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HANDLING CLAIMS OF ACTUAL INNOCENCE: REJECTING FEDERAL HABEAS CORPUS AS THE BEST AVENUE FOR ADDRESSING CLAIMS OF INNOCENCE BASED ON DNA EVIDENCE

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The development of fast, reliable, and affordable means of forensic DNA testing has revealed imperfections in our criminal justice system, especially in the prosecution of violent crimes at the state level. The Innocence Project of the Benjamin N. Cardozo School of Law alone has documented 183 DNA-based exonerations, including eighteen in 2005.[1] As a result, state prisoners have resorted to invoking the remedy of federal habeas corpus, amongst other potential avenues. Habeas relief in such cases is a statutory means for collateral attack of state court judgments.[2] The basis and procedure for the federal review of state convictions can only be properly understood as a legislatively and judicially defined writ that is distinct from the "Great Writ" as understood by the Framers.[3] Although Congress and the Supreme Court expanded the use

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1. The Innocence Project, Case Profiles, http://www.innocenceproject.org/case/index.php (follow "Browse chronological listing" hyperlink) (last visited Oct. 30, 2006).

2. 28 U.S.C. § 2254 (2000).

3. *See* U.S. CONST. art. I, § 9, cl. 2. "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.* Proponents of a broad application of federal habeas corpus often invoke the "Great Writ" embodied in Article I, Section 9—a fallacious argument. The writ of habeas corpus that allows state prisoners to attack their conviction in federal court is legislatively and judicially derived and differs immensely from the "Great Writ" (a pretrial remedy for testing the propriety of one's incarceration by the government). *See* Office of Legal Policy, U.S. Dep't of Justice, *Report to the Attorney General on Federal Habeas Corpus Review of State Judgments*, 22 U. MICH. J.L. REFORM 901, 907-08 (1989) (recommending the abolition of federal habeas corpus as a post-conviction remedy for state prisoners). "These two writs have fundamentally different functions and are directed against the actions of different governments. They have nothing in common but a name." *Id.* at 907. That the original writ was intended as a check against executive detention by the federal government and not detention by the state governments is supported by its presence in Article I, Section 9 and its absence from Article I, Section 10. *Id.* at 918-19. For a dated but seminal view on the issue, see Henry J. Friendly, *Is Innocence Irrelevant? Collat-*

of the writ of habeas corpus primarily to address preserved claims of constitutional error in state court proceedings, the Court has appeared to extend the writ even further in recent cases. The Court seems to have carved a niche into its habeas jurisprudence that allows strong claims of actual innocence to remedy otherwise improper habeas petitions.[4]

This Comment explores this niche as it relates to post-conviction DNA testing. Part I briefly reviews the development of the Supreme Court's habeas corpus jurisprudence with an emphasis on state prisoners' claims of actual innocence[5] with or without constitutional claims. *House v. Bell* is given particular attention, as the petitioner's potential freestanding claim of innocence was based, in part, on exculpatory DNA evidence.[6] Part II examines arguments in favor of and in opposition to a more expansive view of federal habeas corpus, and addresses alternative solutions to the issue of actual innocence claims. Executive clemency and legislative remedies are discussed in this section.

In light of the concerns regarding the state of federal habeas corpus addressed in Part II, Part III comments on the utility of federal habeas re-

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eral Attack on Criminal Judgments, 38 U. CHI. L. REV. 142, 142 (1970) (proposing that collateral attack should only be allowed when the petitioner has "a colorable claim of innocence" to supplement his constitutional claim). Judge Friendly was an early critic of the widespread invocation of federal habeas corpus when the prisoner's guilt is not seriously contested:

> After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill's phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning. Any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant.

Id. Judge Friendly goes on to note that this expansion of habeas corpus is "almost unknown" in England, the country from which we inherited the writ. *Id.* at 145.

4. *See* Schlup v. Delo, 513 U.S. 298, 317-21 (1995); *see also* George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 264-65 (2003) (arguing for a very limited exception in the actual innocence context). The authors contend that such an exception is "grounded firmly in due process of law when the Court's due process principles are applied to the world of criminal justice that now includes DNA as well as persuasive evidence that the police often arrest innocent people." *Id.* at 265.

5. For the purposes of this Comment, "actual innocence" is defined as arising when the accused is innocent of the crime and not merely "legally innocent." Similarly, it is not defined by whether the defendant raised the claim at trial, but by considering all the evidence in the case. *See* LISA R. KREEGER & DANIELLE M. WEISS, AM. PROSECUTORS RESEARCH INST., DNA EVIDENCE POLICY CONSIDERATIONS FOR THE PROSECUTOR 17 n.20 (2004), *available at* http://www.ndaa.org/pdf/dna_evidence_policy_considerations_2004.pdf.

6. *See* House v. Bell, 386 F.3d 668, 686 (6th Cir. 2004) (Merritt, J., dissenting) (finding House's case to be an example of a truly persuasive claim of actual innocence), *rev'd*, 126 S. Ct. 2064 (2006).

view given the many state developments in the area of post-conviction remedies for prisoners with exculpatory or potentially exculpatory DNA evidence. Additionally, Part III raises the issue, infrequently discussed in this debate, of justice to the victims of violent crimes. Part IV concludes with the assertion that newly discovered DNA evidence is best addressed at the state level. This approach would not only solve many of the Court's concerns regarding comity, federalism, and finality, but would also address the pitfall of flooding the federal courts with habeas claims.[7] Justice Robert Jackson recognized this problem as early as 1953 when he lamented: "He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."[8]

I. THE EVOLUTION OF THE WRIT AND STATE PRISONER CLAIMS

A. An Expansive View of the Writ

The tension between the need for finality in state criminal proceedings and the right of state prisoners to have their claims reviewed in federal court characterizes the Supreme Court's habeas jurisprudence.[9] In *Brown v. Allen*, the Court held that the exhaustion of state remedies re-

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7. The prevalence of wrongful convictions is disputed and some commentators even question whether the occasional incarceration or even execution of an innocent person is cause for alarm. *Compare* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 72 (1987) (commenting that according to the authors' study, twenty-three persons believed by the authors to be innocent have been executed), *with* Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 489 (1998) (noting that the vast majority of those convicted of crimes in our system are in fact guilty), *and* Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1664-65 (1986) (arguing that capital punishment is a useful social and moral tool and therefore excusable even if Bedau and others are correct in reporting that twenty-three innocent people have been executed between 1900 and 1985), *and* John McAdams, *It's Good, and We're Going to Keep It: A Response to Ronald Tabak*, 33 CONN. L. REV. 819, 833-834 (2001) (disputing whether the litany of "executed innocents" that Bedau and others cite were actually innocent).

8. Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring).

9. *See* Fay v. Noia, 372 U.S. 391, 424 (1963) (recognizing the conflict between finality and the personal liberty of state prisoners: "conventional 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"); *cf.* Wainwright v. Sykes, 433 U.S. 72, 90 (1977) (describing the importance of the perception that a state criminal trial is a "decisive and portentous event"). Justice Powell expounded on the issue of finality in a 1986 opinion:

> Balanced against the prisoner's interest in access to a forum to test the basic justice of his confinement are the interests of the State in administration of its criminal statutes. Finality serves many of those important interests. Availability of unlimited federal collateral review to guilty defendants frustrates the State's legitimate interest in deterring crime . . . .

Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986) (plurality opinion).

quirement under 28 U.S.C. § 2254, a prerequisite to federal habeas review of a state court conviction, was met with one trip through the state appellate process, ending with denial of certiorari by the United States Supreme Court.[10] This interpretation expanded the availability of habeas review of state judgments, in apparent contradiction to the legislative history of § 2254.[11] After *Brown*, a state prisoner only needed to use the state's available appellate process to qualify for federal habeas corpus; he need not file repeated state habeas applications to meet the exhaustion of state remedies requirement.[12]

In his concurring opinion in *Brown*, Justice Jackson addressed the conflict between state and federal interests as well as the utility of federal review of final state court judgments.[13] He traced the problem before the Court in this case to a three-fold trend.[14] Justice Jackson posited that overuse of the writ has resulted from (1) the Court's use of the broad scope of the Fourteenth Amendment to allow federal interference with state matters; (2) a departure from the rule of law with respect to determinations of due process in favor of case-by-case determinations based on "personal notions of justice"; and (3) the erosion of measures to prevent abuse of the writ.[15]

Additionally, Justice Jackson bemoaned the expansion of habeas corpus from its original purpose to an overused tool for attacking state court findings of fact.[16] Justice Jackson's skeptical view of this body of law frames the issue at several levels of generality.[17] He espoused the need

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10. *Brown*, 344 U.S. at 447, 487.

11. *Id.* at 448-50; *see also* Office of Legal Policy, U.S. Dep't of Justice, *supra* note 3, at 942 (arguing that *Brown v. Allen* represents an example of the Court departing from the plain language of the federal habeas corpus statute to expand its scope).

12. *Brown*, 344 U.S. at 487.

13. *Id.* at 532-34 (Jackson, J., concurring).

14. *Id.* at 532.

15. *Id.* Justice Jackson discussed habeas review of state judgments as another example of the federal government's overreaching:

> The generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states. The expansion now has reached a point where any state court conviction, disapproved by a majority of this Court, thereby becomes unconstitutional and subject to nullification by habeas corpus.

Id. at 534.

16. *Id.* at 532-33 ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.").

17. Justice Jackson, though concurring in the judgment, was clearly concerned with the Court's trend toward expanding the "substantive grounds for habeas corpus." *Id.* at 533-34. So while the narrow thrust of his concurrence simply demands that federal courts only entertain federal habeas petitions in narrow situations, *id.* at 545, he frames the issue with wider concerns about the Court's broad view of due process under the Fourteenth Amendment. *See id.* at 532-34.

for strict adherence to procedure so that federal judges can "distinguish a probable constitutional grievance from a convict's mere gamble on persuading some indulgent judge to let him out of jail."[18] The judicial view of federal habeas corpus that Justice Jackson rejected in *Brown v. Allen* continued to expand with the Court's decision in *Fay v. Noia*.[19] In this case, the United States District Court for the Southern District of New York denied relief to Noia because he failed to appeal his conviction in state court, despite the State of New York's stipulation that his confession was coerced in violation of the Fourteenth Amendment.[20] The Court of Appeals for the Second Circuit reversed and set aside his conviction.[21] The Supreme Court affirmed, holding that Noia's failure to appeal was not a failure to exhaust state remedies merely because the time for direct appeal had lapsed.[22]

Justice Brennan, writing for the majority, found that the prerequisite exhaustion of state remedies under 28 U.S.C. § 2254 referred to state remedies open to the prisoner "at the time he files his application for habeas corpus in the federal court."[23] Justice Brennan expounded the view of habeas corpus that Justice Jackson decried ten years earlier: "[I]ts function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints."[24] The only constraint placed upon a prisoner who failed to appeal his conviction in state court was to deny federal relief where the applicant "deliberately by-passed" his appeal and thus forfeited his state remedies.[25] This expansive view remained for nearly two decades despite opposition on the Court.[26]

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18. *Id.* at 536. "It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold him." *Id.* at 540-41.

19. *See* Fay v. Noia, 372 U.S. 391, 398-99 (1963).

20. *Id.* at 395-96 & n.2.

21. *Id.* at 396-97.

22. *Id.* at 399.

23. *Id.*

24. *Id.* at 401-02 ("[I]n a civilized society, government must always be accountable to the judiciary for a man's imprisonment . . . .").

25. *Id.* at 438-39. ("If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts . . . it is open to the federal court on habeas to deny him all relief . . . .").

