’s the depressing part, that it’s Buffett getting out. Whenever we would start feeling blue about the future of newspapers, we could at least point to Buffett as our savior.”); *see also* Benton & Doctor, *supra* note 43 (“By selling Berkshire Hathaway’s newspapers to Lee Enterprises, the world’s most successful investor is acknowledging the industry’s downhill slide is not near an end.”).

50. *See* Christine Schmidt, *This is the State of Nonprofit News in 2018*, NIEMANLAB (Oct. 2, 2018), <https://bit.ly/2zi4kGw> (noting that, in 2018, nonprofit newsrooms only employed about 2,200 journalists).

51. Marc Andreessen, *The Future of the News Business: A Monumental Twitter Stream All in One Place*, PMARCA (Feb. 25, 2014), <https://bit.ly/3e2d8Ps>.

52. *See generally* RODGERS, *supra* note 32 (discussing, in particular, the long history of the religious critique of the relationship between business and journalism).

53. *See* Noah Kulwin, *Jeff Bezos Is Saving the Washington Post, but He Won’t Be Able to Save Newspapers*, VOX (June 28, 2016), <https://bit.ly/3cYvocJ> (“[M]ost newspapers don’t get to have a billionaire sugar daddy.”). Indeed, national outlets may thrive *at the expense* of other journalism. *See* Ben Smith, *Why the Success of the New York Times May Be Bad News for Journalism*, N.Y. TIMES (Mar. 1, 2020), <https://nyti.ms/3iWAKHF> (arguing that the *Times* has been a beneficiary of “the same rich-get-richer, winner-take-all forces that have reshaped businesses from airlines to pharmaceuticals” and that it has crowded out competition).

there are two points to be made about the relationship between profits and journalism. First, as explained in this Part, there will never be *enough* profits in the news business to support an adequate supply of journalism. Second, as explained in Part III, the search for an increased share of dwindling profits incentivizes news organizations to undermine their important democratic functions.

This Part explores the relationship between journalism and capitalism and argues that the two are fundamentally irreconcilable. It first details the dire present conditions of American journalism. It then explains the economic and historical reasons why such conditions have emerged. Finally, it argues that current market-based efforts to save journalism are not viable solutions.

A. *The Collapse*

There are basically two sources of revenue for a news organization: subscription fees and advertising.⁵⁴ Revenue from subscription fees, known in shorthand as “circulation,” represents direct payments made by consumers in exchange for access to the news product. Advertising revenue consists of payments to producers in exchange for transmitting advertisements to the consumer alongside the news.

A typical economic transaction consists of a direct payment: a consumer pays a producer a mutually agreeable sum, and the producer provides the product. This model, though, has never applied to journalism, which has always faced a disparity between the subscription price necessary to make the enterprise profitable and the subscription price consumers are willing to pay. As a result, “subscriptions alone *have never supported* and are not likely ever to pay the full cost of gathering and disseminating general local news.”⁵⁵ Instead, advertisers have intervened in the transaction and, in doing so, have effectively subsidized the provision of news. Until recently, “advertisers typically paid almost

54. *See Revenue Models*, NW. UNIV. LOCAL NEWS INITIATIVE, <https://bit.ly/30sDNkT> (last visited June 25, 2020). News organizations have, in increasingly desperate attempts to remain profitable, attempted other revenue-generation methods, such as hosting paid events, offering marketing services, providing commercial printing, etc. *See id.* (describing increased use but also relative lack of success of alternative revenue models); Kerry Flynn, *The Atlantic Laid Off 68 Staffers Despite Its Unparalleled Pandemic Coverage*, CNN (May 21, 2020), <https://cnn.it/2VRyJDI> (noting that *The Atlantic* had laid off 68 staffers after the coronavirus pandemic decimated its in-person events business).

55. KNIGHT COMM’N ON THE INFO. NEEDS OF COMMUNITIES IN A DEMOCRACY, ASPEN INST., *INFORMING COMMUNITIES: SUSTAINING DEMOCRACY IN THE DIGITAL AGE: REPORT OF THE KNIGHT COMM’N ON THE INFO. NEEDS OF COMMUNITIES IN A DEMOCRACY* 15 (2009) [hereinafter *Knight Comm’n Rpt.*] (emphasis added).

all of the product's cost, and readers rode their coattails."⁵⁶ The subsidy—the percentage of the cost of journalism (plus a profit margin) borne by advertisers—has traditionally accounted for 80% of journalism revenue.⁵⁷

In particular, classified ads—the “golden goose” of the newspaper industry that functioned as “a license to print money”⁵⁸—provided outsized revenue to newspapers, allowing the press, briefly and gloriously, to paint over the fundamental economic flaws in its business model. National and local newspapers alike were able to exercise the market power provided by their subscriber base to charge classified advertisers enormous sums for tiny plots of newspaper space.⁵⁹

The story of journalism's modern collapse begins in the classifieds section. In 2000, classified ads provided \$19.6 billion in revenue,⁶⁰ or roughly 40% of the industry's ad revenue.⁶¹ Many papers relied on classified ads for as much as 70% of their revenue.⁶² Then, along came Craigslist, eBay, and Google. By 2012, revenue from classified ads had plummeted to \$4.6 billion, and classified ad revenue accounted for only 18% of a vastly diminished revenue base for papers.⁶³ The Federal Reserve of St. Louis estimated newspaper classified ad revenue at \$3.1 billion in 2017.⁶⁴ More recent numbers are hard to come by, although PricewaterhouseCoopers (“PwC”) recently estimated that newspaper classified ads would continue to decline annually at an 11% clip.⁶⁵

The story of classified ads is only a microcosm of the larger collapse of newspaper revenue. Facebook and Google have devoured

56. Mamta Badkar, *Buffett Explains Why He Paid \$344 Million for 28 Newspapers, and Thinks the Industry Still Has a Future*, BUS. INSIDER (Mar. 1, 2013), <https://bit.ly/2ZvhWJo>.

57. See Rick Edmonds, *Revenues Pass Advertising for the First Time*, POYNTER (June 1, 2015), <https://bit.ly/3cKLSEY>.

58. John Reinan, *How Craigslist Killed the Newspapers' Golden Goose*, MINNPOST (Feb. 3, 2014), <https://bit.ly/2X6H0DC>.

59. See Jeremy Littau (@JeremyLittau), TWITTER (Jan. 24, 2019, 1:43 PM), <https://bit.ly/2Up4XFC> (“Classified ads were a damn boondoggle. \$500 in a mid-metro to place a car ad. The more expensive your item, the more you got charged. No wonder people rebelled the minute they were offered the ability to do it for free. [Craig] Newmark didn't kill classifieds; news publisher greed did.”).

60. See Rick Edmonds, *Classified Ad Revenue Down 70 Percent in 10 Years, With One Bright Spot*, POYNTER (Feb. 1, 2010), <https://bit.ly/2WMtC8P>.

61. See Reinan, *supra* note 58.

62. See Mark Fitzgerald, *How Did Newspapers Get in this Pickle?*, EDITOR & PUBLISHER (Mar. 18, 2009), <https://bit.ly/2ZiFG37>.

63. See Reinan, *supra* note 58.

64. See *Breakdown of Revenue by Advertising Type: Newspapers Advertising Space – Classified Advertising for Newspaper Publishers, All Establishments, Employer Firms*, FED. RES. ECON. DATA, <https://bit.ly/2z6CrBh> (last updated Jan. 30, 2020).

65. See *US Online and Traditional Media Advertising Outlook, 2018-2022*, MARKETING CHARTS (June 25, 2018), <https://bit.ly/2T9yOBu>.

increasing shares of the commercial advertising market,⁶⁶ and PwC estimates continued annual reductions of at least 9% in all newspaper advertising revenue streams.⁶⁷ Finally, even where newspapers have retained digital advertising revenue, it tends to be significantly cheaper for advertisers than print ad revenue.⁶⁸

The macro-scale result of the decline in advertising revenue is stunning. During the “golden age” of journalism in the late-twentieth century, advertising accounted for 80% of newspaper revenue. In 2015, circulation revenue exceeded advertising revenue for the first time.⁶⁹ By 2018, “newspapers derive[d] almost twice as many revenues from circulation . . . as from advertising.”⁷⁰ And to put to rest any optimistic interpretation, circulation has been declining as well, recently reaching its lowest point since 1940.⁷¹ In exact figures, total newspaper revenue in 2000 was \$86,342,665,109; by 2018, that number had declined more than 70% to \$25,341,366,102.⁷² The difference—more than \$60 billion—is visible in the statistics set forth at the beginning of this Article: tens of thousands of lost jobs and thousands of closed newspapers. The loss is also measurable in ways much more difficult to quantify, but no less real: information unreported, scandals undiscovered, power unchecked.

Nor is there hope of recovery on the horizon. The Bureau of Labor Statistics estimates that “[e]mployment of reporters and correspondents is projected to decline 12[%]” from 2018 to 2028 due to further declines in advertising revenue.⁷³ Circulation is likewise “expected to continue to decline,” leading to “difficulty selling traditional forms of advertising . . . forc[ing] news organizations to downsize and employ fewer journalists.”⁷⁴ Finally, increased consolidation—forced upon news

66. See Mike Pesca, *Digital Journalism, a Market Failure*, SLATE: THE GIST (Jan. 24, 2019, 8:27 PM), <https://bit.ly/3669RMe2109> (“The layoffs hitting journalism have nothing to do with its quality—and everything to do with Google and Facebook.”).

67. See *US Online and Traditional Media Advertising Outlook, 2018-2022*, *supra* note 65.

68. See BUREAU OF LABOR STATS., *Occupational Outlook Handbook, Reporters, Correspondents, and Broadcast News Analysts: Job Outlook*, U.S., DEPT. OF LABOR, <https://bit.ly/2TbTTeq> (last updated Sept. 4, 2019).

69. See Edmonds, *supra* note 57.

70. *US Online and Traditional Media Advertising Outlook, 2018-2022*, *supra* note 65.

71. Michael Barthel, *5 Key Takeaways About the State of the News Media in 2018*, PEW RES. CTR. (July 23, 2019), <https://pewrsr.ch/2AuWQQF>.

72. *Newspapers Fact Sheet*, PEW RES. CTR. (July 9, 2019), <https://pewrsr.ch/3cK2c9e>. After confirming with Pew that the revenue figures reflected nominal values, I adjusted the data for inflation to reach these figures, measured in 2018 dollars.

73. BUREAU OF LABOR STATS., *supra* note 68.

74. *Id.*

organizations by declining advertising and circulation revenues—will lead to fewer jobs for journalists.⁷⁵ Journalism’s economic model is beyond repair.

B. *The Cause*

The problem with organizing the press as a market institution is that the market cannot generate sustainable business models for journalism.⁷⁶ This is because journalism, like national defense, streetlights, and clean air, is a “public good” in the traditional economic sense. It is non-excludable—once knowledge is reported it can be freely shared—and non-rivalrous—one person’s consumption of reporting does not leave less for the next person. Consequently, the same thing is true of journalism as is true of all other public goods: one cannot rely on the market to produce the optimal amount of the good.⁷⁷ “[J]ust because [America] need[s] journalism does not mean that consumers in the marketplace will generate enough revenue to support that journalism.”⁷⁸

Because of the unique nature of journalism, reporting also generates enormous positive externalities that news organizations have no hope of capturing. For example, one investigative series from Raleigh’s *News & Observer* on North Carolina’s probation system cost the paper \$216,500 to produce, but generated more than \$62 million—\$287 for each dollar of investigative cost—in net policy benefits.⁷⁹ Only 6% of North Carolina households paid for the print version of the *News & Observer* the year the series was published.⁸⁰ Likewise, a Pulitzer Prize-winning *Washington Post* investigation into D.C. police shootings, which cost \$487,000, produced as much as \$73.6 million in social benefits when D.C. police implemented a variety of reforms as a result of the reporting.⁸¹ The *Post* won a Pulitzer but otherwise did not directly receive any portion of the value its reporting generated.⁸²

75. *Id.*

76. See Emily Bell, *What 2000 Job Cuts Tell Us: The Free Market Kills Digital Journalism*, *GUARDIAN* (Feb. 2, 2019), <https://bit.ly/3bEgozd> (“However, the problem now is so clear that even the most advanced digital thinkers can see it: a digital free market for journalism doesn’t work.”).

77. See Sean Ingham, *Public Good*, *ENCYC. BRITANNICA* (Aug. 17, 2015), <https://bit.ly/364fvid>; see also HERBERT SCHILLER, *INFORMATION INEQUALITY* xv (1995) (describing journalism as a public service, the benefits of which cannot be fully accounted for in traditional market pricing).

78. Knight Comm’n Rpt., *supra* note 55, at 15.

79. See Anya Schiffrin, *Book Aims to Pin Down Economic Return on Investigative Reporting*, *COLUM. JOURNALISM REV.* (Apr. 11, 2017), <https://bit.ly/366Z6JV>.

80. *See id.*

81. See James T. Hamilton, *Accountability Journalism: A Cost-Benefit Analysis*, *NIEMAN REPS.* (July 22, 2016), <https://bit.ly/31PQ0kl>.

82. *See id.* (“There is no market mechanism that transforms impacts such as the value of lives saved by accountability journalism into equivalent subscription or

Other studies have shown that, for example, the closing of a local newspaper corresponds with statistically significant increases in the costs of borrowing for municipalities, even when controlling for other factors.⁸³ The closure of a local newspaper creates a “local information vacuum” that national news media cannot and will not fill, meaning that “potential lenders have greater difficulty evaluating the quality of public projects and the government officials in charge of those projects,” and therefore charge higher rates to lend.⁸⁴ Local officials also tend to increase their own pay following the closure of a local news organization.⁸⁵ Needless to say, news organizations do not receive any portion of the difference between the cost of borrowing in their presence and the cost of borrowing in their absence, nor do they get a cut of the money that would otherwise go to increased pay for local officials if the paper were to close.

Whether one looks at the value generated by the paper merely by its presence as a watchdog or the value generated by specific instances of accountability journalism that result in discrete, quantifiable changes, there is simply “no market mechanism that transforms” the value generated “by accountability journalism into equivalent subscription or advertising revenue.”⁸⁶ As a result of the market’s inability to compensate news producers for these externalities, “the free market is—and always has been—incompatible with accountability journalism.”⁸⁷ The Federal Trade Commission has likewise conceded that “public affairs reporting may indeed be particularly subject to market failure.”⁸⁸

In an attempt to paper over these fundamental—and unavoidable—flaws in the market case for journalism, the American news industry has turned to two broad solutions: subsidization and monopolization.

First, journalism in America has *always* had to rely almost entirely on subsidization to exist. The news has *never* not been subsidized. In post-Revolutionary America, the federal government heavily subsidized the development and spread of newspapers through extremely favorable

advertising revenue. . . . The problem . . . is how to fund similarly expensive stories whose reporting costs are concentrated on news organizations yet whose benefits are widely distributed across society.”)

83. See Liz Farmer, *When Newspapers Close, the Cost of Government Goes Up*, GOVERNING (July 25, 2018), <https://bit.ly/3cRNb5j>.

84. *Id.*

85. See *id.*

86. Hamilton, *supra* note 81.

87. Emily Bell (@emilybell), TWITTER (Sept. 14, 2019 12:26 PM), <https://bit.ly/2WD5tkQ>.

88. Notice on Public Workshops and Roundtables: From Town Crier to Bloggers: How Will Journalism Survive the Internet Age?, 74 Fed. Reg. 51605, 51606 (Oct. 7, 2009), <https://bit.ly/30qbZ0z>.

postage rates and lucrative government subscriptions.⁸⁹ If the same postage rates were still in effect today, a number of now-defunct print entities would still be profitable.⁹⁰ Gradually, as the government dialed back its subsidy, an expressly partisan press developed, in which newspapers were directly supported by, and, in turn, operated as mouthpieces of, the major political parties.⁹¹ The rise of industry and mass consumerism in the aftermath of the Civil War generated the model that lasted until the advent of the internet,⁹² in which advertisers subsidized about 80% of the cost of journalism. Additionally, cheaper-to-produce and more popular news—for example, sports or lifestyle sections—subsidized the provision of public interest journalism.⁹³ The internet, which allows consumers to read only the stories that interest them and advertisers to advertise only on those stories, destroyed this internal “subsidy,” too.⁹⁴ Today, as discussed in greater depth *infra*, outlets increasingly rely on the capricious generosity of billionaires to subsidize their operations.⁹⁵

Second, capital has generally forced the industry to monopolize or die. This has resulted in a marked transformation from the news environment of yesteryear. For example, in 1870, the largest cities in the country, with populations of around 270,000, averaged six daily papers while cities with populations of 31,000 had, on average, two dailies.⁹⁶ By

89. See Will Meyer, *The American Experiment was Built on a Government-Supported Press*, COLUM. JOURNALISM REV. (May 7, 2018), <https://bit.ly/2ZbtX6z> (“[A]t the turn of the 19th century, there wasn’t a disagreement as to whether the press should be subsidized, but rather how much it should be.”); David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 801 n.148 (1995) (“The House’s decision to furnish its members with newspapers at public expense, which could easily have been justified as necessary and proper to the informed exercise of the legislative function, was instead defended on the broader ground that the press deserved encouragement.”).

90. See Geoffrey Cowan & David Westphal, *Public Policy and Funding the News*, USC ANNENBERG CTR. ON COMMUN. LEADERSHIP & POL’Y (Jan. 2010), <https://bit.ly/2zNzRjq>.

91. See James L. Baughman, *The Fall and Rise of Partisan Journalism*, U. WIS. CTR. FOR JOURNALISM ETHICS (Apr. 20, 2011), <https://bit.ly/3g7BitY> (“Before the Civil War, parties actually subsidized the operations of many newspapers. Sometimes directly, sometimes through government printing contracts.”).

92. FRANK L. MOTT, *AMERICAN JOURNALISM 1690–1940*, at 56 (1942).

93. See David S. Bennahan, *The New Niche*, COLUM. JOURNALISM REV. (Mar./Apr. 2009), <https://bit.ly/3gyc72S> (“The days of the omnibus newspaper were over by 2012. This has put public-interest journalism—which traditionally had been subsidized by real-estate, sports, and lifestyle sections—on life support.”).

94. See Timothy Karr & Craig Aaron, *Beyond Fixing Facebook*, FREE PRESS, Feb. 2019, at 1, 21, <https://bit.ly/2DgCFHK> (“This is the damaging reality of the attention economy. It has misaligned the flow of advertising money away from content with high social value.”).

