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Legislative Process and Intent in Justice Scalia's Interpretive Method

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by

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INTRODUCTION

Since Antonin Scalia's appointment to the federal court of appeals in 1982, and subsequently his ascension to the Supreme Court in 1986, his opinions have generated controversy. For example, Scalia's attack on using legislative history to interpret and guide judicial readings of statutes has set off a significant debate within the Court, in Congress, and in the press. Recent efforts by Congress through the 1991 Civil Rights Act[1] to subvert several controversial Supreme Court civil rights decisions in the 1991 Civil Rights Act highlight this controversy. Congress sought to ensure the legislation's meaning and to protect it from judicial misconstruction.[2]

This article explores Justice Scalia's views on the legislative process and his interpretive methodology which questions using legislative intent when interpreting statutes. Unlike other recent scholarship which focuses on Scalia's interpretive method,[3] this article is somewhat more expansive. It will examine his views towards the legislative process and decision-making, including his approach and methodology used in interpreting legislative pronouncements. To do this, the article will first provide an assessment of recent legal scholarship describing Scalia's interpretive jurisprudence. The goal here is to establish a description of the legal community's perspective regarding Scalia's views towards interpreting statutes. The second section will then explore Scalia's view of legislative process and intent, and his belief that both should control judicial construction of the laws.

Contrary to existing scholarship on Scalia, the conclusion will argue that Scalia employs an inconsistently applied interpretive method that adopts a

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[1] Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (1991).

[2] R. Pear, *With Rights Act Comes Fight to Clarify Congress' Intent*, N.Y. Times, November 18, 1991, at A1, col. 6; Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1021 (1992).

[3] *See* Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383 (1992); Note, *supra* note 2.

mercurial attitude towards legislative power and the political process.[4] This inconsistent attitude towards using legislative intent is a result of Scalia's often distrustful view of legislative power.[5] Further, this distrust is a consequence of Scalia's political preferences. This essay argues that such an inconsistent application and use of policy preferences is troublesome. This is true especially in light of Scalia's own assertions that the "only checks on the arbitrariness of federal judges are the insistence upon consistency and the application of the teachings of the mother of consistency, logic."[6]

ASSESSING SCALIA'S IMPACT AND PERFORMANCE: THE STATUS OF CURRENT SCHOLARSHIP

Subsequent to his first year on the Court, various scholarship on Scalia sought to examine his interpretive method and the sources of his disagreement with other conservative members of the Court. George Kannar, for example, seeks to understand Scalia's approach to reading the Constitution.[7] He attributes Scalia's rejection of appeal to author's or Founders' intent analysis to his pre-Vatican II catholicism and his father's professorial background in romance literature. Kannar asserts it is this background which narrows Scalia's interpretation of statutes and the Constitution to the plain meaning that the words convey.[8] Farber and Frickey, on the other hand, attribute Scalia's interpretive approach to his general distrust of legislative politics and the questioning of the judiciary's ability to ascertain legislative intent from the committee reports and comments of particular legislators.[9] These authors also agree with other studies which assert that Scalia's methodology is important in his approach to the law.[10]

Similarly, Arthur Stock notes Scalia's unwillingness to defer to legislative intent and other textual evidence when interpreting congressional statutes.[11] However, Stock notes that Scalia is willing to defer to textual evidence such as

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[4] Strauss, *Tradition, Precedent, and Justice Scalia*, 12 CARDOZO L. REV. 1699, 1716 (1991); Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1740 (1991); Brisbin, *Justice Antonin Scalia and the Politics of Expression: A Study of the Law's Violence* 13 (Delivered at annual meeting of Southwestern Political Science Association, Austin, Texas, March 19, 1992).

[5] *Compare* Brisbin, *Justice Antonin Scalia, Constitutional Discourse, and the Legalistic State*, 44 W. POL. Q. 1005, 1029 (Winter 1992), where the author claims that Scalia demonstrates a "lack of fear of the danger of the politics of majority factions" as they influence legislative determinations.

[6] Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1989-90).

[7] Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297 (1990).

[8] *Id.* at 1299, 1316.

[9] FARBER & FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 89-95 (1991).

[10] *Id.* at 89-91.

