SAVING THE NEWS

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INTRODUCTION

It is usually a mistake to suppose that a company is the best judge of how its business works.[1] Or that an industry is the best judge of how the industry works. AT&T is a good example. When the Justice Department sat down with management in 1981 to negotiate a breakup of what was then a monopoly provider of

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[1] This article draws heavily on two working papers of mine. *See* Ramsi Woodcock, *Ruinous Competition in News, the Postal Internet, and the Three Laws of Techno-Legal Change*, (2022), https://perma.cc/J643-RP4J; Ramsi Woodcock, *The Fourth's Estate* (2022), https://perma.cc/AXC6-F823.

telephone service, government lawyers asked which part of the company management wanted to keep after the breakup—the long-distance operations or the regional networks.[2] The long-distance operations had long been the company's most profitable, so management asked for those.[3]

It was a mistake. The long-distance operations had been profitable only because AT&T had owned the regional networks and could use them to deny access to competing long-distance companies seeking to complete calls.[4] Once AT&T had spun off the regional networks, the company could no longer do that.[5] Competitors flooded the long-distance market, driving down AT&T's profits. But the regional networks remained protected from competition thanks to the prohibitive cost of running new wires to individual homes. They flourished. Management had failed to grasp that the real source of AT&T's power was its regional-network monopolies, not its long-distance operations. Two decades later, AT&T was forced to sell itself—to one of the regional networks.[6]

If management sometimes has trouble understanding the value proposition of the single company that it runs, we can forgive newspapers for not understanding the value proposition of the entire industry that they constitute.

Over the past decade, the newspaper industry has been trying to stave off collapse brought on by the very low cost of Internet communication.[7] That low cost has all but eliminated barriers to entry into both the news industry and the broader market for reader attention. That has forced newspapers to engage in ruinous competition for a shrinking share of overall public engagement.[8] In local news markets,

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[2] *See* RICHARD H. K VIETOR, CONTRIVED COMPETITION: REGULATION AND DEREGULATION IN AMERICA 210–11, 223–25 (1994); ALAN STONE, WRONG NUMBER: THE BREAKUP OF AT&T 318–19, 326 (1989).

[3] *See* STONE, *supra* note 2, at 318–19.

[4] *See id.* at 168.

[5] *See id.* at 328 (noting that as part of the breakup the regional networks were required to provide equal access to their networks to all long-distance providers).

[6] *See* Nilay Patel, *Look at This Goddamn Chart*, VERGE (Oct. 24, 2016), https://perma.cc/F45B-BM7F; Matthew Stuart, *How AT&T Conquered All Forms of Communication after the Government Forced It to Break Up*, BUS. INSIDER (Mar. 5, 2018), https://perma.cc/U892-PLJ4.

[7] *See* Fred Dews & Eric Bull, *The Decline of Newspapers, in Four Charts*, BROOKINGS (Oct. 23, 2014), https://perma.cc/76MN-BZ8L.

[8] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 17–20; Woodcock, *The Fourth's*

the result has been bankruptcy as newspapers' declining share of reader attention has reduced the value of newspapers' main product—advertising distribution—to advertisers.[9] In national newspaper markets, which still attract enough attention to sustain the market, the result has been fragmentation and quality destruction. Newspapers have replaced fact-reporting with opinion-reporting to differentiate themselves in a more viewpoint saturated national conversation and cut costs.[10]

The newspaper industry's response has betrayed a lack of comprehension regarding the source of its misfortune. The industry has responded to the overall decline in its share of reader attention by calling for antitrust action against the Tech Giants—particularly Google and Facebook—which are principally responsible for the decline.[11] But Google and Facebook have prospered because social media is more engaging than newspapers, not because the Tech Giants are monopolies. Whether there is one social media company or hundreds, readers are not going to start substituting more newspaper time for the time they spend on social media. In a fit of blind egomania, the industry has also responded by trying to negotiate payments from the Tech Giants as compensation for their use of links to newspaper articles—part of a broader project of obtaining intellectual-property protection for news articles.[12] But social media has captured the public's attention for reasons other than the opportunity it provides to share news. Accordingly, the Tech Giants are not willing to pay much for the privilege of linking, whether newspaper articles are protected by intellectual-property rights or not. They would do just fine without linking to news. Finally, the industry has experimented with a microjournalism model of subscriptions for independent journalists and niche reporting. But while microjournalism may prevent the total demise of journalism at the local level and stem losses at the national level, high-quality fact production requires scale in

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Estate, *supra* note 1, at 9–10.

[9] *See* Bull, *supra* note 7.

[10] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 17–20.

[11] *See* Staff, *Alliance Releases New White Paper Outlining Google's Dominant Market Behavior, Harming of Journalism*, NEWS MEDIA ALLIANCE (Jun. 18, 2020), https://perma.cc/EH73-LXH2; David Chavern, *Statement: News Media Alliance Applauds House Report on Dominant Online Platforms and Market Power*, NEWS MEDIA ALLIANCE (Oct. 6, 2020), https://perma.cc/9PUC-VKC9.

[12] Paul Matzko, *From Hot News to a Link Tax: The Dangers of a Quasi-Property Right in Information,* 3 J. FREE SPEECH L. 269 (2023). *See also* Joshua Benton, *Facebook Got Everything It Wanted out of Australia by Being Willing to Do What the Other Guy Wouldn't*, NIEMAN LAB, https://perma.cc/5TZP-6A37.

newsgathering that is fundamentally incompatible with such decentralization.[13]

To save newspapers, other approaches are needed. Ruinous competition may be addressed by attacking the root of the problem: the low cost of communication. Policymakers could raise the cost of communication by taxing Internet post views at levels just high enough to discourage excessive entry into national news markets and thereby to enable national newspapers to maintain the scale and profitability they need to invest in the production of high-quality investigative journalism.[14] Organizations that cannot pay the tax required to reach a broad audience will be driven from the market. The resulting reduction in competition will alleviate the pressure on newspapers to differentiate themselves through opinion-reporting. It will also drive up revenues, creating both the means and the incentive for newspapers to invest more in fact-reporting. The federal government, in the form of the U.S. Postal Service, already has the tools to impose such a tax by reinterpreting its "letter-box monopoly" to include electronic letter-boxes, allowing the postal service to charge postage for the receipt of electronic communications of any kind.[15]

Internet postage would solve the problem of excessive competition within the newspaper industry but not the problem of competition for reader attention from the Tech Giants that has hit local newspapers particularly hard. Internet postage should not be set so high as to discourage social media use as a general matter, but only high enough to limit the number of users having large numbers of post views.[16] Social media is, overall, a good thing. Taxing it out of existence would therefore destroy value.[17]

To solve the problem of Tech Giant competition, government could adopt a second policy, complementary to the policy of charging Internet postage, that

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[13] *See* JAMES HAMILTON, DEMOCRACY'S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM 131 (2018) (noting that the cost of a single investigation can run into the hundreds of thousands of dollars).

