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A Critical Perspective on Scalian-Originalism's Interpretation of the First Amendment's Freedom of Speech Clause

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Dedication

This thesis is dedicated to my mentor Dr. Dwight Teeter. His passion for Communication Law was evident in his research and in his commitment to his students' success. With his passing he leaves behind a legacy of accomplished scholarship and a challenge for future scholars to pick up the mantle after him. It is now the duty of those who follow him to strive for the same degree of excellence in their work, and to continue his indefatigable study of Communication Law.

Acknowledgement

I would like to thank my committee for all of their support and guidance. Without their unwavering encouragement this manuscript would not have been possible. I would like to thank Dr. Michael Martinez for sharing his vast legal knowledge with me and his ability to help me refine some difficult legal concepts. I would like to thank Dr. Catherine Luther for her dedication to my graduation and for her invaluable insight. Finally, I would like to thank Dr. Amber Roessner for the countless hours she put into ensuring that I walked away from this project a better writer and scholar, and for helping me find direction every time I found myself lost among the trees.

Abstract

Justice Antonin Scalia proudly proclaimed that he was an Originalist, which is the theory that the Constitution should be interpreted in the same manner as those who ratified and drafted the document would have interpreted it. Scalian-Originalism faced several liberal legal critiques that challenged the legitimacy of the method and theory. This manuscript seeks to further the debate regarding Scalian-Originalism's interpretation of the First Amendment by applying a Critical Legal perspective. The analysis is done in the form of an immanent critique, and examines the legitimacy of Scalian-Originalism's First Amendment interpretation by the theory's ability to further equality and democratic participation in American society.

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Chapter I: Introduction

In 2005, the state of California passed Assembly Bill 1179, which prohibited the sale of violent video games to minors. The bill claimed that the state had the compelling interest to curb psychological, social, and neurological harm to minors who were exposed to violent video games. Those found to violate the law could be punished up to $1,000 for each infraction.[1]The video game industry fought back, contending that video games have been subject to self-censorship by the Entertainment Software Rating Board, akin to the Motion Picture Association of America's film rating system, which distributes video games to various age demographics based upon the game's respective content since 1994. Furthermore, the Entertainment Merchants Association argued that video game content was protected by the First Amendment. The district court ruled in favor of the Entertainment Merchants Association, and the Ninth Circuit Court of Appeals affirmed the decision, blocking the state of California from enacting the law; in 2010, the United States Supreme Court heard arguments for the case.[2]

During the arguments Justice Antonin Scalia likened video games to movies, and asserted that since the founding of the country, violence—unlike pornography—had not been constituted as an obscenity. This logic prompted Scalia to ask the lawyer representing California to explain how the framers of the First Amendment would view this case. This prodding by Justice Scalia drew a scathing rebuke from Justice Samuel A. Alito, Jr., who responded by saying, "What Justice Scalia wants to know is what James Madison thought about video

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[1] "AB-1179 Violent Video Games: Sales to Minors." California Legislative Information. October 7, 2005. Accessed November 12, 2014. http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200520060AB1179.

[2]*Brown v. Entertainment Merchants Association*, 131 S.Ct. 3729 (2011)

games."[3]This remark received a rousing round of laughter from within the court room. The statement made by Justice Alito was preposterous and a jovial mockery of Justice Scalia's method for constitutional interpretation known as Originalism, which applies the eighteenth century understandings of the Constitution to modern American jurisprudence. However, the sarcastic comment was perfectly aligned with some of the formalist and liberal legal critiques, such as the ones made by Appellate Court Judge and author Richard Posner which assert that Scalian Originalism's methodology allows for the practice of law office history,[4] is subjective, and fails to a provide practical objective method for judicial restraint.[5]

Modern critiques of Originalism dance around the notion that Scalian-Originalism is an illegitimate method of constitutional interpretation, but few are as bold as esteemed jurist Richard Posner to support a realist argument that, "Originalism is fake."[6]Posner's analysis of Originalism mirrors current liberal legal arguments opposing Originalism within the judiciary and the academy, which primarily apply a formal legal analysis to identify contradictions with the methodology and the theory of the rule of law.[7] This traditional liberal method of analysis has led to many attempts to revamp Originalism with the hope of making it a viable theory and

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[3]Savage, David G. "Supreme Court Appears Split on California Video Game Violence Law." *Los Angeles Times*, November 3, 2010. Accessed December 1, 2014. http://articles.latimes.com/2010/nov/03/business/la-fi-court-videos-20101103-6.

[4] Law office history refers to the use of selective historical content to support a predisposed position. Essentially, a particular ruling is desired, and then historical evidence is found to support the desired ruling, instead of evidence being used to foster a ruling.

[5] Posner, Richard A. "Interpretation." In *Reflections on Judging*. Cambridge, Massachusetts: Harvard University Press, 2013.

[6] Id. 233.

[7] In this context, the term formal legal analysis is referring to the belief in the possibility that a determinate legal solution can be garnered from one's innate conclusion of quasi-deductive reasoning. The terms formal and liberal legal analysis will be treated as synonymous for the purpose of this research. Also, the rule of law refers to the concept that American democracy should governed by law and not by man, as to insure that arbitrary decisions are not made by judges.

methodology while ignoring the possibility that it is nonviable.[8]Therefore, it could be argued that the insistent use of formal legal analysis further supports the notion that there is a strong legitimacy claim for Originalism. However, if a Critical Legal perspective were to be applied to Scalian-Originalism new arguments may possibly be formed to support the legitimacy or illegitimacy of this theory and methodology.

The purpose of this thesis is to perform a Critical Legal analysis of Scalian-Originalism to determine the legitimacy of this form of constitutional interpretation, which appears to emphasize the maintenance and strengthening of the status quo. The focus of this research will be on Justice Scalia's brand of Originalism, which I am referring to as Scalian-Originalism, as it applies to the interpretation of the First Amendment. The First Amendment's freedom of speech clause arguably plays an important role in upholding certain democratic ideals within American society. These democratic ideals are built on a foundation of autonomy.[9] They are pervasive and apart of the American social consciousness, which values liberty above all else.[10]Applying Critical Legal Theory, which is the theoretical approach that challenges normative legal principles from the perspective that law can either sustain or eradicate societal injustice, to the First Amendment's freedom of speech clause's central meaning, as defined by Alexander Meiklejohn and Thomas Emerson, will help provide a strong concrete theoretical approach from which Critical Legal Studies can examine the legitimacy of Scalian-Originalism's interpretation of the First Amendment.

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[8] Griffin, Stephen M. "Rebooting Originalism." University of Illinois Law Review 2008, no. 4 (2008): 1185-223.

[9] Meiklejohn, Alexander. "The First Amendment Is an Absolute." *The Supreme Court Review* 1961 (1961): 244-66.

[10] Fried, Charles. "The New First Amendment Jurisprudence: A Threat to Liberty." *The University of Chicago Law Review* 59, no. 1 (1992): 225-53.

This manuscript acknowledges that for over two decades the Court had two self proclaimed Originalists–Justice Clarence Thomas and Justice Antonin Scalia, as well as other Justices who were not above dipping their toe in the pool of Originalism from time to time when deciding a case.[11] In fact the growing use of Originalism in modern Supreme Court cases has caused some scholars to declare that Originalism is the only true theory and methodology for constitutional interpretation, and that currently it would be "difficult, in American political-legal culture, to make a persuasive case for nonoriginalism."[12]Due to Michael Perry's argument that "we are all Originalist now,"[13]it would be too cumbersome of a task for this thesis to examine all forms of Originalism along with every judge that has practiced Originalism at one time or another. Often cited as the "pioneer" of Originalism–[14]Justice Scalia was widely recognized as the preeminent proponent of the practice. [15] As such, during his time on the Court prior to passing away, Scalia received praise from many, including President Ronald Regan, for his Originalist rulings.[16]

On Saturday, February 13, 2016, Justice Antonin Scalia was found dead at the age of 79. His passing left a vacant seat on the Court for over a year after the Republican led Congress

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[11] Silver, Derigan, and Dan V. Kozlowski. "The First Amendment Originalism of Justices Brennan, Scalia, and Thomas." Communication Law and Policy 17 (2012): 392-94.

[12] Perry, Michael J. "The Legitimacy of Particular Conceptions of Constitutional Interpretation." *Virginia Law Review* 77, no. 4 (1991): 687.

[13] Id. 685-87.

[14] Shesol, Jeff. "Rightward Bound." *The New York Times*, July 2, 2014. Accessed December 1, 2014. http://www.nytimes.com/2014/07/06/books/review/uncertain-justice-and-scalia.html.

[15]Silver, Derigan, and Dan V. Kozlowski. "The First Amendment Originalism of Justices Brennan, Scalia, and Thomas." Communication Law and Policy 17 (2012): 395-96.

[16] Calabresi, Steven G. "Introduction." *Originalism the Quarter-Century of Debate*, 17-20. Washington DC: Regnery Publishing, 2007.

refused to confirm former President Barack Obama's nominee Merrick Garland. The Republican Senate's stonewalling tactic allowed for President Donald Trump to nominate another Originalist judge, Neil M. Gorsuch, to take Scalia's place.[17] This nomination and his subsequent confirmation demonstrate the lasting impact Scalian-Originalism has had in American jurisprudence, and the desire of some to continue Scalia's judicial legacy.

As the author of the framework from which Originalism is viewed and critiqued [18] and the most vocal Originalist until his death, Scalia's brand of Originalism will be the focal point of this thesis. By departing from the traditional formal legal analysis and applying a Critical Legal perspective to the critique of Scalian-Originalism's interpretation of the First Amendment, I intended to further the debate on the consistent nature of Scalian-Originalism and its authoritative power within the courts.

In total, seventeen First Amendment cases were examined by applying the Critical Legal Studies method of an immanent criticism. This method of legal analysis mediates the "stucturalist" and "subjectivist"[19] points-of-view by "merely criticizing a pre-existing delusion in order to liberate those who labor under it."[20]Simply put, the methodology of an "immanent

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[17]The Editorial Board. (2017, January 31). When the GOP stole Merrick Garland's Supreme Court seat, they set the stage for a miserable battle. *Los Angeles Times*. Retrieved March 31, 2017, from http://www.latimes.com/opinion/editorials/la-ed-supreme-court-nomination-20170131-story.html

[18] Scalia, Antonin, and Bryan A. Garner. *Reading Law: The Interpretation of Legal Texts*. St. Paul, MN: Thomson/West, 2012.

[19] The structuralist strand of critical legal theory attempts to look at the repressive structures created within American society that forms a pre-existing belief structure through which legal decisions are made. The subjectivist strand places an emphasis on an individual's subjective experience, and how that personal experience shapes an individual's understanding of the legal and social world. Some have argued that these two competing strands nullify each other because you can apply one strand without applying the other. James Boyle concedes that this argument is true and that both strands are symbiotic, but he argues that Critical Legal theorist must, and will, prioritize one strand over the other. For this paper it should be noted that the structuralist strand will take priority over the subjectivist strand.

[20] Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 769.

critique" applied in this manuscript will allow the legal analysis to focus on Scalian-Originalism's erroneous interpretations of the First Amendment, but not require the analysis to argue the validity of opposing constitutional methods. This thesis will examine freedom of speech cases in which Scalia used an Originalist argument between 1986 and 2011.[21]The intention is to find themes within these rulings to highlight Scalian-Originalism's ability to either preserve or refute the societal injustices perpetuated by law through the hierarchical power structure. This research is important because it adds a contrasting perspective to an ongoing debate, and hopefully will allow for future research on the feasibility of Originalism's continued ascension.

The following chapter of this thesis will explain Critical Legal Theory and its methods, define Scalian-Originalism, and briefly explain liberal First Amendment doctrine and how it aligns with Critical Legal Theory. The context provided will present an understanding of the liberal legal justifications that legitimizes Originalism as a method of constitutional interpretation. The framework will be provided for the reader to engage in the manuscript's critique of Scalian-Originalism from a Critical Legal perspective.

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[21] Silver, Derigan and Dan V. Kozlowski. "The First Amendment Originalism of Justices Brennan, Scalia, and Thomas." Communication Law and Policy 17. (2011): 402-408.

Silver and Kozlowski examined all fifty-six freedom of expression cases in which Justice Scalia wrote an opinion. Their research found that Scalia did not use an Originalist argument in any of his First Amendment rulings until 1990; however, they note that his use of Originalism as a justification for his rulings has appeared to increase over time. The authors also claim that Scalia's opinions are supported by Original-Meaning Originalism. In total the authors found that there were seventeen cases in which Scalia's rulings were supported by an Originalist argument. For the purpose of analysis this manuscript will accept Silver and Kozlowski's research findings that Scalia produced seventeen cases containing an Originalist argument and go beyond their research to examine these Originalist rulings from a Critical Legal perspective.

Chapter II: Theory and Method

CRITICAL LEGAL THEORY

Critical Legal Theory was born from the civil unrest of 1960s and '70s. This theory acknowledges the inequalities within American society brought to light by the civil rights and feminist movements. Scholars then began using this theory to evaluate social disparities within the American legal doctrine. Critical Legal Studies is an interdisciplinary approach that draws from philosophy, economics, history, etc., to "fashion critiques that expose the inherent contradictions in liberal thought and to demonstrate the use of liberal theory to hide the contradictions." [22]By considering the problems of contradiction, Mark Hager argues, "CSL tends to imply that liberal law is illegitimate because of its manifest failure to achieve moral and conceptual consistency."[23] There are two tenets of Critical Legal Theory and one objective, which is to pursue egalitarianism and further democratic participation.

The first argument of Critical Legal Theory is that the law disproportionately favors the elites and serves to maintain an alienating status quo. Borrowing from the social philosophies of Max Weber and Karl Marx, Critical Legal Theory argues that the persistent allegiance to a hierarchical institutional structure of the law causes the underlying social division within American society. Roberto Mangaberia Unger argues that the capitalistic hierarchy creates a

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[22] Cohen, Jeremy, and Timothy Gleason. "Distinguishing Law and Legal Theory." In Social Research in Communication and Law, 49. Vol. 23. Sage Publication, 1990.

[23] Hager, Mark. "Book Review Against Liberal Ideology: A Guide to Critical Legal Studies, By Mark Kelman." The American University Law Review 37 (1988): 1057.

status quo that disproportionately favors an elitist agenda.[24] He cites the practice of contract law, which claims to have "free" and willing participants, but in reality contracts are so ingrained within American society's structure that in order to participate on a communal level individuals feel obligated to enter in to contracts regardless of how "fair" they are for both parties, as an example of the legal maintenance of the status quo. He also cites property rights, considered a naturally moral right from a formalist perspective, but an inescapable residual effect of capitalism.[25]

Peter Gabel and Paul Harris argue that the orthodox Marxist view mirrored by Unger's argument does not account for the political nature of the societal structure. Instead of the law being simply a "toolbox of the ruling class," Gabel and Harris argue that the " legal system is an important public arena through which the State attempts—through manipulation of symbols, images and ideas—to legitimize a social order that most people find alienating and inhumane."[26] By acknowledging the political nature of law as defined by the hierarchal structure of society, Gabel and Harris argue that social alienation can be addressed and political policy shaped within the political and judicial arenas. Consequently, allowing for a social progression toward an egalitarian social connection.[27]

The second tenet of Critical Legal Theory dispels the notion that law can be, or is, neutral, natural, and objective. Claiming to have normative authority on legal analysis, liberal

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[24] Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." Harvard Law Review 96, no. 3 (1983): 561-675.

[25] Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." Harvard Law Review 96, no. 3 (1983): 561-675.

[26] Gabel, Peter, and Paul Harris. "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law." Review of Law and Social Change XI (1982): 370.

[27] Id. 369-411

legal discourse aims to examine law with the understanding that it can be neutral and objective, and that the rule of law, which does not allow for the subjectivity of man, is the pinnacle state of law. The rule of law doctrine creates a sense of legitimacy for the law because it seeks to solidify law within the public consciousness by suggesting that the law can be concrete and that it is beyond being socially engineered. However, Critical Legal scholars argue that legal discourses, meaning both legal ideas and social practices, are structurally political.[28] The law is not removed from society; in fact, it plays a circular role in creating and maintaining the structural status quo. Social types and the inescapable institutional structures shape legal discourses.[29] The notion that the interpretation of the law in a neutral and objective manner cannot occur, as formal legal theory suggests, supports the Critical Legal argument that the liberal state will inevitability collapse. However, James Boyle argues that Critical Legal Theory has shifted its focus from "the failure of neutrality in the interpretation of law and toward a focus on the politically 'tilted' way in which legal doctrine *re-presents* social reality."[30] Therefore, the hierarchal structure of American society explains the political "tilt" of legal doctrine. The political nature of law, Critical Legal scholars argue, allows for the judicial system to help create a new normative vision that champions increased egalitarianism and a more participatory democracy.

This goal is first achieved by recognizing the contradictions and arbitrariness within the legal system. However, the existence of contradictions and arbitrariness is not criticized.

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[28] Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 685-780.

[29] Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." Harvard Law Review 96, no. 3 (1983): 561-675.

[30] Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 697.

Instead, according to Mark Hager, criticisms focus on how liberal law *"responds* to contradictions and for the bias in the *arrangements* of its arbitrariness."[31] Therefore, Critical Legal scholars must analyze the entire legal system from a perspective that accepts contradictions and arbitrariness, but evaluates these patterns as they pertain to the support of egalitarianism and democratic participation.[32]In an attempt to create a "better" normative vision for the law, a Critical Legal theorist, such as Hager, recognizes the inherent "moral and conceptual flaws lying within libertarian assumptions and the liberal legal assumptions which support them."[33]

By accepting the subjective and political nature of law and acknowledging that the legal system is a result of a flawed societal structure, which has formed a hierarchy based on the traditions of racism, sexism, and economic disparities, then legal participants, such as judges and lawyers, can begin to use the law as means to challenge the status quo. Gabel and Harris assert that the optimal method to refute the current social alienation of individuals by the status quo is to politicize the legal system. They advocate that lawyers should become activist within the court room to move the legal process in a direction of equality. For these theorists, the use of media to break down the mysticism and legitimacy of the legal system is imperative to social change because it would allow for individuals to shape a new popular consciousness that delegitimizes the doctrine of a neutral law. This would allow for a change in social consciousness away from

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[31] Hager, Mark. "Book Review Against Liberal Ideology: A Guide to Critical Legal Studies, By Mark Kelman." The American University Law Review 37 (1988): 1063.

[32] Id.

[33] Hager, Mark. "Book Review Against Liberal Ideology: A Guide to Critical Legal Studies, By Mark Kelman." The American University Law Review 37 (1988): 1054.

an individualistic mind set and toward a more altruistic one. Therefore, Gabel and Harris argue for a method of social change that works within the preexisting confines of American society, which would allow for the critique of the elitist agenda and its elimination from the law.[34]The ability to use the law as a tool for egalitarianism would not only allow for "activist" legal participants, but demand them. Therefore, the role of judges would not be to maintain an objective status quo, but to interpret the law in such a way as to combat the deep-seated inequalities within American society.

The interdisciplinary approach of Critical Legal Theory authorizes the use of the judiciary as a means to achieve a more equitable American society. For critics the allowance of an activist judiciary proves problematic. Other critics focus on Critical Legal Theory's highlighting of contradictions and exposing of disharmonies between the law and the prescriptive societal conceptions. For those scholars Critical Legal Studies can prove difficult to describe and understand in clear positivist terms. This abstract nature of Critical Legal Theory is the first of three major critiques.

Critics argue that the method is too theoretical and lacks pragmatic applicability to the current legal discourse.[35] The argument that Critical Legal Theory is too theoretical to actually gain traction within the mainstream discussions of legal discourse is a fair assessment of scholars such as Unger.[36] Those who argue for a complete overhaul of how individuals think and interact

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[34] Gabel, Peter, and Paul Harris. "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law." Review of Law and Social Change XI (1982): 369-411.

[35] Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 688.

[36]Hager, Mark. "Book Review Against Liberal Ideology: A Guide to Critical Legal Studies, By Mark Kelman." The American University Law Review 37 (1988): 1064-68. Unger argues that the constraints placed on an individual by the hierarchical structure of law, prevents the natural human desire for freedom of choice. This freedom is imperative for deconstructing the

with the law without first changing the societal structure take a highly theoretical stance. However, the judiciary's and academy's inability to fathom any theory and method beyond formalism serves to buttress the Critical Legal argument that the law is not a neutral social entity above the constraints and biases of the societal structure. Preexisting definitions would not confine individuals if the law were truly neutral and beyond social construction. Simply put, if law was not legitimized by its shaping through the societal structure, it would not be a difficult task to examine law from several opposing theories. Furthermore, embracing the political nature of law allows for the application of Critical Legal Theory's activist methods.[37] By consistently highlighting the biases and inequalities perpetuated by maintaining the status quo, Critical Legal theorist can begin to change the popular consciousness regarding the objective of law; thus, allowing for social change that values egalitarianism over neutrality.[38]

The second critique of Critical Legal Theory is that it is nihilistic because of its rejection of the rule of law doctrine.[39] Critics claim that advocating for the abandonment of the rule of law, favoring instead a legal system that aims to create a more equal society in which democratic participation prevails, is anarchistic. Hager argues that this is an ill-founded critique by "those in

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status quo and reaching a state of greater equality. The American liberal legal discourse attempts to justify the rule of law as if it were an individual's right based on its objective nature. However, the insistence that an objective legal analysis can create a static and concrete society based on the rule of law ignores the fluid nature of mankind and the progression of morality. An individual's autonomy, Unger argues, is the key to truly defining human moral needs on a meta-ethical level. Moral needs will become empirically verifiable with enough time and space, and freedom to define morality without the influence of an hierarchical society.

