other hand, increased focus on sovereignty and geographical boundaries might not be compatible with the nature of the internet. Indeed, one of the internet's most fundamental characteristics is its boundlessness and global scope. As companies and individuals seek access to new markets and expand their businesses, the internet provides a cheap and easy way to do so. Along with the privilege of serving these markets, however, the concomitant obligation to submit to those markets' laws seems to be firmly grounded in Supreme Court precedent.[107] Taking an overly geographical view may upset this careful quid pro quo by enabling companies to take advantage of the benefits but shirk the obligations.

III. FEDERAL STATUTES AND REGULATIONS

A. *42 U.S.C. § 1983*

1. Postconviction Access to DNA Evidence. — Forty-eight states and the District of Columbia have enacted statutes that grant some convicted prisoners access to DNA testing,[1] creating a liberty interest in proving innocence.[2] In its 2009 opinion in *District Attorney's Office v. Osborne*,[3] the Supreme Court rejected substantive due process as a basis for challenging a state's refusal to test DNA evidence, but it declined to decide by what mechanism a prisoner could bring a procedural due process claim to vindicate the state-created liberty interest.[4] Last Term, in *Skinner v. Switzer*,[5] the Supreme Court held that prisoners challenging denial of DNA testing provided by state statute were not required to seek writs of habeas corpus[6] but could instead use 42

text, *see* Note, *supra* note 89, at 1823, indicates that a clear rule which restricts the scope of personal jurisdiction is best tailored toward satisfying these values.

[107] *See, e.g.*, Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945).

[1] *Access to Post-Conviction DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Access_To_PostConviction_DNA_Testing.php (last visited Oct. 2, 2011). Neither Massachusetts nor Oklahoma has such a statute, *id.*, but both provide procedures for accessing newly discovered evidence, *see* Brief for the Respondent at 29 n.11, Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6) (reporting that all states, with the possible exception of South Dakota, "provide at least one . . . mechanism by which a prisoner may seek relief based on evidence of innocence such as a favorable DNA test result"). *See generally DNA Laws Database*, NAT'L CONFERENCE OF STATE LEGISLATURES, tbl.3 (2010), http://www.ncsl.org/portals/1/Documents/cj/Table3PostConvictionTesting.pdf.

[2] *See Osborne*, 129 S. Ct. at 2319.

[3] 129 S. Ct. 2308.

[4] *Id.* at 2321–22. A procedural due process violation occurs if the procedure provided to the prisoner "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.'" *See id.* at 2320 (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992) (internal quotation marks omitted)).

[5] 131 S. Ct. 1289 (2011).

[6] *See* 28 U.S.C. § 2254 (2006).

U.S.C. § 1983.[7] Though the Court's decision is narrow, it will enable more effective use of state postconviction DNA testing statutes while helping to ensure that those statutes' purposes are fulfilled.

In Gray County, Texas, in 1995, Henry Skinner was convicted and sentenced to death for murdering his girlfriend, Twila Busby, and her two adult sons.[8] Certain pieces of DNA and fingerprint evidence were tested and presented at trial; some results implicated Skinner, and some did not.[9] Defense counsel, however, declined testing of other physical evidence, fearing that the results would incriminate Skinner.[10] On direct appeal, the Texas Court of Criminal Appeals (CCA) upheld the conviction and sentence.[11] In 1998, Skinner began filing habeas corpus petitions in state and federal courts, all of which were ultimately denied.[12] In 2000, the District Attorney sent certain pieces of physical evidence to GeneScreen, a private forensics lab in Dallas, for analysis; again, some but not all of the results were inculpatory.[13]

In April 2001, Texas added chapter 64 to its criminal procedure code, allowing convicted prisoners to file a motion with the convicting court requesting forensic DNA testing.[14] Skinner filed a motion seeking testing of the untested evidence in the District Attorney's possession.[15] The trial court denied the motion, finding that Skinner had failed to meet two of the statutory requirements.[16] The CCA affirmed on one of the bases, agreeing that Skinner had failed "to establish by a preponderance of the evidence that a reasonable probability exists that he . . . would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing."[17] Later, armed with discovery secured during his federal habeas proceeding,[18] Skinner filed

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[7] *See* 42 U.S.C. § 1983 (2006); *Skinner*, 131 S. Ct. at 1293.

