2-2021

The U.S. Supreme Court’s Characterizations of the Press: An Empirical Study

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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 legislators’ and the President’s 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 paper 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 for 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 crucial 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. The study also reveals a substantial correlation between ideology and the Justices’ attitudes toward the press. It likewise illuminates the press-characterizing behaviors of the most and least press-friendly Justices of all time and of the currently sitting Justices, providing insights into patterns that might be expected in the years to come.
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I. 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. Many scholars and commentators have

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responded by examining the impact of the President’s and legislators’ depictions of the news media and by emphasizing the potential dangers that arise when those characterizations become increasingly negative. Throughout this discussion, however, there has been little scrutiny of the views of the press emanating from another powerful governmental institution—the United States Supreme Court. While there is increased awareness of the perils of the political branches’ negative attitudes toward the press, the judiciary is often still assumed to be the same reliable protector of press rights as it was half a century ago. The validity of this assumption, however, is entirely unclear, in large part because there has been almost no substantive investigation of the Court’s views on the role of journalism in our society.

Determining the Court’s view of the press can be a surprisingly difficult task. This is because the Court has recognized virtually all of the press’s substantive protections under the umbrella of general free speech protections for all speakers, rather than in press-specific rulings. Almost everything we know about the Justices’ views on the value and constitutional importance of the press, therefore, has been communicated instead through press-praising dicta—frequent declarations by the Justices about the unique roles of the press in our democracy. In other words, many of the press’s claims of constitutional importance hinge not on


substantive law, but on the Justices’ rhetoric about the significance of the press. Understanding the Justices’ characterizations of the press—as well as any changes in the tone of those characterizations over time—is therefore of heightened importance. If the Justices are no longer depicting 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 answer to these questions sheds 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 landscape and the increased need for investigative and accountability journalism push issues of press freedom squarely into the spotlight, a closer look at the realities of the Court’s characterizations of the 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. 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.


5 Andreas Adriano, Investigative Journalists Play a Key Role in Bringing Corruption to Light, Investigative Reporting Workshop (September 12, 2019), http://investigativereportingworkshop.org/news/investigative-journalists-play-a-key-role-in-bringing-corruption-to-light/ (interviewing Charles Lewis, an investigative journalist who says “[w]e need more discussion, reporting, understanding, and accountability by all these entities”).
The results of our study reveal troubling trends with widespread implications for any discussion of contemporary press freedom. Our data show that the Court’s view of the press has been starkly deteriorating in both quantity and quality across a variety of measures. At this crucial moment, when we have seen the risks of a real-world rise in executive and legislative branch attacks on the press, 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 is simply referencing the press far less frequently than it did a half century ago. This includes a notable decline in even 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 relative percentage of their positive references about the press has decreased notably over the last several decades. In other words, not only is the Court talking about the press much less often; when it does talk about the press, it is doing so in more negative ways.

Our data likewise provide valuable insights into the Court’s more specific depictions of the press and show 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 and a devalued characterization of the press. The Court’s usage 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 are even more likely than before to carry a negative tone.

Combining our data with the information available through the Supreme Court Database leads to additional discoveries. By analyzing
both the frequency and tone of an individual Justice’s press references, we assign each Justice a “Press Support Score” and identify the most and least press-friendly Justices throughout history. We also map our data onto the Justices’ Martin-Quinn ideology scores, finding a substantial correlation between the Justices’ political ideologies and their positive or negative attitudes toward the press.

In Part II 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 explain why a large-scale empirical investigation of the Court’s characterizations of the press was needed. In Part III, we outline the methodology of our study. Our findings follow, starting in Part IV with an examination of the decline in both the frequency and tone of the Court’s press references. In Part V, we consider the impact of political ideology on the Justices’ discussions of the press. In Part VI, we compare individual Justices’ views of the press, including 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 much less consideration to the press and its freedom than it did a generation ago, and increasingly does not think well of it.

II. The Limited Research on the Court’s View of the Press

Fully capturing the U.S. Supreme Court’s view of the press can be 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,” 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. In fact, the Court today recognizes virtually no independent right

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or protection as arising solely from the Press Clause.\footnote{See C. Edwin Baker, The Independent Significance of the Press Clause Under Existing Law, 35 Hofstra L. Rev. 955, 956 (2007) (“The 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.”).} 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 that are most commonly used by the press, or the legal analysis centered on the unique functions of the press.\footnote{See Sonja R. West, The Stealth Press Clause, 48 Ga. L. Rev. 729 (2014) (discussing cases where the holdings applied broadly, but the Court was focused on the press and press issues.).} 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 expression (not just freedom of the press).

This does not mean, however, that the Justices have not expressed views about the importance of the free press. To the contrary, they have on many occasions shared their thoughts about the value of the press and of press freedom.\footnote{See RonNell Andersen Jones, What the Supreme Court Thinks of the Press and Why it Matters, 66 Ala. L. Rev. 253 (2014).} But rather than recognizing explicit rights and protections for the press, the Justices have instead turned to nonbinding dicta as the primary means of expressing their views.\footnote{See RonNell Andersen Jones, The Dangers of Press Clause Dicta, 48 Ga. L. Rev. 705 (2014).} These insights into the Court’s attitudes toward the press have appeared in a variety of forms. Sometimes the Justices have engaged in long and specific expositions about the press,\footnote{See, e.g., New York 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 for serving the purpose that the Founders hoped and trusted they would do.”).} while on other occasions the references were shorter and more implicit.\footnote{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.”).} 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.\textsuperscript{13}

Thus, the approach the Court has taken when it comes to press freedom has been different than its typical mode of protecting constitutional rights. It has lumped members of the press together with other types of speakers, has cast aside unique press freedom issues, and has tended to rely heavily on indirect praise rather than explicit protection. This makes an investigation of the Court’s press depictions particularly important as a substantive matter.

Some might argue, however, that these are merely distinctions without difference, 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, such as crucial protections against threats like prior restraints, content-based regulations, and overly broad or vague regulations of speech. 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. Members of the press are different from other types of speakers in both the protections they need to do their work effectively\textsuperscript{14} and the threats they face from potential government interference.\textsuperscript{15} 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.\textsuperscript{16} 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. These recognitions, moreover, underlie key rights that are held by both the press and the public;\textsuperscript{17} positive characterizations of the press and the press

\textsuperscript{13} 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).

\textsuperscript{14} See Sonja R. West, Press Exceptionalism, 127 Harv. L. Rev. 2434, 2446 (noting the press’s needs in the context of newsgathering).

\textsuperscript{15} See id. at 2446-2447 (noting 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, 543-547 (2019) (examining the unique risks of governmental targeting of the press as an institutional speaker).


\textsuperscript{17} See RonNell Andersen Jones, Litigation, Legislation, and Democracy in a Post-Newspaper America, 68 Wash. & Lee L. Rev. 557, 571 (2011) (exploring how a “sizable amount of vital constitutional doctrine in this country developed as a result of constitutional cases
function have often been central to the Court’s expansive conception of these broadly shared rights.\textsuperscript{18}

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. Therefore, many of the press’s claims of unique constitutional standing and a protected societial 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.\textsuperscript{19}

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 typically has involved investigation into the smaller collection of cases where either a news organization was a party or where the Court reached holdings that are widely relied upon by members of the news media. The general consensus among scholars following this approach is that the Court’s 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.”\textsuperscript{20} During these decades, the Court handed down rulings in a number of important and high-profile 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”)
\textsuperscript{18}See RonNell Andersen Jones, \textit{What the Supreme Court Thinks of the Press and Why It Matters}, 66 ALA. L. REV. 253, 270-71 (2014) (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.”).
\textsuperscript{20}See RonNell Andersen Jones, \textit{What the Supreme Court Thinks of the Press and Why It Matters}, 66 ALA. L. REV. 253 (2014) (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.”); Erin C. Carroll, \textit{Promoting Journalism As Method}, 12 DREXEL L. REV. 691, 696 (2020); \textit{Free Speech Cases May Turn into Blockbusters}, ABA J., Oct., 2000, at 30 (quoting University of Minnesota 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.’”).
cases that greatly favored the news media (even if the holdings themselves applied more broadly). In *New York Times v. Sullivan*\(^{21}\) and its progeny, for example, the Court expanded protection for speakers against defamation lawsuits. The Court also decided a number of key cases opening up access to judicial proceedings, like *Richmond Newspapers v. Virginia*\(^{23}\) and the *Press-Enterprise* cases.\(^{24}\) It was also during this period that the Court secured the protection of speakers against prior restraints by the government, such as in *New York Times Co. v. United States* (the “Pentagon Papers” case).\(^{25}\) In a series of additional rulings, the Court protected the press from liability when it published truthful information on matters of public concern\(^{26}\) and protected the press’s freedom of editorial decision-making.\(^{27}\)

But media law scholars also 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 as well as the way it discusses the role of the press.\(^{28}\) In the 2010 case of *Citizens United v. Federal Election Commission*, for example, the Court seemingly went out of its way to describe the press as an institution on the “decline” that is comprised of “sound bites, talking points, and scripted messages that dominate the 24-hour news cycle.”\(^{29}\)

The task of tracking the Court’s attitudes toward the press over time thus faces several obstacles.\(^{30}\) Because of the Court’s practice of discussing

\(^{21}\) 376 U.S. 254 (1964).


\(^{23}\) 488 U.S. 555 (1980).


\(^{28}\) See, e.g., *RonNell Andersen Jones, What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253 (2014); *Lyrissa Lidsky, Not a Free Press Court?* 2012 BYU L. REV. 1819 (2012) (observing that the Roberts Court “appears to see the ‘Fourth Estate’ as little more than a self-serving slogan bandied about by media corporations”).


