Making—and Sustaining—the News:

A Symposium on Australia’s News Media Bargaining Code and Implications for U.S. Policy

Terry Flew
Chris Krewson
Josh Hammer
Sohrab Ahmari
Matt Stoller
Peter Lewis
# CONTENTS

Editors’ Introduction.................................................................................................................. 2
Australia’s News Media Bargaining Code: A New Institutional Perspective  
  by Terry Flew .......................................................................................................................... 4
Australia’s News Media Bargaining Code and the World It Created  
  by Chris Krewson .................................................................................................................. 14
Small Media, Big Tech, and the “Partiality” Imperative  
  by Josh Hammer .................................................................................................................. 21
Big Tech and the News: A Problem of Countervailing Power  
  by Sohrab Ahmari .................................................................................................................. 28
Should We Save Newspapers from Google?  
  by Matt Stoller .................................................................................................................... 34
Editors’ Introduction: Making—and Sustaining—the News

The question of how to fund newsgathering has made the news. Since the advent of internet classifieds, the growth of massive search and social media platforms, and the wide availability of free news content, media organizations—particularly local and regional ones—have faced challenges in sustaining robust newsgathering operations.

Since 2005, 2,500 newspapers, or more than a quarter of the U.S. total, have shuttered, and newspaper employment has fallen by 70 percent, according to Axios. Between 2019 and 2022 alone, more than 360 newspapers closed down. Today, around a third of U.S. counties have no daily newspapers, and about 7 percent have no local news outlet at all. This decline affects not only news businesses, but raises questions about America’s ability to maintain an informed citizenry capable of holding elected officials and other powerful actors accountable.

Australia’s News Media Bargaining Code, enacted in 2021, represented a landmark policy intervention to address a perceived imbalance in bargaining power between news organizations and major advertising-driven internet platforms. The Code requires news publishers and digital platform distributors to agree on the value of news content provided, subject to arbitration, ensuring that publishers receive some compensation for news content. Although the Code was and remains controversial—Facebook initially threatened to withdraw certain content from the Australian market—agreements were quickly struck between platforms and news publishers. Two years later, it is possible to begin assessing the concrete effects of this legislation.

Australia’s Code has since also inspired similar proposals in other countries, including the United States. The Journalism Competition and Preservation Act of 2022 ultimately did not pass, but it did attract significant bipartisan support. The JCPA would have waived certain antitrust restrictions to news publishers to collectively negotiate with online platforms. More recently, the California Journalism Competition
and Protection Act was introduced in the California state legislature. The bill would require platforms to pay news publishers a “journalism usage fee.”

In hopes of better informing these debates, this symposium analyzes the Code and its implications for U.S. policy from multiple perspectives. University of Sydney professor Terry Flew offers a comprehensive account of the Code’s motivations and an assessment of its effects in the early years of implementation. Chris Krewson of LION Publishers explores the Code’s limitations with regard to transparency and support for small publishers. Josh Hammer of Newsweek examines the larger questions surrounding the Code from a legal perspective, particularly with regard to policymakers’ ability to exercise “partiality” in promoting public interests. Sohrab Ahmari of Compact discusses the Code and similar proposals with reference to the concept of “countervailing power,” drawn from political economy. Matt Stoller of the American Economic Liberties Project focuses on the antitrust implications for both news media and Big Tech. At a later date, Peter Lewis, of Australia’s Essential Media Communications, will address potential changes to the code resulting from privacy reforms, pending the resolution of those policy processes in Australia.

In sum, the Australian News Media Bargaining Code and similar proposals involve a range of fundamental issues—from local news to Big Tech, to advertising markets, antitrust, censorship, privacy, and beyond. A better understanding of the Code and its implementation can offer critical insights to both immediate participants and the wider public as these important debates continue.

—The Editors
Australia’s News Media Bargaining Code: A New Institutional Perspective

by Terry Flew

In 2021, the Australian Federal Government passed a landmark News Media and Digital Platforms Mandatory Bargaining Code through both houses of parliament, which requires the platform companies Google and Meta (then Facebook) to contribute financially to the production of news content by Australian news publishers. This measure, which is estimated to involve an annual transfer of around $A200 million, is intended to support public interest journalism, ensure the viability of news publishing, and reverse the downward trend in journalism employment by requiring financial contributions from the leading digital platforms that acknowledge the role played by news in driving online traffic to their sites.¹ It has been described as a world-leading initiative, and a strategic intervention that takes the first steps towards addressing the unequal bargaining position faced by news publishers in their dealings with platform monopolies.² It has also had considerable influence internationally, most notably with Canada’s proposed C-18 Online News Act, but also the European Union’s Digital Markets Act, Digital Services Act, and proposed European Media Freedom Act.

The News Media and Digital Platforms Mandatory Bargaining Code—hereafter referred to as “the Code”—arose as a response to the

---

Terry Flew is professor of digital communication and culture at the University of Sydney. His books include The Creative Industries, Culture and Policy (SAGE, 2012), Global Creative Industries (Polity, 2013), Media Economics (Palgrave, 2015), Understanding Global Media (Palgrave, 2018), Regulating Platforms (Polity, 2021), and Digital Platform Regulation: Global Perspectives on Internet Governance (Springer, 2022). He was president of the International Communications Association (ICA) from 2019 to 2020, and is an ICA Fellow. He currently leads an Australian Research Council Discovery project on the value of news from an institutional and multi-stakeholder perspective.
Australian Competition and Consumer Commission’s (ACCC’s) Digital Platforms Inquiry (DPI). The ACCC was asked to inquire into matters that included the extent of a digital platforms’ market power and the impact of digital platforms on choice and quality of news and journalism. Its Final Report identified key problems as being a reduction in the advertising revenues of news businesses, a precipitous fall in both the number of journalists employed in Australia and the number of news titles, and an imbalance in the relationship between news publishers and digital platforms which left the news media vulnerable to changes in platform policies and algorithms. The DPI made 23 recommendations overall, most of which were adopted by the Liberal-National Party Government led by Scott Morrison, and of which the most significantly debated has been the requirement that designated digital platforms provide enforceable codes of conduct governing their relations with news businesses, and that such codes commit to treating news businesses fairly, reasonably, and transparently in their commercial dealings, including appropriate value sharing for the distribution of news content online generated by the news businesses.

Debates about the efficacy of the Code have been considerable. Policies such as the Code aim to address the asymmetric interdependence that has come to exist between news publishers and digital platforms, whereby a large number of news publishers are dependent for content distribution on a far smaller number of digital platforms that do not have the same reliance upon news content. The power of digital platforms has thus been seen as one of the key factors threatening the sustainability of advertiser-financed news production and, with this, public interest journalism. Other countries have used copyright-based approaches to ensure news publishers receive payment based on a right to publish. The European Union introduced a publisher’s right to request payment for content where more than a hyperlink was included, and this was adopted in 2019 by France, after previous unsuccessful attempts to apply such a policy in Germany and Spain. More generally, the responsibilities of digital platforms with regard to the future sustainability of news is becoming an issue in many countries, as demonstrated by the Cairncross Review in the UK, the Time to Act report in Canada, and the ACCC DPI in Australia.

The Code can be seen as one of many measures being applied by nation-states around the world to address the power of digital platforms, as part of what has come to be known as the “techlash,” or the movement to “regulate Big Tech.” As the power of digital platforms often raises policy questions that sit outside of conventional industry or...
regulatory frameworks, there is typically a degree of innovation involved in developing policy agencies and instruments that are suitable for the challenges presented; Philip Schlesinger has termed this “neo-regulation.” As a result, each new measure raises questions not only about its efficacy in addressing the particular matter of concern (market dominance, content moderation, hate speech, unfair trading etc.), but the extent to which it marks a sustainable policy response in what are frequently shifting relationships. The Code therefore provides an important case study in the adaptiveness of institutions to new policy and regulatory challenges, as well as an instance where the power of different stakeholders in such regulations—in this case traditional news media businesses and global digital platforms—can be evaluated in terms of their capacity to shape the policy agenda and interpretations of the public interest.

**THE SHIFTING INSTITUTIONAL LANDSCAPE**

A recurring challenge in media economics arises in situations where market participants possess some form of economic power. Natascha Just has observed that addressing concentration through media policy typically requires “the alignment of two competing public interests: the safeguarding of competition on the one hand and ensuring media plurality (media diversity or pluralism) on the other.” The number of news providers is not in itself a sufficient guarantee of other media policy goals, such as equitable distribution of communicative power, availability of diverse content, safeguards against the abuse of media power, and the promotion of civic discourse and the public sphere. Moreover, the traditional media companies are increasingly reliant upon digital platforms and social media for the distribution of their content, while also facing the platform companies as competitors for digital advertising revenue. There is a need to focus not only upon price competition—which is complicated with digital platforms as many of their products and services are free to consumers—but also upon non-price competition factors such as innovation, quality and privacy, the nature of “attention markets,” the power associated with engagement in multi-sided markets, and the role played by access to “big data” as a barrier to entry for new competitors.

