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RonNell Anderson Jones

Lisa Grow Sun

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# Freedom of the Press in Post-Truthism America

*RonNell Andersen Jones\* and Lisa Grow Sun\**

## I. INTRODUCTION

Freedom of the press in America is at a critical crossroads in a number of ways, but one way stands out as most fundamental: the stark impact of the current debate over “Post-Truthism.” Press freedom jurisprudence has long been structured around the concept of an audience member’s search for truth in a marketplace of ideas. But social science research increasingly suggests that individual information consumers are in fact often driven by emotion, political identity, and the need for cognitive shortcuts, and that they may not possess the truthseeking, rational processing, or information-updating capabilities that the Court assumes. The individual search for truth in the marketplace of ideas, some have suggested, is not happening—or at least not happening in the way the United States Supreme Court’s press jurisprudence has envisioned.

Whether this divide between jurisprudence and reality actually exists—and what to do about it if it does—are pressing questions for both the courts and the media, made all the more pressing as the changing media landscape and the modern political climate exacerbate some components of the Post-Truthism critique. The concern for some is that if press freedom has rested on flawed assumptions about the nature of press audiences, the growing awareness of those limitations may undermine the marketplace-of-ideas justification for press freedom and its associated press protections.

This Article investigates both questions. It finds that the factual premise—that the Supreme Court has made erroneous assumptions about the motivations and behaviors of information audiences—is accurate, but argues that the theoretical consequence of this gap is just the opposite of what some have suggested. Instead of undercutting the rationales for press protection, this wider modern understanding of the information-processing and truthseeking limitations of individual press consumers in the marketplace of ideas actually underscores the need for protection of the press as a market-enhancing institution. The Article argues that a fuller appreciation of this dynamic can provide helpful insight into why the Constitution might provide unique Press Clause protections and into some of the functions that would qualify an institutional actor as “the press” for purposes of that constitutional protection—an identification process that will be increasingly vital as information consumers shift from legacy media to new forms of content delivery. The Article probes these

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\* Affiliated Fellow, Yale Law School Information Society Project; Associate Dean of Research and Faculty, Lee E. Teitelbaum Chair & Professor of Law, S.J. Quinney College of Law, University of Utah.

\* Professor of Law, Brigham Young University Law School.

functions and offers a conceptual framework for granting Press Clause protection to market-enhancing entities that compensate for the inherent shortcomings of individual information consumers.

Part II describes the epistemological phenomenon of Post-Truthism and the concerns it has raised about the validity of the marketplace-of-ideas metaphor in the press freedom context.

Part III compares the U.S. Supreme Court’s characterizations of the behaviors and capabilities of press audiences in the marketplace of ideas with social science data about the actual behaviors and capabilities of those audiences. Part III.A identifies the three most foundational assumptions made by the Court—what we label the Truthseeking Assumption, the Rational-Processing Assumption, and the Updating Assumption—and then Part III.B describes the evidence that these assumptions are seriously flawed.

Part IV questions the theoretical response to this gap between assumption and audience reality, pushing back against the conclusion that a greater awareness of audience limitations within the marketplace of ideas should erode the foundation of press protection. It describes the ways that press-audience limitations create compelling reasons to protect the marketplace-enhancing functions of the press and urges that the ongoing effort to imbue the Press Clause with substantive meaning take these compensating functions into account.

Part V concludes, arguing that the protection-of-press-functions approach allows the Court to acknowledge the flaws of individual information seekers without abandoning the aspiration of fact-based, public reasoning and that it will provide a clear path forward for strengthening the press institutions that promote and support those important norms of informed public discourse. This doctrinal guidance is critically important in the changing media landscape, as a functional definition of the press becomes increasingly valuable.

## II. POST-TRUTHISM AND THE PRESS

It has become almost a commonplace to suggest that America is in the midst of an epistemic crisis, a crisis that challenges long-settled expectations about how we come to know truth and about the role that objectively provable, verifiable facts can or should play in decision-making on matters of public concern.<sup>1</sup> Indeed, many have suggested that we may be at a crossroads—at the advent of a new “Post-Truthism” age in which objective facts and deliberative decision-making are subordinated to

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<sup>1</sup> See, e.g., David Roberts, *America is Facing an Epistemic Crisis*, VOX.COM, Nov. 2, 2017, <https://www.vox.com/policy-and-politics/2017/11/2/16588964/america-epistemic-crisis>; LEE MCINTYRE, POST-TRUTH (2018).

emotion and partisanship in the search for truth.<sup>2</sup> These shifts arguably threaten development of the shared understandings about the world that traditionally have been thought to undergird and sustain democratic decision-making.

Many political elites and other influencers are increasingly promoting a worldview in which a crude version of truth-as-feeling seems to substitute for empirical evidence.<sup>3</sup> Thus, for example, when CNN reporter Alisyn Camerota confronted former Speaker of the House and Contract-with-America author Newt Gingrich with FBI statistics contradicting his claim that violent crime was up in America, he insisted that his assertion was “also a fact. . . . The current view is that liberals have a whole set of statistics that theoretically may be right, but it’s not where human beings are.”<sup>4</sup> When the reporter pushed back, Gingrich repeatedly insisted that people’s feelings about crime levels were “equally” as “true” as FBI statistics and that, as a politician, he would “go with how people feel and let [the reporter] go with the theoreticians.”<sup>5</sup>

Claims that we are in a Post-Truthism era have likewise been heightened by developments in the Trump administration—including Kellyanne Conway’s insistence that White House Press Secretary’s Sean Spicer’s false claims about the size of the Trump inauguration crowd were “alternative facts,” not misstatements or falsehoods,<sup>6</sup> and attorney Rudy Giuliani’s much-parodied suggestion that “Truth isn’t truth.”<sup>7</sup>

And, of course, the figure who has loomed largest in much Post-Truthism commentary is President Trump himself, who has a notoriously loose relationship with the truth and who often labels journalism “fake news” when that coverage is unflattering, even when the underlying facts are correct.<sup>8</sup> Many have noted that President Trump seems to care little about

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<sup>2</sup> See, e.g., See Sarah Haan, *The Post-Truth First Amendment*, 94 IND. L.J. 1351 (2019); MICHIKO KAKUTANI, *THE DEATH OF TRUTH: NOTES ON FALSEHOOD IN THE AGE OF TRUMP* (2018); MCINTYRE, *supra* note 1; Derek Bacon, *Yes, I’d Lie to You*; *The Post-Truth World*, ECONOMIST, Sept. 10, 2016, available at <https://www.economist.com/briefing/2016/09/10/yes-id-lie-to-you>.

<sup>3</sup> See Haan, *supra* note 2.

<sup>4</sup> Quoted in LEE MCINTYRE, *POST-TRUTH* 4 (2018).

<sup>5</sup> *Id.*

<sup>6</sup> Eric Bradner, *Conway: Trump White House Offered “Alternative Facts” on Crowd Size*, CNN.COM, Jan. 23, 2017, <https://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/index.html>.

<sup>7</sup> Caroline Kenny, *Rudy Giuliani Says “Truth Isn’t Truth,”* CNN.com, Aug. 19, 2018, <https://www.cnn.com/2018/08/19/politics/rudy-giuliani-truth-isnt-truth/index.html>.

<sup>8</sup> See *Leslie Stahl: Trump Admitted Mission to Discredit the Press*, CBS NEWS, <https://www.cbsnews.com/news/lesley-stahl-donald-trump-said-attacking-press-to-discredit-negative-stories/> (last updated May 23, 2018) (quoting Trump as saying, “I do it to discredit you all and demean you all so when you write negative stories about me, no one will believe you.”).

empirical facts, as evidenced by the fact that he has made more than 16,000 “false or misleading claims” since taking office.<sup>9</sup>

These changing mores about truth among politicians and other powerful elites have coincided with the popularization of a growing body of social science research that highlights real limitations in human rationality and cognition and the influence that emotion and “motivated reasoning”—driven by our desires to belong, to feel safe, and to express important aspects of our identity—do, in fact, have on the ways we seek out and process information about the world around us. Even as some politicians have seemed to affirmatively endorse and even celebrate these limitations and biases in human cognition, many commentators have bemoaned what these social science findings might mean for both our individual ability to be decent, informed democratic citizens and our collective search for truth.<sup>10</sup>

Nowhere have these concerns played out more forcefully than in the ongoing public conversation about the role of “the press” in our democracy. From debates about “fake news,” to conversations about declining trust in the media, to concerns about online “echo chambers” that may reinforce and amplify people’s existing views, there is a lively and impassioned debate about what this social science research and the Post-Truthism era, more generally, mean for the future of the press and press freedoms.<sup>11</sup>

This focus is hardly surprising, given the critical role that the press plays in gathering and distributing the information that propels us forward in our

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<sup>9</sup> FACT CHECKER, WASH. POST,

[https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm\\_term=.0d533cea94c7](https://www.washingtonpost.com/graphics/politics/trump-claims-database/?utm_term=.0d533cea94c7), last visited Feb. 21, 2020.

<sup>10</sup> See, e.g., Bacon, *supra* note 2; ARI RABIN-HAVT & MEDIA MATTERS, LIES, INCORPORATED: THE WORLD OF POST-TRUTH POLITICS (2016); Katharine Viner, *How Technology Disrupted the Truth*, GUARDIAN, July 12, 2016, <https://www.theguardian.com/media/2016/jul/12/how-technology-disrupted-the-truth>; David Roberts, *Donald Trump and the Rise of Tribal Epistemology*, VOX, May 19, 2017, 9:58 AM, <https://www.vox.com/policy-and-politics/2017/3/22/14762030/donald-trump-tribal-epistemology>; Rebecca Newberger Goldstein, *Truth Isn’t the Problem—We Are*, WALL ST. J., Mar. 15, 2018, 10:36 AM, <https://www.wsj.com/articles/truth-isnt-the-problemwe-are-1521124562>; ., Marty Kaplan, *The Most Depressing Brain Finding Ever*, Nov. 16, 2013, HUFFPOST, [https://www.huffpost.com/entry/most-depressing-brain-fin\\_b\\_3932273](https://www.huffpost.com/entry/most-depressing-brain-fin_b_3932273).

<sup>11</sup> See, e.g., Ari Ezra Waldman, *The Marketplace of Fake News*, 20 J. CONSTL. LAW 845, 848 (noting that some scholars have argued that “the inability of consumers to discern good ideas from bad” results in “market failure[s]” like the rise of fake news, which justify “government intervention” and regulation”); Claudio Lombardi, *The Illusion of a “Marketplace of Ideas” and the Right to Truth*, 3 AMERICAN AFFAIRS 1 (Spring 2019), 198-209, available at <https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/#notes> (arguing that, given market failures like “bounded rationality and the echo chamber effect,” “[r]egulation of ‘information markets’ is needed in order to aid better dissemination of news and sustain less profitable sources that have a special role in our democracies”).

collective search for truth. Indeed, the Supreme Court itself has long emphasized the press's role in enabling the "marketplace of ideas" as a critical normative justification for press freedom.<sup>12</sup>

While this marketplace-of-ideas theory has long been criticized for a variety of conceptual and practical flaws,<sup>13</sup> the Post-Truthism ethos and emerging social science suggest new criticisms focused on the Court's conception of a rational, truthseeking press audience. Some of the theory's core assumptions—about press audiences' desires, about their behaviors, and about their capabilities—appear out of step with the real world of American media consumption.

This national conversation on Post-Truthism and the press presupposes both a factual premise and a theoretical consequence. The factual premise is that there is a gap between, on the one hand, what the Supreme Court's marketplace-of-ideas analogy seems to assume about press audiences and, on the other, what is accurate about those audiences as a matter of cognitive behavioral science. The theoretical consequence is that this fundamental market failure might dictate greater government regulation of the press—that is, that an increased recognition that press freedom has rested on flawed assumptions about the nature of press audiences could remove the underpinnings of the marketplace-of-ideas justification for that freedom. These arguments—which might find particular resonance in some corners at a moment of new, intensified attacks on the press and press freedom<sup>14</sup>—suggest that our new awareness of audience limitations might sound the death knell for any marketplace-based press protections.

Perhaps more than in any other area of First Amendment jurisprudence, the Court's marketplace-of-ideas approach in press cases does explicitly and implicitly make assumptions that have never been fully explored or challenged, in part because some of them seem so fundamental that they have been perceived as incontrovertible: People consuming journalism will seek after provable facts. They will rationally process the information they gather from the news. They will use press coverage to challenge their previous views and will update those views when provided with contrary information. They will believe there is such a thing as truth. But modern social science may teach that many of these most basic and deeply held assumptions are, in fact, flawed, and that the Court has mischaracterized

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<sup>12</sup> See, e.g., Stuart Minor Benjamin, *Algorithms and Free Speech*, 161 U. PENN. LAW REV. 1445, 1454 (2013) (observing that the "best-known conception" of the First Amendment "and that most commonly invoked by the Supreme Court, is the marketplace of ideas").

<sup>13</sup> See, e.g., FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 25 (1982); Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. LAW REV. 1160 (2015); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1 (1984) (arguing that the market is "strongly biased in favor of . . . entrenched interests").

<sup>14</sup> See, e.g., sources cited in note 11, *supra*.

what individual press audience members in the marketplace of ideas want, what they do, and what they are capable of doing.

Importantly, however, the theoretical consequence of this gap between Court assumption and real-world reality is not the abandonment of the marketplace of ideas as a justification for press freedom. To the contrary. Instead of undercutting the rationales for press protection, this wider modern understanding of the information-processing and truthseeking limitations of individual press consumers in the marketplace of ideas actually underscores the need for protection of the press as a market-enhancing institution. Citizens are unlikely, on their own, to be able to find truth or acquire knowledge as individual actors in the way the marketplace of ideas theory envisions. But market-enhancing press actors can compensate for audience limitations in the marketplace of ideas—by newsgathering, prioritizing, verifying, contextualizing, and accessing places and information on the individual’s behalf. Appreciating this dynamic can help illuminate why the Constitution might separately provide unique protection under the Press Clause and provide insight into some of the functions that would qualify an institutional actor for that protection.

Thus, this critical jurisprudential and technological juncture warrants a deeper investigation both of the gap between Supreme Court assumption and information-consumer reality and of the benefits of a doctrinal focus on market-enhancing press functions.

### III. THE GAP BETWEEN SUPREME COURT ASSUMPTIONS ABOUT PRESS AUDIENCES AND THE REALITY

While strands of press-praising dicta in many Supreme Court cases discuss the important role the press plays in informing citizens and promoting democracy,<sup>15</sup> the Court has not offered one unifying theory of press freedom. Instead, it has addressed the roles and rights of press actors in a variety of categories of cases, like defamation,<sup>16</sup> access,<sup>17</sup> prior restraints on publication,<sup>18</sup> editorial discretion,<sup>19</sup> taxation and other regulation of the

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<sup>15</sup> See Sonja R. West, *Stealth Press Clause*, 48 GA. L. REV. 729, 732-36 (2014); RonNell Andersen Jones, *Dangers of Press Clause Dicta*, 48 GA. L. REV. 705 (2014); RonNell Andersen Jones, *What the Supreme Court Thinks about the Press Clause and Why It Matters*, 66 ALA. L. REV. 253 (2014).

<sup>16</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 137 (1967); *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

<sup>17</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 558 (1980); *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*, 478 U.S. 1, 3 (1986); *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 503 (1984); *Houchins v. KQED, Inc.*, 438 U.S. 1, 3 (1978).

<sup>18</sup> See *Nebraska Press. Ass’n v. Stuart*, 427 U.S. 539, 541 (1976); *New York Times Co. v. United States (Pentagon Papers Case)*, 403 U.S. 713, 714 (1971); *Near v. Minnesota*, 283 U.S. 697, 703 (1931).

press,<sup>20</sup> and publication of true private facts.<sup>21</sup> Nevertheless, the Court often references the press’s important role in the “marketplace of ideas” and makes clear assumptions about the *audiences* of press coverage and their role as consumers in the marketplace of ideas—assumptions that deserve serious attention and analysis.

## A. The Supreme Court’s Assumptions about Press Audiences

### 1. The Truthseeking Assumption

First, a core assumption in the Court’s press freedom cases is that press audiences seek out empirical truth. They believe that such truth exists and demand that it be provided to them. The Court envisions information consumers as individuals who desire provable facts and are actively expending resources in the search for additional evidence to enlarge their catalogs of truthful, factual information and to test their previous beliefs on important matters.

In the most classic formulation of this notion, the Court in the watershed press case of *New York Times v. Sullivan*<sup>22</sup> constitutionalized the law of libel on the assumption of a press audience that would seek “uninhibited, robust, and wide-open”<sup>23</sup> debate on matters of public concern. This vision of an audience member who is actively searching for truth in a workable marketplace of ideas permeates every press-focused case from the Court. The theoretical assumptions that are made about audiences more generally in First Amendment doctrine—that they rationally seek truth, evaluate all contributions to the marketplace, and reasonably interpret what they are told<sup>24</sup>—are even more pronounced in the context of cases focused on press coverage and the consumers of that coverage. Press audiences are

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<sup>19</sup> See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 243 (1974); *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 97 (1973).

<sup>20</sup> See *Minneapolis Star & Trib. Co. v. Minnesota Comm’n of Revenue*, 460 U.S. 575, 576 (1983); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240 (1936).

<sup>21</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 517–18 (2001) (publishing intercepted and taped cellular phone call); *Florida Star v. B.J.F.*, 491 U.S. 524, 526 (1989) (publishing rape victim’s name based on public police report); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 98 (1979) (publishing name of juvenile offender); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 (1975) (publishing name of deceased rape victim).

<sup>22</sup> 376 U.S. 254 (1964).

<sup>23</sup> *Id.* at 270.

<sup>24</sup> Lyriisa Lidsky, *Nobody’s Fool: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799 (2010), Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649 (2006); Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1 (2003); David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647 (2014).

assumed to be pursuing what is “truthful,”<sup>25</sup> searching available materials for that truth, and doing all they can to avoid deception.<sup>26</sup>

So, for example, the Court’s anticipated newspaper reader in defamation cases eagerly desires to know what is true, and the press needs a wide swath of protection from liability in order to continue looking for that truth on behalf of that reader.<sup>27</sup> Cases focused on protecting the editorial discretion of news outlets do so on the expectation that those organizations will be motivated to serve the truthseeking desires of their viewers and subscribers.<sup>28</sup> Press-freedom cases focused on the sacrosanct protection for publishing truthful information that is lawfully obtained<sup>29</sup> and the core right of the press to be free from governmental prior restraints<sup>30</sup> operate on the premises that objective truth exists, that press consumers are interested in and seeking after it, and that shutting down press coverage unfairly robs those audiences of the chance to know or test that truth.<sup>31</sup>

Throughout the cases, the press is depicted as investigating and probing on behalf of a truthseeking audience.<sup>32</sup> The assumption is that audience

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<sup>25</sup> *Nebraska Press Ass’n*, 427 U.S. at 587 (“Truthful reports of public judicial proceedings have been afforded special protection . . . .”); *Cohn*, 420 U.S. at 496 (“[T]ruthfully publishing information released to the public . . . .”); *id.* at 496 (“Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it.”).