[37]Gabel, Peter, and Paul Harris. "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law." Review of Law and Social Change XI (1982): 369-411.

[38] Gabel, Peter, and Paul Harris. "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law." Review of Law and Social Change XI (1982): 369-411.

[39] Hager, Mark. "Book Review Against Liberal Ideology: A Guide to Critical Legal Studies, By Mark Kelman." The American University Law Review 37 (1988): 1051-53.

a position to know better."[40] The author also argues that Critical Legal Theory acknowledges the injustice and inequality preserved by liberalism theory, and it "cannot succeed in its drive to create a stable, self-consistent rule-governed order."[41] Therefore, the formalist theory of objectivity will someday reveal an inability to pragmatically produce the consistent stability it aims to achieve; subsequently resulting in a requirement for a new purpose for law, which Critical Legal Theory suggests will be one of an egalitarian nature. Consequently, the acknowledgement of liberal legal theory's imminent demise is not nihilistic, but rather a preemptive prediction based on the post-positivist recommendation that it be superseded with an egalitarian purpose.

Finally, some critics contended that similar contradictions identified with liberalism burden Critical Legal Theory and its methodology.[42] Critical Legal Theory applies a structuralist critique of law by arguing that legal liberalism may one day crumble under the weight of the very structure it created because of the contradicting nature of the societal structure and the adherence to the neutrality of law. However, critics argued that a Critical Legal theorist would be unable to be an "outside" observer and would fall victim to the same structuralist constraints created by being a member of the society. James Boyle responds to this criticism by suggesting an "immanent criticism" methodology, which allows a Critical Legal scholar to examine claims of "correctness, naturalness, and neutrality" without having to produce a "pure truth" as

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[40]Id. 1053.

[41] Id. 1061.

[42] Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 729.

rebuttal.[43] Therefore, this Critical Legal method allows a scholar to argue against legal liberalism by describing a pre-existing structure without having to provide a possible solution that may be tainted by the theorist's own subjective constraints.

The "radical" nature of Critical Legal Theory is not cause for its dismissal; rather, its radical nature, if adopted as having certain "truths" about humanity, and can lead to significant social changes. If the societal goal becomes the forming of a more altruistic social structure over the current individualistic structure then American society will begin to allow individuals the freedom to be democratic participants and to strive toward an egalitarian structure. This goal of a society free from the inequalities formed by a hierarchal structure must first begin with the acknowledgement of law's subjectivity and its role in maintaining an alienating status quo.

The use of an activist judiciary to reach Critical Legal Theory's primary objective is emphatically rebuked by Scalian-Originalism's theory and method. However, this thesis will critique the legitimacy of Justice Scalia's decisions from the Critical Legal understanding that all judicial decisions are subjective, which allows for even an Originalist judge to play the role of an activist adjudicator. Next, this manuscript will explain the method used to analyze Scalian-Originalism's interpretation of the First Amendment's freedom of speech clause, and operationalize the terms legitimate and illegitimate from a Critical Legal perspective.

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[43]Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 746-51.

METHOD

This manuscript applied the method of an immanent critique to analyze seventeen of Justice Scalia's First Amendment freedom of speech cases. The analysis began by giving each case a fair and neutral reading in an attempt to find themes within the cases. When it became apparent that there were certain thematic topics within the facts of the cases each legal proceeding was then placed into one of the two corresponding categories: political speech and non-political speech. These two primary categories were applied for two reasons. First, this categorization mirrors formal legal analysis, which argues that political speech should receive a heightened level of First Amendment protection, and therefore should be examined from a stricter level of scrutiny. This form of analysis would be a familiar style of classification, and would likely garner a greater level of support from normative legal scholars. Second, classifying the cases into two large and encompassing categories simplified further analyses of the facts of the cases. As a result, this distribution revealed three political speech classifications: employee speech, anonymous speech, and campaign finance as a form political expression and identified two subcategories for non-political speech: moral speech and cases regarding time, place, and manner restrictions.

Once compartmentalized according to the facts of the case, Scalia's rulings in each case were analyzed for consistency in respect to the level of protection certain types of speech were afforded by the First Amendment's freedom of speech clause according to Scalian-Originalism. Next, an analysis was performed on each ruling to determine if Scalia's decision was legitimate or illegitimate according to a Critical Legal perspective. For the purpose of this analysis Scalia's ruling in each case will be considered legitimate if the outcome produced serves to create a more equitable society and/or allows American citizens a greater level democratic

participation. If the ruling fails to meet these criteria and/or sanctions the subjugation of persons and/ or denies the right of sovereignty for individuals seeking protection under the First Amendment the ruling will be deemed illegitimate.

Subsequently, a postliminary analysis will be performed if Scalian-Originalism's rulings are found to be simultaneously legitimate and illegitimate. This examination will attempt to distinguish any routinely underlying themes that may demonstrate a consistency within Scalian-Originalism's interpretation of the First Amendment's freedom of speech clause. It is the aspiration of this manuscript to provide a workable scheme for future legal analysis concerning the predictable outcome of a Scalian-Originalist's ruling based on the facts presented in a First Amendment freedom of speech case.

Chapter III: Context

Before applying this immanent critique method to analyze of Scalian-Originalism's interpretation of the First Amendment's freedom of speech clause Scalian-Originalism as a theory and methodology must be adequately examined. In the next chapter, this manuscript will define Scalian-Originalism, review liberal normative theory for the First Amendment, and explain how Critical Legal Theory correlates with both.

DEFINING SCALIAN-ORIGINALISM

Originalism as a theory and methodology is in a constant state of renaissance, evolving under criticisms and its champions' desire for survival. Understanding Originalism requires to first understand what it is *not*. The term "Originalism" has become the comprehensive umbrella for all judicial theories and methodologies that opposes the living constitution or "loose construction" judicial practices. Sometimes referred to as "pragmatic," "noninterpretivist," "nonoringinalist" or "realist" the interpretative theory of living constitutionalism is, at its essence, the theory of an evolving constitutional meaning that holds no a piori privilege to the intentions of the framers or a particular time frame.[44] Rather, it aims to interpret the constitution by applying a "moral reading," which utilizes a normative constitutional set of values, "including democracy, the rule of law, liberal individualism, justice, and social welfare, also among others."[45] As a methodology, living constitutionalism gives supremacy to stare decisis, which is

[44]Goldford, Dennis J. "The Political Character of Constitutional Interpretation." *Polity* 23, no. 2 (1990): 266-68

[45]Primus, Richard A. "When Should Original Meaning Matter?" *Michigan Law Review* 107 (2008): 172.

the common law approach founded in statutory precedent and tradition. [46] Originalism emphatically rebukes this theory and method. Conversely, Originalism adheres to an antithetical theory and method for interpreting the Constitution.

Modern Originalism is the method of adjudication born as a response to what was deemed to be overly liberal rulings from the Supreme Court under Chief Justice Earl Warren.[47] It was born from the political discourse initiated by the Reagan administration, specifically Attorney General Edwin Meese, who in his 1985 speech before the American Bar Association called for judicial restraint from the Supreme Court in the form of an Originalist approach to constitutional interpretation.[48] Originalism in its broadest form is entrenched with the theory of judicial restraint, which demands that judges not base rulings on their own personal moral reading of the Constitution.[49] Instead, an Originalist judge must always defer first to the text of the Constitution and its "plain meaning." If ambiguities arise from the plain meaning of the text, an Originalist must prioritize, over modern understandings, the intentions and interpretations of the framers and ratifiers,[50] or at least the understood meaning of the Constitution during the ratifying era.[51] The theory of Originalism contends that the supremacy of the Constitution as

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[46] Fleming, James E. "Living Originalism and Living Constitutionalism as Moral Readings of the American Constitution." *Boston University Law* 92 (2012): 1171-186.

[47] O'Neill, Johnathan. "Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court." *The Review of Politics* 65, no. 3 (2003): 325-51.

[48] Goldford, Dennis J. "The Political Character of Constitutional Interpretation." *Polity* 23, no. 3 (1990): 255-58.

[49] Calabresi, Steven G. "Introduction." In *Originalism the Quarter-Century of Debate.* Washington DC: Regnery Publishing, 2007.

[50]Calabresi, Steven G. "Speech at the University of San Diego Law School: November 18, 1985 Judge Robert H. Bork." In *Originalism the Quarter-Century of Debate,* 83-95. Washington DC: Regnery Publishing, 2007.

[51] Nelson, Caleb. "Originalism and Interpretive Conventions." *The University of Chicago Law Review* 70, no. 2 (2003): 519-98.

rule of law makes the framers of the document, those who ratified it, and layman of the late eighteenth century the definitive voice of interpretation for the Constitution.[52] The methodology relies first on the use of dictionary definitions to interpret the text[53]and second on a judge's historical analysis of the relatively fixed understanding of the text during ratification.[54] To be stated in a simplistic manner, Originalism as a broad term defines constitutional interpretation adverse to that of a living constitutionalism. It is the use of semantic textual analysis and historicism to anchor modern constitutional theory to the era of the framing and ratification of the Constitution.

This expansive definition is rather large and all encompassing. It allows any judge to claim an Originalist perspective without having to adhere to a strict methodology. This lack of defined methodology contradicts Originalism's claim for a higher level of judicial restraint. Furthermore, the use of historical and textual analysis is not distinctively and solely an Originalist approach. The Court has seen a rise in textual interpretations through the use of dictionary definitions from both living constitutionalist and Originalist.[55] Even living constitutionalist, such as Justice Stephen Breyer, rely on historical analysis to determine cases.[56] This broad definition allows for à la carte Originalism, meaning that an Originalist judge could

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[52]Primus, Richard A. "When Should Original Meanings Matter?" *Michigan Law Review* 107 (2008): 167-72.

[53] Cornell, Saul. "Idiocy, Illiteracy, and the Forgotten Voices of Popular Constitutionalism: Ratification and the Ideology of Originalism." *The William and Mary Quarterly* 69, no. 2 (2012): 365-68.

[54] Whittington, Keith E. "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation." *The Review of Politics* 62, no. 2 (2000): 197-229.

[55] Liptak, Adam. "Justices Turning More Frequently to Dictionary, and Not Just for Big Words." *The New York Times*, June 13, 2011. Accessed December 18, 2014. http://www.nytimes.com/2011/06/14/us/14bar.html?_r=0.

[56]*Bush v. Gore*, 531 U.S. 98 (2000)

claim to be a staunch Originalist, even if they applied their own personal moral reading to an issue, as long as they find some historical evidence to back their claim. This quandary requires an Originalist judge, much like a living constitutionalist judge, to further lay out the framework for their interpretative method and theory.

To combat the overly broad definition, this thesis will define four distinctive types of Originalism based on terms historians, legal scholars, and political theorist, who argue on behalf of and against Originalism, commonly used interchangeably under the umbrella term of Originalism when describing the contemporary judicial jurisprudence other than living constitutionalism. Research has yielded that the terms "textualist," "strict construction," "original intent," and "original meaning," have been used loosely and synonymously to describe Justice Scalia and other Originalist judges. The use of these terms interchangeably further legitimizes Originalism. This practice buttresses the false notion that modern Originalism has a long-standing position within the Court and legal discourse. However, as previously mentioned, today's Originalism is a relatively new interpretative theory that gained momentum in the 1980s.[57] Also, using these terms interchangeably further legitimizes Originalism from a formalist perspective because it implies that all forms of Originalism are objective in nature though, pragmatically only two have the potential to be. Categorizing these four distinctive approaches to Originalism into two avenues of interpretation "objective," and "subjective"[58] helps clarify this argument.

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[57] Cornell, Saul. "Idiocy, Illeteracy, and the Forgotten Voices of Popular Constitutionalism: Ratification and the Ideology of Originalism." *The William and Mary Quarterly* 69, no. 2 (2012): 365-68.

[58] Nelson, Caleb. "Originalism and Interpretive Conventions." *The University of Chicago Law Review* 70, no. 2 (2003): 519-98.

The objective approach is far more constraining on judges as it requires that the Originalist judge interpret the Constitution based solely on the semantic understanding of the Constitution. A Textual-Originalist and Strict-Construction Originalist would fit into this category because these approaches leave little room for interpretation, but rather require a judge to simply play the role of enforcer for the Constitution. Originalists laud this limited ability for interpretation because they believe judicial restraint is required to uphold the legitimacy of the Court. However, this may appear to be an idealistic theory that cannot be supported pragmatically by its method.

The subjective approach allows for an Originalist judge to interpret the Constitution as those who were alive, be it the framer, ratifiers, or general public, during its creation and adoption intended or understood it to mean. Original-Intent and Original-Meaning Originalism would fall under this category. Furthermore, this category is arguably the one in which most modern Originalist would align with when interpreting the Constitution.[59] However, it should be noted that some Originalist judges, like Originalist enthusiast Robert Bork, have argued that the latest version of Original-Meaning Originalism is in fact objective rather than subjective because the approach is bound strictly to the ratifying generation.[60] This argument fails to persuade critics because Original-Meaning judges are bound only to a particular timeframe; they are free to choose which sources from this period they can draw historical evidence from and which source they can ignore. The ability to make Original-Meaning Originalism malleable to the will

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[59]Rakove, Jack N. "The Perils of Originalism." In *Original Meanings: Politics and Ideas in the Making of the Constitution*. New York: A.A. Knopf, 1996.

[60] Perry, Michael J. "The Legitimacy of Particular Conceptions of Constitutional Interpretation." *Virginia Law Review* 77, no. 4 (1991): 669-719.

of its judge makes this approach subjective rather than objective.

When the four previously mentioned approaches to Originalism are clearly defined the argument of an objective and subjective avenue for Originalism is supported. By providing a framework that illustrates how these approaches differ both methodologically and theoretically it will become clear how Scalian-Originalism is defined as the subjective Original-Meaning interpretive approach, which is the latest approach in the modern evolution of Originalism. Therefore, by framing modern Originalism in this manner a different schema is provided through which to critique Originalism.

One of the earliest examples of Originalism is the subjective form of Original-Intent Originalism. Denis J. Goldford writes that it is the "regulative theory wherein interpretation is bound substantively by the intent of the framers."[61] It demands that judges first look to the written text of the Constitution, and if there remains ambiguity within the text, then the manifested intent of the framing generation, those who drafted and ratified the document, supersedes all other understandings of the text. This theory and methodology gained momentum under the helm of Justice Hugo Black, a liberal justice who supported civil liberties and was a staunch defender of the First Amendment while serving as Associate Justice on the Supreme Court from 1937 to 1971.[62] He argued in favor of the "absolutes" held within the Bill of Rights, and claimed that any limitations placed on those absolutes were akin to the "English doctrine of legislative omnipotence." [63] Under Black the theory of Original-Intent was built upon the belief

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[61]Goldford, Dennis J. "The Political Character of Constitutional Interpretation." *Polity* 23, no. 2 (1990): 255-81.

[62]Hugo Black. (2015). The Biography.com website. Retrieved 11:00, May 19, 2015, from http://www.biography.com/people/hugo-black-37030.

[63] Black., Hugo L. "The Bill of Rights." *New York University Law Review* 35 (1960): 865-81.

that the framers were men of infallible character. Therefore, their intentions should be discerned and given a priori status over all other interpretations. Black wrote:

> It is my belief that there are "absolutes" in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be "absolutes." The whole history and background of the Constitution and Bill of Rights, as I understand it, belies the assumption or conclusion that our ultimate constitutional freedoms are now more than our English ancestors had when they came to this new land to get new freedoms. The historical and practical purposes of the Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which has denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed.[64]

Original-Intent Originalist rely on the written works of the framers, as defined loosely as men who played a prominent role in the birth of America as a self-governing country. These Originalists rely primarily on the works of Jefferson and Madison, though there were fifty-five founders who drafted the constitution, and ninety more men drafted the Bill of Rights. [65] Believing that these men are to have the definitive voice of constitutional interpretation, Richard A. Primus argument buttresses the Originalists' principle argument "the nature of a written

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[64]Id.

[65] Barton, David. "Editor's Notes." In *Original Intent: The Courts, the Constitution & Religion*. 5th ed. Aledo, TX: WallBuilder Press, 2011.

constitution binds its citizens to the law as it was understood by the authority that created it."[66] This premise supported the argument that Originalism was founded on the need for judicial restraint because an Originalist judge would be forced to remove their own preferences and desires from any rulings, instead deferring to the preferences and intentions of the framers. Original-Intent Originalism, as practiced by those in the judiciary, such as Justice Black, helped create the foundation for the arguments made by the objective forms of Originalism known as Textualism and Strict-Constructionism.

Textualism can be defined as the theory of legal interpretation that holds the "plain meaning" of the written word in supremacy.[67]In its purest form it requires fidelity solely to the written word and the explicit semantic understanding of the text.[68] The methodology relies on authoritative sources, such as dictionaries and concrete grammatical rules that were in circulation during the time of adoption to interpret constitutional and statutory law. [69] This approach is highly objective because it in no way takes into account the context or intent of the text. The rigid boundaries of Textualism make it the forerunning approach for champions of judicial restraint because it leaves little to no room for a judge to participate in judicial activism. However, while this approach is considered analogous with Originalism this theoretical and methodological approach is not, by its nature, exclusively Originalist or non-Originalist since both schools of constitutional interpretation have been known to dabble with it. This approach is

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[66] Primus, Richard A. "When Should Original Meanings Matter?" *Michigan Law Review* 107 (2008): 165-222.

[67] Schauer, Frederick. "Defining Originalism." *Harvard Journal of Law and Public Policy* 19, no. 2 (1995): 343-46.

[68] Booher, Troy L. "Putting Meaning In Its Place: Originalism and Philosophy of Language." *Law and Philosophy* 25 (2006): 387-416.

[69] Calabresi, Steven G. "Speech Before the American Bar Association: Washington, D.C. July 9, 1985 Attorney General Edwin Meese, III." *Originalism the Quarter-Century of Debate.* Washington DC: Regnery Publishing, 2007.

most often applied by judges from both interpretive schools because of its apolitical nature and overwhelming constraints of interpretation. Furthermore, this approach may be sound in theoretical and hypothetical practice, but it is rarely, if ever, used without some subjective context parlayed in support of the textual reading.[70] Consequently, this approach is most often used as a starting point rather than the sole systematic approach for interpretation. Textualism is the beginning platform for its objective kin, Strict-Constructionism.

Like a Textualist judge, a Strict-Constructionist judge is bound to the legal text. There is no attempt to understand the "spirit," or "presumed outcome," of the text, but rather a Strict-Constructionist is bound to enforcing the semantic meaning of only the written word. Nonetheless, while they mirror each other in theory they differ in method. A Strict-Constructionist is not constrained by "authoritative texts," rather such a judge is at liberty to infuse his or her own historical understanding when interpreting a legal text.[71] This content based approach does not support the judicial perspective that the Constitution contains certain judicial derivations to be gleaned, and that these fundamental rights, such as privacy,[72] though not enumerated in the text, are still enforceable by the Constitution.[73]Though this approach bends more than Textualism, it is still objective and still places a lot of constraint on the judiciary.

These objective approaches to law are theoretical in nature because in its application

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[70] Posner, Richard A. "Interpretation." In *Reflections on Judging*. Cambridge, Massachusetts: Harvard University Press, 2013.

[71] "Justice Black's 'absolutism': Notes On His Use of History to Support Free Expression." In *Justice Hugo Black and the First Amendment*, edited by Everette E. Dennis, by Dwight L Teeter and Maryann Yodelis Smith. 1st ed. Iowa State University Press, 1978.

[72]*Griswold v. Connecticut*, 381 U.S. 479 (1965).

[73] O'Neill, Johnathan. "Shaping Modern Constitutional Theory: Bickel and Bork Confront the Warren Court." *The Review of Politics* 65, no. 3 (2003): 325-51.

Textualism fails in its "purest form," meaning that the law is constructed without some level of subjectivity.[74] The inability for objective Originalism to be sustained in a practical and realistic manner would help explain why modern Originalism applies these approaches in only the most nominal way; instead, modern Originalism favors the subjective avenues of interpretation. The objective approaches predate modern Originalism, and is the foundation for Originalism's argument of legitimacy. As a result, these approaches, in many ways, particularly due to the Originalist doctrine of objective judicial restraint, are the launching pads for modern Originalism.

Original-Intent Originalism fell out of favor with subjective Originalist judges, as the rise of objective forms of Originalism became prominent in the political discourse. Both forms play a role as the precursors to the ascendant modern model, Original-Meaning Originalism, or Scalian-Originalism.[75] Original-Meaning Originalism scholar Randy Barnett argues that this transformation was required in order for Originalism to survive and gain its current level of legitimacy. He argues that due in part to the critiques that Original-Intent was unworkable and counter-intuitive to the actual intentions of the framers, the Original-Meaning model was created as a more sustainable methodology.[76]

Justice Scalia defined modern Originalism as, "the interpretative approach we endorse is that of the 'fair reading': determining the application of the governing text to given facts on the basis of how a reasonable reader, fully competent in the language would have understood the text

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[74] Posner, Richard A. "Interpretation." In *Reflections on Judging*. Cambridge, Massachusetts: Harvard University Press, 2013.

[75] Barnett, Randy E. "Trumping Precedent with Original Meaning: Not as Radical as It Sounds." *Constitutional Commentary* 22 (2005): 257-70.