[11] Stock, *Justice Scalia's Use of Sources in Statutory and Constitutional Interpretation: How Congress Always Loses*, 1990 DUKE L.J. 160, 160-61.

the *Federalist Papers* when interpreting the Constitution.[12] Stock argues that this interpretive strategy is "inconsistent"[13] and is employed to limit legislative power in order to benefit executive and judicial power.[14] Further, Jean Morgan Meaux, Richard Nagareda, and Jay Schlosser see Scalia's interpretive strategies, including his skepticism towards legislative intent and history, as important to his jurisprudence in the areas of executive and administrative authority,[15] the First Amendment,[16] and church/state issues.[17]

Finally, Daniel Reisman contends that the Justice's interpretive method is not strictly a textual approach, but instead appeals to extra-textual values, including a belief in a strong executive government.[18] Hence, Scalia's jurisprudence and appeal to a neutral methodology actually mask his commitment to further executive power and his depreciation of congressional authority.[19]

Another related line of scholarship has concentrated on Scalia's definition of the Court's role in American society, his attitude towards the other branches of government, and his views on substantive doctrinal issues such as the First Amendment. Gary Hengstler reviews Scalia's 1987 off-bench remarks that endorse creating special tribunals to handle routine issues such as social security disability and freedom of information disputes, in order to limit the Court's workload.[20]

Christopher E. Smith argues that the Justice's "strong views on separation of powers and the institution of the Supreme Court place him at odds with his colleagues."[21] Moreover, Smith claims that Scalia's commitment to separation of powers has given him the role as "stalwart guardian of American governmental institutions."[22] Similarly, Brisbin reaches a like conclusion in his numerous

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[12] *Id.* at 180. *Compare* White v. Illinois, 112 S. Ct. 736, 744 (1992) (Thomas, J., concurring, Scalia, J., joining) where the Justice questions what the "drafters of the Confrontation Clause [of the Constitution] intended it to mean."

[13] Stock, *supra* note 11, at 160.

[14] *Id.* at 160-61, 190-91.

[15] Meaux, *Justice Scalia and Judicial Restraint: A Conservative Resolution of Conflict Between Individual and the State*, 62 TUL. L. REV. 225, 227 (1987).

[16] Nagareda, *The Appellate Jurisprudence of Justice Antonin Scalia*, 54 U. CHI. L. REV. 705, 722 (1987).

[17] Schlosser, *The Establishment Clause and Justice Scalia: What the Future Holds for Church and State*, 63 NOTRE DAME L. REV. 380, 387 (1988).

[18] Reisman, *Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive*, 53 ALB. L. REV. 49, 50 (1988).

[19] *Id.* at 92-93; Strauss, *supra* note 4, at 1716; Tushnet, *supra* note 4, at 1740.

[20] Hengstler, *Scalia Seeks Court Changes*, 73 A.B.A. J. 20 (April 1, 1987).

[21] Smith, *Justice Antonin Scalia and the Institutions of American Government*, 25 WAKE FOREST L. REV. 783, 785 (1990).

[22] *Id.* at 802.

writings on the Justice.[23] He asserts that Scalia's deference to Congress and the Executive as the primary policy making institutions is important to his conception of American politics.[24] All of these authors agree with other commentators that Scalia's willingness to place limits on standing and deny access to the federal courts are attempts to preserve the federal judiciary --especially the Supreme Court-- as an elite institution in American politics.[25]

Overall, the Scalia scholarship characterizes him as a brilliant yet opinionated Justice, who favors a strict and aggressively enforced conception of separation of powers, as well as limited access to the courts. Generally, Scalia is viewed as granting some deference to Congress and even more to the Executive. The result of Scalia's methodology limits judicial power and shows a deference to the other branches of government. Moreover, this scholarship, while noting Scalia's conservative political views, effectively ignores his ideology as controlling his jurisprudence. The authors instead place emphasis on his legal pragmatism, his democratic vision of American society, and, most importantly, his neutral interpretive methodology as crucial in reaching his decisions.[26]

How accurate is the legal scholarship in reaching these claims? Does Scalia consistently and neutrally apply his interpretive methodology? Is ideology as unimportant as the existing scholarship seems to suggest? Analysis of how Scalia applies his interpretive methodology reveals a different story.

SCALIA AND THE LEGISLATIVE PROCESS

An initial reading of Scalia would suggest that he views the Court's relationship to Congress and other legislative bodies as one of a general deference of the former to the latter's policy making discretion. In a 1979 essay,[27] then University of Chicago Law Professor Scalia argued that "Congress is . . . the first line of constitutional defense, and the courts-even the activist modern courts-merely a backstop."[28] According to Scalia,

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[23] Brisbin, *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 25-28 (1990); Brisbin, *supra* note 5, at 1028; Brisbin, *supra* note 4, at 28.

[24] Brisbin, *The Conservatism of Antonin Scalia*, 105 POL. SCI. Q. 1, 5-6 (1990); Brisbin, *Administrative Law is not for Sissies: Justice Antonin Scalia's Challenge to American Administrative Law*, 44 ADMIN. L. REV. 107 (Winter 1992).

