



1-1-2021

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THE U.S. SUPREME COURT'S CHARACTERIZATIONS OF THE PRESS: AN EMPIRICAL STUDY*

RONNELL ANDERSEN JONES & SONJA R. WEST**

The erosion of constitutional norms in the United States is at the center of an urgent national debate. Among the most crucial of these issues is the fragile and deteriorating relationship between the press and the government. While scholars have responded with sophisticated examinations of the President's and legislators' characterizations of the news media, one branch of government has received little scrutiny—the U.S. Supreme Court. This gap in the scholarship is remarkable in light of the Court's role as the very institution entrusted with safeguarding the rights of the press. This Article presents the findings of the first comprehensive empirical examination of the Court's depictions of the press. We tracked every reference to the press by a U.S. Supreme Court Justice in the Court's opinions since 1784. We coded these references to the press (broadly defined by the Justices themselves) for the presence of common frames and whether the frame was conveyed with a positive, negative, or neutral tone. The results of our study reveal troubling trends at the Court with widespread implications for any discussion of contemporary press freedom. We find that there has been a stark deterioration in both the quantity and quality of the Court's depictions of the press across a variety of measures. Our data show that the Justices are now less likely to talk about the press than they were in the past, and that, when they do, it is more often in a negative light. At this decisive moment, when we have seen the risks of executive and legislative branch attacks on the press, our study finds that the U.S. Supreme Court is not pushing back. It also illuminates the press-characterizing behaviors of the most and least press-friendly Justices of all time and of the Justices currently on the bench, providing insights into patterns that might be expected in the years to come.

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INTRODUCTION

The erosion of constitutional norms in the United States is at the center of an urgent national debate. Among the most crucial of these issues—brought into sharp focus during the Trump administration—is the fragile and deteriorating relationship between the press and government institutions.¹ Many scholars and commentators have responded by examining the impact of the President's and legislators' depictions of the news media and emphasizing the potential dangers that arise when those characterizations become

1. See SARAH REPUCCI, FREEDOM HOUSE, FREEDOM AND THE MEDIA 2019: A DOWNWARD SPIRAL 3 (2019), https://freedomhouse.org/sites/default/files/2020-02/FINAL07162019_Freedom_And_The_Media_2019_Report.pdf [<https://perma.cc/57U2-YNDY>] (“[P]ress freedom has come under unusual pressure in the United States, the world’s leading democratic power. . . . President Donald Trump’s continual vilification of the press has seriously exacerbated an ongoing erosion of public confidence in the mainstream media.”); see also Peter L. Strauss, *Eroding “Checks” on Presidential Authority—Norms, the Civil Service, and the Courts*, 94 CHI.-KENT L. REV. 581, 588–89 (2019) (discussing how U.S. politicians “intimidate the free press” and “use the very institutions of democracy—gradually, subtly, and even legally—to kill it”); Stephen J. Wermiel, *Freedom of the Press: Challenges to This Pillar of Democracy*, INSIGHTS ON L. & SOC’Y (Mar. 26, 2019), https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-19/insights-vol-19-issue-2/freedom-of-the-press/ [<https://perma.cc/EJF6-2H4C>] (“More than two centuries [after our nation’s founding], is the news media still seen as a pillar of freedom, a bulwark against tyranny?”); RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1351 (2017) (“If the press is effectively constructed as an ‘enemy’ dangerous to the American people [as the Trump Administration attempted to do], . . . press protections might be eroded”); Erik Wemple, Opinion, *Devin Nunes’s Anti-Media Rant, Annotated*, WASH. POST (Nov. 19, 2019), <https://www.washingtonpost.com/opinions/2019/11/19/devin-nunes-anti-media-rant-annotated/> [<https://perma.cc/Y4A6-ZXM3> (dark archive)] (quoting U.S. Representative Devin Nunes, who proclaimed that there is a “disconnect” between reality and what “mainstream media accounts describ[e]”); Ben Mathis-Lilley, *Rep. Jim Jordan Complains that CNN Is Doing “Fake News” by Interviewing People About Him*, SLATE (July 11, 2019), <https://slate.com/news-and-politics/2018/07/jim-jordan-tweet-cnn-interviews-fake-news.html> [<https://perma.cc/2QAV-KBM8>] (reporting on U.S. Representative Jim Jordan’s tweet criticizing the media, calling CNN “desperate” and “#fakenews”).

increasingly negative.² Throughout this discussion, however, there has been little scrutiny of the views of the press emanating from another powerful governmental institution—the U.S. Supreme Court. While there is increased awareness of the perils of the political branches’ negative attitudes toward the press, it is often still assumed that the Court is the same reliable protector of press rights that it was half a century ago, when the Justices viewed the press as a “powerful antidote” to government abuse³ and a necessary component of democracy.⁴ The validity of this assumption, however, is entirely unclear—in large part because there has been almost no substantive investigation of the Court’s evolving attitudes about the press and the role of journalism in our society.⁵

Determining the Court’s view of the press is a surprisingly difficult task. This is because the Court has recognized virtually all of the press’s substantive protections under the umbrella of general First Amendment free speech protections for all speakers, rather than in press-specific rulings.⁶ Therefore, almost everything we know about the Justices’ views on the value and constitutional importance of the press has been communicated instead through press-praising dicta—frequent declarations by the Justices about the unique roles of the press in our democracy.⁷ In other words, many of the press’s claims to constitutional importance hinge not on substantive law, but on the Justices’ rhetoric about the significance of the press. Thus, understanding the Justices’ characterizations of the press—as well as any changes in the tone of those

2. See Statement of A.G. Sulzberger, Publisher, New York Times, Response to President Trump’s Tweet About Their Meeting (July 29, 2018), <https://www.nytc.com/press/statement-of-a-g-sulzberger-publisher-the-new-york-times-in-response-to-president-trumps-tweet-about-their-meeting> [<https://perma.cc/QZ5E-49SC> (dark archive)] (noting that former President Trump’s “language was not just divisive but increasingly dangerous”); see also Michael M. Grynbaum, *After Another Year of Trump Attacks, ‘Ominous Signs’ for the American Press*, N.Y. TIMES (Dec. 30, 2019), <https://www.nytimes.com/2019/12/30/business/media/trump-media-2019.html> [<https://perma.cc/JMD9-PZHU> (dark archive)] (explaining details regarding former President Trump’s increased attacks on the press and the negative implications for the press).

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

4. See RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 47, 57–59 (2017) (describing these perceived assumptions as showing deference to journalists, interpreting laws in favor of the press, and prioritizing a “free and robust” press).

5. See *infra* Part I.

6. See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1035–36 (2011) [hereinafter West, *Awakening Press*] (noting that “the Supreme Court has never recognized any constitutional rights or protections belonging exclusively to the press that are distinct from the speech rights that all individuals (and even corporations) enjoy and has only implicitly recognized differences between the two in select areas” (footnotes omitted)).

7. See RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 706–07 (2014) [hereinafter Jones, *Dangerous Dicta*] (“The Court’s opinions in cases involving the media, while almost uniformly reaching conclusions based on other grounds, regularly include language about the constitutional or democratic character, duty, value, or role of the press—language that could be, but ultimately is not, significant to the constitutional conclusion reached.”).

characterizations over time—is of heightened importance. If the Justices no longer depict press freedom as a public good worthy of the strongest constitutional status, then the press’s ability to fight for legal rights and protections may suffer.

This Article thus asks the simple questions: What is the Court’s perception of the press, and is that perception changing over time? The answers to these questions shed light on whether we can count on the Court to act as the backstop for strong, American-style press freedom values, even in the face of political or public backlash. At this critical moment, when both a changing media landscape⁸ and the increased need for investigative and accountability journalism⁹ push issues of press freedom squarely into the spotlight, a closer look at the realities of the Court’s characterizations of the news media is especially needed.

This Article presents the findings of the first comprehensive empirical examination of the U.S. Supreme Court’s depictions of the press.¹⁰ In our study, we tracked every reference to the press by a U.S. Supreme Court Justice in the Court’s opinions since 1784. We coded these references to the press—broadly defined by the Justices themselves—for the presence of common frames related to the press, such as its historical value, its effect on government, its protection from regulation, its impact on individuals’ reputations and privacy, and its trustworthiness and ethics. We also recorded whether each frame was conveyed with a positive, negative, or neutral tone.

The results of our study reveal troubling trends with widespread implications for any discussion of contemporary press freedom. Our data show

8. See Kristen Hare, *The Coronavirus Has Closed More than 50 Local Newsrooms Across America. And Counting.*, POYNTER (Aug. 20, 2020), <https://www.poynter.org/locally/2020/the-coronavirus-has-closed-more-than-25-local-newsrooms-across-america-and-counting/> [<https://perma.cc/5LQJ-RDAC>] (noting that roughly 1,800 newspapers have closed since 2004); see also PENELOPE MUSE ABERNATHY, UNC HUSSMAN SCH. OF JOURNALISM & MEDIA, *THE EXPANDING NEWS DESERT* 8 (2018), <https://www.usnewsdeserts.com/reports/expanding-news-desert/loss-of-local-news/> [<https://perma.cc/4QGY-87UD>] (noting that the “largest 25 newspaper chains own a third of all newspapers, including two-thirds of the country’s 1,200 dailies”); Michael Barthel & Kirsten Worden, *Newspaper Fact Sheet*, PEW RSCH. CTR. (July 9, 2019), <https://www.journalism.org/fact-sheet/newspapers/> [<https://perma.cc/G9LL-UCEF>] (finding that paper newspaper subscriptions have been declining and website audience traffic has leveled off); Tom Stites, *About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds*, POYNTER (Oct. 15, 2018), <https://www.poynter.org/business-work/2018/about-1300-u-s-communities-have-totally-lost-news-coverage-unc-news-desert-study-finds> [<https://perma.cc/PD6C-JUC4>] (noting data showing that more than 1,300 U.S. communities have entirely lost news coverage).

9. Andreas Adriano, *Investigative Journalists Play a Key Role in Bringing Corruption to Light*, INVESTIGATIVE REPORTING WORKSHOP (Sept. 12, 2019), <http://investigativereportingworkshop.org/news/investigative-journalists-play-a-key-role-in-bringing-corruption-to-light/> [<https://perma.cc/2RX4-F565>] (listing examples of major public discoveries revealed through investigative journalism).

10. RonNell Andersen Jones & Sonja R. West, *Compiled Data on Press Mentions by the Supreme Court of the United States 1784–July 2020* [hereinafter *Data on Press Mentions by the Supreme Court*] (on file with the North Carolina Law Review).

that the Court's view of the press has starkly deteriorated in both quantity and quality across a variety of measures. At the same time that we have seen the risks of a real-world rise in executive and legislative branch attacks on the press,¹¹ our study finds that the U.S. Supreme Court is not pushing back. These important findings provide significant evidence that the press's legal standing may be on dangerously shaky ground.

As an initial matter, our data show that the Court references the press far less frequently than it did a half century ago. This includes a notable decline even in the Court's most basic recognitions of the work performed by journalists as communicators of information to the American public. We likewise find that the Justices today are acknowledging the bare existence of a constitutional right to "freedom of the press" significantly less often than in prior eras. In fact, the modern Supreme Court is increasingly less likely to talk about the press or press freedom at all, regardless of the context for the discussion.

Our data also reveal a parallel decline in the overall tone the Court uses to characterize the press. Once again, regardless of how or why the Justices are discussing the news media, the percentage of their references to the press that are positive has decreased notably over the last several decades. In other words, the Court is not just talking about the press far less often; when it does talk about the press, it is doing so in more negative ways.

Analysis of our findings provides valuable insights into the Court's more specific depictions of the press and shows the concrete ways those depictions have changed over time. When our tonal data is investigated against the backdrop of our specific press-characterization frames, powerful subtrends emerge—all pointing in the direction of a U.S. Supreme Court with a decreased respect for the press and a diminished opinion of its value. The Court's use of frames that are typically employed positively, such as those tracking the Court's references to press freedom's historic role or the press's effect on democracy, is on the decline. At the same time, the frames that tend to skew toward negative characterizations, like the frame recording the Court's discussions of the press's impact on individual privacy and reputation, not only comprise a higher percentage of the Court's more recent press mentions, but also are even more likely than before to carry a negative tone.

Finally, by combining our findings with information available through the Supreme Court Database, we were able to analyze each individual Justice's press references. We used this collective data to assign each Justice a "Press Support Score" based on the frequency and tone of his or her press mentions and to identify the most and least press-friendly Justices throughout history.

In Part I of this Article, we provide an overview of the limitations of prior scholarly research about the Court's views of the press and press freedom and

11. See sources cited *supra* note 1.

explain why a large-scale empirical investigation of the Court's characterization of the press was needed. In Part II, we outline the methodology of our study. Our findings follow, with an examination in Part III of the decline in both the frequency and tone of the Court's press references. In Part IV, we compare individual Justices' views of the press, identifying the most and least press-friendly Justices of all time and discussing potential emerging patterns among the Court's current Justices.

All told, our data suggest that any hopes that the judiciary can be trusted to be a savior of press freedom in America might be misplaced. Indeed, our empirical analysis of the Court's characterizations of the press over time suggests just the opposite. The U.S. Supreme Court is giving less consideration and regard to the press and its freedom than it did a generation ago, and it appears unlikely that this trend will reverse in the coming years.

I. LIMITED RESEARCH ON THE COURT'S VIEW OF THE PRESS

Fully capturing the U.S. Supreme Court's view of the press is a tricky endeavor. This is largely because, when considering the substantive protection of expressive freedoms under modern First Amendment doctrine, the Court focuses almost exclusively on speech rights and not on press freedom. While the First Amendment includes explicit textual protections for both the "freedom of speech" and the "freedom of the press,"¹² the Court has decided almost all of the press's legal rights through the lens of general free speech rights for all speakers—not as press-specific rulings.¹³ In fact, the Court today recognizes virtually no independent right or protection as arising solely from the Press Clause.¹⁴ This has been true even when the Justices have decided cases where members of the news media were litigants, the rights at issue were ones

12. U.S. CONST. amend. I.

13. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) [hereinafter Anderson, *Freedom of the Press*] ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press."); C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 956 (2007) ("[T]he Court has never explicitly recognized that the Press Clause involves any significant content different from that provided to all individuals by the prohibition on abridging freedom of speech."); David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 70 (2006) (explaining that the Court's cases reveal an "abandonment of the Press Clause as a specific source of constitutional authority" as "the Court gave the press whatever rights it recognized under the Speech Clause"); Erik Ugland, *Newsgathering, Autonomy, and the Special-Rights Apocrypha: Supreme Court and Media Litigant Conceptions of Press Freedom*, 11 U. PA. J. CONST. L. 375, 393 (2009) (observing that the Supreme Court has not "declared that the Press Clause has any meaning apart from the Speech Clause"); Elisabeth Zoller, *The United States Supreme Court and the Freedom of Expression*, 84 IND. L.J. 885, 886 (2009) ("Freedom of speech and freedom of the press are so united in American culture today that, in practice, the Court makes almost no distinction between the two."); West, *Awakening Press*, *supra* note 6, at 1028 ("The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause." (footnotes omitted)).

14. See Baker, *supra* note 13, at 956.

most commonly *used* by the press, or the legal analysis centered on the unique *functions* of the press.¹⁵ In these cases, the Court’s ultimate holding almost always has been a broader one that applies to all speakers (not just the press) and is part of a sweeping right of free expression (not just freedom of the press).¹⁶

This does not mean, however, that the Justices have not expressed views about the importance of the free press.¹⁷ To the contrary, they have often written about the value of the press and of press freedom.¹⁸ But rather than recognizing explicit rights and protections for the press, the Justices turned to nonbinding dicta as the primary means of expressing their views.¹⁹ These insights into the Court’s attitudes toward the press have appeared in a variety of forms. Sometimes the Justices engaged in long and specific expositions about the press,²⁰ while other times the references were shorter and more

15. See Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 736–46 (2014) [hereinafter West, *Stealth Clause*] (discussing cases where the holdings applied broadly, but the Court’s analysis focused on the press and press issues).

16. See West, *Awakening Press*, *supra* note 6, at 1036 (“While there are many cases that are often hailed as important press cases because the primary beneficiaries were journalists, the Court in these cases actually based its decisions on the Speech Clause or the freedom of expression and awarded rights or protections to everyone.”).

17. See RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 254–55 (2014) [hereinafter Jones, *What the Supreme Court Thinks*] (discussing the “press-praising language” in Court opinions); West, *Stealth Clause*, *supra* note 15, at 731 (explaining that the Court has “recognized the press as constitutionally unique from nonpress speakers”).

