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ESSAYS AND SCHOLARSHIP

# Presuming Trustworthiness

How the Supreme Court has abandoned once-positive assumptions about press speech, even while embracing the trustworthiness of other speakers, and what it might mean for democracy

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# Introduction

A half-century ago, the U.S. Supreme Court routinely sang the praises of speakers performing the press function. Journalists, the justices told us, fulfill crucial democratic functions. They advance public understanding, act as a check on government and the powerful, and serve as the eyes and ears of an attentive but overwhelmed public. While the justices acknowledged that press reports are sometimes inaccurate and that media motivations are sometimes less than public-serving, their laudatory statements nonetheless embraced a baseline presumption of the value and trustworthiness of press speech in general. Speech in the exercise of the press function, they told us, is vitally important to public discourse in a democracy and therefore worthy of protection even when it falls short of the ideal in a given instance.

Those days are over. Our qualitative and quantitative study of every reference to the press function in the history of the Court reveals that the justices' positive assumptions about press-speaker trustworthiness—and the benefit of the doubt that accompanied them—have vanished. Yet, for other types of speakers, the presumption of trustworthiness remains and is perhaps stronger than ever. The Roberts Court justices continue to indulge a generous starting premise for an array of other expressive actors, regardless of the value of their speech or the potential that their speech was the product of less-than-public-serving motives.

In this essay, we explore these dynamics. We share our study's story of the justices' abandonment of a once-vibrant presumption of trustworthiness for press speakers and contrast this with the Court's ongoing willingness to continue to apply, or even to expand, the presumption to other speakers. The declining characterization of the press as trustworthy may well be rooted in a variety of influences, including factual changes in how much modern press speakers merit belief or the benefit of the doubt. But it is not the case that the justices have simply grown more cynical of the trustworthiness of *all* speakers—or even of all speakers whose trustworthiness is sometimes questionable. This contrast may provide important insight into both the future protection of the democracy-enhancing press function and the ways that the Roberts Court may be leaving certain types of speech outside the ambit of its much-touted expansion of speaker protection.

# I. Characterizations of Press Trustworthiness

In a larger study,[1] we reviewed every press reference in all opinions by justices of the U.S. Supreme Court since 1784.[2] The project explores 8,792 total press-function characterizations in the writings of 114 justices over the course of 235 years.[3] We included in the dataset every paragraph in which a justice of the Court spoke in any way about the press function,[4] whether or not it emerged in a case focused on the press or press freedom. Decisions on inclusion were shaped by the Court's own identifications of the press function over time. We used a wide set of synonymous terms for this concept,[5] and the paragraphs that were captured depict both legacy media and other performers of the press function and discuss newsgathering and reporting by entities other than traditional news outlets (including, for example, references to "citizen journalists").[6] Coders tallied the use of eight different framings of press speakers, and post-coding analysis merged the paragraphs with the Supreme Court Database, which allowed justice- and case-level examination of results,[7] including analysis of each reference by Court term, the justice who authored the opinion, and the case topic area.[8]

Among the most telling trends to emerge in this large body of references is the unmistakable qualitative shift away from a presumption of trustworthiness. A Court that once routinely went out of its way to emphasize that its starting point was to believe that a press speaker was well motivated, credible, and public-serving now does nothing of the sort, instead offering characterizations that ascribe opposite traits.

Our review reveals that for much of the Court's history, and for all of the long era stretching from the incorporation of the First Amendment to the Roberts Court, press-speaker trustworthiness was presumed in two separate, but related ways—through "the Worthiness Principle" and "the Breathing Space Principle."

## A. The Worthiness Principle

First, for much of the 20th century, the Court embraced what we label the Worthiness Principle—the principle that those who perform the press function are worthy of trust because they actually or potentially are using that expression to do good. The justices assumed, at least as a default characterization, that press speech was valuable, had presumptively good aims, and produced public-serving and democracy-enhancing benefits.

As we explore in more detail in our empirical study,[9] it was once commonplace for members of the Court to go out of their way to comment on both the admirable motivations of press speakers and the presumptively positive results of their speech. In different opinions, justices of the Court called the press "a mighty catalyst in awakening public interest in governmental affairs"[10] and depicted it as "specifically selected" by the Constitution "to play an important role in the discussion of public affairs."[11] They cast it as aiming to advance "public understanding of the rule of law" and "comprehension of the functioning of the

entire criminal justice system."[12] They presumed the press desired to report "fully and accurately the proceedings of government"[13] in ways that served readers and viewers.

Likewise, our study indicates it was once common for justices to presume the press succeeded in furthering these ends. For example, in both *Sheppard v. Maxwell*[14] and *Nebraska Press Association v. Stuart*,[15] the Court characterized the press as "the handmaiden of effective judicial administration" and lauded as "impressive" its "record of service over several centuries" in this respect.[16] In *Mills v. State of Alabama*,[17] the Court asserted that "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."[18] "The basic assumption of our political system," the Court reiterated two decades later in *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, is "that the press will often serve as an important restraint on government."[19]

Indeed, a remarkable feature of the Court for much of the 20th century was how easily it assumed that press speech was democracy-enhancing and public-serving. The presumption of the justices throughout this long period was that performers of the press function are "informing the citizenry of public events and occurrences"[20] and otherwise conducting the "indispensable service" of shaping community conversation.[21] These functions, the justices asserted, have inherent value because "'[a]n untrammeled press [is] a vital source of public information,' … and an informed public is the essence of working democracy."[22] In hundreds of instances over the years, the justices positively portrayed the press's value to self-governance—often doing so in the superlative, for example by saying press speech plays an "essential role in our democracy,"[23] and is a "foundation"[24] of healthy government on which society "places a primary value."[25]

For much of the Court's history, the justices manifested this Worthiness Principle by assuming members of the press acted as proxies for or servants of the citizens[26] —and against a backdrop assumption that they were trusted to convey knowledge with responsibility and accuracy. "Without the information provided by the press," the Court once said, "most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally."[27] Justices have repeatedly asserted or implied that when constraints on time, space, knowledge, or ability keep individual citizens from learning about the operations of government and community, press speakers can be trusted to communicate vital information about these operations to them. Cases involving questions of press access tended to emphasize these principles most directly, stressing, for example, that the right to attend a criminal trial often will not be exercised through "firsthand observation" but instead through dependable press entities "functioning as surrogates for the public."[28] But it was a governing presumption of the Court for many years that members of the press were in a relationship of trust with members of the public. As Justice White put it in his 1975 opinion in *Cox Broadcasting Corporation v. Cohn*,

"in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."[29]

Our review suggests justices actively invoked all of these facets of the Worthiness Principle and that the presumption of trustworthiness embedded within them animated the Court's inquiries into press protections and permeated much of its general commentary about the press function.

## B. The Breathing Space Principle

Second, in the presumption-of-trustworthiness era, the Court also routinely articulated what we might think of as the Breathing Space Principle. By this we mean that justices acknowledged that individual members of the class of press speakers might be less than trustworthy but drew a protective bubble around the full group in order to protect its ability to exercise its democratic function and err on the side of encouraging its speech.

At least some of the Court's embrace of this Breathing Space Principle stemmed from its lack of faith in government rather than its excess of faith in the press—with justices preferring the harm that might come from press misbehavior over the harm that might come from a regime of speech regulation. But our paragraph coding reveals that the principle also reflected a belief on the part of justices that, most of the time, press speakers were worthy of trust or worthy of the benefit of the doubt about their trust.

Our study finds that justices from earlier eras drew the boundaries of press trustworthiness broadly—calling for "a free and unrestrained press,"[30] with safeguards of the "broadest scope that could be countenanced"[31] that "consistently require[] that the press have a free hand."[32] The undercurrent of these claims is that press speakers as a group are entitled to a broad umbrella of protection. So, for example, in *Grosjean v. American Press Co.*,[33] the Court described "an untrammeled press as a vital source of public information."[34] In *Time, Inc. v. Hill*,[35] it announced that it could not "saddle the press" with an "intolerable burden,"[36] such as liability for merely negligent false statements, because of the "grave risk of serious impairment of the indispensable service"[37] the press provides in a free society.

