ESSAY

DNA AND DUE PROCESS

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The U.S. Supreme Court in District Attorney's Office v. Osborne *confronted novel and complex constitutional questions regarding the postconviction protections offered to potentially innocent convicts. Two decades after DNA testing exonerated the first inmate in the United States, the Court heard its first claim by a convict seeking DNA testing that could prove innocence. I argue that, contrary to early accounts, the Court did not reject a constitutional right to postconviction DNA testing. Despite language suggesting the Court would not "constitutionalize the issue" by announcing an unqualified freestanding right, Chief Justice Roberts's majority opinion proceeded to carefully fashion an important, but qualified and derivative procedural due process right. While denying relief to Osborne for narrow factual and procedural reasons, the Court's ruling swept more broadly. The Court held that states with postconviction discovery rules, as almost all have enacted, may not arbitrarily deny access to postconviction DNA testing, and then pointed to the generous provisions of the federal Innocence Protection Act as a model for an adequate statute. The Court also continued to assume that litigants may assert constitutional claims of actual innocence in habeas proceedings. In this Essay, I explore the contours of the* Osborne *due process right, its larger implications for constitutional interpretation, and, more specifically, whether the decision has the potential to create pressure on the States to provide meaningful avenues for convicts to litigate their innocence.*

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INTRODUCTION

The U.S. Supreme Court definitively entered the DNA era in *District Attorney's Office v. Osborne*,[1] with notable care, a little trepidation, and some evident confusion. The Court announced in the first sentence of the *Osborne* opinion that "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."[2] For the first time, the Court heard a claim by a convict seeking DNA testing that could prove innocence. The Court denied Osborne relief, and early observers reported that the Court did more by rejecting any constitutional right to postconviction DNA testing.[3] Although most courts correctly described the *Osborne* ruling, several U.S. courts of appeals have described the *Osborne* ruling as finding an "absence of a federal constitutional right to post-conviction DNA evidence" and "holding that there is no federal due process right to access to DNA evidence."[4] Those courts and commentators misunderstood, or perhaps simply misstated, the Court's ruling.

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1. 129 S. Ct. 2308 (2009).

2. *Id.* at 2312.

3. *See, e.g.*, Myrna S. Raeder, *Postconviction Claims of Innocence*, CRIM. JUST., Fall 2009, at 14, 15 ("The Supreme Court held in a 5-4 decision that there is no constitutional right to obtain postconviction DNA testing . . . ."); *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 222, 227 (2009) (discussing, in a section entitled *Postconviction Access to DNA Evidence*, the Court's rejection of the substantive due process claim, but not its recognition of a procedural due process claim); Adam Liptak, *Court Rejects Inmate Right to DNA Tests*, N.Y. TIMES, June 19, 2009, at A1 ("Prisoners have no constitutional right to DNA testing that might prove their innocence, the Supreme Court ruled on Thursday in a 5-to-4 decision."); Editorial, *Unparalleled and Denied*, N.Y. TIMES, June 19, 2009, at A26 ("In an appalling 5-to-4 ruling on Thursday, the Supreme Court's conservative majority tossed aside compelling due process claims . . . ."); David G. Savage, *Supreme Court Rules DNA Tests for Prisoners Not a Constitutional Right*, L.A. TIMES, June 19, 2009, http://articles.latimes.com/2009/jun/19/nation/na-court-dna19.

4. Young v. Phila. County Dist. Attorney's Office, 341 F. App'x 843, 845 n.1 (3d Cir. 2009) (referring to an "absence of a federal constitutional right to post-conviction DNA evidence"); McDaniel v. Suthers, 335 F. App'x 734, 736 (10th Cir. 2009) ("The Supreme Court has recently held that there is no 'right under the Due Process Clause to obtain postconviction access to the State's evidence for DNA testing.'" (quoting *Osborne*, 129 S. Ct. at 2316)); *see also* Hernandez v. McDaniel, No. 3:09-cv-00545-LRH-RAM, 2009 WL

The Court feinted in the introduction to the opinion by suggesting it would not "constitutionalize the issue" by announcing an unqualified and freestanding right to postconviction DNA testing.[5] While Chief Justice Roberts's majority opinion did reject a freestanding due process entitlement to DNA testing, the Court proceeded to fashion a qualified, derivative, but nevertheless potentially significant new due process right. The Court ruled that William Osborne had a procedural due process right to DNA testing based on "a liberty interest in demonstrating his innocence with new evidence under state law."[6] The Court then denied relief to Osborne, for reasons equivocally supported by the factual record. However, the Court held out the broad federal Innocence Protection Act[7] as a model and ruled that states with postconviction discovery rules, which almost all states have enacted, must adopt adequate and nonarbitrary procedures providing access to postconviction DNA testing.[8] Properly understood, the ruling places pressure on states to create meaningful avenues to prove innocence.

Two decades ago, the first postconviction DNA exoneration, in 1989, signaled a criminal justice revolution. Traditional postconviction law emphasized leaving final convictions undisturbed because, over time, courts could not reliably revisit facts, as witnesses' memories faded and physical evidence degraded. DNA testing made it possible to reopen cold cases decades after a trial and obtain remarkably accurate scientific evidence concerning identity. As DNA technology steadily improved during the 1990s, law enforcement created vast DNA databanks, tens of thousands of crimes were solved using DNA testing, and many thousands of suspects were excluded using DNA testing.[9] As innocence projects secured the release of mounting numbers of innocent prisoners, legislators recognized

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4953384, at *2 (D. Nev. Dec. 14, 2009); Aaron v. Norris, No. 5:09-cv-00158-JMM-JJV, 2009 WL 4884219 (E.D. Ark. Dec. 10, 2009). *But see, e.g.*, Grier v. Klem, 591 F.3d 672, 678 (3d Cir. 2010) ("There is no substantive due process right to access DNA evidence, and procedural due process does not *require* that a district attorney disclose all potentially exculpatory evidence for postconviction relief to a prisoner." (citing *Osborne*, 129 S. Ct. at 2319–20, 2322)); Cunningham v. Dist. Attorney's Office, 592 F.3d 1237, 1254–55, 1259–62 (11th Cir. 2010) (discussing procedural due process ruling in *Osborne*); Harrison v. Dumanis, 343 F. App'x 218, 219 (9th Cir. 2009) (describing how *Osborne* "had no viable procedural due process claim because state's procedures for post-conviction relief did not transgress recognized principles of fundamental fairness"); Jackson v. Cooley, 348 F. App'x 245, 246 (9th Cir. 2009) (describing *Osborne* as "holding that there is no procedural due process claim to post-conviction access to DNA evidence when a state's procedures for post-conviction relief satisfy recognized principles of fundamental fairness, as well as no substantive due process right").

5. *Osborne*, 129 S. Ct. at 2312.

6. *Id.* at 2319.

7. 18 U.S.C. § 3600(a)(8)(B) (2006).

8. *Osborne*, 129 S. Ct. at 2316–17; *see also* 18 U.S.C. § 3600(a)(8)(B).

9. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631, 1646–50, 1653 (2008).

the importance of DNA testing postconviction, and almost all states enacted statutes providing access to DNA and postconviction relief.[10]

During that time of rapid technological and criminal justice change, the Court lingered on the sidelines. Beginning with its 1993 decision in *Herrera v. Collins*,[11] the Court remained unwilling to recognize, but assumed the existence of, an undefined constitutional right to challenge a conviction based on "truly persuasive" evidence of "actual innocence."[12] Over the years, lower federal courts similarly assumed the existence of this hypothetical right. In the 2006 case of *House v. Bell*,[13] the Court next confronted the question whether to recognize an actual innocence claim.[14] Paul House asked the Court to excuse a procedural default of his habeas petition based on new evidence of innocence, including DNA results. At the time, DNA results excluded House, but included the victim's husband and thus did not necessarily point to the murderer's identity. Chief Justice Roberts dissented in part, arguing that House had not provided "compelling evidence of innocence."[15] In *Osborne*, Roberts cited to *House*, noting that sometimes "[w]here there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent."[16] That reference to the DNA evidence in *House* had already become ironic. The Court had remanded the *House* case for new hearings—leading to House's exoneration. Following the *House* decision, a new round of DNA tests on multiple pieces of evidence, including hair and materials from the victim's fingernails, not only excluded House, but also the victim's husband, and pointed to an unknown culprit.[17] In May 2009, House's conviction was vacated and the indictment dismissed on the motion of the prosecutor.[18]

The *Osborne* case was just the second time the Court had been confronted with a claim of innocence that could be supported by DNA testing. Unlike Paul House, William Osborne did not seek to directly challenge his conviction. Osborne instead filed a civil § 1983 complaint

10. *Id.* at 1673–75.
11. 506 U.S. 390 (1993).
12. *Id.* at 417.
13. 547 U.S. 518 (2006).
14. *Id.* at 555.
15. *Id.* at 571 (Roberts, C.J., concurring in part and dissenting in part).
16. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2316 (2009).
17. David G. Savage, *Murder Charges Dropped Because of DNA Evidence*, L.A. TIMES, May 13, 2009, http://articles.latimes.com/2009/may/13/nation/na-court-dna13.
18. *Id.* The Court has ruled in other cases in which the convict later was exonerated through postconviction DNA testing. All were summary denials of certiorari except one—the case of *Arizona v. Youngblood*, 488 U.S. 51 (1988), in which the Court ruled that forensic evidence that had been stored improperly and degraded was unlikely to have been probative, and there was no constitutional violation where the evidence was not willfully destroyed. *Id.* at 57–59. That same evidence was later tested when DNA technology became available, and it exonerated Youngblood, also producing a "cold hit" with another individual. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 95, 117 (2008); *see also Youngblood*, 488 U.S. at 57–59.

seeking access to crime scene evidence to test it using modern DNA technology. Lower federal courts had considered several such requests for DNA testing, with the circuits split on whether a § 1983 complaint was the appropriate vehicle and whether a constitutional right supported such a claim.[19] DNA testing was a silver bullet that would almost certainly answer the question of Osborne's guilt or innocence. The victim had been raped, and the blue condom that the rapist seized from her and used while committing the rape was collected at the crime scene by the police.

The case so starkly posed the question of postconviction access to evidence of innocence that the State belatedly conceded before the Court that the DNA test results could "conclusively establish Osborne's innocence."[20] Osborne would pay for the testing; there was no cost to the State. The State, however, was Alaska, one of only three states that still have no statutes ensuring access to postconviction DNA testing. In Alaska, prosecutors have never consented to a request for postconviction DNA testing.[21] The State adamantly opposed Osborne's request, for reasons that remain opaque to this day.

Faced with a dramatic request for DNA testing that could uncover the truth once and for all, but no constitutional precedent clearly establishing a due process right to access the State's evidence after trial, the Court selected a narrow approach. A smattering of constitutional rights could plausibly support Osborne's claim, which lay at a complex intersection of criminal procedure, postconviction procedure, and civil rights law. The Court did not recognize an open-ended constitutional right of access to postconviction DNA testing, but instead recognized a liberty interest in the nonarbitrary application of state postconviction procedures. Following prior procedural due process rulings, the Court noted that if a state creates an entitlement, it cannot arbitrarily deny access to it.[22] Since all states now have procedures for claiming innocence, including by using postconviction DNA testing, the *Osborne* liberty interest has great import. Further, the Court noted that the federal Innocence Protection Act provides a model for an adequate set of postconviction DNA access procedures.[23] That federal statute ensures that DNA testing be provided to all convicts who can show that the testing could "raise a reasonable probability that the applicant did not commit the offense."[24] The *Osborne* procedural due process right may encourage states with restrictive statutes to broaden access to DNA testing.

For the second time in the years since the Court decided *Herrera*, the Court also gingerly skirted the question whether to recognize a federal

19. *See* Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045, 1070–71 (2009).

20. Reply to Brief in Opposition at 8, *Osborne*, 129 S. Ct. 2308 (No. 08-6).

21. Brief for Respondent at 6–7, *Osborne*, 129 S. Ct. 2308 (No. 08-6).

22. *Osborne*, 129 S. Ct. at 2319–20.

23. *Id.* at 2316–17.

24. *See* 18 U.S.C. § 3600(a)(8)(B) (2006).

constitutional right to relief based upon a substantial showing of "actual innocence." The Court, as in *Herrera*, "assume[d] without deciding" that such a claim exists.[25] However, the Court had never before indicated that a claim of actual innocence could be litigated in a non–death penalty case. Based on both the procedural due process right recognized and this extension of *Herrera,* a decision that looks on first glance like a crude denial of relief, instead incentivizes continued expansion of postconviction rights for the potentially innocent.

Other aspects of the Court's ruling raise more questions than they answer. The types of DNA technology at issue created some evident confusion. The Court concluded that Osborne had state remedies available, so was not arbitrarily denied DNA testing. In particular, the Court found he did not invoke state procedure to obtain the modern DNA testing sought.[26] In fact, as Justice David Souter pointed out in his dissent, the record was clear that he had requested such modern DNA testing.[27] Although the Court also implied that it was relevant that he had not filed a habeas petition under a state newly discovered evidence statute, the Alaska courts had considered and rejected any such claim under that statute. Thus, the factual basis for the result was quite narrow but also quite tenuous.

