1994

A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia

Michael J. Gerhardt

ARTICLES

A TALE OF TWO TEXTUALISTS: A CRITICAL COMPARISON OF JUSTICES BLACK AND SCALIA

MICHAEL J. GERHARDT*

The idea that Justices Hugo Black and Antonin Scalia have anything in common jurisprudentially is counterintuitive. Justice Black is associated with the progressive social and economic legislation symbolized by the New Deal and with judicial activism in protecting the poor and disenfranchised.[1] He is beloved by many liberals as a champion of individual rights, especially freedom of speech and of the press. In contrast, Justice Scalia is revered by conservatives as a true believer—combating the rising tide of liberalism, big government, and judicial activism—set on restoring traditional notions of federalism and judicial restraint.[2] Any effort to liken these two Justices makes both liberals and conservatives recoil.

* Professor of Law, Marshall-Wythe School of Law, The College of William and Mary. B.A. Yale University; M.Sc. London School of Economics; J.D. University of Chicago. I am grateful for the encouragement and helpful comments on earlier drafts I received from Marc Arkin, Erwin Chemerinsky, George Cochran, Neal Devins, Jill Fisch, Tracy Higgins, Michael Herz, Sandy Levinson, Chip Lupu, Tracey Maclin, John McGinnis, Peter Shane, Bill Treanor, Steve Wermiel, and Ron Wright.

[1] *See generally* HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION 3-11 (1992) (examining the collaborative relationship between Justices Black and Douglas during their years on the Supreme Court together); GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 177-439 (1977) (examining Justice Black's judicial philosophy and decision making); JOHN P. FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949) (sketching the biography of Justice Black and presenting some of his economic regulation and equal protection opinions from his first 10 years on the Court); MARK SILVERSTEIN, CONSTITUTIONAL FAITHS: FELIX FRANKFURTER, HUGO BLACK, AND THE PROCESS OF JUDICIAL DECISION MAKING 90-209 (1984) (exploring Justice Black's political values and his move toward absolutism in due process and First Amendment decision making).

[2] *See generally* Richard A. Brisbin, Jr., *The Conservatism of Justice Scalia*, 105 POL. SCI. Q. 1 (1990) (arguing that Justice Scalia's record on the Court reflects his belief in judicial restraint and deference to majoritarian decision making); Symposium, *The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991) (containing essays describing and critiquing Justice Scalia's constitutional jurisprudence by Judge Alex Kozinski, Robert A. Burt, David A. Strauss, Mark V. Tushnet, Richard D. Friedman, Walter Hellerstein, Larry Kramer, Peter B. Edelman, Toby Golick, Stephen

Nevertheless, this Article seeks to improve our understanding of Justices Black's and Scalia's approaches to constitutional adjudication by examining for the first time[3] how each would evaluate the other's textualism.[4] It reveals their significant methodological and substantive similarities, including their comparably intense and persistent proclamations of fidelity to the constitutional text. This Article will show, however, that textualism only partly explains both Justices' approaches to constitutional adjudication. It suggests that, despite the efforts of both Justices to identify an objective meaning for each part of the Constitution, neither Justice has avoided basing his interpretation of the document on values not grounded in the text. Both have relied heavily on their personal and political judgments regarding the role of the federal judiciary, which reflect changing attitudes toward judicial activism and restraint.

The first two parts of this Article describe the striking similarities between Justices Black and Scalia. Part I examines their similar interpretive methodologies, including their common use of bright line tests designed to promote judicial restraint and to impose limitations on legislative power. Part II compares the two Justices' similar substantive positions regarding the Commerce Clause, the Equal Protection Clause, substantive due process, separation of powers, and, to a limited extent, freedom of speech and search and seizure.

Part III explores perhaps the most striking substantive differences between Justices Black and Scalia—their differing attitudes toward freedom of religion cases and tradition (or longstanding majoritarian prac-

---

Wizner, and George Kannar); David P. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 899 (1993) (briefly contrasting Justice Black's liberal and Justice Scalia's conservative textualism); Jean M. Meaux, Comment, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and State*, 62 TUL. L. REV. 225 (1987) (exploring Justice Scalia's theory of judicial restraint through his pre-appointment writings and decisions, and through his voting during the 1986 Term).

[3] Although both Justices have been compared to other justices, no detailed comparison of the two has been undertaken. *Cf.* BALL & COOPER, *supra* note 1, at 3-11 (comparing the jurisprudence of Justices Black and Douglas); Brisbin, Jr., *supra* note 2, at 25-27 (tracing many of Justice Scalia's views back to those of Justice Felix Frankfurter); Peter B. Edelman, *Justice Scalia's Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950s*, 12 CARDOZO L. REV. 1799, 1799-1801 (1991) (drawing parallels between Justices Scalia and Frankfurter); Sanford Levinson, *The Confrontation of Religious Faith and Civil Religion: Catholics Becoming Justices*, 39 DEPAUL L. REV. 1047, 1074-81 (1990) (exploring the role of morality in Justice Scalia's decision making).

[4] *See* MICHAEL J. GERHARDT & THOMAS D. ROWE, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 39-40 (1992) (defining "textualists" as those scholars and jurists who view the constitutional text as the only or primary legitimate source of constitutional decision making).

tices) as a source of constitutional meaning. This part finds that the Justices' respective judgments about judicial activism and restraint illuminate their disagreement about the appropriate role of tradition and majoritarianism in constitutional adjudication. This conflict is reflected in the contrast between Justice Black's tendency to follow his reading of the text, regardless of the consequences, and Justice Scalia's use of judicial restraint as a default rule to supplement the constitutional text. Consequently, Justice Scalia has found Justice Black's position in freedom of religion cases too activist because it enhanced judicial power at the expense of tradition, while Justice Black would have likely denounced Justice Scalia's use of tradition to defeat individual rights claims as sacrificing the constitutional text to enhance majoritarianism and judicial restraint.

Part IV suggests that textualism provides an incomplete picture of Justices Black's and Scalia's constitutional interpretation. It shows that, despite their protestations to the contrary, both Justices Scalia and Black ultimately have relied on something outside the constitutional text to interpret it. This part suggests that in constitutional adjudication Justices Black and Scalia have depended primarily on their political and personal judgments regarding the proper role of the judiciary,[5] which reflect changed attitudes about judicial activism and restraint.

Part V suggests that Justices Black's and Scalia's reliance on concepts or judgments outside the constitutional text exposes a potential problem with textualism in general. Textualism may fail fully to explain constitu-

---

[5] *See generally* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 15 (1991) (asserting that readers of the Constitution, including judges, cannot avoid making some value judgments when interpreting it); Erwin Chemerinsky, *The Supreme Court 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 94-96, 100-04 (1989) (discussing the inevitable role of personal value choices in judicial decisions and proposing that open debate about such choices should replace the current practice of hiding or masking them); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 138 (1991) (proposing increased candor among the justices); Richard Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 204, 206 (1981) (arguing that deciding constitutional questions involves considerations outside the text that constitute "preconstitutional rules"); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669, 718-19 (1991) (arguing that one's approach to constitutional interpretation depends heavily on one's moral and political judgments about the role of the judiciary in our society). Of course, the idea that people cannot read a text without drawing on or imputing values from outside of the text is not unique to constitutional scholarship. *See* GERHARDT & ROWE, *supra* note 4, at 64-94 (describing and providing excerpts from articles by Owen Fiss, Sanford Levinson, and Stanley Fish about the relationship between a reader's values and a legal text); Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325, 1325-47 (1984) (arguing that there is no legal text apart from the conventions and values of the reading community).

tional adjudication because it neither recognizes nor makes allowances for the inevitability of relying on moral and political judgments about judicial activism and restraint that turn on factors outside the text of the Constitution. These factors include a justice's professional and personal experiences, character, and the perceived need to subvert or compromise views to preserve fragile coalitions on the Court.

I. JUSTICES BLACK'S AND SCALIA'S COMMON METHODOLOGY

Justices Black's and Scalia's descriptions of the methodology of constitutional interpretation are strikingly similar in two respects. First, they share the view that an unrestrained judiciary bent on deciding cases as it pleases is a serious threat to democratic government and to the sanctity of the written Constitution. Second, they agree on the specific solution of fidelity to the text to combat this common enemy. I consider each similarity in turn.

A. *The Common Enemy*

Justices Black and Scalia have each argued that judicial abuse of discretion poses a grave danger to our democratic institutions and to the primacy of the written Constitution. This danger, in their views, necessitates a systematic theory of constitutional interpretation by which to restrain judges. For example, Justice Black especially feared "the rewriting of the Constitution by judges under the guise of interpreting it."[6] Consequently, he rejected the faith "that the Supreme Court will reach a faster and more desirable resolution of our problems than the legislative or executive branches of government."[7] Rather, he believed that individual liberties were not secure when the judiciary is restrained "only by its own ideas of right and wrong."[8] He was further concerned that, left unchecked, some judges might use their power in ways "inimical to freedom and good government."[9]

Similarly, Justice Scalia has complained that far too many judicial decisions have been made "not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable for it to mean."[10] For Justice Scalia, such unprincipled decision making can threaten individual liberties, because its promise of expanding individual liberties is illusory.[11] According to Justice Scalia, unrestrained judges are just as likely to contract individual rights as they

---

[6] HUGO L. BLACK, A CONSTITUTIONAL FAITH 14 (1968).

[7] *Id.* at 11.

[8] *Id.* at 12.

[9] *Id.*

[10] Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

[11] *Id.* at 855.

are to expand them.[12] In short, for Justice Scalia, "the main danger in judicial interpretation of the Constitution . . . is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge."[13]

B. *The Common Solution*

Justices Black and Scalia also agree on the appropriate solution for restraining unprincipled judicial interference with legitimate majoritarian decision making. Both have espoused a theory of constitutional interpretation that requires judges to hew as closely as possible to the constitutional text. Where the text is clear, this approach requires adhering to its plain meaning. Where the text is unclear, this approach requires adhering to its original meaning.

Justice Black believed that the constitutionality of the exercise of governmental power should be determined by the language and history of the Constitution, not by the justices' assessment of its reasonableness.[14] Further, in response to his colleagues who had routinely balanced governmental interests against individual rights,[15] Justice Black asserted that the

---

[12] *Id.*

[13] *Id.* at 863. Interestingly, neither Justice Scalia nor Justice Black has used the term "countermajoritarian difficulty" to refer to the problem that both have identified as the central dilemma in constitutional adjudication. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 12 (1962). Nevertheless, this classic phrasing captures the essence of their common target or enemy—unprincipled or self-interested judicial interference with the decisions of the people's duly elected representatives. *See generally* GERHARDT & ROWE, *supra* note 4, at 3-14 (describing the relationship between the development of American constitutional theory and "the countermajoritarian difficulty").

[14] For example, Justice Black explained:

> Our written Constitution means . . . 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 government—executive, legislative or judicial. Thus, it is the language and history that are the crucial factors which influence me in interpreting the Constitution—not reasonableness or desirability as determined by justices of the Supreme Court.

BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 8.

[15] Justice Black was very critical of Justices Frankfurter's and Harlan's balancing of competing interests in individual rights cases, especially in the context of freedom of speech. *See* BICKEL, *supra* note 13, at 93-97 (discussing Justice Black's absolutist constitutional interpretations); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975) (examining the flag desecration cases in search of a coherent constitutional test); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912-16 (1963) (discussing "ad hoc balancing" and "absolute" tests in the context of the Supreme Court's failure to develop a satisfactory theory of the First Amendment); Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962) (arguing that balancing has appropriately emerged as the test in First

framers of the Bill of Rights had resolved all of the necessary balancing of constitutional liberties in 1791: "Where conflicting values exist in the field of individual liberties protected by the Constitution, that document settles the conflict."[16] Yet, none of this meant that the Constitution was a dead letter. Rather, Justice Black saw it as "a living document . . . contain[ing] within itself a lasting recognition that it should be changed to meet new demands, new conditions, new times. It provides the means to achieve these changes through the amendment process in Article V."[17]

Justice Scalia expressed similar sentiments concerning the importation of judges' personal preferences into constitutional adjudication. His preferred alternative, however, is to substitute the text, including its original meaning, for a judge's personal preferences. Echoing Justice Black, Justice Scalia urged in a 1990 interview with the *Jerusalem Post*:

> Judges should be restricted to the text in front of them. . . . According to my judicial philosophy, I feel bound not by what I think the tradition is, but by what the text and tradition actually say. The Constitution is an anchor. I don't need it to create change. It's a rock to hold on to.[18]

For Justice Scalia, a judge's task is "'not to determine what seems like good policy at the present time, but to ascertain the meaning of the text.'"[19]

Moreover, Justice Scalia has acknowledged that, where the plain meaning of the text is not dispositive, he relies on the original understanding or

---

Amendment cases despite objections from absolutists like Justice Black); Wallace Mendelson, *On the Meaning of the First Amendment: Absolutes in the Balance*, 50 CAL. L. REV. 821 (1962) (critiquing Franz's Article and the trend toward balancing). In *Konigsberg v. State Bar*, Justice Harlan balanced the kind of speech involved against the state's interest in regulating it in order to sustain the state's denial of bar admission to an applicant who had refused to answer questions about Communist Party membership. 366 U.S. 36 (1961) (rejecting Justice Black's argument that the First Amendment provided absolute protection to "freedom of speech"). In *Bridges v. California*, Justice Black explicitly rejected the Frankfurter-Harlan balancing approach to freedom of speech. 314 U.S. 252, 263-67, 269-71 (1941).