[76] Id.

at the time it was issued." [77]As a methodology the Original-Meaning model relies on seventy rules of statutory interpretation, or canons of construction. [78] These rules are meant to remove a judge's personal moral reading from the text and force the judge to adhere to the doctrine of judicial restraint. Original-Meaning Originalists may vary in theory from Original-Intent Originalists, but in practice they are fairly similar.[79]

Like its predecessor, Original-Intent Originalism, the Original-Meaning model is grounded in the eighteenth century. Both require historical research and analysis to support rulings. While giving authority to the text, neither method is bound solely to the textual definition, but rather a judge is allowed to chose the historical content through which to interpret the Constitution, which serves to cloak Originalism in the idea of fairness and objectivity. This is known as the practice of law office history, which is the practice of composing "a plausible historical defense of a result desired on undisclosed grounds."[80] Furthermore, both approaches claim to be champions of judicial restraint, and to argue in favor of reverse stare decisis in matters that do not, in their opinion, align with the original understanding of the Constitution. Consequently, these two models have similar strengths and weakness based on their subjective nature, and from a pragmatic perspective it can be difficult to discern the two.

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[77] Scalia, Antonin, and Bryan A. Garner. *Reading Law: The Interpretation of Legal Texts*. St. Paul, MN: Thomson/West, 2012.

[78]Canons of construction are the guidelines to be applied by an Originalist when deciding a case. Scalian-Originalism has 57 approved canons and 13 that are considered "false." These sometimes contradictory guides are meant to serve as strict guidelines for an Originalist judge. The approved cannons range from grammatical rules of interpretation to common law meanings. The "false" canons serve as guidelines reminding Originalist judges not rule according to false notions such as the "spirit of the statute," or that the purpose of "interpretation is to discover intent."

[79] Nelson, Caleb. "Originalism and Interpretative Conventions." *The University of Chicago Law Review* 70, no. 2 (2003): 519-98.

[80] Posner, Richard A. "Coping Strategies for Appellate Judges II: Interpretation." In *Reflections on Judging*, 190. Cambridge, Massachusetts: Harvard University Press, 2013.

SCALIAN-ORIGINALISM AND CRITICAL LEGAL THEORY

Richard Posner wrote that, "Judges are not competent historians."[81] He argued that the indeterminacy of historiography and the malleability of history to bend to a particular judge's predisposed will creates a dubious form of historical analysis endorsed by Scalian-Originalism. His argument against law-office history challenges the method in which Scalia utilizes history in his rulings. Also, he questions the justifiable use of eighteenth-century history to interpret modern law. The latter argument questioning the supremacy of eighteenth-century morality to modern moral beliefs is supported by Critical Legal Theory.[82]

In the last two centuries, and more specifically the last century, American society has made strides toward equality for all, particularly people of color and women. It is a sociological fact that the American culture has historically favored white men, especially those with wealth.[83] Also, it is understood, as critical historian Walter Benjamin writes, that traditional historicism empathizes with the victor; "Hence, empathy with the victor invariably benefits the rulers."[84] Consequently, Scalia's application of eighteenth-century history, which undeniably favored white elite men because it was written for them and by them, is bound to be riddled with biases and prejudices that would serve only to further the agenda of those in power at that time of the

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[81]Id. 185.

[82] Posner, Richard A. "Coping Strategies for Appellate Judges II: Interpretation." In *Reflections on Judging*, 185. Cambridge, Massachusetts: Harvard University Press, 2013.

[83] Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." University of Pennsylvania Law Review 133, no. 4 (1985): 685-780.

[84] "Theses on the Philosophy of History." In Critical Theory and Society: A Reader, edited by Stephen Eric Bronner and Douglas MacKay Kellner, by Walter Benjamin, 257. London: Routledge, Chapman and Hall, 1989.

ratification of the Constitution. Scalia insists on relying on the founding era's understanding of the Constitution in an attempt to restrain a judge's subjectivity. From a Critical Legal perspective Scalian-Originalism is maintaining a status quo that alienates large portions of American society due to the discriminating hierarchical structure of the society in the eighteenth century. Therefore, Scalia's use of history, whether or not he manipulates it to support his predisposed position, is erroneous because it fails to further every individual's goal of autonomy through individual political power.

The second liberal critique of Scalian-Originalism is that it is not, as it claims to be, objective.[85] Scalia claims that the Constitution must be interpreted as it was understood to mean when it was ratified. This approach makes law predictable and prevents judges from doing whatever they like.[86] The rule of law doctrine intends to create "fairness" within the law by forcing judges to divorce themselves from subjectivity. A judge would not be making arbitrary rulings, but rather would be bound to a predetermined outcome. Originalism has gained support due to its claim of objectivity; though even formalists acknowledge that it fails to practice objectivity in every case.[87] Supporters of Originalism approach the subjective nature of Scalian-Originalism as if were a regrettable byproduct in certain cases where the Originalist method and theory were not strictly adhered to by the person applying it. They argue that, with the understanding that the rule of law is the epitome of liberal jurisprudence, objectivity is possible. Thus, Originalism can be altered in such a way as to make it a neutral method for constitutional

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[85] Posner, Richard A. "Interpretation." In *Reflections on Judging*. Cambridge, Massachusetts: Harvard University Press, 2013.

[86] Scalia, Antonin, and Bryan A. Garner. "Introduction."In *Reading Law: The Interpretation of Legal Texts*. St. Paul, MN: Thomson/West, 2012.

[87] Green, Jamal. "Selling Originalism." The Georgetown Law Journal 97 (2009): 667-72.

interpretation.[88] Other formalists acknowledge the subjective nature of Scalian-Originalism, but argue that it is not a viable method based on its subjective nature's inability to produce consistent and predictable outcomes. They argue that legal reality can be grounded in the Constitution's ability to enforce a neutral law created through its text, but Originalism fails to do this.[89] This critique continues to support the rule of law doctrine, while dismissing Scalian-Originalism.

Critical Legal Theory embraces the subjective nature of Scalian-Originalism because it denies the possibility for any legal method to be objective. Critical Legal Studies is able to critique Scalian-Originalism on the merits of what it is, and not on the merits of what it is not. Using Critical Legal Theory to critique the legitimacy of Scalian-Originalism based on its ability to serve the societal interests of egalitarianism, and greater democratic participation will allow for a new perspective on Scalian-Originalism. Furthermore, a Critical Legal perspective can also help assess Scalian-Originalism's ability to produce predictable meta-ethical moral outcomes. As a result of not focusing on the fact that Scalian-Originalism is not objective, it becomes possible to critique its legitimacy based on what Scalian-Originalism currently is, and not on what it should be.

Having explained how Critical Legal Theory will examine Scalian-Originalism this manuscript will now briefly leave the subject of Scalian-Originalism. In the next section it will be explained how liberal First Amendment doctrine and Critical Legal Theory work together toward the common goal of autonomy. Finally, the manuscript will return to Scalian-Originalism and examine its interpretation of the First Amendment from a Critical Legal

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[88] Griffin, Stephen M. "Rebooting Originalism." University of Illinois Law Review 2008, no. 4 (2008): 1185-223.

[89] Whittington, Keith E. "Dworkin's 'Originalism': The Role of Intentions in Constitutional Interpretation." *The Review of Politics* 62, no. 2 (2000): 197-229.

perspective.

CRITICAL LEGAL THEORY AND THE FIRST AMENDMENT

Anthony Lewis writes, "Freedom to speak and write as you wish is an inescapable necessity of democracy."[90] The argument that the First Amendment's freedom of speech is the foundation for liberty within the American society is pervasively ingrained in the current political consciousness, and this understanding has been touted as a universal truth.[91] Critical Legal theorists deny that there is any "universal democratic ideal."[92] However, the argument that individuals must be free to make choices that allow for egalitarianism to occur, implies that an individual must have access to competing ideas. Accordingly, a Critical Legal theorist can use the modern understanding of the First Amendment as a tool to further the goal of equality and democratic participation. The two schools are in agreement that an individual's ability to communicate freely is imperative for autonomy to be achieved. The theory of a need for self-government, which both formalist and Critical Legal theorist can agree upon, is not explicitly guaranteed in the First Amendment. This allows for judges, who maintain legal legitimacy by interpreting the law and then enforcing it, to perpetuate the movement toward a societal structure not based on hierarchal rule. The concept of changing society's structure through judicial activism is not as radical as it first appears. After all, the contemporary normative freedom of speech doctrine was adopted by the Supreme Court's "mysterious and remarkable process" to

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[90] Lewis, Anthony. "Introduction." In Freedom for the Thought We Hate: A Biography of the First Amendment, xiii. New York: Basic Books, 2007.

[91] Id.

[92] Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." Harvard Law Review 96, no. 3 (1983): 561-675.

change the interpretation of fundamental law. [93]

The Constitution, and more specifically the Bill of Rights, like all forms of law, is political in nature. The Bill of Rights was born from the Anti-Federalists' fears of a federal government centralizing power. The Federalists' conceded to Anti-Federalists' demands in order to ratify the Constitution. This concession resulted in the Federalist agreeing to the Anti-Federalist vigorous campaigns for citizens to be granted "unalienable" rights protected by law.[94] Finally, this process culminated with the ratification of the Constitution and the Bill of Rights with no discernible way to enforce the citizenry's new rights. The Supreme Court would eventually assume the role of Constitutional interpreter and enforcer though this role was not explicitly laid out in the Constitution.

The First Amendment was written ambiguously by the colonial elites with their own agendas to support and protect. There was no clear-cut understanding of its intentions, or who it was meant to protect, but it certainly did not include protection for everyone. Thomas Emerson writes, "Slaves were obviously excluded, and women did not seem to matter."[95] In his seminal article, *Legacy of Suppression*, historian Leonard Levy argued, "There is even reason to believe that the Bill of Rights was more the chance product of political expediency on all sides than of principled commitment to personal liberties."[96] The nullification of the freedom of speech and

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[93] Lewis, Anthony. "Introduction." In Freedom for the Thought We Hate: A Biography of the First Amendment, x. New York: Basic Books, 2007.

[94] Stovall, James Glen, and Dwight L. Teeter. "A Legal Analysis of the First Amendment." In The First Amendment, 63-65. Knoxville, Tennessee (TN): First Inning Press, 2012.

[95] Emerson, Thomas I. "Colonial Intentions and Current Realities of the First Amendment." *University of Pennsylvania Law Review* 125 (1977): 737-60.

[96] Levy, Leonard W. Legacy of Suppression; Freedom of Speech and Press in Early American History. Cambridge, Mass.: Belknap Press of Harvard University Press, 1960. Vii-viii.

press clauses of the First Amendment with the Federalists' Alien and Sedition Act of 1798, which restricted speech critical of the government, supports Levy's argument of political expediency. The Alien and Sedition Act was never found unconstitutional based on the First Amendment, rather it just expired. The lack of First Amendment protection against the 1798 Alien and Sedition Act supports the argument that the Bill of Rights was a political tool of the framers and ratifiers in an attempt to unify the country under the Constitution. Understanding the nature of the Bill of Rights as a political ploy for the elites of the time period to protect their own interest dispels the sentimentality regarding the benevolence of the framers and ratifiers who wrote the Bill of Rights. The ability to understand the political nature of the First Amendment facilitates a deeper understanding of how modern freedom of speech doctrine came to be a champion and defender for individual autonomy.

Upon its conception the First Amendment applied exclusively to the federal government. The passing of Alien and Sedition Acts proved it carried very little weight even within that level of government. Following the Civil War and the subsequent ratification of the Fourteenth Amendment, which allowed for the Constitution to become the supreme law of the land by incorporating the Bill of Rights on a state level, the modern freedom of speech doctrine began emerging. However, the contemporary concept of freedom of speech as an individual's right to pursue a state of self-government did not occur until the twentieth century.

The First Amendment as a right afforded to each American citizen was not made applicable to the states until after World War I.[97] Prior to the *Gitlow* case, free-speech claims seldom made it to the Supreme Court, and if they did make it, the Court seemed more concerned

[97]*Gitlow v. New York*, 268 U.S. 652 (1925).

with defining ways that the state could limit speech rather than protecting speech.[98] In 1931 the Court began enforcing a constitutional guarantee of freedom of speech with the case *Stromberg v. California*.[99] Following this case the Supreme Court was tasked with the duty of interpreting what the words of the First Amendment meant on a case-by-case basis. By the mid-twentieth century, particularly under the Warren Court, protection of free speech began to take hold both within the judiciary and the public. The evolution of free speech from essentially nonexistent to a revered individual right occurred relatively quickly due to "judicial activism," which allowed for judges to work outside the vacuum of the law to shape and be shaped by the public's demand for protection of speech.[100] The ability of judges to completely reshape the foundation of the First Amendment supports Critical Legal theorists Gabel and Harris who argue for the use of the judicial system to further egalitarian goals because it has the political power to do so.

Anthony Lewis argues that the use of the First Amendment to strive toward equality is a, "powerful testimony to the crucial role of judges in the political system that rests on the foundation of law."[101] By daring to challenge the status quo, the Supreme Court created a new understanding of a democratic society that required it citizens to be allowed to challenge those with power. It became the normative thought that democracy had to be protected, and that its citizens had a right to pursue the truth in an attempt to become more enlightened and active

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[98] Lewis, Anthony. "All Life is An Experiment." In Freedom for the Thought We Hate: A Biography of the First Amendment, 28-31. New York: Basic Books, 2007.

[99] Lewis, Anthony. "Defining Freedom." In Freedom for the Thought We Hate: A Biography of the First Amendment, 39. New York: Basic Books, 2007.

[100] Lewis, Anthony. "Introduction." In Freedom for the Thought We Hate: A Biography of the First Amendment, x. New York: Basic Books, 2007.

[101] Id. xii.

within the democratic society.

Prominent legal philosopher Alexander Meiklejohn argues that the First Amendment is an absolute in the sense that it guarantees American citizens the ability to self-govern. The ability to self-govern, he contends, is a core concept of a true democratic society. Meiklejohn argues that with regards to political speech the First Amendment must be an absolute in order to allow for the creation of an informed electorate that cannot be manipulated by those in power who wish to hinder self-government. Meikeljohn does not believe that all forms of speech, such as libel, slander, and obscenity should be protected because the First Amendment does not guarantee the absence of regulation, but protects that "presence of self-government." He states that the purpose of First Amendment is to allow the people of the United States the democratic autonomy and authority to govern themselves by limiting the powers of the government to censor speech.[102]

Thomas Emerson agrees that " freedom of expression is necessary to a democratic political process,"[103] but argues that the First Amendment must protect more than an individual's right to self-government in order to advance individual liberty. Emerson proclaims that freedom of expression must go beyond the political realm if it is to allow humanity to be active participants in shaping their own democratic experience and destiny. According to Emerson there are four intentions of the First Amendment that must be adhered to in order to reach an ideal democratic society. The first intention is known as the "market place of ideas" rationale, which states that the First Amendment is meant to allow individuals to protect themselves from falsities when trying to advance knowledge and discover the "truth." This rationale contends

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[102] Meiklejohn, Alexander. "The First Amendment Is an Absolute." *The Supreme Court Review* 1961 (1961): 244-66.

[103] Emerson, Thomas I. "Colonial Intentions and Current Realities of the First Amendment." *University of Pennsylvania Law Review* 125 (1977): 741.

that American citizens have to be allowed to hear and analyze competing ideas in order to find the "truth." The second intention mirrors Meikeljohn's theory of self-government, which requires individuals to be allowed freedom of expression in order to reach their own judgments and arrive at a common decision. The third intention is a "form of social control that strikes a balance in society between stability and movement, thereby allowing for necessary change without resort to violence."[104] This is known as the freedom of political expression rationale, and has allowed some judges to argue that political speech deserves "special protections."[105] The final intention Emerson attributes to the First Amendment is the need of an individual to achieve personal fulfillment through freedom of speech.[106] These rationales have become the normative liberal argument for the protection of freedom of speech. Even though they are built on "democratic ideals" their goals of creating an enlightened, autonomous, and active democracy resonate well with the goals of Critical Legal Theory.

Though both liberal theory and Critical Legal Theory share similar goals, the role judges play in progressing the citizenry toward individual self-government differ. For formalists the role of the judge is to create a concrete rationale for what forms of speech are protected. From a Critical Legal perspective the division of private and public avenues for speech created by the hierarchy requires judges to interpret free-speech cases on a case-by-case basis.[107] The Court is

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[104] Emerson, Thomas I. "Colonial Intentions and Current Realities of the First Amendment." *University of Pennsylvania Law Review* 125 (1977): 737-60.

[105]Heck, Edward V., and Albert C. Ringelstein. "The Burger Court and the Primacy of Political Expression." *The Western Political Quarterly* 40, no. 3 (1987): 413-25.

[106] Emerson, Thomas I. "Colonial Intentions and Current Realities of the First Amendment." *University of Pennsylvania Law Review* 125 (1977): 737-60.

[107] Cohen, Jeremy, and Timothy Gleason. "Distinguishing Law and Legal Theory." In Social Research in Communication and Law, 49. Vol. 23. Sage Publication, 1990.

supposed to act as a protector for those traditionally alienated by the structure of society. Cases are to be decided in such a manner as to allow citizens to challenge the status quo and to allow all voices equal access to the democratic process. Therefore, the legitimacy of free-speech cases is determined by each case's capacity to facilitate social equality. Scalian-Originalism's interpretation of the First Amendment will be examined by applying this criterion.

SCALIAN-ORIGINALISM, CRITICAL LEGAL THEORY, AND THE FIRST AMENDMENT

On September 25, 1954, Supreme Court Chief Justice Earl Warren was the key note speaker at the Marshall-Wythe Blackstone Commemoration Ceremony. Standing in the College Yard of Virginia's William and Mary College, Warren gave his first public speech since the landmark ruling of *Brown v. Board of Education*. Warren praised Chief Justice John Marshall for building a strong foundation for constitutional law based on the wisdom of William Blackstone. Warren argued that Marshall's decisions at times "aroused a storm of protest as being beyond the words and intent of the Constitution," but that his courageous efforts to reach for a perfect form of justice allowed him, and future generations, to reach for a judicial and governmental system, "which is premised upon freedom and the dignity of the individual." Noting that mistakes had been made along the way, Warren argued that the Court was to reevaluate and at times "wipe that slate clean," in order to continue advancing towards a more just society.[108] Warren's understanding of the purpose of the Supreme Court and his actions regarding the First Amendment, which broadened individual liberties of freedom of speech,

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[108]Warren, Earl. "Warren Speech to Marshall-Wythe Blackstone Ceremony, Sept. 1954." News and Events. June 12, 2009. Accessed June 15, 2015. http://www.wm.edu/news/stories/newssidebars/2009/warren-speech-to-marshall-wythe-blackstone-ceremony,-sept.-1954.php

contributed to his label as an "activist" judge. However, Warren's attempt to use the Court's authority to create a more equal and democratic society, regardless of its driving activist nature, is an honorable, and arguably necessary, function of the Supreme Court according to Critical Legal Theory. Warren's actions resonate with Critical Legal Studies assertion that judges have the ability to, and should, use their authoritative power to balance the scales regarding historically disenfranchised members of the American society even if this leads to momentary destabilization and reverse stare decisis.[109]

The Critical Legal Studies criteria for the determination of legal legitimacy are the antithesis of the modern liberal archetype of legal legitimacy. Formalist legal perspectives have used the activist label with a negative connotation, implying that judicial activism would ruin the very fabric of the American legal system.[110] From the normative standpoint, acts of judicial activism, such as that of the Warren Court, are overstepping the judicial boundaries requiring restraint. The response to judicial activism was the accession of the method of judicial review known as Originalism, which intended to bring order, stability, and credibility back to the Court.[111]

Original-Intent Originalism received criticism and scrutiny almost immediately.[112] Legal scholars began to argue that from a liberal perspective Originalism lacked legitimacy because it was indeterminate, and there was not enough historical evidence to definitively

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[109] Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." Harvard Law Review 96, no. 3 (1983): 561-675.

[110] Calabresi, Steven G. "Introduction." *Originalism the Quarter-Century of Debate.* Washington DC: Regnery Publishing, 2007.

[111] Id.

[112]Bunker, Matthew D. "Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression." *Communication Law and Policy* 17, no. 4 (2012): 330.

argue the intentions of the framers.[113] Also, there was the "dissensus critique," which argued that the framers had no authority to create binding laws.[114] Scholars also pointed out that legal practitioners are not trained historians; therefore, their historical analysis could be flawed or self serving.[115] Finally, critics argued that Original-Intent Originalism was anachronistic and since the framing generation itself did not use this approach, certainly a modern generation should follow suit.[116] Under such criticisms, as well as others, Original-Intent Originalism was revitalized through Original-Meaning Originalism.

This resurgence is not without its own set of liberal critiques. Mathew D. Bunker points out that both Justice Clarence Thomas and Justice Antonin Scalia are both subscribers to Original-Meaning Originalism but on First Amendment issues they are greatly divided.[117] He concludes that Original-Meaning Originalism, "may create at least as many problems as it solves."[118] One glaring issue Bunker highlights is that Original-Meaning Originalism, or Scalian-Originalism, does not restrain a judge any more than the opposing methods. The justices' use of the "reasonable person" assessment gives them a great deal of latitude when finding historical sources, which "presumably, congenial to the judge's own preference."[119]

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[113]Id. 331.

[114] Id. 332.

[115] Id.

[116]Bunker, Matthew D. "Originalism 2.0 Meets the First Amendment: The "New Originalism," Interpretive Methodology, and Freedom of Expression." *Communication Law and Policy* 17, no. 4 (2012):333.

