

THROUGH THE EYES OF JUSTICE: CONSTITUTIONALLY PROTECTED SPEECH AND
PROTEST ACCORDING TO JUSTICE ANTONIN SCALIA

BY

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Abstract

A few hallmark characteristics of the American Republic are a citizen's right to the freedom of speech and the right to peacefully assemble without the fear of retaliation from the government. In recent 21st century history, American society has witnessed the polarization of ideologies to a point where words end in violence and burned-down cities. To encourage and facilitate open communication, legal and cultural progress, and innovation, the freedom of speech and protest must maintain center stage. This study applied Justice Antonin Scalia's judicial doctrine of the freedom of speech and protest to the Black Lives Matter Movement and President Donald Trump's "Save America" Rally speech on January 6, 2021, case studies while seeking to answer this question, "According to Supreme Court Justice Antonin Scalia's originalist interpretation of the First Amendment and free speech, what type of protest actions and words are constitutionally protected?" The criteria applied in this study are derived from Justice Antonin Scalia's judicial doctrine of the freedom of speech and protest and utilizes Kenneth Burke's Dramatistic Pentad, the *Act* to each case study.

Keywords: Justice Antonin Scalia, Free Speech, Protest, Black Lives Matter, President Donald Trump

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Chapter 1: Introduction

Since the beginning of the 21st century, American society has designated silence as racist and opposing ideologies as subject to scrutiny under society's microscope to determine whether the speaker should face censorship, cancelation, or physical violence. The polarization of ideologies has boiled to a point resulting in assemblies that have burned down cities and breached federal buildings. The freedoms of speech and assembly are essential to the flourishing of the American republic. Without these freedoms, the communication of ideas, beliefs, and values does not occur, and the freedom of speech is threatened.

Free Speech in America

Freedom of speech and the right of assembly is intricately woven into the fabric of the American republic. At its inception, the Constitution's framers intended the First Amendment to serve as a natural right for all American citizens. According to Jud Campbell (2018), a natural right is a man's ability to do something without government interference. According to this definition, the government should only intervene and restrict those rights when they do not promote the public good.

As a natural right, freedom of speech in America cannot be prohibited by the government. Many argue for regulating speech in modern America because it is offensive or harmful, often referred to as *hate speech*. This issue has caused significant disagreement in American society. As Nadine Strossen (2018), Professor of Law at the New York Law School, noted, Americans from the "mid-twentieth century" to contemporary times retain "two inconsistent notions of free speech" (para. 2). While many individuals express their "support for free speech, a substantial number of respondents" do "not support the right to express *specific* types of potentially offensive opinions" (para. 4). This observation seems to present a cognitive

disconnect in many Americans' minds over what the First Amendment deems and does not deem free speech.

In a study conducted by the Campaign for Free Speech, "61% of Americans agree that free speech should be restricted, and 51% believe that the First Amendment, ratified in 1791, should be written to reflect the new cultural norms of today" (Bader, 2020, para. 2). This study goes further to say that 57% of the millennials surveyed believed "that the First Amendment should be rewritten" (para. 3). In comparison, 54% believe that "possible jail time would be an appropriate consequence for 'hate speech'" (para. 3). However, the Court "has been evolving toward more and more protection of more and more speech...including hate speech," which reveals that the debate over free speech and its protection is not lost to the ideological dichotomy that seems to permeate American society (para. 8).

The First Amendment, a highly revered and sacred American right, includes the protection of the people from the government "abridging the freedom of speech; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances" (U.S. Const. amend. I). The argument over what words and actions the First Amendment protects has been a long-standing debate within American courts. Protections or limits to what the First Amendment covers have resulted in categories of speech, protest, and court cases that discuss areas such as libel, slander, absolute privilege, advocacy of illegal action, The Brandenburg Test, and unlawful assemblies. The above-mentioned categories of free speech, specifically advocacy of illegal action, The Brandenburg Test, and unlawful assemblies, will serve this study as a foundation for free speech and protest in America.

It is only fair to examine the Supreme Court case *Brandenburg v. Ohio* (1969) to give a more in-depth analysis of how the United States Supreme Court has interpreted the freedom of

speech. Clarence Brandenburg, was arrested in Cincinnati, Ohio, and charged and convicted under an Ohio Syndicalism law. This Ohio law made the advocacy of “crime, sabotage, violence, and/or unlawful methods of terrorism as a means of accomplishing industrial or political reform” illegal as well as the assembly “with any society, group, or...persons formed to teach or advocate the doctrines of criminal syndicalism” illegal (*Brandenburg v. Ohio*, 1969). Criminal syndicalism laws refer to those laws that make “it illegal for individuals or groups to advocate radical political and economic changes by criminal or violent means” (Mineshima-Lowe, 2009, para. 1). Ultimately, the Court ruled that:

the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action (*Brandenburg v. Ohio*, 1969).

In summation, the Court held that the advocacy of illegal conduct was protected speech “unless the speech is likely to incite ‘imminent lawless action’” (Walker, 2009, para.1). This court case's outcome was The Brandenburg Test, which continues to be a standard for free speech cases today.

Although the freedom of speech and the right of peaceful assembly are separate rights within their sphere, John Inazu and Burt Neuborne explain how the United States Supreme Court considers both together as “an expansive ‘speech’ right, often called ‘freedom of expression’” (Inazu & Neuborne, n.d., para. 2). An assembly implies more than one individual, and because of this, the act “often involves non-verbal communication,” often in the form of “a demonstration, picket-line, or parade” (para. 4). Furthermore, the authors explain how the right of assembly stands alone as the only First Amendment right that “requires more than a lone individual for its

exercise” (para. 3). Additionally, the First Amendment right to peaceably assemble has been, in times past, a distinct and major factor for “legal and cultural protection” for Americans (para. 5).

Despite its inclusion in the First Amendment, the right to peacefully assemble has been threatened in court cases such as *Cox v. Louisiana* (1965) and *Gregory v. City of Chicago* (1969). In *Cox v. Louisiana*, civil rights advocate Elton Cox and thousands of others were sprayed with tear gas for refusing to leave a location that was “initially approved by the city’s chief of police” (Aichinger, 2009, para. 3). Elton Cox was arrested on criminal charges for “‘disturbing the peace,’ ‘obstructing public passages,’ and ‘intent of interfering with the administration of justice’” (para. 4). This case was appealed to the United States Supreme Court. Cox’s conviction was overturned as the court believed the law “defining breach of the peace as any activity that (among other things)...designed ‘to interrupt’ or ‘to disquiet’ was ‘unconstitutionally vague in its overly broad scope’” (para. 6). The state of Louisiana claimed that “although the demonstration was not violent, it was ‘inherently dangerous’” which the United States Supreme Court viewed as “unconvincing” (para. 7). The issue lay in the reality that the Louisiana law was not “uniform, consistent, and nondiscriminatory” as it applied to assemblies and what was allowed – Elton Cox had been convicted “for exercising a privilege which the state had clearly told him was available to him” which, according to the United States Supreme Court was unconstitutional (para. 12).

Another case regarding the right to peacefully assemble is *Gregory v. City of Chicago* (1969). Due to the slow speed of school desegregation, the comedian/activist Dick Gregory and others desired to remove Superintendent Benjamin Willis from office. To push Chicago’s mayor toward favoring Willis's removal, Gregory organized a “three-and-a-half-hour march” to the mayor’s home. This march formed a group of onlookers; however, when the demonstrators

arrived at the mayor's home, the onlookers grew "unruly, spewing racial epithets and hailing eggs and rocks" (Healy, 2009, para. 4). This raucous outburst prompted the demonstration's police escort to ask Gregory and the other demonstrators to disperse, which they ultimately refused to do. After refusing, the demonstrators were arrested and convicted of "disorderly conduct," which was upheld by the Illinois State Supreme Court (para. 4). However, this conviction was overturned by the United States Supreme Court, saying that it is "a 'simple case' considering the petitioners' march was 'peaceful and orderly' and therefore worthy of First Amendment protection" (para. 6). In this case, the demonstrators were not in violation of the First Amendment since those being violent were the spectators, not those assembled peacefully.

On its face, the First Amendment appears as a stronghold for all forms of expression. Yet, American history is filled with examples that deal with constitutionally protected free speech. For example, the Sedition Act of 1789 did not protect those who were "deemed a threat" or published "'false, scandalous, or malicious writing' against the government of the United States" (US House of Representatives, n.d., para. 1). And in 1897, the First Amendment failed to protect a black pastor's freedom of speech in Boston as he spoke against racism in a public park (Stein, 2006). It was not until World War I and World War II that free speech doctrine evolved into free speech law. During these times, the United States Supreme Court started "uphold(ing) legislative interventions designed to alleviate the shortcomings of U.S. social, political, and economic life" (p. 3). In light of the events of the year 2020, the constitutionality of words and actions that the First Amendment protects are worth examining.

Justification

American citizens are free to express their opinions without fear of retaliation from the government, an inalienable right that sets the American republic apart on the world stage.

In the United States, the freedom of speech and peaceful assembly fall within the first four freedoms guaranteed by the United States Constitution's First Amendment. To facilitate open communication, legal and cultural progress, and innovation, the American republic guarantees its citizens particular freedoms. There are past and present times when individuals' words and actions must be scrutinized in light of the Constitution to determine whether those words and actions are protected by free speech and assembly. There are differing opinions on what type of speech or acts are constitutional, however. In American society, conservatives and liberals differ on what is protected by the First Amendment.

The two dominant political camps within the United States are Republicans and Democrats and their more extreme counterparts are conservative and liberal. For this study, conservative and liberal will be referenced when discussing the differing views of free speech each political ideology follows. A conservative citizen is defined by his or her devotion to traditional beliefs and values. The opposite is true for the liberal citizen as they are defined as championing progress and new ideas. Concerning free speech and protest in America, the conservative and liberal views have, according to attorney Timothy Snowball "waxed and waned along with cultural trends and changing political ideologies" (2020, para. 1). For example, in the early years of the 20th century, those who leaned more ideologically liberal were some of the most stalwart proponents of free speech. However, since the close of the 20th century, the tide turned with conservatives holding the free speech baton while liberals favor speech in alignment with progressive ideology.

Consistent with Timothy Snowball's assessment of conservative and liberal views of free speech, a 2021 study conducted by Pew Research found that conservative and liberal citizens disagree on social media's ban of President Donald Trump after the United States Capitol

building was breached on January 6, 2021. Although social media companies are not the United States government and do not wield its constitutionally enumerated powers, conservative and liberal ideology toward free speech can be deduced from the study. The statistics provide a general insight into the alignment of conservative and liberal ideology as 88% of conservative citizens believe that it was wrong to ban President Trump from social media (McClain & Anderson, 2021). In comparison, 92% of liberal citizens believe it was the right thing to do.

The issue surrounding the constitutionality of what is deemed protected and unprotected speech under the First Amendment is relevant and applicable to the events during summer 2020 and January 6, 2021. During the summer of 2020, the United States experienced widespread civil unrest. The Black Lives Matter Movement grew as a social movement while demanding justice, reform, and an end to white supremacy. In addition to the civil unrest associated with the Black Lives Matter Movement, the first month of the year 2021 witnessed Trump supporters violently breach the United States Capitol following a speech given by President Donald Trump. When actions and words are taken too far, the issue becomes a significant factor in determining whether a protestor, movement, or speaker's demands remain constitutionally protected.

Throughout this study, the question, "According to Supreme Court Justice Antonin Scalia's originalist interpretation of the First Amendment and free speech, what type of protest actions and words are constitutionally protected?" was answered through the application of four criteria developed from Justice Scalia's originalist interpretation of the First Amendment's freedom of speech and assembly. This study approached the concept of free speech and assembly in 21st century America as it applies to the Black Lives Matter Movement and President Donald Trump's "Save America" Rally speech on January 6, 2021. These two events were studied from Kenneth Burke's Dramatistic Pentad's first element, the *Act*.

The purpose of this study was to apply Justice Antonin Scalia's criteria of free speech and assembly to the Black Lives Matter Movement protests in Minneapolis, New York City, and Portland, as well as President Donald Trump's "Save America" Rally speech and the violent demonstrators' breach of the U.S. Capitol on January 6, 2021, to determine the constitutionality of each case study's "Act," which encompassed each case study's words and actions. As a Supreme Court Justice, Justice Scalia's reputation as an originalist was shown in his devotion to the Constitution's text which combined to make him a stalwart voice for the Constitution and the Founder's original intent. Because of Justice Scalia's devotion to the Constitution and his understanding of the Constitution and the original meaning of its text, this study chose to use his judicial doctrine of free speech and protest as the criteria developed from his doctrine would most closely align with the Constitution. This study was a worthwhile discussion as it had not been done before and fills a gap in research. It applies four criteria that determined constitutionally protected speech and protest developed from Justice Scalia's judicial doctrine of free speech and protest. Also, the study applied the first element of Kenneth Burke's Dramatistic Pentad, the *Act*, along with Justice Scalia's criteria to the Black Lives Matter Movement's actions in three cities during summer 2020 and President Donald Trump's "Save America" Rally speech on January 6, 2021.

This study's contribution to the field of communication is the application of the first element of Kenneth Burke's Dramatistic Pentad, the *Act* and the development of criteria from Justice Scalia's judicial philosophy to determine the constitutionality of the Act within the context of society. This study directly connects to communication as constitutionally protected words and assembly facilitate free and open communication within a constitutional republic.

Chapter 2: Literature Review

Free Speech in America

In his essay “From Small Acorns Mighty Oaks Grow: The Legislatures and Free Speech in Colonial Connecticut and Rhode Island,” Jay Lewis Campbell (1977) discussed the level of free expression in the American colonies. Campbell began by explaining how Leonard W. Levy, Professor of Constitutional History at Brandeis University, “lays waste to tradition that many Americans have long held dear that our union has from its earliest settlement treasured the ideal of freedom of expression” (p. 3). Interestingly enough, Campbell quoted Levy saying that the colonies’ popular elected assemblies were the most restrictive body compared to the common law courts and royal governors. However, he noted two colonies as the most liberal and welcoming of free expression among the other colonies, Connecticut and Rhode Island. To support his assertion that Connecticut and Rhode Island were the benefactors of free speech in early America, he explained how not only was Rhode Island the first colony to declare independence from England, but “when the Islanders ratified the constitution, they were so concerned about the absence of a free speech clause that they included one in their ratification” (p. 5). This essay gave a glimpse into the formation and progress of free speech laws in America. Campbell compared 17th and 18th century Connecticut and Rhode Island’s speech restrictions to the other 11 colonies’ restrictions. He applied Ernest Bormann’s “Fantasy and Rhetorical Vision” to Connecticut and Rhode Island’s creation of liberal colonies. He used this with historical evidence to make the case that Connecticut and Rhode Island were the cradles of American freedom of speech.

Campbell (1977) divided his essay into two parts. Part I discussed the limitations on free speech that Connecticut and Rhode Island placed on their citizens. The essay has four

limitations: 1) provision for parliamentary order, 2) protection against criticism of the colonial government, 3) promotion of the established social order, and 4) guidance of religious beliefs.

The provision for parliamentary order was seen in both houses' creation of in-house rules such as "camera speaking" where members could be monetarily fined if their conduct was disorderly while in session (p. 7). Each legislature prohibited "indecorous" speech toward speaking members of the assembly (p. 7). The prohibition of criticism against a colonial government was prompted by the government's hatred toward dissenting opinions. In 1642, the Connecticut legislature passed a law "forbidding the advocacy of the forcible overthrow of the government. The penalty was death;" however, this penalty was lessened to another form of punishment (p. 8). The third limitation was the promotion of the established social order. An example of this limitation was Connecticut's laws "specifying the crimes for which a person would forfeit his life" (p. 12). The three ordinances dealing with speech were 1) "bearing false witness," 2) "advocacy of the overthrow of the Commonwealth, and 3) "blasphemy" (p. 12). Similarly, the Rhode Island legislature deemed slander and cursing illegal. The fourth limitation dealt with restrictions supporting religious beliefs. These limitations were less strict than the other 11 colonies. The only instance of capital punishment under these limitations was executing a woman for calling Christ a bastard.

Part II investigated a "rhetorical explanation" for why free speech existed and developed the way it did in Connecticut and Rhode Island (Campbell, 1977, p. 6). When Campbell applied Ernest Bormann's Fantasy Theme Theory to Connecticut and Rhode Island, he explained symbolic reality. Unlike the other 11 colonies, Connecticut and Rhode Island stepped away from the royal vision of England. Campbell claimed that it was the decision to remove itself from the royal vision that allowed the people in both colonies to create "the American 'spirit of political

liberalism” (p. 19). Campbell’s research concluded that Connecticut and Rhode Island left the royal vision of England and joined forces to develop their “psychodynamic bonds” to encourage “a symbolic reality,” producing the precursor to America’s freedom of speech laws (p. 23).

The discussion of what free speech is in contemporary America and what it was intended to be in 18th century America is what Professor of Law John Yoo and attorney James Phillips (2019) explored in their article “‘Free Speech’ Means Just That.” The authors explained what they call the “catch-all” free speech clause of the Constitution and how it has come “to defend the right to burn the American flag, dance in the nude, and make unlimited campaign contributions” (para. 1). They argued that the Court’s “perpetually malleable standard” of what constitutes speech has led to the development of the Court’s application of the “catch-all” free speech clause (para. 4). The Court allows the government to place restrictions on the time, place, and manner of speech unless the state restricts the speech based on the speaker’s content. However, the government must apply the “strict scrutiny” test to demonstrate that a “law is narrowly tailored” and serves a “compelling state interest” if it is going to restrict content-based speech (para. 4). The authors provided a contrast between the historical and modern context of the Constitution’s free speech clause.

Looking at the First Amendment, the authors investigated the founders’ intent. Within the Amendment, there are four separate rights: speech, press, assembly, and petition. The authors, however, believed the Court “has allowed free-speech imperialism to expand so far as to swallow up these other First Amendment rights” (Yoo & Phillips, 2019, para. 6). The example the authors mainly used was the assembly clause. Yoo and Phillips argued that the Court “replaced it with a judicially invented ‘freedom of association;’” however, the original meaning of the right of assembly was meant to be much “broader and more concrete” than the Court’s

meaning of the right of “association” (para. 8). The issue with determining the right of assembly “as derivative of the right to speak freely...turns on the what of a message rather than the who or the where of assembly” (para. 10). It is the “who or the where of assembly” that the authors used to explain how “the right to assembly is...broader than free speech because it protects a group’s right to use public space for gatherings” (para. 10). According to Yoo and Phillips, the Court’s divestment from the First Amendment’s original meaning will not apply to future cases that concern what they consider “the most important arenas for the communication of ideas today” (para. 15).

Daniel Ortner (2019), an attorney with the Pacific Legal Foundation, discussed the scope of free and offensive speech. To understand what constitutes the line government may cross and may not cross in terms of offensive speech and the First Amendment, Ortner cited the United States Supreme Court case *Inacu v. Brunetti* (2019). The U.S. Patent and Trademark Office denied the clothing company FUCT a trademark because "it decided the brand's images were 'anti-social' and 'lacking in taste'" (Ortner, 2019, para. 4). The Supreme Court’s majority opinion held this as viewpoint discrimination, and in his concurring opinion, Justice Alito explained that "viewpoint discrimination is poison to a free society," and for government officials to silence censor viewpoints they disagree with is unprotected under the First Amendment (para. 8). The Court held "that government officials shouldn't be allowed to determine whether speech is immoral or scandalous" (para. 4). Additionally, Ortner explained how the Supreme Court believed that “government censorship like this is inconsistent” (para. 6).

In “Toward a More Realistic View of the Judicial Process in Relation to Freedom of Speech,” Ruth McGaffey (1972) discussed the role of legal precedence in First Amendment law and legal and social science viewpoints of the judicial process concerning free speech. In her

essay, she began by explaining *stare decisis*, meaning “let the decision stand” (p. 110). The decision, in this case, is precedent. McGaffey believed that there are few analogous situations from which precedent can be drawn in cases involving symbolic speech. For example, burning a draft card is not analogous to any other activity, whereas a flag's saluting is not the same as displaying a red flag. The new behaviors in these forms of symbolic speech are what, in the author's opinion, also judges “an opportunity to select from among several models” (p. 111). A judge's opportunity to select from these several models translates that judicial process can lean subjective.

Although McGaffey (1972) noted that Supreme Court justices could make subjective decisions, they are hemmed in by ruling on the Supreme Court's precedent. The only way around this is for a justice to admit they were wrong in a previous ruling or that a previous Supreme Court was wrong in its ruling. This creates what she described as an undependable traditional format for the judicial process and a “consistent legal interpretation of the Constitution” (p. 112). The author also discussed the values and attitudes of judges and how these can affect their votes. One example she used came from a 1940s study conducted by C. Herman Pritchett. It was concluded that “values did appear to be ranked in different order of importance, and could have explained differences on particular decisions” (p. 116).

Precedent, values, and attitudes play a significant role in a Supreme Court justice's decisions. Looking at the freedom of speech, McGaffey (1972) noted that the historical context of a justice's decision greatly affects the turnout of the free speech law. Her examples included the First World War, Espionage Act, and the early 1920s Red Scare when those who flew a red flag were prosecuted in court (p. 118). The subjectivity of the judicial process, the application of Supreme Court justices' values and attitudes to Court decisions, and the existence of a historical

context court, concerned McGaffey which led her to state that Constitutional interpretation is neither “logical” nor “rational” and is not “immune from societal or personal pressure” (p. 119). To believe that ideals work apart from individuals' opinions or beliefs is what McGaffey considered mythical and should be cautioned against believing.

In 1969, the United States Supreme Court heard the case *Brandenburg v. Ohio* (1969). In his essay “Protecting Political Speech: *Brandenburg v. Ohio* (1969),” Paul Siegel (1981) explained how the Court overturned Brandenburg’s conviction for advocating racist violence to a Ku Klux Klan gathering. In the Court’s decision, it “ruled that the states may not prohibit or proscribe political speech unless such speech ‘is directed to inciting or producing imminent lawless action, and is likely to produce such action’” (p. 136). Siegel noted that:

implicitly, any advocacy which falls short of a call for illegal action is wholly protected (assuming it does not fall into other categories of unprotected speech, such as libel or obscenity). More crucially, speech which does call for illegal action can still be protected if either of these two conditions obtains: (A) the illegal action is not being sought immediately, or (B) there is reason to believe that the listeners will not actually commit the illegal action (p. 136).

According to these criteria, political speech that advocates “imminent lawless action” can be curtailed by the government (*Brandenburg v. Ohio*, 1969). If an individual’s “utterance is directed towards incitement,” then the government may restrict that individual’s First Amendment rights (Siegel, 1981, p. 138).

An example Siegel (1981) used to explain this was *United States v. Kelner* (1976) where Kelner, the leader of the Jewish Defense League, was charged with threatening the Palestine Liberation Organization leader, Yasser Arafat. His conviction fell under a United States federal

statute that prohibited the “transmission ‘in interstate commerce’ of any communication that threatened the kidnapping or injury of another person” (p. 142). However, Kelner provided two arguments in his case. The first was that he was not in control of his statement being transmitted over state lines. The second was his assertion that he was not threatening through his words and that it “should more accurately be seen as mere political hyperbole” (p. 142). The court rejected both arguments and, in response to the second argument, “admitted at the outset that there can be such a thing as a speech that sounds like a threat but is not one” (p. 142). Furthermore, the Court held that “to be a ‘true threat,’ . . . an utterance must be ‘so unequivocal, unconditional, immediate, and specific as to the person threatened as to convey a gravity of purpose and imminent prospect of execution’” (p. 142). The *United States v. Kelner* decision “held that *words themselves* were capable of expressing an ‘intention of being carried out’” (p. 142). Therefore, the *Brandenburg* test applies to *United States v. Kelner* since it determined to locate the intention within the speaker’s words.

In his article “Allow Offensive Speech – Curb Abusive Speech,” Amitai Etzioni (2019) began with what he calls a “default position” centered on the belief that free speech is essential “for a vibrant democratic and creative society” (para. 1). Etzioni believed the United States Constitution is a living document. To determine when the debate over free speech began, Etzioni (2019) cited World War I and the Espionage Act of 1917 as the beginning of this debate. He used this as his base to explain how the First Amendment and free speech interpretations evolved and were reinterpreted throughout American history, which gives him credence to believe the Constitution is a living document.

However, he believed that there is a category of speech “that causes serious harm – that it is abusive speech” and should be considered more heavily (Etzioni, 2019, para. 19). The question

Etzoni sought to answer is, “How is one to determine that speech is indeed injurious?” (para. 20). To him, there are multiple ways to determine harmful speech. It could be determined harmful by those offended, or it could be based on objective data that explains “psychological and emotional harm” on those affected (para. 21). He added that “it is helpful to draw on the difference between speech that is held to be harmful in and by itself...and speech that causes behavior that is harmful” (para. 24). To determine the difference, Etzoni believed that if violent speech drives violent behavior, then it should be banned because it is the speech that drives the behavior.

In his article “Two Rights of Free Speech,” Andrew Marmor (2018) understood that “Freedom of speech is not one complex right, but spans two separate rights...the right to speak and the right to hear” (p. 140). Further, Marmor trusts that these rights, to hear and speak, are considered “distinct moral rights” (p. 140). Communication is a fundamental human ability that allows for a full life. An individual’s ability to decide what to say, when to say it, and who delivers that message is a fundamental human right. The author’s article targets the government, saying it should not determine what an individual can say and not say because the government is inherently self-interested and cannot be trusted. He ended this portion on the freedom of speech to say that humans’ choice to express “is often a reflection of who and what we are, manifesting various aspects of what we care about, and...our attitude to the world we live in” (p. 143). Whether the right to speak necessitates the right to be heard is the next question Marmor addressed in the article. The right to speak should “guarantee...people’s reasonable ability to express and convey their communicative content” (p. 143). While he believed there are times when a refusal to listen can be immoral or discriminatory, he did not consider these instances to constitute an obligation on the hearer’s part to listen to what the speaker has to say.

An issue arises when trying to define the difference between speech and conduct.

Marmor (2018) believed that the act of slapping someone in the face because the slapper is angry should not be a protected right to free speech. While preventing “harm is often a very good reason for the imposition of legal restrictions on conduct,” the author held the belief that the difference between a reason to prohibit conduct or not rests in the fact that “we do not have a general right not to be harmed” (p. 153). Instead, humans possess the right not to be harmed in “certain ways” (p. 153). For instance, a form of “harm” could look like opening a business across the street that hurts another business. However, the author believed this form of conduct does not violate individual rights. Ultimately, the desire to prevent harm does not justify legal restrictions.

