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Is Innocence Irrelevant to AEDPA's Statute of Limitations - Avoiding a Miscarriage of Justice in Federal Habeas Corpus

Angela Ellis

"IS INNOCENCE IRRELEVANT" TO AEDPA'S STATUTE OF LIMITATIONS? AVOIDING A MISCARRIAGE OF JUSTICE IN FEDERAL HABEAS CORPUS

"The meritorious claims are few, but our procedures must ensure that those few claims are not stifled by undiscriminating generalities. The complexities of our federalism . . . are not to be escaped by simple, rigid rules which, by avoiding some abuses, generate others."
—Justice Felix Frankfurter[1]

I. INTRODUCTION

Imagine you are arrested for a crime you did not commit.[2] Perhaps you were misidentified by an eyewitness, or accused by an informant who received a deal in exchange for testimony.[3] Then imagine that you are convicted in a trial that violates your constitutional rights: maybe the government withholds evidence of your innocence or, worse, uses false testi-

1. Brown v. Allen, 344 U.S. 443, 498 (1953) (Frankfurter, J., concurring).

2. More than two million people are incarcerated in American prisons. *See* BARRY SCHECK & PETER NEUFELD, THE INNOCENCE PROJECT, 250 EXONERATED, TOO MANY WRONGFULLY CONVICTED: AN INNOCENCE PROJECT REPORT ON THE FIRST 250 DNA EXONERATIONS IN THE U.S. 52 n.1 (2010) [hereinafter INNOCENCE PROJECT REPORT], *available at* http://www.innocenceproject.org/docs/InnocenceProject_250.pdf (profiling first 250 exonerations). The Innocence Project estimates that, if the rate of wrongful conviction is as low as one percent, more than 20,000 innocent people are unjustly imprisoned. *Id.* Although scholars have not reached consensus on the rate of wrongful convictions, recent estimates are much higher than one percent. *See id.* (citing studies that range from 2.3% of capital cases to 7% of rape convictions with untested DNA).

3. Mistaken eyewitness identification is the leading cause of wrongful convictions in the United States. *See Understanding the Causes: Eyewitness Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Apr. 2, 2011). The Innocence Project reports that seventy-five percent of the convictions overturned through DNA testing were a result of mistaken eyewitness testimony. *See id.* (discussing impact of eyewitness misidentification).

False testimony offered by informants or snitches is also responsible for many wrongful convictions. *See Understand the Causes: Informants/Snitches*, THE INNOCENCE PROJECT, http://innocenceproject.org/understand/Snitches-Informants.php (last visited Apr. 2, 2011). The Innocence Project recommends specific jury instructions any time a trial rests on the testimony of informants because of such testimony's notorious likelihood of fabrication. *See id.*; ROB WARDEN, NW. UNIV. SCH. OF LAW CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 3 (2004), *available at* http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf (reporting that fifty-one people were wrongfully convicted and sentenced to death based on testimony of "witnesses with incentives to lie—in the vernacular, snitches").

mony to establish your guilt.[4] Picture a judge sentencing you to ten years in prison, life in prison, or even to death.[5]

You appeal your conviction directly and lose.[6] You file for state post-conviction relief and lose there also.[7] After assembling a case demonstrating that you are innocent and were convicted in a trial that violated your constitutional rights, you file a federal habeas corpus petition.[8] It is your

4. Due process violations are established both by the failure to disclose exculpatory evidence and the prosecution's knowing use of false evidence. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Mooney v. Holohan, 294 U.S. 103, 112-13 (1935) (per curiam) (noting that knowing use of false testimony violates due process but denying relief on other grounds); *see also* JAMES LIEBMAN, ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, at 5 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/liebman_final.pdf (determining that prosecutorial suppression of evidence resulted in sixteen to nineteen percent of reversible error in capital cases); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999) (analyzing Supreme Court's treatment of due process violations stemming from prosecutorial misconduct); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHIC. TRIB., Jan. 10, 1999, sec. 1, at 1 (reporting that convictions in 381 homicide cases have been reversed either because prosecutor knowingly used false evidence or suppressed exculpatory evidence).

5. The first 250 people exonerated by post-conviction DNA evidence spent an average of thirteen years in prison before they were released. *See* INNOCENCE PROJECT REPORT, *supra* note 2, at 52 n.1. Seventeen of these prisoners were sentenced to death. *Id.* at 53.

6. The first stage of review after a criminal conviction in state court is conducted in a direct appeal. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 3.5a (5th ed. 2005) (describing procedure of habeas review). For an overview of post-judgment appeals proceedings, see generally *id.*, chapters 35-38.

7. A state prisoner must first exhaust all state remedies before pursuing federal habeas relief. 28 U.S.C. § 2254(b) (2006); *see also* Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 585 (2009) (characterizing exhaustion doctrine as "judicially created equitable doctrine," and discussing impact).

8. Because there is no right to counsel for post-conviction appeals, the majority of state prisoners must file pro se petitions. *See* Duncan v. Walker, 533 U.S. 167, 191 (2001) (Breyer, J., dissenting) (citing study showing that ninety-three percent of federal habeas petitions were filed pro se); Diane E. Courselle, *AEDPA Statute of Limitations: Is It Tolled When the United States Supreme Court Is Asked to Review a Judgment from a State Post-Conviction Proceeding?*, 53 CLEV. ST. L. REV. 585, 586 n.6 (2005-06) (noting that "the vast majority of federal habeas corpus petitions are brought by inmates acting pro se"). This is a difficult task given the complicated set of procedural rules imposed on habeas corpus. *See* Courselle, *supra*, at 586 n.6 (characterizing procedures as "so imprecise or confusing they present difficult interpretive questions not only for pro se litigants, but for attorneys and the courts as well"); Jake Sussman, Article, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 360 (2002) (arguing that failure to recognize difficulty inflicted on pro se petitioners by statute of limitations was lawmakers' "most glaring error in judgment").

last realistic chance to overturn your conviction.[9] Imagine learning that you filed your petition two weeks too late.[10] If you can convince the judge that you are innocent, should the court hear your case anyway?[11]

The question is one of recent vintage.[12] Historically, there was no statute of limitations for filing a habeas corpus petition.[13] Congress departed from this tradition by enacting the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) in the wake of the Oklahoma City bombing.[14] One of AEDPA's most severe restrictions to habeas corpus access is a one-year statute of limitations for original petitions.[15] Prior to

9. Clemency remains as a remedy for wrongfully convicted prisoners who have been denied state and federal post-conviction relief. *See* Herrera v. Collins, 506 U.S. 390, 411-12 (1993) (describing clemency as "remedy for preventing miscarriages of justice where judicial process has been exhausted"). Nevertheless, many scholars have criticized the effectiveness of clemency as a realistic remedy. *See, e.g.*, Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 272 (1991) (noting scarce use of clemency); Austin Sarat, *Memorializing Miscarriages of Justice: Clemency Petitions in the Killing State*, 42 LAW & SOC'Y REV. 183, 186 n.8 (2008) (stating that rare use of clemency "represents a radical shift from several decades ago, when governors granted clemency in 20 to 25 percent of the death penalty cases they reviewed").

10. Petitioners miss deadlines for a variety of reasons, including their attorneys miscalculating the complex tolling system. *See, e.g.*, Souter v. Jones, 395 F.3d 577, 586 (6th Cir. 2005) (discussing missed deadline). In other cases, pro se petitioners are uninformed or lack the expertise to properly calculate the statute of limitations. *See supra* note 8 and accompanying text (discussing plight of pro se petitioners).

11. For a discussion of federal habeas timeliness provisions, see HERTZ & LIEBMAN, *supra* note 6, § 11.1. For a discussion of the relevance of innocence to federal habeas corpus, see *infra* notes 66-96 and accompanying text.

12. The first court to address this issue did so in 2002. *See* Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) (discussing innocence exception for AEDPA statute of limitations); *see also* HERTZ & LIEBMAN, *supra* note 6, § 3.2 (describing statute of limitations as one way in which AEDPA "changed the longstanding provisions of the federal habeas corpus statute").

13. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (noting that no statute of limitations governs federal habeas, and timing is only problematic when delays greatly compromise State's ability to respond). Before AEDPA's statute of limitations, the only time imposition was Habeas Rule 9(a) (Rule 9(a)). For a discussion of Rule 9(a), see *infra* note 124 and accompanying text.

14. *See* Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1217 (1996) (codified as amended in scattered sections of 28 U.S.C.) (creating statute of limitations for habeas corpus petitions). For more information about the Oklahoma City bombing, including original news reports, coverage of Timothy McVeigh's trial and execution, and memorials to the victims, see generally *After Oklahoma City*, THE NEWSHOUR, http://www.pbs.org/newshour/bb/law/oklahomacity/ (last visited Nov. 23, 2010). For an account of the relationship between the political climate following the Oklahoma City bombing and its impact on the resulting federal legislation, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 701-02 (2002).

15. *See* 28 U.S.C. § 2244(d)(1) (2006) (creating one-year statute of limitations). Although AEDPA restricted numerous aspects of habeas corpus review, scholars have argued that the implementation of a statute of limitations has had the most significant impact. *See, e.g.*, John H. Blume, *AEDPA: The "Hype" and the*

AEDPA, courts consistently recognized innocence exceptions for procedurally defaulted habeas corpus claims.[16] The language of the statute, however, does not explicitly create an exception for innocence.[17] Thus, federal courts faced with an innocent but tardy petitioner must decide whether to recognize an "actual innocence exception" to excuse the missed deadline.[18]

The stakes of resolving this question are high, both for innocent petitioners seeking relief and for the courts adjudicating their claims.[19] A res-

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"Bite", 91 CORNELL L. REV. 259, 289 (2006) (arguing that AEDPA's statute of limitations "has deprived thousands of potential habeas petitioners of any federal review of their convictions, and in some cases, their death sentences" although missed deadlines were rarely petitioner's fault).

16. The emergence of an innocence exception is generally attributed to the development of the miscarriage of justice inquiry in *Kuhlmann v. Wilson*, 477 U.S. 436 (1986). *See* Schlup v. Delo, 513 U.S. 298, 321 (1995) (tracing link between innocence and miscarriage of justice inquiry to *Kuhlmann*). For further discussion of the development of the miscarriage of justice doctrine, see *infra* notes 66-96 and accompanying text.

17. The text of 28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of—
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review;
>
> (B) the date on which the impediment to filing an application created b State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented cold have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

18. *See, e.g.*, Lee v. Lampert, 610 F.3d 1125, 1126 (9th Cir. 2010) [hereinafter *Lee II*] ("We must decide whether to recognize a judge-made exception to the statute of limitations for federal habeas relief in the case of a state prisoner who makes a showing of actual innocence in his original petition."); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) ("The second question . . . is whether it is fundamentally unfair to dismiss Cousin's petition for failure to comply with filing requirements without considering the merits of his claims of innocence."); Flanders v. Graves, 299 F.3d 974, 976-77 (8th Cir. 2002) ("In the past, we have declined to address the question of whether a petitioner's 'actual innocence' is a circumstance sufficient to toll the statute of limitations. Today we hold that it is not . . . ." (citation omitted)).

19. The denial of an original habeas petition is significant because it forecloses the protection of habeas corpus altogether. *See* Lonchar v. Thomas, 517 U.S. 314, 324 (1996) (discussing severity of denial of original habeas petition).

olution pulls at the tension between the imperative of protecting innocent people from fundamentally unjust punishment and the need to protect the court system from the burden of costly and lengthy appeals.[20] Further, a resolution requires careful statutory interpretation and implicates difficult questions of economy and finality while innocent lives hang in the balance.[21]

The federal circuits have not resolved this question with uniformity.[22] To date, only the Sixth Circuit has decided the issue in favor of an inno-

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This foreclosure represents the end of the road for most petitioners, who may file habeas petitions only after exhausting all other remedies. *See supra* note 9 and accompanying text (noting that habeas review is petitioner's last realistic chance for relief). The stakes for federal courts are high because the existence of an innocence exception requires courts to assess otherwise defaulted petitions, and this review necessarily entails costs. *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) ("Resort to habeas corpus . . . results in serious intrusions on values important to our system of government."). For a discussion of the impact and policy implications of this question, see *infra* notes 203-18 and accompanying text.