<sup>26</sup> *Pentagon Papers*, 403 U.S. at 717 (Black, J., concurring) (“[P]aramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people . . . .”).

<sup>27</sup> *See, e.g., Sullivan*, 376 U.S. at 271–72 (“That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need to survive . . . .’”) (citation omitted).

<sup>28</sup> *See Tornillo*, 418 U.S. at 255 (“The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by” the needs of its subscribers) (quoting *CBS v. Democratic Nat’l Comm.*, 412 U.S. 94, 117 (1973)); *see also* RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 522–23 (2019) (describing the relationship between the press and those it serves).

<sup>29</sup> *See Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979); *see also Bartnicki*, 532 U.S. at 533–34 (holding that the state may not punish a publisher that lawfully obtained an intercepted telephone conversation even when third party illegally intercepted and recorded it); *Florida Star*, 491 U.S. at 541 (holding that “where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order . . . .”); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103–104 (1979) (“If the information is lawfully obtained . . . the state may not punish its publication” unless furthering a “state interest of the highest order”), *Cox Broad. Corp. v. Cox*, 420 U.S. 469, 491 (1975) (holding that states may not impose sanctions for accurately reporting the “name of a rape victim obtained from public records” that are available for “public inspection”).

<sup>30</sup> *See Nebraska Press Ass’n*, 427 U.S. at 541; *Pentagon Papers*, 403 U.S. at 714; *Near*, 283 U.S. at 703.

<sup>31</sup> *See, e.g., Nebraska Press Ass’n*, 427 U.S. at 788 (describing the “chilling effect” of subsequent punishment of the press and the “freezing” effect of prior restraints).

<sup>32</sup> *See Cox*, 420 U.S. at 491 (stating that the public “relies necessarily upon the press to bring to him in convenient form the facts of [government] operations.”); *Richmond Newspapers*, 448 U.S. at 572–73 (stating that the public “acquire[s] [information] chiefly

members are themselves driven to dig for more information, uncover factual details, and get to the bottom of what is happening in their communities.<sup>33</sup> The major press-freedom cases thus characterize information consumers as fundamentally fact-motivated—as needing, expecting, and seeking empirical facts.<sup>34</sup>

By the Court’s telling of things, the press audience strives primarily to be “informed.”<sup>35</sup> Readers and viewers work to be knowledgeable<sup>36</sup> and educated.<sup>37</sup> And the press’s job is to meet this “public need for information and education with respect to the significant issues of the times.”<sup>38</sup> The “dissemination of information and opinion on questions of public concern” to these eager recipients is “ordinarily a legitimate, protected and indeed cherished activity,”<sup>39</sup> because “the protection of the public requires not merely discussion, but information.”<sup>40</sup>

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through the print and electronic media” rather than by “firsthand observation” and as a result, the media as a surrogate is “validate[d]”).

<sup>33</sup> *Richmond Newspapers*, 448 U.S. at 572–73 (“Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public.”); *Cox*, 420 U.S. at 491 (suggesting that a citizen would like to “observe at first hand the operations of his government, but that citizens “rel[y] on the press to bring . . . facts of those operations” in “convenient form”).

<sup>34</sup> See *Cox*, 420 U.S. at 491–92 (discussing the responsibility of the press to “report fully and accurately the proceedings of government,” which requires access to “official records and documents open to the public.”), *Branzburg v. Hayes*, 408 U.S. 665, 727 (1972) (Stewart, J., dissenting) (“[A] free press . . . provid[es] the people with the widest possible range of fact and opinion . . . .”); *Tornillo*, 418 U.S. at 241, n. 24 (A journal does not merely print observed facts . . . . As soon as the facts are set in their context, you have interpretation and you have selection, and editorial selection opens the way to editorial suppression.”)

<sup>35</sup> See *Houchins*, 438 U.S. at 32 (Stevens, J., dissenting) (“[T]his protection is not for the private benefit of those who might qualify as representatives of the ‘press’ but to insure that the citizens are fully informed regarding matters of public interest and importance.”). See also *Cohn*, 420 U.S. at 496 (referencing the need for “the media to inform citizens about the public business”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (calling the press the “chief[]” source of public information); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (praising the press for “informing the citizenry of public events and occurrences”); *Pentagon Papers*, 403 U.S. at 717 (Black, J., concurring) (“In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The press was protected so that it could bare the secrets of government and inform the people”); *Nebraska Press Ass’n*, 427 U.S. at 587 (Brennan, J., concurring) (“[T]he public’s right to be informed of [criminal] proceedings”); *Grosjean*, 297 U.S. at 250 (calling for “the circulation of information to which the public is entitled in virtue of the constitutional guaranties”).

<sup>36</sup> *Grosjean*, 297 U.S. at 250 (describing the role of the press in “the acquisition of knowledge by the people in respect of their governmental affairs”).

<sup>37</sup> See Jones, *What the Supreme Court Thinks of the Press*, *supra* note 15, at 256–57; RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L. REV. 1301, 1360–63 (2017).

<sup>38</sup> *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

<sup>39</sup> *Butts*, 388 U.S. at 150.

<sup>40</sup> *Sullivan*, 376 U.S. at 272.

The press audience member envisioned by the Court is not stingy in her search for information; rather, she hopes for complete, accurate details<sup>41</sup> on the matters that she considers. The assumed audience member does not want one-sided information. Instead, the Court's key press cases repeatedly emphasize the need to protect the press in order to ensure that there is "vigor"<sup>42</sup> and "variety"<sup>43</sup> in information flow. The Court says the press "serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible."<sup>44</sup>

Discussing the need for reporters to be protected in their use of confidential sources, Justice Stewart emphasizes that information consumers seek "the widest possible range of fact and opinion."<sup>45</sup> His construct for a qualified reporters' privilege<sup>46</sup> roots that protection in the notion that audiences desire and are actively seeking "in-depth, investigative reporting."<sup>47</sup>

Although courts have consistently defined "newsworthiness" in broader terms to include many other matters of interest,<sup>48</sup> a central assumption in the key press-freedom cases is that audience will desire news about the "major public issues of our time."<sup>49</sup> Indeed, a permeating theme of the Court's press freedom cases is that press audiences will want detailed information from the press about their public servants that they can use to scrutinize the people and institutions of power and to demand responsiveness from them.

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<sup>41</sup> *Cohn*, 420 U.S. at 492 ("Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government"); *Branzburg*, 408 U.S. at 738 (Stewart, J., dissenting) (arguing the press needs protection to deliver on "the First Amendment guarantee of the fullest flow of information").

<sup>42</sup> *Sullivan*, 376 U.S. at 279.

<sup>43</sup> *Id.*; see also *Butts*, 388 U.S. at 151 (limitations on the press must not "deprive our free society of the stimulating benefit of varied ideas"); *Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting) ("[T]here is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism").

<sup>44</sup> *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 602–603 (1953).

<sup>45</sup> *Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting).

<sup>46</sup> *Id.* at 725–26; see also RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221, 1225 (2013) (noting that lower courts have recognized a "First Amendment-based reporter's privilege based on Justice Stewart's dissent in *Branzburg*").

<sup>47</sup> *Branzburg*, 408 U.S. at 733 (1972) (Stewart, J., dissenting) (warning against impairing the "flow of news to the public, especially in sensitive areas involving government officials, financial affairs, political figures, dissidents or minority groups that require in-depth, investigative reporting").

<sup>48</sup> AMY GAJDA, *THE FIRST AMENDMENT BUBBLE* (2015).

<sup>49</sup> *Sullivan*, 376 U.S. at 275. See also *Nebraska Press Ass'n*, 427 U.S. at 587 (referring to the "contemporary news value of the information the press seeks to disseminate" and noting that "the damage [of a prior restraint] can be particularly great when the prior restraint falls upon the communication of news and commentary on current events").

The press consumers depicted by the Court are genuinely interested in useful assessments of government performance. They have “ardor as citizens”<sup>50</sup> and care about “the proper conduct of public business.”<sup>51</sup> The assumption is broad, suggesting audience interest in keeping an eye on public services from “the least to the most important”<sup>52</sup> and interest in public actors in the legislative,<sup>53</sup> executive,<sup>54</sup> and judicial<sup>55</sup> branches. These audiences are characterized as seeking knowledge that serves a “watchdog”<sup>56</sup> or “checking”<sup>57</sup> function, and as being particularly in search of truthful information about government mistakes or misbehavior. The Court thoroughly embraces the notion that the citizenry wants information about “official neglect,” “official misconduct,” or “the opportunities for malfeasance and corruption,”<sup>58</sup> and material that might “expose deception in government,”<sup>59</sup> uncover “corruption among public officers and

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<sup>50</sup> *Id.* at 304 (Goldberg, J., concurring).

<sup>51</sup> *Cohn*, 420 U.S. at 495.

<sup>52</sup> *Sullivan*, 376 U.S. at 304 (Goldberg, J., concurring). *But see Rosenblatt*, 383 U.S. at 85 (suggesting particularly strong interest in “those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”) (footnote omitted).

<sup>53</sup> *Cox*, 420 U.S. at 492 (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently . . . .”); *Pentagon Papers*, 403 U.S. at 720 (Black, J., concurring) (stating we need a “free press . . . in order to maintain the opportunity for free political discussion and to that end that government may be responsible to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”) (quoting *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)).

<sup>54</sup> *Pentagon Papers*, 403 U.S. at 728 (Stewart, J., concurring) (stating that “the only effective restraint upon executive policy and power . . . may lie in an enlightened citizenry . . . .”); *Houchins*, 438 U.S. at 30 (Stevens, J., dissenting) (“Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.”); *Near*, 283 U.S. at 718–19 (discussing “public officers, whose character and conduct remain open to debate and free discussion in the press”); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 864 (1974) (Powell, J., dissenting) (“The people must therefore depend on the press for information concerning public institutions.”).

<sup>55</sup> *Estes*, 381 U.S. at 539 (“The free press has been a mighty catalyst in . . . exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.”); *Nebraska Press Ass’n*, 427 U.S. at 539 (noting the press “does not simply publish information about trials but guards against the miscarriage of justice . . . .”) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)); *Sheppard*, 384 U.S. at 350 (calling the press “the handmaiden of effective judicial administration . . . .”).

<sup>56</sup> *Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (describing “the press as a watchdog of government activity.”)

<sup>57</sup> *Id.* at 447 (“The press plays a unique role as a check on government abuse . . . .”); *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 602–603 (1953). *See generally* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RESEARCH J. 521–649 (1977).

<sup>58</sup> *Near*, 283 U.S. at 719–20.

<sup>59</sup> *Pentagon Papers*, 403 U.S. at 717 (Black, J., concurring).

employees,”<sup>60</sup> or “generally inform[ ] the citizenry of public events and occurrences.”<sup>61</sup>

The Court presumes a desire by individual information consumers to dig deeply into “the qualifications and performance” of those who hold office<sup>62</sup> and a thirst for information that will “serve as a powerful antidote to any abuses of power by governmental officials” and “keep[ ] officials elected by the people responsible to all the people whom they were selected to serve.”<sup>63</sup>

A “basic assumption,” the Court notes, is that this accountability-seeking audience “will often serve as an important restraint on government.”<sup>64</sup> Knowing that this audience is attentive will curb the impulses of government leaders and motivate them to be “responsive to the will of the people.”<sup>65</sup> Likewise, the people, the Court assumes, will actively acquire knowledge for the purpose of changing the way they vote, the policies they support, and the demands they make.<sup>66</sup> Because of this particular pattern of truthseeking, the “free flow of information to the public” will “insure nothing less than democratic decisionmaking,”<sup>67</sup> making possible “remedial action in the conduct of public business”<sup>68</sup> and “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>69</sup>

Crucially, the Court’s assumed audience wants this watchdog information universally—and is willing and able to accept and act upon bad news about its initially preferred candidate. Even if the citizens once supported the government official, they will want a continued flow of accurate and useful information about him or her, whether positive or negative. The cases speak of press consumers needing “full information in respect of the

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<sup>60</sup> *Estes*, 381 U.S. at 539.

<sup>61</sup> *Id.*; see also *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (referencing “the paramount public interest in a free flow of information to the people concerning public officials”).

<sup>62</sup> *Rosenblatt*, 383 U.S. at 86.

<sup>63</sup> *Mills*, 384 U.S. at 219.

<sup>64</sup> *Minneapolis Star*, 460 U.S. at 585.

<sup>65</sup> *Sullivan*, 376 U.S. at 269 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

<sup>66</sup> *Cohn*, 420 U.S. at 492 (“Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently . . .”); *Sullivan*, 376 U.S. at 273: (describing people using the press for “effective criticism”); *Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting) (stating the free press should serve “to insure nothing less than democratic decisionmaking through the free flow of information to the public.”).

<sup>67</sup> *Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting).

<sup>68</sup> *Houchins*, 438 U.S. at 8.

<sup>69</sup> *Sullivan*, 376 U.S. at 269 (quoting *Roth v. United States*, 354 U.S. 476 (1957)).

*doings or misdoings of their government*”<sup>70</sup> and information needed “to *applaud or to criticize*”<sup>71</sup> government performance.

The Court sees the press audience member as someone who hopes not merely to have information with which she already agrees or that would make her comfortable about past choices.<sup>72</sup> The Court characterizes audiences as willingly reading about or viewing some matters that are unpleasant to or unpopular with those audiences or that express views with which those audiences might disagree. The assumption is that desired information will include news of “political conduct and views which some respectable people approve, and others condemn,”<sup>73</sup> and that the audience will want “*unpopular* views on public affairs.”<sup>74</sup> The Court envisions citizens seeking completeness of information and sources of truth, whatever their predispositions or partisan priors. It imagines informed democratic citizens who are accountability-seeking and will actively assess the work of government and hold it responsible for necessary change.

All told, the United States Supreme Court characterizes audiences of the press as active, focused fact-seekers on a range of hard, important topics. It unreservedly embraces The Truthseeking Assumption.

## 2. The Rational-Processing Assumption

The Supreme Court’s press-freedom jurisprudence not only envisions an audience that seeks after factual truth; it also envisions one that is made up of people who rationally process that information when it is provided to them. The assumption is of a press audience member who has the capacity to competently digest information in deliberative, analytical ways that lead her to a working understanding of objective facts. The Court is assuming a citizen reader with sufficient devotion, mental energy, and cognitive resources to tussle with and to process competing threads of information.

The Court’s repeatedly suggests that readers and listeners are utilizing their processing skills to achieve “understanding,” “comprehension,”<sup>75</sup> and even “enlightenment” on the issues. Indeed, the Court often speaks of

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<sup>70</sup> *Grosjean*, 297 U.S. at 247 (emphasis added).

<sup>71</sup> *Sullivan*, 376 U.S. at 304 (Goldberg, J., concurring) (emphasis added) (quoting *Barr v. Matteo*, 360 U.S. 564 (1959) (Black, J., concurring)) (describing a desire for coverage that goes beyond being “a captive mouthpiece of newsmakers”)

<sup>72</sup> *Branzburg*, 408 U.S. at 729 (Stewart, J., dissenting).

<sup>73</sup> *Sullivan*, 376 U.S. at 272 (1964).

<sup>74</sup> *Id.* at 294 (Black, J., concurring).

<sup>75</sup> *Richmond Newspapers*, 448 U.S. at 573 (noting the press is central to “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system”); *Nebraska Press Ass’n*, 427 U.S. at 587 (Brennan, J., concurring) (same).

press audience members' capacity to exercise "enlightened choice,"<sup>76</sup> and to become an "enlightened citizenry,"<sup>77</sup> acting on "an informed and enlightened public opinion."

This enlightened press audience found in the jurisprudence is capable of "intelligently form[ing] opinions"<sup>78</sup> and developing "informed and critical" judgments.<sup>79</sup> More fundamentally, the press-freedom jurisprudence, like the First Amendment itself, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues."<sup>80</sup> The presumption is that some conclusions will be objectively right and that press audiences, armed with both mental capacity and mental energy, will use new information to generate thoughtful opinions and reach correct conclusions.

The Court's assumed press audience possesses judgment, logic, and the reasoning skills to take in information, mull it over, work with it, and process it logically. The Court's depiction information consumers is punctuated by decidedly active cognitive verbs: the audience members are "canvassing,"<sup>81</sup> "examining,"<sup>82</sup> and "criticizing."<sup>83</sup> They are "bringing critical judgment to bear on public affairs."<sup>84</sup> Thus, press freedom is rooted in a belief in "the triumphs which have been gained by reason and humanity over error and oppression"<sup>85</sup> and "in the power of reason as applied through public discussion."<sup>86</sup>

The Court's assumed audience will also take the time to engage the facts and ideas presented—getting to work on wrestling with the material and

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<sup>76</sup> *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised . . .").

<sup>77</sup> *Pentagon Papers*, 403 U.S. at 728 (Stewart, J., concurring) (arguing that the press needed a wide swath of protection for its work because "the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry").

<sup>78</sup> *Houchins*, 438 U.S. at 8.

<sup>79</sup> *Pentagon Papers*, 403 U.S. at 728 (Stewart, J. concurring).

<sup>80</sup> *Sullivan*, 376 U.S. at 270 (quoting *United States v. Assoc. Press*, 52 F. Supp. 362 (S.D.N.Y. 1943)).

<sup>81</sup> *Sullivan*, 376 U.S. at 275 (1964) ("[T]he press has exerted a freedom in canvassing the merits and measures of public men, of every description . . .").

<sup>82</sup> *Id.* at 274 ("[T]he right of freely examining public characters and measures, and of free communication among the people thereon . . .").

<sup>83</sup> *Shepherd v. Maxwell*, 384 U.S. 333, 350 (1966) (describing how press "guards against the miscarriage of justice by subjecting" the judicial process to "public scrutiny and criticism.").

<sup>84</sup> *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984).

<sup>85</sup> *Near*, 283 U.S. at 783.

<sup>86</sup> *Sullivan*, 376 U.S. at 270 (stating that the founders "believe[d] in the power of reason as applied through public discussion") (quoting *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring); see also *Tornillo*, 418 U.S. at 259 (White, J., concurring) (same)).

honing it through discussion<sup>87</sup> and debate.<sup>88</sup> Government regulation of the press must be resisted precisely because it risks “impoverish[ing]” the rich, complex “public dialogue” the Court envisions.<sup>89</sup>

Moreover, this envisioned press audience does not stop at talk. The Supreme Court’s consumer of press coverage has the cognitive wherewithal to turn knowledge into working knowledge and to turn working knowledge into thoughtful, contemplative action. Audience members are said to employ information to perform plainly deliberative tasks—to “vote intelligently,”<sup>90</sup> to “enhance the integrity” of proceedings,<sup>91</sup> to “clamor for change,”<sup>92</sup> to “resolve issues,”<sup>93</sup> to “propose remedies,”<sup>94</sup> to “cope with the exigencies”<sup>95</sup> of the day, and, as discussed in more detail below, to “hold accountable” those in power.