[14] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 35–39. The tax might be implemented as follows. For those unwilling to pay the tax, distribution of the post would be broken off after the tax-exempt number of views is reached. Those who do view the post would be free to repost it but would themselves be subject to the tax were views of the reposted material to exceed the quota. Automated reposting to evade payment of postage could be prohibited.

[15] *See id.* at 40–46.

[16] *See id.* at 37–38.

[17] *See id.*

would channel advertising revenues back to the newspaper industry. That policy would be to cap the number of ad impressions that social media companies are permitted to sell per year.[18] Because advertising is ultimately a race to the bottom—firms are compelled to do it to counteract the advertising of competitors—advertisers would respond by shifting their advertising dollars back to newspapers, despite the inferiority of newspaper advertising, in order to keep up with each other. For the same reason, modern militaries would purchase bows and arrows if prevented from purchasing more sophisticated equipment.[19] This race-to-the-bottom characteristic of advertising would, incidentally, allow the government to place a cap on all advertising without reducing the amount of revenue generated by advertising distributors.[20] Because advertising distorts preferences and therefore leads to misallocation of resources, such a cap would improve economic efficiency—and could be piggybacked on policies targeting Tech Giant advertising.

Neither Internet postage nor advertising caps would violate the First Amendment.[21] The Supreme Court long ago ruled that the U.S. Postal Service's letter-box monopoly does not violate the First Amendment because people are free to use alternative means of communication such as placing phone calls, slipping paper under front doors, or making in-person appointments.[22] And advertising caps must pass constitutional muster because, in the information age, advertising's information function is obsolete.[23] Consumers can get all the product information they want from a quick Google search, which they can also use to educate themselves about products that they do not yet know to seek out.[24] Advertising's only remaining function is to manipulate consumers into buying products that they do not prefer. But the Supreme Court has extended First Amendment protection only to

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[18] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 19–29.

[19] *See id.* at 26–27.

[20] *See id.* at 29–33.

[21] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 44–46; Woodcock, *The Fourth's Estate*, *supra* note 1, at 43–52.

[22] *See Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

[23] *Cf.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 917 (2009) (rejecting caps on corporate expenditures on political, as opposed to commercial, speech); Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2334–36 (2018) (explaining why the rationale for a commercial advertising ban would not extend to political advertising).

[24] *See* Woodcock, *supra* note 23, at 2299–2308, 2328–36.

advertising that enhances consumers' ability to make independent choices about which products they wish to buy.[25]

I. NEWSPAPERS' CHALLENGES

Newspapers were perhaps the most successful monopolies of the twentieth century, the sort of asset with a "moat" around it that the likes of savvy investor Warren Buffet coveted.[26] Newspapers enjoyed protection from competition both because distribution costs were high—paper is costly, and heavy—and because advertisers prefer newspapers that have more readers.[27] As a result, a single newspaper serving all advertisers was able to charge lower prices than a smaller newspaper serving a fraction of the market; the larger newspaper could spread distribution costs over more customers. This newspaper could also offer broader distribution to advertisers than a newspaper serving a fraction of the market, making it more appealing to advertisers, as well.[28] Nearly, every city therefore came to have a single major newspaper and a handful of papers served the national news market.[29]

The monopoly position of newspapers created a number of positive externalities. One was independence for the press from interference by either government or corporate advertisers. Monopoly profits meant that newspapers did not require government subsidies and a monopoly position meant that advertisers strove to

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[25] *See* Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748, 765 (1976) (noting that "the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

[26] *See* Buffalo Courier-Exp. v. Buffalo Evening News, 601 F. 2d 48, 50–52 (2d Cir. 1979); Michael Hiltzik, *Column: How Warren Buffett, Who Says the News Business is 'Toast,' Tried to Kill My First Paper*, L.A. TIMES (Jun. 4, 2019); Tae Kim, *Warren Buffett Believes This Is "the Most Important Thing" to Find in a Business*, CNBC (May 7, 2018), https://perma.cc/DZB5-ZQWS.

[27] *See* DAVID S. EVANS & RICHARD SCHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS 22–27, 99 (2016).

[28] *See id.* at 22–27.

[29] *See, e.g.*, Robert G. Picard, *The Economics of the Daily Newspaper Industry*, *in* MEDIA ECONOMICS: THEORY AND PRACTICE 109, 110 (Alison Alexander et al. eds., 2003) ("The newspaper industry in the United States is characterized by monopoly and its attendant market power, with 98% of newspapers existing as the only daily paper published within their markets. In the few cities where local competition exists, it nearly always occurs between differentiated newspapers such as a broadsheet and a tabloid intended for different audiences or between papers that target substantially different geographic markets than their competitors[.]").

please newspapers, not the other way around. Another positive externality of monopoly was that newspapers enjoyed both the means and incentive to invest in expensive fact-reporting.[30] In a competitive news market, each newspaper caters to a relatively small, ideologically homogenous readership.[31] Any attempt to attract ideologically distant readers fails because those readers have access to alternative options that are better aligned with their political views.[32] In a monopoly news market, the monopolist caters to a large, ideologically diverse group of readers because readers who are ideologically distant from the monopolist have no alternative newspaper to which they can turn.[33] To induce such readers to subscribe rather than forgo news entirely, a newspaper monopolist must deemphasize ideology to the greatest extent possible and invest in fact-reporting. Facts have broad appeal across ideological lines, even if each reader prefers a different spin on the facts.[34] The scoop rather than the hot take was therefore king. And, as monopolies, newspapers could afford to invest in scoops. It is no accident that the ethic of objectivity in reporting came to dominate journalism over the course of the twentieth century as newspaper monopolies arose and became more entrenched.[35] The result was a willingness to invest in high-cost investigative journalism that incidentally served democracy.[36] Finally, the monopoly position of newspapers paid a dividend in terms of social stability. There is, of course, no such thing as a neutral or objective report of the facts. Each newspaper must choose a location along the ideological spectrum. As median-voter theory has taught in the context of elections, however, the point that has the broadest appeal is the center. Newspapers therefore tended to

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[30] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 22–24.

