CAN ANTITRUST PROTECT THE FOURTH ESTATE FROM THE FOURTH INDUSTRIAL REVOLUTION?

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> It 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. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That 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. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[1]

I. INTRODUCTION

As World War II was ending, the Supreme Court was asked to reconcile the goals of the Sherman Act and the First

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[1] Assoc. Press v. United States, 326 U.S. 1, 20 (1945).

Amendment. It found no tension, no need for reconciliation: the free market and a free press shared common ground.

The experience of the War had no doubt heightened the Court's awareness of the central role of the marketplace of ideas in a free society. It, therefore, condemned one of the dominant cooperative news gathering agencies of its time, the Associated Press ("AP"), for refusing to share its content with non-member rivals of its membership. In doing so, the Court rejected AP's assertion that the application of the Sherman Act to its activities would abridge freedom of the press.[2] In the Court's view, the opposite was the case. By requiring AP to share its content the antitrust laws could promote access to the news and its widest possible dissemination. Antitrust enforcement could facilitate the political mission of the First Amendment and the vitality of the free press. Only six years later, the Court warned that newspapers were nevertheless vanishing at an alarming rate,[3] while reiterating the view expressed in *Associated Press* that "[a]

[2] From the perspective of the Sherman Act, the Court observed, "the exclusive right to publish news" afforded by the AP gave its newspaper members a "competitive advantage" and left newspapers that did not have access at a "competitive disadvantage." *Associated Press*, 326 U.S. at 17–18.

[3] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 603 (1953) ("…[T]oday, despite the vital task that in our society the press performs, the number of daily newspapers in the United States is at its lowest point since the century's turn…."). With some ups-and-downs, that decline has generally continued. *See 5 Key Takeaways About the State of the News Media in 2018,* PEW RES. CTR. (Jul. 23, 2019) https://www.pewresearch.org/fact-tank/2019/07/23/key-takeaways-state-of-the-news-media-2018/ ("[In 2018], U.S. newspaper circulation reached its lowest level since 1940….").

vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society."[4]

The newspaper business's continuing struggle to survive since that time has been extensively documented.[5] It is perhaps surprising, therefore, that it continued to come under the watchful eye of the antitrust enforcers of the Justice Department ("DOJ"), but incumbent firms facing new competitive challenges may resort to anticompetitive strategies to thwart those very challenges. From the 1940s until the 1960s, newspapers were the target of DOJ and private antitrust claims, mostly successful, which limited their ability to cooperate,[6] their options for responding to new rivals,[7] and their ability to control the distribution of newspapers to subscribers.[8]

These cases contributed to the establishment of important and largely enduring antitrust principles not only for the

[4] *Times-Picayune*, 345 U.S. at 602.
[5] For one example of many, see STEVEN WALDMAN, ET. AL., THE INFORMATION NEEDS OF COMMUNITIES: THE CHANGING MEDIA LANDSCAPE IN A BROADBAND AGE 34–57 (Federal Comm. Commission 2011) [hereinafter FCC Report], https://www.fcc.gov/general/information-needs-communities. *See also* PENELOPE MUSE ABERNATHY, THE EXPANDING NEWS DESERT (2018), https://www.cislm.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf; CLARA HENDRICKSON, LOCAL JOURNALISM IN CRISIS: WHY AMERICA MUST REVIVE ITS LOCAL NEWSROOMS (2019), https://www.brookings.edu/wp-content/uploads/2019/11/Local-Journalism-in-Crisis.pdf.
[6] Citizen Publ'g. Co. v. United States, 394 U.S. 131 (1969).
[7] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).
[8] Albrecht v. The Herald Co., 390 U.S. 145 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3 (1997).

newspaper industry. Those laws have evolved to focus on two kinds of anticompetitive conduct: collusion and exclusion. Both can take many forms and include coordination by rival firms, mergers, restricted distribution, and exclusionary strategies by dominant firms that impedes or entirely bars their smaller rivals from the market. Despite some differences, courts have moved toward a common framework that evaluates the relative strength of evidence of competitive effects, both "anti" and "pro."[9]

These principles are being tested and questioned anew because of the rapid growth of the digital economy. Critics are asking whether they are adequate to the task of policing the behavior of the largest technology firms to preserve competition. Supporters continue to advocate for the less-interventionist view of antitrust that has taken hold over the last generation. And the once robust press, after many decades of decline, finds itself asking whether the laws once used to limit its conduct can help to protect it from the loss of advertising revenues associated with

[9] For a discussion of that common framework, see Jonathan B. Baker & Andrew I. Gavil, *Judge Douglas H. Ginsburg and Antitrust Law's Rule(s) of Reason*, *in* DOUGLAS GINSBURG: AN ANTITRUST PROFESSOR ON THE BENCH, LIBER AMICORUM - VOL. II (Nicolas Charbit, ed., forthcoming 2020) https://ssrn.com/abstract=3349853 (explaining that the "rule of reason" has become an apt description of the common framework under which most antitrust analysis is conducted). Commentators have also observed that exclusionary conduct can be used to support and perpetuate collusion. *See, e.g.* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 536 (2013).

a still-growing digital platform economy.[10] Can the surviving print press of the twenty-first century use the legal and economic principles forged in the twentieth century—principles that they once resisted as defendants—to help shield itself from the competitive challenges of the information age?

In this essay, I look back to look forward. Part II examines a time now hard to imagine: a time when newspapers were prosecuted as monopolists and newsgathering cooperatives as anticompetitive conspiracies. Those cases followed now familiar theories of anticompetitive effect, largely targeting exclusionary strategies by incumbents seeking to fend off new rivals, including new technologies and business models. In this period, key concepts were developed that will be critical today in any effort to use antitrust enforcement against the digital platforms. Part II also includes a brief examination of how the print press was at first limited in its ability to structure its distribution practices, but then may have benefitted from the general loosening of antitrust law's restrictive attitude toward restraints on distribution.

