NOTES

SECTION 1983 & THE AGE OF INNOCENCE: THE SUPREME COURT CARVES A PROCEDURAL LOOPHOLE FOR POST-CONVICTION DNA TESTING IN *SKINNER V. SWITZER*

GABRIEL A. CARRERA*

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* Articles Editor, *American University Law Review*, Volume 61; J.D. Candidate, May 2012, *American University, Washington College of Law*; B.A., Criminology & Criminal Justice, 2007, *University of Maryland*. I would like to thank Professor Stephen Vladeck for his advice and for schooling me on federal habeas corpus and post-conviction remedies. Next, I would like to thank the *American University Law Review* editors and staff members whose hard work, input, and helpful edits brought this Note to publication; and special thanks to Mary Gardner, Jim Turner, and Chris Walsh for your suggestions and encouragement throughout the process. Also, big thanks to Stephen Chuk, Ru-dy! Ru-dy! Ru-dy! Thank you to my friends and family for their continued support. And Kelsey, you are my rock, and I would be nothing without the patience, encouragement, love, and support you provide me every day.

INTRODUCTION

The Innocence Project estimates that at least 20,000 men and women are currently incarcerated for crimes they did not commit.[1] The combination of scientific progress and the zealous advocacy of attorneys has helped begin to remedy this injustice: to date, 273 men and women have been exonerated through post-conviction DNA testing.[2]

Notwithstanding these exonerations, inmates still face great difficulties gaining access to untested DNA evidence.[3] Today, the two options inmates may use to obtain DNA evidence at the federal level are a habeas corpus petition pursuant to 28 U.S.C. § 2254[4] or a civil rights action pursuant to 42 U.S.C. § 1983.[5] The United States Supreme Court has attempted to carve out distinctions between these options so that § 1983 is not used when habeas is more appropriate.[6] Those distinctions, however, produced a circuit split regarding whether § 1983 requests for post-conviction DNA evidence should succeed.[7] The Court's recent decision in *Skinner v. Switzer*,[8] resolved

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1. *See* INNOCENCE PROJECT, 200 EXONERATED, TOO MANY WRONGFULLY CONVICTED 43 n.1, http://www.innocenceproject.org/200/ip_200.pdf (last visited Oct. 26, 2011) (explaining how current research by several professors was used to reach the estimated number of innocent men and women behind bars).

2. *Know the Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/know/ (last visited Oct. 18, 2011) (reviewing the Innocence Project's case profiles and providing statistics regarding exonerations since the advent of DNA testing).

3. *See* David A. Schumacher, Comment, *Post-Conviction Access to DNA Testing: The Federal Government Does Not Offer an Adequate Solution, Leaving the States to Remedy the Situation*, 57 CATH. U. L. REV. 1245, 1246 (2008) (referring to the quest for DNA evidence as "an almost insurmountable uphill climb"). As one example of how difficult this can be, "the State of Virginia only recently removed a rule that granted defendants a time period of merely *twenty-one days* after sentencing is finalized to present new evidence." *See* Jason Borenstein, *DNA in the Legal System: The Benefits Are Clear, The Problems Aren't Always*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 847, 860 n.91 (2006).

4. *See* 28 U.S.C. § 2254 (2006) (allowing prisoners to challenge their convictions under the Constitution based on a misapplication of the facts).

5. *See* 42 U.S.C. § 1983 (2006) (providing a remedy in federal court when state courts fail to adequately protect federal rights).

6. *See* Note, *Defining the Reach of* Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 868–69 (2008) (discussing how the Supreme Court has dealt with the overlapping nature of the two legal remedies over time).

7. *Compare* McKithen v. Brown, 481 F.3d 89, 102 (2d Cir. 2007) (concluding that a prisoner's § 1983 claim is proper even if success on the claim might indicate a wrongful conviction), *and* Savory v. Lyons, 469 F.3d 667, 672 (7th Cir. 2006) (holding a post-conviction DNA § 1983 claim did not necessarily imply the invalidity of the prisoner's sentence although success might afford the prisoner an opportunity to use

the split and held that § 1983 requests for post-conviction DNA testing are proper.[9]

Part I of this Note discusses post-conviction access to DNA evidence, describes the facts and procedural history of *Skinner*, and examines the Court's decision and dissent in *Skinner*. Specifically, Part I focuses on the Court's restriction of the issue to § 1983 and the concerns of dissenting Justice Thomas that these claims are only appropriate in habeas corpus claims. Part II argues that allowing § 1983 access would not have been necessary if the Court recognized a freestanding actual innocence claim. Finally, this Note analyzes how current restrictions to federal habeas corpus render a prisoner's ability to seek post-conviction DNA evidence unworkable and argues that § 1983 access was a necessary procedural loophole to remedy those restrictions.

