Judicial Review and Legislative Deference: The Political Process of Antonin Scalia

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Abstract

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KEYWORDS: campaign, patronage, minorities
Judicial Review and Legislative Deference: The Political Process of Antonin Scalia*

David Schultz**

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**David Schultz is an assistant professor of political science and constitutional law at Trinity University. Mr. Schultz has worked on several political campaigns and served as a government administrator. He is the author of A SHORT HISTORY OF THE U.S. CIVIL SERVICE (1991); PROPERTY, POWER, AND AMERICAN DEMOCRACY (1992); Business & Plant Closings: The Expansion of the 'Public Use' Doctrine in Eminent Domain, Chapter 22, NICHOLS ON EMINENT DOMAIN (1992); The Use of Eminent Domain and Contractually Implied Property Rights to Affect Business and Plant Closings, 16 WM. MITCHELL L. REV. (1990); and The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence, 13 WESTERN NEW ENG. C. L. REV. (1991).

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I. INTRODUCTION

Since Antonin Scalia's appointment to the federal court of appeals in 1982, and his subsequent ascension to the Supreme Court in 1986, there has been a surprising number of legal scholars and members of the media attempting to ascertain his impact on constitutional doctrine.
and the Supreme Court. This scholarship is "surprising" because Scalia was on the federal bench for less than ten years, and has only been on the Supreme Court for about five years; yet he has already attracted relatively more attention than other Justices, such as White, Blackmun, and Stevens, who have been on the Court much longer.

In order to ascertain the accuracy of the current scholarship on Scalia and, more importantly, to assess the novelty of Scalia's political philosophy, this article examines the existing Scalia scholarship, the Justice’s own scholarly writings, and the judicial opinions authored by Antonin Scalia. The phrase “Scalia’s political philosophy” refers to his respective views on the basic institutions and processes of American government and politics, including the allocation of power among the major national institutions, the regulation of elections, and the staffing of federal positions through political hirings.

This article is divided into six sections. First, recent legal scholarship describing Scalia’s jurisprudence, his role on the Court, and his view of the American political process will be briefly reviewed. Then, the Justice’s conception of the role of the federal courts in American society is discussed. Specifically, the discussion will examine how Scalia approaches the logic of judicial action suggested by footnote four of United States v. Carolene Products.¹ The third section analyzes Scalia’s view of legislatures (Congress in particular) and the presidency. Next, his views on patronage, political parties, and spoils will be examined. The fifth section focuses on Scalia’s views on campaign finance reform. The article concludes with an overall assessment of Scalia’s political philosophy. In brief, this article offers a tentative sketch of the Justice’s views on the American political process and provides an appraisal of the claims made by the existing scholarship on Scalia.

The article is premised on the belief that the existing Scalia scholarship has in many ways failed to provide an accurate description of the Justice’s political philosophy. It contends that Scalia’s various scholarly writings and judicial opinions reveal a political philosophy that endorses a specific conception of the political process, which in turn 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

¹ 304 U.S. 144, 152 n.4 (1938).
of majoritarian morality as essential to the creation of free society. This view of the political process usually supports a use of federal judicial power to secure that ideology. Additionally, Scalia’s jurisprudence endorses a strong executive branch and a weak Congress because such a political alignment presently favors his political agenda.

Thus, contrary to the existing Scalia scholarship which proposes that Scalia consistently applies an interpretive strategy and guides his opinions by judicial restraint, Scalia’s ideology generates an inconsistently applied interpretive method that adopts a mercurial attitude towards legislative power and the political process.

II. ASSESSING SCALIA’S IMPACT AND PERFORMANCE: THE STATUS OF CURRENT SCHOLARSHIP

Scholarly analysis of Antonin Scalia began when the former University of Chicago law professor and editor of Regulation became one of the conservatives that former President Reagan appointed to the federal judiciary. The former President’s aim was to create a judiciary that was more sympathetic to the conservative issues he supported, than was the bench as it existed at that time.

James G. Wilson examined Judge Scalia’s voting record on the court of appeals along with the record of other prominent Reagan appointees, including Judges Bork, Posner, Easterbrook, and Winter. Surveying Scalia’s voting record (along with the other four judges) in the areas of access to the courts, the First Amendment, procedural due process, equal protection, and governmental structure, Wilson concluded that “President Reagan must be pleased with these men, who to varying degrees, have made major creative contributions to emerging right-wing jurisprudence. They have aggressively applied traditional

5. A conservative journal published by the American Enterprise Institute.
7. Id. at 1181-1203.
conservative techniques: increasing judicial deference to other branches of government and imposing new limits on federal court jurisdiction. Specifically, Wilson noted that in twenty-three decisions before Scalia involving criminal defendants, media defendants, and civil plaintiffs, he ruled against them twenty times. However, in contrast to the other judges appointed by Reagan, Scalia has not sought to build elaborate constitutional theories. Scalia has eschewed theory building in lieu of reaching more pragmatic decisions.

Upon his ascension to the Supreme Court, the initial series of articles examining Justice Scalia sought to ascertain whether or not there was a “freshman effect,” or to see if in his first year on the bench he had any major impact on the doctrinal development of the Court. Thea F. Rubin and Albert P. Melone reviewed Scalia’s first year decisions and found that while he wrote less than his fair share of decisions the first year (a sign of the freshman effect), he did align himself with the conservative voting block and also appeared comfortable with his new role as Justice. Thus, in their opinion, there was no real freshman effect. Additionally, studies of Scalia’s first year decisions by Michael Patrick King and Richard A. Brisbin, Jr., concluded that his conservative “decisions suggest . . . long-term influence on constitutional doctrine and the High Court.” They concluded that the Justice’s conservatism demonstrates constitutional and political values that place

8. Id. at 1173. See Bernard Schwartz, The New Right and the Constitution: Turning Back the Legal Clock 223-31 (1990) (similarly includes Scalia among those Reagan appointees considered to be leaders of the “new right” legal movement seeking to overturn the more liberal post New Deal and Warren Court decisions).

9. See Wilson, supra note 6, at 1178.


11. A “freshman effect” is composed of three characteristics: 1) a new Justice is bewildered by new duties and needs an adjustment period to define his/her new role; 2) new Justices write fewer opinions than more senior Justices; 3) freshman justices tend not to vote or align themselves with a voting block.


13. Id. at 101-02.


16. See King, supra note 14, at 5-6.
him in the tradition of Justices Frankfurter and Bickel, and that he has indeed become a "Reagan Justice." 17

Subsequent to his first year on the Court, studies of Justice Scalia turned in three directions. First, one set of commentary focused on his increasingly vocal and often times acrimonious opinions and dissents that included belittlement of, and harsh criticism towards, other Justices' opinions. 18 A second set of articles sought to examine his interpretive method, and the sources of his disagreement with other conservative members of the Court. Recent efforts to overturn several controversial Supreme Court civil rights decisions interpreting the 1991 Civil Rights Act highlight this controversy, as Congress sought to ensure its meaning in the legislation and protect it from judicial misconstruction. 19

George Kannar, in his article, examines Scalia's approach to reading the Constitution. 20 Kannar attributes Scalia's literal interpretation of statutes and the Constitution to his pre-Vatican II catholicism and his father's professorial background in romance literature. 21 On the other hand, Daniel Farber and Philip Frickey locate Scalia's interpretive approach in the Justice's general distrust of legislative politics and his questioning of the ability to ascertain legislative intent from committee reports and comments of particular legislators. 22 Farber and Frickey agree with other studies that state that Scalia's methodology is important to his approach to the law. 23 Similarly, Arthur Stock notes that although Scalia is unwilling to defer to legislative intent and other

17. See Brisbin, supra note 15, at 28.
21. Id. at 1300, 1316.
23. Id. at 89-91.
extra textual evidence when interpreting Congressional statutes, Stock is willing to defer to extra textual evidence such as the Federalist Papers when interpreting the Constitution. Stock argues that this interpretive strategy is “inconsistent” and is meant to limit legislative power in order to benefit executive and judicial power.