Unquestionably, then, the U.S. Supreme Court assumes that individual information consumers in the marketplace of ideas are engaging their cognitive faculties to process the information they take in. They can weigh

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<sup>87</sup> See, e.g., *Mills*, 384 U.S. at 218 (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”); *Tornillo*, 418 U.S. at 259 (“[F]ree discussion of governmental affairs.”); *Pentagon Papers*, 403 U.S. at 720 (Black, J., concurring) (suggesting we have a “free press” “in order to maintain the opportunity for free political discussion”); *Sullivan*, 376 U.S. at 281 (“It is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages.”) (quoting *Coleman v. MacLennon*, 98 P. 281 (Kan. 1908)); *id.* at 264 (describing the “maintenance of the opportunity for free political discussion”).

<sup>88</sup> *Near*, 283 U.S. at 718-19 (emphasizing that public officers['] character and conduct remain open to debate and free discussion in the press).

<sup>89</sup> *Branzburg*, 408 U.S. at 733 (Stewart, J., dissenting) (“Thus, we cannot escape the conclusion that when neither the reporter nor his source can rely on the shield of confidentiality against unrestrained use of the grand jury’s subpoena power, valuable information will not be published and the public dialogue will inevitably be impoverished.”).

<sup>90</sup> *Cohn*, 420 U.S. at 492 (“[T]o vote intelligently or to register opinions on the administration of government generally.”); see also *Sullivan*, 376 U.S. at 280-81 (“[W]here an article is published and circulated among voters for the sole purpose of giving what the defendant believes to be truthful information concerning a candidate for public office and for the purpose of enabling such voters to cast their ballot more intelligently . . . .”) (quoting *Coleman v. MacLennon*, 98 P. 281 (Kan. 1908)).

<sup>91</sup> *Richmond Newspapers*, 448 U.S. at 578 (Media . . . presence has historically been thought to enhance the integrity and quality of what takes place [in the trial courtroom].”) (footnote omitted).

<sup>92</sup> See *Mills*, 384 U.S. at 219 (“Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.”)

<sup>93</sup> *Sullivan*, 376 U.S. at 738 (“One main function of the First Amendment is to ensure ample opportunity for the people to determine and resolve public issues.”) (quoting WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 41 (1958)).

<sup>94</sup> *Id.* at 269 (noting that “that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . .”) (quoting *Whitney*, 274 U.S. at 375-76 (Brandeis, J., concurring)).

<sup>95</sup> See, e.g., *Thornhill*, 310 U.S. at 102 (noting that press freedom is necessary to “enable the members of society to cope with the exigencies of their period.”)

values, compare competing data, and deal with volumes of sometimes complex and often contradictory information. They can be trusted to reach correct conclusions.

### 3. The Updating Assumption

Finally, the Supreme Court's press freedom jurisprudence anticipates a press audience that is capable of updating information. The cases repeatedly make clear that the Court assumes that the press audience member will challenge her previous views and will update her knowledge, opinions, and beliefs when provided with contrary information.

The assumed press audience consists of people who are not only willing to accept but regularly affirmatively demand counterspeech<sup>96</sup>—additional information that questions or refutes news coverage that was previously received. Most press-freedom cases have the unspoken thesis that this counterspeech is anticipated, expected, and welcomed by individual information consumers.<sup>97</sup> The Court's depictions often include references to a desire to have “the fullest flow of information”<sup>98</sup> and not to be “fettered”<sup>99</sup> by outdated or incorrect communications.

Beyond this, the Court assumes that as the press audience member receives this continued flow of full, unfettered information, she will use it to test, modify, or improve her previously held views that are inconsistent with the newer data. The prototypical press audience member is, the Court tells us, “scrutinizing”<sup>100</sup> facts, people, and situations in order to hone opinions and revise assessments.

Indeed, the press-freedom cases take as a given not only that audiences will be craving coverage that “contradict[s],”<sup>101</sup> “counteract[s],”<sup>102</sup> “correct[s],”<sup>103</sup> or “rebut[s]”<sup>104</sup> preexisting information, but also that this new information will fix previous thinking by audiences, who will rework their understanding of the particular matters.

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<sup>96</sup> See RonNell Andersen Jones, *The Press and the Expectation of Executive Counterspeech*, 83 MO. L. REV. 939, 942–43 (2019).

<sup>97</sup> *Id.* at 942.

<sup>98</sup> *Branzburg*, 408 U.S. at 738 (Stewart, J., dissenting).

<sup>99</sup> *Grosjean*, 297 U.S. at 250 (noting that “to allow [a free press] to be fettered is to fetter ourselves”).

<sup>100</sup> See, e.g., *Cohn*, 420 U.S. at 492 (describing the press as “bring[ing] to bear the beneficial effects of public scrutiny upon the administration of justice.”) (citation omitted); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (describing how press coverage “guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”).

<sup>101</sup> *Gertz*, 418 U.S. at 344.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Butts*, 388 U.S. at 143.

The Court's press-freedom case law in the libel context particularly embraces this assumption. The doctrinal structure, which centers on a threshold distinction between plaintiffs who are private figures and those who are public ones,<sup>105</sup> does so on the assumption that the latter have greater access to opportunities to offer corrective information to press audiences than the former.<sup>106</sup> It is assumed that this access amounts to audience exposure and that audience exposure will lead to audience updating: "The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error."<sup>107</sup> Although the Court acknowledges that it can be complicated to unring a bell,<sup>108</sup> the Justices in *New York Times v. Sullivan* and its progeny are able to conclude that those with "ready access ... to mass media of communication" can "counter criticism of their views and activities"<sup>109</sup>—and that "sufficient access to the means of counterargument"<sup>110</sup> will allow these individuals to "expose through discussion the falsehood and fallacies of the defamatory statements"<sup>111</sup>—because they assume an updating audience: an audience capable of revising its prior views based on the new information counterargument provides.

The press-freedom model embraced by the Court is that "counterargument and education are the weapons available to expose" misstatements<sup>112</sup>—that "speech can rebut speech, propaganda will answer propaganda, and free debate of ideas will result in the wisest governmental policies."<sup>113</sup> This model is workable only on the assumption that audience members are open to receiving replacement information and are capable of executing that replacing.

## B. The Gap Between Supreme Court Assumptions and the Reality of Press Audiences

The Supreme Court's core assumptions about press audiences—the Truthseeking Assumption, the Rational-Processing Assumption, and the Updating Assumption—are largely undercut by a wide and growing body of literature in behavioral economics, cognitive psychology, social psychology about human desires, capacities, and behavior when interacting with the world of information. Part 1 of this section examines the ways in which that research makes plain that the Court is operating on

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<sup>105</sup> *Gertz*, 418 U.S. at 344.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at n. 9 ("Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie."); Jones, *Executive Counterspeech*, *supra* note 96, at 958.

<sup>109</sup> *Butts*, 388 U.S. at 164 (Warren, C.J., concurring)

<sup>110</sup> *Id.* at 155.

<sup>111</sup> *Id.* (quoting *Whitney*, 274 U.S. at 377 (Brandeis, J., dissenting)).

<sup>112</sup> *Id.* (quoting *Wood v. Georgia*, 370 U.S. 375, 389 (1962)).

<sup>113</sup> *Butts*, 388 U.S. at 153 (quoting *Dennis v. United States*, 341 U.S. 494, 503 (1951)).

false premises. Part 2 then considers two additional factors that may be exacerbating and widening the gap between these Supreme Court assumptions and on-the-ground reality of press audiences in the current moment: growing hyperpartisanship, and a changing information landscape that increasingly enables “filter bubbles” and ideological segregation in news consumption. On every front, the Court’s thinking about press audiences is deeply flawed.

### 1. Social Science Research Demonstrating the Flaws in the Truthseeking, Rational-Processing, and Updating Assumptions

As described in Part III.A, the Supreme Court often assumes that press consumers are strongly motivated to seek out facts on important public matters that will help them have a more accurate view of the world around them. There is little doubt, of course, that many citizens, in many circumstances do, in fact, desire, seek out, process, and act upon empirical truth. However, it turns out that the desire for accurate information is but one of many motivations—some conscious and many more subconscious<sup>114</sup>—that shape and drive the ways that people seek out and process information. Indeed, research has identified a whole host of other important and perhaps more dominant motivations that shape information-seeking and processing, including (1) conserving cognitive resources; (2) expressing and protecting group identity, including cultural and political identity; and (3) managing threats and uncertainty. These discoveries have fundamentally reshaped how scientists understand the ways people interact with information and evaluate the world around them. Taken together, this research reveals significant flaws in the Court’s Truthseeking, Rational-Processing, and Updating Assumptions.

#### a. Conserving Cognitive Resources

Early models of human behavior and decision-making in economics, sociology, and other fields often treated individuals as “rational actors,” who use the information available to them to calculate the expected utility of various options and to make optimal decisions that best satisfy their own preferences.<sup>115</sup> Over time, this “notion of rationality as optimization”<sup>116</sup> was challenged by the idea of “bounded rationality,”

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<sup>114</sup> For simplicity, we will refer to “motivations” here, although the identified motivations are perhaps more properly described as factors that influence and shape decisionmaking processes. See, e.g., Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. LAW REV. 1, 19 (2011).

<sup>115</sup> Gerd Gigerenzer & Reinhard Selten, *Rethinking Rationality* 1, 3 in BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX (Gerd Gigerenzer & Reinhard Selten, eds. 2002); Thomas Vilovich & Dale Griffin, *Introduction—Heuristics and Biases: Then and Now* in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich, Dale Griffin & Daniel Kahneman, eds. 2002) [hereinafter HEURISTICS AND BIASES] 1, 1.

<sup>116</sup> See Gigerenzer & Selten, *supra* note 115, at 3.

proposed by Herbert Simon, which suggests that because people have limited time, information, and cognitive resources (like attention), people actually make decisions not by optimizing (“calculating utilities and probabilities”)<sup>117</sup> but instead by relying on much simpler rules about when to stop searching for additional information and how to make ultimate decisions.<sup>118</sup>

Building on this insight, in the early 1970s, cognitive psychologist Amos Tversky and psychologist and economist Daniel Kahneman identified and described a series of heuristics—mental short-cuts or “rules of thumb”<sup>119</sup>—that people employ to make decisions under conditions of uncertainty. While the heuristics themselves are “sensible estimation procedures” that “draw on underlying processes. . . that are highly sophisticated,”<sup>120</sup> the resulting judgments are biased—that is, they depart from “normative rational theory” in predictable ways.<sup>121</sup>

Of course, people do not always act as “cognitive misers,”<sup>122</sup> who hoard their cognitive resources and limit cognitive expenditures whenever possible. In later work, Kahneman distinguished between two distinct modes of decisionmaking, which he termed System 1 and System 2. System 1 “operates automatically and quickly, with little or no effort and no sense of voluntary control,” whereas System 2 “allocates attention to the effortful mental activities that demand it, including complex computations.”<sup>123</sup> System 1, then, is the realm of quick, automatic judgments, where “quick and dirty”<sup>124</sup> heuristics hold primary sway.

System 2, in contrast, is slower and more deliberate—the “effortful system”<sup>125</sup> that we “identify [as our] conscious, reasoning self that has beliefs, makes choices, and decides what to think about and what to do.”<sup>126</sup> System 2 is typically mobilized when we are surprised by events or data that don’t conform to our normal expectations or by questions for which System 1 doesn’t yield a quick answer.<sup>127</sup> We also use System 2 to “monitor” our “own behavior”<sup>128</sup> and to exert self-control over the

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<sup>117</sup> *Id.* at 8.

<sup>118</sup> *Id.* at 8 (noting that there are “three classes of processes that models of bounded rationality typically specify: “[s]imple search rules,”(how to search) “[s]imple stopping rules,” (when to stop searching) and “[s]imple decision rules” (how to decide)).

<sup>119</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 7 (2011).

<sup>120</sup> Gilovich & Griffin, *supra* note 115, at 3.

<sup>121</sup> *Id.* at 2-3.

<sup>122</sup> The term “cognitive misers” was coined by Professors Susan Fiske & Shelley Taylor to convey the notion that “people are limited in their capacity to process information, so they take shortcuts whenever they can.” SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 11-12 (1984).

<sup>123</sup> KAHNEMAN, *supra* note 119, at 20-21.

<sup>124</sup> *Id.* at 25.

<sup>125</sup> *Id.* at 29.

<sup>126</sup> *Id.* at 21.

<sup>127</sup> *Id.* at 24.

<sup>128</sup> *Id.* at 24.

“impulses” generated by System 1.<sup>129</sup> Other researchers have articulated similar “‘dual process theories’ of thinking, knowing, and information processing.”<sup>130</sup>

This “division of labor”<sup>131</sup> between Systems 1 and 2, with System 1 doing the bulk of decision-making, works because heuristics typically work—or at least work well enough for the majority of situations and decisions. The use of heuristics is both adaptive and, in many respects, fully rational given limited time, energy, information, and cognitive resources.<sup>132</sup> Heuristics do, however, result in predictable biases and systemic errors in information processing. The following discussion considers several heuristics and biases that have particularly important consequences for individual’s interest in and capacity to process information on matters critical to public policy and government affairs.

#### i. The Availability Heuristic

When people make a judgment about how likely a particular risk is to come to fruition—and thus about how important and serious a particular societal problem is—they tend to base that judgment on how easily they can call to mind instances of that problem occurring.<sup>133</sup> Thus, those judgments may turn less on how often that risk has actually come to pass and more on how “available” or mentally accessible examples of that risk occurring are; availability, in turn, is influenced by how salient, vivid, and recent (and thus how memorable) those instances are,<sup>134</sup> which in turn may be influenced by media coverage and public discussion of those events.<sup>135</sup> Indeed, Cass Sunstein and Timur Kuran have also suggested that the “availability errors” generated by this heuristic can be transmitted quickly and compounded through an “availability cascade”—a “self-reinforcing process of collective belief formation by which an expressed perception triggers a chain reaction that gives the perception increasing plausibility through its rising availability in public discourse.”<sup>136</sup>

The availability heuristic may help explain why, for example, parents tend to overestimate the risk of stranger kidnappings. It also helps explain, in part, why people who have very divergent media consumption patterns may develop quite divergent views about how likely or important particular problems are, if those problems are covered with differing frequency, attention, or vividness in their preferred media streams.

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<sup>129</sup> *Id.* at 26.

<sup>130</sup> Paul Slovic et al., *The Affect Heuristic*, in *HEURISTICS AND BIASES*, *supra* note 115, at 397, 398.

<sup>131</sup> KAHNEMAN, *supra* note 119, at 25.

<sup>132</sup> *See, e.g.* Gigerenzer & Selten, *supra* at 9.

<sup>133</sup> *See, e.g.*, Tversky & Kahneman, *supra* note 122, at 1124.

<sup>134</sup> *See id.* at 1124-25.

<sup>135</sup> *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 *STANFORD L. REV.* 683, 683 (1998).

<sup>136</sup> *See id.*

## ii. The Affect Heuristic

While there are many different accounts of the role of emotion in decision-making, one influential account is the “affect heuristic.” Affect describes a feeling, whether conscious or subconscious, that something is good or bad.<sup>137</sup> Particularly when System 1 is generating decisions,<sup>138</sup> those feelings can then influence judgments and decisionmaking.<sup>139</sup> In particular, research suggests that people are inclined to judge an activity as low-risk and high-benefit if they like that activity, and conversely as high-risk and low-benefit if they dislike that activity.<sup>140</sup> Similarly, those risks that evoke a feeling of dread (such as cancer) are perceived as more serious than those that do not.<sup>141</sup>

## iii. Loss Aversion and Framing Effects

Tversky and Kahneman’s Nobel-Prize-winning prospect theory demonstrates that people tend to care more about losses than equivalent gains—that is, the disutility associated with a particular loss exceeds the utility associated with an equivalent gain.<sup>142</sup> This “loss aversion” drives a number of observed heuristics, including “status quo bias”—a “preference for the current state” of things.<sup>143</sup>

Moreover, cognitive psychology and behavioral economics research also demonstrates that differences in the way a question is framed can have significant effects on our judgments. The combination of framing effects and loss aversion means that the amount of money people are willing to spend to address a particular risk turns, to some extent, on whether the pay-off is presented through a positive or negative frame (e.g., lives saved v. lives lost).<sup>144</sup> People are generally willing to spend more to reduce fatalities when the issue is framed as preventing deaths rather than saving

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<sup>137</sup> Slovic et al., *supra* note 130, at 397, 397.

<sup>138</sup> Because “[a]ffective responses occur rapidly and automatically,” they are often viewed as part of System 1 (or experiential) thinking. *Id.* at 398.

<sup>139</sup> *Id.* at 400.

<sup>140</sup> *Id.* at 410-12.

<sup>141</sup> *Id.* at 410. Closely related to the affect heuristic is George Loewenstein’s “risk-as-feelings hypothesis,” which suggests that when “emotional reactions to risky situations . . . diverge” from “cognitive assessments,” “emotional reactions often drive behavior.” George F. Loewenstein et al., *Risk as Feelings*, 127 *PSYCHOLOGICAL BULLETIN* 267, 267 (2001).

<sup>142</sup> *See id.*

<sup>143</sup> Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. OF ECON. PERSPECTIVES* 193, 193 (1991). It also explains the “endowment effect,” in which people “demand[] much more to give up an object than they would be willing to pay to acquire” it. *Id.*

<sup>144</sup> *See, e.g.,* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 *SCIENCE* 453, 453 (1981).

livings.<sup>145</sup> More generally, whether an issue is framed in terms of negative or positive impacts can affect the kind of solutions that seem appealing and appropriate.<sup>146</sup>

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All told, the behavioral research on conserving cognitive resources casts doubt on the Court's assumptions that American press audiences actively seek out truth, rationally process facts, and readily update mistaken assumptions. Our bounded rationality limits both our capacity and desire to seek out and filter the seemingly boundless information available on every policy issue. The desire to conserve cognitive resources and avoid information overload limits a press audience member's motivation to seek out and process empirical facts. Indeed, doing so may be a quite rational response in many circumstances. Moreover, reliance on simple heuristics to conserve mental resources, while rational and useful in a wide variety of circumstances, also affects press audience's processing of the information they do receive. These heuristics result in systemic bias that causes press audience members to, for example, judge the importance of problems based on whether they can conjure up vivid, salient examples of that risk, to base their assessment of the costs and benefits of an activity on how much they like that activity, and to be biased toward the status quo and against taking measures that risk losses.

One might conclude from the preceding discussion that problems with human cognition can be mitigated, at least in some instances, by encouraging people to actively engage System 2, deliberative thinking when evaluating evidence about significant societal problems. And, indeed, research suggests that when accuracy-motivations come to the forefront, people "expend more cognitive effort on issue-related reasoning, attend to relevant information more carefully, and process it more deeply, often using more complex rules."<sup>147</sup> Conserving cognitive resources is not, however, the only motivation that competes with accuracy-seeking.<sup>148</sup>

#### b. Expressing and Protecting Cultural and Political Identity

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<sup>145</sup> See *id.*

<sup>146</sup> See Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 135 (2014) (arguing that whether externalities—such as the third-party effects of vaccination—are framed in positive or negative terms can have “profound effects on both the way we think about and process externalities and on our politics and policy development”).