In many of these instances, the justices attributed the Breathing Space Principle to the Founders. So, for example, in *Bridges v. California*,[38] the Court described the "unqualified prohibitions laid down by the framers [that] were intended to give to liberty of the press ... the broadest scope that could be countenanced in an orderly society."[39] Elsewhere,[40] the Court quoted Madison for the proposition that a free press needs broad leeway for "some degree of abuse,"[41] or emphasized that "from the earliest days of our history," the nation, "dependent as it is for its survival upon a vigorous free press,"[42] had presumed press protection. In a formulation that was repeated across cases, numerous justices suggested that press freedom was ranked by the framers "among our most cherished liberties" and that

"[i]n the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."[43] In the famed *Pentagon Papers* case, Justice Black argued that the press speakers who published leaked documents "should be commended for serving the purpose that the Founding Fathers saw so clearly," and for "nobly [doing] precisely that which the Founders hoped and trusted they would do."[44]

Importantly, in the pre-Roberts Court characterizations, this capacious view of the overall trustworthiness of press speakers is offered with an understanding that individual performance of the press function may often fall short of the ideal. Justices once made a practice of making comments to this effect—that the Constitution "require[s] a free press, not necessarily a responsible or a temperate one,"[45] and that the leeway granted the press comes even though its "sensationalism" is sometimes condemnable.[46] In *Rosenbloom v. Metromedia, Inc.*, the Court specifically noted that it was "aware that the press has, on occasion, grossly abused the freedom it is given by the Constitution."[47] "All must deplore such excesses," it continued,[48] and "[i]n an ideal world, the responsibility of the press would match the freedom and public trust given it."[49] But in the absence of that ideal world, the Court's presumption would err on the side of trustworthiness. In *Time, Inc. v. Hill*, the Court offered the same sentiment, stating "[s]ome degree of abuse is inseparable from the proper use of every thing [sic], and in no instance is this more true than in that of the press."[50] Thus, while "to be sure, no one commends"[51] when journalism falls short of its public-serving aims, "[t]here must be some room for misstatement of fact, as well as for misjudgment, if the press … [is] to function as [a] critical agenc[y] in our democracy."[52] Under these characterizations, the editorial judgments of press speakers—"whether fair or unfair"—require broad deference.[53] The press's overall contribution necessitates legal structures that allow "adequate margin for error."[54]

In perhaps the most famous articulation of this concept, Justice Brennan wrote for the unanimous Court in *New York Times v. Sullivan* that the newspaper in that case needed protection so that similar press communications will "have the 'breathing space' that they 'need … to survive.'"[55] This broad formulation—that "[e]rror and misstatement are inevitable," but "the fruitful exercise" of press freedom "requires a degree of 'breathing space'"[56] —was echoed repeatedly by several justices over much of the following four decades[57] and formed an important component of the presumption of press trustworthiness.

In combination, the Worthiness Principle and the Breathing Space Principle illustrate how both the language employed in the Court's opinions and their substantive holdings long carried a message of presumptive trustworthiness.

# II. Abandoned Presumption of Press Trustworthiness

In the Roberts Court era, however, this presumption of trustworthiness for performers of the press function has disintegrated. Both qualitative and quantitative comparisons reveal that the justices' starting point for thinking about press trustworthiness has radically changed. The baseline characterization of the press is no longer rooted in the presumption that it is something worthy of protection, and the concept of press-speaker breathing space is no longer advanced by any justice of the Court.

## A. The Worthiness Principle

The Worthiness Principle has disappeared from the Supreme Court's references to the press. In a trend that scholars had already begun to notice early in the Roberts Court,[58] and that our study confirms has cemented itself as the norm, the glowing, offhanded references to the positive motivations of press speakers that peppered the Court's earlier opinions had become a thing of the past by the end of the 20th century. In contrast, recent characterizations of press speakers by Supreme Court justices depict them not as speakers driven by democracy-serving values but as actors likely pursuing goals that do not align with the public interest.

This rhetorical shift became most evident in some of the language of *Citizens United v. Federal Election Commission*,[59] a case more widely known for its broader holdings on campaign finance regulation and on corporations' First Amendment protection but recognized by press-freedom scholars as marking a distinct tonal shift in how the Court described the press.[60] In past generations, the justices often used language that recognized the press as being especially trustworthy. They generally described the press as a category of speakers who either were (or who sought to be) reliable sources of information for the public. Yet in *Citizens United*, the Court's majority portrayed press speakers as often untrustworthy, representing a sharp shift in the justices' attitudes. The *Citizens United* Court depicted media companies as corporations that often have "immense aggregations of wealth,"[61] and often express views that "have little or no correlation to the public's support" [62] or as entities that are controlled by conglomerates seeking to "influence or control the media in order to advance [their] overall business interest[s]."[63]

The underlying presumption of much of the opinion's discussion of the press was that the news media was propelled by a "24-hour news cycle" that is "dominate[d]" by "sound bites, talking points, and scripted messages."[64] More recently, Justice Gorsuch echoed this picture of the press in his solo dissent from denial of certiorari last term in *Berisha v. Lawson*[65] when he pointedly emphasized "the rise of 24-hour cable news" in painting a picture of a media environment that "facilitates the spread of disinformation."[66]

Our review found that the fleeting optimistic comments about the performance of the press function that once seasoned the opinions of many Supreme Court justices are now entirely gone and that the justices' asides about press speakers now assume the worst. Justice Alito,

for example, characterized the press as "irresistibly drawn to the sight of persons who are visibly in grief"[67] and eager to give "air time" to scandal and heartbreak.[68] When today's justices make passing references to press speakers, they describe them as "avid" seekers of "confidential law enforcement information … in high-profile cases,"[69] or muse hypothetically that they might be untrustworthy.[70] In a recent dissent from a denial of certiorari, Justice Thomas referred to "media organizations" as among the group of speakers who "cast false aspersions on public figures with near impunity" and "perpetrate lies."[71] For most of the Roberts Court era, the justices no longer take the once-routine step of praising press speakers as worthy of trust.

These references are also now absent from cases that involve the types of fact patterns that might have spurred some reaffirmation of press trustworthiness in the past. For example, the Court was divided in *Skilling v. United States*[72] on the question of whether pretrial publicity prejudiced a jury. The justice who concluded that it did, Justice Sotomayor, made repeated reference to the press in ways that connoted skepticism of press speakers or the harms caused by press speech. She noted, for example, a "barrage of local media coverage"[73] that was "massive in volume and often caustic in tone;"[74] "relentless"[75] coverage that "scoff[ed]" at criminal defendants and placed them "directly in [its] crosshairs;"[76] and the tendency of the press to sensationally "reinforce[]" prejudicial narratives.[77]

This negative commentary might be expected from a justice who was *worried* about the effects of pretrial publicity on the rights of criminal defendants in a particular case. But the majority opinion, which found no violation of the constitutional right of a fair trial before an impartial jury, also did not offer any press-praising commentary or presume a baseline of press trustworthiness, as it once might have. Instead, it merely noted as a factual matter that the press in the given instance appeared not to have crossed a line into excessive sensationalism or bias.[78]

Among the Roberts Court justices, any allusion to the presumption of press-speaker trustworthiness is carefully couched in the past tense. In his dissent from denial of certiorari in *Berisha*, for example, Justice Gorsuch wrote nostalgically of how "back then," press speakers likely expended resources and developed expertise to ensure they got things right[79] and how "[i]n that era," most press speakers fact-checked and edited their journalism and otherwise "strived to report true stories."[80] These positive statements about how the press used to be stood in stark contrast to the opinion's depiction of the press in the present day. Rather than presuming the trustworthiness of the press, his opinion was laced with suspicion of press speech and commentary about the ways it must be curbed to avoid harm.[81]

This shift is a consequence, at least in part, of the justices' changed view of the press's democratic function. If members of the Court once deemed press speakers worthy of protection because of the role they played as surrogates and proxies for the people of a

democracy, they no longer assume as much today. Indeed, at least some justices openly reject the idea that press speakers serve as neutral proxies for the people. In one of the most powerful examples to emerge in our coded dataset, Justice Scalia penned a 21-page memorandum published in the U.S. Reports in which he angrily rejected a party's call for his recusal in *Cheney v. United States District Court*.[82] In that memo, Justice Scalia scoffed at the notion that "I must recuse because a significant portion of the press, which is deemed to be the American public, demands it,"[83] argued that recusal would "encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons,"[84] and asserted that the press was overly "eager to find foot-faults."[85]

All told, very little remains of the presumption of press trustworthiness that once permeated the Court's opinions.

In fact, in our larger quantitative study, the data suggest that both the frequency and the tone of press-trustworthiness characterizations plummeted drastically in the Roberts Court era. The Court is taking far fewer opportunities to speak of the trustworthiness of the press—and to talk about the press in general.[86] Indeed, the steady decline in commentary on press trustworthiness maps onto a steady decline in the Court's overall references to the press.[87] More significantly, though, when justices of the modern Court do offer a view on press trustworthiness, it is now *uniformly* negative in its presumption.

