Thinking/Speaking/Acting “Freely”? A Critical Discourse Analysis of the Free Speech Provisions in the United States and Russian Constitutions

by

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ABSTRACT

A critical discourse analysis (CDA) was employed to examine judicial opinions in the United States and Russia on the free speech provisions in their respective constitutions. As a research perspective, CDA is designed to directly speak to social change, focusing on power, history, ideology, and language's role as a social phenomenon in expressing values of individuals and social groups (Wodak & Meyer, 2001). Fairclough's (2001) methodological approach to CDA was selected for its consistency and structure in examining societal issues in CDA; namely, a five-stage approach that includes: (1) focusing on a social problem that possesses a semiotic aspect; (2) identifying obstacles to addressing the problem through text as semiosis (in relation to his three-part model addressed above); (3) considering whether the social structure "needs" the problem; (4) identifying potential routes to overcome the obstacles, and (5) reflecting critically on the first four stages. This methodological framework was utilized in answering the following research questions: (1) What are the textual and constructive differences in the U.S. and Russian constitutional free speech provisions and judicial systems? (2) How do the differences in (1) affect the protection of individual speech rights? (3) What are avenues to protect or improve speech rights in the future? The results of this study manifested similar structures of power and methods of defending the courts' authority, notwithstanding different cultural understanding of free speech and jurisprudential approaches.

DEDICATION

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Appellate—pertaining to appeals for judicial review of adjudications (The Law Dictionary).

Case law—an "aggregate of reported cases as forming a body of jurisprudence…in distinction to statutes and other sources of law" (The Law Dictionary).

Common law—a "body of rules and principles, written or unwritten…recognized as an organic part of the jurisprudence of most of the United States" (The Law Dictionary).

General jurisdiction—referring to a court, which is not limited to hearing a particular type of case or controversy (Farnsworth, 1963, p. 44).

Judicial opinion—a "[j]udge's written case-judgment explanation" (The Law Dictionary).

Majority—a "decision of more than half of the [number of] judges trying a case" (The Law Dictionary).

Concurring—an "opinion that is given by another authority that is in agreeance and upholds the opinion of the first authority" (The Law Dictionary).

Dissent—an opinion "denot[ing] the explicit disagreement of one or more judges of a court with the decision passed by the majority upon a case before them" (The Law Dictionary).

Jurisprudence—a body of law (The Law Dictionary).

Textualism—"a legal philosophy that laws and legal documents (such as the U.S. Constitution) should be interpreted by considering only the words used in the law or document" (Merriam-Webster).

Part I

Introduction

In February 2012 (Kananovich, 2016), members of the Russian feminist punk collective Pussy Riot were arrested for performing a part of a song set to the music of a Russian Orthodox hymn, in which they supplicated the Virgin Mary to "drive [Russian President] Putin" away (Kananovich, 2014). They donned brightly colored masks and short dresses, performing part of their song, which commented on the closeness of Putin to the patriarch of the Russian Orthodox Church and questioned the practices of the Church (Kananovich, 2014). Three of the women were charged and found guilty of hooliganism motivated by religious hatred (Kananovich, 2014), about which Putin stated, "No one puts anyone in prison for political reasons, for their political views. They get punished for violating the law. Everybody should observe the law" (Spark-Smith, 2012). He further stated that it was fine to hold demonstrations, but those demonstrations should be "legal," and should not interfere with others' lives (Spark-Smith, 2012).

Such a performative act with apparent political implications evokes ties with similar landmark United States cases as *Texas v. Johnson* (1989), wherein Gregory Lee Johnson conducted a "die-in" to protest the consequences of nuclear war and burned the American flag while chanting, "America, the red, white, and blue, we spit on you," (*Texas v. Johnson*, 1989). Yet the United States Supreme Court overturned Johnson's conviction as violating the First Amendment's protection of free speech (*Texas v. Johnson*, 1989), in stark contrast to the Pussy Riot members' convictions and prison sentences (Kananovich, 2014). Indeed, the in-court discussion dissecting Pussy Riot's performance did not approach the content

from a perspective of free speech or expression, but instead from a position of societal expectations and acceptability (Kananovich, 2014).

The differences in approaches to criminalizing or protecting political expression demonstrates the drastic variance of actual protections afforded to citizens in society to engage in protected speech or expressive activities. Although the social, cultural, and political history of the United States and Russia are starkly divergent, this difference in perspectives on protection for speech and expression is perhaps more surprising than a surface view of the two societies and their cultural histories would reveal. That is, both societies protect the freedom of speech in their foundational governmental documents, with the surface text of Russia's free-speech protections spanning several constitutional provisions, additionally guaranteeing freedom of thought among other specific protections (Russ. Const., ch. 2, art. 29, 1993). By contrast, the United States' free-speech clause contains ten words, phrased in the negative: "Congress shall make no law…abridging the freedom of speech" (U.S. Const., Am. 1, 1791). Yet, despite the expansive protections for free speech in the Russian Constitution, the extent to which those protections manifest themselves appear inversely diminished (Tochka, 2013). Even in the United States, manifest discrepancies of recognized civil liberties are apparent in the contours of criminal or civil liability for free speech, including public acts of "pure" speech and freedom of expression (Means, 2002, pp. 505-514; Fisch, 2002; *United States v. O'Brien*, 391 U.S. 367 (1968)), as well as hate speech and other harmful "speech" (e.g., child pornography).

Although popular media and scholarly socio-political work have examined generally the issues of civil liberties and freedom of expression in the United States and Russia (Tochka, 2013; Beschastna, 2013), such issues remain under-explored from a

linguistic approach. This dissertation bridges that gap by applying the theory of critical discourse analysis (CDA) to the free speech provisions in the U.S. and Russian Constitutions. Such an inquiry delves into their histories of constitutional jurisprudence to explore from a linguistic perspective how—and why—the countries approach freedom of expression differently, and examines the contours of free speech jurisprudence to identify the actual implications for individuals citizens in each country, from the perspective of free speech protection as a positive and with an individualistic aim to protect political liberty. Specifically, this dissertation seeks to answer the following questions through CDA:

(1) What are the textual and constructive differences in the United States and Russian constitutional free speech provisions and judicial systems?
(2) How do the differences in (1) affect the protection of individual speech rights?
(3) What are avenues to protect or improve speech rights in the future?

This dissertation proceeds thusly: Chapter 1 introduces the general dissertation topic of critical discourse analysis (CDA) as applied to the law (and, more specifically, CDA as applied to the judicial decisions in the United States and Russia regarding the free speech provisions of both countries' constitutions) by providing a literature review of discourse analysis, critical discourse analysis, and intertextuality in order to establish the applicability of these tools for examining legal topics in introducing the relevant methodological framework for this dissertation (Fairclough, 1992, 2012). Initially, it describes that discourse analysis, particularly Fairclough's (1992) approach, connects linguistic and social analyses as inherent parts of social practice (Paltridge, 2012, p. 2; Gee, J., 2015 p. 162; Wood & Kroger, 2000, p. 206).

This chapter then describes the scholarly treatment of CDA, which focuses on developing "a detailed description…of the ways dominant discourses (indirectly) influence such socially shared knowledge, attitudes and ideologies," (van Dijk, 1993, pp. 258-59). Next, the chapter addresses Fairclough's three-dimensional model of discourse as the most well-developed approach for CDA (Blommaert & Bulcaen, 2000), used here to examine the constitutional provisions and judicial opinions studied within this dissertation. The chapter also examines the applicability of CDA to legal topics nationally and internationally, thus simultaneously demonstrating the flexibility of a CDA approach to examine such issues, as well as its timeliness, and the gap in the research necessitating the inquiry undertaken in this dissertation.

Finally, the chapter also introduces the proposed methodological steps this dissertation follows, as set forth in Fairclough (2001); namely, a five-stage approach that includes: (1) focusing on a social problem that possesses a semiotic aspect; (2) identifying obstacles to addressing the problem through text as semiosis (in relation to his three-part model addressed above); (3) considering whether the social structure "needs" the problem; (4) identifying potential routes to overcome the obstacles, and (5) reflecting critically on the first four stages. This methodological framework is designed to answer the following research questions:

(1) What are the textual and constructive differences in the U.S. and Russian constitutional free speech provisions and judicial systems?

(2) How do the differences in (1) affect the protection of individual speech rights?

(3) What are avenues to protect or improve speech rights in the future?

Chapter 2 begins with describing the legal backgrounds and systems in the United States and Russia. The chapter then addresses the free speech provisions in the U.S. and Russian constitutions to provide an introduction to the surface and substantive differences in the systems that bear directly on the linguistic analysis in subsequent chapters. This includes a discussion of the United States' colonial history and the notions upon which the Constitution was founded (Klug, 2000), as affecting the underlying assumption upon which American jurisprudence rests (namely, on an independent judiciary), contrasting with the Russian Constitution's structure as dependent upon a strong executive branch (Svendsen, 2007; Russ. Const. ch. 4, art. 93, sec. 1, 1993), despite a separate judicial branch and bicameral legislative branch (Butler, 2003). Finally, the chapter explores opposite framing of the constitutional provisions, in terms of what the U.S. provision restricts, and what the Russian provision guarantees (U.S. Const., Am. 1, 1791; Russ. Const. ch. 2, art. 29, 1993).

Chapter 3, as the first stage in Fairclough's (2001) methodological approach (identifying a social problem with a semiotic aspect), begins with identifying free speech as semiosis (i.e., per semiosis as a form of meaning-making), and explores the problems of power (van Dijk, 1995) associated with free speech. As such, the chapter explores the semiotic characteristics of the free speech provisions, arguing that the writtenness and enforceability both constitutions are notable, and manifest an important conceptual image (Balkin, 2011, p. 36; Jamieson & Trapeznik, 2007).

One of the social problems connected with constitutional provisions in general and the free speech provisions in particular relates to different approaches to constitutional interpretation, which I argue are inherently connected to the semiotic principles underlying the constitutional provisions. This chapter then addresses competing perspectives of

constitutional interpretation from a semiotic perspective (Solum, 2013; Cardozo, 1921), including an examination of the historical underpinnings of free speech theories (Lukina, 2017; Sullivan, 2010; Hayman, 2008).

Chapter 4 begins Stage 2 of Fairclough's (2001) methodological framework, which identifies obstacles to addressing the social problem—the crux of this inquiry requires a detailed description of Fairclough's (1992) three-dimensional model of discourse as the approach to explore the semiotic problem. Specifically, this chapter identifies and describes in detail Fairclough's (1992) model of discourse as analyzing a "discourse event" as a (1) piece of text; (2) an example of discursive practice; and (3) an example of social practice, prior to applying each dimension to the data in Chapters 5-7.

The chapter then relates the study design and data collection procedures, which were developed to provide a comparative analysis of the free speech provisions of the Russian and U.S. Constitutions, and how those provisions manifest themselves in judicial opinions. Because the Russian corpus is smaller (beginning only in 1992, with the official beginning of the Russian Constitutional Court), all constitutional court decisions were identified that included free speech analysis. Corresponding U.S. decisions (utilizing the commercial legal database Westlaw) were identified by most-cited free-speech cases by subtopic. The selected judicial opinions were analyzed using a text concordancing program, as well as by holistically approaching the texts. Chapter 5 continues Stage 2, examining the formal features of text within the U.S. and Russian free speech provisions and the respective 28 judicial decisions from each jurisdiction. The chapter analyzes the data from the text concordancing program to compare relevant differences related to power structures as demonstrated through the textual features. This includes the examination and

discussion of the high incidence of words underscoring the importance of both the rights at issue and the courts themselves, as revealed through both corpora.

Chapter 6, likewise part of Stage 2, examines the free speech provisions and judicial opinions utilizing Fairclough's (1992) dimension of discourse as discursive practice. Chapter 6 identifies the various ways the constitutional provisions and opinions, respectively, are produced and consumed, and then explores their textual force, coherence, and intertextuality. For example, the U.S. judicial opinions demonstrate more focus upon individual justices as text producers than do the Russian opinions, which do not identify the author of majority opinions; however, both countries' judicial opinions demonstrate a robust amount of intertextuality through reliance on constitutional provisions and previous judicial decisions.

Chapter 7 is the final chapter in Stage 2, and utilizes Fairclough's (1992) third dimension of discourse as social practice to explore the U.S. and Russian judicial institutions as exemplified through the constitutions and judicial opinions. Specifically, the chapter identifies how ideology and hegemony exist within these institutions, and how the constitutional provisions and judicial opinions support and propagate both of those social elements, as well as related social structures. For example, the courts in both countries have "no influence over either the sword or the purse" (Hamilton, et al., 2009), and as such are in a delicate situation of asserting their own power in a governmental hegemonic struggle, while also attempting to protect the rights of the citizenry as against governmental hegemony. This is especially true in Russia, which features a less institutionalized (and newer) court, as well as a potentially stronger executive branch.

Chapters 8 and 9 are part of Stage 3 under Fairclough's (2001) methodology, wherein the critical inquiry evaluates whether society "needs" the problem, and the ways in which such a problem is engrained into the social structure. Chapter 8 addresses the United States, examining the unique aspects of U.S. society (e.g., current debates on free speech on school campuses, hate speech, etc.). Chapter 9 approaches Stage 3 as well, but as to Russia.

Chapter 10 addresses Stage 4 (Fairclough, 2001), identifying and evaluating ways to overcome the obstacles identified in Stage 3. Chapter 10 approaches the United States and suggest solutions to the structures of power, including ideologies and hegemonies, discussed and analyzed in earlier chapters. Chapter 11 addresses Stage 4 as to Russia.

Chapter 11 comprises the conclusion by way of critical reflection, which is the fifth (and final) stage in Fairclough's (2001) methodological framework. This chapter will view broadly both countries' free speech provisions, free speech jurisprudence, the structures of power uncovered during this dissertation, and the research approach and process to conduct this analysis, including a focus on self-reflection (Wodak & Meyer, 2001, p. 10), designed to answer the stated research questions.

Chapter 1. Critical Discourse Analysis

This chapter presents background and, respectively, an associated literature review of discourse analysis, critical discourse analysis, and intertextuality, respectively. The goal of this initial chapter is to demonstrate the interconnected concepts of language, society, CDA, and intertextuality, particularly demonstrating the appropriateness of the latter two for approaching legal and judicial topics.

A. Discourse analysis.

Broadly, the practice of discourse analysis recognizes that language is inherently connected to the machinations of society (Fairclough, 2003). Discourse analysis systematically explores use of language across texts within their larger socio-cultural contexts (Fairclough, 1992; Paltridge, 2012, p. 2). Fairclough, along with several other scholars, has been widely recognized for connecting linguistic and societal analyses as part of social practice (Gee, J., 2015 p. 162; Sarangi & Slembrouck, 2014, p. 45; Wood & Kroger, 2000, p. 206). He bases his approach to discourse "upon the assumption that language is an irreducible part of social life, dialectically interconnected with other elements of social life, so that social analysis and research always has to take account of language" (2003, p. 2). That is, writ broadly, any societal research reflects a linguistic facet at some level, and as a result any wholistic inquiry into society ought to address at least some aspect of language or language use. Therefore, approaching a social issue from a linguistic perspective is not only well-placed, but is actually a fundamental aspect of a thorough social analysis, particularly pertinent when examining the functioning of law within society. Discourse analysis includes the examination of language in both written and spoken media, as well as different contexts within each subdivision: e.g., how groups of people who participate in shared activity as part of a discourse community interact with each other, how such communities are formed, how particular communicative events (genres) are structured, etc. (Paltridge, 2012).

Discourse analysis takes many different shapes and has developed into a field with scholars engaged in multiple approaches to discourse analysis, to the extent that an outline

in this context is neither prudent or necessary—instead, this subsection has been intended to focus primarily on the integral nature of language to research on social issues, and to establish this interconnectedness from the broader perspective of discourse analysis, before moving on to connected academic fields in subsection B. in this chapter.

B. Critical discourse analysis.

Although discourse analysis encompasses many different subsets of discourse, the strength of CDA stems from the concept that "discourse is an opaque power object in modern societies," and, as such, "CDA aims to make it more visible and transparent" (Blommaert & Bulcaen, 2000, p. 448)—such an approach assists in delving into the relevance of words used when examining the relationship of legal authority to power, as addressed further below. CDA emerged in the late 1980s and early 1990s from a network of scholars who had, in turn, initially developed their study from the growth of critical movements in the 1970s (Wodak & Meyer, 2001, p. 5) and from European discourse studies in the 1980s (Blommaert & Bulcaen, 2000). This "critical" language study focused on an approach to discourse and textual analysis that recognized the importance of language in establishing power relationships in society. The "critical" part of CDA may be understood variably among scholars as a term referring to different formal schools, but foundationally, a "critique" within CDA is treated as "having distance to the data, embedding the data in the social, taking a political stance explicitly, and a focus on self-reflection as scholars doing research" (Wodak & Meyer, 2001, p. 10).

Its "locus of critique is the nexus of language/discourse/speech," (Blommaert & Bulcaen, 2000, p. 449), wherein the researcher uncovers power relationships and inequality through the study of language and ultimately aims to identify and uncover injustice and

inequality (Blommaert & Bulcaen, 2000; Wodak, 1989). Scholars within CDA have, for example, explored the inequality of individuals and groups in political hierarchies (Blommaert & Bulcaen, 2000), from analyses of Nazi-occupied Holland (Sauer, 1989) to Europe and the Soviet Union (Chilton, Ilyin, & Mey, 1998).

Wodak (1989) lays out a multi-step process for CDA: the first step diagnoses social processes in a particular society to lay bare discrimination, demagogy, propaganda, and other evils. The second step requires a researcher to interpret and scrutinize reality, but to also recognize that the researcher should not stay neutral (Wodak, 1989). Instead, CDA scholars advocate for interventionism for positive social change and empowerment for otherwise powerless groups (Blommaert & Bulcaen, 2000; Toolan, 1997). Wodak initially developed her "discourse-historical approach" to follow the establishment of a specific stereotyped anti-Semitic image, but has since adapted this approach to analyze politics in general and to develop theoretical frameworks from political discourse (Wodak & Meyer, 2001).

Teun van Dijk, another prominent CDA scholar, views the main goal of CDA to uncover "the discourse dimensions of power abuse and the injustice and inequality that result from it" (van Dijk, 1993, p. 252). In his view, CDA explores the nature of social power and dominance involving control and abuse by members of one group (van Dijk, 1993). Although this dominance might be restricted within domains, it is usually organized and institutionalized in some sort of hierarchy of power, where "power elites" (i.e., members of dominant groups and organizations) have a role in propagating the domination (van Dijk, 1993, p. 254). The exercise of this social power assumes managing access to the public mind, consisting of organized attitudes formed through general, socially shared

opinions, and which in turn rely on ideologies, which van Dijk (1993) describes as the norms and values underlying those socially shared beliefs. These are "the fundamental social cognitions that reflect the basic aims, interests and values of groups" (van Dijk, 1993, p. 258). Van Dijk then sees the core of CDA as developing "a detailed description, explanation and critique of the ways dominant discourses (indirectly) influence such socially shared knowledge, attitudes and ideologies, namely through their role in the manufacture of concrete models" (1993, p. 258-59).

Like Wodak, van Dijk observes that CDA—in contrast to other approaches in discourse analysis—does not have as its primary goal to contribute to or align with a specific discipline, paradigm, or theory of discourse (1993, p. 252). This allows for flexibility on the part of the researcher to choose different methods or emphases in the process of focusing on serious social problems, such that the selection of the method(s) relates directly to the relevance of the social issues (van Dijk, 1993). Furthermore, social issues are generally complex, which leads to the need for a variety of methods to address the issue (van Dijk, 1993). Joining Wodak in her focus on identifying social issues and advocating for change, van Dijk focuses on the inherent nature of political critique involved in a critical discourse analysis, stating that such analysis is "unabashedly normative" (1993, p. 253). Furthermore, van Dijk assists in narrowing CDA's focus on "social problems," which are those issues that present forms of social inequality (1995).

In contrast with van Dijk, Norman Fairclough (1992) does discuss power, but is not solely focused on power relations—instead, he concentrates on the establishment of ideologies and social change, as well as "the constructive effects discourse has upon social identities, social relations and systems of knowledge and belief" (p. 12). In addition to his

focus on the establishment of ideologies, he focuses on the formation of texts, rather than on studying the texts as finished products, which allows for a dynamic analysis of language and socio-cultural change (Fairclough, 1992).

Fairclough (1992) also establishes a three-dimensional model for discourse, which has been described as the most elaborate methodological framework for CDA (Blommaert & Bulcaen, 2000). This model looks at each discursive "event" (instance of discourse) as simultaneously (1) a piece of text; (2) an instance of discursive practice; and (3) an instance of social practice (Fairclough, 1992). In this model, he approaches the examinable unit as "text" (using Halliday's (1978) broad term to connote the linguistic form in both spoken and written language), but also includes other instances of semiosis such as body language (Fairclough, 1992). He views intertextuality as an intrinsic part of texts within their social environment, in that it is the process of transforming a past text into a present text (Fairclough, 1992).

In analyzing discourse, Fairclough (1992) argues that one should "regard language use as a form of social practice, rather than a purely individual activity or a reflex of situational variables" (p. 63). His use of the general term "discourse" reflects a form of social practice that can be studied systematically. And, rather than examining power relationships in van Dijk's vein, Fairclough (1992) analyzes the relationships of dominance as they exist in practices of institutions, which he characterizes as ideologies. He does this in the Marxist tradition of examining social conflict and using discourse to detect its existence (Wodak & Myers, 2001), viewing politics as a struggle for power (Fairclough, 2003).

Ideologies, in Fairclough's (1992) view, are either "significations" or "constructions of reality…which are built into various dimensions of the forms/meanings of discursive practices, and which contribute to the production, reproduction or transformation of relations of domination" (p. 87). These ideologies are located within the orders, or structures, of discourse, which are composed of both "the outcome of past events and the conditions for current events" (Fairclough, 1992, p. 89), as well as in events themselves through which the structures reproduce and transform. They arise in societies from patterns of domination which rely on salient aspects of various groups, such as class, gender, and culture (Fairclough, 1992, p. 92). When leadership and domination exist across multiple groups within a society, hegemony is established (Fairclough, 1992, p. 92).

Fairclough (2001) also provides a methodological approach which incorporates his three-dimensional framework, thereby establishing a consistent avenue by which to examine societal issues through CDA. Specifically, his methodology consists of five stages: (1) focusing on a social problem that possesses a semiotic aspect; (2) identifying obstacles to addressing the problem through text as semiosis (in relation to his three-part model addressed above); (3) considering whether the social structure ("network of practices") "needs" the problem; (4) identifying potential routes to overcome the obstacles, and (5) reflecting critically on the first four stages (Fairclough, 2001).

Yet, notwithstanding the various approaches that exist within CDA, their similarity converges upon recognizing the multi-dimensional nature of this analytical approach (Fairclough, 1992; Blommaert & Bulcaen, 2000; van Dijk, 2009; Wodak, 1989). Furthermore, these scholars all share the following characteristics in their individual approaches to CDA: (1) utilizing the term "discourse" in its broad sense; (2) focusing on

the generation of power structures in a given society; (3) exploring how discourse relates to such power structures and their propagation.

As a result of CDA's status as a linguistic analysis, such analysis begins with an examination of the underlying text to be studied (Blommaert & Bulcaen, 2000; Bhatia, 2006; Li, 2009). Bhatia (2006) undertakes a critical discourse analysis of political press conferences, beginning with a corpus of press conferences between political leaders and only then considering secondary data. Li (2009) examines the discourse of national conflicts in a comparative analysis of daily newspapers in the United States and China. This research begins with the text of the newspapers and subsequently provided secondary contextualization by examining the sociopolitical background and the conflicts addressed in the newspapers (Li, 2009).

Focusing on the general characteristics of CDA uncovers the importance of examining the use of language in context, particularly as it relates to the use of power. Indeed, as Li (2009) demonstrates, contextualization is an essential aspect in addition to a focus on text and these characteristics assist in demonstrating why CDA as a theoretical approach is taking hold in analyzing legal texts, as demonstrated by Dubrovskaya, Dankova, and Gulyaykina (2015), who investigate media perceptions of judicial power in Russia, first looking at the text of the selected media that formed their data set, but then contextualizing media and judicial power within Russia.

Other academic works examine a wide variety of U.S. and international legal topics. Easy's (2012) dissertation explores the "myth" of the student-athlete with a legal and critical discourse analysis, exploring cultural factors associated with students' academic achievement in Division I sports in the National Collegiate Athletic Association. Goldstein

Hode and Meisenbach (2017) conduct a critical discourse analysis on the theories of Whiteness as portrayed through amicus briefs submitted in support of affirmative action in universities for the recent United States Supreme Court case *Fisher v. University of Texas* (2013). Other critical discourse analyses examine expert testimony on domestic violence (Hamilton, 2009), as well as law journal articles' use of conceptual metaphors in debating legal perspectives on United States citizenship (Santa Ana, Waitkuweit & Hernandez, 2017).

