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Platforms and the Fall of the Fourth Estate:
Looking Beyond the First Amendment to Protect Watchdog Journalism

ERIN C. CARROLL*

INTRODUCTION

Even in a city of monuments, the Newseum is striking. Called a “cathedral” to the First Amendment and the free press, it sits along a stretch of Pennsylvania Avenue that connects the White House and the United States Capitol.¹ On its façade is a 50-ton Tennessee marble plaque carved with all forty-five words of the First Amendment.² Its 250,000 square feet contain some 6,214 journalistic artifacts, including paeans to the press’s watchdog role, like the hotel door from the Watergate break-in.³

Despite its grandeur, however, the Newseum has been teetering on insolvency.⁴ Its executive director hastily stepped down in 2017.⁵ Its benefactor, the Freedom Forum, recently sold the Pennsylvania Avenue building, which some had valued at nearly \$700 million, for about half that amount.⁶ The Newseum is in search of a new home.

Its struggle is no surprise. As the *Washington Post*’s media columnist, Margaret Sullivan, wrote, “It doesn’t require a PhD in comparative literature to see the Newseum’s troubles as a metaphor for the besieged state of the American press.”⁷

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¹ See Sopan Deb, *The Newseum is Increasingly Relevant, But Can It Survive?*, N.Y. TIMES (Oct. 22, 2017), <https://www.nytimes.com/2017/10/22/arts/design/the-newseum-is-increasingly-relevant-but-can-it-survive.html>; *About*, Newseum, <http://www.newseum.org/about/>.

² See Jack Shafer, *The Newseum Deserves to Die*, POLITICO MAGAZINE (Aug. 29, 2017), <https://www.politico.com/magazine/story/2017/08/29/newseum-journalism-artifacts-failure-215554>; Deb, *supra* note 1.

³ See Jack Shafer, *Down with the Newseum*, SLATE (Feb. 7, 2008), http://www.slate.com/articles/news_and_politics/press_box/2008/02/down_with_the_newseum.html.

⁴ See Roger Yu, *The Newseum CEO Steps Down As It Considers Selling, Closing*, USA TODAY (Aug. 30, 2017), <https://www.usatoday.com/story/money/2017/08/30/newseum-ceo-steps-down-considers-selling-closing/616609001/>.

⁵ Margaret Sullivan, *Newseum’s President Steps Down As Financial Review Begins*, WASH. POST (Aug. 28, 2017), https://www.washingtonpost.com/lifestyle/style/newseums-president-steps-down-as-financial-review-begins/2017/08/28/bc76218e-8c52-11e7-91d5-ab4e4bb76a3a_story.html?utm_term=.d4ac02649aa1.

⁶ See Nick Anderson and Peggy McGlone, *Johns Hopkins to Buy Newseum Building in D.C. as Journalism Museum Plans to Relocate*, WASH. POST (Jan. 26, 2019), https://www.washingtonpost.com/education/2019/01/25/johns-hopkins-buy-newseum-building-dc-journalism-museum-plans-relocate/?utm_term=.deed7ef5b857; Peggy McGlone and Miguel Roig-Franzia, *“A Slow-Motion Disaster”: Journalism Museum in Talks About Possible Building Sale*, WASH. POST (Feb. 7, 2018), https://www.washingtonpost.com/entertainment/museums/a-slow-motion-disaster-journalism-museum-in-talks-about-possible-building-sale/2018/02/07/1f816480-0c2f-11e8-95a5-c396801049ef_story.html?utm_term=.84f56d688d92.

⁷ Margaret Sullivan, *The Newseum Opened as the Journalism Industry Tanked. No Wonder It’s In Deep Trouble*, WASH. POST (Aug. 29, 2017), https://www.washingtonpost.com/lifestyle/style/the-newseum-opened-as-the-journalism-industry-tanked-no-wonder-its-in-deep-trouble/2017/08/29/4566f240-8cbf-11e7-84c0-02cc069f2c37_story.html?utm_term=.78071182991f.

The comparison runs deeper, however. The Newseum’s failure is not only a metaphor for the collapse of an institution, but is also emblematic of a strained relationship between constitutional law and the press. The limits of the First Amendment—understood by generations of journalists as an amulet—are becoming more apparent. Despite the press’s heralded role as a bulwark of our democracy, it is unclear if our living Constitution can stretch far and fast enough to protect it.⁸

The very nature of the press has changed. The First Amendment was shaped for and by a conception of the press that is no longer descriptively accurate: the Fourth Estate. The Fourth Estate metaphor captures the understanding of the press as being both an institution and independent. Implicit in the metaphor is also that the press will serve as a check on government power and potential abuse by shining a light on its actions.⁹ The framers sought to create and protect this structural role for the press. The text of the First Amendment itself reflects this aim. Its admonition that “Congress shall make no law . . . abridging the freedom of speech, or of the press,” explicitly protects press autonomy.¹⁰ By enshrining press freedom in the Constitution, the framers were protecting editorial discretion against what they viewed as its greatest threat: government tyranny. They helped to create conditions under which watchdog reporting—by which the press investigates and checks government corruption and malfeasance—could thrive. But the press itself has changed, and the threats to its freedom and its ability to check government have shifted as well.

As technology has transformed any number of industries, it has permanently upended the press. The press’s economic model has been decimated. Two companies, Google and Facebook, now take most of the advertising revenue that fueled the press in the twentieth century.¹¹ From 2001 to 2016, more than half of the news industry jobs in the United States disappeared,¹² and the term “news deserts” has been coined to describe the many communities without local journalism.¹³ The strength of newspapers—the longtime core of the Fourth Estate and the primary source of reporting on civic and governmental affairs—has withered.¹⁴ News

⁸ See William Blackstone, *Libels; Liberty of the Press*, reprinted in *THE FIRST AMENDMENT FREEDOM OF THE PRESS: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE* (Garrett Epps ed., 2008) (noting that the “liberty of the press is indeed essential to the nature of a free state”); Letter from Thomas Jefferson to Marquis de Lafayette (Nov. 4, 1823), <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-3843> (“[T]he only security of all is in a free press.”).

⁹ LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 233–34 (1991); BERNARD SCHWARTZ, *CONSTITUTIONAL ISSUES: FREEDOM OF THE PRESS* 131–33 (1992); LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* 273 (1985).

¹⁰ See U.S. CONST. amend. I.

¹¹ See Nitasha Tiku, *Publishers Could Get a New Weapon Against Google and Facebook*, WIRED (March 7, 2018), <https://www.wired.com/story/bill-would-let-publishers-gang-up-versus-facebook-and-google/>.

¹² See Sasha Lekach, *Not Fake News: News Jobs Are Disappearing*, MASHABLE (Apr. 4, 2017), <https://mashable.com/2017/04/04/newspaper-publishers-jobs-decline-bls/#a9KxxBTdXsqF>.

¹³ Yemile Bucay et al., *America’s Growing News Deserts*, COLUM. JOURNALISM REV. (Spring 2017), https://www.cjr.org/local_news/american-news-deserts-donuts-local.php.

¹⁴ See MATTHEW NISBET ET AL., *FUNDING THE NEWS: FOUNDATIONS AND NONPROFIT MEDIA* (June 18, 2018), <https://shorensteincenter.org/funding-the-news-foundations-and-nonprofit-media/> (“For decades, newspapers produced the journalism that did the most to inform public debate and to hold those in power accountable. Even as the media system rapidly evolved over the past 20 years, studies found that newspapers remained at the core of the country’s information ecology . . . During this period, however, most newspapers also suffered a catastrophic collapse in revenue, a greatly diminished workforce, and a corresponding loss in editorial capacity.”).

organizations have scaled back lobbying and are less likely to sue to protect their right to gather information, protect sources, and publish.¹⁵

The Fourth Estate has now been subsumed into a new entity: the Networked Press.¹⁶ The Networked Press is not an institution—an organization of individuals bound by common norms, goals, and purpose. Rather, it is a web of interconnected actors whose aims and values differ. It includes journalists who share a commitment to being a check on government, a check that enhances citizens’ ability to be self-governing. But it also includes technology platforms, software engineers, algorithms, news consumers, and others who do not share the press’s (or necessarily one another’s) values and commitments. All of these actors—human and non-human—now contribute to how news is made.¹⁷

Although they are interconnected, the actors in the Networked Press are not equally powerful, and the disparities significantly impact journalistic independence and editorial discretion. Whereas in the twentieth century, the Fourth Estate controlled the flow of information to the public, now, platforms like Facebook, Google, Apple, and Twitter are the information gatekeepers.¹⁸ They curate and prioritize a growing amount of the information, including news, that citizens consume.¹⁹ Their ever-shifting algorithms help determine if news goes viral or falls flat. These algorithms—formulas for deciding what information reaches users—are opaque.²⁰

¹⁵ See Ronnell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 559 (2011).

¹⁶ Scholars have used numerous labels to describe the current press ecology. The “Networked Press” is taken from the work of communications scholar Mike Ananny who describes its members as including “journalists, software engineers, algorithms, relational databases, social media platforms, and quantified audiences.” MIKE ANANNY, NETWORKED PRESS FREEDOM: CREATING INFRASTRUCTURES FOR A PUBLIC RIGHT TO HEAR 4 (2018). I prefer its focus on a web of actors to other labels, including the “Networked Fourth Estate,” the “Fifth Estate,” and the “Platform Press,” which focus either on the legacy press or technology platforms. See Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle Over the Soul of the Networked Fourth Estate*, 46 HARV. C.R.-C.L. L. REV. 311 (2011); Adam Cohen, *The Media that Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1 (2011); Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CTR. FOR DIGITAL JOURNALISM (2017), https://www.cjr.org/tow_center_reports/platform-press-how-silicon-valley-reengineered-journalism.php/.

¹⁷ See Pete Brown, et al., *Local Audiences Consuming News on Social Platforms Are Hungry For Transparency*, TOW CTR. FOR DIGITAL JOURNALISM (Oct. 24, 2017), https://www.cjr.org/tow_center_reports/focus-groups-news-media-diet.php (“More people discover news through algorithms than through (human) editors.”). Notably, Apple News seems to be having success using a hybrid approach of algorithms and some human editing. News publishers pitch Apple stories via a Slack channel, and Apple’s editorial staff of about a dozen employees in the United States then decides which stories to feature. See Pete Brown, *Study: Apple News’s Human Editors Prefer a Few Major Newsrooms*, COLUM. JOURNALISM REV. (June 5, 2018), https://www.cjr.org/tow_center/study-apple-news-human-editors-prefer-a-few-major-newsrooms.php.

¹⁸ Throughout this Article, I use “platforms” to refer to companies like Google, Apple, and Facebook. By platform, I mean “[l]arge technology companies that have developed and maintain digital platforms that enable interaction between at least two different kinds of actors who in the process come to host public information, organize access to it, create new formats for it, and control data about it and who thereby influence incentive structures around investment in public communication (including news production).” See Rasmus Kleis Nielsen, *The Power of Platforms*, <https://www.slideshare.net/RasmusKleisNielsen/the-power-of-platforms-inaugural-lecture-by-rasmus-kleis-nielsen-u-of-oxford>.

¹⁹ See Bell & Owen, *supra* note 16 (“Social media and search companies are not purely neutral platforms, but in fact edit, or ‘curate,’ the information they present.”).

²⁰ See generally FRANK PASQUALE, *THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION* (2015) (describing the black-box nature of algorithms).

Many have argued that they've become so complex that platform engineers themselves cannot fully understand how they work.²¹

Relatedly, consumers of news exert tremendous sway over what news is produced.²² More and more, automation and data are influencing or supplanting human news judgment. Large news organizations have teams of employees devoted to studying and reacting to “analytics” that show what news consumers are reading and watching, where, and for how long.²³ Individual journalists, too, are often reliant on data; this reliance can give them the sense of being a contestant in a never-ending popularity contest.²⁴

As the institution of the Fourth Estate crumbles, and platforms alter the exercise of editorial discretion, watchdog journalism is threatened. It is expensive and time-consuming to produce.²⁵ It is also not as widely read as more cheaply produced breaking news.²⁶ A Networked Press regime does not incentivize watchdog journalism. News under this new press model is increasingly dominated by what will garner engagement and social sharing—the palace intrigue and the hot take rather than the painstaking investigation of government malfeasance.

The First Amendment was crafted, in part, to shield the watchdog function from government interference, and it has. The press-as-Fourth Estate has fit relatively comfortably under the First Amendment's protective umbrella. Key Supreme Court cases have blocked the government from interfering with the press and allowed the press to exercise editorial discretion and publish government secrets. So far, indications are that courts will protect journalists from perhaps the most visible form of government interference: hostile treatment by the anti-press White House.²⁷

Yet, the protections the framers put in place are not sufficiently protecting watchdog journalism in the Networked Press era. Journalism remains legally shielded from government interference but not from the encroachment of the private sphere. As technology platform companies grow ever more powerful, it is becoming clearer what a significant threat private companies can be to the press's watchdog role. Various private interests—including advertisers

²¹ See, e.g., Adrienne LaFrance, *Not Even the People Who Write Algorithms Really Know How They Work*, THE ATLANTIC (Sept. 18, 2015), <https://www.theatlantic.com/technology/archive/2015/09/not-even-the-people-who-write-algorithms-really-know-how-they-work/406099/>.

²² See Whitney Phillips, *The Oxygen of Amplification: Better Practices for Reporting on Extremists, Antagonists, and Manipulators Online* DATA & SOCIETY 7 (May 2018), https://datasociety.net/wp-content/uploads/2018/05/FULLREPORT_Oxygen_of_Amplification_DS.pdf (“In the social media age, the measurability and commoditization of content, in the form of traffic, clicks, and likes, has tethered editorial strategy to analytics like never before.”).

²³ See *Nia Decaille Joins the Audience Team*, WASH. POST PR BLOG, WASH. POST (Oct. 2, 2017), https://www.washingtonpost.com/pr/wp/2017/10/02/nia-decaille-joins-the-audience-team/?utm_term=.d6576e8cb441 (describing an employee's job as “serv[ing] audiences who come to us via search engines” and “coaching writers on social and search best practices”).

²⁴ See FRANKLIN FOER, *WORLD WITHOUT MIND* 144-45 (2017).

²⁵ See James T. Hamilton, *Subsidizing the Watchdog: What Would It Cost to Support Investigative Journalism at a Large Metropolitan Daily Newspaper*, DUKE CONF. ON NONPROFIT MEDIA 3-4 (2009), www2.sanford.duke.edu/nonprofitmedia/documents/dwchamiltonfinal.pdf [hereinafter *Subsidizing the Watchdog*].

²⁶ See PABLO J. BOCZKOWSKI & EUGENIA MITCHELSTEIN, *THE NEWS GAP* 2 (2013) (noting the popularity of news about weather, sports, crime, and entertainment).

²⁷ See Paul Farhi, *Judge Hands CNN a Victory in its Bid to Restore Jim Acosta's White House Press Pass*, WASH. POST (Nov. 16, 2018), https://www.washingtonpost.com/lifestyle/style/judge-hands-cnn-victory-in-its-bid-to-restore-jim-acostas-white-house-press-pass/2018/11/16/8bedd08a-e920-11e8-a939-9469f1166f9d_story.html?utm_term=.2f4f5cd9daf9.

and audience—have always tethered the “free” press, but the tether of platforms on the press is especially suffocating because of their immense scale and power.

Platforms are not singlehandedly responsible for the technological changes that have decimated the press’s economic model and so, its ability to robustly fund watchdog reporting.²⁸ Many forces and entities have played a part, including the press itself. Platforms are doing little, however, to prevent the threat from continuing. They have repeatedly shunned the responsibilities to citizens and democracy long shouldered by investigative journalists.²⁹ Rather, they are embracing and reifying features of technology that harm the environment for watchdog reporting. Their tether on the press is restricting the press’s ability to perform its constitutionally prescribed function.

No shortage of legal scholarship exists on the relationship between the press and the First Amendment.³⁰ Likewise, how the First Amendment applies to new forms of speech online has proved fertile (and necessary) ground for legal scholars to till.³¹ Less scholarship, however, has focused on the intersection of the First Amendment, the press, and new technology.³² More examination is needed of how platforms, social media, and algorithms are impacting the press and the journalistic process. We need to think harder about when and how law should respond to these changes. This article is a contribution to that effort.

Part I examines the inextricability of the First Amendment and the Fourth Estate. It establishes that the vision the framers had of “the press” as conveyed by the First Amendment was likely multifaceted and difficult to categorize. Yet, evidence exists that it tracked the qualities inherent to the Fourth Estate metaphor. The framers viewed the press as having three qualities. First, it was an institution. Second, it was independent (meaning that it could freely exercise editorial discretion). Finally, it served as a structural check on the government. The Fourth Estate metaphor was cemented in a series of pro-press Supreme Court opinions in the mid-twentieth century. Not coincidentally, the press truly was a Fourth Estate at this time. In this way, the Court’s First Amendment jurisprudence and the Fourth Estate were mutually reinforcing.

Part II describes the rift developing between constitutional law and the modern-day practice of journalism. In the last twenty years, technology has radically transformed the media. It has undermined the economic model for newspapers and consequently weakened the

²⁸ Of course, platforms are not solely responsible for the loss of journalism jobs. In 2018, *The Denver Post* laid off a third of its newsroom even though it was turning a profit for its hedge-fund owner. See Alex Shephard, *The Local News Crisis Is Bigger Than Sinclair*, THE NEW REPUBLIC (April 3, 2018), <https://newrepublic.com/article/147735/local-news-crisis-bigger-sinclair>.

²⁹ See, e.g., Mike Isaac, *Facebook, in Cross Hairs After Election, Is Said to Question Its Influence*, N.Y. TIMES (Nov. 12, 2016), <http://www.nytimes.com/2016/11/14/technology/facebook-is-said-to-question-its-influence-in-election.html> (noting that Mark Zuckerberg called the possibility that Facebook had affected the 2016 presidential election a “pretty crazy idea”).

³⁰ See, e.g., Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L. J. 49 (2016); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429 (2002).

³¹ See, e.g., Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMENDMENT INSTITUTE (Sept. 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>; Anderson, *supra* note 30, at 434-35 (discussing the First Amendment’s role in the internet era).

³² A notable exception to this is the Knight First Amendment Institute’s *Emerging Threats* series of which Tim Wu’s article *Is the First Amendment Obsolete?*, *supra* note 31, is a part. See *Emerging Threats*, KNIGHT FIRST AMENDMENT INSTITUTE, <https://knightcolumbia.org/emergingthreats>. The series was published during the writing of this article.

institutional Fourth Estate. In the last decade, the circle of actors playing press roles has expanded. Platforms have seized the role of gatekeeper, but they have been reluctant to assume the responsibilities to citizens and democracy that the Fourth Estate has long shouldered. Journalists who aspire to the watchdog role traditionally protected by the First Amendment are increasingly tethered to platforms. Platform values, including speed and scale, influence the editorial discretion that is the animating feature of press freedom. Today, we have a Networked Press.

Part III begins by confronting the limits of the First Amendment. The state action doctrine prevents the First Amendment from truly protecting editorial discretion and watchdog journalism in a Networked Press environment. A disconnect exists between the press that we have and the press that our Constitution is capable of protecting. This disconnect should prompt us to examine whether our current legal framework fosters and protects the type of journalism that centuries of scholars, lawyers, and politicians have said is essential to democracy. We have long relied on the market to produce such journalism. Now, in an era of cheap information, the shortcomings of that approach are clear. This part considers the path forward. It provides a menu of extra-constitutional legal options aimed at fostering watchdog journalism in the age of the Networked Press. They include options that would both loosen the hold of platforms on journalists and empower journalists by making their investigative reporting easier.

