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Bailing Out the Print Newspaper Industry: A Not-So-Joking Public Policy and First Amendment Analysis

Clay Calvert*

I. INTRODUCTION

A single page of a single newspaper on a single date—page B6 of the December 10, 2008 *Wall Street Journal*, to be precise—revealed reams about the sorry economic state of the entire newspaper industry at the end of the fiscally frightening year that was 2008. One story,¹ focusing on debt, lending, and credit at the New York Times Co., was littered with depressing data and developments. It reported:

- “a 15% decline in advertising sales”² throughout the newspaper industry in 2008;
- the prediction, attributed to newspaper publishers, “that the financial picture is bleak for some, if not all”³ of 2009; and
- the slashing of 2,550 positions at the McClatchy Company, then the third-largest newspaper group in the United States,⁴ in 2008.⁵

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1. Russell Adams & Shira Ovide, *New York Times Takes Steps to Aid Liquidity*, WALL ST. J., Dec. 10, 2008, at B6.

2. *Id.*

3. *Id.* The New York Times Company was in such financial trouble in early 2009 that it was seeking to raise \$250 million from Carlos Slim, a Mexican billionaire who is considered among the world’s richest individuals. Matthew Karnitschnig & Russell Adams, *Billionaire Reaches Deal on Funding for Times Co.*, WALL ST. J., Jan. 20, 2009, at B1; see also Russell Adams, *Net at New York Times Falls—Ad Revenue at Internet Group Takes an 18% Decline*, WALL ST. J., Jan. 29, 2009, at B7 (writing that the “New York Times Co. posted a 48% decline in fourth-quarter net income on a rapid deterioration of print advertising,” and adding that “the rate of decline for print advertising revenue has accelerated in January [2009], because of continued weakness in classifieds and the troubled retail sector”).

In April 2009, the New York Times Company faced financial trouble with one of the newspapers it owns, the *Boston Globe*, and it “began negotiations with the Boston Globe’s unions . . . to seek an agreement over \$20 million in new savings at the newspaper.” *N.Y. Times Seeks Concessions From Unions at Globe*, PROVIDENCE J.-BULL., Apr. 7, 2009, at 9.

4. See The McClatchy Company, <http://www.mcclatchy.com> (last visited Jan. 15, 2009) (on file with the *McGeorge Law Review*) (describing the company as “the third-largest newspaper company in the United States, a leading newspaper and internet publisher dedicated to the values of quality journalism, free expression and community service” and asserting that “the company’s newspapers and websites are steadfast defenders of First Amendment values and advocates for the communities they serve”).

5. Adams & Ovide, *supra* note 1.

A second article on the same page addressed the Tribune Company's Chapter 11 bankruptcy filing.⁶ At the time of its filing, the Tribune Company described itself as "America's largest employee-owned media company, operating businesses in publishing, interactive and broadcasting, including ten daily newspapers and commuter tabloids, 23 television stations, WGN America, WGN-AM and the Chicago Cubs baseball team."⁷ Among those ten daily newspapers are large-city leaders, including the *Chicago Tribune* and *Los Angeles Times*.⁸ An article in *The New York Times* contextualized the bankruptcy filing within the broader problems facing the newspaper industry in late 2008:

The recession and the shift of advertising to the Internet have hit newspapers with the sharpest drop in advertising revenue since the Depression—Tribune's papers were down 19 percent in the third quarter—and some major newspapers have defaulted on debt or been put up for sale, with no takers.⁹

The bad-news hits just kept on coming in early 2009. First, the Hearst Corporation proclaimed that if it could not sell the *Seattle-Post Intelligencer* in short order, then it would close down the 145-year-old newspaper, which lost \$14 million in 2008 alone.¹⁰ Next, the *Chicago Tribune*, the eighth-largest daily newspaper in the United States, announced that it would print a broadsheet-format version of the newspaper only for home-delivery subscribers.¹¹ The owner of its local rival, the *Chicago Sun-Times*, was at the same time closing its suburban newspapers.¹²

Writing about the Tribune Company's bankruptcy, *Business Week* media critic Jon Fine predicted "a new phase for the oldest form of mass media and the American newspaper company, one we will call the Great Capitulation. Senior executives at the different major newspaper companies . . . expect a fresh round of mergers . . ."¹³ The new mergers, Fine emphasized, would not be undertaken in the name of producing higher quality journalism, but rather would "be driven by big bankers seeking to ensure that the money they've lent, or at least a decent

6. Ellen E. Schultz, *Tribune Filing Exposes Risks of ESOPs*, WALL ST. J., Dec. 10, 2008, at B6.

7. Tribune Company, <http://www.tribune.com> (last visited Dec. 16, 2008) (on file with the McGeorge Law Review).

8. See Richard Perez-Pena, *Crippled by Debt, Tribune Co. Seeks Bankruptcy Protection*, N.Y. TIMES, Dec. 9, 2008, at A1 (noting that the Tribune Company owns these two major city newspapers).

9. *Id.*

10. Shira Ovide, *Seattle Post-Intelligencer Faces Closure if Buyer Isn't Found Soon*, WALL ST. J., Jan. 12, 2009, at B7. In March 2008, the *Seattle Post-Intelligencer* printed its last hard-copy edition "and became the largest metropolitan daily to switch to an online-only publication." Kim Murphy, *Seattle Paper Says Goodbye to Print*, L.A. TIMES, Mar. 17, 2009, at A11.

11. Shira Ovide, *Chicago Tribune to Print Tabloid for Newsstands*, WALL ST. J., Jan. 14, 2009, at B6. A tabloid-format version of the *Chicago Tribune* would be sold in news racks and at newsstands. *Id.*

12. *Id.*

13. Jon Fine, *Tribune: The Canary in a Scary Mine*, BUS. WK., Dec. 22, 2008, at 77.

portion of it, is repaid.”¹⁴ He quoted one newspaper executive as predicting that there will be “a big wave of consolidation . . . that will be forced on the industry.”¹⁵

Opining in the *Seattle Post-Intelligencer* in December 2008, columnist Stephen Foley pointed out that some newspapers may simply be forced out of business altogether in the near future:

Next year is looking like a potentially vicious one for some of the industry titans. Fitch, the credit rating agency, has issued a stark warning that “more newspapers and newspaper groups will default on their debt, be shut down and be liquidated in 2009 and several cities could go without a daily print newspaper by 2010.”¹⁶

Foley also noted that 15,000 jobs were lost in the United States newspaper industry in 2008 and that, “[a]cross the U.S., more than 30 papers are up for sale, but there are no buyers.”¹⁷

It was in this gloom-and-doom environment¹⁸ of declining revenue,¹⁹ declining paid circulation,²⁰ and declining advertising,²¹ as well as massive job

14. *Id.*

15. *Id.*

16. Stephen Foley, *Writing's on the Wall for Newspapers*, SEATTLE POST-INTELLIGENCER, Dec. 19, 2008, at A29.

17. *Id.*

18. Chris Lamb, a professor of media studies at the College of Charleston, captured this sense of negativity and pervasive pessimism quite well when he recently wrote:

Every day, as circulations fall and advertising revenues plummet, jobs are cut and the newspaper industry becomes less essential to our lives. Newspapers failed to adapt to emerging technologies, to competing media and to the changing interests of Americans. The failure of American newspapers also is the result of its own complacency, greed, folly, waste and hubris.

Chris Lamb, *Democracy and the Newspaper: It's in Americans' Best Interests to Preserve Both*, WASH. TIMES, July 4, 2008, at A25.

19. For example, the *Rocky Mountain News* in Denver, Colorado, lost \$11 million in the first nine months of 2008, and its owner, E.W. Scripps Co., put the newspaper up for sale. Steve Raabe, *Economy, Internet Whipsaw Two-Newspaper Towns*, DENVER POST, Dec. 14, 2008, at K-01. The 149-year-old newspaper ultimately closed in 2009. See Valerie Richardson, *Colorado's Oldest Newspaper Closes*, WASH. TIMES, Feb. 27, 2009, at A3 (writing that “the Rocky Mountain News, the oldest newspaper in Colorado, will publish its last edition Friday after owners failed to secure a buyer for the financially strapped daily, making it the latest casualty in an increasingly shaky newspaper industry” and noting that “the tabloid known as the ‘Rocky’ was just two months shy of its 150th anniversary, during which time it won four Pulitzer Prizes[,] . . . [and] lost \$16 million in 2008 despite a 2001 joint-operating agreement aimed at propping up Denver's two daily newspapers, the Rocky and the Denver Post”).

