The Appellate Jurisprudence of Justice Antonin Scalia

The appointment of Antonin Scalia to the United States Supreme Court in 1986, along with the elevation of Associate Justice William Rehnquist to the position of Chief Justice, stirred extensive speculation about the extent to which these judges would move the Court in a conservative direction. In order to anticipate some of the changes that might take place on the Court, this comment analyzes a selection of Justice Scalia's opinions from his four terms on the United States Court of Appeals for the District of Columbia. These opinions, together with Justice Scalia's academic writings, reveal recurring themes in his jurisprudence.¹ A detailed analysis of the new justice's appellate jurisprudence will serve as a guidepost by which to predict his future performance on the Court, as well as to measure his consistency as a jurist.

The comment examines Justice Scalia's opinions in three major areas: administrative law, statutory interpretation, and the first amendment. Two considerations, one practical, the other thematic, have contributed to this choice of coverage. As an appellate judge, Justice Scalia wrote several opinions in these areas, while he wrote relatively little on other issues likely to come before the Court. In addition, a common thread runs through these subjects: Justice Scalia's conception of the political process and his narrow view of the courts' role in that process. This overarching theme is likely to influence his views in areas beyond those discussed in this comment.

Part I examines Justice Scalia's views on the institutional position of the judiciary in the area of administrative law. Most notably, Justice Scalia has used the doctrine of standing to limit the class of persons who may challenge administrative actions. He has also taken an expansive view of provisions in the Administrative Procedure Act that shield the actions of administrative agencies from judicial scrutiny.

Part II illuminates Justice Scalia's position on statutory inter-

¹ Justice Scalia's opinions for the Supreme Court are not discussed in this comment, since he has not yet had time to develop a body of work large enough for meaningful analysis.

pretation, particularly his willingness to question some of the conventional tools for analyzing statutes. His opinions reflect scrupulous attention both to statutory language and to the nature of bargains struck between various groups in Congress.

Finally, part III examines Justice Scalia's conception of the first amendment. In this area, he has been reluctant to articulate "new" constitutional rights or revise substantive constitutional doctrines in light of changed social circumstances. Moreover, he has accorded substantial weight to government regulatory interests—to the extent of reevaluating existing Supreme Court precedent—even when those interests conflict with freedom of private expression.

I. THE INSTITUTIONAL POSITION OF THE JUDICIARY: THE ROLE OF COURTS IN AN ADMINISTRATIVE STATE

Article III, section 2 of the Constitution confines the federal courts to adjudicating "cases" and "controversies." The Supreme Court has relied on this language to support justiciability doctrines, such as standing, that require federal courts to step aside while the political branches do their work, and thus limit the power of "an unelected, unrepresentative judiciary in [a democratic] government."² However, this sort of deference conflicts with other pressures created by modern government. Administrative regulation of the economy is a pervasive feature of the American political system. Yet, broad legislative grants of power to administrative bodies threaten uncontrolled discretion, as agencies must resolve specific disputes based on amorphous or even contradictory legislative mandates.³ To reduce the problem of discretion, the Administrative Procedure Act (APA) generally subjects agency action to limited judicial review.⁴ The administrative law cases that follow thus pit the structural concerns of judicial restraint against the APA's oversight requirements.

A. Standing: Proper Parties and Issues

The "cases and controversies" language of article III forecloses

² *Allen v. Wright*, 468 U.S. 737, 750 (1984), quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, concurring).

³ For general discussion, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1669, 1684 (1975).

⁴ 5 U.S.C. § 702 (1982): "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

the conversion of the federal courts into "forums for the ventilation of public grievances" by requiring that legal questions be presented to federal courts only "in a concrete factual context."⁵ As a result, Supreme Court standing doctrine has identified restrictions, both constitutional and prudential, on the parties who may invoke judicial authority. At a minimum, a plaintiff must show (1) that she personally has suffered some actual or threatened injury from the defendant's conduct ("injury in fact"), (2) that the injury fairly can be traced to the challenged action ("causation"), and (3) that the injury is likely to be redressed by a favorable decision ("redressability").⁶ Even when the plaintiff has met these constitutional requirements, the Court has "refrained from adjudicating 'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches."⁷ The Court has required that the plaintiff's complaint "fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'"⁸

Standing limitations raise special difficulties in the administrative context. Until the late twentieth century, the law of standing was highly libertarian in character; judicial power "could be invoked by those trying to fend off government activity, but not by those trying to obtain government protection."⁹ But the Supreme Court abandoned this narrow "legal interest" test in *Data Processing Services v. Camp*, holding that a wide variety of economic, aesthetic, or other interests could confer standing.¹⁰ As a result, beneficiaries of regulation as well as private entities subject to regulation could invoke judicial protection. "Faced with the seemingly intractable problem of agency discretion, courts have changed the focus of judicial review . . . so that its dominant pur-

⁵ Valley Forge Christian College v. Americans United, 454 U.S. 464, 473, 472 (1982).

⁶ Id. at 472. For an opinion by Justice Scalia exploring the "injury in fact" requirement, see United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1378-81 (D.C. Cir. 1984) ("chilling" effect of executive procedures for intelligence gathering on political organizations insufficient to confer standing in absence of specific objective harm).

⁷ Valley Forge, 454 U.S. at 475, quoting Warth v. Seldin, 422 U.S. 490, 499-500 (1975).

⁸ Valley Forge, 454 U.S. at 475, quoting *Data Processing Services v. Camp*, 397 U.S. 150, 153 (1970).

⁹ Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, Constitutional Law 87 (1986) ("Stone Casebook").

¹⁰ 397 U.S. 150, 154 (1970) (seller of data processing services had standing to challenge administrative ruling that national banks could sell such services to other banks and bank customers). Even under *Data Processing*, however, a purely ideological interest in bringing about compliance with the law is insufficient to confer standing. See Stone Casebook at 87 (cited in note 9).

pose is no longer the prevention of unauthorized intrusions on private autonomy, but the assurance of fair representation for all affected interests."¹¹

As reflected in his writing both on and off the bench, Justice Scalia remains highly skeptical of these modern developments. In two related cases,¹² for example, Justice Scalia dissented from the D.C. Circuit majority's holdings that consumer organizations had standing to challenge National Highway Traffic Safety Administration (NHTSA) actions reducing 1985 and 1986 fuel economy standards for light trucks¹³ and delaying promulgation of 1987 standards.¹⁴ The injury asserted in both cases consisted of reduced consumer ability to purchase fuel-efficient light trucks.¹⁵

In order to link NHTSA's actions with the asserted injury, the majority looked to the policy that inspired the fuel standards. Because such rules existed "for the purpose of making vehicles more fuel-efficient," and because the plaintiffs complained of less fuel-efficient vehicles, the majority had no difficulty concluding that plaintiffs had met the requirement of causation. As to redressability, the court reasoned that "[i]f setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless."¹⁶

In dissent, Justice Scalia scrutinized each link in the "chain of hypotheses and predictions" connecting NHTSA's actions with reduced consumer choice.¹⁷ He observed that the plaintiffs could not identify a single fuel-efficient truck or fuel-saving option made unavailable by NHTSA's action; the plaintiffs' own studies showed that manufacturers often chose to pay noncompliance penalties rather than take drastic measures to comply with more stringent standards. He concluded that where the plaintiffs had not "suffered the personal hurt that alone justifies judicial interference

¹¹ Stewart, 88 Harv. L. Rev. at 1712 (cited in note 3); Stone Casebook at 87 (cited in note 9).

¹² Center for Auto Safety v. N.H.T.S.A., 793 F.2d 1322 (D.C. Cir. 1986) ("Auto Safety I"); *In re* Center for Auto Safety, 793 F.2d 1346 (D.C. Cir. 1986) ("Auto Safety II").

¹³ For example, NHTSA reduced the 1985 standard of 21 miles per gallon to 19.5 miles per gallon. Auto Safety I, 793 F.2d at 1323.

¹⁴ Auto Safety II, 793 F.2d at 1347-48. For a summary of the regulatory framework, see Auto Safety I, 793 F.2d at 1324-28.

¹⁵ Auto Safety I, 793 F.2d at 1324; Auto Safety II, 793 F.2d at 1350.

¹⁶ Auto Safety I, 793 F.2d at 1334-35.

¹⁷ For example, Justice Scalia questioned whether reduced standards for the current year would necessarily result "in increased sales of fuel-inefficient light trucks and decreased sales of fuel-efficient light trucks" and whether a delay in promulgation of rules for future years would necessarily preclude imposition of the "maximum feasible" fuel economy standards in those years. *Id.* at 1343.

with the execution of the laws" but merely sought to secure a contemplated benefit "to the society at large," a court should defer to "the political mechanisms by which that society acts."¹⁸

Deference to the representative process may be an attractive solution in fuel standard cases. First, there is little reason to suspect that the representative scheme would place any of the relevant interests at a systematic disadvantage. Diffuse consumer interests are represented by an organized lobby; historically, auto manufacturers have influenced legislation affecting them. Second, at least one of the forms of relief requested—retroactive establishment of fuel standards¹⁹—raises troubling implications for the judiciary. While a court may review agency rules to ensure that they are not "arbitrary or capricious,"²⁰ actual rulemaking by a court—at least where it goes beyond ordering the reinstatement of regulations that the agency wrongly abandoned—appears inconsistent with the separation of policymaking and judicial functions.

While Justice Scalia's approach would secure these institutional advantages, it also undercuts the reasons for abandonment of the legal interest test. The most powerful of those rationales was the desire to give full effect to Congress's intent by ensuring that statutes actually protect those they were meant to benefit. A secondary purpose was to enhance judicial oversight of agency discretion.

