UNLIMITED INNOCENCE: RECOGNIZING AN "ACTUAL INNOCENCE" EXCEPTION TO AEDPA'S STATUTE OF LIMITATIONS

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INTRODUCTION

In 1992, Michael Wyzykowski was charged in Palm Beach County, Florida, with the first-degree murder of Fred Butterworth.[1] Mr. Wyzykowski was also charged with the attempted burglary of shoes from Butterworth's home. On the advice of his attorney, Mr. Wyzykowski pleaded guilty to second-degree murder and was sentenced to twenty-three years in a Florida state prison.

After approximately five years in prison, Mr. Wyzykowski filed a pro se federal habeas corpus petition pursuant to 28 U.S.C. § 2254[2] in the Southern District of Florida in July 1997, claiming that he had been denied his Sixth Amendment right to effective assistance of counsel. Under federal laws 28 U.S.C. §§ 2241[3] and 2254, state prisoners who claim to be held in custody by a state government in violation of the Constitution, treaties, or laws of the United States may file a petition for a writ of habeas corpus in federal court.[4] A federal court may order the release of a state prisoner who it determines is being held by a state in violation of federal law.[5]

In his federal habeas corpus petition, Mr. Wyzykowski maintained that he was an innocent man serving an unlawful prison sentence because of the ineffective representation afforded by his lawyer. Mr. Wyzykowski claimed that

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1. Wyzykowski v. Dep't of Corr., 226 F.3d 1213 (11th Cir. 2000). The following recitation of facts and claims from this case come from the Eleventh Circuit's opinion.

2. 28 U.S.C. § 2254 (1994 & Supp. V 1999).

3. 28 U.S.C. § 2241 (1994).

4. Federal prisoners may also seek federal habeas corpus review under 28 U.S.C. § 2255 (Supp. V 1999).

5. As noted by the Supreme Court in *Herrera v. Collins*, 506 U.S. 390 (1993), "The typical relief granted in federal habeas corpus is a conditional order of release unless the State elects to retry the successful habeas petitioner, or in a capital case a similar conditional order vacating the death sentence." *Id.* at 403. For examples of the rare circumstances in which habeas corpus courts have issued unconditional release orders see RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 33.2 (4th ed. 2001) (hereinafter HERTZ & LIEBMAN).

his defense lawyer failed to investigate the case properly before advising him to plead guilty. In addition, as the court noted,

> Wyzykowski claimed that he was actually innocent of second degree murder because the victim actually started the fight with him; of first degree premeditated murder because he was too intoxicated to form the requisite intent and again because the victim started the fight; of first degree felony-murder because he was not guilty of attempted burglary; and of attempted burglary because the shoes . . . [in question] were actually his own shoes.[6]

Mr. Wyzykowski claimed that he had agreed to plead guilty only because his defense attorney had indicated on the eve of trial that she was not prepared to try the case, and that she would withdraw if Mr. Wyzykowski did not plead guilty. He alleged that his attorney also informed him that the indictment itself "nullified all defenses," and that it made no difference to his defense at trial that the victim had attempted to take Mr. Wyzykowski's shoes. Lastly, Mr. Wyzykowski alleged that his attorney warned that if he did not take the plea and instead proceeded to trial, he would "surely be found guilty," and that even if Florida did not seek the death penalty the judge would nonetheless sentence him to death.[7]

The district court declined to hear the merits of Mr. Wyzykowski's claim of ineffective assistance of counsel because he filed his petition two months past a filing deadline created by a newly enacted statute of limitations for federal habeas corpus petitions.[8] This statute of limitations, which was adopted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[9] represented a significant change in the procedural structure for filing federal habeas corpus petitions.[10] In keeping with the writ's historical role as the protector of "individuals against arbitrary and wrongful imprisonment,"[11] the pre-1996 fede-

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6. *Wyzykowski*, 226 F.3d at 1214.

7. *Id.* at 1214–15.

8. *Id.* at 1215.

9. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.).

10. *See, e.g.*, Aparicio v. Artuz, 269 F.3d 78, 89 (2d Cir. 2001) (noting that "enactment of Antiterrorism and Effective Death Penalty Act of 1996 . . . created a tumultuous sea change in federal habeas review, especially affecting the petitions of state prisoners" (citation omitted)).

11. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.1, at 838 (3d ed. 1999); *see also Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830) (explaining the "great object of [the writ of habeas corpus] is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error[] to examine the legality of the commitment."); Stephen A. Saltzburg, *Habeas Corpus: The Supreme Court and the Congress*, 44 OHIO ST. L.J. 367, 367 (1983) (noting that "advocates regard habeas corpus as symbolic of a commitment to constitutional values and to the ideal that no person shall be convicted in violation of the fundamental law of the land"). Although the original scope of federal habeas corpus law was narrow, the 1950s and 1960s brought about an expansion in the availability of federal habeas corpus review to prisoners who suffered violations of their constitutional rights at the hands of the states. In *Brown v. Allen*, 344 U.S. 443 (1953), the Court held for the first time that all federal constitutional claims raised by state

ral habeas corpus statutes and rules imposed only a very loose and easily satisfied requirement concerning the timing of a federal habeas corpus petition.[12] In 1996, however, in the wake of the Oklahoma City bombing, Congress responded to long-voiced conservative criticisms of federal habeas corpus[13] by sharply cur-

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petitioners are cognizable under federal habeas corpus doctrines, thus greatly expanding the availability of relief in federal court. *But see* HERTZ & LIEBMAN, *supra* note 5, § 2.4d, at 67 (asserting that *Brown* in fact "worked no revolution when it recognized the cognizability on habeas corpus of all federal constitutional claims presented by state prisoners"); Eric M. Freedman, Brown v. Allen: *The Habeas Corpus Revolution That Wasn't*, 51 ALA. L. REV. 1541 (2000) (arguing that *Brown* was not revolutionary at all, and was not perceived to be so by the Justices at the time).

12. *See generally* HERTZ & LIEBMAN, *supra* note 5, §§ 24.1–.4. Prior to the enactment of AEDPA, "the primary constraint upon the timing of [federal habeas corpus petitions] was the doctrine of 'prejudicial delay[,]' . . . which was first established by the courts and thereafter codified . . . in Rule 9(a) of the Rules Governing § 2254 Cases and § 2255 Proceedings." *Id.* § 24.1, at 1009. Rule 9(a) gave a court the option of dismissing a habeas corpus petition if the state could show that it had been prejudiced by a delay in filing without a showing of good cause by the petitioner. *See* RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS R. 9(a) (Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the United States 1976) advisory committee's notes ("[Rule 9(a)] is not a statute of limitations. Rather, the [subdivision] is based on the equitable doctrine of laches."); HERTZ & LIEBMAN, *supra* note 5, § 24.1, at 1010 ("Rule 9(a) . . . was designed to give federal courts a flexible discretion to avert strategic delay while still preserving broad access to the federal habeas corpus remedy . . . ."); *see also infra* notes 217–25 and accompanying text.

13. Critics of state-prisoner access to federal habeas corpus relief argue that such a system creates "an expensive, time-consuming, and redundant enterprise that frustrates law enforcement and needlessly injects the federal courts into matters better left to the states." Richard Faust, Tina J. Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 8 N.Y.U. REV. L. & SOC. CHANGE 637, 638 (1990–91); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 172 (1970) (advocating limited availability of federal habeas corpus review in order 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"); Ruth Marcus, *On Death Row, How Many Appeals Are Enough?*, WASH. POST, June 9, 1990, at A1 (repeating Chief Justice Rehnquist's complaints that capital cases are handled chaotically, "with . . . seemingly endless rounds of eleventh-hour appeals"). Advocates of curtailing or even abolishing federal habeas corpus relief for state prisoners have argued that the authority of a federal judge to overturn a state court decision tramples on fundamental principles of respect for local authority and finality. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 128 (1982) ("Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."); Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting) (observing that both "the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation"). *But see* CHEMERINSKY, *supra* note 11, § 15.1, at 839 ("Yet, the controversy over habeas corpus must be put in perspective. A recent study has indicated that federal courts rarely overturn convictions on habeas corpus review. The study concluded that federal courts grant less than one percent of habeas petitions brought by state prisoners." (citing Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 259 (1995))); Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2523–24 (1993) (estimating that no more than 0.4% of state prisoners committed to custody each year even file habeas corpus petitions, and no more than 0.03% obtain relief). Dissent against expansive federal habeas corpus access took hold after the Warren Court era, with decisions by the Burger and Rehnquist Courts gradually cutting back the federal writ's reach. *See* HERTZ & LIEBMAN, *supra* note 5, § 2.4d, at 72–78 (describing the expansion of federal habeas corpus review in the 1960s and its subsequent contraction by the Supreme Court); Alan K. Chen, *Shadow Law: Reasonable*

tailing the availability of the writ in several ways, including establishing a strict one-year limitations period for filing habeas corpus petitions.[14]

Under AEDPA's statute of limitations, prisoners have one year within which to file a federal habeas corpus petition.[15] The limitations period begins to run the day the state court judgment becomes final on direct review; it is tolled while a properly filed[16] application for collateral relief is pending.[17] For prisoners such as Mr. Wyzykowski, whose convictions predated the enactment of AEDPA, courts established a grace period of one year from April 24, 1996, the date of enactment.[18] Mr. Wyzykowski filed his habeas corpus petition in July 1997,[19] just over two months after this one-year grace period had ended.[20] The

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Unreasonableness, Habeas Theory, and the Nature of Legal Rules, 2 BUFF. CRIM. L. REV. 535, 548–52 (1999) (surveying limits imposed on habeas corpus since the advent of the Burger Court); R. Stephen Painter, Jr., Note, O'Sullivan v. Boerckel *and the Default of State Prisoners' Federal Claims: Comity or Tragedy?*, 78 N.C. L. REV. 1604, 1604 (2000) ("[T]he Burger and Rehnquist Courts have limited the writ [of habeas corpus] severely, ostensibly in the interest of federalism and the finality of state criminal proceedings."); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 337–44 (1993) (discussing the emergence of modern federal habeas corpus) [hereinafter Steiker, *Innocence*]. Prior to AEDPA's passage, numerous legislative proposals offering restrictions on habeas corpus had been brought before Congress with little success. *See, e.g.*, Hunter v. United States, 101 F.3d 1565, 1578–83 (11th Cir. 1996) (reviewing string of legislative proposals intent on limiting availability of federal habeas corpus, leading up to passage of AEDPA).

14. *See* 28 U.S.C. § 2244(d) (1994 & Supp. V 1999).

15. *Id.*

16. *See* Artuz v. Bennett, 531 U.S. 4, 8 (2000) (holding that "an application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record" and that an application for state post-conviction relief or collateral review is "properly filed," for purposes of tolling AEDPA's statute of limitations, "when its delivery and acceptance are in compliance with the applicable laws and rules governing filings").

17. *But see* Duncan v. Walker, 553 U.S. 167 (2001) (holding that a first federal habeas corpus petition does not toll the limitation period for a subsequent petition because a federal habeas corpus petition is not an application for state postconviction or other collateral review within the meaning of § 2244(d)(2)).

18. AEDPA became effective when it was signed into law on the afternoon of April 24, 1996. *See* Mincey v. Head, 206 F.3d 1106, 1130 n.58 (11th Cir. 2000) (concluding AEDPA does not govern case where petition was filed the morning of April 24, 1996), *cert. denied*, 532 U.S. 926 (2001). The courts of appeals unanimously agree that it would be impermissibly retroactive to apply the statute of limitations to bar litigation by those prisoners whose statutory right to seek federal habeas corpus relief accrued *prior* to the date of AEDPA's enactment, and have provided a grace period for applicants by extending the limitations period to one year after the date of enactment, regardless of the date of accrual. *See, e.g.*, Hyatt v. United States, 207 F.3d 831, 832–33 (6th Cir. 2000); Morris v. Horn, 187 F.3d 333, 337 (3d Cir. 1999); Gaskins v. Duval, 183 F.3d 8, 9 (1st Cir. 1999); Goodman v. United States, 151 F.3d 1335, 1337 (11th Cir. 1998) (per curiam); Brown v. Angelone, 150 F.3d 370, 373–76 (4th Cir. 1998); Ross v. Artuz, 150 F.3d 97, 100–03 (2d Cir. 1998); United States v. Flores, 135 F.3d 1000, 1002–05 (5th Cir. 1998); Burns v. Morton, 134 F.3d 109, 111 (3d Cir. 1998); Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1286–87 (9th Cir. 1997); United States v. Simmonds, 111 F.3d 737, 744–46 (10th Cir. 1997); Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997).

19. Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1214 (11th Cir. 2000).

20. For petitioners whose convictions postdated the effective date of AEDPA, 28 U.S.C. §

district court barred his habeas corpus petition as untimely, despite his argument that the constitutional violations he suffered resulted in the incarceration of an innocent person.