20. See Dale Kasler, *Web Site Lifts Total Audience: Bee's Paid Circulation Declines 4.2 Percent*, SACRAMENTO BEE, Oct. 28, 2008, at B9 (“Paid circulation fell at almost every U.S. daily during the six months ending Sept. 30. But many papers’ total audience—including estimates of Internet and ‘pass-along’ print readership—went up.”).

21. For instance, McClatchy reported a 19.4 percent drop in revenue for the month of November 2008 relative to the same month in 2007 and “that advertising sales fell 22.4 percent from a year ago.” *McClatchy Co. Revenue Down 19.4% Last Month*, SACRAMENTO BEE, Dec. 16, 2008, at B7.

cuts²² and shuttering print editions in favor of online ones,²³ that *Business Week*'s Jon Fine sought to add some satirical levity. The headline of Fine's November 24, 2008 column aptly and accurately summed up the gist of the provocative thesis and text that ran below it—"Why Not Bail Out Newspapers, Too?"²⁴

Written in the form of a memo directed from a fictitious "Tongue & Cheek Lobbying Innovations LLC" to the senior executives at U.S. newspaper companies, Fine fashioned a fanciful proposal for a Newspaper Rescue Act under which "[t]he U.S. assumes all outstanding debt at all newspaper companies."²⁵ He further vetted the proposition that, as part of this plan, the federal government "may take equity stakes in all companies, should the government deem this wise."²⁶ In a passing reference to the First Amendment,²⁷ Fine suggested that "[w]e can position this as a proactive move to save the only industry prominently mentioned in the Bill of Rights."²⁸

While noting that Fine's idea "started out as pure satire," Jennifer Harper of the *Washington Times* pointed out that in December 2008, "Democratic legislators in Connecticut proposed a state bailout of two local newspapers."²⁹ In a letter to Connecticut's Department of Economic and Community Development,

22. See Neil Downing, *Journal Co. Laying Off 31 to Cut Expenses*, PROVIDENCE J.-BULL., Oct. 10, 2008, at Business 1 (describing "a series of job cuts at newspaper companies throughout the country as publishers attempt to cope with declines in advertising revenue—their chief source of revenue—amid a nationwide economic downturn, competition from the Internet, rising printing costs and other factors," and noting that "[w]ithin the last month, the St. Louis Post-Dispatch, the Plain Dealer in Cleveland and a number of other newspapers ha[d] either laid off workers or announced layoffs and other staff reductions" and that "[l]ast summer, the Hartford Courant cut its newsroom staff by 25 percent, to about 175 people").

23. For instance, "[t]he Boston-based *Christian Science Monitor*, one of the nation's most well-respected sources of international news coverage, announced earlier this year that it would stop printing its newspaper five days a week, opting instead for a significantly bigger Web presence and an accompanying weekly print edition." Nathan Hurst, *Newspapers Struggle Nationwide: Reduced Ad Revenue, Electronic Rivals Are Forcing Print Operations to Innovate, Analysts Say*, DETROIT NEWS, Dec. 17, 2008, at 5A; see also Howard Kurtz, *Under Weight of Its Mistakes, Newspaper Industry Staggers*, WASH. POST, Mar. 1, 2009, at A4 (describing the actions taken by many newspapers across the country to save money, including, among others, the *Washington Post*, which "killed its Sunday Source section and folded Book World as a separate section," and the *Washington Times*, which "dropped its Saturday print edition").

In addition, management at Detroit's two major daily newspapers, the *Detroit Free Press* and the *Detroit News*, announced in December 2008 that, after March 2009, they would "stop home delivery four days of the week, becoming the first major metropolitan dailies to take such a step. On those days, they [would] print pared-down editions for sale at newsstands—32-page, single-section papers." Richard Perez-Pena, *Fewer Papers Will Hit the Porch in Detroit*, N.Y. TIMES, Dec. 17, 2008, at B9.

24. Jon Fine, *Why Not Bail Out Newspapers, Too?*, BUS. WK., Nov. 24, 2008, at 124.

25. *Id.*

26. *Id.*

27. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than eight decades ago through the Fourteenth Amendment Due Process Clause to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

28. Fine, *supra* note 24, at 124.

29. Jennifer Harper, *News Industry Needs a Bailout?: More Layoffs and Huge Losses*, WASH. TIMES, Dec. 9, 2008, at A3.

those legislators wrote “we want the public to have access to independent news about what is going on in government and our communities. We share the sentiments of our nation’s leaders who wrote the Bill of Rights that a free press is an essential part of democracy.”³⁰

The gut reaction of a free-press proponent to any proposal calling for government funding and financial support of the major players in the U.S. newspaper industry surely would be one of both shock and abhorrence. How, after all, can the press play its much-ballyhooed watchdog role³¹ over the government when the government funds (and, therefore, indirectly controls) the press? The United States Supreme Court, after all, has observed that “the press plays a unique role as a check on government abuse”³² and serves “as a watchdog of government activity.”³³

As Robert Steele of the Poynter Institute³⁴ noted, the obvious problems with a government financial bailout of the press is that “[a] financial infusion from the government could raise questions about press independence and credibility. It might also lead to a movement to regulate journalism that would restrict free flow of information and “cripple the watchdog.” There are just too many questions.”³⁵

It is exceedingly easy, of course, to take any proposed bailout of the news media as a joke, especially at the same time when *Hustler* magazine publisher Larry Flynt³⁶ and *Girls Gone Wild* founder Joe Francis³⁷ call for a \$5 billion

30. Michelle Malkin, *Government-Funded News?: The Dangers of Newspaper Bailouts*, GRAND RAPIDS PRESS, Dec. 7, 2008, at A15 (quoting from the letter sent by “seven Democratic state legislators”).

31. As U.S. District Judge Robert E. Payne recently observed, the press plays a “government watchdog role protected by the First Amendment.” *Ostergren v. McDonnell*, No. 3:08cv362, 2008 U.S. Dist. LEXIS 65010, at *28 (E.D. Va. Aug. 22, 2008). In this role, the press is charged with “scrutinizing government action and ensuring that the public has information regarding political issues and other topics of public interest. Ensuring that the press can be a government watchdog increases transparency of government actions, thus contributing to government accountability and discouraging corruption.” Emily Berman, *Democratizing the Media*, 35 FLA. ST. U. L. REV. 817, 824 (2008). As University of Pennsylvania Professor C. Edwin Baker writes, it can be both argued and assumed that “that the press receives constitutional protection to be a voice independent of the government (or, at least, independent of the other three ‘estates’) in order to perform the crucial democratic tasks of providing an independent source of vision and information, including performance of a watchdog role.” C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 968 (2007).

32. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

33. *Id.*

34. The Poynter Institute describes itself on its website as:

a school dedicated to teaching and inspiring journalists and media leaders. It promotes excellence and integrity in the practice of craft and in the practical leadership of successful businesses. It stands for a journalism that informs citizens and enlightens public discourse. It carries forward Nelson Poynter’s belief in the value of independent journalism.

The Poynter Institute, Mission Statement, http://www.poynter.org/content/content_view.asp?id= 8090 (last visited Jan. 18, 2009) (on file with the *McGeorge Law Review*).

35. Harper, *supra* note 29.

36. See generally LARRY FLYNT, AN UNSEEMLY MAN: MY LIFE AS A PORNOGRAPHER, PUNDIT AND SOCIAL OUTCAST (1996) (providing autobiography).

37. See generally Michael Parrish, ‘Gone Wild’ Founder Faces I.R.S., N.Y. TIMES, Aug. 19, 2008, at C1

bailout of another media industry—pornography.³⁸ But rather than derisively dismiss out-of-hand a short-term or one-time government infusion of cash to support and prop up the daily print-newspaper industry in the United States, this Article dares to proffer arguments in favor of a government-funded, content-neutral bailout of print newspapers, as set forth in the form of the working proposal below. The proposal, it is important to understand, serves only as a type of straw man for purposes of examining the larger arguments in favor and against such a maneuver.

