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CAUSE AND PREJUDICE: THE REHNQUIST COURT, HABEAS CORPUS AND JUDICIAL ACTIVISM

[R]espect for the rule of law must start with those who are responsible for *pronouncing* the law.[1]

I. INTRODUCTION

At common law, a habeas corpus proceeding was a civil action in which a prisoner challenged his continued detention and the conviction on which it was based.[2] The United States Constitution guarantees that "[t]he 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."[3] In 1789, Congress gave the federal courts the power to issue writs of habeas corpus,[4] and in 1867 made federal habeas corpus relief available to state prisoners.[5] Under the current statutory scheme, federal habeas corpus allows a prisoner to challenge his state conviction in federal court by presenting federal constitutional claims to support his request for relief.[6] While the writ itself is by definition procedural, it has grown through the years to become a safeguard for "fundamental rights of personal liberty."[7]

In 1963 the United States Supreme Court issued three opinions that greatly eased the restrictions state prisoners face when they attempt to obtain federal habeas corpus relief.[8] Shortly thereafter, as the membership of the Court changed, its decisions gradually imposed new hurdles before petitioners seeking habeas corpus relief from federal courts. Several modern cases illustrate how the activist[9] views of the Court's conservative[10] members have gradually

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[1] McCleskey v. Zant, 111 S. Ct. 1454, 1489 (1991) (Marshall, J., dissenting) (emphasis in original).

[2] 3 WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 27.1 (1984 & Supp. 1991).

[3] U.S. CONST. art. I, § 9, cl. 2.

[4] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 81-82 (1789).

[5] Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (1867).

[6] 3 LAFAVE & ISRAEL, *supra* note 2, at § 27.2; *see* 28 U.S.C. §§ 2241-2255 (1989) (as amended).

[7] Fay v. Noia, 372 U.S. 391, 401 (1963).

[8] *See* Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

[9] *See infra* Section V for a discussion of what constitutes "judicial activism" and "judicial self-restraint," and of the role that these concepts have in the Court's habeas jurisprudence.

[10] It is difficult to define precisely what is meant by the terms "conservative" and "liberal." In this Note, these terms are intended to reflect popularly held notions of what constitutes conservative and liberal views. It may be of some aid to consider the

limited the availability of federal habeas corpus relief. A majority of the Rehnquist Court has repeatedly adopted an activist stance when confronting difficult questions of criminal procedure. The Court's recent decisions in *Coleman v. Thompson*,[11] *McCleskey v. Zant*,[12] and *Keeney v. Tamayo-Reyes*[13] demonstrate this activist posture. In each of these cases, the Court narrowed the availability of federal habeas relief by applying the "cause and prejudice" standard of review in different areas of habeas jurisprudence.

This Note will focus on the Supreme Court's decisions in *Coleman*, *McCleskey*, and *Tamayo-Reyes* and the ramifications of the Court's adoption of the restrictive "cause and prejudice" test in each case. Before the discussion of each decision, the Note will provide a brief review of the modern history and development of the areas in which the test was adopted: procedural default, abuse of the writ, and evidentiary hearings in federal habeas proceedings.[14] The Note will then present a criticism of the Court's adoption of the new standard in these cases. This criticism will focus on the Court's judicial activism and disregard for the separation of powers doctrine, the effects these three decisions will have on federal habeas jurisprudence, the Court's repudiation of

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definitions of "liberalism" and "conservatism" used by United States Circuit Judge Richard Posner in his discussion of the role of federal judges:

> Although one recoils from these terms because of their vagueness and their emotive and partisan overtones, they are neither irrelevant to judging nor meaningless—"liberalism" in its modern sense referring to the belief that there should be extensive regulation of economic life to promote equality, but little or no regulation of personal behavior; "conservatism" referring in some versions to the opposite weighing of social and personal regulation and in others to laissez-faire in both the personal and economic domains.

RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 221 (1985). *See also* Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44, 45 n.10 (1989); Abner J. Mikva, *Judges on Judging*, 50 OHIO ST. L. J. 979, 979 (1990).

[11] 111 S. Ct. 2546 (1991).

[12] 111 S. Ct. 1454 (1991).

[13] 112 S. Ct. 1715 (1992).

[14] Numerous treatises, law review articles, and student notes have been written about federal habeas corpus and have approached this subject from many different perspectives. This Note will not address the basic procedures for obtaining habeas relief, and will not review the historical development of and the early justifications provided for habeas corpus. For an exhaustive review of these topics, *see, e.g.*, 3 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE (1984 & Supp. 1991); LARRY W. YACKLE, POSTCONVICTION REMEDIES (1981 & Supp. 1991); Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Henry Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Jack Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617 (1984); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941 (1991); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985).

prisoners' constitutional rights, and the influence these decisions will have on Congress and the federal courts.

II. PROCEDURAL DEFAULT AND *COLEMAN*

A. *Development of the Procedural Default Doctrine*

In habeas jurisprudence, a procedural default occurs "when a state prisoner has exhausted his state remedies without obtaining any decision on the merits of his federal constitutional claim because he has failed to comply with the state procedural rules on how the claim must be raised."[15] The modern development of the procedural default doctrine began in 1963 with *Fay v. Noia*.[16] In this case the Court removed many of the requirements limiting access to federal habeas corpus relief and abolished its practice of deferring to state court procedures.[17] Writing for the Court, Justice Brennan articulated the test that would be subject to repeated attacks by the Court's conservative members in the years to come.

Justice Brennan discussed the circumstances under which a state court's refusal to consider a state prisoner's federal claims would bar subsequent petition to the federal courts for habeas relief.[18] The Court held that a "federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies."[19] This "deliberate bypass" test made federal habeas relief more available to state prisoners and became the standard by which federal courts were to consider habeas petitions filed by state prisoners.

A decade after *Fay*, the Court laid the foundation for future attacks upon the "deliberate bypass" standard.[20] In *Davis v. United States*,[21] the Court applied the "cause and prejudice" standard, rather than the "deliberate bypass" standard, to a waiver of a challenge to a grand jury's composition.[22]

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[15] Stephanie Dest, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 264 (1989) (footnotes omitted).

[16] 372 U.S. 391 (1963).

[17] Eugene S.R. Pagano, *Federal Habeas Corpus for State Prisoners: Present and Future*, 49 ALB. L. REV. 1, 13 (1984). These requirements included the review by federal courts of the merits of petitioners' claims, which was approved by the Court in Brown v. Allen, 344 U.S. 443 (1953). *See* Pagano, *supra*, at 8-13.

[18] *Fay*, 372 U.S. at 399.

[19] *Id.* at 439.

[20] The membership of the Court had changed considerably in the ten years after *Fay* was decided. In 1963, the Court was composed of Chief Justice Warren and Justices Black, Douglas, Clark, Harlan, Brennan, Stewart, White and Goldberg. In 1973, Chief Justice Burger presided over the Court, accompanied by Justices Douglas, Brennan, Stewart, White, Marshall, Blackmun, Powell and Rehnquist.

[21] 411 U.S. 233 (1973).

[22] *Id.* at 242-245. The *Davis* Court used this standard to affirm the lower courts'

This standard requires that a federal court decline review of a petition for habeas corpus brought by a state prisoner unless the prisoner can demonstrate cause for a default of a state-court procedure and actual prejudice resulting from the alleged violation of his constitutional rights.[23] If the prisoner cannot satisfy this standard, the habeas court will nevertheless consider the petition if a refusal to do so would result in a fundamental miscarriage of justice.[24] The Court's choice of the "cause and prejudice" standard in these narrow circumstances foreshadowed the eventual substitution of the "deliberate bypass" standard in a number of contexts.

Following *Davis*, the Court limited *Fay* when it applied the "cause and prejudice" standard to a claim similar to that raised in *Davis*, made by a state prisoner in a federal habeas petition. In *Francis v. Henderson*,[25] the Court used the "cause and prejudice" standard, rather than *Fay*'s "deliberate bypass" standard, to deny relief.[26] Justice Stewart justified the adoption of the "cause and prejudice" standard in this context by stating that considerations of comity and federalism—grounds that would again appear many times in the later cases addressing the procedural default doctrine—required such an outcome.[27] In his dissenting opinion, Justice Brennan rejected the Court's activist stance and its failure to consider issues such as the applicability of *Fay*'s holding and the doctrine of *stare decisis*.[28] He also rejected the expanded use of the "cause and prejudice" standard and, with ironic foresight, warned that the "talismanic use of the phrase 'comity and federalism' . . . has ominous portent; it has the look of an excuse being fashioned by the Court for stripping federal courts of the jurisdiction properly conferred by Congress."[29]

The Court continued the attack on the "deliberate bypass" standard in

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denial of a motion to dismiss an indictment made pursuant to 28 U.S.C. § 2255 (1989)(as amended). *Id.* at 245. In addition, it expressly held that this standard governed the review of untimely claims such as the one raised by Davis during his trial and on collateral review. *Id.* at 242.

[23] *Id.* at 242-245.

[24] *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

[25] 425 U.S. 536 (1976).

[26] *Id.* at 542.

[27] *Id.* at 539.

[28] *Id.* at 546 (Brennan, J., dissenting). *See* Guttenberg, *supra* note 14, at 628.

[29] *Francis*, 425 U.S. at 551 (Brennan, J., dissenting). Justice Brennan further criticized the majority by stating that

> there is no basis for the Court's inexplicable conclusion that [a habeas] petitioner must show not only "cause" for the untimeliness of the challenge, but also "actual prejudice." This *ipse dixit*, baldly asserted by the Court in its penultimate sentence without the slightest veneer of reasoning to shield the obvious fiat by which it has reached its result, hardly qualifies as judicial craftsmanship. It is, beyond peradventure, a sad disservice to the Court's obligation to elaborate on its rationales for arriving at a particular rule of law.

Id. at 551-552 (Brennan, J., dissenting).

