PRESS SPEAKERS AND THE FIRST AMENDMENT RIGHTS OF LISTENERS

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INTRODUCTION

A wave of scholarly and judicial attention to the rights of listeners has moved First Amendment jurisprudence, in at least some doctrinal subareas, to consider how the Constitution might value and protect audiences of speech and not just producers of it. But this inquiry has largely focused on contexts where the rights of the speakers and listeners diverge. Less discussed, but equally important, are First Amendment dynamics in which speaker and listener interests align, and in which the speaker needs additional protections to adequately safeguard the fuller First Amendment relationship. The most notable of these dynamics is the constitutionally symbiotic relationship between the institutional speakers of the press and their public audiences.

This Article explores American press freedom through the lens of speaker-listener relationships. It argues that the unique features of this particular First Amendment partnership should lead to greater appreciation of the press as a special institutional speaker and to greater protection for newsgathering performed on behalf of listeners.

Part I briefly describes the developing doctrine of listener rights, exploring the protections courts and commentators have argued are warranted for those who have interests in receiving speech. It notes the ways in which the recent debates over the doctrine have been motivated by instances where the interests of listeners differ from those of the speaker and examines how the doctrine must also apply in instances where speaker and

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listener interests converge. Although it has been largely assumed that full protection will necessarily follow when speakers are serving listener interests, that assumption is not always accurate.

Part II investigates the doctrine's application to press speakers and listeners, comparing a prominent "mere-conduit" model—which views press speakers simply as channels through which other speakers' messages travel to listeners—with a proposed "symbiotic-relationship" model—which views institutional press speakers as engaged both in their own quintessential First Amendment speech activities uniquely benefiting press audiences and in special institutional First Amendment speech activities on behalf of those audiences. I more fully develop the symbiotic-relationship model, arguing that the mere-conduit model fails to capture either the richness of the press's speaker contributions or the importance of the press speaker's role in advancing listeners' First Amendment information-seeking and autonomy-exercising interests. Members of the press are not mere conduits for other speakers but rather are autonomous communicators engaged in their own critically important First Amendment speech activities of informing, contextualizing, narrating, and educating—all on behalf of listeners with whom they share a special First Amendment relationship. Leaving press institutions free to curate content enhances listener dignity and self-fulfillment by creating speech packages from which listeners can autonomously choose. More than this, the press as an institution performs a vital proxy role for listeners whose direct First Amendment access interests are fulfilled through the First Amendment activities of their press partners in that joint constitutional relationship.

The Article concludes that new insights from listener-rights doctrine should inform press freedom jurisprudence, supporting commensurately greater First Amendment protections for the gatherers of news.

I. THE RIGHTS OF LISTENERS

Courts and First Amendment scholars have shown increasing interest in the doctrine of listener rights. In areas of

campaign finance,[1] professional speech,[2] and commercial[3] and employer[4] speech, debates over the regulation of expressive activity increasingly feature arguments about the protections that might be warranted for those who have interests in receiving or not receiving others' expression. This movement—to think more holistically about the needs of all parties to a given First Amendment relationship[5]—is motivated primarily by instances in which listeners have interests that differ from those of the speaker. In such instances, the Supreme Court's instincts to protect speakers are arguably insufficient to meet the needs of other actors in the particular First Amendment framework.

The jurisprudential instinct to protect speakers seems rooted, at least partially, in an imbalance within traditional First Amendment theory. Some theories supporting a system of free expression—most notably the theory suggesting that all benefit from an open marketplace of ideas and the theory suggesting that meaningful conversations on matters of public concern are crucial to democratic self-governance[6]—are equally

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1. Citizens United v. FEC, 558 U.S. 310, 371 (2010) (upholding disclosure requirements because "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way" and "enables the electorate to make informed decisions"); *id.* at 339 ("The right of citizens to inquire, to *hear*, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." (emphasis added)).

2. Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31, 37 (2016) (noting that First Amendment theory "sometimes support[s] a listener-centered approach for First Amendment purposes when . . . the listener has less information, expertise, or power than the speaker," including in the professional speech context); *id.* at 59 (describing how "power differentials" that accompany speech by professionals or other fiduciaries can make the case for regulation stronger).

3. Robert Post & Amanda Shanor, Commentary, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015) (noting that, while "[o]rdinary First Amendment doctrine . . . focuses on the rights of *speakers*, not listeners," the "constitutional value of commercial speech lies in the rights of *listeners* to receive information so that they might make intelligent and informed decisions").

4. Norton, *supra* note 2, at 31.

5. Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 918 (2017) (arguing the Court should "build[ ] a First Amendment jurisprudence, not from the abstract top-down, but from the participant bottom-up"); Norton, *supra* note 2, at 36 (noting the alternative contexts that "largely eschew . . . traditional categories to focus instead on the dynamics of certain speaker-listener relationships").

6. Norton, *supra* note 2, at 52 ("Most First Amendment theories . . . do not

motivated by speaker and listener needs. However, an additional theory—the autonomy or self-fulfillment justification for free speech—does not view speech as instrumental to wider audience benefits but instead as valuable in and of itself to the free speaker.[7] Recent scholarship has highlighted how this self-fulfillment rationale has foregrounded the autonomy and dignitary interests of speakers, to the possible detriment of other actors in the communicative process. In his important recent book, *Madison's Music*, Burt Neuborne describes a First Amendment "neighborhood" populated with those who speak, those who listen, those who are spoken about, and those who regulate.[8] Neuborne rightly observes that despite this diversity of implicated relationships, First Amendment doctrine focuses almost exclusively on speakers.[9] As "autonomous human beings blessed with free will,"[10] speakers can argue that they "must be empowered to speak freely in order to shape their own identities and form their own preferences."[11] Neuborne suggests that these dignitary rights for speakers—to find

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focus exclusively on speakers' interests and instead also seek to further the interests of listeners," including "inform[ing] listeners' search for truth" and facilitating their "participation in democratic self-governance.").

7. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, . . . [they] valued liberty both as an end and as a means."); *see also* Martin H. Redish, *The Value of Free Speech*, 130 PA. L. REV. 591, 593 (1982) (arguing that the broader goal is "individual self-realization"). *See generally* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

8. BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 98–99 (2015).

9. *See id.*

10. *Id.* at 99.

11. *Id.*; *see also* C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978) (arguing that speech has value in developing rational human capacities); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE. L.J. 877, 879 (1963) (noting the "right to freedom of expression is justified first of all as the right of an individual purely in his capacity as an individual"); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992) (arguing that "[f]reedom of expression is properly based on autonomy: the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others"); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991) (arguing that the First Amendment must protect against "denial of autonomy" and "interfer[ence] with a person's control over her own reasoning processes").

fulfillment, to define themselves through their own choices, and to think and express with autonomy—might explain the Court's impulse to protect speech regardless of its worth or value to listeners.[12]

The problem with this myopic focus on dignitary speakers, though, is that it ignores First Amendment relationships. In particular, it blinks at the fact that listeners, too, are "entitled to be viewed as autonomous human beings vested with dignity."[13] If listeners, like speakers, have dignitary rights to self-fulfillment and self-definition,[14] they "must also be free to shape their own identities and preferences."[15] Listening should be an independent source of legal right because a listener possesses not only "a powerful dignitary interest in shaping and defining the hearer's self," but also "an instrumental interest in gaining access to information and ideals that will assist the hearer in making rational, informed choices," and a legitimate "fear that government will abuse any power to cut the hearer off" from speech that meets these needs.[16] A recognition of these listener attributes drives the growing movement to consider how listener rights might have distinct legal force.[17]

Nevertheless, except for rare instances of real intrusion into the listener's own space or the listener's unique realm of privacy,[18] listeners almost never win recognition on their own

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12. Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 19 (1989) ("[A] toleration based respect for expression of belief does not question the worth of speech or its value to the society. It protects the speech as a leap of faith about the dignity and worth of the human spirit.").

13. NEUBORNE, *supra* note 8, at 98.

14. Neuborne, *supra* note 5, at 901.

15. NEUBORNE, *supra* note 8, at 98.

16. Neuborne, *supra* note 5, at 906–07.

17. Norton, *supra* note 2, at 36 (noting that "although many think of the First Amendment as primarily focused on protecting speakers of conscience, most First Amendment theorists urge the protection of speech at least in part to further listeners' autonomy, enlightenment, and self-governance interests"); Dana R. Wagner, *The First Amendment and the Right to Hear*, 108 YALE L.J. 669, 673 (1998); *see also* Norton, *supra* note 2, at 55 (arguing that "listeners themselves have autonomy [and] enlightenment" interests "in receiving accurate information that empowers their decision making").

18. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 713 (2000) (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)) (upholding a state statute that prohibited approaching nonconsenting individuals outside health care facilities and suggesting that "following and dogging [can] become unjustifiable annoyance and obstruction which is likely soon to savor of

terms. It is unquestionably the case that the "unwilling hearer has almost no right to be shielded from false, offensive, denigrating, or even frightening speech."[19] The understandably strong norms in favor of speaker autonomy and against governmental content regulation have meant that speech is routinely protected even when there is little evidence of useful information provided to listeners—and even when there is great evidence of disrespect shown or harm done to listeners.[20] Involuntary listeners must "act as a piñata for the privileged speaker, even when it hurts—a lot," and "when the interests of speakers and hearers diverge, the edge usually goes to speakers."[21]

Listener-rights proponents are especially distressed that listener interests, despite being slighted in most of the jurisprudence, are sometimes used by courts to compensate for speakers' lack of protected status, providing the Court with an alternative explanation for a holding in favor of a speaker whose own claim to expressive freedom is weak.[22] This most often occurs when courts consider a speaker who at least arguably lacks the dignitary or autonomy interests that are so central to the speaker-favoring doctrine—for example, when the speaker is an incarcerated prisoner, a foreign national lacking full First Amendment rights,[23] or a non-human corporate

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intimidation"); Frisby v. Schultz, 487 U.S. 474, 484, 487 (1988) (upholding an ordinance prohibiting residential picketing around an abortion doctor's home and noting that "[o]ne important aspect of residential privacy is protection of the unwilling listener" and suggesting that the "target of the focused picketing . . . is . . . a 'captive'"); FCC v. Pacifica Foundation, 438 U.S. 726, 732, 741 (1978) (upholding an FCC order prohibiting the broadcast of a monologue that depicted "sexual and excretory activities" during the day, and noting that the material "confront[ed]" the listener in a way that the listener could not avoid).

19. NEUBORNE, *supra* note 8, at 100; *see also* Snyder v. Phelps, 562 U.S. 443 (2011) (overturning damage award against the Westboro Baptist Church for intentionally inflicting emotional distress with an anti-gay demonstration at funeral of a soldier); United States v. Stevens, 559 U.S. 460 (2010) (vacating a conviction for selling films depicting the torture and death of small animals); NEUBORNE, *supra* note 8, at 106–08 (reviewing the speaker focus in *United States v. Alvarez*, 567 U.S. 709 (2012) (invalidating a criminal conviction for falsely claiming to have received the Congressional Medal of Honor)).

20. NEUBORNE, *supra* note 8, at 109.

21. *Id.* at 100.

22. Neuborne, *supra* note 5, 899, 907 (citing cases as evidence that listeners are "conscripted as a First Amendment stand-in for a speaker who cannot make it on its own").

23. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396 (1974), *overruled on other*

entity lacking individual self-realization or self-fulfillment needs.[24] The result is that listener rights, while largely ignored in listener-focused cases, are nevertheless doing much of the heavy lifting in many speaker-protection cases.