Our study coded every thematic content frame for affective tone—that is, whether justices spoke of the topic framing with a positive, negative, or neutral connotation.[88] Unlike some other framings of the press function, which we found skewed heavily or even entirely as either positive or negative,[89] trustworthiness is a "mixed-tone" frame, which means that the Court has sometimes suggested the press displays it and sometimes acknowledged it does not—that is, until recently. From the 1930s to the 1980s, the Court's references to media trustworthiness were far more tonally varied—with many cases describing the press function as trusted, useful, and public-serving and indicating that press speakers serve democracy-enhancement values and are providers of accurate, credible information. But in the Roberts Court era, positive references in this frame have vanished. In the most recent studied years, in fact, there were none. Since 2009, no justice has made a single positive reference, either explicit or implicit, to the trustworthiness of the press.[90]

## B. The Breathing Space Principle

We also see the waning presumption of press trustworthiness in the desertion of the once-vibrant Breathing Space Principle.

Our dataset does not contain a single reference by any Roberts Court justice suggesting that the press function should be protected, notwithstanding the potential failings of individual press speakers. To the contrary, the most recent writings from some justices appear to flip

the narrative entirely, suggesting the law should presume that incentives drive toward untrustworthiness. In *Berisha*, for example, Justice Gorsuch argued that, at least in the defamation context, the old breathing space rule "has evolved into an ironclad subsidy for the publication of falsehoods" and a dynamic in which "ignorance is bliss."[91] Instead of reiterating a message of press trustworthiness, he suggested that press speakers gravitate toward an "optimal" strategy of "publishing *without* investigation, fact-checking, or editing."[92]

In the past, the justices regularly credited the Founders with embracing the need for a protective bubble for a public-serving press function and with enshrining that principle in the Constitution. Yet now some justices depict those who crafted the Constitution as skeptical of the press[93] and concerned about the harm press publishers could cause. Justice Gorsuch, for example, claimed that the framers were keen to ensure that press speakers did not "ruin[ ] careers or lives, without consequence," and that, while they permitted such speakers to put whatever they "please[] before the public," they insisted they "take the consequence of [their] own temerity."[94] The tonal shift in the originalist vision of press trustworthiness is stark, moving away from a broad presumption that the press will try to get the facts right and toward a stern warning that it has a "responsibility" to do so "or, like anyone else, answer in tort for the injuries they caused."[95]

Our coders likewise detected that fact patterns that were the basis of some justices' breathing space characterizations in the past are being recast in modern opinions as tales of untrustworthiness.[96] In his concurrence in denial of certiorari in *McKee v. Cosby*, for example, Justice Thomas discussed the facts of *New York Times v. Sullivan*—the seminal press "breathing space" case. Yet rather than stressing the overall value and trustworthiness of press speech, as the Court had in the original *Sullivan* opinion, Justice Thomas emphasized the newspaper's failures in that instance, stating that "[t]he Times made no independent effort to confirm the truth of [the] claims," that "they contained numerous inaccuracies," and that "[t]he Times eventually retracted" the statements.[97] That is, the very same material that spurred justices of the previous era to err on the side of protectivity is now being used as evidence of the unworthiness of press speakers.

The presumption of press trustworthiness no longer exists.

# III. The Continued Presumption of Speaker Trustworthiness

The Court's growing skepticism of the press might be rooted in a variety of factors, including changing journalistic norms, the influence of a partisan media, the exclusion of diverse voices from American's newsrooms, and the impact of social media platforms and other changing media landscapes. There is, of course, a powerful argument to be made that the

Roberts Court no longer presumes press trustworthiness because the press no longer conducts itself in a way that is deserving of such a presumption. Our ongoing empirical work shows that there is plummeting faith in press trustworthiness not only by the Supreme Court but in American society broadly.[98] We expect that an array of complex forces, far beyond the scope of this essay, are motivating the changing depictions we have just described.

But it is revealing that one explanation is almost certainly *not* at play here: It is not the case that the justices have simply become less willing to presume the trustworthiness of speakers generally. It is likewise not the case that the justices are simply reserving the presumption for only certain types of speakers whose speech has been shown to be especially worthy of trust. Rather, in recent years, the justices have actively extended the presumption of trustworthiness to a wide range of speakers, often despite serious disagreements about the speakers' deservedness of such generosity. In cases across a number of subareas, the Court has expansively embraced both the potential value of other speakers' expression and a presumption of their motives as virtuous.

## A. The Worthiness Principle

Outside the press context, the Worthiness Principle lives on. The Roberts Court may no longer presume the inherent worthiness of press speakers or be likely to give press speakers the benefit of the doubt, but it has not adopted a similarly skeptical attitude about the value of *all* speakers. Rather, the Court has continued to presume the value of many other types of speakers, sending both explicit and implicit signs about its view of the underlying worthiness of those speakers. Most notably, moreover, the Court has taken this generous approach to some speakers even in cases where there were credible reasons to doubt the trustworthiness of their messages.

Our study of the Court's views on press trustworthiness focused on the justices' individual characterizations of press speakers over time. While we do not have a similar dataset of the justices' references to all other potential types of speakers, we can nonetheless find evidence of their collective or individual baseline views on speaker trustworthiness in a variety of places. These include, for example, the Court's substantive rulings, the justices' depictions of the importance of protecting certain speakers, and their framing of the broader public values at stake. In many instances, moreover, the justices' inclinations to assume the trustworthiness of some types of speakers becomes most visible through the pushback from their dissenting colleagues who suggest that the Court is overemphasizing the potential value of the speech at issue or is underemphasizing the possible harms of the speech. In many of these cases, the dissenting justices have argued that the majority's desire to presume the goodwill of favored speakers is leading the Court to make ill-conceived shifts to the law. Taken together, these signs reveal that the presumption of speaker trustworthiness persists outside of the press context.

It is worth emphasizing, of course, that under the First Amendment, the Court's default approach is to presume that any regulation of speech is unconstitutional unless the government can meet a heightened burden. But even within this traditional speech-favoring framework, the Court's opinions reveal that it at times selectively adopts a threshold favorable view about the motivations of certain speakers and the value of certain speech. While this is most directly addressed in free speech challenges, insights into the justices' presumptions about the worthiness of certain speakers are also evident in cases involving other issues.

As discussed above, the Court's 2010 decision in *Citizens United v. FEC*[99] provides one of the best illustrations of the justices' shifting applications of the Worthiness Principle. In that case, the justices retreated from the Court's prior practice of speaking positively about the value and trustworthiness of press speech and instead adopted a more negative tone when commenting on the trustworthiness of press speakers. At the same time, moreover, the Court in *Citizens United* reversed course on its approach to discussing the inherent value of corporate speech—a category it once described skeptically—and began invoking the Worthiness Principle in support of all corporate speakers.

In a crucial part of the majority's opinion invalidating a limitation on campaign spending by corporations and unions, the Court revisited the 1990 case of *Austin v. Michigan Chamber of Commerce*, which held that there were significant reasons to be concerned about the effect of corporate speech on elections.[100] In *Austin*, the Court stated that corporations "can unfairly influence elections"[101] by creating "corrosive and distorting effects" that "have little or no correlation to the public's support for the corporation's political ideas."[102] Yet 20 years later in *Citizens United*, the Court overruled *Austin* and adopted a starkly different opening position about the inherent trustworthiness of nonmedia corporate speech—a view in which it elevated corporations as valuable participants in the political process.