Stone v. Powell.[30] In this case, the Court effectively narrowed the number of situations in which the standard would measure the merits of a habeas petition. The Court balanced the benefits of the exclusionary rule[31] against the costs of extending it to a review of a habeas petitioner's Fourth Amendment claims.[32] The Court then held that if the state court provided an opportunity for litigating such claims, "the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[33] After assuming that the purpose of the exclusionary rule was to discourage law enforcement officials from violating a suspect's Fourth Amendment rights,[34] the Court decided that such a justification had no relevance in cases on collateral review. The Court took this stance notwithstanding its recognition that the exclusionary rule's deterrent value during the trial and direct review stages is clear.[35] Consistent with its narrow view of habeas relief, the Court removed Fourth Amendment claims from the ambit of the "deliberate bypass" standard and demonstrated the method by which the Court continued to limit prisoners' constitutional rights.[36]

Justice Brennan dissented once again from the Court's "arrogation of power committed solely to Congress."[37] He noted that the majority reached its result without explicitly overruling any of the Court's previous habeas decisions and without addressing the language of the federal habeas statute or the principles of *stare decisis*.[38]

The next major development in the procedural default doctrine came only one year after the *Stone* decision and continued the "shift in focus away from an overriding concern for the enforcement and vindication of federal constitutional rights."[39] In *Wainwright v. Sykes*,[40] the Court held that the "cause and prejudice" standard also applied to a failure to object to the admission of a confession during a trial.[41] In *Sykes*, the Court again demonstrated its preference for the "cause and prejudice" standard of *Davis* and *Francis* over *Fay*'s

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[30] 428 U.S. 465 (1976).

[31] The exclusionary rule provides that evidence seized in violation of a defendant's Fourth Amendment right to be free from unlawful searches and seizures cannot be used against the defendant in a criminal proceeding. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

[32] *Stone*, 428 U.S. at 489.

[33] *Id.* at 482 (footnote omitted).

[34] *Id.* at 492.

[35] *Id.* at 490-493.

[36] *See* Patchel, *supra* note 14, at 958 (noting that the Court's "primary focus became eliminating constitutional claims from habeas review because of some procedural defect in the way the claims were raised"); *see generally id.* at 959-965.

[37] *Stone*, 428 U.S. at 506 (Brennan, J., dissenting).

[38] *Id.* at 503-508 (Brennan, J., dissenting).

[39] Guttenberg, *supra* note 14, at 621.

[40] 433 U.S. 72 (1977).

[41] *Id.* at 87 (footnote omitted).

"deliberate bypass" rule.[42] However, instead of overruling *Fay*, the Court limited its holding to the facts of that case and rejected any application of its broad language.[43]

Before expressly adopting the "cause and prejudice" standard, Justice Rehnquist made a point of "illustrat[ing] th[e] Court's historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged."[44] Apart from its holding, the decision in *Sykes* is important because it illustrates the Court's activist nature and contains an intentional failure to define precisely the "cause and prejudice" standard.[45] Rather than define this test, "*Sykes* indicates what is *not* cause and actual prejudice, a method of definition by elimination that is to be repeated in subsequent cases."[46] This method allowed the Court to take a more conservative approach to habeas corpus. Indeed, what was left for "resolution in future decisions"[47] became the subject of debate between the more conservative Justices and those who believed that the Court had already gone too far in narrowing the availability of federal habeas corpus relief.[48]

The Court again endorsed the "cause and prejudice" standard in *Engle v.*

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[42] *Id.* at 87-88 (footnote omitted).

[43] *Id.* at 88 n.12.

[44] *Id.* at 81. Ironically, one author has characterized the Chief Justice as being opposed to judicial activism and the Court's addressing issues not dealt with by the branches of the federal government whose members, unlike the Justices of the Supreme Court, are accountable to the electorate for their actions. *See* A.E. Dick Howard, *A Key Fighter in Major Battles*, 72 A.B.A. J. 46 (1986).

Professor Burt Neuborne possesses a more realistic view of Chief Justice Rehnquist: "A judicial activist is an ideologue with five votes. Five years ago, Rehnquist would have foamed at the mouth if the liberal wing was [overturning constitutional precedents]. . . . What's disturbing is the hypocrisy with which the Chief Justice has waged a lifelong war against judicial activism and then does it once he gets five votes." Marcia Coyle, *Complete Control*, NAT'L L.J., Aug. 19, 1991, at S2.

[45] *See Sykes*, 433 U.S. at 87.

[46] Guttenberg, *supra* note 14, at 642 (footnote omitted; emphasis in original) (citing United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982)).

[47] *Sykes*, 433 U.S. at 87.

[48] Justice Brennan filed a dissenting opinion in *Sykes* in which Justice Marshall joined. After criticizing the majority's activist stance, Justice Brennan emphatically reminded Congress that it could correct what the Court had done. He wrote:

> It is worth noting that because we deal here with the standards governing the exercise of the conceded power of federal habeas courts to excuse a state procedural default, Congress, as the primary expositor of federal-court jurisdiction, remains free to undo the potential restrictiveness of today's decision by expressly defining the standard of intervention under 28 U.S.C. § 2254.

Id. at 101 n.2 (Brennan, J., dissenting).

Contrary to Justice Brennan's suggestions for congressional action, members of Congress have proposed legislation to restrict the availability of federal habeas corpus relief. *See infra* text accompanying notes 252-257.

Isaac.[49] In this case, Justice O'Connor reaffirmed the principle that a state prisoner may not litigate in a federal habeas proceeding a constitutional claim forfeited before the state courts. She wrote that "[w]hile the nature of a constitutional claim may affect the calculation of cause and prejudice, it does not alter the need to make that threshold showing."[50]

Recognizing that *Sykes* failed to define cause, Justice O'Connor attempted to give meaning to that concept. She rejected the petitioners' contention that raising a constitutional claim in the face of then-existing state law would have been futile and held that such futility alone cannot constitute cause.[51] She justified her interpretation of the "cause and prejudice" standard by listing the costs of federal habeas relief that would be avoided. These costs, which are noted in later habeas cases, included: (1) the extension of the trial for both society and the accused; (2) the frustration of the principles of finality of litigation; (3) the degradation of the trial's importance and of its protections for the accused; (4) the deprivation of society's right to punish admitted offenders; and (5) the hinderance of states' attempts to honor constitutional rights.[52] Finally, Justice O'Connor reaffirmed the conjunctive nature of the "cause and prejudice" test by refusing to grant the petitioners federal habeas relief upon a showing of prejudice alone.[53] In so doing, she continued a pattern of omission prevalent in this line of decisions. Nowhere in her opinion did she discuss the benefits of habeas corpus, such as protecting the innocent and creating an incentive for trial and appellate courts to follow both procedural and substantive rules.

United States v. Frady[54] was decided on the same day as *Engle*. Writing for

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[49] 456 U.S. 107 (1982). *See generally* Mary Ann Snow, Comment, *Lundy, Isaac, and Frady: A Trilogy of Habeas Corpus Restraint*, 32 CATH. U. L. REV. 169 (1982); Martha A. Warren, Note, *Engle v. Isaac: The End of Innocence on Collateral Review*, 32 AM. U. L. REV. 1183 (1983).

[50] *Engle*, 456 U.S. at 129.

[51] *Id.* at 130. For an alternative solution to the problem of futility as cause, *see* Guttenberg, *supra* note 14, at 656-657 (arguing that the Court could have created a definition of cause that would both protect states' interests and relieve the burden of possible relitigation of constitutional claims).

[52] *Engle*, 456 U.S. at 127-128 (footnotes omitted). Justice Brennan responded to the recitation of these costs. With respect to Justice O'Connor's insistence that "[w]e must . . . acknowledge that writs of habeas corpus frequently cost society the right to punish admitted offenders," *id.* at 127, he declared: "I for one will acknowledge nothing of the sort." *Id.* at 147 (Brennan, J., dissenting).

Interestingly, one commentator has noted that Justice O'Connor "believes in electoral accountability and does not want courts to mitigate political responsibility through judicial activism." Robert Glennon, *Democrat with a Small "d"*, 72 A.B.A. J. 54, 56 (1986). After reading her habeas opinions, one may wonder if Justice O'Connor has lived up to these expectations.

[53] *Engle*, 456 U.S. at 134 n.43.

[54] 456 U.S. 152 (1982).

a majority of the Court,[55] Justice O'Connor reaffirmed the "cause and prejudice" standard, holding that it was the proper standard for reviewing a federal prisoner's collateral attack on the jury instructions from his trial.[56] Limiting her discussion to the prejudice prong of the standard,[57] she stated that a petitioner could only meet the burden of demonstrating actual prejudice by "showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting the entire trial with error of constitutional dimensions."[58] By narrowly defining prejudice within the facts of this case,[59] Justice O'Connor left open the possibility that the "cause and prejudice" standard would be narrowly interpreted in future cases, further limiting the availability of federal habeas corpus relief.

Two years after *Frady*, the Court again discussed the "cause and prejudice" test for procedural defaults. Writing for the majority in *Reed v. Ross*,[60] Justice Brennan attempted to stop the trend of narrowing the availability of habeas relief. The support he managed to garner in *Reed*, however, proved to be short-lived.[61] In *Reed*, the Court held that a petitioner may show cause for a procedural default if the constitutional claim presented is so novel that its legal basis is not reasonably available to counsel.[62] Justice Brennan cited *Fay v. Noia*[63] and its discussion of the equitable nature of habeas, and noted that the Court's prior decisions recognized federal courts' considerable discretion under 28 U.S.C. § 2254 to examine a petitioner's constitutional claims.[64] In his dissenting opinion, Justice Rehnquist rejected equating novelty with cause

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[55] Justice Brennan dissented, and renewed his objections to what he called the Court's "progressive emasculation of collateral review of criminal convictions." *Id.* at 178 (Brennan, J., dissenting). He also rejected the Court's blind adherence to the concept of finality, noting that "even in the teeth of clear congressional direction to the contrary, this Court will strain to subordinate a prisoner's interest in substantial justice to a supposed government interest in finality." *Id.* at 186 (Brennan, J., dissenting).

[56] *Id.* at 167. Justice O'Connor explicitly extended the holding of Henderson v. Kibbe, 431 U.S. 145 (1977), to collateral review of federal prisoners' convictions. The *Kibbe* Court held that the "plain error" standard was inappropriate for collateral review of a state prisoner's challenge to jury instructions. *Kibbe*, 431 U.S. at 154.

[57] *See* Pagano, *supra* note 17, at 23 (noting that "*Engle* did not discuss prejudice because the prisoners' failure to show cause made it unnecessary to discuss the point") (citing *Engle*, 456 U.S. at 134 n.43).

[58] *Frady*, 456 U.S. at 170 (emphasis in original).

[59] *See id.* at 168 (noting that *Sykes* left unresolved the precise definition of prejudice: "While the import of the term in other situations thus remains an open question, our past decisions nevertheless eliminate any doubt about its meaning for a defendant who has failed to object to jury instructions at trial.").

[60] 468 U.S. 1 (1984).

[61] *See infra* note 66.

[62] *Reed*, 468 U.S. at 16.

[63] 372 U.S. 391 (1963).

