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Subsidizing the Press

David M. Schizer
Columbia University School of Law, dschiz@law.columbia.edu

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Subsidizing the Press

August 24, 2010

Abstract

Information is the lifeblood of a free society, and the professional press is a crucial source of information. For many years, the positive externalities from investigative and beat reporting were cross-subsidized by robust advertising and subscription revenue. Yet the professional press is experiencing a severe economic crisis, and news organizations across the nation are on the brink of insolvency. When an activity that generates positive externalities is undersupplied, the textbook policy response is a government subsidy. Yet if the press becomes financially dependent on the government, would they be deterred from monitoring and criticizing the government? If so, the subsidy would undercut the very social benefits it is meant to preserve.

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

Based on this framework, the principal recommendation of this Article is for news organizations to make greater use of the nonprofit form. By providing a subsidy through the charitable deduction, we would not empower the government to choose how much funding to allocate to each news organization. Instead, the charitable deduction allows the government to piggyback on the judgments of private donors about which charities to support. In addition, this subsidy is feasible politically since it already can be used, to a significant extent, under current law. This Article also considers four alternative subsidy structures, highlighting their strengths and weaknesses and showing the tradeoffs they present.

Information is the lifeblood of a free society. Voters, investors, and consumers depend on accurate information, and a crucial resource for acquiring it is the professional press. Through beat reporting and investigative journalism, reporters monitor the foundational institutions of our society. This reporting has value even to those who never buy a newspaper or read a website. For example, subscribers and nonsubscribers alike benefit when government officials respond to a critical news story by eliminating an abusive practice.[1] For many years, the positive externalities from investigative and beat reporting were cross-subsidized by robust advertising and subscription revenue. Yet the professional press is experiencing a severe economic crisis. Layoffs are pervasive, and news organizations across the nation are on the brink of insolvency.[2]

When an activity that generates positive externalities is undersupplied, the textbook policy response is a government subsidy. For investigative and beat reporting, however, a government subsidy carries a significant risk. If newspapers, websites and news broadcasts become financially dependent on the government, would they be deterred from monitoring and criticizing the government? If so, the subsidy would undercut the very social benefits it is meant to preserve.

In response to this conundrum, this Article proposes a three-part analytical framework for evaluating press subsidies. The first step is to assess how effectively the subsidy safeguards press independence,[3] including the extent to which the First Amendment helps to achieve this goal – something that varies with the subsidy's structure.[4] The second criterion, which this Article calls "focus," gauges how effectively a subsidy channels resources to externality-generating activities, as opposed to other uses.[5] For example, a subsidy that induces press organizations to hire more reporters is superior to one that can be used, instead, to fund pay raises for the advertising staff or more attractive office space. The third criterion is political plausibility.[6] How likely is a subsidy to attract political support? And how much political support does it need? One that can be implemented under current law, for example, requires less political support than one that depends on broad new legislation.

Based on this framework, the principal recommendation of this Article is for news organizations to make greater use of the nonprofit form. By providing a subsidy through the charitable deduction, we would not empower the government to choose how much funding to allocate to each newspaper, website or news broadcast. Instead, as I have written elsewhere, the charitable deduction allows the government to piggyback on the judgments of private donors about which charities to support.[7] This means the press would not have a financial incentive to cultivate the government's good will. In addition,

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[1] *See infra* Part I.A.
[2] *See infra* Part I.B.
[3] *See infra* Part II.A.
[4] *See infra* Part II.A.3.
[5] *See infra* Part II.B.
[6] *See infra* Part II.C.
[7] David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221 (2009).

this subsidy is feasible politically since it already can be used, to a significant extent, under current law.

This Article also considers four alternative subsidy structures, highlighting their strengths and weaknesses and showing the tradeoffs they present. The first is a tax credit to encourage news organizations to hire more reporters.[8] This structure would be effective at safeguarding press independence and, arguably, even more effective than the nonprofit form at focusing resources on externality generating activities. But this tax credit would be quite difficult to administer. Also, it would be useful only to organizations with profits, so the credit would have to be either refundable (i.e., available to news organizations with net losses) or transferable (i.e., available to financial investors). Unlike the nonprofit model, moreover, this tax credits would require congressional action. Mobilizing the necessary political support would be quite difficult.

The second alternative is a subsidy allocated by readers, such as a government-funded subscription.[9] This approach is effective at safeguarding independence as long as the reader, instead of the government, chooses which news organization to support. Yet significant resources would be misdirected, for instance, to the wrong press organizations and, in some cases, to fraud. In addition, like the tax credit for hiring reporters, this approach requires congressional action and seems politically implausible.

The third alternative is a government-funded board, modeled on the National Endowment for the Arts, which would make grants to selected newspapers, websites, and news broadcasts.[10] In offering the government an active role in allocating the funds, this model could prove particularly effective at focusing the subsidy on externality-generating activities, although much depends on how well run the process proves to be. Indeed, a poorly structured board could prove quite ineffective on this dimension. In any event, a more active government role obviously poses greater risks to press independence. In addition, this model would require congressional action, and thus is more difficult politically than the nonprofit model.

A similar analysis applies to the fourth alternative, a government-owned press organization, such as an American version of the BBC.[11] It has the potential to provide a focused investment in externality-generating activities – if, and only if, it is run well – but it poses risks to press independence and faces daunting political obstacles in the American political context.

Although much has been written about the economic crisis afflicting the press, and some commentators have recommended government subsidies of various types, most of this work has been done by journalists,[12] rather than by legal academics.[13] As a result,

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[8] *See infra* Part IV.A.
[9] *See infra* Part IV.B.
[10] *See infra* Part IV.C.
[11] *See infra* Part IV.D.
[12] *See generally* Leonard Downie, Jr. & Michael Schudson, The Reconstruction of American Journalism, Oct. 20, 2009; Charles Lewis, *The Nonprofit Road*, COLUM. JOURNALISM REV., September / October 2007; PHILIP MEYER , THE VANISHING NEWSPAPER 7 (2004); Victor Pickard, Josh Stearns & Craig Aaron, Saving

the existing literature does not focus on questions of institutional design or political economy. It does not provide an analytical framework for evaluating press subsidies, and it does not offer a sustained comparison between different subsidy structures that accounts for institutional detail across various legal regimes. The existing literature also does not illuminate the unique advantages of the nonprofit form in preserving independence, in requiring at most modest changes in law, and – if structured properly – in ensuring that the subsidy is focused on externality generating activities. The goal of this Article is to fill these significant gaps in the literature, and thus to give guidance about the most promising mechanisms for restoring the American free press to a sustainable financial footing.

Part I establishes the basic case for a government subsidy by surveying positive externalities generated by beat reporting and investigative journalism, as well as the economic crisis plaguing the press. Part II develops three criteria for evaluating various subsidy structures: independence; focus; and political plausibility. Part III applies these criteria to the principal recommendation of this Article, which is to use tax-deductible charitable contributions to subsidize beat and investigative reporting. Part IV considers how four alternative structures fare under these criteria. Part V is the conclusion.

I. **Losing the Social Benefits of News Rooms**

The press provides enormous social benefits, but its business model is collapsing and a robust alternative may not be feasible without government support. To articulate the potential appeal of a government subsidy, Section A discusses the positive externalities generated by investigative and beat reporting. Section B describes the

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the News: Toward a National Journalism Strategy, at 6, posted on WWW.Freepress.net; Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption*), THE NEW REPUBLIC, March 4, 2009; ROBERT W. MCCHESNEY & JOHN NICHOLS, THE DEATH AND LIFE OF AMERICAN JOURNALISM (2010). Both the Federal Trade Commission and the Federal Communications Commission are studying the issue as well. See Federal Trade Commission Staff Discussion Draft, Potential Policy Recommendations to Support the Reinvention of Journalism (2010) (hereinafter "FTC Staff Discussion Draft"), posted on http://www.ftc.gov/opp/workshops/news/jun15/docs/new-staff-discussion.pdf; Lee C. Bollinger, *Journalism Needs Government Help*, WALL ST. J, Jul. 14, 2010 (mentioning FTC and FCC studies).

[13] Three legal academics have made important contributions to this literature. First, Lee Bollinger has just written an important book on the future of the press. *See* LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE OPEN (2009). Although he supports government subsidies for the press (and is more supportive than I am of government grants and government-owned media organizations), his main focus is not the economic challenges facing the U.S. press, but the need for a strategy to promote free press values throughout the world. A second legal academic who has written on related issues is the late Ed Baker. He proposed a tax credit for hiring reporters, structured somewhat differently than the one I propose in Part IV.A. I respond to Professor Baker's proposal there, but it is worth emphasizing that Professor Baker's work generally focuses not on subsidies, but on media ownership and its implications for democracy. *See, e.g.*, EDWIN BAKER, MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS (2007). Finally, Richard Schmalbeck has written about organizing newspapers as nonprofits. *See* Richard Schmalbeck, Financing the American Newspaper in the Twenty-First Century, Duke Conference on Mass Media (2009) (draft on file with author). Professor Schmalbeck's article focuses especially on doctrinal issues within the tax law, rather than on policy issues such as independence, focus, and political plausibility, which are the principal subject of this Article.

economic crisis hobbling professional journalism. Section C assesses the challenge of formulating a new business model without government resources.

A. Positive Externalities from Reporting the News

It is well understood that voters, investors, and consumers need high quality information to make wise decisions, especially in our increasingly complex global society. The press, as Lee Bollinger has put it, is "our scout and our explorer."[14] Reporters also monitor our society's most important institutions in both government and the private sector, exposing incompetence and corruption.[15] Corporate executives know that a negative press story can deprive them of market share, trigger a lawsuit, or even cost them their jobs.[16] Likewise, government officials recognize the press's influence over voters, interest groups, and campaign donors. The press serves as both a watchdog and a scarecrow. Even if the press cannot monitor everyone, it has a positive influence as long as people *believe* they are being monitored.[17]

Although the press also provides an important forum for competing views and trains citizens of a diverse society to be tolerant of other perspectives,[18] the focus of this Article is not on opinion journalism, which is thriving on cable, talk radio, and the blogosphere.[19] Instead, the focus is on the press's responsibility to provide accurate information through beat reporting and investigative journalism.

In using the term "press," moreover, this Article refers not only to newspapers, which offer the vast majority of beat and investigative reporting,[20] but also to websites, and radio and TV broadcasts. The goal here, moreover, is not so much to protect newspapers, as to protect reporting, whether this function is conducted by newspapers or by other media.

Admittedly, the press does not always play a constructive role. Coverage is at times biased, oversimplified, or inaccurate. There can be too much gossip and entertainment and not enough serious reporting. The press has missed important stories in recent years. In some parts of the world, the problems are even more serious, as the press is intimidated by violence against journalists or is controlled by the government, so that it serves as the state's voice, eyes, and ears.[21] Yet there is no denying the vital role that beat reporting and investigative journalism play in a free society.

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[14] BOLLINGER, *supra* note 13, at 87.
[15] Starr, *supra* note 12, at 28.
[16] *Id.* at 28.
[17] Downie & Schudson, *supra* note 12, at 9. (discussing "the watchdog function of the press – reporting that is aggressive and reliable enough to instill fear of public embarrassment, loss of employment, economic sanctions, or even criminal prosecution").
[18] BOLLINGER, *supra* note 13, at 46-50.
[19] Downie & Schudson, *supra* note 12, at 8 ("[A]dvocacy journalism is not endangered – it is growing.").
[20] *See* FTC Staff Discussion Draft, supra note 12, at 2 ("Studies have shown that newspapers typically provide the largest quantity of original news to consumers over any given period of time.").
[21] *See* Benjamin L. Liebman, *Innovation through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARVARD INT'L L.J. 33, 47 (2006); Alicia Adsera, Carles Boix & Mark Payne,

Unfortunately, this role is not economically self-sustaining. The problem is that reporters produce positive externalities. The monitoring they provide leads to benefits enjoyed even by those who never read a newspaper or a website – in the form of better products, more efficient capital markets, and government that is truer to its mission.[22] As a result, beat reporting and investigative journalism are public goods, which are undersupplied.

A partially offsetting factor is that news organizations have a reputational interest in generating first-rate reporting. An organization that is known to offer the most accurate and insightful coverage can charge a premium, both to advertisers and to readers.[23]

Yet in the short run, at least, news organizations have an incentive to favor profits over building their long-term reputation. This explains why Knight Ridder's stock price declined on the day the chain won seven Pulitzer prizes in 1986. When the company's director of corporate relations expressed surprise, a Wall Street Analyst replied, "You win too many Pulitzers."[24] According to Donald Graham, the CEO of the *Washington Post*, "It isn't guaranteed that anyone owning the *[New York] Times* would spend more than $200 million on its newsroom budget or deploy dozens of foreign correspondents around the world. Sending any one of those reporters overseas costs lots of money and doesn't add a penny to this year's circulation or advertising revenue."[25]

B. ***News Reporting in Crisis***

For many years, the press's business model was profitable enough to subsidize beat and investigative reporting but, unfortunately, times have changed. "In the past couple of years alone," Charles Lewis wrote, "everything but a piano has fallen on the head of the serious press."[26] The root of this crisis is that newspapers have lost the very lucrative monopoly they once held on information within a locality. As Warren Buffet has explained,

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Are you Being Served? Political Accountability and Quality of Government, 19 JLEO 445 (2003) ("Much of newspaper journalism in other democracies is still partisan, subsidized by, or closely allied with, political parties.") In fact, Adsera, Boiz and Payne show that, the lower the "free circulation of daily newspapers," an index that measures both freedom of the press and size of circulation, the higher the country rates on a corruption index. This is also true of states within the United States.