Thus, at the same time the Court in *Citizens United* was abandoning its formerly positive assumptions about the motivations of the news media, it began defending the intrinsic worthiness of corporate speech more generally. Corporations, the Court stated, "may possess valuable expertise" on matters of public interest[103] and are core political speakers of the type that are "indispensable to decision-making in a democracy."[104] The justices likewise depicted corporations as trustworthy vehicles for individual expression. In his concurring opinion, for example, Chief Justice Roberts referred to "the fact" that the corporate form simply "help[s] individuals coordinate and present their views more effectively."[105] The majority was no longer concerned that corporate speech might not accurately reflect the views of the public or even its own shareholders, stating that there was "little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.'"[106]

The Court even portrayed corporations as a type of speaker that is potentially well suited to serve the traditional press function of acting as government watchdogs, stating that corporate speakers may be "the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials."[107] It further asserted that corporate speakers benefit democracy by "advising voters on which persons or entities are hostile to their interests."[108] Indeed, rather than evince concern about the influence of corporate speech in the national discourse, Justice Scalia insisted the opposite was true, stating in his concurring opinion that because corporations are "the principal agents of the modern free economy," the public "should celebrate rather than condemn the addition of [corporate] speech to the public debate."[109]

The *Citizens United* justices were willing to embrace this Worthiness Principle about corporate speakers, moreover, in the face of at least some evidence that these speakers were not uniformly trustworthy. As the dissenting justices noted, "[t]he financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process."[110] While a majority of justices suggested that democratic values weighed in favor of presuming the good faith of corporate speakers, the dissenters argued that democratic values in fact pointed in the other directions. Writing for the dissenters, Justice Stevens said that legislators have a "compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races."[111] He further contended that the Court's ruling was "a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt."[112] But this view remained that of a minority of the justices. Thus, despite some factual disputes about their value and motivation, corporate speakers appear to enjoy an ongoing presumption of trustworthiness from most justices on the current Court.

The Court's decision in *Citizens United* illustrates the cross section of two trends regarding speaker trustworthiness. In the past, the Court depicted members of the press as especially trustworthy speakers and portrayed corporate speakers as being of inherently questionable trustworthiness. Yet in *Citizens United*, the Court's majority flipped those presumptions. The Court discussed press speakers with skepticism while, at the same time, it emphasized a narrative of corporate speakers as valuable contributors to the public discourse. As a substantive matter, the Court in *Citizens United* asserted that it was simply treating both media and nonmedia corporations the same. But in the context of the Court's explicit or implicit rhetoric under the Worthiness Principle, the decision reveals a dramatic change in the justices' views.

Another category of speakers who now receive a positive presumption of trustworthiness from many Roberts Court justices are speakers who express anti-abortion messages. In

*National Institute of Family and Life Advocates v. Becerra*, for example, the Court considered California's regulations requiring disclosures by "crisis pregnancy centers" (CPCs)—anti-abortion centers that provide pregnancy-related services.[113] The record in the case suggested there were reasons to doubt the trustworthiness of CPCs as a group of speakers. According to the law's legislative history, the state had collected evidence about CPCs "pos[ing] as full-service women's health clinics" and using "intentionally deceptive advertising and counseling practices [that] often confuse, misinform, and even intimidate women from making fully-informed, time-sensitive decisions about critical health care."[114] Writing for the dissenters, Justice Breyer noted that state legislators had heard testimony about "information-related delays" from CPCs causing harm to pregnant women and infants and observed that it was "self-evident" and "certainly reasonable" for the state to conclude that some patients might be confused about the type of care the clinics offered.[115] In response to these concerns, the state passed a law requiring all facilities to post or distribute notices about the availability of free or low-cost pregnancy-related services and unlicensed centers to inform visitors that they were not licensed medical providers.

Yet in its decision invalidating the disclosure requirement, the majority chose not to mention the state's findings about the unreliability of the CPCs messages. It also did not mention the evidence that CPCs engaged in misleading or deceptive speech. Instead, in describing the facts of the case for the majority, Justice Thomas stated only that the legislative history found that CPCs are "pro-life (largely Christian belief-based) organizations"[116] that "aim to discourage and prevent women from seeking abortions."[117] He then stated that the state passed the disclosure requirements "[t]o address this perceived problem"[118] —implying that, to the state, the "perceived problem" was the centers' anti-abortion views and not their potentially misleading messaging. By refusing to engage with the state's findings about the untrustworthiness of the centers' speech, the majority not only revealed its baseline assumption that the centers were acting in good faith but also established the groundwork for suggesting that the state was targeting the CPCs because of their anti-abortion views. Ignoring the evidence of misleading and deceptive speech freed the majority to contend that the state had passed a law that addressed a "purely hypothetical" harm,[119] covered "a curiously narrow subset of speakers,"[120] and was "wildly underinclusive" to the point that it "raise[d] serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."[121] In other words, the foundational premise was a presumption of speaker trustworthiness.

Writing for four justices in a concurring opinion, Justice Kennedy also invoked the Worthiness Principle and presumed the best about the centers' speech. He embraced a foundational framework of trustworthiness, describing the centers' personnel as people with "deeply held beliefs" who were "grounded in basic philosophical, ethical, or religious precepts, or all of these"[122] and suggested that there was "a real possibility that these individuals were targeted because of their beliefs."[123] Also choosing not to mention the

state's evidence of the centers' unreliability, Justice Kennedy contended that the state was seeking to promote its "own preferred message advertising abortions."

Only the dissent expressed doubts about the trustworthiness of the clinics. In light of the state's evidentiary record of the untrustworthiness of the centers' speech, Justice Breyer contended that the justices in the majority were doing more than simply applying established free speech protections. Instead, he said the Court was applying a "broad and obscure [] standard"[124] that "reache[d] far beyond"[125] prior cases and that suggested "speech about abortion is special."[126] In Justice Breyer's view, it was neither democracy-enhancing nor public-serving to presume that these speakers were worthy of trust.[127] The marketplace of ideas, he argued, was "fostered, not hindered, by providing information to patients to enable them to make fully informed medical decisions in respect to their pregnancies."[128] But the Worthiness Principle garnered a majority, and a presumption of speaker trustworthiness animated the decision.

The Court also appeared to give the benefit of the doubt to the motivations and value of anti-abortion speakers in *McCullen v. Coakley*.[129] In this case, the Court invalidated a Massachusetts law that enacted a 35-foot buffer zone around the entrance to reproductive-care clinics. According to the state, legislators enacted the law in response to a record of consistent and ongoing problems with harassment, verbal abuse, and violence toward patients and employees at abortions clinics throughout the state, including a shooting rampage at two clinics that killed two people and wounded five others.[130]

Writing for a five-justice majority, however, Chief Justice Roberts deemphasized these findings of harm, which cast doubt on the overall worthiness of this category of speech. Instead, the Court noted only that some protestors outside of abortion clinics may use "more aggressive methods such as face-to-face confrontation."[131] Chief Justice Roberts instead wrote through a lens of perceived worthiness of speakers like the petitioners, who, he said, engaged in "sidewalk counseling"—a method he said involved approaching women to provide information about alternatives to abortion with "a caring demeanor, a calm tone of voice, and direct eye contact."[132]

The tone of Chief Justice Roberts's rhetoric repeatedly embraced this charitable presumption of certain anti-abortion speakers. He talked of their "compassionate message[s]"[133] that they share through "close, personal conversations"[134] with women who are entering the clinics. Through the Worthiness Principle, he gave these speakers the benefit of a presumption that they were well motivated, credible, and potentially public-serving, including embracing a narrative of anti-abortion protestors as speakers who "inform women of various alternatives and [] provide help in pursuing them." He also spoke approvingly of their approach, asserting that they have "good reason" for choosing to deliver their messages "through personal, caring, consensual conversations," because "it is easier to ignore a strained voice or a waving hand than a direct greeting or an outstretched arm."[135] Chief Justice Roberts also

appeared to presume that the petitioners' anti-abortion message had inherent value—both to the speakers and to the listeners—when he noted disapprovingly the "precipitous decline" the petitioners had experienced in their "success rate" of convincing women not to have abortions. He stated that, in the years before the buffer zone law, one of the petitioners had convinced about 100 women not to terminate their pregnancy (outcomes he described as "successful interactions"), but, he stressed, she had not had another "successful" interaction since then.[136]

Perhaps one of the most striking examples of the justices choosing to presume the trustworthiness of a particular type of speaker in spite of strong evidence to the contrary is the Court's decision in *Trump v. Hawaii*.[137] In that case, the Court considered the meaning of a presidential proclamation and executive order that altered the vetting protocols for people coming into the United States from eight countries with mostly majority-Muslim populations.[138] Challengers to the law argued that the order was rooted in religious animus against Muslims. As evidence, they pointed to a long record of statements by first-candidate and later-President Donald Trump and his advisers declaring that the purpose of the order was a "total and complete shutdown of Muslims entering the United States."[139]

