

**EXTRA!! EXTRA!! CLICK ALL ABOUT IT?
MODERNIZING PUBLIC NOTICE LAWS IN A DIGITAL AGE**

*Daniel S. Cohen and Brian D. Koosed**

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For over 100 years, print newspapers have been a bedrock institution in American society, providing an affordable and effective means of mass communication. The federal and state governments have used print newspapers to facilitate the public's access to a variety of important information by implementing public notice laws. The mass adoption of the Internet, however, has disrupted the print newspaper industry, giving rise to digital news. As a result, the demand for print newspapers has declined. This reduced demand is not uniform; rather, there is a growing divide between print newspaper and online newspaper readers, often along socio-economic and generational lines. A key consequence of these developments is the diminishing efficacy of providing public notices through print newspapers. State legislatures across the United States have recognized this troubling trend. Over the last decade, some state legislatures have amended their public notice laws to include online newspapers or online repositories, while others have debated contentiously but ultimately decided not to implement such reforms. The various reforms enacted, however, may not be sufficient, in large part because they still tether notice to the print newspaper industry. This Article examines the rise and decline of print newspapers, comments on the debate over public notice law reform, and proposes an alternative to previously proposed and enacted laws: a technologically neutral set of standards, with one or more accompanying safe harbors tailored to the socioeconomic and demographic backgrounds of the particular community to which they apply. By decoupling public notice requirements from the print newspaper industry, this Article's proposal would enable governments and private entities to devise notices that more consistently achieve the intended purpose of public notice laws: actual notice.

INTRODUCTION

THE “Printing Revolution” may have begun with the Gutenberg Bible,¹ paving the way for the pamphlets and leaflets that spurred the American and French Revolutions, but its most prevalent descendant

¹ *Gutenberg and the Printing Revolution in Europe*, Bill of Rights in Action, 24 CONS. RIGHTS FOUND. 3 (2009), <http://www.crf-usa.org/bill-of-rights-in-action/bria-24-3-b-gutenberg-and-the-printing-revolution-in-europe> (last visited Dec. 11, 2018).

today remains the print newspaper. Indeed, print newspapers have been a bedrock institution of the United States for most of its history as a fast and relatively inexpensive means to regularly distribute information to a wide range of people.²

Print newspapers' prominence is reflected in, among other things, our public notice laws. The first public notice law in the United States was enacted by Congress in 1789, shortly after the U.S. Constitution was adopted.³ The law required the Secretary of State to publish every bill, order, resolution, and vote of Congress in at least three public newspapers.⁴ Beginning in the 19th century, state legislatures throughout the United States began enacting complementary laws requiring both government entities and private actors to publish certain public notices in newspapers.⁵ By 1899, 22 states had enacted public notice laws.⁶ By the end of World War II, another 17 states ratified public notice laws.⁷ Before the turn of the century, another 11 states and the District of Columbia implemented such laws.⁸ Then and now, the purpose of these laws remains the same: to notify the public of important government actions, and to notify communities affected by certain activities by private actors (such as a bank's foreclosure on a private home), in a timely and accessible manner.⁹

For example, local and state governments generally must publish the bidding process for public contracts, or publish a list of unclaimed property, in widely circulated local print newspapers.¹⁰ Similarly, in many states, notices of foreclosure or the establishment of various financial institutions must be published in a newspaper that the affected community

² SHANNON E. MARTIN AND KATHLEEN A. HANSEN, *NEWSPAPERS OF RECORD IN A DIGITAL AGE 55* (Praeger 1998).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 66.

⁶ *Id.* at 68–70. The other states were: Georgia, Missouri, Florida, Kansas, Iowa, South Carolina, Illinois, Alabama, South Dakota, Louisiana, New Jersey, Minnesota, Arkansas, New Hampshire, Oklahoma, Wyoming, Delaware, and Colorado.

⁷ *Id.* at 70–71. These states were: Arizona, Vermont, Connecticut, California, Massachusetts, Nebraska, Idaho, Montana, Washington, Oregon, Nevada, Indiana, Pennsylvania, Utah, Texas, New Mexico, and North Carolina.

⁸ *Id.* at 71–72. These jurisdictions are: Washington, D.C., Virginia, Ohio, Maine, Kentucky, West Virginia, Tennessee, Hawaii, Mississippi, Rhode Island, Maryland, and Alaska.

⁹ *Id.* at 62 (for a discussion on the purpose of public notice laws).

¹⁰ *See, e.g.*, GA. CODE ANN. § 44-12-215 (West 2015) (requiring public notice of reports of unclaimed property); REV. CODE WASH. (A.R.C.W.) § 63.29.180 (West 2015) (same); and CAL. PUB. CONTR. CODE. § 20164 (counties must publish an advertisement for bids for public works contracts in a daily newspaper of general circulation published in the county before awarding such contracts).

reads.¹¹ By requiring such “notice by publication,” state governments have sought to make their affairs more transparent while keeping their constituents apprised of various matters of importance in the public and private sectors.

Notice via newspaper, however, is a means to an end, and one that is becoming increasingly less effective due to structural and technological changes in the media landscape nationwide. Specifically, print newspaper readership has steeply declined since the late 1980s, as large swathes of the country have completed the transformation from an analog consumption of media to a largely digital one.¹² For example, in 2017, fewer than one in five Americans between the ages of 25 and 34 reported that they had read a print newspaper the previous day.¹³ Although these developments are not prevalent among younger and more urban Americans, particularly those in the “Millennial” generation,¹⁴ the transition to utilizing digital platforms is actually common across age groups. From 1999 to 2015, daily print newspaper readership significantly decreased across all age groups, as reflected in the table below:

Decline in Daily Newspaper Readership in the United States Across Age Brackets 1999–2015 (Pew Research Center)¹⁵	
18–24 years old	-26%
25–34 years old	-27%
35–44 years old	-33%
45–54 years old	-35%
55–64 years old	-31%
65 years old and older	-22%

¹¹ See, e.g., ME. REV. STAT. TIT. 9-B, § 312 (1997) (requiring entities seeking to charter a trust company in Maine to publish a notice declaring their intent in one or more newspapers of general circulation); and ALA. CODE § 35-10-3 (1972) (requiring public notice of the time, place, terms, and purpose of a foreclosure sale in a newspaper prior to selling a foreclosed on home the deed to which does not contain a power of sale provision).

¹² Colin Sparks et al., *The Impact of Digital Media on Newspapers: Comparing Responses in China and the United States*, 1 GLOB. MEDIA AND CHINA 186, 190 (2016).

¹³ Michael Brandess, Christopher Cahill, & Jonathan Friedland, *Does Newspaper Notice Constitute “Commercially Reasonable Notice” in 2016?*, 47 U.C.C. L. J. 93 (2017).

¹⁴ Millennials are the generation of Americans born between 1981 and 1996. See Michael Dimoc, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RES. CTR. (Mar. 1, 2018), <http://www.pewresearch.org/fact-tank/2018/03/01/defining-generations-where-millennials-end-and-post-millennials-begin/> (last visited Dec. 11, 2018).

¹⁵ *Newspapers: Daily Readership by Age* (2016), PEW RES. CTR., <http://www.journalism.org/chart/5802/>.

These developments have created challenges for all Americans who rely on newspapers for public notice of certain government or private-sector activity, particularly because these changes in media consumption have not yet been met with a sufficient policy response from state and local legislators.

Indeed, despite these socio-economic and technological transformations, all of which have called into question the long-term viability of a print newspaper-based public notice system, only a dozen states have updated their public notice laws over the last decade.¹⁶ Given how drastically the information economy has changed in the United States during this time, this meager response has undermined the efficacy of existing public notice laws and the policy rationale behind them.

This Article will provide a brief look at some of the trends in the print newspaper industry that are straining the effectiveness of public notice laws and some of the recent efforts by state legislators to reform these laws. This Article will also comment on some of the proposed solutions that have been offered to reform existing public notice laws. Neither the status quo nor a full shift to Internet publication is the right answer, in our view. Instead, lawmakers need to consider how their constituents absorb news in each individual state or locality, taking into account their constituents' particular socioeconomic and demographic characteristics. Lawmakers also need to think critically about the challenges inherent in tying public notice laws to particular technologies (whether print, Internet, or otherwise).

Finally, with this background in mind, this Article proposes a solution: adopting a technologically neutral approach for public notice laws that would allow governments and private entities to choose their own method of notice, subject to a statutorily defined minimum standard. This technologically neutral approach would be coupled with one or more "safe harbors" established by state or local regulators, which would grant a presumption of compliance with the generally applicable, technologically neutral standard. Each such "safe harbor" would then be tailored to the particular technologies used by constituents in the area (given their socioeconomic and demographic characteristics, among other things). We believe that this approach would be the most optimal one given current circumstances – it would avoid the need to continually update public notice laws in light of technological changes, while providing significant flexibility, so that public notice laws ensure that notice is actually effectuated to diverse communities.

I. THE RISE AND DECLINE OF PRINT NEWSPAPERS

The vast majority of the states have enacted either a "general public notice law" or specific statutes that require certain government entities and private actors to publish specific information in print newspapers of

¹⁶ See *infra* Part IV.

general circulation. Historically, these laws were implemented in the context of the significant growth of the print newspaper business during the late 19th and most of the 20th century. Over the last 30 years, however, the print newspaper industry has been in decline, leading to reduced access to print newspapers, particularly in rural and low-income communities. Meanwhile, over the last 20 years or so, digital news, including news from social media sources, has been on the rise. These dueling trends divide Americans along age, class, and geography, as older, lower-income Americans and rural households are less likely to have access to digital news than younger, wealthier, and more urban Americans. Together, the rise of the print/digital news divide and the continuing decline of print newspapers themselves have resulted in increasingly inadequate notice for some of the nation's most disadvantaged citizens.

