Washington and Lee Law Review

Volume 79
Issue 4 *Fall*

Article 4

Fall 2022

The Disappearing Freedom of the Press

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Abstract

At this moment of unprecedented decline of local news and amplified attacks on the American press, scholars are increasingly turning their attention to the Constitution's role in protecting journalism and the journalistic function. Recent calls by some U.S. Supreme Court Justices to reconsider the core press-protecting precedent from New York Times Co. v. Sullivan *have intensified these conversations. This scholarly dialogue, however, appears to be taking place against a mistaken foundational assumption that the U.S. Supreme Court continues to articulate and embrace at least some notion of freedom of the press. Yet despite the First Amendment text specifically referencing it and the Roberts Court's claims of First Amendment expansiveness, freedom of the press is quietly disappearing from the Court's lexicon.*

Our individually coded dataset, capturing every paragraph mentioning the press written by all 114 Justices in the 235-year history of the Court, shows that in the last half-century the Court's references to the concept of freedom of the press have dramatically declined. They are now lower than at any other moment since the incorporation of the First Amendment. The

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jurisprudential desertion of this concept is evident in every quantitative and qualitative measure we analyzed. Press freedom was once a commonly adopted frame, with the Court readily acknowledging it on its own and as a coexisting First Amendment right alongside the freedom of speech. Indeed, Justices routinely recognized this right in cases not involving the press. The data reveal that this practice is a thing of the past. Gone are not only the ringing, positive endorsements that situated freedom of the press as valuable, important, or central to democracy but also the bare acknowledgements of the right at all. A close investigation of individual Justice's patterns, moreover, reveals that there are no true advocates of the right on the current Court and that most of the current Justices have rarely, if ever, mentioned it in any context.

This Article addresses both the possible causes and the troubling consequences of this decline. It explores strong evidence contradicting many of the initially appealing explanations for the trend, examining the ways in which the phenomenon is unlikely to be solely a function of the Court's decreasing press-related docket or its reliance on settled law in the area. It also explores data on the interrelationships between ideology and acknowledgement of freedom of the press. The disappearance of the principle of press freedom at the Court may impede the newly revived effort to invoke the Constitution as a tool for preserving the flow of information on matters of public concern.

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INTRODUCTION

At this moment of unprecedented decline of local news and amplified attacks on journalists, it has become clear that the American news media no longer possesses the social or economic protection it previously enjoyed. Scholars are thus increasingly turning their attention to the role of the Constitution as the ultimate protector of the American free press.[1] The problem, however, is that all of these conversations are built on the

1. *See generally, e.g.*, MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021) (arguing that the First Amendment guarantee of freedom of the press may hold meaning in the new media ecosystem as a constitutional support for more robust funding of public media and other reforms); RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. 419 (2020) (arguing that Press Clause protection should be informed by unique functions that enhance the marketplace of ideas for news consumers); [hereinafter Jones & Sun, *Post-Truthism America*]; Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

seemingly basic—yet untested—assumption that the U.S. Supreme Court continues to recognize the First Amendment's guarantee of the freedom of the press.

This Article explores how the "freedom of the press," which was once a regularly referenced concept in Supreme Court opinions as both an explicitly recognized right and a functional constitutional tool, is disappearing from the Court's lexicon.[2] The right is disappearing in spite of the First Amendment's specific textual guarantee[3] and in spite of the Roberts Court's embrace of First Amendment expansiveness in other areas.[4] In a pattern that has gone largely unnoticed until now, the Court today rarely acknowledges the existence of the right to press freedom.[5]

This Article identifies, tracks, and analyzes this trend. Our individually coded dataset, capturing every paragraph mentioning the press written by all 114 Justices in the 235-year history of the Court, shows that the Court's references to the constitutional right of press freedom have dramatically declined in the last generation.[6] Indeed, they are lower now than at any moment since the incorporation of the First Amendment.[7]

The jurisprudential and rhetorical desertion of this right is evident in every quantitative and qualitative measure we analyzed. Press freedom was once a commonly adopted framework, with the Court readily acknowledging it on its own and as a counterpart to freedom of speech.[8] In addition to regularly mentioning the freedom of the press in cases focused on the media, the Court also frequently referenced it in cases not involving the press by including it in general discussions of recognized and valued constitutional rights.[9] Our data, however, reveal that these practices are a thing of the past.[10]

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2. *See infra* Part IV.

3. *See* U.S. Const. amend. I ("Congress shall make no law . . . abridging the freedom of speech, *or of the press* . . . ."(emphasis added)).

4. *See infra* Part V.A.

5. *See infra* Part IV.A.

6. *See infra* Part II.

7. *See infra* Part IV.

8. *See infra* Part III.A.

9. *See infra* Part III.B.

10. *See infra* Part IV.

The current Court rarely references press freedom and even more rarely references it in any context that expands the conceptual scope of the right or advances the real-world protection of newsgatherers. The ringing, positive endorsements of freedom of the press that situated it as valuable, important, or central to our democracy are gone, as are even bare acknowledgements of the concept *at all*. A close investigation of individual Justices' patterns, moreover, reveals that there are no true advocates of the right on the current Court and that most of the current Justices have rarely, if ever, mentioned it in any context.[11] The freedom of the press has simply disappeared at the Court.

This Article addresses the overpowering evidence of this decline and explores its possible causes. Specifically, it shows how the data belie some potential and initially appealing explanations for this decline, such as suggestions that the trend is solely a result of shifts in the ideological makeup of the Court,[12] the Court's smaller press-related docket,[13] or a reliance on settled law in the area.[14] This Article also highlights how the evaporation of this key component of expressive freedom is a significant deviation from the expansive First Amendment jurisprudence that is supposedly a hallmark of the Roberts Court.[15] This Court, which in many ways is pushing the boundaries of First Amendment protection, has quietly erased a major First Amendment value from the conversation. In light of this disappearance, the newly revived effort to invoke the Constitution as a tool for preserving the press function and the flow of information on matters of public concern may face additional hurdles.

The Article proceeds in five Parts. Part I describes the current consequential moment for the American press and the scholarly groundswell that motivates a study of the Court's acknowledgment of press freedom. Part II outlines the methodology for this study. Part III describes the overall patterns revealed by data regarding the Court's recognition of

11. *See infra* Part IV.
12. *See infra* Part V.A.
13. *See infra* Part V.B.1.
14. *See infra* Part V.B.2.
15. *See infra* Part V.B.3.

the right, including the tones Justices use when discussing freedom of the press and the number of Justices over the course of history who have referenced the right in their opinions. This Part also situates these rhetorical patterns within the Court's First Amendment case law to paint the first comprehensive picture of freedom of the press's jurisprudential role. Part IV explores in greater depth the precipitous decline in the Court's mentions of the freedom of the press. It reveals both the quantitative frequency data and the compounding qualitative data that combine to demonstrate the stark disappearance from the Supreme Court's working vocabulary of any concept of the right. Part V examines a set of potential explanations for the trend and uses additional data gathered in the project to interrogate them.

I. A RENEWED FOCUS ON PRESS FREEDOM

Caught inside a perfect storm of economic, cultural, technological, and political forces, the American free press is at a breaking point. Without risk of exaggeration, we can say that our country's news media landscape is being distorted and destroyed before our very eyes—a swift and troubling onslaught that has left scholars and commentators from a number of fields scrambling to draw attention to the problem and search for solutions.[16] Central to these discussions is a renewed scholarly focus on the constitutional right of a free press as an enduring and long-recognized First Amendment value and as a potential legal tool for safeguarding the press function into the future.

The causes of this crisis of the press and democracy are varied. An overarching factor, however, is the sharp financial downturn that has pummeled the news industry over the last two decades.[17] With few exceptions, the once prosperous news

16. *See, e.g.*, *The Crisis of the Press and Democracy: Saving the Press Function*, YALE L. SCH. INFO. SOC'Y PROJECT (Mar. 19, 2021), https://perma.cc/5VMU-PH9J (reporting on an academic conference on the topic of "Saving the Press Function"); *Media Apocalypse*, YALE L. SCH. INFO. SOC'Y PROJECT, https://perma.cc/BGD6-8JTS (highlighting a video series featuring "discussions with experts about the current crisis roiling journalism in the United States and what we might do about it").

17. *See* PENELOPE MUSE ABERNATHY, NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE? 8 (2020), https://perma.cc/WR9P-

business of the twentieth century is no more.[18] By almost every metric, the business side of journalism has fallen precipitously: advertising revenues are down,[19] subscriptions are down,[20] newsrooms are shrinking,[21] and newspapers are shuttering.[22] The newspapers that have survived are becoming "ghosts" of their prior selves, whittled to the bone by new owners who are often private investment firms seeking quick profit through the consolidation and cannibalization of struggling papers.[23] The arrival of the COVID-19 pandemic in the spring of 2020 only brought more economic hardship to the industry and "turbo-charged" its financial downfall.[24]

EWZX (PDF) ("In only two decades, successive technological and economic assaults have destroyed the for-profit business model that sustained local journalism in this country for two centuries. Hundreds of news organizations—century-old newspapers as well as nascent digital sites—have vanished.").

18. *See id.* at 12.

19. *See Newspapers Fact Sheet*, PEW RSCH. CTR. (June 29, 2021), https://perma.cc/9RSQ-T2Q3 ("The total estimated advertising revenue for the newspaper industry in 2020 was $9.6 billion . . . . This is down 25% from 2019.").

20. *See* Michael Barthel, *Estimating U.S. Newspaper Circulation Is a Challenge—Especially for 2020*, PEW RSCH. CTR.: DECODED (June 29, 2021), https://perma.cc/EEA7-6AAU (asserting that although 2020 marked the best year for newspapers in decades, "'best' does not necessarily mean 'good.' If something falls continuously for decades, at a certain point it finds a floor").

21. *See* ABERNATHY, *supra* note 17, at 8 ("In the 15 years leading up to 2020 . . . half of all local journalists disappeared, as round after round of layoffs have left many surviving papers . . . mere 'ghosts,' or shells of their former selves."); Mason Walker, *U.S. Newsroom Employment Has Fallen 26% Since 2008*, PEW RSCH. CTR. (July 13, 2021), https://perma.cc/RA4E-3C7M.

22. *See* ABERNATHY, *supra* note 17, at 8 (describing the closure of 300 newspapers over a span of two years).

23. *See* Joe Pompeo, *The Hedge Fund Vampire That Bleeds Newspapers Dry Now Has the* Chicago Tribune *by the Throat*, VANITY FAIR (Feb. 5, 2020), https://perma.cc/JV44-M9RW (describing Alden Global Capital's "draconian playbook" as: "buy distressed newspapers on the cheap, cut the shit out of them, and reap the profits that can still be made from print advertising"); ABERNATHY, *supra* note 17, at 87 ("Today, four large firms own 15 percent of the country's papers . . . .").

24. *See* ABERNATHY, *supra* note 17, at 8 (stating the fear that the pandemic may amount to an "'extinction-level event' that destroys many of the survivors and newcomers and leads to the collapse of the country's local news ecosystem").

Much of the news industry's commercial troubles accompanied the rise of the digital age and the concomitant collapse of the for-profit, advertising-based business model that long buoyed news organizations.[25] As described by Penelope Muse Abernathy, "[t]he intrusive, always-on internet swiftly siphoned off readers, advertisers and profits. With Facebook and Google capturing the vast majority of digital revenue in many communities today, traditional news organizations, as well as online outlets, have been reduced to fighting over the digital scraps."[26] How the news was presented to Americans swiftly changed as well. Algorithms increasingly dictated what stories made their way to readers' eyes,[27] while the draw of reliably popular content like sports and weather became unbundled from the hard news of public concern, making it harder for the former to financially support the latter.[28]

No segment of the press has been harder hit by economic challenges than local news,[29] a phenomenon that has led to the nationwide rise of "news deserts."[30] According to a report from the University of North Carolina, since 2005, the country has lost a quarter of its local newspapers—the entities that "have historically been the prime source of credible and critical news

25. *See id.*

26. *Id.* at 9.

27. *See* Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69, 71 (2017) ("[Computer engineers'] aim is to perfect algorithms to discern exactly what it is that we want to read and to give us just that, regardless of its objective value or importance.").

28. *See* David Von Drehle, Opinion, *What Happens When a Local Newspaper Dies*, WASH. POST (May 8, 2018, 7:46 PM), https://perma.cc/C8SD-FA9D ("What newspapers bundled, the Internet has unbundled."); *see also* ABERNATHY, *supra* note 17, at 91 ("Public service journalism—investigative and analytical reporting on matters of critical importance, such as education, the environment, politics and the economy—fails to gain traction on the internet . . . .").

29. *See* ABERNATHY, *supra* note 17, at 8; Tom Sites, *About 1,300 U.S. Communities Have Totally Lost News Coverage, UNC News Desert Study Finds*, POYNTER. (Oct. 15, 2018), https://perma.cc/B4JP-S6KL.

30. *See* ABERNATHY, *supra* note 17, at 18 ("[A] news desert [is] 'a community, either rural or urban, where residents have very limited access to the sort of credible and comprehensive news and information that feed democracy at the grassroots level.'").

and information in most small and mid-sized communities."[31] The loss of local newspapers has raised particular concerns among press scholars and commentators because "[i]t is through local journalism that communities stay connected to and informed about what is happening in their backyards, especially in their schools, their governments, and other critical institutions and infrastructures."[32]

Meanwhile, the press has faced an onslaught of attacks—unparalleled in modern times—that have been led and cheered on by political actors.[33] The new moment of heightened scholarly concern about press freedom emerged in part as a result of Donald J. Trump's turbulent presidency, during which time the press was subjected to extraordinary attacks from the highest levels of government.[34] Branded as "fake news" and "enemies of the people,"[35] the press faced an unprecedented effort to discredit its work and its standing within the nation's democratic framework, exacerbating an already deep partisan

31. *Id.* at 89.

32. VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM? CONFRONTING THE MISINFORMATION SOCIETY 102 (2020).

33. *See, e.g.*, David Smith, *'That's a Nasty, Snarky Question': Trump's Media Assault Rages on in Midst of Coronavirus Crisis*, THE GUARDIAN (Apr. 1, 2020), https://perma.cc/T8YL-EQZZ; Jay Rosen, *America's Press and the Asymmetric War for Truth*, THE N.Y. REV. (Nov. 1, 2020), https://perma.cc/6QGU-V9JQ ("To be its dwindling self, the GOP has to also be at war with the press, unless of course the press folds under pressure.").

34. *See* RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1308 (2017) ("Trump's relationship with the press seems unquestionably calculated to construct the press as an enemy.").

35. *Id.* at 1304 (quoting a since-deleted tweet by Trump from February 2017 which stated: "The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People. SICK!").

divide over press trustworthiness[36] and causing the United States' international press freedom ranking to plummet.[37]

Trump's rhetoric included comments celebrating the use of force by police against journalists covering protests,[38] and scholars and advocacy groups have noted that threats and violent attacks against reporters have skyrocketed.[39] Journalists are increasingly at risk of verbal and physical assaults from law enforcement officers[40] and members of the

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36. *See* Megan Brenan, *Americans Remain Distrustful of Mass Media*, GALLUP (Sept. 30, 2020), https://perma.cc/5TC9-JQT7 ("The political polarization that grips the country is reflected in partisans' views of the media, which are now the most divergent in Gallup's history."); Jeffrey Gottfried et al., *Trusting the News Media in the Trump Era,* PEW RSCH. CTR. (Dec. 12, 2019), https://perma.cc/J3F7-C5MK ("On item after item, Republicans consistently express far greater skepticism of the news media and their motives than Democrats . . . ."). *See also* Lili Levi, *Real "Fake News" and Fake "Fake News"*, 16 FIRST AMEND. L. REV. 232, 261 (2017)

> Forty-four percent—almost half—of Americans (and 74% of Republicans) believe that the news media fabricate stories about Trump. A substantial minority—31%—in a recent survey indicate agreement with Trump's tweet that the media are the "enemy" and "keep political leaders from doing their jobs." The survey also shows that "one in four Americans (25%) endorses draconian limitations on press freedom." (citations omitted).

37. *See* Sasha Ingber, *The U.S. Now Ranks as a 'Problematic' Place for Journalists*, NPR (Apr. 18, 2019, 5:13 PM), perma.cc/86BH-TMWS (noting that Reporters Without Borders downgraded the United States to a "problematic" place for journalists and ranked the U.S. 48 out of 180 on the organization's annual World Press Freedom Index).

38. *See* Brett Samuels, *Trump Mocks Reporters Who Were Roughed up by Police During Protests*, THE HILL (Sept. 22, 2020, 9:07 PM), https://perma.cc/RMW7-CEJE (quoting President Trump as saying that police using force against reporters is "actually a beautiful sight").

39. *See* Erin C. Carroll, *Obstruction of Journalism*, 99 DENV. L. REV. 407, 409 (2022) ("Physical assaults against journalists in the United States increased nearly 1,400% in 2020." (citation omitted)); *see also* Kirstin McCudden, *Celebrating 5 Years Since Launch of the U.S. Press Freedom Tracker*, U.S. PRESS FREEDOM TRACKER, https://perma.cc/7B7Y-CRUE ("More journalists were assaulted in the one week [in 2020] immediately following the death of George Floyd . . . than 2017–2019, combined.").

40. *See, e.g.*, *Pulitzer Prize-Winning Photojournalist Shoved to the Ground by LAPD*, U.S. PRESS FREEDOM TRACKER (May 31, 2020), https://perma.cc/35P2-39JP; Marc Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames 'Lamestream Media' for Protests*, N.Y. TIMES (June 1, 2020), https://perma.cc/47Z3-MKXE (last updated Mar. 10, 2021); Katie Shepherd, *This Portland Journalist Has Been Gassed and Shoved by*

public.[41] They are being arrested,[42] charged,[43] and tried[44] for crimes. They are being harassed,[45] threatened,[46] and even killed.[47]

It is against this backdrop that press scholars, commentators, and advocates have come together in a renewed effort to preserve the press function in America.[48] Drawing

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Federal Officers. She's Only 17., WASH. POST (July 23, 2020, 6:32 AM), https://perma.cc/AV5E-JEGZ; Courtney Douglas, *Amid Black Lives Matter Protests, a Crushing Moment for Journalists Facing Record Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. FOR FREEDOM OF THE PRESS (Sept. 4, 2020), https://perma.cc/YPC7-9N3H ("The Press Freedom Tracker has documented 185 attacks on the media in 2020, up from 40 in 2019, 42 in 2018 and 50 in 2017, respectively."); Clare Duffy, *Journalist Partially Blinded While Covering Protests: There's No Way They Could Have Mistaken Me for Anything but Press*, CNN BUS., https://perma.cc/FN5W-2VT7 (last updated June 14, 2020, 5:19 PM).

41. *See, e.g.*, *AP Photojournalist Assaulted by Bystander During Event in Philadelphia*, U.S. PRESS FREEDOM TRACKER (June 4, 2020), https://perma.cc/942C-FP3H; *Reporter Assaulted Live on Air at Phoenix Protest*, U.S. PRESS FREEDOM TRACKER (May 29, 2020), https://perma.cc/37UD-LJES; *Trump Supporter Assaults, Knocks Phone Out of Journalist's Hands*, U.S. PRESS FREEDOM TRACKER (Sept. 30, 2020), https://perma.cc/N6PW-QNFU (last updated May 28, 2021); *Broadcast Journalist Stabbed with Scissors While Reporting in Boston*, U.S. PRESS FREEDOM TRACKER (Sept. 6, 2020), https://perma.cc/W448-ULVQ; *Reporter Hit With Wooden Board at New York's Occupy City Hall Protest*, U.S. PRESS FREEDOM TRACKER (July 12, 2020), https://perma.cc/2H36-ECNN.

42. *See Arrest/Criminal Charge*, U.S. PRESS FREEDOM TRACKER, https://perma.cc/PZZ4-CG4J.

43. *See id.*

44. *See, e.g.*, William Morris, *'The Jury Made the Right Decision': Reporter Andrea Sahouri Acquitted in Trial Stemming From Arrest as She Covered Protest*, DES MOINES REG. (Mar. 10, 2021, 1:32 PM), https://perma.cc/64MX-3MKR (last updated Mar. 11, 2021, 8:54 AM).

45. *See, e.g.*, *Journalists Face Harassment While Covering Coronavirus*, U.S. PRESS FREEDOM TRACKER (May 13, 2020), https://perma.cc/9UZ5-RBUH.

46. *See, e.g.*, Katherine Jacobsen & Lucy Westcott, *'Three People Threatened to Shoot Me.' Journalists Describe Covering Mob Violence at the US Capitol*, COMM. TO PROTECT JOURNALISTS (Jan. 7, 2021, 7:15 PM), https://perma.cc/WU86-3MCJ.

47. *See, e.g.*, '*Dagger at the Heart of Free Press': The Killing of a Las Vegas Journalist*, THE GUARDIAN (Sept. 17, 2022, 1:00 PM), https://perma.cc/24WS-8VXR.