The Court also omitted any mention of the importance of accuracy to due process jurisprudence. Criminal procedure rules, as the Court has repeated time and time again, are intimately concerned with ensuring that "the guilty be convicted and the innocent go free."[28] The Court has fashioned a range of criminal trial rights and postconviction rules to achieve greater accuracy. Failing to mention accuracy as a core due process value was anomalous in a case seeking access to DNA testing, which, after all, has an "unparalleled ability" to quickly and inexpensively get at the truth.[29]

In his opinions, Chief Justice Roberts has repeatedly sounded the theme of going slow when interpreting the Constitution, and in *Osborne*, he emphasized the need for caution in the face of new technology.[30] Justice Souter's short and moving dissenting opinion was one of his last on the Court and a highlight of the Term. Justice Souter seconded the Court's choice of a procedural due process framework, while taking pride in acting as a "stick-in-the-mud" by adopting an incremental approach towards new constitutional rights.[31] The Court had emphasized that because almost all states have statutes providing access to postconviction DNA testing, such experimentation should not be interfered with. Yet, the Court never considered the reverse view that a near-unanimous national consensus

25. *Osborne*, 129 S. Ct. at 2319.
26. *Id.* at 2321.
27. *See id.* at 2342 (Souter, J., dissenting).
28. Herring v. New York, 422 U.S. 853, 862 (1975).
29. *Osborne*, 129 S. Ct. at 2312; *see also infra* Part II.A.
30. *See infra* Part III.C.
31. *Osborne*, 129 S. Ct. at 2341 (Souter, J., dissenting).

among the states justified holding accountable an outlier state that still denies access to DNA testing. The Court has often hewed to such an approach when facing new constitutional questions. Thus, Justice Souter wrote that though "the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim," in Osborne's case, the Court should intervene to right a wrong, where the State "demonstrated a combination of inattentiveness and intransigence" amounting to a due process violation.[32]

Twenty years after DNA technology ignited a criminal procedure revolution, convicting suspects, freeing prisoners, altering postconviction rules, and leading to the adoption of new criminal investigation practices, the Court finally left the sidelines and entered the field. Part I describes the *Osborne* ruling, the *Osborne* litigation from trial through postconviction proceedings, with a focus on the types of DNA technology that developed during the long pendency of Osborne's case, and the role that DNA technology played in the *Osborne* litigation and in the Court's rejection of Osborne's claim. Part II develops the procedural due process right recognized and its likely contours and implications, as well as the expanded recognition of a hypothetical claim of innocence. Part III examines what the Court's choice of right and scope of right reveals about the Court's approach towards due process, focusing on the lack of reliance on any state interest in finality, and the Court's language regarding national consensus.

I. THE DNA REVOLUTION AND THE *OSBORNE* LITIGATION

A. *The* Osborne *Ruling*

William Osborne, convicted of sexual assault, kidnapping, and assault in 1993, sought postconviction DNA testing of material from the crime scene using new DNA technology that he argued could prove his innocence.[33] After seeking such DNA testing in the state courts with no success, as described in some detail in the next section, in 2003 Osborne filed in the federal district court a § 1983 complaint stating that the Due Process Clause of the Fourteenth Amendment entitled him to obtain DNA testing that could provide "profound evidence of his innocence."[34] The circuits had divided on whether there is a constitutional duty to disclose such potentially exculpatory evidence postconviction, and on whether such a right could be asserted in a § 1983 complaint.[35] The U.S. Court of Appeals for the Ninth Circuit recognized a due process right to potential evidence of innocence, grounded in due process rulings such as *Brady v. Maryland*,[36] which

32. *Id.* at 2341, 2343.
33. Joint Appendix at 27, *Osborne*, 129 S. Ct. 2308 (No. 08-6).
34. *Id.* at 25.
35. *See supra* note 19 and accompanying text.
36. 373 U.S. 83 (1963).

entitles a defendant to evidence of innocence in the State's custody.[37] The Ninth Circuit then ordered that the State give Osborne access to the material for DNA testing.[38]

The Supreme Court reversed the Ninth Circuit's ruling, with Chief Justice Roberts writing for a majority also including Justices Scalia, Kennedy, Thomas, and Alito.[39] The Court assumed that the § 1983 claim was not barred by its decision in *Heck v. Humphrey*,[40] which held that claims that "necessarily" imply the invalidity of a conviction must be filed in a federal habeas petition and not in a civil § 1983 complaint.[41] This was itself significant; the Court has not often interpreted criminal-procedure-related rights asserted in civil § 1983 complaints. The Court then held that an independent due process right of the sort recognized by the Ninth Circuit was not supported by precedent, in part because decisions like *Brady* provide the "wrong framework," because they establish due process rights at the time of trial, but not postconviction.[42] Most lower courts recognizing a constitutional right to postconviction DNA testing turned to the *Brady* right to receive disclosure of potentially exculpatory evidence at trial.[43] Doing so, as the Ninth Circuit did in *Osborne*, requires extending a trial right to the postconviction context. This the *Osborne* majority found objectionable, rejecting an extension of "certain familiar preconviction trial rights."[44] The Court emphasized that policy and federalism concerns weighed against the recognition of a freestanding postconviction right to

37. Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1128–29 (9th Cir. 2008), *rev'd*, 129 S. Ct. 2308 (2009). Perhaps, though, *Brady v. Maryland* is not "the wrong framework." *Osborne*, 129 S. Ct. at 2320. The State's possession of exculpatory evidence and failure to grant access to it hampers any meaningful effort to pursue postconviction remedies. Extending *Brady* postconviction is natural, where the *Brady* right is almost always asserted postconviction, when years later concealed evidence comes to light. The *Brady* right does not turn on the fault of prosecutors, but is geared towards disclosure of accurate information; the test simply asks whether the concealed information could have changed the result at trial. A DNA result could be outcome determinative and could enable other postconviction rights. One can better assess Osborne's claim that his lawyer was ineffective for not having pursued more discerning DNA testing, if one knows what the test would have revealed. Another candidate right was found in *Youngblood*, which holds that a state may not intentionally destroy potentially exculpatory physical evidence. Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988). That right was not asserted in *Osborne*, perhaps because the state did not destroy but refused to permit additional access for testing.

38. *Osborne*, 521 F.3d at 1141–42.

39. *Osborne*, 129 S. Ct. at 2312.

40. 512 U.S. 477 (1994).

41. *Osborne*, 129 S. Ct. at 2318–19.

42. *Id.* at 2320.

43. Brady v. Maryland, 373 U.S. 83, 87 (1963); *see, e.g.*, McKithen v. Brown, 565 F. Supp. 2d 440, 450 (E.D.N.Y. 2008); Breest v. N.H. Att'y Gen., 472 F. Supp. 2d 116, 120–21 (D.N.H. 2007); Wade v. Brady, 460 F. Supp. 2d 226, 227, 236–37 (D. Mass. 2006) (applying reasoning of *Brady*); Moore v. Lockyer, No. C 04-1952, 2005 WL 2334350, at *8 (N.D. Cal. Sept. 23, 2005); Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 370 (E.D. Pa. 2001).

44. *Osborne*, 129 S. Ct. at 2319.

obtain access to evidence of innocence. Almost all states had enacted statutes providing access to postconviction DNA testing, and the Court stated it should not interfere so as to "short-circuit" such legislative developments.[45]

However, the Court then established an important procedural due process right to DNA testing. Such a right is not freestanding, but rather derivative of state law. Following prior procedural due process rulings, the Court held that if a state already has an entitlement to postconviction DNA testing, then the state must adopt minimally adequate procedures to access that DNA testing, and cannot arbitrarily deny a person relief. The Court found that Osborne had a liberty interest in the nonarbitrary application of Alaska's existing procedures concerning postconviction access to evidence.[46] Since almost all states have such procedures, this right may be quite significant, and the following parts will develop its contours. Having recognized this constitutional right, the Court found that Osborne had not properly requested the type of DNA testing at issue, and that he had open state avenues for obtaining the DNA testing sought in his federal complaint. As a result, the Court held that the State did not arbitrarily deny Osborne DNA testing or provide inadequate state procedures. The Court found that Osborne had not invoked certain state procedures and held that, "without trying them, Osborne can hardly complain that they do not work in practice."[47]

The Court suggested that Osborne return to the state courts. Alternatively, the Court stated that he could pursue DNA testing in a federal habeas petition, including by claiming that the Constitution entitles him to relief because he is actually innocent.[48] The Court noted that since *Herrera*, it has continued to assume that a claim of actual innocence could hypothetically entitle a petitioner to relief.[49] This statement in *Osborne* was extremely significant. *Herrera* was a capital case and dealt with a right not to be executed given a sufficient showing of actual innocence. The Court had never before indicated that an actual innocence claim could be litigated in a noncapital case.

Justice Alito concurred, joined by Justices Kennedy and Thomas, arguing that additional reasons supported denying relief to Osborne.[50] Justice Alito emphasized that Osborne could have requested more advanced DNA testing at trial, but his attorney chose not to do so, and that he should be bound by his attorney's strategic choice.[51] Further, Justice Alito emphasized that

45. *Id.* at 2322.
46. *Id.* at 2319–20.
47. *Id.* at 2321.
48. *Id.* at 2321–22.
49. *Id.*
50. *Id.* at 2324 (Alito, J., concurring).
51. *Id.* at 2324, 2329–30.

evidence of Osborne's guilt supported denying him relief.[52] Finally, Justice Alito described how DNA test results may not always be definitive and argued that, as a result, states facing backlogs in their crime laboratories may have good reasons to limit requests for postconviction DNA testing.[53]

In dissent, Justice Stevens argued, joined by Justices Ginsburg, Breyer, and Souter in part, that, under either the Ninth Circuit's approach or the majority's procedural due process approach, Osborne was entitled to DNA testing because it could prove his innocence.[54] Justice Stevens emphasized that the testing posed no cost to the State, as Osborne would pay for it, and that the State had not explained what interest was served by denying access to the testing.[55] Justice Stevens also argued that Alaska did not in fact have any meaningful avenue still open for Osborne to pursue DNA testing; unless the federal courts ensured access to testing, he would not receive it.[56] A due process ruling would not hinder legislative development in the states, precisely since almost all states already have statutes providing access to postconviction DNA testing. A stronger due process ruling than the Court's ruling "would merely ensure that States [provide access to DNA testing] in a manner that is nonarbitrary."[57]

Justice Souter authored a separate dissent, agreeing that the Court's procedural due process approach was appropriate, because it would permit more gradual and considered development of the right.[58] However, he argued that the Court, although adopting the correct framework, reached the wrong result in denying Osborne relief because the State had "demonstrated a combination of inattentiveness and intransigence" and offered no nonarbitrary reason for denying Osborne access to DNA testing that could prove his innocence.[59]

B. *DNA Technology and the* Osborne *Litigation*

The *Osborne* decision hinged on an understanding (and misunderstanding) of DNA technology in the 1990s. DNA technology steadily advanced during the time that Osborne was tried and then pursued appeals and postconviction relief.

In the majority opinion, Chief Justice Roberts makes several striking statements about the role DNA testing now plays in our criminal justice system and why state and local actors have an important responsibility to adapt to these changes. The opinion begins by citing to the "unparalleled ability" of DNA testing "both to exonerate the wrongly convicted and to

52. *Id.* at 2324.
53. *Id.* at 2327–28.
54. *Id.* at 2331 (Stevens, J., dissenting).
55. *Id.* at 2336 ("Because Osborne has offered to pay for the tests, cost is not a factor.").
56. *Id.* at 2333–34.
57. *Id.* at 2339.
58. *Id.* at 2340 (Souter, J., dissenting).
59. *Id.* at 2343.

identify the guilty."[60] The Court noted that "[m]odern DNA testing can provide powerful new evidence unlike anything known before."[61] Yet in the final passage of the opinion, the Court also recognized that our criminal system, "like any human endeavor, cannot be perfect. DNA evidence shows that it has not been."[62] Such language acknowledging the problem of wrongful convictions, albeit in an understated way, marks a change from decades of scholarship and decisions doubting whether a wrongful conviction could ever happen.[63] The Court then noted that the "Federal Government and the States have recognized" the power of DNA technology.[64] They have invested great resources in DNA testing as a crime-fighting tool and some more limited resources in the use of DNA testing to correct errors. Vast DNA databanks have been created to help solve crimes. States increasingly require collection of DNA evidence from convicts and even arrestees.[65] Statutes of limitations have been relaxed to facilitate prosecutions premised on DNA to occur many years later.[66] DNA testing is routine before trial, and many thousands of suspects are excluded during investigations and long before a wrongful conviction could occur.[67]

However, Osborne's trial took place at a time when DNA testing was just taking hold. William Osborne and a codefendant, Dexter Jackson, were convicted of a sexual assault, kidnapping, and assault in 1993.[68] Osborne was sentenced to twenty-six years in prison. The victim, K.G., a prostitute, had solicited two men who raped her, beat her, ordered her to lie in the snow, and shot her in the head, leaving her for dead.[69] The passenger of the car had raped her vaginally, using a blue condom that she had brought.[70] She later identified Jackson as the driver of the car, and Jackson confessed, stating Osborne was the passenger.[71] Osborne was in the military and had no criminal record.

