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The problem of interpretation is one which plagues the reader of any document. The issue revolves around a fundamental question: how can one accurately gauge the meaning of a given text? When Hamlet remarks that "conscience does make cowards of us all," how should the reader unearth the meaning buried in this enigmatic phrase? A myriad of solutions abound, all valid methods for discovering the meaning behind Shakespeare's words. Such works of art allow a variety of meanings; therefore, conflicting methods of interpretation are not typically problematic. However, when the document in question is not an artistic text, but a legal text, the problem of interpretation becomes all the more urgent. Law, as an embodiment of justice, demands a consistent interpretation applied equally to all individuals who come under its jurisdiction. Justice cannot be served by laws whose meanings are indeterminate. Therefore, America has given the responsibility to its judicial branch to interpret such legal texts and give them definitive meaning so that they may be applied fairly. Judges interpret the law – but the question remains: "How?"

Within the past century, two members of the Supreme Court have tackled this question directly, both on the bench and in the public arena. These justices, Hugo L. Black and Antonin Scalia, have made forceful and consistent arguments that such interpretations of legal texts must rest upon the meaning inherent in words themselves. This interpretive theory is commonly referred to as "textualism," and it is due to the unrelenting efforts of these two men that textualism has gained a significant position within the American legal culture. These justices argue that by focusing primarily on the inherent meaning of the words, textualism is the only method of interpretation which offers an objective understanding of the text. In examining these two figures, one is struck by the similarity of their interpretive philosophies, yet equally striking is the differing conclusions the application of these philosophies has led them concerning several key legal issues. These differences necessitate investigation, as they suggest that the textualist position may not be as "objective" as its defenders claim. Thus, by examining the philosophy of textualism as understood by Justice Black and Justice Scalia and then analyzing its application in key First Amendment cases, it will be shown that textualism cannot offer a purely objective understanding of legal

texts, nor can it prevent the influence of subjective factors in their interpretations. Indeed, the differences observed in the decisions reached by these two justices are indicative of their differing beliefs and biases, despite their repeated claims to the contrary.

The first step in this analysis is to examine and compare the textualist philosophies of these two justices. Justice Black neatly summed up his understanding as follows:

> [T]he courts should always try faithfully to follow the true meaning of the Constitution and other laws as actually written, leaving to Congress changes in its statutes, and leaving the problem of adapting the constitution to meet new needs to constitutional amendments approved by the people under constitutional procedures.[1]

Though the court ultimately holds the power to interpret the Constitution, Black argues that it must practice restraint in doing so. Interpretation must not be used in such a way as to add new meaning to the text, but only to uncover the meaning already existing within the text.

> I strongly believe that the public welfare demands that constitutional cases must be decided according to the terms of the Constitution itself and not according to the judges' view of fairness, reasonableness, or justice... I do fear the rewriting of the Constitution by judges under the guise of interpretation.[2]

An oft cited example of this textual limitation is the "right to privacy" established in *Griswold v Connecticut*. Black dissented from this ruling, holding that the Constitution contained no provision establishing a right to privacy. Though he recognized that the Constitution protects certain aspects of privacy at certain times, as in the case of the Fourth Amendment's "search and seizure" clause, he refused to recognize the general right to privacy articulated in the majority decision due to the lack of textual basis for such a right.[3] The text thus overrides all other considerations.

Black points out that the benefit of such a system of interpretation is that it serves to limit the power of the government, specifically the Judiciary.

> Our written Constitution means to me that where a power is not in terms granted or not necessary and proper to exercise a power that is granted, no such power exists in any branch of the government – executive, legislative, or judicial. Thus, it is language and history that are the crucial factors which influence me in interpreting the Constitution – not reasonableness or desirability as determined by the Supreme Court.[4]

As unelected, life-tenured officials who wield the power of judicial review and are charged with the task of interpreting the Constitution, the Judiciary holds a unique position within the Federal structure. Often, the court acts as a counter-majoritarian force, protecting the rights of minorities against the tyranny of the majority and ensuring the liberties of all individuals. Yet it is this power to act against the will of the majority that also makes the Judiciary a threat to liberty. "[U]nfortunately, judges have not been immune to the seductive influences of power, and given absolute or near absolute power, judges may exercise it to bring about changes that are inimical to freedom and good government."[5] History shows that judges have exercised their power to unduly impose their own beliefs on the people, and Black is fearful of such misuse of power. This is the basis for his relentless insistence that judges must base their judgments on the text of the Constitution; the text acts as a limit to judicial power. Justices without such limit "roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."[6]