Importantly, even the most ardent listener-rights advocates take no issue with courts invoking the rights of listeners in speaker-rights cases when listeners are "seeking access to the speech" or "would probably want to receive the speech, if asked."[25] But courts go well beyond this, and one of the most pressing issues for listener-rights advocates is the reliance on listeners to support speaker rights in contexts in which it is not at all clear that the speakers are actually serving the listeners' interests. A number of scholars have found this reliance especially troublesome in the hot-button contexts of campaign finance regulation and commercial speech, where they are concerned that speakers regularly have interests that differ radically from the best interests of listeners. The dignitary interests of the listeners, they argue, should be invoked to serve the listeners themselves and not to shore up rights for the nondignitary speaker.[26] These cases, where the Court is accused of placing listener rights on the scale "without asking whether the particular speech before the Court actually enhances a hearer's capacity for informed free choice,"[27] occupy a significant portion of the current dialogue about First

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grounds by Thornburg v. Abbott, 490 U.S. 401 (1989); Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

24. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

25. Neuborne, *supra* note 5, at 909 (citing *Lamont*, 381 U.S. 301, in which the Court invoked the rights of recipients of mail in the absence of any First Amendment rights on the part of the speakers, who were Communist foreign nationals; and *Va. State Bd. of Pharm.*, 425 U.S. 748, where the Court found First Amendment protection for commercial speech even in the absence of a clear dignitary right on the part of the corporate speaker, because of the interests of consumers in receiving the information).

26. *See* NEUBORNE, *supra* note 8, at 117 (arguing that "when in corporate or commercial speech settings the Supreme Court authorizes an otherwise unprotected corporate speaker to 'borrow' the right to know belonging to hearers, the Court should make sure, first, that hearers are willing to lend their rights; and, second, that the borrowed rights will actually be used by corporate speakers to benefit their true owners, the hearers"); Neuborne, *supra* note 5, at 914 ("Remove the dignitary speaker from the equation in commercial speech cases and what you have left is a dignitary hearer with an instrumental need for information that will be useful in making market decisions.").

27. *See* NEUBORNE, *supra* note 8, at 100.

Amendment listeners. The doctrinal focus is on instances in which the speaker and listener interests diverge.

Conversely, there is very little substantive doctrine drawing upon or carefully articulating the scope of listener rights where speaker and listener preferences run in tandem. That is, the speaker-listener dynamics that are undertheorized as a whole are even less carefully parsed when the speaker and the listener share a set of goals. It is apparently assumed that in that context, there is nothing more for listener rights to bring to the table. Yet, if the relationships within the First Amendment are central to the analysis when speaker and listener interests diverge, they also ought to be important considerations when they align. In at least some speaker-listener relationships and at least some regulatory contexts, it is no doubt correct to assume that the common interests of speaker and listener will be fully accommodated by whatever protection is afforded the speaker.[28] But too little thought has been given to instances in which fully protecting a speaker might not fully protect the interests of uniquely situated listeners. The conventional wisdom that alignment between speaker and listener interests will result in full protection for both may not always be accurate.

II. A MERE CONDUIT OR A SYMBIOTIC RELATIONSHIP?

Careful thinking about the convergence of speaker and listener rights might be most warranted in relation to speakers within the institutional press. In our efforts to add nuance to First Amendment analysis with a more holistic investigation of speaker-listener relationships, it is important to examine how that approach applies in the context of protection for the press. There are two possible ways to view the press in this fuller speaker-listener-relationship model.

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28. *Id.* at 101 ("When the communicative interests of speakers and hearers point in the same direction, as they do most of the time, First Amendment protection is at its strongest. Those are the easy free-speech cases."); Neuborne, *supra* note 5, at 900 ("I suspect that free speech outcomes would not change much even if the Court took the interests of the other neighborhood residents into serious consideration," because usually the "interests of speakers . . . and hearers move in tandem.").

According to the first view, the press is neither speaker nor listener, but a mere conduit, conveying the speech of speakers to the ears of listeners. This is the position put forth by one of the most vocal modern proponents of listener rights[29] and backed by historical arguments from some prominent First Amendment scholars and jurists.[30] But this view blinks at some significant press and listener realities. It ignores the many listener-benefiting endeavors that are central to the work of individual journalists and that are unquestionably prototypical speech activity. It also ignores the press organizations' distinctive institutional roles of filtering, packaging, and curating speech, as well as acting as proxies for direct listener rights. Finally, it ignores the extraordinary incentives encouraging government regulators to target the speech of the press—and the ways that protections against such regulation serve both speaker and listener interests. The better way to conceive of the press within a listener-rights framework is found in a symbiotic-relationship model. The press is a unique institutional speaker serving unique listener interests and is therefore entitled to First Amendment protection commensurate with those roles. The press is not something less than an ordinary speaker. It is, in some key respects, something more.

A. The Mere-Conduit Model

One prominent listener-rights theory suggests that the press plays the minor First Amendment role of a mere conduit "whose principal function is to transmit the speech of others to

29. *See* NEUBORNE, *supra* note 8.

30. Alex Kozinski, *How I Stopped Worrying and Learned to Love the Press*, 3 COMM. L. & POL'Y 163, 174 (1998) (arguing that members of the institutional press are "no different from any other entrepreneurs, except maybe that their products are so much more dispensable"); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 118–19 (1975) (rejecting a "separate constitutional status for the mass press"); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 600 (1979) (concluding that a "preferred position for the news media finds no support in history"); Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 441 (2013) (arguing that the Press Clause protects only "the right of any person to use the technology of the press to disseminate opinions"); 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, 465 (2012).

larger audiences."[31] According to this view, except for in rare instances of very direct expression of opinion journalism,[32] members of the press are not speakers at all;[33] instead they are in the business of "transmit[ting]" or, at best, "amplify[ing]," but not communicating or expressing.[34] The position is that the institutional press functions purely as "a skilled tradesman who builds and runs complex machinery" by which speech of journalistic sources moves to listeners, just as the "highly skilled artisans who owned and operated the printing presses in Madison's time" functioned.[35] The mere-conduit theory holds that the modern iteration of that technological conduit includes not only internet providers and cable companies but also newspapers and television news networks,[36] which should be seen as being engaged in the bare conveyance of the speech of others.

According to this view, Supreme Court opinions are misguided in recognizing either the institutional First Amendment value of press speakers or the value of protecting them against content control by government regulators: "Today's conduits have persuaded the Supreme Court to let them dress up as aristocratic speakers, even though all they do is run a big machine that transmits the speech of others to a mass audience."[37] The suggestion is that a more complete analysis of listener rights and First Amendment relationships would "separate the conduit from the speaker"[38] and "out[ ]" the conduits[39] for invoking protections designed for speech.

Advocates of this position argue that failing to correctly identify the press as a mere conduit has resulted in analytical missteps by the Court. They point to cases like *Miami Herald v. Tornillo*,[40] in which the Court struck as unconstitutional a

31. NEUBORNE, *supra* note 8, at 98.

32. *Id.* at 125 ("When conduits are transmitting their own speech, as in newspaper editorials, it makes good sense to treat them as speakers.").

33. Neuborne, *supra* note 5, at 899 (referencing "conduits, as opposed to speakers"); *id.* at 900 (describing the perception that conduits are "passing themselves off [to courts] as speakers").

34. *Id.* at 900.

35. NEUBORNE, *supra* note 8, at 103.

36. *Id.*

37. *Id.*

38. *Id.* at 103–04.

39. *Id.* at 125.

40. 418 U.S. 241, 244 (1974).

Florida "right of reply" statute demanding that a newspaper give equal space to a candidate after publishing an article critical of his candidacy.[41] Viewing the case as centered not on the speech rights of newspapers but on a bare property right of a conduit corporation,[42] Neuborne faults the Court for allowing newspapers to "pass[ ] themselves off as speakers."[43] He suggests that because listeners would have benefited from fuller information, both for and against the candidate, the Court should have read the First Amendment to permit governmental efforts to demand information from conduits.[44]

Likewise, under a mere-conduit view, the watershed First Amendment case of *New York Times v. Sullivan*[45] is doctrinally flawed. Long heralded by First Amendment scholars as ushering in a constitutionalization of libel law and establishing that speech by the press on matters of public concern should be "uninhibited, robust, and wide-open,"[46] *Sullivan* is wrongly decided if the newspaper is characterized as a different sort of First Amendment player. If the *New York Times* is simply a vessel—a tube through which a speaker's message is passed to some listeners—the balance between the reputational interests of the defamed and the free-speech interests of the publishers may shift.[47] The perceived error, then, is that the Court "didn't treat the *Times* as a conduit. It treated the newspaper as a full-fledged speaker and gave the *Times*-as-speaker the same First Amendment protection as the *Times*-as-conduit."[48]

In the mere-conduit construct, the modern institutional press is not seen as having any particular benefit to its audience. Indeed, at least some proponents of the theory harbor significant suspicions that the press is a source of listener harm. Conduits in the listener-relationship theory are to be treated with suspicion because they are powerful and manipu-

41. *Id.*

42. NEUBORNE, *supra* note 8, at 102 (arguing that *Tornillo* represents the Court's "defer[ence] to corporations' private property interests").

43. Neuborne, *supra* note 5, at 900.

44. *See id.* at 899 n.17 (arguing that *Tornillo* wrongly treated a newspaper as speaker).

45. 376 U.S. 254 (1964).

46. *Id.* at 270.

47. NEUBORNE, *supra* note 8, at 130 (arguing that the *Sullivan* approach wrongly undercut the protection "for an innocent speech target harmed by false speech").

48. *Id.*

lative while listeners are vulnerable and susceptible. Neuborne, one of the strongest voices of mere-conduit theory, has argued that although we must treat listeners as "rational, freestanding, trustworthy, and autonomous"[49] to avoid paternalistic assumptions that are contrary to democratic norms,[50] listeners are, in fact, likely less rational, trustworthy, and autonomous than they "would like to believe."[51] "Much of what we think we know about human nature, mass communication, and mass psychology warns us that hearers are often vulnerable to manipulation by sophisticated or passionate speakers backed by powerful amplifying conduits," Neuborne argues. Thus, listeners who are unable to filter out powerful conduit-delivered speech are in danger "a disturbingly high percentage of the time."[52]

1. Historical and Textual Arguments for a Mere-Conduit Model

When presented with the textual evidence that the Founders gave the press its own protective clause in the First Amendment,[53] proponents of the mere-conduit theory argue that the Press Clause was not designed to do any heavy lifting as speaker protection, but instead was a separate provision designed to protect mere conveyance of information from individual speakers "to a mass of hearers."[54] Neuborne's *Madison's Music* argues that the First Amendment's list of protections are best considered as being arranged on an "inside-to-outside axis," moving from the more individual to the more community-focused values. Thus, the text begins with freedom of thought and conscience in the Religion Clauses and

> progress[es] through three ascending levels of individual interaction with the community—free expression of an idea

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49. Neuborne, *supra* note 5, at 905.

50. *See id.* ("If we were to replace the presumption of a strong, autonomous hearer-queen with the vision of a weak, malleable, hearer-pawn, we not only invite massive paternalistic intervention in defense of such an infantile creature; we would erode the foundation of self-government.").

51. *Id.* at 904.

52. *Id.* at 905.

53. U.S. CONST. amend. I ("freedom of speech, or of the press").

54. NEUBORNE, *supra* note 8, at 125.

> by an individual, mass dissemination of the idea by a free press, and collective action in support of the idea by the people—and culminating in the petition clause with the introduction of the idea into the formal process of democratic lawmaking.[55]

In this way, all the residents of "Mr. Madison's neighborhood" find representation in the First Amendment's articulated freedoms, and those freedoms work together to create an "organized blueprint of democracy in action."[56]

Under such a framework, the Press Clause, which follows the Religion Clauses and the Speech Clause, is included in the First Amendment to bridge the gap between those purely individual freedoms at the beginning of the Amendment's text and the largely societal and governmental freedoms of assembly and petition at the end of it. The Framers were not envisioning a protected institutional speaker called "the press" so much as guaranteeing that a free individual speaker has "the ability to reach a mass audience."[57] Thus, the press needs to be "decoupled" from any notion of speaker protection.[58]

This assertion that the "press" protected by the Press Clause is merely a technology—a conduit or mechanism of delivery, as opposed to an institutional speaker—finds support in the originalist arguments of Professor Eugene Volokh.[59] Relying on the linguistic structure of the First Amendment and on founding-era documents that described freedom of the press as a right of "every freeman" or "every citizen,"[60] Volokh argues that the right was seen only as the right to "publish using mass

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55. *Id.* at 17–18.