[10] For a sampling of the range of views, see *Online Platforms and Market Power, Part I: The Free and Diverse Press*, Hearing Before the House Committee on the Judiciary, Subcommittee on Antitrust, Commercial, and Administrative Law, 115th Cong. (2019), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2260 [hereinafter House Hearing].

Part III turns to Congressional efforts to resuscitate the press in response to yet another antitrust decision of the Supreme Court, *Citizen Publishing*,[11] which curtailed cooperation between rival newspapers in the form of "joint operating agreements." Again at the behest of government antitrust enforcers, the Court concluded that newspapers were on the wrong side of antitrust law, this time for establishing cooperative relationships which, the papers argued, were necessary to preserve their very existence. Congress promptly responded with a limited antitrust exemption, opening up new avenues for cooperation, albeit with a degree of government oversight.[12]

Building on the foundation of Parts II and III, Part IV assesses the potential for using the antitrust doctrine that developed to police the press to now police its on-line rivals. It asks whether that doctrine, developed when antitrust was used as a sword against the press, could now serve the press as a shield against the still evolving and expanding digital marketplace. It concludes that although antitrust law enforcement may have a role to play, that role will likely be limited. Antitrust alone cannot save the press. It poses the question whether today's press

[11] Citizen Publ'g. Co. v. United States, 394 U.S. 131 (1969).
[12] *See infra*, Part III.B.

is suffering more so from a range of long-developing market forces and an excess of competition than from restraints on it, and whether other policy approaches will be necessary to preserve what the Court labeled in *Times-Picayune*, the "chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society."[13]

II. WHEN NEWSPAPERS WERE THE ANTITRUST NEWS

As a business model, the traditional print press has always had three critical components: content, advertising, and readers. It has been described, therefore, as a "platform," with advertisers on one side and readers on the other.[14] Advertisers seek access to readers and readers are attracted by content and to an increasingly lesser extent to advertising.[15] The relationship between advertisers and readers is a critical feature of the business model: advertising rates will vary in proportion to the size of the readership. But for the most part, whether supported financially by advertising revenues alone, like free newspapers, over-the-air radio and television, or a combination of advertising

[13] Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 602 (1953).
[14] For an explanation of the "platform" nature of the business and the indirect network effects that characterize it, see Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018). *See also* Michal S. Gal & Daniel L. Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521, 544–47 (2016) (describing economics and welfare analysis of free newspapers).
[15] In their heyday "classified ads," which have now been displaced to a degree by various on-line options, were also an attraction for readers in search of employment, housing, motor vehicles, and many other items for sale.

and subscription fees, newspapers must draw the attention of readers and to do that they must provide content that is valued. Owing to the high costs of generating that content, newspapers have also long sought to cooperate with others to gather and disseminate the news.

Competitive success requires access to all three—to advertisers, content, and readers. It is not surprising, therefore, that anticompetitive conduct in the industry has almost always involved efforts to limit or impede access to one or more of these essential lifelines. In terms of modern exclusion theory, the newspaper model is vulnerable to both input foreclosure (both advertising and content) and customer foreclosure (access to readers).[16] And, to varying degrees, the role of newspapers as organs of free speech that are vital to the functioning of a democratic society has surfaced as a justification for restricting competition.

[16] For a discussion of the economics of exclusion, see ANDREW I. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 451–59 (3d ed. 2017). *See also* Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 376–78 (2017) (discussing two exclusion "paradigms" in antitrust law).

A. Access to Content

"The heart of the government's charge" in *Associated Press* was that AP "had by concerted action set up a system of By-Laws which prohibited all AP members from selling news to non-members, and which granted each member powers to block its non-member competitors from membership."[17] A divided Court concluded that the system was a violation of the Sherman Act, because it provided AP members with a significant competitive advantage and significantly hindered new rivals from entering the newspaper business,[18] an effect that was enabled by the AP's "collective power."[19] Importantly, the Court rejected the AP's argument that because its content was not "indispensable," its refusal to share that content could not supply the basis for antitrust liability.[20] As already noted, it also rejected AP's argument that the imposition of antitrust liability would abridge the freedom of the press guaranteed by the First Amendment.[21]

[17] Assoc. Press v. United States, 326 U.S. 1, 4 (1945). For an account of the story behind the case, which involved a clash of Chicago titans Marshall Field III and Robert McCormick, see SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA 76–84 (2016).
[18] *Id.* at 13–14.
[19] *Id.* at 15.
[20] *Id.* at 18.
[21] *Id.* at 19–20. *See also supra* text accompany note 1. The American Newspaper Publishers Association filed an amicus brief emphasizing that application of the antitrust laws would be "repugnant to the guaranty of a free press as embraced by the First Amendment." Brief of the American Newspaper Publishers Association as Amicus Curiae, Assoc. Press v. United States, 326 U.S. 1 (1945), 1944 WL 42542 at *5.

Associated Press is one in a long line of cases that have prohibited certain types of concerted refusals to deal, which have also been labeled "group boycotts."[22] Although the case has not been overruled and has subsequently been cited by the Supreme Court,[23] its continued vitality today might be questioned based on other developments in antitrust law. Today's Court might be more receptive to the AP's argument that forced sharing of its content can undermine incentives to compete and innovate.[24] Similarly, the Court has disavowed the "essential facilities" doctrine sometimes associated with the decision and others like it, albeit in the context of unilateral, not concerted refusals to deal.[25] As will be discussed in Part III, *infra*, today the desired input might be the "big data" that is generated by some of the largest and most successful digital platforms. Battles may be looming about whether they will be required to share that data

[22] The treatment of group boycotts as an antitrust violation has been complicated and at times has involved per se condemnation for some conduct subject to the label. For a more complete discussion of these cases and the use of the "group boycott" label, see GAVIL, ET AL., *supra* note 16, at 165–70, 600–12.