A. *Working Proposal for Consideration & Critique*

This Article considers the pros and cons of a one-time government infusion of cash—but not the ownership or equity stakes Fine suggested in his satirical piece³⁹—specifically directed at, and to be used exclusively for, publishing and distributing daily, general-circulation print newspapers in the United States. The amount of money distributed would be divvied out in content-neutral fashion, solely in proportion to each company's total combined print circulation for its daily newspapers. A newspaper or newspaper company's political viewpoint or content would not matter in the allocation or distribution of the funds. Newspaper companies would be under no obligation to accept the money; they would be free to decline it.

In addition, once the money is distributed to a company, the government would have no control whatsoever in terms of how it is used, other than that it must be used for publishing and distributing daily editions of hard-copy, print newspapers and that twenty-five percent of the received funds must be allocated to cover salaries of reporters, editors, and other editorial staff members.⁴⁰ Acceptance of government bailout money, however, would be contingent upon its recipients:

- promising to keep publishing their existing daily print newspapers for at least five years; and
- forgoing mergers with other newspaper companies for the same period of time.

(providing background information about Joe Francis, his *Girls Gone Wild* business, and his spate of legal and financial woes).

38. See Matt Lysiak & Christina Boyle, *Soft Sales Send Porn Biz to D.C.*, N.Y. DAILY NEWS, Jan. 8, 2009, at 23 (describing Flynt's proposal and quoting him for the proposition that "[t]he porn industry is hurting, just like the automotive industry, and we account for tens of thousands of jobs"); Howard Gensler, *Tattle: Larry Flynt & Joe Francis Want U.S. Bailout in These 'Hard Times'*, PHILA. DAILY NEWS, Jan. 8, 2009, at Features 28 (quoting Flynt for the assertion that "[i]t's time for Congress to rejuvenate the sexual appetite of America").

39. See Fine, *supra* note 24 (setting forth Fine's equity stake proposal).

40. The reasons for the twenty-five percent provision are discussed later in the Article. Other possible publishing and distributing costs on which the money could be used might include: (1) replacing lost advertising revenue; (2) covering printing press operations; (3) defraying delivery costs (items related to trucks, newsstands, and home delivery); and (4) purchasing technology used for writing, composing, and editing print versions of newspapers.

In other words, the recipients would not be allowed to simply take the money and run, as it were, either by closing up shop or pooling their money with other owners via consolidations/mergers. Further details, at this stage, are unnecessary, as the purpose of this Article is to examine and analyze some of the larger and fundamental First Amendment and public policy concerns behind such a one-time government funding measure for print newspapers. The mere notion of government funding itself raises these issues, regardless of the nuances of the actual distribution system.

In particular, Part II of the Article: (1) employs the scholarship of constitutional law professor Cass Sunstein,⁴¹ articulated in his book *Republic.com*,⁴² to help illustrate the potential pitfalls and problems that a democratic society could face when its citizens are left to rely heavily on online sources for news; (2) examines, through the lens of the venerable “marketplace of ideas”⁴³ theory of free expression, the dangers of further consolidation in the print marketplace, especially when that consolidation is driven by, as Jon Fine noted, the interests of “big bankers,”⁴⁴ rather than by concerns about what will best serve the needs of a democratic society; and (3) identifies two examples of precedent for federal government intervention, via ownership and funding-related legislation, in media marketplaces (both print and broadcast)—the Newspaper Preservation Act of 1970 (NPA)⁴⁵ and the creation by Congress, via the Public Broadcasting Act of 1967,⁴⁶ of the private, non-profit Corporation for Public Broadcasting⁴⁷ (CPB). These were created, as the United States Supreme Court

41. Sunstein is currently the Felix Frankfurter Professor of Law at Harvard Law School. See Harvard Law School, Cass R. Sunstein, <http://www.law.harvard.edu/faculty/directory/index.html?id=552> (last visited Jan. 30, 2009) (on file with the *McGeorge Law Review*).

42. CASS SUNSTEIN, *REPUBLIC.COM* (2001).

43. The “marketplace of ideas” theory of free expression “represents one of the most powerful images of free speech, both for legal thinkers and for laypersons.” MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2* (2001). It has been described as “the dominant First Amendment metaphor.” LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 237 (1991). See generally RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6-8 (1992) (providing an overview of the goals, strengths, and weaknesses of the “marketplace of ideas” theory).

44. Fine, *supra* note 13.

45. In enacting this legislation, Congress wrote:

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

15 U.S.C. § 1801 (2006).

46. 47 U.S.C. §§ 390-399b (2006). See generally Howard A. White, *Fine Tuning the Federal Government's Role in Public Broadcasting*, 46 FED. COMM. L.J. 491, 498-501 (1994) (providing an overview of the Public Broadcasting Act of 1967).

47. See 47 U.S.C. § 396 (2006) (setting forth the rules governing both the structure and financing of the Corporation for Public Broadcasting); see also Corporation for Public Broadcasting, What Is the Corporation for Public Broadcasting?, <http://www.cpb.org/aboutcpb/whatis.html> (last visited Jan. 20, 2009) [hereinafter

wrote in 1984, to “disburse federal funds to noncommercial television and radio stations in support of station operations and educational programming.”⁴⁸ Viewed collectively, the NPA and CPB were designed to promote, preserve, or otherwise prop up a multiplicity of voices/views and a desired quality of content.⁴⁹

In Part III, this Article weighs the points and arguments raised in Part II against clear concerns that any monetary ties to—if not pure reliance on—government largesse would jeopardize press independence and, in the process, the watchdog role of print newspapers. Part III emphasizes that any government bailout would need to pivot on a content-neutral system of capital allocation and distribution, such that the government’s subsidization of print-newspaper speech is not tied to either the type of content or the viewpoint of the newspapers that benefit from such funding.⁵⁰ Finally, this Article concludes in Part IV that the real problem with any government-proposed bailout of print newspapers in the United States is not the funding itself, but rather the difficulty of designing and implementing an effective structure for the allocation and distribution of such funds that guarantees editorial independence and autonomy from the government.

II. SOME REASONS TO SERIOUSLY CONSIDER A PRINT-NEWSPAPER BAILOUT

We now live in what one *New York Times* journalist wryly termed “Bailout Nation.”⁵¹ For instance, the American auto industry, an enterprise that is not mentioned in either the United States Constitution or in any of the amendments to it as deserving of constitutional protection, is a recipient of such government beneficence.⁵²

What Is the CPB?] (on file with the *McGeorge Law Review*) (providing, in relevant part, that “[t]he Corporation for Public Broadcasting is a private, non-profit corporation that was created by Congress in 1967”).

48. *FCC v. League of Women Voters*, 468 U.S. 364, 366 (1984); see also Karl H. Schmid, *Public Broadcast Stations’ Exclusion of Candidates from Debates: A Step Toward Political Independence?*, 5 COMM. L. & POL’Y 115, 122 (2000) (writing that the CPB was established “to receive and distribute federal funds to public broadcasters”).

49. See, e.g., *What Is the CPB?*, *supra* note 47 (providing that the Corporation for Public Broadcasting “funds diverse and innovative programming that’s useful, educational and cultural”).

50. See generally Wilson R. Huhn, *Assessing the Constitutionality of Laws that Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus*, 79 IND. L.J. 801 (2004) (providing an excellent overview of the differences between content-based laws and content-neutral laws).

51. Gretchen Morgenson, *Blank Check for Banks, Pink Slips for Detroit*, N.Y. TIMES, Dec. 14, 2008, at BU 1.

52. See generally Edmund L. Andrews & Bill Vlasic, *U.S. Agrees to a Stake in GMAC*, N.Y. TIMES, Dec. 30, 2008, at B1 (Describing how “President Bush approved up to \$17.4 billion in loans for G.M. and Chrysler on the condition that they seek concessions from their lenders, creditors and the United Automobile Workers union to improve their competitiveness” and reporting that “[t]he Treasury Department injected \$5 billion into GMAC, the automobile financing company, as part of a deal announced Monday night that will let GMAC convert itself into a bank holding company to reduce its borrowing costs and thus borrow money at low rates from the Federal Reserve”).