[117] Id. 342-53.

[118] Id. 354.

[119] Id. 345.

Many scholars both supporters and detractors of Scalian-Originalism agree that a judge's personal beliefs and morals play a large part in their decision making process. Originalist supporter David Barton argued that the First Amendment's freedom of speech clause was written to protect words not actions and behaviors, which the modern doctrine of freedom of expression protects.[120] Barton argues this expansion of the freedom of speech clause allows the judiciary to enshrine, "acts formerly forbidden, and still abhorred by the citizenry."[121] Scalia does not agree with Barton's definition of speech and has supported, to some degree, freedom of expression, which would make Scalia an historical revisionist judge, not an Originalist, according to Barton. However, Justice Scalia conceded that he is not exclusively an Originalist judge, and that at times the method of Originalism just does not apply.[122] In his now famous 1988 Taft Lecture, entitled *Originalism: The Lesser of Evils*, Justice Scalia defends his stance that the Original-Meaning Originalist interpretation of the Constitution is superior to any other method because it advocates for the rule of law as the law of rules approach.[123] Justice Scalia proclaimed that he is a "faint-hearted" Originalist, who will resort to modern understandings in cases where it is difficult to discern the clear original

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[120]Barton, David. "Maintaining Constitutional Integrity." In *Original Intent: The Courts, the Constitution & Religion*, 262. 3rd ed. Aledo, Texas: WallBuilder Press, 2002.

[121] Id.

[122]Scalia, Antonin. "Originalism: The Lesser Evil." *Cincinnati Law Review* 57 (1989): 864.

[123] Id. See also : Segall, Eric J. "Justice Scalia, Critical Legal Studies, and the Rule of Law." *The George Washington Law Review* 62, no. 6 (1994): 1001-002. The author argues that Scalia provides five justifications for his rule of law as law of rules argument, and why Originalism's rule of law approach should be favored in applicable cases. The first justification being that in attempt to create a "perfect substantive answer" it is easier to rely on a previously enumerated rule to buttress the decision. Second, the totality-of-circumstances approach is unstable and does not lead to uniformed law. Third, Scalia contended that the case-by-case approach violates the rule of law by lacking predictability. Fourth, the rule of law approach will limit a judge's discretion and not allow a judge to indulge in his own "policy preferences." Lastly, this approach allows protection by the rule of law doctrine for a judge to reach controversial decisions. Segall concludes that it is Scalia's steadfast desire for a rule of law approach that will produce consistency and predictability that causes him to occasionally trump his adherence to an Originalist stance.

legal meaning or fails to adhere to the rule of law approach.[124] Scalia's own assertion of his need to opt out of an Originalist perspective when the method fails to produce a ruling demonstrates the methods subjective attributes and ability to sanction the practice law office history.

Scalia's "faint-hearted" Originalism is addressed by another Originalist supporter Randy E. Barnett in his article *Scalia's Infidelity: A Critique of "Fainted-Hearted" Originalism.* Barnett argues that there are three ways in which Scalia retracts from an Originalist perspective. First, he argues that Scalia abandons Originalism when he finds portions of the Constitution that do not mesh well with his understanding of the rule of law.[125] Second, he will follow prior precedent that contradicts the Constitution's original meaning if the outcome is objectionable.[126] As a final point, Barnett argues that Scalia, when he cannot justify his ruling using one of the previous avenues, abandons Originalism in cases where the outcome of an Originalist ruling, "he and most others would find too onerous by some unstated criteria."[127] After examining cases where Scalia discards an Originalist viewpoint, Barnett delivers a final argument that Justice Scalia is not an Originalist judge, and by not adhering to the Constitution's original meaning in all cases Scalian-Originalism fails to garner Constitutional legitimacy.[128]

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[124]Scalia, Antonin. "Originalism: The Lesser Evil." *Cincinnati Law Review* 57 (1989): 852-65.

[125]Barnett, Randy E. "Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism." *University of Cincinnati Law Review* 75 (2006): 13.

[126] Id.

[127]Barnett, Randy E. "Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism." *University of Cincinnati Law Review* 75 (2006): 13.

[128] Id. 24.

Opponents of Originalism agree with Barnett's narrative and critique of Scalian-Originalism. Robert M. Howard and Jeffery A. Segal concur that in his court opinions Scalia does not always practice an Originalist approach.[129] The authors decided to examine the systematic empirical validity of Originalism by examining briefs filed by litigants using an Originalist argument of either text or intent over a period of eight years. Howard and Segal reviewed these cases to see if an Originalist argument carried weight with an Originalist judge, or if those judges appeared to rely on their own modern preferences and behave attitudinally.[130] They hypothesized that due to the lack electoral accountability, the fact that Supreme Court Justices have reached the pinnacle career point in the judicial system, and that "humans are utility maximizers," it is likely that Justices would seek to maximize policy goals that coincide with their predisposed positions.[131] The authors then categorized each Originalist brief into a liberal or conservative ideology based on the content being argued. They found that Originalist judges Scalia and Thomas sided with an Originalist argument less than half the time when made by liberal parties, though they did support the liberal parties who made an Originalist argument more often than the parties who did not use a textual claim. For conservative parties the justices agreed with over half of their Originalist arguments, though they disagreed with parties making an Originalist argument more often than conservative parties that did not

[129]Howard, Robert M., and Jeffery A. Segal. "An Original Look at Originalism." *Law and Society Review* 36, no. 1 (2002): 113-38.

[130]Id.

[131] Id. 116-17.

petition on Originalist grounds.[132] Therefore, the use of an Originalist argument did appear to factor into the decisions of conservative justices when made by liberal parties, and enhance the liberal party's chance of receiving a favorable ruling more so than liberal parties who did not use an Originalist argument, but it appeared to have little effect on conservative parties who used the same method. However, when the liberal and conservative case briefs were combined the textual and intentional arguments did not appear to have "any significant impact on any of the Justices."[133] These findings did not discredit justices who may firmly believe that they are pursuing Originalist principles, but rather the results suggest, "that the originalist dream of a neutral method of constitutional interpretation that can remove judicial bias remains illusory." Instead, the results show that the ideological predispositions to vote a particular way overwhelm decision making regardless of whether or not one applies an Originalist interpretative method or some other vague notion of justice."[134]

Howard and Segal's article, *An Original Look at Originalism*, offers an interesting perspective on the normative legal arguments made by Barton and Barnett that Scalian-Originalism fails to create a predictable outcome based on Originalist ideals. This instability, Barton and Barnett argued, made Scalian-Originalism an illegitimate method of constitutional interpretation because it failed to meet the liberal legal standard of the rule of law. Rather, Howard and Segal's data suggest that the predictably of Scalian-Originalism is constructed by Scalia's predisposed political ideology, which shapes his Originalist method more so than a

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[132]Howard, Robert M., and Jeffery A. Segal. "An Original Look at Originalism." *Law and Society Review* 36, no. 1 (2002): 128.

[133] Id. 130-31.

[134]Id. 133-34.

strict allegiance to a particular method for constitutional interpretation. These conclusions are similar to other researchers' results, such as those of Joshua Furgeson. Comparing federal law clerks preferences and political ideologies, Furgeson found "a clear empirical relationship between constitutional preferences and political orientation."[135] Overall, the results showed that liberal law clerks tended to prefer a current meaning method, while their conservative counterparts tended to support the original meaning of the text methodology.[136] These findings mirror the results found by Howard and Segal and further support the argument that the methodology of Scalian-Originalism, which claims judicial restraint, is no more binding than non-originalist methods. This argument would be sufficient for a liberal legal author to argue, as they have, that Scalian-Originalism is illegitimate. However, from a Critical Legal perspective these findings do not lead to a conclusion that Scalian-Originalism is illegitimate, but rather support the inherent subjective nature of the judicial system. Critical Legal Studies does not base the legitimacy of a constitutional interpretation on its predictability, nor, does Critical Legal Theory even attempt to purport that judicial restraint is a necessity of judicial review. In fact, Critical Legal Studies accepts that justices will have political biases, and that they will make decisions based on their predisposed positions rather than the impractical ideal of the supremacy of the rule of law.

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[135]Furgeson, Joshua R., Linda Babcock, and Peter M. Shane. "Behind the Mask of Method: Political Orientation and Constitutional Interpretive Preferences." *Law and Human Behavior* 32 (2008): 506.

[136]Id. 502-10.

Having accepted the liberal legal argument that Scalian-Originalism is a method bound by the justice's predisposition and not by the strict adherence to the rule of law Scalian-Originalism's interpretation of the First Amendment can be critiqued from a Critical Legal perspective because if Scalian-Originalism simply held to the literal textual meaning, or even a consistent method of decision making for every case, it would be hard to argue that it is possibly a form of judicial activism. However, due to the method's inconsistencies, which the normative legal argument claims makes Scalian-Originalism illegitimate; it is possible from a Critical Legal perspective that Scalian-Originalism is a legitimate form of constitutional interpretation, provided that its rulings avow the goal of furthering equality and democratic participation within American society.

Scholars such as Randy Barnett, David Barton, Eric Segall, etc., have researched Justice Scalia's application of Original-Meaning Originalism and included a diverse range of cases in order to critique Scalian-Originalism from a broader vantage point. Some scholars, such as Segall, included certain First Amendment cases in their research, but did not include every freedom of speech case in which Scalia used an Originalist argument in his ruling.[137] This manuscript serves to look all seventeen of Scalia's First Amendment freedom of speech cases where an Originalist perspective was applied. In the next chapter Critical Legal analysis will be conducted, in the form of an immanent critique, to examine the legitimacy of Scalian-Originalism as a constitutional interpretive method for the freedom of speech clause by attempting to determine the ability of Scalia's Originalist rulings in First Amendment cases to create an equitable society and to advance democratic participation. The purpose of this

[137]: Segall, Eric J. "Justice Scalia, Critical Legal Studies, and the Rule of Law." *The George Washington Law Review* 62, no. 6 (1994).

research is to further the understanding of the applicable effects Scalian-Originalism has on the definition and enforcement of the freedom of speech rights granted to the American citizenry under the First Amendment.

Chapter IV: Analysis

The only single overarching theme in Scalian-Originalism's interpretation of the First Amendment is that it is not an absolute. The freedom of speech clause does limit the civil liberties granted to the American public by the First Amendment. For the purpose of this analysis each of the seventeen cases examined are categorized into one of four classifications: employee speech, anonymous speech, campaign finance as a form of political expression, and non-political speech.

SCALIAN-ORIGINALISM AND EMPLOYEE POLITICAL SPEECH

There are four cases of employee speech in which Scalian-Originalism has produced a decision. Out of those cases, two pertain to freedom of speech rights for elected officials, and two cases consider the speech rights of those employed by the state. From a Critical Legal perspective, these four cases are a mixture of legitimate and illegitimate rulings. For cases involving an elected officials' freedom of speech the decisions are just. However, for cases in which state employees seek First Amendment protections for political speech, Scalian-Originalism appears to favor those in power; thus, it fails to be equitable and to further democratic participation.

When addressing the issue of Nevada's recusal law, which required elected officials to disqualify themselves in situations that a reasonable person may be "martially effected by," Scalian-Originalism ruled alongside the other eight justices in an unanimous decision upholding recusal laws.[138] In the case *Nevada Commission on Ethics v. Carrigan,* city council member

[138]*Nevada Commission on Ethics v. Carrigan* 131 S.Ct. 2343 (2011)

Michael A. Carrigan disclosed that his campaign manager had worked in the capacity as a consultant for the Lazy 8 project, which sought to develop a casino/hotel. Carrigan then proceeded to vote in favor of the Lazy 8 project's land use request. The Nevada Commission of Ethics investigated this vote and found that Carrigan had violated Nevada's recusal law. Subsequently, Carrigan was censured. Carrigan appealed his censure, and argued that he had a First Amendment right to vote based on the freedom of speech clause. The Nevada Supreme Court ruled in favor of Carrigan, citing that an elected official's ability to vote on public issues is protected by the First Amendment. After hearing arguments, the Supreme Court reversed this decision and upheld Carrigan's censure.[139]

Writing the opinion for the Court, Justice Scalia wrote that from an Originalist perspective recusal laws were constitutional because they dated back to the founding and have been enforced for more than 200 years. Furthermore, an elected official has a duty to the citizens they serve. "The legislative power thus committed is not personal to the legislatures it belongs to the people, the legislature has no personal right to it."[140] This argument that elected officials should have a duty to the people above any self-interest is a way in which the Court attempts to create equality among those in power and those they are meant to serve. This ambition of fostering an altruistic society in which elected officials cannot abuse their power for personal gain aligns with the critical objective of equality; and therefore, is admissible. Though Scalian-Originalism supports the abridgement of speech in the form of recusal laws, regarding elected officials in an effort to ensure social equality and the lack of abuse of authority by said elected

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[139]*Nevada Commission on Ethics v. Carrigan* 131 S.Ct. 2343 (2011)

[140]Id.

officials, it does not contend that elected officials, or those campaigning for an elected position, must relinquish all forms of speech protected by the First Amendment.

In the case *Republican Party of Minnesota v. White*, Gregory Wersal filed suit against the state's constitution's announcement clause claiming that it violated the First Amendment. The announcement clause forbade those seeking to be elected to the state's Supreme Court from discussing "disputed legal or political issues." While as an associate justice candidate in 1996, Wersal distributed several pieces of literature critical of numerous prior Minnesota Supreme Court cases regarding issues such as abortion, crime, and welfare. A complaint was filed and subsequently dismissed by the Lawyers Board after finding that the literature did not violate the announcement clause. Wersal, however, withdrew from the race. Then in 1998 Wersal once again ran for the same office, but this time he filed a lawsuit in the Federal District Court challenging the constitutionality of the announcement clause. "Wersal alleged that he was forced to refrain from announcing his views on disputed issues during the 1998 campaign, to the point where he declined response to questions put to him by the press and public, out of concern that he might run afoul of the announcement clause."[141] He argued that the clause caused him to remain silent on important issues and that it was unconstitutional because it violated his freedom of speech rights. The district court and the Eighth Circuit Court of Appeals ruled in favor of the respondents. The Supreme Court reversed the lower courts' decision and Justice Scalia authored the Court's opinion.

Scalia wrote that the state's interest in electing impartial judges was weakly defined and not compelling enough to warrant the abridgment of a candidate's speech. Also, the

[141]*Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

respondent's argument of a long-standing tradition prohibiting judicial partisanship, Scalia argued, was false. The movement towards non-partisan judicial elections is a relatively modern phenomenon, and prior to the late nineteenth century, judicial candidates not only discussed, "legal and political issues on the campaign trail, but they were touting party afflictions and angling for party nominations all the while."[142] This did not harm the elections, but rather assisted the voters by providing them with a totality of information from which to make an informed choice for whom to cast a vote. "There is an obvious tension between the article of Minnesota's popularly approved Constitution which provides that judges shall be elected, and the Minnesota Supreme Court's announcement clause which places most subjects of interest to the voters off limits."[143] Simply put, Scalian-Originalism lambasts Minnesota's announcement clause because it hinders the democratic participation of the voters, who are not given complete information and are unable to make a fully educated vote. This ruling protects both the rights of the speaker to inform the public, and the public's right to participate in a candid election; thus, making the decision balanced and fair from a Critical Legal perspective.

Scalian-Originalism has proven to be legitimate from a Critical Legal perspective on issues regarding freedom of speech and elected officials. In both cases, the decisions served to further equality and democratic participation. Where Scalian-Originalism begins to waiver and tip the scales towards illegitimacy in matters of employees speech is on issues regarding the abridgement of state employees' First Amendment protections. For those who are not the upper echelon and elected officials of the state, but rather the majority of subordinates, Scalian-

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[142] Id.

[143] *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

Originalism supports the abridgment of an individual's right to speech by condoning subsequent punishment of unfavorable speech while simultaneously promoting accolades for encouraged speech.

Keen A. Umbehr was an independent contractor for solid waste management for Wasbaunsee County, Kansas from 1985 until 1991. He admitted that he was frequently critical of the County's Board of Commissioners, and he argued his criticisms caused the board to terminate his contract. Umbehr sued the board alleging that his termination was retaliation for his criticisms, which the First Amendment protected. Therefore, the board was in violation of his freedom of speech rights by infringement. The district court granted a summary judgment to the board, but the Tenth Circuit Court reversed that judgment. The Supreme Court granted certiorari to Umbehr's petition.[144]

In a 7-2 decision in favor of Umbehr the Court ruled that the First Amendment shielded Umbehr, as a government employee, from termination on the basis of what he might have said about the board that they found unfavorable. Both Originalist justices Thomas and Scalia dissented. Scalia argued that this ruling changes contract law and ignores a venerable and accepted tradition of the government's ability to contract any party they deem fit, and by ignoring that long-standing tradition, the Court has created a slippery slope by allowing the scrutiny of the government's official contract practices. Essentially, Scalia is arguing that the First Amendment has not historically protected a speaker from punishment; so why should it start now? In fact, "the ability to discourage eccentric views through mild means that have historically been employed, and that the Court has now set its face against, may well be

[144]*Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)

important to social cohesion."[145] This reasoning fails to take into account three major aspects of this case, which suggests the illegitimate nature of this ruling according to Critical Legal Studies.

First, Scalia's dissent in *Umbehr* allows for the government to abridge a speaker's right to express "eccentric" views by permitting punishments for that speech. This Blackstonian concept of prior restraint, which supports punishment for speech after the fact, but forbids only prior censorship, is a deeply rooted First Amendment doctrine. However, the prior restraint doctrine has led to a society willing to participate in self-censorship rather than face the possible legal consequences and social sanctions that could result from speech deemed as unprotected by the First Amendment.[146] The ability to punish an activity will deter that activity; therefore the government's ability to punish an individual for recalcitrant speech hinders the speaker's ability to participate within American society for fear of reprisal.[147] William Mayton argues, "As a result, the state gains an unconfined discretion to pick and choose the idea that it would smother with the costs of subsequent punishment."[148] Therefore, the state is able to quell menacing speech, and an individual's right to democratic participation, simply by continuing to avow foreboding consequences that could prove dire to an individual.

Second, the means deployed by the government in this case was an act that took away Umberh's economic stability by terminating his employment, which by any standards should not be assumed to be "mild." The state is basically given the authority to make an individual either

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[145] Id.

[146]Mayton, William T. "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine." *Cornell Law Review* 67 (1982): 245-82.

[147]Mayton, William T. "Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine." *Cornell Law Review* 67 (1982):. 266.

[148] Id. 267.

practice self-censorship or accept termination. Wayne Sanders writes, "Dismissal is the most common retaliation for speech."[149] Citizens have little or no recourse for termination based on protected speech and will most likely refrain from speaking because of a number of factors that, "decrease an employees' mobility, specifically a long-term economic recession, deepening health care problems, and the advent of two-career families."[150] The ability to severely punish an individual by eliminating their economic livelihood for speaking in a manner that is troublesome and possibly damaging can create a culture of silence that stunts democratic growth and participation.

Finally, Scalian-Originalism is advocating for the abridging of unfavorable speech if it disrupts social cohesion, suggesting that a speaker should first consider the likelihood of society to agree with their statement prior to speaking, and if it may upset others the speaker should refrain from speech. This argument has an ominous nature because, as Gordon Smith argues "when an employee reveals wrong-doing or a breach of public trust, disruption is inevitable,"[151]and this disruption could shake the foundation of societal cohesion. However, in regard to public employees they are the members of the community "most likely to have informed and definite opinions"[152]on matters of public concern; so, arguably it is their duty as citizens of a democratic society to speak and inform the public.

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[149]Sanders, Wayne. "The First Amendment and the Government Workplace: Has the Constitution Fallen Down on the Job?" *The Western Journal of Speech Communication* 47 (1983): 273.

[150]Bingham, Lisa B. "Employee Free Speech in the Workplace: Using the First Amendment as Public Policy for Wrongful Discharge Actions." *Ohio State Law Journal* 55 (1994): 355-56.

[151]Smith, D. Gordon. "Beyond "Public Concern": New Free Speech Standards for Public Employees." *The University of Chicago Law Review* 57, no. 1 (1990): 275.

[152]*Pickering v. Board of Education*, 391 U.S. 563 (1968)

All three of these reasons, on their face, hinder an individual's ability to participate openly within a democratic society. The ability for an individual to speak without fear of severe punishment is necessary in order to have a true "market place of ideas." By supporting punishment for protected political speech, and by allowing the government to terminate an individual merely for speaking, Scalian-Originalism's ruling in *Umbehr*, regarding a public employee's freedom of speech right, is illegitimate.

The support of severe punishment for an employee's critical speech gains heightened levels of concern regarding legitimacy when taking into account Scalian-Oringialism's support of the practice of political patronage. Patronage is defined as the exchange of discretionary favors in lieu of political support.[153] The case *Rutan v. Republican Party of Illinois* addressed this issue. In the fall of 1980 Illinois Governor James Thompson issued an order that prohibited state officials from hiring new employees, recalling laid off employees, or promoting an individual without the prior consent of the Governor's Office of Personnel. This office made employment decisions based on certain factors including the individual's contributions to the Republican Party, service to the party, and support of local party leaders. Cynthia B. Rutan and several other potential and current employees filed suit challenging this patronage system stating that this practice violated their First Amendment rights. In a split decision of 5-4 the Supreme Court ruled in favor of Rutan and found that the Governor's practices were unconstitutional. Justice Scalia dissented.[154]

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[153]Hasen, Richard L. "An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence." *Cardozo Law Review* 14 (1993): 1311.

