

A “FAUSTIAN PACT”?¹ NATIVE ADVERTISING AND THE FUTURE OF THE PRESS

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As technology undermines the economic model supporting the traditional press, news organizations are succumbing to the siren call of “native advertising”—a new marketing technique for unobtrusively integrating paid advertising into editorial content. Brands are increasingly turning to native ads to preempt consumers’ well-documented ad avoidance. Although the native advertising model debuted on digital-native news sites, it is now ubiquitous in elite legacy media as well. Everyone knew “native” had arrived for good when the venerable New York Times not only introduced its online “Paid Post,” but incorporated sponsored content in its print editions, and even hired an in-house branded content production team to conceive and execute the embedded ads on behalf of advertisers. Because such integrated advertising must inevitably flirt with disguise and deception, administrative and scholarly attention has principally addressed it through a consumer protection lens. Yet this conventional frame ignores the more insidious hazards of this transformational development. Apart from confusing at least some consumers, the turn to native ads will profoundly hobble the press in the exercise of its democratic role, and will invite recalibration of whatever privileged constitutional status it still has. These effects are particularly troubling in an age when increases in global state power and new forms of censorship call for a powerful, independent, and fearless press. Still, because native advertising is here to stay, admittedly imperfect

1. Joe Pompeo, ‘Wall Street Journal’ Editor Gerard Baker Decries Native Advertising as a ‘Faustian Pact,’ POLITICO MEDIA (Sept. 25, 2013), <http://www.capitalnewyork.com/article/media/2013/09/8534047/wall-street-journal-editor-gerard-baker-decries-native-advertising-fau> (quoting Wall Street Journal Editor’s warning about some native ad deals between advertisers and news publishers). ‘Faustian pact’ refers to selling one’s soul to the devil. See *Faustian*, OXFORD ENGLISH DICTIONARY (online ed.), http://www.oxforddictionaries.com/us/definition/american_english/Faustian (last visited July 30, 2015).

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responses must be explored. In that spirit, this Article proposes three solutions: (1) “voice priming”: designing sponsorship disclosure at the per-ad level in close alignment with results of rigorous empirical research regarding consumers’ cognitive and perceptual responses to labeling; (2) “surveillance-enabling”: adopting additional, corporate-level disclosure designed to highlight advertiser identity and spending in order to aid public oversight over the editorial independence of news organizations; and (3) “collective standard-setting”: addressing structural impediments to collective action by news organizations to promote collective strategies for effective self-regulation in the deployment of native advertising. These solutions seek to promote a diverse Fourth Estate that sees itself as charged with engaging in accountability journalism. Although it is a closer question with respect to some kinds of native advertising, sponsorship disclosure requirements are unlikely to run afoul of the First Amendment. If they are deemed to do so, however, what might be seen as a free speech “victory” would be Pyrrhic indeed—ironically serving as the nail in the coffin of the press’s distinct status. Recognizing this reality should create significant self-regulatory incentives.

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INTRODUCTION

The buzzwords “native advertising,” “branded content,” “sponsored content,” and “content marketing” are now all the rage in marketing circles.² They refer to advertisements that are seamlessly integrated into editorial content, and are therefore “native” to their digital context. Such commercials are said to be far more effective than the banner ads that represented the initial transition from print to digital advertising.³ Companies find them desirable because, instead of irritating readers and triggering ad avoidance, they engage consumer interest by providing valued content and an integrated digital experience.⁴ According to one study by the Online Publishers Association, almost 75% of the Association’s members now use native advertising.⁵

2. See, e.g., Tanzina Vega, *Ad-Sponsored Editorial Content Draws Regulator’s Notice*, N.Y. TIMES, Oct. 23, 2013, at B4 (quoting a marketing strategy director’s view that native advertising is “the shiny new object of the advertising world.”); see also Cooper Smith, *Native Ads Will Be the Centerpiece of All Social Media Advertising in the Near Future*, BUS. INSIDER (Feb. 12, 2014), <http://www.businessinsider.com/native-mobile-ads-dominate-social-media-2013-11>; Jeff Sonderman & Millie Tran, *Understanding the Rise of Sponsored Content*, AM. PRESS INST. (Nov. 13, 2013, 7:22 PM), <http://www.americanpressinstitute.org/publications/reports/white-papers/understanding-rise-sponsored-content/>.

3. See, e.g., Alex Attinger, *Why Native Advertising Is Here to Stay – But It Must Be Fully Transparent*, THE GUARDIAN – MEDIA NETWORK BLOG (Mar. 10, 2014, 5:00 AM), <http://www.theguardian.com/media-network/media-network-blog/2014/mar/10/native-advertising-engage-consumers-transparent>; Margaret Sullivan, *Pledging Clarity, The Times Plunges Into Native Advertising*, N.Y. TIMES: PUB. EDITOR’S J. (Dec. 19, 2013, 4:17 PM), <http://publiceditor.blogs.nytimes.com/2013/12/19/pledging-clarity-the-times-plunges-into-native-advertising/>; Danny Wong, *11 Surprising Stats That Demonstrate Native Advertising’s Value to Marketers*, HUFFINGTON POST (May 6, 2014, 5:09 PM), http://www.huffingtonpost.com/danny-wong/11-surprising-stats-that_b_5267424.html.

4. See, e.g., Farhad Manjoo, *Fall of the Banner Ad: The Monster That Swallowed the Web*, N.Y. TIMES, Nov. 5, 2014, at A1; FED. TRADE COMM’N, *Blurred Lines: Advertising or Content? – An FTC Workshop on Native Advertising*, 1, 81–82 (2013), http://www.ftc.gov/system/files/documents/public_events/171321/final_transcript_1.pdf [hereinafter *Blurred Lines Workshop*].

5. Online Publishers Ass’n, *Premium Content Brands Are Native Naturals* (July 10, 2013), <http://digitalcontentnext.org/wp-content/uploads/2014/09/2.pdf>; see also You Mon Tsang, *The FTC May Bark at Native Ads, but It Won’t Bite*, VENTUREBEAT (Feb. 20, 2014, 3:30 PM), <http://venturebeat.com/2014/02/20/the-ftc-may-bark-at-native-ads-but-it-wont-bite/>. A report for Journalism.org noted in 2014 that the native advertising market was projected to reach \$4.6 billion by 2017. Jesse Holcomb & Amy Mitchell, *A Deeper Look at the Digital Advertising Landscape*, PEW RES. CTR. (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/a-deeper-look-at-the-digital-advertising-landscape/>

What is particularly new and notable today is that, in addition to their ubiquity in entertainment programming and product placement, native ads increasingly appear in the news context of both legacy and web-native news media. Native advertising has emerged, enthusiasts say, as the next viable economic alternative for press survival in the digital news space.⁶ From BuzzFeed's sponsored listicles to the *New York Times*' "Paid Post," the news space is awash with a variety of such native content.⁷ More striking yet is the fact that these ads are increasingly produced not by brands or their advertising agencies, but by the news organizations themselves on behalf of advertisers. Media companies even court advertisers by promising that their "branded content" studios will offer marketers "access to . . . editorial assets" to help brands "deliver compelling content."⁸

Yet native advertising is controversial.⁹ Lowbrow gossip website Gawker brought the issue to the fore when it revealed that highbrow magazine *The Atlantic* had published a paid Scientology puff-piece that was virtually indistinguishable in style from the magazine's traditional editorial content.¹⁰ Television comedian John

(citing BIA/Kelsey projections); *but cf.* Gee Leung, *Native Advertising: With Great Power Comes Great Responsibility*, AGC PARTNERS (Mar. 2015), <http://agcpartners.com/content/uploads/2015/03/AGC-Native-Advertising-Thought-Piece-March-2015.pdf> (projecting \$21 billion in 2018); *see also Blurred Lines Workshop*, *supra* note 4, at 132 (remarks of Bob Garfield).

6. *See, e.g., Blurred Lines Workshop*, *supra* note 4, at 83–84; Lucia Moses, *Native Seen as 'Salvation' for Ad Woes*, ADWEEK (Sept. 24, 2013, 2:44 PM), <http://www.adweek.com/news/press/native-seen-salvation-advertising-woes-152689>. For a thorough review of the spread of native advertising in online news publications, see Amar C. Bakshi, *Why and How to Regulate Native Advertising in Online News Publications*, U. BALT. J. MEDIA L. & ETHICS, Winter/Spring 2015, at 7–8.

7. Joshua Benton, *Like It or Not, Native Advertising Is Squarely Inside the Big News Tent*, NIEMAN JOURNALISM LAB (Sept. 15, 2014, 11:00 AM), <http://www.niemanlab.org/2014/09/like-it-or-not-native-advertising-is-squarely-inside-the-big-news-tent/>. While traditional news organizations debuted native ads online, they have crossed over into print as well. *See* Lucia Moses, *The NY Times Runs Its First Print Native Ad*, DIGIDAY (Nov. 19, 2014), <http://digiday.com/publishers/new-advertorial-ny-times-runs-first-print-native-ad/>. *Forbes*' February 2015 issue notably referenced, for the first time on the cover, a native ad for Fidelity to be found in the magazine. *See* Molly Soat, *Forbes' Native Ad Cover Sparks Ethics Discussion*, MARKETING NEWS WKLY. (Feb. 24, 2015), <https://www.ama.org/publications/eNewsletters/Marketing-News-Weekly/Pages/forbes-native-ad.aspx>.

8. *See* Press Release, Condé Nast, *New Branded Content Studio 23 Stories by Condé Nast Debuts* (Jan. 26, 2015), <http://www.condenast.com/press/press-releases/2015/01/26/new-branded-content-studio-23-stories-conde-nast-debut>; *see also* Damaris Colhoun, *Disguising Ads as Stories*, COLUM. JOURNALISM REV., Feb. 10, 2015, http://www.cjr.org/behind_the_news/sponsored_content.php.

9. For recent journalistic critiques, *see, e.g.,* Colhoun, *Disguising Ads*, *supra* note 8; Michael Meyer, *Should Journalism Worry About Content Marketing?*, COLUM. JOURNALISM REV., Oct. 29, 2014, http://www.cjr.org/innovations/should_journalism_worry_about.php.

10. *See, e.g.,* Taylor Berman, *The Atlantic Is Now Publishing Bizarre, Blatant Scientology Propaganda as 'Sponsored Content,'* GAWKER (Jan. 14, 2013, 9:22 PM), <http://www.gawker.com/5975981/the-atlantic-is-now-publishing-bizarre-blatant-scientology-propaganda-as-sponsored-content>; Jim Edwards, *Here's the Scientology*

Oliver was so offended that he took the practice of native advertising to task on late night television last year.¹¹ Ambivalent advertisers worry about whether their customers will be alienated by hidden sponsorship.¹² Regulators express concern about the potential for consumer deception, and stakeholders bicker over adopting and enforcing appropriate consumer-oriented transparency and labeling requirements.¹³

The conventional consumer protection frame, however, backgrounds the more insidious hazards posed by the kudzu-like dispersion of native advertising in the news space. Native advertising will likely prove a Faustian bargain for the press. Without entrepreneurial marketing, the financial sustainability of much of the traditional American press may be at risk.¹⁴ But the economic fix offered by native advertising may undercut the very journalism likely to promote democracy most robustly. The catastrophic result: news organizations with crippled reputations in their core functions, and unable to tap the commercial well for funding.

First, native advertising promises to undermine editorial independence and thus weaken journalism's role in holding governmental and private power accountable. By normalizing "corporatized news,"¹⁵ it does so more dramatically

'Sponsored Content' Story That The Atlantic Doesn't Want You to See, *BUS. INSIDER* (Jan. 15, 2013), <http://www.businessinsider.com/heres-the-scientology-sponsored-content-story-that-the-atlantic-doesnt-want-you-to-see-2013-1>; see also *SPONSORED: The Taliban Is a Vibrant and Thriving Political Movement*, *THE ONION* (Jan. 15, 2013), <http://www.theonion.com/articles/sponsored-the-taliban-is-a-vibrant-and-thriving-po,30910/> (satirizing *The Atlantic's* Scientology piece).

11. See, e.g., Kevin O'Keeffe, *John Oliver Takes on Native Advertising, Journalism's Raisin Cookie*, *THE WIRE* (Aug. 4, 2014, 10:07 AM), <http://www.thewire.com/entertainment/2014/08/john-oliver-takes-on-native-advertising-journalisms-raisin-cookie/375513/>; Felix Gillette, *Native-Ad Experts Critique John Oliver's Harsh Critique of Native Advertising*, *BLOOMBERG BUSINESSWEEK* (Aug. 5, 2014), <http://www.bloomberg.com/bw/articles/2014-08-05/ad-industry-execs-weigh-in-on-john-olivers-native-advertising-takedown>.

12. *Blurred Lines Workshop*, *supra* note 4, at 74; see also Michelle Manafy, *Trust Me: Content Marketing Is Risky Business*, *INC.* (Aug. 15, 2014), <http://www.inc.com/michelle-manafy/trust-me-content-marketing-is-risky-business.html>.

13. See *infra* text accompanying notes 70–80.

14. See, e.g., Rick Edmonds et al., *Newspapers: Stabilizing, but Still Threatened*, *PEW RES. CTR.'S PROJECT FOR EXCELLENCE* (July 18, 2013), <http://www.stateofthedia.org/2013/newspapers-stabilizing-but-still-threatened/>; David Lieberman, *Newspaper Closings Raise Fears About Industry*, *USA TODAY* (Mar. 19, 2009, 2:27 AM), http://usatoday30.usatoday.com/money/media/2009-03-17-newspapers-downturn_N.htm; Joe Pompeo, *The U.S. Has Lost More Than 166 Print Newspapers Since 2008*, *BUS. INSIDER* (July 6, 2010, 8:51 AM), <http://www.businessinsider.com/the-us-has-lost-more-than-166-print-newspapers-since-2008-2010-7>; FED. COMM'NS COMM'N, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age* 36–43 (2011), http://www.hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-307406A1.pdf (explaining the financial pressure resulting from public corporate ownership of news organizations and extensive debt service obligations).

15. Colhoun, *Disguising Ads*, *supra* note 8.

than its predecessors in “stealth”¹⁶ advertising. Because of the recent power shift between news organizations and advertisers and the rise of “brand newsrooms,”¹⁷ the purported efficacy of native advertising, and the structural innovations through which much native advertising is produced by news organizations in-house, it is reasonable to expect that advertisers’ interests will have an increased impact on the editorial side of the commercial press. When both the structure and character of advertising undermine the traditional divide between commercial and editorial content, there are increased risks of the selection and coverage of news being especially skewed by the interests of commercial clients. The threat is particularly salient when one looks at native advertising as a part of a broader digital news ecosystem. Thus, native advertising has significant repercussions for public discourse and for the democratic role of the media.¹⁸

Second, even if only some news organizations use native advertising, such ads may well engender distrust of the press as a whole and undermine its power as an institution. This in turn presents a particular danger today because the institutional power of the press already appears diminished from the “golden age” of journalism.¹⁹ It is particularly regrettable when increases in global state power and new forms of censorship²⁰ make a powerful and independent press institution acting in the public interest most necessary.²¹

Third, an expansion of native advertising could jeopardize the press’s privileged position under the First Amendment.²² This is true even if a successful argument could be made that regulation of at least some kinds of native ads would face constitutional hurdles under current advertising-protective Supreme Court precedent. Since the mid-twentieth century, constitutional rhetoric has characterized the press differently from other commercial speakers even though commercial news organizations are for-profit businesses. Once the line between ads and editorial

16. Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83, 83–94 (2006) (describing the practice).

17. See Meyer, *supra* note 9.

18. For important arguments about the democratic harms associated with advertising (and hidden advertising), see, e.g., C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* (Princeton Univ. Press ed., 1994); Goodman, *Stealth Marketing*, *supra* note 16; Bakshi, *supra* note 6, at 6 (discussing “serious concerns about journalistic integrity and advertiser influence in 21st Century online news publications”).

19. See, e.g., David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 506–09 (2002); Jane Kirtley, *Summit Report: Freedom of the Press in the Twenty-First Century—an Agenda for Thought and Action*, 19 COMM. L. & POL’Y 109, 110–11 (2014); Lili Levi, *Social Media and the Press*, 90 N.C. L. REV. 1531, 1553–55 (2012). For discussions of what has been called the “golden age” of journalism, see, e.g., Lyriisa Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819 (2012); RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253 (2014).

20. See Jack Balkin, *Old School/New School Regulation*, 127 HARV. L. REV. 2296, 2306–24 (2014) (identifying a new front in censorship).

21. The revelations of massive-scale spying by the NSA and other countries’ spy agencies support this proposition. See, e.g., Glenn Greenwald & Ewen MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, THE GUARDIAN (June 7, 2013, 3:23 PM), <http://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data>.

22. See, e.g., Jones, *supra* note 19; Lidsky, *supra* note 19.

content has been definitively crossed, however, a court seeking to recalibrate the constitutional status of the press could well use that development as a rationalization for doing so. There are indications that the Roberts Court may be just such a Court.²³

Having identified the triad of threats posed by the spread of native advertising into journalism, and proceeding from the assumption that the Hobson's choice faced by the press offers no perfect solution, the Article proposes three alternatives for exploration.

To the extent that they involve regulation, the Article argues that such solutions would likely pass muster under current First Amendment doctrine.²⁴ This is particularly true if traditional, pre-Roberts-Court commercial speech doctrine is applied. The constitutional question is somewhat complicated, however, by the Roberts Court's apparent embrace of corporate speech and by nontrivial arguments distinguishing native advertising from classic commercial speech. Should advertisers and news publishers be successful in resisting regulation as a result of those developments, however, such a free-speech victory would be Pyrrhic indeed—gaining protection for native advertisements at the cost of reducing constitutional status for the press. Given the conflicting interests of advertisers and news organizations in judicially testing the constitutionality of disclosure regulations, adopting effective self-regulation by collective press industry buy-in would be the preferable alternative.

In the first proposal, the Article recommends empirically-grounded “voice priming” disclosure for native advertising.²⁵ Such disclosure would consist of labeling designed to enable consumers to distinguish native advertising from news and to identify its sponsors at the ad level. “Voice priming” disclosure is less subject to the failures of mandated information disclosure regimes targeted by today's “anti-disclosurism”²⁶ movement.²⁷

Second, the Article proposes linking disclosure to what makes native advertising a meta-threat to expressive values and quality journalism. In contrast with labeling regimes designed to enable consumers to distinguish native advertising at the ad level, this meta-disclosure approach is designed to support oversight over editorial independence. Two examples of this kind of disclosure are offered—the first entails disclosure of the identities (and industries) of news organizations' major advertisers, as well as the percentage of the news outlets' ad-based revenues attributable to those advertisers. The second calls for identification of ad content that was produced in-house by news organization personnel and/or branded content

23. See, e.g., Jones, *supra* note 19; see generally AMY GAJDA, *THE FIRST AMENDMENT BUBBLE* (Harv. Univ. Press ed., 2015) (arguing that the press's increasing tabloidization is leading to a retrenchment in press-protective judicial attitudes).

24. See *infra* text accompanying notes 174–90.

25. Cf. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 52–58 (2011) (describing priming effects).

26. Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021, 1022 (2015) (so characterizing the views of disclosure-skeptics Omri Ben-Shahar and Carl E. Schneider in a review of their book *More Than You Wanted to Know*).

27. See *infra* Section VI.A.

teams employed by the publisher, and disclosure of the relationships between those teams and the editorial side of the organization.

Third, the Article presents the case for more effective self-regulation and industry discipline through collective action. Native advertising cannot realistically be eliminated. The question is what can be done to constrain its worst effects. Collective action by at least the mainstream news organizations might be a way forward. Despite the serious structural constraints on such collective action, it is more likely to be accomplished to good (if not perfect) effect if both brands and news organizations are brought to perceive that the adoption of reasonable checks on native advertising is desirable in their self-interest. It is possible to devise strategies to enhance the likelihood of such collective self-regulation.

Part I of the Article describes the range of native ads and maps their adoption in both digital and mainstream print news publishing settings. Next, Part II explains the regulatory context, focusing on FTC and FCC regulations, as well as advertising industry self-regulation. Part III describes and assesses the current deception- and labeling-focused approach to regulation of native advertising. Part IV turns to the expressive threats posed by native advertising. Section IV.A examines the hazards to editorial independence and democracy-promoting journalism, particularly when seen in concert with other changes to the digital news landscape. Section IV.B shows how native advertising threatens the legitimacy and power of the institutional press as a whole. Part V discusses the constitutional questions raised by native advertising regulation and explains how native advertising could emerge as the hook on which a reevaluation of the constitutional status of the press can be hung. Lastly, to mitigate the intractable problem posed by the need for commercial funding of accountability journalism today, Part VI makes two different transparency proposals, along with recommending strategies to induce better self-regulation.

I. THE RISE AND DIFFUSION OF NATIVE ADVERTISING

Much has been written about the twentieth century model of commercial funding for newspapers²⁸ and its decline in the digital news context.²⁹ Given the collapse of the traditional model of newspaper advertising,³⁰ and the failures of the

28. See, e.g., BAKER, *supra* note 18; Waldman, *supra* note 15; JEFF KAYE & STEPHEN QUINN, *FUNDING JOURNALISM IN THE DIGITAL AGE: BUSINESS MODELS, STRATEGIES, ISSUES AND TRENDS* 5–7 (2010).

29. See, e.g., BAKER, *supra* note 18; FED. COMM'NS COMM'N, *supra* note 14; Paul Starr, *Goodbye to the Age of Newspapers (Hello to a New Era of Corruption)*, NEW REPUBLIC (Mar. 4, 2009), <http://www.newrepublic.com/article/goodbye-the-age-newspapers-hello-new-era-corruption>.

30. See, e.g., Steven Waldman, *The Backstory on Native Advertising*, COLUM. JOURNALISM REV., Aug. 6, 2014, http://www.cjr.org/the_audit/the_backstory_on_native_advert.php; *Blurred Lines Workshop*, *supra* note 4, at 35–36.

first generation of digital advertising,³¹ it is attractive to frame native advertising as the economic savior of news media going forward.³²

A. *What Is Native Advertising?*

Native advertising is consistently described as lacking a unitary and clear definition.³³ Broadly speaking, however, the term refers to the integration of advertisements into the editorial content of websites, newspapers, or magazines.³⁴ Native advertising entails “a publisher placing paid advertising content, written either in collaboration with the advertiser or directly by the advertiser, on its site in such a way that it mimics editorial content.”³⁵ According to the Interactive Advertising Bureau (“IAB”), a major online advertising self-regulatory group, native ads are “paid ads that are so cohesive with the page content, assimilated into the design, and consistent with the platform that the viewer simply feels that they belong.”³⁶

One of the definitional difficulties is due to the fact that there are multiple types of—and perspectives from which to describe—native ads.³⁷ A granular look

31. See, e.g., David Anderson, *Hidden Agendas*, 85 TEX. L. REV. SEE ALSO 1, 2 (2006); Manjoo, *supra* note 4 (discussing the ineffective, confusing, irritating, and skewing character of banner ads).

32. See, e.g., Jason del Rey, *Native Advertising: Media Savior or Just the New Custom Campaign?*, ADVERT. AGE (Oct. 29, 2012), <http://adage.com/article/digital/native-advertising-media-savior-custom-campaign/238010/>.

33. See *Blurred Lines Workshop*, *supra* note 4, at 297 (remarks of Jessica Rich, director of the Bureau of Consumer Protection); Mitch Joel, *We Need a Better Definition of “Native Advertising”*, HARV. BUS. REV. (Feb. 13, 2013), <https://hbr.org/2013/02/we-need-a-better-definition-of/>; see also Fernando A. Bohorquez, Jr. & Alan M. Pate, *All Native Advertising Is Not Equal: Why that Matters Under the First Amendment and Why It Should Matter to the FTC*, IMEDIA CONNECTION: IMEDIA CONNECTION BLOG (Sept. 2, 2014, 9:00 AM), <http://blogs.imediaconnection.com/blog/2014/09/02/all-native-advertising/> (describing the definition of native advertising as “elusive”); see also *infra* text accompanying notes 195–215 (discussing the status of such ads as commercial speech).

34. See Attinger, *supra* note 3 (describing the goal of native ads to “blend” ads and editorial content “into a coherent entity where the relevancy . . . is seamless”); Tom Kutsch, *The Blurred Lines of Native Advertising*, AL JAZEERA AM. (Mar. 8, 2014, 11:45 PM), <http://america.aljazeera.com/articles/2014/3/8/the-blurred-linesofanativeadvertising.html>.