[16] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960).

[17] BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 21; *see also* Black, *The Bill of Rights*, *supra* note 16, at 879 (stating that the balance between competing values in the field of individual liberties "should not be changed without constitutional amendments by the people in the manner provided by the people").

[18] Dan Izenberg, *Clinging to the Constitution*, JERUSALEM POST, Feb. 19, 1990 (quoting Justice Scalia).

[19] George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1303 (1990) (quoting Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987)).

meaning of the Constitution[20] because it "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself."[21] He prefers originalism as a theory of constitutional interpretation because it is "more compatible with the nature and purpose of a Constitution in a democratic system."[22] For Justice Scalia, it is the democratic political process, not particular constitutional guarantees, that ensures that the law reflects contemporary values. In his view, the role of constitutional guarantees is to prevent contemporary majorities from changing the law—short of amending the Constitution—in ways that are incompatible with the values embodied in the original text.[23]

For both Justices, there is a single, immutable, judicially discoverable meaning for each part of the Constitution. Justice Scalia has written that the Constitution is "an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law."[24] By "immersing oneself in the political and intellectual atmosphere of the time,"[25] a judge may discover the underlying values contained in the Constitution. For Justice Scalia, unless judges interpret the text in light of this historical context, the Constitution is meaningless.[26] Similarly, Justice Black asserted that "'in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.'"[27] In his epilogue to *A Constitutional Faith*, Justice Black emphasized that the meaning and promise of the Constitution cannot be understood apart from the unique historical circumstances in which the Constitution was framed. For him, clarifying

---

[20] Scalia, *Originalism: The Lesser Evil*, *supra* note 10, at 852 (citing with approval Chief Justice Taft's opinion for the Court in Myers v. United States, 222 U.S. 52 (1926)).

[21] *Id.* at 864.

[22] *Id.* at 862.

[23] According to Justice Scalia,

> constitutional guarantees . . . prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be set aside.

Id.

[24] *Id.* at 854.

[25] *Id.* at 856.

[26] Antonin Scalia, *Is There an Unwritten Constitution?*, 12 HARV. J.L. & PUB. POL'Y 1, 1 (1989) ("In this way, the written Constitution encompasses a whole history of meaning in the words contained in the Constitution, without which the Constitution itself is meaningless.").

[27] BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 8 (quoting Justice Miller in *Ex Parte* Bain, 121 U.S. 1, 12 (1889)).

this historical understanding of the document required taking each word in it seriously.[28]

C. *The Common Outcomes*

In practice, both Justices Black and Scalia have largely rejected precedent as a legitimate source of constitutional decision making. For both Justices, precedent that conflicts with the plain or original meaning of the constitutional text is not "law" of the same order as the primary sources of constitutional interpretation.[29] Precedent adds a gloss to the constitutional text that should be the ultimate touchstone in every constitutional case. Moreover, the strength of their convictions in the correctness or accuracy of their constitutional visions has emboldened them in urging the Court to set aside any precedent that conflicts with their approaches to constitutional interpretation.[30] Consequently, Justices Black and

---

[28] *Id.* at 65-66. "[T]he Constitution is my legal bible; its plan of our government is my plan and its destiny my destiny. I cherish every word of it, from the first to the last, and I personally deplore even the slightest deviation from its least important commands." *Id.* at 66. Such religious imagery is also not unusual to Justice Scalia, a devout Roman Catholic, who has conceded, for example, that legal views are "inevitably affected by moral and theological perceptions." Antonin Scalia, *Morality, Pragmatism, and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y 123, 123 (1986). Thus, he has found that the keys for being a good Catholic and a good jurist are the same: "'being strong enough to obey'" the relevant law. William Kramer, *Justice Scalia Praises the "Differentness" of Catholics*, L.A. DAILY J., June 1, 1987, at 4 (quoting Justice Scalia). Similarly, he has explained that, as a judge, "'"[y]ou must apply laws you don't like and you don't interject personal biases."'" Kannar, *supra* note 19, at 1319 n.113 (quoting Dixon, *BC Press Grills Scalia*, THE KINGSMAN (Brooklyn College student newspaper), Oct. 23, 1985, at 5 (quoting Justice Scalia)); *see also id.* at 1309-20 (tracing the relationship between Roman Catholicism, particularly the "Baltimore Catechism," and Justice Scalia's constitutional jurisprudence).

[29] *Cf.* Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1689 (1991) (describing the hierarchy of Justice Scalia's sources for constitutional decision making); Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 227, 251 (maintaining that Justice Black tended to reject any precedent that conflicted with his reading of the text or its original meaning). Professor Levinson has likened this conception of constitutional interpretation to Protestantism, which has tended to believe that the Bible (and not its subsequent interpretation) is the source of divine revelation. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 27-30 (1988).

[30] Indeed, both Justices have developed reputations for their refusals to second-guess themselves and for their stubbornness in opposing criticism. *See, e.g.*, JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 155 (1989) (noting that Justice Black not only failed to show any remorse whatsoever regarding his most controversial opinion upholding the internment of Japanese-Americans during World War II, but also that his defense of his position grew bolder over time); Kelman, *supra* note 29, at 251 (suggesting that Justice Black "did not retreat from his pet notions no matter how often or forcefully

Scalia have each argued that *any* precedent deemed wrongly decided or erroneously reasoned should be overruled.[31] To expose the error of a prior decision a justice need only demonstrate that it deviates from the plain or original meaning of the Constitution.

In fact, no two justices in this century have called for overruling more precedents than Justices Black and Scalia.[32] For example, no one on the Court during Justice Black's thirty-four years dissented more often or urged more overrulings than he did.[33] His most notable requests for overrulings occurred in cases involving freedom of speech,[34] incorporation of the Bill of Rights,[35] reapportionment,[36] and the right to counsel.[37] Remarkably, in roughly a fifth of the time Justice Black spent on the

---

his views were dismissed by the Court—not even in cases where the official jurisprudence could be made to yield the same results as his own ideas"). Similarly, Justice Scalia has not hesitated to belittle or to berate those of his colleagues who disagree with him. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring) (likening the Court's allegiance to its twenty-year old *Lemon* test for evaluating Establishment Clause challenges to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried [stalking] our Establishment Clause jurisprudence once again, frightening little children and school attorneys"); Burnham v. Superior Court, 495 U.S. 604, 614 n.3 (1990) (commenting that "one can only marvel at Justice Brennan's assertion"); Michael H. v. Gerald D., 491 U.S. 110, 122 n.2, 124 n.4, 125 n.5, 127 n.6 (1989) (referring to Justice Brennan's dissent as "absurd" and "nonsense").

[31] *Cf.* Gerhardt, *supra* note 5, at 122, 124-25 (describing Justice Scalia's approach to constitutional stare decisis); Kelman, *supra* note 29, at 251-52 (describing Justice Black's approach to constitutional stare decisis).

[32] As one might expect, such argumentation reflects each Justice's considerable self-confidence, refusal to second-guess his own judgment, and readiness to denounce the error of his colleagues. *See* discussion *supra* note 30.

[33] *See* Kelman, *supra* note 29, at 251.

[34] *See, e.g.*, Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (Black, J., concurring) (joining in Justice Douglas's concurrence, explicitly calling for the overruling of Beauharnais v. Illinois, 343 U.S. 250 (1951)); Dennis v. United States, 341 U.S. 494, 580 (1951) (Black, J., dissenting) (urging the Court to overrule the "clear and present danger" test frequently used by the Supreme Court in freedom of speech cases up until that time).

[35] *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 666 (1961) (Black, J., concurring) (joining in the Court's overruling of a case in which he had concurred, Wolf v. Colorado, 338 U.S. 25, 39 (1949) (Black, J., concurring) (holding that the Fourteenth Amendment did not forbid the admission of evidence obtained by an unreasonable search and seizure)).

[36] *See* Wesberry v. Sanders, 376 U.S. 1 (1964) (overturning Colegrove v. Green, 328 U.S. 549, 566 (1946) (Black, J., dissenting)).

[37] *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (overturning Betts v. Brady, 316 U.S. 455, 474 (1942) (holding, over Justice Black's dissent, that state criminal defendants did not have a federal constitutional right to counsel)).

Court, Justice Scalia has already called for the Court to overrule as erroneously reasoned precedents involving such varied subject matters as the Establishment Clause,[38] separation of powers,[39] the dormant Commerce Clause,[40] nude dancing,[41] obscenity,[42] criminal procedure,[43] substantive due process,[44] the Takings Clause,[45] and affirmative action.[46]

---

[38] *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2150 (1993) (Scalia, J., concurring) (declining to apply the test established in Lemon v. Kurtzman, 403 U.S. 602 (1971), and expressing his dismay at the Court's failure to acknowledge the need to abandon *Lemon*); Lee v. Weisman, 112 S. Ct. 2649, 2685 (1992) (Scalia, J., dissenting) (urging the Court to overrule its "religion-clause jurisprudence").

[39] *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (rejecting the Court's methodology in recent separation of powers decisions); Morrison v. Olson, 487 U.S. 654, 710-12 (1988) (Scalia, J., dissenting) (same).

[40] *See, e.g.*, American Trucking Ass'ns v. Scheiner, 483 U.S. 266, 303-06 (1987) (Scalia, J., dissenting) (challenging the Court's dormant Commerce Clause jurisprudence).

[41] *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2463 (1991) (Scalia, J., concurring) (suggesting, contrary to the Court's precedents, that nude dancing merits absolutely no First Amendment protection).

[42] *See* Pope v. Illinois, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (calling for a reconsideration of the Court's test for evaluating the constitutionality of obscenity laws, set forth in Miller v. California, 413 U.S. 15 (1973)).

[43] *See, e.g.*, Harmelin v. Michigan, 111 S. Ct. 2680, 2686 (1991) (joined only by Chief Justice Rehnquist in urging the overruling of Solem v. Helm, 463 U.S. 277 (1983)); California v. Acevedo, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring) (questioning United States v. Ross, 456 U.S. 798 (1982), and Carroll v. United States, 267 U.S. 132 (1925)); Powers v. Ohio, 499 U.S. 400, 417 (1991) (Scalia, J., dissenting) (questioning Batson v. Kentucky, 476 U.S. 79 (1986), and Miranda v. Arizona, 384 U.S. 436 (1966)); Walton v. Arizona, 497 U.S. 639, 656, (1990) (Scalia, J., concurring in part) (calling for the overruling of Lockett v. Ohio, 438 U.S. 586 (1978)); South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (urging the overruling of Booth v. Maryland, 482 U.S. 496 (1987)).

[44] *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791, 2873-74 (1992) (Scalia, J., concurring in the judgment and dissenting in part) (calling for the overruling of Roe v. Wade, 410 U.S. 113 (1973)); Webster v. Reproductive Health Servs., 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part) (same).

[45] *Cf.* Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., dissenting) (suggesting a standard for establishing a "taking"—as perhaps covering or including any governmental regulation driving someone out of business even though there might have been a legitimate state interest underlying the regulation—which is inconsistent with previous "takings" jurisprudence); Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 n.3 (1987) (arguing that Golblatt v. Hempstead, 369 U.S. 590 (1962), reflects "an assumption [as to the applicable standard for takings that] is inconsistent with the formulations of our later cases").