95. See *infra* Section I.C.1.

96. See JAMES T. HAMILTON, *ALL THE NEWS THAT’S FIT TO SELL* 54–55 (2004).

1900, the largest cities in the country averaged almost 11 dailies, and the small cities (those with a population of roughly 91,290) averaged nearly four.⁹⁷

The tide quickly turned. An analysis published in the *Yale Law Journal* in 1952 noted the “20th Century trend toward single-publisher communities,” including a 25% decline in the number of daily newspapers published between 1909 and 1950, even while total circulation drastically increased over the same period.⁹⁸ As a result, in 1952, “more than 80[%] of all cities served by local dailies ha[d] only one paper.”⁹⁹ By 1963, only 3.4% of U.S. cities with a daily newspaper had more than one.¹⁰⁰ And by 2009, only New York, Chicago, Detroit, Boston, and Philadelphia were served by multiple daily papers.¹⁰¹

The monopolization of a particular news market by a single organization allowed newspapers to generate outsized profits, but in economic terms, it represented a market failure.¹⁰² The investigative journalism supported by monopoly newspapers in the twentieth century, and lionized as the highlight of a journalistic “Golden Age” today, was in actuality “a modest spinoff” generated by the “near absolute market power” of journalistic companies that could extract “extortionate and always-rising display advertisement prices.”¹⁰³

Thanks to the internet, the news industry’s monopoly on advertising has been destroyed and replaced by a new regime controlled by entities like Facebook, Google, and craigslist.¹⁰⁴ Monopoly-loving capitalists

97. *See id.*

98. Yale L.J. Editorial Board, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948, 949 (1952).

99. *Id.* at 950.

100. *See* SIMON P. ANDERSON, JOEL WALDFOGEL & DAVID STRÖMBERG, HANDBOOK OF MEDIA ECONOMICS 410 (2016).

101. *See* Heidi Sullivan, *A Tale of Two Cities (Er, One City, Two Newspapers)*, CISION (Mar. 18, 2009), <https://cism.co/3cP9zLE>. *But see* Richard Pérez-Peña & Mary Chapman, *Detroit’s Daily Papers Are Now Not So Daily*, N.Y. TIMES (Mar. 30, 2009), <https://nyti.ms/38vX721> (noting that the *Detroit News* and the *Detroit Free Press*, which “share business functions under a joint operating agreement,” had ended home delivery of their papers on every day but Thursday, Friday, and Sunday, and offered a “condensed” version of their papers on the other days of the week).

102. *See* Dan Gillmor, *Journalism Monopoly was also a Market Failure*, SALON (June 16, 2010), <https://bit.ly/2XfFntz>; *see also* Victor Pickard, *Journalism’s Market Failure Is a Crisis for Democracy*, HARV. BUS. REV. (Mar. 12, 2020), <https://bit.ly/2LMtIXH> (“This was a partnership of convenience—a happy accident—that camouflaged what was in fact an unnatural union. For this and other reasons, journalism has always been prone to market failure.”).

103. Gillmor, *supra* note 102.

104. *See* Pesca, *supra* note 66 (discussing the Facebook and Google online advertising duopoly); Reinan, *supra* note 58 (discussing craigslist’s destruction of the newspapers’ monopoly on classified ads).

have, in turn, abandoned the industry.¹⁰⁵ Counterintuitively, the “eroding newspaper business models represent markets that are *working*.”¹⁰⁶ The problem is that a working market does not work for journalism.

C. The “Solutions”

The market forces laying waste to the press industry have, of course, been met with alarm, but also with a vast number of proposals to “solve” what is, at base, an unsolvable problem. Two proposals have risen to the forefront: the patronage model, in which the press is held aloft by the generosity of the wealthy; and the corporatization model, in which the press is pared down to its barest essentials in the effort of squeezing out a profit. Neither is optimal.¹⁰⁷

1. Patronage

The first emerging “solution” is the patronage model, in which America’s access to journalism relies on the beneficence of capricious billionaires.¹⁰⁸ “Not since the 19th century have so many individuals had so much power over the press.”¹⁰⁹ The pitfalls of this model are obvious as a theoretical matter: The press cannot hold power to account if it is beholden to it.

105. See *supra* notes 34–49 and accompanying text (describing Warren Buffett’s interest in newspapers as a function of their monopoly status and his abandonment of newspapers as that status disappeared).

106. Gillmor, *supra* note 102 (emphasis added).

107. The extreme economic disruption caused by the COVID-19 pandemic has resulted in a variety of even more extreme—and absurd—funding mechanisms. For example, *The National Post*, Canada’s fourth-largest newspaper, lifted all of its paywalls for the month of April thanks to a partnership with a fried chicken company. See Nick Eagland (@nickeagland), TWITTER (Apr. 1, 2020, 3:11 PM), <https://bit.ly/2Tp2t9Q> (“#BREAKING A fried chicken company has paid to lift all Postmedia paywalls so you can read us for free for April. This is not a joke. It’s real and it’s spectacular.”). And *Vox*, an editorial brand owned by Vox Media, which is in turn owned in significant part by Comcast, recently announced that it was “accepting audience support with the launch of a new contribution program”—i.e., the for-profit media company began asking for donations. VOX (@voxdotcom), TWITTER (Apr. 8, 2020, 12:21 PM), <https://bit.ly/2TrCmPE>.

108. See, e.g., Jonathan Chait (@jonathanchait), TWITTER (Apr. 18, 2020, 8:52 AM), <https://bit.ly/2WN2x5n> (“Why aren’t donors stepping up to rescue newspapers while they can be saved cheaply? One day they will realize they can’t have democracy without journalism, and will need to build them back from scratch at much greater cost.”); Megan McArdle (@asymmetricinfo), TWITTER (Nov. 21, 2019, 11:56 AM), <https://bit.ly/3dVBKJQ> (“I am surprised that no one has thought to point out to journalists that—given the parlous business model of our industry—one of the heaviest casualties of a stringent wealth tax would be journalism jobs.”).

109. Alex Pareene, *Billionaires Gone Wild*, COLUM. JOURNALISM REV. (Winter 2018), <https://bit.ly/2WltC8Q>.

For example, when Michael Bloomberg announced his run for the 2020 Democratic presidential nomination, it was widely reported that *Bloomberg News*, which he owns, would not report on the campaign for obvious ethical reasons.¹¹⁰ *Bloomberg's* editor-in-chief affirmed that “the outlet would maintain its ‘tradition’ of not investigating Bloomberg, his family, or foundation,” and, in the interest of fairness, would extend the same courtesy to his rivals.¹¹¹ Nonetheless, exactly one month after the pledge was announced, *Bloomberg News* published a “[d]isgraceful”¹¹² and much-derided¹¹³ hit piece aimed at the presidential campaigns of Senators Elizabeth Warren and Bernie Sanders, calling out those campaigns for purchasing office supplies through Amazon while criticizing the company’s business practices.¹¹⁴ Bloomberg, it should be noted, was encouraged to enter the race by Jeff Bezos, Amazon’s founder,¹¹⁵ and used his brief time in the race to attack Warren and Sanders for their criticisms of Google, Facebook, and Amazon.¹¹⁶

The patronage model is also no path to economic sustainability. “A patron is a person. A person can change his or her mind—and often does. Chris Hughes junked *The New Republic* when losses eclipsed his idealism. Phil Anschutz snuffed out *The Weekly Standard*.”¹¹⁷ Other outlets producing quality, award-winning journalism have similarly had the rug pulled from beneath them:

Pacific Standard and *Topic*, a pair of award-winning publications that stood out from the pack of click-hungry websites, were founded by rich patrons. The generosity of their benefactors allowed them to publish robust journalism at a time when old-line magazine publishers like Time Inc. were being sold for parts—but it wasn’t

110. See Lauren Hirsch & Brian Schwartz, *Bloomberg News Will Not Investigate Mike Bloomberg or His Democratic Rivals During the Primary*, CNBC (Nov. 24, 2019, 3:01 PM), <https://cnb.cx/2zeIFPz>.

111. Sasha Pezenik, *Warren Slams Bloomberg for His News Organization Not Covering Democrats*, ABC NEWS (Jan. 24, 2020, 9:52 PM), <https://abcn.ws/2WOyqdl>.

112. Yashar Ali (@yashar), TWITTER (Dec. 23, 2019, 5:07 PM), <https://bit.ly/2WKOyWS>.

113. See Joseph A. Wulfsohn, *Bloomberg News Slammed for ‘Hit Piece’ on Sanders, Warren Despite Vow Not to Investigate 2020 Democrats*, FOX NEWS (Dec. 23, 2019), <https://fxn.ws/2zgrVHx>; Jake Johnson, *Despite Vow Not to Probe Billionaire Owner’s 2020 Rivals, Bloomberg News Runs ‘Ridiculous Hit Piece’ on Warren and Sanders*, COMMON DREAMS (Dec. 24, 2019), <https://bit.ly/3g71p47>.

114. See Spencer Soper, *Sanders, Warren Campaigns Spend the Most on Amazon While Trashing It*, BLOOMBERG (Dec. 23, 2019, 12:50 PM), <https://bloom.bg/2WQj6JD>.

115. See Jason Del Rey, *Jeff Bezos Asked Michael Bloomberg Months Ago if He’d Consider Running for President*, VOX (Nov. 9, 2019, 1:24 PM), <https://bit.ly/3cOHJzZ>.

116. See Makena Kelly, *Mike Bloomberg Says Breaking Up Tech Companies ‘Is Not an Answer’*, VERGE (Jan. 21, 2020, 12:21 PM), <https://bit.ly/2LM9XiN>.

117. Derek Thompson, *The Media’s Post-Advertising Future Is Also Its Past*, ATLANTIC (Dec. 31, 2018), <https://bit.ly/3g1EpUd>.

enough to keep them from folding. Both died this summer, when their backers decided they were no longer worth the expense.¹¹⁸

As a final example, in March 2017, *DNAinfo*, an online, local news site owned by billionaire Joe Ricketts, purchased the *Gothamist* network—nine other online, local news sites covering various cities.¹¹⁹ Immediately following the acquisition, *Gothamist* sites deleted five negative pieces about Ricketts.¹²⁰ In April 2017, *Gothamist* and *DNAinfo* staff began to consider unionization. *DNAinfo*'s chief operating officer responded with a threat that the business might close should employees unionize, and Ricketts publicly castigated unions.¹²¹ On November 2, 2017, one week after *DNAinfo* and *Gothamist* staff in New York voted to join a union, Ricketts shut the entire network down.¹²² All content was removed from the network's websites and replaced with a letter from Ricketts, which noted: "*DNAinfo* is, at the end of the day, a business, and businesses need to be economically successful if they are to endure."¹²³

The titans of journalism are no more insulated from the pressures leading to the patronage model—the collapse of traditional business models and the rise of the ultra-rich—than the minnows. In 2009, the *New York Times* secured a massive bailout in the form of a \$250 million loan from Mexican billionaire Carlos Slim,¹²⁴ who, in 2016, owned more than 17% of the *New York Times* company.¹²⁵ And Jeff Bezos, the richest man in modern history, purchased the *Washington Post* in October 2013 amidst its own financial troubles.¹²⁶ On the other side of the coin, where billionaires have chosen to crush journalism rather than support it, there is little to stop them, as demonstrated when Peter Thiel bankrolled a successful effort to destroy *Gawker* in retaliation for unfavorable coverage.¹²⁷

118. Marc Tracy, *Closing of Pacific Standard and Topic Shows Perils of Depending on a Rich Patron*, N.Y. TIMES (Aug. 17, 2019), <https://nyti.ms/2zWbyjk>.

119. See Brendan O'Connor, *Gothamist Deleted Negative Coverage of Its New Owner*, JEZEBEL (Mar. 8, 2017, 1:40 PM), <https://bit.ly/3bP1juL>.

120. O'Connor, *supra* note 119.

121. See Andy Newman & John Leland, *DNAinfo and Gothamist Are Shut Down After Vote to Unionize*, N.Y. TIMES (Nov. 2, 2017), <http://nyti.ms/2ztbfLK>.

122. *See id.*

123. *Id.*

124. See Ravi Somaiya, *Carlos Slim More Than Doubles His Stake in Times Company*, N.Y. TIMES (Jan. 14, 2015), <https://nyti.ms/36kO6Zh>.

125. *See id.*

126. See Paul Farhi, *Washington Post to Be Sold to Jeff Bezos, the Founder of Amazon*, WASH. POST (Aug. 5, 2013), <https://wapo.st/2yjxRzf>.

127. See Matt Drange, *Peter Thiel's War on Gawker: A Timeline*, FORBES (June 21, 2016, 1:22 PM), <https://bit.ly/3cTaqM8>.

Billionaires will not—indeed, cannot—save journalism.¹²⁸ As an economic matter, “[t]he press baron model works out so long as people want to be press barons.”¹²⁹ But the model runs short when the patron realizes that “they probably don’t have the one good idea that will ‘crack the code’ of making it profitable to run a large and expensive news-gathering organization,”¹³⁰ a code that, as described above, is impossible to crack.¹³¹ Even more fundamentally, the patronage model is incompatible with journalism’s democratic mission. The availability of accountability journalism cannot depend on the generosity of those who are, by definition, the target of that journalism’s scrutiny. The ultra-rich owners of news organizations have already demonstrated on any number of occasions their willingness to use their ownership interest to advance their personal agendas. As advertising and circulation revenues continue to decline, the power that these benefactors have over news organizations will only increase. Replacing public-interest journalism with a superficial imitation controlled by a handful of billionaires is not the path to saving journalism.

2. Corporatization

The second emerging “solution” is a model defined by corporatization, with a corresponding increase in ownership interest by hedge funds and private equity firms.

Hand-in-hand with journalism’s economic apocalypse, consolidation is the overarching story of recent press history. In 1960, 32% of newspapers were owned by a chain; by 2000, more than 90% were.¹³² And in November 2019, the two largest newspaper owners in the

128. See Kulwin, *supra* note 53.

129. Pareene, *supra* note 109.

130. *Id.*

131. See Flynn, *supra* note 54 (noting that layoffs at *The Atlantic* in response to the COVID-19 pandemic “prompted some head-scratching among journalists who wondered why a philanthropist who Forbes estimates to be worth \$19 billion [majority owner Laurene Powell Jobs] cannot save jobs”); Jake Swearingen (@JakeSwearingen), TWITTER (May 21, 2020, 11:27 AM), <https://bit.ly/3e6x43i> (noting, in response to calls to subscribe to the *Atlantic*, that the median American household purchasing an *Atlantic* subscription would be the equivalent as a percentage of net worth of Laurene Powell Jobs spending \$10.7 million dollars, while the annual cost of employing an *Atlantic* staffer was roughly \$120,000); Tim Herrera (@TimHerrera), TWITTER (May 21, 2020, 10:02 AM), <https://bit.ly/2BzYBNF> (“What is the point in selling yourself to a billionaire if the end result is the exact same thing as if you hadn’t, except now it’s doubly worse because you *know* your owner could save you and they choose not to?”) (punctuation and capitalization corrected).

132. See *The Rise of a New Media Baron*, UNC CTR. FOR INNOV. & SUSTAINABILITY IN LOC. MEDIA (2016), <https://bit.ly/3e4TDWM>.

country, GateHouse Media and Gannett, merged, bringing more than 260 dailies and 300 weeklies under the control of the same corporation.¹³³

In the broadcast context, the Federal Communications Commission currently prohibits any company from owning enough stations to reach more than 39% of the national audience. But this rule is under constant legal threat,¹³⁴ including from the Trump administration¹³⁵ and its corporate allies. In particular, Sinclair Broadcast Group, which owns nearly 200 local stations, at one point attempted to acquire the local television news holdings of Tribune Corp., which would have put Sinclair-owned outlets in more than 70% of American households.¹³⁶

Consolidation and corporatization are bad for the press. First, these forces jointly increase the focus on profits at the expense of the press's public mission. "[C]orporatized" outlets "tend to put greater emphasis on profits and less emphasis on non-profit goals," and chain-owned newspapers tend "to be more 'corporatized' than independently owned newspapers."¹³⁷ Unsurprisingly, in a study that presented newspaper advertising executives with hypothetical ethical problems emerging from advertiser attempts to influence news content, small chain-owned papers were more likely to sacrifice editorial integrity at the behest of advertisers than large independent papers.¹³⁸ Noah Brooks, a friend and biographer of Abraham Lincoln, noted as much in the 1890s, observing that "the publisher's department . . . is apt to be officious, if not influential, in directing the editorial conduct of the paper. This is especially true of the country papers, those rural leaders of public opinion on whose unbiased judgment so much depends."¹³⁹

Second, corporatization reduces local news coverage in favor of cheaper national news coverage, encouraging increased political polarization. For example, when Sinclair purchases a local television station, the result is "a notable spike in nationwide news coverage, and a notable decline in actual local reporting."¹⁴⁰ The national news is

133. See Marc Tracy, *After Its Merger, Gannett Will be the Largest Newspaper Publisher in the U.S.*, N.Y. TIMES (Nov. 14, 2019), <https://nyti.ms/3e7aCb0>.

134. See CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, *FCC Broadcast Ownership Rules*, FED. COMM'NS COMM'N, <https://bit.ly/3fflpAt> (last updated Jan. 17, 2020).

135. See MEDIA BUREAU, *FCC Begins Review of National Ownership Cap*, FED. COMM'NS COMM'N (Dec. 18, 2017), <https://bit.ly/3f8xUgV>.

136. See Tom Wheeler, *A Shameless Effort to Consolidate Control of Local Broadcasters*, BROOKINGS INST. (June 27, 2018), <https://brook.gs/3hbBoBa>.

137. Soontae An & Lori Bergen, *Advertiser Pressure on Daily Newspapers*, 36 J. ADVERTISING 111, 113 (2007).

138. See *id.* at 117.

139. Noah Brooks, *To Abolish Newspaper Advertisements*, PRINTERS' INK, Aug. 13, 1890, at 154, <https://bit.ly/3e3qlax>.

140. Karl Bode, *The Death of Local News Is Making Us Dumber and More Divided*, VICE (Feb. 21, 2019, 1:16 PM), <https://bit.ly/3fbTwsG>.

cheaper; Sinclair can rely on others' reporting, add its own editorial spin,¹⁴¹ and produce a single segment or script for all of its stations, rather than require each station to report and produce its own material. "Other studies have shown that when a town loses its local paper, residents tend to lean more on highly-polarized, purely-partisan national coverage of issues . . ." ¹⁴² As a result, "[v]oters were 1.9[%] more likely to vote for the same party for president and senator after a newspaper closes in their community, compared to voters in statistically similar areas where a newspaper did not close."¹⁴³

Finally, the financialization of the news industry has only worsened its economic state. Indeed, job losses in journalism actually began years before the internet became a significant factor in the market for the news, when the industry capitulated to Wall Street's demands to cut costs in order to increase profits.¹⁴⁴ For example, when the *Baltimore Sun* eliminated its afternoon edition and laid off 100 reporters in the 1990s, it was achieving 37% profits—an astronomical sum.¹⁴⁵ More recently, BuzzFeed laid off 15% of its employees despite double-digit revenue growth.¹⁴⁶ In April 2018, 30 journalists (out of 50 total) were laid off from the *Denver Post* by its hedge fund owner, even though the paper was profitable.¹⁴⁷ Finally, GateHouse Media, the firm that merged with Gannett and which now owns almost 600 newspapers, is particularly defined by its relationship to private equity, with much of its acquisition money borrowed at high interest rates from private equity firms.¹⁴⁸ This

141. See Pam Vogel, *Sinclair Is Forcing Its Stations to Run a Commentary Segment That's Essentially a Trump Campaign Ad*, MEDIA MATTERS (June 20, 2019, 11:59 AM), <https://bit.ly/3dKiRK6>.