[8] Skinner v. State, 956 S.W.2d 532, 535–36 (Tex. Crim. App. 1997).

[9] *See id.* at 536 & n.4; *see also* Skinner v. State, 122 S.W.3d 808, 810 (Tex. Crim. App. 2003).

[10] Skinner v. State, 293 S.W.3d 196, 202–03 (Tex. Crim. App. 2009).

[11] *Skinner*, 956 S.W.2d at 546.

[12] *See* Petition for Writ of Certiorari at 4–5, *Skinner*, 131 S. Ct. 1289 (No. 09-9000).

[13] *Skinner*, 122 S.W.3d at 810 n.2, 810–11.

[14] *See* TEX. CODE CRIM. PROC. ANN. ch. 64 (West Supp. 2010). Among other requirements, the petitioner must show that it was not his or her fault that any untested evidence was not already tested, *id.* art. 64.01(b)(1)(B), and that exculpatory testing results would have prevented conviction, *id.* art. 64.03(a)(2)(A).

[15] *Skinner*, 122 S.W.3d at 811.

[16] *Id.*

[17] *Id.*; *see* TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(A). The CCA ruled that the trial court abused its discretion in finding that Skinner had failed "to demonstrate by a preponderance of the evidence that the DNA testing request is not made to unreasonably delay the execution of his sentence or the administration of justice." *Skinner*, 122 S.W.3d at 811; *see* TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(2)(B).

[18] *See* Skinner v. Quarterman, No. 2:99-CV-0045, 2007 WL 582808, at *30 (N.D. Tex. Feb. 22, 2007). A DNA expert retained by Skinner concluded that one of the hairs that GeneScreen desig-

a second motion in the trial court for DNA testing of all untested evidence.[19] The trial court denied that motion on multiple grounds; the CCA reviewed only one basis for the denial and affirmed.[20] The CCA agreed with the trial court that Skinner had not shown that the failure to test the evidence was "through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing."[21] Because defense counsel's decision not to request testing of all evidence was a reasonable trial strategy, Skinner did not meet that statutory requirement.[22] In October 2009, the trial court set Skinner's execution date for February 24, 2010.[23]

In November 2009, Skinner filed a § 1983 claim in federal district court in Texas, asking the court to require District Attorney Lynn Switzer to give him access to the physical evidence for DNA testing.[24] Skinner alleged that the denial of access to potentially exculpatory evidence violated his due process rights under the Fourteenth Amendment.[25] The district court adopted the magistrate's recommendation to dismiss the complaint for failure to state a claim, based on the Fifth Circuit's decision in *Kutzner v. Montgomery County*,[26] according to which prisoners may bring requests for DNA evidence only in habeas corpus.[27] The magistrate noted that Skinner appeared also to argue "that the state court's actions in applying the state DNA testing statute violated his constitutional rights."[28] Because Skinner did not plead that claim, however, the magistrate did not decide the issue.[29]

Less than one month before Skinner's scheduled execution, the Fifth Circuit affirmed.[30] At Skinner's suggestion, the court disposed of the appeal based on *Kutzner*, without briefing, to allow Skinner to

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nated inconclusive should have been reported as more likely excluding Skinner, Busby, and her two sons. *Id.*; *see also Skinner*, 131 S. Ct. at 1295 & n.4.

[19] Skinner v. State, 293 S.W.3d 196, 199 (Tex. Crim. App. 2009).

[20] *Id.* at 200.

[21] TEX. CODE CRIM. PROC. ANN. art. 64.01(b)(1)(B); *see Skinner*, 293 S.W.3d at 209.

[22] *Skinner*, 293 S.W.3d at 209.

[23] Petition for Writ of Certiorari, *supra* note 12, at 5.

[24] Skinner v. Switzer, No. 2:09-CV-0281, 2010 WL 273143, at *1–2 (N.D. Tex. Jan. 20, 2010).