\(^{30}\) Another enduring difficulty in examining the Court’s view of the press is the problem of determining who (or what) is (or isn’t) the “press” for legal purposes. Scholars have debated what definition of the “press” the Court has or should embrace. Should we think of the “press” of the First Amendment as a technology, an institution, or as a profession? *See Eugene Volokh, Freedom for the Press as an Industry, or for the Press as a*
issues of press freedom in indirect ways, scholars are unable to accurately follow the ebb and flow of the Justices’ views simply by counting the news media’s track record of wins and losses before the Court. 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. Past investigations into the Court’s attitudes about the press, therefore, have been incomplete. While some scholars might have read the “jurisprudential tea leaves” and spotted broad trends in the Court’s characterizations of the press, these doctrinal examinations were inherently limited in scope.

Our study, therefore, set 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 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.

III. METHODOLOGY

We performed 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 the completion of October Term 2019 in July 2020. The studied text set includes all majority, dissenting, and


31 Cf. Lee Epstein, et al., How Business Fares in the Supreme Court, 97 MINN. L. REV. 1431 (2013) (analyzing how “pro-business” the Supreme Court has been over time by tracking whether the Justices ruled for or against a business litigant.)


33 The first such reference does not occur until 1821.
concurring opinions as well as all other published writings by individual Justices, 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 the performance of commonly understood press functions, or to the right of press freedom—no matter how they were referenced. 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 to learn 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 and have since fallen out of use, such as “newspaperman.” In more recent years, with a changing and sometimes more decentralized media ecosystem, it included terms capturing the performance of the newsgathering and reporting functions by entities other than traditional media outlets, such as references to a “citizen journalist.”

In all instances, we made these determinations by tracking the Justices’ own identifications of when they perceived that the press function was occurring. To capture a database with this scope of press-identifying language, we then conducted a broadly drawn Westlaw search for a total of nineteen linguistic terms. Opinions that contained only uses of these terms in a non-journalistic sense were removed from the set as false hits, and we downloaded the remaining text files, parsed using a


35 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 working as a “citizen journalist”).

36 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 newsman or pressman or (news /2 (gather! or magazine or outlet or organization or service or coverage or article or story or cycle or broadcast!)))”.

basic script written in R, to create packets for coders. Coders assessed whether each individual hit was a real hit and, if so, coded the paragraph.

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 connotation. So, for example, if a paragraph made reference to the press’s trustworthiness, reliability, professionalism, or ethics in any way, it would be coded as containing the Trustworthiness Frame. If the reference stated or suggested that the press does behave in a trustworthy manner, the tone would be coded as positive. If the reference indicated that the press behaves in an untrustworthy manner, the tone would be coded as negative. If the reference noted the existence of a debate over the trustworthiness of the press without taking a position, the tone would be coded as neutral.

Paragraphs were randomly shuffled for coder review of every hit, such that paragraphs from earlier and later periods in the chronological data set 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 time period. We did this to provide some context to the coders working in randomly sorted coding packets. Each packet included the paragraph containing the search hit and the paragraph above and below it, for context.

Coders worked from a detailed codebook (on file with authors and available upon request), received 25 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.

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

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. The aims were to explore how the Justices of the Court have depicted the press overall and to portray the full scope of their depictions over time. Thus, the dataset includes instances in which the Court is primarily addressing some other matter—a criminal law or antitrust issue, for example—but takes a moment in passing to say something about the press or to situate its role in society for the reader of the judicial opinion. See Figure 1.

We discovered that these press-characterizing “asides” happen with some frequency and that they often convey some core assumptions about the press. Sometimes they are positive—for example, when the Court off-handedly praises an act of newsgathering as socially valuable 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. Sometimes they are negative, with the Court, for example, describing the tendency of news coverage to be sensational or privacy invading. Sometimes they are neutral, when the Court, for example, merely notes the existence of the press function of distributing information to the public by stating in the facts of an opinion that a newspaper story existed. This study codes both doctrinal and nondoctrinal depictions of the press, and in so doing, captures the full picture of the whole universe of press characterizations over the course of the Supreme Court’s entire history.

41 See The Supreme Court Database, http://scdb.wustl.edu/ (noting that the database “contains over two hundred pieces of information about each case decided by the Court between the 1791 and 2019 terms,” including “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”).

42 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 area as defined by the detailed Supreme Court Database Codebook, were added manually to the data set. See Supreme Court Database Online Codebook, http://scdb.wustl.edu/documentation.php?i=1.
The data summarized below includes 5,250 coder-reviewed paragraphs from 1,296 unique cases, containing 8,792 total characterizations\textsuperscript{43} of the press. See Figure 2.

IV. 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 once did. When the Court does talk about the press, moreover, it is doing 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 is acknowledging 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 role.

Figures 3 and *4* show 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 has decreased during this same time period,\textsuperscript{44} which may account for some of this decline. However, because the unit of analysis for this study is the paragraph, the impact of fewer cases per term is significantly tempered by stark increases in overall opinion length and a clear uptick in the practice of individual Justices of the Court writing more separate opinions per case.\textsuperscript{45} Frequency comparisons might also be impacted by the fact that the

\textsuperscript{43} 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.


\textsuperscript{45} 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#r=iText=The%20lengths%20of%20decisions%20including%20at%20least%20one%20concurring%20opinion%20in%2077%20percent%20of%20unanimous%20rulings%20and%20that%20between%202007%20and%202019%20there%20was%20at%20least%20one%20concurring%20opinion%20in%2077%20percent%20of%20unanimous%20rulings%20and%20that,\textsuperscript{40} Brown v. Board of Education in 1954 had 4,000 words, Citizens United v. Federal Election Commission in 2010 had 48,000, “the length of the Great Gatsby”.

Electronic copy available at: https://ssrn.com/abstract=3787709
Court unquestionably agreed to hear many more cases in the 1960s and 70s that were specifically focused on the press or press rights.\textsuperscript{46} Although all these changes do make contrasts between the low-frequency current Court and the high-frequency era of the Court a half-century ago more complicated, they are all trends that illustrate rather than undermine the theme identified here: that the Court has largely lost interest in speaking about the press.

This trend holds true for every studied frame. So, for example, as seen in Figure 8, 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 after that, diminishing to close to zero in recent years.\textsuperscript{47} 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. See Figure 9 (Democracy Frame); Figure 10 (Judicial System Frame); Figure 11 (Individuals Frame); Figure 12 (Trustworthiness Frame); Figure 13 (History Frame). Indeed, it appears that the U.S. Supreme Court has in effect stopped making even the most casual of references to the press and its operation in society. The Communications Frame captured all textual references in which the Court merely acknowledged or implied that journalism is the means by which information is made widely known and bare mentions of the gathering, reporting, and editing of news. As shown in Figure 14, even these most basic of nods to the press function have ebbed in recent years.\textsuperscript{48} In other words, as a practical matter, the Court today 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. See Figure 15. 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-

\textsuperscript{46} This can be seen in several aspects of our data, including Figures 5 and 6, showing the number and frequency of press-characterizing paragraphs found within cases coded with the Supreme Court Database’s First Amendment category, and Figure 7, showing many more press-characterizing paragraphs per opinion in the 1970s, which might be expected of cases squarely dealing with press-related issues. (In 1975-79, there were cases with 45 or more press-characterizing paragraphs in a single opinion. Since 2015, no case has had more than 10).

\textsuperscript{47} At the Regulation Frame’s peak in 1973, there were 156 characterizations of it in a single term. The combined total references to the frame in the most recent five terms are just 24.

\textsuperscript{48} At its height, the Court was using this frame 60 times in a single term (1971)—twice as many times as it has invoked the frame in the most recent five terms combined.
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 and has declined so thoroughly that many recent terms make no reference to it at all.49 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 case50 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.51 That practice has ended, and the Court now eschews reference to the press component of the 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,”52 in which 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 the evolving mass communication technology or the strategic decisions made by the news media to avoid bringing cases to the Court because of limited finances53 or limited confidence in positive outcomes.54 The confluence of factors may prove complicated to unpack. But the

49 For further investigation of this data and its theoretical and practical ramifications, see RonNell Andersen Jones & Sonja R. West, The Disappearing Freedom of the Press, (forthcoming).


52 Martha Minow, Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech (2020).


54 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.
Court’s choices unquestionably matter. 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. Not only is the Court talking about the press much less often than it once did, when it does talk about the press, it is now more likely to do so in a negative, rather than a positive, manner.

In the last 50 years, the Court’s view of the news media has been deteriorating across a variety of measures. Overall tone data, depicted in Figures 16 and 17, shows 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 more than twice as likely to be characterized positively as a reference from today’s Court.55

This remarkable shift is sharply illustrated through a comparison of two 15-year periods: the first from the Court’s 1970 term to its 1984 term and the second from the 2005 term to the 2019 term. See Figure 18. During the 1970-1984 period, there were more positive than negative mentions in twelve of the fifteen years. As for the other three terms, one was split evenly between positives and negatives (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, where 29 percent of the 129 mentions were negative as compared to 18 percent of mentions that were positive (i.e., the majority of references were neutral). In ten of the fifteen terms, 30 percent or more of the mentions were positive. In three of the terms, positive mentions exceeded 40 percent and in one term, they neared half of all mentions.56 Meanwhile, negative mentions in that time period never once reached 30 percent of the total, and in several terms, the percentage of mentions that were negative was in the teens.57 Notably, this low negativity took place against the backdrop of a staggeringly large

55 The average proportion of positive references in the 1970-1984 terms was 33 percent. The average proportion of positive references in the 2005-2019 terms was 16 percent.
56 October Term 1972 had 47 percent positive mentions.
57 October Terms 1972 (19 percent negative mentions); 1976 (19 percent negative mentions); 1979 (11 percent negative mentions); 1983 (15 percent negative mentions).
number of total paragraphs referencing the press; the seven terms with the highest frequency of press mentions in all of history are within this timeframe.

Conversely, in the most recent 15-year period, the Court’s press-positivity rate has plummeted to an average of just 16 percent per term. In no term has it ever reached 30 percent of the total references, and in eight of the fifteen years, it has been 15 percent or lower. In three terms—2012, 2015, and 2017—no Justice of the Court 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 percent of references conveying negativity.