A. The Joint Rise of Public Notice Laws and Rise of Print Newspapers

In many ways, the underlying premise for existing public notice laws is the lengthy – and assumed-to-be continuous – rise of the print newspaper into a nearly ubiquitous vehicle for collecting and disseminating information to diverse audiences. Today, nearly every state requires private actors and government entities to publish notices in print newspapers to broadcast certain information to specific groups or to the general population writ large.¹⁷ Forty-three states have enacted a “general public notice” law, i.e., a statute that mandates that every notice required to be published by law, court order, or a different legally binding mechanism must be published in a print newspaper.¹⁸ For example, Arkansas’s general public notice law states that:

All advertisements and orders of publication required by law or order of any court, or in conformity with any deed of trust, or real estate mortgage, or chattel mortgage where the amount therein received exceeds the sum of three hundred fifty dollars (\$350), or power of attorney or administrators’ notices, to be made, shall be published in at least one (1) newspaper . . .¹⁹

¹⁷ *General Laws*, PUB. NOTICE RES. CTR., <https://www.pnrc.net/subscribers/statutes-comparative-by-state/eligibility/> (last visited Nov. 11, 2018).

¹⁸ These states are: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin. *See id.*

¹⁹ AR. CODE ANN. § 16-3-101(a) (West 2010).

Similarly, Wisconsin's statute states, "[e]xcept as otherwise provided by law, a legal notice shall be published in a newspaper likely to give notice in the area or to the person affected."²⁰ Each state has implemented a set of criteria that a newspaper must meet to be eligible to publish public notices. Some states, such as Connecticut, require such notices to be published in a newspaper of "substantial circulation,"²¹ while other states, like Ohio, refer to newspapers of "general circulation."²² Typically, to be a newspaper of "general circulation," a newspaper must provide content of general interest to the general public within the relevant community to be notified.²³ In each of these states, a legally required notice must be published in an eligible newspaper; otherwise, the notice is invalid.

In addition, many states have implemented specific statutes that require notice of certain events, such as foreclosures,²⁴ to be published in print newspapers.²⁵ South Dakota, for instance, requires the Department of Legislative Audit to post notices informing the public when municipalities and various other government units fail to submit timely audit reports through both print newspapers and its own departmental website.²⁶ In South Carolina, meanwhile, municipalities must publish assessments for public improvements in print newspapers of general circulation,²⁷ and anyone who wishes to sell recovered property must first advertise the sale in "a local newspaper of general circulation where the property will be sold."²⁸ Maine²⁹ and Texas,³⁰ among other states, require the founders of a trust company to publish notices of their intent to form a trust company in a newspaper of general circulation in the community in which the company will operate.

²⁰ W.S.A. § 985.02(1) (West 2018). *See also*, OH. REV. CODE ANN. § 7.12 (Baldwin's 2011).

²¹ *See, e.g.*, C.G.S.A. § 7-344 & 12-563.

²² OH. REV. CODE ANN § 119.07 (Baldwin's 2007).

²³ *See, e.g.*, Op. S.C. Att'y Gen., 2015 WL 6745997. *See also* 2008 Op. Oh. Att'y Gen. No. 2008-013 (Ohio law defines a newspaper of general circulation as a newspaper that, among other things, is "circulated generally in the political subdivision in which it is published" and is "of a type to which the general public resorts for passing events of a political, religious, commercial, and social nature, current happenings, announcements, miscellaneous reading matter, advertisements, and other notices." OH. REV. CODE ANN. § 7.12 (Baldwin's 2011).

²⁴ N.J. STAT. ANN. § 2A:50-64 (2013).

²⁵ MARTIN & HANSEN, *supra* note 2, at 68–72.

²⁶ *Legislative Front Still Calm*, PUB. NOTICE RES. CTR. (Apr. 4, 2018), <https://www.pnrc.net/2018/04/04/legislative-front-still-calm/> (last visited Dec. 11, 2018).

²⁷ S. D. CODIFIED LAWS. § 5-37-110 (2008).

²⁸ *Id.* at § 27-21-22

²⁹ 9-B ME. CODE R. § 312 (LexisNexis 1997).

³⁰ 7 Tex. Admin. Code § 21.2(D) (2013).

Like general public notice statutes, these specific public notice laws also limit the types of newspapers that can be used, usually requiring publication in a newspaper of general circulation.³¹ In general, both types of laws prescribe several other requirements, such as the format of the notices to be published, and criteria for a newspaper to be eligible to print a required notice.³² For example, most states set publication frequency requirements and minimum subscription and distribution thresholds for a newspaper to be allowed to publish a legally required notice.³³ Adherence to these requirements is important because, absent compliance with and circulation of these notices, the relevant parties cannot undertake their desired activities, whether they be selling recovered property, forming a trust company, or something else entirely.

Notably, most general and specific public notice laws were enacted around the time print newspapers became the dominant public sources of information.³⁴ The first American newspaper was published in 1690, but newspapers did not become relatively common throughout the original American colonies until the mid-18th century and even then, they were common only among the upper class.³⁵ Beginning in the early 19th century, state legislatures throughout the United States began enacting laws requiring public notice through print newspapers because newspapers were “the only available medium through which state government could communicate relatively efficiently with residents.”³⁶ With the rise of the “penny press”³⁷ newspapers, beginning in the 1830s, print newspapers became popular among low- and medium-income households.³⁸ Between 1870 and 1890, the number of daily newspaper issues increased by nearly 600%, and the number of daily newspapers grew by 400%.³⁹ Capitalizing on newspapers’ expanded readership and growing sales, 22 states enacted public notice laws by the end of the 19th century, including Michigan, Wisconsin, North Dakota, and New York.⁴⁰

³¹ See, e.g., 9-B Me. Code R, § 312 (LexisNexis 1997); Tex. Admin. Code Tit. 7 § 21.2(D) (2013); CAL. GOV’T CODE § 6041 (requiring state, county, and city officials and the courts to publish notices in a newspaper of general circulation within the jurisdiction of the officer).

³² Martin & Hansen, *supra* note 2, at 66–68.

³³ *Id.*

³⁴ *Id.* at 18–34.

³⁵ *Id.* at 18–19, 22.

³⁶ *Id.* at 22.

³⁷ Newspapers adopted steam-driven presses to publish their papers beginning in the 1820s, with increased adoption during the 1830s. Steam-driven presses enabled companies to publish more papers in less time and at a lower cost than prior technology. As a result, new newspapers were established and were sold for a few cents per issue. *Id.* at 24–25.

³⁸ *Id.*

³⁹ *Id.* at 29.

⁴⁰ *Id.* at 68–69.

For most of the 20th century, too, the number and circulation of print newspapers increased. In 1916, nearly 2,500 newspapers were circulated on a daily basis, a historical highpoint.⁴¹ Around this time and up to World War II, 17 more states adopted public notice laws tied to print newspaper publication.⁴² The industry's growth continued to be strong even in the post-World War II era. From 1940 to 1990, daily circulation of weekday print newspapers steadily increased from roughly 40 million units to 60 million units, while Sunday circulation grew from 30 million to 60 million.⁴³ During this time period, the industry generated significant and growing revenues. In the mid-1950s, total revenue (advertising and circulation revenues) for print newspapers was approximately \$4.6 billion, most of which was derived from advertising (\$3.2 billion in 1956).⁴⁴ By the early 1980s, revenue nearly quintupled to about \$25 billion.⁴⁵ Revenue continued to grow until the Great Recession in the mid- and late-2000s, peaking at around \$60 billion.⁴⁶

Advertisements were the biggest driver of revenue for newspapers, particularly beginning in the mid-1970s. From 1960 to the early 1970s, newspapers generated nearly equal revenue from circulation as they did from advertisements.⁴⁷ By 1975, advertising began to generate significantly more revenue than circulation.⁴⁸ In 1990, for example, advertisement revenue was around US\$30 billion, whereas circulation revenue was nearly \$10 billion.⁴⁹ Advertisement revenues grew sharply in the 1990s and continued growing until the Great Recession.⁵⁰

Public notices also raised significant revenues for newspapers during this post-WWII era. By the 2000s, revenues from public notices comprised, on average, 5%–10% of all print newspaper revenue.⁵¹ Unsurprisingly, this era also saw an expansion of public notice laws. Between the end of World War II and the turn of the century, 12 states and the District of Columbia implemented public notice laws.⁵² Given the print newspaper

⁴¹ *Id.* at 33.

⁴² *Id.* at 70–71.

⁴³ *Trends and Facts on Newspapers*, PEW RES. CTR., (last visited Dec. 11, 2018), <http://www.journalism.org/fact-sheet/newspapers/>.

⁴⁴ *Id.* at 6. Figures not adjusted for inflation.

⁴⁵ *Id.* Figures not adjusted for inflation.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

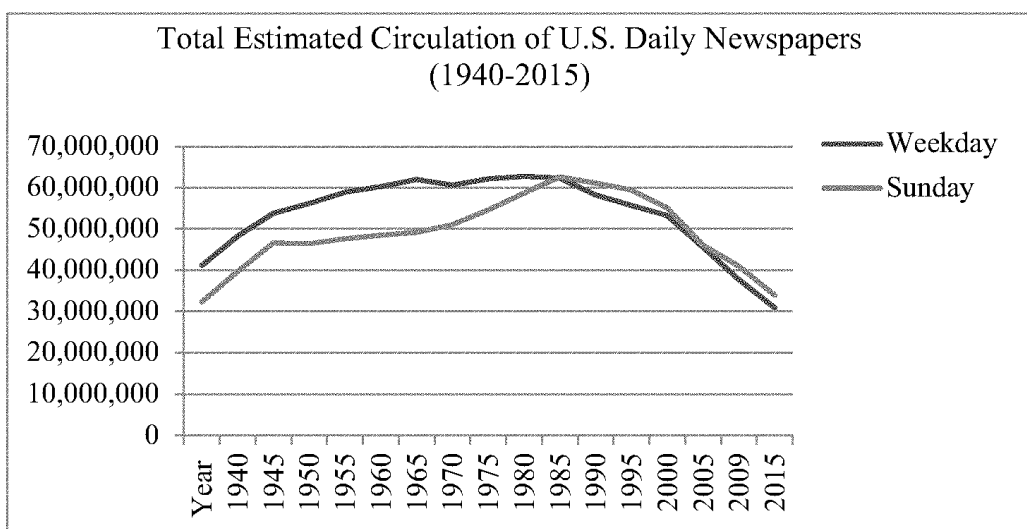
⁵¹ Matthew Weber, *Public Policy and Funding the News*, UNIV. OF SOUTHERN CAL., https://fundingthenews.usc.edu/files/2015/07/6_Carnegie_PublicNotice.pdf (last accessed Dec. 11, 2018),

⁵² Martin & Hansen, *supra* note 2, at 71–72. These states are Virginia, Ohio, Maine, Kentucky, West Virginia, Tennessee, Hawaii, Mississippi, Rhode Island, and Alaska.

industry's wide reach and financial health, it is no surprise that public notice laws were enacted during this time, when nearly every American could reliably be depended upon to receive and read a print newspaper on a weekly, if not daily, basis.