<sup>147</sup> Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOLOGICAL BULLETIN 480, 481 (1990).

<sup>148</sup> See, e.g., Hart et al., *Feeling Validated Versus Being Correct: A Meta-Analysis of Selective Exposure to Information*, 135 PSYCHOLOGICAL BULLETIN 555 (2009) (describing the competition between the accuracy goal and the goal of defending one's preexisting views and noting that “information choices are meant to fulfill goals to defend attitudes, beliefs, and behaviors and to accurately appraise and represent reality”).

Even when we engage our deliberative faculties, truth isn't always the primary objective we pursue. Empirical evidence suggests that people often engage in "motivated reasoning": "the unconscious tendency . . . to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs."<sup>149</sup> Often, motivated reasoning involves seeking out or processing new data in ways that conform to one's preexisting beliefs<sup>150</sup> (so-called "confirmation bias").<sup>151</sup> While motivated reasoning can influence System 1 thinking, its influence on System 2 thinking may be at least as profound.<sup>152</sup> Indeed, engaging in motivated reasoning is often thought to require the expenditure of cognitive resources: cognitive resources must be marshaled to counter-argue or otherwise justify dismissal or discounting of information contrary to our desired result<sup>153</sup> (so-called "disconfirmation bias").<sup>154</sup>

Recent research suggests that one of the primary goals of motivated reasoning is the expression and protection of group identity—such as one's cultural or political identity. Thus, one prominent manifestation of motivated reasoning is cultural cognition, which "refers to the tendency of individuals to conform their beliefs about disputed matters of fact . . . to values that define their cultural identities."<sup>155</sup> Studies of a host of

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<sup>149</sup> Kahan, *supra* note 114, at 19 (2011).

<sup>150</sup> See, e.g., Brendan Nyhan & Jason Reifler, *When Corrections Fail*, 32 POLITICAL BEHAVIOR 303, 307 (2010) (observing that "people tend to display bias in evaluating political arguments and evidence, favoring those that reinforce their exiting views and disparaging those that contradict their views"); C.S. Taber & M. Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POLITICAL SCIENCE 755, 756 (2006) (noting that "tension between the drives for accuracy and belief perseverance underlies all human reasoning" as people seek to accommodate competing "accuracy goals" and "partisan goals, which motivate them to apply their reasoning powers in defense of a prior, specific conclusion").

<sup>151</sup> Toby Bolsen et al., *The Influence of Partisan Motivated Reasoning on Public Opinion*, 36 POLIT. BEHAV. 235, 237 (2014).

<sup>152</sup> See Kahan, *supra* note 114, at 21 ("Indeed, far from being immune from identity-protective cognition, individuals who display a greater disposition to use reflective and deliberative (so-called System 2) forms of reasoning rather than intuitive, affective ones (System 1) can be expected to be even more adept at using technical information and complex analysis to bolster group-congenial beliefs.").

<sup>153</sup> See, e.g., Brian F. Schaffner & Cameron Roche, *Misinformation and Motivated Reasoning: Responses to Economic News in a Politicized Environment*, 81 PUBLIC OPINION QUARTERLY 86, 88 (2016) ("Motivated reasoning is a process in which an individual makes an active, cognitive effort to 'arrive at a particular conclusion'") (quoting Kunda, *supra* note 147).

<sup>154</sup> Bolsen, *supra* note 151, at 237.

<sup>155</sup> The Cultural Cognition Project, <http://www.culturalcognition.net/>, last visited March 18, 2019. More specifically, cultural cognition theory maps people's worldviews along two axes: "hierarchy-egalitarianism" and "individualism-communitarianism," Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. OF RISK RESEARCH 147, 151 (2011), and posits that an array of psychological mechanisms (including motivated reasoning and the availability and affect heuristics) will cause people's assessments of risks to align with their worldviews. *Id.* at 148.

controversial and disputed social issues—including climate change,<sup>156</sup> nanotechnology,<sup>157</sup> HPV vaccination,<sup>158</sup> the death penalty,<sup>159</sup> nuclear power,<sup>160</sup> and gun control<sup>161</sup>—suggest that individuals, often unconsciously, “selectively . . . credit or dismiss evidence of risk” based on cultural values.<sup>162</sup> The result is quite divergent (sometimes “diametrically opposed”) risk perceptions across cultural divides.<sup>163</sup> Interestingly, expertise, education, and increased scientific literacy and numeracy can amplify rather than diminish this polarization, perhaps because expertise and education may simply be additional cognitive resources that can be mobilized to serve the goals of motivated reasoning.<sup>164</sup>

Recent research likewise suggests that protecting one’s *political* identity is another important motivation that influences the way that people seek out and process information. A study of motivated reasoning in the context of mathematical reasoning found that Republicans were more likely to correctly answer a math-story problem about the effect of a handgun ban on crime when the correct answer aligned with their presumed political priors—that gun control measures increase, rather than decrease crime—whereas Democrats were more likely to answer correctly when the data showed that the handgun ban decreased crime.<sup>165</sup> This “motivated numeracy effect” was stronger among high-numeracy individuals (those with greater mathematical skills) than among low-numeracy individuals.<sup>166</sup>

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<sup>156</sup> See, e.g., Daniel M. Kahan et al., *Cultural and Identity-Protective Cognition: Explaining the White Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUDIES, 465 (2007).

<sup>157</sup> See, e.g., Daniel M. Kahan et al., *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECH 87 (2009).

<sup>158</sup> Daniel M. Kahan et al., *Who Fears the HPV Vaccine, Who Doesn’t, and Why? An Experimental Study of the Mechanisms of Cultural Cognition*, 34 LAW & HUMAN BEHAVIOR 501 (2010).

<sup>159</sup> Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. of Personality & Social Psychology 2098 (1979).

<sup>160</sup> See, e.g., Kahan, *supra* note 156.

<sup>161</sup> See, e.g., *id.*

<sup>162</sup> Kahan, *supra* note 155, at 148.

<sup>163</sup> *Id.* at 149.

<sup>164</sup> See, e.g., Daniel M. Kahan et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732 (2012) (finding that “cultural polarization” over climate change facts was most pronounced among those “with the highest degrees of science literacy,” suggesting that “public divisions over climate change” result from cultural commitments rather than lack of scientific understanding); Daniel Kahan et al., *Motivated Numeracy and Enlightened Self-Government*, 1 BEHAVIOURAL PUBLIC POLICY 54, 76 (2017); see also Daniel Kahan, *Motivated System 2 Reasoning (MS2R): A Research Program*, <http://www.culturalcognition.net/motivated-system-2-reasoning-m/?SSScrollPosition=0>.

<sup>165</sup> Kahan et al., *supra* note 164, at 68-69.

<sup>166</sup> See *id.* at 75.

Underlying motivations for these forms of “identity-protective cognition”<sup>167</sup> might include minimizing cognitive dissonance that might result from crediting facts that challenge one’s worldview,<sup>168</sup> “protecti[ng] social standing” in one’s cultural group,<sup>169</sup> and expressing support for that group and its members.<sup>170</sup> Whatever the precise reason, it seems clear that people are often motivated to seek out and process information in ways that express, affirm, and protect their preexisting political and cultural identities.

Moreover, motivated reasoning results not just in “biased assimilation”<sup>171</sup> of facts, but also in “biased search”<sup>172</sup> or “selective exposure.”<sup>173</sup> That is, people engaged in identity-protective cognition are not seeking out what is “true,” but rather are seeking out information that confirms, rather than challenges, their existing beliefs, and worldviews.<sup>174</sup> Research on media consumption preferences and habits demonstrates that party affiliation and political preferences do, indeed, drive media choices.<sup>175</sup> One study of 2004 data found, for example, that a “substantial proportion of the public . . . consumes media sharing their political predispositions.”<sup>176</sup>

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<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 149; Dustin Carnahan et al., *Candidate Vulnerability and Exposure to Counterattitudinal Information: Evidence from Two U.S. Presidential Elections*, HUMAN COMMUNICATIONS RESEARCH 1, 10 (2016) (noting that “dissonance theory remains the preeminent explanation of selective exposure”).

<sup>169</sup> *Id.*

<sup>170</sup> See, e.g., Schaffner & Roche, *supra* note 153, at 87-88 (describing the potential for “expressive responding” as an aspect of motivated reasoning).

<sup>171</sup> Kahan, *supra* note 114, at 21.

<sup>172</sup> *Id.*

<sup>173</sup> R. Kelly Garrett & Natalie Jomini Stroud, *Partisan Paths to Exposure Diversity: Differences in Pro-and Counterattitudinal News Consumption*, 64 J. OF COMMUNICATIONS 680, 680 (2014).

<sup>174</sup> Researchers have hypothesized a number of potential explanations for biased search, including managing cognitive dissonance from encountering information contrary to one’s existing views, conserving cognitive resources (because processing information that conflicts with one’s beliefs may be “cognitively taxing”), and judging proattitudinal information as “higher quality” or more trustworthy than counterattitudinal information. Garrett & Stroud, *supra* note 173, at 681-82. Some researchers contend that “biased search” actually reflects two distinct phenomena: “selective approach” (seeking out proattitudinal information) and “selective avoidance” (actively avoiding counterattitudinal information), while other researchers treat selective approach and selective avoidance as two sides of the same coin. *Id.* at 681.

<sup>175</sup> Natalie Jomini Stroud, *Media Use and Political Predispositions: Revisiting the Concept of Selective Exposure*, 30 POLITICAL BEHAVIOR 341 (2008) (concluding that “people’s political predispositions are important determinants of their media use”) (emphasis omitted).

<sup>176</sup> *Id.* More specifically, “64 percent of conservative Republicans consume[d] at least one conservative media outlet compared to 26 percent of liberal Democrats,” whereas “43 percent of conservative Republicans consume[d] at least one liberal outlet while 74 percent of liberal Democrats consume[d] at least one liberal outlet.” *Id.* “Conservative Republicans are more likely to read newspapers endorsing Bush, listen to conservative talk radio, watch FOX, and access conservative websites. Liberal Democrats are more likely to read newspapers endorsing Kerry, listen to liberal radio, watch CNN/MSNBC,

Recent data confirm these partisan divides in media preferences. A 2014 Pew Research study found that “[w]hen it comes to getting news about government and politics, there are stark ideological differences in the sources that online Americans use, as well as in their awareness of and trust in these sources.”<sup>177</sup> Nearly half of conservatives identify Fox News “as their main source for news about government and politics.”<sup>178</sup> Although there is no dominant media outlet identified by liberals, “liberals are more than twice as likely as web-using adults overall to name NPR (13% vs. 5%), MSNBC (12% vs. 4%), and the New York Times (10% vs. 3%) as their top source for political news.”<sup>179</sup>

Motivated reasoning may also have particularly significant consequences for the Court’s assumptions that people will eagerly update their factual conclusions and beliefs. Indeed, research suggests that people’s views on factual questions are “sticky”: even when confronted directly with new information that contradicts their current beliefs, people are reticent to significantly revise or “update” their view of the facts.<sup>180</sup>

Reluctance to update has been the focus of significant recent attention, with widely circulated reports suggesting not only that people don’t update but that efforts to encourage updating result in a so-called “backfire effect,” in which their erroneous views become even more entrenched.<sup>181</sup> The “backfire effect” quickly became part of the arsenal of those arguing mostly strenuously that we are now in a Post-Truthism era. If attempts to correct people’s basic factual misperceptions on questions critical to public policy are not only sometimes unsuccessful but often actually counterproductive—causing people to “double down”<sup>182</sup> on mistaken factual judgments that support their ideological views—then constructive, deliberate political debate seems a pipedream indeed.

Later research, however, casts doubt on the strength of these findings—and, in particular, has failed to replicate the backfire effect in other

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and access liberal websites.” *Id.*

<sup>177</sup> PEW RESEARCH REPORT, POLITICAL POLARIZATION AND MEDIA HABITS, Oct. 21, 2014, at 11 <https://www.pewresearch.org/wp-content/uploads/sites/8/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf>.

<sup>178</sup> *Id.* at 2.

<sup>179</sup> *Id.* at 4. “Among the large group of respondents with mixed ideological views, CNN (20%) and local TV (16%) are top sources; Fox News (8%), Yahoo News (7%) and Google News (6%) round out their top five sources.” *Id.*

<sup>180</sup> See, e.g., Schaffner & Roche, *supra* note 153, at 104 (finding clear evidence of motivated reasoning in “why individuals provide persistent misinformation” about politically important questions, like the unemployment rate, under a president they support or oppose).

<sup>181</sup> See Nyhan & Reifler, *supra* note 150, at 323. Nyhan and Reifler hypothesized that the “backfire effect” might result from people so “vigorously” generating counterarguments against the ideologically “unwelcome information” that they not only defend, but actually “bolster their preexisting views.” *Id.* at 308.

<sup>182</sup> Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, POLITICAL BEHAVIOR (forthcoming), available at <http://djflynn.org/wp-content/uploads/2016/08/elusive-backfire-effect-wood-porter.pdf>.

experimental contexts.<sup>183</sup> Nonetheless, a recent collaborative study on the effect of fact-checking on people’s factual beliefs conducted by the authors of the original backfire study and their primary critics concluded that, even in the absence of backfire, there is a “widespread evidence of motivated reasoning” in the processing and updating of factual beliefs, citing prior findings that “for approximately 80% of issues tested, responsiveness to corrective information varied by ideology.”<sup>184</sup> Moreover, the authors noted that while the current study results showed no evidence of backfire and indicated at least some participant capacity to update,<sup>185</sup> the study confirmed those earlier findings by documenting motivated-reasoning effects in the form of “differential acceptance”—in which the extent of updating depended on people’s political priors (and thus whether the fact-check was responding to pro- or counter-attitudinal facts) on some of the tested factual claims.<sup>186</sup>

Accordingly, while the jury is still out on the precise extent and mechanisms by which motivated reasoning limits factual updating on controversial facts with high political salience, the evidence suggests that we are at least somewhat reluctant to update our preexisting factual views because we are motivated to protect our cultural and political identities. Press audiences’ preexisting views on factual questions critical to important public policy debates are thus likely to be “sticky,” and the most recent research indicates that while we may not be “fact-immune,” we are probably quite “fact-resistant.”<sup>187</sup>

### c. Managing Threats and Uncertainty

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<sup>183</sup> A 2017 study by Professors Thomas Wood and Ethan Porter tested for the backfire effect with a variety of experimental protocols in a study of more than 10,100 subjects on fifty-two contentious issues. Thomas Wood & Ethan Porter, *The Elusive Backfire Effect: Mass Attitudes’ Steadfast Factual Adherence*, POLITICAL BEHAVIOR (forthcoming), available at <http://djflynn.org/wp-content/uploads/2016/08/elusive-backfire-effect-wood-porter.pdf>. Their study, conducted “during the height of the presidential primary” season, when political loyalties and interest might well be at their zenith, did not identify even “a single instance of factual backfire.” *Id.* Moreover, when study participants were confronted with ideologically unwelcome factual correction, most did, in fact, update their factual beliefs: “for about nine issues in ten, factual information significantly improves the average respondent’s accuracy. At least for a brief moment, their perceptual screens dim, and the facts prevail.” *Id.*

<sup>184</sup> Brendan Nyhan et al., *Taking Fact-Checks Literally But Not Seriously? The Effects of Journalist Fact-checking on Factual Beliefs and Candidate Favorability*, POLITICAL BEHAVIOR (forthcoming) 1, available at <https://www.dartmouth.edu/~nyhan/trump-corrections.pdf> (citing Wood & Porter, *supra* note 183).

<sup>185</sup> Fact-checking caused study-participants, regardless of their political priors, to update their views to align more fully with the facts, even when those facts ran counter to their political ideology and affiliation. *See id.* at 4.

<sup>186</sup> *Id.* at 6.

<sup>187</sup> Alexios Mantzarlis, Director of the International Fact-Checking Network at The Poynter Institute, *The History of Fake News* (Part 2), BBC TRENDING, Jan. 21, 2018, [bbc.co.uk, 9:00-10:00, https://www.bbc.co.uk/sounds/play/w3csvtp9](https://www.bbc.co.uk/sounds/play/w3csvtp9).

Research also reveals that human information seeking and processing are not merely driven by a need for accuracy, but motivated by a deep need to manage threat and uncertainty. Like other fields of social science, social psychology and, particularly, social cognition,<sup>188</sup> suggest a variety of factors, beyond simple empirical truth, that shape the ways that people seek out and interpret data about the social world they inhabit.

As with other cognitive models, the dominant social-cognition models of the “social thinker”<sup>189</sup> have evolved over time from hypothesizing “consistency seekers motivated by [reducing] perceived discrepancies among their cognitions”<sup>190</sup> to “naïve scientists” who employ “attribution theories” to “explain their own and other people’s behavior”<sup>191</sup> to “cognitive misers” who “take shortcuts” to minimize demands on their limited cognitive capacities<sup>192</sup> to “motivated tacticians” who select and cycle among various cognitive strategies to suit their needs and desires in particular contexts,<sup>193</sup> to “activated actors” who rely primarily on rapid “unconscious associations” that “cue associated cognitions.”<sup>194</sup> Each of these models continues, however, to explain important aspects of social cognition.<sup>195</sup>

Many of the motivations recognized by social cognition research echo or mirror those of behavioral economics and cognitive psychology more generally. For example, the needs for “belonging,” “shared social understandings,” and “in-group trust”<sup>196</sup> might be seen as corollaries of the desire to protect and express one’s group identity discussed above. Other motivations, such as the desire to see one’s self positively (“self-enhancement”)<sup>197</sup> and to exert control over “outcomes that depend on other people,”<sup>198</sup> are perhaps more prominent in social cognition than in other fields.

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<sup>188</sup> Social cognition is a sub-field of social psychology that studies the “mental processes involved in perceiving, attending to, remembering, thinking about, and making sense of the people in our social world.” GORDON MOSCOWITZ, SOCIAL COGNITION: UNDERSTANDING SELF AND OTHERS 3 (2005).

<sup>189</sup> FISKE & TAYLOR, *supra* note 122, at 17.

<sup>190</sup> *Id.* at 13.

<sup>191</sup> *Id.* at 14.

<sup>192</sup> *Id.* at 15.

<sup>193</sup> *Id.* at 16.

<sup>194</sup> *Id.*

<sup>195</sup> Moreover, like cognitive psychology, much of social psychology utilizes a dual-process model with an “automatic” and a “deliberate” mode of cognition, *id.* at 33, although the model acknowledges more of a “continuum” with various gradations, *id.* at 55.

<sup>196</sup> *Id.* at 51-54. “Belonging” involves “[b]eing accepted by other people [or] one’s group,” understanding or “social shared cognition” involves the “believe that one’s views correspond to those of one’s group,” and in-group trust involves “viewing people, at least in one’s own group, positively.” *Id.* at 52.