[25] *Id.* at *2. Skinner also claimed that the refusal to grant access to the evidence violated his Eighth Amendment right to be free from cruel and unusual punishment. *Id.*

[26] 303 F.3d 339 (5th Cir. 2002) (per curiam).

[27] *Id.* at 341; *see Skinner*, 2010 WL 273143, at *7.

[28] *Skinner*, 2010 WL 273143, at *3. The magistrate observed that such a claim, to the extent that it involved "complaining of an injury caused by the state court judgment," would be barred from federal district court by the *Rooker-Feldman* doctrine, *see id.* at *5, which requires that any such request be made to the Supreme Court, *see* Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 284 (2005); D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fid. Trust Co., 263 U.S. 413 (1923).

[29] *Skinner*, 2010 WL 273143, at *5.

[30] Skinner v. Switzer, 363 F. App'x 302, 303 (5th Cir. 2010) (per curiam).

seek certiorari immediately.[31] The Supreme Court granted Skinner's petitions for a stay of execution[32] and a writ of certiorari.[33]

The Supreme Court reversed. Writing for the Court, Justice Ginsburg[34] began by observing that Skinner had sufficiently pled his due process claim and that his counsel had further clarified that claim at oral argument: "Texas courts . . . have 'construed the statute to completely foreclose any prisoner who could have sought DNA testing prior to trial[,] but did not[,] from seeking testing' postconviction."[35] Justice Ginsburg emphasized that Skinner's unsuccessful attempts to gain DNA testing access through the state law procedures enabled him to challenge those procedures.[36]

Justice Ginsburg then addressed the central question: whether Skinner's due process claim was cognizable under § 1983 or could be resolved only through habeas corpus. She first examined *Heck v. Humphrey*,[37] where the Court ruled that a prisoner's challenge to the legality of his conviction could not proceed under § 1983 — even though the suit sought only monetary damages — because a judgment in his favor "would necessarily imply the invalidity of his conviction or sentence."[38] Justice Ginsburg contrasted the claim in *Heck* with that in *Wilkinson v. Dotson*,[39] where the Court allowed prisoners' challenges to state parole procedures to proceed under § 1983 because their claims would not "necessarily imply the invalidity of confinement or shorten its duration."[40] Applying the same principle to Skinner's claim, Justice Ginsburg concluded that § 1983 was the proper vehicle because "[s]uccess in his suit for DNA testing would not 'necessarily imply' the invalidity of his conviction": the results could be exculpatory, inculpatory, or inconclusive.[41] Justice Ginsburg dismissed Switzer's argument, based on *Kutzner*, that Skinner's request should be pursued in habeas corpus because he would ultimately use any exculpatory results to attack his conviction.[42] She noted that neither Switzer nor

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[31] *Id.*

[32] Skinner v. Switzer, 130 S. Ct. 1948 (2010).

[33] Skinner v. Switzer, 130 S. Ct. 3323 (2010).

[34] Justice Ginsburg was joined by Chief Justice Roberts and Justices Scalia, Breyer, Sotomayor, and Kagan.

[35] *Skinner*, 131 S. Ct. at 1296 (alterations in original) (quoting Transcript of Oral Argument at 52–53, *Skinner*, 131 S. Ct. 1289 (No. 09-9000)).

[36] *See id.* at 1296 n.8. Justice Ginsburg also noted that, because Skinner challenged not the CCA's decisions but rather the state statute governing those decisions, *Rooker-Feldman* did not bar his suit from federal district court. *Id.* at 1297–98.

[37] 512 U.S. 477 (1994).

[38] *Id.* at 487; *see Skinner*, 131 S. Ct. at 1298.

[39] 544 U.S. 74 (2005).

[40] *Id.* at 82; *see Skinner*, 131 S. Ct. at 1298.

[41] *Skinner*, 131 S. Ct. at 1298.

[42] *Id.* at 1299.