International legal topics are no less varied. Diana Eades (2006, 2012) has examined structures of power and ideologies with Aboriginal English and cross-cultural communicative challenges in the Australian legal system through a critical sociolinguistics approach. Lucia Freitas (2013) utilizes Fairclough's (2003) framework to conduct a critical discourse analysis of a prosecutor's "request for reconsideration" and the judge's subsequent decision related to a domestic violence law in Brazil. Kananovich (2014) conducts a critical discourse analysis on the media portrayals and legal documents associated with the 2012 Russian court case on Pussy Riot's "Punk Prayer," examining portrayals of agency and rhetorical strategies to identify the boundaries of the debate surrounding the band's performance.

These recent studies demonstrate both the flexibility of a CDA approach, as well as the timeliness of utilizing such an approach to examine current legal and judicial issues. Indeed, as van Dijk (1993) observes, one of CDA's strengths is in its ability to adapt to multiple approaches to address societal issues which, particularly in relationship to the judicial system, ought to include an examination of intertextuality as part of a critical discourse analysis (Steel, 1998; Fairclough, 1993).

In addition, as discussed briefly above, intertextuality appears in at least one critical discourse analyst's theory of discourse (Fairclough, 1993). However, the background and study of intertextuality, both generally and as it relates to CDA in particular, bears elucidation in order to lay a foundation for the relevance of intertextuality in CDA in general, and the fitness of intertextuality for examining legal issues in particular. This is so because of the particular nature of judicial opinions and reliance on external sources, such as constitutional provisions, statutes, and even other judicial opinions.

As the name suggests, intertextuality refers to the relationships among separate texts (Austermühl, 2014, p. 28). This concept acknowledges the reality that all texts (both written and spoken (Bakhtin, 1987)) are in a relationship that depends upon other texts, in that there is always a background against which to compare one text to another or to make meaning by comparing with what has been said or written at other points in time (Paltridge, 2012, p. 11). Allen (2011) even goes one step further and states that modern theories view texts "as lacking any kind of independent meaning" (p. 1). Orr (1986) characterizes intertextuality as a "sort of dialogue with the totality of previous or synchronic texts" (p. 185). At its foundation, however, intertextuality examines the relationship between at least two texts—this may include how texts are related structurally, but also includes a variety of other approaches, including examination of a shared grammar or lexicon, parallels with situations, functions or arguments, or how they utilize recurring themes, topics, or allusions to other salient components (Austermühl, 2014).

The concept of intertextuality and its utility in approaching the analysis and exploration of texts has continued to develop over the past several decades. Kristeva first coined the term "intertextuality" (Austermühl, 2014), but Mikhail Bakhtin has been

credited with first approaching the concept of intertextuality—that is, that a singular literary text is related to another (Austermühl, 2014; Kristeva, 1966). Indeed, Kristeva (1986) has stated, "Bakhtin was one of the first to replace the static hewing of texts with a model where literary structure does not simply exist but is generated in relation to another structure" (p. 35). However, Kristeva herself moved further than Bakhtin's dialogism by focusing on the "universal intertext," or the universal dialogue and connection among all texts (Austermühl, 2014, p. 29; Solin, 2004). Furthermore, Bakhtin's focus remained on literary intertextuality, while Kristeva viewed intertextuality as an intrinsic aspect of all texts (Austermühl, 2014, p. 30).

Kristeva's approach, however, does not constitute the foundation of current schools of textual analysis. Her post-structuralist theory of universal interconnectedness does not lend itself to a concrete method of analysis, and subsequent scholars have gravitated towards more tangible, less abstract approaches, including discursive, architextual, thematic, material, and metatextual theories (Austermühl, 2014; Genette, 1997). A non-universal approach focuses on discrete references to other individual texts or groups of texts, as well as "their underlying codes or meaning systems" (Austermühl, 2014, p. 31). For example, Gerard Genette examines literary texts from his perspective of "open structuralism" (Prince, 1997). "Open structuralism" includes a five-category typology, which comprises: (1) intertextuality (in his view, examining only the actual existence of one text within another, such as quotations and allusions); (2) architextuality, referring to genres or categories from which one text emerges; (3) paratextuality, exploring a text's relationship to its paratexts (such as titles and subtitles); (4) metatextuality, examining how one text connects with another; and (5) hypertextuality, describing the relationship wherein

a later text (the hypertext) unites with an earlier text (the hypotext), in a manner that does not constitute commentary. (Yet, although this taxonomy assists in approaching intertextuality from a nuanced perspective, Genette's category of hypertextuality can be difficult to distinguish from metatextuality within his approach (Austermühl, 2014).) For his part, Fairclough (1992, p. 85) has distinguished between "manifest intertextuality," which is when one text explicitly relies on another, and "interdiscursivity/constitutive intertextuality," where one text draws upon elements such as stylistic conventions while creating or establishing a text. This challenge of terms bleeding into one another, combined with a broad spectrum that includes Kristeva's universal approach and which often uses overlapping or similar terminology (Austermühl, 2014; Allen, 2011), presents obstacles when attempting to follow a particular framework within intertextuality.

But intertextuality, writ broadly, often takes into account the larger socio-cultural context in which texts or various genres exist. That is, it explores interrelated features of texts within a particular society, sub-stratum of society, or within a research frame of analysis. This approach to discourse analysis allows researchers to approach a text with a sensitivity to the nature of socio-political discourse and capitalize upon any reliance on discursive properties. As a consequence, intertextuality is a popular approach to exploring political texts through discourse analysis. For example, Austermühl (2014) uses intertextuality to examine inaugural American presidential addresses, which explores presidents connect "their most public presidential acts with the words of previous office holders" (p. 5). Intertextuality also recognizes the reality that there is a "discursive continuum" in the American presidency which affects transition teams, inauguration committees, and speech writers (Austermühl, 2014, p. 5).

Other scholars have explored intertextuality in political scandals (Achter, 2000), as well as in online parody videos in the United States (Tryon, 2008). Internationally, other studies have used intertextuality to provide comparative analysis of the construction of national identities (Li, 2009), as well as to assist in analyzing post-Soviet politics (Wilson, 2005).

Indeed, intertextuality lends itself to investigating political and other social topics, including legal issues. That is, the legal system in many societies possesses inherently intertextual characteristics. Different sets of legal discourses are all related, from a constitution and its subsequent laws, to courtroom discourse (both interactive and ritualistic), to judicial decisions, and language used in legal consultations (Raitt, 2013). A variety of legal studies have examined police interrogation (Van Charldorp, 2014) and courtroom talk (Maryns, 2014; D'hondt & van der Houwen, 2014), including a study focusing on just judges' utterances (Johnson, 2014).

Such studies explore intertextuality as used in different legal settings, as well as demonstrate its utility in comparative analyses (Li, 2009), which bear directly on the proposed research questions for this dissertation. That is, a focus on intertextuality assists in uncovering linguistic differences between the judicial systems in the United States and Russia, and furthermore allows for a comparative analysis of the two, honing in on the development of free-speech law and jurisprudence in both countries.

Because of intertextuality's emphasis on how relationships between texts exist and propagate, Raitt (2013) examines the process of how law develops in legal systems with judge-made law. Steel (1998) highlights the intertextuality present in referencing previous legal opinions (either the facts or the legal conclusions from those cases), as well as the

acknowledgement of (supposed) legislative intent in New South Wales. Scholars have also explored copyright law through intertextuality (Arewa, 2007; Packard, 2002), as well as international and comparative law (Raisch, 2008). These are different aspects of law than this proposed study, but their variety and depth thereby demonstrate the flexibility of intertextuality to legal topics in general.

In addition to law's fitness for examination through an intertextual lens, the law lends itself to both an intertextual and a critical discourse analytic inquiry. Fairclough (1992) explicates the relationship between intertextuality and hegemony by noting that textual productivity and recursivity in the transformation of texts is actually constrained by structures of power. For example, he points to mass media sources, to their "important hegemonic role in not only reproducing but also restructuring the relationship between the public and private domains" (Fairclough, 1992, p. 113). This same approach (i.e., utilizing an intertextual approach to examine hegemonic structures in society) lends itself to applicability in a variety of social constructs, not least of which is the legal system in different countries.

Indeed, CDA and intertextuality have also both been used specifically in concert to approach the language used by legal actors (Al-Gublan, 2015), as well as the constitution and other founding treaties of the European Union (EU) (Määttä, 2007). Specifically, Määttä (2007) explores the connections of the EU's constitution to its founding documents and subsequent versions and manifestations of the constitution in member countries' documents. Määttä (2007) utilizes intertextuality and CDA to examine the significance of wording by each member country to uncover latent identity structures.

C. Conclusion.

The vast range of legal and judicial topics reflected in the academic works cited above demonstrate the flexibility of CDA as an approach to provide fresh, unique perspectives to uncover latent power structures and subsequently to propose solutions to societal issues. Indeed, these studies further display CDA's applicability to legal and judicial topics, particularly because the law touches each individual in his or her daily lives—thus, identifying power structures and uncovering ideologies that permit hegemony.

Yet, despite the various studies touching on CDA, intertextuality, and legal systems in the United States and internationally, no study has yet addressed what I propose to do through this dissertation, namely, comparatively examine the jurisprudential approaches to free speech provisions in two countries with textually divergent protections for speech, in order uncover the extent to which structures of power exist within both societies. Therefore, this study proposes a timely critical discourse analysis on an important legal issue that bears on the protection of individuals and individual freedom from governmental interference as one form of hegemony.

Chapter 2. Free Speech Provisions & Legal Systems

This chapter addresses the legal background and system as established by each country's constitution—first the United States for context, as readers are more likely familiar with the American legal system, and then Russia. Then, this section addresses the free speech provisions in the United States and Russia.

A. Legal systems.

1. United States.

The United States originated from thirteen colonies that declared their independence in 1776—E. Allan Farnsworth (1963) argues that an "adequate comprehension of the American legal system" is impossible "without an understanding of the way in which these individual colonies were welded together into a single nation under a Constitution which has, with relatively little amendment, withstood the stress of diversity and the strain of change from 1789" onward (p. 2).

Briefly, delegates from most of the colonies met at the First Continental Congress in Philadelphia in 1774, wherein they sought to guarantee rights recognized under English case law and the 1689 English Bill of Rights, rights of which they felt they had been deprived as colonists (Farnsworth, 1963, p. 2). This First Congress set forth the colonists' arguments and demands (including that Parliament not interfere in taxation) in its Declaration and Resolves, but did not adopt a proposed plan of uniting the colonies (Farnsworth, 1963, p. 2). The Second Continental Congress convened in 1775, after fighting between the British and the colonists had commenced—despite these clashes, there was remaining reluctance to separate from England, leading to the long delay before all the colonies joined together to declare independence in July of 1776 (Farnsworth, 1963, pp. 2-3). The Declaration of Independence "detailed the colonists' grievances and epitomized much of the revolutionary theory," with the preamble evoking the natural law theories which were used to justify the Revolution—however, the language of the Declaration was "not that of union but only that of 'free and independent states,'" in that

"[i]t did not unite the colonies among themselves, but only severed their ties with England" (Farnsworth, 1963, p. 3).

Following the Declaration, a committee of the Second Continental Congress drafted the Articles of Confederation by 1777 (which were not ratified until 1781)—the Articles did not provide for a separate national executive or judiciary branch, and the Congress created thereunder lacked authority to regulate commerce, levy taxes, or ensure individual states' compliance with treaties (Farnsworth, 1963, p. 3). With these limitations in the Articles of Confederation, and with the adoption of state constitutions beginning as early as 1776, the Constitutional Convention commenced in May, 1787, with the challenge of forming "a strong union without obliterating the states as constituent, in some respects autonomous, parts of the system" (Farnsworth, 1963, p. 3).

The Convention moved away from the ideas behind the environment created by the Articles of Confederation of a loosely connected collection of sovereign entities, eventually arriving at the Constitution's signing and submittal to Congress in 1787, which provided for a central government with greater powers than contemplated in the Articles (Farnsworth, 1963, p. 4). Specifically, the U.S. Constitution contains seven articles, which include provisions on the legislative, executive, and judicial branches (U.S. Const. arts. 1-3, 1791), as well as an article on the states and how to amend the Constitution (U.S. Const. arts. 4-5, 1791). Finally, the Constitution contains all 27 amendments passed since the beginning of the country, including the Bill of Rights as the first ten (U.S. Const, 1791). The Constitution is based on the idea of popular sovereignty, federalism, the separation of powers, and judicial review (Klug, 2000): as Farnsworth (1963) states, "[t]he notions that the people are sovereign and that their government is based on a social compact may be

found in the preamble, in the provisions for state conventions to ratify the completed Constitution, and in the idea that powers are 'granted' to the central government" (p. 4). This idea of limited power is further manifested by express granting of particular powers to the federal government (the power to tax, make treaties, wage war, regulate interstate and foreign commerce), with the unexpressed rights reserved to the states (Farnsworth, 1963, p. 4; U.S. Const. Art. I, sec. 8, Art. II sec. 2, Am. 10).

But, notable for the scope of this dissertation, the U.S. Constitution also provides for an independent judiciary, the scope of whose review includes cases "arising under this Constitution" (U.S. Const. Art. III sec. 2)—Farnsworth argues that this evidences "[o]ne of the tenets of the framers," namely, that "the interpretation of constitutional rights should be entrusted to specialists" (1963, p. 4). The U.S. Supreme Court subsequently unequivocally established its ability to pass on the constitutionality of federal laws in *Marbury v. Madison* in 1803, in which it declared a portion of a federal statute unconstitutional, and thus "firmly establish[ing] that federal legislation was subject to judicial review in the federal courts" (Farnsworth, 1963, p. 5).

Each state also developed its individual law in diverse ways, depending on the extent of English control in each colony, and whether newly added territories had been under Spanish, Mexican, or French rule for significant periods of time (Farnsworth, 1963, p. 6). Overall, however, "the similarities among state law far outweigh the differences and there is on the whole an unmistakable family resemblance to the law of England" (Farnsworth, 1963, p. 7).

Each state contains general-jurisdiction trial courts, wherein a single judge presides and hears all cases which are not otherwise restricted to special courts (Farnsworth, 1963,

p. 36). Each state has a high appellate court, and some states also contain intermediate appellate courts (Farnsworth, 1963, p. 37).

The Constitution establishes for the federal system a Supreme Court, but leaves to Congress the establishment of any lower federal courts (U.S. Const. Art. III sec. 1). The subsequently created system has three levels, composed of the district courts, the courts of appeals, and then the Supreme Court, in addition to some special courts of limited jurisdiction, such as for patent appeals (Farnsworth, 1963, p. 37). The district courts are trial courts of general jurisdiction; appeals from these cases generally funnel directly to court of appeals in the relevant circuit (determined by geography): there are ten such circuits with states geographically divided, and one additional circuit for the District of Columbia (Farnsworth, 1963, p. 37).

In addition to the states' laws, and particularly the Constitution and laws promulgated thereunder, however, there exists a vast body of law developed by judges: the common law (Scalia, 1997). (I use "common law" generally here, as distinct from the "federal common law" which stemmed from the doctrine espoused in *Swift v. Tyson*, and which was eventually overruled in *Erie Railroad Co. v. Tompkins* (Farnsworth, 1963, p. 42; *Swift*, 41 U.S. 1 (1842); *Erie*, 304 U.S. 64 (1938)).) Such law, based on the concept of *ubi ius, ibi remedium* (for every wrong there is a remedy) (Burke Slaymaker, 1903; Eilmansberger, 2004), was adopted from England (Farnsworth, 1963, p. 12; Scalia, 1997, p. 84), and is a system of "making law by judicial opinion" (Scalia, 1997, p. 84). Farnsworth (1963) refers to this body of law as "case law" (usually from judicial opinions) (p. 45), and describes this "decisional law" as placed "below legislation in the hierarchy of authorities," particularly because case law is "subject to change by statute," but that "the

judiciary has been the traditional fountainhead of law in America as in other common law countries" (p. 35). As Farnsworth (1963) states, this reliance on precedent (also referred to as the doctrine of stare decisis) "developed early in English law and was received in the United States as part of the tradition of the common law" (p. 49). Notably, because this system is part of adopted tradition, "it has not been reduced to a written rule and is not to be found in constitution, in statute, or even in oath of office" (Farnsworth, 1963, p. 49).

Some view this system as a corollary to constitutional and statutory law, in that the Constitution "is in effect a charter for judges to develop an evolving common law of freedom of speech, of protections against unreasonable searches and seizures, etc." (Scalia, 1997, p. 89). However, this contrasts with others' view—to include the late Justice Scalia—that this frustrates the entire goal of a written constitution. The ramifications of these differing perspectives for the scope of analysis contemplated by this dissertation will be explored further in Chapter 3.

2. Russia.

The Russian Constitution is of newer vintage, adopted in 1993 (Russ. Const., 1993; Butler, 2003) and establishing the Russian Federation with its 88 constituent subjects (Svendsen, 2007). It established a parliamentary/presidential form of federative governance, along with legislative and judicial branches (Butler, 2003). The constitution provides for a president, with a bicameral legislative branch consisting of the State Duma and the Soviet of the Federation (Butler, 2003). The judicial branch comprises the federal, constitutional, and statutory courts, as well as justices of the peace for the territorial subjects of the Russian Federation (Butler, 2003). Specifically, these courts include the Constitutional Court, the Supreme Court, the supreme courts of the territorial subjects,

district courts, military and specialized courts, the Supreme Arbitrazh Court, and federal arbitrazh courts (Butler, 2003).

Chapter 1, article 10 of the Russian Constitution provides for a separation of powers: "The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive, and judiciary power" (Russ. Const. art. 1, ch. 10, 1993). Yet, notwithstanding this check on power, the executive branch is very strong: the president has constitutional immunity and can be impeached only for high treason or a "grave crime" (Svendsen, 2007; Russ. Const. ch. 4, art. 93, sec. 1, 1993). The presidential oversight of foreign affairs faces very few restrictions: aside from the power to approve international treaties and to adopt laws relating to war and peace, the parliament has almost no further say—it is only able to adopt non-binding recommendations or provide a consultative opinion (Pechota, 1994). The president also may issue presidential decrees, which are binding in the Russian Federation: Svendsen (2007) argues that, other than the Constitutional Court, there is "no real organ that controls the President . . .[and] the Constitutional Court[] cannot really control the masses of decrees that are issued yearly" (p. 205).

The judicial branch contains a split of spheres of authority in the federation's highest courts. The Russian Supreme Court addresses civil, criminal, and administrative issues, while the Constitutional Court hears cases regarding compliance of laws with the Constitution, including alleged violations of constitutional rights and freedoms of citizens (Svendsen, 2007). The president, the legislative branch, other courts, and "the Government" may request the Constitutional Court to interpret the constitution (Russ. Const. ch. 7, art. 125, sec. 2, 1993).

The first Constitutional Court, however, was actually established in 1991, but its enabling law did not keep it out of political disputes (Butler, 2003, p. 68). Accordingly, the Court was able to issue advisory opinions without an actual case being presented before it, which embroiled it in struggles between the President and other state organs, including the Congress of People's Deputies (Butler, 2003, p. 68). Perhaps as part of this, when the 1993 Constitution was adopted and the new Constitutional Court established, the Court was also enlarged, which allowed the president at the time (Yeltsin) to "pack" the Court with sympathetic judges (Butler, 2003, p. 69). The Court consists of 19 judges nominated by the president and appointed by the upper house of the Russian parliament, who mostly come from legal academia (Butler, 2003, p. 69). A panel of 9 or 10 judges generally decides most cases, but some cases require by law the entire panel, for example, those considering the constitutionality of the charters of subjects or the constitutions of the constituent republics (Butler, 2003, pp. 69-70).

Generally, although the judicial branch is theoretically based on independence and democracy as an overarching principle, Russian courts have historically struggled against a history of party and government control—as such, the courts struggle with a public perception of biased rulings in favor of "the government or to criminal organizations instead of ruling strictly on the law" (Svendsen, 2007, p. 222). One such related challenge the courts face is a lack of respect: for example, the mayor of Moscow enacted residency permits in the 1990s, which the Constitutional Court determined violated the Constitution; however, the mayor continued issuing residency permits even following the ruling (Svendsen, 2007).

B. Free speech provisions.

1. United States.

The U.S. free speech clause provides that "Congress shall make no law… abridging the freedom of speech" (U.S. Const., Am. 1, 1791). This provision comprises one of six rights protected within the First Amendment to the U.S. Constitution—in addition to free speech, the First Amendment provides protections: (1) against the establishment of religion by the government, (2) for free exercise of religion; (3) for the freedom of the press; (4) for peaceful assembly; and (5) for petitioning the government "for a redress of grievances" (U.S. Const., Am. 1, 1791). The First Amendment is the first in a list of ten amendments to the U.S. Constitution, which are commonly known as the Bill of Rights (Amar, 1992). Further discussion and explanation as to the historical and societal underpinnings of the Bill of Rights and the First Amendment specifically are contained in Chapter 3.

2. Russia.

Chapter 2 of the Russian Constitution addresses the "Rights and Freedoms of Man and Citizen (Russ. Const. ch. 2, 1993). Chapter 2 contains 49 articles, one of which is devoted only to speech rights (Russ. Const. ch. 2, art. 29, 1993). These provisions include the following speech rights: "freedom of speech and ideas" (guaranteed to everyone); "freedom of mass communication"; and the "right to freely look for, receive, transmit, produce and distribute information by any legal way" (Russ. Const. ch. 2, art. 29, 1993). However, in addition to these positive rights, Article 29 includes several restrictions upon both citizens and (presumably), the government: "No one may be forced to express his views and convictions or to reject them;" "[c]ensorship shall be banned," and "The

propaganda or agitation instigating social, racial, national or religious hatred and strife shall not be allowed. The propaganda of social, racial, national, religious or linguistic supremacy shall be banned" (Russ. Const. ch. 2, art. 29, 1993).

In addition to these provisions, however, the Russian Constitution contains a limiting provision in Article 55, which allows federal law to restrict constitutional rights as "necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, [and] for ensuring defence of the country and security of the State" (Russ. Const. ch. 2, art. 55, sec. 3, 1993). This focus on the general populace and the understanding that individual rights may be reduced for the benefit of the broader citizenry reflects a collectivist cultural understanding (Triandis, 2018), which is explored further in Chapter 8 and beyond.

C. Conclusion.

This chapter has provided a general structural background of the United States and Russian legal systems and free speech provisions, with the aim of demonstrating some superficial and substantive differences that bear directly on the linguistic analysis in subsequent chapters. Specifically, the common-law nature of the U.S. Supreme Court and its vitality as an institution, along with the strength of the Russian president as provided for in the constitution, along with the collectivist mentality manifested in Article 55 and in the free speech provisions pertain to the structures of power in each society, and within each court system.

Part II

Chapter 3. Free Speech Issues as Semiosis

A. Introduction.

This chapter begins the analysis described in Chapter 1—specifically, Stage 1 of Fairclough's (2001) methodological framework, which identifies a semiotic problem with a social aspect: here, free speech (and thus, constitutional issues) in the United States and Russia. This chapter therefore provides context and detailed background on Fairclough's methodological framework (which he initially introduced as a brief outline in a book chapter), reviews other studies applying this framework, and explores semiotic issues of free speech in the U.S. and Russia.

Fairclough (2001) defines "semiosis" as "all forms of meaning-making." This accords with the study of semiotics in general, which comprises all disciplines relating to the conveyance and reception of meaning (Swiggers, 2013). Language is one obvious type of semiosis (Heiskala, 2014)—written or spoken—but body language and visual images (Fairclough, 2001) also are natural extensions thereof. These are all methods by which humans convey meaning, generally in a symbolic, rather than in a literal, way (Finch, 2005). Thus, I use "semiosis" here to align with Fairclough's general characterization, understanding that semiosis refers to the communication of meanings through significant relationships—that is, specifically between the elements within the semiotic environment.

For this initial part of the analysis, it is necessary to "[f]ocus upon a social problem which has a semiotic aspect" (Fairclough, 2001). This requires investigating beyond the "text, using academic and non-academic sources to get a sense of its social context." That

is, a "sense of what the major contemporary social problems are comes from a broad perspective on the social order" (Fairclough, 2001). This is because CDA, in his view, looks at language (or, more broadly, semiosis) as one element of the "material social process," which then leads to ways to analyze language within "broader analyses of the social process" (Fairclough, 2001).