[25] Smith, *supra* note 21, at 794-95; Brisbin, *supra* note 23, at 6-9; Meaux, *supra* note 15, at 227, 246; Schlosser, *supra* note 17, at 385; SCHWARTZ, THE NEW RIGHT AND THE CONSTITUTION: TURNING BACK THE LEGAL CLOCK 226-27 (1990); Scatena, *Deference to Discre.* :: *Scalia's Impact on Judicial Review of Agency Action in the Era of Deregulation*, 38 HASTINGS L.J. 1223, 1235, 1254 (1987).

[26] *See* Texas v. Johnson, 491 U.S. 397 (1989), where Justice Scalia joins the liberals and departs from the conservatives in striking down the Texas flag burning law which is often cited as an example of how method and not ideology controls Scalia's approach to the law.

[27] Scalia, *The Legislative Veto: A False Remedy for System Overload*, REG., Nov.-Dec. 1979, at 19.

[28] *Id.* at 20.

> Congress has an authority and indeed a responsibility to interpret the Constitution that are no less solemn and binding than the similar authority and responsibility of the Supreme Court. . . . Moreover, congressional interpretations are of enormous importance-of greater importance, ultimately, than those of the Supreme Court.[29]

However, while Congress is the primary branch which maintains constitutional integrity, it does not have absolute authority to check executive might or regulatory power through the use of legislative vetos.[30] Instead, Scalia argues in his essay that the legislative veto is a form of "legislation in reverse,"[31] that legislative vetos are clearly contrary to the intent of the Framers, and, more importantly, a violation of article I, section 7, clause 3 of the Constitution (the presentment clause).[32] Specifically, a legislative veto is an usurpation of executive authority invested in the President, and if the legislative veto is left unchecked, it will alter the constitutional balance between Congress and the presidency which will ultimately undermine democratic government.[33]

Several points important to understanding Scalia's interpretive strategy are suggested in this article. First, Scalia is concerned with protecting executive power. He also shows deference to Congress as a policy-making body which interprets the Constitution in response to majority demands.[34] Thus, growing out of his notion of separation of powers is the idea of institutional identity and specific functions for each of the three major branches of the government. His respect then for congressional constitutional interpretation reveals his willingness to make the judiciary less prominent in interpreting the Constitution than it had been traditionally. His defense of separation of powers suggests then that even the judiciary has clearly delineated powers that can neither be encroached upon by other branches nor extended by the courts. Hence, Justice Scalia invokes the principle of separation of powers as deference to legislative and executive power and to remove the judiciary from considering of political policy questions.[35] The reason for limiting the judiciary's role is to allow the other branches to assume their responsibility as policy makers.

There is clear evidence in Scalia's scholarly writings and decisions to show that he respects the legislative process as the primary institution to make policy.

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[29] *Id.*

[30] *Id.* at 19.

[31] *Id.* at 22.

[32] *Id.*

[33] *Id.* at 24-25.

[34] Brisbin, *supra* note 5, at 1008. Scalia's views towards Congress and legislative bodies will be examined *infra* notes 99-101 and accompanying text.

[35] Brisbin, *supra* note 23, at 9-14.

For example, in his "*The Doctrine of Standing as an Essential Element of the Separation of Powers*,"[36] Scalia argues that the judiciary should keep out of those "affairs better left to the other branches."[37] Additionally, in his "*Originalism: The Lesser Evil*,"[38] Scalia describes the basic decision-making process in a democracy:

> A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well.[39]

Elsewhere in the same essay Scalia states that "the legislature would seem a much more appropriate expositor of social values" than the judiciary.[40] Thus, Scalia appears to have a vision of the political process that endorses judicial deference to legislative policy making.

There are also examples of policies where the Associate Justice would let the legislative process act unobstructed by judicial scrutiny. In his scholarly writings, Scalia states that "how much to spend for welfare programs is almost invariably a prudential [choice]," and this choice should not be excluded from the deliberations in the "governmental process."[41]

Second, in *Ollman v. Evans*[42] Scalia argued that "legislatures rather than courts should determine whether damages in libel suits against the press should be limited."[43] Third, in *Stanford v. Kentucky*[44] Scalia wrote the majority opinion upholding the imposition of the death penalty for 16 and 17 year olds. In this case, Scalia emphasized that his decision was grounded in the fact that the imposition of the death penalty for individuals this age was not cruel and *unusual* since a "majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above."[45] Thus, deference to the wisdom of state legislatures is important to upholding a death penalty policy.

Fourth, in *Rutan v. Republican Party of Illinois*,[46] Scalia contended that

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[36] 17 SUFFOLK U.L. REV. 881 (1983).