Jean Morgan Meaux, Richard Nagareda, and Jay Schlosser view 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, the First Amendment, and church/state issues. Finally, Daniel Reisman contends that the Justice’s interpretive method is not strictly a textual approach but appeals to extra-textual values, including a belief in a strong executive government. Hence, Scalia’s jurisprudence and appeal to a neutral methodology actually mask his commitment to executive power and his depreciation of congressional authority.

Finally, a third 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 limiting the Court’s appeals workload by creating special tribunals to handle routine issues such as social security disability and freedom of information disputes. 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.” Moreover, Smith claims that Scalia’s commitment to separation of powers has placed him in the role of “stalwart

25. Id. at 180.
26. Id. at 160.
27. Id. at 160-61, 190-91.
32. Id. at 92-93. See Strauss, supra note 4, at 1716; Tushnet, supra note 4, at 1740.
guardian of American governmental institutions.\textsuperscript{35} Another analyst, Brisbin, reaches a similar conclusion,\textsuperscript{36} and also indicates that Scalia’s deference to Congress and the Presidency, as the primary policy making institutions, is important to his conception of American politics.\textsuperscript{37} Both these authors agree, as do others, that the former University of Chicago law professor’s willingness to place limits on standing and deny access to the federal courts are attempts to preserve the federal judiciary, and especially the Supreme Court, as an elite institution in American politics.\textsuperscript{38}

Overall, the Scalia scholarship characterizes him as a brilliant yet opinionated Justice, favoring a strict and aggressively enforced conception of separation of powers, limited access to the courts, and generally granting some deference to Congress, but more to the President. This scholarship, while noting Scalia’s conservative political views, mostly downplays the Justice’s ideologies as controlling his jurisprudence. Emphasis is placed upon his legal pragmatism, his democratic vision of American society, and most importantly, upon his interpretive methodology as crucial to the decisions that he reaches. How accurate is the legal scholarship in reaching these claims? Analysis of Scalia’s views on judicial review, the legislative process, patronage, and campaign finance reform, offer some interesting insights and clarifications.

III. JUDICIAL POWER, JUDICIAL REVIEW, AND DISCRETE AND INSULAR MINORITIES

Previous scholarship examining Scalia’s view on the role of the judiciary in American society has concentrated on his views towards standing and separation of powers.\textsuperscript{39} For example, Brisbin and Smith claim that Scalia is acting as an institutional guardian of the Supreme Court, that he wishes to preserve the Court as an elite institution, and that this goal may be secured by limiting access to the Court and by keeping the judiciary out of issues that ought to be resolved by the

\begin{itemize}
  \item \textsuperscript{35} Id. at 809.
  \item \textsuperscript{36} Brisbin, \textit{supra} note 17, at 25-28.
  \item \textsuperscript{37} Id. at 5-6.
  \item \textsuperscript{38} See \textit{Smith, supra} note 34, at 794-95; Brisbin, \textit{supra} note 15, at 6-9; Meaux, \textit{supra} note 10, at 227, 246; Schlosser, \textit{supra} note 30, at 385; Schwartz, \textit{supra} note 8, at 226-27; See also Patrice C. Scatena, \textit{Deference to Discretion: Scalia’s Impact on Judicial Review in the Era of Deregulation}, 38 \textit{HASTINGS L. J.} 1223, 1235, 1254 (1987).
  \item \textsuperscript{39} See Brisbin, \textit{supra} note 15, at 6-8; Smith, \textit{supra} note 34, at 792-95.
\end{itemize}
political institutions of the government. Evidence for these claims is found in numerous decisions Scalia wrote on the court of appeals and on the Supreme Court, as well as in scholarly works of Scalia written before becoming a justice on the Court.

In a 1979 essay, while a 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 backdrop.” According to Scalia, “Congress has an authority and indeed a responsibility to interpret the Constitution that is not 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.” However, while Congress is the institution primarily responsible for maintaining constitutional integrity, it does not have carte blanche authority to check the executive branch’s authority or regulatory power through the use of legislative vetoes. Instead, what Scalia argues in this essay is that the legislative veto is a form of “legislation in reverse” that legislative vetoes are clearly contrary to the intent of the Framers, and more importantly, a violation of Article I, Section 7, Clause 3 of the Constitution. Specifically, a legislative veto is a usurpation of executive authority granted to the President, and if the legislative veto is left unchecked, it will alter the constitutional balance between Congress and the presidency; ultimately undermining democratic government.

This article suggests several points important to understanding Scalia’s political philosophy. First, there is Scalia’s concern to protect executive power along with his general deference to Congress to make policy and interpret the Constitution. Thus, growing out of his notion of separation of powers, there is a sense of institutional identity and function for each of the three major branches of the government.

40. See Brisbin, supra note 15, at 7-9, 10-11, 25-26; Smith, supra note 34, at 809.
42. Id. at 20.
43. Id.
44. Id. at 19.
45. Scalia, supra note 41, at 22.
46. Id. at 24-25.
47. Scalia’s views towards Congress and legislative bodies will be examined. See infra notes 109 to 152 and accompanying text.
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Schultz's respect for congressional constitutional interpretation reveals his willingness to make the judiciary less of a prominent and activist guardian of the Constitution than it had been in the past. Therefore, his defense of separation of powers suggests that even the judiciary has clearly delineated powers that can neither be encroached upon by other branches nor extended beyond by the courts.

In a 1983 article, written while serving on the federal court of appeals, Scalia elaborates more fully on his vision of the judiciary. In this article, Scalia claims that the doctrine of standing is a "crucial and inseparable element" of the concept of separation of powers. He asserts that the failure to respect the notion of standing will result in both the "overjudicialization of the process [sic] of self-governance," and in giving greater respect to the general claims of the citizenry rather than a single plaintiff with a particularized injury.

Furthermore, Scalia claims that the Founders' conception of standing was developed to place limits upon judicial power. However, in chronicling the evolution of the doctrine of standing, Scalia notes that it has expanded well beyond the original conception of the Founders. The standing requirement has diminished to such an extent that currently there is almost no limit upon the ability to bring cases to court. The result of this expansion has been to require the courts to address issues that were previously considered beyond their kin.