[22] FTC Discussion Draft, supra note 12, at 4-5.

[23] MEYER, *supra* note 12, at 7 ("A front page that pretends to depict a presidential candidate chatting with an alien from outer space is going to attract only that limited subset of advertisers that depends on the most naively credulous subset of the population."). Meyer offers empirical support for the proposition that newspapers can profit economically from offering high quality reporting, which he calls "the influence model." He shows that the paper that is more trusted tends to outcompete its competitors. *Id.* at 21-33, 52-53, 202-04.

[24] *Id.* at 6.

[25] Donald Graham, *The Gray Lady's Virtues*, WALL ST. J, Apr. 23, 2007.

[26] Lewis, *supra* note 12, at 32. A chorus of commentators is heralding the end of newspapers as we know them. *See, e.g.*, MEYER, *supra* note 12, at 1 ("Journalism is in trouble."); Gabriel Sherman, *Micro Economics*, THE BIG MONEY (Feb. 9, 2009); ("[T[he newspaper industry's fortunes have gone from abysmal to apocalyptic."); Pickard, Stearns & Aaron, *supra* note 12, at 6. ("Journalism as an institution is collapsing before our eyes. . . "); MCCHESNEY & NICHOLS, *supra* note 12, at x ("Investigative journalism is on the endangered species list.").

> For most of the twentieth century, newspapers were the primary source of information for the American public. . . . Just as important, their ads were the easiest way to find job opportunities or to learn the price of groceries at your town's supermarkets. The great majority of families therefore felt the need for a paper every day, but understandably most didn't wish to pay for two. Advertisers preferred the paper with the most circulation, and readers tended to want the paper with the most ads and news pages. . . . Thus, when two or more papers existed in a major city (which was almost universally the case a century ago), the one that pulled ahead usually emerged as the stand-alone winner. After competition disappeared, the paper's pricing power in both advertising and circulation was unleashed . . . and the profits rolled in.[27]

In this flush environment, papers owned by public-spirited families, or run by public-spirited managers, had the resources to cross-subsidize investigative and beat reporting.

Yet with the advent of the Internet, Craig's list and a host of other sites now compete with newspapers for classified and other ads.[28] As a result, revenue from print ads declined industry wide by 23% from 2006 to 2008 and by another 30% in 2009. This is a body blow to the newspaper industry, since even the diminished total still represents 90% of all newspaper revenue.[29] Ad revenue promises to be down again in 2010, although the decline seems to be slowing.[30] Unfortunately, subscription revenue is in steep decline as well, as part of a long-term trend in which young people are less likely to subscribe to a print edition.[31] The percentage of Americans who buy a daily newspaper is half of what it was in 1945, declining from 38% in 2006 to 30% in 2008.[32] "If newspapers continue to lose circulation at a rate of 7 percent every six months," Robert McChesney and John Nichols wrote, "they've got less than eight years to go before no one is reading them."[33] While on-line readership is growing, most newspapers have been offering this content free of charge, and online advertising has generated only limited revenue.

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[27] Starr, *supra* note 12, at 29 (quoting Warren Buffett's 2006 letter to shareholders); see also MEYER, *supra* note 12, at 35 ("monopoly newspapers were the tollgates through which information passed between the local retailers and their customers").

[28] Downie & Schudson, *supra* note 12, at 3 (. "The Internet's easily accessible free information and low-cost advertising have loosened the hold of large, near-monopoly news organizations on audiences and advertisers."); see also MEYER, *supra* note 12, at 61 (""technology can separate advertising from its traditional role of supporting socially useful editorial content. The Internet can be a perpetual catalog").

[29] Pickard, Stearns & Aaron, *supra* note 12, at 7; see also Starr, *supra* note 12, at 28 (citing Barclays study indicating that revenue was down by 25% over three years at the end of 2008, and that it would be down another 17% in 2009 and 7.5% in 2010); FTC Staff Discussion Draft, supra note 12, at 2 (noting that newspaper ad revenue has declined approximately 45% since 2000).

[30] Richard Perez-Pena, Newspaper Advertising Decline is Slowing Markedly at Gannett, New York Times, Apr. 16, 2010 (Moody's predicts 5 to 10% decline in ad revenue in 2010).

[31] MEYER, *supra* note 12, at 17.

[32] Starr, *supra* note 12, at 30; see also Joseph Plambeck, *Newspaper Circulation Falls Nearly 9%*, N.Y. TIMES, Apr. 26, 2010 (citing recent figures from the Audit Bureau of Circulations).

[33] MCCHESNEY & NICHOLS, *supra* note 12, at 14.

As a result, newspaper stock prices have plummeted.[34] Established papers such as the *Rocky Mountain News* and *Ann Arbor News* have shut their doors, while the *LA Times*, *Chicago Tribune*, and the owner of the *Philadelphia Inquirer* and *Daily News* have entered bankruptcy.[35] Many industry analysts expect at least one major U.S. city to be without a metropolitan daily paper soon.[36] Meanwhile, approximately 50 newspapers were shut down in 2008 alone.[37]

As newspaper finances deteriorate, so does the quality of coverage.[38] The press becomes more vulnerable to pressure not to pursue controversial stories.[39] In addition, as Charles Lewis has written, "[t]here are simply fewer and fewer professional reporters monitoring power in America and the world . . . ."[40] According to the "paper cuts" blog, approximately 16,000 journalists lost their jobs in 2008, and another 17,000 in 2009.[41] The newsroom was reduced by half at the *LA Times*, by 45% at the *Newark Star Ledger*,[42] from 450 to 150 at the *Baltimore Sun*, and from 500 to 200 at the *San Francisco Chronicle*.[43] Coverage is thinner across the board, including of the federal government.[44] But state and local news and international coverage have been hit especially hard. For example, the number of reporters covering Trenton has declined from 50 to 15 in the past decade,[45] and the number covering all state capitals has fallen by 32%, from 524 in 2003 to 355 in 2009.[46] Likewise, the number of foreign correspondents declined 30% between 2002 and 2006,[47] and a number of prominent media outlets have closed their last foreign bureaus, including the *Philadelphia Inquirer*, the *Baltimore Sun*

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[34] Starr, *supra* note 12, at 30 (noting that newspaper stocks are down by 80%).
[35] *See* Pickard, Stearns & Aaron, *supra* note 12, at 5. Pickard, Stearns and Aaron assert that many newspapers are profitable if their debt service is not taken into account. While it is useful to know that newspapers can still generate this level of cash flow, debt service is as real a cost as the payroll. Capital is not free, and so if newspapers cannot generate enough revenue to cover this cost, they obviously are not profitable
[36] *See* Mark Fitzgerald, *Several Cities Could Have No Daily Paper as Soon as 2010, Credit Rater Says*, EDITOR & PUBLISHER, Dec. 3, 2008.
[37] MCCHESNEY & NICHOLS, *supra* note 12, at 20 ("More than four dozen newspapers folded in 2008.").
[38] Lewis, *supra* note 12, at 32.
[39] Starr, *supra* note 12, at 29.
[40] Lewis, *supra* note 12, at 32.
[41] MCCHESNEY & NICHOLS, *supra* note 12, at 19-20.
[42] Starr, *supra* note 12, at 28.
[43] Downie & Schudson, *supra* note 12, at 17;
[44] Richard Peres-Pena, *Big News in Washington, But Far Fewer Cover It*, N.Y. TIMES, Dec. 18, 2008; *see also* Starr, *supra* note 12, at 31 (noting that fewer journalists from regional papers are covering DC, which is a particular loss since "journalists from regional papers perform a special service for their readers, monitoring their representatives in Congress and reporting on federal programs from a local angle"; DC reporters for San Diego Union Tribute won a Pulitzer Prize in 2006 for exposing corruption of Rep. Randall "Duke" Cunningham but, since then, the bureau was closed).
[45] Starr, *supra* note 12, at 31.
[46] Downie & Schudson, *supra* note 12, at 18.
[47] Starr, *supra* note 12, at 30.

and the *Boston Globe*.[48] The column inches dedicated to foreign coverage are also shrinking, an unsettling trend in an increasingly global world.[49]

The broadcast media is unlikely to pick up this slack, since it faces the same economic challenges. In fact, 90% of its stories are about crime, accidents, and scheduled events.[50] The typical half-hour TV news show runs ten to twelve stories, in contrast to the typical metropolitan daily, which runs 70 stories on business, national, and local news, and another 30 on sports and entertainment.[51] According to McChesney and Nichols, reporting on TV news has become even scarcer since 2008 because "local TV news has been clobbered by cuts . . . along the lines similar to those seen in newspapers."[52] Indeed, 205 stations now use content produced by other stations in same city.[53] The trend in radio news is similar.[54] Commercial radio does almost no reporting, although public radio is an important source for certain types of news.[55]

Online journalism also is hard pressed to replace the reporting that once was provided by newspapers – at least, for now. Internet sites generally focus more on commentary than on original reporting, often serving as "aggregators" that post stories written by print journalists.[56] Indeed, between 85% and 95% of all professionally reported news still originates with daily newspapers.[57] "Online there is certainly a great profusion of opinion, but there is little reporting, and still less of it subject to any rigorous fact-checking or editorial scrutiny," Paul Starr has written. "No online enterprise has yet generated a stream of revenue to support original reporting for the general public comparable to the revenue stream that newspapers have generated in print "[58] For this to change, Internet sites will have to overcome the same daunting economic challenges that are overwhelming print journalism.

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[48] *Id.* at 31.
[49] *Id.* at 31 (discussing 2008 Pew study which found that 2/3 of news executives surveyed said they had reduced foreign coverage in past three years); *see also* Lewis, *supra* note 12, at 32. (CBS News once had 24 foreign bureaus, now has 6, none in Latin America or Africa).
[50] Downie & Schudson, *supra* note 12, at 26; see also *id*. (noting that many stations do not produce any news at all; 205 stations now use content produced by other stations in same city).
[51] Starr, *supra* note 12, at 28.
[52] MCCHESNEY & NICHOLS *supra* note 12, at 15 (noting that over 1200 TV newsroom jobs were lost in 2008, representing a 4.3% industry decline in one year).
[53] Downie & Schudson, *supra* note 12, at 26.
[54] *Id* at 16 ("And local radio news, a significant producer of local journalism in the 1960s and 1970s, when nearly all AM stations had news directors and often reporters, has all but disappeared, a casualty of 'deregulation.'").
[55] Downie & Schudson, *supra* note 12, at 28.
[56] MCCHESNEY & NICHOLS *supra* note 12, at 16 ("The information discussed online is still gathered by newspaper and broadcast reporters.").
[57] *Id.* at 17 (citing study by Harvard's Alex Jones).
[58] Starr, *supra* note 12, at 28; *see also* Pickard, Stearns & Aaron, *supra* note 12, at 8 ("[W]hile blogs are carving out an increasingly important role in shaping and reporting the news, . . . the overwhelming majority of reporting whether online, broadcast, or cable, still originates with newspapers.").

C. The Challenges of Developing a New Business Model Without a Subsidy

In response, new online startups, as well as traditional newspapers, are seeking to use technology and new forms of organization to reduce costs and increase revenue. This Section surveys a range of steps the press is taking. As we shall see, they hold some promise but, ultimately, are unlikely to generate as much reporting as society needs.

1. Reporting News at Lower Cost

Search engines offer a cheap and powerful means of researching background for a story, and valuable data is now available on the websites of government agencies and watchdog groups.[59] Newsgathering has become a more networked process, in which more people are able to disseminate information – from academics and free-lancers to people with cell phones who happen to see something newsworthy.[60]

In response, some organizations are structuring formal collaborations between professionals and amateurs. This "pro-am" model is especially effective for "hyperlocal" coverage of crime, traffic, and the like.[61] Similarly, an organizer can create a website with a research mission, providing the relevant database and inviting readers to post answers. For example, one nonprofit organized its readers to identify members of Congress who put their spouses on the campaign payroll.[62] Wikipedia obviously is based on a similar approach.[63]

Although networked approaches to newsgathering can be less expensive, they can also be less reliable. Will untrained and unpaid volunteers be as accurate and objective as professional reporters? According to Leonard Downie and Michael Schudson, "[s]omething is gained when news reporting, analysis, and investigation are pursued collaboratively by stable organizations that can facilitate regular reporting by experienced journalists, support them with money, logistics, and legal services, and present their work to a large public."[64] In contrast, many blogs merely peddle rumors and self-interested propaganda.[65] Of course, some blogs do engage in high quality reporting.[66] Yet in doing

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[59] Downie & Schudson, *supra* note 12, at 68-69

[60] Yochai Benkler, *A New Era of Corruption?* NEW REPUB. Mar. 4, 2009; Downie & Schudson, *supra* note 12, at 2.