I. BACKGROUND

A. Overview of Post-Conviction Access to DNA Evidence Through Federal Habeas Corpus and § 1983

Today, convicted prisoners seeking post-conviction access to DNA evidence may pursue relief through two avenues. The first option is to use the narrow federal habeas corpus statute, which permits prisoners to challenge their detention after being convicted.[10] The other option is § 1983, a broad federal statute that provides a remedy for individuals alleging a variety of constitutional and federal civil rights violations by persons acting under color of state law.[11] Because

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the results of the DNA testing in a future proceeding), *and* Bradley v. Pryor, 305 F.3d 1287, 1290–91 (11th Cir. 2002) (allowing a § 1983 claim for post-conviction DNA testing because granting a prisoner access to DNA evidence does not necessarily imply the invalidity of his sentence), *with* Kutzner v. Montgomery Cnty., 303 F.3d 339, 340–41 (5th Cir. 2002) (per curiam) (rejecting a § 1983 claim for post-conviction DNA evidence access because the evidence is entwined with the factual findings underlying the conviction), *abrogated by* Skinner v. Switzer, 131 S. Ct. 1289 (2011), *and* Harvey v. Horan, 278 F.3d 370, 378 (4th Cir. 2002) (denying a prisoner's § 1983 claim because he was using it as a discovery device to overturn his state conviction), *abrogated by* Skinner v. Switzer, 131 S. Ct. 1289 (2011).

8. 131 S. Ct. 1289 (2011).

9. *Id.* at 1298–99.

10. *See* 28 U.S.C. § 2254 (2006); Preiser v. Rodriguez, 411 U.S. 475, 484 (1973) (presenting a historical context of habeas corpus as a means of securing freedom from a purportedly illegal incarceration).

11. *See* 42 U.S.C. § 1983 (2006) (providing that any person acting under the color of law who deprives a U.S. citizen or any person within the U.S. of any right or privilege under the Constitution or its laws shall be held liable); Ian D. Forsythe, *A Guide to Civil Rights Liability Under 42 U.S.C. § 1983: An Overview of Supreme Court and Eleventh Circuit Precedent*, CONSTITUTION SOC'Y, http://www.constitution.org/brief/forsythe_42-1983.htm (last visited Oct. 26, 2011) (outlining the history, elements,

§ 1983 is civil in nature, it allows prisoners to request different types of relief, including injunctions, damages, and declaratory relief.[12] Unlike in habeas claims, prisoners generally are not required to exhaust state remedies under § 1983.[13] Additionally, § 1983 claims are not subject to the strict time limitations and rules against successive filings that characterize the federal habeas statute.[14]

The two statutes overlap when a criminal convicted in state court challenges the constitutionality of his conviction or sentence in federal court because both statutes provide constitutional remedies for constitutional violations.[15] The Court attempted to clarify this apparent overlap in *Heck v. Humphrey*,[16] holding that convicted prisoners could not properly proceed under § 1983 if the defendant requested relief that would "necessarily imply the invalidity of his conviction or sentence." Such a request, the Court explained, required a habeas analysis.[17] However, within the context of DNA evidence, § 1983 access may or may not "necessarily impl[y]" the invalidity of the prisoner's criminal conviction.[18] That question was left open until the Court granted certiorari in *Skinner v. Switzer*.

B. Skinner v. Switzer*: Facts and Procedural History*

On New Year's Eve 1993, Henry "Hank" Skinner ingested codeine pills and large amounts of alcohol instead of preparing to attend a party with his then-girlfriend Twila Busby.[19] When their friend, Howard Mitchell, arrived at Skinner's home at 10:15 p.m., he tried to wake Skinner, but Skinner was "kind of comatose," unconscious on the couch, and unresponsive to shouting or shaking.[20] After waiting for fifteen minutes, Mitchell and Busby left for the party without

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and defenses pertaining to § 1983 claims).

12. Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 587–90 (2004) (explaining that a successful habeas suit would secure release from prison while a § 1983 claim would not).

13. Eric Despotes, Comment, *The Evidentiary Watershed: Recognizing a Post-Conviction Constitutional Right to Access DNA Evidence Under 42 U.S.C. § 1983*, 49 SANTA CLARA L. REV. 821, 824–25 (2009) (explaining the ways § 1983 claims are less restrictive than habeas petitions).

14. *Id.* at 825–26.

15. *See* Note, *supra* note 6, at 868 (explaining that the overlap between the two statutes led to the Supreme Court having to decide whether they were interchangeable when a state prisoner challenges his conviction or confinement).

16. 512 U.S. 477 (1994).

17. *Id.* at 487.

18. *See* cases cited *supra* note 7 (showing the various decisions after *Heck* regarding whether post-conviction access to DNA evidence "necessarily implies" the invalidity of a prisoner's conviction).

19. Petition for Writ of Certiorari at 7–8, Skinner v. Switzer, 131 S. Ct. 1289 (2011) (No. 09-9000).

20. *Id.* at 8 (internal quotation marks omitted).

him.[21] During the party, Robert Donnell, Busby's uncle, drunkenly stalked and made crude sexual remarks to Busby.[22] Busby asked Mitchell to take her home, and when Mitchell returned to the party Donnell was no longer there.[23] Twila Busby and her two sons were later found brutally murdered.[24]

At Skinner's trial, the prosecution did not consider strong evidence that indicated Donnell was the real murderer.[25] A toxicologist gave expert testimony that Skinner was too impaired by the alcohol and codeine in his system to have had the strength to commit the murder.[26] Furthermore, a large quantity of DNA evidence that could have conclusively identified the true killer remained untested.[27] Despite an alternative suspect, evidence that Skinner likely did not possess the strength or coordination to commit the murders, and an abundance of untested DNA evidence, a jury convicted Skinner of capital murder and sentenced him to death.[28]

Beginning in 2000, Skinner requested that the district attorney grant him access to the untested DNA evidence; these requests were repeatedly denied.[29] Skinner also sought access to the evidence under Texas's post-conviction DNA statute and by filing state and federal writs for habeas corpus, but he was again denied.[30] Finally, Skinner sought post-conviction access to DNA testing using one of

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21. *Id.* at 8–9.
22. *Id.* at 11.
23. *Id.*
24. *Id.* at 7–8.
25. *See id.* at 11 (discussing Donnell's violent past behavior and his inappropriate conduct on the night of the murder).
26. *See id.* at 10 (providing that an expert at trial opined that Skinner was "at best in a 'stuporous' condition" at the time of the murders, "such that it would have required all of his physical and mental agility just to stand," and thus was not physically able to execute the murders).
27. *Id.* at 12–13 (identifying seven items that Skinner asked to be tested: vaginal swabs taken from Busby at the time of her autopsy; Busby's fingernail clippings; a knife found on the front porch of Busby's house; a knife found in a plastic bag in the living room of the same house; a dishtowel found in the same plastic bag; a windbreaker jacket found in the living room next to Busby's body; and any hairs found on Busby's hands that had not been destroyed by previous testing).
28. *Id.* at 5.
29. *Id.*
30. *See* Skinner v. Quarterman, No. 2:99-CV-0045, 2007 WL 582808, at *1 (N.D. Tex. Feb. 22, 2007) (denying petition for writ of habeas corpus in federal court), *aff'd*, 576 F.3d 214 (5th Cir. 2009); Skinner v. State, 122 S.W.3d 808, 811 (Tex. Crim. App. 2003) (denying attempts to gain access via state post-conviction procedures), *aff'd*, 293 S.W.3d 196 (Tex. Crim. App. 2009); *Ex parte* Skinner, No. 20,203-04 (Tex. Crim. App. Oct. 10, 2001) (unpublished), *available at* http://www.cca.courts.state.tx.us/opinions/EventInfo.asp?EventID=1982389 (dismissing state habeas corpus claim because of pending federal habeas corpus claim).

the last existing means available—§ 1983.[31] Nonetheless, Skinner was denied relief and faced an impending execution.[32]