Semiosis, as an inherent part of social activity, can be divided into genres, which he defines as "diverse ways of acting" or "producing social life, in the semiotic mode" (Fairclough, 2001). These genres, in representing social practices, are discourses, which are "diverse representations of social life" that are intrinsically different because different social actors experience social practice in different ways (Fairclough 2001). Fairclough (2001) provides the examples of doctors, teachers, etc., who do not have semiotic styles just because of their positions—instead, "each position is performed in diverse styles depending on aspects of identity which exceed the construction of positions in those practices." These practices, connected in a particular way, then constitute a social order (Fairclough, 2001).

Fairclough (2001) characterizes neo-liberal global capitalism as one such semiotic social problem and uses this problem as the example for demonstrating the operation of his methodological framework for CDA. He undertakes his analysis by identifying an issue with a semiotic aspect, specifically, the general topic of language in the new capitalism—which, as discussed above, is a semiotic element—and then investigates the larger social context through a variety of sources, studying these representations (which inherently possess verdant ground for textual analysis). Fairclough (2001) then looks at the "restructuring and re-scaling of capitalism," examining the knowledge-based economy and

how discourses are constituted of knowledge being produced, circulating, and consumed—that is, these are relevant semiotic aspects of a particular social problem, because this process involves "new structural and scalar relationships between genres, discourses and styles" (p. 127).

After identifying and characterizing this general social problem, he identifies "which genres, discourses, and styles are the dominant ones" (Fairclough, 2001). He then looks at the ranges of diversity in social structuring and restructuring of differences, looking at access and who possesses access to the dominant forms (Fairclough, 2001).

He next focuses on one particular text as exemplifying the larger social issue (of language in the new capitalism), in this example, the Foreword to the Department of Trade and Industry's White Paper on competitiveness in 1998, written by British Prime Minister Tony Blair (Fairclough, 2001). For Stage 1, he goes outside the text, as discussed above, using outside sources to understand an aspect of the social context. To that end, he looks at how Margaret Thatcher presented the necessity of "the new capitalism" with the "notorious claim: 'There is no alternative.'"

From Thatcher's claim, he concludes that the characterization of neo-liberal capitalism is "pervasively constructed as external, unchangeable, and unquestionable"—that is, a "simple 'fact of life' which we must respond to" (Fairclough, 2001). This, in addition to the language used regarding new capitalism in general (looking at keywords and phrases in international economic discourses, like "transparency," "flexibility," and "quality," shared and "imposed by organizations like the International Monetary Fund and the World Trade Organization"), leads to the outcome that "feasible alternative ways of organizing international economic relations which might not have the detrimental effects

of the current way (for instance, in increasing the gap between rich and poor within and between states) are excluded from the political agenda by these representations" (2001).

Other scholars have utilized Fairclough's framework in conducting a critical discourse analysis. Stamou (2018) applied Fairclough's approach, combined with Language Ideology, to examine mediation of sociolinguistic diversity in fictional discourse (specifically, a Greek family sitcom). In applying the framework, Stamou (2018) examined two main perspectives on language ideologies, looking at standard language ideology, which "resides in taken-for-granted ideas about the superiority of an idealized language, the 'standard variety', which has as model [sic] the spoken language of the upper middle class" (p. 83). This language ideology is also connected to the "formation of western nation-states," and "sees linguistic homogeneity as the only normal condition, and thus, it stigmatizes and excludes any sociolinguistic diversity" (Stamou, 2018, p. 83). This is "supported by the 'dominant bloc' of education, the media, the courts, and the entertainment industry" (Stamou, 2018, p. 83). This standard language ideology contrasts with democratic egalitarianism as an alternative ideology, "which promotes the acceptance of linguistic variability, residing in the idea that all linguistic varieties are legitimate and well-structured linguistic resources" (Stamou, 2018, p. 83).

Kean-Wah and Ming (2010) also took up Fairclough's exhortation to go outside the text: in conducting a CDA of an academic policy document in Malaysia, they examined the Prime Minister's remarks on Malaysia's task in developing as an industrialized nation, which, according to the authors, was "the catalyst behind Malaysia's response to the onslaught of globalization and the change of world order" (p. 147). Rieger and Figueiredo (2017) explored the instances of misgendering individuals in appellate decisions on claims

for gender identity rights in Brazilian courts. They characterized "the social problem [as] the lack of legislation regulating gender identity rights in Brazil, resulting in the production of different judicial decisions when members of the trans community make a petition to change their official documents" (Rieger & Figueiredo, 2017, pp. 142-143). They continue on to discuss hate crimes, transphobia, growing wave of fundamentalism, fascism, and discourses of discrimination, utilizing the academic policy as a starting point to examine a larger social issue.

Although Fairclough's (2001) explanation of identifying the semiotic characteristics of a social problem was a brief outline in an edited book chapter, this chapter introduces a detailed analysis of such issues. In a similar manner to Kean-Wah and Ming (2018), and Rieger and Figueiredo (2017), Section B below explores freedom of expression and its recognition in the U.S. and Russian Constitutions as social issues with inherent semiotic characteristics. Section B thusly establishes the semiotic nature of free speech issues. Section C then addresses the social context of free speech issues in the United States and then Russia, looking at (as Fairclough emphasizes) secondary texts to contextualize the social environment associated with both societies and their respective free speech issues.

B. Free speech as semiosis.

Any language, subset of language, or mode of communication (i.e., not just a "text") could be considered for its semiotic properties (indeed, this is related to Fairclough's (2001) discussion of genres and their representation as social practices); however, for purposes of this study, the subset analyzed will be the constitution (of both the United States and Russia, as discussed earlier) and, even more specifically, the text of

the free speech provisions within those constitutions. There are attendant semiotic elements of free speech which extend beyond the text of the provisions; for example, the behavior that the constitutional free speech provisions protect, which may include the act of speaking, but also writing, publishing, performing, and other types of expressive acts. Initially, however, this study begins with an examination of the foundational semiotic element: the relevant constitutional provisions and their contexts.

A constitution has the potential to contain the foundation of a governing system as enforceable law, as well as more specific provisions which may establish certain protections for the populace; however, not all constitutions have such specificity. The United States and Russian Constitutions both provide a specific structure for the government, as well as enumerate specific protections for individuals: both establish a federative system under a presidential form of governance (with parliamentary elements in Russia's case) with legislative and judicial branches (Butler, 2003; Russ. Const.; U.S. Const.). But, the written and enforceable nature of these constitutions is itself worthy of note (Jamieson & Trapeznik, 2007): Balkin (2011) observes that the writtenness and enforceability of the U.S. Constitution is significant, and Lerner (1936) long ago explored the symbolism of the Constitution beyond its status and existence as a mere instrument. Indeed, Balkin (2011) emphasizes this unwrittenness of foundational principles, particularly in that the United States did not have to choose a written constitution; instead, "[t]he most obvious model in 1787 would have been the British [C]onstitution, which consisted largely of customary practices and precedents" (p. 36). It could also have been "a political statement of principles, like the Declaration of Independence" (Balkin, 2011,

p. 36). But, both constitutions are enforceable law, rather than general aspirational statements, and both are written.

The writtenness of both constitutions is an important semiotic characteristic. In analyzing the Russian Constitution, Jamieson and Trapeznik (2007) discuss broadly the iconicity of a constitution as a conceptual image, specifically written constitutions. "The iconicity may be conveyed historically, as may be the case with any revolution resolved by constitution. It may also be conveyed jurisprudentially, by introducing radically new ideas or processes of government, or textually, as typified today by many very ancient but sometimes still subsisting codes" (Jamieson & Trapeznik, 2007, p. 474). Contrasting the "traditionally unwritten English constitution" with the Russian counterpart, Jamieson and Trapeznik (2007) observe that the Russian Constitution has a textual image and, as a result, its iconicity is "textually linguistic" (pp. 474-475). The U.S. Constitution is, as Balkin (2011) likewise observed, a written enforceable document as well, and as such, both constitutions demonstrate important iconic characteristics and manifest meaning—i.e., both are semiotic in their relationships to the country that they establish, as well as to those who are outside, looking in.

An additional semiotic element becomes clearer when considering the challenges associated with interpreting and constructing a written constitution: namely, how to do so while remaining faithful to the principles and rules established in the governing documents. And indeed, theories of interpretation rely upon semiotic principles for traction. Within American constitutional jurisprudence, debates on interpretive theories have continued for decades (Calabresi, 2007), particularly on the relevance of the precise words and meanings of the originally enacted provisions. For example, former Supreme Court Justice Antonin

Scalia eschewed inquiry into the text of a law beyond the text itself, rejecting consideration of intent with constitutional (as well as legislative) interpretive issues (Scalia, 1997). Indeed, he has stated that "[i]t is the law that governs, not the intent of the lawgiver" (Scalia, 1997, p. 17). His consultation of outside sources, such as writings from delegates of the Constitutional Convention to inform his conclusions of constitutional interpretation, was not to ascertain original intent, but to analyze how specific words were used at the time, and how the writings were understood (Scalia, 1997). In that type of historical textual analysis, he gave equal weight to Thomas Jefferson's and to John Jay's pieces as he did to Alexander Hamilton's and James Madison's writings, even though the latter two, according to Scalia (1997), were not constitutional framers. Semiotically, such a perspective views that the agreed-upon and enforced original law "fixed" the meaning of the words at the time of legal enactment.

By contrast to Scalia's textualist focus on original words and their meanings, the interpretive theory of living constitutionalism also demonstrates semiotic principles (albeit, in an opposite manner): proponents of this type of methodology ascribe to the concept that the meanings contained within the constitution should calibrate and update to the evolution of societal values and circumstances throughout history (Solum, 2013). Benjamin Cardozo, a former U.S. Supreme Court justice, believed that the concept of "liberty" as expressed in the U.S. Constitution, without a specifically designated definition, could be fluid in its definition, meaning something different from generation to generation (Cardozo, 1921). Thus, the "content of constitutional immunities is not constant, but varies from age to age" (Cardozo, 1921, pp. 82-83). This view imbues the textual iconicity of the

constitution with a different measure of importance, by allowing each generation to define its relationship to governing principles expressed in the constitution.

And, still another perspective on constitutional interpretation offers a middle approach that recognizes the semiotic principles expressed in both the originalist and living constitutionalist perspectives addressed above. Balkin (2011) has explored the challenges and contradictions inherent in both alternative approaches and as a result has developed the concept of "Living Originalism": this constitutional theory relies on the differences of types of provisions in the constitution, distinguishing between clear rules (such as establishing the minimum age of the President), and broader standards and principles (no abridgment of speech). When the constitution provides a clear rule, the rule is applied without further analysis (Balkin, 2011). When the constitution provides a standard or principle, it constrains by "channel[ing] political decisionmaking without foreclosing it" (Balkin, 2011, p. 43). Thus, this theory requires a different perspective on the semiotic nature of the constitution, first in identifying which provisions establish "clear" rules, and which ones are fairly characterized as more open-ended standards and principles.

This abridged discussion on theories of constitutional interpretation was intended to demonstrate the inherent semiotic nature of a written constitution; to be sure, the easy way to analyze these issues per Fairclough's framework (of addressing semiosis) would have been to draw the clear line between the use of language in constitutional provisions, as the language used in such governing documents clearly relates to the meaning-making Fairclough (2001) discusses. However, as can be seen from the discussion above, the centrality of such a document in the governmental structure of a nation leads to a far greater

level of nuance with semiosis as to interpretational perspectives, and to the outcomes that can result from the different semiotic perspectives.

Furthermore, although this above section has addressed theories relating specifically to only the U.S. Constitution, this discussion has not been to the exclusion of the Russian Constitution. Indeed, as the field of comparative constitutional analysis has grown and developed, scholars have advocated for moving beyond "constitutional nationalism" (Choudhry, 1998, p. 823), to a position arguing for the necessity of an "understanding of modern constitutions that is simultaneously global and local, particularly with the globalization of modern constitutionalism" (Choudhry, 1998, p. 824).

The relevance and utility of this comparative approach is further supported by the similarity of provisions in both constitutions. As Balkin (2011) identifies, the U.S. Constitution contains straightforward rule-like provisions: "The Senate of the United States shall be composed of two Senators from each State," (U.S. Const. art. I, sec. 3, cl. 2), as well as broader standards, such as the Fourth Amendment's curtailment of "unreasonable searches and seizures" (U.S. Const. amend. IV); however, no less does the Russian Constitution contain similar dichotomies in its provisions: the president "shall be elected for six years by citizens of the Russian Federation," (Russ. Const. ch. 4, art. 81, cl. 1), versus "[e]veryone shall have the right to the inviolability of private life" (Russ. Const. ch. 2, art. 23, cl. 2).

As demonstrated above, the U.S. and Russian Constitutions contain and concern significant semiotic issues. As this study addresses the free speech provisions of both constitutions, the semiotic nature of both of these provisions are of utmost importance. Moreover, the multifaceted semiosis of the free speech provisions serve not to complicate,

but to underline the importance of the provisions in a critical discourse analysis: that is, the relevant constitutional provisions are themselves semiotic, in that they concern meaning-making in their applications. But, the content of those provisions also directly address the ability of *individuals* to conduct themselves in a semiotic process, by guaranteeing protections for individuals to undertake their own meaning-making through self-expression.

Additionally, the structure and wording of the U.S. and Russian free speech provisions demonstrate the same concerns for constitutional interpretation as discussed above: "free speech" and "abridging" in the United States, and "freedom of thought and speech" in Russia are more reminiscent of Balkin's (2011) principles than they are of straightforward, bright-line (i.e., "clear") rules, and thus provide more challenges in determining the contours of such provisions.

This section has established and analyzed the specific semiotic nature of a government's constitution and related theories of constitutional interpretation, thereby applying and filling out Fairclough's (2001) framework in Stage 1 of his suggested methodological approach for CDA. With Section B having addressed the semiotic nature of constitutional provisions and their relevance—specifically, the free speech provisions—Section C then explores the social context of free speech within the United States and Russia, respectively.

C. Social context of free speech.

As Fairclough (2001) puts forth, the full Stage 1 of the analysis is to focus on a social problem with a semiotic element, and then to explore the social context surrounding the topic. As alluded to above, one of the issues with free speech (and, indeed, any

constitutional issue) is the constitutional interpretative approach used to address it. Through this dissertation, I also approach free speech itself as a social problem—that is, the definition of "free speech" as protected by courts and as exists within society. Furthermore, I approach this dissertation, consonant with the requirement of CDA to acknowledge researcher perspective (Wodak & Meyer, 2001), from the position that free speech is a net positive, and is a satisfactory end goal in itself within society. As such, an important aspect of the social context of free speech is the historical understandings and underpinnings of free speech in each society. The following subsections outline these elements in both the United States and Russia.

1. United States.

As mentioned in Chapter 2, the free speech provision in the United States is one clause of the First Amendment to the Bill of Rights, which comprise the first ten amendments to the Constitution (Amar, 1992). James Madison, in *Federalist No. 51*, defends the Bill of Rights for its protection of self-government and against majoritarian influence over minority groups (Amar, 1992). These concepts connect with natural-rights theorists like Cato and Blackstone, who were large sources of inspiration for founding members of the nation (Hayman, 2008). The first federal constitution (passed in 1787) lacked a bill of rights, but the eventual adoption of the First Amendment displayed "the same principles as the Revolutionary state declarations of rights: that the freedoms of speech and press were inalienable rights of individuals. . . [and a check on] governmental abuse of power" (Hayman, 2008, pp. 12-14).

But, it should be noted that these ideals quickly faced the Sedition Act, passed within a decade from the ratification of the Bill of Rights (Hayman, 2008), which

criminalized seditious libel (Stone, 2004). More specifically, the Sedition Act, passed in 1798 when the United States as a new nation was close to war with France, criminalized any publication or utterance of a "disloyal statement against the government of the United States, the Congress, or the president, with the intent to bring them into contempt or disrepute" (Stone, 2004, p. 12). Although this was a significant impediment to the natural-rights perspective demonstrated by the Bill of Rights, some scholars have viewed this as a demonstration of the citizenry's faith in the rule of law:

> Faith in the rule of law permits the people to be remarkably tolerant of the ragged patterns that First Amendment doctrine actually assumes relative to a society's professed ideals; accepting of the interpretive discretion of jurists and public officials; and forgiving of occasional mistakes of logic and lapses of judgment in securing its guarantees (Tsai, 2014, p. 2).

For example, Tsai (2014) identifies that "substantive legal rules can explicitly provide for governance according to the local norms of 'contemporary communities,' as it does in the area of sexually explicit speech" (p. 168).

Moreover, by the time of the Civil War, the natural-rights approach that motivated the development of the First Amendment had given way to a different theory, specifically, to a "more positivist and utilitarian conception of the law" (Hayman, 2008). In this view, the general function of laws was to provide for social welfare as determined by the government or surrounding community (Hayman, 2008). As such, the social outcome was elevated over protection of fundamental rights, based on the theory that "[r]ights had no independent existence but derived their force entirely from positive law, which sought to promote social ends" (Hayman, 2008, p. 24).

Throughout the last several decades, contemporary scholars have acknowledged a few perspectives on free speech, addressing either a focus on political equality or political liberty (Sullivan, 2010; Gellman, 1995). Political equality as a theory demonstrates its anti-discrimination foundation by protecting "members of ideological minorities who are likely to be the target of the majority's animus or selective indifference" (Sullivan, 2010, p. 144). This includes "upholding the speech rights of anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers" (Sullivan, 2010, p. 144) and even, as Sullivan (2010) argues, includes "affirmative action for marginal speech in the form of access to government subsidies without speech-restrictive strings attached" (p. 145). In this theory, the principle of equality precedes the principle of free speech, with the result that "politically disadvantaged speech prevails over regulation but regulation promoting political equality prevails over speech" (Sullivan, 2010, p. 145).

By contrast, the second theory, similar to the original motivation for free speech upon ratification of the Bill of Rights (Hayman, 2008), views free speech as a method to preserving political liberty, and as a "negative check on governmental tyranny" (Sullivan, 2010, p. 145). This theory leads to distrust of all governmental attempts to suppress speech in a manner that could affect individual interaction with ideas and speech—that is, each citizen has the power to evaluate speech on his or her own, and although the government may intervene to correct certain (speech) inefficiencies in the market, it may not do so for a redistributive or paternalistic reason—for example, chilling even corporate political speech, like was overturned in *Citizens United* (Sullivan, 2010).

Yet, one of the challenges with the First Amendment's free speech clause is that it restricts government action, but not necessarily private speech. This does not mean that governmental speech does not have the capacity to cause harm; however, in considering autonomy, speech from private actors may in many instances be as harmful or injurious to an individual as governmental speech (racist speech, hate speech, etc.) (Post, 1991, Matsuda, 2018).

2. *Russia*.

As previously described in Chapter 2, the Russian free speech provision resides in the Russian Constitution's second chapter, which addresses "Rights and Freedoms of Man and Citizen" (Russ. Const. ch. 2, 1993). The Russian Constitution was adopted in 1993 (Butler, 2003) and thus, is only a quarter century in vintage; however, the history of free speech and individual rights extends back further. Accordingly, the below addresses governmental structure as it relates to freedom of speech and expression.

During the decline of tsarist Russia, Marxism began to grow (Thompson, 1996). Marx believed that the economic base provided the most important foundation for any social system, and that "[p]olitics, culture, education," and the societal structure itself "all derived from that base" (Thompson, 1996, p. 55). Change occurred through conflict between old and new classes in relation to the economic base: this is known as the "dialectic process" in Marxism (Thompson, 1996, p. 55).

These ideas were not well-received by the governing structure, however: the founding meeting attendees of the first Russian Marxist party were quickly arrested, and in the early years, Russian Marxists dealt with police surveillance and harassment (Thompson, 1996, p. 58). In addition to Marxists and other groups led by the intelligentsia

(such as Socialist Revolutionaries), a number of liberals also grew within Russian society—they strongly opposed the diminishing tsarist government, but urged peaceful change, and "[a]ll heartily endorsed civil liberties, rule of law, and some form of representative government at the national level," arguing for "constitutional government, individual rights, and the rule of law" (Thompson, 1996, pp. 59-60).

Following the Revolution of 1905, where the tsar acquiesced to a legislative system (which was curtailed in practice) up until World War I in 1913, the Silver Age of arts sprang up in Russia, as symbolist poetry, innovative stage and ballet productions, and avant-garde painting and music enriched Russian society (Thompson, 1996, p. 79).

But, following the 1917 Revolution (after Nicholas II abdicated his throne), Lenin, who had managed to hang on to power in the ensuing political struggle, suppressed free expression: "Bolshevik authorities ruthlessly squelched anti-Soviet and antisocialist agitation and activity." (Thompson, 1996, p. 189). Hearkening back to Marxist theories of economics as the foundation of society, the Bolshevik leaders viewed the arts as existing to support the efforts to build socialism (Thompson, 1996, p. 186). At first, writers and artists had a fair amount of freedom in selecting the media and art forms for this task but, during the 1920s, the Communist Party began to tighten censorship, shutting down private publishers, placing party members on editorial boards, and establishing a monopoly over the broadcast media (Thompson, 1996, pp. 186, 230).

The establishment of Party control over these aspects of expression laid the groundwork for Stalin: specifically, for his "imposition of total Party domination of Soviet culture" (Thompson, 1996, p. 230). And indeed, Stalin tightened Party control over cultural life and propounded narrow values and themes for the explication of artists,

including socialist realism as an artistic canon in the early 1930s (Thompson, 1996, p. 280). Thus, economic and political goals were elevated above cultural ones—e.g., forms of art were utilized to increase work performance and political loyalty (Elst, 2005). For example, the first congress of the 1934 Writers' Union included the following definition of Soviet literature: "the basic method of Soviet literature and literary criticism, demands of the artist a realistic, historically concrete expression of reality in its revolutionary development. Apart from this the artist also has the task of training the workers ideologically and educating them in the spirit of socialism" (Elst, 2005, p. 45). This suggests that the conception of expression existing only in reference to the protections granted by the Soviet Union, and tailored and designed only to further the aims of the Soviet State.

With such centralized control over the state and its economic functions (which, in turn, bore directly on all other aspects of life), it is perhaps not surprising that Marxism-Leninism viewed freedom from a collective understanding, in which freedom could be realized only when each person put society's well-being ahead of his or her own interests (Elst, 2005). This view, from a perspective of collective state control, assumes that basic human or civil rights are not fundamental, but instead exist only to the extent that such rights can be recognized by the state (Beschastna, 2013).

Indeed, Lukina (2017) discusses the differences in the recognition of rights in the various pre-Russian Federation constitutions: the 1918 Constitution contained only a "Declaration of Rights of the Laboring and Exploited People" (focusing on the centrality of socio-economic rights), while the 1924 Soviet Constitution contained no provisions on rights. The Soviet Constitution of 1936, under Stalin's rule, did include fundamental rights,

including free speech (although socio-economic rights retained their importance (Lukina, 2017).

After World War II, however, attitudes towards human rights began to shift and develop. Lukina (2017) identifies a significant piece of Soviet legal scholarship from the post-war period, "Criminal Responsibility of the Hitlerites," which "significantly influenced international relations and international law, arguably laying down a foundation for the Nuremberg trials" (p. 7). But, even within this document, which mentions crimes against individuals, "the language of specific violations of rights is almost completely absent from it" (Lukina, 2017, p. 7). Thus, when the Universal Declaration of Human Rights (UDHR) was proposed by the United Nations in 1948, Soviets subjected its proposal to some criticism, largely because it "only contained empty, abstract principles and promises rather than tangible policy measures"—that is, although "the Western concept [of human rights] is based on individual autonomy, Soviet approach to human rights mirrors parent-child relations and therefore combines a greater degree of control and limitation on one's freedom with stronger social guarantees" (Lukina, 2017, p. 12). Yet, the wording of the UDHR bears significant similarity to the current Russian Constitution, the relevance of which is discussed in Chapter 6.

Then, under Mikhail Gorbachev in the 1980s, the Soviet Union began to open slightly, but still featured governmental restrictions on speech: although the political side of Gorbachev's reform was *glasnost* ("openness"), which included some sharing of political opinions and relaxing limits on the media (Mason, 1988), any loosening occurred with reference to the government (McForan, 1988). After Gorbachev, Gorham (2014) argues that the attitude towards free speech under Yeltsin was seen as "civic

empowerment," but also then as a Western idea unhinged from Russian attitudes towards language, which allowed it to be associated with excess and a profligate nature. Indeed, Yeltsin's impact was "huge and controversial" in his actions "changing almost every aspect of Russians' lives as they moved through seismic economic, political, cultural and imperialist changes" (Skillen, 2016, p. 187) from a Soviet state where leaders were "expected to provide welfare in exchange for an acquiescent citizenry," to a participatory democracy as in the West (p. 190).