48. *See* ABERNATHY, *supra* note 17, at 88 (quoting a representative of PEN America, a nonprofit organization that advocates for press freedom, as stating that "[t]hings are so bad, we need an all-of-the-above approach").

attention to what they fear is a growing crisis, academics from a number of fields have launched a burgeoning scholarly movement aimed at safeguarding the continuation of newsgathering and accurate information-sharing in America, and exploring how the First Amendment's guarantee of press freedom might be a tool in those efforts.[49]

To this end, scholars are closely questioning the longstanding components of the U.S. press freedom structure[50] and re-exploring the underpinnings of press freedom values in areas where courts have long tussled with the principle, such as reporter's privilege[51] and national security.[52] These scholars, however, are also grappling with complex questions about the roles the press and press freedom play in new media and legal landscapes. They are exploring the relationships between the American free press and changing media structures, political polarization, and the decline of reliable news, as well as interrogating the boundaries of press freedom in the face of propaganda threats[53] and the influence of social media companies' incentives.[54] They are further investigating how organizational operational models[55] and monopolistic

49. *See id.*

50. *See* RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 572–76 (2017).

51. *See generally, e.g.*, RonNell Andersen Jones, *Rethinking Reporter's Privilege*, 111 MICH. L. REV. 1221 (2013) (describing the Supreme Court's investigation of the unique freedom of the press reasons for protecting journalists' ability to preserve source confidentiality).

52. *See generally, e.g.*, Heidi Kitrosser & David Schulz, *A House Built on Sand: The Constitutional Infirmity of Espionage Act Prosecutions for Leaking to the Press*, 19 FIRST AMEND. L. REV. 153 (2021).

53. *See* YOCHAI BENKLER ET AL., NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 75–82 (2018) (arguing that a feedback loop in American conservative media has radicalized the rightwing ecosystem and rendered it susceptible to both foreign and domestic propaganda efforts).

54. *See* SIVA VAIDHYANATHAN, ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY 8 (2018) ("As reputable news organizations lay off reporters and pay less for freelance work, they have altered their editorial decisions and strategies to pander to the biases inherent in Facebook's algorithms.").

55. *See* Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CTR. FOR DIGIT. JOURNALISM (Mar. 29, 2017), https://perma.cc/B7ST-HHZH (describing the evolution of companies

concentrations of power[56] have an impact on free-press values in this ecosystem. Most importantly, they are thinking creatively about the relationship between constitutional values of press freedom and the needs of a vibrant democracy, including suggesting proposals for adopting new models of public media,[57] structural reforms designed to preserve core press functions,[58] and policies that would make a free press more reflective of the needs of the wider citizenry.[59]

Some of this scholarship actively urges the courts to put the constitutional right to press freedom to new analytical use.[60] For example, in her recent work, former dean of Harvard Law School Martha Minow invokes the First Amendment's Press Clause in support of a wide array of reforms meant to protect the flow of information on matters of public concern in the new media landscape.[61] In her new book, *Saving the News: Why the*

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like Google and Facebook beyond a distribution role and the complex question of private platform control over what audiences and what type of journalism occurs).

56. *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 976 (2019) ("A handful of digital platforms exert increasing control over key arteries of American commerce and communications. Structuring access to markets, these firms function as gatekeepers for billions of dollars in economic activity.").

57. *See, e.g.*, PICKARD, *supra* note 32, at 5, 10 (2020) (arguing that "[u]nless we first address the . . . commercialism that lies at the center of the system's maladies . . . we cannot overcome the other harms plaguing American news media" and that "[t]he best hope for public service journalism is a public media option").

58. *See, e.g.*, Steve Waldman, *Curing Local News for Good*, COLUM. JOURNALISM REV. (Mar. 31, 2020), https://perma.cc/M5BZ-CGPP (detailing governmental actions that might spur structural relief to sustain newsgathering, including IRS decisions regarding newspapers' nonprofit status, reforms to bankruptcy and pension law, direct aid to journalists, and government spending on advertising in support of local news).

59. *See, e.g.*, James T. Hamilton & Fiona Morgan, *Poor Information: How Economics Affects the Information Lives of Low-Income Individuals*, 12 INT'L J. COMMC'N 2832, 2843 (2018).

60. *See, e.g.*, Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 LOY. L. REV. 499, 539 (2018) ("To sustain freedom of the press and enable the people, courts need to pursue some new approaches, and so does Congress.").

61 *See id.* at 543 ("What is needed is not a preferred constitutional status for professional journalists, but a constitutionally inflected strategy for reaching news deserts and enabling competing groups to have the materials necessary

Constitution Calls for Government Action to Preserve Freedom of Speech, Minow argues that some government regulations—such as proposals to decrease concentration of platform ownership, to build a new "fairness doctrine," or to support news initiatives with robust public funding—are not merely good policies but affirmative constitutional necessities for fulfilling the wider purpose of the First Amendment in a modern media ecosystem.[62] She further asserts that press advocates can effectively counter any potential legal challenges to the regulation of private speech platforms by relying on the weight of First Amendment press freedom values.[63] Minow's arguments, like those of other scholars at this intense moment of press-freedom focus, invite an investigation of the role of the freedom of the press in our wider constitutional system.

Indeed, other scholarship, including our own, has urged an even more aggressive invigoration of the Press Clause as an affirmative protection for newsgathering;[64] the enhancement of government accountability;[65] and the performance of functions that overcome the limitations of individual press consumers, like information-processing and truth-seeking, in the

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to check alleged facts; see who is paying for what ads and stories; and distinguish vetted and unvetted [materials].").

62. MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 146–48 (2021) (arguing that the First Amendment guarantee of freedom of the press may hold meaning in the new media ecosystem as a constitutional support for more robust funding of public media and other reforms).

63. *See id.*

64. *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1068 (2011) (advancing a proposal to embrace press exceptionalism through a narrow definition of "the press" that reduces overlap between press and speech, thereby granting the Press Clause independent significance); *see also* Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 102 (2018) (pushing back on arguments suggesting "that the Press Clause functions as a nondiscrimination provision that prohibits speaker-based classifications by the government" in favor of the press).

65. *See* Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2437 (2014) (arguing for a classification of "press speakers" who can uniquely invoke Press Clause protection because they fulfill specific roles related to informing the public of newsworthy matters and providing a check on the government and the powerful).

marketplace of ideas.[66] The theoretical approaches proposed in these scholarly conversations are making their way into concrete arguments before the courts, which are being asked to consider the scope and contours of constitutional press freedom protections in new ways.[67]

These inquiries plumb the depths of what the constitutional right of freedom of the press means, how it operates, and who it protects. But all of these arguments share a single baseline: they assume the universal legal recognition of some foundational principle of a constitutional right of press freedom. If that baseline does not exist—if the Court is in the process of erasing the First Amendment right to press freedom altogether—then the conversations in this space face yet another hurdle. The scholarly movement to make something more of the constitutional freedom of the press presupposes a Court that is, at a minimum, amenable to the bare concept of a constitutional freedom of the press.

II. METHODOLOGY

The findings reported here were gathered in a large-scale project designed to code every reference of the press in all

66. *See* Jones & Sun, *Post-Truthism America*, *supra* note 1, at 425 (asserting that there is a need for protection of the press as a market-enhancing institution and exploring the market-enhancing functions that should qualify an institutional actor as "the press" under the Press Clause); *see also* RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 537 (2019) (arguing that press speakers engage in special institutional First Amendment activities on behalf of audiences and perform a vital proxy role for listeners whose direct access interests are fulfilled through the protected activities of their press partners).

67. *See, e.g.*, Brief for Amici Curiae Thirteen Scholars and Practitioners of First Amendment Law in Support of Plaintiffs-Appellees at 28, Index Newspapers LLC v. U.S. Marshals Serv., 977 F.3d 817 (9th Cir. 2020) (No. 20-35739), 2020 WL 7063163, at *28 (asserting that the district court's injunction should be affirmed as a proper enforcement of the rights protected by the Press Clause because journalists were engaged in activity that was intended to be protected by the Clause).

opinions[68] by Justices of the U.S. Supreme Court since 1784.[69] The project explored 8,792 total characterizations of the press in the writings of 114 Justices over the course of 235 years.[70]

The dataset includes every paragraph in which a Justice of the Court spoke in any way about the press or the press function. Decisions on inclusion were shaped by the Court's own identifications of those functions over time, such as its use of a wide set of synonyms for those concepts, and the data include references to both traditional legacy media and other performers of the press function.[71] Coders read each of these 5,267 paragraphs and logged positive, negative, and neutral tonal variations within eight common press-related frames.[72] Seven of the eight frames tracked by our coders are sweepingly topical—capturing, for example, all mentions of interactions between the press and the justice system or all narratives involving possible regulation of the press.[73] But one frame

68. The Westlaw "OPINION" database that was used to create the dataset captures all majority, dissenting, and concurring opinions, as well as all other written materials from individual Justices that were published in the U.S. Reports, including dissents from denial of certiorari and statements associated with recusal decisions and stay applications. The specific search syntax used (without the leading and ending quotation marks) was as follows: "adv: OPINION(#press or media or newspaper or "fourth estate" or journalis! 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!)))".

69. The studied period ran from 1784 through July 2020, when the Court completed its 2019 Term. The first reference to the press found in this studied period occurred in 1821. *See* Anderson v. Dunn, 19 U.S. 204, 232 (1821) (referencing "the liberty of speech and of the press"). The first reference to the concept of freedom of the press was that same Term. *See id.*

70. For an extended discussion of the wider project methodology, see RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, 100 N.C. L. REV. 375, 386–90 (2022) [hereinafter Jones & West, *Empirical Study*].

71. For example, the dataset includes modern paragraphs that do not involve traditional press outlets but speak of the performance of the newsgathering function by other actors. *See, e.g.*, Nieves v. Bartlett, 139 S. Ct. 1715, 1740 (2019) (Sotomayor, J., dissenting) (referencing the possibility of a "citizen journalist" recording police with a cellphone camera and streaming the footage on social media).

72. Jones & West, *Empirical Study*, *supra* note 70, at 387–88.

73. *See id.*

focuses on a linguistically and conceptually precise legal concept: the constitutional right of press freedom.[74] This Article focuses on the data captured by this frame—the "Right Frame."

Coders recorded the Right Frame every time a Justice of the Court mentioned the concept of a free press or freedom of the press in any way. The most common formulations of this across the dataset are direct references to the right of "freedom of the press"[75] or verbatim quotes of the First Amendment's phrasing, "freedom of speech, or of the press."[76] But individual human-coder review ensured the inclusion of a fuller set of theoretical and conceptual synonyms referencing the existence of a freedom of the press.[77] Of the more than 5,000 paragraphs

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74. *See id.*

75. *See, e.g.*, *Ex parte* Jackson, 96 U.S. 727, 733–35 (1877); Downes v. Bidwell, 182 U.S. 244, 277, 298, 368 (1901); Gilbert v. Minnesota, 254 U.S. 325, 332 (1920); United States v. Macintosh, 283 U.S. 605, 622 (1931); Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 299 (1941); Tenney v. Brandhove, 341 U.S. 367, 381 (1951) (Black, J., concurring); Wood v. Georgia, 370 U.S. 375, 384 (1962); Byrne v. Karalexis, 396 U.S. 976, 980 (1969) (Douglas, J., dissenting); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 100–01 (1979); Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 223, 230 (1987); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360–67 (1995) (Thomas, J., concurring); Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 154, 161–62 (2002).

76. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 450 (1857); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 289, 292 (1904); Schaefer v. United States, 251 U.S. 466, 474 (1920); De Jonge v. Oregon, 299 U.S. 353, 364 (1937); Roth v. United States, 354 U.S. 476, 479, 488, 492 (1957); A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Att'y Gen. of Mass., 383 U.S. 413, 427 (1966) (Douglas, J., concurring); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973); Fed. Commc'ns Comm'n v. League of Women Voters of Cal., 468 U.S. 364, 366, 381, 384 (1984); Denver Area Educ. Telcomms. Consortium v. FCC, 518 U.S. 727, 740 (1996); Thomas v. Chi. Park Dist., 534 U.S. 316, 320 (2002); Citizens United v. FEC, 558 U.S. 310, 420 (2010) (Stevens, J., concurring in part and dissenting in part).

77. *See, e.g.*, Sparf v. United States, 156 U.S. 51, 131 (1895) ("[L]iberty of the press . . . ." (internal quotations omitted)); Downes v. Bidwell, 182 U.S. 244, 282 (1901) ("[F]reedom of speech *and* of the press . . . ." (emphasis added)); United States *ex rel.* Milwaukee Soc. Democratic Publ'g Co. v. Burleson, 255 U.S. 407, 409 (1921) ("[F]ree press . . . ."); Gitlow v. New York, 268 U.S. 652, 664 (1925) ("[L]iberty of speech and of the press . . . ."); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 718 (1931) ("[T]he press has exerted a freedom . . . ."); Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936) ("[P]reserve an untrammeled press . . . .").

discussing the press or press functions, 1,192 included at least one reference to the freedom of the press.

Each instance of usage was further coded for tone.[78] Coders recorded a reference as neutral if it suggested that a free press or a constitutional liberty of the press exists but did not include any accompanying commentary characterizing the right. Any mention, for example, simply to "the freedom of the press," "the liberty of the press," or "a free press" was coded as neutral. If, however, a reference used language indicating that the right or liberty is not valuable, then coders logged it as negative. Likewise, coders flagged as positive any reference suggesting that press freedom is important or valuable. Thus, any reference to "press freedom," "free press," or "liberty of the press" that included a modifier like "vital," "significant," "crucial," "important," "central," "core," or "essential" received this coding.

Post-coding analysis merged all coded paragraphs with the Supreme Court Database,[79] making it possible to parse the results by Court Term, by authoring Justice, and by case topic area. Eight hundred and sixty-seven of the 1,192 paragraphs referencing freedom of the press (72.73%) appear in cases reaching First Amendment holdings; the remainder are in cases focused on a variety of other legal matters.[80]

III. JUSTICES' DEPICTIONS OF PRESS FREEDOM

In contrast to the broader set of press references we considered in our larger study,[81] the constitutional right framework focuses specifically on the Justices' mentions of press freedom as a First Amendment liberty. Separately tracking these references allows us to explore important questions of when and how members of the Court have reinforced or amplified the constitutional status of the American free press. In our examination of this data, we find that throughout the

78. *See supra* note 72 and accompanying text.

79. *The Supreme Court Database*, WASH. UNIV. L. SCH., https://perma.cc/VS42-5QSF.

80. For example, 8.31% of the references (99 paragraphs) were in cases coded by the Supreme Court Database as criminal procedure cases; 7.63% (91 paragraphs) were in cases coded as economic activity cases; 3.02% (36 paragraphs) were in cases coded as union cases; and 2.77% (33 paragraphs) were in cases coded as civil rights cases.

81. *See* Jones & West, *Empirical Study*, *supra* note 70, at 390.

Court's history the constitutional right framework has been a key mechanism employed by the Justices to signal the continued value of press freedom and the press function.

A. *Unique Framework Reflecting Press Freedom's Constitutional Status*

Our data show that discussing the role of the press as part of our constitutional system is one of the most frequently used, and therefore arguably the most important, of the press-characterizing contexts we studied. It is the third most common framework the Justices have turned to when mentioning the press.[82] The contexts in which these references occur vary widely over the dataset. Sometimes, press freedom or a "free press" is included in a broader list of constitutional rights or values;[83] in other instances, it is discussed alone without any reference to other constitutionally protected freedoms.[84] In some

82. The only frames that were more common in the full dataset were basic depictions of the press in its role as a communicator of information and discussions of the appropriateness of government regulation of it.

83. *See, e.g.*, Jones v. City of Opelika, 316 U.S. 584, 611 (1942) ("[F]reedom of speech, press and religion."); Schneiderman v. United States, 320 U.S. 118, 145 (1943) ("[F]ree speech, free press and free assemblage . . . ."); Murdock v. Pennsylvania, 319 U.S. 105, 107 (1943) ("[F]reedom of speech, press, and religion guaranteed by the First Amendment."); Rosenblatt v. Baer, 383 U.S. 75, 89 (1966) (Douglas, J., concurring) ("[T]he freedom of speech and of the press guaranteed by the Constitution . . . ." (quoting Thornhill v. Alabama, 310 U.S. 88, 101–02 (1940))); Craig v. Harney, 331 U.S. 367, 373 (1947) ("[T]he unequivocal command of the First Amendment serve[s] as [a] constant reminder[ ] that freedom of speech and of the press should not be impaired . . . ."); Bridges v. California, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting) ("[F]reedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power."); *Thornhill*, 310 U.S. at 101 ("The freedom of speech and of the press guaranteed by the Constitution . . . ."); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) ("[T]he freedom of speech and that of the press . . . ."); *De Jonge*, 299 U.S. at 364 ("[F]reedom of speech and of the press are fundamental rights . . . ."); *Gitlow*, 268 U.S. at 664 ("[T]he liberty of speech and of the press . . . ."); ex rel. *Turner*, 194 U.S. at 294 ("[T]he vital importance of freedom of speech and of the press . . . .").

84. *See, e.g.*, Lowe v. SEC, 472 U.S. 181, 205 (1985) ("The liberty of the press . . . ." (quoting Lovell v. City of Griffin, 303 U.S. 444, 452 (1938))); Pell v. Procunier, 417 U.S. 817, 835 (1974) ("[T]he constitutional right of a free press."); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 145 (1973) (Stewart, J., concurring) ("[A] free press is indispensable to a free

instances, this framing was the only characterization of the press in the specified paragraphs;[85] in others, it was used alongside other common press frames.[86]

Beyond mere frequency, the Justices' use of the constitutional right framework also stands out for its unique tonal delivery. By design, every category in our study was assigned a context in which it would be coded as positive, negative, or neutral.[87] For most frames, however, their common usage tilts heavily toward one tone or another, with some carrying a predominantly negative tone and others a primarily positive one.[88]

The first notable tonal characteristic found in the press-freedom frame is that the Justices' mentions of the press have always been either positive or neutral in tone. No member of the Court has *ever* referenced the right of press freedom with a negative tone—a finding that cannot be said for any other frame that we studied, including other frames that skewed heavily positive.[89]

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society."); *Craig*, 331 U.S. at 384 (Frankfurter, J., dissenting) ("[T]he freedom of the press so indispensable to our democratic society . . . ."); *Id.* at 383 (Murphy, J., concurring) ("A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty."); Time, Inc. v. Hill, 385 U.S. 374, 401 (1967) (Black, J., concurring) ("[T]he clearly expressed purpose of the Founders to guarantee the press a favored spot in our free society."); Pennekamp v. Florida, 328 U.S. 331, 355 (1946) (Frankfurter, J., concurring) ("A free press is vital to a democratic society because its freedom gives it power."); New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) ("[T]he fundamental doctrine of freedom of the press.").

85. In 287 of the 1,192 paragraphs containing reference to press freedom—24% of the total references—the Court was referring to the press only through a reference to freedom of the press.

86. In 526 paragraphs, 44.97% of the total, press freedom was referenced alongside commentary that fell within one of our other codable frames, like the historical value of the press, the impact of the press on individuals, the propriety of regulating the press, or the trustworthiness of the press. In 221 paragraphs, 18.54% of the total, it was referenced alongside two or more of these frames. In 12.42% of paragraphs, it was alongside more than two additional frames.

87. Jones & West, *Empirical Study*, *supra* note 70, at 390 n.65.

88. *See id.* at 396–401.

89. For example, our "History" frame, which captured every reference the Justices made to the press through the eyes of the Founders, was nearly always used with a positive tone, but the dataset includes at least a few

While the constitutional right context was mostly a neutrally applied framework, a significant number of the Justices' references—over 20%—were positive. As discussed earlier, this means that their reference to the right of press freedom included an explicitly positive modifier. In some of these positive statements, the Justices discussed freedom of the press as a standalone constitutional right, referring to it as "vital,"[90] "indispensable,"[91] "essential,"[92] "fundamental,"[93] "important,"[94] or "cherished."[95]

Often, though, the Justices mentioned press freedom not in a standalone way but in tandem with discussions of other constitutional rights. Justice John Harlan II, for example, referred to the "indispensable liberties" of "speech, press, or association."[96] Justice Wiley Rutledge likewise emphasized that "the First Amendment guaranties of the freedoms of speech, press, assembly and religion occupy preferred position not only in the Bill of Rights, but also in the repeated decisions of this

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references by Justices that are using the framework to depict the press negatively. *See id.* at 398–99.

90. *Pennekamp*, 328 U.S. at 355 (Frankfurter, J., concurring) ("A free press is vital to a democratic society because its freedom gives it power.").

91. *Craig*, 331 U.S. at 384 (Frankfurter, J., dissenting) ("It cannot be repeated too often that the freedom of the press so indispensable to our democratic society presupposes an independent judiciary which will, when occasion demands, protect that freedom."); *Columbia Broad.*, 412 U.S. at 145 (Stewart, J., concurring) ("Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society.").

92. *Craig*, 331 U.S. at 383 (Murphy, J., concurring) ("A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty."); *Lowe*, 472 U.S. at 205 (noting the "liberty of the press" and "the vital importance of protecting this essential liberty" (citation omitted)).

93. *New State Ice*, 285 U.S. at 280 (containing Justice Sutherland's reference to "the fundamental doctrine of freedom of the press").

94. *Opelika*, 316 U.S. at 621 (Murphy, J., dissenting) ("Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals—the right to worship their Maker . . . .").

95. Pell v. Procunier, 417 U.S. 817, 840 (1974) (Douglas, J., dissenting) ("The only issue here is whether the complete ban on interviews with inmates selected by the press goes beyond what is necessary for the protection of these interests and infringes upon our cherished right of a free press.").