B. What Goes Up, Must Come Down: Print Newspapers Decline and Digital Ones Rise with the Shift to a Digital Information Economy

While the print newspaper industry grew tremendously for more than 50 years after World War II, it has steadily declined since the mid-1990s. Today, advertisement revenue barely outpaces circulation revenue.⁵³ Weekday circulation, for instance, has decreased from 60 million to about 34 million units, and Sunday circulation has declined to 31 million.⁵⁴ This trend is continuing: from 2007 to 2013, daily circulation fell by 14%.⁵⁵



As print circulation has declined, so too has much of the industry.⁵⁶ Newspaper publishers have lost approximately 50% of their employees since 2001.⁵⁷ In 2017, the industry earned US\$16.5 billion in ad-based

⁵³ PEW RES. CTR, *supra* note 43, at 2.

⁵⁴ *Id.* at 1-2.

⁵⁵ Sparks, et al., *supra* note 12, at 190.

⁵⁶ PEW RES. CTR., *supra* note 43, at 5-6.

⁵⁷ *Newspaper Publishers Lose Over Half Their Employment from January 2001 to September 2016*, BUREAU OF LABOR STATISTICS (Apr. 3, 2017), <https://www.bls.gov/opub/ted/2017/newspaper-publishers-lose-over-half-their-employment-from-january-2001-to-september-2016.htm> (last visited Dec. 11, 2018). In 2004, approximately 70,000 newsroom employees worked as editors, reporters, photographers, or film and video editors. By 2017, only 39,000 were so employed, a 45% decline. *Id.*

revenue, down 10% from 2016. Unsurprisingly, there were 126 fewer print newspapers in 2014 than there were in 2004.⁵⁸

Digital news, on the other hand, has generally been growing over the last decade. The number of newsroom employees working in the “digital-native sector” (newspapers that originated on the Internet) nearly doubled from 2008 to 2016.⁵⁹ Further, because of the booming growth of the digital editions of *The New York Times* and *The Wall-Street Journal*, digital circulation was up by 10% in 2017 over 2016, even while overall newspaper circulation declined across much of the industry.⁶⁰

Subscriptions to digital publications are also growing. In 2017, *The New York Times* had over two million paid digital subscribers, while *The Wall-Street Journal*⁶¹ and *The Washington Post* had over one million.⁶² One year later, *The New York Times*’ subscribers list increased to over four million, more than three million of which subscribed to digital content exclusively.⁶³ *The Washington Post*’s growth in “Web-only subscriptions” has also been tremendous, doubling from January 2017 to September 2017 and tripling from September 2016 to September 2017.⁶⁴

This trend is not limited to national newspapers. The *Los Angeles Times*, a leading regional newspaper, experienced a 100% increase in the number of its paid digital subscribers from 2015 to 2017, increasing its paid digital subscriptions to 105,000.⁶⁵ Over that same period, in contrast, the daily weekday circulation for all print newspapers was down 11%.⁶⁶ Sunday circulation declined by a similar 9%.⁶⁷

Social media is also becoming a prominent forum for news. According to the Pew Research Center, in 2018, 20% of U.S. adults reported

⁵⁸ *PRC State of the News Media 2016*, PEW RES. CTR., at 9 (June 13, 2016), <https://assets.pewresearch.org/wp-content/uploads/sites/13/2016/06/30143308/state-of-the-news-media-report-2016-final.pdf> (last visited Dec. 11, 2018) [hereinafter “PRC June 2016”].

⁵⁹ *Digital News Fact Sheet*, PEW RES. CTR. (June 6, 2018), <http://www.journalism.org/fact-sheet/digital-news/> (last visited Dec. 11, 2018) [hereinafter “Digital News Fact Sheet 2018”].

⁶⁰ PEW RES. CTR., *supra* note 43, at 3.

⁶¹ Paul Fletcher, *Washington Post Tops 1 Million in Paid Digital Subscriptions; LA Times Leads Regional Dailies*, FORBES (Sept. 28, 2017), <https://www.forbes.com/sites/paulfletcher/2017/09/28/the-washington-post-tops-one-million-in-paid-digital-subscriptions-la-times-leads-regional-dailies/#1a9391d91bac> (last accessed Dec. 12, 2018).

⁶² *Id.*

⁶³ Jaclyn Peiser, *New York Times Tops 4 Million Mark in Total Subscribers*, N.Y. TIMES (Nov. 1, 2018), <https://www.nytimes.com/2018/11/01/business/media/new-york-times-earnings-subscribers.html> (last accessed Dec. 27, 2018).

⁶⁴ Fletcher, *supra* note 61.

⁶⁵ *Id.*

⁶⁶ Digital News Fact Sheet 2018, *supra* note 59.

⁶⁷ *Id.*

reading the news on social media sites regularly, whereas only 16% regularly glean the news from print newspapers.⁶⁸ Just two years earlier, a greater percentage of adults reported regularly receiving their news from print newspapers than social media.⁶⁹ Unsurprisingly, the percentage of U.S. adults regularly reading their news on newspaper websites exceeds both sources, at 33% in 2018, up from 28% in 2016.⁷⁰ In total, more than 50% of U.S. adults regularly read the news on a digital platform.⁷¹ These persistent trends suggest that print newspapers will reach even smaller audiences as digital news matures.

C. *The Print/Digital Divide: Both Socioeconomic and Generational*

The simplicity of the economic story outlined above—the steady decline of print newspapers as digital news has risen—masks some stark divides among the consumers of both news forms. Simply put, digital news is embraced by different readers than print newspapers. As digital news grows and print newspapers decline, this demographic divide may present challenges for existing state public notice laws.

Print newspaper and digital news readership contrast significantly across age groups. According to the Pew Research Center, in 2014, less than 17% of all people in the United States between the ages of 25–34 reported reading a print newspaper the day before.⁷² In 2016, the median age of a person who read a print newspaper on a weekly basis was 53.5 years old.⁷³ That same year, the median age of a person who read news online was 41.4 years old, a full decade younger.⁷⁴ As for viewers of newspapers on mobile devices, the median age was 38.6 years old.⁷⁵ By 2017, nearly 40% of all readers of digital newspapers were 18–34 years old, whereas only 25% of all print newspaper readers fell within that age bracket.⁷⁶

⁶⁸ Elisha Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR. (Dec. 10, 2018), <http://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> (last accessed Dec. 27, 2018).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Brandess et al., *supra* note 13 at 2.

⁷³ Jim Conaghan, *Young, Old and In-Between: Newspaper Platform Readers Ages are Well-Distributed*, NEWS MEDIA ALLIANCE (May 17, 2017), <https://www.newsmediaalliance.org/age-newspaper-readers-platforms/> (last accessed Dec. 11, 2018).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Half of Newspaper Readers Stick Exclusively to Print*, MARKETINGCHARTS (Jan. 3, 2017), <https://www.marketingcharts.com/industries/media-and-entertainment-73339> (last accessed Dec. 6, 2018).

These generational divides extend to, and are complicated by, socio-economic and educational divides as well. For example, the median income of individuals who only read print newspapers was US\$49,447 in 2014, whereas the median income of individuals who only read newspapers online was US\$73,473.⁷⁷ (For comparison's sake, the median household income in the United States in 2014 was US\$53,657.)⁷⁸ That same year, 40.7% of individuals who only read an online newspaper graduated from college, in contrast to the 23.1% of individuals who only read print newspapers.⁷⁹ Moreover, 39% of print newspaper readers earned a high school degree or did not complete high school, whereas only 29% of print newspaper readers earned a bachelor's or an advanced degree.⁸⁰

The socio-economic and age differences between print and online newspaper readers persist across regions. In 2014, the Pew Research Center conducted a study of newspaper readers in three specific markets—Denver, Colorado; Sioux City, Iowa; and Macon, Georgia. According to the study, in all three cities, people who read print newspapers were less educated and older than those who read online editions of newspapers.⁸¹ In Denver, for example, 39% of people who only read print newspapers never attended college, whereas only 17% of online newspaper-only readers never attended college.⁸² This divide was 52% to 41% in Sioux City, and 59% to 48% in Macon.⁸³ To put these numbers in context, from 2013 to 2017, nearly half of Denver residents (46.5%) ages 25 and over possessed a bachelor's or more advanced degree.⁸⁴ Nearly 22% of Sioux City residents over 25 had a bachelor's or higher degree,⁸⁵ and 25.4% did in

⁷⁷ Presentation, *Today's Newspaper Audience – Print & Online*, INTERSECT at 9, <http://intersectmediasolutions.com/sites/default/files/docs/WhoReadsNewspapers.pdf> (last accessed Dec. 11, 2018).

⁷⁸ *Income and Poverty in the United States: 2014*, U.S. CENSUS BUREAU (Sept. 2015), <https://www.census.gov/library/publications/2015/demo/p60-252.html> (last accessed Dec. 11, 2018).

⁷⁹ INTERSECT, *supra* note 77, at 9.

⁸⁰ *Distribution of Weekly Print Newspaper Audience in the United States in 2015, by Education Level*, STATISTA, <https://www.statista.com/statistics/209554/average-daily-audience-of-us-newspapers-by-education-level/> (last accessed Feb. 17, 2019).

