Looking Back, Looking Ahead: Justice O’Connor, Ideology, and the Advice and Consent Process

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INTRODUCTION

Running on a platform that faulted the federal judiciary for favoring the rights of criminal defendants and for tolerating affirmative action, Ronald Reagan became President of the United States in 1981. In the election of Reagan, the right-wing message of 1964 Presidential candidate Barry Goldwater, endorsing a far-right judicial agenda including positions against civil rights legislation and for greater law enforcement discretion, enjoyed a new level of social and political acceptability with President Reagan as its vanguard.

Reagan promised to appoint individuals to the federal judiciary who would "let Congress, the president, and the state legislators do what they want unless it clearly contravenes the precise words of the Constitution — for example, regulate or forbid abortions, adopt prayers in public schools, impose capital punishment, [and] authorize police to engage in [warrantless] wire tapping . . . ." In its appointment of federal judges and administrative officials, "[t]he Reagan Administration pursued

1 JAMES M. BURNS ET AL., GOVERNMENT BY THE PEOPLE 174-75 (1987). Of course, other components of his campaign, such as economic recovery and military strength (emphasizing President Carter's weakness as illustrated by the Iranian hostage situation), played a major role in his election. Id. at 504, 445.

2 Id. at 173-75. But cf. Walter F. Murphy & Joseph Tanenhaus, Publicity, Public Opinion, and the Court, 84 NW. U. L. REV. 985, 995-96 (1990) (charting public opinion on court decisions and commenting as a subsidiary matter that "[i]n 1964, Barry Goldwater tried to make the Court's decisions on criminal justice a critical issue in his Presidential campaign . . . . In later years, criminal justice became more salient, but the lag was too long to credit or blame Goldwater's campaign").

3 BURNS, supra note 1, at 374 (discussing Attorney General Edwin Meese III's remarks entitled "On the Theory of a Jurisprudence of Original Intention," in which he suggested that Reagan wanted only interpretivists in the judiciary. In that speech, he also argued "that the accepted view that the Fourteenth Amendment incorporates most provisions of the Bill of Rights is 'constitutionally suspect.") (citing Edwin Meese III, Address to the American Bar Association (July 9, 1985), in TODAY JOURNAL, November 15, 1985, at 6, and a contemporaneous criticism of interpretivism by Justice William Brennan, Excerpts of Brennan's Speech on Constitution, N.Y. TIMES, October 13, 1985, at A36 (Address of Justice William Brennan at Georgetown University (Oct. 12, 1985) (on file at the Supreme Court) [hereinafter Brennan's Speech]). See generally HERMAN SCHWARTZ, PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION (1988) (detailing the Reagan Administration's efforts to appoint ideologically conservative individuals to the federal judiciary).
its agenda with a single-mindedness that perhaps was unequaled by any of its recent predecessors."

During his campaign for the presidency, Ronald Reagan promised to appoint a woman to the Supreme Court. In 1981, President Reagan fulfilled that pledge after the Senate confirmed his nomination of Sandra Day O'Connor to serve as an Associate Justice on the Court. Justice O'Connor's votes and decisions regarding Title VII of the Civil Rights Act of 1964 and the rights of criminal defendants demonstrate the extent to which her jurisprudence coincided with President Reagan's political goal of changing the law in these areas. This Article contends that Justice O'Connor's frequent refusals during her confirmation hearings to answer questions relating to ideology, judicial philosophy, and many constitutional doctrines foreclosed a meaningful Senate dialogue about the extent to which her nomination was a vehicle for the achievement of President Reagan's legal agenda.

This analysis of Justice Sandra Day O'Connor's votes and opinions demonstrates that the Senate has a legitimate role in

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9 She insisted that her refusal was necessary to show her impartiality and unbiased attitude toward cases. See Grover Rees III, Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution, 17 GA. L. REV. 913 (1983) (discussing Justice O'Connor's frequent refusal to answer questions and severely criticizing the notion that a nominee may invoke the impropriety of answering); see also infra notes 17-27 and accompanying text.
investigating and discussing a judicial nominee's jurisprudential philosophy, ideology, and consequent policy preferences during the advice and consent process. Justice O'Connor exemplifies how all justices come to the Court with some form of judicial philosophy and political ideology that significantly affects their approaches to cases. The correlation between President

10 U.S. Const. art. II, § 2. This Article supports the validity of Senate rejection of, or support for, a nominee on ideological grounds because of the considerable effect a sitting Justice's ideology can have in changing and developing federal law. See Lloyd N. Cutler, The Limits of Advice and Consent, 84 Nw. U. L. Rev. 876, 878 (1990) ("[E]very group in our society, whether high or low, looks to the Supreme Court to defend and uphold its rights. As the Constitution enters its third century, this is the most precious and valuable thing about the Court."). Specific proposals for reforming the advice and consent process, such as not directly questioning nominees, are beyond the scope of this Article. See Gary Simson, Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees, 7 Const. Comm. 283 (1990) [hereinafter Taking the Court Seriously] (suggesting that the Senate give special attention to the potential effect of a nominee on the outcome of important cases, the amount of public confidence in the Court and the degree of fairness in the Court's decision making process); William Ross, The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees, 62 Tul. L. Rev. 109 (1987) (discussing Justices Rehnquist, Scalia, and O'Connor and their refusals to answer various questions); see also Gary Simson, Thomas' Supreme Unfitness — A Letter to the Senate on Advice and Consent, 78 Cornell L. Rev. 619 (1993) (evaluating the advice and consent process and urging the Senate to reform the process for assessing the qualifications of nominees).

11 This Article follows the realist proposition that judges have agendas, ideologies, or philosophical perspectives that significantly influence their decision making. Thus, neither laws nor judges are 'neutral.' See, e.g., Donald E. Lively, The Supreme Court Appointment Process: In Search of Constitutional Roles and Responsibilities, 59 S. Cal. L. Rev. 551 (1986) (articulation of the accepted realist position).

12 Judicial philosophies of restraint or activism are not necessarily associated with any particular political perspective, as can be seen by examining both the Lochner and Warren Courts, which could be considered diametrically opposed in their political activism. See Burns, supra note 1, at 374-75.

A nominee's previous political activities, the nominee's writings, judicial record, or the nature of the nominee's law practice may help to identify a nominee with a distinctly conservative or liberal ideology. See, e.g., Robert F. Nagel, Advice, Consent, and Influence, 84 Nw. U. L. Rev. 858, 868 (1990).

Nevertheless, a few appointees' jurisprudential approaches have evolved or dramatically changed over time; Nixon appointee Harry Blackmun provides a good example of such a development. David G. Savage, Turning Right: The Making of the Rehnquist Supreme Court 233-34 (1992).
Reagan's goals and Justice O'Connor's votes and decisions in the areas of Title VII and the rights of the accused demonstrate the considerable power to shape the law that the President wields in choosing a Justice.13 Regardless of whether they were nominated because of certain jurisprudential views they hold, nominees should be required to discuss their views on federal law and the role of judges before the Senate in the public forum provided by the confirmation hearings.14

Part One of this Article examines Justice O'Connor's refusal in her confirmation hearings to discuss the substance of her jurisprudential approach to Title VII of the Civil Rights Act of 1964 and the rights of criminal defendants. In Part Two, this Article examines Justice O'Connor's approach on the Court to these two areas of the law. Part Three discusses how this analysis of Justice O'Connor's work supports various theoretical arguments for Senate investigation and discussion of Supreme Court nominees' ideological perspectives, and the rejection or confirmation of nominees based on this information.

I. JUSTICE O'CONNOR'S REFUSAL TO DISCUSS CONSTITUTIONAL ISSUES AT HER CONFIRMATION HEARINGS

During her Supreme Court confirmation hearings, Sandra Day O'Connor stated that, if confirmed, her intention was to

13 See infra notes 39-202 and accompanying text. Senator Paul Simon, who currently sits on the Senate Judiciary Committee, observed that "[w]hen Presidents have tried to shape the Supreme Court through choosing someone of a particular political and philosophical bent, they have generally been successful." PAUL SIMON, ADVICE AND CONSENT 35 (1992).

14 Nagel, supra note 12, at 866-67 (advocating "substantive, ideological Senate review" and proposing that nominees ought to provide substantial information about their precise views of the law); see, e.g., Rees, supra note 9, at 966-67; Charles Black, A Note on Senatorial Consideration of Supreme Court Nominees, 79 YALE L.J. 657 (1970). Burns notes that the selection process focuses on evaluating nominees' legal competence, integrity, and judicial temperaments. These qualities are essential but not sufficient. Federal judges have too much power and too much discretion to be appointed without inquiry into and concern about their political views and basic values. BURNS, supra note 1, at 372. While not necessarily the determining factor, ideology should play an important role in the Senate's consideration of a nominee.
find the law rather than to make it.\textsuperscript{15} But she had been chosen for the court as a result of President Reagan's campaign to change federal jurisprudence by appointing federal judges aligned with him ideologically.\textsuperscript{16} Justice O'Connor refused to answer questions about issues such as abortion, affirmative action, and the rights of criminal defendants that would have helped the Senators understand her considered approach to these highly contentious issues of federal law.\textsuperscript{17} O'Connor obliquely stated that the federal judiciary should display greater respect for the decisions of governmental officials.\textsuperscript{18} O'Connor responded to questions regarding constitutional issues by either summarizing the Court's holdings in the area, such as desegregation, or by observing that commentators were divided on the issue.\textsuperscript{19} In this way she deflected questions about

\textsuperscript{15} Nomination of Sandra O'Connor: Hearings Before the Senate Comm. on the Judiciary on the Nomination of Judge Sandra Day O'Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, 97th Cong., 1st Sess. 68 (1981) [hereinafter O'Connor Hearings]. At her hearings, O'Connor discussed the difference between legislating and judging:

As a legislator it was my task to vote on public policy issues and to try to translate into a statutory form certain precepts that were developed as a matter of social or public policy in ways which would then govern the residents of our State. As a judge it is not my function to continue to try to develop public policy by means of making the law. It is simply my role to interpret the laws which the legislature has passed, to try to do that in accordance with the intent of the framers. Id. at 68; see also HUBER supra note 5, at 16 (O'Connor declined to answer questions regarding ideology or policy preferences, "steadfastly refus[ing] to predict how she would vote as a Supreme Court justice, particularly on the politically sensitive issue of abortion.").

\textsuperscript{16} ABRAHAM, supra note 6, at 333-34 ("[A]lthough Reagan hoped to fulfill his campaign pledge to appoint a woman to the Supreme Court, he insisted that his nominee meet his political ideological criteria."); cf. Martin Shapiro, Interest Groups and Supreme Court Appointments, 84 NW. U. L. REV. 935, 954 (1990) (contending that "[t]he whole point of the Reagan judicial appointment campaign was that the federal judiciary had been filled with New Deal Democrats who had turned American constitutional law into a branch of liberal Democratic ideology and the courts into a production center of the rights industry operated by a social democratic elite").

\textsuperscript{17} O'Connor Hearings, supra note 15, at 60-63, 79-81, 94-95, 120, 126-27, 146-49.

\textsuperscript{18} Id. at 85-86, 121-22.

\textsuperscript{19} Id. at 69-70, 85, 120-21, 130-35, 151, 247.
affirmative action.\textsuperscript{20} After repeated questioning, O'Connor did briefly reveal her personal views on abortion\textsuperscript{21} and school busing.\textsuperscript{22} She did so, however, only after stressing that her personal views were irrelevant to her judicial decision-making.\textsuperscript{23} She also discussed the death penalty\textsuperscript{24} and the exclusionary rule,\textsuperscript{25} but only in the context of her former roles as legislator and trial court judge.

In refusing to answer questions regarding her ideology or constitutional agenda, O'Connor stated,

I do not believe that as a nominee I can tell you how I might vote on a particular issue which may come before the Court, or endorse or criticize specific Supreme Court decisions presenting issues which may well come before the Court again. To do so would mean that I have prejudged the matter or have morally committed myself to a certain position. Such a statement by me as to how I might resolve a particular issue or what I might do in a future Court action might make it necessary for me to disqualify myself on the matter. This

\textsuperscript{20} Id. at 148, 162-63.

\textsuperscript{21} Id. at 98 (stating her personal opposition to abortion "as a matter of birth control or otherwise").

\textsuperscript{22} Id. at 119 ("I just think that [mandatory busing of school children] is not a system that often is terribly beneficial to the child").

\textsuperscript{23} Id. at 60, 98, 119 (stressing that "the personal views and philosophies . . . of a Supreme Court Justice and indeed any judge should be set aside . . . in resolving matters that come before the Court" and reiterating that point in each discussion).

\textsuperscript{24} Id. at 128 (O'Connor described her efforts as a legislator to develop a constitutional death penalty statute in the wake of Furman v. Georgia, 408 U.S. 238 (1972)).

\textsuperscript{25} Id. at 146-47. Justice O'Connor gave her "simple observation as a trial court judge" about the exclusionary rule that:

I cannot say that I think the application of Miranda has simply tied the [officers'] hands to the extent that police work is ineffective . . . . I think the exclusionary rule, [however,] has proven to be much more difficult in terms of the administration of justice. There are times when perfectly relevant evidence and, indeed, sometimes the only evidence in the case has been excluded by application of a rule which, if different standards were applied maybe would not have been applied in that situation, for instance, to good faith conduct on the part of the police.

\textit{Id.} at 146.
would result in my inability to do my sworn duty; namely, to decide cases that come before the Court.\textsuperscript{26}

O'Connor based her refusal to answer questions about constitutional law on her duty to decide cases impartially without having prejudged the issues.\textsuperscript{27} O'Connor characterized herself as a strict constructionist who would set aside personal values and decide cases in accordance with the intent of the framers.\textsuperscript{28}

\textsuperscript{26} Id. at 57-58. O'Connor stated that she would answer all questions that did not require her to evaluate either an actual past Supreme Court decision or a hypothetical future one. Id.; see Rees, supra note 9, at 950-51 (explaining that O'Connor was the first nominee "to maintain not only that it would be improper to testify on constitutional questions at a confirmation hearing, but that such testimony might give rise to a duty to disqualify herself in future cases presenting issues discussed at the hearing"); cf. Simson, supra note 10, at 653-56 (commenting on the disqualification argument in the context of the Thomas Confirmation Hearings).