[154]*Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

Scalia argued that the practice of patronage was a "venerable and accepted tradition," which supports the stability of a two-party system. The stability created by patronage far outweighs the possible corruptive practices that may result from patronage, according to Scalian-Originalism. Furthermore, the practice of patronage did not hinder the democratic participation of minority groups, but actually helped. This argument may very well be supported, as Scalian-Originalism contends, by a "long political tradition";[155] however, Scalia fails to properly support the notion that patronage is an acceptable practice for any reason other than it has always been a part of the American political system. From a Critical Legal perspective the possibility of corruption introduced by the practice of political patronage far outweighs its stabilizing abilities. In addition, the practice of political patronage for public employees wishing to progress in their careers or even obtain employment would cause them to feel, "a significant obligation to support political positions held by their superiors",[156]and result in the erosion of a public employees' right to free expression.

Political patronage serves the purpose of helping to further political agendas, and allow for the ruling elites to enhance their organizational control,[157] which makes it a powerful tool for politicians, even for those who use it without nefarious reasons. Nevertheless, there are societal costs associated with patronage practices. Richard L. Hansen's research suggests that even if patronage is not used in a manner of corruption the practice alone is enough to increase the appearance of corruption, which has a negative impact on the public's trust in the abilities of

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[155] Id.

[156] Id.

[157]Hasen, Richard L. "An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence." *Cardozo Law Review* 14 (1993): 1317.

the government.[158] He also found that patronage systems are less efficient than merit systems.[159] Therefore, even if no quid pro quo corruption is practiced through patronage it is possible that the practice will sour the public's perception of the government and lead to inefficiencies, which can harm the foundations of democracy.

The democratic ideal of the Right of Association may also be marred by the practice of political patronage. Through a barrage of cases the Court found that the First Amendment protects an individual's right to have political associations with whomever they chose, and the government cannot punish an individual directly or indirectly for their association without a compelling interest.[160] The interest of rewarding individuals for party affiliation, loyalty, or activity is not a compelling one.[161] Rather, the practice of political patronage is self-serving, and fails to protect the preservation of a democratic government in which public jobs are part of the public domain and not the property of the political party in power.[162] By allowing incentives as great as a person's economic livelihood, the practice of patronage forces individuals to participate in the democratic process from the perspective of the employer, which may or may not emulate their own personal beliefs.[163]

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[158]Hasen, Richard L. "An Enriched Economic Model of Political Patronage and Campaign Contributions: Reformulating Supreme Court Jurisprudence." *Cardozo Law Review* 14 (1993): 1322.

[159] Id. 1323.

[160]Schoen, Rodric B. "Politics, Patronage, and the Constitution." *Indiana Legal Forum* 3 (1970): 52.

[161] Id. 57.

[162] Id. 58.

[163] Id. 60.

The concept of gaining political loyalty through acts of coercion, such as political patronage, hinders an individuals' ability to participate in the democratic processes by forcing them to choose to participate from the employer's sanctioned perspective or jeopardize their ability to be hired, promoted, or maintain gainful employment. This practice becomes even more disconcerting when coupled with the accepted practice of discharging employees for critical speech. Rodric Schoen contends, "Hiring for political reasons is no different than firing for political reasons and both are forbidden by the Constitution."[164] What Scalian-Originalism has done in the cases *Rutan v. Republican Party of Illinois* and *Board of County Commissioners v. Umbehr,* regarding employee speech, is examined both sides of the same coin by deciding at what level an employee can participate in the democratic processes before the employer has the right to abridge the employee's First Amendment guarantees. Scalian-Originalism supports the reification of stability at the sacrifice of democratic participation. These two cases are intrinsically implying that an employee, at the very least, should remain silent on issues that the employer may find displeasing, and if they choose to speak, it should be in the matter prescribed by the employer. Scalian-Originalism is attempting to create a dictum eradicating an employee's First Amendment right to freedom of speech by insisting that governmental stability supersedes an individual's legitimate right to participate in the democratic process.

Scalian-Originalism does gain some legitimacy from a Critical Legal perspective when ruling on matters of freedom of speech rights for elected officials. These rulings support the theories of equality and heightened democratic participation. However, with the issue of an employee's right to free speech the methodology appears illegitimate by Critical Legal

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[164]Schoen, Rodric B. "Politics, Patronage, and the Constitution." *Indiana Legal Forum* 3 (1970): 63.

standards due to the hindrance of an employee's ability to speak on matters of public or political concern without coerced incentives or facing penalties for disagreeable statements. By enforcing self-censorship while simultaneously safeguarding the perpetuation of the current elites' agenda and status quo, Scalian-Originalism is stifling democratic participation and creating inequality by indicating the supremacy of the elites' ideologies. Therefore, resulting in the Critical Legal Studies' claim that Scalian-Originalism's interpretation in First Amendment cases regarding employee's political speech lacks legitimacy.

SCALIAN-ORIGINALISM AND ANONYMOUS POLITICAL SPEECH

The second category of speech addressed by Scalian-Originalism is anonymous political speech. There are only two cases in this category, and like employee political speech, the methodology has factors suggesting both the legitimacy and illegitimacy of Scalian-Originalism. The case *Doe #1 v. Reed* deals with the issue of petitioner accountability, while the case *McIntyre v. Ohio Elections Commission* addresses the issue of an individual publishing political literature anonymously. Scalia voted against anonymity in all aspects of political speech citing in both cases that there is no historical support or precedent for anonymous political speech; therefore, it does not receive constitutional protections. However, these cases address two very distinct issues within a democratic society. The first issue addressed is the need for voter accountability to ensure authenticity for official elections, petitions, and referendums. The second matter examined is an individuals' ability to participate in the democratic process by disseminating their point-of-view on topics of public or political concern, which are neither slanderous nor libelous, without revealing their identity.

The issue of voter accountability was challenged in the case *Doe #1 v. Reed.* The state of Washington's constitution allows the request for a referendum, or direct vote, by the

state's citizens to challenge state law. In order for the challenge to make it onto the ballot, the Secretary of the State of Washington must receive a petition containing enough signatures of registered voters to equal at least four percent of the electorate that participated in the last gubernatorial election. For the signature to be valid the petitioner must provide their address and the county in which they are registered to vote. In 2009 the state of Washington proposed a bill that would allow gay couples to be viewed as essentially married in the eyes of the law through the act of domestic partnerships. An anti-gay group Protect Marriage Washington began a petition titled "Protect Marriage, Protect Children" that would call for the bill to be put forth as a referendum. They succeeded, and the ballot contained the bill supporting gay domestic-partnerships. By a narrow margin the bill was enacted in favor of expanding gay rights. Following the vote several individuals requested to see the "Protect Marriage, Protect Children" petition under the state's Public Records Act since it was a matter of public record relating to legislation. Protect Marriage Washington sought an injunction against releasing the names and information of the petition's signees arguing that in matters of referendum the Public Records Act violates the First Amendment because it was not narrowly tailored to serve a compelling government interest. The Supreme Court heard the case, and in a vote of 8-1 ruled in favor the state claiming that the disclosure of referendum petitioners did not violate the First Amendment and identifying petitioners was a compelling interest of the state. Justice Scalia wrote a concurrence for this case.[165]

First, Scalia rebutted the lone, dissenter Justice Clarence Thomas' claim that America had a long history of protecting anonymous speech. Scalia argued that there is no

[165]*Doe v. Reed*, 130 S. Ct. 2811 (2010)

historical precedent protecting anonymous speech. He also stated that voter accountability was vital for democracy, and that, "requiring people to stand up in public for their political acts fosters civic courage, without it democracy is doomed."[166] Critical Legal Theory supports this notion of an accountable electorate populace in official political acts as a way to ensure equality within democracy. It is important that the citizenry has the ability to check the authenticity of petitions for a referendum because it is an official act of legislation, and checks and balances must be in place to guarantee against abuses such as the falsification of signatures. By allowing the verification of a petition's authenticity, Scalian-Originalism is furthering societal equality and allowing for individuals to participate in the democratic processes by playing the role of watchdog. In matters of public legislation, such as a referendum, anonymity cannot be tolerated because the potential for abuse is highly possible. Scalia's insistence on public disclosure and voter accountability in this case in order to protect the foundations of democracy are supported as legitimate by Critical Legal Studies. This legitimacy, however, is not garnered by the idea that anonymous speech has no place within a democracy, but rather it is legitimate because anonymity has no place in acts of legislation in a democracy attempting to strive toward equality and democratic participation.

Anonymous speech does have a valid place in the American democracy when it allows an individual to further participate in democratic practices. In1988, Ohio had a law that forbade citizens from distributing political literature anonymously; all literature had to contain the name and address of the person or campaign official that was issuing the literature. Margaret McIntyre handed out leaflets to people who attended a public meeting in Ohio. The leaflet

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[166] Id.

expressed her opposition to a proposed school tax levy, but rather than signing her own name, she signed it as "Concerned Parents and Tax Payers." McIntyre was charged with violating an Ohio Election Commission Code and found guilty. She appealed to the Court of Common Pleas, which reversed the ruling. The Ohio Court of Appeals reversed the decision, thus again finding McIntyre guilty. The Ohio Supreme Court affirmed. The Supreme Court of the United States granted certiorari.[167]

In a 7-2 vote the Court ruled that Ohio's law prohibiting the distribution of anonymous political literature abridged the freedom of speech clause of the First Amendment because it hindered an individual's ability to advocate for political causes.[168] Justice Scalia wrote a dissent arguing that the case made for supporting anonymity has no historical support. He argued that anonymity tarnishes the sanctity of the "democratic process" and allows for falsehoods by eliminating accountability.[169] Essentially, he disputed the argument that making a person claim their writing or speech in no way hinders them for participating in the democratic process. However, Amy Constantine argues that the desire to remain anonymous is often "driven by a fear of reprisal or the desire for privacy."[170]

As previously shown, Scalian-Originalism supports the societal practice of an authoritative punishment for critical and unfavorable speech. This may, as Jennifer Wieland explains, help understand why at certain times during the history of America, "anonymous

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[167]*McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)

[168]*McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)Id.

[169] Id.

[170]Constantine, Amy. "What's In a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech." *Connecticut Law Review* 29 (1997): 468.

expression has been a tool for those expressing controversial or unpopular views."[171] Many have chosen to speak under the cover of anonymity to express political ideas and to shield the speaker from the "tyranny of the majority."[172] By speaking anonymously, an individual is able to stop the suppression of their ideas "at the hand of an intolerant society."[173] Critical Legal Studies supports anonymous political speech, provided that it is not slanderous or libelous, because it allows those forced into self-censoring out of fear of reprisal to have a voice and to participate in the democracy. Scalian-Originalism's assertion that speech without accountability injures the democratic process is illegitimate because it does not take into account those who have no other avenue through which they can participate within the political landscape.

By treating anonymous political speech the same as anonymous political acts, the methodology fails to recognize the importance of protecting certain forms of speech that could prove to be valuable to American citizens once it reaches a public audience. The acceptance that compulsory disclosure will cause at least some ideas from being expressed is unacceptable from the perspective of enhancing equality and democratic participation. In matters concerning anonymous political speech Scalian-Originalism fails to meet the criteria for legitimacy from a Critical Legal perspective, but it does gain legitimacy with its acknowledgement of the importance of accountability for official political actions.

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[171]Wieland, Jennifer B. "Note: Death of Publius: Toward a World Without Anonymous Speech." *Journal of Law and Politics* 17 (2001): 589.

[172] Id. 590-93.

[173]Constantine, Amy. "What's In a Name? McIntyre v. Ohio Elections Commission: An Examination of the Protection Afforded to Anonymous Political Speech." *Connecticut Law Review* 29 (1997): 467.

SCALIAN-ORIGINALISM AND CAMPAIGN FINANCE AS POLITICAL SPEECH

The third category of political speech given due consideration by Scalian-Originalism is campaign finance as a form of political expression. This topic is one that has received a great deal of criticism from both the academy and the populace as many have condemned the idea that corporations should receive the same rights as actual persons.[174] Scalia remained insistent through all four campaign-financing cases that the First Amendment protected financial campaign contributions.

Scalia began ruling, in what would prove to be a consistent stance, in favor of defining campaign contributions as protected political speech, with the 1989 *case Austin v. Michigan Chamber of Commerce*. The Michigan Chamber of Commerce sought to support a candidate for the state's House of Representatives by placing a newspaper ad using general funds. The organization was not allowed to use general funds to for political expenditures because the Michigan Campaign Finance Act prohibited corporations from supporting or opposing candidates by using treasury money. The Michigan Chamber of Commerce argued that the act violated the First Amendment. The Supreme Court disagreed, and in a 6-3 decision, the majority argued that the Michigan Campaign Finance Act was narrowly tailored and served a valuable state interest in maintaining the integrity of the American political process. Scalia dissented. [175]

Scalia reasoned that there was no compelling interest to prevent corporations from participating in political speech and that limiting corporations' involvement in politics denies the

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[174]Briffault, Richard. "Corporations, Corruption, and Complexity: Campaign Finance After Citizens United." *Cornell Journal of Law and Public Policy* 20 (2011): 643.

[175]*Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)

possibility for opposing views to enter the market place of ideas. Scalia lambasts the majority's argument that campaign finance regulations are imperative given the unfair advantage for those with money to outspend those without wealth; thus, giving the wealthy a louder voice within the political arena. Scalia argues that it was never the intention of those who framed the Constitution to regulate political speech. Scalia writes in his dissent, "The fundamental approach to the First Amendment, I had always thought, was to assume the worst, and to rule the regulations of political speech 'for fairness sake' simply out of bounds."[176] Interestingly, by acknowledging that it is not the government's role to ensure that the political process is "fair," Scalia is acknowledging the inequality created by Scalian-Originalism's interpretation of the First Amendment, but he is arguing that inequality is not a justifiable reason to proscribe political speech. This sentiment of favoring individuals' rights over regulations seeking a more equitable political process is one that Scalian-Originalism maintains throughout all of the campaign financing cases.[177]

In 2003, the Supreme Court once again addressed the issue of campaign finance as a form of political speech in the case *McConnell v. Federal Election Commission*. This case addressed the Bipartisan Campaign Finance Reform Act of 2002. After a long and arduous process Senators John McCain and Russell Feingold passed the Act to reform the way money is raised and spent on political campaigns. The Act had three key provisions: 1) a ban on unrestricted ("soft money") donations made directly to political parties (often by corporations, unions, or wealthy individuals) and on the solicitation of those donations by elected officials; 2)

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[176] Id.

[177] Id.

limits on the advertising that unions, corporations, and non-profit organizations can engage in up to 60 days prior to an election; and 3) restrictions on political parties' use of their funds for advertising on behalf of candidates (in the form of "issue ads" or "coordinated expenditures").[178] The bill contained a unique provision that allowed for a direct appeal to the Supreme Court after an early federal trial. A three-judge panel heard the argument that the Act violated the First Amendment's freedom of speech clause and struck down the Bipartisan Campaign Finance Reform Act of 2002's ban on soft money, but left the rest of the Act intact. The federal court's ruling was stayed until the Supreme Court could hear and rule on the appeal.[179]

The Supreme Court heard the case in September 2003, and by a narrow margin of 5-4 ruled in favor of all of the provisions of the Bipartisan Campaign Finance Reform Act of 2002. In the Court's decision written by Justices Sandra Day O'Connor and John Paul Stevens the majority upheld the precedent of *Austin v. Michigan Chamber of Commerce* and argued that because, "money, like water, will always find an outlet," the government had a legitimate and compelling interest to prevent, "both the actual corruption threatened by large financial contributions and the eroding of public confidence in the electoral process through the appearance of corruption."[180] Once again Scalia did not agree that the government had a compelling interest to further quell political speech because avoiding corruption is not a valid argument, and he dissented.

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[178] *United States Government Printing Office*. "PUBLIC LAW 107–155—MAR. 27, 2002 1 Bipartisan Campaign Reform Act of 2002."

[179] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

[180] Id.

Scalia argued that regulations on campaign finance did not create equality within the political process because limitations on financial contributions overwhelmingly help the incumbent. Furthermore, he argued that spending money is unequivocally a form of political speech and should therefore be protected regardless of whether it is a corporation or individual who is 'speaking.' Justices Scalia asserted, "in the modern world giving the government the power to exclude corporations from political debate enables it effectively to muffle the voices that best represent the most significant segments of the economy and the most passionately held social and political views."[181] Scalia further argued that muffling corporations' ability to speak damages the foundations of democracy by limiting the public's access to opposing views. Scalian-Originalism's core argument that campaign finance limitations violate the First Amendment, and that the government has no compelling interest to prevent political speech based on an argument of equality were once again reiterated in 2006 when the Bipartisan Campaign Finance Reform Act of 2002 was challenged as a violation of the First Amendment. However, this time Scalian-Originalism would score a victory.

The nonprofit organization Wisconsin Right to Life ran commercial ads urging the public to contact two U.S. Senators and to tell them to oppose the filibuster of judicial nominees. The corporation intended to have the ads run through the 2004 election, but the Federal Election Commission would not allow the ads to run within 60 days prior to the election because they violated the Bipartisan Campaign Finance Reform Act of 2002. The Wisconsin Right to Life sued, arguing that their ads were "issue ads" and not "express advocacy" ads in favor or opposing a candidate; therefore, their First Amendment right to free speech was being violated.

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[181] *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

The Supreme Court heard the case and ruled in favor of the nonprofit organization citing that issue ads were different from express advocacy ads and that limiting issue ads would, "unquestionably chill a substantial amount of political speech."[182] Justice Scalia wrote a concurrence citing that the desire to limit the power of elites was not a valid state interest and that financial limits on political campaigns impedes the First Amendment rights of everyone.[183] By having the Court recognize the right of corporations to participate in political speech Scalian-Originalism's interpretation of financial contributions as a form of political speech gained more legitimacy. In addition, it opened the door for a huge victory against campaign finance regulations in *Citizens United v. Federal Election Commission.*

In the controversial 2010 case *Citizens United v. Federal Election Commission* a severely divided court of 5-4 ruled in favor of the free-speech clause protecting corporate funding of independent political broadcasters and that under that protection the broadcasters cannot be limited. The Bipartisan Campaign Reform Act of 2002, which sought to end "big money" campaign contribution, was a federal mandate that prohibited corporations and unions from using their general treasury to fund advertisements in support or against a candidate 30 days before a primary or 60 days before a general election. Citizens United asked for an injunction, citing that the act violated the First Amendment, in order to prevent the act from applying to its film *Hillary: The Movie*, which expressed opinions about Senator Hillary Rodham Clinton's bid for presidency. Ultimately, the Court sided with Citizens United, and essentially took caps off of the amount of money any one organization can donate because it allowed corporations to

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[182] *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007)

[183] Id.

produce and air propaganda that outright favored a candidate or cast their opponent in a negative light.[184] This ruling essentially circumvents previous attempts at campaign finance reform because it cut out the middle man and made it legal for corporations to act as independent individuals and spend any amount they see fit on behalf of their candidate.

The divisive ruling in *Citizens United v. Federal Election Commission* appeared to bolster Scalian-Originalism's interpretation of campaign financing as a symbolic political speech protected by the First Amendment. Justice Scalia joined the majority opinion but also authored a concurrence that addressed Justice Stevens' dissent. Stevens argued that the framers would have never supported this decision because they had a great deal of mistrust toward corporations.[185] Justice Scalia responded that Stevens was mistaken because there were no historical grounds to exclude corporations from speaking. He retorted that the First Amendment protects "speech" and not the "speaker." Scalia also reiterated that it is not the role of the government to prevent "moral decay" by abridging speech.[186]

Through all four cases regarding campaign finance, Scalia's application of Scalian-Originalism's theory affirmed that corporations ought to receive the same First Amendment protections as individuals, that campaign finance should be protected as political speech, and that the government has no compelling interest to further an equitable political process. However, formalist scholars argued that the subsequent results of the rulings in *McConnell* and *Citizens United* served to further convolute the issue of campaign finance. The *McConnell* case created a

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[184]*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

[185]*Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

[186] Id.

new objective for campaign finance known as the "general participatory self-government objective,"[187] which Justice Breyer notes in *McConnell*, is aimed to "democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of candidate's meaningful financial support, and encouraging greater public participation."[188] However, this new objective fails to take into account the anticorruption measures achieved through expenditures limitations,[189] which intended to level the amount of speech in an attempt to balance participatory practices for every citizen.[190] Similarly, the second critique of Scalian-Originalism's interpretation of campaign finance is that it rejects the argument of governmental corruption by allowing corporations to have an undue influence over elected officials.[191] Instead, Scalian-Originalism's interpretation has opened the door for the "quid-pro-quo corruption" argument. This argument circumvents the state's assertion of protecting the sanctity of the political system from not only verifiable corruption, but also the appearance of corruption, by creating a new doctrine of the First Amendment that protects all campaign contributions except those which qualify as a "bribe."[192]The complexity of campaign finance legislation is compounded by this quid-pro-quo doctrine due to the extreme

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[187]Hasen, Richard L. "Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission." *University of Pennsylvania Law Review* 153, no. 1 (2004): 31-32.

[188] Id.

[189]Hasen, Richard L. "Buckley Is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission." *University of Pennsylvania Law Review*153, no. 1 (2004): 71.

[190] Id. 71-72.

[191]Briffault, Richard. "Corporations, Corruption, and Complexity: Campaign Finance After Citizens United." *Cornell Journal of Law and Public Policy* 20 (2011): 644.