⁸¹ Michael Barthel, *Around Half of Newspaper Readers Rely Only on Print Edition*, PEW RES. CTR. (Jan. 6, 2016), <http://www.pewresearch.org/fact-tank/2016/01/06/around-half-of-newspaper-readers-rely-only-on-print-edition/>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Quick Facts, Denver City, Colorado; United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/denvercitycolorado,US/PST045218>, (last visited Feb. 17, 2019).

⁸⁵ *Quick Facts, Sioux City, Iowa; United States*, U.S. CENSUS BUREAU (last visited Feb. 17, 2019), <https://www.census.gov/quickfacts/fact/table/siouxcityiowa,US/PST045218>.

Macon, Georgia.⁸⁶ Additionally, in Denver and Macon, print newspaper readers had less income than online only readers.⁸⁷ Further, a greater percentage of print-only newspaper readers in Denver and Macon earned less than US \$30,000 annually than online-only newspaper readers.⁸⁸

The age divide was even starker. More than a quarter of print-only newspaper readers in all three cities were 65 years or older, whereas less than 10% of online-only readers were in that age group.⁸⁹ Based on this data about age divides, Michael Barthel, a research associate at the Pew Research Center, concluded that if “the print [newspaper] product become[s] a thing of the past, evidence from these three cities suggests that the impact would be felt disproportionately by about half of their audience—indeed, a particularly vulnerable contingent at that.”⁹⁰

Not just low-income households, but low-income communities are particularly disadvantaged by the growing print-digital divide because print newspapers are disappearing from such locales. “Roughly half of the remaining 7,112 newspapers in the country . . . are located in small and rural communities. The vast majority—around 5,500—have a circulation of less than 15,000.”⁹¹ Moreover, more than 500 newspapers have been closed or merged in rural communities since 2004.⁹² Most of the counties where newspapers closed have poverty rates significantly above the national average.⁹³ Accordingly, the decline in print newspapers is creating “news deserts” in low-income communities:

There are almost 200 of the 3,143 counties in the United States without any paper. An additional 1,449 counties, ranging in size from several hundred residents to more than a million, have only one newspaper, usually a weekly. More than 2,000 have no daily paper. The residents of America’s emerging news deserts⁹⁴ are often its

⁸⁶ *Quick Facts, Macon-Bibb County, Georgia; United States*, U.S. CENSUS BUREAU (last visited Feb. 17, 2019), <https://www.census.gov/quickfacts/fact/table/maconbibbcountygeorgia,US/PST045218>.

⁸⁷ Barthel, *supra* note 81.

⁸⁸ *Id.* A larger percentage of online-only readers (36%) than print-only readers (30%) in Sioux City earned less than US \$30,000 per year, but the disparity was not statistically significant.

⁸⁹ Barthel, *supra* note 81.

⁹⁰ *Id.*

⁹¹ Penelope Muse Abernathy, *The Expanding News Desert*, U. OF N.C. SCH. OF MEDIA AND JOURNALISM CTR. FOR INNOVATION AND SUSTAINABILITY IN LOC. MEDIA (2018), at 10, https://www.cism.org/wp-content/uploads/2018/10/The-Expanding-News-Desert-10_14-Web.pdf.

⁹² Abernathy, *supra* note 91, at 11.

⁹³ *Id.*

⁹⁴ The report defines a “news desert” as a community without a local newspaper or where residents are facing significantly diminished access to the sort of news and information that feeds grassroots democracy. *Id.* at 16.

most vulnerable citizens. They are generally poorer, older and less educated than the average American.⁹⁵

In fact, 18% of residents of these communities are impoverished,⁹⁶ which is greater than the national average of just under 13%.⁹⁷ These trends suggest that, as currently constructed, various states' public notice laws will become increasingly ineffective as time goes on at achieving their only legislative purpose: giving the public actual notice of relevant events.

II. THE DEBATE OVER PUBLIC NOTICE LAW REFORM

These trends have not gone unnoticed among policymakers and print newspaper companies. On the contrary, state lawmakers and the newspaper industry have sparred for most of the last decade over reform packages.⁹⁸ Proponents of reform assert a variety of justifications, ranging from increasing citizens' access to notices through digital media to eliminating a public subsidy to a private industry.⁹⁹ Opponents counter with the need for public accountability and transparency and point to the digital divide between the rich and poor, a divide they believe is bridged by print newspapers.¹⁰⁰ These arguments and others are addressed more fully in this section of the Article, but we believe the relatively recent efforts to amend public notice laws in New Jersey and North Carolina to be particularly instructive in underscoring the contentious arguments that public notice reform brings to the fore.

A. Framing the Debate

1. New Jersey

During the winter of 2016, then-Governor Chris Christie championed a bill¹⁰¹ permitting local governments and private entities to meet their public notice requirements through publication on local government websites, reviving the New Jersey legislature's debate over public notice

⁹⁵ *Id.* at 11.

⁹⁶ Abernathy, *supra* note 91, at 16–17.

⁹⁷ Jessica L. Semega, Kyla R. Fontenot & Melissa A. Kollar, *Income and Poverty in the United States: 2016*, U.S. CENSUS BUREAU (Sept. 2017), at 12, <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf>.

⁹⁸ *See infra* notes 186–89.

⁹⁹ *See, e.g., infra* note 101.

¹⁰⁰ *See, e.g., infra* note 158.

¹⁰¹ Chris Christie, *A Message from Governor Chris Christie on Posting Legal Notices Online*, MEDIUM (Dec. 17, 2016), <https://medium.com/@GovernorChristie/a-message-from-governor-chris-christie-on-posting-legal-notices-online-cf4a98e7f2ae>. *See also* Electronic Publication of Legal Notices Act, S. 2855, 217th Leg. (N.J. 2016), https://www.njleg.state.nj.us/2016/Bills/S3000/2855_I1.PDF.

reform that first arose in 2004.¹⁰² New Jersey law requires that public notices be published in print newspapers, a system that Governor Christie described as “archaic” and “costly,” resulting in at least US\$80 million in expenses for New Jersey residents.¹⁰³ The financial cost was also borne in part, he argued, by thousands of residents in financially precarious positions.¹⁰⁴ For example, New Jersey residents facing foreclosure on their homes paid an average of US\$910 in order to publish the foreclosure notices required under existing New Jersey law.¹⁰⁵ Local governments were also expending significant resources on public notices, according to Governor Christie.¹⁰⁶ The real beneficiaries of the public notice law, he argued, were the print newspaper companies who were given a monopoly over public notices and were thus guaranteed tens of millions of dollars in annual revenue by the law.¹⁰⁷

To remedy this purported monopoly, Governor Christie advocated for a bill that would enact two main reforms of New Jersey’s public notice laws: (i) allowing private entities to publish notices online, and (ii) allowing local governments to publish notices on their own websites.¹⁰⁸ These reforms would reduce costs, Governor Christie argued, while maintaining transparency of government action and, potentially, enabling notices to reach a wider audience.¹⁰⁹ To support these points, he noted that 90% of New Jersey households have Internet access and that those who do not have Internet in their homes can access it for free through any New Jersey public library.¹¹⁰ He also asserted that a little over 20% of New Jersey residents purchase a print newspaper regularly.¹¹¹ Moreover, 532 of the 565 municipalities in the state maintained a website, so publishing notices online would not, according to Governor Christie, raise governmental costs relative to publishing in a print newspaper.¹¹²

The New Jersey Press Association (“NJPA”) launched a counter-campaign to rebut Governor Christie’s claims and oppose his proposed reforms. According to the NJPA, New Jersey newspapers only earned US\$32 million in revenue from public notices in 2016, roughly 40% of the revenue that Governor Christie claimed they had earned.¹¹³ In 2010,

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ Christie, *supra* note 101.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Matt Arco, *Christie-Newspaper Feud: Press Association Releases Legal Ad Costs Disputing Governor*, NJ.COM (Mar. 2, 2017),

the industry generated only US\$20 million in such revenues.¹¹⁴ More fundamentally, opponents of Governor Christie's proposed reform bill argued that low-income households would be disproportionately harmed if public notices were placed online instead of in print newspapers. Nearly 360,000 households earning US\$35,000 or less annually did not have a home Internet connection.¹¹⁵ Online notices also raised transparency concerns, according to the NJPA, because, they claimed, nearly 20% of New Jersey residents do not use the Internet at all.¹¹⁶

Various critics of Governor Christie's proposed reform bill further questioned whether municipalities had the capacity to maintain public notices on their websites or could do so cost-effectively, pointing out that the New Jersey Office of Legislative Services indicated that the bill could actually *raise* municipalities' operating expenses.¹¹⁷ Opponents also raised concerns over job losses in the newspaper industry, noting that hundreds of employees would lose their jobs if the bill passed,¹¹⁸ in part because, for decades, public notices have been a stable source of income for newspapers operating in small communities.¹¹⁹ Finally, opponents questioned Governor Christie's motives, suggesting that his true motivation was to punish various newspapers for their negative coverage of his administration.¹²⁰

For a time, Governor Christie's proposed reform bill appeared headed for enactment in December 2016.¹²¹ However, because of pushback from the newspaper industry, and allegations of supporters' ulterior motives, among other reasons, it never reached the New Jersey Senate floor for a vote.¹²² It has not been revived by the legislature since.

https://www.nj.com/politics/index.ssf/2017/03/christie-newspaper_feud_press_association_releases.html.

¹¹⁴ *Id.*

¹¹⁵ John Reitmeyer, *Does Letting Legal Notices Be Published Solely Online Punish the Press Financially?* NJ SPOTLIGHT, (Dec. 19, 2016), <http://www.njspotlight.com/stories/16/12/18/does-letting-legal-notices-be-published-solely-online-punish-the-press-financially/>.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Martin & Hansen, *supra* note 2, at 56.

¹²⁰ *Id.*

¹²¹ Reitmeyer, *supra* note 114.