20. *See Kuhlmann*, 477 U.S. at 449 (recognizing need "to weigh the interests of the individual prisoner against the sometimes contrary interests of the State in administering a fair and rational system of criminal laws"); *see also id.* at 449 n.11 ("Sensitivity to the interests implicated by federal habeas corpus review is implicit in the statutory command that the federal courts 'shall . . . dispose of the matter as law *and justice* require.'" (ellipsis in original) (quoting 28 U.S.C. § 2243 (2006))).

21. Courts entertaining this issue primarily treat it as a question of statutory interpretation. *See, e.g., Lee II*, 610 F.3d at 1127 (discussing statute); Souter v. Jones, 395 F.3d 577, 590 (6th Cir. 2005) (conducting statutory analysis); *Cousin*, 310 F.3d at 849 (interpreting AEDPA). Nevertheless, the states' interest in finality and the conservation of judicial resources permeates these decisions. *See, e.g., Lee II*, 610 F.3d at 1134-35 (considering expenditure of state resources).

22. *See Lee II*, 610 F.3d at 1128 (recognizing circuit split); *Souter*, 395 F.3d at 597-98 (discussing different approaches taken by federal circuits). The First, Fifth, Seventh, Eighth, and Ninth Circuit Courts of Appeals have held that there is no innocence exception. *See Lee II*, 610 F.3d at 1133 (declining to recognize actual innocence exception); Escamilla v. Jungwirth, 426 F.3d 868, 872 (7th Cir. 2005) (holding "'actual innocence' is unrelated to the statutory timeliness rules"); David v. Hall, 318 F.3d 343, 347-48 (1st Cir. 2003) (declining to recognize innocence exception and holding that petitioner had not made credible showing of innocence); *Cousin*, 310 F.3d at 849 (holding that claim of innocence does not toll AEDPA statute of limitations); *Flanders*, 299 F.3d at 976-77 (holding that credible claim of innocence does not excuse missed deadline). The Sixth Circuit has recognized and applied the exception. *See Souter*, 395 F.3d at 580 (concluding that petitioner demonstrated innocence and recognizing gateway exception to statute of limitations). The Second, Third, and Tenth Circuits have held that there may be an exception. *See* Horning v. Lavan, 197 F. App'x 90, 93 (3d Cir. 2006) ("[W]e have yet to hold that the AEDPA statute of limitations can be equitably tolled on the basis of actual innocence."); Doe v. Menefee, 391 F.3d 147, 161 (2d Cir. 2004) ("[W]e see no reason not to apply the *Schlup* standard in the tolling context."); Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (listing actual innocence as appropriate justification for tolling statute of limitations).

cent petitioner.[23] In contrast, the majority of courts have held that the exception is inconsistent with the plain meaning of the statute.[24]

By recognizing an actual innocence gateway, the Sixth Circuit facilitated the exoneration of Larry Pat Souter, a man wrongfully imprisoned for nearly thirteen years.[25] In contrast, the Ninth Circuit recently declined to recognize the exception in the case of Richard Lee, a man who the United States District Court for the District of Oregon determined to be innocent.[26] Without contesting Lee's innocence, the Ninth Circuit stated simply: "We decline to prolong the inevitable recognition that there is no 'actual innocence' exception to the one-year statute of limitation for filing an original petition for habeas corpus relief."[27]

This Note analyzes arguments for and against an actual innocence exception, arguing that the result reached by the Ninth Circuit is not inevitable, contrary to the court's conclusion.[28] Part II lays the groundwork for this argument by describing the history of federal habeas corpus law, analyzing the preeminence of innocence in Supreme Court habeas corpus jurisprudence, and evaluating the changes implemented by AEDPA.[29] Part III explores the current circuit split by examining the rationales adopted by the Sixth and Ninth Circuits.[30] Part IV analyzes the text of the statute and contends that an innocence exception is consistent with the development of federal habeas corpus law and conforms to the Supreme Court's own interpretation of AEDPA's statute of limitations.[31] Part V discusses the impact and policy implications of the exception for both courts

23. *See Souter*, 395 F.3d at 580 (concluding that petitioner demonstrated innocence, and recognizing gateway exception to statute of limitations).

24. *See Lee II*, 610 F.3d at 1133 (declining to recognize actual innocence exception); *Escamilla*, 426 F.3d at 871 (holding "'actual innocence' is unrelated to the statutory timeliness rules"); *David*, 318 F.3d at 347-48 (declining to recognize innocence exception and holding that petitioner had not made a credible showing of innocence); *Cousin*, 310 F.3d at 849 (holding that claim of innocence does not toll AEDPA statute of limitations); *Flanders*, 299 F.3d at 976-77 (holding that credible claim of innocence does not excuse missed deadline).

25. *See Souter*, 395 F.3d at 580 (recognizing petitioner's credible claim of factual innocence and remanding for consideration of innocence claim).

26. *See Lee II*, 610 F.3d at 1136 (holding that there is no innocence exception to AEDPA statute of limitations). For a detailed account of Lee's substantive claim, see *Lee v. Lampert*, 607 F. Supp. 2d 1204 (D. Or. 2009) [hereinafter *Lee I*], *rev'd*, 610 F.3d 1125 (9th Cir. 2010).

27. *Lee II*, 610 F.3d at 1136. For a brief discussion of this case, see Radley Balko, *Ninth Circuit Panel: Innocence, Schminnocence. We Have Rules, You Know.*, REASON MAGAZINE (July 7, 2010), http://reason.com/blog/2010/07/07/ninth-circuit-panel-innocence.

28. *See Souter*, 395 F.3d at 599 (applying innocence exception).

29. For a discussion of federal habeas history, the development of innocence exceptions, and the impact of AEDPA, see *infra* notes 34-136 and accompanying text.

30. For a discussion of the contrasting interpretations of AEDPA's statute of limitations, see *infra* notes 137-84 and accompanying text.

31. For a discussion of AEDPA's textual interpretation, see *infra* notes 185-202 and accompanying text.

and innocent petitioners.[32] Concluding that an innocence exception is necessary to prevent a miscarriage of justice, Part VI proposes that federal courts recognize an actual innocence gateway to AEDPA's statute of limitations.[33]

II. HISTORICAL BACKGROUND: THE EVOLVING REMEDY OF FEDERAL HABEAS CORPUS

As Justice Stevens has noted, "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[34] Precisely what role innocence should play, however, remains unclear.[35] In the last two decades, innocence emerged as the preeminent concern of habeas corpus.[36] Nevertheless, the impact of credible innocence claims on time-barred petitions remains an open

32. For a discussion of the impact of an innocence exception, see *infra* notes 203-18 and accompanying text.

33. For a discussion of the need for an innocence exception, see *infra* notes 219-32 and accompanying text.

34. Schlup v. Delo, 513 U.S. 298, 325 (1995). In *Schlup*, the Court established the threshold standard for an actual innocence exception in the context of procedurally barred successive habeas petitions. *See id.* at 326-27 (establishing standard of proof requirements for miscarriage of justice review). This concern is evidenced by foundational determinations such as the burden of proof in criminal trials. *See id.* at 325 ("That concern is reflected, for example, in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'" (quoting In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring))).

35. For further discussion of the circuit split, see *infra* notes 137-84 and accompanying text.

36. *See Schlup*, 513 U.S. at 321 (noting Court's explicit linking of innocence to miscarriage of justice inquiry "to ensure that the . . . exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that relief would be extended to those who are truly deserving" (citation omitted)); Kuhlmann v. Wilson, 477 U.S. 436, 462 (1986) (Brennan, J., dissenting) (noting majority opinion's implication that "factual innocence is central to our habeas jurisprudence"); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 143-46 (1970) (arguing that habeas review should primarily address claims of innocence); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 304 (1993) (noting that Court has gradually restricted reach of writ and has "repeatedly emphasized that the availability of habeas relief should depend in large measure on whether the petitioner is factually innocent"); Sussman, *supra* note 8, at 378 ("Innocence is now unquestionably relevant to federal habeas corpus review.").

Historically, this was not always the case. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 257 (1973) (Powell, J., concurring) ("I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt."); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (noting that habeas corpus is available "regardless of the . . . apparent guilt of the offender"); Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (noting that habeas corpus inquiry does not address whether petitioner was guilty or innocent, but rather whether petitioner's rights were violated).

question.[37] Lurking behind this question is a historical debate about the proper role and scope of habeas corpus review.[38] In order to understand the implications of this debate, it is first necessary to contextualize the prospect of an actual innocence exception within the history and development of American habeas corpus law.[39]

A. *Judicial Development and Re-Development of the Great Writ*

The American writ of habeas corpus has a dynamic history of great expansion followed by recent constriction.[40] Since its inception, prisoners have used the writ to test the legality of government detention.[41] Early in American history, habeas corpus courts generally reviewed convictions for jurisdictional error.[42] Throughout the first half of the twentieth century, however, the Supreme Court gradually expanded the categories of cognizable habeas corpus claims.[43]

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37. For further discussion of the circuit split and its impact on time-barred but credible innocence claims, see *infra* notes 137-84 and accompanying text.

38. *See* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 1999 (1992) (describing relevance of debate); Steiker, *supra* note 36, at 315 (noting prominent role of debate in Supreme Court's habeas decisions).

39. *See Kuhlmann*, 477 U.S. at 463 n.1 (Brennan, J., dissenting) (declaring necessity of discussing history and purpose of writ before understanding current standards placed on its scope).

40. *See* 1 HERTZ & LIEBMAN, *supra* note 6, § 2.4d (describing expansion and constriction of American habeas review); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 417-18 (1991) (describing expansion of habeas to "status of a general post-conviction remedy for the violation of constitutional rights," and Supreme Court's subsequent restriction of habeas to remedy protecting innocence); Steiker, *supra* note 36, at 308-10 (describing evolution of habeas law).

41. *See* INS v. St. Cyr, 533 U.S. 289, 305 (2001) ("The writ of habeas corpus has always been available to review the legality of Executive detention."); HERTZ & LIEBMAN, *supra* note 6, § 2.3 (describing evolution of habeas corpus application).

42. *See, e.g.*, Wright v. West, 505 U.S. 277, 285 (1992) (plurality opinion) ("For much of our history . . . a prisoner seeking a writ of habeas corpus could challenge only the jurisdiction of the court that had rendered the judgment under which he was in custody."); Ex parte Watkins, 28 U.S. (3 Pet.) 193, 202-03 (1830) (holding that judgment in court of proper jurisdiction precluded further inquiry into case on habeas corpus review); *see also* HERTZ & LIEBMAN, *supra* note 6, § 2.3 (describing origins of habeas corpus as procedure to test jurisdiction).

43. *See Wright*, 505 U.S. at 285 ("Gradually we began to expand the category of claims deemed to be jurisdictional for habeas purposes."); *Kuhlmann*, 477 U.S. at 446 ("During this century, the Court gradually expanded the grounds on which habeas corpus relief was available."); *see also* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 248-49 (1980). The reasons for this expansion continue to cause debate among justices of the Court. *Compare Wright*, 505 U.S. at 285 (Thomas, J., plurality) (arguing that for majority of American history, habeas corpus was used only to test jurisdiction and ensure "full and fair opportunity" in state court proceedings), *with id.* at 297-99 (O'Connor, J., concurring) (arguing that habeas review always mirrored contemporaneous understandings of due process analysis).