In contrast, the First Amendment expressly protects the “press,”⁵³ whose news content serves the public’s unenumerated constitutional right to receive speech.⁵⁴ The receipt of news content, in turn, benefits both individual communities and the country at large.⁵⁵ As the Supreme Court has stated, there is a “need for a vigorous and uninhibited press.”⁵⁶ Into this mix comes money, which, as the financial strength of the press, clearly impacts the effectiveness of the press in conveying important information to the public.⁵⁷ Without sufficient funding, the press cannot perform what the Commission on Freedom of the Press, chaired by Robert M. Hutchins, called “the responsibility of providing the current intelligence needed by a free society.”⁵⁸

Yet, despite the current need for funding, the press has not been a direct recipient of money from the \$700 billion Troubled Asset Relief Program (TARP) that has already helped “banks, credit card companies, automakers and insurance companies, among others.”⁵⁹ This lack of TARP support for print newspapers is somewhat surprising, at least when viewed historically, because the idea of the government subsidizing the press and, in particular, print newspapers, is far from new. In fact, the Postal Act of 1792 instituted artificially low postal rates for newspapers and periodicals.⁶⁰ This centuries-old subsidization measure was adopted, in part, for the purpose of “encouraging the dissemination of political information to the hinterlands.”⁶¹

53. See *supra* note 27 (setting forth the relevant terms of the First Amendment and noting their incorporation to apply to state and local government entities).

54. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (“[T]he right to receive ideas is a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read” (citation omitted)); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (noting that the First Amendment freedom to distribute literature “necessarily protects the right to receive it”).

55. See LEONARD DOWNIE JR. & ROBERT G. KAISER, *THE NEWS ABOUT THE NEWS: AMERICAN JOURNALISM IN PERIL* 4 (2002) (“[G]ood journalism makes a difference somewhere every day. Communities are improved by aggressive, thorough coverage of important, if everyday, subjects like education, transportation, housing, work and recreation, government services and public safety.”).

56. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

57. See Robert G. Picard, *Money, Media, and the Public Interest*, in *THE PRESS* 337, 340 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).

In order to be effective conveyers of information, media entities require financial strength so that they can support information gathering and dissemination activities and produce quality entertainment. Without a strong financial base, media do not have the resources necessary to adequately explore issues and developments in communities, states, the nation or the world.

Id.

58. COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATION: NEWSPAPERS, RADIO, MOTION PICTURES, MAGAZINES, AND BOOKS* 20 (1947).

59. David Barstow, *Treasury’s Oversight of Bailout Is Faulted*, N.Y. TIMES, Jan. 9, 2009, at B3.

60. See generally Timothy E. Cook, *Public Policy Toward the Press: What Government Does for the News Media*, in *THE PRESS*, *supra* note 57, at 248, 252-53 (providing an overview of the Postal Act of 1792 and calling “below-cost postal rates for sending periodicals through the mail” a subsidy “of continuing importance to the press”).

61. Susan Landau, *National Security on the Line*, 4 J. TELECOMM. & HIGH TECH. L. 409, 445 (2006).

Today, support for newspapers is more vital than ever. As *Washington Post* veterans Leonard Downie, Jr. and Robert G. Kaiser wrote in 2002:

[T]he world of news without newspapers would be something like a sleek convertible without an engine. Television news depends on newspapers, as its practitioners freely attest. Radio news is often lifted right out of newspapers. Government officials and politicians understand the primacy of newspapers and regularly go to newspaper reporters first with important or complicated information.⁶²

This statement, describing the pivotal importance of newspapers, may be a more modern version of what has been described as Thomas Jefferson's "familiar quote about the importance of newspapers in his society":⁶³ "[W]ere it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter."⁶⁴ It is extremely unlikely that such a choice or dilemma will arise, but there is a very real danger about the dwindling number of daily newspapers and their continued economic viability today.

Thus, a one-time infusion of government funding for the publication of print newspapers, as articulated in the manner suggested in the Introduction, would facilitate not only the operation of the press itself, but also the public's right to receive speech while serving journalism's larger mission in a democratic society.⁶⁵ As veteran journalist Davis Merritt wrote in 2005, "[a] free press is essential to a functioning democracy. A functioning democracy is essential to a free press."⁶⁶ Merritt emphasizes that newspapers that "have public service at the core"⁶⁷ attempt to act in ways "that reflect the conviction that journalism is a public trust, an institution that serves, advances, and protects the public welfare

The measure arguably worked, as it has been noted that:

In 1794, newspapers constituted seventy percent of all mail, and *reduced postage rates helped increase the number of periodicals from less than one hundred in 1825 to more than six hundred in 1850*. Although the invention of the telegraph in 1842 and the development of road and rail networks after 1830 significantly improved methods of communication, throughout the nineteenth century the mails were the primary method of distributing ideas.

Michael T. Gibson, *The Supreme Court and Freedom of Expression from 1791 to 1917*, 55 *FORDHAM L. REV.* 263, 293-94 (1986) (emphasis added).

62. DOWNIE & KAISER, *supra* note 55, at 64.

63. David Gordon, *Taking the First Amendment on the Road: A Rationale for Broad Protection for Freedom of Expression on the Information Superhighway*, 3 *COMMLAW CONSPECTUS* 135, 137 (1995).

64. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), available at The Letters of Thomas Jefferson: 1743-1826, <http://www.let.rug.nl/usa/P/tj3/writings/brf/jefl52.htm> (last visited Feb. 25, 2009) (on file with the *McGeorge Law Review*).

65. See HERBERT J. GANS, *DEMOCRACY AND THE NEWS* 1 (2003) ("The country's democracy may belong directly or indirectly to its citizens, but the democratic process can only be truly meaningful if these citizens are informed. Journalism's job is to inform them.").

66. DAVIS MERRITT, *KNIGHTFALL* 17 (2005).

67. *Id.* at 15.

and supports a free democratic society.”⁶⁸ If this is the case, then a government bailout of newspapers serves a much larger public interest than simply keeping journalists, editors, and press operators employed.

Such a government bailout, however, conflicts with the view that the First Amendment provides merely a “*negative right* that prevents the government from placing obstacles in the path of constitutionally protected speech.”⁶⁹ The bailout of the press, instead, resembles what Professor Frank B. Cross calls a *positive right* “to government assistance”⁷⁰ and “a right to command government action.”⁷¹

With this in mind, this part of the Article now turns to the work of constitutional scholar Cass Sunstein to buttress the notion that it is particularly important to support print newspapers. For Sunstein, this particular medium of news conveyance is, in many ways, vital for a deliberative democracy.

A. *Cass Sunstein and the Accidental and Unanticipated Learning Experiences Derived from Reading Print Newspapers*

In his 2001 book, *Republic.com*, Cass Sunstein writes and speculates about a “time in the future” when “[g]eneral interest newspapers and magazines are largely a thing of the past.”⁷² It is a world in which people heavily rely on the Internet to obtain what Sunstein calls “personalized news,”⁷³ and in which individuals gain “control over content” and obtain “a great deal of power to filter out unwanted materials.”⁷⁴ The flipside of this control allowed by the Internet is a “decrease in the power of *general interest intermediaries*,” including, importantly, newspapers.⁷⁵

At the heart of Sunstein’s thesis appears to be the belief that American society and democracy will not necessarily be better off in a world where people design “a communications universe of their own choosing”⁷⁶ and that, instead, there are substantial benefits to be gained from reading traditional print newspapers. According to Sunstein:

[P]eople should be exposed to materials that they would not have chosen in advance. Unplanned, unanticipated encounters are central to democracy itself. Such encounters often involve topics and points of

68. *Id.*

69. Jamie Kennedy, Comment, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 789 (2005) (emphasis added).

70. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 858 (2001).

71. *Id.* at 864.

72. SUNSTEIN, *supra* note 42, at 3.

73. *Id.* at 7.

74. *Id.* at 11.

75. *Id.*

76. *Id.* at 55.

view that people have not sought out and perhaps find quite irritating. They are important partly to ensure against fragmentation and extremism, which are predictable outcomes of any situation in which like-minded people speak only with themselves. . . . [I]n a democracy deserving the name, people often come across views and topics that they have not specifically selected.⁷⁷

For Sunstein, print newspapers provide prime vehicles for facilitating these essential but unplanned exposures. Contending that “general interest intermediaries expose people to a range of topics and views at the same time that they provide shared experiences for a heterogeneous public,”⁷⁸ Sunstein provides the following example:

You might, for example, read the city newspaper and in the process find a range of stories that you would not have selected if you had the power to do so. Your eyes might come across a story about ethnic tensions in Germany, or crime in Los Angeles, or innovative business practices in Tokyo, and you might read those stories although you would hardly have placed them in your “Daily Me.”⁷⁹

Although Sunstein makes it clear that he does “not suggest that the government should force people to see things they wish to avoid,”⁸⁰ it seems that his theory would support at least making available to people the opportunities that print newspaper provides. Print newspapers, for Sunstein, provide the “unacknowledged public forums”⁸¹ for a deliberative democracy; as so-called general interest intermediaries, print newspapers, “even without legal compulsion, serve many of the functions of public forums. They promote shared experiences; they expose people to information and views that would not have been selected in advance.”⁸² Sunstein has faith that when you read a city newspaper and “come across a number of articles that you would not have selected in advance[,] . . . you will read some of these articles.”⁸³

Although Sunstein’s theory, and the premises upon which his theory is based, have been criticized by some lawyers and legal scholars,⁸⁴ his work lends support

77. *Id.* at 9.