Mr. Wyzykowski appealed the dismissal of his habeas corpus petition to the Court of Appeals for the Eleventh Circuit, arguing that AEDPA's statute of limitations violated the Suspension Clause of the Constitution[21] because it did not make an exception for an "actually innocent"[22] petitioner. The *Wyzykowski* panel observed that the application of AEDPA's statute of limitations to bar the filing of a first habeas corpus petition by a petitioner alleging actual innocence "raises a troubling and difficult constitutional question" regarding "suspension of the writ of habeas corpus . . . because of the inherent injustice that results from the conviction of an innocent person."[23] The panel remanded the matter to district court for a determination of whether Mr. Wyzykowski had established the requisite "showing of actual innocence," and for further analysis of "the difficult Suspension Clause issue."[24]

While some federal district courts have articulated concerns similar to those expressed in *Wyzykowski*,[25] whether a claim of "actual innocence" constitutes an

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2244(d)(1) provides that the one-year period shall begin to run from the latest of four possible dates: when a petitioner's conviction becomes final upon "the conclusion of direct review or the expiration of the time for seeking such review," when a state-created unconstitutional impediment is removed, when a constitutional and retroactively applicable right is recognized by the Supreme Court, or when a claim previously undiscoverable with due diligence is discovered. 28 U.S.C. § 2244(d)(1)(A)–(D) (Supp. V 1999). Concerning the first possible date, courts have held that the "conclusion of direct review" is set at the end of the period in which the prisoner could have sought review of the direct appeal of her conviction by the United States Supreme Court. *See, e.g.*, Locke v. Saffle, 237 F.3d 1269, 1273 (10th Cir. 2001). The Supreme Court grants ninety days to parties after entry of judgment to petition for a writ of certiorari. SUP. CT. R. 13(1). While the statute of limitations is tolled during the pendency of a petition for state post-conviction relief, it is *not* tolled while a petition for a writ of certiorari on a denial of state post-conviction relief is pending. *See, e.g.*, Coates v. Byrd, 211 F.3d 1225 (11th Cir. 2000), *cert. denied*, 531 U.S. 1166 (2001).

21. 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.").

22. There is a meaningful distinction between "actual" and "legal" innocence, though in the context of considering AEDPA's statute of limitations period, this article will focus on the former. In short, in order to show that he is *actually* innocent, a petitioner "must show a fair probability that, in light of all the evidence, . . . the trier of facts would have entertained a reasonable doubt of his guilt." Kuhlmann v. Wilson, 477 U.S. 436, 455 n.17 (1986) (plurality opinion) (citation omitted). When claiming *legal* innocence, a petitioner does not allege that he is factually innocent of the crime of conviction, but argues instead that, for example, evidence admitted at trial was legally insufficient to support a conviction. *See* Bousley v. United States, 523 U.S. 614, 623 (1998) ("It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency.").

23. Wyzykowski, 226 F.3d at 1218.

24. *Id.* at 1219.

25. *See, e.g.*, Holloway v. Jones, 166 F. Supp. 2d 1185, 1190 (E.D. Mich. 2001) (finding that while petitioner failed to establish colorable showing of innocence, "to utilize the one year statute of limitations contained in the AEDPA to preclude a petitioner who can demonstrate that he or she is factually innocent of the crimes that he or she was convicted of would violate the Suspension Clause . . . as well as the Eighth Amendment's ban on cruel and unusual punishment"); Barbour v.

exception under AEDPA's statute of limitations presents a question of considerable debate that few courts have addressed directly and that, as of this writing, no court has affirmatively resolved in favor of a petitioner.[26] Decisions by those courts that have faced this question reveal, among other things, critical differences in statutory construction and constitutional interpretation. For example, unlike the Eleventh Circuit, both the Fifth and Sixth Circuits have read the statute of limitations quite restrictively and rejected arguments that any actual-innocence exception exists. In *Graham v. Johnson*,[27] the Fifth Circuit rejected,

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Haley, 145 F. Supp. 2d 1280, 1288 (M.D. Ala. 2001) (following *Wyzykowski* and concluding that "this court . . . must give Barbour the opportunity to meet the standards for a showing of actual innocence before it can make any decision about this claim [of actual innocence] on the merits"); United States *ex rel.* Thomas v. Welborn, No. 00-C-2601, 2000 WL 1831548, at *3 (N.D. Ill. Dec. 13, 2000) (finding that while petitioner failed to establish colorable showing of innocence, "to close the gateway of the miscarriage of justice exception to petitioners who fail to timely file their petitions under § 2244(d) would raise 'serious constitutional questions.'. . . Furthermore, it would create the possibility that an innocent person would remain incarcerated due to a constitutional violation, simply because he failed to overcome a procedural hurdle."); Neuendorf v. Graves, 110 F. Supp. 2d 1144, 1158 (N.D. Iowa 2000) (assuming, without deciding, that "sufficient showing of 'actual innocence' would open the gateway to federal *habeas corpus* review, even if the petition in which the claim is asserted is otherwise untimely under the AEDPA"); United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099–1102 (C.D. Cal. 1998) (finding that while petitioner failed to establish colorable showing of innocence, the court nevertheless "extends the miscarriage of justice gateway as a means of considering evidence and constitutional claims otherwise procedurally barred by the AEDPA's statute of limitations" because "foreclos[ing] a claim of constitutional violation where there has been a colorable showing of factual innocence would likely constitute a due process violation or an improper suspension of habeas corpus relief"), *aff'd*, 209 F.3d 1095 (9th Cir. 2000), *amended*, 245 F.3d 1108 (9th Cir.), *mandate stayed*, 271 F.3d 953 (9th Cir. 2001); *see also* McLaughlin v. Moore, 152 F. Supp. 2d 123, 136 (D.N.H. 2001) (indicating that while it is likely that sufficient evidence of actual innocence would provide a gateway through § 2244(d)'s limitation period, thereby permitting a successful petitioner to present untimely claims, "[t]here is at least some judicial authority suggesting that even if an actual innocence exception to AEDPA's time limitation must necessarily be inferred, that exception is not available to petitioners who fail to pursue their claims in a diligent manner") (citing Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1193 (2001)).

26. While some courts have assumed without deciding that an "actual innocence" exception exists under § 2244(d), no petitioner has yet benefited from a court holding to this effect. *See supra* note 25 (citing what are essentially dicta concerning the existence of an "actual innocence" exception under AEDPA's statute of limitations). One federal district court did affirmatively apply the "actual innocence" exception to an otherwise time-barred petitioner. *See* Nickerson v. Carey, No. C-98-04909, slip op. at 12 (N.D. Cal. Sept. 14, 2000) (on file with *NYU Review of Law & Social Change*) (upon motion for reconsideration of dismissal of petition as untimely, court reinstates petition based on petitioner's presentation of "newly discovered . . . evidence of actual innocence," thereby opening "the miscarriage of justice gateway as an avenue for considering claims otherwise procedurally barred by AEDPA's statute of limitations"). The district court's recognition in *Nickerson* of an actual innocence exception under the statute of limitations was later rendered moot when a subsequent Ninth Circuit decision clarified California's rule concerning when a state habeas corpus petition becomes final. *See* Bunney v. Mitchell, 262 F.3d 973, 974 (9th Cir. 2001) (per curiam) (holding that California Supreme Court's dismissal of state habeas corpus petition did not become final until thirty days after dismissal was issued). As a result of the Ninth Circuit's ruling in *Bunney*, Nickerson's federal habeas corpus petition can no longer be deemed untimely; as a result, the district court's finding of an "actual innocence" exception to the statute of limitations becomes unnecessary.

27. 168 F.3d 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000).

inter alia, Gary Graham's argument that strict enforcement of AEDPA to bar federal review of a habeas corpus petition in spite of evidence of Graham's actual innocence would violate the Suspension Clause.[28] The Sixth Circuit took a slightly different approach in *Workman v. Bell*,[29] suggesting that "if a prisoner purposefully or by inadvertence lets the time run under which he could have filed his [federal habeas corpus] petition, he cannot file a petition beyond the statutory time, even if he claims 'actual innocence.'"[30]

In this article I consider the question, addressed to varying degrees in *Wyzykowski*, *Graham*, and *Workman*, whether AEDPA's statute of limitations can constitutionally bar a federal habeas corpus petition where the petitioner can make a colorable showing of actual innocence.[31] In Part I.A., I begin by examining the text of AEDPA's statute of limitations to see whether the statute permits an exception for claims related to innocence. I look closely at the language of the provision itself, as well as other aspects of the statute that might inform how the limitations provision can and should be read. Finding that the statute of limitations does not explicitly provide for an actual-innocence exception, I consider in Part I.B. whether the lack of any such exception ultimately matters—that is, whether there are other possible ways for time-barred innocent petitioners to seek relief outside the statute.

Finding alternative paths for relief insufficient, I consider in Part II whether the lack of an actual-innocence exception under AEDPA's statute of limitations is unconstitutional. I begin this inquiry with a discussion of the Suspension Clause of the Constitution, and explore the reach of Congress's power to shape the scope of the writ. I continue by examining the role of innocence as both a central tenet of habeas corpus jurisprudence and a mechanism through which otherwise barred habeas corpus petitioners have historically been allowed to seek relief in federal court. Concluding that innocence claims have been and must continue to be exempted from procedural bars, I argue that AEDPA's statute of limitations violates the Constitution if interpreted to prohibit an actual-innocence exception. So that they may avoid having to rule that AEDPA's statute of limitations is unconstitutional under these circumstances, I suggest that federal

28. *Id.* at 787–88 (holding that AEDPA's restrictions did not violate the Suspension Clause because when first codified, habeas corpus relief extended only to federal prisoners, which Graham was not, and because the Fifth Circuit has rejected the theory that a "truly persuasive" showing of actual innocence in a capital case would warrant federal habeas corpus relief).

29. 227 F.3d 331 (6th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1193 (2001).

30. *Id.* at 342; *see also* Sharp v. Cary, No. C-01-3625, 2002 WL 202375, at *3 (N.D. Cal. Feb. 1, 2002) (finding that the timeliness requirement set forth in § 2244(d) "contains no 'miscarriage of justice' exception, however. Petitioner provides no authority, and the Court is aware of none, that a petitioner may avoid the limitations period in § 2244(d) based on actual innocence. As a result, petitioner cannot avoid the limitations period on the basis of his assertions of 'actual innocence.'").

31. *See infra* notes 48–64, and accompanying text (discussing definition and application of "actual innocence" under habeas corpus).

habeas corpus courts recognize an actual-innocence or "miscarriage of justice"[32] exception to the statute of limitations.

Underlying the conclusion that an actual-innocence exception must be permitted to time-barred innocent petitioners is the principle that, no matter what, a prisoner who can establish a traditional actual-innocence or miscarriage-of-justice claim must be allowed to pursue federal habeas corpus relief. Thus, in Part III, I go on to propose that federal courts recognize the principle that innocence is always relevant under habeas corpus. Despite a historical legacy of protecting constitutional rights without regard to guilt or innocence, the contemporary federal habeas corpus doctrine necessarily privileges the innocent over the guilty when it comes to granting relief.[33] By suggesting that innocence is always relevant under habeas corpus, I do not mean to suggest that *non*-innocence-related constitutional claims should somehow be relegated to second-class constitutional citizenship, or that some constitutional violations are more worthy than others. Rather, I contend that claims linked to a petitioner's innocence are always relevant and deserving of protection under habeas corpus, and that courts should allow actual-innocence exceptions for petitioners, time bars notwithstanding. By providing an actual-innocence exception under AEDPA's statute of limitations, habeas corpus courts would extend a necessary and constitutionally required protection to innocent prisoners who are otherwise precluded from seeking relief.

I.

TEXTUAL ANALYSIS OF AEDPA'S STATUTE OF LIMITATIONS

While jurists have long debated the merits of various approaches to statutory interpretation,[34] it is a well-settled principle that courts should be very reluctant to disregard what appears to be the plain letter of a statute.[35] Thus, in exploring whether AEDPA's statute of limitations explicitly includes an actual-innocence exception, or whether one can be naturally read into the provision, a close examination of the text of the statute itself is a necessary starting point. As the Supreme Court noted recently when faced with interpreting another aspect of AEDPA's limitations provision, "Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute."[36]

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32. This article utilizes "actual-innocence exception" and "miscarriage-of-justice exception" interchangeably. *See* Murray v. Carrier, 477 U.S. 478, 496 (1986) (analogizing a "fundamental miscarriage of justice" to a showing of actual innocence).

33. *See infra* notes 164–92, and accompanying text (discussing the Supreme Court's increasing focus on innocence as a justification for federal review).

34. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, LEGISLATION: STATUTES & THE CREATION OF PUBLIC POLICY 513–633 (1995) (discussing historical evolution of theories of statutory interpretation).

35. *See, e.g.*, Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) (reaffirming principle that in all statutory-construction cases, courts should begin with the statutory language to determine if it provides a clear answer to the meaning of the words in question).

36. Duncan v. Walker, 533 U.S. 167, 171 (2001) (citations omitted).

A. Examining and Interpreting AEDPA's Statute of Limitations

1. 28 U.S.C. § 2244(d)

The text of AEDPA's statute of limitations, codified at 28 U.S.C. § 2244(d) reads as follows:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court. The limitation period shall run from the latest of—
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.[37]

A simple examination of the plain text of AEDPA's statute of limitations readily reveals that Congress did not explicitly include any exceptions for innocence. In fact, the provision appears relatively straightforward: the only way to affect the limitations period once it commences is to properly file a state post-conviction petition, which will toll the limitations period during its pendency.[38]

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37. 28 U.S.C. § 2244(d)(1)–(2) (Supp. V 1999). Section 2263 of AEDPA also imposes a shorter, 180-day limit on habeas corpus petitions in capital cases in States that opt in to AEDPA's "Special Habeas Corpus Procedures in Capital Cases." *See* 28 U.S.C. § 2261–2266 (Supp. V 1999). As of this writing, however, the opt-in provisions have not been applied to any petitioner, and thus the one-year statute of limitations in § 2244(d) applies to both noncapital and capital prisoners. AEDPA also imposes a one-year statute of limitations on habeas corpus petitions filed by federal prisoners. 28 U.S.C. § 2255 (Supp. V 1999).

38. *See* U.S.C. § 2244(d)(2) (Supp V. 1999); *see also Duncan*, 533 U.S. at 179 (noting that while "[t]he 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments . . . . [t]he tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and limitation period").

As a purely textual matter, there is no explicit exception under AEDPA's statute of limitations for a petitioner who presents a colorable claim of innocence.

