THE SUPREME COURT'S EMERGING MAJORITY: RESTRAINING THE HIGH COURT OR TRANSFORMING ITS ROLE?

by

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INTRODUCTION

Events during the 1980s significantly affected the Supreme Court. The timing of retirements from the Supreme Court gave President Reagan the opportunity to appoint three new justices, Sandra O'Connor, Antonin Scalia, and Anthony Kennedy, and to elevate William Rehnquist to Chief Justice. In selecting its judicial appointees, the Reagan administration "engaged in the most systematic ideological or judicial philosophical screening of judicial candidates since the first Roosevelt administration." In the course of fulfilling the Reagan administration's hopes that the newly constituted Supreme Court would change judicial decision making on controversial issues such as abortion, affirmative action, civil rights, and criminal defendants' rights, the Reagan appointees have formed the core of an emerging conservative majority on the Court that has attracted substantial attention from the

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1 Although William Rehnquist was originally appointed to the Supreme Court by Richard Nixon this article will refer to him as a Reagan appointee because he was elevated to Chief Justice by President Reagan.

2 President Reagan also altered the composition of the entire federal judiciary by appointing 372 of the 736 judges in the district and circuit courts. D. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 102 (2d ed. 1990).


4 See, e.g., Webster v. Reproductive Health Services, 109 S.Ct. 3040 (1989) (approval of state statute placing restrictions upon abortion in public hospitals and declaring that life begins at conception).


6 See e.g., Patterson v. McLean Credit Union, 109 S.Ct. 2363 (1989) (limited scope of civil rights statute to prevent recovery of legal damages in lawsuits alleging racial harassment in the workplace).

7 See, e.g., Duckworth v. Eagan, 109 S.Ct. 2875 (1989) (permit law enforcement officers to alter traditional Miranda warnings in a manner that could deceive indigent suspects into believing that an appointed attorney will not be made available).

8 Although this article focuses on the Reagan appointees, Justice Byron White has usually joined the Reagan justices to provide the needed fifth vote in those cases in which the conservatives have managed to muster a majority. See Kaplan, Byron White Leads the Court to a Pair of Tough Rulings, Newsweek, Apr. 30, 1990, at 62. Justice White has, however, provided the fifth vote in several notable liberal decisions that cast the four Reagan appointees as a dissenting bloc: Metro Broadcasting Inc. v. Federal Communications Commission, 110 S.Ct. 2997 (1990) (five-member majority approved government preference program for minorities in awarding broadcast licenses); James v. Illinois, 110 S.Ct. 648 (1990) (five-member majority
national news media\(^9\) and legal scholars\(^{10}\) for its success in abruptly transforming the Supreme Court’s judicial orientation.

The retirement of Justice William Brennan creates the opportunity for the emerging conservative majority to consolidate further its dominance on the Court both because the high court’s “leading liberal [j]ustice”\(^{11}\) has departed and because Brennan was uniquely effective in persuading colleagues to join his opinions.\(^{12}\) Brennan was frequently the object of harsh criticism by political conservatives who believe that the Supreme Court’s decisions for the past three decades have been too liberal.\(^{13}\) In fact, an Assistant Attorney General in the Reagan administration condemned Brennan’s “radical egalitarianism” as “perhaps the major threat to individual liberty” in the United States.\(^{14}\) Conservatives’ criticism of Brennan focused upon their displeasure with his “judicial activism”: “To his critics, [Brennan] was the worst kind of judicial activist, willing to substitute his whims for the legislated preferences of the majority.”\(^{15}\)

This concern about curbing the so-called “activism” of liberal judges and replacing it with a philosophy of judicial restraint has been a consistent theme espoused by the Reagan-appointed members of the Supreme Court’s emerging majority.\(^{16}\) In nominating a replacement for Justice Brennan, President Bush, who has emulated the Reagan administration’s ideological screening process in making

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\(^{12}\) According to one observer of the Supreme Court, Justice Brennan “was a dominant force on the Court for his entire tenure of nearly 34 years.” Greenhouse, An Activist’s Legacy, N.Y. Times, July 22, 1990, at 1. Brennan’s effectiveness was due to “a combination of intellectual force, a magnetic personality, and unwavering commitment to his vision of the Court and the Constitution . . . . [Thus,] [t]erm after term, he demonstrated his ability to score the unexpected victory or at least to shape outcomes that he no longer had the votes to control.” Id. at 16.

\(^{13}\) In the most extreme example, an anti-abortion clergyman publicly advocated that people pray for the death of Justice Brennan in order to replace him with a justice who would oppose abortion. L. CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 271 (1987).

\(^{14}\) Id. at 276.

\(^{15}\) Kaplan, A Master Builder, Newsweek, July 30, 1990, at 20.

\(^{16}\) For example, in arguing that the Constitution should be interpreted according to the original intent of the Framers, Justice Scalia argued that “the main danger in judicial interpretation of the Constitution — or, for that matter, in judicial interpretation of any law — is that the judges will mistake their own predilections for the law.” Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 863 (1989).
judicial appointments, emphasized similar concerns about insuring that the Supreme Court exercise judicial restraint. Bush said about his nominee, Judge David Souter, that: “Judge Souter is committed to interpreting, not making the law. He recognizes the proper role of judges is upholding the democratic choices of the people through their elected representatives, with constitutional constraints.” In response to a question from reporters about Souter’s nomination, Bush reiterated: “I have selected a person who will interpret the Constitution, and in my view not legislate from the Federal bench.”

President Reagan’s appointees have clearly altered the development of substantive constitutional law and statutory interpretation. Although it is difficult to predict how Justice Brennan’s replacement will decide specific cases, it seems equally clear that the new Bush appointee will not replicate Justice Brennan’s liberal voting pattern. The question remains, however, whether a continuation of increasingly conservative substantive decisions necessarily means that the emerging majority will succeed in imposing judicial restraint upon the Supreme Court. This article will analyze the decisions and arguments about judicial restraint emanating from the increasingly dominant Reagan appointees on the Supreme Court in order to question whether these justices are achieving their purported goal or are merely continuing “activist” judicial behavior in the service of conservative political values.

ACTIVISM, RESTRAINT, AND THE REAGAN JUSTICES

Conceptualizing “Judicial Activism”

The terms “judicial activism” and “judicial restraint” are frequently bandied about without adequate definition. In the contemporary debates concerning the

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19 Id.
20 Legal scholars know that they must be wary of specific predictions about a nominee’s behavior not only because prior legal experience and judicial records are not directly applicable to the cases confronting the U.S. Supreme Court, see Carlson, An 18th Century Man, Time, Aug. 6, 1990, at 19, but also because the decisions of justices such as Earl Warren, William Brennan, and Harry Blackmun have diverged from the values and expectations of the presidents who appointed them. As noted by one scholar, President Eisenhower “was unhappy with the liberalism of both Warren and Brennan; [when] asked if he had made any mistakes as president, Eisenhower replied, “Yes, two, and they are both sitting on the Supreme Court.” L. BAUM, THE SUPREME COURT 41 (3d ed. 1989). Justice Blackmun’s “increased liberalism over time . . . marred the Nixon record of success” in selecting conservative justices. Id.
21 For example, one study of justices’ voting behavior through 1978 found that Brennan favored liberal positions in over eighty-one percent of the Supreme Court’s civil rights and economics cases. Tate, Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946-1978, 75 AM. POLITICAL SCIENCE REV. 355, 357 (1981). By contrast, Justice Rehnquist supported liberal positions in only fifteen percent of cases. Id. Another study found similarly divergent voting patterns for Brennan and Rehnquist during the 1980s. S. GOLDMAN, CONSTITUTIONAL LAW 160-162 (1987).
22 For example, one author has noted three alternative definitions of “judicial activism:” 1) judicial decisions that change past patterns of judicial precedent; 2) judicial decisions that substitute judicial
proper role for the judiciary, conservatives apply the "activist" label to the Supreme Court and other courts because of the judiciary's liberal decisions that protect the rights of individuals and that permit judges to intervene in the administration of government agencies. In fact, however, the concepts of activism and restraint need not be associated with particular political values because conservative Supreme Court justices demonstrated extreme activism in striking down economic regulations and social welfare laws enacted by Congress and state legislatures from the late nineteenth century through the New Deal period. During this era the conservative justices exhibited the same behavior which currently generates conservatives' criticisms of contemporary liberal justices by appearing to apply their personal values to override the enactments of the elected branches of government.

Contemporary debates about judicial activism and restraint have been described by one scholar in the following terms:

In its contemporary form judicial activism has been identified with political liberalism, with the willingness of the Warren Court to enter social, economic, and political disputes in order to exercise the power of judicial review to change established precedent and reconsider legislation when such precedent and legislation conflicted with liberal principles. Conversely, judicial restraint has been identified with political conservatism, with the reticence of the Burger Court to impose its will over legislative determinations reflecting majority sentiments, with its caution in a dispute that involves primarily social, economic, and political questions rather than narrowly framed questions of law.