96. NAACP v. Alabama *ex. rel.* Patterson, 357 U.S. 449, 461 (1958).

Court."[97] In a separate review of these paragraphs, we observed that this practice—of the Justices including press freedom as one of a select group of important constitutional rights—was a significant pattern.

While press freedom appears in the Court's opinions alongside a variety of other constitutional rights, we also noted during our post-coding review that one of its persistent "traveling companions" was the freedom of speech. The Justices often linked the two rights and emphasized their centrality to free people in a democracy.[98] In one illustrative example, Justice Anthony Kennedy declared that "the freedom of speech and that of the press . . . reflect[] the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men."[99]

The constitutional right framework is also unique because of the inherent significance that is conveyed by even the Court's most ordinary uses of it. Our data show that this framework is a predominantly neutral construct, with almost 80% of the Justices' mentions of the press in the constitutional right context occurring without any additional positive description.[100] The Justices, for example, frequently take note of the simple inclusion of press freedom in the Constitution—not uncommonly as part of a straightforward recitation of the First Amendment's text.[101]

Such references are technically "neutral" statements, because the Justices did not include any additional linguistic layer indicating a positive or negative tone.[102] But the housing of press references within the constitutional right framework carries, in and of itself, a distinctive weight as compared to the Court's other press mentions, because all constitutional rights are, by definition, legally special.

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97. Kovacs v. Cooper, 336 U.S. 77, 106 (1949) (Rutledge, J., dissenting).

98. *See, e.g.*, *supra* notes 96–97 and accompanying text.

99. Hill v. Colorado, 530 U.S. 703, 782–83 (2000) (Kennedy, J., dissenting) (quoting Schneider v. New Jersey, 308 U.S. 147, 161 (1939)).

100. *See infra* Figure 1.

101. *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675, 680 (2019) (Thomas, J., concurring) ("The First Amendment provides that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'" (citation omitted)).

102. *See supra* Part II.

While there may be ongoing debates about the precise meaning and contours of the First Amendment right to press freedom, there is no dispute about its heightened status as compared to the spectrum of human activities and interests that the Court has *not* recognized as constitutionally protected. The Court, for example, does not talk of a "right" to eat, have a job, or receive healthcare despite the importance of these activities to individuals. It does not discuss the collective work of teachers, scientists, or farmers as a categorical constitutional "freedom" despite the significance of their occupations to our communities. Indeed, the Court has explicitly rejected claims to a constitutional right to physician-assisted suicide,[103] access to education,[104] protection from private violence,[105] or the testing of DNA evidence by criminal defendants.[106] In the eyes of a subset of legal thinkers, moreover, any right that is grounded in explicit constitutional text—like press freedom—stands on more legitimate constitutional ground than the rights that are "unenumerated."[107] Additionally, any time the Justices note

103. *See* Washington v. Glucksberg, 521 U.S. 702, 735 (1997) (holding that a ban on assisted suicide does not violate the Due Process Clause of the Fourteenth Amendment).

104. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973) (holding that funding disparities in public schools do not violate the Equal Protection Clause).

105. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) ("[W]e conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").

106. *See* Dist. Att'y's Off. for the Third Jud. Dist. v. Osborne, 557 U.S. 52, 73 (2009) ("Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers . . . .").

107. *See, e.g.*, Don Franzen, *Reading the Text: An Interview with Justice Antonin Scalia of the U.S. Supreme Court*, L.A. REV. OF BOOKS (Oct. 1, 2012), https://perma.cc/2SP7-W5B2

> [I]f you believe it is a compendium of all unenumerated rights, you have to believe that the framers were nuts. I mean, did they go through the trouble of listing in detail, you know, the right to trial by jury in all matters of common law involving more than 20 dollars, no quartering of troops in homes, or one after another, and finally when you go, "yes, what should we add? Everything else." That's not the way you write a legal document. And this was a legal document. Just as the Tenth Amendment is nothing but an expression of the belief in federalism, so also the Ninth Amendment

press freedom's incorporation as a "liberty" under the Fourteenth Amendment's Due Process Clause, they are implicitly conveying its place among the rights the Court has deemed to be "fundamental."[108]

Therefore, every time the Court places its references to the press or the press function in the constitutional right framework—with or without additional positive semantics—it is, at a minimum, acknowledging and reinforcing the press function's intrinsically heightened legal position. The effect of the Court noting its constitutional status is cumulative, as each additional recognition of the First Amendment's protection of press freedom contributes to the strengthening of that position. As Frederick Schauer has explained, in the law, "the status of a source as an authority is the product of an informal, evolving, and scalar process by which some sources become progressively more and more authoritative as they are increasingly used and accepted."[109]

If a constitutional right's relevancy is continually reinforced through the Court's (even neutral) acknowledgements of its existence, the opposite phenomenon must also be true: a constitutional right's power may decline, not only through explicitly negative references to it, but rather through the Court's seeming indifference. A legal principle "that is utterly ignored cannot be said to be influential or authoritative."[110]

B. *The Constitutional Right Framework's Heightened Importance for Press Freedom*

This truism—that a legal right can grow, morph, or weaken through the Court's repeated acknowledgement of it or, conversely, through judicial abandonment—is particularly

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> is nothing but an expression of belief in the natural law. But it is not an invitation to the judges to apply whatever they think the natural law says. (quoting Justice Antonin Scalia).

108. *See* John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1299 (1993) ("The breadth of the interests and principles evoked by the term 'liberty' extends far beyond the area of political debate . . . to encompass the kinds of expressive conduct that now enjoys First Amendment immunity.").

109. Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1956–57 (2008).

110. Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 347 (2007).

salient for the constitutional right of press freedom. Over the last half century, the Court has treated freedom of the press as a unique constitutional ingredient—a principle that adds support to the overall strength of expressive freedoms more generally. Press freedom's constitutional potency in this supporting role, moreover, relies heavily on the Court's rhetorical signaling of its continued importance.

The Court's attention to the constitutional protection of the press has gone through a variety of stages throughout the Court's history. But the key before-and-after dividing line can be drawn at the Court's incorporation of press freedom into the Fourteenth Amendment's Due Process Clause in 1931. Before the end of World War I, the Court paid little attention to press freedom, just as they took little notice of any of the First Amendment's expressive liberties.[111] That all changed, however, in *Near v. Minnesota* ex rel. *Olson*[112] when the Court incorporated the protections of the Press Clause to apply to the states and for the first time held that a government regulation violated the Constitution's guarantee of the freedom of the press.[113]

The Court's incorporation of the Press Clause solidified press freedom's constitutional standing as a fundamental right of widespread importance. Consistent with this common understanding of the trajectory of the Court's First Amendment jurisprudence, our data show the Justices' references to the constitutional right of press freedom spiking in frequency starting in the 1930s.[114]

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111. *See* Dennis v. United States, 341 U.S. 494, 503 (1951)

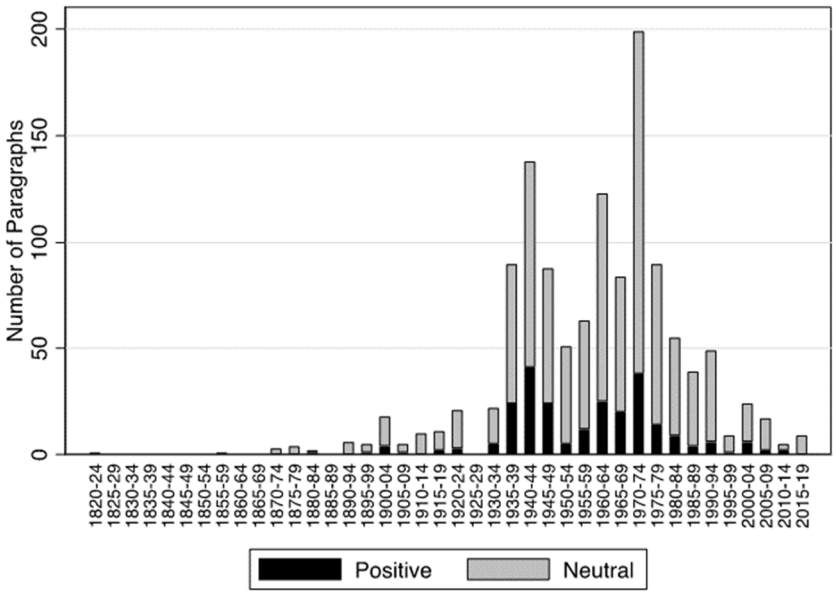
> No important case involving free speech was decided by this Court prior to Schenck v. United States, [249 U.S. 47, 52 (1919).] Indeed, the summary treatment accorded an argument based upon an individual's claim that the First Amendment protected certain utterances indicates that the Court at earlier dates placed no unique emphasis upon that right. It was not until the classic dictum of Justice Holmes in the Schenck case that speech per se received that emphasis in a majority opinion. (citations omitted).

112. 283 U.S. 697 (1931).

113. *See id.* at 722–23.

114. *See* Figure 1.

Figure 1



While references to press freedom rose significantly post-incorporation, scholars have noted differences in how the Justices interacted with the right over time.[115] In the initial period from the 1930s to the 1960s, the Justices substantively engaged with the First Amendment's Press Clause.[116] During this era, as David A. Anderson has explained, "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."[117]

Over time, however, the concept of the constitutional right to a free press seemed to take on a new role as a backup expressive freedom—one less likely to be seen as the repository

115. *See, e.g.*, David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–51 (2002).

116. *See id.* at 448 (referring to this period as "the heyday of the Press Clause in the Supreme Court.").

117. *Id.* (citation omitted).

of substantive rights and protections and more likely to be employed as a rhetorical or analytical tool in support of a broader First Amendment holding.[118] During this stage, spanning from the 1960s through the early 1990s, the Justices' interpretation of the freedom of speech was growing in power and reach.[119] Meanwhile, their depiction of press freedom was transforming from a constitutional power independent from, or coequal to, freedom of speech into a still significant, but less distinct, component of what the Justices began increasingly to refer to as the "freedom of expression."[120]

During this time, the First Amendment right to a free press thus assumed the constitutional character of an often necessary but not sufficient element that meaningfully informed the shape and breadth of expressive freedom. The Justices in these years frequently discussed, lauded, and emphasized press freedom, while at the same time rarely relying on it as the constitutional home of explicit substantive rights.[121] While the Court's ultimate holdings in these cases may have been formally grounded in the Speech Clause, the analyses required to reach those holdings often hinged on the Justices' underlying recognition of the Constitution's protection for the press.[122] The Justices, for example, frequently sandwiched their Speech Clause holdings between soaring statements about the value of a constitutionally protected free press.[123] Alternatively, they analyzed cases through the real-world effects of their decisions on press liberties and the practical value of press functions before announcing a right stemming ostensibly from the

118. *See id.* at 449–50.

119. *See* Sonja R. West, *The "Press," Then and Now*, 77 OHIO ST. L.J. 49, 100 (2016).

120. *Id.*

121. *See* RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 715 (2014) ("[T]hese characterizations of the media, its role, and its unique societal contributions are made when the question of press freedom is not squarely before the Court, and the depictions are presented in passing, unconnected to a holding and unmoored in constitutional jurisprudence.").

122. *See* Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 749 (2014).

123. *See* Jones, *supra* note 121, at 711.

freedom of speech.[124] Indeed, despite the decline in substantive Press Clause holdings, it is during this period that the Court handed down a large number of its most well-known decisions recognizing and protecting the press function.[125]

Take, as an example, the Court's 1976 decision in *Nebraska Press Association v. Stuart*.[126] While the legal challenge was brought by a news organization, this case considered a trial judge's order that prohibited "everyone in attendance" at a criminal pretrial hearing from publicly disseminating potentially prejudicial evidence and testimony.[127] The Court ultimately concluded that the order was an unconstitutional prior restraint on speech—a holding that applies broadly to all speakers.[128] Yet contemplation of press freedom is so interwoven into the Court's analysis that it is difficult to identify where the line shifts from press freedom to speech rights. The Court begins its opinion, for example, by stating that the question presented in the case was whether the order violated "the constitutional guarantee of freedom of the press."[129] Throughout the opinion, however, the Court situates the case as involving the First Amendment protection against prior restraints on speech[130]

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124. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) ("We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated." (internal quotations omitted)); *see also* West, *supra* note 122, at 741 (2014) ("While there are few cases that specifically deal with the press, there are many more that focus on matters that primarily affect the press.").

125. *See* RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255–256 (2014) ("In a smattering of pre-*Sullivan* cases and then very consistently throughout a period that we might call the press 'Glory Days' of the 1960s, 1970s, and early 1980s, the Court went out of its way to speak of the press and then offered effusively complimentary depictions of the media in its opinions.").

126. 427 U.S. 539 (1976).

127. *Id.* at 542.

128. *See id.* at 570 ("We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid.").

129. *Id.* at 539.

130. *See, e.g.*, *id.* at 556 (discussing precedent dealing with regulations that "impose a 'previous' or 'prior' restraint on speech"); *id.* at 559 ("A prior

alone before ultimately landing on a holding based in more ambiguously worded violations of "the freedom to speak and publish"[131] and "the guarantees of freedom of expression."[132]

The Court's views on the distinction between freedom of speech and freedom of the press in *Nebraska Press Association* are decidedly blurry, as are the particulars of what either phrase exactly means. The opinion nonetheless makes clear that the Justices appreciate the underlying importance of a constitutionally protected free press. The most significant way the Court conveys this appreciation is through its simple and consistent *mentioning* of the constitutional right.[133] Between the Court's majority opinion and the four concurring opinions in that case, the Justices made only seven combined references to "free speech" or the "freedom," "liberty," or "right" of speech, yet they make nineteen such references to the constitutional right of press freedom.[134]

Our data reflect this understanding of the Justices' evolving relationship to press freedom during the last few decades of the twentieth century. While they may have been increasingly relying on the Speech Clause to support their conclusions, the Justices were still openly turning to principles of press freedom to inform their thinking.[135] Thus, as shown in Figure 3, our data

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restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." (citation omitted)); *id.* at 562 (posing the question of whether the defendant's right to a fair trial "justifies such invasion of free speech").

131. *Id.* at 570.

132. *Id.*

133. *See, e.g.*, *id.* at 548 (quoting John Jay on the danger of limiting the freedom of the press); *id.* at 549 (referencing the balancing between "the right to a fair trial and the rights of a free press"); *id.* at 556 (invoking the First Amendment right to a free press); *id.* at 557 (noting the right to freedom of the press); *id.* at 561 (noting the "the right of the press" against prior restraint).

134. These numbers were tabulated following the guidelines of our codebook for identifying the constitutional right frame. Thus, they exclude references that are part of book titles or case names, as well as references that appear in a footnote or appendix, and include references that appear in the opinions as a quotation from another source. *See supra* Part II.

135. *See* Anderson, *supra* note 115 at 430 n.3 (noting that even the Justices themselves sometimes confused a substantive speech right held by all speakers with a constitutional protection emanating from the Press Clause.).

show the Justices' use of the constitutional right framework remained robust through the beginning of the 1990s.[136]

Overall, the Court's post-incorporation treatment of press freedom is consistent with our findings on the peak period of the constitutional right framework, which runs from roughly 1935 to 1990.[137] Whether as a matter of cause or effect, our data also show that the Justices who most commonly employed this framework served on the Court between these years.[138] Of the six Justices who most often discussed the constitutional right of press freedom, five of them—Justice Hugo Black, Justice William Douglas, Justice William Brennan, Chief Justice Warren Burger, and Justice Stanley Reed—served the entirety of their terms on the Court during this time.[139] The other Justice in this group—Justice Byron White, who was the fourth most frequent user of this framework—served more than 90% (twenty-eight of his thirty-one years) during this crucial period.[140] The importance of the constitutional right framework

136. *See* Figure 3.

137. *See infra* Part IV.C.

138. *See infra* Part IV.D.

139. Justice Black (1937–1971) discussed the right 169 times and served the entirety of his thirty-four years on the Supreme Court during the peak period of the constitutional right framework. Justice Douglas (1939–1975) discussed the right 129 times and served the entirety of his thirty-six years on the Supreme Court during the peak period of the constitutional right framework. Justice Brennan (1956–1990) discussed the right 102 times and served the entirety of his thirty-four years on the Supreme Court during the peak period of the constitutional right framework. Justice Burger (1969–1986) discussed the right fifty times and served the entirety of his seventeen years on the Supreme Court during the peak of the Constitutional right framework. Justice Reed (1938–1957) discussed the right forty-eight times and served the entirety of his nineteen years on the Supreme Court during the peak of the Constitutional right framework.

140. Justice White (1962–1993) discussed the right fifty-two times and served 90.3% of his time on the Supreme Court during the peak period of the constitutional right framework. The other Justices in the top ten users of the constitutional right framework are Justice Sutherland (1922–1938) (thirty-seven times in the three years he served during the framework's peak use, equating to .19%); Justice Frankfurter (1929–1962) (thirty-seven times during his career, the entirety of which was served during the framework's peak use); Justice Stewart (1958–1981) (thirty-six times during his career, the entirety of which was served during the framework's peak use); and Justice Stevens (1975–2010) (thirty-five times in the fifteen years he served during the framework's peak use, equating to .43%).

for these Justices is likewise reflected in the percentage of their overall press references that used this frame. It was Justices Black and Reed's most commonly used frame and Justice Douglas's second most frequently used frame.[141] Our tracking of the Court's positive references to the liberty of the press also peaks during this time period.[142] Although these fifty-five years constitute less than 25% of the 235-year history of the Court, 82% of the total number of positive constitutional right references are found during this time.

The next chapter of press freedom at the Court generally correlates with the Roberts Court years, which began in 2005 and continues today. During this period, the Roberts Court gained a reputation among many as an exceedingly pro-First Amendment Court.[143] According to Joel Gora, the Roberts Court "may well have been the most speech-protective Court in a generation, if not in our history."[144] Gregory Magarian likewise has observed that "[f]ree speech advocates' conventional (not to say universal) view of this Court is adoring."[145] Indeed, First Amendment expansionism seems to be one of Chief Justice Roberts's personal guiding principles. He has called himself, "the most aggressive defender of the First Amendment"[146] on the Court, and he frequently authors opinions in cases involving

141. *See infra* Part IV.D.

142. *See infra* Part IV.C.

143. *See infra* Part V.B.3.

144. Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL'Y 63, 64 (2016).

145. Gregory P. Magarian, *The Marrow of Tradition: The Roberts Court and Categorical First Amendment Speech Exclusions*, 56 WM. & MARY L. REV. 1339, 1340 (2015); *see also id.* (quoting Burt Neuborne as calling the Roberts Court "the strongest First Amendment court in history" and Kenneth Star claiming it is "the most free speech Court in American history" (citations omitted)). *But see* Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 724 (2011) [hereinafter Chemerinsky, *Not a Free Speech Court*] ("[T]he Roberts Court[] [has a] dismal record of protecting free speech in cases involving challenges to the institutional authority of the government when it is regulating the speech of its employees, its students, and its prisoners, and when it is claiming national security justifications.").

146. April Hefner, *Honorable John G. Roberts, Jr., Chief Justice of the United States, Speaks at Belmont University*, BELMONT UNIV. (FEB. 7, 2019), https://perma.cc/858J-UDK5 (quoting Justice John G. Roberts).

expressive rights.[147] In the words of Ronald Collins and David Hudson, "Roberts is quite at home in the house of the First Amendment—it is perhaps his favorite jurisprudential dwelling."[148]

As explored in the next Part, however, the Roberts Court's broad embrace of First Amendment values in some areas has not been extended to the constitutional right of press freedom.

IV. THE DISAPPEARING "FREEDOM OF THE PRESS"

The principle of freedom of the press—once ubiquitous in the Court's commentary on constitutional rights—is now rare. The data show only scant acknowledgement of the concept from the Roberts Court. Even bare, neutral references to the idea are now few and far between. This stark abandonment of the Court's references to press freedom is particularly glaring even when situated within the wider trends of an overall decreased quantity of Supreme Court references to the press. On top of this, the data associated with Justices who currently sit on the Court show no frequent invokers of the concept, with the Roberts Court Justices being true historical outliers on this front.

This Part explores the study's data on the disappearance of "freedom of the press" on several fronts: (A) in the decline of the raw total instances of reference to freedom of the press over time; (B) in the decline of the percentage of the times when the Court is speaking of the press that it is invoking any notion of freedom of the press; (C) in the lower frequency of reference to a "freedom of the press" framework in recent Court Terms as compared to that frame's overall frequency in the full historical dataset; and (D) in the linguistic patterns of Justices on the current Court, as compared to those of their predecessors. On every axis, the data show that acknowledgement of the right is on the decline.

147. *See* Ronald Collins & David Hudson, *John Roberts: Mr. First Amendment*, SCOTUSBLOG (July 21, 2020, 10:00 AM), https://perma.cc/CT7R-JD7S ("[Roberts] has written the opinion for the court in a whopping 15 First Amendment free expression cases.").

148. *Id.*

A. *Declining Frequency of References to Freedom of the Press*

The disappearance of press freedom is clear in our raw numerical data tracking the total numbers of times the concept is articulated by the Justices of the Court. As seen in Figure 2, the number of references to freedom of the press by the Justices has plummeted in the last generation.