142. Bode, *supra* note 140.

143. Joshua P. Darr, Johanna Dunaway & Matthew P. Hitt, *Want to Reduce Political Polarization? Save Your Local Newspaper*, NIEMANLAB (Feb. 11, 2019, 11:26 AM), <https://bit.ly/3cQni4X>.

144. See *The Future of Journalism: Hearing Before the Subcomm. on Commc'ns, Tech. & the Internet of the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong. 1 (2009) (prepared statement of David Simon, former reporter, *The Baltimore Sun & Blown Deadline Productions*) [hereinafter Prepared Statement of David Simon] (noting that job cutbacks began "well before the Internet ever began to seriously threaten any aspect of the industry" and occurred at a time when the industry "was one of the most profitable" in the country).

145. See *id.*

146. See Kurt Wagner & Peter Kafka, *BuzzFeed Is Laying Off More Than 200 People, Its Second Round of Cuts in 14 Months*, VOX (Jan. 23, 2019, 7:17 PM), <https://bit.ly/2XO22Zd>.

147. See Alex Shephard, *Finance Is Killing the News*, NEW REPUBLIC (Apr. 18, 2018), <https://bit.ly/2MLEpdq>.

148. See Tracy, *supra* note 133; see also Tali Arbel & Alexandra Olson, *As Gannett, GateHouse Merge, Newspaper Cost-Cutting Persists*, ASSOC. PRESS (Aug. 23, 2019), <https://bit.ly/3dQ7oZA>.

borrowing then requires GateHouse to institute immediate cuts to pay down the debt it uses to finance its acquisitions.¹⁴⁹

As David Simon has noted,¹⁵⁰ the pattern is a familiar one in the American economy: private equity “loads up companies with debt, strips out the profits, and leaves the carcass along the road in the aftermath.”¹⁵¹ One study suggested that private equity debt-loading accounted for 61% of all retail jobs lost in 2016 and 2017.¹⁵² The same thing is happening to journalism. The hedge fund that owns the *Denver Post*, Alden Global Capital, has “eliminated a staggering two out of every three staff positions at its media properties . . . Alden has loaded up many of its newspapers with debt that it uses to finance other projects.”¹⁵³ In all, as of December 2017, more than 1,500 local newspapers have been purchased by private-equity firms or hedge funds.¹⁵⁴ Papers owned by those firms have laid off journalists at twice the national average rate.¹⁵⁵ The looting of the American press is well underway.¹⁵⁶

This Part has sought to demonstrate that journalism cannot generate the profits necessary to induce the market to provide it. This problem has been apparent throughout American history; the press has relied on a combination of subsidies and monopolization—neither exactly indicative of a well-functioning market—to remain profitable. That strategy generally worked, and even generated massive profits, until the internet collapsed the press’s monopoly on advertising to the public. Classified ads were replaced by craigslist, commercial advertisers moved to Facebook and Google, and the economic foundation of the press collapsed beneath the industry’s feet.

149. Arbel & Olson, *supra* note 148 (“After GateHouse buys a paper, cost cuts typically follow.”).

150. See Prepared Statement of David Simon, *supra* note 144, at 33 (“In short, my industry butchered itself and we did so at the behest of Wall Street and the same unfettered, free-market logic that has proved so disastrous for so many American industries. And the original sin of American newspapering lies, indeed, in going to Wall Street in the first place.”).

151. David Dayen, *Private Equity: Looting “R” Us*, AM. PROSPECT (Mar. 20, 2018), <https://bit.ly/30DT1UD>.

152. See Steve LeVine, *Vulture Capitalists are Killing Off Retail Jobs*, AXIOS (Jan. 10, 2018), <https://bit.ly/2AolK4K>.

153. Shephard, *supra* note 147.

154. See Robert Kuttner & Hildy Zenger, *Saving the Free Press from Private Equity*, AM. PROSPECT (Dec. 27, 2017), <https://bit.ly/2Yoe188>.

155. See *id.*

156. See Libby Watson, *The Real Threat to Journalism Is Not Donald Trump*, NEW REPUBLIC (Oct. 25, 2019), <https://bit.ly/2XMJecH> (“The president’s supporters may fantasize about murdering journalists, but financial-sector privateers are the ones killing the industry.”).

Had this happened to any other industry, it would pose merely an economic problem. As the next Part details, the press is different.

II. THE CONSTITUTION & THE PRESS

“It is passing strange to interpret the phrase ‘the freedom of speech, or of the press’ to mean, not everyone’s right to speak or publish, but rather everyone’s right to speak or the institutional press’s right to publish.” – Justice Antonin Scalia¹⁵⁷

“[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 Jefferson¹⁵⁸

The First Amendment’s guarantee that “Congress shall make no law . . . abridging the freedom . . . of the press”¹⁵⁹ has bedeviled jurists, in large part because the text—the lodestar of constitutional interpretation¹⁶⁰—is equally susceptible to either of two potential readings. These two interpretations make up the bulk of modern Press Clause scholarship.

The first interpretation—what I refer to as the “dissemination theory”—argues that “freedom of the press” refers to an individual right held by all legal persons that can be characterized as a right to the broad dissemination of one’s expression.¹⁶¹ It is in this sense that the Press Clause is “complementary to and a natural extension of” the Free Speech Clause,¹⁶² the Free Speech Clause protects the right to speak, the Press Clause protects the right to publish, and the two together broadly protect

157. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 390 n.6 (Scalia, J., concurring).

158. Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in *XII PAPERS OF THOMAS JEFFERSON* 48–49 (J. P. Boyd ed., 1955), <https://bit.ly/2AkQljQ>.

159. U.S. CONST. amend. I.

160. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) (determining the “meaning of the Second Amendment” by analyzing its text); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903 (1985) (“The Philadelphia framers’ primary expectation regarding constitutional interpretation was that the Constitution, like any other legal document, would be interpreted in accord with its express language.”).

161. See, e.g., *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 799–800 (1978) (Burger, C.J., concurring) (concluding that “the Press Clause focuses specifically on the liberty to disseminate expression broadly”).

162. See *id.* at 800.

“freedom of expression.”¹⁶³ The textual hook for this interpretation is that the right to broadly disseminate one’s expression is expressed more literally in the Press Clause as a right to use the printing press (and thus also its modern equivalents).¹⁶⁴ The Supreme Court has accepted this interpretation,¹⁶⁵ and it remains the “prevailing view.”¹⁶⁶

As a practical consequence of the Court’s adoption of this first reading, the Press Clause has become “redundant and thus irrelevant.”¹⁶⁷ Because modern free speech doctrine comfortably includes the right to broadly disseminate one’s expression,¹⁶⁸ all activities that might be protected by the Press Clause are already protected by the Free Speech Clause. The Press Clause has effectively been read out of the Constitution.

The second interpretation claims that the Press Clause prohibits any abridgment of that “freedom” that belongs to “the press” as a distinct category of rightsholders, or perhaps as a collective institution.¹⁶⁹ This interpretation has occasionally been called the “structural” interpretation of the Press Clause,¹⁷⁰ in that it posits that the institutional press plays a special role in the constitutional structure—akin to a fourth branch of government—and that the Press Clause was designed to protect that institution.¹⁷¹

Despite a lack of success with the Supreme Court,¹⁷² the second camp has the better of the historical and normative debate, and this Part aims to build on and add to that structural argument. As a historical matter, the perceived importance of the institutional press is virtually unimpeachable. And as a normative matter, it is possible to identify

163. See West, *supra* note 25, at 1036 (noting that the Court has “frequently combin[ed] [the clauses] under the umbrella of the freedom of expression”).

164. See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (arguing that the Press Clause was understood “as securing the right of every person to use communications technology”).

165. See *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’” (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938))).

166. West, *supra* note 25, at 1034.

167. Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1257 (2005).

168. See, e.g., *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (“[T]he creation and dissemination of information are speech within the meaning of the First Amendment.”).

169. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 431 n.57 (2010) (Stevens, J., dissenting) (arguing that the First Amendment draws “explicit distinctions” between the press and other speakers, and therefore that “one type of corporation, those that are part of the press, might be able to claim special First Amendment status”).

170. See, e.g., Stewart, *supra* note 26, at 633.

171. See *id.*

172. See, e.g., text accompanying *supra* note 157.

several roles fulfilled by the institutional press that are vitally important to a democracy, but not necessarily capable of being fulfilled by individual speakers.

This Part proceeds in three steps. First, it explores the Framers' understanding of press freedom and seeks to situate that understanding as a natural outcome of the founding generation's immediate historical experiences. Second, it explores the theoretical arguments for the importance of the institutional press. Third, it argues that the existence of a powerful and independent institutional press was an "assumed condition" to the Framers at the time of the Constitution's authorship, identifies other such assumptions, and explores how other failed assumptions have been addressed.

A. *A Brief History of American Press Freedom*

This Section first explores what the founding generation understood "press freedom" to represent and why they treasured that freedom so highly. It then explains the importance of the institutional press in the Founders' development of that understanding.

1. Press Freedom as the "Bulwark of Liberty"

Press freedom in America began as a battle against "seditious libel," a common-law crime that "consisted of defaming, condemning, or ridiculing the government . . . to the jeopardy of the public peace."¹⁷³ In practice, this law meant that virtually any criticism that "could be construed as having the tendency to lower the government in the public's esteem . . . was seditious libel and exposed the speaker or writer to criminal prosecution."¹⁷⁴ The press in England was "bedeviled" by such prosecutions,¹⁷⁵ and the American colonies were no different; hundreds were prosecuted for having the temerity to criticize the government.¹⁷⁶

Seditious libel prosecutions in America primarily existed by way of the colonial assemblies, which were understood to have the inherent power—a form of parliamentary privilege—to "summon, interrogate, and fix criminal penalties" against those supposedly guilty of the crime.¹⁷⁷ Prosecution by the assemblies avoided the necessity of

173. Leonard W. Levy, *On the Origins of the Free Press Clause*, 32 UCLA L. REV. 177, 182 (1984).

174. *Id.*

175. See Stewart, *supra* note 26, at 634.

176. See LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 18 (1985) [hereinafter LEVY, EMERGENCE] (citing MARY PATTERSON CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 117 (1943)).

177. *Id.* Levy estimates that out of the hundreds of seditious libel prosecutions, no more than a half dozen were carried out in court. See Leonard W. Levy, *Did the Zenger*

persuading a grand jury to indict and a petit jury to convict, an important shortcut for the censors because colonial juries showed little appetite for enforcing the law of seditious libel.¹⁷⁸ In this legal crucible, press freedom as a national ideal was born.

One may even identify something of a birthday: April 16, 1735, when a group of jurors in New York refused to convict John Peter Zenger, publisher of the *New-York Weekly Journal*, of seditious libel in spite of his counsel's admission that he committed the crime and the presiding judge's threat to perjure the entire jury.¹⁷⁹ Zenger's acquittal firmly established the relationship between press freedom and liberty and, in doing so, helped pave the road to American independence.

Zenger's indictment emerged from his paper's furious criticism of New York's colonial government. The *Weekly Journal* made such a habit of lambasting New York Governor William Cosby that Professor Leonard Levy retroactively dubbed it the "first independent and truly free press in America."¹⁸⁰ After multiple failed attempts to secure a grand jury indictment, New York Attorney General Richard Bradley instituted charges himself via an information, charging Zenger with having published "false, malicious, seditious and scandalous libels."¹⁸¹

Zenger's trial counsel was Andrew Hamilton, the speaker of the Pennsylvania Assembly, who was "reputed to be the best advocate in America."¹⁸² Hamilton conceded that Zenger had published the statements, but argued to the jury—over the judge and prosecution's strenuous objections¹⁸³—that the statements could not be libelous because they were true. The prosecution responded that true statements hurt the government more than false ones and, therefore, *aggravated* the libel.¹⁸⁴ Hamilton replied by excoriating the doctrine, asking the jurors if they really believed that "truth is a greater sin than falsehood."¹⁸⁵ He

Case Really Matter? Freedom of the Press in Colonial New York, 17 WM. & MARY Q. 35, 38 (1960).

178. Among those saved by this early tradition of jury nullification was James Franklin, Benjamin's older brother and publisher of the *New-England Courant*. See LEVY, EMERGENCE, *supra* note 176, at 31–32.

179. *Id.* at 39.

180. *Id.*

181. Walker Lewis, *The Right to Complain: The Trial of John Peter Zenger*, 46 A.B.A. J. 27, 29 (1960).

182. LEVY, EMERGENCE, *supra* note 176, at 41.

183. At the time, whether the statement was libelous was a question of law left to the judge, and the only jury question was whether the defendant had published the statements. See Thomas A. Green, *The Jury, Seditious Libel, and the Criminal Law*, in JURIES, LIBEL, AND JUSTICE: THE ROLE OF ENGLISH JURIES IN SEVENTEENTH- AND EIGHTEENTH-CENTURY TRIALS FOR LIBEL AND SLANDER 39, 41 (1984).

184. See Ralph L. Crosman, *The Legal and Journalistic Significance of the Trial of John Peter Zenger*, 10 ROCKY MTN. L. REV. 258, 262 (1938).

185. LEVY, EMERGENCE, *supra* note 176, at 42.

continued by tying the cause of press freedom to the cause of freedom more broadly:

[T]he question before the Court and you gentlemen of the jury is not of small nor private concern, it is not the cause of a poor printer, nor of New York alone, which you are now trying. No! It may in its consequences affect every freeman that lives under a British government on the main of America. It is the best cause. It is the cause of liberty . . . every man who prefers freedom to a life of slavery will bless and honor you as men who have baffled the attempt of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power . . . by speaking and writing truth.¹⁸⁶

The jury apparently required no more than ten minutes of deliberation before returning a verdict of not guilty.¹⁸⁷

Zenger's acquittal—and Hamilton's closing argument—were no mere flash in the pan. Reports of the acquittal were “widely read and frequently reprinted,” and made people throughout the colonies “exult both in liberty and the relationship of liberty of the press to liberty itself.”¹⁸⁸ The *Philadelphia Gazette* wrote in 1738 of Hamilton's closing argument, “[I]f it is not law, it is better than law, it ought to be law, and will always be law wherever justice prevails.”¹⁸⁹ The acquittal “helped create a climate of civil disobedience in which the idea of political independence was conceived and nurtured.”¹⁹⁰ And, as detailed *infra*, it inspired and emboldened a new generation of newspaper publishers who played a significant role in leading the nation into open revolution.

Gouverneur Morris, one of the principal authors of the Constitution, declared that “[t]he trial of Zenger in 1735 was the germ of American freedom, the morning star of *that liberty* which subsequently revolutionized America.”¹⁹¹ “That liberty” that Gouverneur Morris spoke

186. *Id.* at 43–44.

187. See ERIC BURNS, INFAMOUS SCRIBBLERS: THE FOUNDING FATHERS AND THE ROWDY BEGINNINGS OF AMERICAN JOURNALISM 108 (2006).

188. LEVY, EMERGENCE, *supra* note 176, at 37.

189. *Id.* at 38 (quoting *Philadelphia Gazette*, May 18, 1738).

190. RICHARD B. MORRIS, FAIR TRIAL: FOURTEEN WHO STOOD ACCUSED FROM ANNE HUTCHINSON TO ALGER HISS 69 (rev. ed. 1967); see also Paul Finkelman, *Zenger's Case: Prototype of a Political Trial*, in AMERICAN POLITICAL TRIALS 21, 38 (Michal R. Belknap ed., rev. ed., 1994) (“On the American side of the Atlantic, Zenger's case helped lead to the events surrounding the Revolution and the creation of the Bill of Rights and freedom of the press.”).

191. ROBERT W. MCCHESENEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM 232 (2010) (quoting Gouverneur Morris, *Observations on the American Revolution* (1780)) (emphasis added).

of was press freedom, and as the colonies matured toward independence, the role of press freedom was at the forefront of the movement. Freedom of the press was “everywhere a grand topic for declamation” in Revolutionary America.¹⁹²

Hamilton’s closing argument demonstrated why press freedom was so important to the revolutionary cause: The cause of press freedom *is* “the cause of liberty.”¹⁹³ The intellectual theory of press freedom coalesced into a conclusion that press freedom was a “bulwark” or “palladium” of liberty.¹⁹⁴ That is, press freedom was important in large part because it secured *all other liberty*.¹⁹⁵ For example, Reverend Andrew Eliot, a prominent Patriot minister, wrote, “Liberty of the press is the palladium of English liberty. If this is gone, all is gone.”¹⁹⁶ The Massachusetts Assembly adopted a resolution in 1768 referring to press freedom as “the great Bulwark of the Liberty of the People.”¹⁹⁷ The 1776 North Carolina and Virginia state constitutions included the same language,¹⁹⁸ and the original state constitutions of Massachusetts and New Hampshire reflected this idea, as well.¹⁹⁹ Pennsylvania—the only original state constitution to even mention freedom of speech—made the structural role of press liberty even more explicit. Its constitution included a provision guaranteeing that “[t]he print presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any part of government.”²⁰⁰ But that provision was included in the section of the constitution setting forth the *structure* of the state government rather than in its bill of rights.²⁰¹

America’s first *national* commitment to press freedom predated, strictly speaking, America’s existence as a nation, and made clear that press freedom was about checking power. In a 1774 declaration to the inhabitants of Quebec, the Continental Congress sought to explain the goals of the revolutionary project. The declaration extolled freedom of the press for “its diffusion of liberal sentiments on the administration of Government, in its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby

192. LEVY, EMERGENCE, *supra* note 176, at 234.

193. *See supra* note 186 and accompanying text.

194. *See* Patrick J. Charles & Kevin Francis O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. 1691, 1694, 1717–19 (2012).

195. *See id.* at 1706.

196. RICHARD FROTHINGHAM, *LIFE AND TIMES OF JOSEPH WARREN* 46 (1865).

197. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463 (1983).

198. *See* Charles & O’Neill, *supra* note 194, at 1694 n.14.