56. *Id.* at 18.

57. *Id.* at 19 ("Because Madison understood that a single free voice, no matter how earnest and intellectually compelling, can reach only a relatively small audience, his First Amendment narrative turns chronologically and logically to a fourth component of robust democracy—freedom of the press, designed to ensure a free speaker the ability to reach a mass audience.").

58. *Id.* at 126.

59. Volokh, *supra* note 30, at 462 (arguing the Press Clause "does not protect the press-as-industry, but rather protects everyone's use of the printing press (and its modern equivalents) as a technology").

60. *Id.* at 474 (arguing that it would be odd for the wording "freedom of speech, or of the press" to "mean one thing in the first part of the phrase (i.e., everyone's freedom to use the faculty of speech) and a different thing in the second part (i.e., the freedom belonging to a particular group, the press-as-industry)").

technology, as opposed to the freedom of speech."[61] He contends that state supreme court cases and state constitutions from the late eighteenth and early nineteenth centuries also suggest that the press was protected as a conduit, not as a special institutional speaker called "the press."[62] Volokh and others have also made an originalist mere-conduit argument emphasizing that some of the most important contributors to public debate during the Founding Era were not members of the institutional press; thus, they say, it is "unlikely that the Framers would have secured a special right to this small industry, an industry that included only part of the major contributors to public debate."[63]

2. Practical Consequences of a Mere-Conduit Model

The mere-conduit theorists who are convinced as a historical matter that the institutional press deserves no special speaker protection[64] are joined by others who find such protection impractical or unwarranted.[65] The U.S. Supreme Court has largely agreed with them. Despite a great deal of language

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61. *Id.* at 464.

62. *Id.* at 466.

63. *Id.* at 468–69 ("This is especially so given that some of the most powerful and wealthy contributors, such as the politicians and planters who wrote so much of the important published material, weren't part of the industry."); *see also* David B. Sentelle, *Freedom of the Press: A Liberty for All or a Privilege for a Few?*, 2013 CATO SUP. CT. REV. 15, 24–25 (2013–2014) (noting that Thomas Paine, James Madison, Alexander Hamilton, and John Jay were not members of the institutional press and concluding that "[it] is inconceivable that the ratifying public would have thought that *Common Sense* and *The Federalist Papers* would not be covered by the freedom of the press").

64. *See* NEUBORNE, *supra* note 8, at 125 ("Historically, government efforts at censorship initially centered on licensing or regulating the operation of the printing press, not the speaker."); *id.* at 126 (noting that John Milton's *Aeropagitica*, seen as a foundation for First Amendment theory, was focused on printing licenses and not on speakers and that John Peter Zenger's famous trial for seditious libel was a charge for printing); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 600 (1979) (concluding that a "preferred position for the news media finds no support in history"); Volokh, *supra* note 30, at 465 ("The constitutional protections offered to the institutional media have long been understood—in the early republic, around 1868, from 1868 to 1970, and in the great bulk of cases since 1970 as well—as being no greater than those offered to others.").

65. *See* RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1239–40 (2013) (summarizing scholarship arguing that defining the press is impractical).

and analysis to the contrary in key opinions about the press,[66] the doctrinal position adopted by a majority of the Court's Justices, both on[67] and off[68] the bench, is that the Press Clause has no independent heft as a protection for institutional speakers.[69]

To the extent the Press Clause has anything to say about the sophisticated interrelationships between speakers and listeners, the most vocal mere-conduit proponents advocate that it be interpreted as almost exclusively a listener-protection mechanism, with no recognized speech component.[70] According to this view, the conduits in the press would perhaps be able to invoke the Press Clause to insulate themselves from liability for "innocently distributing the speech of others" to listeners[71] and might also be able to employ the Press Clause to get access

66. RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 707 (2014) (summarizing "commentary about the unique role of the press in society and the democratic function that it serves"); Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014).

67. Citizens United v. FEC, 558 U.S. 310, 352 (2010) (quoting Austin v. Mich. Chamber of Commerce, 494 U.S. 690, 691 (Scalia, J., dissenting) (suggesting the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers"); *see also Citizens United*, 494 U.S. at 390–91 n.6, (Scalia, J., concurring) (calling it "passing strange" to suggest that the press deserves unique First Amendment protection); First Nat'l Bank v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring) (calling the Press Clause a reference to "expression and dissemination").

68. *See, e.g.*, *45 Words: A Conversation with U.S. Supreme Court Justices Antonin Scalia and Ruth Bader Ginsburg on the First Amendment*, KALB REPORT (Apr. 17, 2014), https://research.gwu.edu/kalb-report-archives [https://perma.cc/7ZL6-A54L] (transcript available at https://research.gwu.edu/sites/research.gwu.edu/files/downloads/45Words_Transcript.pdf [https://perma.cc/96A7-M5G9]) (Justice Antonin Scalia characterizes the Press Clause as giving "prerogatives to anybody who has a Xerox machine"). *See generally* RonNell Andersen Jones, *Justice Scalia and Fourth Estate Skepticism*, 15 FIRST AMEND. L. REV. 258 (2017).

69. *See* Volokh, *supra* note 30, at 464 (noting the "press-as-technology model has continued to be dominant"); Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 962 (2007) (noting that it is a "commonly suggested view that freedom of the press does not provide for special rights").

70. NEUBORNE, *supra* note 8, at 103 ("Madison gave conduits their own clause—the Free Press Clause—designed to permit skilled tradesmen to transmit the speech of others to larger audiences free from government interference.").

71. *Id.* at 103; *see also id.* at 126 ("Viewed as a conduit, the press might even be treated more like the telephone company, having no legal culpability in merely transmitting the speech of others without knowing that the speech was false or otherwise unlawful.").

to certain government information on behalf of listeners.[72] But the listener-exclusive focus of the mere-conduit reading would also saddle the press with the obligation to prioritize listener preferences over publisher preferences, making the press "subject to regulations designed to ensure access to the mass media for otherwise blocked or unheard voices."[73] Because the press-as-conduit approach envisions the press's role as, at best, "gatekeeping," rather than "speaking," the press is seen as dangerously "control[ling] access by *true speakers* to critical speech-transmission technology."[74] The heavy governmental regulation of content to force access for some individual speakers wishing to use the press would not violate constitutional norms; indeed, providing that access might be a free-speech imperative.[75]

Under this view of the Press Clause, conduits are responsible for meeting both the needs of other speakers and the needs of listeners.[76] Neither the listener nor the government regulator has a reciprocal obligation to recognize the press as a valuable contributor of First Amendment content or a possessor of independent First Amendment interests.

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72. *Id.* at 103; *see also id.* at 126 (noting that under the mere-conduit theory, "the institutional press might be viewed as enjoying privileged access to otherwise blocked speakers, such as prisoners, or having a duty to uncover information *needed by hearers*" (emphasis added)); Neuborne, *supra* note 5, at 907 (suggesting that the Court should hold "that *hearers*, assisted by the press, ha[ve] an enhanced right of access to closed institutions like prisons or mental hospitals" (emphasis added)).

73. NEUBORNE, *supra* note 8, at 103 (arguing for an interpretation of the Press Clause that would require the press to take on an "institutional role to seek out and offer voice to weak speakers"); *id.* at 126 (arguing that the press "might . . . be subject to regulations seeking to broaden the ability of poor speakers to reach a mass audience or preventing any single press entity from becoming too powerful—a kind of First Amendment antitrust law").

74. *Id.* at 126 (emphasis added).

75. *Id.* ("As we experience the increasing consolidation of the press into a few corporate entities exercising 'gatekeeper' control over every form of technological amplification, mandated access for weak voices will become crucial to maintaining a genuine free market in ideas."); *id.* at 102 (criticizing the Court because "[w]hen a right to know would have real benefits for hearers, . . . as in . . . efforts to increase the variety of voices in mass media, the Court usually shuts it down").

76. *Id.* at 126 (articulating a "duty to uncover information needed by hearers").

B. The Symbiotic-Relationship Model

The better view of the press within a listener-rights framework is that it is not a mere conduit, but rather a specially protected institutional speaker with both a uniquely powerful speech relationship with listeners and a uniquely heightened threat of being targeted by government regulators. The remainder of this Article develops this new symbiotic-relationship model, which stands in stark contrast to the mere-conduit model that some scholars and jurists have embraced. The symbiotic-relationship position is supported by more sophisticated historical evidence about the values that press freedom was designed to protect.[77] It is also more descriptively accurate, because individual journalists within the press unquestionably engage in decidedly listener-serving, classic speech activity. Moreover, the institutional press engages in symbiotic-relationship speech activities by curating information for listeners and by acting as a First Amendment proxy for listeners.

Importantly, while this symbiotic-relationship model of the press is superior both descriptively and analytically to the mere-conduit model, they share a fidelity to the same key listener-rights principles. Like the mere-conduit theory, the symbiotic-relationship theory starts from the position that no portion of the First Amendment is a redundancy, and all actors in "Mr. Madison's Neighborhood" were envisioned to have roles that range from individual to societal in scope.[78] Like the mere-conduit model, the symbiotic-relationship model asserts that First Amendment relationships matter, and individual rights of speakers, listeners, and others cannot be considered in a vacuum but must instead be considered comprehensively for their interactions between and among each other. And like the mere-conduit model, the symbiotic-relationship model emphasizes that listeners, in particular, are entitled to have their dignitary interests recognized and their power to choose protected.

The symbiotic-relationship model, though, suggests that the Press Clause represents a different kind of textual bridge

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77. *See* discussion *infra* Section II.B.1; *see also* Randall P. Bezanson, *Institutional Speech*, 80 IOWA L.R. 735, 807–10 (1995).

78. NEUBORNE, *supra* note 8 *passim*.

from the individual to the societal aspects of the First Amendment—because it protects a more listener-cognizant, societally focused speaker rather than a non-speaker conduit. This model calls for recognition of the special relationship between institutional press speaker and societal listener, in which "the press performs a crucial function in effecting the societal purpose."[79] When the press is appreciated as a special institutional speaker, with its rights of editorial discretion and content control preserved as they would be for individual speakers, listeners are the beneficiaries. Listeners' capacity to autonomously choose an identifiable package of information on matters of public concern is enhanced—and in a communications landscape with ever more raw information, listeners retain the freedom to choose speech that is of interest and value to them after it is sifted and curated by trusted institutional speakers.

The failure to take seriously this special First Amendment relationship between societal listeners and institutional press speakers has constitutional consequences. Contrary to the conventional wisdom that both speaker and listener receive full protection when speaker and listener rights travel in tandem, there is currently a significant gap in the protection we would expect institutional press speakers to receive, given the role they play for listeners. This gap is found in the right to gather information that societal listeners cannot meaningfully or practically gather on their own and that institutional press speakers wish to gather for them. A full appreciation for listener rights and a commitment to acknowledging First Amendment relationships would lead to a reading of the Press Clause that more vigorously protects the right of newsgathering.

The discussion below explores the three distinct reasons why the press is better thought of as a special institutional speaker that shares a symbiotic relationship with societal listeners.

79. Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

1. Historical Evidence of the Press as Special Institutional Speaker

The existence of the Press Clause is evidence not that the Framers envisioned the press as something less than a protected speaker, but rather that institutional press speakers had a particularly valuable role to play and a unique relationship with listeners that warranted unique protections.

This history has long been appreciated. Justice Potter Stewart's article *Or Of the Press* asserted that the Press Clause provides special protection for the institution of the press because "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches."[80] Scholars who embrace this view[81] point to powerful historical evidence of the motivations for the Press Clause specifically and for press protection more generally. Their nuanced inquiries into the real-world relationships between the press and its listeners at the time of the founding offer a useful counter to Volokh and Neuborne's mere-conduit views.

At the outset, reliance on the "order, placement, meaning, and structure"[82] of the First Amendment's clauses may be misplaced, as the drafting was significantly less elegant or deliberate than *Madison's Music* suggests. More significantly, beyond imposing a poetic framework that did not inform the First Amendment's drafting, the Neuborne approach inaccurately

80. Potter Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 634 (1975).

81. David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 457 (1983); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 931–32 (1992) (describing historical intent to specially protect the institutional press); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) (arguing that the press was intended to be specially protected); Sonja R. West, *The 'Press,' Then and Now*, 77 OHIO ST. L.J. 49, 54–55 (2016) [hereinafter West, *Then and Now*] (examining the historical press function and arguing the "role is as a repository of unique rights and protections for those speakers who are fulfilling structural functions of the press and not a general right for all speakers to publish and disseminate their speech"); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–29 (2011) [hereinafter West, *Awakening the Press Clause*] (arguing that historical and modern considerations call for unique Press Clause rights for the institutional press).

82. NEUBORNE, *supra* note 8, at 1.

diminishes the primary importance of the First Amendment press protections.[83]

The Press Clause was not a mere afterthought, designating a secondary conduit role for the press to serve the more primary needs of speakers and listeners. Rather, "[e]pistemologically . . . the press clause was primary and the speech clause secondary,"[84] and at least as to some central societal functions, protection of "speech was an afterthought."[85]

David Anderson closely examined the origins of the Press Clause and its precursors in state constitutions and other pre-Revolutionary declarations, as well as in pronouncements by the First Congress and at the Constitutional Convention.[86] He concludes that press freedom clearly predominated over speech freedom for the drafters of the First Amendment.[87] Although there likely was not one true, "comprehensive theory of freedom of the press," it is clear, Anderson says, that press rights were not appended to speech rights so that protected speakers could have a conduit—quite the opposite.[88] Speech rights were debated and added to the First Amendment "as an offshoot of freedom of the press, on the one hand, and on the other, freedom of religion—the freedom to speak openly on religious matters."[89]

Sonja West's more recent historical analysis reinforces this view, concluding that several aspects of the trajectory leading to the final text of the First Amendment do not "fit comfortably with the view that the Press Clause reflects a mere broadening of the Speech Clause to cover the written, as well as the spoken, word or merely the right to disseminate one's speech."[90] A notable example is the "absence[ ] of any reference whatsoever to speech rights in . . . early declarations of free-

83. West, *Then and Now*, *supra* note 81, at 62–63 (describing evidence that "[p]ress freedom was of paramount importance at the time of the framing" and "[s]o clear was the significance of securing freedom of the press that it surpassed even the push for speech rights").

84. Anderson, *supra* note 81, at 487.

85. *Id.*

86. *Id.* at 462–68.

87. *Id.* at 536–37.

88. *Id.*

89. *Id.* at 487 (quoting LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 5 (1960)).

90. West, *Then and Now*, *supra* note 81, at 65.

doms."[91] Indeed, Madison's initial draft of the First Amendment contained a press clause but not a speech clause, and his second proposed draft referred to speaking, writing, and publishing in a single clause and contained a separate press clause, indicating that freedom of the press was designed to do something more than protect the distribution of writing.[92]

West's historical research, focusing on the colonial and early American experiences with the printing press and its societal function, is especially insightful on the question of whether the Press Clause protects a mere conduit.[93] The overwhelming evidence is that the press was a "tool of limited capability," used "primarily only to publish specific kinds of messages" that were "inescapably intertwined with news on public affairs."[94] The founding generation's use of the phrase "freedom of the press" to "reference not only access to technology but also the ability of citizens to express their ideas and to check their government in a distinctive way"[95] suggests that the press was "not simply . . . a technology anyone could use to disseminate any message, but instead . . . a specialized vehicle for comment on and monitoring of the operations of government."[96] Thus, while Volokh and Neuborne are technically correct that the "press" referenced in the Press Clause was likely a technology, it was "a technology that fulfilled particular and highly valued functions"—functions that are today fulfilled primarily by journalists within the institutional press.[97] West's conclusion that "journalism is the modern corollary to the early 'press' as it was experienced in the 1700s"[98] cuts deeply against

91. *Id.* at 63.

92. *Id.* at 63–64 ("[T]he people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable." (quoting JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 451 (1834))).

93. *Id.* at 65–71.

94. *Id.* at 52.

95. *Id.* at 55.

96. *Id.*

97. *Id.* at 102; *see also id.* at 53, 104 (arguing in favor of "interpreting the Press Clause as protecting a function that is today served by journalists" and suggesting that "interpret[ing] the Press Clause today in a manner that is as faithful as possible to its original values" requires recognition that it was designed *both* to secure an individual liberty of self-expression and "to safeguard and further an informational structural defense against the failings of government").

98. *Id.* at 104.

the historical mere-conduit view. It illustrates that the motivation for protecting the press constitutionally was in fact to protect the unique functions performed by today's institutional press speakers.[99]

2. Functional Evidence that the Press is a Special Institutional Speaker

Examining the core functions of the press lays bare the press's role as a special institutional speaker with a symbiotic relationship to listeners. While the task of identifying who counted as the press was perhaps easier a generation ago, a modern definition of the press for constitutional purposes can focus on these functions—and can be broad enough to include those who perform traditional press functions through modern technological means.[100] Importantly, for purposes of the symbiotic-relationship model of the press, these functions include both quintessential individual speech activities and special institutional speech activities that uniquely serve listeners.

a. Quintessential Speaker Activities of the Press

Perhaps the plainest evidence that the press is a speaker, rather than a mere conduit, is that it is comprised of individual journalists[101]—dignitary speakers who are writing and publishing and performing all of the quintessential First

99. *Id.*

100. The specific contours of the modern press definition are beyond the scope of this Article, but the U.S. Supreme Court has identified a number of functions that separate the press from other speakers. *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2444–45 (2014) (describing specific recognized press functions, including newsgathering, public dissemination, checking government and the powerful, possessing specialized knowledge, serving a gatekeeping function through editorial decision-making, placing news in context, devoting time and money to investigation, showing accountability to an audience, and giving attention to professional ethics and standards). Such a functional definition, which centers on a "proven ability to reach a broad audience through regular publication or broadcast," *id.* at 2445, could easily apply beyond the traditional, legacy press organizations of newspapers and broadcast television news to digital and even some social media communication meeting the functional criteria.

101. *See* West, *supra* note 66, at 748–49 (cataloging the ways the Supreme Court refers to individual journalists when discussing "the press").

Amendment speech activities associated with that work.[102] These speakers are entitled to no less protection than any other speaker performing those same activities receives. Employed by a publisher who pays them for expression,[103] they have made it their life's work to engage in discussion of matters of public concern—a classic example of protected speech. Human reporters and editors have the autonomy and self-fulfillment interests in their expressive work that all other humans enjoy.[104] Like any other speaker who engages in informing, contextualizing, storytelling, discussing, educating, investigating, and researching, these individual speakers within the institutional press are serving "the most basic purpose of the First Amendment."[105] Individuals engaging in those speech activities on any topic at all would be squarely within the protection afforded First Amendment speakers. Members of the press, whose endeavors nearly always center on matters of public affairs and issues of public concern, routinely serve listener-focused First Amendment objectives while meeting those speaker-focused ones. Thus, members of the press are even closer to the heart of that protection.[106]

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102. *See* West, *Then and Now*, *supra* note 81, at 54 (describing the ways that that "skilled journalism has expressive qualities").

103. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 503 U.S. 105, 116 (1991) (holding that "[w]hether the First Amendment 'speaker' is considered to be [the individual author] or Simon & Schuster, [the publisher], the statute plainly imposes a financial disincentive only on *speech* of a particular content" (emphasis added)).

104. *See, e.g.*, Saxbe v. Wash. Post Co., 417 U.S. 843, 847 (1974) (addressing the free press rights of "journalists"); Branzburg v. Hayes, 408 U.S. 665, 709 (1972) (Powell, J., concurring) (referring to the rights of "newsmen").

105. N.Y. Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).

106. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) ("Commentary and reporting on the criminal justice system is at the core of First Amendment values . . . ."); Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government."). For more discussion of the institutional press speaker's role as a check on government, see *infra* Section II.B.3 text and accompanying notes 224–231.

i. Informing

Members of the press engage in several prototypical speech activities. At the most basic level, individual members of the press are engaged in the First Amendment speech activity of informing.[107] Sharing facts about the world with listeners who seek those facts is the core First Amendment behavior of all sorts of clearly protected speakers, from lecturers to documentary filmmakers to authors of nonfiction books. Unquestionably, "the creation and dissemination of information are speech within the meaning of the First Amendment."[108] Listeners need facts, and both gathering them and communicating them are critically important speech. "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[109] Informing is speech that aids listeners and advances the autonomy of informers, and the relationship between these two parties is the sort that the First Amendment was designed to foster and protect.[110] Indeed, "[i]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category."[111] People who tell each other things are speakers, and this is no less true when the people are members of the press.

Importantly, even when the press appears to be essentially passing along others' facts, it is not engaged in mere-conduit behavior because it traditionally checks those facts—an investigative and corrective function that is also speech.[112] It is

107. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991) (describing the press's efforts to "gather and report the news"); *Neb. Press Ass'n*, 427 U.S. at 561, 570 (striking as unconstitutional a prior restraint on speech to communicate "news and commentary on current events" and noting the "traditional function of bringing news to the public promptly"); Cox Broad. v. Cohn, 420 U.S. 469, 496 (1975) (describing the role of the press in "inform[ing] citizens about public business"); Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (saying the press meets "the public need for information and education with respect to the significant issues of the times").

108. Sorrell v. IMS Health, Inc., 564 U.S. 552, 570 (2011).

109. *Id.*

110. *See generally* Bartnicki v. Vopper, 532 U.S. 514, 527 (2001); NEUBORNE, *supra* note 8; Neuborne, *supra* note 5.

111. *Bartnicki*, 532 U.S. at 527 (quoting Bartnicki v. Vopper, 200 F.3d 109, 210 (3d Cir. 1999)).

112. *See* RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. L.J. 1301, 1358–59 (2017) (describing ways the press's fact-

because of their unique devotion to this information-confirming activity that "the press and broadcast media have played a dominant and essential role in serving the informative function protected by the First Amendment."[113] A system of free speech relies on thoughtful, corrective informing to shed light on "public and business affairs" and to aid listeners in reaching informed conclusions of their own.[114] Those who do that informing are speakers, not conduits.

ii. Contextualizing

Press speakers of course go well beyond informing listeners in several ways. First, their reporting adds context and thus contributes content. Like the speech of other contextualizers—historians, political commentators, advocates, teachers, and activists—press speech enhances the self-fulfillment interests of the speaker and contributes value to listeners in the marketplace of ideas. Contextualizing is classic First Amendment speech activity.

The speech activity of contextualizing occurs as the press interprets the information it gathers for listeners.[115] It also happens as the press "places news stories in context locally, nationally, or over time."[116] Listeners rely on press speakers to "provide context and reveal impact, exposing the story behind the story and illuminating the nuances beyond the facts."[117] Press scholar David Anderson has noted that this is a major

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checking function provides important new counternarratives).