18. See, e.g., *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 548 (1976) (quoting Thomas Jefferson as writing that “[o]ur liberty depends on the freedom of the press, and that cannot be limited without being lost”); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (praising the media’s “impressive record of service over several centuries,” observing that “[t]he press does not simply publish information about trials but guards against the miscarriage of justice,” and stating that a “responsible press has always been regarded as the handmaiden of effective judicial administration”); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (stating that the press performs an “indispensable service . . . in a free society”); *Estes v. Texas*, 381 U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.”); *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (“[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”).

19. See Jones, *Dangerous Dicta*, *supra* note 7, at 706–08; see also West, *Stealth Clause*, *supra* note 15, at 731–32.

20. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (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 to serve the governed, not the governors. The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell. In my view, far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended

implicit.²¹ There are even occasions where an insight into a Justice's perspective on the press can be gleaned from a mere word choice in his or her description of the facts of the case.²²

When it comes to press freedom, therefore, the Court has not followed its typical path of protecting constitutional rights through direct explanations and substantive holdings. Instead, it has lumped members of the press together with other types of speakers, cast aside unique press freedom issues, and relied heavily on indirect praise rather than explicit protection. Thus, many of the press's claims of unique constitutional standing and a protected societal role—and much of the wider judiciary's scaffolding for approaching cases with press specialness in mind—hinge not on substantive law, but on the Justices' rhetoric.²³ This makes an investigation of the linguistic patterns of the Court's press depictions particularly important.

Some might argue, however, that these are merely distinctions without differences because the press is amply protected as long as First Amendment doctrine broadly secures expressive rights more generally. To be sure, it is hardly the case that the press has been left without constitutional protection. Members of the press, for example, enjoy the same robust speech rights as all speakers, including crucial protections against threats like prior restraints,²⁴ content-based regulations,²⁵ and overly broad or vague regulations of speech.²⁶ But it is both shortsighted and precarious to assume that the press is adequately protected by a one-size-fits-all approach to broader expressive freedoms.²⁷ Members of the press are different from other types of speakers in both the protections they need to do their work effectively²⁸ and the kinds of threats they

for serving the purpose that the Founding Fathers saw so clearly. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.”).

21. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 467 (2011) (Alito, J., dissenting) (describing the media as “irresistibly drawn to the sight of persons who are visibly in grief”).

22. See, e.g., *Marcello v. United States*, 400 U.S. 1208, 1209 (1970) (describing press coverage of the arrival of a prominent figure at the airport by stating that “the press swarmed” the passenger).

23. See Jones, *Dangerous Dicta*, *supra* note 7, at 720; see also West, *Stealth Clause*, *supra* note 15, at 731–32.

24. See *N.Y. Times Co.*, 403 U.S. at 714 (rejecting the federal government's effort to enjoin newspapers from publishing the contents of a classified study because it constituted an unconstitutional prior restraint).

25. See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (describing the scope of the First Amendment's prohibition on content-based regulation of speech).

26. See *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973) (setting forth the First Amendment overbreadth doctrine).

27. See Sonja R. West, *The Majoritarian Press Clause*, 2020 U. CHI. LEGAL F. 311, 325 [hereinafter West, *Majoritarian Clause*] (discussing the harms in viewing press freedom as merely an extension of individual expressive freedoms).

28. See Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2446 (2014) [hereinafter West, *Press Exceptionalism*] (noting the press's needs in the context of newsgathering).

face from potential government interference.²⁹ In fact, through its discussions of the press, the Court itself has acknowledged that the press is distinct because it fulfills specific constitutional functions—gathering and disseminating information about matters of public concern and serving as a government watchdog.³⁰ While the Court has often been reluctant to declare overt rights for the press, it has nonetheless recognized the inherent value of the free press.³¹ These recognitions, moreover, underlie key rights that are held by both the press and the public.³² In fact, positive characterizations of the press and the press function have often been central to the Court’s expansive conception of these broadly shared rights.³³

In other words, past Justices, through their press-praising dicta, have crafted a vital support structure that bolsters the press’s constitutional status. This structure, however, will only remain strong if the principles behind the Justices’ characterizations are repeated, amplified, and reaffirmed by their successors on the bench. The Court’s indirect approach to press freedom means that, when it comes to constitutional protection for the press, the Justices’ words matter. And if this rhetoric were to shift over time, either in framing or in tone, it could have significant consequences for the press. Understanding the arc of the Court’s attitude toward the press, therefore, is a vital tool for determining the strength of press freedom’s constitutional status.

Yet past scholarly research about the Supreme Court’s stance on the press and on press freedom has typically involved investigation into the smaller collection of cases where either a news organization was a party or the Court reached holdings that members of the news media widely rely upon. The general consensus among scholars following this approach is that the Court’s

29. See *id.* at 2446–47 (detailing the unique concerns of the press); see also RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 543–47 (2019) (examining the unique risks of governmental targeting of the press as an institutional speaker).

30. See West, *Stealth Clause*, *supra* note 15, at 750 (compiling Supreme Court precedent establishing that the press fulfills two unique constitutional functions: “(1) gathering and disseminating news to the public and (2) providing a check on the government and the powerful”).

31. See *id.* at 736 (“While the Court has been claiming to treat the public and press alike, there has been a constitutional principle at work in the background . . . [that] has consistently shown that the press is constitutionally unique.”).

32. See West, *Majoritarian Clause*, *supra* note 27, at 322 (asserting that “our failure to recognize the right for the press harms our collective interest in a well-informed populace and a monitored government”); see also RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 571 (2011) [hereinafter Jones, *Litigation, Legislation, and Democracy*] (“A sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases in which mainstream media companies, often newspapers, aggressively fought for fundamental democratic principles that had public benefits beyond the scope of the individual [press] litigants’ successes.”).

33. See Jones, *What the Supreme Court Thinks*, *supra* note 17, at 269, 271 (highlighting “how thoroughly connected the Court’s positive conception of the media has been to the development of wider First Amendment doctrine in this country,” and noting evidence that diminished “press characterization could threaten to impoverish a much wider body of First Amendment rights”).

tenor toward the press has been on the decline over the past fifty years, after hitting a high point in the 1960s, 1970s, and 1980s—sometimes referred to as the “Glory Days.”³⁴ During these decades, the Court handed down rulings in a number of important and high-profile cases that greatly favored the news media (even if the holdings themselves applied more broadly). In *New York Times Co. v. Sullivan*³⁵ and its progeny,³⁶ for example, the Court expanded protection for speakers against defamation lawsuits.³⁷ The Court also decided a number of key cases opening up access to judicial proceedings, including *Richmond Newspapers v. Virginia*³⁸ and the *Press-Enterprise* cases.³⁹ It was also during this period that the Court secured the protection of speakers against governmental prior restraints, such as in *New York Times Co. v. United States* (the “Pentagon Papers” case).⁴⁰ In a series of additional rulings, the Court protected the press from liability when it published truthful information on matters of public concern⁴¹ and protected the press’s freedom of editorial decision-making.⁴²

However, media law scholars have made anecdotal observations that the Court’s view of the press has been declining over the last several decades, both in the number of press cases it is hearing and the way it discusses the role of the

34. *See id.* at 256 (observing the “Glory Days” in which “the Court went out of its way to speak of the press and then offered effusively complimentary depictions of the media in its opinions”); *see also* Erin C. Carroll, *Promoting Journalism as Method*, 12 DREXEL L. REV. 691, 696 (2020) (“To the extent that the Supreme Court has seemed to defer to the press, it did so in the mid-twentieth century—a period that was, relative to today, a golden age.”); David L. Hudson Jr., *First Amendment Free Speech Cases May Turn into Blockbusters*, ABA J., Oct. 2000, at 30, 30 (quoting Professor Jane Kirtley as “recall[ing] with fondness ‘the glory days of the 1970s and ‘80s, when the U.S. Supreme Court elevated the press clause of the First Amendment to new levels’”).

35. 376 U.S. 254 (1964).

36. *See, e.g.*, *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (holding that a public figure can recover damages for defamation, but only after meeting a high burden); *Hustler Mag. v. Falwell*, 485 U.S. 46, 56 (1988) (“[P]ublic figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications . . . without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice.’”).

37. *See, e.g.*, *Sullivan*, 376 U.S. at 283 (“[T]he Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct.”).

38. 448 U.S. 555, 580 (1980) (holding that the right to attend criminal trials for both the public and the press is an implicit right of the Constitution).

39. *Press-Enter. Co. v. Superior Ct. (Press-Enterprise I)*, 464 U.S. 501, 512–13 (1984) (holding that, broadly speaking, criminal trial proceedings, including voir dire, must be open to the public); *Press-Enter. Co. v. Superior Ct. (Press-Enterprise II)*, 478 U.S. 1, 13–14 (1986) (holding that, broadly speaking, criminal trial proceedings, including preliminary hearings, must be open to the public).

40. 403 U.S. 713, 717 (1971) (Black, J., concurring) (asserting that the “press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints”); *see also* *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 567 (1976) (holding that “a whole community cannot be restrained from discussing a subject intimately affecting life within it”).

41. *See, e.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975); *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103–04 (1979); *Fla. Star v. B.J.F.*, 491 U.S. 524, 532 (1989); *Okla. Publ’g Co. v. Dist. Ct.*, 430 U.S. 308, 310 (1977) (*per curiam*).

42. *See, e.g.*, *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

press.⁴³ In the 2010 case *Citizens United v. Federal Election Commission*,⁴⁴ for example, the Court seemingly went out of its way to describe the press as an institution on the “decline”—saying much of today’s media coverage consists of “sound bites, talking points, and scripted messages that dominate the 24-hour news cycle.”⁴⁵

The task of more precisely tracking the Court’s attitudes toward the press over time thus faces several obstacles.⁴⁶ Because of the Court’s practice of discussing issues of press freedom in indirect ways, scholars cannot accurately follow the ebb and flow of the Justices’ views by simply counting the news media’s track record of wins and losses before the Court.⁴⁷ At the same time, doctrinal reviews of the Court’s First Amendment docket are similarly lacking because the Justices often reveal their views on the value of the press in cases that do not directly involve the news media or expressive freedoms. Any past attempts to investigate the Court’s attitudes about the press, therefore, were incomplete. While some scholars might have read the “jurisprudential tea leaves”⁴⁸ and spotted broad trends in the Court’s characterization of the press, these doctrinal examinations were inherently limited in scope.

Our study sets out to fill this gap by undertaking a systematic analysis of the Court’s views of the press and the press function over time through a large-scale empirical examination. At this critical moment for press freedom, only a

43. See, e.g., Jones, *What the Supreme Court Thinks*, *supra* note 17, at 255; Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1821 (observing that the Roberts Court “appears to see the ‘Fourth Estate’ as little more than a self-serving slogan bandied about by media corporations”).

44. 558 U.S. 310 (2010).

45. *Id.* at 364; see also Jones, *What the Supreme Court Thinks*, *supra* note 17, at 261–62.

46. Another enduring difficulty in examining the Court’s view of the press is the effort to determine who (or what) is (or isn’t) the “press” for legal purposes. Scholars have debated what definition of the “press” the Court has embraced or should embrace. Should we think of the “press” of the First Amendment as a technology, an institution, or a profession? See 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, 461–62 (2012); see also Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 49 (2016); Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1035 (2015). Is being a member of the press properly determined by who you are or by what you do? See Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1260 (2012); see also Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 412 (2013); West, *Press Exceptionalism*, *supra* note 28, at 2436. How does this definition change (or not change) as the methods of communication among members of the public or between the government and the people evolve? See Patrick J. Charles & Kevin Francis O’Neill, *Saving the Press Clause from Ruin: The Customary Origins of a “Free Press” as Interface to the Present and Future*, 2012 UTAH L. REV. 1691, 1770. As discussed in more detail in Part II, this study’s methodology was designed to capture the performance of the press function no matter who was performing it, by capturing acts of “journalism,” “news,” and “reporting” as identified by the Court itself. In recent cases, this included acts of so-called “citizen journalism,” performed using new media technologies and not by traditional legacy media organizations.

47. Cf. Lee Epstein, William M. Landes & Richard A. Posner, *How Business Fares in the Supreme Court*, 97 MINN. L. REV. 1431, 1433 (2013) (analyzing how “pro-business” the Supreme Court has been over time by tracking whether the Justices ruled for or against a business litigant).

48. Lidsky, *supra* note 43, at 1820.

study of this scope and scale can adequately assess the judicial temperament toward the press and provide a thoughtful starting point for comparing the judiciary's changing view of the press to similar observable trends in the executive and legislative branches.

II. METHODOLOGY

Our study consists of a systematic content analysis of all press mentions authored by U.S. Supreme Court Justices and published in the U.S. Reports from 1784 through July 2020, when the October 2019 Term was completed.⁴⁹ The studied text set includes all majority, dissenting, and concurring opinions, as well as all other writings by individual Justices appearing in the U.S. Reports, including dissents from denial of certiorari and statements associated with recusal decisions and stay applications.

The goal was to capture all references to the press in its journalistic role, to commonly understood press functions, and to the constitutional right of press freedom—no matter how those references appeared. Because the press and those performing the press function are referred to by a variety of names, we conducted initial research of opinions across time and assembled a list of the terms and phrases most often used as synonyms for the press or primary press behaviors. In some older cases, these included terms that were unique to particular eras but have since fallen out of use, such as “newspaperman”⁵⁰ and “newsmen.”⁵¹ In more recent years, with a changing and at times more decentralized media ecosystem, it included terms that captured the performance of the newsgathering and reporting functions by entities other than traditional media outlets, such as references to a “citizen journalist.”⁵² In all instances, we made these determinations by tracking the Justices' own identifications of when they perceived that the press function was occurring. To create a database with this scope of press-identifying language, we then conducted a broadly drawn Westlaw search for a total of nineteen linguistic terms.⁵³ Opinions that

49. See Data on Press Mentions by the Supreme Court, *supra* note 10. Notably, the first such press reference did not occur until 1821.

50. See, e.g., *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 798 (1978) (Burger, J., concurring); *Walker v. City of Birmingham*, 388 U.S. 307, 311 (1967); *In re Sawyer*, 360 U.S. 622, 655 (1959) (Frankfurter, J., dissenting).

51. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972); *Pell v. Procunier*, 417 U.S. 817, 830 (1974); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 847 (1974); *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966); *In re Roche*, 448 U.S. 1312, 1314 (1980).

52. See, e.g., *Nieves v. Bartlett*, 139 S. Ct. 1715, 1740 (2019) (Sotomayor, J., dissenting) (discussing a hypothetical individual recording a police encounter on a cell phone camera and streaming to social media followers as a “citizen journalist”).

53. The specific search syntax was as follows (without the leading and ending quotation marks): “adv: OPINION(#press or media or newspaper or “fourth estate” or journalist! or reporter or newspaperman or newsmen or pressman or (news /2 (gather! or magazine or outlet or organization or service or coverage or article or story or cycle or broadcast!)).”

contained only uses of these terms in a nonjournalistic sense⁵⁴ were removed from the set as false hits. We downloaded the remaining text files and used an R script to create packets for coders.⁵⁵ Coders assessed whether each individual hit was a real hit and, if so, coded the paragraph.⁵⁶

From this full set, which included more than five thousand press-characterizing paragraphs, coders systematically coded each reference for the presence of eight common press-related thematic content frames: the propriety of regulating the press (the “Regulation Frame”); the press’s effect on government and democracy (the “Democracy Frame”); the press’s historical value to the Founders (the “History Frame”); the press’s use as a public communication mechanism (the “Communication Frame”); the press’s influence on the judicial system (the “Judicial System Frame”); the press’s impact on individuals’ reputations and privacy (the “Individuals Frame”); the constitutional right of press freedom (the “Right Frame”); and the press’s trustworthiness and ethics (the “Trustworthiness Frame”). Paragraphs could—and, in many instances, did—contain multiple frames.

Each thematic content frame was then coded for affective tone—that is, whether the individual frame was conveyed with a positive, negative, or neutral

54. For example, these phrases included “court reporter,” *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 430 (1993), *Britt v. North Carolina*, 404 U.S. 226, 228–29 (1971); “Reporter of Decisions,” *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1506 (2020); “may press charges,” *Wilkie v. Robbins*, 551 U.S. 537, 557 (2007); “dry cleaning press,” *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 161 (1995), *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 212 (2000); or “media of expression,” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1012 (2017). We also removed as false hits paragraphs that included the specified terms only in case names or titles of books and other material cited by the authoring Justice, *see, e.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 382 (1974) (White, J., dissenting) (including the following string citation: “See generally L. Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* 247–48 (1960); *Merin, Libel and the Supreme Court*, 11 *Wm. & Mary L. Rev.* 371, 376 (1969); *Hallen, Fair Comment*, 8 *Tex. L. Rev.* 41, 56 (1929)”), or that made true reference to the press as a noun, but in a noncharacterizing way that could be replaced with other, nonjournalistic nouns, *see, e.g.*, *Lewis v. Jeffers*, 497 U.S. 764, 767 (1990) (“After three days, when the body began to smell, respondent and Van Der Veer wrapped the body in newspaper and plastic garbage bags, placed it in a sleeping bag, and transported it to a secluded area, where they buried it in a shallow grave.”).