Incitement

Alexander Tsesis’s (2015) three rationales for free speech in the United States are 1) the “claim that the purpose of protecting free speech is to further democratic institutions,” 2) “the constitutional commitment to personal autonomy to be the reason why courts and society at large diligently safeguard and treasure free speech,” and 3) the connection of “the high regard for free speech to the advancement of knowledge” (p. 1016). He concluded that while these rationales provide an adequate “careful judicial scrutiny of speech regulations...they also explain some of the rationale for a normative, constitutional guarantee that secures the free flow of information against government overreaching” (p. 1016). To support the rationales discussed, he addressed areas such as personal autonomy, intentional infliction of emotional distress, and the free speech protections within that category, as well as true threats and incitement.

Before he examined true threats and incitement, Tsesis (2015) claimed that there are two components of free speech, which are 1) “certain rights that people expect institutional authorities to protect” and 2) “where two sets of persons have as valid a claim to government

intervention, concerns for the general welfare becoming deciding factors” (p. 1042). With these components in mind, Tthesis concluded that the First Amendment is meant to “safeguard freedom of expression” while only intervening if “two or more people’s assertions of that liberty conflict” (p. 1042). He took this explanation and applied it to true threats and incitement while providing multiple examples of United States Supreme Court cases.

Utilizing *Virginia v. Black* (2003) as an example, Tthesis (2015) clarified what protected speech is and what it is not. The Court combined multiple cross-burning cases into one case known as *Virginia v. Black* and concluded that “where burning crosses convey threats, a speaker can be held criminally culpable, even where there is no imminent likelihood that a crime will be committed” (p. 1058). To understand this majority opinion, Justice O’Connor, with partial concurring and dissenting opinions from Justices Scalia and John Paul Stevens, held that “because burning a cross is a particularly virulent form of intimidation,” this form of expression with the intent to intimidate, is unprotected by the Constitution (p. 1059). Subsequently, states have the authority to prosecute on criminal charges. Additionally, Tthesis pointed out that in *Snyder v. Phelps* (2011), the Court’s majority, including Justices Roberts, Scalia, Kennedy, Thomas, Sotomayor, Kagan, and Ginsburg, ruled that “someone’s offense is not enough without threats or incitement to create adequate reason to curtail free speech” (p. 1064). Therefore, “when incitement threatens others’ well-being, rather than erring on the side of more vitriol, some restriction is necessary to prevent groups or individuals from translating inciteful sentiments into violence” (p. 1066). Tthesis intended to provide “a better approach to free speech theory...that allows government actors to advance the underlying purpose of the Constitution” (p. 1067). He concluded that speech is not purely libertarian because it has the potential to “harm the legally recognized interests” of other individuals in society.

Edward Eberle (2004) used the Supreme Court's definition of true threat and intimidation to explain his review of free speech in *R.A.V. v. City of St. Paul* (1992), *Wisconsin v. Mitchell* (1993), and *Virginia v. Black* (2003). Eberle argued that the protection of free speech by the Constitution should be done to protect "for reasons, among others...autonomy, human personality, and promotion of democracy" (p. 956). Furthermore, he claimed that the government's role in regulating speech should only be done in reaction to pressing circumstances. Instead, it should instead focus on the behavior of bias or hate regulation, legislation, or education. With these suggestions, the author explained how he believed "[e]very idea is an incitement' to action," which prompted him to claim that expression is a form of action (p. 964). For expression to be constitutionally protected, it must "possess sufficient communicative qualities;" however, the behavior such as arson, trespass, or intimidation are behaviors the government is justified in punishing (p. 964). He used the Supreme Court definition of intimidation, which said that "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death" (p. 984). In *Wisconsin v. Mitchell* (1993), the Court came to a unanimous opinion concerning the conviction of the defendant, Mitchell. According to the Wisconsin statute under which Mitchell was convicted, crimes where the victim is chosen by race subject the defendant to a higher penalty. The Court deliberated on whether Mitchell's increased penalty violated his First Amendment rights and eventually concluded that the statute did not violate his rights since the crime was racially motivated. Eberle (2004) effectively utilized *R.A.V.*, *Black*, and *Mitchell* to demonstrate the government's responsibility to protect the individual from "overt criminal behavior that targets a person based on disfavored status" as well as addressing "behavior that targets a person through fear...such as intimidation, threat or similar terror" (p. 1001).

In cases of offense, the Supreme Court has ruled this particular type of speech as protected by the Constitution. Tsesis (2013) expounded on this form of speech, utilizing *Snyder v. Phelps* (2011) as an example. In *Snyder v. Phelps*, protestors picketed against America's "tolerance of homosexuals" during a soldier's funeral at Westboro Baptist Church. Protestors held signs saying, "God Hates the USA/Thank God for 9/11" and "God Hates Fags" (p. 1149). In turn, the father of the deceased soldier filed a lawsuit against the protestors' claiming it "caused him to suffer 'severe and lasting emotional injury'" (p. 1150). However, the Court's majority, which included Justices Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Sotomayor, and Kagan, ruled against the lawsuit saying the Constitution protected the protestors speech since Snyder could not prove the demonstrators were "intentionally threatening him," as they were separated by a significant physical distance and their speech meant to "shock the conscience but not to intimidate Snyder's entourage" (p. 1151). Additionally, the demonstrators did not threaten public peace. However, if the protestors' speech surpassed offense and posed a "threat," then the speech would be beyond the First Amendment's protections.

Tsesis (2013) also discussed inflammatory speech and its First Amendment protections. In *Brandenburg v. Ohio* (1969), a test was developed by the Supreme Court when it "rejected the claim that hateful statements made without the intent to intimidate the public can be actionable" (p. 1159). Speech must be "likely to cause an imminent public disturbance" to apply the Brandenburg test successfully (p. 1160). Additionally, Tsesis claimed that "states and the federal government...have an interest in criminalizing true threats that, unlike the breast-beating statements at the *Brandenburg* rally, are meant to intimidate the public rather than simply invigorate fanatics or outrage opponents," Tsesis used *Watts v. United States* (1969) and *Virginia v. Black* (2003) to differentiate between true threats and imminent threat of harm.

The Court ruled in *Watts* that the petitioner's threat against the president did not demonstrate "actual intent to commit the threatened harm," and because of this, his speech was protected (Tsesis, 2013, p. 1161). The Court, nonetheless, upheld the statute that criminalized intentional intimidation, which in Tsesis's opinion, further complicated the debate. In *Virginia v. Black* (2003), "intent turned out to be a key component" of the true threats doctrine that "recognizes that the criminalization of willful intimidation can be used to protect public safety" (Tsesis, 2013, p. 1162). Additionally, Justice O'Connor's majority opinion "established that intentionally threatening communications, such as cross burnings 'carried out with the intent to intimidate,' are not protected by the First Amendment" and focused attention on the Virginia statute's prima facie provisions, prima facie meaning that the evidence is "sufficient to establish a fact or raise a presumption unless disproved or rebutted" (Tsesis, p. 1163; Black, 2011, p. 593).

The Court struck down the prima facie provision in the Virginia statute that allowed the "the jury to infer intent" (Kahn, 2009b, para. 5). The Court reasoned that the Virginia cross-burning prima facie provision was unconstitutional because the jury in *Barry Black's* case was instructed with the understanding that the "provision means: 'The burning of a cross, by itself, is sufficient evidence from which you may infer the required intent'" (*Virginia v. Black*, 2003). The Court's concern stemmed from the prima facie evidence that "permits a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense," even in cases where there is no intent to intimidate (*Virginia v. Black*, 2003). Although Justice Scalia agreed that cross burnings with the intent to intimidate were unprotected forms of speech, the Justice delivered a partial dissent concerning the prima facie provision. In his explanation for his dissent, he explained that the prima facie presumption of a guilty mind allows

defenders the opportunity to rebut the claims brought against them in court, specifically as it related to Elliot and O'Mara, the other defendants included in *Black's* case.

Protest in America

The Freedom of Assembly is one of the five freedoms guaranteed in the United States Constitution. Throughout American history, this freedom has been used by citizens to make grievances known to the government. Historical examples of the First Amendment's Freedom of Assembly Clause in action are prominent throughout the 20th century. In response to grievances or injustices, individual citizens have the freedom to assemble and make their grievances heard. Many times, this assemblage forms a social movement with a stated purpose. Examples throughout history include the Women's Suffrage Movement, Prohibition, and the Civil Rights Movement. Instances of protest and the formation of social movements continue to be alive and well in contemporary America. While many movements or assemblies remain peaceful with no notable violent actions, there are instances where actions become violent and affect the entire movement.

When looking at social movements as a whole, Sidney Tarrow's *Power in Movement: Social Movements and Contentious Politics* explores what she called "a broad theoretical framework for understanding the place of social movements, cycles of contention, and revolutions within the most general category of contentious politics" (Tarrow, 2011, p. 7). The author's ultimate goal was to connect "social movements to contentious politics and to politics in general" (p. 7). Taking a more historical approach to the evolution of protests and social movements, Tarrow explained how the repertoire of protest could change "depend(ing) on major fluctuations in interests, opportunities, and organizations" (p. 39). Focusing on early-to-mid 19th

century western Europe and North America, Tarrow expounded on another world of collective action that, based on traditional repertoire, was parochial, segmented, and particular (p. 40).

Unlike the traditional form of protest where “forms of action...were directly linked to the nature of their targets and the grievances of the actors who used them,” the birth of the modern social movement sprung from a “more general nature of the new forms of contention” that “laid a common cultural and behavioral foundation” (Tarrow, 2011, p. 41). Before the 18th century, Tarrow explained that collective action was “violent and direct” (p. 46). She reasoned that without the formation of social movements, an individual or group’s need or belief was the main focus of protest rather than the claims and targets of a “corporate membership” (p. 46). However, after the close of the 18th century, a new form of collective action emerged. In comparison to the pre-18th century traditional repertoire, its modern form could “be adapted to different settings, and its elements combined in campaigns of collective action by coalitions of contenders,” which gave way to “boycotts; mass petitioning; and public meetings” (p. 48).

To understand contemporary legal protection that protestors experience, McCarthy and McPhail (1998) explore the legal doctrine of “public forum law,” which is the result of United States Supreme Court decisions over the “First Amendment rights of free public assembly” (p. 87). According to this doctrine, traditional public forums such as sidewalks and streets are reserved for expressive activity, which means that according to the First Amendment, protests on these public forums cannot be bound by content-based speech but can be bound by “reasonable time, place, and manner restrictions...independent of the content of protestors’ messages” (p. 87). Additionally, these limitations must “be narrowly drawn and unavoidable if ‘compelling state interests are to be served’” (p. 87). The authors note that when protestors gather, there are commitments made by governmental authorities to ensure the protection of protestors’ First

Amendment rights. These commitments are 1) the rights of citizen protest, 2) content neutrality, 3) time, place, and manner restrictions, and 4) advance permit requirement. In the authors' opinion, the commitments made to protestors, specifically time, place, and manner restrictions have contributed to the institutionalization of protest. Although protestors' rights "are now more broadly protected" than they have been before, they have nonetheless become more standardized as "protestors and authorities behavior" is prescribed (p. 108).

Although authorities' commitments have been made to protect protestors' First Amendment rights, protests can turn violent. In a study on the public's response to violent political protest, Brent Simpson, Robb Willer, and Matthew Feinberg investigate the clashes between far-right, white nationalists and counter-protestors in Charlottesville, Virginia, and Berkeley, California. According to the authors, these and other incidents have contributed to American society's debate over violence and its place in political protest (Simpson et al., 2018). To provide background for the study, the authors explain the events that happened in summer 2017 as white nationalists marched through the streets of Charlottesville, Virginia, protesting the removal of a Confederate monument. In response to their protest, a group of "mostly peaceful anti-racist counter-protestors" met the white nationalists (p. 1). In this incident, one counter-protestor died, and others were injured due to a car plowing into a crowd of protestors. A few weeks after the Charlottesville incident, a far-right-wing group and counter-protestors met in Berkeley, California. This clash ended in violent altercations between the two groups.

Additionally, in "Justifying Divisive Tactics," Charles Stewart et al. (2012) explore social movements' utilization of violence as a means of achieving a goal or purpose. They investigate various American social movements and messages that have been used to justify violence as a means of collective action or protest. One example is the Weather Underground movement,

which sought to bring “a quick end to U.S. involvement in Vietnam” (p. 311). This group “set off more than a ton of ammonium nitrate fertilizer and fuel oil on the University of Wisconsin campus in 1972,” destroying multiple buildings and killing Robert Fassnacht (p. 311).

Although the movement intended to ignite support for its cause, the bombing had the opposite effect. The authors note that the use of violence painted an unfavorable picture of anti-war protestors and gave President Nixon the “moral advantage” while simultaneously turning public opinion against anti-war sentiments (Stewart et al., 2012, p. 311). Stewart et al. believe that the public generally holds an anti-war sentiment when it comes to social movements. With this in mind, the authors caution “persons who espouse or resort to violent tactics” to prevent “backlash from *within* and *without* that may deny them legitimacy, support, sympathy, and influence while inviting institutional repression” (p. 311). The existence of violent measures can raise serious moral and ethical concerns, which can contribute to the breakdown of a movement’s fragile coalitions and raise questions about its legitimacy in the public eye.

In their study, Simpson et al. (2018) present and test a theory that said, “The use of violence leads protest groups to be perceived as less reasonable by the general public, a perception that reduces the public’s identification with and support for the groups” (p. 2). Simpson et al. sent out an internet-based survey that was “based on recent violent confrontations” such as Charlottesville and Berkeley to test their theory (p. 2). In the study, the authors found that “violence by protestors reduces public support for the protestors and can even erode support for the causes they support” (p. 2). However, the authors noted that from “a large data set of more than 300 resistance campaigns...nonviolent movements were more effective at winning domestic and international support” (p. 2).

In the explanation of their theory, Simpson et al. propose three hypotheses:

- 1) People will support a protest group less if the group engages in violence.
- 2) The negative effect of a protest group's violence on popular support for the group will be mediated by (1) perceptions of the group's reasonableness and (2) identification with the group.
- 3) Use of violence by a protest group will lead to higher levels of public support for rival protest groups (p. 3).

The study found hypothesis one to be supported by the anti-racist (AR) counter-protest violence. The anti-racist counter-protest violence “undermined...support” (Simpson et al., 2018, p. 10). Hypothesis two was also supported by the study, which found that anti-racist counter-protest violence “led participants to view AR counter-protestors as less reasonable” (p. 10). Hypothesis three found support for the white nationalists because of anti-racist counter-protest violence; however, the study did not “increase AR support” (p. 10). The existence of violent protests are not memories of the past but continue to encourage debate in the 21st century with recent violent incidents. The theory developed by Simpson et al. demonstrates the detrimental effect violence can have on the public's perceptions of a social movement and its message; therefore, this article serves as a guide for social movements and their protesting tactics.

Supreme Court Justice Antonin Scalia

Supreme Court Justice, Antonin Scalia, was a stalwart voice for the Constitution and the freedoms it guarantees each American. A first-generation Roman Catholic American born to Italian immigrant parents, Justice Scalia served on the Supreme Court of the United States from 1986 to 2016. While his Italian heritage was a piece of his identity, he did not allow it to overshadow his pride as an American. In a 1986 speech, Justice Scalia described an American as “...not the name or the blood or even the place of birth, but the belief in the principles of

freedom and equality that this country stands for” (Scalia, 2017, p. 17). As an Italian-American, he was wary that it was not the origin of an American that makes an American, but it is how he or she lives according to the foundational principles of the nation. While he was well-known as an Italian-American, Justice Scalia’s reputation as a conservative jurist preceded him. After working for a year as a justice on the D.C. Court of Appeals, John Roberts, who worked in the White House Counsel office, advocated for Scalia to “argue against the proposed creation of an intermediate judicial panel to help the Supreme Court with its burgeoning caseload” (Biskupic, 2010, p. 107). Roberts firmly believed that the Supreme Court should only review judges' opinions with Scalia’s legal caliber, making Scalia the perfect candidate for the task. However, he had been a judge for less than a year.

As the Reagan administration sought to fill Justice William Rehnquist's seat on the Supreme Court, Senator Dennis DeConcini described Scalia as “a new voice for the Court” (Biskupic, 2009, p. 101). Scalia represented the new conservative justice; he was bold and did not mince words in his court opinions. As a D.C. Court of Appeals judge, he continued “systematically arguing for narrower interpretations of liberal Supreme Court decisions on free speech and privacy rights” (p. 108). The foundation for his narrow interpretation of free speech and privacy rights stemmed from an originalist interpretation of the Constitution. He was vehemently against the notion that the Constitution is a living document and believed it should, instead, be interpreted from the framers’ original intent. Justice Scalia’s tenure as a Supreme Court Justice, along with the many opinions he wrote on free speech, serves as a window into his interpretative method.

Perspectives on Scalia's Judicial Philosophy

In a 2012 CNN interview, Piers Morgan discussed everything from faith and family to politics and judicial principles with Justice Antonin Scalia. The interview provided the viewer with an understanding of what drove Justice Scalia's judicial principles and gave a first-hand account of what he held as his judicial doctrine, especially related to the freedom of speech and assembly. Piers Morgan pointed to the First Amendment and Justice Scalia's view on the American flag's burning. In response to the question, "Why do you believe that people who burn the flag in America should be allowed to do so?" (Morgan, 2012, para. 59), Justice Scalia's answer was quizzical yet in line with the judicial restraints afforded to him as a United States Supreme Court Justice. In answer to Morgan's question, Scalia stated

If I were a king, I – I would not allow people to go about burning the American flag.

However, we have a First Amendment, which says that the right of free speech shall not be abridged. And it is addressed, in particular, to speech critical of the government. I mean, that was the main kind of speech that tyrants would seek to suppress" (Para. 60).

He continued explaining that "burning the flag is a form of expression. Speech doesn't just mean written words or oral words....burning a flag is a symbol that expresses an idea" (para. 61).

According to Scalia, expressions such as "a symbol that expresses an idea" are protected under the First Amendment (para. 61).

In another vein, Piers Morgan posed a question about the difference between insurrection and burning a flag. The question was, "What is the difference about insurrection being unacceptable and speech as you're burning a flag? Isn't that a form of insurrection?" (Morgan, 2012, para. 103). Scalia answered with an emphatic "No," explain that burning a flag in protest of the government to say, "we dislike the government," is "not urging people to take up arms

against the government,” which would be considered insurrection and an unacceptable form of speech according to his application of the Constitution concerning freedom of speech and protest (para. 106).

Four years before his death, Justice Scalia delivered the *Hugo L. Black Lecture on Freedom of Expression* to students at Wesleyan University. Throughout his lecture, he discussed his interpretation method for the United States Constitution and his prevailing view of the First Amendment as it pertains to the freedom of speech. Since the Constitution “contains a number of broad provisions,” originalism, as a method of interpretation, “gives to those terms the meaning they were understood to have when the people adopted them” (Scalia, 2017, p. 201). After examining the originalist definition of interpretation, Scalia applied it to the text of the First Amendment. In his interpretation, Scalia set himself apart from the absolutist view of Justice Hugo L. Black. While Black’s literal interpretation of the First Amendment protects all forms of speech, Scalia disagreed and believed, “there are several types of speech or categories of speech unprotected by the First Amendment” (p. 204). Justice Scalia’s originalist interpretation caused him to view *inciting violence* and *fighting words* as unprotected free speech categories. Scalia determined that speech that incites violence and fighting words was unprotected with an understanding of the Framers’ intent and a grasp on their concept of protected speech.

Toward the end of his lecture, Scalia explained the importance of the originalist interpretation. While some call him a strict constructionist, he clarified that he is no such thing. His reason lies in the fact that “texts should be construed neither strictly nor sloppily, but reasonably” (Scalia, 2017, p. 207). Speech and press, under the First Amendment, are stand-ins for the expression of ideas, and that expression can be made through symbols and symbolic acts as well as through words. Ultimately, judges should not allow their desires to dictate how they

interpret the text. During his tenure as a Supreme Court Justice, Scalia ruled in favor of cases that would otherwise go against his conservative orientation. Still, as an originalist, his duty was to examine the text reasonably and according to the original meaning.

Christopher Wolfe (2019) discussed this originalist interpretation of the Constitution in his article “Originalist Reflections on Constitutional Freedom of Speech.” In the article, Wolfe wrote how “it is easy for modern Americans to disdain the founders’ narrower understanding of the scope” of interpretation; however, because of “the fragility of government in the Founding Era” (p. 536), the Founders developed a narrow view of free speech. Just as Justice Scalia addressed the subject of Justice Hugo L. Black’s absolutist interpretation, Wolfe stated that Black’s literal interpretation is a “modern understanding of ‘freedom’” since the freedom for people “to say whatever they want to say” was not the Founders’ original intent (pp. 537-538). Additionally, Wolfe pointed out that this modern understanding is not realistic since it includes “too many examples of speech that can be – must be – prohibited” (p. 538). According to Wolfe, while the First Amendment allows individuals to speak freely, they are not free from receiving “punishment” if that freedom is abused (Wolfe, 2019, p. 538).

Wolfe (2019) continued by defining originalism as more than a theory of interpretation. To him, originalism is a theory of judicial power. In a similar vein to what Justice Scalia explained in his lecture to the Wesleyan students, Wolfe stated that the originalist’s judicial review “is only appropriate when it is...defending and applying the will of the people...rather than judicial will” (p. 539). For the originalist, the tension between precedent and original meaning is a constant battle. The issue lies in the fact that precedent is not always clear; however, Wolfe makes the distinction that precedent on this subject forces originalists to

concede to “the authority of decisions” that expand free speech where there is “no prior restraint” (p. 540).

Precedent weighs heavy on the originalist’s “understanding of ‘judicial power,’” affecting their view of free speech (Wolfe, 2019, p. 539). For the originalist, precedent forces him or her to “accept the authority of decisions expanding free speech significantly” (p. 540). Analyzing Justice Scalia’s majority opinion in the *R.A.V. v. St. Paul* (1992) Supreme Court case, Wolfe explained that the justice did not appear to be as strong of an originalist as portrayed. For Wolfe, the justice’s opinion “establishes a rather convoluted framework for the case,” which becomes “an elaborate constitutional common law opinion” and is not able to “be justified by an appeal to textual original intent” (p. 544). Modern originalists face a “tough decision” that involves surrendering the originalist interpretation or taking on “a generally deferential standard” to regulating speech, which could have adverse outcomes (p. 544).

At the beginning of their article, “Justice Antonin Scalia: His Jurisprudence and His Impact on the Court,” Andrew Nolan et al. (2016) addressed Justice Scalia’s two principles of judicial philosophy. The first principle the author noted was Scalia’s originalist interpretation of the Constitution because it developed “a historical criterion that is conceptually...separate from the preferences of the judge himself” (p. 3). Like Wolfe (2019), Nolan et al. (2016) drew a parallel conclusion from Scalia’s originalist interpretation, saying it prevented judicial bias in interpreting the Constitution. The second principle of judicial philosophy they mentioned was Justice Scalia’s preference to develop “concrete and discrete rules, rather than broad principles or balancing tests” (p. 3). For Scalia, the development of these concrete and discrete rules prevented him from giving in to his “political or policy preferences” since he followed the general rule set up (p. 3).

Before Justice Scalia ascended to the Supreme Court, the types of speech considered protected from the government by the Constitution were broadened (Nolan et al., 2016). Examples included ending the restrictions on “speech that advocated the overthrow of the government...depictions of sex and indecency from some...government regulation,” and lastly, the Court “expanded the right to criticize the government” (p. 26). Justice Scalia and his “rules-based approach to constitutional jurisprudence” made him question the constitutionality of speech restrictions, believing they were a tool for the government to determine what “ideas and viewpoints to favor and disfavor” (p. 26). Nolan et al. cited one of Scalia’s most prominent Supreme Court cases, *R.A.V. v. City of St. Paul* (1992), that supported Scalia’s judicial philosophy. Writing the majority opinion for the Court, Scalia found “the singling out of fighting words with a particular message for special prohibition...objectionable” (p. 27). In other words, Scalia believed that the restriction of specific forms of speech by the government was inappropriate. On the other hand, the authors noted how Scalia defended the government’s ability to oversee speech regulation in public institutions and prisoners, demonstrating his non-absolutist judicial philosophy (Nolan et al., 2016).

In his article “Justice Scalia and the R.A.V. Mystery,” Eric Gander (2006) defined Justice Scalia as “the Court’s most articulate conservative” (p. 135). His article began with the Supreme Court case *R.A.V. v. City of St. Paul* (1992). It proposed to “solve” what he considers the mystery of Justice Scalia’s opinion related to the *R.A.V. v. City of St. Paul* (1992) case (p. 135). Describing Justice Scalia as “without a doubt the Court’s most articulate conservative,” Gander explained how the justice’s view of free speech was based on “protecting...political speech” (p. 135). The federal laws Scalia voted unconstitutional since they went against the Constitution's core were laws that restricted the amount of money and speech spent to deliver a political message against an

incumbent. The justice also voted against specific categories of speech such as pornography and “was less likely to employ the First Amendment as a shield” (p. 135).

In the *R.A.V. v. City of St. Paul* (1992) case, the petitioner called into question the constitutionality of the City of St. Paul’s ordinance, which regulated certain forms of speech, specifically “fighting words” (Gander, 2006, p. 135). The author noted that St. Paul legislators believed they had developed the ordinance according to the Supreme Court’s rulings on free speech. Gander used the Court’s 1942 decision in *Chaplinsky v. New Hampshire* (1942) to determine the Court’s definition of “fighting words” and better understand Justice Scalia’s view of free speech. In 1942, Walter Chaplinsky, a Jehovah’s Witness street preacher, was convicted under a New Hampshire state law for calling a city marshal “a God damned racketeer and ‘a damned Fascist’” (Gander, 2006, p. 136). This conviction was upheld by the Supreme Court, which wrote that there are “certain utterances that inflict injury without necessarily inciting a breach of the peace” (p. 136). Applying the *Chaplinsky* case to the *R.A.V.* case, the Minnesota Supreme Court “drew upon the definition of fighting words that appears in *Chaplinsky*” (p. 137). But Gander states that the Minnesota Court was unclear “in identifying the ‘injuries inflicted by the expression that St. Paul sought to regulate’” with the ordinance (p. 137). This lack of definition compelled the United States Supreme Court to rule the St. Paul ordinance “fatally overbroad and invalid on its face” (p. 137). In the *R.A.V. v. St. Paul* (1992) case, the ordinance only banned words that had to do with “race, color, creed, religion, or gender,” and for Justice Scalia, this was viewpoint discrimination which allows the government to ban some speech while allowing other forms of speech (p. 139).