113. Herbert v. Lando, 441 U.S. 153, 188–89 (1979) ("The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 781 (1978))).

114. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) ("The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.").

115. *Id.* ("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.").

116. West, *supra* note 100, at 2444.

117. Jones & Sun, *supra* note 112, at 1361 (providing examples of contextualizing).

way that press speech "adds value," by "making the information more easily digestible, or by adding historical or comparative perspective."[118] When the press reports a piece of information and then contextualizes it—for example, "it was the fourth murder in the neighborhood this year," or "a study by another group of scientists reached a different conclusion," or "this was the third consecutive quarter of employment gains"[119]—it communicates ideas and contributes as a speaker to a First Amendment relationship with listeners who benefit from the context.

Sometimes press speakers contextualize by zooming out to view information through a wider lens,[120] and sometimes they do so by zooming in to give specific, detailed stories about individuals impacted by wider policy decisions.[121] Both are valuable speech rather than mere conduitism. If any other speaker wrote a story or distributed a leaflet offering either of these forms of context on a matter of public concern, we would surely balk at the argument that this was not core First Amendment speech activity—and we would surely reject the notion that the government could compel the speaker to include different content. This is because we incontrovertibly recognize those who communicate context as speakers, not conduits.

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118. David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 331 (2014).

119. *Id.* at n.4.

120. *See, e.g.*, Jones & Sun, *supra* note 112, at 1361–62 (describing how, in stories about President Trump's attacks on a federal judge, the press did not merely convey information about his statements but also gave context about "the potential impacts of delegitimizing the courts"—"educat[ing] the public about the role of the judiciary, its history, the importance of judicial independence, and the process by which this particular judge was selected and nearly unanimously confirmed"); *id.* at 1366 (describing how, in stories about Trump's immigration proposals, the press "contextualized the action by providing historical comparisons and by offering differing views from Trump's opponents and from skeptics within Trump's own party," providing "historical perspective and educat[ing] the public about the details of the process of refugee vetting").

121. *Id.* at 1363 (describing how press coverage of President Trump's immigration proposals "went well beyond simple fact-checking of numbers, documenting the impacts on individual refugees and visa-holders set to travel to the United States to reunite with their families or receive medical care who were barred from boarding their planes").

iii. Narrating

Press speakers also move beyond informing listeners through the quintessential First Amendment speech activity of narrating. The "ability to disseminate is not the same as the ability to engage an audience, and this is where the press's distinctive value lies today."[122] In recognizing the press as a speaker, the Supreme Court has been careful to note that the press "does not simply publish information *about*" acts of government, but instead formulates narratives of its own choosing to tell the stories it believes its readers should be told and to scrutinize the issues it believes should be scrutinized.[123]

Press speakers are fundamentally engaged in authorship—complete with narration, storytelling, and discussion with anticipated listeners—all of which are classic First Amendment speech. Authorship is what poets, screenwriters, novelists, street-corner soapbox speakers, and traditional pamphleteers do—choosing ideas to convey,[124] details to include,[125] and words and phrases to use to communicate the precise intended message.[126] We value this activity both as speech that fulfills the speaker and as an offering that benefits the listener. It serves identical values in the context of press speakers.

Narration and the First Amendment choices that accompany it are why "[t]he press is not just a gatekeeper" but instead "a full participant in public dialogue, identifying issues, originating ideas, and critiquing the ideas of others."[127] Importantly, the press's guide in these narrative choices is "not just newsworthiness, but its members' own values and perspec-

122. Anderson, *supra* note 118, at 332.

123. Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (emphasis added).

124. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (holding that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

125. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 342 (1995) (holding that "an author's decision to remain anonymous, like other *decisions concerning omissions or additions to the content of a publication*, is an aspect of the freedom of speech protected by the First Amendment" (emphasis added)).

126. Cohen v. California, 403 U.S. 15, 26 (1971) (noting that "linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well" and holding that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").

127. Anderson, *supra* note 118, at 333 n.8.

tives."[128] That is, the individual thinkers and writers within the institutional press have dignitary and autonomy interests at stake in the narrative process, and these interests are central to their definition as First Amendment speakers, rather than mere conduits.

iv. Educating

Additionally, press speakers are engaged in the fundamental First Amendment speech activity of educating. Educating is not merely passing along information to listeners, but rather expressive activity protected by the Speech Clause. Indeed, the whole of academic freedom is premised on the notion that educating is a valuable First Amendment speech activity.[129]

The press "has knowledge, often specialized knowledge," about the subjects of its reporting,[130] and the press makes it its business to investigate and obtain additional knowledge initially lacked by the press and its listeners.[131] Investigative reporting is research, and the publications that result from it educate the reader about the findings of that research. Likewise, even day-to-day beat coverage by the press has a decidedly educative function.[132] For example, throughout the history of the nation, the press has been central to "public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system."[133] The press "is society's great teacher" in other ways as well, using the informing, contextualizing, and narrating tools discussed above to give its listeners knowledge about a wide variety of topics

128. *Id.*

129. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671, 680, 683 (6th Cir. 2001) (holding that "a teacher's in-class speech deserves constitutional protection").

130. West, *supra* note 100, at 2444.

131. *See* Jones, *supra* note 65, at 1228–31 (recounting the history of American investigative reporting and describing developments in Watergate-era watchdog journalism).

132. *See* Jones & Sun, *supra* note 112, at 1360–61 (explaining how the "press has consistently served this teaching role on a wide variety of crucial public issues" and citing examples).

133. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) (Brennan, J., concurring) (quoting Neb. Press Ass'n. v. Stuart, 427 U.S. 539, 587 (1976)).

that the listeners would never experience directly.[134] "Put simply, we rely on the press to tell us how the world works."[135] Consumers of press speech seek it out for purposes of learning, and producers of press speech prepare it for purposes of teaching. Like all educating and expertise-sharing speakers, the press seeks to aid its listeners in forming opinions and in making intelligent, informed choices.[136]

In extending speaker protection to the press, the Supreme Court has regularly emphasized the ways in which the press as educator is the "chief" source of citizens' knowledge on a number of issues.[137] It has called this teaching role the "[g]reat responsibility" of the press[138] and has highlighted the "special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate."[139] Any other educator connecting with learners to teach "about history and current events' likely place within it, about the workings of complex topics, and even about constitutional doctrine and governmental structure" would unquestionably be a fully protected First Amendment speaker.[140]

All told, the quintessential speech activities of individual journalists—including informing, contextualizing, narrating, and educating—share identical ground with the speech activities of other individual speakers who serve listeners by contributing to the marketplace of ideas and offering the tools of self-governance, and who have autonomy and dignitary interests of their own in selecting and delivering their speech. Members of the press are, at the least, equivalent speakers and not less-protected mere conduits.

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134. Thornhill v. Alabama, 310 U.S. 88, 102 (1940) (noting "the public need for information and *education* with respect to the significant issues of the times" (emphasis added)); Jones & Sun, *supra* note 112, at 1360.

135. Jones & Sun, *supra* note 112, at 1360.

136. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975) ("Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."); *see also* Estes v. Texas, 381 U.S. 532, 539 (1965) (describing the importance of the press in "informing the citizenry of public events and occurrences").

137. *See Richmond Newspapers*, 448 U.S. at 573.

138. *Cox Broad.*, 420 U.S. at 491–92.

139. Herbert v. Lando, 441 U.S. 153, 188–89 (1979).

140. *See* Jones & Sun, *supra* note 112, at 1361.

b. Institutional Speaker Activities of the Press

Even when the press is seen as more than the collection of individual journalistic speakers within it, it retains the distinct character of a speaker. The separate protection within the Press Clause represents an acknowledgment that a system of free speech in a democracy requires some speakers who are not individual, autonomous humans but instead are critically important institutional speakers sharing a symbiotic relationship with individual, autonomous listeners. These institutional speakers in the press engage in specialized speech activities, driven by their listener-serving role, that empower listeners to make more and better decisions about their speech consumption.

These critically important speech activities by an institutional speaker are undoubtedly the reason that the Court routinely engages in the "personification of the press," referring to it as having "human-like characteristics."[141] For example, language in Court opinions suggests that the Court thinks of "the press" as something that can be assigned seating, receive telephone calls, discuss matters with others, show concern, be discouraged, and hold beliefs.[142] The Court appreciates that the press is not a mere technology or a conduit, but rather an institution with unique speaker traits. As an institutional rather than an individual speaker, the press lacks autonomy in the purest sense, but the Court routinely anthropomorphizes it because the press as an institution is doing something very individual speaker-like. One central feature of autonomy—that of building one's own identity through content decisions—is at play in the content determinations of the press.

Importantly, in its role as institutional speaker, the press does some speaking that differs from the speech of most ordinary individual speakers[143] but is no less speech—and, indeed, is arguably more listener-focused than much individual speech.[144] As described in more detail below, this institutional

141. West, *supra* note 66, at 747–48.

142. *Id.*

143. *Id.* at 738 (arguing that "press speakers function differently from individual speakers").

144. *Id.* at 756 (describing how "the Court also understands that there are certain speakers who are fulfilling special and important roles in our democracy").

speech is organizational and surrogate in nature and should be "celebrate[d]" as the kind of "partnership between free speakers and free [listeners] that is the bedrock on which democracy rests."[145] Accepting the core premise of Neuborne's *Madison's Music*, that the First Amendment might be read poetically to move from the most individual to the most societal of free expression values, the press is rightly seen as a bridge from individual free-speech needs to broader societal free-speech imperatives. But the step from the Speech Clause to the Press Clause is not a step from true speaker to mere conduit. It is a step from an individual, personal-autonomy-focused speaker to a broader, societally valuable institutional speaker with a particular partnership with listeners. We protect individual speakers even when they speak exclusively for their own self-fulfillment purposes and add no value to listeners. We protect the press because we expect that its primary role will be to speak in ways that advance the communicative autonomy of listeners and strengthen the relationship between listeners and their democratic communities.

This is true in at least two distinct ways. First, the press as institutional speaker makes content-curating choices that define its identity as a speaker and that serve the dignitary interests of listeners who need that packaging in order to be autonomous in their choices of what to hear on matters of public concern. Second, the press as institutional speaker acts as a proxy for listeners who are entitled to receive communications about matters of public concern but who require the aid of an additional speaker because they cannot feasibly be the direct listeners.

i. The Press as Curator for Listeners

The press performs an important institutional-speaker function of curating news, information, and opinion for listeners who benefit from that curation. Curating is much more than conveying or acting as a conduit. It is a speech activity that was recognized as a press function by the Founders[146] and

145. NEUBORNE, *supra* note 8, at 98.

146. *See* West, *Then and Now*, *supra* note 81, at 85 (discussing historical evidence of "printers as gatekeepers," who "decided what would and would not be published").

that is increasingly vital in an age of overwhelming information volume. Understanding the curating function helps us identify the press as a speaker and also helps us see how the press offers amplified value to listeners.

Curating is speaking. The way that speech—especially speech about matters of public concern—is packaged is a matter of content control. No First Amendment right is more sacred than the right of the speaker to control its own content, and conversely, no First Amendment sin is graver than an effort by government to dictate a speaker's content.[147] This is in part because content determines who you are as a speaker. When you are an individual speaker, who you are matters to your identity as a human with autonomy, dignity, and rights to self-definition and self-fulfillment. When you are an institutional press speaker, who you are matters to autonomous listeners, who are judging the contours of your curation and relying on that speech activity to make judgments about what kind of speech they wish to consume—decisions that enhance their own autonomy, dignity, and rights to self-definition and self-fulfillment.