O'Connor's rule against discussing questions that may come before the Court excludes both answers to "result-oriented" questions and everything but simplistic and vague statements about methods of constitutional analysis. O'Connor Hearings, supra note 15, at 85, 134; see Rees, supra note 9, at 950 ("To know that a prospective judge plans to examine legislative history" does not tell a Senator how she intends to do that.).

O'Connor did indicate that she accepts several Supreme Court decisions that she thought were unlikely to be seriously challenged. However, she emphasized that when a Justice "becomes convinced in his or her own mind that something was previously incorrectly resolved and that there are sufficient reasons for reaching a contrary result," only then should he or she should vote to reverse the earlier constitutional interpretation. O'Connor Hearings, supra note 15, at 253; see Rees, supra note 9, at 920-21 (discussing O'Connor's acceptance of Brown v. Board of Education, 347 U.S. 483 (1954), restrictions or exceptions to the First Amendment in cases involving commercial speech or obscenity, the prohibition of gender-based discrimination under the Fourteenth Amendment, and the lack of a right to funding related to abortion). Because O'Connor generally spoke quite briefly about the holdings that she accepts, her discussion was not very conducive to discerning her approach to constitutional questions. Id.; see O'Connor Hearings, supra note 15, at 102, 148, 151, and 160.

\textsuperscript{27} O'Connor Hearings, supra note 15, at 57-58. For criticism of her position, see infra notes 223-225 and accompanying text.

\textsuperscript{28} Id. at 68. No consensus exists about how to discern what the framers of a constitutional provision meant by it. See Rees, supra note 9, at 935-36. Additionally, many scholars and judges believe either that intent is not discernable or that if it can be determined, it should not thwart our evolved sense of justice and liberty. See Brennan's Speech, supra note 3; Harold J. Spaeth & Saul Brenner, Studies in U.S. Supreme Court Behavior 221-49 (1990). Spaeth and Brenner contend that judicial restraint is "issue specific . . . [judges] defer to the judgment of the legislature (or other body) only when
However, Justice O'Connor's pattern of adjudication reveals that she came to the Court with specific ideas about changing the law in the areas of Title VII and criminal defendants' rights.\(^{29}\) As Grover Rees succinctly observed, "If anything was to be gained by anybody as a result of Justice O'Connor's refusal to discuss constitutional questions, it was not a less opinionated judge for future litigants."\(^{30}\)

II. JUSTICE O'CONNOR'S JURISPRUDENCE ON THE RIGHTS OF VICTIMS OF DISCRIMINATION AND CRIMINAL DEFENDANTS

Justice O'Connor's statements regarding greater federal court deference to government officials during her Supreme Court confirmation hearings masked a hostile approach toward affirmative action and the rights of the accused, subjects she evaded in her hearings.\(^{31}\) Her votes and opinions in these areas demonstrate that Reagan nominated her in part to implement these aspects of his judicial agenda.

First, Justice O'Connor has repeatedly chosen to narrowly construe Title VII's congressional mandates on equal opportunity.\(^{32}\) Specifically, she has limited affirmative action plans designed to remedy both discriminatory intent and effect,\(^{33}\) and has similarly restricted the rights of criminal defendants.\(^{34}\) The Constitution provides an explicit inventory of rights designed to guarantee fairness when the government acts to deprive those accused of crimes of their liberty or their life.\(^{35}\) In this area, Justice O'Connor has shown a faithful deference to state courts and law enforcement officials.\(^{36}\) Justice O'Connor has urged federal courts to deny review of convicted defendants' claims of they approve of that judgment . . . . In short, judicial restraint is to judicial decision making as phlogiston is to fire." Id. at 222.

\(^{29}\) See infra notes 39-202 and accompanying text.

\(^{30}\) Rees, supra note 9, at 952.

\(^{31}\) See supra notes 17-25 and accompanying text.

\(^{32}\) See infra notes 39-103 and accompanying text.

\(^{33}\) See id.

\(^{34}\) See infra notes 109-202 and accompanying text.

\(^{35}\) U.S. CONST. amends. IV-VI, VIII; see, e.g., SHELDON GOLDMAN, CONSTITUTIONAL LAW: CASES AND ESSAYS 643 (1987).

\(^{36}\) See ABRAHAM, supra note 6, at 336, 338.
constitutional rights violations unless the constitutional errors are "blatant." 37

A. JUSTICE O'CONNOR'S APPROACH TO LIMITING THE DEFINITION OF, AND REMEDIES FOR, EMPLOYMENT DISCRIMINATION

Paralleling the Reagan position on affirmative action, 38 Justice O'Connor has consistently voted to limit voluntary and court-ordered remedies for discrimination. This section examines the status of affirmative action before Sandra Day O'Connor's appointment and the effect she has had in interpreting Title VII amid the Reagan attack on civil rights.

1. Title VII Before Justice O'Connor's Appointment

Modern civil rights policy, which attempts to prevent discrimination against members of disadvantaged groups, rests upon the Court's dictum in United States v. Carolene Products Co. 39 that the Constitution demands strict scrutiny of classifications that disadvantage "discrete and insular minorities." 40 In response to the civil rights movement, which protested the actual discrimination and lack of equality pervasive in American society, Congress enacted the Civil Rights Act of 1964. 41 Shortly

37 Id. at 336.


39 304 U.S. 144 (1938).

40 Id. at 152 n.4; see Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287 (1982).

41 Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241. Section 703(a) of Title VII provides in relevant part:

It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

Id. at 255 (codified at 42 U.S.C. § 2000e-2(a) (1988)).

thereafter, civil rights enforcement theory embraced prohibitions on both an intent to discriminate and discriminatory effects. The latter theory served to "shift the advantage of time and inertia from the perpetrators of the evil to its victims." This view of civil rights emphasizes the prevention of discriminatory effects that disadvantage women of all colors and members of racial minorities, rather than eradicating only those effects rooted in discriminatory intent.

Not all of society embraced the dramatic reforms of the Civil Rights Act of 1964. Senators Barry Goldwater and George Bush, and California Governor Ronald Reagan, with many southern politicians, vehemently opposed its passage. A very restrictive view of the Act came out of this opposition: the Act eliminated only blatant forms of intentional discrimination. The Court, on the other hand, held in Griggs v. Duke Power Co. that Title VII of the 1964 Civil Rights Act prohibits both intentional discrimination by race or other prohibited

§§ 3601-3631 (1988)). Senator Hubert H. Humphrey explained that discrimination consisted of a difference in treatment, but neither he nor the Civil Rights Act of 1964 specified whether that treatment had to be intentional. See 110 Cong. Rec. 5423 (1964).


43 South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966) (upholding the constitutionality of the Voting Rights Act); see also Days, supra note 4, at 1005 (discussing Katzenbach and unintentional discrimination due to "institutional arrangements").

44 The discriminatory effect theory recognized that "discrimination flows not only from individuals but also from certain institutional arrangements which, whatever the motive for their establishment, disadvantage racial minority group members and women." Days, supra note 4, at 1005.

45 SAVAGE, supra note 12, at 30-31.


characteristics, and any employment practices that had a "disparate" impact on racial minorities as demonstrated by statistical disparities in workforce composition. The Court had interpreted the Act to tolerate employment practices having a disparate impact only when the employers could prove the practices were job-related or justified by business necessity. Critics of Griggs contend that Congress intended the 1964 Civil Rights Act to include a discriminatory motive requirement.

Another major development in civil rights enforcement involved the availability of broad remedies for discriminatory intent or effect. For example, the Court allowed for schemes that required employers to meet goals for employing members of minority groups. Additionally, some colleges, employers, and government entities voluntarily adopted affirmative action plans.

In Regents of the University of California v. Bakke, Justice Powell alone found that "[w]hen a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect." Applying strict scrutiny, Justice Powell concluded that only one purpose might be sufficient to justify the program, the creation of a diverse student body, but he reasoned that the

48 Id. at 431.
50 See Gold, supra note 46, at 489-513 (arguing that Griggs was wrongly decided because Congress intended that courts consider motive in Title VII cases).
51 See Days, supra note 4, at 1007.
53 Days, supra note 4, at 1007.
55 Id. at 305. Accordingly, Justice Powell asserted that race-based affirmative action plans require the application of strict scrutiny, rejecting the notion that the plan should be reviewed under a lesser standard because it addressed discrimination against disadvantaged groups.
University's method, a fixed number of spaces for minority students, was not drawn narrowly enough. In contrast, four Justices concluded that, under an intermediate review for benign or remedial discrimination, the program should be upheld becauseremedying the effects of societal discrimination is a sufficiently important government purpose to justify the use of a racial classification.

In *Fullilove v. Klutznick*, a plurality of the Court upheld a federal law which set aside at least 10 percent of the funds received by contractors for minority business enterprise ("MBE") subcontractors. The plurality endorsed neither an intermediate nor strict scrutiny approach to such remedial plans, but noted the "need for careful judicial evaluation" of group conscious plans.

Justice Marshall, joined by Justices Brennan and Blackmun, contended that benign or remedial racial classifications should be subjected to an intermediate standard of review. Justice Stewart, joined by Justice Rehnquist, dissented and stated that the Constitution is "color blind" and any use of racial classifications is therefore barred.

The Reagan Administration, which considered only blatant, intentional discrimination violative of the federal civil rights laws or the Constitution, criticized the majority's approach to civil rights enforcement and aggressively promoted profound

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57 438 U.S. at 359-69 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part). The remaining four justices voted to invalidate the plan on statutory grounds. *Id.* at 421 (Stevens, J. concurring in part and dissenting in part).

58 448 U.S. 448 (1980).


60 448 U.S. at 453-54.

61 *Id.* at 491-92.

62 *Id.* at 517-20 (Marshall, J., concurring). Under such review, the government interest inremedying the effects of past racial discrimination in the construction industry would be sufficiently important to justify the use of a racial classification.

63 *Id.* at 522 (Stewart, J., dissenting).
changes to this body of law.\textsuperscript{64} The Administration denigrated discriminatory effect or disparate impact theories of litigation as illegitimate and failed to faithfully execute civil rights laws.\textsuperscript{65} Justice O'Connor's votes and opinions reveal that from the very beginning of her tenure, she had adopted this ideological view that only individuals who prove that defendants intentionally discriminated against them may benefit from Title VII.\textsuperscript{66}

2. \textit{Justice O'Connor's Restrictive Interpretation of Affirmative Action}

During her confirmation hearings, Justice O'Connor refused to comment on the meaning of Title VII because she did not want to appear to have prejudged the issue.\textsuperscript{67} Yet, her votes and opinions in this area show her strong agreement with

\textsuperscript{64} Days, supra note 4, at 1008 ("Administration officials believed that a legally wrong and politically wrongheaded shift had occurred in civil rights enforcement in the late 1960s and the early 1970s and that this transformation required immediate correction." (footnote omitted)). \textit{See generally Turning Back the Clock, supra note 38} (discussing inadequate enforcement of civil rights laws by the Reagan Administration).

\textsuperscript{65} \textit{See Turning Back the Clock, supra note 38}, at 313.


Justice O'Connor's approach is extremely formalistic and it fails to provide any substantive meaning to the concept of equality contained in the equal protection clause. \textit{Compare} DAVID RAE ET AL., \textit{EQUALITIES} 51 (1981). \textit{Compare} ALEXANDER BICKEL, \textit{THE MORALITY OF CONSENT} 133 (1975) (contending that affirmative action "derogates the human dignity and individuality of all to whom it is applied") \textit{with RONALD DWORKIN, TAKING RIGHTS SERIOUSLY} 227-29 (1978) (arguing that "affirmative action is consistent with individual right to equal respect and concern").

Justice O'Connor's strict scrutiny approach infrequently provides for deviation from the strict "color-blind" position; she finds such a deviation constitutional only where the government is administering a narrowly compensatory affirmative action program. \textit{See, e.g.,} Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J., concurring).

\textsuperscript{67} \textit{See supra} notes 17-27 and accompanying text.
President Reagan's ideological view that disparate impact analysis contradicts the appropriate focus on individualized, intentional discrimination. President Reagan's agenda included the view that Title VII prohibited the granting of affirmative action remedies designed to overcome patterns of employment discrimination. Justice O'Connor's votes show that she considers affirmative action, whether voluntary or court ordered, an illegitimate means of effectuating equality because it constitutes intentional discrimination. This section briefly examines four areas of Justice O'Connor's decisions on affirmative action: seniority systems, consent decrees, voluntary plans, and defenses to discrimination claims. The subsequent analysis will demonstrate that Justice O'Connor's agenda takes a narrow view of what constitutes discrimination and the tools permissible to remedy discrimination in employment.

a. Deference To Seniority Systems that Lock in the Effects of Discrimination

Shortly after her appointment, Justice O'Connor joined the majority in *American Tobacco Co. v. Patterson* in holding that seniority systems that locked in the effects of past discrimination did not violate Title VII, even if they were developed after the enactment of Title VII. In *Firefighters Local Union No. 1784 v. Stotts*, Justice O'Connor wrote in her concurring opinion that "Title VII affirmatively protects bona fide seniority systems, including those with discriminatory

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68 See Days, supra note 4, at 1008 (discussing Reagan's agenda).


70 See Potenza, supra note 66, at 833.

71 456 U.S. 63 (1982).

