

THE CHANGING ECOSYSTEM OF NEWS AND CHALLENGES FOR FREEDOM OF THE PRESS**

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I. INTRODUCTION

The ecosystem of news has changed beyond the imagination of anyone living when the First Amendment was drafted. Changes in the private industry of the press leave some communities with no local news coverage.¹ A majority of people in the United States now receive news selected for them by a computer-based mathematical formula derived from their past interests, producing echo chambers with few opportunities to learn, understand, or believe what others are hearing as news. Traditional news media—now called “legacy media”—is shrinking, cutting staff, and relying on freelancers. Meanwhile, digital platforms surge in usage, profits, and revenues from advertising, which are used to stimulate engagement and collect data to further target users. This contributes to a world in which fewer than one-third of those surveyed trust mass media to report the news fully and accurately—the lowest number since such surveys began.² The

1. PENELOPE MUSE ABERNATHY, *THE RISE OF A NEW MEDIA BARON AND THE EMERGING THREAT OF NEWS DESERTS* (Ctr. for Innovation & Sustainability in Loc. Media, Univ. of N.C., 2016), http://newspaperownership.com/wp-content/uploads/2016/09/07.UNC_RiseOfNewMediaBaron_SinglePage_01Sep2016-REDUCED.pdf.

2. *Legacy Media*, NETLINGO.COM, <https://www.netlingo.com/word/legacy-media.php> (last visited Oct. 1, 2018) (“Media that is considered ‘old,’ such as radio, television, and especially newspapers. With legacy media, the receiver does not

recent indictment of thirteen Russians for disrupting the 2016 United States presidential election by spreading divisive and false messages through Facebook, Google, and Twitter³ underscores what Alexander Meiklejohn put so well: reliable press expression is fundamental to democratic self-governance.⁴ What can be done when transformations in technology, economics, and communications jeopardize the production and distribution of, and trust in, news that is essential in a democratic society?

Tackling this question means acknowledging a basic fact: the freedom of the press defended by the First Amendment of the United States Constitution assumes the existence and durability of a private press industry. In directing that Congress “shall make no law . . . abridging the freedom of . . . the press,”⁵ the authors assumed the existence of newspapers. Newspapers were, at that time, produced entirely on privately-owned printing presses; they published accounts of events of the day, political opinions, essays, and entertainment for readers.⁶ Constitutional protection for this work could have fallen comfortably within the legal protection of private property or the freedom of speech by individuals. But the authors and voters behind the First Amendment thought it important enough to single out as a distinct bulwark for the liberty of the people and their vision of self-government.⁷ The shift from

contribute or interact with the content and remains totally passive.”); *see also* Silvia Majó-Vázquez, Jun Zhao & Rasmus Kleis Nielsen, *The Digital-Born and Legacy News Media on Twitter During the French Election*, REUTERS INST. (June 15, 2017), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-07/Maj%C3%B3-V%C3%A1zquez%20-%20The%20Digital-Born%20and%20Legacy%20News%20Media%20on%20Twitter.pdf>. *See generally* Dean Starkman, *The Ever-Expanding Media Giants*, TRAFFIC MAG., <http://traffic.piano.io/2016/09/28/the-ever-expanding-media-giants/> (last visited Oct. 24, 2018). On distrust, *see* Alice Marwick & Rebecca Lewis, *MEDIA MANIPULATION AND DISINFORMATION ONLINE* 40 (Data & Soc’y Res. Inst., May 5, 2017), https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf (reporting the results of a September 2016 Gallup poll).

3. Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>.

4. *See generally* ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

5. U.S. CONST. amend. I.

6. *See generally* PAUL STARR, *THE CREATION OF THE MEDIA: POLITICAL ORIGINS OF MODERN COMMUNICATIONS* (2004).

7. The drafters of the First Amendment were, of course, familiar with the protection of the press in the states, such as Pennsylvania and Virginia. *See id.* The Virginia Ratifying Convention directed “that the people have a right to freedom of speech, and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty and ought not to be violated.” *Id.* at 74.

printing presses to tubes and fibers does not matter⁸—jeopardy to the very project of gathering and sharing actual news does. It is not surprising now to hear an astute observer warn: “News as we know it is at risk. So is democratic governance, which depends on an effective watchdog news media.”⁹ Former *Washington Post* journalist Robert Kaiser made that statement in 2014, which, in terms of media and political developments, is almost a lifetime ago.

Nobel prize-winning economist Amartya Sen once observed that no substantial famine has ever occurred in a functioning democracy with regular elections, opposition parties, basic freedom of speech, and a relatively free media, even when the country is very poor and in a seriously adverse food situation.¹⁰ In the United States, dangers to freedoms of speech and of the press in the past came from direct and indirect government suppression, such as the Alien and Sedition Act of 1789, during the Civil War and World War I, and during the Red Scare era of the 1950s.¹¹ In contrast, the current challenges arise from the very digital communication systems that jeopardize the gathering, reporting, and receipt of news. Technological, business, and regulatory tools could significantly change the situation. This Article describes the current news ecosystem in the United States and the multiple and varied trends at work; identifies resulting vulnerabilities for press freedom and democracy; considers how new and different these vulnerabilities are and what they mean for the constitutional guarantee of freedom of the press; and offers possible avenues for the future.

Pennsylvania’s Declaration of Rights also specified that “the people have a right to freedom of speech, and of writing, and publishing their sentiments, therefore, the freedom of the press ought not to be restrained,” and the Pennsylvania Constitution assured free use of printing presses by “any person who undertakes to examine the proceedings of the legislature, or any part of the government.” STARR, *supra* note 6, at 73. The Pennsylvania Constitution currently directs: “The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof.” PA. CONST. art. 1, § 7 (West, Westlaw through Nov. 6, 2018, Gen. Election).

8. See generally ANDREW BLUM, TUBES: A JOURNEY TO THE CENTER OF THE INTERNET (2013).

9. See Robert Kaiser, *The Bad News About the News*, BROOKINGS (Oct. 16, 2014), <http://csweb.brookings.edu/content/research/essays/2014/bad-news.html>; STEVEN WALDMAN, FCC, THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE (2011), https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf.

10. See AMARTYA SEN, DEMOCRACY AS FREEDOM 16, 152–153 (1999).

11. For a comprehensive treatment of these wartime compromises of freedom of expression, see generally GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME (2004).

II. NEWS DESERTS, ECHO CHAMBERS, ALGORITHMIC EDITORS, AND THE SIREN CALL OF REVENUES

How many people now get news from hard-copy newspapers? How many from radio or television? How many from websites? Social media? Reuters Institute found that two-thirds of those surveyed in twenty-six countries use social media, and more people find their news through an online algorithm than through human editors; only one in ten of those surveyed pay anything for online news.¹² People massively rely on smartphone apps and social media. Already in 2002, only two out of ten relied on print newspapers, and only 5% of those aged eighteen to twenty-nine got news from print newspapers.¹³ Newspapers are rapidly shedding staff and shrinking coverage.¹⁴ More than 100 newspapers have shifted from daily to weekly issues, and between 2004 and 2014, at least 664 newspapers shut down.¹⁵ Unbundling is another change: people can get their updates about sports or weather apart from political news, further decreasing cross-subsidies across news and entertainment that were once available to newspapers and mass media.¹⁶ Local news coverage in particular has diminished. Currently, there are no reporters based in the courts of New York's Queens County, which has 2.3 million residents and 200,000 criminal cases each year.¹⁷ The for-profit model of newspapers supported largely by advertising does not work when cheaper, targeted online ads replace print-media ads. Recent estimates indicate that 89% of online advertising dollars go to Google or Facebook, and 60–70% of all advertising revenues go to internet

12. See generally NIC NEWMAN ET AL., REUTERS INSTITUTE DIGITAL NEWS REPORT 2017, REUTERS INST. (2017), https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf.

13. Marc Edge, Book Review, 23 NEWSPAPER RES. J. 156 (2002) (reviewing GILBERT CRANBERG, RANDALL BEZANSON & JOHN SOLOSKI, TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY (2001)).

14. See AMY MITCHELL ET AL., PEW RES. CTR., STATE OF THE NEWS MEDIA 2016 (June 15, 2016), <http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf>.

15. ABERNATHY, *supra* note 1, at 12; Suzanne M. Kirchoff, *The U.S. Newspaper Industry in Transition*, CONG. RES. SERV. (Sept. 9, 2010), <https://fas.org/sgp/crs/misc/R40700.pdf>.

16. When bundled together, sports and entertainment divisions of media can generate enough returns to help pay for investigative reporters; this kind of subsidy, from one kind of content to another, becomes less possible as both companies can precisely deliver one type of content to a consumer.

17. Paul Moses, *In New York City, Local Coverage Declines—and Takes Accountability with It*, DAILY BEAST (Apr. 3, 2017), <https://www.thedailybeast.com/in-new-york-city-local-coverage-declinesand-takes-accountability-with-it>.

companies.¹⁸ Not only do these developments undermine the financing of traditional news media, but targeted marketing dividing people into subgroups is carving up mass media and our communities.

A. TRENDS

These trends are departures. For four decades after World War II, mainstream journalism reflected a mission of nonideological reporting about politics, foreign affairs, business, and entertainment.¹⁹ Major broadcast networks helped to unify the country and provide criticisms of government excesses.²⁰ It was not perfect and always included a range in quality and political slants.²¹ An ideal of objectivity grew and took hold in professional journalism during the twentieth century.²² In the past, people generally could easily find reports of local news but did not have immediate access to reports from news media around the world. Much has changed. Now, in the United States, as journalist Robert Kaiser reports, “[T]he great institutions on which we have depended for news of the world around us may not survive.”²³ Declining circulation, loss of advertising revenues, and diminishing profits reflect and fuel the reluctance of many people to pay for news. Social media platforms take the advertising dollars and filter and distribute news based on data about what

18. Mathew Ingram, *Google and Facebook Account for Nearly All Growth in Digital Ads*, FORTUNE (Apr. 26, 2017), <http://fortune.com/2017/04/26/google-facebook-digital-ads>; see also NEWMAN ET AL., *supra* note 12, at 101–03; Henri Gendreau, *Don't Stop the Presses! When Local News Struggles, Democracy Withers*, WIRED (Nov. 30, 2017), <https://www.wired.com/story/dont-stop-the-presses-why-big-tech-should-subsidize-real-journalism>. Business professor Matthew Gentzkow argues that the drop in classified advertising revenue due to competition from cheaper online options has been significant. See generally Matthew Gentzkow, *Trading Dollars for Dollars: The Prices of Attention Online and Offline*, 104 AM. ECON. REV. 481 (May 2014). Furthermore, spending on digital advertising has overtaken spending on ads for television and other media over the past ten years. See Suzanne Vranica, *Facebook and Google Confront Antagonism of Big Advertisers*, WALL ST. J. (Dec. 26, 2018), <https://www.wsj.com/articles/facebook-and-google-face-emboldened-antagonists-big-advertisers-1521998394>.

19. See generally DOUGLAS BRINKLEY, CRONKITE 2, 5, 663–66 (2012).

20. *Id.* at 2–5.

21. See generally Nicole Hemmer, *The Conservative War on Liberal Media Has a Long History*, THE ATLANTIC (Jan. 17, 2014), <https://www.theatlantic.com/politics/archive/2014/01/the-conservative-war-on-liberal-media-has-a-long-history/283149/>.

22. Brent Cunningham, *Re-Thinking Objectivity*, COLUM. JOURNALISM REV. (July/Aug. 2003), https://archives.cjr.org/feature/rethinking_objectivity.php. For a more skeptical view, see C.W. ANDERSON, LEONARD DOWNIE JR. & MICHAEL SCHUDSON, *THE NEWS MEDIA: WHAT EVERYONE NEEDS TO KNOW* 55–57 (2016).

23. Kaiser, *supra* note 9.

each individual user has liked in the past, accelerating the spread of eye-catching misinformation.²⁴

These trends, though, are complex. Different dynamics are at work for local communities compared with large cities and national markets, and for different people, especially when sorted by age, race, and educational level. There has been less disruption for smaller newspapers than for bigger news operations, but consolidation of ownership and cost-cutting has diminished coverage of local news.²⁵ Major newspaper chains have declared bankruptcy, and revenue declines continue.²⁶ Over the past twenty years, newspapers across the country have lost nearly 40% of their daily circulation, and in the past ten years, advertising revenues decreased by 63%; but, at least since the election of President Donald Trump, new subscribers to the *New York Times* and *Washington Post* brought those top papers to record numbers and sustaining revenues.²⁷ As of 2017, 25% of those surveyed in the United States say they want to help fund journalism.²⁸ But, almost 60% of newspaper jobs in the United States vanished over the span of twenty-six years.²⁹

Smaller newspapers face steep declines in readers and revenues, with many merging or selling to chains or private equity investors pursuing economic returns through cost reductions and restructuring.³⁰ As papers like the *Rocky Mountain News* close and others reduce the frequency of issues from daily to weekly, local news updates are less available, and because of the relatively small numbers of affected individuals, internet solutions are not likely.³¹

24. See Nabiha Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. F. 337, 345 (2017).

25. See Damian Radcliffe & Christopher Ali, *Local News in a Digital World: Small Market Newspapers in the Digital Age*, COLUM. ACAD. COMMONS (2017), <https://academiccommons.columbia.edu/doi/10.7916/D8WS95VQ>.

26. Ken Doctor, *The Newsonomics of Majority Reader Revenue*, NEWSONOMICS (June 1, 2012), <http://newsonomics.com/the-newsonomics-of-majority-reader-revenue/>.

27. *How Leading American Newspapers Got People to Pay for News*, THE ECONOMIST (Oct. 26, 2017), <https://www.economist.com/business/2017/10/26/how-leading-american-newspapers-got-people-to-pay-for-news>.

28. NEWMAN ET AL., *supra* note 12, at 24.

29. Roy Greenslade, *Almost 60% of US Newspaper Jobs Vanish in 26 Years*, THE GUARDIAN (June 6, 2016), <https://www.theguardian.com/media/greenslade/2016/jun/06/almost-60-of-us-newspaper-jobs-vanish-in-26-years>.

30. See ROBERT W. MCCHESNEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 38–41, 47–49, 61–63 (2010); ABERNATHY, *supra* note 1, at 12–14, 20–21.

31. ANDERSON ET AL., *supra* note 22, at 137–40.

In earlier times, concentrated ownership by Knight Ridder and Times Mirror elevated the quality of many local news outlets, but even they ended up making serious cuts before selling.³² Investment-focused owners and chains have been buying up local papers, producing unprecedented levels of consolidation.³³ The ten largest chains have doubled their reach in recent years, and the number of daily newspapers continues to decline.³⁴ The owners hold many products and can close individual papers that do not make the profit they seek, reduce reporting about local news in favor of more generic material, and focus on stories that will “trend” rather than provide the kind of news that equips people to govern themselves.³⁵ The publicly traded companies holding many newspapers need to turn profits for shareholders, even if that means sacrificing journalistic values.³⁶ Smaller staffs mean fewer resources for journalists who are specialists in fields like science and the environment, greater reliance on press releases, and diminished investigative journalism.³⁷ People need more news about economic, political, and governmental matters to navigate health care coverage; to deal with credit cards and mortgages; to oversee schooling for their own and other people’s children; and to understand local recycling rules, large environmental risks, and a host of other issues. These needs, if anything, are growing, just when likely outlets may be less able to generate and distribute effective information.³⁸

Some nonprofit news organizations are emerging to address the declining presence of prior news outlets. Some communities offer reports of governmental and business actions, but these efforts, largely supported by philanthropy or volunteerism, have

32. See Jack Shafer, *Why Newspapers Have Gone to Hell*, SLATE (June 27, 2011), http://www.slate.com/articles/news_and_politics/press_box/2011/06/why_newspapers_have_gone_to_hell.html. See generally Katharine Q. Seelye & Andrew Ross Sorkin, *Knight Ridder Newspaper Chain Agrees to Sale*, N.Y. TIMES (Mar. 12, 2006), <http://www.nytimes.com/2006/03/12/archives/knight-ridder-newspaper-chain-agrees-to-sale.html>.

33. ABERNATHY, *supra* note 1, at 24, 29, 39.

34. See generally Eli M. Noam, *Media Concentration in the United States*, in WHO OWNS THE WORLD’S MEDIA? MEDIA CONCENTRATION AND OWNERSHIP AROUND THE WORLD 500–72 (2016); MITCHELL ET AL., *supra* note 14, at 9–12.

35. See generally Noam, *supra* note 34.

36. See generally LEAVING READERS BEHIND: THE AGE OF CORPORATE NEWSPAPERING (Gene Roberts ed., 2001); Edge, *supra* note 13.

37. ANDERSON ET AL., *supra* note 22, at 113, 117; Timothy A. Gibson, *Economic, Technological, and Organizational Factors Influencing News Coverage of Climate Change*, in OXFORD RESEARCH ENCYCLOPEDIA 102, 109–10 (2016).