[46] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989) (Scalia, J., concurring) (suggesting that race can never be the basis of legislative classifications,

Justices Black's and Scalia's persistent calls for overruling numerous precedents have often subjected them to the charge that they have squandered their chances to build coalitions.[47] However, they have both taken opportunities to vindicate themselves by joining majorities in overruling cases in which they originally dissented. For example, Justice Black had such chances in several areas,[48] perhaps most notably in *Gideon v. Wainwright*,[49] in which he voted with the majority to overrule *Betts v. Brady*,[50] a case in which he had dissented to the Court's holding that an indigent state criminal defendant does not have a constitutional right to counsel. Justice Scalia has already joined in overruling two decisions in which he had dissented to the Court's barring the admission of victim impact statements in the sentencing phase of capital murder trials.[51]

Justices Black's and Scalia's methodologies have also led them both, regardless of the substantive area involved, to favor bright line tests. They have supported such tests for restraining judicial abuse of discretion *and* for providing ample notice to legislatures of the limitations on their powers. Justice Scalia, for example, has explained that adhering to the plain meaning of the text necessitates judicial "establishment of broadly applicable general principles."[52] For Justice Scalia, establishing broad rules in adjudication has two benefits. First, it constrains judges by severely restricting their discretion as to which principle to apply in subsequent cases.[53] Second, this practice enables the courts to achieve predictability—an essential requirement of justice[54]—and actually enhances protection of individual rights by providing "a solid shield of a firm, clear

---

thereby calling into question the validity of Fullilove v. Klutznick, 448 U.S. 448 (1980)).

[47] *See, e.g.*, Gerhardt, *supra* note 5, at 122-24 (arguing that Justice Scalia's widespread challenges to precedent have marginalized his position on the Court); Kelman, *supra* note 29, at 251-52 (arguing that Justice Black may have squandered his influence on the Court because of his steadfast refusal to compromise his views).

[48] *See supra* notes 34-37 and accompanying text.

[49] 372 U.S. 335 (1963).

[50] 316 U.S. 455 (1942).

[51] *See* Payne v. Tennessee, 111 S. Ct. 2597, 2609 (1991) (joining in the Court's overrulings of South Carolina v. Gathers, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting), and Booth v. Maryland, 482 U.S. 496, 519 (1987) (Scalia, J., dissenting)).

[52] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1185 (1989).

[53] Justice Scalia explained that

> when . . . I adopt a general rule, and say "This is the basis of our decision," I not only constrain lower courts, I constrain myself as well. If the next case should have such different facts that my political or policy preferences regarding the outcome are quite opposite, I will be unable to indulge those preferences; I have committed myself to the governing principle.

Id. at 1179.

[54] *Id.* at 1179-80.

principle enunciated in earlier cases."[55] Nevertheless, he recognizes that "when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation."[56]

Justice Black undoubtedly would have agreed that bright line tests protect individual liberties. For him, the Constitution set forth principles that he characterized variously as "absolutes,"[57] "safeguard[s],"[58] "strictly defined boundaries,"[59] and "limitations."[60] He explained: "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"[61] He equated the notion of absolutes with bright line tests drawn or applied by the courts to prevent the dilution of individual liberties or the aggrandizement of any branch, including the judiciary, beyond its proper realm of authority.[62]

Perhaps the most famous example of Justice Black's preference for bright line tests is his unique approach to the Freedom of Speech Clause of the First Amendment.[63] He repeatedly argued that the First Amendment meant exactly what it said in commanding that government could never abridge freedom of speech: "[T]he phrase 'Congress shall make no law' is composed of plain words, easily understood. . . . Neither as offered nor as adopted is the language of this amendment anything less that absolute."[64]

---

[55] *Id.* at 1180.

[56] *Id.* at 1185.

[57] Black, *The Bill of Rights*, *supra* note 16, at 867.

[58] *Id.* at 869.

[59] *Id.* at 871.

[60] *Id.*

[61] *Id.* at 867.

[62] *See id.* at 869-71. For Justice Black, this was the essential feature of a system of checks and balances "designed to prevent any branch . . . from infringing individual liberties safeguarded by the Constitution." *Id.* at 870.

[63] The First Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

[64] Black, *The Bill of Rights*, *supra* note 16, at 874, 879; *see also* BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 45 ("As I have said innumerable times before I simply believe that 'Congress shall make no law' means Congress shall make no law."). Even though other justices consistently rejected his absolutist reading of the First Amendment during his 34 year tenure on the Court, Justice Black never wavered from it, as reflected even in his last opinion in New York Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) (reiterating that, even when national security might be at stake, "the history and language of the First Amendment support the view that the press must be left to publish news, whatever the source, without censorship, injunctions, or prior restraints").

Justice Scalia has reached a similarly absolutist reading of the Sixth Amendment's Confrontation Clause in his dissent in *Maryland v. Craig*.[65] There the Court ruled five-to-four that the government did not violate the Confrontation Clause in a child abuse action when it allowed a child witness to testify against a criminal defendant via one-way closed-circuit television. Writing for the majority, Justice O'Connor argued that the relevant history of the clause and precedent supported a balancing rather than an absolutist approach to the Sixth Amendment.[66] In dissent, Justice Scalia argued that the Sixth Amendment permitted no such balancing:

> I have no need to defend the value of confrontation, because the Court has no authority to question it. . . . For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it. To quote the document one last time (for it plainly says all that need be said): "In *all* criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him"
> . . . .
> . . . We are not free to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with our findings.[67]

Nor is there any doubt that Justice Black would have reached the same conclusion, because he construed "all of the[ ] requirements of the Sixth Amendment a[s] cast in terms both definite and absolute."[68]

In short, Justices Black and Scalia have both rejected judicial balancing and opted instead in many instances for a similar judicial methodology: the formulation of bright line tests to apply in constitutional adjudication. The next part discusses the areas in which both Justices have arrived at similar substantive positions.

II. JUSTICES BLACK'S AND SCALIA'S SUBSTANTIVE SIMILARITIES

The similarities between Justices Black's and Scalia's approaches to the constitutional text become particularly apparent as one tracks their similar substantive positions. These similarities—often the result of applying similar bright line tests—appear in a wide variety of contexts, including but not limited to the Commerce Clause, substantive due process, equal

---

[65] 497 U.S. 836 (1990).

[66] *Id.* at 847-50.

[67] *Id.* at 869-70 (Scalia, J., dissenting) (alteration in original); *see also id.* at 862 ("Whatever else it may mean in addition, the defendant's constitutional right 'to be confronted with the witnesses against him' means, always and everywhere, at least what it explicitly says: the "'right to meet face to face all those who appear and give evidence at trial."'" (quoting his opinion in Coy v. Iowa, 487 U.S. 1012, 1016 (1988) (quoting California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)))).

[68] Black, *The Bill of Rights*, *supra* note 16, at 872.

protection, separation of powers, and even to a limited degree freedom of speech and search and seizure. Their respective decision making in these areas demonstrates the frequency with which Justice Black laid the particular doctrinal foundations that Justice Scalia would later develop.

A. *Commerce Clause*

The first major area of overlap between Justices Black and Scalia is the scope of Congress's power under the Commerce Clause.[69] Justice Black had strong views on the scope of permissible state and especially federal power under the Commerce Clause. As early as his second term in the United States Senate—in the midst of the Great Depression—Justice Black repeatedly argued that the Commerce Clause gave Congress the authority to pass appropriate legislation to deal with any problem that directly or indirectly affected the national economy and that the federal courts had no constitutional authority to interfere with such enactments.[70] Foreshadowing the positions he would later advocate on the Supreme Court, then-Senator Black also backed President Roosevelt's Court-packing plan in large part to ensure that the Court would be sympathetic to a broad interpretation of Congress's power under the Commerce Clause.[71] During his thirty-four year tenure on the Court, Justice Black never voted to strike down any federal law for violating the Commerce Clause.

There is no question that Justice Scalia would agree with Justice Black's view of the scope of federal power under the Commerce Clause. Justice Scalia has even admitted that had he been on the Court in the 1930s, he would have sided with those justices, including Justice Black, who voted to uphold the constitutionality of progressive economic and social measures enacted by the Congress pursuant to its Commerce Clause power.[72] Moreover, the two Justices would have at least agreed on the appropriate standard in dormant Commerce Clause cases. Justice Black, for instance, believed the states have the power to regulate even interstate commerce provided they did not discriminate against it and provided that Congress had not legislated against such regulation.[73] Jus-

---

[69] The Commerce Clause provides that "[t]he Congress shall have the power [t]o regulate Commerce with the foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

[70] *See, e.g*, Michael J. Gerhardt, *Justice Hugo L. Black*, *in* THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES: A BIOGRAPHICAL DICTIONARY (Melvin I. Urofsky ed., forthcoming Sept. 1994); John P. Frank, *Hugo L. Black*, *in* 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969, at 2321-47 (Leon Friedman & Fred L. Israel eds., 1969).

[71] *See* SIMON, *supra* note 30, at 97.

[72] *See* Izenberg, *supra* note 18.

[73] *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761, 789-92, 794 (1945) (Black, J., dissenting) (contending that states may pass laws impacting on interstate com-

tice Black endorsed the "constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition."[74] Similarly, Justice Scalia has agreed that, "[i]n the area of the negative Commerce Clause . . . a state cannot overtly discriminate against interstate commerce."[75] Justice Scalia prefers this rule to the Court's conventional balancing of federal and state interests in dormant Commerce Clause cases because the latter practice allows the Court to make policy determinations of a sort ordinarily left to the political process in state legislatures or in Congress.[76]

---

merce when Congress has not exercised its Commerce Clause power); Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434, 452-54 (1939) (Black, J., dissenting) (arguing that absent federal action, states are entitled to enact laws affecting interstate commerce until Congress limits their authority by exercising its "paramount constitutional power").

[74] Lincoln Fed. Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949) (citation omitted).

[75] Scalia, *The Rule of Law*, *supra* note 52, at 1185.

[76] *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring). Although Justice Scalia voted in New York v. United States, 112 S. Ct. 2408 (1992), to strike down part of a federal law for violating the Commerce Clause or the Tenth Amendment because Congress had tried to "coerce" or "compel" the states to give up some of their "sovereignty," it is not clear that Justice Black would have voted any differently. First, despite his great deference to congressional enactments under the Commerce Clause, Justice Black never directly confronted the issue of whether or to what extent the federal government had the constitutional authority to regulate state activities, functions, or officials under the Commerce Clause. Second, he viewed the Ninth and Tenth Amendments as guaranteeing a realm of state autonomy by "limit[ing] the Federal Government to the powers granted expressly or by necessary implication." Griswold v. Connecticut, 381 U.S. 479, 520 (1965) (Black, J., dissenting). Finally, Justice Black twice opposed congressional civil rights legislation that intruded too far into state sovereignty. *See* Oregon v. Mitchell, 400 U.S. 112, 126 (1970) (Black, J. announcing the judgments of the Court) (taking the position that congressional legislation pursuant to section five of the Fourteenth Amendment establishing age qualifications for state and local elections was unconstitutional because those laws could potentially "blot out all state power, leaving the 50 states as little more than impotent figureheads"); South Carolina v. Katzenbach, 383 U.S. 301, 360 (1966) (Black, J., concurring in part and dissenting part) ("A federal law which assumes the power to compel the States to submit in advance any proposed legislation they have for approval by federal agents approaches dangerously near to wiping the States out as useful and effective units in the government of our country."); *see also Mitchell*, 400 U.S. at 128 (observing that there were several limitations on Congress's powers to enforce the Reconstruction Amendments, including the framers' intent "not . . . to strip the States of their power to govern themselves or to convert our national government of enumerated powers into a central government of unrestrained authority over every inch of the whole Nation").

B. *Substantive Due Process*

Justices Black and Scalia have both opposed the Court's use of the Due Process Clause of the Fourteenth Amendment[77] to protect substantive rights, especially those involving economic interests.[78] For example, Justice Black viewed economic due process as a movement in which judges could strike down laws not because they violate the specific restrictions of the Constitution but because they are unreasonable, unfair, arbitrary, or capricious.[79] Justice Black opposed such open ended interpretation of the Due Process Clause because, in his view, it provided no limitation on judges' freedom to invoke their personal judgments in deciding constitutional questions.[80]

Justice Scalia has also supported the Court's rejection of substantive due process in the economic field.[81] He has explained that his "skepticism [about economic due process] arises from misgivings about, first, the effect of such expansion on the behavior of courts in other areas quite separate from economic liberty, and, second, the ability of the courts to limit their constitutionalizing to those elements of economic liberty that are sensible."[82]

Moreover, Justices Black and Scalia have not confined their distrust of substantive due process to the economic context. Both have also vigorously opposed its use to protect noneconomic interests. Justice Black's opposition to substantive due process in noneconomic cases was most clearly evident in his dissent to the Court's recognition of a constitutionally protected right of privacy in *Griswold v. Connecticut*.[83] He harshly criticized the majority for striking down a Connecticut law prohibiting the sale of contraceptives to married couples on the basis of an implied right

---

[77] The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

[78] There is, however, one critical point regarding substantive due process on which they would have disagreed. *See infra* notes 168-70 and accompanying text.