<sup>197</sup> *Id.* at 54.

<sup>198</sup> *Id.* at 52-53.

Several theories in social cognition suggest that managing threats<sup>199</sup>—to one’s life, way of life, and the status quo—is likewise an important motivation that influences cognition. For example, “mortality salience,” a focus on one’s own death “makes people cherish worldview that will outlive them.”<sup>200</sup> In other words, people who feel threatened “validate the ideologies of their salient group identities. Under threat, conservatives want to conserve, and progressives want to progress,”<sup>201</sup> and both groups incline to “strong leaders, who reduce apparent uncertainty.”<sup>202</sup> Similarly, terror management theory posits that people cope with salient reminders of their own mortality “by identifying with their ingroups, which will outlive them,”<sup>203</sup> and striking out against outgroups.<sup>204</sup>

Another potential method for managing uncertainty is engaging in essentialist thinking about the “other,” because doing so helps people feel more confident in their ability to predict events and to understand others’ behavior. This tendency is exemplified by the “fundamental attribution error,” the “most commonly documented bias in social perception,”<sup>205</sup> in which people ascribe others’ behavior or circumstances to their fixed traits, rather than acknowledging the role that “situational forces” play in shaping that person’s behavior and life circumstances.<sup>206</sup> Thus, if something terrible happens to someone in an outgroup, we tend to assume it is because they are a “bad” person rather than because they are in a bad situation, whereas we tend to assume the opposite when bad things happen to ourselves or to people with whom we easily relate. We thus tend to be far less charitable in our assessments of people who are not like us.

A more controversial theory, known as system justification theory, suggests that both advantaged *and* disadvantaged groups are inclined to “legitimize the status quo,”<sup>207</sup> particularly when the system is threatened or attacked.<sup>208</sup> System justification is not always activated, but when it is, people are inclined to “more favorable attitudes toward the system than” the evidence supports<sup>209</sup> and may further these attitudes by engaging strategies like rationalization and victim-blaming.<sup>210</sup> System justification

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<sup>199</sup> *Id.* at 311 (defining “threats” as intense uncertainty about an important negative possibility”).

<sup>200</sup> *Id.* at 311.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *See id.* Under some circumstances, “[i]ntense ingroup identification, coupled with perceived threat” to “cherished values” can make people on the right incline to authoritarianism. *Id.* at 310; *see also id.* (noting that “the left wing does not test as authoritarian *per se*, although both left and right can be dogmatic”).

<sup>205</sup> FISKE & TAYLOR, *supra* note 122, at 179.

<sup>206</sup> *Id.* at 181.

<sup>207</sup> *Id.* at 312.

<sup>208</sup> Jaime L. Napier et al., *System Justification in Responding to the Poor and Displaced in the Aftermath of Hurricane Katrina*, 6 ANALYSES OF SOCIAL ISSUES & PUBLIC POLICY, 57, 61 (2006).

<sup>209</sup> *Id.* at 60.

<sup>210</sup> *Id.* at 60.

can serve “multiple needs, including epistemic and existential needs to manage uncertainty and threat,” promote “order, structure, and closure,” and decrease “emotional distress associated with social inequality.”<sup>211</sup>

All together, this body of literature suggests strongly that motives like managing uncertainty and threat compete heavily with accuracy motivations in human information seeking and information processing.

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The social science evidence suggests that the Supreme Court’s Truthseeking, Rational-Processing, and Updating Assumptions are deeply flawed. The empirical evidence makes clear that people have a wide variety of motivations other than truthseeking, including preserving cognitive resources, expressing and protecting cultural and political identity, and managing threats and uncertainty.

Moreover, whether engaging the rapid, automatic decisionmaking associated with System 1 or the slower, more deliberate decisionmaking that characterizes System 2 reasoning, people often process information in biased ways. Most strikingly, motivated reasoning—often designed to protect one’s cultural or political identity—means that press audiences will tend to process information in ways that confirm their preexisting views and that otherwise conform to their cultural commitments or political priors.

Likewise, people face significant barriers to rationally updating their prior beliefs. The same phenomena that hamstring a press audience in seeking and processing truth—bounded rationality, motivating reasoning, and identity-protective cognition—all suggest that once press audience members have processed information about matters of public concern and come to a conclusion about what the underlying facts are, those factual judgments will be difficult to dislodge

## 2. Current Exacerbating Factors

Cognitive limitations have always had implications for theories of democracy,<sup>212</sup> the First Amendment,<sup>213</sup> and transparency.<sup>214</sup> Likewise,

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<sup>211</sup> *Id.* at 60.

<sup>212</sup> *See, e.g.,* Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 417 (1998).

<sup>213</sup> *See, e.g., See, e.g.,* Lidsky, *supra* note 24, at 800 (arguing that the “rational audience model represents a flawed but worthy ideal” in the free speech context); Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences & Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1581-82 (2007) (noting that the assumption “that audiences are capable of rationally assessing the truth, quality, and other characteristics of core speech,” while debatable, is “unlikely to be displaced from the pantheon of general First Amendment principles anytime soon”); Bambauer, *supra* note 24, at 651 (arguing that

citizens have often lacked basic factual knowledge about current affairs and thus used cues like political affiliation to decide which candidates and policies to support.<sup>215</sup> But these longstanding truths about cognitive limitations and mental shortcuts seem to be exacerbated today by additional factors that are arguably unique to this particular Post-Truthism moment. New research from the fields of political science and communications highlights the concrete ways in which our cognitive limitations and biases are being amplified by the confluence of two sweeping and mutually-reinforcing societal phenomena: hyperpartisanship and the shifting information landscape. These factors further widen the gap between Supreme Court assumption and on-the-ground reality.

#### a. Hyperpartisanship

Partisanship is, of course, nothing new. Nonetheless, levels of partisanship are on the rise and significantly higher than in the recent past. In 2014, the Director of Political Research at the Pew Research Center declared, “Political polarization is the defining feature of early 21<sup>st</sup> century American politics, both among the public and elected officials.”<sup>216</sup> This pronouncement was grounded in a 2014 Pew Research report that found “Republicans and Democrats are more divided along ideological lines—and partisan antipathy is deeper and more extensive—than at any point in the last two decades.”<sup>217</sup> The area of policy agreement between Democrats and Republicans has shrunk considerably over those decades, as Republicans have shifted to the right and Democrats have shifted to the left. This polarization means that, as of 2014, “92% of Republicans are to the right of the median (middle) Democrat, compared with 64%” in 1994, and “94% of Democrats are to the left of the median Republican,” compared with 70% in 1994.<sup>218</sup> The same deepening polarization is also

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“research in cognitive psychology and behavioral economics shows that humans operate with significant, persistent perceptual biases that skew our interactions with information,” that “[t]hese biases undercut the assumption that people reliably sift data to find truth, and that the U.S. should thus “discard the marketplace of ideas as our framework for evaluating communications regulation”).

<sup>214</sup> See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 928 (2019).

<sup>215</sup> See, e.g., Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA LAW REV. 1141, 1164-65 (2003) (endorsing ordinary citizens’ use of heuristics—like party affiliation and the views of political elites—as a rational tool for determining how to vote: “heuristic cues are an informational bargain, providing relatively high returns at low cost to voters who need help”).

<sup>216</sup> Carroll Doherty, *7 Things to Know About Polarization in America*, June 12, 2014, <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/>.

<sup>217</sup> PEW RESEARCH CENTER REPORT, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC, June 12, 2014, <http://www.pewresearch.org/wp-content/uploads/sites/4/2014/06/6-12-2014-Political-Polarization-Release.pdf>.

<sup>218</sup> *Id.* at 10.

evident in Congress, which by some metrics is “now more polarized than at any time since the end of Reconstruction.”<sup>219</sup>

As cultural cognition and identity-protective cognition predict, Republicans and Democrats are divided today not just on policy, but on facts. Ironically, one of the few things on which Republicans and Democrats readily agree is that they fundamentally disagree about many basic facts.<sup>220</sup>

This perception is borne out by public opinion polls that document a stark partisan factual divide on an extensive array of important factual issues. For example, in 2018, three-quarters of those who lean Democrat agreed that “the Earth is warming primarily due to human causes,” whereas only about one-quarter of Republicans concurred.<sup>221</sup> Similarly, in 2016, nearly three-quarters of Democrats believed unemployment had decreased during the Obama administration, but—again—only one-quarter of Republicans agreed.<sup>222</sup> About two-third of Republicans believed Obama had deported fewer undocumented immigrants than President Bush, “but less than half of Democrats” agreed.<sup>223</sup> In some respects the breadth and depth of these factual divides should not be surprising: in an increasingly partisan world, almost every issue is politicized,<sup>224</sup> which activates “motivated reasoning”—and creates deep partisan divides—on many more factual issues than would otherwise be the case.

Unfortunately, many Republicans and Democrats today don’t simply disagree with each other: increasingly, they also disdain, demonize,

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<sup>219</sup> Drew Desilver, *The Polarized Congress of Today Has its Roots In the 1970s*, June 12, 2014, <https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since/> (quoting Poole and Rosenthal). Today, the ideological overlap between the two parties has all but disappeared. In the mid-1970s, 240 representatives “scored in between the most conservative Democrat . . . and the most liberal Republican,” as did 29 senators. *Id.* Those numbers declined to 66 representatives and 10 senators by the mid-1980s and then to 9 representatives and 3 senators by the mid-1990s. *Id.* “By 2011-12 there was no overlap at all in either chamber.” *Id.*

<sup>220</sup> PEW RESEARCH CENTER REPORT, REPUBLICANS AND DEMOCRATS AGREE: THEY CAN’T AGREE ON BASIC FACTS, Aug. 23, 2018, available at [http://www.pewresearch.org/fact-tank/2018/08/23/republicans-and-democrats-agree-they-cant-agree-on-basic-facts/ft\\_18-08-23\\_basicfacts\\_whites-older-americans/](http://www.pewresearch.org/fact-tank/2018/08/23/republicans-and-democrats-agree-they-cant-agree-on-basic-facts/ft_18-08-23_basicfacts_whites-older-americans/) (reporting that 78% of reporters think that Republicans and Democrats “[d]isagree not only on plans and policies, but also on basic facts”).

<sup>221</sup> CARY FUNK ET AL., PEW RESEARCH REPORT, MAJORITIES SEE GOVERNMENT EFFORTS TO PROTECT THE ENVIRONMENT AS INSUFFICIENT, May 14, 2018, at 3, available at <https://www.pewresearch.org/science/2018/05/14/majorities-see-government-efforts-to-protect-the-environment-as-insufficient/>.

<sup>222</sup> David Dunning, *Psychology Shows that Democrats and Republicans Can’t Even Agree on Objective Reality*, QUARTZ.COM, Oct. 31, 2016, <https://qz.com/823183/republicans-and-democrats-cant-agree-on-the-facts/>.

<sup>224</sup> Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392, 2427 (2014) (arguing that “in today’s politicized environment, everything is contested”).

disparage, and even dehumanize each other.<sup>225</sup> In 2016, poll data showed that about half of Republicans and Democrats were “afraid” of the opposing party.<sup>226</sup> More than one-third of Democrats described Republicans as more “dishonest,” “immoral,” and “unintelligent” than other Americans.<sup>227</sup> Conversely, almost half of Republicans described Democrats as more “immoral,” “dishonest,” and “lazy.”<sup>228</sup> A 2017 survey found that “nearly 20 percent of Democrats and Republicans say that many members of the other side ‘lack the traits to be considered fully human,’” and “[e]ven more chilling,” “about 15 percent of Republicans and 20 percent of Democrats agree that the country would be ‘better off if large numbers of opposing partisans in the public today ‘just died.’”<sup>229</sup>

Additionally, a 2018 survey found that “45 percent of Democrats and 35 percent of Republicans” would be “unhappy if their child married someone from the opposite party (up from about 5 percent for both groups in 1960).<sup>230</sup> And, indeed, “[s]ince 1973, the rate of politically mixed marriages in America has declined by 50 percent.”<sup>231</sup> That decline, in turn, may further deepen the partisan divide, as people in politically mixed marriages—and, importantly, their children—tend to be more politically moderate.<sup>232</sup>

For some significant portion of Republicans and Democrats, then, party affiliation is seen as a reliable enough proxy for *humanity* in both of the important senses of that word: are you deserving of dignity and being treated as fully *human* (or can I legitimately treat you as fundamentally *other*) and are you *humane* (or can I legitimately view you as lacking basic decency). Presumably, these two judgments are, at least in some respects, inextricably linked. And, interestingly, it is “white, urban, older, highly educated, politically engaged, and politically segregated” Americans who are mostly likely to answer no to these questions when judging members of the other political party and to express disdain and contempt for those on the “other side.”<sup>233</sup> As described above, especially in times of perceived threat, this “othering” can intensify group identification and make it easier not only to discount or dismiss opposing views but to justify

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<sup>225</sup> This phenomenon is known as “affective polarization.” R. Kelly Garrett et al., *Implications of Pro- and Counterattitudinal Information Exposure for Affective Polarization*, HUMAN COMMUNICATION RESEARCH 1 (2016).

<sup>226</sup> PEW RESEARCH REPORT, PARTISANSHIP AND POLITICAL ANIMOSITY IN 2016, June 22, 2016, <https://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Amanda Ripley, *The Least Politically Prejudiced Place in America*, The Atlantic, Mar. 4, 2019, available at <https://www.theatlantic.com/politics/archive/2019/03/watertown-new-york-tops-scale-political-tolerance/582106/>.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *Id.*

retreat into ideological silos that enable people to avoid engaging people with whom they disagree. Moreover, the affect heuristic and motivated reasoning both suggest that when people “other” those with whom they disagree, they will be more inclined to accept misinformation that falsely suggests that their opponents are unreasonable, malicious, or even dangerous.<sup>234</sup>

While it is possible that the partisan factual divides are not as quite intractable and stark as they appear,<sup>235</sup> deepening partisanship is a factor that unquestionably undergirds any discussion of modern press-audience behaviors and exacerbates gaps between those behaviors and the assumptions of the Court.

### b. The Changing Information Landscape

Another reason that press-audience dynamics seem so starkly different—and that the threat to truth and truthseeking seems so grave—in the present moment is a fear that the changing information landscape is exacerbating existing human limitations and pathologies. The explosion of available information risks “infobesity”<sup>236</sup> or information overload that presumably heightens the need for (and tendency to) resort to shortcuts and heuristics that conserve cognitive resources, potentially at the expense of accuracy and truthseeking. Moreover, the advent and exponential growth of social media as a source of news and forum for political discussion may both enable and amplify biased search and selective exposure. If these fears come to fruition, the gap between our media reality and the Court’s assumptions of press audience willingness to seek out truth that conflicts with their worldview and preexisting beliefs is likely to widen.

Despite the internet’s multiplication of news sources and facilitation of easy access to a wide and diverse array of news outlets, many fear that—rather than diversifying our media diet—we will choose to inhabit online echo chambers where we surround ourselves with people and information with which we agree.<sup>237</sup> Cass Sunstein, for example, has argued that there

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<sup>234</sup> Cf. Ripley, *supra* note 229 (noting “Democrats now think Republicans are richer, older, crueler, and more unreasonable than they are in real life,” and Republicans think “Democrats are more godless, gay, and radical than they actually are”).

<sup>235</sup> Some researchers have hypothesized that people’s response to survey questions about their factual beliefs on controversial issues are less a reflection of their actual factual beliefs than an expression of support for their political party’s factual assertions and concomitant policy positions. Schaffner & Roche, *supra* note 153, at 87. The hypothesis that factual divides may reflect “expressive responding,” *id.* at 88, is supported by studies that find that the partisan factual divide shrinks considerably when survey participants are offered financial incentives to provide accurate responses (or to admit they don’t know the correct answer). *See id.* at 88. In other words, it might be the case that Democrats and Republicans don’t really inhabit separate factual universes—they just say that they do. *See id.* at 87.

<sup>236</sup> *See, e.g.,* Oksana Tunikova, *Are We Consuming Too Much Information?*, Medium.com, June 7, 2018, [https://medium.com/@tunikova\\_k/are-we-consuming-too-much-information-b68f62500089](https://medium.com/@tunikova_k/are-we-consuming-too-much-information-b68f62500089).

<sup>237</sup> CASS R. SUNSTEIN, #REPUBLIC 6 (2017).

is a growing risk that people's online lives will be ideologically siloed because of "people's growing power to filter what they see" and "providers' growing power to filter for each of us, based on what they know about us."<sup>238</sup> Individual tendency toward biased search and selective exposure will likely be magnified by algorithms employed by social media and other websites designed to keep us on their sites as long as possible (and thereby maximize revenue) by serving up the kind of ideologically congruent content it thinks (probably correctly) that we want to see.

The resulting "filter bubbles,"<sup>239</sup> may augment and entrench selective exposure among even the best-intended who might want more balanced information exposure, as so much of that filtering occurs either entirely or partially unbeknownst to us in service of powerful profit motives. In the partisan context, this phenomenon is perhaps most vividly captured by the Wall Street Journal's Red Feed/Blue Feed project, which juxtaposes a simulated liberal ("blue") next to a conservative ("red") Facebook feed, highlighting the divergence between red and blue echo chambers on issues from President Trump to immigration to guns to abortion.<sup>240</sup> Viewing the two feeds, one does indeed wonder if conservatives and liberals are living in two different Americas, or at least in two different online Americas. Such "ideological segregation,"<sup>241</sup> driven by potent profit motives reinforcing and exacerbating our own worst instincts, portends serious challenges for democratic information flow premised on truth seeking through exposure to conflicting views.

Empirical research suggests that the direst predictions about social-media driven echo chambers and filter bubbles have not—or at least have not yet—come to pass. Thus far, most studies have found that, self-reporting about media preferences notwithstanding, there is still large overlap between the news actually viewed by Republicans and Democrats—in large part because most internet users still get most of their news from a handful of relatively mainstream media outlets. A large-scale analysis of online behavioral data<sup>242</sup> from 2015 and 2016, including the run-up to the 2016 presidential election, found that the "media diets of Democrats and Republicans overlap more than they diverge and center around the middle of the ideological spectrum," a "pattern . . . largely driven by the

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<sup>238</sup> *Id.*

<sup>239</sup> ELI PARISER, *THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU* (2011) (arguing that, in a world of filter algorithms, "Your identity shapes media," but "Media also shape identity. And as a result, these services may end up creating a good fit between you and your media by changing . . . you").

<sup>240</sup> BLUE FEED, RED FEED: SEE LIBERAL FACEBOOK AND CONSERVATIVE FACEBOOK, SIDE BY SIDE, <http://graphics.wsj.com/blue-feed-red-feed/>, last visited March 27, 2019.

<sup>241</sup> Seth Flaxman, *Sharad Goel & Justin M Rao, Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 PUBLIC OPINION QUARTERLY 298, 298 (2016).

