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Structuring a Subsidy for Local Journalism

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19.1 INTRODUCTION

The commercial market for local news in the United States has collapsed. Many communities lack a local paper. These "news deserts," comprising about two-thirds of the country, have lost a range of benefits that local newspapers once provided. Foremost among these benefits was investigative reporting – local newspapers at one time played a primary role in investigating local government and commerce and then reporting the facts to the public. It is rare for someone else to pick up the slack when the newspaper disappears.

The local newspapers that do remain in operation are badly diminished. Most have cut their print circulation either by narrowing geographical reach,[1] distributing the paper only a few days a week,[2] or moving to an online-only model. Almost all surviving newspapers have made severe cuts to reporting staff. These cuts have diminished the quantity and depth of local coverage. Investigations that dig beneath the surface of police reports and press releases are costly and beyond most surviving newspapers' means. It is much more convenient, and much more common, to run low-cost pro forma stories that merely repeat the official line.

Local newspapers of the twentieth century had their own problems, but overall these problems were much less dire. When newspapers made cuts and their quality

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[1] *E.g.*, Nikki Usher, News for the Rich, White, and Blue: How Place and Power Distort American Journalism 73–74 (2021).

[2] *Id.*

suffered, it was usually because management wanted to report high profit margins to investors.[3] But revenues themselves remained quite high.[4]

Revenues were high because twentieth-century papers inhabited a technological "Goldilocks zone."[5] The high cost of printing created economies of scale – big papers with big printers incurred less cost per page, so markets naturally encouraged papers to grow their operations. Distribution costs went up over long distances, though, so it was not generally in a publication's interest to grow the audience by acquiring long-distance subscribers. Instead, the most successful operations achieved scale by saturating the local market.

Under these conditions, most local markets could only support one or two such printer/distributors – and this monopoly or duopoly on printing and distribution served as an anchor for a newspaper's entire operation. The lack of competing publisher-distributors, in turn, created opportunities to package and sell a "bundle" of sports, lifestyle, home and garden, and local and national news. The inclusion of classified ads and advertiser-friendly "soft" content in the bundle allowed newspapers to cross-subsidize the costly work of investigative reporting.

The internet has destroyed the Goldilocks zone that made this business model possible. Today the marginal cost of distribution is zero, and geographical distance is irrelevant. Economies of scale remain, but local journalism institutions are in no position to capture them. Many readers access content on an à la carte basis, typically mediated by some type of online recommendations platform, and the old bundle of "hard" and "soft" content, "local" and "national" content, is no longer marketable.

These market changes have not wiped local news out completely. Some high-quality paywalled products have enjoyed significant success. Mega-papers such as *The New York Times* or *The Guardian* can still thrive by marketing a multimedia super-bundle to far-flung subscribers. But this model only seems possible in very large urban markets, and even when it works, the need to reach out-of-town readers

[3] Victor Picard, *Can Charity Save Journalism from Market Failure?*, Conversation (Apr. 27, 2017), https://perma.cc/JXJ6-HEEM.

[4] U.S. Census Bureau data shows that newspaper publishers earned over twice the revenue in 2002 ($46,179,000) that they did in 2020 ($22,149,000) – and that is before adjusting for inflation. Adam Gundy, *Service Annual Survey Shows Continuing Decline in Print Publishing Revenue*, U.S. Census Bureau (June 7, 2022), https://perma.cc/XF9H-3CV .Adjusted for inflation, total revenue from newspapers and periodicals in 1998 would be approximately $131,889,507 in 2022. Newspapers alone would be around $83,225,792 and periodicals about $64,990,383. Calculated using the U.S. Inflation Calculator based on the latest U.S. government CPI data. *Inflation Calculator*, US Inflation Calculator, www .usinflationcalculator.com/. Based on original numbers compiled by Douglas Galbi at Douglas Galbi, *Historic Patterns of Paying for Content*, Purple Motes (June 14, 2009), https://perma.cc/PR9J-3M2P.

[5] My usage varies from that of Nikki Usher, who uses the term "Goldilocks newspaper" to refer to legacy papers like the *Miami Herald* or *Des Moines Register* that were not quite local, not quite national. *See* Usher, *supra* note 1.

can create pressures for a newspaper like *The New York Times* to divert reporting resources away from New York City concerns.[6]

Other publications have found success by publishing some kind of a smaller product, such as a newsletter, behind a paywall. *The Charlotte Ledger*, for example, offers a daily Substack letter to about 2,000 subscribers for $99 per year. *Downtown Albuquerque News* offers a weekday online-only paper to 450 subscribers for $100 per year. This appears to be a sustainable business model, but one that is probably incapable of producing a volume of content that is comparable to that of a traditional paper.[7]

Some philanthropy-funded, donor-funded, and/or VC-funded outlets have emerged as well, and these often produce high-quality content. But even in large markets, these outlets are unlikely to have the bandwidth to produce the volume and variety of content found in a traditional newspaper, or to achieve the market saturation necessary to play the central role in community life that local newspapers did during most of the twentieth century.[8]

At one time, many hoped that the internet would create new opportunities for volunteers to produce free community journalism – and at some level it has. Quite a bit of social-media activity involves communications that some might consider reporting – even on the low-profile app NextDoor, users "report" (and misreport)

[6] Other publications, meanwhile, produce high-quality niche reporting for a small readership at very high subscription prices. Nic Newman, *Journalism, Media, and Technology Trends and Predictions 2022*, Reuters Inst. (Jan. 10, 2022), https://perma.cc/4VAM-U7RP. "Almost half of news leaders (47%) worry that subscription models may be pushing journalism towards super-serving richer and more educated audiences and leaving others behind. Many leaders of PSBs and others committed to open journalism are amongst those who disagree with this statement, but our own research shows that even these organisations are struggling to build connections with younger and less educated groups online." Sara Fischer, *Media Experts Sound Alarm on Rise of Paywalled Content*, Axios (Jan. 11, 2022), https://perma.cc/S7ST-2RYB.