[37] *Id.* at 891.

[38] 57 U. CIN. L. REV. 849 (1989).

[39] *Id.* at 862.

[40] *Id.* at 854.

[41] Scalia, *Morality, Pragmatism, and the Legal Order*, 9 HARV. J.L. & PUB. POL'Y. 123, 126 (1986).

[42] 750 F.2d 970 (D.C. Cir. 1984).

[43] Meaux, *supra* note 15, at 231.

[44] 492 U.S. 361 (1989).

[45] *Id.* at 371.

[46] 497 U.S. 62 (1990) (Scalia, J., dissenting).

the use of spoils is not a violation of employees or potential employees' First Amendment rights and that the merit system is not the only way to staff the government. In Scalia's words, "[t]he whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives."[47] Thus, when it is proper to use party affiliation for hiring purposes is a legislative question.

Fifth, in *Employment Div. v. Smith*,[48] the Justice indicated that many values found in the Bill of Rights, such as those protections offered to the religious practices of minorities, are not banished from consideration in the political process.

> Values that are protected against governmental interference through enshrinement in the Bill of Rights are not thereby banished from the political process . . . It may fairly be said that leaving accommodation 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. . . .[49]

Therefore, contrary to the judiciary's role suggested by footnote 4 in *Carolene Products*,[50] legislatures may deliberate policy matters affecting personal religious practices of discrete and insular groups without the court intervening to protect them.

Sixth, in *Norman v. Reed*,[51] a 1991 term case, Scalia dissented from the majority opinion striking down an Illinois statute.[52] The statute required new third party candidates to secure 25,000 signatures and meet other procedural hurdles that candidates of established parties did not have to meet. Here, the majority argued that the purpose of the statute was to deny unpopular or minority party candidates access to the statewide ballot and thus challenge more established parties for political power.[53] Scalia instead would give significant deference to the "State of Illinois's arrangement of its elections"[54] to prevent the "dangers of factionalism"[55] that might threaten Cook County or Illinois should numerous

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[47] *Id.* at 66.

[48] 494 U.S. 872, 890 (1990).

[49] *Id.*

[50] United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1938).

[51] 112 S. Ct. 698 (1992) (Scalia, J., dissenting).

[52] ILL. REV. STAT. ch. 46, para 10-2 (1989).

[53] 112 S. Ct. 698, 708 (1992).

[54] *Id.* at 709 (Scalia, J., dissenting).

[55] *Id.* at 711.

political parties form.

Finally, as early as 1978 Scalia argued that in regards to abortion, the Court "had 'no business' deciding an issue which had been determined through the democratic process."[56] Not surprisingly then in *Webster v. Reproductive Health Services*,[57] where the majority upheld several state restrictions upon the right to obtain an elective abortion, Justice Scalia contended that *Roe v. Wade*[58] should be overruled and that the Court should defer to other branches of government to make policy in this area.

> The outcome of today's case 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.[59]

These preceding examples, welfare spending, press liability, the death penalty, the religious practices of minorities, political patronage, regulation of third parties, and abortion are instances where the political process should be allowed to operate freely and unobstructed by judicial scrutiny. Despite Scalia'a apparent respect for legislative discretion, the Associate Justice's view of legislative politics suggests that he does not always consider it worthy of respect and deference.

Instead, as Bernard Schwartz contends, the Justice views legislative policy decisions as nothing more than pressure politics.[60] Thus, attempts to ascertain legislative intent when interpreting statutes is unwise, and it is often times better to defer to the executive when looking for meaning.[61]

For example, in an article on judicial interpretion of administrative law, Scalia contends:

> And to tell the truth, the quest for the "genuine" legislative intent is

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[56] Meaux, *supra* note 15, at 228.

[57] 492 U.S. 490 (1989).

[58] 410 U.S. 113 (1973).

[59] Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[60] Schwartz, *supra* note 25, at 244.

[61] *Id.*

> probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all.[62]

Scalia's skepticism towards legislative intent is echoed elsewhere where the Justice describes the legislative process as corrupted by interest group politics or as lacking the deliberative qualities it should possess. A good example of this skepticism is in affirmative action. In *Johnson v. Transportation Agency*[63] Scalia describes the origin of preferential treatment programs as residing in pressure politics.