35. Holcomb & Mitchell, *supra* note 5.

36. INTERACTIVE ADVERT. BUREAU, NATIVE ADVERTISING PLAYBOOK 3 (2013), <http://www.iab.net/nativeadvertising> [hereinafter NATIVE ADVERTISING PLAYBOOK] (stating the self-regulatory guidelines by the IAB and describing the landscape and recommending disclosure principles for native ads).

37. Holcomb & Mitchell, *supra* note 5. The slides generated for the *Blurred Lines Workshop*, *supra* note 4, provide some visual examples of the variety of native ads and are available at <https://www.ftc.gov/news-events/events-calendar/2013/12/blurred-lines-advertising-or-content-ftc-workshop-native> (follow “Event Materials” hyperlink). For other good collections, see, e.g., Demian Farnworth, *12 Examples of Native Ads and Why They Work*, COPYBLOGGER, <http://www.copyblogger.com/examples-of-native-ads/> (last visited July 30, 2015); Jon Gregoire, *Native Advertising Examples and Publishers*, CPC STRATEGY BLOG (Dec. 11, 2013), <http://www.cpcstrategy.com/blog/2013/12/native-advertising->

at the native advertising landscape reveals differences as to production, character, and placement.³⁸ Native advertising is produced by the brands themselves or their advertising agencies, by the publishers' own writers at the request of the brands, and by the publishers in arranging for sponsorship. From the point of view of placement—how the advertisements are integrated into the media offerings—a review of native ads reveals a variety of formats as well.³⁹ Some publishers even fully integrate the sponsored content, placing it within the body of a news story.⁴⁰ Native advertising formats also differ, with some native ads being part of broader campaigns and others standing alone.⁴¹ Finally, native advertising is further propagated and amplified on the web by being posted to publishers' and brands' social media pages.⁴²

Advertisers increasingly gravitate toward native ads, because they have emerged as viable ways to overcome ad “blindness”—consumer distaste for intrusive, annoying, and distracting advertising.⁴³

examples/; James O'Brien, *4 Native Ads the Media's Talking About*, MASHABLE (Sept. 30, 2014), <http://mashable.com/2014/09/30/native-ad-campaigns/>.

From the production side, there appear to be at least three different models of native advertising. See Dena Levitz, *The Push to Define, Guide “Native Advertising” Intensifies*, MEDIASHIFT (Oct. 4, 2013), <http://mediashift.org/2013/10/the-challenge-of-defining-coming-up-with-a-standard-for-native-advertising/> (discussing the BuzzFeed approach, the underwritten model, and the *Forbes* approach).

38. The IAB's native-identifying factors include: form, function, integration, buying and targeting, measurement, and disclosure. *Native Advertising Playbook*, *supra* note 36, at 6; see also Robert A. Gottfried, Note, *Six Ways this Article Is Most Definitely Not an Ad: Deceptive Marketing and the Need for Clearly-Defined Disclosure Rules in Online Native Advertisements*, 27 LOY. CONSUMER L. REV. 399, 402–03 (2015) (describing IAB categories).

39. See *Native Advertising Playbook*, *supra* note 36, at 4–5 (breaking down native advertising into six categories: (1) in-feed units; (2) paid search units; (3) recommendation widgets; (4) promoted listings; (5) in-ad with native element units; and (6) “custom/can't be contained”); see also Bohorquez & Pate, *supra* note 33, at 7–13 (providing useful elaborations of the various types of native ads); Gottfried, *supra* note 38, at 401–03 (same).

40. Recently, one publisher “has [even] begun breaking up articles by placing advertising content in the middle of them” and even allowing the format of the inserted content to vary “based on the needs of the advertiser.” Jack Marshall, *About.com Adds Its Own Twist to “Native Advertising,”* WALL ST. J.: CMO TODAY (Sept. 3, 2014, 2:05 PM), <http://blogs.wsj.com/cmo/2014/09/03/about-com-adds-its-own-twist-to-native-advertising/>.

41. See, e.g., Rick Edmonds, *As the New York Times Debuts Its Template for Native Ads, Will Other Newspapers Follow?*, POYNTER (Feb. 5, 2014, 8:00 AM), <http://www.poynter.org/news/mediawire/237061/as-the-new-york-times-debuts-its-template-for-native-ads-will-other-newspapers-follow/> (describing *New York Times*' foray into native ads with a campaign by Dell consisting of “a whole series of loosely related articles that touch on how the company defines itself and the services it offers”).

42. *Blurred Lines Workshop*, *supra* note 4, at 48–53.

43. See, e.g., Leung, *supra* note 5, at 2, 4 (describing “banner blindness” and the advantages of native ads for advertisers); Attinger, *supra* note 3 (discussing the perception that native ads are considered more appealing to consumers than traditional and/or banner advertising online); Sonderman & Tran, *supra* note 2 (same).

B. The New Frontier: Mainstreaming Native Advertising in News Venues

One of the most noteworthy recent developments is that news organizations have unashamedly adopted native advertising to help address the misfit of the traditional media-advertising model with digital distribution—and have even brought native advertising production in-house. The development is important because of the modern significance of the separation of news and advertising, both in institutional structure and as a key component of journalism ethics.⁴⁴

Both digital-native news outlets and traditional news organizations have welcomed with open arms the revenues promised by native advertising. Several digital news organizations—BuzzFeed, The Huffington Post, Mashable, and Gawker—have adopted native advertising as a central aspect of their financial strategies.⁴⁵ Traditional, elite print news organizations as well have begun to incorporate native advertising, although more slowly. For example, *The Guardian* launched a “branded content and innovation agency” and a partnership with the company Unilever.⁴⁶ *The New York Times*, *Time*, the *Washington Post*, *Harpers*, *The Atlantic*, and *The Guardian* all now use native advertising.⁴⁷ Similarly, the *Chicago Tribune* and the *Los Angeles Times* offer a version of sponsored content under the label “brand publishing.”⁴⁸

Moreover, many news organizations—both legacy and digital natives—are partnering with brands to produce native advertising. In contrast to past practice, in which newspapers simply reviewed and distributed commercial product provided by advertisers, news outlets are increasingly utilizing their own in-house teams to produce content for advertisers.⁴⁹ *The Guardian* announced that its partnership with Unilever would lead to the creation of an in-house team of 133 people that would

44. This separation is often colloquially referred to as the “church-state distinction” or “the wall of separation.” See, e.g., *Blurred Lines Workshop*, *supra* note 4, at 32 (remarks of Nicholas Lemann); see also *infra* Section IV.A.

45. Holcomb & Mitchell, *supra* note 5 (noting that BuzzFeed announced profitability in 2013 based “almost exclusively” on native ads). Native ads also helped drive *The Atlantic*’s digital revenue from less than 10% in 2006 to 60% in 2013.

46. See Kutsch, *supra* note 34; Press Release, The Guardian News and Media Press Off., Guardian Labs Officially Launches with Unilever Sustainable Living Partnership (Feb. 13, 2014), <http://www.theguardian.com/gnm-press-office/guardian-launches-guardian-labs-with-unilever-partnership> [hereinafter Guardian Press Release].

47. Kutsch, *supra* note 34. Recently, the *New Republic* has joined the fold. See Lukas I. Alpert, *New Republic to Start Producing Content for Advertisers*, WALL ST. J.: CMO TODAY (Mar. 19, 2015, 3:33 PM), <http://blogs.wsj.com/cmo/2015/03/19/new-republic-to-start-producing-content-for-advertisers/>.

48. Edmonds, *supra* note 41; see also GAJDA, *supra* note 23, at 119–20 (describing *Fortune* and *Forbes*’ forays into sponsored content). Even nonprofit news organizations are experimenting in this area. See, e.g., Luis Gomez, *A Nonprofit News Approach to Native Advertising*, JOURNO.BIZ (June 16, 2014), <http://journobiz.com/2014/06/16/a-nonprofit-news-approach-to-native-advertising/>.

49. The *New York Times*, BuzzFeed, *Forbes*, and *The Atlantic*’s Quartz have created in-house “content studios” to produce their native ad posts. See Edmonds, *supra* note 41; see also Colhoun, *Disguising Ads*, *supra* note 8; Meyer, *supra* note 9; Sullivan, *supra* note 4. Condé Nast launched 23 Stories in January 2015. Colhoun, *Disguising Ads*, *supra* note 8.

“tap into the Guardian’s top class editorial, creativity and digital innovation” to help Unilever and other brands “tell their story.”⁵⁰ The *New York Times* announced that content for Dell, which was the *New York Times*’ first major native advertising move, would be produced by employees from the *New York Times*’ advertising division and paid freelancers.⁵¹ Most unusually, some of these news organizations even involve their editorial side in the production of native advertising.⁵²

News content and advertising are being intermingled in different ways as well, as part of new developments in the attempt to monetize news. Some traditional news organizations are offering their content to advertisers for downstream commercial use. The *Wall Street Journal* and *The Dallas Morning News*, for example, are effectively leasing their own archived stories for advertising brands to use on their own sites.⁵³

All this is a marked change from past practice. Although some early radio news programming was sponsored by brands, the use of sponsored content in news reporting was uncommon for most of the twentieth century.⁵⁴ A media, administrative, and public fracas ensued when, in 2004, the *New York Times* broke a story that local television stations had broadcast video news releases (“VNR”) in their news programs without disclosing the involvement of the government in their production.⁵⁵ In contrast to the shame-faced attitude of broadcast news organizations

50. Guardian Press Release, *supra* note 46; *see also* Kutsch, *supra* note 34.

51. *See* Kutsch, *supra* note 34; Michael Sebastian, *Five Things to Know About the New York Times’ New Native Ads*, ADVERT. AGE (Jan. 8, 2014), <http://adage.com/article/media/york-times-debuts-native-ad-units-dell/290973/>.

52. Condé Nast, for example, announced that its magazine editors would “work directly with marketers to produce branded content.” Steven Perlberg, *Condé Nast Unveils Branded Content Shop Powered by Editors*, WALL ST. J.: CMO TODAY (Jan. 26, 2015, 2:50 PM), <http://blogs.wsj.com/cmo/2015/01/26/23-stories-conde-nast-branded-content/>. Similarly, staffers at DailyMail.com also “work on both news reports and branded content.” *Id.*; *see also* Claire Lorell, *Inside Hearst’s Native Ad Strategy*, DIGIDAY (Jan. 15, 2014), <http://digiday.com/publishers/hearst-magazine-native-advertising/> (identifying Hearst as well).

53. Edmonds, *supra* note 41. *See also* GAJDA, *supra* note 23, at 119–20 (describing *Fortune*-branded editorial content for marketers to distribute on their platforms).

54. *See* Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927-1963*, 56 FED. COMM. L.J. 329, 338–44 (2004) (noting that some news programming was sponsored). In any event, what it meant at the time for news programs to have brand sponsorship is not entirely clear. Moreover, sponsored news programming was controversial enough to be terminated as a practice. *Id.*; *see also infra* note 121.

55. *See* Robert Pear, *U.S. Videos, for TV News, Come Under Scrutiny*, N.Y. TIMES, Mar. 15, 2004, at A1; Frank Ahrens, *FCC Queries TV Stations on Video News Releases*, WASH. POST (Aug. 15, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/14/AR2006081401006.html>; Brooks Boliek, *Adelstein to FCC: Police VNR Use*, HOLLYWOOD REP. (Nov. 15, 2006, 4:00 AM), <http://www.hollywoodreporter.com/news/adelstein-fcc-police-vnr-use-143251>; *see also* Clay Calvert, *What Is News?: The FCC and the New Battle Over the Regulation of Video News Releases*, 16 COMM.LAW CONSPPECTUS 361 (2008); Goodman, *supra* note 16, at 90, 92; Peter Menell, *2014: Brand Totalitarianism*, 47 U.C. DAVIS L. REV. 787, 802–03 (2014);

in response to revelations of their inclusion of VNRs in their news programs⁵⁶—and, indeed, what appears to be the comparatively infrequent use of such sponsored news⁵⁷—news organizations today appear to be openly embracing native advertising as their economic holy grail to make up for years of declining advertising revenue. This transition of native ads from the “new” media to the traditional mainstream media indicates that the news industry sees native ads as losing any stigma they may have carried in the past.⁵⁸

II. THE REGULATORY BACKGROUND

Newspapers have relied on advertising in different ways and to different degrees over the past 150 years.⁵⁹ After early skirmishes, broadcasting in the United States also developed as a largely commercial medium reliant on advertising.⁶⁰ In response, advertising has been subject to state and federal regulation since the early days. Constitutionally, regulation of advertising has been reviewed not under traditional First Amendment strict scrutiny, but pursuant to the less stringent judicial review of the commercial speech doctrine since the 1970s.⁶¹ Perhaps because of

Jeffrey Peabody, Note, *When the Flock Ignores the Shepherd – Corraling the Undisclosed Use of Video News Releases*, 60 FED. COMM. L.J. 577, 581–82 (2008).

56. Perhaps in order to stave off regulation, the National Association of Broadcast Communicators produced a Membership Code addressing the use of VNRs. See Peabody, *supra* note 55, at 583–84 nn.28–35 and sources cited therein.

57. In 2006, the Center for Media & Democracy issued a report identifying 77 television stations airing 36 video news releases in their news programming. See Diane Farsetta & Daniel Price, *Still Not the News: Stations Overwhelmingly Fail to Disclose VNRs*, PR WATCH (Nov. 14, 2006), <http://www.prwatch.org/fakenews2/execsummary>. While this is a notable number of stations, it should be seen in the broader context of the thousands of U.S. broadcasting licenses. *But see* Calvert, *supra* note 55, at 370 (citing expansion of VNR production industry); Menell, *supra* note 55, at 802–03 (using CMD data to indicate failure of industry codes of conduct).

58. See Gavin O’Malley, *Native Advertising Predicted to Dominate Digital in 2014*, MEDIAPOST MOBILE MARKETING DAILY (Jan. 9, 2014, 1:19 PM), <http://www.mediapost.com/publications/article/217000/native-advertising-predicted-to-dominate-digital-i.html> (“Say goodbye to the stigma associated with native advertising.”); see also Margaret Sullivan, Opinion, *Dean Baquet’s “Charting the Future” Note to Times Staff*, N.Y. TIMES PUB. EDITOR’S J. (Jan. 6, 2015), <http://publiceditor.blogs.nytimes.com/2015/01/06/dean-baquets-charting-the-future-note-to-times-staff/> (“I’m working with the business side to see if there are steps we can take to attract more ads without compromising the line between news and advertising. For instance, can an advertiser sponsor a regular feature? Yes, so long as it does not make readers question our objectivity. This is tricky territory, but some of the best news organizations in the world have already navigated it.”).

59. See generally BAKER, *supra* note 18.

60. See, e.g., John Nichols & Robert W. McChesney, *The Death and Life of Great American Newspapers*, NATION, Apr. 6, 2009, at 11–20. The early history of radio reflects a distaste for advertising. See, e.g., ROBERT W. MCCHESENEY, TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935, at 5 (1993); Kielbowicz & Lawson, *supra* note 54.

61. See *infra* Section V.A.

changing social norms with respect to advertising,⁶² much of the development in this area has been left up to administrative regulation and industry self-regulation. The federal regulation of advertising has largely been undertaken under the auspices of the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”).⁶³

A. Administrative Regulation

Statutes prohibit false and deceptive advertising and seek to ensure that adequate sponsorship information is provided to the public.⁶⁴ The Federal Trade Commission Act (“FTC Act”) authorizes the FTC to stop “unfair methods of competition,”⁶⁵ and prohibits false advertising.⁶⁶ On the broadcast front, Congress passed sponsorship disclosure requirements with regard to paid content—a regime still operative today.⁶⁷ Both the FTC⁶⁸ and the FCC⁶⁹ have adopted regulations in the exercise of their regulatory jurisdiction over advertising.

62. As Professor Anderson has noted, social responses to commercialization have shifted significantly since the early twentieth century. Anderson, *supra* note 31. To the extent that the audience allows itself to find even commercially sponsored content desirable if it is interesting and fits the reader’s interests, incentives increase for brands to provide such editorial content.

63. Other federal agencies, such as the Food & Drug Administration (“FDA”), the Securities and Exchange Commission (“SEC”), and the Bureau of Alcohol, Tobacco and Firearms, have jurisdiction over advertising as well. This Article will only discuss FTC and FCC regulation.

64. For example, since the Newspaper Publicity Act of 1912, newspapers wishing to take advantage of favorable postage rates were required to distinguish paid content as advertisements. See Kielbowicz & Lawson, *supra* note 54, at 334–35. The disclosure requirement of the Newspaper Publicity Act of 1912 was upheld in *Lewis Publ’g Co. v. Morgan*, 229 U.S. 288 (1913). Newspaper attempts to end-run disclosure obligations by distributing special pages on which a business buying an ad “got a small story lauding the business and its owner” backfired. Anderson, *supra* note 31, at 1.

65. 15 U.S.C. § 45(a)(1) (2012).

66. 15 U.S.C. § 52 (2012); see also FTC Unfairness Policy Statement, appended to *International Harvester Co.*, 104 FTC 949, 1070 (1984).

67. Radio Act of 1927, 47 U.S.C. § 19 (repealed 1934); Communications Act of 1934, 47 U.S.C. §§ 317, 507 (2014).

68. 16 C.F.R. §§ 255.0, 255.1, 255.5 (2015). The FTC first adopted endorsement guidelines for bloggers in 2009. See *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 74 Fed. Reg. 53,124 (Dec. 1, 2009) (mandating disclosure when bloggers have been paid or given something of value to tout a product); see also FED. TRADE COMM’N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (offering practical tips for effective disclosures in digital/online advertising); FED. TRADE COMM’N, THE FTC ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING (2015), https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking?hc_location=ufi (providing disclosure guidance in connection with common social media endorsement scenarios).

69. 47 C.F.R. §§ 73.1212, 76.1615 (2015); see generally Kielbowicz & Lawson, *supra* note 54 (describing the history of sponsorship identification requirements in broadcast regulation).

1. “*Blurred Lines: Advertising or Content?*”—*The FTC’s Recent Workshop on Native Advertising*

Despite predecessor examples of hidden advertising,⁷⁰ the FTC and the advertising industry see the phenomenon of native advertising as a particularly new and disruptive version of hidden sponsorship. As a result, the FTC convened a workshop in December 2013 to explore native advertising.⁷¹ The goal of the workshop was to prompt a discussion among industry stakeholders in order to help the FTC determine whether there was a need for additional guidance and/or regulation of labeling⁷² disclosure by the agency.⁷³

Having begun by sketching the history of FTC regulation of deceptive advertising,⁷⁴ the workshop discussion then focused primarily on the nature and effectiveness of disclosure requirements. All the industry speakers agreed that transparency was necessary not only to avoid consumer deception as to whether content is a paid advertisement, but also in order to protect the publisher’s and brand’s credibility with readers.⁷⁵ At the same time, there appeared to be significant lack of consensus among the participants over (1) what kind of sponsored content should be considered an advertisement subject to disclosure requirements,⁷⁶ and (2)

70. The FTC had been “concerned with consumers’ ability to distinguish between paid and editorial content, for many years” and has targeted hidden sponsorship such as “advertorials . . . infomercials, sponsored posts, fake news sites, and paid search.” *Blurred Lines Workshop*, *supra* note 4, at 6 (quoting FTC Chair Ramirez). Indeed, the FTC has extensive jurisprudence about “masquer-ads,” deceptive advertising or advertising seeking to mislead as to source. *Id.* at 15.

Similarly, in the broadcast context, the FCC has faced hidden sponsorship problems in the culturally salient precedents of radio station payola and the television quiz show scandals. *See* Kielbowicz & Lawson, *supra* note 54, at 347–55. In recent years, consumers’ ability to fast-forward or otherwise avoid the traditional broadcast commercial led advertisers increasingly to adopt product placement strategies, particularly in entertainment programming. In response, the FCC opened a rulemaking docket concerning embedded advertising and product placement. Sponsorship Identification Rules and Embedded Advertising, Notice of Inquiry and Notice of Proposed Rulemaking, 73 Fed. Reg. 43,194 (July 24, 2008); *see also* *In re Applicability of Sponsorship Identification Rules*, Public Notice, 40 F.C.C. 141 (1963) (emphasizing that “listeners are entitled to know by whom they are being persuaded”).

71. *Blurred Lines Workshop*, *supra* note 4.

72. The term “labeling” was used in the FTC workshop and is used here to refer to any method—both words and visuals—used to distinguish ads from editorial content.

73. *Blurred Lines Workshop*, *supra* note 4, at 299.

74. *Id.* at 11–24.

75. *See, e.g., id.* at 54–55, 74, 78.

76. Thus, the workshop revealed a fundamental theoretical split among the panelists on the following question: should the fact that an advertiser paid for content necessarily make that content an advertisement subject to disclosure, or should it depend on context? *See, e.g., id.* at 277. Some speakers emphasized that paid placements by brands should not be deemed to be advertising subject to disclosure requirements under the FTC Act if they contained nothing about the manufacturer’s products or sought to influence purchasing decisions. *See, e.g., id.* at 240–41 (Mudge comments). Other speakers disagreed, and argued for brightline approaches pursuant to which disclosure would be required whenever organizations paid for content. *See, e.g., id.* at 241 (Holt comments).

how to operationalize the notion of transparency effectively, even when participants agreed that disclosure would be warranted. One of the points of agreement was the difficulty of generalizing. The industry speakers appeared to agree that the variety of native ad formats made it unrealistic to craft single, one-size-fits-all labeling language and requirements.⁷⁷ Even within different categories of native ads, panelists notably differed in their views of the deceptiveness of the labeling in hypothetical native ads presented to them by workshop organizers.⁷⁸

At the end of the workshop, an FTC representative characterized the day as having “raised more questions than it answered” for regulators.⁷⁹ While no regulatory program has been issued from the Commission in response to the workshop, intimating that a transparency rulemaking is unlikely in the near future, FTC enforcement actions based on existing law are to be expected.⁸⁰

2. *The FCC’s Open Docket on Sponsorship Identification*

Although the FTC has been the most active agency in the area of advertisement disclosure, the broadcast sponsorship disclosure rules clearly give the FCC jurisdiction to enforce statutory commercial-sponsorship requirements. The FCC has had an open docket since 2008 to consider whether it should revise its sponsorship identification policies in light of the increased use of embedded advertising.⁸¹ Although the Notice of Inquiry in that proceeding does not address the issue of native advertising as such, the Commission could certainly consider the matter as part of that proceeding.⁸² The Commission, however, has not acted on that

77. See, e.g., *id.* at 215 (Zaneis comments). They debated the effectiveness of “sponsored by,” “presented by,” “sponsored content,” and the use of visual cues (graphics/color) to differentiate between sponsored and editorial content. *Id.* at 236–39. Some of the publisher panelists (such as the *Wall Street Journal*’s Robin Riddle) presented more granular and differentiated labeling options than the advertiser representatives. *Id.* at 238–39.

78. *Id.* at 213–17.

79. *Id.* at 294 (closing remarks of Mary Engle); see also Katy Bachman, *Native Ad Workshop Leaves FTC Perplexed, Next Enforcement Steps Unclear*, ADWEEK (Dec. 4, 2013, 9:09 PM), <http://www.adweek.com/news/advertising-branding/native-ad-workshop-leaves-ftc-perplexed-154303>.

80. See *Blurred Lines Workshop*, *supra* note 4, at 294; Edmonds, *supra* note 41 (suggesting likelihood of FTC adjudication and fines for native ads). Admittedly, however, more FTC activity is not out of the question. Recent scholarship has sought to clarify ways in which existing regulations could be tailored to cover at least some native advertising. See, e.g., Bakshi, *supra* note 6, at 25–30; Gottfried, *supra* note 38, at 414–17. More to the point, an FTC staffer recently suggested at an advertising industry conference that the Commission might issue guidance regarding native advertising in 2015. Rebecca Tushnet, *ANA Conference: Native Advertising*, REBECCA TUSHNET’S 43(B)LOG (Apr. 3, 2015), <http://tushnet.blogspot.com/2015/04/ana-conference-native-advertising.html> (summarizing comments made at the ANA Conference).

81. Sponsorship Identification Rules and Embedded Advertising, 73 Fed. Reg. 43,194 (July 24, 2008); see also Goodman, *supra* note 16, at 85; Zahr Said, *Embedded Advertising and the Venture Consumer*, 89 N.C. L. REV. 99, 103–04 (2010); Jennifer Fujawa, Note, *The FCC’s Sponsorship Identification Rules: Ineffective Regulation of Embedded Advertising in Today’s Media Marketplace*, 64 FED. COMM. L. J. 549 (2012).

