Originalism and Our Media: A Supreme Court Case Analysis

By

Marie Louise Grace

A Senior Thesis

Submitted to the Department of Communications and Media

University of Michigan

In partial fulfillment of the requirement for the Degree of Bachelor of Arts (Honors)

April 2021

Thesis Advisor: Professor Faith Sparr

Honors Advisor: Professor Jan Van Den Bulck & Benjamin Pearson

Table of Contents

Acknowledgements

To Professor Sparr –Thank you so much for all your guidance, knowledge and patience. This project was inspired by your class, and I am so grateful for your mentorship. Thanks for having my back!

To Professor Van Den Bulck and Ben –Your calm and humor created a wonderful community for each of our projects to thrive, thank you. We made the most of the virtual classroom!

To my friends and family – Your support and bright ideas will always be appreciated. Thank you.

Abstract

This project aims to investigate the application of the Originalist theory of Constitutional interpretation on Supreme Court cases involving the First Amendment as it relates to the press and media; and if the Originalist theory upholds the responsibilities of the press and media. The Social Responsibility Model is the main media responsibility model used in this analysis. Beginning with Near v. Minnesota, a 1931 case, and ending with Packingham v. North Carolina from 2017, media cases were analyzed through the lens of Inclusive Originalism. 30 cases were considered, 18 were read and 11 were included in the analysis. To discern whether the Originalist theory was used in these case decisions, a 4-pronged metric was applied.

Introduction

The Constitution, our nation's binding contract, does not come with a play book or an instruction sheet; it's standards of interpretation do not speak for itself. So how do American leaders know how to play by the rules? How can this document continue to remain relevant in our modern, media driven age? The Framers of the Constitution carved out a role for the courts in Article III, and strategically made the role malleable so it would stand the test of time. Article III establishes the Supreme Court as an entity separate from the President and Congress to diminish potential political influence, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." ("Constitution of the United States," Art. III, Sec. 1.) The Justices' independent power is furthered by the precedent set in the 1803 *Marbury v. Madison* decision delivered by Chief Justice Marshall, stating, "it is emphatically the duty of the Judicial Department to say what the law is," (Supreme Court of the US 1803.) The establishment of judicial review empowers the courts to check Congress and strike down unconstitutional acts. Given this immense power over Constitutional interpretation, the theories used to guide judges are critically important.

There are various theories of Constitutional interpretation, ranging from a strict adherence to the document's text, to a consideration of modern societal needs. A highly contested and surprisingly dynamic theory of constitutional interpretation, Originalism, has the potential to impact modern American life, specifically our media and technology landscape. Originalism's main focus is to strictly prioritize the original meaning of the Constitution in its original context, hence its apt name. Applying the principles of an 18th century document in a 21st century context presents some challenges for judges and

justices. James Madison and Thomas Jefferson could not have possibly fathomed media's evolution into Facebook or violent video games when they wrote the Constitution, but yet their principles still guide our modern legal relationship with this type of media.

This thesis sets out to investigate the application of the Originalist theory of Constitutional interpretation on Supreme Court cases involving the press and media; and if this theory protects and serves modern day responsibilities of press and media. The Social Responsibility Model was chosen as a press responsibility touch stone because the model is a reflection of the desires of the Constitution. The model maintains that the freedom of the press is given by the people and for the people, not the government. The importance and power of the press was recognized by the Framers of the Constitution, and this eminence is vigorously protected by the First Amendment. Through this lens of Originalism and the Social Responsibility Model, 30 Supreme Court cases were read in search of their application. From those, 18 were chosen for further analysis with a 4-pronged metric informed by the sources The Language of the Law by John O. McGinnis and Michael B. Rappaport, Justice Scalia's Originalism in Practice by Michael Ramsey, and Is Originalism Our Law by William Baude. This metric yielded the 11 cases representing a strong display of the Originalist theory presented in this paper.

Literature Review

Originalism Defined

Originalism as a theory cannot be defined by one, all-encompassing characterization; there are many different iterations of this ascendant theory. The late Supreme Court Justice Antonin Scalia, a strident defender of the theory, serves as a key primary source for broadly defining Originalism. In his speeches "Judicial Adherence to the Text of our Basic Law: A Theory of Constitutional Interpretation" and "Constitutional Interpretation The Old Fashioned Way," Scalia asserts that Originalists should focus only on the direct language from the Constitution, and that language only. He makes it clear that an Originalist judge should not concern themselves with the supposed intent of the framers or with legislative history. The purpose of this strict focus solely on the document is a preventative measure; the theory of Originalism arguably prevents judges from making decisions based on how they feel, "the text and its original meaning are the only objective standards to which all judges can be held." (Scalia 2012.) This point is furthered by his allusion to reading literature, "when we read Shakespeare, we use a glossary because we want to know what it meant when it was written. We don't give those words their current meaning. So also with a statute – our statutes don't morph, they don't change meaning from age to age to comport with whatever the zeitgeist thinks appropriate." (Scalia 2012.)

This is in contrast with those that believe that the Constitution is a 'living' document. Scalia warns against this notion of a living and evolving document, and instead asserts that the Constitution should be viewed as an 'enduring' document. The purpose of the court is to uphold the laws of our land, not to reflect the evolving standards of society. Scalia, perhaps flippantly, put this into perspective, "Why would

you think these nine unelected lawyers living in a marble palace have their thumb on the pulse of the American people so that they know what the evolving standards of decency are? I don't know what they are. I'm afraid to ask," (Scalia 2012.)