[31] *See id.* at 15–17.

[32] *See id.*

[33] *See id.*

[34] *See id.*

[35] *See* MICHAEL SCHUDSON, DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS 121–59 (2011); Woodcock, *Ruinous Competition in News*, *supra* note 1, at 35.

[36] *See* JENNIFER KAVANAGH ET AL., RAND CORP., NEWS IN A DIGITAL AGE: COMPARING THE PRESENTATION OF NEWS INFORMATION OVER TIME AND ACROSS MEDIA PLATFORMS 119 (2019) (stating that since 2020 "news coverage has shifted away from a more traditional style characterized by complex, detailed reporting that emphasizes events, context, public figures, time, and numbers toward a more personal, subjective form of reporting that emphasizes anecdotes, argumentation, advocacy, and emotion"); HAMILTON, *supra* note 13, at 131.

promote viewpoints that interpolated between political extremes, exerting a moderating influence on national debates.[37] All this was true even in markets, such as national news markets, that had a small number of newspapers as opposed to a single monopolist. In those markets, the small number of competitors meant that most readers still lacked ideologically aligned news sources, creating an incentive for papers to use fact-reporting and centrism to reach them. And the small number of competitors meant that papers still earned handsome profits.

The low cost of communication created by the Internet dealt a deathblow to newspaper monopoly on the reader-facing side of the business and created new competitors on the advertiser-facing side, eliminating the positive externalities that had come with newspapers' privileged market position. Printing and distribution of paper editions on a daily basis requires large, up-front investments in printing presses, trucks, paper, and of course labor, making entry into paper news markets difficult.[38] With the maturation of the Internet, anyone who could post news online—and that was almost everyone—could compete with The New York Times.[39] Low-cost communication also introduced new competition into advertising markets. It created an entire new category of media—social media—that gave advertisers a desirable alternative to advertising in newspapers, putting pressure on news industry revenues.[40]

Low-cost communication tore down barriers to entry into news markets, increasing competition for the attention that consumers devote to news. Social media made new categories of consumer attention available to advertisers by causing interactions that might once have been carried out around the dinner table or by

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[37] *See* Markus Prior, *Media and Political Polarization*, 16 ANN. REV. POL. SCI. 101, 119 (2013) ("In the 1970s, about a quarter of Americans identified strongly with a political party. Media in the broadcast era were probably too centrist for these people's tastes. Technological change has made it economically viable to cater to smaller audience segments."); Roger D. Congleton, *The Median Voter Model*, *in* THE ENCYCLOPEDIA OF PUBLIC CHOICE 382, 382 (Charles K. Rowley & Friedrich Schneider eds., 2004).

[38] *See* Picard, *supra* note 29, at 116.

[39] *See* Mahmud Hasan et al., *A Survey on Real-Time Event Detection from the Twitter Data Stream*, 44 J. INFO. SCI. 443, 443 (2018) ("With around 310 million monthly-active Twitter users producing content from all over the world, Twitter has essentially become a host of sensors for events as they happen.").

[40] *See* Penelope Muse Abernathy, *The Loss of Local News: What It Means for Communities*, EXPANDING NEWS DESERT, https://perma.cc/3XQQ-7NJX.

email to be conducted on Internet platforms through which they could be subjected to advertising.[41] People spend more time engaging in these interactions than they spend reading news, and the interactions themselves are more revealing than news-reading. That enabled social media companies to offer advertisers a larger audience than newspapers and to profile consumers and target advertising in ways that newspapers—even in digital form—can not.[42] This shifted the flow of advertising dollars from newspapers to social media giants like Google and Facebook.[43]

The result was the fragmentation of national news markets and the demise of many local news markets. In national news markets, competitors fanned out across the ideological spectrum, picking off legacy papers' ideologically non-aligned readers, who had been weakly held to the legacy papers by an interest in facts.[44]

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[41] *Cf.* Jennifer Allen et al., *Evaluating the Fake News Problem at the Scale of the Information Ecosystem*, 6 SCI. ADVANCES 1, 2–3 (Apr. 3, 2020) ("For online consumption, which includes mobile and desktop, news is dominated by several other categories such as entertainment, social media, and search.").

[42] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 10–11.

[43] *See Google May Employ More People than the Entire U.S. Newspaper Industry*, BLOOMBERG (Feb. 12, 2019), https://perma.cc/S4GN-V3NV. Craigslist, which distributes classified advertising for free online, did some of the initial damage to local newspapers' advertising revenues, but it would be a mistake to suppose that Craigslist alone is responsible for newspapers' advertising woes. *See* Robert Seamans & Feng Zhu, *Responses to Entry in Multi-Sided Markets: The Impact of Craigslist on Local Newspapers*, 60 MGMT. SCI. 476, 490 (2014). News industry advertising revenues have fallen 80%, from a peak of $49 billion in 2005 to $9.6 billion in 2020, far more than the third of advertising revenues accounted for by classified advertising in 2005. *Newspapers Fact Sheet*, PEW RSCH. CTR. (Jun. 29, 2021), https://perma.cc/86S4-TV43; Robert G. Picard, *Shifts in Newspaper Advertising Expenditures and Their Implications for the Future of Newspapers*, 9 JOURNALISM STUD. 704, 713 (2008). Clearly, national and retail advertising, in which the Tech Giants specialize, have also sustained catastrophic declines. Meanwhile, advertising on Google, Facebook, and Amazon were up from nearly zero to $10 billion over the same period. Reid Wilson, *New Data Shows Newspaper Revenues Down Sharply*, HILL (Jun. 9, 2022), https://perma.cc/Y377-K3B3. A recent study commissioned by Google itself shows that almost half of advertising revenue declines between 2003 and 2019 were due to declines in non-classified advertising. *See* Eero Korhonen, *Research: What Really Happened to Newspaper Revenue*, GOOGLE: KEYWORD (Jun. 3, 2021), https://perma.cc/2NQ2-7TTA. That study focused on Western European news markets but may be probative of the situation in news markets in the United States as well. It also bears noting that, in recent years, Facebook Marketplace has made inroads into online classifieds; if the Tech Giants were not the original diverters of newspapers' classified advertising revenues, they are increasingly so today.