82. See Goodman, *supra* note 16, at 145–51 (proposing expansion of sponsorship ID requirements).

docket since 2008, preferring to act on a case-by-case basis to punish violations of its sponsorship identification rules.⁸³ The sponsorship-disclosure regime of the Communications Act is limited to broadcasting and a very small slice of cable programming, however.

B. Self-Regulation in the Advertising Industry

The FCC⁸⁴ and the FTC⁸⁵ also have a long history of actively encouraging industry self-regulation in the advertising arena. Indeed, the best way to see the FTC's Blurred Lines workshop might be as a signal to the industry to engage in more effective self-regulation.⁸⁶

The advertising industry self-regulates principally through the Advertising Self-Regulation Council ("ASRC"),⁸⁷ whose standards for truth and accuracy in national advertising are enforced by the National Advertising Division ("NAD") of the Council of Better Business Bureaus.⁸⁸ The self-regulatory process leads to the

83. See Jon Markman, *FCC Heavies Up on Fine for Multiple Sponsorship ID Violations*, COMMLAWBLOG (Feb. 11, 2014), <http://www.commlawblog.com/2014/02/articles/broadcast/fcc-heavies-up-on-fine-for-multiple-sponsorship-id-violations/> (linking to \$44,000 fine for Chicago AM station airing paid announcements, designed to sound like a newscast, on behalf of the Workers Independent News); see also Howard Weiss, *Sponsorship ID Police Strike Again*, COMMLAWBLOG (Dec. 19, 2014), <http://www.commlawblog.com/2014/12/articles/broadcast/sponsorship-id-police-strike-again/> (describing consent decree with KTNV-TV over paid but undisclosed "special report," designed to sound like a news report about liquidation of auto dealerships).

84. See, e.g., Maureen Ohlhausen, Comm'r, Fed. Trade. Comm'n, Speech at the Better Business Bureau Self-Regulation Conference: Success in Self-Regulation: Strategies to Bring to the Mobile and Global Era (June 24, 2014) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/410391/140624bbbself-regulation.pdf).

85. John E. Villafranco & Katharine E. Reilly, *So You Want to Self-Regulate? The National Advertising Division as Standard Bearer*, ANTITRUST, Spring 2013, at 79.

86. See *Blurred Lines Workshop*, *supra* note 4, at 299–300 (remarks of Jessica Rich, Director of the FTC Bureau of Consumer Protection) (indicating FTC interest in encouraging the development of best practices by the industry while the Commission contemplates its "next steps").

87. See Press Release, PR Newswire, The National Advertising Review Council is Now the Advertising Self-Regulatory Council (ASRC) (Apr. 23, 2012). The ASRC had been called the National Advertising Review Council ("NARC"), and the name was changed to ASRC in 2012. Lucille M. Ponte, *Mad Men Posing as Ordinary Consumers: The Essential Role of Self-Regulation and Industry Ethics on Decreasing Deceptive Online Consumer Ratings and Reviews*, 12 J. MARSHALL REV. INTELL. PROP. L. 462, 495–96 (2013). This is the leading self-regulatory regime in the advertising industry. There are additional self-regulatory efforts, however, including the Direct Marketing Association's e-business privacy and advertising guidelines. See *id.* at 496–500. The self-regulatory framework is governed by advertising ethics codes. *Id.* For a description of the NAD process, see, e.g., C. Lee Peeler et al., *Centennial of the Council of Better Business Bureaus: The Important Role of Self-Regulatory Organizations*, 9 J. L. ECON. & POL'Y 443 (2013).

88. The NAD's website can be found at <http://www.bbb.org/council/the-national-partner-program/national-advertising-review-services/national-advertising-division/> (describing NAD's "mission" as "review[ing] national advertising for truthfulness and

issuance of approximately 200 decisions per year, which become the basis of a self-regulatory jurisprudence.⁸⁹ According to observers, FTC Commissioners have been “consistent and vocal supporters of the NAD” and “when the Commission does act on matters previously before the NAD, the agency’s actions, for the most part, have been consistent with the self-regulatory decision.”⁹⁰

The advertising industry’s self-regulatory mechanisms have already addressed native advertising both on a case-by-case and broader policy basis.⁹¹ NAD has explicitly determined that consumers have a right to know who authors “sponsored content.”⁹² At a policy level, and likely in response to the impending possibility of regulatory action, the IAB recently released ethics rules concerning native advertising as part of its *Native Advertising Playbook*.⁹³ In light of its conclusion that the variety of native ads does not admit of specific regulatory rules, the *Native Advertising Playbook* seeks to provide the industry with a “framework . . . with the goal of eliminating marketplace confusion . . .”⁹⁴ It also gives

accuracy and foster[ing] public confidence in the credibility of advertising . . .”). NAD’s decisions are appealable to the National Advertising Review Board. NAD considers cases brought by competitors and consumers, and also investigations that it self-initiates. ADVERT. SELF-REGULATORY COUNCIL, THE ADVERTISING INDUSTRY’S PROCESS OF VOLUNTARY SELF-REGULATION (Jan. 1, 2014), <http://www.asrcreviews.org/wp-content/uploads/2012/04/NAD-CARU-NARB-Procedures-revised-1.-1.-141.pdf> (procedures for NAD). Advertisers’ participation in the self-regulatory process is voluntary, but there is broad industry-wide participation in the NAD process. *See, e.g.*, Villafranco & Reilly, *supra* note 85, at 79–80. The NAD can refer noncomplying advertisers to the FTC or other appropriate agencies. *Id.* at 79.

89. Ohlhausen, *supra* note 84, at 5; *see also* Villafranco & Reilly, *supra* note 85, at 79–80.

90. Villafranco & Reilly, *supra* note 85, at 79.

91. *See* American Media Inc. (Shape Water Boosters), Case #5665, NAD/CARU Case Reports (Dec. 2013); eSalon (Custom Formulated Hair Color), Case #5645, NAD/CARU Case Reports (Oct. 2013); Qualcomm Inc. (Snapdragon Processors), NAD Case Reports, Case #5633 (Sept. 2013); *see also* Andrew Adam Newman, *Promoting Its Own Products, a Magazine Labels an Ad as News*, N.Y. TIMES, Jan. 16, 2014, at B6; Vega, *supra* note 2. Last spring, NAD called content recommendation service Taboola to task for its labeling practices. Jack Marshall, *Native Ad Labeling is a Work in Progress*, WALL ST. J.: CMO TODAY (May 29, 2014, 10:52 PM), <http://blogs.wsj.com/cmo/2014/05/29/debate-continues-around-native-ad-labelling/>. The Accountability Program sent a compliance warning to several companies in late 2014 in connection with native advertising. Press Release, Advertising Self-Regulatory Council, Native or Not, Interest Based Ads Must Comply with Self Regulation (Dec. 9, 2014) (available at <http://www.asrcreviews.org/2014/12/native-or-not-interest-based-ads-must-comply-with-self-regulation/>); ADVERT. SELF-REGULATORY COUNCIL, COMPLIANCE WARNING (2014), <http://www.asrcreviews.org/wp-content/uploads/2014/12/Compliance-Warning-CW-03-2014-Native-Advertising.pdf>.

92. *Native Advertising Playbook*, *supra* note 36, at 15.

93. *Id.*; *see also* PUB. RELATIONS SOC’Y OF AM., ETHICAL STANDARDS ADVISORY ES-19 (Sept. 2014), <http://www.prsa.org/AboutPRSA/Ethics/documents/EthicalStandardsAdvisoryESA19.pdf> (PRSA’s ethics advisory for native ads).

94. *Native Advertising Playbook*, *supra* note 36, at 1.

“Recommended Industry Guidance for Advertising Disclosure and Transparency for [native] ad units.”⁹⁵

III. NATIVE ADVERTISING AND THE THREAT TO CONSUMERS— DECEPTION

Unsurprisingly, much of the controversy over native advertising currently focuses on whether it is deceptive to consumers. If consumers are not aware that a native ad is a paid placement—rather than independently created content—they may fail to evaluate its claims critically. Their skepticism might be tempered by the brand and credibility of the publisher.⁹⁶ This is particularly important with embedded news-like content because processing such information is part of the consumer’s role as a citizen. The ability “to evaluate where information is coming from, what values it might be representing, whose interests it might be serving, is essential to our democracy.”⁹⁷ As social science confirms, source serves an important heuristic role.⁹⁸

Some critics see native advertising as inherently deceptive. On this view, its entire *raison d’être* is precisely to disable consumers from being able to distinguish between editorial content and commercial propaganda—to trick consumers and end-run ad avoidance.⁹⁹ Other observers are more optimistic about

95. *Id.* The IAB states that “clarity and prominence of the disclosure is paramount” for all paid native ad units. *Id.* at 15. “The disclosure must: Use language that conveys that the advertising has been paid for, thus making it an advertising unit, even if that unit does not contain traditional promotional advertising messages. . . . *Simply put*: Regardless of context, a reasonable consumer should be able to distinguish between what is paid advertising vs. what is publisher editorial content.” *Id.*

The Newspaper Association of America has taken a “cautious approach to the transparency issue” and has not issued labeling guidelines on digital presentation of native ads. Edmonds, *supra* note 41.

96. Chris Hoofnagle, *Notes from a Naif on Native Advertising Impressions from the FTC’s Workshop on Advertorials and Other Disguised Advertising*, TAP BLOG (Dec. 6, 2013), <http://www.techpolicy.com/Blog/December-2013/Notes-from-a-Naif-on-Native-Advertising-Impression.aspx>; see also Anderson, *supra* note 31, at 2 (describing how hidden ads can bypass consumers’ “defenses against hucksterism”); Bakshi, *supra* note 6, at 10–11 (“Such source-based confusion usually leads consumers to trust the subject of the advertisement more than they otherwise would.”); Rebecca Tushnet, *Attention Must Be Paid: Commercial Speech, User-Generated Ads, and the Challenge of Regulation*, 58 BUFF. L. REV. 721, 746–47 (2010) (“Consumers trust commercial messages less than noncommercial ones. . . . [H]idden relationships may give advertisers excessive credibility by using apparently independent sources to confirm the advertiser’s message.”).

97. Damaris Colhoun, *Victor Pickard on Native Ads and the New Journalism Economy*, COLUM. JOURNALISM REV., Feb. 27, 2015, http://www.cjr.org/behind_the_news/qa_victor_pickard.php; see also Tushnet, *supra* note 96, at 746–47.

98. See Tushnet, *supra* note 96, at 747–48; Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 592–93 (2008) and sources cited therein.

99. See, e.g., *Blurred Lines Workshop*, *supra* note 4, at 129 (panelist characterizing native advertising as “a hustle, a racket, a grift”). See also Menell, *supra* note 55, at 814. Some journalists and bloggers agree. See, e.g., Andrew Sullivan, *A Sign of the*

the possibility of effective disclosure. They think it is possible to achieve sufficient transparency to avoid confusion while still ensuring an immersive and integrated experience for the consumer.¹⁰⁰

The self-regulatory picture with respect to native advertising is currently mixed. Some observers of the FTC Blurred Lines workshop were quite critical of self-regulation and the industry's approaches to native ads.¹⁰¹ Many of the labeling practices for native advertising are still "neither clear nor conspicuous."¹⁰² To further complicate matters, there are different kinds of native advertising, which cover a spectrum with regard to transparency.¹⁰³ And a recent IAB study found that the ease of identifying sponsored content varied by type of site, with 82% of respondents finding sponsorship clear for ads shown on business news sites.¹⁰⁴ Behind the apparent general consensus among advertisers about the need for transparency¹⁰⁵ lie industry differences regarding the kind and extent of disclosure needed.¹⁰⁶ Additionally, publishers, including the traditional news organizations, lack a unified self-regulatory approach to native ad labeling.¹⁰⁷ Moreover, labeling practices change over time.¹⁰⁸

Times Ctd., THE DISH (Jan. 9, 2014, 1:13 PM), <http://dish.andrewsullivan.com/2014/01/09/a-sign-of-the-times-ctd/>; see also Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 522–24 (2015) (describing "manipulative marketing" which is designed to take advantage of consumers' cognitive limitations); Colhoun, *Disguising Ads*, *supra* note 8 (discussing journalist silence); Colhoun, *Victor Pickard*, *supra* note 97 (noting a media theorist's diagnosis of native ads as taking subterfuge and confusion to "a new level").

100. See, e.g., Ryan Chittum, *Native Ads Grow Up*, COLUM. JOURNALISM REV. (Jan. 10, 2014), http://www.cjr.org/the_audit/native_ads_grow_up.php.

101. Hoofnagle, *supra* note 96; see also Bakshi, *supra* note 6, at 22–24 (explaining skepticism about the sufficiency of self-regulation by both advertisers and news publishers by reference to industry participants' failure to understand important elements of the basic regulatory structure).

102. Hoofnagle, *supra* note 96 (noting that "the disclosure language was [often] in a very small or less weighty font").

103. *Blurred Lines Workshop*, *supra* note 4.

104. INTERACTIVE ADVERT. BUREAU, GETTING IN-FEED SPONSORED CONTENT RIGHT: THE CONSUMER VIEW (2014), http://www.iab.net/media/file/IAB_Edelman_Berland_Study.pdf [hereinafter *IAB Study*].

105. See *Blurred Lines Workshop*, *supra* note 4; see also *supra* text accompanying notes 75–77.

106. See *supra* text accompanying notes 75–77.

107. *Blurred Lines Workshop*, *supra* note 4, at 298. Some fetishize their labeling in the service of transparency, and others are less assiduous in doing so. See, e.g., Edmonds, *supra* note 41 ("[N]ot every outlet will be as starchy about labeling as the Times.").

108. For example, the *New York Times* reportedly changed its labeling policies with respect to sponsored content by shrinking labels and changing the language, making it more difficult to identify sponsored content. Michael Sebastian, *New York Times Tones Down Labeling on its Sponsored Posts*, ADVERT. AGE (Aug. 5, 2014), <http://adage.com/article/media/york-times-shrinks-labeling-natives-ads/294473/>. Even early adopters of native advertising, such as BuzzFeed, reportedly have changed their disclosure policies. *Id.*

The current state of empirical research in this area is quite preliminary.¹⁰⁹ Empirical data on consumer attitudes to sponsored content and the extent to which they distinguish native advertising are scarce. According to a recent study by the IAB in which consumers were exposed to mock sponsored content placed on various types of websites, a majority of the participants found that it was not clear that the ads constituted sponsored content.¹¹⁰ This is consistent with the findings reported by scholars during the Blurred Lines workshop that consumers did not fully understand the type of disclosure language and cues used in many native ads today.¹¹¹ Yet if further research confirms indications in preliminary data that material numbers of consumers do not care whether the editorial platform or the advertiser pays for the content they find interesting,¹¹² questions can be raised whether the public perceives consumer confusion over sources to be harmful.¹¹³ Although research more directly

109. See, e.g., *Blurred Lines Workshop*, *supra* note 4, at 159. Participants in the Blurred Lines workshop noted areas of needed and forthcoming empirical study regarding native ads. *Id.* at 135–45.

110. INTERACTIVE ADVERT. BUREAU, *Critical to Success of In-Feed Sponsored Content Are Brand Familiarity, Trust and Subject Matter Authority, as well as Relevance, According to New Research from IAB & Edelman Berland* (July 22, 2014), http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_releases/pr-072214; see also Jack Marshall, *Sponsored Content Isn't Always Clearly Labeled, Research Suggests*, WALL ST. J.: CMO TODAY (July 22, 2014, 5:13 PM), <http://blogs.wsj.com/cmo/2014/07/22/sponsored-content-isnt-always-clearly-labelled-research-suggests/> (describing study). Even if the term “sponsored by” is evident in the ad, viewers may not be aware that the sponsor has control over the content. *Id.* In addition, research indicates that 50% of consumers do not know the meaning of “sponsored.” Bruce Goldman, *FTC Probes Online Masquer-Ads*, MEDIA CHANNEL (Dec. 8, 2013), <http://www.mediachannel.org/ftc-probes-online-masquer-ads/> (noting research by Prof. David Franklyn). A survey by native ad tech company TripleLift recently showed that while 71% of the participating consumers who were exposed to several versions of the same native ad on a website, with different disclosure labels, reported awareness of the content of the ad, 62% did not realize they were looking at an ad. Lucia Moses, *How Native Advertising Labeling Confuses People, in 5 Charts*, DIGIDAY (May 4, 2015), <http://digiday.com/publishers/5-charts-show-problem-native-ad-disclosure/> (reporting results). For a typology of different types of deception in advertising, see, e.g., Manoj Hastak & Michael B. Mazis, *Deception By Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims*, 30 J. PUB. POL'Y & MARKETING 157, 157 (2011); Moses, *supra*.

111. See *Blurred Lines Workshop*, *supra* note 4, at 140–45 (Prof. David Franklyn study).

112. One panelist at the Blurred Lines workshop referred to preliminary research indicating that while consumers are often confused by current ad labeling, a sizeable cohort reported that they “do not care” whether content they read is sponsored by a brand or editorial in nature. *Id.* at 144; see also Meyer, *supra* note 9 (noting how much readers care “where each piece of content comes from”). Further study is planned, inter alia, to test consumer understanding of different kinds of labeling. *Blurred Lines Workshop*, *supra* note 4, at 189 (testing the difference between “sponsored by Apple” and “text created by Apple.”).

113. See, e.g., Lin Pophal, *Consumers Coming to Accept Native Advertising Done Right*, ECONTENT (July 28, 2014), <http://www.econtentmag.com/Articles/News/News-Feature/Consumers-Coming-to-Accept-Native-Advertising-Done-Right-97907.htm>; TRIPLELIFT, *Inside Native Advertising 2015 – Trends & Insights* (Dec. 10, 2014), <http://www.slideshare.net/TripleLift/2015-state-of-native-advertising>.

addressing the area of native advertising has been promised,¹¹⁴ much has not yet been undertaken or made publicly available. Embarking on an attempt to craft labeling rules to protect consumers from deception engages a live debate on sponsorship disclosure rules for advertising more generally.¹¹⁵ Many argue that it is impractical and a waste of resources to go down this path.¹¹⁶

Yet, as is argued further below, there is little reason not to turn attention to improved ad labeling to reduce consumer deception.¹¹⁷ Whatever their differences, all industry players' concerns about alienating their customers should create incentives to explore optimizing disclosure of native advertising in the news space.¹¹⁸ Constitutional challenges to labeling requirements are likely to fail, especially if native ads are analyzed under the rubric of commercial speech

It should be noted that these are industry-sponsored empirical studies. Such assertions beg for critical assessment. *See* Colhoun, *Victor Pickard*, *supra* note 97 (suggesting that industry findings that consumers care less about sponsorship than quality of content are suspect as “self-serving”). It is also hard to believe that such findings would apply to the kind of content in the news that is relevant to self-governance, or that was assumed to be attributable to a neutral, unbiased source. Those study responders who said they did not care whether content was paid for might well have been assuming a comparable degree of accuracy and neutrality in the paid and unpaid editorial content. Their responses might have been markedly different if they were to make the contrary assumption. Moreover, the problem here is that such critics have too narrow a view of harm. In any event, even though preliminary survey findings noted above may show a significant percentage of respondents who “do not care,” they are far less than the majority surveyed.

114. *Blurred Lines Workshop*, *supra* note 4, at 137, 142, 189–90 (Franklyn and Hoofnagle comments regarding needed areas for future research). For example, further study is planned to test consumer understanding of different kinds of labeling. *Id.* at 189.

115. *Compare* Goodman, *supra* note 16 (arguing for the need to “revamp[] and extend[] sponsorship disclosure law”), with Eric Goldman, *Stealth Risks of Regulating Stealth Marketing: A Comment on Ellen Goodman’s Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. SEE ALSO 11 (2006) (questioning the viability of mandatory disclosure requirements and their undesirable consequences), Said, *supra* note 81, at 105 (2010) (characterizing the media consumer as a sophisticated “venture consumer” for whom such disclosure is unnecessary), and R. Polk Wagner, *Comments on Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. SEE ALSO 17, 17 (2006) (expressing doubt that a disclosure regime is “either worthwhile or even wise, given the radical changes in the nature of the media markets . . .”). For a broader attack on mandated disclosure regimes, see, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (Princeton Univ. Press ed., 2014); *see also infra* text accompanying notes 244–45.

116. For a discussion of how corrective labeling disclosure, called “voice priming” disclosure below, might be a workable alternative, see *infra* Section VI.A.

117. *See* discussion *infra* Section V.A. (detailing plausible strategies for developing generally workable labeling standards to reduce consumer deception).

118. *See* Moses, *supra* note 110 (reporting on ANA survey results indicating agreement among two-thirds of ANA members that clear disclosure is necessary); Sheelagh Doyle, *ANA Study Reveals Marketers are Increasing Spend on Native Advertising But Disclosure, Ethics and Measurement are Key Issues*, ASS’N OF NAT’L ADVERTISERS (Jan. 29, 2015), <https://www.ana.net/content/show/id/33530>. This Section does not distinguish between, or opine as to the comparative desirability and feasibility of, administrative versus self-regulation. *See infra* Section V.C (describing self-regulation-promoting strategies).

doctrine—and, in any event, self-interest should lead news organizations not to jump to testing the constitutional question in court.¹¹⁹

IV. BEYOND DECEPTION: MAPPING THE EXPRESSIVE AND INSTITUTIONAL THREATS POSED BY NATIVE ADVERTISING

Although the focus on consumer deception is appropriate and worthwhile, the rise of modern native advertising presents a more intractable problem. Sooner or later, the wholesale turn to native advertising will have an impact on the editorial content in which it is embedded, the institutional power of the news media, and the constitutional status of the press.¹²⁰ Even if native advertising only disseminates truthful information, and even if it is well labeled and separated from its associated editorial content, it nevertheless threatens the democratic role of the press and editors' independent journalistic decisions about what to cover.

A. Threats to Independent Editorial Judgment and Accountability Journalism

There has always been a tension between commercial and journalistic interests in the advertising-supported press, but the conflict has traditionally been resolved structurally, via the “church/state divide” or “wall of separation” between the two.¹²¹ Enshrined in both professional ethics codes and news organization

119. See *infra* Section IV.C (describing decreasing recognition of press exceptionalism as a matter of constitutional law).

120. This is not the first scholarly warning as to the expressive threats posed by hidden advertising. In her landmark article, *Stealth Marketing and Editorial Integrity*, Professor Ellen Goodman explains that, in addition to deceiving audiences and adding to the commercialism in media and society, stealth marketing more fundamentally undermines democratic discourse by damaging “the integrity . . . of . . . the media institutions” that support it. See generally Goodman, *supra* notes 16, 86. Joining Professor Goodman’s warnings about the discourse harms posed by hidden advertising, Professor Peter Menell has recently cautioned that integrated advertising “represents a subtle, but real and present threat to expressive freedom, free will, and public well-being.” See Menell, *supra* note 55, at 788; see also Colhoun, *Disguising Ads*, *supra* note 8; Meyer, *supra* note 9.

121. The structural separation of the advertising and journalistic teams was a hallmark of traditional news organizations in the United States in the twentieth and early twenty-first centuries. See, e.g., Nick Couldry & Joseph Turow, *Advertising, Big Data and the Clearance of the Public Realm: Marketers’ New Approaches to the Content Subsidy*, 8 INT’L J. OF COMM. 1710, 1715 (2014); Kielbowicz & Lawson, *supra* note 54, at 337–38. During that period, both newspapers and broadcast networks touted the independence of their editorial departments and their advertising functions, with the advertising side portrayed as a necessary evil whose impact on the institutions would be minimized to the extent possible. This was so even when broadcasters allowed advertisers to sponsor entertainment programming. Couldry & Turow, *supra*, at 1715. The payola scandal in radio airplay, and the quiz show scandal on television caused public outcry and led to congressional prohibitions. See, e.g., Goodman, *supra* note 16, at 85, 89 and sources cited therein; Anderson, *supra* note 31, at 2–3 (describing public outrage); Kielbowicz & Lawson, *supra* note 54, at 333–69; see also R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 287–95 (1979). The church/state divide thereafter gained traction in broadcasting, reflecting itself in internal guidelines on the relationship between ads and the news. Professional ethics codes, like those of the Society of Professional Journalists, foreground this issue: journalists must “[d]istinguish news from advertising and shun hybrids that blur the lines between the two

internal rules, the separation has been touted as the basis for the credibility and legitimacy of the commercial press. At the same time, mainstream media have often been criticized as overly responsive to advertiser pressure.¹²² So why is today's native advertising *more* worrisome with respect to the democratic, institutional, and constitutional role of the press than its predecessors in stealth marketing?