> It is unlikely that today's result will be displeasing to politically elected officials, to whom it provides the means of quickly accommodating the demands of organized groups to achieve concrete, numerical improvement in the economic status of particular constituencies.[64]

In *Richmond v. Croson*[65] Scalia sees the percent MBE set aside program as the product of the type of factional politics that Madison sought to prevent in *The Federalist* No. 10.[66] Scalia states, pace Madison, that "[a]n acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history."[67] Thus, factions are clearly the source of affirmative action programs, and they can damage the integrity of the legislative deliberative process.[68]

Additionally, in his dissent in *Austin v. Michigan Chamber of Commerce*,[69] Scalia attacked a Michigan law[70] requiring business corporations wishing to make political contributions to set up special segregated funds for this purpose. Scalia depicted this law as the product of the type of pressure politics and unchecked public opinion that Jefferson, Madison, and DeTocqueville would

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[62] Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

[63] 480 U.S. 616 (1986).

[64] *Id.* at 677.

[65] 488 U.S. 469 (1989).

[66] *Id.* at 522-24.

[67] *Id.* at 527-28.

[68] In his dissent in Norman v. Reed 112 S. Ct. 698, 711 (1992), Scalia also refers to Madison and THE FEDERALIST NO. 10 and again aludes to the spectre of corruption and factionalism that potentially threatens legislatures.

[69] 494 U.S. 652, 679-95 (1990) (Scalia, J., dissenting).

[70] MICH. COMP. LAWS § 169.254(1) (1979).

have opposed and wanted to contain.[71] Here, Scalia attacked the majority opinion for supporting legislation aimed at rooting out the "New Corruption."[72] He also attacked the Michigan law aimed at corporate campaign contributions as representing no more than a form of public censorship of an unpopular speaker.[73]

Besides affirmative action and campaign finance reform, there are other areas where the Justice second guesses the legislative process.[74] In *Nollan v. California Coastal Commission*,[75] for example, the Justice seemed to suggest that property deserved some type of special protection against legislative excess.[76] Elsewhere, there are general indications that Scalia is suspect of the integrity of legislative political decisions because they are often compromised by interest group politics. In scattered opinions, Scalia suggests that policy decisions often are either the product of pressure politics or staff work, with neither containing discernible significant legislative deliberation or rationality.

For example, in *Hirschey v. F.E.R.C.*,[77] Scalia disagrees with the majority opinion's attempt to use legislative intent to ascertain the meaning of a statute.

> I frankly doubt that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill. And I think it is time for the courts to become concerned about the fact that routine deference to the details of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.[78]

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[71] 494 U.S. at 693-94 (1990) (Scalia, J., dissenting).

[72] *Id.* at 693.

[73] *Id.* at 693-95.

[74] *See* Morrison v. Olson, 487 U.S. 654 (1988) (Scalia, J., dissenting) and Mistretta v. U.S., 488 U.S. 361 (1989) (Scalia, J., dissenting) for the Justice's refusal to defer to congressional legislation that would have authorized either the appointment of a special prosecutor to investigate alleged criminal activity in the Executive branch or the creation of sentencing guidelines by members of the Federal bench. In many ways, both decisions sought to "close" and not open the legislative deliberative process.

[75] 483 U.S. 825 (1987).

[76] *See* Scalia, *Economic Affairs as Human Affairs*, ECONOMIC LIBERTIES AND THE JUDICIARY 31, 37 (Dorn & Manne eds., 1987), where then Court of Appeals Judge Scalia argued for a "constitutional ethos of economic liberty" that will give more protection to economic rights.

[77] 777 F.2d 1 (D.C. Cir. 1985).

[78] *Id.* at 7-8 (Scalia, J., concurring).

In *Green v. Bock Laundry Machine Co.*,[79] Scalia reiterates this theme.

> I am frankly not sure that, despite its lengthy discussion of the ideological evolution and legislative history, the Court's reasons for both aspects of its decision are much different from mine. I respectively decline to join that discussion, however, because it is natural for the bar to believe that the juridical importance of such material matches its prominence in our opinions-thus producing a legal culture in which, when counsel arguing before us assert that "Congress has said" something, they now mean, by "Congress," a committee report.[80]

Additionally, in *Wisconsin Public Intervenor v. Mortier*[81] Scalia questions the value of committee reports in clarifying whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[82] was meant to supersede local state regulation of pesticides.[83] Here he argues that not only are committee reports unclear on this issue, but that committee reports are not even relevant because they do "not necessarily say anything about what Congress as a whole thought."[84] In Scalia's opinion, reading legislative history is a recent phenomena[85] representing a "'weird endeavor'" that is no more than a "'psychoanalysis of Congress.'"[86]

Moreover, Scalia joined Justice Rehnquist's majority in the somewhat paradoxical decision of *Rust v. Sullivan*[87] which upheld the Secretary of Health and Human Services' regulation barring abortion counseling in federally-funded Title X clinics. The Court proclaimed that the Secretary's regulations were made pursuant to 42 U.S.C. §§ 300 to 300a-6[88] which stated at 300a-4 that "[n]one of the funds appropriated under this subchapter shall be used in programming where abortion is a method of family planning."[89]

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[79] 490 U.S. 504 (1989), *superceded by statute*, Davis v. Marion, 1991 U.S. App. LEXIS 13544 (7th Cir. June 21, 1991).