[44] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 17–20; David M. J. Lazer et al.,

Expensive fact-reporting could no longer pay dividends in the form of a broader readership and newspapers now had to defend their own ideological turf against assault from new Internet entrants, including both news websites and social media users with large followings. A turn to inexpensive opinion-reporting was the only option.[45] This was ruinous competition in the economic sense.[46] Firms were forced to degrade their own products' quality in order to survive in the market. High-quality fact-oriented reporting was replaced with low-quality opinion-based reporting. This effect was magnified by competition for advertising from social media companies, which reduced the revenues flowing into news, creating a further incentive to substitute opinion-reporting for expensive fact-reporting. In many local news markets, which were too small to support newspapers on reduced advertising revenues, competition from social media had an even more catastrophic effect; newspapers simply disappeared.[47]

By the 2020s, the positive externalities created by the monopoly position of twentieth century newspapers were gone. Newspapers no longer had the incentive or the revenues to invest in high-quality fact production. Ideological centrism had been replaced by ideological fragmentation, and so newspapers no longer exerted a moderating influence on politics. And the influx of competition into news markets, combined with the competition for advertising from social media companies, had starved national newspapers of revenue and driven many local newspapers out of business entirely. Far from being in a position to speak truth to power, newspapers'

The Science of Fake News, 359 SCI. 1094 (2018) ("The internet has lowered the cost of entry to new competitors—many of which have rejected [objectivity] norms—and undermined the business models of traditional news sources that had enjoyed high levels of public trust and credibility.").

[45] *See* HAMILTON, *supra* note 13, at 315 ("Costly delivery and distribution methods once meant consumer, producer, entertainment, and voter information came bundled in a dominant local newspaper or widely viewed national broadcast. Cable, Internet, and social media broke the bundle, making a wider variety of entertainment and expression possible. This also reduced bundling's support for information with relatively higher costs, . . . namely accountability journalism.").

[46] Ruinous competition is usually defined as competition that prevents firms in an industry from covering fixed costs. *See* ALFRED E KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 173 / II (1971). But when a firm is systematically unable to cover fixed costs, the firm may reduce those costs by reducing product quality. Thus ruinous competition is ultimately competition that degrades quality. *See id.* at 176 / II ("The decline in price to average variable costs can lead to a skimping on safety, reliability, and frequency of service that consumers may have difficulty in detecting promptly.").

[47] *See* Abernathy, *supra* note 40.

continued existence was in doubt, leading to calls for government subsidization.[48]

II. NEWSPAPERS' INADEQUATE RESPONSE

A. To Social Media

Newspapers' responses to these challenges betray a lack of understanding regarding their causes. The basic premise of newspapers' response to competition from social media companies in their advertising markets has been to argue that social media companies are stealing newspaper content. Specifically, newspapers argue that social media companies are using links to news content to attract social media users without providing newspapers with adequate compensation in return.[49] This premise underlies a campaign by newspapers over the past decade to drum up support for antitrust action against Google and Facebook.[50] Not only has the News Media Alliance—newspapers' lobbying organization—explicitly called for antitrust action, but newspapers from across the political spectrum have appeared to use favorable reporting, editorials, and the publication of op-eds by antitrust activists to promote it as well.[51] Whether the apparent pro-antitrust slant to reporting is a product of deliberate policy or anti-tech sentiment among journalists, who believe that their livelihoods are threatened by social media, is unclear.[52] But the premise that Google and Facebook are appropriating something of value from newspapers is not. Newspapers hope that the introduction of more competitors into social media markets via antitrust action will make it easier for newspapers to negotiation compensation from the social media industry.

The premise that social media is stealing from newspapers also underlies newspapers' attempt to lobby Congress for an antitrust exemption that would permit the industry to form a cartel to negotiate compensation from social media companies.[53]

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[48] *See* Robert G. Picard, *Subsidised News Sounds Good, but Is No Panacea to News Industry Challenges*, 13 J. MEDIA BUS. STUD. 136, 136 (2016).

[49] *See* Kate Ackley, *News Media Alliance Pushes for New Senate Antitrust Bill*, ROLL CALL (Jun. 4, 2019), https://perma.cc/JNA6-X4Q5. This is the subject of Paul Matzko's contribution to this volume. *See* Matzko, *supra* note 12.

[50] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 5–7; Ramsi A. Woodcock, *Big Ink vs. Bigger Tech*, TRUTH ON THE MARKET (DEC. 30, 2019), https://perma.cc/Q92L-MFWA.

[51] *See* Chavern, *supra* note 11; Woodcock, *Big Ink vs. Bigger Tech*, *supra* note 50; Woodcock, *The Fourth's Estate*, *supra* note 1, at 5–7.

[52] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 5–7.

[53] *See* Ackley, *supra* note 49; Staff, *Newspapers Nationwide Run Coordinated Ad Campaign,*

If newspapers can negotiate as a block, they reason, they will be able to extract larger payments from social media companies than they might otherwise. The theft premise also underlies the News Media Alliance's interest in achieving intellectual-property protection for news-article links or news content more generally.[54] At present, newspapers have no legal right to demand payment from social media companies for links to news content.[55] All newspapers can do to encourage payment is threaten to program their websites to reject incoming web traffic from social media platforms.[56] The hope is that intellectual-property protection for linking would strengthen newspapers' bargaining position.

It is hard to view newspapers' conviction that the Tech Giants' success is built on appropriation of newspaper content as anything other than narcissistic pathology. The news industry seems unable to conceive that its readers might wish to do something on social media other than find news. But, in fact, they do.[57] While some small fraction of the attention that social media companies generate may represent attention that once would have been devoted to newspapers—and may even be attention poached from newspapers in the sense that news article links are used to attract this attention—the lion's share is not.[58] The success of social media comes not from poaching news readers' attention but from expanding the overall pool of commercializable attention in the economy. Social media companies will, therefore, be unwilling to pay newspapers anything but a small fraction of the advertising revenues that newspapers have lost to social media. This is true whether the social media industry is concentrated into a few Tech Giants or deconcentrated into large

Urge Congress to Pass JCPA, NEWS MEDIA ALL. (Jul. 19, 2022), https://perma.cc/7299-TYFX.

[54] *See* Marshall Kosloff & David Chavern, *Day Three, Session VI: Can News Be Profitable on the Internet?*, REBOOT 2020 CONFERENCE (Nov. 10, 2020), https://perma.cc/XS7W-HCJ9.

[55] *See* NEWS MEDIA ALL., HOW GOOGLE ABUSES ITS POSITION AS A MARKET DOMINANT PLATFORM TO STRONG-ARM NEWS PUBLISHERS AND HURT JOURNALISM 2–4 (2020), https://perma.cc/5MWH-QCW9 (arguing that legal rulings that suggest that newspapers have no copyright over links to their content should be overturned).