The Court, however, embraced a baseline assumption that presidents, when speaking through official executive statements, were trustworthy. The Court adhered to this baseline, moreover, even when confronted with a litany of statements by the president himself stating otherwise. Writing for the five-member majority, Chief Justice Roberts acknowledged President Trump's troubling statements, including his declaration as a candidate that "Islam hates us" and that the United States was "having problems with Muslims coming into the country." The Court further admitted that, as various versions of the executive order were being repeatedly issued and replaced, President Trump continued to refer to the order as a "travel ban," including stating that the "travel ban … should be far larger, tougher, and more specific," but "stupidly that would not be politically correct."[140] In dissent, Justice Sotomayor provided an even fuller record of Trump's statements asserting that the executive order was a Muslim travel ban, such as the president's tweets declaring that "[p]eople, the lawyers and the courts can call it whatever they want, but I am calling it what we need and what it is, a TRAVEL BAN!"[141]

Ultimately, however, the Court chose to set aside this evidence of religious hostility and instead presume the trustworthiness of the assertions made in the president's proclamation that the order was issued solely for national security reasons.[142] Chief Justice Roberts's only nod to the Trump's troubling statements was his observation that presidents throughout history have "performed unevenly" in promoting religious tolerance through speech.[143] Rather than question the president's motives, the majority was willing to err on the side of belief, emphasizing the ways some aspects of the president's communication, when viewed most generously, could be seen as appropriate.[144]

Yet, as the dissenters pointed out, the majority did not contend with Trump's wider statements as part of its substantive legal analysis.[145] Justice Sotomayor suggested that the decision conflicted with the Court's precedents on the protection of individual constitutional liberties by giving the president such an unskeptical benefit of the doubt.[146] She further disagreed that broad deference to the president in these circumstances was of public value, arguing instead that the Court was "turning a blind eye to the pain and suffering the Proclamation inflicts upon countless families and individuals."[147] Notably, the dissenters also disputed the majority's assertion that it was merely applying standard principles of deference to the executive in matters of national security. Analogizing the decision to the Court's "gravely wrong" opinion in *Korematsu v. United States*, Justice Sotomayor stated that the Court was "employing the same dangerous logic" of presuming good faith of the president and "blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security."[148]

## B. The Breathing Space Principle

The Court may no longer talk about the special need of a "breathing space" for the protection of press speakers, but it still routinely embraces a protective-bubble framework for other types of speakers. Through the use of the Breathing Space Principle, the Court errs on the side of protecting an entire class of speakers even while acknowledging that some individuals within that class might be untrustworthy. The underlying message is that the category of speaker as a whole warrants protection. Indeed, in several cases the Roberts Court has ruled in favor of, or spoken out in defense of, seemingly untrustworthy speakers whose messages have questionable public value or may even explicitly inflict harm. To be clear, our discussion of these cases is not meant to suggest that the Court should not err on the side of constitutional overprotection of all sorts of speech. Rather, we seek to contrast the justices' use of the Breathing Space Principle for these low-value or harmful speakers to its abandonment of this principle in the context of the press. As with the Worthiness Principle, evidence of the Court's use of the Breathing Space Principle can be found in the Court's substantive holdings, the prevailing justices' rhetoric, and in the dissenters' contentions that the Court was shifting the law, overemphasizing the value of protecting the speakers, or underemphasizing the harms of the speech.

In *Snyder v. Phelps*, for example, the Court relied on the Breathing Space Principle to protect the members of the fundamentalist Westboro Baptist Church, who had a practice of picketing military funerals with hateful messages such as "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed," "Priests Rape Boys," and "You're Going to Hell."[149] Writing for the Court's eight-member majority, Chief Justice Roberts did not deny the harmful impact of the church members' speech, calling it "certainly hurtful." He noted that their protests on the day of the petitioner's son's funeral "inflict[ed] great pain"[150] on the grieving father and added to his "anguish" and "already incalculable grief."[151] He

conceded, moreover, that the value of the church members' messages to any public debate "may be negligible."[152]

Despite the church members' harmful and untrustworthy messages, the Court held that they should be protected under the First Amendment because they belong to a broader category of political protestors. The church members' speech, according to the majority, "highlighted issues of public import—the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy." Chief Justice Roberts noted that because political commentary deserves protection, even outrageous or insulting speech needs to be shielded as a means "to provide adequate 'breathing space' to the freedoms protected by the First Amendment."[153]

Indeed, the Court in *Snyder* invoked the Breathing Space Principle to protect the church members' speech over the objections of the sole dissenter, Justice Alito, who argued that the Court was protecting speakers who launch "vicious verbal attacks that make no contribution to public debate."[154] It was not necessary to draw the protective bubble so broadly in order to protect core political speech, Justice Alito countered, because the church members had "almost limitless opportunities to express their views" even in highly offensive terms.[155] But the Court, animated by a presumption of trustworthiness embodied in a Breathing Space Principle, was broadly protective of the class of speakers.

The Court again reached for a broad understanding of the Breathing Space Principle in its decision in *United States v. Alvarez*, invalidating a federal law prohibiting false claims of having won military honors.[156] The Court did not defend the value of the speech of the individual respondent in the case, Xavier Alvarez. In fact, it described Alvarez's false claims of having won the Congressional Medal of Honor as "a pathetic attempt to gain respect" and noted that it was the type of lie that could "disparage, or attempt to steal, honor that belongs to those who fought for this Nation in battle."[157]

Nevertheless, the Court concluded that it was necessary to protect Alvarez's lie in order to guard against further encroachment on speech. Upholding the Stolen Valor Act, Justice Kennedy argued, "would endorse government authority to compile a list of subjects about which false statements are punishable" and lead to "an endless list of subjects the National Government or the States could single out."[158] All of the justices agreed that there was a need to invoke the Breathing Space Principle in order to protect valuable speech regarding "philosophy, religion, history, the social sciences, [and] the arts," that could be labeled as "false." Yet the Court went further in its approach, capturing within its protective bubble even speech that the three dissenters stated "is not only verifiably false and entirely lacking in intrinsic value, but … also fails to serve any instrumental purpose that the First Amendment might protect."[159]

The Roberts Court has also invoked the Breathing Space Principle in cases involving violent speech. In *Elonis v. United States*,[160] for example, the Court reversed the conviction of a man who posted violent narratives in the form of rap lyrics on social media, including writing about killing his soon-to-be ex-wife, his coworkers, a class of kindergarteners, and an FBI agent.[161] Justice Alito, in a partial concurrence, spoke of the need to provide breathing space for similar speech and to avoid "chill[ing] statements that do not qualify as true threats."[162] While ultimately concluding that a line could be drawn between threatening speech like Elonis's and speech that does not threaten, he warned of the vital importance of casting a broad net of protection to make sure that the speech of musicians and artists, though violent, would be well within the breathing space.[163]

The Roberts Court further employed the Breathing Space Principle to protect violent speech in *United States v. Stevens*, in which it invalidated a federal law criminalizing depictions of animal cruelty. The government argued that the law would be applied to harmful or low-value speech, such as animal "crush" and dog-fighting videos. But the majority expressed concern about the possible impact of the law on other types of speech that show animals being hurt or killed,[164] like hunting videos and depictions of Spanish bullfights.[165] The majority held that it was necessary to invalidate the law despite the arguments of Justice Alito, the sole dissenter, that valuable speech was unlikely to be impacted and that the harm caused by the makers of crush videos and other recordings of animal abuse "greatly outweighs any trifling value that the depictions might be thought to possess."[166] The takeaway of the opinion was that a majority of the Court was willing to err on the side of breathing space and to presume some fuller group of trustworthy speakers whose protection warranted a more sweeping presumption for all.

As a final example, the Roberts Court embraced the Breathing Space Principle as a means of protecting anonymous donors in a case that many scholars and commentators contend bolsters the speech of another group of potentially untrustworthy speakers—so-called "dark money" political donors.[167]

In *Americans for Prosperity Foundation v. Bonta*,[168] the Court adopted a broader presumption of trustworthiness than it had previously afforded anonymous donors. Earlier, in *Citizens United*, the Court had upheld a law that required the disclosure of the identities of large political donors, stating that there was significant public value in voters having information about the people behind campaign spending.[169] This transparency, the Court argued, enabled voters to "react to the speech of corporate entities in a proper way," "make informed decisions," and "give proper weight to different speakers and messages."[170] In a prior case, the Court had concluded that groups behind campaign spending were not always trustworthy and noted that they "often used misleading names to conceal their identity."[171] Thus, the *Citizens United* Court held that disclosure requirements were constitutional unless there was evidence that the donors in a particular case would face harm (such as threats or harassment) if their names were disclosed.