26. *Id.* at 445 (Clark, J., dissenting) ("While it may be that the Court's 'decision today swings open no prison gates,' the Court must admit in all candor that it effectively swings closed the doors of justice in the face of the State, since it certainly cannot prove its case 20 years after the fact.").

B. The Burger and Rehnquist Courts Rein in Federal Habeas Relief for State Prisoners

1. Wainwright v. Sykes*: Expansive View Overruled in Favor of "Cause" and "Prejudice" Test*

The availability of habeas relief for claims not raised or heard during the prisoner's state proceedings continued to present a problem to the federal judiciary after *Noia*.[27] In *Wainwright v. Sykes*, prisoner Sykes challenged, for the first time in his state habeas petition, incriminating statements made in violation of his *Miranda* rights.[28] He neither raised the issue in a pretrial hearing nor made a timely objection at trial as Florida law required.[29] On certiorari, the Supreme Court faced the question of whether violation of Florida's contemporaneous objection requirement was sufficient to bar federal habeas review.[30] Justice Rehnquist, in his majority opinion, rejected the "deliberate by-pass" standard of *Noia*,[31] and instead adopted the rule of *Francis v. Henderson*,[32] which required a showing of "cause" and "prejudice" before federal habeas review is available in the face of a state procedural waiver.[33] Otherwise, the availability of federal review undermined state procedural requirements, such as Florida's contemporaneous objection rule.[34]

Justice Rehnquist reinjected federalism and comity concerns into the Court's habeas review of state court judgments.[35] To allow easy and unfettered access to federal review of constitutional claims not raised at the trial court level, he argued, "tends to detract from the perception of the trial of a criminal case . . . as a decisive and portentous event."[36] In *Sykes*, the Court reversed and remanded the case back to the district court to dismiss the petitioner's writ of habeas corpus.[37] The Court held that,

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27. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 77-78 (1977) (denying habeas relief to respondent who failed to object to *Miranda* violation during the state court proceedings).

28. *Id.* at 75.

29. *Id.* at 75-77.

30. *Id.* at 87.

31. *Id.* at 87-88 (holding that "[i]t is the sweeping language of *Fay v. Noia*, going far beyond the facts of the case eliciting it, which we today reject").

32. *Id.* at 87 (applying the "'cause' and 'prejudice'" test from *Francis v. Henderson*, 425 U.S. 536, 542 (1976)).

33. *Id.* at 88-89.

34. *Id.* at 89 ("We think the rule of *Fay v. Noia*, broadly stated, may encourage 'sandbagging' on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.").

35. *Id.* at 81 ("[I]t is a well-established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts.").

36. *Id.* at 90.

37. *Id.* at 91.

given the strong evidence of the petitioner's guilt, the admission of his statements did not result in prejudice sufficient to pass the announced cause and prejudice test.[38]

2. "Fundamental Miscarriage of Justice" Exception for Otherwise Procedurally Flawed Constitutional Claims

Despite the tendency toward a stricter application of federal habeas review, the Rehnquist Court recognized that certain circumstances mandate granting habeas review even where the prisoner does not meet the requirement of cause and prejudice under *Sykes*.[39] In *Murray v. Carrier*, the Court upheld the *Sykes* rule, finding that the petitioner's claim that his counsel inadvertently failed to raise a due process claim on appeal did not warrant habeas relief absent a showing of cause and prejudice.[40] Yet, in her majority opinion, Justice O'Connor recognized that in rare cases, prisoners who have been victims of a fundamental miscarriage of justice might not be able meet the required cause and prejudice showing.[41] In these isolated cases "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."[42] It

38. *Id.*; *see also* Engle v. Isaac, 456 U.S. 107, 110 (1982) (holding that, absent a showing of actual prejudice, a prisoner may not raise a constitutional challenge to jury instructions in a federal habeas proceeding where he failed to comply with an Ohio rule requiring "contemporaneous objections to jury instructions").

39. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 322 (1995) (holding that the standard announced in *Murray v. Carrier* applies to the miscarriage of justice exception for otherwise procedurally defaulted habeas petitions); Murray v. Carrier, 477 U.S. 478, 496 (1986) ("[W]here 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."); Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion) (allowing federal habeas review of successive petitions where the prisoner "supplements his constitutional claim with a colorable showing of factual innocence"). Judge Friendly decried the fact that despite advances of the Warren Court in the area of defendants' rights, federal habeas corpus continued to expand, especially in cases where the guilt or innocence of the prisoner is not in doubt: "The proverbial man from Mars['] . . . astonishment would grow when we told him that the one thing almost never suggested on collateral attack is that the prisoner was innocent of the crime." Friendly, *supra* note 3, at 145. Voicing concerns about finality in criminal litigation as well as conservation of judicial resources, Judge Friendly saw no theoretical advantage in allowing for a "second round of attacks simply because the alleged error is a 'constitutional' one." *Id.* at 155. "Today it is the rare criminal appeal that does *not* involve a 'constitutional' claim." *Id.* at 156.

40. *Murray*, 477 U.S. at 494.

41. *Id.* at 495-96.

42. *Id.* at 496; *cf.* Sawyer v. Whitley, 505 U.S. 333, 346 (1992) (holding that to show "actual innocence" a petitioner must show that absent the claimed constitutional error, "'a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under . . . law for the imposition of the death penalty'" (quoting Sawyer v. Whitley, 945 F.2d 812, 820 (5th Cir. 1991))).

was clear to Justice O'Connor that such cases will be rare and that generally there is nothing "fundamentally unfair" about procedural bars to federal habeas review.[43]

The miscarriage of justice exception that arose for both successive petitions[44] and procedurally defaulted petitions[45] required further elaboration to explain what constitutes a showing of "actual innocence" sufficient to allow federal habeas review.[46] The Court in *Sawyer v. Whitley* applied a clear and convincing evidence standard that, absent the constitutional error, "no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[47] The Court affirmed the Court of Appeals for the Fifth Circuit's decision that the evidence withheld from the jury did not render the petitioner ineligible for the death penalty under Louisiana law.[48] Thus, this error was insufficient to allow a successive petition for federal habeas review.[49] The "clear and convincing" standard would soon be limited to the facts of *Sawyer*, where the petitioner challenged the legitimacy of his death sentence and not his guilt or innocence.[50]

The Court in *Schlup v. Delo* rejected the *Sawyer* Court's attempt to instill a more exacting standard into the fundamental miscarriage of justice exception.[51] The issue before the Court was which standard to apply in a miscarriage of justice analysis of Schlup's claim of innocence—a constitutional challenge based on ineffective assistance of counsel and withholding of evidence by the State.[52] The petitioner's claims would otherwise be barred from review because they were raised for the first time in his second habeas petition.[53]

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43. Smith v. Murray, 477 U.S. 527, 538-39 (1986) ("We similarly reject the suggestion that there is anything 'fundamentally unfair' about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination.").

44. *See Kuhlmann*, 477 U.S. at 444.

45. *See Murray*, 477 U.S. at 485-86.

46. *See Sawyer*, 505 U.S. at 335 (finding a clear and convincing evidence standard required for claims of actual innocence intended to cure procedurally flawed constitutional claims).

47. *Id.*

48. *Id.* at 338.

49. *Id.*

50. *See* Schlup v. Delo, 513 U.S. 298, 326-27 (1995).

51. *Id.* at 324.

52. *Id.* at 307. In his second habeas petition, Schlup alleged that: (1) he was actually innocent; (2) his trial counsel was ineffective; and (3) the State withheld exculpatory evidence. *Id.*

53. *Id.* at 314-15 ("Schlup may obtain review of his constitutional claims only if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" (quoting McClesky v. Zant, 499 U.S. 467, 494 (1991))).

Justice Stevens' majority opinion found that the standard of proof in *Carrier*–"that the constitutional error 'probably' resulted in the conviction of one who was actually innocent"–applied in such cases.[54] The Court distinguished a claim of actual innocence from the situation in *Sawyer* where the petitioner's claim was that he was "'actually innocent of the death penalty.'"[55] The Court made it clear that *Carrier*'s "probably resulted" standard must apply to the miscarriage of justice exception where a petitioner has received a death sentence and argues actual innocence to bypass otherwise procedurally barred constitutional claims.[56]

C. The Antiterrorism and Effective Death Penalty Act of 1996: Congress Joins the Mix to Limit Federal Habeas Corpus

In response to criticisms of the lengthy appeals process for death row inmates and the Oklahoma City bombing, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.[57] Purporting to advance the goals of comity, finality, and federalism,[58] AEDPA instituted a variety of restrictions on the federal habeas corpus review of state court judgments.[59] Among the adopted restrictions were provisions mandating a one-year statute of limitations for a writ of habeas corpus application,[60] a ban on claims in a second or successive application under 28 U.S.C. § 2254 that were present in a prior application,[61] and a ban on new claims in a second or successive application unless the new claims meet

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54. *Id.* at 322 ("In addition to linking miscarriages of justice to innocence, *Carrier* and *Kuhlmann* also expressed the standard of proof that should govern consideration of those claims.").

55. *Id.* at 323.

56. *Id.* at 326-27.

57. Pub. L. No. 104-132, 110 Stat. 1214. AEDPA was passed in response to the widespread laments regarding the post-conviction death penalty appeals process. *See* Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 PUB. PAPERS 630, 631 (Apr. 24, 1996) (containing President Clinton's comments at the signing of the Act: "For too long, and in too many cases, endless-death row appeals have stood in the way of justice being served."). This legislation also seemed to address many of the concerns voiced by Judge Friendly thirty years earlier when he advocated restrictions on federal habeas corpus, "to prevent abuse by prisoners, a waste of the precious and limited resources available for the criminal process, and public disrespect for the judgments of criminal courts." Friendly, *supra* note 3, at 172.

58. *See* Williams v. Taylor, 529 U.S. 420, 436 (2000) (recognizing the "AEDPA's purpose to further the principles of comity, finality, and federalism").

59. *See* 28 U.S.C. §§ 2244, 2254 (2000). Section 2254(d)(1), in particular, has been disputed regarding what constitutes a state court decision decided contrary to or unreasonably applying "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); *see also* Williams v. Taylor, 529 U.S. 362, 395 (2000) (holding that the petitioner was entitled to relief because the Virginia Supreme Court erred in dismissing his ineffective assistance of counsel claim).

60. *Id.* § 2244(d)(1).

61. *Id.* § 2244(b)(1).

one of two conditions.[62] The Supreme Court's interpretation of AEDPA is relevant for the purposes of this Comment to the extent that the statute might affect both the miscarriage of justice exception and the Court's consideration of freestanding claims of innocence.[63]

AEDPA's impact on § 2244 raised questions regarding the continued validity of the miscarriage of justice exception to otherwise barred habeas claims.[64] The Court has responded to both AEDPA restrictions and the

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62. *Id.* § 2244(b)(2) (requiring exceptions for new claims in a second or successive application when: (1) the claim is based on a new rule of constitutional law, or (2) the facts underlying the claim could not have been discovered earlier "through the exercise of due diligence," and the facts would "establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have" convicted the prisoner).

63. The area of federal habeas law dealing with successive petitions and the "doctrine of abuse of the writ refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," and, except for its role in the miscarriage of justice exception, is beyond the scope of this Comment. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 489 (1991).