It is inappropriate for the Court to be involved in matters such as majoritarian policy-making because that is not the function of the judiciary. Instead, the concept of standing was "meant to assure that the courts can do their work well," and to "restrict[] the courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and [this] excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest[s] of the majority"

49. Id. at 881.
50. Id.
51. Id. at 882.
52. Scalia, supra note 48, at 882.
53. Id. at 891-93.
54. Id. at 892.
55. Id. at 896. Scalia also suggests that even if they did assume this policy-making function, "there is no reason to believe they will be any good at it." Id.
56. Scalia, supra note 48, at 891.
itself." 57

Overall, Scalia's claim in this article is that the concept of standing must be returned to the original understanding of that term. 58 Only by drawing a narrow definition of standing that respects particularized "concrete" injury 59 to an individual that separates her from the rest of the citizenry can the courts assume their traditional role of "protecting minority rather than majority interests." 60 As a result, the judiciary's main tasks, consistent with the logic of the Founders and De Tocqueville, is to protect the constitutional rights of minorities against the tyranny of the majority. 61

References to Scalia's separation of powers and standing decisions are numerous and need not be reviewed here. 62 However, scholarly attention to Scalia's view on the role of the judiciary, as protecting the rights of minorities, has generally been ignored or limited to assertions that he is unsympathetic to their claims. 63 Yet, Scalia's claim that it is the role of the courts to protect minorities against majoritarian excess does not necessarily appear inconsistent with the role that the judiciary has assumed since 1938.

In what has been referred to as an otherwise unimportant case, 64 footnote four of United States v. Carolene Products 65 hinted at a new role for the judiciary in the wake of the triumph of the New Deal and the repudiation of the Court's "first" New Deal decisions. 66 In Carolene Products, the Court upheld economic regulations upon the

57. Id. at 894.
58. Id. at 897-98.
59. Id. at 895.
60. Id.
61. Id. at 893.
63. See, e.g., Kannar, supra note 20, at 1298-99.
64. Bruce Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713, 713 (1985).
65. 304 U.S. 144, 152 n.4 (1938).
66. Ackerman, supra note 64, at 714-15.
shipment of "filled" milk. The Court noted its willingness to defer to Congress regarding economic regulation, but in footnote four of Justice Stone's opinion, it was hinted that a different standard of scrutiny might apply in other cases. Specifically,

[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious or racial minorities. Whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny.67

Implied in this footnote is a definition of a judicial role and review that is aimed at promoting individual liberty, limiting legislative power, and protecting powerless minorities against intrusive and tyrannical majorities. It is a role that was subsequently adopted most enthusiastically by the Warren Court.

An accurate description of the Warren Court approach to the Carolene Products footnote is found in John Hart Ely's arguments about judicial review in Democracy and Distrust.68 Ely argues that the role of the Supreme Court should be to keep the channels of political change open and to facilitate the representation of minorities in the political process. Relying upon Justice Stone's footnote number four in Carolene Products, Ely describes the job of the courts not as second guessing the substance of legislation, but as helping discrete and insular minorities protect their interests in the political process.69

The Constitution, according to Ely, is generally process orient-
tated;\textsuperscript{70} it does not embody substantive values.\textsuperscript{71} Among the processes deemed important in the Constitution is representation where different individuals and groups compete to influence legislative deliberations.\textsuperscript{72} When certain interests are denied access to the political process, or when the representative system ignores or fails to represent a minority out of prejudice, hostility, or an incompatibility of interests, the political process has "malfunctioned."\textsuperscript{73} The role of the judiciary is not to substitute a legislature's policy judgment with its own, but to take steps to ensure that unrepresented and unprotected interests and groups receive a fair and adequate opportunity to be heard in the political process. The judiciary's role is broadening and strengthening the democratic political process by striking down legislation that limits the access or ability of certain groups to protect themselves in the political process.

Ely's comments, as well as the Court's interpretation of footnote number four, were directed in support of intervention to protect blacks and women, among others, who either lack adequate political representation or who were the source of prejudice and discrimination. Thus, at least on its face, the logic of \textit{Carolene Products} footnote number four and Scalia's comments that the primary function of the courts is to protect minorities against majorities appear to be consistent and compatible. In effect, it appears that Scalia accepts the basic role of the courts as defined by this footnote.

However, analysis of Scalia's affirmative action decisions, scholarly writings, and use of this footnote in his own decisions suggests disagreement with the role of the judiciary suggested by \textit{Carolene Products}. First, a review of all of Scalia's D.C. Circuit Court of Appeals decisions during his tenure as Judge found no citations to \textit{Carolene Products}.\textsuperscript{74} During Scalia's tenure as Justice on the Supreme Court, there have been only six references to \textit{Carolene Products} in Court opinions, and none have been directly made by Scalia.\textsuperscript{75} There exists an interest-

\textsuperscript{70} Id. at 92.
\textsuperscript{71} Id. at 100. Ely qualifies his view that the Constitution is void of substantive values when he states that preserving liberty is a substantive value.
\textsuperscript{72} Id. at 103.
\textsuperscript{73} ELY, supra note 68, at 102-03.
\textsuperscript{74} The author would like to thank Professor Daniel Hays Lowenstein for this information.
ing pattern within these six citations.

In Nollan v. California Coastal Commission,\textsuperscript{76} Scalia was in the majority opinion and the dissenters cited Carolene Products (but not footnote four) in reference to economic regulation and eminent domain takings.\textsuperscript{77} In two cases, South Carolina v. Baker\textsuperscript{78} and New York Club v. New York City,\textsuperscript{79} the majority cites Carolene Products in reference to special scrutiny to be given in reference to participants closed off from the political process\textsuperscript{80} or placed in a suspect classification.\textsuperscript{81} Scalia writes concurrences with the majority opinion in both cases, but specifically dissents from those sections of the majority opinion of both Baker and New York Club where Carolene Products is cited. In United States v. Munoz-Flores\textsuperscript{82} Scalia concurs with the majority opinion, but Carolene Products is cited in a separate concurrence by Justices Stevens and O'Connor.\textsuperscript{83} In City of Richmond v. J.A. Croson Co.,\textsuperscript{84} Justice O'Connor writes the majority opinion and cites Carolene Products footnote four and John Hart Ely's Democracy and Distrust to uphold the proposition that powerless minorities (here, whites) deserve special protection.\textsuperscript{85} Scalia concurs with the majority, but writes his own separate opinion. Only in Airline Pilots v. O'Neill\textsuperscript{86} does Scalia specifically join an opinion in which Carolene Products is cited. In Airline Pilots, Justice Stevens' opinion for the Court cites Carolene Products and several other cases to support the proposition that "legislatures . . . are subject to some judicial review of the rationality of their actions."\textsuperscript{87}

Overall, Scalia does not use Carolene Products as precedent or authority for a specific pattern of judicial review. In fact, as Baker and New York Club indicate, he seems to go out of his way to reject the Carolene Products premises. However, the Justice's failure to cite this

\begin{flushleft}
\textsuperscript{76} Nollan, 483 U.S. 825 (1987).
\textsuperscript{77} Nollan, 483 U.S. at 893 n.1.
\textsuperscript{78} 485 U.S. 505 (1987).
\textsuperscript{79} 487 U.S. 1 (1987).
\textsuperscript{80} Baker, 485 U.S. at 513.
\textsuperscript{81} New York, 487 U.S. at 17.
\textsuperscript{82} 110 S. Ct. 1964 (1990).
\textsuperscript{83} Munoz-Flores, 110 S. Ct. at 1977.
\textsuperscript{84} 488 U.S 469 (1989)
\textsuperscript{85} Croson, 488 U.S. at 495.
\textsuperscript{86} 111 S. Ct. 1127 (1991).
\textsuperscript{87} Airline Pilots, 111 S. Ct. at 1134.
\end{flushleft}
case may not be an indication that he is hostile to minority rights or that he rejects the logic of footnote four. Instead, as Bruce Ackerman and Neil Komesar have pointed out, the logic and definition of the judicial role underlying *Carolene Products* is incomplete and in need of revision. Among other things, the footnote fails to clarify what constitutes political malfunctions or which minorities are discrete and insular. Thus, Scalia's opinions perhaps reflect an attempt at reforming *Carolene Products* to give it new meaning, rather than a rejection of it. There exists good evidence for this proposition and it carries with it significant implications for Scalia's view of the political process.