In addition to Jackson's testimony, two types of evidence supported the conviction. First, the victim identified Osborne at trial. Her certainty at trial contrasted with her earlier uncertainty. She had poor eyesight and was not wearing her contact lenses or glasses at the time of the incident, which had occurred at night.[72] She testified at trial that she was "not totally blind" without her contact lenses, but could not see well without them.[73] She had

60. *Id.* at 2312 (majority opinion).
61. *Id.* at 2316.
62. *Id.* at 2323.
63. *See, e.g.*, Garrett, *supra* note 18, at 56–57.
64. *Osborne*, 129 S. Ct. at 2312.
65. *See* Garrett, *supra* note 9, at 1654.
66. *Id.*
67. *See id.* at 1653.
68. *Osborne*, 129 S. Ct. at 2313.
69. *Id.*
70. *Id.*
71. *Id.*
72. Joint Appendix, *supra* note 33, at 167–68.
73. *Id.* at 82.

described the second perpetrator as 25–30 years old, 6 feet tall, weighing 180–190 pounds, and clean-shaven,[74] but Osborne was 21 years old and 5'9" tall, weighed 155 pounds, and had a prominent mustache.[75] Further, when the victim first saw a photographic lineup, she said that his photo was just the "most familiar" and the "most likely."[76] Seventy-five percent of convicts exonerated by DNA testing were similarly identified by eyewitnesses, and I have found that those eyewitnesses more often than not expressed initial uncertainty, or provided initial descriptions of the attacker that did not match key aspects of the defendant's appearance.[77] Of course, absent DNA testing, we do not know for sure if this eyewitness was mistaken or correct.

Second, DNA testing played a role in Osborne's trial. Police had found a blue condom in the snow at the crime scene.[78] At trial, first-generation DQ Alpha DNA testing results were presented. Such DQ Alpha testing examined genetic markers that were shared by large populations.[79] As a result, DQ Alpha tests were not very discerning. The results at Osborne's trial, typical of such testing, showed only that 14.7–16% of black individuals could have been the perpetrator.[80] The prosecution inaccurately presented that evidence to the jury, repeatedly arguing Osborne's semen was in fact found on the condom.[81] In addition, hairs from the victim's sweater and from the condom were found "consistent with having come from William Osborne."[82] The State also inaccurately told the jury that Osborne's hair had in fact been found at the scene.[83] Unfortunately, I have found that such invalid presentation of forensic science was common in the trials of persons later exonerated by postconviction DNA testing.[84]

Osborne first began asking for DNA testing at trial. He asked his attorney to seek more discriminating Restriction Fragment Length Polymorphism (RFLP) testing, which was the most powerful form of testing available at the time.[85] That second type of DNA testing was far more discerning than DQ Alpha testing. It could generate the types of random match probabilities that we are now familiar with, determining that

74. *Id.* at 167.

75. *Id.* at 166–67.

76. *Id.* at 28.

77. *See* BRANDON L. GARRETT, MISJUDGING INNOCENCE ch. 4 (forthcoming 2011) (on file with author).

78. Joint Appendix, *supra* note 33, at 48.

79. *See, e.g.*, DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 27–28 (1999).

80. Joint Appendix, *supra* note 33, at 119.

81. *Id.* at 123–26.

82. *Id.* at 105.

83. *Id.* at 123, 124, 127, 130.

84. *See generally* Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1 (2009).

85. *See* JOHN M. BUTLER, FORENSIC DNA TYPING: BIOLOGY, TECHNOLOGY, AND GENETICS OF STR MARKERS 146 (2d ed. 2005).

one random person in millions, billions, or even trillions could be expected to share a profile.[86] However, RFLP testing required a large quantity of nondegraded genetic material, and interpretation of the results was potentially subjective.[87] Osborne wrote to an out-of-state expert asking for help obtaining RFLP testing.[88] Under Alaska law, his trial attorney made the final decision whether to seek additional DNA testing. She chose not to.[89] In his postconviction petition he argued that she was ineffective for failing to do this.[90] She responded that she did not request the testing because she thought "Osborne was in a strategically better position without [additional] DNA testing."[91]

Since his trial, not only has DQ Alpha been totally displaced, but by the mid-to-late 1990s, modern and much more powerful Short Tandem Repeat (STR) DNA testing entered into wide use and displaced RFLP testing.[92] One advantage of STR testing is that unlike RFLP testing, STR testing can be used on very small samples; further, new capillary electrophoresis technology permitted rapid and largely computerized analysis of genetic samples.[93] In the late 1990s, mitochondrial DNA (mtDNA) testing was also developed.[94] Such mtDNA testing can now be conducted on hairs, like those found at the crime scene in the Osborne case.[95]

One final technological development accompanied the rise of modern STR DNA testing—the creation of state and then national databanks, or the Combined DNA Index System (CODIS), which now contains millions of genetic profiles.[96] Any unknown DNA profile detected in a case can now be entered into the national databank system, and any resulting "cold hits" often solve cases. In addition, cold hits have often helped to exonerate the innocent. I have found that in forty percent, or 110 of the first 250 DNA exonerations, postconviction DNA testing also inculpated the perpetrator, most often due to a cold hit.[97] The combination of the development of STR DNA testing and DNA databanks led to an acceleration in the numbers of DNA exonerations, from a trickle in the early 1990s, to a flood in the late

86. *Id.*
87. *Id.*
88. Joint Appendix, *supra* note 33, at 162–63, 186, 226.
89. *Id.* at 185–86.
90. *Id.* at 14.
91. Osborne v. State (*Osborne I*), 110 P.3d 986, 990 (Alaska Ct. App. 2005).
92. *See, e.g.*, BUTLER, *supra* note 85, at 9–11, 33–35.
93. *See id.* at 12, 146.
94. *Id.* at 201–98.
95. *Id.* at 272.
96. *See* FED. BUREAU OF INVESTIGATION, DEP'T OF JUSTICE, CODIS: COMBINED DNA INDEX SYSTEM 2 (2007), *available at* http://www.fbi.gov/hq/lab/pdf/codisbrochure2.pdf.
97. *See* GARRETT, *supra* note 77, at 15; *see also* Brief for the Respondent at 5, Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6); Brandon L. Garrett, Judging Innocence: An Update, http://www.law.virginia.edu/html/librarysite/garrett_exonereedata.htm (last visited Apr. 17, 2010) (finding that in 110 of the first 250 DNA exonerations, the DNA testing inculpated a perpetrator, and that in 65 of those cases this was due to a "cold hit").

1990s. These technological developments played a pivotal role in the Supreme Court's decision in *Osborne*.

With several powerful new DNA technologies available, Osborne requested DNA testing, including more modern DNA testing, from the state courts by filing a state habeas petition.[98] In 2002, the trial court found that he had no right to the testing because the evidence of his guilt was strong, and because the trial attorney's failure to request the testing was "strategic" and not unconstitutionally ineffective.[99] It was no surprise that Osborne was denied relief. Alaska had no statute or case law providing any right to postconviction DNA testing.

For the first decade that DNA technology was available, in the 1990s, only two states provided convicts a statutory postconviction right to obtain testing that might prove their innocence.[100] Many localities, though quick to test DNA evidence that might prove guilt, fought efforts to obtain access to DNA evidence to prove innocence.[101] Despite those obstacles, 252 people have obtained postconviction DNA testing and proved their innocence.[102] Gradually, states came to realize the importance of exculpatory DNA testing. Over time, fewer prosecutors challenged defense requests for testing. In studying how all persons exonerated by postconviction DNA testing obtained DNA testing, I have found that in the vast majority of exonerees' cases, prosecutors eventually consented to the DNA testing.[103] In the last decade, almost all states have passed statutes permitting access to postconviction DNA testing.

One of just three states that still has not yet enacted such a statute is Alaska (the others are Oklahoma and Massachusetts; Alabama enacted a statute just before the Court reached its decision in *Osborne*).[104] No person has been exonerated by postconviction DNA testing in Alaska, although there have been exonerations in thirty-three states and the District of Columbia.[105] No postconviction DNA testing has ever been conducted in

98. Osborne had originally sought only RFLP testing at the time of trial because that was all that was available at the time. He amended his state court pleadings to request STR and also mtDNA testing. *See* Joint Appendix, *supra* note 33, at 158–59.

99. Joint Appendix, *supra* note 33, at 17–18.

100. *See* Garrett, *supra* note 9, at 1693.

101. *See* Garrett, *supra* note 18, pt. II.C.1.

102. *See* The Innocence Project, http://www.innocenceproject.org (last visited Apr. 17, 2010) (providing the count of U.S. postconviction DNA exonerations).

103. *See* Garrett, *supra* note 97 (noting that in eighty-eight percent of the first 225 DNA exonerations prosecutors consented to motions to vacate convictions and that in eighty-two percent prosecutors consented to DNA testing); *see also* Brief for the Respondent, *supra* note 97, at 23 (citing this data).

104. *See* The Innocence Project, Access to Post-Conviction DNA Testing, http://www.innocenceproject.org/Content/304.php (last visited Apr. 17, 2010); *see also* Garrett, *supra* note 9, at 1719–23.

105. *See* Press Release, The Innocence Project, 250 Exonerated, Too Many Wrongfully Convicted (Feb. 4, 2010), http://www.innocenceproject.org/Content/2350.php.

Alaska.[106] Prosecutors in Alaska have never agreed to provide access to DNA testing, nor has an Alaska court order ever resulted in DNA testing postconviction.

In Osborne's case, the Alaska Court of Appeals considered a series of potential claims before ultimately denying Osborne relief. The court rejected a theory under the U.S. Constitution, but then considered a hypothetical right to DNA testing under the state constitution and remanded the case to the trial court to examine whether Osborne could secure relief under a three-part test that it referred to as one adopted by several other state courts.[107] That test was whether (1) the conviction relied primarily on an eyewitness identification, (2) there was demonstrable doubt concerning the identity of the perpetrator, and (3) scientific testing could be conclusive on the issue of identity.[108] In fact, no state currently uses such a test (though the majority in *Osborne* referred to the test as "widely accepted").[109] On its face, Osborne's case satisfied those criteria. This was a stranger rape, involving equivocal eyewitness testimony and not very probative forensic evidence. DNA tests of the blue condom would definitely resolve the identity of the rapist. The trial court ruled the DNA tests could not prove Osborne's innocence and emphasized Osborne confessed in a 2004 parole application.[110] The Alaska Court of Appeals agreed, concluding that the DNA testing "would not conclusively establish Osborne's innocence."[111]

The court rejected a statutory avenue for relief as well. Alaska's postconviction statute permits late-filed motions based on newly discovered evidence, but that evidence must be new, or "not previously presented and heard by the court."[112] The court noted that the evidence to be tested was

106. Brief for the Respondent, *supra* note 97, at 6–7.

107. Osborne v. State (*Osborne I*), 110 P.3d 986, 994–95 (Alaska Ct. App. 2005).

108. *Id.* at 995.

109. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2317 (2009). All states' court decisions adopting such tests (though none had those three parts) under their state constitutions have since had such tests superseded by DNA access statutes. *See Osborne I*, 110 P.3d at 995 n.27 (citing state court cases); Garrett, *supra* note 9, at 1673 n.207 (noting that all five state court rulings recognizing a constitutional right to postconviction DNA testing have been superseded by statute).

110. Joint Appendix, *supra* note 33, at 221 ("Mr. Osborne admitted in detail to committing this crime in an Application for Discretionary Parole."). Justice Alito, concurring, emphasized that Osborne had "confessed in detail to the crime." *Osborne*, 129 S. Ct. at 2324 (Alito, J., concurring). That statement implied that the detailed nature of the confession supported its probable truth. However, Osborne was privy to all of the facts in the case—having attended his own trial. Further, almost all people exonerated by DNA evidence who had falsely confessed before trial did so in great detail. We now know that those details were likely disclosed to them. *See generally* Brandon L. Garrett, *The Substance of False Confessions*, 62 STAN. L. REV. 1051 (2010).

111. Osborne v. State (*Osborne II*), 163 P.3d 973, 981 (Alaska Ct. App. 2007); *see also id.* at 985 (Mannheimer, J., concurring).