By definition, the Fourth Estate is not loyal to the occupant of any government office, but it is devoted to upholding our form of government. Watchdog journalism is a check on corruption and protection against tyranny.³³ In contrast, the more diffuse Networked Press, with its web of human and non-human actors, has no collective loyalty. By allowing the Networked Press's most powerful actors, technology platforms, to impose their values on the press, we are at risk of outsourcing a key constitutional function to Silicon Valley.³⁴ The First Amendment alone is unlikely to resolve this problem. To protect the watchdog role in a Networked Press era, we should look beyond it.

I. THE FIRST AMENDMENT, THE PRESS, & THE FOURTH ESTATE

Cognitive linguists believe that a function of metaphor is to make the abstract more concrete.³⁵ Describing life as a “journey,” for example, gives some shape to an otherwise difficult-to-define concept.³⁶ The “Fourth Estate” does the same for the press. The words themselves conjure up a literal place—a formidable manor building with grounds, separated from three other similar estates. This image captures qualities that have been definitional for the American press; it is an independent institution that serves as an overseer of and check on the other estates.

The Fourth Estate metaphor has served admirably for centuries. Both when the First Amendment was ratified and when the Supreme Court interpreted the First Amendment in cases involving the press, the conception of a “free press” under American law has been one that aligns with the Fourth Estate metaphor and its inherent qualities. This section begins by describing how

³³ See BILL KOVACH & TOM ROSENSTIEL, *THE ELEMENTS OF JOURNALISM: WHAT NEWSPEOPLE SHOULD KNOW AND THE PUBLIC SHOULD EXPECT* 174 (3d ed. 2014).

³⁴ See Bell & Owen, *supra* note 16 (quoting David Skok, a digital media executive who worked for the *Boston Globe* and *Toronto Star* as saying, “We are outsourcing our core competency to third parties. We simply don’t have a choice”).

³⁵ See Zoltán Kövecses, *METAPHOR: A PRACTICAL INTRODUCTION* 4 (2002).

³⁶ See *id.*

the framers viewed the press as having the qualities of a Fourth Estate and consequently, how the metaphor was baked into the First Amendment. It then describes the way in which, when the Supreme Court turned in earnest to interpreting the First Amendment in the second half of the twentieth century, it fleshed out the Fourth Estate metaphor. The Court's effort was both descriptive and normative. It reflected a press that actually existed, a press that checked government. Likewise, the Court enshrined its vision of the Fourth Estate into constitutional law.

A. THE FRAMERS & THE FOURTH ESTATE

Somewhat ironically for a metaphor about the origins of journalism, the “when,” “where,” and “who” regarding the first use of the term “Fourth Estate” cannot be confirmed.³⁷ An often-told version of the story is this: It was 1787 in London, and British parliamentarian Edmund Burke was speaking of the rights of reporters to listen in on the business of government when he said: “there were Three Estates in Parliament; but, in the Reporters’ Gallery yonder, there sat a Fourth Estate more important far than they all.”³⁸ The three estates Burke referred to were the clergy, nobility, and the commoners.³⁹ When the metaphor gained currency here, the estates were Americanized and became the executive, legislative, and judicial branches of government.⁴⁰

If we believe this origin story, the timing of Burke’s speech—two years before the drafting of the First Amendment—makes it possible that the framers were familiar with the metaphor.⁴¹ But regardless of whether the framers knew or used the metaphor, evidence exists that they understood the press as having the qualities of a Fourth Estate.⁴² The press was an institution. That institution was independent, and it served as a check on government.

Asserting that the framers viewed the press as an institution is admittedly controversial. Scholars and Supreme Court justices have heatedly debated whether the Press Clause protects the press as an institution or merely as a technology.⁴³ In a 1974 speech, Justice Potter Stewart argued that the First Amendment’s Press Clause was a structural provision designed to protect an

³⁷ See Gregory Shaya, *The Myth of the Fourth Estate*, LAPHAM’S QUARTERLY (April 3, 2012), <https://www.laphamsquarterly.org/roundtable/myth-fourth-estate> (noting that the phrase is “mistakenly” attributed to Edmund Burke).

³⁸ See *id.*; Potter Stewart, “*Or of the Press*,” 26 HAST. L.J. 631, 634 (1975). But see JULIANNE SCHULTZ, REVIVING THE FOURTH ESTATE 49 (1998) (“The Oxford English Dictionary notes for instance that when Thomas Carlyle attributed the term to Edmund Burke, he observed that Burke had used it as a derogatory reference to the self-importance of parliamentary reporters in 1787.”).

³⁹ See Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1366 n. 18 (2016); Zygmunt J.B. Plater, *A Jeffersonian Challenge from Tennessee: The Notorious Case of the Endangered “Snail Darter” Versus TVA’s Tellico Dam-and Where Was the Fourth Estate, the Press?*, 80 TENN. L. REV. 501, 501 n.1 (2013).

⁴⁰ See Stewart, *supra* note 38, at 634.

⁴¹ See SCHWARTZ, *supra* note 9, at 132.

⁴² See Bernard Schwartz, *Death TV? Is There A Press Right of Access to News That Allows Television of Executions?*, 30 TULSA L.J. 305, 350 (1994) (arguing that “influenced by Burke or not, Americans did develop a concept of the press as a Fourth Estate institution by the time the Bill of Rights was ratified”) [hereinafter *Death TV?*]; LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* xii, 273 (1985) (noting that at about the time of the framing, a “free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable, and accountable”).

⁴³ See, e.g., West, *supra* note 30, at 49; Volokh, *supra* note 30, at 461-63; *Citizens United v. Federal Elections Commission*, 558 U.S. 310, 390 n.6, 431 n. 57 (2010).

institutional press.⁴⁴ He wrote that the framers' goal in including the Press Clause in the First Amendment was "to create a fourth institution outside the Government as an additional check on the three official branches."⁴⁵ He added, "The relevant metaphor, I think, is the metaphor of the Fourth Estate."⁴⁶ This view never commanded a majority of the Court, however. Instead, First Amendment doctrine is that the Press Clause does not confer special protections on the press.⁴⁷

Nearly four decades later, in *Citizens United v. Federal Election Commission*⁴⁸ this debate between press-as-technology versus press-as-institution resurfaced.⁴⁹ Justice Scalia wrote in a concurrence that it was "passing strange" to think of the press as an entity worthy of First Amendment protection.⁵⁰ In a separate opinion, Justice Stevens countered that the Press Clause suggests that the press "might be able to claim special First Amendment status."⁵¹ The case set off a new round of scholarly sparring over the Press Clause's meaning.⁵²

Emerging from the debate is a convincing argument that the framers saw the press as both technology and institution. First Amendment scholar Sonja R. West has argued that a consensus probably did not exist among the framers on the precise meaning of the press and that they likely understood the press to have "multiple 'original' meanings."⁵³ She has written that the press "was a technology that, in their experience, was inextricably linked with a group of specialists who were discharging a particular set of functions by informing the citizenry about matters of public concern and checking government abuses."⁵⁴ West examined the "lived experience" of the framing generation and demonstrated that in both "practice and in reputation, the printing press overlapped meaningfully with the growing concept of the 'press' as a community of newspapers and the men who made them."⁵⁵ Thus, evidence exists that the framers understood the press, at least in part, to be a group of specialized actors with a common goal and the Press Clause as a structural provision to protect the institution of the press.⁵⁶

To be fair, scholars and the Court do not utilize an agreed upon definition of institution. In fact, case law or scholarship on the Press Clause rarely examines the term closely. Eugene Volokh, in his work on the Press Clause, wrote "press as institution" could be substituted with press as "industry," "trade," or "occupation."⁵⁷ West used "community," "specialized craft" and an "institutionalized, professionalized endeavor."⁵⁸ Although varied, these labels are consistent with the broad conception of institution I adopt—an organization of individuals bound by

⁴⁴ See Stewart, *supra* note 38, at 634.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Schwartz, *Death TV?*, *supra* note 42, at 353 ("There is no doubt that the Supreme Court jurisprudence . . . has rejected the Fourth Estate concept of the press with additional institutional rights and has instead accepted the Warren notion of the press vested only with the same rights as members of the public.")

⁴⁸ 558 U.S. 310 (2010).

⁴⁹ *Id.* at 390 n. 6. (Scalia, J., concurring), 431 n. 57 (Stevens, J. concurring in part and dissenting in part).

⁵⁰ See *id.* at 390 n. 6.

⁵¹ *Id.* at 431 n. 57.

⁵² See, e.g., Volokh, *supra* note 30, at 461-63; West, *supra* note 30, at 49.

⁵³ West, *supra* note 30, at 55, 61.

⁵⁴ *Id.* at 105.

⁵⁵ *Id.* at 82. This view is shared by Randall P. Bezanson who wrote, "The press is an institutional speaker. This conception of the press was understood in a rough and structural way at the time the First Amendment was ratified, for the press was even then seen as playing a systematic role in democratic society." See Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 757 (1999).

⁵⁶ See West, *supra* note 30, at 89.

⁵⁷ See Volokh, *supra* note 30, at 461 n.2.

⁵⁸ See West, *supra* note 30, at 82, 95.

common norms, goals, and purpose.⁵⁹ Under this definition, the framers viewed the press as an institution.

As a key feature of its institutional nature, the framers also sought to ensure the press's independence. The text of the First Amendment announces the importance of press autonomy from government.⁶⁰ At the heart of this freedom is the press's ability to exercise editorial discretion.⁶¹ Printers were exercising this discretion at the time of the First Amendment's ratification. As First Amendment scholar Randall P. Bezanson wrote, printers in 18th and 19th century England were "selecting material to be published for [a] rapidly increasing audience" and in doing so were exercising "independence from government."⁶² When the technology of printing and mass production was brought to America during the same era, "the idea of 'news' and editorial judgment was refined and extended, but not fundamentally altered."⁶³

As an independent institution, the framers envisioned a key role of the press as being a check on government. About this, there is little question. "Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate," wrote First Amendment scholar Vincent Blasi.⁶⁴ The framers understood well the threat posed by government tyranny and the importance of having means to oppose it. The trial and acquittal of printer John Peter Zenger in 1735 for seditious libel was still in relatively recent memory.⁶⁵ More proximate to the framing era, in 1774 the Continental Congress had made clear the importance of the checking function. In outlining the fundamental rights colonists sought, it emphasized that by a free press "oppressive officers are shamed or intimidated into more honorable and just modes of conducting affairs."⁶⁶ And shortly after the First Amendment was ratified, its drafter, James Madison, argued that while press freedom in England may have been limited due to the belief that legislators there sufficiently checked the executive, in the United States the situation was different.⁶⁷ More freedom was required here, he argued, because officials were not "infallible" or "omnipotent."⁶⁸

Thus, even at the time of the framing, the components of a Fourth Estate were in place. A collective of printers exercising editorial discretion was serving as a check on the nation's fledgling government. The Fourth Estate was taking shape, and the First Amendment promised to protect it from government interference.

⁵⁹ My definition is drawn from First Amendment scholar Paul Horwitz who describes an institution as an organization of individuals "bound together by [a] common purpose." PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 11 (2012). This organization is one of shared "formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behavior, conventions, self-imposed codes of conduct), and their enforcement characteristics." *Id.* (citing Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994)).

⁶⁰ See U.S. CONST. amend. I. ("Congress shall make no law . . . abridging the freedom of speech, or of the press").

⁶¹ See Randall P. Bezanson, *The Atomization of the Newspaper: Technology, Economics and the Coming Transformation of Editorial Judgments About News*, 3 COMM. L. POL'Y 175, 176 (1998).

⁶² *Id.* at 183.

⁶³ *Id.*

⁶⁴ See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527 (1977); West, *supra* note 30, at 70.

⁶⁵ See Blasi, *supra* note 64, at 534-35.

⁶⁶ *Id.* at 535.

⁶⁷ *Id.* at 535-36.

⁶⁸ *Id.* at 536; James Madison, *Report on the Virginia Resolutions*, in 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 570 (Jonathan Elliot ed., 2d ed. 1937).

B. THE SUPREME COURT & THE FOURTH ESTATE

The Supreme Court cemented the conception of the press as a Fourth Estate in a series of decisions from the mid-twentieth century. Although in its first 130-or-so years, the First Amendment lay dormant, the Supreme Court began deciding First Amendment cases in earnest at the close of World War I.⁶⁹ And in the next four decades, the Court issued a series of opinions that constitute a chunk of any media law casebook.⁷⁰ In those opinions, the Court recognized and named the inherent qualities of a Fourth Estate. It viewed the press as an institution. It also confirmed that this institution was endowed with independence in the form of editorial discretion. Moreover, it indicated that a key press function is government watchdog.

“[T]he institutional press,” wrote Justice Brennan in *Richmond Newspapers, Inc. v. Virginia*,⁷¹ “serves as the ‘agent’ of interested citizens.”⁷² This 1980 concurrence capped off an era in which numerous opinions describe the press as an institution. For example, *First Nat. Bank of Boston v. Bellotti*⁷³ calls the press as an “institution” with a “constitutionally recognized role of . . . informing and educating the public, offering criticism, and providing a forum for discussion and debate.”⁷⁴ Likewise, in *Mills v. Alabama*, the Court refers to the press as “one of the very agencies” that the framers “thoughtfully and deliberately selected to improve our society and keep it free.”⁷⁵

In conceiving of the press as an institution, these decisions celebrated the press’s independence. They described the editorial discretion that the press exercised as almost sacrosanct. For example, in *Miami Herald Publishing v. Tornillo*,⁷⁶ a case striking down a state law giving a political candidate the right to reply to a negative newspaper editorial, the Court concluded that the government had no business interfering with the editorial process.⁷⁷ “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,” the Court wrote.⁷⁸ “It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with the First Amendment guarantees of a free press as they have evolved to this time.”⁷⁹ Similarly, in *Columbia Broadcast System, Inc. v. Democratic National Committee*,⁸⁰ the

⁶⁹ The Supreme Court said of its own First Amendment jurisprudence that “no important case involving free speech was decided” until the close of World War I. See *Dennis v. United States*, 341 U.S. 494, 503 (1951); Anderson, *supra* note 30, at 447-48 n. 94; Wu, *supra* note 31 (“The First Amendment was a dead letter for much of American history.”).

⁷⁰ See Anderson, *supra* note 30, at 448.

⁷¹ 448 U.S. 555 (1980).

⁷² *Id.* at 586, n. 2 (Brennan, J., concurring).

⁷³ 435 U.S. 765 (1978).

⁷⁴ *Id.* at 781.

⁷⁵ 384 U.S. at 214, 219 (266). In referring to the institutional press, the justices were not always doing so favorably. In his dissent in *New York Times Co. v. United States*, faulting the government for publishing secret documents, Justice Burger wrote: “To me it is hardly believable that a newspaper long regarded as a great institution in American life would fail to perform one of the basic and simple duties of every citizen with respect to the discovery or possession of stolen property or secret government documents.” *New York Times Co. v. United States*, 403 U.S. 713, 751 (1971) (Burger, J. dissenting).

⁷⁶ 418 U.S. 241 (1974).

⁷⁷ *Id.* at 258.

⁷⁸ *Id.*

⁷⁹ *Id.*

Court insisted on the right of journalists to exercise discretion in determining what qualified as news.⁸¹ The Court rejected the lower court's view that "every potential speaker is 'the best judge' of what the listening public ought to hear."⁸² It reasoned that "[a]ll journalistic tradition and experience is to the contrary."⁸³

Thus, even though doctrine is that the First Amendment confers no unique protections on the press as an institution and that members of the press have no greater protections than any other speaker, in truth, the Court's First Amendment jurisprudence is more complex.⁸⁴ It seems built on acceptance of, and even reliance on, the institutional nature of the press. Take *Tornillo* and the *Columbia Broadcasting System* cases. In both, the Court defers not to individual journalists but to "editorial control and judgment" and to "journalistic tradition."⁸⁵ In doing so the Court reveals its comfort in deferring to an entity that is, like the Court itself, bound by norms and rules.⁸⁶ The Court defers to an institution.

Finally, in addition to recognizing the institutional and independent nature of the press, the Court repeatedly discussed the press's roles and duties. Chief among these was serving as a watchdog. Take, for example, *New York Times Co. v. United States*, a case about one of the press's most legendary acts of checking the government—its publishing of the "Pentagon Papers," secret government documents about the country's involvement in the Vietnam War.⁸⁷ In its opinion, the Court wrote that by the First Amendment, "[t]he press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in the government."⁸⁸ The Court went so far as to say that a free press not only could be a watchdog but had an affirmative obligation to do so.⁸⁹ It wrote that "paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell."⁹⁰

Other cases from the same era likewise lionize the press's role as a "handmaiden of effective judicial administration" through "guard[ing] against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and

⁸⁰ 412 U.S. 94 (1973).

⁸¹ *See id.* at 124-25.

⁸² *Id.* at 124.

⁸³ *Id.*

⁸⁴ *See* *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) ("Freedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals.'")

⁸⁵ *See* 418 U.S. at 258; 412 U.S. at 124.

⁸⁶ And notably, even in one of the very cases in which the Court indicated the press cannot lay claim to any special protections, the Court's opinion effectively gave the press just that. In *Houchins v. KQED*, the Court wrote that the news media did not have any "special privilege of access to information." 438 U.S. 1, 10 (1978) (emphasis in original). Yet, in a concurring opinion, Justice Stewart wrote that although the Constitution does not do more than "assure the public and the press equal access" to information, that "equal access" included accounting for the "practical distinction between the press and the general public" and the press's mission to inform. *Id.* at 16-17. Thus, Stewart's opinion, which was effectively the controlling one in the 4-to-3 decision, agreed with a district court finding that the press was entitled to access to a jail "on a more flexible and frequent basis" than members of the public. *Id.* at 18.

⁸⁷ *See* 403 U.S. at 717.

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Id.*

criticism.”⁹¹ More broadly, the Court indicated that the press acted as “a powerful and constructive force, contributing to remedial action in the conduct of public business”⁹² and that “the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve.”⁹³

Thus, even though the Court has largely sidestepped the Press Clause and stated that the rights of journalists are no greater than other speakers, it has meanwhile repeatedly recognized and relied upon the institutional nature of the press. It has characterized the press as independent and cohesive and signaled that it is worthy of significant deference. It has lauded its watchdog role and even indicated the press’s responsibility to undertake it. In doing so, although the Supreme Court has not used the words “Fourth Estate,” it has breathed life into the metaphor.

C. THE FOURTH ESTATE IN ACTION

The timing of the Supreme Court’s opinions celebrating the press is no coincidence. The 1960s were the press’s period of “high modernism.”⁹⁴ In writing about an institutional press wielding its editorial discretion to serve as a watchdog over government, the Court was not merely being normative, but descriptive as well. It was depicting a press that in many ways already existed.⁹⁵

A far cry from the colonial-era newspapers that journalist and historian Jill Lepore called a “ragged fleet of dung barges,” by the World War II era, the press had actually developed into a robust institution.⁹⁶ It was exhibiting shared norms and goals that had been in development for several decades. For one, it had professional associations, awards, and training opportunities. The Society of Professional Journalists was founded in 1909,⁹⁷ and the American Society of Newspaper Editors (now the American Society of News Editors) followed thirteen years later.⁹⁸ Although Columbia University had in 1892 turned down an offer by Joseph Pulitzer to establish a school of journalism, by 1912, university leadership changed its mind.⁹⁹ That year, journalism classes began for seventy-nine undergraduate and graduate students.¹⁰⁰ In 1917, the University bestowed the first round of Pulitzer Prizes, which Joseph Pulitzer said in his will, were to elevate a “noble profession.”¹⁰¹

Along with graduate programs, professional organizations, and prizes, came increased attention to institutional standards and norms. News became less commentary and more

⁹¹ See *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559-60 (1976).