The curating function is one of the features that separates institutional press speakers from entities that might properly be referred to as mere conduits. The UPS delivery person, who delivers every book that is shipped, is a mere conduit because he does not engage with, enhance, or digest the communicative material in any way before passing it along, and thus adds no First Amendment value to it. Likewise, ongoing debates about the importance of equality of access may be important for modern information conduits like internet service providers or other non-journalistic technology companies, to the extent that they focus on bare delivery of others' content.[148] But the press *does* engage with the material and make substantive decisions about what portions of it to pass along, in addition to decisions about how to intellectually and thematically curate the material for delivery to listeners, who choose that package

147. Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) (holding that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

148. Klint Finley, *Why Net Neutrality Matters*, WIRED (June 27, 2017, 3:52 PM), https://www.wired.com/story/why-net-neutrality-matters-even-in-the-age-of-oligopoly/ [https://perma.cc/DX65-PEVD].

specifically for its content.

By its very nature and function, the press cannot act as a pure conduit—nor would we wish for it to do so. The press could not conceivably provide all information about all topics of interest to all people. It could not even provide 100 percent of the available information about narrower subjects, like matters of public concern or issues debated by government. The content control inherent in the press's information packaging is "intimately related to the journalistic role,"[149] and it is how the press provides its greatest value to listeners. For reasons illuminated by listener-rights doctrine and its focus on the autonomy and dignity of listener choice, speech by institutional press speakers is "not for the benefit of the press so much as for the benefit of all of us."[150]

Curating involves a variety of interrelated speech activities, all of which work together to help the institutional press speaker create an identity and help the listener better make autonomous choices about what to hear. Among these are the interrelated activities that we might label sifting, prioritizing, and branding.

(1) Sifting

Sifting is the speech activity that institutional press speakers engage in to help listeners deal with the dual problems of too much speech and too little time or resources for fully consuming it. In a modern communications era, there is a First Amendment need for the press to "digest and synthesize the mountains of information that is available."[151] As Justice Powell once noted:

> No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens, the prospect of personal familiarity with

149. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 118 (1973); *see also* Anderson, *supra* note 118 (arguing that this role is the key function served by the press).

150. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); *see also* N.Y. Times v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) ("[W]ithout an informed and free press there cannot be an enlightened people.").

151. Jones & Sun, *supra* note 112, at 1366.

> newsworthy events is hopelessly unrealistic. In seeking out the news, the press therefore acts as an agent of the public at large.[152]

When the press brings its expertise and judgment to bear in sifting the newsworthy information from that which is not, it structures public discussion and builds community discourse by starting conversations and contributing carefully sifted useful information as these conversations continue.[153] News organizations "sift, select, and package the news, and in so doing create a community."[154]

This speech function of sifting, filtering, and digesting information is central to the expressive identity of a press organization.[155] The Supreme Court has repeatedly characterized the press as "a dialogue builder—a critically important distiller of societal information and shaper of community conversations through the application of editorial insight and journalistic acumen."[156] It is also one of the primary tasks the listener demands of the press.[157] The listener benefits from the institutional press speaker's sifting in obvious ways. In our modern world, we now create as much information about every two days as we did "from the dawn of civilization up to 2003."[158] The physical and mental impossibility of wading through that much information transforms what was once an added convenience into an absolute necessity.[159] The press speaker's sifting on behalf of the listener is now vital.

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152. Saxbe v. Wash. Post Co., 417 U.S. 843, 863 (1974) (Powell, J., dissenting).

153. *See* Jones & Sun, *supra* note 112, at 1363–64 (describing the ways that the press "helps us to sift" and "digest the massive bulk of available information on public affairs" and giving examples); Anderson, *supra* note 118, at 332–33 ("Democracy requires dialogue, and dialogue requires some agreement about the subjects to be discussed. What the press does . . . is organize public dialogue.").

154. Anderson, *supra* note 118, at 333.

155. *See* Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 391 (1973) (noting that "editorial judgment" is a manifestation of the "free expression of views").

156. RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 257 (2014).

157. *See* NEUBORNE, *supra* note 8, at 102 (supporting stronger rights for speakers where "the hearers [are] seeking access to the speech in question").

158. MG Siegler, *Eric Schmidt: Every Two Days We Create as Much Information as We Did up to 2003*, TECHCRUNCH (Aug. 4. 2010), https://techcrunch.com/2010/08/04/schmidt-data/ [https://perma.cc/UH72-HZ9W].

159. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) ("In a society in which

(2) Prioritizing

Prioritizing is the related speech activity that institutional press speakers use to help listeners deal with the problem of assigning value and importance to information. Listeners not only have limited time and resources, but also have limited mental capacity and knowledge about the relative significance or magnitude of a piece of news, resulting in finite opportunities for such judgments. In addition to sifting information for what will or will not be included in its package, the press prioritizes for listeners—signaling which of those included items are more pressing, more relevant to the listener, or more worthy of attention. The Court has protected this "journalistic judgment of priorities and newsworthiness"[160] because it is valuable First Amendment speech activity.

Sometimes institutional press speakers do this prioritizing quite explicitly, announcing that something is important and deserving of the reader's attention.[161] More often, the function is baked into the very nature of the institutional press operation, with headlines, placement, and other signaling devices offering listeners reliable markers of the institutional press speaker's assessment of importance and the best "starting points for citizen analysis and broader conversations."[162] Because a listener is bounded by the information she already possesses, by the cognitive limitations of her mind, and by the finite amount of time she has to make information-consumption decisions, she best exercises dignity and free choice by

each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."); *see also* Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) ("A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.").

160. CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 118 (1973).

161. *See* Jones & Sun, *supra* note 112, at 1366 (citing Quoctrung Bui, Claire Cain Miller & Kevin Quealy, *Just How Abnormal Is the Trump Presidency? Rating 20 Events*, N.Y. TIMES (Feb. 27, 2017), https://www.nytimes.com/interactive/2017/02/27/upshot/whats-normal-whats-important-a-ranking-of-20-events-in-the-trump-administration.html [https://perma.cc/LQ5H-BAFX] (providing examples of press prioritizing, including a *New York Times* feature asking experts to rank behaviors of the Trump administration on scales of importance and normality)).

162. *Id.*

autonomously selecting a news package and by trusting the prioritization by institutional press speakers.

(3) Branding

Finally, and relatedly, branding is the speech activity that institutional press speakers use to help listeners deal with the problem of selecting from among available curated speech packages. Institutional press speakers define themselves as speakers through this branding, and through the editorial discretion that they exercise while doing it.[163] Listeners rely on this branding, and when constrained from making broader information choices, the choice to select a brand is the way they remain "free to shape [their] own destiny, personality, thoughts, and beliefs."[164] A listener cannot possibly make all decisions about all possible streams of information, but the listener can make the important decision that she, in general, agrees with the sifting, prioritizing, and other curating values of the *New York Times* or the *Wall Street Journal* or *Breitbart News*. The listener's autonomy is heightened when she gets to select the information-delivery package that works for her. Conversely, treating the press as a mere conduit and forcing it to communicate others' messages equally undercuts this value otherwise provided to listeners.

Viewed in this light, *Miami Herald v. Tornillo*, so problematic to mere-conduit theorists for the perceived losses that it imposes on listeners, in fact represents a net positive for both listeners and institutional press speakers. In that case, the Court's recognition of the risks of "compulsion exerted by government on a newspaper to print that which it would not otherwise print" and the "intrusion into the function of editors"[165] was in service of a wider First Amendment relationship. That relationship rises and falls on the exercise of the newspaper's editorial judgment. As David Anderson has noted, that judgment "create[s] a community among people who share the outlet's conception of news sufficiently to subscribe, tune in,

163. *See* Randall Bezanson, *Editorial Discretion*, 78 NEB. L. REV. 754, 829 (1999).

164. NEUBORNE, *supra* note 8, at 98.

165. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256, 258 (1974).

or click,"[166] with the institutional press speakers "constrained only by their own editorial judgment and the need to hold (or expand) the audience."[167] While this bold agenda-setting and institutional speaker-driven curating "is exactly what some people most dislike about the press," the newspaper's capacity to preserve its brand is all that enables "the public to assert meaningful control"[168] over its information intake and, thereby, over the self-governance enabled by that information.

Branding is how listeners and speakers form the active partnership that listener-rights advocates most crave. It is not properly described as an active press speaker role with a passive listener role;[169] rather, it entails a sophisticated First Amendment dynamic of a press that is curating and offering and autonomous listeners who are seeking and finding. Like all other speakers, institutional press speakers "facilitate[ ] some of the core interests of autonomous agents" by conveying material that fosters a speaker-listener relationship and builds understanding between them.[170] Branding enables a press speaker and its listeners "to know one another, to cooperate with one another, to investigate the world, and to enhance [the listeners'] understanding of [their] environment and [their] circumstances, and thereby enable[s] . . . moral agency."[171] It is in part in recognition of the virtues of this relationship that the First Amendment gives "a clear command that government must never be allowed to lay its heavy editorial hand on any

166. Anderson, *supra* note 118, at 333.

167. *Id.* It is of course possible that a press constrained only by audience demands and editorial discretion might choose material that fails to advance democracy or serve the interests of self-government. But the central First Amendment premise of reasonable citizen listeners—who can maintain a sufficient level of civic engagement, promote a minimum level of media literacy that differentiates trustworthy from untrustworthy sources of information, and self-correct consumption habits to demand accurate news on matters of true import—is a basic "foundation of self-government." Neuborne, *supra* note 5, at 905.

168. Anderson, *supra* note 118, at 333; Saxbe v. Wash. Post Co., 417 U.S. 843, 862–64, 894 (1974) (Powell, J., dissenting).

169. *See* West, *supra* note 100, at 2445 (addressing concerns in Adam Cohen, *The Media that Need Citizens: The First Amendment and the Fifth Estate*, 85 S. CAL. L. REV. 1, 4 (2011)).

170. *See* Seana Valentine Shiffrin, *A Thinker Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 305 (2011).

171. *Id.*

newspaper in this country."[172]

Celebrating and protecting the content control by institutional press speakers who are engaged in curating does not harm the diversity of voices in society. Indeed, diverse institutions with diverse curated packages of information may be the only practical way to achieve a diversity of voices. In a society where "[o]ur public debate has never seemed noisier" and the "marketplace of ideas is overloaded with a cacophony of voices,"[173] it is counterproductive to impose constitutional rules that require every press speaker to communicate all information and every vantage point. If the goal is to "enhance[ ] a hearer's capacity for informed free choice,"[174] providing manageable curated packages from which to choose might be a primary free-speech goal. Because technological advances "have opened the gates to press membership wider than ever before,"[175] minority and nontraditional speakers and listeners can find institutional press speakers too. Those voices may well suffer if the government is permitted to impose requirements overriding a news organization's own decisions on sifting, prioritizing, or branding, because the regulation would have the broader effect of muddying the choice between brands.

Indeed, the Supreme Court opinion that most strongly embraces the listener-rights approach may actually be the opinion that most thoroughly rejects the mere-conduit view of the press. In his important dissent in *Branzburg v. Hayes*, Justice Potter Stewart made a full-throated defense of the constitutional uniqueness of institutional press speakers.[176] Read closely, though, Stewart's dissent is as much about the need to defend listener autonomy as it is about the need to protect speaker rights. Stewart's listener-rights approach calls for "enlightened choice by an informed citizenry" and argues that it is the necessity of that decision-making power that makes "a free press . . . indispensable to a free society."[177] Not only does the press "enhance personal self-fulfillment by

172. Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations, 413 U.S. 376, 403–04 (1973) (Stewart, J., dissenting).

173. West, *supra* note 100, at 2446.

174. NEUBORNE, *supra* note 8, at 100.

175. West, *supra* note 100, at 2452.

176. 408 U.S. 665, 725–27 (1972) (Stewart, J., dissenting).