Justice Scalia's strict enforcement of the causation and redressability requirements reduces both protection of regulatory beneficiaries and oversight of agency action. The D.C. Circuit majority had been content to imply causation and redressability from regulatory purposes: because the higher standards apparently were intended to increase fuel efficiency, the majority concluded that the standards would produce that result. Justice Scalia's dissent, on the other hand, demonstrated how marginal increases in fuel standards might fail to increase fuel efficiency because of the regula-

¹⁸ *Id.* at 1343, 1344, 1345. In another case, Justice Scalia argued that separation of powers considerations could outweigh redress for even an undisputed "personal hurt"—a seizure of private property—where a judicial remedy would interfere with functions, such as foreign affairs, exclusively consigned to another branch. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550-66 (D.C. Cir. 1984) (en banc) (dissent).

¹⁹ *Auto Safety I*, 793 F.2d at 1344-45 (Scalia, dissenting).

²⁰ This is the normal standard of review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1982). For two examples of its application by Justice Scalia, see *Center for Auto Safety v. Peck*, 751 F.2d 1336 (D.C. Cir. 1985) (upholding NHTSA's reduction of automobile bumper standards); *KCST-TV, Inc. v. F.C.C.*, 699 F.2d 1185, 1195-1201 (D.C. Cir. 1983) (dissent) (arguing against application of "hard look" doctrine to FCC's denial of local TV affiliate's petition for waiver of exception to network nonduplication rules).

tory loopholes available to manufacturers. For Justice Scalia, these loopholes severed the causal connection between NHTSA's actions and the plaintiffs' injury, thereby foreclosing federal judicial review.

One might argue—following the increasingly influential model of regulation as a bargain between beneficiaries, regulators, and regulated entities²¹—that Justice Scalia's approach merely gives appropriate weight to the lenient provisions that manufacturers succeeded in securing from NHTSA. The implication of such a model, however, is that regulated interests can use such provisions not only to temper the effects of regulation, but also to insulate themselves from judicial oversight of agency efforts to enforce any remaining regulations in the statute.

Finally, a grant of standing to challenge agency action may not require a choice between the judicial and political processes in the long run. The court may uphold the administrative action on the merits; if not, an administrative law decision, unlike a constitutionally based one, still does not foreclose legislative action in the future. Even if Congress later overrides the court's decision, judicial intervention may have been a "necessary stimulant" to effective legislative oversight.²² In this sense, the exercise of judicial power could enhance rather than usurp democratic control of agency discretion.

Justice Scalia's separate opinion in *Community Nutrition Institute v. Block*²³ sheds more light on his view of the representative process and its preeminence over judicial control of agency action. In that case, individual consumers, a consumer organization, and a handler of milk products challenged Department of Agriculture market orders that assured producers uniform prices for raw milk.²⁴ The plaintiffs alleged that the price orders deprived them of a lower-priced substitute for whole milk. The main point of contention between the majority and Justice Scalia was the "prudential" standing requirement that individual consumers fall within the zone of interests protected by the statute. The majority held that the consumers met this requirement because the relevant statute expressed a general congressional policy to protect consumers

²¹ See, e.g., Richard A. Posner, *Theories of Economic Regulation*, 5 *Bell J. Econ.* 335 (1974).

²² See Stewart, 88 *Harv. L. Rev.* at 1742 (cited in note 3).

²³ 698 F.2d 1239, 1255-59 (D.C. Cir. 1983) (concurring in part and dissenting in part).

²⁴ *Id.* at 1242-43. The milk price orders permitted local pooling arrangements and restricted alternative sellers of powdered milk products.

from excessive price increases.²⁵

Justice Scalia argued that the relevant standing inquiry was whether Congress intended to enable consumers to challenge agency action in the federal courts. "Governmental mischief whose effects are widely distributed is more readily remedied through the political process, and does not call into play the distinctive function of the courts as guardians against oppression of the few by the many." In *Community Nutrition* there was "a direct and immediate beneficiary class"—milk producers and handlers—that could be relied upon to challenge agency misconduct, thus weakening the claim of "indirect general beneficiaries"—consumers of milk—to be designated "private attorneys general."²⁶ The nature of the legislation in question—an interest group bargain devised to insulate milk producers from competitive forces, according to Justice Scalia—informed the breadth of the statute's zone of interests. Under this view, a court should restrict actions by parties outside of the legislative bargain.²⁷

On review, the Supreme Court unanimously sided with Justice Scalia in denying an action to individual consumers.²⁸ Rather than distinguish between direct and indirect beneficiaries, Justice O'Connor's opinion emphasized specific statutory provisions calling for cooperation among the secretary of agriculture, producers, and handlers to raise prices—a process excluding direct consumer participation. Because the essential purpose of the regulatory scheme was to raise milk prices and thus secure the economic well-being of dairy farmers, consumers could hardly be deemed beneficiaries at all.²⁹

This approach has drawbacks, however. For one, where Congress has attempted to disguise a pure interest group deal with generalized references to consumer interests, it may be desirable for courts to permit outsiders to challenge the terms of the bargain. A conception of standing that gives full effect to public-minded utterances in statutes could deter the creation of narrow interest group legislation, or at least force Congress to set forth the interest group character of legislation explicitly if it wishes to prevent external attacks.³⁰

²⁵ Id. at 1246-47, 1249.

²⁶ Id. at 1256, 1257.

²⁷ For a similar understanding of the milk price regulations in this case, see Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 49-51 (1984).

²⁸ *Block v. Community Nutrition Institute*, 467 U.S. 340 (1984).

²⁹ Id. at 347, 342.

³⁰ See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum L. Rev. 223, 238-39, 251-52 (1986).

Secondly, Justice Scalia's approach in *Community Nutrition* may insulate agencies too effectively, a tendency also evident in the fuel standards cases. Within the regulatory framework described by Justice O'Connor, the secretary of agriculture is the only participant who can restrain demands for higher prices and thus safeguard consumer interests. Agency capture is a substantial risk where an agency distributes benefits to a narrow economic class: a denial of standing to outsiders simply ignores this problem.³¹ Where courts deny standing to a group seeking to combat the problem of capture, the courts run the risk of squeezing that group out of the political system altogether.

Justice Scalia's academic writings further illuminate his conception of the institutional relationship between courts and agencies.³² In a 1983 article discussing standing and the separation of powers, he observed that "the law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against the impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest of the majority itself."³³ Viewed in this manner, the consumer actions in *Center for Auto Safety* and *Community Nutrition* represented attempts to vindicate majoritarian interests in fuel-efficient trucks and lower milk prices. Commenting on this type of case, Justice Scalia reasoned that "[u]nless the plaintiff can show some respect in which he is harmed *more* than the rest of us

³¹ On the relationship between standing and agency capture, see Stewart, 88 Harv. L. Rev. at 1728 (cited in note 3) ("[E]xtension of standing to an increased range of affected interests is a judicial reaction to the agencies' perceived failure to represent such interests fairly, and the consequent perceived need for court review to correct the dereliction."); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 74-75 (1985) ("judicial review at the behest of beneficiaries, no less than review at the behest of members of the regulated class" may guard against agency capture and "increase the likelihood of agency fidelity to statutory standards"). As Professor Sunstein notes, distrust of narrow factional interests has substantial roots in American political thought. *Id.* at 38-48.

³² For examples, see Antonin Scalia, *Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court, 1978 S.Ct. Rev. 345; Antonin Scalia, The ALJ Fiasco—A Reprise, 47 U. Chi. L. Rev. 57 (1979); Antonin Scalia, Procedural Aspects of the Consumer Product Safety Act and Frank Goodman, 20 U.C.L.A. L. Rev. 899 (1973); Antonin Scalia, Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases, 68 Mich. L. Rev. 867 (1970).

³³ Antonin Scalia, The Doctrine of Standing as an Essential Element of the Separation of Powers, 17 Suffolk L. Rev. 881, 894 (1983) (original emphasis).

. . . he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority." Under such conditions, he could find "no reason to believe that an alleged governmental default of such general impact would not receive fair consideration in the normal political process."³⁴

As *Community Nutrition* illustrates, however, the political process may not always produce an appropriate evaluation of majority and minority interests. Modern theories of pluralism reveal the potential for a well-organized faction to secure its own self-interested ends at the expense of broader interests.³⁵ An argument from political process loses considerable force in light of the collective action problems that typically plague diffuse, unorganized majorities.³⁶ One can hardly believe that Justice Scalia is unaware of these pitfalls.³⁷ Rather, his willingness to use standing requirements to safeguard legislative bargains from external attack embodies acceptance of the Holmesian insight that the "normal" political process consists of an unprincipled, even destructive, power struggle among competing pressure groups.³⁸ As Hamilton noted, courts possess "neither FORCE nor WILL but merely judgment";³⁹ the effective exercise of judicial power ultimately turns on consent, by agencies of government as well as by the public, to the principled determinations of judges insulated from popular pressures.⁴⁰

³⁴ Id. at 894-95 (original emphasis), 896.

³⁵ Two seminal works on pluralist theory are Robert Dahl, A Preface to Democratic Theory (1963); George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. 3 (1971).

³⁶ See generally Mancur Olson, The Logic of Collective Action (1965). For an attack on theories that limit judicial review to protection of minority interests underrepresented in the political process, see Bruce A. Ackerman, Beyond *Carolene Products*, 98 Harv. L. Rev. 713 (1985).

³⁷ For an example of Justice Scalia's work that seems to ignore these difficulties, see 17 Suffolk L. Rev. at 895-96 (cited in note 33), which flatly asserts that the majority's interest in clean air will receive "fair consideration" in the political process.

³⁸ What proximate test of excellence [in a political system] can be found except correspondence to the actual equilibrium of force in the community—that is, conformity to the wishes of the dominant power. Of course, such conformity may lead to destruction, and it is desirable that the dominant power be wise. But wise or not, the proximate test of good government is that the dominant power has its way.