199. *See id.*

200. Anderson, *supra* note 197, at 465.

201. *See id.*

oppressive officers are shamed or intimidated, into more honorable and just modes of conducting affairs.”²⁰² Later, as the nation set out to draft a constitution and then a bill of rights, James Madison’s first draft of what eventually became the First Amendment protected “the right to speak, to write, or to publish,” *as well as* guaranteeing that “the freedom of the press, one of the great bulwarks of liberty, shall be inviolable.”²⁰³

The debate over the ratification of the Constitution hinged, in no small part, on the absence of a bill of rights, and the debate over the absence of a bill of rights hinged, in no small part, on the corresponding absence of a press clause.²⁰⁴ The lack of a press clause became a flashpoint in large part because, again, press freedom was understood to be a foundational liberty of a free society that served to ensure the existence of all other liberties, and therefore integral to the success of the American experiment. For instance, in “the most influential statement of the Federalist position until the appearance of the Federalist Papers,” the absence of a press clause was the “first illustration” of the wisdom of not including a bill of rights, because, the Federalist author argued, an inclusion of a press clause would be read to imply “some degree of power” in the national government “to shackle or destroy that sacred palladium of national freedom.”²⁰⁵ A leading Anti-Federalist responded that, because of its absence of a press clause, the proposed constitution amounted to “[t]he abolition of that grand palladium of freedom, the liberty of the press.”²⁰⁶

This body of historical evidence has led those who have conducted rigorous inquiries—to whom I am greatly indebted—to conclude, as Professor David Anderson has said, that “freedom of the press was viewed not merely as a desirable civil liberty, but as a matter integral to the structure of the new government.”²⁰⁷ The Press Clause ultimately enshrined in the First Amendment, like its predecessors, “w[as] produced not merely as [a] salutary addition[] to an existing order, but as part of

202. *Address to the Inhabitants of Quebec* (1774), in BERNARD SCHWARTZ: THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 221, 223 (1971).

203. Anderson, *supra* note 197, at 478.

204. *See id.* at 467. *But see id.* (cautioning against overinterpreting this fact; opponents of the Constitution were seeking rhetorical tools as much as they were actually concerned about the absence of a bill of rights).

205. *Id.* at 468.

206. *Id.*

207. *Id.* at 487–88; *see also* Sonja R. West, *The ‘Press,’ Then & Now*, 77 OHIO ST. L.J. 49, 54–55 (2016) (arguing that the press was historically understood to protect both individual expressive and structural watchdog roles, and that because of changes in technology and free speech doctrine since that time, faithfulness to the historical understanding requires protecting the press for its structural rather than expressive functions).

the urgent process of establishing” a democratic government.²⁰⁸ The “exclusive thrust” of every official declaration about the freedom of the press was that it “was a necessary concomitant of self-government.”²⁰⁹

2. The Role of the Institutional Press

It is folly to interpret the Constitution as a historical document without reference to the revolution that created it.²¹⁰ And one cannot understand that revolution without appreciating the role played both by freedom of the press as a concept and the institutional press itself.²¹¹ I previously recounted the glowing way that the founding generation spoke of press freedom: as the “palladium” or “bulwark” of all other liberty.²¹² Such tributes are unsurprising, for it was America’s fledgling free press that “transform[ed] lukewarm patriots into fiery revolutionaries” and helped create the Revolution.²¹³

The Zenger acquittal not only provided the intellectual foundations of press freedom, but also materially affected the situation of the press in the colonies, beginning with a de facto end to seditious libel prosecutions.²¹⁴ The acquittal “encouraged more colonists to go into the newspaper business, more editors to speak their minds openly, and more readers to put their trust in those editors.”²¹⁵ At the same time, colonial governments became even more reluctant to attempt to punish dissent.²¹⁶ By the time the colonies confronted the Stamp Act²¹⁷ in 1765, there were 24 American newspapers, more than double the number in existence at the time of the Zenger trial.²¹⁸

The colonies’ successful resistance of the Stamp Act has long been recognized as a turning point in the revolutionary struggle.²¹⁹ Less

208. Anderson, *supra* note 197, at 489.

209. *Id.* at 490–91.

210. *Cf.* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (drawing a line between actions of “[t]hose who won our independence by revolution” and “the command of the Constitution”).

211. *See, e.g.*, Robert G. Parkinson, *Print, the Press, and the American Revolution*, in THE OXFORD RESEARCH ENCYCLOPEDIA, AMERICAN HISTORY (Sept. 3, 2015), <https://bit.ly/2WJV0CI>.

212. *See supra* notes 193–200 and accompanying text.

213. RODGER STREITMATTER, *MIGHTIER THAN THE SWORD* 5 (4th ed. 2011).

214. *See* Harold L. Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEGAL HIST. 160, 164 (1959).

215. BURNS, *supra* note 187, at 110.

216. *See* Finkelman, *supra* note 190, at 39.

217. The Stamp Act placed a duty on virtually all printed documents (as well as playing cards and dice) within the colonies, including newspapers. *See* 5 Geo. III, c 12 (1775).

218. BURNS, *supra* note 187, at 122.

219. *See generally* EDMUND S. MORGAN & HELEN M. MORGAN, *THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION* (1953) (detailing the importance of the Stamp Act crisis in the run-up to the Revolution).

commonly appreciated, however, is the role of the institutional press in the furor over the Stamp Act. The resistance to that law marked “the first widespread employment of newspaper propaganda in America” and one of “the first stages of a developing journalistic warfare which eventually led to revolution and independence.”²²⁰

The reason that the institutional press responded so stridently was simple: The Stamp Act “taxed publications and legal papers,” thereby “jeopardiz[ing] the revenue of printers and lawyers—the two groups most capable of leading public opinion—and set the stage for the American Revolution.”²²¹ In other words, the Stamp Act hit the newspaper publishers, and the publishers hit back. This is not revisionism; the contemporary historian of the Revolution, David Ramsay, concluded as much in 1789:

It was fortunate for the liberties of America, that newspapers were the subject of a heavy stamp duty. Printers, when influenced by government, have generally arranged themselves on the side of liberty, nor are they less remarkable for attention to the profits of their profession. A stamp duty, which openly invaded the first, and threatened a great diminution of the last, provoked their united zealous opposition.²²²

Benjamin Franklin, no stranger to the publishing business,²²³ agreed that the Stamp Act “affect[ed] the Printers more than anybody.”²²⁴

The papers waged an all-out war in retaliation. Newspapers throughout the colonies reprinted a series of resolutions by Patrick Henry of Virginia calling on the colonists to resist the Stamp Act.²²⁵ But they also began to flex their editorial voices, and “daily presented to the public original dissertations tending to prove that if the stamp-act was suffered to operate, the liberties of America were at an end.”²²⁶ The *New-Hampshire Gazette* “equated the [Stamp Act] tax with slavery and

220. Arthur M. Schlesinger, *The Colonial Newspapers and the Stamp Act*, 8 *NEW ENG. Q.* 63, 63 (1935).

221. Ralph Frasca, *Benjamin Franklin’s Printing Network and the Stamp Act*, 71 *PA. HIST.* 403, 403 (2004).

222. DAVID RAMSAY, *HISTORY OF THE AMERICAN REVOLUTION* 61 (1789).

223. Frasca details that, at the time of the Stamp Act’s passage, nine of the colonial newspapers were “under the proprietorship of printers allied with” Franklin, either through formal partnerships or informally. See Frasca, *supra* note 221, at 404. And, of course, Franklin’s older brother—and Franklin for a time—was a publisher of a newspaper. See generally John Clyde Oswald, *BENJAMIN FRANKLIN, PRINTER* (1917) (discussing Benjamin Franklin’s work as a printer, which started in apprenticeship to his older brother James, publisher of the *New England Courant*, one of the first newspapers in America).

224. Frasca, *supra* note 221, at 408.

225. See JON KUKLA, *PATRICK HENRY: CHAMPION OF LIBERTY* 74–75 (2017).

226. RAMSAY, *supra* note 222, at 62 (several superfluous commas omitted).

claimed the law to be ‘as fatal to almost all that is dear to us, as the *Ides of March* were, to the Life of *Caesar*.’”²²⁷ It also suggested that it would be “worse than death [to] be Stamp’d, and lose my freedom.”²²⁸ The *Connecticut Courant* opined, “[I]t is hoped that every Lover of his Country will spurn, with the highest Indignation, the base Thought of ever purchasing a single [stamp]; and despise, execrate and detest the wretch who shall presume to countenance the Use of them, in any way whatever.”²²⁹ The *Boston Gazette* called for its countrymen to “[a]wake . . . and, by a regular & legal Opposition, defeat the Designs of those who enslave us and our Posterity.”²³⁰ And, in an early example of the time-honored American journalistic tradition known as the “hot take,”²³¹ the *Boston Evening-Post* concluded a report of a completely unrelated execution by noting that, on the bright side, the deceased “will never pay any of the taxes unjustly laid on these once happy lands.”²³² As a result of the papers “combin[ing] together to print every thing inflamatory [sic] and nothing that is rational and Cool,” the passions of the colonists were “excited to a Degree of Resentment against the Mother Country, beyond all Description.”²³³

In April 1766, bowing to the colonists’ resistance, Parliament repealed the Stamp Act. When the news reached America in May, papers gave away free editions bearing the news.²³⁴ “[P]eople ran through the streets with [the papers], ducking into shops and taverns and even churches, waving the papers over their heads, reciting lines from the stories as if they were an incantation”²³⁵ The press—and with it, the country—had won its first real battle of the Revolution. “Virtually no one doubted the role that printers, editors, and newspapermen played in unifying colonial opposition to the Stamp Act,” and in the following years, “liberty of the press” was often toasted by colonists, “especially during celebrations commemorating” the Stamp Act’s repeal.²³⁶

The press was emboldened by its victory rather than placated. More papers popped up; by the 1760s, there were 35 weekly newspapers being published throughout the colonies.²³⁷ In this media-rich environment,

227. Frasca, *supra* note 221, at 407.

228. BURNS, *supra* note 187, at 125.

229. Frasca, *supra* note 221, at 407.

230. BURNS, *supra* note 187, at 125.

231. See *Hot Take*, MERRIAM-WEBSTER.COM DICTIONARY, <https://bit.ly/2YiNSOR> (last visited Aug. 30, 2020).

232. BURNS, *supra* note 187, at 125–26.

233. Frasca, *supra* note 221, at 407 (quoting letter from Joseph Galloway to Benjamin Franklin).

234. See BURNS, *supra* note 187, at 128.

235. *Id.*

236. Charles & O’Neill, *supra* note 194, at 1725–26.

237. See STREITMATTER, *supra* note 213, at 8.

Samuel Adams, affiliated formally with the *Boston Gazette*, weaponized the institutional press in an explicitly revolutionary mission. First, Adams published hundreds of political essays and news articles during the 1760s, many of which would be reprinted in papers throughout the colonies.²³⁸ Second, in concert with many other publishers, Adams innovated a new way to radicalize his countrymen: by reporting (a version of) the facts. To this end, in 1768, following the stationing of a body of British troops in Boston, a group of printers created the “Journal of Occurrences”—a system by which Adams and other Boston radicals would write sensationalized accounts of the misdeeds of the British soldiers, which would then be reprinted throughout the colonies.²³⁹ Many of the stories were embellished, or even outright false.²⁴⁰ But the stories, along with Adams’s account of the Boston Massacre, played a significant role in laying the groundwork for revolution.²⁴¹ The historical evidence demonstrates “that Adams thought he was molding public opinion; his opponents thought he was driving the reluctant masses to revolt; and the people frequently commented on his effectiveness.”²⁴²

The press’s war on Britain was not always limited to its official business. Many printers were part of the Sons of Liberty,²⁴³ and the Boston Tea Party was planned, at least in part, in the *Boston Gazette*’s back room; the event “was at least as much the newspaper’s as it was the town’s.”²⁴⁴ The British responded to the Boston Tea Party with a series of punitive laws quickly labelled as The Intolerable Acts, and the colonial press responded with righteous fury, calling on colonists to “UNITE OR DIE” and to rise “[t]o the aid of our much injured country.”²⁴⁵

When, in April 1775, violence erupted at Lexington and Concord, 25 of the colonial papers supported rebellion, while 13 opposed it.²⁴⁶ The Patriot papers reported the news of the outbreak of hostilities with a mixture of exultation, rage, and biting sarcasm. The *New-York Journal*

238. *See id.* at 7.

239. *See id.* at 8.

240. *See id.* at 11; *see also* BURNS, *supra* note 187, at 148.

241. *See* STREITMATTER, *supra* note 213, at 11–13; BURNS, *supra* note 187, at 149–52.

242. Michael H. Harris, *Historians Assess the Impact of Print on the Course of American History: The Revolution as a Test Case*, 22 LIBERTY TRENDS 127, 134 (1973).

243. *See* Schlesinger, *supra* note 220, at 73. The Sons of Liberty were a secret group of prominent colonial radicals formed to resist British taxation, frequently through the use of violence. *See Sons of Liberty*, ENCYCLOPÆDIA BRITANNICA (Mar. 12, 2020), <https://bit.ly/3e5i0TB>.

244. BURNS, *supra* note 187, at 159.

245. *Id.* at 163.

246. *See id.* at 183.

noted, “The kind intentions of our good mother—our tender, indulgent mother—are at last revealed to all the world.”²⁴⁷

A final match was tossed into this powder keg with the January 1776 publication of Thomas Paine’s *Common Sense*.²⁴⁸ Prior to Paine’s publication, all but the most radical of Americans sought only what they saw as a restoration of the rights they were due as British citizens, not independence.²⁴⁹ Paine radicalized the country by expressing a case for political revolution aimed directly at the common citizen.²⁵⁰ The pamphlet was a rousing success. The most popular newspapers of the day had circulations of roughly 2,000; *Common Sense* sold 150,000 copies in three months.²⁵¹ George Washington and Thomas Jefferson both praised its effectiveness in spreading revolutionary fervor.²⁵² And Paine’s target audience—common men and women—were no less zealous. One Philadelphia man credited Paine entirely with the fact that, in the space of three weeks, “tens of thousands of common farmers and tradesmen,” had become willing “to part with the abominable chain.”²⁵³

Common Sense—a pamphlet published by an individual author who was understood by his contemporaries to be exercising press freedom—is often wielded as something of a trump card against any theory of the Press Clause that privileges the institutional press. The sheer weight of its historical example serves to demonstrate that press freedom is about an individual’s right to publish. But *Common Sense* cannot be severed so easily from historical context. At the time of the publication of *Common Sense*, Paine was fully embedded in Philadelphia’s journalistic community. In 1775, he served as the editor of the colonies’ only magazine, the monthly *Pennsylvania Magazine*.²⁵⁴ There, Paine “used the magazine to express disillusionment with the strength and breadth of the push for reconciliation with Parliament. Over time, the essays Paine wrote for the magazine grew more strident.”²⁵⁵ *Common Sense* began to emerge.

247. *Id.* at 191.

248. See THOMAS PAINE, *COMMON SENSE* (1776).

249. See STREITMATTER, *supra* note 213, at 14.

250. See *id.* at 16 (noting that Paine expressed a desire to “make those that can scarcely read understand” and to write “in language as plain as the alphabet”).

251. See *id.*

252. See *id.* at 17.

253. HARVEY J. KAYE, *THOMAS PAINE AND THE PROMISE OF AMERICA: A HISTORY & BIOGRAPHY* 55 (2007).

254. See RICHARD GIMBEL, *THOMAS PAINE: A BIOGRAPHICAL CHECK LIST OF COMMON SENSE WITH AN ACCOUNT OF ITS PUBLICATION* 16 (1956).

255. JOSEPH M. ADELMAN, *REVOLUTIONARY NETWORKS: THE BUSINESS AND POLITICS OF PRINTING THE NEWS* 151 (2019).

Paine's initial draft was of a series of letters to be published anonymously in the Philadelphia papers.²⁵⁶ He eventually settled on a pamphlet to be printed by bookseller Robert Bell, which was aggressively advertised in Philadelphia's newspapers.²⁵⁷ After Bell cheated Paine out of his share of the first edition's profits (which Paine intended to donate to the colonial militia), Paine moved his pamphlet's publication to William and Thomas Bradford, the publishers of the *Pennsylvania Journal*.²⁵⁸ They, in turn, hired Benjamin Towne, publisher of the *Pennsylvania Evening Post*, to assist in printing.²⁵⁹ In conjunction with his new publishers, Paine slashed the pamphlet's price in half, allowing it to reach its target audience.²⁶⁰ *Common Sense*, therefore, emerged in large part from the institutional press.

Looking back on the revolution in an 1815 letter to Thomas Jefferson, John Adams remarked on the historical lesson that he drew:

What do We mean by the Revolution? The War? That was no part of the Revolution. It was only an Effect and Consequence of it. The Revolution was in the Minds of the People, and this was effected, from 1760 to 1775, in the course of fifteen Years before a drop of blood was drawn at Lexington. The Records of thirteen Legislatures, the Pamphlets, Newspapers in all the Colonies ought be consulted, during that Period, to ascertain the Steps by which the public opinion was enlightened and informed concerning the Authority of Parliament over the Colonies.²⁶¹

In light of this immediate historical experience, it would have been impossible to author a constitution that ignored the press.²⁶² The founding generation did not do so.

B. The Role of the Press in a Representative Democracy

When drafting the First Amendment, the Framers were, at the very least, operating in an intellectual and social milieu in which the institutional press loomed large. The dissemination theory's²⁶³ major flaw is in sterilizing the Press Clause of this context. In doing so, "it ignores the social, intellectual, and customary origins of a free press," in

256. See GIMBEL, *supra* note 254, at 17.

257. See *id.* at 21.

258. See *id.* at 23.

259. See *id.*

260. See *id.*

261. *John Adams to Thomas Jefferson, 24 August 1815*, FOUNDERS ONLINE, NAT'L ARCHIVES, <https://bit.ly/3c1BMnm> (last visited Aug. 30, 2020).

262. See Charles & O'Neill, *supra* note 194, at 1693 ("Just as actual events would affect the adoption, text, and structure of the Declaration of Independence, so too did they affect the founding generation's view on constitutional doctrine.")

263. See *supra* notes 161–166 and accompanying text.

particular, the historical fact that “as the liberty of the press grew as a customary popular right, so too did the perception of the constitutional roles of the printer or newspaper.”²⁶⁴

But the normative reasons to recognize the value of the institutional press are equally as compelling. Freedom of the press, like freedom of speech, is an instrumental right guaranteed by the Constitution because its protection ensures a more fundamental good.²⁶⁵ The construction of a Press Clause doctrine is, therefore, “empirically contingent”²⁶⁶—one should construct a Press Clause that best serves the ends of press freedom. Recognizing the special role of the institutional press does exactly that.

This Section first sets forth the important functions that the institutional press serves in advancing the democratic purposes of press freedom. It then addresses the dissemination theory’s principal argument against constitutional recognition for the institutional press: that doing so privileges the press relative to non-press speakers.