[56] *See* Benton, *supra* note 12.

[57] *See id.* (noting that, according to Facebook, only one in every 25 Facebook posts shares news); Allen et al., *supra* note 41, at 3 ("Even including passive exposure to news content on social media sites [Facebook, Twitter, Reddit, and YouTube], search engines [Google, Bing, and Yahoo!], and portals [Yahoo!, MSN, and AOL], news accounts for only 4.2% of total online consumption.").

[58] *See* Joshua Benton, *Don't Expect McConnell's Paradox to Help News Publishers Get Real Money out of Google and Facebook*, NIEMAN LAB (Jan. 8, 2020), https://perma.cc/T3TC-X862.

numbers of small providers. Either way, an industry that relies little on news links is not going to pay much for access to them.

The importance of news to social media was demonstrated in early 2021 when the government of Australia sought to compel social media companies to pay newspapers for links.[59] Facebook responded by disabling news-linking on its platform and pointing out that only 4% of the material shared on its platform involves news.[60] Facebook simply did not need the news. While Facebook and Google eventually agreed to make some payments for news, the amounts—which are estimated to be in the low tens of millions of dollars per year—were an infinitesimal of the Tech Giants' own advertising revenues and an order of magnitude below annual declines in newspaper advertising revenues. Newspapers declared victory, if only to save face.[61]

B. To News Competition

There has been no analogous industry-wide initiative to counter the threat of ruinous competition in national news markets. By its nature, intra-industry competition pits news providers against each other, complicating collective action. Instead, the ruinous-competition problem has been left to individual newspapers and journalists to solve in decentralized fashion. Left to their own devices, newspapers and independent journalists have sought shelter from the competitive gale in news through two strategies: product differentiation and abandonment of the ad-based funding model in favor of subscription models.[62] Newspapers have differentiated their product based on ideological orientation, making the problem of ruinous competition worse, further fragmenting news markets, and forcing opinion-

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[59] *See* Bill Grueskin, *Australia Pressured Google and Facebook to Pay for Journalism. Is America Next?*, COLUM. JOURNALISM REV. (Mar. 9, 2022), https://perma.cc/KS4T-99GX. It may not be a coincidence that Australia is the birthplace of news magnate Rupert Murdoch, a leading proponent of the strategy of making social media pay for news.

[60] *See* Benton, *supra* note 58; Benton, *supra* note 12.

[61] *See* Grueskin, *supra* note 59; Benton, *supra* note 58; Emma Shepherd, *Print Advertising Expected to Decline 10.2% Annually until 2025, PwC Finds*, MUMBRELLA (JUL. 19, 2021); Carmen Ang, *How Do Big Tech Giants Make Their Billions?*, VISUAL CAPITALIST (Apr. 25, 2022), https://perma.cc/ZX4C-WMWY.

[62] *See* Ben Smith, *Bail Out Journalists. Let Newspaper Chains Die.*, N.Y. TIMES (Mar. 29, 2020); Will Oremus, *What Substack Is Really Doing to the Media*, SLATE (Apr. 23, 2021), https://perma.cc/4YNX-R5BT.

reporting on their competitors. Newspapers have also differentiated their product based on subject matter, reporting on a particular industry, profession, neighborhood, or other area of interest. At an extreme, it involves independent journalists taking refuge in subscription-based blogging services like Substack. Differentiation of this and also the ideological variety can help newspapers or independent journalists avoid bankruptcy. But it also results in insufficient revenues to sustain high-quality fact production except in the few ideological or subject matter markets having well-heeled audiences, such as markets for opinion that supports moneyed interests or for news about Silicon Valley, Wall Street, or Capitol Hill.[63] Thus while there might still be years-long investigations of Silicon Valley, there will be no years-long investigations of corruption at City Hall. There have been some notable attempts to overcome the revenue squeeze through pooling of resources across organizations to carry out specific investigations.[64] But these are limited by inter-organization coordination costs that the old newspaper monopolies did not face. The move to subscription-based funding models is also unlikely fully to replace lost advertising revenues. If it could do that, then newspapers would have relied more on subscriptions than advertising in the first place.[65]

III. Postage and Ad Caps as Alternatives

A. Charging Online Postage

One way to restore newspapers' dwindling revenues would be through direct government subsidization along the lines of what Britain does for the BBC in the broadcast arena.[66] To maintain the political independence of the press, government could impose a special tax on communications—in Britain, all television hookups are taxed at a flat rate—and dedicate the proceeds to newspapers, ensuring that any attempt to punish newspapers by directing the funding elsewhere would be viewed by voters as a misappropriation of public funds.[67] Britain does this by taxing all

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[63] *See* Hamilton, *supra* note 13, at 131 (discussing the cost of investigative reporting).

[64] *See The Panama Papers: Exposing the Rogue Offshore Finance Industry,* Int'l Consortium Investigative Journalists (Apr. 3, 2016), https://perma.cc/BLC5-T2FX.

[65] *See* Evans & Schmalensee, *supra* note 27, at 50, 99 (observing that newspapers have "rebalanc[ed] their pricing" to generate more revenue from readers as opposed to advertisers and that "[w]ith less advertising revenue, newspapers couldn't spend as much on content").

[66] *See* Jim Waterson, *How Is the BBC Funded and Could the Licence Fee Be Abolished?*, Guardian (Dec. 16, 2019), https://perma.cc/ANS7-FBKD.

[67] *See id.*

television hookups at a flat rate. On a similar theory, Franklin D. Roosevelt insisted that Social Security tax be charged as a separate line item to taxpayers in the United States in order to protect Social Security from rollback.[68] A few state and local governments are already dabbling in direct subsidization as a way of rescuing local news. But the direct subsidization model is unlikely to spread thanks to America's deeply engrained anti-statism, which resists both taxation and government influence over public debate, however tenuous.[69] Even if it were to spread, it could be no more than a partial solution to fragmentation and political polarization at the national level. Entry into that market would remain free and readers would continue to be drawn to the private news sources that best fit their ideological preferences. But so long as subsidies were to reward fact-reporting, more of that would be supplied to the market.

