the problems with peremptory challenges mentioned above, automatic reversal may well be too high a price to pay to remedy erroneously denied peremptories. Nevertheless, if the Court had openly recognized that error-based harmless error review would always result in reversal, it could have cabined guilt-based review to cases in which the error-based approach is impossible and the right at issue is itself questionable.[83] Instead, by framing the choice as between automatic reversal and harmless error review, and by quietly supporting Illinois's guilt-based review, the Court missed an opportunity to clarify harmless error doctrine and to prevent the expansion of troubling guilt-based review.

Whether peremptory challenges are worth their accompanying troubles is an open question,[84] and it may be good policy to cut back on them by allowing states to functionally eliminate any remedy for their erroneous denial. Although *Rivera*'s refusal to impose a constitutionally required remedy of automatic reversal seems correct, by declining to confront the serious consequences of harmless error review in the peremptory context the Court failed to clarify and confine a troubling kind of harmless error review.

2. Postconviction Access to DNA Evidence. — DNA testing has exonerated a small but symbolic cohort of convicts, throwing the American justice system's vulnerability to convicting the innocent into sharper relief.[1] Last Term, in *District Attorney's Office v. Osborne*,[2] the Supreme Court considered whether convicted felons have a constitutional right to access DNA evidence.[3] The Court held that proce-

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[83] Automatic affirmance thus aligns with the Court's dislike for automatic reversal. *See* Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 142 n.294 (1996) (arguing that harmless error review for the erroneous denial of a peremptory is "far more consistent with the Supreme Court's clear hostility to rules of automatic reversal for errors that do not plainly undermine the reliability of the jury's verdict," *id.* at 143 n.294). Of course, the statement "the defendant was erroneously denied a peremptory challenge, and *therefore* the conviction is affirmed" — what the guilt-based model strongly suggests — is a disturbing non sequitur. *See* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 774 n.8 (1998) (noting that the "curious notion that some trial errors might require automatic affirmance of a conviction" has appeared in cases such as *Annigoni*). The Court could have filled in the missing premises by discussing the dilemma present in the jury error context.

[84] *See* Pizzi & Hoffman, *supra* note 3, at 1437–39. Empirical evidence suggests peremptory challenges may not even be worthwhile tools in allowing parties to secure more favorable juries. *See* Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491, 513–18 (1978) (finding that jurors who would have been seated if not peremptorily struck by prosecutors voted no differently than the seated jurors).

[1] *See, e.g.*, Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php (last visited Oct. 3, 2009).

[2] 129 S. Ct. 2308 (2009).

[3] *Id.* at 2316.

dures set forth by the Alaska legislature and implied by the Alaska Constitution withstood the procedural due process challenge and that no substantive due process right to DNA evidence exists.[4] While the Court's holdings may be correct, its reasoning rests on an internal inconsistency. Much of the opinion depends on DNA being different only in degree, not kind, from other types of evidence. Yet, the dismissal of the substantive due process claim due to "novelty"[5] of DNA technology treats DNA as *categorically* different. This tension undermines the Court's assertions concerning due process and muddies the water for lower courts considering whether to treat DNA as unique.

On March 22, 1993, a prostitute identified as K.G. was raped by two men, beaten, shot in the head, and left for dead.[6] K.G. survived and spoke to police, who investigated and found a condom containing semen at the scene of the crime.[7] Six days later, Dexter Jackson was arrested and confessed to the attack, identifying William Osborne as the other perpetrator.[8] At the time of trial, two types of DNA analysis were available.[9] The State performed the less exact DQ Alpha analysis, which excluded Jackson and another suspect as sources of the semen.[10] Osborne's DNA was consistent with the sample, as is the DNA of roughly sixteen percent of black individuals.[11] Osborne's attorney did not request the more accurate RFLP testing, believing it would further incriminate her client.[12] Based on evidence including the DQ Alpha analysis, a jury convicted both Jackson and Osborne of kidnapping, assault, and first-degree sexual assault; it acquitted the two of attempted murder.[13] After Osborne's conviction, two more accurate DNA testing methods, STR and mtDNA, became available.[14]

After a direct appeal on unrelated grounds failed,[15] Osborne brought a state postconviction appeal on the grounds that his counsel was ineffective for not demanding RFLP testing.[16] He requested a court order allowing him to test the DNA sample using more sophisti-

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[4] *Id.* at 2320–22.