1. The Special Constitutional Value of the Institutional Press

The true value in affording constitutional recognition to the role of the institutional press lies in the manner the institutional press serves the function of press freedom. The institutional press is uniquely capable of “independent[ly] monitoring private and public centers of power and influence within society.”²⁶⁷

A number of scholars have argued for a greater recognition of the role that institutions play within the First Amendment context. For example, Joseph Blocher has argued that speech-regulating decisions made by certain institutions deserve deference in First Amendment doctrine, particularly where they ease transaction costs in the marketplace of ideas.²⁶⁸ Frederick Schauer’s argument for an institutional doctrine is less specifically tied to the marketplace theory, but similarly argues that where institutions promote First Amendment values, courts may rightly treat their speech-regulating actions with deference.²⁶⁹

Unfortunately, as is the case with most First Amendment scholarship, the question of whether an institution serves First Amendment values is often transformed into a question of whether that

264. Charles & O’Neill, *supra* note 194, at 1697, 1722.

265. See Schauer, *supra* note 167, at 1268 (describing the right to free speech as “empirically contingent and instrumental to something deeper”).

266. *Id.*

267. Bezanson, *supra* note 27, at 732.

268. See generally Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821 (2008).

269. See Schauer, *supra* note 167, at 1256.

institution serves the values embodied by the Free Speech Clause.²⁷⁰ Left mostly unexplored is the inquiry into whether providing some special constitutional status to the institutional press would serve the ends of the Press Clause. The remainder of this section answers that question in the affirmative.

From the Constitution's perspective, the press solely exists to scrutinize the powerful.²⁷¹ The institutional press, in turn, provides for "organized, expert scrutiny" of the powerful by an institutional watchdog.²⁷² The institutional press advances the purposes of the Press Clause through both its concentrated structure and its organizational purpose.

To begin, the institutional press serves important mediating functions. Blocher describes these functions as reducing transaction costs in the marketplace of ideas.²⁷³ But the reduction in transaction costs also instrumentally serves the goals of the Press Clause. Reporting by the *New York Times* and similar organizations carries an automatic badge of credibility not extended to "the lonely pamphleteer" who is generally understood to be something of a crank.²⁷⁴ This automatic extension of credibility has costs—when organizations like the *Times* err in their reporting, the ramifications are heightened.²⁷⁵ But it also has significant benefits.

For one, the institutional norms and regulations enforced within established news organizations serve to minimize reporting errors. By contrast, the frequent spread of disinformation online—whether reports that the Marshall of the Supreme Court was set to secretly execute Steve

270. For example, Blocher argues that "speech institutions," including the press "improve the marketplace of ideas by facilitating the flow of ideas." Blocher, *supra* note 268, at 852. In Blocher's model, the press "serv[es] as a clearinghouse for information" that "lowers search costs more easily accessible for consumption or rejection by individual idea consumers." *Id.* at 857. I do not disagree with Blocher; my point is only that just as the institutional press serves free speech values in the marketplace of ideas, it also serves Press Clause values by checking power, and I focus on that issue here.

271. *Cf.* David Joseph Onorato, *A Press Privilege for the Worst of Times*, 75 GEO. L.J. 361, 368 (1986) ("The press exists, in the constitutional sense, to scrutinize government.").

272. Stewart, *supra* note 26, at 634.

273. See Blocher, *supra* note 268, at 857.

274. See Randy J. Kozel, Review, *Institutional Autonomy and Constitutional Structure*, 112 MICH. L. REV. 957, 959 (2014) (reviewing PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013)) (discussing the "trope" of the "lonely pamphleteer" in First Amendment law).

275. See, e.g., Judith Miller, *Illicit Arms Kept Till Eve of War, An Iraqi Scientist Is Said to Assert*, N.Y. TIMES (Apr. 21, 2003), <https://nyti.ms/37oHEkI>; see also Glenn Greenwald, *The Spirit of Judy Miller Is Alive and Well at the NYT, and It Does Great Damage*, INTERCEPT (July 21, 2015), <https://bit.ly/3bYSoqz>.

Bannon,²⁷⁶ or that a pedophilic cabal operated out of the basement of a Washington, D.C. pizza restaurant²⁷⁷—amply demonstrates the danger of reliance on the “lonely pamphleteers” of the twenty-first century to produce news.²⁷⁸ And when the institutional press does err in reporting, it is relatively easy to establish responsibility and to correct those errors.²⁷⁹

Additionally, reporting from reputable news organizations establishes a common set of facts from which democratic deliberation can launch.²⁸⁰ Policymaking is most effective when informed by a common set of facts, at which point disagreements may be limited to the appropriate response to the circumstances that everyone agrees exist.²⁸¹ Where empirical questions remain at issue, the matter of responding becomes muddled. This dynamic is something that is broadly understood by those interested in maintaining the status quo on any given issue. Consider how the debate over how best to respond to climate change was hijacked for more than a decade by the debate over whether the basic phenomenon even existed, in spite of the absence of any real debate over that question among climate scientists.²⁸² It is this function of the press—in one sense the most foundational way the institutional press supports

276. See Katy Waldman, *The Rise of the Liberal Conspiracy Theorist*, SLATE (May 24, 2017), <https://bit.ly/36q4tUu>.

277. See Cecilia Kang, *Fake News Onslaught Targets Pizzeria as Nest of Child-Trafficking*, N.Y. TIMES (Nov. 21, 2016), <https://nyti.ms/3c6cQGd>.

278. See Pickard, *supra* note 102 (“Rushing into the vacuum left by our vanishing local news outlets are various forms of disinformation. At the same time, people are increasingly gleaned news from social media, through which misinformation abounds. Without profound structural changes, our media landscape will produce more noise and propaganda and less fact-based reporting . . .”).

279. See *Code of Ethics*, SOC’Y PROF. JOURNALISTS (Sept. 6, 2014), <https://bit.ly/2Z4PjIG> (establishing ethical requirements to, *inter alia*, “[a]cknowledge mistakes and correct them promptly and prominently” and to “[e]xpose unethical conduct in journalism”).

280. See Michael P. Lynch, *Kick This Rock: Climate Change and Our Common Reality*, N.Y. TIMES (June 5, 2017), <https://nyti.ms/36qb1m9> (“Democracies don’t work if we don’t acknowledge that we all live in the same world, facing the same problems—even if we disagree over how to solve them. Without a common reality, we would have nothing with which to engage.”); David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 332 (June 20, 2014) (“The press creates communities in which democratic dialogue can occur. Without some core of shared information and common purposes, there can be no meaningful discussion of public issues.”).

281. See Robert Kraychik, *Obama: We Need ‘Common Reality/Conversation’ in Media*, DAILY WIRE (Apr. 24, 2017), <https://bit.ly/3cYBDNn> (noting that Barack Obama’s first public remarks since the end of his presidency focused on the importance of a “common reality that allows us to have a healthy debate and then try to find common ground and actually move solutions forward”).

282. See Jonathan H. Adler, *The Climate Debate Should Focus on How to Address the Threat of Climate Change, Not Whether Such a Threat Exists*, REASON (Dec. 1, 2019, 8:55 PM), <https://bit.ly/36tc8Sc>.

democracy²⁸³—that is endangered by attacks from the press’s illiberal enemies.²⁸⁴

The institutional press also functions as a literal mediator between the people—with whom the ultimate sovereignty rests in the American system—and their representatives.²⁸⁵ It does so in numerous ways. For one, the press dramatically reduces the transaction costs for representatives to acquire knowledge on issues of concern to their constituents, as well as knowledge regarding their constituents’ opinions. The institutional press—such as a local newspaper—provides a single, wholesale source for the broad issues of concern to a community. Therefore, a representative need not unnecessarily spend public resources on information-gathering. The institutional press also serves as a forum by which representatives can “speak” back to their constituents—both literally in the form of op-eds or letters to the editor, and figuratively in the sense that the press reports on the representatives’ actions. And, of course, constituents may speak back through the institutional press, although this is one area in which the availability of social networks likely has weakened the justification for the institutional press’s value.²⁸⁶

Equally important, the power and mission of the institutional press also enables effective journalism that would not be possible without news organizations. Most obviously, journalism—particularly investigative reporting—is tremendously expensive and time-consuming to produce.²⁸⁷ As just one example, a single *ProPublica* investigation into acetaminophen, the primary active ingredient in Tylenol, cost more

283. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 474 (1973) (“The preparation has succeeded when people have lost contact with their fellow men as well as the reality around them The ideal subject of totalitarian rule is not the convinced Nazi or the convinced Communist, but people for whom the distinction between fact and fiction (*i.e.*, the reality of experience) and the distinction between true and false (*i.e.*, the standards of thought) no longer exist.”).

284. See Uri Friedman, *The Real-World Consequences of ‘Fake News’*, ATLANTIC (Dec. 23, 2017), <https://bit.ly/2A8gdz6> (noting the adoption by authoritarian regimes globally of the language of “fake news” and its use in, *inter alia*, abetting a genocide in Burma).

285. See G.L., *Fixing the Secrecy System*, ECONOMIST (Mar. 22, 2011), <https://econ.st/3dS1hnA> (describing the institutional press as “a mediator between power and polity”).

286. See generally, e.g., JoAnne Sweeny, “LOL No One Likes You”: *Protecting Critical Comments on Government Officials’ Social Media Posts Under the Right to Petition*, 2018 WISC. L. REV. 73 (2018) (arguing that replying to government officials on social media should be protected by the Petition Clause of the First Amendment).

287. See ALEX JONES, *LOSING THE NEWS: THE FUTURE OF THE NEWS THAT FEEDS DEMOCRACY* xvii (2009) (“[H]igh-quality news is expensive to produce, and in ever shorter supply.”); see also *infra* Section III.B.4.b.

than \$750,000 and took over two years to produce.²⁸⁸ A more robust analysis of 12,000 entries into contests held by Investigative Reporters and Editors, an industry organization, found that many investigations “cost their newspapers \$200,000 or \$300,000 to report.”²⁸⁹ It is functionally impossible for such investigative reporting to emerge from anywhere other than the institutional press. And, as demonstrated *supra*, it is also a virtual certainty that such investigative reporting does not pay for itself.²⁹⁰ It necessarily follows that investigative journalism is essentially unsustainable outside of an institutional context. Inspirational bromides about the democratization of journalism in the age of blogs and Twitter²⁹¹ are simply unrealistic.

Just as important as the economic case for the institutional press is the realist case. The constitutional purpose of journalism is holding power to account.²⁹² Generally speaking, when power punches back, it is helpful to have some modicum of power on the side of the journalist. And while the institutional press currently stands on an economic and political precipice, it is nonetheless significantly more powerful—in economic and social or political terms—than individual journalists. This point can easily be demonstrated by a hypothetical: suppose the President approaches the judiciary and represents that *Americans will die* if a journalist is not forced to reveal her sources. Who would civil libertarians want on the other side of the “v.”—journalist Jane Doe or the *New York Times*? To ask the question is to answer it.²⁹³

In this sense, the Press Clause constitutes a leveling of the playing field—a way to make the First Amendment progressive. “[P]rivate and public centers of power and influence”²⁹⁴ have the same free speech rights as those who would seek to hold them to account. As Louis Seidman has pointed out, however, because the ability to speak freely is subject to material restraints, those with more property have, functionally, a greater ability to speak at more length, to more people,

288. See Peter Osnos, *These Journalists Spent Two Years and \$750,000 Covering One Story*, ATLANTIC (Oct. 2, 2013), <https://bit.ly/3d0c9iH>.

289. Schiffrin, *supra* note 79.

290. See *supra* notes 79–88 and accompanying text.

291. E.g., SCOTT GANT, *WE’RE ALL JOURNALISTS NOW: THE TRANSFORMATION OF THE PRESS AND RESHAPING OF THE LAW IN THE INTERNET AGE* (2007) (arguing that “citizen-journalists” should have the same rights and privileges as professional journalists).

292. See *supra* note 271 and accompanying text.

293. See Jones, *supra* note 21, at 571 (“[N]ewspapers have been the key legal instigator of openness in government in the United States. A sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively fought for fundamental democratic principles that had public benefits beyond the scope of the individual litigants’ successes.”).

294. Bezanson, *supra* note 27, at 732.

more persuasively, and at a higher volume.²⁹⁵ Free speech, then, can never be progressive in the sense of resisting established and unjust hierarchies.²⁹⁶

At first blush, the same is true of the Press Clause. As press critic A.J. Liebling once wrote, “Freedom of the press is guaranteed only to those who own one.”²⁹⁷ But the press can nonetheless serve as a progressive force because the basic orientation of the institutional press is necessarily adversarial to power. As an institution dedicated to the scrutiny of the powerful, the institutional press puts power on the side of those resisting hierarchies. As a practical matter, obviously, this dynamic is more complicated, and many press outlets will exert their editorial voice on behalf of the powerful on many occasions. But for now, it is enough to say that while free speech cannot be progressive, the Press Clause offers a path to rehabilitate the First Amendment. The Clause can only do so, however, if the role of the institutional press is recognized and given force.

2. Rejecting the Premise of Dissemination Theory

Surprisingly, the dissemination theory does not necessarily reject the argument that the institutional press is relatively important to democratic self-governance. The Supreme Court, for instance, has repeatedly paid homage to the value of the institutional press—recognizing its “unique” or “special and constitutionally recognized” role—even while refusing to build a doctrine reflecting its own words.²⁹⁸

The failure to construct a doctrine consistent with this rhetoric is, however, no surprise, because resistance to privileging the institutional press is the central motivating factor driving the dissemination theory. After all, the Press Clause’s text and history are both at least as indicative of the structural theory as they are of the dissemination theory, if not significantly more so. As such, the dissemination theory must rely on something else: a resistance to providing special treatment under the First

295. See Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2232–33 (2018).

296. See generally *id.*

297. A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, NEW YORKER (May 14, 1960).

298. See, e.g., *Leathers v. Medlock* 499 U.S. 439, 447 (1991) (“The press plays a unique role as a check on government abuse.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 781 (1978) (“The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate.”). See generally RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705 (2014) (discussing the consequences of a “dicta-driven Press Clause dialogue” from the Supreme Court).

Amendment to a particular class.²⁹⁹ It is in light of this fear of special treatment that Michael McConnell, for instance, has argued that the Press Clause is in fact an antidiscrimination clause that prohibits the government from drawing distinctions between speakers.³⁰⁰ But fear of the alternative is an unsteady foundation upon which to build a constitutional theory. As a result, dissemination theory suffers from a number of flaws. The fear of privileging the press is both overblown and, in the end, irrelevant.

To begin with, dissemination theory overestimates the horrors supposedly inherent in recognizing the special constitutional value of the institutional press. While Press Clause scholar Sonja West and others have argued for what might be termed as a “special” set of individual rights available only to journalists,³⁰¹ assigning constitutional value to the institutional press does not *necessarily* require doing so. In terms of converting my argument about the Press Clause’s meaning into practical doctrine, for instance, one need not declare that the Constitution gives journalists a special immunity from certain subpoenas. Although I reserve the issue for a more fulsome discussion, the doctrinal consequences of my argument would look more like an ability of Congress to intervene more aggressively into the market to preserve the economic security of the press, so long as such interventions did not undermine its independence or informativeness.³⁰² There is no need, at

299. See West, *supra* note 25, at 1056 (describing this impulse as either “a democratic embrace of equality, a fear of government favoritism, or a repulsion to elitism”).

300. See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 449 (2013) (arguing that the Speech Clause contains a number of doctrines that “have not traditionally been thought to preclude all speaker-based distinctions” but that the “heart of the Press Clause is its prohibition on licensing; another way to express the prohibition on licensing is that the government may not pick and choose who can publish”). *But see* Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 100–05 (2018) (persuasively rebutting this argument).

301. See West, *supra* note 25, at 1043–44 (arguing for recognition of newsgathering rights).

302. This, again, is not a “positive right.” Rather, by placing the protection of the press under the umbrella of a Press Clause doctrine that recognizes that the sustainability of the press is an important element of press freedom, the new Press Clause jurisprudence would simply *not prohibit* certain interventions that would undoubtedly be considered unconstitutional under the Free Speech Clause. For example, under free speech doctrine, there is no way that Congress could restrict the entry of private equity firms into the journalism space or apply meaningful regulations on their actions—to do so would be to discriminate against certain speakers and not others. A revitalized Press Clause doctrine that values the sustainability of the institutional press could take into account that such interventions are unambiguously beneficial to press freedom. But the dissemination theory, taken to its logical end, would prohibit any laws favoring the press. See West, *supra* note 300, at 126 (“If the Constitution prohibits laws that treat the press differently than other speakers, then the numerous press-protective laws outlined [earlier in West’s article] cannot stand, because they favor the press’s right or ability to speak.”).

least as a matter of doctrinal logic, to privilege press speakers above non-press speakers.

Second, the fear of special treatment is overblown because there are constitutionally relevant distinctions between press speakers and non-press speakers that would justify the existence of “special” press rights. Returning to the example of immunity from subpoenas to reveal sources, it would make little sense, as there is little need, to recognize a global free speech right to resist such subpoenas. Most speakers do not have “sources” whose identity must be protected from the government. By contrast, journalists very frequently do have such sources, and the ability of journalists to meaningfully check power is, in large part, dependent on the availability of such sources. Under the current legal regime, those sources are protected by a relative pittance: a combination of whatever reluctance under various political norms that the government may have to pursue aggressively the source’s identity from the journalist,³⁰³ and the journalist’s willingness to go to jail to protect her source’s identity.³⁰⁴ As an empirical matter, providing the right to resist such subpoenas to journalists will go a long way toward advancing the ends of press freedom, while providing the right to the general public will add little marginal value. There will be borderline cases, of course, but there are always borderline cases; their existence is no reason to abandon otherwise good doctrine.³⁰⁵

Third, as West argues at length, one need not fear special treatment of the press because of the significant fallback protections of free speech doctrine. Someone meritorious—a blogger at an upstart outlet, for example—may fail to convince a judge that they are a member of the institutional press, and thereby would lose access to the Press Clause’s reawakened doctrine. The outcome is far from ideal, but the harms of such line-drawing errors are significantly mitigated by the fact that said blogger would nonetheless have access to the full range of powerful—indeed, intentionally overprotective—free speech jurisprudence.³⁰⁶

These are all significant flaws in the dissemination theory’s motivating argument, but each argument is mitigatory in nature. These

303. See Luis Gomez, *Before Trump’s Crackdown on Leaks, Obama Went After 10 Leakers, Journalists*, SAN DIEGO UNION-TRIBUNE (Aug. 4, 2017, 6:05 PM), <https://bit.ly/36tscTC> (discussing increased willingness of last two presidents to aggressively pursue leaks, including by targeting journalists).

304. See *Journalists Jailed or Fined for Refusing to Identify Confidential Sources, as of 2019*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (2019), <https://bit.ly/2XQ7rPu> (collecting list of journalists jailed or fined for refusing to identify confidential sources).

305. See West, *supra* note 25, at 1032 (“While any definition of the press will necessarily be imperfect, these mistakes at the margins will not remove a speaker’s voice from our public debate as would a miscalculation in interpreting the Speech Clause.”).

306. See *generally id.* (making this argument).

arguments accept the dissemination theory's antidiscrimination argument as legitimate and relevant, but seek to demonstrate its relative weakness. But the antidiscrimination argument's biggest flaw is, in reality, its irrelevance. Denying meaning to the *Press Clause* because of a sensible belief that the Constitution should not discriminate between *speakers* makes no sense. *They are different rights*. One can believe that Raytheon, Michael Moore, and the *New York Times* all have the same free speech rights and also believe that the Press Clause reflects a special preference for the *Times* within that Clause's ambit.