38. Thanks to Doug Smith for this insight.

not found a sustainable path.³⁹ The private sector simply may not be able to generate sufficient funding for the kind of reporting that holds local governments accountable.⁴⁰ The entire business model of newspapers in particular is “very much in free fall.”⁴¹ As people grow reluctant to pay for news that is posted for free on the internet, ad revenues migrate to digital companies, and digital companies themselves invest little in news gathering, editing, and reporting.⁴²

B. NEW OWNERS

A few prestigious newspapers have found wealthy individual investors. Jeff Bezos purchased the *Washington Post*, Patrick Soon-Shiong purchased the *L.A. Times* and *San Diego Union-Tribune*, and Laurene Powell Jobs’s Emerson Collective owns a majority interest in the *Atlantic*.⁴³ Such investments may be philanthropic efforts, leaving editorial decisions to professionals, but others may be seeking to influence the political tilt of the news or to change it in other ways.⁴⁴ The Mercer family’s control of Breitbart News Network, Charles and David Koch’s pursuit of media ownership, and Rupert Murdoch’s media empire on three continents are examples of efforts to use wealth to advance particular ideologies through media.⁴⁵ In a self-described

39. ANDERSON ET AL., *supra* note 22, at 103–05.

40. Tim Carney, *A New Role for Public Media: Local Government Watchdogs*, KNIGHT FOUND. (2017), <https://www.knightfoundation.org/public-media-white-paper-2017-carney>.

41. Ronnell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 48, 56 (2017) (quoting Jordan Weissmann, *The Decline of Newspapers Hits a Stunning Milestone*, SLATE (Apr. 28, 2014, 10:16 AM), http://www.slate.com/blogs/moneybox/2014/04/28/decline_of_newspapers_hits_a_milestone_print_revenue_is_lowest_since_1950.html [<https://perma.cc/H9WM-7QVV>]).

42. *Id.*

43. Press Release, Emerson Collective to Acquire Majority Ownership of the Atlantic, Forming Partnership with David Bradley, THE ATLANTIC (July 28, 2017), <https://www.theatlantic.com/press-releases/archive/2017/07/emerson-collective-to-acquire-majority-ownership-of-the-atlantic-forming-partnership-with-david-bradley/535230/> [hereinafter Press Release].

44. Even a publicly traded news company may, through the use of two-tiered stock, retain control for individuals or families devoted to publicly minded journalism. See Kaiser, *supra* note 9; see also David Halberstam, *CBS: The Power and the Profits*, THE ATLANTIC (Jan. 1976), <https://www.theatlantic.com/magazine/archive/1976/01/cbs-the-power-and-the-profits/305304/>; Press Release, *supra* note 43.

45. See generally Sasha Chavkin, *The Koch Brothers Media Investment [Updated]*, COLUM. JOURNALISM REV. (Apr. 22, 2013), https://archives.cjr.org/united_states_project/the_koch_brothers_media_invest.php; Matt Gertz, *Breitbart Is Not Independent: It’s the Communications Arm of the Mercers’ Empire*, SALON (Apr. 24, 2017, 7:59 AM), <https://www.salon.com/2017/04/24/breitbart-is-not-independent-its->

philanthropic effort, billionaire Peter Thiel paid \$10 million to finance several lawsuits against Gawker Media, which, in turn, declared bankruptcy and ceased operations.⁴⁶ Most mass media remains held by private companies or publicly traded corporations; purchases by high-wealth individuals and by private equity funds⁴⁷ are notable developments, affording greater power to a few individuals over the affected news operations.

With broadcasting and cable, mergers and consolidation similarly risk diminishing local news and reducing diversity of opinions and viewpoints. For example, Sinclair is a company that owns 173 television stations,⁴⁸ through which it spreads right-wing political perspectives; if the Federal Communications Commission (FCC) approves Sinclair's plan to purchase forty-two more stations, it would reach three-quarters of American households.⁴⁹ Such concentrated ownership displaces local control of media and shifts editorial decisions to people without a stake in particular local communities. Many local news shows look just like local shows in other parts of the country because stations now borrow segments from other stations owned by the same company.⁵⁰ Local television news turns to weather, traffic, crime, sports, banter, and entertainment news, and national broadcast news networks have

the-communications-arm-of-the-mercurs-empire_partner/; David McKnight, *Rupert Murdoch's News Corporation: A Media Institution with a Mission*, 30 HIST. J. FILM, RADIO & TELEVISION 303 (Aug. 23, 2010); Jim Bucknell, *Ideology Runs Rampant at Rupert Murdoch's Australian Newspaper*, THE GUARDIAN (Dec. 7, 2015, 11:33 PM), <https://www.theguardian.com/commentisfree/2015/dec/07/ideology-runs-rampant-at-rupert-murdochs-australian-newspaper>.

46. Andrew Ross Sorkin, *Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker*, N.Y. TIMES (May 25, 2016), <https://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html>; Sydney Ember, *Gawker, Filing for Bankruptcy After Hulk Hogan Suit, Is for Sale*, N.Y. TIMES (June 10, 2016), <https://www.nytimes.com/2016/06/11/business/media/gawker-bankruptcy-sale.html>.

47. See *supra* note 33 and accompanying text.

48. Eli Rosenberg, *Trump Said Sinclair 'Is Far Superior to CNN.' What We Know About the Conservative Media Giant*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/style/wp/2018/04/02/get-to-know-sinclair-broadcast-group-the-conservative-local-news-giant-with-a-growing-reach/?noredirect=on&utm_term=.6a58d1478d22.

49. Lucia Graves, *This Is Sinclair: 'The Most Dangerous US Company You've Never Heard Of,'* THE GUARDIAN (Aug. 17, 2017, 7:00 AM), <https://www.theguardian.com/media/2017/aug/17/sinclair-news-media-fox-trump-white-house-circa-breitbart-news>; Robert Channick, *Under Sinclair, WGN Would Be Chicago's 'Very Own' No More*, CHI. TRIBUNE (Aug. 10, 2017, 1:54 PM), <http://www.chicagotribune.com/business/ct-tribune-sinclair-merger-wgn-0813-biz-20170810-story.html>.

50. ANDERSON ET AL., *supra* note 22, at 84–85.

cut costs, staff, and coverage.⁵¹ Traditional television is losing viewers—especially younger ones—to streaming services and other digital alternatives. People between the ages of thirteen and twenty-five watch less than thirteen hours of television a week, which is 44% less than five years ago for people in the same age group.⁵² Since the rise of cable and internet, broadcast news has shifted to more entertaining and profit-conscious news programming, and even news magazines have shifted to prefer emotional stories over factual investigations.⁵³ Meanwhile, older people reminisce about the golden age of television news, like when Edward R. Murrow reported on the scene of war and met the Red Scare led by Senator Joseph McCarthy with courage, and Walter Cronkite narrated moon launches, the assassination of presidential leaders, and the Vietnam War.⁵⁴

C. DIGITAL PLATFORMS

New competitors to the concentrated media industry grow as popular streaming services are offered not by the networks and cable but by data and digital platforms, including Amazon, YouTube, and Netflix. An example of what law professor Frank Pasquale calls “The Black Box Society,” the data platforms customize people’s access to news (and sports, entertainment, and other content) without even consulting them. Instead of offering clear choices, the digital platforms bury decisions that affect people in the architecture of their sites, relying on analyses of computer-data usage that is opaque to users.⁵⁵ As one service offered in its launch, “[T]he feature delivers a way to browse and discover news

51. ANDERSON ET AL., *supra* note 22, at 79–80.

52. Erika Fry, *Briefing: Super Bowl Ads Can't Save TV*, FORTUNE, Feb. 1, 2018, at 11, 12 (relying on an analysis of Nielsen data by MarketingCharts.com).

53. Marc Gunther, *The Transformation of Network News*, NIEMAN REP. (June 15, 1999), <http://niemanreports.org/articles/the-transformation-of-network-news>.

54. 2 ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES, 1933–1953*, at 77–78 (1968); CHARLES L. PONCE DE LEON, *THAT'S THE WAY IT IS: A HISTORY OF TELEVISION NEWS IN AMERICA*, at ix–xvii, 4–5 (2015); Jack Mirkinson, *60 Years Ago, Edward R. Murrow Took Down Joseph McCarthy*, HUFFINGTON POST (Mar. 10, 2014, 3:15 PM), https://www.huffingtonpost.com/2014/03/10/edward-murrow-joseph-mccarthy-60-years-later_n_4936308.html.

55. FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* 8 (2015); *see also* PONCE DE LEON, *supra* note 54; Sarah Perez, *Plex Adds Personalized, Streaming News to Its Media Player Software*, TECHCRUNCH (Sept. 26, 2017), <https://techcrunch.com/2017/09/26/plex-adds-personalized-streaming-news-to-its-media-player-software/>; Dan Price, *5 Free Streaming News Channels for Cord-Cutters*, MAKE USE OF (May 18, 2017), <https://www.makeuseof.com/tag/free-streaming-news-channels-cord-cutters/>.

from publishers worldwide, and introduces a personalized newscast—through a ‘filter bubble’—that adapts to your interests based on what programming you watch and skip, among other things.”⁵⁶ Some services sample content from elsewhere and others generate their own stories.⁵⁷ Some commentators maintain that these new services will cover multiple sides, and one observer urged people “to be careful not to create your own echo chamber in which you only ever hear opinions you agree with.”⁵⁸

Thus, potentially big shifts in the news ecosystem arise with three trends: (1) corporate investors giving greater priority to financial returns than to quality journalism or maintaining particular local news outlets; (2) wealthy individual investors who may support independent journalism or may pursue their own ideological projects; and (3) the shift of advertising dollars to online media platforms that harvest user data. The new owners of newspapers and big digital platforms can choose not to invest in news production or what might be called “local government accountability”—such as reporting on the excessive reliance on fines and fees by Ferguson, Missouri, where the police shooting of Michael Brown triggered racial riots across the country.⁵⁹ It turns out that Ferguson, Missouri, had no daily newspaper, no news blog

56. Perez, *supra* note 55 (describing “My Newscast” on Plex); see also Casey Newton, *Google Introduces the Feed, a Personalized Stream of News on iOS and Android*, THE VERGE (July 19, 2017, 3:05 AM), <https://www.theverge.com/2017/7/19/15994156/google-feed-personalized-news-stream-android-ios-app>; Yukinori Koide, *Optimize Delivery of Trending, Personalized News Using Amazon Kinesis and Related Services*, AWS (Jan. 18, 2018), <https://aws.amazon.com/blogs/big-data/optimize-delivery-of-trending-personalized-news-using-amazon-kinesis-and-related-services>; ROBERT M. FARIS ET AL., PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION (Berkman Klein Ctr. for Internet & Soc’y at Harv. Univ., 2017), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:33759251>.

57. See generally Antonis Kalogeropoulos & Rasmus Kleis Nielsen, *Investing in Online Video News*, 19 JOURNALISM STUD. 2207 (2017) (generated video content); *How News Feed Works*, FACEBOOK, https://www.facebook.com/help/1155510281178725/?helpref=hc_fnav (last visited Dec. 18, 2018) (sampled content shared by friends and others with whom the user has linked).

58. Price, *supra* note 55. For a caution against overemphasizing the risk that people will simply read what they already believe, see Andrew Guess et al., *Why Selective Exposure to Like-Minded Congenial Political News Is Less Prevalent than You Think*, MEDIUM (Feb. 12, 2018), <https://medium.com/trust-media-and-democracy/avoiding-the-echo-chamber-about-echo-chambers-6e1f1a1a0f39>.

59. See Stephen Deere, Chuck Raasch & Jeremy Kohler, *DOJ Finds Ferguson Targeted African-Americans, Used Courts Mainly to Increase Revenue*, STL TODAY (Mar. 5, 2015), https://www.stltoday.com/news/local/crime-and-courts/doj-finds-ferguson-targeted-african-americans-used-courts-mainly-to/article_d561d303-1fe5-56b7-b4ca-3a5cc9a75c82.html.

focused on local government, no community radio station, and no local public-access television.⁶⁰

Taken together, the trends help to explain shrinking investments in local news and in professional and specialized journalists. Attention and money are now concentrated on a few digital companies. Facebook, for example, now has 1.6 billion participants across the globe.⁶¹ Its number of users has surpassed the number of people in the most populous nation.⁶² Facebook's recent effort to highlight social content risks further de-emphasizing news, and especially local news.⁶³

The shift of dollars and attention to social media platforms carries further risks.⁶⁴ Social media platforms draw attention and advertising revenues away from traditional media while using and selling data about each user's clicks and engagement.⁶⁵ The effect is to make the user into the product and potentially provide easy vehicles for those who profit from increasing social division, fomenting hatred, and undermining democracy.⁶⁶

60. Josh Wilson, *Fixing Journalism's Ability to Promote Civic Good Should Be the Focus of Philanthropic Giving*, CHRON. PHILANTHROPY (Nov. 1, 2017), <https://www.philanthropy.com/article/Opinion-Fixing-Journalism-s/241610>.

61. Katharine Viner, *How Technology Disrupted the Truth*, THE GUARDIAN (July 12, 2016, 1:00 AM), <https://www.theguardian.com/media/2016/jul/12/how-technology-disrupted-the-truth>.

62. Timothy Stenovec, *Facebook Is Now Bigger than the Largest Country on Earth*, HUFFINGTON POST (Jan. 28, 2015, 4:37 PM), https://www.huffingtonpost.com/2015/01/28/facebook-biggest-country_n_6565428.html.

63. Emily Bell, *Why Facebook's News Feed Changes Are Bad News for Democracy*, THE GUARDIAN (Jan. 21, 2018, 7:32 AM), <https://www.theguardian.com/media/media-blog/2018/jan/21/why-facebook-news-feed-changes-bad-news-democracy>.

64. To avoid the irritation and distraction of online advertisements, many people have turned to third-party ad-blocking software. In response, Google has devised a new feature, allowing its users to filter out some ads—even as unscrupulous actors insert malware through legitimate websites. Some worry that by defining which ads are acceptable, Google and similar large entities will gain greater power with no more transparency. John Herrman, *Google Chrome Now Blocks Irsome Ads. That's a Good Thing, Right?*, N.Y. TIMES (Feb. 19, 2018), <https://www.nytimes.com/2018/02/18/business/media/google-chrome-ad-block.html>; *Google Embraces Ad-Blocking Via Chrome*, THE ECONOMIST (Feb. 17, 2018), <https://www.economist.com/business/2018/02/17/google-embraces-ad-blocking-via-chrome>. Platforms experimenting with “native advertising”—blending ads into editorial content—risk further eroding confidence in reported news by blurring the line between professional journalism and paid-for material. See Lili Levi, *A “Faustian Pact”? Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647 (2015).

65. Tobias Rose-Stockwell, *This Is How Your Fear and Outrage Are Being Sold for Profit*, QUARTZ (July 28, 2017), <https://qz.com/1039910/how-facebooks-news-feed-algorithm-sells-our-fear-and-outrage-for-profit/>.

66. Tom Wheeler, *How to Monitor Fake News*, N.Y. TIMES (Feb. 20, 2018),

Leaders at Facebook and Google stress that, as tech companies, they are not in the business of journalism. They rely on algorithms rather than human editorial decisions to select what people see;⁶⁷ they focus on keeping consumers' attention, not on covering the news. Sheryl Sandberg, the chief operating officer of Facebook, explained: "We're very different from a media company. . . . At our heart we're a tech company. We hire engineers. We don't hire reporters. No one is a journalist. We don't cover the news."⁶⁸ And yet, more and more people get their news from social media—through links and forwarded posts—with each act of sharing increasing a post's visibility to others. British reporter Emily Bell noted, "Social media hasn't just swallowed journalism, it has swallowed everything. It has swallowed political campaigns, banking systems, personal histories, the leisure industry, retail, even government and security."⁶⁹ Judgments once made by a variety of people with diverse aspirations are now made by profit-maximizing algorithms seeking to have the largest number of "eyeballs" and advertising dollars.⁷⁰

Ostensibly neutral digital platforms are easily manipulated by propagandists and extremists who use search optimizing and digital clicks for their own ends while offering revenues to Facebook and Google.⁷¹ Facebook, for example, has become a tool of choice for Rodrigo Duterte, the autocratic president of the

https://www.nytimes.com/2018/02/20/opinion/monitor-fake-news.html?emc=edit_th_180221&nl=todaysheadlines&nlid=378183740221editorial; see also JONATHAN TAPLIN, MOVE FAST AND BREAK THINGS: HOW FACEBOOK, GOOGLE, AND AMAZON CORNERED CULTURE AND UNDERMINED DEMOCRACY (2017).

67. Frank Pasquale, *The Automated Public Sphere* 4–6 (Univ. of Md. Francis King Carey Sch. of Law, Legal Studies Research Paper No. 2017-31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067552.

68. Shona Ghosh, *Sheryl Sandberg Just Dodged a Question About Whether Facebook Is a Media Company*, BUS. INSIDER (Oct. 12, 2017, 10:32 AM), <http://www.businessinsider.com/sheryl-sandberg-dodged-question-on-whether-facebook-is-a-media-company-2017-10>.

69. Viner, *supra* note 61 (quoting Emily Bell, director of the Tow Center for Digital Journalism at Columbia University's Graduate School of Journalism). Social media use around news is greater among young people than other groups. Mary Madden, Amanda Lenhart & Claire Fontaine, *How Youth Navigate the News Landscape: Recent Qualitative Research*, KNIGHT FOUND. (Mar. 1, 2017), <https://www.knightfoundation.org/reports/how-youth-navigate-the-news-landscape>; see also Sandra Cortesi & Urs Gasser, *Youth Online and News: A Phenomenological View on Diversity*, 9 INT'L J. COMM. 1425 (2015).