177. *Id.* at 726.

providing the people with the widest possible range of fact and opinion," Stewart wrote, it also "maximize[es] freedom of choice by encouraging diversity of expression."[178] Stewart's position—that the press is an institutional speaker whose rights should be bolstered by alignment with listeners rather than diminished by characterization as a mere conduit—gives due weight to the value of the press as a communicative curator and to the listener as an autonomous selector of curated information packaging.

ii. The Press as Proxy for Listeners

The press also serves the important institutional-speaker function of exercising listeners' own First Amendment rights as a proxy. In this way, the speaker-listener relationship between the press and its public audience is truly symbiotic, with "the interests of the public to know and of the press to publish"[179] running in tandem and being served simultaneously by the First Amendment activities of the institutional press.

In some respects, of course, the curating function just discussed is performed by the press as proxy for listeners—sifting and prioritizing in ways that approximate what the listener would do for herself if she had the time, resources, or knowledge. But the press also has purer proxy responsibilities that it performs for listeners. The Supreme Court has said, for example, that every citizen has a First Amendment right to attend a criminal trial.[180] When the institutional press attends the trial and reports the proceedings to the listener, it is in part exercising that First Amendment right—engaging in the listener's own First Amendment activity on behalf of the listener.[181]

As a historical matter, the Founders envisioned institutional press speakers as standing in the stead of those who could not exercise their own First Amendment rights. Revolutionary era discussions of press freedom routinely suggested that the "Liberty of the Press" was "a great Bulwark of the

178. *Id.* at 726–27.
179. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975).
180. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980).
181. *See id.*

Liberty of the People,"[182] and investigations of colonial era press freedom demonstrate that it was protected because the press was comprised of "experienced and knowledgeable speakers who were able trustees for the general public's right to information."[183] This proxy notion is all the more valuable in modern times.[184] In the language of the Court, "in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies *necessarily* upon the press to bring to him in *convenient form* the facts of those operations."[185] This view—decidedly listener focused in its acknowledgement of the infeasibility of exercising all First Amendment rights alone—is rooted in a practical reality that "[t]he press goes where we would like to go and does what we would like to do, acting as a proxy and serving as our boots on the ground."[186]

Time and again, the Supreme Court refers to the press as the public listeners' surrogate,[187] agent,[188] servant,[189] or repre-

182. LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 69 (1960) (quoting Letter from Massachusetts House of Representatives to Governor Francis Bernard (Mar. 3, 1768), *in* JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772 275 (1865)).

183. West, *Then and Now*, *supra* note 81, at 76.

184. Jones, *supra* note 156, at 257 (noting the Court's repeated acknowledgement that when "constraints on time, space, knowledge, or ability keep the individual citizen from participating directly," the press is the "entity that will do the hard work of finding out what is happening in the democracy, and then pass along the information to those who could not or would not glean it for themselves").

185. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (emphasis added).

186. Jones & Sun, *supra* note 112, at 1363.

187. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980); *see also* RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791, 1796 (2012) (summarizing the theme of the Court praising "the media's critical role as surrogate, cit[ing] its importance to public understanding of the law and criminal justice, and speculat[ing] that this justified priority entry and special seating for the valuable institution of the press").

188. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 586 n.2 (Brennan, J., concurring) ("As a practical matter . . . the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."); Gannett Co. v. DePasquale, 443 U.S. 368, 397–98 (1979) (Powell, J., concurring) ("[T]his constitutional protection derives, not from any special status of members of the press as such, but rather because in seeking out the news the press acts as an agent of the public at large, each individual member of which cannot obtain for himself the information needed for the intelligent discharge of

sentative.[190] It suggests that the "great responsibility" of the press[191] is "the circulation of information to which the public is entitled in virtue of the constitutional guaranties."[192] Press freedom is routinely cast in instrumental terms focused on this proxy purpose: "Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society."[193] The language is not empty praise or platitude. It is a descriptive characterization of a sophisticated First Amendment relationship between two residents of "Mr. Madison's Neighborhood."

One way the press acts as proxy is by representing listeners in conversations with sources. Holding those conversations on listeners' behalf and asking the questions listeners need to have answered is different in kind, and not just degree, from serving as a mere conduit for the source's speech. A listener possesses a First Amendment right to place a telephone call, ask a question, or seek information—and, as discussed in more detail below, has a particular First Amendment interest in doing so on matters of public concern.[194] Journalists who place calls, ask questions, and seek information stand in for the listener. They couple their own First Amendment role with a First Amendment role of a second would-be party to the communicative exchange:

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his political responsibilities." (internal citations and alterations omitted)); Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 609 (1978) ("Since the press serves as the information-gathering agent of the public, it could not be prevented from reporting what it had learned and what the public was entitled to know."); Saxbe v. Wash. Post Co., 417 U.S. 843, 862–64, 894 (1974) (Powell, J., dissenting) ("In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government."); Mills v. Alabama, 384 U.S. 214, 219 (1966) (calling the press an "agency" that "the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free").

189. N.Y. Times v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (noting the role of the press to "serve the governed").

190. *Saxbe*, 417 U.S. at 863–64 (Powell, J., dissenting) (arguing that "as an agent of the public at large[,] . . . [t]he press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right").

191. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975).

192. Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936).

193. Pennekamp v. Florida, 328 U.S. 331, 354–55 (1946).

194. Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

> In addition to going to places where it would be difficult for individual citizens to go, the press speaks to people who individual citizens would have difficulty both finding and accessing. Many people at the center of current events or controversies—including both government officials and private citizens—cannot reasonably be expected to give hundreds of interviews to interested citizens or answer multitudes of repetitive questions, but will likely be more willing and able to impart information to journalists willing to publish that information to a wider audience.[195]

This proxy role requires an appreciation that when a conversation occurs, a would-be listener is simultaneously a would-be speaker.[196] The consumer of journalism has both interests represented by the journalist, who speaks and listens for her. This proxy role also requires that a protection for newsgathering be seen as more than a protection for newsgatherers. So, for example, in cases focused on differential taxation of the press, the Supreme Court has noted that these taxes are not just troublesome for newspapers, but also troublesome for would-be listeners who need their communicative partner not to be hampered.[197] The tax is "a question of the utmost gravity and importance," not just because it targets a speaker, but also because "it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests."[198]

Another critically important way that the institutional press speaker acts as proxy is by representing listeners in the invocation of the listeners' First Amendment rights of access. Although much of the doctrine in the area of constitutional right of access to government proceedings developed through cases involving media parties,[199] the holdings are that the

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195. Jones & Sun, *supra* note 112, at 1364–65 (discussing examples of this function).

196. *Id.* at 1365 (noting that "[t]he press's access to people who might not otherwise speak takes on particular significance when a source needs or prefers anonymity").

197. *See, e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983); *Grosjean*, 297 U.S. 233.

198. *Grosjean*, 297 U.S. at 243.

199. RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a*

public in general has a First Amendment right to access various public events, like a criminal trial, a preliminary hearing,[200] or jury selection.[201] Attending such proceedings is clear First Amendment activity for the listener when he does so himself, and the institutional press speakers act, at least in part,[202] as proxy for that listener when they attend for journalistic purposes.

Two watershed press-as-proxy cases illustrate the point. In *Richmond Newspapers, Inc. v. Virginia*,[203] the Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment."[204] The analysis had a distinct listener-rights component and a clear press-as-proxy appreciation for First Amendment relationships. In some of the clearest listener-focused language of any First Amendment decision, the Court drew upon the direct rights of listeners by noting that "[t]he First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw" and that "[f]ree speech carries with it some freedom to listen."[205] But it also saw those rights as "assured by the amalgam of the First Amendment guarantees of speech and press"[206] and emphasized that if the courtroom is closed to observers, "important aspects of freedom *of speech and of the press* could be eviscerated."[207] Even though the primary constitutional principle was one of "public inclusion,"[208] the rights at stake were the proxy rights of the press, given the realities of listener information gathering. "That the right to attend may be exercised by people less frequently today when information as to trials generally reaches them by way of

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Post-Newspaper America, 68 WASH. & LEE L. REV. 557, 570–80 (2011).

200. Press-Enter. Co. v. Superior Court of Cal., 478 U.S. 1, 15 (1986).

201. Press-Enter. Co. v. Superior Court of Cal., 464 U.S. 501, 503, 513 (1984).

202. Courthouse News Serv. v. Planet, 750 F.3d 776, 786 (9th Cir. 2014) ("The news media's right of access to judicial proceedings is essential not only to its own free expression, but also to the public's.").

203. 448 U.S. 555 (1980).

204. *Id.* at 580.

205. *Id.* at 572–73 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)).

206. *Id.* at 577.

207. *Id.* at 508 (emphasis added) (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

208. *Richmond Newspapers*, 448 U.S. at 572.

print and electronic media in no way alters the basic right,"[209] the Court said. "Instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media . . . ."[210] The "firsthand observation" by members of the public might not occur, the Court acknowledged, but the First Amendment right would still be exercised by press speakers who are "functioning as surrogates for the public" and "often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard."[211] When space is limited, this proxy role takes on particular importance. As one court put it: "[W]hat exists of the right of access if it extends only to those who can squeeze through the door?"[212]

This proxy principle was likewise the driving motivation for the protection of the press in *Cox Broadcasting Corp. v. Cohn*,[213] which invalidated a state statute punishing the press for publishing information from a public record. Because "[p]ublic records by their very nature are of interest to those concerned with the administration of government," listeners exercise their First Amendment rights in accessing them, and, in turn, a "public benefit is performed by the reporting of the true contents of the records by the media."[214] The Court said:

> Without the information provided by the press, most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.[215]

Through this lens, the rights of the listener—to observe "at first hand"[216] his government—translate into institutional

209. *Id.* at 577 n.12.
210. *Id.*
211. *Id.* at 573.
212. United States v. Antar, 38 F.3d 1348, 1360 (3d Cir. 1994).
213. 420 U.S. 469 (1975).
214. *Id.* at 495.
215. *Id.* at 492.
216. *Id.* at 491.

press speaker rights to act as proxy. The "public scrutiny"[217] so central to the criminal justice system is guaranteed without any actual, direct scrutiny by the public. The public's First Amendment rights to scrutinize are exercised instead by the proxies in the press.

3. The Unique Risk of Governmental Targeting of the Press as Special Institutional Speaker

Finally, a symbiotic-relationship model demands recognition that the press not only is a speaker, but also is a speaker at heightened risk of targeting by government regulators. A First Amendment framework that takes seriously both the rights of listeners and the relationships between and among the residents of "Mr. Madison's Neighborhood" would consider this additional structural reality in the assignment of rights and protections. A historical, practical, and relational understanding of the press and the government illuminates an additional press function that is unquestionably listener-serving speech—namely, speech that discusses government and enhances government accountability. More than this, such an understanding clarifies why the Framers would have been especially motivated to constitutionally protect these special institutional speakers, who would otherwise be uniquely vulnerable to a government incentivized to target them.[218]

As a historical matter, there is "practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,"[219] and that the "Constitution specifically selected the press" to "serve[ ] as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[220] The Founders broadly agreed that "a press clause was necessary, not to induce the press to provide a check on governmental power, but

217. *Id.* at 492.

218. N.Y. Times Co. v. United States, 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting) (noting the companion principles that there is a "broad right of the press to print and . . . [a] very narrow right of the Government to prevent").