This, at base, is the central problem with the antidiscrimination argument and with the dissemination theory more broadly. Treating the press differently than the non-press no doubt poses a problem under free speech doctrine. But that is irrelevant to the meaning of the Press Clause unless one has already assumed an interdependence of meaning between the two clauses. And, as discussed, the primary argument offered to justify reading the two clauses as interdependent is that any other interpretation would allow for favorable treatment for the press. The argument is circular.

C. You Know What They Say About Assumptions . . .

The First Amendment, like the rest of the Constitution, is, first and foremost, a product of a particular set of historical circumstances. The institutional press—as a result of the perceived paramount importance of press freedom; an intellectual, social, and political belief in the importance of newspapermen and printers as trustees of that freedom; and the role that the press played in the Revolutionary struggle—loomed large in the foreground of those circumstances. Indeed, the debate over the Bill of Rights was largely carried out in the pages of the new country's newspapers.

At the time of that debate, the number of newspapers in America had expanded tremendously in a matter of decades. This expansion was no accident; the “press system of the United States was built on a foundation of massive federal postal and printing subsidies that were provided to newspapers” from the beginning of the American experiment.³⁰⁷ “The first generations of Americans understood that it was entirely unrealistic to expect the profit-motive to provide for anywhere near the level of journalism necessary for an informed citizenry, and by extension self-government, to survive”³⁰⁸ and thus appear to have anticipated perpetual subsidies. Or maybe they assumed the industry

307. MCCHESENEY & NICHOLS, *supra* note 191, at xiii.

308. *Id.*

would eventually mature into a self-sustaining juggernaut. Either way, the founding generation took press sustainability for granted.

This oversight is not so strange. The Constitution was built on a set of assumptions, some of which worked out and some of which did not. American constitutional law frequently has to reckon with the Framers' erroneous assumptions. The best response has been to adjust, rather than to let the constitutional text wither and die:

[S]ometimes it is clear that the framers were uncertain about how to proceed and wrote language based on their best guess about how this novel constitutional structure would work in practice. When their best guesses turn out to be wrong, fidelity to the Founders' purposes may be better achieved by adjusting our understanding of what constitutional language permits.³⁰⁹

Take, for instance, the nature of the American economy. “Strikingly large chunks of constitutional law originate in this nation’s agrarian past.”³¹⁰ Unsurprisingly, the Commerce Clause has been implicated by the evolution of the American economy. That Clause, *inter alia*, gives Congress the power “to regulate commerce . . . among the several states.”³¹¹ When written and ratified, “[t]he primary purpose of the clause appears to have been raising federal revenue by the nationalization of the states’ power to impose import tariffs, while a secondary purpose was apparently to allow Congress to regulate and restrict foreign commerce to advance American interests.”³¹² Needless to say, as the American economy has developed into a cohesive national unit rather than thirteen or so individual miniature economies, the relative importance of the Commerce Clause has shifted. Today, more than 700 statutes—including criminal laws and much of the administrative state—explicitly rely on the Commerce Clause as a source of constitutional authorization.³¹³

Other changes in the American economy have called into question somewhat less in-your-face constitutional assumptions. The Seventh Amendment, for example, “preserve[s]” the right to jury trials in “suits at common law, where the value in controversy shall exceed twenty dollars.”³¹⁴ Twenty dollars in 1791 is quite different from twenty dollars in 2020, not only because of inflation but because the nature of the

309. FRANK O. BOWMAN III, *HIGH CRIMES AND MISDEMEANORS: A HISTORY OF IMPEACHMENT FOR THE AGE OF TRUMP* 247 (2019).

310. Jim Chen, *Filburn’s Legacy*, 52 *EMORY L.J.* 1719, 1721 (2003).

311. U.S. CONST. art. I, § 8, cl. 3.

312. KENNETH R. THOMAS, *CONG. RES. SERV.*, RL32844, *THE POWER TO REGULATE COMMERCE: LIMITS ON CONGRESSIONAL POWER* 3–4 (2014).

313. *See id.*

314. U.S. CONST. amend. VII.

economy has changed drastically.³¹⁵ It remains unclear whether fidelity to the Framers' purpose would require adjusting the figure for inflation or leaving it as is.³¹⁶

Despite the protestations of some, American constitutional law has proven sufficiently nimble when it comes to adjusting to the reality of a national economy. The Constitution has undergone a meaningful change in the dominant understanding of the federal government's power; one that allows the federal government to act as a steward and regulator of an economy that is too big and too diffuse to be regulated by the states alone. America has developed from a relatively weak agrarian society into a global economic superpower, and it has done so only because constitutional jurisprudence has adjusted to allow the development and regulation of a national economy. This adaptation, whatever one's normative view of the correct allocation of power between the states and the federal government, represents a successful alteration of the Constitution in response to a failed initial assumption.

Less successful has been the attempt to react to the chasm between the founding generation's expectation of American politics and the almost-immediate reality of those politics. The Framers anticipated that "[b]y institutionalizing a differentiation between executive and legislative powers (as well as by dividing the legislature into two chambers), the separation of powers would harness political competition into a system of government that would effectively organize, check, balance, and diffuse power."³¹⁷ In essence, they assumed the truth of the old D.C. joke in which a new Republican representative shows up to a caucus meeting and "express[es] his interest in fighting the 'enemy'—the Democrats—to which a senior House colleague responds: 'No, the Democrats are the opposition. The Senate is the enemy.'"³¹⁸

In reality, "almost from the outset . . . [p]olitical competition and cooperation along relatively stable lines of policy and ideological disagreement quickly came to be channeled not through the branches of government, but rather through an institution the Framers could imagine only dimly but nevertheless despised: political parties."³¹⁹ As a result, "the law and theory of separation of powers is a perfect fit for the

315. See Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1672–73 (2005).

316. See generally *id.* (discussing the debate over the proper way to interpret the Twenty Dollars Clause in light of the difference in value between \$20 in 1791 and \$20 today).

317. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312–13 (2006).

318. See Mark Alderman & Howard Schweitzer, *Here Are 5 Things President Trump Can't Change*, HILL (Feb. 2, 2017, 2:51 PM), <https://bit.ly/2ZxeDkF>.

319. Levinson & Pildes, *supra* note 317, at 2313.

government the Framers designed. Unfortunately, they miss much of the government we actually have.”³²⁰ Professors Daryl Levinson & Richard Pildes wrote their seminal article on this problem in 2006. Since then, a Republican-controlled Senate has refused to even consider the nomination of a Democratic president’s pick for the Supreme Court, with Senate Majority Leader Mitch McConnell expressly justifying that decision on the basis of political partisanship.³²¹ Similarly, in the failed impeachment of President Trump, only one Republican senator voted to convict, despite reports that if the voting were secret, a majority of the Republican Senators would do so.³²² The theoretical world of separation of powers is almost completely removed from reality, and no doctrine has been modified to reflect that.

Similarly, the existence of the institutional press is a fundamental structural assumption of the Constitution, emerging from James Madison’s “distinctly American theory of the function of rights.”³²³ This theory posits that certain constitutional rights act not merely as trumps “in the sense that they function as negative limits,” but rather as “affirmative devices for encouraging the development of countervailing spheres of power.”³²⁴ The Press Clause enshrines such a right: not simply a right of the press to engage in journalism without undue governmental interference, but a structural guarantee that the press actually *exists*, in perpetuity, to engage in journalism. The press is only “free” in the constitutional sense if it is able to function as a countervailing sphere of power.

The importance of the institutional press to the Framers’ understanding of the best way to check power should not be underestimated. In fact, in an eerie foreshadowing of Levinson and Pildes’s work, Thomas Jefferson predicted a breakdown of the separation of powers to class interests and identified press freedom as the necessary backstop. In a letter to Edward Carrington, Jefferson wrote:

Among the [European governments], under pretence of governing they have divided their nations into two classes, wolves and sheep. I

320. *Id.* at 2314.

321. See Emma Hinchliffe, *Mitch McConnell Defends Blocking Merrick Garland*, FORTUNE (Oct. 7, 2018, 11:32 AM), <https://bit.ly/36tfkgv> (quoting McConnell as relying on precedent where the President and majority of the Senate were of opposing parties).

322. See EJ Montini, *Would Donald Trump Survive a Secret Senate Impeachment Vote? And, Yes, It Could Happen*, ARIZ. REPUBLIC (Jan. 3, 2020, 8:00 AM), <https://bit.ly/3d0zsJk> (“Last year . . . Republican consultant Mike Murphy said that 30 senators would back impeachment if the vote were secret. When asked about that, former Arizona Sen. Jeff Flake said, ‘That’s not true. There would be at least 35.’”).

323. John Lawrence Hill, *A Third Theory of Liberty: The Evolution of Our Conception of Freedom in American Constitutional Thought*, 29 HASTINGS CONST. L.Q. 115, 147 (2002).

324. *Id.*

do not exaggerate. This is a true picture of Europe. Cherish therefore the spirit of our people, and *keep alive their attention*. Do not be too severe upon their errors, but *reclaim them by enlightening them*. If *once they become inattentive to the public affairs*, you and I, and Congress, and Assemblies, judges and governors shall all become wolves.³²⁵

III. PRESS UNFREEDOM

“I mean, climate change really **is* a national emergency.*” – Chris Hayes, host, MSNBC’s *All In with Chris Hayes*³²⁶

“Almost without exception, every single time we’ve covered [climate change] it’s been a palpable ratings killer. So the incentives are not great.” – Chris Hayes, host, MSNBC’s *All In with Chris Hayes*³²⁷

Thus far, this Article has (i) demonstrated that journalism is not viable as a market institution, and (ii) demonstrated the importance of the institutional press to the constitutional structure. This Part first provides a theoretical underpinning for the recognition of economic security or sustainability as an essential element of press freedom. It then demonstrates a number of ways in which the inherent economic insecurity produced by market capitalism undermines the democratic mission of the press.

A. Economic Security as Freedom

Freedom is commonly understood as “the absence of coercion.”³²⁸ And coercion is “force, or the threat of force, or of harm, or deprivation,

325. *From Thomas Jefferson to Edward Carrington, 16 January 1787*, FOUNDERS ONLINE, NAT’L ARCHIVES, <https://bit.ly/2Tz1yDD> (last visited Aug. 30, 2020) (emphasis added).

326. Chris Hayes (@chrishayes), TWITTER (Feb. 14, 2019, 3:26 PM), <https://bit.ly/2XnEt8k>.

327. Chris Hayes (@chrishayes), TWITTER (Feb. 14, 2019, 10:08 AM), <https://bit.ly/2XsWL7Q> (punctuation and capitalization cleaned up).

328. *E.g.*, Ernest Van Den Haag, *Liberty: Negative or Positive*, 1 HARV. J.L. & PUB. POL’Y 63, 63 (1978) (citing JEREMY BENTHAM, OF LAWS IN GENERAL 253 (H.L.A. Hart ed., 1970)).

used to control other persons.”³²⁹ Coercion exists in many dimensions; it “can be public or private; it can be imposed by majorities as well as minorities.”³³⁰ But coercion can also assist in maximizing freedom, at least where it is used to counteract uses of freedom that, in effect, reduce others’ freedom.³³¹

Reflecting the recognition that coercion can be used to enhance freedom, a resurgence of socialist economic and political thought has been premised increasingly on the argument that socialism is not about equality, but about freedom—in effect, turning on its head the ordinary political value paradigm in which the left values equality and the right values freedom.³³² Political theorist Corey Robin argues, for instance, that “[t]he socialist argument against capitalism isn’t that it makes us poor. It’s that it makes us unfree. When my well-being depends upon your whim, when the basic needs of life compel submission to the market and subjugation at work, we live not in freedom but in domination.”³³³ Nobel Prize-winning economist Paul Krugman—not a socialist—agrees that “[m]inimal government doesn’t remove power from our lives.”³³⁴ Drawing on the political philosophies of Franklin D. Roosevelt and Eugene Debs, prominent left politicians like Senator Bernie Sanders have made this argument as well.³³⁵

Whatever one’s thoughts on socialism as a political philosophy, it is inarguable that the market can diminish freedom through coercion; the political question is whether it is appropriate to respond to the market’s coercion with governmental coercion.³³⁶ But where, as with the Press

329. *Id.*; see also Ward S. Bowman, Jr., Review, *Capitalism and Freedom*. By Milton Friedman, 72 YALE L.J. 1469, 1469 (1963) (“The opposite of freedom is coercion.”).

330. Bowman, *supra* note 329, at 1469.

331. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 57 (Mary Gregor trans., Cambridge Univ. Press 1991) (1797), quoted in Edward C. Lyons, *Reason’s Freedom and the Dialectic of Ordered Liberty*, 55 CLEVE. ST. L. REV. 157, 191 (2007) (“[I]f a certain use of freedom is itself a hindrance to freedom in accordance with universal laws . . . , coercion that is opposed to this (as a hindering of a hindrance to freedom) is consistent with freedom in accordance with universal laws . . .”).

332. See Nick Bromell, *Beyond Freedom and Equality*, BOS. REV. (Feb. 8, 2016), <https://bit.ly/3bYBFUc>.

333. Corey Robin, *The New Socialists*, N.Y. TIMES (Aug. 24, 2018), <https://nyti.ms/2WY4Typ>.

334. Paul Krugman, *Capitalism, Socialism, and Unfreedom*, N.Y. TIMES (Aug. 26, 2018), <https://nyti.ms/3ejjSIP>.

335. See Paul Heideman, *Bernie: Freedom Is a Democratic Socialist Value*, JACOBIN (June 13, 2019), <https://bit.ly/2LWlriQ>.

336. See Van Den Haag, *supra* note 328, at 75 (“Freedom can be intruded upon for the sake of the freedom of others, for the sake of other freedoms, or, surely, for the sake of ‘just ways of attempting to combat economic subjugation and human domination,’ whatever they may be. Whether such an ‘intrusion’ is desirable depends on the cost relative to the gain.”).

Clause, freedom is protected to serve a discrete, identifiable end—the establishment and maintenance of an institutional press capable of meaningfully checking power—the more difficult political question of choosing between coercions is largely sidestepped, or at least transformed. The question is instead one of orientation and effect: Does the coercion have the effect of enabling or disabling the press from accomplishing its democratic mission? Coercive actions that diminish the press’s ability to scrutinize and check power are abridgments of press freedom. Actions that bolster the press’s ability to do so are not abridgments, even if they are coercive.

The state of the institutional press in America today is that of an entity existing under constant, pervasive, and dominating coercion. The invisible hand of the market has the institutional press in a chokehold. As a result, the press’s ability to conduct its mission through independent and informative journalism is at existential risk.

B. Economic Insecurity as Unfreedom

The press performs a vital role in a representative democracy: Through expert scrutiny of power and the publication of its investigations, it provides a critical knowledge base and a shared basis of reality upon which democratic decisions can rely. By providing such information to voters and consumers, the press also effectively acts as a check upon misuses and abuses of public and private power. Moreover, the press serves as a mediating institution through which citizens and their representatives can interact. These are crucial functions, and American democracy depends in no small part on the press’s ability to carry them out. Thus: press freedom, as guaranteed by the First Amendment to the Constitution.

The press, therefore, has a democratic ethos—a guiding ideal—that justifies its constitutional protection. By contrast, capitalism is, by definition, amoral³³⁷ and oriented principally to the maximization of profit. Indeed, in the typical corporate model, managers have an obligation to maximize shareholder value.³³⁸

337. See R. Edward Freeman, Kirsten Martin & Bidhan Parmar, *Stakeholder Capitalism*, 74 J. BUS. ETHICS 303, 304–07 (2007) (noting that the traditional narratives of capitalism advanced by diverse and opposing theorists, including Marx, Keynes, and Friedman, concur that capitalism is fundamentally amoral).

338. See Lynn Stout, *Corporations Don’t Have to Maximize Profits*, N.Y. TIMES (Apr. 16, 2015), <https://nyti.ms/3ermPrd> (arguing that there is, broadly speaking, not an enforceable legal obligation to maximize profits for shareholders, but that economists and “increasingly powerful activist hedge funds” endorse and enforce the theory); David G. Yosifon, *It’s Law, But It Shouldn’t Be*, N.Y. TIMES (Apr. 16, 2015), <https://nyti.ms/2ZEBKK6> (arguing that Delaware law in particular makes “stockholder welfare” maximization the sole legitimate purpose of a corporation). Beginning in 2010,

In other words, the press, when organized as a market institution, is asked to serve two masters: profit and democracy. Unsurprisingly, these goals are frequently at cross-purposes, at which point the “amoral values of the market system conflict with the moral agency of a free press, and the two are inherently incompatible.”³³⁹ But the press’s commitment to profit is enforceable, both in legal and economic terms, in a way that its commitment to democracy is not, which “inevitably means accommodating news values to the needs of commercial success.”³⁴⁰

The market undermines journalism’s democratic mission in a number of ways; chiefly through incentivizing exclusion, unequal distribution, economic coercion, and by distorting journalism’s purpose to fit the ends of profit.

1. Exclusion

The first subordination of the news ethos to capitalist principles is the effort of the market to brute-force journalism out of the realm of a public good. As discussed *supra*, journalism is a public good because it is non-excludable and non-rivalrous.³⁴¹ But the market’s most consistent response to declining news revenue has been to attempt to make the news product excludable by erecting pay barriers to access.³⁴² In the digital realm, paywalls are ubiquitous, limiting access to quality journalism to those who can and will pay for it.³⁴³ Subscriptions cost more than twice as much in 2019 as they did in 2009.³⁴⁴ A daily *New York Times*

a number of states authorized corporations to charter as “public benefit” or “B-corps,” which allowed for the advancement of the public good, rather than sheer shareholder value maximization, as a corporate purpose. See Josh Patrick, *Assessing the Benefits of Becoming a Benefit Corporation*, N.Y. Times (June 13, 2014), <https://nyti.ms/3d0kymq>. But the model has not been widely adopted by media companies, with the U.K.’s *Guardian* becoming the first to transition to a B-corp in October 2019. See Press Release, *Guardian Media Group Becomes First Major News Organisation to Become a B Corporation and Pledges to Reach Net Zero Emissions by 2030*, GUARDIAN (Oct. 16, 2019, 4:36 PM), <https://bit.ly/2yuXYTZ>.

339. Pamela Taylor Jackson, *News as a Contested Commodity: A Clash of Capitalist and Journalistic Imperatives*, 24 J. MASS MEDIA ETHICS 146, 146 (2009).

340. Jeffrey B. Abramson, *Four Criticisms of Press Ethics*, in DEMOCRACY AND THE MASS MEDIA: A COLLECTION OF ESSAYS 263 (Judith Lichtenberg & Douglas MacLean, eds., 1990).