Convinced that the need for individual justice outweighed costs to federalism and finality, the Supreme Court expanded federal habeas corpus by permitting de novo review of state court decisions, allowing petitioners to raise claims via federal habeas corpus petitions that were not raised in state court, and providing for federal evidentiary hearings to examine the facts of convictions anew.[44] Thus, by the high-water mark of the Warren Court era, the writ of habeas corpus had become a significant protection of individual constitutional rights.[45]

The expansion of habeas corpus resulted in increased use of the remedy.[46] This increase raised concerns that convictions would be endlessly argued and re-argued on the merits at significant costs to judicial economy, litigation finality, and federalism.[47] Consequently, the Burger and

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44. *See* Fay v. Noia, 372 U.S. 391, 400 (1963) (permitting review of claims not raised in state courts), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977), *abrogated in part by* Coleman v. Thompson, 501 U.S. 722, 750-51 (1991); Townsend v. Sain, 372 U.S. 293, 312 (1963) (permitting habeas courts to "receive evidence and try the facts anew"), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992); Brown v. Allen, 344 U.S. 443, 447-48 (1953) (establishing de novo standard of review), *superseded in part by statute,* 28 U.S.C. §2254(d) (1970), *overruled in part by* Williams v. Taylor, 529 U.S. 362 (2000); *cf.* Sanders v. United States, 373 U.S. 1 (1963) (holding that federal courts may consider previously rejected claims if doing so served "the ends of justice"). The *Brown* decision generated considerable controversy due to its intrusions on federalism. *See* Liebman, *supra* note 38, at 2019 (analyzing *Brown* debate); Steiker, *supra* note 36, at 319 (stating that *Brown* "is rightly regarded as a landmark case"); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It,* 33 CONN. L. REV. 919, 921 (2001) (noting controversy).

Proponents of this expanded scope were not blind to concerns for comity and finality, but, rather, concluded that individual justice outweighed all countervailing interests. *See, e.g., Sanders,* 373 U.S. at 8 ("[C]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged."); *Fay,* 372 U.S. at 424 ("[C]onventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."); *Townsend,* 372 U.S. at 312 ("[T]he opportunity for redress . . . must never be totally foreclosed.").

45. *See* Murray v. Carrier, 477 U.S. 478, 500 (1986) (Stevens, J., concurring in judgment) (noting "historic importance of the Great Writ"); Harris v. Nelson, 394 U.S. 286, 290-91 (1969) ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action."); Smith v. Bennett, 365 U.S. 708, 712 (1961) (describing writ of habeas corpus as considered "highest safeguard of liberty" by Founders).

46. *See* HERTZ & LIEBMAN, *supra* note 6, § 2.4d (describing expansion of habeas review). *Cf.* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (discussing costs of habeas review).

47. *See, e.g., Wright,* 505 U.S. at 293 (noting that habeas review "entails significant costs," and that it "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority" (citing Duckworth v. Eagan, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring) (citation omitted)); Engle v. Isaac, 456 U.S. 107, 128 (1982) (characterizing federal review of state decisions as "intrusions" that "frustrate both the

Rehnquist Courts restricted habeas corpus review by creating procedural hurdles and requiring deference to state court decisions.[48]

The wisdom of various periods in this development is a matter of considerable historical debate.[49] The debate generally breaks down into two views: proponents of restricted habeas corpus review and proponents of broad habeas corpus review.[50] Proponents of restricted habeas corpus review interpret the expansion of habeas corpus as an unfortunate departure from the writ's original purpose.[51] Central to this view is a concern that prisoners who are patently guilty will abuse the appellate system by raising meritless appeals.[52] In this view, a prisoner's interest in endless

States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights").

48. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 730 (1991) (describing "independent and adequate state ground doctrine" as "grounded in concerns of comity and federalism"); McCleskey v. Zant, 499 U.S. 467, 493 (1991) (noting "a habeas court's concern to honor state procedural default rules," and holding that petitioner must show cause and prejudice to avoid dismissal for abuse of writ); Patton v. Yount, 467 U.S. 1025, 1038-40 (1984) (requiring federal courts to afford deference to state court fact finding); Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (requiring showing of cause and prejudice for procedurally defaulted habeas claims); *Stone*, 428 U.S. at 494 (removing Fourth Amendment violations from federal habeas review).

Commentators generally agree that these decisions significantly altered the scope of habeas review in response to concerns for federalism, comity, and finality. *See* HERTZ & LIEBMAN, *supra* note 6, § 2.4d (discussing constriction of habeas scope); Ledewitz, *supra* note 40, at 415 ("In recent years, a series of United States Supreme Court decisions has restricted access by state prisoners to the Great Writ."); Steiker, *supra* note 36, at 309 (describing restriction of habeas scope beginning in mid-1970s). *But see* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2331-32 (1993) (arguing that changes were not result of federalist concerns, but rather resulted from "ideological resistance to the Warren Court's innovative interpretations of substantive federal rights").

49. *See* Blume, *supra* note 15, at 262-64 (describing debate regarding proper role of federal habeas corpus); Liebman, *supra* note 38, at 2010-36 (describing impact of competing views of habeas history on Supreme Court); Steiker, *supra* note 36, at 309 (arguing that primary competing visions of habeas history each "posit a period of 'correct' interpretation of the habeas statute and a period of judicial activism").

50. *See* LISA M. SEGHETTI & NATHAN JAMES, CONG. RESEARCH SERV., RL 33259, FEDERAL HABEAS CORPUS RELIEF: BACKGROUND, LEGISLATION, AND ISSUES 22 (2006), *available at* http://assets.opencrs.com/rpts/RL33259_20060201.pdf (describing opposing views of proper scope of habeas); Liebman, *supra* note 38, at 2041 (noting that two theories of history of habeas corpus developed in mid-1960s); Yackle, *supra* note 48, at 2338 (noting academic "quarrel" over how to characterize history of habeas).

51. *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 523-28 (1963) (arguing for limited habeas review). Professor Bator's argument proved very influential. *See* Liebman, *supra* note 38, at 2013 (attributing Justice Thomas' view of habeas to Professor Bator); Steiker, *supra* note 36, at 312-14 (characterizing Professor Bator's article as "the most influential reconstruction of pre-modern habeas law").

52. *See* Bator, *supra* note 51, at 444-53 (discussing need to limit habeas review to avoid abuse).

appeals is outweighed by the costs of extensive habeas corpus review.[53] Recent constrictions of the habeas scope, in this view, are steps in the right direction.[54]

Proponents of broad habeas corpus review argue that the remedy rightly expanded to accommodate the evolving understanding of constitutional due process.[55] For proponents of this view, the expansion was not a departure from the writ's original purpose, but rather the natural product of a shifting understanding of the liberties guaranteed by the Constitution.[56] In addition, proponents of broad review conclude that costs to the system are outweighed by the imperative of providing individual justice.[57]

The significance of this debate is great.[58] As one commentator has noted, "[t]he stakes of separating history from revisionism are high."[59]

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53. *See id.* at 525 (resting conclusion on "the federalist premise" as well as "the need for finality and repose").

54. *See* Steiker, *supra* note 36, at 309 (noting that proponents of limited habeas review approve of recent decisions).

55. *See, e.g.*, Wright v. West, 505 U.S. 277, 297-98 (1992) (O'Connor, J., concurring in judgment) (arguing that habeas courts denied non-jurisdictional petitions not as "a threshold requirement of habeas corpus," but rather because, previously, due process included no further constitutional protections); Fay v. Noia, 372 U.S. 391, 401-02 (1963) (stating that habeas corpus always protected illegally detained citizens, and arguing that doctrine expanded alongside due process), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72, 87-90 (1977), *abrogated in part by* Coleman v. Thompson, 501 U.S. 722, 750-51 (1991). Defenses of this view have been explored by several scholars. *See generally* William J. Brennan, Jr., *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961); Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

56. *See Fay*, 372 U.S. at 408-10 (discussing relationship between development of habeas corpus and expansion of due process rights).

57. *See* Steiker, *supra* note 36, at 308 (stating that proponents of this view see Supreme Court's recent restrictions of habeas as Court "substituting its own political agenda that its conservative allies were unable to enact in Congress"); Yackle, *supra* note 48, at 2238 (criticizing explanation of "naïve originalists").

58. *See* Liebman, *supra* note 38, at 1999 (arguing that "proper determination of the Great Writ's future requires an accurate understanding of its past"); Steiker, *supra* note 36, at 315 (noting that "disagreement is not merely a semantic one," because Supreme Court often relies on history of habeas to determine its proper future role); Yackle, *supra* note 48, at 2331 (noting significance of debate).

That habeas corpus history has been a source of argument both in Congress and within the Supreme Court for more than four decades illustrates the relentless pressure exacted upon habeas corpus from conservative and liberal scholars who wish to conform the doctrine to their own respective policy preferences. *See* Blume, *supra* note 15, at 262-63 (noting that, although "[t]he debate over the role of federal habeas corpus is an old one," it has only intensified since "highwater mark" of habeas in early 1960s); Liebman, *supra* note 38 (discussing and analyzing debate over proper explanation of habeas history); Steiker, *supra* note 36, at 309 (noting "extensive historiography surrounding federal habeas practice"); Yackle, *supra* note 48 (describing divergent political ideologies present on both sides of habeas debate).

59. Steiker, *supra* note 36, at 315. Despite the significance of this historical understanding, the perils of attempting to construct accurate and objective histori-

Historical narratives do not merely provide fodder for academic debate; they are regularly invoked to justify decisions about the writ's appropriate scope.[60]

Nevertheless, wrangling about the original purpose of habeas corpus risks missing an important point; namely, that each shift in habeas corpus practice has resulted from a judicial balancing of equities.[61] Although the Warren and Rehnquist Courts assigned different weight to liberty and federalism, each came to its conclusions by undertaking essentially the same analysis.[62] Specifically, each attempted to strike the proper balance between unlimited costly litigation and unconstitutional incarceration.[63] Thus, the question of whether courts should recognize an actual innocence exception for time-barred original habeas corpus petitions hinges in part on the degree to which a petitioner's innocence alters this critical balance.[64] To assess the weight of innocence, the following section ex-

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cal narratives divorced from one's own conclusions about how it ought to turn out are well documented. *See generally* HANS-GEORG GADAMER, TRUTH AND METHOD (Joel Weinsheimer & Donald G. Marshall trans., Continuum Books 2004) (1960) (criticizing traditional approaches to knowledge, which seek to interpret texts through discovery of original authorial intent, and discussing subjectivity inherent in any hermeneutic endeavor).

60. *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (emphasizing significance of habeas jurisprudence to AEDPA interpretation); Schlup v. Delo, 513 U.S. 298, 317-26 (1995) (discussing habeas history); Kuhlmann v. Wilson, 477 U.S. 436, 445-53 (1986) (tracing development of habeas corpus); *Fay*, 372 U.S. at 399-409 (discussing link between development of habeas corpus and evolution of substantive due process doctrine).

61. *See Kuhlmann*, 477 U.S. at 448 & n.8 (1986) (describing Court's determination of proper scope of habeas as "a sensitive weighing of the interests implicated"); Steiker, *supra* note 36, at 309 ("[T]he scope of federal habeas has always been fashioned as a matter of federal common-law and court-identified equitable principles."). *But see Kuhlmann*, at 464 (Brennan, J., dissenting) (disagreeing with majority).

62. *See Kuhlmann*, 477 U.S. at 448 & n.8 (arguing that, despite arriving at divergent conclusions, each court that considers scope of habeas does so by balancing competing interests); Steiker, *supra* note 36, at 309 ("The 'new' habeas, no less than the habeas of the Warren Court, is based on a federal common-law balance of Court-identified equities.").

63. *Compare, e.g.*, *Fay*, 372 U.S. at 424 (concluding that individual liberty outweighed concerns for finality and federalism), *and* Sanders v. United States, 373 U.S. 1, 8 (1963) (explaining that "conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged"), *with* Wright v. West, 505 U.S. 277, 293 (1992) (Thomas, J., plurality) (discussing costs of habeas review), *and* Engle v. Isaac, 456 U.S. 107, 128 (1982) (same).

64. *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (discussing relevance of innocence to habeas scope); Friendly, *supra* note 36 (arguing that innocence be used to determine habeas scope). For a discussion of the degree to which innocence has altered the Supreme Court's jurisprudence, see *infra* notes 66-96 and accompanying text.

plores the emergence of innocence as an integral determination in the scope of habeas corpus jurisprudence.[65]

B. *Paramount Relevance: The Emergence of Actual Innocence in Supreme Court Jurisprudence*

In the years preceding AEDPA, innocence became the primary concern of the Supreme Court's habeas corpus jurisprudence.[66] Two phenomena were at work in this process.[67] First, the Supreme Court used innocence as a vehicle for restricting habeas corpus by excluding from review certain claims not bearing on innocence.[68] Second, explicit protection for innocent prisoners became increasingly necessary in light of heightened procedural hurdles that curbed access to habeas corpus review.[69]

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65. For a discussion of the growing relevance of innocence to habeas corpus, see *infra* notes 66-96 and accompanying text.