1. Corporatized News and the Press/Brand Balance

Advertisers see a great deal of benefit in native advertising to enhance their brands and technology enables expansion and “scalability”¹²³ of native advertising. Such advertising is perceived as particularly effective, commands heavy brand resources, and has established a notable footprint in news.¹²⁴ This means that advertisers have much at stake in the success of the native advertising model. This can create incentives to seek more involvement in the news publisher's editorial and placement decisions.

At the same time, news organizations have economic needs that can conveniently be met by attracting brands. By contrast to the legacy days of advertising, though, brands no longer absolutely need media intermediaries to reach their desired audiences.¹²⁵ The low digital barriers to entry, the ability to create their own high-quality “brand newsrooms,”¹²⁶ and the spread of information on social media all shift the balance of power between the brands and their ad publishers in the digital context.¹²⁷ Because advertisers can communicate directly to readers and consumers without the intermediation of editorial voices (other than those of commercial entities such as Facebook), they now hold the upper hand.

News organizations will find it more difficult to resist the financial opportunities offered by brands because the constraints that traditionally kept advertorials in check, like audience disapprobation and the perceived independence

[while] [p]rominently label[ing] sponsored content.” SOC'Y OF PROF'L JOURNALISTS, SPJ CODE OF ETHICS (Sept. 6, 2014), <http://www.spj.org/ethicscode.asp>.

122. See, e.g., C. Edwin Baker, *Advertising and a Democratic Press*, 140 U. PA. L. REV. 2097, 2202 (1992). For a recent example of such a critique, see John Plunkett & Ben Quinn, *Telegraph's Peter Osborne Resigns, Saying HSBC Coverage a 'Fraud on Readers,'* THE GUARDIAN (Feb. 18, 2015, 2:54 AM), <http://www.theguardian.com/media/2015/feb/17/peter-oborne-telegraph-hsbc-coverage-fraud-readers> (describing resignation of chief political commentator of British newspaper *The Daily Telegraph* and his “blistering [public] attack” on the newspaper for “deliberately suppress[ing] stories about the banking giant [HSBC] . . . in order to keep its valuable advertising account”); see also Kevin Draper, *Dan Gilbert Didn't Like A Yahoo Blog Post, So Yahoo Deleted It*, DEADSPIN (Feb. 12, 2015), <http://deadspin.com/dan-gilbert-didnt-like-a-yahoo-blog-post-so-yahoo-dele-1685364080> (describing purported threat to fire a sports writer over his critical comment about Quicken Loans, which is owned by an NBA owner and is a partner with Yahoo!).

123. *Blurred Lines Workshop*, *supra* note 4, at 70–71.

124. See generally Bakshi, *supra* note 6.

125. Kutsch, *supra* note 34 (quoting Professor Jay Rosen).

126. See Meyer, *supra* note 9 (describing how brands' content-marketing teams can end-run intermediary news sites to reach audiences).

127. See, e.g., Anderson, *supra* note 31, at 3–4; Couldry & Turow, *supra* note 121, at 1715–16.

of programmers, have diminished.¹²⁸ Because native advertising is fully integrated into the journalistic content, it will inevitably influence the direction of the content itself. To attract desirable brands, news organizations will inevitably have incentives to generate content with which such brands would wish to be associated. The editorial decision process will become cognizant of, and at least partly responsive to, the interests of their brand advertisers (who can credibly threaten to take their business elsewhere).¹²⁹ The question is one of independence.¹³⁰

Journalists, even celebrity journalists, do not have the heft to constrain newspaper publishers' economically-grounded coverage decisions. Although the Internet has allowed the rise of celebrity, "branded" journalists, whose identities capture public attention beyond their mere affiliation with their particular news organization, the reality is that those types of journalists are few and far between. Further, recent high-profile protest resignations by journalists notwithstanding,¹³¹ the fact that even celebrity journalists are invited to leave if they have disagreements with management suggests the limits of their influence.¹³² In some number of digital native news sites, it is understood that writers must seek approval in order to write about the sites' advertisers.¹³³

128. See Anderson, *supra* note 31, at 2–3.

129. See Meyer, *supra* note 9 (describing how Time Inc. editors now report to managers on the business side and how executives at Vice must be informed about stories that mention advertisers or other corporate brands). We can expect advertisers' personalized content creation and publishers' ability to analyze online engagement data to induce editors to "vary their own material based on their visitors. . . ." Couldry & Turow, *supra* note 121, at 1717.

130. See, e.g., Kellie Riordan, *Accuracy, Independence & Impartiality*, Reuters Institute for the Study of Journalism, Reuters Institute Fellowship Paper, Univ. of Oxford, at 27 (2014).

131. See, e.g., Plunkett & Quinn, *supra* note 122 (discussing political commentator Osborne's protest resignation).

132. Ravi Somaiya, *Ezra Klein Is Said to Plan to Leave* Washington Post, N.Y. TIMES, Jan. 2, 2014, at B3; Margaret Sullivan, *Nate Silver Went Against the Grain for Some at The Times*, N.Y. TIMES: PUB. EDITOR'S J. (July 22, 2013, 1:51 PM), <http://publiceditor.blogs.nytimes.com/2013/07/22/nate-silver-went-against-the-grain-for-some-at-the-times/>. This appears to be the case even in the "new" media, although detailed evidence is lacking. So, for example, although highly regarded, Matt Taibbi was hired by Pierre Omidyar's First Look Media, he left, purportedly because of undisclosed disagreements with respect to journalistic matters.

Most insidiously, celebrity may constrain and skew journalists' news judgments and compromise their ability to be the industry's conscience. For a recent suggestion that celebrity might tempt "branded" journalists into "infotainment" rather than truth-telling, see Edward Kosner, *The Temptation of the Celebrity Journalist*, WALL ST. J. (Feb. 9, 2015, 7:21 PM), <http://www.wsj.com/articles/edward-kosner-the-temptation-of-the-celebrity-journalist-1423527690>.

133. Leaked emails from Vice Media indicate that is the case at Vice, for example. Andy Cush, *Emails: Vice Requires Writers to Get Approval to Write About Brands*, GAWKER (Oct. 2, 2014, 11:50 AM), <http://www.gawker.com/this-is-how-your-vice-media-sausage-gets-made-1641615517>; see also Simon Owens, *Will the FTC Soon Rain on Native Advertising's Parade*, SIMON OWENS (Apr. 21, 2015), <http://www.simonowens.net/is-it-time->

The economic imperative has been used by news organizations to justify a number of moves that particularly threaten editorial independence. Structural factors, such as the development of in-house advertising production and the heightened involvement of journalists in producing native advertising, fundamentally and particularly compromise the traditional “church/state” divide or “wall of separation” between ad and editorial content. Although it could be argued that native ad production in-house, “*Mad Men*-style, could generate some cool storytelling experiments,”¹³⁴ it is likely that “the ad-think will inevitably creep into the editorial content.”¹³⁵ In some circumstances, this will happen because the editorial side will be directly involved in the ad content production.¹³⁶ But even in contexts in which that is not explicitly the case, pressure is to be expected from more complex reporting relationships. Factors that may affect the church/state divide include the cost that has to be recouped from creating a marketing team in-house, the fact that some of the in-house copywriters will actually be journalists not materially different from those on the editorial side, and the very legitimation of marketing as an important news-like function. Once both journalists and in-house native copywriters are seen as “story-tellers” engaged in “storytelling,” the news outlet is engaging in “corporatized news”¹³⁷ that is very difficult to distinguish from a commercial.

When the brand-content journalists sit down in the corporate lunchroom with their editorial-side counterparts, isn’t it likely that the flow of conversation and influence will become routinized, and seem both naturalized and almost undetectable even to the participants? One also wonders about the editorial team’s appetite even to cover the activities of the in-house brand marketers, especially when making money through native ads is presented as an existential financial imperative with all participants in the organization in the same boat.¹³⁸ Having journalists-

for-the-ftc-to-rain-on-native-advertisings-parade (describing Vice episode and BuzzFeed’s removal of a post critical of Dove, a BuzzFeed sponsor).

134. Colhoun, *Disguising Ads*, *supra* note 8 (quoting Patrick Howe, Cal Poly professor who researches impact of native ads on credibility of news sites). Also, it could be argued that having journalists or journalistically-trained copywriters could improve both the accuracy and relevance of the native advertising they produce because of their professional training and their familiarity with the style and editorial approach of the news outlet. But that is precisely the problem, and far too narrow a focus. The concern is less the accuracy of the specific native ad than the integrity of the overall editorial enterprise.

135. *Id.* When “news shed[s] its skin and [becomes] content,” George Simpson, Commentary, *Content: The Race to the Bottom*, MEDIA DAILY NEWS (Sept. 13, 2013, 7:54 AM), <http://www.mediapost.com/publications/article/208951/content-the-race-to-the-bottom.html?edition=64470>, news judgment and journalistic norms as such become far less central.

136. *See, e.g.*, Tanzina Vega, *Harper’s Redesigns Its Web Site and Embraces Branded Content*, N.Y. TIMES, Oct. 14, 2013, at B8 (discussing the involvement of the Hearst editorial team in the creation of “high-quality advertising experience.”); Vega, *supra* note 2 (noting that Mashable editorial employees had written most of the articles that appeared on the site without disclosing that they were paid for by Qualcomm). This does not make such content noncommercial, however. *See infra* text accompanying note 214.

137. Colhoun, *Disguising Ads*, *supra* note 8.

138. One critical journalist notes that the *New York Times* has not run “a pointed, critical piece about storytelling ads” since September 2013, “right before they started doing

turned-copywriters in-house will make it easier for them to appropriate the trappings of journalism, without the journalistic mission, on behalf of brands.¹³⁹ It is telling that news organizations today are firing newsroom staff at the very moment that they are increasing the journalistically trained hiring on the native ad production side of the house.¹⁴⁰ Reduced resources on the editorial side will doubtless impact the reporting function, and might even lead to reduced attention to the “real” journalism produced by reporters. At a minimum, this raises questions about whether the new advertising resources are in fact helping the editorial mission.

News organizations’ business strategies of monetizing their content by licensing its use by others, including advertisers, also transform newspapers’ coverage incentives. When news is perceived at every level as a business, news organizations begin to see their function far more as persuading than as reporting truth and checking official abuse.¹⁴¹ Moreover, when advertisers directly disseminate news content—repurposed to achieve their own commercial goals, and without having to account to (or be controlled by) the originating news organization for their uses—the news organization loses control of its own brand and reputation. And if the news organizations are themselves sellers of products, won’t they have incentives to keep their buyers happy with their content? Once we shift focus from journalism to the business of journalism, the democratic balance has been tipped.

In sum, the fact that the content is sponsored does not mean only that the sponsor will exercise some level of control over the specific material that it sponsors. The broader question is whether the content sponsorship—and the association of news material with advertising brands—will subtly invoke the brand in editorial decisions beyond the specific native advertisement for which the advertiser has paid. There are examples of the advertisers’ interests driving the creation of content, rather than advertisers simply positioning their ads in independently produced content that they find relevant to their desired audiences.¹⁴² This is a particular concern when

them.” Colhoun, *Disguising Ads*, *supra* note 8. The *Times*’ ombudsman has also been quiet on the issue.

139. Meyer, *supra* note 9 (“As content marketers grow more sophisticated, they will continue to adopt the trappings of journalism, if not the journalistic mission.”).

140. A recent report, for example, notes that the *New York Times* has cut 100 newsroom jobs, but is currently hiring for its Paid Post operation. Ravi Somaiya, *New York Times Co. Profit Falls Despite Strides in Digital Ads*, N.Y. TIMES, Feb. 3, 2015, at B3.

141. Riordan, *supra* note 130; *see also* REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM, *Reuters Institute Digital News Report 2013: Tracking The Future Of News* (June 20, 2013), <http://media.digitalnewsreport.org/wp-content/uploads/2014/05/Reuters-Institute-Digital-News-Report-2013.pdf>.

142. The three publishers represented at the FTC’s workshop—Mashable, the Huffington Post, and the Hearst Corporation—revealed examples of advertising generating and shaping what otherwise looks like editorial content. *See Blurred Lines Workshop*, *supra* note 4, at 42–58; Hoofnagle, *supra* note 96. Mashable, for example, created new content for Qualcomm that profiled electronics made with Qualcomm components. *Blurred Lines Workshop*, *supra* note 4. While the content did not directly promote the company’s brand, it was related to its business. *Id.* This is the same with American Express and Marriott. *Id.* at 44. The *Huffington Post* published an article about popular water festivals in order to promote a waterproof Sony device. *Id.* at 49–50. Hearst created an UGG shoes feature for Nordstrom, advising consumers how to transition to winter shoes. *Id.* at 54–55. A native advertising

news outlets partner with commercial, brand-promoting entities, and even, short of partnership, when they enter into long-term native advertising relationships.

Is all this making a mountain out of a molehill? Thus far, one could argue, only one institutionally embarrassing snafu for a traditional news organization using native ads has made the headlines. In January 2013, *The Atlantic* issued an apology for publishing an ad by the Church of Scientology that appeared indistinguishable from the magazine's normal editorial content.¹⁴³ Some sponsored content—such as the *New York Times* series on women in prison, sponsored by Netflix and the television show, “Orange Is the New Black”—has been received with significant critical acclaim.¹⁴⁴ The advertising industry's self-regulatory mechanisms have targeted some of the worst disclosure offenders.¹⁴⁵ So what is the real problem that is not being adequately addressed by the market? As with all these things, however, there is a question to which we have no answer: Has native advertising had any as-yet-unrevealed impact on the press beyond the headlines like *The Atlantic*'s misstep? Are there reasons to fear that, over time, the credibility of news sites will be eroded by native advertising? To those questions, this Article argues “yes.”¹⁴⁶

If so, news organizations' experiments with native advertising, and the structural changes they have implemented to enhance such advertising, may well lead to a catastrophic result if the press does not exercise sufficient care. It is a common intuition that news brands can be tarnished and lose credibility if they are revealed to have too much hidden native advertising.¹⁴⁷ When that happens, brands will no longer see (much of) a benefit from continuing to advertise on those sites. Having lost major sources of revenue, those sites will no longer have either the

campaign for Tyson Nudges associated the brand with some of the best existing news content produced by the editorial side of the site. *Id.* See also Simpson, *supra* note 135 (arguing, in the context of news in social media, that “[f]or every newborn panda you see, you are NOT seeing something far more important that happened that day”).

143. See, e.g., Brian Stelter & Christine Haughney, *The Atlantic Apologizes for Scientology Ad*, N.Y. TIMES, Jan. 15, 2013, at B3. While the web page on which the ad appeared was labeled “sponsored content,” the rest “looked like a sunny blog post about the church's expansion.” *Id.* When reporters from other news organizations noticed it, the ad was removed from *The Atlantic*'s website expeditiously. *Id.*

144. Lucia Moses, *New York Times Debuts the 'Snowfall' of Native Ads*, DIGIDAY (June 14, 2014), <http://digiday.com/publishers/new-york-times-native-ad-thats-winning-skeptics/>.

145. See Villafranco & Reilly, *supra* note 85.

146. Early empirical studies seem to support this conclusion. See, e.g., Henriette Cramer, *Effects of Ad Quality & Content-Relevance on Perceived Content Quality*, CHI 2015 PROCEEDINGS OF THE 33RD ANNUAL ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS 2231–34 (Apr. 18, 2015), <http://dx.doi.org/10.1145/2702123.2702360> (noting that, because of lower perceptions of site quality, “we provide a signal that it is in the best interest of ad-serving platforms to ensure that ads are not only high quality, but also easily distinguishable from content to avoid doubts on content provenance”); see also Moses, *supra* note 110 (reporting on 2014 Contently survey results showing that a majority of readers do not trust sponsored content, and two-thirds reported feeling deceived when told that content had been brand-sponsored); Bakshi, *supra* note 6, at 9 (reporting research results).

147. See, e.g., Colhoun, *Disguising Ads*, *supra* note 8; Bakshi, *supra* note 6, at 19–22 (arguing that native ads' harms to consumers and citizens both are particularly acute today).

financial wherewithal or the reputation to engage in accountability journalism. This, in turn, will reduce the power of the press and its ability to engage in democracy-enhancing political speech.¹⁴⁸ The money to be made from native advertising during the transition period is unlikely to outweigh the longer-term problems.

2. Amplifying Factors: The Broader Digital Context

Obviously, native advertising is not the only element of the digital news environment that is likely to have an impact on journalistic-coverage choices. A complex mosaic of pressures on journalism, borne of technological change, amplifies the expressive threats of native advertising. From personalized news and advertising enabled by big data, to the increasing use of audience interest metrics to drive editorial and coverage judgments, to the decline of the long-form news story, to the connection between news and social media, and to the flattening effect of digital transmission, digital technology has transformed both journalism and advertising. News organizations have recognized the profit associated with ideological partisanship in a media environment that easily allows people to limit their exposure to ideologically agreeable information.¹⁴⁹ The mix of these developments creates a perfect storm likely to have a negative effect on the press and its work.

For example, although it is beyond the scope of this Article to address the multiplicity of consequences resulting from big data collection,¹⁵⁰ it is important to see how native ads fit into the current informational environment of behavioral targeting. Perhaps the most notable aspect of today's online landscape is the massive availability of personalized information about consumers and the aggressive deployment of data mining and analytics to personalize content and advertising directed at consumers.¹⁵¹ To the extent that such "daily me"¹⁵² communications are successful at making the process of editorial selection invisible in practice, and to the extent that they result in a "naturalized" output that quiets the critical faculty of

148. There are other potential consequences too, as can be seen by the current vaccine controversy. Despite the lack of scientific evidence to prove that vaccination causes autism and other harms, significant segments of the public apparently believe that newspaper reports of the safety of vaccines cannot be believed because of news organizations' ties to the pharmaceutical industry. See Clyde Haberman, *A Discredited Vaccine Study's Continuing Impact on Public Health*, N.Y. TIMES (Feb. 1, 2015), http://www.nytimes.com/2015/02/02/us/a-discredited-vaccine-studys-continuing-impact-on-public-health.html?_r=0.

149. See, e.g., Jon D. Hanson, *Ideology, Psychology and Law* 13–14 (Harv. Pub. L., Working Paper No. 12–18, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012939.

150. For a recent critique of behavioral advertising, see, e.g., Katherine J. Strandburg, *Free Fall: The Online Market's Consumer Preference Disconnect*, 2013 U. CHI. LEGAL F. 95 (2013).

151. One of the consequences of data mining is that it generates more and more data. See Strandburg, *supra* note 150; see also Couldry & Turow, *supra* note 121 (describing the democratic harms of advertising personalization).

152. NICHOLAS NEGROPONTE, BEING DIGITAL 153 (1995); see also CASS SUNSTEIN, REPUBLIC.COM (2001), <http://press.princeton.edu/chapters/s7014.pdf> (lamenting some anti-democratic effects of such personalization).

the reader, we can expect that seamlessly incorporated native ads will also benefit from silencing the reader's skepticism.¹⁵³ If everyone receives a different news feed, and a different native ad integrated into it, then it is also more difficult to generate critical communities that can help consumers assess those ads. This can exacerbate the possibility of market manipulation and marketing to consumer vulnerabilities.¹⁵⁴

Another element that may amplify the expressive threat is an increase in news organizations' ability to track and assess the effectiveness of their editorial content on a granular, article-by-article basis. Joined with a revised view of the relationship between the news organization and "the people formerly called the audience,"¹⁵⁵ news organizations can increasingly rely on story popularity to make editorial choices.¹⁵⁶ This leads to a re-imagining of the editorial structure and mission of news organizations. Editors may choose what to cover at least partly based on popularity rather than on the basis of independent professional news judgment. If popularity is the metric warranting inclusion, and if branded content is successful and popular, then such content will become overly represented on the news sites at the expense of professional newsworthiness assessments.¹⁵⁷

Yet another issue is the observation that a lack of linear structure on the Web leads to all content being "flattened out," with the concomitant difficulty in

153. See Menell, *supra* note 55, at 793–94; but cf. Marisa E. Main, *Simply Irresistible: Neuromarketing and the Commercial Speech Doctrine*, 50 DUQ. L. REV. 605, 627 (2012) (describing the ways in which neuromarketing can manipulate decision-making processes).

Admittedly, the relationship between personalized editorial content and personalized native advertising is likely to be complex. Perhaps the ability to personalize advertisements will reduce brands' need to rely on native advertising to end-run ad avoidance. While this may be true in theory, targeted advertising is not yet sophisticated enough to disable consumer distaste for ads. Moreover, native advertising valuably associates brands with highly respected publishers and the targeted ad does not achieve that brand-associated bump for the advertisers.

154. For an excellent overview, see Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014) (sketching out the view that the consumer of the future will be increasingly mediated and that corporations will be able to take advantage of that by marketing to individuals' vulnerabilities and cognitive biases) and sources cited therein.

155. Jay Rosen, *The People Formerly Known as the Audience*, PRESSTHINK (June 27, 2006), http://archive.pressthink.org/2006/06/27/ppl_frmr.html.

156. David Carr, *Risks Abound as Reporters Play in Traffic*, N.Y. TIMES, Mar. 23, 2014, at B1; see also Alexis Sobel Fitts, *When Metrics Drive Newsroom Culture*, COLUM. JOURNALISM REV., May 11, 2015, http://www.cjr.org/analysis/how_should_metrics_drive_newsroom_culture.php.

157. This of course assumes that there are some shared professional newsworthiness norms beyond popularity.

For indications that audience preferences might have increased impact even among the stodgiest of old media, see, e.g., Sullivan, *supra* note 58 (*New York Times*' Dean Baquet announcing the formation of "an audience development department."). For a recent report on the effects of metric-driven newsrooms, see Fitts, *supra* note 156; Couldry & Turow, *supra* note 121, at 1717 (arguing that we can expect advertisers' personalized content creation and publishers' ability to analyze online engagement data to induce editors to "vary their own material based on their visitors . . .").

distinguishing between content types.¹⁵⁸ When “the trade dress disappears [and the lines between marketing, editorial, and government content disappear], are you reading news from a verifiable, reliable source, or are you reading propaganda?”¹⁵⁹

Many “new media” triumphalists celebrate the access to facts, data, opinion, and diversity given to audiences by the digital Fourth Estate, and are not particularly troubled by the fact that “in an age of plenty the consumer has a greater role to play and responsibility for what they consume.”¹⁶⁰ Some media outlets have outsourced accuracy, placing responsibility for skepticism and fact-checking with the audience.¹⁶¹ A problem with this, though, is that the deceptiveness of native advertising is naturally amplified in an environment in which news consumers, not trained professionals, must assess the credibility and accuracy of virtually every bit of news with which they are presented. Imposing on consumers the responsibility not only of verification of accuracy, but also of verification of source, is an amplified burden, which the flattening character of the Internet makes worse. To the extent that cognitive biases lead to bounded rationality in the first instance, adding more complexity to the news consumer’s deliberative choices will make her less able to engage in informed judgment.

B. Threats to the Institution and Power of the Press

In addition to threatening editorial independence as such, the legitimization of native advertising also presents another danger to the traditional press’s democratic role: the diminution of its institutional role and power. While this is a somewhat indirect effect, it is an important one nonetheless.

As any associated stigma increasingly diminishes with significant mainstream adoption of the practice, traditional news organizations that might have disdained the necessary but unseemly role of advertising might now feel competitively required to adapt. If native advertising is framed as an institutional savior of the traditional press, then the institutions are likely to be more open to compromises even with respect to content. Obviously, this will be a matter of degree, but the existence of the institutional pressure is significant. A recent study shows that brands receive reputational benefits from association with the reputations of elite news organizations, but also pose reputational threats to those organizations.¹⁶² At least in the long run, a press whose editorial independence is in doubt will become a hobbled press.

158. See, e.g., Riordan, *supra* note 130, at 27, 46, 56.

159. *Id.* at 27 (citing to a source quoting *New York Times* media correspondent David Carr).

160. *Id.* at 10 (citing Cardiff Prof. Sambrook).