While Scalia appeared to be a “defender of free speech,” David Schultz (1993) believed this was not the case (p. 519). Supporting this statement, Schultz mentioned that out of the free

speech, press, and association cases supported by Justice Scalia, they accounted for only “28.3% of his decisions” (p. 519). According to Justice Scalia, the First Amendment is not confined to a “coherent, overarching philosophical, political or legal reading,” and to Schultz, the First Amendment “is really about concrete and specific fact patterns” (p. 520). Although Justice Scalia was known to categorize speech types, including political, commercial, and symbolic, Schultz pointed out a contradiction in the justice’s judicial philosophy in the *R.A.V. v. City of St. Paul* (1992) case. In this case, Scalia appears to have “analyzed First Amendment protection in terms of proscribable or non-proscribable content, which is a more global or comprehensive approach to free speech” (p. 521). This led Schultz to point to what he believed was a “lack of a consistent” First Amendment philosophy (p. 521).

According to Schultz (1993), one area of speech Scalia supported most was expressive conduct. In defense of expressive conduct, Scalia “voted for constitutional protection in five of seven expressive conduct cases,” including *R.A.V. v. City of St. Paul* (1992) (p. 534). Schultz pointed out that most of these cases involved flag burning where the justice struck down laws that he believed suppressed speech (p. 534). Joining the Court’s majority, Scalia agreed that the Texas statute, which designated flag burning as an illegal act when meant “to seriously offend one or more persons,” was unconstitutional since the law prohibited “cases of flag burning...in which the person...sought to express a message through the act” meaning there was no margin for the government to restrict speech or a message in this sense (p. 535).

Relevant Court Cases

R.A.V. v. City of St. Paul

In the United States Supreme Court case, *R.A.V. v. City of St. Paul* (1992), Justice Antonin Scalia delivered the majority opinion. He began by first stating the protections granted to the petitioner, *R.A.V.*, under the First Amendment, saying:

The First Amendment generally prevents the government from proscribing speech...or even expressive conduct...because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid...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 truth that any benefit that may be derived from them is outweighed by the social interest in order and morality’... We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations (pp. 323-333).

Scalia explained that “a particular instance of speech can be proscribable based on one feature (*e. g.*, obscenity) but not based on another (*e. g.*, opposition to the city government)” (*R.A.V. v. City of St. Paul*, 1992, p. 385). An example used was flag burning, specifically in *Johnson v. Texas* (1989). In this particular case, Justice Scalia differentiated between banning “nonverbal expressive activity because of the action it entails, but not because of the ideas it expresses” (p. 385). This example stems from the *Johnson v. Texas* (1989) case where Scalia explained that burning a flag “in violation of an ordinance against outdoor fires could be punishable;” however, burning a flag “in violation of an ordinance against dishonoring the flag” would not be punishable under the First Amendment since it is a form of expression (*R.A.V. v. City of St. Paul*, 1992, p. 385). The Court’s majority opinion in *Johnson v. Texas* (1989) held that the ideas

expressed by Johnson were political and, therefore, deemed protected under the Constitution as political speech.

Additionally, time, place, or manner restrictions were mentioned by Justice Scalia in this Court opinion that applies to both individuals and crowds of people; however, he also included the word “reasonable” before time, place, or manner and the requirement that it must be “justified without reference to the content of the regulated speech” (*R.A.V. v. City of St. Paul*, 1992, p. 386). These restrictions moved the Court to assert that:

Just as the power to proscribe particular speech on the basis of a noncontent element (*e. g.*, noise) does not entail the power to proscribe the same speech on the basis of a content element; so also, the power to proscribe it on the basis of *one* content element (*e. g.*, obscenity) does not entail the power to proscribe it on the basis of *other* content elements (p. 386).

While it has the power to restrict speech “on the basis of *one* content element,” that being obscenity, it does not have the power to restrict speech that is based on other content elements (*R.A.V. v. City of St. Paul*, 1992, p. 386). In *R.A.V. v. City of St. Paul* (1992), the city’s ordinance prohibited the content of speech, citing the use of fighting words. The Court held that:

Although the phrase in the ordinance, “arouses anger, alarm or resentment in others,” has been limited... to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on

the basis of political affiliation, union membership, or homosexuality—are not covered.

The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects (p. 391)

The Court upheld the prohibition of fighting words that were “bias-motivated” meaning those words that contained “messages ‘based on virulent notions of racial supremacy’” (p. 392). The case was overturned in the United States Supreme Court because the ordinance was unconstitutional since it regulated content-based speech.

Texas v. Johnson

During the 1984 Republican National Convention, Gregory Johnson marched through the streets of Dallas, Texas, with other demonstrators in a political protest over “the policies of the Reagan administration and of certain Dallas-based corporations” (*Texas v. Johnson*, 1989, p. 491). When he and the other demonstrators arrived at city hall, Johnson burned the American flag in protest, which resulted in his arrest and criminal conviction under Tex. Penal Code Ann. § 42.09(a)(3) (1989). When the case reached the United States Supreme Court, Justices Scalia, Marshall, Blackmun, Kennedy, and Brennan formed the Court’s majority opinion, written by Justice Brennan. In his delivery, Justice Brennan explained that:

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex. Penal Code Ann. § 42.09(a)(3) (1989). After a trial, he was convicted, sentenced to one year in prison, and fined \$2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson’s conviction...but the Texas Court of Criminal Appeals reversed... holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances (p. 400).

Although the Texas Court of Criminal Appeals reversed Johnson's criminal conviction, the United States Supreme Court's appeal determined whether Johnson's conviction under the Texas law was constitutional.

In the Texas Court of Criminal Appeals' reversal of Johnson's criminal conviction, the court held that the right to difference of beliefs and convictions "is the centerpiece of our First Amendment freedoms," and "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent" (*Johnson v. Texas*, 1988, as cited in *Texas v. Johnson*, 1989, p. 401).

Additionally, the Texas Court of Criminal Appeals determined that the statute in question was "not drawn narrowly enough" and could not be used to compare flag burning or desecration to a breach of the peace (*Texas v. Johnson*, 1989, p. 401). The United States Supreme Court affirmed this conclusion as Justice Brennan held that the statute was "on its face, unconstitutionally vague and overbroad" (p. 402) and "no disturbance of the peace actually occurred or threatened to occur" in response to Johnson's flag burning (p. 408).

Justice Brennan explained the Court's complicated conclusion per the First Amendment. To provide context for the Court's majority opinion, Justice Brennan laid out four considerations for the Court in *Texas v. Johnson* (1989) as follows:

1. Determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction
2. If his conduct was expressive...decide whether the State's regulation is related to the suppression of free expression

3. If the State's regulation is not related to expression, then the less stringent standard we (the Court) announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls

4. However, if the State's regulation is related to expression, "then we (the Court) are outside of *O'Brien's* test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard" (p. 403).

The majority's opinion concluded that "the expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent," and did not disturb the peace; therefore, "Johnson's burning of the flag was conduct 'sufficiently imbued' with elements of communication" (p. 406). The expressive and overtly political nature of Johnson's conduct can be interpreted as political speech. Additionally, the majority held that Johnson's conduct did not disturb the peace, consequently eliminating the State's interest in "preventing breaches of the peace" (p. 420a).

Brown v. Entertainment Merchants Association

Justice Scalia delivered the majority opinion for the United States Supreme Court case *Brown v. Entertainment Merchants Association* (2011). The case was argued in 2010 and decided in 2011 with the respondents reacting to a California law restricting the sale or rental of violent video games to minors. In the majority opinion, Justice Scalia stated that violent video games, similar to "protected books, plays, and movies" are ways to "communicate ideas – and even social messages," which "confer First Amendment protection" (p. 3). Furthermore, the Constitution protects "'esthetic and moral judgments about art and literature..." which are judgments "for the individual to make, not for the Government to decree, even with the mandate or approval of a majority" (*United States v. Playboy Entertainment Group, Inc.*, 2000, as cited in

Brown v. Entertainment Merchants Association, 2011, p. 3). Additionally, protections for the freedom of speech do not change when a new communication medium appears.

Scalia referred to “the most basic of...principles” as the government having “...no power to restrict expression because of its message, its ideas, its subject matter, or its content” (*Ashcroft v. American Civil Liberties Union*, as cited in *Brown v. Entertainment Merchants Association*, 2011, p. 4). Although the government cannot prohibit expression because of its message, Scalia pointed out “well-defined and narrowly limited classes of speech” that are subject to content restriction (*Brown v. Entertainment Merchants Association*, 2011, p. 4). The limited areas include obscenity, incitement, and fighting words (Scalia Speaks, 2017). The law’s need to “adjust the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children” but instead, “create a wholly new category of content-based regulation that is permissible only for speech directed at children” raised serious concerns for the justices and the restriction of free speech (*Brown v. Entertainment Merchants Association*, 2011, p. 7).

Additionally, Justice Scalia stated there is “no doubt a State possesses legitimate power to protect children from harm...but that does not include a free-floating power to restrict the ideas to which children may be exposed” (*Brown v. Entertainment Merchants Association*, 2011, p. 8). In the eyes of the Court, the State has the power to restrict areas of traditionally unprotected speech such as obscenity, incitement, and fighting words, but it does not have the power to restrict what ideas children might be exposed to. Although the California law restricted the content of protected speech claiming it was violence, the Court said the law was invalid unless it passed “strict scrutiny,” meaning there is “a compelling government interest and is narrowly drawn to serve that interest” (p. 12). This requirement was similar to *Texas v. Johnson* (1989),

where a government's restriction of speech or expression is unprotected unless it has "compelling government interest" and can be "narrowly drawn to serve that interest" (*Brown v. Entertainment Merchants Association*, 2011, p. 12).

In *Brown v. Entertainment Merchants Association* (2011), Justice Scalia affirmed that an actual problem must exist to restrict speech. Concerning California's law and its content restriction placed on video games, the justice stated, "California cannot meet that standard" because it could not "show a direct causal link between violent video games and harm to minors" (p. 12). The evidence produced by California was "not compelling" as it was based on the studies that did not have the Court's confidence (p. 12). Justice Scalia's summation of the legislation was as:

(1) addressing a serious social problem and (2) helping concerned parents control their children. Both ends are legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive...As a means of protecting children from portrayals of violence, the legislation is seriously underinclusive, not only because it excludes portrayals other than video games, but also because it permits a parental...veto. And as a means of assisting concerned parents it is seriously overinclusive because it abridges the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime (p. 17).

Therefore, because the law did not meet strict scrutiny, justified by government interest and narrowly drawn to that interest, it was not protected by the First Amendment.

United States v. Eichman

In the United States Supreme Court Case *United States v. Eichman* (1990), the Court heard appeals from individuals who had been convicted for burning the American flag “in violation of the Flag Protection Act of 1989” (p. 312). Justice Brennan delivered the Court’s majority opinion and was joined by Justices Marshall, Scalia, Blackmun, and Kennedy. The United States Supreme Court case *Johnson v. Texas* (1989) ruled that prosecuting an individual for burning an American flag in political protest was not protected under the First Amendment’s freedom of speech. In *United States v. Eichman* (1990), the United States Supreme Court put Congress’s Flag Protection Act of 1989 under review to determine whether the First Amendment protected the appellees’ violation of the act. The United States Supreme Court held that the Flag Protection Act of 1989 could not constitutionally be applied to the appellees.

In the Court’s majority opinion, Justice Brennan restated the ruling on *Texas v. Johnson* (1989) and said, "that a Texas statute criminalizing the desecration of venerated objects, including the United States flag, was unconstitutional as applied to an individual who had set such a flag on fire during a political demonstration” (*United States v. Eichman*, 1990, p. 313). The issue with *Texas v. Johnson* (1989) was the government’s restriction of the expression of speech and not conduct. In *United States v. Eichman* (1990), the Court “first held that Johnson's flag burning was conduct ‘sufficiently imbued with elements of communication’ to implicate the First Amendment” (p. 313). Next, the court rejected Texas’s plea for it to consider the state’s interest “in preserving the flag as a symbol of nationhood and national unity” (p. 314). The issue surrounded the government’s concern with protecting the flag’s symbolism. The government’s concern resulted in the prohibition of an individual’s expression related to the United States flag;

however, the flag's symbolism "is implicated only when a person's treatment of the flag communicates some message" (p. 314).

It was only after *Texas v. Johnson* (1989) that the United States Congress passed the flag protection act of 1989, which included:

(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.

(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.

(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed." (Desecration of the Flag of the United States, 1989 as cited in *United States v. Eichman*, 1990).

Although the Court stated that the appellees flag burning was expressive conduct protected by the First Amendment, Justice Brennan went further, saying the Court needed to determine whether the Flag Protection Act of 1989 was unlike Texas Statute § 42.09 in *Texas v. Johnson* (1989) for it to be applied and restrict appellees expressive conduct.

Although the Flag Protection Act of 1989 did not have an "explicit content-based limitation on the scope of prohibited conduct," the Court concluded that the government did possess an interest in suppressing free expression (*United States v. Eichman*, 1990, p. 315). The reasoning behind this conclusion stems from the government's desire for "protecting the 'physical integrity' of a privately owned flag" (pp. 315-316). Justice Brennan addressed the

“secret destruction” of a flag and how this “would not threaten the flag’s recognized meaning,” a main concern behind the creation of the act (p. 316).

Justice Brennan explained further that even though Congress “cast the Flag Protection Act of 1989 in somewhat broader terms than the Texas statute...in *Johnson*,” the act suppressed expression “out of concern for its likely communicative impact” (*United States v. Eichman*, 1990, p. 317). Due to this intent, the justice stated that the act must stand against the strictest scrutiny. In the Court’s conclusion, Justice Brennan stated that while burning the American flag “is deeply offensive to many... a bedrock principle underlying the First Amendment,” the government is constitutionally prohibited from restricting expression based on the fact that society finds an idea offensive (p. 319).

McCullen v. Coakley

In the United States Supreme Court case *McCullen v. Coakley* (2014), the Court reviewed the Massachusetts Reproductive Health Care Facilities Act. The purpose of this act was to ease conflicts that occurred between petitioners and individuals who represented the abortion clinics. The act set a well-defined 18-foot radius around the abortion clinic. No individual could, without the other’s consent, approach “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling” (§ 120E½(b), as cited in *McCullen v. Coakley*, 2014). However, there were Massachusetts legislators, as well as police officers, who believed the law was ineffective. According to Boston police captain, William B. Evans, “the 18-foot zones were so crowded with protesters that they resembled a ‘goalie’s crease’ making it hard to determine whether a protester had deliberately approached a patient or ... whether the patient had consented” (*McCullen v. Coakley*, 2014, p. 2526). These concerns prompted the state’s

legislature to amend the statute in 2007, replacing the 18-foot radius with a 35-foot radius between the abortion clinic and petitioners.

When the case came before the United States Supreme Court, the Court “held that the Massachusetts law was content-neutral on its face” since a “violation” of the act “depends not on the speech itself but on the location of the speech,” which brought the justices to the conclusion that the act did not need to undergo strict scrutiny (*McCullen v. Coakley*, n.d.). The Court “held that the law was still not sufficiently narrowly tailored to serve a significant government interest because it places too great a burden on the petitioners' First Amendment Rights” (*McCullen v. Coakley*, n.d.). However, it also “rejected arguments that the buffer zones discriminated against abortion-related speech or that they favored one viewpoint over another, which meant that they were not subject to strict scrutiny” (Vile, n.d., para. 3). Ultimately, the majority agreed that the act was content-neutral, not subject to strict scrutiny, and yet unconstitutional since it was not narrowly tailored, meaning there were as few possible restrictions on First Amendment liberties (Strickland, 2009). Yet, the Court held that public walkways and sidewalks are public areas where individuals can conduct “speech activities” (*McCullen v. Coakley*, 2014, p. 2529).

Along with Justices Kennedy and Thomas, Justice Scalia delivered a blistering concurring opinion. Justice Scalia accused the Court’s majority opinion of giving abortion rights advocates a pass when it comes to suppressing their opponents' free-speech rights (*McCullen v. Coakley*, 2014). His opinion rested on the premise that the act was, in fact, content-based and discriminated against anti-abortion petitioners. The justice disagreed with the Court’s dicta, and his reasoning was as follows:

The gratuitous portion of today's opinion is Part III, which concludes... that subsection (b) of the Massachusetts Reproductive Health Care Facilities Act is not specifically

directed at speech opposing (or even concerning) abortion and hence need not meet the strict scrutiny standard applicable to content-based speech regulations. Inasmuch as Part IV holds that the Act is unconstitutional because it does not survive the lesser level of scrutiny associated with content-neutral "time, place, and manner" regulations, there is no principled reason for the majority to decide whether the statute is subject to strict scrutiny (*McCullen v. Coakley*, 2014, p. 2542).

The lack of the Court's application of strict scrutiny greatly bothered Justice Scalia, causing him to center his opinion on the belief that the anti-abortion petitioners were subjected to content-based speech restrictions under the Massachusetts Reproductive Health Care Facilities Act.

Throughout his concurring opinion, it is apparent that content-based speech restriction was a major concern for Justice Scalia. To expand on his opinion that the Massachusetts Act is "content-based" and should be subject to strict scrutiny, Justice Scalia differentiated between "content-neutral" and "content-based" speech when he cited cases such as *Renton v. Playtime Theaters* (1985) and *Ward v. Rock Against Racism* (1989). In *Renton v. Playtime* (1985), the Court ruled a zoning ordinance, "prohibiting adult motion-picture theaters within 1,000 feet of residential neighborhoods, churches, parks, and schools," content-neutral since it was not intended "to suppress pornographic speech but, rather, to mitigate the 'secondary effects' of adult theaters – including by 'prevent[ing] crime, protect[ing] the city's retail trade, [and] maintain[ing] property values'" (*Renton v. Playtime*, 1985, as cited in *McCullen v. Coakley*, 2014). Justice Scalia included *Ward v. Rock Against Racism* (1989) when the Court held a New York City noise regulation as "content-neutral because its 'principal justification [was] the city's desire to control noise levels,'" (*McCullen v. Coakley*, 2014, p. 2544). Justice Scalia described

the reasons behind the majority's conclusion in *McCullen v. Coakley* as "feeble" since the majority "points only to the statute's stated purpose of increasing 'public safety' at abortion clinics" (*McCullen v. Coakley*, 2014, p. 254). The majority's opinion was feeble to Scalia because it did not apply strict-scrutiny to what he believed was "content-based" speech.

Kenneth Burke's *The Act*

Kenneth Burke's approach to rhetoric, known as *Dramatism*, saw words as more "than just the tools we use to interact with one another" and more as "the fundamental building blocks by which we construct our understanding of the world" (Kuypers, 2016, p. 148). Researchers McGeough and King explained Burke's *Dramatism* as words using humans and not the other way around. During Burke's lifetime, persons such as Hitler, Mussolini, Mao, and Stalin inundated people with messages from every corner of the earth, creating "fear, confusion, or deep cynicism" among many western individuals (p. 151). Burke took the examples of these persons and developed his Dramatistic Pentad for people to develop answers to questions themselves instead of being mindlessly guided by other people's agendas and intents. The Dramatistic Pentad enables people to analyze the hidden messages or ideologies of people's messages, which was especially important to Burke, who lived through the 20th century's ravages and the hidden agendas of its tyrannical leaders.

The Dramatistic Pentad consists of five elements: *Act*, *Scene*, *Agent*, *Agency*, and *Purpose*. McGeough and King described the *Act* as answering the question of "what is the action?" (Kuypers, 2016, p. 153). The *Act* incorporates what is being done, what is happening, and what is going on during a dramatic action. The *Scene* is the "context of the act," which ranges from a simple environmental scene to situational ethics where it is argued that "crime is a result of slum living and can be solved by clearing out such neighborhoods" (p. 153). The third

element of the pentad, the *Agent*, describes the individual performing the actions. *Agency*, which “is the dramatic term for the means the agent uses to do the deed,” involves the overall method or technique used to complete the act or thing being done (p. 154). The fifth element, the *Purpose*, “answers the question, why?” (p. 154). While each element is essential to understanding the underlying meaning behind an individual’s rhetoric, the *Act* is used in this study to understand the rhetoric of an act by first understanding what the action is and what is being accomplished or demanded through individual actions.

Chapter 3: Methodology

Purpose

The purpose of this study was to apply Justice Antonin Scalia's criteria of free speech and protest to the Black Lives Matter Movement demonstrations in Minneapolis, New York City, and Portland, as well as President Donald Trump's "Save America" Rally speech on January 6, 2021, to determine the constitutionality of each case study's act, which encompassed each case study's words and actions. This study was a worthwhile discussion as it applied Justice Scalia's developed criteria of constitutionally protected speech and assembly with the first element of Kenneth Burke's Dramatistic Pentad, the *Act*, to the Black Lives Matter Movement's protests in Minneapolis, New York City, and Portland as well as the "Save America" Rally and President Donald Trump's "Save America" Rally speech on January 6, 2021.

Theory Applied

The theory applied in this study comes from the four criteria developed from the United States Supreme Court Justice Antonin Scalia's judicial doctrine of free speech and protest. This study utilized Kenneth Burke's Dramatistic Pentad and his description of the Pentad's first element, the *Act*, to analyze the Black Lives Matter Movement demonstrations in Minneapolis, New York City, and Portland as well as the "Save America" Rally and President Trump's speech at the Rally as a means of communication.

Criteria

This study developed four criteria, pulled from this proposal's current literature review, from Justice Scalia's judicial doctrine of free speech and assembly and applied each criterion to the three Black Lives Matter Movement demonstrations and the "Save America" Rally and President Trump's "Save America" Rally speech on January 6, 2021. The criteria applied were

based on and developed from the court rulings and judicial philosophy of Justice Antonin Scalia presented in chapter two of this study.

Criteria identified and supported

Criterion 1 (1. Political/Offensive Speech). Justice Scalia believed that while the First Amendment protects political and offensive speech, speech that is incitement to violence and/or intends to intimidate another are not protected forms of speech according to the First Amendment.

Summary of Research Supporting Criterion. In his various Supreme Court rulings, Justice Scalia held multiple opinions regarding the constitutionality of offensive speech, threat, and incitement. As defined in Black's Law Dictionary, to incite is "to provoke or stir up (someone to a criminal act, or the criminal act itself)" and incitement as "1. The act or an instance of provoking, urging on, or stirring up," or "2. *Criminal law.* The act of persuading another person to commit a crime" (Black, 2011, p. 371). This act or instance of incitement must be direct and imminent (*Brandenburg v. Ohio*, 1969).

In *Snyder v. Phelps* (2011), the Court's majority opinion, joined by Justice Scalia, held that deeply offending another person is not enough to prosecute that person without actual incitement that threatens another's well-being. In this Court case, demonstrators gathered outside of the Westboro Baptist Church to protest American tolerance of homosexuals. Additionally, demonstrators picketed with signs saying, "God Hates the USA/Thank God for 9/11" and "God Hates Fags" (Tsesis, 2013, p. 1149). While the protest continued, a funeral for a deceased United States soldier took place. In reaction to his deep offense, the dead soldier's

father filed a lawsuit against the demonstrators, saying he was subjected to “severe and lasting emotional injury” (p. 1150). When the case reached the U.S. Supreme Court, the majority ruled that the demonstrators’ form of speech was constitutionally protected since Synder could not prove the demonstrators meant to intentionally “intimidate, defame, or advance criminal conduct” toward him (p. 1151).

Additionally, Justice Scalia wrote the majority opinion for *Brown v. Entertainment Merchants Association* (2011). In the opinion, the justice noted that for the government to restrict speech, measurable harm to individuals must be shown. In this case, a California law sought to prohibit certain video games because the government believed they were directly linked to violence in children. However, Scalia noted that the Californian government did not have enough evidence to prove that this direct link existed; thereby, dismissing the government’s argument. The Court held that for the government to restrict speech, a problem must exist, and the restrictions must be narrowly drawn and exact for government action.

Justice Scalia agreed with the Court’s majority opinion in *Virginia v. Black* (2003) that certain events, such as burning a cross with the intent to intimidate, are unprotected forms of speech for which an individual may be held criminally responsible.

Writing for the majority in *Virginia v. Black* (2003), Justice O’Connor utilized the Supreme Court case, *R.A.V. v. City of St. Paul* (1992). In *R.A.V.*, the St. Paul ordinance committed viewpoint discrimination based on designating

some forms of speech protected and others as unprotected according to the First Amendment.

The Court's majority agreed that the Virginia cross-burning prima facie provision was unconstitutional because it allowed the "jury to infer intent" (*Virginia v. Black*, 2003, p. 378). Prima facie meaning "sufficient to establish a fact or raise a presumption unless disproved or rebutted" (Black, 2011, p. 593). In *Virginia v. Black* (2003), the Court explained the provision as having been presented to the jury as "the burning of a cross, by itself, is sufficient evidence from which you may infer the required intent" (p. 349). The Court's primary concern came from the provision's allowance of "a jury to convict in every cross-burning case in which defendants exercise their constitutional right not to put on a defense," despite cases where there is no intent to intimidate (p. 372).

In a partial dissent, Justice Scalia disagreed with the majority's opinion over prima facie. In his explanation, the prima facie presumption of a culpable mind allows defenders the opportunity to rebut the claims brought against them in court.

In *R.A.V. v. City of St. Paul* (1992), the Minnesota Supreme Court ruled that the St. Paul ordinance only prohibited speech similar to fighting words. However, when the case was appealed to the United States Supreme Court, Justice Scalia used *Texas v. Johnson* (1989) as an example to explain how it is permissible for the government to ban speech that is a nonverbal expressive activity; however, the government may not prohibit or ban expressive forms of speech, such as a flag burning in protest of the government, which is political

speech. Justice Scalia upheld the ban on words that contain messages of bias toward racial superiority. However, the Court ruled that the St. Paul ordinance prohibited words or expression on a discriminatory basis, which was unconstitutional since the government applied First Amendment protections to some forms of speech and not others, which is what Justice Scalia called *viewpoint discrimination*.

Therefore, Justice Scalia believed that while the First Amendment protects political and offensive speech, speech that is incitement to violence and/or intends to intimidate or cause direct harm to another are not protected forms of speech according to the First Amendment.

Criterion 2 (2. Expression and Symbolic Speech). Justice Scalia believed that the First Amendment protects and provides individuals the freedom of expression through symbolic speech. However, the protected symbolic speech does not protect incitement to violence, rioting, or intended threats of harm toward another person. According to Scalia, protected forms of expression include political speech when an individual expresses his or her “contempt for the government, the Congress, the Supreme Court, even the nation and the nation’s flag” (Scalia, 2017, p. 207).