Our data tracking neutrality also reveals a noteworthy shift in tone. In the earlier of the two 15-year blocks, neutral references averaged 46 percent of the total. In three of the fifteen years, positive references equaled or outnumbered neutral references. In the most recent 15-year block, however, the average neutrality rate is close to two-thirds. Except for one outlier year, in which the positive and neutral numbers were identical, neutrality now always exceeds positivity, and often by large margins. The gravitational pull, therefore, seems to be appearing on two fronts—from positive to neutral and from neutral to negative.58

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 any positive characterization of the press only in the rarest of situations.

When tonal data is 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 true in at least three 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. So, for example, the Democracy Frame captures every instance in which the Court speaks of the press having an impact on government or another powerful entity or having an impact more generally on democracy, elections, or the functioning of representative government. When the Court chooses to use this frame, it

58 These trends are in line with our analysis of the effect of ideology over time, which we discuss further below. See, infra, Part V.B.
almost always does so positively—characterizing the press as serving as a "check" or "watchdog" that creates accountability and that 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 references to the press and its work being "central to a free society," aiding voters’ decision-making, or bringing to light matters of public concern. As seen in Figures 19 and 20, this positive tone predominates within the frame, while negative and neutral uses of it are much rarer. But the frequency data depicts how this thoroughly positive frame has fallen out of use. We see this frame building 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 the heroism of journalism—and then dropping 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 including a paragraph or sentence with this complementary characterization of the press as an accountability-enhancing watchdog is largely a thing of the past.

A similar trend is visible in the History Frame, which was coded any time a Justice of the Court mentioned the founders, the founding era, or the


60 Leathers v. Medlock, 499 U.S. 439, 440 (1991) (explaining that taxes should not hinder the press’ important role as “a watchdog of government activity”).


62 Mills v. Ala., 384 U.S. 214, 218–19 (1966) (explaining 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).

63 New York Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring) (“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”); Stephen F. Rohde, Presidential Power Free Press "We Consider This Case Against the Background of A Profound National Commitment to the Principle That Debate on Public Issues ... May Well Include Vehement, Caustic, and Sometimes Unpleasant, L.A. LAW., Oct. 2017, at 26, 30-31; 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 the declining public view of the press since Watergate).
original intent of the First Amendment as it pertains to the press. \textsuperscript{64} Although the overall number of total uses is relatively small, compared to some other frames, positive historical connotations—suggesting that, as an originalist matter, the founders valued, prioritized, or crafted constitutional provisions with an aim of protecting the press\textsuperscript{65}—overwhelmingly outnumber negative and neutral references. See Figures *21* and *22*. 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.\textsuperscript{66} Staggeringly, in the one recent term in which it does appear, our data show it flipping to total negativity of tone. 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 not use it.

Second, and conversely, frames that are predictors of the Court’s negativity toward the press now have more frequency, as a percentage of mentions, and even stronger intra-frame negativity. Most notably, the Individuals Frame encompasses references by the Court to the press’s impact on individual people’s privacy interests, reputational interests, or

\textsuperscript{64} For further discussion of this data, which contrasts with the increased use of originalism as a jurisprudential tool in other First Amendment contexts and in the wider body of constitutional law, see RonNell Andersen Jones and Sonja R. West, The Supreme Court, The Founders, and The Free Press (forthcoming).

\textsuperscript{65} New York Times Co. v. United States, 403 U.S. 713, 715-17 (1971) (Black, J., concurring) (“Madison and the other Framers of the First Amendment, able men that they were, wrote in language they earnestly believed could never be misunderstood: ‘Congress shall make no law * * * abridging the freedom * * * of the press * * *.’ Both the history and language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship, injunctions, or prior restraints. . . In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . Only a free and unrestrained press can effectively expose deception in government”); Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 151–55 (1973) (Douglas, J., concurring) (“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”); Mills v. Alabama, 384 U.S. 214, 219 (1966) (“Thus 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. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free”).

\textsuperscript{66} From 2008-2019 there were just seven such references—three in October Term 2009 and four in October Term 2018. From October Term 2004 to 2008, there were none at all.
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. See Figures 23 and 24. 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. 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 is tonally negative. Put another way, although the Roberts Court is a Court that is not talking about the press all that often, when it does so, it is saying that the press is harmful to people.

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 in a positive way and sometimes in a negative one. The Trustworthiness Frame and the Regulation Frame both demonstrate this phenomenon. As seen in Figure 25, 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 much 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. The more recent cases, from the Rehnquist and Roberts Courts, chart very little positivity in this frame, with the most recent studied years charting none at all. See also Figure 26. Indeed, there has not been a positive reference to the trustworthiness of the

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67 Ninety-two percent of the Individuals Frame references from 2010 to 2019 were negative; none were positive. While the Individuals Frame accounts for just 2.9 percent of references in the total data set, it accounts for seven percent of frequency in the 2015 to 2019 Terms. With a large percentage of the current Justices’ references falling into the neutral Communications Frame—simply noting the existence of the press as an entity that published material for the public—even small increases in the remaining substantive frames take on meaningful impact on the remaining spread of actual characterizations of the press.

68 The 2018, 2015, and 2010 Terms all had Individuals Frame references with only a negative tone. Between 2010 and 2019, the total tone spread was 92 percent negative and 8 percent neutral.

69 For more in-depth analysis of trends related to the Court’s characterization of the trustworthiness, accuracy, and ethics of the press, including comparisons between the Court’s views on these matters and those of the public at large, see RonNell Andersen Jones & Sonja R. West, The Supreme Court and Public Perceptions of Press Trustworthiness (forthcoming).
press from any Justice since 2009. Thus, when the Court is taking the opportunity to opine on the subject, the opinion it is projecting is now more often that the press lacks credibility and is unethical, dishonest, and inaccurate.

Similarly, but to a lesser extent, the Regulation Frame also 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. Although positive tones have traditionally outpaced negatives, this frame has always been somewhat tonally mixed; the Court, even in its most positive historical years, has recognized a substantial number of situations in which the press could or should be regulated. As depicted in Figures 27 and 28, there is also a slight increase in negativity within this frame over time.

All told, 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 current Court is significantly less positive than the Court a generation ago. The data suggest the press is unlikely to find a receptive audience at the U.S. Supreme Court anytime soon.

V. Ideology and Characterization of the Press

Mapping our data onto the information available in the Supreme Court Database provides further insights by allowing us to examine the relationship between the Justices’ political ideologies and their attitudes toward the press. Our analysis reveals that judicial ideology is highly correlated with a Justice’s likelihood of adopting either a positive or negative tone when characterizing the press. It also suggests that the current

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70 A generation ago, the percentage of neutral references in this category was also larger. It thus appears that the Court is shifting negatively, with references that would once have been made in a neutral way now being made with a negative connotation.

71 Negativity of Regulation Frame references increased from 26 percent in 1960 to 33 percent in 2019.

72 As with the frequency data, the tone data situates itself 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 given to changing press characterizations within the elected branches, there is compelling reason 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. For our closer investigation of the interrelationship between declining public trust of the media and declining Court characterizations of the press’s trustworthiness, see RonNell Andersen Jones & Sonja R. West, *The Supreme Court and Public Perceptions of Press Trustworthiness* (forthcoming).
Court has entered an overall press-unfriendly period in which even those Justices whose ideology might have predicted press friendliness a generation ago will be less likely to be positive about the press today.

A. Strong Relationship Between Judicial Ideology and Tone

To assess the connection between judicial ideology and tone, we compared the probability of a positive, neutral or negative reference to the press with each Justice’s “Martin-Quinn” score, a widely used model that places U.S. Supreme Court Justices on a liberal-conservative ideological spectrum.73 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.

When applied to our data,74 we find statistically and substantively meaningful relationships between judicial ideology and all three tones. More specifically, we find that liberal Justices are more likely than conservative Justices to write positively about the press, while conservative Justices are more likely than their liberal colleagues to adopt a negative tone. The effect is heightened, moreover, the higher (or lower) we move along the ideological scale. At the far ends of the spectrum, we find that the most liberal Justices are also the most press friendly, whereas the most conservative Justices express the least favorable views toward the press. As for neutral depictions, the relationship is less dramatic but behaves generally like negative characterizations, with conservative Justices being somewhat more likely to adopt neutral tones than liberal Justices.

Figure *29* shows the relationship between the likelihood of depiction for all three tones (y-axis) and the opinion writer’s Martin-Quinn score (x-axis). The most liberal Justices appear on the far left of the scale and the most conservative appear on the far right. Starting with the most


74 These estimates come from a series of logistic regression models that we estimated from our underlying treatment data. For example, to generate the positive predicted probabilities we regressed whether a reference was positive (1 = yes, 0 = no) on a Justice’s Martin-Quinn score and the squared value of a Justice’s Martin-Quinn score. We include the square to allow for the possibility of a non-linear effect (e.g., the possibility that positive treatment happens for both very liberal and very conservative Justices).
liberal Justices, we see that they are much more likely to communicate a positive sentiment (i.e., the square points) about the news media than a negative one (i.e., the triangle points). These Justices, in fact, are more than five times as likely to make positive references to the press, which they do with a 52 percent likelihood, than negative ones, which occurs only 11 percent of the time. Consider, by contrast, a Justice with more moderate judicial preferences. A Justice falling near zero on the Martin-Quinn scale would have an estimated 31 percent chance of making a positive reference and a 22 percent probability of making a negative one.

The most conservative Justices, by contrast, are more likely than any other Justices to speak negatively about the press and the least likely to speak positively. We estimate that the most conservative Justices have a 29 percent chance of making a negative reference and just a 22 percent chance of making a positive one. When discussing the press, however, these Justices are most likely to adopt a neutral tone (i.e., the diamond points) which they employed 48 percent of the time, than either a negative or positive one. This is similar to the Justices in the middle of the ideological scale, who remain neutral 45 percent of the time. Yet the most conservative Justices diverge significantly from the median Justices in that they are 10 percentage points more likely to make negative remarks and 13 percentage points less likely to be press-positive than their colleagues in the center.