2. Reading AEDPA's Statute of Limitations in Pari Materia

While a preliminary examination of § 2244(d) reveals no explicit exception for habeas corpus claims linked to innocence, considering the text of AEDPA as a whole may yield a more comprehensive understanding of what Congress intended. This interpretative method, called reading statutes *in pari materia,*[39] involves construing each statutory provision with reference to the others.[40] In other words, the statute should be read holistically to determine whether other provisions in AEDPA might shed light on our understanding of whether an actual-innocence exception can or should be read into the statute of limitations.

In addition to creating a statute of limitations, AEDPA explicitly prohibits filing previously raised claims in a second or successive federal habeas corpus petition,[41] and strictly limits the circumstances under which claims that were not previously raised may be filed in a second or successive petition.[42] While similar to AEDPA's statute-of-limitations provision in that it limits access to federal habeas corpus courts, the successive-petition provision codified at 28 U.S.C. § 2244(b) is different because it includes an exception for petitioners who seek to file claims not previously raised if they can make a particular showing of innocence.[43]

The innocence exception under § 2244(b) derives from the miscarriage-of-justice and actual-innocence standards of pre-AEDPA Supreme Court cases that addressed successive petitions.[44] In *McCleskey v. Zant*, a pre-AEDPA case, the

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39. BLACK'S LAW DICTIONARY 791 (6th ed. 1990) (defining *in pari materia* as a "rule of statutory construction, that statutes which relate to the same subject matter should be read, construed and applied together so that the legislature's intention can be gathered from the whole of the enactments, [that] applies only when the particular statute is ambiguous" (citation omitted)).

40. *Id.* at 1115 ("[L]aws *in pari materia* must be construed with reference to each other."). *See, e.g.*, McFarland v. Scott, 512 U.S. 849, 858 (1994) (holding that language of 21 U.S.C. § 848(q)(4)(B) and 28 U.S.C. § 2251 indicates that the two statutes must be read *in pari materia*, and, as a result, "once a capital defendant invokes his right to appointed counsel [under § 848 (q)(4)(B)], a federal court also has jurisdiction under § 2251 to enter a stay of execution" without violating Anti-Injunction Act); Firstar Bank, N.A. v. Faul, 253 F.3d 982 (7th Cir. 2001) (reaffirming principle that different acts that address the same subject matter should be read together such that the ambiguities in one may be resolved by reference to the other).

41. 28 U.S.C. § 2244(b)(1) (Supp. V 1999).

42. 28 U.S.C. § 2244(b)(2) (Supp. V 1999).

43. Section 2244(b)(2)(B)(ii) provides that a

> claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B)(ii) (Supp V. 1999).

44. *See* McCleskey v. Zant, 499 U.S. 467, 494 (1991) (affirming that in "extraordinary

Supreme Court held that in general an omission of a claim from an earlier petition may be excused only if the petitioner demonstrates objective cause for having failed to raise the claim earlier and actual prejudice attributable to her inability to raise the claim.[45] The *McCleskey* Court held that the petitioner may be excused from this "cause" requirement, however, by "show[ing] that a fundamental miscarriage of justice would result from a failure to entertain the claim."[46]

Though AEDPA does not codify the rule exactly as laid down in *McCleskey,* Congress essentially adopted the *McCleskey* miscarriage-of-justice exception when it drafted the successive-petition provision.[47] It is worth noting that AEDPA conflates the two prongs of the *McCleskey* test by mandating that a petitioner show *both* cause for failing to discover the factual basis for the claim earlier *and* actual innocence, not either one or the other.

AEDPA's successive-petition provision deviates from pre-AEDPA law in another significant way by raising the threshold for demonstrating actual innocence. Before AEDPA, the Supreme Court had held in *Schlup v. Delo*[48] that a petitioner could demonstrate actual innocence by showing "that [it is] *more likely than not* that no reasonable juror would have convicted her in light of the new evidence."[49] Such evidence normally consists of exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial.[50] The *Schlup* standard applied to pre-AEDPA successive petitions. But the successive-petition provision in AEDPA provides a more stringent test for establishing innocence, requiring that petitioners establish innocence by "*clear and convincing evidence.*"[51] Despite this higher standard, when

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instances when a constitutional violation probably has caused the conviction of [an] innocent" person, "a fundamental miscarriage of justice" is "implicat[ed]," and "federal courts retain the authority to issue the writ of habeas corpus . . . despite a petitioner's failure to show cause for a procedural default."); *see also* Bryan Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 NYU L. REV. 699 (2002) (discussing § 2244(b)'s miscarriage-of-justice exception with reference to the pre-AEDPA miscarriage-of-justice exception for successive petitions).

45. 499 U.S. 467, 493 (1991).

46. *Id.* at 495. To meet the "miscarriage of justice" standard under *McCleskey*, a petitioner had to either present "new facts that raise[] sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial," Schlup v. Delo, 513 U.S. 298, 317 (1995), or show by clear and convincing evidence that, but for a constitutional violation, no reasonable juror would have found petitioner eligible for the death penalty under the applicable law, rendering the petitioner "'innocent of death.'" Sawyer v. Whitley, 505 U.S. 333, 345–47 (1992).

47. *See* 28 U.S.C. § 2244(b)(2)(B) (Supp. V 1999); Felker v. Turpin, 518 U.S. 651, 664 (1996) (noting that AEDPA "codifies *some* of the pre-existing limits on successive petitions" (emphasis added)).

48. 513 U.S. 298 (1995).

49. *Id.* at 327 (emphasis added).

50. *Id.* at 322–24.

51. 28 U.S.C. § 2244(b)(2)(B)(ii) (Supp. V 1999) (emphasis added). This higher standard had previously applied only to claims that challenged the validity of a death sentence, as opposed to the validity of a conviction. *See* Sawyer, 505 U.S. at 346–47 (holding that in order to demonstrate

§ 2244(b) is read together with the statute of limitations provision, the presence of an actual-innocence exception in § 2244(b) highlights the absence of any such exception in the statute-of-limitations provision.

An additional preclusive defense under AEDPA that helps to inform analysis of the statute of limitations is the provision limiting a habeas corpus petitioner's right to a federal evidentiary hearing. This section, found at 28 U.S.C. § 2254(e)(2), provides that a federal court shall not conduct an evidentiary hearing where the habeas corpus petitioner failed to develop the factual basis for her claim in state court.[52] However, unlike under the statute of limitations but akin to the successive-petition provision, AEDPA's limitation on evidentiary hearings offers an exception if "the facts underlying the [petitioner's] claim would be sufficient to establish by clear and convincing evidence" the petitioner's innocence.[53] The actual-innocence exception for obtaining a federal evidentiary hearing existed under pre-AEDPA jurisprudence as well. For example, in *Keeney v. Tamayo-Reyes*,[54] the Supreme Court held that the "failure to develop a claim in state-court proceedings will be excused and a hearing mandated if [a petitioner] can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."[55] Thus, as it did with the successive-petition provision, Congress essentially codified, with some alteration,[56] the preexisting miscarriage-of-justice exception for evidentiary hearings when it drafted AEDPA.

Reading these three provisions—§§ 2244(b), 2244(d), and 2254(e)(2)—*in pari materia,* it appears that while Congress was certainly capable of including an actual-innocence exception, it decided not to include such an exception to the statute of limitations. The reasoning is one of negative implication: When

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actual innocence to obtain relief on a successive or abusive claim, condemned petitioner must show by clear and convincing evidence that no reasonable juror would have found petitioner eligible for death penalty under applicable state law).

52. 28 U.S.C. § 2254(e)(2) (Supp. V 1999).

53. *Id. See also* Williams v. Taylor, 529 U.S. 420, 433–37 (2000) (holding that § 2254(e)(2) provides that a federal court shall not conduct an evidentiary hearing if the petitioner failed to develop a claim in state court, except if the claim relies on a new rule of constitutional law or on "a factual predicate that could not have been previously discovered through the exercise of due diligence" and the facts "would establish by clear and convincing evidence" the petitioner's actual innocence).

54. 504 U.S. 1 (1992).

55. *Id.* at 12.

56. Similar to AEDPA's conflation of *McCleskey*'s requirements that petitioners show either "cause" or "innocence" to be excused from a bar on successive petitions, *see supra* note 47 and accompanying text, § 2254(e) departs from the *Tamayo-Reyes* rule of requiring either "cause" or a "miscarriage of justice" in order to excuse an evidentiary hearing default. *See* 28 U.S.C. § 2254(e)(2) (Supp. V 1999). Instead of requiring one or the other, § 2254(e) both "cause" *and* "innocence" to overcome AEDPA's limitation on federal evidentiary hearings. *See, e.g., Williams*, 529 U.S. at 433 (noting that § 2554(e)(2) "eliminat[es] a freestanding 'miscarriage of justice' exception" which thereby "raise[s] the bar *Keeney* imposed on prisoners who were not diligent in state-court proceedings"); *see also* HERTZ & LIEBMAN, *supra* note 5, § 20.2b (discussing standards under § 2254(e)(2) as compared with pre-AEDPA standards).

reading the statute as a whole, the inclusion or enumeration of certain things in certain places in AEDPA suggests that the legislature did not intend to include things not listed.[57] And although the standards for establishing actual innocence under the successive-petition and evidentiary hearing provisions are quite stringent when compared to pre-AEDPA standards, their very inclusion underscores the lack of any corresponding exception to AEDPA's statute of limitations.

Of course, there are limits to an approach that seeks to elicit meaning from reading statutes *in pari materia*. As Karl Llewellyn noted about the application of various rules or canons of statutory interpretation, "there are two opposing canons on almost every point."[58] For example, in *Nickerson v. Carey*,[59] the only case to date in which a federal district court has affirmatively found an actual-innocence exception to AEDPA's statute of limitations,[60] the court took a distinctly different approach to reading AEDPA's preclusive provisions. In *Nickerson*, the petitioner alleged that newly discovered evidence proved his actual innocence of the two counts of first-degree murder and one count of attempted murder of which he had been convicted.[61] Interpreting § 2244(d), the court first analogized AEDPA's statute of limitations to other procedural bars under habeas corpus jurisprudence, such as the doctrines of procedural default[62]

57. *See* Duncan v. Walker, 533 U.S. 167, 172–73 (2001) (reading § 2244(d)(2) *in pari materia* with other sections of AEDPA, including §§ 2254, 2261(e), and 2264(a)(3), and finding that "a comparison of the text of § 2244(d)(2) with the language of other AEDPA provisions supplies strong evidence that, had Congress intended to include federal habeas petitions within the scope of § 2244(d)(2), Congress would have mentioned 'Federal' review expressly"); *see also* Rodriguez v. United States, 480 U.S. 522, 525 (1987) (per curiam) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting Russello v. United States, 464 U.S. 16, 23 (1983))); Gendron v. United States, 154 F.3d 672, 674 (7th Cir. 1998) ("[W]here Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded."); *cf.* ESKRIDGE & FRICKEY, *supra* note 34, at 638–39 (describing the doctrine of *expressio unius*, which stands for the principle that "[w]ords omitted may be just as significant as words set forth").

58. Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950); *see also Duncan*, 533 U.S. at 188 (Breyer, J., dissenting) (criticizing majority's reading of statue *in pari materia*, contending that "the 'argument from neighbors' shows only that Congress *might* have spoken more clearly than it did" and "cannot prove the statutory point" (emphasis added)).

59. No. C-98-04909, slip op. at 12 (N.D. Cal. Sept. 14, 2000) (on file with *NYU Review of Law & Social Change*).

60. As discussed *supra* note 26, the finding of an actual-innocence exception under § 2244(d) was subsequently mooted. Judge Patel's analysis is nonetheless informative as one example of how a court might interpret the statute.

61. *Nickerson*, No. C-98-04909, slip op. at 12 (N.D. Cal. Sept. 14, 2000) (on file with *NYU Review of Law & Social Change*).

62. Procedural default "bars habeas review of constitutional claims that a movant has failed to present at procedurally required opportunities, such as at trial, sentencing, or on direct appeal." United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099–1100 (C.D. Cal. 1998) (internal citations omitted), *aff'd*, 209 F.3d 1095 (9th Cir. 2000), *amended*, 245 F.3d 1108 (9th Cir.), *mandate stayed*, 271 F.3d 953 (9th Cir. 2001).

and abuse of the writ.[63] Noting the similarities between these preclusive defenses and the statute of limitations, the court reasoned that since "court[s] may nonetheless consider procedurally barred claims [in cases of procedural default and abuse of the writ] if failure to do so would result in the conviction of execution of 'one who is actually innocent,'" a similar such actual-innocence exception to the statute of limitations must exist.[64] Whereas one reading of preclusive defenses to habeas corpus petitions might stress what they *lack*—i.e., the missing actual-innocence exception under § 2244(d)—another reading, as seen in *Nickerson*, might incorporate elements of other provisions into the statute of limitations because the provisions are, indeed, so similar.

While §§ 2244(b), 2244(d), and 2254(e) each limit a petitioner's ability to prosecute a habeas corpus claim, a closer examination of the statute of limitations indicates that reading the provision *in pari materia* with other preclusive defenses under AEDPA may be the wrong approach. "A statute is not *in pari materia* if its scope and aim are distinct."[65] Indeed, a strong argument can be made that the statute of limitations is unlike these other preclusive defenses and, thus, should not be read in light of these other provisions.

The most significant difference between the statute of limitations and the other preclusive defenses under AEDPA is that the statute of limitations is a wholly unprecedented restriction on habeas corpus claims. Prior to the enactment of AEDPA, neither Congress nor the courts had ever imposed strict time constraints on filing federal habeas claims. The Supreme Court had long held that "*habeas corpus* provides a remedy . . . without limit of time."[66] Indeed, the Court held shortly before AEDPA's enactment that an initial habeas corpus petition could even be filed on the day of a petitioner's scheduled execution.[67] The only pre-AEDPA timeliness requirement was that an application for habeas corpus relief be filed without prejudicial delay.[68] While statutes of limitation on

63. Abuse of the writ "forecloses habeas claims that were available but not relied upon in a previous motion or petition." *Id.* at 1100 (citing Kuhlmann v. Wilson, 477 U.S. 436, 444 n.6 (1986)).