[79] BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 28.

[80] *Id.* at 24. Justice Black wrote that expressions such as unreasonable, arbitrary, and capricious "impose no limitations or restrictions whatever on judges, but leave them completely free to decide constitutional questions on the basis of their own policy judgments." *Id.*

[81] Antonin Scalia, Economic Affairs as Human Affairs, Address at the Cato Institute's Conference: Economic Liberties and the Judiciary (Oct. 26, 1984), *reprinted in* ECONOMIC LIBERTIES AND THE JUDICIARY 33-34 (James A. Dorn & Henry G. Manne eds., 1987) ("The Supreme Court decisions rejecting substantive due process in the economic field are clear, unequivocal and current . . . [I]n my view the position the Supreme Court has arrived at is good . . . .").

[82] *Id.* at 34.

[83] 381 U.S. 479, 507 (1965) (Black, J., dissenting to the Court's recognition of a fundamental right of privacy protecting the use of contraception by married couples).

of privacy in the Constitution.[84] For Justice Black, the framers of the Bill of Rights had already made a decision about which aspects of a person's privacy should be constitutionally protected and which aspects should be left to the majoritarian process for protection or regulation. He viewed the Court's recognition of implied fundamental rights, such as a general right of privacy, to be tantamount to the revival of economic due process in a noneconomic context. Thus, he argued that the "[u]se of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention."[85] To him, a right of privacy was nothing more than a vague judge-made goal that "like a chameleon, has a different color for every turning."[86]

Justice Scalia has shown a similar disdain for substantive due process in the noneconomic context. This contempt is reflected most clearly in his critiques of *Roe v. Wade*[87] and subsequent decisions reaffirming the Court's recognition of a fundamental right to an abortion.[88] For example, in his concurrence in *Webster v. Reproductive Health Services*,[89] Justice Scalia complained that

> [t]he outcome of today's case [narrowing *Roe* but not overruling it] will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless it is statesmanlike needlessly to prolong this Court's self-awarded sovereignty over a field where it has little proper business since the answers to most of the cruel questions posed are political and not juridical—a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.[90]

---

[84] *Id.* at 520.

[85] *Id.*

[86] Berger v. New York, 388 U.S. 41, 77 (1967) (Black, J., dissenting).

[87] 410 U.S. 113 (1973) (striking down a Texas law criminalizing abortion as violating the right to privacy protected by the Fourteenth Amendment).

[88] *See, e.g.*, Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992). This case reaffirmed the central holding of *Roe*. *Id.* at 2821. However, the Court overruled in part Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759, 772 (1986), and City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 420 (1983), both of which reaffirmed the central holding of *Roe* as inconsistent with the state's legitimate interest in protecting potential life. *Casey*, 112 S. Ct. at 2816.

[89] 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part). Justice Scalia wrote separately to voice his disappointment at the majority's failure to address directly the constitutional issue presented in this case. In his view, this was an appropriate case for the Court to dispose of the case on the constitutional issue. He favored treating the case as an exception to the general rule that requires the Court to decide cases on the narrowest ground possible. *Id.* at 534-35.

[90] *Id.* at 532.

More recently, in *Planned Parenthood v. Casey*,[91] Justice Scalia repeated his view that "the Constitution says absolutely nothing about [abortion], and . . . the longstanding traditions of American society have permitted it to be legally proscribed."[92]

C. *Equal Protection*

Justices Black and Scalia have used similar bright line tests to strike down laws that explicitly discriminate on the basis of race as violating the Equal Protection Clause.[93] In several cases,[94] Justice Black voted to strike down laws that discriminated explicitly against individuals on the basis of their race. In *Korematsu v. United States*,[95] he explained that *any* classification based on race was "suspect" and therefore must be subjected to the "most rigid scrutiny" and upheld only if justified by a "public necessity."[96] Nevertheless, Justice Black found that the federal internment of Japanese-Americans during World War II met that test.

Justice Scalia has applied at least as tough a standard under the Equal Protection Clause to strike down any law that classifies people on the basis of race. In voting to strike down a city's set-aside of construction contracts for minority firms in *City of Richmond v. J.A. Croson Co.*,[97] he explained:

> At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the

---

[91] 112 S. Ct. 2791, 2812-18 (1992) (reaffirming the essential holding of *Roe* but rejecting the trimester system in favor of the undue burden analysis).

[92] *Id.* at 2874 (Scalia, J., concurring in part and dissenting in part). For more on Justice Scalia's understanding of the role of "tradition" in constitutional adjudication, see *infra* notes 155-61 and accompanying text.

[93] The Equal Protection Clause of the Fourteenth Amendment provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[94] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (striking down a state law preventing marriages between persons solely on the basis of explicit racial classifications for violating the Equal Protection Clause); Brown v. Board of Educ., 347 U.S. 483 (1954) (striking down a state law explicitly mandating separation of the races in public school for violating the Equal Protection Clause).

[95] 323 U.S. 214 (1944) (upholding the constitutionality of federal internment of Japanese-Americans during World War II).

[96] *Id.* at 216.

[97] 488 U.S. 469, 520 (1989) (Scalia, J., concurring that "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign'").

> Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[98]

Moreover, outside the context of racial discrimination, Justice Black vigorously opposed judicial enforcement of so-called equal protection fundamental rights, which were interests found by the Warren Court to be of such importance that distinctions made on the basis of their exercise required compelling justifications. He maintained that the Equal Protection Clause had been designed primarily to end racial discrimination and insisted that the Warren Court should apply a rational basis test to review equal protection claims. Hence, he dissented to the Warren Court's uses of strict scrutiny under the Equal Protection Clause to strike down laws that made it more difficult for people to engage in interstate travel[99] or to vote.[100]

Justice Scalia has thus far not encountered any asserted claims of equal protection fundamental interests. However, there are two reasons to believe his position with respect to these interests would be the same as Justice Black's. First, equal protection fundamental rights typically resemble affirmative rights in that they both require the government to expend resources. Justice Scalia has endorsed the view that the Constitution protects only negative rights, which require the government to refrain from doing certain things.[101] Second, Justice Scalia's critique of

---

[98] *Id.* at 521 (citation omitted). Justice Scalia endorsed a standard at least as tough as strict scrutiny in Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), in which he joined Justice Kennedy's dissent to the majority's decision to uphold a congressional program establishing explicitly race-based preferences for awarding broadcast licenses. *Id.* at 631 (Kennedy, J., dissenting). Justice Kennedy denounced the Court's abandonment of strict scrutiny to evaluate the constitutionality of explicitly race-based preferences and cautioned that "[e]ven strict scrutiny may not have sufficed to invalidate early race based laws of most doubtful validity, as we learned in [*Korematsu*.]"). *Id.* at 633.

[99] Shapiro v. Thompson, 394 U.S. 618, 648 (1969) (Warren, C.J., joined by Black, J., dissenting on the ground that the right to travel cannot be the basis for invalidating residency requirements for voting because Congress has the authority to burden travel interests).

[100] *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 634 (1969) (Stewart, J., joined by Black, J., dissenting to the Court's holding that a New York law requiring ownership or leasing of taxable property for eligibility to vote in school board elections violates the Equal Protection Clause of the Fourteenth Amendment); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (Black, J., dissenting to the Court's holding that Virginia's poll tax violates the Equal Protection Clause of the Fourteenth Amendment).

[101] *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195-96 (1989) (holding that the Due Process Clauses of the Fifth and Fourteenth Amendments impose no affirmative duties on government). *See generally* Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights*

substantive due process[102] is consistent with Justice Black's rejection of substantive due process and equal protection fundamental rights as disingenuous judicial efforts to substitute personal preferences for the actual constitutional text. Justice Black wrote:

> There is no constitutional support whatever for this Court to use the Due Process Clause as though it provided a blank check to alter the meaning of the Constitution as written so as to add to it substantive constitutional changes which a majority of the Court at any given time believes are needed to meet present-day problems. Nor is there in my opinion any more constitutional support for this Court to use the Equal Protection Clause . . . to write into the Constitution its notions of what it thinks is good governmental policy.[103]

D. *Separation of Powers*

In the area of separation of powers Justices Black and Scalia have both endorsed a formalist methodology. This approach is "premised on the beliefs that the text of the Constitution and the intent of its drafters are controlling and sometimes dispositive, that changed circumstances are irrelevant to constitutional outcomes, and that broader 'policy' concerns should not play a role in legal decisions."[104] In *Youngstown Sheet & Tube Co. v. Sawyer*,[105] Justice Black's only major separation of powers opinion, he took a purely formalist position by voting to strike down President Truman's seizure of the nation's steel mills. According to Justice Black, the power to seize the steel mills was exclusively within Congress's authority while the President's only explicit constitutional authority was "to see that the laws are faithfully executed."[106] The Constitution grants Congress the exclusive authority to "make laws necessary and proper to carry out the powers vested by the Constitution."[107] Because the President's seizure of the steel mills was an exercise of power explicitly delegated to another branch, he violated the separation of powers demanded by the Constitution.[108]

Vision of the Constitution, 43 VAND. L. REV. 409, 410 (1990) (distinguishing between "affirmative" and "negative" rights).

[102] *See supra* notes 87-92 and accompanying text.

[103] *Harper*, 383 U.S. at 675-76 (Black, J., dissenting) (arguing that the Court should follow the original meaning of the Constitution).

[104] Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 495 (1987).

[105] 343 U.S. 579 (1952) (holding that an executive order seizing a number of the nation's steel mills was unconstitutional).

[106] *Id.* at 587.

[107] *Id.* at 588-89.

[108] *Id.*

Justice Scalia has expanded on Justice Black's formalism. For example, in *Morrison v. Olson*,[109] Justice Scalia dissented on the ground that the Ethics in Government Act's[110] vesting of executive prosecutorial power in an individual not removable at will by the President violated the concept that "all purely executive power must be under control of the President."[111] Justice Scalia further opined that the majority's "ad hoc approach to constitutional adjudication" undermined the immutable allocation of powers set forth in the Constitution.[112]

Similarly, in *Mistretta v. United States*,[113] Justice Scalia dissented on separation of powers grounds from the majority's opinion, which upheld the constitutionality of the United States Sentencing Commission, at least three of whose members are required by statute to be federal judges, and which is empowered to promulgate, review, and revise sentence-determinative guidelines. For Justice Scalia, the Commission's fatal flaw was that "[its] only governmental power . . . is the power to make law; and it is not the Congress."[114]

E. *Other Constitutional Areas*

In at least two other areas, Justices Black and Scalia have specifically urged the Court to reject judicial balancing in favor of bright line tests. First, in freedom of speech cases, they have both applied rigorous bright line tests to protect freedom of speech from governmental censorship or punishment. This Article has already alluded to Justice Black's absolutist reading of the Freedom of Speech Clause,[115] which led him to oppose *any* prior restraint of the press[116] or *any* regulation of verbal or written communications or expressions, including but not limited to advocating the overthrow of government,[117] obscene materials,[118] and any libel or defa-

---

[109] 487 U.S. 654, 697 (1988) (upholding the constitutionality of the independent counsel provisions of the Ethics in Government Act of 1978).

[110] 28 U.S.C. §§ 49, 591-99 (1988 & Supp. IV 1992).

[111] *Morrison*, 487 U.S. at 709 (Scalia, J., dissenting).

[112] *Id.* at 734.

[113] 488 U.S. 361, 413 (1989).

[114] *Id.* at 422 (Scalia, J., dissenting).

[115] BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 45-47; *see supra* notes 63-64 and accompanying text.

[116] *See supra* note 64 and accompanying text.

[117] *See, e.g.*, Konigsberg v. State Bar, 366 U.S. 36, 77-80 (1961) (Black, J., dissenting from the Court's holding that the Supreme Court of California's refusal to admit the petitioner to the state bar because of his refusal to answer questions pertaining to his membership in the communist party did not violate the Fourteenth Amendment); Barenblatt v. United States, 360 U.S. 109, 145-46 (1959) (Black, J., dissenting to the Court's upholding the conviction of an individual who refused to tell the House Un-American Activities Committee whether he was or ever had been a communist); Dennis v. United States, 341 U.S. 494, 579-80 (1951) (Black, J., dissenting from the Court's affirming of petitioner's conviction of conspiracy to organize a communist party).

mation laws.[119] Justice Scalia in turn has treated as content-based and therefore presumptively invalid any law regulating arguably political discourse.[120]

Moreover, like Justice Black, Justice Scalia opposes judicial balancing.[121] In *Austin v. Michigan Chamber of Commerce*,[122] for example, he dissented to the majority's opinion that upheld the state of Michigan's efforts to regulate the speech of corporations to ensure a more level playing field in public discussions. He was particularly opposed to the majority's balancing of the value of individual freedom of expression on political subjects against the right of corporations to use their wealth to influence political debate:

> This is not an argument that our democratic traditions allow—neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be "unduly" extensive (because they are rich) or "unduly" persuasive (because they are movie stars) or "unduly" respected (because they are clergymen). The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff.[123]

Indeed, in any case involving the Bill of Rights, "[t]he premise . . . is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure 'fair' political debate."[124]

---

[118] BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 46-47 (stating his position against censorship of "obscene" materials).