Scalia's main support of Originalism, that it functions as a constraint on judges, is highly contested like the theory itself. Other scholars emphasize this as a weak point of the theory and think it should be viewed from a different vantage point. In Originalism as a Constraint on Judges, William Baude argues that the draw to Originalism should not be because of its ability to curtail, but rather its ability to serve as "an ultimate truth maker." Baude argues that the idea of constraint is too ambiguous, and that it only works for those that "seek to be bound," (Baude, 2017.) Scalia himself admits that Originalism is not a perfect method. He states, "If the law is to make any attempt at consistency and predictability, surely there must be general agreement not only that the judges reject one exegetical approach (originalism), but that they adopt another. And it is hard to discern any emerging consensus among the nonoriginalists as to what this might be." (Baude, 2017.) Though there is some disagreement on certain aspects of the theory, the heart of Originalism that remains consistent is a desire to harness the truth behind the words of the Constitution and apply them appropriately.

Given that Originalism relies so heavily on the text, one must understand the language as practiced by those that wrote the Constitution. John O. McGinnis and Michael B Rappaport, two leading scholars on the theory of Originalism, enumerate the 'language of the law' in the source The Constitution and the Language of the Law, and highlight how it is significantly different from everyday language. McGinnis and Rappaport argue that the interpretation of English documents under the 'language of the law' produces a different meaning than when using standard English. Originalism

hinges on an accurate read of the Constitution, so clear comprehension of the implemented language is crucial. This argument for the existence of the language of the law is a direct support for the validity of Originalism. McGinnis and Rappaport state, "the meaning of the Constitution was fixed at the time of its enactment. And that meaning was fixed by the Constitution's language. Thus, the language in which the Constitution was written can make a fundamental difference to its interpretation." (McGinnis and Rappaport 1325.) They argue that viewing the Constitution from the lens of 'ordinary' English is the root of interpretation disputes. However, when viewed under the language of the law, the document is technical, definitive, and unchanging. McGinnis and Rappaport's working knowledge of the language of the law validates the use of Originalism as Scalia broadly defines it and has informed the metric applied to the Supreme Court cases.

To reconcile the flaws presented by Scalia's Originalism, as pointed out by Baude, and coupled with the framework of the language of the law, the branch of Originalism highlighted in this research project is "Inclusive Originalism." The source Is Originalism Our Law, also by William Baude, presents Originalism as a more wide-reaching theory that can be reconciled with other interpretive methods. Baude contends that the current legal practice of the highest court can indeed be constituted as Originalism, despite other theorists' notions that the Supreme Court does not abide by Originalist doctrine. The practice of Inclusive Originalism presented in this study "allows for precedent and evolving interpretations only to the extent that the original meaning itself permits them." (Baude, 2015.) The Framers of the Constitution intentionally implemented a degree of flexibility into the document, allowing judges to utilize other devices to reconcile the intentional vagueness. In this way, an originalist interpretation of the

Constitution incorporates the use of precedent. This allowance presents a paradox. In Scalia's understanding of the theory, the interpretive methods should exclusively utilize the direct words of the document, but Inclusive Originalism maintains that the structure of the document permits the use of precedent and other methods in cases of ambiguity. Baude reconciles the paradox by explaining, "the regular use of precedent by the Supreme Court in constitutional cases does not pose a threat to constitutional textualism or originalism, because precedent's pedigree is itself consistent with originalism." (Baude 2375.) While Inclusive Originalism is more flexible than Scalia's, there is still a hierarchy to the theory, requiring "all other modalities to trace their pedigree to the original meaning." (Baude 2363.) This provides a broader scope for originalism to thrive in the court, while still adhering to the original meaning of the Constitution as written by the Framers.

Using Inclusive Originalism to inform the metric for this research allowed for a broader application of the Originalist theory to media law cases. By using the language of the law to extract the meaning, Inclusive Originalism is seen in a number of cases.

Media at the Supreme Court

The media's preeminent power over American society drives many academic inquiries, but the source of this power receives less attention. Elizabeth Blank Hindman, in her work *Rights and Responsibilities: The Supreme Court and the Media,* provides a novel look at "the intersection of legal and ethical theories in their efforts to understand media responsibility," (Hindman 13.) To examine this intersection, Hindman initially defines the core functions of the media by citing *Defining Press Responsibility: A Functional Approach* by Louis W. Hodges. According to Hodges, the media is categorized into four different factions: political, educational, mirroring, and bulletin

board. These categories are the core of the legal discourse of media responsibility, and span across print and digital media, specifically with regards to the press. The political role encompasses the 'watchdog' function of the press, ensuring that the people remained informed on a daily basis. According to Hindman, this is the main reason for Constitutional protection of the media. The educational function is crucial for the practices of modern social media, as it represents the marketplace of ideas. The courts strive to preserve a free and open media space where the First Amendment can thrive. The mirroring and bulletin board functions are also important in the digital media world, where human interest stories and basic information alike are available for citizens to learn practical details and create a sense of community. (Hindman 16.)

From a Communication theory lens, these four functions of the media are underpinned by the Social Responsibility Model. This very American model emphasizes that media freedom is rooted in obligation to the people they serve, and that the public will dictate and regulate the media. (Hindman 28.) In an idealized sense of the freedom of press, the media would be self-regulating, but history has shown the shortcomings of this notion. In The Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility, and Soviet Communist Concepts of What the Press Should Be and Do by Fred Siebert, Theodore Peterson, and Wilbur Schramm, The Social Responsibility Model maintains that "Freedom carries concomitant obligations; and the press, which enjoys a privileged position under our government, is obliged to be responsible to society for carrying out certain essential functions of mass communication in contemporary society. […] To the extent that the press does not assume its responsibilities, some other agency must see that the essential functions of mass communications are carried out." (Peterson 74.) So in order to maintain their freedom,

the media and the press must remain truthful and honest to the four functions, otherwise the government would intervene.