Thus the differences between how the most liberal and the most conservative Justices talk about the press are striking. Justices on the most liberal end of the Martin-Quinn scale are more than twice as likely as the most conservative Justices to mention the press in a positive manner. The correlation is reversed when considering negative references; a Justice on the conservative end of the spectrum is two and a half times more likely to characterize the press negatively than the most liberal Justices.

While judicial ideology has a clear impact on the tone of press mentions, our data show that this effect is not equal among frames. Figure 30 depicts the intersection of ideology, frame and tone. This chart (as well as others that are discussed below) plots the effect on the probability that a Justice will adopt a particular tone when the Martin-Quinn score is shifted one unit (or one point) toward the more conservative end of the scale. To

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75 This corresponds to Justice William O. Douglas’ during the latter part of his tenure on the Court, when he had Martin-Quinn scores of less than -7 from the 1965 Term through the 1975 Term.
76 This corresponds (approximately) to Justice Anthony M. Kennedy, who had a Martin-Quinn score of -0.04 during the 2016 Term.
77 Substantively, then-Associate Justice William H. Rehnquist from 1975-1979, when he had a Martin-Quinn score of around 4.5.
78 This Figure also groups the frames as “Mostly Positive Treatments,” “Mostly Neutral Treatments,” and “Mostly Negative Treatments.”
put this in perspective, a one-unit difference is approximately equivalent to the difference during the Court’s 2007 term between Chief Justice John Roberts (1.42) and Justice Anthony Kennedy (0.41) or, also during the 2007 term, between Roberts and Justice Antonin Scalia (2.46). This figure also includes vertical “whisker” lines designating the confidence intervals. When the whisker lines do not cross the dashed zero line, it indicates that the effect of the ideological shift is significant. While we present our data in terms of smaller, one-unit ideological shifts, it is important to keep in mind that the practical implications between liberal and conservative Justices are often much larger because the Justices are frequently divided by significantly more than a single Martin-Quinn unit. During 2019 term, for example, Justice Elena Kagan and Chief Justice John Roberts were the liberal and conservative Justices who fell closest on the ideological scale—yet even they were separated by a distance of almost two units. The most extreme ideological gap in 2019 was between Justice Sonia Sotomayor and Justice Clarence Thomas, who were more than 7 units apart. A seemingly small variance in the ideological effect in our data (for example, a 3 or 4 percentage point gap) would therefore represent a much larger real-world effect between these two Justices (in our example, a roughly 21 to 28 percentage point difference).

As seen in Figure 30, judicial ideology has the strongest effect in the Regulation Frame, which tracked the Justices’ attitudes toward the importance of the press and, in particular, the acceptability of government regulation of the press. For each additional point we move toward the more conservative end of the Martin-Quinn scale, a Justice’s likelihood of positively discussing the importance of the press decreased by 4 percent and her likelihood of negatively characterizing the press increases by 3.5 percent. The impact of ideology on the tone used in other frames, however, is often minimal. Even though Trustworthiness is a generally negative frame, for example, the influence of a Justice’s ideology on tone is statistically insignificant, suggesting that liberal and conservative Justices are generally equally likely to cast doubt, at times, on the press’s reliability, professionalism or ethics.

One place where Justices on the extreme ideological ends of the scale tend to align—and differ from their colleagues in the middle—is in the frequency with which they mention the press. Figure 31 shows that as we move from the most liberal Justices toward the ideological center, there is

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79 Comparisons from the liberal side of the Court are possible, too. During the Court’s 2013 Term, for example, Justice Elena Kagan had an estimated score of -1.62 compared to an estimate of -2.58 for Justice Sonia Sotomayor.

80 For a discussion of the Court’s view on the Regulation of the press over time, see RonNell Andersen Jones & Sonja R. West, The U.S. Supreme Court and Press Regulation (forthcoming).
an initial decrease in the total number of references. But when we continue to move toward the most conservative Justices, the frequency with which they discuss the press increases again. These numbers suggest that, when compared to their colleagues in the middle, the most liberal and most conservative Justices are somewhat more likely to find opportunities to discuss the press. Taken in conjunction with the tone-trend data, it seems that the most conservative Justices are more prone to going out of their way to offer up negative characterizations of the press and that the most liberal Justices are finding opportunities to present positive ones.

B. Impact of Ideology Over Time

We also investigated the impact of judicial ideology on the tone of press characterizations over time. We are able to track this relationship beginning in 1937, the earliest year for which Martin-Quinn scores are available. The relationships between ideology and tone that are revealed through this analysis are complex, but they provide important insights into our understanding of exactly how today’s less press-friendly Court has, over time, been displacing the press-friendly Court of a generation ago. Indeed, the data seem to reveal a gravitational pull toward press unfriendliness that keeps even the Court’s most liberal Justices—who a half century ago might have gone out of their way to praise the press or the press function—from positively characterizing them today.

Three interrelated trends appear to speak to this story. The first is the recent uptick in the impact that conservative ideology is having on the likelihood of negative press characterizations. As seen in Figure 32, the effect of ideology on negative mentions has varied widely over the years. In the Court’s earlier terms, conservative shifts in ideology were significantly correlated to increases in the probability of negative reference to the press. In 1937, for example, a more conservative Justice was 6 percent more likely to discuss the press negatively than a more liberal Justice who sat one Martin-Quinn unit to his left. Over time, this effect softened, and by 1986, the impact of ideology on negative tone had decreased to making less than a 1 percent difference. Notably, however, the last several decades have shown signs that the gap is widening once again. It is now three times what it was in the 1980s. In the 2019 term, a one-unit increase in a Justice’s Martin-Quinn conservatism corresponded to approximately a 3 percent increase in the chance of a negative press

81 Stated a bit more formally, the marginal effect of a one-unit increase in ideology on the number of paragraphs is negative and statistically significant when ideology runs from -5 through about -1. It is null (p > 0.20) for -1 through +3.5 and then positive and statistically significant from +3.5 to +4.5 (p < 0.10, one-tailed test).
reference. That is, the relationship between ideology and press negativity is again becoming stronger.

The correlation our data show between the conservative ideology of more recent Justices and their negative attitudes toward the news media mirrors the partisan divide that we see today among members of the public and representatives of the political branches. A 2020 poll by Gallup and the Knight Foundation, for example, found that “Republicans express more negative sentiments on every aspect of media performance compared to Democrats and independents.”\textsuperscript{82} Our data dispel any suggestion that the Justices are unaffected by these political influences. This conclusion is supported by research establishing that political influences on the Court are increasing. As two Court scholars observed, today’s Justices are sharply split along partisan lines in a manner that is “unprecedented”\textsuperscript{83} and “unique in the Court’s history.”\textsuperscript{84}

This is all occurring, meanwhile, against the backdrop of a Court that has been steadily trending to the right over the past several decades.\textsuperscript{85} Indeed, as of 2010, when Justice Elena Kagan joined the Court following the retirement of Justice John Paul Stevens, the partisan transformation had become complete in that every sitting Republican-nominated Justice was ideologically to the right of all of the Democratic-nominated Justices.\textsuperscript{86} Our

\textsuperscript{82} \textit{GALLUP & KNIGHT FOUNDATION, AMERICAN VIEWS 2020: TRUST, MEDIA AND DEMOCRACY} (2020), https://knightfoundation.org/reports/american-views-2020-trust-media-and-democracy/ (The poll found that 72 percent of Republicans said they believe there is “a great deal” of political bias in news coverage, compared to only 28 percent of Democrats. Democrats, meanwhile, are more likely than Republicans to say that the press plays a “very important” or “critical” role in our democracy. When asked how much blame the press deserves for America’s political divisions, 75 percent of Republicans (but only 26 percent of Democrats) said “a great deal.”).

\textsuperscript{83} Neal Devins & Lawrence Baum, \textit{Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court}, 2016 SUP. CT. REV. 301

\textsuperscript{84} Id.


data suggest that if this trend holds, the forecast for press treatment at the U.S. Supreme Court may be dire, as the Court is poised to continue its rightward shift and take an historic ideological turn for the conservative.\(^87\)

A second trend potentially compounds the real-world impact of the first. The correlation that once existed between ideology and positive references to the press—which a generation ago resulted in significant numbers of press-praising characterizations from the Court’s liberal Justices—has now essentially disappeared. Figure *33* depicts these positivity-and-ideology correlations over time, showing that judicial ideology was a much bigger driver of positive references in the Court’s earlier terms. In 1937, for example, a one-unit shift toward liberalism raised the probability of a positive characterization by 5 percent (or, stated in the converse, an increase in conservatism decreased the probability of a positive characterization to that same degree).

As seen in the Figure 33, however, the effect of ideology on press positivity steadily narrows until it becomes statistically insignificant around 2003. This attenuating trend continues until, by the late 2010s, ideology exerts essentially no effect on the likelihood that a Justice will speak positively about the press. As discussed in detail above, overtly positive characterizations of the press or the press function are starkly waning overall;\(^88\) a key point that the ideology data adds to this is the understanding that a Justice’s increased liberalism is no longer likely to make it more probable that she will author a positive reference. The press, therefore, seems to be experiencing the double whammy of compounded negativity from the ideological group at the Court that has been historically negative (the conservative Justices) and a loss of positivity from the ideological group that has been historically positive (the liberal Justices). Ideology is simply no longer predictive of positive treatment.

The story of the interplay of tone and ideology over time is rounded out with a third interesting trend on the impact of Justices’ ideology on neutral mentions. This data provides an even richer account of the shifts


\(^88\) See supra Part IV.B.
that have happened since the press-friendly Court a handful of decades ago and of the ways the press can expect to be treated at the Court in the years to come. Figure *34* shows that the impact of the Justices’ ideology on neutral mentions has been statistically insignificant for much of the Court’s history.