78. *Id.* at 36.

79. *Id.* at 12.

80. *Id.* at 9.

81. *Id.* at 34.

82. *Id.* at 37.

83. *Id.* at 34.

84. See Anupam Chander, *Whose Republic?*, 69 U. CHI. L. REV. 1479, 1485 (2002) (contending that Sunstein’s work neglects the fact that “the general interest intermediaries provide shared experiences that focus almost exclusively on the concerns and experiences of the dominant group” and that minority groups “would find little that would affirm their interests, their concerns, or their way of life” if they relied on traditional mass media); Mark S. Nadel, *Customized News Services and Extremist Enclaves in Republic.com*, 54 STAN. L. REV.

to the notion that there is something particularly important about *print* newspapers that merits government support. As a leading constitutional scholar, Sunstein's contention merits serious consideration, especially when debating the concept of a one-time government-funded bailout of print newspaper companies.

Finally, it is important to note that Sunstein's views resonate with theories from the field of communication studies. In particular, cultural communication scholars will note that Sunstein's beliefs and opinions about how newspapers "promote shared experiences"⁸⁵ reflect the late James Carey's ritual view of communication as "draw[ing] persons together in fellowship and commonality."⁸⁶ This ritualistic view suggests, according to Carey, that communication helps sustain "the maintenance of society in time,"⁸⁷ something Sunstein seems to prize when he privileges the role of print newspapers as general interest intermediaries. As Sunstein writes:

[A] heterogeneous society benefits from shared experiences, many of them produced by the media. . . . A special virtue of unsought exposures to information is that even if *individuals frequently do not gain much from that information, they will tell other people about it, and it is here that the information will prove beneficial*. If the role of public forums and general interest intermediaries is diminished . . . those benefits will be diminished as well, with harmful results for republican ideals.⁸⁸

The italicized portion of that quotation is noteworthy because it resonates, to some extent, with Carey's belief that under a ritual model of communication, "news is not information"⁸⁹ so much as it is "drama" and an "arena" that "invites our participation on the basis of our assuming, often vicariously, social roles within it."⁹⁰

With Sunstein's views in mind about the importance of print newspapers in a democratic society, this Article turns to the metaphor of the marketplace of ideas. It explores the dangers of further consolidation of the print-newspaper marketplace that militate in favor of a government bailout of that particular news medium.

831, 834 (1982) (noting that "Sunstein fails to prominently acknowledge that individuals most commonly use filtering as a time management tool to help them consume information more effectively, not as a screen against serendipity or challenging viewpoints" and that he "neglects to observe that open-minded citizens are likely to design customized filters to provide precisely the kinds of information that he fears that filters will exclude: common experiences and diverse views on important public issues" (emphasis omitted)); Thomas S. Ulen, *Democracy on the Line: A Review of Republic.com* by Cass Sunstein, 2001 U. Ill. J.L. TECH. & POL'Y 317, 331 (2001) ("I am not convinced that Professor Sunstein is correct in identifying filtering and group polarization and the consequent decline of shared social experiences as a serious problem stemming from use of the Internet.").

85. SUNSTEIN, *supra* note 42, at 37.

86. JAMES W. CAREY, COMMUNICATION AS CULTURE: ESSAYS ON MEDIA AND SOCIETY 18 (1988).

87. *Id.*

88. SUNSTEIN, *supra* note 42, at 103 (emphasis added).

89. CAREY, *supra* note 86, at 21.

90. *Id.*

B. Consolidation of the Print Marketplace of Ideas and Revisiting the High Court's Opinion in *Tornillo*

First Amendment scholar Owen Fiss wrote more than two decades ago that, in the United States, “we tend to identify the Free Speech Tradition with the protection of ‘the marketplace of ideas.’”⁹¹ In this ideal view, competition among ideas produces the truth or, at least, the best conception of the truth at any one time.⁹²

The United States Supreme Court specifically invoked and employed the marketplace of ideas theory thirty-five years ago in *Miami Herald Publishing Co. v. Tornillo*⁹³ when discussing ownership problems in the world of print newspapers. According to the Court:

[T]he same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. It is urged that the claim of newspapers to be “surrogates for the public” carries with it a concomitant fiduciary obligation to account for that stewardship. . . . The First Amendment interest of the public in being informed is said to be in peril because the “marketplace of ideas” is today a monopoly controlled by the owners of the market.⁹⁴

The problems associated with a shrinking number of voices in the print-newspaper marketplace of ideas are even worse in 2009 than they were in 1974 when *Tornillo* was decided. The current economic crisis threatens to put more papers out of business and force the reductions in both staffing and print editions in many of those newspapers that do, in fact, continue to survive.⁹⁵ Significantly, as Jon Fine wrote in *Business Week*, there likely will now be a “fresh round of mergers,”⁹⁶ driven “by big bankers seeking to ensure the money they’ve lent, or at least a decent portion of it, is repaid,” thus further reducing the distinct number of print-newspaper voices in the marketplace of ideas.⁹⁷ Indeed, a September 2008 article in the *San Diego Union-Tribune* noted that current newspaper

91. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1413 (1986).

92. As Justice Oliver Wendell Holmes famously put it ninety years ago:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

93. 418 U.S. 241 (1974).

94. *Id.* at 251.

95. See *supra* Part I (describing a multitude of problems facing the print newspaper industry today).

96. Fine, *supra* note 13, at 77.

97. *Id.*

owners hoping to sell their properties are being forced to look “at less traditional buyers”⁹⁸ that are decidedly non-journalism centric, such as investment firms Onex and Avista Capital Partners.⁹⁹

All of this compounds the problem that modern-day critical communication scholars have long anticipated and railed against—that “[u]nder capitalism, the media are structured so that their primary goal is profit”¹⁰⁰ and that “advertisers exert direct and indirect influence over news media content.”¹⁰¹ With profits dwindling as advertisers reduce spending on ads in print newspapers, one is left to speculate about possible deals that might be cut between the news and advertising divisions of surviving newspapers controlled by investment firms and non-media-centric conglomerates for the purpose of keeping print newspapers financially viable. This is particularly dangerous because “[j]ournalism is becoming a smaller and smaller piece of behemoth corporations, many not beholden to the traditions of truth telling and transparency that have been the espoused values of these enterprises in the past.”¹⁰²

In his 2000 book *Drive-By Journalism*,¹⁰³ veteran journalist and media critic Arthur Rowse suggests the danger that mergers can have on journalism, especially when non-journalistic entities (the big bankers, as Fine puts it) are part of that process. Rowse writes that “[e]very merger of a business conglomerate and a news operation increases tensions for journalists: pressures for greater corporate efficiency through budget cuts, the need to attract new audiences and keep older ones from leaving plus the urge to downsize serious news and replace it with trivia and scandal.”¹⁰⁴ Along the same lines, Professor Michael Schudson of the University of California, San Diego, recently observed that critics have argued that consolidation during the 1980s and 1990s “fostered a numbing sameness in news selection and presentation, reduced the number of distinct editorial voices, and multiplied the opportunities for conflicts of interest.”¹⁰⁵

It is important to understand that the economic problems and corporate pressures of 2008 and 2009 facing the print newspaper industry only exacerbate and build on problems that have existed for quite some time.

98. Thomas Kupper, *Loading up on Debt to Buy Papers Can Backfire*, SAN DIEGO UNION-TRIB., Sept. 21, 2008, at C5.

99. *Id.*

100. RONALD V. BETTIG & JEANNE LYNN HALL, *BIG MEDIA, BIG MONEY: CULTURAL TEXT AND POLITICAL ECONOMICS* 2 (2003).

101. *Id.* at 95.

102. John Carey & Nancy Hicks Maynard, *The Future of News, The Future of Journalism*, in *THE PRESS*, *supra* note 57, at 415, 418.