In *Croson*, there are numerous passages indicating that the majority examined the openness of the legislative process in Richmond, Virginia. For example, the majority discussed the legislative history of the Minority Business Utilization Plan (the Plan), and inquired into the reasons given for the Plan, as well as the decision-making process that produced the Plan. The majority suggested that the deliberative process was not open and representative, but rather closed to nonminorities. Additionally, the majority claimed that the Richmond political process failed to show how the 30 percent set aside for Minority Business Enterprises (MBEs) was reasonable or that the Plan was not simply the product of the "shifting preferences" of group and racial politics in the city. Overall, the majority stressed that their decision declaring the city of Richmond's Minority Business Utilization Plan unconstitutional was significantly motivated by their concern with the way the decision was made.

Justice Scalia, in his concurrence, was most direct in his views, stating that this Plan looked to be no more than the product of pressure politics. Scalia, in referring to the *Federalist Papers* and the

88. Ackerman, *supra* note 64, at 717.
90. *Id.* at 411, 415, 424-25; *see* Ackerman, *supra* note 64, at 718, 723-24.
92. *Id.* at 493-500.
93. *Id.* at 521-26. In fact, as pointed out in Farber & Frickey, *supra* note 20, at 89-102, several of Scalia's decisions have noted that legislatures are often not acting in the deliberative fashion they are supposed to and, instead, are either adversely influenced by interest groups or pressure politics. Such a view of the legislative process has influenced Scalia's approach to statutory interpretation, which is to question legislative intent. *Cf.* Hirschey *v.* FERC, 777 F. 2d. 1 (D.C. Cir. 1985) and *United States v.* Stuart, 489 U.S. 353 (1989) for some of Scalia's observations on the deliberative pro-
problems of factions influencing a legislative process, suggested that the Court had a duty to inquire into the structure or fairness of the legislative process to prevent it from damaging the rights or interests of weak or unrepresented groups. The majority, as noted above, referred to Carolene Products and reaffirmed its role in protecting discrete and insular minorities. The Court noted the black majority on the Richmond City Council and suggested that it had illegitimately worked to the disadvantage of a white minority that clearly needed some judicial protection. The conservative Rehnquist Court, Scalia included, demonstrated that it was concerned with the integrity of the political decision-making process and in preventing any groups from exerting any undue influence upon it. Scalia was not hostile to what he saw as a discrete and insular minority (the white minority) being persecuted by a majority. His objective in Croson was to invoke some type of strict scrutiny to keep the political process from closing out a weak minority.

Scalia's opinion in Croson does not necessarily suggest a hostility to Carolene Products, but rather indicates an unwillingness to use it to sustain affirmative action and preferential action for blacks. In Scalia's scholarly writings, he has stated that he is "opposed to racial affirmative action for reasons of both principle and practicality." In his dissent in Johnson v. Transportation Agency, Scalia rejects the gender based affirmative action program of Santa Clara County and argues that the hiring of a woman with a written employment test score less than a white male (Johnson) resulted in discrimination against Johnson. Scalia's opinion reiterates his view expressed in Croson that affirmative action plans are simply the product of politics and not proper constitutional or social policy.

Further insight into Scalia's interpretation of Carolene Products is found in three cases where he employs a revised form of footnote four logic, although he does not cite the case directly. First, in Nollan v.

94. Croson, 488 U.S. at 824. After discussing Madison's views on the danger of factions and the tyranny of the majority in politics, Scalia states, in reference to the politics of the Richmond Plan: "The prophesy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominant racial group." Id.

95. See Antonin Scalia, The Disease as Cure, 1 WASH. U. L. Q. 147, 156 (1979).
97. Id. at 662.
98. Id. at 676-77.
California Coastal Commission, Scalia writes the majority opinion striking down a California zoning/environmental law compelling a property owner to give the public a right of way across his property to the beach and ocean. The majority considered this right of way an uncompensated taking. Scalia indicated that this law infringed upon individual ownership rights and that the strict scrutiny employed in this instance was necessary to prevent legislatures and the political process from singling out specific individuals to contribute to the public good. Thus, property rights appear to deserve special protection against legislative action.

Scalia’s dissent in Austin v. Michigan Chamber of Commerce is a second appeal to Carolene Products logic. Scalia argues against a Michigan law that would place restrictions on the ability of some corporations to disperse money out of corporate treasury funds for political purposes. According to Scalia, the requirement that money spent for political purposes be segregated from other corporate funds eliminates the voice of powerful associations and impoverishes public debate. There is no evidence that placing limits upon the voice of these powerful associations would do what Scalia claims, i.e., “impoverishing public debate.” Further examination indicates that Scalia is protecting a wealthy and well financed organization, against the majority. In many ways, this case, as well as Croson v. Richmond, invokes the logic of footnote four of Carolene Products to protect wealthy corporations and white constituencies, neither of which can within easy reach of imagination (or traditional interpretations of Carolene Products) be considered “discrete and insular minorities” or closed off from the political process. In neither case is Scalia willing to defer to the electorally accountable branches to make policy; he asserts that the courts must intervene.

However, Scalia has no problem deferring to the political process in cases such as Employment Division v. Smith where he appears to repudiate the logic of Carolene Products when it comes to protecting a Native American from majoritarian excess.

100. Id. at 835 & n.4.
102. For a fuller treatment of Austin, see infra notes 188 to 212 and accompanying text.
103. Austin, 494 U.S. at 694-95.
104. See Croson, 488 U.S. at 469.
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 . . . .

Thus, while Scalia is willing to defer to the political process to protect Native Americans, he is not willing to do so for corporations, and he appears to be quite content to raise white males, property rights, and corporations to the status of a discrete and insular groups, and to second guess legislatures in order to protect them.

Scalia has not abandoned Carolene Products and the logic of correcting political malfunctions, it just appears that his definition of when the system malfunctions is triggered by different interests, substantive (political) values, or policy preferences than had been triggered by the Warren Court. Thus, as Komesar correctly points out, Carolene Products is not completely process orientated and value neutral; substantive values determine when the logic is invoked and whom to protect. 107 Scalia's jurisprudence is not completely driven by method as Kannar and others claim, 108 but is guided perhaps by his substantive political values that determine how and when he will employ judicial review and scrutiny over the legislative process.