Justice Oliver Wendell Holmes: His Book Notices and Uncollected Letters and Papers 250 (1936). This view counsels substantial deference by judges to political outcomes. Holmes once wrote: "If my fellow citizens want to go to Hell I will help them. It's my job." 1 Holmes-Laski Letters 249 (Mark DeWolfe Howe ed. 1953). For a summary of the Holmesian understanding, see Stone Casebook at 738-39 (cited in note 9).

³⁹ The Federalist Papers No. 78 at 465 (New Amer. Lib. ed. 1961) (emphasis in original).

⁴⁰ On the importance of principle in the exercise of judicial review, as well as the difficulties its pursuit may cause the courts, see Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 23-28, 111-98 (2d ed. 1986).

Thus, where disputes over the direction of public policy do not implicate agreed-upon principles for the protection of a minority but are merely questions of power, an unelected judiciary has no claim to control the outcome.

At bottom, preservation of legislative bargains relates to the legitimacy of judicial power. If judges embroil themselves in power struggles among interest groups, they run the risk of undermining public esteem for the courts by contributing to a perception that the judges' own policy views, rather than neutral principles, guide judicial review.

But judicial deference on this ground also presents a different threat to judicial legitimacy. As the Supreme Court has acknowledged, standing requirements are largely "judicially self-imposed limits."⁴¹ Even Alexander Bickel, a fervent advocate of both principled decision making and judicial self-restraint, conceded that such "devices for staying the Court's hand . . . cannot themselves be principled in the sense in which we have a right to expect adjudications on the merits to be principled." It is at the point where a court "gives the electoral institutions their head and itself stays out of politics" that the court "is most a political animal."⁴²

Justice Scalia's restrictive standing doctrine raises a similar danger: his strategy may create a perception that judicial deference stems from a particular, and possibly idiosyncratic, view of representative government rather than from the application of agreed-upon principles.⁴³ Though expressed in terms evoking the separation of powers, Justice Scalia's views on standing amount to revival of the pre-*Data Processing* understanding of the judicial role: that, for the most part, courts should intervene only to safeguard regulated entities (minorities) from illegitimate regulation rather than to protect the ostensible beneficiaries of regulation (majorities) from agency dereliction. Such a regime creates pressure in one direction: administrators have little to fear from a court if they fail to regulate, but risk judicial intervention should they choose to impose sanctions. In this respect, Justice Scalia's jurisprudence is fundamentally laissez-faire and antiregulation; it is also contrary to legislative will in cases where Congress has evinced a desire to use

⁴¹ Wright, 468 U.S. at 751.

⁴² Bickel, *The Least Dangerous Branch* at 132, 132 (cited in note 40).

⁴³ See generally Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964) (criticizing Professor Bickel's "passive virtues" as themselves undermining the Court's function of enunciating principle).

regulation to protect the public.

A pre-*Data Processing* approach to standing would strongly encourage Congress itself to state clearly that beneficiaries may obtain regulatory action through the courts. In his article on standing, Justice Scalia at least admitted that he would permit actions by beneficiaries when authorized by particular regulatory statutes.⁴⁴ This aspect of Justice Scalia's standing jurisprudence can hardly fail to find support in the Supreme Court. A conception of standing in administrative law cases rooted in specific statutory directives would demand the kind of close examination of statutes undertaken by the unanimous Court in *Community Nutrition*.

In practice, however, reliance on legislative grants of standing would insulate agencies from attack in precisely those situations where external monitoring is most needed: where the targets of regulation form a highly concentrated, organized interest group and the beneficiaries a diffuse and politically weak class. Justice Scalia—accepting the outcomes of political power battles as legitimate despite distortions in the representative process—would probably respond: so be it.

B. Judicial Review Under the Administrative Procedure Act

While the cases on standing define who may obtain judicial review of agency action, a second group of cases establishes the types of agency behavior that may be reviewed. Under the APA, final agency action is subject to judicial review.⁴⁵ However, the general review clause does not apply where “(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.”⁴⁶ Disputes over the scope of these two exceptions once again involve a conflict between the value of judicial oversight and concerns about judicial policymaking.

*Gott v. Walters*⁴⁷ involved the first of the APA's two excep-

⁴⁴ Under the judicial review provision of the APA, “any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. According to Justice Scalia, the second clause of this provision incorporates the liberalized standing provisions of specific statutes, although it does not, contrary to *Data Processing*, affirmatively grant standing in all situations where the plaintiff's interests are affected by regulation. 17 Suffolk L. Rev. at 887-89 (cited in note 33). For *Data Processing*'s treatment of this provision of the APA, see 397 U.S. at 153 (holding that plaintiffs merely must be within the “zone of interests to be protected or regulated by the statute . . . in question”).

⁴⁵ 5 U.S.C. § 701.

⁴⁶ Id. at § 701 (a)(1),(2).

⁴⁷ 756 F.2d 902 (D.C. Cir. 1985), vacated and remanded, 791 F.2d 172 (D.C. Cir. 1986) (en banc).

tions to judicial review. There, the plaintiffs challenged certain injury methodologies used by the Veterans Administration on the ground that the agency had failed to follow the notice and comment procedures outlined in the APA. The veterans' benefits statute stipulated that VA decisions "on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive."⁴⁸

Under the VA's interpretation, its contested injury methodologies were unreviewable because they related to the benefit scheme administered by the VA and thus "arose under" the veterans' benefit statute. The plaintiffs, however, maintained that their challenge was permissible because it derived from the APA, not veterans' benefits laws.⁴⁹ In upholding the VA's interpretation, Justice Scalia's majority opinion relied primarily on pragmatic considerations, although it found further support in legislative history. He reasoned that judicial review would create the prospect of judicial interference with "millions" of agency decisions by opening individual claim determinations to review for compliance with APA procedures, a result that would undermine the purpose of the statutory provision precluding review.⁵⁰ In the face of statutory ambiguity, Justice Scalia thus selected a reading that would limit judicial interference with agency affairs.

Some of *Gott's* language particularly reflects Justice Scalia's concerns about the judiciary's role in the modern administrative state. Justice Scalia emphasized the legislature's rejection of the "judicialization, and even the lawyerization" of veterans' benefits and quoted a commentator's assessment that the VA system had "managed to maintain an acceptable level of satisfaction with its process without significant use of oral hearings, without employing independent ALJs, and without subjecting its judgments to judicial review."⁵¹ This aspect of *Gott* is dictum; but it reflects a belief that courts should not readily impose legalistic structures on the

⁴⁸ 38 U.S.C. § 211(a) (1982), quoted in *Gott*, 756 F.2d at 906.

⁴⁹ See *Gott*, 756 F.2d at 905-10 (rejecting the plaintiffs' argument), 919-20 & n.3 (Wald, dissenting) (adopting it).

⁵⁰ *Id.* at 909.

⁵¹ *Id.* at 916, quoting Jerry L. Mashaw, *Bureaucratic Justice* 142 (1983). Using the Social Security Administration as his primary example, Professor Mashaw "squarely reject[ed] the traditional American reliance on formal proceedings and judicial review to control administration." Lance Liebman and Richard B. Stewart, *Book Review: Bureaucratic Vision*, 96 Harv. L. Rev. 1952, 1954 (1983). In passing, Professor Mashaw cited the VA as an example in support of this thesis. See Mashaw, *Bureaucratic Justice* at 142. For a contrary view of the VA's operation, see *National Ass'n of Radiation Survivors v. Walters*, 589 F.Supp. 1302, 1315-23 (N.D. Cal. 1984) (describing VA processing of veterans' disability claims).

administrative process.

*International Union, United Auto., Aerospace v. Donovan*⁵² involved the APA's second exception to judicial review of agency action: action "committed to agency discretion by law." The Supreme Court has held that an action is so committed "where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'"⁵³ In *International Union*, the plaintiff unions had challenged the secretary of labor's decision not to allocate any of the agency's appropriations to a job training program, although such a program was included among the permissible uses of the funds.⁵⁴ Justice Scalia's opinion for the panel held that the court of appeals lacked jurisdiction over the secretary of labor's allocation of a lump-sum budgetary appropriation from Congress.

Where Congress had delegated allocative discretion to an agency, Justice Scalia was not prepared to infer a requirement of "reasonable distribution." He supported this result by arguing that the judiciary was not competent to distribute public funds among competing social programs. The process of budgetary allocation was "an archetypically political task, involving the application of value judgments and predictions to innumerable alternatives, as opposed to the application of accepted principles to a binary determination."⁵⁵ For Justice Scalia, the budgetary process represented precisely the type of unprincipled pork-barrel conflict that he had counseled against disturbing in the standing cases.

In an earlier article opposing the legislative veto,⁵⁶ Justice Scalia lamented Congress's tendency to delegate to administrative agencies "tasks requiring judgments that are of an essentially political nature and that ought to be made by our elected representatives."⁵⁷ Budgetary allocation would fit this description. With re-

⁵² 746 F.2d 855 (D.C. Cir. 1984).

⁵³ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), quoting Sen. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945).

⁵⁴ *Intern. Union*, 746 F.2d at 856.

⁵⁵ *Id.* at 862-63.

⁵⁶ Antonin Scalia, *The Legislative Veto: A False Remedy for System Overload*, 3 Regulation 19 (Nov.-Dec. 1979) (describing the legislative veto as "the device whereby executive [agency] action authorized by statute is made subject to prior disapproval by one (the so-called one-house veto) or both (the two-house veto) houses of Congress"). The "distinctive feature" of the legislative veto is that it enables Congress to stay or revoke previously authorized executive action while "avoiding the President's veto power and (in the case of the one-house veto) the requirement of approval by both houses." *Id.* Since that article, the Supreme Court's decision in *I.N.S. v. Chadha*, 462 U.S. 919 (1983), striking down a one-house veto on separation of powers grounds, largely has settled the debate in Justice Scalia's favor.