[64] *Reed*, 468 U.S. at 9.

and argued that

> [t]he Court's treatment of novelty as cause suggests that whenever the Court announces a new principle of constitutional law to be applied retroactively, a State's procedural default rule will have no effect. Far preferable, it seems to me, would be the adoption of the position of Justice Harlan, that new constitutional principles should, with rare exception, not be given retroactive application on habeas review.[65]

Five years later this argument prevailed when the Court decided *Teague v. Lane*.[66]

In 1986 the Court returned once again to the "cause and prejudice" standard. It held in *Murray v. Carrier*[67] that this standard applied when a petitioner's attorney failed to raise a particular claim on appeal and that failure was subsequently deemed a procedural default by the state courts.[68] Justice O'Connor's majority opinion stated that "[a]ttorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial."[69] To support this result, she argued that cause required that the attorney's efforts were hindered when presenting the prisoner's claims.[70] The holding and reasoning of *Carrier* were reaffirmed in *Smith v. Murray*,[71] which was decided on the same day. Justice O'Connor, again writing for the majority, reinforced the holdings in these cases by echoing her earlier opinions and emphasizing two important concerns implicated by a federal habeas court's review of a state prisoner's claims. She noted: "Th[e] congruence between the standards for appellate and

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[65] *Id.* at 26 n.3 (Rehnquist, J., dissenting) (citing Mackey v. United States, 401 U.S. 667 (1971)). Joining in the dissenting opinion were Chief Justice Burger and Justices Blackmun and O'Connor. *Reed*, 468 U.S. at 21.

[66] 489 U.S. 288 (1989). In *Teague*, the Court adopted, in a slightly altered form, Justice Harlan's test for the retroactive application of new constitutional rules. This test was taken from Justice Harlan's separate opinion in Mackey v. United States, 401 U.S. 667 (1971), and his dissenting opinion in Desist v. United States, 394 U.S. 244 (1969). The *Teague* Court held that new rules would not be retroactively applied to cases on collateral review, with two narrowly tailored exceptions. *Teague*, 489 U.S. at 300, 310-315. The two exceptions are: (1) if the rule places some individual conduct beyond the power of the criminal law; and (2) if the rule is a "watershed" rule of criminal procedure. *Id.* at 311.

For a review of the Court's retroactivity doctrine, *see* Wright v. West, 112 S. Ct. 2482 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sawyer v. Smith, 497 U.S. 227 (1990); Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Penry v. Lynaugh, 492 U.S. 302 (1989); Sharon K. Alexander, *The Decline of the Great Writ: An Analysis of Teague v. Lane*, 31 SANTA CLARA L. REV. 525 (1991); Stephen P. Garvey, *Politicizing Who Dies*, 101 YALE L.J. 187 (1991).

[67] 477 U.S. 478 (1986).

[68] *Id.* at 492.

[69] *Id.*

[70] *Id.*

[71] 477 U.S. 527 (1986).

trial default reflects our judgment that concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure."[72]

Justice Stevens, who concurred in the Court's judgment in *Carrier*, dissented from the decision in *Smith*. He criticized the majority for its activist interpretation of prior habeas decisions and of the federal habeas corpus statute. Justice Stevens wrote that it was "clear that the application of the Court's 'cause and prejudice' formulation as a rigid bar to review of fundamental constitutional violations has no support in the statute . . . ; the standard thus represents judicial lawmaking of the most unabashed form."[73] In *Carrier*, Justice Brennan similarly expressed his displeasure with the Court. He noted that, although Congress gave federal courts latitude to shape the availability of habeas relief, the Court had no authority to engage in such *ad hoc* legislating.[74] The use of the "cause and prejudice" standard in *Carrier* and *Smith* yet again narrowed the availability of federal habeas relief and provided the framework for the Court's sweeping application of the standard six years later.

B. *The* Coleman *Decision*

The Court's activist trend toward limiting federal habeas relief culminated in *Coleman v. Thompson*.[75] In this case the Court finally and explicitly overruled the "deliberate bypass" standard of *Fay v. Noia*[76] and adopted the restrictive "cause and prejudice" test for all procedural defaults.

In 1983, a Virginia jury convicted Roger Keith Coleman of rape and murder and sentenced him to death.[77] After the county circuit court denied a petition for a writ of habeas corpus, Coleman filed a notice of appeal with that court and a petition for appeal with the Virginia Supreme Court.[78] Because the notice of appeal was untimely,[79] the Commonwealth of Virginia filed a motion to dismiss the appeal. Seven months later, the Virginia Supreme Court dismissed the appeal, basing its decision "[u]pon consideration" of the numerous motions and memoranda filed by Coleman and the Commonwealth.[80]

Coleman then sought federal habeas relief in the United States District Court for the Western District of Virginia. He presented four constitutional claims that he had raised on direct appeal and seven more claims that were

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[72] *Id.* at 533.

[73] *Id.* at 541 (Stevens, J., dissenting) (footnote omitted).

[74] *Carrier*, 477 U.S. at 519 (Brennan, J., dissenting).

[75] 111 S. Ct. 2546 (1991).

[76] 372 U.S. 391 (1963).

[77] *Coleman*, 111 S. Ct. at 2552.

[78] *Id.*

[79] Coleman filed the notice of appeal with the county circuit court thirty-three days after the entry of final judgment. The filing violated Virginia Supreme Court Rule 5:9(a), which provides that such notice must be filed within thirty days of final judgment. *Id.* at 2552-2553.

[80] *Id.* at 2553.

originally raised in the state habeas petition.[81] The District Court held that Coleman had procedurally defaulted the seven claims raised previously and denied the petition after addressing all eleven claims.[82] The dismissal was affirmed by the United States Court of Appeals for the Fourth Circuit, which held that the "plain statement" rule of *Harris v. Reed*[83] had been met by the Virginia Supreme Court's dismissal of the petition for appeal on procedural grounds.[84] The Court of Appeals further held that the dismissal rested on independent and adequate state grounds[85] and that Coleman had not shown sufficient cause to excuse the default.[86] The United States Supreme Court granted certiorari "to resolve several issues concerning the relationship between state procedural defaults and federal habeas review . . . ."[87]

Writing for the majority, Justice O'Connor commented that the Court's decisions in *Carrier* and *Sykes* left undecided the question whether the "deliberate bypass" standard of *Fay* applied when a state prisoner defaulted his entire appeal rather than one or some of his claims.[88] She took this opportunity to provide an answer, and, in so doing, clearly stated the Court's holding and the demise of the "deliberate bypass" standard:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.[89]

With this holding, the Court finally adopted the restriction for procedural default cases that had previously pertained only to selected circumstances.

Justice O'Connor offered a number of justifications for the adoption of this standard for all procedural default cases. These justifications echoed those mentioned in the litany of concerns discussed in previous cases and included: (1) the respect due the states' procedural rules;[90] (2) the elimination of the inconsistency between the respect federal courts show state procedural rules

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[81] *Id.*

[82] *Id.*

[83] 489 U.S. 255 (1989). The "plain statement" rule provides that a federal court will not review a state court's determination of a federal claim if the state court clearly noted that its decision rested upon independent and adequate state grounds. *Id.* at 262; Michigan v. Long, 463 U.S. 1032, 1042 (1983).

[84] *Coleman*, 111 S. Ct. at 2553.

[85] *See Sykes*, 433 U.S. at 81-87.

[86] *Coleman*, 111 S. Ct. at 2553.

[87] *Id.*

[88] *Id.* at 2564.

[89] *Id.* at 2565.

[90] *Id.* at 2563.

and that which they show their own;[91] and (3) the states' interests in "channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct [their] own errors . . . ."[92] Justice O'Connor then rejected Coleman's argument that his attorney's errors constituted cause.[93] She contended that because an attorney acts as the prisoner's agent, the prisoner must " 'bear the risk of attorney error' " caused by ignorance or mistake.[94]

Justice Blackmun, frustrated by what he viewed as the Court's assumption of powers traditionally left to Congress, was critical of the majority's opinion.[95] He began by rebuking the majority for characterizing this case as being "about federalism"[96] and put forth his view of that concept. He stated that the purpose of federalism is to protect the liberties granted to citizens by the separation of federal and state governmental powers.[97] He argued that, in this case, the Court "proceed[ed] as if the sovereign interests of the States and Federal Government were co-equal. Ours, however, is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign States."[98] In Justice Blackmun's view, the Court's deferral to state procedural rules at the expense of prisoners' federal constitutional rights was improper.

Justice Blackmun also criticized the Court for continuing the evisceration of federal habeas corpus. He noted that the majority

> display[ed] obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, [and] continue[d] its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims.[99]

Finally, Justice Blackmun rejected the argument that the interests identified by Justice O'Connor were harmed by federal habeas review of state court

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[91] *Id.* at 2565.

[92] *Id.*

[93] *Id.* at 2566-2567.

[94] *Id.* (quoting Murray v. Carrier, 477 U.S. 478, 488 (1986)). Justice O'Connor did note, however, that an attorney's ineffectiveness will constitute cause if it reaches the level of an independent constitutional violation. *Coleman*, 111 S. Ct. at 2567.

[95] Justices Marshall and Stevens joined in the dissenting opinion. *Id.* at 2569.

[96] *Id.* (Blackmun, J., dissenting). Justice Blackmun was referring to the opening sentence of the majority opinion, in which Justice O'Connor declared: "This is a case about federalism." *Id.* at 2552.

[97] *Id.* at 2570 (Blackmun, J., dissenting).

[98] *Id.* (Blackmun, J., dissenting).

[99] *Id.* at 2569 (Blackmun, J., dissenting). One author has suggested that the procedural default doctrine should be replaced with a system that focuses solely on habeas petitioners' substantive claims. Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737 (1991).

judgments.[100] After denouncing the increasingly activist stance taken by the Court when addressing matters of criminal procedure, Justice Blackmun concluded his opinion with the bitter realization that, by reaching beyond the boundaries of its power established by the federal government's tripartite structure, the Court "managed to transform the duty to protect federal rights into a self-fashioned abdication."[101]

III. ABUSE OF THE WRIT AND *MCCLESKEY*

A. *Development of the Abuse of the Writ Doctrine*

The doctrine of abuse of the writ "defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus."[102] A prisoner must present all cognizable claims in one habeas petition to avoid dismissal. In 1963, the Court first articulated the abuse doctrine in *Sanders v. United States*.[103] Three years later, Congress amended the federal habeas statute to incorporate certain principles of the *Sanders* abuse doctrine.[104] Although the amended statute reflects general principles of the doctrine, a review of its development highlights some of the concerns later raised by the opponents of the Court's restric-

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[100] *Coleman*, 111 S. Ct. at 2570 (Blackmun, J., dissenting). With respect to one of these interests—finality of litigation—it may be argued that in *Coleman*, as well as in the earlier habeas cases, the "Court's discussion[s] of finality . . . fail[] to explain why the goal of terminating the litigation holds an exalted position over the review of constitutional questions that affect a citizen's liberty and possibly his life." Guttenberg, *supra* note 14, at 681 (footnote omitted).