As might be expected, Supreme Court references to press freedom were scant before the incorporation of the First Amendment[149] and the initial recognition of a substantive press freedom by the *Near* Court in 1931.[150] But once the right was recognized, it was steadily acknowledged for much of the next half century.[151] In the period from the 1930s to the 1990s, even at its lowest frequency points, the Court was quite routinely mentioning press freedom.[152] That is, for most of the modern newsgathering and journalistic era, the Supreme Court's consistent acknowledgement of a constitutional right of freedom of the press was a given.

At some moments in history, the references to the right have been especially strong. The raw frequency data has a bimodal peak, with an uptick in 1940 to 1944 that is sandwiched by two somewhat lower-frequency eras, and followed by a second especially strong high-point in the five-year period from 1970 to 1974, during which the Court referenced to the concept a total of 179 times.[153] At the historical heights of its frequency, the

149. *See* Gitlow v. New York, 268 U.S. 652, 666–667 (1925) (holding that the 14th Amendment extended the First Amendment's protections to apply to state governments).

150. *See generally* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (striking a prior restraint against a newspaper as an unconstitutional restriction on the First Amendment's freedoms of speech and press).

151. *See supra* notes 115–120 and accompanying text.

152. *See supra* notes 118–125 and accompanying text. Court Terms with thirty or more references were once relatively common. The dataset shows thirty-eight in 1972, thirty-five in 1971, forty-five in 1970, thirty-six in 1966, thirty-one in 1963, thirty in 1956, thirty-three in 1945, forty-one in 1942, and thirty-three in 1939.

153. Although press-focused cases are not solely responsible for this uptick, this time period gave rise to some of the most foundational constitutional cases featuring journalists and media entities as parties. *See generally, e.g.*, Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974); Gertz

Justices at times invoked the concept of press freedom more than fifty times in a single Term.[154]

In contrast, in four of the last ten Terms, the Justices have not made a single reference to the concept of press freedom in any majority, concurring, or dissenting opinion or in any other work published in the U.S. Reports. In three additional Terms during this time period, there was only a single mention of the concept.[155] Indeed, except for one clear outlier Term,[156] no Term of the Roberts Court era has included even double-digit mentions of press freedom by all nine Justices combined, across the entire Term.[157] Eighty-seven percent of all Terms in the Roberts Court had three or fewer mentions of the right in any way. The last positive references to freedom of the press were more than a decade ago.[158] Thus, in a simple assessment of frequency, we see that a concept that once lived vibrantly within the Supreme Court's constitutional rights commentary has largely exited the lexicon—the Court has seemingly forgotten this freedom.

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v. Robert Welch, Inc., 418 U.S. 323 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972); N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

154. In both the 1941 Term and the 1973 Term, there were fifty-three separate paragraphs referencing the freedom of the press. In the 1960 Term, there were fifty-two references.

155. *See infra* Part IV.D; *infra* note 194 and accompanying text.

156. The 2009 Term had eleven total references.

157. There were six references in 2018. There were three references each in 2005, 2007, and 2019. There were two references in 2006, and one each in 2011, 2013, and 2016. In 2008, 2012, 2014, 2015, and 2017, there were no references.

158. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("And whatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." (internal quotations omitted)); Borough of Duryea v. Guarnieri, 564 U.S. 379, 388 (2011) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances." (internal quotations omitted)).

B. *Declining Percentage of Freedom of the Press Mentions in Cases Referencing the Press*

More complex analyses of press-related trends at the Court also show the disappearance of the freedom of the press—in particular, the data comparing the relative frequency of the constitutional right framing within the fuller set of press-referencing paragraphs. That is, beyond a decline in the overall number of mentions of freedom of the press, there also has been a decline in the *percentage* of references to press freedom.

We designed our wider project to inclusively capture every time the Court mentioned the press or the press function in any way, even when the Court's terminology identifying those functions changed over time.[159] Once a paragraph was included in the dataset, coders then searched it for a variety of common frames, including for the "Right Frame," which captured all references to the constitutional right of press freedom.[160] Tracking the references to the Right Frame in proportion to all other references to the press reveals additional evidence that this right is disappearing.

During the long post-incorporation period of frequent "freedom of the press" usage, it was consistently the case that 20% or more of all press mentions made by any Justice in any context were references to freedom of the press.[161] The strong position that the constitutional right occupied in the Court's overall dialogue about press functions is illustrated in Table A, which provides a summary of the percent of total references to the press containing the concept of freedom of the press in five-year periods between 1935 and 1974.

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159. *See supra* Part II.

160. For more discussion of the various common frames, see Jones & West, *Empirical Study*, *supra* note 70, at 387.

161. *See* Figure 2.

Figure 2

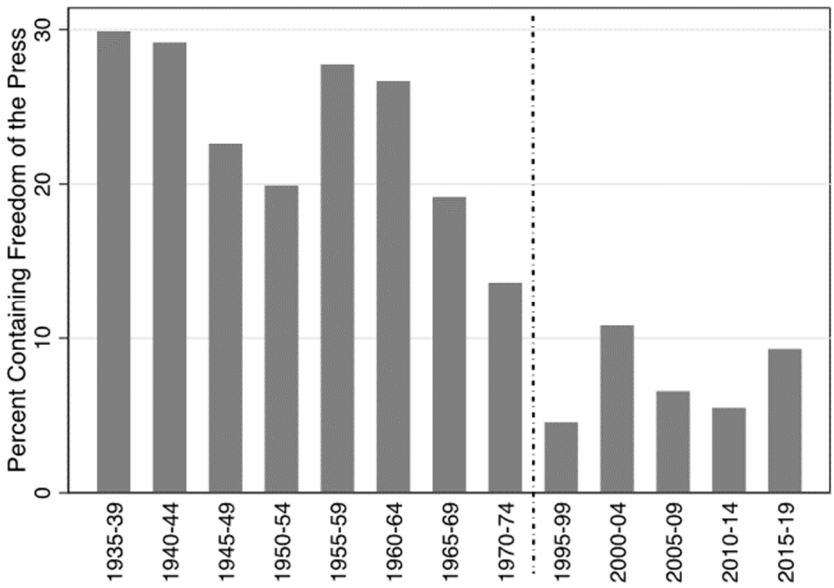

Table A

Year range	Percent of total references to the press containing the concept of freedom of the press
1935–1939	29.7%
1940–1944	29.2%
1945–1949	22.1%
1950–1954	19.1 %
1955–1959	27.4%
1960–1964	26.4%

1965–1969	18.6%
1970–1974	13.1%

In several individual Terms during the peak of the Right Frame's usage, it constituted an even larger percentage of total press references, with the Justices referencing the freedom of the press more than four in every ten times they spoke of the press.[162] When we review the data throughout the 1930s,[163] 1940s,[164] 1950s,[165] and 1960s,[166] we routinely find Terms in which 20% to 50% of the press references are making at least some nod to the constitutional right to a free press.

When this same analysis is conducted on the data from more recent Terms, the drop-off in references to the right of freedom of the press is stark. Table B, which reports the snapshot summary of the percent of total references to the press containing the concept of freedom of the press in five-year periods between 1995 and 2019, shows that the percentage has never exceeded 10% in the recent era.

162. In 1933 (50%), 1937 (45%), 1939 (44.8%), 1942 (44.6%), and 1943 (44.1%), the Court's press references frequently referred to freedom of the press.

163. In 1932 (32%), 1933 (50%), 1935 (26.1%), 1937 (45%), and 1939 (41.2%), the Court's press references made some nod to the constitutional right of free press.

164. In 1940 (31%), 1941 (38%), 1942 (44.6%), 1943 (44.1%), 1947 (23%), 1948 (33.3%), and 1949 (38%), the Court's press references made some nod to the constitutional right of free press.

165. In 1950 (28.1%), 1953 (35.3%), 1956 (33.3%), 1957 (26.3%), and 1959 (48.7%), the Court's press references made some nod to the constitutional right of free press.

166. In 1960 (35.1%), 1962 (26.3%), 1963 (25.6%), 1966 (20.5%), 1967 (34.6%), and 1968 (23.5%), the Court's press references made some nod to the constitutional right of free press.

Table B

Term range	Percent of total references to the press containing the concept of freedom of the press
1995–1999	4.1%
2000–2004	10.8%
2005–2009	7.6%
2010–2014	5.5%
2015–2019	10.2%

Although the Court's overall references to the press have declined in recent years,[167] the data indicate that the percentage of references suggesting a constitutional right of press freedom has also drastically declined in comparison to the percentage of references in previous years.[168] In five separate Terms of the Roberts Court, the Justices made some references to the press but never once did so using a "freedom of the press" framing.[169] In most other Roberts-era Terms, press freedom hovers in the range of only 5% to 9% of the total press references.[170]

167. *See* Jones & West, *Empirical Study*, *supra* note 70, at 379 ("As an initial matter, our data show that the Court references the press far less frequently than it did a half century ago.").

168. *See* Figure 4.

169. The "freedom of the press" frame constituted 0% of the overall coding total in the years 2008, 2012, 2014, 2015, and 2017.

170. The data show that in 2005 (7.9%), 2006 (9.1%), 2009 (7.2%), 2010 (7.7%), 2011 (9.1%), 2013 (5%), and 2016 (6.7%) the Court's press references regarding press freedom never surpassed 10%. Indeed, no individual Term in the Roberts Court era exceeded 15% of press-freedom references. There were 15% in 2007 and 12% in both 2018 and 2019.

Within the already diminishing total group of press references, the "freedom of the press" frame is being eclipsed by other frames. Notably, the Court's references are shifting heavily to the frame that we call the "Communication" frame, which captures instances in which the Court simply acknowledges an act of journalism or the fact that the media was used to make something publicly known.[171] These bare references to the communication function of the press constituted, on average, about a fifth of the mentions of the press in the years between 1935 and 1974. During the Roberts Court era, they average nearly half of all mentions; specifically, in eight of the last fifteen years, more than 50% of all mentions were simply saying that the media exists or that news was published.

The combined data show that in the past, when the topic of the press or press functions came up, the Court routinely took the opportunity to speak of the freedom of the press.[172] To the extent that the topics come up today, the Court is more often simply noting that the press function occurs, omitting the constitutional right from the mention.[173] The framing of the press function as something that is rights-bearing or housed within a constitutional freedom is disappearing.

C. *Underperformance of the Frame Compared to its Overall Expected Frequency*

The modern-era disappearance of press freedom is further confirmed by a more detailed quantitative analysis of the "freedom of the press" frame's performance against its own likelihood in the full dataset. Using our full historical data and the total sets of references to the press within every framing, we set out to predict how many references to the press might ordinarily be expected and to judge the modern data against this baseline. The analysis confirms that references to the constitutional right of press freedom are seriously underrepresented in the Roberts Court era.

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171. *See* Jones & West, *Empirical Study*, *supra* note 70, at 401 n.89.

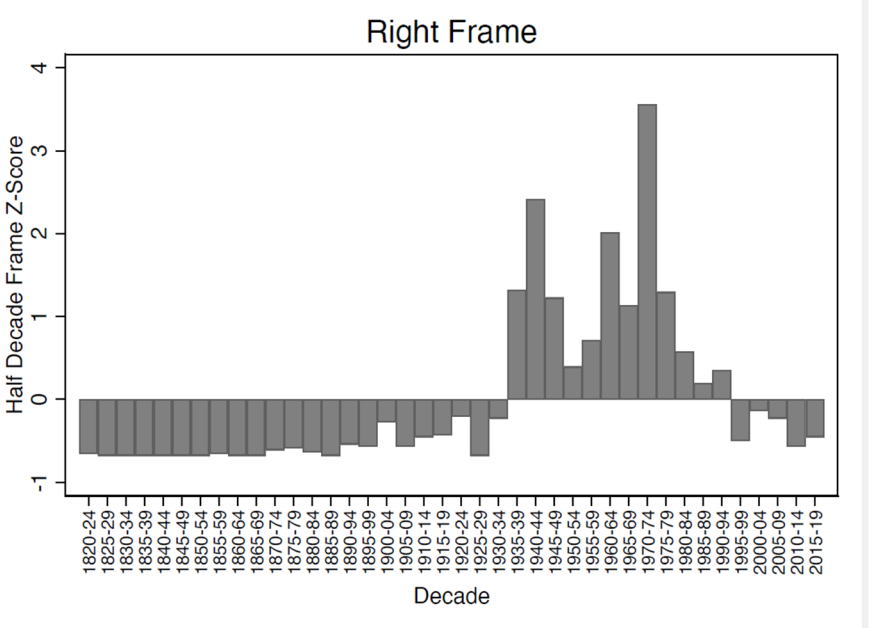
172. *See supra* Part III.B.

173. *See, e.g.*, Jones & West, *Empirical Study*, *supra* note 70, at 424–25 (explaining that Justices Kavanaugh and Gorsuch have almost exclusively referenced the press "as an information delivery mechanism").

A z-score, or standard score, is a measure of how many standard deviations below or above the population mean a raw score is. It is a mechanism for comparing results to a so-called "normal" population. Here, our "normal" is the incidence of the constitutional right framing that we would expect over all time, given the full set of data. Thus, the z-score reveals how much the press-freedom frame is over- or under-performing its "normal" at any given time period. By creating z-scores for each frame's number of references, we are able to directly compare just how discrepant any period is for a frame's incidence.

We examined the extent to which each frame in every half-decade period was above or below the average for that frame across all the half-decade periods studied. Figure 3 shows these z-score results for references to freedom of the press. In the bar plot, positive values on the y-axis indicate that the frame's count in that half-decade is above average by the listed standard deviations relative to the frame's overall quantity in the data. Negative values indicate that the frame's count in that half-decade is below average.

Figure 3



The z-score analysis, quite expectedly, shows freedom of the press references turning to stronger relative activity from the early- to mid-1930s onward, once the Court incorporated the First Amendment and acknowledged modern press freedom in *Near*.[174] The over-performance of the frame based on its z-score peaks abruptly in the 1970s and then sharply declines, with freedom of the press essentially collapsing as a concept by the mid-1990s.[175]

The underperformance of the press-freedom frame from its overall expected frequency is further confirmed through an additional model that more squarely compares the Justices' usage patterns in different eras. We analyzed the underlying press freedom-reference trends from a baseline era of 1935 to 1974.[176] We then applied those identical trends to predict what the expected reference numbers would be in a later era, from 1995 to 2019. Figure 4, showing the resulting discrepancies, demonstrates a clear behavioral shift in the Justices' willingness to refer to press freedom. Had the tendencies of the 1935 to 1974 Justices been in play from 1995 to 2019, we would expect to see almost 278 references to the notion of a constitutional right of freedom of the press. In actuality, we see just sixty-four, which is only 23% of the expected value. Moreover, Figure 4 shows that this discrepancy is greater in the constitutional right frame than it is in any other studied frame. Notably, when the same data is analyzed within tonal categories, we again see that the numbers of expected references fall short for both positive and neutral mentions.[177] While both varieties of references to press freedom have collapsed since the baseline era, it is positive references that have fallen the most.

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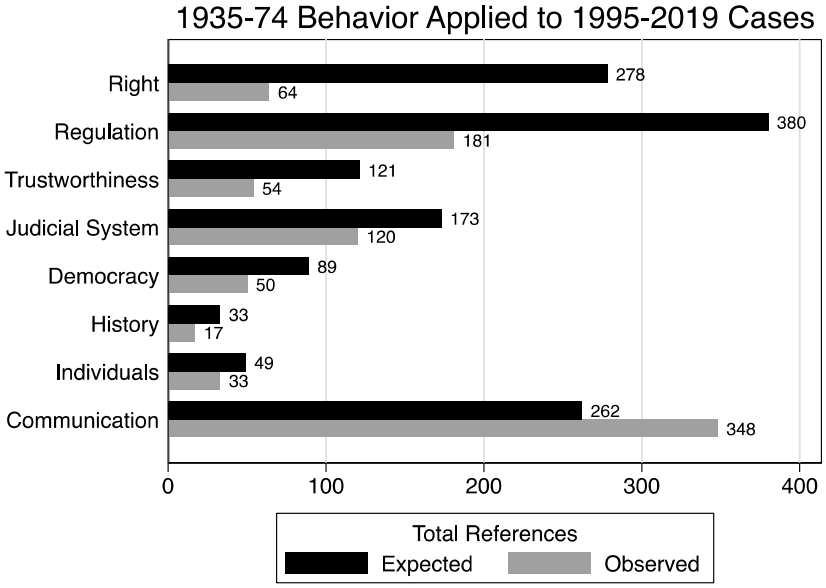
174. *See supra* Part III.B.

175. *See* Figure 3.

176. The baseline era trends were established by identifying the rate of mentions per case for each of 112 unique combinations of press frames and broad Supreme Court Database issue areas. An example illustrates: For the Regulation Frame during the 1935 to 1974 period, there were on average 2.3 mentions per case in First Amendment cases, but only 0.06 mentions per case in Economic Activity cases. These frame-issue area rates were then applied to the specific mixture of cases the Court decided during the second compared era.

177. *See* Jones & West, *Empirical Study*, *supra* note 70, at 395–96.

Figure 4



Our analyses therefore show that, even when compared with its own expected frequency and controlling for an overall declining number of total references to the press, the Court's invocation of "freedom of the press" as a concept is in stark decline.

D. *Freedom of the Press and the Justices of the Court*

Finally, the disappearance of freedom of the press is evident in comparisons between the current Justices' press-freedom patterns and those of their predecessors. Both our quantitative data and the contextual clues within this data show a massive institutional shift in the Justices' collective approach to press freedom, of a degree not seen since the First Amendment's incorporation. Court-wide acknowledgement of a constitutional right has been essentially abandoned. Indeed, the dataset reveals that most of the current Justices have rarely, if ever, mentioned press freedom in any context, and that there appear to be no true advocates of the right on the Court.[178]

178. *See* Figure 5.

The Justices who most frequently mentioned the constitutional right of press freedom all sat on the Court during the post-incorporation eras of the 1930s through the 1990s. At the top of this list are Justices who referred to the concept more than one hundred separate times,[179] the last of whom, Justice Brennan, left the Court in 1990.[180] No recent Justice has even approached that level of reference. Justice Clarence Thomas, the highest scoring "press-freedom" invoker on the current Court, has fewer references to the concept in nearly three decades on the bench than Justice Black had in just the period between 1940 and 1942.[181]

Even more telling than snapshots of individual Justices' behavior is the more global data showing a change in the likelihood that the Court will acknowledge freedom of the press across the board. Several separate analyses of the data make clear that the level of press-freedom references in the earlier post-incorporation eras was not a function of any particular Justice's frequency of reference but instead of a consistent, Court-wide recognition of the right that now has disappeared.

Notably, during the Terms in the dataset in which the numbers of references to the constitutional right of freedom of the press are particularly high, the mentions did not come from a small number of especially press-praising Justices. Rather, Justices who varied in ideology, background, and friendliness toward the press appear to have shared a common, baseline acknowledgement of the constitutional right of press freedom. An illuminating illustration is seen in the data of Justice Byron White. As a matter of overall tone, Justice White was the least press-friendly Justice of all time;[182] nonetheless, he made more than fifty separate references to the concept of freedom of the

179. Justice Hugo Black did so 169 times; Justice William O. Douglas 129 times; and Justice William Brennan 102 times.

180. *William J. Brennan, Jr.*, OYEZ, https://perma.cc/32MX-DY6T.

181. Justice Thomas has made twenty-eight total references to freedom of the press, while Justice Black made thirty-one references between 1940 and 1942 (five references in the 1940 Term, nineteen references in the 1941 Term, and seven references in the 1942 Term).

182. *See* Jones & West, *Empirical Study*, *supra* note 70, at 418.

press[183]—more than 50% more mentions per Term than any member of the Roberts Court.[184] Justice White routinely found that the values at stake in individual cases outweighed press freedom or that protection was not warranted in the particular circumstances, but he nonetheless consistently acknowledged the existence and relevancy of the right.

In an effort to further explore Court-wide behavior, we calculated the press-freedom career averages of every Justice across time, investigating the average number of mentions per Term made by each Justice. We again found, across the board, that previous Justices made far more frequent reference to the principle of freedom of the press than today's Justices do. For example, Figure 5 contrasts the full-career patterns of the nine Justices who sat on the Court in 1964, the year in which *New York Times Co. v. Sullivan*[185] was decided, with the records of the nine Justices who were sitting on the Court when our study concluded in July 2020. The 1964 Court's Justices spoke of press freedom regularly—not just in *Sullivan* or in the Term in which *Sullivan* was decided but across their often very long careers on the bench.[186] Only one Justice on the 1964 Court, Justice Tom Clark, had a career-long average of less than one press-freedom reference per Term,[187] and even he authored fifteen total mentions of the concept in his eighteen years as a Justice. Conversely, there is no Justice on the 2020 Court with a career average of even one press-freedom mention per Term.[188] Eight of the nine Justices of the current Court have an average of less

183. Justice White authored fifty-two total paragraphs that were coded as containing references to press freedom.

184. Justice White was on the Court for thirty-one years and averaged 1.7 references per Term. Justice Clarence Thomas is the highest averaging current Justice, with 0.97 references per Term.

185. 376 U.S. 254 (1964).