70. PASQUALE, *supra* note 55.

71. Pasquale, *supra* note 67, at 6–9.

Philippines.⁷² In the Philippines, 97% of people have Facebook.⁷³ Duterte's support from Facebook started with training sessions the company provided for presidential candidates and continued with "white-glove" services upon his election.⁷⁴ He and his supporters deployed fake accounts, aggressive messages and insults, threats of violence, and fraudulent endorsements, creating the illusion of support for his regime.⁷⁵ He then used Facebook to stream his inauguration after he banned all independent media in the Philippines.⁷⁶ Facebook, in turn, has entered into a partnership to lay undersea cables to support users in the Philippines and allowed critics of Duterte to be removed from Facebook.⁷⁷

While leaders of digital services have claimed they are passive intermediaries treating everyone the same, critics charge that the tools and designs at work enable abuses.⁷⁸ Such charges have not produced verdicts because data companies like Facebook, Twitter, and Google have avoided civil liability, despite allegations that their platforms and tools assist terrorists like Hamas; again, the companies claim that they are not responsible for the content on their platforms.⁷⁹ Leaders of digital companies have pretended

72. Lauren Etter, *What Happens When the Government Uses Facebook as a Weapon?*, BLOOMBERG BUSINESSWEEK (Dec. 7, 2017, 3:00 AM), <https://www.bloomberg.com/news/features/2017-12-07/how-rodrico-duterte-turned-facebook-into-a-weapon-with-a-little-help-from-facebook>. Traditional media routinely identifies Rodrigo Duterte as an autocrat with oppressive practices. *See, e.g., Philippine Strongman Duterte Has Some Thoughts on Condoms*, MARKETWATCH (Feb. 20, 2018, 8:38 PM), <https://www.marketwatch.com/story/philippine-strongman-duterte-has-some-view-on-condoms-2018-02-17>.

73. Etter, *supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Zeynep Tufekci, *Zuckerberg's Preposterous Defense of Facebook*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/opinion/mark-zuckerberg-facebook.html>; Tomás Undurraga, *Making News, Making the Economy: Technological Changes and Financial Pressures in Brazil*, 11 CULTURAL SOC. 77–96 (2017). Expressions of concern increasingly address digital companies' inadequate protection of users' privacy and of the companies associated with extremist content that are paying for ads. *See* Vranica, *supra* note 18.

79. Federal district courts have dismissed complaints against Twitter, Facebook, and Google under Section 230 of the Communications Decency Act, despite charges that the companies allowed Hamas to use their sites for spreading propaganda. The companies' business of providing online publishing services did not generate a violation, in light of *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150 (N.D. Ca. 2017), which "held that the plaintiffs in that case failed to allege Google's targeted advertising tools encouraged the posting of unlawful material." Alexis Kramer, *Twitter, Facebook, Google Not Liable for Hamas Posts*, BLOOMBERG BNA (Dec. 6, 2017),

that their platforms make no editorial choices for which they should be responsible. Yet the tools of the digital companies are easily used to spread misinformation and fraudulent content.⁸⁰ When Robert Mueller indicted thirteen Russians for disrupting the 2016 United States presidential election through Facebook and other digital media, he effectively torpedoed denials by Facebook executives⁸¹ about the platform's role in election-season misinformation and propaganda.⁸² Russian provocateurs, knowledgeable about social media, used widely available technological tools, including, perhaps, some not known by the companies themselves.⁸³ Insulated from liability, digital platforms take insufficient precautions against such exploitation and misuse.

The insulation of the digital platforms from liability differs from treatment of newspapers and broadcasters, which can be held liable for defamation, false information, threats, sexually explicit material involving minors, and racially discriminatory housing ads

<https://www.bna.com/twitter-facebook-google-n73014472792/>; see also *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (upholding immunity for internet service providers from any violations of the Communications Decency Act and affirming federal preemption of state tort law in this context). See Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity* (Univ. of Md. Francis King Carey Sch. of Law, Legal Studies Research Paper No. 2017-22), <http://ssrn.com/abstract=3007720>, for a defense of modest revision to deny such immunity to intentional hosts of objectionable material. See generally Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 2018), <https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy>.

80. Tufekci, *supra* note 78.

81. Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>.

82. See Mark Mazzetti & Katie Benner, *12 Russian Agents Indicted in Mueller Investigation*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html>; John Marshall, *Facebook Still Lying About Its Role in the 2016 Election*, TALKING POINTS MEMO (Feb. 17, 2018, 7:34 PM), <https://talkingpointsmemo.com/edblogger/facebook-still-lying-about-its-role-in-the-2016-election>.

83. Georgia Wells & Robert McMillan, *Facebook Battles New Criticism After U.S. Indictment Against Russians*, WALL ST. J. (Feb. 19, 2018, 7:23 PM), <https://www.wsj.com/articles/facebook-battles-new-criticism-after-u-s-indictment-against-russians-1519066080> (quoting Sam Wooley, Oxford research associate studying social media platforms). Russia apparently uses both disinformation and cyberattacks. See Megan Reiss, *Takeaways from the Latest Russian Hacking Indictment*, LAWFARE (Oct. 4, 2018), <https://www.lawfareblog.com/takeaways-latest-russian-hacking-indictment>. For further developments in federal investigations, see Adam Goldman, *Justice Dept. Accuses Russians of Interfering in Midterm Elections*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/us/politics/russia-interference-midterm-elections.html>.

posted by users.⁸⁴ Because this insulation (under Section 230 of the Communications Decency Act) has enabled innovation and expansion of digital platforms, any revision of the rule should be limited. But, accountability for the failure to warn about a known online sexual predator and for hosting a site that matches potential roommates in a racially discriminatory manner has not chilled platforms from providing and expanding their services.⁸⁵

The role played by digital platforms in misinformation and propaganda grows from the sheer number of people “engaged.” The use of algorithms accelerates the spread of materials that attract attention. Readers are often vulnerable to hoaxes and abuses enabled, in part, by “dark posts”—ads that are invisible to all but those targeted and that do not reveal who paid for or is behind them.⁸⁶ Oxford University scholars study and critique this “computational propaganda.”⁸⁷ Activists can use digital media to nudge voter turnout and target individual voters. “Click-bait”—arresting headlines and ads drawing attention—enables a surprising amount of disinformation without the checks that counter-speech and investigation can provide.⁸⁸ Filter bubbles isolate individuals in a stream of messages that match their prior views. So do unscrupulous campaigns of division that include attacks on the media. The risk that subcommunities of people will

84. Section 230 of the Communications Decency Act of 1996 (Title V of the Telecommunications Act of 1996), codified at 47 U.S.C. § 230, shields internet service providers and other intermediaries from liability for postings by third parties. Communications Decency Act of 1996, 47 U.S.C. § 230 (2012). See generally *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

85. See *Fair Hous. Council*, 521 F.3d at 1169, 1173–74; see also *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 852–53 (9th Cir. 2016).

86. Through “dark posts,” an advertiser can “target different audiences, split test headlines and even create personalized messages for demographic and geographic targets—literally run dozens of ads all on the same day—without a single ad showing in their own news stream.” John Jantsch, *Why Dark Posts Are the Best Facebook Advertising Approach Right Now*, DUCT TAPE MARKETING, <https://www.ducttapemarketing.com/facebook-dark-posts/> (last visited Oct. 2, 2018). Moreover, “[o]nce your ads are approved you can start monitoring your Ad performance to tweak your tests and improve your results.” *Id.* After the 2016 election, when the practice became more known, Facebook ended the “dark post” option. Garrett Sloane, *No More ‘Dark Posts’: Facebook to Reveal All Ads*, AD AGE (Oct. 27, 2017), <https://adage.com/article/digital/facebook-drag-dark-posts-light-election/311066>.

87. Gillian Bolsover & Philip Howard, *Computational Propaganda and Political Big Data: Moving Toward a More Critical Research Agenda*, 5 *BIG DATA* 273, 273–76 (Dec. 1, 2017), <https://doi.org/10.1089/big.2017.29024.cpr>.

88. See generally Alexis C. Madrigal, *What Facebook Did to American Democracy*, THE ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/>.

echo one another without challenge is a problem not just for individuals but also for society and democratic processes.⁸⁹ Digital platforms could engage in “digital gerrymandering,” selectively presenting information to serve interests unknown to recipients and undisclosed to the world.⁹⁰ Although Facebook has added staff to police hate speech and take down fake accounts, no one thinks these efforts work well.⁹¹ Investigations into past and present risks of chaos and misinformation continue.⁹²

The negative effects of digital media on elections exacerbate the declining trust in media already underway. According to a recent poll, nearly half of registered United States voters believe major news organizations make up stories about Donald Trump.⁹³ Professional journalism, messages from your cousin, or messages from a Macedonian adolescent paid to design arresting ads can seem equal in a world without editors vetting stories. Social media algorithms that determine what is distributed and to whom are not visible to anyone outside the companies, and it can take quite a while before the actual patterns of distribution are apparent.⁹⁴

Contributing to the growing distrust of news and media is the deadlock in the Federal Election Commission, the government agency charged with regulating election-related speech. The

89. See generally ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011); CASS SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (2017).

90. Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 336 (2014); Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Ever Finding Out*, NEW REPUBLIC (June 1, 2014), <https://newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering>.

91. See, e.g., Richard Nieva, *Facebook Now Tells You Exactly Why It Takes Down Posts*, CNET (Apr. 23, 2018, 5:36 PM), <https://www.cnet.com/news/facebook-releases-internal-guidelines-for-taking-down-posts/>; Ben Wolfgang, *Thumbs Down: Facebook's Hate Speech and Censorship Policies No Easy Fix*, WASH. TIMES (Apr. 22, 2018), <https://www.washingtontimes.com/news/2018/apr/22/facebook-hate-speech-censorship-policies-upset-bot/>. Some critics note that Facebook does not alter its central focus on targeting individuals based on using their data trail. See Kari Paul, *Facebook to Remove 'Trending' News from Its Site Amid Fake News Criticism*, MARKETWATCH (June 3, 2018, 7:56 AM), <https://www.marketwatch.com/story/facebook-to-remove-trending-news-from-its-site-amid-fake-news-criticism-2018-06-01>.

92. See Madrigal, *supra* note 88; Sloane, *supra* note 86; Herrman, *supra* note 64.

93. James Hohmann, *The Daily 202: The Corrosion of Support for First Amendment Principles Started Before Trump. He's Supercharged It.*, WASH. POST (Oct. 23, 2017), https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/10/23/daily-202-the-corrosion-of-support-for-first-amendment-principles-started-before-trump-he-s-supercharged-it/59ed49b130fb045cba000926/?utm_term=.adf193d03d56.

94. Wheeler, *supra* note 66.

Commission's inability to act prevents clarity about rules governing election-related speech.⁹⁵ Individuals presenting themselves anonymously online and ads giving no clue about who funded them shatter basic norms of civility and honesty. YouTube recently promoted a conspiratorial video accusing one of the survivors of the mass shooting at Florida's Stoneman Douglas High School of being an actor who did not attend the school. YouTube later explained that it misclassified the video; meanwhile, it was viewed more than 200,000 times, labeled as "trending," and accelerated in its distribution before complaints led to its removal.⁹⁶ YouTube's algorithms tend to recommend channels advancing conspiracy theories and falsehoods, even to people who have never shown an interest in such content.⁹⁷ Changing rules about how much power internet providers and data service companies can exercise over what users see or know about only adds further complexity and confusion.⁹⁸

Surveys show that a large and growing number of Americans see news stories as faulty and the professional press as unwilling to admit mistakes or correct biases.⁹⁹ President Trump has made "fake news" a popular phrase, and disagreements over its meaning

95. Michelle Ye Hee Lee, *FEC Struggles to Craft New Rules for Political Ads in the Digital Space*, WASH. POST (June 28, 2018), https://www.washingtonpost.com/politics/fec-struggles-to-craft-new-rules-for-political-ads-in-the-digital-space/2018/06/28/c749a234-7af9-11e8-aece-4d04c8ac6158_story.html?utm_term=.53fffe4b08c7; Ann Ravel, *How the FEC Turned a Blind Eye to Foreign Meddling*, POLITICO (Sept. 18, 2017), <https://www.politico.com/magazine/story/2017/09/18/fec-foreign-meddling-russia-facebook-215619>; Kenneth P. Doyle, *Facebook Political Ads Get Bare-Bones Guidance from FEC*, BLOOMBERG BNA (Dec. 15, 2017), http://news.bna.com/mpdm/MPDMWB/split_display.adp?fedfid=125137469&vname=mpebulallissues&jd=000001605713dc0aa3657f3feaba0002&split=0.

96. Douglas MacMillan, *Youtube Says It Mistakenly Promoted a Conspiratorial Video on Florida Shooting*, WALL ST. J. (Feb. 22, 2018, 6:56 PM), <https://www.wsj.com/articles/youtube-says-it-mistakenly-promoted-a-conspiratorial-video-on-florida-shooting-1519257359>.

97. *Id.*

98. Brian Fung, *FCC Plan Would Give Internet Providers Power to Choose the Sites Customers See and Use*, WASH. POST (Nov. 21, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/21/the-fcc-has-unveiled-its-plan-to-rollback-its-net-neutrality-rules/?utm_term=.bef70448a21f.

99. Jones & West, *supra* note 41, at 60; *Press Widely Criticized, but Trusted More than Other Information Sources: Views of the Media: 1985–2011*, PEW RES. CTR. (2011), <http://www.people-press.org/2011/09/22/press-widely-criticized-but-trusted-more-than-other-institutions/>; Uri Friedman, *Trust Is Collapsing in America*, THE ATLANTIC (Jan. 21, 2018), <https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/>; see also JOSEPH A. CALIFANO JR., OUR DAMAGED DEMOCRACY: WE THE PEOPLE MUST ACT 158–61 (2018).

simply amplify the doubt and distrust toward providers of news.¹⁰⁰ Competing for shrinking audiences, even mainstream media increasingly stresses sensational headlines or human interest stories.¹⁰¹ At the same time, technological and economic disruptions alter how news is gathered, edited, accessed, distributed, and financed. These patterns contribute to and reflect the diminishing role of evidence and analysis in the United States.¹⁰²

This is the new ecosystem of news.¹⁰³ Serious risks of news deserts; echo chambers; concentrated ownership of newspapers, radio, television, and cable sources of news; shrinking numbers of professional journalists; blurring of ads and news; and dominance of digital platform companies: this is what shapes people's encounters with news. As the big digital platforms do little to invest in news creation, the United States is in danger of losing the crucial relationship between press and democracy—i.e., holding officials accountable—as presumed by the authors of the First Amendment.

III. A FRAGILE RIGHT: PRESS FREEDOM HINGES ON THE VIABILITY OF EVOLVING PRIVATE INDUSTRY

The framers of the Bill of Rights assumed the existence of a private press in guaranteeing its freedom. At the same time, in varied ways, the federal government has contributed money and devised laws and regulations to develop the free and private media. Over two centuries, the government invested in the development of a new media, shielded innovative media from competition, and enforced competition rules to promote access and innovation. The transformation of media from printing presses to the internet thus involves both ingenuity of private enterprise and conscious government policies. Both have been crucial to the operations of freedom of speech and of the press.

Let us start with the private enterprise side of the equation. From the nation's start, the informed electorate and the

100. James Carson, *Fake News: What Exactly Is It—And How Can You Spot It?*, THE TELEGRAPH (Feb. 16, 2018), <http://www.telegraph.co.uk/technology/0/fake-news-exactly-has-really-had-influence/>.

101. CALIFANO, *supra* note 99, at 160.

102. See generally JENNIFER KAVANAGH & MICHAEL D. RICH, RAND CORP., TRUTH DECAY: AN INITIAL EXPLORATION OF THE DIMINISHING ROLE OF FACTS AND ANALYSIS IN AMERICAN PUBLIC LIFE (2018).

103. Emily Bell observes: "Our news ecosystem has changed more dramatically in the past five years than perhaps at any time in the past 500." Viner, *supra* note 61.

accountable democratic republic it serves hinged on the vitality of private industry. The framers of our Constitution and Bill of Rights understood these difficulties. James Madison, for example, saw public opinion as the real sovereign in a free society; but, in a large society, public opinion is “less easy to be ascertained, and . . . less difficult to be counterfeited.”¹⁰⁴ Accordingly, he argued, freedom of the press would be crucial to ensure “a general intercourse of sentiments,” including roads and commerce, “a free press, and particularly a circulation of newspapers through the entire body of the people.”¹⁰⁵ These elements are the preconditions for the “republican form of government” guaranteed by a Constitution vesting sovereignty in the people and their chosen representatives.

A. GOVERNMENT ENGAGEMENT WITH SHIFTING TECHNOLOGIES AND FINANCING OF MEDIA

Warnings that the news industry is about to collapse have come in recurring waves throughout United States history.¹⁰⁶ Repeatedly, technological changes and innovations in financing media have challenged prevailing methods of sharing news. Government policies have long contributed to shaping media, especially in times of innovation and change. Although private-sector companies and investments are central to the development of media news, government subsidies and regulations have long played influential roles. The government has made significant contributions to the current shape of new media.

In one of the events inciting the American Revolution, Great Britain tried to raise revenues through the Stamp Act of 1765 by requiring American colonists to pay a tax on every piece of printed paper—including newspapers and other documents.¹⁰⁷ The protests that followed focused on taxation without representation, and it was also obvious that the tax could destroy American printing businesses. Colonial newspapers, once bland and

104. James Madison, *For the National Gazette*, [ca. 19 December] 1791, FOUNDERS ONLINE (June 13, 2018), <https://founders.archives.gov/documents/Madison/01-14-02-0145>.