[119] Edmond Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 557-58 (1962) (interviewing Justice Black, who stated: "[T]here should be no libel or defamation law in the United States."); *see* BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 48.

[120] *See* R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992) (stating that "[c]ontent-based regulations are presumptively invalid"). Justice Scalia also joined two other decisions in which the Court struck down laws prohibiting flag-burning as content-based and, therefore, automatically violative of the First Amendment. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). In contrast, Justice Black excluded symbolic conduct from the protections of the Freedom of Speech Clause. *See* BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 56-58.

[121] *See supra* part I.B.

[122] 494 U.S 652 (1990) (upholding a Michigan statute that regulated corporate spending on state political campaigns).

[123] *Id.* at 695 (Scalia, J., dissenting).

[124] *Id.* at 692.

Another area of overlap for both Justices Black and Scalia is the Fourth Amendment.[125] Both justices have argued that the Fourth Amendment embodies categorical rules even though it permits judges to engage in what seems like balancing in the process of determining the unreasonableness of governmental searches and seizures. As Justice Black explained:

> The use of the word "unreasonable" in this Amendment means, of course, that not all searches and seizures are prohibited. Only those which are *unreasonable* are unlawful. There may be much difference of opinion about whether a particular search or seizure is unreasonable and therefore forbidden by this Amendment. But if it *is* unreasonable, it is absolutely prohibited. Likewise, the provision which forbids warrants for arrest, search or seizure without 'probable cause' is itself and absolute prohibition.[126]

Similarly, Justice Scalia has taken what he regards as a categorical approach in defining a search and a seizure.[127] For example, he rejected the Court's totality of the circumstances test for determining whether the government has made a seizure for purposes of the Fourth Amendment. As he explained, "police conduct cannot constitute a 'seizure' until (as that word connotes) it has had a restraining effect."[128] Further, in determining what constitutes a home for purposes of the Fourth Amendment, he explained: "If a barn was not considered curtilage of a house in 1791 or 1868 and the Fourth Amendment did not cover it then, unlawful entry

---

[125] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

[126] Black, *The Bill of Rights*, *supra* note 16, at 873. Another example of Justice Black's literalist approach is his position that the Fourth Amendment did not prohibit unauthorized governmental wiretapping. Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting) ("A conversation overheard by eavesdropping, whether by plain snooping or wiretapping . . . can neither be searched nor seized."). Elsewhere he explained:

> I just cannot say that a conversation may be "searched" or "seized" within the ordinary and generally accepted meanings of those words. When this is reinforced by the historical evidence that the Framers were aware of the practice of eavesdropping, . . . I cannot help but believe that if they had desired to outlaw or restrict the use of evidence obtained by such a practice, they would have used the appropriate language in the Fourth Amendment to do so.

BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 10.

[127] Scalia, *The Rule of Law*, *supra* note 52, at 1184 (stating that adherence to a "more or less originalist theory of construction" facilitates the "formulation of general rules").

[128] *Id.* Justice Scalia later incorporated this view into his majority opinion for the Court in California v. Hodari, 499 U.S. 621 (1991), in which the Court ruled that a suspect is not "seized" for purposes of the Fourth Amendment unless that person is physically grabbed by or formally surrenders to the government.

into a barn today may be a trespass, but not an unconstitutional search and seizure."[129]

In *Arizona v. Hicks*,[130] in determining whether a search has occurred, Justice Scalia rejected balancing the interests of law enforcement against the interest in privacy. He found that the probable cause requirement applied throughout a warrantless search of an apartment, such that the exception for any item in plain view did not even permit an officer's temporarily lifting a turntable.[131] He suggested that, unless an item was in plain view, it could not be searched without a warrant or probable cause because "a search is a search, even if it happens to disclose nothing but the bottom of a turntable."[132]

In the First and Fourth Amendment contexts, it nevertheless becomes apparent that, in spite of their similar methodologies, Justices Black and Scalia have not reached the same substantive positions in all areas. It is worth exploring their most significant differences because these differences reveal even more about the textualism of each Justice.

III. JUSTICES BLACK'S AND SCALIA'S CRITICAL DIVERGENCES

The most notable differences between Justices Black and Scalia are revealed in two areas: freedom of religion and the relevance or significance of tradition as a source of meaning in constitutional interpretation. These differences illustrate the relationship between each Justice's attitude toward the propriety of judicial activism or restraint in general and his approach to the specific constitutional provision involved.

A. *Freedom of Religion*

Justices Black and Scalia would have clearly been at odds in most religion cases. Running throughout their disagreement in this area is Justice Black's conviction that the text and original meaning clearly authorize judicial intervention and Justice Scalia's conflicting concern about judicial

---

[129] Scalia, *The Rule of Law*, *supra* note 52, at 1184 (discussing the formulation of general rules in the area of search and seizure).

[130] 480 U.S. 321 (1987) (holding that a police officer's lifting of a turntable to view serial numbers constituted a "search" for Fourth Amendment purposes).

[131] *Id.* at 326-28.

[132] *Id.* at 325. Despite his frequent criticisms of the Court's penchant for judicial balancing in Fourth Amendment cases, Justice Scalia has written or joined in opinions in which the Court has actually balanced competing interests in search and seizure cases. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989) (finding that the government's flying of a helicopter over a private greenhouse was not a "search" for purposes of the Fourth Amendment); California v. Greenwood, 486 U.S. 35 (1988) (finding that the government's sifting through a person's garbage was not a "search" for purposes of the Fourth Amendment); Griffin v. Wisconsin, 483 U.S. 868 (1987) (treating a warrantless search of a probationer's home differently for Fourth Amendment purposes from that of any other private citizen).

overinvolvement and the need for greater judicial deference to majoritarian preferences. In other words, Justice Black was willing in religion cases to enforce his absolutist reading of the text, even though it often led to judicial activism, while Justice Scalia's goal in this area has been to secure judicial restraint, despite arguably conflicting constitutional text or original meaning.

For example, in *Everson v. Board of Education*,[133] Justice Black wrote the Court's first opinion ever to apply the Establishment Clause[134] to the states. Although the *Everson* Court ultimately concluded that the state's payment of bus fares for all pupils, including those in parochial schools, served a secular purpose, and therefore did not violate the Establishment Clause, Justice Black understood the original intent underlying that provision to erect "'a wall of separation between Church and State'"[135] and noted that government cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[136] Justice Black also authored *Engel v. Vitale*,[137] which held that a state-sponsored "non-denominational prayer"[138] was "wholly inconsistent" with the Establishment Clause.[139] He viewed the founders' understanding of the Establishment Clause as prohibiting any laws that "establish an official religion whether those laws operate directly to coerce nonobserving individuals or not."[140] Justice Black explained that the history of the Establishment Clause demonstrated that it stood "as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate."[141] He also concurred in *Lemon v. Kurtzman*,[142] in which the Burger Court set forth a three-part test for evaluating whether a statute violated the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; . . . finally, the statute must not foster 'an excessive government entanglement with religion.'"[143]

---

133 330 U.S. 1 (1947) (holding that state funding of students' transportation to parochial schools does not violate the Establishment Clause).

134 The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend. I.

135 330 U.S. at 16 (citation omitted).

136 *Id.*

137 370 U.S. 421 (1962).

138 *Id.* at 430 (stating that "[n]either the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause").

139 *Id.* at 424.

140 *Id.* at 430.

141 *Id.* at 432.

142 403 U.S. 602, 625 (1971) (Douglas, J., concurring, joined by Black, J.).

143 *Id.* at 612-13 (citations omitted).

Thus, Justice Black read the Establishment Clause to require strict separation of church and state.

In contrast, Justice Scalia to date has not voted to strike down any law for violating the Establishment Clause. He has grounded his decisions in this area in neither the text nor in the original meaning of the Establishment Clause. Rather, in his dissent in *Lee v. Weisman*,[144] in which the Supreme Court held that a nonsectarian prayer at a public school graduation violated the Establishment Clause, he challenged the *Lemon* test for ignoring "the historic practices of our people"[145] and for relying on intrusive judicial inquiries into the unreliable and easily manipulated legislative histories of the majoritarian enactments at issue.[146] Thus, Justice Scalia concluded in *Weisman* that public school prayer does not violate the Establishment Clause, because it derives from "long-accepted constitutional traditions."[147]

The two Justices also have reached remarkably different readings of the Free Exercise Clause. For example, in *Sherbert v. Verner*,[148] Justice Black joined the Court's endorsement of a test that evaluates free exercise claims in terms of whether the statute involved substantially burdens the claimant's religious beliefs or practices and, if so, whether it is justified by a compelling government interest. In contrast, in both *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[149] and *Employment Division v. Smith*,[150] Justice Scalia rejected the application of the *Sherbert* test in free exercise cases in favor of the position that "a neutral, generally applicable law" does not violate the Free Exercise Clause even if it interfered with the practices of some religions. In *Smith*, Justice Scalia ironically echoed Justice Black's understanding of the Free Exercise Clause as drawing "the line . . . between freedom to believe in and advocate a doctrine and freedom to engage in conduct violative of the law."[151] In

---

144 112 S. Ct. 2649, 2679 (1992) (Scalia, J., dissenting).

145 *Id.*

146 *See* Lamb's Chapel v. Center Moriches Union Free Sch. Dist. 113 S. Ct. 2141, 2159 (1993) (Scalia, J. concurring) (arguing that *Lemon* should already be "dead" as a precedent); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2239 (1993) (Scalia, J., concurring in part) (arguing that it is "virtually impossible to determine the singular 'motive' of a collective legislative body . . . and this Court has a long tradition of refraining from such inquiries" (citations omitted)); Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting) (criticizing the *Lemon* "purpose" test for relying on unreliable, easily manipulated inquiries into legislative history).

147 112 S. Ct. at 2685 (Scalia, J., dissenting).

148 374 U.S. 398 (1963) (holding that a provision of the South Carolina Unemployment Act that denies compensation to a Seventh Day Adventist who was discharged for refusing to work on the sabbath violates the Establishment Clause).

149 113 S. Ct. 2217, 2239 (1993) (Scalia, J., concurring in part).

150 494 U.S. 872 (1990).

151 BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 56.

upholding a law that criminalized peyote use even in religious rituals, Justice Scalia explained that his approach derived from the need to avoid intrusive judicial inquiry into particular religious beliefs or practices.[152] To justify this approach, he has relied neither on the constitutional text nor on its original meaning. Rather, he has relied on precedent[153] and on his assertion that "the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well."[154]

B. *The Role of Tradition in Constitutional Analysis*

A second area of sharp disagreement between Justices Black and Scalia involves their different attitudes toward tradition as a possible source of constitutional meaning. Justice Scalia has invoked "tradition"—or "longstanding" majoritarian practices—to illuminate the scope or content of particular constitutional guarantees, particularly those that are open-ended or ambiguous. For example, in *Michael H. v. Gerald D.*,[155] the Court rejected a challenge to a state law presumption of paternity of a child born to a married woman living with her husband. Justice Scalia explained:

> We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there was no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and . . . reason from, the traditions regarding natural fathers in general. But there is a more specific tradition, and it unqualifiedly denies protection to such a parent.[156]

According to Justice Scalia, the Court's general duties involve "reading text and discerning our society's traditional understanding of that text."[157] He believes the Court should respect longstanding majoritarian practices as an accurate measure of the Constitution's meaning. In this manner, tradition properly understood takes on the status of stare decisis for purposes of predictability, continuity, and stability in governmental decision making.[158] This explains why Justice Scalia has chastised the Court for failing to recognize longstanding traditions favoring state regulations of abortion and has consequently rejected a Fourteenth Amend-

---

[152] *Smith*, 494 U.S. at 886-87.