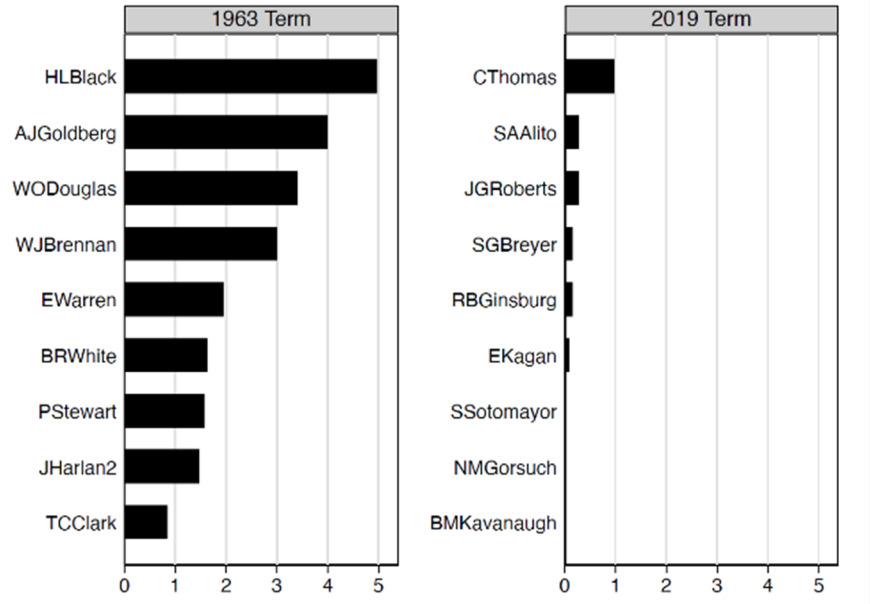
186. Justice Black had a career average of 5 references per Term, Justice Goldberg 4, Justice Douglas 3.4, Justice Brennan 1.9, Justice Warren 1.9, Justice Stewart 1.6, Justice White 1.6, and Justice Harlan 1.5.

187. Justice Clark, who served on the Court from 1948 to 1967, had a career average of 0.83 references per Term.

188. As of July 2020, only one current Justice had come close. Justice Clarence Thomas had made twenty-eight press-freedom references in his nearly twenty-nine years on the Court, for a career average of 0.97 references per Term.

than one press-freedom mention for every three Terms on the Court, and three of them have no mentions at all.[189] The career per-Term average of Justice Clark, the lowest scorer of the earlier era, was at least three times larger than the per-Term averages of every Justice on the current Court except Justice Thomas.

Figure 5



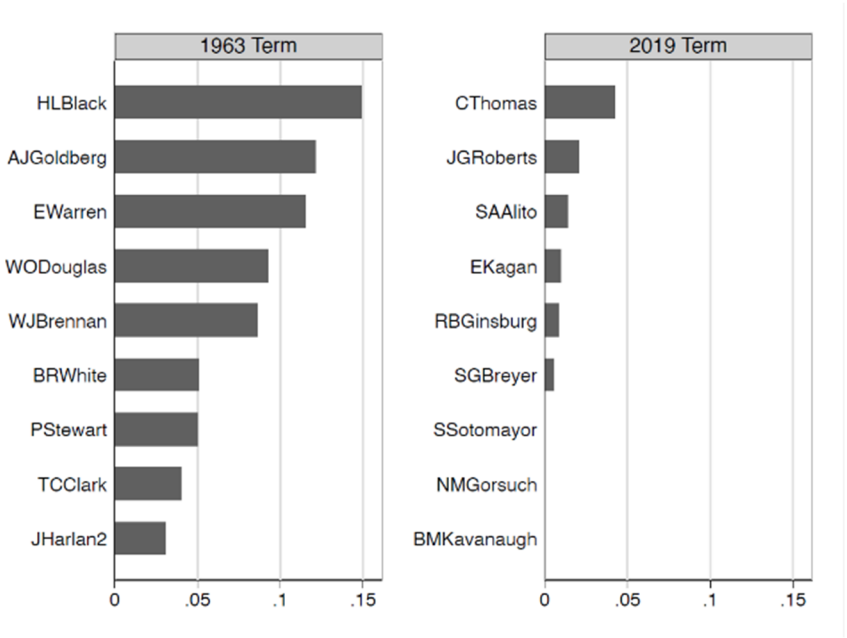
Average per-Term references

It is not simply a change in the Court's overall caseload that produces these stark comparisons. When we investigate the Justices' average number of references to press freedom per-opinion, as opposed to per-Term, the disparities between time periods are similarly glaring. As illustrated in Figure 6, Justices from the earlier era universally outpace their modern

189. Chief Justice John Roberts and Justice Samuel Alito both had an average of 0.27 mentions per Term, while Justice Ruth Bader Ginsburg had an average of 0.15 mentions per Term, Justice Stephen Breyer 0.11, and Justice Elena Kagan 0.10. Justices Brett Kavanaugh, Neil Gorsuch, and Sonia Sotomayor had never mentioned freedom of the press.

counterparts in reference to freedom of the press even when the inquiry is controlled for shrinking docket sizes and changing overall numbers of opinions authored per Term.

Figure 6



Average per-opinion references

The data indicate near-uniform recognition of the right for most of the Court's earlier post-incorporation eras. The distribution of references across Justices in this period was broad. For example, in the 1960 Term and again in the 1973 Term, there were more than fifty total references to freedom of the press over the course of the Term.[190] These mentions did not come at the hands of a few press-freedom activists; rather, the data show that seven of the nine Justices referenced the right.[191]

190. There were fifty-two references in the 1960 Term and fifty-three references in the 1973 Term.

191. The fifty-two references in the 1960 Term included eighteen from Justice Hugo Black, sixteen from Chief Justice Earl Warren, eight from Justice William O. Douglas, five from Justice William Brennan, three from

This same breadth of acknowledgement—with a far-reaching distribution of mentions across much of the Court—was true of every other especially high-frequency Term during the pre-Roberts Court period.[192] The Justices were homogenous in their steady acknowledgment of a free-press right.

The tide has now turned at the Court; there is now homogeneity in taking nearly no notice of the right. Positive, praising references to the right of press freedom have all but vanished,[193] and while all of the Justices might have once mentioned the right in a given Term, it is now regularly the case that almost none of them do so. In five of the fifteen Terms since John Roberts became Chief Justice, no Justices at all have invoked the concept.[194] In three of those fifteen Terms, only a single Justice has done so.[195]

The total number of times that *every* Justice who was sitting on the Court in June 2020 invoked the right of press freedom during their combined careers is only forty-six. This is fewer references than appeared *in a single Term* at several points in earlier eras[196] and fewer references than were made by Justice Hugo Black in just a handful of his particularly active Terms.[197]

Justice Tom C. Clark, and one each from Justices Potter Stewart and John Marshall Harlan II. The fifty-three references in the 1973 Term included fifteen from Justice William O. Douglas, twelve from Justice Lewis Powell, seven each from Justices Potter Stewart and Byron White, six from Justice William O. Brennan, five from Chief Justice Warren Burger, and one from Justice William Rehnquist.

192. For example, in 1941, there were fifty-three references made by six of the nine Justices. In 1970, there were forty-five references made by seven of the nine Justices. In 1942, there were forty-one references made by eight of the nine Justices.

193. *See supra* note 158 and accompanying text.

194. In four of the last ten Terms—2012, 2014, 2015, and 2017—there have been *no* references to freedom of the press of any sort by any Justice in any material published in the U.S. Reports.

195. In five other Roberts-era Terms, only two Justices referenced the right.

196. In the 1941 Term, there were fifty-three total references to freedom of the press; in the 1960 Term, fifty-two; and in the 1973 Term, fifty-three.

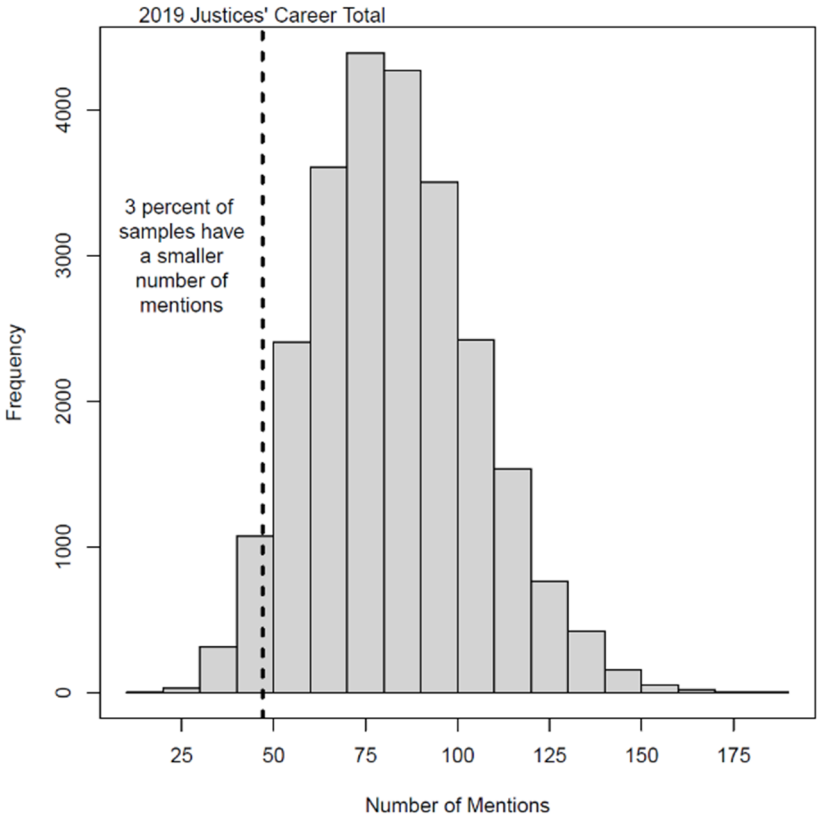
197. Justice Hugo Black's highest Terms of usage were 1941 (nineteen references), 1960 (eighteen), 1945 (sixteen), and 1970 (twelve). In just these four Terms, he amassed more mentions of the right of freedom of the press than all nine current Justices combined.

A more direct statistical comparison with former Justices confirms the extent to which the Roberts Court Justices are clear outliers on this principle. We compared these nine Justices to former Justices to determine whether this group's forty-six total mentions is aberrationally low. The nine Justices sitting on the Court in July 2020 who generated the forty-six references had served a cumulative total of 140 Terms on the Court. Over the entire history of the Court, there have been a total of 1,986 Terms of Justice service.[198] In an effort to determine how discrepant that July 2020 group is compared to other slates of Justice-Term combinations, we randomly selected 140 of those 1,986 Justice-Term observations to count the number of references to freedom of the press in the random subset, and then repeated the process for a total of 25,000 investigations. The results, depicted in Figure 7, indicate that the Roberts Court Justices are indeed making far fewer references to freedom of the press as a group on a per-Term basis.[199] A remarkable 97% of the randomly selected sample sets yielded more press-freedom references than the Roberts Court Justices. This random sampling drew upon the full slate of Justice-Term combinations—including those that occurred before the First Amendment was incorporated, before the existence of the modern press, and before any press references occurred at the Court—and yet the Roberts Court Justices' collective mentions of freedom of the press still pale in comparison.

198. This formula gives Term credit to any Justice who cast at least one vote during a Term.

199. The median number of references is eighty-two, with twenty-fifth and seventy-fifth percentile values of sixty-eight and ninety-eight, respectively.

Figure 7



An analysis of current Justices' individual references to press freedom confirms the scope and magnitude of this institutional shift. When our study concluded in June 2020, eight of the nine Justices serving that Term had never positively referenced press freedom in all their time on the Court.[200] Three of the nine Justices on the Court had not made a *single reference* of any variety to the concept of freedom of the press in any published Supreme Court document.[201] Two of these Justices

200. The only currently sitting Justice to do so is Justice Clarence Thomas, although none of his positive references were in a context involving the application of the freedom to a journalist or news organization.

201. *See* Jones & West, *Empirical Study*, *supra* note 70, at 425 n.174.

with zero mentions—Gorsuch and Kavanaugh—were newcomers with a shared total of only five years on the Court at the time our study concluded.[202] Justice Sonia Sotomayor, however, had been on the Court for eleven years and had plenty of opportunity.[203] By the close of our study, Justice Sotomayor had written fifteen opinions in cases classified by the Supreme Court Database as being within the First Amendment issue area and had mentioned some aspect of the press or the press function sixty-eight different times. Indeed, with an average of more than six such mentions per Term, her frequency outpaced that of every other sitting Justice. Yet she has never noted even the conceptual *existence* of freedom of the press.[204]

At the conclusion of our study, five of the remaining six Justices had referenced press freedom with only single-digit frequency in their entire careers, despite having been on the Court for more than a decade. It is unsurprising that this group includes Justice Samuel Alito,[205] who has publicly criticized some members of the press;[206] however, it also includes Justice Elena Kagan, the Justice with the strongest First Amendment background before joining the Court.[207] Prior to her

202. Gorsuch joined the Court on April 7, 2017 and had been a Justice for 3 years at the time this study concluded in July 2020. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), https://perma.cc/FV2P-RTXQ. Kavanaugh joined the Court on October 6, 2018 and had been a Justice for 2 years. *Brett Kavanaugh Confirmation: Victory for Trump in Supreme Court Battle*, BBC (Oct. 7, 2018), https://perma.cc/54Z8-QQWT.

203. *See* Jones & West, *Empirical Study*, *supra* note 70, at 424 n.169.

204. In the full set of Justice Sotomayor's overall press references, she used a press-positive tone only 11.8% of the time, so the wider body of her jurisprudence likewise shows no signals of press friendliness. *See* Jones & West, *Empirical Study*, *supra* note 70, at 425 n.174.

205. Justice Alito referenced freedom of the press just four times in nearly fifteen years on the Court, for a career-to-date average of 0.27 references per Term. None of Justice Alito's references were tonally positive.

206. *See* Ed O'Keefe, *Samuel Alito v. The Press*, CNN, https://perma.cc/9XAL-AP7Y (last updated Nov. 18, 2014, 7:24 AM) (quoting Justice Alito as saying that, while the full-time press corps covering the Court is largely competent, some news columnists are "not very knowledgeable").

207. *See generally* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul*,* Rust v. Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29 (1992); Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V.*,* 60 U. CHI. L. REV.

confirmation to the Court, Justice Kagan had "worked on free-speech and free-press issues more than any recent high court nominee."[208] Despite this history, she has been surprisingly silent during her decade on the Court on the issue of freedom of the press, with only a single mention of the principle.[209] Also in this group were two of the Court's then-longest-serving members, Justice Ruth Bader Ginsburg and Justice Stephen Breyer, who had each been on the Court for more than a quarter of a century, but had made only four[210] and three[211] total references to freedom of the press, respectively.

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873 (1993); Elena Kagan, *When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints*, 29 U.C. DAVIS L. REV. 957 (1996); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine,* 63 U. CHI. L. REV. 413 (1996).

208. *Elena Kagan*, REPS. COMM. FOR FREEDOM OF THE PRESS (May 13, 2010), https://perma.cc/H4DS-TRXD.

209. For Justice Kagan's sole reference to freedom of the press, see Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 767–68 (2011) (Kagan, J., dissenting). Justice Kagan alluded to the concept only in passing, without any positive tonal overlay, when noting in her dissent that the Court had previously held that "[t]he central purpose of the Speech and Press Clauses . . . was to assure a society in which uninhibited, robust, and wide-open public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." *Id.* at 767 (internal quotations omitted).

210. Justice Ginsburg, whose final year on the Court was the last year included in the dataset, had been on the Court for twenty-seven years but had referenced freedom of the press only four times—all in neutral, rather than positive, ways. One of Justice Ginsberg's four references to freedom of the press is merely a quote of an earlier opinion noting "[a] contention cannot be seriously considered which assumes that freedom of the press includes a right to raise money to promote circulation by deception of the public." Illinois, *ex rel.* Madigan v. Telemarketing Assocs., Inc., 538 U.S. 600, 612 (2003) (quoting Donaldson v. Read Mag., 333 U.S. 178, 192 (1948)).

211. None of Justice Breyer's references invokes the concept in a way that leads to the protection of newsgathering or broader press functions. One of his three mentions of press freedom notes "the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,'" but then goes on to note that, "[a]t the same time, our cases have not left Congress or the States powerless to address the most serious problems." Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Commc'ns Comm'n, 518 U.S. 727 (1996). Justice Breyer's reference noted "the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,'" but then went to note that "[a]t the same time, our

Chief Justice John Roberts himself has done almost nothing to keep the constitutional right of freedom of the press conceptually alive during his time on the Court. In his fifteen years as Chief Justice, Roberts alluded to freedom of the press or a free press only four times and never once referenced the right with a positive connotation. One early reference from Roberts pointed to a past Court's apparent application of the right.[212] The other references were all noting the right of freedom of the press in the course of dismissing its applicability. On two separate occasions—representing 50% of his total career mentions—Roberts referenced freedom of the press only to say that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part carried out by means of language."[213] On another occasion, he asserted that "it rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in a violation of a valid criminal statute."[214]

Justice Clarence Thomas's references to press freedom reveal a similar pattern. Quantitatively, Justice Thomas comes out as the Roberts Court's clear leader in the "freedom of the press" analysis.[215] Although his usage pales in comparison to that of Justices on the Court at the height of the frame's reference a half-century ago, Justice Thomas did mention the concept twenty-eight times, an average of just under once a Term. Four of these adopted a positive tone, and the remaining twenty-four were neutral references. Although a number of Thomas' mentions were concentrated in a few opinions that

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cases have not left Congress or the States powerless to address the most serious problems." *Id.* at 740 (citations omitted).

212. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 348 (2006) (citing *Arkansas Writers' Project, Inc. v. Ragland,* 481 U.S. 221 (1987) as "invalidating state sales tax under the Free Press Clause").

213. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 62 (2006) (internal quotation omitted); *see also* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017).

214. United States v. Stevens, 559 U.S. 460, 471 (2010) (quoting New York v. Ferber, 458 U.S. 747, 761–62 (1982)).

215. *See* Jones & West, *Empirical Study*, *supra* note 70, at 423.

directly quote the text of the First Amendment,[216] he continued to mention the concept over time, including as recently as the 2018 and 2019 Terms.[217] Justice Thomas, however, presents a peculiar dynamic: the Court's top user of the press-freedom frame is also widely understood to be the most aggressive advocate for scaling back foundational press protections.[218] For example, four of his most recent references to press freedom came in his concurrence in denial of certiorari in *McKee v. Cosby*,[219] which scholars viewed as one of the most press-threatening opinions of the modern era because it urged the abandonment of the foundational *New York Times v. Sullivan* standard.[220] While not specifically tracked as part of our broader empirical study, observations about Justice Thomas's practice of sandwiching "freedom of the press" references between negative tonal discussions of the press—and alongside broad assertions that the Founders would not have protected the press under the circumstances—show that even current Justices' rare references to the concept may not be contributing to an ongoing viable right of meaningful constitutional dimension.

In total, our quantitative data on the current Court's extremely limited references to the constitutional right of press

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216. Fourteen of Justice Thomas's paragraphs, accounting for half of his total mentions, were contained in a single case. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995) (Thomas, J., concurring) (holding that a prohibition on anonymous campaign literature violates the First Amendment).

217. *See* McKee v. Cosby, 139 S. Ct. 675, 677 (2019) (Thomas, J., concurring) ("The Court took it upon itself to define the proper accommodation between two competing interests—the law of defamation and freedoms of speech and press protected by the First Amendment." (internal quotations omitted)); United States v. Sineneng-Smith, 140 S. Ct. 1575, 1583 (2020) (Thomas, J., concurring) ("[T]he Court concluded that the law was unconstitutional because it d[id] not aim specifically at evils within the allowable area of state control but, on the contrary, swe[pt] within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press." (internal quotations omitted)).

218. *See* Erwin Chemerinsky, *Justice Clarence Thomas's Two Attacks on Basic Freedoms*, SEATTLE TIMES (Mar. 6, 2019, 5:46 AM), https://perma.cc/2DLV-HYTZ (last updated Mar. 8, 2019, 3:30 PM).

219. 139 S. Ct. 675 (2019).

220. *See id.* at 680–82 (Thomas, J., concurring); *see also* Chemerinsky, *supra* note 218; Steve Vladek, *Trump's Attacks on the First Amendment and the Press Gain an Ally in Supreme Court Justice Clarence Thomas*, NBC NEWS (Feb. 20, 2019, 11:18 AM), https://perma.cc/C94Y-4F7P.

freedom, coupled with our observations about the specific contexts accompanying that rhetoric, strongly suggest that the U.S. Supreme Court has experienced a far-reaching institutional change. The broad-based, Court-wide recognition of the principle has given way to a sweeping shift: the disappearance of the freedom of the press.

V. EXPLORING POSSIBLE EXPLANATIONS FOR THE DISAPPEARANCE

While our data unquestionably reveal that Supreme Court references to the concept of a constitutional right of freedom of the press are disappearing, *why* they are disappearing is a harder question. A complex set of causal factors is surely at work, and the changing Court dynamics are intertwined with changing media landscapes, changing press behaviors, and changing public perceptions in ways that scholars from a number of disciplines have explored and will continue to investigate in the face of this new data. Importantly, though, our dataset did provide opportunities to test some potential explanations for these trends, including chances to probe whether the findings are solely a result of shifts in ideological makeup of the Court, the Court's smaller press-related docket, or the existence of settled law in the area. Although each is an initially appealing explanation, our analysis suggests that none fully account for the disappearance of the freedom of the press.

A. *Ideological Shifts at the Court*

One initially appealing explanation is that the disappearance of references to freedom of the press is solely the result of ideological shifts at the Court. While the data do provide some support for this explanation, our analyses across a number of other measures suggest that there is more to the erasure of press freedom than just the Court's changing ideological composition.