But a little over a decade later, in *Bonta*, the Court drew upon the Breathing Space Principle to embrace even broader protection for anonymous donors. This case involved a California law that required nonprofit charities to disclose the identities of their major donors to the state attorney general[172] —a step the state claimed helped its regulators detect fraud.[173] While the Court did not dispute the "serious social harms" that can be caused by fraudulent charities, it nevertheless held that the disclosure law was a facially unconstitutional burden on associational freedoms because it might chill donors. The Court stated that "[t]he risk of a chilling effect on association is enough, because First Amendment freedoms need breathing space to survive."[174]

In employing the Breathing Space Principle, the Court did not consider the trustworthiness of large anonymous donors but rather pointed to the associational values present in the 1958 case of *NAACP v. Alabama*, in which the Court found that the NAACP had a First Amendment right not to disclose its membership lists to the state of Alabama after the organization received threats for advocating for racial integration.[175] Writing for the dissenters in *Bonta*, Justice Sotomayor objected to the Court's reliance on the First Amendment interests of "NAACP members in the Jim Crow South [who] did not want to disclose their membership for fear of reprisals and violence" as a means for protecting wealthy donors with only vague privacy concerns.[176] But the Court contended that no additional evidence was necessary to prove the "gravity of the privacy concerns" of the donors and asserted that the "deterrent effect feared by [nonprofit] organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California."[177]

In all of these cases, the Roberts Court utilized the Breathing Space Principle to protect speakers of questionable trustworthiness, such as violent speakers, bigots, liars, and potentially fraudulent speakers. Despite evidence that the particular speakers before them were engaged in low-value or harmful speech, the justices nonetheless declared it necessary to shield them in order to ensure that the larger categories of speakers remained protected.

These cases all stand in sharp contrast to the Roberts Court's abandonment of the presumption of trustworthiness for the press. At the same time that the Court was no longer adopting a baseline assumption of the value and good faith of press speakers, it was actively embracing this generous starting view for other types of speakers. Remarkably, moreover, the justices were often employing the Worthiness Principle and the Breathing Space Principle to protect speakers about whom there were credible doubts about their reliability or sound reasons to believe their speech was especially harmful.

# Conclusion

The qualitative and quantitative data showing that justices have abandoned the presumption of trustworthiness for press speakers creates as many questions as it answers. Diminishment of both the reality and the perception of a trusted press function calls for meaningful

investigation. But, as a starting matter, it is important and revealing that the justices have not rejected the presumption for speakers more generally. Indeed, the treatment of press speakers is strikingly divergent from the approach the Court seems willing to take in many other areas when faced with a choice about presuming trustworthiness and sits uneasily within the wider framework of speaker-trust expansion that is often touted as a flagship of the Roberts Court.

An expanding body of criticism charges that the Roberts Court has left some types of speech outside the ambit of its much-celebrated expansion of speaker protection. In other contexts, scholars have condemned the justices for "the speech that they fail to protect"[178] and for "concentrat[ing] managerial power over public discussion in the government or in favored private actors."[179] Some have noted a tendency to "treat[] with skepticism all government efforts at speech suppression that might skew the private ordering of ideas"[180] and suggested "a triumph of the libertarian over the egalitarian vision of free speech."[181]

To this, our survey of presumed trustworthiness adds that the Roberts Court is making clear choices about when to trust speakers—and that it has starkly and totally abandoned that choice when it comes to the press. As we have emphasized in our other work, a vibrant and valued press function is central to the operation of a healthy democracy.[182] Much deeper exploration is necessary to survey why the press is losing its trusted status, both among the public and among the judiciary. But the fact that press speakers are no longer the beneficiaries of a trustworthiness presumption, when so many other speakers of contested trustworthiness are, is itself an important marker of the rhetorical and reputational loss the press has experienced in just the last decade. It bodes poorly for press speakers' claims of constitutional specialness and for wider battles that may loom at the Court on doctrinal issues of importance to the press. And it illustrates a glaring contrast between the Roberts Court's stances of inclusion and even near absolutism in some speaker-protection dynamics and its dwindling regard for protection of the press function.[183]

In so many other contexts, across doctrinal subfields, a presumption of trustworthiness is provided to a variety of speakers. The Court's justices embrace a wide vision of the speech's potential contribution and benefit to a democracy and err on the side of valuing a full class of speakers even when individuals within the class fall short of the ideal. For generations, the Court conveyed that press speakers were among the speakers most entitled to this presumption. The disappearance of that benefit of the doubt not only marks a harsh turning point in the way we speak of and treat the press but also deprives press speakers of the trust afforded to so many others. Indeed, press speakers may have gone from once being uniquely valued to now being distinctively disfavored.

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**1** *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 (2022).

**2** The studied period ran from 1784 through July 2020, when the Court completed October Term 2019. The first reference to the press found in this studied period occurred in 1821.

**3** For an extended discussion of the wider project methodology, see Jones & West, *supra* note 1, at 386-90.

**4** Coded characterizations included the Justices' original characterizations as well as characterizations made by others that the Justices repeated in their writings.

**5** The Westlaw "OPINION" database, 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!)))".

**6** *See, e.g.*, Nieves v. Bartlett, 139 S. Ct. 1715, 1740 (2019) (Sotomayor, J., dissenting) (referencing recording police with a cell phone camera and streaming social media footage of the behavior).

**7** *See The Supreme Court Database*, WASH. UNIV. L., http://scdb.wustl.edu/ [https://perma.cc/VJA8-UEJQ] (last visited Aug. 15, 2022). The database provides two datasets, one including data from 1946 to 2020, see *MODERN Database: 2021 Release 01*, WASH. UNIV. L., http://scdb.wustl.edu/data.php [https://perma.cc/YH23-YHTN] (last updated Sept. 30, 2021), and the other providing data from 1791 to 1945, see *LEGACY Database: SCDB Legacy 07*, WASH. UNIV. L., http://scdb.wustl.edu/data.php?s=6 [https://perma.cc/N8DD-7ZCM] (last updated Oct. 1, 2021).

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

**9** *See* Jones & West, *supra* note 1.

**10** Estes v. Texas, 381 U.S. 532, 539 (1965).

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

**12** Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring)).

**13** Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975).

**14** 384 U.S. 333, 350 (1966) ("Its function in this regard is documented by an impressive record of service over several centuries.").

**15** 427 U.S. 539 (1976).

**16** *Id*. at 560 (quoting *Sheppard*, 384 U.S. at 350). *See also id*. (noting the press "does not simply publish information about trials but guards against the miscarriage of justice").

**17** 384 U.S. 214 (1966).

**18** *Id*. at 219.

**19** 460 U.S. 575, 585 (1983).

**20** Estes v. Texas, 381 U.S. 532, 539 (1965).

**21** Time, Inc. v. Hill, 385 U.S. 374, 389 (1967).

**22** *Minneapolis Star*, 460 U.S. at 585 (alternation in original) (citation omitted) (quoting Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936)).

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

**24** *Minneapolis Star*, 460 U.S. at 585.

**25** *Time, Inc*., 385 U.S. at 388.

**26** *See* RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. Colo. L. Rev. 499, 538–39 (cataloging instances of the Court referring to the press as the public's surrogate, agent, servant, or representative).

**27** Cox Broad. Corp. v. Cohn, 420 U.S. 469, 492 (1975).

**28** Richmond Newspapers v. Virginia, 448 U.S. 555, 573 (1980). *See also* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (noting that "[w]hat transpires in the court room is public property" and that the press exposes it "to extensive public scrutiny and criticism" (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

**29** *Cox*, 420 U.S. at 491.

**30** *N.Y. Times Co*., 403 U.S. at 717 (1971) (Black, J., concurring).

**31** Bridges v. California, 314 U.S. 252, 265 (1941).

**32** *Sheppard*, 384 U.S. at 350 (Clark, J., majority opinion).

**33** 297 U.S. 233 (1936).

**34** *Id.* at 250.

**35** 385 U.S. 374 (1967).

**36** *Id.* at 389.

**37** *Id.*

**38** 314 U.S. 252 (1941).

**39** *Id.* at 265. *See also* Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

**40** *Time, Inc.*, 385 U.S. at 388.

**41** *Id.* at 388–89 ("James Madison said, '[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.'" (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.))).

**42** Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 51 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

**43** Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 381 (1973) (Powell, J., majority opinion) (quoting N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

**44** *N.Y. Times Co.*, 403 U.S. at 717 (Black, J., concurring).

**45** Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Douglas, J., concurring) (quoting Douglas J. Stewart, *TV or Not TV?: News from Nowhere*, Wash. Post , Mar. 25, 1973, at BW4-5 (reviewing Edward Jay Epstein, News from Nowhere: Television and the News (1973))).