66. *See* Steiker, *supra* note 36, at 304 (arguing that, "[a]s the Court has narrowed the reach of the writ, it has repeatedly emphasized that the availability of habeas relief should depend in large measure on whether the petitioner is factually innocent"); Sussman, *supra* note 8, at 378 (noting "intimate coupling," since 1970s, of habeas relief and innocence, and stating that "[i]nnonence is now unquestionably relevant to federal habeas corpus review"). Justice Powell signaled this change in 1973, stating:

> I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. . . . We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an unjust incarceration.

Schneckloth v. Bustamonte, 412 U.S. 218, 257-58 (1973) (Powell, J., concurring). *But see* Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 437 (1980) (arguing that Supreme Court's habeas jurisprudence is not explained by "guilt-or-innocence model of criminal justice").

67. *See* Steiker, *supra* note 36, at 304-05 (discussing dual roles of innocence in habeas development).

68. *See* Alexander v. Keane, 991 F. Supp. 329, 338 (S.D.N.Y. 1998) ("In fact, the Supreme Court has often justified pruning back the scope of federal habeas review by cutting away those aspects which do not bear on actual innocence." (citations omitted)); Yackle, *supra* note 48, at 2353-55 (describing Chief Justice Rehnquist's recommendations that Nixon-era Judicial Conference Subcommittee restrict federal habeas relief to "colorable claims of innocence" as one of three ways to limit habeas). The argument for the protection of innocence as a restriction on habeas corpus is generally attributed to Judge Friendly's influential lecture at the University of Chicago in 1970. *See generally* Friendly, *supra* note 36 (advocating that federal courts should act to protect few innocent people who have slipped through cracks).

69. *See* Ledewitz, *supra* note 40, at 416 (noting advent of innocence exceptions to procedural restrictions placed on habeas by Supreme Court, and arguing that this is consistent with Court's "view of habeas corpus as a safety valve for the innocent defendant"); Steiker, *supra* note 36, at 322 (noting that Supreme Court's

In the mid-1970s, the Supreme Court began to constrict habeas corpus.[70] The first signal of this shift was the removal of fully litigated Fourth Amendment claims, which do not implicate a petitioner's innocence, from federal habeas corpus review.[71] In addition, the Court created procedural hurdles to bar access to certain claims unless the petitioner could establish "cause" and "prejudice" to excuse the default.[72] Recognizing the possibility that the standard might unfairly bar meritorious claims, the Court held that such petitions should not be dismissed if doing so would result in a "miscarriage of justice."[73]

The Supreme Court subsequently linked the miscarriage of justice exception to a petitioner's actual innocence.[74] This development rested on the conclusion that the policy underlying the cause and prejudice hurdles must sometimes "yield to the imperative of correcting a fundamentally un-

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restriction of habeas necessitated availability of post-conviction procedures to "vindicate claims of actual innocence").

70. For a discussion of the constriction of habeas, see *supra* note 48 and accompanying text.

71. *See* Kuhlmann v. Wilson, 477 U.S. 436, 446 (1986) (describing *Stone* holding); Stone v. Powell, 428 U.S. 465, 481-82 (1976) (removing Fourth Amendment claims). The key to the Court's rationale was the conclusion that such claims are less compelling on habeas review because they do not implicate a defendant's innocence. *See Stone*, 428 U.S. at 491 n.31 ("Resort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government."); *see also Kuhlmann*, 477 U.S. at 446-47 (discussing *Stone*'s conclusion that exception of Fourth Amendment claims "created no danger that we were denying a 'safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty'" (quoting *Stone*, 428 U.S. at 490)).

72. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (establishing "cause" and "prejudice" standard). The petitioner in *Sykes* failed to follow Florida's requirement that the admission of evidence must be appealed at trial or it is barred from being raised on subsequent appeals. *Id.* at 86-87. The *Sykes* decision left the definition of the "cause" and "prejudice" standard open for later decisions. *See id.* at 91 ("Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here."); *see also* Murray v. Carrier, 477 U.S. 478, 485-86 (1986) (noting that *Sykes* Court reserved definition of "cause" and "prejudice" standard for future decisions).

73. *Sykes*, 433 U.S. at 91 (stating that mechanism was necessary to ensure that procedural default "will not prevent a federal habeas court from adjudicating . . . the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice"). This exception resulted from the Court's recognition of possible rare cases where an innocent petitioner might fail to meet the standard. *See* Engle v. Isaac, 456 U.S. 107, 135 (1982) (asserting existence of certain cases where failure to meet standard will not necessitate dismissal).

74. *See Carrier*, 477 U.S. at 496 (creating innocence exception to cause and prejudice standard); *Kuhlmann*, 477 U.S. at 452 (noting innocent prisoners' "overriding interest" in habeas relief); *see also* Schlup v. Delo, 513 U.S. 298, 322 (1995) ("[T]his Court explicitly tied the miscarriage of justice exception to the petitioner's innocence."). For a discussion of the development of the miscarriage of justice doctrine, see generally HERTZ & LIEBMAN, *supra* note 6, § 26.4.

just incarceration."[75] Thus, the Court held in *Murray v. Carrier*[76] that an innocent petitioner's failure to show cause and prejudice for procedural default should not prevent a court from granting a writ.[77]

Similarly, in *Kuhlmann v. Wilson*,[78] the Court held that federal courts must consider the "ends of justice" when deciding whether to entertain another variety of defaulted petition.[79] The Court, however, defined the ends of justice far more narrowly than it had previously articulated.[80] Noting that "a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated," the Court held that "the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence."[81]

The restriction of habeas corpus to claims weighing guilt or innocence took place over vigorous dissent from members of the Court who resisted such limitations.[82] Nevertheless, following *Kuhlmann* and *Carrier*, it was clear that exceptions to new procedural hurdles would exist, but

75. *See Engle*, 456 U.S. at 135 (describing need for miscarriage of justice exception).

76. 477 U.S. 478 (1996).

77. *See id.* at 496 (explaining innocence exception). Justice O'Connor was candid in her explanation of the necessity of the exception:

> We remain confident that, for the most part, "victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard." But we do not pretend that this will always be true. Accordingly, we think that in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.

Id. at 495-96.

78. 477 U.S. 436 (1986).

79. *See id.* at 453 (considering successive petitions alleging same grounds rejected on previous petition).

80. *See id.* at 455 (applying narrow standard).

81. *Id.* at 452, 454. Significantly, the Court in *Kuhlmann* was working against the backdrop of new habeas legislation that barred successive petitions and made no mention of an "ends of justice" inquiry. *Id.* at 449 (noting that statute made "no reference to the 'ends of justice'"). Despite congressional silence on the matter, the Court required the inquiry to continue. *See id.* at 451 (holding that courts must continue to consider "ends of justice").

82. *See, e.g.*, *Carrier*, 477 U.S. at 509 (Brennan, J., dissenting) ("I cannot join in any opinion that attempts to confine the Great Writ within rigid formalistic boundaries."); *Kuhlmann*, 477 U.S at 466 (Brennan, J., dissenting) (arguing that "innocent and guilty alike" are entitled to constitutional rights). Scholarly reaction to these changes was largely critical. *See, e.g.*, Friedman, *supra* note 55, at 253 (criticizing procedural rules as "hopelessly confusing and confused"); Graham Hughes, *Sandbagging Constitutional Rights: Federal Habeas Corpus and the Procedural Default Principle*, 16 N.Y.U. REV. L. & SOC. CHANGE 321, 338 (1988) (criticizing Supreme Court's procedural default system); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 939, 971-72 (1991) (arguing that focus on innocence is insufficient to protect other important constitutional violations); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988) (criticizing Supreme Court for ranking importance of different rights in reference to innocence).

solely to protect innocent petitioners.[83] The Court even expanded the innocence exception to excuse default in state courts for failure to meet state statutes of limitations.[84] For a majority of the Court, an innocence exception struck the proper balance between the need to curb excessive use of habeas corpus review and the need to provide protection to those "extraordinary cases" that demand habeas corpus relief.[85]

The Court subsequently clarified the nature and standard of this innocence exception in the 1995 case *Schlup v. Delo*.[86] In *Schlup*, the Court held that a petitioner establishes actual innocence by making a showing that, in light of all the evidence, "it is more likely than not that no reasonable juror would have convicted."[87] The Court chose a preponderance standard rather than a higher standard of proof because the innocence exception to procedural default is unique in that it asserts both actual innocence and a tainted trial.[88]

A *Schlup* innocence exception is procedural rather than substantive.[89] Unlike freestanding innocence claims such as the one asserted in *Herrera v. Collins*,[90] which asserted the petitioner's innocence itself as the substantive basis for relief, a *Schlup* innocence claim supplements an independent constitutional claim.[91] The showing of innocence in a *Schlup* claim is not an independent basis for relief, but is rather a mechanism for bypassing a procedural default.[92] A *Schlup* claim is "not itself a constitutional claim,

83. *See* Schlup v. Delo, 513 U.S. 298, 322 (1995) (noting effect of *Kuhlmann* and *Carrier*).

84. *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (extending cause and prejudice standard to state-defaulted habeas claims).

85. *See Schlup*, 513 U.S. at 322 ("Explicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" (citing *Carrier*, 477 U.S. at 496)).

86. 513 U.S. 298 (1995).

87. *Id.* at 327. This showing does not require irrefutable proof of innocence. *See id.* at 328 (arguing that innocence and guilt must be defined in reference to reasonable doubt); *see also* House v. Bell, 547 U.S. 518, 538 (2006) (noting that *Schlup* standard does not require "absolute certainty").

88. *See Schlup*, 513 U.S. at 316 (arguing that such convictions deserve less deference than convictions attained free of constitutional violations).

89. *See id.* at 314 (distinguishing *Herrera* claims).

90. 506 U.S. 390 (1993). In *Herrera*, the Court assumed, without deciding, that the execution of a petitioner who could make "a truly persuasive" showing of innocence would violate the Constitution. *Id.* at 417.

91. *See Schlup*, 513 U.S. at 314 (noting that basis was not innocence but other constitutional claim of ineffective assistance of counsel and *Brady* claim). The *Schlup* petitioner's relief depends on the validity of the underlying constitutional claims. *See id.* at 315 (noting petitioner's ineffective assistance of counsel and *Brady* claims).

92. *See id.* at 314 (distinguishing miscarriage of justice exception from *Herrera* claims where innocence is basis for relief); *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) (describing petitioner's contention that he was entitled to relief despite fair and error-free conviction and sentence).

but instead a gateway through which a habeas corpus petitioner must pass to have his otherwise barred claim considered on the merits."[93]

By the time *Schlup* was decided, the Supreme Court had significantly constricted habeas corpus review by creating procedural hurdles for many claims.[94] Simultaneously, the Court confirmed its commitment to excepting claims establishing a petitioner's innocence from these hurdles.[95] It is against this backdrop that Congress enacted AEDPA.[96]

C. *A Late Arrival: Legislative Development of Habeas Corpus*

The Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended . . . ."[97] While the Suspension Clause implies the power of courts to issue the writ, it is well established that this power is not inherent and must be granted by statute.[98] Thus, the evolution of habeas corpus in the United States has always been a joint venture between the legislature and the courts.[99]

Courts regularly affirm that Congress is, generally speaking, the branch appropriately tasked with making determinations about the scope of habeas corpus.[100] Nevertheless, the Supreme Court has on numerous occasions inserted judicial equitable principles into the habeas corpus statute, sometimes even in the face of unambiguous statutory language.[101] To address the proper interpretation of AEDPA's statute of limitations within

93. *Schlup*, 513 U.S. at 315 (quoting *Herrera*, 506 U.S. at 404).

94. *See* HERTZ & LIEBMAN, *supra* note 6, § 2.4d (describing contraction of habeas).