103. ARTHUR E. ROWSE, *DRIVE-BY JOURNALISM: THE ASSAULT ON YOUR NEED TO KNOW* (2000).

104. *Id.* at 20.

105. Michael Schudson & Susan E. Tift, *American Journalism in Historical Perspective*, in *THE PRESS*, *supra* note 57, at 17, 38.

Consider the words of Gene Roberts, former executive editor of the *Philadelphia Inquirer* and managing editor of *The New York Times*, written in 1997:

It is difficult to survey the American newspaper landscape these days and not become truly alarmed. Many, perhaps most, have squeezed and re-squeezed their newsroom budgets to the point that they no longer cover their communities well. This is a serious failure because historically newspapers have been part of the glue that holds America's counties, towns and cities and states together by keeping the citizenry informed.¹⁰⁶

If Roberts was "truly alarmed" twelve years ago, imagine what he might say today, given the further economic woes and the threat to the shrinking number of voices in the print-newspaper marketplace of ideas. It is important, then, to return to the Supreme Court's opinion in *Tornillo* that made reference that marketplace, since there would surely be legal challenges to a bailout to prop up the print-newspaper marketplace.

The high court in *Tornillo* squarely rejected and found unconstitutional a Florida right-of-reply statute that was designed to provide access to the print-newspaper medium for any candidate for public office who was "assailed regarding his personal character or official record."¹⁰⁷ The Florida law at stake in *Tornillo* is radically different, however, from the proposal at the heart of this Article¹⁰⁸ in several crucial ways:

- The Florida law compelled newspapers to print certain content,¹⁰⁹ but the bailout proposal does not compel the publication of any specific content, viewpoint, or type of news.
- The Florida law was a content-based¹¹⁰ (in fact, arguably viewpoint-based¹¹¹) law affecting speech, while the bailout proposal would be administered in a content-neutral fashion with money divided based solely in relation to a newspaper or newspaper company's print circulation.

106. Gene Roberts, *Conglomerates and Newspapers*, in CONGLOMERATES AND THE MEDIA 61, 61 (Erik Barnouw et al. eds., 1997).

107. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244 (1974).

108. See *supra* Part I.A (setting forth the terms of the bailout proposal under consideration in this Article).

109. See *Tornillo*, 418 U.S. at 256 ("Compelling editors or publishers to publish that which 'reason' tells them should not be published is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter.").

110. *Id.* ("The Florida statute exacts a penalty on the basis of the content of a newspaper.").

111. The statute in question was triggered only when *negative* content about a candidate for public office was printed by a newspaper; the compelled-space requirement was not triggered when newspaper *lauded* a candidate for public office. See *id.* at 244 (providing that the law is triggered only "if a candidate for nomination or election is *assailed* regarding his personal character or official record by any newspaper" (emphasis added)).

- The Florida law was mandatory—newspapers that attacked candidates for public office could not avoid it—but the bailout proposed in this Article is voluntary, as no newspaper company is under any obligation to accept funds.

The Supreme Court in *Tornillo* was highly concerned about Florida's law intruding on the realm and prerogative of newspaper editors, writing:

The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.¹¹²

Under the bailout proposal, however, the government would not interfere with the exercise of editorial control or judgment of either reporters or editors. The bailout's function, in fact, would be to provide an influx of money to allow reporters and editors to continue doing their jobs. The money would flow in regardless of what the editors had printed in the past and regardless of the content they would print in the future. Newspapers that elect to take the funds would only be obligated to use the funds to keep printing and distributing newspapers and to hire the journalists who work on them.

The implication of this is that the Supreme Court's resounding rejection in *Tornillo* of one form of government intervention in the print-newspaper marketplace of ideas does not preclude a decidedly different form of intervention in the mode of a content-neutral financial bailout. In brief, monetary marketplace intervention represents a dissimilar approach and an effort to give audiences continued access to print newspapers that might otherwise diminish in publication or cease to exist altogether. It potentially would help reduce consolidation in the print-newspaper industry, thus allowing more voices to survive in this distinctive marketplace of ideas.

C. Precedent for Intervention to Sustain Newspapers and a Mechanism for Government Subsidization of Media Content

The United States Congress has intervened before in the print-newspaper marketplace of ideas, namely with the NPA.¹¹³ The NPA allowed for, in the face of antitrust laws, joint operating agreements between the business and advertising sides of newspapers in the same city or metropolitan area. The NPA "gives

112. *Id.* at 258.

113. 15 U.S.C. §§ 1801-05 (2006).

newspapers immunity from antitrust prosecutions when an ‘economically distressed’ newspaper shares a physical plant with but has separate editorial functions from another newspaper.”¹¹⁴

Unfortunately, as Jason Martin recently argued in an extensive review of the NPA, the measure “has failed,”¹¹⁵ for a number of reasons, to live up to “its original stated aim” of preserving “editorial diversity.”¹¹⁶ Despite its failings, the NPA remains very significant for a much larger and grander reason: as Martin writes, “the legislation’s passage created *an official government position of support for a multiplicity of newspaper editorial voices* outside the usual boundaries of business regulation.”¹¹⁷ What’s more, although the NPA failed to prop up competition in the print-newspaper marketplace of ideas, Martin identifies and describes a number of studies that suggest benefits to the public from having competitive newspapers.¹¹⁸

In other words, although the NPA may have failed, as Martin and others¹¹⁹ suggest, to support competition in the print-newspaper marketplace of ideas, Congress has not repudiated the underlying goal of sustaining a richer and more diverse newspaper marketplace. Furthermore, the United States Department of Justice, as recently as 2006, openly acknowledged that mergers between newspapers in the same markets threaten the quality of news coverage and the service provided to readers.¹²⁰ In its 2006 Competitive Impact Statement—which alleged antitrust violations in the Minneapolis/St. Paul newspaper marketplace resulting from the then-proposed merger of the McClatchy Company and Knight-Ridder, Inc. and, by extension, the *Star Tribune* and the *St. Paul Pioneer Press* newspapers—the Justice Department asserted that:

[T]he combination of these two daily newspapers would substantially reduce or eliminate competition for readers of local daily newspapers and newspaper readers in the Minneapolis/St. Paul metropolitan area would be likely to pay higher prices and to receive lower levels of quality and service. In addition, the combination of these two daily newspapers would substantially reduce or eliminate competition for advertising in local daily newspapers in the Minneapolis/St. Paul metropolitan area.¹²¹

114. See Cook, *supra* note 60, at 257.

115. Jason A. Martin, *Reversing the Erosion of Editorial Diversity: How the Newspaper Preservation Act Has Failed and What Can Be Done*, 13 COMM. L. & POL’Y 63, 65 (2008).

116. *Id.*

117. *Id.* at 66 (emphasis added).

118. See *id.* at 69-70.

119. See, e.g., Richard Brand, *All the News That’s Fit to Split: Newspaper Mergers, Antitrust Laws and the First Amendment*, 26 CARDOZO ARTS & ENT. L.J. 1, 7 (2008) (“[I]t appears that the Newspaper Preservation Act may be not be enough to save newspapers from the grim economic realities they face.”).

120. See *id.* at 21-23 (describing the Justice Department’s “effort to prohibit a merger between the parent corporations of the *Star Tribune* and *Pioneer Press*”).

121. Competitive Impact Statement, *United States v. McClatchy Co.*, Case No. 1:06CV01175 (D. D.C.

This Article's bailout proposal (as described in the Introduction) includes a provision that any newspaper company that accepts bailout money may not merge with another company or close down its current daily papers for at least five years. This taps directly into the government's recognition, via the Justice Department, that readers are harmed when consolidation and mergers occur.