Justice Thomas in dissent had found any case "in which the Court has recognized habeas as the sole remedy, or even an available one, where the relief sought would 'neither terminat[e] custody, accelerat[e] the future date of release from custody, nor reduc[e] the level of custody.'"[43]

Justice Ginsburg also rejected Switzer's argument that allowing § 1983 claims for DNA testing would open the floodgates to lawsuits in federal district courts. First, no "litigation flood or even rainfall" had appeared in any of the circuits that already permitted DNA testing claims under § 1983.[44] Second, *Osborne* limited such claims by establishing that they could not be grounded in substantive due process.[45] Finally, the Prison Litigation Reform Act of 1995[46] constrained the claims prisoners could file in federal court.[47] As a related matter, Justice Ginsburg observed that the present ruling would have no effect on *Brady* claims[48] because those claims "necessarily yield[] evidence undermining a conviction" and therefore remain "within the traditional core of habeas corpus and outside the province of § 1983."[49]

Justice Thomas filed a dissenting opinion.[50] Due process challenges to state collateral review procedures, he argued, should proceed only in habeas corpus.[51] As an analytical matter, all challenges to the "process of law under which [a prisoner] is held in custody by the State"[52] should be treated alike because they all "concern the validity of the conviction."[53] Having held that challenges to trial and direct appeal procedures belong within habeas corpus, the Court should not now recognize § 1983 as the vehicle for challenges to collateral review procedures.[54] In addition, Justice Thomas argued, recognizing procedural challenges under § 1983 would undermine the restrictions that Congress had placed on federal habeas procedures to protect federal-state comity.[55]

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[43] *Id.* (alterations in original) (quoting *Dotson*, 544 U.S. at 86 (Scalia, J., concurring)).

[44] *Id.* Three circuits had held that claims seeking DNA testing were cognizable under § 1983. *See id.* at 1293 (citing McKithen v. Brown, 481 F.3d 89, 99 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 669 (7th Cir. 2006); Bradley v. Pryor, 305 F.3d 1287, 1290–91 (11th Cir. 2002)).

[45] *Id.* at 1299.

[46] Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (codified as amended in scattered sections of the U.S. Code).

[47] *Skinner*, 131 S. Ct. at 1299–300.

[48] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding it unconstitutional for the prosecution to suppress material evidence favorable to the accused).

[49] *Skinner*, 131 S. Ct. at 1300. Because the lower courts had resolved the case on a motion to dismiss for failure to state a claim, Justice Ginsburg declined to express an opinion as to its ultimate disposition and directed the lower court to consider arguments based on the merits. *Id.*

[50] Justice Thomas was joined by Justices Kennedy and Alito.

[51] *Skinner*, 131 S. Ct. at 1302 (Thomas, J., dissenting).

[52] *Id.* (quoting Frank v. Mangum, 237 U.S. 309, 327 (1915) (alteration in original)) (internal quotation marks omitted).

[53] *Id.* at 1302–03.

[54] *Id.* at 1302.

[55] *Id.* at 1303.

Unsuccessful state habeas petitioners, following Skinner's artful pleading model, could now easily relitigate their claims in federal court.[56]

Finally, Justice Thomas criticized the majority's use of *Dotson*.[57] Because that case dealt with challenges to state parole procedures, which "in no way relate[] to the validity of the underlying conviction or sentence," it did not control the present case.[58] Further, *Dotson* did not, Justice Thomas thought, reduce the inquiry into § 1983's scope to a perfunctory consideration of "whether the prisoner's claim would 'necessarily spell speedier release.'"[59]

By allowing prisoners to invoke a procedural due process right to DNA testing under § 1983 rather than requiring them to seek a writ of habeas corpus, the Court's sound decision will prevent federal courts from imposing unnecessary hurdles on prisoners who seek access to DNA testing procedures specified under state law. Moreover, rather than undermining federal-state comity, federal court review of these cases will help preserve state legislatures' intent when state courts have unduly restricted the statutes' applications.