The Supreme Court's decision in Lochner v. New York, 198 U.S. 45 (1905), is often regarded as the symbolic pinnacle of the pre-1937 period of conservative judicial activism. In Lochner, the Supreme Court invalidated a New York public health statute which attempted to limit the number of hours that bakery employees could work during each week. According to Archibald Cox, the judicial activism prior to the New Deal stemmed, in part, from some justices' intentional efforts to impose their values upon society:

The Lochnerian decisions are often characterized as "activist." Plainly the Justices in the majority did not hesitate to substitute judicial opinions for the judgments of elected representatives of the people, not only on such questions of fact as the relation between health and long hours of work in a bakery but also on the relative values of liberty of contract and sundry opposing public interests. The term "activist" is also fairly applicable to some of the Justices in the majority insofar as it implies a self-conscious will to reach a social or political result, giving scant weight to recognized sources of law.

Nineteenth- and early-twentieth-century lawyers lived almost entirely in the world of business, finance, and property. It is unlikely that many of them could as judges wholly slough off the premises of their earlier years in private practice, whatever their effort to achieve detachment. Some frankly acknowledged their purpose to fend off attacks upon business, property, and an open market in which the strong would survive and the weak would go under.
As analyzed by one scholar, the concept of "judicial activism" (and con-
versely, the concept of "judicial restraint") contains six elements:26

(1) Majoritarianism — the degree to which policies adopted through demo-
cratic processes are judicially negated.

(2) Interpretive Stability — the degree to which earlier court decisions,
doctrines, or interpretations are altered.

(3) Interpretive Fidelity — the degree to which constitutional provisions are
interpreted contrary to the clear intentions of their drafters or the clear
implications of the language used.

(4) Substance/Democratic Process Distinction — the degree to which judi-
cial decisions make substantive policy rather than affect the preservation
of democratic political processes.

(5) Specificity of Policy — the degree to which a judicial decision estab-
ishes policy itself as opposed to leaving discretion to other agencies or
individuals.

(6) Availability of an Alternate Policymaker — the degree to which a
judicial decision supercedes serious consideration of the same problem
by governmental agencies.27

Aspects of these elements are evident in the arguments favoring judicial
restraint which are put forth by conservative commentators and contemporary
justices.

Arguments for Judicial Restraint

The fundamental premise underlying the arguments favoring judicial restraint
was expressed by Judge Robert Bork, one of the foremost critics of judicial activism:
"The structure of government the Founders of this nation intended most certainly did
not give courts a political role."28 In his detailed critique of judicial activism by both
liberals and conservatives,29 Judge Bork argues that judges should respect majori-
tarian democratic principles and defer to the elected branches of government by
scrupulously interpreting the Constitution according to the original intent of the

27 Id. at 239.
Framers. Because, in Bork’s view, original intent jurisprudence provides “neutral principles” for judges to follow, adherence to the theory prevents judges from exceeding the narrow boundaries of the proper exercise of judicial power. Thus, democratic processes can govern the country without improper interference by the unelected and unaccountable federal judiciary. In Bork’s words, “only the approach of original understanding meets the criteria that any theory of constitutional adjudication must meet in order to possess democratic legitimacy.” By following original intent judges will stop “embark[ing] on more adventures in policymaking.” Without original intent jurisprudence, “there is nothing to constrain the judge, and there is nothing to give legitimacy to the judge’s power over the elected branches of government.”

As the United States Attorney General during the Reagan Administration, Edwin Meese echoed Bork's views by repeatedly advocating that judges limit their actions by following original intent in order to effectuate “a deeply rooted commitment to the idea of democracy” and to “depoliticize the law.” In addition to utilizing original intent jurisprudence as the vehicle for limiting judicial activity, critics of liberal judicial activism also urge judges to apply stringently the doctrine of standing and other jurisdictional requirements in order to prevent litigants from bringing their claims to court. Thus, judges would self-consciously deprive themselves of opportunities to make judicial decisions which might have consequences for public policy.

The foregoing arguments against judicial activism primarily concern the legitimacy of permitting judicial officers to participate in specific decisions which affect public policy. As Judge Bork emphatically declared, “[w]hen constitutional

30 Originalists believe that the genius of the Constitution stems from the wisdom of a small group of men in the late eighteenth century who managed to set down firm rules to govern human behavior in the future. The alternative view, which posits that the genius of the Framers was to leave flexibility in the Constitution, is presented by Archibald Cox:

In retrospect we can see that much of the genius of the Founding Fathers, perhaps forced upon them by their very differences, lay in their remarkable capacity for saying enough but not too much — just enough to give those who would come after them a point of reference and a strong foundation on which to build, but not so much as to inhibit their successors, who would live in changed and changing worlds.

A. Cox, supra note 25, at 42.
31 Bork, supra note 28, at 24.
32 R. Bork, supra note 29, at 143.
33 Id. at 83.
law is judge-made and not rooted in the text or structure of the Constitution, it does not approach illegitimacy, it is illegitimate, root and branch.”\(^3\) Other arguments against judicial activism focus on the capacity of judges to make good public policy decisions. These arguments assert that, whether or not it is proper for judges to act, judicial processes are poorly suited to the task of developing and implementing effective public policies.\(^3\)

**The Reagan Justices and Judicial Restraint**

1. Justice Antonin Scalia

Justice Antonin Scalia is one of the most vocal advocates of judicial restraint among the justices in the emerging conservative majority.\(^4\) Scalia’s views on the limited nature of appropriate areas for judicial action are so strong and extreme that he has forcefully criticized all of the other justices, both liberal and conservative, for creating risks that the Supreme Court “will destroy itself”\(^5\) if it continues to be involved in difficult moral issues such as the “right to die” and abortion. Scalia’s expressed concerns about the Court’s appropriate role demonstrate that he shares the fears of Bork and Meese that the judiciary is improperly involved in politics. In criticizing his colleagues, both liberal and conservative, for not forthrightly over-turning *Roe v. Wade*\(^5\) and withdrawing the Supreme Court from participation in decisions about abortion, Scalia explicitly (and sarcastically) echoed Bork’s view that the Supreme Court does not belong in politics:

The outcome of today’s case will doubtless be heralded as a triumph of judicial statesmanship. It is not that, unless, it is statesmanship-like to needlessly prolong the Court’s self-awarded sovereignty over a field where it has little proper business since the answers to most cruel questions posed are political not juridical — a sovereignty which therefore quite properly, but to the great damage of the Court, makes it the object of the sort of organized public pressure that political institutions in a democracy ought to receive.\(^6\)

Scalia predicted that the Court’s continued involvement in the abortion issue would lead to “another term with carts full of mail from the public, and streets full

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\(^3\) R. Bork, *supra* note 29, at 119-120.


\(^7\) *Webster*, 109 S.Ct. at 3064 (Scalia, J., concurring).
of demonstrators urging us . . . to follow the popular will." 44

Justice Scalia also shares with Bork and Meese a belief that original intent jurisprudence will prevent judges from overriding the decisions of the democratically elected branches of government by imposing their personal values into judicial decisions. 45 Although the other justices appointed by President Reagan share Scalia's interest in promoting judicial restraint, they are less committed to the "Interpretive Fidelity" 46 component of judicial restraint which demands adherence to the Framers' intentions. 47

Because Scalia has been very outspoken about his desire to reduce the number of cases that are permitted to receive consideration within the federal courts, 48 he has consistently utilized the doctrine of standing to create barriers to litigants seeking federal court review of their claims. 49 Thus, through Scalia's approach to jurisdictional issues, the opportunities for excessive exertions of judicial power can be diminished. 50

44 Id. at 3065. By contrast, retired Justice Lewis Powell believes that demonstrations at the Supreme Court are positive aspects of the American democratic system: "Frequently, there are demonstrations around the [C]ourt. In our democratic system, that is a plus. But if you are a federal judge appointed for life, you are not likely to be influenced by people marching around the [C]ourt." Sanders, The Marble Palace's Southern Gentleman, Time, July 9, 1990, at 13.

45 According to Scalia, "[o]riginalism does not aggravate the principal weakness of the system, [namely the risk of judicial activism,] for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself." Scalia, Originalism, supra note 16, at 864. As one commentator observed, "[a]t its root, Justice Scalia's view embodies a deep suspicion of the judiciary's ability to sustain constitutional values on its own." Comment, The Appellate Jurisprudence of Justice Antonin Scalia, 54 U. Chi. L. Rev. 705, 733 (1987). Thus, Scalia believes, as he once argued during a debate, that the judiciary has "no business" deciding issues which have been determined through the democratic process. Comment, Justice Scalia and Judicial Restraint, supra note 40, at 228. For example, Justice Scalia's view is that the Supreme Court must "presume that legislatures act in a constitutional manner." Edwards v. Aguillard, 482 U.S. 578, 618 (1987) (Scalia, J., dissenting). "[B]ecause [s]triking down a law approved by the democratically elected representatives of the people is no minor matter." Id. at 626.