The complex institutional nature of internet and digital platform governance is partly acknowledged in the academic literature. Robert Gorwa has represented internet governance as a triangle, with shifting configurations of industry, government, and civil society organizations
acknowledging the increasingly hybrid nature of governance generally, and the particular pressures to decentralize internet governance so as to mitigate claims of state censorship.\textsuperscript{12} An important limitation of this model, however, is that it cannot directly address conflicts between institutions within the three sectors. This is a particular problem with business, as competition is as much between firms in different sectors as it is within sectors, and businesses seek to use the policy process in order to gain strategic advantage. This has been referred to as rent-seeking behaviour, with rent defined as “a return to a resource owner in excess of the opportunity return the owner would otherwise receive.”\textsuperscript{13}  

The relations between digital platforms and news publishers as content providers raise what the institutional economist Oliver Williamson identified as “transaction cost” issues. Transaction costs are defined as information and communication costs that arise because “market actors . . . have basic information deficits and the price system does not reflect all the relevant information.”\textsuperscript{14} Platforms such as Google and Facebook are valuable to media companies as they provide infrastructure for content distribution that is freely available and can reach audiences beyond those directly attracted to their brand. The platform companies also benefit from the ways in which this news content drives traffic to their sites, and thereby enables them to be more attractive to advertisers. The challenge is that it is very hard to quantify benefits to either party from these transactions, as they come from the availability of content and services that are themselves free to the consumer. Moreover, both platforms and publishers are direct competitors for digital advertising revenues. The turn on the part of the news media industries for government action to address the perceived unequal bargaining power of the relevant parties arises from a strong sense that the cost burden associated with producing news content is being met entirely by the publishers, but that a significant—if unknown—amount of the resulting revenues are going directly to the platforms. There is thus a governance question surrounding the relationship that has been perceived to require a third party, such as government regulators, to mediate on behalf of the competing interests.

The importance of the governance framework for these institutional arrangements is intensified by the nature of news itself. News is not only the content that is being produced by media companies and distributed through digital channels. It plays a key role in shaping what Douglass North termed the “institutional environment,” that is, “the rules of the game in a society, or … the humanly devised constraints that shape human interactions.”\textsuperscript{15} News media are critical to shaping the ideas,
values, and beliefs that shape a culture, and particularly the ideologies or “mental maps” through which social reality is collectively perceived and acted upon. Putting this more concretely, concerns about misinformation, “fake news,” “news deserts” and a general crisis in the financial sustainability and viability of news publishers, and with this the employment of journalists, present issues about the future of democratic societies that go beyond the future of particular media companies or news brands. As Michael Schudson has argued, “The world will survive without a lot of the journalism we have today, but the absence of some kinds of journalism would be devastating to the prospects for building a good society, notably a good democratic political system.”

ASSessing the Asteralian News Media Bargaining Code

Two broad priorities can thus be identified with Australia’s News Media Bargaining Code. One is to create a more “level playing field” in bargaining relations between digital platforms and news publishers. Rod Sims, who was in many respects the architect of the Code as chair of the ACCC, has argued that “the NMBC was precisely targeted at the issue of an imbalance of bargaining power.” He has summarized the point in these terms:

The Inquiry found that in the absence of the bargaining power imbalance the platforms and media businesses would bargain over the value created by the media companies from the use of their news content by the platforms, and the referral by the platforms of audience traffic to the news media businesses and reach a commercial arrangement. This was not possible in this instance, however, because the platforms had significant bargaining power and so could unilaterally set the terms of any such arrangement. . . . To the Inquiry this significant bargaining power imbalance represented a clear market failure that needed to be addressed.

The Code can thus be seen as an explicit government intervention to set a “fair price” for the use of news content on selected digital platforms. At the same time, the aim has been to establish a co-regulatory framework rather than one based around command-and-control regulation, so the parties are obligated to bargain in order to establish a mutually agreed ‘price’ for the use of news on platforms.

This desire to appear noninterventionist has generated two sources of ambiguity in the Code. One is that no platform has been explicitly designated by the government as having to bargain with news providers,
although it is implicitly understood the at the Code applies specifically to Google and Meta. At the same time, there is not a list of new organizations that the platforms are required to deal with, leading to ambiguity as to why some news publishers receive funding and not others, and concerns about a hierarchy among news businesses between the most powerful who are able to negotiate deals, and others who are set aside. In general, there are concerns about a lack of transparency in the bargaining process under the Code.

The Code has, of course, attracted significant criticism. Google and Meta believe that it unfairly singles them out as having responsibility to subsidize legacy media and note that they already contribute to innovative journalism through the Google News Initiative and the Facebook Australia News Fund (although the funds allocated through these schemes are far lower than those distributed through the Code). There have been high profile media companies that have not been able to reach agreement with the platforms through the Code, most notably the multicultural government broadcaster Special Broadcasting Service (SBS) and the university-supported independent online platform The Conversation not reaching an agreement with Meta. From a US perspective, the journalist and academic Bill Grueskin has argued that “Australia looks like a success story to those who’ve long yearned to force Big Tech to prop up suffering newsrooms. But it’s a murky deal, with critical details guarded like they’re nuclear launch codes.”

The lack of transparency about how much money is going to news publishers, which publishers have deals and which do not, and how the funds are being used by news organizations has been a regular source of criticism. Bossio et al. have observed, “Given the lack of investment in smaller, independent journalism and the lack of transparency about how media organisations would invest the funding, it is yet to be seen how the NMBC contributes to maintaining a sustainable business model for public interest journalism, other than continued payments from platforms.”

In its review of the Code’s operations after one year, the Australian Department of Treasury concluded, “Looking back at its first year of operation, it is reasonable to conclude that the Code has been a success to date. Over 30 commercial agreements between digital platforms (Google and Meta) and a cross-section of Australian news businesses have been struck, agreements that were highly unlikely to have been made without the Code.”

Recommending only minor changes to the Code’s operations, the Treasury considered whether it could be extended to other popular
social media platforms, such as Instagram and TikTok. The architect of the Code, former ACCC Chair Rod Sims, has also argued that the code has been a success: “The NMBC has been successful by any measure. It has almost completely met the objective set for it, and more quickly than initially hoped for. Few other government measures can claim the same.”

There are a second order set of priorities which centre around securing the future of news and journalism. Access to reliable news and information performs a series of important social functions (trust in government, better public policy debate, exposure to diverse views etc.), and journalism has a historic mission to “speak truth to power.” Journalists must be prepared to investigate powerful individuals and institutions (governments, business, religion etc.) on behalf of the citizenry, and in doing so improve the accountability, transparency, and effectiveness of our social and political institutions. Whether news outlets and journalists do this in practice is of course hotly debated. But they have been able to rely upon an institutional infrastructure for doing so that has been to a significant degree underpinned by the flow of advertising revenues to commercial news brands.

This was the primary business of commercial news and journalism for over a hundred years, and it meant that media companies serviced two markets: consumers and advertisers. The rise of the internet has, however, transformed this market for news in a variety of ways, both good and bad. The traditional news media business model was highly profitable for the owners of media businesses but also a very effective engine for the employment of journalists. Underpinning it were monopolies over classified advertising, limited options for advertisers more generally, and a monopoly or oligopoly in particular geographical markets. The rise of the internet as an outlet for news empowered consumers and advertisers. Suddenly, consumers faced a proliferation of news options from around the globe, while advertisers and those using classified services had access to a much wider range of prospective buyers of their products and services, and far more fine-grained analysis of who viewed their content than analog media could ever provide. Social media also enabled news content to be shared, debated, and engaged with to an unprecedented degree.

This was a wave that the traditional news brands initially surfed quite effectively, revelling in new forms of audience reach, social engagement, and profile on global digital platforms. But the proliferation of free content from multiple sources undercut the scarcity rationales they had traditionally benefited from, while also leaving the news business far
more open to a range of new providers, of varying degrees of accuracy and credibility. By the mid 2010s, as the problems of misinformation and “fake news” became more visible to the public and to politicians, there had been a scaling down of the operations of newsrooms which made them less able to respond to the new challenges of credible, accurate, and engaging content. In Australia, about 25 percent of journalism jobs disappeared between 2012 and 2017, and the impact of Covid-19 saw over one hundred newspapers close up across Australia, particularly in rural areas.  

The future of the Code is under debate for a few reasons. The adoption of comparable measures by the Canadian Government with the C-18 Online News Act has triggered threats to withdraw Canadian news from Meta’s platform sites that have similarities to the threats made in Australia in 2021. Google and Meta remain highly critical of Australia’s Code and what they see as an arbitrary requirement to pay well-established commercial news businesses under threat of government designation. In an environment that is less profitable for the tech sector and with growing cost pressures faced by these companies, Meta has signalled a movement from social media to the “metaverse.” But the Code has considerable political support in Australia, particularly as it presents one way in which the financial sustainability of news production and journalism can be secured in the face of ongoing turmoil for the advertiser-financed business model. At the same time, the overall lack of transparency around how it operates, and who benefits from the associated transfer of funds, remains troubling for democratic accountability. 