IV. SCALIA AND THE LEGISLATIVE PROCESS

As previously noted, Justice Scalia invokes the principle of separation of powers as deference to legislative and executive power and to remove the judiciary from consideration of political policy questions. 109 However, as the discussion of Carolene Products revealed, Scalia's view of legislative politics 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. 110 Hence, attempts to ascertain intent of legislatures when reading statutes is unwise; the preferable method being to defer to the executive

106. Id. at 890.
110. See Schwartz, supra note 8, at 244.
branch when looking for meaning.\textsuperscript{111}

There is evidence in various articles authored by Scalia that he respects the legislative process as the primary institution for policy making. In \textit{The Doctrine of Standing as an Essential Element in the Separation of Powers},\textsuperscript{112} Scalia argues that the judiciary should keep out of those "affairs better left to the other branches."\textsuperscript{113} Additionally, in \textit{Originalism: The Lesser Evil},\textsuperscript{114} 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."\textsuperscript{115}

Scalia further states that "the legislature would seem a much more appropriate expositor of social values" than the judiciary.\textsuperscript{116} Thus, a vision of the political process that endorses legislative deference to make policy appears.

Clearly, there are examples of policies where Scalia would let the legislative process act. One, in Scalia's scholarly writings he 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."\textsuperscript{117} Two, in \textit{Liberty Lobby Inc. v. Anderson},\textsuperscript{118} Scalia argued that "legislatures rather than courts should determine whether damages in libel suits against the press should be limited."\textsuperscript{119} Three, in \textit{Stanford v. Kentucky},\textsuperscript{120} 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 on the fact the imposition of the death penalty for individuals this age was not cruel and unusual since a "majority of the [s]tates that permit capital punishment authorize it for crimes committed at age 16 or above."\textsuperscript{121} Thus, deference to the wisdom of state legislatures is important to upholding a death penalty policy. Four, in

\begin{table}
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\textbf{111.} & \textit{Id.} \\
\textbf{113.} & \textit{Id.} at 891. \\
\textbf{114.} & 57 Cinn. L. Rev. 849 (1989). \\
\textbf{115.} & \textit{Id.} at 862. \\
\textbf{116.} & \textit{Id.} at 854. \\
\textbf{118.} & 746 F. 2d. 1563 (D.C. Cir. 1984). \\
\textbf{119.} & Meaux, supra note 12, at 231. \\
\textbf{120.} & 492 U.S. 361 (1989). \\
\textbf{121.} & \textit{Id.} at 371. \\
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Rutan v. Republican Party of Illinois,\textsuperscript{122} Scalia contended that 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, "the whole point of my dissent is that the desirability of patronage is a policy question to be decided by the people's representatives."\textsuperscript{123} Thus, when to use party affiliation for hiring purposes is a legislative question.\textsuperscript{124}

Five, as noted above in Employment Division v. Smith,\textsuperscript{125} 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. Therefore, legislatures may deliberate policy matters that affect personal religious practices of unpopular groups. 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."\textsuperscript{126} Not surprisingly then, in Webster v. Reproductive Health Services,\textsuperscript{127} where a majority upheld several state restrictions upon the right to obtain an elective abortion, Justice Scalia contended that Roe v. Wade\textsuperscript{128} should be overruled and that the Court should defer to other branches 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.\textsuperscript{129}

Moreover, in a somewhat paradoxical decision, Rust v. Sullivan,\textsuperscript{130}

\begin{itemize}
\item 122. 110 S. Ct. 2729 (1990).
\item 123. \textit{Id.} at 2752.
\item 124. For a fuller analysis of Scalia's dissent in Rutan, see infra notes 154 to 174 and accompanying text.
\item 125. 490 U.S. 872, 890 (1990).
\item 126. \textit{See} Meaux, \textit{supra} note 10, at 228.
\item 127. 492 U.S. 490 (1989).
\item 128. 410 U.S. 113 (1973).
\item 129. Webster, 492 U.S. at 532.
\end{itemize}
Scalia joins Rehnquist’s majority decision which upheld a regulation of the Secretary of Health and Human Services barring abortion counseling in federally funded Title X clinics. The Court claimed that the Secretary’s regulations were made pursuant to 42 U.S.C. sections 300-300a-6, which at 300a-4 stated that “none of the funds appropriated under this subchapter shall be used in programming where abortion is a method of family planning.”

In this case, 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 here to join a decision that assumed or reconstructed a legislative history or intent, when both were noted by the majority to be ambiguous. Scalia did not 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 this Act. Scalia strayed from his usual approach in order to reach a constitutional issue on a policy issue that he felt strongly about.

These six examples, welfare spending, press liability, the death penalty, the religious practices of minorities, political patronage, and abortion are instances where the political process should be allowed to operate freely and unobstructed by judicial scrutiny. However, there are many policy areas where Scalia does not view the political process as worthy of deference. As noted above, in *Nollan v. California Coastal Commission* Scalia seemed to suggest that property was deserving of some type of special protection against legislative excess. An even clearer example of legislative questioning is in affirmative action. In *Johnson v. Transportation Agency*, Scalia describes the origin of preferential treatment programs as being 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 improve-

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131. *Id.* at 1767-68.
132. For clarification of this point, see *Rust*, 111 S. Ct. at 1778-80 (Blackmun, J., dissenting).
ment in the economic status of particular constituencies.”

In City of Richmond v. J.A. Croson Co., Scalia views the 30 percent MBE set aside Plan as the product of the type of factional politics that Madison, in Federalist No. 10, sought to prevent. In fact, Scalia states that “an 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.” Thus, factions are clearly the source of affirmative action programs and they can damage the integrity of the legislative deliberative process.

In addition to affirmative action, there are other areas where the Justice second guesses the legislative process, and there are general indications overall that Scalia is suspect of the integrity of legislative political decisions. In scattered opinions, Scalia seems to suggest that policy decisions often are either the product of pressure politics or staff work, with neither containing significant legislative deliberation or rationality than can be discerned. In Hirschey v. F.E.R.C., 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.

136. Id. at 677.
138. Id. at 522-24.
139. Id. at 523.
140. 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) where Scalia refuses 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.
141. 777 F. 2d. 1 (D.C. Cir. 1985).
142. Id. at 7-8 (footnote omitted).
In *Green v. Bock Laundry Machine Co.*, 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 judicial 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.

Additionally, in *Wisconsin Public Intervenor v. Mortier*, Scalia questions the value of committee reports in clarifying whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) was meant to supersede local state regulation of pesticides. 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.” In Scalia’s opinion, reading legislative history is a recent phenomena representing a “weird endeavor” that is no more than a “psychoanalysis of Congress.”

Elsewhere, Scalia has expressed similar skepticism towards ascertaining legislative intent. Overall, the inability to ascertain a comprehensive legislative history intent, or a history that details a legislative process that is truly deliberative, has led the Justice towards alternative means for interpreting statutory construction.

144. *Id.* at 529-30.
148. *Id.* at 2489.
149. *Id.* at 2490 (quoting Justice Jackson in *United States v. Public Utilities Comm’n*, 345 U.S. 295, 319 (1953)).
Consequently, despite claims by some that Scalia defers to Congress out of respect for its position as the primary policy making body, his own opinions reveal a deep distrust for the legislative process because: (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 but the product of staff or committee work. Hence, while some of Scalia’s own scholarly writings suggest legislative deference and respect, Scalia’s opinions 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 that Madison feared in Federalist No. 10.