From a jurisprudential standpoint, the Court properly focused not on Skinner's ultimate goal of exoneration but only on his immediate goal of gaining access to untested physical evidence, an emphasis that corrects some lower courts' failures to amend their understandings of *Heck* following the Court's 2005 decision in *Dotson*. In 2002, the Fourth and Fifth Circuits rejected § 1983 as a vehicle for gaining access to postconviction DNA testing.[60] Drawing on the Supreme Court's opinions in *Heck*, which supplied the "necessarily imply" principle, and *Preiser v. Rodriguez*,[61] which established habeas corpus as prisoners' only means for challenging the validity or duration of their confinement,[62] the Fourth Circuit concluded in *Harvey v. Horan*[63] that a prisoner seeking access to DNA evidence was impermissibly "trying to use a § 1983 action as a discovery device to overturn his state conviction."[64] In its brief per curiam opinion in *Kutzner*, the Fifth Circuit agreed.[65] Three years later, however, in *Dotson*, the Supreme Court

[56] *Id.*

[57] *Id.* at 1303–04.

[58] *Id.* at 1304.

[59] *Id.* (quoting *id.* at 1299 n.13 (majority opinion)).

[60] *See* Kutzner v. Montgomery Cnty., 303 F.3d 339, 340 (5th Cir. 2002) (per curiam); Harvey v. Horan, 278 F.3d 370, 375 (4th Cir. 2002). In an unpublished opinion, the Sixth Circuit similarly refused to recognize a claim for testing under § 1983. Boyle v. Mayer, 46 F. App'x 340, 340 (6th Cir. 2002).

[61] 411 U.S. 475 (1973).

[62] *Id.* at 490.

[63] 278 F.3d 370.

[64] *Id.* at 378; *see also id.* at 374–75, 377–78. Federal habeas petitioners, unlike regular civil litigants, are not automatically entitled to discovery. *See* Bracy v. Gramley, 520 U.S. 899, 904 (1997).

[65] 303 F.3d at 340–41.

allowed prisoners to challenge state parole procedures using § 1983 because success on their claims would lead, at most, to further procedure — a new eligibility review or a new parole hearing.[66] The implications for postconviction requests for DNA testing procedures were clear: "Every Court of Appeals to consider the question since *Dotson* has decided that because access to DNA evidence . . . does not 'necessarily spell speedier release,' it can be sought under § 1983."[67]

Justice Ginsburg's opinion was also sound from pragmatic and policy perspectives: prisoners seeking access to DNA evidence should not be required to clear the greater procedural obstacles placed on direct challenges to continued confinement through habeas corpus petitions.[68] The Supreme Court has developed significant habeas corpus restrictions, including procedural default of objections not entered at trial[69] and claims not raised on direct appeal.[70] Congress has further imposed a one-year statute of limitations,[71] standards of review requiring deference to state courts' factual[72] and legal[73] determinations, a requirement of exhaustion of state court remedies,[74] and limits on successive petitions[75] and evidentiary hearings.[76] Prisoners generally proceed pro se through this procedural maze, for there is no constitutional right to an attorney during postconviction review.[77] Thus, from a

[66] *See* Wilkinson v. Dotson, 544 U.S. 74, 82 (2005).

[67] Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2318 (2009) (citation omitted) (citing McKithen v. Brown, 481 F.3d 89, 103 & n.15 (2d Cir. 2007); Savory v. Lyons, 469 F.3d 667, 672 (7th Cir. 2006); Osborne v. Dist. Attorney's Office, 423 F.3d 1050, 1055–56 (9th Cir. 2005)).

[68] For a discussion of federal habeas corpus requirements, see Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 448–53 (2007). For an account of their development in the Court prior to enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code), which amended the federal habeas statute, see Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 609–11 (2005).

[69] *See* Beard v. Kindler, 130 S. Ct. 612, 618 (2009); Coleman v. Thompson, 501 U.S. 722, 750 (1991).

[70] *See* Bousley v. United States, 523 U.S. 614, 621 (1998).

[71] 28 U.S.C. § 2244(d)(1) (2006).

[72] *Id.* § 2254(e)(1).

[73] *Id.* § 2254(d).

[74] *Id.* § 2254(b)(1); *see* O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) (interpreting the exhaustion doctrine as requiring state prisoners to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process"). The exhaustion requirement applies unless the state has expressly waived it. 28 U.S.C. § 2254(b)(3).