⁵⁷ Scalia, 3 Regulation at 26 (cited in note 56).

spect to many of these political judgments, he pointed out that "Congress would not wish to monitor even if it *could* do so," since it had "delegated in the first place simply because [such matters] were 'too hot to handle.'" ⁵⁸ This observation, however, undercuts Justice Scalia's own use of standing limitations, discussed earlier, to reserve some issues for representative bodies. Where the original delegation is evidence of the legislature's unwillingness to grapple with "hot" political issues directly, there may be little reason to suspect that the legislators will adequately monitor agency discretion when such issues are thrown back to them by the courts.

A second case in which Justice Scalia interpreted the "committed to agency discretion" exception required a more fundamental reassessment of the relationship between courts and agencies. In *Chaney v. Heckler*,⁵⁹ eight death row inmates asserted that state executioners' use of certain drugs to administer capital punishment, without prior approval by the Food and Drug Administration (FDA), violated provisions of the Food, Drug, and Cosmetic Act designed to ensure the safety and effectiveness of new uses for existing drugs.⁶⁰

The D.C. Circuit panel majority upheld the plaintiffs' claim. It held that, among other things, the FDA's refusal to exercise its enforcement power did not fall within the APA's "agency discretion" exception to judicial review. Rather, the majority concluded, there was "law to apply" in the case: an FDA policy statement had stipulated that when unapproved use of a regulated drug endangered the public health, the FDA was "obligated" to act.⁶¹ Justice Scalia vigorously dissented. On review, the Supreme Court, in an opinion by Justice Rehnquist, agreed with Justice Scalia and reversed the panel's decision, holding that the agency's action was an unreviewable exercise of discretion.

The essential difference between the approaches of Justice Scalia and the panel's majority lay in characterization of the case. For the majority, *Chaney* involved a clash between individual rights and government power, one that pitted a "glib statement of reasons for the agency's inaction" against the risk to the inmates of "cruel, protracted death" from the inappropriate use of regulated

⁵⁸ Id. at 24 (original emphasis).

⁵⁹ 718 F.2d 1174 (D.C. Cir. 1983), reversed by *Heckler v. Chaney*, 470 U.S. 821 (1985).

⁶⁰ *Chaney*, 718 F.2d at 1176-77. See 21 U.S.C. § 355(a) (1982).

⁶¹ 718 F.2d at 1186, quoting Policy Statement, Legal Status of Approved Labeling for Prescription Drugs, 37 Fed. Reg. 16503, 16504 (1972).

The majority also held that the FDA had jurisdiction to interfere with state capital punishment procedures employing the drugs. Justice Scalia dissented on this point as well.

drugs.⁶² For Justice Scalia and Justice Rehnquist, by contrast, *Chaney* represented a clash of institutions: an attempt to secure judicial interference with an executive agency's expert judgment concerning the deployment of its limited enforcement resources.⁶³

Framing the issue as an institutional conflict led both Justice Scalia and Justice Rehnquist to infer a general presumption against judicial review of agency inaction.⁶⁴ Yet the distinction they drew between action (presumptively reviewable) and inaction (presumptively unreviewable) appears tenuous in light of the express terms of the APA. That statute defines agency action to include a "failure to act" and empowers the courts to "compel agency action unlawfully withheld or unreasonably delayed."⁶⁵ Justice Scalia's willingness to infer a broad presumption against judicial review in the face of this statutory language indicates how strongly he emphasizes the separation of powers.

Justice Scalia's line between agency action (the marshaling of government power against the individual) and inaction (a refusal to confer a benefit on an individual)⁶⁶ is consistent with his conception of a countermajoritarian role for the courts. Justice Scalia converted *Chaney* from an attractive case for judicial action in which plaintiffs sought judicial protection as a political minority (inmates facing capital punishment) to a far less attractive case in which the plaintiffs sought a public benefit (FDA enforcement of

⁶² *Chaney*, 718 F.2d at 1191.

⁶³ *Id.* at 1192-95 (Scalia, dissenting).

⁶⁴ *Id.* at 1198 (Scalia, dissenting); 470 U.S. at 838. Justice Scalia and Justice Rehnquist used similar arguments to support this proposition. Both opinions maintained: (1) that enforcement decisions implicated agency expertise, see 718 F.2d at 1192-93, 470 U.S. at 831-32; and (2) that enforcement priorities came within the executive branch's constitutional authority to "take care" that the laws be faithfully executed, U.S. Const. art. II, § 3. See 718 F.2d at 1192, 470 U.S. at 832. Justice Rehnquist added that agency inaction generally does not involve the "exercise of coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." 470 U.S. at 832 (original emphasis). For criticism of these arguments, see Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. Chi. L. Rev. 653, 665-75 (1985). For general background, see Comment, *The Impact of Heckler v. Chaney on Judicial Review of Agency Decisions*, 86 Colum. L. Rev. 1247 (1986).

Although the Court was unanimous as to the result in *Chaney*, Justice Marshall disagreed with the general presumption of unreviewability, 470 U.S. at 840-55 (concurring), and Justice Brennan believed that the opinion left open the possibility of judicial review of a wide range of agency inaction, *id.* at 839 (concurring).

⁶⁵ 5 U.S.C. §§ 551(13), 706(1) (1982).

⁶⁶ For discussion of this distinction in the constitutional context, see David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. Pa. L. Rev. 1293 (1984).

public health statutes). In choosing this perspective, Justice Scalia looked beyond the particular parties before the court to the larger political context underlying governmental decisions. Although such a perspective is ostensibly a means to protect the separation of powers, it tends to taint judicial treatment of a particular "case" with the broader policy outlook more typical of legislative decisions.

Taken as a whole, these cases strongly suggest that Justice Scalia tends to value institutional concerns such as separation of powers more than the competing interest of judicial oversight. In particular, the new justice perceives a sharp distinction between agency action and inaction and between judicial protection of regulated interests and of regulatory beneficiaries. The major flaw in this approach lies in its failure to acknowledge evidence that the representative process has only limited capacity to safeguard the diffuse majoritarian interests that regulation purportedly serves.

II. STATUTORY INTERPRETATION

A. The Canons of Statutory Construction

The canons occupy a central place among the tools available to a judge in applying a statute. Defenders of these devices contend that they serve as agreed-upon rules for deciphering statutes, represent commonsense guides to interpretation, constrain judicial interpretation, and limit the delegation of legislative power to courts.⁶⁷ Critics have assailed the canons as indeterminate,⁶⁸ and even "just plain wrong"—that is, contrary to any realistic conception of legislative behavior.⁶⁹

Justice Scalia likewise has been suspicious of several canons. For example, in *Carter v. Director, Office of Worker's Compensation Programs*,⁷⁰ his opinion for the panel declared that the canon "inclusio unius est exclusio alterius"⁷¹ has force "only when there is no apparent reason for the inclusion of one disposition and the

⁶⁷ For a concise but critical review of these arguments, see Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805-07 (1983).

⁶⁸ See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To be Construed*, 3 Vand. L. Rev. 395, 401-06 (1950) (for every canon there exists an opposite canon).

⁶⁹ Posner, 50 U. Chi. L. Rev. at 806 (cited in note 67). Judge Posner has argued, for example, that the canons frequently and unrealistically assume legislative omniscience with respect to the details of previously enacted statutes. *Id.* at 811-14.

⁷⁰ 751 F.2d 1398 (D.C. Cir. 1985).

⁷¹ "The inclusion of one thing implies the exclusion of alternate things."

omission of a parallel disposition except the desire to achieve disparate results.”⁷² *Carter* involved provisions of the Longshoreman’s and Harbor Worker’s Compensation Act (LHWCA) permitting employers and their insurers to offset compensation payments by the amount that an injured worker recovered from a third-party tortfeasor.⁷³ The plaintiff worker argued that the provision’s failure to mention the federal government implied that the defendant agency could not offset his benefits.

In rejecting the plaintiff’s contention, Justice Scalia relied on the particular background of LHWCA, which he said demonstrated the legislature’s support for “further judicial elaboration” according to “traditional equitable principles” to prevent double recovery by workers.⁷⁴ This approval of judicial gap filling initially appears anomalous in light of the justice’s strict guardianship of the separation of powers. But *Carter* indicates flexibility in his views; the decision approves supplementation of statutes where the underlying legislation represents a delegation of authority to the common law process and where recognized principles (for example, equitable doctrines) serve to limit judicial innovation.

In a second case involving the canons, *United States v. Hansen*,⁷⁵ Justice Scalia criticized one canon while applying another. The case involved a prosecution of Representative George Hansen for failing to disclose certain income pursuant to the Ethics in Government Act (EIGA).⁷⁶ Hansen’s conviction rested not on the civil penalty clause of EIGA itself, but on a general federal statute imposing criminal sanctions on persons willfully making false statements to a department or agency.⁷⁷

Citing the rule of lenity, which provides that ambiguity in a criminal statute should be resolved in the defendant’s favor, Hansen contended that the uncertainty concerning the preemptive effect of EIGA on the existing criminal statute meant he should not be subject to the criminal sanctions. Justice Scalia responded, however, that the Supreme Court had previously rejected the rule of lenity in cases involving the criminal statute in question.⁷⁸ Although this argument alone could have been dispositive, Justice

⁷² *Carter*, 751 F.2d at 1401.

⁷³ 33 U.S.C. § 933(f), (h) (1982).

⁷⁴ *Carter*, 751 F.2d at 1402.

⁷⁵ 772 F.2d 940 (D.C. Cir. 1985).

⁷⁶ EIGA, Title I, 2 U.S.C. §§ 701-09 (1982) (setting forth the reporting requirements).