<sup>242</sup> The data was collected by passive-metering, which tracks that online behavior, including website visits. See Andrew M Guess, *(Almost) Everything in Moderation: New Evidence on Americans' Online Media Diets*, July 2, 2018, at 1 available at [https://webspace.princeton.edu/users/aguess/Guess\\_OnlineMediaDiets.pdf](https://webspace.princeton.edu/users/aguess/Guess_OnlineMediaDiets.pdf).

dominance of mainstream, relatively centrist websites—the kinds of ‘general-interest intermediaries’” of media days of yore.<sup>243</sup> Moreover, “the media diets of the vast majority of people—regardless of political orientation—are moderate, with only a small share of highly partisan respondents driving a disproportionate amount of traffic to relatively extreme outlets, especially on the right.”<sup>244</sup> Other studies have reached similar conclusions.<sup>245</sup>

There are, nonetheless, real reasons to be concerned about whether the shift to internet news consumption will exacerbate polarization, especially as social media sites like Facebook increasingly acting as a “front page” for media outlets,<sup>246</sup> as some data does suggest that greater polarization may occur when people use social media to get their news.<sup>247</sup> Increasingly sophisticated algorithms may also drive more “ideological segregation”<sup>248</sup> in the future.

While both hyperpartisanship and the changing information landscape have a complex relationship with the cognitive limitations addressed in Part III.B.1—at times seeming to be caused by those limitations and at times seeming to amplify them—both of these factors widen the gap between the Supreme Court’s assumptions about press consumers and their real-world desires, capacities, and behaviors.

#### IV. THEORETICAL RESPONSES TO THE GAP BETWEEN ASSUMPTION AND REALITY

This gap seems to threaten both the marketplace-of-ideas theory of the press and its concomitant justifications for press protections. Indeed, when viewed through a narrow lens, there are good reasons to be frustrated with the marketplace-of-ideas metaphor. Long-recognized critiques—that individual recipients of information are not, in fact, always rational market participants—are increasingly supported by clear social science research and are coming to a head in particularly powerful ways in the emotion-driven, Post-Truthism media climate. Plainly, consumers of information

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<sup>243</sup> *Id.* at 2.

<sup>244</sup> *Id.* at 2.

<sup>245</sup> *See, e.g.,* Flaxman et al., *supra* note 241, at 317 (finding in a study of anonymized web-browsing data from 2013 of 50,000 internet users who actively read online news that “outlets that dominate partisan news coverage are still relatively mainstream, ranging from the *New York Times* on the left to Fox News on the right; the more extreme ideological sites (e.g., Breitbart), which presumably benefited from the rise of online publishing, do not appear to qualitatively impact the dynamics of news consumption”); Jacob L. Nelson & James G. Webster, *The Myth of Partisan Selective Exposure: A Portrait of the Online Political News Audience*, July-Sept. 2017 SOCIAL MEDIA & SOCIETY 1 (arguing that Facebook users “frequently navigate[] to new sites from Facebook . . . congregat[ing] among a few popular, well known political news sites”).

<sup>246</sup> Nelson & Webster, *supra* note 245, 1-2.

<sup>247</sup> Flaxman et al., *supra* note 241, at 298; *id.* at 311 (finding that those consuming their news via social media sites, rather than directly browsing news sites, exhibited higher levels of “ideological segregation”).

<sup>248</sup> *Id.* at 301.

do not necessarily behave in the way the U.S. Supreme Court routinely characterizes them. They often do not thirst for empirical facts, engage in a truthseeking dialectic, desire to receive information that doesn't comport with previously held views, have the cognitive ability to rationally process information without bias, or possess a capacity to update old positions based on newer, more correct factual information. In our new, hyperpartisan, algorithmically determined, information-siloed world, this may be increasingly the case.

If the most basic premise of the marketplace-of-ideas approach is sometimes—or even routinely—inaccurate, we might criticize the theory as inapt and the press protections justified by the model as unwarranted.

But this suggestion misconceptualizes both the ongoing utility of the marketplace metaphor and the ongoing importance of press functions in a complex information society. Indeed, rather than undercutting the rationales for press protection, these information-consumer flaws underscore the need for vibrant protection of market-enhancing press institutions. They form the basis for a theory of press protection that centers on the set of press functions that can directly compensate for these individual limitations and can advance the search for truth on a population level even when that search is challenging on an individual level. At this unique moment for both information distribution and jurisprudential development, when scholarly attention has turned to the scope and purpose of the First Amendment's Press Clause,<sup>249</sup> this approach will prove valuable to the ongoing efforts to doctrinally situate that Clause and to identify which entities in the new media landscape might invoke its protections.

#### A. A Wider Marketplace Inquiry: Why Audience Shortcomings Don't Undermine Press Freedom Rationales

The philosophical and jurisprudential origins of the marketplace analogy and a vibrant body of institutional First Amendment literature all support an approach that identifies entities as the constitutionally protected “press” based on their performance of market-enhancing functions that help compensate for individual information-consumer flaws.

Even the earliest proponents of the marketplace-of-ideas theory recognized that individual information consumers would not be perfect truthseekers. Indeed, J.S. Mills, one of the theory's originators, explicitly acknowledged that the inherent limitations and biases of human cognition would impede the search for truth: “Men are not more zealous for truth than they often are for error.”<sup>250</sup> Oliver Wendell Holmes, whose landmark dissent in *Abrams v. United States*<sup>251</sup> infused the theory into modern

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<sup>249</sup> See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

<sup>250</sup> JOHN STUART MILL, ON LIBERTY 53 (2d ed 1859).

<sup>251</sup> *Abrams v. United States*, 250 U.S. 616 (1919).

American jurisprudence, was likewise skeptical of the truthseeking motivations and capabilities of individual information consumers. He was struck by “how seldom and slowly people yield” to errors in their own thinking<sup>252</sup> and was convinced that society would need more than individual “rational or empirical refutation” to advance understanding and knowledge.<sup>253</sup>

Moreover, the instinct that institutions might be important partners in this truthseeking endeavor builds on the scholarly scaffolding already erected by Institutional First Amendment theory, which asserts that in at least some contexts, societal institutions might serve as intermediating devices and surrogates for important First Amendment values.<sup>254</sup> From a marketplace-of-ideas approach, this would call for protection of institutional functions that are uniquely market-enhancing and facilitating of the flow of information and ideas.<sup>255</sup> As Joseph Blocher argued in his detailed investigation of universities as marketplace-enhancing institutions, the First Amendment’s solicitude for the operation of the marketplace of ideas calls for protection of entities that mitigate the costs of transmitting, receiving, and processing information.<sup>256</sup> While information is being consumed at the individual level, transaction costs are often defrayed at the institutional level,<sup>257</sup> and when this institutional contribution is cognizable, constitutional protection is warranted.

This institutional recognition is particularly warranted for the press, because the First Amendment’s Press Clause may provide a unique doctrinal home for constitutional protection of its function.<sup>258</sup> In recent years, scholars have made compelling arguments, rooted in textualism, originalism, and pragmatism,<sup>259</sup> that the Court should recognize a Press Clause doctrine separate from and nonredundant to the Speech Clause, offering protection to a “press” that would not be available to an ordinary speaker.<sup>260</sup> At this critical moment, when important work remains to be done in theorizing the role of that Clause—and when a rapidly changing media topography poses challenges for satisfactorily identifying “the

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<sup>252</sup> . VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* 640 (2012)

<sup>253</sup> *Id.*

<sup>254</sup> Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1275 (2005) (suggesting that “institutional categories serve as rules--as intermediating devices whose more or less rigid application will serve the values lying behind the rules more effectively than will direct application of those values on a more particularistic basis”). PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 146 (2013) (arguing that the press is institutionally “identifiable and long established; it is a major part of the infrastructure of public discourse”).

<sup>255</sup> Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L. J. 821 (2008).

<sup>256</sup> *Id.* at 147.

<sup>257</sup> *Id.*

<sup>258</sup> See West, *Awakening the Press Clause*, *supra* note 265.

<sup>259</sup> See *id.*; see also Sonja R. West, *The ‘Press,’ Then and Now*, 77 OHIO ST. L. J. 49 (2016).

<sup>260</sup> See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014)

press”<sup>261</sup>—the marketplace-of-ideas theory can contribute important insights to the courts’ functional approach to both issues. A careful investigation of the market-enhancing functions that might qualify an entity as the “press” for constitutional purposes can provide one tool for determining which actors receive that protection.

While press protection is justified for a number of theoretical and normative reasons that, together, should shape the wider inquiry into who constitutes the press,<sup>262</sup> marketplace-of-ideas analysis can and should inform this assessment, and may be particularly valuable as the collapse of once-dominant media structures makes it all the more important that the inquiry focus on function rather than self-identification or legacy-media status.

Thus, this inquiry—into whether an entity is performing those core tasks that make its admittedly imperfect audience of information consumers better able to participate in marketplace truthseeking—is an important but as yet unrecognized component of the emerging conversations on the Press Clause.<sup>263</sup> In other words, the Court can jettison its erroneous and confusing focus on individual behavior and audience capacity without abandoning the marketplace of ideas as a framework. The theory continues to have an important place within modern media-law doctrine, with a new focus on the institutional Press Clause functions that enhance audience members’ functioning within the marketplace.

## B. Identifying “Market-Enhancing” Features of “The Press”

As noted above, the press can improve the search for truth in the marketplace of ideas by compensating for individual deficiencies in truthseeking, rational processing, and updating. A careful investigation and identification of the specific market-enhancing press functions that serve this goal will help construct a more appropriate marketplace-of-ideas theory in the press-freedom context and help identify who, in the changing media topography, qualifies as “the press” under an invigorated Press Clause doctrine.

While the judicial inquiry into these functions should be ongoing and might acknowledge new market enhancements as they emerge, a set of functions commonly served by entities historically thought of as “the

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<sup>261</sup> *See id.*

<sup>262</sup> *See, e.g.,* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961) (arguing the First Amendment protects “the freedom of those activities of thought and communication by which we govern”).

<sup>263</sup> *See* West, *Press Exceptionalism*, *supra* note 276; 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).

press” can help structure the conversation about how this compensation for individual limitations operates and why market-enhancing functions are worthy of constitutional protection.<sup>264</sup> Press functions might include, for example, doing the following tasks on behalf of audience members: (1) newsgathering, (2) prioritizing, (3) substantiating, (4) educating, and (5) accessing. As described below, these press functions make the audience member more likely or more able to engage in truthseeking, to process information rationally, and to update facts and opinions about the ramifications of those facts.

### 1. Newsgathering

The act of newsgathering—of identifying newsworthy questions and then investigating and reporting their answers to a wider audience—is a critically important enhancer of the marketplace of ideas. It introduces market efficiencies by reducing information-collecting costs, information-consumption costs, and information-transaction costs. In so doing, it compensates for the now clearly understood tendencies of individual information consumers to conserve cognitive resources, to struggle with bounded rationality, and to experience information overload.<sup>265</sup>

Newsgathering shifts some of the most burdensome truthseeking tasks to press entities who “devote time, resources, and expertise” to the work of “informing the public on newsworthy matters.”<sup>266</sup> With the press acting as a market-enhancing partner—“a full participant in public dialogue, identifying issues, originating ideas, and critiquing the ideas of others”<sup>267</sup>—the reader has less work to do. Easily accessible facts, compiled by those who have engaged in newsgathering, leave the reader with less need to resort to mental shortcuts that might otherwise hinder the search for truth.<sup>268</sup>

Moreover, on behalf of its larger audience, the press representative can connect with people and information in ways that help audience members discover, compare, and elucidate ideas more cheaply and efficiently. One identifying feature of the press is that it “makes it its business to investigate and obtain additional knowledge initially lacked” by the press and its audience.<sup>269</sup> It would be deeply inefficient for every person in the town to travel to city hall, fully prepared to ask the mayor thoughtful questions about the city roads budget, but one reporter can tackle that information-gathering task on behalf of the whole and enhance the

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<sup>264</sup> For discussion of some of these functions as they relate to individual autonomy, see generally Jones, *Press Speakers*, *supra* note 28, at 523.

<sup>265</sup> See, *supra*, text accompanying note 236.

<sup>266</sup> West, *Press Exceptionalism*, *supra* note 276 at 2437.

<sup>267</sup> David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331, 333 n.8 (2014).

<sup>268</sup> Jones, *Press Speakers*, *supra* note 28, at 523 (describing the process by which the press can “aid listeners in reaching informed conclusions of their own”).

<sup>269</sup> *Id.* at 526.

marketplace of ideas. As repeat players, members of the press often have superior knowledge about how and where to get information and pre-existing relationships with those who possess that information.<sup>270</sup> Press entities that “place calls, ask questions, and seek information” act as proxies for their audience members, who technically could perform those tasks, but whose limited time, resources, and cognitive bandwidth mean they almost certainly will not do so.<sup>271</sup> As Justice Powell once noted, “[f]or most citizens, the prospect of personal familiarity with newsworthy events is hopelessly unrealistic,” and thus, in “seeking out the news, the press therefore acts as an agent of the public at large.”<sup>272</sup>

The market enhancement runs in the opposite direction, as well, benefitting those from whom the press gathers newsworthy information. Because “transaction costs are paid not just by those trying to find good ideas, but by those trying to spread them,” the role of the press as a disseminator of sources’ ideas is equally important.<sup>273</sup> It is a market-enhancing press function to act as a known repository for those who have information to share, and to thereby enhance “the circulation of information”<sup>274</sup> on important matters. Information sources who cannot reasonably deliver their facts to each individual in the community can rely on trusted press entities to disseminate that information widely.<sup>275</sup> Recognition of this function helps explain why some have argued that an established audience or regular publication are features that should weigh in favor of a determination that an entity is “the press” for Press Clause purposes.<sup>276</sup>

## 2. Prioritizing

The market-enhancing press function of prioritizing—sifting through large amounts of potentially interesting or potentially useful information and curating it for use by individual idea consumers—improves the otherwise faulty consumer-level operation of the marketplace of ideas. It counteracts individual consumer deficiencies rooted in inadequate time and cognitive

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<sup>270</sup> See Blocher, *supra* note 271 at 145 (noting the ways that “the institutional press improves the marketplace of ideas by serving as a clearinghouse for information,” which “lowers search costs and makes ideas more easily accessible for consumption or rejection by individual idea consumers”).

<sup>271</sup> Jones, *Press Speakers*, *supra* note 28, at 539-40.

<sup>272</sup> *Saxbe*, 417 U.S. at 863 (Powell, J., dissenting).

<sup>273</sup> Blocher, *supra* note 271 at 147-48 (arguing that through First Amendment institutions, “individuals can defray the costs of communication and more effectively direct their ideas into the marketplace” and that “in this way, institutions mitigate the cost of selling ideas as well as the cost of purchasing them”).

<sup>274</sup> *Grosjean*, 297 U.S. at 250.

<sup>275</sup> Jones & Sun, *supra* note 37, at 1364–65 (discussing examples the press introducing efficiencies by “the press speaking to people who individual citizens would have difficulty both finding and accessing” and who will “likely be more willing and able to impart information to journalists willing to publish that information to a wider audience.”)

<sup>276</sup> See West, *Press Exceptionalism*, *supra* note 276, at 2460 (arguing that “regularity of publication or a showing of established readership” are relevant to the identification of an entity as the press for constitutional purposes”).

resources for digesting the massive quantities of available information,<sup>277</sup> thus compensating for some of the key constraints that encourage resort to heuristics that may not always facilitate truthseeking, rational processing, or the updating of ideas.

Indeed, gatekeeping is among the functions most commonly recognized as core to the identification of the press for Press Clause purposes, both as an historical matter<sup>278</sup> and as an ongoing practical matter.<sup>279</sup> “In a society in which each individual has but limited time and resources with which to observe at first hand,” he has to rely on a market-enhancing press actor “to bring to him [the information] in convenient form.”<sup>280</sup> In the modern “age of overwhelming information volume,”<sup>281</sup> this is true on an ever-increasing scale.<sup>282</sup> If market enhancement is the guide, offering a clear, consistent, reliable process to sift through this unmanageable quantity of information<sup>283</sup> is a core function of the constitutional “press.”

The specific nature of this press prioritizing is key to its value to the marketplace of ideas. Merely reducing the amount of information passed along to the consumer, even in a curated or tailored way, is not as market-enhancing as prioritization that involves an exercise of editorial discretion—an application of “journalistic judgment of priorities and newsworthiness.”<sup>284</sup> The press “brings its expertise and judgment to bear in sifting newsworthy information from that which is not,”<sup>285</sup> and it is the nature of this editorial decisionmaking that so uniquely compensates for the widest range of individual market failures.<sup>286</sup>

The prioritizing function draws upon a body of experience in identifying subjects that are important for citizens and communities, and in so doing,

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<sup>277</sup> Jones, *Press Speakers*, *supra* note 28, at 531 (describing the ways that press helps its audience “deal with the dual problems of too much speech and too little time or resources for fully consuming it”).

<sup>278</sup> See West, *Then and Now*, *supra* note 275, at 85 (providing historical discussion of “printers as gatekeepers,” who “decided what would and would not be published”).

<sup>279</sup> Anderson, *supra* note 283 at 333 (arguing that the core practical value of news organizations is that they “sift, select, and package the news, and in so doing create a community”).

<sup>280</sup> *Cohn*, 420 U.S. at 491.

<sup>281</sup> Jones, *Press Speakers*, *supra* note 28, at 530.

<sup>282</sup> *Id.* at 531 (“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. The physical and mental impossibility of wading through that much information transforms what was once an added convenience into an absolute necessity. The press speaker’s sifting on behalf of the listener is now vital”) (internal citations omitted)).

<sup>283</sup> Jones & Sun, *supra* note 37, at 1366 (offering examples of this function of the press “digest[ing] and synthesiz[ing] the mountains of information that is available”).

<sup>284</sup> *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 118 (1973). See also *Tornillo*, 418 U.S. at 241 (protecting the exercise of editorial judgment under the First Amendment).

<sup>285</sup> Jones, *Press Speakers*, *supra* note 28, at 532.

<sup>286</sup> West, *Press Exceptionalism*, *supra* note 276 at 2444 (noting that the press “serves a gatekeeping function by making editorial decisions regarding what is or is not newsworthy”).

it “structures public discussion and builds community discourse by starting conversations and contributing carefully sifted useful information as these conversations continue.”<sup>287</sup> The kind of editorial discretion and journalistic judgments that truly serve these purposes are likely to be more market-enhancing than the mere sorting and “prioritization” of information content that some entities, like search engines, perform today. These functional differences may aid courts in answering emergent questions about whether new information-dissemination entities engaged in algorithmic curation are fulfilling press functions in a way that would qualify them for special press protections.<sup>288</sup>

The marketplace-enhancing prioritization function manifests itself not only in the selection of the news but also in its organization and presentation. Information consumers rely on the press not just to sift for what to include but also to signal “which of those included items are more pressing, more relevant to the listener, or more worthy of attention.”<sup>289</sup> This function thus compensates not only for audience members’ limited time and resources, but also for their limited processing capabilities and limited “knowledge about the relative significance or magnitude of a piece of news.”<sup>290</sup> In the legacy media, this aspect of the prioritizing function has been performed quite explicitly, with labels like “breaking news” and “top story,” and with “headlines, placement, and other signaling devices offering listeners reliable markers of the institutional press speaker’s assessment of importance,”<sup>291</sup> but the tools by which it could be performed are not stagnant. Knowing, as we now do, that individual information consumers struggle with “assigning value and importance to information,”<sup>292</sup> entities that fill that gap enhance the market.