This conviction leads Black to oppose the philosophy of the "Living Constitution," which is a theory of interpretation which holds that the meaning of the Constitution is not fixed by the text, but instead evolves over time to meet changing circumstances. This process of evolution is carried out primarily by the courts, which are charged with finding a "reasonable" interpretation in light of current standards. Black vehemently rejects this theory. As he states in his *Griswold* dissent:

> I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this court is charged with a duty to make those changes. For myself,

> I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our fathers, and being somewhat old-fashioned I must add that it is good enough for me.[7]

Black is careful to note, however, that the critique is not intended to vilify every justice who ascribes to this theory. He points out that quite often the intentions of such justices are noble; it is their method which must be repudiated as the threat.[8] Black confesses, "I deeply fear for our constitutional system of government when life-appointed judges can strike down a law passed by Congress or a state legislature with no more justification than that the judges believe the law is 'unreasonable.'"[9]

Justice Scalia shares many of Justice Black's concerns over judicial interpretation and power, as well as many of his proposed solutions. Scalia identifies himself as a textualist:

> I belong to a school, a small but hardy school, called "textualists"... If you are a textualist, you don't care about the intent, and I don't care if the Framers of the Constitution had some secret meaning in mind when they adopted its words. I take the words as they were promulgated to the people of the United States, and what is the fairly understood meaning of those words.[10]

As with Black, the primary basis for interpretation of a legal test arises from the meaning inherent within said text, and not from outside sources. Scalia's rationale behind such a theory is similar as well, though it is more refined than Black's and as such requires a more detailed examination. His discussion centers around two distinct methods of formulating law: the "common-law" and democratic legislation.

Scalia begins with a discussion of the common-law tradition as it has evolved through history. This tradition, Scalia points out, is one in which law develops not out of the will of the people nor out of their customary practices; instead, Scalia identifies it as law created by and expounded on by judges. It functions by considering the particular facts of a given case and attempting to reach a decision that is fair and reasonable. Two fundamental tools aid this process. The first tool is the doctrine of *stare decisis*, Latin for "let the decision stand," more

commonly known as "precedent." This doctrine holds that the decision reached in a given case becomes a binding rule which will apply to similar cases in the future. The second tool is the technique of "distinguishing," whereby a case currently under consideration is separated from a line of precedent by noting that the facts of the current case are significantly different from previous cases as to nullify *stare decisis* in this unique instance and allow the judge create a new ruling. Scalia likens this process to a game of Scrabble: no prior moves are erased, only amended.[11]

Scalia then contrasts the common-law tradition of law-making with that of democratic legislation. This process works through the codification of a set of general rules by a specific process through which the will of the people becomes law.[12] Yet it is now evident that there exists two differing methods of producing law; one in which law is created by a select few on the basis of their own personal understanding of justice, the other in which the law is produced by will of the majority. Scalia notes "the uncomfortable relationship of common-law lawmaking to democracy..."[13] but quickly acknowledges that the common-law process does serve a needed purpose.[14] His real issue lies with what he identifies as the "*attitude* of the common-law judge – the mind-set that asks, 'What is the most desirable resolution of this case, and how can any impediments to the achievement of that result be evaded?'"[15] Echoing Black's concerns, Scalia fears that this type of judicial decision-making, based on a subjective feeling of justice, opens the door to misuse of judicial power and rulings which run counter to obvious meaning of the text.[16] He points out that any philosophy which allows for an expansion of rights, irregardless of the text, can just as easily reduce those same rights; ultimately, it "is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is."[17]

To combat this tendency, Scalia offers up his version of textualism. The essence of Scalia's position is that the "text is the law, and it is the text that must be observed."[18] Under this theory, judges have no authority to broaden social goals or create new law, but only to textually interpret and apply the existing law.[19] How does one carry out a textual interpretation? According to Scalia:

> A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means... [T]he good textualist is not a literalist, neither is he a nihilist.

> Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible... In textual interpretation, context is everything... [20]

Once the meaning of the text is properly ascertained, the justice is bound by its prescriptions. In effect, all pertinent decisions have already been made by the text; the judge simply applies what is written. Again, the meaning inherent within the text acts as a limit on judicial power.