46 See supra notes 26-27 and accompanying text.

47 For example, Chief Justice Rehnquist has publicly distanced himself from the theory of constitutional interpretation by original intent. See Rehnquist's Perspective, 73 A.B.A. J. 19 (Apr. 1, 1987).

48 In his first major address to the American Bar Association, Scalia urged that the number of cases in the federal courts be limited in order to enable the federal judiciary to regain its "elite" status as a "natural aristocracy . . . of ability rather than wealth." Taylor, Scalia Proposes Major Overhaul of U.S. Courts, N.Y. Times, Feb. 16, 1987, at 1.

49 As a judge on the District of Columbia Circuit Court of Appeals, Scalia published a law review article discussing the importance of standing. See Scalia, The Doctrine of Standing As an Essential Element of the Separation of Powers, 17 SUPPOLE U. L. Rev. 881 (1983). See also Wilson, Constraints of Power: The Constitutional Opinions of Judges Scalia, Bork, Posner, Easterbrook and Winter, 40 U. Miami L. Rev. 1171 (1986). "[O]n the D.C. Circuit[,] Judge Scalia has been particularly adept at invoking procedural defenses to constitutional claims." Id. at 1181; Comment, The Appellate Jurisprudence of Justice Antonin Scalia, supra note 45. "As reflected in his writing both on and off the bench, Justice Scalia remains highly skeptical of . . . modern developments [in the doctrine of standing]." Id. at 708.

50 Scalia's desire to reduce and limit the number of cases heard in the federal courts may be coming to fruition in the Supreme Court. During the 1989-1990 term, the justices heard fifteen percent fewer cases than in the previous term. No Heavy Lifting at the High Court, Newsweek, Feb. 5, 1990, at 63.
2. Chief Justice William Rehnquist

Although Chief Justice Rehnquist is not a proponent of original intent jurisprudence,51 he advances his consistent, long-standing support for judicial restraint by advocating a similarly narrow approach to constitutional interpretation. According to a scholar who analyzed Rehnquist’s judicial opinions during his first fourteen years on the Supreme Court, “Rehnquist’s approach includes the belief that the Constitution is limited to the text of the document, the idea that the Constitution has fixed meaning, and the view that it comprises a set of rules to be strictly followed.”52 Rehnquist’s published writings also reflect his view that judicial officers should be restrained by interpreting the Constitution in a narrow manner.53

Rehnquist’s judicial decisions reflect his adherence to the conception of judicial restraint by continually emphasizing that the federal courts should defer to the states and to the elected branches of the federal government.54 The most thorough study of Rehnquist’s judicial philosophy concluded that “[h]e places a preeminent value on federalism; indeed, the theme of state autonomy runs throughout his opinions.”55 Moreover, “[t]he constant theme in Rehnquist’s decision making is one of a thoroughgoing commitment to protecting the states from what he perceives to be unnecessary, burdensome, and constitutionally inappropriate intrusion by the federal courts.”56 Another study identified Rehnquist’s basic beliefs as a presump-

51 Rehnquist’s Perspective, supra note 47, at 19. Although Rehnquist is not a vocal proponent of original intent, he is willing to utilize that approach to constitutional interpretation when it is useful to his view of proper case outcomes. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985). “The true meaning of the Establishment Clause can only be seen in its history . . . . As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decision making that has plagued our Establishment Clause cases since Everson [v. Board of Education, 330 U.S. 1 (1947)].” Id. at 113 (Rehnquist, J., dissenting).
53 See, e.g., Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976). “Once we have abandoned the idea that the authority of the courts to declare laws unconstitutional is somehow tied to the language of the Constitution that the people adopted, a judiciary exercising the power of judicial review appears in a quite different light . . . . [Then judges will be] a small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.” Id. at 698-99.; W. Rehnquist, The Supreme Court -- How It Was; How It Is 317 (1987) “Yet to go beyond the language of the Constitution, and the meaning that may be fairly ascribed to the language, and into the consciences of individual judges, is to embark on a journey that is treacherous indeed.” Id.
54 See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975) “[S]urely constitutional adjudication is a more canalized function than enforcing as against the States this Court’s perception of modern life.”; Id. at 542 (Rehnquist, J., dissenting). Rummel v. Estelle, 455 U.S. 263 (1982) “This uncertainty reinforces our conviction that any ‘nationwide trend’ toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts.”; Texas v. Johnson, 109 S.Ct. 2533 (1989) “The Court’s role as the final expositor of the Constitution is well established but its role as a platonic guardian admonishing [elected officials] responsible to public opinion as if they were truant school children has no similar place in our system of government.” Id. at 2355. (Rehnquist, C.J., dissenting).
55 S. Davis, supra note 52, at 18.
56 Id. at 154.
individuals and government should be decided against the interests of the individual, and a consistent theme that the states should prevail in conflicts between state and federal authority.  Thus, Rehnquist has been characterized as "the Court's most consistent and most articulate exponent and defender of judicial restraint."  

3. Justice Sandra O'Connor

President Reagan's first appointee to the Supreme Court, Justice O'Connor, shares the other Reagan justices' commitment to judicial restraint. She has demonstrated a "faithful, if not inevitably predictive" deference to state courts and to legislatures. For O'Connor, policy making decisions must rest with elected officials and "judicial interference is justified only in extremis." As an advocate of judicial restraint, for example, O'Connor has urged that federal courts decline to review prisoners' allegations about constitutional rights violations if those claims have previously been raised in state courts.  

4. Justice Anthony Kennedy

Justice Kennedy came to the Supreme Court with the "reputation ... of a low-profile and nonconfrontational conservative jurist." On the Supreme Court, Kennedy has consistently joined with the other Reagan appointees in conservative decisions. Although Kennedy is not an advocate of original intent jurisprudence, he shares the other Reagan appointees' concerns about judicial restraint. For example, in a case in which a divided Supreme Court approved a district judge's decision in

57 Shapiro, Mr. Justice Rehnquist: A Preliminary View, 90 Harv. L. Rev. 293, 294 (1976).
58 H. Abraham, Justices and Presidents: A Political History Of Appointments To The Supreme Court 318 (2d ed. 1985). One scholar characterizes Rehnquist's consistent deference to the other branches of government in the following terms: "He not only embraces, but exceeds the Holmesian-Frankfurter creed of permitting legislatures, the people's representatives, wide discretion in forging public policy and public law, even if those representatives enact silly, stupid, asinine, unnecessary, even unfair and undemocratic legislation — so long as the latter is not unconstitutional." Id. at 336.
59 Id. at 336.
60 O'Connor advocates the "desirability as well as the necessity for federal courts to respect [state courts'] role by deferring to it, absent constitutional error so blatant that they necessitate federal interference." Id. at 337.
61 O'Connor "evinc[es] a commitment to the proposition that, as a matter of basic democratic policy, the people's representatives must be granted the benefit of the doubt in setting and executing public policy." Id. at 336-337.
62 Id. at 337.
63 See Duckworth, 109 S.Ct. at 2883 (O'Connor, J., concurring). Although O'Connor does not acknowledge it, deferring to state court determinations about prisoners' rights creates risks that the state judges, who are frequently elected officials, will lack the necessary political insulation and independence to protect members of this despised political minority.
64 D. O'Brien, supra note 2, at 112.
66 Kennedy described original intent as a "starting point," rather than a "methodology," and he asserted that original intent "doesn't tell us how to decide a case." D. O'Brien, supra note 2, at 114.
actions in forcing a local school district to raise taxes in order to fund a school desegregation plan, Justice Kennedy wrote a "caustic[]" opinion joined by the three other Reagan appointees. Kennedy asserted that the majority's "casual embrace of taxation imposed by the unelected, life-tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions."

FLAWS IN THE RESTRAINTISTS' ARGUMENTS AND BEHAVIOR

The members of the Supreme Court's emerging majority and their supporters assert that by curbing judicial activism the federal judiciary can fulfill its proper restrained, non-political role. The restraintists' arguments and behavior, however, raise doubts about the validity of the means and ends advocated by the Reagan appointees.

The Critique of Original Intent Jurisprudence

The arguments presented during the 1980s by advocates of constitutional interpretation by original intent elicited powerful responses from critics of originalist jurisprudence. There are significant questions about jurists' abilities to discern whether precise intentions lie beneath the frequently ambiguous wording of a constitution that was composed by a divided, argumentative deliberative body. If there are precise meanings underlying the Constitution's wording, do the limited historical records of the constitutional convention permit modern judges to find those meanings? Moreover, whose defining intentions are most important: the authors of the words or the participants within the various states who gave the words meaning through the ratification process?