⁹² See *Houchins v. KQED, Inc.*, 438 U.S. 1, 8 (1978).

⁹³ See 384 U.S. at 219.

⁹⁴ MICHAEL SCHUDSON, *WHY DEMOCRACIES NEED AN UNLOVABLE PRESS* 35 (2008) [hereinafter SCHUDSON, *WHY DEMOCRACIES NEED AN UNLOVABLE PRESS*].

⁹⁵ See HORWITZ, *supra* note 59, at 16 (“Law regulates our culture, but it is also determined by our culture.”).

⁹⁶ See Jill Lepore, *The Day the Newspaper Died*, *NEW YORKER* (Jan. 26, 2009), <https://www.newyorker.com/magazine/2009/01/26/back-issues>; see West, *supra* note 30, at 88 (quoting the Lepore article).

⁹⁷ See *Join SPJ*, Society of Professional Journalists, <https://www.spj.org/join.asp>.

⁹⁸ See *About Us*, American Society of Newspaper Editors, <http://asne.org/about-us>.

⁹⁹ See *Pulitzer Prize Celebrates 100 Noteworthy Years*, *COLUMBIA NEWS* (Feb. 16, 2016), <http://news.columbia.edu/content/pulitzer-prizes-celebrate-100-newsworthy-years>; Michael Lewis, *J-School Confidential*, *THE NEW REPUBLIC* (April 17, 1993), <https://newrepublic.com/article/72485/j-school-confidential>.

¹⁰⁰ See *Our History*, Columbia Journalism School, <https://journalism.columbia.edu/columbia-journalism-school>.

¹⁰¹ See *History of the Pulitzer Prizes*, *The Pulitzer Prizes*, <http://www.pulitzer.org/page/history-pulitzer-prizes>.

“scientized” and “fact-centered.”¹⁰² Objectivity became “a kind of industrial discipline.”¹⁰³ News was grounded in “a faith in ‘facts,’ a distrust of ‘values,’ and a commitment to their segregation.”¹⁰⁴ In 1923, at its opening convention, the American Society of Newspaper Editors adopted the “Canons of Journalism,” which included impartiality, truthfulness, and accuracy.¹⁰⁵ Likely in service of objectivity, it was by this time that interviewing became a routine aspect of journalism.¹⁰⁶

The press’s increasing focus on objectivity was, in part, a means of asserting its freedom from forces that might tether it. It was a response to criticism that the press had been a conduit for propaganda during World War I.¹⁰⁷ It was also an attempt to distinguish journalism from the burgeoning fields of public relations and advertising.¹⁰⁸ Thus, the press’s cohesiveness as an institution coincided with its increasing independence from other major forces that had traditionally impeded its freedom and independent exercise of editorial discretion.

As the institutional press developed, it played its constitutionally prescribed watchdog role in ways that have become fodder for Hollywood blockbusters.¹⁰⁹ In 1971, the *New York Times* and other newspapers published the Pentagon Papers.¹¹⁰ The next year, the *Washington Post* would play a key role in revealing the details of the Watergate scandal that brought down a president and numerous other officials.¹¹¹ Around this time as well, CBS launched *60 Minutes*, an investigative news show so successful that it is still produced today.¹¹²

The press’s watchdog role during this time period also extended beyond what it published. The press served as an “instigator and enforcer” in legislatures and courts.¹¹³ Cases like *New York Times Co. v. United States* (allowing newspapers to publish the Pentagon Papers), *Richmond Newspapers, Inc. v. Virginia* (granting access to courtrooms during criminal trials) and *Nebraska Press Association v. Stuart* (invalidating a bar on the press publishing accounts of confessions or admissions in a criminal trial) all involved the press flexing its muscle in the name of greater First Amendment freedoms.¹¹⁴ “Without newspapers and newspaper organizations at the helm—instigating, enforcing, coordinating, and financing legal change, much, if not most, of the nation’s important open-government law from the last generation simply would not have

¹⁰² See ANANNY, *supra* note 16, at 68 (quoting Daniel C. Hallin).

¹⁰³ See MICHAEL SCHUDSON, *THE SOCIOLOGY OF NEWS* 75 (2011) [hereinafter SCHUDSON, *THE SOCIOLOGY OF NEWS*].

¹⁰⁴ See ANANNY, *supra* note 16, at 68 (quoting MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* 6 (1978)).

¹⁰⁵ See SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 75; *History*, American Society of Newspaper Editors, <https://www.asne.org/asne-history>.

¹⁰⁶ See SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 74.

¹⁰⁷ See ANANNY, *supra* note 16, at 75. As media sociologist Michael Schudson wrote, “For journalism, habitual deference to government officials, especially in foreign policy, came to be seen not as professionalism but as occupationally induced laziness, naïveté, or even worse.” SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 80. Journalists began emphasizing their role as “activist, reformer, and exposé.” See KOVACH & ROSENSTIEL, *supra* note 33, at 169.

¹⁰⁸ See ANANNY, *supra* note 16, at 71; SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 76.

¹⁰⁹ See, e.g., *ALL THE PRESIDENT’S MEN* (Warner Bros. 1976); *THE POST* (Amblin Entm’t. et al. 2017).

¹¹⁰ See SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 81; KOVACH AND ROSENSTIEL, *supra* note 33, at 177.

¹¹¹ See SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, 82.

¹¹² See KOVACH AND ROSENSTIEL, *supra* note 33, at 170.

¹¹³ See Jones, *supra* note 15, at 559.

¹¹⁴ See 403 U.S. at 714; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); 427 U.S. at 570, 584.

come to pass,” media law scholar RonNell Andersen Jones wrote.¹¹⁵ This includes the Freedom of Information Act, which was drafted by a former journalist and passed because of the work of a wide range of journalism organizations.¹¹⁶

To be fair, this golden age of journalism was not without tarnish. The press could be biased. It could still be a mouthpiece for government and private interests. It could be apathetic and even hostile to women and people of color both in its ranks and in its audience. Even so, if we look at the attributes that made the press a Fourth Estate—institutional cohesion, the ability to exercise independence through editorial discretion, and service as a watchdog—the press was at a relative apex. It was profiting handsomely. It controlled its distribution networks. And, although composed of many news organizations, those organizations that made up the Fourth Estate only had to worry about competing with one other. News executives likely would not have imagined a day in which they would be beholden to a handful of platforms just one of which, Alphabet, Inc., the parent company of Google, has annual revenue four times that of the entire newspaper industry.¹¹⁷

II. THE NETWORKED PRESS: DEFINING FEATURES & THE CHALLENGE TO WATCHDOG REPORTING

In May of 2018, Showtime premiered a docu-series by Oscar-nominated filmmaker Liz Garbus entitled *The Fourth Estate*.¹¹⁸ A teaser for the series says it “intimately chronicles the tenacious men and women in the trenches who are fighting for the freedom of the press and America’s right to know.”¹¹⁹ But despite its title and this description, the series is not primarily about “the press” writ large. Rather, its focus is a single newspaper: the *New York Times*. It follows *Times* journalists as they negotiated covering the first year of the Trump Administration.

The title of the series is evidence that the Fourth Estate metaphor still has cultural heft. And yet, its subject demonstrates how narrow the scope of the metaphor has become. The Fourth Estate has not disappeared, but its membership has shrunk dramatically, and it has been subsumed into a vast media ecosystem—one that includes players far more powerful than the *Times*. Although they deny being media companies, platforms like Google, Facebook, and

¹¹⁵ Jones, *supra* note 15, at 570.

¹¹⁶ To be sure, the press plays numerous societal roles that may not all be encompassed under the watchdog umbrella. For example, Michael Schudson described the six functions of journalism in democratic societies as: information, investigation, analysis, social empathy, public forum, and mobilization. SCHUDSON, WHY DEMOCRACIES NEED AN UNLOVABLE PRESS, *supra* note 94, at 12. Acting as a watchdog may overlap with one or more of these roles at any given time, but it does not necessarily do so.

¹¹⁷ Combined circulation and subscription revenue for newspapers in 2017 was an estimated \$27.7 billion. See *Newspapers Fact Sheet*, PEW RESEARCH CENTER (June 13, 2018), <http://www.journalism.org/fact-sheet/newspapers/> (adding together estimated subscription and advertising revenue in “Data” tab of “Estimated advertising and circulation revenue of the newspaper industry”). In contrast, Alphabet, Inc.’s revenue was \$110.9 billion in 2017. See *Alphabet Announces Fourth Quarter and Fiscal Year 2017 Results*, Feb. 1, 2018, https://abc.xyz/investor/pdf/2017Q4_alphabet_earnings_release.pdf. Facebook’s revenue for 2017 was approximately \$40.7 billion. See *Facebook Reports Fourth Quarter and Full Year 2017 Results* (Jan. 31, 2018), <https://investor.fb.com/investor-news/press-release-details/2018/Facebook-Reports-Fourth-Quarter-and-Full-Year-2017-Results/default.aspx>.

¹¹⁸ Greg Evans, *Liz Garbus’ New York Times Documentary Gets May Premiere on Showtime – TCA*, DEADLINE HOLLYWOOD (January 6, 2018), <http://deadline.com/2018/01/liz-garbus-showtime-new-york-times-documentary-may-premiere-tca-1202237019/>; Matt Grober, “*The Fourth Estate*” Director Liz Garbus on the Plight of Journalists in the Trump Era, DEADLINE HOLLYWOOD (May 14, 2018), <http://deadline.com/2018/05/the-fourth-estate-donald-trump-liz-garbus-showtime-video-interview-1202371099/>.

¹¹⁹ Evans, *supra* note 118.

Twitter are exercising traditional press functions, including editorial discretion.¹²⁰ And what media scholar Jay Rosen called “the people formerly known as the audience” are also playing journalistic functions by creating, curating, and sharing news, not simply consuming it.¹²¹ That these entities might not consider themselves members of the press—or may even actively distance themselves from the label—does not negate their role.

Platforms are goliaths in the news ecosystem because they are often where we go to find news. And they are a particular threat to news because platforms are also where we go to find so many other types of information. News is just one type of content that platforms monetize. Platforms are not concerned with news as much as they are with whether news is content that captures attention.

Each week, 600 million people see a news story on Facebook.¹²² Between February 2018 and February 2019, about fifty percent of referral traffic to publisher sites came from Google and twenty-five percent was from Facebook.¹²³ Consumers also find news on other platforms including YouTube (owned by Google), Twitter, Reddit, Instagram (which is owned by Facebook), and Snapchat.¹²⁴ In other words, a significant percentage of news sites’ readership is coming to them through a search engine or social media. “[N]ews spaces are no longer owned by newsmakers,” Emily Bell, the director of the Tow Center for Digital Journalism at Columbia University, said.¹²⁵ Rather, platforms are now playing a gatekeeping function once exercised by the press.

This gatekeeping role has earned platforms vast wealth. Google and Facebook control about seventy-three percent of digital advertising revenue in the United States.¹²⁶ While newspapers have hung on to some of this revenue, most has escaped their white-knuckle grasp. In the last decade, advertiser spending on newspapers plunged by almost seventy-five percent.¹²⁷ Desperate to recoup some of that loss, many publications have agreed to share their journalism with certain platforms and, in return, receive some portion of advertising revenue.¹²⁸ These

¹²⁰ See Margaret Sullivan, *Mark Zuckerberg is a Horror Show. But There’s a Glimmer of Truth Hidden in His Latest Blunder*, WASH. POST (July 22, 2018), https://www.washingtonpost.com/lifestyle/style/mark-zuckerberg-is-a-horror-show-but-theres-a-glimmer-of-truth-hidden-in-his-latest-blunder/2018/07/20/023c46da-8c1b-11e8-8aea-86e88ae760d8_story.html?utm_term=.2333a9fe645f (quoting renowned First Amendment lawyer Floyd Abrams on Facebook’s press-like function saying: “They say, ‘we don’t do editing,’ but they do make choices”).

¹²¹ See Jay Rosen, *The People Formerly Known as the Audience*, HUFFPOST: THE BLOG (June 30, 2006), https://www.huffingtonpost.com/jay-rosen/the-people-formerly-known_1_b_24113.html; KOVACH AND ROSENSTIEL, *supra* note 33, at 25.

¹²² Julia Greenberg, *Facebook has Seized the Media, and That’s Bad News for Everyone But Facebook*, WIRED (Apr. 13, 2016), <https://www.wired.com/2016/04/facebook-seized-media-thats-bad-news-everyone-facebook/>. About two-thirds of American adults use Facebook, and nearly half of them get news from the site. John Gramlich, *5 Facts About Americans and Facebook*, PEW RESEARCH CTR. (April 10, 2018), <http://www.pewresearch.org/fact-tank/2018/04/10/5-facts-about-americans-and-facebook/>.

¹²³ See *Explore Traffic Source Trends for Digital Publishers*, PARSE.LY, <https://www.parse.ly/resources/data-studies/referrer-dashboard/>.

¹²⁴ See Brown, *Local Audiences Consuming News on Social Platforms Are Hungry For Transparency*, *supra* note 17.

¹²⁵ See Elise Hu, *Silicon Valley’s Power Over the Free Press: Why it Matters*, NPR (Nov. 24, 2014), <https://www.npr.org/sections/alltechconsidered/2014/11/24/366327398/silicon-valleys-power-over-the-free-press-why-it-matters>.

¹²⁶ Tiku, *supra* note 11.

¹²⁷ FOER, *supra* note 24, at 211.

¹²⁸ One example is the May 2015 announcement by Facebook that it had entered into agreements with nine publishers to provide it content for its Instant Articles product. See Martin Moore, *Tech Giants and Civic Power*, CENTRE FOR THE STUDY OF MEDIA, COMMUNICATION, AND POWER 31 (April 2016),

arrangements have tended to disadvantage news organizations. A 2017 report by the World Association of Newspapers and News Publishers concluded that “revenue shared by the leading platforms is too low to fully fund editorial operations,” even for the largest news organizations.¹²⁹

Although signs are emerging that some news organizations are having success bringing viewers to their home pages and garnering subscriptions, these successes are still limited.¹³⁰ Meanwhile, the effects of the erosion on the press’s business model have been serious and widespread. Some are tangible: the shuttering of news bureaus, the laying off of journalists, and the folding of entire newspapers.¹³¹ Digital-native news sites are not immune. In January 2019, BuzzFeed and the media division of Verizon, which owns Yahoo, HuffPost, and TechCrunch, laid off hundreds of workers.¹³² The press’s contraction is particularly acute in smaller markets. *New York Times* Executive Editor Dean Baquet said, “The biggest crisis in journalism is not Donald Trump’s attacks on the Washington Post and the New York Times.”¹³³ Rather, it is “the decline of local newspapers.”¹³⁴ News deserts are proliferating.¹³⁵ To the extent a Fourth Estate

<https://www.kcl.ac.uk/sspp/policy-institute/cmcp/tech-giants-and-civic-power.pdf>. In describing this development, media scholar Martin Moore says that the publishers entered into these agreements “willingly.” *See id.* Yet, this is not an entirely fair characterization. Having had their revenue streams gutted, publishers were left with few viable choices.

¹²⁹ Ricardo Bilton, *Are Publishers Making Money on Facebook? “Not Really,” A New Report Finds*, NIEMANLAB, (Sept. 14, 2017), <http://www.niemanlab.org/2017/09/are-publishers-making-money-on-facebook-not-really-a-new-report-finds/>.

¹³⁰ *See* Joshua Benton, *So Some People Will Pay for a Subscription to a News Site. How About Two? Three?*, NIEMANLAB (Nov. 13, 2018), http://www.niemanlab.org/2018/11/so-some-people-will-pay-for-a-subscription-to-a-news-site-how-about-two-three/?utm_source=Daily+Lab+email+list&utm_campaign=4f7c334fd5-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-4f7c334fd5-396214909 (indicating that subscriptions are “at the center of media company plans for 2019 and beyond” but that the “data thus far isn’t super encouraging”).

¹³¹ *See* Daniel Funke, *What’s Behind the Recent Media Bloodbath? The Dominance of Google and Facebook*, POYNTER (June 14, 2017), <https://www.poynter.org/news/whats-behind-recent-media-bloodbath-dominance-google-and-facebook> (quoting Jason Kint, CEO of an advertising trade organization saying, “There is a clear correlation between layoffs and buyouts with the growth in market share for the duopoly—Google and Facebook”). In fact, *New York Times* CEO Mark Thompson forecasted benefits for his company in the next five years because so many other news entities are going out of business. *See* Ken Doctor, *Newsonomics: The New York Times’ Mark Thompson on Regulating Facebook, Global Ambition, and When to Stop the Presses (Forever)*, NIEMANLAB (Nov. 13, 2017), <http://www.niemanlab.org/2017/11/newsonomics-the-new-york-times-mark-thompson-on-regulating-facebook-global-ambition-and-when-to-stop-the-presses-forever/>.

¹³² Tom Kludt, *Layoffs Underway at HuffPost a Day After Parent Company Verizon Announced Cuts*, CNN BUSINESS (Jan. 24, 2019), https://www.cnn.com/2019/01/24/media/huffpost-layoffs/index.html?utm_source=Daily+Lab+email+list&utm_campaign=fe3b715fc1-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-fe3b715fc1-396022525.

¹³³ Jackie Wattles, *New York Times Top Editor on Journalism’s “Biggest Crisis,”* CNN RELIABLE SOURCES (April 8, 2018), <http://money.cnn.com/2018/04/08/media/dean-baquet-new-york-times/index.html>.

¹³⁴ *Id.*

¹³⁵ *See* Bucay et al., *supra* note 13. Relatedly, journalists are now more concentrated in a handful of coastal cities. Whereas in 2004, one in eight news jobs was based in Washington, New York, or Los Angeles, today it is one in five. *See* Helain Olen, *The Crisis in Journalism That’s Helping Trump*, WASH. POST (April 9, 2018), https://www.washingtonpost.com/blogs/plum-line/wp/2018/04/09/the-crisis-in-journalism-thats-helping-trump/?utm_term=.d3de140bb388.

still exists within the Networked Press, it is dominated by a handful of powerful media like the *Times* and the *Post* that distract from the rot that lies beneath them.¹³⁶

The Networked Press does not function in the same way that the Fourth Estate, at its height, did. Its players do not abide by the same rules, hold the same values, or aspire to the same goals. As a result, editorial discretion is not operating in the same way. The decision of an engineer in Silicon Valley may have far more impact on the news we consume than that of the editor-in-chief of a big-city newspaper. And that engineer's choices are influenced more heavily by drawing users to a platform and keeping their attention than providing them information that helps them to participate in democracy. A casualty of this shift is the press's watchdog role.

This section describes the shift from the Fourth Estate to a Networked Press. Part A posits that the Networked Press is not an institution in the same way as the Fourth Estate because platform norms and goals, which differ from those of the press, figure so prominently. It sets out a taxonomy of those norms and goals and contrasts them against those traditionally exercised by the press, especially investigative reporters. These include: commodification (versus duty), personalization (versus community), agnosticism (versus commitment), speed (versus deliberation and process), and scale (versus targeted impact). Part B goes on to describe how platform norms and goals are starting to infiltrate press ones, influencing journalists' exercise of editorial discretion and compromising journalistic independence. It concludes that the Networked Press is impeding the press's watchdog role.