The question then becomes, how does Justice Scalia know when the legislative process is or is not tainted? When is pressure politics really pressure politics and not simply the reasonable mobilization of coalitions or minorities to produce a majority? How does Scalia separate good majority building in legislatures that respond to the will of the electorate from the catering to special interests? No rule is provided by the Justice, and this leaves us with many questions regarding the consistency, methodology, and aims of his statutory construction, unless we assume that the Justice is guided by some policy preferences that would tell him when deference is demanded or not.

V. PARTY POLITICS, PATRONAGE, AND ADMINISTRATIVE ORGANIZATION

In 1990, the Supreme Court, in *Rutan v. Republican Party of Illinois*, held that the State of Illinois could not consider political affiliation when hiring, transferring, or promoting individuals because such a consideration violated the First Amendment rights of individuals applying for government employment. *Rutan* was not an aberration or an

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152. See Brisbin, supra note 15; Nagareda, supra note 29, at 739; Scalia, supra note 114, at 854.


155. Justice Brennan wrote the opinion for the majority which was joined by Justices White, Marshall, Blackmun and Stevens. Stevens wrote a separate concurring opinion. Justice Scalia wrote the dissenting opinion joined by Rehnquist, Kennedy, and
isolated judicial attack on spoils, but instead it represented a continuation and extension of a series of patronage decisions over the last 20 years in which the Court has attempted to place limits upon the ability of governmental units to employ the spoils system in the staffing of the bureaucracy.\footnote{156} Scalia’s dissent in \textit{Rutan} is interesting because it reveals the Justice’s sense of how party politics, elections, and administrative organizations are related.

\textit{Rutan}, a 5-4 decision, provoked the most intense debate on the Court surrounding judicial assault upon patronage and spoils since Powell’s dissent in \textit{Branti v. Finkel}.\footnote{157} Brennan wrote for the majority and was joined by Marshall, White, and Blackmun, with Stevens writing a separate concurring opinion. In dissent was the “Reagan” Court of Rehnquist, Scalia, O’Connor, and Kennedy.

The \textit{Rutan} case grew out of a challenge to the Illinois governor’s use of party affiliation when hiring, rehiring, transferring, and promoting individuals. The majority opinion of the Court struck down this practice as an unconstitutional infringement of the First Amendment rights of these individuals. Significantly, Brennan cited his decisions in \textit{Elrod v. Burns}\footnote{158} and \textit{Branti}; he extended those rulings, which had applied to patronage dismissals, to also include patronage hirings, transfers, promotions, and recalls after layoffs.\footnote{159} Brennan opined that the government interests in patronage were not vital enough to justify the limitation of the First Amendment rights of these workers.\footnote{160}

More importantly, the majority used this decision to engage in a debate with the dissenters from this case and \textit{Branti} to justify the importance of limiting patronage in the governmental system. As in \textit{Elrod}, Brennan argued that the preservation of the democratic process and party organization is not furthered by patronage.\footnote{161} Moreover, given that civil service rules have already limited the number of patronage positions available in the last few years, the linkage between parties and patronage is now weak. Thus, “parties have already survived the substantial decline of patronage employment practices in this

\footnote{157. 445 U.S. 507 (1980).}
\footnote{158. 427 U.S. 347 (1976).}
\footnote{159. \textit{Rutan}, 110 S. Ct. at 2731-32, 2739.}
\footnote{160. \textit{Id.} at 2734.}
\footnote{161. \textit{Id.} at 2737.
In his dissent, Scalia launched a ferocious attack on the majority's anti-patronage position by arguing that while the merit principle is clearly the "most favored" way to organize governments, it is neither the only way to do it nor does it enjoy exclusive constitutional protection. In referring to George Plunkitt in his discussion of patronage, Scalia describes spoils as part of the American administrative/political tradition, but he backs off from claiming that it is of "landmark status . . . or one of our accepted political traditions."

Scalia's dissent is founded upon two basic claims. First, he rejects the idea that the merit principle is the only constitutional way to organize the bureaucracy. Thus, he defers to legislative wisdom in making this choice. The choice of which way to staff the government should be up to elected officials and not the courts. Second, Scalia also defends patronage as having a rational basis because it supports strong parties, party government, and popular government. Clearly the second claim will be linked to his first, and more important constitutional claim.

The primary constitutional line of attack that Scalia uses in his dissent is to argue that the strict-scrutiny standard used by the majority in this case (as well as in Elrod and Branti) to protect the rights of federal employees is inappropriate, and ought to be rejected in favor of a balancing of interests test. There are two parts to this claim for a new standard. First, Scalia argues that the restrictions on the speech of governmental employees has been held to be different from the restrictions that may be placed on the general citizenry. Second, if the government does have more latitude to act with in regard to its own employees, then all the Court needs to ask is whether there is a rational basis for its regulations. Thus, when Scalia turns to the issue of spoils and patronage, his argument will be that so long as the government can show a rational basis or how patronage serves a reasonable governmental purpose, and that this purpose outweighs the "coercive" effects on the employee, then the Court should defer to Congress. In Scalia's words, "the whole point of my dissent is that the desirability of

162. Id.
163. Id. at 2747.
164. Rutan, 110 S. Ct. at 2748.
165. Id. at 2749, 2752.
166. Id. at 2749.
167. Id.
168. Id. at 2752.
patronage is a policy question to be decided by the people's representatives.169

The second part of Scalia's dissent is directed at showing how patronage does serve an important governmental interest. In presenting an argument in favor of patronage, Scalia states that "the Court simply refuses to acknowledge the link between patronage and party discipline, and between that and party success."170 Scalia cites numerous works in the political science and public administration field that discuss how parties are important to American government and how strong parties provide challengers with the resources needed to take on an incumbent. Crucial to the formulation of a strong party, then, is the reward of patronage that will entice and reward workers.171 Scalia indicates how parties, supported by patronage, will foster two party competition, the integration of excluded groups, and help build alliances.172 Thus, all of these functions are important to democracy and can be aided by patronage.

In his dissent, Scalia does two important things. First, he seeks to place the justification for patronage upon the same or similar legal footing as the Hatch Act decisions which had upheld restrictions upon the partisan political activity of federal employees.173 The second thing that Scalia does is to make a forceful argument for patronage that parallels a pre-civil service reform and Jacksonian defenses of spoils. In effect, Scalia joins Rehnquist and Powell from earlier patronage cases (as well as Rehnquist, Kennedy, and O'Connor in the Rutan dissent) in rejecting much of the language of neutral competence and administration reform that had sought to eradicate spoils.

Overall, what Scalia's dissent suggests is a vision of politics that endorses one of the most brazen types of partisan pressure politics and political activity, i.e., patronage.174 In determining how an administrative agency should be organized and staffed, it should be up to a legislative body to determine if party affiliation is an appropriate qualification for employment. Not only does the Rutan dissent endorse legislative deliberations when Scalia has otherwise questioned it, but it

169. Rutan, 110 S.Ct. at 2752.
170. Id. at 2753.
171. See Id. at 2753-58.
172. Id.
also supports a free wheeling laissez-faire "to the victor belongs the spoils" vision of political activity. Political activity, party maintenance, and electoral activity should not be restricted or encumbered even by the First Amendment rights of government employees.175

VI. THE PARADOXES OF CAMPAIGN FINANCE REFORM

The last arena of politics that this paper explores is the issue of campaign finance reform. Since becoming a Justice on the Supreme Court, Scalia has had the opportunity to rule on two cases involving the political spending of non-profit corporations. In both cases he ruled on First Amendment grounds to strike down applicable campaign finance restrictions.