64. *See* Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 349-50 (2001-2002) (arguing that AEDPA's statute of limitations provision should have included an actual innocence or miscarriage of justice exception, and if interpreted to exclude such an exception, the statute violates the Suspension Clause). Although Sussman correctly points out that AEDPA's statute of limitation provisions are silent on the issue of the miscarriage of justice exception, it can be argued from subsequent cases that the exception remains viable. *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 558 (1998) (noting that "[t]he miscarriage of justice standard is altogether consistent . . . with AEDPA's central concern"). Additionally, Sussman's claim that AEDPA's statute of limitations provision offends the Suspension Clause is belied by the Court's pre- and post-AEDPA Suspension Clause jurisprudence. *See* Felker v. Turpin, 518 U.S. 651, 658 (1996) (holding that AEDPA affects the standards governing the granting of habeas relief in the successive petition context, but does not prevent the Court from entertaining an application and thus offends neither that doctrine nor the Suspension Clause). Noting that the Habeas Corpus Act of 1867 greatly expanded the breadth of federal habeas review, the Court in *Felker* observed that the notion of the writ at the time the Suspension Clause was written referred only to cases where it was necessary that the prisoner be brought into the court to testify. *Id.* at 659. The Court concluded further that even if the Suspension Clause protected federal habeas corpus to its current statutory extent, the provisions of AEDPA still do not amount to a "suspension" of the writ. *Id.* at 664; *see also* Swain v. Pressley, 430 U.S. 372, 381 (1977) (holding that the old § 2255 was not barred by the Suspension Clause). Justice Stevens reiterated the government's position that the Suspension Clause did in fact refer to the scope of the writ at the time of the framing and "at that time the writ was not employed in collateral attacks on judgments entered by courts of competent jurisdiction." *Id.* at 380. For more discussion on AEDPA, see Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 891-92 (1998) (demonstrating that Congress has the absolute right to limit federal habeas corpus by way of AEDPA, Scheidegger asks: "[C]an Congress limit the additional remedy of its own creation to the circumstances in which it believes the benefit to be worth the cost, or is it constitutionally forced to an all-or-nothing choice? This is a simple question with a simple, obvious answer"). *See generally* Richard A. Posner, Foreword, *A Political Court*, 119 HARV. L. REV. 31, 59-60 (2005) (espousing pragmatism and judicial modesty in the Supreme Court's constitutionally-based decisions). Even where the Court could, in some—either legitimate or

role of federal habeas review generally.[65] In *Calderon v. Thompson*, the Court considered whether the Ninth Circuit's decision to revoke its mandate denying habeas relief was governed by § 2244(b).[66] The Ninth Circuit held that § 2244(b) did not apply because the court recalled the first petition *sua sponte*, not as the result of a successive petition by the prisoner.[67] In reversing the Ninth Circuit, the Court announced that the petitioner did not satisfy the miscarriage of justice standard of *Schlup* and *Sawyer*.[68] This suggests that the rationale underlying *Schlup* has survived the stringency of AEDPA, and the miscarriage of justice exception is alive and well.[69]

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strained—reading of the Suspension Clause, strike down such a provision, Judge Posner argues that from a pragmatic standpoint, it is better for the Court to affirm federal government action unless that action is either "inconsistent with all reasonable understandings" of the constitutional provision at issue or is "revolting." *Id.*

65. *See infra* notes 66-69 and accompanying text.

66. *Calderon*, 523 U.S. at 554 (holding that where the court considered the first application and not a successive one, the letter of AEDPA was not violated).

67. *Id.* at 548.

68. *Id.* at 560. In announcing that the petitioner here did not satisfy the miscarriage of justice standard of *Sawyer* and *Schlup*, it follows that the "more likely than not" standard for claims of actual innocence in successive or abusive petitions still applies in the face of AEDPA:

> [W]e hold the general rule to be that, where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, *the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence.*

Id. at 558 (emphasis added).

69. *Id.* at 559. The post-AEDPA viability of this exception and its ability to revive otherwise flawed petitions might have led to the additional federal habeas corpus restrictions proposed in both chambers of Congress in 2005. *See* Press Release, Jon Kyl, Limiting Endless Death Penalty Delays (July 18, 2005), *available at* http://kyl.senate.gov/record.cfm?id=240769 (discussing the Streamlined Procedures Act of 2005, introduced in the United States Senate by Jon Kyl). Senator Kyl cites the failure of the reforms in AEDPA as the reason why additional restrictions on federal habeas corpus are needed, arguing that since AEDPA, "things have gotten worse, not better. The backlog of 'habeas' claims has actually increased, and so has the workload of prosecutors." *Id.* Still, Senator Kyl claims that the changes will allow claims of "prisoners who are truly innocent–as opposed to simply protesting some procedural technicality . . . to move forward unimpeded." *Id.* As a result of the increased volume of habeas corpus petitions since the passage of AEDPA, legislation such as the Streamlined Procedures Act of 2005 is "strongly support[ed]" by the National District Attorneys Association. Press Release, Nat'l Dist. Att'ys Ass'n, The Need for Habeas Corpus Reform Is Critical to the Credibility of Our Criminal Justice System Says the National District Attorneys Association (Nov. 11, 2005), *available at* http://www.ndaa-apri.org/newsroom/pr_habeas_corpus_reform.html. *But see* Editorial, *Stop This Bill*, WASH. POST, Jul. 10, 2005, at B6 (describing the Streamlined Procedures Act of 2005 as a "particularly ugly piece of legislation designed to gut the legal means by which prisoners prove their innocence"); AM. BAR ASS'N, STREAMLINED PROCEDURES ACT OF 2005 S. 1088 / H.R. 3035 SECTION-BY-SECTION ANALYSIS 3-7, http://www.nacdl.org/public.nsf/Legislation/Habeas/$FILE/ABA_analysis.pdf (last visited Oct. 30, 2006) (stating the ABA's opposition to the proposed legislation). The ABA ar-

Indeed, the fact that the Court has interpreted § 2244 to include this exception both pre- and post-AEDPA indicates the Court's tendency to find federal habeas corpus available in the extreme case where a prisoner has made a showing of actual innocence.[70] This tendency came into play in *Herrera v. Collins*, which is discussed in the following section.[71]

D. Herrera v. Collins*: Habeas Relief and Claims of Actual Innocence*

Although the case law addressing the availability of habeas relief for state prisoners with colorable constitutional claims was well-developed, the Court faced a novel issue in 1993 with the case of *Herrera v. Collins*.[72] In this pre-AEDPA case, the Court once again was charged with reconciling the conflict of finality and comity with the fair administration of

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gues that the provisions would eliminate federal habeas corpus for claims that the prisoner's procedural default was due to his ineffective assistance of counsel, eliminate federal habeas corpus in cases where the state court has determined that the constitutional error was "harmless or not prejudicial," and eliminate federal habeas corpus in death penalty cases where the state had provided competent counsel in state post-conviction proceedings). *Id.*

70. Although AEDPA provided no express provision to address the actual innocence or miscarriage of justice exception specifically, the Court has implied that the exception remains intact: "The miscarriage of justice standard is altogether consistent, however, 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." *Calderon*, 523 U.S. at 558. In fact, as Justice Scalia noted in his dissenting opinion in *Schlup*, the Court appeared to ignore the plain language of the pre-AEDPA § 2244 in crafting the miscarriage of justice exception in the first place:

> Today, however, the Court obliquely but unmistakably pronounces that a successive or abusive petition *must* be entertained and may *not* be dismissed so long as the petitioner makes a sufficiently persuasive showing that a "fundamental miscarriage of justice" has occurred. That conclusion flatly contradicts the statute, and is not required by our precedent.

Schlup v. Delo, 513 U.S. 298, 344 (1995) (Scalia, J., dissenting) (internal citations omitted). Justice Scalia finds this departure from clear and unambiguous statutory language inexcusable: "There is . . . no route of escape from the Court's duty to confront the statute today." *Id.* at 350. One overarching characteristic of the Supreme Court's habeas jurisprudence has been allowing review in the exceptional case even when it might conflict with the apparent congressional restrictions of AEDPA. *See, e.g.*, Office of Legal Policy, U.S. Dep't of Justice, *supra* note 3, at 942. Lamenting the Court's expansive decision in *Brown v. Allen*, the report notes:

> Notwithstanding the unequivocal language of the provision of section 2254(c) and Judge Parker's observations concerning its meaning, the Supreme Court in *Brown v. Allen* refused to give it effect and held that exhaustion does not require repetitive recourse to state remedies. In reaching this result, the Court stated that it was unwilling to accept so radical a change from prior habeas practice without "a definite congressional direction."

Id. (footnote omitted).

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

72. *Id.*

criminal justice in the state courts.[73] The petitioner argued that the newly discovered evidence of his actual innocence was sufficient to invoke federal habeas corpus.[74]

1. State Prisoner's Claim of Actual Innocence Based on Newly Discovered Evidence is Not Grounds for Federal Habeas Corpus

In *Herrera*, Chief Justice Rehnquist wrote in the majority opinion: "Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence."[75] The petitioner Herrera filed a second federal habeas petition ten years after his conviction.[76] Herrera alleged in the petition that he was actually innocent of the murders for which he was sentenced to death, and he put forth affidavits stating that his now-dead brother had committed the crimes.[77]

The Court affirmed the Fifth Circuit's decision to vacate the stay of execution, holding that the claim of actual innocence was not proper: "'[T]he existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.'"[78] The Court held the petition here did not state a claim for federal habeas relief because Herrera did not allege an independent constitutional violation in the state proceedings.[79]

The Chief Justice also made it a point to distinguish the situation in *Herrera* from the fundamental miscarriage of justice cases.[80] Despite the petitioner's argument that the execution of a factually innocent person is a violation of the Eighth and Fourteenth Amendments, the Court made it clear that a claim of "actual innocence" is not an independent constitutional claim.[81] Rather, it provides the otherwise flawed habeas petitioner with a "gateway" to federal court review.[82]

Despite the apparently unequivocal stance the majority took in *Herrera*, the Court left open the question of when, if ever, the incarceration or execution of a factually innocent person violates the United States

73. *See id.* at 398. Ten years after his conviction, Herrera brought his actual innocence claim in a second federal habeas petition. *Id.*

74. *Id.* Petitioner Herrera claimed that he was actually innocent and thus his death sentence violated the Eighth and Fourteenth Amendments. *Id.*

75. *Id.* at 401.

76. *Id.* at 393.

77. *Id.* at 396-97.

78. *Id.* at 398 (quoting Townsend v. Sain, 372 U.S. 293, 317 (1963)).

79. *Id.* at 400.

80. *Id.* at 404 ("Petitioner in this case is simply not entitled to habeas relief based on the reasoning of this line of cases.").

81. *Id.* at 404-05.

82. *Id.* at 404.

Constitution.[83] Chief Justice Rehnquist appeared, in dicta, to craft an exception to the general rule that actual innocence claims do not warrant freestanding habeas relief.[84] The Chief Justice assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence'" would demand a different result.[85] Justice White's concurring opinion further bolstered the presence of such an exception.[86] He asserted the very same proposition, "that a persuasive showing of 'actual innocence' made after trial, even though made after the expiration of the time provided by law for the presentation of newly discovered evidence, would render unconstitutional the execution of petitioner in this case."[87]

Though the Court is divided over the issue of whether the incarceration of an actually innocent person offends the Constitution, at least a plurality of judges seem to hold that the execution of a truly innocent person is unconstitutional.[88] The question that remained unanswered is what standard is required to meet this apparent exception as announced in *Herrera*.[89] Following the Court's recent decision in *House v. Bell* this question remains unanswered.[90]

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83. *Id.* at 407-08 & n.6. Chief Justice Rehnquist did not address the question of whether due process prohibits the execution of an actually innocent person because, in his analysis, Herrera came before the Court as a person convicted under the protections provided by the due process of law–his claim could only be considered to be a procedural due process claim. *Id.*

84. *Id.* at 417 ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . .").