64. *Nickerson*, slip op. at 12. *See generally* Coleman v. Thompson, 501 U.S. 722, 748–50 (1991) (holding that procedurally defaulted petitioner must show cause for the default and prejudice, or demonstrate that failure to consider the claim will result in a miscarriage of justice (i.e., the petitioner is actually innocent)); McCleskey v. Zant, 499 U.S. 467, 494–95 (1991) (holding that petitioner may be excepted from abuse-of-writ bar by establishing cause and prejudice, or by making a colorable claim of innocence).

65. Llewellyn, *supra* note 58, at 402 (citing Wheelock v. Myers, 64 Kan. 47, 67 Pac. 632 (1902)); BLACK, CONSTRUCTION AND INTERPRETATION OF LAWS § 104 (2d ed. 1911); SUTHERLAND, STATUTORY CONSTRUCTION § 449 (2d ed. 1904); 59 C.J., *Statutes* § 620 (1932)); *see also, e.g.*, Firstar Bank, N.A. v. Faul, 253 F.3d 982, 990 (7th Cir. 2001) (noting that "before construing different statutes *in pari materia*, courts should take a hard look to ensure that the purposes and subjects of the acts are in fact similar" (citations omitted)).

66. United States v. Smith, 331 U.S. 469, 475 (1947) (dicta); *see also* Vasquez v. Hillery, 474 U.S. 254, 265 (1986) ("Congress has yet to create a statute of limitations for federal habeas corpus actions.").

67. Lonchar v. Thomas, 517 U.S. 314 (1996).

68. RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 9(a)

habeas corpus petitions had been proposed in previous legislative sessions,[69] none had ever passed.[70] Unlike AEDPA's successive-petition and evidentiary-hearing provisions that, as noted above, developed against a preexisting jurisprudential backdrop, the statute of limitations on filing federal habeas corpus petitions was made entirely out of whole cloth.[71] Because it is an entirely new and exceptional preclusive defense under federal habeas corpus law, the statute of limitations should not necessarily be read hand-in-hand with other provisions that have their own pre-AEDPA histories.

It is critical to keep in mind that, while the statute of limitations on federal habeas corpus petitions is unprecedented, its creation is not necessarily, in and of itself, unconstitutional. In fact, to date, every circuit court agrees that § 2244(d)

(Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the United States 1976) ("A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond. . ."); RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS R. 9(a) (Comm. on Rules of Prac. and Proc. of the Jud. Conf. of the United States 1976) ("A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion . . . ."); *see also Lonchar*, 517 U.S. at 314 (holding that pre-AEDPA first federal habeas corpus petition is governed by Rule 9 of Habeas Corpus Rules, not by generalized equitable considerations not encompassed within framework of Rule 9, and Rule 9 provides the only form of "time limitation" for first federal habeas corpus petition).

69. *See* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 452 n.2 (1990–1991) (detailing host of congressional bills proposing time limits on habeas corpus petitions); *see also* Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2350–76, 2416–23 (1993) (reviewing congressional debates and proposals concerning statutory limitations on habeas corpus law).

70. While congressional attempts at reforming federal habeas corpus had little success prior to the enactment of AEDPA, the idea of congressional reform in this area was in itself nothing new. *See* 135 CONG. REC. S13,471–72 (daily ed. Oct. 16, 1989) (statement of Sen. Biden) ("The Powell Committee studied the issue that we have debated for many, many years here in the Senate. It has been the issue of debate . . . at least for the 17 years that I have been a Senator."); *see also* Hunter v. United States, 101 F.3d 1565, 1578–83 (11th Cir. 1996) (tracing and discussing the numerous proposed reform bills that eventually led to the enactment of AEDPA). For further discussion of the Powell Committee, in particular, and its role in the ultimate creation of AEDPA, see Alexander Rundlet, Student Comment, *Opting for Death: State Responses to the AEDPA's Opt-In Provisions and the Need for a Right to Post-Conviction Counsel*, 1 U. PA. J. CONST. L. 661, 689–704 (1999).

71. Some states have statutes of limitations on their post-conviction processes for both capital and noncapital cases. *See* Mello & Duffy, *supra* note 69, at 476 n.155 (discussing examples of statutes of limitations on state capital post-conviction processes). The mere existence of state statutes of limitations does not, however, adequately inform our understanding of AEDPA's statute of limitations, since the constitutionality of state statutes is reviewed with reference to their respective state constitutions, as opposed to the federal constitution. Moreover, there is pre-AEDPA case law from at least one state indicating that the validity of limitations on that state's post-conviction petitions was due to the fact that, at the time of ruling, there was a *lack* of any such limitations period for filing a federal habeas corpus petition. *See* Snow v. State, 779 P.2d 96, 97 (Nev. 1989) (holding that that state's two-year post-conviction limit on introducing new evidence did not violate the Eighth or Fourteenth Amendments of the United States Constitution because relief was still available through federal habeas corpus petition).

is not unconstitutional per se.[72] Debating the merits of the limitations period outside of any discussion relating to innocence is beyond the scope of this article. The point of the foregoing discussion of the uniqueness of AEDPA's statute of limitations is that the strictness of the provision, combined with the fact that there is no written exception for an innocence-related claim, raises unprecedented questions that cannot be resolved merely by reference to other provisions of AEDPA.

3. Legislative History

Despite its clearly stated purpose to reduce delay and induce finality in postconviction collateral attacks,[73] AEDPA was also touted as a law sensitive to

72. *See, e.g.*, Lucidore v. New York State Div. of Parole, 209 F.3d 107, 113 (2d Cir. 2000) (rejecting facial challenge to AEDPA's statute of limitation because it leaves petitioners with some reasonable opportunity to have their claims heard on the merits: "[T]he limitation period does not render the habeas remedy 'inadequate or ineffective to test the legality of detention,' and therefore does not *per se* constitute an unconstitutional suspension of the writ." (citations omitted)), *cert. denied*, 531 U.S. 873 (2000); Hyatt v. United States, 207 F.3d 831, 832 (6th Cir. 2000); Green v. White, 223 F.3d 1001, 1003 (9th Cir. 2000) ("AEDPA's one-year limitation does not constitute a per se violation of the Suspension Clause."); Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (per curiam) ("Turner cannot show that the limitations period has rendered his habeas remedy inadequate or ineffective. We therefore reject Turner's claim that § 2244 is unconstitutional."); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (holding that, where petitioner does not contend he is actually innocent, the limitation period does not render the habeas corpus remedy inadequate and ineffective); Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1217 (11th Cir. 2000) (holding that AEDPA does not suspend the writ of habeas corpus); *cf.* Weaver v. United States, 195 F.3d 123, 125 (2d Cir. 1999) ("We hold that the application of the limitations period in 28 U.S.C. § 2255 to dismiss a first motion for relief under § 2255 does not per se violate the Suspension Clause of the federal Constitution"), *cert. denied*, 529 U.S. 1094 (2000); Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 918 (1994) ("The notion that [habeas corpus] should be perpetual must be abandoned. . . . [A] more sensible understanding of the guarantee against 'suspension' is that it obligates Congress to provide one meaningful, nondiscretionary opportunity to secure federal review of federal claims.") [hereinafter Steiker, *Incorporating the Suspension Clause*]. *But see* Rosa v. Senkowski, No. 97 CIV. 2468, 1997 WL 436484 (S.D.N.Y. Aug. 1, 1997) (finding that application of AEDPA's statute of limitations barring the filing of a first federal habeas corpus petition violates the Suspension Clause), *aff'd on other grounds*, 148 F.3d 134 (2d. Cir. 1998); Mello & Duffy, *supra* note 69 (arguing that proposed limitations periods on habeas corpus petitions violates Constitution); Peter Sessions, *Swift Justice?: Imposing a Statute of Limitations on the Federal Habeas Corpus Petitions of State Prisoners*, 70 S. CAL. L. REV. 1513 (1997) (arguing that AEDPA's statute of limitations violates the Constitution).

73. *See, e.g.*, President Bill Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), *in* 32 WKLY. COMP. PRES. DOC. 719 (Apr. 29, 1996) ("For too long, and in too many cases, endless-death row appeals have stood in the way of justice being served."); H. CONF. REP. NO. 104-518, at 111 (1996) (noting that AEDPA "incorporates reforms . . . to address the acute problems of unnecessary delay and abuse in capital cases"); 142 CONG. REC. H3605 (daily ed. Apr. 18, 1996) (statement of Rep. Hyde) (discussing SEN. CONF. REP. on S. 735, Antiterrorism and Effective Death Penalty Act of 1996) ("I simply direct attention to quotations from President Bill Clinton, who has said in death penalty cases, it normally takes 8 years to exhaust the appeals. It is ridiculous, 8 years is ridiculous; 15 and 17 years is even more so. . . . [W]e have a 1-year statute of limitations in habeas [in the bill]. Nothing wrong with that."); 141 CONG. REC. H1400–02 (daily ed. Feb. 8, 1995) (statement by Rep. McCollum) ("By curtailing

the problems of the wrongfully convicted.[74] While some lawmakers expressed their concerns that AEDPA's provisions would effectively prevent innocent petitioners from securing relief,[75] a search of the legislative history reveals only two comments on how AEDPA's limitations provisions might affect a time-barred innocent petitioner.[76]

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the seemingly endless appeals of death-row inmates, . . . H.R. 729 sends the clear message to criminals that the criminal justice system is not a game. . . . In many cases where the people's elected representatives have passed capital punishment laws, executions never occur because of endless appeals and lawsuits.").

74. *See* Orrin Hatch, *Tighter Rules Were Needed*, USA TODAY, Jan. 30, 2000, at 16A ("Congress' reforms carefully preserve the most important function of habeas corpus, to guarantee that innocent persons will not be illegally imprisoned or executed, and explicitly permit repeated petitions that clearly and convincingly present new evidence of innocence."); President Bill Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), *in* 32 WKLY. COMP. PRES. DOC. 719 (Apr. 29, 1996) (responding to "concern that . . . [AEDPA] could be interpreted in a manner that would undercut meaningful Federal habeas corpus review" by stating that "I am confident that the Federal courts will interpret these provisions to preserve independent review of Federal legal claims and the bedrock constitutional principle of an independent judiciary"); 142 CONG. REC. S3465 (daily ed. Apr. 17, 1996) (statement of Sen. Warner) (discussing SEN. CONF. REP. on S. 735, Antiterrorism and Effective Death Penalty Act of 1996) ("I have faith that our State courts respect our constitutional rights, and in the exceptional case where Federal rights have been violated, defendants retain very reasonable access to Federal courts to prove their innocence."). Former California Attorney General Dan Lungren, another critic of habeas corpus and one of AEDPA's chief supporters, made similar comments which assumed that innocence could overcome any preclusive defense resulting from any future Congressional tinkering with habeas corpus law. Lungren wrote that a state prisoner's successive petition should *always* be considered if, and only if, "the threshold showing of innocence ha[s] been established." Daniel E. Lungren & Mark L. Krotoski, *Public Policy Lessons from the Robert Alton Harris Case*, 40 UCLA L. REV. 295, 313 (1992). Lungren also testified before the Senate Judiciary Committee before AEDPA's passage:

> We desire legislation which embodies a concept of justice that is primarily defined by the guilt or innocence of those who claim constitutional violations, rather than dexterity at procedural gamesmanship. The assertion of constitutional rights at the later stages of the process must not be at the expense of the truth-finding function of the criminal justice system. If the guilt or innocence determination of the state courts is to have any meaning at all, there must be some conclusion with respect to the timing and the nature of the claims that may be brought under federal collateral review.

S. 623, A Bill to Reform Habeas Corpus Procedures, and for Other Purposes: Hearing Before the Sen. Comm. on the Judiciary, 104th Cong. 25 (1995) (statement of Daniel Lungren, Atty. Gen. of Cal.) (discussing H.R. 729).

75. *See, e.g.*, 142 CONG. REC. H3611 (daily ed. Apr. 18, 1996) (statement of Rep. Scott) (discussing SEN. CONF. REP. on S. 735, Antiterrorism and Effective Death Penalty Act of 1996) ("If this bill is enacted, we will find that those who are factually innocent and can present evidence of innocence will in fact be put to death. . . . Those who could show that they are probably innocent will not even get a hearing, under this bill.").

76. Representative Watt, discussing the conference report, commented:

> By imposing this limitation, important new evidence, even new compelling evidence of one's innocence, can no longer be offered in a court of law to prove one's innocence. Compelling new evidence of one's innocence can no longer be offered, after that one bite within 1 year. We have seen the advances that our country has made in DNA, and DNA evidence is now coming forward to reveal that people who have been in jail for 10 years, 15 years, are being held unjustly, without any contradiction, and we are willing to compromise the most basic thing, innocence, for political expediency.

Reading the legislative history surrounding AEDPA's passage, one gets the sense that the idea of an innocent prisoner failing to file a federal habeas corpus petition within the limitations period was simply unthinkable. AEDPA largely codified established doctrine, and many lawmakers appeared to focus their attention primarily on establishing strict prohibitions on successive petitions.[77] Having had no experience with a statute of limitations on federal habeas corpus petitions, lawmakers possibly underestimated what it takes to file such a petition.[78] Perhaps the most glaring error in judgment was lawmakers' lack of attention to the plight of pro se prisoners, who would face the daunting prospect of filing a federal habeas corpus petition within the limitations period without the aid of counsel or investigative resources.