Another approach would target fragmentation and political polarization in national news markets in particular, and avoid the pitfalls of direct subsidization. That approach would be to leverage a mode of indirect support for the news with which Americans are comfortable and which is so firmly embedded in the nation's history that it was one of the means by which the country obtained independence from Britain in the eighteenth century: the postal service.[70] Although Americans today think of the postal service as a rapidly obsolescing mode of private communication through the exchange of paper letters, it started life as a method of distributing newspapers.[71] The British crown had a monopoly over the provision of postal services in the colonies and its postmasters leveraged this monopoly to favor carriage

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[68] *See* Matthew H. Hawes, *So No Damn Politician Can Ever Scrap It: The Constitutional Protection of Social Security Benefits*, 65 U. PITT. L. REV. 865, 904 (2004).

[69] *See* Jack Shafer, *The State of New Jersey Wants to Subsidize News. Uh-Oh.*, POLITICO MAG. (Jul. 6, 2018), https://perma.cc/WL8T-9X5M; Sarah Bartlett & Julie Sandorf, *How New York City Is Saving Its Local News Outlets*, N.Y. TIMES (May 20, 2021).

[70] *See* Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 681–83 (2007) (describing the abandonment of the "parliamentary Post" by American colonials in favor of a private network established by a pro-independence newspaper publisher seeking a means of distributing his newspapers free of British control as "the first institutional change of the American Revolution").

[71] *See id.* at 683 (describing the "initial establishment" of the forerunner to the U.S. Postal Service as "due to a printer's attempt to ensure delivery of his newspapers to the populace at large").

of newspapers that they themselves published, excluding competing viewpoints.[72] In response, the American revolutionaries created a national postal service that lavishly subsidized the distribution of American newspapers, enabling any newspaper to transmit the news to customers at virtually no cost.[73] Alexis de Tocqueville, viewing the results some decades later, remarked with awe that, thanks to America's subsidized news distribution, a backwoodsman in Michigan knew more about the rest of the world than a suburban Parisian.[74]

By the start of the twentieth century, the postal service had largely ceased to be an important disseminator of news. The advent of the telegraph and a general decline in transportation costs allowed newspapers to build private distribution networks that disseminated the news far more quickly.[75] The challenges faced by newspapers today give the postal service an opportunity once again to carry out its original mission to sustain the press.[76] Whereas the challenge faced by the press at the nation's founding was how to overcome an excessively high cost of communication, today the challenge faced by the press in national news markets is how to overcome an excessively low cost of communication that has led to ruinous competition and political polarization. It follows that, whereas the job of the postal service at the founding was to lower the cost of distributing the news by charging low, subsidized postage rates to newspapers, the job of the postal service today should be to raise the cost of distributing the news by charging postage for online posts.[77]

The goal would not be to drive distribution costs back to pre-Internet days. The low cost of communication has created immense value for society by allowing a greater diversity of voices and information to enter public debate. Rather, the goal would be to drive costs up enough to strike a balance between the benefits and harms of easy entry into news markets.[78] Just as the Federal Reserve uses data on

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[72] *See id.* at 678–81.

[73] *See id.* at 694 (noting that whereas the cost to the post office of delivering a four-sheet newspaper more than 450 miles was a dollar, postage in 1792 was "a cent and a half").

[74] *See* RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 1–2 (1995).

[75] *See* PAUL STARR, THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS 174–75, 179, 252 (2006); Woodcock, *Ruinous Competition in News*, *supra* note 1, at 34.

[76] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 32–46.

[77] *See id.* at 35.

[78] *See id.*

capital markets to set interest rates, the postal service could use data on news markets to adjust online postage rates to achieve a level of ease of entry that properly balances benefits and harms.[79] By imposing a zero price of postage for posts to social media sites, blogs, or newspaper websites that garner small numbers of views but a substantial fixed price for posts to such platforms that have a moderate number of views, the postal service could impose a fixed cost on writing for the general public as opposed to private friend groups. That cost would drive down the number of news organizations in the market. With competition reduced, the news organizations that would remain in the market would have the opportunity and incentive to maximize their readership through fact-reporting.[80] Scale would be rewarded, and fragmentation and product differentiation discouraged.[81]

The postal service already has the statutory authority to act.[82] Federal law gives the postal service a "letter-box monopoly"—the sole right to deliver mail to mailboxes—and the authority to define, by regulation, what a mailbox is.[83] By redefining mailboxes to include electronic mailboxes, including email and social media accounts, the postal service could acquire the exclusive right to deliver Internet communications.[84] It could then grant a license to make those deliveries to the firms, such as Google and Facebook, that actually deliver them today. But the postal

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[79] *See* David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157, 162–63, 171–72 (2015); Woodcock, *Ruinous Competition in News*, *supra* note 1, at 37.

[80] *Cf.* EVANS & SCHMALENSEE, *supra* note 27, at 50.

[81] Kyle Langvardt, *Structuring a Subsidy for Local Journalism,* 3 J. FREE SPEECH L. 297 (2023). *See also* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 37–38. For example, if the postal service were to charge $1 million in postage for a post that receives more than 10,000 views, most posters would need to be able to derive revenue from such an audience in order to be able to afford to post to it. And the bigger the audience, the better, because, operating costs aside, every dollar of revenue generated above the $1 million fee would be profit. Moreover, unable to cover postage, many ideological posters would no longer be able to reach large audiences. Ideological posters would be too few to give every viewer a fellow traveler to prefer over an ideologically different poster of facts. Fact-reporting would, therefore, once again be rewarded and ideological differentiation would become less important to success.

[82] *See id.* at 40–46.

[83] 18 U.S.C. § 1725 (2018); J. Gregory Sidak, *Abolishing the Letter-Box Monopoly*, 1 CRITERION J. INNOVATION 401, 408 (2016).

[84] *See* Woodcock, *Ruinous Competition in News*, *supra* note 1, at 40–46.

service could retain the right to charge postage for such delivery. To minimize the resemblance of such postage to a tax, the postal service could distribute the proceeds to the public. This would demonstrate that, even if Internet postage would have the effect of a tax on participants in news markets, its purpose would not be to raise revenue for the postal service or the government more generally, or to subsidize the news industry à la the BBC's tax on television hookups, but only to alter the structure of news markets in ways that improve the quality of the news and reduce political polarization.

B. Capping Advertising

Internet postage would insulate national newspapers from ruinous competition from other news sources, but it would not restore the revenues that national newspapers have lost to social media. Internet postage also would not help local newspapers, which lack the advertising revenues they need to stay in business, much less engage in ruinous competition. Some additional policy is required to address newspapers' loss of advertising revenue to social media. One approach would be for the postal service to use high postage rates for social media views to destroy social media. That would eliminate the competition that is diverting newspapers' advertising revenue flows. But that is not a desirable solution. Social media represents a genuine improvement upon communication, which is why it is so popular.[85] Destroying it would be wasteful.