105. *Id.*

106. ANDERSON ET AL., *supra* note 22, at 117–20.

107. *A Summary of the 1765 Stamp Act*, COLONIAL WILLIAMSBURG, <http://www.history.org/history/teaching/tchrsta.cfm> (last visited Sept. 25, 2018); *Declaration of Rights and Grievances, October 14, 1774*, LIBR. OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/amrev/rebelln/rights.html> (last visited Sept. 25, 2018).

noncontroversial, began to mobilize opinions against Britain.¹⁰⁸ Patriot printers generated newspapers and pamphlets, including Thomas Paine's *Common Sense*, to present arguments and information about the conflict unfolding between the mother country and the colonies.¹⁰⁹ Thomas Jefferson wrote to his friend, the Marquis de Lafayette, "The only security of all is in a free press."¹¹⁰ Journalists continued to print criticisms of politics and officials throughout the Revolution, and leaders celebrated the debate expressed and fostered by the press as key to the Revolution.¹¹¹ The Continental Congress sought support for their cause, in part, by extolling the freedom of the press:

The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs.¹¹²

Freedom of the press came to symbolize liberty for all. State constitutions, and then the Bill of Rights amending the United States Constitution, emphasized freedom of speech and of the press. Historian Leonard Levy concluded that for the founders, "freedom of the press had come to mean that the system of popular government could not effectively operate unless the press discharged its obligations to the electorate by judging officeholders and candidates for office."¹¹³

More so than in British North America (now Canada) during

108. LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 86–87 (1985).

109. CAROL SUE HUMPHREY, *THE AMERICAN REVOLUTION AND THE PRESS* 114–15 (2013).

110. JERRY W. KNUDSON, *JEFFERSON AND THE PRESS: CRUCIBLE OF LIBERTY* 171 (2006) (quoting Thomas Jefferson). Jefferson later wrote a friend:

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

Thomas Jefferson, *To Edward Carrington Paris, Jan. 16, 1787*, AMERICAN HISTORY: FROM REVOLUTION TO RECONSTRUCTION AND BEYOND, <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl52.php> (last visited Sept. 28, 2018).

111. See KNUDSON, *supra* note 110, at 71–76.

112. Continental Congress, *An Appeal to the Inhabitants of Quebec*, DIGITAL HIST. (2016), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psid=4104.

113. LEVY, *supra* note 108, at xii.

the same period, newspapers grew, along with the new nation of the United States, and even reached into most small towns.¹¹⁴ Competition among newspapers grew as political parties grew over the course of the nineteenth century; newspapers became partisan to cultivate readers and some actually received subsidies from political parties.¹¹⁵ Some communities without newspapers mobilized ways to get one: by offering credit to a printer, assuring a sufficient number of subscriptions, or finding a political sponsor.¹¹⁶ Demand for local papers may have reflected the decentralized nature of the government.¹¹⁷ By contrast, in France and Britain, publishing and news enterprises were concentrated in the capital cities. Starting in 1830 and assisted by steam-powered presses replacing hand printing, some papers sold for one penny and reached out to working-class readers with more fact-based information, human interest stories, melodrama, and gossip, instead of the opinion-based articles familiar in elite publications.¹¹⁸ The number of daily newspapers grew fourfold between 1870 and 1900; circulations increased as well.¹¹⁹

B. GOVERNMENT POLICIES, INVESTMENTS, AND LAWS

Although enacting the First Amendment was important to the ratifying states, during the nation's first century, the constitutional language forbidding Congress from abridging the "freedom of . . . the press" had no judicial enforcement.¹²⁰ Other parts of government, however, attended to the distribution of news. The postal system, for example, allowed distribution of newspapers, books, letters, and pamphlets, even to remote villages.¹²¹ Congress gave newspapers discounted rates and also authorized newspapers to exchange copies with one another for

114. STARR, *supra* note 6, at 48–49, 57.

115. FREDERIC HUDSON, JOURNALISM IN THE UNITED STATES, FROM 1690 TO 1872, at 414 (1873); *see also* Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149, 1209 (2018).

116. STARR, *supra* note 6, at 85.

117. *Id.* at 87 (citing MICHAEL WARNER, THE LETTERS OF THE REPUBLIC: PUBLICATION AND THE PUBLIC SPHERE IN EIGHTEENTH-CENTURY AMERICA 19 (Harvard Univ. Press 1990)) (discussing de Tocqueville's idea that "the explanation for America's abundance of newspapers was its decentralized structure of government, which, he thought, created demand for local news affairs").

118. *See generally* DAVID T. Z. MINDICH, JUST THE FACTS: HOW "OBJECTIVITY" CAME TO DEFINE AMERICAN JOURNALISM (1998); STARR, *supra* note 6.

119. STARR, *supra* note 6, at 252.

120. U.S. CONST. amend. I.

121. STARR, *supra* note 6, at 48.

free, resulting in some 4,300 exchange copies received by a typical newspaper each year in the 1840s.¹²² State and local governments refrained from taxing newspapers (and later, telecommunications equipment); the Supreme Court stepped in when Governor Huey Long, smarting from press critics, imposed a newspaper tax.¹²³ The Supreme Court halted Governor Long's tax as a violation of the constitutional freedom of the press.¹²⁴ The federal government also promoted communications by authorizing mail circulation with no government surveillance and supporting schooling to cultivate informed citizens.¹²⁵

The telegraph spread across the country more thoroughly than in Europe through a pro-business governmental policy, rather than through government ownership and management, and helped newspapers gain speedy and inexpensive access to news.¹²⁶ Because of its speed in conveying news across long distances, the telegraph might have undermined newspapers or reduced them to offering only opinion and commentary. But instead, a few newspapers developed a network approach to breaking news and getting it to "the last mile," where the reader lives.¹²⁷ The nonprofit Associated Press (AP) began in 1846, initially as a handful of papers; it now unites more than 6,000 newspapers and broadcasters in an unincorporated association¹²⁸ and remains a cooperative service, permitted by antitrust law, pooling some costs of newsgathering and charging other outlets for the reported news.¹²⁹ This cooperative effort shared the costs of the telegraph and of gathering news in remote places.¹³⁰ Some say it also

122. STARR, *supra* note 6, at 48, 90.

123. *See id.* at 125 (nineteenth century, no taxes on newspapers); *see also id.* at 125–26.

124. *See id.* at 125–26 (referring to *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936)); *id.* at 345 (contrasting U.S. and European approaches to taxing newspapers and telecommunications).

125. STARR, *supra* note 6, at 107, 110.

126. *See id.* at 154–69.

127. *See Understanding Last Mile Internet Access*, MEDIUM, https://medium.com/@datapath_io/understanding-last-mile-internet-access-a62ee96c0a00 (last visited Oct. 23, 2018).

128. *The Associated Press*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences-and-law/economics-business-and-labor/businesses-and-occupations/associated-press> (last visited Oct. 24, 2018).

129. *See generally Our Story*, ASSOCIATED PRESS, <https://www.ap.org/about/our-story/> (last visited Sept. 26, 2018).

130. *Network Effects: How a New Communications Technology Disrupted America's Newspaper Industry—in 1845*, THE ECONOMIST (Dec. 17, 2009), <http://www.economist.com/node/15108618>.

pioneered a direct and simple style for reporting news, dubbed “telegraphic” and neutral in tone and content, designed to be acceptable across many different news outlets.¹³¹ Initially spanning newspapers, and eventually, radio, television, and the internet, the AP remains committed to impartial and accurate reporting, and competing cooperative services have developed to meet the demand for news as a product. The older media took hold of a new technology, sharing its costs and facilitating quick distribution of news.

Between 1917 and the 1930s, active campaigns by fledgling civil liberties initiatives and dissenting voices at the Supreme Court pushed against punishments for antiwar publications and other forms of dissenting speech.¹³² The business of gathering and sharing news proved resilient and even grew stronger, building commitments to professionalism. Competition and commercial pressures pushed publishers to expand their audiences beyond particular partisan lines and contributed to the rise of bold graphics and sensational stories but also broader investigations.¹³³ Some papers even produced fake stories, but in efforts to appeal to mass audiences, they used headlines and illustrations that expanded readership and exposed mistreatment of the disadvantaged.¹³⁴ Even as “yellow journalism”¹³⁵ emphasized scandals and emotional stories, journalists began to aspire to

131. For the attribution of “telegraphic style” to the telegraph, see *Network Effects*, *supra* note 130. *Contra* MINDICH, *supra* note 118.

132. See generally *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA’S CIVIL LIBERTIES COMPROMISE* (2016) (arguing that civil liberties turned from workers’ rights to an embrace of industry and corporations during and since the New Deal). See also *United States v. One Book Called Ulysses*, 72 F.2d 705, 707 (2d Cir. 1934); STARR, *supra* note 6, at 268, 271, 284.

133. See GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 28 (1992); Michael Schudson, *The Objectivity Norm in American Journalism*, 2 *JOURNALISM* 149, 159–60 (2001); Jack Shafer, *The Lost World of Joseph Pulitzer*, *SLATE* (Sept. 16, 2005, 2:55 PM), http://www.slate.com/articles/news_and_politics/press_box/2005/09/the_lost_world_of_joseph_pulitzer.html. See generally GÉRALDINE MUHLMANN, *UNE HISTOIRE POLITIQUE DU JOURNALISME* (2004); cf. GÉRALDINE MUHLMAN, *POLITICAL HISTORY OF JOURNALISM* (Jean Birrell, trans., 2008).

134. See generally PHYLLIS LESLIE ABRAMSON, *SOB SISTER JOURNALISM* (1990); JUDITH SPENCER, *THE YELLOW JOURNALISM: THE PRESS AND AMERICA’S EMERGENCE AS A WORLD POWER* (2007).

135. *U.S. Diplomacy and Yellow Journalism, 1895–1898*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1866-1898/yellow-journalism> (last visited Dec. 18, 2018).

achieve objectivity in reporting.¹³⁶ When a scurrilous newspaper printed anti-Semitic claims but also exposed local government and business corruption, the Supreme Court reinforced protections for the free press.¹³⁷ Advertising revenues replaced political party financing and motivated the search for broader readership.¹³⁸ Large urban papers published investigations of crowded housing, tainted food, and misconduct by officials, in tune with Progressive Era reform efforts.¹³⁹ Economies of scale allowed lower prices and higher profits; the telegraph and telephones enhanced collection and sharing of news.¹⁴⁰ As the federal government allowed more concentrated ownership of newspapers during the first several decades of the twentieth century, journalism grew more professional.¹⁴¹

Government policies by the 1940s banned local newspapers and television stations from merging in order to limit market concentration in media ownership and control, but at other times permitted joint operating agreements¹⁴² to allow newspapers to cut costs.¹⁴³ Although the Supreme Court has resisted claims of special rights for the press, such as confidentiality for its sources or access to closed government spaces, over time, it broadened judicial protection for freedom of speech.¹⁴⁴ For example, constitutional decisions expanded protections for speech and press

136. See generally MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* (1978); SPENCER, *supra* note 134.

137. See generally FRED W. FRIENDLY, *MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO THE FREEDOM OF THE PRESS* (1981) (discussing the background of *Near v. Minnesota*, 283 U.S. 697 (1931)).

138. See James L. Baughman, *The Fall and Rise of Partisan Journalism*, CTR. FOR JOURNALISM ETHICS (Apr. 20, 2011), <https://ethics.journalism.wisc.edu/2011/04/20/the-fall-and-rise-of-partisan-journalism>.

139. STARR, *supra* note 6, at 256.

140. *Id.* at 125–35, 154, 162–69.

141. Robert McChesney & John Nichols, *The Rise of Professional Journalism: Reconsidering the Roots of Our Profession in an Age of Media Crisis*, IN THESE TIMES (Dec. 7, 2005), http://inthesetimes.com/article/2427/the_rise_of_professional_journalism.

142. See Robbie Steel, Comment, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PA. L. REV. 275, 275–76 (1989).

143. Steve Pociask, *A New Look at Media Cross-Ownership Rules*, FORBES (Nov. 7, 2017, 9:21 AM), <https://www.forbes.com/sites/stevepociask/2017/11/07/a-new-look-at-media-cross-ownership-rules/#55854a24181f>.

144. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 456–60 (1983); Jones & West, *supra* note 41, at 52–54.

to include honest mistakes.¹⁴⁵

Nonetheless, the Supreme Court has allowed government media regulation, like the Fairness Doctrine, which mandated opportunities for replies by those attacked on-air in light of the scarcity of broadcasting channels.¹⁴⁶ The government justified regulation of speech with a right of reply because of the scarcity of broadcast spectra used by television and radio licensees as trustees for the public.¹⁴⁷ The Fairness Doctrine required broadcast networks to provide contrasting views on issues of public importance.¹⁴⁸ The Federal Communications Commission, for a time, deemed the Fairness Doctrine the “single most important requirement of operation in the public interest—the sine qua non for grant of a renewal of license,”¹⁴⁹ but over time, weakened and then ended it as cable and the internet altered the predicate of scarce speech opportunities. The FCC still limits obscenity, indecency, and profanity during certain broadcasting hours.¹⁵⁰ Today, the Supreme Court authorizes light government oversight of technology in the hands of private businesses in addressing speech issues and public concerns.¹⁵¹

From the telegraph to the internet, pro-business governmental policies have fashioned the media. The federal government gave free use of unoccupied public lands to support the development of the telegraph and bolstered radio’s development by purchasing radio equipment.¹⁵² As broadcasting developed, the

145. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 278–80 (1964).

146. See Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, 47 DUKE L.J. 899, 903 (1998); Jennifer L. Polse, *United States v. Playboy Entertainment Group, Inc.*, 16 BERKELEY TECH L.J. 347, 348 (2001); Josephine Soriano, *The Digital Transition and the First Amendment: Is It Time to Reevaluate Red Lion’s Scarcity Rationale?*, 15 B.U. PUB. INT. L.J. 341 (2006). See generally *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (upholding the “Fairness Doctrine”); *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994); *Reno v. ACLU*, 521 U.S. 844 (1997). Upholding the constitutionality of the Fairness Doctrine did not affect the FCC’s discretion regarding whether or not to continue the Fairness Doctrine, which it ended in 1987 after a series of federal appellate cases helped move the FCC to do so.

147. Dante Chinni, *Is the Fairness Doctrine Fair Game?*, PEW RES. CTR. (July 19, 2007), <http://www.pewresearch.org/2007/07/19/is-the-fairness-doctrine-fair-game/>.

148. *Id.*

149. Dan Fletcher, *A Brief History of the Fairness Doctrine*, TIME, Feb. 20, 2009, <http://content.time.com/time/nation/article/0,8599,1880786,00.html>.

150. FCC, CONSUMER GUIDE: OBSCENE, INDECENT AND PROFANE BROADCASTS (2017), <https://transition.fcc.gov/cgb/consumerfacts/obscene.pdf>.

151. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000); *Sable Comm’ns of Cal., Inc. v. FCC*, 492 U.S. 115 (1989).

152. RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN

government presumed that a private press would exist, and at the same time, assisted its flourishing. Antitrust enforcement promoted competition among news, media, and telecommunications in services and ownership while protecting private investors in the United States from interests elsewhere.¹⁵³ The big decision to take apart the largest telephone company marked a government decision to prefer innovation through competition over quality and reach of services assured by a regulated monopoly.¹⁵⁴ Federal policies have also promoted universal service and steered private industries toward that goal.¹⁵⁵ Over the course of United States history, media grew with subsidies from government actors (including the military) and political parties, with advertising and direct-to-consumer purchases, and with a surging cultural and political conception of pluralistic, independent media as a watchdog of the state.¹⁵⁶ Hence, liberal constitutionalism, protecting both private property and freedom of speech, combined with government policies promoting economic development and competition to support flourishing media. Government involvement co-existed with a conception of news media as independent of government, and the flourishing of a range of viewpoints for more than 200 years has supported that conception.¹⁵⁷

TELECOMMUNICATIONS 8 (2010); *see also* STARR, *supra* note 6, at 154–71, 331–33, 338, 344–45, 363.

153. STARR, *supra* note 6, at 186, 224, 393, 401; Robert E. Litan, Deputy Assistant Att’y Gen., Antitrust Div., Dep’t of Justice, Antitrust Enforcement and the Telecommunications Revolution: Friends, Not Enemies, Address before the National Academy of Engineering (Oct. 6, 1994) (transcript available at <https://www.justice.gov/atr/speech/antitrust-enforcement-and-telecommunications-revolution>).

154. *See generally* STEVE COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986).

155. *See* CHRISTOPHER H. STERLING ET AL., *SHAPING AMERICAN TELECOMMUNICATIONS: A HISTORY OF TECHNOLOGY, POLICY, AND ECONOMICS* 270–79 (2005); Cecilia Kang, *TV’s Future: FCC Decisions on Internet Access, Comcast-NBC Merger Approaching*, WASH. POST (Dec. 18, 2010, 1:05 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/17/AR2010121703792.html>; Kristina M. Lagasse, Note, *Shaping the Future of the Internet: Regulating the World’s Most Powerful Information Resource in U.S. Telecom Ass’n v. FCC*, 63 LOY. L. REV. 322, 323 (2017); *see also* STARR, *supra* note 6, at 331, 345, 380, 394.

156. *See* STARR, *supra* note 6, at 107–10, 386–92, 402. *See generally* ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING 1928–35* (1993); Eugene E. Leach, *Tuning Out Education, Chapter 1*, CURRENT (Jan. 14, 1983), <https://current.org/1983/01/tuning-out-education/>.

157. For a thoughtful analysis of these developments until 2009, see Kristine A. Oswald, *Mass Media and the Transformation of American Politics*, 77 MARQUETTE L. REV. 395 (2009).