Summary of Research Supporting Criterion. In his review of the Supreme Court cases *R.A.V. v. City of St. Paul (1992)*, *Wisconsin v. Mitchell (1993)*, and *Virginia v. Black (2003)*, Edward Eberle (2004) defined the meaning of the term “expression,” and the government’s power to regulate that expression. According to Eberle, an idea is “an incitement’ to action,” and for the expression of that idea to be sufficiently protected by the First Amendment, it must have significant

communicative qualities (p. 964). Eberle clarified the difference between expressive behavior protected by the First Amendment and expressive behavior justified by government regulation or punishment. Expression is deemed unprotected when, among others, it takes the form of arson, trespass, or intimidation. Expression of an idea can take the form of symbolic speech, which is all “nonverbal, nonwritten forms of communication” and is protected from government regulation unless “it causes a specific, direct threat to another individual or public order” (Kahn, 2009a, para. 1).

In his CNN interview with Piers Morgan, Justice Scalia stated what he believed to be constitutionally protected expression and speech forms. In his answer to Morgan’s question regarding the allowance of individuals to burn the American flag, Justice Scalia stated that the First Amendment, “which says that the right of free speech shall not be abridged,” is addressed “to speech critical of the government” (Morgan, 2012, para. 60). The expressive nature of burning the American flag is a symbolic form of speech that communicates a message and, subsequently, is a form of protected speech.

The communicative qualities of flag burning as an expressive act of political protest explain why Justice Scalia deemed flag burning as protected speech. In his opinion, the First Amendment allows citizens to express their grievances with the government.

In *Wisconsin v. Mitchell* (1993), the Court unanimously decided the conviction of the defendant, Mitchell. Convicted under a Wisconsin statute that increased sentences when the defendant chose his or her victim based on race,

Mitchell was found guilty. In accordance with the statute, his sentence was increased as his crime was biased in nature. Mitchell argued that the law violated his First Amendment rights; however, the Supreme Court did not find the statute in violation of his rights (Eberle, 2004).

In *Watts v. United States* (1969), the Court ruled that an actual intent to commit a threatened harm was unprotected speech. Additionally, Justice Scalia joined the Court's majority opinion in *Virginia v. Black* (2003), where Justice O'Connor "established that intentionally threatening communications, such as cross burnings 'carried out with the intent to intimidate,' are not protected by the First Amendment" (Tsesis, 2013, p. 1163). Intent was a key component in *Virginia v. Black* (2003) as it recognized that the willful intention of intimidation could be criminalized to protect public safety.

The American form of government necessitates the freedom of expression with symbolic acts that are significantly imbued with communicative qualities and relay a political message. In his interview with Piers Morgan, Justice Scalia stated that if the government restricts the freedom of expression, it abridges Americans' First Amendment rights.

Additionally, ruling with the majority opinion in *Johnson v. Texas* (1989), Justice Scalia explained his view on the right of freedom of expression under the First Amendment protection. As an expressive and symbolic form of speech against the government, Johnson's burning of the American flag was deemed protected by the First Amendment since it adhered to what the Court determined as four considerations from the *O'Brien* test and did not disturb the peace.

Shortly after *Johnson v. Texas* (1989), Justice Scalia joined the other justices on the Court's ruling in *United States v. Eichman* (1990) that the Flag Protection Act of 1989 was unconstitutional. Like *Johnson v. Texas*, Congress's Flag Protection Act of 1989 went under review by the Court to determine whether the appellees who violated the Act were protected by the First Amendment's freedom of expression. In the Court's majority opinion, joined by Justice Scalia, the Court ruled that the government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable.

Therefore, Justice Scalia believed that the First Amendment protects and provides individuals the freedom of expression through symbolic speech. However, the protected symbolic speech does not protect incitement to violence, rioting, or intended threats of harm toward another person. According to Justice Scalia, protected forms of expression include political speech when an individual expresses his or her "contempt for the government, the Congress, the Supreme Court, even the nation and the nation's flag" (Scalia, 2017, p. 207).

Criterion 3 (3. Time, Place, or Manner Restrictions). According to Justice Scalia, the government may restrict non-content-based speech or conduct when it violates time, place, or manner restrictions as well as disturbance of the peace. When applied to the First Amendment's right to peacefully assemble, the time, manner, and place restrictions as well as the disturbance of the peace apply.

Summary of Research Supporting Criterion. In the United States Supreme Court case *R.A.V. v. City of St. Paul* (1992), Justice Scalia, who wrote the Court's majority opinion, stated that for the government to ban speech or assembly, a

reasonable time, place, or manner restriction may be enforced. However, the ban must be justified without reference to the content of the assembly or speech. Justification for the ban applies to conduct such as breaking the reasonable restrictions, including limiting the noise level of speech or protest, limiting the number of protestors in attendance, or prohibiting early-morning or late-evening protests (O'Neill, 2009).

Additionally, Justice Scalia wrote a concurring opinion in the United States Supreme Court case, *McCullen v. Coakley* (2014). The Massachusetts state legislature passed a statute setting an 18-foot radius around an abortion clinic, prohibiting anti-abortion petitioners from approaching those entering or exiting the clinic without consent. Police officers and state legislatures believed the statute was ineffective, however. The Massachusetts legislature amended the law to be a 35-foot radius to resolve the ineffective radius. While the Court's majority believed this was content-neutral on its face, even though they did not think it was as narrowly tailored as it should have been, Scalia disagreed. He explained that content-neutral regulations include sound volume and a time, place, or manner restriction. Regarding the relevant statute, he explained that it was content-based as it appeared to discriminate against the anti-abortion protestors' message and not their conduct.

Therefore, according to Justice Scalia, the government may restrict non-content-based speech or conduct when it violates time, place, or manner restrictions as well as disturbance of the peace. When applied to the First

Amendment's right to peacefully assemble, the time, manner, and place restrictions as well as the disruption of the peace apply.

Criterion 4 (4. Insurrection). According to Justice Scalia, an insurrection is an unacceptable form of speech.

Summary of Research Supporting Criterion. In his 2012 CNN interview with Piers Morgan, Justice Scalia answered another question about insurrection and its link to flag burning. In response, Scalia clarified that he did not believe the First Amendment's right to free expression applied to insurrection. For him, the symbolic expression of burning a flag in protest of the government and the call to arms against the government were two separate forms of speech. The former being protected expression or speech and the latter being unprotected expression or speech.

Therefore, according to Justice Antonin Scalia, an insurrection is an unacceptable form of speech.

As an originalist, Justice Scalia's interpretation of the Constitution's text was derived from the Framers' original intent. Justice Scalia was not an absolutist and did not believe that the Constitution should protect every free speech type. Instead, based on court rulings previously discussed, he believed that specific free speech categories, such as the incitement of violence and fighting words, are unprotected speech categories by the First Amendment. Additionally, he believed that communication via an act is constitutionally protected expression, evident through his various rulings on flag burning cases. As it applies to the freedom of assembly, Justice Scalia's criteria hold that expressive conduct, carried out peacefully and within a reasonable time, place, or manner restriction, is protected by the First Amendment. While there are

protected forms of speech and assembly according to the other three developed, Justice Scalia believed that insurrection is never an acceptable or constitutionally protected form of speech.

Study Design

The study's design was a textual-investigative case study analysis that followed a multi-step process to gather and synthesize information on the Black Lives Matter Movement protests in Minneapolis, New York City, and Portland and President Donald Trump's "Save America" Rally speech on January 6, 2021.

The study's first step was to determine the criteria of Justice Antonin Scalia's judicial doctrine of free speech and assembly in accordance with the United States Constitution's First Amendment.

The study's second step was to conduct and analyze the Black Lives Matter and "Save America" Rally case studies.

Black Lives Matter Case Study

The first step was to choose and analyze a piece of rhetoric from Black Lives Matter leaders over the time period discussed in the case study.

The second step was to understand the act by providing the Black Lives Matter Movement's history and background that led to the demonstrations in Minneapolis, New York City, and Portland during the summer of 2020.

The third step defined and delimited the act by analyzing the Black Lives Matter protests in Minneapolis, New York City, and Portland during each protest's set period of time. This included gathering news articles during each protest's set period of time and analyzing videos of protestors' actions during the demonstrations in Minneapolis, New York City, and Portland.

The fourth step was to apply Justice Scalia's criteria to the act, defined in step three, and

answer each criterion to determine whether the speech and protest in each city were constitutionally protected according to the study's developed criteria.

“Save America” Rally Case Study

The first step was to analyze President Donald Trump's “Save America” Rally speech.

The second step was to understand the act by providing history and background for President Donald Trump's “Save America” Rally speech on January 6, 2021, and the eventual breach of the U.S. Capitol on January 6, 2021.

The third step was to define and delimit the act by President Donald Trump's “Save America” Rally speech in light of the January 6, 2021, U.S. Capitol breach. This included the rhetorical analysis of President Trump's speech as well as the gathering of news articles and videos that reported on the U.S. Capitol breach Trump supporters' reactions during the U.S. Capitol breach.

The fourth step was to apply Justice Scalia's criteria to the act, defined in step three, and answer each criterion to determine whether the speech and protest conducted on January 6, 2021, was constitutionally protected according to the study's developed criteria.

These criteria should be seen as an attempt to summarize Justice Scalia's judicial doctrine of protected speech as a conservative upholding a literal interpretation of the United States Constitution.

Chapter 4: Case Studies and Criteria Application

To provide a successful and balanced study of what is considered free speech and protest according to Justice Scalia's four criteria, 1) political/offensive speech, 2) expression and symbolic speech, 3) time place, or manner restrictions, and 4) insurrection, this study conducted two case studies. The first case study covered Black Lives Matter demonstrations in three cities throughout a specified period of time. The second case study was on the "Save America" Rally and President Donald Trump's speech on January 6, 2021. Each case study applied Justice Scalia's four criteria to determine the protected or unprotected words and actions in each case study.

Black Lives Matter Case Study

In response to the 2013 acquittal of George Zimmerman, Trayvon Martin's killer, Patrisse Cullors, Alicia Garza, and Opal Tometi created the #BlackLivesMatter project (Black Lives Matter, n.d.-a). The project's mission was to "eradicate white supremacy and build local power to intervene in violence inflicted on Black communities by the state and vigilantes" (para. 1). On July 17, 2014, Eric Garner died from an altercation with police officers. In less than a month after Garner's death, Michael Brown was fatally shot by police officer Darrell Wilson in Ferguson, Missouri. After Garner and Brown's deaths, the Movement grew to a "member-led global network of more than 40 chapters" (Black Lives Matter, n.d.-b, para. 1). Since then, it has associated itself as an "ideological and political intervention" for black lives, including women, queer and transgender individuals (para. 2).

A pivotal moment in the Black Lives Matter Movement (BLM) happened in May 2020, when George Floyd, an African-American man living in Minneapolis, Minnesota, died due to an encounter with police officers. Floyd's death ignited a string of protests across the United States

and the world. For the Movement, this was a moment to “build local power to intervene in violence inflicted on Black communities by the state and vigilantes” and end white supremacy (Black Lives Matter, n.d.-b, para. 1). Much of its goal and purpose over the summer of 2020 was to defund the police in cities across America. In an analysis on data collected by the nonprofit organization, Armed Conflict Location and Event Data Project (ACLED), the civil unrest, which occurred in response to Floyd’s death, noted that “in more than 93% of all demonstrations connected to the movement, demonstrators have not engaged in violence or destructive activity” (Kishi, 2021, para. 8). However, the data also showed that out of the 12,045 incidents, “the 633 incidents coded as riots” found “88 percent...recorded as involving Black Lives Matter activists” (Kishi, 2021, as cited in Pullman, 2020, para. 3). Additionally, “BLM activists were involved in 95 percent of the riots for which there is information about the perpetrators’ affiliation” (Pullman, 2020, para. 3). While there was an overwhelming number of peaceful protests conducted by the Black Lives Matter Movement, the violence associated with the Movement’s name took center stage during the summer of 2020.

In her article, “Opal Tometi, co-founder of Black Lives Matter: 'I do this because we deserve to live,’” Ellen Jones (2020) discussed Tometi’s activist background by noting her childhood. An underlying distrust of the government developed when Tometi experienced childhood trauma as her parents, who were illegal immigrants from Nigeria, faced possible deportation. Jones explained Tometi’s outrage at Trayvon Martin's death and its influence on the creation of the Black Lives Matter Movement. For Tometi, the name Black Lives Matter is what she described as “an ‘umbrella statement,’” that is “broad enough to challenge not just the criminal justice system, but also racism in education, healthcare and elsewhere” (para. 15). When

questioned about the violence that occurred during the summer of 2020, Tometi responded saying:

In 93% of the protests, nothing like that has happened. But beyond that I'll be really honest: I'm not really concerned about broken glass. I'm concerned about people's broken faces, their broken bodies...Property can be replaced, people cannot (para. 20).

Additionally, Tometi noted how the Black Lives Matter protestors "have been the victims of violence (para. 21), while she described the perpetrators as police officers, military, and vigilantes.

In his Question and Answer session with Opal Tometi, Isaac Chotiner (2020) discussed the recent Black Lives Matter protests and what they meant to Tometi and the movement's goal to defund the police. Chotiner's question, "How are these protests different from what came before, and why do you think they are different from what came before?" was answered by Tometi, who set the George Floyd protests apart from other protests since she believed, "they are marked by a period that has been deeply personal to millions of Americans and residents of the United States" (para. 2). The "deeply personal" period of time emotionally connects those millions of Americans to be more "tender or sensitive" to the issues facing black Americans (para. 2). Additionally, Tometi's answers included words such as "barbaric" to describe the murder of George Floyd and "war" to describe what she views as the system's unequal and unjust war against black people. A common theme throughout her answers centered on the struggle black Americans face as she claimed they are subjected to police brutality and an unjust and unequal system.

Chotiner (2020) continued asking, "Is it important that a specific agenda is heard from protesters, or is that the job of other people?" and clarified his question, saying, "People showing

up at protests with signs listing specific reforms.” In her answer, Tometi explained that those who participated in the protests called for “a divestment from the police and an investment in black communities” (para. 11). Ultimately, she was speaking against what she considered a war on black communities and people. Her language demonstrated a commitment to the protection and respect of protestors’ rights and the “immediate relief” of black communities where African-Americans have a controlling stake (para. 11). For Tometi, prioritizing property over people was a main concern regarding reform in the black community. The emotional connection and “war on black people” justified her reasons for not condemning the loss of property but instead focused on loving “people over property” (Chotiner, 2020, para. 13).

In the beginning of her essay, “Black Lives Matter and the Paradoxes of U.S. Black Politics: From Democratic Sacrifice to Democratic Repair,” Juliet Hooker (2016) distinguished herself from those whom she believed demonized the Black Lives Matter Movement’s efforts “to protest the routine killing of black persons with impunity across the United States for minor, if not imagined, offenses by representatives of the state” (p. 449). The protests the author described were in reaction to the 2014 death of Michael Brown. To the author, the Black Lives Matter Movement’s critics and supporters, who took to the street shortly after, “have viewed the same events through very different lenses” (p. 449). The difference of perspective lies in the two group’s view of protests. She explained that one group viewed the protests as “unlawful ‘riots,’” while others saw them as “justified ‘uprisings’” (p. 449). These perspectives brought to question the “forms of politics that black citizens, who are experiencing a defining moment of racial terror in the United States in the 21st century, can and should pursue” (p. 449). Because of what Hooker described as the 21st century’s “racial terror” on black citizens and their continual state as losers in the United States, she believed that blacks suffer and sacrifice at the expense of the democratic

polity (p. 456). She sought to understand if the “exemplary citizenship” of black Americans, through peaceful means of protest in the past, resulted in inequality as “an unjust form of democratic suffering” (p. 449). To Hooker, the unjust suffering of black Americans, regardless of their “exemplary citizenship” (p. 449), questioned whether the “riots” were justified reactions to the “racial terror” black Americans face in the United States. According to Hooker, the only proper form of combating “racial terror” and violence against black Americans is to “consider instances of ‘rioting’ as a form of democratic redress for black citizens” (p. 464). Regardless of whether these instances of violence are “often viewed as self-destructive,” Hooker believed that rioting might be “productive” for black Americans since it “allow(s) for the expression of black anger and pain,” which could be repressed by black sacrifice (p. 464).

Peter Hasson (2020) defined riots as “demonstrations in which any demonstrators engage in violently disruptive or destructive acts...as well as mob violence in which violent mobs target other individuals, property, businesses” (para. 5). For three months, during the summer of 2020, the United States Crisis Monitor reported that the United States experienced 637 riots, with 91% of those riots linked to the Black Lives Matter Movement. Hasson included multiple quotes from Black Lives Matter organizers such as Ariel Atkins, saying, “I don’t care if someone decides to loot a Gucci or Macy’s or a Nike store, because that makes sure that person eats...that makes sure that person has clothes” (para. 10). To Atkins, these violent actions were justified as reparations.

In an article by Casey Michel, the violence during the summer of 2020 was described as the “kinds of domestic unrest America hasn’t seen in decades” (Michel, 2020, para. 3). Portland was an example of extremism, and as Mark Pitcavage, a researcher for the Anti-Defamation League, said, “I think Portland in a lot of respects represents a worst-case scenario” (para. 5).

Portland was the scene of extreme and violent protests by the Black Lives Matter Movement. The Black Lives Matter protests can be considered a catalyst for Portland's violence. Michel wrote that "left-wing forces...insist that 'riots and looting' are 'a legitimate and profound form of protest'" (para. 6). The article quoted former Portland State University professor, Randy Blazak, saying, "the thing that's been happening in the country, the political division over race, has been happening here – we're kind of one step ahead in that conversation...Portland is positioned to lead that conversation...I think Portland can help guide the way" (para. 24).

In her examination of the Black Lives Matter Movement and its grassroots efforts, Leslie Crutchfield (2020) discussed how the Movement "has been building for years, and it has reached a tipping point," with the death of George Floyd (para. 2). Unlike the Civil Rights Movement of the 1960s, the Black Lives Matter organization does not possess a sole, "charismatic leader," which, in Crutchfield's opinion, protects the Movement, making it less vulnerable (para. 4). To accomplish the Movement's mission to end police brutality and racial injustice, social norms must be changed. Similar to Hooker (2016), Crutchfield (2020) repeated the phrase "racial reckoning" to demonstrate the inequality of black Americans to a larger, dominant racial group (para. 9). She believed that corporations could attribute change in the social norm to reconcile this racial disparity. Crutchfield believed that the future of racial reckoning is determined by what Black Lives Matter and its allies do to advocate for change. In previous months, this advocacy has taken the form of violent protesting, and which, according to Hooker, is an effective means to enacting real "democratic redress" (p. 464).

The Protests

At the beginning of the summer of 2020, the Black Lives Matter Movement sprung into action after the death of George Floyd. In the following case study, the aftermath of George

Floyd's death was discussed. This case study was defined and limited to the acts conducted in Minneapolis, Minnesota, from May 25 to May 30; New York City, New York, from May 30 to June 4; and Portland, Oregon, from May 29 to June 2. Within each protest, Burke's *Act* which, "incorporates what is being done, what is happening, and what is going on during a dramatic action," was demonstrated. Each city's demonstrations were carried out in response to George Floyd's death, and a significant portion of their message involved defunding the police.

Minneapolis Protest

Monday, May 25. On Monday, May 25, 2020, George Floyd died due to an encounter with four Minneapolis police officers. In response to a call about a forgery, Derek Chauvin, Tou Thao, J. Alexander Kueng, and Thomas K. Lane arrived at the scene (Bjorhus, 2020). After interacting with Floyd for a considerable time, the interaction escalated and resulted in Floyd's death. In a Facebook video posted by an onlooker, officer Chauvin is shown kneeling on top of Floyd's neck, who repeats the ubiquitous phrase "I can't breathe" (Frazier, 2020, 1:05). In reaction to Floyd's death, the Minneapolis Police Chief immediately dismissed the four officers on Monday night, which resulted in their firing on Tuesday and criminal charges being brought against the officers.

Tuesday, May 26. Civil unrest immediately followed George Floyd's death in Minneapolis, Minnesota. On Tuesday, May 26, demonstrators gathered at Cup Foods as more information about his death was revealed. Protestors held signs with sayings such as "I can't breathe" and "Stop Killing Black People" (Kaul, 2020, para. 23). The crowd swelled to thousands as it marched from Cup Foods to the Minneapolis Police Department's Third Precinct. As the evening continued, protestors broke windows and

sprayed graffiti on the Minneapolis Police Department's Third Precinct, causing police officers to spray rubber bullets and tear gas (MPR, 2020). In a May 26 Twitter post, a video was posted at 8:54 PM showing protestors gathering outside of the Minneapolis Police Department's Third Precinct entrance. The video began zoomed-in on the protestors as a small group of them got into a tussle near the Third Precinct entrance (Frost, 2020). The general atmosphere appeared to be tense and highly charged as flashing red and blue lights were seen in the distance. The Twitter post described the scene as "cops in riot gear. More tear gas" (Frost, 2020). However, Tuesday, May 26, did not evolve into full-blown civil unrest as protestors "dispersed" because of rain (Kaul, 2020, para. 24).

Wednesday, May 27. On Wednesday, May 27, the four officers involved in Floyd's death were revealed. During the day, the Minneapolis mayor, Jacob Frey, held a press conference where he advocated for charges against the police officer responsible for kneeling on Floyd's neck. This call for charges to be brought against the officer came from Frey's belief that there was no "evidence that the use of force had been justified" (Kaul, 2020, para. 28). That night, protestors had another skirmish with police officers. In this instance, rubber bullets, tear gas, and flashbangs were utilized by police officers.

As the night wore on, the Target store near the Minneapolis Police Department's Third Precinct was looted, and in raw video footage, the store appeared to be in disarray with merchandise strewn around. Looting was not the only incident that happened on May 27. Stores such as "AutoZone, Wendy's and an apartment building, were set ablaze" as protests raged on throughout the night (Kaul, 2020, para. 34). The night experienced more violence with Calvin Horton, Jr.'s protest-related death when he was fatally shot by

the Cadillac Pawn & Jewelry shop owner. As police officers tried to help Horton after the shooting, they were “physically and verbally assaulted,” which resulted in them moving Horton to another location (The Associated Press, 2020, para. 5). The pawnshop owner was released without charges since the investigators did not “have enough evidence to prove that the shooting wasn’t self-defense” (The Associated Press, 2020, para. 3).

Wednesday, May 27, began a string of violent acts that occurred throughout Minneapolis as protestors took to the streets.

Thursday, May 28. After the previous nights’ outburst of civil unrest, the Minneapolis mayor, Jacob Frey, urged the governor to call out the National Guard (Kaul, 2020, para. 36). According to a report by Caputo et al., “Between 9 p.m. on Wednesday, May 27, and 7 a.m. on Thursday, May 28, the Minneapolis Fire Department responded to 16 fires within blocks of the 3rd Precinct” (2020, para. 31). In the early morning, looters raided Cup Foods. Video footage showed the glass entrance doors shattered as water covered the ground, with food items strewn across the floor. Multiple shelves were turned over, cash registers were damaged, and empty shelves lined the aisles (KARE 11, 2020).

As protestors began gathering in St. Paul, the governor deployed 500 National Guard troops to Minneapolis and St. Paul to “protect life, preserve property and the right to peacefully demonstrate” while ensuring “fire departments are able to respond to calls” (Minnesota National Guard, 2020). Like May 27, looting and arson continued as tension grew at the Minneapolis Police Department’s Third Precinct. As darkness fell, “a distress call went out over the scanner” from the Third Precinct, saying, “They’re breaching the gates. They are throwing stuff at our cops” (Caputo et al., 2020, para. 50). Normally, when police officers are under attack, force is the appropriate response. In this situation,

Minneapolis authorities deemed best for the police officers to retreat and evacuate the precinct to not cause more violence or anger among the public. At 9:53 PM, another distress call went out from the Third Precinct saying, “We need to move. We need to move,” resulting in the police officers' evacuation of the Third Precinct (para. 1). After police officers evacuated the Third Precinct, protestors set fire to the building (Kaul, 2020). Video footage showed protestors in front of the burning building shouting, “I can't breathe,” as some raised their fists in the air (Elfrink et al., 2020, 0:11). The Third Precinct and hundreds of other buildings burned during the night of Thursday, May 28. **Friday, May 29.** Early Friday morning, Minneapolis mayor, Jacob Frey “held another press conference, once again acknowledging people's anger over Floyd's death;” however, “he also deemed the looting and destruction ‘unacceptable,’ and called on the city for peace” (Kaul, 2020, para. 48).

In a video showing protestors gathered outside of the Minneapolis Police Department's Fifth precinct, a protester with a megaphone was seen saying to the crowd, “and they said...ya'll have until 8 o'clock to go home...and who went home, ya'll? Who went home?” (Tanner Charles, 2020, 2:20-2:28). He is heard further chanting, “Who outside?” as the crowd responded, “We outside!” in defiance of the governor's protest-related 8 PM curfew (Charles, 2020, 2:32). That night, cars and other buildings such as the U.S. Post Office near the Fifth Precinct, a Wells Fargo, and another convenience store were set ablaze (Kaul, 2020).

Saturday, May 30. At 1:30 AM Saturday, May 30, Minnesotan governor Tim Walz addressed the growing civil unrest in Minneapolis and St. Paul. During this press conference, Walz said, “This is not grieving, and this is not making a statement...this is

life-threatening, dangerous to the most well-qualified forces to deal with this...this is not about George's death. This is about chaos being caused" (CBS Minnesota, 2020, para. 3). First responders, such as firefighters, struggled to battle the many fires burning across the city and the lack of police protection from rioters. Police officers were significantly outnumbered. On Saturday morning, for example, there were a mere 350 police officers on the ground, far outnumbered by protestors and rioters (WCCO, 2020, para. 7). In response, Minnesotan officials "announced that the Minnesota National Guard would be mobilized fully for the first time since World War II" while continuing to emphasize the importance of residents keeping the 8 PM curfew (Kaul, 2020, para. 67).

Because first responders were outnumbered and targeted by rioters, residents took matters into their own hands as they "developed plans to protect their homes and business" (Kaul, 2020, para. 73). It had been four days and nights of chaos and violent civil unrest. It was not until late Saturday that "police and the National Guard greatly outnumbered peaceful protesters" (Sawyer et al., 2020, para. 2). Minneapolis and St. Paul residents continued with their plans to protect their homes and businesses (para. 2). Efforts such as "caution tape, sawhorses, and makeshift barricades" were crafted to "protect residential areas from rioters" (para. 1). The twin cities saw fathers and daughters standing with bats, ready to protect their neighborhood (Melo, 2020). As law enforcement became elusive, residents took action to protect their neighborhoods. George Floyd's death ignited a period of turmoil that continued throughout the summer of 2020 and spread to other major and minor American cities such as New York City, New York, and Portland, Oregon.