112. ALASKA STAT. § 12.72.010(4) (2008) ("[T]here exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice.").

not newly discovered, stating that the evidence was available at trial and that no new type of testing was requested.[113] Most states do not routinely permit discovery under their general postconviction statutes, and decisions granting or denying such requests can be quite variable.[114] Osborne had not sought relief under that statute, instead seeking discovery as part of a claim that his counsel was ineffective. Regardless, the court held that "Osborne apparently does not qualify for post-conviction relief" under the Alaska newly discovered evidence statute, and then held that the statute also barred Osborne from relief under the Alaska Constitution.[115]

A technological issue became a crucial subject in the Supreme Court's majority opinion. In the background portion of the opinion, the majority noted in a footnote that "[i]t is not clear whether the Alaska Court of Appeals was correct that Osborne sought *only* forms of DNA testing that had been available at trial."[116] However, later in the opinion the Court concluded that "[w]hen Osborne *did* request DNA testing in state court, he sought RFLP testing that had been available at trial, not the STR testing he now seeks, and the state court relied on that fact in denying him testing under Alaska law."[117] The Court then quoted a claim by the Alaska Court of Appeals that "'the DNA testing that Osborne proposes to perform on this evidence existed at the time of Osborne's trial.'"[118]

Regardless, Osborne did request both STR and mtDNA testing in his postconviction petitions. Both were new forms of DNA testing far more powerful than anything available at the time of his trial. Indeed, by the time of the Alaska Court of Appeals decisions a few years later, RFLP testing had fallen into disuse. There would be no reason to request RFLP testing, and it is not clear that many laboratories would still perform it. The record before the Court could not have been clearer that Osborne did *not* limit his

113. *See Osborne II*, 163 P.3d at 984.

114. 1 CRIMINAL PRACTICE MANUAL § 19:31 (Thomson Reuters/West ed., 2009) ("In contrast with their adoption or adaptation of federal court rules in some other areas, most states have no equivalent of Rule 6 specifically permitting and regulating discovery in post-conviction proceedings."). The Alaska statute in question has been mentioned only in a handful of decisions aside from those in Osborne's case.

115. Osborne v. State (*Osborne I*), 110 P.3d 986, 995 (Alaska Ct. App. 2005).

116. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2314 n.2 (2009).

117. *Id.* at 2321 (citing *Osborne I*, 110 P.3d at 992).

118. *Id.* (quoting *Osborne I*, 110 P.3d at 992). The full quotation states that the physical evidence itself (the blue condom) was not newly discovered and that Osborne's trial attorney "consciously chose not to seek more specific testing." *Osborne I*, 110 P.3d at 992 ("The State points out that Osborne's due process claim is apparently barred by this statute because the physical evidence in this case is not newly discovered, because the DNA testing that Osborne proposes to perform on this evidence existed at the time of Osborne's trial, and because Osborne's trial attorney was aware of this and consciously chose not to seek more specific testing."). In its subsequent decision, the Alaska court did state, incorrectly, that "[i]t is true that Osborne now proposes a different, more discriminating DNA test—but this more discriminating DNA was also available at the time of Osborne's trial." *Osborne II*, 163 P.3d at 984.

request to RFLP testing. The Joint Appendix included state court briefs in which he requested STR and mtDNA testing.[119]

The confusion over this fact nevertheless played a key role in the conclusion that Osborne had "attempt[ed] to sidestep state process."[120] The Court also indicated that Osborne should have used state procedures in a state habeas petition. Yet the Court was not clear what procedures should have been attempted. The Alaska Court of Appeals had found that Osborne was not entitled to DNA testing under any existing state law avenue, including any state statute or hypothetical state constitutional right.

It is obvious why Osborne would litigate for years to try to prove his innocence and obtain his freedom. What was the State interest in denying testing? After all, the State litigated for years and at great expense to oppose Osborne's request for DNA testing. Alaska's position was never particularly clear. Cost was not an issue. The Innocence Project, which represented Osborne, offered to pay all costs associated with the DNA testing.[121] Before the Ninth Circuit, the State had argued that test results could not be material and could not show Osborne's innocence.[122] That argument was at least clear, but it was also patently meritless,[123] and the State abandoned it before the Supreme Court. After all, the State had relied on the DQ Alpha DNA test results at trial to support its case for Osborne's guilt.[124] Thus, the State conceded before the Court that a favorable test could "conclusively establish Osborne's innocence."[125] If Osborne is innocent, the tests might point to the true rapist. Justice Stevens began his dissent noting "for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all."[126]

C. *Denying Osborne Relief*

The result in *Osborne* hinged on the Court's finding Alaska had a state mechanism that was "adequate on [its] face" to obtain testing, but which Osborne *had not tried to use*.[127] The ruling can be seen as an abstention decision of sorts, in which existing state process was found to adequately protect the constitutional due process right.[128] Richard Fallon has observed

119. *See* Joint Appendix, *supra* note 33, at 158–59.
120. *Osborne*, 129 S. Ct. at 2321.
121. *Id.* at 2336 (Stevens, J., dissenting).
122. Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1136 (9th Cir. 2008), *rev'd*, 129 S. Ct. 2308 (2009).
123. *Id.*
124. *Id.*
125. Reply to Brief in Opposition, *supra* note 20, at 8.
126. *Osborne*, 129 S. Ct. at 2331 (Stevens, J., dissenting).
127. *Id.* at 2321 (majority opinion).
128. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993) (describing the Court's range of "avoidance strategies" in the substantive due process area, including use of abstention).

that the Court often examines the adequacy of state process from a "managerial" perspective, not focusing on whether the individual claimant was treated fairly but, rather, whether the state system as a whole is tolerably fair.[129] However, in this case, the Court's findings regarding both the fairness of Osborne's treatment and the general state process on which the outcome hinged were quite equivocal.

First, the Court concluded that Osborne "has not tried to use the process provided to him," and therefore could not challenge the process as applied to him.[130] The Court was clear that Osborne need not have exhausted state process. While the Court at times examines state procedures from a system perspective, many of the Court's prior due process decisions examine whether the state applies procedures arbitrarily to a type of situation or in the manner it handled a given case.[131] Indeed, in this case, there was a vanishing distinction between any state procedures on their face and as applied. It was in Osborne's individual case that the Alaska court had first gestured towards any procedures for evaluating postconviction DNA testing requests, by way of denying Osborne relief. Osborne's claim was that there was no adequate procedure in Alaska that he could use.

Regardless, the Supreme Court's ruling that Osborne had not used the procedures in question was based on a finding that Osborne had never asked for modern STR DNA testing, which was simply incorrect. As noted, the record before the Court displayed that Osborne had sought modern DNA testing in state courts and was denied relief.[132] Perhaps the Court instead meant to say not that Osborne did not ask for modern DNA testing, but that he failed to specifically request modern DNA testing by invoking the general state newly discovered innocence statute. The majority concluded, "If he simply seeks the DNA through the State's discovery procedures, he might well get it."[133] Such a holding would not be factually erroneous, since Osborne did not in fact invoke that statute. However, as just described, the state courts had denied Osborne relief finding that he could not obtain relief under any other statute, such as the Alaska newly

129. *Id.* at 311.

130. *Osborne*, 129 S. Ct. at 2321.

131. *See, e.g.*, United States v. Agurs, 427 U.S. 97, 110–12 (1976) (holding that even if the defendant makes no specific request for material exculpatory evidence to be disclosed, the prosecution has a duty to produce it); Wolff v. McDonnell, 418 U.S. 539, 556–57 (1974) (requiring that procedures be provided so that a convict's rights at a prisoner disciplinary hearing are not "arbitrarily abrogated"); *see also* Newton v. City of N.Y., No. 07 Civ. 6211(SAS), 2010 WL 323050, at *8–9 (S.D.N.Y. Jan. 27, 2010) (exploring how in *Osborne*, the Court found that the applicant had failed to test state procedures, while in other cases the "Court has recognized that fundamental fairness requires that once a state creates a statutory right and puts procedures in place to protect that right, those procedures must comport with due process in application"). The next section discusses several of those cases in greater detail.

132. *See supra* note 119.

133. *Osborne*, 129 S. Ct. at 2321.

discovered evidence statute, nor could he obtain testing using a hypothetical rule under the Alaska state constitution.

Second, the Court held that the state process was adequate on its face.[134] However, the state had no process that explicitly provided for access to postconviction DNA testing. To the extent that the state court speculated that it might recognize such a right, under a general postconviction discovery statute or the state constitution, it denied relief. No litigant has ever obtained postconviction DNA testing in Alaska.[135] The state process consisted entirely of recited reasons for denying Osborne testing.

Thus, Justice Souter agreed with the majority that a narrower procedural due process approach was appropriate, because "at a general level Alaska does not deny a right to postconviction testing to prove innocence."[136] Instead, the problem was that "Alaska has presented no good reasons even on its own terms for denying Osborne the access to the evidence he seeks."[137] Though the Court does not correct errors in application of state law, Justice Souter argued that, here, the arbitrary treatment of Osborne's requests constituted "procedural unfairness" in application of state process.[138] After all, the state process was itself defined in the decision that denied Osborne testing.

If the Alaska courts should have given Osborne DNA testing had he only asked for it, then following the Court's ruling, perhaps Osborne should now be able to earn relief from the Alaska state courts. Should Osborne reapply and again request modern STR testing, perhaps the State would violate his due process rights by denying him relief. There is another reason why it is hard to imagine that state courts could continue to deny Osborne DNA testing. The state courts cannot easily argue that DNA tests could not show innocence. After all, the state conceded before the Court that DNA testing could prove Osborne's innocence.[139]

Even if the Court's ruling cannot be easily explained factually, the constitutional right established has legal significance. Under the Court's test, a litigant may be entitled to DNA testing postconviction having previously requested new testing from the state courts. The question then arises whether states may adopt other rationales for limiting DNA testing. The Court emphasized that states have "flexibility" in crafting such postconviction statutes.[140] Since the Court ruled that there was no arbitrariness supposing the State left open an avenue to prove innocence,

134. *Id.* at 2320–21.

135. The majority cited to one case, *Patterson v. State*, No. A-8814, 2006 WL 573797 (Alaska Ct. App. Mar. 8, 2006), in which an Alaska court ordered testing, but it was never conducted because the evidence was destroyed. *Osborne*, 129 S. Ct. at 2332–33 n.4 (Stevens, J., dissenting).

136. *Osborne*, 129 S. Ct. at 2340 (Souter, J., dissenting).

137. *Id.* at 2342.

138. *Id.* at 2343.

139. *Id.* at 2336 (Stevens, J., dissenting).

140. *Id.* at 2320.

conversely the opinion suggests that it could violate due process to close off a convict's access to postconviction DNA testing. The Court repeats often the axiom that due process "is flexible and calls for such procedural protections as the particular situation demands."[141] What does this new postconviction DNA testing context demand? Those questions are taken up in the next part.

II. A NEW PROCEDURAL DUE PROCESS RIGHT AND *HERRERA* REVISITED

The *Osborne* Court grappled with the question whether to recognize a new constitutional right of importance to both civil rights law and postconviction law. First, the Court recognized a remarkable new postconviction liberty interest, the first of its kind, a right to access postconviction DNA testing. Yet the Court left several questions open. The Court began by explaining that it would not "constitutionalize the issue" by recognizing an independent constitutional right to postconviction DNA testing.[142] The Court found that Osborne was not entitled to relief, having sidestepped available state process. However, the Court ruled Osborne had "a liberty interest in demonstrating his innocence with new evidence under state law."[143] The Court recognized a derivative procedural due process right arising from state procedures regarding newly discovered evidence of innocence. The scope of the *Osborne* procedural due process right remains undefined, and this part and the next examine its contours. Second, this part explores implications of the due process right recognized. Third, this part examines the Court's expansion of a hypothetical constitutional claim of actual innocence.

A. *A New Postconviction Liberty Interest*

Despite language espousing unwillingness to take over responsibility for a new constitutional right, the *Osborne* court recognized a liberty interest and a due process right in an area where none had been recognized before. That feature of the majority opinion makes it all the more enigmatic—and important. The Court did not recognize a freestanding right to postconviction DNA testing under all circumstances. Nor did any litigant or Justice call for an unfettered right of access. All sides agreed that the Due Process Clause entitles a convict to DNA testing under some circumstances. The majority simply had a different reading of the facts raised by Osborne's request, finding that he had not yet pursued available state remedies.[144] The Court adopted an approach that did not establish an independent federal right, but rather a derivative right triggered only when a

141. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
142. *Osborne*, 129 S. Ct. at 2312.
143. *Id.* at 2319.
144. *Id.* at 2320–21.

state adopts postconviction procedures for access to new evidence of innocence.

Under the Court's procedural due process approach, states retain the flexibility to decide whether or not to provide an entitlement. If they do, like Alaska did, and like all states have done, they cannot adopt wholly inadequate procedures for obtaining access to that entitlement, nor may they arbitrarily deny access to the entitlement.[145] The *Osborne* Court's ruling did not detail what should be drawn from prior procedural due process precedents, and no prior decision had ever clearly recognized any kind of due process right during the postconviction process.

The Court cited to *Medina v. California*[146] for the proposition that in the criminal procedure context, courts should apply a deferential test in which convicts are entitled to protections arising from traditional notions of "'fundamental fairness.'"[147] The *Medina* case dealt with criminal trial rules, and the Court emphasized that it deferred to the rule in question not only because of a consensus among the states, but also "because the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition."[148] The *Medina* decision sheds no light on what flexibility states retain when crafting postconviction statutes.[149]

Nor does the "fundamental fairness" language in *Medina* necessarily counsel any unusually deferential approach. That language was premised

145. Not only do all states but three have statutes providing access to postconviction DNA testing, but all states except possibly South Dakota, in which the law is unclear, have either such a statute or some kind of procedure providing for access to newly discovered evidence. *See* Brief for the Respondent, *supra* note 97, at 29 n.11.