55. A script is a file of code to be executed in R, which is a programming language and environment “for statistical computing and graphics.” *See The R Project for Statistical Computing*, R FOUND., <https://www.r-project.org> [<https://perma.cc/YH7V-VZQP>]. Our script divided up the full opinion texts into smaller files for the coders to evaluate. Paragraphs were randomly shuffled for coder review of every hit—such that paragraphs from earlier and later periods in the chronological dataset were mixed and multiple paragraphs from a single opinion were not presented seriatim—so as to avoid any possible acclimation effects that might arise from a coder working within a particular opinion or era. Each packet included the paragraph containing the search hit and the paragraph above and below it. We did this to provide some context to the coders working in randomly sorted coding packets.

56. Coded characterizations included the Justices’ original characterizations, as well as characterizations made by others that the Justices repeated in their writings.

connotation.⁵⁷ For example, if a paragraph referenced the press's trustworthiness, reliability, professionalism, or ethics in any way, it was coded as containing the Trustworthiness Frame. If the reference stated or suggested that the press behaves in a trustworthy manner, the tone was coded as positive. If the reference indicated that the press behaves in an untrustworthy manner, the tone was coded as negative.⁵⁸ If the reference noted the existence of a debate over the trustworthiness of the press without taking a position, the tone was coded as neutral.

Post-coding analysis merged the paragraphs with the Supreme Court Database, which allowed Justice- and case-level examination of results,⁵⁹ including analysis of each press reference by Court Term, the Justices who authored the opinion, and the case topic area.⁶⁰

Importantly, this approach captured *every* time the Court engaged in a characterization of the press, not just those cases in which the press was a party or press freedom was expressly at issue. We sought to explore how the Justices have depicted the press overall and to portray the full scope of their depictions over time. Thus, as shown in Figure 1, the dataset includes instances in which the Court primarily addressed some other matter—a criminal law or antitrust issue, for example—but took a moment in passing to say something about the press or to situate the press's role in society.

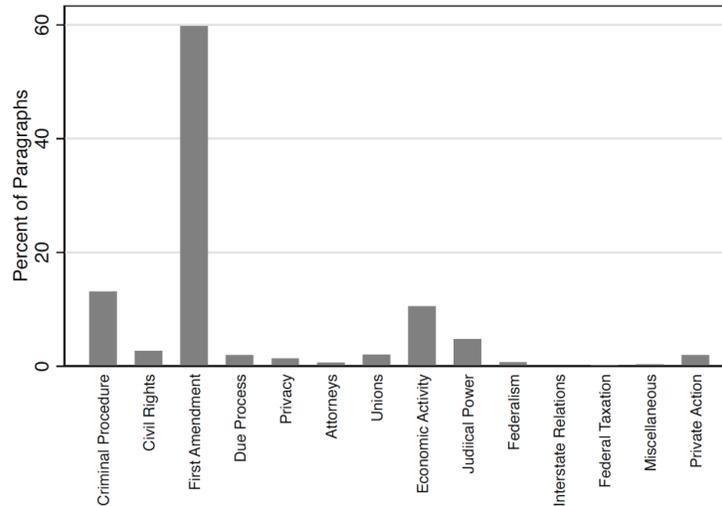
57. Coders worked from a detailed codebook (on file with the authors and available upon request), received twenty-five hours of substantive training on identification of frame and tone, and performed nine rounds of beta testing on practice batches of paragraphs. We also iteratively revised the codebook itself in instances where our initial protocols had been unclear or yielded coding results that were unreliable across the coders. Intercoder agreement was +95% on thematic frame content and +90% on affective tone.

58. The coding scheme allowed for each unique paragraph-frame combination to take on each of the possible tone values. A single paragraph could, for example, be coded with both a positive Trustworthiness Frame and a negative Trustworthiness Frame if the authoring Justice characterized the press both ways within the paragraph.

59. See WASH. U. L. SUP. CT. DATABASE, <http://scdb.wustl.edu/> [<https://perma.cc/VJA8-UEJQ>] (“The Database contains over two hundred pieces of information about each case decided by the Court between the 1791 and 2019 terms[,] . . . includ[ing] the identity of the court whose decision the Supreme Court reviewed, the parties to the suit, the legal provisions considered in the case, and the votes of the Justices.”). The database provides two datasets, one including data from 1946 to 2020, *MODERN Database: 2021 Release 01*, WASH. U. L. SUP. CT. DATABASE, <http://scdb.wustl.edu/data.php> [<https://perma.cc/YH23-YHTN>] (Sept. 30, 2021), and the other providing data from 1791 to 1945, *LEGACY Database: SCDB Legacy 07*, WASH. U. L. SUP. CT. DATABASE, <http://scdb.wustl.edu/data.php?s=6> [<https://perma.cc/N8DD-7ZCM>] (Oct. 1, 2021).

60. In a small number of cases, non-opinion materials included within the studied set—for example, dissents from denial of certiorari or published statements on recusal—were not found within the Supreme Court Database. In these instances, the relevant information, such as authoring Justice, Term of publication, and the Supreme Court issue (as defined by the detailed Supreme Court Database Codebook) was added manually to the dataset. See *Online Code Book*, WASH. U. L. SUP. CT. DATABASE, <http://scdb.wustl.edu/documentation.php?s=1> [<https://perma.cc/QBT6-GWHY>].

Figure 1. Distribution of Press Mentions Among Issue Areas



We discovered that these press-characterizing “asides” occur with some frequency and often convey core assumptions about the press. Sometimes they are positive, like when the Court offhandedly praises an act of newsgathering as socially beneficial or casually mentions freedom of the press as a critically important value when listing such values in a case focused on another constitutionally protected liberty.⁶¹ Sometimes they are negative, for example, when the Court describes the tendency of news coverage to be sensational⁶² or invasive of privacy.⁶³ Other times they are neutral, like when the Court merely notes the existence of the press’s function of distributing information to the public by mentioning the existence of a newspaper story in the facts of an opinion.⁶⁴ By coding both doctrinal and nondoctrinal depictions of the press,

61. See, e.g., *Baumgartner v. United States*, 322 U.S. 665, 680 (1944) (Murphy, J., concurring) (“The naturalized citizen has as much right as the natural-born citizen to exercise the cherished freedoms of speech, press and religion . . .”).

62. See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 541 (1990) (Blackmun, J., dissenting) (stating that the Court’s opinion on abortion rights is likely “to further incite [the] American press”); *Elrod v. Burns*, 427 U.S. 347, 384 (1976) (Powell, J., dissenting) (“Despite the importance of elective offices to the ongoing work of local governments, election campaigns for lesser offices in particular usually attract little attention from the media . . .”).

63. See, e.g., *Flowers v. Mississippi*, 139 S. Ct. 2228, 2254 (2019) (Thomas, J., dissenting) (“[P]erhaps the Court granted certiorari because the case has received a fair amount of media attention. . . . Media attention can produce . . . dangers, . . . including discouraging reluctant witnesses from testifying and encouraging eager witnesses, prosecutors, defense counsel, and even judges to perform for the audience.”).

64. See, e.g., *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 93 (1972) (“Seeing a newspaper announcement of the new ordinance, Mosley contacted the Chicago Police Department to find out

this study captures the full picture of the universe of press characterizations over the course of the Supreme Court's history.

The data summarized below include 5,267 coder-reviewed paragraphs from 1,296 unique cases, containing 8,840 total characterizations of the press.⁶⁵

III. A WANING PERCEPTION OF THE FREE PRESS

The most notable trend across all categories of gathered data in this study is that the U.S. Supreme Court's characterizations of the press are starkly declining in both quantity and quality. The Court makes far fewer references to the press and its role in society than it did at the height of the Glory Days. When the Court does talk about the press, moreover, it does so in increasingly negative ways.

A. *Decreased References to the Press and Press Freedom*

Through an investigation of the frequency of press references, we find that the Court acknowledges both the existence of journalism in American society and the bare notion of a "freedom of the press" much less often than it did a half century ago. Today's Court, in other words, is far less likely to talk about the press or press freedom in *any* context. As discussed above, a significant portion of the press's constitutional status has its roots in the Justices' nonbinding discussion of its work—as opposed to coming from substantive legal holdings.⁶⁶ Thus, in light of the press's unusual reliance on the Court's continued recognition of its various roles, this drop in the frequency of press references might be a reason for concern.

Figure 2 shows the overall frequency of coded mentions across time. Since the late 1970s, the incidence of press references has steeply declined. The number of cases that the Court has heard per Term decreased during this same period,⁶⁷ which may account for some of this decline. Because the unit of analysis for this study is the paragraph, however, the impact of fewer cases per Term is significantly tempered by substantial increases in overall opinion length and a clear uptick in the practice of individual Justices writing separate

how the ordinance would affect him; he was told that, if his picketing continued, he would be arrested.”).

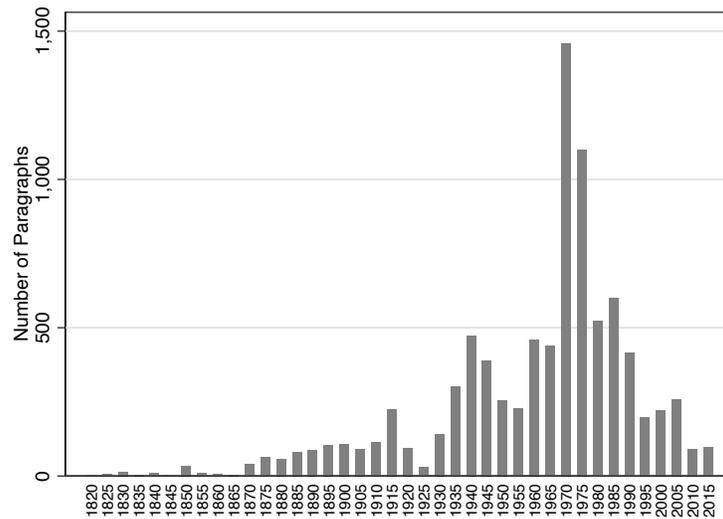
65. Each frame-tone combination is treated as an individual mention. If a paragraph contained multiple frames—or multiple tonal depictions of a single frame—all were coded individually.

66. *See supra* Part I.

67. *Federal Judicial Caseloads, 1789–2016: Supreme Court of the United States Petitions Granted, 1970–2015*, FED. JUD. CTR., <https://www.fjc.gov/history/exhibits/graphs-and-maps/supreme-court-case-loads-1880-2015> [<https://perma.cc/LA2D-SND9>] (showing the number of granted Supreme Court petitions peaking in 1981 and steadily declining since); *see also Supreme Court Cases, October Term 2019–2020*, BALLOTPEdia, https://ballotpedia.org/Supreme_Court_cases,_October_term_2019-2020 [<https://perma.cc/8ZWN-79HD>] (“The court issued decisions in 63 cases this [2019] term. Between the 2007 and 2019 terms, SCOTUS released opinions in 991 cases, averaging 76 cases per year.”).

opinions.⁶⁸ Frequency comparisons might also be impacted by the fact that the Court agreed to hear many more cases in the 1960s and 1970s that were specifically focused on the press or press rights.⁶⁹ Although these changes do complicate contrasts between the low-frequency current Court and the high-frequency Court a half-century ago, they indicate trends that illustrate rather than undermine the theme identified here: that the Court has largely lost interest in speaking about the press.

Figure 2. Total Number of Press Mentions Over Time



This trend holds true for every studied frame. For example, the Court’s references characterizing the press within the Regulation Frame, which captures the Justices’ views on the news media’s power and the appropriateness of government regulation of the press, peak in the 1970s and drop off precipitously

68. See Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <https://www.nytimes.com/2010/11/18/us/18rulings.html#~:text=The%20lengths%20of%20decisions%2C%20including,a%20record%2C%20at%208%2C265%20words> [https://perma.cc/29MN-D43Y (dark archive)] (noting that in the 2009 Term, there was “at least one concurring opinion in 77 percent of unanimous rulings” and that, while *Brown v. Board of Education* in 1954 had fewer than 4,000 words, *Citizens United v. Federal Election Commission* in 2010 had 48,000, “about the length of ‘The Great Gatsby’”).

69. This can be seen in several aspects of our data. Notably, the data show that a higher proportion of press-characterizing paragraphs from that era are found in cases that the Supreme Court Database codes as First Amendment cases. Our data likewise show many more press-characterizing paragraphs per opinion in the 1970s, which might be expected of cases squarely dealing with press-related issues. For example, from 1975 to 1979, there were some cases with forty-five or more press-characterizing paragraphs in a single opinion. Since 2015, no case has had more than ten.

after that, diminishing to nearly zero in recent years.⁷⁰ Characterizations of the press's effect on democratic government, its influence on the judicial system, its impact on individuals' reputations and privacy, its trustworthiness and ethics, and its value to the Founders all similarly plummeted. Indeed, it appears that the U.S. Supreme Court has, in effect, stopped making even the most casual references to the press and its operation in society. The Communication Frame captured all textual references in which the Court merely acknowledged or implied that journalism is how information is dispersed or becomes widely known by the population, as well as any mentions of the gathering, reporting, and editing of news. Yet even these most basic nods to the press function have ebbed in recent years.⁷¹ That is, as a practical matter, today's Court is erasing the work of the press from its public discourse.

The "freedom of the press," moreover, has also dropped out of the U.S. Supreme Court's collective vocabulary. The data show that a generation ago, the Court routinely acknowledged press freedom as a First Amendment right worthy of mention, yet today it does not. The Right Frame, which was coded every time the Court made any reference to rights-recognizing language like "freedom of the press," "the liberty of the press," or "the right of a free press," hit its crest in the 1970s. Since then, usage of this language has declined so thoroughly that many recent Terms make no reference to it at all.⁷² This decline appears not to be exclusively, or even primarily, due to a reduced caseload of press-focused cases. Many of the references at the height of the Court's usage of this frame came by way of inclusion of "freedom of the press" in something of a laundry list of important values not at issue in the particular case⁷³ or in the Court's inclusive use of the First Amendment language "freedom of speech or of the press" in cases that were focused on speech rights.⁷⁴ That practice has ceased, and the Court now eschews reference to the press component of the

70. At the Regulation Frame's peak in 1973, there were 156 characterizations of it in a single Term that fit within that frame. The combined total references to the frame in the most recent five Terms are just twenty-four.

71. At its height, the Court was using this frame sixty times in a single Term (1971)—nearly twice as many times as it has invoked the frame in the most recent five Terms combined (thirty-one times).

72. For further investigation of this data and its theoretical and practical ramifications, see generally RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press*, WASH. & LEE L. REV. (forthcoming 2022) (manuscript at 24–39).

73. See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (noting, in an expressive freedom case, the right to "a free press"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (describing, in a freedom of association case, the "indispensable liberties . . . of speech, press, or association"); *Torcaso v. Watkins*, 367 U.S. 488, 492 (1961) (suggesting, in a religious freedom case, that the First Amendment "broke new constitutional ground in the protection it sought to afford to freedom of religion, speech, press, petition and assembly").

74. *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937); see also *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938); *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

right. Rhetorically, the freedom of the press as a specified, recognizable liberty has all but disappeared.

A radically declining incidence of Supreme Court attention to the press—like most issues related to the press in American society today—is a “wicked problem,”⁷⁵ as both the scope of causation and the array of practical ramifications are complicated by the existence of other simultaneously occurring phenomena. This changing behavior by the Court is, of course, happening alongside a changing media landscape, a changing public, a changing economy, and a changing political environment. The Court’s choice to shy away from its once-frequent pattern of judicial characterization of the press surely cannot be divorced from other factors, including evolving mass communication technology and the strategic decisions made by the news media to avoid bringing cases to the Court because of limited finances⁷⁶ or limited confidence in positive outcomes.⁷⁷ This confluence of factors may prove complicated to unpack. But the Court’s choices unquestionably matter, as well. The U.S. Supreme Court has a heavy influence in shaping the environment for the exercise of rights and has historically been a source of significant public narrative about the role the press plays in society. That it has fallen silent on this front—and that it has virtually ceased to give voice to even the bare existence of an American freedom of the press—is an important component of the wider conversation on the future of the media.

B. *A Sharp Decline in Tone*

Notably, a parallel and concerning trend demonstrates an unambiguous decline in the tone the U.S. Supreme Court uses to characterize the press. In other words, our data show not only that the Justices are talking about the press less often but also that, when they do, they are adopting more negative tones.