95. *See* Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CALIF. L. REV. 485, 506 (1995) (noting advent of exceptions for procedural default due to Supreme Court's unwillingness to foreclose review of innocence claims).

96. *See* Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (interpreting AEDPA in light of prior habeas practice which "was always determined under equitable principles"); Slack v. McDaniel, 529 U.S. 473, 483 (2000) (interpreting AEDPA to "incorporate earlier habeas corpus principles").

97. U.S. CONST. art. I, § 9, cl. 2.

98. *See* Ex parte Bollman, 8 U.S. (4 Cranch) 75, 94 (1807) ("[P]ower to award the writ . . . must be given by written law."); *see also* Boumediene v. Bush, 553 U.S. 723, 723 (2008) (same); Stone v. Powell, 428 U.S. 465, 475 (1976) (same).

99. *See* Schlup v. Delo, 513 U.S. 298, 319 n.35 (1995) (noting "interplay" between judicial and legislative branches in habeas development).

100. *See* Felker v. Turpin, 518 U.S. 651, 664 (1996) (citing Lonchar v. Thomas, 517 U.S. 314, 323 (1996)).

101. *See, e.g.*, Holland v. Florida, 130 S. Ct. 2549, 2561-62 (2010) (applying equitable tolling despite statutory silence); *Schlup*, 513 U.S. at 326-27 (recognizing existence of innocence exception despite absence from statutory language); *Schlup*, 513 U.S. at 343 (Scalia, J., dissenting) ("Rather than asking what the statute says, or even what we have said the statute says, this Court asks only what is the fairest standard to apply."); Kuhlmann v. Wilson, 477 U.S. 436, 451 (1986) (rejecting argument that federal courts no longer needed to consider "ends of justice" after phrase was deleted from statute); *see also Schlup*, 513 U.S. at 319 n.35 (noting Court's repeated recognition of joint judicial and legislative roles in development of habeas).

the "complex and evolving" nature of habeas corpus, this Part will examine the statutory impact on the writ.[102]

1. *Legislative Impact Pre-AEDPA*

As Chief Justice John Marshall explained in 1807, "the power to award the writ . . . must be given by written law."[103] This power was granted to federal courts during the first congressional session in 1789, in the same statute that created the federal court system.[104] In the Habeas Corpus Act of 1867, Congress extended federal habeas corpus jurisdiction to persons within state custody.[105]

Subsequently, in 1948, Congress passed the federal habeas corpus statute that evolved into today's amended version.[106] This statute largely codified the Supreme Court's habeas corpus jurisprudence without making any substantive changes.[107] The same was true of the 1966 amendments.[108] Enacted in response to "increasing burdens" on federal courts, these amendments attempted to create "a greater degree of finality of judgments in habeas corpus proceedings."[109] The impact of the amendments was minimal, however, because Congress refrained from altering the Supreme Court's own tinkering with habeas corpus review.[110] Thus, prior to the passage of AEDPA in 1996, it was the Supreme Court—not Congress—that determined the form and scope of habeas corpus review.[111]

2. *Habeas Corpus in the Wake of AEDPA*

By the time Congress seriously waded into the habeas corpus debate, the Court had already significantly scaled back the scope of the writ.[112]

102. *See* McCleskey v. Zant, 499 U.S. 467, 489 (1991) (discussing evolution of habeas doctrine).

103. *Bollman*, 8 U.S. (4 Cranch) at 94.

104. *See* Judiciary Act of Sept. 24, 1789, ch. 20, 14, 1 Stat. 73, 82 (1789).

105. *See* Habeas Corpus Act of Feb. 5, 1867, ch. 28, 1, 14 Stat. 385 (1867).

106. Act of June 25, 1948, 28 U.S.C. §§ 2241-55 (1948).

107. *See* Kuhlmann v. Wilson, 477 U.S. 436, 467 (Brennan, J., dissenting) (noting that congressional statutes since 1948 have "simply tracked contemporaneous Supreme Court decisions" (citation omitted)); LARRY W. YACKLE, POSTCONVICTION REMEDIES § 19, 90 (1981) (same).

108. *See Kuhlmann*, 477 U.S. at 467 (discussing Congress's "steadfast[ ] refus[al]" to substantively alter Court's habeas precedent); *cf.* Liebman, *supra* note 38, at 2087 (arguing that amendments largely mirrored habeas judicial precedent but "did not quite codify prior law").

109. *See* Schlup v. Delo, 513 U.S. 298, 318 (1995) (quoting S. REP. NO. 89-1797, at 2 (1966)) (describing purpose of amendments).

110. *See* Liebman, *supra* note 38, at 2091 (arguing that Congress knowingly failed to alter precedent).

111. *See* Blume, *supra* note 15, at 270 (noting that Court shaped habeas absent reform from Congress until 1996).

112. *See id.* at 262 (arguing that many of AEDPA's provisions "lack bite" because Supreme Court had already "significantly curtailed" habeas by 1996).

Nevertheless, the amendments Congress enacted in 1996 served to further constrict habeas corpus review.[113] Indeed, particularly with respect to the statute of limitations, AEDPA markedly departed from Supreme Court precedent.[114]

That AEDPA more severely altered habeas corpus review than any previous legislation and was, at least in part, a product of the political climate in which it was passed.[115] Specifically, the fear and anger that followed the Oklahoma City bombing provided lawmakers with justification and political cover for aggressive restrictions on the remedy.[116] While AEDPA advanced familiar policy goals aimed at promoting finality, comity, and federalism, it was also cast as an important response to domestic terrorism.[117]

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113. *See* Aparicio v. Artuz, 269 F.3d 78, 89 (2d Cir. 2001) (describing AEDPA's enactment as "sea change in federal habeas review"); Blume, *supra* note 15, at 259-60 (describing perceived impact); Stevenson, *supra* note 14, at 701 (noting restriction of habeas advanced by AEDPA).

114. *See* Stephen B. Bright, *Is Fairness Irrelevent?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997) (describing AEDPA's provisions as "unprecedented restrictions"); Traum, *supra* note 7, at 550 (noting novelty of AEDPA's statute of limitations).

115. *See* Blume, *supra* note 15, at 270 (arguing that AEDPA would not have been possible without "help of Timothy McVeigh"); James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 413 (2001) (arguing AEDPA resulted from "bizarre alignment" of Timothy McVeigh, conservative "Gingrich Revolution," and "the Clinton Presidency at the furthest point of its most rightward triangulation"); Williams, *supra* note 44, at 923 (describing effect of political environment on Congress and Clinton).

116. AEDPA was passed in the fearful and emotional wake of the Oklahoma City bombing. *See* Anthony G. Amsterdam, *Foreword*, *in* RANDY HERTZ & JAMES S. LIEBMAN, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, vi (5th ed. 2005) (contending that, because AEDPA was passed in wake of bombing, it "reflected a passion-fueled, extreme, and not well thought-out form of habeas corpus bashing"); Stevenson, *supra* note 14, at 701 (describing atmosphere in which bill was passed). President Bill Clinton referenced the tragedy in his signing statement, stating:

> After the tragedy in Oklahoma City, I asked Federal law enforcement agencies to reassess their needs and determine which tools would help them meet the new challenge of domestic terrorism. . . . I am pleased that the Congress included most of . . . [the agencies'] proposals in this legislation.

Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630 (April 24, 1996).

Some members of Congress criticized the use of the tragedy as justification. *See, e.g.*, 142 CONG. REC. 7965 (statement of Rep. Don Young) ("Shame on those who invoke the names of innocents slaughtered in Oklahoma City . . . in their quest to effectively abolish the writ of habeas corpus."); *id* at 7972 (statement of Rep. Don Young) ("I strongly feel this legislation is a knee-jerk reaction to a most heinous crime.").

117. *See* Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (recognizing AEDPA's goal of eliminating delays in habeas process); Traum, *supra* note 7, at 552 (stating that AEDPA reflected congressional intent to promote finality); Williams, *supra* note 44, at 923 (describing AEDPA's stated purpose).

The resulting legislation, however, has not been hailed as an epitome of sophisticated statutory drafting.[118] Describing the statute, Justice Souter famously stated that, "in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting."[119] Justice Scalia has also criticized the statute, asking in oral argument, "[w]ho is responsible for writing this?"[120] Nevertheless, petitioners seeking habeas corpus review and federal courts conducting habeas corpus proceedings must interpret and comply with AEDPA's provisions.[121]

Among these provisions, AEDPA significantly altered habeas corpus practice by requiring a higher burden of proof for *Schlup* innocence exceptions, a deferential standard of review for state convictions, and a statute of limitations for original habeas corpus petitions.[122] Prior to AEDPA, the only constraint on the timeliness of original habeas corpus petitions was Habeas Rule 9(a) of the Rules Governing section 2254 Cases and section 2255 Proceedings in the United States District Courts (Rule 9(a)), which permitted dismissal only where a petitioner's delay in filing was unreasonable and prejudiced the government's ability to respond.[123] In con-

118. *See, e.g.*, West v. Vaughn, 204 F.3d 53, 59 (3d Cir. 2000) ("AEDPA is less than a masterpiece of clarity."), *abrogated on other grounds by* Tyler v. Cain, 533 U.S. 656 (2001); Blume, *supra* note 15, at 261 (describing AEDPA as "poor drafting"); Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 992 (2006) (noting AEDPA's lack of clarity); Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 448 (2007) (criticizing AEDPA as "hastily ratified and poorly cohered"); Stevenson, *supra* note 14, at 705 (noting AEDPA's ambiguity and inconsistency). Anthony G. Amsterdam has described the impact of AEDPA's poor drafting:

> [T]he new rules are still being laboriously disentangled. The courts' efforts to straighten them out resemble nothing so much as the proverbial fire-fighter returning from a night on the town—groping, lurching, muzzy, trying with exquisite and exaggerated concentration to make sense of utter incoherence, and beginning to wonder vaguely whether the excitement of the task is worth the headache it is bound to bring tomorrow morning.

Amsterdam, *supra* note 116, at v.

119. Lindh v. Murphy, 521 U.S. 320, 336 (1997).

120. Transcript of Oral Argument at 14, Dodd v. United States, 545 U.S. 353 (2005) (No. 04-5286).

121. *See Vaughn*, 204 F.3d at 59 (noting that despite drafting deficiencies, courts are bound by statute).

122. *See* Blume, *supra* note 15, at 270-71 (describing AEDPA's major changes to habeas review). *See generally* Larry Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996) (analyzing AEDPA's habeas alterations).

123. *See* Rules Governing § 2254 Cases and § 2255 Proceedings in the United States District Courts R. 9(a) (Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the United States 1976) advisory committee notes (stating that Rule 9(a) "is not a statute of limitations. Rather, [it] is based on the equitable doctrine of laches."); *see also* Rodriguez v. Artuz, 990 F. Supp. 275, 279 (S.D.N.Y 1998) (noting that laches doctrine is "embodied" in Rule 9(a)). Rule 9(a) codified the laches doctrine. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) ("[T]here is no statute of limitations governing federal habeas, and the only laches recognized are those which affect the State's ability to defend against the claims raised on habeas."); *Rodriguez*, 990 F. Supp. at 279 (discussing application of Rule 9(a)).

trast, AEDPA established a very short statute of limitations governed by rules rather than equitable concerns.[124]

In addition, the limitations period failed to explicitly include any *Schlup* gateway exception for late petitions.[125] Rather than failing to mention *Schlup* exceptions altogether, AEDPA enacted modified versions of the exception that mirrored the Supreme Court's application.[126] Notably, there was no Supreme Court precedent applying the exception to a petition's timeliness, however, because the statute of limitations was so novel.[127]

3. *The Supreme Court's Construction of AEDPA's Statute of Limitations*

Recognizing the significance of AEDPA's revision to the statute of limitations for habeas corpus petitions, the Supreme Court has demonstrated a willingness to interpret the statute liberally.[128] In *Holland v. Florida*,[129] the Court held that the statute of limitations was subject to equitable tolling.[130] Significantly, the Court construed AEDPA to be consistent with prior habeas corpus practice and signaled that it will continue to do so unless given "the clearest command" that Congress intended otherwise.[131] Noting the equitable background of habeas corpus, the Court "counsel[ed] hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open."[132]

The essence of the rule was basic fairness; courts were unconcerned with the timeliness of a habeas petition except to prevent a petitioner from "unfairly disadvantaging the state by delaying adjudication of his habeas claims until witnesses are unavailable, memories stale, and evidence difficult to produce" absent good cause for the delay. *See Rodriguez*, 990 F. Supp. at 279-80 (discussing laches doctrine).