85. *Id.*

86. *Id.* at 429 (White, J., concurring). Justice White wrote that to be eligible under this exception, the petitioner must show that based on his "newly discovered evidence *and* the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id.* (emphasis added) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

87. *Id.*

88. *Compare id.* at 427-28 (Scalia, J., concurring) ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."), *with id.* at 435 (Blackmun, J., dissenting) ("I believe it contrary to any standard of decency to execute someone who is actually innocent. Because the Eighth Amendment applies to questions of guilt or innocence . . . I also believe that petitioner may raise an Eighth Amendment challenge to his punishment on the ground that he is actually innocent. . . . Execution of the innocent is equally offensive to the Due Process Clause of the Fourteenth Amendment.").

89. *Id.* at 417 (majority opinion) (stating only that standard must be "extraordinarily high").

90. House v. Bell, 126 S. Ct. 2064, 2086-87 (2006). The majority declined to answer the question regarding the viability of *Herrera* claims of actual innocence: "House urges the Court to answer the question left open in *Herrera* and hold not only that freestanding innocence claims are possible but also that he has established one. We decline to resolve this issue." *Id.*

2. House v. Bell*: The Sixth Circuit Addresses a Claim of Innocence*

The question of what constitutes a showing of innocence sufficient to warrant habeas relief that would otherwise be barred came before the Sixth Circuit in the case of *House v. Bell*.[91] In *House*, a Tennessee jury convicted petitioner Paul G. House for the murder of Mrs. Carolyn Muncey.[92] House filed a habeas petition raising "actual innocence" under the miscarriage of justice exception to cure an otherwise procedurally defaulted claim.[93] His argument relied on the rationale in *Schlup*, that to prevail on this exception "'the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.'"[94] The Sixth Circuit, sitting en banc, applied this standard to newly discovered evidence that House presented in district court, and ultimately affirmed the district court's denial of federal habeas corpus.[95]

The Sixth Circuit voted eight-to-seven to affirm, a close vote making the case an excellent vehicle to test the Supreme Court's standard for federal habeas review.[96] Indeed, Circuit Judge Merritt noted in his dissent that this is "the rare or extraordinary case in which the petitioner through newly discovered evidence has established his actual innocence of both the death sentence and underlying homicide."[97]

House had presented a variety of new evidence in district court, including DNA evidence proving that semen found on the victim's nightgown, and originally attributed to him at trial, in fact belonged to Mrs. Muncey's

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91. House v. Bell, 386 F.3d 668, 677 (6th Cir. 2004) (en banc) (affirming the district court's finding that the petitioner's ineffective assistance of counsel claims were procedurally defaulted), *rev'd*, 126 S. Ct. 2064 (2006).

92. *Id.* at 668. Though the evidence against House was characterized as circumstantial, "it was quite strong. Particularly incriminating was the testimony that he had emerged from an embankment where the body was found, wiping his hands on a dark cloth, without disclosing to anyone the presence of the body." *Id.* at 673.

93. *Id.* at 677.

94. *Id.* at 678 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)). "Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty." *Schlup*, 513 U.S. at 324.

95. *House*, 386 F.3d at 685 ("Despite his best efforts, the case against House remains strong. . . . [H]e has fallen short of showing, as he must, that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence.").

96. Petition for Writ of Certiorari at *i, House v. Bell, 126 S. Ct. 2064 (2006) (No. 04-8990), *available at* 2005 WL 1527632 (presenting two questions for the Supreme Court: (1) "Did the majority below err in applying this Court's decision in *Schlup v. Delo* to hold that Petitioner's compelling new evidence . . . was as a matter of law insufficient to excuse his failure to present that evidence before the state courts"; and (2) "[w]hat constitutes a 'truly persuasive showing of actual innocence' pursuant to *Herrera v. Collins* sufficient to warrant freestanding habeas relief").

97. *House*, 386 F.3d at 686 (Merritt, J., dissenting).

husband.[98] Despite this evidence, a majority of the Sixth Circuit denied federal habeas review.[99] Mr. House petitioned for, and the Supreme Court granted, certiorari.[100] In his petition for certiorari, House argued that his newly discovered evidence satisfied both the *Schlup* gateway standard and the *Herrera* freestanding claim of actual innocence standard.[101]

3. The Roberts Court Rules on a Claim of Innocence

Writing for a five-Justice majority, Justice Kennedy announced that House had in fact satisfied the "stringent showing" required by the miscarriage of justice exception.[102] Therefore, the Court held that House's habeas action may continue in federal court despite the state procedural bar.[103] Justice Kennedy restated the governing standard as requiring a showing that "in light of the new evidence, . . . more likely than not any reasonable juror would have reasonable doubt."[104]

Although neither the district court nor the Sixth Circuit was persuaded by House's newly presented evidence, the Court stressed three particular aspects of House's case that warranted reversal.[105] Justice Kennedy discussed in great detail the importance of the DNA evidence,[106] the blood-stain testimony,[107] and the testimony that Mrs. Muncey's husband may have confessed to the horrific crime.[108] Though House was not charged with a sexual offense, the majority relied upon DNA testing showing that the source of the semen on Mrs. Muncey's nightgown was her husband and not House.[109] Because the Court determined that the prosecution alluded to a sexual motive in its closing arguments, evidence that the semen stain did not come from House would impact a reasonable juror's decision.[110] Justice Kennedy also gave weight to House's theory that the victim's blood was spilled onto House's jeans before the evidence arrived at the Federal Bureau of Investigation laboratory for analysis.[111] Taken together, the Court found House's newly presented evidence to be sig-

98. *Id.*
99. *Id.* (majority opinion).
100. House v. Bell, 125 S. Ct. 2991 (2005).
101. *See* Petition for Writ of Certiorari, *supra* note 96, at *31, *33.
102. House v. Bell, 126 S. Ct. 2064, 2068 (2006).
103. *Id.*
104. *Id.* at 2077. Justice Kennedy restated the *Schlup* standard without the "double negative." *Id.*
105. *See id.* at 2083.
106. *Id.* at 2078-79.
107. *Id.* at 2079-81.
108. *Id.* at 2083-84.
109. *Id.* at 2078-79.
110. *Id.* at 2079.
111. *Id.* at 2080-81.

nificant enough that no reasonable juror would have convicted House in light of this evidence.[112]

Justice Kennedy's opinion conceded that even with the newly discovered evidence, there was significant and undisputed circumstantial evidence against House, writing: "This is not a case of conclusive exoneration."[113] Based on that finding, the Court held that although House had cast doubt on his guilt with his introduction of the newly discovered evidence, he did not satisfy the *Herrera* standard, if such a claim even exists, for freestanding claims of actual innocence.[114] Thus, the Court did not see fit to determine "whatever burden a hypothetical freestanding innocence claim would require."[115] Justice Kennedy made clear that in considering evidence under a *Schlup* claim, the Supreme Court would not have to rely on the district court's evidentiary findings.[116]

Chief Justice Roberts penned the dissent in this case, joined by Justices Scalia and Thomas (Justice Alito took no part in the consideration of the case).[117] The newly confirmed Chief Justice took the majority to task for disregarding the district court's findings: "Witnesses do not testify in our courtroom, and it is not our role to make credibility findings and construct theories . . . . We are to defer to the better situated District Court on reliability, unless we determine that its findings are clearly erroneous."[118] Given that the district court had already poured over the evidence and heard the testimony, the dissenters saw no reason to "second-guess" the district court's findings.[119]

Chief Justice Roberts considered the newly presented evidence with an emphasis on the district court's credibility findings.[120] Though the DNA

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112. *Id.* at 2083. The majority emphasizes the strength of the new evidence when taken as a whole:

> Were House's challenge to the State's case limited to the questions he has raised about the blood and semen, the other evidence favoring the prosecution might well suffice to bar relief. There is, however, more; for in the post-trial proceedings House presented troubling evidence that Mr. Muncey, the victim's husband, himself could have been the murderer.

Id.

113. *Id.* at 2086.

114. *Id.* at 2087.

115. *Id.*

116. *Id.* at 2078. The majority clearly doubted the evidentiary and credibility determinations made by the district court to the extent that Justice Kennedy wrote that the majority was "uncertain" about the reliability of its conclusions. *Id.*

117. *Id.* at 2087 (Roberts, C.J., dissenting in part, concurring in part). The dissenting faction concurred as to the rejection of the *Herrera* claim. *Id.*

118. *Id.* at 2090.

119. *Id.* at 2092.

120. *Id.* Chief Justice Roberts described the district court's determination with much deference: "The District Court attentively presided . . . concisely summarized . . . then

evidence might have eliminated the possibility of a sexual motive, he noted that the other two pieces of evidence relied upon by the majority were judged by the district court as lacking in credibility.[121] The Chief Justice applied the *Schlup* standard and concluded that, while the DNA evidence might cloud the motive issue in the minds of one or more jurors, it is "more likely than not that in light of this new evidence, at least one juror, acting reasonably, would vote to convict House."[122] Because of this likelihood, the dissent, stressing the "important judicial interests of finality and comity,"[123] would have affirmed the Sixth Circuit's decision.[124]

Given the Justices' differing opinions on what standard to apply to–and what, if any, chance exists for–petitioners with freestanding claims of innocence, Part II of this Comment addresses the efficacy of the current habeas jurisprudence given the influx of claims of innocence due to advances in DNA-testing technologies.

II. FEDERALISM, FINALITY, AND THE FAIR ADMINISTRATION OF JUSTICE

A. Widespread Calls for Freestanding Habeas Review

The attention given to high profile DNA-based exonerations has spurred many legal commentators and practicing attorneys to call for a variety of federal habeas reforms.[125] These proposed remedies range from the favorable interpretation of Supreme Court precedent in *Herrera*

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dutifully made findings about the reliability of the testimony it heard and the evidence it observed." *Id.*

121. *See id.* at 2095-96.

122. *Id.* at 2096.

123. *Id.* at 2089.

124. *Id.* at 2087.

125. *See, e.g.*, Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 320 (1990-1991) (proposing that the federal habeas statute be amended to allow state prisoners in capital cases to allege that based on new evidence of innocence, "there is now probable cause to believe that a new jury might reach a different outcome on either guilt or sentence"); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 773-74 (2002) (proposing several remedies to the limitations on the filing of successive petitions put in effect by AEDPA); Nicholas Berg, Note, *Turning a Blind Eye to Innocence: The Legacy of* Herrera v. Collins, 42 AM. CRIM. L. REV. 121, 122 (2005) (comparing the Court's decision in *Herrera* to such infamous decisions as *Korematsu* and *Plessy*: "The *Herrera* Court turned a blind eye to the execution of innocent people"); Rachel E. Wheeler, Note, *AEDPA Deference and the Undeveloped State Factual Record:* Monroe v. Angelone *and New Evidence*, 46 WM. & MARY L. REV. 1887, 1890 (2005) (arguing that federal courts should review de novo all presentations of evidence not considered by the state court).

and *Schlup* proposed by Mr. House,[126] to more significant departures.[127] These pleas run headlong into the strong view of federalism espoused by the Court's recent collateral attack jurisprudence.[128] This conflict raises the question of whether the federal district court system is the most effective venue to re-litigate state court judgments when a prisoner raises a claim of actual innocence.[129] Given the broad discretionary powers allotted to the states to enforce their criminal laws, state-based remedies appear to be a more appropriate solution.

1. Is It Judicious for Federal District Courts to Re-litigate State Court Judgments?

In support of their position, opponents of the exercise of federal habeas review in cases lacking constitutional violations cite respect for state court judgments, finality, and the inherent unreliability of factual determinations made years after a crime has been committed.[130] The power granted to the federal courts to intervene in state court proceedings should only be used if there is a violation of "clearly established federal law."[131] Former Chief Justice Rehnquist has emphasized that prisoners,

126. Petition for Writ of Certiorari, *supra* note 96, at *31-33 (arguing that *Herrera* allows for habeas review when the petitioner demonstrated a truly persuasive claim of innocence).