[7] *Why DAN's Business Model Is the Future of Local News*, Downtown Albuquerque News, https://perma.cc/Z9UM-XDNH; *see also* Mark Jacob, *Subscriber-Only Newsletters Aim to Build Local News Loyalty*, Local News Initiative (Oct. 23, 2019), https://perma.cc/6RQ2-H2EQ. *Chicago Tribune*'s newsroom began offering two subscriber-only newsletters: *The Spin*, a political newsletter, and *10 Thoughts*, a Bears newsletter. According to Christine Taylor, the Managing Editor for Audience, subscriber-only newsletters create a benefit in "convenience and reader experience, putting content where readers are already spending time – their inbox." *Id.* *10 Thoughts* acquired over 1,000 new subscribers in the first week, and has attained an open rate of over 100 percent, meaning that people are opening the newsletter and coming back to it multiple times to actually finish it.

[8] *The Daily Memphian* may be an exception to this trend, as it offers a high-quality full-service newspaper for around $10 per month. But "The Memphian's unorthodox and opaque fundraising strategy has been controversial among many, both in the bubbling new news landscape and in Memphis. Transparency in funding has become a mantra in the nonprofit news movement, and there the Memphian is lacking. 'Give or take, the original $6.7 million was all raised anonymously, which caused some consternation with journalists and INN [Institute for Nonprofit News],' says [Memphian CEO Eric] Barnes." Ken Doctor, *Newsonomics: In Memphis' Unexpected News War, The Daily Memphian's Model Demands Attention*, NiemanLab (Feb. 20, 2020), https://perma.cc/DFR2-ZESV.

suspicious activity on their block. But volunteer reporting, typically uncoordinated, has obvious limits as a substitute for an industry that employs full-time professional reporters.[9] Indeed, the low-quality information that amateurs and saboteurs circulate on social media and in similar settings only intensifies the public need for professional journalists to play a corrective role.

This is all to say that there is little reason to expect the private sector to produce any reliable, widely reproduceable model to recover what has been lost – or that it is unlikely, at least, that any such model will emerge on an acceptable timescale.[10] If commerce, philanthropy, and volunteerism will not sustain high-quality, wide-circulation local journalism, then the only viable models for journalism will have to depend for financial support on the government.

19.2 PUBLIC MEDIA AND SUBSIDIZED PRIVATE MEDIA

Almost all wealthy democracies give substantial financial support to news media. But in the United States, there is a widespread and deep-seated fear among American policymakers and journalists themselves that government actors will inevitably capture and exploit media organizations that depend on public support. This fear explains – or at least provides a rationalization for – America's uniquely stingy approach to its news media. According to research conducted by Timothy Neff and Victor Pickard, the United States spends just $3.16 per person on its public media, while Germany spends $142.42 on public media per person, Norway $110.73, and the UK $81.30.[11]

America's concern about state capture is probably somewhat excessive – the sky has not fallen in Iceland, where per-capita state expenditures on media outstrip those in the United States by a factor of about 13 to 1. Yet state capture is not an

[9] *See, e.g., The Future of Journalism: Hearing before the S. Comm. on Com., Sci., and Transp.*, 111th Cong., 1st sess. 28, 32–33 (2009) (statement of David Simon, former reporter, *The Baltimore Sun* and Blown Deadline Productions) (quoted in Victor Pickard, Democracy Without Journalism?: Confronting the Misinformation Society 41 (2019)) ("[T]o read the claims that some new media voices are already making, you would think they need only bulldoze the carcasses of moribund newspapers aside and begin typing. They do not know what they do not know – which is a dangerous state for any class of folk – and to those of us who do understand how subtle and complex good reporting can be, their ignorance is as embarrassing as it is seemingly sincere. Indeed, the very phrase citizen journalist strikes my ear as nearly Orwellian. A neighbor who is a good listener and cares about people is a good neighbor; he is not in any sense a citizen social worker. Just as a neighbor with a garden hose and good intentions is not a citizen firefighter. To say so is a heedless insult to trained social workers and firefighters.").

[10] *See* Pickard, *supra* note 9, at 61 ("'[A]s news media institutions continue to search desperately for new commercial models, one central fact usually remains unsaid: There is precious little evidence to suggest that market-based initiatives and new media technologies can effectively replace everything being lost with the downfall of traditional news outlets.'"). *See more generally id.* at 70–89 for a discussion of the "New US Media Landscape."

[11] *Id.* at 9.

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entirely unrealistic concern either – state institutions in flawed democracies around the world have used subsidies to influence news coverage, and America's increasingly troubled political system is nothing if not "flawed." The question, then, is how to structure a subsidy for local journalism that mitigates the state-capture concern as well as is reasonably achievable.

There are, broadly, two ways for the public sector to support journalism financially. The United States practices both methods in modest ways, but at nowhere near the levels that most wealthy democracies do.

19.2.1 *Public Options*

The first approach would provide a journalistic "public option" that operated alongside any number of private media companies. The UK's British Broadcasting Company offers a famous and highly successful example of this approach. The United States has its own public options – the Corporation for Public Broadcasting, Radio Free Europe/Asia, Stars and Stripes, and so on – but at a much smaller scale. In principle, the United States could dramatically expand these offerings at all levels, including local levels, until they compensated for the collapse of the commercial market for journalism.