⁷⁷ 18 U.S.C. § 1001 (1982).

⁷⁸ *Hansen*, 772 F.2d at 948-49, citing *United States v. Yermian*, 468 U.S. 63, 70 n.7 (1984), and *United States v. Rodgers*, 466 U.S. 475 (1984).

Scalia went on to note that the rule "provides little more than atmospherics, since it leaves open the crucial question . . . of how much ambiguousness constitutes an ambiguity."⁷⁹ In other words, application of such an open-ended rule for statutory explication, unlike the gap filling in *Carter*, would expand judicial discretion without a congressional mandate to do so.

While he rejected the rule of lenity, Justice Scalia applied the canon disfavoring repeals of previous laws by implication. Without that canon, he wrote, "the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress [would] vote for or against a particular measure according to their varying estimations of whether it will be held to suspend the effects of an earlier law that they favor or oppose."⁸⁰ The implications of this argument are twofold. First, it is consistent with Justice Scalia's preference for explicitness in legislation: application of the canon compels Congress expressly to reconsider existing law, without the subterfuge of implicit repeal. To this extent, the canon can help preserve the original legislative bargain from collateral attack. Second, the canon may facilitate lawmaking by eliminating one potential ground of dispute between opponents and proponents of a bill. When the presumptive effect of new laws on existing statutes is known, legislators can use their time to resolve substantive disagreements concerning the new proposal.⁸¹

B. Legislative History and the Politics of Lawmaking

Hansen raises a second problem of gap filling: what evidence should a judge employ to justify a particular statutory reading by reference to the intentions of the enacting legislature? To pin down the nebulous concept of "legislative intent," the federal courts traditionally have turned to congressional committee reports.⁸² A footnote to the D.C. Circuit's opinion in *Hirschey v. F.E.R.C.*,⁸³ for example, referred to a statement in a committee report that the 1985 amendments to the Equal Access to Justice Act

⁷⁹ 772 F.2d at 948.

⁸⁰ *Id.* at 944.

⁸¹ Of course, it might be argued that Justice Scalia's approach also would limit resort to ambiguous language where that is the only way to reach a compromise. This would tend to reduce Congress's ability to enact new legislation, another result with which Justice Scalia might not be wholly displeased.

⁸² See Horace E. Read, John W. MacDonald, Jefferson B. Fordham, and William J. Pierce, *Materials on Legislation* 906-41 (4th ed. 1982); Frank E. Horack Jr., ed., 2 *Sutherland on Statutes and Statutory Construction* §§ 5005-07 (3d ed. 1943).

⁸³ 777 F.2d 1 (D.C. Cir. 1985).

(EAJA) "ratified" an earlier D.C. Circuit decision concerning the granting of attorney's fees under EAJA.⁸⁴ In his concurring opinion, Justice Scalia used this fleeting reference to launch a broad attack on conventional deference to such evidence.

Specifically, Justice Scalia rejected the assumption that "the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of" the enacting legislature.⁸⁵ In part, this objection reflects the fear that deference to every minutiae of a committee report would "convert[] a system of judicial construction into a system of committee-staff prescription."⁸⁶ Justice Scalia's concern stems from his aversion to devices that mask the underlying choices made by the judge in construing a statute and that may even serve to confer a false impression that elected representatives actually considered and intended the result reached by the judge.⁸⁷

An even more problematic source of evidence concerning "legislative intent" consists of "subsequent legislative history," that is, legislators' remarks on the meaning of a previously enacted statute. Justice Scalia's views on this type of evidence are clearly presented in *Gott v. Walters*, discussed in part I, which construed a statute governing the availability of judicial review of VA decisions. In dissent, Judge Wald argued for review power, relying in part on legislators' statements made during debate over a subsequent veterans' benefits law. In that context, the proponent of the later law had observed that previous legislation—namely, the statute at issue in *Gott*—had already granted judicial review.⁸⁸ Justice Scalia responded for the majority, however, that reliance on such after-the-fact remarks would allow advocates of judicial review to "achieve the result they were unable to obtain [earlier] through the legislative process."⁸⁹

⁸⁴ Id. at 2 n.9. Far from relying on the committee report, the majority expressly stated that such evidence was "irrelevant" to its determination.

⁸⁵ Id. at 7 (concurrence). Justice Scalia also cited an excerpt from the *Congressional Record* in which a committee chairman admitted that he had not written or read the committee's report and that the committee itself had never voted on the report. 777 F.2d at 7 n.1.

⁸⁶ Id. at 8. In *Hirschey*, the statements in the committee report were particularly suspect because they dealt with a portion of the statute that the 1985 Congress had reenacted unchanged, despite a contemporary circuit split over its meaning. If Congress had considered and resolved the problem in favor of the D.C. Circuit's position, one would expect it would have made this clear when it reenacted the statute. See id.

⁸⁷ See Posner, 50 U. Chi. L. Rev. at 816-17 (cited in note 67) (criticizing the canons on similar grounds).

⁸⁸ *Gott*, 756 F.2d at 926-27.

⁸⁹ Id. at 914. Justice Scalia supported the denial of jurisdiction over veterans' benefits

A similar concern for protection of the original legislative bargain informed Justice Scalia's dissent in *Illinois Commerce Com'n v. I.C.C.*⁹⁰ There, a state regulatory agency challenged the ICC's decision to preempt regulation of intrastate railroad rates under the Staggers Rail Act of 1980,⁹¹ legislation that empowered the ICC to exempt railroads from regulation under specified circumstances.⁹² The panel majority upheld the ICC's conclusion that a federal exemption order constituted a "standard and procedure" to which the state must defer under the statute.⁹³

Siding with the state agency, Justice Scalia recharacterized the regulatory context by reference to the political forces underlying the Staggers Rail Act. For Justice Scalia, the language of the Act embodied "a compromise between pro- and anti-preemption legislators," and it would be a "betrayal of that compromise" for a court subsequently to accord victory to the pro-preemption forces.⁹⁴

Justice Scalia's attention to the dual nature of the statutory language in this case, which prescribed limitations as well as powers,⁹⁵ reflects a concern for preserving the outcome of the legislative bargaining process. In his view, compromise "becomes impossible when there is no assurance that the statutory words in which it is contained will be honored." Those representatives who unsuccessfully oppose a piece of legislation would "have every reason to fear that any [statutory] ambiguity will be interpreted against their interests" in subsequent litigation.⁹⁶ If, as Justice Scalia's administrative law cases suggest, the courts should defer to representative institutions in confronting difficult redistributive questions, then courts also must take care to preserve the techniques of compromise that make legislative solutions possible.

To be sure, political compromises are not always easy to iden-

in *Gott* in part by reference to a brief passage in the House report expressing concern over possible judicial review of individual benefit determinations. 756 F.2d at 909. He used the passage, however, merely to refute the plaintiffs' own reference to the same materials in support of jurisdiction.

⁹⁰ 749 F.2d 875, 887-93 (D.C. Cir. 1984).

⁹¹ 49 U.S.C. §§ 10101-11917 (1982).

⁹² *Id.* § 10505(a).

⁹³ *Illinois Commerce Com'n*, 749 F.2d at 883-85.

⁹⁴ *Id.* at 888, 889.

⁹⁵ Justice Scalia's reliance on statutory language will not always yield results that reduce judicial interference with agency functions. See, e.g., *Church of Scientology of Cal. v. I.R.S.*, 792 F.2d 153 (D.C. Cir. 1986) (holding, in a Freedom of Information Act case imposing a new requirement, that IRS "reformulate" tax return information before disclosure to public, and that agency could not merely delete identifying names and numbers).

⁹⁶ *Illinois Commerce Com'n*, 749 F.2d at 893 (dissent).

tify. The language and history of statutes are often convoluted, contradictory, or hopelessly ambiguous. In such cases, a judge of necessity must engage in some degree of creativity and imaginative reconstruction.⁹⁷ The value of Justice Scalia's approach lies in its willingness to acknowledge this problem rather than to seek refuge in convenient answers gleaned from dubious external sources, such as committee reports, that may not reflect the actual bargaining process in the legislature.

Justice Scalia's approach could prove troublesome, however, in at least three respects. First, in practical terms, courts often lack the resources and political insight necessary to "dig behind the scenes to find out the 'real' story."⁹⁸ Indeed, there may be little difference between the evidence that judges currently examine to discern "legislative intent" and the evidence available to uncover political negotiations. Second, the actual scope of compromise between legislators may go beyond the terms of a single statute. Typically, "logrolling"⁹⁹ occurs across different pieces of legislation; a representative might trade her vote for railroad deregulation in exchange for a new post office in her home district. A judge truly concerned with reconstructing the bargaining process in Congress thus might have to look far beyond the statute at issue in a given case. Further, it is far from clear how such information could be used: it is difficult to imagine interpreting a railroad rate statute so as to ensure the opposing representative gets her post office.

Third, while the bargain in *Illinois Commerce Com'n* involved issues of federalism, the administrative law cases discussed in part I suggest that legislation frequently involves the funneling of benefits to a particular interest group. An approach directing judges to ferret out the lines of political bargaining might lead "not only to more special interest legislation, but also to legislation that is less honest as to its special interest antecedents."¹⁰⁰ An interest group would have little incentive to incur the political costs of obtaining explicit pork-barrel legislation if it could obtain the same benefits through laws couched in public-minded rhetoric. Justice Scalia might respond that such broad language would bind a judge no less

⁹⁷ The phrase "imaginative reconstruction" comes from Posner, 50 U. Chi. L. Rev. at 817 (cited in note 67). As Judge Posner notes, this view has substantial roots in American jurisprudence, particularly in the writings of Judge Learned Hand. Id. at 817 n.60.