[61] Pickard, Stearns & Aaron, *supra* note 12, at 20; Downie & Schudson, *supra* note 12, at 43-44 (describing such initiatives in Seattle, New Haven, and Northern New Jersey).

[62] Benkler, *supra* note 60.

[63] Starr, *supra* note 12, at 33.

[64] Downie & Schudson, *supra* note 12, at 11.

[65] Starr, *supra* note 12, at 33; Downie & Schudson, *supra* note 12, at 55 ("the polemical excesses for which the blogosphere is known remain real" and the Internet "remains a hothouse for rumors, distortions, and fabrications") (quoting Michael Massing).

[66] For example, Josh Marshall's *Talking Points Memo* combines traditional news reporting with an openly ideological agenda. It won the George Polk award for its investigation of firings of US Attorneys. Downie & Schudson, *supra* note 12, at 52. Likewise, *Chi-Town Daily News* broke the story of Chicago officials who were pushing through a 10% tuition increase at city colleges without public notice, and *Voices of San Diego* exposed the inaccuracy of a police chief's crime statistics and the fact that a school board president was out of town 1/3 of the time. Randy Dotinga, *Nonprofit Journalism on the Rise*, CHRISTIAN SCIENCE

so, they face the same economic challenges that burden traditional newspapers in seeking revenue to pay the salaries of their reporters.[67]

2. Distributing News at Lower Cost

Another way to cut costs is to disseminate content online. There is no need for presses, paper, ink, trucks, or the various union workers involved in producing the print edition. By putting out only an online edition, as the *Christian Science Monitor* has done, a press organization can save approximately 40% to 50% of its costs.[68] Cutting home delivery on certain days, a strategy chosen by Detroit's two metropolitan papers, can offer cost savings as well.[69]

Yet there are two problems with this strategy. First, approximately 40% of the population does not have access to high speed Internet. These readers are disproportionately elderly and poor, and it would be troubling, if only for distributional reasons, to cut off their access to information.[70] This is likely to change over time – and, indeed, a subsidy may be warranted to ensure broader access to high speed Internet – but, for now, this remains an issue.[71] Second, online editions are notoriously unsuccessful at generating revenue. Although print editions are more expensive to produce, they generate 90% of the industry's revenue.[72] Needless to say, cutting costs by even 50% is still a losing proposition if accompanied by a 90% decline in revenue.

3. *Enhancing Online Revenue Through New Technology*

Yet increasing on-line revenue is a challenge. In creating on-line editions, most newspapers posted the content for free, hoping to attract a flood of on-line ad revenue. Unfortunately, this revenue has not materialized. Only 8% of the industry's advertising revenue comes from online ads, and the percentage has stopped growing.[73] Online ads are thought to have less impact than print ads, since they are considered less successful at catching a reader's eye. According to one industry analyst, "[t]he notion that the enormous cost of real news-gathering might be supported by the ad load of display

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MONITOR, Feb 12, 2008; David Scharfenberg, *Aiding Tomorrow's Journalists Today*, BOSTON GLOBE, Feb 2, 2009 (describing successes of *VoicesofSanDiego* and *Minnpost*).

[67] According to Joel Kramer, founder of MinnPost, "I am reporting back from the frontline of this digital journalism revolution that making it happen is no picnic. The same forces working against the for-profit model make self-sustaining nonprofit models challenging too." Joel Kramer, *Lessons I've Learned After a Year Running MinnPost*, NIEMAN JOURNALISM LAB, March 19, 2009. http://www.niemanlab.org/2009/03/joel-kramer-lessons-I've-learned-after-a-year-running-minnpost/.

[68] Starr, *supra* note 12, at 32; FTC Staff Discussion Draft, *supra* note 12, at 3 (by moving to an online-only edition, newspaper can avoid 50% of its costs).

[69] Starr, *supra* note 12, at 32.

[70] Pickard, Stearns & Aaron, *supra* note 12, at 9.

[71] Indeed, the FCC's new "National Broadband Plan" is meant to expand access. *See* http://www.broadband.gov/. These efforts may be complicated, though, by the questions recently raised by the DC Circuit about the FCC's authority to regulate the Internet. Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

[72] Starr, *supra* note 12, at 32.

[73] *Id*. at 30.

advertising down the side of the page, or by the revenue share from having a Google search box in the corner of the page, or even by a 18-second teaser from Geico prior to a news clip, is idiotic on its face."[74]

Even so, there are two ways that news organizations might ultimately attract more online advertising revenue. First, specialized sites tend to be more successful, because they offer targeted access to specialized readers. For example, hyperlocal sites are especially appealing to local merchants, and websites covering the federal government are attractive to advertisers who want to influence policymaking.[75] Second, there is a great deal of profit in "smart" advertising, which takes account of a reader's interests and responds by posting a related ad. Yet unfortunately for the press, search engines control this market.[76] News organizations are seeking to negotiate a better deal with Google and other search engines, but they may not have enough leverage to do so.[77] For example, Rupert Murdoch has threatened to take the *Wall Street Journal* out of *Google News*, and to negotiate exclusive access for Microsoft's Bing search engine, but this threat may not be credible since he would lose access to a significant volume of readers.[78]

In addition to advertising, another way to generate revenue is to charge readers for access to online editions. In theory, a publication with a reputation for quality content should be able to charge online, just as it charges for print. The success story here is *The Wall Street Journal*, which claims to have one million online subscribers who pay a monthly subscription fee.[79] Other business publications also have successful online subscription programs.[80]

Yet aside from business publications, most online content has been free, and it is unclear whether consumers can be persuaded to pay for it.[81] *The New York Times* tried and failed to charge for online content in 2007, but will try again in 2011.[82] It is

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[74]David Carr, *Let's Invent an iTunes for News*, N.Y. TIMES, Jan 12, 2009 (quoting Craig Moffett of Bernstein Research).

[75] Downie & Schudson, *supra* note 12, at 48 – 49 (noting that AOL is creating local sites to attract local advertising, and that *Politico*, a website that focuses on the federal government, attracts advertisers that are interested in influencing legislation).

[76] MEYER, *supra* note 12, at 62.

[77] Pickard, Stearns & Aaron, *supra* note 12, at 30-31.

[78] Richard Perez-Pena & Tom Arango, *Adding Fees and Fences on Media Sites*, NY TIMES, Dec 28, 2009, at B1.

[79] Downie & Schudson, *supra* note 12, at 19.

[80] *Id*. at 19 (*Financial Times* claims to have 120,000 online subscribers); Starr, *supra* note 12, at 30 ("sources of financial news have always been able to set higher prices than other news media because of the value that business readers derive from reliable, up-to-the-minute information"); Carr, *supra* note 74 (*Consumer Reports* and *Cooks Illustrated* charge for online subscriptions).

[81] Richard Perez-Pena & Tom Arango, *Adding Fees and Fences on Media Sites*, N.Y. TIMES, Dec 28, 2009, at B1 ("Over more than a decade, consumers became accustomed to the sweet, steady flow of free news, pictures, video and music on the Internet. Paying was for suckers and old fogeys. Content, like wild horses, wanted to be free.").

[82] *Id.* at B2 (noting that "conventional wisdom among media companies has swung hard from the belief that pay walls would only curb traffic and stifle ad revenue, to the view that media businesses need to try something new, because the current path appears to lead to extinction."); Russell Adams, *New York Times is Near Web Charges*, WALL ST J., Jan 19, 2010, at B6; Russell Adams, *New York Times to Charge for*

especially difficult to charge for content when competitors do not. *Newsday*, which has the eleventh largest circulation in the nation, hoped to attract a host of paying subscribers to its website – in addition to those who already had free online access (e.g., by subscribing to the print edition) – but they attracted only thirty-five paying subscribers after three months.[83] A further problem with "paywalls" is that they are porous. Although nonsubscribers cannot browse through the *Wall Street Journa*l online, they can still access particular articles through *Google News*.[84]

Alternatively, instead of charting a flat fee for everything on the site, press organizations can charge readers for each article they download.[85] This "micropayments" approach is modeled on iTunes, a service offering downloadable songs that many credit with reviving the recording industry. To read this downloaded material, readers could use the new Apple iPad, which was launched with much fanfare,[86] as well as other devices, including Amazon's Kindle[87] and Sony's "make believe" reader for the *Wall Street Journal*.[88] Yet this strategy should not be oversold. Even with iTunes, nearly three times as many songs are pirated each year as are legally downloaded.[89] Also, paying for a song, which can be played many times, may prove more appealing than paying for an article, which will be read only once.[90] Again, this is all the more true if competitors are offering news for free.[91]

Web, WALL ST. J., Jan 21, 2010, at B10 (offering print subscribers free access online, and giving those who aren't print subscribers free access to a designated number of hits, but charging once the reader has exceeded that minimum; plan announced to begin in 2011); Richard Perez-Pena, *Some Newspapers Prepare to Charge for Web Access*, N.Y. TIMES, Feb 3, 2010, at B2.

[83] John Koblin, *After Three Months, Only 35 Subscriptions for Newsday's Web Site*, N.Y. OBSERVER, Jan. 26, 2010 (noting that those holding print subscriptions and those subscribing to Optimum Cable already have free online access and, according to *Newsday*, this group represents 75% of Long Island households).

[84] Carr, *supra* note 74 (noting that it is possible to get *WSJ* articles for free but people still pay).

[85] Walter Isaacson, *How to Save Your Newspaper*, TIME, Feb. 5, 2009 (advocating micropayments); Steve Brill, *Turning Around the Times . . . And Journalism*, Poynter Institute, November 2009, http://www.poynter.org/column.asp7id=45&aid+158210.

[86] Ykahi Iwatani Kane & Ethan Smith, *Apple Sees New Money in Old Media*, WALL ST. J., Jan 21, 2010, at B1 (noting Steve Job's ambition to reshape newspaper and other media businesses); Brad Stone & Stephanie Clifford, *With Apple Tablet, Print Media Hope for a Payday*, N.Y. TIMES, Jan. 26, 2010, at B1.

[87] Jack Shafer, *Building an iTunes for Newspapers*, SLATE (Jan 12, 2009) (criticizing Kindle as unattractive and cumbersome).

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

[89] Gabriel Sherman, *Micro Economics*, THE BIG MONEY (Feb. 9, 2009) (noting that 14 billion songs are legally downloaded per year, while 40 billion are pirated).

[90] *Id*.

[91] Cf. Jeff Jarvis, *Can Newspapers Charge for Online Versions of Their Work?*, LOS ANGELES TIMES, March 19, 2009 ("Once news is known, that knowledge is a commodity and it doesn't matter who first reported it. There's no fencing off information, especially today, when the conversation that spreads it moves at the speed of links.")

4. Enhancing Revenue Through Antitrust and Intellectual Property Law

In theory, this coordination problem could be addressed through an industry wide agreement, in which news organizations commit to charging for online content.[92] But this sort of agreement is likely to violate the antitrust laws. In 2009, Speaker Pelosi asked the Justice Department to consider a broader antitrust exemption for the newspaper industry,[93] but the Justice Department opposes this step.

Another legal response is to offer the press stronger property protections for the information they uncover. Under current law, a news organization can copyright a story, but not the facts reported in it.[94] The Supreme Court has rejected "sweat of the brow" copyright theories that would protect the work of those uncovering or assembling information.[95] As a practical matter, this means a reporter who scoops a story cannot stop other news organizations from rewriting and selling it.

The common law "hot news" doctrine offers some protection for reporting, but its scope is fairly limited.[96] The doctrine, first developed in a law suit by the Associated Press against Hearst, is meant to keep news agencies from appropriating each other's work, and thus "render[ing] publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return."[97] The doctrine was reaffirmed under New York law when the NBA sued Motorola for offering NBA scores.[98] Yet the NBA lost on the facts even as it won on the law, a result that suggests how difficult "hot news" claims are to establish.[99]

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[92] FTC Staff Discussion Draft, supra note 12, at 14 (discussing antitrust exemption to facilitate creation of paywalls).

[93] John Eggerton, *Pelosi Asks Justice to Take Broader View of Competitive Landscape*, BROADCASTING & CABLE, March 17, 2009. There already is a limited antitrust exception for newspapers, known as the Newspaper Preservation Act of 1970, which tried to prevent newspapers from forming local monopolies by allowing more than one paper to share costs and revenue through joint operating agreements.

[94] FTC Staff Discussion Draft, supra note 12, at 6 (noting that copyright does not protect underlying information).

[95] *Feist Publications, Inc. v. Rural Telephone Service Co,* 499 US 340 (1991) (holding that telephone database is not protected by copyright if it is not a "compilation," in which the collector uses an act of creativity or expression in establishing criteria).