Advocates of judicial restraint, such as Bork, Meese, and Scalia advocate originalist jurisprudence because "for those seeking to constrain the discretion and political influence of judges, Original Intent appears to be a useful straitjacket." Because of their desire to advance their conception of judicial restraint, such advocates gloss over the difficulties in discerning original intent. For example,

68 Id.
at 23.
69 For example, an entire body of judicially created doctrine has developed to define the extent of Congressional power "to regulate Commerce... among the several States." U.S. CONST. art I, sec. 8. See Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); National Labor Relations Board v. Jones & Laughlin Steel, 301 U.S. 1 (1937); Katzenbach v. McClung, 379 U.S. 294 (1964).
72 Id. at 23.
73 In the words of one scholar, "Original intent, however, can be neither an escape [from difficult political decisions facing judges] nor a straitjacket [against judicial activism], for there is no simple canonical intent locked in the historical record waiting to be uncovered and deferred to... [T]hose who invoke, against a robust judiciary, the founding document and the intent of its Framers have understood neither." Id.
Meese attempted to rewrite history by asserting that the Supreme Court’s decisions disadvantaging African-Americans in *Dred Scott v. Sandford* and *Plessy v. Ferguson* would have favored civil rights and equality if only the justices had followed original intent jurisprudence. Meese’s argument ignores the fact that the *Dred Scott* opinion is very consciously based upon original intent and that the racial segregation endorsed in *Plessy* is consistent with the segregation maintained by the authors’ of the Fourteenth Amendment. Instead of questioning the validity of originalist jurisprudence, Meese “manipulat[ed] history in order to place [himself and his theory], albeit unsuccessfully, on the ‘correct’ side of civil rights cases.”

Judge Robert Bork issued a more sophisticated attempt to avoid association with the undesirable outcomes that can follow from adherence to original intent. Bork says that the decision outlawing school segregation in *Brown v. Board of Education* was correct despite the fact that the Framers of the Fourteenth Amendment intended to preserve racial segregation because the underlying intent of the Equal Protection Clause, namely equality before the law, precludes racial discrimination. But is this interpretive license to identify the underlying spirit of the Constitution rather than specific intentions of the Framers really any different than the liberal justices’ “judicial activism” which is condemned, for example, by Justice Rehnquist in *United Steelworkers v. Weber* when the majority approved voluntary affirmative action programs by following the spirit rather than the wording of an employment discrimination statute?

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74 60 U.S. (19 How.) 393 (1857). In *Dred Scott*, the Supreme Court declared that African-Americans did not enjoy citizenship rights under the Constitution.

75 163 U.S. 537 (1896). In *Plessy*, the Supreme Court endorsed the policy of racial segregation through its doctrine of “separate but equal.”

76 Meese, *The Battle for the Constitution*, supra note 36, at 34.

77 In the majority opinion in *Dred Scott*, Chief Justice Roger Taney wrote:

> We think... [African-Americans]... are not included and were not intended to be included, under the words “citizens” in the Constitution... On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority.

60 U.S. at 404-05 (emphasis added).

No one, we presume supposes that any change in public opinion or feeling, in relation to this unfortunate race, in the civilized nations of Europe or in this country, should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

Id. at 426 (emphasis added).


81 See supra note 78.

82 Bork, *supra* note 29, at 82.

Because “Interpretive Fidelity,” namely strict adherence to the intentions and language of constitutional drafters, is one of the six key elements for critics of judicial activism, it is instructive that only Justice Scalia among the Reagan-appointed restraintists genuinely urges adherence to original intent. The other justices are apparently willing to admit that they will accept the risk that judicial officers will apply their own personal interpretations in deciding cases. Moreover, Scalia admits that “in a crunch I may prove a faint-hearted originalist,” because he would not apply original intent in interpreting the Eighth Amendment’s prohibition on cruel and unusual punishment. By conceding that original intent should not apply to all of the Constitution’s provisions, Scalia inadvertently calls into question original intent’s purported usefulness in preventing justices from interpreting the Constitution in light of their own twentieth-century views.

In the final analysis, original intent jurisprudence is a malleable device for advancing the views of jurists whose personal philosophical and political orientations make them critical of judicial actions which clash with the preferences of other governmental branches.

The Restraintists’ “Activist” Behavior

One of the key elements of judicial restraint is “Interpretive Stability,” namely respect for earlier court decisions, doctrines, and interpretations. If law is to support stability and reliance interests in society and the courts are to appear to be legal rather than political institutions, then judicial officers should be very reluctant to overturn existing precedents. Stare decisis is supposed to serve as a guide for and a limitation upon judges within the common law tradition to prevent them from harming social stability by deciding cases unpredictably according to their personal values and preferences. The restraintist approach to stare decisis is epitomized by Justice Lewis Powell’s plea in City of Akron v. Akron Center for Reproductive Health for the Supreme Court to adhere to its consistent, decade-long line of precedents supporting the right of choice in abortion. Powell argued that the Court should not suddenly abandon a carefully considered, consistently reaffirmed precedent.

The Reagan appointees in the Supreme Court’s emerging majority do not,

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84 Canon, supra note 26, at 239, 242-244.
85 See Rehnquist’s Perspective, supra note 47, at 19; D. O’Brien, supra note 2, at 112-114.
86 Scalia, Originalism, supra note 16, at 864.
87 Id.
88 Canon, supra note 26, at 239, 241-242.
89 See J. Calvi & S. Coleman, American Law and Legal Systems 30-31 (1989) (“Stare decisis refers to the policy of courts to follow the rules laid down in previous judicial decisions and to refrain from disturbing established points of law. The purpose is to ensure stability and certainty in the legal system. Litigants are aware of the results in similar prior cases and make their decisions in regard to the lawsuit accordingly; stare decisis enhances predictability.”).
91 L. Caplan, supra note 13, at 76-77.
however, share Powell's concern for the preservation of precedent. They appear to share the view of Judge Richard Posner that, unlike Powell's traditional notion of judicial restraint, judges are "restrained" when they actively overturn precedents in order to reduce the power of the judiciary. Thus, under Posner's formulation, if the Supreme Court were to overturn *Marbury v. Madison*, the classic case supporting the power of judicial review which for nearly two centuries has been the basis for the judiciary's role in the governing system, the Court would be practicing "judicial restraint." 

Although none of the Reagan appointees have sought to reverse *Marbury*, they have been relatively unabashed in their willingness to overturn precedents with which they disagree. Justice Scalia, for example, has forthrightly declared that he is concerned with advancing his own interpretations of the Constitution regardless of contrary case precedents: "I would think it a violation of my oath to adhere to what I consider a plainly unjustified intrusion upon the democratic process in order that the Court might save face."

Chief Justice Rehnquist and Justice Kennedy have both written opinions emphasizing the need to provide greater deference to previous decisions affecting statutory interpretation than to decisions interpreting the Constitution. After emphasizing this accepted distinction between statutory and constitutional interpretation, however, both justices subsequently joined the other members of the emerging conservative majority to rewrite two important anti-discrimination statutes without mentioning their previously stated respect for statutory precedents.

In a case in which the emerging majority undercut the line of abortion precedents that began with *Roe v. Wade*, Chief Justice Rehnquist indicated that respect for case precedent was a fundamental aspect of American law and that statutory precedents are entitled to greater deference than constitutional precedents such as *Roe*: "*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes." In a racial discrimination case, Justice Kennedy reiterated the importance of case precedent for statutory interpretation: "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done."

In the very same case in which Kennedy indicated the need for deference in

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93 5 U.S. 137 (1803).
94 L. CAPLAN, supra note 13, at 77.
95 South Carolina v. Gathers, 109 S.Ct. 2207, 2218 (Scalia, J., dissenting).
96 410 U.S. 113 (1973).
statutory interpretation, the Reagan appointees acted to limit the scope of a thirteen-year-old civil rights precedent in order to preclude lawsuits seeking damages for racial harassment. The emerging majority altered the statutory precedent after taking the extraordinary step of asking, *sua sponte,* for reargument to consider reversing the precedent, 99 and after ignoring the request by forty-seven state attorneys general, including both Republicans and Democrats, that the precedent be left undisturbed. 100 In a separate case affecting an employment discrimination statute, the same five-member majority, including the four Reagan appointees, increased the burden of proof upon plaintiffs utilizing statistical evidence of discrimination and thereby altered a well-established eighteen-year-old precedent. 101 In the majority opinion, Justice White employed a profound understatement in conceding that the long-standing statutory precedent had been suddenly altered: “We acknowledge that some of our earlier decisions can be read to suggest [principles different than those we put forth today].” 102

The Reagan appointees’ activist inclinations in doing away with precedents with which they disagree have led one scholar to observe that they do not really advance judicial restraint, but instead seek “politically conservative results [through] liberal judicial methods.” 103

*The Political Nature of the Supreme Court*

The advocates of judicial restraint assert that the Supreme Court must remove itself from involvement in politics. For example, Meese asserts that the application of original intent jurisprudence will “de-politicize the law.” 104 Scalia complains that the Supreme Court’s continued involvement with abortion and other controversial issues does “great damage to the Court [by] mak[ing] it the object of the sort of organized public pressure that political [rather than legal] institutions in a democracy ought to receive.” 105 This reflects a long-standing desire in American society to believe that law flows from abstract notions of justice and that judges’ decisions are guided by law rather than personal values. 106 In fact, however, law is developed and implemented by actors and institutions, including the Supreme Court, that are intimately connected to the political system.