NOTES

5 Emily J. Bell, “The Dependent Press: How Silicon Valley Threatens Independent Journalism,” in Digital Dominance: The Power of Google, Amazon,


Schlesinger, The Neo-Regulation of Internet Platforms.


Sims, Instruments and Objectives, 2.

Sims, Instruments and Objectives, 6.


Sims, Instruments and Objectives, 21.

Australia’s News Media Bargaining Code and the World It Created

by Chris Krewson

If publishers bargaining for payments from platforms was going to save local journalism in Australia, we’d probably know it by now. After all, back in 2021 Australia passed the News Media Bargaining Code, presented as a way for publishers to claw back advertising revenue. In their eyes, their articles, photos, columns, editorials, and letters to the editor—their “content”—was a big reason why the internet platforms (primarily Google and Facebook) had hoovered up nearly all the digital advertising dollars globally available. Banding together in a cartel, as made permissible by the Bargaining Code, would allow those publishers some leverage, and allow them to be compensated for the content.

There are, of course, problems with the idea that platforms derived much of their value to advertisers from news. (In fact, advertisers have for years been trying to move their brands to safer places, and remove their perfumes, cars, and clothes from alighting next to the latest mass shooting or the occasional armed insurrection.)

But—setting all that aside—legislators in Australia passed the Code. So what happened next? If all went to plan, bargaining began; platforms, publishers, and mediators hashed out fair deals in this experiment.

Instead, Google and Facebook each cut side deals with publishers—the details of which are not public, as there are nondisclosure agreements barring further review. Wrote Bill Grueskin, Columbia University journalism professor and a journalist in residence at the time at the Australia-based Judith Neilsen Institute:

If you want to learn whether those newsrooms are spending that money to bolster journalism, rather than pad executives’ salaries,

Chris Krewson is executive director of LION Publishers.
you’re also out of luck. I’ve been talking to newsroom managers most of my adult life, and I’ve never seen a group so reticent to share details of anything related to their business.

So we have a precedent set in one nation of 25 million residents, the first time governments have interceded to mandate platforms pay news organizations. And no evidence that the dollars that flowed actually meant more journalism. Grueskin pegged the influx of cash at $200 million, not an inconsiderable sum.

That $200 million could not stop the tide. In October 2021, “Australia’s news sector has experienced the third largest number of contractions within a single quarter since Covid-19 emerged,” per the Australian News Data Report from the Public Interest Journalism Institute.

And what about the smallest publishers, those who might reach to qualify for this code? I asked Claire Stuchbery, executive director of Australia’s Local Independent News Association, what her membership is seeing. Stuchbery responded that most of that group’s members do not qualify or benefit at all—not least because of the lengthy and expensive process needed to navigate the Code:

What we have learned through the review process is that publishers had to find funding partners to engage legal support to enter the bargaining process. The process then took around 18 months, followed by a rigorous process of negotiating commitments (e.g. number of stories published each week, topics covered, target audience groups), with some publishers only receiving their first payments in the last month. While amounts have been set, delivery models and expectations must be re-negotiated annually over a five-year deal. These deals have only been forthcoming from Google to date, with no engagement from Meta.

Registration as a public interest news outlet has been patchy. For example, one publisher has three mastheads, two of which were considered eligible and one was not, despite operating on the same model as the other two in the same publishing house. And, being registered does not automatically mean the masthead will be accepted by Google or Facebook, who apply their own considerations to who is or is not eligible for a deal. In this way, the Mandatory Bargaining Code only gets publishers part-way to a deal with the big tech companies.

Beyond those few publications who have successfully negotiated a deal, there are many who have found the whole
process too cumbersome to manage, have not had the capacity to engage with it and/or don’t meet the financial eligibility requirements. The Code requires newsrooms to have an annual turnover of $150k+ to be eligible, a barrier to new entrants and small publishers. LINA suggests a non-financial measure alongside this requirement would allow for smaller public interest news publishers to participate in the Code. Eg. $150k turnover and/or producing an average of 6+ local news stories per week (or similar). A barrier to entry is reasonable to ensure focus on quality news content, but a content measure would also be appropriate to demonstrate alignment with the codes’ purpose.

To date, no community radio news service has received funding through the Code and only 3 LINA members have been able to engage with the process, noting this occurred through the Public Interest News Alliance prior to the establishment of LINA.

The overall impression of the Code’s implementation has been that it has significantly favoured large, mainstream media outlets, some of whom have closed down since receiving the money, (and) will have limited impact or benefit to small, independent newsrooms.

In fact, in a report released by the Australian government in early December, it declares the code a success—not because anyone knows how well it worked, but because twenty secret deals were cut between publishers and platforms. In any event, the precedent was enough to pique the interest of struggling legacy media owners the world over, and in the United States, lobbyists for the newspaper industry got to work building upon what Australia had started.

**THE JOURNALISM COMPETITION AND PRESERVATION ACT**

I became aware of the U.S. version of the Aussie bargaining code when Minnesota Senator Amy Klobuchar introduced the “Journalism Competition and Preservation Act.” The bill purports to help local media compete by allowing them to collectively bargain with tech platforms. After reading the legislation, I wrote a letter to LION Publishers’ membership—which today stands at 450, most of which are in the United States, and two dozen in Canada.

The letter covered both the JCPA and Canada’s version, a bill called CA-18; I wrote:
[While the legislative proposals’] stated purpose is to help local news . . . on the whole, they will not. Yes, they will help some family-owned newspaper companies slow their decline, and perhaps some of our larger members will gain some much-needed revenue—and I am glad for those businesses.”

Still, the bills are part of an international legislative push to extract revenue from the platforms that have succeeded in capturing the bulk of digital advertising dollars. (You may have seen this effort in Australia, which proved to be a testing ground of sorts.)

In my view, though, these measures are written to redistribute those advertising dollars to qualifying publishers and broadcasters—and as you might imagine based on the lobbying dollars involved, there are several disqualifying measures for any organization that’s not a large legacy print or broadcast business.

I come to these conclusions honestly. I’ve spent the last eight years of my career building the next generation of news organizations; first as the person who hired and led a start-up newsroom in Philadelphia, helped launch another in Pittsburgh, then ran strategy for their parent company until the money ran dry. Then, as executive director at LION Publishers, a national nonprofit serving local entrepreneurs like the startup local news company I used to work for.

Those efforts have been greatly aided by funding from the Google News Initiative and the Meta Journalism Project, which have underwritten training programs, fellowships, and research into this emerging ecosystem. So far, the results are encouraging, though too many news entrepreneurs building digital businesses tell us their efforts are not sustainable.

These efforts—like the Santa Cruz Local, a LION member site started by Kara Meyberg Guzman—show great promise because they start small, continually responding to their community’s information needs. Sometimes an effort that starts small can become dominant; this year, founding publisher Anne Galloway is stepping down from VTDigger. She was laid off from the Times Argus newspaper in 2009; in 2022, the site she founded is now the largest newsroom in Vermont.

Don’t take my word for it, though. In a letter penned to his local congressman, newspaper executive and industry analyst-turned-local-publisher Ken Doctor, of Lookout Local, came to similar conclusions, writing: “I believe JCPA, despite its intentions, will generate more nega-
tive impact on the local press standing and revival than positive. . . .” He added:

The newspaper chain recipients of such funding are in survival, lifeboat mode. Four companies that now control 50% of American daily newspaper circulation are all embarked on the same “squeeze on the last profits, and then turn the lights off” business strategy. Some don’t mind being referred to as vultures; others display prettier public plumage, but important employ the same wind-it-down tactics. The major loss reported by Gannett, which itself controls 25% of circulation... certified how quickly the final days of the print chains are coming.

New revenue streams that might be gained by these companies—and have no doubt they would more greatly benefit from negotiated or mediated platform payments than the hundreds of smaller outlets, like Lookout—won’t make a signal difference in the only metric that matters: how many journalists are working to cover local communities. The amounts estimated will not turn around companies that are losing tens of millions of dollars; they will only forestall the presence of these companies in their markets. In fact, their ability to take money that will increase their profits – but not their journalism – will be hard to police post passage.

Money gained would support “ghost newspapers.” We all hear about news deserts, and they are pernicious, but are found in relatively small population areas. Ghost newspapers do more, every day, to threaten local democracy. These are papers that maintain the decades-only trusted nameplates, but have one or two “local” stories, usually written by a $20 an hour trainee reporter with no experience in the community. They are ghosts, and legislation that enables them to take space in the market – and stands in the way of new spirited operations getting established – is misguided.

Unlike the Local Journalism Sustainability Act (LJSA), about which I see positives and negatives, JCPA will disproportionately favor big publishers. As a small publisher now building a network, all I ask for is an even playing field. By enabling “side deals”, big companies – those light on journalistic missions and heavy on short-term profit maximization – are sure to drive disproportionately better deals. That’s unfair and a detriment to democracy.”
As with Stuchbery’s analysis of Australia’s Code and its impact on this burgeoning ecosystem, based on their income nearly half of LION members won’t see a dime from the JCPA. That measure does not apply to news organizations that have been in business for less than a year, and it excludes news businesses that earn less than $100,000 per year. As of 2021, 44 percent of LION members earned less than that.