72 Id. at 67-68. The Supreme Court disagreed with the Fourth Circuit's conclusion that "Congress intended the immunity accorded seniority systems by § 703(h) to run only to those systems in existence at the time of its effective date ...." Patterson v. American Tobacco Co., 634 F.2d 744, 749 (4th Cir. 1980), vacated, 456 U.S. 63. In *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977), the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." Id. at 353-54.

effects on minorities." Additionally, in her majority opinion in *Ford Motor Co. v. EEOC*, she limited remedial compensation to women denied work on the basis of gender because she found that under Title VII the accused employer could limit future liability by offering jobs without seniority to victims of discrimination. Justice Blackmun argued that O'Connor's deferential approach to employers was unnecessary and unfair, and it effectively authorized employers to make "cheap offers" to victims of discrimination, undermining their rights to full relief from employment discrimination.

b. Limitations on Consent Decrees to Remedy Discrimination

Justice O'Connor further undermined Title VII's mandates by placing limits on consent decrees to remedy discrimination. In *Sheet Metal Workers v. EEOC*, Justice O'Connor wrote a separate opinion arguing that only under exceptional circumstances may a court permit a race-conscious remedy that benefits minorities who were not party to a previous finding of discrimination. Furthermore, in *United States v. Paradise*, in which the Court upheld a race-conscious consent decree as justified by blatant, deliberate, and long-standing employment discrimination, she disputed the necessity of a consent decree that was not race neutral, despite the finding that the Alabama

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74 Id. at 587 (O'Connor, J., concurring). The court reversed a district court order requiring the dismissal of white city employees, and not minority employees, when the white employees had more seniority. Id. at 575.


76 Id. at 241.

77 Id. at 255 (Blackmun, J., dissenting).

78 478 U.S. 421 (1986). Justices Brennan, Marshall, Blackmun, and Stevens held that the legislative history does not indicate that Congress intended that affirmative relief under § 706(g) of Title VII benefit only the identified victims of past discrimination. Id. at 444-79 (Brennan, J., plurality).

79 Id. at 496 (O'Connor, J., concurring in part, dissenting in part). She expressed concern, however, that the Court had disregarded the Stotts policy that Title VII prevented such "non-victim" remedies. Id.


81 Id.
State Police had engaged in "pervasive, systematic, and obstinate" exclusion of African Americans.\textsuperscript{82}

In these cases, Justice O'Connor's adjudication reveals her strong agreement with the Reagan ideology against affirmative action plans even when they are used to confront persistent, blatant, and intentional discrimination. The Court's rulings unilaterally notified over fifty jurisdictions that their consent decrees were illegal.\textsuperscript{83}

c. Limitations on Voluntary Affirmative Action Plans

In \textit{Wygant v. Jackson Board of Education},\textsuperscript{84} Justice O'Connor cast the key vote and authored a concurring opinion voiding a voluntary layoff plan that attempted to protect the gains of an affirmative action plan.\textsuperscript{85} In \textit{Wygant}, the Court struck down as unconstitutional a voluntary collective bargaining agreement that required proportional layoffs of white and minority teachers irrespective of seniority.\textsuperscript{86} The Court disregarded the fact that the union and the school district adopted this plan as a way to preserve the hiring of minority teachers in compliance with an order of the Michigan Civil Rights Commission.\textsuperscript{87} Justice O'Connor applied strict scrutiny to invalidate the school board's interest in "providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination."\textsuperscript{88}

Similarly, in \textit{Richmond v. J.A. Croson Co.},\textsuperscript{89} Justice O'Connor ruled that a city minority set-aside program that ensured minority business enterprises a fixed percentage of

\begin{itemize}
  \item \textsuperscript{82} \textit{Id.} at 196 (O'Connor, J., dissenting).
  \item \textsuperscript{83} \textit{See Days, supra} note 4, at 1014.
  \item \textsuperscript{84} \textit{476 U.S.} 267 (1986).
  \item \textsuperscript{85} \textit{Id.} at 284.
  \item \textsuperscript{86} \textit{Id.} at 271. The collective bargaining agreement required that teachers with the least seniority be laid off first, except that the percentage of minority teachers to be laid off could not exceed the percentage of minority teachers currently employed. \textit{Id.} at 270. Because most of the minority teachers were recent hires, white teachers with greater seniority were laid off, while minority teachers with less seniority were retained. \textit{Id.} at 271.
  \item \textsuperscript{87} \textit{Id.} at 297-98 (Marshall, J., dissenting). Justice Marshall contended that the layoff provision was the only way the school board could have preserved the success achieved through the minority hiring goals. \textit{Id.} at 307.
  \item \textsuperscript{88} \textit{Id.} at 274.
  \item \textsuperscript{89} \textit{488 U.S.} 469 (1989).
\end{itemize}
public works or procurement contracts violated the Constitution.90 Like the Court in Wygant,91 the Croson Court asserted that the Constitution does not allow the government to engage in race-conscious employment or contracting schemes designed to redress societal discrimination.92 The Reagan Administration had vigorously argued for this result in its political and judicial campaign to eliminate affirmative action plans.93 Justice O'Connor succeeded in getting judicial sanction for the proposition that the Constitution requires strict scrutiny review of all race-conscious programs, regardless of whether the classification is characterized as "benign" or "remedial."94

90 Id. Although the Court decided this case shortly after President Bush took office, the Reagan Justice Department was heavily involved and aggressively argued for the position that O'Connor ultimately took. See Days, supra note 4, at 1015.

In Croson, the Court struck down the Minority Business Utilization Plan ("MBE") enacted by the city government of the former capital of the Confederacy. This plan was extremely similar to the MBE plan upheld by the Court in Fullilove v. Klutznick, 448 U.S. 448, 452 (1980) (The MBE plan in Fullilove required 10% of any federal funds granted to state and local governments to be expended employing MBEs.). Justice O'Connor distinguished the plurality's holding in Fullilove, which applied a deferential approach, because the MBE provision there was enacted by Congress pursuant to a specific constitutional grant of authority under section five of the Fourteenth Amendment. Croson, 488 U.S. at 476. In contrast, Croson involved a city action; therefore that local government, unlike Congress, lacks constitutional authority to legislate in this area. Id. at 495. In June 1990, the Court reaffirmed this more deferential approach to congressional affirmative action plans. Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3009 (1990).

91 See supra notes 84-88 and accompanying text.

92 488 U.S. at 488. Justices Marshall, Brennan, and Blackmun voted to uphold the set-aside. Id. at 556-57 n.12 (Marshall, J., dissenting).

93 See Days, supra note 4, at 1015.

94 Croson, 488 U.S. at 493-94, 497. Applying strict scrutiny, O'Connor found that the city had failed to demonstrate that it had a compelling interest for implementing the Plan. Id. at 499. Justice Marshall harshly criticized this approach to affirmative action:

In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brute and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. Id. at 551-52 (Marshall, J., dissenting).

Justice O'Connor's approach reflects the ideological perspective, advocat-
By rejecting affirmative action plans based on an acknowledgement of societal discrimination as "too amorphous a basis for imposing a racially classified remedy," Justice O'Connor helped to elevate the interests of "innocent" beneficiaries of discrimination over the interests of innocent victims of societal discrimination. A key component of the Reagan agenda on civil rights involved the prohibition of race-conscious hiring, promotion, retention, and contracting programs. In Wygant, Justice O'Connor joined a decision and rationale consistent with this ideological rejection of benevolent efforts to eradicate the effects of the undeniably discriminatory


Wygant, 476 U.S. at 276. Justice O'Connor joined the plurality opinion, which reasoned that even if the school board had a compelling interest, the layoff provision was unconstitutional because the means of achieving this goal were not narrowly tailored to the asserted interest. Id. at 283-84.

Id. at 281 (The governmental body must demonstrate a compelling interest justifying the use of a racial classification before "innocent persons may be called upon to bear some of the burden of the remedy."). Thus, this opinion contended that in this case, unlike in cases involving hiring goals that diffuse the burden on society generally, the layoff provision was overburdensome in that it "impose[d] the entire burden of achieving racial equality on particular individuals." Id. at 283.

In his dissenting opinion, Justice Marshall voted to uphold the plan under intermediate scrutiny. Id. at 303-06. Justice Marshall rejected the plurality position that the plan was unduly burdensome because "someone will lose a job under any layoff plan and, whoever it is, that person will not deserve it." Id. at 307.

See Robert E. Taylor, Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action, WALL ST. J., Dec. 8, 1981, at 4 (Assistant Attorney General Bradford Reynolds seeking to prohibit voluntary race-conscious hiring and promotion programs as inconsistent with Title VII).
environment pervasive in American society. In *Croson*, she helped to move the Court toward the Reagan agenda of allowing remedies only for intentional discrimination and only for those individuals who the courts have recognized as victims of discrimination.

d. Expansion of Employer Defenses to Title VII Actions

In *Wards Cove Packing Co. v. Atonio*, Justice O'Connor took a narrow view of equal rights and the utility of statistics in meeting the burden of proof in discrimination cases. *Wards Cove* restricted the eighteen-year-old *Griggs* precedent that required an employer to show that employment tests were "demonstrably a reasonable measure of job performance." Instead, *Wards Cove* allowed employers to meet the easier defense to statistical disparity of "legitimate business interest," while also requiring the plaintiffs to maintain the burden of persuasion. Thus, Justice O'Connor joined an opinion that significantly curtailed the prospect of plaintiffs winning disparate impact discrimination cases.

Congress strongly disagreed with this parsimonious treatment of the important disparate impact line of cases. After vetoes by President Bush, Congress finally amended Title VII to restore and strengthen civil rights laws that ban discrimination in employment, repudiating the *Wards Cove* decision. Thus, five members of the Court, the President, and twenty-five members of the Senate almost thwarted the will of the majority of citizens regarding the need for remedies for both discriminatory intent and effect. The difficulty Congress faced in President Bush's ideological opposition to restoring Title VII shows the potentially devastating impact of Senate acquiescence.

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100 490 U.S. at 659.
to the appointment of Supreme Court nominees who may share their nominator's ideological agenda.

3. Summary

Justice O'Connor's Title VII decisions reveal a distinct ideological perspective favoring the claims of "innocent" white males over the equality interests of innocent victims of discriminatory intent or effect. Justice O'Connor has zealously protected seniority systems that perpetuate the effects of past discrimination, has prohibited affirmative plans, and has deferred to employer defenses to discrimination claims. Justice O'Connor's formalistic approach to equality fails to consider the substantive and social inequalities present between the classes affected by such programs. Because of Justice O'Connor's reinterpretation of the mandates of Title VII, precedents now reflect the Reagan judicial agenda. Thus, despite denials during her confirmation hearings, Justice O'Connor's jurisprudence reveals her sympathy for curtailing the application of civil rights laws.

B. JUSTICE O'CONNOR'S NARROWING OF THE RIGHTS OF CRIMINAL DEFENDANTS

Analysis of Justice O'Connor's votes and opinions involving the rights of criminal defendants demonstrates her jurisprudential consistency with President Reagan's hostility toward the rights of criminal defendants. During her confirmation hearings she declared herself judicially neutral in interpreting such laws. In criminal cases, Justice O'Connor has supported

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103 Justice Marshall criticized O'Connor's holding in Croson that Richmond had inadequate findings to conclude that there was prior discrimination in its construction industry. 488 U.S. at 539-48 (Marshall, J., dissenting). He characterized the majority's analysis as "exceedingly myopic." Id. at 530 (Justice Marshall objected to the majority's analyzing each piece of evidence as if it existed in a vacuum rather than as a whole.). Id. at 551-52.

See Robin West, Progressive and Conservative Constitutionalism, 88 MICH. L. REV. 641, 693 (1990) (arguing that any evaluation of affirmative action programs must take into consideration the condition of race relations, the equality of opportunities available to minorities, and whether such programs are a means of eventually achieving a color-blind society).

104 See supra notes 15-27 (discussing O'Connor's assertion of constructionism — interpretivism or analysis of the Constitution based on the Framers' intent — and federalism).
the independence of law enforcement officers over the constitutional precedents protecting criminal defendants. Perhaps some Senators who voted to confirm Justice O'Connor would have agreed with her perspective that the state interest in law and order outweighed then-existing doctrine protecting the rights of criminal defendants.\textsuperscript{105} However, Justice O'Connor's assertions of neutrality circumvented any meaningful dialogue in the Senate or in the public about her hostility toward these precedents. This section examines three substantive areas of the rights of criminal defendants that reveal Justice O'Connor's unstated law-and-order agenda: habeas corpus, right to counsel, and the imposition of the death penalty.

1. Justice O'Connor's Restrictions on the Availability of Habeas Corpus Relief

The Reagan Administration asserted that "there is no justification in the present day for the availability of federal habeas corpus as a routine means of review of state criminal convictions."\textsuperscript{106} President Reagan's proposed Habeas Corpus Reform Act included the denial of habeas relief if a court finds that a claim was fully and fairly adjudicated in state proceedings, deferring broadly to the factual findings or mixed fact and law conclusions of state courts, and mandating forfeitures of rights due to procedural default (through restrictions on second habeas petitions and on retroactivity rights claims, in addition to amplification of the adequate-state-ground doctrine).\textsuperscript{107} Justice O'Connor's votes and opinions on federal

\textsuperscript{105} O'Connor thwarted the Confirmation process by denying the existence of the ideological perspective that she, like all justices, obviously possesses. Still, had the Senate Judiciary Committee known more about her ideology, they probably would have confirmed her anyway. \textit{See} Rees, \textit{supra} note 9, at 940 (observing that the "absence of liberal opposition to Justice O'Connor was surely due in part to the calculation that she was the best Reagan nominee they could have hoped for") (citation omitted).

\textsuperscript{106} \textit{The Habeas Corpus Reform Act of 1982: Hearings on S. 2216 Before the Comm. on the Judiciary, 97th Cong., 2d Sess. 45 (1982) [hereinafter Reform Act]} (quoting a letter from William French Smith, U.S. Attorney Gen., to George Bush, President of the Senate (Mar. 3, 1982)).

review of criminal convictions have significantly furthered President Reagan's agenda of restricting the success and availability of habeas corpus relief. This section examines the status of habeas corpus review before Justice O'Connor's appointment and how she has actively participated in judicial "reform" of this remedy.

a. Historical Background of Habeas Corpus

The Constitution guarantees the availability of the writ of habeas corpus unless it is suspended due to national security. The Reconstruction Congress passed the Habeas Corpus Act immediately following the Civil War. This Act extended the protections of the writ of habeas corpus to inmates in state prisons so they would have a guaranteed civil right to seek justice in a federal court. During the time of the

(1982)). Yackle observed that:

The explanation for the Administration's assault on the postconviction writ resides deep within an ideological tradition that subordinates the long-standing function of the federal courts in the enforcement of constitutional safeguards to values touching federalism and the finality of criminal judgments . . . . The Administration would dismantle, to a large extent, the federal machinery now in place for the federal effectuation of the Bill of Rights and its analogue, the Fourteenth Amendment.