The Supreme Court granted Skinner a stay less than an hour before he was scheduled to be executed.[33] The Court granted certiorari and heard oral arguments in his case on October 13, 2010.[34] The issue before the Court was whether a convicted prisoner seeking access to biological evidence for DNA testing may assert that claim in a civil rights action under § 1983, or whether such a claim may be asserted only in a petition for writ of habeas corpus.[35]

C. Skinner v. Switzer*: The Supreme Court's Decision and Justice Thomas's Dissent*

In *Skinner*, the Court measured Skinner's claim against its prior holding in *Heck v. Humphrey* that § 1983 claims are not proper if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."[36] In finding that Skinner's request for DNA *would not* "necessarily imply" the invalidity of his conviction, the Court emphasized that the test results might implicate, rather than exculpate, Skinner.[37] The respondent had argued that Skinner's *ultimate* aim in requesting DNA testing was to attack his conviction.[38] The Court responded that there was no case in which it recognized habeas as the sole remedy "where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody.'"[39]

Respondent and its amici expressed concerns about the expansion of federal jurisdiction; specifically, they predicted a surge of federal civil actions.[40] The Court, however, noted that these concerns were unwarranted for the following reasons: (1) the circuits that currently allow § 1983 claims for DNA testing have not shown any "flood or

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31. Skinner v. Switzer, 364 F. App'x 113, 113 (5th Cir. 2010) (per curiam) (citing 42 U.S.C. § 1983 (2006)).

32. *Id.* at 114; *cf.* Kutzner v. Montgomery Cnty., 303 F.3d 339, 341 (5th Cir. 2002) (holding that a § 1983 action was not the proper avenue to bring a post-conviction claim for DNA).

33. Lyle Denniston, *Execution Delayed in DNA Case*, SCOTUSBLOG (Mar. 24, 2010, 6:17 PM), http://www.scotusblog.com/2010/03/execution-delayed-in-dna-case-2/.

34. Skinner v. Switzer, 131 S. Ct. 1289, 1289, 1293 (2011).

35. *Id.* at 1293.

36. *Id.* at 1298 (quoting Heck v. Humphrey, 512 U.S. 477, 487 (1994)) (internal quotation marks omitted).

37. *Id.* (internal quotation marks omitted).

38. *Id.* at 1299 (citing Wilkinson v. Dotson, 544 U.S. 74, 86 (2005) (Scalia, J., concurring)).

39. *Id.* (quoting *Dotson*, 544 U.S. at 86 (Scalia, J., concurring)).

40. *Id.*

even rainfall" of litigation;[41] (2) the Court's recent decision in *District Attorney's Office v. Osborne*,[42] where it rejected a substantive due process basis for these types of claims, makes the toll on federal courts even more unlikely;[43] and (3) under the Prison Litigation Reform Act of 1995,[44] Congress limited prisoner suits to "prevent sportive filings in federal court."[45]

In his dissent, Justice Thomas argued that allowing § 1983 challenges like Skinner's would undermine Congress's strict limitation on federal review of state habeas decisions and contended that Skinner's claims should only be brought in habeas corpus.[46] Because collateral review procedures permit challenges to a conviction only after the conviction is final, Justice Thomas argued, procedural challenges "concern[] the validity of a conviction."[47] Furthermore, Justice Thomas emphasized that Congress has limited federal habeas challenges to state convictions and state habeas decisions because of concerns for federal-state comity, and he labeled § 1983 claims as undercutting those restrictions.[48] As a result, Justice Thomas proclaimed that the Court's decision facilitates additional § 1983 claims related to the state habeas process and allows for another "bite at the apple" after unsuccessful habeas claims.[49]

II. ANALYSIS

Section 1983 access would not have been necessary if the Court had recognized a freestanding actual innocence claim. Further, because the Court only decided the narrower issue, § 1983 access was necessary in the post-conviction DNA context due to the combination of current federal habeas restrictions. Barring § 1983 claims would leave prisoners with valid constitutional claims unable to access evidence that could conclusively establish their guilt or innocence.