This notion of freedom of the press under the Social Responsibility Model is constitutionally backed by the First Amendment. The First Amendment, the touchstone of media law, maintains that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (US Constitution.) According to Originalist Reflections of Constitutional Freedom of Speech by Christopher Wolfe, the Originalist interpretation of the First Amendment is a strong example of Inclusive Originalism, in that "the force of precedent is so strong that originalists have to accept the authority of decisions expanding free speech significantly – extending beyond 'no prior restraint' to encompass most subsequent punishment as well." (Wolfe 540.) The use of precedent is crucial because if we were to take the Amendment verbatim, as Justice Hugo Black did, to mean that 'no law abridging' that would mean that right to speak is absolute. This would allow for libel and seditious speech, as well as obscene speech. (Wolfe, 538.) Wolfe's understanding of Originalism as applied to the First Amendment supports the use of Inclusive Originalism in the metric below.

Methods/Metric

In order to identify Originalist theory in a Supreme Court decision, a metric must be developed. The *Language of the Law* serves as a foundation for this metric, and *Justice Scalia's Originalism in Practice* by Michael Ramsey laid the major framework for an identifying guide. The core value of Inclusive Originalism, that the use of precedent is acceptable so long as it is reconciled with the original meaning, is woven into the metric.

1. *Direct Quotation*. Justices often reference the direct language of the Constitution. This is the heart of Originalism.
2. *Adopting constitutional structure and background assumptions into the originalist methodology*. In other words, if there is verbiage not directly in the text, but would be necessary to preserve the design of the Constitution. There is an extratextual right to protect a textual right when the text is ambiguous or has no direct bearing on the present case. This is consistent with the hierarchical concept within Inclusive Originalism; allowing for precedent so long as the it can "trace its pedigree to the original meaning" (Baude 2363.)
3. *Post ratification history*. The influence of the First Congress and First Executive Administration can also illuminate ambiguous text. Though there remains a distinction between the original meaning and the original expected application, the public understanding can be important for originalist constitutional interpretation. For example, "Where the meaning of a constitutional text (such as the freedom of speech) is unclear, the widespread and long-accepted practices of the American people are the best indication of what fundamental beliefs it was intended to enshrine," (Ramsey 1962.) This also includes the Inclusive Originalist

acceptance of the use of precedent in order to reconcile the intentional vagueness of the Constitution.

4. *Adaptation to changing technology*. Scalia "indicated a willingness to go beyond the Constitution's text in adapting it to changed technology." (Ramsey 1962.)

   New technology can be classified into categories that the Constitution establishes, not just the technology that was around at the time it was written.

   This metric aligns with Inclusive Originalism and allows for a broader application in order to study the relationship between Originalism and Supreme Court cases on the media.

Case Analysis

Hindman's Rights vs Responsibilities provides a comprehensive list of all Supreme Court cases involving the press and media from 1931-1996. A reading of her analysis provided some insight into which cases might contain Originalist ideology. After reading her book, 18 cases were chosen to be read with the above metric in mind. To account for the years after 1996, I referenced the syllabi of University of Michigan Communications and Media courses 421 and 425: Media and Policy Law and Internet, Society, and the Law, respectively. Cases after the 2019 court term were not taken into account.

Near v Minnesota, 1931

Case Background:

The Saturday Press, a Minneapolis newspaper, accused the Chief of Police, the County Attorney, Mayor, and a member of the jury of colluding with a "Jewish gangster [who] was in control of gambling, bootlegging and racketeering in Minneapolis." The newspaper alleged that the "law enforcing officers and agencies were not energetically performing their duties," (Chief Justice Hughes.)

This ungrounded accusation violated Section one of the Sessions Laws of Minnesota Act, which states that anyone, as an individual or as a member of an organization, who produced, published, circulated, possessed, sold or gave away material that was "a malicious, scandalous and defamatory newspaper, magazine, or other periodical [was] guilty of a nuisance, and all persons guilty of such nuisance may be enjoined."

The defendant Jay Near, as the owner of The Saturday Press, appealed the Minnesota law on the grounds that this 'gag law' violated his right to due process under

the Fourteenth Amendment; furthermore, infringing on the free press clause of the First Amendment.

Case Decision & Analysis:

Even though the Originalist theory really only became popularized in the late 1960's, the reasoning structure is evident in this 1931 opinion. Chief Justice Hughes wrote for the majority and ruled that the Minnesota statute unconstitutionally violated the Fourteenth Amendment, meaning that Near, the owner of The Saturday Press, could continue with his publication, even if it may be malicious, scandalous or defamatory. Hughes affirmed that the due process clause of the Fourteenth Amendment safeguarded the liberty of the press and prevented the government from placing prior restraint on publications. Applying the metric to Hughes' decision reveals that Hughes makes two references to the post ratification history and the Framers, references changing technology once, and makes one structural argument.

The original meaning of the First Amendment is supported by a quote from Madison, stating "the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also." (Supreme Court of the US 1931.) By referencing Madison's own understanding of the First Amendment and the meaning of the freedom of the press, Hughes displayed an Originalist interpretive technique. This reasoning fits under Inclusive Originalism, which supports utilizing a reasonable person's understanding of the text at the time of adoption, and more importantly the writing of a member of the First Congress.

The post ratification history and early precedent is also present in Hughes' opinion, he states, "The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration," (Supreme Court of the US 1931.) Hughes is noting that it is a historical precedent in our country to refrain from limiting the press. This is consistent with the Social Responsibility Model in that it is allowing the press to regulate itself and allow it to protect the people from government overreach.