New York City

Saturday, May 30, and Sunday, May 31. In the evening of Saturday, May 30, and into the early morning on Sunday, May 31, looters ransacked stores such as Apple, Chanel, and Rolex. Video footage showed looters exiting Chanel's broken storefront window carrying items as they quickly ran away (Rosner, 2020). In another video, looters entered and exited a broken Apple storefront window carrying and throwing items into the crowd gathered outside (Perez, 2020).

Monday, June 1. After the previous evening events, the June 1 daytime protests near Midtown New York City were peaceful. As the day wore on, protestors moved through the streets with their hands in the air, chanting, "Hands up, don't shoot" (Kimball, 2020, para. 7). However, as night fell, the looting began once again.

Midtown's peace did not last long when the Zumiez store on Broadway and 13th was broken into and looted (Kimball, 2020). Looters attempted to break into a Smoke & Vape shop, "but police arrived on the scene and chased them away" (para. 10). Additionally, they broke into Macy's on 34th street, Nike, Coach, and Bergdorf Goodman. That same night, Wall Street's George Washington statue was vandalized with the words "Black Lives Matter" graffitied on it.

The unrest was not limited to looting and vandalism. In the late evening of June 1, video footage showed a police officer struggling to hold a man to the ground as another man picked up a "large metal object" and threw it at the police officer while running away (Sergeants Benevolent Association, 2020). Another man in a black shirt picked up the same metal object and hit the police officer again while another man held him to the ground. Throughout the day, the New York Police Department (NYPD) made 700

arrests, and New York City witnessed its worst night of civil unrest (Kimball, 2020). In response, New York City Mayor Bill de Blasio put an 11 PM curfew into effect to stop the unrest; however, the curfew was changed to 8 PM on Tuesday, June 2.

Tuesday, June 2. Tuesday, June 2, witnessed another full day of protest. Around 6 PM, nearly 3,000 protestors gathered at Foley Square and headed toward the mayor's residence at Gracie Mansion (Pozarycki et al., 2020). This large protest and the one earlier that day remained peaceful (Kimball, 2020). It was not until the 8 PM curfew that police officers and protestors clashed once more (Pozarycki et al., 2020). This resulted in arrests as protestors broke curfew. It was reported that around 20 protestors looted a Verizon store on Broadway and Canal Street during the evening of June 2. At around 9:30 PM, protestors defiance of the 8 PM curfew, set up blockades to prevent police officers from reaching them. However, this did not stop police officers from making arrests for curfew violations.

Wednesday, June 3. In defiance of the curfew, Wednesday's protests resulted in groups that "continued to demonstrate long past the deadline" (Barnard, 2020, para. 2).

According to Terrance A. Monahan, the department's Chief, the police response to the curfew violation was unlike the night before where, according to Terrance A. Monahan, the department's Chief, protestors were given until "...9 o'clock. And there was no indication they were going to leave" (para. 6). However, since the police officers took a harder stance on the curfew Wednesday, Chief Monahan reported that "as of 9:30 p.m...no looting had been reported in the city" (para. 12). The NYPD's hard implementation of the 8 PM curfew on Wednesday, June 3, had a "calming impact," according to Mayor de Blasio (para. 7).

Thursday, June 4. In the early evening of Thursday, June 4, approximately 300 protestors marched through the Bronx neighborhood of Mott Haven. This protest, which started at 6 PM, “was one of the many community-driven responses” to George Floyd’s death. Around 7:50 PM, protestors “encountered a row of at least 50 police officers with bikes blocking them” (Human Rights Watch, 2020, para. 92). When the protestors turned to continue “east on 136th Street,” they were met by another line of police officers in the front and another behind “at around 7:56 p.m.,” which blocked the protestors from continuing or turning back (para. 92). By 8 PM, protestors “were trapped...and the arrests had already begun” as police officers held people to the ground to arrest them with zip ties (para. 98).

Portland Protest

Friday, May 29. The protests on Friday, May 29, in Portland, Oregon, began peacefully. Protestors held a vigil for George Floyd, where thousands of people attended the vigil, which lasted over three hours (Rambo, 2020). Once the vigil finished, protestors marched toward the downtown Multnomah County Justice Center, which houses the county jail and police headquarters. The large group of protesters marched from Peninsula Park and across the Burnside Bridge was peaceful (Levinson, 2020). It was not until “some members of the crowd marched to the Multnomah County Justice Center” and began smashing windows and igniting a fire inside that the Portland police defined the event as an “unlawful assembly” (Harbarger, 2020, para. 5). Police arrived in riot gear and “used tear gas, pepper balls and stun grenades to attempt to break up the protest” to stop the violence from continuing (para. 6). At around 11:30 PM, the Pioneer Mall was broken into and looted, while fires were lit in the streets and in downtown. Police labeled Friday,

May 29, as the first riot, defined as “when six or more people ‘engage in tumultuous and violent conduct and thereby intentionally or recklessly creating a grave risk of causing public alarm’” (Thompson, 2020, para. 6).

In his response to the riot, Portland Mayor Ted Wheeler held an interview with KGW at 12:30 AM on Saturday calling for protestors to “go home,” calling “their actions a ‘dismantling of our beloved community’” (Harbarger, 2020, para. 24). He continued saying, “What’s going on right now is flat out breaking the law, violating our community, violating the memory of George Floyd and so many other people on such an important night” (para. 25). On Friday, May 29, the violent outburst prompted Mayor Ted Wheeler to declare a State of Emergency at 4 AM on Saturday and implement a curfew that lasted until 6 AM on Saturday. This curfew began again on Saturday at 8 PM and lasted until Sunday, May 31, at 6 AM (Levinson, 2020, para. 2). The curfew prevented any resident from traveling on public streets (KOIN, 2020). The May 29 protests and subsequent riots resulted in the arrest of 13 people on charges such as arson, theft, riot, and burglary.

Saturday, May 30. Saturday, May 30, was the second night of protest over the death of George Floyd. Around 6 PM, a crowd of about “500 people gathered outside of the Justice Center in an almost immediate confrontation with police” as protestors chanted the phrase “no justice, no peace” (KOIN, 2020, para. 6). By 7:14 PM, after multiple attempts to disperse the crowd with flashbangs, the police “declared the gathering an ‘unlawful assembly’” (KOIN 6, 2020, para. 9). At 8 PM, the curfew went into effect. By 8:30 PM, the unlawful assembly turned into a “civil disturbance,” defined as “a gathering that constitutes ‘a clear and present danger of riot, disorder, interference with traffic’ or other threat to public safety” (Thompson, 2020, para. 6). Although the Portland police's

crowd dispersion tactics prevented “more volatile mobs,” pockets of protestors continued to march in the streets (KOIN, 2020, para. 7). In live video footage taken around 10 PM titled, “Civil Disturbance: 7 Arrested in 2nd Night of Portland Protests,” a reporter from KOIN 6 described the scene in downtown Portland. In total, Portland police arrested “at least 48 people” on charges of curfew violation, burglary, riot, and disorderly conduct (KOIN 6, 2020, para. 3).

Sunday, May 31. On Sunday, May 31, Portland witnessed another night of tense clashes between protestors and Portland police officers. An act of goodwill and compassion was demonstrated as police officers and protestors kneeled together in solidarity near the scene of the previous nights’ unrest beginning at 5 PM (Harbarger, 2020a). Around 5:30 PM, Portland police said that protestors were “obeying an order to vacate the street near Southwest Third Avenue and Main Street” (para. 41). According to a tweet sent out by the Portland Police Bureau, police would not “interfere with their peaceful march as long as it remains civil” (Portland Police, 2020a). Soon after, thousands of protestors gathered to march on Portland’s east side (Harbarger, 2020b).

Immediately after the 8 PM curfew went into effect, police fired off tear gas to disperse the gathered crowd (Harbarger, 2020a). Police officers claimed protestors had thrown water bottles prior to the tear gas being deployed. Police officers then explained to the crowd that the gathering had been designated an unlawful assembly and needed to disperse or face arrest. However, as police officers attempted to disperse the crowd, another large group from Laurelhurst Park entered the downtown area. In video footage provided by Molly Harbarger (2020b), Portland police are heard saying, “the city of Portland wants to protect your First Amendment rights. The tone of your demonstration

will set the tone for this evening. Please demonstrate but do not destroy your city.” At 10:50 PM, police officers reported a disturbance at the federal courthouse causing police to deploy tear gas to disperse the crowd. Soon after, police officers repeated this course of action as fireworks were directed toward them.

Monday, June 1. On Monday, June 1, Portland police officers set up a fence around the Multnomah County Justice Center as thousands of demonstrators gathered once again to protest George Floyd's death (Ramakrishnan, 2020, para. 3). This protest was peaceful and began on Portland's eastside at Revolution Hall, moved into downtown at the Pioneer Courthouse Square, and then back to Revolution Hall at 11:30 PM (KGW, 2020b). Tina Jones, a lieutenant with the Portland Police Bureau, said that protestors were “self-policing” which “made for a more peaceful atmosphere than previous nights,” although the 8 PM curfew was still in effect (KGW, 2020b, para. 10). After the large crowd had “disbanded on their own accord for the night,” a group of nearly 100 people, “throwing projectiles, including glass bottles and rocks” clashed with police officers in the early morning hours of June 2, resulting in police declaring another “unlawful assembly” (paras. 2-3).

Tuesday, June 2. On Tuesday, June 2, two peaceful protests took place. The first began with “a couple hundred demonstrators at Pioneer Courthouse Square” (KGW, 2020a, para. 5). Around 6:30 PM, another began at Revolution Hall. After the second protest crowd crossed the Burnside Bridge and reached Pioneer Courthouse Square, the two converged into one large, peaceful crowd. After 9:30 PM, police officers declared another unlawful assembly as a separate group of protestors, “at Southwest Taylor and 4th Avenue,” threw projectiles at police officers (KGW, 2020a, para. 9). At 10 PM, the

Pioneer Courthouse Square protestors marched back across the Burnside Bridge and dispersed, and at 10:25 PM, Portland police announced that “due to criminal activity and unlawful assembly, everyone should leave the downtown area immediately. Please do not come downtown” (KGW, 2020a, para. 11). Police used tear gas and later, police warned protestors that those who did not vacate would “be subject to arrest or use of force, including riot control agents and impact munitions” (Portland Police, 2020b). Events calmed down around 2 AM, and the 8 PM curfew was lifted on Tuesday, June 2.

After George Floyd's death, protests throughout the United States, and the world were organized in association with the Black Lives Matter Movement. This case study focused on Minneapolis, Minnesota; New York City, New York; and Portland, Oregon, in the days that followed George Floyd's death. A general overview of the events that happened between May 25 and June 4 was done for each city during a specific period of time. Within each city, the *Act*, which incorporates what is being done, what is happening, and what is going on during a dramatic action and the protestors/rioters' speech, was seen and heard. The overall attitude and speech within each protest is a reflection of the Movement's leadership. An analysis of Hawk Newsome's 2020 interview with Fox News anchor Martha MacCallum provides a focused analysis of a Black Lives Matter leader's attitude and speech concerning the Movement and its message.

Analysis of Hawk Newsome's Interview

On June 24, 2020, Fox News anchor Martha MacCallum held an interview with Hawk Newsome, the President of Greater New York Black Lives Matter. At the beginning of the interview, MacCallum asked, “What exactly is it that you hope to achieve through violence?”

which elicited him to respond saying, “Wow...it’s interesting that you would pose that question like that” since he believed America was “built upon violence” and, to support his claim, he used the American Revolution as an example (BexarPatriot, 2020, 01:48-02:21). Newsome continued saying, “why – are you screaming and not allowing me to talk, ma’am?” (02:38-02:44). After this short, fiery exchange, Newsome explained that he hoped black citizens would arm themselves in self-defense instead of relying on police protection. Later in the interview, Newsome questioned MacCallum on her support of the Second Amendment and explained that he considered it a solution for African-Americans' defense. Furthermore, he reasoned, when the discussion to arm African-Americans was discussed, “the talk is violence but when white people grab assault rifles and go to...their...state’s capitol, it’s all good,” and explained that the “hypocrisy of America” is one where saving property, not lives, is prioritized (03:23-03:36).

After Newsome questioned MacCallum on her support of the Second Amendment, she brought the conversation back around to the use of violence and questioned Newsome’s true motives behind his words, “burn it down’ it’s time” (BexarPatriot, 2020, 04:11). Newsome clarified the intention behind “burn it down” (2020, 04:11). According to him, his statement “if this country doesn’t give us what we want, then we will burn down this system and replace it” could be interpreted figuratively or literally, “it’s a matter of interpretation” (04:20-04:32). Newsome claimed wealth and property ownership grew when African-American people rioted in the 1960s, which led him to conclude that real change could come from the summer 2020 protests, as “people get aggressive, and they escalate...their protests, the country listens” (05:28-05:36). His belief, however, was that peaceful protesting did not have the same changing effect.

Throughout the interview, Newsome’s rhetoric can objectively be deemed fiery and agitated. His statement, “if this country doesn’t give us what we want, then we will burn down

this system and replace it,” sounded rousing, polarizing, and combative (BexarPatriot, 2020, 04:20-04:25). However, his following statement demonstrated an attempt to maintain a demeanor of neutrality concerning the advocacy of violent protests. He followed his previous statement about the 1960s riots with another, “I don’t condone nor do I condemn rioting,” which further validated his neutral stance (05:41-5:46).

Application of Criteria

The study applies Justice Scalia's criteria to determine whether the Black Lives Matter Case Study is protected speech and protest. The application of Scalia’s criteria found multiple observations as defined below:

Criterion 1 (1. Political/Offensive Speech)

Justice Scalia believed that while the First Amendment protects political and offensive speech, speech that is incitement to violence and/or intends to intimidate another are not protected forms of speech according to the First Amendment.

Observation 1. In his interview with Martha McCallum, Hawk Newsome stated that the United States was built on violence, and if the country did not give protestors what they wanted, then the system will burn and be replaced. He followed this statement with, “I could be speaking figuratively. I could be speaking literally. It’s a matter of interpretation” (BexarPatriot, 2020, 4:25-4:36).

When applying Justice Scalia’s first criterion (1. political/offensive speech), the study first addresses Hawk Newsome’s incitement to violence. According to Justice Scalia’s first criterion, incitement is not protected speech. As defined, incitement is “the act or instance of provoking, urging on, or stirring up” (Black, 2011, p. 371). In his interview with Martha MacCallum, Hawk Newsome stated that the system would burn,

which was about the government authorities; however, his statement was immediately followed with “I could be speaking figuratively. I could be speaking literally” (2020, 04:27-04:32). According to Scalia’s criterion (1. political/offensive speech), for the incitement to violence to occur, an individual must intentionally stir up or provoke another to violence.

Although his language may be offensive to some on the conservative side of the political aisle, Newsome’s language was political as he stated his grievance with the governing authorities in an attempt to enact change for the Black Lives Matter Movement.

Also, Newsome’s speech did not appear to have a direct cause and effect on Minneapolis, New York, or Portland’s violent protests discussed in this study as his statement remained intentionally neutral toward violent protests when he stated, “I don’t condone nor do I condemn rioting” making the possibility of a violent riot directly linked to his interview very unlikely (2020, 05:41-05:46). Additionally, his language did not direct a specific threat or intent of intimidation toward one person(s) or group.

Therefore, it can be concluded that Hawk Newsome’s speech is protected according to Justice Scalia’s first criterion (1. political/offensive speech) because he did not intentionally direct one person(s) or a group to carry out a specific form of violence, his speech was political in nature, and it is unlikely that this particular interview is a direct link to a specific violent protest.

In his address at Wesleyan University, Justice Scalia stated that “There are other examples of speech that is unprotected by the First Amendment because ‘the freedom of

speech’ was not understood to cover it. Incitement to violence and fighting words, for example” (Scalia, 2017, p. 205).

Criterion 2 (2. Expression and Symbolic Speech)

Justice Scalia believed that the First Amendment protects and provides individuals the freedom of expression through symbolic speech. However, the protected symbolic speech does not protect incitement to violence, rioting, or intended threats of harm toward another person. According to Scalia, protected forms of expression include political speech when an individual expresses his or her “contempt for the government, the Congress, the Supreme Court, even the nation and the nation’s flag” (Scalia, 2017, p. 207).

Observation 1. Throughout the summer of 2020, the United States experienced a string of protests in major and minor cities alike. This case study focused on the Black Lives Matter protests in Minneapolis, New York City, and Portland immediately following George Floyd’s death in late May 2020. In a 2020 interview with Ellen Jones, Opal Tometi discussed the Movement’s founding and her opinion of the violent protests that occurred during the summer of 2020. Although she claimed that 93% of the protests were peaceful, she also stated that she was “not really concerned about broken glass” (Jones, 2020, para. 20).

Juliet Hooker’s assessment of the Black Lives Matter Movement in 2016 prompted her to say that while some saw the Movement’s protests as “unlawful riots,” others viewed them as “justified ‘uprisings’” (p. 449). It was the “racial terror” on black citizens that led Hooker to believe that the only way to combat the terror was to “consider instances of ‘rioting’ as a form of democratic redress for black citizens” (p. 464). While there was a tremendous amount of peaceful protesting, those were those who participated in the violent Black Lives Matter protests and did so with the intention of expressing their

grievances. Additionally, Black Lives Matter organizer, Ariel Atkins, said, “I don’t care if someone decides to loot a Gucci or Macy’s or a Nike store, because that makes sure that person eats...that makes sure that person has clothes” (Hasson, 2020, para. 10). For Hooker in 2016 and Atkins in 2020, protesters' violent actions were justified as reparations and were considered means for living.

In Minneapolis, New York City, and Portland, peaceful protesting did occur; however, violence and rioting occurred. For six days, there was looting, arson, and vandalism across Minneapolis. On Thursday, May 28, the Minneapolis Police Department’s Third Precinct burned as protestors stood outside with their fists in the air yelling George Floyd’s ubiquitous line, “I can’t breathe.”

For nearly five days, New York City experienced events similar to those of Minneapolis. Peaceful protests were carried out during the day and when night came, so did looting, arson, vandalism, and physical assault. On Monday, June 1, a police officer was physically assaulted with a large, metal object as he struggled to hold another man to the ground.

In Portland, the events were similar to those of Minneapolis and New York City. While there were peaceful protests throughout the day, violence broke out at night with looting, arson, and physical assault. Additionally, violent protestors threw projectiles and water bottles at police officers, which resulted in multiple clashes. There were multiple nights when the Portland Police Bureau (PPB) declared an unlawful assembly, and on Friday, May 29, they declared Portland’s first riot.

The violent demonstrators’ form of symbolic expression as a form of grievance was the violent acts in each city. This study considers their expressed forms of speech to

be looting, arson, and physical assault. It is believed among some that to enact true change and be heard, broken glass and stolen Nikes may be necessary. Additionally, this form of speech can be categorized as political since the protestors possess contempt for the government.

In *Texas v. Johnson* (1989), Justice Scalia recognized the burning of the American flag as protected speech. However, the symbolic act of burning a flag was done peacefully, did not disturb the public, and did not end in a riot.

Therefore, when applied to the Black Lives Matter Movement's violent protests in Minneapolis, New York City, and Portland, Justice Scalia's second criterion (2. Expression and symbolic speech) does not categorize the protestors' violent forms of expression as protected speech under the First Amendment. Protestors' criminal activities such as looting, vandalism, arson, and rioting immediately placed them in an unprotected category of free speech as they broke reasonable laws that are enforced to keep the peace.

As an originalist, Justice Scalia interpreted the "action" of Johnson's flag burning in *Johnson v. Texas* "a form of speech" (Scalia, 2017, p. 206). According to Justice Scalia, the expression of ideas "can be made through symbols and symbolic acts as well as through words" (p. 207).

Criterion 3 (3. Time, Place, or Manner Restrictions)

According to Justice Scalia, the government may restrict non-content-based speech or conduct when it violates time, place, or manner restrictions as well as disturbance of the peace. When applied to the First Amendment's right to peacefully assemble, the time, manner, and place restrictions as well as the disturbance of the peace apply.

Observation 1. The violent nature of the demonstrations that took place in Minneapolis, New York City, and Portland were subjected to a curfew enforced by the governing authorities. The violence that occurred with each protest mainly happened during the night. The nature of the violent protests prompted authorities to enact and enforce curfews for the cities.

In each city, Minneapolis, New York City, and Portland, the governing authorities enforced curfews to respond to the violent protests. Despite police officers' best efforts to enforce the curfews, violent protesting continued throughout the night, which resulted in the violent protestors' curfew violation. An example of protestors breaking curfew was the gathering that happened outside of the Minneapolis fifth precinct. In this video, protestors chanted and referred to the 8 PM curfew saying, "Who outside?" "We outside!"

As a response to the violence in their cities, each mayor enforced a reasonable time, place, or manner restriction. The form of this restriction was a curfew and was violated by the violent protestors.

Observation 2. In addition to the curfews enforced, police officers in Portland declared civil disturbances and unlawful assemblies multiple times. Police officers utilized tear gas and rubber bullets to disperse protestors who refused to leave when ordered to do so after the curfew was in effect.

Therefore, when applied to the Black Lives Matter protests in Minneapolis, New York City, and Portland, Justice Scalia's third criterion (3. time, place, or manner restrictions) deems assemblies after the reasonable time, place, or manner restriction, as unprotected speech.

Furthermore, protestors' refusal to vacate an area when ordered to do so by a police officer after the curfew went into effect is another violation of the curfew and subsequently a violation of a time, place, or manner restriction. Therefore, when applied to the protestors' curfew violation, Justice Scalia's third criterion (3. time, place, or manner restrictions) views this as unprotected speech.

In his opinion for *R.A.V. v. City of St. Paul*, Justice Scalia stated that the Court had "upheld reasonable 'time, place, or manner restrictions;'" however, these restrictions were only applicable if they were "justified without reference to the content of the regulated speech" (*R.A.V. v. City of St. Paul*, 1992).

Criterion 4 (4. Insurrection)

According to Justice Scalia, an insurrection is an unacceptable form of speech.

Observation 1. The study does not find Justice Scalia's fourth criteria (4. insurrection) applicable to the Black Lives Matter violent protests. In order to be deemed an insurrection, an attempt to overthrow authority or the government must be present. In the Black Lives Matter case study, the protests sought police defunding, not a change of government.

In his interview with Piers Morgan, Justice Scalia asserted that an insurrection is an unacceptable form of speech and thereby deemed it unprotected.

Summary of Applied Criteria

In the application of Justice Scalia's free speech criteria, three criteria apply to the Black Lives Matter case study while one criterion does not apply. Scalia's first criterion (1. Political/offensive speech) finds Hawk Newsome's speech as protected; however, his second criterion (2. Expression and symbolic speech) holds that expression, through looting, vandalism,

and arson, as an unprotected form of speech. Lastly, Justice Scalia's third criteria (3. Time, place, or manner restrictions) finds that the violent demonstrators violated the reasonable time, place, or manner restriction, and because of this, their speech was unprotected. Scalia's fourth criterion (4. Insurrection) does not to the violent Black Lives Matter demonstrators since they neither attempted nor carried out an act of insurrection.

“Save America” Rally Case Study

Every four years, the United States of America undergoes a national presidential election, and on November 3, 2020, the nation elected a new president. Due to restrictions pertaining to COVID-19, such as social distancing and statewide lockdowns, many individuals chose to vote via mail-in ballots for the first time. The use of these mail-in ballots caused significant anxiety among many conservatives, and the potential for election fraud was a primary concern, especially for President Donald Trump. Suspicions surrounding the November 3rd election prompted President Trump to contest the election results. Because elections are not certified until January 6, President Trump had time to make his case. On the day they were due to certify the election results, the United States Congress gathered to declare an official presidential winner. This study provided a broad overview of the president's rhetoric between December 2020 and the beginning of January 2021 and was limited to President Trump's "Save America" Rally speech on January 6, 2021.

After November 3, many major news organizations pronounced Joseph Biden as the new president-elect. Pew Research found that nearly half of the primary ballots cast in the 2020 presidential election were absentee ballots, and by October 28, "more than 75 million voters already had cast ballots" (Desilver, 2020, para. 6). Due to an overwhelming number of mail-in ballots and legal battles being fought in multiple swing states, the election results were delayed

until December 8. In response, President Trump delivered a statement on December 23, 2020. In the video's first 40 seconds, he asserted that "Democrat officials in the key swing states illegally violated their own state laws in order to enable, encourage and facilitate fraud on a scale never before seen in the history of our country...we won by a landslide" (0:28-0:42). President Trump claimed there were "statistically inconceivable vote dumps" in Michigan, Wisconsin, Georgia, and Pennsylvania. For example, he pointed out that Michigan suddenly reported 147, 224 votes with 94% for Joseph Biden (Dent, 2020, para. 3). However, this jump was a clerical error that resulted in 153,710 votes for Biden instead of 15,371. The problem was quickly resolved, nullifying President Trump's claim of election fraud in this instance. Another example he used was Wisconsin's sudden 140,000 vote jump. However, Milwaukee County leans heavily toward the Democrat Party during each election cycle. Additionally, due to President Trump having "heavily criticized voting by mail," many Democrats chose to vote via absentee ballot (para. 5). These two examples seemingly disprove the claim made by President Trump in his speech on December 23.

In addition to the video of his speech, President Trump's Twitter account contained similar rhetoric between December 12 and January 6. For example, on December 12, he tweeted, "WE HAVE JUST BEGUN TO FIGHT!!!" (Trump, 2020, as cited in Sherman, 2020, para. 12). Subsequently, on December 18, he posted, "We won the Presidential Election, by a lot. FIGHT FOR IT. Don't let them take it away" (Trump, 2020, as cited in Sherman, 2020, para. 9). On December 26, he claimed that the 2020 Presidential election was "the biggest SCAM in our nation's history, despite overwhelming evidence. They should be ashamed. History will remember. Never give up. See everyone in D.C. on January 6th" (para. 14). On January 3, 2021, President Trump tweeted, "If you are planning to attend the peaceful protests in DC on the 6th, i

recommend wearing a body camera. The more video angles of that day the better” (para. 20).

Starting on the day of the election and culminating with his speech at the “Save America” Rally, President Trump’s language consisted of strong, hyperbolic, and colorful rhetoric, with the expressed intent of exciting his voter base.