There is no reason to worry, under existing First Amendment doctrine, that an expanded public media system would run into serious constitutional trouble.[12] But the politics look almost prohibitive. Since its inception, Republican leaders have called to defund the CPB, and at various points they have come close. At one time, PBS and NPR relied on direct federal funding as a primary revenue source; today, federal funding accounts for only about 15 percent of PBS's budget and 2 percent at NPR.[13] Republicans have historically lambasted NPR and PBS for alleged "liberal bias," and the "bias" against the GOP has only grown stronger during the Trump years and beyond as party leaders have embraced flagrant lies about the 2020 election

[12] Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 675 (1998) ("Although public broadcasting as a general matter does not lend itself to scrutiny under the forum doctrine, candidate debates present the narrow exception to the rule."). Under *Forbes*, candidate debates conducted on public television must remain open on a viewpoint-neutral basis. Otherwise, the Court indicated that the First Amendment does not – in the absence of some legislative design to "regiment" broadcasters another way – impose any free-standing requirement of content- or viewpoint-neutrality on public broadcasters.

[13] Amy Bingham, *Mitt Romney Cannot Roast Big Bird with PBS Cuts*, ABC News (Oct. 4. 2012), https://perma.cc/EX8P-AZDF (stating that "[a]bout 15 percent of PBS's budget comes from federal funds."). *See also* Suevon Lee, *Big Bird Debate: How Much Does Federal Funding Matter to Public Broadcasting?*, ProPublica (Oct. 11, 2012), https://perma.cc/E4MS-GPH7 (explaining that the Corporation for Public Broadcasting (CPB) created by Congress in 1967 to disperse funds to nonprofit broadcast outlets like PBS and NPR was set to receive $445 million from 2012–2014. "PBS draws roughly 15 percent of its revenue from the CPB. NPR's revenue mostly comes from member station dues and fees, with 2 percent coming from CPB-issued grants.").

and other crucial matters. Short of a realignment in American politics, it is hard to see how a serious expansion of domestic public media could make its way into law.

19.2.2 *Broad-Based Subsidies*

An alternative to a public media option would involve direct subsidies for private media institutions. Almost since its founding, the U.S. Postal Service has subsidized newspapers and magazines, albeit indirectly, with free or reduced-rate ("second-class") postage. Today, several media organizations have registered with the IRS as tax-exempt charitable organizations. And as discussed in Laurie Thomas Lee's chapter in this volume, private local broadcasters receive an effective subsidy from cable carriers in the form of carriage fees that are required under law.[14]

These kinds of policies have never attracted the same kind of political attacks as public broadcasting. One can speculate why. Perhaps public broadcasting makes an easier target simply because PBS, NPR, and the Corporation for Public Broadcasting are high-visibility brands, while second-class postage and Section 501 (c) of the tax code are not. Maybe public broadcasting's Great Society roots trigger a vindictive reflex in Republicans, and none of the media-subsidy programs have a similarly partisan pedigree.

Or perhaps the reason that media subsidies do not draw significant fire is that so many of their would-be critics – small-government think-tanks, conservative print media, local broadcasters – are themselves beneficiaries of the subsidy. Such institutions may argue from time to time that some other organization should be either included or excluded in the subsidy.[15] But few organizations are likely to argue that "their" subsidy should be cancelled across the board.

[14] Laurie Thomas Lee, *How Local TV News Is Surviving Disruption as Newspapers Fail: Lessons Learned*, 3 J. Free Speech L. 241, 251 (2023).

[15] *See* Alan Rappeport, *In Targeting Political Groups, I.R.S. Crossed Party Lines*, N.Y. Times (Oct. 5, 2017) (explaining the results of the I.R.S. targeting controversy investigation: "The exhaustive report, which examined nine years' worth of applications for tax-exempt status, comes after a similar audit in 2013 found that groups with conservative names like 'Tea Party,' 'patriot,' or '9/12' were unfairly targeted for further review. . . . The new report found that the I.R.S. was also inappropriately targeting progressive-leaning groups. While the investigation does not specify the political affiliations of the groups, the names that were flagged included the words 'progressive,' 'occupy,' 'green energy,' and Acorn. . . . Organizations that were flagged by the I.R.S. as potentially political had to undergo intensive requests for information about any legislative activities."). *See also* Emily Cochrane, *Justice Department Settles with Tea Party Groups after I.R.S. Scrutiny*, N.Y. Times (Oct. 26, 2017) ("While the I.R.S. acknowledged wrongly targeting groups based on political leanings, a report this month found that behavior crossed party lines."). *See also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that the Religion Clauses of the First Amendment did not prohibit the Internal Revenue Service from revoking the tax-exempt status of a religious university whose practices are contrary to a compelling government public policy, such as eradicating racial discrimination).

Despite disputes there is no apparent desire anywhere on the political spectrum to eliminate nonprofit status altogether, and one naturally suspects that this has something to do with the

These observations suggest that a broad-based, boring, and ideally bipartisan subsidy for local news could hold up well politically. A broad-based subsidy would mollify its own would-be critics; a boring subsidy would be hard to campaign against; and a bipartisan subsidy, if possible, would be harder to attack as the other party's dastardly deed.

19.3 CONCERNS ABOUT CONSTITUTIONALITY AND STATE CAPTURE

Even assuming that a broad-based subsidy is politically achievable, however, it is also likely to draw a constitutional challenge. Such a challenge would almost certainly center on the program's eligibility criteria and the compatibility of these criteria with the First Amendment.