WHAT IT MEANS FOR THE FUTURE

Late in 2022, Senator Klobuchar attempted to attach the JCPA to a big year-end spending bill. After the bill was proposed, Gannett—mentioned in Doctor’s note, the largest U.S. newspaper publisher by circulation—announced a major executive departure by the end of the year, ahead of the announcement of still more layoffs and cuts. The head of the News Media Alliance—a huge advocate for the JCPA—also announced his departure from the top of that organization.

What that means for the ecosystem we are building has yet to be determined. Meanwhile there are government efforts that are promising—one is a payroll tax credit for journalists, the surviving provision of a package of measures called the Local Journalism Sustainability Act.

Under this measure, qualifying newsrooms would get a refundable tax credit for five years, a cash benefit, of up to $25,000 in the first year and $15,000 in years two through five for each full-time local journalist. The benefit amounts to 50 percent of a local journalist’s compensation up to a $50,000 salary in the first year, and 30 percent of the salary in the last four years.

Many LION members don’t use payroll providers, but it’s our goal as a staff to help these members further professionalize, and a tax credit to subsidize work they’re already doing would be a huge incentive for them to do so. LION is proud to support this measure.

Another promising effort is in California, a $25 million journalism fellowship program has been announced at the University of California at Berkeley. Funds for the fellowship program will come from California Assembly Bill 179, which was approved by legislators in the senate and assembly and signed into law in the fall of 2022.

The program aims to strengthen local reporting across the state and to combat the gaps in credible local news coverage that have been filled by disinformation, state Sen. Steve Glazer told U.C. Berkeley.

“Public television and public radio have shown that Americans trust independent, government-funded media,” Glazer said. “This program builds on that tradition by providing public resources to local media
through the creation of a university-run fellowship program whose journalists will be completely independent and operate without any connection to the government or influence from politicians.

Finally, in 2018, New Jersey created the Civic Information Consortium, a first-of-its-kind nonprofit to strengthen local-news coverage and boost civic engagement statewide. Since 2021, the consortium has invested $1.35 million of public funds into initiatives that benefit the state’s civic life and meet the evolving information needs of New Jersey’s communities—and in its last grant announcement, funded projects including coverage of climate change, increasing the amount of reporters at municipal meetings, and adding an internship program, among many other efforts.

These kinds of government interventions have had positive impacts at the local level, and don’t threaten the independence of the organizations that take advantage of them. Hopefully they provide a model to build upon, with the needs of communities and underserved populations—long overlooked by journalism organizations—identified and prioritized.
Small Media, Big Tech, and the “Partiality” Imperative

by Josh Hammer

It has been about two years since Australia enacted its much-disputed News Media Bargaining Code (NMBC) legislation. That new dispensation Down Under requires hegemonic Big Tech platforms to remunerate local Aussie media outlets, in straightforward enough fashion, for the right to post and disseminate an outlet’s substantive content on a technology platform. The motivating idea was, and remains, the righting of a power imbalance between traditional publishers and what the NMBC refers to as “digital platform companies” (and what, in the U.S., Section 230 of the 1996 Communications Decency Act refers to as “interactive computer services”).

Similar draft legislation that failed to pass the U.S. Congress in 2022, dubbed the Journalism Competition and Preservation Act (JCPA), would effectively grant publishers and journalistic content creators greater collective bargaining power with which to negotiate with oligopolistic internet companies for a share of digital advertising revenue. The JCPA, then, is in essence a slightly watered-down legislative cousin of the NMBC; the NMBC mandates Big Tech to negotiate deals with publishers in a more hands-on fashion, whereas the JCPA grants publishers an antitrust exemption for purposes of pursuing collective bargaining. Under both the NMBC and JCPA, binding arbitration is available as a negotiating back-up.

The JCPA is a fine piece of legislation. It is worthy of conservative support, and the new Republican-held House of Representatives would be wise to eschew the invariable teeth-gnashing of the GOP’s donor wing and give the bill another look.

Josh Hammer is Newsweek opinion editor, host of the Josh Hammer Show, a research fellow with the Edmund Burke Foundation, and counsel and policy adviser for the Internet Accountability Project.
But the JCPA is, candidly, a fairly marginal remedy designed to palliate a much more penetrating and debilitating societal woe: Big Tech’s unprecedented power over our commerce, speech, social interactions, and general daily life. While the JPCA represents a suitable starting point to begin to rein in Big Tech power, then, additional public policy solutions are also needed. Indeed, the most interesting aspect of the JCPA debate is perhaps not its concrete policy ramifications (favorable though those may be), but its more theoretical utility as an instrument to help habituate sympathetic lawmakers into assessing economic statecraft through a less fanciful and more realistic analytical lens of “partiality.”

**EVALUATING THE NMBC**

Much sound and fury accompanied Australia’s initial policy roll-out and subsequent ratification of the NMBC. But true to Shakespeare, the sound and fury signified nothing. Facebook and Google vociferously opposed the ratification of the NMBC, with the former going so far as to threaten to cease distributing news articles in Australia (a tactic the company redeployed during the JCPA debate in the U.S.). Those turned out to be empty bluffs; neither company notably altered its Australia-specific services offered in the aftermath of the NMBC. Overall, the financial effect thus far has been well over AU$200 million remitted from Facebook and Google to Australian news publishers, since the NMBC took effect.

The NMBC’s breadth, moreover, is staggering: Facebook and Google have reached deals with publishers representing an estimated 90-plus percent of all Australian journalists. A formal Australian government review of the effects of the law’s first year, published in November, found that the NMBC directly led to more than thirty total commercial agreements between publishers and either Facebook or Google. Crucially, these agreements represent not just Rupert Murdoch-aligned conglomerates, but also smaller publishers; specifically, the NMBC provides an exemption permitting collective bargaining for any outlet with annual revenue of less than $10 million (USD).

The clear *ex ante* takeaway is that more investment dollars and more human capital talent alike will be deployed in Australian media, moving forward. Indeed, the Australian government’s November report makes this explicit: “At least some of the agreements have enabled news businesses to, in particular, employ additional journalists and make other valuable investments to assist their operations.” As for the digital
advertising monopolists, those sprawling multinationals Facebook and Google—well, they are doing just fine. (To be more precise, some of the co-called “FAANG” companies have endured a difficult business stretch over the past year, but there is no reason to blame the NMBC; France even passed a similar law to the NMBC back in 2019, well before the post-Covid onset of the “FAANG” financial woes.) Overall, the NMBC has been so transparently successful that Aussie neighbor New Zealand is now poised to follow suit.

The JCPA, if enacted into law in the U.S., would operate similarly to the NMBC in Australia. The bill would provide an express antitrust carve-out, permitting traditional publishers—many of whose business models have infamously been decimated in the Digital Age, especially with the onset of contemporary social media—the ability to collectively bargain with Facebook and Google for a slice of their digital advertising revenue. In its most recent iteration from the tail end of the most recent Congress, the JCPA—thanks to Sen. Ted Cruz (R-TX)—would limit publishers’ antitrust exemption solely to bargaining over pricing, and would explicitly exclude any collective bargaining agreement terms pertaining to content moderation. For conservatives (properly) still concerned about Big Tech censorship and algorithmic chicanery even with Elon Musk at the helm of Twitter, that is an important point of clarification.

Facebook is yet again threatening to extricate itself from the news dissemination business if the JCPA passes into law, but the world has already seen this bluff unfold in real-time; after a brief shut-down, Facebook quickly returned to the news business in Australia following the enactment of the NMBC and participated in negotiations with Australian publishers in reasonably good faith. Google, which had similarly claimed the NMBC might “break” its search engine in Australia, has similarly steered the corporate course. It is thus safe to simply ignore these multinationals’ wailing this time around, when it comes to the JCPA; they aren’t going anywhere, and they will not be changing any of their relevant practices.

Some, such as the Google-funded libertarians at R Street Institute, have been suggesting that the JCPA might only help “big media conglomerates” and do nothing to help smaller and local media outlets—the clearest financial victims of Big Tech’s digital advertising depredations. This is pure disinformation, perhaps even deliberate deceit; the JCPA antitrust safe harbor, by its own explicit terms, only includes publishers with 1,500 employees or fewer. Thus, the blueblood legacy press and corporate media, such as ABC, NBC, CBS, the New
York Times, and the Washington Post, are specifically excluded from the statutory ambit of the antitrust safe harbor. On the flip side, smaller conservative media outlets such as Newsmax, Salem Media Group, the Washington Examiner, and the Daily Caller have all publicly announced their support for the JCPA.

The intent and effect of the JCPA is to ensure that small publishers and those publishers customarily discriminated against by Big Tech—translation: right-leaning media outlets—can negotiate fair advertising deals for the dissemination of their content. The JCPA, much like the NMBC, is an attempt to partially restore the pre-social media status quo ante, before Facebook and Google successfully manipulated the digital advertising space, acquired monopolist status, and devastated local news outlets across the country. The ultimate beneficiaries of the JCPA’s successful passage would be small-town America—to wit, the small-town media consumers of a partially revived local news industry.