These various trends throughout the history of Russian or Soviet governance suggest that the history of Russian speech is tied directly to the government, and the overarching assumption appears to be that it such a right is contextually determined, rather than enjoying its own independent existence. Furthermore, the focus on "society," as opposed to the "individual," relates to the cultural context of collectivism within Russia (Triandis, 2018), which is discussed in Chapter 8 with relevance to CDA.

D. Conclusion.

This chapter has addressed the semiotic elements inherent in constitutional provisions (including the text of the provisions themselves and the interpretive principles), and, particularly, the free speech clauses of the U.S. and Russian Constitutions, and has provided a background to the history and perspectives on free speech as an individual right in both countries. This has been undertaken as necessary constituent parts of the analysis in Fairclough's (2001) methodological framework for CDA. And, although Fairclough (2001) initially introduces only a small aspect of the societal context of a semiotic social problem for Stage 1 of his analytical framework, the aim here has been to provide a

comprehensive context for the societal issues associated with free speech in both the United States and Russia.

Part III

Chapter 4. Three-Dimensional Discourse Model and Corresponding Study Design

A. Introduction.

This chapter addresses Fairclough's (1992) three-dimensional discourse model as an integral part of the next stage of his methodology. That is, in recognizing text as discourse within social practice, it is important to identify the multiple ways in which it connects with its surrounding elements—indeed, Fairclough's approach has been the most rigorous attempt to theorize the CDA movement in constructing a social theory of discourse (Blommaert & Bulcaen, 2000). Accordingly, this chapter details Fairclough's (1992) model (before addressing each dimension in detail in subsequent chapters), and then details the design and data collection practices of the study, tailored to identify characteristics of judicial practice relevant to a CDA focus.

B. Three-dimensional discourse model.

Fairclough's (1992) model of discourse views a "discourse event" as simultaneously comprising (1) a piece of text; (2) an instance of discursive practice; and (3) an instance of social practice. In his work, Fairclough uses the term "discourse" in two senses: in the abstract sense to mean "language and other types of semiosis as elements of social life," and, in a more concrete sense, to mean "particular ways of representing part of the world" (2003, p. 26). A "discourse event," however, appears to relate to the former sense, as a particular instance of language. Texts are "multi-functional," in that a particular discourse event fits into social practice in several different ways: through the relationship

of the text itself to the event, to the "wider physical and social world," and to the people "involved in the event." (2003, p. 27). In order to investigate a text's multi-functionality, Fairclough looks at the discourse event in each of these contexts, recognizing that although each of these contexts should be distinguished to allow thorough analysis, they are not completely separate and are instead "dialectically related," and, in a way, "each 'internalizes' the others" (2003, p. 29). As such, keeping in mind the interconnectedness of each category with its other two constituents, this chapter and the succeeding chapters address the categories separately for clarity of analysis.

1. Discourse event as text.

In examining a discourse event as a piece of text (referred to as a "text" in the rest of this subsection), formal linguistic features of the discourse event are salient (Fairclough, 1992, p. 74). Although any feature of a text is potentially relevant at this level of analysis, Fairclough generalizes four different levels: (1) vocabulary at the level of individual words; (2) grammar at the level of clauses and sentences (i.e., how those words are combined); (3) cohesion, which explores how those clauses and sentences link together; and (4) text structure, which examines how texts are organized at a grand scale (1992, pp. 74-75). However, as alluded to above, one of the overlapping characteristics between text and discursive practice is the production and interpretation of texts (Fairclough, 1992, p. 73). That is, analyzing a text requires contemporaneous consideration of both form and meaning; however, a text has both meaning *potential* and *interpretation*—while the textual features may allow for a wide range of meaning potentials, specifically as a "complex of diverse, overlapping, and sometimes contradictory meanings" which lead to a high level of ambiguity, the interpretation process "usually reduce[s] the this potential ambivalence by

opting for a particular meaning, or a small set of alternative meanings" (Fairclough, 1992, pp. 74-75). The normative choices made among different potential meanings in the process of interpretation belong appropriately to Fairclough's second (or even third) dimension, and so analysis at the level of text will be restricted to identifying meaning potential.

2. Discourse event as discursive practice.

Discursive practice relates to "processes of text production, distribution, and consumption," however, the specific characteristics of each discursive process depends to some extent upon the social context of the discursive event (Fairclough, 1992, p. 78). Indeed, the process of text production, distribution, and consumption from a student in an undergraduate university class differs greatly from the process of producing, distributing, and consuming a judicial opinion.

Furthermore, as Fairclough identifies, each step (of production, distribution, and consumption) can—and should—be further deconstructed, where the process depends upon the various positions connected with that process (1992, p. 78). Fairclough (1992) separates the production process into various positions, citing Goffman (1981) for identifying the particular positions of "animator" (who actually utters the sounds or make the marks on paper), "author" (who is "responsible for the wording), and "principal," (whose "position is represented by the words")—different people can fill each of these positions; however, these positions may also overlap (p. 78).

Distribution may be simple or complex (Fairclough, 1992, p. 79), with the wider the sphere of influence, the more complex the distribution. A casual email between two friends would have a simple distribution (unless the email is forwarded to another

individual for some reason), while governmental texts have a complex distribution, "across a range of institutional domains" (Fairclough, 1992, p. 78).

Similarly, text consumption may be individual or collective (Fairclough, 1992, p. 79). Some texts (e.g., personal letters, class notes, etc.) are consumed by just one person, but other texts such as official interviews and administrative records are "recorded, transcribed, preserved" or reconsumed (Fairclough, 1992, p. 29). This, again, is socially bounded, as the nature of the consumption relies upon the discursive—and, often, social—context in which the discursive event exists and is consumed.

The reconsumption of texts and transformation into other texts relates to another feature that Fairclough identifies in his three-dimensional model, namely, intertextuality: specifically, he delineates three categories that depend upon formal features of texts. He addresses these in relation to discourse as text; however, he uses them in analyzing discourse as discursive practice rather than discourse as text. These categories, in addition to intertextuality, are the force and coherence of a text (1992, p. 75). For example, it is true that the textual characteristics of intertextuality are apparent in any discourse event which directly relies on or pulls from another discourse event; however, such characteristics become fully relevant only through exploring the social contexts of production, distribution, and consumption processes. Because these three categories relate to analyzing the discursive nature of discourse, therefore, they are addressed (and will be analyzed in later chapters) in reference to discursive practice.

3. Discourse event as social practice.

Although the previous subsection addressed discourse events in a context that is inextricably linked to societal environments, this dimension, despite its name, instead

investigates how discourse relates to social *structures*, namely, ideologies and power relations (Fairclough, 1992, p. 86). Discourse as a form of social practice as it relates to the formation and propagation of ideologies and of the "view of evolution of power relations as hegemonic struggle," (Fairclough, 1992, p. 86), builds out the final element of Fairclough's model by providing a critical lens to the power implications of a particular discourse event, beyond its formal textual features and the constraints of a particular discourse genre or style.

In examining ideologies, Fairclough relies on Althusser (1971) for three theoretical claims as foundational bases for forming the debate about ideologies. The first claim is that ideology "has a material existence in the practices of institutions," (Fairclough, 1992, p. 87), which allows exploration of the power implications of a particular discourse style or genre. Second, ideology leads to the "constitution of subjects," and third, class struggles center around ideological state structures (Fairclough, 1992, p. 89), such as education or, as relevant here, the judiciary.

Building on Althusser (1971), Fairclough views ideologies as "significations" or "constructions of reality (the physical world, social relations, social identities)" (Fairclough, 1992, p. 87). He understands these as "built into various dimensions of the forms/meanings of discursive practices," which then contribute to the production or propagation of hegemonic relations (Fairclough, 1992, p. 87). He further posits that ideology is located both in structures of discourse, as well as in "events themselves as they reproduce and transform their conditioning structures" (Fairclough, 1992, p. 89).

Fairclough (1992) also incorporates the concept of hegemony into the third element of his three-dimensional discourse model, which he defines as "power over society as a

whole" of a particular class, which focuses on "constructing alliances, and integrating rather than simply dominating subordinate classes, through concessions or through ideological means, to win their consent" (Fairclough, 1992, p. 92). Hegemony is a process of "constant struggle" and "takes place on a broad front," including the various societal institutions (Fairclough, 1992, p. 92). In other words, investigating hegemonic practices extends the analysis of a particular institution's discourse from the text in its social context, to exploring how the latent ideologies present in such discourse contribute to the propagation of power.

C. Study design.

With Fairclough's (1992) three-dimensional model of discourse as the lodestar, this study has been designed to explore the discursive characteristics of the free speech provisions of the U.S. and Russian Constitutions, and how the respective provisions manifest themselves in subsequent judicial opinions, with the goal of answering the research questions listed in the introduction to Part I of this dissertation.

Although the rest of this study has thus far addressed the United States legal system and free speech provisions first, and only then proceeded with the Russian counterparts, by contrast, here the data collection for the study was undertaken in the opposite order. The justification for this decision was to identify the closed corpus of Russian decisions on free speech—these decisions exist within a comparatively smaller group of judicial decisions, extending back only to 1992, as compared to over a century's worth of decisions from the United States Supreme Court. The Russian decisions thus guide the inquiry, both in number and in subtopic (of free speech), with most-cited U.S. cases (according to free-speech subtopic) then identified, as a proxy for societal impact.

The Russian free speech provisions exist within Article 29 of the Constitution of the Russian Federation. Constitutional Court judicial opinions from the Russian Federation are officially published in the *Rossiskaya Gazeta*; however, they are also posted on the Constitutional Court's own website. Because of the open-source nature of the latter (as well as its status as an official government site), this was the database from which relevant judicial opinions were collected.

The first round of review consisted of viewing the available English summaries on the Russian Constitutional Court's website to identify decisions that addressed freedom of speech—from this, the original Russian decision was analyzed to gain a sense of the Russian terms used in discussing such issues. Next, the search widened to on-the-merits rulings (postanovleniya), which are distinct from "determinations" (opredeleniya): these are petitions dismissed for non-justiciability or which are otherwise not within the jurisdiction of the court (Burnham, et. al., 2004). The on-the-merits rulings were searched for terms that included "freedom of speech" and citations to "Article 29" (in Russian).

The next level of review included both on-the-merits rulings and a subset of dismissed petitions, which did not include those determinations that outright denied further consideration of the matter (these were captioned either "об отказе в принятии к рассмотрению жалобы гражданина…" or "прекращение переписки,"—"on the denial of accepting a citizen's complaint for review" or "termination of correspondence," respectively). These were not considered because, like denials of petitions for writs of certiorari to the United States Supreme Court, these are not decisions made on the merits, and although they likely contain relevant and important information, they are beyond the scope of this study.

This next level of review included a text search of the content words within the Russian free speech provisions, including forms of the following words: “слово” (“speech”), “мысль” (“thought”), “пропаганда” (“propaganda”), “ненависть” (“hatred”) “вражда” (“strife”), “мнение” (“opinion”), “убеждение” (“conviction”), “цензура” (“censorship”), “информация,” (“information”), and “29” (to identify citations to the relevant constitutional article). These terms, in conjunction, assisted in identifying whether issues related to the Russian free speech provisions were used. Some terms were excluded from this search: one such was “свобода” (“freedom”), because it and similar terms were underdeterminative, in that the Russian Constitutional Court uses such words in a multitude of cases to discuss a variety of topics, and therefore did not assist in narrowing or identifying relevant opinions.

Decisions containing the above list of terms were identified and scrutinized for whether they analyzed and decided the case (or a portion thereof) on the merits of the free speech provisions. If the cases did so, the subtopic of free speech (e.g., elections, mass media) was identified (for alignment with the relevant subtopic in U.S. Supreme Court free speech decisions, discussed below).

Although the second round of Russian data collection included and considered “determinations,” which can still contain binding interpretations of statutes (Burnham, et. al., 2004; Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 28 fevralya 2008 g. [Ruling of the Russian Federation Constitutional Court of February 28, 2008], Sobranie Zakonodatel’stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2008, p. 8), these data were eliminated from the final round of analysis. This decision was made because goal for this study was to identify one-to-one comparisons of

full decisions on the merits of Russian and U.S. court opinions, and the determinations, although relevant to Russian jurisprudence (and discussed further in this chapter), do not provide a basis for comparative analysis within the scope of this study.

Once the Russian rulings were so identified, a corresponding U.S. Supreme Court opinion was found on the commercial database WestlawNext, which allows a user to filter case searches by most-cited cases. Each case published on WestlawNext has each legal issue identified and assigned a topic heading and database identifier (a "key number") that is proprietary to the publishing company (Thompson Reuters, 2013). The initial stage of research on U.S. cases was undertaken by reading through the topics and key numbers to find subjects that generally corresponded to each Russian free speech case. Once the topics and key numbers were identified, individual searches were conducted on WestlawNext's general search platform, with search syntax that narrowed the results to those involving the First Amendment and, specifically, free speech. Then, for each individual case, an additional filter was employed utilizing the topics previously identified, with results organized from the most-cited to the least-cited cases. (By utilizing the additional filter relying on the wording from WestlawNext's topics, but by not using the key numbers to narrow the search directly, the search included cases that had *both* the relevant key numbers and general discussion of such topics, thus keeping the search as inclusive as possible.)

The most-cited U.S. case on point was chosen to correspond with each Russian case, skipping cases that contained the search terms but did not analyze the required topic, or choosing the next case in the list if a more-cited case had already been chosen for a Russian case. For cases that had no one-to-one correspondence with a topic, a close corresponding subject was chosen, based on underlying principles and circumstances in

the individual case—for example, the Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 iyuniya 2015 g. [Ruling of the Russian Federation Constitutional Court of June 16, 2015], addressed the confidentiality of information related to adoptions as balanced against citizens' rights to receive information (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 iyuniya 2015 g. [Ruling of the Russian Federation Constitutional Court of June 16, 2015], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2015); searching U.S. opinions for First Amendment issues on the right to receive information relating to children or minors resulted in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (505 U.S. 833 (1992)), which addressed, inter alia, First Amendment implications of a law requiring doctors to provide certain information to women prior to an abortion, focusing on both a woman's right to receive information and on the physician's free speech interest in needing to provide that information in a manner mandated by the state, *Casey*, 505 U.S. at 882-883.

The Russian and U.S. cases, each totaling 28 separate opinions and approximately 880,000 words (tokens) of the full opinions, and 532,600 of the majority opinions, were then analyzed using a text concordancer (AntConc) to identify formal features of the texts (Fairclough, 1992), including word frequencies, word collocations, and unique writing conventions, as well as instances of intertextuality (Austermühl, 2014). The cases are listed in the Appendix. Using AntConc to explore the Russian corpus and the two different corpora for the U.S. opinions (one with dissents and concurrences included, one with only majority opinions, discussed further in Chapter 5), word frequency lists were generated. Custom stop lists were generated to eliminate calculations of prepositions, articles, and

other non-content words. Word collocations were then analyzed for each of the content words in the U.S. and Russian free speech provisions.

For the second and third dimensions of Fairclough's CDA approach, secondary texts on constitutional and free speech issues in both countries were then used to provide a societal context and to contribute further insight into structures of power for the second and third dimensions of Fairclough's (1992) model. However, these texts (and the corresponding analysis) depend upon the texts chosen and analyzed through the methodology described above in this chapter.

D. Conclusion.

This chapter has furnished an overview of Fairclough's three-dimensional model of discourse in order to provide a more detailed idea of each aspect of this analysis, as well as to contextualize the study design. The total of 56 majority opinions with several hundred thousand tokens in the analysis provides a sufficient data size to draw conclusions regarding the text features under Fairclough's three-dimensional analysis. Similarly, identifying corresponding U.S. opinions to the Russian free speech topics (to the greatest extent possible) assists in establishing a measure of similarity to help highlight emergent differences and their applicability in discursive practice and social practice under Fairclough's methodology.

Chapter 5. Discourse as Text

A. Introduction.

This chapter addresses Fairclough's (1992) dimension of discourse as text. Specifically, Chapter 5 discusses the formal features of text found within the corpora of the U.S. and Russian free speech decisions by utilizing a text concordancing program. The

program allowed for analysis of word frequencies, word collocations, capitalization conventions, and other text features, which led to preliminary analyses of the pertinence of these features, thereby revealing a focus—with both courts—on indicators of importance and authority.

B. Formal features of text.

As Chapter 1 has discussed, the first dimension of Fairclough's three-dimensional approach to discourse is "discourse as text," which investigates formal features of texts (1992, pp. 73-74). Because CDA does not require a specific methodology and instead allows the researcher to adopt "any method that is adequate to realize the aims of specific CDA-inspired research" (Baker, et al., 2008, p. 273), this leaves room for both quantitative and qualitative methods, to include relying on techniques and strategies from corpus linguistics to conduct a critical discourse analysis (Baker, et al., 2008, p. 275; Orpin, 2005). Although one of the challenges in using corpus linguistics to explore connections between language and ideology can be the size of potential corpora and where to start (Orpin, 2005, pp. 38-39), such a problem does not present itself here, as the data sets (and thus, the corpora) are limited. As detailed in Chapter 4, the corpora here are the texts of 28 Russian Constitutional Court decisions containing analysis on free speech, and the texts of 28 U.S. Supreme Court decisions containing analysis on similar subtopics on free speech.

Fairclough's first dimension of analysis begins at the word level, moving on to grammar, cohesion, and working up to text structure (1992, p. 75). As such, word frequency lists and word collocations (Austermühl, 2014) were generated for each corpus (Russian and U.S.). Yet, the first relevant difference between the two reveals itself even here: the Russian Constitutional Court opinions comprise 176,927 words, while the U.S.

Supreme Court opinions comprise a staggering 703,165 words for the same number of opinions within the corpus. Considering only majority opinions barely modifies the size of the Russian opinions, leaving 173,428 words (a difference of 3,499 words, stemming from only one opinion, (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 27 dekabrya 2012 g. [Ruling of the Russian Federation Constitutional Court of December 27, 2012], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2012)), but nearly halves the word count for the U.S. opinions, down to 359,234 by eliminating dissents and concurrences—each case contained at least one dissent or concurrence, and many of them contained multiple minority opinions.

From the word frequency lists, the general distribution of significant words in the U.S. corpora did not differ largely. For example, "speech" was 20th and 27th on the list of content words in the full opinions and majority opinions, respectively. "Court" and "amendment" were both likewise within the top 20 words. The top hits on the Russian frequency list were forms of the "Russian Federation," (second and first, respectively, for the genitive), as well as "constitutional" and "right." The use of the genitive "Российской федерации" (the possessive form of "Russian Federation") is notable, particularly the frequency of the phrase compared to other word forms in the corpus: the hits for "федерации" were 3,608 and were 3,563 for "российской"—the next closest were for the particle "не" ("not") at 1,725 and "статьи" (plural or genitive singular of "article") at 1,584. The prevalence of the genitive form of "Russian Federation" (a total of 3,513 concordance hits for the phrase itself) emphasizes the government throughout these opinions—indeed, with an average of over 125 times per opinion. The usage of the phrase in context is, in large part, because of reliance on the full captions for the titles of laws that

the RCC is evaluating, many of which include reference to the Russian Federation: for example, «О государственной гражданской службе Российской Федерации» ("On civil service of the Russian Federation") (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 30 iyuliya 2011 g. [Ruling of the Russian Federation Constitutional Court of June 30, 2011], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2011); these official citations further underscore the strength and authority of the government body. By contrast, the U.S. corpus revealed "United" and "States" lower down the list (in the 20s), with only 651 concordance hits for the phrase "United States" (in a much larger corpus). This difference may be due in part to the individual ways in which each country cites and refers to laws at issue in its opinions, but nevertheless manifests an interesting comparative divergence.

Although word frequencies are not necessarily as telling as word collocations (utilized for discussion in subsequent chapters), examining the differences in word frequencies while accounting for the difference in capitalization revealed a notable similarity between the U.S. and Russian courts: both the USSC and the RCC distinguish their respective court (as opposed to lower courts) with self-references to a capitalized "Court." The RCC also referred to the Russian Supreme Court with "Court," which makes sense as it is a court of the same level within Russia's parallel judicial system (Burnham, Maggs, & Danilenko, 2004, p. 51). Both courts refer to the lower courts within their respective systems with a lowercase designation, and use "Court" (as opposed to "court") significantly more: U.S. Supreme Court decisions manifested "Court" 3,013 times as opposed to 430 or, excluding the dissents, 1,111 times to 269. Similarly, the RCC consistently used forms of "Суд" ("Court") more often than "суд," ("court"), with 891

total singular forms of the capitalized term, versus 187 of the lowercase version. Some of these instances are referring to the proper name of a lower court (for example, the "Minnesota Supreme Court"). But, for the remainder, capitalizing the self-referential term imbues the courts with an element of importance and authority, particularly when the capitalization is not needed for disambiguation: the Supreme Court consistently uses "this Court" or "the Court" when referring to itself—these instances make up half (532) of the instances of "Court" in the U.S. majority-opinion corpus. The Russian corpus also utilizes capitalization in a similar manner to refer to itself, using the lowercase version to refer to lower courts; particularly when capitalization is less common than lowercase style in both languages' orthographies (Wade, 2000, p. 16; Garner, 2002, p. 61), such a choice is significant, and emphasizes both courts.

C. Conclusion.

An examination of Fairclough's (1992) first dimension begins to reveal structures of authority and power, even at the text level. Comparing the textual features of both countries' judicial opinions uncovers elements that may not have been noticeable at first glance when scrutinizing just one in isolation: the practices associated with capitalization provide one such example, particularly when considering the orthographical conventions of each country. These textual elements, although significant in their own right (as discussed above), also lay the groundwork for subsequent in-depth analysis as the other dimensions of Fairclough's (1992) discourse model provide additional layers and opportunities for analysis.

Chapter 6. Discourse as Discursive Practice

A. Introduction.

Chapter 6 approaches the U.S. and Russian free speech provisions and selected judicial opinions from Fairclough's (1992) discourse as discursive practice dimension. This explores the various ways texts are produced and consumed, as well as textual force and coherence. Finally, this chapter addresses the concept of intertextuality and the implications of its robust existence in the studied documents.

B. Text production.

Each text is produced in a unique way depending upon its particular social context (Fairclough, 1992, p. 78). The processes and sources of the U.S. and Russian constitutional provisions are discussed in Chapters 2 and 3—as described there, the process of drafting and ratifying the constitutional provisions involved many actors who fulfilled roles that are similar between the two countries (despite the separation of many years): drafters of the provisions (who are plural in number), as well as representatives (again, plural) who legislatively approve of the content and therefore recognize it as binding law within their respective jurisdictions (Farnsworth, 1963; Danilenko, 1994).

The number of both the drafters and the representatives is significant, as the constitutional provisions apply to anyone within each country's jurisdiction; therefore, ensuring that no one idiolect or one individual's idiomatic way of expressing language is enshrined within a legally binding text assists in securing clear and democratic application of the constitutional text. Indeed, debates on theories of constitutional interpretation touch upon this issue, as the "Old Originalist" theory of original intention originalism sought to

identify the original intention of constitutional provisions; however, as later theorists have identified, original intentions originalism is problematic because it has the potential to fix legal meaning on the subjective mental processes of multifarious framers (Solum, 2013, p. 463). Similarly, requiring a large number of legal representatives to enact constitutional provisions, which may be more difficult to change than statutory provisions (U.S. Const. Art. I, sec. 7; U.S. Const. Art. V), assists in providing an additional level of solidity to the legal process—or, at least, the multi-stage process under which constitutional provisions are created provides the *appearance* of solidity, despite the fact that the authors themselves are in large part anonymous, and information on the drafting process comes only ex ante, and perhaps only from the drafters themselves (Levy, 2000), thus subject to their own framing of the process.

By contrast to the multifarious and potentially unidentifiable authors of constitutional provisions, court decisions have some of their text producers more clearly identified. Both the U.S. and Russian court opinions list the names of the judges who join the majority opinion, and list the names of any judges who have presented separate opinions. U.S. opinions have clearer delineations between Goffman's (1981) roles (discussed further in Chapter 4): the entire majority constitutes the principal of the text (i.e., the one(s) whose position is represented), but there is only one listed authoring justice: for example, in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the case begins with the statement that "Mr. Justice POWELL delivered the opinion of the Court" (p. 591). The caps font applies likewise to the authors (and joiners) of concurrences and dissents, as well as to cross-references to those authors within each discussion: for example, in Justice Steward's dissent for *Young v. American Mini Theatres, Inc.*, the caption and

separate opinion began: “Mr. Justice STEWART, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice BLACKMUN join, dissenting….I dissent from this drastic departure from established principles of First Amendment law,” (427 U.S. 50, 84 (1976)).

The Russian opinions, however, while they identify each judge of the Constitutional Court at the beginning of each opinion, do not specify which judge authored the opinion—instead, after listing each judge, the lawyers, and other legal professionals involved in the case, each opinion states “Конституционный Суд Российской Федерации установил:…” (“The Constitutional Court of the Russian Federation has established:…”) before continuing to the main content of the opinion (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 27 dekabrya 2012 g. [Ruling of the Russian Federation Constitutional Court of December 27, 2012], Sobranie Zakonodatel’stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2012).