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102 Id. at 2126.
103 Glennon, *supra* note 10, at 50.
105 Webster, 109 S.Ct. at 3064 (Scalia, J., concurring in part).
106 As described by one scholar:

With symbols such as law degrees, robes, walnut-paneled courtrooms, elevated benches, a special language, and the like, we help sustain the myth of an impersonal judiciary divining decisions based on some objective truth contained in the Constitution (another symbol), and knowable only by a select few. It is all a very reassuring view of policy-making (or rather
A significant body of scholarly research has demonstrated the myriad connections between the Supreme Court, its decision-making processes, and the political system. Justices are appointed to the Supreme Court for political reasons, usually because they share the President’s political ideology or because their appointments will appeal to a particular political constituency that the President wishes to cultivate. Justices’ decisions on cases are inevitably influenced not only by their theories of constitutional interpretation, but also by their relationships and interactions with other justices and by their calculations concerning potential reactions by other political actors. Law cannot, in Meese’s terminology, be “de-politicized” because it develops and changes according to the actions of inherently political institutions, including courts. Thus, Meese’s assertions about the “de-politiciz[ing]” benefits of original intent jurisprudence pander to latent human desires for neutral justice in law and ignore the realities of the inevitably intimate connections between the judiciary and the political system.

Justice Scalia’s expressed concerns about how the public perceives the Supreme Court imply that the judiciary’s image and legitimacy are best preserved by abstaining from controversies that might tend to associate the judiciary with politics in the eyes of the public. The Supreme Court’s legitimacy and image as a non-political institution are generally regarded as important components of the Court’s effectiveness. Because the public has so little awareness of the Supreme Court’s processes and actions, however, scholarly research casts doubt upon the

rule divining), for after the tumult, greed, indecisiveness of the legislative process — not to mention the excesses, embarrassments and dissonance of the executive policy process — we quickly weary of the frustrations and disappointments of plain old POLITICS and wish to repair to the serenity, the sureness, indeed the utter sublimity of JUSTICE, which the LAW and its purveyors promise.


108 See generally, H. Abraham, supra note 58 (systematic review of each president’s motivations in appointing justices to the Supreme Court).


110 For example, in deciding whether and how to order the dismantling of racially segregated schools during the 1950s, the justices of the Supreme Court considered potential societal reactions to desegregation orders. R. Kluger, supra note 78, at 740-742.

111 In addition to the aforementioned connections between the Supreme Court and the political system, state courts are generally even more intimately attached to local politics because judges in most states are elected, frequently with the overt partisan participation of political parties. L. Baum, American Courts: Process & Policy 99-114 (2d ed. 1990).

112 In an opinion, Justice Blackmun expressed the commonly held belief that the Supreme Court must carefully preserve its image as a legal institution by avoiding any action which might “undermine[] public confidence in the disinterestedness of the Judicial Branch.” Mistretta v. United States, 109 S.Ct. 647, 672-73 (1989). Blackmun explicitly expressed his belief in the importance of the Supreme Court’s image and legitimacy by writing that “[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.” Id.
importance and fragility of the Court's image in the eyes of the public. A thorough study of the impact of Supreme Court involvement in major societal controversies concluded that the Court is an extremely resilient, effective institution despite the periodic collisions it has with other political actors. Moreover, if Scalia is truly concerned about preserving the Supreme Court's image as a legal rather than political institution, why does he not show more concern about maintaining stability in law and about avoiding bitter, "un-judge-like" bickering between the justices?

In sum, restraintists' arguments about removing the Supreme Court from politics misapprehend the Court's intimate connections to and role within the nation's political governing system.

**JUDICIAL RESTRAINT OR MAJORITARIAN BIAS?**

Although Justice Scalia urges that the Supreme Court remove itself from controversial political issues, Scalia recognizes that the Supreme Court is linked to the political system. During an interview for a film on the Supreme Court, Scalia said: "If the society changes, you are going eventually to be drawing judges from that same society. And however impartial they may try to be, they are going to bring with them those societal attitudes — in their heads, not because they are trying to reflect [public opinion]." Scalia's insightful and telling observation raises questions about which societal attitudes the Reagan appointees have brought to their work at the Supreme Court. A primary value manifested in the Reagan appointees' opinions is an emphasis upon the "Majoritarianism" element of judicial restraint which dictates judicial deference to elected institutions and democratic processes. The emerging majority's emphasis upon this issue may constitute the most funda-

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115 See supra note 95 and accompanying text.

116 Justice Scalia, in particular, has a penchant for harshly condemning his colleagues within his opinions. See supra notes 41-44 and accompanying text. See also Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 Ky. L. J. 317 (1990-1991). One long-time observer of the Supreme Court has noted that the contemporary justices, including Scalia, have engaged in very open and emotional bickering within their opinions which could harm the Court's stature:

But there is still a serious cost to public brawling on the bench: The more the justices question each other's basic common sense and good faith, the more they may deplete the reservoir of popular good will that is so essential to their singular role in American life. They might eventually find their rulings dismissed as the work of unelected, unprincipled politicians.


117 This Honorable Court: Inside the Marble Temple (PBS television broadcast, Sept. 12, 1989) (videotape on file at Cuyahoga County, Ohio Public Library).

118 Canon, *supra* note 26, at 239-241.
mental change in the contemporary Supreme Court by altering the Court's role as the protector of political minorities.

The Reagan Era and Political Minorities

President Ronald Reagan, who enjoyed unprecedented popularity in public opinion polls, was harshly criticized for his insensitivity to racial minorities and women and for his administration's efforts to curtail civil rights laws and their enforcement. For example, the Reagan administration initially opposed the 1982 extension of the Voting Rights Act, but subsequently claimed credit for the Act after it was passed overwhelmingly by Congress. In a variety of cases, the Reagan administration sought to have the Supreme Court reverse itself on precedents supporting school desegregation and affirmative action. Statistics for the 1984 election indicate that Reagan received only nine percent of African-Americans' votes, only thirty-three percent of Hispanic people's votes, only thirty-two percent of Jewish people's votes, and only forty-six percent of poor people's votes (i.e., incomes under $12,500). This provides a good sample of the members of political minorities who felt that their best interests were not being served by this immensely popular president. By contrast, in examining the people with whom Reagan was popular and from whom he received political support, namely white, affluent, Christian, predominantly male people, one can surmise that the Reagan administration represented the attitudes and values of majoritarian groups and political interests.

The representation of majoritarian interests during the Reagan administration is evident in the reductions in federal social welfare spending, which primarily

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121 The House version of the bill sought to permit proof of discrimination by showing the detrimental effects of voting practices. The Reagan administration, however, wanted to ensure that discrimination could be proven only when there was direct proof of intent to discriminate. The consequence of the Reagan position was to make it extremely difficult for claimants to prove discrimination, especially as local officials became more sophisticated about avoiding overt expressions of racial bias. The Reagan administration also wanted to limit the duration of the Voting Rights Act's coverage. Id. at 144-145.
122 [The President] invited a group of civil rights leaders to the signing ceremony, where he took credit for passage of bill! . . . Later, in a speech before the American Bar Association, he took credit not only for getting the bill passed but for the Justice Department's vigorous enforcement for the act as well!

Clearly, on the record, the president's claim of having supported the bill was unjustified. Rather, he abandoned his opposition only when it became clear that the amendments would be passed despite his opposition. As to his subsequent assertion of vigorous enforcement by the Justice Department, the record is also otherwise.

Id. at 146.
123 L. CAPLAN, supra note 13, at 81-95.
125 E. LADD, supra note 119, at 681-684.
benefit less affluent political minorities, during an era of deepening problems with poverty.\textsuperscript{126} The assertion of majoritarian interests may also be manifested and starkly illuminated by the increase in ethnically motivated violence that was associated with the Reagan era\textsuperscript{127} and by the growing political career of a former Ku Klux Klan leader in Louisiana who won a seat in the state legislature and generated nationwide attention for his U.S. Senate campaign.\textsuperscript{128} These events appear to reflect, in extremely graphic forms, an assertion of majoritarian interests and a backlash against perceived policy favoritism directed toward political minorities. Although President Reagan\textsuperscript{129} and his appointees to the Supreme Court would never endorse these graphic manifestations of political backlash and majoritarian interests, their attitudes reflect, in more socially acceptable ways, similar opposition to policies, such as affirmative action, that evince strong sensitivity to the societal disadvantages endured by political minorities.