In the last fifty years, the Court’s view of the news media has deteriorated across a variety of measures. Overall tone data, depicted in Figures 3 and 4, show positivity of press characterization peaking sharply in the 1970s and declining in the years since. Indeed, a Supreme Court reference to the press a generation ago was nearly twice as likely to be characterized positively as a reference from today’s Court.⁷⁸

75. MARTHA MINOW, *SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH* 101 (2021) (defining a “wicked problem” as one “with multiple interacting causes and no single solution”).

76. See Jones, *Litigation, Legislation, and Democracy*, *supra* note 32, at 617–19 (addressing the financial decline of the newspaper industry and its impact on constitutional litigation).

77. We note, however, that the data shows a decline in press references across the board and not just a decline in cases in which the press is a party.

78. The relative frequency of positive references in the 1970 to 1984 Terms was 35%, and 19% in the 2005 to 2019 Terms.

Figure 3. Tonal Variations in Press Mentions Over Time (As Raw Number of Paragraphs with a Press Reference)

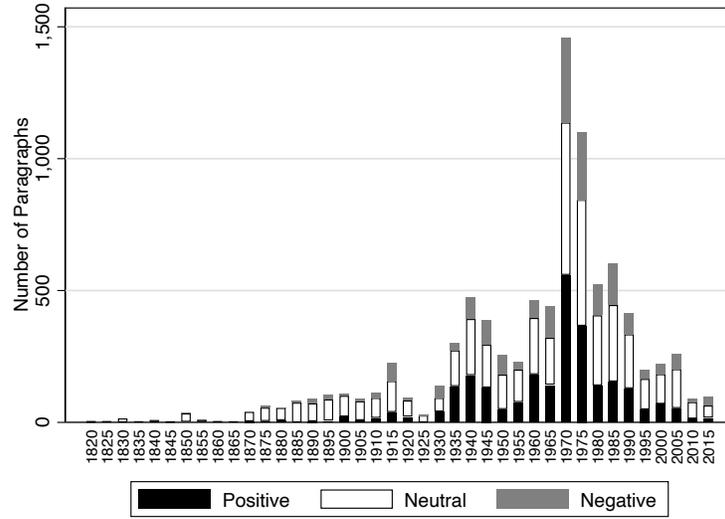
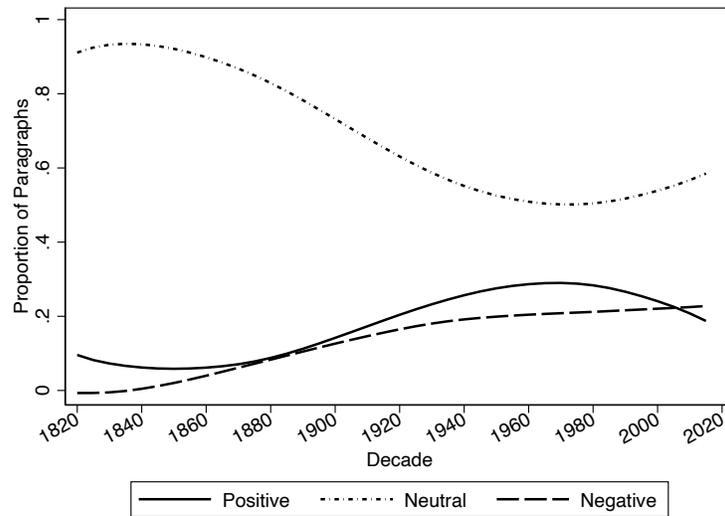
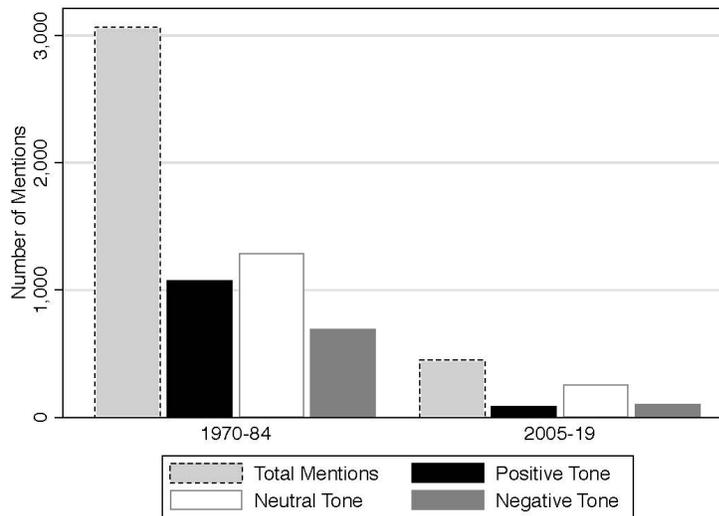


Figure 4. Tonal Variations in All Press Mentions Over Time (As Proportion of Total Paragraphs with a Press Reference)



This remarkable shift is sharply illustrated through a comparison of two fifteen-year periods, which are depicted in Figure 5: the first from the Court's 1970 to 1984 Terms and the second from the 2005 to 2019 Terms.

Figure 5. Comparison of Press Mentions from 1970–1984 and 2005–2019



During the 1970 to 1984 period, there were more positive than negative mentions in eleven of the fifteen years. As for the other four Terms, two were split almost identically between positives and negatives (1976 and 1978), and another had only three more negative references than positive (1980). Only a single Term (1981) provided even modest evidence of an anti-press slant with 29% of the 129 mentions carrying a negative tone as compared to 17% of mentions that were positive (although the majority of references were neutral). In ten of the fifteen Terms, 30% or more of the mentions were positive. In three of the Terms, positive mentions exceeded 40%.⁷⁹ Meanwhile, negative mentions in this period never once reached 30% of the total, and in several Terms, the percentage of negative mentions was in the teens.⁸⁰ Notably, this low negativity rate took place against the backdrop of a staggeringly large number of total paragraphs referencing the press; the seven Terms with the highest frequency of press mentions are all within this timeframe.

Conversely, in the most recent fifteen-year period, the Court's press-positivity rate plummeted to an average of just 19% per Term. In no Term has it ever exceeded 40% of total references, and in six of the fifteen years, it was

79. The October 1972 Term had 47% positive mentions.

80. The October 1972 Term had 19% negative mentions; the 1979 Term had 11% negative mentions; the 1982 Term had 18% negative mentions; and the 1983 Term had 15% negative mentions.

15% or lower. In three Terms (2012, 2015, and 2017) no Justice made any positive characterization *at all* in any majority, concurring, or dissenting opinion or other official writing published in the U.S. Reports. In sharp contrast to a generation ago, in ten of the fifteen most recent Terms, the number of negative mentions was equal to or greater than the number of positive mentions. In 2015, for the first time in history, the number of negative press mentions outnumbered the combined total of positive and neutral references, with 75% of references conveying negativity.⁸¹

Our data tracking neutrality also reveal a noteworthy shift in tone. In the earlier of the two fifteen-year blocks, neutral references averaged 43% of the total. In two of the fifteen years, positive references equaled or outnumbered neutral references. In the most recent fifteen-year block, however, the average neutrality rate was around 57%. Neutrality now always exceeds positivity, and often by large margins. The gravitational pull, therefore, seems to appear on two fronts—from positive to neutral and from neutral to negative. Ultimately, the tone-trend analyses in the study run entirely in the direction of reduced positivity toward the press and the press function. The modern data suggest that the current Court will engage in a positive characterization of the press only in the rarest of situations.

When tonal data are investigated against the backdrop of specific frames, powerful subtrends emerge—all of which also point in the direction of a U.S. Supreme Court with a decreased respect for and a devalued characterization of the press. This is evidenced in three major ways.

First, frames that tend to produce positive characterizations from the Court are on the decline. The data indicate that some frames are overwhelmingly predictive of a positive tone. For example, the Democracy Frame captures every instance in which the Court speaks of the press's impact on government and other powerful entities or its impact more generally on democracy, elections, and the functioning of representative government. When the Court chooses to use this frame, it almost always does so positively—characterizing the press as a check⁸² or watchdog⁸³ that creates accountability and subjects powerful actors or their policies to public scrutiny in ways that are valuable and beneficial to society. Included within this frame are the many

81. Like many recent Terms, the 2015 Term had an exceptionally low absolute frequency. There were four total references to the press, three of which were negative, one of which was neutral, and none of which were positive.

82. *See, e.g.*, *N.Y. Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (explaining that the press acts as a vital check which “serves the basic purpose of the First Amendment”); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569, 580 (1980) (holding that the First Amendment guarantees the right of the public and press to attend criminal trials as a check on the government).

83. *See, e.g.*, *Leathers v. Medlock*, 499 U.S. 439, 440 (1991) (explaining that taxes should not hinder the press's important role as “a watchdog of government activity”).

references to the press and its work being “central to a free society,”⁸⁴ aiding voters’ decision-making,⁸⁵ and bringing to light matters of public concern. As seen in Figures 6 and 7, this positive tone predominates within the frame, while negative and neutral uses are much rarer. But the frequency data depict how thoroughly this positive frame has fallen out of use. This frame builds in occurrence, peaking during the mid-1960s to the early 1980s—an era that maps onto Watergate, the Pentagon Papers, and a swelling public sense of journalism’s heroism⁸⁶—and then drops off significantly during the Rehnquist and Roberts Courts. The Court is simply not discussing the press through the lens of its democracy- and accountability-enhancement functions anymore. The once relatively frequent pattern of briefly mentioning this complementary characterization of the press as an accountability-enhancing watchdog is largely a thing of the past.

84. *Time, Inc. v. Hill*, 385 U.S. 374, 407–08 (1967) (Harlan, J., concurring in part and dissenting in part) (explaining that truth in publication is “central to a free society”).

85. *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (explaining that the First Amendment’s purpose is to “protect the free discussion of governmental affairs,” including “discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes” to create an informed citizenry).

86. See *N.Y. Times Co.*, 403 U.S. at 728 (“In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people.”); see also Stephen F. Rohde, *Presidential Power vs. Free Press*, L.A. LAW., Oct. 2017, at 26, 30 (discussing President Nixon’s relationship and conflicts with the press); Paul Brewer, *The Fourth Estate and the Quest for a Double Edged Shield: Why a Federal Reporters’ Shield Law Would Violate the First Amendment*, 36 U. MEM. L. REV. 1073, 1114 (2006) (stating that “the greater the connection between the press and elected officials, the greater the decline in journalism,” which could result in groundbreaking stories, like Watergate, failing to make the front page).

Figure 6. Mentions of Press Effect on Democracy by Raw Frequency

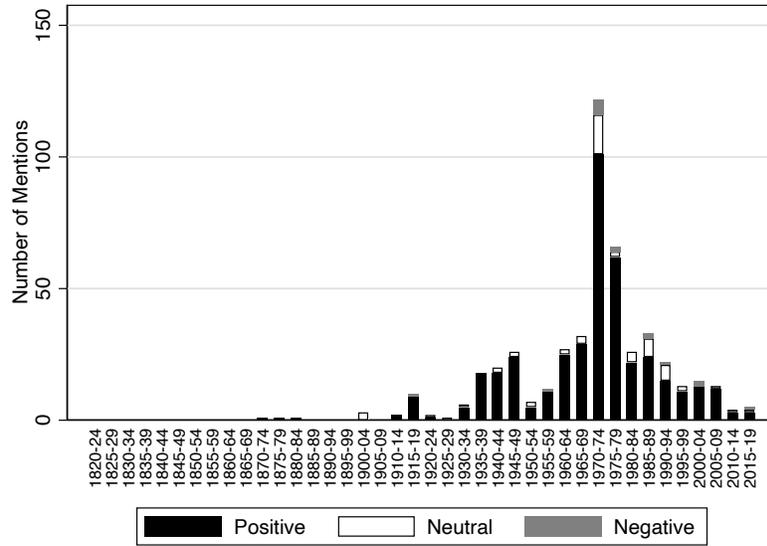
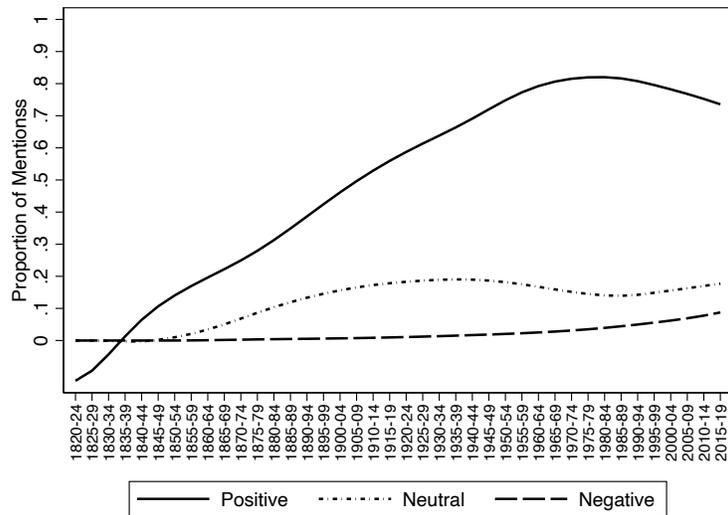


Figure 7. Mentions of Press Effect on Democracy as Proportion of Total



A similar trend is visible in the History Frame, which was coded any time a Justice mentioned the Founders, the Founding era, or the original intent of the First Amendment as it pertains to the press. Although the overall number of total uses is relatively small compared to certain other frames, Figures 8 and

9 show that positive historical connotations—those suggesting that, as an originalist matter, the Founders valued, prioritized, and crafted constitutional provisions with the goal of protecting the press⁸⁷—overwhelmingly outnumber negative and neutral references. Again, this frame builds in frequency, peaks in the 1970s, and then drops off, so much so that it is virtually undetectable in many of the most recent years of the Roberts Court.⁸⁸ Staggeringly, in the one recent Term in which the History Frame does appear, our data show it flipping to total tonal negativity. All told, it appears that the current Court is outright abandoning framings of the press that—either as a practical matter or as a matter of established precedent or rhetorical pattern—are positive in their depictions. If a particular framing of the press is primarily positive, the Court now chooses to omit it.

87. See, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 151, 153 (1973) (Douglas, J., concurring in the judgment) (“The sturdy people who fashioned the First Amendment would be shocked at that intrusion of Government into a field which in this Nation has been reserved for individuals, whatever part of the spectrum of opinion they represent. . . . But even Thomas Jefferson, who knew how base and obnoxious the press could be, never dreamed of interfering. For he thought that government control of newspapers would be the greater of two evils.”); *Dennis v. United States*, 341 U.S. 494, 531 (1951) (Frankfurter, J., concurring in the judgment) (“History regards ‘freedom of the press’ as indispensable for a free society and for its government.”); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 147 (1967) (discussing “the intent of the Founders who felt that a free press would advance ‘truth, science, morality, and arts in general,’ as well as responsible government”).

88. From 2008 to 2019, there were just seven such references—three in the October 2009 Term and four in the October 2018 Term. From the October 2004 Term to 2008 and 2010 to 2017, there were none at all.