¹²² Brent Johnson and Susan Livio, *The Inside Story of How Controversial Christie Bills Crumbled*, NJ.COM (Dec. 26, 2016), https://www.nj.com/politics/index.ssf/2016/12/the_inside_story_of_how_controversial_christie_bil.html. See S. 2855, 217th Leg. (Nj. 2017), https://www.njleg.state.nj.us/2016/Bills/S3000/2855_I1.PDF.

2. North Carolina

North Carolina had a similarly contentious debate over various bills to place public notices online, which culminated in a pilot program to test online notices in one county. In April 2017, the North Carolina Senate passed S.B. 343, a bill authorizing municipalities and county governments to publish public notices on their own websites, and to publish private entities' required notices, for a fee.¹²³ The bill's supporters argued that the current system distributes an unnecessary subsidy to the newspaper industry, while generating little additional benefit to the public.¹²⁴ According to the North Carolina Association of County Commissioners and the North Carolina League of Municipalities, North Carolina's county and municipal governments, collectively, spend nearly \$4 million per year to comply with the state's public notice laws.¹²⁵

Critics countered that the proposed reform would take money away from newspapers based in rural communities and would undermine transparency because people are more likely to read a newspaper than a government website.¹²⁶ For example, Montgomery County, North Carolina's website had 27,000 visitors in one-half of 2016, whereas the *Montgomery Herald* print newspaper reached 316,000 readers over that same period.¹²⁷ Similarly, three million readers typically visit the Raleigh-based *News & Observer* newspaper's website each month, whereas the city of Raleigh's website only averages 271,000 visitors per month.¹²⁸ Moreover, critics contended that many North Carolinians cannot afford Internet access.¹²⁹

In an effort to compromise, the North Carolina Press Association ("NCPA") supported H.B. 572, a separate proposal in the North Carolina General Assembly.¹³⁰ Under that bill, public notices would still need to be published in print newspapers, but newspaper companies would also be required to post those notices on their websites, as well as on the NCPA's website.¹³¹ Ultimately, neither bill was enacted into law.

Instead, in June 2017, the North Carolina General Assembly passed H.B. 205, a bill that authorized only Guilford County, North Carolina, to publish notices on its website and to charge fees to private entities to post

¹²³ Colin Campbell, *Local Governments Want Public Notices out of Newspapers, and onto Their Own Websites*, CHARLOTTE OBSERVER (May 10, 2017), <https://www.charlotteobserver.com/news/politics-government/article149672364.html>.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Campbell, *supra* note 123.

¹³⁰ *Id.*

¹³¹ *Id.*

their notices there.¹³² A prior version of the bill would have created a pilot program to test the efficacy of publishing public notices on the websites of three other counties—Buncombe, Durham, and Forsyth.¹³³

Governor Roy Cooper, a Democrat, vetoed the test county bill in July 2017, charging Republican state legislators with attempting to punish newspapers critical of the Republican Party.¹³⁴ In justifying his veto, the governor argued that the bill would have “threaten[ed] a free and open press” by enacting “retribution” on media sources critical of elected officials.¹³⁵ Proponents of the bill rejected the governor’s accusation, arguing that the bill would modernize the state’s public notice laws, while eliminating a costly subsidy to print newspapers.¹³⁶ They also accused the governor of harboring ulterior motives: seeking to curry favor with journalists.¹³⁷ Other critics worried that the measure would open the door to broader future legislation that would undermine the press’s role in promoting government transparency.¹³⁸ Some small newspapers even stated that they would be forced to shut down if the bill passed.¹³⁹ Ultimately, North Carolina legislators circumvented Governor Cooper’s veto in October 2018 by passing the bill as a “local bill,” which is not subject to gubernatorial review.¹⁴⁰

Nevertheless, four newspapers filed suit against North Carolina and Guilford County on June 11, 2018, asserting that the law violates their equal protection rights and alleging, as Governor Cooper did, that the bill was enacted in retribution for negative press coverage of various Guilford County public officials.¹⁴¹ The plaintiffs further allege that the North Carolina legislature sought to restrict their ability to criticize various Guilford County officials in the future by undercutting their revenues and that the

¹³² Taft Wireback, *Cooper Vetoes ‘Legal Notices’ Bill, Says It’s Part of a GOP Pattern to ‘Attack’ Critics*, NEWS & RECORD (July 17, 2017), https://www.greensboro.com/news/government/cooper-vetoes-legal-notices-bill-says-it-s-part-of/article_ef027ed9-4da1-5797-bae6-fd7b839d66b7.html.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Wireback, *supra* note 132.

¹³⁹ *Id.*

¹⁴⁰ BH Media Grp., Inc., et al., v. North Carolina and Guilford Cty., No. 18CV007280 (Gen. Ct. of Justice, Wake Cty., N.C., filed June 11, 2018), https://www.pnrc.net/wp-content/uploads/2018/06/Guilford_Complaint.pdf (last accessed Jan. 3, 2019); *See also* Taft Wireback, *Guilford County Newspapers Suing to Stop Legal Notices Change*, NEWS & RECORD (June 11, 2018), https://www.greensboro.com/news/government/guilford-county-newspapers-suing-to-stop-legal-notices-change/article_8b7c5097-2cc6-50e6-8c1e-30746c03b1a6.html.

¹⁴¹ *BH Media Grp., Inc., et al.*, No. 18CV007280.

law undermines government transparency by “forfeit[ing] the important government oversight function that publication in newspapers serves.”¹⁴²

B. Reformers’ and Critics’ Arguments

The controversial measures in New Jersey and North Carolina revealed most, if not all, of the arguments that both reformers and critics of public notice laws tend to employ to advance their respective positions. This section will delve into those arguments more deeply.

Proponents of modifying public notice laws to replace or supplement the print newspaper publication requirement with an online publication requirement typically assert some combination of four distinct justifications.

First, proponents argue that the internet is a more effective tool to broadcast messages to the public than print newspapers.¹⁴³ For example, as part of his reform campaign, then-Governor Christie pointed out that: (i) 90% of New Jersey households have internet access; (ii) every public library in the state provides free internet access, thereby connecting their more than 43 million annual visitors to the internet; and (iii) 81% of adults nationwide read the news online or through mobile apps, whereas only two in ten adults read print newspapers for their news.¹⁴⁴ Moreover, websites can be easily accessed through a variety of devices and in most locations.¹⁴⁵ As a result, proponents believe Internet-based publications are superior to print newspaper-based notices.

Second, proponents argue that online publications will save taxpayer money, including funds from economically distressed households.¹⁴⁶ Governor Christie asserted that New Jersey local governments and private citizens, collectively, pay US\$80 million annually for required legal notices.¹⁴⁷ David M. Sanko, the executive director of the Pennsylvania State Association of Township Supervisors, similarly claimed that Pennsylvanians spent an estimated \$26 million on public notices in 2017.¹⁴⁸ Some

¹⁴² Wireback, *supra* note 132. The suit is still pending before the Wake County, North Carolina General Court of Justice, Superior Court Division.

¹⁴³ See Lauren A. Rieders, *Old Principles, New Technology, and the Future of Notice in Newspapers*, 38 HOFSTRA L. REV. 1009, 1034–35 (2010).

¹⁴⁴ Christie, *supra* note 101; Amy Mitchell, Jeffrey Gottfried, Michael Barthel & Elisa Shearer, *Pathways to News*, PEW RES. CTR. (July 7, 2016), <http://www.journalism.org/2016/07/07/pathways-to-news/>.

¹⁴⁵ Rieders, *supra* note 143, at 1034-35.

¹⁴⁶ See Emery P. Dalesio, *Move to Online Public Notices Looms over Papers*, ABC NEWS, <https://abcnews.go.com/Technology/story?id=7659030&page=1>; See also Christie, *supra* note 101; David M. Sanko, *Op-Ed: Why Not Online Legal Notices?*, MONTGOMERY CTY. ASS’N OF TWP. OFFICIALS (June 30, 2017, 10:30 AM), <https://www.mcato.org/state/news/op-ed-why-not-online-legal-notices>.

¹⁴⁷ Christie, *supra* note 101.

¹⁴⁸ Sanko, *supra* note 146.

of these costs, proponents contend, are borne directly by distressed households. In New Jersey, for example, homeowners in foreclosure proceedings pay an average of \$910 to publish the required legal notices in print newspapers.¹⁴⁹

Third, proponents assert that many public notice laws currently provide print newspapers with an unjustified monopoly.¹⁵⁰ Given the nationwide shift toward digital media, why should print newspapers still be the only means through which citizens can receive legally required public notices, particularly when citizens have themselves abandoned print media for digital to varying degrees? Public notice reform would allow additional enterprises to compete for the revenue stemming publishing legally required notices.

Fourth, proponents also argue that Internet-based notices provide citizens a more accessible record of notices because digital archives can be accessed almost anywhere, unlike physical archives.¹⁵¹ Additionally, print newspapers are subject to physical constraints, thereby limiting the number of notices they can publish. Online publications, however, do not face such constraints.¹⁵² Finally, proponents of reform often note that print newspapers cannot be updated frequently; at a minimum, not as frequently as Internet-based notices.¹⁵³

Opponents typically respond to each of these points in kind by levying a variety of counterpoints. First, opponents note that a shift to an Internet-based publication requirement would disproportionately disadvantage people of color, low-income residents, and rural communities because each of those groups is less likely to have access to the Internet than other demographics.¹⁵⁴

Second, opponents assert that a significant number of Americans—approximately 30%—do not use the Internet at all, even among those who have easy access to it.¹⁵⁵ Indeed, about half of the 30% of Americans who do not use the Internet have a computer *in their own homes*.¹⁵⁶ These kinds of figures led former Colorado Governor John Hickenlooper to veto a bill in June 2018 that would have allowed Colorado counties to publish salary

¹⁴⁹ Christie, *supra* note 101.

¹⁵⁰ See Christie, *supra* note 101.

¹⁵¹ Rieders, *supra* note 143, at 1034-35.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Marty Schladen, *Newspaper Public Notice Requirements Defended*, WEATHERFORD DEMOCRAT (Aug. 26, 2016), http://www.weatherforddemocrat.com/news/newspaper-public-notice-requirements-defended/article_454386a4-6bcb-11e6-a5e2-3fecfb2a474d.html.