161. *Id.*

162. This is not meant simply to refer to the “objective” mainstream press, which has been subject to critique both from without and within the journalistic profession. For a recent debate on journalistic objectivity versus transparency, see, e.g., Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), <http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html?pagewanted=all>; see also David Domingo et al., *Tracing Digital News Networks*, 3 DIGITAL J. 1, 10 (2015) (observing “new rituals of transparency” substituting for

The success of the institutional press as watchdog depends on several things: government's belief that press disclosure of government missteps will lead to public outrage or legislative activity; the institutional capacity and resources of the press to litigate in order to constrain government and establish expressive rights; and access to information. The bottom line is that the press has to be seen as independent, powerful, and credible by a number of important actors, including the government, courts, legislatures, whistleblowers, and other potential sources. The more compromised the press is, or at least is perceived to be, in its independence, the greater the likelihood that it loses credibility in the eyes of all these constituencies. When the press's reputation is such that: (1) people do not believe press pronouncements; (2) government is not afraid that the press will effectively reveal wrongdoing; (3) courts become skeptical about its democracy-sustaining role; and (4) sources and information dry up, then the power of the press to check abuse of official power is significantly undermined.¹⁶³

These concerns are particularly important today because an independent, fearless, and powerful press could serve as a critical bulwark against global governmental overreaching. Certainly the traditional press is not the only such bulwark; indeed, it is currently quite a tarnished and diminished one. Nevertheless, we should not abandon it. It is beyond the scope of this Article to detail the ways in which new forms of expressive controls collusively wielded by powerful government and private actors—what Professor Jack Balkin has called “new-school” press regulation¹⁶⁴—present a multi-modal, powerful net of threats to free speech and government accountability.¹⁶⁵ Suffice it to say, however, that a press

the old “[t]he rituals of objectivity”). The key point is belief in the editorial independence of the press, regardless of whether its reporting philosophy is activist or neutral and objective. *IAB Study*, *supra* note 104.

163. Professor David Anderson has recently argued that the “strongest case for constitutional protection of the press rests on its role as an organizer of democratic dialogue” rather than as performer of “unique constitutional functions in gathering and disseminating information and checking power.” David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. 331 (2014). I wonder whether there is more to be said for the uniqueness of the press's possible checking function than Professor Anderson allows. Regardless, I do not take Professor Anderson as rejecting an institutional role for the press in checking government and the powerful, when it can. Although I do not disagree with his skepticism about increasing limits to its ability to do so, my point is simply the smaller one that further challenges to the independence and legitimacy of the press will embolden miscreants to act with reduced concerns about press oversight and disclosure. In any event, the dive into native advertising is also likely to undermine the press's role as organizer of democratic dialogue.

164. Balkin, *supra* note 20.

165. Other channels, like Wikileaks, which leaked the Private Manning documents revealing U.S. conduct in the war, cannot act as government watchdogs in the same way and to the same extent that the institutional press can. A credible and sophisticated press can better analyze, explain, contextualize, and weigh the benefits of publishing the type of material revealed by Wikileaks. If it is independent and generally credible, then the institutional press can serve as a comparatively trusted party situated between government and more anarchic digital players. Moreover, the institutional press is less directly subject to government control, because, for example, it is easier for the government to indict individual leakers who are more isolated from the industry. Matt Apuzzo, *Holder Fortifies Protection of News Media's Phone Records, Notes or Emails*, N.Y. TIMES, Jan. 14, 2015, at A18; Matt Apuzzo, *Times Reporter*

whose credibility is doubted by the population, which cannot attract sources, of which courts are skeptical, and which is not feared by governments, is inevitably damaged in performing its (at least aspirational) democratic functions. The U.S. press has already hobbled itself on many fronts with institutional and professional failures unrelated to native advertising—squandering the public trust that a post-Watergate public had in a neutral and independent media.¹⁶⁶ Native advertising could well serve to push the press over the edge of credibility.¹⁶⁷ Despite the existence of other powerful participants in public discussion, this would be a serious loss.¹⁶⁸

Will Not Be Called to Testify in Leak Case, N.Y. TIMES, Jan. 12, 2015, at A1 (describing the Obama Administration's abandonment of its seven-year attempt to force the *New York Times* journalist James Risen to testify as to the identity of a confidential CIA source, demonstrating the difficulties of attempting to control mainstream journalists associated with traditional news organizations); see also Keith Bybee, *Justice Stewart Meets the Press*, in JUDGING FREE SPEECH: FIRST AMENDMENT JURISPRUDENCE OF U.S. SUPREME COURT JUSTICES (Helen J. Knowles & Steven B. Lichtman eds., 2015) (explaining why the blogosphere cannot adequately perform Justice Stewart's view of the press's structural function of "toe-to-toe confrontation with federal powers").

166. See sources cited in Bakshi, *supra* note 6, at 19 nn.54–56 (discussing post-Watergate institutional trust in the media). That trust has eroded, in part, by the political polarization enabled by niche news programming, distaste for increased media sensationalism, and media incompetence and falsehood. See Emily Steel & Ravi Somaiya, *Brian Williams Suspended from NBC for 6 Months Without Pay*, N.Y. TIMES, Feb. 11, 2015, at A1 (discussing then-NBC News anchor Brian Williams' false reports of being fired on while embedded with U.S. troops in a helicopter during the Iraq war). On the effects of focusing on metrics in newsrooms, see, e.g., Fitts, *supra* note 156.

167. Approaches relying on the noncommercial news sector are not adequate alternatives. If the United States is not currently likely to make a significant commitment to public media; if government sponsorship comes with its own difficulties at a time when the relationship between government and press is particularly fraught; and if philanthropic support of the press has a limited footprint, then looking to noncommercial outlets to make up for the inadequacies of commercially-funded news production is quixotic.

168. This Article leaves it to later work to defend the continuing need for a powerful traditional institutional press in the United States as part of today's complex media sector. Some have faith that the massive technology companies like Google and Twitter can serve as the new vanguard in developing worldwide free expression norms, effectively minimizing the significance of, and perhaps the continuing need for, the traditional institutional press. For a recent account of the increasing significance of free speech lawyering by technology company lawyers, see generally Marvin Ammori, *The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter*, 127 HARV. L. REV. 2259 (2014). Although such companies clothe their businesses in the mantle of free speech, see *id.* at 2260, their business is actually monetizing information rather than promoting democratic discourse or the public interest. *Id.* at 2270. Further, even if these publicly-traded companies can fight for free speech norms, their incentive to do so is variable, depending on their global economic interests. See Colhoun, *Victor Pickard*, *supra* note 97. While this is not to deny the compromised character of the highly consolidated traditional press sector, it is to warn that one should not mistake Google and Twitter's incentives for those either of the *New York Times* or the public interest blogger.

V. THE CONSTITUTIONAL THREAT

Notwithstanding the two types of threats posed by native advertising (to consumers and to journalism), there are arguments that the First Amendment should be read to block attempts to minimize such threats. Such arguments implicitly cast the anti-regulatory stance as a call for expressive freedom. The press itself, and not only the advertising industry, could easily be seduced by such arguments. The first constitutional issue is whether advertisers and press, reliant on native ads, could successfully argue that attempts to regulate in this space would face constitutional infirmity under current First Amendment doctrine. Even if the answer to that is *yes*, the second question is whether constitutional protection for such advertising would be a Pyrrhic victory because native advertising undermines recognition of the broader, special constitutional status of the press.

A. *First Amendment Challenges to Regulability*

Were further disclosure rules for native advertising adopted by regulators such as the FTC or FCC, query whether such rules would face First Amendment hurdles.¹⁶⁹ Under conventional free speech doctrine since the 1970s, the critical threshold issue would be whether native advertising would be analyzed as commercial or noncommercial speech.

1. *Under Classic Commercial Speech Doctrine*

Although commercial advertising was considered completely excluded from First Amendment protection as late as 1942 in *Valentine v. Chrestensen*,¹⁷⁰ developing commercial speech doctrine in the 1970s and 1980s rapidly brought informational advertising under the constitutional umbrella.¹⁷¹ Nevertheless, the Supreme Court's commercial speech cases made clear that restrictions on such speech would receive more relaxed constitutional scrutiny than noncommercial expression, and many advertising regulations thereby passed constitutional muster.¹⁷² The Court's commercial speech jurisprudence of the 1980s accords particularly deferential scrutiny to advertising regulations designed to protect consumers from deception.¹⁷³ The Court in *Zauderer*, for example, subjected mandated speech disclosures (as opposed to speech restrictions) to First Amendment

169. For an earlier argument that carefully drawn sponsorship-disclosure requirements would survive constitutional scrutiny, see, e.g., Goodman, *supra* note 16, at 130–36. For arguments that existing regulatory power could apply to native ads, see, e.g., Bakshi, *supra* note 6; Gottfried, *supra* note 38.

170. 316 U.S. 52, 54 (1942) (“[T]he Constitution imposes no . . . restraint[s] on government as respects purely commercial advertising.”).

171. The key cases recognizing some constitutional protection for advertising were *Bigelow v. Virginia*, 421 U.S. 809 (1975), *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976), and *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

172. *Cent. Hudson Gas*, 447 U.S. at 566 (articulating a four-pronged standard of intermediate scrutiny for commercial speech).

173. See, e.g., Berman, *supra* note 99; Jonathan Weinberg, *On Commercial - and Corporate - Speech* (Wayne State Univ. Law Sch., Research Paper No. 2014-12, 2014), <http://ssrn.com/abstract=2517599>.

review under an even more relaxed standard, akin to rational basis review.¹⁷⁴ Because protection of commercial speech was “justified principally by the value to consumers of the information such speech provides,”¹⁷⁵ mandated factual disclosure did not even have to satisfy the intermediate level of First Amendment scrutiny applied to commercial speech restrictions under *Central Hudson*.¹⁷⁶ The listener-focused justification for mandated disclosure regulation stood in stark contrast to speaker-centered constitutional analysis protecting liberty of self-expression in the context of noncommercial speech.¹⁷⁷ Although, over time, the Supreme Court became more skeptical of paternalistic regulations restricting nonmisleading informational advertising, regulation aimed at protecting consumers from being misled did not trigger the same concerns.¹⁷⁸

Thus, if native ads were classed as commercial advertising and analyzed under pre-Roberts Court commercial speech jurisprudence, then attempts to regulate them would be subject to significantly relaxed constitutional scrutiny and likely upheld. To the extent that the regulations were deemed to be correctives for deceptive advertising, precedent contains language suggesting that they would not be subject to First Amendment protections at all.¹⁷⁹ In any event, if the regulations were mandated to be “factual and uncontroversial” disclosure requirements (as opposed to speech restrictions), designed to improve information flow and protect consumers without unduly burdening speakers, it is likely that they would pass constitutional muster under *Zauderer*’s rational basis review.¹⁸⁰

174. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651, 656 (1985) (upholding against First Amendment challenge regulations requiring commercial speakers to disclose factual information, so long as the required disclosures were “purely factual and uncontroversial,” not “unjustified or unduly burdensome,” and “reasonably related” to the state interest in preventing consumer deception); see also Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 520 (2014) (noting that the law of commercial speech has been more hospitable to speech mandates rather than restrictions).

175. *Zauderer*, 471 U.S. at 651; see also Goodman, *supra* note 174, at 521 and sources cited therein.

176. The underlying question of the appropriateness or viability of scrutiny analysis in the First Amendment context is beyond the scope of this Article. However, for a powerful critique, see C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57. See also C. Edwin Baker, *Media Concentration: Giving Up on Democracy*, 54 FLA. L. REV. 839, 852–53 (2002).

177. See, e.g., *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976). The justification for the regulation of commercial speech is to protect the interests of listeners who receive information in order to make informed decisions. By contrast, “ordinary” First Amendment doctrine (outside the context of broadcasting) focuses on the rights of speakers. See Robert Post & Amanda Shanor, *Adam Smith’s First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015); see also Goodman, *supra* note 174, at 519.

178. See Berman, *supra* note 99, at 518–30 (discussing manipulative effect on viewers of embedded product placement which persuades while evading critical evaluation).

179. See, e.g., *Va. Bd. of Pharmacy*, 425 U.S. at 773.

180. See *Zauderer*, 471 U.S. at 651.

To be sure, the *Zauderer* precedent is contested in application.¹⁸¹ Neither have the Supreme Court nor lower courts clearly established what kinds of compelled commercial speech calls for the laxest form of First Amendment scrutiny.¹⁸² Should the failure to disclose sponsorship in native ads be deemed deception appropriately subject to corrective speech mandates? A narrow interpretation of deception might lead to the conclusion that fully integrated native ads are not improperly false and deceptive if they do not contain factual falsity.¹⁸³ Failure to identify provenance, then, might not fit the definition. Alternative readings are possible, however. For courts that grant lenient First Amendment review to mandated disclosure requirements beyond deception-correction,¹⁸⁴ the sponsorship of stealth advertising should fall naturally into such expanded categories. Arguably, the deception in the native ad context resides at the “meta”-level, even in the most factually accurate native advertising content, where there is no clear source disclosure.¹⁸⁵ The product labeling that “favor[s] disclosure when it

181. Lower courts have differed over its application when mandates are adopted for purposes other than preventing consumer deception. *See, e.g.,* Recent Case, *Commercial Speech – Compelled Disclosures – D.C. Circuit Applies Less Stringent Test to Compelled Disclosures*, American Meat Institute v. USDA, 128 HARV. L. REV. 1526 (2015) (canvassing range of cases).

One of the difficulties with *Zauderer* is that its reasoning effectively complicated what might otherwise have been an unexceptionable conclusion that “corrective advertising or affirmative disclosures that prevent or correct deception simply do not raise First Amendment concerns.” Goodman, *supra* note 174, at 523.

182. Goodman, *supra* note 174, at 521–22 (“Some have held that it applies only when the government is attempting to prevent consumer deception. Others have held that it may apply also when the government has broader informational goals. Courts have split on what kind of consumer deception counts and whether the term should have a narrow, technical meaning. They also disagree on what the alternative to *Zauderer* review is: intermediate or strict scrutiny. Commentary on the use of *Zauderer* in the cigarette-labeling cases has been similarly torn.”); *see also id.* at 539–45 (theorizing that the confusion among the lower courts may be due to the lack of clarity in *Zauderer* itself, which muddied what should have been an unexceptionable application of *Virginia Board of Pharmacy*); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539 (2012) (describing *Zauderer*’s ambiguities and uncertain scope).

183. Thus, according to some, “manipulative marketing is not likely to be “false and misleading” because it is unlikely to make *factually* false statements or claims. Berman, *supra* note 99, at 523. While this may be true for product placement, for example, it is not true for native advertising.

184. For a useful discussion of cases in which mandated disclosure requirements received rational basis review even if they were not deception-corrective, *see, e.g.,* Goodman, *supra* note 174, at 540–44; *see also* Robert Post, *Transparent and Efficient Markets: Compelled Commercial Speech and Coerced Commercial Association in United Foods, Zauderer, and Abood*, 40 VAL. U. L. REV. 555, 562 (2006) (arguing that mandated disclosures are permitted not only to correct deception, but also “to promote transparent and efficient markets”).

185. *See* Anderson, *supra* note 31, at 9 (describing how stealth marketing is designed to mislead); *see also* Berman, *supra* note 99 (arguing that modern advertising techniques that do not communicate information but persuade consumers at the subconscious or emotional level should be regulable); Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 114–16 (2012) (discussing persuasive ads).

corrects for important information deficits¹⁸⁶ should include provenance because, at a minimum, the ad's implicit assertion of approval by the news organization indicates deception as to source.¹⁸⁷

In any event, even if sponsorship disclosure rules for native ads were not rubber-stamped under the most deferential type of constitutional review under *Zauderer*, such regulations would still receive intermediate review under classic *Central Hudson* commercial speech analysis if native advertising were analyzed as commercial speech. Although *Central Hudson* review is less deferential than review under *Zauderer*, carefully crafted regulations would arguably be deemed constitutional if *Central Hudson* were deemed the appropriate analytic frame.¹⁸⁸

2. Under Recent Developments Affecting Commercial Speech Doctrine

Two factors create uncertainty for the application of commercial speech doctrine here. First is the current equivocal status of pre-Roberts Court commercial speech doctrine itself. Recent First Amendment developments suggest that the Supreme Court is wearing away at the distinction between commercial and noncommercial speech for First Amendment purposes. Arguments against maintaining the distinction¹⁸⁹ appear to be bearing fruit.¹⁹⁰ The Roberts Court

186. Goodman, *supra* note 174, at 538.

187. See Rebecca Tushnet, *Towards Symmetry in the Law of Branding*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 971, 979 (2011); see also Tushnet, *supra* note 96, at 721. Even internally factually accurate advertising is deceptive in that it rests on brand confusion, where the advertiser captures the benefits of association with the publisher's own brand. See Goodman, *supra* note 16, at 112. While, arguably, consumers who know that a news outlet has morphed into an advertising vehicle are less likely to be deceived, see *id.*, the constitutional calculus cannot properly hinge on whether the audience has developed such overall skepticism that it would not permit itself to be credulous. See Tushnet, *Towards Symmetry*, *supra*, at 974–75 (criticizing the “unappealing consequences for dynamic efficiency” of the reasonable consumer having to assume that “everybody is lying”).

Ultimately, of course, the question of what should be considered misleading or deceptive is less a matter of technical, doctrinal argument than a normative choice regarding the balance between autonomy and paternalism.

188. This point is descriptive only. For an exhaustive listing of scholarship challenging the ambiguity and incoherence of commercial speech doctrine from various vantage points, see Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154–61 (2012).

189. For classic arguments rejecting a second-class constitutional status for commercial speech, see, e.g., Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 631–38 (1990); Martin H. Redish, *Commercial Speech, First Amendment Intuitionism and the Twilight Zone of Viewpoint Discrimination*, 41 LOY. L.A. L. REV. 67 (2007); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 630–33 (1982); Rodney Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 TEX. L. REV. 777 (1993); Nat Stern & Mark Joseph Stern, *Advancing an Adaptive Standard of Strict Scrutiny for Content-Based Commercial Speech Regulation*, 47 U. RICH. L. REV. 1171, 1171–88 (2013).

190. Weinberg, *supra* note 173, at 8 (“It’s fair to say, I think, that *Central Hudson* is no longer good law.”). For other descriptions of the precedent as reflecting an increasingly protective approach to advertising under the First Amendment, see, e.g., Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76

appears to have become more attentive to speakers' interests and more skeptical of what could be styled as paternalistic constraints even in the commercial context.¹⁹¹ Arguably, today, interference with the speech of even nonpress corporate speakers can be subject to the most stringent scrutiny unless it classically and predominantly proposes a commercial transaction. In addition, the Roberts Court has significantly extended protection for corporate speech in cases such as *Citizens United*.¹⁹² Corporations as a group may well have now achieved parity with the press as to speech, meaning that both news organizations and other sorts of commercial entities have an increased scope of freedom of speech.

Despite these developments, scholars claim that courts have not “abandoned the essential distinction between commercial speech and public discourse.”¹⁹³ However narrowed, the commercial speech jurisprudence is still there. If native ads are not analytically distinguishable from other content analyzed as commercial speech, then viable arguments can still be made that regulations would be deemed constitutional if properly structured.

3. *Applicability of Commercial Speech Doctrine: Narrow or Broad*

It has been argued that protecting commercial speech to the same extent as public discourse renders democratic governance impossible.¹⁹⁴ The question, though, is when to say we are engaging in commercial speech rather than public discourse. Proponents of native advertising claim that, regardless of the state of commercial speech doctrine, at least native ads that are primarily designed to promote brands—rather than simply to propose particular commercial transactions—should not be treated as classic commercial speech in the first place.¹⁹⁵

TEMP. L. REV. 1, 29 (2003); Rodney A. Smolla, *Free the Fortune 500! The Debate over Corporate Speech and the First Amendment*, 54 CASE W. RES. L. REV. 1277, 1292 (2004); Stern & Stern, *supra* note 189, at 1171. Numerous scholars have decried the recent turn to the First Amendment as a convenient and powerful “engine of constitutional deregulation.” See, e.g., Post & Shanor, *supra* note 177, at 167 (“The echoes of *Lochner* are palpable.”); Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 233 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1207–09 (2015); Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614, 1616, 1629 (2015).

191. The freedom of the state to regulate commercial speech has been weakened by cases such as *Citizens United v. FEC*, 558 U.S. 310 (2010) and *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). See also TAMARA PIETY, BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA 2–12, 223 (2012) (describing increasing protection for commercial speech against regulation under the First Amendment).

192. *Citizens United*, 558 U.S. at 319, 323–24, 343. On the expansion of corporate speech rights, see, e.g., PIETY, *supra* note 191; Deven R. Desai, *Speech, Citizenry, and the Market: A Corporate Public Figure Doctrine*, 98 MINN. L. REV. 455, 462 (2013); Weinberg, *supra* note 173.

193. Post & Shanor, *supra* note 177, at 174. For Dean Post’s classic critique of commercial speech doctrine, see generally Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000) (seeking to establish the distinction between speech valued as information and as embodying democratic participation).

194. Post & Shanor, *supra* note 177, at 172 n.46.

195. A number of commenters at the FTC Blurred Lines workshop, for example, took the position that editorial content paid for by an advertiser should not be considered or

They argue that such native ads deserve full-strength First Amendment protection because they are pure speech or, at a minimum, “hybrid” speech containing both commercial and noncommercial elements.¹⁹⁶ On this view, even if commercial speech doctrine were still intact and sponsorship-disclosure rules for commercial speech were still subject to deferential review, the noncommercial character of native advertising would necessitate stringent First Amendment review. Further, if the speech were analyzed under precedent granting First Amendment protection to anonymous political speech, then disclosure regulations would likely be constitutionally suspect.

Doctrinally, the distinction between commercial and noncommercial speech is aporetic.¹⁹⁷ Nontrivial arguments are being made favoring a narrow interpretation of “commercial”—as communication that “does no more than propose a commercial transaction.”¹⁹⁸ This is notable because of the Supreme Court’s endorsement of corporations as speakers. At the same time, the Court has elsewhere defined commercial speech apparently more broadly as “expression related solely to the economic interests of the speaker and its audience.”¹⁹⁹

Moreover, even if we could easily distinguish between archetypal commercial and noncommercial speech in the abstract,²⁰⁰ native advertising forces

labeled an ad if it does not directly promote a product or a brand. *See Blurred Lines Workshop*, *supra* note 4, at 273–76; *see also* Gottfried, *supra* note 38, at 421 (stating that native advertisements in endemic in-feed format “may not qualify as commercial speech” because “editorial content outweighs the commercial qualities.”). Some take an even narrower view of native ads that should be considered commercial speech. *See, e.g.,* Bohorquez & Pate, *supra* note 33 (distinguishing between native advertisements “with a link directly to a promoted product or brand,” and those that contain “more editorial content than anything else”).

For discussions of modern marketing and the differences between brand image advertising and product informational advertising, *see, e.g.,* sources cited in Jennifer L. Pomeranz, *Are We Ready for the Next Nike v. Kasky?*, 83 U. CINN. L. REV. 203, 210–15, 224 (2014).

196. *See, e.g.,* Bohorquez & Pate, *supra* note 33; *see also* Desai, *supra* note 192, at 487–89 (discussing *Nike v. Kasky*, 539 U.S. 654 (2003)); PIETY, *supra* note 191, at 3, 223; *see also* Brudney, *supra* note 188, at 1157–61, 1204 (discussing “enriched” speech that does more than only propose a sale transaction).

197. *See* Ellen P. Goodman, *Peer Promotions and False Advertising Law*, 58 S.C. L. REV. 683, 697 (2007) (describing the Supreme Court’s definition of commercial speech as “notoriously plastic”).

Proponents of heightened constitutional protection for native advertising would claim that the contested doctrinal distinctions in current precedent—for example between speech mandates and speech restrictions, and between commercial and noncommercial speech—cannot withstand analytic scrutiny because they are, in fact, nothing but unhelpfully formal and manipulable categories of convenience.

198. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976).

199. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980) (citations omitted).

200. Hawking particular wares for an immediate sale transaction is an easy case at one extreme of the commercial/political divide. Corporate stands on purely political questions in an effort to shape public opinion may be an easy case at the opposite end. *See* Frederick

us to focus on the vast middle ground of speech containing both aspects (what has been called “integrated” or “hybrid” speech).²⁰¹ Much native advertising intentionally inhabits that space—where the corporation’s interest in brand identity constitutes a more indirect commercial interest than direct offers of sale, and where promotional messages are intermixed with noncommercial content. Although the prototypical commercial message imparts information about the *product or service* being offered, the new fully integrated native ad, which may not even mention the advertiser or its products except in a small brand logo, constitutes speech about the *speaker* and its views.

This is a harder issue, and one where the constitutional outcome is not as clear. The Court has not addressed the matter head-on.²⁰² It did note, however, that simply because a communication is an advertisement “does not compel the conclusion that [it is] commercial speech.”²⁰³ In a remarkably indeterminate hint, the Court also distinguished between speech rendered noncommercial by the intermingling of “inextricably intertwined”²⁰⁴ noncommercial speech and speech simply linking a product to a current public debate in order to “immunize false or misleading product information from government regulation”²⁰⁵ Almost equally indeterminately, the Court also found “strong support” for a finding of commerciality when the speech is a paid advertisement, promotes a specific product, and is discernibly economically motivated.²⁰⁶

Schauer, *Constitutions of Hope and Fear*, 124 *YALE L.J.* 528, 544–49 (2014) (discussing the possibility of corporate participation in democratic legitimation). A problem, though, is that such pure archetypes are few and far between.