Put differently, the press as institutional speaker makes content-curating choices that serve as an additional, positive heuristic for press consumers,

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<sup>287</sup> Jones, *Press Speakers*, *supra* note 28, at 532. For a through discussion of the core function of the press as an organizer of public dialogue and decider of subjects to be discussed, see Anderson, *supra* note 283, at 332–33.

<sup>288</sup> See Robert Post, *Data Privacy and Dignitary Privacy: Google Spain, The Right to Be Forgotten, and the Construction of the Public Sphere*, 67 DUKE LAW J. 981, 1018, 1016 (2018) (arguing that the critical question for proper resolution of the European Court of Justice case in Google Spain, which held that EU law established a “right to be forgotten” requiring Google Spain to remove certain search results, is “to determine whether Google should be invested with the same kind of public interest that we accord to the press,” i.e., “whether Google has become, like the modern newspaper, an essential component of the communicative infrastructure necessary to sustain the public sphere”); *cf.* Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, Knight Institute Emerging Threats Series, 1, 3 (2018) (examining whether “the various choices companies like Facebook and Google make are indeed analogous to editorial ‘speech’”). Moreover, while a full exploration of these questions is beyond the scope of this article, we note that an entity may not be entitled to Press Clause protection simply because it performs one of the press functions identified in this section.

<sup>289</sup> Jones, *Press Speakers*, *supra* note 28 at 533.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

who can select the shortcuts they most trust by choosing “from among available curated speech packages.”<sup>293</sup> An audience member “cannot possibly make all decisions about all possible streams of information, but ... can make the important decision that she, in general, agrees with the sifting, prioritizing, and other curating values”<sup>294</sup> of particular news organizations. Each news organization’s distinctive mechanism for sifting what is newsworthy and for prioritizing which items “are more pressing, more relevant to the listener, or more worthy of attention”<sup>295</sup> can be a tool that inches the information consumer closer to knowledge and closer to democratic participation. The news-outlet-as-positive-heuristic is thus market-enhancing and should lead to special protection for institutional actors who prioritize and package information and engage intellectually on the audience’s behalf.

### 3. Substantiating

The press function of substantiating—testing factual information from other sources to verify, authenticate, and confirm—enhances the marketplace of ideas and compensates for shortcomings of individual information consumers. Institutions that perform this corroborative function consistently over time build reputational goodwill as repeat players and permit cheaper transaction of information. Indeed, just as individuals can use the press as a heuristic to access the curated information package they prefer, they can use a trusted press outlet as a heuristic for obtaining reliable, verified facts, without having to do that substantiation themselves. Verification is thus a central market-enhancing function that can help identify an entity as the press for constitutional purposes.

Press institutions with clear fact-checking processes superimpose a set of systemic, population-serving behaviors that an individual information consumer cannot or will not do for herself. An institutional methodology demanding investigation of facts before they are published and expecting assertions to be properly sourced through probing inquiry<sup>296</sup> substitutes for a thorough investigation by individuals, who often lack the cognitive instincts to challenge information or the motivation to dig for contrary information. An entity that requires itself to perform this function advances truthseeking in the wider marketplace of ideas.

Beyond the episodic benefits of finding and substantiating discrete factual truths, there is more sustained market-enhancing impact when prolonged performance of this function over time builds institutional reputations for verification. This reputational factor introduces truthseeking efficiencies both in the gathering and distributing of information. A press entity with

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<sup>293</sup> *Id.* at 534.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 533.

<sup>296</sup> See Jones, *Press Speakers*, *supra* note 28, at 522 (describing the “investigative and corrective function” of fact-checking by the press).

“accountability to its audience” and “attention to professional standards or ethics”<sup>297</sup> develops a reputation for imparting trustworthy, accurate information and a regular, established audience that continues to demand those standards of verification.<sup>298</sup> As Joseph Blocher has noted, these repeat-player actions form some of the most obvious parallels between actual market institutions and marketplace-of-ideas institutions like the press.<sup>299</sup> “In both scenarios, institutions made up of repeat players are more likely to have communication-enhancing norms,” and “[j]ust like market actors, repeat speech players are less likely to violate norms, lie, or break promises, because they know that repeat interactions are inevitable.”<sup>300</sup>

Much like the universities that Blocher explored as speech institutions, the press regularizes relationships, allowing individuals within the system to rely on an institutional actor with a “reputation for imparting accurate information,” and thereby “to transact ideas more cheaply.”<sup>301</sup> This efficiency of communication enhances the marketplace in part because individual press consumers “feel less of a duty to double-check the information they are receiving” than they would if a random person on a street corner were shouting the very same information.<sup>302</sup> The trust the press audience members place in the information they receive “saves them from having to pay what could otherwise be substantial information costs”<sup>303</sup>—costs that the cognitive behavior science and psychology literature tells us the individual almost certainly will not incur. Additionally, a news outlet’s reputation for fact-verification also reduces information transmission costs for sources, including anonymous sources, because their choice of outlet allows them to signal to the wider press audience that their information is reliable because the news outlet will have taken appropriate steps to verify it.

In this way, the verification function compensates for many of the truthseeking and rational processing limitations of individual information consumers. It engages the core processes of challenging, testing, and confronting information in ways that are not naturally occurring for the individual. It improves upon the individual’s limited capacity to update by preemptively checking, replacing, and updating untruthful information in the course of newsgathering, well before the information is delivered to

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<sup>297</sup> West, *Press Exceptionalism*, *supra* note 276, at 2444; *see also id.* at 2457 (noting that press organizations “are accountable to the public, self-regulating, self-correcting, and sensitive about adapting to changing times”).

<sup>298</sup> *Id.* at 2461 (“regularity of audience and the existence of an established audience ensure accountability for the press”); *CBS v. DNC*, 412 U.S. 94, 117 (1973) (noting that the power of newspapers resides heavily in “the journalistic integrity of its editors and publishers”).

<sup>299</sup> *See* Blocher, *supra* note 271 at 146-47.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 147.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

the consumer. The reputational integrity of a market-enhancing institution combats the tendency for emotion-based judgments by creating a pattern of efficient fact-seeking and fact-trusting by idea consumers. It combats the effects of motivated reasoning and cognitive dissonance by establishing a safe and trusted place for counternarratives to flourish.<sup>304</sup> A news consumer who might not otherwise embrace ideas that challenge her worldview may be more inclined to do so when the institution she has long trusted with verification insists that its verification process has disproven the position.

Importantly, a judicial inquiry into whether an entity serves the verification function—and thus might properly be identified as the press—is not an inquiry into whether the specific material that the entity published was true. The latter inquiry oversteps First Amendment bounds in dangerous ways and harms rather than benefits the marketplace of ideas.<sup>305</sup> The test is not whether the press was *truthful*, but rather whether the press had in place a process for *truthseeking*—factual investigation, verification, corroboration, and clarification. Institutions that have such mechanisms in place of course will not be failsafe; sometimes they will publish falsehood.<sup>306</sup> But the existence of the function counteracts the individual limitations of consumers in compelling ways and is therefore a market-enhancing function that helps identify a press actor who may warrant special protection.

#### 4. Educating and Contextualizing

Educating—developing expertise in learning about matters of public concern and then providing necessary context when teaching others the information learned—is a core market-enhancing function that can identify entities that are serving the press role. While the Post-Truthism critique rightly observes that audience members struggle on their own to put factual information to broad and meaningful use, the press’s educative function helps offset that limitation by making information accessible, understandable and useable.

The press educative function enhances the marketplace of ideas in two complementary ways, because the press acts both as a learner, in a proxy role for individuals who themselves face barriers to full learning, and as a teacher, interpreting and contextualizing information for individuals who receive the information. As learners, press entities develop expertise in

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<sup>304</sup> See Jones & Sun, *supra* note 37, at 1358–59 (describing ways the press’s fact-checking function provides important new counternarratives).

<sup>305</sup> See *W. Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (prohibiting governmental control of the content of speech); *United States v. Alvarez*, 567 U.S. 709 (2012) (protecting false speech).

<sup>306</sup> *Sullivan*, 376 U.S. at 271 (noting that “erroneous statement is inevitable in free debate”).

knowledge acquisition.<sup>307</sup> Through training and experience, members of the press know who to ask for information and what to ask of them, and have structures in place that make them quicker to understand facts that are provided, more likely to appreciate nuance within those facts, and better able to probe for pertinent detail and push for clarification than the average individual audience member. When the press acts as learner, all of those learning behaviors are still occurring for the wider population, within a framework of proficiency unmatched and unmatchable on an individual scale, and this is a market efficiency that can be rewarded with special protection for press actors.

When the press entity passes along what it has learned to its audience, it likewise introduces market efficiencies through its teaching role. The role of the press as educator is widely recognized,<sup>308</sup> and like other trusted educators, the press makes information easier to digest and easier to use. So, for example, on complicated matters of governmental and public affairs, the press acts as “one of the great interpreters,”<sup>309</sup> contributing to “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system.”<sup>310</sup> This function plays “a particularly important role in explaining and distributing information about other institutions whose functioning would otherwise be impossible for the average citizen to follow.”<sup>311</sup> When information that is hard to understand is made understandable and complexity is simplified, the marketplace of ideas functions more smoothly—and truthseeking, rational processing, and updating are all enabled. “Put simply, we rely on the press to tell us how the world works,”<sup>312</sup> because the world works in ways that are unlikely to be accurately processed without assistance.

The best of this educating involves not only passing along clarified information, but adding value by “plac[ing] news stories in context

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<sup>307</sup> West, *Press Exceptionalism*, supra note 276, at 2444 (noting that the press “has knowledge, often specialized knowledge, about the subject matter at issue”); *id.* at 2459 (arguing that “training, education, or experience” might be factors relevant to identifying the press for Press Clause purposes).

<sup>308</sup> See, e.g., *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)); *Thornhill*, 310 U.S. at 102 (noting the press serves “the public need for information and education with respect to the significant issues of the times”).

<sup>309</sup> *Grosjean*, 297 U.S. at 250 (“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.”).

<sup>310</sup> *Richmond Newspapers*, 448 U.S. at 573 (Brennan, J., concurring) (quoting *Neb. Press Ass’n.*, 427 U.S. at 587).

<sup>311</sup> Blocher, supra note 271 at 145–6. See also Jones & Sun, supra note 37, at 1361 (describing examples of this function); see also Jones & Sun, supra note 37, at 1361 (describing how “the press as educator teaches about history and current events’ likely place within it, about the workings of complex topics, and even about constitutional doctrine and governmental structure”).

<sup>312</sup> Jones & Sun, supra note 37 at 1361.

locally, nationally, or over time.”<sup>313</sup> The individual audience member’s rational processing limitations are such that she otherwise cannot or will not appreciate the “big picture,” and thus she is likely to reach erroneous conclusions even from otherwise factual information. But the educative press function compensates for these shortcomings by “provid[ing] context and reveal[ing] impact, exposing the story behind the story and illuminating the nuances beyond the facts.”<sup>314</sup> It does this in both broadening and narrowing ways.<sup>315</sup> The broadening contextualization function expands the audience member’s thinking on an issue by providing “historical or comparative perspective”<sup>316</sup> or additional background that illuminates the fuller truth that the marketplace seeks to advance. As David Anderson has noted, this contextualizing—“it was the fourth murder in the neighborhood this year,” “a study by another group of scientists reached a different conclusion,” or “this was the third consecutive quarter of employment gains”<sup>317</sup>—is core to what it means to be functioning as the press.<sup>318</sup> The narrowing task—for example, telling the story of a larger issue or policy through the narrative of affected individuals, a single impacted business, or another illustrative microcosm—likewise adds insight the audience member could not achieve alone.

In the aggregate, this educative function promises to offset some of the gravest limitations of individual audience members. While education is not a panacea, the marketplace of ideas is unquestionably enhanced when a reliable, consistent educator provides accurate context and necessary depth of coverage. The marketplace shortcoming of fundamental error attribution,<sup>319</sup> for example, can be diminished. An assumption that bad things happen primarily to bad people is more difficult to hold when a trusted educative narrator is describing the circumstances in which bad things are happening to good people. System justification<sup>320</sup> and the victim-blaming that attends may be counteracted by context that provides fuller details of the causes of and solutions to local and national problems. Cognitive limitations presenting barriers to accurate assessment of hazards may be softened when press entities contextualize the relative risk of different threats. An entity that performs the task of learning, and then the task of interpreting the information it gathers for others,<sup>321</sup> places

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<sup>313</sup> West, *supra* note 276 at 2444.

<sup>314</sup> Anderson, *supra* note 283 at 333.

<sup>315</sup> Jones, *Press Speakers*, *supra* note 28 at 523 (“Sometimes press speakers contextualize by zooming out to view information through a wider lens, and sometimes they do so by zooming in, to give specific, detailed stories about individuals impacted by wider policy decisions”).

<sup>316</sup> Anderson, *supra* note 283, at 333 n. 4.

<sup>317</sup> *Id.*

<sup>318</sup> For examples of this function, see Jones & Sun, *supra* note 37, at 1361–62.

<sup>319</sup> See *supra* text accompanying note 205.

<sup>320</sup> See *supra* text accompanying notes 207–211.

<sup>321</sup> Jones, *Press Speakers*, *supra* note 28, at 523.

information in context and lowers the information usability costs for the fuller marketplace.

## 5. Accessing

Lastly, the act of accessing—of retrieving records and visiting locations on behalf of a wider audience—is market-enhancing. When entities perform this task, they reduce information collection and consumption costs and offset the individual idea consumer’s tendency to avoid some fact-gathering. Most importantly, they compensate for serious deficiencies of time and resources that render impossible or impracticable some truthseeking on matters of public affairs.<sup>322</sup>

In a number of important contexts, the entire population possesses the constitutional or statutory right to access and observe the government “at first hand.”<sup>323</sup> However, for all of the reasons addressed above, the vast majority of individual citizens are not likely to put these rights to use. An institutional press entity acting as proxy makes it possible for the rights to be invoked and for the population to enjoy the substantial benefits of access—including government accountability and ongoing scrutiny of procedures conducted in the name of the people.<sup>324</sup> Those serving this market-enhancing function have a stronger claim to identification as “the press.”

So, for example, “instead of relying on personal observation or reports from neighbors as in the past, most people receive information concerning trials through the media.”<sup>325</sup> When “firsthand observation” cannot occur, the individual consumers can rely instead on observations the press communicates to those not in attendance, with press observers thus “functioning as surrogates for the public.”<sup>326</sup> The same is true when press entities gather and publish information from public records.<sup>327</sup> Indeed, “[w]ithout 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.”<sup>328</sup> Thus, there is a marketplace justification for protecting the act of physically standing in the stead of the wider audience.

How to protect and expand this beneficial proxy access and how to define who qualifies to perform it are major motivating questions in the

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<sup>322</sup> For discussion of the accessing function of the press, see Jones, *Press Speakers*, *supra* note 28 at 542.

<sup>323</sup> *Cohn*, 420 U.S. at 491. See also *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

<sup>324</sup> *Richmond Newspapers*, 448 U.S. at 572.

<sup>325</sup> *Richmond Newspapers*, 448 U.S. at 572.

<sup>326</sup> *Id.*

<sup>327</sup> *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

<sup>328</sup> *Id.*

developing literature on the invigoration of the Press Clause.<sup>329</sup> Determining who is “the press” is important so that those truly acting as surrogates can be “provided special seating and priority of entry so that they may report what people in attendance have seen and heard”<sup>330</sup> in courtrooms, White House press conferences, and other places where access is allowed but space limitations and the practicalities of resource limitations mean the collective whole cannot attend, observe, participate, or investigate. It may also prove important in an expanded doctrine of access, because adequately defining the press and fully embracing its market-enhancing proxy role may call for press access to places where *no* broad public access is feasible, such as prisons and immigration detention centers, but a small set of representative proxies could observe on behalf of that broader public and thereby create an expanded and more efficient marketplace of ideas.<sup>331</sup>

Future scholarship and caselaw might well identify other press functions that are market-enhancing because they help press audiences compensate for their individual cognitive biases and limitations. Moreover, additional factors—derived from other theoretical justifications for press protection—may also be part of the “holistic” inquiry<sup>332</sup> that helps identify what entities should count as the “press” for purposes of meriting Press Clause-specific protections.

We recognize, of course, that our proposed approach to addressing the gap between the Supreme Court’s press audience assumptions and reality is not a panacea for the impact those limitations have on our truthseeking, rational processing, and updating capacities. Even when aided by market-enhancing press entities, press audiences will still be composed of flawed human beings who have limited capacity and desire to objectively seek out and consume news.

The point of establishing and facilitating a marketplace of ideas is not, however, to guarantee the emergence of truth over error, but to provide the best conditions to facilitate the ongoing search for truth and refinement of public opinion over time. Like J.S. Mill’s, our argument is for establishing “the optimal conditions for truth-discovery,”<sup>333</sup> not embarking on a quixotic quest for an infallible system that inexorably leads to discovery of truth.

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<sup>329</sup> See West, *Awakening the Press Clause*, *supra* note 265; West, *Press Exceptionalism*, *supra* note 276.

<sup>330</sup> *Richmond Newspapers*, 448 U.S. at 573.

<sup>331</sup> . See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (jails); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (prisons); *Pell v. Procunier*, 417 U.S. 817 (1974) (same).

<sup>332</sup> West, *Press Exceptionalism*, *supra* note 276, at 29.

<sup>333</sup> PAUL WRAGG, *A FREE AND REGULATED PRESS* (2020), at 91 (arguing that Mills’ claim is “entirely negative”: “if we want to discover truth, societally and individually, then the optimal legal and ethical conditions that would enable it are those which are tolerant of non-conformity and the capacity to challenge orthodoxy”).

### C. Confronting Partisanship: Can the Partisan Press Be Market-Enhancing?

The functions addressed above are uniformly market-enhancing. But some press features that carry the potential to be market-enhancing also carry the potential to be market-inhibiting, and thus would require more careful analysis by the Court. Partisanship is the clearest example of such a press feature.