[75] 28 U.S.C. § 2244(b).

[76] *Id.* § 2254(e)(2).

[77] *See* Murray v. Giarratano, 492 U.S. 1, 3–4 (1989) (plurality opinion); Pennsylvania v. Finley, 481 U.S. 551, 554–56 (1987). A statute may provide a right to counsel in such proceedings, *see, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 64.01(c) (West Supp. 2010), but no constitutional right to effective assistance attaches to the statutory right. *See* Celestine Richards McConville, *The*

pragmatic standpoint, the availability of the relatively simple procedures of § 1983 will increase the likelihood that wrongfully convicted prisoners will successfully navigate the federal court system to gain access to DNA testing.

From a policy perspective, the procedural hurdles imposed on federal habeas corpus reflect choices in favor of "comity, finality, and federalism"[78] — values that are threatened by state prisoners' federal court challenges to their convictions and sentences.[79] Imposing those restrictions on prisoners who seek DNA testing, however, would be anomalous: such petitioners are not directly challenging their confinement by the state; they are merely seeking fair application of the procedures the state statute provides.[80] Where state legislatures have acted specifically to provide postconviction DNA testing but state courts have barred use of those procedures, *Skinner*'s recognition of federal jurisdiction over prisoners' § 1983 claims, rather than undermining federal-state relations, may help preserve state legislatures' intent.[81]

In Texas, the CCA denied Skinner access to the procedures outlined by that state's DNA testing statute because he had failed to show that it was not his fault that the evidence had not been tested and that the interests of justice required testing. Skinner must now convince the federal district court that the statute as construed by the state courts rendered the statutory postconviction relief procedures "fundamentally

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Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel, 2003 WIS. L. REV. 31, 35–36. Habeas's procedural complexity has prompted some commentators to recommend that a constitutional right to counsel be recognized in all federal habeas proceedings. *See, e.g.*, Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 544 & n.13 (2009).

[78] These are the frequently cited goals of AEDPA, which contains most of the federal habeas corpus requirements discussed in the text. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1401 (2011); Jimenez v. Quarterman, 129 S. Ct. 681, 686 (2009). *But see* Kovarsky, *supra* note 68, at 458–507 (arguing that these purposes provide inadequate guides to AEDPA's meaning).

[79] *See, e.g.*, *Skinner*, 131 S. Ct. at 1303 (Thomas, J., dissenting); Preiser v. Rodriguez, 411 U.S. 475, 490–92 (1973).

[80] *Cf.* Benjamin Vetter, Comment, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 614 (2004) (arguing that § 1983 is the appropriate vehicle for litigants seeking postconviction DNA testing because they "are not using a civil tort to attack a criminal conviction; rather, they are using it to establish an essential predicate that may create viable habeas claims").

[81] *Skinner* has, of course, already affected *federal* courts by abrogating *Harvey* and *Kutzner*. In the former case, the Fourth Circuit was concerned that allowing a prisoner to bring a § 1983 claim every time new DNA testing technology became available would undermine the finality of criminal judgments. *See* Harvey v. Horan, 278 F.3d 370, 375–76 (4th Cir. 2002). Yet it acknowledged that the state's recently enacted DNA testing statute required a prisoner to show either that the evidence sought had become available only after conviction or that "the testing procedure was not available at the Department of Forensic Science at the time the conviction became final." VA. CODE ANN. § 19.2-327.1 (2008); *see Harvey*, 278 F.3d at 377. Thus, the Virginia legislature had indicated its willingness to sacrifice finality to accommodate the rapid development of DNA testing technology, but the Fourth Circuit resisted.

inadequate to vindicate the substantive rights provided."[82] This bar may be difficult to meet, but in cases such as Skinner's, where the state court of last resort has arbitrarily categorized the petitioner as ineligible for testing under the statute, filing a § 1983 claim in federal district court provides the only possible avenue for relief.