Before long, “the press” encompassed the new technologies of broadcast and cable news, which disrupted print media, but then broadcast and cable encountered the disruption of the internet, mobile phones, and attendant economic and technological changes. Radio communications proved significant in efforts to reduce shipping disasters. In 1912, the federal government started licensing private radio stations, and after 1,500 people went down with the *Titanic* ocean liner, it required all ships to have wireless stations, chiefly used for point-to-point messages.¹⁵⁸ Inventors and hobbyists took the lead in using radio to communicate news; Lee de Forest broadcasted election returns in 1916 and started news broadcasts reaching a 200-mile radius around New York City.¹⁵⁹ Live coverage of special events, such as the Scopes Monkey Trial, showed the potential of broadcasting.¹⁶⁰

In 1926 and 1927, private, competing networks—namely, NBC and CBS—began broadcasting news about political conventions and election results.¹⁶¹ The federal government shifted regulation from the Department of the Navy to the Department of Commerce, and then to an independent agency.¹⁶² Using the justifications of spectrum scarcity and national security, the government further regulated radio during World War I, enabling private investment but maintaining control by the Navy, even after the war, to ensure its use for military defense.¹⁶³ Defenders of freedom of speech sought to purchase airtime, open to anyone who would pay, while commercial broadcasters sought to retain editorial control over programming.¹⁶⁴ First, the Federal Radio Commission, started in 1926, and then its 1934 replacement, the FCC, mandated government-controlled licensing, assigning broadcasters to channels in the electromagnetic spectrum, and requiring broadcasters to advance the public interest as

158. STARR, *supra* note 6, at 218–219.

159. Gordon Govier, *The Living Room Fixture*, RADIO SCRIBE, <http://www.radioscribe.com/formats.html> (last visited Oct. 24, 2018).

160. *Id.*

161. *News Network*, MUSEUM, <http://www.museum.tv/eotv/newsnetwork.htm> (last visited Oct. 3, 2018).

162. See Thomas H. White, *Early Government Regulation (1903-1901)*, EARLY RADIO HIST., <https://earlyradiohistory.us/sec023.htm> (last updated Mar. 11, 2003).

163. STARR, *supra* note 6, at 333.

164. See Stuart N. Brotman, *Revising the Broadcast Public Interest Standard in Communications Law and Regulation*, BROOKINGS (Mar. 23, 2017), <https://www.brookings.edu/research/revisiting-the-broadcast-public-interest-standard-in-communications-law-and-regulation/>.

determined by the government regulator.¹⁶⁵ The resulting frameworks regulated interstate communications of radio, television, wire, satellite, and cable, but efforts to regulate the internet in the United States and elsewhere remain contested.

Broadcasting has been a largely private industry both in financing and in fundamental decisions, such as whether to permit advertising. Broadcasting in the United States diverged from the development of broadcasting in other countries that use governmental investment and control or a hybrid of public and private investment and control.¹⁶⁶ Herbert Hoover, as Secretary of Commerce, set this path. He drew on his business and engineering background to foster growth of private broadcasting while orchestrating the federal licensing scheme and method for allocating the spectrum.¹⁶⁷

By the time of the Great Depression, publishers worried that radio would draw readers and advertisers away from newspapers¹⁶⁸—similar to how newspapers and broadcasters now worry about the internet and digital media. President Franklin Delano Roosevelt used “fireside chats” on the radio as a mechanism to talk directly to the public about his policies and responses rather than having his words filtered through journalists.¹⁶⁹ Although he did so only thirty-one times during his twelve years in office, this use of media set a personal tone and helped overcome opposition to his plans.¹⁷⁰ Here, President Roosevelt pioneered the use of a new technology to bypass journalists and communicate directly with people, just as President Donald Trump has pursued with his even more frequent use of Twitter. During his first year in office, President Trump sent 2,568 tweets, which amounts to a little more than seven tweets each day.¹⁷¹

As television emerged in the 1950s and 1960s, dominant radio networks experimented with the new medium and built on the surge of interest in news during World War II to create news and

165. See Brotman, *supra* note 164.

166. STARR, *supra* note 6, at 335, 339, 363; *Radio: The Golden Age Around the World*, BRITANNICA, <https://www.britannica.com/topic/radio/The-Golden-Age-around-the-world> (last visited Oct. 3, 2018).

167. STARR, *supra* note 6, at 333–34.

168. *Id.* at 377.

169. *Id.* at 360, 374.

170. *Id.* at 374.

171. Chris Tognotti, *How Many Times Has Trump Tweeted as President? Twitter is His Best Friend*, BUSTLE (Jan. 24, 2018), <https://www.bustle.com/p/how-many-times-has-trump-tweeted-as-president-twitter-is-his-best-friend-8011368>.

public affairs programming.¹⁷² An initial governmental freeze on new licenses gave leading networks (NBC and CBS) a head start.¹⁷³ While local stations mainly relied on wire service headlines, national networks turned presidential conventions, the Army-McCarthy hearings, and later, moon launches, into must-see events. Documentaries, interviews, and inventive formats, such as Fred Friendly's "See It Now" newsmagazine, attracted broad audiences.¹⁷⁴

Public broadcasting, which started as educational radio using portions of the airwaves allocated by the government to noncommercial stations, emerged first with local stations in the 1950s.¹⁷⁵ National public television launched in 1967 with a nonprofit organization serving as a buffer between local stations and the federal government.¹⁷⁶ National Public Radio started in 1970, broadcasting Senate hearings on the Vietnam War and developing independent news reporting, funded partially by the government but mainly by private donations.¹⁷⁷ Also, in 1969, for the first time, the United States Supreme Court articulated the First Amendment rights of broadcasters; at the same time, the Court approved the Fairness Doctrine, a requirement that licensees, entrusted with the scarce resource of the spectrum, present competing sides of controversial issues covered in their broadcasts in order to serve the public interest.¹⁷⁸

Satellite distribution and cable services threatened the

172. PONCE DE LEON, *supra* note 54, at 4.

173. *Id.* at 6.

174. *Id.* at 14–27, 35.

175. *The History of Public Broadcasting*, UNC SCH. OF GOV'T: MPA@UNC BLOG (Oct. 21, 2013), <https://onlinempa.unc.edu/history-of-public-broadcasting>.

176. *Id.*

177. *Id.* Federal, state, and local governments fund 14% of NPR's budget. See *Public Radio Finances*, NPR, <https://www.npr.org/about-npr/178660742/public-radio-finances> (last visited Oct. 3, 2018); *Overview and History*, NPR, <https://www.npr.org/about-npr/192827079/overview-and-history> (last visited Oct. 3, 2018); *CPB FAQ*, CORP. FOR PUB. BROADCASTING, <https://www.cpb.org/faq#2-1> (last visited Oct. 3, 2018); Ted Johnson, *Trump's Budget Again Proposes Elimination of Public TV, Arts Funding*, VARIETY (Feb. 12, 2018, 10:31 AM), <http://variety.com/2018/tv/news/trump-budget-eliminates-pbs-nea-funding-1202695205/>. For a critique of any public funding of public broadcasting, see Jim Epstein, *Funding for Public Broadcasting Is Just 0.01 Percent of the Federal Budget. It Should Still Be Eliminated*, REASON (Feb. 23, 2017, 5:43 PM), <http://reason.com/blog/2017/02/23/pbs-npr-government-cpb-trump>. The FCC reconsidered the Fairness Doctrine in 1987, concluding that the rise of cable television altered some of the scarcity issues and that the Fairness Doctrine might deter broadcasters from addressing important issues. Chinni, *supra* note 147.

178. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369, 400–01 (1969).

networks with rapid expansion of stations and content, but network news adjusted, and cable found audiences seeking news 24/7.¹⁷⁹ Ted Turner's CNN in 1980 and Robert Murdoch's Fox News demonstrated that there were sufficient audiences for constant news shows, though Fox brought more edgy, populist, and entertaining elements, drawing on popular talk radio as an alternative to what some viewed as a liberal bias at CNN.¹⁸⁰ MSNBC further fractured audiences with a more explicit liberal slant.¹⁸¹ And by 1999, Comedy Central drew in younger viewers, and Jon Stewart turned the comedic *Daily Show* into satiric comments on the news.¹⁸² Networks and cable channels developed web-based journalism, offering in-depth features, visuals, and other follow-up material that strengthened television news audiences.¹⁸³ Sophisticated analyses identify how to engage audiences and push out news using social media and other platforms, as well as through traditional media.¹⁸⁴ Contrary to the dreams of early internet pioneers, the new media platforms design new constraints, not endless opportunities.¹⁸⁵

When it comes to entertainment, this pattern of technological innovation has upended old industries but also opened new ones. Radio, film, and television affected, but did not eliminate, audiences for live theater.¹⁸⁶ "Streaming may have killed home video," observes Matt Pressberg, "but it ended up ushering in a different kind of boom of watching movies and TV shows at home."¹⁸⁷ Digital distribution of music first led to piracy and

179. See PONCE DE LEON, *supra* note 54, at 168, 172, 188–229.

180. See *id.* at 187–226, 229.

181. See MSNBC, MEDIA BIAS/FACT CHECK, <https://mediabiasfactcheck.com/msnbc/> (last visited Dec. 18, 2018).

182. See PONCE DE LEON, *supra* note 54, at 226, 258.

183. See *id.* at 276–77.

184. See generally DOUGLAS K. SMITH ET AL., TABLE STAKES: A MANUAL FOR GETTING IN THE GAME OF NEWS (2017).

185. Sebastian Anthony, *Is the Internet a Failed Utopia?*, ARS TECHNICA (June 13, 2015, 5:50 PM), <https://arstechnica.com/information-technology/2015/06/is-the-internet-a-failed-utopia>. People still pursue visions of the internet, including as a vehicle to realize freedom of assembly as well as speech. See G. Perez de Acha, *Freedom of Association on the Internet*, INTERNET ENGINEERING TASK FORCE (June 22, 2017), <https://tools.ietf.org/id/draft-tenoever-hrpc-association-01.html>.

186. See generally Jonathan Mandell, *8 Ways Television is Influencing Theater*, HOWLROUND (Oct. 16, 2013), <https://howlround.com/8-ways-television-influencing-theater>; Tom Lewis, "A Godlike Presence": *The Impact of Radio on the 1920s and 1930s*, OAH MAG. HIST., Spring 1992, at 26.

187. Matt Pressberg, *Amazon, Netflix Should Consider Buying Movie Theaters*, THE INFORMATION (Jan. 16, 2018, 10:40 AM), <https://www.theinformation.com/articles/amazon-netflix-should-consider-buying-movie-theaters>.

plummeting sales, but then iTunes, Spotify, and Pandora developed ways to raise funds and expand audiences.¹⁸⁸ It took twenty years, but now the music industry is increasing revenue.¹⁸⁹ Old media may disappear, but also may be reinvented with new purposes alongside innovations, just as radio persisted after the rise of television and the internet.¹⁹⁰

The Constitution assumed the existence and viability of private enterprises producing and distributing news across the decades. The news business changed with the telegraph and telephone, radio and television, cable and wireless, the internet, computers, and mobile phones. These technological changes and the transformations they brought did not occur in a vacuum. The federal government has subsidized, regulated, and shaped them, with policies helping media prosper without domination by a few players or by limited viewpoints. It is a history of many disruptions and changes; a history of private businesses at times competing, at times cooperating, and mixing reliance on private financing, including advertising, with consumer subscriptions and government subsidies.

Are the disruptions affecting news in 2018 more severe or different in kind than the prior disruptions of telegraph, radio, television, and cable? The problem now is not governmental *over*-regulation curtailing freedom of speech but inadequate government guidance to prevent domination by a few companies and the swamping of users with a plethora of messages, propaganda, memes, and ads. Here, the question is not just finding paths to financial viability, but maintaining the free expression of news and opinion, called by the Virginia Declaration of Rights in 1776, “one of the greatest bulwarks of liberty.”¹⁹¹

IV. WHAT’S NEW AND LESSONS FROM THE PAST

In some ways, the current disruptions in media and news echo past technological and economic changes that have radically altered the vehicles for collecting and distributing news in the United States. Big data platforms draw patrons and advertising

188. *Float of a Celestial Jukebox*, THE ECONOMIST (Jan. 11, 2018), <https://www.economist.com/business/2018/01/11/having-rescued-recorded-music-spotify-may-upend-the-industry-again>.

189. *Id.*

190. ANDERSON ET AL., *supra* note 22, at 120–21.

191. Virginia Declaration of Rights § XVII (1776) (available at http://avalon.law.yale.edu/18th_century/virginia.asp).

away from older media; presidents (such as FDR and Trump) go over the heads of professional journalists to send messages (through radio or Twitter) directly to the public. Federal and state governments play catch-up, pursuing regulation after developments emerge, and chiefly rely on competition among private-sector companies to check bad practices. Perhaps older companies and media will find ways to adapt by collaborating with new enterprises, focusing on distinctive strengths; just as newspapers moved to more in-depth analysis after the development of 24/7 broadcast news, all media will change in response to and in collaboration with data platforms on the internet.

But the current shift differs precisely because of the availability and practices of new media and digital tools. Digital networks, unlike the telegraph, radio, or television, do not need the newspaper to reach the “last mile” to the reader and allow readers to communicate across the networks, too. “Google stole the delivery trucks and Amazon stole the newsstand”—as one journalist put it.¹⁹² The lag time of a single day once was enough to allow one newspaper an advantage in breaking a story, but now the internet, as well as broadcast and cable, can transmit any story reported by a newspaper immediately—with most of the profit not going to those who reported the news.¹⁹³ Through the network of networks that composes the internet, one-to-many and many-to-one communications are easy and can bypass the newspaper, publisher, or broadcaster that used to select, edit, and vet news. Anyone with access to an email account, mobile phone, or social network can not only receive but also send out information. These channels are global and “distributed,” meaning the components are spread widely and coordinated through networks, not hierarchies or a central coordinator or chain of command.¹⁹⁴ And now advertisers can bypass newspapers and other middlemen, reaching

192. See Paul Bradshaw, *How the Web Changed the Economics of News – In All Media*, ONLINE JOURNALISM BLOG, <https://onlinejournalismblog.com/2009/06/04/how-the-web-changed-the-economics-of-news-in-all-media/> (last updated Oct. 9, 2012).

193. MCCHESENEY & NICHOLS, *supra* note 30, at 73; see also FTC, STAFF DISCUSSION DRAFT: POTENTIAL POLICY RECOMMENDATIONS TO SUPPORT THE REINVENTION OF JOURNALISM, https://www.ftc.gov/sites/default/files/documents/public_events/how-will-journalism-survive-internet-age/new-staff-discussion.pdf (last visited Oct. 3, 2018).

194. See *Distributed Network*, TECHNOPEdia, <https://www.techopedia.com/definition/27788/distributed-network> (last visited Dec. 31, 2018). Some describe the internet as a network of networks. Paul Tulenko, *Internet is a Network of Networks*, DESERET NEWS (May 9, 1995, 12:00 AM), <https://www.deseretnews.com/article/419986/internet-is-a-network-of-networks.html>.

customers directly online and gathering data about them at the same time.¹⁹⁵

Because mega-digital companies, such as Google, Amazon, Facebook, and Twitter, generally do not gather, edit, or produce news stories, their dominance of the news business does not strengthen or even preserve reliable news. Indeed, the digital companies free ride on the content generated or conveyed through social media by users, and also use search optimization and social marketing to gain customers and to sell data about the users.¹⁹⁶ Unlike newspapers and broadcasters, the digital companies do not need to invest in gathering or assessing news, they therefore exacerbate the risk of news deserts, as highly local topics go without coverage because local outlets have closed and national investors and digital companies are focused elsewhere. Even when hard-core news struggled for readers, newspapers and broadcasters could help pay for it through cross-subsidies offered by bundling content: people interested in style, crossword puzzles, and horoscopes would help pay for reporters on politics, science, and sports. Now, media is so weakened it has little role in controlling the limits of what is acceptable to say and what is believable.¹⁹⁷

Even the huge digital companies are only partially in control of the transformed world determining the shape, price, and quality of news. You send and receive news and other communications by connecting to a telecommunications service provider, which translates the text message sent or received into electronic signals, transmitted through the network as packets of data through an internet service provider, such as Verizon, AT&T, or Comcast, and ultimately this chain translates a message back into text as it reaches another device.¹⁹⁸ If internet service providers do not treat all packets the same, those with more money or influence or those favored by a controlling government will be able to negotiate better speed and service.¹⁹⁹ When you use the internet, you are using a

195. See Bradshaw, *supra* note 192.

196. See *supra* note 18 and accompanying text.

197. Viner, *supra* note 61.

198. See generally Jeff Tyson, *How Internet Infrastructure Works*, HOWSTUFFWORKS (Apr. 3, 2001), <https://computer.howstuffworks.com/internet/basics/internet-infrastructure.htm>; *How Do Mobile Phones and the Internet Work?*, ME & MY SHADOW, <https://myshadow.org/how-do-mobile-phones-and-internet-work> (last updated Mar. 4, 2016).

199. See Nils B. Weidmann et al., *Digital Discrimination: Political Bias in Internet Service Provision Across Ethnic Groups*, 353 SCI. 1151, 1152, 1154 (Sept. 9, 2016),

device—a phone, tablet, or laptop computer—that is linked to hardware, such as an Ethernet network card or a modem, connected to an electronic cable, wireless transmission of radio waves, or beam of light sent down a fiber optic glass tube.²⁰⁰ Private companies compete in assembling this network of networks we call the internet.²⁰¹ The businesses and architecture of each of these elements affect whether and how people receive or create information. Held by a few dominant companies, access to these elements raises new concerns about concentrated and unaccountable power.²⁰² These companies—and the advertisers using their channels—can bypass newspapers and broadcasters as vehicles for reaching audiences.