[96] See generally VICTORIA SMITH ELKSTRAND, NEWS PIRACY AND THE HOT NEWS DOCTRINE: ORIGINS IN LAW AND IMPLICATIONS FOR THE DIGITAL AGE (2005).

[97] *International News Service v. Associated Press*, 248 US 215, 241 (1918).

[98] *National Basketball Association v. Motorola,* 105 F.3d 841 (2d Cir. 1997); *see also Morris Communications Corp., Inc. v. PGA Tour, Inc.*, 117 F. Supp. 2d 1322 (M.D. Fla. 2000*), aff'd in* 106 F.3d at 845 (allowing PGA to require anyone publishing golf scores using their data to impose 30 minute delay). The Second Circuit held that a cause of action would be established if: "(i) a plaintiff generates or gathers information at a cost; (ii) the information is time sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened." *Morris Communications Corp., Inc. v. PGA Tour, Inc*., 117 F. Supp. 2d 1322 (M.D. Fla. 2000).

[99] The doctrine was applied again recently in the financial news setting to delay republication of stock recommendations. *See Barclays Capital Inc. v. Theflyonthewall.com*, 2010 WL 1005160 (S.D.N.Y. Mar.

In theory, stronger property protections could be offered as a way to enhance the profitability of reporting.[100] Yet this strategy has the potential to be counterproductive. News reporting is an incremental process, in which reporters build on the information that other reporters have already uncovered. Although a stronger hot news doctrine could increase the returns to reporting, it could also increase the *costs* of reporting, for instance, if other reporters have to be compensated for earlier stories.[101]

II. **Criteria for Judging a Subsidy**

Part I showed that the market is unlikely to support as much beat and investigative reporting as society needs. When a public good is undersupplied, the textbook response is a government subsidy. In this context, a subsidy of approximately $2.5 billion per year would make an extraordinary difference. This would be enough to cover the cost of rehiring the 33,000 reporters that have lost their jobs in 2008 and 2009, assuming the total annual cost of a reporter is approximately $75,000.[102] Although this is a substantial amount of money, to be sure, it represents less than $10 per year per American, and would constitute only a tiny fraction of the federal budget. The amount is also in line with support provided to the press in other countries.[103]

Yet subsidies have costs as well as benefits, and can be crafted in different ways. This Part offers a framework for evaluating a particular subsidy by developing three criteria for assessing its effectiveness. First, does the subsidy preserve the independence of the press, so that reporters still feel free to write stories that are critical of the government? Second, is the subsidy sufficiently focused on the activity that generates the positive externalities – that is, reporting on issues of public concern – so that significant resources are not redirected to other uses, such as pay increases for the advertising staff? Third, can the subsidy attract enough political support to be implemented? As we shall see, different types of subsidies present various tradeoffs among these criteria. After Part II delineates these criteria, Parts III and IV apply them to a menu of different subsidies.

18, 2010); *see also Associated Press v. All Headline News Corp.*, 608 F.Supp.2d 454 (S.D.N.Y. 2009) (allowing an Internet news misappropriation claim to go forward)

[100] *See, e.g.*, Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information after* Feist v. Rural Telephone, 92 COLUM. L. REV. 338, 341-42, 388 (1996) (suggesting Congress has the authority to adopt limited property rights for "information compilers").

[101] FTC Staff Discussion Draft, *supra* note 12, at 6, 10-11 (noting concern that news organizations could be hurt by stronger property protections, given their heavy reliance on previously reported news for source information). *Cf.* MICHAEL HELLER, THE GRIDLOCK ECONOMY (2008).

[102] According to McChesney and Nichols, 16,000 journalists lost their jobs in 2008, and 17,000 lost their jobs in 2009. MCCHESNEY & NICHOLS, *supra* note 12, at 19-20. Note that they advocate a subsidy with the substantially higher price tag of $35 billion. *Id.* at 206.

[103] For instance, in 2006 Sweden spent over $65 million subsidizing its newspapers. At the same per capita rate, that would represent over $2 billion per year in the United States. The per capita rate in Norway is even higher, translating to $4 billion annually in the U.S. MCCHESNEY & NICHOLS, *supra* note 12, at 166-67.

A. Independence

A subsidy for the press presents a unique challenge: any financial support that the government provides cannot be allowed to compromise the press's independence. After elaborating on this problem, this Section describes different design features that can be incorporated in a subsidy in order to protect the press's independence, some of which are more effective than others. In order to establish the importance of these institutional design questions, this Section goes on to show that current First Amendment doctrine, in and of itself, does not provide complete protection for press independence in many circumstances. Since the First Amendment is not an all-purpose remedy, we need to protect press independence in other ways, which have to be hard-wired into the design of the subsidy.

1. *Risks to Independence*

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

Although these risks are minimized when the press is funded only by its readers – such that its sole incentive is to provide them with the most accurate and interesting information – questions about press independence arise whenever funding comes from other sources. Indeed, we already have the issue with advertising revenue. It is awkward for the newsroom to run a story criticizing a key financial supporter of the newspaper. This is why the leading U.S. news organizations have a firewall separating the newsroom from business operations. Yet the firewall is constantly under pressure,[104] and this pressure is growing as ad revenue becomes even more scarce, further motivating press organizations to please their funders.[105]

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[104] For example, Philip Meyer showed that in the 1980's – when the press's finances were much more secure than they are today – "editors representing 79% of daily newspaper circulation in the United States reported sometimes getting pressure from advertisers that was serious enough to require a newsroom conversation to resolve the issue. One in four said it happened at least once a month." MEYER, *supra* note 12, at 226.

[105] Even the most prestigious news organizations are not immune. *The Washington Post* recently was contemplating a series of intimate dinners offering access to its reporters for lobbyists and their clients. After a flood of negative publicity, the *Post* cancelled this series before it ever began. Jack Shafer, *Monetizing the Washington Dinner Party*, SLATE, July 2, 2009, *posted at* http://www.slate.com/id/2222093.

Yet although advertisers can undercut press independence, the government poses a unique risk by virtue of its vastly greater size and financial muscle. A news organization will never want to lose any advertiser, but if it loses one, it knows there are other fish in the sea. Indeed, even though running a story critical of Toyota could antagonize Toyota, it might well cultivate good will with Ford or Nissan. The concern about the government, though, is that it would occupy too dominant a position. This is not to say that the government is monolithic. Perhaps a story critical of one official who has influence over allocation of the subsidy could, at the same time, ingratiate a rival official who also has influence; for example, a story criticizing the President might please congressional leaders of the other party, and vice versa. Yet it obviously would be better for reporters and editors not to have to make this sort of calculation. Simply put, we don't want government money to become a temptation or a distraction.

2. *Functional Safeguards for Independence*

The surest way to structure a subsidy that safeguards the press's independence, then, is for the government to authorize the expenditure of funds for the broad goal of subsidizing reporting, but to play no role in deciding which news organizations receive this money. Under this approach, the government plays only a passive role, offering funding automatically to any claimant that complies with designated conditions. Of course, the government retains the option to pull the plug on the entire program, but it cannot single out individual media outlets that run critical stories.

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

a. <u>Viewpoint</u>

Obviously, any conditions based on viewpoint would be problematic. To ensure that independence is not compromised, the government must be barred from conditioning benefits on viewpoint. Admittedly, this means that news organizations espousing offensive views cannot be denied government funding on this basis.[106]

[106] See Seth Lipsky, *All the News That's Fit to Subsidize*, WALL ST. J., Oct. 21, 2009 (opposing subsidies for the press and emphasizing risk that the government would be asked to fund the modern equivalent of Jay Neal's anti-Catholic, anti-Semitic, and racist *Saturday Press*).

b. Content

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

Although the government generally would not be able to use content-based parameters to punish its critics, the hard cases will be about whether a subject matter has been excluded because the government wishes to avoid scrutiny about it. For instance, if Congress declines to subsidize reporting about battlefield casualties, there is room to wonder whether Congress is trying to discourage media criticism of a war. In this way, some topics could become proxies for viewpoint. Similarly, a commitment to subsidize coverage in some regions of the United States but not others might be a proxy for viewpoint-based discrimination. After all, we would not want the government to favor "blue" or "red" state perspectives. To sum up, then, the government must not be allowed to make judgments about content that are, in reality, disguised judgments based on viewpoint.

c. Quality

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

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

There is a potential tradeoff, then, between safeguarding independence, on one hand, and focusing the subsidy on externality generating activities, on the other. If safeguarding independence is the priority, then the government's role in allocating funding must be quite limited, as noted above. Yet a different way to manage this tradeoff, of course, is to favor focus over independence by assigning the government a more active role in funding decisions. For example, the government can itself own and operate a media organization, or it can create a program to dispense grants to privately owned press outlets. In either of these approaches, funding decisions can in principle be made by Congress, by members of the executive branch, or even by an independent board or agency. While each of these approaches creates risks that the press organization will not be independent, these risks can be magnified or diminished, depending upon how the arrangement is structured. The devil is in the details, including who is empowered to allocate the subsidy, how these decision makers are appointed, renewed, and compensated, and the like.

3. *Constitutional Analysis*

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

a. <u>Viewpoint</u>

As noted above, viewpoint-based judgments pose a particular threat to press independence. Yet although the Court says repeatedly in dictum that government benefits cannot be conditioned in a manner that "aim[s] at the suppression of dangerous ideas,"[107] the protection is not absolute.

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[107] *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1969)) (quoting *Speiser v. Randall*, 357 U.S. 513, 519 (1958)). Likewise, newsroom staff presumably can't be required to swear a loyalty oath. *Cf. Speiser v. Randall*, 357 U.S. 513 (1958) (veterans could not be required to swear loyalty oath in return for claiming property tax exemption in California).

It is strongest when the government is seeking to create a public forum, such as a state university program funding all student groups[108] or, by analogy, a federal program funding any press organization that applies. Yet if the government is not creating a public forum, it has discretion to make viewpoint-based judgments.

As Robert Post has observed, the government has especially broad discretion to support a particular viewpoint when it itself is speaking, for instance, through its own employees: Cabinet officials can be fired for publicly disagreeing with the President, public defenders can be required to defend (rather than prosecute) their clients, and the like.[109] In this spirit, a government-owned media organization – such as Voice of America or the U.S. equivalent of the BBC, if one were created – presumably would be permitted some discretion under the First Amendment to determine which viewpoints to promote.[110]

Just as the government can influence the viewpoints expressed by its employees, it can also do so with private parties who receive government grants, as long as the purpose of the grant is not to create a public forum. For example, when the government funds family planning services, doctors and counselors who work for federally funded programs can be prevented from counseling about abortion.[111] Likewise, in making grants, the National Endowment for the Arts can be directed to "tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[112] By analogy, a national endowment for journalism presumably

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

[109] Robert Post, *Subsidized Speech*, 106 YALE L. J. 151, 164 (1996). *See also Rust v. Sullivan*, 500 U.S. 173 (1991) (""When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as Communism and Fascism.").

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

[111] *Rust v. Sullivan*, 500 U.S. 173 (1991).

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

could also be directed to apply a comparable values-infused standard in choosing which press organizations to fund.

b. Content

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

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

The government can also draw content-based distinctions when subsidizing private parties. For example, the Court upheld Congress's decision not to subsidize lobbying by nonprofits except in the case of veterans organizations.[113] Subsidizing some speech but not others, the Court said, is ordinarily "a matter of policy and discretion not open to judicial [review]."[114] On this theory, Congress can also subsidize reporting about some topics but not others (e.g., foreign affairs, but not sports), or within some media but not others (e.g., print but not online publications).

In choosing not to subsidize a particular type of private speech, the government is on safer First Amendment ground if private actors remain free to engage in this speech with their own resources. Nonprofits can still lobby, for instance, but they must do so through unsubsidized affiliates. In contrast, the Court struck down an effort by Congress to deny subsidies to broadcasters that engage in editorializing. The difference emphasized by the Court was that a "station that receives 1% of its overall income from [the government] is barred absolutely from all editorializing," even editorializing that is not funded by the government.[115] Put another way, the government can choose not to pay for particular content, but it cannot keep the press from generating this content on its own.

c. Quality

Likewise, under the First Amendment, the government is free to make judgments based on quality, even though, as noted above, this gives the government a lever that can undermine the independence of grantees. For example, the Court upheld the ability of the National Endowment for the Arts to make judgments based on quality, reasoning that the

[113] *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).
[114] *Id.*
[115] *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

NEA has an "inherently content-based excellence threshold."[116] Similarly, the Court held that public libraries are also not public forums, and thus are entitled to "collect only those materials deemed to have 'requisite and appropriate quality.'"[117] Thus, libraries can be required to filter pornography as a condition of receiving public funding because libraries themselves engage in filtering. The Court reasoned that the government is freer to impose its own funding criteria in contexts in which potential grantees are already themselves picking and choosing.[118]

Obviously, news organizations are inherently selective in this way. Not everyone gets to write for *The New York Times*, and so news organizations are not, in and of themselves, public forums. Indeed, news organizations seem quite analogous to libraries, and it is not much of a stretch to compare journalists with artists. Under recent precedents, then, a government program that allocates grants to the press presumably would be allowed to make judgments based on quality, including creativity, anticipated public interest, contemporary relevance, educational value, appeal to special audiences, and the other factors that the Court listed as relevant to arts funding.[119] This would give government grant-makers a great deal of discretion over what to fund – discretion that could, unfortunately, give news organizations the incentive to ingratiate themselves with these decision makers. Of course, a news organization that failed to receive a grant could launch an "as applied" challenge, arguing that the negative judgment about it was actually based on viewpoint, instead of quality.[120] Yet the evidentiary hurdles and the cost of bringing such a challenge render it an imperfect remedy at best.