[101] *Coleman*, 111 S. Ct. at 2571 (Blackmun, J., dissenting). *See* Patchel, *supra* note 14, at 943 (arguing that by restricting federal habeas review, the Court "has de facto returned the development of constitutional restrictions on criminal process to the states").

[102] *McCleskey*, 111 S. Ct. at 1457.

[103] 373 U.S. 1 (1963).

[104] 28 U.S.C. § 2244 provides in pertinent part:

> (b) When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.

28 U.S.C. § 2244 (1989)(as amended). At the same time, Congress also adopted the Court's holding in Townsend v. Sain, 372 U.S. 293 (1963). In *Townsend*, the Court espoused a set of standards for determining when an evidentiary hearing is required in § 2254 proceedings. *See infra* text accompanying notes 182-195.

tive habeas jurisprudence.

Writing for the majority in *Sanders*, Justice Brennan stated that federal courts may rely on dismissals of prior habeas petitions when declining to review subsequent applications for habeas relief. However, the courts may do so only if three conditions are met: "(1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application."[105]

After discussing each condition, Justice Brennan noted that courts should review a subsequent petition that raised different grounds than the ones presented in earlier petitions.[106] Similarly, courts should review a subsequent petition that raised claims presented in an earlier application but not adjudicated on the merits.[107] Thus, Justice Brennan concluded that when a prisoner files a second or subsequent petition for federal habeas relief, "full consideration of the merits of the new application can be avoided only if there has been an abuse of the writ . . . ."[108] He noted further that the government bears the burden of pleading that such an abuse has occurred,[109] and that it is left to the discretion of the habeas judge to decide whether the application constitutes an abuse of the writ.[110] Justice Brennan cautioned, however, that even if it is alleged that a petitioner has abused the writ, federal judges have the power to consider the merits of the petition if the "ends of justice" so demand.[111] Justice Brennan did not explicitly discuss which test would govern in such cases. Instead, he referred to the decisions in *Fay v. Noia*[112] and *Townsend v. Sain*[113] for their discussions of "the circumstances under which a prisoner may be foreclosed from federal collateral relief."[114] However, Justice Brennan did provide two examples of situations in which the presentation of new claims in subsequent petitions would be deemed an abuse of the writ. He stated that a review of a subsequent petition will be denied if a prisoner "deliberately withholds one of two grounds for federal collateral relief at the time of filing his first application, in the hope of being granted two hearings,"[115] and if he

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[105] *Sanders*, 373 U.S. at 15.

[106] *Id.* at 17.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 18.

[111] *Id.* at 18-19.

[112] 372 U.S. 391 (1963). *See supra* text accompanying notes 15-19.

[113] 372 U.S. 293 (1963). *See infra* text accompanying notes 182-193.

[114] *Sanders*, 373 U.S. at 18. Justice Harlan's dissenting opinion criticized the Court's decisions in *Sanders*, *Fay*, and *Townsend* for degrading the importance of the principle of finality of litigation. *Id.* at 23 (Harlan, J., dissenting).

[115] *Id.* at 18.

"deliberately abandons one of his grounds at the first hearing."[116]

Although the Court considered many habeas cases after *Sanders*, no major developments in the abuse of the writ area occurred until the Court decided *Kuhlmann v. Wilson* in 1986.[117] In this case, Justice Powell, writing for a plurality of the Court, attempted to determine when a federal court should entertain a petition for federal habeas relief that is based on claims rejected in earlier petitions. He discussed the *Sanders* "ends of justice" test and concluded that, although the issue of burden allocation was decided in that case, there was no guidance as to what kind of proof a petitioner would need in order to relitigate on habeas claims previously decided adversely to him.[118] Once Justice Powell identified this shortcoming, he determined that it was incumbent upon the Court to provide a solution that would promote the principle of finality of litigation.[119] Accordingly, he considered whether the prisoner's interests in relitigating claims previously held to be without merit outweighed the principle of finality.[120] He held that the "ends of justice" test requires federal habeas courts to entertain successive petitions only when a petitioner "supplements his constitutional claim with a colorable showing of factual innocence."[121]

Justice Brennan rejected both the Court's holding and its reasoning, and pointed out that the Court had only utilized such a balancing test in cases involving procedural defaults in state courts.[122] He criticized the plurality for adopting a new approach to the "ends of justice" inquiry and for limiting the scope of the federal habeas statute, noting that the habeas statute itself did not provide any justification for the plurality's decision.[123] He also pointed out that the statute that gives federal courts the power to issue writs of habeas corpus, 28 U.S.C. § 2241, contained no references to either a petitioner's innocence or to a need for conducting a balance inquiry.[124] Finally, Justice Brennan argued that nothing in the habeas statute's legislative history showed that Congress intended to renounce the *Sanders* "ends of justice" inquiry.[125] The *Kuhlmann* Court's modification of this standard in the absence of statutory support showed its willingness to continue limiting the availability of habeas

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[116] *Id.*

[117] 477 U.S. 436 (1986). *See generally* George Wesley Sherrell, Note, *Successive Chances for Life: Kuhlmann v. Wilson, Federal Habeas Corpus, and the Capital Petitioner*, 64 N.Y.U. L. REV. 455 (1989).

[118] *Kuhlmann*, 477 U.S. at 444-445.

[119] *Id.* at 451-452.

[120] *Id.* at 452. Justice Powell noted that a petitioner may have an interest in obtaining another review of the constitutionality of his imprisonment and in securing his release from prison because he is in fact innocent of the charge for which he was convicted. *Id.*

[121] *Id.* at 454; *see* Patchel, *supra* note 14, at 977-979.

[122] *Kuhlmann*, 477 U.S. at 464 (Brennan, J., dissenting).

[123] *Id.* at 467 (Brennan, J., dissenting).

[124] *Id.* (Brennan, J., dissenting).

[125] *Id.* at 468-469 (Brennan, J., dissenting).

relief by activist means and foreshadowed the result in *McCleskey v. Zant*.[126]

B. *The* McCleskey *Decision*

In 1978, Warren McCleskey and three other men robbed a Georgia furniture store. During the robbery one of the men shot and killed an off-duty policeman.[127] After his arrest, McCleskey confessed to participating in the robbery but denied shooting the policeman.[128] When on trial for both the robbery and the murder, McCleskey put forth an alibi and recanted his confession.[129] To rebut McCleskey's testimony the prosecution called as a witness Offie Evans, an inmate who occupied the jail cell next to McCleskey's. Evans testified that McCleskey had admitted to him that he had shot the policeman.[130] Additional evidence linked McCleskey to the murder and he was convicted and sentenced to death.[131]

In January 1981, after an unsuccessful direct appeal to the Supreme Court of Georgia, McCleskey filed his first petition for state habeas corpus relief.[132] He challenged the admission of Evans' testimony, contending that the failure to suppress it violated his due process rights under *Brady v. Maryland*.[133] He also claimed that, under *Giglio v. United States*,[134] his due process rights were violated by the State's failure to disclose an agreement it had made with Evans to drop pending charges in exchange for his testifying.[135] McCleskey also raised a claim based on *Massiah v. United States*,[136] alleging that the admission of Evans' testimony violated his right to counsel as guaranteed by the Sixth Amendment.[137] The state habeas court denied relief, and the United

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[126] 111 S. Ct. 1454 (1991).

[127] *Id.* at 1457-1458.

[128] *Id.* at 1458.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] 373 U.S. 83 (1963). The *Brady* Court held that suppression of material evidence favorable to a defendant who has requested it violates due process, regardless of the good faith or bad faith of the prosecutor. *Id.* at 86-88. The *Brady* claim was one of the claims McCleskey raised on direct appeal to the Supreme Court of Georgia. *McCleskey*, 111 S. Ct. at 1458.

[134] 405 U.S. 150 (1972). In *Giglio*, the prosecution failed to inform the defense that the only witness linking the defendant to the crime, the defendant's co-conspirator, had been granted immunity in exchange for his testimony. The Court held that the witness' credibility was an important issue and that the evidence of an agreement would be relevant to this credibility. *Id.* at 154-155.

[135] *McCleskey*, 111 S. Ct. at 1458.

[136] 377 U.S. 201 (1964). In *Massiah*, the Court held that the accused's Sixth Amendment right to counsel was violated when incriminating statements that federal agents elicited from him after he had been indicted and in the absence of his attorney were admitted at trial. *Id.* at 206.

[137] *McCleskey*, 111 S. Ct. at 1459.

States Supreme Court denied McCleskey's petition for a writ of certiorari.[138]

In December 1981, McCleskey filed his first federal habeas corpus petition in the United States District Court for the Northern District of Georgia.[139] This petition did not raise the *Massiah* claim, but did reassert the *Brady* and *Giglio* claims.[140] Finding that the admission of Evans' testimony violated *Giglio*, the District Court granted relief.[141] The United States Court of Appeals for the Eleventh Circuit reversed and held that the *Giglio* violation was harmless in this situation.[142] The Supreme Court granted certiorari, limiting its review to whether Georgia's capital sentencing procedures were constitutional.[143]

In 1987 McCleskey filed his second state habeas petition. One of the claims presented in this petition centered on the admission of Evans' testimony.[144] The petition was dismissed, and in July 1987 McCleskey filed his second application for federal habeas relief.[145] In this application he asserted seven claims, including the *Massiah* claim omitted from the first federal habeas petition.[146] McCleskey justified his presentation of this claim at such a late date by relying on additional information he obtained only one month before he filed this second federal petition. This information consisted of a statement made to the Atlanta Police Department on August 1, 1978, two weeks before McCleskey's trial.[147] The statement revealed that Evans had been deliberately placed in the cell next to McCleskey's and had been instructed by the police to talk with McCleskey about the robbery and murder.[148] The State of Georgia opposed this second federal petition by pleading that McCleskey had abused the writ by failing to raise the *Massiah* claim in his first federal petition.[149]

The District Court held hearings that focused on the arrangement between

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[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *Id.*

[143] *Id.* The Court rejected McCleskey's challenge to the State of Georgia's imposition of the death penalty in capital cases. Specifically, McCleskey contended that the Georgia capital sentencing process was administered in a racially discriminatory way and therefore violated the Eighth and Fourteenth Amendments. McCleskey v. Kemp, 481 U.S. 279, 286 (1987). McCleskey based this claim on a statistical study that considered the races of murder defendants and their victims and that concluded that black defendants who killed white victims had the greatest chance of receiving the death penalty. *Id.* at 286-287.