341. See *supra* note 77 and accompanying text.

342. See, e.g., Nico Perrino, *Ep. 103: Guns, Addiction, and the Press*, SO TO SPEAK: THE FREE SPEECH PODCAST (Feb. 6, 2020), <https://bit.ly/3bUiJpz> (arguing, at 1:14:00, that the news industry should have proactively set up paywalls at the advent of the internet).

343. See Alexis C. Madrigal, *Prepare for the New Paywall Era*, ATLANTIC (Nov. 30, 2017), <https://bit.ly/36tqbao> (note that when I accessed this URL to cite the article, I was greeted with a pop-up banner informing me that “this is your last free article”).

344. See Joshua Benton, *Newspapers Cost More Than Twice as Much Today as They Did a Decade Ago (And That Was a Smart Move by Publishers)*, NIEMANLAB (Jan. 28, 2019, 10:48 AM), <https://bit.ly/2Zzj1Qu>.

subscription costs more than \$1,000 annually.³⁴⁵ Individual copies of the *Washington Post* cost 35 cents in 2001 and \$2.00 in 2019.³⁴⁶ And at the extreme, D.C.-focused outlet *Axios* “eventually wants to charge \$10,000 a year” for its reporting.³⁴⁷ Overall, in the last decade, there have been “industry-wide, more-than-substantial price hikes. Seven-day home delivery price more than doubled, and weekday single-copy price tripled. . . . Seven-day subscription now costs \$510 a year—print subscribers are paying on average \$293 more to have the same newspaper delivered to their doorstep.”³⁴⁸

Some insist that the price increases are not only necessary, but good, arguing that if prices had not gone up so dramatically, news organizations would “employ even fewer journalists and be in even worse shape today.”³⁴⁹ This argument is debatable even as an empirical matter; anyone familiar with basic economic principles can affirm that when price increases, demand typically declines. This would appear to be especially true of a product that consumers have traditionally paid almost nothing for. But the claim that consumers need to pay more for the news is also beside the point in the context of journalism, which is “neither a Saturday morning haircut nor a new pair of running shoes. [News] is an item of trade, but one intrinsically linked to our political life and human flourishing.”³⁵⁰ Exclusionary pricing of journalism is bad; “[i]f journalists really believe that what they do is a public good, they should make sure that it is accessible to as many people as possible, not just those who can afford subscriptions to a half-dozen newspapers.”³⁵¹ Additionally, exclusionary pricing models actually diminish one of the principal positive externalities of journalism: society as a whole benefits when more of its members are well-informed and make their decisions based on a more fully-developed body of information.

The setting of a price point sufficient to generate a profit is the primary influence of capital on journalism, and it is a bad one. Because of the role of journalism in democracy, the effect of subjecting journalism to market capitalism is to capitalize a crucial aspect of democracy. Access to information becomes stratified along the same

345. *See id.*

346. *See id.*

347. Kyle Pope, *Is There A Business Model for Serious Journalism in the Age of Trump?*, THE NATION (Mar. 2, 2017), <https://bit.ly/2zjuOaI>.

348. Hsiang Iris Chyi & Ori Tenenboim, *Charging More and Wondering Why Readership Declined? A Longitudinal Study of U.S. Newspapers' Price Hikes, 2008-2016*, 20 JOURNALISM STUD. 2113, 2124–25 (2019).

349. Benton, *supra* note 344.

350. Jackson, *supra* note 339, at 147.

351. Mari Cohen & Christian Belanger, *Journalism Should Be Free: Imporing Readers to Support Outlets Through Subscriptions Misdiagnoses the Problem*, OUTLINE (Feb. 6, 2019, 12:48 PM), <https://bit.ly/2WSv35r>.

lines as access to any other commodity. And because access to information is the presumed basis of democratic deliberation and debate,³⁵² access to democracy becomes unequally distributed. The effect is a degradation of the ability of ordinary citizens “to make educated political choices” for individual or social good.³⁵³

2. Unequal Distribution

The market also undermines journalism by generating unequal distribution patterns across geographic and socioeconomic lines. The collapse of journalism has not been evenly spread across communities. Some communities—albeit an increasingly small number—have the benefit of receiving local, national, and international news through “daily newspapers, radio and television broadcasts, local cable news channels, hyper-local Web sites, services that connect to police reports and other sources of local information, blogs, and mobile alerts.”³⁵⁴ Meanwhile, many others are “unserved or are woefully underserved.”³⁵⁵ The result is a stratification—“second-class information citizenship” as “[t]he poor, the elderly, rural and small town residents, and some young people” are faced with a reduction in the sources of journalism available to them.³⁵⁶

The reduction of access to relevant news also generates a self-reinforcing cycle of reduced access. With news viewership increasingly driven by social media, Facebook or Twitter algorithms interpret the initial lack of interest in the irrelevant news available to underserved communities as a lack of desire on the part of young people, poor people, or racial or ethnic minorities to be shown any news at all.³⁵⁷ News organizations also have little incentive to seek out marginalized audiences, who tend to be poorer and thus less attractive to advertisers.³⁵⁸

The consequences of the collapse of local journalism are grim. Local journalism fosters democratic governance “by promoting values of openness, accountability, and public engagement.”³⁵⁹ The loss of those functions in a community results in citizens that “are less informed about politics, less civically engaged, and less likely to vote.”³⁶⁰ This translates

352. See Jackson, *supra* note 339, at 149 (“Journalism represents a right to public interest news and information.”).

353. *Id.* at 150. (“Our ability to make educated political choices that can improve our own quality of life and the greater social good is compromised by news commodification.”)

354. Knight Comm’n Rpt., *supra* note 55, at XII.

355. *Id.*

356. *Id.* at 1.

357. See Kjerstin Thorson, *Time to Get Mad About Information Inequality (Again)*, NIEMANLAB, <https://bit.ly/2LNJ5Px> (last visited Aug. 30, 2020).

358. See *id.*; see also *infra* Section III.B.4.a.

359. Knight Comm’n Rpt., *supra* note 55, at XII.

360. Bode, *supra* note 140.

directly into a loss of democratic power at the local level, as citizens lose access both to a dedicated institutional watchdog and to the information they need “to run their lives, their communities, and their country.”³⁶¹ The primary consequence of the unequal destruction of journalism, is, accordingly, an unequal distribution of the ability to check power and, accordingly, an unequal distribution of freedom—an intolerable condition in a democracy.

For example, the number of reporters assigned to cover the nation’s 50 state legislatures dropped by 35% between 2003 and 2014.³⁶² The majority of the remaining statehouse reporters were part-time employees, and one in seven was a current college student.³⁶³ South Dakota had two reporters covering its statehouse in 2014—one for the Associated Press and one who worked for six outlets.³⁶⁴ The number of reporters covering the Illinois Capitol—the entity charged with governing the sixth largest population in the United States and the fifth largest GDP (or, if it were a country, the 22nd-largest GDP in the world)—declined from 40 in 2001 to ten in 2017.³⁶⁵ Illinois state politics are infamously dysfunctional and corrupt.³⁶⁶ The public has less oversight over those politicians now than it has had in decades.

Moreover, information inequality actually serves to expose the press to attacks from its illiberal opponents:

[As] access to the information the public needs to meaningfully participate in self-governance . . . become[s] even more two-tiered[,] [t]he well-off will receive accurate and timely news, while the struggling will have to settle for unprofessional, misleading “news” that costs them nothing but the effort required to wade through a barrage of down-market advertising. This scenario, in turn, will play into the hands of anti-journalism tyrants, who will be able to point—correctly—to a popular press that is ever less credible.³⁶⁷

Finally, and perhaps most importantly, information inequality tears at the social fabric of the country. Journalists write “the first rough draft

361. Knight Comm’n Rpt., *supra* note 55, at 3.

362. See Mark Jurkowitz, *5 Key Takeaways from Our Census of Statehouse Reporters*, PEW RES. CTR. (July 10, 2014), <https://pewrsr.ch/3bPRYmd>.

363. *See id.*

364. *See id.*

365. See Andy Shaw, *As Statehouse Press Corps Dwindles, Other Reliable News Sources Needed*, BETTER GOV’T ASS’N (May 27, 2017, 6:00 PM), <https://bit.ly/2LMA5Kn>.

366. See Zachary Proulx, *Ending “The Chicago Way”: New Poll Ranks Corruption Above the Economy as Top Concern in Illinois*, BRENNAN CTR. FOR JUSTICE (Feb. 21, 2009), <https://bit.ly/3eb7ydA>.

367. Pope, *supra* note 347.

of history”³⁶⁸ and collectively generate the consensus of what is “reality.” When there is unequal access to those facts, there is, in a very real sense, unequal access to reality. This inequality makes it progressively more difficult to address social problems, as the perceived need to address those problems is unequally distributed in an artificial pattern, primarily along the basis of income. The inevitable result of democratic clash between two or more factions with utterly different senses of reality is a broken, confused parody of democratic deliberation. This dysfunctional marketplace of ideas creates opportunities for bad-faith actors, like outlets with the primary purpose of propagandizing rather than informing—often funded by wealthy ideologues rather than by market forces—to wreak havoc. Journalism’s function, stripped of all bells and whistles, is to prevent this from happening. It is the glue that holds a democratic society together. “When [public] services are stripped of their social character, privatized, and put on an individual ability-to-pay basis, the common good is grievously wounded. Along with the inevitable inequity that accompanies ability-to-pay standards comes a further weakening of the social organism.”³⁶⁹

3. Coercion

The foundational premise of an independent press is that the press’s decisions regarding what issues to investigate and what stories to tell must be based exclusively on the press’s editorial judgment.³⁷⁰ As this concept relates to the internal operations of the press, it is often referred to metaphorically as a “wall” between business-side operations and press operations in a news organization.³⁷¹ Journalists consider respecting this bifurcation to be a moral duty and a professional responsibility.³⁷² Meanwhile, capitalists consider it to be an anachronism and an absurdity;

368. See Jack Shafer, *Who Said It First?*, SLATE (Aug. 30, 2010, 8:04 PM), <https://bit.ly/3cXMV4A> (discussing the history of this quote).

369. SCHILLER, *supra* note 77, at xv.

370. See *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 391 (1973) (“[We] reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial.”); Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 857 (1999) (arguing that the protection of “editorial judgment” is the central component of press freedom).

371. See Raul Ferrer Conill, *Camouflaging Church as State: An Exploratory Study of Journalism’s Native Advertising*, 17 JOURNALISM STUD. 904, 904 (2016) (referring to the bifurcation of business and press functions in a news organization as the wall between “church and state”).

372. See, e.g., Ira Basen, *Breaking Down The Wall*, UNIV. OF WIS.-MADISON: CTR. FOR JOURNALISM ETHICS (Dec. 19, 2012), <https://bit.ly/2XmeC0a> (“The wall between ‘church and state’ was not to be breached . . . [T]he idea that editorial decisions would be made independent of the wishes of advertisers has long been considered to be one of journalism’s most fundamental principles.”).

as Andreessen put it, “[t]he news business is a business like any business.”³⁷³ The result is, in a very real sense, an internal contradiction baked into every for-profit news organization: “CEO’s who think their job is to create ‘vertically integrated digital-media companies,’ and journalists who think their job is to win Pulitzers. . . . [T]wo separate cultures are pursuing their own separate objectives.”³⁷⁴

Unsurprisingly, it is Andreessen’s ideological compatriots that own and run news organizations, and they do so because they expect those organizations to be profitable. Mark Willes, who served as the publisher of the *Los Angeles Times* in the 1990s, famously announced his intent to tear down the wall with “a bazooka if necessary.”³⁷⁵ The result of business-side pressure is a long-term degradation of the editorial integrity of the news, such that “[t]he primary mention of the wall in many stories on the news-business boundary is simply to refer to its ongoing destruction.”³⁷⁶ “Today, at the healthiest news organizations, the Chinese Wall looks more like a picket fence.”³⁷⁷ Private censorship of the news is, as a result of this degradation, ubiquitous.

Advertisers are the prime culprit in private news censorship. They plant favorable stories and kill unfavorable stories and they influence the content of the news by demanding that their ads be placed next to happy news that leaves consumers in a “buying mood.”³⁷⁸

The first form of advertiser coercion represents a literal subservience of the press to the advertiser’s interests, in which the advertiser either kills a negative story or plants a positive one. The latter instance most often takes the form of what was historically called “reading notices,”³⁷⁹ and what is today called “native advertising”—advertisements published with the appearance of a real news story, with little or no disclaimer that the content is, in fact, a paid advertisement.³⁸⁰

373. Andreessen, *supra* note 51.

374. Greg Satell, *If Journalism Is Going to Survive as a Business, We Need to Rethink the Chinese Wall*, DIGITALTONTONTO (Apr. 15, 2015), <https://bit.ly/2Tt3ZYG>.

375. MCCHESNEY & NICHOLS, *supra* note 191, at 48.

376. Mark Coddington, *The Wall Becomes a Curtain*, in MATT CARLSON & SETH C. LEWIS, *BOUNDARIES OF JOURNALISM: PROFESSIONALISM, PRACTICES AND PARTICIPATION* 72 (2015).

377. Amanda Hale, *The Year We Start to Talk About “The Business Side”*, NIEMANLAB, <https://bit.ly/2WSFaY4> (last visited Aug. 30, 2020).

378. See C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2144–64 (1992) (describing the primary forms of advertiser control over the news).

379. See *id.* at 2144.

380. See generally B.W. Wojdyski, *Native Advertising: Engagement, Deception, and Implications for Theory*, in *THE NEW ADVERTISING: BRANDING, CONTENT AND CONSUMER RELATIONSHIPS IN A DATA-DRIVEN SOCIAL MEDIA ERA* 203 (R. Brown, V.K. Jones & B.M. Wang eds., 2016) (providing an overview of the practice and discussing its normative implications). The worst problem with native advertising, perhaps, is that academics have been generally unable to resist writing articles about it without some

Historically, advertisers “required that these insertions be indistinguishable from the newspaper’s normal news and editorial content.”³⁸¹ Today, to publish native advertising with no disclaimer would be considered an egregious breach of journalistic ethics. But economic pressures and advertiser demands have nonetheless induced some news outlets to “blur[] [the] boundaries” between “church and state”—a metaphor that casts the ethical debate in familiar and heightened terms.³⁸² As one group of scholars noted, “For the press to function in a normative manner, as a watchdog, contributing to the public’s ability to self-govern, it simply cannot participate in deception.”³⁸³ And yet, the economic situation of journalism is so dire that native advertising is ubiquitous.³⁸⁴ And boundaries are being pushed; in 2015, the American Society of Magazine Editors “overhauled its guidelines, clearing away hurdles that sought to prevent editors from creating advertising content.”³⁸⁵

The other form of direct coercion, in which advertisers exert their economic power to kill unfavorable stories, also frequently befalls the press. “Major advertisers, such as car dealers and realtors, *often* attempt to control news stories and threaten to withdraw advertising over unfavorable coverage.”³⁸⁶ In the 1970s, for instance, the *New York Times* was forced to sell its *Modern Medicine* magazine after pharmaceutical companies threatened to pull all advertising after the *Times* published a series of articles on medical malpractice.³⁸⁷ Similarly, the magazine *Mother Jones* once commissioned “an exposé on the deadly effects of cigarettes” and notified cigarette companies who advertised in the magazine ahead of publication so they could pull their ads from that

variation on the idiom “going native” in the title. See, e.g., Matt Carlson, *When News Sites Go Native: Redefining the Advertising-Editorial Divide in Response to Native Advertising*, 16 JOURNALISM 849 (2015); Bartosz W. Wojdowski & Nathaniel J. Evans, *Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising*, 45 J. ADVERT. 157 (2015).

381. Baker, *supra* note 378, at 2145.

382. See Conill, *supra* note 371, at 904.

383. Erin E. Schauster, Patrick Ferrucci & Marlene S. Neill, *Native Advertising is the New Journalism: How Deception Affects Social Responsibility*, 60 AM. BEHAV. SCIENTIST 1408, 1408 (2016).

384. See David Taintor, *Pretty Much Everyone Is Doing Native Ads Now*, ADWEEK (June 17, 2013), <https://bit.ly/2LMm4wo>.

385. Michael Sebastian, *Magazine Trade Group Overhauls Advertising Guidelines*, ADAGE (Apr. 15, 2015), <https://bit.ly/3cUCvCO>.

386. An & Bergen, *supra* note 137, at 111 (emphasis added).

387. See *id.* at 112.

issue.³⁸⁸ The companies responded by cancelling their entire contract, and liquor companies followed suit in a “show of corporate solidarity.”³⁸⁹

In one study, 90% of news editors reported that advertisers attempted to “influence the content of stories,” 70% reported that advertisers attempted to kill stories, and 93% reported that advertisers “threatened to pull their ads because of the content of stories.”³⁹⁰ The effect of such threats is magnified at “small newspapers” with “less market power,”³⁹¹ which reported “greater advertiser influence” than at large papers,³⁹² and which, in a study presenting ad directors with ethical dilemmas, were “more likely” to yield to advertising pressure to compromise editorial integrity.³⁹³

Advertisers (and consumers) also often attempt to censor the press by demanding that ads do not appear next to certain stories, limiting the ability of outlets to publish those stories.³⁹⁴ “[A]dvertisers pay the media to provide content the advertiser believes will leave that audience emotionally and intellectually most vulnerable to commercial messages.”³⁹⁵ For example, Fidelity Investments distributes a blacklist containing more than 400 words—words like “immigration,” “racism,” and “Trump”—next to which it will not pay for ads to appear.³⁹⁶ Publishers “feel[] the impact,” which “threatens to hit publications’ revenue and is creating incentives to produce more lifestyle-oriented coverage that is less controversial than hard news.”³⁹⁷ On CNN.com, for instance, blacklists containing the word “Trump” prevented CNN from placing ads more than 600,000 times.³⁹⁸

In recent years, political activists have also used concentrated pressure on advertisers to inflict economic damage on the press as punishment for expressing opinions with which the activists disagree. Shortly after the 2016 election, for instance, “an anonymously run Twitter account emerged with a plan to choke off advertising dollars to Breitbart News, the hard-edge, nationalist website closely tied to

388. Eric Bates, *Smoked Out*, MOTHER JONES (Mar./Apr. 1996), <https://bit.ly/2XmCqRB>.

389. *Id.*

390. An & Bergen, *supra* note 137, at 112.

391. *Id.* at 118.

392. *Id.* at 112.

393. *Id.* at 119.

394. Baker, *supra* note 378, at 2153.

395. *Id.* at 2154.

396. Suzanne Vranica, ‘Shooting,’ ‘Bomb,’ ‘Trump’: Advertisers Blacklist News Stories Online, WALL ST. J. (Aug. 15, 2019, 10:24 AM), <https://on.wsj.com/2ZsRYpB>.