Id. at 666. Yackle concluded that these proposed reforms of habeas corpus reflect a reactionary conservative ideology aimed at restricting the federal court's opportunities to effectuate constitutional guarantees, a process that began in earnest after President Franklin D. Roosevelt appointed a majority of the Supreme Court in the late 1930s. Id. at 612.

While Congress rejected President Reagan's legislative proposals, the Court transformed some of them into law. See infra notes 119-157 and accompanying text.

U.S. CONST. art. I, § 9. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Federal habeas corpus is based upon one of the most ancient writs in the Anglo-American legal tradition. See generally LARRY W. YACKLE, POST-CONVICTION REMEDIES § 4 (1981) [hereinafter POST-CONVICTION REMEDIES] (describing the history and status of habeas corpus jurisprudence).


See 1 JAMES S. LIEBMAN, HABEAS CORPUS AND THE PENALTY OF DEATH: FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2, at 14 (1988) (discussing the prejudicial environment prior to and following the civil war and its effect on civil rights).
Reconstruction Amendments and Civil Rights Acts, "it was clear to Congress that the fundamental federal rights...would be meaningless absent appropriate mechanisms for their enforcement." Accordingly, habeas corpus provided inmates the right to petition a federal judge to hear their pleas that their rights under the Constitution had been violated. The writ allowed a federal judge to unconditionally discharge prisoners from custody upon a finding that the state had obtained a conviction or sentence through a constitutional violation.

The availability of federal habeas corpus as a postconviction remedy for constitutional error is of preeminent significance as a demonstration of this civilization's commitment to the maintenance of individual liberty against the incursions of governmental power.

For nearly a century, the writ of habeas corpus provided "the most important way for a state prisoner to vindicate his federal constitutional rights." Prior to Justice O'Connor's appointment to the Supreme Court, a habeas corpus petitioner could obtain review of his federal constitutional claims in a federal

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112 Id. § 2.2, at 8 n.10.
113 See id. § 8.1, at 85.
114 See id. § 8.5, at 108.
115 POST-CONVICTION REMEDIES, supra note 109, § 87, at 354. Thirty years ago, the Supreme Court noted that the framers of our Constitution recognized the necessity of habeas corpus to protect the individual in "the unceasing contest between personal liberty and government oppression." Fay v. Noia, 372 U.S. 391, 400-01 (1963) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 129 (R. Welsh ed., 1900)). In 1973 the Court reaffirmed the important role of habeas corpus, stating that the writ is "available to effect discharge from any confinement contrary to the Constitution or fundamental law..." Presier v. Rodriguez, 411 U.S. 475 (1973); see BURNS, supra note 1, at 139-40.
116 Ronald J. Tabak & J. Mark Lane, Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals, 55 ALB. L. REV. 1, 4 (1991). See generally Zechariah Chafee, Jr., The Most Important Human Right in the Constitution, 32 B.U. L. REV. 143 (1952) (arguing that habeas corpus is that most important right). Habeas corpus helps to guarantee the rights of an American citizen under the Constitution by protecting criminal defendants from abuses or errors in the exercise of authority by state courts and law enforcement. BURNS, supra note 1, at 139.
court unless he had deliberately waived those claims. A petitioner could also return to the federal courts following the denial of the initial habeas corpus petition if he wished to present additional facts or theories for relief.

b. Justice O'Connor's Curtailment of Habeas Corpus Review

During Justice O'Connor's confirmation hearings, she did not reveal her views on the need to restrict the availability of habeas corpus relief. However, Justice O'Connor has helped to curtail the availability of habeas corpus review to such an extent that many now consider the writ an ineffective tool for redress of constitutional violations.

Through a series of decisions rendering habeas corpus more complex and more unfair to criminal defendants, Justice O'Connor has aided in the deconstruction of the writ. These decisions have "greatly undermined the ability of federal courts to issue the writ of habeas corpus . . . ." Specifically, Justice

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117 See Tabak & Lane, supra note 116, at 19.

118 Id. at 23-24 (discussing under what grounds a prisoner may bring successor habeas petitions); Sanders v. United States, 373 U.S. 1, 15-19 (1962) (outlining basic rules on successor habeas petitions).

119 See O'Connor Hearings, supra notes 17-25 and accompanying text.


121 Tabak & Lane, supra note 116, at 53-55. Some of these decisions were made upon issues not argued by the parties. Tower v. Glover, 467 U.S. 914, 923 (1984) (O'Connor gave advice to federal trial judges on collateral estoppel, and other avenues to avoid hearing habeas petitions, even though the question had not been raised or briefed.); McCleskey v. Zant, 111 S. Ct. 1454, 1477 (1991) ("Indeed, the new rule announced and applied today was not even requested by respondent at any point in this litigation.") (Marshall, J., dissenting).

122 Tabak & Lane, supra note 116, at 7.
O'Connor has "interpreted" a severe restriction on the raising of claims of constitutional violations via more than one habeas corpus petition. She has required that petitioners exhaust all state remedies prior to application to the federal courts. She has also required defendants to show actual, rather than potential, prejudice before they may obtain relief. This section discusses how these judicially enacted reforms of habeas corpus have eliminated the effectiveness of the writ of habeas corpus for many inmates.\textsuperscript{123}

i. Justice O'Connor's Application of a Total Exhaustion Rule and Limitation of Successive Habeas Corpus Petitions

Justice O'Connor began to restrict habeas corpus early in her tenure. In \textit{Rose v. Lundy},\textsuperscript{124} Justice O'Connor interpreted habeas corpus to require a federal judge to dismiss an entire petition for habeas corpus relief if it contained any unexhausted state claims.\textsuperscript{125} This total exhaustion rule significantly limited the availability of federal relief for convictions obtained in violation of the rights guaranteed by the federal Constitution.\textsuperscript{126} This total exhaustion rule fails to harmonize with the language

\textsuperscript{123} Tabak & Lane, \textit{supra} note 116, at 5 ("This judicial legislation has made habeas corpus — once a straightforward legal remedy — into an immensely complex morass of procedural rules and legal obstacles.").

\textsuperscript{124} 455 U.S. 509 (1982).

\textsuperscript{125} \textit{Id.} at 522. Thus every federal constitutional claim of a defendant was not cognizable on its merits as a result of Justice O'Connor's rule.

\textsuperscript{126} See Tabak & Lane, \textit{supra} note 116, at 65-66.
and intent of the habeas corpus statute, and demonstrates Justice O'Connor's failure to follow her assertions of a philosophy of judicial restraint.\footnote{See id. at 66.}

During her tenure on the Court, Justice O'Connor has supported Justice Rehnquist's argument that because federal courts spend too much time on state death penalty cases, the Court should limit federal jurisdiction over such cases.\footnote{See id. (discussing these modifications of the writ in the context of Chief Justice Rehnquist's effect on the doctrine). Justice O'Connor has acted in synchronicity with Rehnquist to undermine the writ of habeas corpus. The Court handed down only a few significant restrictions of habeas corpus between Justice Rehnquist and Justice O'Connor's appointments, most importantly Stone v. Powell, 428 U.S. 465 (1976). In Stone, Rehnquist held that federal courts could no longer consider habeas claims under the Fourth Amendment exclusionary rule if the prisoner had been given a "full and fair" opportunity to litigate the claim in the state courts. \textit{Id.} at 494. This removed a major area of constitutional law from the jurisdiction of federal courts, despite the principle that federal courts should have the final say on matters of federal law.} Both Justices publicly supported Republican efforts to further curb the writ, and after Congress repudiated their efforts, the Court "interpreted" new restrictions on the availability of habeas corpus relief.\footnote{See infra notes 151-157 and accompanying text; Tabak & Lane, \textit{supra} note 116, at 55 (arguing that the habeas system legislated by the Rehnquist Era Court has greatly taxed judicial resources by imposing complex procedural requirements).}

The Court in \textit{McCleskey v. Zant},\footnote{111 S. Ct. 1454 (1991).} joined by Justice O'Connor, ignored the language and intent of the habeas statute and implemented a new statute of limitations. The Court held that by failing to include all of his claims in one petition, the petitioner was barred from filing further claims.\footnote{Id. at 1474; see \textit{McCleskey v. Kemp}, No. C87-1517A (N.D. Ga. Dec. 23, 1987) (the state had "planted" a jailhouse informant to deliberately elicit inculpatory admissions from McCleskey in violation of his Sixth Amendment right to counsel. The district court determined that McCleskey had not known about these violations when he filed his first federal petition, and that his failure to discover this evidence earlier was not the result of "inexcusable neglect"). \textit{McCleskey}, 111 S. Ct. at 1460.} The Court reasoned that because McCleskey had not shown "cause" for his failure to raise the claim in his earlier petition, the Court's refusal to allow federal courts to address the merits of this capital defendant's claim did not result in a miscarriage of
The Court criticized the "significant costs of habeas corpus review," including the disrespect for the finality of state criminal convictions that multiple habeas petitions cause, the "heavy burden on scarce federal judicial resources," and the system's "disincentives to present claims when evidence is fresh." The Court stated that permitting more than one habeas corpus petition amplifies these costs because "[p]erpetual disrespect for the finality of convictions disparages the entire criminal justice system." In *McCleskey*, Justice O'Connor participated in a major decision that "accomplished much of what Chief Justice Rehnquist tried to do the previous year in a personal campaign to persuade Congress to amend the habeas corpus statute." The dissenters roundly criticized the conservative activism apparent in the decision:

Today's decision departs drastically from the norms that inform the proper judicial function. Without even the most casual admission that it is discarding longstanding legal principles, the Court radically redefines the content of the "abuse of the writ" doctrine, substituting the strict-liability "cause and prejudice" standard of Wainwright v. Sykes, 433 U.S. 72 (1977), for the good-faith "deliberate abandonment" standard of Sanders v. United States, 373 U.S. 1 (1963) . . . [ignoring that the] very essence of the Great Writ is our criminal justice system's commitment to suspending "[c]onventional notions of finality of litigation . . . where life or liberty is at stake and infringement of constitutional rights is alleged."
Contrary to her confirmation statements about original intent and judicial restraint, Justice O'Connor joined a Court opinion that ignored the language and intent of the habeas statute and ignored Congress' rejection of this revision of habeas corpus.\textsuperscript{137} Her advocacy of stringent limits on habeas corpus claims reveals that she came to the court with an ideological perspective that she hid from the Senate. The McCleskey restriction on successive habeas corpus petitions, when combined with the Rose rule, increases the likelihood that a prisoner, usually acting \emph{pro se},\textsuperscript{138} will default on his substantive claim of violations of his constitutional rights.\textsuperscript{139}

Habeas corpus expert Larry Yackle predicted the deleterious effect of such a combination shortly after Justice O'Connor's 1982 decision:

The Supreme Court's unfortunate embrasure of the "total exhaustion" rule in \textit{Rose v. Lundy} makes the very idea of a statute of limitations untenable. The district courts have now been instructed to dismiss entirely petitions raising more than one claim if any has not yet been put to the state courts. . . . Combined with a statute of limitations, the "total exhaustion" rule would cause enormous difficulty for litigants attempting in good faith to follow prescribed procedures . . . . The likely result, should [\textit{Rose v. Lundy}] be joined by a statute of limitations, could only be the coerced forfeiture of "unexhausted" claims in all too many cases . . . . Currently "unexhausted" claims threaten to delay the presentation of claims already "exhausted"

\begin{quote}
Lane, \textit{supra} note 116, at 6.
\end{quote}

\textsuperscript{137} "It is axiomatic that this Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes." 111 S. Ct. at 1489 (Marshall, J., dissenting).

\textsuperscript{138} Most habeas litigation involves undereducated prison inmates proceeding \emph{pro se}. The Court's rule unreasonably imposes procedural traps for these advocates who lack professional training. See \textit{infra} notes 169-178 and accompanying text discussing the right to counsel. See generally Paul Robinson, \textit{An Empirical Study of Federal Habeas Corpus Review of State Court Judgments} (1979) (examining habeas corpus and finding that time is required to marshall precise arguments on federal issues because the nature of collateral claims means that they often come to a litigant's attention well after judgment).

\textsuperscript{139} See Tabak & Lane, \textit{supra} note 116, at 60.
beyond the period permitted by [a proposed time limitation].

Thus by creating a total exhaustion rule and a statute-like limitation on the ability to bring a second habeas corpus petition, Justice O'Connor helped to effectuate the Reagan judicial agenda that sought to substantially diminish the availability of habeas corpus to remedy constitutional violations.

ii. Justice O'Connor's Imposition of a Higher Burden of Actual Prejudice in Habeas Corpus

Justice O'Connor's decisions also coincided with the Reagan agenda of strongly limiting the availability of habeas corpus relief by imposing an "actual prejudice" rule. The Court in *United States v. Frady* held that if a petitioner cannot show, for instance, that jury instructions had resulted in actual prejudice, then cause does not exist for collateral review of his conviction or sentence. The Federal Rules of Criminal Procedure require a mere showing of plain error for collateral review, but Justice O'Connor's majority opinion described the lower burden of the federal "plain error" rule is "out of place" in habeas corpus proceedings, even though the Habeas Corpus Act does not mention or imply an actual prejudice standard. *Frady* limited federal courts' ability to address habeas

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140 Yackle, *supra* note 107, at 621-22 n.70 (1983) (adding that "[o]ne hardly must be a devotee of habeas corpus to recognize that inconsistent procedural requirements may constitute due process violations"). In the simplest illustration, a prisoner may have two federal claims, only one of which has been put to the state courts. A statute of limitations would require the presentation of the "exhausted" claim as soon as possible . . . . The *Lundy* rule, on the other hand, sends just the opposite signal, instructing the petitioner intentionally to withhold the "exhausted" claim so that it can be presented together with the currently "unexhausted" claim — that is after the latter has been taken to state court.