[153] *See Church of the Lukumi*, 113 S. Ct. at 2239 (Scalia, J., concurring) (explaining that his position in *Smith* primarily rested on precedent and that the terms "neutrality" and "general applicability" do not appear in the First Amendment, but are used in *Smith* and earlier cases).

[154] *Smith*, 494 U.S. at 890.

[155] 491 U.S. 110 (1989).

[156] *Id.* at 127-28 n.6.

[157] Planned Parenthood v. Casey, 112 S. Ct. 2791, 2884 (1992) (Scalia, J., concurring in part and dissenting in part).

[158] *See infra* note 178 and accompanying text.

ment due process right of women to have unlimited access to abortion.[159] It also explains his position in *Lee v. Weisman* that invocations and benedictions at public school graduation exercises are supported by longstanding tradition and therefore are not forbidden by the Establishment Clause.[160]

Justice Black would have rejected Justice Scalia's reliance on tradition. First, Justice Black would have argued that neither the Constitution nor its original meaning authorize judicial reliance on nontextual sources of decision such as tradition.[161] For Justice Black, history could not add a gloss to the constitutional text: A rights-granting provision, for example, says what it says and nothing more or less until and unless it is amended.[162]

Second, Justice Black probably would have argued that Justice Scalia's reliance on tradition exposes Justice Scalia's personal preferences, particularly in light of Justice Scalia's use of tradition to defeat individual rights claims even when the relevant text or its original meaning directs otherwise.[163] Mindful that deviations from the constitutional text are just as likely to result in the contraction as in the expansion of individual liberties,[164] Justice Black would have viewed Justice Scalia as using tradition as a nontextual source of decision to defeat judicial intervention. For Justice Black, only the constitutional text may authorize judicial intervention or deference. He believed that majorities may continue to do what they have long done if and only if they are permitted to do so by virtue of the

---

159 *See, e.g, Casey*, 112 S. Ct. at 2874.

160 112 S. Ct. 2649, 2680 (1992) (Scalia, J., dissenting).

161 The following quote from Justice Scalia typifies the particular view with which Justice Black would have vehemently disagreed: "'"I adhere to the text where the text is clear. Where the text leaves room for interpretation, I am guided in what it means by our societal traditions, not by a show of hands."'" Kannar, *supra* note 19, at 1319 n.113 (quoting Dixon, *BC Press Grills Scalia*, THE KINGSMAN (Brooklyn College student newspaper), Oct. 23, 1985, at 5 (quoting Justice Scalia)). Justice Black would have countered that, in those situations in which the text is unclear, one should consult the history of the Constitution and not the history of its interpretation by society or even the Court. *See supra* notes 27-28 and accompanying text.

162 *See supra* note 17 and accompanying text.

163 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1512 (1990) (arguing that, contrary to Justice Scalia's opinion in *Smith*, "the modern doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation"); *see also infra* note 188 and accompanying text.

164 *See* BLACK, A CONSTITUTIONAL FAITH *supra* note 6, at 12-14; Black, *The Bill of Rights*, *supra* note 16, at 878 (arguing that constitutional balancing allows the Court to be swayed by the government in times of crisis to curtail individual liberties); *cf.* Scalia, *Originalism: The Lesser Evil*, *supra* note 10, at 855-56 (arguing that a nonoriginalist reading of the constitutional text can lead to expansion *or* contraction of individual liberties).

Constitution's silence on the matter in question. Indeed, Justice Scalia concedes as much by denying any constitutional protection to longstanding traditions that violate a clear textual mandate.[165] This concession would have admitted the obvious to Justice Black: A tradition does not receive constitutional protection because it is old or even because people have long relied on its perpetuation, but rather because it does not conflict with an explicit guarantee. Justice Black would have argued that using historical convention rather than the constitutional text or its original meaning to uphold a majoritarian practice is a thinly veiled effort to ignore the text and its original meaning. Justice Scalia arguably did this in *Smith* for the sake of preserving the status quo and the longstanding majoritarian practices he preferred.[166]

Moreover, Justice Black might have argued that, as long as Justice Scalia claims a tradition may be upheld because it does not violate a clear textual mandate to the contrary,[167] then he has failed to provide the kind of bright line test he prefers to avoid abuses of judicial discretion. Also, it is far from clear how long or how many states must do something in order for their practices to become a tradition of constitutional significance for Justice Scalia.

In contrast to Justice Scalia's willingness to rely on tradition to supplement the constitutional text and even to recognize the merit of some substantive due process claims,[168] Justice Black sought to restrict judicial

---

165 *See* Planned Parenthood v. Casey, 112 S. Ct. 2791, 2874 n.1 (1992) (Scalia, J., concurring in part and dissenting in part) (agreeing with the Court's striking down a state law prohibiting interracial marriages in Loving v. Virginia, 388 U.S. 1, 9 (1967), in spite of longstanding majoritarian practices to the contrary, on the ground that "[a]ny tradition in that case was contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value").

166 494 U.S. 872 (1990); *see supra* note 163 and *infra* note 204 and accompanying text.

167 *See supra* note 165 and accompanying text.

168 Justice Scalia joined opinions recognizing prisoners' fundamental or substantive due process rights to marry in Turner v. Safly, 482 U.S. 78 (1987), and to be free from involuntary administration of antipsychotic drugs in Washington v. Harper, 494 U.S. 210 (1990). Justice Black undoubtedly would have found that the government's concerns in both cases were immaterial because the relevant text is silent and thus leaves nonreviewable discretion in prison authorities to do whatever they want to do with respect to the personal interests involved. *Compare* Griswold v. Connecticut, 381 U.S. 479, 508-21 (1965) (Black, J., dissenting) (criticizing each of the bases on which the majority applied the Fourteenth Amendment beyond its historical and textual meanings) *with* Loving v. Virginia, 388 U.S. 1 (1967) (Black, J., joining the Court's decision striking down a law prohibiting interracial marriages for violating the Equal Protection Clause of the Fourteenth Amendment) *and* Skinner v. Oklahoma, 316 U.S. 535 (1942) (Black, J., joining the Court's unanimous decision striking down a state law mandating sterilization for certain repeat felons for violating the Equal Protection Clause of the Fourteenth Amendment).

interference with majoritarian decisions to cases only involving individual liberties explicitly protected by the constitutional text. Even when faced with the open-ended term "liberty" in the Fourteenth Amendment Due Process Clause, Justice Black explained that his study of the history of the Fourteenth Amendment persuaded him "that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights applicable to the States."[169] He especially feared

> the consequences of the Court's practice of substituting its own concept of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights . . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.[170]

In other words, Justice Black sought to restrict judicial discretion by urging the Court to define the term liberty by reference to other language in the Constitution in which the original framers had defined the basic components of liberty as consisting of the specific guarantees set forth in the first eight Amendments.

It is significant that the two Justices' different positions on freedom of religion and tradition are influenced by their different opinions about how to secure judicial restraint or how to avoid judicial activism.[171] As

---

[169] Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

[170] *Id.* at 89.

[171] The differences between Justices Black's and Scalia's approaches to statutory interpretation are subtler and perhaps less revealing. On the one hand, Justice Scalia has urged the Court to abandon its traditional use of legislative history to interpret statutes except in the rare case in which the statutory text is absurd on its face. Green v. Bock Laundry Mach. Co. 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring). In place of the conventional approach, he has argued that the only legitimate source for interpretive guidance in statutory cases is the text of the statute at issue, or related provisions of enacted law that shed light on the meaning of the disputed text. *See* Begier v. IRS, 496 U.S. 53, 62 (1990) (Scalia, J., concurring); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring). Justice Scalia has justified his approach on the ground that judges can easily manipulate legislative history. Staffers rather than members of Congress create legislative history, and legislators support or oppose bills for reasons that are often unclear. *See* Blanchard v. Bergeron, 489 U.S. 87, 98-100 (1989) (Scalia, J., concurring in part).

Perhaps most importantly, Justice Scalia has suggested that the Court should never deviate from the statutory text, which is all that Congress has formally enacted into law. Any attempt by judges to read anything else into a formal enactment is an improper exercise of unique legislative authority, while any effort by Congress to control the interpretation of statutes after their enactment is an invalid usurpation of duties left by the Constitution exclusively with the courts. *See* Thompson v. Thompson, 484 U.S. 174, 191-92 (1988) (Scalia, J., concurring).

the next part demonstrates more fully, such different attitudes depend to a significant degree on neither the constitutional text nor on its original meaning, but rather on the respective Justices' personal and political judgments about the role of the federal judiciary in American society.

IV. THE LIMITS OF JUSTICES BLACK'S AND SCALIA'S TEXTUALISM

Justices Black's and Scalia's professed fidelity to textualism does not fully explain their respective constitutional decisions. Rather, their approaches to constitutional interpretation have turned primarily on their personal and political judgments regarding the role of the federal judiciary in American society, which have reflected changing attitudes toward judicial restraint and activism.

For example, New Deal liberals, like Justice Black, equated improper judicial activism with the economic due process decisions of the late nineteenth and early twentieth centuries, striking down desperately needed economic reforms.[172] They trusted the fairness and workability of the majoritarian process, at least with respect to economic and social reforms, and they correspondingly distrusted the judiciary in cases involving economic matters.

The New Deal liberals on the Court could not agree, however, on what approach to substitute for economic due process (other than a very deferential reading of the Due Process Clause in cases involving economic interests) *and* how to interpret noneconomic liberty claims, particularly

---

On the other hand, Justice Black's approach to statutory construction is more ambiguous. He never set forth an elaborate theory or general position on statutory interpretation. Instead, he took the approach that he thought the particular case demanded. In some cases, he construed the statute at issue strictly on the basis of the plain language or meaning of the text. *See* United States v. Sullivan, 322 U.S. 689, 693 (1948) (stating that when a restrictive interpretation is not required by the text of the Food, Drug and Cosmetics Act, the Court should not apply a restrictive interpretation simply because Congress has departed from custom). He also agreed that only Congress had the constitutional authority to make law and that another branch's attempt to do so violated the principle of separation of powers. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Yet, he joined or authored opinions relying on the extensive use of legislative history. *See, e.g.*, Monroe v. Pape, 367 U.S. 167 (1961) (joining Justice Douglas's opinion, which relied on legislative history to clarify the meaning of the word "person" in 42 U.S.C. § 1983); ICC v. Inland Waterways Corp., 319 U.S. 671, 692 (1943) (Black, J., dissenting) (demonstrating that the majority's upholding of a tariff issued by the Interstate Commerce Commission was not supported by an extensive review of the legislative history of the Transportation Act of 1940).

[172] *See generally* DUNNE, *supra* note 1, at 163-65 (discussing then-Senator Black's criticism of Supreme Court decisions that invalidated New Deal legislation and his call for radical legislative change of the Court's jurisdiction); FRANK, *supra* note 1, at 63-94 (describing then-Senator Black's support for New Deal Legislation and his senatorial investigations of big business interests); SIMON, *supra* note 30, at 88-97 (same).

those based on specific constitutional provisions.[173] For example, Justice Frankfurter proposed extreme judicial deference to legislative judgment across the board.[174] In contrast, Justice Black favored constitutional literalism and formalism as a way of eliminating judicial activism in economic due process cases. But, he also advocated bold judicial enforcement of the Constitution's explicit guarantees. Justice Black's textualism represented his effort to limit judicial discretion *and* to justify judicial flexibility to enforce and interpret the constitutional text, including its broad language.[175]

Consequently, for Justice Black, judicial restraint was not always a virtue. It was appropriate in those significant instances in which the Constitution was silent with respect to an important personal interest. It was especially inappropriate, though, in cases involving violations of explicit constitutional guarantees.[176] In the latter context, the Court's principal duty as a countermajoritarian institution was to enforce the text, regardless of the consequences. As Justice Black explained, "the judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches."[177] In all other cases, the Court should defer to the judgments of the democratic institutions of government.[178] Thus, another critical element of Justice Black's liberalism was his commitment to the Court's rigid enforcement of the Constitution's explicit guarantees to the fullest extent possible—i.e., absolutely—to protect the American people from certain "ancient evils."[179]

Justice Black's views on judicial activism and restraint, however, were not shaped in the abstract. They were clearly influenced by his personal and professional experiences.[180] For example, as a police court judge and

---

173 *See* GERHARDT & ROWE, *supra* note 4, at 213; *see also* Melvin I. Urofsky, *Conflict Among the Brethren: Felix Frankfurter, William O. Douglas and the Clash of Personalities and Philosophies on the United States Supreme Court*, 1988 DUKE L.J. 7, 81-83 (contrasting the philosophies of Justices Frankfurter and Douglas with respect to judicial activism and restraint).