A. COMPETING NORMS & THE DECLINE OF AN INSTITUTIONAL PRESS

In the spring of 2016, Benjamin Fearnow was working as a contract employee for Facebook.¹³⁷ The Columbia Journalism School graduate and former producer at CBS News had been hired by a third party, and his managers were reticent to permit him to list the Facebook position on his LinkedIn profile.¹³⁸ His task, along with about two-dozen others, was to work in tandem with Facebook's algorithms to decide which posts would be featured on Facebook's Trending News feature, a changing list of the most popular stories on the platform.¹³⁹ If, for some reason, the algorithm didn't surface news that human editors like Fearnow thought was

¹³⁶ By "rot," I mean to invoke Jack Balkin's concept of "constitutional rot." See Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147 (2017). Balkin differentiates between the acute process of "constitutional crisis" and the "degradation of constitutional norms that may operate over long periods of time" that he calls "constitutional rot." See *id.* at 147, 150-51. This slow, institutional degradation is similar to what is occurring to the press.

¹³⁷ See Nicholas Thompson & Fred Vogelstein, *Inside the Two Years that Shook Facebook—and the World*, WIRED, (Feb. 12, 2018), <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/>; Mike Isaac, *Facebook "Trending" List Skewed by Individual Judgment, Not Institutional Bias*, N.Y. TIMES (May 20, 2016), <https://www.nytimes.com/2016/05/21/technology/facebook-trending-list-skewed-by-individual-judgment-not-institutional-bias.html>.

¹³⁸ See Benjamin Fearnow, LINKEDIN, <https://www.linkedin.com/in/benjamin-fearnow-3a096831/>; Nathan Bomey, *How Facebook Fired Workers Who Blocked "Fake News"—"After the Fact" Book Excerpt*, USA TODAY (May 6, 2018), <https://www.usatoday.com/story/money/2018/05/06/after-fact-erosion-truth-donald-trump-book/541341002/> (noting contractors had been "sworn to secrecy over the existence of their jobs"); Isaac, *Facebook "Trending" List Skewed by Individual Judgment, Not Institutional Bias*, *supra* note 137 (noting that "managers were ambivalent about allowing staff members to identify themselves as curators or editors on their LinkedIn profiles ... given concerns that outsiders would notice the element of human judgment and ask questions about it"); Thompson & Vogelstein, *supra* note 137.

¹³⁹ See Thompson & Vogelstein, *supra* note 137.

important, the humans could “inject” it.¹⁴⁰ Facebook hoped that the humans would be so helpful in training the algorithms that the humans would make themselves unnecessary.¹⁴¹

The plan was short-circuited, however, when the Trending News team of editors became news themselves. A series of stories broken in May 2016 by technology publication *Gizmodo* revealed the existence of the human editors at Facebook and that certain of them were suppressing conservative views.¹⁴² A public relations crisis ensued, and the backlash led Facebook CEO Mark Zuckerberg to meet with conservative leaders. Zuckerberg posted on Facebook about the meeting and included a photo with the words: “A Platform for All Ideas.”¹⁴³ Several months later, Facebook fired the Trending News team.¹⁴⁴

Reflecting on the experience, Fearnow (who had actually been fired in April for leaking information to the *Gizmodo* reporter) expressed surprise at the outcry over supposedly “liberal journalists” dictating stories, given that the engineers training Facebook’s algorithm were truly the ones with the power.¹⁴⁵ “The culture at Facebook is, the engineers there are like editors,” he said.¹⁴⁶ “They’re like God, because no one really knows what . . . they do.”¹⁴⁷

The incident highlights the difficulty of labeling today’s press an institution. Rather, platforms, software designers, engineers, algorithms, consumers of news, journalists, and others, all play press functions.¹⁴⁸ The Fourth Estate still exists, but it could be described as a node in the Networked Press—a web in which the biggest nodes are platforms. The norms of its members vary wildly. Most significantly, those of platforms chafe against those of the Fourth Estate.¹⁴⁹ Below is a taxonomy that details platform norms and explains how they differ from those of the press.¹⁵⁰

¹⁴⁰ See *id.*

¹⁴¹ See *id.*; Sam Thielman, *Facebook Fires Trending Team, And Algorithm Without Humans Goes Crazy*, THE GUARDIAN (Aug. 29, 2016), <https://www.theguardian.com/technology/2016/aug/29/facebook-fires-trending-topics-team-algorithm> (noting that “the trending module was meant to have ‘learned’ from the human editors’ curation decisions and was always meant to eventually reach full automation”).

¹⁴² See, e.g., Michael Nunez, *Want to Know What Facebook Really Thinks of Journalists? Here’s What Happened When It Hired Some*, GIZMODO (May 3, 2016), <https://gizmodo.com/want-to-know-what-facebook-really-thinks-of-journalists-1773916117>; Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016), <https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>. Fearnow had been a roommate of the Gizmodo reporter who wrote the stories and a source for stories about Facebook that had run earlier in 2016. See Thompson & Vogelstein, *supra* note 137 (noting the source and roommate relationships). Once Facebook learned of the leaks in April of 2016, it fired him. See *id.*; Isaac, *Facebook “Trending” List Skewed by Individual Judgment, Not Institutional Bias*, *supra* note 137.

¹⁴³ Mark Zuckerberg, FACEBOOK, (May 18, 2016), <https://www.facebook.com/photo.php?fbid=10102840575485751&set=a.529237706231.2034669.4&type=3&theater>.

¹⁴⁴ See Bomey, *supra* note 138.

¹⁴⁵ See *id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ See Mike Ananny, *The Partnership Press: Lessons for Platform-Publisher Collaborations as Facebook and News Outlets Team to Fight Information*, TOW CTR. FOR DIGITAL JOURNALISM (April 4, 2018), https://www.cjr.org/tow_center_reports/partnership-press-facebook-news-outlets-team-fight-misinformation.php/#citations.

¹⁴⁹ See KOVACH AND ROSENSTIEL, *supra* note 33, at XIII (“Much of the revenue surrounding journalism now flows to companies such as Google that are engaged in its distribution but not its creation and, thus, its values.”).

¹⁵⁰ I chose to focus on the values of platforms both because of their outsized impact in the Networked Press, and because there are certain values platforms espouse that could be isolated and described. I do not attempt to do the same for the audience as the group is too diverse with too many motivations and values. I also do not attempt to define the values of algorithms because their values are those that software engineers build into them. As Google’s

1. COMMODIFICATION V. DUTY

“If I ever say the word ‘user’ again, *immediately charge me \$140*,” Jack Dorsey, Twitter’s CEO, wrote in 2013.¹⁵¹ “No one wants to be thought of as a ‘user’ (or ‘consumer’ for that matter). I certainly don’t,” Dorsey said, calling the word “derogatory.”¹⁵² Dorsey then made a plea: “To everyone in the technology industry: I encourage you to reconsider the word ‘user’ and what you call the people who love what you’ve created.”¹⁵³ It is not clear if Dorsey ever needed to pay out. (I have found no evidence of him saying “user” publicly in the years since). Regardless, Dorsey definitively failed at convincing Silicon Valley to give up the term.

His request was unlikely to be heeded. The term is hard to shake because its negative connotations are apt. “User” accurately captures the prototypical busy person reliant on the platform while not fully appreciating what he is giving away.¹⁵⁴ Platforms commodify users. For platforms, “users” are not really “customers” (a word Dorsey prefers).¹⁵⁵ Rather, as the using public has begun to better understand, they are the commodity.¹⁵⁶

Although users do not hand over cash, platforms are not providing a free service. Users pay with their personal information. Platforms harvest vast amounts of data from users that platforms then monetize. The volume of this data and the breadth of those it has been shared with is only beginning to get attention. The commodification of users is the platform business model.

In contrast, a text widely read by journalism students counsels that journalism’s “first loyalty is to citizens.”¹⁵⁷ This sentiment is echoed by working journalists. For example, the editorial board of the *Bangor (Maine) Daily News* wrote, “News organizations don’t serve governments. They serve you, the public. They are the only way you know when your government isn’t working as it should. They are the only independent way to know what elected officials are doing.”¹⁵⁸ Journalism—especially watchdog journalism—is a public service.

vice-president of news Richard Gringas quipped, “As I often say, technology has value but it doesn’t have values. It’s what we do with it.” David Skok, *Google’s News Chief Richard Gringas: “We Need To Rethink Journalism At Every Dimension,”* NIEMANLAB (May 10, 2018), <http://www.niemanlab.org/2018/05/googles-news-chief-richard-gringras-we-need-to-rethink-journalism-at-every-dimension/>.

¹⁵¹ Jack Dorsey (jacks), TUMBLR (2013), <http://jacks.tumblr.com/post/33785796042/lets-reconsider-our-users> (emphasis in original).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ It also captures the addictive nature of the technology given that “user” is also a word used to describe someone addicted to drugs. Dorsey, too, recognized this connotation. *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ Don Norman, the director of The Design Lab at the University of California, San Diego, argues that “user” is “a way to degrade the people for whom we design, a way of labeling them as objects.” *See* Don Norman, *Words Matter. Talk About People: Not Customers, Not Consumers, Not Users*, JND.ORG, https://www.jnd.org/dn.mss/words_matter_talk_ab.html; *About Don Norman*, JND.ORG, <https://www.jnd.org/about.html>.

¹⁵⁷ *See* KOVACH AND ROSENSTIEL, *supra* note 33, at 9, 72; ANANNY, NETWORKED PRESS FREEDOM, *supra* note 16, at 186 (noting that “the very best and most self-reflective journalists do not shy away from seeing their work as part of democratic culture” and that, in contrast, “[a]s technology companies and social media platforms try to decide what exactly they are and who their constituents are, they often only awkwardly and shallowly invoke democracy and self-governance, preferring instead the safer terrain of users, customers, communities, personalization, and optimization”).

¹⁵⁸ *See The Media Is the Enemy Only If You Don’t Want to Know What Your Government is Doing*, BANGOR DAILY NEWS, Aug. 15, 2018, <http://bangordailynews.com/2018/08/15/opinion/editorials/media-is-the-enemy-only-if-you-dont-want-to-know-what-your-government-is-doing/>; *Journalists Aren’t the Enemy; We Are You*, BOZEMAN DAILY CHRONICLE, Aug. 15, 2018, https://www.bozemandailychronicle.com/opinions/editorials/journalists-aren-t-the-enemy-we-are-you/article_bcebaadb-9616-584c-b721-e26d0b539a6c.html.

Providing information to citizen-readers that will allow them to be self-governing is the ultimate goal.¹⁵⁹ True, like the “user” of a platform, the reader or viewer is commodified by the press via advertising and subscriptions. In contrast to platforms, however, the press reciprocates the reader or viewer’s investment with its own loyalty to that reader or viewer as a citizen.

It is a loyalty sufficiently strong that it has been likened to a legal duty. “Every CEO understands they have a fiduciary duty to their shareholders,” a former chairman of the *International Herald Tribune*, Peter C. Goldmark, Jr., said. “In terms of journalism, I put more faith in corporate leadership that understands that they have an equally solemn fiduciary responsibility arising from their ownership of a news organization—that they hold a public trust.”¹⁶⁰ In fact, the Supreme Court suggested such a duty exists when in *Nebraska Press Association v. Stuart* it wrote, “The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly.”¹⁶¹

And so, while the press, like platforms, makes money from those who read and watch its products, there is an important difference. The press views itself as having an obligation to the communities and citizens it serves.¹⁶² It sees itself as having a role fundamental to our democracy. In fact, journalists are strikingly uniform in their understanding of their “public information mission.”¹⁶³ A study by psychologists at Stanford, Harvard, and University of Chicago found that journalists in large numbers subscribed to the belief that “[t]he primary purpose of journalism is to provide citizens with the information they need to be free and self-governing.”¹⁶⁴

2. PERSONALIZATION V. COMMUNITY

Every day, viewers around the world log one billion hours watching YouTube.¹⁶⁵ About seventy percent of that time, viewers are not watching content that they sought out, but rather, content that YouTube’s algorithm selected for them.¹⁶⁶ YouTube’s goal is to make its website “sticky” so that users stay on it.¹⁶⁷ To do that, not only does the site recommend personalized

¹⁵⁹ See Albuquerque Journal Editorial Board, *Editorial: A Check on Power*, ALBUQUERQUE JOURNAL, Aug. 15, 2018, <https://www.abqjournal.com/1209434/editorial-a-check-on-power.html> (“The news media’s job is to hold a mirror up to the world, to tell the truth and to put events into context, so that ‘we, the people’ can make wise and informed decisions. The job of the media is to help the people hold their government accountable.”).

¹⁶⁰ See KOVACH AND ROSENSTIEL, *supra* note 33, at 88. Even the Supreme Court indicated that the press has such a duty. See 427 U.S. at 559-60 (“The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty.”).

¹⁶¹ 427 U.S. at 560. In this case, in which the Court had to balance fair trial rights against the rights of the press to publish, the Court went on to say that this was “a duty widely acknowledged by not always observed by editors and publishers.” See *id.*

¹⁶² See James T. Hamilton, *What’s the Incentive to Save Journalism?*, in WILL THE LAST REPORTER PLEASE TURN OUT THE LIGHTS: THE COLLAPSE OF JOURNALISM AND WHAT CAN BE DONE TO FIX IT 278 (Robert W. McChesney & Victor Pickard eds., 2011).

¹⁶³ See KOVACH AND ROSENSTIEL, *supra* note 33, at 20-21.

¹⁶⁴ See *id.* at 17, 21. To be clear, this information-providing function is broader than the press’s watchdog role.

¹⁶⁵ Jack Nicas, *How YouTube Drives People to the Internet’s Darkest Corners*, WALL ST. J. (Feb. 7, 2018), <https://www.wsj.com/articles/how-youtube-drives-viewers-to-the-internets-darkest-corners-1518020478>.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

content, but it also automatically plays those recommended videos from a bottomless queue.¹⁶⁸ The phenomenon has a name: the YouTube rabbit hole.¹⁶⁹

YouTube's attention-capture efforts are not unique. In order to be sticky, platforms highly personalize the user experience. Two people may conduct an identical Google search and receive different results.¹⁷⁰ Facebook prioritizes items in one person's News Feed differently than another.¹⁷¹ Apple News advertises to users it is "More Personalized" with "Top Stories picked for you and recommendations from Siri."¹⁷² Twitter, too, advertises personalized news updates based on user interest.¹⁷³

Personalization is a key facet of the platform business model. Per the platforms, personalization promotes engagement (i.e., more user time spent on the platform).¹⁷⁴ Engagement allows platforms to show the user more advertising, thereby increasing profit.¹⁷⁵ Engagement also allows the platforms more opportunities to collect user data. More data, in turn, allows for more targeted advertising, again increasing profits.¹⁷⁶

In contrast, the press has not catered to an audience of one. Doing so would have been financially disastrous in the pre-internet days, but it also runs contrary to a journalistic value,

¹⁶⁸ See Mitch Joel, *The Billion Hour YouTube Rabbit Hole (And It's Growing)*, MEDIUM (Feb. 28, 2017), <https://medium.com/@mitchjoel/the-billion-hour-youtube-rabbit-hole-and-its-growing-e9ecd9925ce4>.

¹⁶⁹ See Nicas, *supra* note 165; Kate Drozynski, *The 10 Stages of Falling Down a YouTube Rabbit Hole*, MTV NEWS (Sept. 27, 2015), <http://www.mtv.com/news/2283473/youtube-rabit-hole/>; Definition: "YouTube Rabbit Hole," URBAN DICTIONARY (April 17, 2016), <https://www.urbandictionary.com/define.php?term=youtube%20rabbit%20hole>.

¹⁷⁰ See Lisa Gevelber, *It's All About "Me"—How People Are Taking Search Personally*, THINK WITH GOOGLE, (January 2018), <https://www.thinkwithgoogle.com/consumer-insights/personal-needs-search-trends/>; Larry Magid, *How (And Why) To Turn Off Google's Personalized Search Results*, FORBES (Jan. 13, 2012), <https://www.forbes.com/sites/larrymagid/2012/01/13/how-and-why-to-turn-off-googles-personalized-search-results/#11b14c4338f2>.

¹⁷¹ See Josh Constine, *How Facebook News Feed Works*, TECHCRUNCH (Sept. 6, 2016), <https://techcrunch.com/2016/09/06/ultimate-guide-to-the-news-feed/> (describing "personalized relevancy score" and how it impacts hierarchies in News Feed).

¹⁷² Screenshot from Apple News app on file with the author.

¹⁷³ See Keith Coleman, *Product: See What's Happening*, TWITTER (June 13, 2018), https://blog.twitter.com/official/en_us/topics/product/2018/see_whats_happening.html; Hillary Grigonis, *Twitter's Happening Now, Explore, About to Get More Personal*, DIGITAL TRENDS (June 13, 2018), <https://www.digitaltrends.com/social-media/twitter-happening-now-personalized-news/>.

¹⁷⁴ See Adam Mosseri, *Building a Better News Feed For You*, FACEBOOK (June 29, 2016), <https://newsroom.fb.com/news/2016/06/building-a-better-news-feed-for-you/> (stating that Facebook aims "to show people the stories that are most relevant to them").

¹⁷⁵ See Emily Bell, *Facebook Creates Orwellian Headache as News is Labelled Politics*, THE GUARDIAN (June 24, 2018), <https://www.theguardian.com/media/media-blog/2018/jun/24/facebook-journalism-publishers> (noting that targeted advertising represents 98 percent of Facebook's revenue). To be fair, not all platforms are created equal. For example, Apple touts that it does not monetize customer data. See Leonid Bershidky, *Why Microsoft and Apple Don't Need to Sell Your Data*, NEW YORK POST, April 3, 2018, <https://nypost.com/2018/04/03/why-microsoft-and-apple-dont-need-to-sell-your-data/>. Yet, Apple collects vast amounts of information from users and is able to leverage it to sell users more of its own products.

¹⁷⁶ *Once Considered a Boon to Democracy, Social Media Have Started to Look Like Its Nemesis*, THE ECONOMIST, (Nov. 4, 2017), <https://www.economist.com/briefing/2017/11/04/once-considered-a-boon-to-democracy-social-media-have-started-to-look-like-its-nemesis> ("The more people use their addictive-by-design social media, the more attention social-media companies can sell to advertisers—and the more data about the users' behaviour they can collect for themselves."); Zeynep Tufekci, *Facebook's Surveillance Machine*, N.Y. TIMES (March 19, 2018), <https://www.nytimes.com/2018/03/19/opinion/facebook-cambridge-analytica.html> ("Facebook makes money, in other words, by profiling us and then selling our attention to advertisers, political actors and others. These are Facebook's true customers, whom it works hard to please.").

which is to “try to serve the interest of the widest community possible.”¹⁷⁷ In one example, several years ago, The Poynter Institute, a journalism nonprofit, collected responses to this question: why does local journalism matter?¹⁷⁸ The resulting article excerpting responses had the word “community” in it forty-one times.¹⁷⁹ One local newspaper editor said that newspapers “frame the conversation in a community. Usually, that’s as simple as shifting the conversation to be centered on others instead of on ourselves.”¹⁸⁰

In fact, sociologists argue that news itself creates communities and that this process is crucial for democracy. As media scholar Michael Schudson wrote in his 2003 book, *The Sociology of News*: “That you and I read the same front page or see the same television news as do the president of the United States and the chairperson of IBM is empowering; the impression it promotes of equality and commonality, illusion though it is, sustains a hope of democratic life.”¹⁸¹

3. AGNOSTICISM V. COMMITMENT

On a 2016 trip that included a private audience with the pope, Mark Zuckerberg told a group of Italian students that Facebook is “a tech company, not a media company . . . we build the tools, we do not produce any content.”¹⁸² This agnosticism regarding content has long been a legal and marketing strategy for platforms.

Distancing themselves from the media label allows platforms to absolve themselves of significant responsibility. Under Section 230 of the Communications Decency Act, platforms are generally not liable for content because their sites are merely intermediaries.¹⁸³ Platforms have been careful to advertise that they are conduits and not creators. Facebook merely helps you find “the things that you care about,” the company has said.¹⁸⁴ It is just a tool; it is not “the things” themselves.