Figure 8. Mentions of Historical Value of Press by Raw Frequency

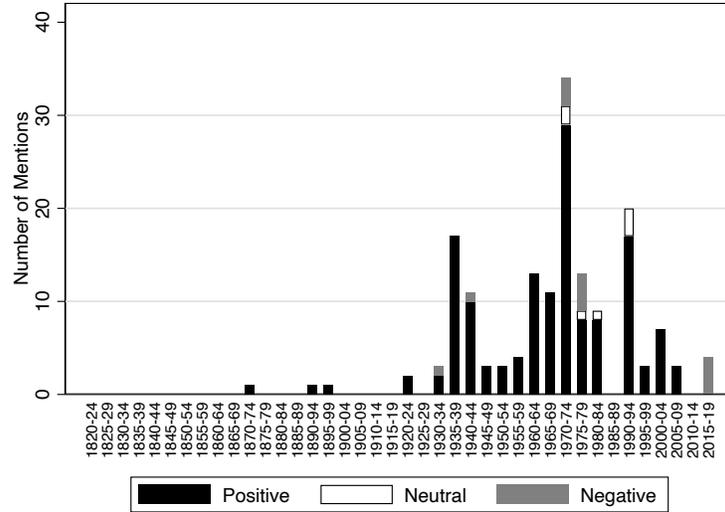
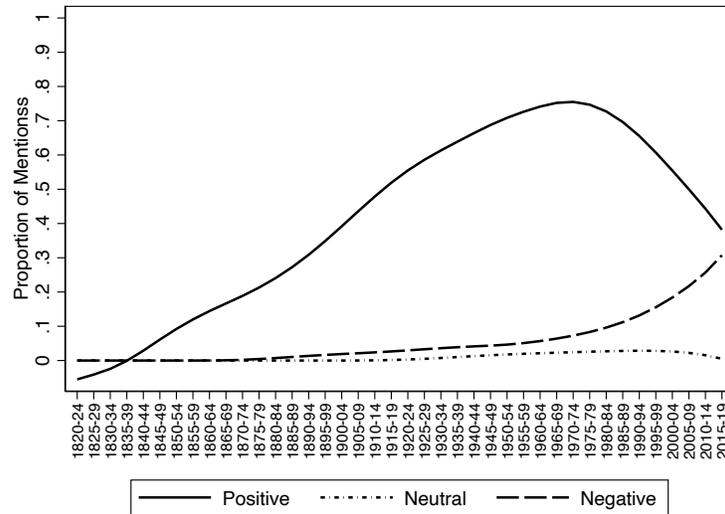


Figure 9. Mentions of Historical Value of Press as Proportion of Total



Second, and conversely, the frames that are predictors of the Court’s negativity toward the press are now both appearing more frequently as a percentage of mentions and showing even stronger intraframe negativity. In other words, the Justices are turning to these negative-leaning frames more

often and then using them in a more consistently negative manner. Most notably, this is happening with the Individuals Frame, which encompasses references by the Court to the press's impact on individuals' privacy interests, reputational interests, and emotional interests. Perhaps unsurprisingly, given the existence of legal causes of action for invasion of privacy, defamation, and infliction of emotional distress, the negative tone appears much more often in this frame than do the neutral or positive tones. Figures 10 and 11 show these trends. When the Individuals Frame is invoked, it is usually for the Court to comment that the press injured (or was a tool used by someone else to injure) an individual's privacy, reputation, or emotional well-being. The combined tone and frequency data show upward negative tone trends and comparatively stronger frequency over the last half-century.⁸⁹ At the peak of the Court's generous treatment of the press, in the 1970s, the negative Individuals Frame references were tempered somewhat by neutral ones. Today, that is not the case. In many recent years, the entire set of Individuals Frame characterizations has been tonally negative.⁹⁰ Put another way, although the Roberts Court does not speak about the press often, when it does, it says that the press is harmful to people.

89. Ninety-two percent of the Individuals Frame references from 2010 to 2019 were negative; none were positive. While the Individuals Frame accounts for just 4.2% of references in the total dataset, it accounts for 7.2% of references from 2015 to 2019. With a large percentage of the current Justices' references falling into the neutral Communication Frame—simply noting the existence of the press as an entity that publishes material for the public—even small increases in the remaining substantive frames have a meaningful impact on the spread of actual characterizations of the press.

90. The 2010, 2015, and 2018 Terms all referenced the Individuals Frame with only a negative tone. Between 2010 and 2019, the total tone spread was 92% negative and 8% neutral.

Figure 10. Mentions of Press Effect on Individuals by Raw Frequency

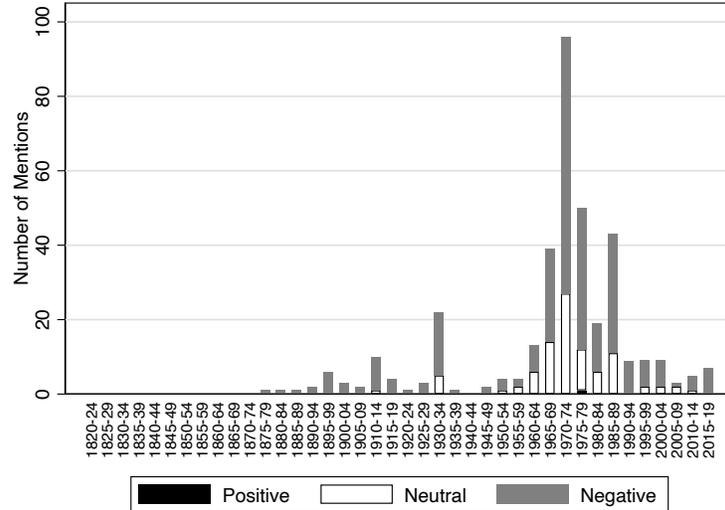
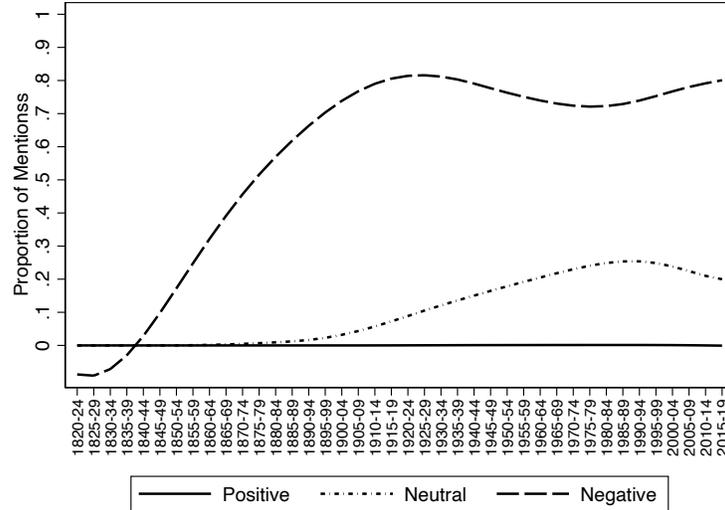


Figure 11. Mentions of Press Effect on Individuals as Proportion of Total



Third, and finally, the tone trend is also seen in data gathered on what we might term “mixed-tone” frames—content characterizations of the press that the Court has sometimes portrayed positively and other times negatively. The Trustworthiness Frame and the Regulation Frame both demonstrate this

phenomenon. As seen in Figure 12, the Trustworthiness Frame skews negative overall, but has a mixed-tone history with a distinct upward trajectory of negativity. From the 1960s to the 1980s, the Court's references to media trustworthiness and ethics were far more tonally varied—with many cases describing the press as a trusted, useful, ethical institution and indicating that journalism is a source of accurate, dependable information from credible sources. Figure 13 shows that the more recent cases, from the Rehnquist and Roberts Courts, chart very little positivity in this frame, with the most recent years charting none at all. Indeed, there has not been a positive reference to the trustworthiness of the press from any Justice since 2009.⁹¹ Thus, when the Court is taking the opportunity to opine on the subject, the opinion it now projects is that the press lacks credibility in some way—for example, by behaving unethically, providing inaccurate information, or sensationalizing events.

91. A generation ago, the percentage of neutral references in this category was also higher. Thus, it appears that the Court is shifting negatively and references that would once have been made in a neutral way now have a negative connotation.

Figure 12. Mentions of Press Trustworthiness by Raw Frequency

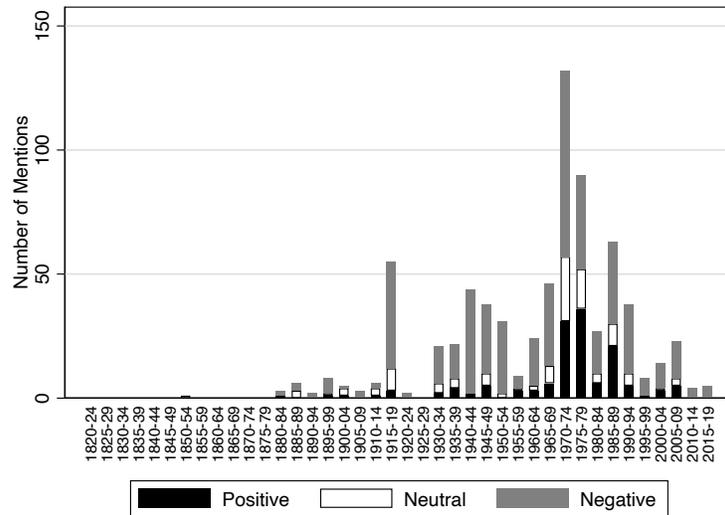
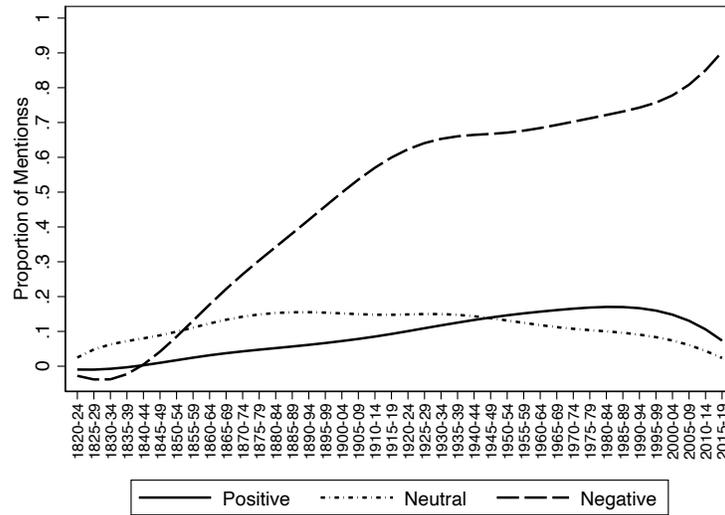


Figure 13. Mentions of Press Trustworthiness as Proportion of Total



Similarly, but to a lesser extent, the Regulation Frame shows some increased negativity in a mixed-tone dynamic. This frame follows the Court’s

acceptance or rejection of the government's ability to regulate the press.⁹² Although positive tones have traditionally outpaced negative ones, this frame has always been somewhat tonally mixed; even in its most positive historical years, the Court has recognized a substantial number of situations in which the press could or should be regulated. As depicted in Figures 14 and 15, there is also a slight increase in negativity within this frame over time.⁹³

92. For this frame, any reference by the Court suggesting that the government cannot or should not regulate the press was coded as positive, while any reference suggesting the opposite was coded as negative.

93. Negativity of Regulation Frame references increased from 14% in 1960–1964 to 33% in 2015–2019.

Figure 14. Mentions of Press Protections from Government Regulation by Raw Frequency

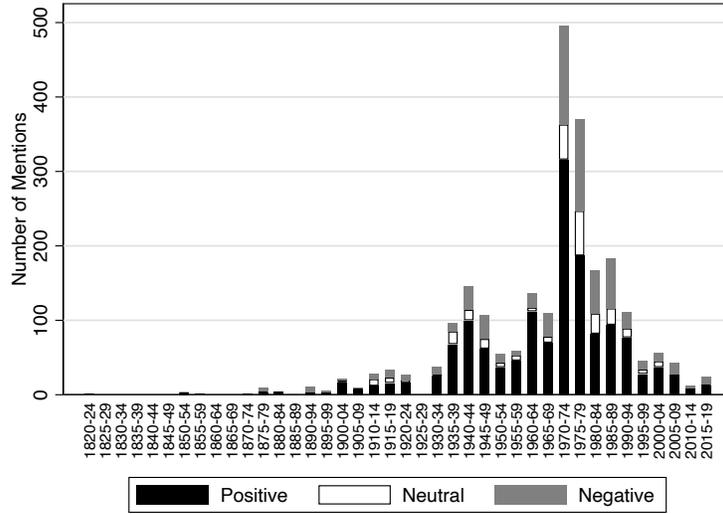
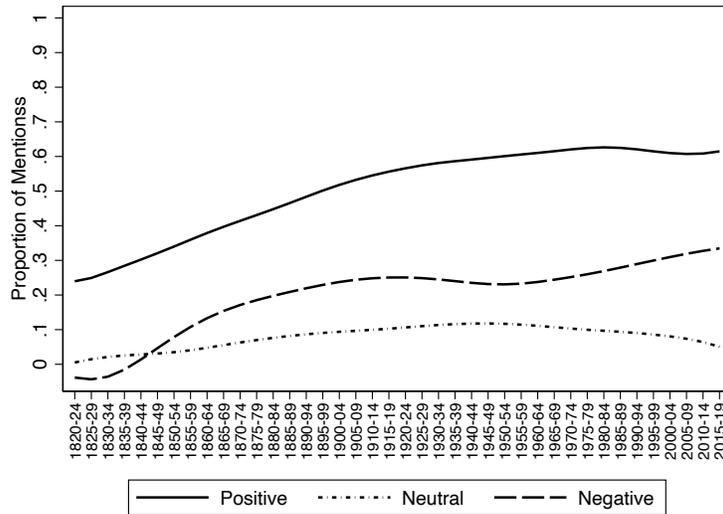


Figure 15. Mentions of Press Protections from Government Regulation by Proportion of Total



On every meaningful measure included within the study—including the frequency of acknowledgement of the press, the frames selected for

characterizing the press, and the tone used to depict the press—the modern Court is significantly less positive than the Court a generation ago. The data suggest that the press is unlikely to find a receptive audience at the U.S. Supreme Court anytime soon.⁹⁴

IV. INDIVIDUAL JUSTICES AND PRESS CHARACTERIZATIONS

Finally, we analyzed our data for comparisons between and among individual Justices, with the goal of identifying the most and least press-friendly Justices of all time. The individual Justice data also permit us to better understand the judicial environment the press currently faces by examining the press references by the Justices on the modern Court.

A. *Determining the Justices' Press-Friendliness*

As discussed above, two primary factors are important when considering the Court's characterizations of the press: frequency and tone.⁹⁵ The tone of the Court's press references, of course, sends a strong message about its understanding of the press's value in our society. But how often the Court mentions the press also affects this message by amplifying (through a high number of references) or minimizing (through a low number) the impact of these characterizations. We therefore focus on these same two factors to examine the relative press-friendliness of the individual Justices.

We first analyzed tone by assigning a "Press Support Score" to every Justice who authored more than fifty total mentions in the dataset.⁹⁶ To calculate the Press Support Score, we looked at how far above or below average a Justice was on three measures: (1) percent positive characterizations, (2) percent negative characterizations, and (3) the ratio of positive to negative characterizations. We then rescaled these scores from zero to one hundred, assigning the Justice with the highest raw Press Support Score, Justice Sutherland, a score of one hundred and the Justice with the lowest, Justice Clark, a score of zero.⁹⁷

94. As with the frequency data, the tone data situate themselves within a wider, multifaceted societal and media dynamic. We do not suggest that the Court's perceptions of the press are the sole factor in any meaningful consideration of press roles or press rights. But particularly given the comparatively intense scrutiny afforded to changing press characterizations within the legislative and executive branches, there are compelling reasons to interrogate the false assumptions that might have been made about a baseline of positivity from the Court and to explore what the data to the contrary may mean for the already complicated conversations about the press's composition, its performance, and its protection in American society.

95. *See supra* Part III.

96. This group of Justices is approximately equivalent to the sixtieth percentile. We concluded that we lacked sufficient data to analyze the positive-to-negative ratios for the Justices whose frequency of mentions fell below this threshold.

97. Based on their Press Support Scores alone, we found that the second-most positive Justice was the first Justice Harlan, whose Press Support Score is ninety-five. He is followed by Justice Black

The ratio of a Justice's positive to negative references, however, does not fully capture the influence of a Justice's discussions about the press. It also matters how often a Justice chooses to speak about the press, its role in society, and its value to democracy. Each time a Justice finds an opportunity to communicate a view of the press, the effect of the Justice's characterization, whether positive or negative, is magnified. Therefore, we also ranked each Justice based on the number of times he or she referenced the press. Our data show that Justice Brennan was the most frequent commentator on the press, with 650 mentions.⁹⁸ On the other end of the spectrum are Justices who ranked low on the frequency scale, including three who authored only a single paragraph referencing the press.⁹⁹ Indeed, 20 of the 114 total Justices to serve on the Court never once characterized the press.¹⁰⁰

Because we limited our Press Support Score ranking pool to Justices who had more than fifty mentions in our dataset, however, we included only this same set of Justices for our analysis of the most and least press-friendly members of the Court. This means that *all* of the Justices we considered for these rankings were in roughly the top 40% of Justices based on frequency.

Figure 16 shows how these two factors work together to reveal our most press-friendly and least press-friendly Justices. In this figure, we plotted the thirty-nine qualifying Justices based on their frequency of press mentions (x-axis)¹⁰¹ and their Press Support Score (y-axis). The dashed line indicates the median for each factor. The farther above the median Press Support line a Justice appears, the more press-friendly he or she is and vice versa. The farther

at ninety-four, Justice Brandeis at ninety-two, and Justice Goldberg at eighty-nine. Justice Frankfurter is the second most negative Justice with a Press Support Score of eight, followed by Justice Pitney at fourteen, Justice White at nineteen, and Justice Robert Jackson at twenty-five. Again, we did not calculate Press Support Scores for Justices who had fifty or fewer paragraphs in our dataset, so these scores are only among those whose frequency warranted inclusion in that pool.

98. Justice Brennan was followed by Justice White with 629 paragraphs, Justice Douglas with 612, Justice Burger with 497, and Justice Black with 481.