To conduct these analyses, we mapped the probability of a press-freedom mention onto each Justice's Martin-Quinn score, a widely used model that places U.S. Supreme Court Justices on

a liberal-conservative ideological spectrum.[221] Higher Martin-Quinn scores indicate greater conservativism and lower scores indicate greater liberalism.[222]

There is an intuitive logic behind the instinct to attribute the press-freedom trend to Justices' ideologies. The stark modern drop-off of references to the constitutional right did happen during a time period in which the Supreme Court swung significantly to the right and the median Martin-Quinn scores of the Justices increased.[223] And the data do show that at least some prominent liberal Justices of the previous eras were major promoters of the concept of press freedom.[224] The three most frequent mentioners of freedom of the press—Justices Black,[225]

221. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145–52 (2002). For updated Martin-Quinn scores, see *Measures*, MARTIN-QUINN SCORES, https://perma.cc/TR4G-PQ8W.

222. The historic span of Martin-Quinn ranges from a most-liberal score of less than -7, which was Justice William O. Douglas's rating during the periods between 1965 to 1975, to a most-conservative score of 4.5, which was then-Associate Justice William H. Rehnquist during the period from 1975 to 1979. *See* Martin & Quinn, *supra* note 221, at 145.

223. *See* Michael A. Bailey, *If Trump Appoints a Third Justice, the Supreme Court Would Be the Most Conservative It's Been Since 1950*, WASH. POST (Sept. 22, 2020, 7:00 AM), https://perma.cc/7R7J-EWSJ; Michael A. Bailey, *Is Today's Court the Most Conservative in Sixty Years? Challenges and Opportunities in Measuring Judicial Preferences*, 75 J. POL. 821, 829 (2013) (quoting data suggesting "that the contemporary Court is more conservative than any other time since 1937"); Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES (July 24, 2010), https://perma.cc/P84P-ZTPT; *see also Measures*, *supra* note 221.

224. *See Jones & West*, *Empirical Study*, *supra* note 70, at 411.

225. Justice Hugo Black referenced the right of a free press 169 times, 22% of which had an affirmatively positive tone. His career-wide average Martin-Quinn score was -1.8—more liberal than the 2019 Term score of Justice Elena Kagan and identical in score to Justice Stephen Breyer. *Measures*, *supra* note 221.

Douglas,[226] and Brennan,[227]—are all Justices with broader records as liberals.[228] Each made more than one hundred separate mentions of the right over their time on the Court. Likewise, other notable liberal Justices of the past have high frequency scores on mentions of press freedom.[229]

Unsurprisingly, perhaps, when we investigate the overall historical data, we find a link between Justices' ideology and their likelihood of invoking the concept of freedom of the press. Throughout the entirety of the Court's history, liberal Justices have mentioned press freedom more often than conservative Justices have.

We produced a model based on the full data since 1784 to examine the Justices' likelihood of characterizing the press in any framing, including a "freedom of the press" frame.[230] The model controls for both the number of First Amendment opinions the Justice wrote and the number of non-First

226. Justice William O. Douglas referenced the right of a free press 129 times, 21% of which had an affirmatively positive tone. Justice Douglas's career-wide average Martin-Quinn score was -4.9. *Id.* Over a ten-year period near the end of his time on the Court, he averaged -7 or higher, which is the most liberal Martin-Quinn score in history. *Id.*

227. Justice William Brennan referenced the right of a free press 102 times, 25% of which had an affirmatively positive tone. His career-wide average Martin-Quinn score was -1.6. *Id.*

228. *See* Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U.L. REV. 1483, 1518, 1531 (2007).

229. Justice John Paul Stevens (Martin-Quinn score of -2.4) had thirty-five mentions of press freedom. *Measures*, *supra* note 221. Justice Frank Murphy (Martin-Quinn score of -1.6) had thirty-four mentions. *Id.* Chief Justice Earl Warren (Martin-Quinn score of -1.3) had thirty-one mentions. *Id.* Justice Thurgood Marshall (Martin-Quinn score of -3.2) had thirty mentions. *Id.*

230. This model treats each Justice-Term-frame-ideology combination as a separate observation. Because we studied seven separate framings of the press, in each Term with nine justices there are a total of seventy-two observations. A Justice was included in this data regardless of whether he or she had any references for a given frame in a given Term but would be recorded with a zero for frames that were not invoked by the Justice. This approach, which produced 6,040 observations, creates a picture of both the mentions and the non-mentions of the press and, when mapped onto the available Martin-Quinn ideology data, captures all changes in ideology, because Martin-Quinn scores vary from Term-to-Term.

Amendment opinions.[231] Figure 8 shows the effect of ideology on a Justice's predicted frequency of freedom of the press mentions for each Term.

In this broad-overview model, conservatism is, in fact, associated with a decreased tendency to reference the freedom of the press. As depicted in Figure 8, a hypothetical Justice with a Martin-Quinn score of -7.5, which is approximately the score of Justice Douglas in the late 1960s (the most liberal Justice score of all time),[232] would make 3.3 references to press freedom per Term. A Justice with a Martin-Quinn score of -2.5, which is approximately the score of Justice Brennan in the late 1970s,[233] would be predicted to make two references per Term, and a Justice with a Martin-Quinn score of 1.35, which was Justice Kennedy's score in the late 1980s,[234] would be predicted to make 1.3 references. A Justice with a Martin-Quinn score of 4.5, which is approximately the score of Justice Rehnquist in the late 1970s (the most conservative score of all time),[235] would make only about 0.9 mentions.

231. The data show that 73% of press-freedom mentions take place in cases classified by the Supreme Court Database as First Amendment cases. *See The Supreme Court Database: Analysis Overview*, WASH. UNIV. LAW, https://perma.cc/E7BK-VSD3. Controlling for this helps examine the true variables of interest—ideology and references to freedom of the press—and addresses the statistical concern that a Justice's underlying proclivity to mention freedom of the press could also be correlated with the number of opinions the Justice writes in the issue area most closely associated with freedom of the press.

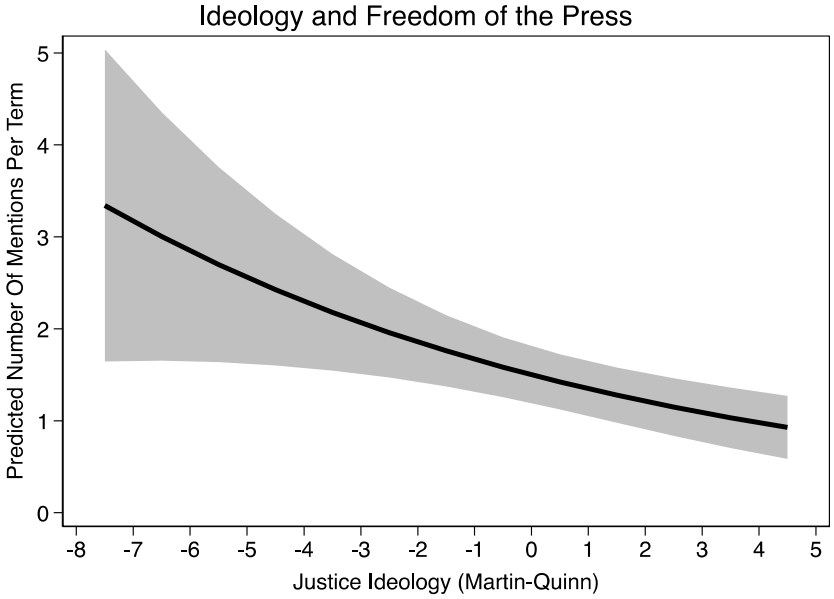
232. *See supra* note 226.

233. *See supra* note 227.

234. *See Measures*, *supra* note 221.

235. *See id.*

Figure 8



This model alone, however, does not completely explain the extent to which freedom of the press references disappeared. Some of our other data on Justices' ideology, moreover, cut against this narrative and suggest there is more going on than simply the Court's most recent ideological shift. Notably, for example, we find that ideology has essentially no marginal effect on a Justice's likelihood of depicting the freedom of the press with a positive tone.[236] If ideology were the primary driver of the Justices' views of the value of press freedom, then presumably we would see a correlation between the Justices' ideology and the tone with which they speak of the concept. But this link does not exist.

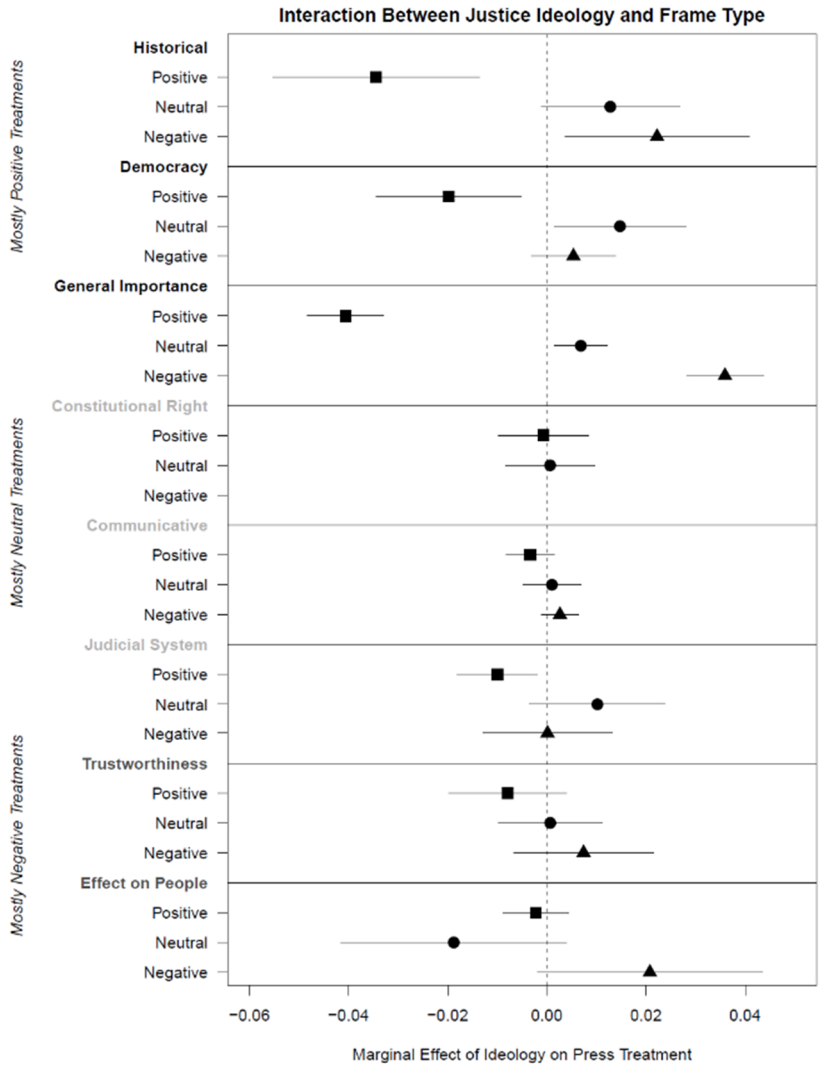
To test this question, we again employed Martin-Quinn ideology data. We charted the effect on the probability that a Justice will adopt a particular tone within the frame when the Martin-Quinn score is shifted one unit (or one point) toward the

236. *See* Figure 9.

more conservative end of the scale.[237] While ideology has an effect on tone in some frames, we find that the influence of a Justice's ideology on the constitutional right frame is essentially nonexistent, meaning that, generally, liberal and conservative Justices are equally likely to celebrate the notion of freedom of the press. Indeed, Figure 9, which depicts the interaction between ideology and all frames, shows that for both the positive and the neutral uses of the constitutional right framing, the marginal effect of ideology on press freedom depictions hovers near zero.

237. This one-unit difference is about the difference during the Court's 2007 Term between either Chief Justice John Roberts (1.42) and Justice Anthony Kennedy (0.41) or between Chief Justice Roberts and Justice Antonin Scalia (2.46). *Measures*, *supra* note 221. It is also the approximate distance, in the 2013 Term, between Justice Elena Kagan (-1.62) and Justice Sonia Sotomayor (-2.58). *Id.*

Figure 9



These data suggest that the disappearance of positive mentions of freedom of the press is not happening at the hand of any one ideological wing of the Court. We also parsed the data more finely to investigate the interaction of ideology with the frame over time, essentially looking for any indication that ideology once had an impact on positive usage but no longer

does, or vice versa. We find no significant effects.[238] There is no evidence that ideology has been a reliable predictor of a Justice's frequency of positive references to the right of press freedom during any era of our dataset.

Focusing more closely on the work of the Roberts Court Justices further belies the suggestion that ideology alone explains the stark decline in press freedom references. On a more granular level—and potentially key to thinking about the current role of ideology on press freedom—there are simply no quantitative or qualitative data to suggest that the Court's most recent liberal Justices are press-freedom advocates. Indeed, at the time our study concluded, no sitting liberal Justice had *ever* referenced the freedom of the press in a positive tone.[239] Justices Sotomayor, Breyer, and Kagan, the current Justices whose Martin-Quinn scores place them furthest to the left on the ideological spectrum,[240] had made fewer than five combined references to freedom of the press in their total time on the Court, and all of these were neutral in tone.[241] Justice Sotomayor, whose Martin-Quinn score marks her as the most liberal of the current Justices, contributed no press-freedom references to this total, as she had never once mentioned press

238. This examination was made with the aggregation and reduction of the data to the number of neutral and positive mentions by Justice by Term.

239. *See* Jones & West, *Empirical Study*, *supra* note 70, at 426 ("In nearly three decades on the bench, [Justice Ginsburg] referenced the 'freedom of the press' and related concepts only four times, three of which were tonally neutral, and only once suggested that the right was special or valuable."); *id.* at 427 ("Despite serving on the Court for more than a quarter century, [Justice Breyer] has invoked the principle of 'freedom of the press' only three times and has never done so in an overtly positive manner."); *id.* at 428 ("Justice Kagan's frequency is the lowest among her peers on the current Court, and even among these rare characterizations, her negativity outpaces her positivity." (citation omitted)).

240. Justice Sotomayor's Martin-Quinn score in 2019 was -3.48; Justice Breyer's -1.87; and Justice Kagan's -1.62. *Measures*, *supra* note 221. Justice Ginsburg, whose Martin-Quinn score for 2019 was -2.82, the second most liberal, was also on the Court through the conclusion of this study's dataset in July 2020. She had a career-long total of only four references to press freedom, none of which was positive in tone.

241. Justice Kagan had made one reference; Justice Breyer had made three; and Justice Sotomayor had made none. Jones & West, *Empirical Study*, *supra* note 70, at 427–28.

freedom or a free press in any way in all of her then-eleven years on the Court.[242]

The most frequent referencer of press freedom today is, in fact, the Court's most conservative Justice, Clarence Thomas[243]—although his total number of mentions pales in comparison to the totals of even the less frequent mentioners from the 1930s to 1980s.[244] Overall, the Roberts Court conservatives have low numbers of press-freedom mentions compared to their peers in the preceding era, just as the Roberts Court liberals do. While Justices of all ideological stripes once seemed to accept a foundational premise of press freedom, there are no indicators in either the quantitative or the qualitative data to suggest that any current Justice has active interest in the constitutional right, particularly as any kind of operationally protective principle for newsgatherers. At an individual-Justice level, changes in the ideological composition of the Court do not explain the disappearance of freedom of the press.

All told, despite some clear overarching indications of relationship between ideology and press-freedom mentions, it does not appear to be the case that changes in Justices' ideology are the sole factor behind the departure of freedom of the press from the Supreme Court's lexicon. Justices across the ideological spectrum were more likely to mention freedom of the press in earlier eras and are less likely to do so now. Changes in the ideological makeup of the Court cannot be the driving cause of the disappearance.

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242. Justice Sotomayor has referenced the press more generally, but she does not make mention of the constitutional freedom of the press. *See id.* (noting that "when . . . Justices are compared by their averages per year served on the Court, [Sotomayor] is ranked first among the sitting Justices for frequency of press mentions" and that "she has referenced the press or a press function 68 times, for an average of 6.09 references per year").

243. Justice Thomas had a 2019 Martin-Quinn score of 3.69. *Measures*, *supra* note 221.

244. Thomas has mentioned freedom of the press twenty-eight times in his nearly twenty-nine years on the Court, for an average of 0.97 references per year.

B. *Fewer Opportunities to Reference Press Freedom*

Other potential explanations for the right's disappearance focus on the possibility that the legal and media landscapes in which the Justices work are changing, rather than the language and practices of the Justices themselves. Under these views, the Roberts Court is referencing the freedom of the press less often because it has fewer opportunities to do so. But the data cast doubt on these explanations.

1. Reduction in Overall References to the Press

One theory might be that it is not "freedom of the press" that is disappearing from the Court's opinions but rather the broader concept of the press itself. That is, as the country moved from an era featuring a more recognizable institutional press to one with a more complicated media terrain, discussion of the press declined overall, and with that decline came a commensurate decline in references to press freedom. Our wider study confirms that the overall frequency of mentions of the press is itself in sharp decline in Supreme Court opinions.[245] But this decline alone does not explain the linguistic and conceptual abandonment of "freedom of the press." Indeed, two important sets of data strongly suggest that something more is happening on the press-freedom front than a simple decline in overall attention to the press.

245. *See* Jones & West, *Empirical Study*, *supra* note 70, at 390; Figures 10, 11.

Figure 10

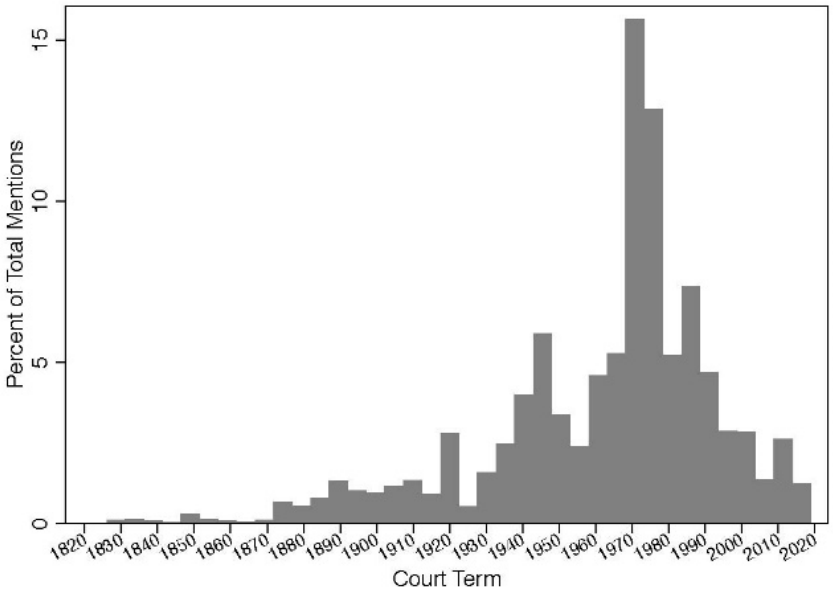
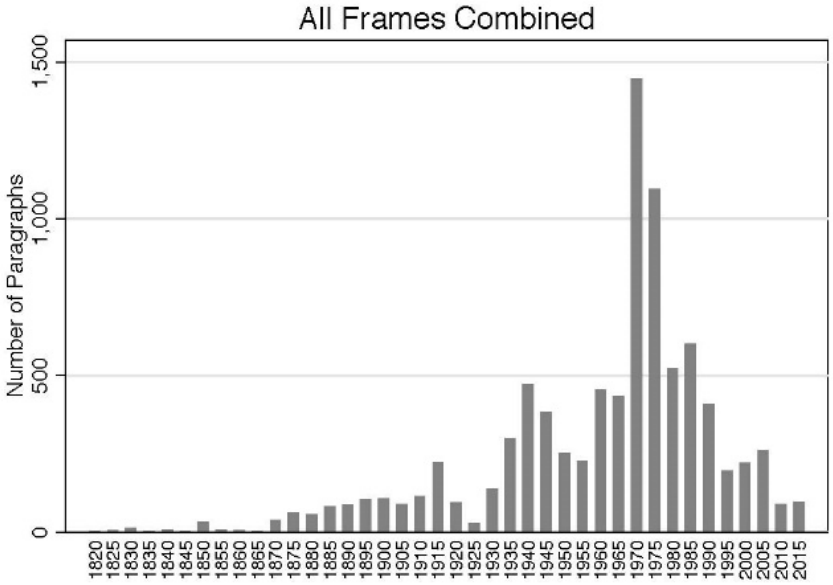


Figure 11



First, data reveal that the press freedom frame is in sharper decline than other press frames. Thus, even considering the reduced amount of overall press mentions, reference to press freedom is on the decline. A reduction in freedom of the press references that merely reflected an overall decline in references to the press might be expected to have a stable proportion of press-freedom references within the smaller, modern set of press references. As discussed above, however, this is not the case. While close to 30% of all press references mentioned press freedom for much of the 1930s to 1990s,[246] these mentions are now consistently below 10%.[247] Within the already diminishing total group of press references, the constitutional right frame is being eclipsed by other frames. Notably, the Court's references are shifting heavily to the frame that we call the "Communication" frame, which captures instances in which the Court simply acknowledges an act of journalism or the use of media to make something publicly known.[248] Rather than affirm or recognize freedom of the press, the Court frequently chooses to merely note that a news story was published or that press coverage occurred. Perhaps even more troubling for the press, frames that strongly correlate with negative tonal depictions—such as the frame Justices use to note that the press injured an individual's privacy, reputation, or emotional well-being—also have comparatively stronger frequency in this time period.[249] Simultaneously, the press-freedom frame is disappearing. Thus, while infrequency of press references may partially explain the drop in press-freedom references, this overall decline does not fully explain this frame's disproportionate disappearance.