Content is not unimportant to platforms. But it is a means, a commodity to be curated and leveraged to another purpose. Training the eyes and minds of users on their sites is the goal.¹⁸⁵ With this in mind, Facebook, in particular, goes out of its way to avoid content that might bristle users. That bristly content includes news. In 2018, Facebook announced that its News Feed would prioritize posts from users’ family and friends over those from “businesses, brands, and media.”¹⁸⁶ According to Facebook, “passively reading articles or watching videos” from these entities may not be as good for our “well-being” as posts from families and friends.¹⁸⁷

¹⁷⁷ See KOVACH AND ROSENSTIEL, *supra* note 33, at 40.

¹⁷⁸ See Melody Kramer, *Why Does Local Matter? Let’s Ask Our Audience*, POYNTER (June 23, 2015), <https://www.poynter.org/news/why-does-local-matter-lets-ask-our-audience>.

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

¹⁸¹ See SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 24.

¹⁸² See Bell & Owen, *supra* note 16; Giulia Segreti, *Facebook CEO Says Group Will Not Become a Media Company*, REUTERS (Aug. 29, 2016), <https://www.reuters.com/article/us-facebook-zuckerberg-idUSKCN1141WN>;

¹⁸³ *See* 47 U.S.C. § 230.

¹⁸⁴ *See* Ravi Somaiya, *How Facebook Is Changing the Way Its Users Consume Journalism*, N.Y. TIMES, (Oct. 26, 2014), http://www.nytimes.com/2014/10/27/business/media/how-facebook-is-changing-the-way-its-users-consume-journalism.html?_r=0 (quoting Greg Marra, a Facebook engineer).

¹⁸⁵ *Once Considered a Boon to Democracy, Social Media Have Started to Look Like Its Nemesis*, *supra* note 176 (“It is the overall paying of attention, not the specific information, that matters.”)

¹⁸⁶ *See* Mark Zuckerberg, FACEBOOK (Jan. 11, 2018), <https://www.facebook.com/zuck/posts/10104413015393571>.

¹⁸⁷ *See id.*

With a more cynical take, communications and technology scholar Kate Crawford paraphrased the attitude of Silicon Valley engineers and technologists she interviewed about news values saying: “If somebody just wants to read news stories about marmots or the Kardashians, that’s completely fine.”¹⁸⁸ Again conveying an agnosticism to the relative importance or worth of content, a senior news app designer told Crawford he did not consider journalistic values as he worked.¹⁸⁹ In fact, the designer said, “I think there are no ideals being pursued.”¹⁹⁰

Crawford’s interviews were conducted in 2014. Now, with the benefit of hindsight, it is easy to see how such attitudes foretold the ways in which disinformation could emerge and mutate on platforms. Today, marmots and Kardashians are far from the most dangerous subject matter on platforms. Disinformation and its amplification on platforms is an outgrowth of content agnosticism.

For its part, the press has historically not been content-agnostic. Explainers, tic-tocks, profiles, brights, briefs, and breakers—these are just some of the types of stories journalists produce. These stories are not merely “content.” And watchdog journalism—a specialized, time-consuming, and expensive brand of journalism—is a calling for some journalists. Watchdog journalism is intended to expose corruption and to prompt a corrective response. Investigative journalists measure their success by the probes they have sparked, officials who have been ousted, or legislation that has been passed as a result of their work. Watchdog journalism often needles, incenses, and offends. It does so by design. It is not there for the well-being of any one user. Rather, its intent is the well-being of the citizenry and our democratic form of government.

4. SPEED V. DELIBERATION & PROCESS

Platforms are infatuated with speed and optimized for immediacy. “Mobile speed is good for everyone, everywhere,” announced a 2016 Google report.¹⁹¹ When searching on Google, users are told not only how many results the platform has identified, but also the speed at which it identified them down to the hundredth of a second. Twitter posts indicate how long they have been lingering on the platform—almost as if anything more than twenty-four hours old has spoiled. Snaps—posts on the platform Snapchat—last for hours (not days) before vanishing.¹⁹²

With the constant stream of loud, bright, and glittery things on the internet, users are hard-pressed to spend too much time on any one. The fear of missing out looms large. Facebook’s News Feed or Twitter’s TweetDeck (which allows users to see multiple, customizable Twitter feeds on a single screen) lets users scroll images, text, and video rapidly. A common sequence emerges: scan, dive shallowly into content, scan, reload, repeat. The feed is bottomless, and every refresh promises something new.

¹⁸⁸ See Columbia Journalism School, *Journalism + Silicon Valley Conference—Full Day—Tow Center Nov. 12, 2015*, YOUTUBE (Nov. 13, 2015), <https://www.youtube.com/watch?v=0Qftw6VkDKQ> (starting at 54:35).

¹⁸⁹ See Mike Ananny & Kate Crawford, *A Liminal Press*, 3 DIGITAL JOURNALISM 192, 200 (2014), <http://www.tandfonline.com/doi/abs/10.1080/21670811.2014.922322>.

¹⁹⁰ *Id.*; see Nicas, *supra* note 165 (quoting a Northeastern University computer-science professor as saying, “The editorial policy of these new platforms is to essentially not have one”).

¹⁹¹ *The Need for Mobile Speed: How Mobile Latency Impacts Publisher Revenue*, DOUBLECLICK BY GOOGLE, <https://www.doubleclickbygoogle.com/articles/mobile-speed-matters/> (noting this on page 10 of embedded slide presentation).

¹⁹² See *When Does Snapchat Delete Snaps and Chats?*, SNAPCHAT SUPPORT, <https://support.snapchat.com/en-US/a/when-are-snaps-chats-deleted>. Unopened content on Snapchat may last up to thirty days. See *id.*

It is true that speed is important in journalism; journalists often have to work quickly. The Pulitzers have an entire category devoted to “Breaking News.” Watchdog journalism, however, tends to plod. As Bill Kovach and Tom Rosenstiel wrote in *The Elements of Journalism*: “More often than not, revelation comes not from a single document suddenly found, but from discoveries slowly earned—winning the trust of sources, noticing a fragment of information, recognizing its possibilities, triangulating that with fragments from other information, fitting the pieces together, and establishing proof to a level that will satisfy lawyers.”¹⁹³

Take, for example, the investigative stories that helped galvanize the #MeToo Movement and won Pulitzers for the *New York Times* reporters and the *New Yorker* reporter who wrote them. *New York Times* reporters Jodi Kantor and Meaghan Twohey worked on the first article chronicling allegations of sexual misconduct by film mogul Harvey Weinstein for four months.¹⁹⁴ Ronan Farrow of the *New Yorker* worked on his initial article about Weinstein for more than a year.¹⁹⁵

All of this sunken time makes watchdog journalism the most expensive type of journalism to produce. A study by a Stanford economist showed that funding investigative reporters is significantly more expensive than beat reporters.¹⁹⁶ As just one example, a “conservative[] estimate” of the cost spent by *ProPublica*, a nonprofit investigative journalism site, on a series about the dangers of acetaminophen was \$750,000.¹⁹⁷ The stories took two years to produce.¹⁹⁸

The siren song of the audience seeking the live tweet or the hot take is constant. Carving out time and space for watchdog journalism is a challenge. “The daily churn of doing news keeps you from getting to more meaningful, deeper truths, and you just are reactive,” according to Jim Nelson, the former editor of *GQ*.¹⁹⁹ Readers and viewers want news not only right after it happened, but while it is happening. News organizations have taken to making educated guesses about what news might happen and writing the story in advance so that it can be rolled out within minutes if needed.²⁰⁰ The frenzy takes its toll. “I’m so tired,” *New York Times* White House

¹⁹³ KOVACH AND ROSENSTIEL, *supra* note 33, at 191.

¹⁹⁴ See Isaac Chotiner, *The Weinstein Break*, SLATE, Oct. 2017, http://www.slate.com/articles/news_and_politics/interrogation/2017/10/jodi_kantor_on_how_she_broke_the_harvey_weinstein_story.html.

¹⁹⁵ Kim Masters and Chris Gardiner, *Harvey Weinstein Lawyers Battling N.Y. Times, New Yorker Over Potentially Explosive Stories (Exclusive)*, HOLLYWOOD REPORTER (Oct. 4, 2017), <https://www.hollywoodreporter.com/news/harvey-weinstein-lawyers-battling-ny-times-new-yorker-potentially-explosive-stories-1045724>.

¹⁹⁶ Stanford economist James T. Hamilton, in a 2009 paper on subsidizing the news business, suggested that funding a beat reporter for a year in North Carolina would cost \$61,500, while funding an investigative reporting unit (including an editor, three reporters, research, travel and legal expenses) that might produce two or three investigative series per year, would cost \$500,000. See Hamilton, *Subsidizing the Watchdog*, *supra* note 25, at 3–4; JAMES T. HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE JOURNALISM* 10 (2016) (“Investigative reporting involves original work, about substantive issues, that someone wants to keep secret. It is costly, underprovided in the marketplace, and often opposed.”).

¹⁹⁷ Peter Osnos, *These Journalists Spent Two Years and \$750,000 Covering One Story*, THE ATLANTIC (Oct. 2, 2013), <https://www.theatlantic.com/national/archive/2013/10/these-journalists-spent-two-years-and-750-000-covering-one-story/280151/>.

¹⁹⁸ *Id.*

¹⁹⁹ #268: *Jim Nelson*, LONGFORM PODCAST at 8:00 (Nov. 1, 2017), <https://longform.org/search?utf8=%E2%9C%93&q=jim+nelson&>.

²⁰⁰ See Charles Bethea, *News Outlets Are Prewriting Stories About Officials Getting Fired to Keep Up With the Trump Era*, NEW YORKER (Aug. 1, 2018), <https://www.newyorker.com/news/news-desk/news-outlets-are-prewriting-stories-about-officials-getting-fired-to-keep-up-with-the-trump-era>. This phenomenon is not new (it has

correspondent Maggie Haberman said in the documentary *The Fourth Estate*.²⁰¹ “But also, like, I really don’t know how to stop at this point, either.”²⁰²

5. SCALE V. TARGETED IMPACT

In Silicon Valley speak, “scale” is the obsession with making things infinitely bigger.²⁰³ For platforms, the goal is to have more and more users, which means curating more and more information and enabling more and more sharing.²⁰⁴ A handful of platforms have become enormously successful at this. Facebook has 2.2 billion monthly active users.²⁰⁵ It owns Instagram, which has 800 million active monthly users.²⁰⁶ Google does not release data on how many searches it processes, but some have guessed it is on the order of billions daily.²⁰⁷ And Google owns YouTube, which has one billion users.²⁰⁸

Given the breadth and openness of the internet, the rapid sharing of content among users is perhaps a foregone conclusion.²⁰⁹ See, for example, the ice bucket challenge, exploding watermelons, and eating Tide pods.²¹⁰ Platforms incentivize virality by baking its promise into the infrastructure. Take Twitter. Its hashtag is a sorting mechanism that allows the platform and users to amass all tweets on a particular topic (e.g., #Resist, #MAGA).²¹¹

long been done with obituaries), but the pressure to post news quickly may be prompting it to occur even more often. *See id.*

²⁰¹ THE FOURTH ESTATE (Showtime 2018); Simon Vandore, *Fire, Fury, and “The Failing New York Times,”* SBS (June 21, 2018), <https://www.sbs.com.au/guide/article/2018/05/28/fourth-estate-SBS-VICELAND>.

²⁰² THE FOURTH ESTATE, *supra* note 201; Vandore, *supra* note 201.

²⁰³ For example, LinkedIn founder Reid Hoffman has a podcast called *Masters of Scale* about “how great entrepreneurs take their companies from zero to a gazillion in ingenious fashion.” *See About Masters of Scale, Masters of Scale with Reid Hoffman*, <https://mastersofscale.com/#/about-us>.

²⁰⁴ This is consistent with Crawford and Ananny’s interviews, in which they heard from engineers and designers that “By far and away, the biggest value was ‘We just want users ... We just want to be the most popular app in the space.’” *See* Columbia Journalism School, *Journalism + Silicon Valley Conference—Full Day—Tow Center Nov. 12, 2015*, *supra* note 188, at 54:10.

²⁰⁵ *See Company Info*, FACEBOOK NEWSROOM, <https://newsroom.fb.com/company-info/>.

²⁰⁶ *See* Anita Balakrishnan and Julia Boorstin, *Instagram Says It Now Has 800 Million Users, Up 100 Million Since April*, CNBC (Sept. 25, 2017), <https://www.cnbc.com/2017/09/25/how-many-users-does-instagram-have-now-800-million.html>.

²⁰⁷ *See How Many Google Searches Per Day On Average in 2018*, ARDOR SEO BLOG, <https://ardorseo.com/blog/how-many-google-searches-per-day-2018/>; Danny Sullivan, *Google Now Handles At Least 2 Trillion Searches Per Year*, SEARCH ENGINE LAND (May 24, 2016), <https://searchengineland.com/google-now-handles-2-999-trillion-searches-per-year-250247>.

²⁰⁸ *See* YouTube For Press, YOUTUBE, <https://www.youtube.com/intl/en-GB/yt/about/press/>.

²⁰⁹ *Virality*, ENGLISH OXFORD LIVING DICTIONARY, <https://en.oxforddictionaries.com/definition/virality> (“The tendency of an image, video, or piece of information to be circulated rapidly and widely from one Internet user to another; the quality or fact of being viral.”)

²¹⁰ Alexandra Sifferlin, *Here’s How the ALS Ice Bucket Challenge Actually Started*, TIME (Aug. 18, 2014), <http://time.com/3136507/als-ice-bucket-challenge-started/>; Tasneem Nashrulla, *We Blew Up a Watermelon and Everyone Lost Their Freaking Minds*, BUZZFEED (April 8, 2016), https://www.buzzfeed.com/tasneemnashrulla/we-blew-up-a-watermelon-and-everyone-lost-their-freaking-min?utm_term=.snnEo3eLd#.bIP18AwL9; *The Strange Story of How Tide Pod Eating Went Viral*, FORBES (Feb. 5, 2018), <https://www.forbes.com/sites/quora/2018/02/05/the-strange-story-of-how-tide-pod-eating-went-viral/#243de6874932>.

²¹¹ #Resist and #MAGA were the “most tweeted activism hashtags” in 2017. *See* Jennifer Machin, *Twitter’s Most Popular Tweets and Accounts of 2017*, MASHABLE (Dec. 5, 2017), <https://mashable.com/2017/12/05/twitter-most-popular-2017/#CzNx3U49zqqL>. Hashtags perform a similar function on Instagram.

Scale (like personalization) functions exponentially. It is self-reinforcing. The platforms already have so many users and are such an essential way of organizing and transmitting information that those seeking influence, from celebrities to politicians to advocates, use the platforms as a tool. In doing so, they generate more activity on platforms and bring in even more users.²¹²

Although it may be too sweeping to say investigative reporting is not scalable, it is difficult to scale. Although in the *Pentagon Papers Case*, the Supreme Court wrote that a role of the press was to “bare the secrets of government,” watchdog reporting is not always that gripping or glamorous. Perhaps consequently, it is not always all that read, at least relatively.²¹³

Investigative journalism is the leafy green of the news diet—vital for good health but not necessarily what people choose to eat first. This is borne out by research. According to one study of 40,000 stories posted on news sites in North and South America and Western Europe, the stories that the audience pays most attention to are about sports, crime, entertainment and weather.²¹⁴ They may be great journalism, but they are not, generally speaking, stories about government and its inner workings. For example, a study by the *Columbia Journalism Review* of the most read stories for leading news organizations (including NPR, CNN, ABC News, and the *Los Angeles Times*) found that despite the belief that Donald Trump was dominating the news cycle, in reality, stories about hurricanes or mass shootings were even more widely read.²¹⁵

Today, some journalists view diverging from the prevailing narrative—or that which might scale or go viral—as a risk.²¹⁶ “We are telling stories that other outlets aren’t telling, which is almost to our detriment in the world of viral news,” Delaney Simmons, Director of Digital Content and Social for New York public radio station WNYC, said.²¹⁷ “When it comes to the way Facebook and Twitter currently surface trending content and breaking news, it’s not about the story that no one has. It’s about the story that everyone has.”²¹⁸

²¹² See Josef Adalian, *Inside the Binge Factory*, N.Y. MAGAZINE (June 11, 2018), <http://www.vulture.com/2018/06/how-netflix-swallowed-tv-industry.html> (describing a “simple logic” behind Facebook and Amazon’s success that “[g]rowth begets more growth begets more growth”).

²¹³ Likewise, to the extent that the watchdog reporting is local news reporting, it is especially difficult to scale. See Harry Siegel, *Why We Need Local Journalism: Look Around at How Vulnerable We Are Right Now*, N.Y. DAILY NEWS, July 22, 2018, <http://www.nydailynews.com/opinion/ny-oped-why-we-need-local-journalism-20180720-story.html> (“The thing I love about local news is that it doesn’t scale. It happens one court hearing or campaign or crime at a time so that you can fairly try and connect political decisions to individual people, the life of the city to that of its inhabitants.”).

²¹⁴ See BOCZKOWSKI & MITCHELSTEIN, *supra* note 26, at 2.

²¹⁵ See Justin Ray, *The Most Read Stories Since Trump’s Election Win Might Surprise You*, COLUM. JOURNALISM REV. (Nov. 7, 2017), https://www.cjr.org/covering_trump/trump-election-stories-most.php.

²¹⁶ See Phillips, *supra* note 22, at 24. “[S]ocial media amplify the financial incentive to join the heard,” FOER explained. Foer, *supra* note 24, at 148. For news, “[t]he results are highly derivative.” *Id.* This derivative nature of news is also described by Caitlin Petre when she wrote “[T]he leaderboards ranking stories and staffers don’t just harness employees’ competitive tendencies; they shape the very nature of competition in the media field, namely by turning it further inward.” See Caitlin Petre, *The Traffic Factories: Metrics at Chartbeat, Gawker Media, and The New York Times*, TOW CTR. FOR DIGITAL JOURNALISM (May 7, 2015), https://www.cjr.org/tow_center_reports/the_traffic_factories_metrics_at_chartbeat_gawker_media_and_the_new_york_times.php.

²¹⁷ See Bell & Owen, *supra* note 16.

²¹⁸ See *id.*; John Warner, *The Best Algorithm-Driven Writing Instruction You Can Imagine*, INSIDE HIGHER ED, (June 26, 2018), <https://www.insidehighered.com/blogs/just-visiting/best-algorithm-driven-writing-instruction-you-can-imagine> (“Speaking at a conference, Alison Woodruff a human-computer interaction researcher remarked “Machine learning is good if you want the future to look like the past.”).

B. THE CHANGING NATURE OF EDITORIAL DISCRETION & THE MUZZLING OF THE WATCHDOG

For decades, decisions about what to publish have been made around a big table in a newsroom. Journalists have discussed, debated, and employed their collective judgment to determine what is newsworthy.²¹⁹ As the word “newsworthy” itself indicates, this judgment has involved not simply what is new or enticing but what is important and legitimate. Journalists have not viewed their role as merely to entertain or capture attention (although they have recognized and capitalized on this as a means to profit), but to provide a public service. They have attempted to discern, however inelegantly or incorrectly, not simply whether something qualifies as news but whether that news is *worthy* of citizens’ attention.²²⁰ One type of news that has perennially qualified is investigative or watchdog reporting.

Platforms have significantly altered both the ability of the press to discern newsworthiness and the process for doing so. They have been able to do this in large part because of their size. Platform values and norms, which disincentivize watchdog reporting, dominate. As a result, the press’s ability to perform a core structural role—to be a check on government—is not obliterated, but it is compromised. While the previous section detailed the ways in which platform and press values differ, this section describes the mechanics of both how platform values are imposed upon the press and also how the press has sometimes chosen to adopt them.