Near v Minnesota employs a recognition of changing technology that is also consistent with the Social Responsibility Model. Hughes emphasizes that even as technology and society advances, the necessity of a free press has not lessened, "Meanwhile, the administration of government has become more complex, the opportunities for malfeasances and corruption have multiplied [...] emphasizes the primary need of a vigilant and courageous press," (Supreme Court of the US 1931.) As media technologies evolve, the press is the most effective tool for protecting the people from potentially being taken advantage of by the government.

This case is the first major instance of press responsibility at the Supreme Court, and it established that the abuse of press power deserves punishment, but the abuse does not present enough threat to warrant prior restraint. It directly informs the infamous 1971 case, *New York Times Co. v United States*, known for the New York Time's publication of the 'Pentagon Papers,' in addition to *Smith v California*.

Bridges v California, 1941

Case Background:

This is another prior restraint case, in which longshoreman's union leader Harry Bridges implied in a telegram to the Secretary of Labor that his union would go on strike if his pending case in the Superior Court of Los Angeles County did not go in his favor. This telegram was distributed to multiple newspapers, including *The Los Angeles Times*. Bridges and the *Times* were fined and found in contempt of court, which they both separately appealed all the way up to the Supreme Court. (Oyez.)

Case Decision & Analysis:

The Supreme Court majority held the charges and fines were unconstitutional under the First Amendment. A clear display of early Originalist theory, Justice Hugo Black notes the direct language of the First Amendment two times, makes two references to historical precedent and the Framers, and one structural argument to support his majority opinion.

Black clearly emphasizes that Constitutional language marking the freedom of speech leaves no room for interpretation. "For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." (Supreme Court of the US 1941.) Here, Black draws a hard line on the ability of the government to place restraint on the press. In the instance of 'clear and present danger,' which the Superior Court of California suggested the telegram represented, Black utilizes the precedent standard of *Schenck v United States*. In accordance with Originalist interpretation, Black recognizes that this use of precedent does not devalue the language of the Constitution, "Those cases do not

purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compilation of the Bill of Rights." (Supreme Court of the US 1941.) This is consistent with the notion of Inclusive Originalism, as "it allows for precedent and evolving interpretations only to the extent that the original meaning itself permits them." (Baude, 2015.) Black uses *Schneck* only to help define "clear and present danger" as it relates to this case. Despite recognizing that the circumstance of "the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished," (Supreme Court of the US 1941.) the court did not observe this case to meet that standard of severity. Furthermore, Black notes his reluctance to even use the precedent in this case because of his structural argument, "No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression." (Supreme Court of the US 1941.) Black's decision emphasizes that neither Congress nor the Court should overstep the bounds of the Constitution.

In *Bridges v California*, Originalist theory protected the press's right to publish without the pressure of prior restraint. By focusing on the direct language of the First Amendment, Black upheld the core value of Social Responsibility of the press; that the press should self-regulate, and that the public will punish accordingly if the press acts irresponsibly. The prospect of potentially harmful publications does not present a sufficient enough danger to "warrant the curtailment of liberty of expression." (Supreme Court of the US, 1941.) As a result of this decision, the 18th century belief that the press should have the liberty to act as a watchdog for the American people was maintained.

Smith v California, 1959

Case Background:

A California statute declared the possession of 'obscene' material by a bookstore proprietor, even if they had no knowledge of the content of the book, to be a criminal offense. Eleazar Smith was convicted of criminal charges under this statute, and he appealed to the Supreme Court on the basis that this statute violated the freedom of the press.

Case Decision & Analysis:

The Court ruled that the California "ordinance imposes an unconstitutional limitation of the public's access to constitutionally protected matter." (Supreme Court of the US 1959.) Across Justice Brennan's majority opinion and Justice Black's concurring opinion, there are three references to historical precedent, two mentions of the direct language of the First Amendment, and two structural notions. Justice Brennan's majority opinion was informed by precedent set in *Near v. Minnesota,* in addition to a rationale that would be necessary to preserve the structure of the Constitution. Justice Black's concurring opinion is indicative of the Originalist theory.

Brennan states, "There is no specific constitutional inhibition against making the distributors of goods the strictest censors of their merchandise, but the constitutional guarantees of the freedom of speech and of the press stand in the way of imposing a similar requirement on the bookseller," (Supreme Court of the US, 1959.) Brennan is maintaining that despite the Constitution not directly mention this matter, it still cannot support the law because it is not consistent with the structure of the first Amendment, so it must be unconstitutional.

Justice Black agrees that the statute is unconstitutional, but not for the reasons given by Justice Brennan. Black again cites the direct language of the Constitution, "Certainly the First Amendment's language leaves no room for inference that abridgements of speech and press can be made just because they are slight. That Amendment provides, in simple words, that 'Congress shall make no law…abridging the freedom of speech, or the press.' I read ' no law … abridging' to mean *no law abridging*. The First Amendment, which is the supreme law of the land, has thus fixed its own value on the freedom of speech and press by putting these freedoms wholly 'beyond the reach' of federal power to abridge," (Supreme Court of the US 1959.) Here, Justice Black examines the exact wording of the First Amendment and takes it literally. Justice Black's originalist interpretation of the First Amendment does not allow for any law to abridge an American's right to speech. Black's rationale aligns with Scalia's Originalist belief that any encroachment on the First Amendment presents a threat to all speech, "Censorship is the deadly enemy of freedom and progress. The plain language of the Constitution forbids it," (Supreme Court of the US 1959.) Black's interpretation of the First Amendment would forbid any demarcation of 'obscene' media at all; however the Court's majority does not maintain this belief. This is consistent with the Social Responsibility Model, in that the values of freedom and progress are safeguarded by an unregulated press. The First Amendment assures that the press holds the power to protect the people.

