

How The Supreme Court Talks About the Press (and Why We Should Care)

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RonNell Andersen Jones & Sonja R. West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study* (August 10, 2021), available at [SSRN](#).

An independent judiciary and an independent press are two of the institutions most often associated with a constitutional democracy's commitment to public accountability. Two of our most thoughtful Press Clause scholars—RonNell Andersen Jones and Sonja West—set out to document what the former (more specifically, the Supreme Court) says about the latter (the press), and how that has changed over time. What they found is both fascinating and disquieting.

Worried about “the fragile and deteriorating relationship between the press and the government” and what that means for the protection of press freedom, Jones and West identified every reference to the press made by any Supreme Court Justice in any opinion since 1784. They then coded each reference by content (e.g., whether the Justice addressed the press's trustworthiness, the press's impact on reputation and privacy, its value, its constitutional protection, and more) and by tone (i.e., whether the Justice's reference reflected a positive, negative, or neutral characterization of the press).

This is impressive empirical work—work that has generated a rich data set that the authors will continue to mine in future scholarship (where, for instance, they plan to consider what the Court's rhetoric means for the public's perception of the Court, and what this in turn might mean for the protection of press freedom).

In this Article, Jones and West detail the dramatic deterioration in both the frequency and the positivity of the Court's description of the press. Bottom line, the members of today's Court are much less likely even to mention the press than did their predecessors. And when today's Justices do discuss the press, they are much more likely to do so in negative terms.

More specifically, in terms of frequency, Jones and West show that “the Court is simply referencing the press far less frequently than it did half a century ago,” including fewer references that even acknowledge the existence of the First Amendment's Press Clause. And in terms of tone, when contemporary Justices *do* talk about the press, they are more likely to speak about it in negative terms. In short, the Justices' references to the press in opinions written 50 years ago were more than twice as likely to be positive than press-related references today.

Jones's and West's discoveries are many, with some more surprising than others. For instance, they found a significant correlation—in the past and continuing today—between Justices' ideology and their expression of positive or negative views of the press. Over time, left-leaning Justices have been more likely than right-leaning Justices to write positively about the press, and right-leaning Justices have been more likely than their left-leaning colleagues to write negatively (with the effects even starker at both ends of the left-right continuum).

Perhaps less expected, Jones and West also learned that today's left-leaning Justices discuss the press, and discuss it positively, much less than their counterparts of a half century ago. Right-leaning Justices

today are more likely to write negatively rather than neutrally about the press, and left-leaning Justices today are more likely to write neutrally rather than positively about the press.

The authors also identify the most and least press-friendly Justices of all time, based on metrics that combine both how frequently and how positively or negatively each Justice mentioned the press. These measures led them to identify Hugo Black, William Douglas, and William Brennan as the most press-friendly Justices ever, and Byron White as the least press-friendly. Note that all four are among the longest-serving Justices and that the tenure of all four overlapped at least in part during what some call the Press Clause's "Glory Days" during in the 1960s, 70s, and 80s—a time when the Court decided a bevy of important press-related cases like *New York Times v. Sullivan* and the Pentagon Papers case (*New York Times v. United States*).

In contrast, that the contemporary Justices speak so rarely about the press means that it's difficult to compare their positivity or negativity in statistically significant ways, and thus harder to identify any rhetorical press champions among today's Justices. Clarence Thomas, the longest-serving of the current Justices, has mentioned the press most frequently, with 51 percent of those references neutral, 30 percent positive, and 19 percent negative. And while then-professor Elena Kagan extensively addressed free speech and press issues in her scholarship, since joining the Court she has rarely mentioned the press and press freedoms.

As Jones and West observe, the causes of these changes are tricky to identify, correlating as they do with changes in technology, changes in politics, and related changes in the press's business model and economic prospects. (These changes also correlate with apparent changes in how the press talks about the Court. In [Supreme Court Journalism: From Law to Spectacle?](#), Barry Sullivan and Cristina Carmody Tilley compare the print media coverage of *Brown v. Board of Education* with that of *Parents Involved in Community Schools v. Seattle School Dist. No. 1* to illuminate how the press's description of the Court's work has changed over the last fifty years. They conclude that "while the mid-twentieth century press described the Court's decisions largely in terms of the legal questions presented, the contemporary press seems more likely to describe the Court's decisions in non-legal terms—as something resembling a spectacle, in which unelected judges are presumed to decide cases, not on properly contested legal grounds, but based on their respective commitments.")

At a time when the press faces existential challenges on numerous fronts, it needs defenders willing to advocate for the value it delivers as both government watchdog and as public educator (even while the press's defenders need not, and should not, remain uncritical of its performance). As one of many illustrations of what we lose when we lose a commitment to the press and press freedoms, [Richard Hasen](#) and [Margaret Sullivan](#) (among others) detail the evidence that a decline in local newspapers—and the accompanying decline in public scrutiny of local government—correlates with a rise in local government corruption.

And so I find Jones's and West's takeaway both gloomy and consequential:

At this crucial moment, when we have seen the risks of executive and legislative branch attacks on the press, our study finds that the U.S. Supreme Court is not pushing back. . . . A generation ago, the Court actively taught the public that the press was a check on government, a trustworthy source of accurate coverage, an entity to be specially protected from regulation, and an institution with specific constitutional freedoms. Today, in contrast, it almost never speaks of the press, press freedom, or press functions, and when it does, it is in an overwhelmingly less positive manner.

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