1. TOP-DOWN INFLUENCES ON EDITORIAL DISCRETION

For John F. Kennedy, the relatively new technology of television was a means of speaking directly to citizens, unfiltered by the media.²²¹ During his presidency, Kennedy held a televised press conference almost every other week.²²² But even though Kennedy appreciated directly connecting with his audience, he still viewed the press as essential. “[T]here is a terrific disadvantage not having the abrasive quality of the press applied to you daily, to an administration,” he said in a 1962 interview with NBC.²²³ “[E]ven though we never like it, and even though we wish they didn’t write it, and even though we disapprove, there still isn’t any doubt that we couldn’t do the job at all in a free society without a very, very active press.”²²⁴ The press, Kennedy said, was “a check really on what is going on in the administration.”²²⁵

In its period of “high modernism,” the press applied its “abrasive quality” to government regularly. And while the current administration is still subject to this rough treatment, many state and local governments across the country are faced with less of a scrub than they once were. Some are altogether unmonitored by the press. Tethered by platforms and audience, the press is

²¹⁹ According to journalism scholars, news is that which “is judged to be newsworthy by journalists, who exercise their news sense within the constraints of the news organizations in within which they operate.” See Deirdre O’Neill and Tony Harcup, *News Values and Selectivity*, in *THE HANDBOOK OF JOURNALISM STUDIES* 161 (Karin Wahl-Jorgensen and Thomas Hanitzsch eds. 2009).

²²⁰ The legal definition of newsworthiness (an affirmative defense to privacy torts in many jurisdictions) captures this. In order to be newsworthy, information must generally not simply be of interest but be of “legitimate public interest.” See *RESTATEMENT (SECOND) OF TORTS* § 652D, cmt. h (AM. LAW INST. 1977).

²²¹ See *John F. Kennedy and the Press*, John F. Kennedy Presidential Library and Museum, <https://www.jfklibrary.org/JFK/JFK-in-History/John-F-Kennedy-and-the-Press.aspx>.

²²² See *id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

both less able and less incentivized to act in its watchdog capacity. Platforms are behind both of these changes.

The number of full-time newspaper reporters in statehouses dropped thirty-five percent between 2003 and 2014.²²⁶ Most obviously, with fewer reporters and fewer newspapers, the press is simply unable to provide the checking function it once did. In an article entitled *The Capitol Press Corpse*, the “dean” of the Austin, Texas press corps, Paul Burka, said, “It’s the boots-on-the-ground principle. The more troops you have, and the more visible they are, the more the bad guys fear you and the less likely they are to do mischief.”²²⁷ Likewise, a reporter at Eugene, Oregon’s *Register Guard* said, “We’re treading water.”²²⁸ The capitol press corps in Salem has dropped from thirty-seven to thirteen since 2005.²²⁹ And it is not only reporters who are lamenting the losses in statehouses nationally. “The public is not being kept aware of important policy decision that are being made that will affect their daily lives,” said Gene Rose, a former communications director for the National Conference of State Legislatures.²³⁰

Measuring how much news we are missing—and what the impact of that news would be—is next to impossible. But it is likely a very significant amount. This was the warning in a tweet by *New York Daily News* editor Josh Greenman in July of 2018 when the paper’s parent company, Tronc, fired half of the paper’s reporters.²³¹ Greenman wrote: “The Daily News led the charge to get 9/11 first responders health benefits. Exposed widespread abuse of eviction rules punishing poor people. Revealed deception and dysfunction in public housing that put kids in danger of lead poisoning. Showed the world the Eric Garner video.”²³²

Platforms, of course, also have tremendous impact on those newsrooms still operating. Their algorithms are a top-down mediation tool. When a user opens her News Feed, behind the scenes, Facebook’s algorithm has examined all of the content recently posted by that user’s friends, by members of groups that user belongs to, or on pages that the user has liked.²³³ The algorithm has assigned a score to each of these posts.²³⁴ It then prioritizes those items with the highest score, buoying them to the top of the feed.²³⁵

Thus, a formula rather than a journalist decides which news the reader has the opportunity to read and, by its placement in the news feed, how likely it is that the user will actually read it.²³⁶ Platforms do not share information about how their algorithms function—

²²⁶ See *America’s Shifting Statehouse Press: Can New Players Compensate for Lost Legacy Reporters?*, PEW RESEARCH CENTER 13 (July 10, 2014), http://assets.pewresearch.org/wp-content/uploads/sites/13/2014/07/Americas-Shifting-Statehouse-Press_full_report.pdf. [hereinafter *America’s Shifting Statehouse Press*].

²²⁷ See Paul Burka, *The Capitol Press Corpse*, TEXAS MONTHLY (January 2008), <https://www.texasmonthly.com/politics/the-capitol-press-corpse/>; Paul Burka, TEXAS MONTHLY, <https://www.texasmonthly.com/author/paul-burka/>.

²²⁸ Anna Marum, *Oregon’s Dwindling Statehouse Reporters Are “Treading Water,”* COLUM. JOURNALISM REV. (June 13, 2018), https://www.cjr.org/united_states_project/oregon-capitol-press-corps.php.

²²⁹ *Id.*

²³⁰ *America’s Shifting Statehouse Press*, *supra* note 226 at 7.

²³¹ See Josh Greenman, TWITTER, <https://twitter.com/joshgreenman/status/1021373539084103680>.

²³² *Id.*

²³³ See Will Oremus, *Who Controls Your Facebook Feed*, SLATE (Jan. 3, 2016), http://www.slate.com/articles/technology/cover_story/2016/01/how_facebook_s_news_feed_algorithm_works.html (describing algorithms as “a set of concrete instructions by which a given problem may be solved”).

²³⁴ *See id.*

²³⁵ *See id.*

²³⁶ Bell & Owen, *supra* note 16 (“While publishers can freely post to Facebook, it is the algorithm that determines what reaches readers.”)

except in the broadest of sketches—meaning that the platforms’ editorial process is a black box.²³⁷ Yet, as detailed, platform norms and goals, in many instances, differ vastly from those of journalists.

Platforms are also exercising editorial discretion by dictating what form news takes.²³⁸ For example, in the last several years, Facebook has pushed news organizations to produce news in a video format. In 2016, to promote its Facebook Live feature, Facebook paid out millions to news organizations including CNN, the *New York Times*, Vox, and Mashable, to create video.²³⁹ Again in 2018, to promote another new video product, Facebook Watch, the platform solicited news video “tailored to succeed in a social environment.”²⁴⁰

And even without Facebook’s explicit push, many news organizations began emphasizing video believing that algorithms preferred it.²⁴¹ The movement among publishers was so big that it was labeled the “pivot to video.”²⁴² As it turns out, the pivot was a mistake. Viewers have not been as keen as Facebook predicted to watch their news online, and video has not proved lucrative for many news organizations.²⁴³

But even if the effort had succeeded, that would not necessarily put news organizations at ease—at least not for any length of time. Platforms can change priorities without warning. Often news organizations only become aware of such a change when traffic to their sites inexplicably spikes or plummets. They then scramble to assess the benefits or losses. The uncertainty is exacerbated because many large news organizations post to an array of platforms. For example, during a single week in 2017, CNN used eleven different platforms to distribute its journalism.²⁴⁴ Journalists are in a constant state of uncertainty about how a key part of their distribution network will function. “Every publisher knows that, at best, they are sharecroppers on Facebook’s massive industrial farm,” according to *Wired* editor-in-chief Nicholas Thompson and Fred Vogelstein.²⁴⁵ “And journalists know that the man who owns the farm has the leverage.”²⁴⁶

Again, none of this is to say that the news industry is blameless.²⁴⁷ The press has now struggled for decades to come up with a viable online business model for journalism. These

²³⁷ See generally PASQUALE, *supra* note 20 (describing the black-box nature of algorithms).

²³⁸ See Bell & Owen, *supra* note 16 (noting that platforms dictate “what format and type of journalism flourishes”).

²³⁹ See Mathew Ingram, *Facebook is Paying Millions to News Outlets and Celebrities to Create Live Video*, FORTUNE (June 21, 2016), <http://fortune.com/2016/06/21/facebook-paying-live-video/>.

²⁴⁰ See Sara Fisher, *Scoop: Facebook Aiming to Launch News for Watch This Summer*, AXIOS (March 13, 2018), <https://www.axios.com/facebook-aiming-to-launch-news-for-watch-this-summer-1520911507-46955a82-61d6-4295-a978-16508421720f.html>.

²⁴¹ See Heidi N. Moore, *The Secret Cost of Pivoting to Video*, COLUM. JOURNALISM REV. (Sept. 26, 2017), https://www.cjr.org/business_of_news/pivot-to-video.php; Zach Schonfeld, *MTV News—and Other Sites—Are Frantically Pivoting to Video. It Won’t Work*, NEWSWEEK (June 30, 2017), <http://www.newsweek.com/mtv-news-video-vocativ-media-ads-pivot-630223>.

²⁴² See Moore, *The Secret Cost of Pivoting to Video*, *supra* note 241.

²⁴³ See Susie Banikarim, *R.I.P. Pivot to Video (2017-2017)*, NIEMANLAB: PREDICTIONS FOR JOURNALISM 2018, <http://www.niemanlab.org/2017/12/r-i-p-pivot-to-video-2017-2017/>.

²⁴⁴ See Bell & Owen, *supra* note 16.

²⁴⁵ Thompson & Vogelstein, *supra* note 137; Open Markets, *America’s Free Press and Monopoly: The Historical Role of Competition Policy in Protecting Independent Journalism in America*, OPEN MARKETS INSTITUTE (June 11, 2018), <https://openmarketsinstitute.org/wp-content/uploads/2018/06/Americas-Free-Press-and-Monopoly-PDF-1.pdf> (quoting Thompson & Vogelstein) [hereinafter *America’s Free Press and Monopoly*].

²⁴⁶ Thompson & Vogelstein, *supra* note 137.

²⁴⁷ See Joshua Benton, *Facebook’s Message to Media: We Are Not Interested in Talking to You About Your Traffic...That is the Old World and There’s No Going Back*, NIEMANLAB (Aug. 13, 2018),

efforts have often been clumsy and misguided. Very few legacy news organizations have figured out how to profit online—the *New York Times* and the *Washington Post* are among the few. (The latter had the benefit of being purchased by a billionaire tech executive.) Yet, at times, it also feels as if the platforms are holding the press’s collective head underwater. Platforms have profited handsomely while paying little to nothing for content generated by journalists. Their executives have spoken in platitudes about bringing the world together while ignoring the damage wrought by their innovation.

2. BOTTOM-UP INFLUENCES ON EDITORIAL DISCRETION

In terms of indirect influences, platforms shape everything from newsroom organizational charts to journalists’ word choices.²⁴⁸ The *New York Times*, for example, employs social media editors to eye which Facebook or Twitter posts are being shared so that they can recycle the language that they use.²⁴⁹ They also have “growth editors” across various news desks who “spray[] social platforms with *Times* links.”²⁵⁰ The *Wall Street Journal* has a position entitled, “Executive Emerging Media Editor, Audience Development.”²⁵¹ News organizations also have employees who serve as diplomats of a sort to the platforms. For example, some British publications have created the position of Chief Customer Officer (or “CCO”), whose role often includes negotiating with Google and Facebook.²⁵² These newsroom employees can sway coverage. If one of them does not think a story will perform on platforms, it might not be assigned at all.²⁵³

Perhaps even more impactful on editorial discretion than these employees are the analytics that tell journalists where, when, and how their readers are consuming news.²⁵⁴ Products like Chartbeat, CrowdTangle, and NewsWhip use analytics to tell journalists how their

http://www.niemanlab.org/2018/08/facebooks-message-to-media-we-are-not-interested-in-talking-to-you-about-your-traffic-that-is-the-old-world-and-there-is-no-going-back/?utm_source=Daily+Lab+email+list&utm_campaign=b482893d06-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-b482893d06-396214909 (“[T]he responsibility for building a sustainable model for news is on us, not on anyone in Menlo Park, Mountain View, Cupertino, Redmond, or Seattle.”).

²⁴⁸ Bell & Owen, *supra* note 16 (“News organization structures, workflows, and resource allocation are increasingly dictated by platforms.”)

²⁴⁹ See Shan Wang, *The New York Times Is Trying to Narrow the Distance Between Reporters and Analytics Data*, NIEMANLAB (July 25, 2016), <http://www.niemanlab.org/2016/07/the-new-york-times-is-trying-to-narrow-the-distance-between-reporters-and-analytics-data/>.

²⁵⁰ Bell & Owen, *supra* note 16.

²⁵¹ See *id.*

²⁵² See Lucinda Southern, *The Pivot to Paid Heralds the Rise of the Chief Customer Officers at Publishers*, DIGIDAY (Nov. 21, 2017), https://digiday.com/media/pivot-paid-heralds-rise-chief-customer-officer-publishers/?utm_source=CJR+Daily+News&utm_campaign=dfaa93e26b-EMAIL_CAMPAIGN_2017_06_05&utm_medium=email&utm_term=0_9c93f57676-dfaa93e26b-174420317. For its part, Google has a “senior director of news and social products” and Facebook has a “head of global news partnerships.” See Richard Gringas, <http://www.richardgringras.com/bio.html>; Erin Corbett, *Facebook is Partnering with Media Organizations to Launch Original News Programs*, FORTUNE (June 6, 2018), <http://fortune.com/2018/06/06/facebook-cnn-abc-media-partnerships/>.

²⁵³ Bell & Owen, *supra* note 16 (“One publisher said that if their audience team doesn’t think a story will perform, it may not be assigned.”).

²⁵⁴ See Petre, *supra* note 216 (“One way to win the fierce competition for dwindling ad dollars was to enlarge a publication’s audience, and metrics developed a reputation as a crucial tool for doing just that.”).

work is succeeding (or not) on platforms.²⁵⁵ Some newsrooms project analytics onto TV screens for all reporters to see.²⁵⁶

Although little research exists measuring the impact of analytics on newsrooms, what there is confirms that journalists use data to try to maximize audience.²⁵⁷ A study by journalism scholars at University of Texas, University of Minnesota, and New York University found that journalists are engaged in “an often subtle but sometimes deliberate pursuit of topics and terminology most likely to attract traffic via search algorithms and viral social channels.”²⁵⁸ What has resulted, they said, is “a culture of the click.”²⁵⁹

To be sure, it would be inaccurate and simplistic to say that reacting to the audience is bad. Being attentive to the audience—along with editorial values like accuracy and proportionality—is vital. Given that journalists are not representative of Americans generally (they are more educated, more urban, and less diverse), it is dangerous for journalists to assume that what they think the public needs to know *is* definitively what the public needs to know.²⁶⁰

But the pressure on journalists to amass audience and the tools that they have to measure whether they are successfully doing so are unprecedented. Even journalists at established institutions are not immune. Franklin Foer wrote that during a time when he served as the editor of *The New Republic*, Chartbeat was his “master.”²⁶¹ He said he would peak at the site and its dashboard interface while he was brushing his teeth, editing stories, and even standing at the urinal.²⁶² Other journalists have called analytics “sanity ruining” and like “crack cocaine.”²⁶³ Asked whether Chartbeat is addictive because it “speaks to an editorial mindset,” one journalist replied: “I wish I could say yes, but no ... you are constantly worrying about whether you’re getting enough traffic or not. So your eyes are glued to Chartbeat because your life depends on it.”²⁶⁴ Some news organizations including *Forbes* and *The Oregonian* have, in fact, linked reporters’ pay to audience engagement metrics.²⁶⁵ One reporter at the *Des Moines Register* said of watching the traffic to his web posts, “It absolutely changes what I write.”²⁶⁶

²⁵⁵ See FOER, *supra* note 24, at 144-47.

²⁵⁶ See Petre, *supra* note 216 (indicating that the *Washington Post* has screens in the newsroom that project analytics).

²⁵⁷ See Petre, *supra* note 216 (“Audience metrics have become ubiquitous in news organizations, but there has been little empirical research on how the data is produced or how it affects newsroom culture and journalists’ daily work.”).

²⁵⁸ See Angela M. Lee et al., *Audience Clicks and News Placement: A Study of Time-Lagged Influence in Online Journalism*, COMMUNICATION RESEARCH 41(4) 510 (2014). “The more editors know about their audience metrics, the more they become ‘sensitive to the implications of what their audience [is] reading and why,’ altogether showing that ‘the process of ‘deciding what’s news’ is increasingly influenced by quantitative measurement techniques.” *Id.* at 512.

²⁵⁹ *Id.* at 510.

²⁶⁰ See Betsy O’Donovan & Melody Kramer, *Skepticism and Narcissism*, NIEMANLAB: PREDICTIONS FOR JOURNALISM 2018, <http://www.niemanlab.org/2017/12/skepticism-and-narcissism/>.

²⁶¹ See FOER, *supra* note 24, at 144.

²⁶² See *id.*

²⁶³ See Petre, *supra* note 216.

²⁶⁴ *Id.*

²⁶⁵ See Lewis DVorkin, *Insides Forbes: The Coming Era of the Super Journalist*, FORBES (Jan. 12, 2015), <https://www.forbes.com/sites/lewisdvorkin/2015/01/12/inside-forbes-the-coming-era-of-the-super-journalist/#21ee7e0526ee>; David Carr, *Risks Abound as Reporters Play in Traffic*, N.Y. TIMES (Mar. 23, 2014), <https://www.nytimes.com/2014/03/24/business/media/risks-abound-as-reporters-play-in-traffic.html>; Petre, *supra* note 216 (discussing “pay-for-performance schemes”). Similarly, the blogging platform Medium pays certain writers based on how many “claps” the person’s posts have received. See Jacob Kastrenakes, *Medium Will Now Pay*

A movement is afoot among news organizations to thoughtfully incorporate analytics.²⁶⁷ Such an approach stems from a recognition that reader input is vital to both mission and economics but also should not supplant editorial judgment. In order for analytics to improve journalism and rejigger the press’s economic model, news organizations are beginning to recognize that relying on a single data point—the page view—cannot be the sum total of their focus. As an internal *New York Times* report on the company’s future stated, “The newsroom needs a clearer understanding that page views, while a meaningful yardstick, do not equal success ... The most successful and valuable stories are often not those that receive the largest number of pageviews, despite widespread newsroom assumptions.”²⁶⁸

A difficulty with implementing any nuanced analytics strategy, however, is that page views are the dominant metric for platforms. If platforms remain primarily concerned with how many hits any piece of content is getting, news organizations that rely on platforms as a distribution network will not be able to escape this metric.

And so, prominent journalists remain concerned about the pull of platforms. They are warning that algorithms are an existential threat to editorial discretion—the lynchpin of a free press. As Pulitzer Prize-winning technology reporter Julia Angwin said at a 2018 conference on the power of platforms over the press: “Essentially journalism has become a game of how to game the algorithm as opposed to what is the news.”²⁶⁹ That is, platforms and their algorithms are not just conduits. They are becoming the ultimate arbiter of newsworthiness.

III. LOOKING BEYOND THE FIRST AMENDMENT TO PROTECT WATCHDOG JOURNALISM

For decades, the First Amendment has offered real and significant protection to the Fourth Estate.²⁷⁰ It has prevented prior restraints.²⁷¹ It has given the press “breathing room” by barring the government from meddling with decisions about newsworthiness.²⁷² It has also

Writers Based on How Many Claps They Get, THE VERGE (Aug. 22, 2017),

<https://www.theverge.com/2017/8/22/16180150/medium-paywall-articles-claps-author-payments>.