In addition to citing the direct wording of the First Amendment, Black again relies on the words of Framers James Madison and Thomas Jefferson. Madison affirmed that "without tracing farther the evidence on this subject, it would seem scarcely possible to doubt that no power whatever over the press was supposed to be

delegated by the Constitution, as it originally stood, and that the amendment was intended as a positive and absolute reservation of it," (Supreme Court of the US 1959.) Black's use of this quote proves that those that wrote the Constitution expressly rejected any type of media regulation. He further bolsters this evidence with quotes from Jefferson, "[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech, and of the press insomuch that whatever violates either throws down the sanctuary which covers the others, and that libels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."(Supreme Court of the US 1959.) The Framers wrote the First Amendment as wide-reaching as possible to allow for all speech, and they feared that an encroachment on one type of speech puts all others at risk. Black does concede that Madison and Jefferson were referring to federal statutes, and that *Smith v California* involves a state law. However, he claims that "our prior cases holding that the Fourteenth Amendment applies to the First, with all the force it brings to bear against the Federal Government, against the States." (Supreme Court of the US 1959.)

This concurring opinion is significant because it reminds that although other, logical reasons exist as to why a statute that makes possession of obscene material without *mens rea* a criminal offense is unconstitutional - such as Justice Brennan's belief that the statute would threaten book shop owners to the degree that reading material would be severely limited - the underpinning factor of all opinions is the clear, unequivocal language of the First Amendment. All reasons are rooted in the belief that Americans should have unbridled access to whatever knowledge they wish to disseminate or consume.

Mills v Alabama, 1966

Case Background:

An Alabama statute made it illegal for a newspaper to publish an editorial soliciting votes on election day. James E. Mills, the editor of the Birmingham Post-Herald, was arrested for writing and publishing an editorial that urged people to vote for a new system of city government.

Case Decision & Analysis:

Justice Black delivered the unanimous opinion that the Alabama statute was an unconstitutional violation of the First Amendment. In this succinct opinion, Black references the language of the First Amendment once, and quotes the Framers once.

Black's opinion focuses on the fact that this Alabama statute is a blatant suppression of the press. He states, "The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs. Thus, the press serves and was designed to serve as a powerful antidote to any abuses of power by government officials, and as a constitutionally chosen means for keeping officials elated by the people responsible to all the people whom they were selected to serve. Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change, which is all that this editorial did, muzzles one of the very agencies the Framers of our Constitution thoughtful and deliberately selected to improve our society and keep it free."(Supreme Court of the US 1966.) Again, the Justice's pay homage to the original design and desires of the Framers and respect the potential dangers they foresaw. The Alabama statute is the exact type of government suppression the Framers were protecting Americans from.

This is another example of the Social Responsibility Model at work in the Constitutional design. The press works for the people, not the government. By criminalizing a political publication, the government is directly interfering with the most important responsibility of the media. Black's opinion again highlights that in order for the press to 'improve our society and keep it free,' it must remain 'unmuzzled.'

New York Times Co. v United States, 1971

Case Background:

In this famous bit of American history, better known as the Pentagon Papers case, President Nixon used his executive power to restraint the New York Times, along with the Washington Post, from reporting on the leaked Department of Defense documents regarding secret American activity during the Vietnam War. President Nixon argued that the prior restraint was a matter of national security.

Case Decision & Analysis:

In a 6-3 decision, the Court decided that the Nixon Administration's use of prior restraint was unconstitutional, meaning that the newspapers could continue with their publications. Justice Black's opinion contains six references to precedent and post ratification history, uses the direct language of the Constitution twice, and includes one structural argument.

With regards to Nixon's prior restraint assertion, Black states, "I can imagine no greater perversion of history. Madison and the other Framers of the First Amendment, able men they were, wrote in a language they earnestly believed could never be misunderstood. 'Congress shall make no law…abridging the freedom…of the press…' Both the history and the language of the First Amendment support the view that the press must be left free to publish news, whatever the source, without censorship,

injunctions, or prior restraints, (Supreme Court of the US 1971.) This is a perfect example of the Originalist theory at work. He not only uses the words of the Framers, but also quotes the direct language of the First Amendment. Black further expands on the post ratification history by stating, "In the First Amendment, the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government…Only a free and unrestrained press can effectively expose deception in government," (Supreme Court of the US 1971.) Black's firm belief in press freedom also gets at the Social Responsibility Model, affirming that the press serves the people. The Framers had the people's protection in mind when writing the First Amendment, not the protection of the government.

Black also notes that the First Amendment is a foundational element that allows the very nature of our governmental system to thrive. He asserts, "[T]he more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government," (Supreme Court of the US 1971.) To Black, this reading of the First Amendment is crucial to uphold the rest of the document.

Miami Herald v Tornillo, 1974

Case Background:

After publishing a criticism of Florida House of Representatives candidate Pat Tornillo, the Miami Herald refused to publish his rebuttal. Based on Florida's 'right of reply' statute, Tornillo filed suit against the Miami Herald.

Case Decision & Analysis:

The Supreme Court held that the Florida 'right of reply' statute was an unconstitutional violation of the First Amendment's guarantee of a free press. In a unanimous decision, the court makes two structural arguments, employs precedent and the words of the Framers twice, and notes the application of new technology once.

While the right of reply statute theoretically suggests the 'noble' thing for the press to do, Chief Justice Burger emphasizes that the Constitution cannot mandate press responsibility. Noting the structure of the Constitution, he states, "The clear implication has been that any such a compulsion to publish that which 'reason tells them should not be published' is unconstitutional. A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."(Supreme Court of the US 1974.) This is in direct support of the Social Responsibility Model, allowing the press to dictate their own responsibilities without government interference. Here, Burger solidifies that the press has the power to dictate their own responsibilities. Giving the press autonomy allows them to base their values off of the people's desires without government influence.