In the first case, Federal Election Commission v. Massachusetts Citizens for Life,178 the Supreme Court was confronted with the application of a Federal Election Campaign Act (FECA) provision177 that "prohibits corporations from using treasury funds to make expenditures 'in connection with' any federal election and requires that any expenditure for such purpose be financed by voluntary contributions to a separate segregated fund."178 Here, Massachusetts Citizens for Life (MCFL) was a nonprofit, nonstock corporation that supported pro-life issues through a variety of activities including an infrequently published newsletter. What was in question was whether section 441b of FECA applied to an MCFL newsletter published prior to an election primary that urged Massachusetts citizens to vote for pro-life candidates even though the publication did not specifically say "vote for Smith," nor anyone else.179 The Court held that this newsletter was a violation of section 441b. But, at the same time, the Court also held that this provision, as applied to MCFL, was unconstitutional because it excessively burdened the organization's First Amendment rights.

In reaching this holding, the Court first asked whether requiring corporations to set up segregated funds for political expenditures was a

175. See Tashjian v. Republican Party of Conn., 479 U.S. 208, 235 (1986) (Scalia, J., dissenting), where Scalia upholds a Connecticut law that places restrictions upon who may vote in a Republican Party primary. This appears to be a counter example of a situation where he does not support a "wide open, no holds barred" form of political activity and organization.
179. Id. at 243, 249-50.
compelling enough state interest to justify incidental limits upon corpo-
rate free speech rights. The Court answered yes and indicated that:

We have described that rationale in recent opinions as the need to restrict “the influence of political war chests funnelled through the corporate form;” to “eliminate the effect of aggregated wealth on federal elections;” to curb the political influence of “those who exercise control over large aggregations of capital;” and to regulate the “substantial aggregations of wealth amassed by the special advantages which go with the corporation form of organization.”

Thus the Court, with Scalia in the majority, held that preventing the “corrosive influence of concentrated corporate wealth” was compelling enough of a state interest to require separate segregated political funds to ensure that resources acquired in the economic marketplace do not have an unfair advantage in the political marketplace. Segregated funds as prescribed by section 441b would ensure that the political ideas expressed by the corporation are an indication of the voluntary political support for the ideas articulated, and not the ability of a company to amass wealth through its economic actions.

However, the Court noted that the justifications for section 441b restrictions do “not uniformly apply to all corporations.” Some corporations, such as the MCFL, “have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status.” Groups such as MCFL that were formed for ideological purposes, lacking shareholders, and not acting as a conduit for a business or a union, are really political associations and not corporations. Therefore, the special accounting procedures and requirements that compliance with section 441b would entail are “more extensive than it would be if it (MCFL) were not incorporated.” Thus, because this segregated fund requirement is overly broad in its applica-

180. Id. at 256.
181. Id. at 257 (footnotes omitted).
183. Id.
184. Id. at 258-59.
185. Id. at 263.
186. Federal Election Commission, 479 U.S. at 263.
187. Id. at 264.
188. Id. at 254.
tion to the MCFL, its application in this case is unconstitutional.

Scalia’s joining of the majority opinion in Federal Election Commission stands in somewhat curious contrast to Austin v. Michigan Chamber of Commerce⁹⁹ where he dissented from a majority holding that upheld a similar segregated fund requirement in Michigan.

The six-person majority held that corporations, even some non-profit ones such as the Michigan Chamber of Commerce,¹⁰⁰ could constitutionally be prohibited from using direct corporate treasury funds for independent expenditures to support or oppose candidates for office. Following upon arguments made in Federal Election Commission and Buckley v. Valeo,¹⁰¹ the Court ruled that campaign finance laws may, to some extent, regulate the conditions affecting the marketplace of ideas to ensure that it functions fairly and efficiently. Specifically, the majority gave greater weight to an expanded definition of corruption that was referred to in Buckley and Federal Election Commission. Instead of viewing corruption as merely a narrow, individual quid pro quo exchange between a candidate and a lobbyist or interest group, the majority expressed concern over “a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas.”¹⁰² Therefore, the State of Michigan may constitutionally regulate corporate political activity more strictly than many expected the Court to allow. Corporate treasury spending to support or oppose candidates running for office, even by some non-profit corporations like the Chamber, may be prohibited.

Unlike the MCFL, the Michigan Chamber of Commerce was not deemed by the majority to be an ideological and voluntary political association and thus exempt from Michigan requirements to segregate political funds. Surprisingly, Scalia dissented. He opined that the Michigan law interfered with the First Amendment rights of the Chamber, which he presumably labeled a voluntary political association.¹⁰³

Important to Scalia’s dissent and response to the majority holding

¹⁹⁰. The Michigan Chamber of Commerce received its money from business members of the local chamber of commerce.
¹⁹². Austin, 110 S. Ct. at 1397.
¹⁹³. Id. at 1416.
are three claims. First, he maintains that the majority's opinion is a departure from previous Court campaign finance cases. Second, that the holding is a clear case of censorship because it is not a narrowly tailored limitation upon the political expression of a speaker, i.e., a corporation. Third, and perhaps most importantly, even "if the law were narrowly tailored to serve its goal, ... that goal is not compelling." Overall, Scalia claims that the holding is inconsistent with the First Amendment, both by way of its original intent and by way of recent rulings on this Amendment.

To support these claims, Scalia argues against the majority's position that legislatures can regulate corporate speech because "[s]tate law grants (corporations) special advantages" that allow them to amass wealth. In citing *Pickering v. Board of Education* and *Speiser v. Randall*, Scalia reminds the majority that the "[s]tate cannot exact as the price of those special advantages the forfeiture of First Amendment rights." The only way speech can be limited is to secure a compelling state need. In this case, the majority's contention that large corporate treasuries and corporate spending are a threat to public discourse is not narrowly tailored enough to justify limits upon their ability to speak. It is not narrowly enough drawn because the law excludes the "war chests" of certain individuals whose wealth may similarly raise the potential of corruption, while also including within the ban many corporations which may not be wealthy and are subject to the Michigan law.


196. *Id.* at 1408.
199. *Austin*, 110 S. Ct. at 1408. Note, however, that in both *Pickering* and *Speiser* the rights in question were those of individuals seeking public employment, and not corporations participating in the political process.
200. *Id.* at 1409, 1413.
201. *Id.* at 1413.
202. *Id.* at 1409-10, 1412-13. The Court has already held that these individuals cannot be prohibited from making independent expenditures to express their political views.
203. *Id.* at 1413.
Additionally, Scalia indicates that the Michigan Chamber of Commerce is more like a voluntary political association as described by the majority in *Federal Election Commission*, and De Tocqueville in *Democracy in America.* Supposing these voluntary associations, according to Scalia, is destructive. "To eliminate voluntary associations—not only including powerful ones, but especially including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish public debate." Thus, to burden the Chamber with a segregated political fund requirement would be analogous to encumbering the MCFL with such a fund requirement. This requirement would place an excessive burden upon the free speech rights of the Chamber, and thus would be unconstitutional as applied in this case.