¹⁵⁵ *Public Notices*, MDDC PRESS, <http://www.mddcpress.com/services/public-notices> (last visited Dec. 11, 2018).

¹⁵⁶ *Public Notices on Government Websites*, PUB. NOTICE RES. CTR., <https://www.pnrc.net/subscribers/talking-points/websites/> (last visited Dec. 11, 2018) (emphasis added).

reports, financial statements, monthly expense reports, and other financial information on their own websites, simply because not enough Coloradans have access to the Internet.¹⁵⁷

Third, opponents note that the demographically concentrated disparities in Internet access would lead to less actual notice being provided if public notices were moved to online forums, thus undermining the whole point of these laws: to notify the public of events and increase transparency of public affairs.¹⁵⁸

Fourth, reform opponents contend that “reform” measures are tools through which politicians seek to punish newspapers critical of their policies. Former Governor Christie, as previously mentioned, was accused of ulterior motives during his campaign to allow online publication in lieu of newspaper publications.¹⁵⁹ Governor Cooper of North Carolina made similar accusations against Republican state legislators who helped pass that state’s online public notice pilot program in Guilford County.¹⁶⁰

Fifth, reform opponents contest or downplay the size of the cost savings that reform measures would purportedly produce.¹⁶¹ In New Jersey, the NJPA pushed back on then-Governor Christie’s claim that New Jersey’s newspapers earned nearly US\$80 million in revenues because of the state’s public notice law, stating that the actual figure for 2016 was US\$32.3 million.¹⁶² Critics also pointed to a fiscal impact study of Governor Christie’s proposed law by New Jersey’s Office of Legal Services, which stated that the impact would be “indeterminate.”¹⁶³ Similarly, Governor Hickenlooper stated that the bill he vetoed would only save Colorado counties \$100 to \$500 per year.¹⁶⁴

Finally, opponents argue that websites do not create permanent records and are less secure than print newspapers because of the risk of cybersecurity attacks.¹⁶⁵ They also note that government websites in particular are inadequate because citizens do not check them with any

¹⁵⁷ Letter from John W. Hickenlooper, Governor of C.O. (June 5, 2018), https://www.pnrc.net/wp-content/uploads/2018/06/Hickenlooper_letter.pdf.

¹⁵⁸ Reitmeyer, *supra* note 115.

¹⁵⁹ Johnson & Livio, *supra* note 122; *See also* Reitmeyer, *supra* note 115.

¹⁶⁰ Wireback, *supra* note 132.

¹⁶¹ Reitmeyer, *supra* note 115.

¹⁶² Arco, *supra* note 113.

¹⁶³ Reitmeyer, *supra* note 114 (quoting OFFICE OF LEGISLATIVE SERVICES, LEGISLATIVE FISCAL ESTIMATE, S. 217-2179, 1st Sess. at 1 (N.J. 2016)).

¹⁶⁴ Hickenlooper, *supra* note 157.

¹⁶⁵ *See* MDDC, *Public Notices Fact Sheet* (February 17, 2019), <http://www.mddepress.com/services/public-notices>; PUB. NOTICE RES. CTR., *Public Notices on Government Websites* (February 16, 2019), <https://www.pnrc.net/subscribers/talking-points/websites>; cf. Wireback, *supra* note 130.

regularity.¹⁶⁶ For example, according to the Public Notice Resource Center, an advocacy group dedicated to preserving public notice via print newspapers, only 13% of adults regularly check a government website on a daily basis.¹⁶⁷

In sum, critics and reformers have raised a variety of arguments to advance their respective policy preferences, touching on the purpose of public notice laws, the feasibility of different methods to achieve that purpose, and the economic and political factors informing the policy debate and the underlying policies. These points and counterpoints have been featured prominently in recent legislative reforms and attempted reforms.

III. LEGISLATIVE EFFORTS TO UPDATE PUBLIC NOTICE LAWS AND THEIR ADVANTAGES AND DISADVANTAGES

Nearly all of the states have, in some form or another, recognized the growing concerns of the efficacy of current public notice laws. Over the last decade, dozens of state legislatures have proposed a variety of reforms. Twelve states have enacted reforms, each of which require some form of print newspaper-based publication and digital publication. While these reforms generally improve upon the existing regime, they are still rooted in print newspapers and the newspaper industry more generally. By continuing to tether public notice laws to specific technologies and industries, these reforms cement their own inevitable obsolescence.

A. *Enacted Legislation To-Date*

Like New Jersey and North Carolina, many states have enacted or attempted to enact public notice reforms. During the 2008–2009 legislative session, roughly 40 state legislatures considered proposals to amend public notice laws.¹⁶⁸ Within the last decade, 12 states have amended their laws to at least accommodate the growing popularity of Internet-based newspapers and the declining circulation of print newspapers.¹⁶⁹ These amendments can be divided into three principal categories.

First, a number of states have amended their public notice laws to require: (a) newspapers to publish notices both in print and in the newspaper's online edition, if it has one; *and* (b) the notices to also be published on a statewide website operated by a newspaper association. Alabama,¹⁷⁰

¹⁶⁶ See, e.g., Schladen, *supra* note 154; see also Rieders, *supra* note 143, at 1-2.

¹⁶⁷ PUB. NOTICE RES. CTR., *supra* note 165.

¹⁶⁸ Weber, *supra* note 51, at 2.

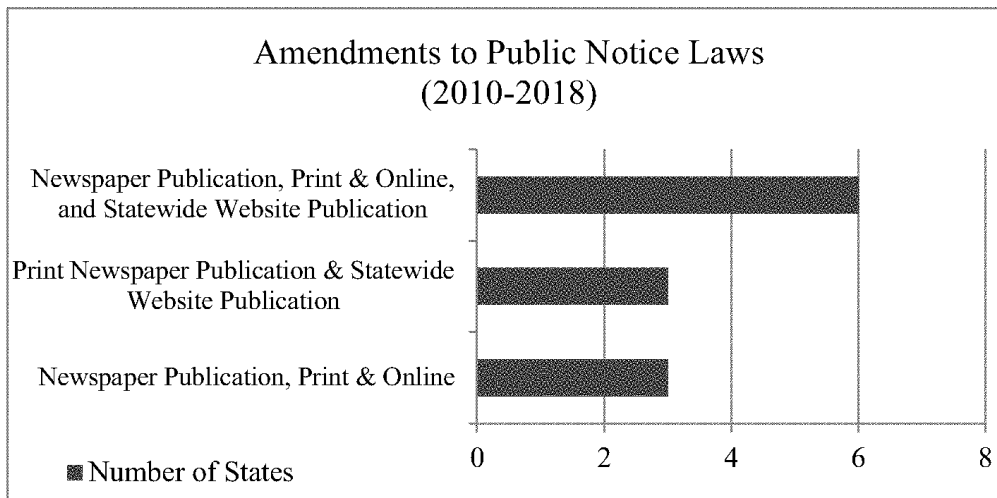
¹⁶⁹ PUB. NOTICE RES. CTR., *Web Posting Laws*, *supra* note 165.

¹⁷⁰ ALA. CODE § 6-8-62 (1975).

Florida,¹⁷¹ Louisiana,¹⁷² Tennessee,¹⁷³ Utah,¹⁷⁴ and Wisconsin¹⁷⁵ fall within this category.

Second, several states have amended their laws to require newspapers to publish notices on a statewide website maintained by a newspaper association in addition to publishing in print newspapers. Illinois,¹⁷⁶ Colorado,¹⁷⁷ and Ohio¹⁷⁸ have enacted such laws.

Third, some states require print newspapers to publish notices on their websites, if they have one, in addition to publication in their print editions. Indiana,¹⁷⁹ Maine,¹⁸⁰ and Minnesota¹⁸¹ have modified their laws in this way. Together, these changes can be summarized by the following chart:



In addition to these broader reforms of general public notice statutes, several states have enacted more limited reforms to specific types of notices. South Carolina, for example, adopted a law in 2018 that requires the Department of Health and Environmental Control to publish proposed locations for beachfront baselines and setbacks on its website.¹⁸² In 2018, Kentucky modified its public notice laws to allow school districts to publish annual financial statements and report cards on their websites in lieu of publishing them in print newspapers and to authorize counties and cities

¹⁷¹ FLA. STAT. ANN. § 50.0211 (West 2014).

¹⁷² LA. STAT. ANN. § 43:111 (2015).

¹⁷³ TENN. CODE ANN. § 1-3-120 (2014).

¹⁷⁴ UTAH CODE ANN. § 45-1-101 (2018).

¹⁷⁵ WIS. STAT. ANN. § 985.02 (West 2018).

¹⁷⁶ 715 ILL. COMP. STAT. 5./2.1. (West 2018).

¹⁷⁷ COLO. REV. STAT. § 24-70-103 (West 2018).

¹⁷⁸ OHIO REV. CODE ANN. § 125.182 (West 2015).

¹⁷⁹ IND. CODE ANN. § 5-3-1-1.5 (West 2016).

¹⁸⁰ ME. REV. STAT. ANN. tit.1, § 601 (2013).

¹⁸¹ MINN. STAT. ANN. § 331A.02 (West 2009).