Beyond the NPA, the government has authorized subsidies to help promote content in other mediums—television and radio. As Professor Robert K. Avery noted in a 2007 article, the federal government provided funding for public broadcasting in recent years “at a level of \$400 million.”¹²² The CPB is charged by federal statute, under revisions to the Public Broadcasting Act of 1967, with ensuring that those funds are used with a “strict adherence to objectivity and balance in all programs or series of programs of a controversial nature.”¹²³

There are, of course, constant battles over whether these government funds are used to promote biased content.¹²⁴ In addition, the funding structure created by the Public Broadcasting Act of 1967 has been described recently by one scholar as “the weak link in our public broadcasting system”¹²⁵ because “instead of long-term, stable, independent funding for public broadcasting, we have short-term, tenuous, highly politicized funding.”¹²⁶

A one-time print-newspaper bailout avoids both of these problems. First, the government would have no control whatsoever in terms of the content for which the funds are used, other than that the money must be employed for publishing and distributing daily editions of print newspapers and that twenty-five percent of the funds received must be allocated to cover salaries of reporters, editors, and other editorial staff members. In other words, liberal-leaning and conservative-leaning papers could use the money however they see fit, free from government control. Second, the funding process itself would not be politicized, as it would be a one-time distribution given to all newspapers, allocated only in proportion relative to circulation. The twenty-five percent sum for personnel is employed here as a measure to ensure that newspapers that receive bailouts do not continue to cut staff to save money. Even this condition on receipt of funds is unlikely to interfere with news or editorial content because it leaves companies free to hire (or to continue to employ) the reporters and editors they choose, regardless of their political leanings or supposed biases.

June 27, 2006), available at <http://www.usdoj.gov/atr/cases/f216800/216878.htm> (last visited Feb. 4, 2009).

122. Robert K. Avery, *The Public Broadcasting Act of 1967: Looking Ahead by Looking Back*, 24 CRITICAL STUD. IN MEDIA COMM. 358, 362 (2007).

123. 47 U.S.C. § 396 (2006).

124. See generally Tom Sullivan, *Screening for Bias*, NEWS MEDIA & L., Summer 2005, at 36 (describing battles and charges of bias and “questions about whether CPB is wielding funding power to interfere with the Public Broadcasting Service’s public affairs programming”).

125. William Hoynes, *Public Broadcasting for the 21st Century: Notes on an Agenda for Reform*, 24 CRITICAL STUD. MEDIA COMM. 370, 371 (2007).

126. *Id.*

The bottom line is that the government already has engaged in marketplace intervention to prop up print newspapers, starting with the Postal Act of 1792. The NPA may have failed in this endeavor, but that does not mean that a bailout allocating money that must be spent on printing, distributing, and staffing of daily print newspapers will not help sustain what voices are left in the print-newspaper marketplace of ideas.

In addition, the government has engaged in subsidization of media content via the CPB; mechanisms that, however flawed they may be, have been and continued to be used to dole out government largesse in the broadcast realm. The bailout proposed here avoids the political landmines of the CPB by allocating money without making qualitative demands about the content or viewpoints that newspapers produce.

III. BRIBING THE WATCHDOG TO BE A LAPDOG? DANGERS TO A FREE PRESS FROM GOVERNMENT FUNDING

In his 1999 book *Uncertain Guardians*, Professor Bartholomew Sparrow asserts that “[t]he investigation of the Watergate break-in and cover-up in 1972 and 1973 firmly established in Americans’ minds the perception that the news media are public guardians, able to protect the national interest against government corruption.”¹²⁷ This comports with the late Supreme Court Justice Potter Stewart’s assertion that the First Amendment protects the press so that it can play the role of a Fourth Estate¹²⁸ and reflects what Vincent Blasi called the checking value in First Amendment theory.¹²⁹ More bluntly put, “[a] fundamental tenet of our First Amendment tradition is that the press does not simply report what public officials say, but acts instead as a ‘watchdog’ over the government.”¹³⁰

To best serve this role, and according to the meaning of the terms of the First Amendment itself, there is a fundamental premise of “a press independent of government.”¹³¹ This is perhaps the most troubling concern with any government infusion of monetary relief to the press—the press is no longer independent of the government and, in turn, becomes beholden to the government.¹³² In colloquial terms, the worry is that the press simply will not bite—or at least bark,

127. BARTHOLOMEW H. SPARROW, *UNCERTAIN GUARDIANS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 1-2 (1999).

128. Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 633-34 (1975) (reprinted in 50 HASTINGS L.J. 705 (1999)).

129. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977).

130. Jonathan Mermin, *Free But Not Independent: The Real First Amendment Issue for the Press*, 39 U.S.F. L. REV. 929, 929 (2005).

131. *Id.* at 931.

132. See Harper, *supra* note 29.

as a watchdog, at—the government hand that feeds it. Government money might have a chilling effect on potentially negative coverage of the government or hard-hitting investigations of government officials, with the press perhaps hoping for another handout down the road if it behaves well and engages in such self-censorship. A governmental gift of money might therefore affect the editorial judgment of the press in a way that actually harms society.

These concerns about jeopardizing editorial sovereignty are reflected in First Amendment scholarship. For instance, Professor Randall P. Bezanson argued a decade ago, in an excellent analysis of the meaning of the term “press” in the text of the First Amendment,¹³³ that autonomy and independence of editorial judgment are central to the understanding of a truly free press. Bezanson concluded his analysis with the following observation:

[W]hat marks the press off as distinct is the process of judgment that accompanies expression, or publication, and the cant of that judgment, its orientation to a public and to needed information and to fact and to fierce independence. If I am right in this, then I think I am warranted also in concluding that purpose is the key to freedom of the press, that *editorial judgment is the prism through which the purpose inquiry should be focused*, and that as imperfect as the currently developing law of editorial judgment is, that law is both inevitable and, in its focus on purpose, fundamentally correct.¹³⁴

A related concern regarding a press bailout might be that such funding could lead down a slippery slope of further government intervention into the affairs of print journalism. The fear might be that a one-time, content-neutral infusion of cash could lead to a “dangling” of more cash in return for a particular type of content or coverage.

In summary, then, two seemingly prominent arguments against a government bailout of print newspapers are:

- The bailout jeopardizes the independence—and thus, editorial autonomy—of the press that is vital for the press to play its watchdog role over the government; and
- The bailout represents a financial “entrée” into the realm of newspapers that could lead down a slippery slope to state-controlled media.

Both of these fears, of course, are speculative and represent mere metaphorical marchers in a possible parade of horrors. Slippery slope arguments, as First Amendment scholar Frederick Schauer illustrated, are

133. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 755 (1999).

134. *Id.* at 857 (emphasis added).

incredibly common in First Amendment jurisprudence;¹³⁵ almost to the point where their excessive use renders them somewhat impotent.¹³⁶ To mix clichés, then, slippery slope arguments are a dime a dozen and should be taken with a grain of salt (or perhaps more than a few grains to melt the slipperiness). Let us have empirical evidence or some form of tangible proof before we shred a proposal that could possibly help sustain the print newspaper industry and its role in a democratic society.

Would the watchdog role of the press really be harmed by a one-time infusion of government cash, divvied up on a content-neutral basis and not tied to performance or viewpoint? It is impossible to know for sure. What we do know, however, is that the sad reality of the current economic situation already does not allow journalists from print newspapers to properly play their watchdog role; the bark of the watchdog on Washington, D.C. is growing weaker and weaker. As Joe Strupp recently wrote in *Editor & Publisher* magazine, “the pool of newspaper reporters covering the federal government is shrinking dramatically.”¹³⁷ He added that “[a]lthough several newspapers, including *The New York Times* and *The Washington Post*, are slightly bolstering their White House staffs, the number of journalists in town to keep watch on Congress, federal agencies, and government malfeasance is plunging.”¹³⁸ Strupp quoted John Walcott, chief of the McClatchy Company’s Washington bureau, for the obvious yet important observation that “[i]t is tragic that the number of newspaper reporters who are here in Washington to keep tabs on the federal government is decreasing at a time when the country is still enmeshed in two wars, and facing a financial and environmental crisis.”¹³⁹

A *New York Times* article from December 2008 also recognized the diminishing presence of the watchdog-press in the nation’s capital, reporting that “[t]he times may be news-rich, but newspapers are cash-poor, facing their direst financial straits since the Depression. Racing to cut costs as they lose revenue, most have decided that their future lies in local news, not national or international events. That has put a bull’s-eye on expensive Washington bureaus.”¹⁴⁰

135. As Professor Frederick Schauer wrote more than two decades ago:

Although the first amendment has no monopoly on slippery slope arguments, these arguments appear commonly in discussions about freedom of speech. The warning is frequently heard that permitting one restriction on communication, a restriction not by itself troubling and perhaps even desirable, will increase the likelihood that other, increasingly invidious restrictions will follow.

Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363 (1985).

136. *Id.* at 382 (“Many slippery slope claims, whether in law or in popular discourse, are wildly exaggerated.”).