**Insensitivity to Political Minorities**

1. Racial Discrimination

The Reagan appointees to the Supreme Court evince an insensitivity to

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\textsuperscript{127} SOUTHERN POVERTY LAW CENTER, SPECIAL REPORT: THE KU KLUX KLAN -- A HISTORY OF RACISM AND VIOLENCE 57 (1988).

\textsuperscript{128} See Former Leader of Klan Narrowly Wins Contest in Louisiana, N.Y. Times, Feb. 19, 1989 at 27 "A former grand wizard of the Ku Klux Klan, narrowly defeated his opponent to win a seat today in the Louisiana Legislature . . . The former Klan leader, David Duke, had . . . 51 percent [of the vote.]" Id. at 27; Ex-Klan Leader Says He Will Run for Senate, N.Y. Times, Dec. 5, 1989, at A29 "Mr. Duke said he thought his past as imperial wizard of the Knights of the Ku Klux Klan would help him. 'I think it says to a lot of people that I will stand up for my principals [sic] and ideals,' he said." Id.; *Quixote Watch*, Time, Sept. 10, 1990, at 17 "David Duke[.] The ex-Klansman won a seat in the Louisiana legislature as a Republican and is running for the U.S. Senate; . . . he hopes to force a runoff with Democrat J. Bennett Johnston." Id.

\textsuperscript{129} Although President Reagan never condoned ethnic violence, there have been concerns that his resistance to and condemnation of civil rights laws may have effectively encouraged or legitimized the actions of extremists who similarly opposed such laws. In his role as president, Reagan never utilized the symbolic power of his office to advance ethnic equality:

In sum, the meaning of the Reagan record has been defiance of, rather than adherence to, the prophylactic goals of national civil rights law. But, to reiterate, there is a significant difference between the opposition to affirmative action by individual citizens and groups, and similar opposition by a national administration. The president is elected to enforce the laws of the United States — laws enacted by Congress and the law of the Constitution promulgated by the Supreme Court. Beyond his legal duty, moreover, the president is expected to use his "bully pulpit" to provide moral leadership, to encourage others to comply with the laws, and to adhere to constitutional requirements. The civil rights laws are laws of the United States enacted by the people of the United States. These laws require affirmative action on the part of the national administration to achieve their remedial purpose. They are not different in this respect from other national laws except in their moral dimension . . . [The Reagan administration's] record, in the main, has been . . . one in which the requirements [of civil rights laws] have not been met.

N. AMAKER, *supra* note 120, at 160.
political minorities that is altering the Supreme Court's established role as the
guardian of constitutional rights for those who lack political power. For example,
in *McCleskey v. Kemp,* a five-member majority, including three Reagan appoint-
ees, ignored powerful statistical evidence of racial discrimination in death penalty
sentencing in Georgia. It provides little solace to say, as Justice Powell did for the
majority in the language of judicial restraint, that such "arguments are best presented
to the legislative bodies." The elected branches of government are not designed
to be responsive to discrimination against political minorities unless, as developed
during the enactment of civil rights legislation in the 1960s, majoritarian interests
decide to provide protection for minorities. By contrast, the federal judiciary, with
its life tenure and protected salaries for judges, is expressly designed to make
independent decisions that uphold constitutional principles, such as Equal Protec-
tion, without waiting for majoritarian political interests to recognize and act to
correct discriminatory harms.

In another example, the emerging majority’s aggressive rewriting of anti-
discrimination laws demonstrates a lack of understanding of the continuing preva-
lence of racial discrimination, the limited scope of alternative legal protections,
and the difficulties facing victims of discrimination who wish to pursue their cases
in court.

2. Religious Minorities

Racial groups are not the only political minorities to be slighted by the
emerging majority’s insensitivity to political minorities. For example, in *Lyng v.*

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131 Taking account of 230 different variables, the study of Georgia’s sentencing system found, among other
things, that defendants charged with killing white victims were 4.3 times as likely to receive a death sentence
as defendants charged with killing African-Americans. *Id. at 287.*
132 *Id.* at 319.
133 *U.S. Const.,* art. III, sec. 1.
134 See supra notes 99-101 and accompanying text.
135 As described in a study by one of the leading scholars in the field of race relations, "[t]hough older forms
persist, the ‘new patterns of racism’ are more subtle, indirect, and ostensibly nonracial." Pettigrew, *supra*
note 126, at 700. In the legal context, for example, psychological studies indicate that unconscious racial
bias can affect decisions by jurors and others within the criminal justice system. *See Johnson, Black
Innocence and the White Jury,* 83 *Mich. L. Rev.* 1611 (1985); *Johnson, Unconscious Racism and the
136 For example, in rewriting the anti-discrimination statute to preclude lawsuits for racial harassment in
Patterson v. McLean Credit Union, Justice Kennedy asserted, on behalf of the five-member majority, that
racial harassment “is actionable under the more expansive reach of Title VII of the Civil Rights Act of
1964.” 109 S.Ct. at 2374 (1989). Thus, he implied that an alternative statute was available to protect victims
discriminatory harassment. However, Title VII only applies to employers with fifteen or more
employees. *See 42 U.S.C. §§2000e-2000e-(17).* The *Patterson* decision thus removed all such protection
from the estimated 10.7 million workers who are employed in settings not covered by Title VII. Eisenberg
137 The many obstacles to pursuit of discrimination cases, including preliminary proceedings in state civil
rights agencies and the complications and costs of legal proceedings, have the effect of discouraging many
Norwest Indian Cemetary Protective Association, Justice O'Connor's opinion acknowledged that "we have no reason to doubt that the logging and road-building projects . . . could have devastating effects on traditional Indian religious practices" by destroying a religious area utilized by Native Americans for centuries. Despite the recognized conflict between First Amendment religious exercise rights and a government policy, O'Connor declined to apply the usual strict scrutiny standard and allowed the government to proceed with the road without showing any compelling governmental interest.

In another decision demonstrating majoritarian bias, the Reagan appointees plus Justices White and Stevens upheld Oregon's prohibition on the use of peyote in traditional Native American religious ceremonies. As one commentator observed, "[i]n theory, all religions are equal under the First Amendment; but in the eyes of the [C]ourt some are clearly more equal than others. Alcohol, the sacramental element of choice for Christians and Jews, is allowable; peyote, the element of choice for [Native Americans], is not." Because Native Americans have little power in Congress or in state legislatures, they turned, unsuccessfully as it turned out, to the Supreme Court, the one institution of government structured to protect individuals' constitutional rights from destruction by majoritarian policy initiatives.

In Establishment Clause cases, Reagan appointees have begun to dismantle

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139 Id. at 451.
140 O'Connor's approach to assessing the harm to the Native American religion in Lyng differed starkly from Chief Justice Burger's analysis of the clash between Wisconsin's mandatory education law and the Amish people's desire to remove their children from school in the classic free exercise precedent Wisconsin v. Yoder, 92 S.Ct. 1526 (1972). Although O'Connor claimed that the Supreme Court did not wish to "weigh the value of every religious belief and practice that is said to be threatened by any government program," Lyng v. Northwest Indian Cemetary Protective Association, 485 U.S. at 457, that is precisely what Burger did in Yoder. Burger examined whether the state's compulsory education law would collide with Amish beliefs, Yoder, 92 S.Ct. at 1534-1535, and then asked whether the state had a compelling interest in forcing the Amish children to attend school in spite of the conflict with their families' religious beliefs. Id. at 1536-1542. The religious minority had their free exercise rights protected in Yoder and Native Americans would have been entitled to the same protection in Lyng if the emerging majority had applied the established analysis for free exercise claims.

142 Yoder, Ruling On Ritual Use of Peyote a Threat to Religious Practice, Akron Beacon J., Apr. 23, 1990, at A9. The First Amendment decision authored by Justice Scalia, was described as "[a] blow to Indian traditions," Id. Sachs, A Victory for Integration, Time, Apr. 30, 1990, at 85. One observer commented on the majoritarian biases evident in the opinion:

If a state were crazy enough to place alcohol on the Schedule I list of dangerous drugs and make no exemption for ritual uses, that would be that for wine in the Eucharist and other ceremonies. For Christians and Jews it would be grape juice a la Wesley or nothing.

But obviously (you say) no state would do something so crazy. And if it did, the voters would sweep the lawmakers who did it from office.