**46** Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) (Clark, J., majority opinion) (quoting Bridges v. California, 314 U.S. 252, 265 (1941).

**47** 403 U.S. at 51.

**48** *Id.*

**49** *Id.*

**50** Time, Inc. v. Hill, 385 U.S. 374, 388–89 (1967) (quoting 4 Elliot's Debates on the Federal Constitution 571 (1876 ed.)). *See also* N.Y. Times Co. v. Sullivan 376 U.S. 254, 305 (1964) (Goldberg, J., concurring) (calling protection of press speakers "essential to enlightened opinion," "in spite of the probability of excesses and abuses" (quoting Cantwell v. Connecticut, 310 U.S. 296, 310 (1940))).

**51** Gertz v. Robert Welch, Inc., 418 U.S. 364 (1974) (Brennan, J., dissenting).

**52** Pennekamp v. Florida, 328 U.S. 331, 371–72 (1946) (Rutledge, J., concurring).

**53** Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (noting "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.").

**54** Time, Inc. v. Firestone, 424 U.S. 448, 472 (1975) (Brennan, J., dissenting).

**55** *See* 376 U.S. at 272 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

**56** *See* Lorain J. Co. v. Milkovich, 474 U.S. 953, 953 (1985) (Brennan, J., dissenting from denial for certiorari) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

**57** *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469, 499 (1975) (Powell, J., concurring) (discussing the need to "provid[e] the required 'breathing space' for First Amendment freedoms" (quoting Gertz v. Robert Welch, Inc., 418 U.S. 364, 354 (1974) (Blackmun, J., concurring))); *Gertz*, 418 U.S. at 354 (Blackmun, J., concurring) (citing the need for "sufficient and adequate breathing space for a vigorous press"); *id.* at 342 (Powell, J., majority opinion) (noting "we have been especially anxious to assure" that press freedom has "'breathing space'" and "a measure of strategic protection" (quoting *NAACP*, 371 U.S. at 433)).

**58** *See, e.g.*, Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. Rev. 1819 (2012).

**59** 558 U.S. 310 (2010).

**60** Lidsky, *supra* note 58. The *Citizens United* majority's discussion of the application of campaign finance regulations to media corporations is somewhat complicated. Although the regulation at issue in that case included an exemption for news media corporations, the Court held that this exemption was unconstitutional speaker discrimination under the First Amendment's Free Speech Clause. But it also held that it would be unconstitutional for Congress to pass a regulation that applied to the campaign-related speech of the news media, because such a regulation would violate the First Amendment's guarantee of a free press. The majority thus used the Constitution's protections of the press as a mechanism to invalidate regulations of the campaign spending of nonmedia corporations. *See* Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. Pa. L. Rev. Online 253, 255 (2016) (explaining the Court's reliance on press freedom to support invalidating campaign finance laws and arguing that the Court "fail[ed] to recognize that the press is different from other types of speakers. The press is different textually. It is different historically. And it is different functionally. Once the special constitutional role of the press is acknowledged, the media exemption problem loses its force."); *see also* Sonja R. West, *Favoring the Press*, 106 Calif. L. Rev. 91 (2018) (arguing that the Court was incorrect in *Citizens United* in holding that legislators cannot treat news media corporations differently under the First Amendment).

**61** *Citizens United*, 558 U.S. at 351 (quoting Austin v. Mich. Chamber of Com., 494 U.S. 652, 660 (1990)).

**62** *Id.*

**63** *Id.* at 352.

**64** *Id.* at 364.

**65** 141 S. Ct. 2424, 2425 (2021) (Gorsuch, J., dissenting from denial of certiorari). *Berisha* was decided after the close of our dataset, and so its paragraphs have not yet been included in our coding.

**66** *Id.* at 2427.

**67** Snyder v. Phelps, 562 U.S. 443, 467 (2011) (Alito, J., dissenting).

**68** *Id.* at 468.

**69** Trump v. Vance, 140 S. Ct. 2412, 2450 (2020) (Alito, J., dissenting) ("And even where grand jury information is not lawfully disclosed, confidential law enforcement information is avidly sought by the media in high-profile cases, leaks of such information are not uncommon, and those responsible are seldom called to account.").

**70** Walden v. Fiore, 571 U.S. 277 (2014) (Thomas, J., majority opinion) ("However scandalous a newspaper article might be, it can lead to a loss of reputation only if communicated to (and read and understood by) third persons.").

**71** Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr., 2022 WL 2295074, at *2 (U.S. June 27, 2022) (Thomas, J., dissenting from denial of certiorari) (quoting Tah v. Global Witness Publ'g , Inc. 991 F.3d 231, 254 (2021)).

**72** *See generally* 561 U.S. 358 (2010).

**73** *Id.* at 427 (Scalia, J., concurring).

**74** *Id.*

**75** *Id.* at 447 (Sotomayor, J., concurring in part and dissenting in part).

**76** *Id.* at 430.

**77** *Id.* at 451.

**78** *See, e.g.*, *id.* at 370 (Ginsburg, J., majority opinion) (quoting the district court as indicating that "[d]espite 'isolated incidents of intemperate commentary,'. . . media coverage 'ha[d] [mostly] been objective and unemotional,' and the facts of the case were 'neither heinous nor sensational.'").

**79** Berisha v. Lawson, 141 S. Ct. 2424, 2427 (2021) (Gorsuch, J., dissenting from denial of certiorari).

**80** *Id.* at 2427–28.

**81** *See, e.g.*, *id.* at 2428 ("It seems that publishing *without* investigation, fact-checking, or editing has become the optimal legal strategy. . . . Combine this legal incentive with the business incentives fostered by our new media world and the deck seems stacked against those with traditional (and expensive) journalistic standards —and in favor of those who can disseminate the most sensational information as efficiently as possible without any particular concern for truth.").

**82** 541 U.S. 913 (2004).

**83** *Id.* at 923.

**84** *Id.* at 927.

**85** *Id.* at 928.

**86** *See* Jones & West, *supra* note 1.

**87** *See generally id.*

**88** The detailed codebook is on file with the authors and available upon request. Intercoder agreement was +95% on thematic frame content and +90% on affective tone.

**89** For example, paragraphs that depict the Founders' views of the press function nearly always do so in positive, praising ways, and depictions that speak of the press's impact on the reputation or privacy of individual people overwhelmingly do so with a negative tone.

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

**91** Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting) (partially quoting David A. Logan, *Rescuing Our Democracy by Rethinking* New York Times Co. v. Sullivan, 81 Ohio State L. Rev. 759, 778 (2020)).

**92** *Id.*

**93** *See id.*; *see also* Jones & West, *supra* note 1, at 399 (explaining this tonal switch).

**94** *Berisha*, 141 S. Ct. at 2426 (Gorsuch, J., dissenting) (quoting 4 W. Blackstone, Commentaries on the Laws of England 151-52 (1769)).

**95** *Id.*

**96** *See, e.g.*, McKee v. Cosby, 139 S. Ct. 675 (2019) (Thomas, J., concurring in denial of certiorari).

**97** *Id.* at 676.

**98** *See* RonNell Andersen Jones & Sonja R. West, *The Supreme Court and the Public's Perceptions of Press Trustworthiness* (forthcoming).

**99** 558 U.S. 310 (2010).

**100** Austin v. Mich. Chamber of Com., 494 U.S. 652, 660 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that the state of Michigan had "articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.").

**101** *Id.* at 660.

**102** *Id.*

**103** 558 U.S. at 364.

**104** *Id.* at 313 (quoting First Nat'l Bank v. Belloti, 435 U.S. 765, 777 (1978)).

**105** *Id.* at 382 (Roberts, C.J., concurring).

**106** *Id.* at 361-62 (quoting First Nat'l Bank v. Belloti, 435 U.S. 765, 794 (1978)).

**107** *Id.* at 364.

**108** *Id.* at 354.

**109** *Id.* at 393 (Scalia, J., concurring); *see also id.* at 354 (stating that "[t]he Government has 'muffle[d] the voices that best represent the most significant segments of the economy'") (citation omitted).

**110** *Id.* at 394 (Stevens, J., concurring in part and dissenting in part); *see also id.* at 454 (detailing a number of ways that corporations could unduly impact elections, including that they "tend to be more attuned to the complexities of the legislative process," "have vastly more money with which to try to buy access and votes," and have "unparalleled resources, professional lobbyists, and single-minded focus" on maximizing shareholder profits.)