⁹⁸ Macey, 86 Colum. L. Rev. at 239 (cited in note 30). For similar criticism, see Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 272-73 (1982).

⁹⁹ See John W. Kingdon, *Congressmen's Voting Decisions* 99-101 (2d ed. 1981).

¹⁰⁰ Macey, 86 Colum. L. Rev. at 238 (cited in note 30).

than would provisions explicitly allocating special benefits. Such an admission, however, would seriously undercut his arguments for denying standing in the face of broad statutory declarations, as discussed in Part I.

The primary appeal of Justice Scalia's approach to statutory interpretation—accepting or rejecting particular tools based on whether they help reveal the dynamics of decision making by elected officials—lies in its goals of constraining judicial discretion and adhering to the legislature's design. Outside of cases where legislation displays clear political lines, however, this approach could be at least as indeterminate as the tools (canons and committee reports) that it purports to discard.

III. THE FIRST AMENDMENT: JUDICIAL GUARDIANSHIP OF PUBLIC DEBATE

The problems of interpreting delphic statutory language arise on a broader scale in the area of constitutional rights. Like an amorphous statute, the Constitution often speaks in general language to which a judge must attribute meaning in specific cases. The first amendment, for instance, declares that "Congress shall make no law . . . abridging the freedom of speech or of the press." While historical research can flush out enduring values, traditions, and understandings, changes in social conditions over time may cast doubt on historical constitutional standards. Section A of this part examines these problems of constitutional interpretation as illustrated in Justice Scalia's opinions dealing with freedom of the press. Section B examines the conflict between political dissent and the regulatory powers of government.

A. Judicial Innovation and Freedom of the Press

1. *The role of history in the articulation of constitutional rights.* The free press guarantee of the first amendment can be understood as a structural provision designed in part to protect "a fourth institution outside the Government as an additional check on the three official branches."¹⁰¹ This conception is consistent with Justice Scalia's institution-based jurisprudence, particularly his affection for the separation of powers. Yet protection for the press presents a conflict between institutions, pitting the press against the regulatory powers of government. Thus, despite the institutional nature of the free press guarantee, Justice Scalia has

¹⁰¹ Potter Stewart, "Or of the Press," 26 Hastings L. J. 631, 634 (1975).

not been one of its strong defenders.

Justice Scalia's reluctance to favor the press over the government is demonstrated by *In re Reporters Comm. for Freedom of the Press*.¹⁰² In that case an organized reporters' group sought access to sealed discovery documents pertaining to a libel action by a corporate officer against the *Washington Post*.¹⁰³ The reporters asserted a first amendment right of prejudgment access to court records in civil trials.

In reviewing this claim, Justice Scalia confined his inquiry to whether the historical practice allowed such access and to whether a right of access was essential to safeguard "the proper functioning of the judicial process and the government as a whole."¹⁰⁴ Such an inquiry appears simply to restate the two criteria used by the Supreme Court in previous press access cases.¹⁰⁵ Justice Scalia, however, asserted that *both* the historical and functional questions "must be answered affirmatively before a constitutional requirement of access can be imposed." In effect, the functional inquiry would become relevant only to assure that "the most trivial and unimportant historical practices" would not be "chiselled in constitutional stone."¹⁰⁶

Strictly speaking, this approach is reconcilable with Supreme Court precedent. In its decisions on press access rights, the Court has left open the precise relationship between its historical and functional inquiries. Faced with this ambiguity in the relevant authorities, Justice Scalia adopted an approach that would constrain judges' ability to infer new first amendment rights. By contrast,

¹⁰² 773 F.2d 1325 (D.C. Cir. 1985).

¹⁰³ The Mobil Oil Corporation had obtained a protective order based on an affidavit that the documents contained sensitive business information. Once the trial ended, however, Mobil "conceded the non-confidentiality of all but a handful of its documents" and ultimately "was unable to sustain its claim of confidentiality for a single document." *Id.* at 1344 (Wright, dissenting).

¹⁰⁴ *Id.* at 1331.

¹⁰⁵ See, e.g., *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501, 505-10 (1984) (upholding press and public's right of access to voir dire examinations in criminal trials); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604-07 (1982) (upholding press and public's right of access to trial of defendant charged with rape of minor girls). In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the earliest of this line of cases, the Court inferred a first amendment right for the press and the public to attend criminal trials. In a plurality opinion, Chief Justice Burger looked to the historical practice of open trials, *id.* at 564-73, and to the usefulness of a right of access in safeguarding the right "to speak and to publish concerning what takes place at a trial," *id.* at 576-77. Similarly, Justice Brennan's concurring opinion examined long-standing traditions, *id.* at 589-93, but also looked to the function of access in "maintaining public confidence in the administration of justice," *id.* at 595.

¹⁰⁶ *Reporters Comm.*, 773 F.2d at 1332, 1332.

Judge Wright in dissent read the same body of precedent to show that the Supreme Court merely "weighed historical practice as one factor among many."¹⁰⁷

Justice Scalia supported his restrictive reading by referring to institutional considerations: if a court's inquiry in constitutional cases were to proceed "[w]ith neither the constraint of text nor the constraint of historical practice, nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential."¹⁰⁸ Justice Scalia therefore denied the reporters' first amendment access claim because he could not "discern an historic practice of such clarity, generality and duration as to justify the pronouncement of a *constitutional rule*" granting prejudgment access to records of private civil actions.¹⁰⁹

The use of historical constraints in *Reporters Comm.* reflects a belief that the unelected judiciary should hesitate before discovering new constitutional rights that enjoy heightened protection from the normal political process. The undoing of such a newly declared right, by means of a constitutional amendment, would require an extraordinary combination of popular forces.¹¹⁰ Justice Scalia thus would prefer to enforce only those practices that have already been accepted rather than seek to transform historical practice through judicial decisions.

This conception of the judicial role notably overlooks *Marbury v. Madison*'s declaration that it is the "province and duty" of the courts to say what the law is.¹¹¹ A long-accepted practice does not necessarily make a constitutional practice, and the absence of a practice does not mean that that practice is not constitutionally required. Only judges, not societal inertia, have the power to define what the Constitution requires.

2. *The problem of changed circumstances.* While a free press serves as an important external check on government conduct, its power to criticize also may result in harm to individuals, whether government officials or private citizens. As the Supreme Court has noted, the individual's right "to the protection of his own good name" is "a concept at the root of any decent system of ordered

¹⁰⁷ Id. at 1347.

¹⁰⁸ Id. at 1332.

¹⁰⁹ Id. at 1336 (original emphasis). For a reading of the common law tradition to support the right of access, see id. at 1348-51 (Wright, dissenting).

¹¹⁰ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 4 (1980).

¹¹¹ See *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

liberty.’”¹¹² Elaborating on this concern in its 1974 decision in *Gertz v. Robert Welch, Inc.*, the Court observed that while “there is no such thing as a false idea” under the first amendment, nonetheless there “is no constitutional value in false statements of fact. . . . Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”¹¹³ Although this remark represented a digression in *Gertz* itself,¹¹⁴ a majority of the federal courts of appeals, including the D.C. Circuit, have accepted as controlling law this distinction between protected opinions and unprotected statements of fact.¹¹⁵

In *Ollman v. Evans*, for example, a Marxist political science professor brought a defamation action against the authors of a newspaper column that had criticized him for using his position to impart Marxist revolutionary philosophy to his students. Specifically, the column had quoted an unidentified political scientist as saying that the plaintiff had “no status” within his profession and was merely “a pure and simple activist.”¹¹⁶ In a six-to-five vote, the D.C. Circuit, sitting en banc, held that this quoted statement was absolutely protected as an expression of opinion under the first amendment. Rather than joining the court’s opinion, four of the six judges voting to uphold the first amendment defense signed Judge Bork’s concurrence. Accordingly, Justice Scalia directed his dissenting remarks to that opinion.

Judge Bork initially conceded that if the case presented only a choice between protected opinions and unprotected statements of fact, the challenged passage probably would fall in the unprotected category, since it was “a statement that others hold a particular opinion” about Ollman’s professional status. Judge Bork noted, however, that “life will bring up cases whose facts simply cannot be handled [adequately] by purely verbal formulas.” In particular, a judge “who refuses to see new threats to an established constitu-

¹¹² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974), quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, concurring).

¹¹³ 418 U.S. at 339-40, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹¹⁴ The main part of the opinion dealt with whether the “actual malice” standard of proof of *New York Times Co. v. Sullivan* should be extended to non-public figures. 418 U.S. at 342-48.

¹¹⁵ See *Ollman v. Evans*, 750 F.2d 970, 974-75 n.6 (D.C. Cir. 1984) and cases cited therein.

¹¹⁶ *Ollman*, 750 F.2d at 973, quoting “The Marxist Professor’s Intentions,” a piece by syndicated columnists Rowland Evans and Robert Novak in the May 4, 1978, edition of the *Washington Post*.

tional value . . . fails in his judicial duty.”¹¹⁷ Believing that a “remarkable upsurge” in libel actions and damage awards threatened “to impose [a form of] a self-censorship on the press,”¹¹⁸ Judge Bork substituted a test that considered “the totality of circumstances” in place of the formal pigeonholes of fact and opinion.¹¹⁹ Because Ollman had gone beyond “the role of the cloistered scholar” by using his academic post to further his political views, Judge Bork reasoned that Ollman had exposed himself to the rhetoric of political discussion.¹²⁰

Justice Scalia, in dissent, took a markedly different approach: he supported continued adherence to a flat rule of liability for the knowingly false disparagement of a public figure’s professional reputation. Justice Scalia stressed the “risk of judicial subjectivity” in Judge Bork’s test, which offered “no mechanism to gauge how much defamation is a decent amount” in a given situation.¹²¹

Justice Scalia also distinguished the “application of existing [legal] principles to new [factual] phenomena” from the alteration of the principles themselves based on a “judicial perception of changed social circumstances.”¹²² For Justice Scalia, the democratic structure of government requires judges to avoid the task of constitutional innovation:

[T]he identification of ‘modern problems’ to be remedied is quintessentially legislative rather than judicial business—largely because it is such a subjective judgment; . . . remedies are to be sought through democratic change rather than through judicial pronouncement that the Constitution now prohibits what it did not prohibit before. . . . [I]t is frightening to think that the existence or nonexistence of a

¹¹⁷ Id. at 994, 994, 996 (concurrence).