A completely neutral subsidy available to any media organization that wants it is not desirable. However broadly the subsidy might be drawn, it will have to exclude at least some media institutions to achieve its goals. A subsidy for local news, for example, would probably exclude media institutions that do not report news at all, or that consist entirely or primarily of commentary on national developments. Beyond this basic criterion, one can also expect that the subsidy would require beneficiaries to meet some minimum threshold of quality and human decency.

All these requirements would favor some kinds of speech over others. This favoritism could pose a serious problem if courts apply the "public-forum" doctrine – an uneven but often severe set of First Amendment rules for public programs that underwrite private speech. But it is also conceivable that courts would view a local-news subsidy as *the government's own speech* rather than as a form of regulation and, on that basis, exempt the program from any kind of First Amendment scrutiny at all. The stark difference between these two doctrinal worlds – government speech versus public forum – makes it very important to determine which one of them we are in. And if it is impossible to answer this question conclusively up front, then we should determine how likely it is that a court would apply public-forum principles to the kind of broad-based subsidy we have in mind. If it seems likely that courts would apply the public-forum doctrine to the subsidy, then the subsidy's designers would have to tread lightly to avoid invalidation.

19.3.1 *Subsidies as a Public Forum*

The discussion in *Rosenberger v. Rector and Visitors of the University of Virginia*,[16] a seminal public-forum holding, illustrates why a subsidy would likely be construed as a public forum. In that case, the University of Pennsylvania maintained a fund to

fact that American politicians depend on 501Ic(3) organizations and 501(c)(3) organizations depend on 501(c)(3) status.

[16] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995).

cover printing costs for publications by student groups. Under the policy, these publications could cover "student news, information, opinion, entertainment, or academic communications media groups."[17] The policy nevertheless excluded "religious activities," which in relation to the printing fund meant any publication that "primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality."[18]

The Supreme Court held that the exclusion for "religious activities" violated the First Amendment. "[V]iewpoint-based restrictions are [not] proper," it explained, "when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers."[19] For the Court, it was untenable to frame the University's printing fund as a government speech when the University itself had "declared that the student groups eligible for SAF support are not the University's agents, are not subject to its control, and are not its responsibility. Having offered to pay the third-party contractors on behalf of private speakers who convey their own messages, the University may not silence the expression of selected viewpoints."[20]

Now consider a hypothetical subsidy program to shore up local media around the country. The parallels to *Rosenberger* seem unavoidable. Like the university fund, our subsidy for local news organizations would subsidize private speech with government funds. And to preserve the credibility of news organizations that took the subsidy, the subsidy's enabling law would almost certainly include some express public assurance – much like the University's in *Rosenberger* – *that* the subsidy's recipients were "not [government] agents, not subject to its control, and not its responsibility."[21] Such assurances are routine when the government underwrites media, and it is hard to see why a subsidy for local news would not work the same way.[22] Indeed, the norm is so accepted that a court might read some protection for

[17] *Id.* at 824.
[18] *Id.* at 825.
[19] *Id.* at 834.
[20] *Id.*
[21] Turner v. U.S. Agency for Glob. Media, 502 F. Supp. 3d 333, 342 (D.D.C. 2020), *appeal dismissed*, No. 20-5374, 2021 WL 2201669 (D.C. Cir. May 17, 2021). Central to the success of this critical foreign policy work, however, is the premise that, in contrast to the state-run propaganda that dominates media in the countries where VOA and its sister networks broadcast, U.S.-funded international broadcasting outlets combat disinformation and deception with facts, told through an American lens of democratic values. Thus, "to transform" these outlets "into house organs for the United States Government" would be "inimical to [their] fundamental mission." Ralis v. RFE/RL, Inc., 770 F.2d 1121, 1125 (D.C. Cir. 1985). Instead, to provide a model of democratic debate and deliberation informed by the contributions of a free press, VOA and its sister networks must "present the policies of the United States clearly and effectively," alongside "responsible discussions and opinion on these policies." 22 U.S.C. § 6202(c)(3); *see also id.* § 6202(b)(3).
[22] Past practice shows that Congress recognizes the relationship between editorial independence and journalistic credibility. The U.S. Agency for Global Media, for example, is a fully public organization housed within the State Department; it runs Voice of America, Radio Free

editorial independence into a statute that did not provide for it expressly.[23] In any event, a broad subsidy with protections for editorial protection would be hard to characterize as government speech, and easy to characterize as a public forum.

19.3.2 *Avoiding "Viewpoint Discrimination"*

If our subsidy is indeed a public forum, then it must be held out on broadly equal terms. The details are complex, but suffice it to say that viewpoint discrimination in such a "forum" is broadly prohibited. Discrimination on the basis of *subject matter*, meanwhile, is often upheld "where a government 'reserv[es a forum] for certain groups or for the discussion of certain topics,'"[24] so long as the subject-matter rules are reasonable and viewpoint-neutral.[25]

In practice, however, the allowance for viewpoint-neutral subject-matter restrictions does not go as far as one might expect. This is because courts throw the phrase "viewpoint" around rather liberally, and in a way that sometimes covers classifications that read more intuitively as having to do with topic or subject matter. In *Rosenberger*, for instance, the category of "religious publications" included publications that either represented or opposed any religion; this, for the Court, was a viewpoint-based category in spite of its seeming even-handedness.[26] In other

Europe, Radio Free Asia, the Office of Cuba Broadcasting, and the Middle East Broadcasting Networks. Congress has every right under the Constitution to make these platforms into state mouthpieces. Instead, these organizations operate under a longstanding "statutory firewall" that requires the agency director to maintain "respect [for] the professional independence and integrity of the [Broadcasting Board of Governors], its broadcasting services, and the grantees of the Board," § 6204(b). An early court decision involving the firewall policy noted that in Congress, "to transform [Radio Free Europe] from independent broadcasters into house organs for the United States Government was seen as inimical to [their] fundamental mission." *Ralis*, 770 F.2d at 1125.