201. See Goodman, *supra* note 197, at 694–99 (describing integrated advertising and its legal treatment).

202. One foregone opportunity was *Nike v. Kasky*, 539 U.S. 654 (2003), in which the California Supreme Court appeared to have adopted an expansive definition of commercial speech. Ultimately, however, the Supreme Court rejected Nike’s appeal on procedural and jurisdictional grounds, dismissing its writ of certiorari as improvidently granted. See also Pomeranz, *supra* note 195 (discussing *Nike v. Kasky* in light of modern marketing practices).

As for administrative interpretations, the FTC only regulates advertising it sees as commercial speech. *In re R.J. Reynolds Tobacco Co.*, 111 F.T.C. 539, 541 (Mar. 4, 1988); see also Goodman, *supra* note 197, at 683, 696 n.72. In dealing with native ads, the agency looks at the “*RJR* factors,” including whether the advertisement advances the speaker’s commercial interests and whether it speaks about specific attributes. See Comments of Laura M. Sullivan, Staff Attorney, Division of Advertising Practices, FTC, at ANA The Natives Are Restless Conference; see *supra* text accompanying note 91.

203. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (addressing whether pamphlet promoting prophylactics should be considered an advertisement for contraceptives violating a federal statutory prohibition of unsolicited mailing of such ads); see also Goodman, *supra* note 197, at 697–98.

204. See *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (on “inextricably intertwined” speech); *Board of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474, 475 (1989) (same).

205. *Bolger*, 463 U.S. at 68 (discussing the impermissibility of merely linking a product to a matter of public debate in order to claim noncommercial status).

206. *Id.* at 66–67.

The difficulty is that applying these factors to native ads can rationally lead to contrasting constitutional results. On the one hand are arguments that native ads consisting largely of native content (rather than links for direct purchases) should be deemed to constitute either pure editorial content, or inextricably combine commercial with noncommercial speech.²⁰⁷

On the other hand, close analysis even of advertising that has been treated as commercial speech reveals that it is often, in fact, full of noncommercial speech.²⁰⁸ Whether a court will find any particular instance of commercial and noncommercial speech to be “inextricably intertwined” will depend in large part on whether it applies a narrow or broad definition of inextricable linkage.²⁰⁹ In addition, despite the focus on the speaker’s expressive message rather than the specifics of a particular mercantile offer, there is a difference between messages that promote a commercial reputation and positive associations with a corporate brand, and messages that directly attempt to influence the content of public opinion,²¹⁰ or weigh in on matters with no significant commercial connection to the business or reputation of the corporate speaker.

Much native advertising that does not promote a particular corporate product nevertheless can be described as having a fundamentally commercial

207. See, e.g., Bohorquez & Pate, *supra* note 33.

208. Nike’s “If You Let Me Play” ad is obviously commercial speech, but it also contains noncommercial elements, such as statistics about the benefits of girls playing sports. However, these noncommercial elements in the ad do not immediately transform the speech into noncommercial speech for First Amendment purposes. See also Desai, *supra* note 192, at 487–89.

209. Thus, for example, the Court found in *Board of Trustees of the State University of New York v. Fox* that speech about home economics in a Tupperware ad should not make the ad noncommercial because it is not “impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.” 492 U.S. at 474. Arguably, this is an extremely narrow interpretation of “inextricably intertwined,” which makes the joined speech a necessary condition. On this sort of interpretation, the brand association would not necessarily be inextricably intermixed in the endemic in-feed native ad context.

210. This is Post & Shanor’s phrasing of the distinguishing characteristic. Post & Shanor, *supra* note 177, at 176. Alternative phrasing might define such speech as “perception-based promotion,” rather than participating in public debate. Pomeranz, *supra* note 195, at 228. Professor Piety takes the broader position that “the definition of commercial speech should include any speech by a for-profit corporation [because] all speech by for-profit corporations [are] inherently commercial by definition.” PIETY, *supra* note 191, at 224. The argument here does not extend so far. Professor Brudney foregrounds context as the determining factor, arguing that even with “enriched” commercial speech addressing either governance or cultural matters, the speaker intends a “transaction-stimulating purport” and a personal benefit to the consumer, rather than alluding to matters of public policy in order to generate true and complex engagement in the general public interest. Brudney, *supra* note 188, at 1218. The conclusion is consistent with the attempt to characterize the entire native ad as transaction-offering in this Article, although getting there does not necessarily entail signing on to Professor Brudney’s apparently wholesale rejection of an autonomy-focused First Amendment theory.

character in two senses.²¹¹ In one alternative, we can focus on the modern meaning of what it means to promote a specific product. Even if a native ad does not mention any of an advertiser's products, it can still seek to promote the commercial aim of establishing and burnishing the reputation of the *speaker or corporate brand* as a *product*. Thus, even though such native ads might not be proposing a particular commercial transaction or selling a specific product directly, the speech is arguably still promoting a higher level or more abstract conception of the modern "specific product"—that is, corporate or brand identity.²¹²

In an alternative sense, even nonproduct-focused online ads are best seen in today's online marketing context as the initial step in proposing a commercial transaction, bringing them under the umbrella of classic commercial speech. In the online world, the consumer is bombarded with a plethora of "push marketing," in which sellers are madly vying with one another to induce ad-blind consumers to notice their ads and products. Reduced consumer attention and an almost infinite variety of claims on that attention require clever marketers to think of new ways to distinguish themselves. One such new way is the native ad that consists of "pull marketing"—content that intrigues a consumer to click and be brought to an explicitly commercial transaction.²¹³ Thus, even ads that do not in themselves contain a reference to a commercial transaction can best be seen as the first element in a multi-step proposal of a commercial transaction. If one employs a broad notion of commercial transaction that focuses not only on the "close," but also on every step prior to the close, then content that merely associates a brand with material the consumer enjoys can easily be seen as the initial commercial "hook" in the accomplishment of the sale transaction.²¹⁴

Alternatively, if the analytical focus is not on the nature and commercial character of the transaction at issue, but on the goals of the regulation, then arguably deference might properly be granted to well-intentioned consumer-protective

211. Perhaps, at a minimum, we can point to differences in emphasis on the corporate identity as opposed to the ideological point in these different kinds of messages.

212. For recent articles on the practice of "unbranding," see, e.g., Cassi G. Matos, Note, *The Unbranding of Brands: Advocating for Source Disclosure in Corporate America*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1307 (2010); Aaron Perzanowski, *Unbranding, Confusion, and Deception*, 24 HARV. J. L. & TECH. 1 (2010); Ponte, *supra* note 87; Jeremy N. Sheff, *The Ethics of Unbranding*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 983 (2011).

213. See Vitaly Pecherskiy, *Trends That Gave Rise to Native Advertising*, MARKETING MAG. (Apr. 7, 2015), <http://www.marketingmag.ca/sponsored/trends-that-gave-rise-to-native-advertising-142020>.

214. To be sure, a narrower interpretation can be adopted as well, under which the fact that an invitation ultimately ends in a commercial transaction does not for that reason eliminate the noncommercial character of the initial approach when viewed in its own terms. See Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 75 (2013) (proposing redefining commercial transactions to include "transactions where a company leverages consumer participation in its service as a salable good" even if the consumer is not offered a commercial transaction); *cf. also* Brudney, *supra* note 188, at 1159.

corrective regulation.²¹⁵ This approach, however, does not necessarily lead to a predictable result in this context.

4. *The Protection of Anonymous Speech*

First Amendment protection of anonymous speech can provide an alternative ground for a constitutional challenge to sponsorship disclosure.²¹⁶ This alternative line of reasoning must be addressed even if a broad interpretation of commercial speech were adopted, or even if a court were to find that source disclosure is tantamount to minimally invasive regulation of the envelope in which speech appears, rather than the content of the speech itself.

Yet protection of anonymous speech has never been absolute, and has been primarily geared to protecting vulnerable speakers.²¹⁷ Mandated media speech requiring disclosure of paid content has passed constitutional muster in the past.²¹⁸ There are credible distinctions between anonymity in the native ad context and anonymity in the political leaflet context.²¹⁹ Perhaps most notably, the skepticism-

215. See, e.g., Tushnet, *supra* note 96, at 754–55 (applying a standard based on Justice Stevens’ litmus test of whether “the purpose of [the state’s] regulation is consistent with the reasons for according constitutional protection to commercial speech . . .”). Query whether this alternative focus on government purpose for regulation is an improvement over contested decisions about the significance of economic benefit. It is as open to similar charges of ambiguity as the other transaction-defining approaches.

216. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (striking down a state statute prohibiting distribution of anonymous campaign literature on First Amendment grounds).

217. See C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 964 n.37 (2007); Helen Norton, *Setting the Tipping Point for Disclosing the Identity of Anonymous Online Speakers: Lessons from Other Disclosure Contexts*, 49 WAKE FOREST L. REV. 565, 565 (2014).

Recently, arguments have been made that the First Amendment should not protect online anonymity in some circumstances. See, e.g., DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61 (2009); Frederick Schauer, *Anonymity and Authority*, 27 J.L. & POL. 597, 606 (2012) (discussing the costs of both anonymity and disclosure, and particularly recognizing that the identity of a speaker provides authority and is “part and parcel of the content of what a speaker says and of how listeners evaluate it”). Even those who make both positive and normative arguments in support of constitutional privilege for anonymous speech, however, accept more paternalistic reasons for permitting compelled disclosure in commercial speech contexts. See, e.g., Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1541 (2007); see also Norton, *supra* (suggesting attention to government motive, a balancing of costs and benefits, and the nature of the contested speech).

218. See, e.g., Baker, *Press Clause*, *supra* note 217, at 964 (discussing prior treatment of mandated disclosure); *supra* note 169 and sources cited therein.

219. The native ad is not the kind of anonymous speech by the kind of anonymous speaker targeted for protection in *McIntyre*. *McIntyre* dealt with a state law that prohibited the distribution of anonymous campaign literature. The decision protected core political speech in an electoral context by a private individual likely to be deterred without a grant of anonymity, and whose identity would not have added much to the content of the communication at issue. Moreover, there was no indication that the handbill at issue was false or libelous—a factor the Court specifically noted. 514 U.S. at 344. The Court emphasized

inducing element of anonymity recognized by the Court in the political leafletting setting is absent in the native ad context.²²⁰ The point of hidden sponsorship in native ads is implicit misidentification rather than anonymity.²²¹

Additionally, although the Court recognized broad corporate speech rights in *Citizens United*, it also upheld disclosure as a regulatory technique even in the context of pure political speech during elections.²²² The majority's reasoning relied on a governmental interest in providing the electorate with information about election-related spending sources in order to enable voters to make informed choices.²²³ The importance of source identity in that process was explicitly recognized.²²⁴ To be sure, *Citizens United* recognized the possibility of as applied challenges to disclosure laws,²²⁵ and scholars have warned that disclosure laws, even in the electoral context, should have clear standards and avoid excessive burdens.²²⁶ Moreover, the sponsorship information involved in the native advertising context does not directly concern the fundamental value of informed voting. Nevertheless,

that "handing out leaflets in the advocacy of a politically controversial viewpoint—is the essence of First Amendment expression." *Id.* at 347. The Court saw the anonymity issue in *McIntyre* as providing "a shield from the tyranny of the majority." *Id.* at 357.

In the native advertising context, the interests and incentives differ. We need not fear the chilling effect that figured importantly in *McIntyre*. Indeed, one of the rationales for reduced constitutional protection of commercial speech has been the notion that regulation would not chill the expression of commercial advertisers. *See* Va. Bd. of Pharmacy v. Va. Citizen Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976) (discussing the hardness of commercial speech).

220. The *McIntyre* Court recognized that anonymity itself could serve as an important cue to trigger skepticism on the part of the recipient of an anonymous communication. 514 U.S. at 348 n.11; *see also* Tushnet, *Attention Must Be Paid*, *supra* note 96, at 767 n.129.

221. Such an approach is designed to suggest that someone other than the sponsor—the news organization's editorial voice and curatorial judgment—is responsible for the content. That is a far cry from the unpopular political speech of the unpopular political speaker whose First Amendment and autonomy interests were recognized in *McIntyre*.

Moreover, the Court in *McIntyre* found that mandating speaker identification was not necessary in order to promote the state's legitimate interest in preventing voting fraud. 514 U.S. at 349–50.

222. The *Citizens United* Court upheld the disclosure requirements of the Bipartisan Campaign Reform Act of 2002 (BCRA or McCain-Feingold) against a facial First Amendment challenge. *Citizens United v. FEC*, 558 U.S. 310, 369 (2010).

223. *Id.* at 371 ("This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."). Even though the majority refused to distinguish between media and nonmedia corporate speakers, the Court recognized that the "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Id.* at 368 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 792 n.32 (1978)).

224. *Id.* at 368 ("At the very least, the disclaimers avoid confusion by making clear that the ads are not funded by a candidate or political party.").

225. *Id.* at 370.

226. *See, e.g.*, Richard L. Hasen, *The Surprisingly Complex Case for Disclosure of Contributions and Expenditures Funding Sham Issue Advocacy*, 48 UCLA L. REV. 265, 268 (2000).

the news consumer's ability to distinguish between paid and editorial content is surely a critical element in promoting an informed electorate and democratic competence. Just as the state has a compelling interest in preventing consumer fraud, strategies that might effectively debias citizens' ability to assess the information they use in the process of self-governance could better promote democracy. Alternatively, to the extent that *Citizens United* is an anti-exceptionalism case for the press, then the deployment of disclosure as an unexceptionable regulatory technique for all corporate speech may open the door to somewhat greater deference to deception-correcting disclosure requirements.

B. Threats to the Constitutional Status of the Press

The previous Section argued that well-crafted labeling requirements in the native ads context are likely to be found facially constitutional if the constitutionality of such regulations is tested through conventional commercial speech jurisprudence. But if commercial speech doctrine declines further, or if a court were to treat native ads as noncommercial speech, the First Amendment might be deemed offended by such regulations. Although this might initially be welcomed by some as a victory for free speech, it is the task of this Section to argue that such a First Amendment "victory" would in fact constitute an important defeat.

Regardless of scholars' differing views on the constitutionally "special" and unique character of the press under traditional First Amendment interpretation,²²⁷ there is likely to be consensus that the Supreme Court, in interpreting the First Amendment in most of the relevant jurisprudence, has not historically characterized press speakers as simply fungible corporate actors engaging in for-profit speech.²²⁸ Yet several of the recent decisions of the Roberts Court are easy to read as signaling a trend toward diminished special status for the press.²²⁹ There is a nontrivial risk that the turn to native ads and the blurring of the "church-state divide" will undermine whatever special status has been constitutionally and otherwise attributable to the press.

Even if this is true, what impact might follow from this diminution in the constitutional status of the press—why would it matter?²³⁰ Would the press

227. Scholars differ on the independent meaning of the Press Clause and its role in First Amendment jurisprudence. For important discussions, see, e.g., Anderson, *supra* note 19; Baker, *supra* note 217; Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011). However, even under traditional free speech principles, the Court has often emphasized the signal importance of the press to democracy. See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966); see also Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1263 (2012); Paul Horwitz, *Institutional Actors in New York Times Co. v. Sullivan*, 48 GA. L. REV. 809, 817 (2014); Jones, *supra* note 19.

228. See Jones, *supra* note 19; Weinberg, *supra* note 173, at 50–51.

229. See e.g., *Citizens United v. FEC*, 558 U.S. 310 (2010); *supra* notes 23, 192 and sources cited therein.

230. See Jones, *supra* note 19, at 268 (arguing that a diminution in the Court's view of the press may well lead to a reduction in First Amendment freedoms in general).

necessarily lose important speech protections as a result? Which ones? Is there any reason to believe that press corporations would not simply benefit from the speech liberalizations applicable to all corporate speakers without significant countervailing costs? In other words, what does the “special” role of the press (at least in the rhetoric of the Court during the press’s Golden Age in the Brennan years) provide for the press? The short answer is that it both provides certain affirmative benefits and protects the press from certain potential disadvantages.

One of the difficulties is that native advertising opens the door to administrative review not only of the advertisement itself, but also its associated editorial context, in order to make the assessments required by advertising and communications law.²³¹ Not having the “church-state” separation of advertising and editorial means that relevant government agencies are allowed to range into content in order to define the boundary themselves. Government agencies are charged with the fine-grained determinations of what press content should require supporting documentation adequate to satisfy bureaucratic evidentiary requirements. This involves discretionary judgments otherwise left to the expertise of editors in the ordinary press context. It effectively involves the government in determining newsworthiness and salience. Because of the embedded context of native advertising, advertising law can function as a de facto prior restraint on the press’s speech.

Moreover, there have been special benefits for journalism that came with legislative and judicial recognition of the special democratic role of the press.²³² Perhaps more importantly, however, it appears that the constitutional status of the press has stayed the hand of government officials who had formal power to regulate but chose to exercise discretion and forbear. A common recent context of governmental forbearance toward the press is that of national security leaks. Although government officials (especially recently) have threatened the press with espionage prosecutions for their roles in publicizing leaked national security materials,²³³ and although the Supreme Court’s press jurisprudence does not clearly

231. Advertising law, for example, requires advertisers to substantiate factual claims they make about products in their ads, implicitly or explicitly. Policy Statement Regarding Advertising Substantiation Program, appended to *in re* Thompson Med. Co., 104 F.T.C. 648 (1984). Similarly, FCC regulations permit the Commission to determine whether a broadcast program should be considered a program-length commercial for purposes of assessing compliance with children’s advertising rules. *In re* Policies and Rules Concerning Children’s Television Programming, 6 FCC Rcd 2111, 2118 (1991), *recon. granted in part*, 6 FCC Rcd 5093, 5098 (1991).

232. For example, the press has benefited from heightened liability standards in certain defamation cases, *see, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964), limits on the ability of courts to prohibit the publication of true information, *see, e.g.*, *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 98–100, 106 (1979), judicial recognition of some protection for newsgathering rights, *see, e.g.*, *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Branzburg v. Hayes*, 408 U.S. 665, 707 (1972), and information access statutes such as federal and state freedom of information acts, *see* *Anderson*, *supra* note 19, at 432; *Baker*, *supra* note 217, at 983–84 (describing the separate meaning of Press Clause for the protection of institutional integrity); *Bezanson*, *supra* note 227, at 1268 (cataloguing some others).

233. *See, e.g.*, Joanna Walters, *James Risen Calls Obama ‘Greatest Enemy of Press Freedom in a Generation,’* THE GUARDIAN (Aug. 17, 2014, 4:24 PM),

prohibit press prosecutions in such contexts, the special role of the press cannot but have played a significant role in government decisions not to focus on the press.²³⁴ However, a Court inclined to discipline the press might well diminish its status by casting it as a commercial actor whose speech and speech-related activities are constitutionally equivalent to those of other similarly situated commercial speakers.²³⁵ Particularly in the newsgathering context, where the Court has shown some ambivalence about journalistic activity in any event, a diminution in the press's special reputation is likely to tip courts, legislatures, and administrative agencies against protection.²³⁶

Furthermore, the apparent diminution in press exceptionalism at the Supreme Court today may be accompanied by an increase in corporate speech exceptionalism that could potentially hobble the press's ability to report on and oversee corporate expression and activity.²³⁷ In other words, it is not only that press speech is seen as less exceptionally privileged, but correspondingly that corporate speech may be receiving more protection than press speech in today's topsy-turvy First Amendment climate.

Finally, the Supreme Court's attitude toward the press doubtlessly has a trickle-down effect on lower courts.²³⁸ The less exalted the constitutional place of journalism, the more such courts are likely to look with skepticism at press claims of privilege of any kind or journalistic arguments for application of tort and privacy law with a light touch in media cases.²³⁹

<http://www.theguardian.com/world/2014/aug/17/james-risen-obama-greatest-enemy-press-freedom-generation>.

234. This is not to say that the government's threats are not intended to, and do not, chill the press. However, if First Amendment jurisprudence did not include significant rhetoric highlighting the democratic role and significance of the press, government officials might not be nearly as wary of prosecuting journalists whenever they could arguably do so.

235. This is not an argument about the application of commercial speech doctrine to assess regulation of the press.

236. Of course, native advertising is not going to cause the Court to reverse fundamental First Amendment protections that are particularly valuable for the press. At least on the margins, however, envisioning the press as wholly commercial speakers may well incline courts in less press-protective directions.

237. Professor Desai, for example, has recently argued that the increased recognition of corporate speech rights under the First Amendment, when combined with other legal protections available to corporations, makes it more difficult to criticize corporate speakers than individual speakers. *See* Desai, *supra* note 192, at 500–01.

238. This is not to suggest that lower courts in the past have always issued press-protective decisions in sympathy with the press-vaunting rhetoric of some Supreme Court press jurisprudence. *See, e.g.,* GAJDA, *supra* note 23, at 24–49.

239. Of course, these threats to the press are to be feared only to the extent that we see a continuing value in a distinct Fourth Estate that imagines itself as tasked to undertake watchdog journalism in the public interest. But what is really still special and distinct about the traditional institutional press? *See* Yochai Benkler, *A Free Irresponsible Press: Wikileaks and the Battle over the Soul of the Networked Fourth Estate*, 46 HARV. C.R. – C.L. L. REV. 311 (2011) (discussing the networked Fourth Estate). Is native advertising simply a consequence of the evolution of the eighteenth century Fourth Estate into the distributed and networked media—a transformation through which everyone, whether corporate PR hack or

All this should make the press wary of bringing First Amendment challenges to native advertising regulation such as sponsorship disclosure rules, should they be governmentally mandated. Because native advertising blurs the distinction between the press's role as public fiduciary and its role as profit-maximizing economic actor, it stands as an invitation to courts seeking to cabin whatever "special" role and treatment the press has been granted.²⁴⁰ The problem is that even if publishers exercise self-restraint in bringing First Amendment challenges to native advertising regulation because of their broader concern about contributing to further diminution of press exceptionalism (such as it is), advertisers will likely see their own interests differently. If constitutional challenges are to come, then, they will predictably come from sponsors of native ads rather than the news organizations themselves. It is in the news organizations' interests, therefore, to end-run such judicial interventions by adopting self-restraint in the native advertising context.

VI. SOME MODEST PROPOSALS

There is no perfect solution to the dilemma faced by today's news organizations vis-à-vis native advertising, though a multi-pronged strategy could be fruitful. First, consumer-protective labeling, the approach currently on the table for the FTC and the industry, should not be rejected (but can be improved). Second, a different type of transparency approach, including oversight-oriented disclosure rules designed to protect editorial independence, could address public debate

trained *New York Times* reporter, can become a journalist? Although this raises a much bigger question than can be answered in this Article, a few observations are in order to explain the Article's underlying assumptions about the continuing value of promoting entities that consider themselves to be the press and engage in journalistic functions. Not everyone in the networked Fourth Estate is a journalist, even if the output looks like a new story. The difference lies in the editorial judgments—judgments being made on the basis of purely financial imperatives as opposed to professional or ideological norms. While these views may sometimes overlap, entities for which economic stakes are the fundamental decisional factors will be more frequently and extensively subject to pressure to compromise speech decisions. Another important quality of the press's speech is "its independence from the government." Bezanson, *supra* note 227, at 1269. Further, despite the Anderson critique, there is something to the notion that a function of the press is not only to report news, but to be able to generate or improve accountability. That the press is not the only participant in the public sphere able to do so does not minimize its potential contribution on this front. A mixed media environment consisting of both the traditional institutional press and newer forms of online journalists can serve as a mosaic to generate an effective accountability regime. Because native advertising is prevalent in both the online and traditional news contexts, it undermines both models' ability to aspire to fill that watchdog role. Native advertising is important precisely because it threatens such reporting in both the networked and legacy Fourth Estate. Whether the goal is the transparency touted by advocacy journalists or the neutrality claimed by the traditional elite newspaper, "real" reporters are engaged in publishing their views of the truth rather than merely seeking commercial influence designed to enhance fleeting marketing goals. Admittedly, arguments from expertise and professional standards are culturally contingent, and economic goals surely motivate traditional corporate press organizations. It is important not to indulge in excessive sentimentalism regarding the press.

240. As noted above, however, this is far from saying that the Court has consistently granted the press full constitutional protection as such under the Press Clause.

concerns beyond consumer protection. Third, it is possible to craft a strategy based on enlightened self-interest to nudge improved self-regulation.