124. *See* Holland v. Florida, 130 S. Ct. 2549, 2561 (2010) (describing brevity of statute of limitations).

125. *See Lee II*, 610 F.3d. 1125, 1127 (9th Cir. 2010) (noting absence of innocence exception); Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005) (highlighting lack of any mention to innocence in statute of limitations).

126. *See* 28 U.S.C. § 2244(b)(2)(B) (2006) (including *Schlup* exception, but altering standard of proof from preponderance to clear and convincing evidence).

127. *See Lee II*, 610 F.3d at 1131 (explaining no *Schlup* exception existed in pre-AEDPA timeliness requirements because those requirements were created by AEDPA).

128. *See, e.g., Holland*, 130 S. Ct. at 2560 (holding that AEDPA statute of limitations is subject to equitable tolling); *c.f.* House v. Bell, 547 U.S. 518, 539 (2006) (applying *Schlup* exception to state-defaulted habeas claim).

129. 130 S. Ct. 2549 (2010).

130. *See id.* at 2560 (upholding equitable tolling).

131. *See id.* at 2562 ("AEDPA seeks to [achieve its goals] without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law, under which a petition's timeliness was always determined under equitable principles."); Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles." (citation omitted)).

132. *Holland*, 130 S. Ct. at 2562.

Similarly, the Supreme Court has invoked the avoidance doctrine to preserve habeas corpus review.[133] The avoidance doctrine construes statutory language as consistent with constitutional principles and developments to avoid deciding a more difficult constitutional issue.[134] Given the choice between two interpretations of AEDPA in *INS v. St. Cyr*, the Court chose to interpret the statute broadly to avoid deciding whether the more narrow interpretation violated the Suspension Clause.[135] The Court's reliance on the avoidance doctrine in *St. Cyr* demonstrates its willingness to preserve habeas review, as well as its desire to avoid deciding a Suspension Clause issue.[136] Thus, by preserving equitable tolling in *Holland* and avoiding a Suspension Clause problem in *St. Cyr*, the Court demonstrated that the history and development of habeas corpus remains a significant piece of the interpretive puzzle.[137]

III. CONFLICTING RESULTS: DIVERGENT APPROACHES IN FEDERAL COURTS

Any federal court deciding whether to recognize an actual innocence exception to AEDPA's statute of limitations must come to terms with two undeniable facts: (1) AEDPA does not explicitly create an innocence exception;[138] and (2) there are innocent people who—absent an exception—will remain in prison with no other avenue for relief.[139] Faced with

133. *See* I.N.S. v. St. Cyr, 533 U.S. 289, 305 (2001) (invoking doctrine to "avoid such a serious and difficult constitutional issue"); Traum, *supra* note 7, at 592-94 (discussing application of avoidance doctrine to AEDPA's statute of limitations). *But see* Felker v. Turpin, 518 U.S. 651, 664 (1996) (holding that AEDPA provision did not per se violate Suspension Clause).

134. *See St. Cyr*, 533 U.S. at 301 n.13 ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely."); *c.f.* Rodriguez v. Artuz, 990 F.Supp. 275, 283 (S.D.N.Y. 1998) (holding statute of limitations did not per se violate Suspension Clause, but implying that constitutional challenges may have merit in case of innocent petitioner).

135. *See St. Cyr*, 533 U.S. at 301 n.13 (construing AEDPA to avoid constitutional issues); Traum, *supra* note 7, at 592-93 (discussing Court's holding).

136. *See* Traum, *supra* note 7, at 593 (arguing that Supreme Court ignored apparent congressional intent in *St. Cyr* to avoid Suspension Clause question).

137. *See id.* (applying judicial background to interpretation of AEDPA).

138. 28 U.S.C. § 2244(d) (2006). For the full text of the statute, see *supra* note 17.

139. *See* 28 U.S.C. § 2244(d). The statute of limitations makes no mention of an exception for innocence. *See id.*

The release of at least two innocent men, Larry Pat Souter and Bruce Lisker, has depended on the willingness of federal courts to recognize an actual innocence exception to AEDPA's statute of limitations. *See* Lisker v. Knowles, 463 F. Supp. 2d. 1008, 1036 (C.D. Cal. 2006) (holding that failing to apply exception in Lisker's case would result in miscarriage of justice); Souter v. Jones, 395 F.3d 577, 602 (6th Cir. 2005) (recognizing exception and holding Souter established innocence). Souter's release is perhaps best described in his press release of April 2, 2005. *See generally* Souter Press Release on Discharge (April 2, 2005), *available at* http://www.smietankalaw.com/souterpresssrelease2.doc (last visited October 3, 2010). For media coverage of Bruce Lisker's case and release, see generally Scott

these realities, the circuit courts of appeals reached different conclusions.[140] The majority of circuit courts that have decided the question have declined to recognize the exception.[141] In contrast, the Sixth Circuit is the only federal court of appeals to adopt the exception.[142] The following Section will explore the circuit split by contrasting two cases that are representative of each approach.[143]

A. *The Majority Approach: Turning a Blind Eye Toward Innocence*

On April 18, 1995, Richard Lee was convicted of sexual abuse.[144] Lee's conviction rested on the testimony of the victim, a six-year-old boy.[145] Due to an improper interpretation of Oregon's rape shield law, however, the defense was precluded from informing the jury that another man, Robert Nachund, had pled guilty to molesting the victim during the same time period and at the same location.[146] During the trial, the victim confused Lee with Robert Nachund and gave conflicting testimony regarding the identity of his abuser and the abusive acts he suffered.[147] The jury

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Glover & Matt Lait, *Bruce Lisker Won't Be Retried for 1983 Slaying of His Mother*, L.A. TIMES, September 22, 2009, *available at* http://articles.latimes.com/2009/sep/22/local/me-lisker22 ("The San Fernando Valley man, now 44, walks free after more than 26 years behind bars.").

140. For a further discussion of the differing conclusions courts have reached on this issue, see *supra* note 15 and accompanying text.

141. *See Lee II*, 610 F.3d 1125, 1133 (9th Cir. 2010) (declining to recognize actual innocence exception); Escamilla v. Jungwirth, 426 F.3d 868, 872 (7th Cir. 2005) (holding "'actual innocence' unrelated to statutory timeliness rules"); David v. Hall, 318 F.3d 343, 347-48 (1st Cir. 2003) (declining to recognize innocence exception and holding that petitioner had not made credible showing of innocence); Flanders v. Graves, 299 F.3d 974, 976-77 (8th Cir. 2002) (holding that credible claim of innocence does not excuse missed deadline); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) (holding that claim of innocence does not toll AEDPA statute of limitations).

142. *See Souter*, 395 F.3d at 599 (applying exception); *see also Lee II*, 610 F.3d at 1134 (listing district courts that recognize exception).

143. For a discussion of the divergent approaches to this question, see *infra* notes 144-84 and accompanying text.

144. *Lee I*, 607 F. Supp. 2d 1204, 1210 (D. Or. 2009), *rev'd* 610 F.3d 1125 (9th Cir. 2010).

145. *Id.*

146. *Id.* at 1209.

147. An excerpt of the victim, Matthew's, direct examination states:

Q: Do you know who this is, Matthew? What's his name?
A: Robert—I mean, Richard.
Q: Matthew, do you know why you're here today?
A: No.
Q: Do you know why you've come today to talk to us?
A: No.
Q: Did—did Richard do anything that you wanted to talk to us about?
A: No.

Id. at 1210.

was never given sufficient information to interpret the victim's confusion.[148]

Lee appealed his conviction directly and, after losing, subsequently filed a timely appeal in Oregon for post-conviction relief.[149] What Lee did not realize at the time, however, was that Oregon's two-year statute of limitations was longer than AEDPA's statute of limitations.[150] Thus, by the time Lee filed for relief in Oregon—a mere sixteen months after his conviction was final—his opportunity to seek federal habeas corpus review had lapsed.[151]

The United States District Court for the District of Oregon applied a *Schlup* exception to AEDPA's statute of limitations and concluded, after weeks of evidentiary hearings, that Lee satisfied the requisite showing of innocence required by *Schlup*.[152] Accordingly, the district court examined Lee's petition on the merits and granted his writ.[153]

On appeal, the Ninth Circuit reversed.[154] The court's decision was not, however, due to doubts about Lee's innocence.[155] Rather, the court held that, innocence notwithstanding, Lee was not entitled to relief because his petition was time-barred.[156]

The Ninth Circuit's reasoning hinged on its statutory analysis.[157] The court began by noting the absence of any explicit actual innocence exception in AEDPA.[158] The court emphasized that this absence is important,

148. *See id.* at 1217-18 (noting erroneous evidentiary ruling "which improperly excluded evidence essential to the defense and, indeed, essential for the jury to have any real understanding of what happened").

149. *Id.* at 1216.

150. *Compare* OR. REV. STAT. § 138.510(3) (2009) (setting two-year statute of limitations), *with* AEDPA, 28 U.S.C. § 2244(d)(1) (2006) (establishing one-year statute of limitations to file both state and federal post-conviction appeals). Under AEDPA's rules, the time period during which a "properly filed" state post-conviction appeal is pending is tolled under AEDPA. *Id.*

151. *See Lee II*, 610 F.3d 1125, 1128 (9th Cir. 2010) (describing untimeliness of Lee's federal petition).

152. *See Lee I*, 607 F. Supp. 2d 1204, 1221 (D. Or. 2009) ("In this circumstance, 'it is more likely than not that no reasonable juror . . . would lack reasonable doubt.'" (citation omitted)), *rev'd* 610 F.3d 1125 (9th Cir. 2010).

153. *See id.* at 1226 (holding that Lee established "constitutionally ineffective assistance of counsel [and was] entitled to a new trial on all counts").

154. *See Lee II*, 610 F.3d at 1136 (reversing and remanding with instructions to dismiss as untimely).

155. The Ninth Circuit assumed that Lee made the showing of innocence. *See id.* at 1126 ("We must decide whether to recognize a judge-made exception to the statute of limitations for federal habeas relief in the case of a state prisoner who makes a showing of actual innocence in his original petition.").

156. *See id.* at 1133 (holding *Schlup* innocence exception inapplicable to statute of limitations).

157. *See id.* at 1132 (refusing to "override the plain meaning of the statute").

158. *See id.* at 1127 ("Notably absent . . . is an 'actual innocence' exception.").

particularly in light of the fact that the statute provides four possible tolling dates.[159]

Casting the alternative tolling dates as exceptions, the Ninth Circuit reasoned that the absence of an innocence exception indicates congressional intent to exclude it.[160] The court bolstered this conclusion by arguing that the existence of a *Schlup* exception in AEDPA's provisions governing successive petitions and evidentiary hearings further implied congressional intent to omit the exception from the statute of limitations.[161] Because of its interpretation of the statute's plain meaning, the court refused to consider fairness arguments, stating: "it is not up to us to revise the habeas corpus statute to conform with our understanding of equity . . . . We will not rewrite Congress's handiwork."[162]

Lee also raised a Suspension Clause issue, arguing that an exception should be recognized to "avoid serious constitutional concerns."[163] The court rejected this argument, however, reasoning that the statute of limitations provided adequate time for petitioners to bring habeas corpus claims.[164] Consequently, the court dismissed Lee's petition as untimely.[165]

The Ninth Circuit's approach in *Lee* is typical of the approach employed by the majority of circuit courts of appeals that have considered the issue, though no other court has decided the issue in the case of an innocent petitioner.[166] These decisions rest on an interpretive approach that focuses solely on the language of the statute, without reference to the purpose and development of the scope of the writ.[167]

159. 28 U.S.C. § 2244(d)(1)(A)-(D) (2006). AEDPA's statute of limitations begins to toll either as soon as a conviction becomes final, or on one of three other dates: (1) if a state government illegally created an impediment to filing, tolling begins on the day that the impediment is removed; (2) if the Supreme Court creates a new constitutional right and makes it retroactively applicable, tolling begins on the day that the right is recognized; or (3) if the necessary facts to establish a constitutional claim were unavailable at the conclusion of direct review, tolling begins on the date when a petitioner could have discovered the facts through the exercise of due diligence. *Id.*

160. *See Lee II*, 610 F.3d 1128-29 (invoking interpretive canon of *expressio unius est exclusio alterius*).