A better solution would be for government to place a cap on the number of advertising impressions that social media companies distribute each year.[86] Normally, a restriction on the sale of a superior product will not necessarily help a competitor offering an inferior product because buyers might exit the product category entirely rather than purchase the inferior product. If you cannot obtain a high-quality ice cream, you might purchase pastry instead, rather than poor-quality ice cream. So, in principle, capping social media advertising, which advertisers view as superior because of its reach and the opportunities it affords for targeting, would not necessarily induce advertisers to advertise in newspapers. They might choose to stop advertising entirely and invest in improving the technology of their products instead.

But advertising is different. Firms rarely have a choice about whether to

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[85] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 42.

[86] *See id.* at 19–29.

advertise because their competitors already advertise. If they do not use counter-advertising to cancel out their competitors' advertising, they will lose business.[87] It follows that firms that are locked out of high-quality advertising distribution will substitute low-quality advertising distribution because they fear that their competitors will substitute low-quality advertising distribution.[88] A cap on the amount of advertising that social media can distribute would, therefore, channel advertisers' dollars back to newspapers rather than away from advertising entirely.[89] By adjusting the cap, a regulator could adjust the precise amount of advertising revenue that would be returned to the newspaper industry. The regulator could even set the cap so low as to redirect all social media profits to newspapers, allowing the social media industry only enough revenue to cover costs.[90] Thus a cap would not have the redistributive limitations inherent in the news industry's current approach of seeking to extract payment from social media companies that place a low value on access to news content. While the Federal Communications Commission (FCC) currently enjoys some authority to regulate advertising, new legislation would be required to enable the FCC or another regulator to implement this approach.[91]

An advertising cap has the virtue of continuing the newspaper industry's tradition of funding itself through advertising.[92] That approach is the principal way in which an anti-statist society such as the United States funds information-related public goods, including not just newsgathering but also the arts, entertainment, and sports.[93] All of these activities provide benefits to society as a whole—newsgathering is critical to a successful democracy, for example—for which consumers are sometimes not willing to pay in full if charged directly.[94] Rather than fund these activities through taxation—the textbook means of funding public goods—the

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[87] *See* Kyle Bagwell, *The Economic Analysis of Advertising*, *in* 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1701, 1729 (2007); Woodcock, *The Fourth's Estate*, *supra* note 1, at 26 n. 129.

[88] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 27–28.

[89] *See id.*

[90] *See id.* at 29. For an estimate of those costs, see Woodcock, *supra* note 23, at 2340 n. 345.

[91] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 21 n. 96.

[92] *See* STARR, *supra* note 78, at 86.

[93] *See* DAVID A. MOSS, WHEN ALL ELSE FAILS: GOVERNMENT AS THE ULTIMATE RISK MANAGER 317 (2002) (discussing American anti-statism).

[94] *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 670–71 (7th ed. 2006).

United States for the most part leaves it to those engaged in these activities to acquire their own funding through the distribution of advertising. Consumers still end up paying for these activities, but they do so indirectly by purchasing advertised products. Advertising manipulates consumers into paying higher prices for goods and services. Advertisers pay a portion of the additional revenues they generate from those higher prices to the providers of informational public goods who distribute their advertising. In this way, advertisers end up manipulating consumers into paying for public goods for which consumers would not be willing to pay if asked to do so directly.[95] The result is a decentralized model of public goods financing that minimizes the influence of government over the news and culture more generally. Such minimization of government influence is not necessarily good for either the news or culture.[96] Moreover, there is something odd about using a practice that manipulates consumers into buying products they would not otherwise buy to fund a newspaper industry devoted to empowering citizens to think for themselves.[97] But this funding model may be the only approach to subsidizing the news that Americans will accept, at least in the short term.

An added benefit of placing a cap on social media advertising is that it would afford government the opportunity to reduce the overall amount of advertising in the economy.[98] Reducing advertising is desirable because advertising short-circuits

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[95] *See id.* Advertising's manipulative properties are consistent with advertising's cancelling effect. When a firm that is alone in an industry advertises, the advertising draws customers away from competitors and makes these customers willing to pay higher prices, because the advertiser must charge higher prices to cover the cost of advertising. To counteract this effect, the other firms in the industry must also advertise, drawing customers to their products to make up for those they have lost. These may be customers who were drawn away by the first firm's advertising or legacy customers of the first firm. Regardless, these customers must now pay a higher price for the other firms' products in order to cover the other firms' advertising costs. From the perspective of firms, nothing has been achieved by advertising other than to defend against each other's advertising. But, from the perspective of consumers, much has changed. Some have been manipulated into buying products that they would not have purchased otherwise. All have been manipulated into paying higher prices.

[96] *See* JEAN-JACQUES ROUSSEAU, LETTER TO D'ALEMBERT AND WRITINGS FOR THE THEATER 113 (Alan Bloom et al. eds., 2004) (arguing against the establishment of a theater in Geneva on the ground that the theater would "attack" the morals and constitution of the city).

[97] *See* Ramsi A. Woodcock, *Advertising Is Obsolete – Here's Why It's Time to End It*, CONVERSATION (Aug. 20, 2018), https://perma.cc/A9GQ-CYYA.

[98] *See* Woodcock, *supra* note 23, at 2278–90.

free markets. Free markets enable consumers to impose their preferences on firms, showering profits on those that please them and starving those that do not.[99] Consumers who have been manipulated by advertising into buying things that they would not otherwise buy are unable to impose their will on firms, however. Firms use advertising to ensure that consumers buy products that *firms* prefer rather than products that consumers prefer.[100] While counter-advertising by other firms tends to prevent advertising from raising demand for individual firms—that's the canceling effect of advertising—it does not prevent consumers from being manipulated by advertising. The net effect of advertising may well be that those who prefer Coke drink Pepsi and those who prefer Pepsi drink Coke, even if advertising does not increase overall demand for either product.[101] The result is inefficiency: advertising prevents markets from allocating resources in ways that consumers would value the most.[102] It was once possible to argue that advertising had an offsetting benefit in the form of the product information that it provided to consumers. In the world before the Internet, a consumer might not have been able to find a product that he really did prefer without the aid of advertising.[103] But in the information age, advertising's information function has become redundant. Consumers can find all the product information they desire—much of it in the form of unvarnished consumer reviews that are more informative than any advertisement—through a Google search.[104]

A regulator empowered to place a cap on social media advertising could go one step further and place a cap on all advertising.[105] For the same reason that the canceling aspect of advertising ensures that capping social media advertising would not reduce the total amount of money spent by firms on advertising but would merely shift it to newspaper advertising, capping all advertising would not reduce the total

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[99] *See id.*

[100] *See id.*

[101] *Cf.* Samuel M. McClure et al., *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 NEURON 379, 384 (2004) (finding that study participants were unable to distinguish Coke from Pepsi in blind taste testing but that they exhibited strong brand preferences that were reflected in imaging of their brains).