[5] *Id.* at 2322 (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)).

[6] *Id.* at 2313.

[7] *Id.*

[8] *Id.* K.G. also identified Osborne as one of her attackers. *Id.*

[9] *See id.* at 2314 & n.2.

[10] *Id.* at 2313.

[11] *Id.*

[12] *Id.* at 2314.

[13] Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1124 (9th Cir. 2008). The jury acquitted Osborne of a separate count of sexual assault. *Id.*

[14] Osborne v. Dist. Attorney's Office, 423 F.3d 1050, 1052 (9th Cir. 2005).

[15] *See* Jackson v. State, Nos. A-5276, A-5329, 1996 WL 33686444 (Alaska Ct. App. Feb. 7, 1996).

[16] *See* Osborne v. State, 110 P.3d 986, 989–90 (Alaska Ct. App. 2005).

cated methods.[17] Judge Gleason rejected Osborne's claim because his attorney made a tactical judgment that a more accurate test would only confirm his guilt,[18] a holding affirmed by the Alaska Court of Appeals.[19] Further state holdings rejected the claim that the denial of access to DNA evidence violated the Alaska Constitution.[20]

During this litigation, Osborne appealed in federal court, claiming that the Alaskan procedures for postconviction access to DNA violated his constitutional rights.[21] After more legal wrangling,[22] the district court eventually found for Osborne on the grounds that "the testing sought was *not* available to [him] at the time of trial, . . . the testing sought can be easily performed without cost or prejudice to the Government, and . . . the test results can either confirm [his] guilt or provide evidence upon which [he] might seek a new trial."[23]

The Court of Appeals affirmed.[24] Judge Brunetti, writing for a unanimous panel, cited *Brady v. Maryland*,[25] which mandated that prosecutors turn over any material evidence favorable to a defendant prior to trial.[26] Relying on past Ninth Circuit precedent applying *Brady* postconviction, the court held that the due process right includes postconviction access to DNA evidence.[27] After characterizing the State of Alaska's argument as an attempt to conflate the right to evidence with the right to habeas relief,[28] Judge Brunetti declined to create an explicit standard for how material DNA evidence must be to qualify under *Brady*, but found Osborne's case "so strong on the facts" that "[w]herever the bar is, he crosses it."[29]

The Supreme Court reversed. Writing for the Court, Chief Justice Roberts[30] recognized the persuasive impact of DNA evidence.[31] However, the Court stated that creating procedures for postconviction ac-

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17 *Id.* at 992.

18 *Id.* at 991.

19 *Id.* at 991–92 (citing ALASKA RULES OF PROF'L CONDUCT R. 1.2(a) (2009)).

20 *See* Osborne v. State, 163 P.3d 973, 980–82 (Alaska Ct. App. 2007).

21 Osborne v. Dist. Attorney's Office, 423 F.3d 1050, 1052 (9th Cir. 2005).

22 The district court initially dismissed the appeal on the grounds that it should have been brought as a habeas claim. *Id.* The Ninth Circuit reversed and remanded the case for further proceedings. *Id.* at 1056.

23 Osborne v. Dist. Attorney's Office, 445 F. Supp. 2d 1079, 1081 (D. Alaska 2006).

24 Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1122 (9th Cir. 2008).

25 373 U.S. 83 (1963).

26 *See Osborne*, 521 F.3d at 1128.

27 *See id.* (citing Thomas v. Goldsmith, 979 F.2d 746, 749–50 (9th Cir. 1992)).

28 *Id.* at 1132.