*Id.*

141 See Tabak & Lane, *supra* note 116, at 37 (discussing the effect on habeas corpus of the "actual prejudice" rule stated in the pre-O'Connor case of Wainright v. Sykes, 433 U.S. 72 (1977)).


143 *Id.* at 168.

144 *Fed. R. Crim. P.* 52(b).

145 *Frady*, 456 U.S. at 164.
petitioners' claims on the merits, because without a showing of actual prejudice to the defendant, the federal court must consider the error harmless.\textsuperscript{146} Thus, Justice O'Connor reduced the constitutional protection given to criminal defendants by limiting opportunities to raise claims of violations of federal constitutional guarantees.\textsuperscript{147}

The implementation of Justice O'Connor's ideological agenda has resulted in the executions of several people whose trials included "egregious" constitutional errors.\textsuperscript{148} Death penalty experts Tabak and Lane clarified the important role of habeas corpus in protecting the guarantees of the Bill of Rights when they noted that:

Most death-sentenced inmates with valid federal constitutional claims have received relief on those claims, if at all, only when they have reached the federal courts. Indeed, state death penalty proceedings have been so frequently flawed by constitutional error that has not been corrected on appeal or in state collateral proceedings that about forty percent of all state court capital judgments have been reversed by the

\textsuperscript{146} Prior to O'Connor's appointment to the Court, the federal courts were usually able to reach the merits of a petitioner's claims easily and grant relief for meritorious constitutional claims, except when the harmless error doctrine applied. See Tabak & Lane, supra note 116, at 28.

The Supreme Court's harmless error doctrine has distinguished two general categories of constitutional rights: those for which the violation requires automatic reversal and those for which the violation requires reversal unless the error can be shown to have been harmless. See Chapman v. California, 386 U.S. 18, 22-24 (1967). Accordingly, O'Connor's imposition of an actual prejudice requirement on habeas corpus petitions not only raises the burden of proof but also effectively shifts it to the petitioner. For an examination of the Reagan Administration's attempts to modify the harmless error doctrine, see Yackle, supra note 107.

\textsuperscript{147} See SAVAGE, supra note 12, at 226.

\textsuperscript{148} See Ronald J. Tabak, The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s, 14 N.Y.U. Rev. L. & SOC. CHANGE 797, 840-42 (1986) (detailing one case in which a state procedural habeas bar resulted in an execution of one defendant while another, virtually identical defendant in the same crime received a life sentence, Smith v. Kemp, 715 F.2d 1459 (11th Cir.), cert. denied, 464 U.S. 1003 (1983), and one case in which an execution took place after the Eleventh Circuit refused to hear a second habeas corpus petition including an affidavit from the then disbarred trial attorney who admitted to having been on drugs during the trial, Young v. Kemp, 758 F.2d 514 (11th Cir. 1985)).
federal courts. This has occurred despite the presumption of correctness given to state court findings of fact. Thus, habeas corpus is tremendously important in our constitutional system, and is the predominant means of correcting constitutional error in state capital cases.149

The constitutional-error rate for death penalty cases has risen significantly since 1981.150 Justice O'Connor has played a key role in this area.

149 Tabak & Lane, supra note 116, at 11 (adding that this has occurred "despite overly restrictive procedural bars developed by the Supreme Court that preclude consideration of meritorious claims in a great many cases").

Several explanations exist for the high rate of constitutional error in state criminal proceedings. Perhaps the more politically oriented and parochial state courts are prone to allowing the occurrence of serious constitutional errors because of the unfamiliarity of many state court judges with federal constitutional jurisprudence, including Eighth Amendment requirements. Id. at 14-15.

Some state court judges have strongly supported federal review in criminal cases through habeas corpus. Utah Supreme Court Justice Christine M. Durham acknowledged her deep respect for the role of state courts but added that she "welcome[s] and rel[ies] upon the availability of federal habeas review of criminal cases . . . [because] the state courts lack the fundamental resources necessary to ensure full and fair representation of all criminal defendants." Hearings on Habeas Corpus Issues Before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 102d Cong., 1st Sess. 433-34 (1991) [hereinafter Habeas Corpus Hearings] (prepared statement of Christine Durham, Assoc. Justice, Utah Sup. Ct.).

Tabak and Lane conclude that the electoral vulnerability of some state court judges affected their deference to constitutional guarantees:

Another apparent reason for constitutional errors by state courts in death penalty cases is that these cases often subject judges to intense political scrutiny, more so than any other type of legal proceeding. In states where members of the judiciary stand for election, or for reconfirmation by the voters, a judge's voting record in capital cases can decide the election. As Justice Durham has stated, "[t]here is therefore a structural vulnerability in the state court systems" to pressures that "are sometimes antithetical to federal constitutional guarantees." Indeed, . . . if a state judge provides relief in a death penalty case "he will not only forfeit his judgeship, but will quite possibly lose any chance to practice law in that community."

Tabak & Lane, supra note 116, at 15-16 (footnotes omitted) (emphasis in original).

150 Habeas Corpus Hearings, supra note 149, at 507 (Memorandum from James Liebman to Sen. Joseph Biden (July 15, 1991)) (reporting on recent American Bar Association findings that while the constitutional-error rate for federal courts overall between 1976 and 1991 was 40%, the error rate for the
role in restricting the federal courts from ruling on the merits of a criminal defendant's claims that the state violated the guarantees of the Bill of Rights.

Despite the obstructions to habeas corpus relief interpreted by the Court since Justice O'Connor's appointment, the Bush Administration sought to further restrict the availability of the writ in 1991. The Bush anti-crime bill included a series of amendments to the federal habeas corpus statute that would have virtually abolished federal habeas jurisdiction. The Bush Administration proposal included and expanded on the recommendations of the Powell Committee, which Chief Justice Rehnquist had formed. Perhaps the most significant aspect of the ideological cohesion between members of the Court and the executive branch concerned the advocacy of the elimination of the authority of federal courts to overturn a state conviction or sentence on any grounds which had been "fully and fairly adjudicated in State proceedings." 

This amendment sought to establish a strict Stone v. Powell standard for reviewing all federal constitutional claims in federal habeas corpus proceedings. In Stone, Justice Rehnquist's majority opinion carved out a substantial exception to the availability of habeas corpus relief by holding that federal courts could not entertain claims invoking the exclusionary rule for violations of the Fourth Amendment if there had been a "full and fair" adjudication of those claims in the state court. Because the full and fair adjudication standard does not ensure a just determination of an alleged rights violation, the Bush proposal to expand this harsh doctrine would have disempowered the federal courts from examining the merits of constitutional claims. Given that since 1971 federal courts have reversed convictions due to erroneous state court holdings in six circuits reviewing death sentences since 1981 was over 50%.


154 Id.
approximately 40 percent of capital cases, this was indeed a striking proposal.

Contemporaneous with the Bush proposal, Justice O'Connor spoke in favor of severe restrictions on the availability of habeas corpus relief because, in her view, federalism demands that federal courts respect state court convictions. Thus, Justice O'Connor deems the need for finality in state court proceedings as greater than the need for relief from convictions based upon violations of the rights of those accused of crimes. Congress rejected such a balancing approach in its refusal to adopt any variation of the Bush proposals that had sought to effectively abolish habeas corpus. Considering Congress' refusal to adopt Reagan and Bush proposals limiting habeas corpus in these ways, these decisions reveal Justice O'Connor's ideological predisposition to contravene text, intent, and separation of powers to accomplish conservative reform of constitutional law.

2. Justice O'Connor's Restrictions on the Meaning of Right to Counsel

Justice O'Connor's votes and opinions on the scope of the constitutionally-guaranteed right to counsel parallel her restrictive interpretation of habeas corpus. She has helped to effectuate the Reagan agenda of limiting the availability and meaning of the right to state-paid counsel for criminal defendants. This subsection discusses the status of the right to

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155 Tabak & Lane, supra note 116, at 11.

156 See id. at 5 n.6 (citing Justice Sandra Day O'Connor, Address at the Attorney General's Crime Summit (Mar. 4, 1991)). Justice O'Connor's views were similar to Chief Justice Rehnquist's in this area. In speeches, Chief Justice Rehnquist has frequently called for reform of habeas corpus, complaining that federal courts exercise too much review over state criminal proceedings and that, consequently, state death sentences were delayed too frequently. Id. (discussing Coyle et al., Rehnquist is Still Hoping for Habeas 'Reform,' NATL. L.J., Jan. 14, 1991, at 5; Chief Justice William H. Rehnquist, Remarks at the American Law Institute Annual Meeting (May 15, 1990) (unpublished transcript, on file with the Albany Law Review); Chief Justice William H. Rehnquist, Remarks at the American Bar Association Mid-year Meeting (Feb. 6, 1989); Chief Justice William H. Rehnquist, Remarks at the National Conference of Chief Justices (Jan. 27, 1988)).

157 On October 17, 1991 members of the House of Representatives voted 218-208 against the Bush habeas corpus proposals. Tabak & Lane, supra note 116, at 93.
counsel before Justice O'Connor's confirmation and explores the
effects of her decisions in this area.

a. The Right to Counsel Prior to Justice O'Connor

The Constitution provides that "[i]n all criminal prosecu-
tions, the accused shall . . . have the assistance of counsel for
his defense." For over a century, the Supreme Court con-
strued that phrase merely to allow criminal defendants the
right to have an attorney in court if they could afford one. In
1938, however, the Supreme Court concluded that the Sixth
Amendment forbids the federal courts from "depriv[ing] an
accused of his life or liberty unless he has or waives the
assistance of counsel."

In *Gideon v. Wainwright*, the Warren Court stated that
"reason and reflection require us to recognize that in our ad-
versary system of criminal justice, any person haled into court,
who is too poor to hire a lawyer, cannot be assured a fair trial

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158 U.S. CONST. amend. VI.

159 WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 21-
30 (1955) (discussing Powell v. Alabama, 287 U.S. 45 (1932)). Beginning in
1932, the Court indicated that a death sentence imposed without the benefit
of adequate trial counsel might not comport with the Constitution. In *Powell*,
the infamous "Scottsboro Boys" case, the state sought to impose capital
punishment on nine black men accused of raping two white women. *Id.* at 49.
The state trial court did not give the defendants adequate time to secure their
own counsel, and then appointed counsel at the last minute. *Id.* at 53. In
reversing the convictions, the Supreme Court held that the trial court's
actions had violated the Fourteenth Amendment's requirement of "fundamen-
tal fairness," but it limited its holding to the peculiar facts of the case. *Id.* at
71; see Charles W. Wolfram, *Scottsboro Boys in 1991: The Promise of Ade-
quate Criminal Representation Through the Years*, 1 CORNELL J.L. & PUB.
POLY 61 (1992) (giving an overview of the "Scottsboro Boys" case and the
development of the modern public defender system and its shortcomings).

160 Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (holding for the first time
that the Sixth Amendment requires the appointment of counsel for indigent
defendants in federal criminal prosecutions). In *Betts v. Brady*, 316 U.S. 455
(1942), which was later overruled by the Court in *Gideon v. Wainwright*, 372
U.S. 335, 343-44 (1963), the Court refused to extend this ruling to the states.
The *Betts* Court had declined to extend the holding of *Johnson* to the states
and refused to read *Powell* as requiring the appointment of counsel when
"special circumstances" are absent. *Betts*, 316 U.S. at 471-72; see also *Powell

unless counsel is provided for him."\(^{162}\) It further held in *Douglas v. California*\(^{163}\) that the right to counsel extends to an indigent defendant's appeal of his conviction.\(^{164}\) Through *Gideon* and later cases,\(^{165}\) the Supreme Court clarified the idea that a system under which an indigent criminal defendant has significantly less access to counsel than a non-indigent contradicts the principles of our Constitution.\(^{166}\) These decisions implied that the right to the assistance of counsel includes the right to effective counsel; otherwise the Sixth Amendment would indeed hold out an empty promise to those accused of crimes. Thus, before Justice O'Connor's appointment, the Court had frequently recognized the importance of qualified trial and appellate counsel for indigent defendants.

b. Justice O'Connor's Restrictions on the Availability of "Effectiveness of Counsel" Claims

President Reagan appealed to the popular fear of increasing crime rates by arguing that courts were unnecessarily letting criminals out of prison on technicalities.\(^{167}\) The Reagan judicial

\(^{162}\) *Id.* at 344.


\(^{164}\) *Id.* at 357-58 (holding that the Constitution requires that the state appoint counsel for indigent defendants in all direct state court appeals as of right). Earlier, the Court had stressed that a state may not grant appellate review in a manner that "discriminates against some convicted defendants on account of their poverty." *Griffin v. Illinois*, 351 U.S. 12, 18 (1956).

\(^{165}\) See, e.g., *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (right to counsel exists as soon as any judicial proceedings have begun); *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970) (right to counsel exists at preliminary hearing); *United States v. Wade*, 388 U.S. 218, 277 (1967) (right to counsel exists at post-indictment lineup); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (custodial interrogation as to specific crime creates right to counsel); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (confession obtained by trickery in non-custodial setting violates Sixth Amendment right to counsel); *White v. Maryland*, 373 U.S. 59, 60 (1963) (right to counsel attaches at preliminary arraignment in capital case); *Brewer v. Williams*, 430 U.S. 387, 400 (1977) (a confession obtained in custody without counsel by "Christian burial speech" violates the Sixth Amendment).

\(^{166}\) Tabak & Lane, *supra* note 116, at 17-19 (illustrating the expansion of the right to counsel during the pre-Rehnquist era); see LEONARD W. LEVY, AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE 199 (1974) (stating that due process requires the right to counsel for all felony indigents).