In assessing prisoners' requests for the DNA testing provided by their state statutes, other state courts have interpreted those statutes more narrowly than the plain language would suggest,[83] often concluding, as the CCA did, that the statutes do not apply to certain groups of prisoners or under certain circumstances that are not spelled out in the statutes. The Illinois Supreme Court, for example, has interpreted Illinois's statute to deny DNA testing access to those prisoners who have pled guilty.[84] The statute requires a petitioner to establish a prima facie case that "identity was the issue in the trial which resulted in his or her conviction."[85] According to the state supreme court, that language clearly and unambiguously "permits a motion for DNA testing only when a defendant has been *convicted following a trial* contesting identity"; thus, all defendants who plead guilty are ineligible for postconviction relief under the statute.[86] Analyses of successful DNA testing claims reveal the problematic nature of such an interpretation: of the first 265 prisoners to be exonerated by DNA evidence, 22 had pled guilty.[87]

In some states, supreme courts have been willing to correct lower courts' overly narrow statutory interpretations. The Pennsylvania Superior Court, for example, had interpreted Pennsylvania's statute to bar access to DNA testing by prisoners who had voluntarily confessed, reasoning that they could not meet the statutory requirement of demonstrating that DNA evidence would establish their actual inno-

[82] *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009).

[83] *See, e.g.*, David S. Mitchell, Jr., Comment, *Lock 'Em Up and Throw Away the Key: "The West Memphis Three" and Arkansas's Statute for Post-Conviction Relief Based on New Scientific Evidence*, 62 ARK. L. REV. 501, 511–32 (2009) (criticizing an Arkansas trial court's narrow interpretation of that state's postconviction DNA testing statute on several grounds, including the court's deviation from the plain language, *id.* at 514–17).

[84] People v. O'Connell, 879 N.E.2d 315, 317–19 (Ill. 2007).

[85] 725 ILL. COMP. STAT. 5 / 116-3(b)(1) (2010). The lower courts had struggled with this key provision for several years. *See* Diana L. Kanon, Note, *Will the Truth Set Them Free? No, but the Lab Might: Statutory Responses to Advancements in DNA Technology*, 44 ARIZ. L. REV. 467, 477–80 (2002).

[86] *O'Connell*, 879 N.E.2d at 319. This interpretation is not uncommon. *See* Nicole Dapcic, Case Comment, *A Quest for Exculpatory DNA Evidence or a Wild-Goose Chase? Expansion of Searches for Lost Evidence Under* Horton v. State of Maryland, 37 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 77, 81–82 (2011).

[87] *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Oct. 2, 2011).

cence.[88] In February 2011, the state supreme court overturned those decisions, concluding that the lower court had erred "by announcing such a sweeping preclusion."[89] Similarly, Tennessee's criminal appellate court had interpreted Tennessee's statute to authorize only the comparison of "the petitioner's DNA to samples taken from biological specimens gathered at the time of the offense."[90] Three months after *Skinner* was decided, the Tennessee Supreme Court ruled that the lower courts had inappropriately limited the statute's reach.[91] It noted that the DNA testing statute had two purposes: exonerating the innocent and identifying the true perpetrators.[92] The lower courts' interpretation was incorrect because it overlooked the latter purpose.[93]

In rare cases, a state legislature may ultimately correct a court's misinterpretation. A lower appellate court in Florida had ruled, similarly to the Illinois Supreme Court, that the state DNA testing statute's language — "has been *tried* and found guilty" — precluded any defendant who had pled guilty or nolo contendere from seeking testing.[94] Three years later, the Florida legislature amended its DNA testing statute specifically to provide that entering such a plea did not render a defendant ineligible for testing of physical evidence.[95]

Of course, not all narrow interpretations of postconviction DNA testing statutes are inconsistent with legislative intent, and a state legislature may itself act to restrict access to testing. Arkansas's DNA testing statute, for example, was in place for only four years before the legislature restricted its scope.[96] Changes in this direction underscore the narrowness of Skinner's victory: prisoners seeking access to testing must depend on the state testing statute, without which they have no judicially recognized liberty interest[97] and therefore no way to claim the procedural due process relief that *Skinner* makes available under § 1983.[98] But it is precisely because prisoners' rights to seek testing

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[88] Commonwealth v. Wright, 935 A.2d 542, 546 (Pa. Super. Ct. 2007); Commonwealth v. Young, 873 A.2d 720, 727 (Pa. Super. Ct. 2005); *see* 42 PA. CONS. STAT. ANN. § 9543.1(c)(3) (West 2007).