A second, separate set of data that we gathered similarly undercuts the proposition that the press-freedom frame's disappearance is simply a function of the Court discussing the press less overall. There is strong evidence that the Court is neglecting opportunities to reference freedom of the press that it previously might have used as moments to reaffirm and

246. *See supra* Figure 2; Table A.

247. *See supra* Figure 2; Table B.

248. *See supra* note 171 and accompanying text.

249. *See* Jones & West, *Empirical Study*, *supra* note 70, at 401 ("[A]lthough the Roberts Court does not speak about the press often, when it does, it says that the press is harmful to people.").

acknowledge the right. As discussed above, the ongoing vitality of freedom of the press as a baseline concept was not solely fueled by references in cases with press-focused fact patterns but also in judicial opinions not involving the press, which alluded to it as part of a wider First Amendment discussion. This invocation of press freedom—essentially as a "traveling companion" to freedom of speech—once routinely occurred in more generalized "freedom of expression" cases.[250] These references were, at times, arguably ambiguous in their substantive meaning but were nonetheless significant for their preservation of press freedom as a rhetorical and conceptual constitutional ingredient that could potentially be employed in future press-focused cases. Justices Black and Douglas, known for their First Amendment absolutism,[251] regularly engaged in this coupling of the rights by discussing "freedom of speech and of the press" in a single breath,[252] but they certainly were not alone in the practice.[253] Throughout past eras, these "traveling

250. *See supra* notes 96–99 and accompanying text.

251. *See* Jones & West, *Empirical Study*, *supra* note 70, at 414–15.

252. *See, e.g.*, Milk Wagon Drivers Union, Loc. 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301 (1941) (Black, J., dissenting) ("[T]his great responsibility is entrusted to courts . . . that those brought before them may enjoy a trial in which all their constitutional rights are safeguarded—including the constitutional guaranties of freedom of speech and the press."); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495 (1949) ("This contention appears to be grounded on the guaranties of freedom of speech and press stemming from the Fourteenth and First Amendments."); Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) ("What are the 'more important' interests for the protection of which constitutional freedom of speech and press must be given second place?"); Bell v. Maryland, 378 U.S. 226, 346 (1964) (Black, J., dissenting) ("A great purpose of freedom of speech and press is to provide a forum for settlement of acrimonious disputes peaceably . . . ."); Craig v. Harney, 331 U.S. 367, 373 (1947) ("[T]he unequivocal command of the First Amendment serve[s] as [a] constant reminder[] that freedom of speech and of the press should not be impaired . . . ."); Ashton v. Kentucky, 384 U.S. 195, 200 (1966) ("When First Amendment rights are involved, we look even more closely lest . . . freedom of speech or of the press suffer." (citation omitted)); Old Dominion Branch No. 496 v. Austin, 418 U.S. 264, 290 (1974) (Douglas, J., concurring) ("[T]he Court frequently has rested state free speech and free press decisions on the Fourteenth Amendment generally rather than on the Due Process Clause alone." (internal quotation omitted)).

253. *See, e.g.*, Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 118 (1872) (Bradley, J., dissenting) (discussing constitutional rights, including "the right

companion" references situated speech and press freedoms as coequal and complementary constitutional rights.

To explore this practice further, we collected an additional dataset to study the Justices' practice of jointly mentioning the freedoms of speech and press as part of its discussions of First Amendment rights. We gathered data on this practice for two key time periods—the fifteen years of the Roberts Court (2005 to 2019) and a period a half-century earlier of equivalent, fifteen-year length (1960 to 1974).[254] For both periods, we investigated every reference to freedom of speech for the presence of any "traveling companions"—constitutional rights that were mentioned alongside the speech-freedom right.

Our examination reveals that freedom of the press is no longer a regular "traveling companion" to freedom of speech. Figure 12 offers a comparison of the fifteen-year periods. In the

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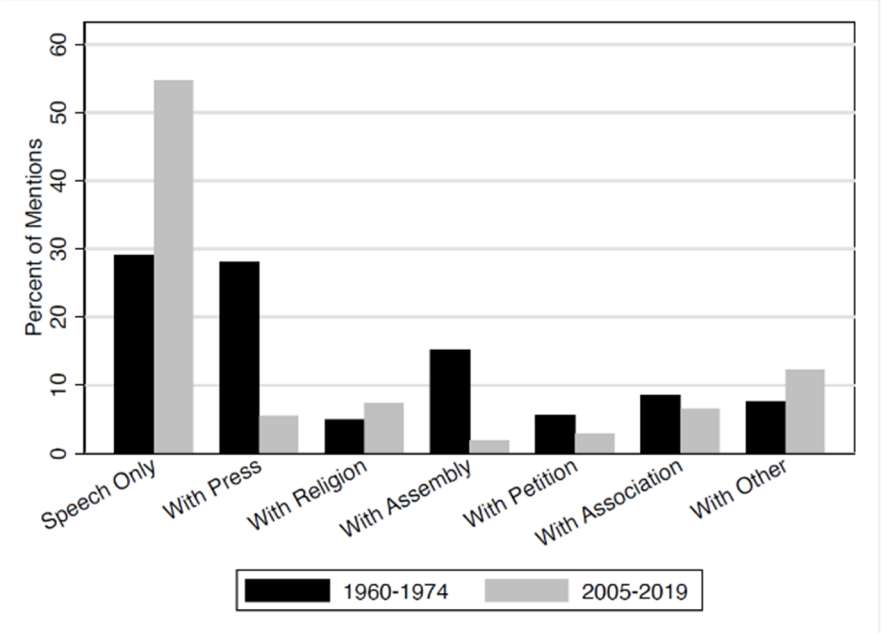
of free speech and a free press"); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 294 (1904) ("We are not to be understood as depreciating the vital importance of freedom of speech and of the press . . . ."); Gitlow v. New York, 268 U.S. 652, 664 (1925) ("[T]he 'liberty' protected by the Fourteenth Amendment includes the liberty of speech and of the press . . . ."); Powell v. Alabama, 287 U.S. 45, 67 (1932) ("[T]his court has considered that freedom of speech and of the press are rights protected by the due process clause of the Fourteenth Amendment . . . ."); Schneider v. New Jersey, 308 U.S. 147, 161 (1939) ("This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties." (citation omitted)); Thornhill v. Alabama, 310 U.S. 88, 101 (1940) ("The freedom of speech and of the press guaranteed by the Constitution . . . ."); Bridges v. California, 314 U.S. 252, 284 (1941) (Frankfurter, J., dissenting) ("[F]reedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power."); Yakus v. United States, 321 U.S. 414, 487 (1944) (Rutledge, J., dissenting) ("The great liberties of speech and the press are curtailed but not denied."); FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 250 (1990) (Scalia, J., concurring in part and dissenting in part) ("[T]he protection of freedom of speech and press . . . ." (internal quotation omitted)); Bartnicki v. Vopper, 532 U.S. 514, 534 (2001) ("The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press." (internal quotation omitted)); Thomas v. Chi. Park Dist., 534 U.S. 316, 320 (2002) ("The First Amendment's guarantee of 'the freedom of speech, or of the press' prohibits a wide assortment of government restraints upon expression . . . ." (citation omitted)); Virginia v. Black, 538 U.S. 343, 359 ("Furthermore, the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation . . . ." (internal quotation omitted)).

254. *See* Figure 12.

period from 1960 to 1974, press freedom was a consistent traveling companion to freedom of speech. In 37% of all paragraphs containing a reference to free speech, the Court also referenced freedom of the press.[255] Freedom of speech traveled alongside freedom of the press far more frequently than it traveled with any other constitutional right—nearly twice as often as the next most common right.[256] Indeed, during this period, freedom of speech as a concept was accompanied by freedom of the press almost as often as it appeared alone.

Figure 12



The data from the fifteen-year period of the Roberts Court stands in stark contrast. While in the previous period, the Court delivered hundreds of "traveling companion" paragraphs, the Roberts Court has done so fewer than two dozen times. During this more recent era, press freedom was a "traveling companion"

255. This period had 561 total references to freedom of speech. In 208 of them, there is also a reference to freedom of the press.

256. *See* Figure 12.

to free speech only 6% of the time.[257] A Court that once routinely referred to "freedom of speech and of the press" now nearly always simply refers to "freedom of speech." Press freedom has plummeted even among the ranks of those rights that do occasionally find mention alongside free speech, now eclipsed in frequency by religious freedoms, freedom of association, and other non-First Amendment rights.[258]

The "traveling companion" data thus further signal that the disappearance of the press-freedom right at the Court is not merely an outgrowth of a decline in the overall discussion of the press. Our data show that the Court is passing up opportunities to reference freedom of the press that it might have seized in the past. Freedom of speech references accompanied by a deliberate marker from the Court that free speech was one half of a vibrant two-right combination kept the concept of freedom of the press alive in earlier years. As addressed in more detail below, the Roberts Court has not lacked for opportunities to make these same "traveling companion references"; indeed, a robust free-speech docket, with expansionary Speech Clause protections, has been a hallmark of the era.[259] But free speech as a concept is now traveling alone, and the once persistent companion concept of press freedom has been mostly abandoned. Thus, while the decline in overall press references surely accounts for some of the reduction in freedom of the press mentions, the Court's patterns of referring to press freedom in non-press contexts has also dramatically shifted, spurring a more expansive disappearance.

2. Reduction in Number of Press-Specific Cases

A related, but distinct, explanation for the recent decline in references to the constitutional right of press freedom could be a decrease in press-specific cases at the Court.[260] Whether seen

257. This period had 381 total references to freedom of speech. Only twenty-three of them also reference freedom of the press.

258. *See* Figure 12.

259. For a discussion of the Roberts Court's approach to First Amendment speech rights, see Part V.

260. As discussed in Part III, discerning the constitutional status of press freedom can be a murkier undertaking compared to other provisions. The Court often speaks in ambiguous language that makes it unclear which rights

as part of the natural ebb and flow of the Court's docket or a predictable aftermath to the press-active caseload of the prior decades, this argument suggests that the Court simply no longer considers as many press issues as it once did, and therefore the Justices have fewer opportunities to discuss the right of press freedom. On closer review, however, it appears that while the makeup of the Court's dockets might explain some of the shift in press right references, it does not account for the full extent of the decline.

As discussed earlier, there is a strong consensus among press scholars that the height of the press's successes at the Supreme Court occurred during the latter half of the twentieth century—particularly during the thirty-year period beginning in the mid-1960s.[261] There is likewise widespread agreement that the Court today has not been deciding as many cases of key significance to the press, likely for a variety of interrelated reasons. The freefalling economics suffered by the news industry have left the institutional press with fewer resources to fight legal battles.[262] Concentrated media ownership has reduced competition among the press and resulted in less boundary-pushing journalism.[263] News organizations also might

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and protections stem from the Press Clause and which are rooted in the Speech Clause. There is also uncertainty concerning the Court's recognition of differences between members of the "press" and non-press speakers. Additionally, it has a practice of extending rights that are recognized primarily because of the press function to everyone. As a result, it is difficult to identify what factors distinguish a "press case" from other cases, including other First Amendment cases. Must a member of the press be a party to the case? Must the Court's holding rest solely or explicitly on press freedom? Must the case center on an activity or function of particular value to the press or that is clearly distinct from speech, such as newsgathering?

261. *See supra* Part III.

262. *See* Tony Mauro, *"We Need to Be Ready to Fight"*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://perma.cc/M2D4-KZW9 (quoting Gibson, Dunn & Crutcher partner Theodore Boutrous Jr. as stating that "major media organizations used to be much more willing to spend time and money to fight major First Amendment battles").

263. *See* PEN AM., LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS 5 (2019), https://perma.cc/4EXZ-AJGE (PDF) (stating that after news organizations face economic obstacles "consolidation and cost cutting gut newsrooms, beats remain uncovered, and corruption goes uninvestigated, the American populace lacks vital information about their lives and their communities").

be foregoing potential legal challenges out of concern that they will face press-unfriendly judges.[264]

Another possible explanation for the reduction in the number of press-related cases at the Court is that there are simply fewer unresolved press-specific issues following the spate of cases decided during earlier decades. While the press certainly secured a number of important rights and protections during the post-incorporation eras, it seems shortsighted to suggest that there are no remaining issues related to press freedom left for the Court to decide.[265] As an initial matter, there are some press-related issues that the Court addressed during these earlier years but did not fully resolve. The Court, for example, has yet to clear up the ongoing confusion about either the existence or contours of a constitutionally protected reporter's privilege,[266] a First Amendment right to government information,[267] or the right of public college and university student journalists not to be censored by their schools.[268] A

264. *See* Mauro, *supra* note 262 (quoting Theodore Boutrous Jr. as saying that "there is a sense among some that the current court is hostile to freedom of the press and that it is too risky to ask the court to weigh in on important issues").

265. *See supra* Part I. Moreover, the large number of freedom of speech cases decided during this period has not stopped the Roberts Court from continuing to find cases that raise new free speech questions. *See infra* Part V.B.3.

266. *See* Brief Amici Curiae of ABC, Inc. et al., Miller v. United States, 545 U.S. 1150 (2005) (Nos. 04-1507, 04-1508), 2005 WL 1199075; Sari Horwitz & Robert Barnes, *Supreme Court Refuses to Take Reporter's Case on Revealing Confidential Source*, WASH. POST (June 2, 2014), https://perma.cc/UU6T-W2SW.

267. *See* Matthew L. Schafer, *Does* Houchins v. KQED, Inc. *Matter?* BUFF. L. REV. (forthcoming 2022) (manuscript at 2) ("The plurality concluded that '[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information.'" (quoting Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978))).

268. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."); Brief of Amici Curiae Student Press Law Center et al., Hosty v. Carter, 412 F. 3d 731 (2005) (No. 05-377), 2005 WL 2736314, at *3 ("Because of the growing confusion and conflict among the lower courts on [the question left undecided by *Hazelwood School District*], *amici* believe the time has come for this Court to provide an answer.").

review of advocacy groups' litigation activity in these areas likewise reveals a host of other unresolved legal questions affecting the press, such as the risks for journalists and their sources under the Espionage Act;[269] protections against government surveillance of the press;[270] the targeting and arrest of journalists by law enforcement;[271] government censorship on digital platforms;[272] restrictions on the ability of government employees to talk to the press or to share certain information publicly;[273] the unsealing of court records;[274] the right to record law enforcement officials;[275] and warrantless searches of electronic devices at the border.[276]

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269. *See* Jameel Jaffer, *The Espionage Act and a Growing Threat to Press Freedom*, THE NEW YORKER (June 25, 2019), https://perma.cc/6Z2T-AC7U.

270. *See, e.g.*, Mailyn Fidler, *Police Camera Surveillance Threatens First Amendment Interests*, REPS. COMM. FOR FREEDOM OF THE PRESS (Feb. 22, 2021), https://perma.cc/GN5G-YPYX. *See generally, e.g.*, Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv., 14 F.4th 276 (4th Cir. 2021).

271. *See, e.g.*, Elahe Izadi, *Iowa Reporter Acquitted in a Trial that Shocked Press Freedom Advocates*, WASH. POST (Mar. 10, 2021, 3:24 PM), https://perma.cc/55A2-Q4E4; Goyette v. City of Minneapolis, 338 F.R.D. 109, 114 (D. Minn. 2021) (granting a restraining order against Minnesota police to prevent continued "violat[ions] [of] the constitutional rights of the members of the press who are covering [the George Floyd] protests").

272. *See, e.g.*, Charlie Savage, *Trump Can't Block Critics From His Twitter Account, Appeals Court Rules*, N.Y. TIMES (July 9, 2019), https://perma.cc/EGE8-YSEX.

273. *See, e.g.*, Edgar v. Haines, 2 F.4th 298, 304–07 (4th Cir. 2021) (addressing "prepublication review" requirements of intelligence agency employees and military personnel); Cato Inst. v. Sec. & Exch. Comm'n, 4 F.4th 91, 95 (D.C. Cir. 2021) (addressing gag orders of public officials).

274. *See, e.g.*, *United States v. Acosta*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, https://perma.cc/8RGQ-ZRPN (last updated Apr. 19, 2021) (addressing arguments that newspapers "have a First Amendment and common law right to access the records, and that the potential harm in unsealing the court documents does not outweigh the public's interest in accessing them").

275. *See, e.g.*, Project Veritas Action Fund v. Rollins, 982 F.3d 813, 817 (1st Cir. 2020) (detailing a Massachusetts law prohibiting recording).

276. *See, e.g.*, Alasaad v. Mayorkas, 988 F.3d 8, 12 (1st Cir. 2021) (addressing policies that "allow border agents to perform 'basic' searches of electronic devices without reasonable suspicion and 'advanced' searches only with reasonable suspicion."); Seth Harp, *I'm a Journalist But I Didn't Fully Realize the Terrible Power of U.S. Border Officials Until They Violated My Rights and Privacy*, THE INTERCEPT (June 22, 2019, 8:00 AM), https://perma.cc/PV3C-GUUC.

Even accepting that there has been a decrease in the number of press-related cases at the Court, the question remains whether a smaller press docket fully accounts for the decrease in references to press freedom. Or, alternatively, are today's Justices overlooking opportunities in the cases they are deciding to mention the right that past Justices likely would have embraced?

As discussed above, our baseline analysis of expected references suggests that the Roberts Court Justices have been sharply underperforming their predecessors when it comes to press freedom references.[277] Notably, in establishing those baseline era trends, we relied on the Supreme Court Database's "issue area" coding, which categorizes every case the Court decides as involving one of fourteen broad legal areas.[278] One of these issue areas identifies all of the Court's "First Amendment" cases.[279] By relying on the average number of expected references per case by issue area, we were able to adjust for any shift in the types of cases the Court was considering, including a potential drop in the number of First Amendment cases.

To consider these questions further, we sought to identify potentially viable opportunities for more recent Justices to acknowledge the constitutional right of press freedom. We examined cases where news organizations and press advocates filed amicus briefs highlighting potential press freedom issues despite members of the press not being parties to the proceedings.[280] Our analysis revealed that the Roberts Court frequently omitted references to press freedom in their opinions, regardless of press organizations' attempts to highlight the impact of issues on the free press and how these cases fit under the press freedom framework. This was the case, moreover, even in cases with some similarity to earlier cases in which these

277. *See supra* Part IV.

278. *See The Supreme Court Database: Online Code Book*, WASH. UNIV. L., https://perma.cc/XS6B-D6WJ.

279. *Id.*

280. *See, e.g.*, Brief for The Reporters Committee for Freedom of the Press as Amicus Curiae Supporting Appellant, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 132714, at *3 [hereinafter Brief of the Reporters Committee].

Justices' predecessors had acknowledged the constitutional right of press freedom.

In the Court's 2010 decision of *Citizens United v. FEC*,[281] for example, the Roberts Court considered whether a campaign finance law regulating the distribution of a political documentary violated the First Amendment.[282] The Court heard oral argument in the case twice.[283] Before the first argument, the Reporters Committee for Freedom of the Press, a press advocacy organization, filed an amicus brief emphasizing the value of the work of the news media and situating the issues within a press freedom framework.[284] The brief contended that the law raised potential risks for the "free press" and that it violated the "freedom of speech and of the press."[285] Less than a year later, before re-argument of the case, the Reporters Committee filed another brief again stressing the constitutional press freedom issues at stake.[286] It specifically asked the Court to clarify the relationship between some of its past decisions and "the First Amendment's protection of the press."[287] In response, another group of news organizations filed an amici brief that argued the opposite—that the campaign finance provision sufficiently protected the First Amendment rights of journalists.[288] Indeed, at least four other briefs filed by various groups in this case discussed the issues, at least in part, on press freedom grounds.[289] These groups did not agree on the specific

281. 558 U.S. 310 (2010).

282. *Id.* at 318–19.

283. *Id.* at 385 (Roberts, C.J., concurring).

284. *See generally* Brief of the Reporters Committee, *supra* note 280.

285. *Id.* at *5, *12.

286. *See generally* Supplemental Brief for The Reporters Committee for Freedom of the Press as Amicus Curiae Supporting Appellant, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2219299.

287. *Id.* at *2.

288. *See* Supplemental Brief for The Center for Independent Media et al. as Amici Curiae in Supporting Appellee, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365229, at *4–6.