Further complicating the situation is the sheer complexity and lack of transparency of the internet and digital companies. Robert Mueller’s indictments give a clue about the vulnerability of Facebook tools to manipulation and deceit, but it is difficult for most people to see or understand fake accounts, micro ads, or devices like “dark posts.”²⁰³ According to a recent study of middle-schoolers in the United States, users confuse items labeled as “sponsored content” with vetted news stories.²⁰⁴ Innovations blurring the distinction between ads and news make the problem much worse.

What other techniques are available for misuse? Mathematical formulas—algorithms—are supposed to connect people with content they are looking for and would like. What if a digital platform adjusts the math “so that only posts that get a

<http://science.sciencemag.org/content/353/6304/1151.full?ijkey=7Wq4RKNGjbIvw&keytype=ref&siteid=sci>. For efforts to prevent discrimination by internet service providers in the United States, see *infra* note 267 and accompanying text (discussing net neutrality).

200. See generally Dong Ngo, *Home Networking Explained, Part 4: Wi-Fi vs. Internet*, CNET (Sept. 3, 2016, 5:00 AM), <https://www.cnet.com/how-to/home-networking-explained-part-4-wi-fi-vs-internet/>; Allie Shaw, *How Does Fiber Internet Work?*, REVIEWS.ORG (Oct. 3, 2016), <https://www.reviews.org/internet-service/fiber-internet-work/>.

201. Rus Shuler, *How Does the Internet Work*, THE SHULERS (2005), http://www.theshulers.com/whitepapers/internet_whitepaper/index.html.

202. See TAPLIN, *supra* note 66. See generally SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* (Yale Univ. Press 2013) (critiquing how dominant internet service leaders—Comcast, Verizon Wireless, AT&T, and Time Warner Cable—reap 95% profit rates).

203. See *supra* notes 81–83 and accompanying text.

204. Sue Shellenbarger, *Most Students Don't Know When News is Fake, Stanford Study Finds*, WALL ST. J. (Nov. 21, 2016, 9:43 PM), <https://www.wsj.com/articles/most-students-dont-know-when-news-is-fake-stanford-study-finds-1479752576>.

disproportionate amount of engagement (likes, clicks, comments, shares) will be seen by a lot of people—regardless of whether those people are fans or friends?”²⁰⁵ Traffic is directed by an unseen traffic cop. Someone who likes updates from friends may not get many of them because they are not circulating among or preferred by the large numbers of people valued by the algorithm. Companies and people who are not getting their messages delivered as much as they would like can—and do—pay for better placements.²⁰⁶

This is the technology that enables predatory messages, like ads for fraudulent educational opportunities, targeting vulnerable people with false or misleading information.²⁰⁷ Facebook altered the newsfeeds of two million politically engaged people, who were sent a higher proportion of hard news instead of cat videos and the like; when their friends shared a news story, it showed up high on their feed without revealing the mathematical tweak behind this phenomenon.²⁰⁸ Unlike choices by Fox News or MSNBC editors to highlight one story over another, these algorithmic adjustments are invisible to viewers and thus elude comment or criticism.²⁰⁹ Apparently, during the 2016 election season, fake stories, especially pro-Trump or anti-Clinton, attracted engagement and performed better than legitimate news, generating income for teenagers in Macedonia who created websites and messages repeating hyper-partisan content.²¹⁰

Whether carefully designed or reflecting unconscious biases, algorithms govern the work of digital platforms as they collect and use vast amounts of information about individual users. And the data guiding the distribution of content may be faulty. People are known to lie or boast, for example, on Facebook, but the algorithms

205. Jay Baer, *3 Ways to Fight Facebook's Algorithm and Customize Your Feed*, CONVINCING & CONVERT (Dec. 2015), <http://www.convinceandconvert.com/social-media-tools/3-ways-to-fight-facebooks-algorithm-and-customize-your-feed/>.

206. Kate Van Huss, *What is Algorithm in Digital Marketing & How Does It Affect Your Promotional Efforts*, LINKEDIN (Sept. 22, 2015), <https://www.linkedin.com/pulse/what-algorithm-digital-marketing-how-does-affect-your-kate-van-huss>.

207. CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY 70–79 (2016).

208. *Id.* This is a technique Facebook used to nudge particular people to vote. *Id.* at 181.

209. *Id.* at 182–83.

210. *Fake News Expert on How False Stories Spread and Why People Believe Them*, NPR (Dec. 14, 2016, 12:31 PM), <https://www.npr.org/2016/12/14/505547295/fake-news-expert-on-how-false-stories-spread-and-why-people-believe-them> [hereinafter *Fake News Expert*] (linking to transcript and audio file of recording).

simply use the data to affect how news and other information circulate.²¹¹ People using digital platforms like Facebook and Google do not have a window into the choices made in the design of platforms, and yet those choices select, suppress, push, and censor.²¹² This visibility problem exacerbates the filter bubble—the intellectual isolation that results when algorithms select what users should see based on predictions about what they would like.²¹³ Amplifying prior views and predicted interests, the communication within social networks facilitated by digital companies may contribute to social division and polarization, even before enemies of the United States exploit them.²¹⁴ Russian disinformation appeared, at times, in traditional U.S. journalism outlets, but as former U.S. Ambassador to the U.N. Samantha Power notes, “Russia has keenly exploited our growing reliance on new media—and the absence of real umpires.”²¹⁵ Russian and Macedonian actors pretending to be Americans are a transborder threat to democracy, no less than cyberhacking threatens American businesses.²¹⁶ Recent research, though, suggests both

211. See SETH STEPHENS-DAVIDOWITZ, *EVERYBODY LIES: BIG DATA, NEW DATA, AND WHAT THE INTERNET CAN TELL US ABOUT WHO WE REALLY ARE* 188–92 (2017).

212. See Lincoln Caplan, *Should Facebook and Twitter Be Regulated Under the First Amendment?*, WIRED (Oct. 11, 2017, 7:00 AM), <https://www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment>. See generally Tim Wu, *Is the First Amendment Obsolete?* (Columbia Pub. Law Research Paper No. 14-573, 2017), <https://ssrn.com/abstract=3096337>.

213. See generally PARISER, *supra* note 89.

214. Thus, the signals users give through their social networks contribute even more than algorithms due to the divergence in the news and information that different groups access. See John Wihbey, *Does Facebook Drive Political Polarization? Data Science and Research*, JOURNALIST’S RESOURCE (May 7, 2005), <https://journalistsresource.org/studies/society/social-media/facebook-political-polarization-data-science-research> (reporting research showing that signals, which users give to the algorithm, are more powerful than intrinsic choices limiting exposure to ideologically cross-cutting content). Growth in political polarization is apparently greatest among members of older populations who use the internet and social media less than younger people. Levi Boxell et al., *Is the Internet Causing Political Polarization? Evidence from Demographics* (Nat’l Bureau of Econ. Research, Working Paper No. 23258, 2017), <https://www.nber.org/papers/w23258.pdf>.

215. Samantha Power, *Samantha Power: Why Foreign Propaganda is More Dangerous Now*, N.Y. TIMES (Sept. 19, 2017), <https://www.nytimes.com/2017/09/19/opinion/samantha-power-propaganda-fake-news.html>. It is not just the Russians. See Gary King et al., *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 AM. POL. SCI. REV. 484 (2017), <https://doi.org/10.1017/S0003055417000144>.

216. Sam Meenasian, *The Biggest Threat Blowing Up Companies of All Sizes Worldwide*, CNBC (Nov. 17, 2016, 10:11 AM), <https://www.cnbc.com/2016/11/17/cyber-hackers-the-biggest-threat-blowing-up-companies-worldwide.html> (discussing international hackers stealing data).

greater domestic forces and political asymmetry in the contributions to polarization as right-wing sites and their users operate apart from the checking function of mainstream media.²¹⁷

Transnational digital platform invasions daily inject uncertainty, manipulation, and fraud through the open digital architecture housed by dominant private companies that are either unwilling to provide or are incapable of providing secure and reliable messages. A former Facebook executive explained how the company was taken by surprise: “You’re so focused on building good stuff . . . you’re not sitting there thinking, if we get lucky enough to build this thing and get two and a quarter billion people to use it, then this other bad stuff could happen.”²¹⁸ New communications technologies have long attracted propagandists. The great public relations expert Edward Bernays, who convinced large numbers of American women to smoke cigarettes, noted how shifting news technologies give rise to new periods of propaganda and fakery.²¹⁹ What is new is how the current technologies allow the propagandists to hide their tracks from even the most observant critics, while unleashing distractions and distortions on an unprecedented global scale.

The internet is also vulnerable to “flooding”: an enormous volume of information drowns out disfavored speech and either discredits mainstream media sources or distracts people from them.²²⁰ Robotic attacks boost harassment on the internet.²²¹

217. Yochai Benkler, Robert Faris, Hal Roberts & Ethan Zuckerman, *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. JOURNALISM REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php>. For further detailed analysis, see FARIS ET AL., *supra* note 56 and YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS (2018).

218. Deepa Seetharaman et al., *Tone-Deaf: How Facebook Misread America’s Mood on Russia*, WALL ST. J. (Mar. 2, 2018, 10:53 AM), <https://www.wsj.com/articles/tone-deaf-how-facebook-misread-americas-mood-on-russia-1520006034>.

219. Edward Bernays, *Propaganda (1928)*, HISTORY IS A WEAPON, <http://www.historyisaweapon.com/defcon1/bernprop.html> (last visited Oct. 4, 2018). Propaganda tapping into rage seems particularly effective in this early part of the twenty-first century. See generally PETER SLOTERDIJK, RAGE AND TIME: A PSYCHOPOLITICAL INVESTIGATION (Mario Wenning trans., 2006).

220. Wu, *supra* note 212, at 15–16.

221. Phil Muncaster, *Bot-Driven Credential Stuffing Hits New Heights*, INFOSECURITY MAG. (Feb. 21, 2018), <https://www.infosecurity-magazine.com/news/botdriven-credential-stuffing-hits>; Cristina Maza, *Florida Shooting: Russian Bots Flooded the Internet with Propaganda About Parkland Massacre*, NEWSWEEK (Feb. 16, 2018), <http://www.newsweek.com/florida-shooting-russian-bots-twitter-809000>.

“Internet trolls” post inflammatory, provocative messages to disrupt online communities or badger individuals into withdrawing.²²² The government was once assumed to be the main threat to the “marketplace of ideas,” through punishments or bans on publication, but now the greater danger comes through overwhelming individuals with messages that swamp meaningful communication.²²³ The current situation differs from prior disruptions because now the very viability of news enterprises, getting news to people, is under siege.

V. WHAT WOULD MEIKLEJOHN DO?: FIRST AMENDMENT AND DEMOCRATIC OBLIGATIONS

At this time, First Amendment freedoms and the crucial watchdog function of news hinge not only on the viability of private companies, but on decisions—made by dispersed, powerful, private, competing companies that are not in the news business—that are invisible to those affected and demonstrably manipulated by enemies of the nation and treacherous schemers. News deserts trap many local communities without reporting on local governmental and community developments, denying many people what they need to govern themselves and hold others accountable. An architecture of online communications enables anonymous and bot-initiated messages to fill the algorithms determining what news individuals get. Digital companies free ride on the news links shared by users, without reinvesting in the apparatus necessary for investigating, testing, and reporting news, and undermine people’s ability to get and trust news.

Law professor Tim Wu argues that the First Amendment was intended to prevent government censorship and is becoming irrelevant to this sprawling world of private companies and deceitful agents.²²⁴ He argues that responsibility falls to private companies, technologists, and legislators.²²⁵ All of those players should step up, but the First Amendment and the Constitution generally remain implicated, relevant, and motivating. The First Amendment constrains Congress from “*abridging*” the freedom of

222. Tom de Castella & Virginia Brown, *Trolling: Who Does It and Why?*, BBC (Sept. 14, 2011), <https://www.bbc.com/news/magazine-14898564>; Howard Fosdick, *Why People Troll and How to Stop Them*, OS NEWS (Jan. 25, 2012), <http://www.osnews.com/story/25540> (stating the definition of an internet troll, their characteristics, and an analysis of their motives).

223. Wu, *supra* note 212, at 6–7.

224. *Id.* at 17–18.

225. *Id.*

the press and the freedom of speech but does not bar actions to strengthen them. To sustain freedom of the press and enable the people, courts need to pursue some new approaches, and so does Congress.

Take, for example, the impact of social media when used by government officials for communicating with the public. The social media platforms are private, but government officials use the private tools to constrain speech and press as the officials try to control with whom they communicate. The First Amendment does not conventionally regulate decisions by private actors; courts find constitutional violations only if local, state, or federal government abridges speech or press.²²⁶ Still, if the President of the United States or other officials use Twitter or Facebook for communicating their policies and views with voters, those communications should be viewed as the kind of public communication that cannot block or “unfriend” individuals seeking to connect with them.²²⁷ Government officials converting private vehicles into their official channels of communication should be subject to the Constitution. Digital companies in some ways function like governments, controlling the public squares where people communicate,²²⁸ and have not yet found effective ways to enforce their own rules. Transplanting First Amendment limitations on censorship here is not the best solution, as it would bar private platforms from guarding against harassment, bullying, and deceit. Yet, governments in the United States and elsewhere are probing the inadequacies of self-regulation by the digital platforms.²²⁹

226. See Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 152, 156 (2017); *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1258–66 (2010).

227. Caplan, *supra* note 212; Harold Brubaker, *Elected Officials, Social Media, and the First Amendment*, PHILA. INQUIRER (Sept. 7, 2017, 5:00 AM), <http://www.philly.com/philly/business/law/elected-officials-social-media-and-the-first-amendment-20170907.html> (noting that U.S. District Judge James C. Cacheris found that the chair of the Loudoun County Board of Supervisors violated a constituent’s “right of free speech under the First Amendment” when she deleted his critical post and banned him from her Facebook page for twelve hours).

228. See *Marsh v. Alabama*, 326 U.S. 501, 507–08 (1946) (finding that a private town owned by a company functions like a public space and must comport with the First Amendment).

229. See Evelyn Douek, *European Commission Communication on Disinformation Eschews Regulation. For Now.*, LAWFARE (May 2, 2018, 7:00 AM), <https://www.lawfareblog.com/european-commission-communication-disinformation-eschews-regulation-now>; *Eroding Exceptionalism: Internet Firms’ Legal Immunity is Under Threat*, THE ECONOMIST (Feb. 11, 2017), <https://www.economist.com/business/2017/02/11/internet-firms-legal-immunity-is-under-threat>.

Instead, I suggest that the Constitution can and should play a vital role in exposing how the government sets up the current dangers and should therefore prompt new policies, regulations, and practices. The First Amendment in particular is implicated because government action, in specific ways, shapes the internet and media. The complex ecosystem of contemporary media did not spring solely from private decisions, investments, or market strategies; it has been shaped, supported, and promoted by specific government policies and actions. The Constitution is implicated because the democracy it establishes depends on a citizenry informed by news in ways that are currently in severe jeopardy. The Constitution, including the First Amendment, is no barrier to so many government actions that could make a difference. New policies and practices could tackle the concentration of private power, market failures, and coordination that our government is meant and authorized to address.

A. FIRST AMENDMENT AND GOVERNMENT ACTS, OMISSIONS, AND INVOLVEMENT WITH THE MEDIA ECOSYSTEM

The Supreme Court views the essential tripwire for First Amendment review to be actual governmental action affecting speech, and there may be specific instances where public officials' direct private channels satisfy this requirement.²³⁰ Because it is the gateway to constitutional protection, the "state action" doctrine has become an undeniable mess, with inconsistent and unpredictable results.²³¹ Government involvement in the entire framework of contemporary media reflects what lawyers might well call "entanglement," well beyond mere licensing and regulation.²³²

The role of the government in the rise of digital platforms and decline of broadcasting and newspapers is subtle but pervasive. The federal government gave subsidies to newspapers and magazines through the postal service and promoted communications by "making credible commitments not to control

230. Wu, *supra* note 212, at 19–20. On the general requirement of "state action," see Minow, *supra* note 226, at 146.

231. See Minow, *supra* note 226, at 149.

232. The Supreme Court articulated the entanglement doctrine—finding sufficient state action to trigger constitutional protection (in the Equal Protection context) where the government element was an integral part of the private effort—in *Burton v. Wilmington Parking Authority*, and limited it in *Moose Lodge No. 107 v. Irvis*, to exclude mere licensing. See generally *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

[the] content” of newspapers, letters, and education.²³³ The federal government financed and owned the first telegraph line in the United States—and the telegraph transmitted news of the 1844 presidential convention, and both federal and state governments provided use of lands to support a transcontinental telegraph.²³⁴ And it was the federal government that supported the creation and preservation of an open and accessible internet. The federal government subsidized research and demonstrations of computer networking that became ARPANET, the precursor of the internet.²³⁵ The federal government also guaranteed consumers the right to use modems on their phone lines, prevented telephone companies from undermining the emerging computer network market, and required phone companies to share their lines with competing broadband services (DSL) operating through phone lines.²³⁶ After Congress overhauled telecommunications law in 1996, the Clinton-era FCC required incumbent phone companies to share their lines with competitors who wanted to provide DSL service, a kind of broadband internet access that works through phone networks.²³⁷ And as interpreted judicially, Congress has worked to promote unfettered speech on the internet.²³⁸

Government-directed and government-funded research underlie critical innovations in communications and computer technologies, just as was true with transportation networks in an earlier era.²³⁹ Federal dollars covered at least 50% of research and

233. STARR, *supra* note 6, at 110; *see also id.* at 48, 89–90, 107–10.

234. *Id.* at 161, 171. The government declined to purchase rights from the inventor and left expansion of the telegraph to private capital. *Id.* at 163–65.