[23] In Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001), the Supreme Court struck down a statutory limitation on funds for litigation challenging public welfare restrictions. In doing so, the Court distinguished Rust v. Sullivan, 500 U.S. 173 (1991), in which it had upheld, as government speech, the Hyde Amendment's restriction on the use of federal funds to underwrite abortion counseling by physicians. The Court's rationale here was that litigation against the government was so inherently adversarial to the government that it could not plausibly be characterized as speech by the public: to do so would "distort[] the legal system by altering the traditional role of the attorneys." Legal Servs. Corp., 531 U.S. at 544. The press, with its own tradition of adversariness, might suffer a similar "distortion" if by taking funds it became a "government speaker."

[24] Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 201 (2015) (quoting Rosenberger, *supra* note 16 at 829 (1995)).

[25] *See* Barrett v. Walker Cnty. Sch. Dist., 872 F.3d 1209, 1225 (11th Cir. 2017) ("content-based discrimination … is permitted in a limited public forum if it is viewpoint neutral and reasonable in light of the forum's purpose").

[26] 515 U.S. 819, 831–32 (1995) ("It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The [notion] that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.").

cases, the Court has treated pharmaceutical-marketing regulations as viewpoint-discriminatory if they treated generic drugs more favorably than the name brand.[27] And in a number of cases, the Court has treated general bans on racial or ethnic disparagement, no matter whose group is disparaged, as bans on a viewpoint rather than as bans on a general topic or theme.[28] Offensiveness itself is considered a viewpoint.[29]

Some of the Court's more activist Justices have blurred the nature of the viewpoint-discrimination rule even further by invoking it to strike down "controversial" speech regulations that offend the "viewpoint" of one of the regulated parties. Unions are "controversial," for example, so for Justice Alito, it is viewpoint discrimination to pay for collective bargaining from mandatory union fees.[30] Abortion is "controversial," so for Justice Thomas, it is viewpoint discrimination to require crisis pregnancy centers to disclose true information about the availability of family-planning services in the area.[31] Note that neither the paycheck deduction nor the disclosure requirement actually regulated advocacy or opinion on unions, abortion, or any other "controversial" subject.

I do not mean to suggest that the Court should give the government a pass on genuine viewpoint discrimination when it subsidizes speech. The Court is right – obviously right – that viewpoint discrimination qualifies as a "particularly egregious" form of content discrimination. In the context of media subsidies, viewpoint discrimination marks the line between public media and state propaganda.

What I *do* mean to point out, though, is that the First Amendment bar against viewpoint discrimination is susceptible to overextension and abuse by courts. This oversensitivity to "viewpoint" concerns could make it very difficult for subsidy designers and administrators to run a competent program.

To illustrate this problem, suppose that the local news subsidy is available only to organizations that spend some given amount of time or space *covering local news*. This seemingly modest requirement could create a lot of trouble.

19.3.2.1 Localism

Suppose that to receive the subsidy, a local newspaper must show that at least one-third of the stories it runs deal with people who reside or events that occur within a 100-mile radius. Such a rule – the "local" half of a "local news" requirement – would undoubtedly have to do in some sense with the "content" of subsidized papers. But on its own, this localism requirement would be hard to strike down as any kind of "viewpoint" restriction.

[27] Sorrell v. IMS Health Inc., 564 U.S. 552 (2011).
[28] R.A.V. v. St. Paul, 505 U.S. 377 (1992); Matal v. Tam, 137 S. Ct. 1744 (2017).
[29] Iancu v. Brunetti, 139 S. Ct. 2294 (2019).
[30] Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., 138 S. Ct. 2448 (2018).
[31] Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018).

A recent case involving an Austin, Texas, signage ordinance deals with a similar issue. The law there put a restriction on the use of digital signs: Owners could use them to display messages about "on-premises" concerns (e.g., "eat here" at a restaurant on the premises) but not "off-premises" concerns (e.g., "Biden/Harris 2020"). The Supreme Court upheld it as a content-neutral time-place-manner regulation because it did not "single out any topic or subject matter for differential treatment."[32]

I grant that the analogy between the Austin signage law and a national media subsidy is somewhat unsatisfying. The expressive stakes in the Austin case were low, after all, and removed from the media context. But the Austin case is not the first time that the Court has upheld a locality preference as content-neutral. It has also upheld a requirement that cable-service providers, notwithstanding their "editorial discretion" under the First Amendment, can be required to carry local television stations as part of a basic cable package.[33] This, for the Court, was also a content-neutral requirement.

Again, there are significant contextual differences between the "editorial discretion" exercised by a newspaper as opposed to a cable-service provider. But very broadly, both cases suggest a somewhat relaxed attitude on the Court toward localism requirements. If the Court was unwilling in these cases to scrutinize locality restrictions as even being *content*-based, then there is some reason to hope that a locality criterion in the context of a news subsidy would not be considered *viewpoint*-based.

19.3.2.2 Quality and Professionalism

So far, so good. But realistically, the "local news" concept would incorporate a number of cross-cutting content lines beyond localism. The subsidy might reasonably be limited to reporting on matters of public importance rather than trivial personal matters or neighborhood gossip. There may be some threshold for journalistic quality, or a mechanism to ensure that "hard news" and investigative reporting get the bulk of the subsidy. Chronic defamers or conspiracy spreaders might be disqualified somehow. And so on.

At least some of these lines could become proxies for viewpoint discrimination or state capture. A "journalistic quality" criterion will raise some particularly delicate issues; even if it is defined in a relatively objective way and administered with safeguards against corruption, journalistic quality will correlate at some level with viewpoint. In some situations, such a "journalistic quality" criterion will correlate even *more* strongly with partisan viewpoint if it is administered well.