127. *See* Stevenson, *supra* note 125, at 774, 783-84 (proposing congressional reform and a broader interpretation of federal habeas corpus).

128. Herrera v. Collins, 506 U.S. 390, 401 (1993) ("Few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.").

129. *See generally* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 507-14 (1963).

130. *See Herrera*, 506 U.S. at 403 ("[T]he passage of time only diminishes the reliability of criminal adjudications."). In *Herrera*, the habeas petition was filed ten years after the petitioner's conviction, making more difficult the district court's effort to weigh "'hot' and 'cold' evidence on petitioner's guilt or innocence." *Id.* at 404; *see also* Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (plurality opinion) (discussing the problems that the State might encounter in attempting to retry criminal cases years after witnesses have disappeared and memories have faded); Bator, *supra* note 129, at 443-44 (arguing that habeas corpus jurisdiction should be used to review state courts' decisional processes and not the guilt or innocence results of state criminal proceedings). Professor Bator points to the impulse inherent in many lawyers and judges "to make doubly, triply, even ultimately sure that the particular judgment is just" as detrimental to finality in criminal prosecutions. *Id.* at 443.

131. *See* 28 U.S.C. § 2254(d)(1)-(2) (2000) (stating, in relevant part, that an application for a writ of habeas corpus by a state prisoner convicted in state court proceedings will not be granted unless the decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court" or "based on an unreasonable determination of the facts"); *see also* Yarborough v. Alvarado, 541 U.S. 652, 660-61 (2004) (holding that "clearly established [federal] law" refers to Supreme Court holdings in force at "'the time of the relevant state court decision'" (quoting Williams v. Taylor, 529 U.S. 362, 472 (2000))); Mitchell v. Esparza, 540 U.S. 12, 16 (2003) (holding that "a state court's

like *Herrera*, were duly convicted in front of a jury under all the protections of the Constitution.[132] In his view, nothing short of a "truly persuasive" showing of innocence would warrant a federal remedy.[133]

Proponents of a broader exercise of federal habeas review counter these arguments with several recurrent themes. The first counterargument can be described as the "fundamental fairness" argument.[134] This school of thought relies on the proposition that no matter which constitutional right is at issue, it is fundamentally offensive to the Constitution to deny federal relief to a state prisoner with a claim of actual innocence.[135] Justices Brennan and Stevens advocated this position in their opposition to many of the Rehnquist Court's habeas corpus decisions.[136] Presently,

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decision is not 'contrary to . . . clearly established Federal law' simply because the court did not cite our opinions"). For an extensive statutory analysis of § 2254(d)(1), see Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 682-84 (2003) (interpreting the "clearly established federal law" requirement to mean that the federal law must be "embodied in a pre-existing Supreme Court precedent" to allow for habeas review). Professor Ides posits that to qualify under the "contrary to" requirement of § 2254(d)(1), the state court judgment must have applied "a legal standard other than the one dictated by that [Supreme Court] precedent and, as a consequence, arrives at an outcome incompatible with that precedent." *Id.* at 687; *see also* Melissa M. Barry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under The Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 754-55 (2005) (proposing five analytical touchstones to guide the Court's determination of when a precedent amounts to "clearly established law" under the Act).

132. *Herrera*, 506 U.S. at 418-19.

133. *Id.* at 417.

134. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence. . . . Today, as in prior centuries, the writ is a bulwark against convictions that violate 'fundamental fairness.'" (quoting Wainwright v. Sykes, 433 U.S. 72, 97 (1976) (Stevens, J., concurring))); Eric Seinsheimer, Note, Dretke v. Haley *and the Still Unknown Limits of the Actual Innocence Exception*, 95 J. CRIM. L. & CRIMINOLOGY 905, 907 (2005) ("The Court's decision [in *Dretke v. Haley*] is also fundamentally unfair, because it punishes Haley for a triad of mistakes by others: his counsel during trial, the district court, and the Fifth Circuit.").

135. *See* Murray v. Carrier, 477 U.S. 478, 516 (1986) (Brennan, J., dissenting) ("[T]he root principle underlying 28 U.S.C. §2254 is that government in a civilized society must always be accountable for an individual's imprisonment; if the imprisonment does not conform to the fundamental requirements of law, the individual is entitled to his immediate release.").

136. *See, e.g.*, *id.* at 500 (Stevens, J., concurring) ("As the statute suggests, the central mission of the Great Writ should be the substance of 'justice,' not the form of procedures."). Justice Brennan argued that the plurality in *Kuhlmann* was not faithful to history and prior interpretation of habeas corpus:

> Having thus implied that factual innocence is central to our habeas jurisprudence generally, the plurality declares that it is fundamental to the proper interpretation of "the ends of justice." Neither the plurality's standard for consideration of successive petitions nor its theory of habeas corpus is supported by statutory language, legislative history, or our precedents.

legal observers and scholars cite a multitude of cases in which prisoners and death row inmates have been exonerated to support this view of habeas corpus.[137]

The second argument against the current state of habeas corpus is that the Rehnquist Court's attempts to limit review have proved detrimental to finality, federalism, and judicial economy. By carving out various procedural tests for when a state prisoner may qualify under § 2254, Professor Barry Friedman argues that the Court has effectively undermined the statute's stated purpose.[138] Friedman evaluates the Rehnquist Court's concerns for finality, federalism, and judicial economy, and posits that "it is time for the Supreme Court to ask itself whether the reform venture has been a success."[139] Citing the fact that the Court already reviews state court judgments under the miscarriage of justice analysis for otherwise procedurally defaulted claims, Friedman makes the case that the current state of habeas jurisprudence fails to address the Court's fears.[140]

Kuhlmann v. Wilson, 477 U.S. 436, 462-63 (1986) (Brennan, J., dissenting). *But see* Friendly, *supra* note 3, at 170-71. Judge Friendly, arguing against the view of the majority Court in *Fay v. Noia*, vehemently denies Justice Brennan's characterization of the original understanding of the writ:

> [D]espite the "prodigious research" evidenced by the *Noia* opinion, the assertion that habeas as known at common law permitted going behind a conviction by a court of general jurisdiction is simply wrong. The very historians cited in the opinion disagree with any such conclusion. *Bushell's Case*, the only authority cited that gives even slight support to the thesis espoused in the elaborate dictum, is wholly inadequate to sustain the view that English courts used the writ to penetrate convictions of felony and treason and seek out violations of Magna Carta.

Id. at 171 (footnotes omitted).

137. *See* Brief for the Innocence Project, Inc. as Amicus Curiae Supporting Petitioner at 1-2, House v. Bell, 126 S. Ct. 2064 (2006) (No. 04-8990) (describing a "revolution" of DNA-based exonerations since the Court decided *Schlup*).

138. Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 488 (1995).

139. *Id.* at 546.

140. *Id.* at 500-01. Minimizing the judicial economy argument, Friedman writes that "[t]he number of habeas petitions actually granted by the federal courts is small anyway, and evidence suggests that the number has not dropped appreciably under the reform effort." *Id.* at 501 (footnote omitted). Friedman asserts that the very nature of the Court's view of habeas corpus violates federalist principles:

> Superficially the most serious-seeming injury is the very fact that federal courts will adjudicate claims of guilt and innocence. This displaces the state courts from their very *raison d'être*. But there is another injury to federalism here, an injury of the very sort one would think the Rehnquist Court would most disdain. That is the implicit aspect of *Herrera*, the "if they don't do it we will do it for them" conclusion that the federal courts may only hear innocence claims if state process is unavailable. This appears to wipe away state limitations on the time for presenting newly discovered evidence, at least if state courts want to avoid the risk of federal courts throwing egg all over their faces.

Id. at 512 (footnote omitted).

Perhaps the widespread criticism from the legal community, coupled with circuit court difficulties in applying Supreme Court habeas precedents, led the Court to grant certiorari in *House v. Bell*.[141] In practice, the circuits have interpreted the freestanding *Herrera* actual innocence claims in a variety of ways, including that they exist but require an extraordinary showing,[142] that they exist but are restricted to capital cases,[143] that they exist but only where there is no state post-conviction avenue available,[144] or that they do not exist at all.[145] Because the Supreme Court in *House*

141. *See* Petition for Writ of Certiorari, *supra* note 96, at *31-33 & n.18 (detailing a variety of standards the various circuits have imposed to deal with the Court's decision in *Herrera*).

142. *See, e.g.*, Boyde v. Brown, 404 F.3d 1159, 1168 (9th Cir. 2005) (recognizing a freestanding actual innocence basis for habeas relief although the petitioner "must affirmatively prove that he is probably innocent"), *amended*, 421 F.3d 1154 (9th Cir. 2005); Cox v. Burger, 398 F.3d 1025, 1031 (8th Cir. 2005) (explaining the difference between *Herrera* and *Schlup* claims of actual innocence, and recognizing that the petitioner is entitled to habeas review where he has alleged a "'truly persuasive demonstration[] of actual innocence'" (quoting Herrera v. Collins, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring))), *cert. denied*, 126 S. Ct. 93 (2005); Souter v. Jones, 395 F.3d 577, 596 n.11 (6th Cir. 2005) (finding that the Court in *Herrera* distinguished between substantive and procedural claims of actual innocence; and for substantive claims, the petitioner must "demonstrate that 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt'" (alteration in original) (quoting *Herrera*, 506 U.S. at 429 (White, J., concurring))); House v. Bell, 386 F.3d 668, 688-90, 708 (6th Cir. 2004) (en banc) (Merritt, J., dissenting) (applying Justice White's framework for freestanding actual innocence claims), *rev'd*, 126 S. Ct. 2064 (2006); Conley v. United States, 323 F.3d 7, 14 n.6 (1st Cir. 2003) (en banc) (stating "[i]t is not clear whether a habeas claim could be based on new evidence *proving* actual innocence"); David v. Hall, 318 F.3d 343, 347-48 (1st Cir. 2003) (explaining that an actual innocence exception "has been firmly disallowed by the Supreme Court as an independent ground of habeas relief, save (possibly) in extraordinary circumstances in a capital case").

143. *See, e.g.*, Pettit v. Addison, 150 F. App'x 923, 926 (10th Cir. 2005) (holding that freestanding relief under the *Herrera* standard is not available where petitioner was not sentenced to death); Lodge v. Candelaria, 107 F. App'x 110, 111 (9th Cir. 2004) (mem.) ("A freestanding claim of actual innocence does not, absent an independent constitutional violation in the criminal proceeding, state a ground for federal habeas relief in a non-capital case."), *cert. denied*, 544 U.S. 983 (2005); Hunt v. McDade, 205 F.3d 1333, 2000 WL 219755, at *3 (4th Cir. Feb. 25, 2000) (unpublished table decision) (clarifying the *Herrera* holding: "analytical assumptions recognizing the possibility of a persuasive freestanding claim of actual innocence may be limited to capital cases because those assumptions were made in the context of evaluating the constitutionality of the petitioner's execution").

144. *See, e.g.*, Royal v. Taylor, 188 F.3d 239, 243 (4th Cir. 1999) (interpreting *Herrera* to mean that actual innocence alone will not avail a prisoner of federal habeas review if the state in which he is incarcerated offers the option of executive clemency); Felker v. Turpin, 83 F.3d 1303, 1312 (11th Cir. 1996) (interpreting the *Herrera* standard to require that a petitioner establish persuasively (1) that there are no state post-conviction avenues to pursue, and (2) that he is innocent).