[80] *Id.* at 529-30 (Scalia, J., concurring).

[81] 111 S. Ct. 2476 (1991).

[82] 7 U.S.C. § 136 *et seq.* (1988).

[83] Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991).

[84] *Id.* at 2489.

[85] *See* Note, *supra* note 2, at 1011 for a historical discussion of the Court's use of legislative history in interpreting statutes.

[86] *Mortier*, 111 S. Ct. at 2490 (quoting Justice Jackson in United States v. Public Utilities Commission, 345 U.S. 295, 319 (1953) (Jackson, J., concurring)).

[87] 111 S. Ct. 1759 (1991).

[88] 42 U.S.C. § 300a to § 300a-6 (1988).

[89] 42 U.S.C. § 300a-4 (1988).

In *Rust*, Scalia joined Chief Justice Rehnquist, who was unwilling to defer to Congress on the political question of abortion counseling. Instead, Scalia was willing to second guess Congress when there was no evidence presented that the legislation was the product of pressure politics. Additionally, while Scalia usually dissents from appeals to legislative history, he was willing to join in a decision that assumed a legislative history or intent when the opinion noted that both were ambiguous.[90] Here, Scalia refused to follow his usual methodological rules or the usual canons of judicial interpretation and legislative deference that would assume that Congress was not seeking a constitutional challenge when it wrote the Act.[91] Instead, Scalia acted contrary in order to reach a constitutional issue on a policy that he felt strongly about.

Elsewhere, Scalia has expressed similar skepticism towards ascertaining legislative intent, except where it seems to support a particular holding he endorses.[92] For example, in *Sable Communications v. FCC*,[93] Scalia wrote a concurring opinion that relied in part on the use of legislative history to uphold the banning of "dial-a-porn" services over telephones.[94] In *Jett v. Dallas Independent School District*[95] Scalia appeals to legislative intent in a concurring opinion[96] holding that an individual who is allegedly discriminated against by a municipal employee may not hold the municipality responsible for the discrimination.[97] Here, Scalia uses legislative intent to indicate that Congress did not intend that 42 U.S.C. §§ 1981, 1983 apply to municipalities for an employee's violation of another employee's rights. Moreover, in *Chisom v. Roemer*[98] Scalia dissents[99] from the majority opinion upholding the application of Section 2 of the 1965 Voting Rights Act as amended in 1982.[100] In his dissent Scalia uses the legislative history of the Act to show why Congress did not intend to apply the Act to state judicial elections.[101] Overall, it appears that Scalia's suspicion towards the integrity of the legislative decision making process has led the Justice to his claim to ascertain a comprehensive legislative history. This has thus led the Justice towards alternative means for interpreting statutes

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[90] 111 S. Ct. at 1767-68.

[91] *See* Justice Blackmun's dissent in *Rust*, 111 S. Ct. at 1778-80 for clarification of this point.

[92] *See generally Regulatory Review and Management*, REG., Jan.-Feb. 1982, at 19, 21; Nagareda, *supra* note 16, at 722; Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

[93] 492 U.S. 115 (1989).

[94] 492 U.S. 115, 133 (1989) (Scalia, J., concurring).

[95] 491 U.S. 701 (1989).

[96] *Id.* at 738.

[97] *Id.*

[98] 111 S. Ct. 2354 (1991).

[99] 111 S. Ct. 2354, 2369-76 (1991).

[100] Voting Rights Act of 1965, codified as amended at 42 U.S.C. § 1973 (West 1983 & Supp. 1992).

[101] 111 S. Ct. 2354, 2369 (1991).

based on the plain English meaning of the words employed.[102]

Consequently, despite claims by some that Scalia defers to Congress out of respect for it as the primary policy making body representing majority factions,[103] his own opinions repeatedly demonstrate an apparent contradictory commitment to deference to legislatures along with deep distrust for their politics. His distrust is the product of his belief that: (1) local legislatures, and perhaps Congress, are often captured by factions and interest group politics; or (2) legislative choices are not the product of rational deliberation by elected representatives, but are the product of staff or committee work. Hence, while some of Scalia's own scholarly writings suggest legislative deference and respect,[104] the Justice's opinions also often reject an appeal to legislative intent as an unreliable means to interpret statutes. Overall, we are left with a record that shows Scalia's view of legislative politics as one threatened by the evils of faction and interest that Madison feared and discussed in *The Federalist* Nos. 10 and 51.[105]