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41. *Id.*
42. 129 S. Ct. 2308 (2009).
43. *Skinner*, 131 S. Ct. at 1299; *see Osborne*, 129 S. Ct. at 2321 (rejecting the extension of substantive due process to the post-conviction context and, therefore, leaving little room for a prisoner to show that the governing state law denies him due process).
44. Pub. L. No. 104-134, 110 Stat. 1321–66 (1996) (codified as amended in scattered sections of 11, 18, 28 and 42 U.S.C.).
45. *Skinner*, 131 S. Ct. at 1299.
46. *Id.* at 1302 (Thomas, J., dissenting).
47. *Id.* at 1303.
48. *Id.*
49. *Id.*

A. Section 1983 Access Would Not Have Been Necessary if the Court Had Recognized a Freestanding Actual Innocence Claim

In the future, the Court could provide a viable path for post-conviction DNA testing in federal habeas corpus claims by recognizing a freestanding actual innocence claim. In *Herrera v. Collins*,[50] the Supreme Court held that simply alleging a defendant is "actual[ly] innocen[t]" does not, by itself, make a cognizable constitutional claim.[51] Although the Court said a "truly persuasive demonstration of 'actual innocence'" could make a sufficient constitutional claim, it did not elaborate on what would be "truly persuasive."[52] By placing an extraordinarily lofty burden on a hypothetically achievable freestanding claim of innocence, the Court has rendered habeas relief a mere mysticism.[53]

Since *Herrera*, the Court has been unwilling to clarify its stance, making federal habeas actions based on actual innocence claims problematic.[54] In 2006, the Court's decision in *House v. Bell*[55] again assumed that a federal constitutional right to relief based on a showing of actual innocence exists.[56] But the Court suggested that to prevail on a claim of actual innocence, a prisoner would have to meet a substantially high bar.[57] In *Osborne*, the Court held that the freestanding actual innocence issue was still an "open question."[58] Importantly, the Court noted that if a freestanding actual innocence claim did exist, it would be brought in habeas.[59] The Court elaborated that if such a claim were subsequently found "viable," then "federal procedural rules [would] permit discovery 'for good cause.'"[60] Two months later, the Court ordered a hearing in the case of a Georgia death row inmate, Troy Davis, on the issue of "actual innocence," stating that it would violate the Eighth Amendment prohibition of cruel and unusual punishment to execute an innocent

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50. 506 U.S. 390 (1993).
51. *Id.* at 404 (internal quotation marks omitted).
52. *Id.* at 417.
53. *See* Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2950 (2010) ("For seventeen years since *Herrera* was decided in 1993, the federal courts have operated under what Justice Scalia called 'a strange regime' assuming that an actual innocence claim exists, but unsure of its status or context.").
54. *See, e.g.*, House v. Bell, 547 U.S. 518, 555 (2006) (holding that although a prisoner had "cast doubt" on his conviction, he failed to meet the "extraordinarily high" burden of a freestanding innocence claim implied in *Herrera*).
55. 547 U.S. 518 (2006).
56. *Id.* at 522.
57. *Id.*
58. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2321–22 (2009).
59. *Id.* at 2322.
60. *Id.* (citations omitted).

man, as Davis claimed to be.[61] *Skinner* afforded the Court an opportunity to clarify this ambiguous stance on claims of actual innocence; however, the Court chose to restrict its decision to the narrow § 1983 issue.[62]

By failing to resolve *Herrera* and its progeny and adopt a constitutional innocence claim in light of modern DNA testing's ability to prove innocence, the Supreme Court again demonstrated its reluctance to fully respond to scientific progress and blocked relief for prisoners trying to seek habeas relief.[63] The Court's underlying rationale in *Herrera* focused on concepts of finality and reliability that are no longer valid because of DNA's probative value.[64] *Herrera* was decided only four years after DNA evidence became available and when states were divided on how to deal with new evidence of innocence.[65] Forty-eight states have since enacted post-conviction statutes to provide relief to prisoners seeking access to DNA evidence.[66] Furthermore, DNA evidence today lasts for decades and can prove guilt or innocence more accurately than any of the traditional evidence underlying the Court's previous reliability concerns.[67]

Because finality concerns no longer exist in the post-conviction DNA context, the Court could have ensured uniformity by establishing a freestanding innocence claim in *Skinner*.[68] However, the Court chose only to decide the narrower issue and rightly held that prisoners may seek access to post-conviction DNA testing under § 1983.[69] By doing so, the Court continued to duck the larger issue and

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61. *In re* Davis, 130 S. Ct. 1, 1 (2009) (mem.).