[192]Id. 661.

difficulty in proving whether a campaign donation is intended as a bribe or if it is given in support of the candidate with no strings attached.[193] This incoherence caused by Scalian-Originalism's position of campaign finance as a protected form of political speech is the third and final formalist critique. Richard L. Hasen argues that the Court's adoption of a new campaign finance jurisprudences that eradicated decades of prior precedent has led to a new incoherence because "it is unlikely that the court will follow the new case to its extreme— for example to allow spending by foreign nationals to influence candidate elections, to treat spending in judicial elections the same way as spending for other races, or to strike down reasonable limits on campaign contributions made directly to candidates."[194] Simply put, the liberal argument against Scalian-Originalism's interpretation of campaign finance, as a First Amendment protected freedom of political speech, fails to remain consistent with prior precedent and fails to clearly define the new guidelines for campaign finance; thus, adding to the complexity of future cases, and creating the new objective of "general participatory self-government" without providing support that the new First Amendment protection of political contributions would in fact further that goal.[195] Interestingly, the argument against the "general participatory self-government objective" is closely related to the Critical Legal critique of Scalian-Originalism's interpretation of the First Amendment's protection of campaign finance as political speech.

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[193] Id. 661-62.

[194]Hasen, Richard L. "Citizens United and the Illusion of Coherence." *Michigan Law Review* 109, no. 4 (2011): 585.

[195]Hasen, Richard L. "Citizens United and the Illusion of Coherence." *Michigan Law Review* 109, no. 4 (2011): 585.

From a Critical Legal Studies perspective the definitive Scalian-Originalism ruling in *Citizens United v. Federal Election Commission* creates an inexcusable amount of inequality within the political process because it hinders political participation by those who cannot afford to participate. Scalian-Originalism's interpretation of finance contributions fails to take into account the vast wealth inequality within American society, which creates a huge gap in opportunities for individuals to speak and participate in the democratic process. It also fails to acknowledge the adverse societal effects of allowing those with greater wealth, or the elites, a larger opportunity to circulate their agenda and a greater ability to coerce the masses into supporting that agenda.

In Edward N. Wollf's seminal piece *Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It,* he emphasizes the need for research to examine the monetary inequalities within American society beyond just the income inequalities, but instead the wealth inequalities. He argued that the study of wealth inequalities provides a better representation of the economic inequalities within the society than income because income fluctuates while wealth tends to simply grow.[196] The author points out that following the market deregulation of the Reagan years American society saw an unprecedented increase in wealth inequality.[197] Through a quantitative economic analysis Wolff found that, "the top 1 percent of wealth holders controlling 39 percent of total household wealth. Focusing more narrowly on

[196]Wolff, Edward N. "Why Wealth?" In *Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It*, 5-6. New York, New York: New Press, 1996.

[197]Wolff, Edward N. "Household Wealth Inequalities in the United States: Present Level and Historical Trends." In *Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It*, 7-13. New York, New York: New Press, 1996.

financial wealth the richest one percent of households owned 48 percent of the total."[198] Furthermore, while wealth continued to grow for the top, "the bottom 40 percent showed an absolute decline. Almost all absolute gains in real wealth accrued to the top 20 percent of wealth holders."[199] Wolff found that the level of wealth inequality within American society is much greater than other "class-ridden" societies, such as the United Kingdom, Germany, and Japan.[200] Wolff concludes by arguing that there is a societal need for taxation on wealth in order to lessen the gap between the top and bottom, which would affect only a small percent of the population (about three percent), but would allow for more wealth distribution within the society as a whole.[201] Edward N. Wolff described the importance of wealth distribution as vital to the equality within American society, but more specifically the political arena because, "in the political arena large fortunes can be a source of economic power and social influence…large accumulations of financial and business assets can confer special privileges on their holders. Such fortunes are often transmitted to succeeding generations, thus creating family 'dynasties.'"[202] In this piece, Wolff articulates the argument against American wealth disparities. He advocates for change because, by lessening the wealth inequalities within the American class

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[198] Id. 7.

[199] Id.

[200]Wolff, Edward N. "Current Systems of Wealth Taxation." In *Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It*, 33-40. New York, New York: New Press, 1996.

[201]Wolff, Edward N. "Concluding Remarks." In *Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It*, 51-57. New York, New York: New Press, 1996.

[202]Wolff, Edward N. "Household Wealth Inequalities in the United States: Present Level and Historical Trends." In *Top Heavy: The Increasing Inequality of Wealth in America and What Can Be Done About It*, 7. New York, New York: New Press, 1996.

system it is possible to create a more equitable society, and limit the elites' ability to shape society and further their own agenda through the legal arena.

Edward N. Wolff's concerns regarding an unfair advantage given to the wealthy to shape and control the American political agenda are valid. Even Justice Scalia concedes that individuals and corporations spend money on campaigns and candidates because it works on shaping the public's opinion.[203] The impact that elites have on shaping American society and culture through the promotion of their agenda is the topic Thomas Frank explores in his book *Pity the Billionaire: The Hard-Times Swindle and the Unlikely Comeback of the Right*.

Frank's book explores a theme of "haves" versus the "have nots," and how this societal framework has shaped America's political system. Frank contends that the 2010 election results are a consequence of the systemic problem of the populace willingly following rhetoric rather than reason. Therefore, the influence allotted to the "haves" in American society due to the hierarchical political structure allows the power elites to enjoy the fruits of the populace's ignorance.[204]

Frank argues that the economic collapse of 2008 and 2009 caused the modern recession, and originated when the power elites failed to be properly wrangled in by the government. Frank contends that the largest cause of the economic crash was the deregulation of the banking industry.[205] Frank's research focuses the phenomena in which American people rallied around

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[203]*McConnell v. Federal Election Commission*, 540 U.S. 93 (2003)

[204]Frank, Thomas. *Pity the Billionaire: The Hard Times Swindle and the Unlikely Comeback of the Right*. New York, New York: Picador, 2012.

[205]Frank, Thomas. "1929: The Sequel." In *Pity the Billionaire: The Hard Times Swindle and the Unlikely Comeback of the Right*, 28. New York, New York: Picador, 2012.

certain Conservative ideals, such as the need for a free market[206] and the bad neighbor doctrine, even though these positions contradicted the interests of the masses.[207] Frank's book explains how America's wealthiest were able to shape the outcome of the 2010 election in favor of George W. Bush who in return continued to create policies that disproportionately favored the elites.[208] The author's research succinctly examines how the detrimental effects that the deregulation of campaign finance reform, and the subsequently larger voice given to those on top, contributed to economic and social inequalities that followed the 2010 election.[209]By giving further spending power to the elites though rulings such as *McConnell* and *Citizens United*, from a Critical Legal perspective, what Scalian-Originalism accomplished creates greater inequality within American society. Wolff highlighted the enormous already existing wealth gap between those on the top and those on the bottom, and Frank's writing serves as a cautionary tale about how the elites can mislead the public in such a way that would allow for the masses to rally behind positions that oppose their own interest. In summation, due to wealth disparities Scalian-Originalism has allowed for those who can afford it, the elites, the unbridled ability to promote their agenda, while systematically quelling the voices of those who cannot afford the same level of influence. This can have a negative effect on equality within American society as a whole by unfairly promoting an agenda that favors the elites, and preventing the citizenry from protecting their own interest by failing to allow equal access to opposing arguments. The inequality created

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[206]Frank, Thomas. "Nervous System." In *Pity the Billionaire: The Hard Times Swindle and the Unlikely Comeback of the Right*, 66. New York, New York: Picador, 2012.

[207]Frank, Thomas. "1929: The Sequel." In *Pity the Billionaire: The Hard Times Swindle and the Unlikely Comeback of the Right*, 28. New York, New York: Picador, 2012.

[208]Frank, Thomas. "Making a Business of It." In *Pity the Billionaire: The Hard Times Swindle and the Unlikely Comeback of the Right*, 77-90. New York, New York: Picador, 2012.

[209] Id.

through Scalian-Originalism's interpretation of campaign finance as a form of protected political speech, from a Critical Legal perspective, strains Justice Scalia's claim of applying a legitimate theory and methodology to the interpretation of the First Amendment.

SCALIAN-ORIGINALISM AND NON-POLITICAL SPEECH

Non-political speech is the final category of speech considered by Scalian-Originalism. Scalia has stated that political speech deserves a greater a priori status than non-political speech. Perhaps this is because political speech is easier is to categorize and define than non-political speech because non-political speech is based on issues of morality, which by its nature is fluid, and changes and evolves over time. The liberal perspective has attempted to resolve the fluid nature of non-political cases by adopting the doctrine of prior restraint and applying time, place, and manner restrictions.[210]Non-political speech deals with issues of morality or societal concern and the government's right to abridge speech based on time, place, and manner restrictions.The Court has consistently held that time, place, and manner restrictions violate the prior restraint doctrine only if the state fails to create "content neutral" legislation.[211] It is intended for time, place, and manner restrictions to allow the state the authority to allocate resources, such as the use of a public park for assembly, in an equitable manner to avoid conflicts based on the scarcity of space.[212] However, the ability for the state to grant permits for speech based on a wide range

[210]Whorf, Robert H. "The Dangerous Intersection at "Prior Restraint" and "Time, Place, and Manner": A Comment on Thomas v. Chicago Park District." *Barry Law Review* 3, no. 1 (2002): 1-13.

[211]Lee, William E. "Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression." *The George Washington Law Review* 54 (1986): 758.

[212]Whorf, Robert H. "The Dangerous Intersection at "Prior Restraint" and "Time, Place, and Manner": A Comment on Thomas v. Chicago Park District." *Barry Law Review* 3, no. 1 (2002): 12.

discretionary tactics increases the possibility of censorship based on the content of the speech.[213] The level of discretionary authority afforded to the state's allows for legislative practices that seek to further define morality within in American society, which from a critical perspective makes it the Court's duty to guarantee that time, place, and manner restrictions are not used as a guise for censorship, and that in cases where censorship does occur the state has a compelling interest to warrant prior restraint.

These two formalist First Amendment doctrines garner legitimacy for cases of non-political speech as long as the legislation in question is considered to be content neutral or if the state is able to provide compelling interest abridging of the First Amendment. From a Critical Legal Theory perspective legitimacy is gained in non-political cases regarding morality when the ruling furthers equality within the society or democratic participation, which at times may allow for legislation that is not content-neutral to be found just. If the legislation mirrors current societal values and morals, or the legislation seeks to protect or further the interests of historically disenfranchised groups then from a Critical Legal perspective the legislation is legitimate. Therefore, the court has the right and the responsibility to review cases regarding morality from a modern perspective and rule accordingly to the legislation's ability to further equality and democratic participation. Scalian-Originalism's theory rebukes this notion that the Court has a responsibility to help shape society in an equitable manner and instead favors the formalist argument of content-neutral legislation and the subsequent time, place, and manner restrictions.

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[213] Id.

There are seven non-political rulings, which Scalia weighed in on from an Originalist perspective. All of the cases deal with moral issues and the state's implicit or explicit attempt to regulate morality. Scalian-Originalism's methodology applies the formalist understanding of the First Amendment on issues of non-political speech. First, Scalian-Originalism examines legislation to identify if it is content neutral, or at least appears as content neutral. If Scalia finds that the legislation is not content neutral, but rather morally defined, then, this legislation is justifiable as long as the morals it seeks to define align with the moral perspectives of the American culture during the time of the drafting of the Constitution.

In issues regarding time, place, and manner restrictions, Scalia sides with the state as long as the state's restrictions of speech appears content neutral. As previously stated, it can be a difficult task for the Court to discern when time, place, and manner restrictions are truly content neutral. However, in some cases the state's blatant censorship of content is so clearly visible that from a liberal perspective the Court has no choice other than to rule in favor of the speaker. In two unanimous cases the Court found that the state's morally compelling argument to restrict speech was not a justifiably compelling interest according to the First Amendment doctrine of prior restraint.

In the first case *44 Liquormart Inc. V. Rhode Island* petitioners filed suit against the state of Rhode Island claiming that its statute banning the advertisements of liquor prices in places where liquor is not sold violated the retailers' right to freedom of speech. The state argued that it had a vested interest in protecting consumers from "commercial harms," and promoting temperance.[214]

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[214] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)

In the *44 Liquormart Inc.* case the Court applied the Central Hudson Test as formed in the case *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[215]In this case the Court ruled that a regulation banning an electric utility company from promoting and advertising the use of electricity violated the First and Fourteenth Amendments. This ruling founded the Central Hudson Test, which is a four-step analysis to be applied to cases concerning commercial speech. First the court must decide if the speech in question promotes lawful activity and is not misleading. Second, the Court must decide if the state's interest is substantial. Third, the Court considers if the regulation serves to advance the state's substantial interest. Finally, the Court must conclude that the regulation is not more extensive than necessary to serve that interest.[216] After applying these guidelines the Court ruled in favor of the liquor sellers in the *44 Liquormart Inc.* case because it found that the state's ban was far too "paternal," and hindered public choice. Scalia concurred with the ruling, but disagreed with the use of the Central Hudson test in this case. He argued that this test was not formed at the time that the First Amendment was adopted, and that he is not convinced that the Central Hudson Test reflects the framers understanding of the First Amendment.[217]

In the second case, *R.A.V. v. City of St. Paul,* the state once again attempted to defend the regulation of speech based on a moral argument, and once again the state lost its argument due to the lack of the legislation's content neutral nature. The state's Bias-Motivated Criminal Ordinance was constitutionally challenged after a crudely fashioned cross was burned on the

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[215]*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)

[216]*Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980)

[217]*44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)

lawn of a black family, allegedly by several teenagers. The teens were charged under a local ordinance that prohibited the display of a symbol, which "arouses anger alarm or resentment in others on the basis of race, color, creed, religion, or gender."[218] The state attempted to ensure that the rights of groups historically discriminated against were not violated by enacting this criminal ordinance.[219] Justice Scalia delivered the majority opinion for the court and he argued that the ordinance was on its face invalid and unconstitutional because it prohibited otherwise permitted speech solely on the basis of subject that the speech addressed. He argued that not all speech is protected and even acknowledged that at times the state has successfully argued for the regulation of speech, such as defamatory or obscene speech, that could prove detrimental to the society as a whole. Scalia wrote, "From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are 'of such slight social value as a step to the truth that any benefit that may be derived from them is clearly out-weighed by social interest in order and morality.'"[220] However, in this case the state had no compelling interest to restrict speech because while burning a cross is a reprehensible act any law tailored specifically for the action violates the First Amendment.[221]

For Scalia, and the Court, both of these cases were "easy" cases because in both instances the state sought to restrict speech based on its morally objectionable content. However, from a

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[218]*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

[219]Id.

[220]*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

[221] Id.

critical perspective these cases are not one and the same. In *44 Liquormart* the state sought to protect consenting adults from themselves, while in *R.A.V.* the state attempted to protect historically disenfranchised groups, and the states citizenry, from the effects of hate speech.

From a Critical Legal perspective the ruling in *44 Liquormart* is legitimate and just because it sought to create equality among all of the state's residents regardless to whether or not an individual lived in a "dry" county. The Court's ruling that the state's paternal attempt to promote "temperance," by restricting the circulation of non-misleading commercial speech, creates equality by eliminating the state's ability to effectively determine which state residents were able to receive information and make an informed decision on their level of participation in the act of consuming alcohol. Furthermore, the state's desire to promote temperance could already be obtained without having to restrict speech through the application of criminal legislation such as the forbiddance of an individual to drive while impaired and the criminalization of acts that disturb the public peace. In this case the Court, and Scalia, by the implementation of Scalian-Originalism's theoretical approach, sought to further the interest of equality and democratic participation by allowing individuals the ability to make informed decisions based on an access to complete information. However, the interest of equality and democratic participation were abandoned in the hate speech case *R.A.V v. St. Paul.*

Hate speech receives First Amendment protections so long as it does not incite "imminent lawless action."[222] The imminent lawless action doctrine supports the notion that only speech that has a direct and immediate causation of harm is punishable by the law. This doctrine attempts to solidify the Market Place of Ideas rationale for freedom of expression. This doctrine

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[222]*Brandenburg v. Ohio*, 395 U.S. 444 (1969)

can be hard for even the staunchest liberal legal scholars, such as Anthony Lewis, to support unequivocally. Lewis argued for the punishment of speech that urges "terrorist violence to an audience some of whose members are ready to act on the urging,"[223] even if the acts of violence do not occur within an imminent time frame. Lewis stated that this argument only supports the restriction of speech that is "genuinely dangerous," not less egregious forms of speech such as flag burning or racist slang.[224]

Interestingly, Lewis' acknowledgement that some speech holds such a danger to society that it warrants censorship, buttresses the Critical Legal perspective of the First Amendment. The distinction between the formalist perspective and Critical Legal Theory is that Critical Legal Theory acknowledges the necessity to restrict hate speech that denies citizens individual personal security and liberty, not just speech that incites physical violence.[225] For Critical Legal scholars a legal response to speech that causes harm to those historically on the "bottom," such as women, children, people of color, the poor, etc. is a societal statement that these vulnerable groups are not valued members of the American polity.[226]

In *R.A.V.* the state of Minnesota attempted to create legislation that further supported the ideal of equality and protected historically intimidated groups from being the unwilling targets of hate speech. The state acknowledged, just as a Critical Legal Studies acknowledges, that hate

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[223]Lewis, Anthony. "Thoughts That We Hate." In *Freedom for the Thought We Hate: A Biography of the First Amendment*, 167. New York, New York: Basic Books, 2007.

[224] Id.

[225]Matsuda, Mari J. "Public Response to Racist Speech: Considering the Victim's Story." *Michigan Law Review* 87, no. 8 (1989): 2321.

[226]Matsuda, Mari J. "Public Response to Racist Speech: Considering the Victim's Story." *Michigan Law Review* 87, no. 8 (1989): 2322.

speech, which exerts any axiom that continues the subordination of individuals at the bottom of society, lacks societal value and simply continues the legacy of inequality. In *R.A.V.* Scalia dismissed the state's attempt to criminalize the racist action of burning the cross because the legislation was not content neutral, and by nullifying the state's pursuit to redress systematic discrimination, Scalia maintained the status quo of inequality.

Racism has been imbued within American culture since the first settlers made their way across the ocean. From the genocide of Native Americans, to the lynching and ascendancy of whites over blacks, America has an ugly history of maltreating persons of color. The undeniable subjugation of blacks within American society requires that the law consider the victim's story prior to creating a just and fair hate speech jurisprudence.[227] By examining hate speech from the bottom, or victim's perspective, the judiciary is forced to acknowledge the societal harm and inequality that continues to be perpetuated by the First Amendment's protection of hate speech.[228]

In the article *Hate Speech and Its Harms: A Communication Theory Perspective,* Clay Calvert proposes that the courts and legislative bodies examine hate speech through the lens of two Communications models: transmission model and ritual model. The author argues that applying these models will help the courts and legislative bodies scrutinize the effects hate speech has on the individual and American society.[229] Applying the transmission model to hate speech directs the courts' attention to the "immediate, and overt behavioral changes, physical

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[227] Id. 2320-2381.

[228] Id.

[229]Calvert, Clay. "Hate Speech and Its Harms: A Communication Theory Perspective." *Journal of Communication*, 1997, 4-18.

responses, and mental anguish suffered by the targets of hate speech."[230] The ritual model, Calvert argues, illuminates the long-term cumulative harm that occurs through the repeated use of racist speech towards minorities, which serves to perpetuate and reinforce discriminatory attitudes and behaviors.[231] Calvert concludes that the continued protection of hate speech promotes feelings of inferiority, facilitates the unequal treatment of groups, and creates and maintains a hegemonic power structure.[232] In this article the author does not attempt to address the legality of the First Amendment's protection of hate speech, but rather simply, "offers courts and legislative bodies a vehicle for better understanding how racist and sexist speech creates and maintains a reality of discrimination."[233]

Critical Legal Studies recognizes, as Calvert does, the continuous inequalities that are formed and sustained through the acceptance of hate speech. This is why it is imperative that the legal system adopts a doctrinal basis of reparations. Mari J. Matsuda argues that historically victimized groups will continue to be denied personal liberty and democratic equality until the legal system acknowledges the need for reparations as an act of contrition.[234] The author suggests a form of monetary reparations as a symbolic gesture affirming the legitimacy of the victims' claims of systematic inequality, and a form of reparations in which the legal system

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[230] Id. 6.

[231] Id.

[232] Id. 6-7.

[233] Id. 17.

[234]Matsuda, Mari J. "Looking to the Bottom: Critical Legal Studies and Reparations." *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987): 376-99.

aims to protect the interests of minorities.[235] By acknowledging the sustained inequality of minority groups within American society, it becomes the duty of the courts to "promote good rather than evil."[236] The courts have the transformative power to correct past injustices, to equally redistribute power out of the hand of the dominant class who continue to benefit from historical inequalities, and construct a more equitable society for all.[237]

Formalist scholars may find the restriction of hate speech, as argued by Critical Legal scholars, as an erosion to the First Amendment's freedom of speech protection.[238] However, even the formalist perspective has acknowledged that there are forms of speech that do not warrant protection, such as fighting words, forms of obscenity, slanderous, and libel statements. Legal liberals have conceded that there are some forms of speech that are harmful to the democratic process and lack societal value. The acknowledgement that the First Amendment is not an absolute, and that the state does have a compelling interest to restrict certain forms of speech, begets the Critical Legal argument for the restriction of hate speech. Given the level of harm created and sustained by hate speech and the minimal value it has in the market place of ideas, the argument for a new First Amendment doctrine that embraces a goal of equality and furthering democratic participation via the censorship of hate speech does not seem so radical.