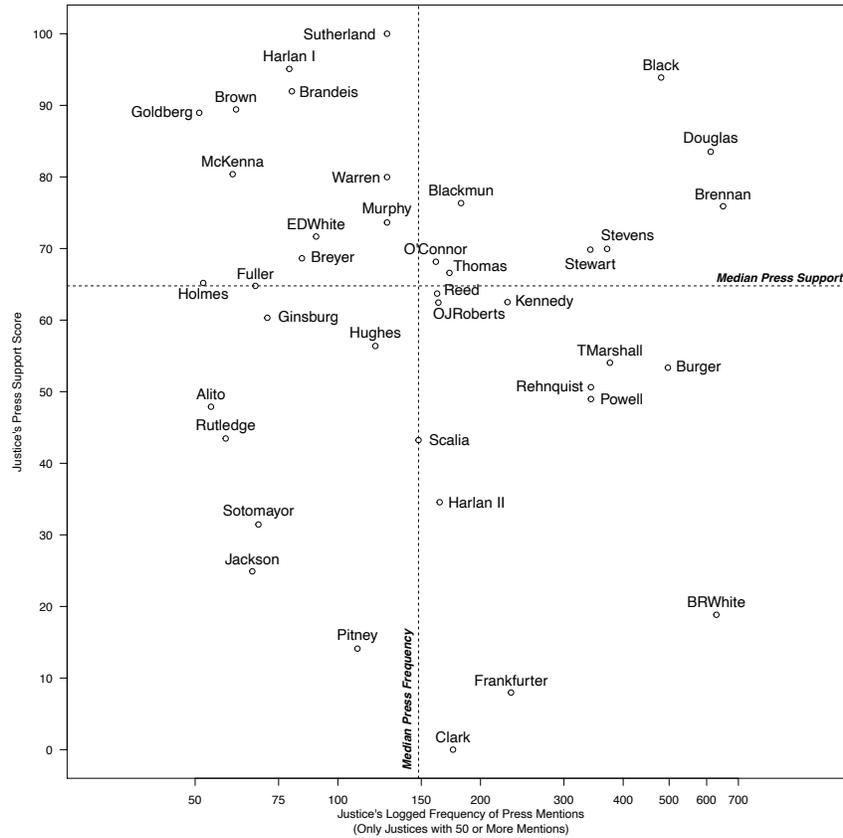
99. These were Chief Justice Marshall and Justices Samuel Chase and Whittaker.

100. Justice Barrett, the Court's 115th Justice, was not included in our study. *The Court as an Institution*, SUP. CT. U.S., <https://www.supremecourt.gov/about/institution.aspx> [<https://perma.cc/TD8W-VPL2>]. The twenty Justices who never characterized the press were Justices Moore; Duvall; Livingston; Jackson; Campbell; Blair; Byrnes; Iredell; Jay; McKinley; Rutledge, Jr.; Wilson; Ellsworth; Barbour; Trimble; Chase; T. Johnson; Todd; Cushing; and Paterson. Many of these Justices served in the 1700s and early 1800s, *id.*, when the issue had not emerged factually and the Court's opinions were much more concise. But seven of the twenty Justices penned opinions classified as First Amendment opinions by the Supreme Court Database.

101. The x-scale presents the natural logarithm of the number of press mentions in our data. Logging our values removes the skewness in the distribution introduced by the presence of a number of Justices who mentioned the press especially often in their writings. For example, the minimum in the graphed data is fifty-one mentions, and the maximum is 650 mentions, which means the discrepancy between the two raw values is separated by a factor of about thirteen. The logged values are 3.9 and 6.5, respectively, which are separated by a factor of only about 1.7.

to the right of the median press frequency line a Justice appears, the more often he or she mentions the press; those to the left are less-frequent commentators.

Figure 16. Most and Least Press-Friendly Justices



The first quadrant, in the upper-right-hand corner, showing high frequency and strong Press Support Scores, indicates our most press-friendly Justices—those who both spoke often about the press and, when they did so, were more likely to speak positively. We find that the most press-friendly Justices of all time are Justices Black, Douglas, and Brennan. The least press-friendly Justice—found in the fourth quadrant in the lower-right-hand corner, with the combination of high frequency and low Press Support Score—is Justice Byron White.

Several observations stand out about these particular Justices who emerge as our free-press “heroes” and “villain.” The first is the length of time they served on the Court. All four Justices are among the longest-serving Justices of all time—Justice Douglas currently ranks as the longest-serving Justice, Justice

Black as the fifth, Justice Brennan as the seventh, and Justice White as the twelfth.¹⁰² The length of these Justices' tenures exposes a limitation of relying too heavily on the frequency of press mentions alone. The longer a Justice serves on the Court, of course, the more opportunities he or she had to speak about the press. Some Justices had exceedingly short stints on the bench¹⁰³ and others only recently took their seats,¹⁰⁴ which means that their opportunities to characterize the press were likely not as plentiful as those with longer periods on the Court. Our findings indicate, however, that the mere fact of having served on the Court for a longer tenure does not necessarily result in increased frequency of press mentions. Some Justices with long tenures did not even make our cut of having more than fifty press mentions. Chief Justice Marshall, for example, is the fourth longest-serving Justice,¹⁰⁵ but he had only a single reference to the press in his thirty-four years on the Court.¹⁰⁶

For similar reasons, we believe that the eras in which these Justices served are equally telling. All four of these Justices were on the bench during at least part of the period in which the Court decided the bulk of the cases most affecting the press. In fact, all four Justices served on the bench together for the nine years from 1962, when Justice White joined the Court, to 1971, when Justice Black stepped down.¹⁰⁷ Our data show that these years, which spanned the end of the Warren Court to the beginning of the Burger Court, coincided with the height of press mentions overall. Our press-friendly heroes, furthermore, served together for fifteen years from 1956 to 1971—a significant portion of the most press-heavy era for the Court. Still, this does not mean that all of the Justices who served during this period were high-frequency Justices. Justice Frankfurter, for example, served all twenty-three years of his tenure on the bench with Justices Black and Douglas, yet contributed fewer than half as many press mentions.¹⁰⁸

102. Justice Douglas served for thirty-six years; Justice Black for thirty-four years; and Justice White for thirty-one years. See *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [<https://perma.cc/F5RX-FHA5> (staff-uploaded archive)].

103. Justice T. Johnson, for example, served for the shortest amount of time to date, a mere 163 days, before he retired due to poor health. *Thomas Johnson Has a Cup of Coffee on the Supreme Court*, FOUNDER DAY (Aug. 25, 2018), <https://www.founderoftheday.com/founder-of-the-day/thomas-johnson> [<https://perma.cc/56GA-2Z6P>].

104. At the close of our study, Justice Gorsuch (confirmed in 2017) and Justice Kavanaugh (confirmed in 2018) ranked among the ten shortest-serving Justices. See *Justices 1789 to Present*, *supra* note 102. Justice Barrett (confirmed in October of 2020) was not included in our study.

105. See *Justices 1789 to Present*, *supra* note 102.

106. Justice Chase, who served for fifteen years from 1796 to 1811, also had only one press reference. See *id.*

107. See *id.*

108. Justice Douglas had 612 paragraphs, Justice Black had 481, and Justice Frankfurter had 232.

B. *Most Press-Friendly Justices of All Time*

Why, then, did Justices Black, Douglas, and Brennan rise to the top of our press-friendliness rankings? Again, the period during which they served surely played a role. These Justices were all on the bench during at least part of the Court's press freedom Glory Days in the 1960s, 1970s, and 1980s.¹⁰⁹ Not only was this a period when the Court decided many press-related cases, but it was, as our tone data show,¹¹⁰ also the height of press-positivity. Thus, these Justices may have simply been part of a pro-press wave sweeping the Court and the country.¹¹¹ Yet, not all Justices from this period received a high Press Support Score. As is discussed further below, our least press-friendly Justice, Justice White, also served during this era. Likewise, Justice Frankfurter, who was previously mentioned as serving all of his tenure with Justices Douglas and Black, had a Press Support Score of only eight. Instead, an examination of the writings of Justices Black, Douglas, and Brennan, along with their individual press-characterization data from our study, suggests that they are the most press-friendly Justices not simply because they served during a particularly press-positive time, but rather because they were, in fact, the Court's leaders in recognizing the valuable roles the press plays and the importance of press freedom.

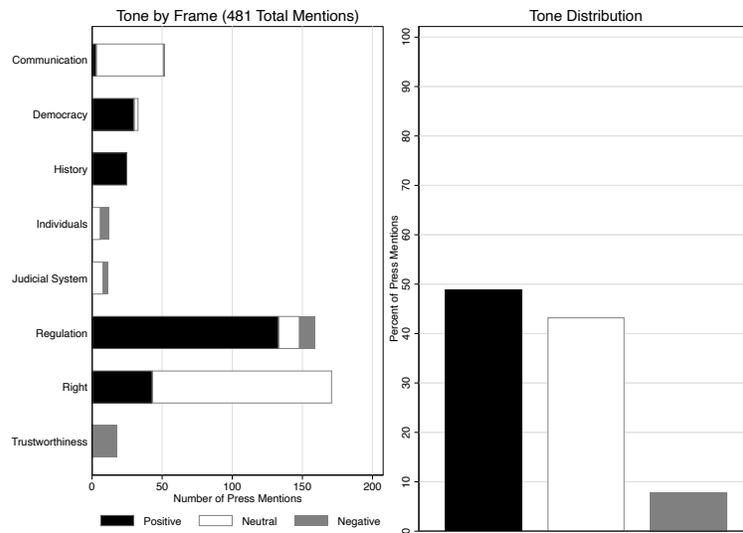
109. See *Justices 1789 to Present*, *supra* note 102.

110. See *supra* Section III.B.

111. Jeffrey M. Jones, *Americans' Trust in the Mass Media*, GALLUP (Apr. 20, 2004), <https://news.gallup.com/poll/11428/americans-trust-mass-media.aspx> [<https://perma.cc/29CD-2GCG> (staff-uploaded archive)] (noting the high levels of public trust in the news media in the early 1970s).

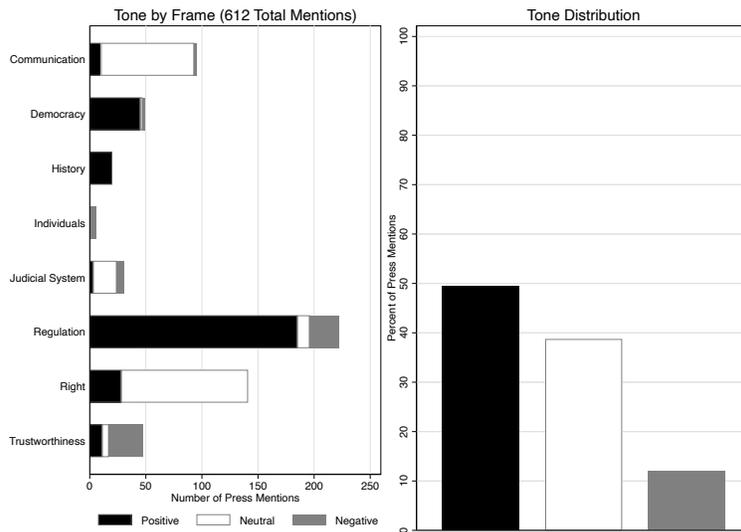
Justices Black, Douglas, and Brennan were First Amendment lions and celebrated advocates for the protection of individual expressive freedoms. Our data confirm that they were also great allies to the press. Justice Black earned the highest Press Support Score among the Justices who were above the median frequency line in Figure 16, and the third highest Press Support Score overall. During his time on the bench, Justice Black found many opportunities to praise the press, as seen in Figure 17. He was the fifth most-frequent press commentator in our dataset, with 481 mentions—a striking 235 (or 49%) of which were positive and only 8% of which were negative.

Figure 17. Justice Black’s Press Mentions



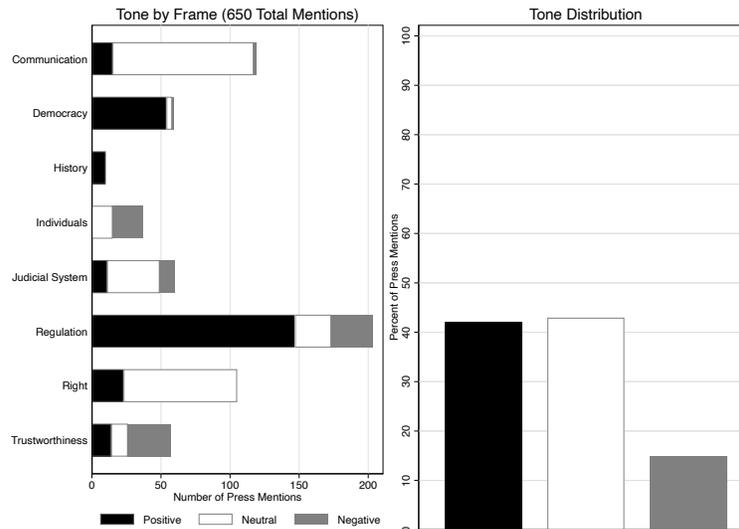
Justice Douglas had the highest overall positivity rate in our dataset, with almost half of his press references indicating positivity and only 12% conveying negativity, as shown in Figure 18. With 612 mentions, he was our third most frequent press commentator. His Press Support Score of 84, meanwhile, was the second highest among the Justices who came in above the median frequency line and the seventh highest overall. He authored 302 positive mentions, compared to only 73 negative ones.

Figure 18. Justice Douglas’s Press Mentions



Our last press-friendly hero, Justice Brennan, was the most prolific press referencer in our dataset with an incredible 650 press mentions. He also earned a Press Support Score of 76, which put him in third place among the Justices who were above the median frequency line and eleventh overall. As seen in Figure 19, 42% of Justice Brennan's characterizations were positive, while only 15% were negative.

Figure 19. Justice Brennan's Press Mentions



These three Justices climbed to the top of the press-friendly charts by taking advantage of opportunities to talk about the press. They frequently discussed the press in separate opinions, employed positive-leaning frames, and emphasized the values of a free and vibrant press.

Our heroes were some of the most frequent users of the more positive-leaning frames, like the Regulation, Democracy, and History Frames. They were the top three Justices to use the Regulation Frame in a positive manner, with Justice Douglas employing it an astounding 185 times and Justices Brennan and Black close behind with 147 and 133 references, respectively. Famous for their roles as two of the only First Amendment absolutists in the Court's history, Justices Black and Douglas tolerated few restrictions on press freedom and often advocated for more press protection than even their other press-friendly colleagues—viewpoints that boosted their numbers under the Regulation Frame.

Concurring in *New York Times Co. v. Sullivan*, the seminal 1964 case that transformed the law of defamation¹¹² and ushered in the press's Glory Days at the Court, Justice Black wrote that the Constitution required that the press have "an absolute immunity for criticism of the way public officials do their public duty."¹¹³ While *Sullivan* is widely celebrated by free press advocates for the broad protection it provides to working journalists, Justice Black made clear that he did not think it went far enough, writing three years later, in *Curtis Publishing v. Butts*,¹¹⁴ that the *Sullivan* actual-malice rule "is wholly inadequate to save the press from being destroyed by libel judgments."¹¹⁵ This approach to government regulation of the press likely explains why Justice Black only wrote negatively under the Regulation Frame (i.e., in favor of press regulation of any kind) a mere 7% of the time.

The Court's other First Amendment absolutist, Justice Douglas, also often turned to the Regulation Frame to condemn government interference with the autonomy of the press. Writing for the Court in *Columbia Broadcasting System, Inc. v. Democratic National Committee*,¹¹⁶ for example, he insisted that the First Amendment announces "one hard and fast principle[:]. . . Government shall keep its hands off the press."¹¹⁷

Justice Brennan is perhaps most associated in the minds of First Amendment scholars as the author of the Court's opinion in *Sullivan*. He explained why the First Amendment requires a public official to show actual malice to succeed in a libel suit¹¹⁸ and specifically spoke about the importance of protecting the press. Using the Regulation and Democracy Frames, he wrote that "[w]hether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."¹¹⁹

Perhaps unsurprisingly, our heroes also took the top three medals for their use of the highly positive Democracy Frame. Justice Brennan earned the top spot with fifty-four positive references, followed by Justice Douglas with forty-five and Justice Black with thirty. As an example, in *Mills v. Alabama*,¹²⁰ Justice Black explained why an Alabama law that led to the arrest of a newspaper editor

112. See generally ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT (1991) (exploring the historical significance and impact of *New York Times Co. v. Sullivan* and detailing the context of the time period wherein the case arose).

113. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 295 (1964) (Black, J., concurring).

114. 388 U.S. 130 (1967).

115. *Id.* at 171 (Black, J., concurring in part and dissenting in part).

116. 412 U.S. 94 (1973).

117. *Id.* at 160–61 (Douglas, J., concurring in the judgment).