Thus, in the preliminary analysis of Justice Black's and Justice Scalia's versions of textualism, it would seem that there is little disagreement between the two men. Both fear the threat of an unrestrained judiciary, and both hold that only an adherence to the meaning inherent within the text can properly limit judicial power. Both adamantly oppose any interpretative theory which allows judges to construe the meaning of a text based on subjective understandings of "fairness" or "reasonableness," and both recognize that the legislative branch, via the amendment process, is the proper source of any changes to the meaning of the Constitution. Yet in their respective applications of textualism, Justices Black and Scalia arrive at positions which are inconsistent. To illustrate this fact, this analysis now turns to and examination of their respective rulings in key First Amendment cases.

The text of the First Amendment appears simple enough: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[21] Indeed, the relative straightforwardness of its language seems to invite a pure textual analysis. Yet hidden pitfalls wait within these simple lines. It is here that the flaws of textualism, as well as the fundamental differences between Justices Black and Scalia, will become apparent.

The first clause of the amendment holds that "Congress shall make no law respecting the establishment of religion." In the case of *Everson v Board of Education of Ewing TP.*, Justice Black, speaking for the court, ruled on the constitutionality of a New Jersey law allowing the reimbursement of the expenses connected with transporting one's children to school. Students attending religious schools were eligible for this program. Black begins with an analysis of the historical conditions leading to the Establishment Clause; he notes that the clause was designed as a reaction to the entanglement of church and state common in Europe, and the persecutions which inevitably followed. He then

points to the arguments of Jefferson and Madison against Virginia support the state's established church via a general tax as providing the stimulus for the clause. Informed by the historical evidence, Black's textualism leads him to interpret the Establishment Clause as such:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion... In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[22]

However, Black sees the reimbursement program not as a government support of religion, but instead as a social welfare program designed to assist in transporting children to school. Black concludes that the "First Amendment has erected a wall between church and state... We could not approve of the slightest breach. New Jersey has not breached it here."[23]

In the case of *Lemon v Kurtzman*, Black further develops his Establishment Clause jurisprudence. The case in question involved a state tax to subsidize the cost of instructing secular courses incurred by private schools. Only those courses which corresponded to courses taught in the public school system would be eligible, and only the costs of the teacher's salary, books, and other relevant materials would be covered. The court ruled that this tax was unconstitutional, to which Black joined the concurring opinion:

> [T]here are those who have the courage to announce that a State may nonetheless finance the *secular* part of a sectarian school's educational program. That, however, makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries. A [secular] class in a parochial school is not a separate institute; it is part of the organic whole which the State subsidizes... The school is an organism living on one budget. What the taxpayers give for salaries of those who teach only the humanities or science without any trace of

> proselytizing enables the school to use all of its own funds for religious training.[24]

Here there could be no confusion; the state was directly supporting a religious institution, albeit only one aspect of it. This directly conflicts with Black's textual understanding of the clause and cannot be upheld.

In contrast, Justice Scalia's treatment of the Establishment Clause directly contradicts Black's interpretation as developed in both *Emerson* and *Lemon*. In particular, the rulings in *Agostini v Felton* and *Zelman v Simmons-Harris* directly challenge Black's jurisprudence. Scalia did not write a separate opinion in either of these cases; he did join the majority opinions, therefore the arguments presented within these opinions can be regarded as having his approval.

In *Agostini v Felton,* the issue at hand was whether or not public school employees could provide remedial education to private school students at the expense of the state, all on the premises of the private institution. The court ruled that such services were constitutional. The majority opinion held that:

> We have departed from the rule... that all government aid that directly aids the educational function of religious schools is invalid... Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause... We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause...[25]

As a member of this majority, Scalia is specifically denying Black's interpretation of the Establishment Clause that any and all direct aid to religious institutions are prohibited. Instead, he endorses a reading of the clause which holds that the government may supply aid to such institutions, insofar as that aid is neutrally provided to all parties. So long as the government does not single out one religion as the lone recipient of such benefits, nor does it explicitly act to exclude a religion from such benefits, it does not engage in the "establishment of religion."

This reading of the text is again supported by Scalia in the case of *Zelman v Simmons-Harris*. At issue here was Ohio's Pilot Project Scholarship Program, in which the state provided vouchers to parents

with students in the Cleveland city school system. These vouchers could then be used to pay tuition costs at both religious and nonreligious private school. Again the majority held that:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions...[26]

Taken together, these two cases give clear evidence as to Scalia's reading of the Establishment Clause. Scalia's textualism leads him to an understanding of the clause which posits that insofar as government support is neutral, i.e. it does not favor one religious group over another, it is valid. This position is fundamentally opposed to Black's, which holds that any government support of religious is unconstitutional.