[23] *See, e.g.*, Nw. Wholesale Stationers, Inc. v. Pac. Stationery and Printing Co., 472 U.S. 284, 290 (1985).

[24] One commentator notes that as a consequence of the decision, the AP became even more dominant than it had previously been as it opened its doors to additional members and that doing so may have led to the homogenization of the content offered by newspapers. In the end, therefore, it may have diminished, not increased, the competition between them. *See* LEBOVIC, *supra* note 17, at 83 (noting that "if all papers relied on the AP service, the information that reached the public would become less diverse, not more diverse" and that by 1966 "84 percent of dailies received their out-of-town news entirely from one of the two remaining services").

[25] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11 (2004) (questioning prior judicial recognition and continued vitality of the "essential facilities" doctrine in connection with a unilateral refusal to deal in a regulated industry).

with rivals, especially as it relates to product and service development, improved targeting of advertising, and increased access to consumers. To date, however, there has not been any suggestion that they have acted in concert as had the members of the AP.

B. Access to Advertising Revenues

AP's jealous control of its content was not directed solely at its members' newspaper rivals. By the 1920s, newspapers were being challenged by radio broadcasting for advertisers and the consumers that attracted them, but were also concerned that broadcasters could easily lift their content. As the FCC observed in 2011:

> Foreshadowing some of the concerns heard today, print journalists complained that radio stations often lifted copy directly from newspapers, aired stories that didn't go into depth, and hired inexperienced reporters. Newspaper executives tried to undermine competition from radio. The Associated Press, created by the newspaper industry, vowed in 1933 not to sell wire copy to radio stations.[26]

The response of newspapers to the perceived competitive threat of radio led to another important government antitrust challenge, *Lorain Journal Co. v. United States*,[27] a case that remains surprisingly relevant to the application of Section 2 of the

[26] FCC Report, *supra* note 5, at 35.
[27] 342 U.S. 143 (1950).

Sherman Act and the offense of monopolization.[28] As in *Associated Press*, the case involved conduct that could be labeled a "refusal to deal" or "group boycott." Also as in *Associated Press*, the challenged conduct arose as a response to new competition, in this instance WEOL, a newly licensed over-the-air radio station that challenged what the Court described as the Lorain Journal's "substantial monopoly in Lorain of the mass dissemination of news and advertising, both of a local and national character."[29] As the Court put it, "WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly."[30] In contemporary terms, radio was a disruptive new technology and source of competition based on a different business model[31] that threatened to diminish the market power of the incumbent, Lorain Journal.

The Lorain Journal responded by threatening to refuse to deal with any local merchant who advertised with WEOL and

[28] 15 U.S.C. § 2 (prohibiting "monopolization" and "attempt to monopolize").
[29] *Lorain Journal Co.,* 342 U.S. at 147. The Court observed that the Journal had obtained its position after purchasing its sole competing newspaper. The Court also noted that the Journal had itself sought, but failed to secure, a broadcasting license. *Id*. at 146.
[30] *Id*. at 151.
[31] Both newspapers and free over-the-air radio were dependent on advertising revenues. But because it did not also have subscriber income, the radio station was especially vulnerable to conduct that impeded its access to advertisers.

by terminating its relationships with any advertiser who did. It thus used a unilateral threat to refuse to deal to secure a concerted one. As the Court noted, "[t]he program was effective. Numerous Lorain County merchants testified that, as a result of the publisher's policy, they either ceased or abandoned their plans to advertise over WEOL."[32] WEOL's only source of revenue, advertising dollars, was compromised.

The Supreme Court unanimously agreed with the government that Lorain Journal's conduct violated the Sherman Act as an anti-competitive effort to thwart its emerging rival and maintain its monopoly. It reasoned that the reduction of advertisers willing to use WEOL:

> …not only reduced the number of customers available to WEOL in the field of local Lorain advertising and strengthened the Journal's monopoly in that field, but more significantly tended to destroy and eliminate WEOL altogether. Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station.[33]

[32] *Lorain Journal Co.,* 342 U.S. at 149.
[33] *Id*. at 150.

The Court rejected the Journal's argument that it had a "right" to "select its customers and to refuse to accept advertisements from whomever it pleases," citing to its previous decisions in *Associated Press* and quoting with added emphasis from *United States v. Colgate & Co.*, the Court reasoned:

> The right claimed by the publisher is neither absolute nor exempt from regulation. Its exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. The operator of the radio station, equally with the publisher of the newspaper, is entitled to the protection of that Act. "*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." (Emphasis supplied.)[34]

Three years later, the conduct of a newspaper was once again subjected to antitrust scrutiny by the Supreme Court at the behest of the government, but in this instance, the paper fared better, albeit with a closely divided Court.[35] And as in *Associated Press*, but notably not in *Lorain Journal*, the "freedom of the press" was again argued to be in tension with the antitrust laws.

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[34] *Id.* at 155 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)). *See also* Kansas City Star Co. v. United States, 240 F.2d 643, 654–55 (8th Cir. 1957) (affirming criminal convictions under Section 2 for successful efforts by newspaper to use threats of refusals to deal to deprive rivals of advertising revenues).

[35] Times-Picayune Pub. Co. v. United States, 345 U.S. 594 (1953). Justice Burton authored a dissenting opinion joined by Justices Black, Douglas and Minton. *See id.* at 628 (Burton, J., dissenting).