Justice White elaborates further in his concurring opinion, stating, "in Jefferson's words, '[w]here the press is free, and every man able to read, all is safe.' Any other

accommodation - any other system that would supplant private control of the press with the heavy hand of government intrusion - would make the government the censor of what the people may read and know." (Supreme Court of the US 1974.) Quoting Jefferson gives historical weight to the Social Responsibility Model, emphasizing that a government censorship of the press has dangerous potential to be in direct conflict with the needs of the people.

Tornillo, the appellee, argues that the changing technology of news media affords the press too much power and the government should intervene. The court considers this argument but declares "that a free press is a condition of a free society." (Supreme Court of the US, 1974.) Yet again, The Supreme Court upholds the Social Responsibility Model of press responsibility. Unequivocally, the court refuses to allow government encroachment on the press' value system.

F.C.C. v Pacifica Foundation, 1978

Case Background:

During an afternoon broadcast, a radio station in New York aired Georgie Carlin's stand-up comedy monologue, titled "Filthy Words," "which listed and repeated a variety of colloquial uses of words you couldn't say on the public airwaves." A father driving with his young son heard the broadcast and filed a complaint to the Federal Communications Commission. The FCC issued a declaratory order, which "forbids the use of any obscene, indecent, or profane language by means of radio communication." (District of Columbia Circuit Court 1978.)

Case Decision & Analysis:

In a close 5-4 decision, the Court ruled that the FCC's regulation was not a violation of the First Amendment. To show that the government had some ability to

regulate 'patently offensive' speech, Steven's majority opinion contained one structural argument, two references to precedent and the Framers, and one application of changing technology.

In this case, the Court's attitude towards a free press begins to change. Stevens claims that because of its pervasive nature, broadcasting is afforded the least amount of First Amendment protection of all forms of communication. He states, "Among the reasons for specially treating indecent broadcasting is the uniquely pervasive presence that media of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive. Broadcasting, moreover, is uniquely accessible to children." (Supreme Court of the US 1978.) Stevens notes the power of changing communication technology and views the increasingly invasive potential as reason for allowing regulation.

This is backed up by a precedential claim, "The First Amendment does not prohibit all governmental regulations that depends on the content of speech. The content of respondent's broadcast, which was 'vulgar,' 'offensive,' and 'shocking,' is not entitled to absolute constitutional protection in all contexts;" (Supreme Court of the US 1978.) This precedent comes from a previous case *Roth v. United States,* which is not included in the analysis because of its lack of Originalist theory application. Roth maintains that "Obscene materials have been denied the protection of the First Amendment because their contents is so offensive to contemporary moral standards." (Supreme Court of the US, 1978.) This application of precedent is consistent with the theory of Inclusive Originalism, even though its regulation seems in contrast with previous Originalist decisions.

While the Court is still employing some Originalist interpretational skills, this decision is in contrast with previous Originalist decisions that did not allow for regulation of the press. Here, the precedent is being applied in a different manner, and permitting government intervention on the values of the press. This does not comport with the Social Responsibility Model. Instead of allowing the broadcast stations to decide for themselves what is appropriate for the pubic, the government is allowed to intervene.

Confusingly, Justice Stevens does acknowledge that the government should remain neutral when it comes to speech. He states, "but the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four-letter words – First Amendment protection might be required." (Supreme Court of the US, 1978.) Despite this affirmation of the breadth of the First Amendment which *is* consistent with Inclusive Originalism, Steven's places a higher value on the precedent set by *Roth v United States* and allows the FCC to regulate broadcasted speech. This is inconsistent with Inclusive Originalism, because it does not 'trace their pedigree to the original meaning.' (Baude, 2015.)

Since the decision for this case was extremely close, Justice Brennan's dissent was also included in the analysis. The opinion included reactionary arguments to the

majority opinion, including one structural argument, one changing technology example, and one reference to the language of the Constitution.

In response to Stevens' logic that the nature of broadcast radio allows it to permeate into the private home, Brennan suggests that those who are offended by the broadcast may simply turn the device off. He states, "Whatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to the full First Amendment protection," (Supreme Court of the US 1978.) To Justice Brennan, changing technology is not substantial enough to encroach on the First Amendment. He allegorizes Steven's logic as "burn[ing] the house to roast the pig;" (Supreme Court of the US 1978,) emphasizing his belief that the majority is mistaken in their decision and are over-extending their Constitutional bounds.

Brennan also takes time to emphasize American cultural diversity and its Constitutional protection. He laments, "Yet there runs throughout the opinions of my Brothers Powell and Stevens another vein I find equally disturbing: a depressing inability to appreciate that in our land of cultural pluralism, there are many who think, act, and talk differently from the Members of this Court, and who do not share their fragile sensibilities. It is only an acute ethnocentric myopia that enables the Court to approve the censorship of communications solely because of the words they contain," (Supreme Court of the US 1978.) Here, Brennan's logic is based on the structural foundation of our nation: that all men shall be created equal. Brennan is disturbed by

the content based discrimination of the Court, as it does not reflect the many cultural values that make up our nation.

Brennan emphasizes this further by stating, "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand,"(Supreme Court of the US 1978.) This is reminiscent of Scalia's logic, that the nine members of the Court should not be the ultimate counselors of what is appropriate for our society. Moreover, this is clearly indicative of the Social Responsibility Model; to allow the public to decide what the media should provide. Brennan is disappointed with the Court for forcing their values on the press, and therefore, onto the people.