397. *Id.*

398. *See id.*

President Trump’s administration.”³⁹⁹ The organization behind the account—Sleeping Giants—has since turned its sights on companies that advertise on Fox News, and has achieved some measure of success.⁴⁰⁰ More than 4,000 companies have removed their ads from *Breitbart*,⁴⁰¹ and nearly 40 have pulled ads from Tucker Carlson’s Fox News show.⁴⁰² Bill O’Reilly was forced off the air after more than 60 advertisers pulled ads from his show.⁴⁰³ Glenn Beck was forced off the air after a similar advertiser boycott.⁴⁰⁴ Conservative activists have “started getting in the ad boycott game” as well.⁴⁰⁵ Advertisers are the major, but not the only, culprit; as discussed *supra*, owners and would-be owners of news organizations also significantly interfere with editorial integrity.⁴⁰⁶

4. Distortion

Finally, the influence of the market on the press can result in a subtle abdication of the press’s responsibility to cover all issues of importance to society from a variety of viewpoints. This distortion occurs in two dimensions. First, the market forces the news to gear its product towards its consumers *qua* consumers. Second, news organizations are forced to pursue cheap news and abandon more important but less profitable journalism.

a. Consumer news

A press produced by capitalists and aimed at a consumer class with disposable income to be spent on a “luxury” item like the news can be expected to fail to cover stories that are not of interest or importance to those groups and to exclude certain viewpoints systemically. In addition to the more obvious cases, advertisers can inflict slow deaths on press outlets that focus on audiences who do not necessarily skew wealthy. For instance, at the time of its shutdown due to declining advertising revenue, the *Daily Herald*—a U.K. paper with a left-leaning editorial

399. Sapna Maheshwari, *Revealed: The People Behind an Anti-Breitbart Twitter Account*, N.Y. TIMES (July 20, 2018), <https://nyti.ms/3bMXR3G>.

400. *See id.*

401. *See* Eric Johnson, *How a Twitter Account Convinced 4,000 Companies to Stop Advertising on Breitbart*, VOX (Sept. 4, 2018, 10:34 AM), <https://bit.ly/2A0vUIq>.

402. *See* Bill McCarthy, *The Facts on Advertiser Boycotts Against Cable News Networks*, POLITIFACT (July 22, 2019), <https://bit.ly/3bZFTVB>.

403. *See* Abigail Abrams, *More Than 60 Advertisers Have Dumped Bill O’Reilly’s Show After Sexual Harassment Allegations*, TIME (Apr. 6, 2017, 6:57 PM), <https://bit.ly/2XnifmF>.

404. *See* Jeff Guo, *Why Fox News Finally Dropped Bill O’Reilly*, VOX (Apr. 19, 2017, 3:50 PM), <https://bit.ly/3eiBtkp>.

405. David Ng, *Advertisers Are in the Hot Seat as Activists Both for and Against Trump Call for Boycotts*, L.A. TIMES (June 13, 2017, 1:50 PM), <https://lat.ms/3gkpiVM>.

406. *See supra* Section I.C.1.

voice—was read by 4.7 million, “nearly twice as many as the readership of *The Times*, *Financial Times*, and *Guardian* added together.”⁴⁰⁷ Its readers were “the most committed and the most intensive readers, with the most favorable image of their paper” of any group in the country.⁴⁰⁸ But they were working class and poor, and so the *Herald* could not attract advertisers to subsidize its operations. As a result, the paper was shuttered.⁴⁰⁹ The *Daily Herald* is not the only left-wing paper to meet an advertiser-induced demise; the advent of advertising led to “the end of a national radical press in Britain.”⁴¹⁰

The fate of the *Daily Herald* was emblematic of a larger trend that took place stateside, as well. Starting in the 1960s, “the newspaper industry started to employ the tools of the growing consumer research industry to target ‘quality’ demographics—that is, more upwardly mobile readers, with higher education and higher incomes.”⁴¹¹ This trend is visible in advertisements placed by newspapers in *Editor & Publisher*, a trade journal in which newspapers advertise themselves to advertisers.⁴¹² Over time, those advertisements came to rely explicitly on assuring advertisers that the papers’ readership was affluent. A *Cleveland Plain Dealer* ad promised, “Our readers are . . . affluent moderns who are the first with new things for better living.”⁴¹³ At times, these attempts to assure advertisers of the wealth of a paper’s readers veered into the territory of self-parody, as with a *Los Angeles-Herald Examiner* ad’s faux-concerned question, “Are we in danger of becoming the rich man’s paper?” followed by the tagline: “*Los Angeles Herald-Examiner*, where the money is.”⁴¹⁴

This subversion of the press’s democratic ethos is subtler, but still visible, in the actual content of the stories. The first *New York Times* story ever published about Senator Bernie Sanders, who identifies as a democratic socialist, accused him of “bias toward the poor,”⁴¹⁵ and continued controversy dogged the press’s ham-handed attempts to cover

407. C. EDWIN BAKER, ADVERTISING AND A DEMOCRATIC PRESS 12–13 (2nd prtg. 1995).

408. *Id.*

409. *See id.*

410. DAVID CROTEAU, WILLIAM HOYNES & STEFANIA MILAN, MEDIA/SOCIETY: INDUSTRIES, IMAGES, AND AUDIENCES 64 (4th ed. 2012).

411. Christopher R. Martin, *News for the Consumer Class*, WORKING CLASS PERSPECTIVES (Apr. 1, 2013), <https://bit.ly/3ebyKJo>.

412. *See id.*

413. *Id.*

414. *Id.*

415. Michael Knight, *Vermont Socialist Plans Mayoralty with Bias Toward Poor*, N.Y. TIMES (Mar. 8, 1981), <https://nyti.ms/3cH2UUr>.

his 2020 presidential campaign fairly.⁴¹⁶ More broadly, media scholar Christopher Martin has noted that as newspapers ramped up advertising the affluence of their audience, papers eliminated their labor reporters.⁴¹⁷ Consequently, their coverage of labor disputes became overtly anti-worker, with stories about strikes focusing on “how strikes inconvenienced consumers.”⁴¹⁸ Newspapers are now written for the consumer, not the citizen.

b. Cheap news

Second, the market forces the news to systemically under-cover important but “boring” stories. Chief among the neglected subjects are investigative journalism, science journalism, and foreign reporting.

Good journalism is expensive, and some of the most important beats are the most expensive. When an organization’s financial health is jeopardized, eliminating these costs is the most obvious solution. Consider, for example, the Raleigh *News & Observer*, which in 2004 had 250 newsroom employees.⁴¹⁹ By 2009, the *News & Observer* had only 132 employees; among the eliminated positions were the “Durham Courts Reporter; Durham Schools Reporter; Legal Affairs Reporter; Agriculture Reporter; Lead Growth Reporter; Science Reporter; Environmental Reporter; and Statewide Public Education Reporter,” as well as a Workplace Reporter who “produced stories on [undocumented] immigrants in NC, visa violations, and companies avoiding unemployment taxes”; a Banking Reporter who “wrote about Fannie Mae and Freddie Mac’s mortgage ties in the Triangle and about predatory lending in the state”; a Tech Reporter who “covered the Research Triangle Park companies”; and a Pharma Reporter who “covered local drug and health companies.”⁴²⁰

416. See, e.g., Branko Marcetic, *MSNBC is the Most Influential Network Among Liberals—and It’s Ignoring Bernie Sanders*, IN THESE TIMES (Nov. 13, 2019), <https://bit.ly/3cHOgwn> (noting that, of the major Democratic presidential candidates, Sanders received the least and most negative coverage on MSNBC). The mainstream media, which is broadly entrenched in technocratic liberalism, particularly struggled to recognize the distinctions between Sanders’ democratic socialism and Trump’s ethnonationalism. See The Editorial Board, *Bernie Sanders*, N.Y. TIMES (Jan. 13, 2020), <https://nyti.ms/3bCBiyF> (“Given what we’ve gone through over the last three years when Democrats hear about the president flying around the country holding rallies, they might cringe. And I’m wondering how you flying around the country in 2021 rallying the people would be different than what Donald Trump has been doing?”).

417. Martin, *supra* note 411.

418. *Id.* For example, Martin analyzed news stories about the 2012 bankruptcy of Hostess Brands. While the Hostess workers’ unions “made big concessions worth \$110 million a year . . . , more than 60[%] of the 2012 news stories blamed the union for Hostess closing.” *Id.*

419. See Hamilton, *supra* note 81, at 3.

420. *Id.*

The most obvious example of capitalism's forced cost-cutting is the decline of investigative journalism, which is tremendously expensive, tremendously valuable, and tremendously endangered.⁴²¹ A single investigative journalist "can cost a news organization more than \$250,000 a year in salary and expenses for only a handful of stories."⁴²² A Pulitzer Prize-winning series on police shootings in Washington D.C. "that precipitated major changes in the D.C. police department that saved lives" cost \$487,000 to produce.⁴²³ The *Miami Herald's* audit of the vote count in Florida in the 2000 presidential election cost \$850,000.⁴²⁴ Organizations do not reap commensurate rewards, resulting in the market failure discussed *supra*.⁴²⁵

Investigative journalists are prone to fail, and to fail frequently. Seymour Hersh once explained that he "strike[s] out one time in three."⁴²⁶ Even when investigative journalists do not fail, the stories that emerge "can be very expensive to defend legally."⁴²⁷ For example, when *BuzzFeed News* reporters began to investigate sexual misconduct claims against self-help guru Tony Robbins, his lawyers sent a letter to *BuzzFeed* threatening a suit with "devastating impact on the financial condition of *BuzzFeed* and its investors."⁴²⁸ The *Washington Post* recently concluded: "[T]here's never been a better time to sue a journalist."⁴²⁹

Like the decline of journalists and outlets more broadly, the decline in investigative reporting has also not been evenly distributed:

Prizewinning investigative work is increasingly concentrated—the top five outlets accounted for 30% of major investigative awards in the 1990s but nearly 50% by the 2000s. In an era of declining career prospects and little training at papers, the average age of Pulitzer

421. See ABRAMSON, *supra* note 38, at 2 ("Global news-gathering, meanwhile, remained monstrously expensive. The kind of investigative stories that won Pulitzers took months to report, took still more time to edit and make legally bullet-proof, and were ever more costly. . . . What was at risk was far bigger than just one industry—it was truth and freedom in a democratic society, an informed citizenry, and news sources that were above politics in their reporting.").

422. MCCHESENEY & NICHOLS, *supra* note 191, at 24.

423. Hamilton, *supra* note 81.

424. See Greg Bolt, *Journalist Offers Blunt Assessment of Industry*, REGISTER-GUARD (Apr. 3, 2009), <https://bit.ly/368U3IJ>.

425. See *supra* notes 79–88 and accompanying text.

426. MCCHESENEY & NICHOLS, *supra* note 191, at 24.

427. Fiachra Gibbons & Frédéric Pouchot, *Crippling Costs of War Reporting and Investigative Journalism*, AFP (Aug. 28, 2018), <https://yhoo.it/2Xa6Mqq>.

428. Erik Crouch & Avi Asher-Schapiro, *Legal Threats Prompt Journalists to Take Creative Approaches to Investigative Stories*, COMM. TO PROTECT JOURNALISTS (Oct. 23, 2019, 2:30 PM), <https://bit.ly/2LEtmCp>.

429. Paul Farhi, *Why There's Never Been a Better Time to Sue a Journalist*, WASH. POST (Nov. 5, 2016), <https://wapo.st/2Ted07K>.

winners for investigative work has increased by nearly ten years since the 1980s. Freedom of Information Act requests by local newspapers at a set of federal agencies dropped by almost a half between 2005 and 2010.⁴³⁰

Indeed, at the same time that FOIA requests from local outlets dropped by half, “FOIAs increased by 42[%] from other media such as AP, Bloomberg and niche outlets aimed at those who follow the details of policymaking for a living in their roles as lobbyists, company officials or governmental employees.”⁴³¹ Reporters from niche outlets now outnumber those from daily papers in the Senate Press Gallery.⁴³²

Science reporting has also been hard-hit. “Between 1989 and 2005—before the Internet-Great Recession crisis—the number of daily newspapers with weekly science section[s] shrunk from 95 to 34.”⁴³³ By 2012, there were only 19 weekly science sections remaining.⁴³⁴ Among the 2,222 members of the National Association of Science Writers in 2009, only 79 were full-time staff reporters.⁴³⁵ The effects of this decline are being felt exactly as science itself “is experiencing a reproducibility crisis, in which scientists are finding that published results are difficult (if not impossible) to replicate, and the peer review system that it’s long relied upon is falling under much needed scrutiny.”⁴³⁶ And, of course, there are the extreme examples, the unknowable counterfactuals. What would climate policy look like in 2020 if the world’s primary superpower had retained a cadre of science journalists in the twentieth and twenty-first centuries?⁴³⁷

Perhaps most extreme has been the loss of foreign reporting. Foreign news is among the most expensive categories of journalism. For instance, in 2008, the *New York Times*’s Baghdad bureau cost \$3 million annually to operate.⁴³⁸ Elsewhere, it has been reported that it costs the

430. JAMES T. HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 9 (2016).

431. Lindsay Green-Barber, *How Much Is Investigative Journalism Worth?*, *MEDIA SHIFT* (Oct. 27, 2016), <https://bit.ly/3cJOOBF>.

432. *See id.*

433. MCCHESENEY & NICHOLS, *supra* note 191, at 35.

434. *See* Sara Morrison, *Hard Numbers*, *COLUM. JOURNALISM REV.* (Jan./Feb. 2013), <https://bit.ly/2LAopdR>.

435. *See* Mitch Waldrop, *AAAS: Science Journalism in Crisis?*, *NATURE: IN THE FIELD* (Feb. 14, 2009, 4:32 AM), <https://go.nature.com/36auYgx>.

436. Kate Lunau, *Science Journalism’s Identity Crisis*, *VICE* (June 1, 2016, 1:46 PM), <https://bit.ly/3fXDQKV>.

437. *See* MCCHESENEY & NICHOLS, *supra* note 191, at 35 (“For a disturbing glimpse of what to expect from a media world with vastly fewer trained science journalists, we need only recount how much of the press managed to bungle the most important science-related story of our time: global warming.”).

438. *See* Seth Mnookin, *The New York Times’s Lonely War*, *VANITY FAIR* (Nov. 3, 2008), <https://bit.ly/2AIl6zb>.

Times \$10,000 a day “to cover a story in Baghdad.”⁴³⁹ Back in 2003—again, before the Great Recession and before the internet’s effects truly, forcefully kicked in—ABC and Fox closed their Moscow bureaus; CBS withdrew reporters from Paris, Johannesburg, and Beijing; and CNN closed bureaus in Manila, Belgrade, Brussels, and Rio de Janeiro.⁴⁴⁰ “[T]o a large extent, all of Europe and Asia are covered from London or New York. Latin American correspondents are almost nonexistent”⁴⁴¹ The result is natural: less foreign news. One study of the U.K. press found that the news in 2009 featured 39% fewer international stories than in 1979.⁴⁴² Over the same time period, foreign policy has increasingly become irrelevant in domestic politics.⁴⁴³ The result of the reduced attention to foreign affairs and foreign policy has been the rise of the foreign policy “blob,”—part of which consists of what Trump might call the “deep state,” and part of which exists in thinktanks and media organizations—which is largely immune from democratic pressure, yet responsible for much of the calamitous foreign policy disasters of the twenty-first century.⁴⁴⁴ Those interventionist catastrophes represent a chilling example of what policymaking looks like in the near-absence of the press.

This Part has not attempted to exhaustively document the journalistic concerns posed by market journalism. Rather, by emphasizing a few key examples, I have hoped to make two points. First, the incentives created by the necessity of producing a profitable product in the marketplace are frequently in direct conflict with the democratic

439. Gibbons & Pouchot, *supra* note 427.

440. See Lucinda Fleeson, *Bureau of Missing Bureaus*, AM. JOURNALISM REV. (Oct./Nov. 2003), <https://bit.ly/2X6zpF8>.

441. *Id.*

442. See Oliver Willmott, *The Decline of the Foreign Correspondent*, NEW STATESMAN (Nov. 1, 2010), <https://bit.ly/3bM1iY9>.

443. See Alex Seitz-Wald, *Trump’s Facing Crises Around the World. So Why Aren’t Democratic Candidates Talking about Foreign Policy?*, NBC NEWS (May 19, 2019, 8:06 AM), <https://nbcnews.to/3gai2fo>; Jonathan Tepperman, *The 2020 Candidates Aren’t Talking About Foreign Policy. They Need to Start.*, FOREIGN POLICY (May 11, 2019, 6:00 AM), <https://bit.ly/2X0z32A>.

444. See Ryan Cooper, *Fear the Foreign Policy ‘Blob’*, THE WEEK (May 11, 2016), <https://bit.ly/3bJuWgG> (“In short, while it seems that Obama and Rhodes really are trying fairly hard to limit the damage done by overseas adventurism, eventually they run into hard limits. And that is because of the ideology of the Blob, which always frames foreign policy discussions around *how* force should be used, not whether it’s a good idea in the first place.”); Richard Sokolsky & Gordon Adams, *Don’t Let the DC ‘Blob’ Guide Trump’s Foreign Policy*, CARNEGIE ENDOW. FOR INT’L PEACE (Nov. 17, 2016), <https://bit.ly/2WHtebJ> (noting the disconnect between the foreign policy establishment’s desire for interventionism and “global cop” responsibilities, and the general public’s more isolationist viewpoint).

ideals of journalism. Those ideals are *why* the press is protected by the First Amendment, and therefore the assignment of producing journalism to the market is self-defeating. Second, critically, market journalism is *not* “free” in anything but the narrowest sense of not experiencing direct editorial coercion from the government. Such a cabined definition of press freedom is insufficient to ensure the existence of a lively and powerful press capable of checking power.

CONCLUSION

One cannot have a representative, democratic government in the absence of a meaningfully powerful institutional press. The authors of the Constitution understood that fact and chose to enshrine in the First Amendment a guarantee against the abridgment of press freedom. Americans, particularly in the past century, have guarded that right zealously against any official encroachment, and paeans to its importance are ubiquitous. But the single-minded vigilance against governmental interference has proven irrelevant. The press has disappeared, almost overnight, without any official act to blame.

Instead, the responsibility lies in the error of assigning the task of producing journalism to the market. For a number of unavoidable reasons, the market cannot produce an optimal supply of quality journalism. This reliance has proven calamitous as the internet’s reallocation of advertising revenue and finance capitalism’s insistence on large profit margins have demonstrated the fundamental flaws in journalism’s business model.

The ramifications of the disappearance of the American free press are already beginning to be felt. Hyper-partisan distributors of disinformation are replacing vital local news outlets. To the extent that quality journalism survives, access to it is becoming stratified along socioeconomic, racial, and geographic lines. As a consequence, democratic deliberation is breaking down as the national polity fragments into groups operating with entirely different understandings of reality. These consequences strike at the core of the constitutional system. Representative government cannot endure in the absence of press freedom, and press freedom without press sustainability is a hollow promise. The press’s economic collapse is a constitutional crisis. We must understand and address it as such.