For a detailed discussion of this case, *see* Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

[144] *McCleskey*, 111 S. Ct. at 1459.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.* at 1459-1460.

[149] *Id.* at 1460.

the police and Evans, and found that McCleskey was entitled to relief under *Massiah*.[150] It rejected the State's contention that McCleskey had abused the writ and noted that his failure to discover the evidence of Evans' complicity with the police was not due to inexcusable neglect.[151] The Court of Appeals again reversed, holding that the District Court abused its discretion by failing to dismiss the second petition as an abuse of the writ.[152] McCleskey petitioned the Supreme Court for certiorari, and after granting the petition the Court requested that the parties address an additional question: "Must the State demonstrate that a claim was deliberately abandoned in an earlier petition for a writ of habeas corpus in order to establish that inclusion of that claim in a subsequent habeas petition constitutes abuse of the writ?"[153]

Writing for the Court, Justice Kennedy admitted that in the past the Court had little occasion to define the abuse concept,[154] and that the Court's habeas opinions "[did] not all admit of ready synthesis."[155] He inferred that, because of the number of changes made in the past, the Court was at liberty to make further changes to its federal habeas doctrine. After citing the references in *Sanders* to *Townsend v. Sain*[156] and various cases from the courts of appeals, Justice Kennedy stated that an abuse of the writ can occur in situations other than those in which a claim has been deliberately abandoned.[157] He concluded that a petitioner may also abuse the writ by failing to raise a claim through inexcusable neglect.[158] Such a failure, Justice Kennedy asserted, would constitute a procedural default. He then argued that because the procedural default and abuse of the writ doctrines involved similar costs and raised common concerns, the same standard for excusing failures to raise claims should govern in both contexts.[159] Accordingly, he held that the "cause and prejudice" standard applies to cases in which the government has pleaded an abuse of the writ.[160]

Justice Kennedy outlined the way in which the "cause and prejudice" analysis should be conducted in the context of an allegation of an abuse of the writ:

> When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that petitioner has abused the writ. The burden to disprove abuse then becomes petitioner's. To excuse his failure to raise the claim earlier,

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[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.* at 1461 (quoting McCleskey v. Zant, 110 S. Ct. 2585 (1990)).
[154] *McCleskey*, 111 S. Ct. at 1461.
[155] *Id.* at 1467.
[156] 372 U.S. 293 (1963).
[157] *McCleskey*, 111 S. Ct. at 1467.
[158] *Id.* at 1468.
[159] *Id.*
[160] *Id.* at 1470.

> he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. . . . If petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice would result from a failure to entertain the claim.[161]

Justice Kennedy justified the adoption of the "cause and prejudice" standard in abuse cases by invoking the need for "certainty and stability in our discharge of the judicial function."[162] He also relied upon the often-cited concern for the finality of state court judgments,[163] the need to avoid placing heavy burdens upon federal judicial resources,[164] and the fear that habeas review gives petitioners an incentive to manipulate the process.[165] Finally, he characterized the test as an objective one, well-defined in the case law and familiar to federal courts.[166] Justice Kennedy concluded that the test's use would help to clarify federal habeas law and that the standard would "be applied in a manner that comports with the threshold nature of the abuse of the writ inquiry."[167]

In his discussion of the cause portion of the standard, Justice Kennedy stated that in the abuse context habeas petitioners must conduct "reasonable and diligent investigation[s] aimed at including all relevant claims and grounds for relief"[168] in their initial federal habeas petitions. Prisoners will not be permitted to file successive petitions based on subsequently discovered evidence for it is "what [a] petitioner knows or *could discover*"[169] when con-

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[161] *Id.*

[162] *Id.* at 1471.

[163] *Id.* at 1468.

[164] *Id.* at 1469. Justice Kennedy's concern for the burden placed on the federal judiciary by habeas petitioners seems to be misplaced. For example, in 1978 the number of filings for federal habeas corpus was 7,033; in 1987 this number had risen to 9,542, showing an increase of 36%. The number of potential habeas petitioners during this period rose from 267,155 to 517,733, representing an increase of 94%. The rate of filings per prisoner, therefore, actually dropped from 2.54% to 1.84% over this period. David D. Kammer, *Restricting New-Claim Successive Applications for Federal Writs of Habeas Corpus: McCleskey v. Zant*, 60 U. CIN. L. REV. 1405, 1423 (1992) (citing Larry W. Yackle, *Form and Function in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus*, 23 U. MICH. J.L. REF. 685, 704-705 (1990)). Moreover, in fiscal 1988 only 9,880 of the 239,634 civil filings in the federal district courts were applications for habeas relief filed by state prisoners. This number represents only 4.1% of the total filings. Kammer, *supra*, at 1423 (citing Vivian Berger, *Justice Delayed or Justice Denied? — A Comment on Recent Proposals to Reform Death Penalty Habeas Corpus*, 90 COLUM. L. REV. 1665, 1669 n.23 (1990)).

[165] *McCleskey*, 111 S. Ct. at 1469.

[166] *Id.* at 1471.

[167] *Id.*

[168] *Id.* at 1472.

[169] *Id.* (emphasis added).

ducting such an investigation that is important.

Justices Marshall, Blackmun, and Stevens refused to join in the Court's opinion and judgment. In his dissenting opinion, Justice Marshall criticized the majority for what he characterized as judicial activism and blind adherence to the principles of federalism and finality of state court determinations. Justice Marshall noted that the decision "depart[ed] drastically from the norms that inform the proper judicial function"[170] because the Court, "[w]ithout even the most casual admission that it [was] disregarding long-standing legal principles[,] . . . radically redefine[d] the content of the 'abuse of the writ' doctrine"[171] by adopting the standard traditionally reserved for procedural default cases. Such an undertaking, in Justice Marshall's view, repudiated the statutory standard governing abuse of the writ cases.[172] Justice Marshall also criticized the majority for performing its own review of the record—in which it failed to give any weight to the District Court's findings of fact—instead of remanding the case to the District Court for reconsideration.[173]

Justice Marshall criticized as unprincipled the Court's substitution of one habeas standard for another by incorporating the "cause and prejudice" standard into the abuse doctrine through an exercise of its discretion. He based this argument on the fact that Congress had codified the *Sanders* good-faith standard of "deliberate abandonment" many years before.[174] He then discussed Congress' recent refusal to amend the habeas statute,[175] and stated that "[i]t is axiomatic that th[e] Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes."[176]

Justice Marshall further criticized the majority's opinion on a number of

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[170] *Id.* at 1477 (Marshall, J., dissenting).

[171] *Id.* (Marshall, J., dissenting).

[172] *Id.* (Marshall, J., dissenting).

[173] *Id.* (Marshall, J., dissenting). It is particularly disturbing that in a capital case such as this, the Court did not remand the entire matter to the District Court. Even if McCleskey's claims would not have been enough to afford him a new trial, he should have been given the opportunity to present the claims in light of the Court's adoption of the "cause and prejudice" standard.

[174] *Id.* at 1480, 1481-1482 and n.4 (Marshall, J., dissenting). Justice Marshall reviewed the *Sanders* decision and its discussion of the abuse doctrine. He argued that the standard of review put forth in *Sanders* was a "deliberate abandonment" test designed to resemble the "deliberate bypass" test of *Fay*. *Id.* at 1478 (Marshall, J., dissenting). He then concluded that Congress intended for the language in *Sanders* to control the interpretation of § 2244(b). *Id.* at 1480 (Marshall, J., dissenting). However, Justice Marshall reached this conclusion despite the fact that the language that he relied on is arguably dicta, and that § 2244(b) contains slightly different language than that found in *Sanders*. *See* 28 U.S.C. § 2244(b) (1989) (as amended); *see also supra* text accompanying notes 103-116.

[175] *McCleskey*, 111 S. Ct. at 1482 (Marshall, J., dissenting) (discussing H.R. 5269, 101st Cong., 2d Sess. § 1303 (1990)). *But see infra* text accompanying notes 252-257.

[176] *McCleskey*, 111 S. Ct. at 1482 (Marshall, J., dissenting).

different grounds. First, he vehemently rejected the Court's activist stance by pointing out that neither of the parties to the litigation had raised arguments regarding modification of the abuse doctrine, and that the State of Georgia did not mention the standard in its brief and during oral argument.[177] Second, Justice Marshall argued that finality is not a proper justification for the "cause and prejudice" standard because "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.' "[178]

Finally, Justice Marshall questioned the majority's view of federalism in the context of federal habeas relief. He disagreed with the majority's application of its new standard to McCleskey because he believed that such actions belied the discussions of federalism found in earlier decisions. He wrote that "[t]he Court's utter indifference to the injustice of retroactively applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of 'new rules' that enforce the constitutional rights of citizens charged with criminal wrongdoing."[179] Nearing retirement,[180] and disappointed and frustrated by the Court's increasingly activist positions, Justice Marshall commented that "[w]hatever 'abuse of the writ' today's decision is designed to avert pales in comparison with the majority's own abuse of the norms that inform the proper judicial function."[181]

IV. EVIDENTIARY HEARINGS AND *TAMAYO-REYES*

A. *Federal Courts' Authority to Hold Evidentiary Hearings*

In 1963 the Supreme Court began to expand the availability of federal habeas relief for state prisoners. *Townsend v. Sain*[182] represents one example of this expansion. In this case, the Court held that in certain situations, federal habeas courts were to hold evidentiary hearings in order to aid them in their review of state prisoners' habeas petitions. In the 1966 amendments to the

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[177] *Id.* at 1485 (Marshall, J., dissenting) (footnote omitted).

[178] *Id.* at 1483 (Marshall, J., dissenting) (quoting Sanders v. United States, 373 U.S. 1, 8 (1963)).

[179] *McCleskey*, 111 S. Ct. at 1485 (Marshall, J., dissenting) (citing Saffle v. Parks, 494 U.S. 484 (1990); Butler v. McKellar, 494 U.S. 407 (1990); Teague v. Lane, 489 U.S. 288 (1989)).

[180] Justice Marshall retired from the Court on June 27, 1991, at the age of 82. He cited his advanced age and declining health as the reasons for his retirement. *See* Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES, June 28, 1991, at A1. President Bush nominated Clarence Thomas to succeed Justice Marshall. After much controversy, the Senate confirmed his nomination. *See* R.W. Apple, Jr., *Senate Confirms Thomas, 52-48, Ending Week of Bitter Battle*, N.Y. TIMES, Oct. 16, 1991, at A1.