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

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[116] *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).
[117] *United States v. American Library Ass'n*, 539 U.S. 194 (2003).
[118] *Id.* at 194 ("Although they seek to provide a wide array of information, their goal has never been to provide 'universal coverage.").
[119] *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) (concluding that the NEA is entitled to "fund particular projects for a wide variety of reasons, 'such as the technical proficiency of the artist, the creativity of the work, the anticipated public interest in or appreciation of the work, the work's contemporary relevance, its educational value, its suitability for or appeal to special audiences (such as children or the disabled), its service to a rural or isolated community or even simply that the work could increase public knowledge of an art form'").
[120] *Id.*

C.Focus

Thus, it is essential to tailor any press subsidy in a way that safeguards the press's independence. But this obviously is not the only goal. We also want the subsidy to be as effective as possible in creating the relevant positive externalities, while also being administrable. We do not want it to be easily diverted to other uses.

An ideal subsidy, then, would channel one hundred percent of its funding to high quality reporting on issues of public concern. The funding would not be diverted to tabloids, or to other uses within a press organization, such as raises for the advertising staff. An ideal subsidy would not fund opinion journalism, which is thriving in the blogosphere, or sports and entertainment coverage, which do not generate positive externalities to the same extent as political or business news. Likewise, an ideal subsidy also would be costless to administer, so that resources are not diverted to implement the program.

This Article uses the term "focus" to describe the extent to which the subsidy approaches this ideal by directing dollars to the relevant positive externalities, instead of in these various other directions (i.e., tabloids, expenses other than reporting, etc.). Obviously, this ideal is not fully achievable. For instance, it would be exceedingly difficult for a subsidy program to distinguish reporting from opinion journalism, and any attempt to do so would be costly to administer. Yet although no subsidy will achieve this ideal, some will come closer than others, and it is useful to compare them on this dimension.

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

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

Likewise, the government will be hard pressed to anticipate all the scenarios that either deserve, or do not deserve, to be subsidized. For example, new technologies are constantly being developed, but government officials are not well positioned to determine which technologies to support, and government programs do not always change with the times. Indeed, one of the most important press subsidies already in place – the

discounted postal rate for newspapers sent through the U.S. mail[121] – favors perhaps the most primitive method of delivering content, while providing essentially no value to the web-based press. Instead of this backward looking subsidy, we should favor ones that are at least neutral as to new technology.

Similarly, it will be difficult for the government to anticipate which types of coverage to support, and to define these categories with precision. It would certainly be desirable, for example, to support only high quality press organizations, but not all stories are broken by *The New York Times*. John Edward's affair, for example, was exposed by the *National Inquirer*. Defining which news organizations offer high quality reporting is a difficult mission, even aside from the risk, discussed above, that such authority could be abused.

Nor will it always be easy to decide which stories qualify as issues of public concern. What about the Tiger Woods scandal? The story certainly had the flavor of gossip about a sports figure, but it also had important implications for the economics of the PGA tour, the media firms that cover it, and the companies that had hired Woods to advertise their products and services.

It is quite a challenge, then, to design a subsidy that is neither over- nor under-inclusive, is inexpensive to administer, and also preserves press independence. There will inevitably be tradeoffs. To focus the subsidy more effectively, we might want the government to vet the quality of the news organization[122] and perhaps even the importance of the particular story to be subsidized. Yet such an active role for government raises questions about press independence, as well as about the government's capacity to make this sort of judgment effectively.

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

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

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[121] *See generally* RICHARD JOHNS, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE (1995)

[122] David Scharfenberg, *Aiding Tomorrow's Journalists Today*, BOSTON GLOBE, Feb 2, 2009 (advocating a $100 mil federal fund to seed low-cost Internet news organizations).

D. Political Plausibility

To be implemented, a press subsidy needs political support. Yet many journalists in the United States are uneasy about a government subsidy, fearing it will undercut their independence.[123] Owners, meanwhile, will consider the effect of any subsidy on their ownership interests' value, something that could vary with a subsidy's structure. For example, owners will not be interested if a subsidy is available only if they surrender their interest (e.g., to the government or to a nonprofit). As the economic condition of news organizations become increasingly precarious, though, journalists and owners are likely to reconcile themselves to some sort of subsidy.

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

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

For these reasons, a subsidy that is tailored narrowly for news organizations is less likely to pass than a program that is offered more broadly, so that the press is allied with other interest groups in lobbying for it. For example, a tax cut for journalists only (e.g., so that their wages are taxed at capital gains rates, or their capital equipment is subject to especially favorable depreciation rules) is politically implausible.

Likewise, an incremental change to a program that already exists is likely to be easier politically than launching something new. For example, a modest increase in the postal subsidy is probably easier than launching a new program. Easier still would be a refinement in the rules for nonprofits, such that newspapers could make broader use of this existing tax benefit. In this spirit, a change in regulations is likely to be easier than a change in legislation. Obviously, anything that can be done under current law, requiring no changes in law of any kind, is easier still.

III. News Organizations as Tax Exempts

In light of these various criteria, subsidies are not all created equal. They offer different mixes of costs and benefits. Some are more successful at securing the press's

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[123] BOLLINGER, supra note 13, at 132 ("there is . . . at least among print journalists, a sense that government funding is antithetical to the spirit of an independent press"). See, e.g., Lipsky, *supra* note 106 (expressing strong opposition to subsidies for the press).

independence, while others focus more precisely on generating positive externalities, and still others are more plausible politically. Part III offers the principal recommendation of this Article, which is for news organizations to make greater use of the nonprofit form, modeling themselves on other great cultural institutions such as universities and museums.

News organizations collect this subsidy in the form of two tax advantages. First, as tax exempts, they can accept tax-deductible contributions, which means that the government in effect matches private contributions (i.e., by reducing the tax bill of those who give, thereby encouraging them to give more). Second, to the extent that tax exempt news organizations earn a profit – less likely in today's environment, but still a possibility – they are not subject to corporate tax.

In general, to qualify for these tax benefits, a news organization must pursue one of the exempt purposes listed in Section 501(c)(3); the closest fit is "educational," which the regulations define to include "instruction of the public on subjects useful to the individual and beneficial to the community."[124] A press organization that pursues this educational purpose has to pass two further tests. The first, the "organizational" test, requires the organization's articles of organization to limit it to this educational mission.[125] The second, the "operational" test, generally requires the organization to focus on its exempt purpose, not to generate "private benefits" for its economic stakeholders, and not to engage in lobbying.[126]

An important caveat is that even if a news organization satisfies these tests, some of its revenue – most notably, advertising revenue – still will be taxable as "unrelated business taxable income" or so-called "UBTI." Income is classified as taxable UBTI if it derives from a business that is not "substantially related" to the organization's exempt purposes (in this case, educating the public),[127] such that it does not "contribute importantly to the accomplishment" of this purpose.[128] Under this standard, it is well settled that subscription revenue is tax exempt (i.e., not UBTI).[129] Revenue from charitable contributions obviously is tax exempt as well. In contrast, advertising revenue generally is taxable as UBTI because it is too removed from the nonprofit's educational mission. Although ads furnish information, their purpose ordinarily is to sell products,

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[124] Treas. Reg. 1.501(c)(3) – 1(d)(3)(b). The government has ruled a number of times that organizations can pursue their educational purpose under Section 501(c)(3) by publishing their findings and analyses. *See* Rev. Rul. 67-4, 1967-1 C.B. 121 (organization engaged in publishing scientific and medical literature qualifies for tax exempt status); *see also* Rev. Rul. 74-615, 1974-2 C.B. 165 (exempt organization that monitors quality of press coverage periodically publishes its findings); Rev. Rul. 66-255, 1966-2 C.B. 210 (exempt organization uses publications to educate public about particular method of painless childbirth); Rev. Rul. 72-228, 1972-1 C.B. 148 (exempt organization publishes handbook on equal rights for women as part of its efforts to combat discrimination against women).
[125] Treas. Reg. 1.501(c)(3) – 1(b).
[126] Treas. Reg. 1.501(c)(3) – 1(c).
[127] Treas. Reg. 1.513-1(a). To be taxed as UBTI, the income must also be from a trade or business that is carried on regularly. Id.
[128] Treas. Reg. 1.513-1(d)(2).
[129] Treas. Reg. 1.513-1(d)(4)(i) (example 6) (sale of subscriptions by a professional journal does not give rise to UBTI).

rather than to inform.[130] Yet this revenue can be sheltered, to an extent, with deductions associated with generating this revenue.[131]

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

A. *Independence and Constitutionality*

As I have written elsewhere, the deduction for charitable contributions is a way of privatizing the allocation of funding for public goods, so the government piggybacks on the judgments of private philanthropists.[132] Beyond making judgments about the broad category of activities that can receive tax deductible contributions, the government is not involved in allocating funds.

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

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[130] As a result, ad sales by a nonprofit publication do not contribute importantly to the publication's educational mission, and are thus offered in regulations as an example of UBTI. Treas. Reg. 1.513-1(d)(4)(i) (examples 6 & 7) ("While the advertisements contain certain information, the informational function of the advertising is incidental to the controlling aim of stimulating demand for the advertised products . . . "). Interpreting this regulation, the Supreme Court has held that advertising revenue is UBTI even if the nonprofit publication, in this case a scholarly journal of internal medicine, accepts "only advertisements containing information about the use of medical products, and screens proffered advertisements for accuracy and relevance to internal medicine." *See United States v. American College of Physicians*, 475 U.S. 834, 835 (1986). The Court emphasized that the journal's goal was commercial, rather than educational, as evidenced by the fact that "[t]hose companies willing to pay for it got it; others did not." Id. at 853. This sort of commercial standard will apply to almost all advertising revenue generated by a nonprofit news organization, so it almost always will be UBTI. But the Court concluded that the regulation does not provide a *per se* rule. "By coordinating the content of the advertisements with the editorial content of the issue, or by publishing only advertising reflecting new developments in the pharmaceutical market, for example, perhaps the College could satisfy the stringent standards erected by Congress and the Treasury." *Id.* at 854. It will be rare, I suspect, for nonprofit news organizations to show that their advertising is educational in this way. One (relatively uncommon) example, offered by the IRS, is the revenue a legal publication receives "in publishing legal notices, as required by the state in connection with legal proceedings such as the administration of estates." This revenue is not UBTI because the "purpose [of this advertising] is to inform the general public of significant legal events rather than to stimulate demand for the products or services of an advertiser." IRS PUBLICATION 598, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATIONS 5 (March 2010).

[131] To the extent that ad revenue is deemed to be UBTI, the IRS has offered guidance about how to allocate deductible expenses to offset this income. ." IRS PUBLICATION 598, TAX ON UNRELATED BUSINESS INCOME OF EXEMPT ORGANIZATIONS 10-13 (March 2010).

[132] *See generally* Schizer, *supra* note 7.

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

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

A notable example of this risk – and, ultimately an important bulwark against it – is *Big Mama Rag, Inc. v. United States*.[133] In that case, a publication focused on women's issues was denied tax exempt status. According to the publication's counsel, IRS officials said at an early stage in the process that the publication could be approved only if the organization "agree[d] to abstain from advocating that homosexuality is a mere preference, orientation, or propensity on par with heterosexuality and which should otherwise be regarded as normal."[134] Eventually, more senior IRS officials offered a different theory. In denying the application, they relied on a Treasury Regulation providing that a publication could not be "educational" – and thus did not have the necessary charitable purpose – if it "advocates a particular point of view" and does not "present a sufficiently full and fair exposition of the pertinent facts." In other words, a so-called "advocacy" publication had to pass an extra test, showing that it did not offer "unsupported opinion" but instead offered a "full and fair exposition" of issues it was covering.

Although the district court affirmed the IRS's judgment, the DC Circuit reversed, striking down the regulation's "full and fair exposition" test as unconstitutionally vague. "Applications for tax-exemption must be evaluated on the basis of criteria capable of neutral application," Judge Mikva wrote. "The standards may not be so imprecise that they afford latitude to individual IRS officers to pass judgment on the content and quality of the applicant's views and goals and therefore to discriminate against those engaged in protected First Amendment activities."[135] *Big Mama Rag*, therefore, serves as an important safeguard for the independence of nonprofit news organizations under current law, keeping the government from conditioning tax-exempt status on viewpoint.

The government can still exclude some press organizations from tax exempt status, as long as the criteria are clear and unrelated to viewpoint. For example, the publication could be required to dedicate a minimum percentage of its column inches to issues of public concern, as opposed to advertising or other types of coverage. Yet the more lines we ask the government to police, the greater the risk of abuse. For example, in principle the government could limit the subsidy to reporting, instead of editorializing.