The Times-Picayune Publishing Company owned and published the morning Times-Picayune and the evening States in New Orleans. According to the Court, following years of consolidation and the acquisition of the States by the Times-Picayune, the two papers along with their main rival, The Item, were the "sole significant newspaper media for the dissemination of news and advertising to the residents of New Orleans."[36]

The case concerned the Times-Picayune's policy of selling advertising space for both general display and classified ads as a bundle: advertisers could only purchase ads appearing in both publications. It refused to accept ads for just one paper.[37] Viewing the contracts associated with the policy as "tying," the district court had concluded that they violated both Sections 1 and 2 of the Sherman Act, because they foreclosed competition for advertising and resulted in higher advertising rates.[38] But the Court reversed, concluding that the government had failed to show that the agreements had the requisite adverse effect on competition.[39]

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[36] *Id.* at 598.
[37] *Id.* at 596–97. For the specifics and evolution of the plan, see *id.* at 598–601.
[38] *Id.* at 601.
[39] *Id.* at 622 ("the Government here has proved neither actual unlawful effects nor facts which radiate a potential for future harm."). Justice Burton, who authored the Court's opinion in *Lorain Journal*, dissented, arguing that the district court's findings were sufficient to warrant affirmance. He was joined by Justice Black, who wrote the majority opinion for the Court in *Associated Press*, and Justices Douglas and Minton. *Id.* at 628 (Burton, J., dissenting).

As was true of *Associated Press*, the Court appeared to be acutely aware of the challenges being faced by the newspaper industry. But in *Times-Picayune* acknowledging those challenges led the Court's majority to be especially reluctant to condemn the Times-Picayune's practices. The majority opinion quickly voiced its concern for the fate of the daily newspaper and its role in a democratic society, signaling that it had a different view of the utility of the arrangements than did the district court.[40] Before delving into the antitrust issues, it canvassed the available evidence of the decline of the daily newspaper and noted that many other papers had adopted a similar strategy of bundling advertising.[41] And it later carefully distinguished *Lorain Journal*.[42] In effect, even though the paper's policies were directed at and designed to thwart competition, as was true in both *Associated Press* and *Lorain Journal*, the Court viewed it as engaging in nothing more than aggressive competition, not exclusionary conduct.[43]

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[40] *Id.* at 602 ("The daily newspaper, though essential to the effective functioning of our political system, has in recent years suffered drastic economic decline. A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society."). *See also* supra note 3.

[41] *Id.* at 602–04. Those papers included the Times-Picayune's two main rivals, the Item and the Morning Tribune, at whom the policy was directed. *Id.* at 623.

[42] *Id.* at 625.

[43] Five years after its victory in the Supreme Court, the Times-Picayune purchased The Item, making it a complete newspaper monopoly in New Orleans, after which it "immediately increased its advertising rates by 30 percent." LEBOVIC, *supra* note 17, at 146.

C. Access to Readers

Printed newspapers also depend for their survival on a cost-effective method of distribution. In the twentieth century, that meant a combination of home delivery, newsstands, and various other retail businesses that included newspapers among their wares. In the mid-1960s, however, antitrust law adopted a skeptical stance toward efforts by suppliers to control their downstream distribution, a stance that came as newspapers were exploring alternative means of distributing papers. The Court's turn toward intolerance flowed in part from its long-standing hostility to minimum resale price maintenance, which it had condemned as early as 1911.[44] In 1967, the Court concluded that non-price restraints on distribution, such as limits on the territories in which independent distributors were authorized to sell, should be similarly condemned as per se unreasonable under the Sherman Act.[45] This set the stage the following year for yet another visit by a newspaper to the Supreme Court.

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[44] Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406–08 (1911) (supplier's agreements with retailers setting the minimum price they could change for its products violated Sherman Act), *overruled by* Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877, 907 (2007).

[45] United States v. Arnold, Schwinn & Co., 388 U.S. 365, 379–81 (1967) (holding vertical restrictions on territory, locations, or customers per se unlawful), *overruled by* Cont'l TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977).

In 1968, the Court considered a newspaper's ability to control the downstream *maximum* retail prices charged by independent distributors in *Albrecht v. The Herald Co*.[46] The antitrust claim was brought not by the government, but by one of The Herald's independent carriers, who challenged the paper's effort to regulate the prices charged by carriers to The Herald's readers. The facts were largely undisputed: The Herald engaged another carrier to solicit away Albrecht's customers when Albrecht sought to charge them more than The Herald's maximum advertised retail prices. With two Justices dissenting, the Court held that the practice was a per se violation of the Sherman Act. In the Court's view, whether retail prices were set at a minimum or a maximum level by a supplier was irrelevant. In either instance fixing downstream prices substituted "the perhaps erroneous judgment of a seller for the forces of the competitive market," which "may severely intrude upon the ability of buyers to compete and survive in that market."[47] The holding was a blow to newspapers, however, for as Justice Harlan recognized in dissent, it could allow independent distributors to maximize their own profits by charging above-

[46] 390 U.S. 145 (1968), *overruled by* State Oil Co. v. Khan, 522 U.S. 3, 7 (1997).
[47] *Id*. at 152.

maximum prices, which could drive down readership and hence advertising revenues, injuring newspaper-level competition.[48]

Schwinn and *Albrecht* together were the high watermark in the Court's hostility toward restrictions on distribution. But along with *Dr. Miles*, *Schwinn* and *Albrecht* would eventually be overruled. In the interim between *Albrecht* and *Sylvania*, the Court had changed. The Warren Court had given way to the Burger Court and five new justices, with different views about the role of antitrust in policing business behavior, had been added to the Court.[49] *Schwinn* was overruled within a decade by *Sylvania*. *Albrecht* remained the law for nearly thirty years until it was overruled in *Khan*. And *Dr. Miles*, the most durable of the three, was overruled after nearly a century in *Leegin*.

Newspapers lurked in the background, however, when the Court changed course with respect to the kinds of vertical, intrabrand, non-price restraints at issue in *Schwinn* and *Sylvania*.

[48] As the Court would later recognize in overruling *Albrecht*, Justice Harlan correctly observed that "Price ceilings…do not lessen horizontal competition; they drive prices toward the level that would be set by intense competition, and they cannot go below this level unless the manufacturer who dictates them and the customer who accepts them have both miscalculated. Since price ceilings, reflect the manufacturer's view that there is insufficient competition to drive prices down to a competitive level, they have the arguable justification that they prevent retailers or wholesalers from reaping monopoly or supercompetitive profits." *Id.* at 159 (Harlan, J., dissenting).