[102] *See* Woodcock, *supra* note 23, at 2278–90.

[103] *See id.*

[104] *See id.* at 2299–2308.

[105] *See* Woodcock, *The Fourth's Estate*, *supra* note 1, at 29.

amount of money spent by all firms on advertising either. But because now there would be no alternative form of advertising to which the money could flow, capping social media advertising would instead cause advertisers to bid up the price of the advertising that would remain available under the cap. Indeed, because firms advertise in order to cancel the advertising of others, a cap on all advertising would lead firms to bid up the price of advertising impressions—so as not to lose the opportunity to counteract a competitor's employment of this scarce resource—until they find themselves spending the same amount on advertising as they did before the cap.[106] Funding for public goods financed through the distribution of advertising—whether the good is news, the arts, or sports—would, therefore, not be reduced by a cap on all advertising.[107] So long as the regulator were to cause the cap to fall disproportionately on social media advertising relative to newspaper advertising, dollars would still be diverted from social media to newspapers, but the overall number of advertising impressions served up by the advertising-distribution industry would fall.

C. First Amendment Concerns

Both Internet postage and advertising caps regulate speech. Postage burdens Internet communication and advertising caps prevent advertisers from speaking about their products. Neither of these policies would violate the First Amendment, however. In *Postal Service v. Council of Greenburgh Civic Ass'ns*, the Supreme Court rejected a challenge to the postal service's letter-box monopoly on the ground that regulation of the speech that passes through mailboxes does not prevent speakers from communicating by other means.[108] According to the Court, the postal service's control over mailbox speech is rather like the military's control over speech on military bases—necessary for government to act.[109]

To be sure, were the postal service to redefine the definition of "letter-box" to include all virtual receptacles of online communications, the definition would be far more expansive than the physical mailbox on a stick on the front lawn contemplated by the Supreme Court in *Greenburgh*.[110] But all of that expansion would be

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[106] *See id.* at 29–33.

[107] *See id.*

[108] *See* Postal Service v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

[109] *See id.* at 129–30.

[110] *See id.* at 129.

to areas that did not exist when the Supreme Court decided *Greenburgh* in 1981.[111] If, at a time when virtual mailboxes were not an extant alternative to mailing letters, the Court thought that depriving Americans of the right to speak through physical mailboxes without paying a toll left Americans enough alternative modes of communication for free speech to remain uninfringed, then it is hard to see why depriving Americans of the freedom to speak un-tolled through new virtual mailboxes that did not exist at the time *Greenburgh* was decided could deprive Americans of sufficient alternative modes of communication to pose a threat to free speech.[112] Moreover, in both the case of the physical letter-box and the virtual letter-box, regulation is essential to the government activity of promoting a healthy news industry that is the original purpose of the postal service.

Advertising caps do not violate the First Amendment because advertising's manipulativeness—which is its exclusive function now that its information function has been rendered obsolete by the information age—places all advertising in the same unprotected First Amendment category as false advertising.[113] The Supreme Court has said that false advertising receives no protection because it tends to impair the ability of consumers to make "intelligent and well informed" purchase decisions.[114] That is, false advertising impairs consumers' ability to impose their preferences on markets. All other forms of advertising today do the same, but they do it by manipulating consumer preferences rather than hiding the true characteristics of products from consumers, as false advertising does.[115] While advertising's information function, which does help consumers make well-informed purchase decisions, once enabled advertising to enjoy First Amendment protection, the obsolescence of that function has eliminated this rationale for protecting advertising.[116] The notion that the First Amendment no longer protects *any* advertising would seem to clash with the apparent alacrity with which the Court has extended the First

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[111] *See id.* at 114.

[112] *See* Woodcock, *Ruinous Competition in News, the Postal Internet*, *supra* note 1, at 44–45.

[113] *See* Woodcock, *The Obsolescence of Advertising in the Information Age*, *supra* note 23, at 2328–36.

[114] *See* Va. State Bd. of Pharmacy v. Va. Consumer Council, 425 U.S. 748, 765 (1976).

[115] *See* Woodcock, *The Obsolescence of Advertising in the Information Age*, *supra* note 23, at 2308–19.

[116] *See id.* at 2299–2308.

Amendment to ever-larger amounts of commercial speech in recent decades.[117] But a careful reading of the cases shows that the Court has never extended protection to advertising that it has understood to be exclusively manipulative in function, as all advertising is today.[118]

Conclusion

By lowering the cost of communication almost to zero, the Internet created two challenges for newspapers. The first was that, by making possible the creation of the social media industry, the Internet greatly expanded the amount of commercializable attention in the economy, relegating the quality of the advertising distribution product offered by newspapers to second-class status, and driving revenues so low that newspapers disappeared from many local news markets. The second was that, by enabling virtually anyone to distribute news, the Internet greatly increased competition within national news markets, forcing newspapers to substitute opinion-reporting for fact-reporting, fragmenting the industry, and polarizing American public discourse.

Newspapers' responses have been inadequate. Attempts to force social media companies to share revenues will not restore newspapers' lost profits because the sharing of news links is a small part of social media activity. The Tech Giants will not pay enough for links to restore newspapers' lost revenues. Embrace of a small-is-beautiful ethic in newsgathering, in the mode of Substack authoring, will only increase opinion-reporting, industry fragmentation and polarization.

One solution to the problem of ruinous competition between newspapers would be to restore some of the cost of communication. The postal service could reinterpret its letter-box monopoly to apply to virtual mailboxes, allowing the postal service to charge postage for Internet posts that garner large numbers of views. That would reduce the number of players in news markets and so the opinion orientation, fragmentation, and political polarization that afflict the industry. A solution to competition from social media companies would be for regulators to cap the number of advertising impressions that social media companies are permitted to distribute per year. Because advertising is a race to the bottom, such a cap would not reduce the amount of money spent on advertising, but it would drive advertising dollars back to newspapers.

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[117] *See id.* at 2330–36.

[118] *See id.* at 2334.