¹¹⁸ Id. at 996, citing Anthony Lewis, *New York Times v. Sullivan* Reconsidered: Time to Return to “The Central Meaning of the First Amendment,” 83 Colum. L. Rev. 603 (1983). While Lewis’s article reviewed prominent libel decisions, it did not offer any quantitative evidence of the number or magnitude of libel awards.

¹¹⁹ 750 F.2d at 997. Judge Bork went to great lengths to demonstrate that the Supreme Court actually employed a balancing test rather than formalistic categories in its libel and defamation cases. Id. at 998-1001. Justice Scalia viewed the same authorities as according sufficient protection for the press, making further doctrinal evolution unnecessary. Id. at 1036-37 (dissent).

¹²⁰ Id. at 1003 (Bork, concurring). This idea is not new. *Gertz* itself recognized that erroneous statements of fact are “inevitable in free debate” and that therefore the first amendment requires protection of “some falsehood in order to protect speech that matters.” 418 U.S. at 340, 341.

¹²¹ 750 F.2d at 1038.

¹²² Id. at 1038 n.2.

constitutional rule . . . is to depend upon [judges'] ongoing personal assessments of such sociological factors.¹²³

As in the administrative law cases on standing, institutional considerations favoring judicial abstention dominated Justice Scalia's conception of the private dispute in *Ollman*.

Unfortunately, the choice between placing a statement in the category of fact or opinion appears equally fraught with uncertainty, particularly in a case like *Ollman*, where the contested statement contained an assertion of fact that itself involved an opinion. Application of formal labels in such a case masks the judge's inevitable balancing of contextual evidence. Moreover, the assertion that legal principles do not change when "applied" to new circumstances is open to question. The critical legal studies movement, for instance, has underscored the artificiality of judges' claims that they "neutrally" apply existing principles laid down in prior cases.¹²⁴

Finally, while emphasis on institutional concerns and separation of powers may be appropriate in resolving issues of justiciability, the resolution of constitutional issues calls for a diminished emphasis on institutional concerns. The substantive rules governing libel actions are themselves the products of adjudication. As Judge Bork tellingly observed, most first amendment doctrine "is merely the judge-made superstructure that implements basic constitutional principles."¹²⁵ Even the constitutional distinction between protection granted to statements of opinion and that granted to statements of fact had its genesis in the judicial process; modification of that standard by judges thus would not infringe upon any preexisting legislative domain. In fact, deference to a hypothetical legislative resolution at some undetermined future date amounts to abandonment of judicial interpretation altogether.¹²⁶

Nor does deference to the representative process solve problems of subjectivity. While Justice Scalia's approach would indeed transfer the "identification of modern problems" to the legislature, the choice to abstain from a judicial solution in itself re-

¹²³ Id. at 1038-39 (original emphasis).

¹²⁴ For example, see Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 814-15 (1983).

¹²⁵ 750 F.2d at 995 (concurrence).

¹²⁶ Indeed, it is questionable whether Justice Scalia's jurisprudence would have permitted the Court to reach the same decision in *New York Times*, 376 U.S. 254, which imposed constitutional limits on the states' power (recognized by a long record of history) to award libel damages in the absence of actual malice, in part due to the deterrent effect of such awards on the exercise of speech rights.

flects a conception of legitimate power in a representative government. Justice Scalia probably would maintain that such underlying values stem from constitutional structure rather than subjective considerations. As his exchange with Judge Bork indicates, however, there may not be agreement—even among proponents of “judicial restraint”¹²⁷—as to the principles that should govern judicial consideration of new circumstances. Moreover, as Justice Scalia himself recognized in criticizing legislative vetoes,¹²⁸ Congress may not be able to, or even wish to, turn to these problems. A choice of no judicial decision may foreseeably be a choice of no government decision at all.

Despite these objections, Justice Scalia’s approach in *Ollman* retains considerable merit. The external forces identified by Judge Bork were of recent origin: the purported “upsurge in libel actions” took place in the two decades since the Supreme Court’s decision in *New York Times Co. v. Sullivan*.¹²⁹ The historical considerations set forth by Justice Scalia in *Reporters Comm.* thus may lend support to his deferential posture in *Ollman*: to expand constitutional rights because of short-run phenomena would be unwise, given that such expansion is not easily rolled back. Furthermore, there are reasons to think that the representative process will be receptive to the free expression claims at stake in *Reporters Comm.* and *Ollman*. As Justice Scalia wryly noted, “[i]t has not often been thought . . . that the press is among the least effective of legislative lobbyists.”¹³⁰

Justice Scalia’s approach also may be based on a desire to preserve discussion of constitutional values by the other branches.

¹²⁷ For background on Judge Bork’s views as an academic on judicial restraint in first amendment cases, see Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L. J.* 1 (1971). Despite its age, Judge Bork’s article remains a frequently cited description of judicial restraint. For a more recent, but also more general, exposition, see Robert H. Bork, *The Constitution, Original Intent and Economic Rights*, 23 *San Diego L. Rev.* 823 (1986).

¹²⁸ See note 56 and accompanying text.

¹²⁹ Lewis, 83 *Colum. L. Rev.* 603 (cited in note 118), covered developments since *New York Times*. For arguments that the instability in libel actions since *New York Times* instead indicates the fundamental unsoundness of that decision, see Richard A. Epstein, *Was New York Times Wrong?*, 53 *U. Chi. L. Rev.* 782 (1986).

¹³⁰ *Ollman*, 750 F.2d at 1039 (dissent). This argument may well turn the free press clause on its head; a conventional “structural” conception of the press clause as protecting a fourth center of power outside of government favors special judicial solicitude for press claims, see Stewart, 26 *Hastings L. J.* at 633 (cited in note 101).

But consider also Melville B. Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 *Hastings L. J.* 639, 639 (1975) (separate clause may indicate less protection for press).

While much of what legislatures do may consist of pure power politics, a judge should not foreclose opportunities for politicians and their constituents to interpret the Constitution for themselves. As Professor Thayer observed, judicial review carries a tendency "to dwarf the political capacity of the people, and to deaden its sense of moral responsibility," because the people thereby lose the experience and education that come from reassessment of their basic principles.¹³¹

At its root, Justice Scalia's view embodies a deep suspicion of the judiciary's ability to sustain constitutional values on its own. Commenting on the relationship between Congress and the courts, Justice Scalia has observed:

[C]ongressionally applied constitutional law ultimately affects the character of the judicially applied stratum beneath it. This may or may not be desirable but it is unquestionably true. . . . When our people ceased to believe in a federal government of narrowly limited [economic and regulatory] powers, Congress's constitutional interpretation disregarded such limitations, and the courts soon followed.¹³²

This understanding of representative government shuns the transformative power of law—that is, the potential for judicial decisions to shape the beliefs of the people. Those who believe in such transformative functions of law concede that the courts must select a normative theory before they may transform attitudes.¹³³ For Justice Scalia, democratic principles would foreclose any such aspiration on the part of an insulated judiciary.

B. Freedom of Speech and the Power to Govern

In cases involving standing issues, Justice Scalia deferred to the representative process for resolution of broad political objections to government policy. While the electoral process established by the Constitution formally safeguards this interest, the first amendment's free speech clause facilitates representative government in a less structured way. The first amendment thus forces Justice Scalia to confront the tension between his deference to the regulatory powers of government and his special solicitude for the

¹³¹ James Thayer, *John Marshall* 106 (1901), quoted in *Stone Casebook* at 33 (cited in note 9).

¹³² *Scalia*, 3 *Regulation* at 20 (cited in note 56).

¹³³ See Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 *U. Chi. L. Rev.* 1129, 1169-70 (1986).

rights of political minorities.

Justice Scalia has tended to resolve this conflict in favor of regulatory interests. An example is *Block v. Meese*,¹³⁴ where the United States distributor and prospective United States exhibitors of three Canadian documentary films criticizing American policy on acid rain challenged the Justice Department's classification of the films as "political propaganda" under the Foreign Agents Registration Act (FARA).¹³⁵ The plaintiffs claimed that the term "propaganda" amounted to a pronouncement by the United States government that the films contained "misstatements, half-truths and attempts to mislead."¹³⁶ In upholding the classification for a unanimous panel, Justice Scalia gave the government substantial latitude for participation in political debate. Initially, he maintained that the classification did not entail government disapproval at all. Rather, "in labelling something 'propaganda' the government is not expressing its own disapproval but is merely identifying an objective category of speech of which the public generally disapproves."¹³⁷

One problem with this approach lies in its suggestion that the process of categorization can remain impartial where the objective label "propaganda" is inextricably associated with connotations of untruth. In response to this problem, Justice Scalia observed that the Justice Department had attached the label "propaganda" to other foreign films advocating positions supported by the United States: for instance, films criticizing the Berlin Wall and detailing the plight of Soviet Jews.¹³⁸ Such applications reduced suspicion that the Justice Department had used FARA as a ruse for content regulation.

Although Justice Scalia might have resolved *Block* on this narrow ground specific to FARA, he went on to suggest a connection between standards for government participation in political debate and standards for government regulation: "If the first amendment

¹³⁴ 793 F.2d 1303 (D.C. Cir. 1986), *aff'd* as *Meese v. Keene*, 107 S.Ct. 1862 (1987).