That is Justice Antonin Scalia's solution to the dilemma. He wrote the majority opinion
any walls of separation that prevented governmental entities from advancing the interests of majoritarian Christian religious beliefs. In *Bowen v. Kendrick*, a five-member majority, including the three Reagan appointees on the Court at that time, approved a Congressional statute that funneled public funds to Christian religious groups who wished to counsel adolescents about premarital sexual relations and pregnancy. The Reagan appointees also support the use of public funds and public property for religious displays during the Christmas season. Chief Justice Rehnquist and Justice Scalia would even permit state legislatures to require public schools to teach Christian beliefs about the origins of the world. The support for governmental favoritism toward Christianity demonstrates an insensitivity to the members of smaller religious sects whose tax money is utilized to support the government-sponsored Christian programs and symbols which, in the case of religious holiday displays, are then thrust upon them involuntarily.

3. Criminal Defendants as a Political Minority

Criminal defendants and prisoners constitute a despised political minority that is excluded from participation in democratic governing processes. Because they have no opportunity to protect their interests in the elected branches of government, they must look to the judiciary for the protection of their constitutional rights. The Reagan appointees' insensitivity to this vulnerable political minority is particularly evident in efforts to accelerate implementation of capital punishment in spite of evidence that inmates' constitutional rights have been violated. In *Butler v. McKellar*, a five-member majority, including the four Reagan appointees, acknowledged that a death row inmate's rights were violated when he was interrogated by police outside of the presence of his attorney. Because the majority concluded that the violation occurred before the Supreme Court determined in a separate case that such police actions were improper, the five-member majority affirmed the death sentence in spite of the constitutional violation. The majority's unwillingness to

upholding Oregon's refusal to exempt religious uses of peyote from its general ban on illicit drugs, as many state and federal laws do. But he offered the consoling view that if indeed states choose to burden the free exercise of religion in this way, the answer lies at the ballot box.

There is much to be said for this view when less than fundamental liberties are at issue. But as Scalia himself acknowledges, the flaw is that religious minorities may lack the political clout to protect their sacramental practices and substances from ban.


give retroactive application to constitutional principles, especially in an instance in which someone will go to the electric chair as a result of police officers’ actions in violating his rights, has led one commentator to conclude the Reagan appointees treat constitutional principles as if they are merely changeable rules for police conduct.\textsuperscript{148} The majority opinion in \textit{Butler} did not discuss the fact that the defendant whose confession was elicited during improper police questioning had an IQ of only sixty-one and the mental functioning capacity of a nine-year-old.\textsuperscript{149} Subsequent scientific analysis of physical evidence raised doubts about the defendant’s guilt, but his inexperienced attorney, who was paid only $300 to handle a capital rape-murder case, spent “a mere [ten] minutes giving the jury evidence of why his client should not be put to death.”\textsuperscript{150} The factual circumstances of the case present precisely the kind of vulnerable individual who needs to receive careful scrutiny and protection from judicial officers.

In \textit{Murray v. Giarratano},\textsuperscript{151} the same five-member majority decided that indigent death row inmates are not entitled to the services of appointed counsel to pursue collateral attacks upon their convictions after unsuccessful appeals. This lack of resources will preclude effective presentation of habeas corpus petitions which, when adequately presented in the federal courts, had led to the discovery of defects in the convictions of sixty to seventy percent of capital defendants.\textsuperscript{152} Thus, improprieties in the trial proceedings which result in death sentences will go undiscovered and undisturbed. Without legal assistance, indigent prisoners are not able to present their claims effectively because they frequently lack the education, intelligence, language skills, and familiarity with prison law library resources necessary for preparation of \textit{pro se} petitions.\textsuperscript{153}

Thus, the emerging majority on the Supreme Court appears unwilling or unable to recognize the vulnerability of political minorities and the needed role of the judiciary in providing basic constitutional protections for those who are victimized by the actions of the elected branches of government. One commentator’s description of Justice Scalia’s judicial philosophy seems to apply with equal force to the other Reagan appointees:

Justice Scalia’s judicial philosophy may nevertheless undercut the courts’ constitutional mandate to serve as a check on the political branches in protecting the rights of minorities ... Justice Scalia’s broad

\textsuperscript{148} See Lasser, Cynicism on the Supreme Court, Akron Beacon J., Apr. 3, 1990, at A7. “To the Reagan appointees, constitutional decisions are not lasting, permanent interpretations of the fundamental law; they are merely guidelines for the law enforcement profession.” Id.


\textsuperscript{150} Id.

\textsuperscript{151} 109 S.Ct. 2765 (1989).

\textsuperscript{152} Id. at 2778 (Stevens, J., dissenting).

deference [to other branches of government] would remove the Court as a "shield" and relegate protection of the minority to the unrestrained, and often indifferent, processes of majority rule. 154

The Defense of Majoritarian Interests

1. The Tone of Aggressive Defensiveness

The emerging majority's apparent insensitivity to the vulnerability of political minorities and its activism in altering precedents affecting discrimination have elicited strong responses from the liberal justices. The most pointed criticism came from Justice Harry Blackmun, who wrote in a dissenting opinion: "One wonders whether the majority still believes that race discrimination — or, more accurately, race discrimination against nonwhites — is a problem in our society, or even remembers that it ever was." 155 This is a powerful accusation in the contemporary United States in which "statements opposing racial discrimination have become the norm for society." 156

One response by the conservative justices to such assertions is to explain that new doctrinal developments do not, in fact, reflect any lessening of the Court's commitment to Equal Protection and other constitutional principles. For example, in rewriting and restricting major precedents affecting an employment discrimination statute, Justice White acknowledged that "[s]ome will complain that [his] specific causation requirement is unduly burdensome on Title VII plaintiffs," but he explained that, in his view, "liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims." 157 Although Justice White apparently underestimated the significance of the new majority's change in statutory interpretation, 158 he attempted to provide a reasoned response to the new majority's liberal critics. Similarly, in limiting the scope of another anti-discrimination law, Justice Kennedy defended the emerging majority against liberal critics by asserting that "[n]either our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in the private, as well as the public, sphere." 159 Although Kennedy did not acknowledge the detrimental practical impact of his opinion upon many victims of racial harassment, 160 he did attempt to assuage his critics.

Other opinions by the Reagan appointees manifest two new kinds of responses to their critics' accusations about insensitivity to minorities. First, Justice Scalia

154 Comment, Justice Scalia and Judicial Restraint, supra note 40, at 257.
156 Smith, Jurisprudential Politics, supra note 79, at 160.
158 In reducing the ability for plaintiffs to utilize statistics to raise an inference of employment discrimination, White almost seems to presume that employers will leave "smoking gun" memoranda in their files which demonstrate their conscious intent to discriminate. Id.
159 Patterson, 109 S.Ct. at 2379 (1989).
unleashed a belligerent counterattack against such accusations in a case raising the issue of racial discrimination in jury selection: "Justice Marshall’s dissent rolls out the ultimate weapon, the accusation of insensitivity to racial discrimination — which will lose its intimidating effect if it continues to be fired so randomly."\(^1\) In addition to its sarcastic tone, Scalia’s statement disturbingly implies that he and the four justices who joined his opinion believe that claims of racial discrimination are raised too frequently and that such claims “intimidat[e]” justices into improperly favoring the interests of racial minorities.

Second, Justices Kennedy and Scalia have both asserted that it is actually majoritarian groups who are under attack by an insensitive Supreme Court. In a case in which the majority of the Court decided that purely religious Christmas displays on public property violate the Establishment Clause, Justice Kennedy, who was joined by Chief Justice Rehnquist, Justice Scalia, and Justice White, wrote that the Supreme Court was fostering discrimination against majoritarian religions:

I am quite certain that ["the reasonable person"] will take away a salient message from our holding in this case: the Supreme Court of the United States has concluded that the First Amendment creates classes of religions based on the relative numbers of adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any possible risk of offending members of minority religions.\(^1\)

In the context of the case that Kennedy was criticizing, this was a patently absurd assertion. Three justices (Brennan, Marshall, and Stevens) believe that no religious displays are permissible on public property.\(^1\) This hardly constitutes a preference for any religion over any other religion. Justices Blackmun and O’Connor believe that religious displays are acceptable so long as there are secular holiday elements, such as Santa Claus, snowmen, and reindeer, present in conjunction with the display.\(^1\) Their view that sacred objects must be mixed with secular objects in order avoid Establishment Clause problems also does not prefer any particular religions. In fact, Blackmun and O’Connor implicitly tolerate a prefer-

\(^{160}\) In the five months following the Supreme Court’s decision in *Patterson*, ninety-six discrimination cases were dismissed by federal district judges as a direct result of the new limitation upon anti-discrimination lawsuits initiated by the conservative majority in *Patterson*. *NAACP Legal Defense and Educational Fund, Inc., The Impact Of Patterson v. McLean Credit Union* (Nov. 1989). See Rothfeld, *Rulings on Job Bias: Chilling Effect on Lawsuits*, N.Y. Times, Oct. 27, 1989, at B7.