161. *See id.* at 1130 (noting existence of exception in 28 U.S.C. § 2244(b)(2)(B) and § 2254(e)(2)(B)); Souter v. Jones, 395 F.3d 577, 589 (6th Cir. 2005) (noting that Congress codified actual innocence exception for successive petitions but did not include it for original petitions).

162. *See Lee II*, 610 F.3d at 1132.

163. *Id.*

164. *Id.* at 1132-33.

165. *See id.* at 1136 (noting court dismissed claim on statute of limitations grounds).

166. *See* Escamilla v. Jungwirth, 426 F.3d 868, 871 (7th Cir. 2005) (rejecting petitioner's claim of innocence); David v. Hall, 318 F.3d 343, 348 (1st Cir. 2003) (holding that petitioner failed to establish *Schlup* innocence).

167. *See, e.g., Lee II*, 610 F.3d at 1132 (discussing statute's "plain meaning"); *Escamilla*, 426 F.3d at 872 (refusing to "alter the rules laid down in the text"); *David*, 318 F.3d at 346 ("Congress likely did not conceive that the courts would add

B. *The Minority Approach: Interpreting AEDPA with an Eye Toward Context*

In 1992, Larry Pat Souter was convicted of the 1979 murder of Kristy Ringler.[168] He was sentenced to twenty to sixty years in prison.[169] In his original federal habeas corpus petition, Souter provided proof that the government withheld exculpatory photographs and used unreliable expert testimony at his trial.[170] Unfortunately, Souter's petition was filed fifty-nine days late.[171] Thus, the district court denied his petition as untimely.[172]

Similar to the Ninth Circuit's examination in *Lee*, the Sixth Circuit's analysis in *Souter* rested on statutory interpretation.[173] Rather than focusing solely on the language of the text, however, the court interpreted the statute within the context of its history, noting that *Schlup* gateway exceptions for actual innocence constituted the "jurisprudential background" against which the statute was written.[174] Emphasizing the writ's equitable

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new exceptions and it is even more doubtful that it would have approved of such an effort."); Flanders v. Graves, 299 F.3d 974, 977 (8th Cir. 2002) (declining to "engraft an additional judge-made exception onto congressional language that is clear on its face").

168. *See* Souter v. Jones, 395 F.3d 577, 583 (6th Cir. 2005) (noting trial court's decision). Kristy's body was found lying on the highway on the night of her death in 1979. *See id.* at 581 (discussing facts of case). Investigators at the time concluded she had been struck by a hit-and-run driver, and never filed any charges. *See id.* at 582. Twelve years later, a newly elected sheriff "who committed his office to reviewing unsolved homicides" reopened the case for investigation. *See id.* (discussing reopening of case). The government's theory was that Kristy's body looked too clean to have been hit by a car. *Id.* at 582-83. Instead, the government argued, Kristy had been hit in the head by a Canadian Club Whiskey bottle. *See id.* at 583 (detailing government's argument).

169. *See id.* at 583 (discussing sentence).

170. *See id.* at 591-92 (evaluating weight of new evidence). One of the experts recanted his testimony, and the manufacturer of Canadian Whiskey bottles—the purported murder weapon—submitted an affidavit that cast serious doubt on the government's entire trial theory. *See id.* at 591 (discussing recanted testimony and affidavit of bottle manufacturer).

171. *See id.* at 586 (discussing compliance with timeliness provision).

172. *See id.* at 577 (discussing district court's holding). Souter had contested his conviction in direct and then post-conviction Michigan state court proceedings until 2001. *See id.* at 585 (discussing state proceedings). One year after his state post-conviction appeal was denied, Souter filed a first federal habeas petition. *See id.* at 586 (discussing federal proceeding). His lawyer failed, however, to count the fifty-nine days between the conclusion of Souter's direct appeal and the commencement of his collateral proceeding. *See id.* (discussing reason for untimely submission of petition). Thus, Souter's federal habeas petition was time-barred. *See id.*.

173. *See id.* at 597-600 (interpreting 28 U.S.C. § 2244(d)(1) (2006)).

174. *See id.* at 598 ("In interpreting a statute, we presume that Congress legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence.").

history, the court reasoned that, absent clear evidence of congressional intent, courts should not deny relief to innocent petitioners.[175]

Accordingly, the Sixth Circuit refused to draw the "negative implication that the absence . . . was intended."[176] Instead, the court noted that innocence exceptions for procedurally defaulted habeas corpus claims were well established when AEDPA was enacted.[177] The court then reasoned that Congress included the exception in the provisions governing successive petitions and evidentiary hearings because it altered the standard of review in those situations.[178] Thus, the court concluded, the absence of an explicit exception from the statute of limitations demonstrated congressional intent to retain an unaltered *Schlup* exception for time-barred original petitions.[179] Accordingly, the court held that, "[a]bsent evidence of Congress's contrary intent," a *Schlup* exception should apply.[180]

The Sixth Circuit also concluded that an innocence exception is consistent with the policy goals underlying AEDPA.[181] The court reasoned that AEDPA sought to curb abuse and delay, but not to deny relief in the extraordinary case where an innocent person is wrongfully convicted.[182] In addition, the court reasoned that interpreting the statute to include an actual innocence exception avoided the "constitutional concerns" that could result from denying habeas corpus relief to a petitioner who is actually innocent.[183] Therefore, the Sixth Circuit applied the innocence exception, assessed Souter's petition on the merits, and concluded he was entitled to relief.[184]

IV. TEXTUAL ANALYSIS

As one commentator recently noted, "[a]t some level, any theory of statutory interpretation is about constitutional law and the institutional

175. *See id.* at 599 (refusing to imply inequitable result "[a]bsent evidence of Congress's contrary intent").

176. *See id.* (noting that courts apply equitable tolling despite statutory silence).

177. *See id.* at 598-99 (analyzing *Coleman* and *Schlup* in reaching holding).

178. For a discussion of the inclusion of the innocence exception in one provision but its absence in 28 U.S.C. § 2244(d)(1), see *supra* note 159 and accompanying text.

179. *See Souter*, 395 F.3d at 599 ("The more reasonable inference . . . is that Congress intended not to alter the existing jurisprudential framework which allowed for a showing of actual innocence to overcome a procedural default.").

180. *See id.* (applying exception).

181. *See id.* (noting consistency between exception and AEDPA's principles).

182. *See id.* (citing Calderon v. Thompson, 523 U.S. 538, 558 (1998)) ("The miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of actual innocence.").

183. *See id.* at 601 (discussing "constitutional concerns").

184. *See id.* at 602 (summarizing holding).

roles of Congress and the courts."[185] This is particularly true in the arena of federal habeas corpus, which has long been shaped by the Supreme Court.[186] The role of Congress in this process was minimal until the passage of AEDPA in 1996.[187] Thus, while it is true that the courts have no inherent power to grant habeas corpus relief, any interpretation of the habeas corpus statute that fails to reference its history is woefully inadequate.[188]

The evolution of habeas corpus demonstrates a general consensus that, while courts should not endure endless and abusive habeas corpus appeals, any restriction on access to the writ should be accompanied by exceptions for innocent petitioners.[189] Unlike the majority approach, which focuses on the statutory language stripped of its context, the Supreme Court has refused to ignore this history when interpreting AEDPA.[190] Instead, similar to the minority approach taken by the Sixth Circuit in *Souter*, the Court has assumed AEDPA's consistency with habeas corpus history and has emphasized the importance of this jurisprudential background to the interpretive process.[191] Moreover, the Court has ex-

185. Traum, *supra* note 7, at 548-49.

186. For a discussion of the Supreme Court's impact on the development and scope of federal habeas corpus, see *supra* notes 106-09 and accompanying text.

187. *See* Traum, *supra* note 7, at 584 (noting that habeas has been "governed less by 'statutory developments' than by 'a complex and evolving body of equitable principles informed and controlled by historical usage . . . and judicial decisions.'" (citations omitted)).

188. The need for express power to grant the writ was established by Chief Justice John Marshall in *Ex parte Bollman*, 8 U.S. 75, 94 (1807). The Supreme Court has signaled, however, that the history of the writ as an equitable principle plays a role in interpreting the statute. *See* Holland v. Florida, 130 S. Ct. 2549, 2560 (2010) (noting that "[e]quitable principles have traditionally governed the substantive law of the habeas corpus"); *id.* at 2562 ("AEDPA seeks to [achieve its goals] without undermining basic habeas corpus principles and by harmonizing the statute with prior law, under which a petition's timeliness was always determined under equitable principles."); Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions . . . incorporate earlier habeas corpus principles."). For further discussion of why and how the history of the habeas corpus should be considered in any interpretation of the habeas corpus statute, see *infra* notes 189-202 and accompanying text.

189. *See* Friedman, *supra* note 94, at 530 (noting that Supreme Court "cannot help itself from creating exceptions . . . . The Court should, and does, worry that in curtailing habeas it is closing a door to what might be a valid claim. . . . So, for every door it shuts, the Court creates several escapes."). For a discussion of the development of innocence exceptions and tracing development of miscarriage of justice doctrine, see *supra* notes 63-98 and accompanying text.

190. *Compare Holland*, 130 S. Ct. at 2562 (construing AEDPA as consistent with "basic habeas corpus principles" and noting equitable history of timeliness provisions), *with Lee II*, 610 F.3d 1125, 1132 (9th Cir. 2010) (focusing solely on statute's "plain meaning").

191. *See Holland*, 130 S. Ct. at 2560 (refusing to construe AEDPA "to displace courts' traditional equitable authority absent the 'clearest command'" (citation omitted)); *Slack*, 529 U.S. at 483 (holding that AEDPA incorporated historical equitable principles governing habeas).

plicitly warned against deriving implications from statutory silence that would yield unjust results.[192]

To this end, the majority approach stands in contrast to the Supreme Court's AEDPA interpretation.[193] It ignores habeas corpus history and abandons the equitable inquiry altogether.[194] Consequently, it assumes that Congress intentionally provided greater protection to prisoners filing successive petitions—after receiving a *full hearing* on the merits in both state and federal court—than to innocent petitioners who have received no habeas corpus review at all.[195] Congress may be free to enact statutes based on such reasoning, but courts should not imply this unfair result.[196]

In addition, the minority approach's reliance on the avoidance doctrine is consistent with the Supreme Court's recent Suspension Clause analysis.[197] Without clear guidance from the Supreme Court about the scope of the Suspension Clause, federal courts should avoid this difficult issue by construing AEDPA's statute of limitations to provide a safety valve for truly innocent petitioners.[198]

The Supreme Court has recognized an imperative to correct those extraordinary cases that result in the conviction of an innocent person.[199] Accordingly, the Court has consistently employed innocence exceptions for procedurally defaulted habeas corpus claims.[200] AEDPA's statute of

192. *See Holland*, 130 S. Ct. at 2562 ("counsel[ing] hesitancy" against implying inequitable purpose from statutory silence).

193. For a discussion of the majority approach, see *supra* notes 144-67 and accompanying text.

194. *See Lee II*, 610 F.3d at 1132 (declining to discuss equitable principles).

195. *See id.* at 1131 (discussing significance of exception's presence in 28 U.S.C. § 2254(b)(2) and absence in § 2244(d)).

196. *See Holland*, 130 S. Ct. at 2560 (requiring clear command from Congress before displacing equitable inquiry). The Supreme Court has long recognized the unique significance of the dismissal of a first habeas petition because it "denies the petitioner the protections of the Great Writ entirely." *See* Lonchar v. Thomas, 517 U.S. 314, 324 (1996) (noting that this denial risks "injury to an important interest in human liberty").