137. Joe Strupp, *Losing Capital*, EDITOR & PUBLISHER, Jan. 1, 2009.

138. *Id.*

139. *Id.*

140. Richard Perez-Pena, *Big News in Washington, but Far Fewer Cover It*, N.Y. TIMES, Dec. 18, 2008, at A1.

What's the danger in all of this? As *The New York Times* story noted:

The much greater loss, the journalists say, is the decline of Washington reporting on local matters—the foibles of a hometown congressman or a public works project in the paper's backyard. One after another, they cited the example of the San Diego paper's Washington bureau for exposing the corruption of Representative Randall Cunningham, who is known as Duke.¹⁴¹

A government infusion of cash to print newspapers might actually help print newspapers play a watchdog role. Recall, in particular, that newspaper companies that accept the money must devote twenty-five percent to covering salaries and costs related to the employment staff members, including reporters and editors. It is also important to understand that this Article's proposed bailout does not require the newspapers that accept government funds to publish any specific content. They simply must keep publishing daily print newspapers. Implementing a content-neutral system of distributing the money—one based solely on circulation figures—helps to safeguard editorial autonomy.

There is, finally, one more potential harm that the press may incur as a result of accepting a government bailout: the perception of harm, in the public's eyes, to its credibility as a purveyor of the truth. One problem with this argument, however, is that the credibility given today to print newspapers by members of the public is already low. In August 2008, a survey released by the Pew Research Center for the People & the Press found that only twenty-five percent of respondents "believe all or most of what" is printed in the *Wall Street Journal*, while the figures are even lower for *The New York Times* (eighteen percent) and *USA Today* (sixteen percent).¹⁴² What's more, only twenty-two percent "believe all or most" of what is printed in their own local newspaper.¹⁴³ We can only speculate, then, as to whether an infusion of cash would further harm press credibility.

None of this is to say that there are no other possible objections to a press bailout like the kind proposed here. But this Article has now placed that ball squarely in the court of would-be critics to articulate those problems in future articles.

141. *Id.*

142. Pew Research Center for the People & the Press, Key News Audiences Now Blend Online and Traditional Sources, Aug. 17, 2008, <http://people-press.org/report/?pageid=1358> (on file with the *McGeorge Law Review*).

143. *Id.*

IV. CONCLUSION

A government bailout of daily print newspapers is not likely to stop the massive decline in advertising revenue¹⁴⁴ or circulation as people increasingly turn to the Internet to get their news.¹⁴⁵ But that is not the purpose of the bailout discussed in this Article. Rather, it is to help sustain a particular medium of journalistic communication that can, when practiced well, serve the interests of a democratic society. It is a medium that, as constitutional law scholar Cass Sunstein argues, has unique qualities essential in a deliberative democracy.¹⁴⁶

Although there is debate as to the meaning of freedom of the press in First Amendment theory,¹⁴⁷ University of Pennsylvania Professor C. Edwin Baker asserts that “[a]greement on two abstractions—that democracy requires a free press and that the First Amendment protects a free press—is relatively easy.”¹⁴⁸ In that case, then, a one-time, content-neutral bailout of print newspapers, with no strings attached to editorial judgment or autonomy, can be seen simply as one effort to protect a free press from economic failure and, thus, to serve democracy.

We live in a time when journalists themselves consider the economic climate and constraints under which they work to be a huge problem. A poll released by the Project for Excellence in Journalism in 2008 found that “55 percent of the national press corps said business and financial woes were the most important problem in journalism today, up from 30 percent four years ago”¹⁴⁹ and that “82 percent said the scope of coverage has been cut too much.”¹⁵⁰

As this Article has made clear, the government has long provided subsidies to print newspapers via reduced postal rates.¹⁵¹ What’s more, it has tried, albeit unsuccessfully, to prop up a diverse marketplace of print newspapers with joint

144. See Russell Adams, *Gannett’s Net Dives; L.A. Times Cuts Jobs*, WALL ST. J., Jan. 31-Feb. 1, 2009, at B5 (“Gannett, which publishes 85 daily newspapers including USA Today, reported a 23% decline in advertising revenue in its publishing division. . . . Ad revenue at [USA Today] fell 19% in the fourth quarter after declining 8% during the first nine months of the year.”).

145. See generally David R. Baker, *Newspaper Circulation Shrinks More as Readers Turn to Internet*, S.F. CHRON., Oct. 28, 2008, at D2.

Circulation at the nation’s newspapers, including The San Francisco Chronicle, kept sliding this spring and summer, as readers turned to the Internet for news. . . . [O]nly USA Today and the Wall Street Journal saw daily circulation rise, and for each of them, the increase amounted to .01 percent. USA Today, the country’s largest newspaper, now has 2.29 million daily circulation, while the Journal has 2.01 million.

Id.

146. See *supra* Part II.A.

147. See Jon Paul Diltz, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL’Y 25, 31-32 (2002) (“The origins of the First Amendment and the Press Clause are well debated, and it is not reasonable to maintain that the Constitution’s framers had any precise understanding of the press.”).

148. C. Edwin Baker, *The Media that Citizens Need*, 147 U. PA. L. REV. 317 (1998).

149. Jennifer Harper, *Right Underrepresented in Press’s Diversity*, WASH. TIMES, Mar. 18, 2008, at A3.

150. *Id.*

151. See *supra* notes 60-61 and accompanying text.

operating agreements through the NPA.¹⁵² In the broadcast realm, it has provided funding, through the mechanism of a private, non-profit corporation, to be spent on generating what is supposed to be improved, quality content.¹⁵³

There is, in other words, precedent for government intervention in the print-newspaper marketplace of ideas and for government efforts to prop up quality content. The real problem, then, with a government bailout like the one proposed here lies in the details of its implementation. It must be carried out in a content-neutral manner, with no strings attached to the specific types of content or viewpoints that recipients may print. There must be no *quid pro quo* other than the following: the money must be spent on printing and distributing daily newspapers, a portion of it must go to cover personnel costs, and papers that accept the money must not merge for at least five years.

Some might say that print newspapers simply do not deserve a bailout because, not only have their owners often feasted on huge profits and returns for many years,¹⁵⁴ but they are a part of a capitalistic enterprise with a flawed and failed business model. But, as this Article has pointed out, they are a business that, when done right, plays a critical role in a democratic society.¹⁵⁵

In summary, this Article has attempted to take seriously a proposal by Jonathan Fine that started out as satire.¹⁵⁶ Legislators in Connecticut were actually considering such an idea, and Senator Benjamin L. Cardin put a new twist on it when he introduced a bill in March 2009 in the United States Senate that would allow newspapers to be treated as non-profit entities exempt from taxation.¹⁵⁷

This Article has riffed, as it were, off of Fine's initial joke and finessed and tweaked it into a much more plausible proposal that is designed in a content-neutral fashion. In a modest attempt to explain and defend the merits of a newspaper bailout, this Article as relied on a range of different sources, spanning from the work of Cass Sunstein,¹⁵⁸ to veteran journalists who have condemned consolidation and mergers in the newspaper industry,¹⁵⁹ to First Amendment theory about the marketplace of ideas¹⁶⁰ and the meaning of a free press.¹⁶¹ This

152. See *supra* Part II.C.

153. See *id.*

154. See MERRITT, *supra* note 66, at 16 ("Compared to most business ventures, operating margins in newspapers have been incredibly high. Family dynasties lasting a century or more were built on operating returns as high as 50 percent. Profits of 20 percent to 30 percent were virtually automatic . . .").

155. See *supra* Part II.

156. See Fine, *supra* note 24.

157. See Harper, *supra* note 29; see also S. 673 111th Cong. (2009) (setting forth the text of Cardin's bill); Cardin Proposes Tax-Exempt, BALT. SUN, Mar. 25, 2009, at A15 ("[Cardin's bill] would allow newspapers to choose tax-exempt status. They would no longer be able to make political endorsements, but could report on all issues, including political campaigns. Advertising and subscription revenue would be tax-exempt, and contributions to support coverage could be tax-deductible.").

158. See *supra* Part II.A.

159. See *supra* notes 103-05 and accompanying text.

160. See *supra* Part II.B.

161. See Bezanson, *supra* note 133, at 875.

Article has further acknowledged and attempted to address flaws and problems with any bailout, particularly as they may plague the watchdog role of the press.¹⁶² It is now up for others to methodically and rationally criticize both the proposal and the defense of it.

162. *See supra* Part III.