But two aspects of this timeline stand out. The first is the reversal in recent years of the direction of the relationship between ideology and the likelihood of a neutral characterization. Throughout the last half of the twentieth century, our data suggest that an increase in conservatism was associated with a slight increase in the probability of a neutral mention. By the mid-1990s, however, that effect had not only disappeared but started to reverse. Increased conservatism became increasingly negative in nature such that an increase in conservatism was correlated with a decreased likelihood of a neutral tone. In addition to the direction of the relationship inverting in recent years, the size of its impact is now greater than at any other point in our dataset. From the late 1950s to the late 1980s, a one-unit change in ideology translated into only a 1 percent increase in the chance of a neutral mention. But in our most recent data for the 2019 term, each one-unit increase in the Martin-Quinn score decreased the likelihood of a Justice speaking neutrally by almost 3 percent. That is to say that while a generation ago, increased conservatism made it more likely that a Justice would make a neutral mention, it is now increased liberalism that makes it more likely that a Justice will speak with neutrality. When it comes to the impact of ideology on tone, neutral depictions seem to be moving toward taking the place of positive depictions (with more liberal Justices moving toward them and more conservative Justices moving away from them).

One possible explanation for these shifts is that the press-friendly era at the Court a generation ago created something of a positive gravitational pull, while the current, press-unfriendly Court is creating an opposite, negative pull. The overall press-friendly Court may have had an agenda-setting effect, as cases were selected for review that had potential press-friendly outcomes. In the most press-friendly eras, even the most press-negative ideologues are placed in environments that compel at least a neutral depiction of the press, and those who might otherwise speak negatively find themselves sometimes speaking neutrally. In press-negative eras, in contrast, those whom we might expect, based on ideology, to speak positively about the press either have fewer opportunities or less inclination to do so, and so their tone shifts to neutral.

Importantly, while some of the press mentions in this study are either fact-driven or doctrinal in character (in the sense that they are contained in paragraphs making objective observations about the behaviors of the press or reaching tonally substantive holdings about press issues), in many

Electronic copy available at: https://ssrn.com/abstract=3787709
instances, neither of these is the case. Justices mentioning the press—just like the officials in the legislative and executive branches who have garnered so much recent attention for their press commentary—had a choice to make about whether to mention the press at all, whether to add a connotation of praise to that mention, and whether to add an implication of criticism. The data suggest that current and recent Justices are choosing—consciously or unconsciously—to make two negative-directional shifts, one from positivity to neutrality and another from neutrality to negativity. Some Justices, likely the more conservative, have stronger negative views of the press, and others, probably the more liberal, may be passing up potential moments for press positivity in favor of mere neutrality. The combined result is that positive mentions are only rarely occurring, negative references are becoming more frequent, and the press is left with fewer champions at the highest Court in the land.

VI. INDIVIDUAL JUSTICES AND CHARACTERIZATION OF THE PRESS

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. This individual Justice data also permits us to summarize both the frequency and the negative-positive characterization ratios of each of the Justices of the current Court, so as to better understand the judicial environment the press currently faces.

A. Determining the Justices’ Press-Friendliness

As we have discussed above, there are two primary factors that are important when thinking about the Court’s characterizations of the press—frequency and tone. The tone of the Court’s press references, of course, sends a strong message about its understanding of the value of the press in our society. But how often the Court mentions the press also affects this message by amplifying (through a high number of references) or negating (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 50 or more total mentions in the dataset. We calculated the Press Support Score by looking at how much above or below
average a Justice was on three measures: (a) percent positive characterizations, (b) percent negative characterizations, and (c) the ratio of positive to negative characterizations. We then rescaled these scores from 0 to 100, assigning the Justice with the highest raw Press Support Score, Justice George Sutherland, a score of 100 and the Justice with the lowest, Justice Tom Clark, a score of zero.  

Yet the ratio of a Justice’s positive to negative references does not fully capture the influence of a Justice’s discussions about the press. As we have discussed above, how often a Justice chooses to speak about the press, its role in society, or its value to democracy is likewise impactful. Each time a Justice finds an opportunity to communicate a view of the press, the effect of their characterizations, whether positive or negative, is magnified. We therefore also ranked each Justice based on the number of times he or she referenced the press. Our data show that Justice William Brennan was the most frequent commentator on the press with 646 mentions. On the other end of the spectrum are Justices who ranked very low on the frequency scale, including three who authored only a single paragraph referencing the press. Indeed, 20 of the 114 total Justices to serve on the Court never once characterized the press.

Because we limited our Press Support Score ranking pool to Justices who had at least 50 mentions in our dataset, however, we included only this same set of Justices for our analysis of the most or 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 percent of Justices based on frequency. Figure *35* shows how these two factors work together to reveal our most press-friendly and least press-friendly Justices. In this Figure, we have plotted these forty-one Justices based on their frequency of press mentions

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91 Based on their Press Support Scores alone, we find that the second most positive Justice was the first Justice John Harlan, who had a press support score of 95. He was followed by Justice Hugo Black at 94, Justice William Brandeis at 92, and Justice Arthur Goldberg at 89. Justice Felix Frankfurter was the second most negative Justice with a press support score of 7, followed by Justice Mahlon Pitney at 14, Justice Byron White at 19, and Justice Robert Jackson at 22. But to stress again, we did not calculate Press Support Scores for Justices who had less than 50 paragraphs in our dataset.

92 Justice Brennan was followed by Justice Byron White with 628 paragraphs, Justice William Douglas with 599, Justice Warren Burger with 494, and Justice Black with 479.

93 These were Chief Justice John Marshall, Associate Justice Samuel Chase and Justice Charles Evans Whittaker.

94 Justices Moore, Duvall, Livingston, Jackson, Campbell, Blair, Byrnes, Iredell, Jay, McKinley, Rutledge II, Wilson, Ellsworth, Barbour, Trimble, Chase, and Johnson, Todd, Cushing, and Paterson. Many of these Justices served in the 1700s and early 1800s, when the issue did not emerge factually and the Court’s opinions were much more concise. But seven of the 20 had opinions classified as First Amendment opinions by the Supreme Court Database.
(x-axis)\textsuperscript{95} and their Press Support Score (y-axis). The dashed line indicates the median for each factor. The further above the median Press Support line a Justice appears, the more press-friendly he or she is and vice versa. The further to the right of the median press frequency line a Justice appears, the more often he or she mentions the press, while those to the left are less-frequent commentators.

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 were Justice Hugo Black, Justice William Douglas, and Justice William Brennan. The least press-friendly Justice, found in the fourth quadrant in the lower-right-hand corner—with the negative combination of high frequency yet the lowest Press Support Score—was Justice Byron White.

A few things stand out about these particular Justices emerging 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 top 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. 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 has to speak about the press. Some Justices had exceedingly short stints on the bench\textsuperscript{96} and others only recently took their seats,\textsuperscript{97} which means that their opportunities to characterize the press might not have been as plentiful as those with longer periods on the Court. Our findings indicate, however, that the bare fact of having served on the Court for a longer does not result in increased frequency of press mentions. Some Justices with long tenures did not even make our cut of having at least 50 press mentions. Chief Justice John Marshall, for example, is the fourth longest-serving Justice to date, but in his 34 years on the Court had only a single reference to the press.\textsuperscript{98}

\textsuperscript{95} 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 with very large numbers of press mentions. For example, the minimum in the graphed data is 50 mentions and the maximum is 646 mentions, such that there is roughly a 13x discrepancy between the two raw values. The logged values are 3.9 and 6.5, respectively, which is only about a 1.7x discrepancy.

\textsuperscript{96} Justice Thomas Johnson, for example, served for the shortest amount of time to date, a mere 163 days, before he retired due to poor health.

\textsuperscript{97} Justice Neil Gorsuch, confirmed in 2017, and Justice Brett Kavanaugh, confirmed in 2018, currently rank among the ten shortest-serving Justices.

\textsuperscript{98} Associate Justice Samuel Chase, who served for 15 years from 1796 to 1811, also had only one press reference.
For similar reasons, we believe that the time periods in which these Justices served are equally telling. All four of these Justices were on the Court 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. Our data show that these years, which spanned the end of the Warren Court era and the beginning of the Burger Court, were near the height for the number of press mentions overall. Our press-friendly heroes, furthermore, served together for fifteen years from 1956 to 1971—a period that is part of the most press-heavy era for the Court. Still, this does not mean that all the Justices who served during this time period were high-frequency Justices. Justice Felix Frankfurter, for example, served all twenty-three years of his tenure on the bench with Justices Black and Douglas, yet he contributed fewer than half as many press mentions.99

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 time period 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, 70s, and 80s. Not only was this a period when the Court decided a lot of cases that were related to the press, but it was, as our tone data show,100 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.101 Yet not all Justices from this time 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 7. Instead, an examination of the writings of Justices Black, Douglas and Brennan and their individual data from our study together suggest that they are the most press-friendly Justices not simply because they happened to serve during a particularly press-positive time, but rather because they were, in fact, the Court’s leaders in the recognition of the valuable roles the press plays and the importance of press freedom.

Many already know Justices Black, Douglas, and Brennan as First Amendment lions and celebrated advocates for the protection of expressive

99 Justice Douglas had 599 paragraphs, Justice Black had 279, and Justice Frankfurter had 171.
100 See, supra, Part IV.B.
freedoms. But 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 35 and the third highest overall. During his time on the bench, Justice Black found many opportunities to praise the press, as seen in Figure 36. He frequently made positive references to the press, authoring 229 positive characterizations. He had an overall positivity rate of 48 percent, while his negativity rate was a mere 8 percent. He was also the fifth most-frequent press commentator in our dataset with 479 mentions.