146. 505 U.S. 437 (1992).

147. *Osborne*, 129 S. Ct. at 2320–21 (quoting *Medina*, 505 U.S. at 446, 448).

148. *Medina*, 505 U.S. at 445–46.

149. The majority opinion did not apply the Court's decades-old due process test under *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Osborne*, 129 S. Ct. at 2336 n.3 (Stevens, J., dissenting) (noting that Osborne had asked that the Court apply the standard of *Mathews*). Thus, the Court did not balance the individual interest in obtaining DNA testing against the State's interest in not providing the testing while taking into consideration the risk of an erroneous deprivation. The Court's rationale was that, in *Medina v. California*, the Court had ruled that the *Mathews* due process test does not apply to criminal procedure. *See Medina*, 505 U.S. at 443. Nor had the Court often applied *Mathews* in criminal procedure cases. *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 420–21 (2001) ("Although the Supreme Court considered numerous due process challenges to state criminal procedures in the fifteen-year period between *Mathews* and *Medina v. California*, it utilized the *Mathews* balancing test in only one of those cases, and its use there was not debated."). However, the *Osborne* case was a civil § 1983 complaint. *Osborne*, 129 S. Ct. at 2312. The relief request was in the nature of discovery, and not vacatur of a conviction. *Id.* at 2316. In contrast, *Medina* was a criminal appeal challenging allocation of burdens of proof at a trial. *Medina*, 505 U.S. at 439. One advantage of the *Mathews* analysis is that it would have forced the majority to articulate what interests were at stake. The majority did not directly address what Alaska's interest was in denying Osborne the DNA testing. Alaska itself was not clear.

on an approach interpreting due process narrowly outside the specific Bill of Rights guarantees selectively incorporated as against the States. However, the language in *Medina* suggesting that the Due Process Clause has only a narrow or "'limited operation'" outside specific Bill of Rights guarantees belied the vast edifice of the Court's due process jurisprudence.[150] Though the Court's approach has evolved over time, due process regulation now extends to all aspects of criminal procedure.[151] Rules originating from the Due Process Clause and not exclusively from specific Bill of Rights provisions include, for example, rules regulating eyewitness identification procedures,[152] police interrogations and voluntariness of confessions,[153] defense access to certain expert evidence,[154] defense access to exculpatory material,[155] prosecution presentation of false evidence,[156] the ability of the defense to present crucial witnesses at trial,[157] unfair prosecution closing arguments,[158] and the obligation of the State to prove guilt beyond a reasonable doubt.[159] The list goes on and on. The Court's array of freestanding due process decisions regulate an "extraordinary range" of criminal investigation, charging, trial, guilty pleas, sentencing, and posttrial procedures.[160] To say that the Court regulates areas only affected by concerns of fundamental fairness is to say that the Court regulates almost all aspects of criminal process.

The *Osborne* Court noted that unlike at the investigative, trial, or appellate stage, states have "more flexibility" when crafting postconviction procedures.[161] Few rulings address the scope of state postconviction procedures, which are themselves comparatively recent. While common-law writs dated back centuries, most states enacted statutory postconviction rules in the 1970s in part responding to the enlargement of federal habeas corpus, and to address claims of attorney inadequacy or undisclosed evidence of innocence not easily asserted during appeals.[162]

The Court has held that the State need not provide convicts with counsel during postconviction procedures. After all, such procedures are discretionary and need not be made available at all. The Court draws a

150. *Medina*, 505 U.S. at 443 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

151. Jerold Israel develops this feature of the Court's due process jurisprudence with great care and detail. *See* Israel, *supra* note 149, at 389–90.

152. *See* Manson v. Brathwaite, 432 U.S. 98, 129 (1977); Stovall v. Denno, 388 U.S. 293, 302 (1967).

153. Dickerson v. United States, 530 U.S. 428, 433–34 (2000).

154. Ake v. Oklahoma, 470 U.S. 68, 86–87 (1985).

155. *See* Kyles v. Whitley, 514 U.S. 419, 432–41 (1995).

156. Mooney v. Holohan, 294 U.S. 103, 112–13 (1935).

157. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

158. Darden v. Wainwright, 477 U.S. 168, 181–82 (1986).

159. *In re* Winship, 397 U.S. 358, 367 (1970).

160. *See* Israel, *supra* note 149, at 389.

161. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009).

162. *See* Garrett, *supra* note 9, at 1671.

sharp line between the criminal appeal and postconviction proceedings that may follow. After the direct appeal is complete, the conviction is considered final. Though entitled to "fundamental fairness," convicts have no right to the assistance of counsel during the civil, collateral postconviction proceedings that follow.[163] Thus, as the Court explained in *Pennsylvania v. Finley*,[164] a decision relied upon by the majority in *Osborne*, "States have substantial discretion to develop and implement programs to aid prisoners seeking to secure postconviction review."[165] However, a state's discretion is not unfettered postconviction. In *Murray v. Giarratano*,[166] the Court ruled that even in a capital case, an inmate lacks an entitlement to counsel postconviction, but Justice Kennedy, providing the fifth vote and joined by Justice Sandra Day O'Connor, concurred, stating that it would be a different matter if a person was to be executed without representation.[167] Following that concurring opinion, most states now provide postconviction representation to death row inmates.[168]

That a state need not necessarily provide counsel postconviction does not answer when states must provide access to postconviction evidence, much less to potentially dispositive evidence of innocence. Providing indigent convicts with lawyers is expensive and far more burdensome than other postconviction procedures. Nor does provision of indigent defense attorneys necessarily enhance the accuracy of outcomes.

The *Osborne* Court did cite to one case that describes a set of minimally adequate procedures that might be provided regarding postconviction rights. The Court cited *Wolff v. McDonnell*,[169] a case regarding procedures for disciplining prison inmates for misconduct, emphasizing that, though there was no underlying entitlement to be free from such discipline, minimal protections must ensure that the state-created right is not arbitrarily abrogated.[170] The Court in *Wolff* stated, "[A] person's liberty is equally protected, even when the liberty itself is a statutory creation of the State."[171]

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163. Ross v. Moffitt, 417 U.S. 600, 610–11 (1974).

164. 481 U.S. 551, 559 (1987).

165. *Id.* The *Osborne* dissenters cited to *Evitts v. Lucey*, 469 U.S. 387 (1985), in which the Court held that though a state need not create appeals as of right, if they do, a convict is entitled to minimally adequate appellate representation. In *Evitts*, the Court asked whether the state provided "an adequate opportunity to present his claims fairly in the context of the State's appellate process." *See id.* at 402 (quoting *Ross*, 417 U.S. at 616). The Court explained, "when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Id.* at 401.

166. 492 U.S. 1 (1989).

167. *Id.* at 14–15 (Kennedy, J., concurring).

168. Eric M. Freedman, Giarratano *Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079, 1086 (2006).

169. 418 U.S. 539 (1974).

170. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2334 (2009) (citing *Wolff*, 418 U.S. at 555–56).

171. *Wolff*, 418 U.S. at 558. The *Osborne* majority cited to *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458 (1981), for the same proposition. *Osborne*, 129 S. Ct. at

The Court held in *Wolff* that prisoners need not be provided with counsel or a right to cross-examine witnesses during such disciplinary hearings, but that they were entitled to notice, an opportunity to present documentary evidence, and a right to obtain discovery, including by taking witness statements, obtaining documents, and calling witnesses.[172] In that context, the Court was reluctant to create trial-like procedures "encasing the disciplinary procedures in an inflexible constitutional straitjacket."[173] While requiring that discovery be afforded to the inmate, the right to call witnesses at the hearing, for example, could be limited if doing so would "create a risk of reprisal or undermine authority."[174]

One reading of cases like *Wolff* is that some significant discovery rights, including a right to call witnesses and obtain documents, must be provided when liberty interests are at stake. The liberty interest in *Wolff* was arguably more limited, involving imposition of prison discipline, than that in *Osborne*, involving postconviction rights to accessing evidence of innocence that could in turn potentially result in proof of innocence and the vacatur of the conviction. *Wolff* rejected certain trial-like procedures, involving appointment of counsel and cross-examination of witnesses, while requiring access to discovery, including documents and sometimes witnesses. A request for access to evidence for DNA testing is far less intrusive than discovery envisioned in inmate disciplinary proceeding cases.

The *Osborne* Court did not cite to a series of other decisions regarding access to evidence in criminal cases. The Court did not cite *Griffin v. Illinois*,[175] which held that the State must provide a transcript to indigent criminal appellants who could not afford to buy one if that was the only way to assure an "adequate and effective" appeal.[176] The *Griffin* decision is relevant because it applies to access to discovery of information required to meaningfully pursue state posttrial (though not postconviction) remedies. Other cases discuss rights of access to evidence before and during a criminal trial or before a guilty plea.[177] The Court has said that the defense right of access to potentially exculpatory evidence is so important that prosecutors are required to secure such evidence from police.[178] After all, discovery ensures fairness as well as accuracy. Such cases suggest special reasons to ensure broad access to evidence crucial to a convict's ability to pursue other state remedies. These omissions from *Osborne* are troubling

2319 ("'[A] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right.'" (quoting *Dumschat*, 452 U.S. at 463)).

172. *Wolff*, 418 U.S. at 563–72.

173. *Id.* at 563.

174. *Id.* at 566.

175. 351 U.S. 12 (1956).

176. *Id.* at 20.

177. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 243 n.5, 244 (1969); Brady v. Maryland, 373 U.S. 83, 90–91 (1963).

178. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 421 (1995).

but not surprising. As discussed in the next section, the Court simply failed to discuss how a fundamental concern with accuracy animates criminal and postconviction procedure.

Procedural due process precedent suggests that following *Osborne*, a state that creates the means to access postconviction DNA testing need not create elaborate procedures for litigation of the issue but, at the same time, may not "arbitrarily" deny access to that DNA testing. The *Osborne* Court explained that federal courts may intervene if state procedures are "fundamentally inadequate."[179] Conversely, minimally adequate procedures must be provided to permit a convict to apply for postconviction DNA testing, and, similarly, such procedures must be provided to permit a convict to challenge a decision denying access to DNA testing. The Court indicated that Alaska's procedures satisfied the due process test because they did provide access to inmates like Osborne; Osborne had simply not asked for the DNA testing he sought.[180] The Court noted other features of Alaska procedure that made it adequate, including that such claims are exempt from time limits that would otherwise apply.[181] Thus, the *Osborne* right may have some significance if states categorically deny access to DNA testing or provide inadequate procedures, as in *Wolff*, for ensuring access to evidence in the State's custody. Such applications of *Osborne* are taken up next.

B. *Future Development of the* Osborne *Liberty Interest*

Despite language indicating intent not to constitutionalize the area, the decision in *Osborne* recognizes a broad procedural due process right. On the one hand, such a derivative right imposes no obligation on states that provide no avenue at all for postconviction DNA testing.[182] On the other hand, almost all states do provide for postconviction testing, and still others provide for general postconviction access to discovery.[183] Constitutional questions will be raised in those states, both states that do have avenues available for postconviction DNA testing and those that have more general postconviction discovery statutes. The Court avoided answering such questions because Osborne's case, in which he supposedly did not ask state courts for the testing he sought, did not raise those issues. Future cases will raise those issues.

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179. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009).

180. *Id.* at 2321.

181. *Id.* at 2320.

182. The Court made an unusual point that Alaska considered passing its own postconviction DNA testing statute. *See id.* at 2316. The *Osborne* decision does not appear intended to give Alaska any incentive to pass or not pass such a statute.

183. Indeed, as the Court noted, three of the four jurisdictions that do not have specific postconviction DNA testing statutes have had courts indicate that postconviction requests may be granted pursuant to general provisions. *Id.* at 2317; *see also supra* note 104.

Language in the majority opinion suggested that a broader ruling would raise the spectre of technology run amok: the power of DNA must be harnessed to avoid "unnecessarily overthrowing the established system of criminal justice."[184] How could DNA technology overthrow our criminal justice system? As the opinion otherwise recognizes, DNA testing is used in tens of thousands of cases each year precisely to serve the goals of the criminal justice system, expediting the process of securing convictions when used to identify culprits.[185] In a small minority of cases, numbering in the hundreds, DNA evidence excludes and proves innocence postconviction. The statement suggesting that those comparatively few cases might "overthrow" the system[186] is hyperbolic if not insensitive, and runs contrary to statements in the opinion recognizing the law enforcement significance of DNA testing. Chief Justice Roberts elaborated that states enacted mechanisms to channel the power of DNA into established procedures. Citing to my work surveying state statutes, he noted that states permit postconviction motions seeking DNA testing, but often require that the testing be material to the convict's case.[187] Some state statutes require diligence in seeking the testing, or require that the testing have been technologically impossible at trial, and some even exclude persons who pleaded guilty. The question then arises what the *Osborne* due process right means when applicants are denied relief under such statutes.