How then does Black's textual reading of the Establishment Clause differ from Scalia's reading? Simply put, by the context within which they place the clause. Black views (and thereby understands) the clause in light of the history which preceded its adoption; specifically that America was a destination for those seeking to escape the persecution of state-sponsored religion in Europe and that some Founders, such as Jefferson and Madison, fought to prevent any similar interaction from occurring here.[27] Yet Scalia places the clause in a different context; he views and understands the clause in light of the history which followed its adoption. In *Lee v. Weisman*, Scalia argued:

> Three Terms ago, I joined an opinion recognizing that the Establishment Clause must be construed in light of the "[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage." That opinion affirmed that "the meaning of the Clause is to be determined by reference to historical practices and understandings..." As we have recognized, our interpretation of the Establishment Clause should "compor[t] with what history reveals was the contemporaneous understanding of its guarantees."[28]

Again, Scalia's interpretation of the clause is informed by his understanding of how the clause has been traditionally viewed and applied by American society after its adoption; namely, the clause did not serve as an absolute wall between church and state. Therefore, Scalia ascribes to the "neutral applicability" interpretation of the clause. As shown, two differing contexts lead to two differing textually-based interpretations of one singular statement of right.

However, one difference is not sufficient to prove the argument offered here. The analysis continues, now examining the views of Black and Scalia regarding the Free Exercise Clause, which states "Congress shall make no law... prohibiting the free exercise [of religion]." Though Black did not write an opinion in *Sherbert v Verner,* he did join the majority opinion. Thereby one can grasp his position. In this case, Adell Sherbert has been fired from her job because her religious beliefs precluded her from working on Saturdays. She was the denied unemployment benefits because she was not willing to accept jobs requiring her to work on Saturday. In response, she sued the state, claiming that the unemployment regulations constituted a violation of her right to free exercise. The majority ruled in her favor, holding that the regulation did indeed violate her right to free exercise.

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[29]

The court acknowledged the violation of Sherbert's rights, but then went a step further and devised a test whereby it could discern whether any future suits brought under the Free Exercise Clause were valid. First, the majority held, to survive a Free Exercise challenge, the state must show that the regulation in question protects an issue which represents a "strong state interest." Secondly, the state must "demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights."[30] Together these two prongs form what is known as the "Sherbert Test," and represent a extra grant of

protection of the Free Exercise Clause and a principled statement by Justice black as to the need for and extent of First Amendment freedoms.

Justice Scalia's views on the Free Exercise Clause can be found in the case of *Employment Division, Department of Human Resources of Oregon v Smith*. In this case, two members of the Native American Church – Alfred Smith and Galen Black – were fired from their jobs because they had taken peyote during a Native American Church ceremony. They subsequently applied for and were denied unemployment benefits because they had been fired for "misconduct." The two sued under the Free Exercise Clause, citing the *Sherbert* case as precedent that a state cannot deny unemployment benefits due to one's unwillingness to abandon a religious activity. Scalia wrote the majority opinion, holding that:

> Respondents... seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice... As a textual matter, we do not think the words must be given that meaning... We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate... the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability..."[31]

In his opinion, Scalia wholly abandons the *Sherbert* test in favor of the new standard created here – that of a "valid and neutral law of general applicability." Such a standard holds that insofar as the law in question: a) represents a valid exercise of the state's police power; b) is neutral on its face (i.e. neither benefiting nor penalizing any given religion); and c) is generally applicable, it does not violate the Free Exercise Clause, even if its application acts to hinder a given religion. Such a standard is required, for to "make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs... permitting him, by virtue of his beliefs, 'to become a law unto himself...' contradicts both constitutional tradition and common sense."[32]

Once again, two different interpretations of the same constitutional text arise from this analysis. In Black's reading of the

clause, we see a concern for the protections afforded by the clause and an interpretation that seeks to limit legislative power. Scalia's reading, on the other hand, is quite the opposite. His concern is for the traditional understanding of the clause and thus offers an interpretation which seeks to instead limit the restrictions that may be placed on legislative power.

The final clause of the First Amendment to be examined here states that "Congress shall make no law... abridging the freedom of speech." Two critical questions arise out of this clause. First, to what extent is the government prohibited from making law which regulates speech? Second, what constitutes "speech?" Not surprisingly, the two textualists in question do not agree among themselves as to the answer to either of these questions.