174 *See* SIMON, *supra* note 30, at 62-63, 121, 128 (describing Justices Black's and Frankfurter's differences of opinion on how much deference the Court should afford majoritarian decision making).

175 *See generally* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 333-36 (1988) (discussing Justice Black's attempts to deal with modern technological and social developments that threatened the values he sought to protect).

176 *See* BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 14-15.

177 Black, *The Bill of Rights*, *supra* note 16, at 870.

178 *Id.*

179 *Id.* at 867, 874-81.

180 *See generally* DUNNE, *supra* note 1, 85-173 (detailing Justice Black's pre-Court life); SILVERSTEIN, *supra* note 1, at 90-125 (same); SIMON, *supra* note 30, at 66-100, 209-11 (same); *see also* Mark V. Tushnet, *Constitutional Interpretation, Character, and*

county prosecutor, he had learned about police misconduct and about the need for efficient and equal justice.[181] These personal experiences helped to motivate him later as a senator to declare that he would not vote to confirm a prosecutor as a federal judge if the prosecutor had abused fair criminal procedures,[182] and as a Supreme Court justice to lead the Court to enforce strictly the Constitution's provisions requiring trial by jury[183] and availability of counsel[184] and prohibiting coerced confessions,[185] compulsory self-incrimination,[186] and double jeopardy.[187]

Ironically, Justice Scalia came from a conservative movement that developed in the 1960s and grew in the 1970s in opposition to what it perceived as rampant judicial activism in the twentieth century. The conservative movement of this period opposed the Warren Court's extension of federal judicial power beyond the economic context, particularly at the expense of the states, through the doctrines of incorporation, equal protection fundamental rights, separation of church and state, and substan-

---

Experience, 72 B.U. L. REV. 747 (1992) (discussing the relevance of the character and political and personal experiences of particular Supreme Court justices, including Justice Black, to their judicial decision making).

[181] *See* Frank, *supra* note 70, at 2324, 2338-39 (describing then-Judge Black's efficient operation of his Birmingham, Alabama courtroom, his success as a prosecutor, and his early opposition to the use of coerced confessions); *see also* SIMON, *supra* note 30, at 72-76 (relating several anecdotes from Justice Black's days as a municipal court judge and a county prosecutor).

[182] Frank, *supra* note 70, at 2330.

[183] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 162-71 (1968) (Black, J., concurring) (enunciating his theory of incorporation); Klopfer v. North Carolina, 386 U.S. 213 (1967) (enunciating the right to a speedy trial); *In re* Oliver, 333 U.S. 257 (1948) (holding that the Due Process Clause of the Fourteenth Amendment requires both public trial and prior notice of charges).

[184] *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (specifically incorporating the Sixth Amendment right to counsel into the Fourteenth Amendment Due Process Clause); Johnson v. Zerbst, 304 U.S. 458 (1938) (holding the right to counsel so fundamental as to require intelligent and competent waiver).

[185] *See* Chambers v. Florida, 309 U.S. 227 (1940) (finding no meaningful distinction for constitutional purposes between a confession obtained through torture and one obtained through psychological pressure).

[186] *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964) (overruling Adamson v. California, 332 U.S. 46 (1947)).

[187] *See* Benton v. Maryland, 395 U.S. 784 (1969) (making the Double Jeopardy Clause applicable to the states). Moreover, it is well documented that Justice Black's ill health and impatience with the excesses of political protest and experimentation in the 1960s led him during his last decade on the Court to write shorter, angrier opinions, and to show less tolerance for dissenting or anti-establishment speech than he had demonstrated during his previous 24 years on the Court. *See generally* Roger K. Newman, *Hugo L. Black*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 121, 122 (Leonard Levy et al. eds., 1986).

tive due process.[188] These conservatives later denounced the Burger Court for balancing competing interests in a variety of constitutional contexts.[189]

Yet, this movement ultimately divided over whether to reject judicial balancing altogether *and* over just how far the Court should go in enforcing explicit constitutional guarantees.[190] For example, Chief Justice Rehnquist has responded to the Court's activism in the twentieth century by deferring to majoritarian judgments even more extensively than Justice Frankfurter.[191] Similarly, Justice Scalia has unequivocally distanced himself from the label of judicial activism[192] and has argued that judicial restraint is (almost) always a virtue.[193] Thus, he uses the text and, where it is not clear, tradition as a default rule to limit judicial discretion and to empower traditional majoritarian decision making.

---

[188] *See* GERHARDT & ROWE, *supra* note 4, at 213-44 (describing and excerpting commentaries on constitutional interpretation and adjudication from such varied conservative jurists, scholars, and commentators as Judge Robert Bork, Justice Antonin Scalia, Professor Richard Epstein, Professor Stephen Macedo, Gary McDowell, Justice Sandra Day O'Connor, Judge Richard Posner, Professor Harry Jaffa, and then-Equal Employment Opportunity Commission Chairman Clarence Thomas); *see also* Kannar, *supra* note 19, at 1347 (suggesting that liberals after the New Deal initially viewed textualism as "idiosyncratic" in "the era of Hugo Black" and later as an "inherently reactionary" response of conservatives to the liberals' increasing efforts to "realiz[e] their agendas through succeeding volumes of the U.S. Reports").

[189] *See* BERNARD SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK *passim* (1990) (describing the critiques of and responses to the jurisprudence of the Burger Court by various conservative jurists, scholars, and commentators throughout the 1980s); Earl Maltz, *The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence*, 24 GA. L. REV. 629 (1990) (same).

[190] *See* GERHARDT & ROWE, *supra* note 4, at 213-14 (describing the conflicts among contemporary conservatives).

[191] For Chief Justice Rehnquist's views on constitutional interpretation, see William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); *see also* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976) (surveying the Chief Justice's first four years on the Court and positing that he would, whenever possible, resolve conflicts between individuals and government in favor of the government).

[192] *See* Izenberg, *supra* note 18 (quoting Justice Scalia as distinguishing between "activist" judges and those, like himself, who exercise "judicial restraint").

[193] *Cf.* Scalia, *Originalism: The Lesser of Two Evils*, *supra* note 10, at 863:

> The practical defects of originalism are defects more appropriate for the task at hand—that is, less likely to aggravate the most significant weakness of the system of judicial review and more likely to produce results acceptable to all. If one is hiring a reference-room librarian, and has two applicants, between whom the only substantial difference is that the one's normal conversational tone tends to be too loud and the other's too soft, it is pretty clear which of the imperfections should be preferred.

Indeed, Justice Scalia's reliance on tradition as a supplement to the constitutional text is consistent with his unique understanding of the rule of *stare decisis* as "the general principle that settled practices and expectations in a democratic society should generally not be disturbed by the courts."[194] These positions seem to treat the will of the majority rather than the text as the ultimate source of legitimacy and authority for the Constitution and judicial review.

Yet, Justice Scalia has also argued that judicial intervention with democratic institutions may be justified if undertaken pursuant to a clear constitutional mandate,[195] provided the Court does not transgress its institutional competence.[196] In Justice Scalia's view, the judiciary is tempted to apply nonoriginalist principles, which inevitably lead it away from the Constitution's true meaning—respect for democratic institutions and tradition.[197] Thus, the critical elements of Justice Scalia's conservatism are his profound trust in democratic institutions and his corresponding distrust in the federal judiciary.

It is obvious, however, that in interpreting the Constitution Justice Scalia relies on more than just the constitutional text and its original meaning. He also relies on "societal traditions" as illuminating whether various constitutional provisions embody specific individual guarantees.[198] Moreover, in affirmative action cases he has openly sympathized with immigrants or immigrant children like himself.[199] In addition, emboldened by concerns about the long history of judicial abuse of discretion, Justice Scalia has taken the position that even when the Constitution might provide a basis on which the Court could protect an interest, the Court should not intervene unless the Constitution clearly grants it the authority to do so and the timing or circumstances are appropriate for such intervention. Thus, for Justice Scalia, case or controversy requirements, particularly with respect to standing and justiciability, take on a

---

194 Payne v. Tennessee, 111 S. Ct. 2597, 2614 (1991) (Scalia, J., concurring).

195 *See supra* note 165 and accompanying text.

196 *See supra* notes 25-26, 56, 154 and accompanying text.

197 *See* Scalia, *Originalism: The Lesser Evil*, *supra* note 10, at 852-56.

198 Kannar, *supra* note 19, at 1319 n.113 (quoting Dixon, *BC Press Grills Scalia*, THE KINGSMAN (Brooklyn College student newspaper), Oct. 23, 1985, at 5 (quoting Justice Scalia)).

199 *See* Johnson v. Transportation Agency, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (defending "unknown, unaffluent and unorganized" workers whose interests he feels are ignored by proponents of affirmative action); *see also* Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race"*, 1979 WASH. U. L.Q. 147, 152 (denouncing "the Wisdoms and the Powells and the Whites," whose ancestors participated in the oppression of African-Americans and who, in his view, now seek to rectify the effects of that oppression at the expense of newer immigrants through affirmative action).

far greater importance than they ever had for Justice Black.[200] Justice Scalia views these requirements as imposing critical limitations on the timing and conditions under which the Court may interfere with majoritarian decisions, even when the Constitution might provide some textual authority for such interference. Also, the Court might still have to refrain from striking down a law to avoid overenforcing a constitutional norm[201] or to respect democratic institutions and their longstanding practices.[202]

Two further illustrations aptly underscore the link between the Justices' textualism and their concerns about judicial activism and restraint. These examples demonstrate that both Justices have grounded their approaches to constitutional interpretation in their personal opinions about judicial activism or restraint rather than in the text or original meaning.

First, Justice Scalia's effective nullification of the Free Exercise Clause in *Smith* flowed from his concern about the consequences of judicial overenforcement of that particular constitutional norm.[203] His failure in

---

[200] *Compare* Nixon v. United States, 113 S. Ct. 732, 735 (1993) (joining the majority opinion that found that challenges to the removal process for federal judges pose nonjusticiable, political questions) *and* Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2145 (1992) (citations omitted):

> The question presented here is whether the public interest in proper administration of the laws . . . can be converted into an individual right by a statute that denominates it as such, and that permits all citizens . . . to sue. If the concrete injury requirement [for standing] has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed."

with BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 20:

> I think determining when a judge shall decide a constitutional question calls for an exercise of sound judicial judgment in a particular case which should not be hobbled by general and abstract judicial maxims created to deny litigants their just deserts [sic] in a court of law, perhaps when they need the court's help most desperately. Consequently, if it is judicial activism to decide a constitutional question which is actually involved in a case when it is in the public interest and in the interest of a sound judicial system to decide it, then I am an "activist" in that kind of case and shall, in all probability, remain one. In such circumstances I think "judicial self-restraint" is not a virtue but an evil.

[201] In Employment Div. v. Smith, 494 U.S. 872, 890 (1990), Justice Scalia explained:

> It may fairly be said that leaving accommodation [of free exercise of religious practices] to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

[202] *See supra* notes 156-60 and accompanying text.

[203] *See supra* notes 150-54, 201 and accompanying text.

that case to demonstrate any connection between the text or the original meaning of the Free Exercise Clause and his substantive position that the Court should not apply heightened scrutiny to "neutral, generally applicable laws" burdening religious practices led Justice Souter to urge the Court in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* to "reexamine" *Smith* because it conflicted with "the precedent on which it was rested [as well as the] text of the Free Exercise Clause and its origins."[204] Rather than respond to this criticism by providing textual and historiographical analyses of the meaning of the Free Exercise Clause, Justice Scalia conceded that "[t]he terms 'neutrality' and 'general applicability' are not to be found within the First Amendment itself, of course, but are used in [*Smith*] and earlier cases."[205]

Justice Black, however, accepted judicial activism in enforcing explicit guarantees, particularly freedom of speech. This led him to argue that, rather than drawing relatively arbitrary lines between protected and unprotected verbal or written expressions, the Court should treat all forms of speech the same for purposes of the First Amendment and consequently strike down *any* law that abridged *any* kind of verbal or written expression or discourse.[206] Thus, although the specter of judicial mangling of the text moved Justice Black to favor overenforcement of freedom of speech, Justice Scalia preferred to risk legislative underenforcement of the textual guarantee of free exercise of religion to the prospect of overenforcement of a constitutional norm.