The narrow interpretation of the decision is that the due process scrutiny *Osborne* commands is so lax that just about any state procedure providing some access to postconviction DNA testing or discovery will be found constitutional. After all, the decision held that Alaska's ill-defined process was constitutionally adequate. On one view, Alaska has absolutely no clearly defined standard, or at least none that was applied in any clear fashion in Osborne's case. Alaska makes postconviction DNA testing available only under a hypothetical test drawn from other states, or alternatively under a general postconviction statute that does not speak to DNA testing. Under that reading, *Osborne* permits a state to adopt a procedure in name only. States would retain almost unfettered flexibility to craft postconviction statutes that do not meaningfully provide access to DNA testing.

That narrow interpretation conflicts with the Court's understanding of Alaska's procedures. The Court described Alaska's procedures as providing a fairly broad avenue for postconviction DNA testing. The Court emphasized that the Alaska procedures lacked time limits and merely required that the DNA testing was "diligently pursued" and "sufficiently material."[188] The Court approved the state procedure only by interpreting it

184. *Osborne*, 129 S. Ct. at 2316.
185. *Id.* at 2328–29.
186. *Id.* at 2316; *see supra* note 102.
187. *Osborne*, 129 S. Ct. at 2316–17 (citing Garrett, *supra* note 9, at 1719).
188. *Id.* at 2320.

to provide broad access to DNA testing under clear criteria. Indeed, the Court recommended that Osborne seek relief under those very procedures.

Adopting a cramped reading of *Osborne*, one could discount that language as the Court's attempt to disguise the true meaning of the decision—that the Court recognized a right without any meaningful remedy, because a state statute providing even the most insurmountable obstacles to accessing the provided DNA testing will satisfy the due process test. Such a reading ignores the Court's stated legal basis for its ruling. A related argument could recognize that the Court was willing to rely on equivocal findings to serve as the basis for denying Osborne relief. The Court might similarly view the record in future due process cases.

Additional support for the interpretation that *Osborne* permits even highly restrictive state postconviction procedures is that the majority approach never mentions accuracy as a central concern in the Court's criminal procedure jurisprudence of fundamental fairness. Indeed, the majority makes a point of stating that some error is tolerable. The Court states that although our criminal system is "time-tested" it "cannot be perfect" and is "not flawless."[189] The Court has time and time again described as perhaps the central objective of our criminal justice system that "the guilty be convicted and the innocent go free"[190] and that a "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[191] The Court adopts or rejects criminal procedure protections citing to concerns regarding accuracy, including due process protections to ensure that unreliable evidence is not presented to a jury at trial. Examples include rules regulating eyewitness identifications, confessions, defense access to expert assistance, and defense access to exculpatory evidence.[192] Further, the Court adopted the protection that a conviction be reversed if there was not sufficient evidence such that a jury could have convicted beyond a reasonable doubt on all elements of the crime.[193] In the postconviction context, the Court has adopted exceptions to otherwise restrictive habeas corpus procedures if a compelling showing of innocence is made.[194] Thus, the *Herrera* plurality cited to the series of celebrated constitutional protections ensuring against wrongful convictions, but noted, "'Due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person.'"[195] The step

189. *Id.* at 2323.

190. Herring v. New York, 422 U.S. 853, 862 (1975); *see also* Portuondo v. Agard, 529 U.S. 61, 73 (2000); Berger v. United States, 295 U.S. 78, 88 (1935).

191. Schlup v. Delo, 513 U.S. 298, 325 (1995).

192. *See supra* notes 174–78 and accompanying text.

193. Jackson v. Virginia, 443 U.S. 307, 316 (1979).

194. For a taxonomy of innocence-related postconviction standards, see Garrett, *supra* note 9, pt. II.D.

195. Herrera v. Collins, 506 U.S. 390, 399 (1993) (alteration in original) (quoting Patterson v. New York, 432 U.S. 197, 208 (1977)).

requested by *Osborne* posed no cost and could potentially uncover a false conviction, and, if so, it could identify an unpunished perpetrator, but the *Osborne* majority failed to develop the core criminal justice concern with accuracy.

All of these arguments, despite some merit, overstate the degree to which the Court failed to conduct robust due process scrutiny. I argue that one must accept the *Osborne* Court's holding on its face, as future courts are obligated to do. The Court recognized a due process right and defined its broad contours. The Court's prior procedural due process jurisprudence will also inform the inquiry that lower courts must conduct. Further, far from merely gesturing towards due process, the Court described in broad-brush form what a minimally adequate state statute provides.

State statutes can reasonably require that the evidence "must indeed be newly available," "must have been diligently pursued, and must also be sufficiently material."[196] Most critical, the Court cited to the standard in the federal statute providing access to postconviction DNA testing sought by federal prisoners. The federal statute, enacted pursuant to the Innocence Protection Act, provides a sensible model for a nonarbitrary statute. Indeed, the Court noted that "[a]t oral argument, Osborne agreed that the federal statute is a model for how States ought to handle the issue."[197] That statute ensures that DNA testing be provided to convicts who can show that the testing could "raise a reasonable probability that the applicant did not commit the offense."[198]

The *Osborne* decision can be seen as ratifying the federal Innocence Protection Act model. Many states have sensible and broad DNA access laws that provide access to postconviction DNA testing to those who could plausibly prove their innocence. Still other states have statutes that ensure access to non-DNA postconviction discovery that could shed light on claims or on the issue of innocence. In contrast, statutes in some states that do not grant discovery or testing to those who could reasonably prove innocence may be vulnerable to due process challenges. In a series of states, the *Osborne* ruling could trigger successful challenges to restrictions on access to postconviction discovery or DNA testing.

For example, some states arbitrarily exclude subcategories of prisoners entirely from access to postconviction DNA testing. Take a compelling example: Kentucky and Nevada limit access to postconviction DNA testing to capital cases.[199] A prisoner not sentenced to death would have a strong claim that such a distinction is arbitrary. Such a prisoner would have no meaningful state avenue for relief. The *Osborne* Court never suggested that

196. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320–21 (2009) (citing 18 U.S.C. § 3600(a) (2006)).

197. *Id.* at 2316–17.

198. 18 U.S.C. § 3600(a)(8)(B).

199. *See* KY. REV. STAT. ANN. § 422.285(1) (LexisNexis Supp. 2009); NEB. REV. STAT. §§ 29-4116 to -4125(1) (2008).

any such categorical exclusion from testing could be valid. Further, the Court has often suggested that distinctions should not be drawn between capital and noncapital cases postconviction, stating, for example, that "we have 'refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus.'"[200]

Similarly, several states require that the issue of identity has been litigated at trial, which five states' courts interpret to bar relief to convicts who did not have a trial but pleaded guilty.[201] A state might argue that DNA testing would serve no purpose because no person would ever admit guilt falsely. However, we know that in fact individuals do falsely confess. Indeed, sixteen convicts who had pleaded guilty have been exonerated by postconviction DNA testing, and forty-two exonerees had confessed their guilt, albeit falsely.[202] The *Osborne* majority, quite importantly, did not rely on any rationale that evidence of guilt should preclude access to testing. The majority noted the fact that he had confessed at a parole hearing in the background section of the opinion. The Court never discussed that event or referred in any other way to Osborne's likely guilt in the discussion of the contours of the due process right.

The type of due process scrutiny envisioned by the Court becomes clear when one compares the concurring opinion authored by Justice Alito, who would have upheld the Alaska statute for very different reasons. It was only Justice Alito who emphasized unrelated evidence of guilt, noting that "[a]fter conviction, in an unsuccessful attempt to obtain parole, respondent confessed in detail to the crime."[203] Of course, if Osborne was innocent, he certainly could have known the details of his case—he could have confessed "in detail" based on what he heard at his own trial.[204]

Following *Osborne*, statutes may be vulnerable to due process challenges if they rely on distinctions premised on harmless error reasoning that trial evidence of guilt, or posttrial evidence for that matter, should preclude access to scientific evidence of innocence.[205] For example, in Pennsylvania, courts have dismissed requests for DNA testing by persons who had confessed, ruling that such a person cannot assert his innocence.[206] The U.S. Court of Appeals for the Third Circuit recently confronted such a

200. *See Herrera*, 506 U.S. at 405 (quoting Murray v. Giarratano, 492 U.S. 1, 9 (1989)).

201. *See* Brief for the Respondent, *supra* note 97, at 6 & n.1; Garrett, *supra* note 9, at 1680–81.

202. *See* Garrett, *supra* note 110, at 115.

203. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2324 (2009) (Alito, J., concurring).

204. *See supra* note 110.

205. Justice Stevens emphasized that courts are not necessarily good at assessing innocence postconviction, citing my study developing this point. *See Osborne*, 129 S. Ct. at 2337 n.9 (Stevens, J., dissenting) (citing Garrett, *supra* note 18, at 109).

206. *See, e.g.*, Commonwealth v. Young, 2005 PA Super. 1428, ¶ 10, 73 A.2d 720, 727. The Pennsylvania Supreme Court granted an appeal on whether a confession bars access to postconviction DNA testing. Commonwealth v. Wright, 951 A.2d 263, 263 (Pa. 2008).

case, misinterpreting *Osborne* to rule out a due process right, but dismissing the complaint because it missed a state statute of limitations, not based on the merits.[207] Should such a case be reached on the merits, a regime denying DNA testing merely because the convict confessed or pleaded guilty should be found arbitrary and a denial of due process.

A final set of statutes require due diligence in seeking DNA testing at trial or that the technology not have been available at trial. The concern is that the convict might fail to request DNA testing at trial for tactical reasons. Yet, the *Osborne* majority did not suggest that such a state interest could be interposed to bar access to postconviction DNA testing. It is the concurring opinion by Justice Alito that argued that Osborne should be "bound by his attorney's tactical decisions" if the attorney "declines the opportunity to perform DNA testing at trial for tactical reasons."[208] The U.S. Court of Appeals for the Tenth Circuit opinion claiming that *Osborne* established no right under the Due Process Clause involved a Colorado statute barring DNA testing unless trial counsel had a justifiable excuse or engaged in ineffective assistance.[209] In that case, the convict's lawyer failed to seek DNA testing at trial, apparently for strategic reasons, as perhaps Osborne's lawyer did.[210] Yet the DNA tests could unequivocally prove innocence. Following *Osborne*, it is not clear that a state can reasonably attribute the attorney's decision to the client. If there is anything that DNA exonerations have taught us, it is that many actually innocent individuals fail to understand the significance of DNA testing, fail to claim their innocence at trial, and fail to obtain DNA testing, often because of inadequate legal representation, only to prove their innocence years later.[211] The state has primary custody of the evidence, and a decision by the state not to itself conduct DNA testing is highly suspect. Further, there may be sound reasons for trial attorneys not to seek DNA testing where the state does not do so. They may rely on the state's representation that testing would not be probative or that insufficient evidence exists to test. In addition, courts often do not fund access to independent experts or testing, but rather, as Erin Murphy argues, make "the government not only the party able to obtain and then seclude such evidence, but often also grant[] it total control over the mechanisms of analysis."[212]

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207. Young v. Phila. County Dist. Attorney's Office, 341 F. App'x 843, 845 (3d Cir. 2009).

208. *Osborne*, 129 S. Ct. at 2324, 2330 (Alito, J., concurring).

209. McDaniel v. Suthers, 335 F. App'x 734, 735–36 (10th Cir. 2009).

210. *Id.* at 735.

211. *See* Garrett, *supra* note 9, pt. II.B (presenting data concerning the one quarter of DNA exonerees for whom DNA testing existed at the time of trial); Garrett, *supra* note 18, pt. II.B.5 (presenting data concerning litigation of claims of innocence by persons after exonerated by DNA testing).

212. Erin Murphy, *Inferences, Arguments, and Second Generation Forensic Evidence*, 59 HASTINGS L.J. 1047, 1067 (2008).

Most states adopt requirements that the DNA testing be potentially probative of innocence. Such a standard certainly makes sense. For example, DNA testing would serve no useful purpose in a case where the convict still concedes that he had sexual intercourse with the victim, but maintains that there was consent. However, some state courts have adopted strained interpretations of materiality requirements. They rule, for example, that because the test results could conceivably match a consensual partner that there is no reason to conduct the testing.[213] Such rulings make no sense. The testing could establish the identity of the culprit. Additional testing could also tell one whether the results merely identified a consensual partner. Such speculative rationales may be open to challenge as arbitrary. Indeed, challenges to such rulings have particular merit after *Osborne*, because such a convict is within the group to which the State claims to provide the entitlement, yet the state court nevertheless arbitrarily denies relief. On the other hand, at least one court has adopted the interpretation that I reject: that because the *Osborne* inquiry focuses on whether the state process is adequate on its face, no inquiry at all is necessary into whether the individual reasons for denying relief were valid.[214] The Court in *Osborne* did inquire into the state courts' reasons for denying relief, as well as the adequacy of the state process.