The JCPA is a sound statute, worthy of support and enactment into law. But beneficial though the JCPA may be, it is important to emphasize that it is merely an incremental statute that will marginally ameliorate the distorted status quo, seeking to restore a modicum of balance to a wildly unbalanced digital advertising space. The JCPA would have little bearing on broader societal issues pertaining to digital technologists’ sweeping assault on our daily economic livelihoods and the systemic curtailment of our most fundamental twenty-first-century digital civil rights, platform access and online speech. To meaningfully move the ball forward and circumscribe the astounding scope of Big Tech’s reach, stricter prophylactic regulation pertaining to algorithmic manipulation, content moderation, and viewpoint discrimination is necessary.

The obvious legal paradigm, as I and many others have argued, is the common carrier framework. Applying common carriage to the Big Tech platforms—“interactive computer services,” per Section 230—would solve many, perhaps most, of our Big Tech woes. Indeed, sprawling, industry-wide common carriage would probably even go a long way toward remedying some of the structural inequities in the digital advertising space, thus rendering the JCPA itself at least partially superfluous.

True industry-wide common carrier regulation for all “interactive computer services” would likely have to happen at the federal level, via either fresh congressional legislation or simple Title II regulatory diktat. But in the interim, the best short-term path forward is represented by state-level legislation such as Texas’s H.B. 20 viewpoint-
nondiscrimination law, upheld last September by the U.S. Court of Appeals for the Fifth Circuit in the case of *NetChoice v. Paxton*. The states may properly use their police powers to directly impose such nondiscrimination requirements on private enterprises operating within their borders; indeed, as Professor Philip Hamburger of Columbia Law School has suggested, such direct statutory requirements may be conceptually viewed as the common carrier regulatory framework’s correlative “sticks” for the “carrot” of sweeping Section 230 legal immunity.

Section 230 itself, of course, is also in need of both statutory reform and a proper judicial reinterpretation. Nor should we give up on antitrust, as a remedy for rapacious technologists who have simply amassed far too much corporate power; for traditional monopolists such as Amazon and Google, good ol’-fashioned trust-busting likely is our best approach.

But common carrier regulation, previously floated by no less a conservative legal titan than Justice Clarence Thomas himself in the April 2021 case of *Biden v. Knight First Amendment Institute*, is the closest thing we have to a near-panacea for our digital enslavement via the whip of Big Tech. It would behoove policymakers to focus less on small-ball legislation, such as the JCPA and other incremental bills introduced last Congress by a band of happy anti-Big Tech warriors led by Rep. Ken Buck (R-CO), and more on the seismic paradigm shift that is common carriage.

**THE PARTIALITY TRADE-OFF**

Given the outsize role these platforms play in our contemporary lives and how indispensable they have become to countless Americans’ economic livelihoods, it simply defies common sense that “interactive computer services” are not currently regulated the same way that telecom companies, for example, are. Your phone company cannot discriminate against you, or charge you more, based on the substantive content of your oral communications; nor, for that matter, should Big Tech be able to discriminate against you based on what you post online. When it comes to digital advertising, the particular concern of the JCPA, this “net neutrality”-style regulatory approach would prevent the Big Tech oligarchs from treating conservative media outlets less favorably than they treat Regime-approved Pravda. That is no small victory.

But the single most important aspect of the NMBC/JCPA debate is less about the specific letter of the law(s) in question and more about the
importance of the very questions that the debate presents, in terms of political statecraft, the ineluctable reality of legislative trade-offs, and the wielding of just political authority to promote the common good.

The right-liberal would look askance at this entire problem; indeed, he would be unlikely to consider the problem here much of a “problem” at all. Just let the economic chips fall where they may, the argument goes. Any guardrails or other deliberate policymaker thumb on the scale would evince Hayek’s “fatal conceit” and just gum up the works, after all; far better to just sit back and do nothing at all. Oren Cass calls this mentality “let the market rip,” and here the predictable result would be the perpetuation of the regnant status quo: the engorgement of Big Tech, the further entrenchment of Facebook and Google’s digital advertising duopoly, and the further decimation of smaller and more local media publishers.

But the implicit argument of the JCPA is that the policymaker does have a role to play in making such assessments as, for instance, weighing whether the distribution of resources between small-time publishers and Big Tech titans is, in the year 2023, either fair as an ex post matter or likely to incentivize sound outcomes as an ex ante matter. The argument JCPA proponents are advancing, whether they realize it or not, is that economic statecraft is an inextricable component of broader political statecraft for the simple reason that our economy will always be “partial,” as my Newsweek Opinion colleague Philip Jeffery recently argued at Public Discourse. True “neutrality,” in other words, is here, there, and everywhere a lie. The “partiality” trade-off between Big Tech and Small Media is reflective of the notion that everything in statecraft amounts to a trade-off, and that trade-offs necessarily entail the rendering of value judgments.

Ours is not an anarcho-libertarian “night watchman state”; there are governing rules for every institution and every instrumentality of daily life. The relevant tasks for policymakers is to assess those rules’ soundness, from both an ex post and ex ante perspective, and with a view to the common good. In the context of the JCPA debate, that militates in favor of targeted policy measures to help revive America’s moribund local news industry—the vitality of which naturally aids a polity’s ability to secure the republic from one generation to the next—and curtail the discriminatory power of the already-far-too-powerful social media platforms that in many instances are affirmatively destructive to our fraying social fabric. In short, a healthy republic should more highly value a robust, thriving small and local media industry than the financial
vagaries of multinational technologists. In this case, the public policy analysis actually is that simple.

From this perspective, the JCPA debate is, however unintuitive it may seem, conceptually reflective of the industrial policy debate. There, just as here, policy advocates reject the illusion of “neutrality” and the siren song of “let the market rip,” arguing instead for a concerted economic “partiality” that manifestly favors some things (e.g., domestic manufacturing production) over others (e.g., service-sector consumption). Perhaps, if we are really lucky, Congress passing the JCPA into law and rendering an implicit value judgment about the imperative to restore smaller and local media outlets could produce some fortuitous spillover effects: maybe a revival of domestic manufacturing could be next in line for a beneficent legislative “partiality” only made possible by genuine economic statecraft oriented toward the common good. Wouldn’t that be something?
On the morning of October 14, 2020, I caught a firsthand glimpse of what it’s like for a traditional media outlet to go up against the vast agglomeration of economic and digital power known as Big Tech—and to do so without the benefit of what economist John Kenneth Galbraith defined as countervailing power.

That was the day the New York Post, where I served as op-ed editor at the time, published its first story on the so-called Hunter Files, dishing on the contents of a laptop abandoned by then candidate Joe Biden’s son at a Delaware repair shop. Normally, I would have looked up the day’s cover—“the wood,” in tabloid parlance—in the Post’s pagination system the night before. But in this case, I hadn’t bothered for some reason, and got to read it at the same time as everyone else.

The first Hunter story—there would be a few others—concerned his business dealings in Ukraine. E-mails recovered from the laptop suggested that Hunter in 2015 had arranged a meeting between executives from Burisma, a Ukrainian energy firm that was paying him at least $83,000 a month to serve on its board, and his father, then the vice president of the United States and the Obama administration’s point man on Ukraine.

“What a scoop!,” I thought, upon opening my Post app while still lying in bed at five in the morning. I wasn’t alone in my excitement. As the hours sped by, the story garnered massive attention on social media—until suddenly, it disappeared. At about 11 o’clock, I spotted a curious online statement from a communications staffer at Facebook named Andy Stone. It read: “I want be [sic] clear that this story is..."
eligible to be fact checked by Facebook’s third-party fact-checking partners. In the meantime, we are reducing its distribution on our platform.”

Twitter went further. The microblogging platform flat-out banned the story from being shared—including in private messages between users—and suspended the Post’s account to boot. All this, on the grounds that the paper had supposedly violated Twitter’s “hacked-materials policy.” High-level Twitter executives considered that excuse to be risible at the time, as we now know thanks to new CEO Elon Musk’s disclosures of internal deliberations at the firm. Yet in those early days, Twitter refused to budge from its initial determination; the Post, founded more than two centuries earlier by Alexander Hamilton, remained suspended for a fortnight.

The Hunter Files ordeal has become the subject of intense national scrutiny and debate. In years to come, it may well mark a watershed moment in American journalism in the twenty-first century. Most of the brouhaha, however, has focused on political questions. These include the role (if any) played by the national security apparatus in suppressing the story, the effect on the outcome of the 2020 election, and the need to reform the 1996 law that permits social media platforms to act like publishers while shirking the liabilities associated with traditional publishing.

Almost no effort has been made, however, to examine the Hunter Files from an economic standpoint: that is, to situate the episode (and others like it) within the context of a U.S. media market that has been dramatically transformed by the likes of Facebook, Twitter, and Google. Since the mid-2000s, traditional outlets have increasingly had to compete with Silicon Valley as both disseminators of news content and as sellers of digital advertising. This, even as traditional media are also utterly dependent on search and social platforms to reach new readers and grow their subscriber base as print advertising continues its downward spiral.