[32] City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464, 1472 (2022).

[33] Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC (*Turner II*), 520 U.S. 180 (1997).

Correlation, of course, is not causation or motivation, and under basic doctrinal principles, the First Amendment does not bar policies that have a disparate ideological impact so long as they are neutral by design.[34] But the distinction between a neutral requirement and a discriminatory one can be more slippery than one might think.

Journalistic ethics codes, for example, routinely require objectivity in reporting, a wall between reporting and commentary, and fair and respectful treatment of subjects and sources. But even standards designed to promote objectivity and neutrality embody something that could reasonably be called a viewpoint: namely, the "viewpoint from above" that is the hallmark of professionalized mainstream journalism.

At a policy level, one might question how serious a concern this particular kind of viewpoint discrimination really is, and what measures if any might be taken to mitigate or offset it. But under First Amendment law, any subsidy that is conditioned on journalistic professionalism will be vulnerable to challenges based on the formalistic and somewhat obtuse position that the AP reports the news from one viewpoint and Breitbart reports the news from another.

The upshot here is that if the government (1) offers subsidies on a broad basis to journalistic institutions and (2) includes protections for editorial independence, then courts are likely to treat that program as a public forum.[35] If the subsidy is a public forum, then it must be defined and administered in a viewpoint-neutral manner. Institutions excluded from the subsidy will therefore bring constitutional challenges that attack various boundary-setting features of the subsidy as being viewpoint-based. And given how broadly and sometimes capriciously the concept of "viewpoint" has been interpreted in the past, it may be very difficult to draft content requirements that are entirely safe from invalidation.

19.3.3 *Government Speech?*

Recall, however, that there are *two* conceivable ways to frame a media-subsidy program under the First Amendment: as a public forum or as government speech. So far, I have focused on the public-forum framing because, for reasons I have already discussed, it fits a lot better. But the government-speech framing is also worth discussing – not because it fits the policy particularly well, but because it presents such a tempting shortcut around the meddlesome public-forum doctrine.

[34] "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

[35] More specifically, courts would probably regard this kind of program as a "limited public forum." In a "limited public forum," the government is free to set rules that discriminate on the basis of *content*, so long as those rules are viewpoint-neutral, they relate reasonably to the purpose of the forum, and they are defined up front and enforced consistently.

The government-speech doctrine rests on the principle that government must be free to project *its own* viewpoint, and to exclude others', when it communicates with the public. That implies that when the government enlists private speakers as mouthpieces for the government, the government is not opening any kind of public forum. The government may impose whatever kind of messaging restrictions it pleases on these speakers without triggering any kind of First Amendment scrutiny.

To expand on this theme, one might say that if the government wishes to use its "voice" via media subsidies to strengthen democracy and public knowledge through a strong, independent, and pluralistic press, then it should not also have to underwrite propaganda outlets that lie to the public and undermine democracy.[36] The government-speech concept, at first impression, captures this idea in an appealing way. As Justice Alito has memorably observed, the United States did not, by accepting the Statue of Liberty from France, assume a duty to accept "other statues of a similar size and nature (e.g., a Statue of Autocracy, if one had been offered by, say, the German Empire or Imperial Russia)."[37]

The catch, of course, is that the government-speech doctrine cuts both ways. The government can always accept the Statue of Autocracy and reject the Statue of Liberty. And applied to a media subsidy, the government-speech framing would empower the government to structure the subsidy in abusive and anti-democratic ways without any meaningful judicial oversight.

Between the highly restrictive public-forum doctrine and the completely ambivalent government-speech doctrine, the Court has thus put forward an all-or-nothing model for analyzing governmental speech supports under the First Amendment. And as noted above, I think the Court would be far more likely to put a broad-based, even-handed local media subsidy into the "public forum" box than the "government speech" box.[38] But note that in holding out these two alternatives, the Court signals perverse incentives to Congress. If Congress designs up a subsidy that encourages a "diversity of views"[39] and includes protections for editorial autonomy, then its program will become a litigation magnet under the public-forum doctrine; if Congress strips out the editorial protections and encourages newspapers to toe the government's line, then the program might be upheld as government speech. Or at least that is how the existing case law makes it look.

National Endowment for the Arts v. Finley[40] illustrates, in a lower-stakes context, the kinds of political and legal difficulties that legislators, administrators, and courts may someday face when considering a national subsidy for local news. The National Endowment for the Arts awards grants to artists and arts organizations based on a

[36] *See* Adam Shinar, *Democratic Backsliding, Subsidized Speech, and the New Majoritarian Entrenchment*, 69 Am. J. Comp. L. 335 (2021).
[37] Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 479 (2009).
[38] *See supra* notes 16–23 and accompanying text.
[39] Rosenberger, *supra* note 16.
[40] Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998).

standard of "artistic excellence and artistic merit." In the early 1990s, the NEA sustained heavy criticism for funding works that were in one way or another created to shock mainstream sensibilities. The most controversial among these works involved religious desecration, nudity, or explicit depictions of sex.[41] Congress responded to the controversy by amending the NEA's statutory guidelines to require the NEA to "take into consideration . . . general standards of decency and respect for the diverse beliefs and values of the American public."[42]

The NEA was set up to be administered apolitically. But by requiring the NEA to consider "decency and respect," Congress obviously wanted the NEA to consider whether an artist's work offended mainstream sensibilities. And "giving offense," as the Court has noted more recently, "is a viewpoint."[43] This viewpoint discrimination is not a problem if the NEA's subsidy is seen as government speech; but it is a big problem if NEA funding is considered a public forum.