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[133] 631 F.2d 1030 (DC Cir. 1980).
[134] *Id.* at 1040.
[135] *Id.* at 1040.

Yet even if this line would pass constitutional muster – and there is reason to believe it would not[136] – it would be difficult to administer, and might be invoked selectively against critics of the government.

B. *Focus*

While tax-exempt status assures news organizations a stream of government revenue that is unlikely to compromise their independence, it is worth asking whether there will be enough revenue. Also, will this revenue be used in the right way?

It is encouraging that news nonprofits are already attracting significant support, including $128 million from foundations between 2005 and 2009.[137] To raise additional money, these organizations will have to invest more in fundraising infrastructure, something that is beginning to happen as well.[138] One can imagine billionaires making substantial contributions[139] and also large numbers of readers making small donations, paralleling the "major gift" and "annual fund" efforts of universities, museums, and the like.

The potential of nonprofit news organizations is further demonstrated by successful precedents already in existence. Perhaps the most notable is National Public Radio, which attracts 40% of its budget from foundation and corporate sponsors.[140] Other well known news nonprofits include *Harper's Magazine*, *Foreign Affairs*, *Foreign Policy*, *Washington Monthly*, *Ms. Magazine*, *Mother Jones*, *Consumer Reports*, and *National Geographic*.[141]

One advantage of this subsidy model is that it is neutral as to new technology. Unlike the postal subsidy, which applies only to print editions, tax exempt status is equally available to print, online, radio, and television journalism. Indeed, some of the most promising online startups are tax exempts, including *Voices of San Diego*, which has a dozen reporters focusing on local investigative and beat reporting, receives 100,000 hits per month, and has a $1 million annual budget.[142] "We don't count on mass traffic, but rather a level of loyalty," said publisher Scott Lewis. "We're seeking loyal people like those who give to the opera, museums, or the orchestra because they believe they

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[136] *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (holding that Congress could not condition federal funding on whether broadcasters engaged in editorializing).
[137] Downie & Schudson, *supra* note 12, at 64 (describing results of study by J-Law at American University).
[138] For example, "Investigative News Network" was formed in 2009 to help news nonprofits collaborate on fundraising, legal matters, and other administrative functions. Downie & Schudson, *supra* note 12, at 47-48. Likewise, websites have been formed to bring donors and freelancers together. *Id*, at 64 (describing "Spot Us," which as raised $40,000 from over 800 people for 30 stories).
[139] David Swensen & Michael Schmidtz, *News You Can Endow*, N.Y. TIMES, Jan. 27, 2009 (calling on "enlightened philanthropists" to endow great newspapers); Steve Coll, *Nonprofit Newspapers*, NEW YORKER, Jan. 28, 2009 (former managing editor of *Washington Post* argues that $2 billion endowment could secure future of its newsroom).
[140] MEYER, *supra* note 12, at 225.
[141] Lewis, *supra* note 12, at 34; Pickard, Stearns & Aaron, *supra* note 12, at 14.
[142] Downie & Schudson, *supra* note 12, at 35-36.

should be sustained."[143] A similar model is used by *Minnpost*,[144] the *St Louis Beacon*,[145] *Real News Project, Inc.*,[146] the *Center for Investigative Reporting*, and the *Center for Public Integrity*,[147] among others.

Will the subsidy find its way to the highest quality news outlets? To determine which organizations receive government funding, this model relies on donors, instead of on readers, government officials or a government-appointed board of experts. Although donors will vary in their sophistication, the fact that they are investing their own money will focus their minds, motivating them to think carefully about which organization deserves their support.[148]

This process not only prevents the government from influencing media outlets, but also promotes diversity. Unlike a political process, which tends to empower the median voter, the charitable deduction empowers any individual – including someone with views outside of the mainstream – to direct government funds to her cause of choice, merely by making a contribution.[149]

Notwithstanding these advantages of the nonprofit form, which help the subsidy to be more focused, this structure has disadvantages as well. One limitation is that the size of the subsidy is determined, somewhat obliquely, by the donor's marginal tax rate. Every time a donor contributes a dollar, the government contributes the amount of tax it otherwise would have collected on this dollar. If the marginal tax rate is 35%, then that is the share borne by the government.[150] In determining the tax rate, the government considers many factors, including its effect on the willingness of taxpayers to work, the political environment, the government's revenue needs, and the desired distribution of tax burdens. But one factor that is never considered is the level of government support needed both to motivate, and to supplement, private contributions to news organizations. As a result, there is no particular reason to think that the subsidy is set at the optimal level. In theory, as I have written elsewhere, the level of government support provided to particular charities can be calibrated more precisely – for instance, through a tax credit that can be set at different levels for different types of charities. Yet it is doubtful that the government has the information and expertise to find this optimal level[151] and, in any event, it is politically implausible for Congress to single out news organizations for special treatment.

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[143] *Id*. at 36.
[144] *Id*. at 40. ("sustaining support must come from readers through donations, big and small, like museums, orchestras, and other community cultural necessities") (quoting founder Joel Kramer).
[145] *Id*. at 38-39.
[146] Form 1023 on file with author.
[147] Lewis, *supra* note 12, at 34-35.
[148] Schizer, *supra* note 7.
[149] *Id*.
[150] To be precise, if the donor contributes appreciated stock, the government's share is somewhat higher, reflecting the fact that the taxpayer never pays capital gains tax on the built-in appreciation in the stock.
[151] See Schizer, supra note 7.

A further limitation of this subsidy structure is that tax-exempt news organizations would be barred from an important function performed by for-profit newspapers: the endorsement of political candidates. This would almost surely be viewed as an impermissible "attemp[t] to influence legislation."[152] This result is unfortunate, since the endorsement of candidates is a valuable function, but changing it would require us to amend Section 501(c)(3).[153]

One risk inherent in this subsidy model is a different threat to independence: the concern that donors will inappropriately influence which stories are covered and which viewpoints are expressed. This risk needs to be managed properly, but it is not especially different from the risk posed by advertisers.[154] It also is less dangerous than government control over the allocation of funds. Donors are easier to defy because, like advertisers, there are many of them, whereas there is only one federal government.

Even so, procedural safeguards are needed. For example, press organizations should disclose who their donors are, so that readers will know of potential conflicts. If a particular story has been supported by a donor, this should be disclosed as well. This issue arose recently when the *Washington Post* ran a story about budget deficits, but failed to disclose that the nonprofit working with them on the story was funded by Peter G. Peterson, a prominent public critic of deficits.[155]

Although donors should not be allowed to influence viewpoint, their preferences to support particular content generally can be accommodated,[156] just as donors to universities are allowed to support particular types of programs. Giving donors this control is likely to inspire greater donations. Although there is a risk that only "sexy" topics will draw donor support, advertising and subscription revenue can fill in the gaps. NPR seems to strike the right balance. "Grants narrowly restricted to coincide with a donor's economic or advocacy interest are not allowed," Philip Meyer has written of NPR. "However, funders can suggest broad themes, and the news director puts out a wish list of projects that NPR would like to do if funders find them worthy."[157]

Ideally, the subsidy would support only externality-generating activities, but this is difficult to achieve. Contributions might support not just reporting on issues of public concern, but other expenses of the news organization, including salaries for advertising staff, printing press operators, gossip columnists, sports reporters, and the like. In this

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[152] FTC Staff Discussion Draft, supra note 12, at 25 (quoting one panelist as saying that political endorsements are "an absolute no, no for 501(c)(3). It's not even a gray area").
[153] Schmalbeck, supra note 13, at 12.
[154] MEYER, *supra* note 12, at 226 ("So let us be blunt. Allowing charitable foundations to pay for the news might be risky , but it is probably no worse than a system in which advertisers pay for it.").
[155] Richard Perez-Pena, *Sourcing of Article Awkward for Paper*, N.Y. TIMES, Jan 6, 2010, at B3 (describing controversy when *Washington Post* ran story prepared by Fiscal Times, funded by Peter G. Peterson).
[156] Franklin Foer, Tom Freedman, & Elizabeth Wilner, *How a Philanthropic Network Can Save Journalism*, CHRON. OF PHILANTHROPY (Feb 26, 2009) (noting that philanthropists might find it appealing to be able to post on Website, that serves as online intermediary, "topics of which they would like to sponsor coverage").
[157] MEYER, *supra* note 12, at 225-26

way, the tax-exempt model is less focused than, for instance, a tax credit or government grants targeted at the cost of hiring additional reporters.

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

The first alternative, the "nonprofit newsroom," is an independent entity that engages only in reporting, but does not actually publish a newspaper. Instead, it shares its stories at with other news organizations.[158] *Pro Publica*, the best known example of this type of organization, was the first online news organization to win a Pulitzer prize, which it shared with the *New York Times* in 2010.[159] *Pro Publica* is funded in part with a $30 million gift from Herbert and Marion Sandler. It has three dozen reporters and has given stories (at no charge) to the *N.Y. Times*, the *Washington Post*, the *Los Angeles Times*, the *Chicago Tribune*, the *Denver Post*, CNN, ABC, CBS, NBC, WNYC Radio, and *Huffington Post*.[160] After giving these news outlets a period of exclusivity, Pro Publica then publishes its stories on its own website. Since *Pro Publica* engages only in reporting about issues of public concern, donor contributions and government resources are focused effectively on these externality generating activities (with only modest amounts diverted to the organization's overhead).

The second alternative is to segregate externality-generating activities into a separate entity that, unlike *Pro Publica*, actually is affiliated with a particular for-profit news organization. The *N.Y. Times*, for example, could create a nonprofit affiliate that accepts tax-deductible contributions to support beat and investigative reporting on issues of public concern. The nonprofit affiliate could also focus even more narrowly, for instance, on international news or on covering state and local government. Although the *Times* obviously has not taken this step, *Huffington Post* has created the *Huffington Post Investigative Fund*, a legally separate nonprofit with a dozen investigative journalists.[161] The *Watchdog Institute* has a similar relationship with the *San Diego Union-Tribune*.[162]

Under current law, this sort of joint venture between a for-profit and a nonprofit is scrutinized to ensure that the for-profit is not deriving a "private benefit" from the

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[158] The government has ruled that a nonprofit can distribute its work product through for-profits without jeopardizing its nonprofit status. *See, e.g.*, Rev. Rul. 74-587, 1974-2 C.B. 162 (exempt organizations can distribute their work through for-profits as long as the for-profits are merely "instruments by which the charitable purposes are sought to be accomplished"); Rev. Rul. 67-342, 1967-2 C.B. 187 (nonprofit that produces educational films can distribute them on commercial television without jeopardizing nonprofit status); *see also* Rev. Rul. 68-489, 1968-2 C.B. 210 (organization does not jeopardize exemption even though it distributes grants to nonexempt organizations); Priv. Let. Rul. 9223054 (nonprofit could make grant to for-profit foreign newspaper to help it obtain news service).
[159] Reuters, *Online Site Wins Journalism Firsts at Pulitzers*, N.Y. TIMES, Apr. 13, 2010.
[160] Downie & Schudson, *supra* note 12, at 40-41.
[161] *Id*, at 58.
[162] *Id*, at 38.

nonprofit.[163] To avoid this problem under current law, the nonprofit has to share its stories with other press organizations, and not just with its for-profit affiliate. This is somewhat awkward, since the *Washington Post* might be reluctant to run a story if doing so requires them to credit the *N.Y. Times* tax exempt affiliate, and the *Times* itself will be unenthusiastic about sharing scoops with rivals. Yet the appeal of deductible contributions should motivate news organizations to overcome this hurdle, and obviously these organizations already are willing to credit wire services such as the *Associated Press*, at least for minor stories. Even so, in theory it is tempting to encourage the government to scrutinize news organizations less carefully for private benefits in order to avoid this problem, although that would be difficult for the IRS to do, since it would set a precedent that could be problematic in other contexts.

C.Political Feasibility

An important advantage of the tax-exempt model is that it is politically feasible. This approach already is available, to a significant extent, under current law. The nonprofit form is already being used by independent newsrooms specializing in investigative reporting, such as *Pro Publica*, as well as by National Public Radio and a range of websites and public affairs magazines.[164] The fact that no change in law is needed in order for this approach to come into wider use means that there is no need to sell the public on a bailout for news organizations. Unlike with other subsidy models, it is not necessary to single out news organizations for special treatment or to authorize a separate budget line for subsidizing them. The relevant tax benefit exists under current law, and is offered not just to news organizations, but to a broad class of institutions, from religious organizations and universities to orchestras and museums.