This difference between delineating the different roles of text production has the potential to result in several different outcomes. The U.S. approach not only identifies each author, but *emphasizes* each author and related dialogue among them through the font (which, although such orthographical features are arguably part of formal features of text, relate most saliently to authorial text production, Fairclough, 1992, p. 74). The WestlawNext opinions (from which the U.S. data here were gathered) use all-caps to designate the U.S. justices, which differs slightly from the official (i.e., the Supreme Court) reporters of the same cases, which use small-caps (e.g., SCALIA in the official reporter versus SCALIA in WestLawNext). However, because use of caps font in either situation

distinguishes the name from the surrounding environment, this analysis assumes there is little (or negligible) difference between all- and small-caps font. The capitalized name allows the principal text producer to formulate and pronounce the governing law, but simultaneously provides an opportunity for each author to develop a distinct voice (the late Justice Scalia was both lauded and criticized for his distinct and snarky style, (Hasen, 2015), with descriptions of other justices' characterizations as "[p]ure applesauce" or as performing "somersaults of statutory interpretation," *King v. Burwell*, 135 S. Ct. 2480, 2501, 2507 (2015)). This also allows individuals who are supportive of the content of various opinions to identify with and champion individual justices—a quick Google search (or walk down a law school hallway) will show bobble-head figures of different justices, or even art based on other cultural figures (such as a crowned image of Justice Ruth Bader Ginsburg as the "Notorious RBG," reminiscent of a similar image of the rap artist "the Notorious B.I.G."). Such practices, although they establish a cultural currency around judicial decisions and encourage individuals to be cognizant of such writings, also have the potential to distract from the content of such opinions and may encourage judges—who are only human—to consider their "legacy" in conjunction with the writing of any one opinion. Indeed, multiple articles use just such a term to discuss recently retired Justice Kennedy's impact on the U.S. Supreme Court which, even though these are third-person descriptions, still reduce the focus on the Court as an institution, and look at the force of individual judges (Totenberg, 2018; Feldman, 2018). On the other hand, however, this also encourages individuals to pay close attention to positions and practices of Supreme Court justices, who can have great effect on the rights and freedoms of citizens.

Although the Russian Constitutional Court judges may also write separately from the majority opinion, it appears to be far rarer than in U.S. Supreme Court decisions—out of the 28 opinions considered in this study, only one case had separate opinions (compared with at least one separate opinion in all 28 of the U.S. cases). This, combined with the lack of distinction between author and principal, leads to the impression of the Russian Court as a unitary establishment. This is likely related to the composition of the RCC of 19 judges, 9 or 10 of whom generally sit on any one case (Burnham, Maggs, & Danilenko, 2004, p. 69).

Furthermore, the reduced focus (at least from this data set) on any individual Russian judge assists in presenting a unified front of the judiciary on constitutional issues. For an institution that is constitutionally entrusted with upholding and protecting individual rights and freedoms, this can be an important portrayal, particularly if—as some argue—other branches of the Russian government possess (or have claimed) more power. However, having an opaque, faceless judiciary also has the potential to denude individuals of claimed rights in a vague, bureaucratic manner, reminiscent of the Soviet era, where "institutions and decision-making processes" were structured "in a hierarchy of offices, occupied by salaried, appointed, and replaceable officials" (Rigby, 1970, p. 5).

Finally, both the U.S. and Russian courts rely on invisible text producers in the composition of their opinions. In the U.S. judicial system, law clerks are relied upon (and fill highly sought-after positions), who may write memoranda on petitions for certiorari and assist in developing judicial opinions for the justice for whom they work (Rehnquist, 2007, p. 8).

Connected with the first-mentioned role of law clerks, the Secretariat of the RCC also assists in determining whether to accept petitions submitted to the Court (Dzmitryieva, 2017, p. 2). Thus, although the Secretariat does not possess direct text production powers, this gatekeeping function still ties directly into whether a text will be produced in the first place. However, the identification of employees within the Secretariat is even more opaque than the "author" role in the production of RCC opinions (as are the identities of U.S. law clerks, who are not listed on the U.S. Supreme Court's website, but are listed only on unofficial sources for the legal community), which presents similar concerns of anonymity and bureaucracy.

Text production, therefore, is not necessarily linked to authorial credit—with the exception of current justices on the USSC, much of the focus on the process of text production is diminished, where the focus instead remains on the final product. This emphasis on the final product is perhaps fitting of an institution which accords respect and itself is positioned to afford respect to the law. Diminishing the production process in favor of the product is likewise an important counterpoint to the other branches of government in both countries, which have one chief executive, and whose elected representatives likewise rely on name recognition to be elected.

C. Text distribution, consumption, and force.

The process of text distribution may be simple or complex, and certain types of governmental texts may be distributed across a variety of domains (Fairclough, 1992, p. 79). In this study, there are two different kinds of texts: the constitutional provisions themselves, and the cases. The constitutional provisions have an incredibly complex distribution, as their dissemination exists both through their presence in their respective

constitutions, as well as the variety of places the constitution is distributed (in online versions of the constitution, textbooks, news reports, casual conversation, etc.). Indeed, the cases discussing the constitutional provisions may also be one of the outlets of distribution. The Russian opinions in this study do not habitually quote the wording of Article 29, but the U.S. cases cite the free speech provision of the First Amendment on eight separate occasions. This in itself is one of the institutional domains of the constitutional text distribution, compounded by the fact that the force of the constitutional text is binding to governmental branches in both countries.

Connected with the above, the distribution of cases is similarly complex. Russian cases are published in the *Rossiskaya Gazeta*, the official collection of laws of the Russian Federation, and in the RCC's Bulletin (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 fevralya 2013 g. [Ruling of the Russian Federation Constitutional Court of February 14, 2013], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013). U.S. Supreme Court decisions are disseminated widely as well—the Supreme Court's website provides three different "official" print opinion sources (including from the Public Information Office at the Court) and two electronic, as well as multiple unofficial sources (21 at the time of writing), but which are still "legitimate" sources (*Where to Obtain Supreme Court Opinions*). Multiple other sources exist where versions of the cases may be found: other online sources, legal textbooks, and news articles can even include partial excerpts or summarize the cases (in itself a kind of distribution).

Consumption is linked with distribution and may be collective or individual (Fairclough, 1992, p. 79). The law-making power of the constitutional and case texts

naturally lead to a collective consumption, although the consumption patterns inevitably change based on the type of consumption: other governmental actors must all adhere to the dictates of a relevant case, including the Court themselves, as well as "lower" courts. Other actors within the legal system (lawyers, paralegals, etc.) must conform and tailor research and arguments to be confined within such text, while members of the public at large may consume the text (or a summary of it) for entertainment or informational purposes.

Furthermore, the distribution and consumption patterns are also directly related to the force of the texts (Fairclough, 1992, p. 80). Force, or the potential thereof, is "what the text will accomplish socially: whether and to which extent the textual agency of the the strategic text will be actualized, whether it will have performative effects, whether and how it will affect power relations and whether it will reproduce or transform ideological assumptions" (Vaara, Sorsa, & Palli, 2010, p. 689). As Fairclough asserts, such processes are socially constrained by internalized structures within society (1992, p. 80). Certainly, the constitutional structure in both countries of the judicial ability to pronounce the law constrains the consumption of the texts themselves, in the sense that such governmental actors are directly limited by the force of the constitutional and judicial texts. The Russian opinions close with the statement that the judgment "shall come into force immediately upon pronouncement, shall be directly applicable and shall not require confirmation by other authorities and officials" (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 fevralya 2013 g. [Ruling of the Russian Federation Constitutional Court of February 14, 2013], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013 (Official English Translation)), thus directly self-declaring the force of the text, while the Supreme Court uses the understated

terminology of “We hold” (using this exact phrase 38 times in the corpus), as well as the active language of “reversing” or “affirming” the lower courts’ decisions. This difference could be because of the longer history of the U.S. Supreme Court, and its ability to rely on past precedent; however, a reading of an early case (which claimed the power for judicial review of other branches’ actions) shows a similar pattern: *Marbury v. Madison* ends with relying on the U.S. Constitution, as well as a simple, five-word disposition:

> Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.
>
> The rule must be discharged. 5 U.S. 137, 180 (1803).

This understatement, then, could be its own demonstration of power and subsequent reliance on it by succeeding justices, in that the Court decided to not rely on proclamations of the force or power of its opinions, and instead to just assume such power through performative words and phrases.

Text distribution, consumption, and force are all closely related aspects of discourse as discursive practice (Fairclough, 1992), and assist in demonstrating here the interrelation of the constitutional provisions, the subsequent judicial opinions, and their dissemination (and effect) within society.

D. Text coherence.

As Fairclough (1992, p. 80) discusses, the “‘sociocognitive’ dimensions of text production and interpretation” are centered “upon the interplay between the members’ resources which discourse participants have internalized and bring with them to text

processing, and the text itself, as a set of 'traces' of the production process, or a set of 'cues' for the interpretation process." As discussed briefly in Chapter 3, the process of interpreting the constitutional provisions through the judicial opinions has the potential to differ depending on the particular interpretive theory at play. In Fairclough's terms, the different internalized resources from text participants (likely, the respective judges or justices interpreting a particular constitutional provision) affects how they view the text in question. Indeed, the difference between "traces" from the production process and "cues" for the interpretation process align with two strands of the theory of originalist interpretation throughout its historical development—early theories of originalism ("Old Originalism") looked to the drafters of a particular provision to ascertain their intent (i.e., "traces" from the production process), while the "New Originalism" examines textual provisions for their "meaning," viewing such "meaning" fixed at the time of ratification, thus looking for "cues" for the interpretation process based on the meaning of the words used at the particular point in history (Solum, 2013).

Indeed, Fairclough (1992) states that the particular "way in which a coherent reading is generated for a text depends again upon the nature of the interpretative principles that are being drawn upon" (p. 84). He continues that there are specific interpretive principles that "come to be associated in a naturalized way with particular discourse types," and examining such connections is worthwhile "for the light they shed on the important ideological functions of coherence in interpellating subjects" (Fairclough, 1992, p. 84). He provides the example of the two sentences, "She's giving up her job next Wednesday. She's pregnant," as one in which the assumption that women stop working when they have children establishes the coherent link between the two sentences (Fairclough, 1992, p. 84).

Interpreters of texts, in taking up these positions and automatically making these connections, "are being subjected by and to the text," which is "an important part of the ideological 'work' of texts and discourse in 'interpellating' subjects" (Fairclough, 1992, p. 84). Here, however, winnowing the focus even further to what *types* of competing interpretative principles exist within judicial discourse uncovers even further insight into ideological functions of coherence.

Different interpretive theories are certainly associated with constitutional interpretation, and, at least the United States, popularly associated with different ideological perspectives. That is, originalism has been described as a "political strategy," and similarly, the Warren and Berger courts of 1970s and 1980s have been viewed (from an opposing political perspective) as ideological apparati (Baude, 2014). Such an understanding of interpretive theories clearly directly bears upon ideological approaches; however, a competing perspective on interpretive theories is that such theories are not outcome determinative and may constrain a judicial actor into an outcome with which he or she does not ideologically align (Benesh & Czarnezki, 2009, pp. 116-117). Indeed, as Judge Pryor (2017) notes, Justices Scalia and Thomas, both originalist justices, would come out on different sides of the same issue due to variances in their originalist methodology (i.e., rather than reaching the same normative outcome). However, even this decision to adhere to an interpretive principle is an ideological decision, in that the contemporary actor makes the decision to be bound—in some capacity—by a previous judicial actor. This may be a valid way of preserving the rule of law within a constitutional system, but is no less an ideological approach than other perspectives of constitutional interpretation.

It is easy to see with the text of the First Amendment how the interpretative approach can be outcome determinative: the text states "Congress shall make no law… abridging the freedom of speech" (U.S. Const., Am. 1, 1791). An Old Originalist approach would look at the original intent of the founders, and at what sort of "speech" was protected at the time—"speech" in the form of text message or Internet posting may not apply, or look at the intent of the founders, finding that certain restrictions existed on speech prior to the passage of the First Amendment, and assuming that such continued restrictions are permissible. A New Originalist might also conclude that certain restrictions upon speech are permissible; for example, defamation and libel can infringe upon speech, but for reasons that such causes of action exist within the common law and, per the precise wording of the First Amendment, Congress does not act to abridge speech in such a capacity. A Living Constitutionalist might view, as the U.S. Supreme Court has over the decades, appropriate carve outs to "free speech" as those prohibiting incitement of imminent lawlessness when such speech is likely to cause that action (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

The RCC has also used different terminology in its decisions to suggest a sensitivity to different methods of interpretation. A variant of the word "буквально" ("literal(ly)") appears 16 times in the Russian corpus, and is used to refer to the literal meaning of Russian law: in the Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 23 noyabrya 1999 g. [Ruling of the Russian Federation Constitutional Court of November 22, 1999], the RCC begins one of its paragraphs with, "По буквальному смыслу оспариваемых положений…" ("according to the literal meaning of the contested provisions") in analyzing first the plain language, and then the interplay of provisions with penalties for

religious groups lacking a document confirming their existence if they have been organized for fewer than 15 years (Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1999).

From these competing perspectives, whether a discourse participant views constitutional texts (and subsequent judicial decisions) as coherent and as proffering a permissible interpretation may depend in large part on his or her ideological perspective on constitutional interpretive theories. Thus, the coherence of a text undoubtedly relates to ideologies, and may have interplay with hegemony and structures of power, discussed in the following chapter, depending on whether a particular interpretive theory dominates on a particular court.

E. Intertextuality.

Intertextuality constitutes a central part of discursive practice, particularly within judicial texts and opinions. Fairclough (1992) distinguishes between "manifest" and "constitutive" intertextuality (p. 85). The former is "where specific other texts are overtly drawn upon within a text," and the latter, which he also calls "interdiscursivity," "extends intertextuality in the direction of the principle of the primacy of the order of discourse" (Fairclough, 1992, p. 85). Either type of intertextuality, however, "sees texts historically as transforming the past—existing conventions and prior texts—into the present" (Fairclough, 1992, p. 85).

The constitutional provisions at issue here do not present manifest intertextuality; however, both demonstrate constitutive intertextuality in their reliance on the principles and underlying texts explicated in their respective free speech provisions. The First Amendment framers relied heavily on John Locke and his view of social contract theory,

where “universal principles of reason set bounds around an area of legitimate governmental action within which the exercise of popular will was given free rein” (Simon, 2014, p. 16). Likewise, as discussed in Chapter 3, the emphasis on the writtenness of the U.S. Constitution was significant, as was the doctrine of popular sovereignty; that is, that governmental power ultimately remains with the people (McAfee, 1991, pp. 275-276). This focus on popular sovereignty and the ultimate will of the people is demonstrated by the text of the constitution (that Congress shall not abridge free speech), but the sense of Locke’s social contract theory can also be extracted from the ways in which the contours of free speech were treated within a short time after the founding—that is, the Alien and Sedition Acts, although never ruled on by courts, were passed as law within a decade after the Constitution’s ratification (Emerson, 1977, pp. 738-39). Such acts, which created liability for treasonous activities (including speech), arguably rely upon social contract theory, which is based upon the idea that in participating within a society, an individual agrees to limit his or her freedom of action to some extent. Although such acts were never ruled upon by the Supreme Court, the implicit endorsement of their content by the framers themselves is relevant to the context surrounding the Bill of Rights and, pertinent here, the First Amendment’s connection with underlying theories of Enlightenment philosophers like Locke, as part of the First Amendment’s constitutive intertextuality.

A colorable argument also exists that the Russian Constitution possesses constitutive intertextuality from the Universal Declaration of Human Rights (UDHR), which was adopted by the UN General Assembly in 1948 (“History of the Document”). Indeed, after *perestroika*, legal reforms became more focused on international norms, perhaps based on “the recognition that the country would never be fully integrated into the

world community if it did not ensure the observance of internationally accepted norms, in particular norms concerning human rights" (Danilenko, 1994, p. 459). The constitution's drafters "placed special emphasis on domestic implementation of international human rights standards," and the Declaration of the Rights and Freedoms of Person and Citizen was "largely based on internationally recognized human rights principles and norms" (Danilenko, 1994, p. 461). These ties between international norms and the Russian constitution can be seen through wording and expressive similarities of both: rather than the "negative liberty" construction of the U.S. free speech provision (Bandes, 1990, p. 2273), both the Russian constitution and the UDHR focus on positive liberties, that is, what "everyone" is entitled to, and what "no one" may endure. The structure of the different rights in each provision differs: for example, consider "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" in the UDHR with "Everyone shall be guaranteed the freedom of ideas and speech…[and e]veryone shall have the right to freely look for, receive, transmit, produce and distribute information by any legal way" in Article 29, provisions 1 and 4 of the Russian constitution. Indeed, the similarity in the expression of ideals on free speech and expression shared between the two texts demonstrates constitutive intertextuality, which dovetails with the manifest intertextuality apparent in RCC judicial opinions, discussed immediately below.

Judicial opinions, both in the United States and in Russia, provide examples of both types of intertextuality. In the realm of constitutive intertextuality, both countries' opinions rely on a standard structure: the U.S. opinions begin by listing the party names, the citation

information, attorneys and law firms, and which justice wrote the majority opinion. The opinion generally begins with a short introduction listing the issue presented in the case (e.g., "This case presents the question whether the District Court for the District of Columbia should release to respondents certain tapes admitted into evidence in the trial of petitioners former advisers." (*Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)), before providing a factual background and outlining the parties' arguments, then addressing the reasoning and arguments of the majority itself. The RCC follows an exceptionally close model throughout its opinions, by providing a short synopsis of the law at issue and who brought the complaint, before beginning the opinion with mentioning the judges who heard the argument, the specific arguments at issue, the lawyers, and the arguments of the complaining party, before beginning the court's own analysis and ending in its holding. Certain opinions (both U.S. and Russian) may vary somewhat from this general framework, but the reliance on this overarching framework in both countries' high courts throughout their judicial opinions demonstrates constitutive intertextuality, which has the effect of presenting a dependable institutional face, which is socially expected from such institutions.

Manifest intertextuality is clearer to identify, as it relies upon express reference to other texts (Fairclough, 1992, p. 85). Both the U.S. and Russian judicial opinions greatly rely on manifest intertextuality: both countries' opinions cite the constitutional provisions upon which the litigation relies, and both U.S. and Russian opinions cite other, previous opinions. The RCC opinions tend to not directly quote other sources, rather referring to them generally as a source upon which to rely in the present set of facts; on the contrary, the U.S. opinions rely heavily on quotations from other cases, statutes, and constitutional

provisions. However, as discussed previously, the RCC appears to have a much more succinct style, particularly when looking at the variance in word count between the Russian and U.S. opinions. But, this does not prevent the RCC opinions from exhibiting manifest intertextuality, particularly in the opinions' reliance on decisions from the European Court of Human Rights (ECHR) (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 30 iyuliya 2011 g. [Ruling of the Russian Federation Constitutional Court of June 30, 2011], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2011.).

In fact, the robust nature of manifest intertextuality in the RCC opinions, particularly as it relates to the inclusion of ECHR opinions, was one of the most surprising findings of this study. Indeed, with other scholars' descriptions of Russia's judicial system as one in which precedent does not govern or is of questionable authority (Krug, 2000; Butler, 1999), the finding that the ECHR was referred to 62 times in 28 opinions was unexpected indeed, as were discussions of the ECHR's findings in certain opinions.

As such, although not the level to which the USSC relies on manifest intertextuality in its opinions (including even citing portions of a dissenting justice's opinion in the same case), these high courts in both countries undoubtedly demonstrate manifest intertextuality in their opinions: this certainly aligns with Fairclough's (1992, p. 85) observation that texts historically transform the past "into the present"—one of the tasks of courts is to rely on pre-existing legal authority and apply it to the facts before them, which is the epitome of transforming a past text into the present.

F. Conclusion.

This chapter has applied Fairclough's (1992) second dimension to the studied materials, discussing the texts' production, distribution, force, coherence, and reliance on intertextuality. This examination uncovered the differences in the U.S. and Russian judges' self-references and emphasis on individual judges within opinions, but identified multiple spheres of similarity, from the unseen roles of different text producers, as well as the complex distribution and consumption of the constitutional provisions and judicial opinions. Furthermore, manifestations of text coherence and intertextuality demonstrated much deeper similarities than a surface view of both judicial systems would suggest. Indeed, such an inquiry has uncovered some differences, but has also established many more similarities between the judiciary's treatment of the constitutional provisions in both countries, as well as the ramifications thereof.

Chapter 7. Discourse as Social Practice

A. Introduction.

Chapter 7 addresses Fairclough's (1992) third dimension, which is discourse as social practice. Specifically, this chapter looks at how ideology and hegemony exist within these institutions, and how such elements—as well as the resultant social structures—are supported and propagated by the studied provisions and judicial opinions.

This piece of the analysis is supported by the features of text and discursive practice discussed in Chapters 5 and 6, as Fairclough's analytical dimensions all depend to some extent upon each other for a fulsome investigation.

B. Ideology.

In considering discourse as social practice, Fairclough (1992, p. 87) views ideology as a manifest part of institutions. Ideologies, as Fairclough (1992, p. 87) sees them, are "significations" or "constructions of reality," "which are built into various dimensions of the forms/meanings of discursive practices, and which contribute to the production, reproduction or transformation of relations of domination." Ideologies are most effective in discursive practices when they become "naturalized," thereby achieving "the status of 'common sense'" (Fairclough, 1992, p. 87). But, the focus on transformation (and, concomitant with that, struggle) is also an inherent part of discursive practice (Fairclough, 1992, pp. 87-88).

The USSC and RCC share a similar aspirational ideology of the value of democracy and the importance of free speech in guaranteeing such a system. The USSC in *Citizens United v. Federal Election Commission* expressed the value of speech thusly: "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people….The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it" (558 U.S. 310 (2010)). This elucidation of one of the motivating values for free speech presents parallels to RCC discussions on the value of the freedom of peaceful assembly, which the RCC analyzes separately, but in connection to free speech:

> [T]his constitutional right ensures for citizens real possibility by means of holding of public events (assemblies, meetings, demonstrations, processions and picketing) to influence the activity of bodies of public authority and

> thereby make for maintenance of peaceful dialogue between civil society and the State, which does not exclude protest character of such public events, which may express itself in criticism both of individual actions and decisions of bodies of State power and bodies of local self-government and their policy as a whole. Accordingly, it is intended that the reaction of public authority to organization and holding of assemblies, meetings, demonstrations, processions and picketing must be neutral and in any event—irrespective of political views of their organizers and participants—aimed at providing conditions (both on the level of legislative regulation and in law-applying activity) for lawful realization by citizens and their associations of the right to freedom of peaceful assembly, including by way of working out clear-cut rules of their organization and holding, not exceeding the limits of admissible restrictions of the rights and freedoms of citizens in a democratic law-governed State (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 fevralya 2013 g. [Ruling of the Russian Federation Constitutional Court of February 14, 2013], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013 (Official English Translation)).

Although the Russian perspective put forth here demonstrates a somewhat moderated view of citizen interaction with the State (and thereby separating the roles of citizen and government, unlike the USSC quote above), both the USSC and the RCC recognize the importance of citizen expression in a democratic system.

Both the U.S. and Russian high courts studied here demonstrate similar ideologies within the discursive practice of issuing their judicial opinions. Significant ideologies include both the assumption that their respective constitutions are binding law, and that the holdings of law, issued by the courts, are binding upon the other branches of government and upon the populace. As discussed above in Chapter 5, the RCC is more explicit about demonstrating these ideologies than the USSC by stating at the end of each opinion that such holdings are final law and are immediately enforceable; nevertheless, however, such ideologies are fully incorporated in both court systems—indeed, the idea that the USSC issues binding pronouncements of law is "naturalized," in that it is taken for granted by a large percentage of the U.S. citizenry that the USSC has the power to find laws, governmental, and private conduct "constitutional" or "unconstitutional"; it is arguably because of this embedded ideology that USSC confirmations have become more and more strategic: alternating, as Yale Law School professor Akhil Amar (2018) describes, between "rubber stamps and witch hunts." This criticism is not new, with descriptions of the confirmation process as "intrigue, political strategy, active domination by special interest groups, and scrutiny that many nominees find too great to bear," to the extent that "nominees increasingly see themselves more as battle-ready legal warriors, rather than neutral, disinterested jurists" (Cooper, 2006, p. 443).

