



The Modes of Constitutional Analysis: Textualism (Part 2)

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This Legal Sidebar Post is the second in a nine-part series that discusses certain “methods” or “modes” of analysis that the Supreme Court has employed to determine the meaning of a provision within the Constitution. (For additional background on this topic and citations to relevant sources, please see CRS Report R45129, *Modes of Constitutional Interpretation*.)

Textualism is a mode of legal interpretation that focuses on the plain meaning of a legal document’s text. Textualism **usually emphasizes** how the terms in the Constitution would be understood by people at the time the terms were ratified, as well as the context in which those terms appear. Textualists usually believe there is an objective meaning of the text, and they do not typically inquire into questions regarding the intent of the drafters, adopters, or ratifiers of the Constitution and its amendments when deriving meaning from the text. In other words, they are concerned primarily with the plain, or popular, meaning of the Constitution’s text. Textualists are generally unconcerned with a decision’s practical consequences; rather, they are wary of the Court acting to refine or revise constitutional texts.

The Justices frequently rely on the text in conjunction with other methods of constitutional interpretation. The Supreme Court will often look to the text *first* before consulting other potential sources of meaning to resolve textual ambiguities or to answer fundamental questions of constitutional law not addressed in the text. For example, in *Trop v. Dulles*, a plurality of the Court held that the Eighth Amendment prohibited the government from revoking the citizenship of a U.S. citizen as a punishment. When determining that a punishment that did not involve physical mistreatment violated the Constitution, the Court first looked briefly to the Eighth Amendment’s text, emphasizing that the “exact scope” of the phrase “cruel and unusual punishment” had not been “detailed by [the] Court.” The plurality then turned to other modes of interpretation, such as moral reasoning and historical practices, in deciding the case.

The *Trop* plurality’s use of textualism in combination with other interpretive methods is distinguishable from a stricter textualist approach espoused most famously by Justice Hugo Black. Consistent with his view that those interpreting the Constitution should look no further than the literal meaning of its words, Justice Black **contended** that the First Amendment’s text—which states “Congress shall make no law . . . abridging the freedom of speech, or of the press”—absolutely forbids Congress from enacting any law that would curtail these rights.

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An example of Justice Black's use of textualism in a First Amendment case is his dissent in *Dennis v. United States*. In that case, the Court held that Congress could, consistent with the First Amendment's guarantee of freedom of speech, criminalize the conspiracy to advocate the forcible overthrow of the U.S. government. The Court determined that the severity of potential harm to the government from the speech in question justified Congress's restrictions on First Amendment rights. In accordance with his view that the Constitution's text should serve as the sole source of its meaning, Justice Black dissented on the grounds that the Court should not have applied a balancing test to uphold the law against First Amendment challenge. He wrote: "I cannot agree that the First Amendment permits us to sustain laws suppressing freedom of speech and press on the basis of Congress' or our own notions of mere 'reasonableness.' Such a doctrine waters down the First Amendment so that it amounts to little more than an admonition to Congress."

Another classic example of a self-consciously textualist opinion is Justice Black's dissent in *Griswold v. Connecticut*. In *Griswold*, the majority struck down as unconstitutional a Connecticut law that criminalized the furnishing of birth control to married couples based on a view that the Fourteenth Amendment's Due Process Clause provides a general right to privacy. Justice Black criticized the majority for straying too far from the Bill of Rights' text and relying on "nebulous" natural law principles to find a "right to privacy in marital relations" in the Constitution that—at least in his view—did not exist. Adhering to his preference for interpreting the Constitution in line with its text, Justice Black wrote: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."

Proponents of textualism point to the simplicity and transparency of an approach that focuses solely on the objectively understood meaning of language, independent of ideology and politics. They argue that textualism prevents judges from deciding cases in accordance with their personal policy views, leading to more predictability in judgments. Proponents also argue that textualism promotes democratic values because it adheres to the Constitution's words adopted by "the people," as opposed to what individual Justices think or believe.

Opponents of a strict reliance on the text alone in interpreting the Constitution suggest that judges and other interpreters may ascribe different meanings to the Constitution's text depending on their background—a problem compounded by textual provisions that are broadly worded or fail to answer fundamental constitutional questions. In addition, opponents argue that judges should consider values not specifically set forth in the text, such as those based on moral reasoning, practical consequences, structural relationships, or other considerations. In other words, establishing textual meaning may not be straightforward, and a more flexible approach that does not bind the Court and policymakers to words written 300 years ago may, in the view of those who argue against textualism, be necessary to ensure preservation of fundamental constitutional rights or guarantees.

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