\(^{167}\) See, e.g., *Mary Thornton, Justice Department Official Backs Easing of Exclusionary Rule*, N.Y. TIMES, Oct. 6, 1981, at A2 (describing Administration
ideology specifically targeted the right to effective assistance of counsel. Through her votes and opinions, Justice O'Connor helped to raise barriers to relief for defendants complaining of ineffective assistance of counsel. Consistent with President Reagan's ideology, Justice O'Connor increased the criminal defendant's burden of proof by requiring that he show actual prejudice resulting from his counsel's ineffectiveness. She also found that deliberate tactical decisions that show terrible legal judgement do not constitute a ground for relief under the Sixth Amendment, nor does counsel error in missing statute of limitations deadlines for appeal. Not only have Justice O'Connor's decisions in this area led to the Court's failure to fulfill the promise of Gideon, but the expansive toleration of inept representation has also undermined what remains of the writ of habeas corpus.

i. Justice O'Connor's Dissolution of Inadequate Counsel Claims

Justice O'Connor's decisions have "provided substantial support to the states' provision of woefully inadequate counsel to indigent people facing trial." In Strickland v. approaches to change the rights of criminal defendants).


169 See Tabak & Lane, supra note 116, at 41 n.192.

170 Coleman v. Thompson, 111 S. Ct. 2546, 2564 (1991). Such instances of counsel error leave a defendant recourse only through civil damages, while they remain incarcerated due, at least in part, to the errors or ineffectiveness of their counsel.

171 See Tabak & Lane, supra note 116, at 29 (imploring that "the full magnitude of the Rehnquist Era Court's persistent undermining of the federal habeas writ [cannot] be fully grasped" without examining the Court's inadequate decisions on the right to counsel).

172 Id. at 33; cf. John A. Martin & Michelle Travis, Defending the Indigent During a War on Crime, 1 CORNELL J.L. & PUB. POL'y 69 (1992) (discussing the difficulties in providing adequate indigent defense while public sentiment runs against the rights of the accused); Marilyn L. Ray, Selecting a System for the Legal Representation of People Who are Unable to Afford Retained Counsel: A Case Study, 1 CORNELL J.L. & PUB. POL'y 105 (1992) (analyzing the public defender and legal services systems in New York State).
Washington,\textsuperscript{173} Justice O'Connor's majority opinion formulated an extremely difficult standard for criminal defendants to establish constitutional error due to ineffective counsel.\textsuperscript{174} To obtain a reversal, a criminal defendant must show "that counsel's representation fell below an objective standard of reasonableness."\textsuperscript{175} In \textit{Strickland}, the Court also required a showing that this ineffective representation actually prejudiced the defendant, or that it "so undermined the proper functioning of the adversarial process"\textsuperscript{176} that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."\textsuperscript{177}

Consequently, "[e]ven in cases in which the performances of counsel have passed constitutional muster under the test of \textit{Strickland v. Washington} and executions have been carried out, the representation provided has nevertheless been of very poor quality."\textsuperscript{178} Thus Justice O'Connor's restrictive interpretation of

\textsuperscript{173} 466 U.S. 668 (1984).
\textsuperscript{174} Id. at 687-88, 690.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 686.
\textsuperscript{177} Id. at 694. Tabak and Lane clarify the practical result of O'Connor's rule by highlighting a later case following \textit{Strickland}, in which the Fifth Circuit denied relief to Raymond G. Riles of Texas:

To me, a sufficient showing has been made that trial counsel did not provide this accused with the quality of defense essential to adequate representation in any serious felony case, and particularly in a capital case. . . . The briefs and argument of current counsel . . . together with the record, indicate that, if Riles' trial counsel had been able, the jury might not have imposed the death penalty. Precedent requires me to agree that this is not enough to [grant relief]. The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective under the standard set by \textit{Strickland v. Washington}. Proof that the lawyer was ineffective requires proof not only that the lawyer bungled but also that his errors likely affected the result. Ineffectiveness is not measured against the standards set by good lawyers but by the average — "reasonableness under prevailing professional norms" — and "judicial scrutiny of counsel's performance must be highly differential [sic]."

Tabak & Lane, \textit{supra} note 116, at 33-34 (citing Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring)) (citations omitted).

\textsuperscript{178} \textit{Habeas Corpus Hearings}, \textit{supra} note 149, at 479-81 (Prepared Statement of John Curtin, President, American Bar Association, and James Liebman, Professor of Law, Columbia University School of Law). Tabak and
the right to counsel negates *Gideon*’s promise that denial of life and liberty should not turn on the defendant’s inability to retain competent counsel.

ii. The Fateful Combination of Justice O’Connor’s Jurisprudence Regarding the Right to Counsel and Habeas Corpus

Justice O’Connor’s restrictions on right to counsel claims amplify the burdensome requirement that in order to obtain relief, a habeas corpus petitioner must show cause and actual prejudice resulting from an alleged constitutional violation. If a defendant’s counsel fails to raise important issues or misses statutes of limitations, the defendant may not obtain relief under Justice O’Connor’s interpretation of the Constitution. A court will grant an inmate’s petition for relief only if a habeas petitioner can show some "objective factor external to the


179 See *supra* notes 109-157 and accompanying text.

180 See *supra* notes 169-178 and accompanying text.
defense" that prevented compliance with the rule or incompetence of counsel under the *Strickland* test.\(^8\)

Justice O'Connor's decisions in this area effectuate the Reagan agenda of making it more difficult for habeas corpus petitioners to obtain relief.\(^9\) Furthermore, if defense counsel makes a deliberate, but terrible, tactical decision not to pursue certain claims, the federal courts have no power to reverse state convictions for ineffectiveness of counsel.\(^10\)

Justice O'Connor's approach allows low quality defense work by appointed counsel, which is perhaps the greatest factor undermining the fairness of criminal trials.\(^11\) Her opinions, in this area as well as in habeas corpus, defer to courts that tolerate inadequate counsel and then apply procedural bars to constitutional claims that those appointed lawyers, through ignorance or neglect, fail to raise. She has emphasized that Sixth Amendment right to counsel cases are really "about federalism . . . [they concern] the respect that federal courts owe the States and State's procedural rules."\(^12\) Justice O'Connor's

\(^{181}\) Murray v. Carrier, 477 U.S. 478, 488 (1986); Reed v. Ross, 468 U.S. 1, 16 (1984) (holding that a "novel" claim "not reasonably available to counsel" is sufficient to show cause for a habeas petition). In one example of the extreme circumstances necessary to obtain relief under this prong, the Court in Amadeo v. Zant, 486 U.S. 214 (1988), granted the petitioner relief on a jury discrimination claim where the prosecution intentionally rigged the jury selection process to discriminate against women and blacks in a way that was difficult to detect.

\(^{182}\) See *supra* notes 173-178 and accompanying text.

\(^{183}\) The Reagan proposal indicated that counsel errors that do not signal that the lawyer is totally incompetent do not show sufficient cause for habeas corpus intervention in state proceedings, even though the Justice Department's commentary recognized that questions relating to "cause" have arisen "most frequently" in cases in which procedural default resulted from counsel's "error or misjudgment" falling short of ineffective assistance. Like O'Connor's ultimate decision in *Strickland*, the Justice Department commentary conceded that courts had found "cause" in such cases, but it urged that those cases were wrong and that "cause" should be found only when the prisoner can demonstrate an independent violation of the Sixth Amendment. Yackle, *supra* note 107, at 611-20.

\(^{184}\) See Tabak & Lane, *supra* note 116, at 19-20 (Counsel who make mistakes in their assessment of their clients' cases, which cost the latter their liberty or their lives, show that the attorney is competent, not deficient, because he has winnowed down legal arguments according to Justice O'Connor's standard.).

\(^{185}\) *Id.* at 94.

\(^{186}\) Coleman v. Thompson, 111 S. Ct. 2546 (1991). The Virginia judges
effectuation of the Reagan agenda against releasing criminal defendant's on "technicalities," such as the right to counsel, supports the assertion that President Reagan appointed her to pursue these goals.

3. Justice O'Connor's Deference to States in Capital Punishment Cases

At her confirmation hearings, Justice O'Connor stated that she favored the death penalty. She emphasized, however, that her personal support for it would have no effect on her impartial determination of cases. Yet, an examination of her votes and opinions in this area reveals that she rarely perceives constitutional limitations on or problems with the imposition of this punishment. This subsection briefly examines death penalty jurisprudence in the decade prior to Justice O'Connor's appointment to the Supreme Court, and then it explores the effect she has had on this area of law.

a. Death Penalty Jurisprudence Before Justice O'Connor

Nearly a decade before Justice O'Connor's confirmation, the Supreme Court recognized that the practice of giving a jury "untrammeled discretion" to impose a death sentence on a defendant convicted of a capital offense violated the Eighth Amendment. Furman v. Georgia and its progeny required

had dismissed Coleman's case because his lawyer had bungled the time to make an appeal; Justice O'Connor, writing for the Court, refused to consider the merits of the criminal defendant's claim of ineffective assistance of counsel. Id. at 2565. Thus, in the Rehnquist court, in part due to O'Connor's votes and opinions, procedural rules prevail over the rights guaranteed by the Constitution.

187 See discussion supra note 24.

188 Id.


190 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

191 The Furman line of cases consists of Furman itself and the five death
the replacement of "arbitrary and wanton jury discretion with objective standards to guide" the imposition of the death penalty. Before this landmark decision, juries were "free to sentence [convicted defendants] to death or to life without any standards or guidelines to help (or force) them to make rational or uniform sentencing choices." Jurors often imposed death penalties against minorities and the poor in an "arbitrary or 'freakish' manner, if not actually discriminatorily and capriciously." Prior to the election of Ronald Reagan and the Supreme Court appointment of Sandra Day O'Connor, the Court had established a "standard of fairness and consistency" for death penalty cases.


Woodson, 428 U.S. at 303.


Joshua N. Sondheimer, Note, A Continuing Source of Aggravation: The Improper Consideration of Mitigating Factors in Death Penalty Sentencing, 41 HASTINGS L.J. 409, 413 (1990) (citing Furman, 408 U.S. at 310 (Stewart, J., concurring)) (footnotes omitted). Justice Stewart noted that "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." 408 U.S. at 310-11. The decision in Furman implicitly overruled McGautha v. California, 402 U.S. 183 (1971), which rejected the contention that discretionary death penalty sentencing violated the fundamental fairness standards of Due Process. Lockett v. Ohio, 438 U.S. 586, 599 (1978).

See Pascucci, supra note 193, at 1143 (citing Furman, 408 U.S. at 257 (Douglas, J., concurring)). "[I]t is 'cruel and unusual' to apply the death penalty — or any other penalty — selectively to minorities whose numbers are few, who are outcasts of society, who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board." Furman, 408 U.S. at 245.

Later decisions characterized death sentences imposed during this period as "pregnant with discrimination." Lockett 438 U.S. at 600 (citing Furman, 408 U.S. at 257 (Douglas, J., concurring)).

Pascucci, supra note 193, at 1164.
b. Justice O'Connor's Expansion of the Availability of the Death Penalty

President Reagan disagreed with the Court's idea of an appropriate standard and his judicial agenda included greater deference to trial court imposition of capital punishment.\footnote{See supra text accompanying note 3.} Since her appointment to the Court, Justice O'Connor has frequently voted against the defendant in capital cases. Justice O'Connor's ideological deference to government officials in their maintenance of law and order has resulted in the expansion of the availability of capital punishment.

In her votes and opinions, Justice O'Connor has narrowly construed the rights of criminal defendants under the Eighth Amendment. By voting for deference to state legislatures, which are "uniquely suited to select goals and modes of punishment," Justice O'Connor has allowed the imposition of the death penalty on accomplices not present at a victim's murder.\footnote{For example, she wrote a dissent in Edmund v. Florida, 458 U.S. 825 (1982), finding death not to be a disproportionate penalty for the driver of a getaway car who did not participate in or witness the killing, deferring to the trial judge because he is "best able to assess the defendant's blameworthiness." \textit{Id.} at 826.} Justice O'Connor also played a pivotal role in the Court's conclusion that the capital punishment of convicted murderers who were minors\footnote{Stanford v. Kentucky, 429 U.S. 361 (1989). \textit{See generally} Twila L. Perry, Justice O'Connor and Children and the Law, 13 \textit{WOMEN'S RTS. L. REP.} 81 (1991).} or mentally retarded\footnote{Penry v. Lynaugh, 492 U.S. 302 (1989). O'Connor voted to overturn the death sentence of a mentally retarded defendant because the jury instructions were unfair. However, she found that the execution of a mentally retarded defendant is not prohibited by the Constitution. She concluded that "[m]ental retardation is a factor that may well lessen a defendant's culpability for a capital offense. But we cannot conclude today that the Eighth Amendment precludes the execution of any mentally retarded person of Penry's ability convicted of a capital offense simply by virtue of his or her mental retardation." \textit{Id.} at 340. Her opinion turned on the fact that the state did not ensure that jurors carefully consider the evidence of a murderer's retardation as a mitigating factor. \textit{Id.} at 318. She added that a person's mental age is not reason to take away the person's legal rights or responsibilities, whether to marry or to be punished for a crime. \textit{Id.}} did not automatically violate the Constitution. In \textit{Penry v. Lynaugh},\footnote{\textit{Id.}} Justice O'Connor wrote for the 5-4 Court that "a new rule placing a
certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all." Thus, Justice O'Connor's ideological votes assisted in the realization of Reagan's agenda that neither the Constitution nor the Court would stand in the way of the execution of these classes of offenders.

Combining her attacks on the rights of criminal defendants, and on civil rights, Justice O'Connor assisted Reagan's agenda even further in *McCleskey v. Kemp*, when, along with four others, she repudiated the use of statistical evidence to show that the sentencing of a capital defendant probably involved discrimination.