235. ARPANET, DEF. ADVANCED RES. PROJECTS AGENCY, <https://www.darpa.mil/about-us/timeline/arpamet> (last visited Oct. 4, 2018); Jeff Madrick, *Innovation: The Government Was Crucial After All*, N.Y. REV. BOOKS (Apr. 14, 2014), <http://www.nybooks.com/articles/2014/04/24/innovation-government-was-crucial-after-all/> (reviewing MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* (2011) & WILLIAM H. JANEWAY, *DOING CAPITALISM IN THE INNOVATION ECONOMY: MARKETS, SPECULATION AND THE STATE* (2012)).

236. Timothy Lee, *Network Neutrality, Explained*, VOX (May 21, 2015, 5:07 PM), <https://www.vox.com/cards/network-neutrality/what-have-federal-regulators-done-to-protect-network-neutrality>.

237. *Id.*

238. *See CDA 230: Legislative History*, ELECTRONIC FREEDOM FOUND., <https://www.eff.org/issues/cda230/legislative-history> (last visited Dec. 31, 2018).

239. Madrick, *supra* note 235. On government investment in transportation networks, *see* STARR, *supra* note 6, at 156 and CARTER GOODRICH, *GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800–1890* (1960). On the key role of state governments in economic growth, *see* generally JAMES WILLARD HURST, *LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN*

development investment in the United States between 1951 and 1978, the crucial period in developing telecommunications and the internet.²⁴⁰ Government investment embodies not only material resources but also the great patience and staying power, through experimentation and failure, involved in the innovation process.²⁴¹ Private enterprises bring investment and risk-taking but often harvest results of significant government vision, direction, and financing of breakthroughs.²⁴² A prime example: Google's basic algorithm was developed with a National Science Foundation grant.²⁴³ The point is not simply that private companies as well as ultimate consumers benefit from research backed by the tax revenues collected from citizens and patents authorized by Congress, it is that government instigation, resources, and shaping have been *indispensable* to the development of modern communications. While private enterprise has supplied financial and managerial resources and deeply influenced media and news, federal antitrust policies and practices and federal communications regulation, for better or worse, have played powerful and essential roles in the shaping of the nation's news ecosystem.²⁴⁴

This degree of government responsibility for our media infrastructure should compel government action to improve reliable access to material enabling competing views and authentication of messages and sources.²⁴⁵ The government can protect users against bombardment by computer-generated messages that drown out news and drive citizens away from the

WISCONSIN 1836–1915 (1984).

240. Madrick, *supra* note 235.

241. *Id.*

242. *See generally* MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* (rev. ed. 2014).

243. Madrick, *supra* note 235.

244. *See supra* text accompanying notes 152–157.

245. The First Amendment has only on a few occasions translated into a right of access to information and instead has developed as a right of expression. *See generally* SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* (2016) (tracing the dominance of expressive rights over access rights). Nonetheless, the right of access to information is an important part of the First Amendment and its commitments. *See Bd. of Ed., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982); *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council, Inc.*, 425 U.S. 748 (1976); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308–09 (1965) (Brennan, J., concurring); *Martin v. City of Struthers*, 319 U.S. 141 (1943); April Dawkins, *Access to Information: A Universal Human Right*, OFF. OF INTELL. FREEDOM BLOG (Apr. 8, 2017), <https://www.oif.ala.org/oif/?p=8797>.

exchange needed for democratic self-governance. Nothing in the Constitution forecloses government action to regulate concentrated economic power, to require disclosure of who is financing communications, or to support news initiatives where there are market failures. The First Amendment forbids Congress from “abridging” the freedom of speech and freedom of the press; it does not forbid strengthening it and amplifying news.²⁴⁶ Affirmative government action may be precisely what the First Amendment actually requires now.²⁴⁷ What is needed is not a preferred constitutional status for professional journalists, but a constitutionally inflected strategy for reaching news deserts and enabling competing groups to have the materials necessary to check alleged facts; see who is paying for what ads and stories; and distinguish vetted and unvetted stories, ads, and reported news.²⁴⁸ Also essential are regulatory guardrails against the hijacking of digital tools by harassers, bots, and enemies of the nation.

B. CONSTITUTIONAL DEMOCRACY DEMANDS THE PREDICATE OF NEWS INFORMING ITS MEMBERS

Indeed, because the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance. Larry Kramer, former dean of Stanford Law School, notes, “You cannot run a democratic system unless you have a well-informed public, or a public prepared to defer to well-informed elites.”²⁴⁹ He warns of the dangers from failures by Google and Facebook to engage in fact-checking and notes that they are inevitably selecting material and have obligations to do so in light of democracy’s prerequisites.²⁵⁰

246. Here, the Speech and Press Clauses notably diverge from the Religion Clauses, which forbid government establishment of religion. *See* U.S. CONST. amend. I.

247. Somewhat analogous are arguments for affirmative government duties regarding freedom of association and democratic governance. *See generally* Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights & the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 4 (2018); Tabatha Abu El-Haj, *‘Live Free or Die’—Liberty and the First Amendment*, 78 OHIO ST. L.J. 4 (2017); Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011).

248. *See generally* Blair Levin, *Public Media at 50: What’s Next for the Information Commons?*, KNIGHT FOUND. (2017), <https://www.knightfoundation.org/public-media-white-paper-2017-levin>.

249. Caplan, *supra* note 212 (quoting Larry Kramer).

250. *See* Caplan, *supra* note 212. *See generally* Zeynep Tufekci, *It’s The (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018, 6:00 AM), <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/>.

If the economy collapses, the government takes action.²⁵¹ Government action always carries risks and needs to comport with constitutional guarantees, but government inaction can also jeopardize constitutional guarantees. If the basic mechanisms for collecting votes become vulnerable to hacking, the government should act.²⁵² Certain institutional arrangements are necessary for democracy to proceed; because reliable circulation of actual news is one of them, there is a constitutional obligation for reforms and regulations of our news ecosystem.²⁵³ Different constellations of economic and institutional relationships make democracy more or less possible. To work, democracy needs: (1) an arena where participants can engage in self-governance; (2) institutions enabling individuals to learn about social needs and personal desires, to deliberate, to express their views, and to select representatives to do the work of governing; and (3) the kind of information that enables people to act to advance their own and society's interests.²⁵⁴ Federal action is necessary to overcome news deserts; concentrated power, which shields digital companies from competition, accountability, and fair contributions to news media; and collective action failures to combat security defects in digital communications. These challenges should summon the complete powers authorized to protect national security, for that is ultimately what is at stake.

C. INITIATIVES

Many different kinds of initiatives could reshape the news ecosystem to serve democracy. Some would not be compatible with American traditions; some may arouse strong opposition from powerful constituencies. The following list of possible initiatives illustrates a range of possibilities that ideally will inspire more and better ones. Although no single initiative put forward here is

251. See *Bush: Bailout Necessary to Deal with Crisis*, CNN (Sept. 25, 2008, 8:09 PM), <http://www.cnn.com/2008/POLITICS/09/24/bush.bailout/index.html>; see also Josh Zumbrun, *Financial Crisis, Regulatory Agenda Shaped Obama's Economic Legacy*, WALL ST. J. (Jan. 18, 2017), <https://www.wsj.com/articles/financial-crisis-regulatory-agenda-shaped-obamas-economic-legacy-1484762499>.

252. Michael Waldman, *The First Step to Hack-Proofing Our Elections*, BRENNAN CTR. (Feb. 15, 2018), <https://www.brennancenter.org/analysis/first-step-hack-proofing-our-elections>.

253. There is a resemblance between this argument and Gillian Metzger's effort to show that certain features of the administrative state are required by the Constitution. See generally Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015); Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

254. K. SABEEL RAHMAN, *DEMOCRACY AGAINST DOMINATION* 114 (2017).

perfect, and each would require political action, some set of initiatives in their spirit is essential if the Constitution's First Amendment and guarantee of a republican form of government are to meaningfully endure.

1. A NEW FAIRNESS DOCTRINE

When reliance on the broadcast spectrum made communication opportunities scarce, the FCC required radio and television licensees to provide balanced, fair treatment of controversial issues.²⁵⁵ Although cable and internet options have undone the scarcity rationale in terms of providers of content, the new scarcity is the attention of viewers and readers.²⁵⁶ This scarcity of attention—and also demonstrable risk of user confusion and exploitation—justifies a new Fairness Doctrine, with the obligation to be held by carriers, including digital platforms like Facebook and Google.²⁵⁷ The platforms would not become censors but instead searchers and sharers of competing views. Professor Cass Sunstein, who considered and later rejected the idea of a Fairness Doctrine for the internet, urges a “serendipity” element through which Facebook and similar platforms would enable people to encounter material quite different from what they usually absorb or prefer.²⁵⁸ Algorithms used to narrow what people receive could be modified to expand what people receive; government requirements would stimulate innovation; and feedback by users and observers would help develop techniques for breaking out of the filter bubble and echo chambers crafted by current media and digital companies.²⁵⁹ Risks of a heavy-handed

255. See *supra* text accompanying notes 146–151 (discussing the Fairness Doctrine).

256. Caplan, *supra* note 212 (quoting Tim Wu).

257. See *supra* notes 146–150 and accompanying text (discussing the Fairness Doctrine). The Fairness Doctrine eroded as the Supreme Court accorded increasing First Amendment rights to broadcasters, and the rationale of scarcity declined with the rise of cable. Actual jurisdiction for such regulation could fall in the Federal Communications Commission, the Federal Trade Commission, the Department of Justice, the Department of Commerce, the Department of Homeland Security, or a consortium of federal agencies.

258. Lewis Rice, *Common Threat: Sunstein Urges People to Consume More Diverse Information for the Good of Our Democracy*, HARV. L. TODAY (July 25, 2017), <https://today.law.harvard.edu/book-review/common-threat/>; see also Robert Farley, *Cass Sunstein Once Considered a “Fairness Doctrine” of Sorts for the Internet, but then Thought Better of It*, POLITIFACT (May 5, 2009, 3:12 PM), <http://www.politifact.com/truth-o-meter/statements/2009/may/05/chain-email/cass-sunstein-once-considered-fairnes-doctrine-sor/>.

259. These fairness ideas can proceed with opportunities of reply, even with complexities introduced in debates over the feasibility and desirability of “search neutrality.” See generally Frank Pasquale, *Search Neutrality as*

government suppressing messages can be considerably reduced by putting the burden of creating the methods for finding and sharing competing views on the shoulders of the digital platform managers and encouraging users and critics to give feedback.²⁶⁰ Innovations can be designed to ensure exposure to competing views. Four college students at the University of Chicago have already founded FlipSide, an artificial intelligence platform that uses an algorithm to assess political ideology and then provide users with news stories and opinion articles from opposite points of view.²⁶¹ There are good reasons to keep government away from any editorial or censoring powers, but government can avoid those roles while still requiring digital platforms to relate and deliver ways to provide readers with contrasting views. At a minimum, government can require platform companies to give users options to receive information that diverges from their habitual sites and also to live up to their own terms of service agreements.

2. TREAT DIGITAL PLATFORMS AS PUBLIC UTILITIES OR REGULATE THEM

During the turn of the twentieth century, “trustbusting” leaders, including Woodrow Wilson and Teddy Roosevelt, pursued regulatory innovations to restore democratic control in the face of the concentrated power of private companies.²⁶² A similar concept could apply to social media platforms and internet service providers.²⁶³ Maintaining infrastructure of a natural monopoly for public purposes, a public utility can be organized as a governmental monopoly or as a regulated, investor-owned utility, operating for a profit, with a range of potential structures. Although competition exists for some parts of the news and media

Disclosure and Auditing, CONCURRING OPINIONS (Feb. 19, 2011), <https://concurringopinions.com/archives/2011/02/search-neutrality-as-disclosure-and-auditing.html>; James Grimmelman, *Some Skepticism About Search Neutrality*, in *THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET* 435–61 (Berin Szoka & Adam Marcus eds., 2010).

260. For caution about the constitutionality of a revived Fairness Doctrine, see Kathleen Ann Ruane, *Fairness Doctrine: History and Constitutional Issues*, CONG. RES. SERV. (July 13, 2011), <https://fas.org/sgp/crs/misc/R40009.pdf>.

261. Jamie Ehrlich, *Student Start-Up Series: ‘Flipside’ Bolsters Political Discourse Through Technology*, UNIV. CHI.: THE COLLEGE (Nov. 1, 2017), <https://college.uchicago.edu/news/student-stories/student-start-series-flipside-bolsters-political-discourse-through-technology>.

262. RAHMAN, *supra* note 254, at 72–75.

263. See CRAWFORD, *supra* note 202. See generally K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 101 (2018).

ecosystem, the infrastructure distributing access to the internet is still largely monopolistic. As Sabeel Rahman diagnoses, internet platforms exercise power over transmission, gatekeeping, and scoring.²⁶⁴

Public utility regulation of digital platforms would focus on ensuring fair access and treatment, protecting the privacy and safety of users, and establishing transparency and forms of accountability.²⁶⁵ Such goals could be pursued through a variety of means: oversight by regulatory bodies; self-regulation reported by companies; professional standards monitored by civil society associations and watchdog groups; public options offered to compete with private ones; required access to coordinated data; programming tools to permit monitoring by the government or third parties; and other approaches.²⁶⁶ Classifying the internet or some elements of it as a public utility is one predicate for what Tim Wu has labeled “network neutrality,” federal or state regulation preventing internet service providers from blocking or slowing some content in preference to other content.²⁶⁷

The government could require digital companies to report how

264. K. Sabeel Rahman, *Regulating Informational Infrastructure: Internet Platforms as the New Public Utilities*, 2 GEO L. TECH. REV. 234 (2018) (draft paper for Georgetown Law School Symposium: “The Governance and Regulation of Internet Platforms”) (defining platforms’ ability to manipulate transactions and flow of information, control over entry to and exit from the platforms, and conversion of their data into a score or index used by third parties).

265. *Id.* at 246.

266. *Id.* at 246–49; Wheeler, *supra* note 66. On basic ideas about the internet and regulation, see generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

267. Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141 (2003). An internet service provider could be tempted to prefer some providers over others, either by willingness to pay or other more content-oriented reasons. The Obama-era FCC pursued net neutrality; the FCC under President Trump has repealed those efforts. Keith Collins, *Why Net Neutrality Was Repealed and How It Affects You*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-rules.html>; Brian Fung, *The FCC’s Vote Repealing Its Net Neutrality Rules Is Finally Official*, WASH. POST (Feb. 22, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/02/22/the-fccs-net-neutrality-rules-will-die-on-april-23-heres-what-happens-now/?utm_term=.e05c92ce7b9f. In January, the governor of Montana signed a bill requiring net neutrality for ISPs doing business in the state and other states may follow. Cecilia Kang, *Montana Governor Signs Order to Force Net Neutrality*, N.Y. TIMES (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/technology/montana-net-neutrality.html>. Defenders of net neutrality are also pursuing other efforts. See Tony Romm, *It Ain’t Over: Net Neutrality Advocates Are Preparing a Massive New War Against Trump’s FCC*, RECODE (Jan. 4, 2018), <https://www.recode.net/2018/1/4/16846978/net-neutrality-internet-donald-trump-ajit-pai-fcc-democrats-advocates-election>.

they are providing security against flooding and harassment, equal access, and fair pricing, and how they are investing in enforcing the digital platforms' own rules. Currently, digital platform companies do not adequately enforce their internal terms of service. Google AdSense, for example, seeks added value and supposedly does not take payment for sites that simply copy and paste content from other sites—yet, that is precisely what some 2016 election-era sites did.²⁶⁸ Alerting users to manipulation by ads that are disguised as content that is not subsidized would be another potential area for enforcement.²⁶⁹ Regulations could also require providers to partner with or subsidize local public service coverage.

Regulation of internet service providers, similarly, could acknowledge their power and remain consistent with the First Amendment. Modest adjustment of the current immunity from liability for anything they carry would make internet service providers liable for knowing and intentional transmission of cyberstalking, defamatory, or otherwise destructive material that would be treated as illegal if posted by a publisher.²⁷⁰

3. USE ANTITRUST AUTHORITY

Antitrust enforcement would break apart concentrated ownership and control that have made powerhouse companies, like Facebook and Google, immune from pressures to protect consumer interests in a variety of ways. The threat of antitrust enforcement itself could lead to more responsiveness by digital companies.²⁷¹ Bringing cross-ownership rules up to date should be a priority,

268. *Fake News Expert*, *supra* note 210.

269. See Amar Bakshi, *Why and How to Regulate Online Advertising in Online News Publications*, 4 J. MEDIA L. & ETHICS 22 (2015) (calling for enforcement of rules regarding product placement and native advertising, where ads and content blend). Concerns about overreach should inform such regulations. For such concerns, see Levi, *supra* note 64.

270. See Citron & Wittes, *supra* note 79. Even though the immunities have contributed to the expansion of the internet, incremental steps towards accountability by digital companies could be pursued without jeopardizing broad expression. Jonathan Zittrain, *CDA 230 Then and Now: Does Intermediary Immunity Keep the Rest of Us Healthy?*, THE RECORDER (Nov. 10, 2017), <https://www.law.com/therecorder/sites/therecorder/2017/11/10/cda-230-then-and-now-does-intermediary-immunity-keep-the-rest-of-us-healthy/?sreturn=201802041504555>.