CONCLUSION

Explaining Scalia's Interpretive Bias

What does an analysis of Antonin Scalia's scholarly writings and judicial opinions suggest about his views on legislative history and the legislative process? First, the Justice appears unwilling to defer to legislative bodies in the area of affirmative action and the protection of white males, property rights, campaign finance reform as it effects corporations,[106] and the authorization of abortion counselling in federally funded clinics, among other areas. However, he seems content to defer to Congress in the areas of abortion regulation, tort liability for the press, the death penalty, religious practices of minorities, and political patronage, among other policy areas. Scalia's own writings suggest that he is often suspect of legislative integrity, and perhaps that suspicion or his interpretive methodology might explain this facially erratic pattern of legislative deference. Yet no clear rule or criterion in his decisions or writings has emerged to tell readers when judicial review is needed because the legislative process has

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[102] FARBER & FRICKEY, *supra* note 9, at 89-90.

[103] Brisbin, *supra* note 5, at 1029.

[104] Brisbin, *supra* note 23, at 5-7; Nagareda, *supra* note 16, at 739; Scalia, *supra* note 37, at 854.

[105] *See* City of Richmond v. Croson, 488 U.S. 469, 522-24 (1989) (Scalia, J., concurring) and Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 692-95 (1990) (Scalia, J., dissenting) as specific examples of where Scalia draws references to Madison, legislative politics, factions, and THE FEDERALIST PAPERS. In these two cases specific references to the dangers of factions and threatening legislative deliberations is noted.

[106] 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, 1815 (1991).

malfunctioned. All that Scalia has given us are policy areas where the Justice may or may not defer to Congress. Contrary to his claims and those by his critics, the Justice does not demonstrate a consistently applied attitude towards the legislative process or the use of legislative intent.

However, how important is it for Scalia or the judiciary to be consistent? While Scalia has indicated that legislatures "are subject to democratic checks upon their lawmaking"[107] and thus, by implication, are not subject to the test of consistency, the "only checks on the arbitrariness of federal judges are the insistence upon consistency" and the application "to each case a system of abstract and entirely fictional categories developed in earlier cases which are designed, if logically applied, to produce 'fair' or textually faithful results."[108] Hence, Scalia appears to agree with a long line of legal scholarship that the hallmark of judicial decision-making and the chief check upon such abuse is the consistent application of neutral and general principles of law to particular cases.[109] Yet the Associate Justice has also echoed Emerson's well-known aphorism that "a foolish consistency is the hobgoblin of little minds."[110] In some cases, a "sacrifice of consistency" is permitted if such consistency would produce a result that is "simply wrong."[111]

The question becomes, then, how does Scalia know when the legislative process is or is not tainted, or that applying consistency would produce "simply wrong" results, thus justifying a departure from consistency? When is pressure politics really pressure politics and not simply the reasonable mobilization of coalitions, interest groups or minorities to produce a majority?[112] How does Scalia separate good majority building in legislatures in response to the electorate's will from catering to special interests? No consistent rule or category is provided by the Justice, despite Scalia's claim that such categories are necessary to check the judiciary. This absence of a rule, along with his erratic pattern of deference and second-guessing legislatures leaves us with many questions regarding the consistency, methodology, and aims of his statutory

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[107] Scalia, *supra* note 6, at 588.

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

[109] *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law*, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961); BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); *and* BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); *with* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) *and* BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 147-48 (1990).

[110] Scalia, *supra* note 6, at 586.

[111] *Id.* at 589.

[112] *Compare* VAN HORN, et al., POLITICS AND PUBLIC POLICY (1989) *with* RIPLEY & FRANKLIN, CONGRESS, THE BUREAUCRACY, AND PUBLIC POLICY (3d ed. 1984); LOWI, THE END OF LIBERALISM (2d ed. 1979) *with* POLSBY, COMMUNITY POWER AND POLITICAL THEORY (1st ed. 1963); *and* DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY (1961) *with* TRUMAN, THE GOVERNMENTAL PROCESS (1951).

construction. Hence, we must assume that the Justice's interpretive methodology is not neutral and instead is guided by some substantive values that tell him whether or not deference is demanded.