145. *See, e.g.*, Balsewicz v. Kingston, 425 F.3d 1029, 1032 (7th Cir. 2005) (holding that neither the Supreme Court nor the Seventh Circuit allows freestanding actual innocence claims when the petitioner's filing is untimely), *cert. denied*, 126 S. Ct. 1160 (2006); Fielder v. Varner, 379 F.3d 113, 122 (3d Cir. 2004) ("It has long been recognized that '[c]laims of actual innocence based on newly discovered evidence' are never grounds for 'federal ha-

failed to answer the questions surrounding *Herrera* claims,[146] state prisoners with claims of actual innocence based wholly, or in part, on DNA evidence are likely to persist.[147] As a result, competing political and judi-

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beas relief absent an independent constitutional violation.'" (quoting *Herrera*, 506 U.S. at 400)), *cert. denied sub nom.* Fielder v. Lavan, 543 U.S. 1067 (2005); Kincy v. Dretke, 92 F. App'x 87, 92 (5th Cir. 2004) (announcing that "it has long been the rule in this circuit that claims of actual innocence based on newly discovered evidence alone are not cognizable under federal habeas corpus"); United States v. Quinones, 313 F.3d 49, 69 (2d Cir. 2002) (stating that "the Supreme Court established in *Herrera* that there is no fundamental right to the opportunity for exoneration even before one's execution date, much less during the entire course of one's natural lifetime").

146. Supreme Court observers and political commentators have speculated on the likely jurisprudential approach of Chief Justice John Roberts. *E.g.*, Editorial, *Roberts's Conservative Leanings*, WASH. TIMES, Aug. 2, 2005, at A16 (discussing the question of whether Roberts' jurisprudence would track that of the late Chief Justice William Rehnquist, for whom Roberts clerked); Editorial, *Young Lawyer Roberts*, WASH. POST, Jul. 31, 2005, at B6 (discussing Roberts' role in the Justice Department during the Reagan administration as showing "a lawyer fully in tune with the staunchly conservative legal views of the administration he was serving"). Those who anticipate a "conservative" Justice Roberts point to, among other things, his 1981 memorandum regarding federal habeas reform efforts in which he criticized the status of federal habeas corpus at that time as "'making a mockery of the entire criminal justice system.'" *Roberts's Conservative Leanings*, *supra*.

To the extent that such observers might have correctly predicted Chief Justice Roberts's approach to federal habeas corpus, the same predictions have been made with respect to Associate Justice Samuel Alito, Jr., who did not take part in the *House* case. House v. Bell, 126 S. Ct. 2064, 2068 (2006). Evidence of Justice Alito's textualist approach can be seen in his critique of the Court's decision in *Fisher v. United States*, which altered the Court's analysis regarding the Fifth Amendment and the compulsory process of documents: "The lack of proof that the fifth amendment privilege was intended to regulate subpoenas for existing documents *should end the inquiry*. This problem should be left for regulation, at the federal and state levels, by nonconstitutional means." Samuel A. Alito, Jr., *Documents and The Privilege Against Self-Incrimination*, 48 U. PITT. L. REV. 27, 80 (1986) (emphasis added).

Although conventional wisdom assumes that Justice Alito will be a "conservative" Supreme Court Justice, such labels are hardly predictive of how a given judge would rule on the more mundane and less politically polarizing issues. *See* Linda Greenhouse, *Death Penalty Case Gives a Clue to Alito's Methods*, N.Y. TIMES, Nov. 16, 2005, at A16 (discussing then-Judge Alito's opinion in a federal habeas corpus case, *Bronshtein v. Horn*, and concluding that "even while adhering to a straightforward and technical approach to deciding the case, [Judge Alito] reached results that defy easy categorization"); *see also* Bronshtein v. Horn, 404 F.3d 700 (3d Cir. 2005) (reversing the district court's order for a new trial on guilt, and affirming the district court's order for re-sentencing), *cert. denied sub nom.* Beard v. Bronshtein, 126 S. Ct. 1320 (2006). In *Bronshtein*, the Third Circuit affirmed the district court's finding that where the prosecutor argued the future dangerousness of the defendant in his closing argument, the trial judge should have instructed the jury that the defendant would receive life without parole if they elected not to sentence him to death. *Id.* at 716-20.

147. *But see* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS xvii (1999), *available at* http://www.ncjrs.org/pdffiles1/nij/177626.pdf (predicting that over time, post-conviction

cial philosophies must be put aside to determine the best means to evaluate the merits of such claims.

2. Allegedly Exculpatory DNA Evidence: The Shining Light of Innocence, or Just More Fog?

The utility of forensic DNA technology as an effective law enforcement tool has been demonstrated time and time again.[148] Unlike many other techniques developed for criminal investigation, DNA testing is just as able to shed light on a given suspect's innocence as his guilt.[149] Exploiting state-of-the-art advances in biochemistry and molecular biology, scientists continue to develop new and more discriminating testing methods more than a decade after the technology became commonplace.[150] The forward march of technology gives a new meaning to newly discovered evidence.

In his claim for habeas relief, the petitioner in *House* cited, among other things, exculpatory DNA evidence.[151] During the trial, the State introduced serological evidence that, according to the State's expert, could not exclude House as the source of semen stains on the victim's clothes.[152] DNA technology, not available at the time of his trial, had since shown the victim's husband to be the source of the semen stains.[153] While the petitioner offered this "new" evidence in his actual innocence claim, the presence of the victim's spouse's DNA on her nightgown was, in and of itself, by no means exculpatory.

This evidence is not necessarily inconsistent with the State's theory of the case.[154] The State hinted at House's motive–that he had attempted to have forcible sex with Mrs. Muncey and when she fought back, he struck

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claims of innocence based on DNA evidence will diminish as more sensitive testing methods are used routinely in investigating and prosecuting crimes).

148. *See* Edward K. Cheng, *Reenvisioning Law through the DNA Lens*, 60 N.Y.U. ANN. SURV. AM. L. 649, 649 (2005) (citing the utility of DNA testing for both prosecutors and defendants).

149. *Id.*

150. *See, e.g.*, Robin Lloyd, *Lab on a Chip May Turn Police into DNA Detectives*, WASH. POST, Mar. 1, 1999, at A9 (detailing new chip technology that would allow DNA analysis to be conducted rapidly at the actual crime scene); Lutz Roewer, *Male DNA Fingerprints Say More*, PROFILES IN DNA, Sept. 2004, at 14, 14, *available at* http://www.promega.com/profiles/702/ProfilesinDNA_702_14.pdf (describing the ability of newly developed Y-STR technology to discriminate between male and female sources of DNA, as well as relatedness between males).

151. House v. Bell, 386 F.3d 668, 680 (6th Cir. 2004) (en banc), *rev'd*, 126 S. Ct. 2064 (2006).

152. *Id.* at 672.

153. *Id.* at 685.

154. *See* House v. Bell, 126 S. Ct. 2064, 2095-96 (2006) (Roberts, C.J., dissenting in part, concurring in part).

and killed her.[155] In fact, the lack of semen from House would support the thwarted sexual assault theory as much as the alleged presence of his semen might have at the trial. Likewise, the presence of Mr. Muncey's semen on his wife's nightgown does not imply that he murdered her.

The development of new DNA testing methodologies is a double-edged sword. Although in many cases it is highly relevant to guilt or innocence, in cases like *House*, the test results can be consistent with both parties' theories of the case.[156] The *Herrera* majority's concerns regarding diminished finality of state convictions, criticized by Friedman and others, might come to fruition if the Court expands the reach of federal habeas review.[157] Any given item of evidence could be tested in the future with different or more sensitive DNA tests.[158] In some cases, the results of the subsequent rounds of testing might provide more or different information when compared to the initial results.[159] For instance, more sensitive tests could reveal the presence of multiple DNA contributors where initially only one source of DNA was identified.[160] Does this "newly discovered evidence" rise to a showing of actual innocence, or merely a colorable claim?

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155. *Id.* at 2095.

156. Although House presented a variety of evidence at the district court evidentiary hearing, the semen stain exclusion was an important part of his innocence claim. *House*, 386 F.3d at 686 (Merritt, J., dissenting). Still, the majority opinion noted that despite of all this, the evidence against House was "quite strong." *Id.* at 673 (majority opinion); *cf.* EDWARD CONNORS ET AL., U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 28 (1996), *available at* http://www.denverda.org/legalResource/Exonerated%20by%20Science.pdf (noting, for example, that DNA evidence loses much of its exculpatory value in multiple defendant cases).

157. See, for example, Justice Powell's concerns: "'I know of no other system of justice structured in a way that assures no end to the litigation of a criminal conviction. Our practice in this respect is viewed with disbelief by lawyers and judges in other countries. Nor does the Constitution require this sort of redundancy.'" Office of Legal Policy, U.S. Dep't of Justice, *supra* note 3, at 911 (quoting Justice Lewis F. Powell, Address Before the ABA Division of Judicial Administration (Aug. 9, 1982)).

158. The amount of biological sample necessary for DNA testing has drastically reduced since RFLP-based methods first rose to prominence. *See* KREEGER & WEISS, *supra* note 5, at 7-9 (2003); Kim Herd et al., Am. Prosecutors Research Inst., *A Short Primer on STRs: Why Do Prosecutors Need to Learn about STRs?*, SILENT WITNESS, 1999, *available at* http://www.ndaa.org/apri/programs/dna/newsletter.html (discussing the advantages of STR testing as more discriminating and better for smaller samples).

159. With more sensitivity comes the chance of picking up more DNA contributors–minute contributions that might not have been revealed with less discriminating testing methods. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, *supra* note 147, at 21 (discussing categories of potential results from post-conviction DNA tests ranging from definitive exclusions and inclusions to more ambiguous results); *see also* Carll Ladd et al., *Interpretation of Complex Forensic DNA Mixtures*, 42 CROAT. MED. J. 244, 244-45 (2001) (addressing some of the interpretive problems associated with mixed DNA profiles).

160. *See supra* notes 158-59.

B. Other Options to Address State Prisoners' Claims of Actual Innocence

1. Executive Clemency

When a state prisoner claims actual innocence, the power of a state governor to grant clemency to state prisoners has been cited as an appropriate alternative to federal habeas corpus.[161] However, the effectiveness of executive clemency as a safeguard to protect the innocent has been called into question, especially in death penalty-friendly states.[162] From a historical standpoint, governors have appeared reluctant to use clemency since the death penalty was effectively reinstated with the Supreme Court's 1976 decision in *Gregg v. Georgia*.[163] Professor Hugo Adam Bedau cites public support for the death penalty and governors' political concerns as contributing to this reduction in the use of clemency.[164]

Despite Bedau's cited statistical decrease in the prevalence of executive clemency compared to other periods of our history, state governors do intervene in capital cases.[165] Former Virginia Governor Mark Warner, who pardoned Marvin Lamont Anderson as a result of DNA evidence,[166] is just one example.[167] Indeed, when DNA testing might confirm the guilt of a death row inmate or one who has already been executed, state execu-

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161. Herrera v. Collins, 506 U.S. 390, 416-17 (1993) (proposing clemency as a more suitable alternative). As the majority points out, "[h]istory shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 417.

162. *See* Anderson, *supra* note 7, at 510-11. Anderson notes that when then Texas Governor George W. Bush commuted Henry Lee Lucas' death sentence in 1998, it was apparently the first time a Texas governor intervened to commute a death sentence on his own (i.e., without court intervention) since the 1930s. *Id.* at 511 n.206. Anderson argues that *Herrera* does not allow for federal habeas relief based on freestanding claims of actual innocence and encourages the various states to develop the means to address the problem. *Id.* at 518-19. For a discussion of state legislative remedies, see *infra* notes 192-94.

163. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); *see also* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 264 (1990-1991) (citing Department of Justice statistics showing that from 1961 to 1970 there was approximately one death sentence commuted for every 6.3 imposed, while from 1979 to 1988 the ratio dropped to one commutation per approximately every 40.2 death sentences imposed).

164. Bedau, *supra* note 163, at 267-68. Bedau goes on to argue that faith in the number of appeals in the state and federal courts give governors the security not to grant clemency. *Id.* at 269.

165. *See* Maria Glod, *Cleared Va. Man to be Pardoned: Warner's Act to End Struggle of Trucker Cleared by DNA Evidence*, WASH. POST, Aug. 21, 2002, at B2 (detailing Virginia Governor Mark Warner's pardon of Marvin Lamont Anderson, who was the first Virginian exonerated under a 2001 law allowing DNA testing of inmates).

166. *Id.*

167. *See, e.g.*, *infra* notes 173-75 and accompanying text.

tive intervention is an equally important tool to consider.[168] Virginia executed Roger Keith Coleman in 1992 for the rape and murder of his sister-in-law, Wanda McCoy.[169] Despite proclamations of his innocence and a "25-year crusade" on his behalf, DNA test results, again ordered by Governor Mark Warner, confirmed his guilt in 2006.[170]

Contrary to common perception, one of the few statistical analyses on the use of clemency found that politics do not significantly affect a state executive's use of clemency.[171] The study's author discovered that political factors did not affect the use of executive clemency in a statistically significant way: "Consistent with the other political factors, none of the governors' background variables achieved statistical significance. Interestingly, despite widespread popular perceptions that women, Democrats, and Catholics view the death penalty with less favor, the results indicate that these characteristics had no effect on clemency decisions."[172] Indeed, the outgoing Republican governor of Maryland has, since 2003, pardoned or granted clemency to 190 convicted offenders.[173]

Another prominent recent use of executive clemency was Illinois Governor George H. Ryan's 2000 moratorium on executions prompted by the release from of thirteen men death row in approximately ten years.[174] The thirteen death row pardons ranged from cases where there was scant evidence of the inmates' guilt to cases where subsequent investigation, including post-conviction DNA testing, excluded the inmate as a likely

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168. *See, e.g.*, Kansas v. Marsh, 126 S. Ct. 2516, 2533 (2006) (Scalia, J., concurring) (citing the Virginia case of Roger Keith Coleman). Justice Scalia argues that while "[t]he dissent makes much of the new-found capacity of DNA testing to establish innocence. . . . in every case of an executed defendant of which I am aware, that technology has confirmed guilt." *Id.*

169. Glenn Frankel, *Burden of Proof*, WASH. POST, May 14, 2006, (Magazine), at 8-11 (recounting the effort to exonerate Coleman). Following the Coleman execution, Jim McCloskey read his last words for those in attendance: "'An innocent man is going to be murdered tonight. When my innocence is proven, I hope Americans will realize the injustice of the death penalty as all other civilized countries have.'" *Id.* at 10.

170. Maria Glod & Michael D. Shear, *DNA Tests Confirm Guilt of Man Executed by Va.*, WASH. POST, Jan. 13, 2006, at A1.

171. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and its Structure*, 89 VA. L. REV. 239, 289, 296 (2003) (examining the effects of political factors such as "presidential and gubernatorial election cycles, whether a governor granted clemency during an administration's 'eleventh hour,' whether state court judges are elected, and a governor's background characteristics").

172. *Id.* at 295 (footnote omitted).

173. Matthew Mosk, *Ehrlich Prolific in Granting Clemency*, WASH. POST, Aug. 25, 2006, at A1 (noting that Governor Robert Ehrlich granted clemency for a variety of reasons during his first term).

174. *See* COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 1-4 (2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf.

perpetrator of the crime.[175] The moratorium was supplemented with the recommendations of the Ryan Commission—a collection of political figures, law enforcement officials, and legal experts.[176] The Ryan Commission proposed a variety of measures in response to systemic problems in Illinois, including, a requirement that the trial judge concur in jury impositions of death sentences,[177] a prohibition of death sentences for the mentally retarded,[178] and provisions allowing for newly-discovered evidence in post-conviction proceedings.[179] This type of executive intervention is always available to aid the wrongly convicted. However, federal and state legislative remedies may offer the most hope for the fair administration of justice in extreme cases of actual innocence.[180]

2. *Legislative Remedies*

a. *Federal Solution: Innocence Protection Act of 2004*

Proponents of post-conviction DNA testing lauded Congress for its passage of the Innocence Protection Act (IPA) of 2004, which is contained in the Justice For All Act of 2004.[181] Vermont Democratic Senator

175. *Id.* at 7-9. Among the death row inmates to have their sentences commuted were two members of the infamous "Ford Heights Four." The four men, including Verneal Jimerson and Dennis Williams who were on death row, were exonerated after DNA testing failed to physically link any of the men to the crime. *Id.* at 8.

176. *Id.* at v-vii.

177. *Id.* at 33-34.

178. *Id.* at 34.

179. *Id.* at 35-36.

180. *See* Freedman, *supra* note 125, at 318 (espousing the potential of "vertical federalism," that is distilling power down to the most politically accountable local unit, to solve the problem of post-conviction innocence claims, while criticizing those who claim "horizontal federalism" is the appropriate answer). *But see* Posner, *supra* note 64, at 90. Espousing pragmatism and modesty as judicial virtues, Judge Posner points out that when the Court strikes down or avoids a particular policy-based law or regulation, the Court has made the political judgment for us–we will never know if the policy works:

> The pragmatist wants to base decisions on consequences—and it is very difficult to determine the consequences of a challenged policy if you squelch it at the outset. The Holmes-Brandeis idea of the states as laboratories for social experimentation is both quintessentially pragmatic (the term that John Dewey, the great pragmatic philosopher, preferred for his philosophy was "experimentalism") and a fundamental principle of judicial modesty.

Id. at 91 (footnote omitted). This view runs counter to Freedman's inherent distrust in the state-based approach. Freedman, *supra* note 125, at 318.

181. *See* Press Release, U.S. Senator Patrick Leahy, Leahy DNA/Death Penalty Reform Bill Poised to Become Law This Weekend (Oct. 30, 2004), *available at* http://leahy.senate.gov/press/200410/103004A.html (last visited Oct. 30, 2006) [hereinafter Leahy Press Release]; Press Release, U.S. Conference of Catholic Bishops, The Innocence Protection Act (Aug. 2002), *available at* http://usccb.org/sdwp/national/ipa809.htm ("Although it will not end the use of capital punishment, the U.S. Bishops have supported the IPA because it will help protect innocence people from being executed").

Patrick Leahy introduced the law in 2000, and hailed its passage as "a rare example of bipartisan cooperation for good causes."[182] The Act provides for post-conviction DNA testing in applicable federal cases,[183] the preservation of biological evidence,[184] funds to help states "defray the costs of post-conviction DNA testing,"[185] and other incentives granted to states who comply with federal standards.[186] This legislation is important not only for its bipartisan support, but also for the development of alternatives to federal habeas corpus relief.[187]

The passage of the IPA and AEDPA represent considered and legitimate exercises of congressional power.[188] Professor Kent Scheidegger refutes the claim that limitations to federal habeas corpus violate the constitutional rights of state prisoners because they have no "right" to this remedy:

> In the proper exercise of this power, Congress has chosen a middle ground of preclusion, similar to the doctrine of the law of the case. Stated another way, Congress has chosen to limit the habeas remedy to cases where the state court decision is clearly wrong, resolving doubtful cases in favor of the finality of the judgment.[189]

Scheidegger's conclusion is consistent with an originalist approach; under this school of thought the democratically elected branches of government are better suited to make a determination as to which scope of federal review is appropriate over final state court judgments.[190] The pas-

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182. Leahy Press Release, *supra* note 181. *See generally* Justice For All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18, 28, and 42 U.S.C.). Though ultimately hailed as a bipartisan effort, the Act did not garner widespread Republican support until the post-conviction DNA testing provisions were joined with provisions giving funding and other resources to law enforcement interests. *See* Peter Baker, *Behind Bush's Bid to Save the Innocent*, WASH. POST, Feb. 4, 2005, at A9.

183. *See* Justice For All Act § 411, 18 U.S.C. § 3600 (Supp. IV 2004).

184. *See* § 411, 18 U.S.C. § 3600A ("[T]he Government shall preserve biological evidence that was secured in the investigation or prosecution of a Federal offense, if a defendant is under sentence of imprisonment . . . .").

185. *Id.* § 412, 42 U.S.C.A. § 14136e (West 2005).

186. *See id.* § 413, 42 U.S.C.A. § 14136 (West 2005).

187. *Id.* § 411, 18 U.S.C. 3600A ("Nothing in this section shall provide a basis for relief in any Federal habeas corpus proceeding.").

188. *See* Scheidegger, *supra* note 64, at 891-92 (defending provisions of AEDPA, Scheidegger proposes that Congress is on strong constitutional footing with respect to the limits placed on federal habeas corpus under AEDPA).

189. *Id.*

190. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (arguing that, while admittedly less than perfect, an originalist approach to constitutional cases should be preferred). Justice Scalia argues that the Court should leave such matters to the elected branches as they are not really acting as judges when determining the contemporary scope of fundamental values, writing: "It is very difficult for a person to discern a difference between those political values that he personally thinks most impor-

sage of AEDPA and IPA demonstrates that our elected representatives are able to address perceived abuses of the federal habeas corpus system while preserving remedies for prisoners with the strong claims of innocence that exculpatory DNA testing can provide.[191]

b. State Legislative Remedies

State legislatures also have debated, proposed, and enacted a variety of post-conviction remedies to deal with claims of actual innocence.[192] From 2000 to 2004, one observer found that state legislatures around the country enacted at least sixty laws that provide for post-conviction DNA testing, the retention of biological evidence, or other procedural remedies.[193] Undoubtedly, many of these bills were passed in anticipation of federal funding made available under the IPA.[194]

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tant, and those political values that are 'fundamental to our society.'" *Id.* at 863. Judge Posner also advocates such judicial restraint by the Supreme Court when facing constitutional cases:

> A constitutional court composed of unelected, life-tenured judges, guided, in deciding issues at once emotional and politicized, only by a very old and in critical passages very vague constitution (yet one as difficult to amend as the U.S. Constitution is), is potentially an immensely powerful political organ—unless, despite the opportunities that are presented to the Justices, they manage somehow to behave like other judges.

Posner, *supra* note 64, at 40. *But see* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 470 (1981) (arguing that judges cannot remove substantive political judgments from their rulings in constitutional cases). Professor Dworkin counters the originalist and judicial restraint argument with the assertion that this approach merely disguises value-laden, political judgments: "Judges cannot decide what the pertinent intention of the Framers was, or which political process is really fair or democratic, unless they make substantive political decisions of just the sort the proponents of intention or process think judges should not make." *Id.*

191. *See generally supra* notes 181-90 and accompanying text.

192. DNA Resource, Post Conviction DNA Legislation, http://www.dnaresource.info/documents/2003PostConvictionLegislation.pdf (last visited Oct. 30, 2006) [hereinafter Post-Conviction DNA Legislation] (discussing state post-conviction DNA legislation as of December 2003).

193. DNA Resource, DNA Database Legislative Expansion, http://www.dnaresource.info/expansion.html (last visited Oct. 30, 2006) (listing state bills relating to post-conviction DNA testing by year).