Perhaps because the ideology of binding law from the RCC is not as "common sensical" at this point in Russia's development as it is in the United States, the additional ideology is apparent that the ECHR and the UDHR are sources of legal authority upon which to base legal reasoning. This reliance on extra-territorial legal authority and legal precedent has no counterpart in the U.S. decisions but, as discussed in Chapters 5 and 6,

are potentially indicative of the need for the RCC both to express its supremacy in its constitutional decisions over other Russian high courts, and over the other branches of the Russian government. Additionally, this dovetails with the characteristic of "transformation" of ideologies, in that the RCC is both moving toward a more precedent-focused jurisprudence, as well as struggling to establish itself as a final arbiter on constitutional issues.

Such ideologies—of democracy, as well as the strength of a judicial court decision and the self-pronouncement from a particular court on the force of its own opinions—connect directly to the structures and institutions of power over the U.S. and Russian citizenry, addressed below.

C. Hegemony.

In focusing on transformation through ideologies and such discursive change as addressed above, Fairclough (1992) relies upon the concept of hegemony to theorize such change. Specifically, he defines hegemony as "leadership as much as domination across the economic, political, cultural and ideological domains of a society" (1992, p. 92). It involves "constructing alliances, and integrating rather than simply dominating subordinate classes, through concessions or through ideological means, to win their consent" (1992, p. 92). However, existing hegemony is volatile: it includes "the dialectical view of the relationship between discursive structures and events [and] seeing discursive structures as orders of discourse conceived as more or less unstable configurations of elements" (Fairclough, 1992, p. 93). The process of "articulation and rearticulation of orders of discourse" itself becomes one piece of the discursive facet of the hegemonic struggle (Fairclough, 1992, p. 93).

Hegemony, then, provides a way to analyze the "social practice within which the discourse belongs in terms of power relations, in terms of whether they reproduce, restructure or challenge existing hegemonies—and a model—a way of analysing discourse practice itself as a mode of hegemonic struggle, reproducing, restructuring or challenging existing orders of discourse" (Fairclough, 1992, p. 95).

In both countries, the high courts examined here have a similar position: they both exist as one of the three branches of the federal government—ostensibly as an independent branch. They also both are in the position (or have claimed the position) of analyzing and recognizing or denuding individuals' interests and their rights (and responsibilities) within society. The RCC faces a curious additional element in its governmental position, wherein it is one of three Russian high courts, as discussed in Chapter 2, albeit the only one who can theoretically hear whether a particular law complies with the Russian Constitution (Svendsen, 2007).

This positioning places both the USSC and the RCC in a potentially delicate situation. James Madison called the judicial branch the "least dangerous to the political rights of the Constitution," (Hamilton, et al., 2009), and, in accordance with that, there is not necessarily any way to "enforce" a Supreme Court decision if other governmental actors decide not to: it has "no influence over either the sword or the purse…it may truly be said to have neither force nor will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments" (*Federalist* No. 78). As a somewhat recent example, an Alabaman court clerk was jailed for refusing to issue marriage licenses to same sex couples in the wake of a USSC decision finding gay marriage legal (Siemaszko, 2016), which depended upon the police (a non-judicial entity)

to enforce the USSC ruling. The RCC is in an even more perilous position, where it may face opposition from other (or lower) government branches (Svendsen, 2007), including the potential of jurisdictional issues with the other high courts.

From the above considerations, each judicial opinion, then, is its own discursive event that, in addition to the legal holdings contained therein, seeks to underscore its own authority, as a participant in the hegemonic struggle that underlies the concept of separation of powers. This also may help explain why the RCC ends its decisions with the pronouncement (mentioned above) that its decision is final and not subject to appeal, and is immediately enforceable: it is seeking to strengthen its authority in a government that may have other stronger branches (Svendsen, 2007; Pechota, 1994) and thus perhaps challenging existing hegemonies (Fairclough, 1992, p. 95), and also intending to establish its right to sole purview of the analyzed issues—that is, to the exclusion of the other Russian courts.

But, in addition to this micro-hegemonic struggle, another, larger struggle exists with each discursive event (in the form of a judicial opinion) that the high courts issue on individual rights. That is, with each opinion—whether the courts' holding recognizes an individual's free-speech right or declines to find a protectable interest—the courts further engrain their own leadership and continually reposition the individual as a member of the subordinate class (where the classes are the government and/or court as the high class, and citizens as the subordinate class). This also relates to the transformative nature of hegemony (and ideologies) with the articulation and rearticulation of power as the opinions relate to new fact patterns of the same constitutional provision. Indeed, the discursive elements identified and discussed at length above (e.g., self-reference, statements or

assumptions of the courts' own power, reliance on the previous opinions and constitutional provisions via intertextuality), are all themselves part of the process of transformation, and as part of repeated and inherent practices of the court are an element within the hegemonic struggle.

An additional perspective also views the courts—with the same hegemonic patterns as immediately above—as governmental actors, who are undertaking these discursive practices and actions on behalf of the government. However, the other side of the hegemonic equation remains the same: the individual is still subordinated, whether by the courts in their own hegemonic struggle against other branches, by the courts in their capacity as governmental actors, or some combination thereof.

At this point, further discussion is warranted on the basis of the assumption that individuals and their rights and responsibilities are within the purview of a particular court to evaluate and recognize; however, this also necessitates the observation that this assumption is, to some extent, in fact consenting to just such a hegemonic power structure (Fairclough, 1992, p. 92). Assuming this, however, demonstrates the volatility of hegemony: in some cases the high courts strike down the challenged law in favor of the individual, and in others they uphold the law. Thus, there is consistently a struggle in this discursive context, although it occurs on behalf of individuals by the courts—this is arguably an additional element of hegemony.

But, it is also true that the high courts studied here act as a bulwark against encroachment on individual rights by other branches of the government. The opinions studied here in large part relate to a legislative provision that is challenged for allegedly violating the constitution. In this way, the high courts act as mediator (and defender) of

the individual in a hegemonic struggle against the other branches of government, particularly through the transformative discursive nature of judicial opinions described above. Furthermore, the RCC also has a role in representing individuals' interests against other individuals—that is, through the Russian free speech provisions, individual conduct is also circumscribed (e.g., through the ban of linguistic supremacy and incitement of social or racial enmity) (Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 fevralya 2013 g. [Ruling of the Russian Federation Constitutional Court of February 14, 2013], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013). In this way, although from one perspective the RCC is further imposing hegemonic views upon one class of individuals, it is simultaneously protecting against private hegemony from the opposite perspective.

On the other hand, the USSC is proscribed through the wording of the First Amendment from ruling on a private entity's actions or efforts in restricting speech, unless the entity can fairly be held to be a state actor (*Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 560 n.4 (2005)). That is, unless the conduct of a private individual is fairly attributable to the government through some sort of joint relationship or excessive entwinement (*Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961)); *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 535 U.S. 971 (2002)), a private individual's affirmative speech or restrictions thereof, with very few exceptions, is not reachable by jurists. This difference in the constitutional provisions, as borne out by the USSC's jurisprudence, means that private hegemonies (at least addressing free speech) are not protected against.

D. Conclusion.

This chapter has explored discourse as social practice as manifested through the U.S. and Russian constitutional and judicial materials. Specifically, although both the U.S. and Russian courts appear to share the aspirational ideology of the value of free speech in a democratic society, as well as the belief that their issued opinions on constitutional matters constitute binding declarations of law, the extent to which they emphasize both concepts in their respective opinions may be reflective of their own self-positioning in the larger governmental and societal structure. This self-positioning also reflects the potential of different hegemonies, both those in which the courts are implicit actors in subordinating the citizenry, and those in which the courts are defenders of hegemonic processes from other parts of the governmental institution and structure. Both concepts will be addressed in later chapters.

Indeed, various explanations of ideologies and hegemonies potentially exist, and this chapter has attempted to identify some of them, and hypothesize as to their existence, underpinnings, and underlying reasoning, with the hope to, in later chapters (e.g., Chapter 11), come to a conclusion as to a way forward that will surmount such issues.

Part IV

Introduction

Chapters 4 through 7, composing Part III of this dissertation, have identified obstacles to addressing the "problem" identified in earlier chapters (Fairclough, 2001) of the extent to which individual expressive rights are protected—or not protected—by the highest constitutional court of the respective country. Briefly, as discussed above, such

problems are manifested in the inculcation of various ideologies and hegemonies as they are supported, propagated, or at least not directly challenged by the courts.

Following Fairclough's (2001) approach, then, the next step in the methodology is to inquire as to whether each respective society "needs" the problem—i.e., to what extent the societal functions and system are predicated upon the continuance of such ideologies and hegemonies. As discussed in Chapter 3, the social problem at the center of this inquiry has been free speech, both as a debatable issue (rather than as a "given"), and as a right protectable by courts. Chapter 8 addresses the ideologies and hegemonies as earlier discussed in relation to Russian society and postulates on the extent to which the society "needs" such ideologies and hegemonies that stem from this social problem, and Chapter 9 addresses the same, as to the United States, as well as addresses a comparative perspective of the Russian free speech provisions as viewed through an American lens (that is, why Americans think Russians do not have free speech).

Chapter 8. Needing the Problem: Russia

As stated in the introduction to this Part, the next portion of this inquiry requires investigating the extent to which society "needs" the problem of free speech, which in Russia centers around its and Europe's historical background with nationalism, as well as with the constitutional structure of each branch and their relative strengths.

The changes within contemporary life in Russia assist in explaining how free speech has reached the point it has, as well as suggests the extent to which Russian society "needs" the problem of free speech to the point it is protected. The "particular concern" with CDA "is with the radical changes that are taking place in contemporary social life, with how semiosis figures within processes of change, and with shifts in the relationship

between semiosis and other social elements within networks of practices" (Fairclough, 2001, p. 123). Ideology is also tied into this concern, in that "discourse is ideological in so far as it contributes to sustaining particular relations of power and domination" (Fairclough, 2001, p. 123). In Russia, the discourse surrounding free speech is contextualized by the background of nationalism and the immediacy of Nazism within the last century, to an extent that is closer to home than in the United States.

This closeness has manifested itself ideologically in a couple different ways with respect to free speech as a social problem and the inherent ideologies discussed in earlier chapters. First, nationalism has been a recurrent issue within Europe in general and Russia in particular. For example, multiple European countries have in recent past discredited nationalism based on culture and identity, and have worked on rejecting "Fascism in the aftermath of the Second World War and emphasizing democracy and tolerance" (Keating, 2004). As part of this, Europe, through its European Convention for the Protection of Human Rights, has focused on separating "human rights from nationality and citizenship, undermining state claims to be the bearers of universal rights or the only means to secure them" (Keating, 2004). Such focus on democracy and tolerance, as well as emphasis on the European mechanisms by which to protect individual rights (as opposed to state- or nation-specific solutions), assists in contextualizing the Russian free speech provisions and resultant opinions.

As a related organization, the ECHR likewise focuses on universal human rights, and appears particularly willing to subordinate individual rights in appropriate circumstances—for example, declining to find a German father's actions in posting his frustration on a blog with specific reference to Nazi propaganda as protected by free

speech, because while the ECHR acknowledged that he had a right to freedom of expression, it likewise acknowledged the necessity for interference with such freedom in a democratic society, and deemed the restriction (and resulting penalties) acceptable (Nix v. Germany, Application no. 35285/16 (2018)). Indeed, the Court stated "that the historical experience of Germany is a weighty factor to be taken into account when determining, when it comes to recourse to symbols such as those at issue in the present case, whether there exists a pressing social need for interfering with an applicant's right to freedom of expression," and found that "[t]he interference was therefore proportionate to the legitimate aim pursued and was thus 'necessary in a democratic society'" (Nix v. Germany, Application no. 35285/16 (2018), p. 17). This case assists in demonstrating the contextualized environment of free speech within Europe, particularly to the extent that European (and East European countries such as Russia) may rely on the ECHR and its perspective on individual rights and democracy.

As to Russian nationalism in particular, Russia has had instances of nationalism and ethnic identity resurface since the fall of the Soviet Union, as well as more recently (i.e., since the turn of the millennium). Although Russian authorities have not always eschewed nationalism (Panfilov, 2006, p. 142), President Putin has since come under fire for his "willingness to keep Russian borders open to labour migration" from nearby regions (Kolsto, 2016, p. 1).

Second, the institution of the RCC is still relatively new, and within the European model of constitutional courts, is consistent with such a recognition of positive liberties. That is, the general model of European constitutional courts are different, in that they are based, not on the U.S. Supreme Court, but on the Continental model stemming from the

Austrian legal theorist Hans Kelsen following World War I (Schwartz, 1992, p. 742). This means that the "European constitutional court's primary function is…to provide interpretations of that nation's constitution" (Schwartz, 1992, p. 744). This differs from the U.S. Supreme Court, which faces (along with other federal courts) limits on "justiciability," or limits on judicial power (Chemerinsky, 2013, p. 40). These justiciability limits including doctrines affecting issuing advisory opinions, whether the parties have standing to litigate, whether the "case" or "controversy" is ripe for review—or, conversely, whether the same is moot—as well as whether the issue is something more appropriate for one of the other two branches (Chemerinsky, 2013, p. 40). Indeed, by contrast to Kelsen's Continental model, where the focus is on interpreting the constitution (Schwartz, 1992, p. 744), the U.S. justiciability doctrines limit presentation to the federal courts of "concrete controversies best suited for judicial resolution" (Chemerinsky, 2013, p. 40).

Furthermore, the conception of freedom of expression fits within the structure of positive liberties (Berlin, 1970), which is recognized to the extent that it does not encroach on the positive liberties of others. This system leads to the analysis of individual rights in a more holistic way. It also assists in preventing private hegemonies, where one individual can be limited in his or her speech to protect the expression of another's additional rights. (The same is not the case in the United States, where there needs to be some governmental action—or a proxy thereof—against an individual before the courts can recognize an encroachment against the individual's free speech rights, as discussed in Chapter 3.)

Finally, as related to the idea of positive liberties, the Russian "culture" of rights tends to be collective. That is, viewing "culture" as "linked to a language, a particular time period, and a place" (Triandis, 2018, p. 4), the Russian "culture" (as expressed through the

Russian Federation's constitutional protection of civil liberties) tends toward a collectivist view (Prosic, 2015, p. 211; Triandis, 2018, p. 2). This perspective, which existed even before the Russian Revolution, manifested itself at all levels of society, from peasant land communes, to student and workers' cooperatives, and philosophers and socio-political thinkers with "strong collectivist views" (Prosic, 2015, p. 211). Specifically, Triandis (2018, p. 2) defines collectivism as "a social pattern consisting of closely linked individuals who see themselves as parts of one or more collectives…[and] are primarily motivated by the norms of, and duties imposed by, those collectives," and are additionally "willing to give priority to the goals of these collectives over their own personal goals" and to "emphasize their connectedness to members of these collectives." Historically within Russia, in addition to the cultural contexts discussed above, this arguably extends in part from the Orthodox concept of "sobornost'," which focuses on "the state of being together," and similarly focused characteristics of "togetherness" (Prosic, 2015, p. 215). From this viewpoint, it is acceptable from the perspective of the RCC and from the perspective of the citizenry to suppress individual speech rights for the good of the society as a whole. It is possible, then—as well as arguably necessary—for the RCC to have a role that could include the suppression of individual rights for the betterment of the collective.

Considering such a collectivist perspective, the RCC as a national body is in a position to view society as a whole which allows it to provide a fulsome evaluation of collective rights and (from its perspective) when those rights may overcome an individual's corresponding rights. Because the RCC is in this position, namely, one in which it can evaluate and pronounce the expression of rights from an individual and collective perspective, the very mechanism of the RCC evaluating such rights continues to imbue it

with some level of power. Within this context, society "needs" the problem of free speech, because it assists in continuing to propagate the status quo of a collectivist perspective, and perpetuates whatever level of power the RCC does enjoy. As discussed in Chapter 1, I proceed with this dissertation from the perspective that the collectivist and egalitarian model of speech is dispreferred, meaning that utilizing free speech in this manner perpetuates power in the hands of the collective at the expense of individual speech rights.

The above assists in explaining the ideologies examined and discussed in Chapter 7. As discussed there, the free speech ideologies surrounding the RCC potentially bear upon the more tenuous position of that court in its positioning within the government. This tenuous nature assists in explaining its quest to solidify its hegemony as against a stronger executive, and provides one basis for its many citations to the ECHR—that is, the RCC citing to the ECHR's decisions and line of reasoning and comparing the analysis and outcomes to the RCC's ultimate decisions, lends additional credibility to the RCC's endeavors. Furthermore, the historical and, to a certain extent, contemporary nature of nationalism assists in explaining the additional reliance on the EHCR. In this way, the RCC "needs" the problem of free speech with its historical context of nationalism and the concept of positive liberties, because the former allows reliance on the ECHR as a well-established institution, and also, along with the latter, allows the court to performatively claim its authority over the citizenry, thereby demonstrating the extent to which the RCC "needs" the problem of free speech in the Russian society. Additionally, however, the collectivist cultural context of Russian society provides an additional avenue by which the RCC, as an organ of the government, is able to maintain power.

Chapter 9. Needing the Problem: United States

This chapter addresses the United States as to its approach both to current free speech jurisprudence and as to a general U.S. perspective of Russian free speech. The reasons and implications connected with both are likewise explored.

The reliance that the United States has on the current jurisprudence of the First Amendment manifests U.S. society's "need" for the problem in different ways from Russian society. The Court's case-by-case method of analysis for such issues, combined with its heightened level of review for fundamental rights like free speech, has led in an incremental manner to its potential overextensions. In the early 1900s, the Court determined that incitement (as speech) was not protectable (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)); similarly, other types of speech have been determined permissible to limit to a greater extent (e.g., commercial speech with the *Central Hudson* test, 47 U.S. 557 (1980)). However, arguably in part because of the case-by-case analysis the Supreme Court employs, additional arguments have taken hold beyond just "pure" speech. For example, expressive conduct has a "test" for analysis in the Court, thanks to *Texas v. Johnson* (491 U.S. 397 (1989)) and Johnson burning the American flag—albeit, despite the Court declining to find burning a military draft card to be expressive conduct (*United States v. O'Brien*, 391 U.S. 367 (1968)). Yet, perhaps because of speech's metaphorical nature (e.g., in burning a draft card or the American flag), this practice of applying expressive conduct has continued, to even one of the largest cases in the 2017 term, with a wedding cake baker's defense to not making a cake for a homosexual couple based in part on a compelled speech defense. (*Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*,

Petition for Writ of Certiorari, 2016). However, this continual pushing of the First Amendment by each case that is submitted means first that, potentially, the First Amendment could be stretched to the point where it is so diluted to the point of not meaning much of anything (M. McConnell, panel presentation, January 27, 2018), but also means that the protection of free speech is in a continual state of flux, as citizens are then motivated to utilize such arguments to support the assertion of their rights, and continue to rely upon them to avoid governmental harm.

This constant state of flux is helpful to the judicial system for at least two reasons. First, the ideology of the Supreme Court as the protector of individual rights aligns with its practice of continually addressing new expressions and possible manifestations of protectable rights. That is, by thrusting itself continually into the fray, and by also contributing to the uncertainty itself (as to whether a particular metaphorical action is protected under free speech), it continues to bolster its own standing within society as to its status within the hegemonic system. Second, by continually engaging in questions relating to the protection of individual rights, the Supreme Court is thus able to define such rights for the populace, and the populace thereby accepts them. This generalized acceptance is intriguing, because, contrary to Russian cultural mores, the United States tends to have a more individualistic culture, which "is a social pattern that consists of loosely linked individuals who view themselves as independent of collectives[, who]…are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others," and who "give priority to their personal goals over the goals of others[,] and emphasize rational analyses of the advantages and disadvantages to associating with others" (Triandis, 2018, p. 2). However, the decisions of the Supreme

Court, although generally framed to apply to individuals, then apply widely to the populace (and thereby to "collectives," e.g., doctors, homosexuals, etc.). Arguably, then, the Court "needs" this system because it assists in widespread acceptance of the Court's own power.

This acceptance propagates hegemony, as it continues the cycle of dependence on a governmental entity for the expression of an individual right. In these ways, U.S. society—or at least the ideologies behind the government and governmental hegemonic institutions—"needs" the problem of free speech, because the process of protection thereof extends and propagates the power of the government.

Furthermore, viewing Russian society from a U.S. perspective reveals another potential ideology with respect to the sense in which U.S. society "needs" the problem of free speech. From an American perspective, it does not seem to many laypeople that Russia recognizes or protects free speech (Piet, 2014). From a purely anecdotal standpoint, by far the most common response when mentioning the topic of this dissertation was a sarcastic comment or question about whether free speech in Russia was "even a thing." While this is not a scientific poll, it reflects common perception, for which this dissertation contemplates two possible answers: first, perhaps this is true, and despite explicit protections for free speech from the RCC as discussed in earlier chapters, the strong executive in Russia precludes actual exercise of separation of powers, and the RCC is in name only. However, a second potential explanation is that this popular conception is not at all true, but that it is convenient or politically advantageous from a U.S. perspective to make Russia the bogeyman. This could be unrelated to Americans (other than for strategic foreign policy reasons), or it could be to encourage complacency and thus the propagation of hegemonic authority and ideology, to the extent that, if Americans view another society

with “worse” protection for a particular right such as free speech (whether in Russia or elsewhere), it decreases motivation to challenge the existing order, because comparatively the current system is better than in other countries. (Arguably, as well, recent allegations of Russian meddling in the United States 2016 elections simultaneously demonstrate the above, and also suggest the potential for Russia to similarly use the United States—and stereotypes therefrom—as a negative comparison for its own ends (Saletan, 2017).)

As discussed above, the case-by-case analytic approach of the Supreme Court and society’s negative comparative perspective of Russian free speech protection demonstrates the manner in which current existing hegemonies and ideologies are propped up and continued, thereby demonstrating the extent to which the existing structures of power “need” the issue of free speech in the United States.

Part V

Chapter 10. Overcoming the Obstacles

A. Introduction.

Chapters 8 and 9, as Part IV of this dissertation, have identified the extent to which each respective society “needs” the problems as identified within the analysis in earlier chapters as to how individual expressive rights are protected by the highest constitutional court (Fairclough, 2001).

In accordance with Fairclough’s (2001) methodology, the next step is to identify potential routes to overcome the obstacles identified in Part IV. Specifically, as will be explained further below, this identification stems—intentionally—from the perspective of evaluating and increasing individual expression of free speech rights. As such, Chapter 10 first addresses ways to overcome the challenges of nationalism and collectivism in Russia,

and subsequently addresses ways in which to surmount the elevation of the individual U.S. Supreme Court justices and the obstacles of First Amendment dilution through the case-by-case approach used by the Court.

B. Routes past the obstacles.

This chapter addresses both Russian and U.S. obstacles together in two separate sections because both societies present challenges centering around the dichotomy of collectivism versus individualism (Triandis, 2018). Chapter 10 first builds from Chapters 8 and 9 in further developing Triandis' (2018) scaffold of cultural perspectives and then utilizes this to identify how to overcome the aforementioned obstacles on both sides of the individualist-collectivist spectrum.

This individualist-collectivist spectrum exists within each individual and in all societies (Triandis, 2018). Although Triandis (2018) draws generalizations of different countries or cultures that tend to display proclivities towards one or the other, he also identifies the common process of development, wherein most "start by being collectivists, attached to their families," but "become detached from them in different degrees and learn to be detached from collectives in different situations" (p. xiii). This detachment is minimal within collectivist cultures, where people view their own identities as part of their collectives and have a greater propensity to elevate the goals of the collectives higher than their personal goals (Triandis, 2018, p. xiii). However, there is still a "full distribution" of individualists and collectivists in each culture (Triandis, 2018, p. 5).

Generally, the propensity of each person towards individualism or collectivism affects his or her relation to "ingroups" of which that person is a part (Triandis, 2018). "Ingroups" are generally identified based upon similarities among members, and

"individuals have a sense of 'common fate' with members of the ingroup" (Triandis, 2018, p. 9). Accordingly, collectivists feel more comfortable in the presence of others who are like-minded than individualists do, and also seek a greater amount of homogeneity in their ingroups (Triandis, 2018, p. 9). Similarly, history tends to be more important to collectivists than individualists, because the former "see themselves as links in a long chain that consist of ancestors and descendants" (Triandis, 2018, p. 10). However, within these concepts, solidarity can also take different forms: Triandis (2018) distinguishes between "mechanical" and "organic" solidarity. The former relates to a high level of similarity among members of a society where "they relate to each other automatically without considering that any other option exists," and the latter relates to circumstances in which there is "functional specialization" and where individuals are "interdependent because it is advantageous" (Triandis, 2018, p. 7). That is, mechanical solidarity broadly relates to collectivism, and organic solidarity relates to individualism.