One possible set of values that may guide his interpretation of legislation could be his sympathy for executive over legislative power. As discussed in Section I,[113] many authors have noted Scalia's support for strong executive power. The separation of powers cases, *Mistretta v. United States*, *Morrison v. Olson*, and *Synar v. United States*, for example, are instances where Scalia favored executive power and discretion over legislative control and discretion.[114] Scalia's dismissing legislative history and preferring to apply a textualist approach when reading statutes necessarily limits the deference he gives to Congress. This method implicitly favors executive authority by giving more leeway to interpret statutes.[115] Hence, one could explain many of his decisions which from legislative deference by postulating that when congressional-legislative power comes into conflict with presidential-executive power, Scalia's methodology is to favor the latter. While this rule may explain many of the cases noted in this article, it cannot account for decisions where questions of conflict between congressional and presidential power are not at issue. Moreover, the issue of affirmative action, for example, is somewhat unaccounted for. Additionally, in cases such as *Sable Communications v. F.C.C.*,[116] the Justice was willing to defer to Congress and to the use of legislative intent. This result is also inconsistent with the above claim.

Another way to explain his decisions is to look at the policy areas where Scalia favors deference versus those where he does not. Looking at different policy areas might reveal a pattern of decisions or a political philosophy guiding his interpretive strategy. Given his willingness to defer to legislatures in the areas of the death penalty, religious expression, and tort liability for the press, and his unwillingness to defer in the areas of property rights, campaign finance reform as it affects corporations, and affirmative action as it affects white males, Scalia appears to endorse a specific conception of the political process that endorses a political ideology sympathetic to classical Manchester Liberalism. Such an ideology, as originally articulated in 19th century England, emphasized limited government, faith in the marketplace, commitment to legalism, materialism, property rights, and enforcement of majoritarian morality as essential to the creation of free society.[117] Hence, it is possible, and not surprising, that either

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[113] *See supra* notes 13-19 and accompanying text.

[114] Mistretta v. United States, 488 U.S. 361, 413-21 (1989) (Scalia, J., dissenting); Morrison v. Olson, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting); Bowsher v. Synar, 478 U.S. 714 (1986).

[115] Strauss, *Legal Process and Judges in the Real World*, 12 CARDOZO L. REV. 1653, 1656 (1991).

[116] 492 U.S. 115 (1989).

[117] DOLBEARE, DIRECTIONS IN AMERICAN POLITICAL THOUGHT, 16-18, 22-23 (1969).

Scalia's (or any Justice's or judge's) own political values[118] influence the use of his interpretive methodology, or that his interpretive methodology is not neutral,[119] but is governed by other values that indicate where he is willing to defer to congressional-legislative power. What is surprising, instead, is how most of the scholarship on Scalia has ignored the influence of his ideology on his decision-making and approach to the law.

Thus, whether referring to Scalia's support of presidential power or his political values, this essay questions previous scholarship on the Justice which primarily argues that Scalia's jurisprudence is methodologically driven and that his methodology is consistently applied. If we assume that Scalia's jurisprudence is methodologically driven, or driven by some vision of separation of powers or American political institutionalism, we are then left with a view of his political process and interpretive strategy which suggests a perhaps inconsistent use of legislative history and deference to legislative decision-making. If, however, we assume that Scalia's jurisprudence is result orientated and that his political philosophy and policy preferences dictate the use of legislative intent or deference to other branches, then his writings and decisions reveal a profound commitment to use judicial power to serve specific policy goals he supports.

Such a hypothesis should not come as a surprise. In an address to a conference on federalism,[120] Scalia cautioned conservatives to "keep in mind that the federal government is not bad but good. The trick is to use it wisely."[121] Clearly Scalia's decisions seem to bear this caution in mind by revealing attempts to use federal judicial power wisely to create a political process that nourishes policy preferences the Justice supports.

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[118] BAUM, THE SUPREME COURT 144-58 (1992); Wilson, *Constraints on Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook, and Winter*, 40 MIAMI L. REV. 1171 (1986); Gottschall, *Reagan's Appointment to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 50 (1986); Tate, *Personal Attribute Models of the Voting Behavior of United States Supreme Court Justices: Liberalism in Civil Liberty and Economic Decisions, 1948-1978*, 75 AM. POL. SCI. REV. 355 (1981); Gibson, *Judges Role Orientations, Attitudes, and Decisions*, 72 AM. POL. SCI. REV. 911 (1972); Danelski, *Values as Variables in Judicial Decision-Making: Notes Towards a Theory*, 19 VAND. L. REV. 721 (1966); FRANK, LAW AND THE MODERN MIND (1930); CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[119] *See* GADAMER, TRUTH AND METHOD, 289-305 (1986), for a discussion of how any technique of interpretation, including legal hermeneutics, is affected by the attitude and "horizon" of the interpreter. Gadamer's point here is that there is no such thing as an objective tool of interpretation but instead that each interpretive technique is the product of a particular cultural horizon reflecting a specific set of values that determine how that rule will be employed.

[120] *See* Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19 (1982).

[121] *Id.* at 22.