The “Save America” Rally

On January 6, 2021, thousands of Trump supporters gathered at the National Mall in Washington, D.C. to protest the United States presidential election amidst claims that it had been stolen from President Trump. On the morning of January 6, President Trump addressed the large crowd that had gathered on the National Mall. After his speech, a group of ardent supporters clashed with United States Capitol Police. The feeling on the ground was described in an *Insider’s* video compilation from the day. At the beginning of the video, one Trump supporter, pointing to the Capitol, was heard saying, “We can take that place...Heads on pikes!” (Abramson, 2021, 00:00-00:07). Tensions continued to rise, which resulted in Capitol Police evacuating some congressional buildings. Protestors “tried to push past the officers who held shields and officers could be seen firing pepper spray into the crowd to keep them back” (The Associated Press, 2021, para. 85). While this was occurring, President Trump sent out a tweet that urged protestors to “stay peaceful” but did not urge for their dispersal (para. 80). Protestors eventually breached all barriers and walked through the Capitol, shouting and waving both American and Trump flags. As a result of the violence, two people lost their lives. One, a Capitol Police Officer, Brian Sicknick, died from an injury as he clashed with protestors. The second was Ashli Babbitt, who a Capitol Police Officer shot as she climbed through a window (Nexstar Media Wire, 2021).

Rhetorical Analysis of Trump's Speech

The rhetoric used by President Trump in his social media posts leading up to January 6, 2021, set the stage for one of his last and most controversial public addresses as president. This rhetorical analysis of President Trump's "Save America" Rally speech was divided into three sections and a short discussion on his language's influence throughout his speech. The three sections are 1) the media's role in the claim of election fraud, 2) President Trump's claim of election fraud, and 3) his accomplishments and the subsequent impact of a Biden presidency on them.

In the first three minutes of his speech, President Trump immediately called out the media for misrepresenting the crowd at the "Save America" Rally. After describing the scene, he continued saying, "The media is the biggest problem we have as far as I'm concerned, single biggest problem" (Trump, 2021, 03:35-03:40). His rhetoric regarding the media changed tone at minute 9:59 when he criticized them for refusing to show the crowd and as bearing responsibility for his loss in the election. Similar to the four years of his presidency, President Trump accused the media of suppressing free speech and claimed the election was worse than that of a corrupt third-world country. The language he used to paint the media as corrupt included words such as "communist" and "silent," to which he explained that the media's silence about his claims was akin to suppression of speech (28:10-28:17). Although his rhetoric at the beginning of his address was focused on the media and their perceived attempts at silencing him as well as his claims of election fraud, President Trump's accusations persisted throughout as he discussed the election, as well as the impact of a Biden presidency on his legacy and the nation as a whole.

The purpose of the "Save America" Rally was to protest what many believed to be widespread fraud in the 2020 presidential election. As a keynote speaker for the Rally, President

Trump's speech was filled with fiery language concerning his election fraud claim. Within the first four minutes, he made the following statements:

Hundreds of thousands of American patriots are committed to the honesty of our elections and the integrity of our glorious Republic. All of us here today do not want to see our election victory stolen by emboldened radical left Democrats, which is what they're doing and stolen by the fake news media. That's what they've done and what they're doing. We will never give up. We will never concede, it doesn't happen. You don't concede when there's theft involved (Trump, 2021, 04:10-04:40).

Words such as "stolen" and "fake" to describe the election and media, respectively, were followed by the assertion that "we," as in President Trump and his supporters, "will never concede" (Trump, 2021, 04:10-04:40). Later, he posed the question, "Does anyone believe that Joe had 80 million votes? Does anybody believe that? He had 80 million computer votes. It's a disgrace," which was artfully used to infuse doubt into the legitimacy of a Biden victory (06:09-06:22). Additionally, President Trump addressed the "weak Republicans," saying they must "fight" against vote certification, and if they did not fight, then the people "have to primary the hell out of the ones that don't fight" to save the American democracy from what he perceived to be an emanate threat (14:28-14:32).

Nearly halfway through his speech, President Trump presented what he believed to be iron-clad proof of election fraud. Among the concerns presented were perceived issues in crucial battleground states such as Michigan, Wisconsin, Georgia, and Pennsylvania's. After this, he addressed Vice President Mike Pence, whose job was to oversee the electoral votes' final count and certification on January 6, 2021. During this direct address to his Vice President, his language changed and became antagonistic in nature, "And Mike Pence, I hope you're going to

stand up for the good of our Constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you" (Trump, 2021, 51:29-51:48). President Trump continued describing the election as "fraudulent" and a "criminal enterprise" as he neared the end of his speech (01:03:03-01:03:14).

Throughout his "Save America" Rally speech, President Trump mentioned the incoming Biden presidency several times. He mentioned to the crowd that he "will not take the name off the Washington Monument," bringing up a sensitive subject among his supporters regarding the perceived threat of having their voices silenced by the incoming Biden administration (Trump, 2021, 10:30-10:34). He continued to stress that under the Biden administration, "it could happen," and the American people will "see some really bad things happen" (10:50-10:54). This statement, juxtaposed with his list of personal accomplishments earlier in the speech, served to amplify his positive attributes while simultaneously reminding his supporters what they should fear about the incoming administration. President Trump stated it was his successes, as well as the fact that his administration had "taken care of things" and "done things like nobody's ever thought possible," which contributed to his adamant belief that the fight needed to persevere (21:24-21:35).

After the evidence supporting his claim of election fraud was presented, President Trump addressed what he believed to be Congress's role in deciding the election. His language raised concerns over the certification of their state's electoral votes by a number of congressional members. Highlighting allegations of fraud in the Pennsylvania presidential election and the duty of congress to certify its electoral votes, President Trump said, "Mike Pence has to agree to send it back. And many people in Congress want it sent back" (Trump, 2021, 39:43-40:0). This statement was met with cheers from the crowd, saying, "Send it back!" (39:43-40:00). Matching

the energy of the crowd, President Trump explained that since the votes had not been sent back for re-certification, those who did not stand up to re-certify were “stiffs” and “stupid people” (40:14-40:15). President Trump reinforced mutually held concerns over the Biden presidency by saying, “You will have a president who lost all of these states...You will have an illegitimate president, that’s what you’ll have....These are the facts that you won’t hear from the fake news media” (Trump, 2021, 40:50-41:16).

The rhetoric utilized by President Trump at the “Save America” Rally was effective in speaking to and empathizing with the Rally attendees. The tone of his rhetoric was combative and emphasized his frustration with the 2020 presidential election and his desire for the members of Congress and Vice President Mike Pence to recertify state electoral votes in Trump’s favor. The words “fraud” and “fraudulent” were used seventeen times, coming in second to the words “illegal” and “illegally.” Also, these four words, “corrupt,” “steal,” “theft,” and “false,” were also used by President Trump during his address. Each word used throughout his speech emphasized the election’s illegality and corruption and were purposefully used to resonate with and encourage those gathered at the Rally to have their voices heard by the Congressional members certifying the votes in the United States Capitol building.

In key moments of his speech, President Trump used the words *fight* and *fighting* twenty-one times to describe what was being done to combat the alleged fraud. At one point, the crowd was heard chanting, “Fight for Trump! Fight for Trump! Fight for Trump!” at which point President Trump thanked the crowd, secret service, military members, etc. (Trump, 2021, 07:11). His overall speech was political and although his fighting theme was in the context of legal and legislative battles, his address was directed to a large, seemingly angry crowd. President Trump indicated that the march toward the Capitol should be done “peacefully and patriotically,” and he

concluded his speech saying, “And we fight. We fight like Hell and if you don’t fight like Hell, you’re not going to have a country anymore” (1:12:14-1:12:20).

From November 3, 2020, to January 6, 2021, President Trump’s carried his claim that election fraud had occurred in the 2020 presidential election. Throughout the entire month of December, he sent out Twitter messages stating that election fraud occurred with his language containing combative themes. On December 12, he posted a Twitter message that said, “WE HAVE JUST BEGUN TO FIGHT!!!” (Trump, 2020, as cited in Sherman, 2020, para. 12). On December 26, he sent out another tweet telling his supporters to “Never give up” and that he would see them in Washington, D.C. on January 6 at the “Save America” rally (para. 14). With thousands gathered on the National Mall in Washington, D.C., President Trump addressed his supporters. Justice Scalia’s four criteria were applied to determine whether President Trump’s “Save America” Rally speech and the demonstrators’ actions following President Trump’s speech are instances of protected speech according to the First Amendment; Justice Scalia’s four criteria were applied.

Application of Criteria

Criterion 1 (1. Political/Offensive Speech)

Justice Scalia believed that while the First Amendment protects political and offensive speech, speech that is incitement to violence and/or intends to intimidate another are not protected forms of speech according to the First Amendment.

Observation 1. The atmosphere at the “Save America” Rally in Washington, D.C., was an emotionally charged and highly political rally. Leading up to the rally, President Trump encouraged his supporters to “never give up” and not give up the fight (Trump, 2021, 04:33-04:35). The “fight” that he spoke of was his

claim that he lost the 2020 presidential election because of widespread election fraud.

Throughout his speech, President Trump referenced “fight” multiple times as well as “illegal” and “fraud.” He stated Vice President Mike Pence had the Constitutional authority to overturn the electoral college votes. If he did not do this, then President Trump would be very disappointed in the Vice President since he claimed that the survival of the American democracy was at stake. Near the end of his speech, President Trump stated that “We fight like Hell and if you don’t fight like Hell, you’re not going to have a country anymore” (2021, 1:12:15-1:12:20). However, President Trump stated at the beginning of his speech that he and the demonstrators would walk to the Capitol peacefully and patriotically. Additionally, the terms “fight” or “fighting,” when viewed critically, were said within the context of a legal and/or legislative battle, not a literal battle.

The “Save America” Rally was a political rally protesting the 2020 presidential election results. President Trump’s address focused on his contempt for the governing authorities and what he believed to be their negligence toward election fraud. Therefore, his speech was political in nature and expressed President Trump’s frustration with the government and presented his political viewpoint.

While President Trump’s language was fiery and repeatedly utilized the word “fight,” he countered this type of fiery language by urging demonstrators to peacefully and patriotically march to the Capitol. Although his fiery rhetoric may have caused some among the crowd to become angrier since the crowd was

already highly emotional and politically charged, his language was figurative, and within the context of the address, the “fight” concerned the legal and legislative battles he took and urged his supporters to take when combating election fraud. Ultimately, his language was not imminent and did not direct the demonstrators to storm the U.S. Capitol (*Brandenburg v. Ohio*, 1969).

When President Trump addressed the electoral vote certification, he specifically addressed Vice President Mike Pence. He said, “And Mike Pence, I hope you’re going to stand up for the good of our Constitution and for the good of our country. And if you’re not, I’m going to be very disappointed in you” (Trump, 2021, 51:29-51:48). Although the direct address to Vice President Pence demonstrated President Trump’s frustration with the election results, his words “disappointed in you” are not intended to threaten or intimidate since President Trump said he would only be “disappointed” showing his displeasure in Vice President’s decision (51:46-51:49). Lastly, President Trump’s speech was political in nature and could not avoid offending others. Nonetheless, his speech did not cause immediate or direct harm to the listeners.

In summary, President Trump’s address did not directly incite imminent violence and threaten another person(s) or group as he called for a patriotic and peaceful march. Additionally, his address was political in nature, and although it most definitely offended some listeners, as it was a political speech, he did not direct harm toward those listeners. Therefore, according to Justice Scalia’s first criterion (1. Political/offensive speech), President Trump’s address is protected speech according to the First Amendment.

In his address at Wesleyan University, Justice Scalia stated that “There are other examples of speech that is unprotected by the First Amendment because ‘the freedom of speech’ was not understood to cover it. Incitement to violence and fighting words, for example” (Scalia, 2017, p. 205).

Criterion 2 (2. Expression and Symbolic Speech)

Justice Scalia believed that the First Amendment protects and provides individuals the freedom of expression through symbolic speech. However, the protected symbolic speech does not protect incitement to violence, rioting, or intended threats of harm toward another person. According to Scalia, protected forms of expression include political speech when an individual expresses his or her “contempt for the government, the Congress, the Supreme Court, even the nation and the nation’s flag” (Scalia, 2017, p. 207).

Observation 1. President Trump’s “Save America” Rally speech was done in contempt toward the governing authorities and the results of the 2020 presidential election. As President Trump addressed the thousands gathered at the “Save America” Rally, he discussed the “weak Republicans”. He explained how he and his supporters must “fight” against the certification of the electoral votes (Trump, 2021, 14:28-14:32). Throughout his speech, he relayed his grievances with the governing authorities as he believed he was cheated out of the presidency, thus categorizing his speech as political. His language was figurative as he spoke about “fighting” and never directed harm toward one person(s) or group. His speech's political nature allowed his speech to be offensive to some as he expressed his frustration with what he allegedly viewed as the government’s negligent behavior toward election fraud.

Observation 2. After President Trump’s “Save America” Rally speech, demonstrators made their way to the U.S. Capitol, where they clashed with Capitol police and breached the U.S. Capitol’s barriers, windows, and doors. As a result of the breach, two people died. In an act of frustration with the governing authorities and the overwhelming concern of election fraud, demonstrators overtook the U.S. Capitol in an act expressing their frustration and anger with the government’s alleged negligence of election fraud.

Therefore, when applied President Trump’s “Save America” Rally speech, Justice Scalia’s second criterion (2. Expression and symbolic speech) holds his form of expression as protected under the First Amendment as it was political in nature, and he did not directly incite imminent harm. However, when applied to demonstrators’ breach of the U.S. Capitol breach, Justice Scalia’s second criterion (2. Expression and symbolic speech) does not hold this form of expression as protected speech as it was not merely symbolic but disrupted the public order, trespassed, and violated the restrictions put in place by law enforcement to ensure the public’s safety.

As an originalist, Justice Scalia interpreted the “action” of Johnson’s flag burning in *Johnson v. Texas* “a form of speech” (Scalia, 2017, p. 206). According to Justice Scalia, the expression of ideas “can be made through symbols and symbolic acts as well as through words” (p. 207).

Criterion 3 (3. Time, Place, or Manner Restrictions)

According to Justice Scalia, the government may restrict non-content-based speech or conduct when it violates time, place, or manner restrictions as well as disturbance of the peace.

When applied to the First Amendment's right to peacefully assemble, the time, manner, and place restrictions as well as the disturbance of the peace apply.

Observation 1. Women for America First organized the "Save America" Rally.

The Women for America First filed a permit with the National Park Service to hold a rally "to demand transparency and protect election integrity" (U.S. Dept. of Interior, 2021, p. 2). Therefore, to hold the rally, the Women for America First managed to obtain a permit that abided by specific time, place, or manner restrictions.

Therefore, when applied to the Women for America First's filing of a permit for the "Save America" Rally, Justice Scalia's third criterion (3. Time, place, or manner restrictions) considers the rally as a protected category of speech since it abided by a reasonable time, place, or manner restriction.

In his opinion for *R.A.V. v. City of St. Paul* (1992), Justice Scalia stated that the Court had "upheld reasonable 'time, place, or manner restrictions;'" however, these restrictions were only applicable if they were "justified without reference to the content of the regulated speech" (*R.A.V. v. City of St. Paul*, 1992).

Criterion 4 (4. Insurrection)

According to Justice Scalia, an insurrection is an unacceptable form of speech.

Observation 1. The study did not find Justice Scalia's fourth criteria (4. Insurrection) applicable to President Trump's "Save America" Rally speech. In order to be deemed an insurrection, an attempt to overthrow authority or the government must be present. In his speech, President Trump did not seek to

overthrow the government but instead sought legal and legislative action to “fight” against election fraud.

Observation 2. As demonstrators made their way to the U.S. Capitol after President Trump’s “Save America” Rally speech, they clashed with Capitol police and breached the U.S. Capitols barriers, windows, and doors, and as a result of the breach, two people died. The protestors' extreme frustration and anger toward the governing authorities' alleged negligent behavior toward election fraud led them to breach the U.S. Capitol. The highly emotional and politically charged atmosphere during the U.S. Capitol breach as well as demonstrators' violent and unlawful actions such as violent clashes with Capitol police and the unlawful breach of the U.S. Capitol building can be categorized as insurrection. One protestor was heard saying, “we can take that place...Heads on pikes!” (Abramson, 2021, 00:00-00:07). The general attitude among demonstrators gathered outside of the U.S. Capitol displayed intent to breach the barriers and trespass into the U.S. Capitol.

Therefore, when applied to President Trump’s “Save America” Rally speech, Justice Antonin Scalia’s fourth criterion (4. Insurrection) views President Trump’s speech as protected speech as it did not directly incite an insurrection. When applied to the demonstrators’ act of insurrection, Justice Scalia’s fourth criterion views the demonstrator’s speech as unprotected under the First Amendment as Justice Scalia believed that insurrection is an unacceptable form of speech.

In his interview with Piers Morgan, Justice Scalia (2012) asserted that an insurrection is an unacceptable form of speech and thereby deemed it unprotected.

Summary of Applied Criteria

In the application of Justice Scalia's free speech criteria, all four criteria apply to President Trump's "Save America" Rally case study. Justice Scalia's first criterion (1. Political/offensive speech) views President Trump's speech as protected since it did not directly incite imminent violence and threaten another person(s) or group but called for a patriotic and peaceful march. It also holds that the address was political in nature and although some may have considered it offensive, President Trump did not intentionally direct harm toward a group of people, therefore, rendering it protected speech. Scalia's second criterion (2. Expression and symbolic speech) holds that President Trump's freedom of expression is protected under the First Amendment since it was political speech, and he did not directly incite imminent harm toward others. However, Scalia's second criterion (2. Expression and symbolic speech) views the violent demonstrations that breached the U.S. Capitol as unprotected freedom of expression. The violent demonstrators did not engage in purely symbolic expression but trespassed and violated the restrictions put in place by law enforcement meant to ensure public safety. The Women for America First Organization's obtainment of a rally permit, is considered by Justice Scalia's third criterion (3. Time, place, or manner restrictions) as a protected form of speech since it abided by a reasonable time, place, or manner restriction. Lastly, Justice Scalia's fourth criterion (4. Insurrection) views President Trump's speech as protected because it did not directly incite an insurrection. However, when applied to the violent demonstrations at the U.S. Capitol, Scalia's criterion deems the event as unprotected speech because the violent demonstrators carried out an insurrection.

Chapter 5: Conclusions

Summary of Criteria and Their Application

Justice Scalia's originalist interpretation of the Constitution's text is derived from the Framers' original intent. The study's criteria are based on United States Supreme Court rulings previously discussed in this study, and conclude that Justice Scalia's first criterion (1. Political/offensive speech) held political and offensive speech are protected by the First Amendment; however, speech that is incitement to violence and/or intends to intimidate another are not protected forms of speech according to the First Amendment. Additionally, Justice Scalia's second criterion (2. Expression and symbolic speech) believes that the First Amendment protects and provides individuals the freedom of expression through symbolic and political speech. However, this protected speech does not protect incitement to violence, rioting, or intended threats of harm toward another person. Scalia's third criterion (3. Time, place, or manner restrictions) is based on his belief that the government may restrict non-content-based speech or conduct when it violates time, place, or manner restrictions as well as disturbance of the peace. Lastly, while there are protected forms of speech and assembly according to the other three criteria developed, Justice Scalia's fourth criterion (4. Insurrection) believes that insurrection is never an acceptable or constitutionally protected form of speech.

There are constitutional and unconstitutional elements of speech and protest when Justice Scalia's criteria were applied to the two case studies. When applied to the violent Black Lives Matter demonstrations in Minneapolis, New York City, and Portland, Justice Scalia's first criterion (1. Political/offensive speech) holds that Hawk Newsome's speech as protected since it did not intentionally direct one person(s) or group to incite violence. Additionally, his language was political, and it was unlikely that there was a direct link between his interview and the

violent demonstrations. Justice Scalia's second criterion (2. Expression and symbolic speech) believes that the demonstrators' use of expressive speech, through looting, vandalism, and arson, were unprotected as they broke reasonable laws intended to keep the peace. Lastly, Scalia's third criterion (3. Time, place, or manner restrictions) holds demonstrators in violation of the reasonable time, place, or manner restriction. Because of the reasonable time, place, or manner violation, the demonstrators' speech was unprotected since they violated curfew. Justice Scalia's fourth criterion (4. Insurrection) cannot be applied to the violent Black Lives Matter demonstrations since neither attempted nor carried out an act of insurrection. While forms of speech not directed toward a person(s) or group were considered protected forms of speech, the use of other forms such as expression to justify looting, arson, or vandalism were unprotected forms of speech.

All four of Justice Scalia's criteria apply to President Trump's "Save America" Rally case study. Scalia's first criterion (1. Political/offensive speech) views President Trump's speech as protected since it did not directly incite imminent violence and threaten another person(s) or group but instead called for a patriotic and peaceful march. Justice Scalia's first criterion also holds that President Trump's speech was political in nature. Although it was most likely to offend some, he did not direct harm toward those listeners, thus designating it protected speech. Scalia's second criterion (2. Expression and symbolic speech) renders the president's freedom of expression as protected under the First Amendment because it was political speech, and he did not directly incite imminent harm toward anyone. Nonetheless, his second criterion holds that when applied to the violent demonstrations at the U.S. Capitol, it does not consider this form of expression protected speech since it was not purely symbolic but violated the restrictions put in place by law enforcement to ensure the public's safety. Under Justice Scalia's third criterion, (3.

Time, place, or manner restrictions), the Women for America First Organization's obtainment of a rally permit is a protected category of speech since the organization abided by a reasonable time, place, or manner restriction. Lastly, Scalia's fourth criterion (4. Insurrection) views President Trump's speech as protected because it did not directly incite an insurrection. However, the application of the fourth criterion to the violent demonstrations at the U.S. Capitol deems the event as unprotected speech since the violent demonstrators carried out an insurrection.

Research Question

This study aimed to answer the following question, "According to Supreme Court Justice Antonin Scalia's originalist interpretation of the First Amendment and free speech, what type of protest actions and words are constitutionally protected?" This study utilizes a textual-investigative, case-study analysis and applies four criteria from Justice Scalia's doctrine of free speech to the violent Black Lives Matter demonstrations in Minneapolis, New York City, and Portland, as well as President Trump's "Save America" Rally speech and the violent demonstrations after his speech at the U.S. Capitol. Additionally, the first element of Kenneth Burke's Dramatistic Pentad the *Act* demonstrates the communicative nature of the protests and President Trump's speech. Based on these case studies and the application of Justice Scalia's criteria, it can be concluded that Justice Scalia believed that content-based speech, such as political speech, is protected from government censorship unless it incites violence or intends to intimidate another person(s) or groups. Expressive forms of speech, such as symbolic acts, are protected from government restriction unless they incite violence or rioting. Additionally, peaceful assemblies are subject to reasonable time, place, or manner restrictions and protected unless the assembly violates the restrictions implemented by a governing authority. Lastly, Justice Scalia held that insurrection is always an unprotected form of speech

according to the Constitution's First Amendment. Therefore, most speech, especially if it is content-based, cannot be restricted by the government unless it directs a person(s) or group to incite violence or intends harm to another.

After applying Justice Scalia's criteria to the Black Lives Matter demonstrations and the "Save America" Rally, the study concludes that there are protected and unprotected types/forms of speech and protest. Justice Scalia's four criteria hold that protected speech and protest include content-based speech, which includes political or offensive speech; symbolic acts such as burning an American flag in protest; and peaceful assemblies that are subject to a time, place, or manner restriction. Additionally, unprotected speech and protest include insurrection; speech that incites violence or intends to harm another person(s) or group; and assemblies that violate a time, place, or manner restriction. Therefore, it is concluded that the message or content of speech is protected so long as it does not intend to intimidate or incite violence; however, violent communicative actions that accompany the message's content are not protected.

This Study's Importance

The First Amendment's right to free speech and assembly are bulwarks of the American Republic. This Amendment facilitates open communication, legal and cultural progress, and innovation. Without these, ideologies become bifurcated and lead to the complete intolerance of other views, resulting in censorship or physical violence. These outcomes can also occur when groups or individuals are neither given a voice nor feel like the majority does not hear them. This study's research illustrates that according to Justice Scalia, speech and assembly are protected until violence and harm are direct and accompany the speech; once done, the speech is no longer constitutionally protected.

Limitations

This study develops Justice Scalia's criteria from multiple United States Supreme Court cases, personal lectures, and speeches discussed in the literature review to determine what his developed criteria would consider protected speech when applied to the two discussed case studies. The first limitation within this study is that the research was conducted from a communication standpoint instead of a legal standpoint. The researcher is not, nor does she claim to be, a legal scholar. Another limitation is the researcher's conservative political orientation and potential bias. Although this study is conducted in the most objective way possible, the reader must understand and acknowledge potential bias since this can aid the reader as he/she develops a well-informed opinion.

Recommendations

There are multiple paths this study can take for future studies. The first recommendation for a future study is applying this study's criteria of Justice Scalia's doctrine of free speech and protest to other social movements. Another recommendation for future study is a Burkian Analysis of the words used in this study's case studies. A preliminary research question for this future study could be, "In accordance with Kenneth Burke's Dramatistic Pentad, what is the relationship of words and their use to motivate people in the context of protected free speech?" In addition to this, the study could investigate Burke's philosophy that words paint pictures and, when they do, are the words that describe the *Act* considered protected speech based on their motive behind the action of the *Act*.

Contribution to Field

This study's contribution to the field of communication is the application of the first element of Kenneth Burke's Dramatistic Pentad, the *Act*, and the development of criteria from

Justice Scalia's judicial doctrine of free speech to determine the constitutionality of speech within the context of society. This study directly connects to the field of communication as constitutionally protected words and protest facilitate free and open communication within a constitutional republic.