29 *Id.* at 1134. The court did hold that the standard was "no higher than a reasonable probability that, if exculpatory DNA evidence were disclosed to Osborne, he could prevail in an action for post-conviction relief." *Id.*

30 Justices Scalia, Kennedy, Thomas, and Alito joined the opinion.

31 *Osborne*, 129 S. Ct. at 2316 (stating that DNA testing presented evidence "unlike anything known before").

cess to DNA testing was primarily a legislative duty.[32] The majority declined to resolve whether Osborne "invoked the proper federal statute in bringing his claim,"[33] because answering that question was unnecessary to resolve the appeal.[34] As to the procedural due process claim, the Court dismissed the Ninth Circuit's use of *Brady*,[35] calling it "the wrong framework" in the postconviction context.[36] Osborne's liberty interest was less significant than that of a defendant before conviction, giving the state more flexibility in its procedures.[37] The majority held that Alaska's procedures were adequate because they did not "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' or 'transgress[] any recognized principle of fundamental fairness in operation.'"[38] The Court noted that "Alaska provides a substantive right to be released on a sufficiently compelling showing of new evidence that establishes innocence[,] exempts such claims from otherwise applicable time limits[, and] provides for discovery in postconviction proceedings . . . available to those seeking access to DNA evidence."[39]

The Court also considered relevant a suggestion from the Alaska Court of Appeals that the state constitution might provide relief if the statutory procedures fell short.[40] After concluding that the procedures were adequate on their face, the Court added that Osborne had not availed himself fully of these procedures and "without trying them, Osborne can hardly complain that they do not work in practice."[41]

The Chief Justice concluded by rejecting Osborne's substantive due process claim of "a freestanding right to DNA evidence untethered from the liberty interests he hopes to vindicate with it."[42] The majority asserted that "[t]he mere novelty of such a claim is enough to doubt that 'substantive due process' sustains it."[43] Chief Justice Roberts again deferred to state criminal procedures, concerned that creating a new constitutional right would "short-circuit" action by the federal and state governments.[44] The Court also worried that establishing a right

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[32] *Id.*
[33] *Id.* at 2318.
[34] *Id.* at 2319.
[35] *Id.*
[36] *Id.* at 2320.
[37] *See id.*
[38] *Id.* (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992)).
[39] *Id.* (citing Patterson v. State, No. A-8814, 2006 WL 573797, at *4 (Alaska Ct. App. Mar. 8, 2006)).
[40] *Id.* at 2321 (citing Osborne v. State, 110 P.3d 986, 995–96 (Alaska Ct. App. 2005)).
[41] *Id.*
[42] *Id.* at 2322.
[43] *Id.* (alteration in original) (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)) (internal quotation marks omitted).
[44] *Id.*

to DNA testing would involve the Court in "a myriad of other issues," including evidence preservation.[45]

Justice Alito concurred,[46] and wrote separately to add two reasons for rejecting Osborne's claim. Part I argued that Osborne ought to have brought a habeas petition.[47] Part II argued that defendants who decide to forego testing methods at trial should be foreclosed from seeking that evidence later because of the cost and inconvenience DNA testing would impose upon the state.[48] Justice Alito noted that granting access to the evidence could contaminate it, lead to false positives, and burden already overworked DNA labs.[49]

Justice Stevens dissented[50] and expressed puzzlement about why Alaska "refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all."[51] While he agreed that the Alaskan statute governing postconviction access to evidence was not deficient on its face, he expressed concern that the state's procedures were "fundamentally unfair" in practice,[52] since no litigant had successfully acquired DNA evidence using the statute.[53] Disputing the majority's suggestion that Osborne was attempting to sidestep Alaska's procedures, Justice Stevens contended that Osborne had been "rebuffed at every turn" by state courts and specifically highlighted factual errors[54] and what he saw as faulty reasoning by the state judiciary.[55] Calling the state court's conclusion that the DNA evidence would not be dispositive "indefensible,"[56] Justice Stevens argued that the Alaska courts' application of the state law gave him "grave doubt" about whether the procedures provided meaningful protection to litigants.[57] While conceding that criminal conviction reduces a felon's constitutional rights, Justice Stevens cited a number of cases in which substantive constitutional protections had been extended to

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45 *Id.* at 2323.

46 Justice Kennedy joined the concurrence, and Justice Thomas joined as to Part II.

47 *See Osborne*, 129 S. Ct. at 2324–26 (Alito, J., concurring).

48 *See id.* at 2329–30.

49 *Id.* at 2327–29.

50 Justices Ginsburg and Breyer joined in full, and Justice Souter joined in part.

51 *Osborne*, 129 S. Ct. at 2331 (Stevens, J., dissenting).

52 *Id.* at 2332.