271. Maurice E. Stucke & Allen P. Grunes, *Why More Antitrust Immunity for the Media Is a Bad Idea*, 105 NW. U. L. REV. 1399 (2011); Jonathan Taplin, *Is It Time to Break Up Google?*, N.Y. TIMES (Apr. 22, 2017), <https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html>; see also TAPLIN, *supra* note 66.

whether pursued by the FCC or antitrust policies.²⁷² And offering a safe harbor from antitrust concerns for newspapers or broadcasters that associate in order to survive competition with tech companies would better level the playing field.²⁷³

4. REQUIRE COMMUNICATION ACROSS SOFTWARE INTERFACES AND ACCESS TO DATA FOR ACCOUNTABILITY

It will take tech tools to break out of the problems that tech tools have created. Tom Wheeler, former chair of the FCC, and Wael Ghonim, former Google employee who helped spark protests behind Arab Spring, propose requiring social media platforms to coordinate through “open application programming interfaces,” not to steal the secrets of social media algorithms, but to enable third parties to build software that can monitor consequences of social media algorithms.²⁷⁴ Wheeler argues, “The best approach is to share information and ideas to increase our collective knowledge, with the full weight of government and law enforcement leading the charge against threats to our democracy.”²⁷⁵ Such interfaces already allow Google Maps to work with Uber; an interface can protect the privacy of users as well as the secrets of algorithms, while making it possible for others to develop algorithms to track who purchases social media ads, how much they are accelerated and distributed, what content is deleted, and how much is spread before deletion.²⁷⁶ To match the computational and analytical power of private networks, government and public interest groups need to be able to see what so far has been hidden from view.²⁷⁷ Requiring more transparency would allow people beyond the platform programmers to understand and critique the curation of content received by users.²⁷⁸ Governing boards of private digital

272. See Pociask, *supra* note 143 (“The FCC’s jurisdiction excludes Facebook, Google and most of the streaming services that have become the competitive nemesis of traditional media properties. Perhaps its narrow jurisdiction within the broader media industry explains its earlier reluctance to take a more holistic view of the consumer benefits of cross-ownership.”).

273. Sara Fischer, *Scoop: Newspapers Launch PAC to Take On Google, Facebook*, AXIOS (Feb. 27, 2018), <https://www.axios.com/scoop-newspapers-launch-pac-to-take-on-google-facebook-1519737275-1c785ebc-b656-472f-a8d3-2e188bab10dc.html>.

274. Wheeler, *supra* note 66.

275. *Id.*

276. See generally *Decoding the Social Media Algorithms. A Guide for Communicators*, STEPHEN DAVIES, <https://www.stedavies.com/social-media-algorithms-guide/> (last visited Sept. 21, 2018).

277. See Tony Chappelle, *Facebook, Twitter and Social Media in a Risk Vise*, AGENDA (Jan. 22, 2018), <http://agendaweek.com/pc/1858614/317383>.

278. PASQUALE, *supra* note 55, at 6; see also Chappelle, *supra* note 277.

platform companies and telecommunication companies should establish risk committees that obtain and review audits of how their systems work and how they deceive.²⁷⁹ The government can promote or require such efforts. The boards and chief executives of media companies should escalate credibility of the content they distribute as a priority concern.

5. REQUIRE PAYMENT FOR NEWS CIRCULATED ON SOCIAL MEDIA

Currently, much of the news people read on social media is shared by friends, even when it is from sources protected by copyright, and the recent studies show that people trust news coming to them from friends even more than traditional journalism sources; people increase their trust in news sources when friends share them.²⁸⁰ Digital platforms report their audiences and take in ad money accordingly.

The journalists writing the shared reports and their newspapers and broadcasters, however, do not get a share, other than for their direct partnerships with the platforms. Facebook and Google benefit from the “safe harbor” clause in the 1998 Digital Millennium Copyright Act and free ride on the content others create.²⁸¹ This clause could be changed to ensure that journalists and legacy news organizations are compensated for their work. Jonathan Taplin notes:

Removing the safe harbor provision would also force social networks to pay for the content posted on their sites. A simple example: One million downloads of a song on iTunes would yield the performer and his record label about \$900,000. One million streams of that same song on YouTube would earn them about \$900.²⁸²

279. Chappelle, *supra* note 277 (boards need risk committees; noting how comptroller as sole trustee of N.Y. state common retirement fund, third-largest public pension fund in the country, sought information about size of risks from rash of fake news, election interference, including risk to company finances).

280. *Who Shared It?: How Americans Decide What News to Trust on Social Media*, AM. PRESS INST. (Mar. 20, 2017, 8:00 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/trust-social-media/>.

281. *See generally* Chief Judge Edward J. Damich, *Foreword* to LEE A. HOLLAR, LEGAL PROTECTION OF DIGITAL INFORMATION (2002), <http://digital-law-online.info/lpdi1.0/treatise2.html>; Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C. & 28 U.S.C.).

282. Taplin, *supra* note 271; *see also* Pryan Chittum, *Mo Pageviews, Mo Problems*, TRAFFIC (Sept. 22, 2017), <https://traffic.piano.io/2016/09/22/mo-pageviews-mo->

Even a requirement that digital platforms nudge their users to contribute voluntarily to news sources would generate resources to support investigations, editing, checking, and reporting.²⁸³ Framing matters. As a marketing expert put it: “[W]hy would people who think nothing of paying \$5 for a Starbucks latte believe that a \$10-a-month music-streaming service is overpriced?”²⁸⁴ It took time for iTunes and Spotify pricing, streaming, and copyright enforcement to break music piracy, but it largely worked.²⁸⁵ A similar combination of smart pricing, technological innovation, and regulation could restore income streams for journalism.

6. REGULATE FRAUD

The European Union has been more effective in getting Facebook and other digital companies to remove fake accounts.²⁸⁶ While the Supreme Court has interpreted the First Amendment to provide some breathing room for lies,²⁸⁷ the First Amendment has,

problems/ (arguing that users should be charged for content). Ensuring that Google, Facebook, and similar digital providers do not respond to changes in the safe harbor provision with worse news operations would be a further concern. New efforts offering subscribers services without ads show potential markets could emerge if the safe harbor clause were changed. See David Beard, *Spotify for News? Subscription Service Scroll Has New Investor, Partners*, POYNTER (Feb. 22, 2018), <https://www.poynter.org/news/spotify-news-subscription-service-scroll-has-new-investor-partners>.

283. See Katherine Viner, *Together, We are Safeguarding the Guardian's Independent Journalism*, THE GUARDIAN (Oct. 26, 2017), <https://www.theguardian.com/membership/2017/oct/26/together-we-are-safeguarding-the-guardians-independent-journalism> (asking readers for voluntary contributions to support independent quality journalism).

284. Frank Luby, *Top Pricing Consultant Frank Luby Shares Three Rules for Building a Thriving Media Business in the Age of Free Content*, TRAFFIC, <https://traffic.piano.io/2016/09/22/the-price-is-wrong/> (last visited Sept. 21, 2018).

285. See generally Paul Boutin, *The Age of Music Piracy Is Finally Over*, WIRED (Nov. 29, 2010), <https://www.wired.com/2010/11/st-essay-nofreebird/>; Paul Fingas, *Spotify Really Does Reduce Music Piracy, but at a Cost*, ENGADGET (Oct. 28, 2015), <https://www.engadget.com/2015/10/28/spotify-piracy-study/>; Mark Wilson, *Apple's iTunes Match Legitimizes Music Piracy—Because Piracy No Longer Matters*, POPULAR MECHANICS (Nov. 15, 2011), <https://www.popularmechanics.com/technology/gadgets/a7292/apples-itunes-match-legitimizes-music-piracy-because-piracy-no-longer-matters-6562084/>. Piracy may evolve, though, requiring further measures, including legal enforcement. See *Music Piracy Increasing Globally*, S. CHINA POST (Sept. 20, 2017), <http://www.scmp.com/culture/music/article/2112017/music-piracy-increasing-globally-ripped-spotify-youtube-says-recording>.

286. Tufekci, *supra* note 78.

287. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (false statements made without malice against public figures protected from defamation liability); see also *United States v. Alvarez*, 567 U.S. 709 (2012) (overturning conviction for claims to have received military awards because statute restricting such claims was too

from the start, coexisted with laws against defamation.²⁸⁸ Ongoing government enforcement of truth-in-advertising and corporate disclosures has not contravened the First Amendment,²⁸⁹ neither should requirements to remove fraudulent accounts from digital platforms.

More difficult to regulate, consistent with First Amendment concerns, are sites producing a large amount of false material.²⁹⁰ Giving government the job of removing misinformation and hateful comments would be giving government too much authority to suppress speech. But government requirements that private companies disclose how well or how poorly they enforce their own terms-of-service rules would be constitutional and potentially powerful in promoting the disciplining effort of consumer choice.

7. STRENGTHEN PUBLIC MEDIA AND MEDIA EDUCATION

Despite claims that PBS and NPR are unnecessary or obsolete,²⁹¹ there are crucial needs for an “information commons” and for the competition with private values that public service communications have been able to demonstrate. Surveys rate public media as the most trustworthy news organization now and for the past fourteen years.²⁹² Public media could make a

broad).

288. Justice James Kent of the New York Superior Court stated:

The founders of our government were too wise and too just, ever to have intended, by the freedom of the press, a right to circulate falsehood as well as truth, or that the press should be . . . an engine for evil and designing men, to cherish, for mischievous purposes, sedition, irreligion, and impurity.

People v. Crosswell, 3 Johns. Cas. 337, 393 (N.Y. Sup. Ct. 1804). James Kent was born in 1763 and became a judge and author of an influential law treatise. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (noting defense of truth against defamation laws that existed in the early Republic).

289. See generally *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980); *Friedman v. Rogers*, 440 U.S. 1 (1979); Gene Quinn, *Does the First Amendment Protect False and Misleading Speech?*, IP WATCHDOG (Feb. 9, 2012), <http://www.ipwatchdog.com/2012/02/09/does-the-first-amendment-protect-false-and-misleading-speech/id=22202/>.

290. See *Fake News Expert*, *supra* note 210.

291. See generally Mike Gonzalez, “*Is There Any Justification for Continuing to Ask Taxpayers to Fund NPR and PBS?*”, KNIGHT FOUND. (2017), <https://www.knightfoundation.org/public-media-white-paper-2017-gonzalez>. For more on local news issues, see *Local Journalism in the Pacific Northwest: Why It Matters, How It’s Evolving, and Who Pays for It* (Univ. of Or. Sch. of Journalism and Comm., Agora Report, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3045516. See also Molly de Aguiar & Josh Stearns, *Lessons Learned from the Local News Lab*, LOC. NEWS LAB (Feb. 2016), <https://medium.com/the-local-news-lab/tagged/lessons-learned>.

292. Levin, *supra* note 248, at n.9 and accompanying text.

difference in addressing holes created by private actors, such as news deserts, and deepen local news across the country.²⁹³ It could create digital platforms for community news and information, including capacity to collect and analyze big data in service of cities and towns. Public media, with more resources, could expand investigative journalism, documentary films, and exchanges of community news and information. Public media often pursue the background and multiple explanations for events in ways that commercial media may not.²⁹⁴ Granting public media the flexibility to generate funding through underwriting by private sources would require policy changes; so does adjusting the Copyright Act's treatment of public media to reflect new distribution platforms.²⁹⁵

Some argue further for a publicly-funded alternative to Facebook and Google.²⁹⁶ If supported by subscription fees rather than advertising, a digital platform and information aggregator could avoid coaxing users to give up their personal data and might increase competition for quality content.²⁹⁷ Reliance on governmental support for a public platform—or for public media—however, heightens vulnerability to political trends or capture by particular interests.²⁹⁸ A counterpoint argument notes that public funding may be necessary to ensure local news coverage in many regions.²⁹⁹

293. Levin, *supra* note 248. See generally Adam Ragusea, *Topple the Towers: Why Public Radio and Television Stations Should Radically Reorient Toward Digital-First Local News, and How They Could Do It*, KNIGHT FOUND. (2017), <https://www.knightfoundation.org/public-media-white-paper-2017-ragusea>.

294. See James. T. Hamilton, *Public Affairs: What the Invisible Hand of the News Market Leaves All Too Invisible*, CURRENT (May 17, 2010), <https://current.org/2010/05/public-affairs-what-the-invisible-hand-of-the-news-market-leaves-all-too-invisible/>.

295. Levin, *supra* note 248.

296. Diane Coyle, *We Need a Publicly Funded Rival to Facebook and Google*, FIN. TIMES (July 9, 2018), <https://www.ft.com/content/d56744a0-835c-11e8-9199-c2a4754b5a0e>.

297. *Id.*

298. See Diane Coyle, *Diane Coyle Outlines Her Vision for a 21st Century BBC – Full Text*, THE GUARDIAN (June 24, 2014), <https://www.theguardian.com/media/2014/jun/24/diane-coyle-lecture-vision-21st-century-bbc-full-text>; Mike Gonzalez, “*Is There Any Justification for Continuing to Ask Taxpayers to Fund NPR and PBS?*,” KNIGHT FOUND. (2017), <https://www.knightfoundation.org/public-media-white-paper-2017-gonzalez>.

299. Brad Plumer, *Why Exactly Should the Government Fund PBS and NPR*, WASH. POST (Oct. 10, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/10/10/why-exactly-should-the-government-fund-pbs-and-npr/?noredirect=on&utm_term=.27c555347878. Arguments for and against government ownership of airwaves to serve the public interest and raise quality reflect competing views about what is more

Media education, equipping people to become informed and aware consumers of media of all sorts, should highlight digital media practices and risks.³⁰⁰ A 2012 study shows that digital media literacy is associated with greater political engagement and with exposure to diverse viewpoints.³⁰¹ Highlighting efforts by providers to distinguish stories exchanged by friends from content produced or vetted by professionals would assist educational efforts aimed at helping users distinguish different materials generated and posted in different ways.³⁰²

8. NONGOVERNMENTAL INITIATIVES

Philanthropy already supports nonprofit news operations, including the big data analyses of ProPublica and media watchdogs; government should preserve tax deductions for such contributions.³⁰³ Those in charge of voting the stock proxies of

threatening, big business or big government. See WEINRIB, *supra* note 132, at 311–28.

300. See Emily Bonilla, *Why Media Literacy Education Matters in the Era of Fake News*, REIMAGINE TEACHING (TNTP) (Dec. 13, 2016), <https://tntp.org/blog/post/why-media-literacy-education-matters-in-the-era-of-fake-news>; *What is Digital Literacy?*, COMMON SENSE MEDIA, <https://www.common sense media.org/news-and-media-literacy/what-is-digital-literacy> (last visited Dec. 11, 2018). A recent study shows that children often feel neglected, misrepresented, or depressed by news they encounter in varied media and also have trouble distinguishing fake news stories from real ones. Michael B. Robb, *News and America's Kids: How Young People Perceive and Are Impacted by the News*, COMMON SENSE MEDIA (Mar. 2017), <https://www.common sense media.org/research/news-and-americas-kids>.

301. See generally Joseph Kahne et al., *Digital Media Literacy Education and Online Civic and Political Participation*, 6 INT'L J. COMM. 1 (2012).

302. See generally Katie Benner, *Snapchat Remakes Itself, Splitting the Social from the Media*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/technology/snapchat-redesign-social-media.html>. Cultivating interest in and attention to high quality news is a serious problem made worse by the addictive nature of social media. See Ethan Zuckerman, *Four Problems for News and Democracy*, MEDIUM (Sept. 24, 2018), <https://medium.com/trust-media-and-democracy/we-know-the-news-is-in-crsrisi-5d1c4fbf7691>.

303. Collaborations through which some news organizations support data analyses through cooperative agreements are the kind of effort that can help and should not be impaired by antitrust or other legal concerns. See generally Ken Doctor, *Newsonomics: The New Knight-Lenfest Initiative Gives a Kick in the Pants to America's Metro Newspapers*, NIEMAN LAB (Feb. 13, 2017), <http://www.niemanlab.org/2017/02/newsonomics-the-new-knight-lenfest-initiative-gives-a-kick-in-the-pants-to-americas-metro-newspapers>. Slanted imitators are bound to arise, requiring further watchdogs. Philanthropic support for local journalism offers some promise of improvements. See Aude White, *New York Magazine Partners with the City, a Nonprofit Digital News Start-Up*, N.Y. MAG.: PRESS ROOM (Sept. 26, 2018), <http://nymag.com/press/2018/09/new-york-magazine-partners-with-news-start-up-the-city.html>; Tony Proscio, *Out of Print: The Case for Philanthropic Support for Local Journalism in a Time of Market Upheaval*, REVSON FOUND. (Jan. 31, 2018), <http://revsonfoundation.org/download/publications/Out-of-Print-Report-Tony-Proscio.pdf>.

retirement funds could do more to guard against further concentration of control and wealth in digital and media companies or flex their power to seek some of the reforms already described. None of the proposals here involve censorship or constraints on particular views; none abridge the freedom of speech or the freedom of the press. All build on steps taken in the past. These proposals and others like them could revitalize the news that democracy needs. Inaction poses grave threats because the current news ecosystem, built with government support and regulation, in fact, abridges the freedom of the press.

VI. AN EXPERIMENT

Alexander Meiklejohn was the first to theorize about the reason and shape of the First Amendment entirely in terms of democracy.³⁰⁴ He also had a healthy ability to look forward, not just backward, and emphasized how much we need to remain open to change. He wrote, “We must accept and applaud the assertion that the Constitution is an experiment, in the sense in which all life is an experiment.”³⁰⁵ The success of that experiment depends on our ability, now, to enable in our rapidly changing world the production, distribution, and trust in news that is essential to our democratic society.

304. See generally Dara Purvis, *Alexander Meiklejohn*, in *ENCYCLOPEDIA OF THE FIRST AMENDMENT* 734 (John R. Vile et al. eds., 2009).

305. MEIKLEJOHN, *supra* note 4, at 85.