Finley presented Congress with a problem similar in some respects to the one the government might face if it was trying to exclude fringe publications – neo-Nazis, jihadists, QAnoners – from a media-subsidy program. Any viable, politically sustainable program has an interest in not getting caught funding flamboyantly offensive projects. Yet preventing offense is exactly what the First Amendment forbids the government to do when it sets up a public forum. Read simply, the public-forum doctrine would seem to force the government to choose between an unconstitutional policy and a politically vulnerable one.[44]

Justice O'Connor, writing for a six-Justice majority in *Finley*, found a way to finesse the issue: She and the majority upheld the program based primarily on the fact that the "decency" criterion was merely one factor to be considered as part of a competitive grantmaking process rather than a binding requirement for funding. Even assuming the NEA was a public forum, the new statutory guidelines were

[41] *Id.* at 574–75.

[42] 20 U.S.C. § 954(d)(1). *See also* 20 U.S.C. §954(d)(2) (NEA "regulations and procedures shall clearly indicate that obscenity is without artistic merit, is not protected speech, and shall not be funded").

[43] Matal v. Tam, 582 U.S. 218, 243 (2017).

[44] *See* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 681–82 (1998):

> Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates' views at all. A broadcaster might decide "'the safe course is to avoid controversy,' . . . and by so doing diminish the free flow of information and ideas." Turner Broadcasting System, Inc., 512 U.S., at 656 (quoting Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257 (1974)). In this circumstance, a "[g]overnment-enforced right of access inescapably 'dampens the vigor and limits the variety of public debate.'" *Id.* (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964)).
>
> These concerns are more than speculative. As a direct result of the Court of Appeals' decision in this case, the Nebraska Educational Television Network canceled a scheduled debate between candidates in Nebraska's 1996 United States Senate race. Lincoln Journal Star, Aug. 24, 1996, p. 1A, col. 6. A First Amendment jurisprudence yielding these results does not promote speech but represses it.

simply too ineffectual for the Court to "perceive a realistic danger that [they would] compromise First Amendment values."[45]

Yet this "merely a factor for consideration" reasoning ultimately dodges the issue, as Justice Souter argued in a lone dissent: "What if the statute required a panel to apply criteria 'taking into consideration the centrality of Christianity to the American cultural experience,' or 'taking into consideration whether the artist is a communist,' or 'taking into consideration the political message conveyed by the art,' or even 'taking into consideration the superiority of the white race'?" he asked.[46] In any of these situations, it would be impossible to disregard the censorial implications.

Justice Souter's point here is surely correct. Yet Justice O'Connor's small concession to political reality may well have done more to preserve the arts as a going concern in American life. Even so, it is hard to read Justice O'Connor's opinion as anything but a punt – a way to give Congress a pass in *this* case while still preserving the option, under public-forum doctrine, to invalidate some other more troubling restriction on arts funding in a later case.

Justice Scalia, concurring in the judgment, would have cut the Gordian knot by calling the whole NEA a form of government speech and unshackling the government to set the message however it wants.[47] But in a country where arts organizations typically rely on NEA funds to cover about a third of their budget, the "government-speech" approach would allow the government to play a disturbingly authoritarian role in the arts world. It would leave the government free, for example, to withdraw sustaining support from community theaters whose programming is critical of the president's party. In recent years, the leaders of countries experiencing "democratic backsliding" have exploited subsidies for arts, science, and journalism in just this way.[48]

19.4 LIMITED OPTIONS

In sum, the First Amendment as currently interpreted seems to allow three broad strategies to support local media:

1. Congress may create its own media institutions and then provide them the financial resources to run local affiliates around the country. These institutions may be in the mold of the Agency for Global Media, which is housed within the State Department, or it may be a publicly funded nonprofit corporation like the Corporation for Public Broadcasting. The Supreme Court has held that government may do this without inadvertently opening a public forum. That means that Congress should have

[45] *Finley*, 524 U.S. at 583.
[46] *Id.* at 610 (Souter, J., dissenting).
[47] *Id.* at 590 (Scalia, J., concurring).
[48] Shinar, *supra* note 36, at 341 (discussing the phenomenon in Israel, Poland, and Hungary).

the ability to require the new media institution to observe norms of professionalism, objectivity, and balance, and to create institutional firewalls to protect for editorial independence.

2. Congress may give subsidies to existing private media institutions and guarantee these institutions' editorial independence in much the same way that it guarantees editorial independence at the Corporation for Public Broadcasting and the Agency for Global Media. But in guaranteeing that it will not withdraw the subsidy based on editorial decisions, Congress is very likely to become committed to a full "viewpoint-neutrality" requirement under the public-forum doctrine. This viewpoint-neutrality requirement will make it very difficult for Congress to set minimum standards for journalistic quality.
3. Congress might give subsidies to existing private media institutions as in strategy 2 while also clarifying somehow that these media institutions now speak on behalf of the government and that the government has control over the message. This strategy would allow the government to avail itself of the "government speech" doctrine, which means that the government could safely deny the subsidy to low-quality outlets. The problem, obviously, is that this kind of incursion onto the independence of the press would largely defeat the purpose of having a press at all.

Among these options, the first one – a massive expansion of public media – is in most respects the best. There is American precedent for this model in a dramatically smaller form. PBS and NPR enjoy broad public support despite their perennial funding battles, and their journalistic operations are widely respected.

This model is relatively uncomplicated from a legal perspective as well. Insofar as the courts have applied the First Amendment to public broadcasting, they have generally done so in a way that supports editorial independence at these institutions. Courts have not, so far, given any reason to fear that First Amendment litigation will undermine or interfere with these programs' operations. For all these reasons, a public media expansion would be an attractive and straightforward way to provide economic support for local journalism.