53 *Id.* at 2332–33.

54 *Id.* The Alaska Court of Appeals rejected Osborne's appeal on the grounds that the evidence he sought was not "newly discovered," and was available during his trial. Osborne v. State, 110 P.3d 986, 992 (Alaska Ct. App. 2005). But Justice Stevens noted that Osborne had "plainly requested STR DNA testing," which was not available during his trial. *Osborne*, 129 S. Ct. at 2333 (Stevens, J., dissenting).

55 *Osborne*, 129 S. Ct. at 2333–34 (Stevens, J., dissenting).

56 *Id.* at 2333 (citing Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1136–39 (9th Cir. 2008)).

57 *Id.* at 2334.

convicts.[58] Though *Brady* did not explicitly extend its disclosure obligation to the postconviction setting, Justice Stevens argued that the same concerns motivating *Brady* were present in *Osborne*.[59] Justice Stevens balanced the state's interest in finality with its interest in seeing justice done,[60] and he concluded that if proof of innocence could be obtained without significantly burdening the state, "a refusal to provide access to such evidence is wholly unjustified."[61]

Justice Souter also dissented. He harshly condemned the state's behavior in the case as "demonstrat[ing] a combination of inattentiveness and intransigence . . . that add[s] up to procedural unfairness that violates the Due Process Clause."[62] Though he joined Justice Stevens in finding the Alaskan procedures unconstitutional as applied to Osborne, Justice Souter declined to reach Osborne's broader claim of a substantive right of access to DNA evidence.[63] He noted that states need time to address the constitutional issues raised by DNA before asking "whether a law or practice on the subject is beyond the pale of reasonable choice."[64] Though he declined to determine whether sufficient time had passed, he suggested that, given the speed at which states have adopted procedures for dealing with DNA evidence, there was little concern about subjecting "wholly intransigent legal systems to substantive due process review prematurely."[65]

In rejecting the substantive due process claim, the Court stated as its primary rationale a policy against including novel rights under the umbrella of substantive due process.[66] Framing the substantive right as access to DNA rather than to potentially exculpatory evidence implies that DNA differs fundamentally from other forms of evidence. Yet, such a fundamental difference would undermine the Court's arguments about procedural due process. Thus, if DNA is *not* exceptional, the Court's novelty argument is insufficient to deny substantive due process; if DNA *is* exceptional, the Court's argument that standard postconviction procedures can accommodate DNA is insufficient to deny procedural due process. In either case, the Court failed to support its denial of Osborne's due process claims.

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[58] *Id.* at 2334–35 (citing Thornburgh v. Abbott, 490 U.S. 401, 407 (1989); Turner v. Safley, 482 U.S. 78, 84 (1987); Cruz v. Beto, 405 U.S. 319, 322 (1972) (per curiam); Johnson v. Avery, 393 U.S. 483 (1969); Lee v. Washington, 390 U.S. 333 (1968) (per curiam)).

[59] *Id.* at 2335.

[60] *Id.* at 2337.

[61] *Id.* at 2338.

[62] *Id.* at 2343 (Souter, J., dissenting).

[63] *See id.* at 2341–43.

[64] *Id.* at 2341.

[65] *Id.*

[66] *Id.* at 2322 (majority opinion).

DNA may not be substantially different from other evidence. Although DNA tests may be more accurate, forensic DNA analysis remains fallible: "DNA typing — done perfectly and precisely according to protocol — still often entails making discretionary calls and choices."[67] The National Academy of Sciences has recommended greater oversight of laboratories because of "poor documentation, serious analytical and interpretive errors, the absence of quality assurance programs, inadequately trained personnel, erroneous reporting, the use of inaccurate and misleading statistics, and even 'drylabbing' (the falsification of scientific results)."[68] As such, the advantages of DNA tests may be insufficient for them to deserve exceptional treatment. The Court endorsed this view explicitly: "The criminal justice system has historically accommodated new types of evidence . . . . [T]here is no basis for Osborne's approach of assuming that because DNA has shown that these procedures are not flawless, DNA evidence must be treated as categorically outside the process, rather than within it."[69] In addition, within its discussion of procedural due process, the Court upheld Alaska's standard postconviction process laws, deciding that no special DNA laws were necessary: "We see nothing inadequate about the procedures Alaska has provided to vindicate its state right to postconviction relief in general, and nothing inadequate about how those procedures apply to those who seek access to DNA evidence."[70]