Moreover, Scalia contends that even if the law correctly distinguished between voluntary associations and corporations, and "if the law were narrowly tailored to achieve its goal... that goal is not compelling." According to Scalia, the "potential danger" of corporate wealth is not enough of a justification for the Michigan law to establish the narrow tailoring necessary to support the state's objective of restrictions upon corporate political speech. In effect, in breaking with the dicta that he joined in with the majority in *Federal Election Commission*, Scalia questions whether or not there could ever be a compelling enough state interest to place a limit upon a corporation's First Amendment rights. Scalia's contention is that the Michigan law is directed at corporations *qua* corporations, the wealth that they have amassed, and the presumed potential for corruption such wealth has in our society. Such legislation, for Scalia, is clearly a form of censorship directed at the agent of a specific type of speech and is inconsistent with the First Amendment, the intent of Madison and Jefferson, as well as the observations of De Tocqueville on the need for free speech.

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204. *Austin*, 110 S. Ct. at 1415-16. Although if the three criteria of *Federal Election Commission* to distinguish corporations from voluntary associations are applied, i.e., voluntary associations are formed for ideological purposes, lacking shareholders, and not acting as a conduit for a business or a union, then it is debatable whether the Chamber met any of these requirements very well or at all. Unfortunately, Scalia gives no argument to show the application of the *Federal Election Commission* rules to the Chamber of Commerce in *Austin*.

205. *Austin*, 110 S. Ct. at 1416 (emphasis in original).

206. *Id.* at 1413.

207. *Id.* at 1414.

208. *Id.* at 1415.
and voluntary associations in society.

Scalia also argues that the majority’s special corporate exception for the regulation of political speech is inconsistent with previous rulings such as *FCC v. League of Women Voters of California*,209 which struck down bans on political editorializing by noncommercial broadcasting systems. According to Scalia, the majority opinion misuses *FEC v. National Right to Work Comm.*210 as precedent for its decision. Scalia argues that the majority leaps from an assertion in *FEC*, where the Court stated that “we accept Congress’ judgment that the special characteristics of the corporate structure create a potential for . . . influence that demands regulation” to the overbroad and not narrowly tailored limitation upon all corporate speech in *Austin.*211

Scalia views this case as a departure from *Buckley v. Valeo*, which struck down direct contributions to candidates, but which left in place independent expenditures such as the type the Michigan law here aimed to prohibit. In effect, Scalia contends that while *Buckley* sought to eliminate direct *quid pro quo* corruption where money is given to a candidate with the understanding of reciprocity, the aim of the Michigan law is to address the “New Corruption” problem whereby the speech of one unpopular participant is reduced in order to “enhance the relative force of others.”212 Such a reduction of speech by one participant will have the net effect of reducing the total amount of speech in society, and will limit the amount of free expression, diversity of thought and exchange of ideas in society.213 Thus, this law is a form of censorship.

Overall, Scalia’s dissent in *Austin* amounts to the claim that the Michigan law as applied to the Chamber of Commerce is unconstitutional either because it burdens a voluntary political association, or because the law aims at suppressing corporation speech to eliminate corruption.

When Scalia’s views in *Federal Election Commission* and *Austin* are examined together, he appears to be doing two things. First, Scalia seems to be rejecting the goal of corporate campaign finance reform he endorsed in *Federal Election Commision*. In *Austin*, he declared the

212. Id. at 1411.
213. Id.
regulation to be a form of censorship. Second, he also appears to be moving towards an equivalence of corporations with De Tocqueville’s notion of voluntary political associations. He does that without either providing an analysis of De Tocqueville to show the parallels between the two entities, or relying upon legal arguments to show why the rules formulated in Federal Election Commission, to distinguish associations from corporations, need to be amended, applied differently, or rejected.

Thus, if we follow the direction of Scalia’s thought in Austin, we see that elections represent the expression of political ideas, that corporations are an important expression of political ideas, and thus, to regulate corporate spending in elections would be to suppress important First Amendment rights of free expression which would result in censorship and in damage to the electoral process.

VII. CONCLUSION: SCALIA’S POLITICAL PROCESS

What does an analysis of Antonin Scalia’s scholarly writings and judicial opinions in the areas of minority rights, the legislative process, patronage and administrative organization, and corporate campaign finance reform tell us about the Justice’s political philosophy?

First, Scalia’s approach to judicial review reveals a rethinking of the Carolene Products logic. The Justice appears unwilling to defer to legislative bodies in the areas of affirmative action and the protection of white males, property rights, and campaign finance reform as it effects corporations.214 However, he seems content to defer in the areas of abortion, tort liability for the press, the death penalty, religious practices of minorities, and political patronage, among other policy areas. While it appears that Scalia is no longer willing to defer to legislatures in the areas traditionally covered by footnote four of Carolene Products, he does appear to be willing to second guess in new 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 malfunctioned. All that Scalia has given us are policy areas where the Justice will defer or not. Contrary to his claims and those by his critics,

the Justice does not demonstrate a consistently applied attitude towards the legislative process.

Scalia's opinions in limiting campaign finance and patronage reform, and his views on party politics and governmental organization demonstrate a sympathy for what is traditionally more characteristic of the Jacksonian area than of the recent 20th century reform movement. It is a sympathy for a survival of the fittest, a free political market of democratic competition where all ideas and tactics are permitted and where to the victor of the political market belongs the spoils. Overall, Scalia's views in these policy areas describe a judicial role in the political process that is different than the role the Court has previously adopted from Carolene Products. Exactly where Scalia is headed is unclear, but it is definitely in a direction different from what is presently the case.

Second, Scalia's jurisprudence reflects a preference for policies that have been labeled as Manchester Liberalism. This is a version of liberalism more supportive of property rights than civil rights, more supportive of the marketplace than the government, and more supportive of the enforcement of majoritarian morality than of respecting individual ethical choices when those choices are at odds with majoritarian preferences. In effect, Scalia's jurisprudence tends to be more supportive of the goals of classical liberal thought than of those goals supported by the 20th century New Deal welfare state.

Third, this article questions previous scholarship on the Justice which argues for the most part that Scalia's jurisprudence is primarily methodologically driven and that his methodology is consistently applied. Instead, this article presents a view of Scalia's political process that suggests a perhaps inconsistent deference to legislative decision-making if we assume that his jurisprudence is methodologically driven. If we assume that Scalia's jurisprudence is results orientated and that willingness to defer or not to other branches is controlled by his political philosophy and policy preferences towards specific issues, then his writings and decisions reveal a profound commitment to use judicial power to serve specific goals. Such a hypothesis should not come as a surprise. In an address to a conference on federalism, Scalia cautioned conservatives to "keep in mind that the federal government is

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215. See supra note 2 and accompanying text.
not bad but good. The trick is to use it wisely.”217 Clearly Scalia’s decisions seem to bear this caution in mind and reveal an attempt to use federal judicial power wisely to create a political process that nourishes policy preferences that the Justice supports.

217. Id. at 22.