[49] Only four of the nine Justices who had decided *Albrecht* remained on the Court when *Sylvania* was decided in 1977. For a discussion of the effect of the change in the Court's make-up on antitrust law, see Andrew I. Gavil, *Antitrust Remedy Wars Episode I:* Illinois Brick *from Inside the Court*, 79 ST. JOHN'S L. REV. 553, 561–63 (2005).

In *Noble v. McClatchy Newspapers*,[50] the distributor of the Sacramento Bee, which was published by McClatchy, challenged McClatchy's termination of their dealership when they refused to surrender a portion of their assigned territory and accused it of monopolizing the "publication of daily newspapers of general circulation in the relevant market."[51] Applying *Schwinn*, the Ninth Circuit agreed with the plaintiffs that territorial restrictions should have been treated as per se unlawful by the lower court,[52] but it affirmed the dismissal of their monopolization claim.[53] A petition for a writ of certiorari was pending, however, when the Supreme Court took up *Sylvania*. And in light of its decision in *Sylvania*, the Court granted the petition, vacated the Ninth Circuit's decision, and remanded the case for "further consideration in light of" its decision in *Sylvania*.[54]

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[50] 533 F.2d 1081 (9th Cir. 1975*), petition. for cert. granted and vacated* McClatchy Newspapers v. Noble, 433 U.S. 904 (1977).
[51] *Id*. at 1082, 1086.
[52] *Id*. at 1086–90.
[53] *Id*. at 1090.
[54] McClatchy Newspapers v. Noble, 433 U.S. 904 (1977); *see also* Naify v. McClatchy Newspapers, 599 F.2d 335 (9th Cir. 1977) (dismissing antitrust claims that challenged McClatchy's decision to substitute self-distribution for use of independent distributors just four days after *Sylvania* was decided). McClatchy recently joined the long list of newspaper publishers facing severe financial challenges when it filed for bankruptcy. *See* Taylor Telford, et al., *Newspaper Giant McClatchy Files for Bankruptcy, Hobbled by Debt and Declining Print Revenue*, WASH. POST (Feb. 13, 2020), https://www.washingtonpost.com/business/2020/02/13/newspaper-giant-mcclatchy-files-bankruptcy-hobbled-by-debt-declining-print-revenue/; *see also* Paschall v. Kansas City Star Co., 727 F.2d 692 (8th Cir. 1984) (rejecting antitrust challenge to newspaper's decision to switch from independent to direct-distribution).

It is no accident that these twentieth-century antitrust challenges to the newspaper industry focused on the three critical pathways that support publication of the news: generating content, securing advertisers, and distributing the content and advertising to the reading public. Historically, antitrust laws have often been directed at conduct that interferes with such market-specific pathways. In Part III, *infra*, we will consider whether the case law generated in enforcement directed at print journalism remains current and whether it might now be the foundation for any challenges to the digital platforms.

III. COOPERATIVE PUBLISHING AND THE PERCEIVED NEED FOR ANTITRUST IMMUNITY

A. The Antitrust Analysis of Joint Operating Agreements in Citizen Publishing[55]

The newspaper business faced one final antitrust challenge at the Supreme Court as the 1960s came to a close. In *Citizen Publishing* the Supreme Court enjoined a joint operating agreement (JOA) between Tucson's only two newspapers of general circulation, The Citizen, an evening paper, and The Star, a morning daily. Under the agreement, each paper was to retain its own corporate identity, as well as its own news and editorial departments, but a new entity, Tucson Newspapers, Inc. (TNI),

[55] Citizen Pub. Co. v. United States, 394 U.S. 131 (1969).

was created to manage all of their production, distribution, and related business.[56] According to the Court, "[t]he purpose of the agreement was to end any business or commercial competition between the two papers."[57] TNI determined prices for subscriptions and advertising, all profits were pooled, and future competition outside of TNI was prohibited.[58] "All commercial rivalry between the papers ceased."[59]

The Court readily concluded that the agreement violated the antitrust laws, describing the Sherman Act Section 1 violation as "beyond peradventure."[60] The Court rejected what it described as the firms' "only real defense," that the agreement was necessary to prevent their failure. That "failing company" defense was asserted in response to the claims under Section 2 of the Sherman Act, 15 U.S.C. §2 and Section 7 of the Clayton Act, 15 U.S.C. §18.[61] Citing *Associated Press*, the Court also rejected the argument that application of the antitrust laws to the agreement abridged the First Amendment: "Neither news

[56] *Id*. at 133–34.
[57] *Id*. at 134.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 135–36. Justice Harlan authored a separate concurring opinion and Justice Stewart, alone, dissented.
[61] *Id.* at 136–40.

gathering nor news dissemination is being regulated by the present decree. It deals only with restraints on certain business or commercial practices. The restraints on competition with which the present decree deals comport neither with the antitrust laws nor with the First Amendment."[62]

B. The Newspaper Preservation Act

Congress responded promptly to *Citizen Publishing*, enacting the Newspaper Preservation Act in 1970,[63] which provided limited exemptions from the federal antitrust laws for newspaper JOAs and established a system of Department of Justice oversight through a review and approval process for JOAs.[64] The Congressional declaration of purpose states:

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

[62] *Id*. at 139.
[63] 15 U.S.C. §§ 1801–04.
[64] For a brief review of the history and evolution of JOAs prior to the adoption of the Newspaper Preservation Act, see Mark Fink, Comment, *The Newspaper Preservation Act of 1970: Help for the Needy or the Greedy?*, 1990 DET COLLEGE L. REV. 93, 97–99. A comprehensive review of the commentary on the Act is beyond the scope of this essay. For one collection, see Eric J. Gertler, Comment, Michigan Citizens for an Independent Press v. Attorney General: *Subscribing to Newspaper Joint Operating Agreements or the Decline of Newspapers*, 39 AM. U.L. REV. 123, 126 & n.12 (1989).