[181] *McCleskey*, 111 S. Ct. at 1489 (Marshall, J., dissenting).

[182] 372 U.S. 293 (1963).

federal habeas statute, Congress codified to a large degree these specific situations. The Court's reasoning in *Townsend*, like that in *Fay*, was later rejected by the Rehnquist Court in *Tamayo-Reyes*.

When the Court decided *Townsend*, it attempted to delineate the proper scope of federal evidentiary hearings.[183] Chief Justice Warren stated in the majority opinion that the time had arrived "to elaborate the considerations which ought properly to govern the grant or denial of evidentiary hearings in federal habeas corpus proceedings."[184] Chief Justice Warren referred to the review in *Fay v. Noia*[185] of "[t]he broad considerations bearing upon the proper interpretation of the power of the federal courts on habeas corpus."[186] According to the Chief Justice, this review supported the conclusion that federal courts had the authority to conduct hearings when state prisoners claimed that a violation of their constitutional rights had occurred.[187] This authority permitted the courts to consider evidence presented in a collateral proceeding as well as on direct review.[188] Chief Justice Warren discussed the situations in which evidentiary hearings were mandatory rather than discretionary, and held that if the state court did not hold an evidentiary hearing during the trial or in a collateral proceeding, such a hearing was required during federal habeas review.[189]

Recognizing that such a test might be too general and therefore might not provide adequate guidance for the federal courts,[190] Chief Justice Warren provided six particular situations in which evidentiary hearings are to be held:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[191]

Regarding the fifth situation, Chief Justice Warren held that an evidentiary hearing was required if "for any reason not attributable to the inexcusable neglect of [the] petitioner . . . evidence crucial to the adequate consideration

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[183] *Id.* at 309.

[184] *Id.* at 310.

[185] 372 U.S. 391 (1963). *Fay* and *Townsend* were both decided on March 18, 1963. *See Townsend*, 372 U.S. at 293. For a discussion of *Fay*, *see supra* text accompanying notes 15-19.

[186] *Townsend*, 372 U.S. at 310-311.

[187] *Id.* at 311.

[188] *Id.* at 311-312.

[189] *Id.* at 312.

[190] *Id.* at 313.

[191] *Id.*

of the constitutional claim was not developed at the state hearing."[192] He then defined this standard by referring to the "deliberate bypass" test for procedural defaults set forth in *Fay v. Noia*.[193]

Three years after *Townsend*, Congress amended the federal habeas corpus statute[194] and included among the changes a list of eight situations in which a presumption arises that state court factual determinations are incorrect.[195] In § 2254(d), Congress incorporated several of the situations discussed in the Court's *Townsend* opinion. Specifically, § 2254(d)(3) mirrored the circumstances described by the fifth scenario in the *Townsend* list.

B. *The* Tamayo-Reyes *Decision*

In the twenty-seven years since Congress amended the habeas statute to include the *Townsend* criteria, the Court's membership has changed considerably. A majority of the Rehnquist Court, in sharp contrast to the Warren

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[192] *Id.* at 317.

[193] 372 U.S. 391 (1963). *See Townsend*, 372 U.S. at 317.

[194] *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1104 (1966).

[195] *See* 28 U.S.C. § 2254(d), which provides in pertinent part:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court . . . shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

28 U.S.C. § 2254(d) (1989) (as amended).

Court, favors the use of openly activist positions to advance a markedly conservative approach in the context of criminal procedure.[196] In *Keeney v. Tamayo-Reyes*,[197] the Court adopted an activist stance and imposed restrictions on the availability of federal habeas corpus relief despite statutory language to the contrary.

Jose Tamayo-Reyes, a Cuban immigrant, spoke almost no English. In 1984, he was charged with murder after allegedly stabbing a man who intervened in a fight between Tamayo-Reyes and his girlfriend.[198] The State provided Tamayo-Reyes with an attorney and an interpreter, and the attorney recommended that he plead *nolo contendere* to first-degree manslaughter.[199] He signed a form that explained, in English, the rights that he was waiving. With his court-appointed attorney and his interpreter present, he entered his plea.[200] At the plea hearing, the judge explained to Tamayo-Reyes, with the aid of the interpreter, the rights that he was waiving and the consequences of his plea.[201] Tamayo-Reyes indicated that he understood his rights and the judge accepted the *nolo contendere* plea.[202]

Tamayo-Reyes later challenged the constitutionality of the plea in a state habeas corpus proceeding. He contended that he had not knowingly and intelligently made the plea because the interpreter had not accurately translated the *mens rea* element of manslaughter.[203] He claimed that he thought that he was agreeing to be tried for this charge.[204] The state court held a hearing and dismissed Tamayo-Reyes' petition for habeas relief, stating that the interpreter correctly translated the attorney's explanations.[205] The state court of appeals affirmed the dismissal, and the state supreme court denied review.[206]

Tamayo-Reyes then filed a petition for federal habeas corpus relief. In this petition, he claimed that the material facts concerning the translation were not adequately developed at the state-court hearing. He argued that the failure to develop the facts that supported his constitutional claim was not due to inex-

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[196] It is true that the Warren Court used activist means to further its own agenda. A major difference between the Warren and Rehnquist Courts, however, is that while both used judicial activism to advance their positions, the former sought to advance liberal goals. Indeed, it is beyond dispute that the Warren Court used "an approach to judicial review that focused on aggressive judicial protection of certain rights" and "viewed its role especially as assuring the just functioning of the democratic process." Chemerinsky, *supra* note 10, at 50-51. For more on judicial activism and the Rehnquist Court, *see infra* Section V.

[197] 112 S. Ct. 1715 (1992).

[198] *Id.* at 1716.

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.* at 1716-1717.

[206] *Id.* at 1717.

cusable neglect. He claimed, therefore, that the fifth situation discussed in *Townsend v. Sain*[207] required a federal evidentiary hearing on the issue of whether his plea was unconstitutional.[208] The United States District Court for the District of Oregon held that Tamayo-Reyes' failure to develop the facts material to his federal claim was due to inexcusable neglect and that no hearing was required.[209]

The United States Court of Appeals for the Ninth Circuit stated that if Tamayo-Reyes' claim were true, the interpreter's failure to translate properly the *mens rea* element of the charge would serve as an adequate basis for overturning the plea.[210] The court found that Tamayo-Reyes' attorney erred in not adequately developing the material facts in the state habeas proceeding. It held that *Townsend* and *Fay v. Noia*[211] required that an evidentiary hearing be held because Tamayo-Reyes had not deliberately bypassed the state court procedures.[212] The United States Supreme Court granted certiorari to determine "whether the deliberate bypass standard is the correct standard for excusing a habeas petitioner's failure to develop a material fact in state-court proceedings."[213]

Justice White, writing for the majority, characterized this case as one dealing with a habeas petitioner's procedural default and stated that the Court of Appeals incorrectly applied the "deliberate bypass" standard of *Fay*.[214] He asserted that this mistake was due to the fact that the holding of *Townsend*—that the "deliberate bypass" standard was to be applied to cases such as the one before the Court—had never been reversed.[215]

Justice White discussed some of the major cases decided since *Townsend* and identified each of these cases as dealing with the "cause and prejudice" standard and its application to different areas of federal habeas law. In particular, Justice White cited *Francis v. Henderson*,[216] *Wainwright v. Sykes*,[217] and *Engle v. Isaac*[218] to support his argument that the "cause and prejudice" standard, rather than the "deliberate bypass" standard, was applicable in cases of procedural default.[219] Justice White also cited the Court's recent decisions in *McCleskey* and *Coleman* to reinforce his argument that the "cause and

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[207] 372 U.S. 293 (1963). *See supra* text accompanying notes 182-193; *see also* 28 U.S.C. § 2254(d)(3) (1989) (as amended).

[208] *Tamayo-Reyes*, 112 S. Ct. at 1717.

[209] *Id.*

[210] *Id.*

[211] 372 U.S. 391 (1963).

[212] *Tamayo-Reyes*, 112 S. Ct. at 1717.

[213] *Id.*

[214] *Id.* at 1717-1718.

[215] *Id.* at 1717.

[216] 425 U.S. 536 (1976). *See supra* text accompanying notes 25-29.

[217] 433 U.S. 72 (1977). *See supra* text accompanying notes 39-48.

[218] 456 U.S. 107 (1982). *See supra* text accompanying notes 49-53.

[219] *Tamayo-Reyes*, 112 S. Ct. at 1718.

prejudice" standard should be applied uniformly in habeas cases.[220] He then contended that

> [i]n light of these decisions, it is . . . irrational to distinguish between failing to properly assert a federal claim in state court and failing in state court to properly develop such a claim, and to apply to the latter a remnant of a decision that is no longer upheld with regard to the former.[221]

Accordingly, Justice White applied the "cause and prejudice" standard to the case before the Court and overruled that portion of *Townsend* that applied the "deliberate bypass" standard to a habeas petitioner's failure to develop a material fact in a state habeas proceeding.[222]

To support the adoption of the "cause and prejudice" standard in this context, Justice White relied on previously cited concerns of finality, comity, and judicial economy, and the need to resolve claims in the appropriate forum.[223] Justice White also contended that the use of the "cause and prejudice" standard in this case would promote uniformity in the law of habeas corpus.[224] He wrote that "[t]here is no good reason to maintain in one area of habeas law a standard that has been rejected in the area in which it was principally enunciated."[225]

Finally, Justice White rejected the argument, espoused by Justice O'Connor in her dissenting opinion, that § 2254(d) codified all aspects of the *Townsend* decision.[226] He claimed that whereas *Townsend* described circumstances in which evidentiary hearings would be required, § 2254(d) provided exceptions to the presumption that state-court findings were correct. These issues, according to Justice White, are distinct and should not be confused with one another.[227]

In her dissenting opinion, Justice O'Connor gave two reasons for rejecting the Court's adoption of the "cause and prejudice" standard in this case. First, she argued that the state and federal interests involved in a federal court's decision to consider a habeas petition should not control the decision to hold an evidentiary hearing.[228] According to Justice O'Connor, the interests advanced when federal courts decline to consider habeas petitions—finality, federalism, and comity—are not implicated to the same degree when habeas courts conduct evidentiary hearings during collateral review.[229]

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[220] *Id.* at 1718-1719.

[221] *Id.* at 1719.

[222] *Id.* at 1717.

[223] *Id.* at 1719-1720.

[224] *Id.* at 1720.

[225] *Id.*

[226] *Id.* at 1720 n.5.

[227] *Id.*

[228] *Id.* at 1721 (O'Connor, J., dissenting).