62. *See* Skinner v. Switzer, 131 S. Ct. 1289, 1297 (2011) (explaining that the Court was only deciding whether there was federal court subject matter jurisdiction over Skinner's complaint and whether his § 1983 claims were proper).

63. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1700 (2008) (opining that if the Court had established a freestanding innocence claim in *House* and reconsidered *Herrera*, "it might have concluded that the advent of DNA testing upended the two pillars supporting the decision: reliability and finality").

64. *See id.* at 1701 (arguing that the weak evidence of innocence in *Herrera* led Justices O'Connor and Kennedy, despite their support of a freestanding innocence claim, to join the majority opinion).

65. *Id.* at 1702.

66. *Reforms by State*, INNOCENCE PROJECT, http://www.innocenceproject.org/news/LawView2.php (last visited Oct. 26, 2011).

67. *See* Garrett, *supra* note 63, at 1703 (citing Christopher H. Asplen, *Integrating DNA Technology into the Criminal Justice System*, 83 JUDICATURE 144, 146 (1999)) (describing the difference between modern DNA evidence and earlier tests' ability to establish guilt or innocence).

68. *See id.* at 1717 (arguing that the Supreme Court's conflicted reaction to modern advancements in DNA testing would be solved if it adopted a constitutional innocence claim).

69. *See* Skinner v. Switzer, 131 S. Ct. 1289, 1297 (2011) (holding that Skinner's other challenges were not ripe for consideration).

effectively rendered the existence of freestanding actual innocence claims in federal habeas corpus "as little more than false beacons of hope: claims that can be raised and argued but never, as a practical reality, won."[70]

B. The Court Created a Necessary Procedural Loophole by Allowing § 1983 Claims for Post-Conviction DNA Access Due to the Current Federal Habeas Corpus Restrictions

In 1963, Professor Paul Bator wrote a famous law review article about the scope of federal habeas corpus, and his argument became known as Bator's Process View.[71] Bator's Process View argues that the possibility the last court to hear a case could make a mistake always exists no matter how many times a prior judgment is reviewed.[72] The Process View's standard is to create a procedural model that provides "a reasoned and acceptable probability that justice will be done."[73] In applying this standard to habeas corpus, Bator's theory would ask: did the measures and processes of the state court, which previously determined the facts and applied the law, give the prisoner a full and fair opportunity to litigate his claims?[74] According to Bator, if the prisoner was given an adequate opportunity to litigate any federal claims in state court, then the federal courts should defer to previous state judgments.[75]

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) builds on Bator's Process View and presents significant procedural obstacles that hamper potential federal habeas corpus relief.[76] Specifically, the AEDPA's one-year statute of limitations and

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70. Kathleen Callahan, Note, *In Limbo:* In re Davis *and the Future of* Herrera *Innocence Claims in Federal Habeas Proceedings*, 53 ARIZ. L. REV. 629, 636 (2011).

71. *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing that federal questions in state criminal trials should only be revisited by federal courts when challenging the state's decisional process rather than the decision itself).

72. *See id.* at 446–48 (explaining the problem of finality and presenting the underlying premise that because no tribunal is infallible, no certainty of guilt exists for any detention); *see also* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final.").

73. Bator, *supra* note 71, at 448; *cf.* Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 244 (1955) ("The question then is not whether the fact exists in an absolute sense but whether the evidence is adequate to justify the exercise of power: ultimately, whether the evidence is a sufficient moral predicate in the sense that society will accept it as sufficient for the exercise of the power in question.").

74. Bator, *supra* note 71, at 449.

75. *Id.* at 462.

76. *See* CARY FEDERMAN, THE BODY AND THE STATE: HABEAS CORPUS AND AMERICAN JURISPRUDENCE 35, 162 (Robert J. Spitzer ed., 2006) (explaining that the AEDPA's habeas limitations and federal deference to state court fact finding are very difficult

restrictions on a prisoner's ability to file second or successive petitions with a new, previously unasserted claim prevents federal courts from considering new evidence of innocence in post-conviction DNA access cases because untested DNA evidence usually surfaces years after trial.[77] Thus, pursuing federal habeas claims is a difficult road for prisoners, like Skinner, to travel when trying to access DNA evidence post-conviction because newly discovered evidence claims do not state a ground for habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.[78]