If courts interpret state materiality requirements in an arbitrary fashion, then they should be subject to due process scrutiny. They have adopted a process permitting courts to deny DNA testing based on unsupported speculation to those who could reasonably prove innocence. Similarly, rulings that simply conclude, without explanation, that testing could not be probative of innocence, may also be open to challenge as arbitrary. A related factual scenario was raised in a decision that the Ninth Circuit recently affirmed.[215] The district court denied relief, arguing that an inmate could not reasonably show innocence through a DNA test of two crime scene hairs found by the victim's body. Those hairs were not introduced at trial as evidence of guilt. Nor were they clearly tied to the perpetrator. The hairs could have come from another visitor to the victim's home. Yet should those hairs be identified as not coming from the convict, but as matching another person with no innocent explanation for being in the victim's home, the test results would raise a "reasonable probability" of a different outcome.[216] The court did not clearly explain why it assumed that this testing could not create "an opportunity to exonerate him."[217]

213. *See* Garrett, *supra* note 9, pt. II.C.3.b.

214. Cunningham v. Dist. Attorney's Office, 592 F.3d 1237, 1266 (11th Cir. 2010) ("It is essential to Cunningham's argument that this Court find Alabama's process inadequate *on its face*, not just as it might apply to his particular case, because only then can his failure to properly pursue state-law remedies be excused.").

215. Harrison v. Dumanis, 343 F. App'x 218 (9th Cir. 2009).

216. Harrison v. Dumanis, No. 06cv2470-RLH, 2007 WL 1159976, *7–8 (S.D. Cal. Apr. 18, 2007), *aff'd*, 343 F. App'x 218 (9th Cir. 2009).

217. *Id.*

One last argument deserves mention because it provides a second place in the *Osborne* opinions where Justices misunderstood applicable scientific principles. Justice Alito, concurring and joined by Justices Kennedy and Thomas, cited to several valid but very much misplaced concerns regarding accuracy of DNA testing in cases involving contaminated or degraded biological samples. The concurring opinion suggests that a State might always retain some residual interest in denying DNA testing because the results can fail "to provide 'absolute proof' of anything."[218] Indeed, the concurring opinion displayed real confusion about the science of DNA testing. In particular, the opinion confused the probative value of an exclusion with that of an inclusion. The opinion quotes from an article by Erin Murphy, which had made very clear at the outset that an exclusion has far greater probative value than an inclusion: "When a genetic profile is generated, it is far easier to determine with confidence those individuals from whom the sample could *not* have come than to identify with certainty the individual to whom the sample absolutely belongs."[219]

To take a simple example, conventional ABO blood typing did not have great probative power if the results included a suspect. Suppose the evidence and the suspect had an O blood type—so does about forty percent of the population. Yet ABO blood typing could be definitive if it excluded a suspect. If the evidence was known to have originated from the perpetrator and displayed B blood group substances, while the defendant had the A type, then the defendant could be excluded. Similarly, even partial or degraded DNA evidence might very well contain more than enough information to *exclude* a person and support innocence. Such partial DNA evidence might not be capable of *including* a person with any significant probative power. Thus, Justice Alito, perhaps unintentionally, raised important concerns largely irrelevant in the exoneration context, but highly salient when defendants challenge DNA testing that prosecutors far more commonly use to support a case for guilt.

C. *An Expanded but Hypothetical Actual Innocence Right*

The elephant standing in the Justices' chambers was the question whether to recognize a federal constitutional right to relief based on a showing of actual innocence. If so, *Osborne* could be entitled to discovery that would help him vindicate such a right. 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.[220] The plurality in *Herrera* did not reach

218. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2324, 2327 (2009) (Alito, J., concurring) (quoting *id.* at 2337 (Stevens, J., dissenting)).

219. Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489, 493 (2008).

220. Herrera v. Collins, 506 U.S. 390, 429 (1993) (Scalia, J., concurring).

the question. A majority of the Justices stated they would recognize such a claim of actual innocence, but some declined to do so in that case, citing to Herrera's weak showing of his innocence.[221] The Court maintained that stance in its 2006 *House* decision by again assuming that such a right might exist, but suggesting the standard would be quite high to prevail on a claim of actual innocence.[222]

Following the same evasive approach, the *Osborne* majority noted that "[i]n this case too we can assume without deciding that such a claim exists," because Osborne did not assert such a claim in a habeas petition.[223] The opinion notes that such an actual innocence claim could then support a request for discovery, which is available "for good cause" under the federal rules governing habeas petitions.[224] Justice Alito, in his concurring opinion, echoed this point, recommending that Osborne should assert such a claim in a habeas petition.[225]

The *Osborne* decision gives far greater weight to litigation of innocence, including claims of innocence in habeas petitions. That is because, for the first time, a due process actual innocence claim assumed to exist for the sake of argument in *Herrera* and *House*—which were both death penalty cases—now was assumed to exist in a noncapital case. This aspect of *Osborne*, not highlighted in the Justices' opinions, may be the most significant. A far broader class of convicts may now assert such innocence claims. To be sure, no convict has ever obtained relief under such a claim, which, because it is only assumed to exist, has no settled standard for obtaining relief.[226] However, the Court made it clear that federal district courts have authority to entertain actual innocence claims, and may order postconviction DNA testing as part of discovery relevant to such claims or to other constitutional claims.[227]

Indeed, the Alaska court did not just rely on state law, but contended that the U.S. Supreme Court would be unlikely to recognize a federal due process right to postconviction DNA testing or to claim actual innocence.[228] With the Supreme Court continuing to assume the existence of such an actual innocence right, lower federal courts and states may be encouraged to continue to entertain and factually develop claims of actual innocence. The Court added further weight to such claims by recently granting its first original habeas petition in decades in the case of Troy Davis, a capital case,

221. *Id.* at 419, 421 (O'Connor, J., concurring) (concluding that "the proper disposition of this case is neither difficult nor troubling" where the record "overwhelmingly demonstrates" petitioner's guilt).
222. 547 U.S. 518, 555 (2006).
223. *Osborne*, 129 S. Ct. at 2321.
224. *Id.* at 2322.
225. *Id.* at 2329–30 (Alito, J., concurring).
226. *See* Garrett, *supra* note 9, at 1691.
227. *Osborne*, 129 S. Ct. at 2322.
228. Osborne v. State (*Osborne I*), 110 P.3d 986, 994 (Alaska Ct. App. 2005).

and sending the petition to the district court for evaluation of his claim of actual innocence.[229]

III. OUTLIERS AND IMPLICATIONS

A. *The Eclipse of Finality*

The *Osborne* Court emphasized that not only are states "actively confronting the challenges DNA technology poses to our criminal justice systems," but also how DNA technology challenges "our traditional notions of finality."[230] What is perhaps most significant about that passage and then the opinion is that the Court said so little about finality, seeming to acknowledge that finality is less of a concern in the DNA era. Finality refers to the State's interest in repose after entering a final conviction. The concern with finality was expressed in statutes barring postconviction litigation based on new evidence of innocence after limitations periods had expired. State postconviction rules adopted chiefly beginning in the 1970s restricted efforts to raise new trial motions and newly discovered evidence of innocence.[231]

The concept of finality played a pivotal role in the recent history of federal habeas corpus, but in the area of postconviction DNA testing, finality has all but disappeared as a state concern. Drawing on national consensus, in *Herrera*, the Court noted that a reason not to recognize a right to claim actual innocence was that "[o]nly 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction."[232] Although at times the *Osborne* decision reads as if tracking the language of the majority opinion in *Herrera* (including by citing *Medina*),[233] the finality-based underpinnings of *Herrera* had completely eroded, and the same reasoning could not apply.

Due to the advent of DNA testing, forty-nine of the fifty states now provide at least one, and sometimes more than one, mechanism by which a prisoner may seek relief based on evidence of innocence—such as a favorable DNA test result—even after the ordinarily applicable time limits have expired.[234] Alaska has also disclaimed an interest in finality. The state permits a motion made at any time regarding newly discovered evidence of innocence, though it does not provide a separate right to access and test evidence in the custody of the state.

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

230. *Osborne*, 129 S. Ct. at 2322.

231. *See* Garrett, *supra* note 9, at 1660–84.

232. Herrera v. Collins, 506 U.S. 390, 411 (1993).

233. *Osborne*, 129 S. Ct. at 2320; *Herrera*, 506 U.S. at 407–08.

234. The law in the last state, South Dakota, remains unclear but suggests at least that such a right exists. *See* Jenner v. Dooley, 1999 SD 20, ¶¶ 17–19, 590 N.W.2d 463, 471 (stating that "courts should solemnly consider reopening a case if a 'truly persuasive' showing of actual innocence lies close at hand" (quoting *Herrera*, 506 U.S. at 417)).

Why have state rules of finality evaporated? The concern with finality was firmly joined to a concern with accuracy. States barred new trial motions made years after a conviction because traditional evidence became far less reliable over time. As the plurality put it in *Herrera*, "the passage of time only diminishes the reliability of criminal adjudications" due to "'erosion of memory and dispersion of witnesses.'"[235] The trial is the more accurate test of the evidence. DNA "challenges" all of those traditional assumptions because it can provide evidence far more accurate than the memory of a witness or a conventional forensic analysis, and it can do so years or decades later. When finality no longer served the interest in accuracy, accuracy prevailed and the states upended postconviction statutes of limitations.

One finer procedural point related to § 1983 doctrine explains an oddity in the opinion. Relying on finality would have been particularly misplaced in the *Osborne* case, because as the Court noted, Osborne was not directly attacking his conviction, and therefore did not need to exhaust state procedures to obtain relief under § 1983.[236] Under the doctrine of *Heck*, one may not challenge one's conviction by filing a civil claim.[237] The majority assumed for the purposes of this decision that Osborne satisfied the *Heck* requirements (however, the Court has just stayed an execution in a case squarely raising the question whether *Heck* bars a § 1983 complaint seeking postconviction DNA testing).[238] As a formal matter, the complaint does not seek to invalidate a conviction. Osborne "must bring an entirely separate suit or a petition for clemency to invalidate his conviction."[239] If not challenging a final conviction, finality is only hypothetically implicated. If Alaska values finality over accuracy, then state courts could deny a vacatur and the Governor can refuse a pardon even if DNA test results exclude Osborne.[240] For all of those reasons, the majority could not insist on any strong state interest in finality.

B. *Rewarding the Outlier?*

While the Court recognized a groundbreaking constitutional right, it discussed as a special reason for exercising caution in the area the fact that "[s]tates are actively confronting the challenges [of] DNA technology" by enacting statutes providing for access to testing postconviction and that action from the Court might "short-circuit what looks to be a prompt and

235. *Herrera*, 506 U.S. at 403–04 (quoting McCleskey v. Zant, 499 U.S. 467, 491 (1991)).

236. *Osborne*, 129 S. Ct. at 2321.

237. Heck v. Humphrey, 512 U.S. 477, 490 (1994).

238. *Osborne*, 129 S. Ct. at 2319; *see* Skinner v. Switzer, No. 09-9000 (09A743), 2010 WL 1133880 (Mar. 24, 2010).

239. *Osborne*, 129 S. Ct. at 2318.

240. After all, several DNA exonerees were initially denied relief even after DNA testing excluded them. *See* Garrett, *supra* note 18, pt. II.C.1.

considered legislative response."[241] The Court then did just that, and constitutionalized the area by reaffirming a due process interest contingent on existence of inadequate state-created process.