Yet, if DNA is unexceptional, the novelty argument dodges complex due process issues. The Court stated that "Osborne seeks access to state evidence so that he can apply new DNA-testing technology that might prove him innocent. There is no long history of such a right, and '[t]he mere novelty of such a claim is reason enough to doubt that "substantive due process" sustains it.'"[71] Although precedent is muddled on the level of generality at which rights should be characterized,[72] the Court's narrow definition of the asserted right as one solely concerning DNA[73] would be defensible only if the Court

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[67] Erin Murphy, *The Art in the Science of DNA: A Layperson's Guide to the Subjectivity Inherent in Forensic DNA Typing*, 58 EMORY L.J. 489, 491 (2008).

[68] Donald E. Shelton, *Twenty-First Century Forensic Science Challenges for Trial Judges in Criminal Cases: Where the "Polybutadiene" Meets the "Bitumen,"* 18 WIDENER L.J. 309, 326 (2009) (quoting NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 193 (2009)).

[69] *Osborne*, 129 S. Ct. at 2323.

[70] *Id.* at 2320.

[71] *Id.* at 2322 (alteration in original) (quoting Reno v. Flores, 507 U.S. 292, 303 (1993)).

[72] *See* John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. FLA. J.L. & PUB. POL'Y 401, 423 (2005) (providing a table of varying levels of generality in Supreme Court precedent).

[73] *See Osborne*, 129 S. Ct. at 2322 n.4 ("[T]he asserted right to access DNA evidence is unrooted in history or tradition . . . .").

had viewed DNA as exceptional.[74] If, as the Court asserts, DNA evidence is the same in kind as other types of evidence, it should at least have explored whether Osborne had a right to access evidence generally, if not the broad rights to "physical liberty" and "freedom from arbitrary government action" advanced in Justice Stevens's dissent.[75]

The Court's definitions of substantive due process have ranged from the narrow, requiring longstanding evidence of the right, to the broad, taking into account evolving opinions on the fundamental nature of the right.[76] Also, access to evidence raises a blend of due process issues:

> The asserted right at issue is not one to material, exculpatory evidence necessary to ensure a fair trial. It is not a right of "factual innocence." Nor is it one of right to the preservation of potentially exculpatory evidence. At least as classically understood, it is not a right of procedural due process. And neither is it a typical substantive due process right. But it is a right that *legitimately* draws upon the principles that underlay all of these . . . .[77]

The opinion's omission of these issues fails to clarify due process doctrine, which "subsists in confusion."[78] Further, even with a narrow right to potentially exculpatory postconviction evidence and a narrow restriction of substantive due process to historic rights, the Court should have discussed the history of postconviction evidence and explored whether the state customarily granted access. The long existence of postconviction scientific evidence — consider skeletal[79] or fingerprint identifications — requires more consideration than a one-paragraph dismissal for novelty. If DNA is unexceptional, the Court's choice to isolate DNA appears to create a straw man.

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[74] *See id.* at 2338 (Stevens, J., dissenting) ("The flaw is in the framing. Of course courts have not historically granted convicted persons access to physical evidence for STR and mtDNA testing.").

[75] *Id.*

[76] *See* Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543, 1545 (2008) (discussing Washington v. Glucksberg, 521 U.S. 702 (1997); Lawrence v. Texas, 539 U.S. 558 (2003)).

[77] Harvey v. Horan, 285 F.3d 298, 310–11 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc) (citations omitted); *see also* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 406–07 (2002) (arguing that the obligations that "might loosely be called the area of constitutionally guaranteed access to evidence" extend to postconviction (quoting Arizona v. Youngblood, 488 U.S. 51, 55 (1988)) (internal quotation marks omitted)).

[78] Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993).

[79] An 1812 case involved the forensic misidentification of a skeleton as that of a missing man, leading to a mistaken conviction, which was eventually overturned when the missing man returned alive. *See* Bruce P. Smith, *The History of Wrongful Execution*, 56 HASTINGS L.J. 1185, 1205–06 (2005) (citing GERALD W. MCFARLAND, THE "COUNTERFEIT" MAN: THE TRUE STORY OF THE BOORN-COLVIN MURDER CASE (1990)).