Looking to the first issue, Black takes an "absolutist" stand with regard to the prohibitions aimed at government concerning the freedom of speech. His dissent in the case of *Dennis v United States* illustrates his position:

> Undoubtedly, a governmental policy of unfettered communication of ideas does entail dangers. To the Founders of this Nation, however, the benefits derived from free expression were worth the risk. They embodied this philosophy in the First Amendment's command that "Congress shall make no law... abridging the freedom of speech, or of the press..." I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere "reasonableness."[33]

Black argues for a literal reading of the First Amendment, meaning that Congress cannot pass any law whatsoever that serves to prohibit speech. The Founders did not qualify the amendment, nor did they place any vague text within the statute. The command is simple and straightforward: "Congress shall make *no law*..."

In *Street v New York*, Black was confronted with the second question – is the burning of the American flag protected by the First Amendment's guarantee of free speech? His answer was firm. Relying on the oft-cited distinction between "expression" and "action," he argued that:

> [T]he offense which [the Court of Appeals] sustained was the burning of the flag and not the making of any statements about it... It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American flag an offense. It is immaterial to me that words are spoken in connection with the burning. It is the burning of the flag that the State has set its face against.[34]

Here, Black's textualism leads him to a literal interpretation of "speech" as speech (i.e. vocal expressions). The necessity for this interpretation is apparent; he has already ascribed to a literal interpretation of the amendment, as shown above. Furthermore, he cannot consistently argue that Congress is forbidden to regulate speech and then declare that action can fall under the category of speech. These two issues are intricately bound together.

Scalia, though, takes a different approach to the First Amendment's Free Speech Clause. Writing for the majority in the case of *R.A.V. v City of St. Paul, Minnesota*, Scalia notes that

> From 1791 to the present, however, our society, like other free but civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality..." We have recognized that "the freedom of speech" referred to by the First Amendment does not include a freedom to disregard these traditional limitations: [obscenity, defamation, and "fighting words."] What they mean is that these areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content (obscenity, defamation, etc.)[35]

Justifying his position by an appeal to tradition as the proper context for understanding the clause, Scalia holds that there exist certain classes of expression which have always been subject to regulation. As such, there is no basis for assuming that the Free Speech Clause applies to these classes of expression.

As to the second question regarding what constitutes speech, Scalia is willing to accept that actions can be expressive and therefore afforded some protection under the First Amendment. In the case of *Texas v Johnson*, Scalia joined the majority opinion, which held that the act of flag-burning did constitute protected speech. The court found that

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea..." we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments..."[36]

Thus construed, the majority had little problem accepting that Johnson's act of flag-burning did constitute "speech" and was afforded enough protection by the constitution to render his indictment under a Texas statute prohibiting such flag-burning unconstitutional.

The issue here should be clear – though Justices Black and Scalia both espouse the judicial philosophy of textualism, and though their formulations of this philosophy are almost identical, the particular findings reached as a result of their application of textualism are markedly different. This presents a problem for the textualist. If textualism provides a means for uncovering the objective meaning inherent within the text, thus saving the judiciary from the dangers of subjective interpretation, why do these justices repeatedly reach decisions that stand in such stark opposition with each other? The only possible answer is this: textualism is not as objective as its adherents claim it to be. Indeed, it seems to be just as susceptible to the influence of subjective beliefs and biases as any other theory of interpretation. By comparing the observed applications of the textualist philosophy, two uniquely personal dispositions become apparent.

Justice Black arrived on the court following Franklin D. Roosevelt's crucial "showdown" with the Supreme Court over the New Deal. The Court had consistently thwarted Roosevelt's programs through their use of the Due Process Clause to implement their own "reasonable" understanding of economic liberties. Black, along with the other Roosevelt appointees, reacted against this excessive use of judicial

authority and formulated his textualist philosophy as a counter to the economic reading of the Due Process Clause. His literalism arose out of this background as a means to limit a seemingly unrestrained judiciary without receding into judicial inaction, thereby still retaining the ability to enforce the explicit guarantees of the Constitution. By understanding his background, one can better understand the overwhelming emphasis he continued to place on interpreting the text in a literal fashion, holding that the rights guaranteed by the First Amendment mean no more and no less than what they literally say.