[229] *Id.* at 1725 (O'Connor, J., dissenting). This argument is instructive, for it indicates why Justice O'Connor, who sided with the majority in *Coleman* and *McCleskey*, dissented in this case.

Second, Justice O'Connor argued that Congress' enactment of § 2254(d) embraced the broader circumstances discussed in *Townsend*. After recognizing that this section did not precisely codify that case's holding,[230] she argued that the circumstances discussed in the statute and in *Townsend* are nonetheless "obviously intertwined" and "work hand in hand."[231] She argued that the majority's adoption of the "cause and prejudice" standard, and overruling of the portion of *Townsend* reflected in § 2254(d)(3), frustrated congressional intent to the contrary.[232] Viewed from this perspective, *Townsend* altered a position presumed to be foreclosed by statute for over twenty years.

V. CRITICISM OF *COLEMAN*, *MCCLESKEY*, AND *TAMAYO-REYES*

The Court's decisions in *Coleman*, *McCleskey*, and *Tamayo-Reyes* provide striking illustrations of the activist stance adopted by the Rehnquist Court. By changing the standards by which habeas petitions will be reviewed, the Court has exceeded the bounds of its power and has dramatically altered federal habeas jurisprudence. The activism with which the Court made these changes is contrary to the doctrine of separation of powers. Moreover, the Court has greatly restricted the access to federal courts required by state prisoners seeking redress for violations of their constitutional rights. These activist decisions, through the doctrine of *stare decisis*, impose upon the federal courts a restrictive view of habeas corpus. Finally, the Court's interpretation of federal habeas corpus may establish a narrow definition of this concept that some members of Congress may utilize when proposing amendments to the federal habeas statute.

A. *Judicial Activism*

Judges, professors, and law students frequently use the terms "judicial activism" and "judicial self-restraint"[233] without defining precisely what is meant by these terms; perhaps they assume that the definitions are universally understood and accepted.[234] Despite this problem, general notions of what constitutes both "judicial activism" and "judicial self-restraint" can be articulated. Traits that characterize a judge as favoring judicial self-restraint include: respect for the roles intended for the separate branches of the federal

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[230] *Id.* at 1726 (O'Connor, J., dissenting).

[231] *Id.* (O'Connor, J., dissenting).

[232] *Id.* (O'Connor, J., dissenting).

[233] The terms "judicial self-restraint" and "judicial restraint" are intended to have the same meaning in this Note and will be used interchangeably throughout.

[234] It seems that the better approach when using these terms is to define them, so that a clear understanding of what is intended by their use in a given context may be gained. *See* Mikva, *supra* note 10, at 979 ("judicial activism" is used "to describe the decisional process by which judges fill in the gaps that they perceive in a statute or the ambiguities that they find in a constitutional phrase"); *see also* POSNER, *supra* note 10, at 198.

government and deference to decisions of the executive and legislature,[235] strict adherence to statutory language and legislative intent, respect for precedent and for the doctrine of *stare decisis*, and a refusal to be influenced by personally held moral and political beliefs. An activist judge, by contrast, is one who exhibits characteristics diametrically opposed to those listed.

Coleman, *McCleskey*, and *Tamayo-Reyes* share one feature that marks their holdings as activist—each decision demonstrates a disregard for the separation of the powers doctrine. Rather than sit as a reviewing body in these cases, the Court redefined an area of law traditionally governed by statute. This point is illustrated in *McCleskey*, wherein the Court adopted the "cause and prejudice" standard despite clear legislative intent and statutory language codifying the good-faith "deliberate abandonment" standard of *Sanders*.[236] The activist nature of these decisions represents what one commentator has called a "loss of principled adjudication."[237] By adopting an activist stance, the Court ignored the principles that guide its functions.[238] The Court should leave to Congress the task of amending the habeas statute, for even if the Court disagrees with the current scope of habeas relief, "judicial restraint is valuable even when it produces 'incorrect' substantive decisions because it respects the process of democratic decisionmaking embodied in legislative enactments."[239]

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[235] Particularly useful is Judge Posner's definition of "separation-of-powers judicial self-restraint," a concept that he labels "structural restraint." He defines this term as "the judge's trying to limit his court's power over other government institutions. If he is a federal judge he will want federal courts to pay greater deference to decisions of Congress, of the federal administrative agencies, of the executive branch, and of all branches and levels of state government." POSNER, *supra* note 10, at 208. Judge Posner notes that

> [s]tructural restraint is not a liberal or conservative position, because it is independent of the policies that the other institutions of government happen to be following. It will produce liberal or conservative outcomes depending on whether the courts in question are at the moment more or less liberal than those institutions.

Id. at 208-209 (footnote omitted).

[236] *See* Justice Marshall's criticism of the *McCleskey* decision, *supra* text accompanying notes 170-181.

[237] *See* Patchel, *supra* note 14, at 1028-1046; *see also* POSNER, *supra* note 10, at 199-207.

[238] *Cf.* Chemerinsky, *supra* note 10, at 48. In his discussion of the principles that guided the Rehnquist Court during the 1988 Term, Professor Chemerinsky notes that "[i]f a jurisprudential theme can be identified, it is the Court's search for judicial neutrality," which is defined as "a desire for a method of judging that excludes the personal preferences of the Justices from the decisionmaking process." *Id.* at 48 and n.14.

It may be asked whether in *Coleman*, *McCleskey*, and *Tamayo-Reyes* the Court's conservative members allowed themselves to be influenced by their personal preferences regarding the need for and desirability of federal habeas relief for state prisoners. Given the results in these cases, one may wonder whether Professor Chemerinsky's characterization is correct.

[239] David L. Anderson, Note, *When Restraint Requires Activism: Partisan Gerry-*

The decisions in these three cases also demonstrate the Court's disregard for the doctrine of *stare decisis*.[240] In each case, despite the existence of precedent to the contrary, the Court replaced the governing standard of review with the restrictive "cause and prejudice" standard.[241] Such *ad hoc* judicial legislation undermines the tripartite framework upon which the federal government is based.

When discussing judicial activism in the context of these decisions, several questions arise: Is judicial activism only wrong when it limits individual rights, or is it always wrong? Does the answer to this question depend upon which rights are limited? Is activism acceptable when it serves liberal, as opposed to conservative, goals? If so, does that mean *Brown v. Board of Education*[242] and *Roe v. Wade*[243] are acceptable because of their results, despite being clearly activist decisions? Do we forgive the *Brown* and *Roe* Courts for their activism? If so, can we forgive the Rehnquist Court for *Coleman*, *McCleskey*, and *Tamayo-Reyes*?

There are, of course, no universally accepted answers to these questions. Nevertheless, it is important to recognize that they may represent legitimate concerns to persons who support the Rehnquist Court's jurisprudential vision.

B. *Federal Habeas Jurisprudence*

The *Coleman*, *McCleskey*, and *Tamayo-Reyes* decisions will likely curtail state prisoners' ability to obtain federal habeas relief. The Court has narrowed the availability of such relief to the point where the likelihood of a writ of habeas corpus being granted is so small as to be effectively nonexistent. Indeed, the Court's activism has resulted in the exaltation of state procedural rules over prisoners' constitutional rights. One author has argued that this

> lack of concern for the interests of petitioners and for the impact that changing the applicable rules and procedures mid-stream has on these individuals stands in stark contrast to the concern for certainty and protection of reliance interests with regard to the states and their criminal

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mandering and the Status Quo Ante, 42 STAN. L. REV. 1549, 1561 (1990).

[240] One commentator has noted that

> [j]udicial activism and judicial restraint are defined in part by the Court's respect for *stare decisis* . . . . Traditionally, that doctrine applies with its fullest force to statutory interpretation, especially to long standing constructions. Because it is easier for Congress to change the law than for the nation to amend the Constitution, the Court may honor the values of stare decisis in statutory cases without worrying that error cannot be otherwise corrected.

Brian K. Landsberg, *Race and the Rehnquist Court*, 66 TUL. L. REV. 1267, 1317 (1992). From the decisions in these cases, it appears that certain members of the Court do not wish to wait for Congress to "correct" the habeas statute.

[241] *See* Patchel, *supra* note 14, at 1034.

[242] 347 U.S. 483 (1954).

[243] 410 U.S. 113 (1973).

procedures that the Court expresses in [its] decisions.[244]

With the adoption of a more stringent standard of review, fewer petitions will conform to the Court's requirements. Thus, fewer meritorious claims will be heard, and fewer constitutional violations will be remedied.

The Court has similarly placed concerns for finality of litigation and federalism over the need to assure that habeas petitioners will be given adequate opportunities to address violations of their constitutional rights.[245] With the addition of these cases to federal habeas jurisprudence, form is elevated over substance.[246] As a result of the recent decisions, many more capital petitioners will be executed without having had their claims reviewed by a federal court, and countless non-capital petitioners will remain in prison even if their claims plainly deserve attention.

C. *Federal Courts*

The Court's adoption of the "cause and prejudice" standard will influence lower federal judges' treatment of state prisoners' habeas petitions.[247] Indeed, lower federal courts have already cited *McCleskey* and *Coleman* numerous times as authority to deny state prisoners federal habeas relief.[248] This fact

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[244] Patchel, *supra* note 14, at 1045 (footnote omitted).

[245] *See, e.g., Coleman*, 111 S. Ct. at 2565; *McCleskey*, 111 S. Ct. at 1468.

[246] *See generally* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988) (arguing that courts should treat the habeas petition as an appeal and that the complicated current doctrine should be replaced with well-known appellate procedures, thereby striking an appropriate balance between competing interests).

[247] To be consistent, I must agree with the proposition that the Court's decisions in the three cases at issue deserve respect from the lower federal courts under the doctrine of *stare decisis*. Nevertheless, I maintain my disagreement with both the results in these cases and the ways in which the Court reached them, and hope that Congress will correct what the Court has done.

[248] *McCleskey* has been cited as controlling authority in Austin v. Thomas, No. 92-15175, 1992 U.S. App. LEXIS 33999 (9th Cir. Dec. 14, 1992); Johnson v. Hargett, 978 F.2d 855 (5th Cir. 1992); Andrews v. Deland, 943 F.2d 1162 (10th Cir. 1991); Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991); Jones v. Whitley, 938 F.2d 536 (5th Cir. 1991); Woods v. Whitley, 933 F.2d 321 (5th Cir. 1991); Cuevas v. Collins, 932 F.2d 1078 (5th Cir. 1991); Kirsh v. Michetti, 787 F. Supp. 403 (S.D.N.Y. 1992); Wheeler v. Whitley, No. 91-2211, 1992 U.S. Dist. LEXIS 3450 (E.D. La. March 12, 1992); Turnpaugh v. Johnson, 780 F. Supp. 476 (E.D. Mich. 1992).