The failure of the novelty argument is compounded by the weakness of the Court's other two arguments against creating a substantive due process right: that it would cut off legislative development of policies and would embroil the Court in mundane policy details.[80] Neither of these arguments recognizes that constitutional rights do not have to bar variation in state-level enforcement. The Court could have constructed a narrow constitutional right as a floor, permitting state-by-state policy variations. For example, Justice Stevens noted that the decisions in *Powell v. Alabama*[81] and *Gideon v. Wainwright*[82] recognized new due process rights but "did not impede the ability of States to tailor their appointment processes to local needs."[83] In addition, the logic of the legislative development argument seems suspect. The vast majority of states have passed DNA testing statutes,[84] thereby revealing consensus about the need for access to such evidence.[85] It thus appears that states have already engaged in thorough consideration of these issues, which suggests that finding a constitutional right would not cut off nascent policy conversations. As all three arguments against a substantive due process right are insufficient, the Court has failed to justify its denial of that right if DNA is unexceptional.

However, DNA arguably could be considered exceptional, resolving the problems with the novelty argument. Those who claim that DNA is categorically different assert that DNA has an unprecedented ability to convict or exonerate "to a practical certainty."[86] The Court lends

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[80] *Osborne*, 129 S. Ct. at 2322–23.

[81] 287 U.S. 45 (1932).

[82] 372 U.S. 335 (1963).

[83] *Osborne*, 129 S. Ct. at 2339 (Stevens, J., dissenting).

[84] *Id.* at 2322 (majority opinion) ("In the past decade, 44 States and the Federal Government have [passed DNA testing statutes]."). Since the opinion was written, the numbers have grown: now, forty-seven states (all except Alaska, Massachusetts, and Oklahoma) and the District of Columbia have passed postconviction DNA testing statutes. Press Release, Innocence Project, U.S. Supreme Court Decision on DNA Testing Is Disappointing But Will Have Limited Impact, Innocence Project Says (June 18, 2009), http://www.innocenceproject.org/Content/2042.php.

[85] *See Osborne*, 129 S. Ct. at 2335 (Stevens, J., dissenting). Note that of the three states without such legislation, Alaska is considering passing legislation, *id.* at 2316 (majority opinion), and Massachusetts may lack a statute on account of the relative ease of access to DNA information in that state. *See* Rachel Steinback, Comment, *The Fight for Post-Conviction DNA Testing Is Not Yet Over: An Analysis of the Eight Remaining "Holdout States" and Suggestions for Strategies To Bring Vital Relief to the Wrongfully Convicted*, 98 J. CRIM. L. & CRIMINOLOGY 329, 348 (2007) (noting that alternate ways to access DNA testing and cooperation from district attorneys "likely remove[] the sense of urgency that is necessary to propel a bill through the legislative process").

[86] Eric Despotes, Note, *The Evidentiary Watershed: Recognizing a Post-Conviction Constitutional Right To Access DNA Evidence Under 42 U.S.C. § 1983*, 49 SANTA CLARA L. REV. 821, 843 (2009) ("Those who argue that the right to access evidence post-conviction for DNA testing does have a constitutional dimension emphasize that the advances of DNA technology are no ordinary scientific developments. DNA evidence can, in certain cases, exonerate criminal defendants — or those wrongfully convicted — to a practical certainty. Thus, DNA testing is categorically different from other types of evidence." (footnotes omitted)); *cf.* Erin Murphy, *The New*

some credence to this view directly,[87] as well as indirectly by advancing the novelty argument. But this exceptionality would then lend support to a right of access to DNA evidence as "the evidentiary equivalent of a 'watershed' rule of constitutional law."[88] If DNA had near-absolute truth-finding potential, it could implicate deeper issues of fundamental fairness than traditional forms of evidence, possibly making refusal of access a violation of the *Medina v. California*[89] standard.[90] For example, if the Court were instead considering a new, infallible lie detector that could tell whether someone had committed a crime with complete certainty, denying access to such a machine could reasonably be thought to "offend[] some principle of justice . . . ranked as fundamental."[91] So, accepting DNA as exceptional calls into question the Court's argument that DNA evidence requires no further safeguards than any other kind of evidence to satisfy procedural due process. Whether or not DNA is exceptional, the Court's reasoning for its denial of Osborne's due process claims falls short.