Applying Scalian-Originalism, Scalia reviewed the two time, place, and manner cases *R.A.V. v. St. Paul* and *44 Liquormart Inc. v. Rhode Island* as similar cases in which the state

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[235]Matsuda, Mari J. "Looking to the Bottom: Critical Legal Studies and Reparations." *Harvard Civil Rights-Civil Liberties Law Review* 22 (1987): 363-80.

[236] Id. 393.

[237] Id. 376-99.

[238]Calvert, Clay. "Hate Speech and Its Harms: A Communication Theory Perspective." *Journal of Communication*, 1997, 16-17.

attempted to restrict speech based on moral ground, and thus violated the prior restraint doctrine. Without taking into account that the state in *R.A.V.* sought to remedy historical atrocities and create a more equitable society, while in *44 Liquormart* the state attempted to create inequality, Scalia upheld the formalist perspective of First Amendment jurisprudence, and continued the legacy of promoting the status quo of inequality for those on the bottom. Critical Legal Studies endorses the legitimacy of Scalia's ruling in *44 Liquormart* based on its attempt to further equality, but finds his ruling in *R.A.V.* illegitimate because it failed to recognize the facilitation of inequality brought about through the protection of hate speech.

Scalia took the two complex time, place, and manner cases *R.A.V. v. St. Paul* and *44 Liquormart Inc. v. Rhode Island* and simplified them into prior restraint cases. By ruling that these cases both dealt with the restriction of speech based on its content Scalia did not even have to address whether or not the state had a compelling interest to garner time, place, and manner restrictions. However, it is not always so easy for the Court to determine if the state is justly applying time, place, and manner restrictions or if the state is restricting speech based on its content. In the cases *Thomas v. Chicago Park District* and *Hill v. Colorado*, Scalia sides with the state when he deems the legislation regarding the use of a public park to be content neutral and sides with the petitioner when the state enacts a semantically neutral law that Scalia believes targets unfavorable speech.

In *Thomas v. Chicago Park District* the Park District adopted an ordinance that required individuals to obtain a permit before allowing them to conduct large-scale events in the public park. The ordinance allowed for the denial of a permit based on thirteen specified grounds. It also stated that the Park District must process all applications within 28 days and when they did not approve a petitioner's request, they must explain the reasons for denial. The denied

applicants had the ability to appeal first with the park's general superintendent and then to a state court. The Windy City Hemp Development Board made several attempts to obtain permits to hold rallies in the park that would advocate for the legalization of marijuana. After only receiving a permit for some of their request, the Windy City Hemp Development Board filed suit alleging that the ordinance was unconstitutional because it allowed the Chicago Park District to censor speech based on unfavorable content. In a unanimous opinion delivered by Justice Scalia, the Court found that First Amendment's freedom of speech does not guarantee that a permit must be issued every time a request is made. Furthermore, they found that the Chicago Park District ordinance was content-neutral and therefore protected by the First Amendment's time, place, and manner doctrine.[239]

The facts of the case, particularly that the permits had been previously issued, support Scalia's argument that the state was acting within its authority to regulate the use of public space among the polity in accordance with the time, place, and manner doctrine. Critical Legal Studies would argue that the state has a vested interest in regulating public arenas in such a manner as to allow multiple voices and messages to be heard. Justice Scalia's ruling in *Thomas* satisfied the liberal, "public forum" doctrine, which argues, and is agreed upon to a degree by Critical Legal Studies, that open public spaces and accessible properties owned by the government, such as parks, streets, sidewalks, etc., are an effective arena for communication for all citizens regardless of "their political ideology, private wealth, property ownerships, social status, or popularity."[240]

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[239]*Thomas v. Chicago Park District* 534 U.S. 316 (2002)

[240]Raskin, Jamin B., and Clark L. LeBlanc. "Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Forum and the Need for an Objective Speech Discrimination Test." *American University Law Review* 51 (2001): 180-81.

Due to the neutral-viewpoint wording and application of the state's ordinance in *Thomas*, the case was not examined with the most rigorous form of scrutiny, which meant the state only had to prove a significant interest and not a compelling one. Though liberal and Critical Legal scholars differ on what the Court should consider to be a "compelling interest," both sides agree in the need for the citizenry to have equal access to public forums in order to disseminate their views. The Court has not always been delivered a time, place, and manner case as "easy," as *Thomas v. Chicago Park District.* This case is unique because the state was able to prove the neutrality of the legislation beyond the facially neutral language of the statue. By providing evidence proving that the state did grant some of the Windy City Hemp Development Board permit requests, the state was able to definitively prove that it did not cast a wide blanket of restriction on a particular group's message, nor prevent the group's ideas from being shared in a public forum; but rather, the state plainly limited the group's access to the public forum in accordance to the guidelines laid forth in the ordinance. Ultimately, a Critical Legal perspective finds this ruling to be legitimate from both a formalist and Critical Legal perspective because of its equitable interest in regulating public arena access in such a manner as to let a wide variety of speech from several viewpoints to enter the market place of ideas. The state's interest in regulating speech in an equitable manner allows for a wide variety of groups to obtain access to a public forum, which furthers the groups' ability to participate in the democratic process. Scalia's ruling in this case is legitimate because it protects the state's interest to promote equality and democratic participation. However, by justifying *Thomas v. Chicago Park District*'s ruling by applying the content neutral doctrine to the state's ordinance some liberal legal scholars argued that this left the question of whether the state's actions were truly neutral or was this an act of discriminatory regulation to restrict speech based on the state's perception of the low societal

value of the message.[241] By stumbling upon Critical Legal Studies legal goal of equality through the use of the content neutral doctrine, rather than adopting a new doctrine that takes into account the Critical Legal understanding of the complexity of free speech cases, which cause the necessity of the Court to review the state's interest in each case from the perspective of furthering equality and democratic participation, Scalian-Originalism left the door open for the possibility of states to enact legislation that appears neutral in nature, but is in fact discriminatory towards unfavorable speech. The prospect of states restricting speech, while remaining within the boundaries of the content neutral doctrine emerges in the case *Hill v. Colorado*.

In 1993, the Colorado legislature enacted a statute making it unlawful for any person within one hundred feet of the entrance of a healthcare facility to approach within eight feet of another person without prior consent from the person being approached. The law made it illegal for a person to approach another individual with the intention of passing a leaflet or handbill, to display a sign, or engage in oral protest, education, or counseling. The state contended that the statute was in response to protest outside of health care facilities in which citizens seeking medical assistance, and employees of the facilities, were allegedly verbally and physically harassed. The state argued that it had an interest in preventing intrusive protesting because it harmed certain individuals, and it prevented and discouraged some patients from obtaining health care in a timely manner. Furthermore, the statute was content and viewpoint neutral and only sought to regulate speech on the grounds of the place and manner in which the speech was occurring. Leila Hill, along with other side-walk counselors, who previously offered information about alternatives to abortion to women entering abortion clinics, claimed that this statute

[241]Whorf, Robert H. "The Dangerous Intersection at "Prior Restraint" and "Time, Place, and Manner": A Comment on Thomas v. Chicago Park District." *Barry Law Review* 3, no. 1 (2002): 12.

violated their First Amendment right to free speech and press. The lower courts ruled in favor of the state and held that the statute imposed content neutral time, place, and manner restrictions, that it was narrowly tailored, and that it served a significant government interest. Seven years after the statute was enacted, in 2000, the case made it before the Supreme Court. Once again the majority opinion, delivered by Justice John Paul Stevens, concluded that the statue was constitutionally justifiable because it did not regulate speech, "rather, it is a regulation of the places where some speech may occur."[242] Furthermore, the majority argued that whether or not the statute was solely a regulation of the places where some speech may occur, the legislation was content-neutral, which means the state only had to prove a significant interest, and it did so by arguing that the statute protected the unwilling listeners interest of avoiding unwanted communications that have been repeatedly identified as harassing.[243]

Justice Scalia did not join the majority in this opinion. In his dissent, Justice Scalia argued that the statute was not content neutral because it was clearly targeting those who wished to council others in the alternatives to abortion. Scalia further argued that this ruling eroded the First Amendment. Previous First Amendment jurisprudence, which held that the government did not have an interest in protecting people from unwelcomed communication, warranted the Court to find Colorado's statute unconstitutional. Justice Scalia concluded that this ruling, which aimed to prevent speech that the state deemed offensive, directly opposed the First Amendment doctrine of a marketplace of ideas, which promotes the "uninhibited, robust and wide open

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[242]*Hill v. Colorado*, 530 U.S. 703 (2000)

[243]Id.

debate."[244] By ruling in favor of the state, the Court had replaced the democratic sovereignty rationale with the new and unheard of "right to be left alone" doctrine.[245]

Justice Scalia wrote a scathing rebuke of the majority's decision stating that the ruling in *Hill* was just another example of the liberal justices' attempt to pursue the fabricated constitutional protection of abortion rights. "There is apparently no end to the distortion of our First Amendment law that the Court is willing to endure in order to sustain this restriction upon the free speech of abortion opponents."[246] Scalia's argument that the state's legislation in the case *Hill v. Colorado* is not content neutral carries some validity. James B. Raskin and Clark L. LeBlanc concur with Scalia's assessment that the statute undeniably targets anti-abortion protesters.[247] They argue that the public forum doctrine is meant to protect groups of individuals from the unjust regulation of speech that the state deems offensive because "democracy depends on free speech, and free speech depends on the wide-open availability of the traditional public forum to the citizens for speech purposes."[248] By failing to look beyond the state's statute's appearance of content neutrality, as Scalia did, the majority opinion in this case created a dangerous precedent and provided a "blueprint" for state's intending to ban unfavorable speech by forbidding all speech in the places where the unfavorable speech is likely to occur.[249]

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[244]Id.

[245] Id.

[246] Id.

[247]Raskin, Jamin B., and Clark L. LeBlanc. "Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Forum and the Need for an Objective Speech Discrimination Test." *American University Law Review* 51 (2001): 194-98.

[248] Id. 184.

[249] Id. 212-20.

To the disdain of Justice Scalia, the Court ruled in favor of the state partially because it found the legislation content neutral, which allowed for the case to be reviewed under a lesser scrutiny, and partially because the state was able to successfully argue that the statute applied only to areas around health-care facilities. The unique personal nature of health-care facilities, the state argued, constitutes the state's interest to restrict speech in favor of protecting an unwilling listener from unfavorable speech.[250] By acknowledging the listeners "right to be left alone," which the theoretical framework of Scalian-Originalism rebukes, the majority defends, perhaps unintentionally, the Critical Legal discourse that the Court has a duty to protect the special interest of historically maltreated groups in the interest of facilitating equality.

Borrowing from feminist theories, Critical Legal Studies adopts the "truth" that the American legal system, like other societal institutions, is built on a hierarchal foundation formed by the patriarchy that unjustly favor "male concepts," in a pursuit to continue the subjugation of women to men's will.[251] Understanding the struggles of the women's right movement to challenge inequalities in a historically male-dominated society allows Critical Legal Studies to examine the illegitimate hierarchies created and sustained by the law and legal institutions.[252] The Critical Legal perspective acknowledges the limitations of theoretical constructs and laws created by men,[253] and how those constructs hinder women's pursuit of equality within American society.

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[250]*Hill v. Colorado*, 530 U.S. 703 (2000)

[251]Menkel-Meadow, Carrie. "Feminist Legal Theory, Critical Legal Studies, and Legal Education or the Fem-Crits Go To Law School." *Journal of Legal Education* 38 (1988): 61-85.

[252] Id. 62-66.

[253] Id. 71.

While feminist-critical theorists agree that law disproportionately favors men's agendas and continues to concentrate power in the hands of men, two schools of theory have emerged with distinctly different applicable models to achieve substantive equality.[254]First, is the "equal treatment" model, which espouses that women should be treated equally to men in areas of the law to rectify past recognitions of "differences" that have become legitimized unjust repercussions.[255] The second model is "substantive-equality," which urges the acceptance and recognition of differences in order to render the differences as inconsequential.[256] Critical Legal Theory tends to favor the latter model because it addresses the power and authority traditionally held by men to construct the law and its legal institutions in such a manner as to permit the dominance of men over women, while also acknowledging the value of "female" qualities as equal to the value of "male" qualities.[257]

From a Critical Legal perspective, the ruling in *Hill v. Colorado* is legitimate because it protects equally both men and women seeking medical care from unwelcomed speech, and simultaneously protects the hard fought for woman's right to reproductive choices. Conversely, Scalia's ruling in this case is illegitimate because it does not acknowledge the tremendous struggle women faced to get the Court to recognize the insurmountable sexist disadvantages that the law created and sustained when it continually upheld the doctrinal stance that "pregnant persons," could not seek relief from discriminatory practices under the

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[254] Id. 71-72.

[255] Id. 73-74.

[256] Id. 73-75.

[257] Id. 73-74.

Constitution's Equal Protection Clause because such relief would unjustly favor women since only they can biologically be pregnant.[258] By supporting the First Amendment right of anti-abortion protesters to engage and harass women entering abortion clinics, Scalia continues the inadvertent subjugation of women to men by reinforcing anachronistic laws that did not allow women autonomous authority over their own bodies, instead women were forced into complying with laws created by a patriarchal legal system.

When comparing the legitimacy of Scalia's rulings in *Thomas v. Chicago Park District* and *Hill v. Colorado* from a Critical Legal perspective an apparent dichotomy emerges. While both statutes were written in a content neutral manner, Scalia did not examine the context of the *Thomas* case beyond the prior restraint rationale, and in the *Hill* case relied exclusively on the case's context to negate the use of the prior restraint doctrine. From a Critical Legal perspective this dichotomy is both promising and troubling. It is promising because it shows Scalian-Originalism's recognition that freedom of speech cases do not occur in a neutral legal vacuum, but rather occur within a certain societal context. However, it is troubling because Scalian-Originalism does not recognize the importance of societal context in shaping the Court's decision in every case. Critical Legal Studies accepts the indeterminacy of law, and that its irregular nature makes it difficult to produce concrete, one-size-fits-all doctrines, which is why it is imperative that judges review the context of every freedom of speech case and determine the outcome best suited to further equality and democratic participation, even if that means the censorship of certain forms of speech based on their predictable societal harm.

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[258]Menkel-Meadow, Carrie. "Feminist Legal Theory, Critical Legal Studies, and Legal Education or the Fem-Crits Go To Law School." *Journal of Legal Education* 38 (1988): 71.

Moral speech is the final freedom of speech category in which Scalia applied the theory and methodology of Scalian-Originalism. In these three cases, the state sought to regulate speech based primarily on the immoral nature of the speech, and argued that the state had a compelling interest to abridge speech when it is so erroneous and immoral that it is likely to cause egregious societal harm.

Scalian-Originalism asserts that in certain cases the government does have a compelling interest to uphold morality and should be allowed to do so.[259] As previously stated, Critical Legal Theory does not dispute the law's authority to construct and bolster moral objectives, provided that the law is establishing a moral objective that furthers the goals of equality and democratic participation, or reinforces the moral will of the public based on their ability to define morality from a fully equitable and democratic participatory foundation. When these two prescribed objectives are applied to morally defined laws a sort of symbiotic effect occurs. When the law mirrors society's values the citizenry develops a desire to behave in socially acceptable and ethical way, and moves away from a society in which moral compliance is formed by the fear of punishment towards a society that is self-regulatory. The aspiration to behave morally from a self-regulating manner builds a greater level of legitimacy for the law through consent and cooperation, which increases legal order and bestows upon the legal system the effectiveness to create sustainable legislation that achieves greater polity equality.[260] From this understanding that law is being shaped by and shapes societal values, it is the contention of

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[259]*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)

[260]Tyler, Tom R., and John M. Darley. "Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities Into Account When Formulating Substantive Law." *Hofstra Law Review* 28 (2000): 707-11.

Critical Legal Studies that the Court has the duty to rule on moral issues in accordance with either society's moral objectives or an equitable moral objective. This Critical Legal perspective will be used to analyze the legitimacy of Scalia's rulings in the moral speech cases *Brown v. Entertainment Merchants Association*, *National Endowment for the Arts v. Finley*, and *Barnes v. Glenn Theatre Inc.*

The facts in the case *Brown v. Entertainment Merchants Association* were already provided in detail in the introduction of this thesis, and will not be repeated at great lengths again. Rather, the facts only pertinent to the analysis will be restated. The state of California attempted to enact a law that would impose restrictions and labeling regulations for violent video games that may be sold or rented to minors without parental supervision. Those who violated the law would be penalized with fines. The state argued that it had a compelling moral interest to protect minors from the possible harmful side effects of exposure to violent materials. The video game industry filed a lawsuit against the statute claiming that it violated their First Amendment right to freedom of speech. In a 7-2 decision, the Supreme Court ruled in favor of the video game industry and found the law to be unconstitutional.[261]

In the majority opinion written by Justice Scalia, the Court ruled that the statute was not narrowly tailored and that the state's argument was flawed. Scalia argued that video games deserve the same First Amendment protections afford to entertainment mediums of the past. "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's

[261]*Brown v. Entertainment Merchants Association*, 131 S.Ct. 3729 (2011)

interaction with the virtual world). That suffices to confer First Amendment protection."[262] Also, Scalia rationalized that the state's argument, that children should be protected from violent images and messages, was not compelling because it failed to recognize American society's "long standing tradition" of accepting minors consumption of violent entertainment, and that the state failed to provide compelling evidence to support their claim that there is a link between violent video games and their possible effects on children.[263]

Admittedly, there are fewer empirical studies on the effects of video game violence than on the effects of TV and film violence, but this is due to the fact that video game technology is relatively new.[264] Within this field's limited research, there is a lot of debate regarding the level of influence violent video games have on minors. Some researchers, such as Craig A. Anderson, have found that the effects of video game violence on minors is significantly harmful and can result in "higher levels of aggressive behavior, aggressive cognition, aggressive affect, and physiological arousal, and lower levels of prosocial behavior" in minors exposed to violent video games.[265] Other researchers have found that there is little-to-no empirical evidence that violent video games have an effect on aggression.[266] Though researchers may come to conflicting conclusions they agree that there is a need for "more comprehensive meta-analysis on

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[262] Id.

[263] *Brown v. Entertainment Merchants Association*, 131 S.Ct. 3729 (2011)

[264] Anderson, Craig A., Nobuko Ihori, Brian J. Bushman, Hannah R. Rothstein, Akiko Shibuya, Edward L. Swing, Akira Sakamoto, and Muniba Saleem. "Violent Video Game Effects on Aggression, Empathy, and Prosocial Behavior in Eastern and Western Countries: A Meta-Analytic Review." *Psychological Bulletin* 136, no. 2 (2010): 152.

[265] Id.

[266] Id.

media violence effects."[267] For Scalia the lack of definitive proof that violent video games have a negative effect on minor's behavior was enough to dismiss the entire body of research, and the state's argument that it had a morally compelling interest to curb minor's access to violent materials.[268]

Scalia quickly dismissed the state's moral argument stating that "filling the remaining modest gap in concerned-parents' control can hardly be a compelling state interest." [269] However, Scalia fails to articulate why even the possibility of negative effects, caused by violent video games on minors is not a compelling interest, but that the continuation of American society accepting the "long standing tradition" of minors' consuming violent entertainment without any shred of empirical evidence, one way or the other, of its effects on society, is morally superior to the state's argument. Certainly, most would agree that if there was even a remote possibility in preventing horrifically violent acts, such as the Columbine school shooting from being committed by minors, or against minors, the state would be morally just in restricting speech.[270] Furthermore, the state attempted to regulate speech in the least restrictive way possible by allowing minors to obtain violent video games as long as a parent was present; thus, individuals who disagreed with the state's moral objection to minor's access to violent video games were not prevented from allowing their children access to the material. From a Critical

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[267] Id. 153.

[268] *Brown v. Entertainment Merchants Association*, 131 S.Ct. 3729 (2011)

[269] *Brown v. Entertainment Merchants Association*, 131 S.Ct. 3729 (2011)

[270] In 2011, prior to the Court releasing its decision, a national phone survey conducted by Fairleigh Dickinson University's Public Mind found that a majority of American voters (57%) agreed that the states should have the "right to regulate the sale of video games [that are violent] in order to protect minors; the same way states regulate tobacco, alcohol and pornography."

Legal perspective Scalian-Originalism's dismissal of the state's argument, which mirrored modern social values regarding violence and minors, while supporting his ruling by superimposing eighteenth-century societal values to modern phenomena illegitimatizes the decision in *Brown v. Entertainment Merchants Association* because the Court declined to adhere to the moral objective shaped by the public. Scalian-Originalism's use of archaic societal values to shape modern law also applies to Scalia's ruling in *Barnes v. Glen Theatre Inc.*

Until issues of morality are raised, Scalian-Originalism is a staunch advocate of the prior restraint doctrine and requires that state's legislation must unequivocally be content neutral in nature in order to receive First Amendment protections. In every other non-political speech case Justice Scalia ruled against the state's morally founded argument if the state's statute restricted or appeared to restrict speech based on its unfavorable content. While it may have appeared the state could not produce a compelling interest strong enough to persuade Justice Scalia to rule in favor of restricting speech, Scalia's concurrence in *Barnes v. Glen Theatre Inc.* proves that it is possible for Scalian-Originalism to find justification in the restriction of speech that lacks great societal value.