Hustler v Fallwell, 1988

Case Background:

Jerry Falwell, a public figure known as a televangelist and conservative activist was featured in a nationally circulated parody advertisement in Hustler Magazine. The 'advertisement' satirizes the double entendre of popular Campari Liqueur ads, in which celebrities discuss their 'first time' trying the liquor; and intimates that Falwell's "first time was a drunken incestuous rendezvous with his mother in an outhouse," (The Fourth Circuit Court.) Falwell sued Hustler for libel, invasion of privacy, and intentional infliction of emotional distress. Hustler appealed on the basis of First Amendment press rights.

Case Decision & Analysis:

The court unanimously decided that the First Amendment protects parodies, and in order for public figures to win damages for emotional distress claims, they must show

that the speech was made with "actual malice." In the majority opinion, Chief Justice Rehnquist used a structural argument and a reference to the First Congress and the Framers.

Justice Rehnquist utilizes Justice Steven's confusing logic in *FCC v Pacifica* in order to support a more Originalist understanding of the Constitution. He quote's Steven's and states, "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." (Supreme Court of the US 1988.) This time, this logic is being used to protect the press from government encroachment and upholds the Social Responsibility Model. Rehnquist notes that these represent "oft-repeated First Amendment principles," (Supreme Court of the US 1988) emphasizing they are foundational and are not easily challenged. The fact that Falwell was offended by the parody was not enough to warrant a First Amendment violation.

The Court also justifies the constitutionality of public figure parody by referencing historic parody of members of the First Congress and other notable American History figures. He states, "Despite their sometimes caustic nature, from the early cartoon portraying George Washington as an ass down to the present day, graphic depictions and satirical cartoons have played a prominent role in public and political debate…Lincoln's tall, gangling posture, Teddy Roosevelt's glasses and teeth, and Franklin D. Roosevelt's jutting jaw and cigarette holder have been memorialized by political cartoons with an effect that could not have been obtained by the photographer or the portrait artist." (Supreme Court of the US 1988.) This shows that parody has been

a historic fixture of American communication and media since the time of the Framers and is an important facet of political speech. Barring this kind of speech would be suppressing political speech, which the court has time and time again prohibited.

Reno v ACLU,1997

Case Background:

In the first Supreme Court case regarding the Internet, the Attorney General of the United States, Janet Reno, defended two provisions of the Communications Decency Act, which "criminalized the 'knowing' transmission of 'obscene or indecent' messages to any recipient under 18 years of age…that in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs," (Reno 1997.) The ACLU argues the statute is overbroad, thus violating the First Amendment.

Case Decision & Analysis:

In another unanimous decision, the Court held "The CDA's 'indecent transmission' and 'patently offensive display' provisions abridge 'the freedom of speech' protected by the First Amendment." (Supreme Court of the US 1997.)

While this decision, like *FCC v Pacifica*, does not represent an entirely Originalist opinion, this landmark case is monumentally important for the way our society engages with online media, so it was included in the analysis.

In his majority opinion, Justice Stevens argues the statute is far too overbroad, that it prevents parents from consenting to their child's use of restricted material, and that the statue fails to define 'indecent.' In addition, Stevens makes two references to the fact that the Internet is a boundlessly capable new technology, and one structural argument.

Stevens argues that the Internet is unlike other forms of communication that have been subject to regulations in the past because it does not have limited frequencies, it is noninvasive, and that it would be unlikely for one to accidentally stumble upon explicit content. He states, "[S]ome of our cases have recognized special justifications for regulation of the broadcast media that are not applicable to other speakers…the scarcity of available frequencies at its inception, and its 'invasive' nature…those factors are not present in cyberspace. Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. Moreover, the Internet is not as 'invasive as radio or television. The District Court specifically found that '[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.' It also found that '[a]lmost all sexually explicit images are preceded by warnings as to the content ,' and cited testimony that 'odds are sim' that a user would come across aa sexually explicit sight by accident." (Supreme Court of the US 1997.) Stevens assessed the previously set standards of media regulation and found that it did not match, so the Internet must remain beyond the Government's reach.

The opinion is closed out with the statement, "As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it, The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." (Stevens, 1997.) Though Stevens employed other interpretive theories for this opinion, Constitutional tradition and structure consistent with Originalism underpins the

argument and upholds the Social Responsibility Model. Stevens is affirming that the value of free expression is greater than the perceived value of government censorship. Like never before, the Internet offers the entire public a brand-new opportunity to publish their own material and exercise their speech. Now, the Social Responsibility Model includes the public in a new way, and extends the ability for all people to determine their own publishing values without government censorship.

Brown v. Entertainment Merchants Association, 2011

Case Background:

A California statute "prohibit[ing] the sale or rental of violent video games to minors and requir[ing] their packaging be labeled '18,'" was challenged by representatives of the video game industry as a violation of the First Amendment.

Case Decision & Analysis:

In a 7-2 decision, the Court ruled that the statute was indeed an unconstitutional violation of the First Amendment. Justice Scalia's brief majority opinion includes two applications of the original meaning to changing technology, and one reference to the direct language of the First Amendment.

In Scalia's view, the qualities of a video game are not so drastically different from classical media to constitute government restrictions. He states, "Like the protected books, plays, and movies that preceded them, video games communicate ideas - and even social messages- through many familiar literary devices…and through features distinctive to the medium…That suffices to confer First Amendment protection. Under our Constitution, 'esthetic and moral judgement about art and literature…are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. And whatever the challenges of applying the Constitution to

ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment command, do not vary' when a new and different medium for communication appears." (Supreme Court of the US 2011.) This consistently applied notion of allowing the public to decide for themselves what they deem appropriate for consumption is in line with Originalism and the Social Responsibility Theory. Scalia upholds the invariable meaning of the First Amendment by refraining from making a content or technologically based discrimination.