²⁶⁶ JEFFREY C. ALEXANDER ET AL., *THE CRISIS OF JOURNALISM RECONSIDERED: DEMOCRATIC CULTURE, PROFESSIONAL CODES, DIGITAL FUTURE* 184 (2016) (concluding that analytics “don’t help enrich coverage” and that instead, “the data may in fact guide journalists to make decisions purely based on real-time, immediate audience reaction. This can result in stories that have no lasting value to readers, and instead take on click-bait headlines”).

²⁶⁷ See generally, Tom Rosenstiel, *Solving Journalism’s Hidden Problem: Terrible Analytics*, BROOKINGS INSTITUTION, Feb. 2016, <https://www.brookings.edu/wp-content/uploads/2016/07/Solving-journalisms-hidden-problem.pdf> (arguing for utilizing a broader array of metrics than page views as a means of pursuing the journalistic mission).

²⁶⁸ See *Journalism that Stands Apart: The Report of the 2020 Group*, N.Y. TIMES (January 2017), <https://www.nytimes.com/projects/2020-report/index.html>.

²⁶⁹ Open Markets Institute, *Panel 1 Discussion from the Open Markets Institute Conference, Breaking the News: Free Speech & Democracy in the Age of Platform Monopoly*, YOUTUBE (June 14, 2018), <https://www.youtube.com/watch?v=40HXpi0IzDk&t=3080s> (21:15) [hereinafter *Breaking the News*].

²⁷⁰ See Geoffrey R. Stone, *Reflections on Whether the First Amendment is Obsolete*, <https://knightcolumbia.org/content/reflections-whether-first-amendment-obsolete> (“[T]he First Amendment, as interpreted and applied by the Supreme Court, has been extraordinarily successful at constraining the primary evil at which the First Amendment was directed—government censorship of unwelcome ideas and criticism.”).

²⁷¹ *Near v. Minnesota*, 283 U.S. 697 (1931).

²⁷² See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 570 (1977).

shielded it from liability when it makes mistakes in reporting on public figures²⁷³ and topics of legitimate public interest.²⁷⁴

The First Amendment, too, offers protection to the Fourth Estate that extends beyond doctrine.²⁷⁵ It has sweeping cultural significance.²⁷⁶ The luster of the First Amendment and the promise of its protections likely emboldens the press in its everyday work. In an era when the press is under sustained attack from the Trump Administration, defenders of the press have regularly invoked the First Amendment and the principle of a free press. The First Amendment is essential.

Neither First Amendment doctrine nor cultural coattails, however, can incentivize and shield the press's watchdog role in a Networked Press environment in the same way that they did when the press was a Fourth Estate. The First Amendment's protection is bounded in two ways—one structural and one interpretive. Structurally, the state action doctrine prevents the First Amendment from being used as a sword against platforms.²⁷⁷ Platforms may be sovereign-like (scholars have referred to them as “Facebookistan” and “Googledom”²⁷⁸ and collectively as the “New Governors”²⁷⁹), but when courts have been confronted with the question of whether or not technology companies are state actors, they have found that they are not.²⁸⁰ It is unlikely that courts will change tack soon.²⁸¹

In addition, from an interpretive standpoint, it is not clear that the Supreme Court embraces a theory of the First Amendment that would readily protect investigative journalists or watchdog journalism in a Networked Press era. It is true that black-letter doctrine holds that press speakers are no different than other speakers. That means that the First Amendment should protect individual journalists from government interference. But this is a narrow reading of the case law. As described in Part I, in the key cases in which the Supreme Court bestowed the benefits of the First Amendment on journalists, it did so while speaking glowingly and deferentially of the institution to which journalists belong—the press. Without a recognizable

²⁷³ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (requiring that to constitute defamation of a public official, a statement must be made with “actual malice”).

²⁷⁴ Many state torts for invasion of privacy have exemptions for newsworthiness. These exemptions are designed to ensure the torts do not run afoul of the First Amendment. See, e.g., Fla. Stat. § 540.08 (2015) (including exemption for matters of “legitimate public interest”).

²⁷⁵ See Lee C. Bollinger, *Can the First Amendment Save Us?*, COLUM. JOURNALISM REV. (Fall 2017), https://www.cjr.org/special_report/can-the-first-amendment-save-us.php (“Though the First Amendment applies only to state action, it has become a touchstone for broader society, influencing norms far beyond its legal reach.”).

²⁷⁶ See Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J. FORUM 337, 338 (2017), <https://www.yalelawjournal.org/forum/real-talk-about-fake-news> (“As colloquially invoked, the ‘First Amendment’ channels a set of commonly held values that are foundational to our social practices around free speech.”).

²⁷⁷ See generally *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (discussing the state action requirement for a First Amendment claim and indicating that state action only exists where there “is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”).

²⁷⁸ See Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807 (2012); REBECCA MACKINNON, CONSENT OF THE NETWORKED 149 (2012) (referring to “Facebookistan” and “Googledom”).

²⁷⁹ See Klonick, *supra* note 31, at 1603.

²⁸⁰ See *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 445 (E.D. Pa. 1996); Wu, *supra* note 31 (arguing that finding platforms to state actors would have negative consequences because it would prevent them from combatting “trolling, flooding, abuse, and myriad other unpleasantries” online).

²⁸¹ See Klonick, *supra* note 31, at 1658 (arguing that it “is both unlikely and normatively undesirable” that courts would find platforms to be state actors for purposes of imposing First Amendment obligations on them).

and robust Fourth Estate, it is not clear that the Court would shield individual journalists in the same way it did in the cases from the press's golden era. That the Court has not heard a case in more than a decade in which journalists sought to vindicate rights is a cause for concern.²⁸² And so, although the First Amendment is an indispensable tool in protecting the press, it is not enough.

Before examining whether other sources of law should be used to reinvigorate the press's watchdog role, it is worth considering whether law is even the proper tool. Some might argue that the essence of a free press demands just that: freedom. Perhaps the most famous First Amendment lawyer alive, Floyd Abrams, made a version of this argument in 1979 when he wrote that, "A press that continually applies to the courts for vindication of its right to gather information cannot credibly be the same press that tells the same courts that what the press prints and why it prints it are not matters that courts may even consider."²⁸³ In other words, the press undermines itself when it champions its independence on the one hand and asks government to grant that same independence on the other.

One could also argue that legal action is unnecessary because other means could address platforms' tethering of the press. For example, the press could try to isolate itself. It could maintain or create its own distribution networks. It could shift its funding structure so that far more of its income is coming from subscriptions and less from advertising.²⁸⁴ Public pressure could be brought to bear more heavily on platforms forcing them to acknowledge the ways in which they function as the twenty-first century press and to take on some of the associated responsibility.²⁸⁵

In fact, all of these private solutions are happening in some form. And yet, the tethering continues and may be worsening. These platforms are simply so powerful and have so little competition that their incentives for any change that is not profitable are limited.²⁸⁶ Leaving this to the market or to public shaming have not proven, at least to date, to be solutions.

Time itself could also be an antidote. Wu has argued that "attention merchants"—a label he applies to the advertising industry, platforms, and others—have historically proved fleeting. Eventually, adherents begin to feel manipulated and resentful, and the merchants lose their grip on power. Signs are emerging that this may be happening with platforms.²⁸⁷ Criticism of

²⁸² See RonNell Andersen Jones and Sonja R. West, *Don't Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017) ("The Supreme Court has not decided a major press case in more than a decade, in part because it has declined to do so, and in part because media companies, inferring the court's relative lack of interest, have decided not to waste their resources pressing cases.")

²⁸³ See Floyd Abrams, *The Press is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 591 (1979); Stephen I. Vladeck, *Democratic Competence, Constitutional Disorder, and Freedom of the Press*, 87 WASH. L. REV. 529, 548 (2012) (discussing Abrams's view on freedom as a "variation" on Justice Potter Stewart's who said that "autonomy cuts both ways").

²⁸⁴ See L. Gordon Crovitz, *Serving Readers Over Advertisers*, NIEMAN LAB: PREDICTIONS FOR JOURNALISM 2018, <http://www.niemanlab.org/2017/12/serving-readers-over-advertisers/> (noting that "[f]or the first time in decades, several large news publishers now generate more revenue from readers than advertisers).

²⁸⁵ At least one prominent news executive has suggested this might be a dangerous idea. See *Fight for the Future: New York Times CEO Mark Thompson's "Breaking the News" Keynote*, DIGITAL CONTENT NEXT (June 12, 2018), <https://digitalcontentnext.org/blog/2018/06/12/fight-for-the-future-new-york-times-ceo-mark-thompsons-breaking-the-news-keynote/> (expressing concern about Facebook "set[ting] itself up as the digital world's editor-in-chief") [hereinafter *Fight for the Future*].

²⁸⁶ See *Breaking the News* at 50:40.

²⁸⁷ See John Naughton, *The Tide is Starting to Turn Against the World's Digital Giants*, THE GUARDIAN (Sept. 24, 2017), <https://www.theguardian.com/commentisfree/2017/sep/24/the-tide-is-starting-to-turn-against-tech-giants-facebook-google-european-commission>.

Facebook in particular has increased dramatically in the wake of the 2016 election and the revelation about the scope of Facebook’s sharing of users’ personal data. The downfall of Facebook or any other platform, however, seems far from imminent. The companies have burrowed into users’ lives and routines in ways that are difficult to curb much less reverse. And even if these platforms were to fail in key ways, other entities—also driven by profit and scale and speed—would gladly take their place.

But biding time is not a satisfactory option when it comes to a free press. If the press is a “bulwark of democracy,” and if, as William Blackstone said, “[t]he liberty of the press is indeed essential to the nature of a free state,” then it seems right that law should have some role in preserving and protecting it.²⁸⁸ And the Supreme Court has written that “[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom.”²⁸⁹ Moreover, in an era when the press is under attack from within the government, we should be wary of relying too heavily on established norms and conventions—as opposed to law—for press protection.²⁹⁰

To be sure, any legal responses to platform pressure on the press must be carefully calibrated. We need to be vigilant about maintaining sufficient press autonomy. With these concerns in mind, the remainder of this section provides an overview of legal options that could foster the press’s watchdog role, none of them mutually exclusive, that fall into two general types. The first type includes top-down options: law that tries to loosen the tether of platforms on journalists. The second type includes bottom-up options: law aimed at incentivizing watchdog reporting.

A. ALIGNING PLATFORM & JOURNALISTIC NORMS: LOOSENING PLATFORMS’ TETHER

The top-down suggestions all involve first gaining a better understanding of how platforms manipulate content and users. They then seek to incentivize platforms to adopt journalistic methods and processes. They focus on transparency, sharing of data, and hiring of journalists. Thus, they harken back to Part II and aim to better align values and goals within the Networked Press—to instill in it some of the institutional nature of the Fourth Estate.

1. ALGORITHMIC TRANSPARENCY REGARDING NEWS CONTENT

No matter how vehemently they deny it, platforms are playing press roles. Manipulating the algorithms that surface content is an editorial act. The choices behind the algorithms help to determine what users consume. Algorithms are intended to optimize the likelihood that certain content will be viewed. If we want platforms to prioritize democracy-enhancing content like investigative journalism, we need to understand platforms’ motivations as well as how those motivations are put into action through engineering choices. This article has attempted to

²⁸⁸ *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

²⁸⁹ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

²⁹⁰ The Trump Administration has selectively barred reporters and revoked press credentials seemingly in retaliation for unfavorable coverage. See David Folkenflik, *Lashing Out Against Critical Reports, White House Bars Outlets From Briefing*, NPR (Feb. 24, 2017), <https://www.npr.org/2017/02/24/517112555/lashing-out-against-critical-reports-white-house-bars-outlets-from-briefing>; Brian Stelter and David Shortell, *CNN Asks for Emergency Hearing After Trump Threatens to Revoke Acosta’s Press Pass Again*, CNN (Nov. 19, 2018), <https://www.cnn.com/2018/11/19/media/cnn-acosta-emergency-hearing/index.html>.

illuminate and categorize those motivations. Other scholars, notably law and technology scholar Kate Klonick, have described the way in which Facebook makes decisions about what speech is and is not allowed on its platform.²⁹¹

What is needed to supplement this work is an understanding of how various platforms prioritize (or deprioritize) news in particular. Of critical importance is understanding whether and how content is tagged as newsworthy or of legitimate public concern. We need this information to understand what ends up at the top or the bottom of a news feed; what is displayed on a single occasion and what is recycled; what is sprayed to many users and what is limited to a few. In essence: what types of news are platforms privileging or marginalizing and how?²⁹²

Indications are that the revelations might be concerning. In a recent article on how Facebook determines whether to censor posts, Klonick described how Facebook employees decide whether someone is a public figure: They search to see if that person's name appears on Google News. We should not assume that the engineers manipulating platforms' algorithms are any more sophisticated when it comes to imbuing their work with journalistic values or democratic ideals.

Many have called for algorithmic transparency and to impose that transparency by law, if necessary. *New York Times* CEO Mark Thompson said transparency would be best if it were voluntary, "but even if it requires regulation or legislation, it must be done—and done promptly."²⁹³ Polling suggests the idea has public support.²⁹⁴ A 2018 study by Gallup and the Knight Foundation found that 88 percent of those surveyed believed "internet companies" should "disclose the methods they use to determine what news items show in their news feeds."²⁹⁵

Knowing how algorithms manipulate news would allow press advocates to challenge those aspects of the algorithm that disadvantage watchdog reporting. It could also allow journalists to work more collaboratively with platforms to provide investigative reporting to the public in ways that are more likely to "scale" (either because of format, placement, or some other factor) and have wider impact. Moreover, forcing platforms to be more transparent—especially if it is with the aim of bringing investigative reporting to broader audiences—might incentivize platforms to make algorithms friendlier to this brand of journalism.

²⁹¹ See generally Klonick, *supra* note 31 (describing a variety of rules and processes that platforms use to govern speech); Kate Klonick, *Facebook v. Sullivan*, KNIGHT FIRST AMENDMENT INSTITUTE (Oct. 18, 2018), <https://knightcolumbia.org/content/facebook-v-sullivan>.

²⁹² This proposal is a more news-specific version of one made by Jameel Jaffer of the Knight First Amendment Institute. He called on platforms to be more transparent generally regarding "how they're shaping the speech they're not taking down." See Jameel Jaffer, *Digital Journalism and the New Public Square – Or' Emet Lecture*, Nov. 13, 2018, <https://knightcolumbia.org/news/digital-journalism-and-new-public-square-or-emet-lecture>.

²⁹³ See *Fight for the Future*, *supra* note 285; *Algorithmic Angst: News Corp Chief Executive Robert Thomson's "Breaking the News" Keynote, Digital Content Next*, DIGITAL CONTENT NEXT (June 12, 2018), <https://digitalcontentnext.org/blog/2018/06/12/algorithmic-angst-news-corp-chief-executive-robert-thomsons-breaking-the-news-keynote/> (calling for an "Algorithm Review Board").

²⁹⁴ See *Fight for the Future*, *supra* note 285; CODE DEPENDENT: PROS AND CONS OF THE ALGORITHM AGE, PEW RESEARCH CENTER 74-83 (Feb. 8, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/14/2017/02/08181534/PI_2017.02.08_Algorithms_FINAL.pdf (cataloguing calls for algorithmic transparency).

²⁹⁵ See *Major Internet Companies as News Editors*, https://kf-site-production.s3.amazonaws.com/publications/pdfs/000/000/260/original/KnightFoundation_PlatformsAsEditors_080818.pdf.

Of course, platforms are highly resistant to transparency and justify their secrecy by claiming their algorithms are proprietary. Yet, proprietary interest should give way to the public interest in understanding how platforms distribute democracy-enhancing investigative reporting. This is especially true given, as the Supreme Court recently said, social media websites are, for many, “the principle sources for knowing current events” and “speaking and listening in the modern public square.”²⁹⁶ Moreover, there is precedent, albeit in a different context, for piercing this shield to reveal information in the public interest. In November 2018, in response to a lawsuit by investigative journalists under the Freedom of Information Act, the Labor Department indicated it would share statistics about the diversity of workforces at numerous Silicon Valley companies.²⁹⁷ The Department had initially argued that these statistics were trade secrets. Thus, proprietary concerns can give way to public interest.

2. REQUIRE PLATFORMS TO SHARE DATA WITH JOURNALISTS

Platforms amass vast troves of data. User information is the capital of platforms. As the Cambridge Analytica story revealed, Facebook has long profited by sharing user data with numerous partners. If platforms are willing to share data for profit, they should be required to share data for public benefit. This could be done by making certain data available to investigative journalists.

Platforms could do this both affirmatively and by request. Affirmatively, platforms could be required to develop public interest APIs, which are portals that would allow the public to access information on the platforms while protecting anonymity, trade secrets, and intellectual property.²⁹⁸ Some have suggested a public interest API might help to combat misinformation, false advertising, and election manipulation.²⁹⁹ It has also been suggested that it could help the public monitor how platforms are censoring content.³⁰⁰ Such APIs could supply extremely useful data to journalists.

In addition, however, journalists should be able to readily obtain data from platforms without fear of legal action. As it stands, journalists use “scraping”—an increasingly popular and powerful automated process for extracting data from websites.³⁰¹ For example, scraping resulted in an *Atlanta Journal-Constitution* story about sex abuse by doctors that was a finalist for the 2017 Pulitzer Prize for national reporting.³⁰²

Yet, currently, scraping opens up journalists to various forms of civil and criminal liability.³⁰³ For example, the Computer Fraud and Abuse Act (“CFAA”) bars knowing access to a “protected computer without authorization” and thereby obtaining “anything of value.”³⁰⁴ No

²⁹⁶ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

²⁹⁷ See Will Evans and Sinduja Rangarajan, *We Got the Government to Reverse Its Longtime Policy to Get Silicon Valley Diversity Data*, REVEAL NEWS, Nov. 15, 2018, <https://www.revealnews.org/blog/we-got-the-government-to-reverse-its-longtime-policy-to-get-silicon-valley-diversity-data/>.

²⁹⁸ See Wael Ghonim and Jake Rashbass, *It’s Time to End the Secrecy and Opacity of Social Media*, WASH. POST (Oct. 31, 2017), https://www.washingtonpost.com/news/democracy-post/wp/2017/10/31/its-time-to-end-the-secrecy-and-opacity-of-social-media/?utm_term=.a7116399bd25.

²⁹⁹ See *id.*

³⁰⁰ See *id.*

³⁰¹ D. Victoria Baranetsky, *Data Journalism and the Law*, Sept. 19, 2018, https://www.cjr.org/tow_center_reports/data-journalism-and-the-law.php/.

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See 18 U.S.C. § 1030(a)(4).

journalist has been prosecuted under the statute, but journalistic sources have.³⁰⁵ Some circuits read the statute broadly enough that violating platforms’ terms of service could trigger liability.³⁰⁶ Although ongoing legal challenges to the CFAA might lead to protection for scraping by journalists (and others), consideration should also be given to amending the CFAA to protect journalists from obtaining data in this way.³⁰⁷ Again, precedent for this exists, albeit under European law. The General Data Protection Regulation—the European Union’s sweeping data privacy law—notes that member states “shall provide for exemptions or derogations” for uses of data “carried out for journalistic purposes.”³⁰⁸ The United Kingdom is among the member states that have enacted such protections.³⁰⁹

3. INCENTIVIZE PLATFORMS TO OWN THE PRESS LABEL

Law could also do more to require platforms to own up to the press label. Platforms could be incentivized to hire journalists and could be monitored by journalists in the hope of starting to collapse the dichotomies that were described in Part II. Perhaps journalistic values could start to infiltrate platform ones.