Thus, on the one hand, the legislative history of AEDPA's passage indicates that there was a basic assumption by lawmakers that the statute of limitations, whether viewed as harsh or necessary, was not a provision that would adversely affect innocent petitioners. On the other hand, the legislative history fails to shed light on how restrictively the statute of limitations should be read when applied to the case of a time-barred innocent petitioner.

B. Does the Lack of an Actual-Innocence Exception in § 2244(d) Matter?

While the statute, as written, does not appear to provide any viable options for a time-barred innocent prisoner, one might ask whether that even matters. If a time-barred petitioner has an uninhibited opportunity to seek relief by other means, perhaps even the most restrictive interpretation of AEDPA's statute of limitations would not implicate constitutional concerns. I now consider five other possible avenues for relief that might render moot the issue of the constitutionality of AEDPA's statute of limitations.

1. Equitable Tolling

Some courts have suggested that federal courts should equitably toll[79] AEDPA's statute of limitations when presented with a petition alleging facts that

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142 CONG. REC. H3602 (daily ed. Apr. 18, 1996). In the same debate, Representative Pelosi noted:

> The habeas corpus provisions in this bill are dangerous to ordinary citizens. They increase the risk that innocent persons could be held in prison in violation of the constitution, or even executed. For the first time, a use it or lose it approach is being applied to a basic constitutional right. Constitutional rights are not time-bound, they are timeless or they are worthless. The bill before us mandates strict habeas corpus filing deadlines that ordinary citizens, especially those lacking financial resources, may not be able to meet.

142 CONG. REC. H3614 (daily ed. Apr. 18, 1996).

77. *See supra* note 73 (statements by lawmakers focused on limiting "seemingly endless appeals" of prisoners).

78. *See* HERTZ & LIEBMAN, *supra* note 5, §§ 11.1–11.9 (detailing steps for filing federal habeas corpus petition).

79. "Equitable tolling" is "a well-established principle that calls for affording litigants a 'reasonable period' of time to comply with a newly enacted statute of limitations." HERTZ &

establish a colorable claim of actual innocence.[80] Thus, despite the lack of an actual-innocence exception to the statute of limitations, the doctrine of equitable tolling may nevertheless toll the limitations period for a petitioner who can establish a colorable claim of innocence.

Courts have generally found that AEDPA's statute of limitations may be equitably tolled because it is a statute of limitation and not a jurisdictional bar.[81] Traditionally, courts have deemed equitable tolling appropriate in two distinct kinds of situations. First, equitable tolling may be appropriate if a petitioner is "prevented from asserting her claims by some kind of wrongful conduct on the part of the government."[82] Second, equitable tolling may be appropriate if "extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time."[83] Extraordinary circumstances that might toll the limitations period and account for the failure to file a timely claim have been limited to "external forces, rather than a petitioner's lack of diligence."[84]

LIEBMAN, *supra* note 5, § 5.2a, at 234 (footnote omitted). For a more comprehensive discussion of the doctrine of equitable tolling see *id.* at 234–36.

80. *See, e.g.*, Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (suggesting that actual innocence or uncontrollable circumstances that prevent inmate from filing timely amounts to "rare and exceptional circumstances," thus rendering one-year statute of limitations subject to equitable tolling); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (implying that actual innocence may be grounds for equitable tolling of the § 2244(d)(1) limitations period). *But see* Felder v. Johnson, 204 F.3d 168, 171 (5th Cir. 2000) (holding that a claim of actual innocence "does not constitute a 'rare and exceptional' circumstance, given that many prisoners maintain they are innocent"; noting, however, that petitioner did not show himself actually innocent), *cert. denied*, 531 U.S. 1035 (2000).

81. *See* Harris v. Hutchinson, 209 F.3d 325, 329–30 (4th Cir. 2000) (concluding that § 2244(d) is subject to equitable tolling, at least in principle); Smith v. McGinnis, 208 F.3d 13, 17 (2d Cir.) (stating that the limitation period for filing habeas corpus petitions may be equitably tolled in extraordinary circumstances), *cert. denied*, 531 U.S. 840 (2000); Taliani v. Chrans, 189 F.3d 597, 598 (7th Cir. 1999) (holding that "judge-made doctrine of equitable tolling is available" under AEDPA's statute of limitations); Calderon v. United States Dist. Court for Cent. Dist. of Calif. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998) (en banc) ("[Section] 2244(d)(1) can be tolled if extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time.") (internal quotation marks omitted); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998) (holding that § 2244(d)'s limitation period can be equitably tolled in "rare and exceptional circumstances"); Miller v. N.J. Dep't of Corr., 145 F.3d 616, 618 (3d Cir. 1998) (holding that § 2244(d)'s limitation period can be equitably tolled in extraordinary circumstances); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) ("It must be remembered that § 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling."); *see also* Dunlap v. United States, 250 F.3d 1001 (6th Cir.) (finding that one-year statute of limitations for federal prisoners, found in 28 U.S.C. § 2255, may be equitably tolled), *cert. denied*, 122 S. Ct. 649 (2001); Sandvik v. United States, 177 F.3d 1269 (11th Cir. 1999) (same); Moore v. United States, 173 F.3d 1131 (8th Cir. 1999) (same).

82. Seattle Audubon Soc'y v. Robertson, 931 F.2d 590, 595 (9th Cir. 1991), *rev'd on other grounds*, 503 U.S. 429 (1992).

83. *United States Dist. Court for Cent. Dist of Calif. (Kelly)*, 163 F.3d at 541 (citation and internal quotation marks omitted).

84. Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999); *see, e.g.*, Valverde v. Stinson, 224 F.3d 129, 133 (2d Cir. 2000) (confiscation of habeas corpus petitioner's legal papers may justify equitable tolling).

While courts have recognized the applicability of equitable tolling to AEDPA's statute of limitations, establishing "extraordinary circumstances" has proven to be quite challenging.[85] For example, a petitioner's ignorance of the law,[86] lack of legal training or representation,[87] incapacitating illness,[88] illiteracy,[89] and counsel's error in failing to timely file[90] have all been deemed

85. *See* Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283, 1289 (9th Cir. 1997) (admonishing district courts to "take seriously Congress's desire to accelerate the federal habeas process" and "only authorize extensions when this high hurdle is surmounted").

86. *See, e.g.*, United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir.) (rejecting argument that statute of limitations should be equitably tolled for one day: "Petitioner's argument that the deadline was unclear . . . makes no sense, because if it was unclear, they should have filed by the earliest possible deadline, not the latest. The deadline simply was missed."), *cert. denied*, 531 U.S. 878 (2000); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (holding equitable tolling not warranted for prisoner claiming he lacked access to federal statutes and case law, and only learned of AEDPA's time limitations sometime after April 29, 1997); Bilodeau v. Angelone, 39 F. Supp. 2d 652, 659 n.1 (E.D. Va.) (holding petitioner's "ignorance of the law and . . . decision to blindly seek legal assistance" do not warrant equitable tolling), *appeal dismissed*, 182 F.3d 906 (4th Cir. 1999); *see also* Sperling v. White, 30 F. Supp. 2d 1246, 1254 (C.D. Cal. 1998) (citing cases establishing that ignorance of the law does not constitute extraordinary circumstances).

87. *See, e.g.*, Turner v. Johnson, 177 F.3d 390, 392 (5th Cir. 1999) (noting that "lack of representation during the applicable filing period" does not "merit[] equitable tolling"); Turner v. Smith, 70 F. Supp. 2d 785 (E.D. Mich. 1999) (holding that pro se habeas corpus petitioner, who filed petition after expiration of one-year limitations period established by AEDPA, was not entitled to equitable tolling of statute of limitations on basis of his alleged helplessness due to a lack of academic and legal education); Henderson v. Johnson, 1 F. Supp. 2d 650 (N.D. Tex. 1998) (holding that federal habeas corpus petitioner's allegations that he did not have professional legal assistance, did not know what to do, and had another inmate help him until the inmate left the unit did not demonstrate extraordinary circumstances that made it impossible to file petition on time, as would equitably toll statute of limitations imposed by AEDPA); *see also Sperling*, 30 F. Supp. 2d at 1254 (citing cases establishing that lack of legal assistance does not constitute extraordinary circumstances).

88. *See, e.g.*, Rhodes v. Senkowski, 82 F. Supp. 2d 160 (S.D.N.Y. 2000) (holding that petitioner's alleged AIDS-related physical and mental impairments during the one-year limitations period, including periods of hospitalization and confinement to prison disabled unit, were insufficient to establish extraordinary circumstances).

89. *Turner*, 177 F.3d at 392 (noting that "[i]t is irrelevant whether [ignorance of the law] is due to illiteracy or any other reason") (citation omitted); *see also Sperling*, 30 F. Supp. 2d at 1254 (citing cases establishing that illiteracy does not constitute extraordinary circumstances).

90. *See, e.g.*, Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000) (holding that "mere attorney negligence does not justify equitable tolling," and "[a]n attorney's miscalculation of the limitations period or mistake is not a basis for equitable tolling"); Harris v. Hutchinson, 209 F.3d 325, 331 (4th Cir. 2000) ("In short, a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding."); Sandvik v. United States, 177 F.3d 1269, 1272 (11th Cir. 1999) (holding that counsel's untimely filing error does not provide ground for equitable tolling because error "was one that Sandvik's counsel could have avoided by mailing the motion earlier or by using a private delivery service or even a private courier"); Smaldone v. Senkowski, No. 99-CV-3318, 2000 WL 1134391, at *4–*6 (E.D.N.Y. Aug. 3, 2000) (attorney's erroneous advice that the petitioner would have a year to file federal petition after end of state collateral review did not warrant equitable tolling), *aff'd*, 273 F.3d 133 (2d Cir. 2001), *petition for cert. filed*, 70 U.S.L.W. 3535 (U.S. Feb. 12, 2002) (No. 01-1194); Warren v. United States, 71 F. Supp. 2d 820, 821–23 (S.D. Ohio 1999) (failure of appointed attorney to notify peti-tioner did not justify equitable tolling). *But see* Helton v. Sec'y for Dep't of Corr., 233

insufficient to justify equitable tolling of § 2244(d). As one example, the Sixth Circuit has fashioned the following test to determine whether equitable tolling of the habeas corpus limitations period is appropriate: (1) Did the petitioner lack notice of the filing requirement?; (2) Did the petitioner lack constructive knowledge of the filing requirement?; (3) Was the petitioner diligent in pursuing her rights?; (4) Would equitable tolling prejudice the respondent?; and (5) Was it reasonable for the petitioner to remain ignorant of the legal requirements for filing her claim? Under this test, petitioners must allege specific circumstances that caused them to file their petitions after the expiration of the statute of limitations.[91]

Some courts have recognized that innocence might be relevant to an equitable-tolling analysis, particularly in capital cases where there is a heightened need for reliability.[92] Generally speaking, however, case-by-case inquiries into the applicability of equitable tolling often hinge on whether there was any governmental interference or other similar extraordinary circumstance that prevented the petitioner from filing within the limitations period. In short, innocence, without more, is not likely to be enough. Instead, courts focus on (1) whether innocence is a possibility, but also (2) whether the petitioner pursued the

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F.3d 1322 (11th Cir. 2000) (affirming trial court's finding that statute was equitably tolled in light of unusual history of case and where petitioner diligently pursued his legal remedies without delay, received incorrect information from counsel as to expiration of statute, and was prevented from discovering the appropriate calculation due to deficiencies in prison library system), *cert. denied*, 70 U.S.L.W. 3707 (U.S. May 20, 2002) (No. 01-7860).

91. *See* Dunlap v. United States, 250 F.3d 1001, 1008–09 (6th Cir. 1998) (citing test put forth in Andrews v. Orr, 851 F.2d 146 (6th Cir. 1988)), *cert. denied*, 122 S. Ct. 649 (2001).

92. *See* Fahy v. Horn, 240 F.3d 239, 244–45 (3d Cir.) (electing to grant equitable tolling "under the facts of this capital case where there is no evidence of abuse of the process" because, "as the Supreme Court has repeatedly stated, . . . 'death is different,' . . . [and] the consequences of error are terminal"), *cert. denied*, 122 S. Ct. 323 (2001); *see also* Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (suggesting that actual innocence or uncontrollable circumstances that prevent inmate from timely filing amount to "rare and exceptional circumstances," thus rendering one-year statute of limitations subject to equitable tolling); Miller v. Marr, 141 F.3d 976, 978 (10th Cir. 1998) (implying that actual innocence may be grounds for equitable tolling of the § 2244(d)(1) limitations period). As noted by Professors Hertz and Liebman, HERTZ & LIEBMAN, *supra* note 5, § 5.2b, at 272 & n.95, four Supreme Court Justices have stated somewhat similar views: Justice Stevens, joined by Justice Souter, has found that nothing in the text or legislative history of AEDPA

> precludes a federal court from deeming the limitations period tolled for . . . a petition as a matter of equity . . . [and] a federal court might very well conclude that tolling is appropriate . . . [for] the class of petitioners whose timely filed habeas petitions remain pending in district court past the limitations period, only to be dismissed after the court belatedly realizes that one or more claims have not been exhausted. . . . [E]quitable considerations may make it appropriate for federal courts to fill in a perceived omission on the part of Congress by tolling AEDPA's statute of limitations.