A. “Voice Priming”: Improved Labeling to Protect Against Consumer Deception

Cognitive psychology teaches us that rapid and unconscious biases and heuristics—System 1 cognitive processes—can significantly influence what we think and what choices we make.²⁴¹ Native advertising permits misidentification of who is speaking, and whose voice the consumer is reading or hearing, via such a System 1 process. It triggers, among other things, the priming effect through which credibility associations with a respected news organization can influence a consumer’s susceptibility to undisclosed commercial content.²⁴² Ultimately, then, “voice priming” disclosure, a disclosure that would trigger awareness that the speaker is not the editorial voice, could facilitate a skeptical stance on the part of the consumer of advertiser-inflected news.

Disclosure has become the preferred regulatory alternative to command-and-control,²⁴³ yet it is both villain and hero. Disclosure-oriented proposals inevitably raise cognitive psychology-based critiques on their efficacy.²⁴⁴ However, the type of disclosure approaches recommended here are not significantly subject to these objections.²⁴⁵ For example, debiasing disclosure rules,²⁴⁶ present different

241. See generally KAHNEMAN, *supra* note 25, at 19–30 (describing System 1 and System 2 cognitive processes and their interactions).

242. This process can bypass the type of skepticism with which many people may approach commercial appeals. To be sure, this is not to say that news consumers are not skeptical of the content they encounter in the editorial well. But they are likely to be skeptical about different things, such as, for example, ideological or political slant or completeness by contrast to commercial manipulation.

243. See, e.g., BEN-SHAHAR & SCHNEIDER, *supra* note 115, at 4–6 (describing preference for disclosure approaches because the benefits of increased information are assumed and disclosure seems to “regulate lightly”); Bubb, *supra* note 26, at 1022 (describing attractiveness of “light-touch regulatory tools like disclosure . . .”).

244. Disclosure-skeptics argue powerfully that mandatory disclosure “is a fundamental failure that cannot be fundamentally fixed.” BEN-SHAHAR & SCHNEIDER, *supra* note 115, at 12. Some argue that disclosure can have paradoxical over-deterrent effects. See, e.g., Goldman, *supra* note 115 at 11; see also Calo, *supra* note 154, at 1012–15 and sources cited therein (describing arguments); Tushnet, *supra* note 96, at 764–71 (discussing Goldman argument). For criticisms of Ben-Shahar and Schneider’s critique, see, e.g., Calo, *supra* note 172, at 1014 (“Everyone has cognitive biases, but not everyone has the same biases or experiences them to the same degree.”); Jeremy N. Sheff, *Disclosure as Distribution*, 88 WASH. L. REV. 475, 475–78 (2013).

245. Not all disclosure rules are equal, and they do not all have the same goals. See Margaret Jane Radin, *Less Than I Wanted to Know: The Submerged Issues in More Than I Wanted to Know*, JERUSALEM REV. LEGAL STUD. 1–12 (2014), available in draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462818 (criticizing Ben-Shahar and Schneider *inter alia* for ignoring mandated disclosure “intended as a corrective” for practices that trigger biases).

246. “Debiasing” disclosures are designed to correct predictable misperceptions or biases. For one important model of debiasing rules, see Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006). For an insightful discussion of such debiasing disclosure models, see Bubb, *supra* note 26, at 1028–38.

sorts of issues than disclosures designed affirmatively to improve decision-making or to generate fully informed consent through instruction.²⁴⁷ Furthermore, even if consumers would still be subject to many of the cognitive biases hampering the ability to process the full implications of sponsorship identification in connection with native advertising, “voice priming” native ad labeling could at a minimum make consumers aware that they were looking at paid-for content. And because not all consumers are alike, even in their cognitive biases, voice-priming disclosure can be helpful for more than a marginal percentage of those engaging with news-integrated native ads.²⁴⁸

The question, then, is how to design effective voice-priming ad labeling, especially responsive to different people’s different ways of thinking. Admittedly, there are a number of practical challenges. For example, panelists made the point at the FTC’s Blurred Lines workshop that “one size fits all” disclosure requirements would be particularly difficult to craft for native ads, at a minimum because of the sheer variety of native advertising models and platforms.²⁴⁹ We have seen that practical questions can also be raised about the likely effectiveness of sponsorship disclosure in the future, given empirical indications of current consumer confusion about labeling.²⁵⁰ The possibility of confusion is enhanced because of the variety of possible disclosures, depending on the type of native ad. Underlying this is some observers’ conclusion that consumers care less about provenance of content than whether it is true and engaging.²⁵¹ Moreover, much of news today is spread by reader recommendation on social media, and it is unclear that the sponsorship labeling with which native advertising may begin at its point of inception will necessarily travel with the material as it proliferates within social media.²⁵² The migration to mobile is likely to put downward pressure on extensive disclosure as a result of reduced screen space.²⁵³ Enforcement questions are also naturally raised,²⁵⁴ particularly in

247. See, e.g., Bubb, *supra* note 26, at 1023; Radin, *supra* note 245.

248. Cf. Richard Craswell, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 347–48 (2013).

Further, voice priming disclosure requirements do not trigger some disclosure critics’ concerns about government pushing particular controversial norms to influence behavior. See Bubb, *supra* note 26, at 1036–39 (discussing the normativity and coercive character of behavioral manipulation via effective System 1-oriented disclosure requirements); see also Goodman, *supra* note 174, at 515–16 (addressing disclosure regulations by which government seeks both to inform and influence consumers). Rather than seeking to change consumer behavior, such a disclosure regime seeks to convey information—a “goose” rather than a “nudge.” Thus, the fact that some studies show consumers not changing their behavior in response to disclosure of manipulation does not undercut the use of disclosure proposed here. See Calo, *supra* note 154, at 1044 and sources cited therein.

249. See, e.g., *Blurred Lines Workshop*, *supra* note 4, at 215 (comments of Zaneis).

250. See *supra* text accompanying notes 133–34.

251. See *supra* text accompanying notes 135–40.

252. For a discussion of how downstream “socializing” of advertising content can strip it of its disclosures, see *Blurred Lines Workshop*, *supra* note 4, at 248–55.

253. *Id.* at 277 (comments of panelist Mudge).

254. One of the important bases of Professor Anderson’s critique of Professor Goodman’s sponsorship disclosure proposal is precisely questions about enforcement. See Anderson, *supra* note 31, at 8.

view of the extent to which industry testimony at the FTC's native advertising hearing indicated misunderstanding of the law of deception.²⁵⁵ Finally, skeptics might ask whether, if there is a problem, advertiser self-interest and the market would not adequately address it by generating the appropriate level of disclosure without regulation.²⁵⁶ And, on the doctrinal side, regulation may invite statutory and constitutional challenges.²⁵⁷

Although it is beyond the scope of this Article to draft specific native advertising disclosure rules in response to these practical difficulties, keeping the following four factors in mind is likely to lead to an improvement over the current situation.

First, voluntary adoption of industry standards would be feasible and helpful. The variety of native ad formats does not preclude the development of multiple standardized approaches to disclosure. Technology might provide one element warranting optimism.²⁵⁸ Until now, much ad blocking software has functioned by targeting words indicative of advertising and blocking such content. In addition to the classic explanation, the rise of ad blocking software might also have created incentives for native advertisers to resist standardization in disclosure terminology. Recently, however, ad blocking technology is poised to be supplanted by native ad labeling software.²⁵⁹ Since the appearance of AdDetect, for example, native advertisers can be assured that the consumer's ad blocker will not erase the ad. This removes the disincentive to standardization, and is said to increase the incentive to improve the quality of sponsored content.²⁶⁰ As an incentive to voluntary industry agreement, it would be useful to remember that numerous administrative regulations exist under which disclosure-based regulation arguably

255. Hoofnagle, *supra* note 101.

256. See, e.g., Wagner, *supra* note 115 (critiquing disclosure as either ineffective or voluntarily adopted by the market if desired by the public).

257. See *supra* text accompanying notes 169–240.

258. On one technological front, it is beyond the scope of this Article to address the technical fix for the different ways in which native ad labeling can become dissociated from the ad content itself as it travels among the multiple platforms and contexts of today's media. To the extent, however, that one of the impediments is the terms of service of platforms like Facebook that limit publishers' ability to include brand names when branded content is shared from the platform, then it is not the social sharing as such that hampers the effectiveness of the native ad disclosures. Similarly, one scholar identifies a possible culprit in enhancing the salience of native advertising as the ranking choices made by search algorithms that do not distinguish between native ads and editorial articles for purposes of delivering search results. Bakshi, *supra* note 6, at 21. This too is not an inevitable state of affairs.

259. See, e.g., Steven Perlberg, *Meet AdDetector – The New Plug-In That Labels Native Advertising*, WALL ST. J.: CMO TODAY (Aug. 20, 2014), <http://blogs.wsj.com/cmo/2014/08/20/ad-detector-native-ads/> (describing Google product engineer's disclosure plug-in for Chrome and Firefox, which labels sponsored content with a large red banner identifying the sponsor, but does not block the advertisement's content). The open source plug-in can be downloaded from <http://www.ianww.com/ad-detector/>.

260. *Id.* (describing the plug-in developer's view).

could be intensified by the FTC or FCC short of the adoption of new rules.²⁶¹ Further, broader consensus for market correction would likely be generated by better evidence detailing consumer reactions and providing concrete risk analysis of consumer trust in this context.²⁶²

Second, the approach to labeling should be heavily informed by empirical data.²⁶³ There is little evidence that advertisers are currently incorporating the insights of empirical work on human visual perception in their disclosure designs.²⁶⁴ With better and more extensive data, native ad design *could* potentially achieve voice priming and effectively reduce consumer confusion. If the details of disclosure more closely address human cognition and visual perception, the disclosures are more likely to be processed properly. Empirical data can also refine the analysis and identify those models of native ads that now present the greatest threat of deception.²⁶⁵ At the same time, of course, some of the industry-funded survey data should be assessed critically.

As part of the recommended sensitivity to empirical study, the industry's choice of disclosure-labeling models should be influenced by socially-situated understandings of meaning. Presumptively, labeling should be granular and specific to the extent possible.²⁶⁶ Language typically used to label native advertising should

261. For arguments that the relevant administrative agencies already have significant regulatory jurisdiction over native advertising practices, see Bakshi, *supra* note 6; Gottfried, *supra* note 38.

262. See *Blurred Lines Workshop*, *supra* note 4, at 298; see also *supra* text accompanying notes 109–16 (describing the thinness of current data).

263. For a persuasive argument that “the right response to the important critiques of mandatory disclosure . . . is . . . rigorous empirical assessment of which disclosures work and which do not,” see Bubb, *supra* note 27, at 1023.

264. See *id.* at 1030–33 (discussing impacts of human visual perception on consumers' ability to process sponsorship disclosures). Native advertising industry participants are beginning to engage in such research. See, e.g., SHARETHROUGH, *A Neuroscience Perspective: Assessing Visual Focus, Message Processing & the Ability to Strengthen Associations Through Mobile Native Advertising* (2015), <http://www.sharethrough.com/neuroscience/> (describing “a first look at what neuroscience can teach us about creating effective native ads”). Sharethrough is a leading native advertising automation company.

265. The agency could focus on a detailed and granular analysis of various different native advertising techniques and their potential threat level from the vantage point of accountability journalism. Thus, for example, the agency should focus on recommendation widgets. See *Blurred Lines Workshop*, *supra* note 4, at 259.

266. See *id.* at 214 (commenter Holt's suggestion). Even if its major goal is to correct misperceptions in consumers' System 1 attribution assumptions, neuroscientifically grounded disclosures both of who created and paid for the placement of the content might be useful, at least to some portion of the audience.

Admittedly, the question of who created the content becomes more complex when it is the product of joint work by the advertiser and the publisher—and particularly when publishers bring the native ad production in-house. Nevertheless, even when publishers create the content, it should be identified as being created for, and to satisfy the requirements of, the brand. Otherwise, it would have been created to satisfy the independent editorial considerations of the publisher.

be assessed for ambiguity and cultural differences in understanding.²⁶⁷ Because disclosure terms develop standard meanings and associations over time, it would be useful if the relevant industries developed consistent usages for like contexts.²⁶⁸ Consumers can be sensitized to the breadth of cultural association of meanings over time.²⁶⁹ Moreover, the advertising industry is not the only relevant participant here; if publishers can come to some common understandings as an industry, this will likely have some corraling effect on brands as well.

Third, the burden should be placed on proponents of nondisclosure to explain why there should not be a presumption that paid-for content should be identified as such.²⁷⁰ The presumption of labeling for all paid-for content reduces uncertainty and Talmudic discussions about the degree to which paid-for editorial content does or does not actually promote products. It is also more consistent with the notion of brand advertising, rather than mere product promotion. Particularly when surveys reveal that consumers feel deceived if they discover camouflaged advertising, but have good rates of engagement if even sponsored content is high quality, native advertisers' interest is consistent with disclosure. Concerns about quality could be addressed by collective action, especially with the intervention of selective ad market intermediaries.²⁷¹

Fourth, publishers and advertisers should consider opening their native ad content to public assessment and comment.²⁷² For example, moderated comments sections for native advertising content might help mitigate consumer confusion. Inviting the wisdom of the crowd would enable publishers and advertisers to take

267. If, for example, in the culture and over time, the public has come to associate the notion of sponsorship with mere underwriting, then it is unsurprising that consumers might not realize that a disclosure of "sponsored content" was in fact produced by the brand and not the media organization. Under those circumstances, simply using the terms "sponsored by" for an integrated native ad would actually be misleading, given the previous cultural meaning that serves as the consumer's standard for comparison. See *Blurred Lines Workshop*, *supra* note 4, at 178, 216–18. The alternative of "sponsor generated content" might be an improvement. See *id.* at 239 (describing the *Wall Street Journal* labeling approach).

268. Major advertisers could agree and set the standards that would then promote industry alignment. See *id.* at 218.

269. Thus, for example, truncated vocabularies for mobile device disclosure could develop to overcome the space handicap.

270. *Id.* at 275–76 (noting Blurred Lines workshop panelists' differences on this question). The IAB Native Advertising Playbook helpfully recommends that, regardless of native advertising type, clear and prominent disclosures should apply to paid-for advertising, even if it does not contain traditional promotional advertising messages. See *supra* note 36 (citing to the document).

271. Thus, for example, it is reported that a number of high-level British publishers have formed a consortium to engage in the algorithmic placement of native ads in their publications. See Press Release, Guardian News & Media Press Office, World's Leading Digital Publishers Launch New Programmatic Advertising Alliance, PANGAEA (Mar. 18, 2015), <http://www.theguardian.com/gnm-press-office/2015/mar/18/worlds-leading-digital-publishers-launch-new-programmatic-advertising-alliance-pangaea>.

272. To the extent that the FTC chooses to enter the field, it should operate less by command-and-control than by incentives and architecture. Creating incentives for moderated comment sections in spaces where there is native advertising might be one such indirect inducement.

consumers' temperature with respect to confusion on an ad-per-ad basis. To be sure, many news organizations are said to be reducing or eliminating their comments sections.²⁷³ Nevertheless, moderated comment areas would be much less likely to face such problems.²⁷⁴

Of course, despite calls for empirically based disclosure approaches—something like evidence-based transparency—it is often difficult to predict whether, to what extent, and in whom such disclosures will trigger awareness and skepticism. It is also appropriate to worry about whether the disclosure, if it works, will lead to an excessive amount of skepticism and unduly impoverish public discourse merely because of the commercial provenance of its content. Will the voice priming disclosure lead to an irrational avoidance of potentially valuable information simply because of its commercial sponsorship?²⁷⁵ This is why even awareness-directed disclosure must itself be approached with a healthy skepticism and a commitment to continuing testing.

273. Although Comments sections had been touted as a beneficial invitation to public participation, many are being shut down because of uncivil comments. Craig Newman, *Sick of Internet Comments? Us, Too – Here's What We're Doing about It*, CHI. SUN-TIMES (Apr. 12, 2014, 12:01 AM), <http://voices.suntimes.com/news/sick-of-web-comments-us-too-heres-what-were-doing-about-it/>; Dan Colarusso, *Editor's Note: Reader Comments in the Age of Social Media*, REUTERS (Nov. 7, 2014), <http://blogs.reuters.com/great-debate/2014/11/07/editors-note-reader-comments-in-the-age-of-social-media/>. Studies also indicated that people would remember the comments and somehow associate them with the newspaper's article. Ashley Anderson et al., *The "Nasty Effect": Online Incivility and Risk Perceptions of Emerging Technologies*, 19 J. OF COMPUTER-MEDIATED COMM. 373 (2013); see also Dominique Brossard & Dietram A. Scheufele, *This Story Stinks*, N.Y. TIMES, Mar. 2, 2013, at SR5. Added complexity would be expected if native content were to be included in comments as well. See Garrett Sloane, *Ads Are Coming to the Comments Section of Publisher Sites*, ADWEEK (Nov. 3, 2014, 10:23 AM), <http://www.adweek.com/news/technology/ads-are-coming-comments-section-publisher-sites-161168>. Despite these problems, however, moderated-comments sections could potentially serve a beneficial checking function, much like crowdsourcing.

274. Admittedly, one of the factors that led to public outrage over *The Atlantic's* native ad puffing the Church of Scientology, see *supra* note 10, was that an *Atlantic* staffer responded to the large numbers of negative comments generated by the piece by excising them. See Lucia Moses, *After Scientology Debacle, The Atlantic Tightens Native Ad Guidelines*, ADWEEK (Jan. 30, 2013, 12:44 PM), <http://www.adweek.com/news/advertising-branding/after-scientology-debacle-atlantic-tightens-native-ad-guidelines-146890>. In order to preserve the corrective and skew-revealing role potentially attributed to comments sections here, therefore, the comment-moderating staff would require training in how to promote such a goal for comments. *The Atlantic*, in response to the Scientology faux pas, apparently adopted native advertising guidelines and limited the scope of moderator discretion to eliminate negative comments solely on that basis.

275. This question has been raised, *inter alia*, by Professor Tushnet. See Tushnet, *supra* note 96, at 774 (responding that people have “a metapreference for when [they are] hearing ads . . . put[ting] source disclosure in a somewhat better position, even from an antipaternalistic standpoint, than certain other types of disclosure . . .”).

B. “Surveillance-Enabling”: A Corporate-Level Disclosure Approach²⁷⁶

The per-ad labeling systems discussed above are principally designed to help consumers recognize whether, and on whose behalf, they are reading commercial matter. However, to the extent that we want to craft a regulatory regime (whether mandated or self-regulatory) designed to address the threats posed by the blurring of the “church-state divide,” mere labeling requirements designed to reduce confusion at the ad level are insufficient. If our principal worry is the corrupting effect of advertising influence on editorial choices, we should require those types of disclosures from news organizations as would be useful in identifying, revealing, and quantifying the risk of such corruption. Thus, a disclosure regime focused on detailed disclosure of each news organizations’ commercial advertising funding would help support public oversight of how well news organizations are policing their advertising/editorial boundaries.

The alternative type of disclosure regime recommended here would be designed to ferret out circumstances particularly raising the specter of advertiser influence over editorial decisions.²⁷⁷ One such oversight-focused disclosure requirement would lead news organizations to disclose the identities (and/or the industries/types of products or brands) of their major advertisers and the percentage of advertising revenues attributable to such advertisers. At a minimum, the disclosure could focus on the advertisers placing native advertising. The disclosure requirements would have to be tailored to address, to some degree, the historical as well as current advertising relationship with the news organization. They would also have to account for the likelihood of future increases in advertising by the brands at issue on any given outlet for at least the near-term future. Moreover, the disclosures would have to be publicly available, and in forms amenable to comparative analysis, so that a contextual assessment across publishers could be made. Thought would have to be given to enforcement and inducements to comply.²⁷⁸

Given media concentration, disclosure requirements should apply at the corporate level and not merely at the level of particular stations, newspapers, or online news providers. On the basis of this kind of information, and in light of the news organizations’ coverage over given periods of time, private watchdog groups

276. Professor Menell has suggested an alternative approach, focused on taxation. Thus, he suggests a modest tax on embedded advertising (the proceeds of which would be used to fund consumer education) or the elimination or scale-back of tax deductibility of advertising expenses. Menell, *supra* note 55, at 817. Professor Goodman’s *Stealth Advertising* adverted to, but did not extensively discuss, corporate disclosure. Goodman, *supra* note 16, at 151.

277. It is unclear from Professor Goodman’s proposal for the expansion of the FCC’s sponsorship identification requirement whether media should be required to disclose not only the fact of sponsorship, but also the identity of those who paid for the advertising. See Anderson, *supra* note 31, at 6 (making this point); cf. Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 404 (2013) (describing government transparency as “about revealing influence in order to limit corruption . . .”).

278. Such disclosures would “put[] private intermediaries in a position to fortify official enforcement regimes” Goodman, *supra* note 16, at 151.

might question publicly the degree of influence various advertisers might have on the news organizations' editorial judgment.

Second, a related type of oversight-enabling disclosure requirement would focus on the production aspects of native advertising. Thus, one possibility might be requiring news organizations to disclose which, or at least what percentage of, their native ads were produced by their brand advertising producers in-house. Another would require the news organizations licensing their editorial content to disclose the kind and percentage of such licensing in which they engage.

The intuition underlying these suggestions is that news organizations are more likely to compromise their editorial judgments for major advertisers (or those brands they are courting to become major advertisers in the near term), and when they know that the advertisers have equivalent alternatives to which they can turn if their demands are not met. Media watchdog groups, armed with the news organizations' advertiser breakdowns, could more effectively assess the likelihood of advertiser influence at any given time.

This approach is, of course, far-from-perfect. After all, it relies on proxies and probabilities of influence—very indirect matrices from which to infer causative conclusions. It requires inevitably arbitrary decisions regarding disclosure thresholds. There is no objective, principled ground by which to identify the percentage of advertising revenue that should be deemed as the threat threshold—5%? 10%? 20%? More? Under whose auspices would such a scheme be administered? How would the information be publicized? Depending on the details, such a disclosure regime could potentially force the harmful revelation of proprietary information to competitors. It could even invite the creation of a media watchdog establishment with an institutional bias for finding editorial skew in virtually every major ad-supported news organization.

Given the fluidity, subjectivity, and contextual character of news judgments, it is likely that watchdog groups with different news values and ideological commitments will always be able to look to disclosed advertising information to justify their assertions of advertiser bias in a news organizations' editorial choices. We have already seen this in the current landscape, with both right- and left-wing complaints about media bias in the traditional news arena. An advertiser-disclosure requirement might well revive and further legitimate such claims, even if the differences are ideological rather than a result of advertiser-prompted corruption. Further, as has previously been argued in an analogous context, enforcement of such sponsorship rules would doubtlessly “present some difficulties.”²⁷⁹

Nevertheless, disclosure of major advertisers has the benefit of focusing analysis at the institutional level, rather than the granular, ad-by-ad level. It at least provides the possibility that public discourse will focus on the dangers of embedded advertising to news content and editorial integrity. While the triggering percentages will inevitably be subject to dispute, most would probably agree on the relational salience of the selected metrics. It is likely that a news platform would be less likely

279. Anderson, *supra* note 31, at 6 (criticizing Goodman's proposed sponsorship disclosure model on such grounds).

to compromise its news judgments over a 5% advertiser that has not varied in its advertising buys for the previous decade as opposed to a brand accounting for 25% or more of the platform's advertising revenue. And even if ideologically motivated watchdog groups could use the disclosed information in support of their own media bias campaigns, the availability of hard revenue information would enable more factually grounded claims about declines in editorial independence.

Although we can complain about the political bias of those news organizations that do not reflect our own political views, and although we are all aware that news judgment can be skewed by all kinds of factors, including reporters' political outlook, professionalism, intellectual capacity, work ethic, social circle, and source pool, we nevertheless bridle in particular against revelation that news organizations have compromised their (admittedly otherwise fallible) professional news judgments for advertising dollars.²⁸⁰ We expect editorial independence from mammon, if not from the other cognitive and social biases to which people are prone.²⁸¹

Perhaps most realistically, the need to comply with such a disclosure regime might force the news organizations themselves to face the problem of possible influence. A newspaper's own reporters, armed with this advertiser information, can challenge content decisions that appear to them to be unduly deferential to major advertisers. The fact that the news organization has the burden of justifying its news coverage, particularly if it has significant and publicly-disclosed advertising relationships with particular brands, could create the occasion for its own internal institutional assessments of the impact of such advertising on its own news brand and reputation. The need to comply with a disclosure regime might therefore serve as a practical nudge.

Finally, public companies already provide some of this information to some constituencies voluntarily. Thus, for example, the *New York Times* revealed a significant amount of information about the economics of its Paid Post venture in a presentation to investors earlier this year.²⁸² Of course, the degree of detail provided will predictably vary among organizations. Even news outlets with a penchant for transparency will in all likelihood stop short of making all the relevant information available publicly. Nevertheless, that some financial information will likely be voluntarily disclosed, at least by public companies, is a step in the right direction.