194. *See* Memorandum from Sarah Tofte to Innocence Network Members (Dec. 8, 2004), *available at* http://www.innocenceproject.org/docs/JFAA_Memo.pdf (reviewing provisions of the federal Innocence Protection Act that might provide states with funding for post-conviction DNA testing and other state programs). Additional incentives for the states to provide post-conviction assistance can be found in AEDPA, wherein Congress structured the Act to offer states the incentive to provide adequate representation to prisoners attacking their judgments in state courts. *See* 39 AM. JUR. 2D *Habeas Corpus* § 138 (1999). By investing money and resources in the representation of prisoners at the state level, AEDPA offers "a quid pro quo arrangement" to the states, whereby "there is expedited review of any subsequent federal habeas corpus petition, limitations on the petitioner's ability to amend the federal petition, and restrictions on a federal court's review of the merits of the federal petition." *Id.* To exploit these special federal habeas limitations,

This movement by the states, even in traditional "tough on crime" states like Virginia,[195] toward giving state prisoners a chance to raise post-conviction claims of innocence, is encouraging.[196] Further, this movement begins to call into question the argument that states cannot be trusted to ensure post-conviction justice.[197]

III. THE STATE DEMOCRATIC PROCESS IS WELL-DESIGNED TO ADDRESS THE ISSUE OF ACTUAL INNOCENCE CLAIMS

The proposition that the United States Constitution was not created to solve each and every problem we face as a nation is not a new one.[198] This adage rings especially true in the context of federal habeas applications based primarily on newly discovered DNA evidence–given the multitude of local solutions, why flood the federal courts with cases that do not even raise an issue of federal law? The effect of a broad interpretation of the role of federal habeas corpus is a burden on both the state[199]

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the state must have offered court-appointed counsel to all state prisoners serving a capital sentence. *Id.*

195. *See, e.g.*, Teresa Welsh, *Kilgore Campaign Comes to Emporia*, http://www.vancnews.com/articles/2005/09/05/emporia/news/news01.txt (last visited Oct. 30, 2006) (quoting gubernatorial candidate Jerry Kilgore: "'I don't think that is a bad thing. I'm proud Virginia is a tough-on-crime state.'").

196. *See* Glod, *supra* note 165 (stating that prior to Virginia's post-conviction DNA testing law, the prisoner here would have had no right to the testing that ultimately exonerated him); *see also* Michael D. Shear, *DNA Database Touted by Police, Prosecutors: More Funding Urged for State Resource*, WASH. POST, Nov. 21, 2002, at T3 (citing Virginia's voter-approved amendment giving the Virginia Supreme Court the power to hear a prisoner's claims of actual innocence based on DNA evidence).

197. *See, e.g.*, Freedman, *supra* note 125, at 319 (expressing doubt in the states' ability to resolve this problem: "[T]he idea of permitting the states to experiment with a process that determines whether a person lives or dies is, or should be, unacceptable").

198. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358 (1981) (criticizing the so-called "due substance" theorists). Professor Monaghan describes the due substance theorists' view that "the constitution guarantees against the political order most equality and autonomy values which the commentators think a twentieth century Western liberal democratic government ought to guarantee to its citizens." *Id.* (emphasis omitted). Professor Monaghan later describes the "perfectionist" view of the Constitution as follows:

> Perfectionism requires the continuous reformulation of the minimum ideal norms of the polity, and the continuous application of the norms to varying circumstances. Legislation may (and given the current explosion of civil rights enactments, frequently does) embody those norms. Yet, a current schedule of extraconstitutional norms is always "necessary" for a proper assessment and constraint of the workings of the political process. Otherwise, the constitution might begin to show the hallmarks of a less-than-perfect document.

Id. at 390-91.

199. *See, e.g.*, Office of Legal Policy, U.S. Dep't of Justice, *supra* note 3, at 948. The availability of federal habeas corpus review of state court judgments burdens the states as well as the federal system because the petitioner must first exhaust all possible state remedies before turning to the federal courts. *Id.*

and lower federal court systems.[200] Although proponents of this broad interpretation are quick to cite the potential miscarriage of justice in select cases, rarely is the delay in providing justice to the victims of violent crimes mentioned.[201] Additionally, such an expansive view of federal habeas corpus operates as an affront to our federal system–empowering the lower federal courts with a "quasi-appellate" role over the state supreme courts.[202] In the words of one commentator: "Federal habeas for state prisoners is . . . quite simply, an exercise in judge-shopping. Because only the defendant and not the state can file habeas, it creates a 'heads I win, tails we take it over' system of review."[203]

Instead of demonstrating the need to broaden our conception of when federal habeas relief is available to state prisoners, cases like *House* demonstrate that claims of actual innocence based on newly discovered evi-

200. *Id.* Federal habeas applications by state prisoners rose from 127 in 1941 to 9542 in 1987. *Id.* The Department of Justice's Bureau of Justice Statistics reported in 1995 (the most recent report from that Bureau) that the number of petitions in 1991, for example, had reached 10,310. ROGER A. HANSON & HENRY W.K. DALEY, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 8 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fhcrcscc.pdf.

201. Not only is the plight of victims of violent crime rarely mentioned in this debate, but the typical habeas petitioner has been convicted of a violent felony and has little chance of prevailing. Office of Legal Policy, U.S. Dep't of Justice, *supra* note 3, at 948-49.

202. *Id.* at 953 ("While federal review of the judgments of state courts has traditionally been confined to direct review in the Supreme Court, the current habeas corpus jurisdiction enables individual federal trial judges to overturn the considered judgments of state supreme courts in criminal cases."); *see also* Scalia, *supra* note 190, at 862 (arguing that, while admittedly less than perfect, an originalist approach to constitutional cases should be preferred). Justice Scalia argues that even if the Constitution was intended to address the evolving concerns of American society, there is no evidence that it was meant to address such concerns in the courts:

> A democratic society does not, by and large, need constitutional guarantees to insure that its laws will reflect "current values." Elections take care of that quite well. The purpose of constitutional guarantees . . . . [is] to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular [original] values can be cast aside.

Id. at 862. He posits that in the past, unlike now, the Court "had the decency to lie, or at least to dissemble, about what they were doing" in advocating a non-originalist view of a constitutional provision. *Id.* at 852; *see also* Monaghan, *supra* note 198, at 396 (recognizing that an emphasis on original intent and stare decisis in constitutional adjudication would limit the Supreme Court in its ability to right the perceived wrongs of our society, Monaghan proposes that "perhaps the constitution guarantees only representative democracy, not perfect government").

203. Scheidegger, *supra* note 64, at 940. Explaining the structure of the federal courts, Scheidegger observes that there is no support for any supremacy of the lower federal courts over the state courts regarding federal questions; only the Supreme Court has this power over the states: "The unique status of the Supreme Court as the only federal court above the state courts can be seen throughout the constitutional debates and the Judiciary Act." *Id.* at 899. Thus, Congress has the plenary power to, for example, abrogate *Brown v. Allen* and remove the power of federal courts to hear state prisoners' claims entirely. *See id.* at 891.

dence can be difficult to address in the federal courts.[204] The fact that a federal court of appeals sitting en banc was split over the claim lends credence to the notion that the federal courts might not be the most suitable place to resolve such tough cases.[205] The very same facts and procedural posture resulted in a five-to-three split in the Supreme Court, where the opposing factions not only weighed the newly presented evidence differently, but could not even agree on what standard to apply to the district court's findings.[206]

Despite the skepticism, the local democratic process can be an effective means by which the citizens of a state can determine for themselves when a claim of innocence based on new evidence warrants the protection of post-conviction safeguards.[207] The voters of the Commonwealth of Virginia made that determination when they voted a collective "yes" on the following proposed amendment:

> [C]oncern[ing] cases in which someone is convicted of a felony but is later able to prove his 'actual innocence' because of newly discovered scientific or DNA evidence. Approval of this proposal would make it clear that the state Supreme Court may consider a claim of actual innocence without requiring that the claim be filed first in a lower court.[208]

And Virginia is not alone; a consideration of enacted state legislation from the year 2004 alone shows the willingness and ability of state legislatures to address claims of actual innocence based on DNA evidence.[209]

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204. *See supra* notes 83-90 and accompanying text.

205. *See supra* notes 91-103 and accompanying text.

206. *See supra* note 141; *see also* House v. Bell, 126 S. Ct. 2064, 2086-87 (2006).

207. *See, e.g.*, Post-Conviction DNA Legislation, *supra* note 192. Note the variety of state solutions to the post-conviction DNA testing issue—from Oregon's expansive testing provisions allowing for relief at any time if grounds for innocence are established by DNA evidence, to Missouri's more restrictive provisions requiring that:

> (1) there is evidence upon which DNA testing can be conducted; and (2) the evidence was secured in relation to the crime; and (3) the sample was not previously tested by the movant because: (a) The technology for the testing was not reasonably available to the movant at the time of the trial; (b) Neither the movant nor his or her trial counsel was aware of the existence of the evidence at the time of trial; or (c) The evidence was otherwise unavailable to both the movant and the movant's trial counsel at the time of trial; and (4) Identity was an issue in the trial; and (5) A reasonable probability exists that the movant would not have been convicted if exculpatory results had been obtained through the requested DNA testing.

MO. REV. STAT. § 547.035(2) (2006).

208. Editorial, *Virginia Ballot Issues*, WASH. POST, Sept. 28, 2002, at A22.

209. *See* H.R. 640, 2004 Sess. (N.H. 2004) (providing for post-conviction DNA testing available at any time after conviction assuming certain threshold requirements are met); S. 44, 2004 Reg. Sess. (Fla. 2004) (extending the cut-off date from two to four years for filing a petition for post-conviction DNA testing—there is no time limit for petitioners who can claim that they have new evidence that could not have been previously discovered by the exercise of due diligence).

These states have displayed not only the ability to conform state procedure to advances in forensic science, but also the previously unheard of ability to admit when their judicial processes have failed.[210]

IV. CONCLUSION

The Supreme Court had the opportunity in *House v. Bell* to recognize the existence of freestanding actual innocence claims. However, the Court declined to address the issue. Nonetheless, absent the truly "persuasive showing of actual innocence"[211] alluded to in *Herrera*, a state prisoner's colorable claim of innocence based on newly discovered evidence, such as DNA test results, does not necessarily require federal review. Cries to expand the availability of federal habeas corpus beyond the restrictions apparent in both the Constitution itself and Congress' passage of AEDPA, would be a disservice to the notions of finality in the administration of criminal justice, state autonomy, and enumerated powers of the federal legislative branch.

On the other hand, a limited federal habeas corpus regime for state prisoners who have exhausted their federal cause of action, allowing for freestanding habeas review only in the rare "truly persuasive" showing of actual innocence, would leave to the states the task of considering DNA-based claims. This outcome would also support Congress' attempts to prevent the flood of habeas corpus claims from overwhelming the federal courts. Such a prisoner would already have had one shot at direct federal review of his or her state conviction. Beyond that, it is evident that the states are grappling with the best means of addressing these problems. Well-conceived state statutory schemes provide the best, least arbitrary means for DNA-based post-conviction claims to be heard and adjudicated. If the early returns from the DNA age are any indication, the states are beginning, however slowly, to get it right.

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210. *See* H.D. 848, 2004 Reg. Sess. (Va. 2004) (mandating that Julius Earl Ruffin, granted an Absolute Pardon by Governor Mark Warner in 2003, be paid $325,000 on or before Aug. 1, 2004, that he receive monthly annuity payments for thirty years totaling $900,000, and that he receive up to $10,000 worth of free tuition within the Virginia community college system for technical training).

211. Herrera v. Collins, 506 U.S. 390, 429 (1993).