197. *Compare* I.N.S. v. St. Cyr, 533 U.S. 289, 305 (2001) (invoking doctrine to avoid such serious and difficult constitutional issue), *with* Souter v. Jones, 395 F.3d 577, 601 (6th Cir. 2005) (discussing constitutional concerns).

198. *See St. Cyr*, 533 U.S. at 301 n.13 (declining to decide scope of Suspension Clause protections); Amsterdam, *supra* note 116, at vi (noting that "[i]nsofar as the statute purports to deny federal judges powers they have long exercised to adjudicate and rectify violations of basic federal law, AEDPA is susceptible to constitutional challenges that can invalidate some of its provisions or applications and influence the construction of others" through avoidance doctrine); Traum, *supra* note 7, at 593-94 (explaining Supreme Court's "strong desire to avoid resolving a Suspension Clause challenge and . . . strong instinct to preserve habeas review").

199. *See* Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (describing "powerful and legitimate interest" of innocent person in obtaining release); Engle v. Isaac, 456 U.S. 107, 135 (1982) (noting that, in certain cases, principles of comity and finality "must yield to the imperative of correcting a fundamentally unjust incarceration").

200. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 326-27 (1995) (establishing threshold showing of innocence for successive petitions); Coleman v. Thompson, 501

limitations does not expressly overturn this precedent.[201] Thus, courts should construe the limitation provision to allow a gateway exception for innocent petitioners.[202]

V. POLICY IMPLICATIONS AND IMPACT

Determining access to habeas corpus review inherently involves tension between two legitimate and important interests.[203] On the one hand, the government must conserve scarce judicial resources and ensure that habeas corpus review is manageable for federal courts.[204] At some point, litigation must end.[205]

On the other hand, courts have a duty to ensure that the Constitution is not violated in criminal trials and that citizens spending their lives in prison are guilty of the crimes for which they are sentenced.[206] The legal process inevitably involves costs; such is the nature of our system of government.[207] A statute of limitations requiring prompt appeals may be an ap-

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U.S. 722, 750 (1991) (recognizing miscarriage of justice exception for state-defaulted claims); *Kuhlmann*, 477 U.S. at 455 (requiring courts to entertain petitions establishing "colorable claim of innocence").

201. *See* 28 U.S.C. § 2244(d) (2006); *see also Lee II*, 610 F.3d 1125, 1127 (9th Cir. 2010) (noting statute's silence regarding innocence exception).

202. *See* Souter v. Jones, 395 F.3d 577, 599 (6th Cir. 2005) (holding that innocence exception should apply to statute of limitations).

203. *See* Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (discussing need to balance competing interests); Seghetti & James, *supra* note 50, at 22 ("Although trial finality is often cited by proponents who favor further restricting federal habeas corpus relief to state prisoners as a desirable goal . . . a prisoner's constitutional rights is often cited . . . as equally paramount to the discussion of the proper scope of habeas corpus relief.").

204. *See Stone*, 428 U.S. at 491 n.31 (listing values intruded upon by habeas corpus as "the most effective utilization of limited judicial resources," need for finality in criminal trials, and requirements of federalism).

205. *See id.* (arguing for limited habeas review to create finality). Justice Harlan persuasively described the interest in finality:

> Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.

Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

206. *See* Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (describing the "powerful and legitimate interest" of innocent person to receive relief); Murray v. Carrier, 477 U.S. 478, 495 (1986) (holding that innocent person's right to relief outweighs interests in comity and finality); *Stone*, 373 U.S. at 491 n.31 (discussing "the need in a free society for an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty").

207. *See* Holland v. Florida, 130 S. Ct. 2549, 2562 (2010) (stating that AEDPA "did not seek to end every possible delay at all costs"); *Kuhlmann*, 477 U.S. at 452 (noting that certain claims outweigh costs to finality, economy, and federalism); *Carrier*, 477 U.S. at 495 (noting that costs must sometimes "yield to the imperative of correcting a fundamentally unjust incarceration" (citation omitted)).

propriate means of managing habeas corpus review.[208] Nevertheless, an innocence exception properly ensures that habeas corpus review remains available in the rare and quintessentially unjust cases in which an innocent person is imprisoned.[209]

Dismissal of a first habeas corpus petition is significant because it denies a petitioner habeas corpus protection entirely.[210] This is particularly troubling for innocent petitioners because it forecloses any further judicial review.[211] The majority interpretation, which affords greater protection to petitioners filing second rather than first petitions, improperly balances the countervailing interests in individual justice and finality.[212]

Importantly, an innocence exception does not violate AEDPA's underlying policy goals of economy, finality, and federalism.[213] First, the statute of limitations does not, in fact, implicate federalism; it merely asks federal courts to interpret a federal law.[214] Further, it does not interfere with congressional concern for judicial economy because credible innocence claims are very rare.[215] Although many petitioners may falsely claim

208. *See Lee II*, 610 F.3d 1125, 1133 (9th Cir. 2010) (discussing validity of statute of limitations); David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003) (concluding that "the limitation is not even arguably unconstitutional"). Not every court has agreed, however, that the one-year statute of limitations is impervious to Suspension Clause challenges, including then-district court Judge Sotomayor. *See* Rodriguez v. Artuz, 990 F. Supp. 275, 283 (S.D.N.Y. 1998) (holding that statute of limitations does not per se violate Suspension Clause, but implying that constitutional challenges may have merit in case of innocent petitioner).

209. *See* Schlup v. Delo, 513 U.S. 298, 326-27 (1995) (applying exception to maintain procedural bar but protect innocent petitioners); *Kuhlmann*, 477 U.S. at 453 (affirming right of innocent person to seek relief); *Carrier*, 477 U.S. at 495 (concluding that innocence exception prevails over interests in finality); *Stone*, 428 U.S. at 491 n.31 (acknowledging necessity of relief for innocent petitioners).

210. *See* Rhines v. Weber, 544 U.S. 269, 278 (2005) (implying that value of access to writ for first-time petitioners outweighs AEDPA's goals of finality and comity); Lonchar v. Thomas, 517 U.S. 314, 324 (1996) ("Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty.").

211. *See* Traum, *supra* note 7, at 594-95 (discussing Supreme Court's bias in favor of access to habeas review for first-time petitioner).

212. For further discussion of the unique significant of denial of a first habeas petition, see *supra* note 19 and accompanying text.

213. *See* Souter v. Jones, 395 F.3d 577, 599-600 (6th Cir. 2005) ("Any concerns that recognition of an actual innocence exception . . . will result in a deluge of untimely frivolous constitutional claims is belied by this court's experience that a credible claim of actual innocence is extremely rare.").

214. *C.f.* Holland v. Florida, 130 S. Ct. 2549, 2563 (2010) (noting that interpretation of AEDPA's statute of limitations does not implicate federalism because "ask[ing] whether federal courts may excuse a petitioner's failure to comply with *federal* timing rules . . . does not implicate a state court's interpretation of state law").

215. *See* Schlup v. Delo, 513 U.S. 298, 324 (1986) (noting that credible innocence claims are extraordinarily uncommon); *Souter*, 395 F.3d at 599 (noting that gateway exceptions have not caused frivolous delay).

to be innocent, a *Schlup* gateway requires federal courts to assess the claims only of petitioners who make a credible showing of innocence.[216] This threshold is not easily established.[217] By recognizing an innocence exception, courts can curb excessive use of habeas corpus without facilitating the paramount miscarriage of justice that results from the conviction and incarceration of an innocent person.[218]

V. CONCLUSION

Failing to recognize an innocence exception to AEDPA's statute of limitations will, in some extraordinary cases, condone the incarceration of innocent citizens.[219] Just ask Bruce Lisker.[220] At age seventeen, Lisker was sentenced to life imprisonment for his mother's murder.[221] Twenty-six years later, helped by an extensive report by the *L.A. Times*, Lisker's case was overturned.[222] Its reversal depended on the district court's willingness to apply an innocence exception.[223] The state lacked evidence against Lisker and did not retry him.[224] Just weeks after the Ninth Circuit issued its opinion in *Lee*, however, the California's Attorney General filed a motion to send Lisker back to prison because his release depended on an exception now rejected in the Ninth Circuit.[225]

Lisker's case illustrates the tragic consequences of a rigid system that dismisses such individual injustices as, in the words of Judge Kozinski, "acceptable cost[s] of doing business."[226] This conclusion contradicts the

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216. For further discussion of the *Schlup* gateway exception and its credible showing of innocence requirement, see *supra* note 98 and accompanying text.

217. Indeed, many claims of innocence are disposed of in opinions shorter than five pages. *See, e.g.*, Escamilla v. Jungwirth, 426 F.3d 868, 871-72 (7th Cir. 2005) (rejecting petitioner's claim of innocence); David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003) (same).

218. *See supra* note 213.

219. *See supra* note 139.

220. *See generally* Scott Glover & Matt Lait, *New Light on a Distant Verdict*, L.A. TIMES, May 22, 2005, http://articles.latimes.com/2005/may/22/local/la-me-lisker 22may22 (discussing detailed report of Bruce Lisker's conviction).

221. *See id.* (describing Lisker's conviction).

222. *See id.* (implying Lisker's innocence).

223. *See* Matt Lait & Scott Glover, *Brown's Office Reconsidering Motion Seeking to Send Lisker Back to Prison*, L.A. TIMES, Sept. 3, 2010, http://articles.latimes.com/2010/sep/03/local/la-me-lisker-20100903/3 (discussing district court's ruling).

224. *See generally* Matt Lait & Scott Glover, *Bruce Lisker Won't Be Retried for 1983 Slaying of His Mother*, L.A.TIMES, Sept. 22, 2009, http://articles.latimes.com/2009/sep/22/local/me-lisker22 (discussing state's reasons for choosing not to retry).

225. *See* Glover & Lait, *supra* note 220 (discussing motion to send Lisker back to prison). A federal judge denied the motion. *See* Matt Lait, *Judge Rejects Motion to Put Bruce Lisker Back in Prison*, L.A. TIMES, Oct. 9, 2010, http://articles.latimes.com/2010/oct/09/local/la-me-lisker-20101009.

226. *See* Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal., 128 F.3d 1283, 1288 n.4 (9th Cir. 1997) (concluding that such "'occasional' injustices . . . are decidedly not an acceptable cost of doing business" in discussion of innocent petitions facing capital sentences).

Great Writ's historic role of protecting individual liberty against unjust and illegal incarceration.[227] Condoning such a system undermines principles at the core of the American criminal justice system.[228] The hands of federal courts should not be so tied.[229]

Instead, courts should recognize an innocence exception to the statute of limitations.[230] Such an outcome is consistent with the history and evolution of habeas corpus, adheres to proper statutory interpretation in light of textual silence, and protects against individual injustice without interfering with congressional purpose.[231] Innocent lives are depending on it.[232]

*Angela Ellis**

227. *See* Harris v. Nelson, 394 U.S. 286, 290-91 (1969) ("The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.").

228. *See* Schlup v. Delo, 513 U.S. 298, 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.").

229. *C.f.* Gilbert v. United States, 609 F.3d 1159, 1163 (11th Cir. 2010) ("[T]he 'Great Writ' cannot be so moribund, so shackled by the chains of procedural bars and rigid gatekeeping that th[e] court is not authorized to grant relief to one who is 'in custody in violation of the Constitution or laws or treaties of the United States.'").

230. *See* Souter v. Jones, 395 F.3d 577, 599 (6th Cir. 2005) (applying innocence exception).

231. *See id.* ("[W]e conclude that against the backdrop of the existing jurisprudence and in the absence of evidence to the contrary, Congress enacted [AEDPA's statute of limitations] . . . consistent with the *Schlup* actual innocence exception.").

232. For a discussion of the impact of AEDPA on innocent petitioners, see *supra* notes 203-18 and accompanying text.

* Villanova University School of Law, J.D. Candidate, 2012. I am grateful for the invaluable assistance of Professor Tuan Samahon, Darby Sullivan, John Jennings, and the staff of the Villanova Law Review.