Justice Douglas had the highest overall positivity rate of any Justice in our dataset with fully half of his press mentions being positive, as Figure 37 shows, while his negativity rate was only 12 percent. He was our third most frequent press commentator with 599 mentions. His Press Support Score of 83, meanwhile, was the second highest among the Justices who came in above the median frequency line and the seventh highest overall. He authored exactly 300 positive mentions, compared to his only 73 negative ones.

Our last press-friendly hero, Justice Brennan, was the most prolific Justice in our dataset with an incredible 646 press mentions. He 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 38, more than 40 percent of Justice Brennan’s characterizations were positive, while only 15 percent were negative.

Our heroes climbed to the top of the press-friendly charts through a variety of paths. To start, they racked up their frequency scores by taking opportunities to write separately in concurrences and dissents in addition to authoring opinions of the Court. These separate writings, moreover, like their majority opinions, were often filled with positive-heavy mentions, which improved their Press Support Scores. They also were often the most frequent users of the more positive-leaning frames like the Regulation Frame, Democracy Frame, and History Frame.

Our heroes were our top three Justices to use the Regulation Frame in a positive manner, with Justice Douglas employing it an astounding 184 times and Justices Brennan and Black close behind with 146 and 133 positive mentions. 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 brethren—viewpoints that boosted their numbers under the Regulation Frame.

Concurring in *New York Times v. Sullivan*, for example, 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.”

While Sullivan is widely celebrated for the broad protection it provides to working journalists, Justice Black made clear that he did not think it went far enough in protecting the press from legal restrictions, writing three years later in Curtis Publishing v. Butts that the Sullivan actual-malice rule “is wholly inadequate to save the press from being destroyed by libel judgments.” This approach to thinking about 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 percent of the time.

The Court’s other well-known First Amendment absolutist, Justice Douglas, also turned to the Regulation Frame to condemn government interference with the autonomy of the press. Like Justice Black, he concurred separately in Sullivan and declared that the press has a constitutional right to “express its view on matters of public concern, and may not be barred from speaking or publishing because those in control of government think that what is said or written is unwise, unfair, false, or malicious.”

Justice Brennan is perhaps most associated in the minds of First Amendment scholars as the author of the Court’s opinion in Sullivan, the seminal 1964 case which transformed the law of defamation and ushered in the press’s Glory Days period at the Court. He also often wrote in the unusually high number of cases that followed Sullivan about the need for constitutional protections against defamation lawsuits. In Sullivan he explained why the First Amendment requires a public official to show actual malice in order to succeed in a libel suit and specifically talked 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.”

Perhaps unsurprisingly, our heroes also took the top three medals for their use of the highly positive Democracy Frame. Justice Brennan was the highest in this area with 54 mentions, followed by Douglas with 45 and Black with 30 positive references. In Mills v. Alabama, for example, Justice Black called the public’s attention to the democracy-enhancing functions of the press, such as enhancing public debate and serving as a

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104 Sullivan, 376 U.S. at 298-99 (Goldberg, J concurring).
government watchdog. When explaining in *Mills* why an Alabama law that led to the arrest of the newspaper editor was unconstitutional, 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.”

We see him turn to the Democracy Frame again in his concurrence in *New York Times Co. v. United States* (the “Pentagon Papers case”) where he wrote at length about the structural and societal value of the press and famously declared that “[t]he press was to serve the governed, not the governors.” Justice Douglas was also a fan of the Democracy Frame, writing in *United States v. Caldwell*, one of the consolidated cases in which the Court held that there is no First Amendment right to a reporter’s privilege in criminal grand jury proceedings, 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.”

Justice Brennan was the top positive user of the Judicial Systems Frame, a mixed frame that often captures the Justices’ views on the news media’s negative impact on the fair trial rights of criminal defendants. But Justice Brennan set himself apart from many of the other Justices by also applying the Judicial System Frame positively to emphasize the importance to the public of having vigorous press coverage of the judicial process. In a concurrence in *Nebraska Press Ass’n v. Stuart*, a case challenging a judge’s gag order on the press in a high-profile criminal case, 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.”

Our heroes also often made a point to reference the historical importance of press freedom. Justice Black was our top positive user of the History Frame and wrote frequently of the unique historical role of press protections. In the Pentagon Papers case, for example, he declared, “the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy.” He also spoke about press freedom

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107 *Id.*
109 *See id.* (“Only a free and unrestrained press can effectively expose deception in government.”)
110 *Id.*
112 *Id.*
113 *New York Times Co.*, 403 U.S.
as more than an abstract idea and specifically praised the practical day-to-day work of the journalists of his time, observing in 1971 that “far from deserving condemnation for their courageous reporting, the New York Times, the Washington Post, and other newspapers should be commended 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.”

Justice Douglas was the second most frequent user of positive mentions under the History Frame. Combined with his absolutist positions, he would push the other Justices (and, at times, even the press advocates) toward more robust protections for press freedom. In his dissent in Caldwell, for example, he expressed amazement that The New York Times—the defendant, reporter Earl Caldwell’s, employer—would concede that the government could compel a journalist’s testimony under any circumstances. Relying on the Regulation and History Frames, he stated: “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.”

As we discussed earlier, the Right Frame is a typically neutral frame that nonetheless has a special importance for tracking the frequency in which the Justices even acknowledge the existence of the constitutional right. It is significant, therefore, that our press-friendliest Justices often used the Right Frame, taking the top three spots for neutral uses of it with Justice Black in first place with 132 neutral mentions and Justices Douglas and Brennan in second and third with 102 and 77 references. But they did more than merely note the First Amendment right of press freedom, they also spoke of it with heightened importance more often than any other Justices—sweeping the category of positive Right mentions with Justice Black making 37 references, followed by Justices Douglas and Brennan with 27 and 25. While we have focused in this article on the press-positive “Glory Days” of the late-twentieth century, these Justices’ frequent inclusion of references to the constitutional right is in keeping with what 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.”

114 Id.
115 Caldwell, 408 U.S. at 713.
Our press-friendliest Justices rose to the top through a combination of factors. Serving long-tenures during a time period when the Court was actively considering the contours of press freedom was no doubt part of the equation. But our data reveal that these three Justices took (and often made) opportunities to speak about the press even when their colleagues did not. And when they spoke about the press, they framed these discussions in press-positive ways by shining a bright light on the crucial roles a free press fills in our society today 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 Byron White is our least press friendly Justice of all time. During his time on the Court, he authored a staggering 234 negative depictions of the press. Justice White’s Press Support Score is only 19, meaning he ranked 37 out of 41 in our analysis. Yet he wrote about the press often and thus came in second in frequency with 628 mentions of which only 22 percent were positive, while 37 percent were negative.

As seen in Figure 39, Justice White often employed the negative-leaning frames. He came in at the top of the list of Justices who negatively discussed the press under the Trustworthiness Frame, with more than half of his characterizations of reliability and ethics of the press being negative. He was the Justice most likely to speak negatively of the press’s impact on individuals—a step he took more than twice as often as the second most negative Justice in this category. He depicted the press as harmful to individual people 85 percent of the time he used the Individuals Frame.

While the press-friendly heroes turned to the Regulation Frame as a common method for conveying positive characterizations, Justice White led the pack in his negative use of it, with almost three times more references in which he spoke approvingly of regulations on the press than the Justice next behind him on this list. Writing for the Court in Red Lion Broad. Co. v. F.C.C., for example, Justice White held that Federal Communication Commission’s implementation against the broadcast media of the Fairness Doctrine and other regulations “fall short of abridgment of the freedom of speech and press.”

When invoking the History Frame—used almost exclusively with a positive tone for the entirety of the Court’s history—White was negative 50 percent of the time. He tied for first place when it came to making an

117 Justice White came in 17 out of 20 among the Justices above the median frequency line.
affirmatively negative statement 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.”

Like the three Justices who emerged as the most press friendly, White
both served on the Court during a period when a significant number of
press-focused cases were on the Court’s docket and had a longer than
average tenure on the Court, and thus his frequency score benefitted from
more total opportunities to opine about the press and its role. But unlike his
top-ranking press-friendly peers, White was working against the powerful
gravitational pull of a Court inclined toward press positivity, which makes
his exceptionally low Press Support ranking and overall negativity total all
the more notable. Many of Justice White’s press references were in
majority opinions he authored that were signed by significantly more press-
friendly peers and thus likely had to be tempered to hold their votes. With
so many colleagues so eagerly engaged in purposeful press praise, Justice
White stands out for not being more regularly aligned with that positivity.
That he authored enough press-critical material to overcome the weight of
these Glory Days characterizations is striking.