This literalist tendency also led him to understand the rights promulgated within the Bill of Rights as absolute prohibitions against the government. Thus, when deciding cases, Black was prone to limit democratic legislation in favor of the explicit, literal meaning he finds in the Constitution. This disposes him to a position of judicial activism, whereby he is quite willing to impress his understanding of the rights afforded by the Constitution upon the will of the majority. Finally, this explains his selection of historical context when discussing these rights; he is disposed to select that context which emphasizes the design of the Constitution and its provisions, and not how subsequent generations understood the text.[37]

Justice Scalia, on the other hand, arrived at the court on the crest of a conservative reaction against the perceived judicial excesses of the Warren Court. Scalia also sought a means by which to curb the excesses of a Judiciary seemingly out-of-control, and as did Black, he formulated a textualist approach to interpretation as a means of solving this problem. Yet while Black's textualism was grounded in a literal interpretation of the text which both limited and increased judicial power in various respects, Scalia's textualism seems to be more so rooted in a wholesale attempt to limit judicial power and defer to the will of the majority in most issues, save instances of an unavoidable Constitutional mandate. This disposes Scalia to limit the protections of given rights in the face of conflicting democratic legislation. Furthermore, it explains his tendency to contextualize specific his understanding of the Constitution in terms of how the generations after ratification traditionally understood the text, thus diminishing the capability of the judiciary to exercise its authority.[38]

If textualist interpretations are so thoroughly infused with the personal predilections of the justice interpreting the text, then the quest for an objective determination of legal texts may be impossible. How can it not? Indeed, it is now uncertain as to what "textualism" actually means: Black represents one idea, Scalia another. Thus the discussion has come full circle. The question which began this inquiry remains the

unanswered question at the end – "How can one accurately gauge the meaning of a given text?"

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[1] Hugo LaFayette Black, *A Constitutional Faith* (New York: Alfred A. Knopf, Inc., 1968) xvi.
[2] Ibid, 14.
[3] Griswold v Connecticut, 381 U.S. 479 (1965), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=381&page=479
[4] Black, *A Constitutional Faith,* 8.
[5] Ibid, 12.
[6] Black, *A Constitutional Faith*, 23-36.
[7] Griswold v Connecticut.
[8] Black, *A Constitutional Faith*, 14.
[9] Ibid, 24.
[10] Antonin Scalia, "A Theory of Constitutional Interpretation," Remarks at The Catholic University of America, Washington D.C., October 18, 1996, accessed on 28 March 2006; available from http://personal.ashland.edu/~cburket1/POLSC%20370%20FALL%2005/POLSC370HANDOUTSCONSTITUTIONALINTERPRETATION.pdf
[11] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997) 1-9.
[12] Ibid, 9-10.
[13] Ibid, 10.
[14] Ibid, 12.
[15] Ibid, 13.
[16] Ibid, 16-23.
[17] Ibid, 22, 47.
[18] Ibid, 22.
[19] Ibid, 23.
[20] Ibid, 23-4, 37.
[21] U.S. Constitution, amend. 1.
[22] Everson v Board of Education of Ewing TP., 330 U.S. 1 (1947), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=330&page=1
[23] Ibid.
[24] Lemon v Kurtzman, 403 U.S. 602 (1971), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=403&page=602
[25] Agostini v Felton, 521 U.S. 203 (1997), accessed on 25 March 2006; available from

http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=521&page=203

[26] Zelman v Simmons-Harris, 536 U.S. 639 (2002), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-1751

[27] Everson v Board of Education of Ewing TP.

[28] Lee v Weisman, 505 U.S. 577 (1992), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=505&page=577

[29] Sherbert v Verner, 374 U.S. 398 (1963), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=374&page=398

[30] Ibid.

[31] Employment Division, Department of Human Resources of Oregon v Smith, 494 U.S. 872 (1990), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=494&page=872

[32] Ibid

[33] Dennis v United States, 341 U.S. 494 (1951), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=341&invol=494

[34] Street v New York, 394 U.S. 576 (1969), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=394&invol=576

[35] R.A.V. v City of St. Paul, Minnesota, 505 U.S. 377 (1992), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=505&page=377

[36] Texas v Johnson, 491 U.S. 397 (1989), accessed on 25 March 2006; available from http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=491&page=397

[37] Michael J. Gerhardt, "A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia," *Boston University Law Review* 74, no. 1 (January 1994) : 54-57. accessed on 4 April 2006; available from http://web.lexis-nexis.com.fetch.mhsl.uab.edu/universe/printdoc

[38] Ibid, 57-62.