Could it be that this lopsided distribution of market power has no editorial or ideological consequences? Of course not. The crisis of Big Tech censorship is at least in part a problem of market power, an instance of the coercion that suffuses market systems in the absence of sufficient regulation and pushback from its victims. Or to use the classic terminology developed by John Kenneth Galbraith: What we are dealing with is original market power that is as yet unmet by countervailing power by those subjugated by it.
Countervailing power is today largely associated with labor progressivism. Mounting countervailing power against employers’ original power is the central function of labor organizations. But for Galbraith, the concept had applications far beyond labor markets. Countervailing power, he argued, is necessary in any market in which a few buyers lord it over many sellers (or vice versa)—which is to say, in most markets in aftermath of the Industrial Revolution.

The problem of less-than-perfect competition has long bedeviled advocates of laissez-faire economics. Basing their abstract models on preindustrial conditions, laissez-faire theorists treat competition, crystalized in the common-price mechanism, as the one thing needful to forestall market-based coercion. But in the real world, most industries are dominated by a handful of giants, leaving workers, suppliers, and consumers more or less at their mercy.

Laissez-faire was prepared to smash these giants into smaller parts if they achieved monopoly status. The problem was that oligopoly—a market characterized by a few dominant sellers—was the more frequently encountered pattern. Besides, as political-economist Michael Lind has shown, oligopoly or even monopoly has often served socially useful purposes, as compared to the destructive chaos that could rack entire sectors or even the whole economy as a result of cutthroat price competition.

There was a better way to check the undue power of the giants, and that was to raise the countervailing power of those coerced by them. In this model, instead of putting their hopes in competition between sellers or between buyers and turning to antitrust when that failed, policy makers would seek to empower sellers in relation to buyers (or vice versa). That is, the counterpressure came “from the other side of a given market,” as Galbraith often said, from buyers going up against sellers or vice versa.

In some markets, government didn’t have to lift a finger for countervailing power to emerge on its own. As Galbraith noted in his classic text, *American Capitalism: The Concept of Countervailing Power* (1952), large retailers naturally mount countervailing power against, say, appliance manufacturers and then pass on the resulting savings to consumers. In other markets, however, the raising up of countervailing power requires political supports, owing to the objective and subjective weaknesses of those subjugated on the other side.

Labor was one such market. Galbraith famously interpreted the New Deal as one big effort to bring countervailing power to bear against the original power of employers—a power that had proved catastrophic, by
creating permanent low-wage conditions that ended up suppressing demand in a manufacturing economy. In response, the Wagner Act and the Fair Labor Standards Act (FLSA) made it easier for many workers, sellers of labor power, to push back against a fewer number of buyers in the U.S. labor market.

How precisely countervailing power operated in the labor market, and how it was lost in recent decades, are questions beyond the scope of our discussion here. What matters for our purposes is the analogy between the crisis of market-based coercion in the pre-New Deal labor market and the problem of Big Tech power today. In our time, a handful of web 2.0 platforms exercise unchecked power over two sets of other actors: consumers and suppliers.

Their power over the consumer—the power to restrict access to certain information, inter alia—is all too familiar. It triggers much harumphing, particularly among conservatives who are its chief victims. The outrage is justified, for in wielding that power, Big Tech takes advantage of its market power to gather an enormous reservoir of what Galbraith called “conditioned power”: the power to shape what millions of people get to say, know, and think.

Far less visible, but as crucial, is the market power Big Tech wields over traditional media outlets. Indeed, there is a good argument to be made that Big Tech’s conditioned power over users or readers is a function of its market dominance—“compensatory power,” in Galbraithian lingo—over other vehicles of democratic knowledge: namely, traditional media, which have paid the heaviest price for the rise of social media.

The exact scale of that dominance is well-established in the antitrust literature. The best single assessment may be found in a 2020 majority staff report of the Senate Judiciary Committee’s Subcommittee on Antitrust, Commercial and Administrative Law, of which Lina Khan was the lead author, since then tapped by President Biden to serve as chairwoman of the Federal Trade Commission. Khan and colleagues found that “the United States has lost nearly 1,800 newspapers since 2004 either to closure or merger, 70 percent of which were in metropolitan areas. As a result, the majority of counties in America no longer have more than one publisher of local news, and 200 [are] without any paper.”

The decimation of U.S. newspapers, particularly local papers, has many causes. But one major cause identified by Khan et al. is the ruthless practices of Big Tech. To wit, search and social giants like Google and Facebook expose readers to a great deal of local-news
content on their platforms, but the entire reading experience can take place on Big Tech’s turf. Many people never click through to the underlying source, depriving the original news-gatherers of “eyeballs,” subscriptions, and ad revenue. Local outlets were thus forced to compete with Big Tech not just for ad dollars, but as suppliers of content. This, even as they remained utterly dependent on these platforms for spreading their content and growing their audience online.

This is a raw form of power asymmetry. It translates into a painful incapacity to translate the creation of original reportorial content into either ad revenue or subscriptions. But it also means something more ideologically insidious: As anyone who has worked in upper-middle to upper management at a traditional outlet can tell you, management is loath to challenge Big Tech when it reduces circulation on a story lest “they cause us problems with other content” (the Hunter story was the exception to this norm of quiet submission, precisely because the censorship in that case was so blatant and egregious). As Galbraith would say, compensatory and conditioned power frequently go hand-in-hand. Or as any ordinary person would say, money talks.

In this case, we are dealing with unduly gathered conditioned power that, in turn, rests on abuse of market power: Big Tech, in short, sits on both sides of both digital-advertising and content transactions. As advertising platforms, Facebook and the like force news outlets to compete with them on their own territory, even as they also attract eyeballs and subscribers away from the outlets that put capital and sweat equity into producing original journalism. And those subjugated, the traditional outlets, dare not fight back lest they lose still more ground. Rather, each outlet tries individually to do the best it can, given this structural asymmetry, with varying degrees of success. National papers like the Wall Street Journal and New York Times, for example, mastered the paywall model early on, as have a handful of local and regional newspapers like the Boston Globe and the Minneapolis Star Tribune. Many others founder.

This, in short, is a classic problem of countervailing power. Just as, all else being equal, most individual employees eschew collective and political action in favor of doing their best individually, to the detriment of employees as a class, so traditional media can’t challenge the original power—both compensatory and conditioned—of social-media platforms. Their subjugation, in turn, translates into the subjugation of news consumers who lose access to information, either through the diminishment of traditional journalism or outright censorship.
Big Tech and the News: A Problem of Countervailing Power

The challenge, then, is to fortify the ability of traditional outlets to mount countervailing power. A first step is to put a stop to practices like those described above, in which traditional outlets find themselves competing with Big Tech on both advertising and content. On the content front, it must be recognized that Big Tech’s advantage is often based on sheer expropriation of others’ sweat equity. The proper policy response is restorative: to demand that tech platforms pay outlets for content, as Australian lawmakers have done (and as lawmakers in Canada and elsewhere seek to do).

Would this, without more, solve the problem of Big Tech censorship and the broader decline of traditional outlets? No. But it is a starting point, much as the FLSA was a starting point for concentrating and fortifying the countervailing power of nonunionized workers in the midcentury labor market. Workers who could count on a minimum wage were more willing to take the risks associated with collective and political action. Likewise, we might expect outlets that are marginally less subjugated by Big Tech to feel more secure in challenging its market and ideological diktats.
There are a lot of discussions about the media in American politics, but very few about advertising, which is the key pivot point around which the media organizes itself. In America, and throughout the world, the press is dying, starved of ad revenue. Since 2005, we’ve lost more than 2,500 newspapers and tens of thousands of jobs in journalism. Australia for instance, lost more than 15 percent of its newspapers from 2008 to 2019, and you can trace similar declines globally.

A common explanation is, well, the internet killed the news. And yet, ad revenue for newspapers peaked in 2006, which was more than ten years after the internet became a commercial medium. A different explanation for the decline of news publishing is that, starting in the mid-2000s, Google and Facebook built market power in ad markets, directing revenue away from newspapers and toward themselves. One very clear indication that the market power story has merit is that, in 2021, the Australian government made a significant change to policy to undo part of big tech’s bargaining leverage. If “the internet killed the news,” then changes to ad markets wouldn’t matter. But the result of the new law was a massive increase in journalism.

In fact, in Australia today, it is hard to recruit interns at newspapers because there are so many full-time jobs available, even as Gannett in the United States recently did yet another round of layoffs. In 2022, the U.S. Senate, as well as legislatures around the world, began looking at copying Australia’s example, through an antitrust bill called the Journalism Competition and Preservation Act.

Matt Stoller is director of research at the American Economic Liberties Project and the author of Goliath: The 100-Year War between Monopoly Power and Democracy (Simon and Schuster, 2019).
CAN AMERICA EXIST WITHOUT NEWSPAPERS?