Despite the aforementioned restrictions on a prisoner's ability to seek post-conviction DNA testing in a federal habeas petition, Justice Thomas still contends that this type of challenge may not be brought under § 1983.[79] Contrary to Justice Thomas's argument, however, Skinner is not attempting to circumvent habeas: he has already failed.[80] Further, the AEDPA substantially limits the ability of federal courts to hear new evidence of innocence.[81] As a result, the current restrictions on federal habeas corpus coupled with a bar on § 1983 claims would leave prisoners with valid constitutional claims unable to access evidence that could conclusively establish their guilt or innocence.[82]

In the event that DNA testing provides a favorable result after receiving access to the evidence, a federal habeas petition would not necessarily follow, particularly given the current state of freestanding

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to get around); Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 44 (2007) ("AEDPA has the effect of limiting the habeas claims a federal court may review, effectively eliminating many habeas petitions at the district court level, and even more, by narrowly restraining the limitation period during which a habeas petition may be filed, effectively reducing the number of claims any federal court hears." (footnotes omitted)). *But see* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 153 (2001) (arguing that the final version of the AEDPA enacted modest reforms relative to the proposals that came before it).

77. Garrett, *supra* note 63, at 1689.

78. *See* Townsend v. Sain, 372 U.S. 293, 317 (1963) (noting that newly discovered evidence relevant to the guilt of a state prisoner is not, by itself, a ground for relief on federal habeas corpus); Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 516–18 (1996) (arguing for consideration of newly-discovered evidence in federal court).

79. Skinner v. Switzer, 131 S. Ct. 1289, 1302 (2011) (Thomas, J., dissenting).

80. *See* Brief in Support of Plaintiff's Motion for Preliminary Injunction at 35–36, Skinner v. Switzer, No. 2:09-CV-0281, 2010 WL 273143 (N.D. Tex. 2010), 2009 WL 5143302 at *35–36 (distinguishing Skinner's case from *Osborne* by showing that Skinner, unlike Osborne, has already twice attempted to seek testing through state procedures rather than going straight to § 1983).

81. *See* Garrett, *supra* note 63, at 1688–89 (describing the provision restricting claims for new evidence of innocence under the AEDPA).

82. *See id.* at 1690 (noting that habeas corpus claims for a new evidentiary hearing for untested DNA evidence are highly unlikely).

claims of actual innocence.[83] On the contrary, subsequent to favorable DNA test results, a prisoner would be more likely to proceed through clemency, seek prosecutorial consent to vacate, or pursue other established mechanisms for post-conviction relief.[84] Therefore, the Court's decision allowing Skinner to bring his claim under § 1983 does not undermine the current limitations Congress has placed on federal habeas.[85] Instead, *Skinner* provides a necessary opportunity for a prisoner to seek DNA testing that could conclusively prove innocence or guilt without expanding those restrictions.

CONCLUSION

The *Skinner* decision, on its face, appears to be a positive development for prisoners seeking DNA evidence and testing that can conclusively prove their guilt or innocence. This Note has shown, however, that allowing prisoners to seek DNA testing under § 1983 was a procedural loophole necessary only because of the way habeas corpus claims in this context are foreclosed. While providing this avenue to prisoners may signal the Court's increased recognition of modern DNA testing's probative value, it is also evidence of the Court's failure to change its habeas corpus jurisprudence accordingly.

When objective, scientific proof is readily available, no justification exists to support a court's refusal to order a test that could conclusively establish innocence or guilt. The Supreme Court should recognize that access to post-conviction DNA testing is not another "bite at the apple" but rather an extraordinary opportunity to prove actual innocence.

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83. *See id.* at 1691–92 (finding that no one has been exonerated by post-conviction DNA under an actual innocence claim during appeals before acquiring DNA testing because *Herrera* only established a hypothetical claim with an extraordinarily high burden); *see also* Albrecht v. Horn, 485 F.3d 103, 126 (3d Cir. 2007) (holding that the *Herrera* standard was not met).

84. *See* Garrett, *supra* note 53, at 2932 n.103 (noting that in eighty-eight percent of cases resulting in exonerations the prosecutors consented to motions to vacate convictions, and in eighty-two percent prosecutors allowed for DNA testing (citation omitted)).

85. *See supra* notes 80–84 and accompanying text.