289. *See generally* Brief on Supplemental Question for The Institute for Justice as Amicus Curiae Supporting Appellant, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 2365219; Brief on Supplemental Question for The Free Speech Defense and Education Fund, Inc. et al. as Amici Curiae Supporting Appellant, Citizens United v. FEC, 558 U.S. 310 (2010) (No.

issues in the case or on the meaning of press freedom; nonetheless, they all acknowledged press freedom's relevancy in the case, even if only as a "traveling companion." Yet, the majority decision in *Citizens United* contains no reference to the constitutional right to freedom of the press and instead grounds its discussion solely in the freedom of speech.[290]

A sampling of other cases shows a similar pattern: In the 2017 case of *Packingham v. North Carolina*,[291] the Court reviewed a state law prohibiting sex offenders from accessing certain social media websites.[292] Press advocates told the Court in amici briefs that the case presented issues that affected the First Amendment rights "of speech and press" and "the press's First Amendment right to distribute news."[293] Yet the *Packingham* Court did not once mention the word "press" and instead focused its entire discussion on "the First Amendment's Free Speech Clause."[294] Likewise, in the 2018 case of *Lozman v. City of Riviera Beach*,[295] the Court was asked to determine whether a man was constitutionally arrested after he spoke critically of government officials at a city council meeting.[296]

08-205), 2009 WL 2372918; Brief for The Cato Institute as Amicus Curiae Supporting Appellant, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 106650; Brief for The Foundation for Free Expression as Amicus Curiae Supporting Petitioner, Citizens United v. FEC, 558 U.S. 310 (2010) (No. 08-205), 2009 WL 97752.

290. *See generally Citizens United*, 558 U.S. 310. Justice Antonin Scalia's concurrence and Justice John Paul Stevens's dissent, however, do mention and debate the right of press freedom. *See id.* at 390 (Scalia, J., concurring); *id.* at 420 (Stevens, J., concurring in part and dissenting in part); *see also* Michael W. McConnell, *Reconsidering* Citizens United *as a Press Clause Case*, 123 YALE L.J. 412, 416 (2013) ("[T]he most important flaw—a flaw to which the parties and the lower courts contributed—was to analyze the case under the wrong clause of the First Amendment.").

291. 137 S. Ct. 1730 (2017).

292. *See id.* at 1733.

293. Brief for The Reporters Committee for Freedom of the Press and The Thomas Jefferson Center for Protection of Free Expression as Amici Curiae Supporting Petitioner, Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (No. 15-1194), 2016 WL 7438450, at *8–9 ("[I]ndividuals have the constitutional right to listen to what others have to say").

294. *Packingham*, 137 S. Ct. at 1733.

295. 138 S. Ct. 1945 (2018).

296. *See id.* at 1948–49.

Briefs by multiple amici and one of the parties debated how the case interacted with the constitutional right to press freedom.[297] The Court's opinion, however, again contains no press right references. As a final example, in *Carpenter v. United States*,[298] twenty press amici explicitly told the Court that it should consider the Fourth Amendment's historic role in protecting "the freedom of the press" as part of its decision regarding whether law enforcement officials could obtain cellphone location site information without a warrant.[299] Although the Justices were deeply divided on the main issues in *Carpenter*, they were united in their decision not to mention the constitutional right to a free press in any of the five published opinions.

These opinions stand in stark contrast to those from earlier periods, when Justices frequently referenced press freedom in cases where news media organizations were not parties—and sometimes in cases that did not even involve a First Amendment issue at all. In *Joseph Burstyn, Inc. v. Wilson*,[300] for example, the Court considered regulations on the exhibition and distribution of motion pictures—an issue similar to that underlying *Citizens United*.[301] Like *Citizens United*, *Burstyn* did not have a news

297. *See, e.g.*, Brief for Marion B. Brechner First Amendment Project and Brechner Center for Freedom of Information as Amici Curiae Supporting Petitioner, Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (No. 17-21), 2017 WL 6804623, at *6 ("[T]his case raises First Amendment free press concerns, not simply free speech and petition interests."); Brief for National Press Photographers Association and 25 Media and Free Speech Organizations as Amici Curiae Supporting Petitioner, Lozman v. City of Riviera Beach, 138 S. Ct. 1945 (2018) (No. 17-21), 2017 WL 6804624, at *6 (arguing that "freedom of the press is at risk").

298. 138 S. Ct. 2206 (2018).

299. Brief for The Reporters Committee for Freedom of the Press and 19 Media Organizations as Amici Curiae Supporting Petitioner, Carpenter v. United States, 138 S. Ct. 2206 (2018) (No. 16-402), 2017 WL 3530966, at *14.

300. 343 U.S. 495 (1952).

301. *Compare id.* at 497 ("The issue here is the constitutionality, under the First and Fourteenth Amendments, of a New York statute which permits the banning of motion picture films on the ground that they are 'sacrilegious.'"), *with* Citizens United v. FEC, 558 U.S. 310, 321 (2010) ("[Citizens United] feared . . . that [its] film . . . would be covered by § 441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties.").

media organization as a party; yet, unlike the *Citizens United* Court, the *Burstyn* Court repeatedly referenced the constitutional freedom of the press.[302]

The Roberts Court's *Packingham* decision, meanwhile, is comparable to the 1940 case of *Thornhill v. Alabama*,[303] where the Court considered the arrest of two union workers for "loitering and picketing" outside of a wood-processing plant during a labor strike.[304] Neither *Thornhill* nor *Packingham* involves a news media party, although they both implicate questions about the government's use of criminal law to target disfavored speakers and prevent them from potentially reaching certain audiences. Unlike the *Packingham* Court, however, the Court in *Thornhill* referenced press freedom multiple times.[305]

The examples continue. In the 1960 case of *Wilkinson v. United States*,[306] the Court addressed a situation which echoed the issue in *Lozman*. In *Wilkinson*, the petitioner was criminally convicted after he refused to answer questions before the House Committee on Un-American Activities and publicly disputed the legality of the Congressional investigation into his possible affiliations with the Communist Party.[307] Thus, in both *Wilkinson* and *Lozman*, the Justices were tasked with considering the constitutional implications of government officials wielding criminal charges against speakers who publicly challenge them. Unlike *Lozman*, however, the *Wilkinson* opinion repeatedly references press freedom.[308]

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302. *See, e.g.*, *Burstyn*, 343 U.S. at 502 ("[E]xpression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments."); *id.* at 503 ("[T]he basic principles of freedom of speech and the press, like the First Amendment's command, do not vary.").

303. 310 U.S. 88 (1940).

304. *Id.* at 91.

305. *See id.* at 95 ("The freedom of speech and of the press . . . are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment . . . ." (citation omitted)); *id.* ("Abridgment of freedom of speech and of the press . . . impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through . . . popular government.").

306. 365 U.S. 399 (1961).

307. *See id.* at 400–04.

308. *See, e.g.*, *id.* 422–23 (Black, J., dissenting) ("For the principles of the First Amendment are stated in precise and mandatory terms and unless they

Finally, a 1961 case, *Marcus v. Search Warrants of Property at 104 East Tenth Street*,[309] can be juxtaposed against *Carpenter* in that both cases examined the Fourth Amendment limitations on government searches against non-press actors.[310] The *Marcus* Court, however, did precisely what the Roberts Court did not do in *Carpenter* (despite the press advocates' requests)—it acknowledged the historical relationship between Fourth Amendment protections and the freedom of the press. Writing for the Court, Justice William Brennan stated that "[h]istorically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power."[311]

The argument that the Roberts Court has not had the same opportunities to mention the constitutional right to press freedom does not fully account for the reduction in its references. Rather, review of the cases suggests that the Justices from prior eras had press freedom more front of mind and included references to the right more naturally in a variety of contexts. In contrast, despite press advocates' efforts to draw attention to threats to the right, recent Justices have developed a habit of omitting mentions to press freedom.

3. Press Freedom and the Roberts Court's First Amendment

The suggestion that the Roberts Court's failure to mention the constitutional right of press freedom is due to a dearth in opportunities rings all the more hollow in light of the Roberts

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are applied in those terms, the freedoms of religion, speech, press, assembly and petition will have no effective protection."); *id.* at 425–26 (Douglas, J., dissenting) ("Criticism of government finds sanctuary in several portions of the First Amendment. It is part of the right free speech. It embraces freedom of the press.").

309. 367 U.S. 717 (1961).

310. *Compare id.* at 718 ("This appeal presents the question whether due process under the Fourteenth Amendment was denied . . . by the application . . . of Missouri's procedures authorizing the search for and seizure of allegedly obscene publications preliminarily to their destruction . . . ."), *with* Carpenter v. United States, 138 S. Ct. 2206, 2211 (2018) ("This case presents the question whether the Government conducts a search under the Fourth Amendment when it accesses historical cell phone records . . . .").

311. *Id.* 724.

Court's reputation as a Court with an active—and at times groundbreaking—interest in First Amendment rights.

Setting aside any debates about the correctness of its rulings, the Roberts Court can hardly be accused of overlooking issues of expressive freedoms. In fact, according to a study by Ronald Collins and David Hudson, the Court decided fifty-six free speech cases between 2005 and 2020.[312] Time and again, the Roberts Court has upheld or seriously entertained novel or boundary-pushing First Amendment arguments, and they did so in cases where, in the eyes of many observers, the connection between the underlying activities and traditional free speech values were more tangential than in the past. The Court, for example, considered free speech issues in cases involving animal snuff films,[313] offensive or disparaging trademarks,[314] credit card fees,[315] union dues,[316] vanity license plates,[317] student athlete recruitment,[318] commercial disclosure of doctors'

312. Ronald Collins & David Hudson, *John Roberts: Mr. First Amendment*, SCOTUSBLOG (July 21, 2020, 10:00 AM), https://perma.cc/9SKH-AYZG.

313. *See* United States v. Stevens, 559 U.S. 460, 482 (2010) (holding that an animal cruelty statute was substantially overbroad and therefore invalid under the First Amendment).

314. *See* Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (finding that the Lanham Act's disparagement clause "violates the Free Speech Clause"); Iancu v. Brunetti, 139 S. Ct. 2294, 2302 (2019) (determining that the Lanham Act's bar for "immoral or scandalous" phrases discriminated on the basis of viewpoint and therefore violated the First Amendment).

315. *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1151 (2017) (remanding the case for consideration of whether a New York statute prohibiting merchants from requiring customers to pay a credit card surcharge regulated speech).

316. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018) (holding that, under the First Amendment, "[n]either an agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . unless the employee affirmatively consents to pay.").

317. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 219–20 (2015) (holding that Texas did not violate free speech rights by refusing a license-plate design displaying the Confederate flag).

318. *See* Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad., 551 U.S. 291, 299 (2007) (finding that a state actor's anti-recruiting rule did not violate a school's First Amendment rights when the school voluntarily joined the organization).

drug-prescribing records,[319] bigoted protests near military funerals,[320] and the sale of violent video games to minors without parental consent.[321]

Even in cases considering potential free speech issues that were more similar to those of prior eras, the Roberts Court Justices still often surprised commentators by handing down rulings that took a more expansive speech-protective stance than expected.[322] They declared, for example, that corporations have equivalent rights to people[323] and that states cannot create protective zones around women entering abortion clinics.[324] They held that the government cannot punish people who lie about winning military honors,[325] impose "entirely reasonable"

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319. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 579–80 (2011) ("The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues . . . . In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.").

320. *See* Snyder v. Phelps, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.").

321. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 805 (2011) ("[California's legislation] abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime.").

322. *See, e.g.*, Jeffrey Toobin, *Money Unlimited: How Chief Justice Roberts Orchestrated the* Citizens United *Decision*, THE NEW YORKER (May 14, 2012), https://perma.cc/28KU-JU5M ("[Citizens United's counsel] could tell from the new Questions Presented that the Court was . . . heading for a ruling that was far broader than the one he had originally sought.")

323. *See generally* Citizens United v. FEC, 558 U.S. 310 (2010).

324. *See* McCullen v. Coakley, 573 U.S. 464, 494–97 (2014); *see also* Emily Jane Goodman, *Supreme Court Decision on Abortion Clinic Buffer Zones Opens the Door to Further Challenges*, THE NATION (July 1, 2014), https://perma.cc/CAR4-C5TP.

325. *See* United States v. Alvarez, 567 U.S. 709, 723 (2012) (finding that the power that the Stolen Valor Act potentially gave government created a chill that the "First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom"); *see also* Erwin Chemerinsky, *Chemerinsky: The First Amendment and the Right to Lie*, ABA J. (Sept. 5, 2012, 1:57 PM), https://perma.cc/8W5H-YVAT ("*Alvarez* is one of the court's most emphatic statements that false speech is generally protected by the First Amendment and it is for the marketplace of ideas, and not for the government, to decide what is true and what is false."); *id.* ("What makes

regulations on local signage,[326] or require reproductive healthcare clinics to display factual information.[327]

In light of this record, both supporters and critics of the Roberts Court agree on at least this much: the Court "has dramatically expanded the reach of the First Amendment by striking down a wide range of statutes for encroaching on free speech rights."[328] Floyd Abrams, for example, said the Roberts Court "deserves great credit" for its record "render[ing] First Amendment-protective decisions in an extraordinarily broad range of cases," while Geoffrey Stone stated that "[t]he Roberts court has given more protection to free speech across a larger range of areas than any of its predecessors have—although sometimes unwisely."[329] After noting in a review of the Court's 2010 Term that the "[f]ree-speech claimants won virtually every case, even the close and difficult ones," Michael McConnell concluded that free speech jurisprudence "must be seen as this Court's most distinctive contribution to the ongoing judicial interpretation of our constitutional order."[330]

Alvarez surprising is that the Roberts court had generally rejected free speech claims when the institutional interests of the government were at stake.").

326. Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015) (holding that a law prohibiting certain types of signage failed strict scrutiny and violated free speech guarantees).

327. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2378 (2018) (deciding that a California law requiring pro-life reproductive facilities to notify patients of certain services, including abortions, violated the First Amendment); *see also* Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019) ("*NIFLA v. Becerra* is only secondarily about speech. . . . The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech.").

328. Amelia Thomson-DeVeaux, *Chief Justice Roberts Is Reshaping the First Amendment*, FIVETHIRTYEIGHT (Mar. 20, 2018, 5:58 AM), https://perma.cc/72C5-BREN.

329. Steve Chapman, *The John Roberts Court: Champion of Free Speech*, CHI. TRIB. (July 26, 2017, 2:48 PM), https://perma.cc/9MSG-KNVU.

330. Michael W. McConnell, *A Free Speech Year at the Court*, FIRST THINGS (Oct. 2011), https://perma.cc/N6W9-G3EV; *see also* Ronald K.L. Collins, *Foreword: Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 413 (2012) ("[T]here is . . . something remarkable in how the Roberts Court has re-conceptualized the way we think about certain free speech issues and has likewise

If press freedom relies on Justices who notice, appreciate, and acknowledge underlying expressive values, then it would be natural to assume that a Court that is known for its purportedly broad protection of First Amendment values would also fully embrace press freedom. Yet our data reveal that this is not the case. As expansive as it might be in some ways, the Roberts Court's particular vision of the First Amendment is not one that prioritizes the constitutional protection of the free press.

The growing chorus of scholars critical of the Roberts Court's free speech jurisprudence will likely be unsurprised by the revelation that the Court has left certain types of speech outside the ambit of its much-celebrated free speech expansionism. Over the past decade, an increasing number of academics and commentators have argued that the Court's approach primarily favors only particular speakers or messages, while leaving others with far less vibrant protections.[331] When assessing the Justices' First Amendment decisions, Heidi Kitrosser has explained that the calculus is "not a mere matter of tallying free speech wins and losses," but also requires acknowledging "the importance of the speech that they fail to protect."[332]

The Roberts Court, for example, has actively defended the rights of corporate and commercial speakers,[333] but it has allowed the government to regulate, at times severely, the

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reinvigorated a measure of free speech liberty, albeit to the consternation of many.").

331. *See, e.g.*, Chemerinsky, *Not a Free Speech Court*, *supra* note 145, at 725 ("The pattern is uniform and troubling: when the government is functioning as an authoritarian institution, freedom of speech always loses.").

332. Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 95 WASH. U. L. REV. 1405, 1406 (2018).

333. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2118 (2018) ("These days, the winners in First Amendment cases are much more likely to be corporations and other economically and politically powerful actors." (citation omitted)); *see also* Tim Wu, *The Right to Evade Regulation: How Corporations Hijacked the First Amendment*, THE NEW REPUBLIC (June 3, 2013), https://perma.cc/AQ35-2XSL ("Once the patron saint of protestors and the disenfranchised, the First Amendment has become the darling of economic libertarians and corporate lawyers who have recognized its power to immunize private enterprise from legal restraint.").

speech of students,[334] unions,[335] prisoners,[336] and government workers.[337] Gregory Magarian refers to the Court's selective record on expressive liberties as a preference for "managed speech," which he describes as a First Amendment jurisprudence that "concentrates managerial power over public discussion in the government or in favored private actors."[338] Kathleen Sullivan depicts this record as "a triumph of the libertarian over the egalitarian vision of free speech."[339] In other words, Sullivan asserts that the Court has endorsed a view that "treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas," as opposed to one centered on the protection of "marginal, dissident, or unpopular viewpoints that are likely to suffer political subordination or hostility."[340] Other scholars contend that the Court's free expression jurisprudence is most aptly labeled "First Amendment Lochnerism"—the process through which the Court has transformed expressive rights from

334. *See* Morse v. Frederick, 551 U.S. 393, 410 (2007) ("The First Amendment does not require schools to tolerate at school events student expression that contributes to [the dangers of illegal drug use].").

335. *See* Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2486 (2018).

336. *See* Beard v. Banks, 548 U.S. 521, 533 (2006) (determining that a prison's policy depriving dangerous inmates of access to newspapers, magazines and photos was constitutional).

337. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

338. GREGORY P. MAGARIAN, MANAGED SPEECH: THE ROBERTS COURT'S FIRST AMENDMENT xv (2017)

> The Roberts Court, with a consistency and potency unique in the Supreme Court's history, has authorized established, powerful institutions strongly invested in the status quo to exercise managerial control over public discussion, with the apparent goal and typical result of pushing public discussion away from destabilizing, noisy margins and toward a stable, settled center.

339. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 145 (2010).

340. *Id.* at 145, 148.

"weapons of the weak into one more resource that wealthy interests could deploy to preserve their advantages."[341]

The constitutional value of press freedom is, of course, different in significant ways from the disfavored speech described by these scholars. While historically freedom of the press has been critically important as a protection for some unpopular and disfavored voices, the free press does not exclusively consist of inherently marginalized voices, nor does it always embody unpopular viewpoints. In fact, the institutional press can be a uniquely powerful speaker in many contexts. Yet the free press in all of its forms shares important qualities with these other disfavored categories that likewise make its steady disappearance from the Supreme Court's First Amendment canon highly concerning. By design, the press functions as a counterbalance to the government and thus threatens the "managerial power" of government actors defined by Magarian,[342] thereby making members of the press more likely to be targets of the government hostility described by Sullivan.[343] And while the American press is not necessarily weak (the trait identified by the scholars of First Amendment Lochnerism), it functions to equalize the balance of power between the people and their government through government scrutiny and the dissemination of information of public concern.[344]

Thus, whatever the appropriate description of the Roberts Court's First Amendment jurisprudence may be, our study contributes an important additional observation: this jurisprudence does not include any meaningful conception of freedom of the press. In contrast to their purportedly open embrace of freedom of speech—which expanded the concept to new speakers and new activities, while rejecting many limits or

341. Jeremy K. Kessler & David E. Pozen, *Introduction: The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1960 (2018). *See generally* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133 (2016); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

342. *See generally* MAGARIAN, *supra* note 338.

343. *See generally* Sullivan, *supra* note 339.

344. *See* Sonja R. West, *The Majoritarian Press Clause*, 2020 U. CHI. LEGAL F. 311, 314 (2020) (asserting that one of the Press Clause's tasks is "safeguarding our collective, majoritarian right to a republican form of government").

regulations—the Roberts Court has rejected the freedom of the press. Rather than mirror their inclusive and, at times, near-absolutist stance regarding freedom of speech, the Justices have starved the press-freedom right of oxygen by seemingly erasing it from its prior platform of rhetorical prominence.

CONCLUSION

Freedom of the press—a principle once roundly recognized by Justices of all stripes at the U.S. Supreme Court—is disappearing. On every meaningful measure captured by our dataset, the frequency of acknowledgement of the right is in sharp decline. No Justices on the current Court invoke the concept with any regularity, and a contextual review of their rare passing references suggests there are no remaining advocates of the right. Missing from the current Court's lexicon are not only the glowing positive endorsements of a free press as vital, valuable, or crucial to democracy, but also the bare, passing references to the concept that once appeared with great frequency. Although the social, judicial, and technological factors that have combined to bring about this change are surely complex, our data rule out that the desertion of the concept is solely a result of the Court's shifting ideology. They also cast serious doubt on the notion that the issue is simply the result of a decrease in references to the press more generally, a reduction in the Court's press-focused docket, or other lack of opportunity to refer to freedom of the press. Indeed, the evidence is entirely to the contrary. The Roberts Court has built a reputation of actively and expansively engaging cases that speak to principles of First Amendment expressive freedom—the very sorts of cases that our data show would unquestionably have given rise to a reference to press freedom a generation ago. A Court that is otherwise capacious in its First Amendment acknowledgements has all but deleted a major First Amendment value from the conversation.

The institutional press itself is changing—and may even be disappearing—but the *press* and *the press function* of course continue to exist, and a stable democracy requires continued recognition of the overarching principle of press freedom. Indeed, a powerful academic movement at this moment has turned its attention to the invigoration of the Press Clause precisely because scholars and commentators recognize the

critical value of protecting these functions in a new media landscape.

The lesson from our data is that this movement needs a more fundamental starting point. Conversations about the scope and contours of the freedom of the press should be shaped by a recognition that the current Court's rhetorical and conceptual acknowledgement of the freedom is disappearing.