Let’s start with the problem, which is that newspapers are disappearing en masse across America. So far, one might say, so what? In the 1980s, newspapers became part of big conglomerates and failed to address their business model problems, instead collecting high profit margins due to local monopoly status. They are also owned by big private equity predators. Why care about whether some hedge fund magnate has more money versus some Palo Alto magnate? Moreover, the news world hasn’t covered itself in glory. As someone who is still angry about the lies that led us into the war in Iraq, I shrug my shoulders about the bankruptcy of any particular news outlet.

However, newspapers and the news are not the same thing. One typical way to fix the news is by starting new outlets to compete with the old ones. That’s how the alt-weeklies of the 1960s were formed, filling a void that the audience wanted. And yet, despite high traffic to local news, as well as high interest in niche communities, new outlets are mostly not being born. No one is replacing the local newspapers that go out of business, such that today, nearly a third of U.S. counties have no daily paper. People have tried many different innovative strategies, and they can generate traffic and readers. But unlike in any other period in American history, publishers can’t manage to sell ads. And if they can’t sell ads, they can’t finance a diverse set of independent publishing outlets.

This situation, of a newspaper-less nation, is a crisis. America has never existed as an independent nation without lots and lots of local and niche newspapers. “Nothing is easier than to set up a newspaper, and a small number of readers suffices to defray the expenses of the editor,” Alexis de Tocqueville wrote in 1835 in his iconic Democracy in America. “The number of periodical and occasional publications which appears in the United States actually surpasses belief.” Tocqueville actually found it kind of annoying, because the papers were often crude. And yet, it was also a source of public order and local control of politics.

In nineteenth-century Europe, aristocrats and kings controlled and financed the news. But most American papers, by contrast, were chock full of advertising. No one paper was powerful, Tocqueville argued, because there were so many. Anticipating the debate over “disinformation” today, he called it “self-evident” that “the only way to neutralize the effect of public journals is to multiply them indefinitely.” The wide distribution of lots of opinions meant that, in America, no one who was particularly powerful could use papers, as Tocqueville noted,
to “excite the passions of the multitude to their own advantage.” In Europe, there were fewer outlets, and not being financed by ads, they were often state-controlled, polarizing, elitist, and destructive.

The European aristocratic system of the press is what American journalism looks like today. Trade publications and elite news centered in New York and D.C. do pretty well, cable news gets automatic payment from subscriber fees, but the local news is dying. It’s very hard to start a paper these days and have it financed by anyone but foundations or billionaires. Jeff Bezos owns the Washington Post, Marc Benioff owns Time, Laurene Powell Jobs owns the Atlantic, and Miriam Adelson owns the Las Vegas Review-Journal. Meanwhile, private equity funds are squeezing whatever they can out of the remaining local press, laying journalists off en masse. The news increasingly looks like an oligarchy.

The intense paranoia about “disinformation” is a result of the narrowing of the economic and political basis of news. The idea of free expression as a mechanism to promote liberty and correct errors is ebbing in parts of our political spectrum. Even certain left-wing advocacy groups are teaming up with dominant distributors in Silicon Valley to advocate against antitrust rules and for mass censorship, attacking the basic diversity of thought which underpinned American democracy in the name of preventing “disinformation.”

But there’s an economic basis to this shift.

**The 257 Billion Reasons for the Collapse of the News**

Let’s start with why news collapsed, which has to do with advertising markets. From the early 1900s until the early 2000s, 60–80 percent of the budgets of newspapers came from advertising. And in the 1990s and early 2000s, this model ported reasonably well to the web, with a host of ad intermediaries fostering open markets for internet advertising. But a host of mergers, culminating in 2007 with Google’s purchase of DoubleClick, changed the situation.

What makes advertising valuable is two things. First is the placement. Is there a pair of eyeballs looking at an ad? And second is data. Who is looking at the ad and are they looking at it when they want to buy something? In 2007, Google was the dominant search engine, and DoubleClick was the dominant system tracking people all over the web. DoubleClick DART software enabled publishers and advertisers to serve ads in standardized formats. The company began brokering advertising, helping to match ad buyers with available ad inventory.
When Google sought to buy DoubleClick, it was a major pivot point in the industry, and highly controversial. The Federal Trade Commission oversaw the merger, but voted 4–1 to let it go through. When these firms combined, it “tipped” online advertising into a monopoly. Google could now track every individual everywhere online, and show them ads with more granularity than anyone else. Because of DoubleClick’s market position and its own search data, Google now had a God’s eye view into what every publishing company, every advertiser, and every user did. (I’m going to tell the Google story here, but the Facebook story is roughly similar, and the two in fact entered into a presumed cartel in the mid-2010s that is now being litigated in an antitrust suit.)

From 2003 onward, Google rolled up much of the online intermediary world. It bought YouTube, Applied Semantics, Keyhole, Admob, Urchin, Android, Neotonic, and hundreds of other firms. Though Google portrayed itself as innovative, in fact most of its products, from Maps to Gmail, came from acquisitions. By 2014, Google was no longer just a search engine; if you bought advertising, sold advertising, brokered advertising, tracked advertising, etc., you were doing it on Google tools. It tied its products together so you couldn’t get access to Google search data or YouTube ad inventory unless you used Google ad software, which killed rivals in the market. It downgraded newspapers who tried to negotiate different terms.

This leverage came from Google’s control of both the distribution of news and the software and data underpinning online ad markets. Roughly half of Americans report getting news from social media, while 65 percent get it from a search engine like Google. That means newspapers are getting a lot of their customers from entities who compete with them to sell ads, often to their same audience. And they must use the software offered by Google to sell those ads, and often display content on Google News under the terms that Google demands, which includes allowing Google to display much of the article itself on its own properties. (If you want a good example of how Google steals content, read this piece on what it did to Celebrity Net Worth.)

During these years, Google introduced Google News and standards for web pages that privileged its own services, cut favorable deals with adblockers, and fought against things like header bidding, which was an attempt by publishers and advertisers to get better prices than Google was offering for ad inventory. Google began demanding terms for data and formatting that publishers had no choice but to accept. In 2017, for instance, the Wall Street Journal refused to allow Google search users to read its content for free, instead locating its content behind a paywall.
Matt Stoller

Google downgraded the status of the newspaper in its search rankings. While subscriptions went up, traffic to the newspaper dropped by 44 percent.

Over the course of these twenty years, under Republican and Democratic administrations, neither Congress nor the FTC created mandatory public rules over the use of data, and enforcers pursued no meaningful antitrust suits to stop big tech firms. In 2012, the FTC Bureau of Economics, in one of the all-time most embarrassing episodes for economics, actively killed a suit that could have stopped the monopolization of the search market. So Google became a monopoly in the advertising industry, not just over search ads, but over most online advertising markets. Last year, Google’s global revenue amounted to $257.6 billion, which is nearly all from advertising. That’s a huge amount of money, some of which used to go to finance journalism but now goes to private jets in Palo Alto.

The net effect of decades of bad policy is simple. Newspapers began to die, and private equity is now feeding on the carcasses. This collapse, and the turn towards aristocracy it is fostering, is not driven by some large culture force, but by shifts in competition and antitrust law that fostered market power in advertising markets.

**WHY THE AUSTRALIAN LAW WORKS**

One possible way that newspapers could have fought back would have been to band together and bargain collectively with Google. One newspaper can’t stop Google News from imposing new contractual terms or prevent Google from rolling out new ad formatting standards, but thousands of them can if they work together. The problem is that independent businesses collectively bargaining against a dominant firm is an antitrust violation, seen as price-fixing by enforcers. In 2012, for instance, book publishers and Apple were sued by the Department of Justice for trying to create a competitor to Amazon’s Kindle e-book reader. The sword of antitrust was perversely used by the Obama administration on behalf of the monopolist.

Prosecuting all collaboration with rivals as price-fixing while legalizing mergers creates a tremendous incentive to merge to monopoly. And that’s exactly what happened. Google’s hundreds of mergers were legal, but newspapers couldn’t band together to address the bargaining power because that was considered price-fixing. (This dynamic is similar with Uber drivers, who can’t collectively bargain because they are independent businesses and that would be price-fixing.)
Google is much, much, much bigger than the entire news industry, but the basic bargaining imbalance in ad markets is at the core of the death of news gathering. It’s not just the reason why newspapers are falling apart; it’s also why it’s extremely difficult to start new ad-financed publications.

Now, the market power story isn’t obvious. Much of the shift was disguised by two events. Craigslist in the mid-2000s killed classified ads, and then the financial crisis crushed the whole ad market, temporarily. Newspaper publishers were confused, and did not at first understand what was happening. Moreover, advertising is weird and confusing and full of quasi-con artists who spout chatter about data, so most people just take the false narrative that “the internet killed the news.”

Moreover, depending on your perspective, it often doesn’t look like Google is the bad guy. Google is delivering free services to consumers, and consumers don’t know that the content is stolen from publishers. It just looks like awesome free content. And to newspaper workers, each newspaper—especially because many have been bought by corporate chains—looks powerful, buying back tens of millions of dollars of stock.