118. See *Sullivan*, 376 U.S. at 269–70, 282–83 (majority opinion).

119. *Id.* at 278.

120. 384 U.S. 214 (1966).

was unconstitutional.¹²¹ He wrote that the press “serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”¹²² In his concurrence in the Pentagon Papers case, he also relied on the Democracy Frame, writing at length about the structural and societal value of the press¹²³ and famously declaring that “[t]he press was to serve the governed, not the governors.”¹²⁴ Justice Douglas also wrote positively about the impact of the press on democracy. For example, in his dissent in *United States v. Caldwell*¹²⁵—one of the consolidated cases in which the Court held there is no First Amendment right to a reporter’s privilege in criminal grand jury proceedings—he wrote that the press “has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public’s right to know.”¹²⁶

Justice Brennan was the top positive user of the Judicial System Frame, a mixed-tone frame that often captures the Justices’ views on the news media’s negative impact on the fair trial rights of criminal defendants. Justice Brennan, however, set himself apart by regularly emphasizing the importance to the public of vigorous press coverage of the judicial process. For example, in a concurrence in *Nebraska Press Ass’n v. Stuart*,¹²⁷ a case challenging a judge’s gag order on the press in a high-profile criminal case,¹²⁸ he wrote that free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.¹²⁹

These three Justices also often made it a point to reference the historical importance of press freedom, thus employing another heavily positive frame. Justice Black was the top positive user of the History Frame, writing frequently of the unique historical role of press protections and the Founders’ appreciation for the value of a free press. In the Pentagon Papers case, for example, he called the reporting of the newspapers involved in that case “courageous,” stating that

the New York Times, the Washington Post, and other newspapers should be commended for serving the purpose that the Founding Fathers

121. *Id.* at 219–20.

122. *Id.* at 219.

123. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“Only a free and unrestrained press can effectively expose deception in government.”).

124. *Id.*

125. 408 U.S. 665 (1972).

126. *Id.* at 721 (Douglas, J., dissenting).

127. 427 U.S. 539 (1976).

128. *Id.* at 541.

129. *Id.* at 587 (Brennan, J., concurring in the judgment).

saw so clearly. In revealing the workings of government that led to the Vietnam [W]ar, the newspapers nobly did precisely that which the Founders hoped and trusted they would do.¹³⁰

Justice Douglas was the second most positive user of the History Frame, surpassing the other less press-friendly Justices (and, at times, even the press advocates themselves) in advocating for more robust protections for press freedom. In his *Caldwell* dissent, for example, he expressed amazement that the *New York Times*—which employed the defendant, reporter Earl Caldwell—would concede that the government could compel a journalist’s testimony under any circumstances.¹³¹ Relying on the Regulation and History Frames, he wrote:

My belief is that all of the “balancing” was done by those who wrote the Bill of Rights. By casting the First Amendment in absolute terms, they repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the *New York Times* advance in the case.¹³²

As discussed earlier, the Right Frame is typically a neutral frame that nonetheless has a special importance for tracking the Justices’ simple acknowledgement of the constitutional right to press freedom. It is significant, therefore, that our most press-friendly Justices often invoked it, taking the top three spots for neutral uses, with Justice Black in first place with 128 mentions and Justices Douglas and Brennan in second and third with 113 and 82 references, respectively. But they did more than merely note the First Amendment right of press freedom; they also spoke of its positive value and importance more often than any other Justice, sweeping the category of positive Right Frame mentions with Justice Black making forty-three references, followed by Justices Douglas and Brennan with twenty-eight and twenty-three, respectively. These Justices’ frequent inclusion of references to the constitutional right of press freedom coincides with what Professor David Anderson calls the “heyday of the Press Clause in the Supreme Court” during the 1930s to 1960s, in which “the Court invoked the Press Clause in many cases and appeared to rely on it, rather than the Speech Clause, to protect freedom of the press.”¹³³

Our most press-friendly Justices rose to the top of our ranking system through a combination of factors. Serving long tenures during a period when the Court was actively considering the contours of press freedom was no doubt

130. *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring).

131. *Branzburg v. Hayes*, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).

132. *Id.*

133. Anderson, *Freedom of the Press*, *supra* note 13, at 448. Justices Black and Douglas both joined the Court in the late 1930s and served into the 1970s. See *Justices 1789 to Present*, *supra* note 102. Justice Black served from August 19, 1937, to September 17, 1971, and Justice Douglas served from April 17, 1939, to November 12, 1975. *Id.*

part of the equation. But our data reveal that these three Justices took—and often created—opportunities to speak about the press even when their colleagues did not. And when they did so, they framed the discussions in press-positive ways by shining a bright light on the crucial roles a free press fills in our society and the unique historical and democracy-enhancing values protected by the First Amendment’s guarantee of press freedom.

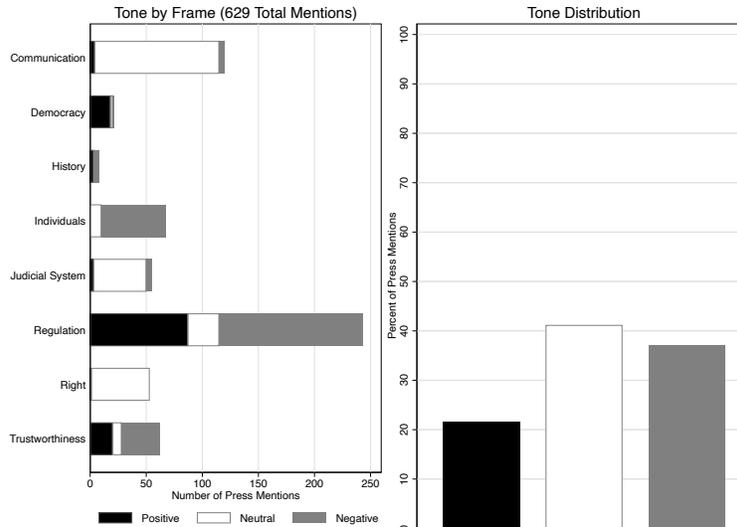
C. *History’s Least Press-Friendly Justice*

Conversely, Justice White is the least press-friendly Justice of all time. During his time on the Court, he wrote about the press often and thus came in second in frequency with 629 mentions. His view of the press, however, was decidedly poor, in that a staggering 234 (or 37%) of his references were negative, while only 22% were positive. Justice White’s Press Support Score is only nineteen, meaning that he ranked thirty-sixth out of thirty-nine Justices in our analysis.¹³⁴

As seen in Figure 20, Justice White often used the negative-leaning frames. He was the Justice, for example, most likely to speak negatively of the press’s impact on individuals—a position he took more than twice as often as the second most negative Justice in this category. When using this frame, he depicted the press as harmful to individuals 85% of the time. Justice White also employed mixed-tone frames as vehicles for press negativity. For example, he was the most-frequent negative user of the Trustworthiness Frame, with about 55% of his characterizations of the reliability and ethics of the press expressed negatively.

134. Only Justices Pitney, Frankfurter, and Clark have lower Press Support Scores.

Figure 20. Justice Byron White's Press Mentions



Justice White also managed to turn the same frames his press-friendly colleagues were using as vehicles for press positivity into occasions to speak negatively about the press. While the press-friendly heroes turned to the Regulation Frame as a common method for conveying positivity, for example, Justice White led the pack in his negative use of it, with almost three times more references in which he spoke approvingly of government regulation of the press than were made by the Justice next behind him on this list. Likewise, he employed the History Frame—a frame used throughout the Court's history with almost complete positivity—in a negative manner 50% of the time. He tied for first place when it came to making negative statements about the historical value of the press. In upholding the execution of a search warrant on a university student newspaper's newsroom, for example, Justice White expressed skepticism that the Framers intended for the Constitution to provide the press protection in such situations, writing that they “did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated.”¹³⁵

Like the three Justices who emerged as the most press-friendly, Justice White served on the bench during a period when a significant number of press-

135. *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978).

focused cases were on the Court's docket¹³⁶ and also had a longer than average tenure on the bench.¹³⁷ Therefore, his frequency score benefited from more total opportunities to opine about the role of the press. But unlike our press-praising heroes, Justice White worked against the culture of a Court inclined toward press positivity, which makes his exceptionally low Press Support ranking and overall negativity even more notable. Many of Justice White's press references were in majority opinions that he authored and that his significantly more press-friendly colleagues joined; thus, he presumably had to temper his rhetoric to hold their votes.¹³⁸ With so many fellow Justices eagerly engaged in purposeful press praise, Justice White stands out for his apparent resistance to that positivity. The fact that he authored enough press-critical material to overcome the influence of the Glory Days characterizations is striking.

Indeed, Justice White's record reflects his active pessimism for the value of the press. He penned several of the most notable rejections of press protectiveness in the Court's history. In *Branzburg v. Hayes*,¹³⁹ for example, Justice White wrote for a five-to-four Court that reporters could not invoke any First Amendment privilege to protect their confidential sources when subpoenaed.¹⁴⁰ He rejected as "speculative"¹⁴¹ and wrong¹⁴² the arguments of news organizations that the First Amendment's protection for press freedom encompasses safeguards for confidentiality in newsgathering in order to ensure the free flow of crucial information of public concern and to maintain the historical independence of the press.¹⁴³ Instead, he spoke broadly of the press's

136. In fact, in at least a few prominent instances, Justice White also sided with the press. *See, e.g.,* *N.Y. Times Co. v. United States*, 403 U.S. 713, 730–31 (1971) (White, J., concurring) (agreeing that the injunction against the press in the Pentagon Papers case was unconstitutional); *Mia. Herald v. Tornillo*, 418 U.S. 241, 259–60 (1974) (White, J., concurring) (arguing against government interference with the editorial decisions of newspapers).

137. Spanning thirty-one years, from 1962 to 1993, Justice White's tenure on the Court is the twelfth longest in history. *See Justices 1789 to Present*, *supra* note 102.

138. *See infra* notes 139–59 and accompanying text.

139. 408 U.S. 665 (1972).

140. *Id.* at 709 ("[P]etitioner must appear before the grand jury to answer the questions put to him, subject, of course, to the supervision of the presiding judge as to 'the propriety, purposes, and scope of the grand jury inquiry and the pertinence of the probable testimony.'"); *see also id.* at 685 ("[N]ewsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.").

141. *Id.* at 693–94 ("Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."); *see also id.* at 674 ("Any adverse effect upon the free dissemination of news by virtue of petitioner's being called to testify was deemed to be only 'indirect, theoretical, and uncertain.'").

142. *Id.* at 698 ("We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us.").

143. *Id.* at 679–81; *see also id.* at 743 (Stewart, J., dissenting). Justice Stewart agreed with the press organizations and argued that there should be a qualified reporter's privilege, writing that

lack of constitutional specialness,¹⁴⁴ declaring that those who gather and produce the news are no different from the “average citizen.”¹⁴⁵

In *Cohen v. Cowles Media Co.*¹⁴⁶ and *Zurcher v. Stanford Daily*,¹⁴⁷ Justice White pounded this theme home. In *Cohen*, he rejected an argument that a reporter should be exempt from claims of promissory estoppel rooted in the publication of a truthful story,¹⁴⁸ writing—again for a narrow majority—that “generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”¹⁴⁹ Four of his colleagues feared the free press would be dangerously curbed by punishment of “important political speech”¹⁵⁰ and highlighted the “importance . . . to public discourse” of the press’s work.¹⁵¹ But Justice White found nothing warranting distinct protection for that function.¹⁵² Likewise, in *Zurcher*, he rejected arguments that a newsroom should be constitutionally protected from police searches for journalist work product,¹⁵³ suggesting that “surely a warrant to search newspaper premises for criminal evidence . . . carries no realistic threat of prior restraint or any direct restraint whatsoever on the publication . . . or on its communication of ideas.”¹⁵⁴

The press lost at the hands of Justice White in other contexts, as well. In *Hazelwood v. Kuhlmeier*,¹⁵⁵ he wrote for a majority that dealt a blow to student journalists, rejecting their challenge to a content-based deletion of stories from their public school newspaper¹⁵⁶ and holding that “[e]ducators are entitled to exercise greater control over this” form of expression for pedagogical

when a reporter is asked to appear before a grand jury and reveal confidences, I would hold that the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.

Id. at 743 (footnotes omitted).

144. *Id.* at 684–85 (majority opinion) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded . . .”).

145. *Id.* at 682.

146. 501 U.S. 663 (1991).

147. 436 U.S. 547 (1978).

148. *Cohen*, 501 U.S. at 665.

149. *Id.* at 669.

150. *Id.* at 675–76 (Blackmun, J., dissenting).

151. *Id.* at 677–78 (Souter, J., dissenting).

152. *See id.* at 670 (majority opinion) (“[E]nforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.”).

153. *Zurcher v. Stanford Daily*, 436 U.S. 547, 552–53 (1978).

154. *Id.* at 567.

155. 484 U.S. 260 (1988).

156. *Id.* at 262, 266.

purposes.¹⁵⁷ In *Herbert v. Lando*,¹⁵⁸ he authored the opinion rejecting a television producer's First Amendment claim to an editorial privilege that would have barred pretrial discovery questions related to actual malice, leaving members of the press vulnerable to costly defense and sweeping inquiries.¹⁵⁹

While these more explicit examples of Justice White's anti-press jurisprudence have not escaped notice, and his reputation as a press-freedom skeptic is widely noted,¹⁶⁰ our empirical findings indicate that his disapproval of the press—and cynicism for its protected role—extended beyond these high-profile, doctrinally significant examples. Justice White's role as a counter-voice in the otherwise press-friendly Glory Days was not confined to press cases; rather, it permeated his wider tenure on the Court.¹⁶¹ Significantly, although several of his press-specific holdings might be characterized as merely declining to extend additional protections to the press,¹⁶² the total coding of his references reveals the heavy presence of negative characterizations of the press. When combined with his exceptional frequency of press mentions, this negativity makes him the clear historical standout for press unfriendliness.

D. *Current Justices' Attitudes About the Press*

We also considered the press references of Justices of the modern Court, as it existed at the close of our study in July of 2020.¹⁶³ It is difficult, however,

157. *Id.* at 271.

158. 441 U.S. 153 (1979).

159. *Id.* at 155, 157, 172 (“Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation. Permitting plaintiffs such as Herbert to prove their cases by direct as well as indirect evidence is consistent with the balance struck by our prior decisions. If such proof results in liability for damages which in turn discourages the publication of erroneous information known to be false or probably false, this is no more than what our cases contemplate and does not abridge either freedom of speech or of the press.”).

160. See, e.g., Michael J. Armstrong, *A Barometer of Freedom of the Press: The Opinions of Mr. Justice White*, 8 PEPP. L. REV. 157, 179–85 (1980) (“White has chosen to view common law principles as restricting the first amendment to a protection of political criticism and from prior restraint.”); Bernard W. Bell, *The Populism of Justice Byron R. White: Media Cases and Beyond*, 74 U. COLO. L. REV. 1425, 1463–65 (2003) (exploring Justice White's critiques of limiting campaign finance regulations and opposing the conflation of campaign funding to speech).

161. Armstrong, *supra* note 160, at 162–66 (explaining “the White style” in the context of cruel and unusual punishment and criminal investigation cases, among others).

162. See Markus E. Apelis, *Fit To Print? Consequences of Implementing a Federal Reporter's Privilege*, 58 CASE W. RESV. L. REV. 1369, 1373–74 (2008) (recapitulating Justice White's analysis in *Branzburg v. Hayes* and his conclusion that the “truth-finding function of the grand jury” outweighs reporter privilege).

163. The data collection in this study concluded in July 2020, with the full set of cases from the Court's October 2019 Term. Thus, it does not include any analysis of opinions authored by Justice Barrett, who was confirmed to the Court on October 27, 2020. See *Justices 1789 to Present*, *supra* note 102. In the interest of completeness, this section includes analysis of all nine Justices who sat on the bench in the last studied Term, including Justice Ginsburg, who died on September 18, 2020. *Biography*

to perform the same analyses on these Justices that we conducted on the wider historical set for two reasons: first, as discussed above, the frequency of press references has precipitously plummeted in recent years; and second, two of the nine Justices in this group joined the Court so recently that they have had relatively few opportunities for press characterization.