4. Summary

Justice O'Connor's votes and opinions have significantly reduced the rights of criminal defendants. O'Connor has undermined the viability of federal habeas corpus petitions through her application of a total exhaustion rule, severe restrictions on subsequent habeas petitions, and the imposition

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201 Id. at 329-30. Thus, Justice O'Connor observed that a holding that a mentally retarded person could not constitutionally be executed would be a new rule that would be subject to the first *Teague* exception. *Id.* at 329. She cited as examples the Court's holdings that an insane person could not be executed, *Ford v. Wainwright*, 477 U.S. 399 (1986), and that execution was not a constitutionally acceptable punishment for rape, *Coker v. Georgia*, 433 U.S. 584 (1977). *Penry*, 492 U.S. at 330. According to Tabak and Lane, there are two "narrow" exceptions to *Teague*’s nonretroactivity rule. The first is that a "new" constitutional rule will be applied retroactively in habeas corpus "if it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." The second exception is that a "new" rule should be applied retroactively in habeas corpus "if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty."


203 Id. She rejected claims that the Georgia capital punishment system was infected with racial discrimination, and therefore filled with cruel and unusual punishment. O'Connor joined the majority opinion that discounted the famous Baldus study detailing how Georgia prosecuted and punished murderers and showed disparate impact depending on the race of the victim. *Id.* at 291.
of an actual prejudice standard of review. Additionally, she has
taken a narrow view of the Sixth Amendment right to counsel
and expanded the availability of the death penalty. Justice
O'Connor's decisions have coincided with the Reagan
Administration's agenda for legal change, while imposing
restrictions on the effectiveness of habeas writs which Congress
had rejected. Justice O'Connor's jurisprudence demonstrates
that she is ideologically inclined to restrict the rights of criminal
defendants, notwithstanding her statements during Senate
confirmation that she had no judicial agenda.

III. APPOINTMENTS AND CONSENT: THE PHILOSOPHICAL CASE FOR REJECTING A SUPREME
COURT NOMINEE BASED ON IDEOLOGY

The preceding study of the relationship between ideology
and jurisprudence in the decisions of Justice Sandra Day
O'Connor lends pragmatic support to the argument for Senate
analysis of the ideological perspectives of Supreme Court
nominees. Some opponents of ideological review express
concern that such an inquiry can diminish the public perception
of the Court. However, prohibiting inquiry into a nominee's
ideology "does not create even the illusion of neutrality; it only
perpetuates ignorance about the individual's actual beliefs." 205

204 See Richard Friedman, The Transformation in Senate Response to
Supreme Court Nominations: From Reconstruction to the Taft Administration
and Beyond, 5 CARDOZO L. REV. 1, 85 (1983). See generally ALEXANDER
BICKEL, THE LEAST DANGEROUS BRANCH (1962) (arguing that the Court lacks
enforcement power and must rely on the 'political branches' as well as public
perception for the enforcement and power of its decisions.).

For a general discussion of the potential for diminished public percep-
tions through active senate inquiry of nominees, see Rees, supra note 9,
observing that

The danger of an appearance of impropriety is increased by the fact
that, if it is legitimate for a Senator to vote against a nominee with
whose constitutional (or even social or economic) views he dis-
agrees, then fuller discussion of constitutional questions will
presumably result in more negative votes on opinion grounds. This,
in turn, might lead some people to suggest that when a nominee
agrees with Senators on constitutional questions it is in order to be
confirmed.

Id. at 961 (citation omitted).

205 Erwin Chemerinsky, Ideology, Judicial Selection and Judicial Ethics,
2 GEO. J. LEGAL ETHICS 643, 660 (1989) (discussing the arguments in favor of
the "ideological orientation" approach to evaluating judges, in the context of
Critics of a vigorous senatorial role in the appointment process contend that inquiry into ideology would threaten the integrity and independence of the judiciary.²⁰⁶ Yet the potential for judicial decisions that threaten the integrity of the rights and principles enshrined in the Constitution must outweigh concerns about the impact of senatorial scrutiny of a nominee's ideology on the Court's prestige as an institution.²⁰⁷ Because ideology does affect judicial decision-making, the appointment process should be viewed as essentially political.²⁰⁸ Therefore, concerns about politicization fail to acknowledge the strong role that ideology or political factors actually play in both selection and adjudication.

The debate regarding the propriety of asking a candidate about, or rejecting a nominee because of, ideological preferences the Robert Bork nomination and the California Supreme Court retention elections).


²⁰⁷ See Black, supra note 14, at 663-64 (concluding that no strong reasons refute the pragmatic justification for active senatorial review of Supreme Court nominees' ideologies and implicit agendas).

²⁰⁸ Henry P. Monaghan, The Confirmation Process: Law or Politics?, 101 HARV. L. REV. 1202 (1988). Because of the linkage between politics and ideology, this Article advocates the viewing of the process as political rather than non-political. However, to the extent that a political view of the appointment process can denigrate into pure partisan politics, this Article prefers to focus the evaluation of candidates on ideology rather than on political affiliation. See generally Black, supra note 14; John P. Frank, The Appointment of Supreme Court Justices: Prestige, Principles and Politics, 1941 WIS. L. REV. 172 (1941); Luis Kutner, Advice and Dissent: Due Process of the Senate, 23 DEPAUL L. REV. 658 (1974); Note, Must a Supreme Court Justice Refuse To Answer Senators' Questions?, 78 YALE L.J. 696 (1969); Advice and Consent on Supreme Court Nominations: Hearings Before the Subcomm. on Separation of Powers of the Comm. on the Judiciary of the United States Senate, 94th Cong., 2d Sess. (1975) (Every witness that addressed the issue stated that a nominee's philosophy should be considered.). Robert Meserve, former President of the American Bar Association, stated that "political or ideological grounds . . . are very important considerations in the selection of a Supreme Court Justice, perhaps the most important considerations that the Senate should consider." Id. at 4.
remains unresolved. By supplementing the arguments for the legitimacy of Senate discussion of a Supreme Court nominee's ideology, this Article seeks to spur public dialogue about the meaning of the Constitution and the role that ideology already plays in the interpretation of the civil rights clauses and statutes. An examination of the theoretical arguments for inquiry into a judicial nominee's ideological perspective provides strong support for the legitimacy of Senate rejection or confirmation of Supreme Court nominees based on ideology. In fact, these justifications tend to support the notion that Senators have a duty to undertake an ideological examination of Supreme Court nominees.

This section first examines the language of the Constitution and its historical context. It then sets forth the political theory argument favoring a strong Senate role in the appointment process and the history of Senate consideration of a nominee's

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209 The question of the role of ideology in the confirmation process remains unanswered today. Even Republican Senator Arlen Specter acknowledged that one of the key questions confronting senators "was what weight, if any, the Senate should give to judicial philosophy." Arlen Specter, Concluding Address: On the Confirmation of a Supreme Court Justice, 84 NW. U. L. Rev. 1037, 1039 (1990) (also noting "historically ... that ideology had played a significant role in the Senate's rejection of nominees ranging from John Rutledge, in 1795, to Harold Carswell, in 1970").

Robert Bork's controversial confirmation hearings did not resolve the issue of the weight to be accorded ideology after the Senate determines the nominee's legal competence, integrity, and judicial temperament. See BORK, supra note 206, at 346-47 (criticizing members of the Senate Judiciary Committee for inquiring into and insisting on answers to "doctrinal" questions). Bork insists that his rejection was ideological and vengeful. Id. at 349; see also DAVID M. O'BRIEN, STORM CENTER 111 (1990) (attributing Bork's rejection to his controversial views and his association with conservative legal policy goals).

210 See Rees, supra note 9, at 919 ("If ... it would have been proper for Senators to base their votes in whole or in part upon Justice O'Connor's constitutional philosophy, then no Senator could have cast an informed vote without access to information that was not in the record of the hearings," because of her refusal to answer those kinds of questions.). Rees added that:

If a Senator may legitimately vote to confirm or reject a nominee because of the nominee's positions on questions of constitutional law or related questions of social and economic policy — and especially if ... a Senator has a duty to base his vote at least partly on the nominee's views — then the Senator should endeavor to familiarize himself with these views. It does not follow that the nominee has a constitutional obligation to assist the Senator in his quest.

Id. at 947-48 (emphasis in original).
ideology. Finally, this section identifies the pragmatic justification for considering a nominee's ideological perspective.

A. BACKGROUND ON THE ADVICE AND CONSENT CLAUSE

The Advice and Consent Clause states that "[the President] shall have the power, by and with the Advice and Consent of the Senate to . . . nominate, and by and with the consent of the Senate, shall appoint . . . Judges of the [S]upreme Court." An examination of the historical record surrounding the ratification of the Constitution suggests that Senators should consider any factors that they believe bear on the wisdom of confirming the nominee.

An examination of the thought underpinning this ambiguous clause at the time of the Constitution's ratification supports a strong Senate role in the confirmation of Supreme Court nominees. In Federalist Number 76, Alexander Hamilton argues that the Senate's power to reject nominees "would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity." David Danelski suggests that the Framers' intent as evinced by the

211 U.S. CONST art. II, § 2. See generally David J. Danelski, Ideology as a Ground for the Rejection of the Bork Nomination, 84 NW. U. L. REV. 900 (1990) (discussing the Tribe and Black theses and concluding that the argument based on "original intent" provides the strongest justification for ideological or political inquiry into Supreme Court nominees).

212 Black, supra note 14, at 662 (finding no "hint that the Senators may not or ought not, in voting on a nominee, take into account anything that they, as serious and public-spirited men, think to bear on the wisdom of the appointment"). For the argument that the Framers' intent is impossible to determine, see Brennan's Speech, supra note 3; Rees, supra note 9, at 935-36.

213 See Danelski, supra note 211, at 916-17 (concluding that the historical record "supports Charles Black's view that the framers intended that the Senate have a broad role in passing on Supreme Court nominations"). But see Brennan's Speech, supra note 3 ("It is a little more than arrogance cloaked in humility . . . to pretend that from our vantage we can gauge accurately the intent of the Framers . . . the ultimate question must be, what do the words of the text mean in our time?").

Federalist Papers lays a foundation for inquiry into the ideology of Supreme Court nominees.\textsuperscript{215}

Documents from the time of the Federal Convention also support the argument that the Framers intended that the Senate play an active role in deciding whether or not to confirm a nominee.\textsuperscript{216} For example, Roger Sherman, a delegate to the Constitutional Convention, noted the importance of the Senate's role in the appointment process "for aiding and supporting the executive, securing the rights of the individual states, the government of the United States, and the liberty of the people."\textsuperscript{217} While this historical evidence does not explicitly mention Senate rejection of nominees based on the nominee's ideological perspective, it does reveal a contemplation of shared power between the political branches in determining who may serve as a justice of the Supreme Court. The record indicates that the Senate's role was conceived of as a significant check on the President's power of appointment in order to protect the people and the country.

\textsuperscript{215} See Danelski, \textit{supra} note 211, at 916-17. For instance, Alexander Hamilton, who first suggested executive and legislative cooperation in the appointment of judicial nominees, contended that the senate was intended to play a significant role in the appointment process:

The \textsc{power} which can \textit{originate} the disposition of honors and emoluments, is more likely to attract than to be attracted by the \textsc{power} which can merely obstruct their course. If by influencing the President be meant \textit{restraining} him, this is precisely what must have been intended.

\textsc{The Federalist} No. 77, at 516-17 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (emphasis in original).

\textsuperscript{216} Danelski, \textit{supra} note 211, at 918 (noting, for instance, that "[a]t the Pennsylvania ratification convention, James Wilson — who at the Constitutional Convention had supported placing appointments solely in the executive — acknowledged that the Senate was to play an important role in the process," adding that "in the exercise of the appointment power 'the Senate stands controlled. If it is that monster which it [is] said to be, it can only show its teeth; it is unable to bite or devour.'") (discussing 1 \textsc{Records of the Federal Convention of 1787}, at 119, and quoting 2 \textsc{The Documentary History of the Ratification of the Constitution} 480 (Jensen ed. 1976)).

\textsuperscript{217} Danelski, \textit{supra} note 211, at 918 (quoting Letter from Roger Sherman to John Adams (July 20, 1789), \textit{reprinted in} 6 \textsc{The Works of John Adams} 440 (1851)). "Roger Sherman and Oliver Ellsworth wrote Governor Samuel Huntington on Sept. 26, 1787: 'The equal representation of the states in the senate, and the voice of that branch in the appointment of offices, will secure the rights of the lesser as well as the greater states.'" \textit{Id.} at 918 n.90 (citation omitted).
B. THE SENATE'S ROLE AS A CHECK ON THE PRESIDENT'S APPOINTMENT POWER

The ideologies of Supreme Court justices play an important role in determining the constitutionality or proper interpretation of statutory provisions that have a significant impact on individual rights. The power to interpret statutes was entrusted to the Court to protect individual rights from popular excesses. This Article envisions the Court as holding a sacred trust to protect judicially enforceable rights against tyranny.\(^{218}\)

The advice and consent process is the only democratic check on the federal judiciary. "[I]t is precisely because federal judges are essentially immune from external checks once they are on the bench that they [must] be carefully scrutinized prior to their confirmation."\(^{219}\) Additionally, a strong Senate inquiry can help provide a check against the appointment of individuals whose ideological perspective is overly deferential to majority actions that may trample upon the rights of minorities in a way that is contrary to the explicit guarantees of the Constitution.\(^{220}\)

\(^{218}\) For an early exposition of the proposition that the Constitution was designed with checks and balances to protect people from tyranny, see THE FEDERALIST NO. 51 (James Madison) (Jacob E. Cooke ed., 1961):

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

*Id.* at 349.

Dividing the power between the executive and legislative branches for the appointment of federal judges is a structural check against excessive power. The bill of rights is another precaution against political tyranny. See LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 6 (1991); see also BERNARD BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 273 (1967) ("Everyone knew the basic prescription for a wise and just government. It was so to balance the contending powers in society that no one power could overwhelm the others and, unchecked, destroy the liberties that belonged to all.").

\(^{219}\) Chemerinsky, *supra* note 205, at 650 (adding that "[s]election by the President and confirmation by the Senate properly exists precisely to have some majoritarian influence over the composition" of the Court).