Second, in Takings Clause[207] cases, Justices Black and Scalia have reversed their positions from those described above. For example, in *United States v. Causby*,[208] Justice Black dissented to the Court's holding "that the Government ha[d] 'taken' respondents' property by repeatedly flying Army bombers directly above respondents' land at a height . . . where the light and noise from these planes caused respondents to lose sleep and their chickens to be killed."[209] Justice Black rejected the Court's "imposition of relatively absolute constitutional barriers."[210] Rather than basing his opinion on the relevant text or on the original meaning, he asserted that the technological advances in air travel created complex problems not suited to the application of rigid constitutional restraints and incapable of adequate resolution by courts, which lack the requisite techniques and personnel.[211] Having abandoned his customary

---

204 113 S. Ct. 2217, 2248 (1993) (Souter, J., concurring in part).

205 *Id.* at 2239 (Scalia, J., concurring in part).

206 *See* BLACK, A CONSTITUTIONAL FAITH, *supra* note 6, at 46-47.

207 The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

208 328 U.S. 256 (1946).

209 *Id.* at 268 (Black, J., dissenting).

210 *Id.* at 269.

211 *Id.* at 274-75.

confidence in the judiciary's ability to define the "absolute" limitations embodied in constitutional guarantees, Justice Black concluded that *Causby* "open[s a] wedge for an unwarranted judicial interference with the power of Congress to develop solutions for new and vital national problems."[212]

In sharp contrast, Justice Scalia has urged the Court to take a more aggressive role in enforcing the Takings Clause. For example, in *Lucas v. South Carolina Coastal Council*,[213] he wrote the Court's opinion, which held that South Carolina had violated the Takings Clause by prohibiting construction of any permanent habitable structures on certain ocean-front property. Justice Scalia based this holding on his view that the Takings Clause requires just compensation "when the owner of real property has been [required by the government] to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle."[214]

Given Justice Scalia's willingness to embrace a strong interventionist role for the judiciary in *Lucas*—in sharp conflict with his usual distrust of judicial activism—one would have expected him to have provided a detailed accounting of the support for his position from the text, original meaning, and tradition. Yet, Justice Scalia did no such thing. His only comment on the relevant text was in a footnote in which he merely asserted that "the text of the Clause can be read to encompass regulatory as well as physical deprivations."[215] He also failed to cite any original understanding supporting his position. Moreover, he rejected all early American experience, prior to and after the passage of the Bill of Rights, and any case law prior to 1897 as "entirely irrelevant" in determining "the historical compact recorded in the Takings Clause."[216] Instead, Justice Scalia relied primarily on a line of post-1922 precedents, conflicting with the earlier 130 year-old understanding of the Court and of the public that a "taking" consists "only [of] a 'direct appropriation' of property."[217] Nor did he explain in any meaningful detail why the Court's apparent understanding of the Takings Clause over the past sixty years more accurately reflects a tradition of constitutional significance than the Court's understanding of the same subject matter prior to 1922. Rather, Justice Scalia merely asserted without further analysis that his deviation from the early understanding of takings was "consistent with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle

---

212 *Id.* at 275.

213 112 S. Ct. 2886 (1992).

214 *Id.* at 2895 (footnote omitted).

215 *Id.* at 2900 n.15.

216 *Id.*

217 *Id.* at 2892 (citation omitted).

of rights' that they acquire when they obtain title to property."[218] Consequently, Justice Scalia ironically opened himself to attack from Justice Blackmun in *Lucas* for not having any "clear and accepted 'historical compact' or 'understanding of our citizens'" supporting his position and for regarding "history as a grab-bag of principles, to be adopted where they support the Court's theory, and ignored where they do not."[219]

V. THE POLITICS OF TEXTUALISM

The failures of Justices Black and Scalia to stick strictly to the constitutional text expose a conceivable problem with textualism in general. Justices Black and Scalia may not be bad textualists. Rather, the problem with their approaches to constitutional interpretation may be with textualism itself. Textualism arguably denies the inevitability or necessity of relying on moral or political judgments outside the constitutional text to make sense of it in constitutional adjudication.

The textual provisions at issue in constitutional adjudication are usually susceptible to more than one reasonable construction, at which point an interpreter must refer to something else to settle the ambiguity of the relevant text.[220] In confronting ambiguous text, an interpreter must choose the appropriate level of generality at which to state the constitutional norm at its core.[221] In making this choice, the interpreter must be guided by something. Textual ambiguity makes this choice possible. And it makes relying solely on the text for guidance impractical. The critical

---

[218] *Id.* at 2899. Yet another telling aspect of *Lucas* for Justice Scalia may have been his finding that the plaintiff in *Lucas* had standing in spite of his failure to show that he had any intention to build any structure on his property or that he had exhausted his right to apply for a special permit to "regain . . . beneficial use of his land." *Id.* at 2892. This approach contrasts not only with Justice Scalia's position on standing in *Lujan*, *see* discussion *supra* note 200 and accompanying text, but also with the traditional prudential rule against the Court's deciding constitutional issues "unless absolutely necessary to a decision of the case." *Lucas*, 112 S. Ct. at 2886, 2918 (citation omitted).

[219] *Lucas*, 112 S. Ct. at 2917 (Blackmun, J., dissenting). Justice Scalia's position on takings also contrasts sharply with his support for regulations he otherwise has claimed the Court wrongly invalidated through economic due process. *See supra* note 72 and accompanying text.

[220] *Cf.* Richard A. Posner, *What Am I? A Potted Plant?*, NEW REPUBLIC, Sept. 28, 1987, at 24:

> Many provisions of the Constitution . . . are drafted in general terms. This creates flexibility in the face of unforeseen changes, but it also creates the possibility of multiple interpretations, and this possibility is an embarrassment for a theory of judicial legitimacy that denies that judges have any right to exercise discretion. A choice among semantically plausible interpretations of a text, in circumstances remote from those contemplated by its drafters, requires the exercise of discretion and the weighing of consequences.

[221] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 135-36 (1977).

debate in constitutional adjudication is not about whether the constitutional text is binding.[222] Instead, it is about the propriety of the premise—or guiding principle—of one's constitutional interpretation, which inevitably turns on one's moral or political judgments regarding the proper role of federal courts in our society.[223] Nor is it possible, as a general matter, for a judge confronted with an interpretive question to ignore completely the influence of his or her professional and personal experience and character on his or her judgments about judicial activism or restraint.[224] In other words, textualism might fail in practice because it arguably cannot fully escape the natural human impulse to interpret texts consistent with (or at least with some sensitivity to) one's political or moral experience and disposition.

The mistake of textualists such as Justices Black and Scalia is that they have failed to acknowledge the degree to which they have reached beyond the text to premises that they have not fully disclosed and that may not be fully linked to the text. Constitutional theory aims to clarify the nature of these premises and to assess the coherence and consistency of the arguments based on them.[225] Textualists, or at least the two most

---

[222] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 760 (2d ed. 1991) ("Almost everyone believes that the text of the Constitution is binding and that it must be interpreted. Usually the principle point of disagreement is whether the original understanding of the text is decisive or nearly so and, if it is, how that understanding should be characterized."); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 472 (1981) ("Each theory claims to provide the most illuminating account of what our actual constitutional tradition . . . 'comes to' . . . . So the thesis, that a useful distinction can be made between theories that insist on and those that reject interpretation . . . is more confusing than helpful."); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984) ("We are all interpretavists; the real arguments are not over whether judges should stick to interpreting [the Constitution], but over what they should interpret and what interpretive attitudes they should adopt.").

[223] Judge Posner explained that

> [e]ven the decision to read the Constitution narrowly, and thereby "restrain" judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, "Read me broadly," or "Read me narrowly." That decision must be made as a matter of political theory, and will depend on such things as one's view of the springs of judicial legitimacy and of the relative competence of courts and legislatures in dealing with particular types of issues.

Posner, *supra* note 220, at 24; *see* Erwin Chemerinsky, *Wrong Questions Get Wrong Answers: An Analysis of Professor Carter's Approach to Judicial Review*, 66 B.U. L. REV. 47, 68-69 (1986); Richard Kay, *The Illegality of the Constitution*, 4 CONST. COMMENTARY 57, 60 (1987); Kay, *supra* note 5, at 203-04; Perry, *supra* note 5, at 715.

[224] *See generally* Tushnet, *supra* note 180, at 752-63.

[225] *See* Chemerinsky, *supra* note 223, at 69 (suggesting that because "the judge's values [inevitably] enter into the interpretation process," the critical question in constitutional law is whether moral or political values should guide the choice and application of a particular constitutional authority).

ardent textualists of this century, have failed to acknowledge or fully explain the premises apart from the text on which they are relying.

Another possible limitation on textualism relates to the nature of constitutional adjudication. On a collegial court, such as the Supreme Court, the need to maintain coalitions may make it impossible to reach agreement on all of the premises underlying a particular result, much less the results in a series of cases.[226] In all fairness, Justices Black and Scalia may have been prevented at times from fully explaining the premises of their decision making because doing so would have risked further fracturing of a fragile coalition. Nevertheless, the credibility of the two Justices' persistent claims that they have adhered more closely than any other justices to the constitutional text is threatened by their more than occasional failures to explain how their decisions seem more consistent with some undisclosed premise pertaining to a moral or political view of the propriety of judicial activism than with the text itself. It is reasonable to expect textualists to demonstrate how they have routinely stuck to the text to the exclusion of all else. Otherwise, it is not unreasonable to think, particularly when factors outside the text seem better to explain actual decisions, that textualism inadequately explains constitutional adjudication.

CONCLUSION

The comparison between Justices Black and Scalia is long overdue. More than any other justices in this century, they have insisted on judicial fidelity to the plain or original meaning of the constitutional text. This common emphasis has led them both to urge overruling decisions, to adopt bright line tests, and to reach similar substantive positions, especially with respect to the Commerce Clause, the Equal Protection Clause, substantive due process, and separation of powers.

Yet, the comparison reveals a significant problem with Justices Black's and Scalia's approaches to constitutional interpretation and with textualism in general. As Professor Philip Kurland has observed, "[y]ou can see that although [Justices Black and Scalia] have the same words . . . they do not come out with the same music. And that must be because there is something different in the Constitution for [each] of them, in spite of the fact that the words are the same."[227] For Justices Black and Scalia that "something different" is political and personal judgments regarding the appropriate role for the federal judiciary in our society. For Justice Black, judicial activism was not wrong per se. It was wrong only when it could not be exercised pursuant to a categorical rule grounded in specific

---

[226] Gerhardt, *supra* note 5, at 115-16, 137-39.

[227] Professor Philip B. Kurland, Statement at Constitutional Roundtable Before the National Commission of Judicial Discipline and Removal (Dec. 18, 1992), *reprinted in* HEARINGS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 356 (1993).

constitutional text or in its original meaning. Thus, he argued that the Bill of Rights provided absolute limits on the federal and state governments, and he enforced those guarantees (as he understood them) to the fullest extent possible, regardless of the consequences. While Justice Scalia has risked the consequences of aggressive judicial enforcement of certain constitutional norms, such as the private property protected by the Takings Clause, he has also invariably denounced judicial activism, even if there is a constitutional norm derived from the text that a federal court could enforce. Hence, he has argued that the federal courts are in no better position than legislatures to protect the constitutional right of free exercise of religion.

Moreover, judicial restraint was a virtue for Justice Black, but only when the Constitution was silent on the relevant subject matter. Consequently, he refused to find any role for the federal courts in reviewing the constitutionality of state legislation affecting marital privacy, economic matters, or any other important personal interests not explicitly set aside for protection by the constitutional text. While Justice Scalia would surely share this position with respect to interests not explicitly protected in the text, he has argued that judicial restraint is important for its own sake and acts as a tie-breaker for cases in which judges do not have clear constitutional authorization to proceed. This accounts for his willingness to toughen case or controversy requirements.

Comparing Justices Black and Scalia further reveals that in constitutional law the more things change the more they stay the same. Thus, from different political heritages, both Justices have proposed the same solution to the persistent problem of reconciling judicial review with democratic rule. In doing so, they have acted on their respective political and personal judgments about the role of the judiciary. These perceptions and practices tell us a lot about textualism, especially that it seems to fail to account for the need in constitutional adjudication to make reference to something apart from the text of the Constitution in order to apply it. If it is ever to achieve its stated objective of explaining constitutional interpretation, textualism must clarify the inevitability of a justice's development of nonconstitutional premises from which to proceed in constitutional adjudication and the unstable relationship between these premises and the text of the Constitution. The purpose of constitutional theory is to explain these premises, including the degree to which they turn on moral or political judgments about the propriety of judicial activism and restraint. Although none of this is meant to suggest that Justices Black's and Scalia's textualism is nonsense, it does mean that thorough exploration of these Justices' attitudes toward judicial activism and restraint is necessary before students of their jurisprudence can fully make sense of the nature and limits of their textualism.