Thus, most of the modern Justices are so rarely speaking about the press that there are simply not enough data points for us to compare their positivity, negativity, and neutrality toward the press to any statistically significant degree. Indeed, four of the nine Justices who participated in the 2019 Term do not have the more-than-fifty references needed to be included in our Press Support scoring system comparing them to the other Justices throughout history.¹⁶⁴ Among those who do make that cut, only Justice Thomas, the longest serving of the current Justices,¹⁶⁵ has authored more than the requisite 150 mentions needed to fall above the median frequency line shown in Figure 16.¹⁶⁶ All of the other sitting Justices have eighty-five or fewer total references to the press in their entire body of published writing on the Court. Three of these—Justice Kagan and two of the newcomers, Justices Gorsuch and Kavanaugh—have spoken of the press or the press function ten or fewer times.¹⁶⁷

Nevertheless, an investigation of the frequencies, frames, and tones of press characterizations for each of the modern Justices offers some insights into the ways that the trends described elsewhere in this Article may be playing out on the present-day Court. It also helps reveal the areas in which particular Justices may shape the judicial characterizations of the press in the years to come.

On the question of frequency, the data reveal that the two most frequent characterizers of the press on the current Court are the two Justices at its ideological extremes, when judged by the widely used Martin-Quinn ideology scores.¹⁶⁸ Justice Sotomayor is the current Court's most liberal member, with a

of Associate Justice Ruth Bader Ginsburg, SUP. CT. U.S., <https://www.supremecourt.gov/about/biographyGinsburg.aspx> [<https://perma.cc/B7TS-BUL8>].

164. Chief Justice Roberts and Justices Kagan, Gorsuch, and Kavanaugh all have fewer than fifty references.

165. See *Justices 1789 to Present*, *supra* note 102.

166. Justice Thomas has a total of 172 mentions of the press.

167. Justice Kagan has spoken of the press ten times, while Justice Gorsuch has four mentions and Justice Kavanaugh has two.

168. See Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145–46 (2002). The “Martin-Quinn” score is a model that places U.S. Supreme Court Justices on a liberal-conservative ideological spectrum. *Id.* A Justice who falls on the more conservative side of the ideological continuum receives a higher Martin-Quinn score, while more liberal Justices are given lower scores. *Id.* For updated information, see *Measures*, MARTIN-QUINN SCORES, <https://mqscores.lsa.umich.edu> [<https://perma.cc/H5RC-6UB7> (staff-uploaded archive)] [hereinafter MARTIN-QUINN SCORES]. For a discussion describing the Martin-Quinn method in a “non-technical fashion that is likely to be understood by a legal audience,” see Ward Farnsworth, *The Use and Limits of Martin-Quinn Scores To Assess Supreme*

2019 Martin-Quinn score of negative 3.48. When the Justices are compared by their average references per year served on the Court, she is also the sitting Justice who most frequently mentions the press. In her eleven years on the Court,¹⁶⁹ she has referenced the press or a press function sixty-eight times for an average of 6.09 references per year. In second place is the Court's current most conservative member, Justice Thomas, with a 2019 Martin-Quinn score of 3.69. He has discussed the press or a press function 172 times in his nearly twenty-nine years on the Court¹⁷⁰ for an average of 5.93 references per year. By contrast, Justice Brennan, the most frequent press mentioner in our full dataset, characterized the press more than nineteen times per year—over three times more often than the most active commenters on the current Court. The least frequent commenter of the press on the current Court is Justice Kagan, with just six total mentions in a decade as a Justice,¹⁷¹ which translates to an average of 0.59 mentions per year.

Although it is difficult to make judgments based on their comparatively short tenures on the Court, two of the most recent appointees to the Court—Justices Gorsuch and Kavanaugh—do not seem inclined to go out of their way to discuss either the press or the press function. In his first two years on the Court,¹⁷² Justice Kavanaugh authored only two references to the press, both in the Regulation Frame, one positive and one negative. Justice Gorsuch, who had been on the Court three and a half years by the close of our study,¹⁷³ only referred to the press four times, all of which were neutral Communication

Court Justices, with Special Attention to the Problem of Ideological Drift, 101 NW. U. L. REV. 1891, 1891–96 (2007). For context, the Justice with the lowest (most liberal) recorded Martin-Quinn score is Justice Douglas. See MARTIN-QUINN SCORES, *supra*. During the latter part of Justice Douglas' tenure on the Court, he had Martin-Quinn scores of less than negative 7. *Id.* The highest (most conservative) score is then Associate Justice Rehnquist. See *id.* From 1975 to 1979, Justice Rehnquist had a Martin-Quinn score of about 4.5. *Id.* A Justice who scores near zero (moderate) on the scale is Justice Kennedy. *Id.* He had a Martin-Quinn score of negative 0.04 during the 2016 Term. *Id.*

169. At the close of our study, Justice Sotomayor had served from August 8, 2009, until July 31, 2020. *Justices 1789 to Present*, *supra* note 102.

170. At the close of our study, Justice Thomas had served from October 23, 1991, until July 31, 2020. *Id.*

171. At the close of our study, Justice Kagan had served from August 7, 2010, until July 31, 2020. *Id.*

172. At the close of our study, Justice Kavanaugh had served from October 6, 2018, until July 31, 2020. *Id.*

173. At the close of our study, Justice Gorsuch had served from April 10, 2017, until July 31, 2020. *Id.* While this Article was going to print, Justice Gorsuch was drawing attention for a dissent from denial of certiorari in *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (mem.), that spoke at length about some aspects of the press function. See *id.* at 2425–30 (Gorsuch, J., dissenting from the denial of certiorari); see also Mark Walsh, *Will the Supreme Court Reconsider a Landmark Defamation Case?*, ABA J. (July 22, 2021, 11:19 AM), <https://www.abajournal.com/web/article/will-the-supreme-court-reconsider-a-landmark-defamation-case> [<https://perma.cc/T5H2-LE85>] (“The dissenting opinion was buried near the bottom of a busy orders list issued at the end of the U.S. Supreme Court term on July 2, but it has stirred tremors of concern among advocates for press freedom.”). This opinion was not included in the data set, which concluded in July 2020.

Frame depictions of the press as an information delivery mechanism. Thus, although the data are exceptionally limited, neither Justice has actively contributed to the body of press characterizations.

The other Justices, however, have been on the Court long enough to produce some observable data about the kinds of characterizations they make of the press. Among the most interesting is Justice Thomas, whose strong pace of press characterizations carries distinctive content themes that make a unique mark on the Court's overall set of press mentions. He is a major contributor to the overall number of references within the Right Frame, which captures references to "the freedom of the press." He has made thirty such references over the course of his time on the Court—more than seven times as many as his contemporaries.¹⁷⁴ He most often references the constitutional right neutrally, simply by naming the freedom without praising the right as special or important,¹⁷⁵ which could be attributed to his tendency to quote the First Amendment's text fully and directly.

Even more idiosyncratic is Justice Thomas's invocation of the History Frame, which characterizes the press by reference to the views of the Founders. He is the only member of the current Court to invoke the frame at any time; none of his colleagues have referenced the historical role of the press even once in their entire tenures on the Court. With only 163 total references, the frame has been rarely invoked over the course of the full 235-year dataset. Yet Justice Thomas generated twenty-two of those references. Even more astounding, although the History Frame has the highest positivity ratio compared to any other frame (only 8% total negativity), 18% of Justice Thomas's use of the frame have been negative.¹⁷⁶ Indeed, Justice Thomas personally accounts for 31% of the entire dataset's tonally negative depictions of the press's position in the founding era. He is currently tied with our least press-friendly Justice of all time, Justice White, for the most references invoking the views of the Founders against, rather than in favor of, the press.

In addition to this uncommon negativity in the predominantly positive History Frame, Justice Thomas has displayed powerful negativity in his use of the Individuals Frame—where 89% of his references suggest the press is harmful to individuals—and in the Trustworthiness Frame—where 100% of his references suggest the press lacks credibility and ethics. Yet despite all of this, his *overall* tone ratio is more positive than any other member of the Court. Twenty-nine percent of his total mentions were positive; 52% were neutral; and 19% were negative. Justice Thomas's positive use of the History Frame, coupled

174. Chief Justice Roberts and Justices Ginsburg and Alito have each used the Right Frame four times. Justice Breyer has used it three times and Justice Kagan has used it once. Justices Sotomayor, Gorsuch, and Kavanaugh have never used it.

175. Twenty-six of his thirty references were neutral.

176. Justice Thomas's negativity rate within the frame is 19.05%.

with his heavily positive use of the Regulation Frame, account for much of his positivity.¹⁷⁷

Despite being on the Court nearly as long as Justice Thomas, the late Justice Ginsburg took far fewer opportunities to reference the press or the press function. She made only seventy-one total characterizations of the press during her twenty-seven years as a Justice¹⁷⁸ for an average of 2.63 per year. Forty-two percent of these were neutral references within the Communication Frame, which means she simply factually conveyed, without more, that the press functioned as a communicator.¹⁷⁹ Her overall positivity rate is just shy of 13%, contributing to a Press Support Score of sixty, which is slightly below the median. While Justice Ginsburg's exceptionally small number of references within the Democracy and Regulation Frames were heavily positive,¹⁸⁰ they were outweighed by many more references within the Judicial System Frame, where she had a much more mixed characterization of the press. Ten of her twenty-two total mentions of the press's impact on the operation of courts and the justice system cast the press in a negative light; the remaining twelve were neutral, such that she never once stated or suggested that the press might have a positive role in coverage of trials. In nearly three decades on the bench, she referenced the "freedom of the press" and related concepts only four times, three of which were tonally neutral, and only once suggested that the right was special or valuable.

Justice Breyer's record on press characterizations closely parallels Justice Ginsburg's in a number of ways. His overall frequency of press mentions—eighty-four total mentions in twenty-six years,¹⁸¹ for an average of 3.23 per year—is slightly higher, as is his overall positivity ratio (20%). But 39% of his total references over the years have been neutrally toned Communication Frame mentions.¹⁸² Justice Breyer has occasionally suggested that the press should be free from regulation¹⁸³ and, more rarely, that it serves democracy.¹⁸⁴

177. Sixty-eight percent of his twenty-two History Frame references were positive. Sixty-one percent of his thirty-eight Regulation Frame references were positive.

178. At the close of our study, Justice Ginsburg had served from August 10, 1993, until July 31, 2020. *Justices 1789 to Present*, *supra* note 102.

179. Communication Frame references accounted for thirty of Justice Ginsburg's seventy-one frames. One hundred percent of these were coded as tonally neutral.

180. Four of five Regulation Frame references were positive. Two of three Democracy Frame references were positive.

181. At the close of our study, Justice Breyer had served from August 3, 1994, until July 31, 2020. *Justices 1789 to Present*, *supra* note 102.

182. Thirty-three of his eighty-four references were neutral Communication Frame references.

183. Justice Breyer had twenty-five references within the Regulation Frame, eleven of which were positive.

184. Justice Breyer had four references within the Democracy Frame, three of which were positive.

His tone on the trustworthiness of the press has been mixed,¹⁸⁵ and his references to the impact of the press on the judicial system have been nearly entirely neutral.¹⁸⁶ Despite serving on the Court for more than a quarter century, he has invoked the principle of “freedom of the press” only three times and has never done so in an overtly positive manner.

Chief Justice Roberts and Justice Alito, who joined the Court within four months of each other,¹⁸⁷ have mentioned the press with similar frequency. Chief Justice Roberts has characterized the press forty-seven times, falling just short of the number needed to be included in the pool of Justices who were assigned a Press Support Score. At an average of 3.1 references per year, he is a slightly less frequent commenter on the press than Justice Alito, who averages 3.68 per year and has characterized the press a total of fifty-four times. Both have been tonally neutral in the majority of their mentions.¹⁸⁸

The two differ, however, on the negative-positive mix, with Justice Alito opting for negativity more than twice as often as Chief Justice Roberts,¹⁸⁹ who characterizes the press with positivity 28% of the time to Justice Alito’s 19%. Chief Justice Roberts has strong positivity mentions in the Regulation and Democracy Frames,¹⁹⁰ which Justice Alito’s record mirrors.¹⁹¹ But Justice Alito diverges with heavy negativity in the Trustworthiness Frame—where he uniformly characterizes the press as inaccurate, unethical, and untrustworthy—and in the Judicial System Frame—where four of his five mentions suggested the press does harm. Justice Alito’s tendency to speak critically of those facets of the press place him below the mean in his Press Support Score.

Justice Sotomayor, as discussed above, has commented on the press more often than her fellow Justices, but her characterizations have often been unfavorable. With only 12% of her press references tonally positive and 32% of them negative, her Press Support score is well below the median. Her negativity totals are heavily influenced by negative characterizations of the press’s role in

185. Justice Breyer had three references within the Trustworthiness Frame—one positive, one neutral, and one negative.

186. Justice Breyer had eleven references within the Judicial System Frame, ten of which were neutral.

187. Chief Justice Roberts was confirmed on September 29, 2005, and Justice Alito was confirmed on January 31, 2006. *Justices 1789 to Present*, *supra* note 102.

188. Fifty-six percent of Justice Alito’s full set of press references were neutral. Sixty-two percent of Chief Justice Roberts’s were neutral.

189. Twenty-six percent of Justice Alito’s references were negative. Eleven percent of Chief Justice Roberts’s were negative.

190. Three of Chief Justice Roberts’s four uses of the Democracy Frame were positive. Nine of his thirteen uses of the Regulation Frame were positive, with the remaining four split with three negative and one neutral.

191. Three of Justice Alito’s four uses of the Democracy Frame were positive; the fourth was negative. All six of his uses of the Regulation Frame were positive.

the judicial system¹⁹² and her use of the negative tone within the Trustworthiness Frame, where seven of her eight total mentions suggested that the press lacks trustworthiness, accuracy, and ethics.

Perhaps the most surprising results on the modern Court involve Justice Kagan. In her previous professional life as a legal academic, Justice Kagan “worked on free-speech and free-press issues more than any recent high court nominee,”¹⁹³ but since joining the bench, she has almost never spoken of the press or freedom of the press. In her decade on the Court,¹⁹⁴ she has made only six total references to the press, two of which were mere Communication Frame references to the press publishing or otherwise making a piece of information widely known, and one of which was a negative reference to the press’s harm to individuals. She once neutrally noted the existence of a constitutional right of press freedom but has never characterized the right as valuable or important. Justice Kagan’s frequency is the lowest among her peers on the current Court, and even among these rare characterizations, her negativity outpaces her positivity.¹⁹⁵ Nothing about her record on the Court indicates a propensity to characterize the press at all, let alone to do so favorably.

Thus, although the dataset is too small to permit meaningful statistical comparisons of the Justices on the modern Court—either with the wider set of Justices throughout history or with each other—a qualitative examination of their characterizations of the press suggests that no sitting Justice is particularly interested in advancing positivity about the press. A number of them are actively undercutting some frames once dominated by press praise or avoiding all but the most neutral mentions of the press required by the facts of the cases before them. Ultimately, the fact that there are few references to the press from any Justice currently on the bench suggests that the Court has all but given up on the once-common endeavor of shaping the discussion of the press and specifying the value of press functions in a democracy.

CONCLUSION

The vilification of the press by the political branches—a focus of significant concern in recent years—is matched by a marked and previously undocumented uptick in negative depictions of the press by the U.S. Supreme Court. Our large-scale empirical study shows an especially stark abandonment

192. Justice Sotomayor characterized the press within the Judicial System Frame twenty-six times, thirteen of which were negative and only one of which was positive.

193. Repts. Comm. for Freedom of the Press, *Elena Kagan*, NEWS MEDIA & L., Spring 2010, at 21, 21.

194. At the close of our study, Justice Kagan had served from August 7, 2010, until July 31, 2020. See *Justices 1789 to Present*, *supra* note 102.

195. Two of Justice Kagan’s six references, or 33%, were negative. One reference, 17%, was positive. Fifty percent of her mentions (i.e., three) were tonally neutral.

of positive judicial depictions of the press in the last fifty years. A generation ago, the Court actively taught the public that the press was a check on government, a trustworthy source of accurate coverage, an entity to be specially protected from regulation, and an institution with specific constitutional freedoms. Today, in contrast, it almost never speaks of the press, press freedom, or press functions, and when it does, it is in an overwhelmingly less positive manner.

All told, in a study of eight frames, three tonal variations, 114 Justices, and more than 8,000 characterizations of the press over the course of 235 years, there is not a single indicator that bodes well for the press's position before the current U.S. Supreme Court. The Justices today are less likely than their predecessors a half century ago to recognize the work of the press, the role it fills in our society, or its constitutional status. When they do discuss the press, moreover, they are more likely to do so negatively—such as focusing on perceived ethical lapses or harms inflicted by the press—than positively—like noting the press's historical importance or value to democracy.

Given that much of the foundation for the press's special or protected societal role has turned on the tenor of the Court's rhetoric, our findings make clear that any assumption that the Court is poised to be the branch to defend the press against disparagement is misplaced. Instead, the trend of sharply negative tones suggests that the judicial road ahead for the American press will be bumpy. When members of the press turn to the Court in their legal battles, they will no longer find an institution that consistently values their role in our democracy, but rather one that views their place with skepticism or ignores it altogether.