Packingham v North Carolina 2017

Case Background:

A North Carolina criminal statute prohibits registered sex offenders from using social media sites that also allow minors to make accounts. In 2010, Lester Packingham, a registered sex offender, was arrested for violating the statute after making a Facebook post. He appealed and argued that the statute violated his First Amendment rights.

Case Decision & Analysis:

The Court unanimously decided that the North Carolina law unconstitutionally violated the First Amendment. Justice Kennedy's brief opinion is a reflection of *Reno v ACLU,* in that the Court recognizes the immense communicative power of the Internet. Kennedy's opinion represents an application of new technology within the parameters of the First Amendment.

He states, "A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more…While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace-the 'vast democratic forums of the Internet' in general and social

media in particular." (Supreme Court of the US 2017.) While the government of course has substantial interest in protecting children from harm, the statute too broadly sweeps over valuable access to speech. Yet again, the Court upholds the Social Responsibility Model by not restricting the public's access to the press and media.

Conclusion

After analyzing these 11 media law cases through the applied metric of Inclusive Originalism, it is clear that the Originalist theory has been applied to preserve the First Amendment rights of the press and media. In the cases presented in this analysis there were 19 references to precedent and the Framers, 10 structurally based arguments, 8 direct references to the original language of the First Amendment, and 8 acknowledgements of changing technology. This shows that the Originalist theory is most often applied through the use of precedent and by placing the present case in the context of the Framers.

The selection of applicable cases reveals that Originalism is typically used in cases that involve government abuse of prior restraint and over-broad regulations of obscenity or indecency. The Court employs Originalism to emphasize to Congress or the States that they are over-stepping their constitutional bounds. When Originalism is applied, the Social Responsibility Model is widely upheld, and press freedom is maintained.

The Originalist theory was not as prevalent in media law cases as originally predicted. Some Justices, mainly Justice Black, certainly utilize the theory more than others. Nevertheless, its application in landmark Supreme Court cases has undoubtedly shaped our nation's legal relationship with the media. First Amendment protections of speech and press allow the Social Responsibility Theory to thrive. Especially with the Internet, the Originalist theory has aided in the preservation of press freedom and has kept the power of the press in the hands of the people.

Works Cited

5 U.S. 1 Cranch 137 137 (1803). Marbury v. Madison . 23 Feb. 1803. Justia US Supreme Court . . n.d.

Baude, William. "IS ORIGINALISM OUR LAW." *Columbia Law Review* (December 2015): 2349-2408.

"Originalism as a Constraint on Judges." *The University of Chicago Law Review* (2017): 2213-2229.

Bridges v California . No. 314 U.S. 252. US Supreme Court . 8 December 1941.

Brown v. Entertainment Merchants Association . No. 564 US 786. US Supreme Court . 27 June 2011.

FCC v Pacifica Foundation . No. 438 US 726. US Supreme Court. 3 July 1978.

Hindman, Elizabeth Blanks. Rights vs. Responsibilities : The Supreme Court and the Media. Greenwood Press, 1997. n.d.

Hustler Magazine, Inc. v. Falwell . No. 485 US 46. US Supreme Court. 24 February 1988.

“Bridges v California .” Oyez.org, www.oyez.org/cases/1940-1955/314us252. . n.d.

“The 3rd Article of the U.S. Constitution.” National Constitution Center – The 3rd Article of the U.S. Constitution, constitutioncenter.org/interactive-constitution/article/article-iii#article-section-1. . n.d.

“U.S. Constitution - First Amendment: Resources: Constitution Annotated: Congress.gov: Library of Congress.” Constitution Annotated, constitution.congress.gov/constitution/amendment-1/. n.d.

McGinnis, J. O., & Rappaport, M. B. (2017-2018). The Constitution and the Language of the Law. William & Mary Law Review, 49(4), 4th ser.

https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3743&context=wmlr. n.d.

Miami Herald Publishing Co v. Tornillo . No. 73-797. US Supreme Court . 25 June 1974.

Mills v. Alabama. No. 384 US 214 . US Supreme Court. 23 May 1966.

Near v Minnesota . No. 283 U.S. 697. U.S Supreme Court . 1 June 1931.

New York Times Co. v. United States. No. 403 US 713 . US Supreme Court . 30 June 1971.

Packingham v. North Carolina . No. 15-1194. US Supreme Court . 19 June 2017.

Patel, Ushma. “Scalia Favors 'Enduring,' Not Living, Constitution.” Princeton University, The Trustees of Princeton University, www.princeton.edu/news/2012/12/11/scalia-favors-enduring-not-living-constitution. . n.d.

Peterson, Theodore. “The Social Responsibility Theory Of The Press.” Four Theories of the Press, 1984, pp. 73–104., doi:10.5406/j.ctv1nhr0v.6. n.d.

Ramsey, M. D. (may 2017). Beyond the Text: Justice Scalia's Originalism in Practice. Notre Dame Law Review, 92(5), 1945-1976. https://scholarship.law.nd.edu/ndlr/vol92/iss5/3/. n.d.

Reno, Attorney General of the United States, et al. v. American Civil Liberties Union et al. No. 96-511. US Supreme Court . 26 June 1997.

Smith v. California . No. 361 U.S. 147 . US Supreme Court . 14 December 1959.

Wolfe, Christopher. “Originalist Reflections on Constitutional Freedom of Speech .” SMU Law Review, vol. 72, no. 3, ser. 535, 2019. 535. . n.d.