In 1991, the Supreme Court ruled in a landmark decision that allowed for states to ban speech, in the form of expressive conduct, if it furthered the government's substantial interest to protect morality and social order. The case was brought before the Court by two adult entertainment establishments, the Glen Theatre and the Kitty Kat Lounge, who argued that Indiana's statute preventing "indecent behavior" violated the First Amendment's freedom of expression guarantee. Indiana's statute regulating public nudity did not allow full nudity and

required that dancers wear "pasties" and a "G-string."[271]

Justice Scalia wrote a concurring opinion and argued that the government was allowed to uphold "morality," within the public. He also argued that the law did not prevent expression, but "conduct," which means this form of speech does not have First Amendment guarantees. Finally, Scalia argued that nudity had always been considered indecent or obscene, and Indiana's law prohibiting public nudity was just part of the country's "long tradition," which had never run afoul of the First Amendment.[272]

Scalia's ruling does not offer an explanation as to why the state has a morally compelling interest to ban nudity, other than the fact that it has a long history of being immoral. Justice Scalia does not explain what social harm the state is attempting to negate through the regulation on public nudity other than it is indecent and obscene. From a Critical Legal perspective, this ruling is overly paternal in nature because it prevents consenting adults from participating in certain forms of "conduct," because that conduct is historically believed to be immoral. Arguably, western cultures' contemporary dominating consciousness that nudity is obscene and immoral is based on the Judeo-Christian belief that after Adam and Eve's fall from Eden their sin opened their eyes to the shame of being naked.[273] Judeo-Christian teachings suggests that this shame was caused by Adam and Eve's sensuality and sexual desires that were brought about by nakedness, and as Rob Cover argues that "the subjugation of reason to sexual passion is the cause, permitting the blame be placed not only on woman but on both naked and

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[271]*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)

[272] Id.

[273]Cover, Rob. "The Naked Subject: Nudity, Context and Sexualization in Contemporary Culture." *Body and Society* 9, no. 3 (2003): 55.

sexual creatures."[274]

Nicola Beisel argues that the shamefulness of nudity and the subsequent cultural acceptance of its obscene and indecent nature allows for cultural and political power elites within communities to use controversies about obscenity "to bolster their social or political positions, implying that struggles over obscenity in art are covert struggles over class and status."[275] The hierarchical structure of society reinforces the superiority of those in power over the powerless and advances widely shared beliefs that the upper class is refined, while the lower class is comprised of "unrefined hordes."[276] Through the reinforcement of hierarchical cultural schemas, which defined the relationship between classes, ethnic groups, and genders, the upper class was often entrusted with the task of differentiating between art and obscenity during the early nineteenth century.[277] During this period the objective of obscenity laws was to protect public morality, especially those in the community whose class prevented them from forming the ability to resist the lewd effects of prohibited pictures, photographs, and publications.[278] The perceived argument was that the government had a compelling interest to protect uncultured and inexperienced people from possibly negative effects of obscene art.[279] During the early nineteenth century, a common defense of obscenity laws, and the consequential censorship of

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[274] Id.

[275]Beisel, Nicola. "Morals Versus Art: Censorship, The Politics of Interpretation, and the Victorian Nude." *American Sociological Review* 58, no. 2 (1993): 146.

[276] Id. 148-53.

[277]Beisel, Nicola. "Morals Versus Art: Censorship, The Politics of Interpretation, and the Victorian Nude." *American Sociological Review* 58, no. 2 (1993): 150-54.

[278] Id. 156.

[279] Id. 157.

female nudity in art, was based on gender and the family.[280] Some argued that young men may not be able to control their sexual feelings, and their uncontrolled arousal could threaten "respectable" women.[281] This argument is interesting from a Critical Legal perspective because it shows that obscenity laws were created from an elitist agenda, which continued the subjugation of women in the society by the censorship of primarily only the naked female body, and the subjugation of women to man's will by censoring nudity because the unrefined members of the society would not be able to control their sexual desires produced by viewing nudity.

By understanding the conception of obscenity laws as an endeavor by society's elites to protect both men and women from the harmful and immoral effects of the nude female body postmodern-feminism developed the theory that the female identity is constructed as the "objectified other."[282] Jeanie Forte argues that "woman constitutes the position of object, a position of other in relation to a socially-dominated male subject."[283] The culturally constructed category of "woman" is defined as it relates exclusively to "man," which results in the objectification of women and their subjugated societal representation.[284] Women are absent from the dominant culture and representation is only rendered to women through their personification of male desire.[285] Simply put, postmodern feminism argues that the patriarchal society model creates an oppressive role for women in which they are expected to service men's needs and

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[280] Id. 156.

[281] Id.

[282]Forte, Jeanie. "Women's Performance Art: Feminism and Postmodernism." *Theatre Journal* 40, no. 2 (1988): 218.

[283] Id..

[284]Forte, Jeanie. "Women's Performance Art: Feminism and Postmodernism." *Theatre Journal* 40, no. 2 (1988): 218.

[285] Id.

submit to male dominance. Women are constructed through their sexuality as it relates to men, and women must work to reclaim the female body from the "phallocentric" system of representation.[286]

Women began using performance art during the women's rights movement of the 1960s and 1970s as a strategic means of expression to deconstruct the patriarchal culture of representation.[287] Women also began to use performance art in overtly political ways. They used it to address their role as the "objectified other," and to encourage the female exploration of self. Performance artists began performing nude to highlight the necessity of women to define their own bodies and sexuality in the absence of male desire.[288] Women recognized the conventional uses and abuses of the female body and began "writing the body," which identified the language of women's sexuality and recognized the strength in "writing" to create a new arena of possibilities relating to women's subjectivity.[289] By performing nude, female performance artists sought to peel away the cultural constructions created by men that made the nude female figure taboo and immoral. They attempted to address the cultural suppression of female sexuality and develop a means of expression for women that was not conceived through the patriarchal system of representation.

Scalia's argument that the state has a compelling interest to uphold morality by banning nudity in *Barnes v. Glen Theatre* is illegitimate, from a Critical Legal perspective,

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[286] Id. 226.

[287] Id. 17-35.

[288] Id. 225-32.

[289] Id. 226.

because it failed to recognize how the continued perpetuation of the patriarchal construct that nudity, is obscene and indecent, further excludes historically powerless groups, particularly women, from receiving equitable societal status. By supporting the state's position that nudity is immoral and harmful to the society, even with the absence of evidence, Scalian-Originalism continued the unjust tradition of subjugating women by supporting the objectified perception that women cannot define their sexuality without relating it to man's desires. Furthermore, this ruling is illegitimate because it overwhelmingly supports the elitist paternal perspective that the upper class must protect the lower class from their uncultured lewd natures, and that women's virtue would be compromised without their regulatory oversight. Scalian-Originalism's willingness to restrict speech of marginalized members of the community that the state finds unfavorable, but labels obscene or indecent is also present in the case *National Endowment for the Arts v. Finley.*

The National Foundation on the Arts and Humanities Act gives the discretionary authority to the National Endowment of the Arts to award financial grants to the arts. The original guidelines for determining monetary awards stated that awards would be given to works with "artistic and cultural significance" with the emphasis on "creativity and cultural diversity, professional excellence, and encouragement of public education and appreciation of the arts."[290]In 1990, Congress amended this criteria and required that the National Endowment of the Arts also consider "artistic excellence, artistic merit, and taking into consideration general standards of decency and respect for the diverse beliefs and values of the American public."[291] Artist Karen Finley was rejected for funding along with three other performance artists and

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[290]*National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)

[291] Id.

challenged the amendment as unconstitutional because it was discriminatory toward unfavorable speech. The lower courts ruled in favor of Finley and the Supreme Court granted certiorari. Justice Scalia joined the majority of the Court, which found that the amendment did not regulate speech and that Congress had the authority to set spending priorities, which may indirectly affect certain forms of expression. The funding of one activity of public interest to the exclusion of another did not constitute viewpoint discrimination. Justice Scalia wrote a concurrence in which he argued that the government does not have to award money according to the First Amendment. Furthermore, refusing public funding does not prevent or abridge speech, and the law did not violate the First Amendment because it meant what it said and it was not vague because "those who wished to create indecent and disrespectful art are as unconstrained now as they were before the attachment of the statute."[292]

The political nature of all forms of art[293] and art's ability to further democratic participation in the political and cultural discourses[294] were not addressed in Scalia's ruling in *Finley*. Justice Scalia's ruling does not appear to recognize any societal value of the arts or the government's interest in the patronage of the arts as a way to protect some citizens' ability to articulate a political identity.[295] Scalia found that the defunding of artists' work does not constitute the censorship of speech because the statute is clearly written and "means what it says." This argument does not account for the likely result of viewpoint discrimination by the

[292]*National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998)

[293]Patten, Neil C. "The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law in National Endowment for the Arts v. Finley." *Houston Law Review* 37 (2000): 562.

[294]Stychin, Carl F. "Identities, Sexualities, and the Postmodern Subject: An Analysis of Artistic Funding By the National Endowment for the Arts." *Cardozo Arts and Entertainment Law Journal* 12 (1994): 132.

[295] Id. 79.

government,[296] or the possibility of artist who are seeking funding to alter a substantial portion of their work to reflect messages they believe the National Endowment of the Arts board supports since the artist's entire body of work is reviewed prior to the board awarding grant money.[297] Scalia's failure to see the context of the statute, which clearly presents the government's attempt to restrict the content of speech,[298] beyond the language of the statute prevents Justice Scalia from considering the statute's ability to hinder equality and political participation; therefore, according to Critical Legal Studies this ruling is illegitimate.

In the three non-political moral speech cases *Brown v. Entertainment Merchant Association, National Endowment for the Arts v. Finley*, and *Barnes v. Glen Theatre Inc.*, Scalia's rulings are illegitimate from a Critical Legal perspective. Justice Scalia's application and enforcement of eighteenth-century morals regarding obscenity and violence prevented him from furthering modern social values, which include the only legitimate objectives that constitute a morally justifiable compelling interest for the government. In all three cases, Scalian-Originalism failed to further equitable ideals and hindered the citizenry's ability to participate in the democratic process.

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[296]Patten, Neil C. "The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law in National Endowment for the Arts v. Finley." *Houston Law Review* 37 (2000): 590.

[297]Patten, Neil C. "The Politics of Art and the Irony of Politics: How the Supreme Court, Congress, the NEA, and Karen Finley Misunderstand Art and Law in National Endowment for the Arts v. Finley." *Houston Law Review* 37 (2000): 598.

[298] Id. 568.

Chapter V: Conclusion

Out of the seventeen cases in which Justice Scalia applied an Originalist argument to support his ruling, this analysis found five cases contained legitimate rulings from a Critical Legal perspective: *Thomas v. Chicago Park District*, *44 Liquormart v. Rhode Island*, Nevada *Commission on Ethics v. Carrigan*, *Doe # 1 v. Reed*, and *Republican Party of Minnesota v. White*. The remaining twelve cases examined found Scalian-Originalism's rulings illegitimate. However, in every case, Scalia ruled in favor of the status quo by relying on phrases like it is a "long standing tradition," "venerable and accepted tradition," "no historical basis," etc., to support his rulings in favor of the status quo. It may appear contradictory that Scalia can rule in favor of maintaining the status quo and still be found legitimate by Critical Legal standards. This can occur because of the indeterminacy of law. The particular facts of a case may support the status quo position but still further equality and democratic participation. This is why it is imperative that the Court examine the context of every case, which would contradict the formalist legal argument regarding the rule of law. By recognizing that the nature of law prevents judicial neutrality, it is possible to examine a judge's rulings as they apply to modern societal values, and hold the judge accountable for the consequences of their rulings. Essentially, this prevents judges from hiding behind the "the law made me do it" defense in cases that produce or uphold inequality within American society.

After analyzing Scalian-Originalism's interpretation of the First Amendment from a Critical Legal perspective, consistency in Scalia's rulings begins to emerge. In every case Scalia ruled in favor of the party whose objective best aligned with the elitist status quo and either maintained or strengthen the elite's power. In Scalian-Originalism's theoretical interpretation of

the First Amendment freedom of speech, the hierarchal status quo routinely receives First Amendment protections.

In cases where one party had a vested economic interest he ruled in their favor.[299] In matters of political speech by public employees, Scalian-Originalism supported the elite's right to speech according to the market place of ideas rationale,[300] but supported stringent punishments against the layperson seeking the same right.[301] In fact, the only time Scalian-Originalism accepted the restriction of political speech for an elite member of the government was when supporting that speech would blatantly, or with a high possibility, challenge the legitimacy of government.[302] For the layperson, Justice Scalia systematically supported the state's right to punish unfavorable speech[303] while championing the state's right to reward favorable speech.[304]Scalian-Originalism's interpretation of the First Amendment continued the societal subjugation of historically disenfranchised groups[305] by delegitimizing moral claims made by the state as not compelling enough to warrant restrictions and regulations of speech. Moral claims made by the state were only protected if they were supported by eighteenth century societal

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[299] See *Brown v. Entertainment Merchants Association, 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), R*utan v. Republican Party of Illinois*, 497 U.S. 62 (1990), *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

[300] R*utan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

[301]*Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)

[302] See *Doe # 1 v. Reed*, 130 S. Ct. 2811 (2010) and *Nevada Commission on Ethics v. Carrigan* 131 S.Ct. 2343 (2011)

[303] See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)and *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996)

[304] See *Thomas v. Chicago Park District* 534 U.S. 316 (2002) and R*utan v. Republican Party of Illinois*, 497 U.S. 62 (1990)

[305] See *Hill v. Colorado*, 530 U.S. 703 (2000), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991),*National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

values;[306] otherwise, they were not even considered.[307] Interestingly, Scalian-Originalism rebuked the argument that the state had a morally compelling interest to protect historically oppressed groups from the harms of harassing and unwanted speech,[308] but agreed that the state had a compelling interest to protect its citizenry from willfully participating in immorally expressive conduct.[309] Justice Scalia continually ruled in favor of the state when the writing in the challenged statute was in a content neutral manner. He did so without considering the opposing argument that the state's legislation was actually intended to mask content discrimination.[310] Nevertheless, Scalia recognized the importance of evaluating a statute's context when the subject matter in question mirrored the societal values of the founding generation and it appeared possible that discrimination occurred based on content.[311] Scalian-Originalism's often contradictory rulings according to a formalist perspective appear quite predictable when examined through a Critical Legal lens. Scalian-Originalism will rule in a manner that best maintains the power in the hands of the elite; regardless of the state's compelling interest, prior precedent, or the rule of law. These findings are especially useful after the passing of Justice Scalia, who firmly placed Scalian-Originalism in the arena of American

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[306] Barnes

[307] See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), *Brown v. Entertainment Merchants Association*, 131 S.Ct. 3729 (2011), *Hill v. Colorado*, 530 U.S. 703 (2000), *Thomas v. Chicago Park District* 534 U.S. 316 (2002), and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

[308] See *Hill v. Colorado*, 530 U.S. 703 (2000) *and R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992)

[309] *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991)

[310] See *Thomas v. Chicago Park District* 534 U.S. 316 (2002), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995)

[311] *Hill v. Colorado*, 530 U.S. 703 (2000)

jurisprudence, and the future of Originalism under the helm of Judge Neil M. Gorsuch.

In Justice Antonin Scalia's *The New York Times* obituary Adam Liptak wrote about the influence Scalian-Originalism had on the Court and the role that it may play in future cases. Liptak wrote about the "effectiveness" of Scalian-Originalism in shaping the Court's opinion on cases involving many subjects including the application of the Second Amendment as an individual right and the subsequent changes to criminal law due to Scalia's interpretation of the Sixth Amendment.[312] In *The Washington Post* Robert Barnes wrote about Scalia's political leanings in his rulings and how he, "quickly became the kind of champion to the conservative legal world that his benefactor (President Ronald Regan) was in the political realm."[313] Others were less favorable when reflecting on Justice Scalia's time on the Court. In *The New Yorker*, Jeffery Tobin wrote, "Atonin Scalia, who died this month, after nearly three decades on the Supreme Court, devoted his professional life to making the United States a less fair, less tolerant, and less admirable democracy."[314] Though authors of Scalia's obituaries varied in tone and the manner in which they addressed his Originalist approach all were in concurrence that he left behind a profound impact on the Court and the future of Constitutional interpretation.

The legacy of Scalia's constitutional interpretation and its alignment with modern conservative political agendas explains why Senate Majority Leader Mitch McConnell announced within hours of Scalia's death that the Senate would refuse to vote on any nominee

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[312]Liptak, Adam. (2016, February 13). Antonin Scalia, Justice on the Supreme Court, Dies at 79. *The New York Times*. Retrieved February 25, 2017, from https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0.

[313]Barnes, Robert. (2016, February 13). Supreme Court Justice Antonin Scalia dies at 79. *The Washington Post*. Retrieved February 25, 2017, from https://www.washingtonpost.com/politics/supreme-court-justice-antonin-scalia-dies-at-79/2016/02/13/effe8184-a62f-11e3-a5fa-55f0c77bf39c_story.html?utm_term=.f9a256e85568.

[314]Toobin, Jeffery .(2016, February 29). Looking Back. *The New Yorker*. http://www.newyorker.com/magazine/2016/02/29/antonin-scalia-looking-backward.

presented by President Barack Obama. Instead they would wait for the results of the 2016 presidential election. On November 9, 2016, well-known businessman and reality television host Donald J. Trump won the presidency for the Republican Party. Within his first month as the President of the United States Trump nominated Judge Neil M. Gorsuch to replace Scalia in the Supreme Court. In April 2017 Gorsuch was confirmed and sworn in as a Supreme Court Justice.

Gorsuch admitted his admiration of Justice Scalia and even claimed to have cried when he heard the news of Scalia's passing. Judge Gorsuch, like his predecessor, is a "demonstrated Originalist" whose method of constitutional interpretation mirrors the political principles of conservative political ideologies. [315] In a 2016 case regarding a petitioner's Fourth Amendment excessive-force claim, after the petitioner was shot eight times by the police, Gorsuch ruled in favor of the state finding that petitioner was never found to be innocent, but was released from persecution based on his right to receive a speedy trial, which the petitioner was not granted. He cited that it is a judge's duty to interpret the Constitution as it was written, "And that document isn't some inkblot on which litigants may project their hopes and dreams for a new and perfected tort law, but a carefully drafted text judges are charged with applying according to its original public meaning."[316] In the case *United States v. Nichols* regarding the federal statute known as the Sex Offender Registration and Notification Act, Gorsuch wrote a dissent objecting to the statute's application to those found guilty of sex crimes prior to the enactment of the act. He used an Originalist argument and stated that "the framers of the

[315]Blake, Aaron. (2017, February 1). Neil Gorsuch, Antonin Scalia and originalism, explained. *The Washington Post*. Retrieved February 26, 2017, from https://www.washingtonpost.com/news/the-fix/wp/2017/02/01/neil-gorsuch-antonin-scalia-and-originalism-explained/?utm_term=.209a5116caa6.

[316]*Cordova v. City of Albuquerque*, 816 F. 3d 645-2016.

Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people's liberty."[317] Judge Gorsuch's application of Originalism to the interpretation of the Constitution appears to align with Scalia's, and like Scalia he has shown a steadfast dedication to Original-Meaning Originalism. However, since Originalist judges utilize its theory and methodology in the different manners, it will be interesting to see how Judge Gorsuch will continue the legacy of Scalian-Originalism; or if he will form his own brand of Originalism. The comparative research of Originalism that would follow after Gorsuch takes his place on the Court will certainly be forthcoming, and will add to the debate regarding Originalism's legitimacy as a constitutional interpretive method and theory.

This thesis has examined the legitimacy of Scalian-Originalism's interpretation of the First Amendment's freedom of speech clause from a Critical Legal perspective. Traditional liberal legal scholars may find the Critical Legal Studies criteria of legal legitimacy, to further equality and democratic participation based on the accepted indeterminate nature of the law, as an erosion of First Amendment jurisprudence. However, formalist should not immediately dismiss the arguments made by Critical Legal Studies simply because its theoretical framework disputes the possibility of the Court to simplify and solidify First Amendment's freedom of speech doctrines and rationales. By accepting the Court's duty to rule on First Amendment issues on a case-by-case basis, according to the context surrounding each case, and to decide each case from the position of a judicial activist seeking to find the result that would best pursue social

[317] *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015).

equality, Critical Legal Studies is able to offer an alternative perspective to the formalist debate regarding the legitimacy of Scalian-Originalism.

While this analysis found Scalian-Originalism's interpretation of the First Amendment's freedom of speech clause primarily illegitimate, with roughly less than a third of the cases being legitimate from a Critical Legal perspective, it does not conclude that Scalian-Originalism as a method and theory for First Amendment interpretation completely illegitimate or without merit. This manuscript, also, did not examine Originalism as a theory and methodology beyond Scalian-Originalism. The examination of other forms of Originalism, such as Justice Thomas' Originalism, Ronald Dworkin's "moral reading" Originalism, and Jack M. Balikin's "living" Originalism are left for future research. This analysis suggests both the legitimacy and illegitimacy of Scalian-Originalism. It also argues that a consistency and predictability in Scalian-Originalism's interpretation of the First Amendment can be found based on Scalia's constant maintenance and strengthening of the elitist status quo. Hopefully, the research in this manuscript will further the debate of Scalian-Originalism's legitimacy by extending it beyond the formal liberal legal perspective. By holding judges, and their theory and methodologies accountable for the consequences of their rulings, it is possible for American society to create a constitutional legal system that moves the society as a whole toward equality and universal democratic participation.

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