Coleman has been similarly cited in Maynard v. Lockhart, No. 92-1090, 1992 U.S. App. LEXIS 32437 (8th Cir. Dec. 14, 1992); Satter v. Leaply, 977 F.2d 1259 (8th Cir. 1992); Nickerson v. Lee, 971 F.2d 1125 (4th Cir. 1992); Rapheld v. Delo, 940 F.2d 324 (8th Cir. 1991); Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991); Young v. Herring, 938 F.2d 543 (5th Cir. 1991); Quirama v. Mitchele, 791 F. Supp. 82 (S.D.N.Y. 1992); Player v. Berry, 785 F. Supp. 339 (E.D.N.Y. 1992); Owes v. Gullian, No. 89-0546-T-C, 1992 U.S. Dist. LEXIS 2810 (S.D. Ala. Feb. 4, 1992); Gibson v. McGinnis, 773 F. Supp. 126 (C.D. Ill. 1991); Pruett v. Thompson, 771 F. Supp. 1428 (E.D. Va. 1991); Lloyd v. Walker, 771 F. Supp. 570 (E.D.N.Y. 1991).

demonstrates that Justices Blackmun and Marshall accurately predicted the significant impact of these decisions.

Not all federal judges have agreed with the Court's approach to habeas relief. Shortly after the Court decided *Coleman* and *McCleskey*, its restrictive habeas jurisprudence was the subject of a stinging criticism by Chief Judge Oakes of the United States Court of Appeals for the Second Circuit. In his concurring opinion in *Gonzalez v. Sullivan*,[249] Chief Judge Oakes expressed his displeasure with the recent developments in federal habeas jurisprudence:

> What a marvelous Catch-22 the law of federal habeas corpus now is! You lose in state court because your counsel did not make a timely objection. Your federal habeas petition is barred because no "objective factor external to the defense impeded [your] counsel's efforts to comply with the State's procedural rule," and you therefore cannot show "cause" and "prejudice" under *Wainwright v. Sykes*. And, since you have not raised the point that your trial counsel's default was incompetency, that issue cannot be considered by the federal court. But if it is raised in a subsequent petition, it will be considered an abuse of the writ, because it was not raised previously.[250]

Fortunately, the entire federal judiciary does not agree with the Court's conservative view of habeas corpus. However, despite the lack of unanimous support, the entire federal court system, much like Chief Judge Oakes,[251] is bound by the decisions of the Supreme Court.

D. *Congress*

In the cases that led to *Coleman*, *McCleskey*, and *Tamayo-Reyes*, the Court construed the federal habeas statute narrowly. By doing so, it influenced the ways in which some members of Congress viewed both the need for and desirability of habeas relief. In 1991, members of both houses of Congress introduced legislation that would sharply curb the availability of federal habeas relief for both capital and non-capital petitioners. Examples of the proposed changes include: a one-year statute of limitations for filing petitions;[252] a

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[249] 934 F.2d 419 (2d Cir. 1991).

[250] *Id.* at 424-425 (Oakes, C.J., concurring) (citations omitted).

[251] Chief Judge Oakes stated that he joined in the *Gonzalez* majority's judgment solely because he was bound by the Supreme Court's decisions. *Id.* at 426 (Oakes, C.J., concurring).

[252] *See* H.R. 365, 102d Cong., 1st Sess. § 211 (1991); H.R. 1400, 102d Cong., 1st Sess. § 202 (1991). Both of these bills provide in pertinent part:

> Section 2244 of title 28, United States Code, is amended by adding at the end thereof the following new subsection:
>
> "(d) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The period of limitation shall run from the latest of the following times:
>
> (1) the time at which the State remedies are exhausted;
>
> (2) the time at which the impediment to filing an application created by State

180-day statute of limitations for the filing of petitions by capital petitioners;[253] a codification of the retroactivity test found in *Teague v. Lane*[254] and its progeny;[255] and a strict version of the "cause and prejudice" standard for procedural defaults.[256]

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action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

(3) the time at which the Federal right asserted was initially recognized by the Supreme Court, where the right has been newly recognized and is retroactively applicable; or

(4) the time at which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence."

H.R. 1400, § 202.

[253] *Compare* S. 620, 102d Cong., 1st Sess. § 2 (1991) *and* H.R. 365, 102d Cong., 1st Sess. § 201 (1991) (both bills provide for statute of limitations for capital petitioners only if the state has a statutory scheme for the appointment of "collateral counsel") *with* H.R. 18, 102d Cong., 1st Sess. § 2 (1991) (provides for same statute of limitations but treats all capital petitioners alike, regardless of whether the state has provided counsel).

For an argument challenging the constitutionality of such a statute of limitations, *see* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451 (1990-1991).

[254] 489 U.S. 288 (1989). *See supra* note 66.

[255] *See* H.R. 18, 102d Cong., 1st Sess. § 6 (1991), which provides in pertinent part:

Chapter 153 of title 28, United States Code, is amended by adding at the end the following:

"2256. Law applicable

(a) In an action filed under this chapter, the court shall apply a new rule only if the new rule—

(1) places the claimant's conduct beyond the power of the criminal lawmaking authority to proscribe or punish with the sanction imposed; or

(2) requires the observance of proceedings without which the likelihood of an accurate conviction is seriously diminished.

(b) For purposes of this section, the term "new rule" means a sharp break from precedent announced by the Supreme Court of the United States that explicitly and substantially changes the law from that governing at the time the claimant's sentence became final. A rule is not new merely because, based on precedent existing before the rule's announcement, it was susceptible to debate among reasonable minds."

H.R. 18, § 6.

[256] *See* H.R. 18, 102d Cong., 1st Sess. § 7 (1991), which would have added to 28 U.S.C. § 2254 the following:

(h) A district court shall decline to consider a claim under this section if—

(1)(A) the applicant previously failed to raise the claim in State court at the time and in the manner prescribed by State law;

(B) the State courts, for that reason, refused to entertain the claim; and

(C) such refusal would constitute an adequate and independent State law ground that would foreclose direct review of the State court judgment in the

The bills' use of language from the Court's decisions suggests that the Court may define the way some members of Congress view federal habeas corpus and the need to restrict further the availability of relief. The Court's three latest opinions may influence congressional attitudes. In addition, with the recent inauguration of Bill Clinton as the forty-second President of the United States, legislation reforming habeas corpus may be enacted sometime in the near future. President Clinton supports gun control, anti-crime legislation, and limiting prisoners to one habeas corpus review while expanding the availability of court-appointed counsel for criminal defendants.[257] Therefore, it seems unlikely that he will veto legislation that curbs the availability of federal habeas relief for state prisoners.

VI. CONCLUSION

Since the early 1960s, the United States Supreme Court has decided several difficult cases that have defined the scope of the availability of federal habeas corpus relief for state prisoners. In recent years, an increasingly activist Court has disregarded established law in order to advance a conservative agenda. In so doing, the Court has demonstrated its lack of respect for precedent, for the rights of prisoners who seek writs of habeas corpus, and for the traditional role of the Court in our constitutional democracy.

Supreme Court of the United States; and

(2) the applicant fails to show cause for the failure to raise the claim in State court and prejudice to the applicant's right to fair proceedings or to an accurate outcome resulting from the alleged violation of the Federal right asserted, or that failure to consider the claim would result in a miscarriage of justice.

(3) The court shall not find cause in any case in which it appears that the applicant or counsel deliberately withheld a known claim from the State courts for strategic purposes. An applicant may establish cause by showing that—

(A) the factual or legal basis of the claim—

(i) could not have been discovered by the exercise of reasonable diligence before the applicant could have raised the claim in State court, or

(ii) was not discovered or asserted due to ignorance or neglect of the applicant's counsel;

(B) the claim relies on a decision of the United States Supreme Court, announced after the applicant might have raised the claim in State court;

(C) the failure to raise the claim in State court was due to interference by State officials; or

(D) the failure to raise the claim was due to counsel's ineffective assistance in violation of the United States Constitution.

H.R. 18, § 7.

[257] *See generally The Executioner Sings, Again and Again*, U.S. NEWS & WORLD REP., Feb. 8, 1993, at 13.

With its decisions in *Coleman v. Thompson*,[258] *McCleskey v. Zant*,[259] and *Keeney v. Tamayo-Reyes*,[260] the conservative majority of the Rehnquist Court sharply curtailed the availability of federal habeas corpus relief. The Court's activism in these cases is ironic, for conservative jurists such as Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas have advocated for judicial restraint and adherence to precedent in other settings.[261] More importantly, this activism has significantly damaged the doctrines of judicial self-restraint, *stare decisis*, and separation of powers.

In the end, however, the greatest harm from these decisions will fall upon state prisoners who are refused federal habeas relief. They will have to contend with the bitter reality that their petitions were denied not because their convictions were correct or because their constitutional rights were not violated, but because the Supreme Court deems their plight to be less important than the principle of finality of litigation and the concerns for comity and federalism.

Warren McCleskey was executed on September 25, 1991,[262] and Roger Keith Coleman was executed on May 20, 1992.[263] The results of the decisions bearing their names and that of Jose Tamayo-Reyes, however, will be felt by an untold number of prisoners. These unfortunate victims, like the stature of the federal judiciary itself, will continue to suffer from the Court's unabashed activism.

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[258] 111 S. Ct. 2546 (1991).

[259] 111 S. Ct. 1454 (1991).

[260] 112 S. Ct. 1715 (1992).

[261] *See, e.g.*, Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2855-2873 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); Hudson v. McMillian, 112 S. Ct. 995, 1004-1011 (1992) (Thomas, J., dissenting); Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 292-301 (1990) (Scalia, J., concurring); American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 200-205 (1990) (Scalia, J., concurring in the judgment); Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 489-525 (1979) (Rehnquist, J., dissenting).

[262] *See* Peter Applebome, *Georgia Inmate Is Executed After "Chaotic" Legal Move*, N.Y. TIMES, Sept. 26, 1991, at A18. The Court denied McCleskey's application for a stay of execution, over the dissents of Justices Marshall, Blackmun, and Stevens. McCleskey v. Bowers, 112 S. Ct. 38 (1991) (memorandum decision).

[263] *See* Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. TIMES, May 21, 1992, at A20. The Court denied Coleman's application for a stay of execution. Coleman v. Thompson, 112 S. Ct. 1845 (1992). Justice Blackmun filed a dissenting opinion, *id.* at 1845-1846, and Justice Souter would have granted the application. *Id.* at 1846.