And, indeed, the record of Justice White’s press-focused opinions
reflects this active pessimism for the specialness of the press function. He
pened several of the most notable rejections of press protectiveness in the
Court’s history. In *Branzburg v. Hayes*, 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,
indicating that “newsmen are not exempt from the normal duty of appearing

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120 Spanning 31 years, White’s tenure on the Court is the twelfth longest in history.
121 Indeed, in at least some prominent instances, Justice White’s votes sided with the press.
See, e.g., New York Times Co. v. United States, 403 U.S. 713 (1971) (White, J.,
concurring) (agreeing that the injunction against the press in the Pentagon Papers cases
was unconstitutional); Miami Herald v. Tornillo, 418 U.S. 241 (1974) (White, J.,
concurring) (arguing against government interference with the editorial decisions of
newspapers).
123 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 testi-
mony.’”).
before a grand jury and answering questions relevant to a criminal investigation.” 124 Press organizations had argued that, in practice, a system that precludes journalists from promising confidentiality at the time of newsgathering deters important informants from coming forward, stifles the publication of crucial matters of public concern, and undermines the historical independence of the press by conscripting reporters as government investigators, in conflict with the First Amendment’s protection for freedom of the press. 125 But White dismissed these arguments as “speculative” 126 or wrong, 127 calling the burden on newsgathering “uncertain” 128 and finding that those who gather and produce the news are no different than the “average citizen,” who must “discl[E] to a grand jury information that he has received in confidence.” 129 White took the occasion to speak broadly of the ways that reporters have no constitutional specialness. 130

In Cohen v. Cowles Media 131 and Zurcher v. Stanford Daily, 132 Justice White pounded home this theme. In Cohen, he reject an argument that a reporter should be exempt from claims of promissory estoppel rooted in the publication of a truthful story and wrote—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.” 133 Four of his colleagues on the Court feared the free press would be dangerously curbed by punishment of

124 Id. at 685.
125 Id. at 679–81; See also Id. at 743 (Stewart, J. dissenting) (agreeing with press organizations and arguing that there should be a qualified reporter’s privilege: “[W]hen 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.”).
126 Id. at 694 (“Estimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosure to newsman are widely divergent and to a great extent speculative”).
127 Id. at 698 (“We are admonished that refusal to provide First Amendment report’s privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson that history teaches us.”).
128 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’”).
129 Id. at 682.
130 Id. at 684–85 (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded”).
133 Cohen, 501 U.S. at 669.
“important political speech”\textsuperscript{134} and highlighted the “importance … to public discourse” of the press’s work,\textsuperscript{135} but Justice White found nothing warranting distinct protection for that function.\textsuperscript{136} In \textit{Zurcher}, he rejected arguments that a newsroom should be constitutionally protected from police searches for journalist work product, suggesting that “surely a warrant to search newspaper premises for criminal evidence … carries no threat of prior restraint or any direct restraint whatsoever on the publication … or on its communication of ideas.”\textsuperscript{137}

The press lost at the hands of Justice White in other contexts, as well. In \textit{Hazelwood v. Kuhlmeier},\textsuperscript{138} 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 newspaper and holding that “educators are entitled to exercise greater control over this” form of expression for pedagogical purposes.\textsuperscript{139} In \textit{Herbert v. Lando},\textsuperscript{140} 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 against extensive discovery and sweeping inquiries on their knowledge or reckless falsity in a libel suit.\textsuperscript{141}

While these more explicit examples of Justice White’s anti-press jurisprudence have not escaped notice, and his reputation as a press-freedom skeptic has been widely noted,\textsuperscript{142} our empirical findings indicate that White’s disapproval of the press—and cynicism for its protected role—extended beyond these high-profile doctrinally significant examples.

\textsuperscript{134} \textit{Id.} at 675 (Blackmun, J., dissenting).
\textsuperscript{135} \textit{Id.} at 678 (Souter, J., dissenting).
\textsuperscript{136} See \textit{Id.} at 670 (holding that “enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations” and listing other areas of generally applicable laws).
\textsuperscript{137} \textit{Zurcher}, 436 U.S. at 567.
\textsuperscript{138} 484 U.S. 260 (1988).
\textsuperscript{139} \textit{Id.} at 271.
\textsuperscript{140} 441 U.S. 153 (1979).
\textsuperscript{141} \textit{Id.} at 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.”).
Justice White’s role as counter-voice in the otherwise press-friendly Glory Days was not confined to press cases but instead permeated his wider tenure on the Court.143 Significantly, although a number of his press-specific holdings might be characterized as merely declining to extend additional protections to the press,144 the total coding of his references reveals the heavy presence of overtly negative characterizations of the press. When combined with his exceptional frequency of press characterization, this low press support makes him the clear historical standout for press unfriendliness.

D. Current Justices’ Attitudes about the Press

Among the current Justices of the Court,145 it is much harder to perform analyses of the sort we conducted on the wider historical set—both because, as discussed in detail above, the frequency of press references has so precipitously plummeted in recent years and because two of the nine Justices have joined the Court so recently that they have had a particularly shallow pool of opportunities for press characterization.

Thus, for one reason or another, most of the current Justices are so rarely speaking about the press that there simply are not enough data points to allow 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 requisite 50 references to the press needed in order to be included in our Press Support scoring system comparing them to the other Justices throughout history. Among those that do make that cut, only Justice Clarence Thomas, the longest serving of the current Justices, has authored more than 150 mentions.146 All of the other sitting Justices have 85 or fewer total references to the press in their entire body of published writing on the Court. Three of these—Justice Kagan and the two newcomers,

145 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 Amy Coney Barrett, who was confirmed to the Court on Oct. 26, 2020. In the interest of completeness, this section includes analysis of all nine Justices who sat on the Court in the last studied term, including Justice Ruth Bader Ginsburg, who died on Sept. 18, 2020.
146 Justice Thomas has a total of 169 mentions of the press in his nearly 29 years on the Court.
Justices Gorsuch and Kavanaugh—have spoken of the press or the press function fewer than ten times.\footnote{Kagan has spoken of the press 10 total times. Gorsuch has four mentions and Kavanaugh has two.}

Nevertheless, an investigation of the frequency, frames, and tones of press characterizations for each of these current 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.

1. Trends on the Current Court

The data reveal that the two most frequent characterizers of the press on the current Court are the two Justices at its ideological extremes—a result that is wholly consistent with the wider findings on the historical relationships between ideological poles and frequency of press commentary.\footnote{See infra, Part IV.} Justice Sonia Sotomayor is the current Court’s most liberal member, with a 2019 Martin-Quinn score of -3.48, and, when the Justices are compared by their averages per year served on the Court, she is ranked first among the sitting Justices for frequency of press mentions. In her 11 years on the Court, she has referenced the press or a press function 68 times, for an average of 6.09 references per year. In second place is the Court’s current most conservative member, Justice Clarence Thomas, with a 2019 Martin-Quinn score of 3.69. He has discussed the press or a press function 169 times in his nearly 29 years on the Court, for an average of 5.83 references per year. By contrast, Justice Brennan, the most frequent press mentioner in our full dataset, characterized the press more than 19 times per year—more than three times more often than the most active commenters on the current Court. The least frequent referencer of the press on the current Court is Justice Elena Kagan, with just six total mentions in more than a decade as a Justice, which translates to an average of .59 mentions per year.

At least some of the other recent notable trends on the relationship between ideology and press mention also manifest themselves in the data from the current Court. For example, there is no discernible pattern linking judicial ideology and press positivity, which seems to reflect the disappearing connection between ideology and press positivity seen in the longer trend studies. The two Justices with the highest percentage of positive press references are Justice Thomas, the Court’s most conservative Justice,\footnote{Justice Thomas’s references to the press have been positive 29 percent of the time.} and Chief Justice Roberts, the Court’s median
Justice on the Martin-Quinn scale, both of whom have nearly 30 percent positivity. The next two most positive Justices, however, are the Court’s third most liberal and second most conservative Justices, all of which suggests the strong left-right correlation that once existed on overt press positivity has vanished.

Perhaps most notably, the two Justices with the highest percentage of references that are neutral in tone are two of the recent Court’s most liberal Justices, Justices Ginsburg and Breyer, whose total press characterizations over the course of their tenures have been 68 percent and 62 percent neutral, respectively. The gravitational pull away from positivity about the press and toward liberal jurist neutrality is unambiguously illustrated when we compare their tonal characterizations with those of the leftmost Justices of a half-century ago. While Justices Ginsburg and Breyer negatively characterized the press relatively rarely—and only slightly more often than press-freedom heroes Brennan, Black, and Douglas—they positively characterized the press drastically less often. Put another way, while both the current-day liberals and the liberals from a fifty years ago all have positive or neutral characterizations of the press in approximately four-fifths or more of their mentions, the subset of those mentions that are overtly positive has nose-dived. Justices Brennan, Black, and Douglas all had positive rates that were close to or exceeding their neutral rates, but Justice Breyer has three times as many neutral references as positive ones and Justice Ginsburg has six times as many. Indeed, these modern liberal Justices shied away from positive characterizations of the press in favor of neutral ones to such an extent that their overall positivity percentages are lower than that of our least press-friendly Justice of all time, Justice Byron White.

150 Chief Justice Roberts’s Martin-Quinn score in 2019 was +.216. His total references to the press over his 15 years on the Court have been positive 27 percent of the time.
151 Justice Breyer’s Martin-Quinn score in 2019 was -1.87. His total references to the press over 26 years on the Court have been positive 20 percent of the time.
152 Justice Alito’s Martin-Quinn score in 2019 was +2.05. His total references to the press over his nearly 15 years on the Court have been positive 19 percent of the time.
153 Justice Ginsburg’s Martin-Quinn score for 2019 was -2.82, the second most liberal.
154 Justice Breyer’s was -1.87, making him the third most liberal.
155 Justice Ginsburg is positive or neutral a total of 79 percent of the time; Justice Breyer 82 percent. Justice Brennan was positive or neutral 85 percent of the time; Justice Douglas 87 percent; Justice Black 92 percent.
156 Justice Douglas’s overall positive-neutral mix was 50-37 percent. Justice Black’s was 48-44 percent. Justice Brennan’s was 43-42 percent.
157 Justice Ginsburg’s overall positive-neutral mix was 11-68 percent. Justice Breyer’s is 20-62 percent.
158 Justice White characterized the press positively 21 percent of the time. Justice Breyer has done so 20 percent of the time and Justice Ginsberg just 11 percent of the time.
2. Observations about the Current Justices

Although the overall numbers of references are small, an examination of the data reveals some interesting tendencies about the current Justices.

The most recent appointees to the Court have done almost nothing to give us insight into the views on the press—but certainly do not seem inclined to reach out to discuss either the press or the press function. See Figures 40 and 41. Justice Brett Kavanaugh’s two years on the Court have produced only two references to the press, both in the Regulation Frame, one positive and one negative. Justice Neil Gorsuch, who has been on the Court three and a half years, has only referred to the press four times, all of which were neutral Communication Frame depictions of the bare fact of the press as an information delivery mechanism. Thus, although the data is exceptionally limited—and these Justices could ramp up in the aggressiveness of their frequency, their positivity, or their negativity—at the moment, neither seems poised to actively contribute to the body of press characterizations.