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

> (1) [T]he content of its publication is educational, (2) the preparation of material follows methods generally accepted as "educational" in character, (3) the distribution of the materials is necessary or valuable in achieving the organization's educational or scientific purposes, and (4) the manner in which the distribution is accomplished is distinguishable from ordinary commercial publishing.[165]

Although the first three elements of this test should not be difficult to satisfy for news organizations that cover issues of public concern, the fourth – the need to distinguish its distribution efforts from those of for-profit news organizations – is a potential sticking

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[163] *Plumstead Theatre Society, Inc. v. Commissioner*, 74 T.C. 1324 (1980) (permitting, but scrutinizing, joint venture between not-for-profit and for-profit); GCM 39005 (1983) (monitoring joint venture to ensure for-profit is not deriving private benefit).
[164] See text accompanying notes 140 to 147.
[165] Rev. Rul. 1967-4, 1967-1 C.B. 121.

point. This was the theory offered in a 1977 revenue ruling denying exempt status to a full service newspaper: Without offering details to illuminate its reasoning, the government held that its operations were "indistinguishable from ordinary commercial publishing practices. Accordingly, it is not operated exclusively for charitable and educational purposes."[166]

To differentiate themselves from for-profits, nonprofit news organizations can find guidance in rulings and cases distinguishing nonprofit and for-profit hospitals. There is no magic bullet, since both types of hospitals engage in similar activities.[167] To determine whether a hospital is pursuing commercial goals or the public good, courts look at the totality of the circumstances. Does the hospital provide care to patients who cannot pay? Does it distribute excess earnings or reinvest them in treatment and research? Is the hospital run by a board controlled by independent representatives of the community?[168] By analogy, a news organization can strengthen its case for exempt status by charging less than its costs for its stories,[169] by prioritizing stories based on their relevance to the public good instead of their commercial potential, by reinvesting any excess earnings in its journalistic mission instead of distributing them, and by having community representatives instead of economic stakeholders on its board of directors.

A boutique dedicated solely to investigative journalism, such as *Pro Publica*, can adopt these features more easily than a full service news organization. The latter will have a broad range of stories, including ones with commercial appeal, and will secure a significant volume of its revenue from advertising.[170] It is not clear that a full service news organization can qualify as a nonprofit under the government's 1977 ruling.[171] Senator Ben Cardin has proposed legislation to ensure this result,[172] but guidance from the IRS would render legislation unnecessary.[173]

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[166] Rev. Rul. 77-4, 1977-1 C.B. 141.

[167] Schmalbeck, *supra* note 13 (noting that for-profit and nonprofit hospitals are "not distinguishable except by reference to whether their managers were seeking to make a profit"); *see also Goldsboro Art League v. Commissioner*, 75 T.C. 337 (1980) (holding that art gallery could be treated as not-for-profit even though its activities resembled activities of for profit). Schmalbeck, *supra* note 13, at 10 (discussing *Goldsboro*).

[168] *See* Rev. Rul. 69-545, 1969-2 C.B. 117; *St David's Health Care System v. United States*, 349 F. 3d 232 (5th Cir. 2003) (describing so-called "community board" standard).

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

[170] Advertising revenue generally will be UBTI, see *supra* text accompanying notes 129 to 131, and an organization's tax exempt status can be called into question if too high a percentage of its revenue constitutes UBTI.

[171] Schmalbeck, supra note 13, at 19 ("There does not appear to be a definitive answer to this question [of whether a metropolitan daily would qualify for exempt status]. The IRS position . . . is generally negative.").

[172] *See* Benjamin L. Cardin, *A Plan to Save Our Free Press*, WASH. POST, April 3, 2009. One change from current law that Senator Cardin advocates is treating advertising revenue as tax exempt, instead of as UBTI. *Id.* ("Advertising and subscription revenue would be tax exempt . . . "). For full text of bill, see http://cardin.senate.gov/pdfs/newspaperbill.pdf.

[173] Schmalbeck, *supra* note 13, at 21 ("Unilateral declaration by the IRS, in the form of a ruling, would almost certainly be enough.").

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

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

Another way to preserve for-profit ownership while allowing the news organization to benefit from tax-deductible contributions, at least from foundations, is the so-called low-profit limited liability company, or L3C. This approach offers a different way to separate for-profit owners from nonprofit supporters. Instead of housing the activities they support in different entities – the approach of the "affiliate" model, discussed above – the L3C houses all these activities within a single entity, but one that has a tiered capital structure. The most junior capital comes from foundations in the form of program related investments.[174] This model has the advantage of avoiding the private benefit issue, discussed above, that is inherent in pairing a for-profit with a separate tax-exempt entity. But unlike the pairing of for-profit and tax-exempt affiliates, the L3C does not focus the government subsidy on externality-generating activities, since all activities of the news organization would be conducted through the L3C. Also, although the L3C could accept contributions from foundations, it could not accept tax-deductible contributions from individuals.[175] In any event, until the IRS gives guidance that news organizations qualify for program-related investments, the L3C model is unlikely to come into broad use.

IV. Other Subsidy Models

Although organizing newsrooms as tax-exempts is a promising approach, other subsidy models have their own advantages, and reasonable minds can disagree about which mix of costs and benefits is most desirable. Part IV discusses four other possibilities: tax credits for hiring additional reporters; subsidies allocated by readers; government grants to privately owned news organizations; and publicly-owned news organizations. The judgment about which model to favor depends in part upon on our priorities, as well as on empirical questions about the extent of the tradeoffs among these priorities. The optimal strategy, moreover, is not necessarily to choose only one

[174] *See* Pickard, Stearns & Aaron, *supra* note 12, at 16 (describing L3C as "compelling alternative").
[175] Although in theory the foundation could accept some contributions from individuals, it generally is limited in its ability to do so, at least while maintaining its status as a private foundation.

alternative. There may be wisdom in managing tradeoffs by employing multiple approaches, so that different goals are pursued in various ways.[176]

A. Tax Credits For Hiring Additional Reporters

One alternative is a tax credit to offset the cost of hiring more reporters. Under this approach, if a news organization increases the number of reporters on staff (or, alternatively, the total payroll for reporters), it would receive a tax credit covering a portion of this incremental cost. Such a tax credit would be modeled on the research and development credit currently in the tax code, which also encourages incremental expenditures.[177] As we shall see, this approach is strong on preserving press independence. In theory, it also is particularly effective at encouraging additional positive externalities (i.e., by inducing growth in the volume of reporting). In practice, though, this approach offers limited quality control and would be difficult to administer. In providing unique and salient benefits to journalists, moreover, this approach probably is politically implausible.

1. Independence and Constitutionality

If the government plays a passive role in allocating the credit, this approach is effective at safeguarding independence. In this spirit, the government would make the tax credit available to any company that qualifies under a broad definition of "news organization" and is hiring reporters who cover "issues of public concern" (or, if a narrower category is desired, international news, state and local government, or any other favored category). The government would then exercise no discretion about which qualifying organizations can claim the subsidy.

Yet under this approach, quality control is limited. The credit would be available to any qualifying news organization hiring additional reporters who will cover the designated set of issues. The *Weekly World News* would be on par with the *New York Times*, as long as it can pay its share of the new reporters' salaries. Unlike the tax exempt model, this approach does not allow the government to piggyback on the judgment of charitable donors. Instead, the government can piggyback, to an extent, on the judgment of readers and advertisers, since a news organization cannot afford to pay even *some* of the cost of new reporters unless it has some subscription and advertising revenue. Yet this positive signal about quality probably is not as strong as the one a donor sends in making a charitable contribution; someone who donates money to a publication is likely to be especially devoted to it. In theory, of course, the government could play a more active role in screening for quality, but this creates greater risks to press independence, as discussed above. Either way, there should be no issues about the constitutionality of the program.

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[176] Lee Bollinger makes a similar point about using different regulatory models for print and broadcast journalism. See BOLLINGER, *supra* note 13, at 64 ("Having multiple approaches to the conflicting benefits and risks or a wholly independent press is the best way to achieve our ultimate goal of creating an overall press that is both robust and responsible to the public good.").

[177] *See* Section 41.

2. *Focus*

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

An important advantage over the nonprofit model, moreover, is that it can, at least in principle, be structured to motivate news organizations to hire *more* reporters, and not only to keep the ones they have. The idea is to cover a portion not just of the cost of *all* reporters, as Professor Ed Baker has proposed, but to cover the cost of *new* reporters.[178] This should create an incentive, at the margin, to *increase* the overall level of externality-generating reporting.

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

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

More generally, the credit would encourage news organizations to backload their new hiring, in order to show the necessary increases over time. There are other ways to manipulate the credit, depending upon whether it is based on the total number of reporters, or the total dollar level of their payroll. For example, if the latter trigger is used, then the credit could fund raises for existing reporters, instead of an increased number of reporters. If instead the credit turns on the number of reporters, then organizations would have an incentive to fire more experienced (and expensive) reporters and replace them with a larger number of more junior reporters at the same payroll cost. Either way, there will be pressure on the definition of "reporter," since news organizations will want to reclassify every new hire as having this status, including photo journalists, columnists, editors, and the like. All of this will add administrative costs to the system, imposing compliance burdens on taxpayers and requiring the government to monitor and refine the rules.

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[178] Testimony of C. Edwin Baker Before House Judiciary Committee, Apr. 21, 2009, *posted at* http://judiciary.house.gov/hearings/pdf/Baker090421.pdf.

It is worth emphasizing, moreover, that these burdens would add expense and complexity to the tax system, in pursuit of goals that are unrelated to that system's core mission of generating revenue. Using the tax system in this way is quite controversial among academics, although it obviously has become increasingly common in recent years, as new tax expenditures for a broad range of policy purposes have been added to the tax code.

A particular problem with this tax expenditure is that it could be claimed only by press organizations that are otherwise profitable enough to pay taxes. Yet many news organizations are losing money, so that tax savings is not high on their list of priorities. One way to address this concern is to make the credit refundable (so that the government makes payments even to news organizations with net losses), and another is to make it transferable (so that news organizations can in effect sell the tax credit to investors). By analogy, the low income housing credit is structured so that financial investors receive tax credits in return for investing, and perhaps an analogous market could develop here.[179]

3. Political Feasibility

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

Yet unlike the nonprofit model, this program requires a change in law. It also has the singular disadvantage of being for journalists alone. Unlike the tax-exempt model, which applies to a broad range of activities and thus is protected by a coalition of interest groups, this program is specific to news organizations. A "low income housing" model would be a somewhat easier sell, since financial investors who could benefit from the credit would join news organizations in petitioning for its enactment. Yet it still requires far more political support than the nonprofit model, which is already feasible under current law.

B. ***Subsidies Allocated by Readers***

Another model is a subsidy allocated by readers. The French government, in a program called Mon Journal Offert or "my complimentary paper," offers 200,000 18- to 24-year olds a yearlong subscription to the newspaper of their choice.[180] The US government could adopt a similar program, for example, through a tax credit for subscriptions to newspapers or websites (presumably for every household, not just for 18- to 24-year olds). Or, similarly, the U.S. government could allow taxpayers to direct federal money to the media outlet of their choice by checking a box on their tax return,

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[179] *See* Section 42. I thank Jack Coffee for this insight.
[180] John Tagliabue, *Daily Paper for Children Defies the Craze for Digital*, N.Y. TIMES, Jul. 26, 2010.

just as taxpayers can choose to support political parties in elections.[181] Yet these approaches pose their own tradeoffs between independence and focus, and are politically implausible in the United States.

1. Independence and Constitutionality

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

2. Focus

Although this program has the advantage of being neutral as to technology and of allowing the government to piggyback on the preferences of readers, it would lead to considerable waste for four reasons. First, the program would not control how the news organization uses any extra revenue that it receives. There is no assurance, for example, that the press would use it to hire more reporters. Second, if the government plays no role in deciding which news organizations can be supported, there obviously is a risk of financing low quality news organizations. Although there is a similar issue under the tax exempt model – since donors under that program could support low quality news organizations with tax-deductible contributions – the risks are probably greater here. Even those who would take seriously where they direct their charity are likely to spend less time, or to prioritize different values, in deciding what publication to buy at government expense or which to support through a check off that requires no matching money from them. Of course, we could address this problem by empowering the government to designate a list of approved news organizations, but this would pose greater risks to press independence. Third, fraud can be an issue when the government offers a credit for relatively small expenditures. Finally, if the subsidy funds subscriptions, it could end up financing a large number of subscriptions that would have been purchased anyway.[182] In these cases, the subsidy would not increase the revenue of news organizations, but would merely increase the discretionary income of inframarginal subscribers.

3. Political Feasibility

Like the tax credit for hiring reporters, this subsidy requires a change in law and supports only journalists. As a result, this approach is much less plausible politically than the tax-exempt model, which s available, to a significant degree, under current law.[183]

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[181] McChesney and Nichols recommend this approach, which they call "Citizenship News Vouchers." MCCHESNEY & NICHOLS, *supra* note 12, at 201-06.

[182] This risk is not presented if the taxpayer does not receive anything in return – as in the "Citizenship News Voucher" program.