These concepts—namely, individualism and collectivism—map broadly onto free speech. That is, according to Sullivan (2010) two opposing views of free speech exist: first, to serve the ends of political equality, and second, to serve the ends of political liberty (pp. 144-145). In viewing free speech to protect political equality, this perspective broadly considers the speech rights of all groups, and is concerned with groups of people expressing their views without being discriminated against, even when such views are marginal or dissident (Sullivan, 2010, p. 144). By contrast, viewing free speech as protecting political liberty includes considering free speech to be "a negative check on government tyranny, and treats with skepticism all government efforts at speech suppression that might skew the private ordering of ideas" (Sullivan, 2010, p. 145). In this way, free speech as

protecting political equality views the speech rights of groups or, even if viewing speech rights on an individual level, looks to bring those expressive activities within the generalized acceptance of the relevant group or collective (here, the country). By contrast, free speech as political liberty looks at the individual's private scaffolding of ideas as inviolate from governmental interference, an inherently individualistic perspective. I approach free speech from the perspective of protecting political liberty as an individualistic aim, rather than as a collectivist focus, and so the discussion below positing strategies to overcome obstacles to free speech thus assumes the end goal as an individualist perspective to protect political liberty (as stated above, this is further contextualized in the next chapter).

1. Russia.

Perhaps the largest obstacle with how the RCC approaches free speech is the fact that the RCC's decisions and interpretation of the free speech provisions align with Sullivan's (2010) description of political equality.

Indeed, Triandis (2018, p. 2) identifies Russia as containing a generally collectivist culture and, as discussed in Chapter 8, this is further bolstered by the religious and otherwise cultural concepts of sobornost', which focuses on togetherness (Prosic, 2015, p. 215). To be sure, even the members of Pussy Riot, who push the boundaries of expressive activities within Russia, style themselves as a punk feminist *collective*, whose members often wear bright balaclavas when performing (Gessen, 2014), thus deemphasizing the individual identities of the members. The membership of the band, with the exception of the more visible members, likewise is fluid (Gessen, 2014)—thus, the individual members subordinate themselves to the larger goals of the group.

Characterizing Russian culture as generally collectivist is also potentially tied into the perspective of positive liberty (Berlin, 1970) as expressed through the Russian Constitutional provisions. That is, the Russian provisions, in expressing positive liberty, guarantee such liberty only to the extent that it could curtail another's guaranteed liberty in a separate setting. As such, it may not be possible to overcome these obstacles without a change to the constitutional provisions itself, but even that may not be enough without a cultural sea change. This, however, eventually may be possible through the passage of time.

From a relativistic perspective, the focus on collectivism in the Russian culture may not be a negative attribute; however, in line with Fairclough's (2001) methodology, the fact that the perspective on free speech lacks individualism has been identified above as a "problem," with this step functioning as problem-solving to overcome such issues.

As mentioned above, the Russian culture may already be shifting to a point where it will be possible to emphasize more individualist elements than collectivist. For example, the Russian Federation is composed now of many different other regions, autonomous republics, and other entities with their own governing structures and documents (Svendsen, 2007). Despite the fact that suppression of speech through strong central control currently remains popular, the foregoing fosters an increased level of heterogeneity, which can naturally lead to greater individualistic perspectives, as solidarity grows organically, rather than mechanically (Triandis, 2018), and nationalist focuses can also be avoided. Furthermore, moving away from the historical collectivism of the Soviet Union, and relying on the "newer" history of the Russian Federation may assist in shedding the cultural adherence to collectivism from a sense of identifying with history (Triandis, 2018).

To continue to increase the focus on individualism, then, it is likely necessary to increase discourse on the differences in viewing free speech, particularly in a way that acknowledges the culturally bounded elements of collectivism and individualism, and how those tie into free speech. Undertaking such activities while advocating for free speech further assists in pushing past these obstacles in a way that overcomes the hegemony identified earlier in this dissertation, the interpretation of free speech that allows the RCC to suppress some individuals' rights in the interests of others.

2. United States.

The obstacles identified in the United States are different than in Russia. Although the United States tends to have a more individualistic culture (Triandis, 2018, p. 2), challenges still exist unique to America that prevent full expression of free speech as political liberty. As mentioned above and discussed at length in Chapter 9, these include the popularization of the U.S. Supreme Court justices and the case-by-case jurisprudence that potentially leads to the dilution or overextension of the First Amendment's free speech clause.

The pop culture status surrounding many of the justices also potentially ties into the labels that have been ascribed to them as conservative and liberal. For example, although the late Justice Scalia was known popularly as a "conservative" justice (Brisbin, 1998), he also was a defender of criminal defendants' rights, saying once that he "ought to be the darling of the criminal defense bar," because he defended such rights "to a greater degree than most judges have" (Ring, 2016). As Sullivan (2010) observes, the labels of "liberal" and "conservative" are "reductive and sometimes incoherent as descriptions of the Justices' approaches to constitutional decisionmaking," but they have nevertheless

"become pervasive in popular accounts of the Court and in attempts to quantify its outcomes" (p. 144, n.7). Such vote-counting has existed for a long period of time, including assumptions such that justices may seek to operationalize policy preferences in the form of normative outcomes (Segal & Cover, 1989, p. 558).

Engendering a dialogue that focuses upon the above issue would begin to address this problem. Furthermore, focusing on the popularization of justices potentially relates to the power that each individual justice possesses may assist in overcoming the pop culture armchair approach prevalent in evaluating U.S. Supreme Court jurisprudence. Moreover, focusing on the uproar surrounding recent nomination proceedings (Sherfinski, Swoyer, & Dinan, 2018) assists in demonstrating how much power one justice on the U.S. Supreme Court possesses. Focusing additional discourse on this may ideally bring attention to the fact that the system as it has evolved (particularly when a particular individual or group does not like the normative outcome) may lead to the subjugation of individual rights to a governmental branch, which continues such hegemony.

Second, the potential issues with dilution of the strength of the First Amendment can be clarified by resetting the perspective on liberty. Meiklejohn (2000), for example, argues that the Constitution "recognizes and protects two different sets of freedoms," wherein one type of freedom is "open to restriction by the government," and the other is not (p. 2). Free speech, according to Meiklejohn, is one of the latter, where property rights, for example—still similarly protected in the Bill of Rights—is one of the former. That is, as stated within the constitution, one's personal property is not inviolate from incursion by the government (via taxes, other types of governmental takings, etc.), but free speech is certainly stated as an absolute. Perhaps, then, as free speech becomes more metaphorically

extended to non-speech situations, the issue is that litigants are seeking free speech's unrestricted freedom to be applied in circumstances where a restricted form of freedom would otherwise exist. For example, the Civil Rights Act of 1964 prohibits discrimination on several bases in many places of public accommodation, to include restaurants, gas stations, and places of entertainment (Singer, 1995, p. 1288). In a manner that garners widespread support, business owners' rights over private property are thus circumscribed in their ability to exclude people from their property. This, indeed, is an undercurrent to *Masterpiece Cakeshop*, where a Colorado anti-discrimination law established similar prohibitions, and provides a direct example of extending the First Amendment to a situation where another rights-based argument may have closer application (e.g., private property).

In order to prevent further dilution of free speech freedoms, a possible option to overcome this obstacle is to gird up free speech to ensure that its protections do not weaken through overextension. However, an alternative possibility is to extend such unrestricted freedom to constitutional interpretation elsewhere. The second approach would be more consistent with my perspective in this dissertation of increasing individual liberty (in all manifestations); however, regardless, either route to overcome this obstacle would be implemented necessarily through advocacy.

C. Conclusion.

This chapter has addressed different ways in which to overcome the issues identified in earlier chapters as to free speech in each society; namely, collectivism and nationalism in Russia, and hyper-focus on the U.S. Supreme Court justices and overextension of the First Amendment in the United States. It is perhaps not shocking that, in a dissertation exploring greater protection of free speech, the potential routes identified

past the above problems focus on increasing dialogue among the respective citizenry; however, just such a route is suggested in each circumstance.

Part VI

Chapter 11. Critical Reflection

A. Introduction.

This section, as the last of Fairclough's (2001) five-part approach to CDA, requires a critical reflection of the first four stages. Although Fairclough himself does not provide a particular meta-outline of this critical reflection, this dissertation accomplishes that stage by transposing the "critical" perspective of other CDA scholars onto this dissertation and its findings.

Part I (Chapter 1, p. 5) describes the attributes of a "critical" approach. Namely, this approach consists of "having distance to the data, embedding the data in the social, taking a political stance explicitly, and a focus on self-reflection as scholars doing research" (Wodak & Meyer, 2001, p. 10). Accordingly, this chapter will first undertake the critical reflection through sections discussing (1) distance to the data; (2) embedding the data in the social; (3) taking a political stance explicitly; (4) and a focus on self reflection as scholars doing research, and then proceed with discussing conclusions and findings associated with the research questions identified in Chapter 1, before concluding this dissertation.

B. Critical reflection.

1. Distance to the data.

As per the quantitative aspect encouraged by a CDA perspective (in addition to the qualitative approach that is likewise an inherent element of the scholarly perspective), this

study has undertaken a perspective to the quantitative data from a detached perspective. That is, the textual analysis in Chapter 5 fulfilled this aspect—to emphasize findings from this section, the U.S. opinions focused far more on individual justices, both as through orthography, as well as through emphasis on non-majority opinions (i.e., the difference between words devoted to and prevalence of non-majority opinions: 3,499 words in RCC opinions and 343,931 in USSC opinions), and the explicit naming of which justices join in which opinions. This is important, because minority opinions can change the course of the law, either through further development in the future, or even encouragement to change statutory law (Stephens, 1952, pp. 404-408). By contrast, the RCC focuses on a more collectivist perspective (Triandis, 2018), with no individual justices named in an opinion, with the exception of dissenting opinions (but, in the corpus of opinions considered in this study, just one). This aspect of reflection indicates a potential difference between the Russian and U.S. constitutional courts. However, as reflected by the rest of this section, the differences continue to diminish.

2. Embedding the data in the social.

These data are inherently embedded in the "social" from a variety of perspectives. The "social" is largely understood as application to the world in order to integrate this research into the audience or society that the research investigates, as opposed to staying contained solely within the academy (Wodak, 2007). First, these data, as a reflection of free speech jurisprudence, are an inherent part of social activity with regards to intra-personal interaction. Additionally, as discussed in Chapter 3, free speech in both societies are part of a semiotic issue, which is inherently connected to social issues as semiosis. Moreover, the strength of a CDA approach is partially found in the fact that it focuses on

the effect upon people within society (Fairclough, 2001). Accordingly, this entire study has analyzed the data as embedded within the social—i.e., of how the data and structures surrounding free speech effect real people in their respective societies, specifically, through the ramifications of appellate court decisions on day-to-day interactions that impact real people in real situations (for example, whether a baker is obligated to provide goods for others when his religion would dictate otherwise).

3. Taking a political stance explicitly.

I have proceeded with this dissertation from the perspective that free speech rights as expressible within society are a good and a goal in and of themselves. And, indeed, that stems from the expectation that individual rights—and protection thereof—are a goal within any society to preserve and protect. As the author, I recognize that this is not necessarily the same goal or understanding as everyone within the United States (thus exemplifying an understanding of the heterogenous nature of the United States' individualistic society), and particularly within Russia. However, this is the perspective from which this study proceeds, and because all analysis is accomplished through this lens, this perspective needs explicit recognition. Moreover, this leads to important analytical conclusions in a manner which does not favor one country's perspective over another—that is, this analytical perspective allows an approach which even-handedly critiques both the United States and Russia (particularly in looking at the hegemonic struggles in both countries' judicial systems and how ideologies are manifested, as discussed at length in Chapters 8 and 9), because neither society exemplifies this jurisprudential framework (and, even if the United States did at the very beginning, the Alien and Sedition Acts very quickly disabused the nation of that framework at the outset)—this assists in emphasizing that this

approach has proceeded from a non-culturally favoring perspective, because neither the United States nor Russia demonstrate a society or jurisprudential framework as to free speech that bolster individual speech rights. Although both countries may land at different points on the spectrum, neither are in a superior position—both fail at different points for varying reasons.

4. Self-reflection as scholars doing research.

This section relates to the section immediately above; however, the third research question likewise incorporates this aspect, which is addressed below. Furthermore, self-reflection allows for the additional insight as to potential limitations, but also for the option of additional insight from an awareness of my background as an American scholar—that is, I can acknowledge this limitation of lacking a "native" understanding of Russian free speech and society, but this same limitation also leads to additional insight, particularly through the awareness that a "native" U.S. view of Russian free speech is fragmented and biased, and the possible reasons for this (as discussed in Chapter 9).

C. Research questions.

1. Research question 1.

The first research question of this study focused upon the textual and constructive differences between the U.S. and Russian constitutional provisions. The textual differences are, from a surface view, straightforward to identify. However, the implications thereof lead to more nuance, particularly because of the framing of each country's provision.

As discussed in Chapter 6, the two provisions are framed in opposite manners. The U.S. free speech clause is phrased as the explication of a negative liberty, while the Russian

free speech provisions are proposed as positive liberties. Indeed, the Russian provisions, as discussed also in Chapter 9, demonstrate a similarity to the UDHR (Universal Declaration of Human Rights). However, the Russian Constitution also includes a limitation on these positive rights, to the extent that those rights interfere with others'.

Constructively, each constitutional court's approach to the textual provisions likewise demonstrates divergences. As discussed in Chapter 6, the jurisprudential practices of each court differ, with the USSC focusing more heavily on dissents and other non-majority opinions, along with a focus on the individual authors and personalities thereof. By contrast, the RCC does not identify the author of majority opinions, and does not demonstrate (at least to the extent this data set applied) a robust practice of non-majority opinions, with only one opinion in the 28 studied showing a dissent.

Furthermore, the difference in interpretive principles (as applied to both provisions) affects the reading of the provisions. As discussed at length in Chapter 3, a textual or originalist understanding of the U.S. free speech clause would lead to vastly different outcomes than have been demonstrated by jurisprudential and legislative practices in the last two centuries. These differences in interpretive principles are no less important than the cultural divergences also discussed earlier (in Chapter 8), wherein traditions of each culture and subculture map onto the interpretive process. A lack of awareness regarding cross-cultural differences reduces competency in evaluating such issues (Knutson, et al., 2003, pp. 65-66), and can lead to inaccurate and superficial results if not accounted for.

2. Research question 2.

The second research question asks how the textual and constructive differences above affect individual speech rights. First, the textual differences allow for potentially

greater protection for speech in Russia, because of the limitation to state action in the U.S. Constitution—that is, incursions on free speech may be evaluated only when those limiting such speech are state actors. This leaves out private actors—for example, it would not limit a private speech code for employees. This means that "[p]rivate employers are free to fire employees for disfavored speech" (Becker, 1995, p. 816). By contrast, the framing of the Russian Constitution's positive liberty to freedom of speech allows for protection in the private sphere, in addition to the public sphere, where the "propaganda or agitation instigating social, racial, notional or religious hatred and strife shall not be allowed" (Russ. Const. Art. 29 clause 2, 1993).

But, as referenced above, Article 55 in the Russian Constitution demonstrates an important limiting principle that shows how individual speech rights can be suppressed for the benefit of the collective. And, although the U.S. Constitution does not contain such similar limiting provisions, the difference in the interpretive principles that have been applied to constitutional jurisprudence likewise affect the exercise and expression of individual speech rights. Specifically, laws like the Alien and Sedition Acts (which, although never ruled on by courts, were drafted within the generation of those who drafted the Constitution and Bill of Rights) and cases considering incidental restrictions on speech (through discussion of content-specific versus content-neutral laws, which either limit a message based on the content it conveys, or or regulate a message "without regard to the content or communicative impact of the message conveyed" (Stone, 1987)) demonstrate that a purely textualist understanding of the First Amendment's free speech clause does not exist, and may never have existed—that is, one that begins with and focuses on the text (O'Scannlain, 2017). And, even if the legal validity of the free speech provisions are

robust, the social validity thereof may have inversely diminished strength. For example, in a town run by an oligarch who also owns the main factory (and therefore the means of living in town), an employee of the factory may not be able to express dissident views—although the freedom remains in theory, it does not in practice. This is also true for the U.S. provisions, but for a different reason: specifically, if a private actor (who cannot be considered a state actor) circumscribes other private speech, through employment speech codes, harassment (Internet trolls), etc., the protection of the First Amendment, such as it is, has no application.

As such, this study has uncovered the possibility that, at least from a perspective that unfettered free speech is a positive attribute and desirable goal, the approaches to, and resulting protection of, free speech jurisprudence is relatively similar between the two countries. First, both countries' constitutional courts demonstrate similar perspectives on the value of free speech—as the discussion on the democratic values in Chapter 7 demonstrate, both have opinions considering free speech as political equality.

This similarity extends to the practices of each country's constitutional court. That is, both high courts continue hegemonic processes, as discussed in Chapter 7—moreover, the intertextual nature of judicial opinions in both countries and the extent to which that intertextuality is constrained by convention, tradition, and precedent continues to support those structures of power (i.e., by each opinion fitting within the restrictions of the genre framework, it continues to support this structure).

Admittedly, this study has identified differences in how each court pronounces opinions. That is, the USSC focuses heavily on individual justices and their personalities and writing styles, whereas the RCC moves from a collective framework. Although one

explanation likely relates to individualist versus collectivist understandings in each society (Triandis, 2018), another explanation relates to the structure of the constitutions themselves. As discussed in Chapter 2, Svendsen (2007) argues that the Russian Executive is more powerful than the judicial branch, particularly any one court. Accordingly, perhaps the RCC chooses a united front against the other branches for its own power, the protection of citizens' rights, or some combination thereof.

3. Research question 3.

The third research question focuses on the avenues that exist to protect or improve speech rights in the future. (As discussed above, this is a permissible goal within a CDA approach.) In order for free speech to be protected to a level that recognizes individual autonomy, I propose through this dissertation three distinct steps.

First, identifying *why* free speech is a positive goal will assist in centering the discussion for consistency. As this study has demonstrated, there are competing conceptions of free speech (e.g., political equality versus political liberty, as well as views on the permissibility of suppressing such types of individual rights for the benefit of the collective in both countries). Identifying the rationale behind free speech assists in ensuring that the focus remains on a same or similar goal, because with so many perspectives on speech and citizens' places in society, a productive conversation is difficult to accomplish without a common base. In this dissertation, I position free speech as a positive in itself, because of its inherent tie with expression and individual autonomy, and as well as for robust protection of such rights within any society.

Second, once the foundational perspective (and, accordingly, a common goal) has been identified, the next proposed step is to focus upon the interpretive lens that identifies

the protective framework for the underlying right. The strength of such a lens is that it reduces reliance on subjective human predilections and allows for a consistent approach with, ideally, consistent outcomes.

Third, the final step is to encourage and foster active engagement of the populace in the interest of the above goal and perspective on speech. This is true both from an effectiveness perspective, as well as from considering hegemonic roles, because the courts theoretically already protect speech; however, as has been seen through preceding discussion (Chapter 7), this protection may be only nominal, and may also be part of shoring up the hegemonic processes. Furthermore, although much of the immediately preceding chapters have discussed the differences in collectivist and individualist cultures, it is possible that heterogeneity will continue to increase in Russian society and will perhaps eventually foster an individualist understanding of individual liberties, to include free speech rights. Conversely, however, it is possible that the United States is shifting in the opposite direction (with focus on suppressing hate speech, regulating commercial speech (Blanks Hindman (2004)), etc.), and so additional effort will be necessary in this regard.

D. Conclusion.

Ultimately, through a CDA examination of the U.S. and Russian free speech provisions, this dissertation has identified similarities and differences between both countries' constitutions, free speech provisions, and jurisprudential practices. Although differences were expected, the similarities between the two societies' approach to constitutional interpretation was most surprising, as was the robust nature of the Russian free speech provisions, at least from a surface perspective. Moreover, it is possible that

while the individualist/collectivist perspective helps explain some differences between the content of the free speech provisions, the hegemonic structures are so well engrained within both countries that the governments' (and, specifically, the courts') approaches are similar. In this way, a CDA approach assists in identifying a way forward to increase speech in both countries, which has been the "critical" part of this critical discourse analysis.

References

Achter, P. J. (2000). Narrative, intertextuality, and apologia in contemporary political scandals. *Southern Journal of Communication, 65*(4), 318-333.

Al-Gublan, B. K. (2015). A linguistic study of language power and strategy used by jurists. *International Journal of Language and Linguistics, 2*(3), 165-82.

Allen, G. (2011). *Intertextuality*. Routledge.

Amar, A.R. (1992). The creation and reconstruction of the Bill of Rights. *Southern Illinois University Law Journal, 16*, 337-350.

Amar, A. (2018, July 9). "A Liberal's Case for Brett Kavanaugh." *The New York Times*. Retrieved from https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html.

Appellate. (n.d.). In *The Law Dictionary*. Retrieved from https://thelawdictionary.org/.

Arewa, O. (2007). The freedom to copy: Copyright, creation, and context. *U.C. Davis Law Review, 41*(2), 477-558.

Austermühl, F. (2014). *The great American scaffold: Intertextuality and identity in American presidential discourse* (Vol. 53). John Benjamins Publishing Company.

Baker, P., Gabrielatos, C., Khosravinik, M., Krzyżanowski, M., McEnery, T., & Wodak, R. (2008). A useful methodological synergy? Combining critical discourse analysis and corpus linguistics to examine discourses of refugees and asylum seekers in the UK press. *Discourse & Society,* 19(*3*), 273-306.

Bakhtin, M. M. (1987). *The problem of the text in linguistics, philology, and the human sciences: An experiment in philosophical analysis. Speech genres and other late essays* (pp. 103-131).

Balkin, J. M. (2011). *Living originalism*. Cambridge, MA: Harvard University Press.

Bandes, S. (1990). The negative constitution: A critique. *Michigan Law Review*, 88(8), 2271-2347.

Baude, W. (2014, March 7). Originalism: The theory and the politics. *The Volokh Conspiracy*. Retrieved from https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/03/07/originalism-the-theory-and-the politics/?noredirect=on&utm_term=.bd00debef63a.

Becker, M. (1995). How free is speech at work. *UC Davis Law Review, 29*, 815-873.

Benesh, S. C., & Czarnezki, J. J. (2009). The ideology of legal interpretation. *Washington University Journal of Law & Policy, 29*, 113-132.

Berlin, I. (1970). Two concepts of liberty. *Four Essays on Liberty* (pp. 118-172). New York: Oxford University.

Beschastna, T. (2013). Comment, Freedom of expression in Russia as it relates to criticism of the government, *Emory International Law Review, 27*, 1105-1144.

Bhatia, A. (2006). Critical discourse analysis of political press conferences. *Discourse & Society, 17*(2), 173-203.

Blanks Hindman, E. (2004). The chickens have come home to roost: Individualism, collectivism and conflict in commercial speech doctrine. *Communication Law and Policy, 9*(2), 237-271.

Blommaert, J., & Bulcaen, C. (2000). Critical discourse analysis. *Annual Review of Anthropology 29*, 447-466.

Brisbin, R. A. (1998). *Justice Antonin Scalia and the conservative revival*. JHU Press.

Brandenburg v. Ohio, 395 U.S. 444 (1969).

Burnham, W., Maggs, P.B., & Danilenko, G.M. (2004). The judicial system. *Law and legal system of the Russian Federation* (pp. 49-130) (3rd ed.). Huntington, NY: Juris Publishing, Inc.

Butler, W. (1999). *Russian law*. New York, NY: Oxford University Press.

Butler, W.E. (2003). National treaty law and practice: Russia. *Studies in Transnational Legal Policy, 33*, 151-172.

Calabresi, S. (2007). *Originalism: A quarter-century of debate*. Washington, DC: Regnery Pub.

Cardozo, B. N. (2010). *The nature of the judicial process*. Yale University Press.

Case law. (n.d.). In *The Law Dictionary*. Retrieved from https://thelawdictionary.org/.

Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980).

Chemerinsky, E. (2014). *Constitutional law* (4th ed.). New York, NY: Wolters Kluwer Law & Business.

Chilton, P., Ilyin, M. V., & Mey, J. L. (Eds.). (1998). *Political discourse in transition in Europe 1989-1991* (Vol. 36). John Benjamins Publishing.

Choudhry, S. (1998). Globalization in search of justification: Toward a theory of comparative constitutional interpretation. *Indiana Law Journal, 74*, 819-892.

Common law. (n.d.). In *The Law Dictionary*. Retrieved from https://thelawdictionary.org/.

Concurrence. (n.d.). In *The Law Dictionary*. Retrieved from https://thelawdictionary.org/.

Const. of the Russian Federation, Ch. 2, Art. 29 (1993).

Cooper, H. (2005). Tilting at windmills: The troubling consequences of the modern Supreme Court confirmation process. *Southern University Law Review*, *33*(3), 443-452.

Danilenko, G. (1994). The new Russian Constitution and international law. *The American Journal of International Law, 88*(3), 451-470. doi:10.2307/2203713.