\(^{162}\) *County of Allegheny v. ACLU*, 109 S.Ct. 3086, 3145 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

\(^{163}\) *Id.* at 3124-34.

\(^{164}\) In *County of Allegheny*, Blackmun and O’Connor joined with Kennedy, Rehnquist, Scalia, and White to approve the display of an eighteen-foot-tall Hanukkah menorah on the steps of the Pittsburgh City Hall next to a Christmas tree. Simultaneously, Blackmun and O’Connor joined Brennan, Marshall, and Stevens to find that a Nativity scene, by itself, was impermissible at the Allegheny County Courthouse a block away from the city hall. *Greenhouse, Religious Displays: In Menorah and Creche Rulings, Court Takes Case-by-Case Tack*, N.Y. Times, July 4, 1989, at 1.
ence for majoritarian religions, namely the Christian displays that are most commonly on public property in cities throughout the country, as long as the displays are not limited to religious symbols. Kennedy and his fellow dissenters, in an open display of insensitivity to religious minorities, seem to assert that if majoritarian religions cannot receive support and preferences from government, then those religions, and not minority religions which are similarly denied government support, are somehow uniquely victimized. Such strange logic clearly reflects a bias favoring governmental support of majoritarian Christian religions.

In dissenting from a decision approving the use of gender as one criterion in a promotion decision under an affirmative action plan, Justice Scalia wrote:

In fact, the only losers in the process are the [white males] of the country, for whom Title VII has been not merely repealed but actually inverted. The irony is that these individuals — predominantly unknown, unaffluent, unorganized — suffer this injustice at the hands of a Court fond of thinking itself the champion of the politically impotent.165

Contrary to his usual deference to the elected branches of government, Scalia acknowledges the idea that the Supreme Court should play a role in protecting those who are disadvantaged in the political governing processes — but he reserves his recognition and protection for the groups who have traditionally benefited from majoritarian processes.

2. Activism Against Legislative and Executive Actions

Consistent with Scalia's apparent assertion that the Supreme Court has been protecting the wrong groups from disadvantaging policies which emanate from legislatures, the Reagan appointees have abandoned their usual deference to the elected branches of government when those branches have acted to protect political minorities.166 In City of Richmond v. J.A. Croson Co.,167 the Reagan appointees were


166 The fact that the government has acted in selected policy initiatives to redress the historical disadvantages facing racial and other political minorities should not be construed as evidence that such minorities can protect their interests through the political process. For example, governmental programs give scant and inadequate attention to the legacy of discrimination which has accrued into significant detrimental consequences affecting the employment, housing, health care, and education of racial minorities. See Pettigrew, supra note 126, at 674-682. Anti-discrimination laws have symbolic value but are often of limited utility, in part because it is difficult for less affluent people to utilize the legal system effectively. See K. Bumiller, supra note 137; Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 MINN. L. REV. 1049 (1978). The few existing affirmative action programs which are under attack by the emerging majority are focused primarily upon selected contexts in white-collar jobs, higher education, and government employment. As a leading sociologist has noted, "affirmative action programs are not designed to deal with the problem of the disproportionate concentration of [African-Americans] in the low-wage labor market," W. Wilson, The Declining Significance Of Race 110 (1978) — a phenomenon that has attendant detrimental consequences for African-Americans' ability to obtain housing, health care, and other basic needs.

joined by Justices White and Stevens in invalidating a program initiated by the Richmond City Council for providing preferences to Minority Business Enterprises in awarding public contract funds. In *Metro Broadcasting Inc. v. Federal Communications Commission*, the four Reagan appointees dissented against a decision approving the federal government’s minority preference program in issuing communications broadcasting licenses. In neither case did the Reagan appointees emphasize their usual deference to the decisions of other governmental branches. If the replacement for Justice Brennan shares the Reagan appointees’ disdain for remedial governmental preferences for traditionally disadvantaged minorities, there could be swift decisions rejecting the remaining affirmative action precedents, including *Metro Broadcasting*, *Fullilove v. Klutznick*, and *Regents of the University of California v. Bakke*, in which slim majorities approved governmental preference programs.

Although Justice Scalia has never been sympathetic to discrimination claims by minority group members, he has evinced sensitivity to majoritarian group members through his forthright and long-standing opposition to affirmative action programs which disadvantage white males. Similarly, Chief Justice Rehnquist has always been reluctant to recognize discrimination claims by racial minorities. Although in “typical cases . . . official purposeful factors in racial discrimination are not often so blatant,” Chief Justice Rehnquist refuses to recognize discrimination claims except in the few cases of “official involvement that entails an intent to discriminate.” Despite his reluctance to recognize illegal discrimination against minorities, Rehnquist joins Scalia in exhibiting great sensitivity to discrimination against members of majoritarian groups. Scalia and Rehnquist are so concerned about so-called “reverse discrimination” that they will ignore the deference to other branches of government which is normally so central to their decision making.

**CONCLUSION**

The justices in the emerging majority are asserting a vision of American constitutional democracy that outwardly appears to adopt a simple formulation of
'majority rule' without recognizing that the American definition of democracy actually means always meant majority rule plus the protection of rights for political minorities. One prominent scholar has concluded that a "majoritarian paradigm" now dominates the analysis applied by the Reagan appointees in the Supreme Court's emerging conservative majority. The justices advance their purported interest in judicial restraint by seeking "to avoid overturning legislative or executive decisions based on their personal preferences and [by] generally ruling in favor of the elected branches of government." A primary consequence of this effort to eliminate judicial activism is an abdication of the Supreme Court's role as the guardian of the rights of political minorities. Because "[e]lected legislatures . . . are structured to register current voter preferences and organized interests' desires, and these political forces hinder [government] officials' ability to apply the Bill of Rights' protections for individuals — especially politically powerless individuals," there is a compelling need for judicial vigilance on behalf of those whose political weakness means that they "cannot succeed in forming coalitions to protect themselves in the political process."

Although Congress has acted to undo the damage of several of the Supreme Court's statutory interpretation decisions evincing the emerging majority's insensitivity to racial discrimination, several factors limit the ability of a legislative body to fulfill the Supreme Court's traditional role in protecting minorities: the President may block Congressional enactments through the veto power; Congress is not structured to respond effectively to discrimination against political minorities; and the emerging Court majority has demonstrated its inclination to overturn or modify Congressional enactments with which it disagrees. The risk of majoritarian tyranny looms large when the Supreme Court abdicates its responsibilities for overseeing the treatment of political minorities. The risk is even more pronounced in the immediate future with a Court composed of appointees who have not merely withdrawn from the scene, but who actually express pro-majoritarian biases.

The changes initiated by the Reagan appointees have been implemented in the name of judicial restraint. A close examination of their actions indicates that the justices' conception of "restraint" actually requires activism in the service of their

176 Chemerinsky, supra note 10, at 87.
177 Id.
179 Chemerinsky, supra note 10, at 84.
181 Id.
182 See supra note 177 and accompanying text.
183 See supra notes 99-101 and accompanying text.
184 See supra notes 162-164 and accompanying text.
philosophical values. The emerging majority’s willingness to overturn suddenly precedents with which they disagree has attracted the ire of a more traditional restraintist, retired Justice Powell, who says that the new overeagerness to reverse precedents “represent[s] explicit endorsement of the idea that the Constitution is nothing more than what five justices say it is. This . . . undermine[s] the rule of law.”

There are growing signs that the Reagan appointees’ purported deference to the elected branches of government is merely situational. Not only do they overturn and rewrite statutes with which they disagree, they are initiating new approaches to statutory interpretation that disregard traditional legislative history sources which are normally utilized to find the legislative intent underlying statutory enactments.

This selective disregard for legislative intentions seems strange for justices who purport to defer to elected branches of government. The Reagan appointees’ activist tendencies merely confirm, however, Justice Brennan’s views about the inevitability of choices and political consequences in justices’ decision making processes. Although Brennan directed his comments specifically at original intent jurisprudence, they apply with equal force to the mix of restraintist ideology and activist inclinations which characterize the behavior of the Reagan appointees on the emerging majority: “[T]he political underpinnings of such a choice should not escape notice . . . . This is a choice no less political than any other; it expresses antipathy to claims of the minority to rights against the majority.”

Future decisions coming from the strengthened conservative majority on the Brennan-less Supreme Court bear watching to see how the purported advocacy of judicial restraint fits with the recurring manifestations of activist behavior. More importantly, the consequences of Supreme Court decisions as they affect political minorities deserve scrutiny. The transformed role of the Court in the political system appears to have diminished the effectiveness of the institutional structure designed to protect politically weak individuals and instead has, in the words of one scholar, left the country “living with a Court pursuing a pre-determined course toward Constitutional retrenchment.”

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185 Glennon, supra note 10, at 51.
186 See supra notes 99-101 and accompanying text.