¹³⁵ 22 U.S.C. §§ 611-22 (1982). FARA defined "political propaganda" to include communication " 'reasonably adapted to . . . prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public . . . with reference to the political or public interests, policies, or relations' of a foreign government or political party or the foreign policy of the United States." *Block*, 793 F.2d at 1311, quoting 22 U.S.C. § 611(j). *Block* also upheld application of a Justice Department regulation, enacted pursuant to FARA, requiring that foreign agents disclose the name of each exhibitor using their films. 793 F.2d at 1315-18.

¹³⁶ 793 F.2d at 1311, quoting Brief for Appellants at 54.

¹³⁷ 793 F.2d at 1312.

¹³⁸ *Id.*

considers speakers to be so timid, or important ideas to be so fragile, that they are overwhelmed by knowledge of governmental disagreement, then it is hard to understand why official government *action*, which speaks infinitely louder than words, does not constantly disrupt the first amendment 'marketplace.'"¹³⁹

Justice Scalia's comparison, however, fails to recognize that while regulatory action may reflect a government viewpoint, it usually has another legitimate purpose, such as preventing harm. Naked government disapproval of speech, on the other hand, has only an illegitimate purpose: to regulate thoughts and ideas. On this point, Justice Scalia merely offered practical arguments based on the judiciary's inability to draw the requisite lines. In his view, "[i]t would constantly be necessary to decide when the government has crossed the line between mere fact-finding (which presumably remains constitutional) and ideological advocacy."¹⁴⁰

Justice Scalia's opinion in *Block* appears at odds with his own conception of the judiciary as the protector of political minorities. If a judge accepts the proposition that the Constitution leaves "the selection and accomodation of substantive values . . . almost entirely to the political process,"¹⁴¹ she should exercise special care to safeguard the operation of that process, particularly the participatory rights of minorities. The first amendment recognizes that the democratic process depends not only on the formal means of representation in government, but also on the self-help mechanisms of free expression.¹⁴² When a judge simply throws up her hands at the prospect of difficult line drawing in a first amendment case, she permits the majority to defeat the rights of the minority in that case and distorts the process by which new majorities will form in the future.

To be sure, a lenient standard for government participation in public debate may be desirable in that it could increase the range of ideas available in the "marketplace." The troublesome point of *Block* is its willingness to resolve that question implicitly as part of a practical discussion, rather than through an explicit (though more difficult) weighing of constitutional values. In this sense, *Block* reflects *Ollman*'s distrust of the judiciary's ability to perform such a balance.

¹³⁹ *Id.* at 1313 (original emphasis).

¹⁴⁰ *Id.* Paradoxically, this objection would undercut the judicially drawn line between opinion and fact, advocated by Justice Scalia in *Ollman*.

¹⁴¹ Ely, *Democracy and Distrust* at 87 (cited in note 110).

¹⁴² See generally *id.* at 105-16.

Justice Scalia's preference for the government over dissenters also appears in *Community for Creative Non-Violence v. Watt*.¹⁴³ There, the National Park Service had permitted the Community for Creative Non-Violence (CCNV) to construct symbolic tent cities in Washington, D.C. as part of a round-the-clock dramatization of the plight of the homeless. The Park Service prohibited the demonstrators from sleeping overnight in the tents, invoking a regulation banning "camping" in the parks.¹⁴⁴ CCNV thus presented the issue of government regulation of expressive conduct. In a six-to-five en banc decision, the D.C. Circuit held that the camping regulation was unconstitutional as applied to CCNV. In his majority opinion, Judge Mikva had no difficulty concluding that the proposed sleeping constituted protected expression where it was "carefully designed to . . . express the demonstrators' [political] message."¹⁴⁵

Faced with a situation in which "'speech' and 'non-speech' elements [were] combined in the same course of conduct,"¹⁴⁶ the majority employed the four-factor balancing test set forth by the Supreme Court in *United States v. O'Brien*.¹⁴⁷ In evaluating the substantiality of the government's regulatory interest under the *O'Brien* framework, the majority looked solely at the marginal benefits to be derived from regulation of CCNV's particular conduct. It reasoned that where CCNV had already been allowed to "maintain an all-night presence," there would be "no incremental savings of park resources . . . to be gained by proscribing only sleep."¹⁴⁸

In contrast, the principal dissent, authored by Judge Wilkey and joined by Justice Scalia, reasoned that the court should not look solely to the governmental interest in preventing CCNV alone from sleeping, but rather should consider "the interest in prevent-

¹⁴³ 703 F.2d 586 (D.C. Cir. 1983) reversed by *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

¹⁴⁴ 36 C.F.R. § 50.27(a) (1982), quoted in CCNV, 703 F.2d at 588 n.1.

¹⁴⁵ CCNV, 703 F.2d at 592.

¹⁴⁶ *Id.* at 595, quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

¹⁴⁷ 391 U.S. 367 (1968) (upholding statute prohibiting knowing destruction of draft cards as applied to demonstrator who burned his card to protest Vietnam conflict). In *O'Brien*, the Court held that regulation of symbolic conduct is constitutionally permissible "if [1] it is within the constitutional power of the Government; if [2] it furthers an important or substantial governmental interest; if [3] the governmental interest is unrelated to the suppression of free expression; and if [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377.

¹⁴⁸ CCNV, 703 F.2d at 596 (emphasis added).

ing camping by all classes of persons, whatever their motive."¹⁴⁹ This perspective, permitting all future beneficial applications of a general rule to enter the constitutional calculus, severely limits protection of dissenters from majoritarian interests. Indeed, it also strongly resembles the model of rulemaking (based on legislative function) rather than adjudication (predicated on the judicial model),¹⁵⁰ and contrasts with Justice Scalia's antipathy to rulemaking by courts in administrative law cases.

CCNV's debate over the proper evaluation of governmental interests largely suppressed a second issue in the case. While adopting Judge Wilkey's reasoning on review, the Supreme Court assumed but did not decide that CCNV's sleeping was expressive conduct protected by the first amendment.¹⁵¹ It was this question, however, that had stirred the pen of Justice Scalia in the D.C. Circuit below.

In a separate dissenting opinion, Justice Scalia set forth a view of free expression that would restrict the category of behavior to be accorded full first amendment protection and expand the permissible scope of content-neutral regulation. Under Justice Scalia's literal reading, the speech and press clauses afford "special protection against all laws that impinge upon spoken or written communication," but they do not "extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of 'making a point.'"¹⁵² This reflects a fear that if behavior were to receive full first amendment protection simply because of a remote possibility that the behavior might have been used to "make a point," the regulatory power of government would be paralyzed.

As in *Block v. Meese*, Justice Scalia relied on a remote possibility to support abstention from judicial line drawing. Consideration of extreme scenarios certainly can aid judicial decision mak-

¹⁴⁹ Id. at 616 (dissent). Because "the vast majority" of persons wishing to camp in Washington parks "would not be intending to express anything," id. at 618, the incidental infringement on speech was minimal compared to the government's regulatory interest in providing clean and orderly parks for non-campers.

This reasoning prevailed in the Supreme Court in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The critical passage in Justice White's opinion is virtually identical to the language used by Judge Wilkey. Id. at 296-97. For a similar understanding of CCNV, see Easterbrook, 98 Harv. L. Rev. at 19-21 (cited in note 27).

¹⁵⁰ For general background on the significance of this distinction in administrative law, see Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy* 466-75 (2d ed. 1985).

¹⁵¹ CCNV, 468 U.S. at 293.

¹⁵² CCNV, 703 F.2d at 622, 622 (dissent) (original emphasis).

ing. The problem in both *Block* and *CCNV*, however, is that Justice Scalia expressly considered only one of at least two extreme scenarios. Full first amendment protection for all forms of conduct would indeed paralyze the regulatory powers of government. But a lack of protection for symbolic conduct, such as sit-ins and picketing, would foreclose crucial methods of political expression that arguably are especially important for those holding dissident views. And while (as Justice Scalia argued in *Block*) a total prohibition on governmental disapproval of speech may harm the government's ability to regulate actions, blanket protection of such disapproval would enable government to exploit its political market power and thereby inhibit effective advancement of alternative views.

CCNV also shows that although Justice Scalia is not willing to extend the constitutional shield to individual acts not historically practiced, he is willing to depart from legal doctrine to extend that shield to governmental acts. His dissent indicates that he will look beyond or reinterpret the formal tests set forth in Supreme Court precedent in order to safeguard the regulatory powers of government. As the majority in *CCNV* observed, in concluding that the Park Service's conduct was constitutional, Justice Scalia effectively "collapse[d] the four-pronged *O'Brien* test into a one-pronged standard" of content neutrality.¹⁵³

Thus, while the opinions involving constitutional protections for the press resist creative judicial interpretation of the first amendment, other cases demonstrate the powerful influence that Justice Scalia's guardianship of government power can exert on his willingness to reformulate substantive doctrine. Although there remains room in his conception of public debate for expressions of dissent, such *inputs* to the representative process cannot subsume the *outputs* of that process as embodied in the rules by which a democratic majority exercises its legitimate power to govern.

CONCLUSION

Though frequently set forth in "conservative" terms, Justice Scalia's jurisprudence in administrative and first amendment law calls for substantial change in existing legal doctrines. The impetus for this change stems from his tendency to view the substantive issues in a given case through the prism of the institutional constraints on courts within the scheme of representative government.

¹⁵³ Id. at 600 n.36.

For Justice Scalia, the Constitution does not give a mandate to the judiciary to ensure perfect government. That responsibility rests with the formal mechanisms of the representative process. As his tenure on the Supreme Court begins, Justice Scalia stands as a lawyer skeptical of the transformative power of law, a jurist uneasy with judicial authority.

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