[183] Indeed, Paul Starr gives Sarkozy's program no chance of being enacted in the United States. "In America this would be a joke," Starr wrote, "though depending on how many teenagers chose one of our

C. ***Government Grants***

Still another model is for the government to give grants to support investigative journalism and beat reporting at selected private media outlets. This sort of direct subsidy for the press is common in Europe.[184] It also resembles other federal programs.[185] For example, the Corporation for Public Broadcasting awards $400 million per year to fund overhead of public radio and TV stations and some programming,[186] but virtually no investigative reporting.[187] Another alternative would be to provide grants to young journalists, and then to place them at selected press outlets.[188]

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

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

1. Independence and Constitutionality

Allowing the government to allocate this funding obviously puts pressure on press independence. The extent of this pressure depends on the details of the program. Who will the decision makers will be? What process will they use? It is not hard to imagine members of Congress wanting to allocate this money themselves, along with other earmarks. Yet involving elected officials directly in this process is problematic. As one commentator put it, once federal funds were committed to public television, "every two-

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racier tabloids, it could give added meaning to the concept of a 'stimulus package.'" Starr, *supra* note 12, at 34.

[184] Downie & Schudson, *supra* note 12, at 72.

[185] For example, the National Endowment for the Humanities gives $ 140 million of grants each year, and the National Endowment for the Arts dispenses $160 million. Pickard, Stearns & Aaron, *supra* note 12, at 26 Likewise, the National Science Foundation has a $6 billion annual budget, while the National Institute of Health awards $28 billion each year. Downie & Schudson, *supra* note 12, at 91.

[186] Downie & Schudson, *supra* note 12, at 28.

[187] *Id*. at 29; *see also* Lewis, *supra* note 12, at 34 (noting that NPR does virtually no investigative reporting).

[188] McChesney & Nichols, *supra* note 12, at 169-70 (advocating inclusion of journalists in AmeriCorps program).

bit politician felt compelled or obliged or somehow able to say, 'I'm not going to vote money for the kind of garbage that fellow is speaking on public television.'"[189]
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Instead of elected officials, we would be better off relying on a board of independent experts like the boards of the NEA and NEH, which are nominated by the President and confirmed by the Senate.[190] But congress and the executive branch would still oversee the process – for example, holding hearings about how the subsidy was being allocated – and they could threaten to discontinue funding if their direction was not followed. The political branches would have further influence through the process of nominating, confirming and reappointing these experts. This political screening would favor politically attuned candidates, and would motivate them to please those who control their reappointment.

This is not to say that the government will inevitably abuse its funding authority. For example, both state and private universities receive a great deal of money from various levels of government but, overall, academics remain quite willing to criticize government policy.[191] Even this context is not wholly immune, though, as evidenced by the recent efforts of state legislators to limit the activities of law school clinics.[192]

In any event, the track record of public funding for broadcasting and the arts is less reassuring. From the beginning, the process periodically has become highly politicized. Within months after the Johnson Administration created public television, as David Stone has written, "Nixon and his closest aids wanted to take control of public television – or get rid of it."[193] Indeed, the Nixon administration ultimately vetoed the CPB authorization bill in 1972, prompting one Senator to charge that President Nixon "would have *Sesame Street* and *Mr. Rogers* as his puppets."[194] There was perhaps "poetic symmetry" in the fact that PBS prominently aired the Watergate hearings,[195] but this act of defiance against a wounded president does not negate the fact that Nixon and his allies in Congress launched a determined and, at least temporarily successful, assault on public television.

Likewise, a political firestorm erupted in 1989 around NEA funding for the homoerotic art of Robert Mapplethorpe, as well as for Andres Serrano's "Piss Christ," a photo of a small plastic crucifix submerged in the artist's urine. In response, a bipartisan group of 23 Senators – including liberals and moderates such as Bob Kerry, Arlen Specter, and Harry Reid – sent a letter to the head of the NEA "to express our outrage and to suggest in the strongest terms that the procedures used by the Endowment to

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[189] See DAVID M. STONE, NIXON AND THE POLITICS OF PUBLIC TELEVISION (1985) (quoting Peter Lasagor).
[190] Pickard, Stearns & Aaron, *supra* note 12, at 26.
[191] BOLLINGER, *supra* note 13, at 133; MCCHESNEY & NICHOLS, *supra* note 12, at xiv.
[192] *See First, They Get Rid of the Law Clinics*, N.Y. TIMES, Apr. 11, 2010. I am grateful to Eva Subotnik for this point.
[193] STONE, supra note 189, at xviii.
[194] *Id.* at 173 (quoting Senator Frank Moss of Utah).
[195] *Id.*

award and support artists be reformed."[196] Serrano "is not an artist, he is a jerk . . . ," said Senator Jesse Helms, "That is all right for him to be a jerk but let him be a jerk on his own time and with his own resources. . . . I also resent the National Endowment for the Arts spending the taxpayers' money to honor this guy."[197] Congress reacted with legislation, discussed above, incorporating a "community values" test in NEA funding decisions.[198]

Similarly, there has been a recurring political battle about whether the Corporation for Public Broadcasting displays political bias in its funding decisions. For example, in 2005 CPB Chairman Kenneth Tomlinson commissioned a controversial study showing liberal bias on the part of CPB-supported programming.[199] In response, congressional Democrats mounted the counter-charge that Tomlinson was imposing Republican ideology on programming. In calling for him to resign, they distributed a "wanted" poster featuring the Muppet Elmo and the caption, "Red Fur May Indicate Communist Leanings."[200] A similar controversy in the 1990's surrounded NPR, prompting it to add more conservative voices.[201]

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

2. *Focus*

On the positive side of the ledger, this model could, in theory at least, empower the government to focus the subsidy more effectively on externality-generating activities. Instead of piggybacking on the judgment of donors or readers, the government could rely on its own designated experts to make judgments about the topics most in need of

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[196] Letter to Mr. Hugh Southern, Acting Chairman, National Endowment for the Arts, Congressional Record, May 18, 2009, http://www.csulb.edu/~jvancamp/361_r7.html (signed by Alfonse D'Amato, Bob Kerrey, Warren R. Rudman, Rudy Boschwitz, Dennis Deconcini, Pete Wilson, Bob Dole, Chuck Grassley, James A. McClure, John Heinz, Wendell Ford, Howell Heflin, Harry Reid, Richard Shelby, John W. Warner, Larry Pressler, Conrad Burns, Tom Harkins, Trend Lott, Jesse Helms, John McCain, Arlen Specter, Steve Symms).

[197] Cynthia Koch, *The Contest for American Culture: A Leadership Case Study on the NEA and NEH Case Study Crisis*, PUBLIC TALK, 2008, *posted at* http://www.upenn.edu/pnc/ptkoch.html (quoting Senator Helms).

[198] *See supra* note 112 and accompanying text.

[199] One of the study's findings was that 92 of the 136 segments run on Bill Moyers's show, *Now*, were critical of the Bush Administration, while none of the others were supportive; they were either neutral or nonpolitical. Paul Farhi, *CPB Liberal Bias Study Flawed, Critics Say*, WASH. POST, July 1, 2005.

[200] Dan Gilgoff, *Bias in Public Broadcasting*, U.S. NEWS & WORLD REP., June 23, 2005, *posted on* http://www.usnews.com/usnews/culture/articles/050623/23cpb.htm.

[201] Downie & Schudson, *supra* note 12, at 73-74.

support, and about which press organizations are most capable of providing high quality coverage. If government grant makers are systematically more effective at making these judgments than donors and readers, then we face a tradeoff between these advantages and the costs to political independence described above.

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

3. *Political Plausibility*

As a result, much depends on what the program would actually look like once it was enacted. Yet there obviously is a threshold question of whether it actually *could* be enacted. The fact that this program would be for journalists only is a challenge, as is the need for a change in law. In this way, a government grants program is less plausible than the tax-exempt model, in which the press uses a benefit already available under current law, while joining a host of other interest groups with a stake in Section 501(c)(3).

If enacted, this initiative could involve the creation of a new bureaucracy, such as a "National Endowment for Journalism."[202] Yet it probably is politically easier to engraft this initiative onto an existing program. As Leonard Downie and Michael Schudson have proposed, the Corporation for Public Broadcasting could be given enhanced funding and a broader mission, such as to support local newsgathering.[203]

F. ***Government-Owned News Organization***

Finally, government resources could be dedicated to news organizations that are owned and operated by the federal government, perhaps modeled on the BBC. Indeed, other commentators have recommended this approach.[204] As with the government grants program, the details here matter in determining how independent this organization would be and how focused it would be on externality generating activities. Yet the challenges here arguably are even greater than with government grants.

1**.** *Independence and Constitutionality*

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

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[202] Pickard, Stearns & Aaron, *supra* note 12, at 27 (describing idea proposed by Eric Klinenberg).
[203] Downie & Schudson, *supra* note 12, at 86-87.
[204] *See, e.g.*, BOLLINGER, *supra* note 13; Pickard, Stearns & Aaron, *supra* note 12, at 45.

board to decide how to dispense government grants to private organizations, we would likewise want an independent board to run a government news organization.

With a government-owned entity, a larger percentage of the budget is likely to come from the government than with a private entity receiving a government grant. If this proves to be the case, the risks to independence are all the greater. In addition, the First Amendment arguably provides less protection. As noted above, the doctrine of unconstitutional conditions applies less strictly when the government is itself speaking, so that the government arguably has more leeway over viewpoint and content with its own employees.[205]

This is not to say that a government-owned press organization must inevitably be captive to the government. The BBC is an important counterexample. Although it is owned by the British Government and supported by British taxpayers, it offers high quality coverage and can be quite critical of British government policy.[206] The BBC's independence is reinforced by the manner in which it is funded, the structure of its board, and the language of its charter, and these features could, in principle, be replicated in the U.S. The fact that the BBC has a designated source of funding – a special tax on television ownership – is helpful to its independence, although the point should not be overstated, since Parliament has the power to repeal the tax or to redirect this funding. The fact that the BBC is governed by an independent board of trustees is also a positive, although again the point should not be overstated, since the trustees are appointed by the government. BBC's charter contains language about its independence.[207] Notably, though, BBC World Service does not have the same formal guarantees of independence. It is funded by the Foreign and Commonwealth Office, instead of by license fees, and it is explicitly directed to consult with Foreign Secretary about "the policies of Her Majesty's Government in its international relations."[208]

In any event, the four press organizations owned and operated by the U.S. government – Voice of America, Radio Free Europe, Radio and TV Marti, and Al Hurra – do not share the BBC's reputation for independence or otherwise inspire confidence in the ability of the U.S. government to operate a high quality independent news organization. As Lee Bollinger has observed, "These broadcast channels have walked an uneasy line between propagandistic purposes and attempts to provide objective reporting and information to regions of the world that lack an independent media."[209] Perhaps surprisingly, these organizations have formal structures and charters that are not especially different from those of the BBC. For example, like the BBC, they are operated by an independent board (the so-called "Broadcasting Board of Governors") and their

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[205] *See* Post, *supra* note 109.
[206] *See* BOLLINGER, *supra* note 13, at 101 ("The BBC World Service is known for its very strong commitment to editorial independence from the British government.")
[207] *See* BOLLINGER, *supra* note 13, at 99 ("The BBC shall be independent in matters concerning the content of its output, the times and manner of which this is supplied, and in the management of its affairs.") (quoting BBC Royal Charter).
[208] *Id.* at 100.
[209] *Id.* at 102.

charters contain language about objectivity.[210] Yet notwithstanding these formal trappings of independence, these organizations generally disseminate the U.S. government's point of view, so much so that they are not permitted to broadcast within the United States.[211]

This is not to say that it would be impossible for the U.S. government to create a high quality news organization that offers an independent perspective.[212] But the same political culture that periodically politicizes funding to the NEA and CPB, discussed above, is likely also to create serious issues for a government-owned news organization.

2. Focus

If such an organization were created, could it successfully focus its resources on externality generating activities? The analysis here is generally the same as for a government grant program. In principle, the government could hire its own experts to run a first-rate organization, but there is also the risk that a government-owned enterprise would become a source of pork, and would be run quite badly.

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

3. Political Plausibility

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

V. Conclusion

News organizations play a crucial role in a democratic society, so the collapse of their traditional business model is cause for grave concern. Hopefully, the press will find a new path to profitability. Yet there is a significant risk that beat and investigative

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[210] For example, the charter of Radio Free Europe directs it "to promote democratic values and institutions by disseminating factual information and ideas," and to provide "objective news, analysis, and discussion of domestic and regional issues crucial to successful and democratic free market transformation." *Id.* at 102 – 103 (quoting charter).

[211] *Id.* at 104 (describing constraints imposed by Smith Mundt Act).

[212] As a favorable precedent, Lee Bollinger mentions public defenders who are government employees but who nevertheless put the government's case against defendants to the test. *See* Bollinger, *supra* note 12.

reporting will be undersupplied, since many who derive substantial benefits from this activity never buy (or even read) a newspaper.

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

To address these three challenges, the principal recommendation of this Article is for the press to make greater use of the nonprofit form. It safeguards press independence because the government does not allocate the subsidy. This approach also focuses the subsidy on reporting, as long as the tax exempt entity engages only (or at least primarily) in this externality-generating activity. This strategy is largely feasible under current law, and can be implemented even more broadly with only modest changes in the relevant tax regulations and I.R.S. rulings.

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