**111** *Id.* at 394.

**112** *Id.* at 479.

**113** 138 S. Ct. 2361 (2018).

**114** Joint Appendix at 39, *Becerra*, 138 S. Ct. 2361 (2018).

**115** 138 S. Ct. at 2390 (Breyer, J., dissenting).

**116** *Id*. at 2368 (describing the legislative history as stating: "'[U]nfortunately,' the author of the FACT Act stated, 'there are nearly 200 licensed and unlicensed' crisis pregnancy centers in California. These centers 'aim to discourage and prevent women from seeking abortions.' The author of the FACT Act observed that crisis pregnancy centers 'are commonly affiliated with, or run by organizations whose stated goal' is to oppose abortion—including 'the National Institute of Family and Life Advocates,' one of the petitioners here.") (citations omitted).

**117** *Id*. (quotations omitted).

**118** *Id*.

**119** *Id*. at 2377.

**120** *Id*.; *see also id*. at 2374 ("Tellingly, many facilities that provide the exact same services as covered facilities—such as general practice clinics—are not required to provide the licensed notice." (citation omitted)).

**121** *Id*. at 2376 (quotations omitted).

**122** *Id*. at 2379 (Kennedy, J., concurring).

**123** *Id*.

**124** *Id*. at 2388 (Breyer, J., dissenting).

**125** *Id*. at 2382.

**126** Indeed, in Justice Breyer's view, telling patients about the availability of publicly funded reproductive care is "truthful and nonmisleading," and "not a normative statement or a fact of debatable truth," *id*. at 2388.

**127** *Id*. at 2382. In contrast, the majority implied that the information required in the disclosures went beyond pure statements of fact by distinguishing them from "health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products," *id*. at 2376.

**128** *Id*. at 2388.

**129** 573 U.S. 464 (2014).

**130** *See* Adam Liptak & John Schwartz, *Court Rejects Zone to Buffer Abortion Clinic*, N.Y. Times, June 27, 2014, at A1; John Kifner, *Gunman Kills 2 at Abortion Clinics in Boston Suburb*, N.Y. Times, Dec. 31, 1994, at A1.

**131** 573 U.S. at 472.

**132** *Id*. at 473.

**133** *Id*. at 487.

**134** *Id*.

**135** *Id*. at 489.

**136** *Id*. at 487.

**137** 138 S. Ct. 2392 (2018).

**138** *Id*. at 2417.

**139** *Id*.

**140** *Id*.

**141** *Id*. at 2437.

**142** *Id*. at 2399-2400 (noting that in issuing the proclamation, the President stated that the restrictions were needed to "prevent the entry of those foreign nationals about whom the United States Government lacks sufficient information" and "elicit improved identity-management and information-sharing protocols and practices from foreign governments.") (quotations omitted).

**143** *Id*. at 2418.

**144** The majority noted that the final version of the President's proclamation was "facially neutral toward religion" and that the "text says nothing about religion." It further praised the order for its length and for including "a comprehensive evaluation" and "extensive findings." It approvingly noted that it "thoroughly describes the process, agency evaluations, and recommendations underlying the President's chosen restrictions—is more detailed than any prior order a President has issued under [the statute]," *id*. at 2418, 2421, 2400, 2409.

**145** *Id*. at 2442 ("The President's statements, which the majority utterly fails to address in its legal analysis, strongly support the conclusion that the Proclamation was issued to express hostility toward Muslims and exclude them from the country.").

**146** *Id*. at 2434-35 (stated that "[t]o determine whether plaintiffs have proved an Establishment Clause violation, the Court asks whether a reasonable observer would view the government action as enacted for the purpose of disfavoring a religion" and that the Court should consider "any available evidence regarding . . . the legislative or administrative history, including contemporaneous statements made by" the decisionmaker.") (quotations omitted).

**147** *Id*. at 2433.

**148** *Id*. at 2448.

**149** 562 U.S. 443 (2011).

**150** *Id*. at 460-61.

**151** *Id*. at 456.

**152** *Id*. at 460.

**153** *Id*. at 458 (quotations omitted).

**154** *Id*. at 464.

**155** *Id*. at 463.

**156** 567 U.S. 709 (2012).

**157** *Id*. at 714; *see also id*. at 733-34 (Breyer, J., concurring) (noting "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart" and "those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.").

**158** *Id*. at 723.

**159** *Id*. at 752 (Alito, J., dissenting) ("Tellingly, when asked at oral argument what truthful speech the Stolen Valor Act might chill, even respondent's counsel conceded that the answer is none.")

**160** 575 U.S. 723 (2015).

**161** Elonis v. United States *Opinion Announcement*, Oyez, https://www.oyez.org/cases/2014/13-983 [https://perma.cc/8ULR-EFQP] (last visited Sept. 2, 2022).

**162** *Elonis*, 575 U.S. at 748 (Alito, J., concurring in part).

**163** *Id*. at 747 (noting that "lyrics in songs that are performed for an audience or sold in recorded form are unlikely to be interpreted as a real threat to a real person").

**164** United States v. Stevens, 559 U.S. 460, 470 (2010) ("The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.").

**165** *Id*. at 479.

**166** *Id*. at 498 (Alito, J., dissenting).

**167** *See* Emma Waitzman, *Free Ride on the Freedom Ride: How "Dark Money" Nonprofits Are Using Cases from the Civil Rights Era to Skirt Disclosure Laws*, 100 Tex. L. Rev. 115, 150 (2021) (stating that "the *Bonta* decision will have the practical effect of making it easier for dark money nonprofits to eliminate disclosure requirements").

**168** 141 S. Ct. 2373 (2021).

**169** 558 U.S. 310, 367 (2010).

**170** *Id*. at 371.

**171** McConnell v. Fed. Election Comm'n, 540 U.S. 93, 128 (2003) (noting as examples that "'Citizens for Better Medicare,' . . . was not a grassroots organization of citizens, as its name might suggest, but was instead a platform for an association of drug manufacturers. And 'Republicans for Clean Air,' which ran ads in the 2000 Republican Presidential primary, was actually an organization consisting of just two individuals—brothers who together spent $25 million on ads supporting their favored candidate"); *see also Citizens United*, 558 U.S. at 367 ("There was evidence in the record that independent groups were running election-related advertisements while hiding behind dubious and misleading names." (quotations omitted)).

**172** 141 S. Ct. 2373 (2021).

**173** Brief for Respondent at 1, Ams. for Prosperity Found. v. Bonta, 141 S. Ct. 2373 (2021) (Nos. 19-251 & 19-255), https://www.supremecourt.gov/DocketPDF/19/19-251/172982/20210325141442657_19%20251%2019%20255%20Brief%20on%20the%20Merits.pdf [https://perma.cc/BS7Q-AW8H].

**174** 141 S. Ct. at 2389 (quotations omitted); *see also Bonta*, 141 S. Ct. at 2384 ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." (quotations omitted)); *id.* at 2388 ("[D]isclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'") (citation omitted); *id.* (The disclosure law "creates an unnecessary risk of chilling in violation of the First Amendment, indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous." (quotations and citations omitted)).

**175** *Id.* at 2382.

**176** *Id.* at 2392; *see also id.* at 2394 (Sotomayor, J., dissenting) (noting that "privacy can be particularly important to 'dissident' groups because the risk of retaliation against their supporters may be greater. For groups that promote mainstream goals and ideas, on the other hand, privacy may not be all that important.").

**177** *Id.* at 2388.

**178** Heidi Kitrosser, *Public Employee Speech and Magarian's Dynamic Diversity*, 95 Wash. U. L. Rev. 1405, 1406 (2018).

**179** Gregory Magarian, Managed Speech: The Roberts Court's First Amendment, at 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.").

**180** Kathleen M. Sullivan, Comment, *Two Concepts of Freedom of Speech*, 124 Harv. L. Rev. 143, 145 (2010).

**181** *Id.*

**182** *See* RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 Nw. U. L. Rev. Online 47 (2017).

**183** *See* RonNell Andersen Jones & Sonja R. West, *The Disappearing Freedom of the Press*, 79 Wash. & Lee L. Rev. (forthcoming 2022) ("When it comes to speech rights in many contexts, these Justices have adopted stances of inclusion and even, at times, near-absolutism—expanding the concepts to new speakers and new activities, while increasingly rejecting any potential limits or regulations. Yet, at the same time, they have starved the right of press freedom of oxygen by seemingly erasing it from its prior platform of rhetorical prominence.")

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