It is unclear why the majority elevates DNA evidence as unparalleled while also insisting that DNA evidence deserves no special treatment under due process because it is not categorically distinct.[92] One possible explanation stems from the Court's emphasis on finality as an overarching judicial interest. Chief Justice Roberts framed the opinion as an answer to the "dilemma [of] how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice"[93] and later noted that the state legislatures considering the issue "are actively confronting the challenges DNA technology poses to . . . our traditional notions of finality, as well as the opportunities it affords."[94] As Professor Daniel Medwed has argued in his examination of prosecutors' behavior, such intense focus on

Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence, 95 CAL. L. REV. 721, 726–30 (2007) (creating a typology of first- and second-generation forensic evidence and arguing that they differ in scientific rigor, as well as scope, mechanics, ability to identify suspects, and privacy implications).

87 *See Osborne*, 129 S. Ct. at 2312 ("DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty."); *id.* at 2316 ("Modern DNA testing can provide powerful new evidence unlike anything known before."); *id.* at 2322 ("The elected governments of the States are actively confronting the challenges DNA technology poses to our criminal justice systems and our traditional notions of finality, as well as the opportunities it affords.").

88 Despotes, *supra* note 86, at 844 (citing Harvey v. Horan, 285 F.3d 298, 301 (4th Cir. 2002) (Luttig, J., respecting denial of rehearing en banc)).

89 505 U.S. 437 (1992).

90 *See Osborne*, 129 S. Ct. at 2320 (citing *Medina*, 505 U.S. at 446).

91 *Id.* (quoting *Medina*, 505 U.S. at 466) (internal quotation marks omitted).

92 *Id.* at 2323.

93 *Id.* at 2316.

94 *Id.* at 2322.

the results of trials may hinder broader goals of justice.[95] Although the effects of a court's desire for finality are likely smaller than the effects of a prosecutor's desire for conviction, such tendencies might lead a judge to assert the exceptional ability of DNA evidence to establish guilt or innocence at trial in order to confirm the result reached, yet consider such evidence unexceptional in the postconviction setting, again confirming the result reached below.

Regardless of the reason for the conflicting messages about DNA in *Osborne*, the confusion over DNA's uniqueness leaves unclear how lower courts should treat DNA in other contexts, including the determination of whether claims for access to DNA evidence should be brought under § 1983 or in habeas petitions and of how to treat actual innocence defenses. In *Osborne*, the Court declined to discuss whether Osborne's claim was brought validly under § 1983,[96] despite a circuit split on the issue.[97] If DNA evidence is viewed as conclusive, requests for access to such evidence may implicate the claims of innocence and requests for release at the core of habeas doctrine. Similarly, DNA's ability to provide sufficiently strong evidence of innocence may bolster appeals based on the yet unacknowledged claim of actual innocence.[98]

The Court's contradictory treatment of DNA calls the decision into question and impairs lower courts' ability to deal with DNA in other contexts. The Court avoided the complicated problems involved in substantive due process analysis by disingenuously rejecting the right as novel. Instead, the Court should have grappled with the issue and avoided leaving future treatment of DNA in doubt.

C. Freedom of Speech and Expression

1. Government Speech. — For decades, the Supreme Court has recognized that there must be "room for play in the joints" between the two religion clauses of the First Amendment.[1] Less well explored is the relationship between the Establishment Clause and the Free Speech Clause's government speech doctrine. Under current doctrine,

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[95] *See* Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 38 (2009) ("[I]nstitutional, professional, and psychological incentives [of prosecutors] are normally aligned with preserving the integrity of the trial result.").

[96] *Osborne*, 129 S. Ct. at 2319.

[97] *See generally* Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587 (2004).

[98] *See generally* Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 GEO. MASON U. CIV. RTS. L.J. 233 (2002); Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197 (2003).

[1] Locke v. Davey, 540 U.S. 712, 718 (2004) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).