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Appendix A**Martha McCallum and Hawk Newsome Interview****Transcript:**

MARTHA MCCALLUM (MM):

01:38

Hawke Newsome's the head of black

01:40

lives matter for Greater New York good

01:43

to have you with us tonight, sir thank

01:44

you for being here

HAWK NEWSOME (HN):

01:46

thank you for having me

MM:

So you know

01:48

obviously, you know people watch what you

01:50

say in that video that you want to now

01:52

shove legislation down people's throats

01:54

now that you have everyone's attention

01:56

and you also have called said that

01:58

violence is sometimes necessary in these

02:01

situations what exactly is it that you

02:03

hope to achieve through violence

HN:

Wow

02:08

it's interesting that you would pose

02:10

that question like that because this

02:13

country is built upon violence what was
02:16
the American Revolution, which are our
02:21
diplomacy across the globe we go in and
02:23
we blow up countries, and we replace
02:25
their leaders with leaders who we like
02:27
so for any American to accuse us of
02:31
being violent it's extremely
02:32
hypocritical now when we talk about why
02:38
we use why are you screaming and not
02:41
allowing me to talk question allow me to
02:44
answer that – I'm the process of answering
02:46
that I must be that much longer, okay
02:49
you asked what we hope to achieve. We're
02:52
talking about self-defense, we're talking
02:54
about four or five police officers
02:56
choking someone to death and someone
02:59
from the community having the training
03:01
to intervene effectively
03:03
we're talking about saving lives
03:04
nobody's talking about ambushing police
03:07
officers we're talking about protecting
03:09
lives, and there's nothing more American
03:12
than that, and we talk about uplifting
03:14

and upholding the Second Amendment I

03:17

think that you should be applauding me

03:18

the saying is no, you guys are huge

03:21

supporters of the Second Amendment but

03:23

it seems to be the hypocrisy of America

03:25

that when black people start talking

03:26

about arming themselves and defending

03:28

themselves the talk is violence, but when

03:31

white people grab assault rifles and go

03:33

to our nation's their state's capitols

03:36

it's all good

MM:

all right, first of all you

03:38

I've never talked about my stance on the

03:40

Second Amendment, you know that that's my

03:42

I'm not criticizing you or appreciation

03:45

for the Second Amendment

HN:

you don't

03:46

support the second amendment

MM:

my role here to

03:48

ask you a question

HN:

do you support the

03:51

Second Amendment you know a lot of your viewers

03:55

would like to know if you support the

03:57

second

MM:

that's fine but – but that's not

03:59

why we're here and what you know the

04:01

only reason that I posed that first

04:02

question to you the way that I did was

04:04

that I watched you – you know talking and

04:07

on a bunch of different interviews today

04:08

and you said burn it down

04:11

you said burn it down it's time so that

04:15

makes me think

HN:

if this country if this

04:20

country doesn't give us what we want

04:21

then we will burn down this system and

04:25

replace it all right, and I could be

04:27

speaking figuratively, I could be

04:30

speaking literally, it's a matter of

04:32

interpretation like let's be very real

04:36

And – and – and let's observe the history of

04:38

the 1960s when black people were rioting

04:41

we had the highest growth in wealth in

04:45

property ownership think about the last
04:47
few weeks since we started protesting
04:51
there have been eight cops fired across
04:54
the country you remember they were
04:56
telling us that there was due process
04:58
that's why the cop that choked Eric
05:00
Gardening to death had kept his job and
05:02
may get received raises for five years
05:04
any time a cop heard a woman heard a
05:07
child her pregnant people hurt elders
05:09
there was always a call for due process
05:12
you must wait you must wait with the
05:14
moment people start destroying property
05:17
now cops can be fired automatically what
05:20
What – what is this country rewarding what
05:25
behavior is it listening to obviously
05:28
not marching, but when people get
05:30
aggressive and they escalate their – their
05:33
protests the country message – get fired
05:36
now you have now you have police
05:38
Officers – you have Republican politicians
05:41
talking about police reform I don't
05:43
condone nor do I condemn rioting, but I'm
05:46

just telling you what I observed

MM:

you're –

05:48

seeing you're saying that in that that's

05:50

what appears to be working and getting

05:52

results right now and maybe that is

05:53

something for you know everybody to

05:55

think about I just want to put up this

05:57

quote from Martin Luther King, and I've

05:58

heard you talk about Martin Luther King

05:59

versus Malcolm X and you said that he

06:02

you know was an anomaly. Martin Luther

06:04

King – he said, “let us be dissatisfied

06:06

until that day when no

06:08

will shout white power, when nobody will

06:10

shout black power, but everybody will

06:11

talk about God's power and human power

06:14

do you agree with that?

HN:

I love the Lord

06:19

and my Lord and Savior Jesus Christ is

06:22

the most famous black radical

06:26

revolutionary in history, and he was

06:28

treated just like Dr. King he was

06:32

arrested on occasion, and he was also
06:34
Croods – crucified or assassinated. This is
06:37
what happens to black activists – we are
06:40
killed by the government – well – and if you
06:43
need context – if you read your Bible is
06:44
to say that Jesus had feet like burnt
06:47
brass and hair like wool. I don't know if
06:50
you notice, but our hair seems to be more
06:52
like wool than we seem to be likened to
06:54
that color than anyone else and you know –
06:57
It's just the hypocrisy and white
06:59
supremacy in America and in the world
07:00
that would show us portraits of a pasty
07:04
white Jesus. Jesus was not white we all
07:07
know this –

MM:
Okay, you know I – I mean I think,
07:11
Jesus is Jesus to all Christians and
07:14
people interpret him in – in imagery in
07:17
different ways. Obviously, he was from the
07:19
Middle East – we all know that – that's
07:21
obvious so –

HN:
Oh so he wasn't a white man?
07:23

MM:

we all know that – I don't know how Middle

07:27

Eastern – yeah – he was Middle East – yeah all

07:29

right we're gonna go thank you very much

07:30

I – I appreciate it where you're coming

07:33

From, and I appreciate you coming on

07:35

Tonight, and I know you're very

07:36

passionate and that you that you want

07:39

what's best. So everybody has different

07:41

names and different ways to get there,

07:43

but I appreciate you sharing thoughts.

HN:

07:44

I just want black liberation in black

07:46

Sovereignty

07:47

Thanks – thank you for being

07:50

Here. Thanks Hawk Newsom

Appendix B

President Donald Trump's "Save America" Rally Speech

Donald Trump (00:02:44):

The media will not show the magnitude of this crowd. Even I, when I turned on today, I looked, and I saw thousands of people here, but you don't see hundreds of thousands of people behind you because they don't want to show that. We have hundreds of thousands of people here, and I just want them to be recognized by the fake news media. Turn your cameras please and show what's really happening out here because these people are not going to take it any longer. They're not going to take it any longer. Go ahead. Turn your cameras, please. Would you show? They came from all over the world, actually, but they came from all over our country. I just really want to see what they do. I just want to see how they covered. I've never seen anything like it. But it would be really great if we could be covered fairly by the media. The media is the biggest problem we have as far as I'm concerned, single biggest problem, the fake news and the big tech. Big tech is now coming into their own. We beat them four years ago. We surprised them. We took them by surprise and this year, they rigged an election. They rigged it like they've never rigged an election before. By the way, last night, they didn't do a bad job either, if you notice. I'm honest. I just, again, I want to thank you. It's just a great honor to have this kind of crowd and to be before you. Hundreds of thousands of American patriots are committed to the honesty of our elections and the integrity of our glorious Republic. All of us here today do not want to see our election victory stolen by emboldened radical left Democrats, which is what they're doing and stolen by the fake news media. That's what they've done and what they're doing. We will never give up. We will never concede, it doesn't happen. You don't concede when there's theft involved.

Donald Trump (00:04:42):

Our country has had enough. We will not take it anymore and that's what this is all about. To use a favorite term that all of you people really came up with, we will stop the steal. Today I will lay out just some of the evidence proving that we won this election, and we won it by a landslide.

This was not a close election. I say sometimes jokingly, but there's no joke about it, I've been in two elections. I won them both and the second one, I won much bigger than the first. Almost 75 million people voted for our campaign, the most of any incumbent president by far in the history of our country, 12 million more people than four years ago. I was told by the real pollsters, we do have real pollsters. They know that we were going to do well, and we were going to win. What I was told, if I went from 63 million, which we had four years ago to 66 million, there was no chance of losing. Well, we didn't go to 66. We went to 75 million and they say we lost. We didn't lose.

Donald Trump (00:06:08):

By the way, does anybody believe that Joe had 80 million votes? Does anybody believe that? He had 80 million computer votes. It's a disgrace. There's never been anything like that. You could take third world countries. Just take a look, take third world countries. Their elections are more honest than what we've been going through in this country. It's a disgrace. It's a disgrace. Even when you look at last night, they're all running around like chickens with their heads cut off with boxes. Nobody knows what the hell is going on. There's never been anything like this. We will not let them silence your voices. We're not going to let it happen. Not going to let it happen.

Crowd (00:07:11):

Fight for Trump! Fight for Trump! Fight for Trump!

Donald Trump (00:07:11):

Thank you. I'd love to have, if those tens of thousands of people would be allowed, the military, the secret service, and we want to thank you, and the police law enforcement. Great. You're doing a great job, but I'd love it if they could be allowed to come up here with us. Is that possible? Can you just let them come up, please? Rudy, you did a great job. He's got guts. You know what? He's got guts, unlike a lot of people in the Republican party. He's got guts, he fights. He fights, and I'll tell you. Thank you very much, John. Fantastic job. I watched. That's a tough act to follow, those two. John is one of the most brilliant lawyers in the country, and he looked at this and he said, " What an absolute disgrace, that this could be happening to our constitution." He looked at Mike Pence, and I hope Mike is going to do the right thing.

Donald Trump (00:08:09):

I hope so. I hope so because if Mike Pence does the right thing, we win the election. All he has to do. This is from the number one or certainly one of the top constitutional lawyers in our country. He has the absolute right to do it. We're supposed to protect our country, support our country, support our constitution, and protect our constitution. States want to revoke. The States got defrauded. They were given false information. They voted on it. Now they want to recertify. They want it back. All Vice-President Pence has to do is send it back to the States to recertify, and we become president, and you are the happiest people.

Donald Trump (00:09:08):

I just spoke to Mike. I said, "Mike, that doesn't take courage. What takes courage is to do nothing. That takes courage," and then we're stuck with a president who lost the election by a lot, and we have to live with that for four more years. We're just not going to let that happen. Many of you have traveled from all across the nation to be here, and I want to thank you for the

extraordinary love. That's what it is. There's never been a movement like this ever, ever for the extraordinary love for this amazing country and this amazing movement. Thank you.

Crowd (00:09:44):

We love Trump! We love Trump! We love Trump!

Donald Trump (00:09:59):

By the way, this goes all the way back past the Washington monument. Do you believe this? Look at this. Unfortunately, they gave the press the prime seats. I can't stand that. No, but you look at that behind. I wish they'd flip those cameras and look behind you. That is the most amazing sight. When they make a mistake, you get to see it on television. Amazing, amazing, all the way back. Don't worry. We will not take the name off the Washington monument. We will not. Cancel culture. They wanted to get rid of the Jefferson Memorial, either take it down or just put somebody else in there. I don't think that's going to happen. It damn well better not. Although with this administration, if this happens, it could happen. You'll see some really bad things happen.

Donald Trump (00:10:54):

They'll knock out Lincoln too, by the way. They've been taking his statue down, but then we signed a little law. You hurt our monuments, you hurt our heroes, you go to jail for 10 years and everything stopped. Did you notice that? It stopped. It all stopped. They could use Rudy back in New York City. Rudy, they could use you. Your city is going to hell. They want Rudy Giuliani back in New York. We'll get a little younger version of Rudy. Is that okay, Rudy?

Donald Trump (00:11:25):

We're gathered together in the heart of our nation's Capitol for one very, very basic and simple reason, to save our democracy. Most candidates on election evening, and of course this thing

goes on so long, they still don't have any idea what the votes are. We still have congressional seats under review. They have no idea. They've totally lost control. They've used the pandemic as a way of defrauding the people in a proper election. But when you see this and when you see what's happening, number one, they all say, "Sir, we'll never let it happen again." I said, "That's good, but what about eight weeks ago?" They try and get you to go. They say, "Sir, in four years, you're guaranteed." I said, "I'm not interested right now. Do me a favor, go back eight weeks. I want to go back eight weeks. Let's go back eight week." We want to go back, and we want to get this right because we're going to have somebody in there that should not be in there and our country will be destroyed, and we're not going to stand for that.

Donald Trump (00:12:34):

For years, Democrats have gotten away with election fraud and weak Republicans, and that's what they are. There's so many weak Republicans. We have great ones, Jim Jordan, and some of these guys. They're out there fighting the House. Guys are fighting, but it's incredible. Many of the Republicans, I helped them get in. I helped them get elected. I helped Mitch get elected. I could name 24 of them, let's say. I won't bore you with it, and then all of a sudden you have something like this. It's like, "Gee, maybe I'll talk to the president sometime later." No, it's amazing. The weak Republicans, they're pathetic Republicans and that's what happens. If this happened to the Democrats, there'd be hell all over the country going on. There'd be hell all over the country. But just remember this. You're stronger, you're smarter. You've got more going than anybody, and they try and demean everybody having to do with us, and you're the real people. You're the people that built this nation. You're not the people that tore down our nation.

Donald Trump (00:13:45):

The weak Republicans, and that's it. I really believe it. I think I'm going to use the term, the weak Republicans. You got a lot of them, and you got a lot of great ones, but you got a lot of weak ones. They've turned a blind eye even as Democrats enacted policies that chipped away our jobs, weakened our military, threw open our borders and put America last. Did you see the other day where Joe Biden said, "I want to get rid of the America first policy." What's that all about, get rid of ...? How do you say, "I want to get rid of America first?" Even if you're going to do it, don't talk about it. Unbelievable, what we have to go through, what we have to go through and you have to get your people to fight. If they don't fight, we have to primary the hell out of the ones that don't fight. You primary them. We're going to let you know who they are. I can already tell you, frankly.

Donald Trump (00:14:39):

But this year using the pretext of the China virus and the scam of mail-in ballots, Democrats attempted the most brazen and outrageous election theft. There's never been anything like this. It's a pure theft in American history, everybody knows it. That election, our election was over at 10:00 in the evening. We're leading Pennsylvania, Michigan, Georgia by hundreds of thousands of votes, and then late in the evening or early in the morning, boom, these explosions of and bullshit, and all of a sudden. All of a sudden it started to happen.

Crowd (00:15:25):

[inaudible 00:15:25]

Donald Trump (00:15:35):

Don't forget when Romney got beat. Romney. I wonder if he enjoyed his flight in last night? But when Romney got beaten, he stands up like you're more typical. Well, I'd like to congratulate the victor, the victor. Who was the victor, Mitt? I'd like to congratulate. They don't go and look at

the facts. Now I don't know. He got slaughtered probably, maybe it was okay. Maybe it was that's what happened. But we look at the facts and our lecture was so corrupt that in the history of this country, we've never seen anything like it. You can go all the way back. America is blessed with elections all over the world. They talk about our elections. You know what the world says about us now? They said we don't have free and fair elections and you know what else? We don't have a free and fair press.

Donald Trump (00:16:25):

Our media is not free. It's not fair. It suppresses thought. It suppresses speech, and it's become the enemy of the people. It's become the enemy of the people. It's the biggest problem we have in this country. No third world countries would even attempt to do what we caught them doing and you'll hear about that in just a few minutes. Republicans are constantly fighting like a boxer with his hands tied behind his back. It's like a boxer, and we want to be so nice. We want to be so respectful of everybody, including bad people. We're going to have to fight much harder and Mike Pence is going to have to come through for us. If he doesn't, that will be a sad day for our country because you're sworn to uphold our constitution. Now it is up to Congress to confront this egregious assault on our democracy. After this, we're going to walk down and I'll be there with you. We're going to walk down. We're going to walk down any one you want, but I think right here. We're going walk down to the Capitol, and we're going to cheer on our brave senators, and congressmen and women. We're probably not going to be cheering so much for some of them because you'll never take back our country with weakness. You have to show strength, and you have to be strong.

Donald Trump (00:18:16):

We have come to demand that Congress do the right thing and only count the electors who have been lawfully slated, lawfully slated. I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard. Today we will see whether Republicans stand strong for integrity of our elections, but whether or not they stand strong for our country, our country. Our country has been under siege for a long time, far longer than this four-year period. We've set it on a much straighter course, a much ... I thought four more years. I thought it would be easy. We created-

Donald Trump (00:19:03):

Four more years, I thought it would be easy. We created the greatest economy in history. We rebuilt our military. We get you the biggest tax cuts in history. We got you the biggest regulation cuts. There's no President, whether it's four years, eight years, or in one case more, got anywhere near the regulation cuts. It used to take 20 years to get a highway approved. now we're down to two. I want to get it down to one, but we're down to two. And it may get rejected for environmental or safety reasons, but we got it down the safety. We created Space Force. Look at what we did. Our military has been totally rebuilt. So we create Space Force, which by in of itself is a major achievement for an administration. And with us, it's one of so many different things.

Donald Trump (00:19:52):

Right to try. Everybody know about right to try. We did things that nobody ever thought possible. We took care of our vets. Our vets, the VA now has the highest rating, 91%, the highest rating that it's had from the beginning, 91% approval rating. Always you watch the VA, when it was on television. Every night people living in a horrible, horrible manner. We got that done. We got accountability done. We got it so that now in the VA, you don't have to wait for four weeks,

six weeks, eight weeks, four months to see a doctor. If you can't get a doctor, you go outside you get the doctor, you have them taken care of. And we pay the doctor. And we've not only made life wonderful for so many people, we've saved tremendous amounts of money, far secondarily, but we've saved a lot of money.

Donald Trump (00:20:49):

And now we have the right to fire bad people in the VA. We had 9000 people that treated our veterans horribly. In primetime, they would not have treated our veterans badly. But they treated our veterans horribly. And we have what's called the VA Accountability Act. And the accountability says if we see somebody in there that doesn't treat our vets well, or they steal, they rob, they do things badly. We say, "Joe, you're fired. Get out of here." Before you couldn't do that. You couldn't do that before.

Donald Trump (00:21:24):

So we've taken care of things. We've done things like nobody's ever thought possible. And that's part of the reason that many people don't like us, because we've done too much, but we've done it quickly. And we were going to sit home and watch a big victory. And everybody had us down for a victory. It was going to be great. And now we're out here fighting. I said to somebody, I was going to take a few days and relax after our big electoral victory. Ten o'clock, it was over. But I was going to take a few days.

Donald Trump (00:21:52):

And I can say this, since our election, I believe, which was a catastrophe when I watch and even these guys knew what happened, they know what happened. They're saying, "Wow, Pennsylvania's insurmountable. Wow, Wisconsin, look at the big leads we had." Even though the press said we were going to lose Wisconsin by 17 points. Even though the press said Ohio is

going to be close, we set a record. Florida's going to be close, we set a record. Texas is going to be close. Texas is going to be close, we set a record. And we set a record with Hispanic, with the Black community. We set a record with everybody.

Donald Trump (00:22:36):

Today, we see a very important event though, because right over there, right there, we see the event going to take place. And I'm going to be watching, because history is going to be made. We're going to see whether or not we have great and courageous leaders or whether or not we have leaders that should be ashamed of themselves throughout history, throughout eternity, they'll be ashamed. And you know what? If they do the wrong thing, we should never ever forget that they did. Never forget. We should never ever forget. With only three of the seven states in question, we win the presidency of the United States.

Donald Trump (00:23:21):

And by the way, it's much more important today than it was 24 hours ago. Because I spoke to David Perdue, what a great person, and Kelly Loeffler, two great people, but it was a setup. And I said, "We have no back line anymore." The only back line, the only line of demarcation, the only line that we have is the veto of the president of the United States. So this is now what we're doing, a far more important election than it was two days ago.

Donald Trump (00:23:59):

I want to thank the more than 140 members of the House. Those are warriors. They're over there working like you've never seen before, studying, talking, actually going all the way back, studying the roots of the Constitution, because they know we have the right to send a bad vote that was illegally got, they gave these people bad things to vote for and they voted, because what did they know? And then when they found out a few weeks later... Again, it took them four years

to devise history. And the only unhappy person in the United States, single most unhappy, is Hillary Clinton because she said, "Why didn't you do this for me four years ago? Why didn't you do this for me four years ago? Change the votes! 10,000 in Michigan. You could have changed the whole thing!" But she's not too happy. You notice you don't see her anymore. What happened? Where is Hillary? Where is she?

Donald Trump (00:24:57):

But I want to thank all of those congressmen and women. I also want to thank our 13 most courageous members of the US Senate, Senator Ted Cruz, Senator Ron Johnson, Senator Shadowless, Kelly Loeffler. And Kelly Loeffler, I'll tell you, she's been so great. She works so hard. So let's give her and David a little special head, because it was rigged against them. Let's give her and David. Kelly Loeffler, David Perdue. They fought a good race. They never had a shot. That equipment should never have been allowed to be used, and I was telling these people don't let them use this stuff. Marsha Blackburn, terrific person. Mike Braun, Indiana.

Disinvested, great guy. Bill Hagerty, John Kennedy, James Lankford, Cynthia Lummis. Tommy Tuberville, to the coach. And Roger Marshall. We want to thank them, senators that stepped up, we want to thank them.

Donald Trump (00:26:04):

I actually think though it takes, again, more courage not to step up. And I think a lot of those people are going to find that out, and you better start looking at your leadership because the leadership has led you down the tubes. "We don't want to give \$2000 to people. We want to give them \$600." Oh, great. How does that play politically? Pretty good? And this has nothing to do with politics. But how does it play politically? China destroyed these people. We didn't destroy. China destroyed them, totally destroyed them. We want to give them \$600, and they just

wouldn't change. I said, "Give them \$2000. We'll pay it back. We'll pay it back fast. You already owe 26 trillion. Give them a couple of bucks. Let them live. Give them a couple of bucks!"

Donald Trump (00:26:57):

And some of the people here disagree with me on that. But I just say, look, you got to let people live. And how does that play though? Okay, number one, it's the right thing to do. But how does that play politically? I think it's the primary reason, one of the primary reasons, the other was just pure cheating. That was the super primary reason. But you can't do that. You got to use your head.

Donald Trump (00:27:19):

As you know the media is constantly asserted the outrageous lie that there was no evidence of widespread fraud. You ever see these people? "While there is no evidence of fraud..." Oh, really? Well, I'm going to read you pages. I hope you don't get bored listening to it. Promise? Don't get bored listening to it, all those hundreds of thousands of people back there. Move them up, please. Yeah. All these people don't get bored. Don't get angry at me because you're going to get bored because it's so much. The American people do not believe the corrupt fake news anymore. They have ruined their reputation.

Donald Trump (00:27:57):

But it used to be that they'd argue with me, I'd fight. So I'd fight, they'd fight. I'd fight, they'd fight. Boop-boop. You'd believe me, you'd believe them. Somebody comes out. They had their point of view, I had my point of view. But you'd have an argument. Now what they do is they go silent. It's called suppression. And that's what happens in a communist country. That's what they do. They suppress. You don't fight with them anymore, unless it's a bad. They have a little bad story about me, they'll make it 10 times worse and it's a major headline. But Hunter Biden, they

don't talk about him. What happened to Hunter? Where's Hunter? Where is Hunter? They don't talk about him.

Donald Trump (00:28:34):

Now watch all the sets will go off. Well, they can't do that because they get good ratings. The ratings are too good. Now where is Hunter? And how come Joe was allowed to give a billion dollars of money to get rid of the prosecutor in Ukraine? How does that happen? I'd ask you that question. How does that happen? Can you imagine if I said that? If I said that it would be a whole different ball game. And how come Hunter gets three and a half million dollars from the Mayor of Moscow's wife, and gets hundreds of thousands of dollars to sit on an energy board even though he admits he has no knowledge of energy, and millions of dollars up front, and how come they go into China and they leave with billions of dollars to manage? "Have you managed money before?" "No, I haven't." "Oh, that's good. Here's about 3 billion."

Donald Trump (00:29:29):

No, they don't talk about that. No, we have a corrupt media. They've gone silent. They've gone dead. I now realize how good it was if you go back 10 years. I realized how good, even though I didn't necessarily love him, I realized how good it was like a cleansing motion. But we don't have that anymore. We don't have a fair media anymore. It's suppression and you have to be very careful with that. And they've lost all credibility in this country. We will not be intimidated into accepting the hoaxes and the lies that we've been forced to believe over the past several weeks. We've amassed overwhelming evidence about a fake election. This is the presidential election. Last night was a little bit better because of the fact that we had a lot of eyes watching one specific state, but they cheated like hell anyway.

Donald Trump (00:30:27):

You have one of the dumbest governors in the United States. And when I endorsed him, I didn't know this guy. At the request of David Perdue. He said, "A friend of mine is running for Governor, what's his name." And you know the rest. He was in fourth place, fifth place. I don't know. He was way... He was doing poorly. I endorsed him. He went like a rocket ship and he won. And then I had to beat Stacey Abrams with this guy, Brian Kemp. I had to beat Stacey Abrams and I had to beat Oprah, used to be a friend of mine. I was on her last show. Her last week she picked the five outstanding people. I don't think she thinks that anymore. Once I ran for president, I didn't notice there were too many calls coming in from Oprah. Believe it or not, she used to like me, but I was one of the five outstanding people.

Donald Trump (00:31:17):

And I had a campaign against Michelle Obama and Barack Hussein Obama against Stacey. And I had Brian Kemp, he weighs 130 pounds. He said he played offensive line in football. I'm trying to figure that. I'm still trying to figure that out. He said that the other night, "I was an offensive lineman." I'm saying, "Really? That must've been a really small team." But I look at that and I look at what's happened, and he turned out to be a disaster. This stuff happens.

Donald Trump (00:31:50):

Look, I'm not happy with the Supreme Court. They love to rule against me. I picked three people. I fought like hell for them, one in particular I fought. They all said, "Sir, cut him loose. He's killing us." The senators, very loyal senators. They're very loyal people. "Sir, cut him loose. He's killing us, sir. Cut him loose, sir." I must've gotten half of the senators. I said, "No, I can't do that. It's unfair to him. And it's unfair to the family. He didn't do anything wrong. They're made up stories." They were all made up stories. He didn't do anything wrong. "Cut him loose, sir." I said, "No, I won't do that." We got him through. And you know what? They couldn't give a

damn. They couldn't give a damn. Let them rule the right way, but it almost seems that they're all going out of their way to hurt all of us, and to hurt our country. To hurt our country.

Donald Trump (00:32:40):

I read a story in one of the newspapers recently how I control the three Supreme Court justices. I control them. They're puppets. I read it about Bill Barr, that he's my personal attorney. That he'll do anything for me. And I said, "It really is genius," because what they do is that, and it makes it really impossible for them to ever give you a victory, because all of a sudden Bill Barr changed, if you hadn't noticed. I like Bill Barr, but he changed, because he didn't want to be considered my personal attorney. And the Supreme Court, they rule against me so much. You know why? Because the story is I haven't spoken to any of them, any of them, since virtually they got in. But the story is that they're my puppet. That they're puppets. And now that the only way they can get out of that, because they hate that, it's not good on the social circuit. And the only way they get out is to rule against Trump. So let's rule against Trump, and they do that. So I want to congratulate them.

Donald Trump (00:33:41):

But it shows you the media's genius. In fact, probably, if I was the media, I'd do it the same way. I hate to say it. But we got to get them straightened out. Today, for the sake of our democracy, for the sake of our Constitution, and for the sake of our children, we lay out the case for the entire world to hear. You want to hear it?

Crowd (00:34:04):

Yes!