¹⁸² PUB. NOTICE RES. CTR., *It's Shaping up to Be a Good Year for Public Notice*, *supra* note 165.

whose population exceeds 90,000 to publish the results of audits, the text of ordinances, and solicitations for bids on government contracts on their own websites.¹⁸³ In Florida, water management districts are now required to publish notice of potential sales of surplus land on their websites in addition to providing notice through print newspapers.¹⁸⁴

B. *Proposed Reforms*

Beyond these successful efforts to amend public notice laws, numerous state legislatures have seen renewed, but largely unsuccessful, efforts to change these laws in the last two or three years. In 2017 alone, 21 state legislatures considered proposals to include some form of online publication in their general public notice laws or specific notice laws.¹⁸⁵ For example, the Missouri legislature considered a bill that would require mandated public notices to be published on a website established by the Secretary of State in lieu of print newspaper publication.¹⁸⁶ A similar bill was proposed in Maine.¹⁸⁷

Members of the Kansas legislature introduced a bill allowing cities, counties, school districts, and other local government entities to designate an official website on which they would publish their required public notices in lieu of print newspaper publication.¹⁸⁸ A similar bill was introduced in the Mississippi legislatures in 2016, but these bills applied only to localities lacking a newspaper of general circulation.¹⁸⁹ Neither bill passed.¹⁹⁰

C. *Benefits and Disadvantages of The Enacted and Proposed Reforms*

The various policies discussed above that have either been enacted or proposed all seek to improve upon the current regime of public notice

¹⁸³ PUB. NOTICE RES. CTR., *Foreclosure Bill on Move in Missouri; Some Notices Eliminated in Kentucky*, *supra* 165.

¹⁸⁴ PUB. NOTICE RES. CTR., *Legislative Front Still Calm*, *supra* note 165.

¹⁸⁵ PUB. NOTICE RES. CTR., *Dark Clouds Dissipate on Legislative Front*, *supra* note 165.

¹⁸⁶ PUB. NOTICE RES. CTR., *Missouri Only State in Present Public Notice Peril*, *supra* note 165. *See also*, PUB. NOTICE RES. CTR., *It's Shaping up to Be a Good Year for Public Notice*, *supra* note 165.

¹⁸⁷ S.B. 1630, 128th Leg., Reg. Sess. (Me. 2017).

¹⁸⁸ H.B. 2247, 87th Leg., Reg. Sess. (Kan. 2017).

¹⁸⁹ Adam Lockhart, *Notice Any Changes? Newspapers of General Circulation and the Internet*, LEGAL SOLS. BLOG, Thomson Reuters (Jan. 26, 2016), <http://blog.legalsolutions.thomsonreuters.com/law-and-techology/notice-any-changes-newspapers-of-general-circulation-and-the-internet/>.

¹⁹⁰ Richard Karpel, *State Legislatures Back; Public Notice Safe for Now*, PUB. NOTICE RES. CTR. (Feb. 6, 2018), <https://www.pnrc.net/2018/02/06/state-legislatures-back-public-notice-safe-for-now/>.

laws, but none of them completely solves the problem. Each of them is anchored in the technology of the day, thus failing to address what is arguably the most fundamental deficiency of existing public notice laws: the inevitable fact that an effective form of public notice today may well be obsolete tomorrow.

1. Newspaper Publication, Both Print and Online

Three states have enacted laws that require a newspaper to publish legal notices in their online edition, if they have one, in addition to publication in their print version. By expanding notice requirements to include at least some form of Internet publication, these laws will likely provide more notice than print newspapers do on their own, by reaching the growing number of people who do not receive a print newspaper.

Moreover, by adding notice through online newspapers rather than replacing print newspaper-based notice, these laws do not disadvantage residents based on their Internet access or their news source preference. Thus, these laws may avoid the risk that various populations—most notably, older, poorer, and rural ones—are disproportionately less likely to receive Internet-based notices.¹⁹¹ At a minimum, they provide a belt-and-suspenders approach that minimizes the risk that affected persons will not have reasonable access to or awareness of public notices.¹⁹² Because these laws also require newspapers to publish government notices online for free, they may achieve the goals of promoting government transparency and effectively providing notice, without materially increasing the cost to taxpayers of doing so.

But these policy changes do not address important long-term public notice issues. First and foremost, these laws still rely on the print newspaper industry to achieve notice, thereby maintaining what many view as the industry's monopoly on such notices, without a clear justification. Social media sites and other Internet-based social forums are excluded. Such platforms may be as effective, if not more effective, in reaching targeted audiences today than print newspapers and their online editions. And their effectiveness is only likely to increase in the future. These sites, such as Facebook, allow users to create webpages designed to target specific audiences, relying on unparalleled amounts of data about those users' online behavior. Such personal information is far more likely to lead to a tailored notice that reaches the intended audience than a printed ad in a newspaper. Indeed, in recent years, various courts have allowed service of process via

¹⁹¹ Thirty-nine percent of Americans living in rural areas lack access to advanced telecommunications technology. FED. COMM. COMM'N, 2016 BROADBAND PROGRESS REPORT, FCC 16-6 AT 3 (JAN. 29, 2016). Moreover, thirty-one percent of rural Americans lack access to fixed terrestrial broadband at speeds of twenty-five Mbps or higher. FED. COMM. COMM'N, 2018 BROADBAND PROGRESS REPORT, FCC 18-10 AT 33 (FEB. 2, 2018).

¹⁹² Rieders, *supra* note 143, at 1041.

social media in limited circumstances given these platforms' ability to reach particular groups or individuals.¹⁹³ Moreover, in 2017, three-fourths of Americans gleaned at least some of their news from social media sites,¹⁹⁴ and in 2018, 20% of adults regularly received their news from social media (more adults than who regularly gleaned their news from print newspapers).¹⁹⁵

Second, it is unclear how the print newspaper industry's continued monopoly on public notice serves the public interest since, for the reasons discussed above, allowing notice through additional platforms would reach more people. Moreover, the restricted competition does not force print newspaper companies to reduce costs as much as they would if they faced competition from other businesses. Instead, this monopoly provides a steady—albeit small—stream of revenue to these companies, some of which is at the taxpayers' expense. Lawmakers need to carefully consider the trade-off of continuing these direct and indirect subsidies. Notably, however, allowing public notices to also be published in online-only newspapers and Internet-based social forums would likely not appreciably expand access to low-income and less-educated communities.

Third, these laws also do not require print newspapers to establish a website. As a practical matter, this concern may not be an issue as many newspapers now have online editions, but to the extent a newspaper does not maintain one, these laws have not addressed the inadequacies of print-based notices.

2. Print Newspaper Publication and Statewide Website Publication

Three states still require publication in a newspaper's print edition but require newspapers to publish a notice on a website maintained by a newspaper association for this purpose. This approach improves the current notice regime but does not address the complexities of the changing nature of the news industry. As a practical matter, this reform is being implemented by the newspaper industry itself throughout the nation since there are newspaper associations in 41 states and the District of Columbia that publish notices online.¹⁹⁶ By providing this service, the industry is addressing some of the key issues raised by critics of existing public notice laws. This reform achieves similar benefits as the reform mandating

¹⁹³ See, e.g., *Kelly v. Phiten USA, Inc.*, 277 F.R.D. 564 (S.D. Iowa 2011); *FTC v. PCCare247 Inc.*, No. 12-CIV-7189 (S.D.N.Y. Mar. 7, 2013); *Mark v. Gawker Media LLC*, No. 1:13-cv-04347 (S.D. N.Y. June 30, 2013).

¹⁹⁴ *Print vs. Digital Subscribers: Demographic Differences and Paths to Subscription*, AM. PRESS INST. (May 2, 2017, 8:05 A.M.), <https://www.americanpressinstitute.org/publications/reports/survey-research/print-vs-digital/>.

¹⁹⁵ Shearer, *supra* note 68.

¹⁹⁶ *State Press Associations*, PUB. NOTICE RES. CTR., <https://www.pnrc.net/find-a-notice/state-press-associations/> (last visited Dec. 11, 2018).

publication in online newspapers in addition to print editions but presents similar disadvantages. Additionally, none of the three states that have adopted this approach require print newspapers to publish Internet address information for the third-party website, which begs the question: How many people are actually aware of this resource?

3. Newspaper Publication, Both Print and Online, Plus Statewide Website Publication

Six states have combined these reforms, thus maintaining the print newspaper-based public notice requirement while expanding the requirement to include both online newspaper editions and statewide websites dedicated to compiling public notices. This reform provides the same benefits but on a greater scale, as the public has multiple avenues through which it can access public notices. This reform also creates a single repository through which a person can access any number of relevant notices.¹⁹⁷ However, it still preserves the print newspaper industry's revenue stream,¹⁹⁸ and it still excludes publication through various forums that may be more effective in reaching certain audiences.¹⁹⁹

IV. ALTERNATIVE REFORM: STANDARDS AND SAFE HARBORS

Notably, these reforms, like original public notice laws, require notice through a specific technology popular at the moment, rather than adopting a technologically neutral approach. The pivot to website-based notice is understandable and will likely be beneficial given the Internet's current role in our economy. But each of the various reforms discussed above is insufficient to address the obstacles that states face in promoting adequate

¹⁹⁷ Rieders, *supra* note 143, at 1042.

¹⁹⁸ Whether print newspapers' effective "monopoly" on public notices is justified is a point of contention. Proponents argue that notice through print newspapers is essential for a variety of reasons and this revenue stream is necessary to mitigate the industry's economic decline. Opponents counter that governments should not support an industry that is losing market share and should allow other entities to provide public notices as a way of promoting competition and, ultimately, better and more effective notice. This Article touches on this issue in the context of considering reforms, but does not take a position on it.

¹⁹⁹ Some states have also considered allowing public notices to be published on a statewide government website or individual local government websites. To be sure, such reforms could expand access to public notices, save taxpayer money, and potentially even raise public revenues by allowing state and local governments to charge fees for notices. However, a case-by-case analysis is necessary to estimate the actual cost savings or revenue of any such plan, since it would impose additional ongoing and likely unfunded operational costs for local governments. Costs aside, the average American does not frequently visit a government website, so it is not clear that this solution will increase access, at least absent a coordinated and sustained advertising campaign (which itself would raise costs).

notice to various diverse communities. Further, while expanding notice to websites is good, perhaps one day, publication via online newspapers, or government or third-party websites will be inadequate to effectuate notice because of technological innovations and changing social preferences like print newspapers today.