219. Mills v. Alabama, 384 U.S. 214, 218 (1966).

220. *Id.* at 219.

because it was universally assumed that the press would indeed provide such a check and that government therefore would seek to suppress it."[221] Madison himself described how "the press has exerted a freedom in canvassing the merits and measures of public men, of every description," and underscored that "[o]n this footing the freedom of the press has stood; on this foundation it yet stands."[222] Modern inquiries have concluded that this special speech function was the "single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment."[223] In the words of Justice Potter Stewart, the "primary purpose of the constitutional guarantee of a free press" was to "create a fourth institution outside the Government as an additional check on the three official branches."[224]

The speech role played by the press on this front—alternatively referred to as a "watchdog"[225] or a "checking"[226] function—is not mere conduitism, but rather an active, expressive, engaged relationship with both government and listeners. It is an investigating, questioning, fact-checking, researching function.[227] In recognition of this role, the Court has called the press "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and

221. Anderson, *supra* note 81, at 491; *see also* West, *Then and Now*, *supra* note 81, at 53–54 (reporting on historical research concluding that the Founders drafted the Press Clause in recognition of both a need to protect the individual press speakers and "the pressing need to check the government"); *id.* at 67 (noting that early documents "repeatedly hailed press freedom to be the 'bulwark of liberty' and 'essential to the Security of Freedom in a the [sic] State'" and that this evidences that "[t]he freedom of the press quite clearly had a job to do—to defend and protect the people and the republic").

222. *N.Y. Times Co.*, 376 U.S. at 274 (1964) (quoting 4 JONATHAN ELLIOT, ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 570 (1876)).

223. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527, 538 (1977) ("[T]he generation of Americans which enacted the First Amendment built its whole philosophy of freedom of the press around the checking value.").

224. *See* Stewart, *supra* note 80, at 634.

225. Leathers v. Medlock, 499 U.S. 439, 447 (1991) (describing "the press as a watchdog of government activity").

226. *Id.* at 447 ("The press plays a unique role as a check on government abuse . . . ."). *See generally* Blasi, *supra* note 223.

227. Jones & Sun, *supra* note 112, at 1358–59 (noting that "the press . . . often engages in rigorous fact-checking of assertions made by government officials" and "is critical to both exposing—and deterring—corruption and abuse of power," and providing examples).

employees and generally informing the citizenry of public events and occurrences."[228] The press "bring[s] critical judgment to bear on public affairs."[229] In so doing, it "serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[230] If there is one clear theme in the Supreme Court's media-law jurisprudence, it is that the constitutional guarantee of a free press "assures the maintenance of our political system and an open society"[231] and is therefore "a condition of a free society."[232]

Of course, as listener-rights advocates make plain, a First Amendment "Neighborhood" resident's specific roles and specific relationships with other neighborhood residents tell us much about the risks the resident faces and the protections the First Amendment needs to provide to him. Some of these risks help explain why the press has warranted speaker protection from the Court and why the Court has spoken of it, at least in dicta, as a special entity in need of safeguards.[233]

Two very specific risks emerge from the institutional press speaker's watchdog role. The first is a unique risk of being co-opted by government—forced to be a mouthpiece for the government's messages or a deputy in the government's law enforcement efforts. The government knows that as listeners "we value the press for telling us what our elected officials are up to, so that we can, in turn, have an informed dialogue about

228. Estes v. Texas, 381 U.S. 532, 539 (1965); *see also* Garrison v. Louisiana, 379 U.S. 64, 77 (1964) (describing "the paramount public interest in a free flow of information to the people concerning public officials"); N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (describing the role of the press in "expos[ing] deception in government"); Anderson, *supra* note 118, at 332 (detailing the ways that "[i]nvestigative journalism exposes venality, waste, or inattention in government").

229. FCC v. League of Women Voters of Cal., 468 U.S. 364, 382 (1984).

230. Mills v. Alabama, 384 U.S. 214, 219 (1966).

231. Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); *see also* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 560 (1976) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (noting that the press "does not simply publish information about trials but guards against the miscarriage of justice")); *Sheppard*, 384 U.S. at 350 (calling the press "the handmaiden of effective judicial administration" and saying that its "record of service over several centuries" has been "impressive").

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

233. Jones, *supra* note 66; West, *supra* note 66.

their performance and make informed decisions about whether we wish to elect them again."[234] It has every incentive to attempt to use its power to shape and even forcibly control that content to make it favorable to the government. Likewise, because the press as institutional speaker is often investigating matters that the government is also investigating, members of the press "have special concerns . . . about becoming tools of the government or law enforcement."[235] A primary concern in the debate over the reporter's privilege, for example,[236] is that subpoenas to the press "transform journalists into de facto police investigators whom prosecutors might summon at any time."[237] This throws First Amendment relationships out of balance by discouraging sources who might otherwise be valuable to the watchdog function and by conscripting the press to do the government's work rather than leaving it free to check the government's power.

The second unique risk for institutional press speakers as watchdogs is the risk of being specially targeted by the government for punishment of speech that performs the checking function—or of being preemptively regulated to curtail that checking. Without heightened protection, a speaker that is focused on "organized, expert scrutiny of government"[238] will fall victim to "the inherent tendency of government officials to abuse the power entrusted to them."[239] Justice Hugo Black once put it this way: "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people."[240]

The significant listener value of checking-function speech and the keen incentives of government to stifle that speech require skepticism of any regulation aimed at the institutional speakers who engage in it. "[W]hen the government announces it is excluding the press for reasons such as administrative

234. Jones & Sun, *supra* note 112, at 1357.
235. West, *supra* note 100, at 2446.
236. *See* Jones, *supra* note 65.
237. West, *supra* note 100, at 2247.
238. Stewart, *supra* note 80, at 634.
239. Blasi, *supra* note 223, at 538.
240. N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

convenience, preservation of evidence, or protection of reporters' safety, its real motive may be to prevent the gathering of information about government abuses or incompetence."[241] The wariness required for all government interactions with institutional press speakers is most apparent in cases involving tax schemes that single out the press.[242] The long history of concern about differential taxation of the press is not so much about the press as it is about the government and listeners. It is driven by a deep suspicion that government will use taxes as a tool to punish an institutional speaker charged with checking it.[243] We are so sure that government is likely to be targeting the press in order to stop its watchdog function that such taxes are presumptively unconstitutional even in the absence of any showing of harmful intent.[244] The protections the press may invoke against such regulation are rooted in "the basic assumption of our political system that the press will often serve as an important restraint on government"[245] and the equally basic assumption that government will endeavor to restrain back.

All told, given the realities of the press-government relationship and its inevitable link to the press-listener relationship, it is imperative that First Amendment doctrine treat the institutional press as the speaker that it is, and that it aggressively protect institutional press speech from the vulnerabilities created by its watchdog task.

CONCLUSION

The movement to consider all actors in the First Amendment dynamic—and especially to consider the rights of listeners and the nuances of listeners' relationships with other First Amendment actors—has important ramifications for our consideration of the rights and protections of the press. But they are not the ramifications that some listener-rights proponents have identified.

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241. Dyk, *supra* note 81, at 949.

242. Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (noting that press regulation presents "a particular danger of abuse by the state").

243. Grosjean v. Am. Press Co., 297 U.S. 233, 247–50 (1936).

244. *See* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 585 (1983).

245. *Id.*

The press is not a mere conduit between other speakers and listeners. It is a unique institutional speaker itself, with a uniquely symbiotic relationship with listeners. Its history, function, and relationships with government regulators demonstrate that it should not only be treated as a speaker for First Amendment purposes but also be recognized as a specially situated speaker engaged in a distinctive partnership with listeners that warrants additional consideration from courts.

Recognition of the press as a special institutional speaker is an important starting point for analysis of the Press Clause, which should be read to give members of the institutional press both broad editorial discretion over their decisions in curating the institution's news product and broad newsgathering rights in creating it. This reading of the Press Clause is the most listener-protective reading because it honors autonomous listeners' dignitary interests in exercising their choice among institutionally identifiable speakers and because it offers the press information access and additional tools as it acts as proxy for listeners.

Indeed, taking listener rights and First Amendment relationships seriously, we see that the press context may be an area in which the conventional wisdom about the protection of unified listener-speaker interests is simply wrong. The assumption in the case law has been that where "the interests of speakers and hearers overlap[ ] and reinforce[ ] each other," it is largely "unnecessary to attempt to map the precise contours of either interest"[246] because the courts will necessarily give speakers the protection required to meet the needs of both.[247] Yet in the press setting, where speaker and listener interests travel in tandem, courts have consistently fallen short of protecting newsgathering rights that would advance the interests of both institutional press speakers and their listeners.[248]

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246. Neuborne, *supra* note 12, at 22.

247. Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both.").

248. *See, e.g.*, West, *supra* note 100, at 2435–36 (describing contexts involving "access to property . . . information, and government meetings" and "protections against subpoenas" where additional press rights would enhance listener rights); *id.* at 2446 (describing newsgathering liability for "tort violations such as

Scholars have recently argued persuasively that the space where the Press Clause's value is not redundant with that of the Speech Clause is in the protection of those newsgathering interests.[249] A robust listener-rights doctrine advances that argument significantly. Where a special symbiotic relationship between an institutional speaker and its listeners requires more protection in order to serve both parties in a system of free expression, the press must be considered in a speaker-plus way, rather than through the speaker-minus lens of a mere-conduit doctrine.[250]

These symbiotic interests reside not only in the publication interests of the press, or even in the proxy interests already recognized by the courts; they also are found in instances in which "treating the press like all other speakers obstructs the public's right to know and impedes an important check on the government."[251] For example, whereas the courts have recognized the press's ability to sit in for its listeners in places that could also accommodate those listeners, they have been unwilling to grant institutional press speakers access to places where it is unreasonable to allow access for *all* citizens but where it would be feasible to allow access for only a press proxy.[252] Thinking about listener rights and about First

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trespass, fraud, or breach of duty of loyalty (common issues for undercover reporting)," along with other areas in which newsgathering is underprotected, including journalist subpoenas, newsroom searches, divulging of telephone records, and leaks from sources); *see also* West, *Awakening the Press Clause*, *supra* note 81, at 1042–45 (listing contexts where newsgathering rights could be enhanced by a more robust reading of the Press Clause).

249. West, *Awakening the Press Clause*, *supra* note 81, at 1042–43 (arguing that the role for the Press Clause is "not with the protection of the news itself once it is published or broadcast, but rather with the process of obtaining it" because "when the courts turn to the newsgathering process, the First Amendment seems to disappear" and the Court has "never protected the rights of the press qua press to gather the news").

250. Ordinary speaker rights under the Speech Clause would remain unaffected if Press Clause rights were enhanced. *See id.* at 1046–47 (arguing that "recognizing the independent significance of the Press Clause would result in a gain of constitutional protections only. No one, whether a member of the press or not, would lose the expressive rights that are already protected. There are no constitutional losers in this equation.").

251. West, *supra* note 100, at 2447.

252. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (holding that the First Amendment gives the press "no special right of access [to a jail] different from or greater than that accorded the public generally"); Saxbe v. Wash. Post Co., 417 U.S. 843, 850 (1974) (holding that "newsmen have no constitutional right

Amendment relationships might move courts to consider situations where the interest in aiding citizens to know "what their government is up to"[253] would call for additional rights for the press to act as a key surrogate in places or at events where full public access is impractical.[254] It might also move them to more vigorously protect members of the press in their efforts to communicate with confidential sources, whistleblowers, or leakers whose information would serve listeners.[255]

Appreciating listeners as valuable First Amendment actors and acknowledging that institutional press speakers carry out an important role separate and apart from that of other speakers are both important steps toward the same goal of a more comprehensive First Amendment analysis that protects relationships within "Mr. Madison's Neighborhood." Elevating institutional press speakers from their mere-conduit status will have significant listener-serving and listener-empowering effects.

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of access to prisons or their inmates beyond that afforded the general public"); Pell v. Procunier, 417 U.S. 817 (1974) (same).

253. U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 783 (1989).

254. *See, e.g.*, Cal. First Amendment Coal. v. Calderon, 150 F.3d 976, 982 (9th Cir. 1998) (rejecting press access to an execution because the public had no right of access).

255. *See generally* RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585 (2008).