[89] Commonwealth v. Wright, 14 A.3d 798, 812 (Pa. 2011).

[90] Alley v. State, No. W2006-01179-CCA-R3-PD, 2006 WL 1703820, at *9 (Tenn. Crim. App. June 22, 2006); *see also* Powers v. State, No. W2008-01346-CCA-R3-PC, 2010 WL 571801, at *10–11 (Tenn. Crim. App. Feb. 18, 2010).

[91] Powers v. State, No. W2008-01346-SC-R11-PC, 2011 WL 2410462, at *8 (Tenn. June 16, 2011).

[92] *Id.* at *10.

[93] *See id.*

[94] Stewart v. State, 840 So. 2d 438, 438 (Fla. Dist. Ct. App. 2003) (quoting FLA. STAT. § 925.11(1)(a) (2002) (amended 2006) (emphasis added)).

[95] FLA. STAT. § 925.11(1)(a)(2) (2010); *see* Lindsey v. State, 936 So. 2d 1213, 1214 (Fla. Dist. Ct. App. 2006).

[96] *See* Mitchell, *supra* note 83, at 510 (discussing ARK. CODE ANN. § 16-112-202 (2006)).

[97] *See* Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2322 (2009).

[98] *Cf.* Brandon L. Garrett, Essay, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2943 (2010) (arguing that "*Osborne* recognizes a broad procedural due process right" but acknowledging

are entirely circumscribed by their state legislatures that it is so important that those statutes be faithfully interpreted.

Chief Justice Roberts has observed that "[t]he dilemma [of DNA testing] is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice" — a task that "belongs primarily to the legislature."[99] As the Chief Justice pointed out, almost every state legislature has enacted a statute to provide some postconviction access to DNA testing.[100] Where the state court of last resort has categorized a prisoner as ineligible for testing under the statute and there is no time for the legislature to act because execution is imminent, filing a § 1983 claim in federal district court now provides a narrow avenue for relief. *Skinner* thus reserves for federal courts a limited but crucial role in protecting prisoners' rights to access state-provided procedures, which in turn helps preserve state legislatures' place in controlling criminal justice systems.

2. Scope of Municipal Liability. — American prosecutors wield extraordinary power. Yet their professional mandate to do justice is an imperfect shield against mistakes and abuses that may imperil defendants' rights — including the due process right protected by *Brady v. Maryland*'s[1] command that prosecutors disclose material exculpatory evidence. Observing that *Brady* violations are alarmingly common and have contributed to wrongful convictions, a growing chorus of experts has called for reforms to prosecutorial training and discipline.[2] Last Term, in *Connick v. Thompson*,[3] the Court set these efforts back by holding that a district attorney's office cannot be held liable under 42 U.S.C. § 1983[4] for failure to train its prosecutors based on a single *Brady* violation.[5] Although the Court found that general lawyerly skills justify a presumption that prosecutors are adequately trained to secure *Brady* rights,[6] its support for this proposition is deficient, and its reading of doctrine is unduly narrow. Further, the Court completely ignored compensation and deterrence — two core purposes of § 1983. Ultimately, *Connick* constitutes yet another step down an improvident path that weakens prosecutorial accountability by segregating rights from the remedies that give them life.

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that "such a derivative right imposes no obligation on states that provide no avenue at all for postconviction DNA testing").

[99] *Osborne*, 129 S. Ct. at 2316.

[100] *See id.*

[1] 373 U.S. 83 (1963).

[2] *See generally* Symposium, *New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

[3] 131 S. Ct. 1350 (2011).

[4] 42 U.S.C. § 1983 (2006).

[5] *See* 131 S. Ct. at 1356.

[6] *See id.* at 1361–64.