D'hondt, S., & van der Houwen, F. (2014). Quoting from the case file: How intertextual practices shape discourse at various stages in the legal trajectory. *Language & Communication*, *36*, 1-6.

Dissent. (n.d.). In *The Law Dictionary*. Retrieved from https://thelawdictionary.org/.

Dubrovskaya, T., Dankova, N., & Gulyaykina, S. (2015). Judicial power in Russian print media: Strategies of representation. *Discourse & Communication*, *9*(3), 293-312.

Dunning, C. (2012). The tsar's red pencil: Nicholas I and censorship of Pushkin's "Boris Godunov." *The Slavic & East European Journal*, *54*, 238-254.

Dzmitryieva, A. (2017). Case selection in the Russian Constitutional Court: The role of legal assistants. *Laws*, *6*(12), 1-23.

Easy, O. X. (2012). *A legal and critical discourse analysis of the language used to preserve the "myth" of a student-athlete.* Available from ProQuest Dissertations & Theses Global.

Eilmansberger, T. (2004). The relationship between rights and remedies in EC law: In search of the missing link. *Common Market Law Review, 41*, 1199-1246.

Elst, M. (2005). *Copyright, freedom of speech, and cultural policy in the Russian Federation* (W.B. Simons ed.).

Emerson, C. (1998). Pushkin, literary criticism, and creativity in closed places. *New Literary History, 29*, 653-672.

Emerson, T. I. (1977). Colonial intentions and current realities of the First Amendment. *University of Pennsylvania Law Review, 125*(4), 737-760.

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

Fairclough, N. (1992). *Discourse and social change*. Cambridge, MA: Polity Press.

Fairclough, N. (2001). Critical discourse analysis as a method in social scientific research. In R. Wodak & M. Meyer (Eds.), *Methods of critical discourse analysis* (pp. 121-138). London: Sage.

Fairclough, N. (2003). *Analysing discourse: Textual analysis for social research*. London: Psychology Press.

Farnsworth, E. (1963). *Introduction to the legal system of the United States.* New York, NY: Oceana Publications, Inc.

Feldman, N. (2018, June 27). Justice Kennedy's legacy is the dignity he bestowed. *Bloomberg*. Retrieved from https://www.bloomberg.com/view/articles/2018-06-27/anthony-kennedy-retirement-his-legacy-is-dignity-he-created.

Finch, G. (2005). *Key concepts in language and linguistics*. Palgrave Macmillan.

Fisch, W. B. (2002). Hate speech in the constitutional law of the United States. *The American Journal of Comparative Law, 50*, 463-492.

Freitas, Lucia. (2013). Critical discourse analysis in two legal texts on Maria da Penha Law/Analise critica do discurso em dois textos penais sobre a Lei Maria Da Penha. *Alfa: Revista de linguistica, 57*(1), 11-35.

Garner, B.A. (2002). *The red book: A manual on legal style*. St. Paul, MN: West.

Goffman, E. (1981). *Forms of talk*. University of Pennsylvania Press.

Gee, J. (2015). *Social linguistics and literacies: Ideology in discourses*. Routledge.

Gellman, S. (1995). Hate speech and a new view of the First Amendment. *Capital University Law Review, 24*(2), 309-318.

Genette, G. (1997). *Palimpsests: Literature in the second degree* (Vol. 8) (C. Newman & C. Doubinsky, Trans.). U of Nebraska Press.

Gessen, M. (2014, January 24). Pussy Riot: Behind the balaclavas. *The Guardian*. Retrieved from https://www.theguardian.com/books/2014/jan/24/pussy-riot-behind-balaclava.

Goldstein Hode, M., & Meisenbach, R. J. (2017). Reproducing whiteness through diversity: A critical discourse analysis of the pro-affirmative action amicus briefs in the *Fisher* case. *Journal of Diversity in Higher Education, 10*(2), 162-180.

Gorham, M. S. (2014). *After newspeak: Language culture and politics in Russia from Gorbachev to Putin*. Cornell University Press.

Hamilton, A., Madison, J., & Jay, J. (2009). In Ian Shapiro (Ed.), *The federalist papers.* New Haven, CT: Yale University Press.

Hasen, R. L. (2015). The Most Sarcastic Justice. *UC Irvine School of Law Research Paper No. 2015-11*. Available at SSRN: https://ssrn.com/abstract=2550923.

Hayman, S. (2008). *Free Speech & Human Dignity*. New Haven, CT: Yale University Press.

Heiskala, R. (2014). Toward semiotic sociology: A synthesis of semiology, semiotics and phenomenological sociology. *Social Science Information, 53*(1), 35-53.

Jamieson, N.J. & Trapeznik, A. (2007). A legislative (logico-linguistic) analysis of the common law components of the Russian constitution. *Transnational Law & Contemporary Problems, 16*, 431-489.

Johnson, A. (2014). 'Dr Shipman told you that…' The organising and synthesising power of quotation in judicial summing-up. *Language & Communication, 36*, 53-67.

Judicial opinion. (n.d.). In *The Law Dictionary*. Retrieved from https://thelaw dictionary.org/.

Jurisprudence. (n.d.). In *The Law Dictionary*. Retrieved from https://thelaw dictionary.org/.

Kananovich, V. (2014). Pussy Riot vs. civil obedience: A critical discourse analysis of two texts. *Iowa Journal of Cultural Studies, 16*, 65-81.

Kananovich, V. (2016). Progressive artists, political martyrs, or blasphemous hussies? A content analysis of the Russian media coverage of the Pussy Riot affair. *Popular Music and Society, 39*(4), 396-409.

Kean-Wah, L. & Ming, T.S. (2010). A critical discourse analysis of the Malaysian smart schools (MSS) conceptual blueprint and implications to implementation. *International Journal of Language, Society and Culture, 30*, 132-154.

Keating, M. (2004). European integration and the nationalities question. *Politics & Society*, *32*(3), 367-388.

Klug, H. (2000). Model and anti-model: The United States constitution and the rise of world constitutionalism. *Wisconsin Law Review, 3*, 597-616.

Knutson, T. J., Komolsevin, R., Chatiketu, P., & Smith, V. R. (2003). A cross-cultural comparison of Thai and US American rhetorical sensitivity: Implications for intercultural communication effectiveness. *International Journal of Intercultural Relations*, *27*(1), 63-78.

Kolsto, P. (2016). *The new Russian nationalism*. Edinburgh University Press.

Krug, P. (2000). The Russian federation supreme court and constitutional practice in the courts of general jurisdiction: Recent developments. *Review of Central and East European Law*, *26*(2), 129-146.

Lerner, M. (1937). Constitution and court as symbols. *The Yale Law Journal*, *46*(8), 1290-1319.

Levy, L. W. (2000). *Original intent and the framers' Constitution*. Rowman & Littlefield.

Li, J. (2009). Intertextuality and national identity: Discourse of national conflicts in daily newspapers in the United States and China. *Discourse & Society*, *20*(1), 85-121.

Lukina, A. (2017). Soviet Union and the Universal Declaration of Human Rights. *Max Planck Institute for European Legal History Research Paper*. Series No. 2017-01. Available at SSRN: https://ssrn.com/abstract=2952292 or http://dx.doi.org/10.2139/ssrn.2952292.

Määttä, S. K. (2007). The foundations of Europe: A critical discourse analysis of the EU constitution. *Critical approaches to discourse analysis across disciplines*, *1*(1), 166-178.

Madison, J. (1961). *The federalist papers: No. 51*. New York: New American Library, 961, 326.

Majority. (n.d.). In *The Law Dictionary*. Retrieved from https://thelawdictionary.org/.

Mason, D.S. (1998). Glasnost, Perestroika and Eastern Europe. *International Affairs (Royal Institute of International Affairs 1944-)*, *64*, 431-448.

Masterpiece Cakeshop v. Colo. Civil Rights Comm'n (2016). Petition for Writ of Certiorari.

Matsuda, M. J. (2018). *Words that wound: Critical race theory, assaultive speech, and the first amendment*. Routledge.

Maryns, K. (2014). The interdiscursive construction of irresponsibility as a defence strategy in the Belgian Assize Court. *Language & Communication*, *36*, 25-36.

McAffee, T. B. (1991). The Bill of Rights, social contract theory, and the rights retained by the people. *Southern Illinois University Law Journal, 16*, 267-305.

McForan, D. W. J. (1988). Glasnost, democracy, and Perestroika. *International Social Science Review, 63*, 165-174.

Means, B. (2002). Criminal speech and the First Amendment. *Marquette Law Review, 86*, 501-539.

Meiklejohn, A. (2000). *Free speech and its relation to self-government*. The Lawbook Exchange, Ltd.

Nix v. Germany, Application no. 35285/16 (2018).

O'Scannlain, D. F. (2017). We are all textualists now: The legacy of Justice Antonin Scalia. *John's Law Review, 91*, 303-313.

Orpin, D. (2005). Corpus linguistics and critical discourse analysis: Examining the ideology of sleaze. *International Journal of Corpus Linguistics, 10*(1), 37-61.

Orr, L. (1986). Intertextuality and the cultural text in recent semiotics. *College English, 48*(8), 811-823.

Paltridge, B. (2012). *Discourse analysis: An introduction* (2nd ed.). Bloomsbury Publishing.

Packard, A. (2002). Copyright term extensions, the public domain and intertextuality intertwined. *Journal of Intellectual Property Law 10*(1), 1-32.

Panfilov, O. (2006). *Rebirth of Russian nationalism.*

Pechota, V. (1994). Foreign affairs in the new constitution of the Russian Federation. *Parker School Journal of Eastern European Law, 1*, 521.

Piet, Remy. (2014, July 31). Russia: RIP freedom of speech? *Aljazeera*. Retrieved from https://www.aljazeera.com/indepth/opinion/2014/07/russia-rip-freedom-speech-2014731823530549.html.

Post, R. C. (1991). Racist speech, democracy, and the First Amendment. *William and Mary Law Review, 32*(2), 267-328.

Prosic, T. (2015). Cultural hegemony, sobornost, and the 1917 Russian revolution. *Stasis, 3*(2), 204-225.

Pryor Jr., W.H. (2017). Justice Thomas, criminal justice, and originalism's legitimacy, Y*ale Law Journal Forum 127*, 173-181.

Raisch, M. (2008). Codes and hypertext: The intertextuality of international and comparative law. *Syracuse Journal of International Law and Commerce 35*(2), 309-340.

Raitt, G. (2013). Insights for Legal Reasoning from Studies of Literary Adaptation and Intertextuality. *Deakin Law Review, 18*(1), 191-206.

Rehnquist, W. H. (2007). *The Supreme Court.* Vintage.

Rigby, T. (1970). Bureaucracy and democracy in the USSR. *The Australian Quarterly, 42*(1), 5-14.

Ring, K. (2016, February 16). Antonin Scalia was a great jurist for criminal defendants. *Reason*. Retrieved from https://reason.com/archives/2016/02/16/antonin-scalia-was-a-great-jurist-for-cr.

Russ. Const. (1993).

Saletan, W. (2017, March 31). Hate makes us weak: How Russia exploits American racism and xenophobia for its own gain. *Slate*. Retrieved from https://slate.com/news-and-politics/2017/04/how-russia-capitalizes-on-american-racism-and-xenophobia.html.

Santa Ana, O., Waitkuweit, K., & Hernandez, M. (2017). Blood, soil, and tears: Conceptual metaphor-based critical discourse analysis of the legal debate on US citizenship. *Journal of Language and Politics, 16*(2), 149-175.

Sarangi, S., & Slembrouck, S. (2014). *Language, bureaucracy and social control*. Routledge.

Sauer, C. (1988). Structures of concensus-making and intervention: The concept of Nazi language policy in occupied Holland ("Deutsche zeitung in den Niederlanden" 1940-1945). In R. Wodak (Ed.), *Language, Power and Ideology. Studies in Political Discourse* (3-38). Amsterdam: Benjamins.

Scalia, A. (1997). Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws. *Tanner Lectures on Human Values, 18*, 77-122.

Scalia, A. (2018). *A matter of interpretation: Federal courts and the law*. Princeton University Press.

Schwartz, H. (1991). The new East European constitutional courts. *Michigan Journal of International Law, 13*, 741-785.

Segal, J. A., & Cover, A. D. (1989). Ideological values and the votes of US Supreme Court justices. *American Political Science Review, 83*(2), 557-565.

Sherfinski, D., Swoyer, A., & Dinan, S. (2018, September 6). Accusations fly against Kavanaugh in craziest Supreme Court confirmation hearings in decades. *The Washington Times*. Retrieved from https://www.washingtontimes .com/news/2018/sep/6/brett-kavanaugh-confirmation-hearings-feature-wild/.

Siemaszko, C. (2016, June 21). Kentucky clerk Kim Davis, who refused to issue marriage licenses to gays, seeks to end case. *NBC News*. Retrieved from https://www.nbcnews.com/news/us-news/kentucky-clerk-kim-davis-who-refused-issue-marriage-licenses-gays-n596476.

Simon, S. A. (2014). *Universal Rights and the Constitution*. SUNY Press.

Singer, J. W. (1995). No right to exclude: Public accommodations and private property. *Northwestern University Law Review*, *90*, 1283-1497.

Slaymaker, G. B. (1903). Competency of evidence relating to physical condition. *Central Law Journal*, *56*, 83-89.

Solum, L. B. (2013). Construction and Constraint: Discussion of Living Originalism. *Jerusalem Review of Legal Studies*, *7*(1), 17-34.

Solum, L. B. (2013). Originalism and constitutional construction. *Fordham Law Review*, *82*, 453-537.

Spark-Smith, L. (2012, August 18). Russian court imprisons Pussy Riot band members on hooliganism charges. *CNN*. Retrieved from http://www.cnn.com/2012/08/17/ world/europe/russia-pussy-riot-trial/index.html.

Stamou, A. (2018). Synthesizing critical discourse analysis with language ideologies: The example of fictional discourse. *Discourse, Context & Media*, *23*, 80-89. http://dx.doi.org/10.1016/j.dcm.2017.04.005.

Steel, A. (1998). Intertextuality and Legal Judgments. *Macarthur Law Review*, *2*, 87-108.

Stephens, R. B. (1952). The Function of Concurring and Dissenting Opinions in Courts of Last Resort. *University of Florida Law Review*, *5*, 394-410.

Stone, G. R. (1987). Content-neutral restrictions. *The University of Chicago Law Review*, *54*(1), 46-118.

Stone, G. R. (2004). *Perilous times: Free speech in wartime from the Sedition Act of 1798 to the war on terrorism*. WW Norton & Company.

Sullivan, K. M. (2010). Two concepts of freedom of speech. *Harvard Law Review*, *124*(1), 143-177.

Svendsen, K. (2007). The constitutional framework of political powers of the Russian Federation. *Bond Law Review, 19,* 188-224.

Swift v. Tyson, 41 U.S. 1 (1842).

Swiggers, P. (2013). Linguistics through its proper mirror-glass: Saussure, signs, segments. *Semiotica*, *2013*(193), 1-29.

Texas v. Johnson, 491 U.S. 397 (1989).

Textualism. (n.d.). In *Merriam-Webster*. Retrieved from https://www.merriam-webster.com/.

Thompson, J.M. (1996). *A vision unfulfilled: Russia and the Soviet Union in the Twentieth Century*. Lexington, MA: D.C. Heath & Co.

Tochka, N. (2013). Pussy riot, freedom of expression, and popular music studies after the cold war. *Popular Music, 32*(2), 303-311. doi:http://dx.doi.org.ezproxy 1.lib.asu.edu/10.1017/S026114301300007X.

Toolan, M. (1997). What is critical discourse analysis and why are people saying such terrible things about it? *Language & Literature, 6*(2):83-103.

Totenberg, N. (2018, June 30). Justice Kennedy may soon find himself disappointed and his legacy undermined. *NPR*. Retrieved from https://www.npr.org/2018/06/30/624918050/justice-kennedy-may-soon-find-himself-disappointed-and-his-legacy-undermined.

Triandis, H. C. (2018). *Individualism and collectivism*. Routledge.

Tryon, C. (2008). Pop politics: Online parody videos, intertextuality, and political participation. *Popular Communication, 6*(4), 209-213.

Tsai, R. L. (2014). *Eloquence and reason: Creating a first amendment culture*. Yale University Press.

U.S. Const., Am. 1 (1791).

U.S. Constitution, Art. I, sec. 7 (1791).

U.S. Constitution, Art. V (1791).

United Nations. *History of the Document.* Retrieved from http://www.un.org/en/sections/universal-declaration/history-document/index.html.

United States v. O'Brien, 391 U.S. 367 (1968).

Vaara, E., Sorsa, V., & Pälli, P. (2010). On the force potential of strategy texts: a critical discourse analysis of a strategic plan and its power effects in a city organization. *Organization, 17*(6), 685-702.

Van Charldorp, T. C. (2014). "What happened?" From talk to text in police interrogations. *Language & Communication, 36,* 7-24.

van Dijk, T. A. (1993). Principles of critical discourse analysis. *Discourse & Society*, 4(2), 249-283.

van Dijk, T. A. (1995). Aims of critical discourse analysis. *Japanese Discourse, 1*(1), 17-28.

Wade, T. (2000). *A comprehensive Russian grammar*. Malden, MA: Blackwell Publishing.

Where to Obtain Supreme Court Opinions. Retrieved from https://www.supremecourt.gov/opinions/obtainopinions.aspx.

Wilson, A. (2005). *Virtual politics: Faking democracy in the post-Soviet world*. Yale University Press.

Wodak, R. (Ed.). (1989). *Language, power and ideology: Studies in political discourse* (Vol. 7). John Benjamins Publishing.

Wodak, R. & Meyer, M. (2001). *Methods of critical discourse analysis.* London: Sage.

Wodak, R. (2007). Pragmatics and critical discourse analysis: A cross-disciplinary inquiry. *Pragmatics & Cognition*, *15*(1), 203-225.

Wood, Jr., J.E. (1991). The bicentennial of the Bill of Rights. *Journal of Church & State*, *33*(3), 443-452.

Wood, L. A., & Kroger, R. O. (2000). *Doing discourse analysis: Methods for studying action in talk and text*. Thousand Oaks, CA: Sage Publications, Inc.

APPENDIX A

RUSSIAN AND UNITED STATES LEGAL OPINIONS AND TYPES/TOKENS

Table 1

Corresponding Legal Opinions and Type/Tokens

The below appendix provides the number of types and tokens in each legal opinion, with the ratio of each expressed as a decimal in the next column. The closer the decimal is to 1.0, the less variety that exists within the opinions. Correspondingly, the closer the decimal is to 0.0, the greater the variety.

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
1	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 27 maya 1993 g. [Ruling of the Russian Federation Constitutional Court of May 27, 1993], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1993.	720/2327	.30941	*Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994).	2697/19218	14.03%
2	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 19 maya 1993 g. [Ruling of the Russian Federation Constitutional Court of May 19, 1993], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1993.	919/2702	.34012	*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).	2603/16565	15.71%

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
3	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 22 noyabrya 2000 g. [Ruling of the Russian Federation Constitutional Court of November 22, 2000], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2000.	797/2455	.32464	*Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).	3568/27038	13.2%
4	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 20 dekabrya 1995 g. [Ruling of the Russian Federation Constitutional Court of December 20, 1995], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1995.	626/1656	.37802	*Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).	3218/22162	14.52%
5	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 4 marta 1997 g. [Ruling of the Russian Federation Constitutional Court of March 4, 1997], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1997.	705/1745	.40401	*Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).	2325/15959	14.57%

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
6	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 23 noyabrya 1999 g. [Ruling of the Russian Federation Constitutional Court of November 22, 1999], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1999.	1144/3788	.30201	*W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).	2804/15617	17.95%
7	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 30 oktabrya 2003 g. [Ruling of the Russian Federation Constitutional Court of October 30, 2003], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2003.	1412/5628	.25089	*Buckley v. Valeo*, 424 U.S. 1 (1976).	5121/83398	.06140
8	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 noyabrya 2005 g. [Ruling of the Russian Federation Constitutional Court of November 14, 2005], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2005.	1026/2765	.37107	*Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).	5330/55035	.09685

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
9	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 iyuniya 2006 g. [Ruling of the Russian Federation Constitutional Court of June 16, 2006], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2006.	1054/3068	.34355	*McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).	5852/80233	.07294
10	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 iyuliya 2007 g. [Ruling of the Russian Federation Constitutional Court of July 16, 2007], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2007.	1515/5367	.28228	*Elrod v. Burns*, 427 U.S. 347 (1976).	2245/12602	.17815
11	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 31 marta 2011 g. [Ruling of the Russian Federation Constitutional Court of March 31, 2011], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2011.	1387/4758	.29151	*Bartnicki v. Vopper*, 532 U.S. 514 (2001).	2267/12650	.17921

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
12	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 14 fevralya 2013 g. [Ruling of the Russian Federation Constitutional Court of February 14, 2013], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013.	4649/33508	.13874	*Grayned v. City of Rockford*, 408 U.S. 104 (1972).	1355/6455	.20991
13	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 9 iyulya 2013 g. [Ruling of the Russian Federation Constitutional Court of July 9, 2013], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2013.	1337/4216	.31713	*Snyder v. Phelps*, 562 U.S. 443 (2011).	1924/9283	.20726
14	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 23 sentyabrya 2014 g. [Ruling of the Russian Federation Constitutional Court of September 23, 2014], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2014.	2162/7273	.29726	*Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50 (1976).	2425/14665	.16536

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
15	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 iyuniya 2015 g. [Ruling of the Russian Federation Constitutional Court of June 16, 2015], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2015.	1647/5278	.31205	*Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992).	4858/54645	.08890
16	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 26 oktabrya 2017 g. [Ruling of the Russian Federation Constitutional Court of October 26, 2017], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2017.	1410/4149	.33984	*Reno v. ACLU*, 521 U.S. 844 (1997).	2584/15644	.16518
17	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 31 iyuliya 1995 g. [Ruling of the Russian Federation Constitutional Court of July 31, 1995], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1995.	1238/3965	.31223	*Branzburg v. Hayes*, 408 U.S. 665 (1972).	3372/24188	.13941

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
18	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 7 iyuniya 2012 g. [Ruling of the Russian Federation Constitutional Court of June 7, 2012], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2012.	1320/4643	.28430	*Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).	2175/12916	.16840
19	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 27 marta 1996 g. [Ruling of the Russian Federation Constitutional Court of March 27, 1996], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 1996.	762/2028	.37574	*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).	2758/16953	.16269
20	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 18 iyuliya 2012 g. [Ruling of the Russian Federation Constitutional Court of July 18, 2012], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2012.	1513/6125	.24702	*Nixon v. Warner Comm'ns, Inc.*, 435 U.S. 589 (1978).	1751/9429	.18570

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
21	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 24 fevralya 2004 g. [Ruling of the Russian Federation Constitutional Court of February 24, 2004], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2004.	1605/5084	.31570	*Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).	3143/20955	.14999
22	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 18 iyuliya 2003 g. [Ruling of the Russian Federation Constitutional Court of July 18, 2003], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2003.	1334/4522	.29500	*Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974).	2762/22597	.12223
23	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 1 aprel'ya 2003 g. [Ruling of the Russian Federation Constitutional Court of April 1, 2003], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2003.	895/2346	.38150	*Johanns v. Livestock Mkt'g Ass'n*, 544 U.S. 550 (2005).	1826/9665	.18893

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
24	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 3 marta 2004 g. [Ruling of the Russian Federation Constitutional Court of March 3, 2004], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2004.	1127/4001	.28168	*Griswold v. Connecticut*, 381 U.S. 479 (1965).	2638/18128	.14552
25	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 28 iyuniya 2007 g. [Ruling of the Russian Federation Constitutional Court of June 28, 2007], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2007.	2377/8646	.27492	*Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).	2477/17465	.14183
26	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 28 fevralya 2008 g. [Ruling of the Russian Federation Constitutional Court of February 28, 2008], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2008.	1672/6651	.25139	*Repub. Pty. of Minn. v. White*, 536 U.S. 765 (2002).	2777/18151	.15299

	Russian Supreme Court Opinion	Type/Token	Ratio	U.S. Supreme Court Opinion	Type/Token	Ratio
27	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 30 iyuliya 2011 g. [Ruling of the Russian Federation Constitutional Court of June 30, 2011], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2011.	1546/4997	.30939	*Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968).	1333/6619	.20139
28	Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 27 dekabrya 2012 g. [Ruling of the Russian Federation Constitutional Court of December 27, 2012], Sobranie Zakonodatel'stva Rossiiskoi Federatsii [SZ RF] [Russian Federation Collection of Legislation], 2012.	2587/11319	.22855	*Garcetti v. Ceballos*, 547 U.S. 410 (2006).	2265/12126	.18679