Nor were states particularly "prompt." For more than a decade after DNA testing was first used postconviction in 1989, New York and Illinois had adopted the only statutes providing for access to testing postconviction.[242] Only in the last decade did almost all remaining states pass statutes, many in just the past five years. Alaska, however, "is one of a handful of States yet to enact legislation."[243]

What made the Court's discussion remarkable was the suggestion that consensus among the states counseled *against* recognizing or further defining a right, rather than in favor of doing so. Michael Klarman has explored how "the Justices seem least reluctant to expand constitutional rights when doing so involves simply holding a few outlier states to the norm already espoused by the vast majority."[244] Obviously, the Court intrudes far more on the states if it invalidates widely held practices. Klarman notes, for example, "*Griswold* required the Court to invalidate the laws of only two states and almost certainly was consistent with dominant national opinion. *Roe*, on the other hand, had the effect of invalidating the abortion laws of forty-six states and has been intensely controversial ever since."[245] Consistent with that theory, the Court has repeatedly emphasized consensus among the states. In *Stanford v. Kentucky*,[246] the Court stated that "the primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws."[247] In *Loving v. Virginia*,[248] the Court noted that only sixteen states had antimiscegenation statutes.[249] More recently, in *Lawrence v. Texas*,[250] the Court noted Texas was one of few states that still criminalized same-sex sodomy.[251]

The Court also tracks national consensus and regulates outliers in the area of criminal procedure, in which the Court is especially sensitive to concerns of federalism and comity. As Carol Steiker and Jordan Steiker explain, "the wholesale criminal procedure revolution wrought by the Warren Court in the 1960s was in large part an attempt to bring outliers—

241. *Osborne*, 129 S. Ct. at 2322.
242. *See supra* note 100 and accompanying text.
243. *Osborne*, 129 S. Ct. at 2317.
244. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 63 (2000) [hereinafter Klarman, *Racial Origins*]; *see also* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 16–17 (1996); Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 172–73 (1998).
245. Klarman, *Racial Origins*, *supra* note 244, at 53.
246. 492 U.S. 361 (1989).
247. *Id.* at 373.
248. 388 U.S. 1 (1967).
249. *Id.* at 6 n.5.
250. 539 U.S. 558 (2003).
251. *Id.* at 568–73.

again, mostly southern states—up to a national standard of due process in criminal cases."[252] Much of the Court's death penalty jurisprudence is concerned with practices in a relatively small number of states. For example, in *Atkins v. Virginia*,[253] the majority emphasized not only "the number of these States" prohibiting execution of the mentally retarded, but also "the consistency of the direction of change" and the rare incidence of executions of the mentally retarded in states that do not prohibit it.[254] Similarly, the Court's 2005 decision in *Roper v. Simmons*[255] relied on the fact that "30 States prohibit the juvenile death penalty."[256] In the 2008–2009 Term, in *Melendez-Diaz v. Massachusetts*,[257] the Court cited to "widespread practices" in the states concerning confrontation of forensic reports,[258] while the dissent argued that the Court was overturning the rule in thirty-five states.[259]

Another line of Supreme Court decisions emphasizes not national consensus, but rather a long-standing tradition protecting a right. The Court in substantive due process decisions like *Washington v. Glucksberg*[260] has refused to recognize rights that would have upended the long-standing practices of the vast majority of the states.[261] In the area of substantive due process, tradition is particularly salient, for the Court examines whether the conduct is so far outside the bounds of long-accepted behavior as to "shock the conscience."[262] That the *Osborne* Court rejected a substantive due process theory of entitlement to postconviction DNA testing was no surprise. The Court, as in the past, stated reluctance "to expand the concept of substantive due process" and cited to the novelty of Osborne's claim.[263]

In the criminal procedure context, the Court's approach has been mixed, often emphasizing current consensus, but at other times emphasizing tradition, and not always making clear whether a right established is a substantive or procedural due process right. The Court frequently discusses current consensus in the states when evaluating due process claims, though also heavily emphasizing historical practice, and noting at times, "This is not to say that either history or current practice is dispositive."[264] Consider

252. Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869, 1916 (2006).
253. 536 U.S. 304 (2002).
254. *Id.* at 315–16.
255. 543 U.S. 551 (2005).
256. *Id.* at 564.
257. 129 S. Ct. 2527 (2009).
258. *Id.* at 2541.
259. *Id.* at 2555 (Kennedy, J., dissenting).
260. 521 U.S. 702 (1997).
261. *Id.* at 702.
262. Sacramento v. Lewis, 523 U.S. 833, 836 (1998).
263. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2322 (2009) (citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).
264. Schad v. Arizona, 501 U.S. 624, 642 (1991); *see* Israel, *supra* note 149, at 413–14.

Medina, the case from which the *Osborne* majority drew. There, the Court stated that it considered whether the challenged procedure was consistent with "[c]ontemporary practice," before turning to whether it "transgresses any recognized principle of 'fundamental fairness' in operation."[265] Particularly relevant to the claim Osborne raised, in *Herrera* the Court noted that "[o]nly 15 States allow a new trial motion based on newly discovered evidence to be filed more than three years after conviction."[266] Now that such statutes have almost entirely been displaced, there is a strong argument that not only should the Court recognize a constitutional claim for access to postconviction DNA testing, but also to relief based on a showing of actual innocence.[267]

The Court in *Osborne* claimed the opposite rationale, that state consensus counseled against further intervention. The majority suggested that a ruling for Osborne could somehow "cast these statutes into constitutional doubt and be forced to take over the issue of DNA access ourselves."[268] The majority also cited to *Washington v. Glucksberg* for the proposition that the Court "'must therefore exercise the utmost care whenever we are asked to break new ground'" and also that the states "'are currently engaged in serious, thoughtful examinations.'"[269] Such a rationale makes little sense on its face or against the backdrop of the Court's jurisprudence. If only a handful of states had postconviction DNA testing statutes, and the others were in the process of considering such statutes, then the concern with interfering in that process would have made some sense. Chief Judge J. Harvie Wilkinson first made the argument that states should be free to experiment in the area in *Harvey v. Horan*.[270] But Judge Wilkinson's opinion was written in 2002, when only half of the states had adopted DNA access statutes, and one could fairly say that the states were still divided and experimenting.[271] Now that almost all states have enacted DNA access statutes, the concern has vanished. Instead, a ruling providing DNA testing to Osborne or recognizing a freestanding entitlement to DNA testing would affect Alaska, an aberrational outlier, and perhaps other states that adopt arbitrary restrictions on postconviction DNA testing. The dissent noted, "The fact that nearly all the States have now recognized some postconviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence in cases where litigants are unfairly barred from obtaining relief in state court."[272] The *Osborne*

265. Israel, *supra* note 149, at 447–48 (quoting Dowling v. United States, 493 U.S. 342, 352 (1990)).

266. Herrera v. Collins, 506 U.S. 390, 411 (1993).

267. *See* Garrett, *supra* note 9, at 1699–716.

268. *Osborne*, 129 S. Ct. at 2322.

269. *Id.* at 2316, 2322 (quoting Washington v. Glucksburg, 521 U.S. 702, 719–20 (1997)).

270. 285 F.3d 298, 300–01 (4th Cir. 2002).

271. *See* Garrett, *supra* note 9, app.

272. *Osborne*, 129 S. Ct. at 2335 (Stevens, J., dissenting).

majority never explained how a freestanding right to postconviction DNA testing would substantially disrupt state practice.

The Court's rhetoric about deference to state experimentation was also puzzling, because the *Osborne* due process interest provides grounds to challenge arbitrary denial of access to postconviction DNA testing. As Justice Stevens noted in his dissent, "a decision to recognize a limited right of postconviction access to DNA testing would not prevent the States from creating procedures by which litigants request and obtain such access; it would merely ensure that States do so in a manner that is nonarbitrary."[273] That due process right may cement the existing national consensus, while reigning in outlier states that persist in denying DNA testing to those who could prove innocence. [274]

C. *Recognizing New Constitutional Rights*

The *Osborne* Court used strong language affirming its unwillingness to "constitutionalize" the postconviction DNA testing field. The majority framed the question "whether the Federal Judiciary must leap ahead—revising (or even discarding) the system [of criminal justice as it now exists] by creating a new constitutional right and taking over responsibility for refining it."[275] The majority stated that recognizing a postconviction right would "force us to act as policymakers."[276] Similarly, Justice Alito in his concurring opinion, joined by Justices Kennedy and Thomas, discussed the need to avoid "wielding the blunt instrument of due process, to interfere" with state and federal regulation.[277] The Court did recognize a liberty interest in state postconviction process, including access rights to DNA testing. Yet the Court tiptoed around the claim, making every effort to construe (or disregard) facts to avoid vindication of that liberty interest in this case. Similarly, the Court avoided reaching, but assumed the existence of, an actual innocence right. Finally, the Court did not carefully define the boundaries of the procedural due process right it recognized. That language expressed a temperamental unwillingness by many of the Justices to develop new constitutional rights. Chief Justice Roberts offered similar reasons in the *Northwest Austin Municipal Utility District Number One v. Holder*[278] decision upholding the Voting Rights Act by narrowly interpreting the statute to avoid a constitutional ruling.[279] In this case, Roberts noted how the Justices remain "keenly mindful of our institutional

273. *Id.* at 2339.

274. Indeed, Alaska may itself enact postconviction DNA access legislation. *See* Jeremy Hsieh, *Sen. French: DNA Bill Should Mimic Federal Law*, JUNEAU EMPIRE, Apr. 4, 2010, http://juneauempire.com/stories/040410/sta_601760153.shtml.

275. *Osborne*, 129 S. Ct. at 2323.

276. *Id.*

277. *Id.* at 2329 (Alito, J., concurring).

278. 129 S. Ct. 2504 (2009).

279. *Id.*

role" and ended the decision by stating that "[w]hether conditions continue to justify such legislation is a difficult constitutional question we do not answer today."[280]

Similarly, in *Osborne*, the Court was willing to leave important questions to be answered on another day. Justice Souter's dissent sounded those themes at greater length in several moving passages. Justice Souter lauded the virtues of cautious work when recognizing "an individual right unsanctioned by tradition."[281] He agreed that "the beginning of wisdom is to go slow" and added, "[T]he accumulation of new empirical knowledge can turn yesterday's reasonable range of the government's options into a due process anomaly over time."[282] He elaborated,

> Changes in societal understanding of the fundamental reasonableness of government actions work out in much the same way that individuals reconsider issues of fundamental belief. We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally.[283]

The passage endorsing an incremental approach provides a fitting bookend to Souter's years on the Court—particularly because he emphasized that there were limits to his patience. He argued that although the Court should usually go slow, Osborne had tried every avenue to obtain DNA testing that could prove his innocence. Osborne had waited long enough for justice.

The going slow (or standing still) approach has characterized the Court's innocence jurisprudence. The Court has yet to decide, but has long assumed *arguendo* that a capital convict can secure relief based on a showing of actual innocence. For seventeen years, the Court has repeatedly avoided deciding whether such a claim exists, much less defining its scope. Again in *Osborne*, the Court assumed an actual innocence right might exist, but without defining the right.

Outside of the innocence context, the Court has often proceeded more quickly. Several areas of criminal procedure have been marked by recent and dramatic change, such as in the landmark death penalty rulings in *Atkins* and *Roper*,[284] the Confrontation Clause ruling in *Crawford v. Washington*,[285] and the sentencing decisions following *Apprendi v. New Jersey*.[286] In the 2008–2009 Term, the Court in *Melendez-Diaz*, found that a convict's confrontation right to challenge forensic analysis was violated.[287] The right asserted was a Sixth Amendment Confrontation

280. *Id.* at 2513, 2516.
281. *Osborne*, 129 S. Ct. at 2340 (Souter, J., dissenting).
282. *Id.*
283. *Id.* at 2341.
284. *See supra* Part III.B.
285. 541 U.S. 36 (2004).
286. 530 U.S. 466 (2000).
287. 129 S. Ct. 2527 (2009).

Clause right grounded in the not particularly long-established *Crawford* line of cases. Outside the criminal procedure area, but also faced with the assertion of a brand new due process right the same Term, in *Caperton v. A.T. Massey Coal*,[288] the Court established a right to obtain the recusal of a judge given an undue probability of bias based on campaign donations and conceded that the context of judicial campaigns was "not presented in the precedents."[289] Did Osborne fare as well? He obtained no relief from the Court. In a way he did achieve something, though, because the Court recognized a new procedural due process right to DNA testing.

CONCLUSION

The *Osborne* opinion charted new and uncertain terrain by establishing a potentially significant procedural due process right to postconviction DNA testing. The Court did not define the outer reaches of that due process right. Yet contrary to early observations, the opinion may have some real importance. Almost all states now choose to provide access to new evidence of innocence postconviction. They must now do so in an adequate and nonarbitrary fashion. The Court offered some guidance on what access states must constitutionally provide. In doing so, the Court held out the federal Innocence Protection Act as a model for an adequate set of postconviction procedures regarding access to DNA testing. The Court also broadened the reach of its hypothetical actual innocence right, but without answering whether such a constitutional right will someday become more than an operative assumption.

No floodgates have been opened by the decisions made or not made. The vast majority of criminal cases are not suitable for DNA analysis. Most prosecutors willingly agree to conduct DNA testing, state statute or not, for reasons including that DNA testing often identifies an actual perpetrator. To date, although more than 250 have been exonerated by postconviction DNA testing, less than two dozen convicts have had to litigate access to DNA claims in the federal courts, with several obtaining the testing that proved their innocence.[290]

Nevertheless, the newly established constitutional right intersects with an important area of rapidly changing criminal justice jurisprudence. In one of Justice Souter's last opinions on the Court, his praise for slow going in matters of constitutional innovation explained the Court's hesitance in *Osborne*, as in other cases in which the Court entered new constitutional territory. His belief that judicial patience can be worn thin when justice is too-long denied set the stage for what is to come post-*Osborne*. Although the Court went slowly in *Osborne*, the decision created incentives for states to go much faster. The liberty interest recognized and the continued

288. 129 S. Ct. 2252 (2009).
289. *Id.* at 2261–62.
290. *See* Starger, *supra* note 19, at 1050–51.

constitutional assumption that a *Herrera* "actual innocence" right may exist placed pressure on states to facilitate access to DNA testing. Even if courts fail to rigorously enforce the *Osborne* due process right, the renewed assumption of an actual innocence right may spur the states to adopt "further change" primarily "by legislative revision and judicial interpretation of the existing system."[291] Accuracy has eclipsed finality. The DNA revolution will continue to promote consideration of new evidence of innocence and in the words of the Court, to "lead to changes in the criminal justice system."[292]

291. Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2323 (2009).
292. *Id.*