We propose an alternative reform, one that would be technologically neutral (to avoid the need to continually update public notice laws due to technological changes) and that would also provide significant flexibility (to ensure notice is actually effectuated to various diverse communities). Specifically, our recommendation is to reform both general and specific public notice statutes²⁰⁰ by allowing governments and private entities to choose their own method of notice, subject to a statutorily defined minimum standard. Rather than mandate publication through specific mechanisms—whether print, online, or otherwise—the individuals and entities subject to the notice requirement would distribute their notices through any forum(s) and method(s) that would adequately notify the target community. For example, instead of mandating foreclosure notices through print newspapers of general circulation, a household in foreclosure could have the necessary notice published on a newspaper’s website, a government website, and/or a social media platform. Alternatively, the household could have the notice distributed through other means or a combination of these methods.

To ensure that adequate notice is provided, we recommend that lawmakers implement a technologically neutral standard that all notices, however distributed, must meet. For instance, all public notices could be required to be “reasonably calculated” to effectuate notice. Such standards are not uncommon. The Federal Rules of Civil Procedure (“FRCP”), for instance, require notice to be given to an individual in a foreign country in a manner “reasonably calculated” to achieve that purpose.²⁰¹ Prior to December 1, 2015, the FRCP also limited the scope of discovery to information reasonably calculated to lead to admissible evidence.²⁰²

To be clear, the standard need not be “reasonably calculated.” One alternative criteria could be that the method was sufficient based on the preponderance of the evidence. States should be free to choose whichever standard they believe is necessary and that reflects their constituents’ policy preferences. What is important is that lawmakers select a clearly articulated, technologically neutral standard to serve as a minimum baseline for compliance.

To minimize compliance costs and to provide additional clarity, the states should also implement one or more “safe harbors.” Under these safe harbors, certain publication methods would be granted a presumption of compliance with the generally applicable, technologically neutral

²⁰⁰ See discussion *supra* Part II(a), notes 18–33.

²⁰¹ FED. R. CIV. P. 4(f)(1)–(2).

²⁰² FED. R. CIV. P. 26(b)(1).

standard. Publication through print newspapers, or through newspaper or government websites, could, in certain circumstances, qualify as a safe harbor. Any safe harbor, however, would have to take into account the nature of the public notice and the intended target audience. Publication through a website, for example, would be ineligible for the presumption of compliance if the intended audience, in general, does not have consistent access to the Internet.

Various regulators already implement a similar system whereby regulated entities can either choose their own method of compliance, subject to a standard, or adopt a model method that the regulators deem to be compliant with the generally articulated standard. For example, pursuant to Regulations Z²⁰³ and X,²⁰⁴ financial institutions must disclose certain information to consumers. The Consumer Financial Protection Bureau (“CFPB”) implemented the “TILA-RESPA Integrated Disclosure Rule” to combine these regulations’ disclosure requirements.²⁰⁵ To comply, financial institutions may provide consumers with the model disclosure forms that the CFPB has created, or devise their own.²⁰⁶ Entities that devise their own disclosures must ensure that these disclosures are “substantially similar” to the CFPB’s model forms.²⁰⁷

The states can design a similar regime for public notice. Such a regulatory regime would provide several benefits. First, it would allow greater flexibility by expanding the number of methods through which notice can be achieved. One of the chief concerns with the current notice regimes is that they are too prescriptive, anchoring themselves in specific modes of communication that may or may not reach their target audience. Our proposal, by contrast, is not tethered to any particular communication technology. Moreover, it would leverage innovation in the public and private sectors by creating incentives to provide notice in a manner that best suits each sector’s budgets and needs. Additionally, it would soften what some view as print newspapers’ unjustified monopoly over public notices.

Second, and relatedly, greater flexibility may improve actual notice. As we have shown, different communities rely on different forums for their information.²⁰⁸ Expanding the number of methods by which relevant

²⁰³ See, e.g., 12 C.F.R. § 1026.37 (2017) (loan estimate).

²⁰⁴ See, e.g., 12 C.F.R. § 1024.7 (2017) (good faith estimate of cost of the loan).

²⁰⁵ Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79730 (Dec. 31, 2013).

²⁰⁶ Federal Register, *supra* note 203.

²⁰⁷ *TILA-RESPA Integrated Disclosure Rule: Small Entity Compliance Guide*, Consumer Fin. Prot. Bureau 34 (May 2018), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/2017-10_cfpb_KBYO-Small-Entity-Compliance-Guide_v5.pdf.

²⁰⁸ See discussion *supra* Part II(c).

communities can be reached would likely increase access to, and knowledge of, the relevant information.

Third, our proposal would clarify notice obligations. Under our proposal, state legislatures would establish a specific standard to which every notice must comply. Moreover, the states would provide models that can be adapted to meet that standard. Government entities and private actors, therefore, will not be confused with respect to their obligations and how to meet them.

Fourth, because this regime would be technologically neutral, it would enable notice requirements to evolve with society and avoid the need for legislatures to amend their notice laws every decade or two to account for changing technology. Simply put, while there may be a need to update the safe harbors with the times, the generally articulated, technologically neutral standard would not need to be updated.

The vast change in the media landscape over the past few decades reflects the benefits of such an approach. Thirty years ago, the Internet was barely on the horizon, and 20 years ago, “social media” was just a concept. Durable public notice reform must account for changing technology and corresponding shifts in consumer preferences. Lawmakers cannot avoid these changes nor should they attempt to predict them. Rather, they should devise a flexible regulatory regime that accommodates such inevitable—yet unpredictable—change.

To avoid any doubt, our proposal would present certain challenges. First, it would likely be more complex than the existing, print newspaper-based regime. Currently, compliance with public notice laws is relatively easy because the laws are, in general, quite prescriptive and straightforward. Standards, by definition, are broader than rules. Therefore, any standard-based approach would allow for more disclosure mechanisms, including mechanisms that lawmakers have not considered. This necessarily entails greater complexity. Adding a safe harbor for certain disclosures under certain circumstances also adds complexity by requiring lawmakers or regulators to tailor some disclosure mechanisms to a particular set of facts. Naturally, such tailoring is more complicated than the current system or even the aforementioned reform proposals.

The increased complexity would disproportionately affect less-sophisticated entities. For instance, a property owner who rents or sells a property to earn supplemental income may not necessarily be well-versed in all of the relevant requirements. Such a property owner may provide inadequate public notices regarding mold, foreclosures, or other issues, absent a clear and specific disclosure requirement. As a result, the property’s title could be disputed or the property owner’s subsequent actions, such as foreclosure, could be deemed illegitimate, complicating the transfer of that property to new owners. The existing regime has the great advantage of ease of administration and clarity to even relatively unsophisticated parties.

Second, this proposed regime would likely increase enforcement costs and increased judicial intervention. By implementing a standard, the

proposal creates the potential for ambiguity and misunderstanding. As a result, some entities may provide notice in an inadequate manner and may be fined or otherwise penalized for doing so. Although the safe harbors would reduce noncompliance, thereby reducing enforcement costs, it is reasonable to predict that enforcement costs would still be greater overall than the current system because not all entities will opt for the “safe harbor” forms of notice. For the same reason, the courts may become more involved, as state and private actors bring suits over allegedly inadequate notices. This may be yet another potential downside to balance against the substantial upside of increased notice.

Third, this method would likely increase the regulatory burden for the states, especially initially after adoption, because they would likely need to provide interpretive guidance and establish one or more safe harbors. To minimize any ambiguity under a reasonably calculated standard (or other standard) and to provide regulated entities with greater certainty, the relevant regulator would likely need to provide at least some interpretive guidance. Providing such guidance is relatively common,²⁰⁹ but it is not without costs. Alternatively, the states’ attorney generals may need to issue legal opinions—another relatively common action.²¹⁰ Moreover, such guidance would need to be updated over the years as markets and technologies change. Interpretive guidance, therefore, would be an ongoing operational expense for the states.

Despite the potential costs and challenges, however, we believe that a regime based on a technologically neutral standard, supplemented by model notification methods protected by one or more safe harbors would ultimately provide more flexibility, make public notice independent of any one industry, and decouple public notice from the technology of the day, all of which would be substantial improvements upon the status quo.

²⁰⁹ State regulators often provide interpretive guidance. For example, many state regulators responsible for supervising money transmitters provide interpretive guidance. See Idaho Department of Finance’s No-Action and Opinion Letters, <http://www.finance.idaho.gov/MoneyTransmitter/NoActionOpinionLetters.aspx> (last visited Dec. 11, 2018); see also Texas Department of Banking’s Supervisory Memorandum 1037, <https://www.dob.texas.gov/public/uploads/files/consumer-information/sm1037.pdf> (last visited Dec. 11, 2018).

²¹⁰ Various states’ attorney generals have issued legal opinions about public notice laws. See Letter from Marc Dann, OH. Op. Att’y. Gen., to Betsy Houchen, Exec. Director, OH. Board of Nursing (April 30, 2008), 2008 WL 1952097 (interpreting a specific public notice statute enacted by the Ohio legislature to exclude an online version of a newspaper of general circulation in a particular county from the meaning of “newspaper of general circulation”); S.C. Op. Atty. Gen., 2015 WL 00780167 (Oct. 21, 2015) (interpreting South Carolina’s specific public notice laws to exclude newspapers published on the Internet).

CONCLUSION

Current public notice laws are rooted in a pre-Internet conception of the economy. As more and more people shift away from print news and towards digital media, the risk that fewer people will receive the notice they should receive rises. Lawmakers need to adopt reforms that allow for publication online, but they should weigh the costs, and the ability to meaningfully increase actual notice, of specific proposals. Completely supplanting print newspapers, however, may, at least in the short term, be counterproductive. Instead, public officials should take a step back and consider how to implement a technologically neutral approach to avoid anchoring public notice laws into the technology of a particular era. One approach would be to allow notice to be provided in any manner, subject to a standard that such notices must meet. This would provide greater flexibility, disentangle public notice from the technological and economic trends of any particular era, and even increase actual notice, at least in some circumstances. Providing one or more safe harbors for certain notification methods and/or certain communities in order to flesh out the technologically neutral legislative standard would provide greater clarity, minimize enforcement actions as much as possible, and establish a baseline for adequate notice. Regardless of the exact nature of any reform lawmakers adopt, they should consider the ultimate goal of public notice laws first and foremost: providing the public with actual and adequate notice of legally significant events.