> effected in accordance with the provisions of this chapter.[65]

One of its explicit purposes was to allow the JOA prohibited in *Citizen Publishing* to be reinstated.[66] As one court later described it, quoting from the Act's legislative history:

> Congress found that "economic conditions have created a situation in which a large majority of American communities have already become one owner newspaper communities."….JOAs accomplished Congress's goal because they allowed newspapers "to reduce costs by combining the economic and business aspects of newspaper production, and at the same time, permitted the newspaper participants to maintain separate editorial and reportorial staffs and independent editorial and news policies."[67]

Although the Act remains in force, the government has on occasion continued to challenge newspaper JOAs that, in its view, do not satisfy its terms.[68] Perhaps more importantly, the decline of newspapers has continued and the Act's antitrust exemption does not appear to have arrested that broader trend in any substantial way. One critic argues that the Act tended to

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[65] 15 U.S.C. § 1801.
[66] H.R. REP. NO. 91–1193, 91st Cong., 2nd Sess., 3547 (1970).
[67] Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 744–45 (9th Cir. 1996) (citations omitted).
[68] *See, e.g.*, United States v. Daily Gazette Co., 567 F. Supp.2d 859 (S.D.W.V. 2008). For an unsuccessful private challenge to a Justice Department decision to approve a JOA, see Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285 (D.C. Cir. 1989).

undermine, not promote free speech, by mistakenly equating less competition with more speech.[69] Few JOAs remain in effect, and litigation has even surfaced by newspapers trying to void them.[70] As will be discussed in Part III, however, once again some in the industry have advocated for antitrust exemptions that would allow some news publishers to pool together and coordinate their negotiations with the major digital platforms.

IV. PRESERVING PRINT NEWS IN THE DIGITAL AGE

What has been labeled the "fourth industrial revolution,"[71] combined with globalization, is now disrupting the world's economies. It has been accompanied by the swift growth of technologies and technology-focused firms that have provided a wide range of new products and services, but which have also challenged policymakers to address myriad concerns, including privacy, data security, the spread of disinformation, and competition.

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[69] *See* Robbie Steel, Comment, *Joint Operating Agreements in the Newspaper Industry: A Threat to First Amendment Freedoms*, 138 U. PENN. L. REV. 275 (1989). *See also* Thomas J. Horton, *Daily Newspapers and Antitrust: As Relevant and Crucial to Our Democracy as Ever*, *in* MEDIA MARKETS AND COMPETITION LAW: MULTINATIONAL PERSPECTIVES 153 (Antonio Bavasso, David S. Evans & Douglas H. Ginsburg, Eds.) (2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544310 (arguing that the NPA likely led to lower quality journalism and less competitive newspapers).

[70] *See* Ken Ritter, *Judge Upholds Arbitration in Las Vegas Newspaper Battle*, AP News (Dec. 5, 2019), https://apnews.com/e57d77d0f91fa7b460fe1aff3c6d178a.

[71] For one interpretation of the term, see *The Fourth Industrial Revolution*, WORLD ECON. F. https://www.weforum.org/focus/fourth-industrial-revolution (last visited July 17, 2020).

The rapid growth of the largest technology-driven companies also has sparked an especially vigorous public debate about the current state and role of antitrust policy.[72] A great deal of attention has focused in particular on Amazon, Apple, Facebook, Google and Microsoft, eliciting strong and contrasting views about their conduct, including their acquisition strategies over the last decade.[73]

The continuing struggles of the newspaper industry have been part of that debate. Although it has fought for decades to fend off competitive challenges for advertising dollars from other media, the internet has presented its greatest competitive challenge yet.[74] The narrow question for this essay is "can antitrust law enforcement help?"

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[72] Numerous public and private agencies have recently undertaken studies and issued extensive reports on competition policy for the digital age. *See, e.g.*, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; JACQUES CRÉMER, YVES-ALEXANDRE DE MONTJOYE & HEIKE SCHWEITZER, COMPETITION POLICY FOR THE DIGITAL ERA (2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf; STIGLER COMMITTEE ON DIGITAL PLATFORMS: FINAL REPORT (Stigler Ctr. 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf. *See also* JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 97–193 (2019) (proposing revised antitrust rules for the information economy).

[73] In February 2020, the Federal Trade Commission announced a major study of the past non-reportable acquisitions of these five. *See* Press Release, *FTC to Examine Past Acquisitions by Large Technology Companies* (Feb. 11, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[74] *See, e.g.*, *Newspapers Fact Sheet*, PEW RES. CTR. (Jul 9, 2019), https://www.journalism.org/fact-sheet/newspapers/ (providing statistics on trends in newspaper circulation and the decline of advertising revenue). *See also* FCC Report, *supra* note 5, at 39 ("By 2005, the Internet had begun seriously undercutting newspaper revenue. In 2000, total newspaper print advertising amounted to almost

A. Collusion or Exclusion?

Any claim today against the digital platforms would likely need to be grounded in claims of collusion or exclusion. Although traditional collusion—some sort of conspiracy between the digital platforms—has not been uncovered, many of the accusations targeted at the large technology-driven firms have claimed that they are "monopolies" and are or have engaged in various exclusionary practices and unlawful acquisition strategies to squelch potential competition.

From the perspective of the newspaper industry, the most consistent target has been their power over advertising, especially Google and Facebook, and on the compensated (or under-compensated) "scraping" of valuable news content.[75] Some argue that they have collectively sucked countless advertising dollars out of the newspaper industry and that they have done so, in part, by free-riding on newspaper content.[76] The critical

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$48.7 billion. Ten years later, it had plummeted to $22.8 billion, a loss of more than 50 percent.").