The Supreme Court has, for at least the last half-century, assumed that the market-enhancing functions outlined in Part IV.B would be performed by mainstream media outlets—by widely-trusted, shared, transpartisan, expert institutional gatekeepers of information<sup>334</sup>—that would strive to be accepted arbiters of objective truth.<sup>335</sup> Moreover, the Supreme Court’s case law has assumed, not only that there will be one distinct kind of entity recognizable as “the press”,<sup>336</sup> but that this singular, distinct press will be serving one distinct set of “public” informational needs, shared by all and determined by the press as expert gatekeeper.<sup>337</sup> This undifferentiated “public” would trust “the press” to provide impartial, objective, and balanced coverage on the “major public issues of our time.”<sup>338</sup>

Today, while many people continue to rely on the mainstream press to perform critical market-enhancing functions,<sup>339</sup> the rising popularity of

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<sup>334</sup> See, e.g., *Assoc. Press v. NLRB*, 301 U.S. 103, 131 (1937) (describing the “critical” roles played by an independent press, including “furnish[ing] unbiased and impartial news reports”). In the 1960s and 1970s heyday of press-freedom jurisprudence, the “press” was a readily identifiable institutional entity made up of daily newspapers, the news outlets affiliated with the three broadcast television networks, and various news magazines and radio news organizations. See West, *Then & Now*, *supra* note 259, at 102–103.

<sup>335</sup> Silvio Waisbord, *Truth is What Happens to News: On Journalism, Fake News, and Post-Truth*, 19 JOURNALISM STUD. 1866 (2018).

<sup>336</sup> West, *Press Exceptionalism*, *supra* note 276 at 2437; West, *Stealth Press Clause*, *supra* note 15 at 746–48.

<sup>337</sup> Thus, in the context of targeted taxation of newspapers, we are told that a single “untrammeled press” is a vital source of . . . information” for a single, nebulous “public.” *Minneapolis Star*, 460 U.S. at 585 (quoting *Grosjean*, 297 U.S. at 250). And in the context of sought-for access to prisons, we are told that the “free flow of information” to “the public” best happens through “the press.” *Houchins*, 438 U.S. at 34 (Stevens, J., dissenting).

<sup>338</sup> *Sullivan*, 376 U.S. at 275. Another important way the Court manifests its assumption of transpartisan gatekeepers is by signaling the acceptability of fungible press proxies in important access cases. In situations where the press might be granted special access on the public’s behalf, the Court never suggests that multiple proxies with varying partisan orientations are necessary. Instead, it simply notes that representatives from “the media” or “the press” will serve “public” interests. See, e.g., *Richmond Newspapers*, 448 U.S. at 555 (granting special press access to criminal trials to vindicate public’s constitutional right to attend).

<sup>339</sup> Most news consumers still “rely heavily” on relatively neutral, mainstream sources of information. See, e.g., Carnahan et al., *supra* note 168, at 10 (observing that, “[n]ot

“partisan press” fundamentally challenges the assumption of a single, monolithic press audience that will look to the “mainstream media,” as a shared, trusted source of reliable, objective facts and information. Rather than relying solely on “traditional news outlets [that] emphasize balance and objectivity,”<sup>340</sup> people increasingly get at least some of their news from partisan media outlets, “opinionated media”<sup>341</sup> that “provide a more one-sided take on the day’s events”<sup>342</sup> and promote particular political narratives and agendas.<sup>343</sup>

Of course, partisan media isn’t new. “Indeed, for most of American history, the news media *were* partisan media.”<sup>344</sup> Still, some might worry whether—in an age of potential social media echo chambers and algorithms that reinforce our tendency to choose only congenial news sources—partisan news sources can serve important “market-enhancing” functions or whether they will be primarily “market-inhibiting.” And, indeed, partisan press entities are likely to have more mixed impacts on the marketplace of ideas than traditional media outlets.

#### 1. Partisanship as a heuristic for preferred prioritization and curation

First, individuals may employ partisanship as a heuristic for finding press entities with a particular, identifiable approach to prioritization and curation. Thus, for example, the existence of partisan news sources can facilitate individuals’ ability to quickly find and digest information on the issues they consider most pressing, from the perspective they consider most interesting, and with the kind of context they consider most relevant. So understood, reliance on partisan press is a specific instance of the more general press-as-heuristic phenomenon that aids people’s search for truth by reducing search costs.<sup>345</sup> From this perspective, the proliferation of news sources generally, and the emergence of partisan press in particular, can be market-enhancing,<sup>346</sup> as partisan outlets provide additional media

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surprisingly online political information-seekers, including ideologues, still rely heavily on sources that are nonideological,” and that in 2012 “around 43% of political conservatives and 51% of political liberals reported using neutral sources with varying degrees of regularity”).

<sup>340</sup> MATTHEW LEVENDUSKY, HOW PARTISAN MEDIA POLARIZE AMERICA 4 (2013).

<sup>341</sup> *Id.* at 7.

<sup>342</sup> *Id.* at 4.

<sup>343</sup> *Id.* at 8 (citation omitted) (observing that, in partisan media, “[s]tories are ‘framed, spun, and slanted so that certain political agendas are advanced’” and facts are “present[ed] in such a way to support a particular conclusion”).

<sup>344</sup> LEVENDUSKY, *supra* note 340, at 8.

<sup>345</sup> The explosion of available information and media options presumably increases reliance on this kind of partisan heuristic. *See* KEVIN ARCENEUX & MARTIN JOHNSON, CHANGING MINDS OR CHANGING CHANNELS?: PARTISAN NEWS IN AN AGE OF CHOICE 163-64 (2013).

<sup>346</sup> During the heyday of the mainstream press, power to set the national news agenda was concentrated in the hands of “a small set of media elites,” LEVENDUSKY, *supra* note 340, at 151, at the expense of a more diverse set of potential voices and audiences. The emergence of new media outlets that serve niche information needs or investigate issues

options that clearly signal some important features of their curated news packages.

An individual who wishes to get a balanced take on the news might use this partisan signaling to expose herself to arguments on “both sides” of the partisan divide. Some press consumers may be suspicious of the very notion of “objectivity” and prefer that their news sources make their primary biases explicit so that the consumer doesn’t have to spend time and mental effort trying to identify those biases. This ability to achieve balanced coverage by consuming a variety of identifiable partisan news voices is clearly market-enhancing.

Relatedly, partisan media can also serve a market-enhancing function by reducing search costs for those who affirmatively want to seek out “counterattitudinal information” that challenges their existing views and political identity. Thus, for example, a Democrat might seek out an explicitly Republican media outlet (or vice versa) to probe and challenge her existing views. Such engagement with counterattitudinal information is actually quite common.<sup>347</sup> Whether that exposure ultimately exacerbates or mitigates the tendency toward motivational reasoning may depend on why the person is engaging that material. Research suggests that exposure to counterattitudinal information tends to further polarize staunch partisans, perhaps because they seek out the “other side’s perspective” primarily to engage in the kind of counterargument and defense of existing views that tends to entrench people’s priors and drive them to take even more extreme positions.<sup>348</sup> In contrast, moderates who engage with counterattitudinal information appear more interested in true engagement and more open to revising their existing views in the direction of the newly acquired information.<sup>349</sup>

As the last example illustrates, reliance on partisanship as a heuristic for preferred prioritization is not uniformly market enhancing. Sometimes individuals will use that heuristic to choose partisan press because they wish to consume only information that will be ideologically congenial or

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and facts that traditional media may have neglected should enhance the overall marketplace of information.

<sup>347</sup> Dustin Carnahan et al., *supra* note 168, at 10 (observing that “many [experimental] respondents reported using counterattitudinal sources, with 11% using at least one counterattitudinal source in the past week in 2008 and 31% reporting use of such source with varying regularity in 2012” and thus “that counterattitudinal sources continued to be used among a nontrivial segment of the population despite ample opportunity to do otherwise”). It is particularly common among those who also seek out proattitudinal information. *Id.* at 9 (noting that “[d]espite varied explanations as to why, *proattitudinal site use* has been shown to [be] highly correlated with counterattitudinal site use”).

<sup>348</sup> See LEVENDUSKY, *supra* note 340, at 21 (arguing that counterattitudinal (or “crosscutting” media) “polarize some subjects (those with strong prior attitudes), and depolarize others (those who find crosscutting media to be highly credible”).

<sup>349</sup> *See id.*

“proattitudinal”<sup>350</sup>—information that aligns with and confirms their partisan priors and thus protects, reinforces, and expresses their partisan political identities.<sup>351</sup> So employed, partisan media is “market-inhibiting”: it merely exacerbates individuals’ cognitive biases, by facilitating partisan “motivated reasoning” and more efficient “biased search.”

This type of partisan media consumption can “intensify” motivated reasoning and thereby entrench and polarize views because proattitudinal messages—that partisans are already inclined to accept—are presented without counterargument and thus “seem stronger and even more persuasive,”<sup>352</sup> and because “[p]artisan media’s framing of the news as a struggle between the two major parties” increases the salience of these political divisions and “activates viewers’ partisan identities,”<sup>353</sup> heightening the motivation to protect and express these identities. Indeed, some research suggests that consumption of “like-minded” partisan media makes “viewers become more polarized, more certain their beliefs are the correct ones, less willing to compromise and support bipartisanship, and more willing to attribute election victories by the other side to nefarious motives.”<sup>354</sup>

## 2. Partisanship as a heuristic for accurate verification

Rather than seeking out information from a particular partisan perspective, people who consume partisan media might merely be seeking accurate

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<sup>350</sup> See Matthew A. Baum & Phil Gussin, *In the Eye of the Beholder: How Information Shortcuts Shape Individual Perceptions of Bias in the Media*, 3 *QUARTERLY J. OF POLITICAL SCIENCE* 1, 15 (2007) (observing that “a media outlet’s brand name may serve as a powerful information shortcut” for finding information that is “probably dissonant” or “probably consonant”).

<sup>351</sup> See, e.g., Toby Bolsen et al., *The Impact of Message Source on the Effectiveness of Communications About Climate Change*, 41 *SCIENCE COMMUNICATION* 464-487 (2019) (“Partisans in pursuit of value-affirming information may . . . turn to sources who share their group identity or cultural worldviews in seeking out or interpreting any new information about climate change.”).

<sup>352</sup> LEVENDUSKY, *supra* note 340, at 51.

<sup>353</sup> *Id.* at 52. Partisan media may also promote affective polarization—negative emotions toward members of opposing political parties—by “activating” and increasing the salience of political identity and by valorizing party elites’ demonization of political opponents and members of the opposite party. R. Kelly Garret et al., *supra* note 358, at 3, 16.

<sup>354</sup> LEVENDUSKY, *supra* note 340, at 136. The extent of this effect is contested, particularly because it can be difficult to discern whether partisan media drive polarization or merely reflect it. ARCENEUX & JOHNSON, *supra* note 345, at 150 (reporting “evidence that partisan cable news reflects, rather than creates, polarization” in the American polity). While Levendusky finds substantial evidence that consumption of partisan media increases polarization, *see id.*, Arceneaux and Johnson argue that the direct effects of partisan media on polarization are much more limited because many people opt out of news coverage altogether in favor of entertainment options and that the confirmed partisans who seek out partisan coverage are already firmly entrenched in their views. They argue that the larger experimental effects other researchers observe occur when people who are otherwise news-avoidant (who would generally choose entertainment over news) are forced to consume partisan media in unnatural experimental conditions. See ARCENEUX & JOHNSON, *supra* note 345, 150, 152.

information—pursuing an accuracy, truthseeking goal—by turning to those sources they believe are the most credible and trustworthy fact-verifiers,<sup>355</sup> with partisanship serving as a heuristic or mediator for source credibility and trust.<sup>356</sup> As Dan Kahan has explained: “Individuals more readily impute expert knowledge and trustworthiness to information sources whom they perceive as sharing their worldviews and deny the same to those whose worldviews they perceive as different from theirs.”<sup>357</sup> Indeed, the empirical findings bear out that suggestion that people will tend to trust information sources that align with their political views and distrust those that don’t.<sup>358</sup> The 2014 Pew Research study that documented strong partisan differences in news outlet preferences also found that “ideological differences” about which news sources to trust “are especially stark.”<sup>359</sup>

If partisanship were a good proxy for responsible verification of facts, this heuristic might be market-enhancing shortcut, but there is no reason to assume this is so. Nonetheless, information consumers’ use of bare partisanship as a proxy for accuracy and credibility may be unproblematic if the trusted outlet does, in fact, engage in fact-checking. If it does not, the situation risks uncritical acceptance of misinformation or disinformation. In either event, however, the partisan nature of the press should be largely irrelevant to a court’s determination of whether that entity engages in market-enhancing verification or not.

There is, however, one important sense in which this heightened trust of ideologically friendly sources of information may enable the partisan press to play a unique market-enhancing role: by countering “motivated reasoning” and thereby making co-partisans more likely to accept counterattitudinal information. Recent research demonstrates that—on politicized, controversial issues like climate change—“uncongenial,” unwelcome, or “counterattitudinal” information—is more likely to be believed when communicated by co-partisan sources:

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<sup>355</sup> James N. Druckman & Mary C. McGrath, *The Evidence for Motivated Reasoning in Climate Change Preference Formation*, 9 NATURE CLIMATE CHANGE 111-119 (2019) (noting that people who believe in climate change might seek out “significantly less conservative media (which tends to be skeptical of climate change) and more non-conservative media” because they are “accuracy-driven audience members seeking information from sources they perceive as credible”).

<sup>356</sup> *See id.* (citing research findings that “the very sources that people find credible are the ones with whom they share common beliefs”).

<sup>357</sup> Kahan et al., *Cultural Cognition of Scientific Consensus*, 14 J. OF RISK RESEARCH 147 (2011).

<sup>358</sup> “Partisans are quick to evaluate media messages based on the ideological affiliation of the source are less likely to be persuaded or otherwise influenced by messages from attitude-discrepant sources than from attitude-consistent sources.” R. Kelly Garret et al., *Implications of Pro- and Counterattitudinal Information Exposure for Affective Polarization*, HUMAN COMMUNICATION RESEARCH 1, 4 (2014) (citation omitted).

<sup>359</sup> POLITICAL POLARIZATION AND MEDIA HABITS, *supra* note 177, at 5.

Partisans making statements that do not align with their perceived group's position may draw greater attention to the frame's content, may be seen as a 'costly' signal thereby enhancing its perceived honesty and credibility, or may reduce identity protective forms of motivated reasoning that would otherwise lead to the rejection of arguments related to a polarized and highly salient issue such as climate change.<sup>360</sup>

Accordingly, when like-minded partisan media report "surprising" facts to press consumers that cut against the source's political leanings, that reporting can "break through the barriers that impede communication efforts," persuade skeptical co-partisans, and help build consensus on the most contentious and politicized of subjects.<sup>361</sup>

While this kind of reporting might be relatively "rare,"<sup>362</sup> when it occurs it can be a powerful impetus toward truth and is uniquely market-enhancing because it mitigates and overcomes one of the most tenacious and intransigent cognitive limitations—our tendency to engage in partisan motivated reasoning<sup>363</sup>—in a way that few other things can.<sup>364</sup>

All told, while we recognize the risks that the growth of partisan media poses to the marketplace of ideas, the partisan nature of any particular media outlet does not necessarily preclude it from serving market-enhancing functions. The partisan nature of a media outlet therefore should not automatically disqualify it from receiving the special

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<sup>360</sup> Bolsen et al., *supra* note 351.

<sup>361</sup> *Id.* (reporting empirical research that "clearly demonstrates the power that trusted in-group (i.e., in-party leaders) sources could play in overcoming hurdles posed by partisan polarization on climate change," altering not beliefs "about the threats that climate change presents and willingness to support policy action, but also . . . broader perceptions about [whether climate research is politicized] and even beliefs that climate change is a hoax"). See also Salil D. Benegal & Lyle A. Scruggs, *Correcting Misinformation about Climate Change: The Impact of Partisanship in an Experimental Setting*, 148 CLIMATIC CHANGE 61, 62-63 (2018) (noting that "we should expect partisans who speak against their own interests to be more powerful persuasive sources on highly polarized issues" because partisans "who make such statements are engaging in more potentially costly behavior that lend them additional persuasive value").

<sup>362</sup> LEVENDUSKY, *supra* note 340, at 20 ("While such counterideological signals provide voters with valuable information, they are valuable precisely because they are rare.").

<sup>363</sup> See Benegal & Scruggs, *supra* note 361, at 62 (suggesting that climate-change messaging featuring Republicans "speaking against their expected partisan positions" helps "reduce identity-based processing or 'cultural cognition' about climate change") (citations omitted).

<sup>364</sup> Indeed, a fair amount of empirical research suggests that most other potential techniques for countering motivated reasoning are unlikely to succeed. "Naïve realism"—the ability to identify the effects of bias and motivated reasoning in others, but not in one's self—means that simple exhortations to people to be more "objective" or "open-minded" may be counterproductive because those reminders may heighten people's attention to other's biases, but not their own. Kahan, *supra* note 114, at 22-23. The result may be entrenchment of the belief that one's own views are "objective," and that the differing views of others are fatally compromised by bias. *Id.*

protections of the press clause, particularly because there are some market-enhancing functions that partisan media are sometimes particularly well suited to perform. Of course, partisan entities, like any entities, that traffic in disinformation and propaganda are market-destructive and should not qualify for Press Clause protections. Fortunately, there still seem to be limits to what most media consumers will trust, even when a source vying for their attention and allegiance is ideologically friendly. Although Republicans tend to place less trust in “mainstream news” sources than Democrats, “both Democrats and Republicans gave mainstream media sources substantially higher trust scores than either hyperpartisan sites or fake news sites.”<sup>365</sup>

## V. CONCLUSION

This Post-Truthism moment is an important one—for considering the actual limitations of information consumers, for assessing how the jurisprudence of press freedom has been constructed, and for thinking critically about how it ought to be shaped going forward.

The Supreme Court’s press-freedom case law has been operating on false assumptions about the capacities, desires, and behaviors of press audiences, and that gap poses serious challenges to the Court’s conception of the marketplace of ideas. Rather than undercutting the marketplace rationales for press protection, however, these limitations heighten the need to identify and bolster press entities performing market-enhancing functions that compensate for the individual limitations of information consumers.

In the end, the refocused marketplace-of-ideas approach we urge here allows the Court to acknowledge the flaws of individual information seekers without abandoning the aspiration of fact-based, public reasoning. It also serves to strengthen the institutions that promote these norms and suggests to individual information seekers how they can use press coverage to compensate for their own shortcomings and fulfill their democratic responsibilities. This function-based approach will be particularly important in the changing media landscape, allowing the doctrine to identify and embrace “the press” as it shifts from legacy media to other methods of newsgathering and news delivery. Protecting institutions that enhance the marketplace of ideas, whatever their form, will serve the constitutional goals of the Press Clause and enhance the search for truth in meaningful ways.

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<sup>365</sup> Gordon Pennycook & David G. Rand, *Fighting Misinformation on Social Media Using Crowdsourced Judgments of News Source Quality*, PNAS Latest Articles (2018) 1, 2, available at <https://www.pnas.org/cgi/doi/10.1073/pnas.1806781116> (“While these differences were significantly smaller for Republicans than Democrats, Republicans were still quite discerning. For example, Republicans trusted mainstream media sources often seen as left-leaning, such as CNN, MSNBC, or the New York Times, more than well-known right-leaning hyperpartisan sites like Breitbart or Infowars.”).