On the other side of the spectrum is Justice Clarence Thomas, whose strong pace of press characterizations not only ranks among the highest frequency on the current Court, as discussed above, but also carries distinctive content themes that make a unique mark on the Court’s overall set of press mentions. As Figure 42 shows, 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 28 such references over the course of his time on the Court—more than five times as many as were made by any of his contemporaries. He most often references the constitutional right neutrally, simply by naming the freedom without praising the right as special or important, which could be due to his tendency to more fully and directly quote the First Amendment’s text.

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 has referenced the historical role of the press even once in their entire tenures on the Court. With only 157 references in total, the frame is relatively rare over the course of the full 235-year data set. Yet Justice Thomas generated 21 of those references. Even more astoundingly, although this frame has the overall highest positivity ratio of any frame, with only 8 percent of its total hits coded as

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

160 Twenty-four of his 28 references were neutral.
negative in tone, nearly one in every five uses of it by Justice Thomas are negative. Indeed, Justice Thomas personally accounts for 31 percent of the entire dataset’s tonally negative depictions of the press’s position in the founding era. He currently is tied with our least press-friendly Justice of all time, Justice White, for having the most instances of 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 100 percent of his references suggest the press is harmful to individual people—and in the Trustworthiness Frame—where 89 percent 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. Thirty percent of his total mentions were positive. Fifty-one percent were neutral, and 19 percent were negative. Justice Thomas’s use of positive History Frame references, coupled with his heavily positive use of the Regulation Frame, account for much of the positivity.

Despite being on the Court nearly as long, the late Justice Ruth Bader Ginsburg took far fewer opportunities to reference the press or the press function than Justice Thomas. Figure 43 shows that she made only 72 total characterizations of the press during her 27 years as a Justice, for an average of 2.65 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 or made something known. Her overall positivity ratio is just 11 percent, contributing to a Press Support score of 61, which is just below the median. See Figure 35. While Justice Ginsburg’s exceptionally small number of references within the Democracy Frame and the Regulation Frame were heavily positive, they were outweighed by many more references within the Judicial System Frame, where Justice Ginsburg had a much more mixed characterization of the press. Ten of her 22 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 12 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 high court, she referenced the “freedom of the press” and related concepts

161 Justice Thomas’s negativity rate within the frame is 19.05 percent.
162 Seventy-one percent of his 21 History Frame references were positive. Sixty-one percent of his 38 Regulation Frame references were positive.
163 Communications Frame references accounted for 30 of Justice Ginsburg’s 72 frames. One hundred percent of these were coded as tonally neutral.
164 Four of five Regulation Frame references were positive. Two of three Democracy Frame references were positive.
only five times, and each of these references was tonally neutral, with the Justice not ever suggesting that the right was special or valuable.

Justice Stephen Breyer’s record on press characterizations closely parallels Justice Ginsburg’s in a number of ways. See Figure 44. His overall frequency of press mentions—85 total mentions in 26 years, for an average of 3.25 per year—is slightly higher, as is his overall positivity ratio, with 20 percent of his characterizations taking a positive tone. But 39 percent of his total references over the years have been neutrally toned Communication Frame mentions, merely noting as a factual matter that the press engaged in some act of public communication. Justice Breyer occasionally has suggested that the press should be free from regulation and, more rarely, that it serves democracy, but his tone on Trustworthiness has been mixed and his references to the impact of the press on the judicial system have been nearly entirely neutral. Despite serving on the Court for more than a quarter century, he has invoked the principle of “freedom of the press” only four times, and never has done so in an overtly positive manner.

Chief Justice John Roberts and Justice Samuel Alito, who joined the Court within four months of each other, have similar frequencies of mentioning the press. Chief Justice Roberts has characterized the press 48 times, falling just shy of the requisite 50 mentions required to be included in the Press Support scoring pool. At an average of 3.2 references per year, he is a slightly less frequent referencer of the press than Justice Alito, who averages 3.68 per year and has characterized the press 54 total times. Both of them have made a majority of their mentions with tonal neutrality. See Figures 45 and 46.

Where the two diverge is on the negative-positive mix, with Justice Alito opting for negativity more than twice as often as Chief Justice Roberts and Roberts opting for positivity 27 percent of the time to Alito’s 19 percent. Chief Justice Roberts has strong positivity mentions in

165 Thirty three of his 85 references were neutral Communications Frame references.
166 Justice Breyer had 25 references within the Regulation Frame, 11 of which were positive.
167 Justice Breyer had four references within the Regulation Frame, three of which were positive.
168 Justice Breyer had three references within the Trustworthiness Frame—one positive, one neutral, and one negative.
169 Justice Breyer had 11 references within the Judicial System Frame, 10 of which were neutral.
170 Roberts was confirmed in September 2005. Alito was confirmed in January 2006.
171 Fifty-six percent of Alito’s full set of press references are neutral. Sixty-three percent of Roberts’s are neutral.
172 Twenty-six percent of Justice Alito’s references are negative. Ten percent of Roberts’s are negative.
the Regulation Frame and the Democracy Frame,\(^\text{173}\) which Alito’s record mirrors.\(^\text{174}\) But Alito diverges with heavy negativity in the
Trustworthiness Frame, where he uniformly characterizes the press as inaccurate, unethical, or untrustworthy, and in the Judicial System Frame, where four of his five mentions have suggested the press does harm. Justice Alito’s tendencies to speak critically of those facets of the press place him below the mean in his Press Support Score. See Figure 35, infra.

Justice Sonia Sotomayor is the Court’s most ideologically liberal Justice—a factor that once would have predicted strong press positivity. But with only 12 percent of her press references tonally positive and 32 percent of them negative, her Press Support score is well below the median. See Figure 47 and Figure 35, infra. As discussed above, like her predecessors who were at the ideological poles of the Courts on which they sat, Justice Sotomayor has commented on the press more often than her fellow Justices; but unlike her predecessor liberal Justices, she has not done so in ways that favor the press. Her negativity totals are heavily influenced by negative characterizations of the press’s role in the judicial system,\(^\text{175}\) and her use of the negative tone within the Trustworthiness Frame, where seven of her eight total mentions have suggested that the press lacks trustworthiness, accuracy, or ethics.

Perhaps the most surprising results for a Justice on the current Court are those of Justice Elena 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,”\(^\text{176}\) but since joining the bench she has almost never spoken of the press and freedom of the press. See Figure 48. In more than a decade on the Supreme Court, she has made only six total references to the press, three of which were mere Communication Frame references to the press publishing or otherwise making widely known a piece of information and one of which was a negative reference to the harm the press causes to individuals. She has once neutrally noted the existence of a constitutional right of press freedom, but has never characterized that right as valuable or important. Justice Kagan’s frequency is the very lowest among her peers on the current Court, and even among these rare characterizations, her negativity

\(^{173}\) Three of Chief Justice Roberts’s four uses of the Democracy Frame were positive. Nine of his 13 uses of the Regulation Frame were positive.

\(^{174}\) Three of Justice Alito’s four uses of the Democracy Frame were positive. All six of his uses of the Regulation Frame were positive.

\(^{175}\) Justice Sotomayor characterized the press within the Judicial System frame 26 times, 13 of which were negative and only one of which was positive.

outpaces her positivity.\textsuperscript{177} 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 of the current Court—either with the wider set of Justices throughout history or with each other—a qualitative examination of their characterizations of the press suggests no sitting Justice has particular interest in advancing positivity about the press and that a number of them are either actively undercutting some characterization frames once dominated by press praise or entirely avoiding all but the most neutral, bland mentions of the press required by the facts of the cases before them. Indeed, the fact that there are passing few references to the press from any Justice of the current Court suggests that the Court has all but given up on the once common endeavor of shaping discussion of the press and specifying the value of press functions in a democracy.

**VII. 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 of positive judicial depictions of the press in the last 50 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.

Given that much of the press’s foundation for a 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 that defends the press against disparagement is misplaced. Instead, these sharply negative tone trends suggest that the judicial road ahead for the American press will be bumpy. This conclusion is reinforced by our data on the impact of judicial ideology on the Justices’ attitudes toward the press, which indicate that conservative Justices are as unlikely as their co-ideologues in the political spheres to view the press positively. Moreover, while liberal Justices of a generation ago were the all-time press friendliest—actively finding opportunities to discuss the press and

\textsuperscript{177} Two of Justice Kagan’s six references, or 33 percent, are negative. One reference, 17 percent, is positive. Fifty percent of her mentions are tonally neutral.
aggressively preserving a positive characterization when doing so—this generation’s liberal Justices appear significantly less poised to take these opportunities and, instead, are drifting toward more neutral depictions or toward not discussing the press at all.

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.
Figure 3

Figure *4*

[Image of a histogram showing percent of total mentions by court term]

[Image of a histogram showing number of paragraphs by year for all frames combined]
Figure 5

Figure 6
Figure 13

![History Frame Chart]

Figure 14

![Communication Frame Chart]
Figure 15

Right Frame

Figure 16

All Frames Combined

Electronic copy available at: https://ssrn.com/abstract=3787709
Figure *19*

**Democracy Frame**

- Positive
- Neutral
- Negative

Figure *20*

**Democracy Frame**

- Positive
- Neutral
- Negative
Figure 27

Figure 28
Figure *29*

**Ideology and Press Mentions**

- **Positive**
- **Neutral**
- **Negative**

Electronic copy available at: https://ssrn.com/abstract=3787709
Figure 30

Interaction Between Justice Ideology and Frame Type

Marginal Effect of Ideology on Press Mention

Electronic copy available at: https://ssrn.com/abstract=3787709
Figure *35*
Figure 40

![Graph showing tone distribution for Kavanaugh]

Figure 41

![Graph showing tone distribution for Gorsuch]
Figure 44

Breyer

Tone by Frame (65 Total Mentions)

Tone Distribution

Figure 45

Roberts

Tone by Frame (48 Total Mentions)

Tone Distribution

Electronic copy available at: https://ssrn.com/abstract=3787709