Donald Trump (00:34:06):

In every single swing state, local officials, state officials, almost all Democrats made illegal and unconstitutional changes to election procedures without the mandated approvals by the state legislatures, that these changes paved the way for fraud on a scale never seen before. And I think we'd go a long way outside of our country when I say that.

Donald Trump (00:34:34):

So just in a nutshell, you can't make a change on voting for a federal election unless the state legislature approves it. No judge can do it. Nobody can do it, only a legislature. So as an example in Pennsylvania or whatever, you have a Republican legislature, you have a Democrat mayor, and you have a lot of Democrats all over the place. They go to the legislature, the legislature laughs at them. Says, "We're not going to do that." They say, "Thank you very much." And they go and make the changes themselves. They do it anyway. And that's totally illegal. That's totally illegal. You can't do that.

Donald Trump (00:35:13):

In Pennsylvania, the Democrat Secretary of State and the Democrat State Supreme Court justices illegally abolished the signature verification requirements just 11 days prior to the election. So think of what they did. No longer is there signature verification. Oh, that's okay. We want voter ID by the way. But no longer is their signature verification, 11 days before the election! They say, "We don't want it." You know why they don't want it? Because they want to cheat. That's the only reason. Who would even think of that? We don't want to verify a signature? There were over 205,000 more ballots counted in Pennsylvania. Now think of this. You had 205,000 more ballots than you had voters. That means you had 200... Where did they come from? You know where they came from? Somebody's imagination. Whatever they needed. So in Pennsylvania you had 205,000 more votes than you had voters! And it's the number is actually much greater than

that now. That was as of a week ago. And this is a mathematical impossibility, unless you want to say it's a total fraud. So Pennsylvania was defrauded.

Donald Trump (00:36:35):

Over 8000 ballots in Pennsylvania were cast by people whose names and dates of birth match individuals who died in 2020 and prior to the election. Think of that. Dead people! Lots of dead people, thousands. And some dead people actually requested an application. That bothers me even more. Not only are they voting, they want an application to vote. One of them was 29 years ago died. It's incredible.

Donald Trump (00:37:05):

Over 14,000 ballots were cast by out-of-state voters. So these are voters that don't live in the state. And by the way, these numbers are what they call outcome determinative. Meaning these numbers far surpass... I lost by a very little bit. These numbers are massive. Massive. More than 10,000 votes in Pennsylvania were illegally counted, even though they were received after Election Day. In other words, "They were received after Election Day, let's count them anyway!" And what they did in many cases is they did fraud. They took the date and they moved it back, so that it no longer is after Election Day. And more than 60,000 ballots in Pennsylvania were reported received back. They got back before they were ever supposedly mailed out. In other words, you got the ballot back before you mailed it!

Donald Trump (00:38:03):

... they were supposedly mailed out, in other words, you got the ballot back before you mailed it, which is also logically and logistically impossible. Think of that one. You got the ballot back. Let's send the ballots. Oh, they've already been sent. But we got the ballot back before they were sent. I don't think that's too good.

Donald Trump (00:38:23):

Twenty-five thousand ballots in Pennsylvania were requested by nursing home residents, all in a single giant batch, not legal. Indicating an enormous illegal ballot harvesting operation. You're not allowed to do it. It's against the law. The day before the election, the State of Pennsylvania reported the number of absentee ballots that had been sent out. Yet this number was suddenly and drastically increased by 400,000 people. It was increased. Nobody knows where it came from by 400,000 ballots. One day after the election, it remains totally unexplained. They said, "Well, we can't figure that." Now that's many, many times what it would take to overthrow the state. Just that one element. 400,000 ballots appeared from nowhere, right after the election.

Donald Trump (00:39:16):

By the way, Pennsylvania has now seen all of this. They didn't know because it was so quick. They had a vote, they voted, but now they see all this stuff. It's all come to light. Doesn't happen that fast. And they want to re certify their votes. They want to re certify. But the only way that can happen is if Mike Pence agrees to send it back.

Donald Trump (00:39:43):

Mike Pence has to agree to send it back. And many people in Congress want it sent back, and take of what you're doing. Let's say you don't do it. Somebody says, "Well, we have to obey the constitution." And you are, because you're protecting our country and you're protecting the constitution, so you are. But think of what happens. Let's say they're stiff and they're stupid people. And they say, "Well, we really have no choice." Even though Pennsylvania and other states want to redo their votes, they want to see the numbers. They already have the numbers. Go very quickly and they want to redo their legislature because many of these votes were taken as I said, because it wasn't approved by their legislature. That in itself is illegal and then you have the

scam and that's all of the things that we're talking about. But think of this: if you don't do that, that means you will have a president of the United States for four years, with his wonderful son.

Donald Trump (00:40:50):

You will have a president who lost all of these states, or you will have a president to put it another way, who was voted on by a bunch of stupid people who lost all of these things. You will have an illegitimate president, that's what you'll have. And we can't let that happen. These are the facts that you won't hear from the fake news media. It's all part of the suppression effort. They don't want to talk about it. They don't want to talk about it. In fact, when I started talking about that, I guarantee you a lot of the television sets and a lot of those cameras went off and that's how a lot of cameras back there. But a lot of them went off, but these are the things you don't hear about. You don't hear what you just heard. And I'm going to go over a few more states. But you don't hear it by the people who want to deceive you and demoralize you and control you, big tech, media.

Donald Trump (00:41:48):

Just like the suppression polls that said, we're going to lose Wisconsin by 17 points, well we won Wisconsin. They don't have it that way because they lose just by a little sliver. But they had me down the day before Washington Post, ABC poll, down 17 points. I called up a real pollster. I said, "What is that?" "Sir, that's called a suppression poll. I think you're going to win Wisconsin, sir." I said, "But why do they make it four or five points?" "Because then people vote. But when you're down 17, they say, 'Hey, I'm not going to waste my time. I love the president, but there's no way.'" Despite that, we won Wisconsin, you'll see. But that's called suppression because a lot of people, when they see that, it's very interesting. This pollster said, "Sir, if you're down three,

four or five people vote. When you go down 17, they say, 'Let's save, let's go and have dinner, and let's watch the presidential defeat tonight on television darling.'"

Donald Trump (00:42:49):

And just like the radical left tries to blacklist you on social media, every time I put out a tweet, even if it's totally correct, totally correct. I get a flag. I get a flag. And they also don't let you get out. On Twitter, it's very hard to come on to my account. It's very hard to get out a message. They don't let the message get out nearly like they should, but I've had many people say, "I can't get on your Twitter." I don't care about Twitter. Twitter is bad news. They're all bad news. But you know what? If you want to get out of message. And if you want to go through big tech, social media, they are really, if you're a conservative, if you're a Republican, if you have a big voice, I guess they call it shadow ban. Shadow ban. They shadow ban you and it should be illegal. I've been telling these Republicans get rid of Section 230.

Donald Trump (00:43:47):

And for some reason, Mitch and the group, they don't want to put it in there. And they don't realize that that's going to be the end of the Republican party as we know it, but it's never going to be the end of us, never. Let them get out. Let the weak ones get out. This is a time for strength. They also want to indoctrinate your children in school by teaching them things that aren't so. They want to indoctrinate your children. It's all part of the comprehensive assault on our democracy and the American people to finally standing up and saying, "No." This crowd is again a testament to it. I did no advertising. I did nothing. You do have some groups that are big supporters. I want to thank that Amy and everybody, we have some incredible supporters, incredible, but we didn't do anything. This just happened.

Donald Trump (00:44:39):

Two months ago, we had a massive crowd come down to Washington. I said, "What are they there for." "Sir, they're there for you." We have nothing to do with it. These groups, they're forming all over the United States. And we got to remember, in a year from now, you're going to start working on Congress. And we got to get rid of the weak congresspeople, the ones that aren't any good, the Liz Cheneys of the world, we got to get rid of them. We got to get rid of them. She never wants a soldier brought home. I've brought a lot of our soldiers home. I don't know, some like it. They're in countries that nobody even knows the name. Nobody knows where they are. They're dying. They're great, but they're dying. They're losing their arms, their legs, their face. I brought them back home, largely back home, Afghanistan, Iraq. Remember I used to say in the old days, "Don't go into Iraq. But if you go in, keep the oil." We didn't keep the oil. So stupid. So stupid, these people. And Iraq has billions and billions of dollars now in the bank. And what did we do? We get nothing. We never get. But we do actually, we kept the oil here. We did good. We got rid of the ISIS caliphate. We got rid of plenty of different things that everybody knows and the rebuilding of our military in three years, people said it couldn't be done. And it was all made in the USA, all made in the USA. Best equipment in the world. In Wisconsin, corrupt Democrat run cities deployed more than 500 illegal unmanned, unsecured drop boxes, which collected a minimum of 91,000 unlawful votes. It was razor thin the loss. This one thing alone is much more than we would need, but there are many things.

Donald Trump (00:46:29):

They have these lockboxes and they pick them up and they disappear for two days. People would say, "Where's that box?" They disappeared. Nobody even knew where the hell it was. In addition, over 170,000 absentee votes were counted in Wisconsin without a valid absentee ballot application. So they had a vote, but they had no application. And that's illegal in Wisconsin.

Meaning those votes were blatantly done in opposition to state law. And they came 100% from Democrat areas, such as Milwaukee and Madison, 100%. In Madison, 17,000 votes were deposited in so-called human drop boxes. You know what that is, right? Where operatives stuff thousands of unsecured ballots into duffel bags on park benches across the city in complete defiance of cease and desist letters from state legislature. The state legislature said, "Don't do it." They're the only ones that could approve it. They gave tens of thousands of votes.

Donald Trump (00:47:37):

They came in in duffel bags. Where the hell did they come from? According to eyewitness testimony, postal service workers in Wisconsin were also instructed to illegally backdate approximately 100,000 ballots. The margin of difference in Wisconsin was less than 20,000 votes. Each one of these things alone wins us the state. Great state, we love the state, we won the state. In Georgia, your secretary of state, I can't believe this guy's a Republican. He loves recording telephone conversations. I thought it was a great conversation personally, so did a lot of other ... people love that conversation, because it says what's going on. These people are crooked. They're 100% in my opinion, one of the most corrupt. Between your governor and your secretary of state. And now you have it again last night, just take a look at what happened, what a mess and the Democrat party operatives entered into an illegal and unconstitutional settlement agreement that drastically weakened signature verification and other election security procedures.

Donald Trump (00:48:53):

Stacey Abrams, she took them to lunch and I beat her two years ago with a bad candidate, Brian Kemp. But the Democrats, took the Republicans to lunch because the secretary of state had no clue what the hell was happening, unless he did have a clue. That's interesting. Maybe he was

with the other side, but we've been trying to get verifications of signatures in Fulton County. They won't let us do it. The only reason they won't is because we'll find things in the hundreds of thousands. Why wouldn't they let us verify signatures and Fulton County? Which is known for being very corrupt. They won't do it. They go to some other county where you would live. I said, "That's not the problem. The problem is Fulton County." Home of Stacey Abrams. She did a good job. I congratulate her, but it was done in such a way that we can't let this stuff happen.

Donald Trump (00:49:53):

We won't have a country if it happens. As a result Georgia's absentee ballot rejection rate was more than 10 times lower than previous levels, because the criteria was so off, 48 counties in Georgia with thousands and thousands of votes rejected zero ballots. There wasn't one ballot. In other words, in a year in which more mail-in ballots were sent than ever before, and more people were voting by mail for the first time, the rejection rate was drastically lower than it had ever been before. The only way this can be explained is if tens of thousands of illegitimate votes were added to the tally, that's the only way you could explain it. By the way, you're talking about tens of thousands. If Georgia had merely rejected the same number of unlawful ballots, as in other years, there should have been approximately 45,000 ballots rejected, far more than what we needed to win, just over 11,000.

Donald Trump (00:50:59):

They should find those votes. They should absolutely find that just over 11,000 votes, that's all we need. They defrauded us out of a win in Georgia, and we're not going to forget it. There's only one reason the Democrats could possibly want to eliminate signature matching, oppose voter ID and stop citizenship confirmation. Are you in citizenship? You're not allowed to ask that question. Because they want to steal the election. The radical left knows exactly what they're

doing. They're ruthless and it's time that somebody did something about it. And Mike Pence, I hope you're going to stand up for the good of our constitution and for the good of our country. And if you're not, I'm going to be very disappointed in you. I will tell you right now. I'm not hearing good stories. In Fulton County, republican poll Watchers were rejected in some cases, physically from the room under the false pretense of a pipe burst.

Donald Trump (00:52:03):

Water main burst, everybody leave. Which we now know was a total lie. Then election officials pull boxes, Democrats and suitcases of ballots out from under a table. You all saw it on television, totally fraudulent. And illegally scanned them for nearly two hours totally unsupervised. Tens of thousands of votes, as that coincided with a mysterious vote dump of up to 100,000 votes for Joe Biden, almost none for Trump. Oh, that sounds fair. That was at 1:34 AM. The Georgia secretary of state and pathetic governor of Georgia ... although he says, I'm a great president. I sort of maybe have to change. He said the other day, "Yes, I disagree with president, but he's been a great president." Oh, good. Thanks. Thank you very much. Because of him and others. Brian Kemp, vote him the hell out of office, please.

Donald Trump (00:53:05):

Well, his rates are so low, his approval rating now, I think it just reached a record low. They've rejected five separate appeals for an independent and comprehensive audit of signatures in Fulton County. Even without an audit, the number of fraudulent ballots that we've identified across the state is staggering. Over 10,300 ballots in Georgia were cast by individuals whose names and dates of birth match Georgia residents who died in 2020 and prior to the election. More than 2,500 ballots were cast by individuals whose names and dates of birth match incarcerated felons in Georgia prison. People who are not allowed to vote. More than 4,500

illegal ballots were cast by individuals who do not appear on the state's own voter rolls. Over 18,000 illegal ballots were cast by individuals who registered to vote using an address listed as vacant, according to the postal service. At least 88,000 ballots in Georgia were cast by people whose registrations were illegally backdated.

Donald Trump (00:54:18):

Each one of these is far more than we need. 66,000 votes in Georgia were cast by individuals under the legal voting age. And at least 15,000 ballots were cast by individuals who moved out of the state prior to November 3rd election. They say they moved right back. They move right back. Oh, they moved out. They moved right back. Okay. They miss Georgia that much. I do. I love Georgia, but it's a corrupt system. Despite all of this, the margin in Georgia is only 11,779 votes. Each and every one of these issues is enough to give us a victory in Georgia, a big, beautiful victory. Make no mistake, this selection stolen from you, from me and from the country. And not a single swing state has conducted a comprehensive audit to remove the illegal ballots. This should absolutely occur in every single contestant state before the election is certified.

Donald Trump (00:55:21):

In the State of Arizona, over 36,000 ballots were illegally cast by non-citizens. 2000 ballots were returned with no address. More than 22,000 ballots were returned before they were ever supposedly mailed out. They returned, but we haven't mailed them yet. 11,600 more ballots and votes were counted more than there were actual voters. You see that? So you have more votes again than you have voters.

Donald Trump (00:55:51):

150,000 people registered in Maya Copa County after the registration deadline. 103,000 ballots in the county were sent for electronic adjudication with no Republican observers. In Clark County, Nevada, the accuracy settings on signature verification machines were purposely lowered before they were used to count over 130,000 ballots. If you signed your name as Santa Claus, it would go through. There were also more than 42,000 double votes in Nevada. Over 150,000 people were hurt so badly by what took place. And 1500 ballots were cast by individuals whose names and dates of birth match Nevada residents who died in 2020, prior to November 3rd election. More than 8,000 votes were cast by individuals who had no address and probably didn't live there. The margin in Nevada is down at a very low number. Any of these things would have taken care of the situation. We would have won-

Donald Trump (00:57:03):

Any of these things would have taken care of the situation. We would have won Nevada also. Every one of these we're going over, we win. In Michigan quickly, the secretary of state, a real great one, flooded the state with unsolicited mail-in ballot applications, sent to every person on the rolls, in direct violation of state law. More than 17,000 Michigan ballots were cast by individuals whose names and dates of birth matched people who were deceased. In Wayne County, that's a great one. That's Detroit. 174,000 ballots were counted without being tied to an actual registered voter. Nobody knows where they came from. Also in Wayne County, poll watches observed canvassers re-scanning batches of ballots over and over again, up to three or four or five times. In Detroit, turnout was 139% of registered voters. Think of that. So you had 139% of the people in Detroit voting. This is in Michigan, Detroit, Michigan.

Donald Trump (00:58:08):

A career employee of the Detroit, City of Detroit, testified under penalty of perjury that she witnessed city workers coaching voters to vote straight Democrat, while accompanying them to watch who they voted for. When a Republican came in, they wouldn't talk to him. The same worker was instructed not to ask for any voter ID and not to attempt to validate any signatures if they were Democrats. She also told to illegally, and was told backdate ballots received after the deadline and reports that thousands and thousands of ballots were improperly backdated. That's Michigan. Four witnesses have testified under penalty of perjury that after officials in Detroit announced the last votes had been counted, tens of thousands of additional ballots arrived without required envelopes. Every single one was for a Democrat. I got no votes.

Donald Trump (00:59:10):

At 6:31 AM, in the early morning hours after voting had ended, Michigan suddenly reported 147,000 votes. An astounding 94% went to Joe Biden, who campaigned brilliantly from his basement. Only a couple of percentage points went to Trump. Such gigantic and one-sided vote dumps were only observed in a few swing states and they were observed in the states where it was necessary. You know what's interesting, President Obama beat Biden in every state other than the swing states where Biden killed him. But the swing States were the ones that mattered. There were always just enough to push Joe Biden barely into the lead. We were ahead by a lot and within the number of hours we were losing by a little.

Donald Trump (01:00:03):

In addition, there is the highly troubling matter of Dominion voting systems. In one Michigan County alone, 6,000 votes were switched from Trump to Biden and the same systems are used in the majority of states in our country. Senator William Ligon, a great gentleman, chairman of

Georgia Senate Judiciary Subcommittee, Senator Ligon, highly respected on elections has written a letter describing his concerns with Dominion in Georgia.

Donald Trump (01:00:40):

He wrote, and I quote, "The Dominion voting machines employed in Fulton County had an astronomical and astounding 93.67% error rate." It's only wrong 93% of the time. "In the scanning of ballots requiring a review panel to adjudicate or determine the voter's interest, in over 106,000 ballots out of a total of 113,000." Think of it, you go in and you vote and then they tell people who you're supposed to be voting for. They make up whatever they want. Nobody's ever even heard. They adjudicate your vote. They say, "Well, we don't think Trump wants to vote for Trump. We think he wants to vote for Biden. Put it down for Biden." The national average for such an error rate is far less than 1% and yet you're at 93%. "The source of this astronomical error rate must be identified to determine if these machines were set up or destroyed to allow for a third party to disregard the actual ballot cast by the registered voter."

Donald Trump (01:01:44):

The letter continues, "There is clear evidence that tens of thousands of votes were switched from President Trump to former Vice President Biden in several counties in Georgia. For example, in Bibb County, President Trump was reported to have 29,391 votes at 9:11 PM Eastern time. While simultaneously Vice President Joe Biden was reported to have 17,213. Minutes later, just minutes, at the next update, these vote numbers switched with President Trump going way down to 17,000 and Biden going way up to 29,391." And that was very quick, a 12,000 vote switch, all in Mr. Biden's favor.

Donald Trump (01:02:31):

So, I mean, I could go on and on about this fraud that took place in every state and all of these legislatures want this back. I don't want to do it to you because I love you and it's freezing out here, but I could just go on forever. I can tell you this...

Speaker 1 (01:02:52):

We love you. We love you. We love you. We love you. We love you. We love you. We love you. We love you.

Donald Trump (01:03:03):

So when you hear, when you hear, "While there is no evidence to prove any wrongdoing," this is the most fraudulent thing anybody's... This is a criminal enterprise. This is a criminal enterprise and the press will say, and I'm sure they won't put any of that on there because that's no good, do you ever see, "While there is no evidence to back President Trump's assertion," I could go on for another hour reading this stuff to you and telling you about it. There's never been anything like it. Think about it, Detroit had more votes than it had voters. Pennsylvania had 205,000 more votes than it had more, but you don't have to go any... Between that, I think that's almost better than dead people, if you think, right? More votes than they had voters, and many other States are also.

Donald Trump (01:03:56):

It's a disgrace that the United States of America, tens of millions of people are allowed to go vote without so much as even showing identification. In no state is there any question or effort made to verify the identity, citizenship, residency, or eligibility of the votes cast. The Republicans have to get tougher. You're not going to have a Republican party if you don't get tougher. They want to play so straight, they want to play so, "Sir, yes, the United States, the constitution doesn't allow me to send them back to the States." Well, I say, "Yes, it does because the constitution says you have to protect our country and you have to protect our constitution and you can't vote

on fraud," and fraud breaks up everything, doesn't it? When you catch somebody in a fraud, you're allowed to go by very different rules. So I hope Mike has the courage to do what he has to do. And I hope he doesn't listen to the RINOs and the stupid people that he's listening to. It is also widely understood that the voter rolls are crammed full of non-citizens, felons and people who have moved out of state and individuals who are otherwise ineligible to vote. Yet Democrats oppose every effort to clean up their voter rolls. They don't want to clean them up, they are loaded. And how many people here know other people that when the hundreds of thousands and then millions of ballots got sent out, got three, four, five, six, and I heard one who got seven ballots. And then they say, "You didn't quite make it, sir." We won. We won in a landslide. This was a landslide.

Donald Trump (01:05:43):

They said, "It's not American to challenge the election." This is the most corrupt election in the history, maybe of the world. You know, you could go third world countries, but I don't think they had hundreds of thousands of votes and they don't have voters for them. I mean, no matter where you go, nobody would think this. In fact, it's so egregious, it's so bad, that a lot of people don't even believe it. It's so crazy that people don't even believe it. It can't be true. So they don't believe it. This is not just a matter of domestic politics, this is a matter of national security. So today, in addition to challenging the certification of the election, I'm calling on Congress and the state legislatures to quickly pass sweeping election reforms, and you better do it before we have no country left. Today is not the end. It's just the beginning.

Donald Trump (01:06:37):

With your help over the last four years, we built the greatest political movement in the history of our country and nobody even challenges that. I say that over and over, and I never get challenged

by the fake news, and they challenge almost everything we say. But our fight against the big donors, big media, big tech and others is just getting started. This is the greatest in history. There's never been a movement like that. You look back there all the way to the Washington Monument. It's hard to believe. We must stop the steal and then we must ensure that such outrageous election fraud never happens again, can never be allowed to happen again, but we're going forward. We'll take care of going forward. We got to take care of going back. Don't let them talk, "Okay, well we promise," I've had a lot of people, "Sir, you're at 96% for four years." I said, "I'm not interested right now. I'm interested in right there."

Donald Trump (01:07:33):

With your help we will finally pass powerful requirements for voter ID. You need an ID to cash your check. You need an ID to go to a bank, to buy alcohol, to drive a car. Every person should need to show an ID in order to cast your most important thing, a vote. We will also require proof of American citizenship in order to vote in American elections. We just had a good victory in court on that one, actually. We will ban ballot harvesting and prohibit the use of unsecured drop boxes to commit rampant fraud. These drop boxes are fraudulent. There for, they get... They disappear and then all of a sudden they show up. It's fraudulent. We will stop the practice of universal, unsolicited mail-in balloting. We will clean up the voter rolls that ensure that every single person who cast a vote is a citizen of our country, a resident of the state in which they vote and their vote is cast in a lawful and honest manner. We will restore the vital civic tradition of in-person voting on election day so that voters can be fully informed when they make their choice. We will finally hold big tech accountable and if these people had courage and guts, they would get rid of Section 230, something that no other company, no other person in America, in the world, has.

Donald Trump (01:09:10):

All of these tech monopolies are going to abuse their power and interfere in our elections and it has to be stopped and the Republicans have to get a lot tougher and so should the Democrats. They should be regulated, investigated and brought to justice under the fullest extent of the law. They're totally breaking the law. Together we will drain the Washington swamp and we will clean up the corruption in our nation's capital. We have done a big job on it, but you think it's easy, it's a dirty business. It's a dirty business. You have a lot of bad people out there. Despite everything we've been through, looking out all over this country and seeing fantastic crowds, although this I think is our all time record. I think you have 250, 000 people. 250,000.

Donald Trump (01:10:05):

Looking out at all the amazing patriots here today, I have never been more confident in our nation's future. Well, I have to say we have to be a little bit careful. That's a nice statement, but we have to be a little careful with that statement. If we allow this group of people to illegally take over our country, because it's illegal when the votes are illegal, when the way they got there is illegal, when the States that vote are given false and fraudulent information. We are the greatest country on earth and we are headed, and were headed, in the right direction. You know, the wall is built, we're doing record numbers at the wall. Now they want to take down the wall. Let's let everyone flow in. Let's let everybody flow in.

Donald Trump (01:10:52):

We did a great job in the wall. Remember the wall? They said it could never be done. One of the largest infrastructure projects we've ever had in this country and it's had a tremendous impact and we got rid of catch and release, we got rid of all of the stuff that we had to live with. But now the caravans, they think Biden's getting in, the caravans are forming again. They want to come in

again and rip off our country. Can't let it happen. As this enormous crowd shows, we have truth and justice on our side. We have a deep and enduring love for America in our hearts. We love our country. We have overwhelming pride in this great country, and we have it deep in our souls. Together we are determined to defend and preserve government of the people, by the people and for the people.

Donald Trump (01:11:44):

Our brightest days are before us, our greatest achievements still wait. I think one of our great achievements will be election security because nobody until I came along, had any idea how corrupt our elections were. And again, most people would stand there at 9:00 in the evening and say, "I want to thank you very much," and they go off to some other life, but I said, "Something's wrong here. Something's really wrong. Can't have happened." And we fight. We fight like Hell and if you don't fight like Hell, you're not going to have a country anymore.

Donald Trump (01:12:21):

Our exciting adventures and boldest endeavors have not yet begun. My fellow Americans for our movement, for our children and for our beloved country and I say this, despite all that's happened, the best is yet to come.

Donald Trump (01:12:43):

So we're going to, we're going to walk down Pennsylvania Avenue, I love Pennsylvania Avenue, and we're going to the Capitol and we're going to try and give... The Democrats are hopeless. They're never voting for anything, not even one vote. But we're going to try and give our Republicans, the weak ones, because the strong ones don't need any of our help, we're going to try and give them the kind of pride and boldness that they need to take back our country.

Donald Trump (01:13:19):

So let's walk down Pennsylvania Avenue. I want to thank you all. God bless you and God bless America. Thank you all for being here, this is incredible. Thank you very much. Thank you.