280. See *id.* at 3.

281. See *id.* at 1–2 (agreeing with such a view of news consumer expectations); Baker, *supra* note 217, at 958–70 (discussing institutional integrity).

282. See Michael Sebastian, *Native Ads Were 'Inside' 10% of Digital at the New York Times Last Year, Publisher Now Pursuing More Creative Work*, ADVERT. AGE (Feb. 3, 2015), <http://adage.com/article/media/york-times-sold-18-2-million-worth-native-ads/296966/>. The article recounts the executive vice president of advertising at the *New York Times* telling investors that Paid Posts comprised “inside 10%” of the company's digital ad revenue in 2014, or up to \$18 million dollars of native ads. She revealed that Paid Posts had “a lot of demand,” and that approximately 40 brands bought paid posts in 2014, with 50 campaigns running on the *New York Times*' website and in its mobile apps. *Id.*

C. Strategies to Promote Effective Self-Regulation

The third proposal is an attempt to promote enlightened corporate self-interest through collective action. As such, it engages in revealing and realigning incentives. One might wonder whether effective self-regulation in this space is realistic.²⁸³ Skepticism is natural at least in part because financially strapped news organizations cannot afford to take the high road on native advertising if their competitors are actively engaging in the practice. They face structural incentives to minimize the risks and overplay the benefits. What might be useful, then, is devising strategies that will create incentives for *collective* resistance to those structural incentives.²⁸⁴ But such collective action is highly unlikely unless arguments in its favor are directed not only to publishers, but also to other important stakeholders. If the variety of participants—publishers, advertisers, media lawyers, ad industry and journalism trade associations, and scholarly researchers in the area—can be convinced that effective self-regulation by news organizations will be in everyone’s long-term self-interest, then workable models are more likely to emerge.²⁸⁵ The task, therefore, is to persuade the players that effective self-regulation of native advertising is a “win-win” alternative for both news organizations and advertisers.

A lynchpin of the strategy of persuading news organizations to recalibrate their perceived balance of self-interest vis-à-vis native advertising is to make them face the likely institutional and doctrinal costs of an unhesitating, wholesale commitment to native advertising. It is important for all, or at least mainstream, news organizations that rely on native advertising to recognize the extent to which, by conspicuously blurring the traditional line between advertising and editorial content, they are inviting potentially catastrophic doctrinal and institutional consequences for all news organizations.²⁸⁶ And at least those culturally concerned

283. See, e.g., Goodman, *supra* note 16, at 137–41 (arguing why markets are not sufficient and mandatory sponsorship disclosure regulations are necessary).

284. This is not the kind of collective action that would likely trigger antitrust law concerns.

285. Admittedly, self-regulatory approaches in the advertising context have prompted significant critique. See, e.g., Dale Kunkel et al., *Solution or Smokescreen? Evaluating Industry Self-Regulation of Televised Food Marketing to Children*, 19 COMM. L. & POL’Y 263 (2014) (criticizing self-regulation with respect to food marketing to children); Villafranco & Reilly, *supra* note 85 (noting limits on effectiveness of self-regulation by NAD). For broader critiques of self-regulation in the communications context, see, e.g., Angela Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999). At the same time, arguments have been made supporting the benefits of self-regulation through organizations such as the NAD. See, e.g., Peeler, *supra* note 87, at 444–45. It is beyond the scope of this Article to moderate that debate. It is enough to note for purposes of the proposals here that they do not raise all the concerns articulated in the critiques of self-regulation in the advertising space. The point of the strategy proposed here is to get the various stakeholders to see the alignment of their incentives. Cf. Calo, *supra* note 154, at 1022–24 (characterizing behavioral economics as problem solving via realigning incentives).

286. See, e.g., Colhoun, *Disguising Ads*, *supra* note 8 (“[D]isguising ads . . . likely lowers the credibility of an outlet.”).

Admittedly, the threat may be less of a concern right now for digital-native hybrid news sites online (such as BuzzFeed), whose readers may know exactly what to expect. On the other hand, to the extent that such hybrid sites evolve into more mainstream news

with professional standards and the democratic role of the press will be concerned that their activities will directly degrade the communicative environment and public discourse.²⁸⁷

This is not to suggest that these institutions are somehow too unsophisticated to recognize such threats.²⁸⁸ Rather, the problem is that they are constrained by three factors: the reality that desperation and competition concentrate even the institutional mind on immediate solutions, the fact that decision-making in hierarchical organizations is often in the hands of those with short-term economic horizons, and the possibility that the media bar has led the press to an unduly sanguine view of its constitutional protections.

Because publishers are not confronted with ineluctable evidence about the tarnishing impact of native advertising on news brands, decision-makers can conveniently respond to immediate market needs—and their competitors’ actions—without considering the long view. Yet the mid- and long-term reputational impact on news organizations is only now starting to be studied,²⁸⁹ and the long view suggests that, over time, insufficiently transparent native advertising appears to erode reader trust in the news sites themselves.²⁹⁰

outlets, their interests too are likely to align with those of the traditional news organizations. See also Tushnet, *supra* note 187, at 9 (discussing the inefficiency of generalized consumer skepticism). And reputation is the key to consumer acceptance of mixed hard news and “audience-pleasing frivolity.” Ann Friedman, *Why Serious Journalism Can Coexist with Audience-Pleasing Content*, COLUM. JOURNALISM REV., Feb. 20, 2015, http://www.cjr.org/behind_the_news/serious_journalism_content.php?utm_source=CJR+Legacy&utm_campaign=e587b7d09d-2_26_15+CJR&utm_medium=email&utm_term=0_b59738358c-e587b7d09d-%5BLIST_EMAIL_ID%5D&ct=t%282_26_15+CJR%29.

287. Goodman, *supra* note 16, at 112–13 (discussing the nature of the threat).

288. Of course, the concern about native advertising harming the news organization’s own brand is not news to the publishers themselves. After all, it was the *Wall Street Journal*’s editor who warned of the dangers of native advertising as a “Faustian pact” in 2013. Pompeo, *supra* note 1 (quoting *Wall St. Journal* Editor Gerard Baker).

289. See Patrick Howe & Brady Teufel, *Native Advertising and Digital Natives: The Effects of Age and Advertisement Format on News Website Credibility Judgments*, 4 INT’L SYMP. ON ONLINE JOURNALISM 78, 79–81 (2014) (reviewing the sparse literature); but cf. James T. Cole II & Jennifer D. Greer, *Audience Response to Brand Journalism: The Effect of Frame, Source, and Involvement*, 90 JOURNALISM & MASS COMM. Q., 673, 674 (2013) (describing the dearth of academic research on how audiences react to custom magazines). The Tow Center and the Reuters Institute for the Study of Journalism at Oxford are apparently planning to survey 2000 respondents per country in the United States and Europe “creating one of the broadest analyses about credibility.” Colhoun, *Disguising Ads*, *supra* note 8 (quoting Tow Center fellow). The Tow/Reuters study designers expect to see consumers “lose trust in the host news organization.” *Id.*

290. Of the relatively small number of studies available, even those produced on behalf of the advertising industry suggest a negative effect on credibility. For example, a recent study of people’s attitudes toward native advertising revealed that while brands benefit from appearing on highly trusted media sites, 62% of study respondents said that the native ads did not help the reputations of the news sites. *IAB Study*, *supra* note 104; see also, Tom Foremski, *Study on ‘Native Advertising’ Finds Benefit for Brands, Risks for Publishers*, ZDNET (July 24, 2014, 4:12 PM), <http://www.zdnet.com/article/study-on-native-advertising-finds-benefits-for-brands-risks-for-publishers/> (“The study shows that media companies carry

Although one might think that this concern about news organizations' own brand integrity would be dispositive, one of the constraints here is the limited view of many of the corporate executives and managers charged with funding decisions for news organizations. Many such institutions today are publicly held corporations. The short term horizon is often a consequence of executives' desire to show short-term gains to their shareholders in such ownership structures. By contrast to the future-focused reputational incentives that actuated many of the family-owned newspaper dynasties of the twentieth century,²⁹¹ newspaper management today is most interested in (and judged by) short-term economic results. Current executives' incentives to show short-term hikes in share prices thus do not factor in longer term institutional harms.

Revealing the longer-term harms might promote a more complex risk/return strategy and a more nuanced deployment of native advertising. But how could that be accomplished, if short-term decision-making is rational in the current press structure? First, if the news organizations were to act collectively, competitive advantage would not be as driving a factor, and the executives' share-price-focused decisions would not need to be so risk-taking. Second, even if a corporate decision-maker has the ultimate decisional responsibility in any given situation, institutional decisions often straddle conflicts within different participating parts of institutions. If the true costs of an uncritical native advertising strategy are made clear, institutional participants (such as professional journalists and editors) can put pressure on the business executives.²⁹² They can use publicity and the threat of public shaming to do so. Nudging pressure under those sorts of circumstances might well tip the balance of power among contending groups. Similarly, debt-holders and even some shareholders can seek more accountability from management with respect to long-term risks of an "all-in" native advertising strategy.²⁹³

a far higher risk to their reputation and value perception in allowing native advertising than their brand advertisers."'). Although business news and entertainment news sites were seen as less problematic, general news sites running native ads exposed their publishers to reputational risk. *Id.* While the IAB *Native Advertising Playbook* recommended on the basis of these findings that publishers "walk away from advertisers who aren't relevant/trusted," that is a recommendation that would be very difficult to effectuate consistently. *IAB Study*, *supra* note 104. It is also silent on the deeper reasons for distrust. Most of the few scholarly studies, while not conclusive, also suggest negative credibility effects for the news publishers. *See, e.g.*, Elisabeth Clark, *Research Shows Readers Lose Trust with Native Advertising. Is the Revenue Worth It?*, INMA (Aug. 24, 2014), <http://www.inma.org/blogs/value-content/post.cfm/research-shows-readers-lose-trust-with-native-advertising-is-the-revenue-worth-it>. Admittedly, a recent article reporting the results of a small study concluded that the negative impact on credibility expected by the authors was not in fact borne out by their results. Howe & Teufel, *supra* note 289. However, as Professors Howe and Teufel admit, there are a number of limitations to their study. *Id.* at 87.

291. *See* C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (Cambridge Univ. Press ed., 2007) (noting differences between family and corporate-owned newspapers).

292. *Cf.* Plunkett & Quinn, *supra* note 122.

293. One can question whether shareholder involvement on these issues is either likely or desirable. The reality of the ownership of public corporations today, by and large, is that stock is not held for very long periods of time by the stockholders. Even if influential

Ironically, the media bar may be another of the blind spots for news organizations. So, an additional strategy to promote collective action by news organizations would be to direct attention to their lawyers' recommendations. Professor Amy Gajda has described the breadth, and "knee-jerk" character, of the First Amendment arguments made today by media lawyers for the full range of speakers and publishers.²⁹⁴ Such confidence in the protections of the First Amendment is already quite questionable, even without the complicating factor of native advertising.²⁹⁵ When that element is factored into the picture, such news organizations might have to become less sanguine concerning their constitutional and other special protections. To the extent that a rosy, backward-looking First Amendment world-view stops the media bar and its press clients from realistically facing the possibility of the loss of important institutional leverage and First Amendment protections, the publishers may not adequately recognize the need to check a headlong rush into the current model of native advertising. Further complicating the analysis is the increasing extent to which lawyers for technology companies are envisioning and "shaping the future of free expression worldwide."²⁹⁶

In addition to arguments directed at publishers, it could be useful for advertisers themselves to recognize the benefits of advertising on news venues with continuing high credibility. From one point of view, it could be said that, at any given moment, there may be little economic reason for an advertiser to care about

institutional stockholders (such as hedge funds) have been shown to be not as "short term" in their investments as had originally been supposed, their stockholding horizon is not generally a multi-year investment. In any event, even if some of the institutional shareholders (pension funds, labor unions and the like) might be disposed to consider the nonmonetary issues, the majority of shareholders are likely to focus on the short term share price. This is not the end of the story, however. Although this is, of course, subject to falsification by empirical study, it seems reasonable to assume that bondholders and others holding news organizations' debt would have longer time horizons and a potentially greater interest than current managers and even current shareholders in the future financial risks facing their firms.

It is, of course, troubling to suggest anything remotely resembling shareholder or debtholder control over journalistic content decisions. However, that is not what is being proposed here. If persuasive data about the threat of native advertising to news organizations' own credibility were publicized, there would be some stakeholders with an interest in the long term impact of risky decisions with short term benefits. The executive decision-makers would not be the only voices. These stakeholders could provide push-back against media executives' short-term economic decisions. Rather than censoring the news organizations, these participants would be promoting editorial independence and credible journalism.

294. See GAJDA, *supra* note 23, at 192–221 (noting, and criticizing, the media bar's calls for absolute First Amendment protection of any and all press activities).

295. Jones, *supra* note 19, at 271; GAJDA, *supra* note 23, at 2–3.

296. See generally Ammori, *supra* note 168. Not only are such lawyers representing commercial entities with more mixed economic and expressive interests than traditional stand-alone media organizations, but they are also likely to be more focused on Internet service provider immunity under Section 230 of the Communications Decency Act and transnational law regarding expression, than on the First Amendment. See *id.* at 2262–63. Less exclusively focused on the First Amendment—a "local ordinance" interpreted by a "local tribunal," *id.* at 2263—lawyers for these companies may constitute a counterweight to the remaining traditional media bar. This too raises concerns, at a minimum of the pendulum swinging too far in the other direction.

the future reputation of the publisher. This is particularly true if the advertiser has other avenues through which to reach the customer demographic of choice.²⁹⁷ The problem, however, is that advertisers will still have to advertise somewhere. And the established news organizations are still better venues than striking out entirely on their own.²⁹⁸ For example, a recent study of U.S. internet traffic to 26 of the top news websites concludes that, although Facebook and search engines “are critical for bringing added eyeballs to individual stories . . . [and do so] in droves,” direct visitors to a news site have a higher level of engagement—spend much more time, view many more pages of content, and return more frequently—than visitors referred by a search engine or Facebook.²⁹⁹ In addition, to the extent that people access the news via apps on mobile devices, the move to mobile is likely to increase news organizations’ (rather than Internet intermediaries’) control over news content. Moreover, if the brands leave the news sites because they can no longer obtain the reputational benefit of association with the news organization’s brand, they will move to Facebook or other social media in order to disseminate their messages. But Facebook, with its own economic interests and its terms of service, will not necessarily be more hospitable to the brands than the news venues. Thus, it might persuasively be argued to advertisers that even news organizations with high-level standards for native advertising would in fact be more beneficial to advertiser self-interest than direct advertising by the brands via intermediated social media.

When information about native advertising in the news space is broadly publicized on a real-time basis, institutions that have more at stake in terms of power and authority might well perceive the benefits of attempting to control the behavior of their competitors. After all, if native advertising by some push-the-envelope publishers casts the entire commercial journalism sector into disrepute, those with the more balanced approaches should have incentives to act collectively. If the news publishers with well-received brands can be convinced, on the basis of robust empirical data, that native advertising will tarnish their own brands, then they will have incentives to engage in collective self-regulation. And if such a move takes place collectively, then the competitive gaming problem is reduced. Ethics codes or rules are likely to gain more adherents when news organizations see their interests as common.³⁰⁰

Even if some outliers do not comply with such a self-regulatory regime, the “reputable” and independent news brands can use the distinction to differentiate their own brands further. Something like a “*Good Housekeeping* seal of approval” for independence and credibility could add monetizable brand cachet to the

297. See Meyer, *supra* note 9 (describing direct engagement between brands and customers via brand journalism unmediated by media).

298. There are limits to the effectiveness and scope of direct communications by brands on their own sites or on Facebook at this time.

299. Amy Mitchell et al., *Social, Search and Direct: Pathways to Digital News*, PEW RES. CTR. (Mar. 13, 2014), <http://www.journalism.org/2014/03/13/social-search-direct/>.

300. A helpful self-regulatory approach seeking to foster editorial integrity would ensure that news organizations’ native advertising policies and ethical rules would be drafted by the editorial (and not the sales) staff and heavily publicized.

mainstream news organizations participating in the collective self-regulatory experiment.

What kind of collective self-regulation might result from this process of facing the dangers of native advertising? The specifics are hard to predict, but one simple answer is the development of—and more consistent adherence to—ethics codes addressing native advertising for both journalistic organizations and advertisers. On the advertising side, the online advertising industry has already issued guidance recommending a meaningful degree of sponsorship disclosure. The goal there is to promote compliance with that guidance by brands, which would be more likely to occur if NAD takes the guidance seriously. On the journalistic side, a common self-regulatory model has not yet emerged.³⁰¹ Newly developing, hybrid forms of digital journalism are said to require “a more streamlined, contemporary set of editorial standards that fit the Internet era.”³⁰² The Online News Association (“ONA”), the world’s largest trade organization of digital journalists, is formulating new editorial standards in a “do-it-yourself” ethics code.³⁰³ The International Chamber of Commerce has issued guidance on native advertising emphasizing sponsorship identification.³⁰⁴ The Society of Professional Journalists could profit from looking at the variety of principles under which different news organizations are currently structuring their native advertising and distill best practices not only for labeling, but for reinforcing the “church-state” separation in organizations with changing internal structures.³⁰⁵ The negotiated compliance agreements included in

301. What was there—for example, the ethics code of the American Society of Magazine Editors—was unrealistically prohibitive of native advertising and therefore unlikely to be widely followed. *See* AM. SOC’Y OF MAG. EDITORS, *ASME Guidelines for Editors and Publishers* (Apr. 15, 2015), <http://www.magazine.org/asme/editorial-guidelines>. The ASME guidelines, if read strictly, appeared effectively to prevent native advertising integrated into news sites. As a result, ASME recently changed and liberalized its rules, although its principle “don’t deceive the reader” still remains central. *See* Michael Sebastian, *Magazine Trade Group Overhauls Advertising Guidelines*, ADAGE (Apr. 15, 2015), <http://adage.com/article/media/asme-dramatically-overhauls-guidelines-advertising/298053/>.

302. Riordan, *supra* note 130, at 3.

303. *Id.* at 9. The mix-and-match approach consisting of a baseline of mandatory principles for all digital journalists, with additional optional ones tailored to the character of the specific outlet.

304. INT’L CHAMBER OF COMMERCE COMM’N ON MKTG. AND ADVERT., *ICC Guidance on Native Advertising*, Doc. No. 240-712 (2015), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2015/ICC-Guidance-on-Native-Advertising/>; *but cf.* Damaris Colhoun, *Tracking Your Every Online Move*, COLUM. JOURNALISM REV., Feb. 18, 2015, http://www.cjr.org/behind_the_news/native_ad_user_tracking.php (describing a recent BBB warning that companies marketing via native advertising and engaging in online tracking must comply with the BBB’s privacy code and alert them to the tracking).

305. The recently revised SPJ Code of Ethics relevantly provides as follows: “Deny favored treatment to advertisers, donors or any other special interests, and resist internal and external pressure to influence coverage. . . . Distinguish news from advertising and shun hybrids that blur the lines between the two. Prominently label sponsored content.” SOC’Y OF PROF’L JOURNALISTS, SPJ CODE OF ETHICS (Sept. 6, 2014), <http://www.spj.org/ethicscode.asp>.

recent FCC Consent Decrees with licensees that violated commercial sponsorship rules might also prove fruitful.³⁰⁶ Importantly, the work of the journalistic and ad industry trade associations would benefit from proceeding each with reference to the other.

We must, of course, address the risk that such self-regulatory initiatives could turn out to be little more than illusory solutions. Why should we believe that, instead of the development of collective-transparency norms, news organizations would not engage in collusive activity in order to prevent revelation of stealth campaigns? After all, if consumers do not in fact realize that they have been deceived as to source, the news organizations should not be subject to a credibility drop.³⁰⁷ Or, even if codes of conduct have been adopted, what is to stop some news organizations and advertisers from engaging in gaming strategies to avoid or limit compliance?

Ultimately, there is no way to answer this question with certainty. Whether the experiment is worthwhile will depend on one's view of the relative likelihood of a good-faith self-regulatory process.³⁰⁸ Two interconnected factors should be considered in that assessment: the professional journalistic norms and culture of the news organizations, and the existence of a journalistic cadre that can serve as a constituency holding the publishers to their commitments. The assessment of whether regulation could realistically be in the offing, via adjudication even if not rulemaking, is also relevant. These elements do not necessarily lead to a single reassuring conclusion, of course. Given the financial difficulties facing publishers, journalists afraid for their jobs may not stand together to put pressure on publishers. Given how slowly both legislative and administrative wheels grind, the shadow of potential regulation might not lead to much bargaining among the regulated. And

306. For example, KTNV-TV in Las Vegas settled a sponsorship ID violation case with the FCC in return for the payment of \$115,000 and agreement to effectuate a "compliance plan" in 2014. *See* Press Release, Fed. Comms. Comm'n, Journal Broad. Corp. to Pay \$115,000 Penalty for Airing Paid Ads Posing As Station's Special Reports, (Dec. 5, 2014), <https://www.fcc.gov/document/ktnv-tv-pay-115k-violation-sponsorship-id-rules>; *see also* Weiss, *supra* note 83 (describing the case). The Compliance Plan would require the appointment of a Compliance Officer, adoption of a detailed Compliance Plan and Compliance Manual, education of sponsors with respect to sponsorship ID requirements, and a series of reports to the FCC and the licensee's Board of Directors.

307. Or if all the news organizations are corrupt (or at least all engaging in native advertising), then would a drop in credibility across the board really have an impact as a practical matter? This is the easier objection. Consumers will not assess all news organizations as equally culpable with respect to deception. And it is unrealistic to think that the hidden will not, at some point, be revealed. The longer the deception, the more furious the customer.

308. For points of view skeptical of self-regulation, *see, e.g.,* Colhoun, *Victor Pickard, supra* note 97; Bakshi, *supra* note 6, at 22. As for Professor Margaret Jane Radin's broader warnings about the democratic degradation that can accompany private standardization and formal disclosure in contracts, namely "mass-market deletion of rights to meaningful redress of grievances," Radin, *supra* note 245, at 14, native advertising is precisely one context in which private-press industry agreements for self-restraint could forestall democratic degradation by deterring advertisers from applying to the courts to constitutionalize silence in the service of purely commercial interests.

given changes in news culture and practices, traditional norms might not prevail against participants who see some value in collaborations across the commercial/editorial divide. Still, this Article supports taking the leap of faith that most news organizations, at least of the more traditional sort, would sincerely attempt to keep faith with their professional roles, so long as their competitors did not make that impossible. An experiment in collective action could help ensure that.

CONCLUSION

The digital news landscape presents unprecedented challenges for news organizations. The traditional business model that sustained newspapers during the twentieth century is dead. Instead, innovative advertising techniques have developed as replacements. Most of these modern techniques involve disguising commercial advertising by seamlessly integrating it into editorial content, both in entertainment and in news venues. Everyone is said to win with such marketing: consumers by having access to valuable and interesting content rather than irritating ads, advertisers by having satisfied customers whose brand loyalty they can build and whose browsing experience they can mine for information, and news organizations by finally being able to halt the existential financial crisis they have faced for the past decade.

The problem, however, is that the cure may be worse than the disease, particularly with respect to “stealth advertising” in news contexts. The transitory financial bump of native advertising will ultimately pale in light of the harm to the credibility of news organizations from their lemming-like foray into native advertising. It is particularly troubling that news organizations are themselves producing such advertising content in-house and leasing their editorial content to be used for marketing by brands. Thus, not only does the new fad of native advertising pose significant threats of consumer confusion and deception, but it also presents deeper and broader dangers to the editorial independence and unbiased news judgment to which we aspire, and to the legitimacy, power, and democratic centrality of the press as an institution.

So what is to be done? Expecting financially ailing news organizations to reject native advertising at the very moment of its increasing profitability and popularity is unrealistic. This means that proposed solutions must be crafted from the vantage point of the second best. Three approaches have been suggested in that spirit. First, and contrary to the arguments of disclosure-skeptics, there is little reason to abandon transparency in ad labeling as a goal so long as the labeling rules are crafted with a view to robust empirical support. Second, additional benefits designed to enable oversight of how news organizations are operationalizing native advertising can be gleaned from corporate-level disclosures about the news organizations’ advertisers and ad content production relationships. Third, despite structural roadblocks to collective self-regulation by news organizations presenting native advertising, persuasive strategies are available to enhance recognition of aligned interests by advertisers, news organizations, trade associations, and media lawyers. These solutions seek to promote—although, regrettably, they cannot guarantee—a diverse Fourth Estate that encourages accountability journalism.