“I don’t bargain with Google, I bargain with the publishers, so how money comes in is less urgent to me as a union than how it’s spent,” one reporter told me over Twitter to explain skepticism towards the bill. But newspapers are a flea on an elephant when compared to Google, and they are being squeezed by forces much larger than themselves.

And this brings me to how Australia started fixing the problem. I’ve been following the Australian competition authorities for years, because they are ahead of the game when it comes to Big Tech. After the Australian Competition and Consumer Commission did a long series of investigations and reports on how big tech firms operate, Australia passed a law letting newspapers band together and bargain against Big Tech.

The government also set certain rules mandating how the bargaining should take place. Newspapers got to form co-ops, but also request arbitration with dominant Big Tech firms. As I wrote, “the arbitrator doesn’t micro-manage the process, but does ‘baseball style’ arbitration, meaning both sides give an offer, and the arbitrator picks one of them. This kind of arbitration is both faster and less intrusive that standard government regulation, and creates the incentive for both sides to offer non-extreme proposals they can live with, for fear the arbitrator will simply pick the other side if they suggest something outlandish.”

Now, the ideal solution is a time machine to prevent Google from becoming a monopoly in the first place. But a temporary exemption
from antitrust laws, along with rules that mimic a healthy market where there is transparency of data and a robust set of buyers and sellers instead of a few dominant platforms, is the next best thing, at least for now. As the legislature noted, “This allows the panel, in making their determination, to consider the outcome of a hypothetical scenario where commercial negotiations take place in the absence of the bargaining power imbalance.”

When Australia proposed this legislation, large swaths of the media reform and internet world freaked out. Many tech-friendly lobbyists, like those at Techdirt and various trade associations, obviously opposed it, claiming that the law would place a tax on every single link and destroy the web. This “link tax” idea spread among normally credible actors. For instance, the “founder of the World Wide Web,” Tim Berners-Lee, made the same point.

He wasn’t the only one. The nonprofit group Public Knowledge, which, though funded by Google and Facebook, has supported certain antitrust laws to address Big Tech dominance, argued that the legislation would be “a radical change that threatens the fundamental nature of the internet as it exists today.” The left-wing group Free Press argued that the bill simply forced publishers to “pay for links” and would backfire, “wedding an old-media business model to a new-media disinformation engine.” There were many more criticisms, but that’s the gist.

The basic argument from some of these advocates was that for-profit media simply isn’t realistic anymore. “The market-driven model that once helped sustain public-interest news doesn’t function in a world where attention is the main commodity,” wrote Tim Karr of Free Press. “No amount of tinkering with these mechanics can fix that.” Karr went on to note there was “little evidence that any of the money generated through negotiations with Big Tech would go to putting reporters back on local beats where they’re needed most.”

There were many arguments about why the Australian law would devastate the internet, create new and intrusive copyright rules, foster hate speech and disinformation, and entrench the existing business models of big media while not helping the little guy. Instead, these groups proposed taxing the Big Tech firms and having the government redirect that money to newspapers, which is very similar to how Google and Facebook regularly offer grants to local news outlets.

And what happened? For a time, Google threatened to pull out of Australia, and Facebook actually did pull out. But this bullying of Australia generated anger, not just locally, but globally, as regulators everywhere looked at the power of Big Tech and got both incensed and
afraid that their nations might be blackmailed as well. The law went into effect, Google and Facebook quickly caved, and these two firms began cutting deals with Australian newspapers. None of the scare stories about the new law came true. There were no changes to copyright, no link taxes, there was no devastation of the internet, and no increase of hate speech. There was no entrenchment of Big Media business models, the ACCC continued to move ahead to stop anti-competitive practices in the adtech marketplace.

Big Media firms benefitted, but so did small ones, and most of all, so did journalists. According to Poynter, the main result of this law has not been a link tax, but a flourishing of journalism. Outlets throughout Australia are hiring new reporters. The Guardian added fifty journalists, bringing their newsroom total up to 150. Journalism professors say their students are getting hired and that there are too many job vacancies to fill.

There are problems with the law, such as a lack of transparency, truculence from Facebook, and a demand from Big Tech that publishers sign non-disclosure agreements during and after bargaining. The government is reviewing the code, and will make changes. But there’s no other way to characterize the code as anything but a stunning success, and the arguments against the law as projecting scare stories that did not come true.

**BRINGING THE AUSTRALIAN LAW TO AMERICA**

In late 2022, the Senate Judiciary Committee took up a similar bill called the Journalism Competition and Preservation Act. (There’s an update at the bottom of the article on what happened.) The JCPA is slightly different than the Australian bargaining code, because speech regimes differ between countries. The American version would temporarily suspend narrow applications of antitrust laws for news publishers, letting them band together to bargain with dominant tech platforms who use their content, and imposing an arbitration process for negotiating with big tech firms.

The JCPA mandates certain rules about when publishers can enter co-ops, with no ability to restrict anyone based on viewpoint. It also has a size cap to exempt the biggest newspapers, like the New York Times and Wall Street Journal. Arbitration is baseball-style, similar to Australia; 65 percent of the payout from these cooperatives would be based on the number of journalists hired by newspapers, and 35 percent would come from the traffic publishers generated. In some ways, it is
similar to agriculture cooperatives, which are bands of farmers exempted from certain antitrust laws so they can collectively bargain with processors.

The co-op incentive model would do two important things to newspapers. First, private equity owners, who right now are laying people off and squeezing whatever remains of the customer base until the papers they own die, will have their incentives changed. They will make money not by firing people, but by hiring people, not by killing journalism, but by doing more of it. And second, it would allow people to form media outlets and monetize the traffic. If Alden Capital chooses to kill a newspaper, journalists from that paper can leave, start a local competitor, and make money doing it.

Given all this, you’d think that the law would be a gimme. Yet despite the success of the law in Australia, the bill kicked up a storm of opposition, and not all of it in bad faith. In a letter signed by a weird mix, tech lobbyists Chamber of Progress and Computer & Communications Industry Association joined left-wing public interest groups Public Knowledge, Common Cause, Free Press, and Consumer Reports to oppose the bill. They argued, echoing the same discredited critiques of the Australian bill, that the JCPA would foster hate speech, impose a link tax, fail to pay journalists, and help conglomerates but not small publishers. It’s a bizarre letter, written as if we don’t have the example of Australia to look at.

Some of the opposition is easy to explain. Obviously there are a lot of tech lobbyists who dislike it, and groups paid by big tech firms to oppose it. Libertarian Republicans like Jim Jordan are deeply opposed, arguing that the bill would help entrench the left-wing “big media.” It’s impossible to tell where Big Tech influence stops and libertarian ideas start, but whether good faith or not, that opposition is understandable.

And yet Big Tech money and power doesn’t explain it all. In certain parts of the progressive world, there is a genuine ideological opposition to decentralized ad markets and a diverse press. For instance, influential left-wing scholar Victor Pickard regularly critiques the importance of advertising in the American news landscape, arguing that the mid-twentieth-century moment where newsgathering was profitable was something of an anomaly. Commercialism, he argues, “degrades journalism.” Pickard, who I like and respect very much, is taking issue with how Tocqueville laid out the basics of the American media landscape in the 1830s. For these left-wing advocates, the “public option is the best model going forward.”
Pickard’s framing resonates widely among groups like Free Press and Public Knowledge, who have made the case for a tax on targeted advertising and a redirect of that money to public interest news organizations. Behind that is a basic distrust for the commercial press. And that’s the reason the Australian success story doesn’t register with large swaths of the media reform world. For them, it’s not a success. Their basic assumption, like that of Pickard, is that the centralization of bargaining power by Google and the resulting death of newspapers isn’t a problem, but is in fact a solution to what is their long-standing gripe with for-profit ad-funded news.

In other words, baked into the opposition to the JCPA is a preference for large centralized administrative processes. It’s not just the desire for a centralized fund to finance the news. Free Press, for instance, opposes Big Tech antitrust bills on the grounds that they would not allow Google and Facebook to sufficiently police the internet for hate speech and “disinformation.” They want censorship, and fear a diversity of press funded by advertising precisely because it fosters speech that is out of their control.

That desire for centralization is not so different from how Google executives see their role, as “organizing the world’s information,” or how Mark Zuckerberg once framed Facebook’s mission, which was to “make the world more open and connected.” Left or Right, centralizers share a utopian vision of a world brought to us by our betters, instead of the muck of advertising and the diversity of speech that, while bringing democratic features, also allows racism and whatever crudeness any ordinary person might see fit to print. As FDR’s antitrust chief and later Nuremberg chief prosecutor Robert Jackson once put it, “what the extreme socialist favors, because of his creed, the extreme capitalist favors, because of greed.”

Open ideological debates are generally not common in American politics, because there’s an attempt to paint opponents as evil. I do not believe opponents of the JCPA are evil. I have learned a lot from Pickard, and I respect and have worked with many of the people and groups I have highlighted here as opponents. But on a practical level, for anyone who tracks ad markets, what is happening in Australia is perhaps the most important real-world experiment in structuring a healthy news ecosystem. Love it or hate it, you have to reckon with it. And opponents of newspaper co-ops and the JCPA simply haven’t.