[75] *See* House Hearing, *supra* note 10 (statement of David Chavern, President and CEO, News Media Alliance), at 3:

> These tech giants use secret, unpredictable algorithms to determine how and even whether content is delivered to readers. They scrape news organizations' content and use it to their own ends, without permission or remuneration for the companies that generated the content in the first place. They also suppress news organizations' brands, control their data, and refuse to recognize and support quality journalism.

[76] *See* House Hearing, *supra* note 10 (statement of David Pitofsky, General Counsel, News Corp.), at 1:

> When it comes to news, the companies that invest in original journalism should reap the financial rewards of their creations. Unfortunately, free-riding by the dominant online platforms has

question will be whether the platforms are engaging in the kinds of strategies the newspapers once followed to squelch new competitive threats and whether there are effective remedies that might make a difference for the news. Ironically, are the digital platforms now in the "monopoly" position once enjoyed by newspapers and are they borrowing from their playbook? It may also be the case, however, that newspapers are once again facing a challenge from new technologies and new business models that their legacy business model is not well-equipped to address. Are newspapers seeking the protection of antitrust laws because they are the victims of exclusionary strategies, or are they seeking its protection *from* competition?

Antitrust law enforcement is at its best when the discrete conduct of individual firms or groups of firms is involved and its consequences can readily be observed or predicted. At the other

resulted in a massive siphoning off of profits, such that the lion's share of online advertising dollars generated off the back of news content goes to the platforms, not to the content creators. As a result, while the tools consumers use to find news on the Internet may continue to develop, there is less and less reliable, quality news for consumers to find.

end of the spectrum are broad societal and market trends that can alter the very terms of competition. If antitrust violations are found, effective remedies, too, are likely to be a challenge for courts to identify and implement. To the extent a court were to conclude that any of the major digital platforms engaged in unlawful anticompetitive conduct, the likeliest remedy would be to enjoin that conduct. Repairing the market—addressing the consequences of the conduct—is theoretically permitted, but has proven to be a difficult road. Structural remedies, such as divestiture of specified assets, and the total dissolution of a company—a true "break-up"—are rare and the current standards of proof are demanding.[77] Any proposal to break them up will have to explain how such a remedy would be proportional to any violation and would not deprive consumers of the benefits that have fueled their growth.[78]

For these reasons and because concerns about the digital platforms go well-beyond competition issues, case-by-case enforcement, albeit of value, will typically not be a sufficient response to the larger trends.[79] Antitrust enforcement could not

[77] *See, e.g.*, United States v. Microsoft Corp., 253 F.2d 34, 105–07 (D.C. Cir. 2001) (reversing order that Microsoft be broken up as a remedy for its violations of antitrust law).
[78] *Id.* at 106.
[79] *See, e.g.*, House Hearing, *supra* note 10, at 5 (statement of Gene Kimmelman, President and CEO, Public Knowledge: "Even if the Federal Trade Commission (FTC) and Department of Justice (DOJ) enforce the antitrust laws to the fullest…that may not be enough to generate competitive digital markets in a timely fashion.").

have helped the horse-and-buggy, the rotary phone, carbon paper, or cassette tapes—and it would have been a misuse of antitrust law if it had been used to do so. Competition policy, broadly conceived, is more likely to be useful during such transformative periods, but policymakers often find it difficult to strike the best balance between regulation and reliance on markets.

B. Adaptive Strategies for Competing in the Information Age

The New York Times topped five million subscribers in early 2020 and announced a goal to reach a subscription base of 10 million by 2025.[80] Facebook reportedly has a membership of more than 2 billion.[81] Although the competitive health of the Times appears to be on the upswing, it has an atypically broad-based subscriber base, and even so is and is likely to remain a limited competitor for Facebook when it comes to advertising revenue. As one recent study of the relationship between newspapers and digital platforms concluded, the "answer" for most newspapers, therefore, probably does not lie in recuperating some of its lost share of digital advertising, but rather in changing

[80] Marc Tracy, *The New York Times Tops 5 Million Subscriptions as Ads Decline*, N.Y. TIMES (Feb. 6, 2020), https://www.nytimes.com/2020/02/06/business/new-york-times-earning.html.
[81] *See Number of monthly active Facebook users worldwide as of 1st quarter 2020*, STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ (last visited July 17, 2020).

its business model to move away from reliance on advertising revenue to a combination of subscription income and public support.[82] Similarly, the FCC's 2011 Report observed:

> Perhaps we have not gone from an era when newspapers could be profitable to one in which they cannot, but rather from an era when newspapers could be wildly profitable to one in which they can be merely moderately profitable or break even. It is an important distinction, because it means that certain public policy remedies—for instance, making it easier for newspapers to reestablish themselves as nonprofit entities—might be more fruitful than in the past. Or it may mean that wealthy individuals—entrepreneurs and philanthropists—will view newspaper ownership in a different light than most corporate leaders have: not as a profitmaking venture, but as a way to provide an important civic benefit that will help to sustain democracy.[83]

Some newspapers and news organizations are also exploring reliance on a non-profit model.[84] Local journalism is facing an

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[82] *See* PROTECTING JOURNALISM IN THE AGE OF DIGITAL PLATFORMS 3 (Stigler Ctr. 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/media---report.pdf [hereinafter Stigler Media Report] ("This report sees the seismic shift in the advertising dollars to the online world as an opportunity to create a news ecosystem supported more by paid subscriptions and public funding, and less by advertising.").

[83] FCC Report, *supra* note 5, at 56*; see also* House Hearing, *supra* note 10, at 5 (statement of Kimmelman):

> …[T]he exploding digital marketplace has effectively wiped out the market for print classified and display advertising. Because digital advertising is much cheaper, can be more personally targeted, and fits well with today's disaggregated news delivery, it is hard to imagine that the newspaper and news media industry could replace its lost print advertising online, even if all ad revenue flowed back to journalism. Therefore, the financing of quality news in the digital market will require new sources of revenue far beyond advertising to remain a positive force for democracy.