Facebook has employees who censor content by employing elaborate and shifting community standards. Journalists could help make sounder decisions when it comes to manipulating Facebook’s News Feed algorithm. Jonathan Albright, the director of the Digital Forensics Initiative at Columbia’s Tow Center for Digital Journalism, found that even a handful of people can have a great impact on the quality of information on the platform.³¹⁰ He suggested, for example, that if Google had had a “Platform Editor,” it might have seriously stanching the flow of disinformation in the wake of the 2017 Las Vegas shooting. Albright said, “I do know that one person could have stopped that. And I do know that a group of people working together – even if it involves deliberation, even if they don’t agree on one specific thing—can often solve problems that appear or are starting to surface because of automation.”³¹¹

Law could incentivize such hiring through a Work Opportunity Tax Credit. This tax credit has been used to combat unemployment and incentivize companies to hire from groups that face barriers to employment such as veterans and previously incarcerated individuals.³¹² In the past decade journalists have lost jobs at alarming rates while platforms have profited from investigative reporting and other journalist-created news. Promoting the jobs of journalists focused on core First Amendment speech could be a sound use of the credit.

4. COUNTERACTING THE PLATFORM MONOPOLY

Concern about concentrated power over the press has a long history. In 1947, the Commission of Freedom of the Press, also known as the Hutchins Commission, concluded that

³⁰⁵ See Baranetsky, *supra* note 301.

³⁰⁶ See *id.*

³⁰⁷ See *id.*; Jaffer, *supra* note 292.

³⁰⁸ See European Parliament and Council Regulation 2016/679, General Data Protection Regulation, art. 85.

³⁰⁹ Jaffer, *supra* note 292.

³¹⁰ Laura Hazard Owen, *News in a Disintegrating Reality: Tow’s Jonathan Albright On What to Do As Things Crash Down Around Us*, NIEMANLAB (Feb. 28, 2018), <http://www.niemanlab.org/2018/02/news-in-a-disintegrating-reality-tows-jonathan-albright-on-what-to-do-as-things-crash-around-us/>.

³¹¹ *Id.*

³¹² See 26 U.S.C. § 51.

freedom of the press was in grave danger because few had access to the press, and those few did not always wield their power ethically.³¹³ In the 1990s, pointing to a steep rise in the number of cities with a single newspaper, First Amendment scholar Lee C. Bollinger noted that “[m]any commentators commonly believe, in fact, that the problem is worse now than in 1947.”³¹⁴

Now, twenty-five years later, the concern is arguably even more pressing.³¹⁵ As noted, the profits of Facebook or Google alone exceed that of the entire newspaper industry.³¹⁶ Platforms are behemoths suctioning up advertising dollars that once funded journalism. Precedent exists for using anti-monopoly law to ensure that news is not controlled by a select few. For example, in 1945, in *Associated Press v. United States*,³¹⁷ the Supreme Court held that the Associated Press membership requirements violated the Sherman Antitrust Act by preventing non-members from getting access to news created by members.³¹⁸ The Court noted that the First Amendment “rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.”³¹⁹ It added: “Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not.”³²⁰

Today, even advocacy groups are not clear, however, about how best to use antitrust law to protect the news business.³²¹ And there is no sign that the Department of Justice has any interest in breaking up platforms. In a June 2018 speech, Makan Delrahim, the assistant attorney general for antitrust, argued that it would be misguided for enforcers to “broaden the consumer welfare lens to think about effects on democracy or expression.”³²² More thinking needs to be done about how best to create more robust competition in the Networked Press environment, and advocates may need to wait for a new administration to bring ideas to fruition.

In the meantime, if antitrust law cannot be imposed on platforms, Congress should consider exempting news organizations from antitrust laws so that they might band together in an attempt to exert pressure on platforms. For example, the Journalism Competition and Preservation Act of 2018 would create a temporary safe harbor from antitrust laws for publishers to collectively negotiate with platforms regarding the terms on which their content may be

³¹³ See Commission on Freedom of the Press, *A Free and Responsible Press* 1 (University of Chicago Press, 1947).

³¹⁴ See Lee C. Bollinger, *Why There Should Be An Independent Decennial Commission on the Press*, 1993 U. CHIC. L. FORUM 1, 9 (1993).

³¹⁵ See *America’s Free Press and Monopoly*, *supra* note 245 (describing the problem of “the concentration of power over reporters and news publishers by giant ‘platform monopolists’”).

³¹⁶ See *supra* note 117.

³¹⁷ 326 U.S. 1 (1945).

³¹⁸ See *id.* at 21-23.

³¹⁹ *Id.* at 20.

³²⁰ *Id.*

³²¹ See *America’s Free Press and Monopoly*, *supra* note 245 (“At Open Markets Institute, we believe the American people have both a right and a duty to use government to ensure the independence and financial viability of both national and locally based news organizations. Although it is by no means clear yet what specific regulatory actions and policy decisions Americans should take today, at OMI we believe that a close study of American history will help citizens identify a clear set of goals as to the type of journalism we want and need, and the principles by which to achieve those goals”).

³²² See *Stand by Me: The Consumer Welfare Standard and the First Amendment*, Assistant Attorney General Makan Delrahim Delivers Remarks at the Open Market Institute Event: Antitrust and the News, UNITED STATES DEPARTMENT OF JUSTICE (June 12, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-open-markets-institute-event>.

used.³²³ The bill is being pushed by the News Media Alliance, which represents almost 2,000 news organizations.³²⁴ As the CEO of that organization, David Chavern, said in an op-ed, “The least the government can do is get out of the way and let publishers protect themselves and their readers.”³²⁵

B. BOLSTERING INVESTIGATIVE JOURNALISM

With regard to bottom-up legal possibilities, they could take several forms, including more significant government funding of the press, better enforcement (and some expansion) of laws around newsgathering, and broadening the Corporation for National and Community Service (which spearheads AmeriCorps) to include a journalism component.

1. ENHANCED PUBLIC FUNDING OF THE PRESS

Some journalists would dismiss public funding outright as anathema to their role as watchdog. Yet, more robust public funding needs to at least be on the menu of options. Watchdog reporting is the most expensive type of reporting, and part of the reason it flourished in the 1960s and 1970s was that news organizations were better able to afford it.³²⁶ As profits have been squeezed by platforms, investigative reporting is often the first thing newsrooms slash.³²⁷

Public funding of the press is not a new concept. The newspaper industry, in fact, is likely indebted to the American government for its very existence.³²⁸ The Postal Service Act of 1792 made mailing a newspaper cheaper than sending a letter (and free if it was being sent to another newspaper), and so newspapers could cheaply reach readers in far-flung locations.³²⁹ This gave the fledgling newspaper industry both a distribution network and a heap of content to choose from since newspapers freely borrowed content from one another.³³⁰ The government has provided the press a host of other financial incentives in the centuries since.³³¹

³²³ See Journalism Competition and Preservation Act of 2018, H.R. 5190, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5190/text>; Tiku, *supra* note 11.

³²⁴ See *Congressman David Cicilline to Introduce Anti-Trust Safe Harbor Bill for Newspaper Companies*, NEWS MEDIA ALLIANCE (Feb. 25, 2018), <https://www.newsmediaalliance.org/release-safe-harbor-bill/>; *About Us*, NEWS MEDIA ALLIANCE, <https://www.newsmediaalliance.org/about-us/>.

³²⁵ David Chavern, *Protect the News from Google and Facebook*, WALL ST. J. (Feb. 25, 2018) <https://www.wsj.com/articles/how-antitrust-undermines-press-freedom-1499638532>.

³²⁶ See KOVACH AND ROSENSTIEL, *supra* note 33, at 191 (“[I]t is no accident that the rise of investigative modern reporting in the 1960s coincided with the growing financial strength of news organizations in print and television.”).

³²⁷ See SEYMOUR M. HERSH, REPORTER (asking in the Introduction: “Where are the tough stories today about America’s continuing Special Forces operations and the never-ending political divide in the Middle East, Central America, and Africa? Abuses surely continue—war is always hell—but today’s newspapers and networks simply cannot afford to keep correspondents in the field”).

³²⁸ Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 688 (2007).

³²⁹ See ROBERT W. MCCHESENEY & JOHN NICHOLS, *THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN* 124-25 (2011); SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 213.

³³⁰ See SCHUDSON, *THE SOCIOLOGY OF NEWS*, *supra* note 103, at 213.

³³¹ See Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 216-17 (2016); C.W. Anderson et al., *Post-Industrial Journalism: Adapting to the Present*, TOW CTR. FOR DIGITAL JOURNALISM 4-5 (Dec. 3, 2014),

In addition, other democracies fund journalism at much higher levels than ours. Whereas the United States spends \$2.25 per capita to fund media systems, Canada spends \$22, the United Kingdom spends \$86, Germany spends \$107, and Norway spends \$135.³³² In numerous Western European countries, public news organizations are well-funded and powerful enough that they are the top news sources for citizens.³³³ For example, the BBC is the main news source for forty-eight percent of adults in the United Kingdom.³³⁴

In terms of convincing lawmakers to provide funding for journalism, recent research suggests watchdog reporting actually saves local communities money. A study by economists at Notre Dame and the University of Illinois at Chicago found that when a local newspaper shuts down and there is less scrutiny of local government, costs for municipal projects rise.³³⁵ “[I]f you look at the municipal bond market, you can actually see the financial consequences that have to be borne by local citizens as a result of newspaper closures,” a study co-author Chang Lee said.³³⁶ Thus, by funding watchdog journalism, communities may actually save money.

And some politicians have shown a willingness to fund local journalism. New Jersey legislators recently created a first-of-its-kind “Civic Information Consortium” and provided it with \$5 million in seed money.³³⁷ The consortium will be affiliated with several New Jersey state universities and will, according to the law creating it, “provide grants that support news and information that benefit the State’s civic life and meet the evolving information needs of New Jersey’s underserved communities.”³³⁸ Free Press, the advocacy group that lobbied for the bill, hopes that the Consortium will train journalists; improve access to government data and other civic information, especially to low-income communities and communities of color; and “nurture better civic engagement and dialogue.”³³⁹

2. BETTER ENFORCEMENT AND EXPANSION OF LAWS AROUND NEWS GATHERING

A second way in which watchdog reporting could be bolstered is better enforcement and expansion of laws related to news gathering. One of the most significant of these laws is the federal Freedom of Information Act (“FOIA”) and its state counterparts.³⁴⁰ Getting information

<https://academiccommons.columbia.edu/catalog/ac:7sqv9s4mx8> (noting that “[g]ood journalism has always been subsidized; markets have never supplied as much news as democracy demands” and defining “subsidy” broadly to include more than “direct government funding”).

³³² See Marlee Baldrige, *Water in a News Desert: New Jersey is Spending \$5 Million to Fund Innovation in Local News*, NIEMANLAB, July 3, 2018, http://www.niemanlab.org/2018/07/water-in-a-news-desert-new-jersey-is-spending-5-million-to-fund-innovation-in-local-news/?utm_source=Daily+Lab+email+list&utm_campaign=a7280c0a66-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-a7280c0a66-396214909.

³³³ See Katerina Eva Matsa, *Across Western Europe, Public News Media Are Widely Used and Trusted Sources of News*, PEW RESEARCH CENTER (June 8, 2018), http://www.pewresearch.org/fact-tank/2018/06/08/western-europe-public-news-media-widely-used-and-trusted/?utm_source=Daily+Lab+email+list&utm_campaign=b1c142e79a-dailylabemail3&utm_medium=email&utm_term=0_d68264fd5e-b1c142e79a-396022525 (noting that in seven Western European countries surveyed, a public news organization was the top main news source).

³³⁴ See *id.*

³³⁵ See Kriston Capps, *The Hidden Cost of Losing Your City’s Newspaper*, CITYLAB (May 30, 2018), <https://www.citylab.com/equity/2018/05/study-when-local-newspaper-close-city-bond-finances-suffer/561422/>.

³³⁶ *Id.*

³³⁷ See Baldrige, *supra* note 332; Mike Rispoli, *Why the Civic Info Bill Is Such a Huge Deal*, FREE PRESS (July 2, 2018), <https://www.freepress.net/our-response/expert-analysis/explainers/why-civic-info-bill-such-huge-deal>.

³³⁸ See Senate, No. 2317, State of New Jersey, 218th Legis., <https://legiscan.com/NJ/text/A3628/2018>.

³³⁹ See *id.*

³⁴⁰ See 5 U.S.C. § 552 (2012).

from government is, obviously, critical to watchdog reporting. Journalists have lamented for decades that obtaining government records through FOIA is numbingly slow and sometimes impossible. I have elsewhere argued in favor of overhauling the expedited processing provision under FOIA to give preference to journalists.³⁴¹ (Many states have expedited processing provisions as well).³⁴² Providing public records to journalists faster could help minimize the amount of time that makes watchdog reporting particularly difficult given the speed of information flow today. More dramatically, several scholars have proposed reimagining FOIA to shift from its “request-and-respond paradigm” to an affirmative disclosure regime.³⁴³ This would also result in a faster provision of information to journalists. This is essential given the platform value of speed.

Other newsgathering protections could be explored as well. For example, several scholars have proposed enhanced protections for whistleblowers.³⁴⁴ And news organizations have long been trying to pass a federal reporter’s shield law. Protection for sources is critical given the nature of the information being collected when the press is acting in its watchdog role. All of these suggestions would better enable journalists to produce substantive investigative reporting rather than “content,” the primary purpose of which is to lure eyes to their publication.

As any enhancement of news-gathering laws is considered, it will be critical to bring journalists into the conversation. Lawmakers need to better understand the news gathering and editorial processes so that they can best protect them. As good as the press is at shining the light on everything around it, it has historically not been transparent about its own processes. Yet, this is shifting.³⁴⁵ Today, there is urgency for the press to explain how it goes about its work.

3. EXPANDING THE CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

A third option for bolstering watchdog reporting would be to create a federally-funded program for journalism akin to AmeriCorps, to build out the existing AmeriCorps program to include journalism, or to create a similar privately-funded organization.³⁴⁶ This proposal is aimed specifically at bolstering the press’s focus on community and combatting the tendency of platforms and technology to cater to an audience of one, thereby producing isolation despite

³⁴¹ See Carroll, *supra* note 331 at 196.

³⁴² See Utah Code Ann. § 63G-2-204(3)-(4) (West Supp. 2015).

³⁴³ See David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1148-49 (2017); David C. Vladeck, *Information Access: Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1792 (2008) (arguing for affirmative duty to make environmental information available). Pozen also made the intriguing suggestion that some consideration be given to shifting the FOIA budget into subsidies for the press. See Pozen, *supra* note 343, at 1145.

³⁴⁴ See Pozen, *supra* note 343, at 1149.

³⁴⁵ See Liz Garbus, *A View Inside the ‘Fourth Estate’ During Trump’s First Year*, N.Y. TIMES (April 26, 2018), <https://www.nytimes.com/2018/04/26/insider/true-story-the-fourth-estate.html>; WashPost PR, *The Washington Post Launches ‘How to Be a Journalist’ Video Series*, WASH. POST PR BLOG (Dec. 8, 2017), https://www.washingtonpost.com/pr/wp/2017/12/08/the-washington-post-launches-how-to-be-a-journalist-video-series/?utm_term=.03dcb149cc91. *Washington Post* editor Marty Baron also said that the paper is looking for ways to combat the mystery around who journalists are and what they do. See Indira Lakshmanan, *Marty Baron: ‘Fair and Honest Reporting’ Will Be Validated Over the Long Run*, POYNTER INSTITUTE (Dec. 15, 2017), <https://www.poynter.org/news/marty-baron-fair-and-honest-reporting-will-be-validated-over-long-run>.

³⁴⁶ Inspiration for this idea came from journalists Deborah and James Fallows. See #295: *Deborah and James Fallows*, LONGFORM PODCAST at 59:30 (May 23, 2018), <https://longform.org/posts/longform-podcast-295-deborah-and-james-fallows> (describing a “Peace Corps-like” program to “train the next generation of journalists”).

promises of connectivity. It is also aimed at the largest gap in watchdog reporting and reporting in general—reporting on local governments.

The AmeriCorps program began in the early 1990s and supports volunteers in local communities working on a range of issues including improvements in education, combatting poverty, and disaster preparedness.³⁴⁷ It is part of the Corporation for National and Community Service whose mission is promoting “civic engagement” and building “stronger, more efficient, and more sustainable community networks.”³⁴⁸ Watchdog journalism comfortably fits within this mission.

Members of this journalism service program could be placed in communities with one or more experienced journalists (depending on the size of the community) to report on local government. If publication is online, overhead costs could be kept fairly low. Private models for such programs exist.³⁴⁹ Of course, political roadblocks to such a proposal might abound at the federal level, but this proposal, as well as other “bottom up” options outlined here, could be undertaken at the state level. As noted, the New Jersey Civic Information Consortium is an example of a state government—seemingly pushed by grassroots organizing and local communities—taking steps to improve the local news ecology.

This overview of top-down and bottom-up possibilities is intentionally just an overview. The goal is to demonstrate that law beyond the First Amendment can and should be considered as a tool for protecting and fostering watchdog journalism. Neither journalists nor lawmakers should assume that the First Amendment is sufficient. A broad range of options exist for creating an environment that would foster watchdog reporting. These options are not mutually exclusive, nor do they all require sweeping government action.

CONCLUSION

Journalists often speak of the First Amendment as if it has talismanic power. The First Amendment has capably protected the Fourth Estate—an institution that exercised editorial discretion independently to act as a check on government. In part because of that protection, the Fourth Estate flourished in the second half of the twentieth century and demonstrated the power of its watchdog role.

But the press ecology has changed dramatically. The Fourth Estate has been eclipsed by the Networked Press in which not only journalists but platforms, algorithms, audience and others play significant roles in creating and distributing news. Until recently, journalists served as information gatekeepers and were relatively free in their exercise of editorial discretion. Platforms now host public squares, set their boundaries, and police what happens in them.

If an institution is an organization based on shared norms and goals, the Networked Press does not qualify. While platforms are focused on commodification, personalization, agnosticism, speed, and scale, in contrast, watchdog journalists are engaged in a deliberate and often time-consuming process to unearth stories that can impact the community. This is true even when the

³⁴⁷ See *Who We Are*, CORPORATION FOR NATIONAL & COMMUNITY SERVICE, <https://www.nationalservice.gov/about/who-we-are>.

³⁴⁸ See *id.* (noting this under “Guiding Principles”).

³⁴⁹ One is Report for America. It sends journalists to “under-covered corners of America.” See *Class of 2018 Corps Members*, REPORT FOR AMERICA, <https://www.reportforamerica.org/corps-members-2018>; *Our Vision*, REPORT FOR AMERICA, <https://www.reportforamerica.org/our-vision/>. Comparing itself to AmeriCorps and Teach for America, Report for America aims to “hold powerful institutions accountable”—in other words, to be a watchdog. See *Principles*, REPORT FOR AMERICA, <https://www.reportforamerica.org/principles/>.

stories may not be widely read. The power of the platforms is so immense—in part because of their hold on advertising dollars—that platform values are permeating the Networked Press and undermining the conditions needed for watchdog journalism to thrive. Editorial discretion is not being exercised in the same way, and watchdog journalism is threatened.

Although the First Amendment largely protected the Fourth Estate, it does not protect the press from private power. Technology platforms have amassed that power in a way perhaps never seen before and they have wielded it—even if unintentionally—against the press. At its core, the role of the watchdog is to protect against tyranny. Today, that role is significantly compromised. To protect watchdog journalism some action is needed. Law should be part of that response.

Various possibilities exist, including algorithmic transparency, sharing of data, the hiring of journalists by platforms, press exemptions from antitrust law, subsidies, better enforcement of laws related to newsgathering, and a corps of volunteer journalists. Some of these are aimed at strengthening the press, others at weakening platforms. The goal is to reduce the power asymmetry between the players in the Networked Press, better align platform and press goals and norms, and create an environment in which watchdog journalism can thrive.