The one real shortcoming of this approach – other than the longstanding political opposition to public media – is that on its own, it would not support private news institutions that may already be established in a community. If struggling private news institutions are forced to compete with better-funded public options, then a public media expansion seems certain to accelerate their decline. Even with strong public media, the loss of these private institutions would badly diminish the plurality and resiliency of the overall media landscape in ways that may be hard to foresee.[49]

[49] *See* Brian Asher Rosenwald, Mount Rushmore: The Rise of Talk Radio and Its Impact on Politics and Public Policy (2015) (PhD dissertation) (on file with the University of Virginia Library), https://perma.cc/C9KT-28VH (arguing that subsidized NPR affiliates' hold over

Therefore, some kind of subsidy for nonpublic media institutions is probably desirable in any event, either as a standalone program or as a supplement to a public media expansion.

19.5 DESIGNING A SUBSIDY

The question, then, is how to design this kind of program in a manner that is least likely to fall under constitutional challenge. As I have discussed, it is likely that courts would construe a broad media-subsidy program as a public forum for First Amendment purposes. In principle, this would allow the government to set some viewpoint-neutral rules for the kind of content the program will support, and at what level. But in practice, it can be hard to predict where the line lies between content classifications and viewpoint classifications. This uncertainty introduces a degree of litigation risk into any element of a subsidy that turns on content. Program designers will be well-advised to avoid content classifications to the greatest extent practicable.

Some degree of content classification is probably unavoidable and relatively safe. A program designed to promote local journalism can probably get away with requiring local coverage.[50] But it is less certain whether content classifications designed to ensure that funds go to legitimate institutions would survive review.

Bob McChesney has proposed to hold referenda in which voters would name a short list of news outlets in their community to receive federal funds. The few top-ranking outlets then would become eligible to take "journalism vouchers" that individual community residents allocate to the participating institution of their choice.

Vouchers are promising. The Supreme Court has upheld school tuition-voucher programs over objections that these vouchers gave an unconstitutional benefit to religious schools. Direct, preferential grants by government to parochial schools might have violated the First Amendment's Establishment Clause. But if the government left the final choice with individuals who overwhelmingly awarded their vouchers to parochial institutions, then the government's hands were clean.[51] A similar line of reasoning could inoculate a journalism voucher from First Amendment-based challenges: It is not viewpoint discrimination or even content discrimination for the government to give funds to individuals who then spend them according to personal preference.

The primary difficulty with a voucher-oriented program, however, is that one still must set some conditions to determine which organizations may collect vouchers and seek public reimbursement. Otherwise, program funds could be diverted to uses

center-to-left listeners played a role in preventing left-wing talk radio from flourishing) (thanks to Paul Matzko for this tip).

[50] *See supra* notes 32–33 and accompanying text.

[51] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

that are not related to the purpose of the fund. Churches, for example, might encourage members to use their voucher to buy the church bulletin; or retailers might give incentives for customers to "subscribe" to "news" about products on sale. And for the program to have the most impact, it will probably make sense to concentrate vouchers on a small menu of publications within a community.

McChesney's proposal of a ranked referendum is likely to address these concerns without requiring government *officials* to set content criteria. But the Supreme Court has indicated fairly clearly that it would view even a popular referendum as yet another form of viewpoint discrimination. In *Board of Regents v. Southworth*, the Court warned that a campus referendum to decide funding for student groups would violate the First Amendment. "To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. . .. Access to a public forum . . . does not depend upon majoritarian consent."[52]

An irony here is that in the glory days of local news, the business model of a robust community newspaper really *did* depend on something like popular consent in the form of large market share, which enabled high economies of scale. It is only when majorities express themselves through a *political* process – here a direct referendum, but legislative action would count as well – that the First Amendment kicks in and concerns about majoritarian tyranny flare up.

Whether or not this dichotomy between political majoritarianism and market majoritarianism makes any sense, it is bedrock in American constitutional culture. And it may provide an opening for a public subsidy program to concentrate its funds on widely read and widely trusted community papers. Rather than asking community members to *choose* which local news outlets are worthy to receive public subsidies, the government might implement a system of content-neutral subsidies to simulate the monopolistic incentive structure that made the old local newspapers viable. The government might, for example, provide matching funds for each subscription a local publication picks up – and then sharply escalate the degree of match as the publication achieves a higher degree of saturation within a defined geographical radius.

Such a system would involve some degree of technical challenge, as well as several difficult design choices. But it would also seem to avoid the concerns about state influence and content neutrality that have traditionally underlain the American suspicion toward public news subsidies. In many ways, the incentive structure I propose would offer a spiritual successor to the postal subsidies that Congress has at various points extended to the press.

Those subsidies, too, came with content-neutral conditions that Congress adjusted over the years to achieve different structural goals. In some years, the subsidies were drawn to reward long-distance readership. In other years,

[52] Bd. of Regents of Univ. of Wisconsin Sys. v. Southworth, 529 U.S. 217, 235 (2000).

the subsidies were drawn to reward local readership. A twenty-first-century subsidy for local newspapers might be drawn to reward *popular* outlets that are capable of reaching a large segment of the community and offering a common reference point on local events.

Hopefully, many recipients of a program like this one would use their new revenues to pick up the hard, investigative reporting work that so many legacy papers have been forced to forego. But even "soft" news on culture, sports, and community events could provide real value by helping to consolidate a sense of place and local community. If nothing else, a consistent source of local news might help to displace the excess of ideologically polarizing national news that dominates most contemporary news consumers' media diets.