[84] *See, e.g.*, Stigler Media Report, *supra* note 82, at 28–29. *See also Local and Nonprofit News*, KNIGHT FOUND., https://knightfoundation.org/topics/local-and-nonprofit-news/ (collecting resources and guides for the non-profit business model). In 2019, it was reported, the Salt Lake Tribune became the first "legacy" newspaper to make that change. *See 'Salt Lake Tribune' Becomes 1st Legacy Newspaper to Change to Nonprofit Structure*, NPR (Nov. 12, 2019), https://www.npr.org/2019/11/12/778632543/salt-lake-tribune-becomes-first-legacy-newspaper-to-change-to-non-profit-structu.

especially acute crisis and may require unique solutions tailored to the needs of local reporting, including public funding.[85]

In addition to revisiting the basics of its business model, the newspaper industry is already evolving to adapt to these new competitive circumstances in other ways, including new forms of procompetitive cooperation. For example, in 2010, the Associated Press secured a favorable Business Review Letter from the Justice Department indicating that the government would not challenge AP's plan "to develop and operate a voluntary news registry (the "Registry") to facilitate the licensing and Internet distribution of news content created by the AP, its members, and other news originators."[86] Similarly, the Knight Foundation has suggested a variety of ways that journalists and publishers could use artificial intelligence (AI) to their competitive advantage.[87] Many such proposals and others were examined and endorsed in the Stigler Center's 2019 Media Report.[88]

Broader technology industry regulation that might benefit newspapers may also be in the offing, albeit for reasons not

[85] *See, e.g.,* HENDRICKSON, *supra* note 5.
[86] *See Response to Associated Press's Request for Business Review Letter*, U.S. DEP'T OF JUSTICE (Mar. 31, 2010), https://www.justice.gov/atr/response-associated-presss-request-business-review-letter.
[87] Paul Cheung, *Journalism's Superfood: AI?*, KNIGHT FOUND. (Nov. 21, 2019), https://knightfoundation.org/articles/journalisms-superfood-ai/.
[88] Stigler Media Report, *supra* note 82.

limited to competition. For example, the Stigler Center's Media Report discusses regulations to address media concentration,[89] and to increase transparency and accountability.[90] Some have also advocated for the creation of a new, industry-specific regulator.[91]

There is reason to be cautious, if not skeptical, however, of proposals to provide antitrust immunity for collective negotiations between news publishers and online platforms.[92] The challenges of the news business long pre-date the information age and consumers could well be the losers if reforms do little more than immunize news publishers from

[89] *Id*. at 43–46.
[90] *Id*. at 46–54.
[91] House Hearing, *supra* note 10, at 6 (statement of Kimmelman: "Ultimately we cannot rely on antitrust alone to address the problems of platform power. We need a sector-specific regulator with expertise in how digital platforms operate and authority to affirmatively promote competition.").
[92] *See* H.R. 2054, 106th Congress (2019-20), https://www.congress.gov/bill/116th-congress/house-bill/2054/text. For a sampling of contrasting views of the legislation, see Matt Stoler, *Tech Companies Are Destroying Democracy and the Free Press*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/tech-monopoly-democracy-journalism.html; Margaret Sullivan, *Google and Facebook Sucked Profits from Newspapers, Publishers are Finally Resisting*, WASH. POST (Jun. 5, 2019), https://www.washingtonpost.com/lifestyle/style/google-and-facebook-sucked-profits-from-newspapers-publishers-are-finally-resisting/2019/06/04/d5fa2aaa-86de-11e9-98c1-e945ae5db8fb_story.html; Alec Stapp, *Google and Facebook Didn't Kill Newspapers: The Internet Did*, TECHDIRT (Oct. 25, 2019), https://www.techdirt.com/articles/20191024/13182743257/google-facebook-didnt-kill-newspapers-internet-did.shtml; and Chris Jennewein, *Newspaper Preservation Act is Bad News for Journalism in America*, TIMES OF SAN DIEGO (Jun. 12, 2019), https://timesofsandiego.com/opinion/2019/06/12/newspaper-preservation-act-is-bad-news-for-journalism-in-america/ ("The legislation would effectively allow a handful of large newspaper groups and their affiliated online publishing operations to control how Google, Facebook and Twitter display news content. The result would be a news cartel that excludes broadcast television, cable news and the growing numbers of independent local news publishers.").

scrutiny by allowing them to extract higher prices from digital platforms.[93]

V. CONCLUSION

Newspapers have faced competitive challenges from evolving technology since at least the advent of radio. From being the focus of antitrust law enforcement when newspapers were the incumbents seeking to use their competitive advantage to ward off those challenges, many newspapers now find themselves struggling to compete with today's digital platforms. The internet surely has amplified their precarious position in the marketplace, but the challenges of the digital age are not limited to newspapers. As I have argued, however, although antitrust law enforcement should play a role when exclusionary conduct is uncovered, it will not provide a complete response to the long-festering challenges of the news industry. Other options will be needed to preserve the free press.

Newspapers are not cassette tapes. They serve a public function that goes well beyond being just any product or service.

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[93] House Hearing, *supra* note 10, at 8 (statement of Kimmelman) (footnote omitted):

> We do not believe this problem will be solved by allowing more consolidation of power, whether among platforms or media. And we believe exceptions to the antitrust laws should be a tool of last resort, if they are ever used. Enabling excess market power to challenge the existing dominant platforms does nothing to address the long term need to develop market forces that promote strong local journalism, and does nothing to reduce any undue market power that may have made current market conditions worse.

They play an outsized role in a democratic society and it is now well-documented that they are at risk in the twenty-first century. Newspapers are losing the competition for the attention of the American reader. Winning back that attention is a societal challenge that goes beyond antitrust policy alone and will require broader strategies to refresh the product, reimagine the business model, and win back customers.