\(^{220}\) *Id.* at 651. The rejection of Robert Bork provides a controversial application of this aspect of checks and balances. See S. Rep. No. 7, 100th
Some contend that subjecting a Supreme Court nominee to active majoritarian review, through strong Senate inquiry during the advice and consent process, would undermine the separation necessary to fulfill this trust. However, once appointed, federal judges have life tenure and are immune from salary reduction. Thus federal judges are assured of independence from the political branches, and may safely adopt any interpretation of the Constitution or statutes regardless of popular opinion.

Justice O'Connor's jurisprudential cohesion with the Reagan ideological hostility toward these minority rights supports this argument for ideological review of Supreme Court nominees. Her assertion of judicial neutrality and refusals to discuss statutory and constitutional interpretation on vital issues of the day denied the Senate and the public their opportunity to consider them. Supreme Court justices "possess substantial discretion — especially in interpreting an expansively worded document like the Constitution .... Ideology inevitably influences the exercise of that discretion." Given the impact of ideology on the interpretation of vital constitutional

Cong., 1st Sess. 7, 37 (1987) (Senate Judiciary Committee based its opposition to Bork's nomination on his political ideology as well as his judicial philosophy because he "lacks the sensitivity and commitment to assuring equal justice under law for all Americans that any Supreme Court Justice should possess.").

221 Carter, supra note 206, at 1198.

222 U.S. CONST. art. III, § 1.

223 See SPAETH & BRENNER, supra note 28, at 244 (concluding that "[f]or those who would preserve and perpetuate the myth that judges only find, and do not make the law, judicial activism and restraint may be useful concepts. But most people who have reached adulthood no longer believe the myth anyway").

However, active Senate inquiry can play an important role in educating and involving the public in a discussion of the meaning of rights under the Constitution. For example, the Bork nomination generated such controversy that:

[for a few weeks, the nation's attention was riveted on the Constitution. Conversations were dominated by discussions of whether the Constitution should be limited to the Framers' views and whether there should be a right to privacy. Such discussions are important in informing the public about the content of the Constitution and the nature of judicial decision-making.

Chemerinsky, supra note 205, at 656.

224 Chemerinsky, supra note 205, at 648.
protections, it is both appropriate and necessary to consider a nominee's views on issues likely to come before the Court.225

C. HISTORICAL PRECEDENT FOR IDEOLOGICAL INQUIRY

Charles Black contends that there is no historical basis for rejecting a strong Senate role in the appointment process.226 Similarly, Laurence Tribe concludes that in six historical instances where Supreme Court nominees were rejected due to

225 Id. at 647. The illogic of Justice O'Connor's refusal to discuss issues that might come before the court is best illustrated by Justice Rehnquist's observation that "[p]roof that a Justice's mind at the time [s]he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." Laird v. Tatum, 409 U.S. 824, 835 (1972) (memorandum denying motion to recuse Justice Rehnquest); see also Rees, supra note 9, at 948 (evaluating O'Connor's position that "if sharing one's opinions with Senators prior to confirmation constitutes prejudgment," then "a nominee is bound to withhold the information notwithstanding its relevance to the decision the Senators have to make").

Rees discusses the implications of O'Connor's prejudgment statement in great detail. Id. at 950-51. He stated that O'Connor's suggestion that a statement of opinion on a constitutional question would amount to "prejudgment" of future cases... is perhaps the broadest statement on record of the standard for judicial disqualification. Justice O'Connor apparently made no distinction between prejudging a case and forming an abstract opinion on an issue before it has presented itself in a case.... It has never been thought to require the judge not to form opinions on questions of law simply because he might someday be forced to decide these questions.

Id. (emphasis in original). Rees also reiterates Justice Rehnquist's historical points that Justice Black wrote the Fair Labor Standards Act and later upheld it as constitutional in United States v. Darby, 312 U.S. 100 (1941), Justice Frankfurter wrote a book about labor injunctions and later ruled on that issue in United States v. Hutchenson, 312 U.S. 219 (1941), and Chief Justice Hughes wrote the opinion in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), when he had written a book on the subject before his appointment. Id. at 953.

226 Black, supra note 14, at 661-62; see also Carter, supra note 206, at 1187; Monaghan, supra note 208, at 1204-07; Rees, supra note 9, at 938; Bruce Fein, A Circumscribed Senate Confirmation Role, 102 HARV. L. REV. 672, 677 (1989). Black further noted that the history of Senate rejections of Supreme Court nominees is "confusing and multifarious." Black, supra note 14, at 663 (Nominees have been rejected for mediocrity, partisan politics, and "repugnancy of the nominees' views on great issues," mentioning explicitly two rejections as of 1970 based on the nominee's views.).
their political, judicial, or economic philosophies,\textsuperscript{227} the nominees' views were an important part of their evaluation.\textsuperscript{228} Tribe contends that these historical precedents validate a senator's consideration of both the constitutional views of a nominee and the potential impact of a nominee on the existence of an ideological balance on the Court.\textsuperscript{229}

While past consideration of ideology does not necessarily make an affirmative case for the value of such an inquiry, it

\textsuperscript{227} Laurence H. Tribe, God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History 79-80, 86-89 (1985) (John Rutledge (1795), John J. Crittenden (1829), George W. Woodward (1846), Jeremiah S. Black (1861), Caleb Cushing (1874), and John J. Parker (1930)).

\textsuperscript{228} Id. at 86-89. He also discusses the nominations of Roger B. Taney (first nomination, 1835), Stanley Matthews (first nomination, 1881), and G. Harrold Carswell (1970) but he believes that their rejections were not clearly due to ideology. Id. Additionally, he does not attribute the rejections of Abe Fortas to Chief Justice (1968), or of Clement F. Haynesworth to Associate Justice (1969) solely to ideology. Id. at 38, 88-89; see also Herman Schwartz, The Senate's Right to Reject, N.Y. Times, July 3, 1987 at A27 (noting "[o]f some 27 rejections or withdrawals under fire, more than one-third were for ideological reasons").

The role of ideology in the Fortas nomination has been disputed by scholars. See Bruce Allen Murphy, Fortas: The Rise and Ruin of a Supreme Court Justice 598 (1988) (rejection was ideological). But see E. Bronner, Battle for Justice 115-16 (1989); Paul Freund, Appointment of Justices: Some Historical Perspectives, 101 Harv. L. Rev. 1146, 1155 (1988).

\textsuperscript{229} Tribe, supra note 227, at 93, 100.
does help to refute the myth that ideological inquiry is a recent phenomenon.\textsuperscript{230} As Tribe concluded,

One need not endorse the opinions espoused by those Senators who cast negative votes on confirmation, nor disagree with the positions taken by the nominees who suffered those rejections, in order to accept the irrefutable historical evidence that, for reasons both good and bad, the Senate has long judged candidates for the Supreme Court on the basis of what they believe.\textsuperscript{231}

The history of Senate rejection of nominees based on the candidates' ideologies supplements the pragmatic and interpretive arguments for this type of Senate activism.

D. JUDICIAL IDEOLOGY PLAYS AN INTEGRAL ROLE IN SHAPING THE LAW

Perhaps this Article's model of the Senate's role in evaluating potential judges may best "be defended in the

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\textsuperscript{230} See Bork, \textit{supra} note 209, at 337-43 (criticizing his ideological rejection as illegitimate liberal activism and deplorable politicization of the law). That only six Supreme Court nominees have been rejected for their ideology may suggest that the historical argument for ideological inquiry rests on aberrations. However, many nominees have been confirmed on an ideological basis as well. See Tribe, \textit{supra} note 227, at 50-92; Joseph P. Harris, \textit{The Advice and Consent of the Senate} (Greenwood Press 1968). Harris commented:

The increasing role of the Supreme Court in passing upon social and economic measures has led to greater attention [by the Senate in confirmation hearings since 1894] to the philosophy, record, and attitudes of nominees on such issues, and far less concern than formerly to their party regularity . . . only five nominations [between 1900 and 1953] to the Supreme Court have faced serious opposition in the Senate: those of [Louis D.] Brandeis (1916), [Harlan Fiske] Stone (1925), [Charles] Hughes (1930), [John J.] Parker (1930), and [Hugo] Black (1937). In each and every case the opposition was due to the philosophy and supposed stand of the nominee on social and economic issues rather than to partisan considerations.

\textit{Id.} at 303. All but Parker were confirmed by substantial margins. \textit{Id.} at 113, 117, 126, 131, and 308 (respectively).

\textsuperscript{231} Tribe, \textit{supra} note 227, at 89. See Danelski \textit{supra} note 211, at 920, for an evaluation of the Tribe thesis concluding that the historical basis is not irrefutable but, nonetheless, ideological inquiry is justified.
simplest terms: ideology should be considered because ideology matters. Judges are not fungible; a person's ideology influences how he or she will vote on important issues. It is appropriate for an evaluator to pay careful attention to the likely consequences of an individual's presence on a court.²³² Because ideology matters, the appointment process should openly consider the ideological perspective of a president's nominee to the nation's highest court. To preserve the integrity of the confirmation process, the role of ideology in judicial interpretation should be openly acknowledged and should inform the decision about whether or not to confirm a particular candidate to the Court.

Historical analysis reveals that the ideology of both the nominator and the nominee have a significant effect on the adjudication of cases before the Supreme Court.²³³ While Supreme Court justices are independent and are not merely the puppets of their nominator, they undeniably have ideological perspectives that affect the way they interpret the law. Respect for the profound influence that justices have on the interpretation of rights under the Constitution and statutes warrants that the Senate consider the impact an individual's ideology may have on their interpretation of legal rights and remedies.

Perhaps the most eloquent argument for Senate consideration of the ideology of Supreme Court nominees was stated twenty years ago by Charles L. Black, Jr. In his thorough discussion of the judicial selection process, he stated that

there is just no reason at all for a Senator's not voting, in regard to confirmation of a Supreme Court nominee, on the basis of a full and unrestricted review, not embarrassed by any presumption, of the nominee's fitness for the office. In a world that knows a man's social philosophy shapes his judicial behavior, that

²³² Chemerinsky, supra note 205, at 648.
²³³ TRIBE, supra note 227, at 51-54. See generally, e.g., ABRAHAM, supra note 6. But cf. Linda Greenhouse, Candid Look at High Court Finds that Presidents Can't Pack Bench, N.Y. TIMES, October 20, 1984, at 1 (quoting Justice William Rehnquist, Presidential Appointments to the Supreme Court, Address at the University of Minnesota College of Law (October 19, 1984) (on file at the Supreme Court), stating that while presidents have the full right to pack the Court, presidents are likely to be disappointed by the votes and opinions of their nominees).
philosophy is a factor in his fitness. If it is a philosophy the Senator thinks will make a judge whose service on the Bench will hurt the country, then the Senator can do right only by treating this judgment of his, unencumbered by deference to the President's, as a satisfactory basis in itself for a negative vote. I have as yet seen nothing textual, nothing structural, nothing prudential, nothing historical, that tells against this view.\footnote{Black, supra note 14, at 663-64 (adding that a "Senator properly may, or even at some times in duty must, vote against a nominee to that Court, on the ground that the nominee holds views which, when transposed into judicial decisions, are likely, in the Senator's judgment, to be very bad for the country"); see also ROBERT HARRIS, DECISION 94-95 (1971) (a number of senators decided to vote against the confirmation of Nixon nominee G. Harrold Carswell because of Black's article); 1 Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 1006 (1987) (Barbara Jordan strongly urged the Senate Judiciary Committee to vote against Bork based on Black's article.).}

The Court's decisions, and the justices' "social philosophies," have a significant impact on public policy, and this reality justifies senatorial review of a nominee's ideology.\footnote{Nagel, supra note 12, at 867 (contending that "[i]t is now the conventional wisdom to view the appointment process as an appropriate occasion for the political culture to communicate its views on legal issues to the federal judiciary and thereby to shape the development of the law," but noting surprise "that so much emphasis is placed on controlling the identity of the specific individuals appointed to the bench"); see also Rees, supra note 9, at 923-24.} Common sense supports the proposition that the Senate should "assert its vision of the public good against that of the President" by rejecting or confirming nominees based upon the notions of public good inherent in a candidate's ideology.\footnote{Monaghan, supra note 208, at 1207 ("[S]tatesmanship, prudence, common sense, and politics" can serve as appropriate basis for rejection.). Monaghan contends that viewing the process as political allows for the rejection of a nominee without an unduly personal attack on his or her character in that "a nominee may be rejected without the Senate having to establish humiliating propositions, such as that the nominee is a dangerous radical." Id.} Furthermore, the interplay of ideology and interpretation in Justice O'Connor's jurisprudence regarding minority rights and the rights of criminal defendants supports the theoretical
arguments for strong Senate inquiry into the ideology of Supreme Court nominees.\textsuperscript{237}

CONCLUSION

During his presidency, Ronald Reagan actively sought out judicial nominees who shared his conservative ideology. In Sandra Day O'Connor, he found a nominee likely to help implement some of his desired changes in the law. This Article shows that she has done so. Justice O'Connor's positions on affirmative action, habeas corpus, the right to counsel, and the death penalty have drastically altered the nature of these issues in modern federal law.

During her confirmation hearings, Sandra Day O'Connor perpetuated the myth that personal or political views play no role in the interpretation of the Constitution. Her confirmation hearing statements set a precedent for nominees to refuse to answer questions about their interpretation of the Constitution. Refusing to answer these questions obscures the role that ideology plays in interpreting the scope of constitutional rights. Justice O'Connor's jurisprudence demonstrates that when the Senate fails to consider ideology in the confirmation process, it ignores possible threats to the values of freedom and equality that inform our Constitution.

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\textsuperscript{237} See discussion \textit{supra} Part II.

\textsuperscript{†} Candidate for J.D., 1994. I thank Christina Feege, Joseph Kennedy, John Lynch, and Professor Sheri Lynn Johnson for their comments on earlier drafts of this article. I am grateful to the members of the \textit{Cornell Journal of Law and Public Policy} for their diligent editorial work. I am especially grateful to Mark Freedman for his insightful editing. Finally, I am indebted to Professor Alan Bigel and Professor Robert Freeman whose debates on the relationship between law, policy, and ideology have informed and inspired me. All mistakes and omissions remain my own.