Duncan v. Walker, 533 U.S. 167, 183–84 (2001) (Stevens, J., concurring in part and concurring in the judgment). In the same case, Justice Breyer, joined by Justice Ginsburg, dissented, commending Justice Stevens's "sound suggestion[] that district courts . . . employ equitable tolling . . . [to] ameliorate some of the unfairness of the majority's interpretation" of the statutory tolling provision of AEDPA. *Id.* at 192 (Breyer, J., dissenting).

relevant supporting evidence with all due diligence. For instance, the Fifth Circuit has stated that "'[e]quitable tolling applies principally where the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights.'"[93] Moreover, a petitioner must diligently pursue post-conviction relief.[94]

Unless a petitioner who claims that innocence should equitably toll the statute of limitations presents circumstances that occurred immediately before or during the limitations period that prevented her from timely filing the petition, the claim of actual innocence suffers from a lack of "newness"—in other words, the petitioner could have raised the same claim during the one-year limitation period.[95] Establishing diligent pursuit of the newly discovered evidence therefore becomes critically important and, particularly for pro se petitioners, quite difficult to prove. Thus, while there are certainly instances in which innocence might justify tolling the statute of limitations, to date there is no clear indication that actual innocence per se constitutes an extraordinary circumstance that warrants equitable tolling.[96] Courts have held that, at the very least, a petitioner must establish "circumstances beyond his control or government misconduct" which contributed to missing the filing deadline.[97]

That innocence has even become part of the equitable tolling analysis is notable, since importing the issue of innocence into a discussion of equitable tolling at all reflects a significant doctrinal shift. Historically, the doctrine of equitable tolling had nothing to do with innocence. The doctrine long referred to

93. Coleman v. Johnson, 184 F.3d 398, 402 (5th Cir. 1999) (quoting Rashidi v. Am. President Lines, 96 F.3d 124, 128 (5th Cir. 1996)).

94. *See, e.g.*, Melancon v. Kaylo, 259 F.3d 401, 408 (5th Cir. 2001); *see also* Ott v. Johnson, 192 F.3d 510, 514 (5th Cir. 1999) (stressing that timing of when to file petition which thereby tolls statute of limitations is a matter entirely within petitioner's control), *cert. denied,* 529 U.S. 1099 (2000).

95. Moore v. Johnson, No. 05-95-01844-CR, 2001 WL 1041798, at *2 (N.D. Tex. Aug. 31, 2001).

96. *Compare* West v. Kaiser, 7 Fed. Appx. 821, 823 (10th Cir. 2001) (noting that actual innocence is one example of a rare and exceptional circumstance justifying equitable tolling of AEDPA's statute of limitations), *with* United States v. Zuno-Arce, 25 F. Supp. 2d 1087, 1099 (C.D. Cal. 1998), *aff'd*, 209 F.3d 1095 (9th Cir. 2000) ("A claim of actual innocence would not constitute an 'extraordinary circumstance,' as that term is understood in the context of equitable tolling."), *aff'd*, 209 F.3d 1095 (9th Cir.), *amended*, 245 F.3d 1108 (9th Cir. 2000), *mandate stayed*, 271 F.3d 953 (9th Cir. 2001). *See also* Virginia E. Harper-Ho, *Tolling of the AEDPA Statute of Limitations:* Bennett, Walker *and the Equitable Last Resort*, 4 CAL. CRIM. LAW REV. 2, ¶ 37 (2001), *at* http://www.boalt.org/CCLR/v4/v4harper.htm ("[I]t is far from clear what type of showing a petitioner must make to uphold [equitable tolling in case of actual innocence], particularly where the claim is one of factual, rather than legal, innocence. Because many prisoners maintain their innocence, a mere assertion of innocence will not likely be deemed 'extraordinary' for the purposes of § 2244(d).").

97. *Zuno-Arce*, 25 F. Supp. 2d at 1099; *see also* Pacheco v. Artuz, No. 97 CIV 5954, 2002 WL 372913, at *4 (S.D.N.Y. Mar. 8, 2002) (finding that petitioner's claim that witness recanted his previous identification of petitioner and affirmatively stated that petitioner was not killer is not barred for lack of newness because petitioner could not have "discovered" fact that main prosecution witness perjured himself at trial).

the *timing* of a petitioner's habeas corpus petition, rather than to the merits of the underlying claim. The courts' willingness to consider equitable tolling as a possible remedy for time-barred innocent prisoners reveals their general discomfort with such cases. Bringing innocence questions into the equitable-tolling analysis suggests that courts do, in fact, view innocence as highly relevant. But while some federal courts have recognized that the doctrine might enable particular time-barred innocent petitioners to have their claims heard, this avenue of relief is certainly not a well-defined or undisputed means for gaining access to federal court.

2. Original Habeas Corpus Petition

Another possible avenue of relief for a petitioner barred by the statute of limitations might be the filing of an original habeas corpus petition with the United States Supreme Court. In *Felker v. Turpin*,[98] the Court acknowledged that AEDPA removed its jurisdiction to grant a writ of certiorari to review a decision by a court of appeals to deny a motion to file a successive habeas corpus petition, but held that AEDPA does not disturb the Court's own jurisdiction to hear original habeas corpus petitions filed under 28 U.S.C. §§ 2241 and 2254.[99] Nevertheless it is unrealistic to think that an original habeas corpus proceeding in the Supreme Court could provide an adequate alternative mechanism for obtaining federal review.

Satisfying the "exceptional circumstances" requirements of Supreme Court Rule 20.4(a)[100]—which must be met in order for the Court to take jurisdiction on an original petition—is particularly difficult. As a result, the Supreme Court rarely, if ever, exercises its jurisdiction over such original habeas corpus petitions,[101] and it would make little practical sense for AEDPA's statute of

98. 518 U.S. 651 (1996).

99. *Id.* at 660–61 (noting that "[n]o provision of Title I mentions our authority to entertain original habeas petitions," and the statute "makes no mention of our authority to hear habeas petitions filed as original matters in this Court"). As a general matter, federal courts have jurisdiction to entertain a state prisoner's habeas corpus petition if the confinement is the result of a violation of federal law. *See* 28 U.S.C. § 2241 (1994); *see also* 28 U.S.C. § 2254(a) (1994) (federal judges shall entertain habeas corpus applications on behalf of persons in custody pursuant to state court judgments on the ground that petitioners are being held in violation of the Constitution or laws and treaties of the United States). The habeas corpus provisions of AEDPA limit the jurisdiction of the Supreme Court and the United States courts of appeals to hearing appeals of habeas corpus petitions from lower federal courts. *See* 28 U.S.C. §§ 2244(b)(3), 2253 (Supp. V 1999); FED. R. APP. P. 22(a). Moreover, the courts of appeals are barred from considering original habeas corpus petitions, and an original habeas corpus petition filed with a circuit judge must be transferred to the appropriate district court. *See* 28 U.S.C. § 2253(c) (Supp. V 1999); FED. R. APP. P. 22(a).

100. Supreme Court Rules require original petitioners, in order "[t]o justify the [Court's] granting of a writ of habeas corpus," to "show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." SUP. CT. R. 20.4(a).

101. *See, e.g.*, *In re* McDonald, 489 U.S. 180, 184–85 (1989) (per curiam) ("[W]e have not granted [an original habeas corpus petition] . . . for at least a decade. We have emphasized that

limitations to divert time-barred innocent petitioners away from filing in federal district court and toward filing original habeas corpus petitions in the Supreme Court instead. That said, one commentator has convincingly argued that AEDPA "radically changed" the Supreme Court's traditional exercise of original habeas corpus jurisdiction, and that the statute's restrictions on federal jurisdiction have "necessitate[d] that some . . . prisoners now seek federal review in the Supreme Court by means of original habeas corpus petitions."[102] Until the Supreme Court indicates a willingness to change its traditional reception of such petitions, however, this alternative route has little to offer time-barred innocent petitioners.

3. Relief in State Court Systems

Opponents of broad federal review contend that regardless of any alterations made to the scope of federal habeas corpus, a state prisoner always has the opportunity to pursue relief in state court. Briefly stated, however, complete reliance on the state court system as a mechanism for relief is insufficient.

As a preliminary matter, whereas the one-year statute of limitations under AEDPA constitutes an arguably narrow limitations period, many states offer even shorter periods within which new evidence may be presented.[103] More critically, however, empirical studies reveal that serious constitutional errors are passed over by state courts during postconviction review at a disturbingly high rate.[104] Explanations for this phenomenon abound, including the argument that

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extraordinary writs are, not surprisingly, 'drastic and extraordinary remedies,' to be 'reserved for really extraordinary causes,' in which 'appeal is clearly an inadequate remedy.'" (quoting *Ex parte* Fahey, 332 U.S. 258, 259 (1947)); HERTZ & LIEBMAN, *supra* note 5, § 40.3, at 1700 ("However the original habeas corpus jurisdiction of Supreme Court Justices and the Supreme Court itself is defined, that jurisdiction is rarely exercised." (citing SUP. CT. R. 20.4(a))).

102. Stevenson, *supra* note 44, at 782.

103. *See* Lissa Griffin, *The Correction of Wrongful Convictions: A Comparative Perspective*, 16 AM. U. INT'L L. REV. 1241, 1293–94 (2001) (arguing that "[i]n many states, a very short statute of limitations [for granting new trial on newly discovered evidence] makes relief virtually unattainable"). Griffin collects the relevant statutes of all fifty states, showing that four states (Florida, Hawai'i, South Dakota, Utah) have 10-day time limits; one state (Minnesota) has a 15-day limit; one state (Wisconsin) has a 20-day limit; one state (Virginia) has a 21-day limit; one state (Missouri) has a 25-day limit; eight states (Alabama, Arkansas, Illinois, Indiana, Mississippi, Montana, Tennessee, Texas) have 30-day limits; one state (Michigan) has a 42-day limit; one state (Arizona) has a 60-day limit; four states (Louisiana, Maryland, Oklahoma, Washington) have 1-year limits; eight states (Alaska, Delaware, Kansas, Maine, Nevada, New Mexico, Vermont, Wyoming,) and the District of Columbia have 2-year limits; and four states (Connecticut, Nebraska, New Hampshire, North Dakota) have 3-year limits. *Id.* at 1294 n.202. Eight states (California, Colorado, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, South Carolina) have no time limit, and six states (Georgia, Idaho, Iowa, Kentucky, Ohio, and Oregon) have time limits (ranging from five days to one year) that can be waived. *Id.*

104. A recent study of capital cases reveals that federal habeas corpus courts found serious error in forty percent of the capital judgments they reviewed, despite the fact that these capital judgments previously underwent state direct appeals and state post-conviction reviews. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995, at 68, *available at* http://www.justice.policy.net/jpreport, *reprinted in part in* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1849 (2000);

most state judges are elected to the bench and are therefore prone to considering the political implications of their decisions.[105]

As the foregoing discussion indicates, state statutory schemes, as well as institutional differences, render reliance on state court systems alone inadequate to remedy the problem of time-barred innocent petitioners. And arguments concerning the adequacy of state court review aside, a federal court should not and need not abdicate its place in the criminal justice system as the protector of the innocent.[106] As one commentator noted, "not only should the innocent defendant

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see also Martin I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965–1988*, 18 N.Y.U. REV. L. & SOC. CHANGE 807, 810 (1990–1991) (noting that review of wrongful homicide convictions in New York State from 1965 to 1988 reveals that "in many of the cases we have studied, the defendant was exonerated only after having spent many years in prison. Often the direct appeals process [in state court] had been exhausted. . . ."); *id.* at 810 n.16 (expressing concern that Supreme Court decisions and efforts made by Congress during late 1980s "may substantially speed the carrying out of death sentences by seriously limiting (if not eliminating) federal judicial review of state capital cases," thereby obviating the critical function provided by federal habeas corpus review in exonerating the innocent); Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 16–17 nn.53–54 (1991) (discussing study of state habeas corpus post-conviction decisions from Butts County, Georgia, from 1983 to 1987, in which relief was denied by state court in twenty-six capital post-conviction cases, although federal habeas corpus courts subsequently found harmful constitutional error in at least fourteen of the same cases); Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677, 681 (2000) ("A death row inmate's best chance of having his conviction and sentence overturned and his constitutional rights vindicated traditionally occurs after filing [for] a writ of habeas corpus in federal court. Federal habeas writs result in reversals of approximately fifty percent of all death sentences." (citations omitted)); Tara L. Swafford, Note, *Responding to* Herrera v. Collins: *Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 607 (1995) (citing statistics showing that federal courts have granted habeas corpus relief in well over fifty percent of capital cases that made it through state appellate and post-conviction proceedings).

105. *See, e.g.*, LIEBMAN ET AL., A BROKEN SYSTEM, *supra* note 104, at 102–12 (showing that certain aspects of state judicial systems, such as "'political pressure' (the extent to which state sentencing and appellate judges are subject to electoral discipline for actions they take as judges), judicial workloads . . . and judicial resources," correlate with capital case error rates); Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1808 (2000) (giving examples of the danger of having capital cases reviewed by elected state judges); Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 (1997) (same); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995) (same); *see also* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1390–91 (4th ed. 1996) [hereinafter HART & WECHSLER] (questioning adequacy of state-court review of innocence claim "in the context of a capital conviction for a heinous murder in a region known for both strong pro-death penalty sentiment and inadequate resources for defense counsel"); Williams, *supra* note 104, at 682 (noting variety of reasons why petitioners typically receive better review in federal habeas corpus); TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY (2000), *available at* http://www.texasdefender.org/study/study.html (comprehensive report on administration of capital punishment in Texas, detailing problems such as lack of statewide public defender system, state misconduct, and lack of in-depth scrutiny given by state courts to state appellate and post-conviction claims).

106. *See* Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's*

not be incarcerated or executed—that is patently obvious—but it is a responsibility of the federal courts to see that this does not occur."[107]

4. Clemency

Another possible avenue for relief for a prisoner barred from federal court review is executive clemency.[108] Clemency, however, also fails to amount to a practical alternative to federal habeas corpus review. As one state judge recently noted, "Clemency . . . has been described as arbitrary, lacking both systematic rules and appellate review, and subject to the whims of the governor's personal preferences and the political pressures borne by him."[109] Indeed, studies on clemency reveal its inconsistent and infrequent application.[110] The unpredictability of clemency procedures aside, innocent prisoners should not be left to rely entirely on the mere grace of a state governor. As one commentator notes, "Indisputably, the governor does have this power [to grant clemency], and may exercise it . . . [although] the opportunity to seek clemency is no substitute for proper judicial procedure."[111] Thus, while clemency is occasionally granted,

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Wrong with It and How to Fix It, 33 CONN. L. REV. 919, 925 (2001) (arguing that "an innocent defendant should not have to rely solely on the goodwill of state officials, who are often guided by political calculations. There is sure to be an occasion in the future where a state official is unwilling to accept DNA evidence exonerating a defendant of a crime. A federal court should be empowered to review this defendant's claim of innocence.").

107. Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 430 (1990–1991).

108. *See* Herrera v. Collins, 506 U.S. 390, 411–12 (1993) ("Clemency . . . is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted.") (footnote omitted).

109. Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence,"* 22 U. ARK. LITTLE ROCK L. REV. 629, 641 (2000).

110. *See, e.g.*, Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255, 272 (1990–1991) (discussing declining use of executive clemency nationally during the latter part of the twentieth century, concluding that "[t]he criminal justice system in its normal operation should not be expected to allot a large role to executive clemency. . . . Those who oppose the death penalty cannot realistically hope to have state governors save them from popular folly."); Daniel T. Kobil, *Chance and the Constitution in Capital Clemency Cases*, 28 CAP. U. L. REV. 567 (2000) (noting significant decrease of commutations granted since reinstatement of death penalty); Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 608 (1991) (arguing that political pressures effectively negate use of executive clemency in most cases). This trend away from granting executive clemency has been particularly clear since the late 1970s. For instance, between 1909 and 1930, forty-six percent of those who received the death penalty in North Carolina had their sentences commuted to life; from 1909 to 1970, 358 prisoners were executed and 236, or forty percent of prisoners under sentence of death, had their sentences commuted or otherwise limited. Gene R. Nichol, *Governors With Power to Spare*, NEWS & OBSERVER (Raleigh, NC), Oct. 10, 2001, at A21. But prior to North Carolina Governor Mike Easley's decision to grant clemency to Robert Bacon, Jr. on October 2, 2001, only three North Carolina death row inmates in nearly twenty-five years had had their sentences reduced to life in prison by the governor. *Id.*

111. Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform*, 83 CAL. L. REV. 485, 506 (1995).

classifying it as some type of safety mechanism ready to protect innocent persons languishing in prisons is unrealistic and impractical.

5. Innocence Protection Act

A final possible alternative avenue for addressing time-barred claims relating to innocence might come in the form of federal legislation, specifically, what has been introduced in Congress as the Innocence Protection Act (IPA) of 2000.[112] Leading versions of the IPA would allow state and federal prisoners to use the results of DNA testing to establish their innocence, regardless of any statutory or procedural prohibition.[113] The IPA, if enacted,[114] would presumably create an exception for any procedurally defaulted or time-barred petitioner who can both qualify under the Act for DNA testing and can use the results of such testing to establish innocence.

Despite the well-deserved attention that DNA evidence has garnered in recent years,[115] innocent prisoners who could exonerate themselves via DNA

112. *See* Innocence Protection Act of 2001, S. 486, 107th Cong. §§ 101–103 (2001); Innocence Protection Act of 2001, H.R. 912, 107th Cong. §§ 102–104 (2001); *see also* Innocence Protection Act of 2000, S. 2073, 106th Cong. §§ 101–104 (2000); Innocence Protection Act of 2000, H.R. 4167, 106th Cong. §§ 101–104 (2000); Innocence Protection Act of 2000, H.R. 4078, 106th Cong. §§ 101–104 (2000); Criminal Justice Integrity and Law Enforcement Assistance Act, H.R. 5000, 106th Cong. §§ 101–102 (2000); The Right to Use Technology in the Hunt for Truth Act, S. 1700, 106th Cong. § 2 (1999).

113. *See, e.g.*, Innocence Protection Act of 2001, S. 486, 107th Cong. §§ 102–103 (2001); Innocence Protection Act of 2000, S. 2073, 106th Cong. §§ 102–103 (2000); Innocence Protection Act of 2000, H.R. 4167, 106th Cong. §§ 102–103 (2000); Innocence Protection Act of 2000, H.R. 4078, 106th Cong. §§ 102–103 (2000). For example, under version S. 486 of the IPA, state prisoners could request and obtain DNA testing at any time after conviction, and the government would be required to preserve potential DNA evidence and pay for DNA testing for indigent defendants. *See* Innocence Protection Act of 2001, S. 486, 107th Cong. § 103 (2001). If the results of such testing are favorable, the IPA would allow the state prisoner to apply for post-conviction relief, "notwithstanding any provision of law that would bar such application as untimely." *Id.* at § 103(a)(1). A similar provision would be created for federal prisoners. *See id.* at § 2291(g)(3) (stating that "if the results of such [DNA] testing are favorable to such person, [the IPA would] allow such person to apply for post-conviction relief, notwithstanding any provision of law that would bar such application as untimely"); *see also* Innocence Protection Act of 2001, H.R. 912, 107th Cong. §§ 102–104 (2001) (House version of same). *But see* Criminal Justice Integrity and Law Enforcement Assistance Act, H.R. 5000, 106th Cong. § 101 (2000) (creating thirty-month period during which prisoners may seek court order for DNA testing).

114. *But see* Karen Christian, *"And the DNA Shall Set You Free": Postconviction DNA Evidence and the Pursuit of Innocence,* 62 OHIO ST. L.J. 1195, 1233 n.173 (2001) (noting that the Innocence Protection Act of 2000 "'represent[s] a significant federal intervention into state judicial procedures, and runs counter to a legislative trend [in recent years] curtailing the rights of Death Row inmates to reopen their cases'" (quoting Mike Dorning, *Senator to Propose Death Row Safeguards*, CHI. TRIB., Feb. 10, 2000, at 1)). Though the passage of the IPA remains in question, state statutes aimed at providing DNA testing for state inmates have met a modicum of success in recent years. *See, e.g.*, Craig Timberg, *Gilmore Signs Bill Permitting Felon DNA Tests; Death Row Inmates Eligible*, WASH. POST, May 3, 2001, at B1 (reporting that Virginia joins fourteen other states to pass laws in past year and a half giving death row inmates new rights to DNA testing).

115. *See, e.g.*, Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment*, 33 CONN. L. REV.

testing are the extreme exception and not the rule.[116] Thus, though the IPA would be an important step toward protecting a certain class of innocent prisoners, it would not provide relief for the bulk of innocent prisoners whose innocence cannot be proven through DNA testing.

As the foregoing discussion makes clear, other suggested means by which a time-barred innocent petitioner may secure relief—equitable tolling of the statute of limitations, an original habeas corpus petition to the Supreme Court, state-court relief, clemency, and the Innocence Protection Act—are inadequate mechanisms to protect the life and liberty interests of those unjustly incarcerated.[117] Such alternative avenues of relief offer insufficient protection to innocent prisoners who run afoul of AEDPA's statute of limitations provision. The subsequent question then becomes whether AEDPA's statute of limitations can be applied so restrictively as to preclude relief for time-barred petitioners who can establish actual innocence. To further test how restrictively or broadly courts can and should read AEDPA's statute of limitations, in Part II I will examine the constitutional dimensions of the statute.

II.
CONSTITUTIONAL EXAMINATION OF AEDPA'S STATUTE OF LIMITATIONS

Despite lingering questions concerning how one might interpret AEDPA's statute of limitations, it is apparent that there is no explicit actual-innocence exception in § 2244(d). The inquiry then becomes whether this raises constitutional concerns.

733, 733 (2001) (noting "marked change in the climate with regard to public discourse about the death penalty in the United States," and that "[t]his is partly due to advances in DNA technology").

116. For example, while 101 people have been released from death row in the United States since 1973, DNA was a critical factor in twelve cases, or approximately 11.8% of all such cases. *See* Death Penalty Information Center, *Innocence: Freed from Death Row*, *at* http://www.deathpenaltyinfo.org/Innocentlist.html (last visited June 29, 2002); *see also* Tabak, *supra* note 115, at 735 (noting that "although the great public emphasis on DNA testing may obscure this[,] . . . science is often unable to provide dispositive results. Notwithstanding all the hoopla surrounding DNA testing, it can be performed only in a small minority of situations in which significant biological evidence from the real culprit is collected properly at the scene of the crime." (citation omitted)). *But see* The Innocence Project, *Case Profiles* (listing 108 persons exonerated through DNA testing), *at* http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration (last visited June 29, 2002); Cynthia Bryant, *When One Man's DNA Is Another Man's Exonerating Evidence*, 33 COLUM. J.L. & SOC. PROBS. 113, 121 (2000) (noting that "[p]ostconviction DNA testing has resulted in the release of sixty-five inmates from prison").

117. For other possible "alternative" avenues that courts have tried see HERTZ & LIEBMAN, *supra* note 5, § 5.2a, at 245–46 (noting some additional "analytic devices that federal courts are employing to adjust the limitations period to avoid unjust results in particular cases," including the "conclu[sion] that the state's excessive delay in invoking the statute of limitations is a ground for excusing a petitioner's failure to comply with the statute" as well as the "require[ment] that district courts (1) advise *pro se* petitioners and section 2255 movants of the need to include all claims in the first petition or motion, so as to guard against foreclosure of claims as a result of AEDPA's restrictions on successive applications, and (2) toll the statute of limitations where necessary to permit a *pro se* petitioner or section 2255 movant who was denied such a 'prophylactic' warning to 'file all of his claims in the correct manner'" (citations omitted)).

A. The Suspension Clause

The only reference to habeas corpus in the United States Constitution appears in the Suspension Clause: "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.[118]" While it is beyond the scope of this article to exhaustively examine the competing arguments surrounding the Suspension Clause, its origins, and its development,[119] the Clause's general contours can help to inform our understanding of how strictly courts can and should read AEDPA's statute of limitations.

As Professor Jordan Steiker notes, "the peculiar phrasing of the Suspension Clause raises doubts about whether the Clause affords prisoners even a qualified entitlement to habeas."[120] The "peculiar phrasing" to which Steiker refers is the Constitution's explicit proscription against suspension of the writ of habeas corpus, except in narrow circumstances, without anywhere vesting the power to *issue* the writ. To say the least, this wording makes it "unclear at first blush to whom [habeas corpus] applies, or what statutory revisions would constitute a violation of the clause."[121] So in addressing the question of whether the Suspension Clause requires that AEDPA's statute of limitations include an actual-innocence exception, an even more fundamental question arises: Does the Suspension Clause require Congress to provide *any* mechanism for federal habeas corpus relief for state prisoners? Or is federal habeas corpus review available to state prisoners merely as "a matter of legislative grace rather than constitutional command?"[122]

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118. U.S. CONST. art. I, § 9, cl. 2.

119. For more detailed explorations of the Suspension Clause see generally Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079 (1995); Eric M. Freedman, *The Suspension Clause in the Ratification Debates*, 44 BUFF. L. REV. 451 (1996); Steiker, *Incorporating the Suspension Clause*, *supra* note 72; Mello & Duffy, *supra* note 69, at 461–72; Sessions, *supra* note 72, at 1521–32.

120. Steiker, *Incorporating the Suspension Clause*, *supra* note 72, at 864.

121. Sessions, *supra* note 72, at 1520; *see also* INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) ("A straightforward reading of the text discloses that it does not guarantee any content to (or even existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended." (citing HART & WECHSLER, *supra* note 105, at 1369 ("[T]he text [of the Suspension Clause] does not confer a right to habeas relief, but merely sets forth whether the 'Privilege of the Writ' may be suspended."))); Erwin Chemerinsky, *Thinking About Habeas Corpus*, 37 CASE W. RES. L. REV. 748, 751 n.14 (1986–1987) ("There simply is no discernable Framers' intent with regard to the specific questions confronting the Supreme Court in defining the scope of habeas corpus.").

122. Sessions, *supra* note 72, at 1521 (citations omitted); *see also St. Cyr*, 533 U.S. at 337 (Scalia, J., dissenting) (contending that federal habeas corpus is not affirmatively guaranteed under the Constitution; "Indeed, that was precisely the objection expressed by four of the state ratifying conventions—that the Constitution failed affirmatively to guarantee a right to habeas corpus." (citing Rex A. Collins, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335, 340 & nn. 39–41 (1952))).

This question is critical to any inquiry concerning the availability and scope of habeas corpus because if the availability of the writ is not mandated in the first instance, subsequent discussions concerning its scope are arguably academic. In 1857, Chief Justice Marshall wrote in *Ex parte Bollman*[123] that "the power to award the writ [of federal habeas corpus] by any of the courts of the United States[] must be given by written law."[124] Thus, one reading of *Bollman* suggests that because the power to grant federal habeas corpus relief falls under the courts' appellate jurisdiction, and because Congress determines federal appellate jurisdiction, federal habeas corpus is a statutorily derived remedy.[125]

There are, however, competing interpretations of *Bollman*. For example, Eric Freedman argues that federal courts possessed common law and state law powers to issue writs of habeas corpus even absent statutory authority.[126] Nevertheless, the generally held view is that while the Supreme Court largely created pre-AEDPA federal habeas corpus doctrine,[127] the power to shape habeas corpus ultimately resides with Congress.[128]

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123. 8 U.S. (4 Cranch) 75 (1807).

124. *Id.* at 94.

125. The Court's holding in *Bollman* that state prisoners have no federal habeas corpus right unless Congress creates one was essentially confirmed in *Ex parte* Dorr, 44 U.S. (3 How.) 103 (1845), where the Court ruled that "neither this nor any other court of the United States, or judge thereof, can issue a [writ of] *habeas corpus* to bring up a prisoner, who is in custody under a sentence of execution of a state court, for any other purpose than to be used as a witness." *Id.* at 105.

126. Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make it So:* Ex parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531 (2000); *see also* Sessions, *supra* note 72, at 1523 n.43 (discussing criticism of the view that Marshall's opinion in *Bollman* stands for the proposition that federal habeas corpus is purely a statutorily derived remedy; critics argue that Marshall actually conceded in *Bollman* that, in fact, Congress had an "obligation" to make habeas corpus relief available).

127. *See* HART & WECHSLER, *supra* note 105, at 204 (2001 Supp.) ("[B]etween 1867 and 1996, Congress amended the habeas statute infrequently, without purporting to make fundamental changes in the jurisdiction. Decisional law wove an intricate web of doctrinal rules, which have changed significantly over time."); Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703, 1709 (2000) ("Prior to the passage of AEDPA, the Court rather than Congress initiated the most significant reforms of the habeas forum." (citing Steiker, *Innocence*, *supra* note 13, at 337–44 (discussing Court-initiated reforms of federal habeas corpus))) [hereinafter Steiker, *Habeas Exceptionalism*]; Forsythe, *supra* note 119, at 1171 (discussing pre-AEDPA evolution of federal habeas corpus doctrine, noting, "[w]hat is left is essentially a policy judgment as to the value and necessity of a second tier of federal appeal over and above the criminal justice system of the states and direct federal review. This is the Court's policy, not Congress's.").

128. *See* Sessions, *supra* note 72, at 1530 ("The implication is that habeas is a remedy grounded in statute, not in the Constitution, and that Congress has broad discretion to modify the remedy as it pleases."); Steiker, *Incorporating the Suspension Clause*, *supra* note 72, at 863 (noting that "the constitutional argument [that federal habeas corpus is a mandated remedy for state prisoners] appears to have been entirely abandoned. The liberal minority on the Court has not mentioned the Suspension Clause in over a decade, and legislative as well as academic supporters of habeas have scarcely alluded to the Constitution as a bulwark against the writ's further demise.").

The Supreme Court has held as much in the few cases in which it has squarely addressed the Suspension Clause argument. In 1971, during an era in which expansive collateral review "gradually evaporated,"[129] the Burger Court held in *Swain v. Pressley*[130] that Congress does not violate the Suspension Clause by limiting the scope of habeas corpus review so long as the limitation does not render the remedy ineffective or inadequate to test the legality of the detention.[131] Chief Justice Burger, in a concurring opinion in which Justices Blackmun and Rehnquist joined, implied that Congress could essentially modify the Court's jurisprudence on the availability and scope of federal habeas corpus for state prisoners in whatever fashion Congress deemed appropriate. "Since I do not believe that the Suspension Clause requires Congress to provide a federal remedy for collateral review of a conviction entered by a court of competent jurisdiction," Burger wrote, "I see no issue of constitutional dimension raised by the statute in question."[132]

The Supreme Court addressed the Suspension Clause again in *Felker v. Turpin*,[133] a case challenging AEDPA's prohibitions on successive habeas corpus petitions. In *Felker*, the Court rejected, inter alia, a state prisoner's Suspension Clause challenge to AEDPA's stringent limitations on the power of the federal courts to entertain such petitions.[134] Chief Justice Rehnquist's opinion found no unconstitutional suspension of the writ, holding that the Court has "recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'"[135] In reaching its conclusion, the Court noted that the "abuse of the writ" doctrine "refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions,"[136] and that AEDPA's "restrictions . . . on second habeas petitions are well within the compass of this evolutionary process, and [therefore] . . . do not amount to a 'suspension' of the writ contrary to Article I, § 9."[137]

While both *Pressley* and *Felker* are powerful examples of the Supreme Court deferring to Congress in matters relating to the actual scope and availability of habeas corpus,[138] neither case squarely controls the question

129. Sessions, *supra* note 72, at 1526.

130. 430 U.S. 372 (1977).

131. *Pressley*, 430 U.S. at 381.

132. *Id.* at 385. Chief Justice Burger repeated his assertions later that same term in *Bounds v. Smith*, 430 U.S. 817 (1977), when he wrote that "it is now clear that there is no broad federal *constitutional* right to such collateral attack [by state prisoners in federal court]. . . . [W]hatever right exists is solely a creation of federal statute." *Id.* at 835 (Burger, C.J., concurring).

133. 518 U.S. 651 (1996).

134. *Id.* at 664.

135. *Id.* (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996)).

136. *Id.* (quoting McCleskey v. Zant, 499 U.S. 467, 489 (1991)).

137. *Id.*

138. *See* Sessions, *supra* note 72, at 1530 ("The implication is that habeas is a remedy grounded in statute, not in the Constitution, and that Congress has broad discretion to modify the

raised here. Neither *Pressley* nor *Felker* addressed the constitutionality of a statute of limitations for filing a federal habeas corpus petition, nor did either consider the role of a petitioner's innocence. As discussed below, these two factors—a time limitation and innocence—alter the calculus so significantly as to render the Supreme Court's existing Suspension Clause jurisprudence off-point.

Before discussing the effect that the nexus of the statute of limitations and innocence has on our understanding of the Suspension Clause jurisprudence, it is worth noting a broader argument that takes issue with the view that Congress wholly controls the scope and availability of federal habeas corpus. Professor Steiker argues that the history of habeas corpus prior to the ratification of the Fourteenth Amendment, the texts of the Suspension Clause and the Fourteenth Amendment, the Supreme Court's "doctrinal approach to discerning 'nationalized' rights in the Fourteenth Amendment," and "overarching considerations of constitutional structure," taken together, suggest that the Suspension Clause should be incorporated by the Fourteenth Amendment.[139] It would then follow that Congress may limit and restrict habeas corpus so long as it does not encroach upon those rights normally protected under the Fourteenth Amendment.

Indeed, the Court's period of expanding the writ during the 1950s and 1960s seems to support Steiker's view of the writ's scope. Notwithstanding the original intended scope of habeas corpus, the Warren Court's decisions indicated that the writ had essentially evolved into a fundamental right for both state and federal prisoners.[140] Steiker contends that while the Constitution did not originally prohibit suspending the writ as to state prisoners, there now exists a constitutional right to federal habeas corpus relief. The incorporation concept, Steiker argues, reflects the post-Civil War era's heightened concern for the supremacy of federal law and for the potential abuse of state power.[141] Despite the compelling points raised by Steiker's thesis, however, his argument has yet to gain wide judicial approval.[142]

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remedy as it pleases."); Steiker, *Incorporating the Suspension Clause*, *supra* note 72, at 863 (noting that the constitutional argument that federal habeas corpus is a mandated remedy for state prisoners "appears to have been entirely abandoned. The liberal minority on the Court has not mentioned the Suspension Clause in over a decade, and legislative as well as academic supporters of habeas have scarcely alluded to the Constitution as a bulwark against the writ's further demise.").

139. Steiker, *Incorporating the Suspension Clause*, *supra* note 72, at 868.

140. *See infra* notes 158–59 and accompanying text.

141. Steiker, *Incorporating the Suspension Clause*, *supra* note 72, at 899–912.

142. At least one court has accepted the incorporation theory and found that application of the statute of limitations to bar the filing of a first federal habeas corpus petition was an unconstitutional "suspension" of the writ:

> In light of the exclusivity of the habeas remedy to challenge a prisoner's confinement, and the judicial and statutory expansion of federal habeas preceding adoption of the Fourteenth Amendment, the Due Process Clause should be read to include the right of a state prisoner to challenge the constitutionality of the fact of his confinement in a

Despite the practical shortcomings of Steiker's thesis, there are still forceful arguments for why *Pressley* and *Felker* fail to control the issue of whether AEDPA can constitutionally preclude a time-barred innocent petitioner from obtaining habeas corpus relief. In *Felker*, for instance, the Court left untouched the question of whether, and to what extent, Congress might go further than it already had by limiting the availability of successive petitions. Rather, the *Felker* Court read AEDPA's limitation on successive petitions as simply extending the pre-existing doctrine on abuse of the writ.[143] Had the Court been faced with the question of AEDPA's statute of limitations, the final analysis would have almost certainly been different. As then-District Court Judge Sotomayor noted in comparing AEDPA's statute of limitations with its successive-petition provision, "The 'abuse of the writ' doctrine, the evolving scope of which *Felker* held to encompass the successive-petition limitations of the AEDPA, is a 'modified res judicata' doctrine which has only applied to the problem of successive petitions; it has never encompassed *time limits* applicable to first petitions."[144]

Of course, it is critical to note that Suspension Clause challenges to AEDPA's statute of limitations have had little success in federal district courts.[145] These lower court decisions have held that, so long as the procedural limits on habeas corpus leave petitioners with some reasonable opportunity to have their claims heard on the merits, the limitation period does not violate the Court's Suspension Clause jurisprudence by rendering the writ inadequate or ineffective to test the legality of the detention in question. Courts have held this despite the fact that barring *initial* habeas corpus petitions through the strict enforcement of AEDPA's statute of limitations is significantly different from prohibiting a *second* or *successive* petition, which the Court in *Felker* considered constitutional.[146] Along the lines of the Court's holding in *Pressley*, so long as the petitioner has a fair opportunity to raise her claims in a competent court, and

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federal habeas corpus proceeding.

Rosa v. Senkowski, No. 97 CIV. 2468, 1997 WL 436484, at *11 (S.D.N.Y. Aug. 1, 1997). *But see* Rodriguez v. Artuz, 161 F.3d 763, 764 (2d Cir. 1998), *aff'g* 990 F. Supp. 275, 277–78, 283–84 (S.D.N.Y. 1998) (disavowing *Rosa*'s interpretation of AEDPA's statute of limitations).

143. The Court stated:

> The new restrictions on successive petitions constitute a modified res judicata rule, a restraint on what is called in habeas corpus practice "abuse of the writ." . . . The added restrictions which the Act places on second habeas petitions are well within the compass of th[e] evolutionary process [of the doctrine of abuse of the writ], and we hold that they do not amount to a "suspension" of the writ contrary to Article I, § 9.

Felker v. Turpin, 518 U.S. 651, 664 (1996).

144. *Rodriguez*, 990 F. Supp. at 279 (emphasis added) (citing McCleskey v. Zant, 499 U.S. 467, 477–89 (1991)).

145. *See supra* note 72 and accompanying text.

146. *See* Lonchar v. Thomas, 517 U.S. 314, 324 (1996) ("Dismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty."). *But see* Coleman v. Thompson, 501 U.S. 722, 757 (1991) (restricting initial federal habeas corpus petition due to procedural rule barring claims not raised in state court).

presuming that no procedural default can be attributed to an inadequate state process, these courts have held that narrowing the window for seeking federal habeas corpus review—even to one year—is not per se unconstitutional.[147] Yet none of the lower court decisions upholding AEDPA's statute of limitations directly faced the question of innocence, which, as *Wyzykowski* illustrates, fundamentally changes the analysis. How and why a court's analysis changes because of a petitioner's potential innocence is explored below.

B. The Role of Innocence in Habeas Corpus

The Supreme Court has been quite explicit in holding that innocent prisoners should be afforded certain protections in order to "balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case."[148] Indeed, over the past thirty years, the Supreme Court has enhanced the relevance of innocence by allowing prisoners who can establish such a claim to overcome certain bars to federal review.

In *Schlup v. Delo*,[149] the Court stressed that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."[150] Quoting from Justice Harlan's famous concurring opinion in *In re Winship*, the *Schlup* majority continued, "That concern is reflected . . . in the 'fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free.'"[151] In the Eleventh Circuit's *Wyzykowski* opinion, Chief Judge Anderson noted that the possible lack of a "miscarriage of justice" exception to AEDPA's statute of limitations "raises concerns because of the inherent injustice that results from the conviction of an innocent person, and the technological advances that can provide compelling evidence of a person's innocence."[152] So while AEDPA's

147. *See* Note, *The Avoidance of Constitutional Questions and the Preservation of Judicial Review: Federal Court Treatment of the New Habeas Provisions*, 111 HARV. L. REV. 1578, 1588 (1998).

148. Schlup v. Delo, 513 U.S. 298, 324 (1995).

149. 513 U.S. 298 (1995).

150. *Id.* at 325.

151. *Id.* (quoting *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring)). *But see* Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1665 (1986) (arguing that the potential execution of innocent people is offset by the moral benefits of doing justice); Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 123 (1988) (arguing that the risk of executing the innocent is an acceptable cost of an otherwise desirable process).

152. Wyzykowski v. Dep't of Corr., 226 F.3d 1213, 1218 (11th Cir. 2000) (citations omitted). In an accompanying footnote, Judge Anderson refers to many recent studies and reports chronicling the profound impact that scientific advances have had on exonerating innocent prisoners. *See id.* at 1218 n.5; Bryant, *supra* note 116, at 117–34 (discussing DNA evidence and its use in post-conviction claims of actual innocence, and noting that "post-conviction DNA testing has resulted in the release of sixty-five inmates from prison"); *Confronting the New Challenges of Scientific Evidence: DNA Evidence and the Criminal Defense*, 108 HARV. L. REV. 1557, 1571–82

one-year limitations period may, in fact, pass constitutional muster,[153] it would be quite another matter to allow it to preclude an innocent prisoner from seeking federal habeas corpus relief altogether.

1. Becoming Relevant: Innocence Emerges in the Habeas Corpus Doctrine

Before exploring the role of innocence within the context of habeas corpus, it is important to state an irrefutable fact: innocent persons have been and continue to be sent to prison, including death row.[154] It is also quite clear that the federal writ of habeas corpus is critical to the protection of such persons.[155]

Despite the phenomenon of wrongfully convicted persons, as well as the important role of federal review as a corrective measure, it is noteworthy that innocence has *not* historically been the most relevant issue with regard to habeas corpus relief.[156] Traditionally, the purpose of federal habeas corpus was to

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(1995) (discussing use of DNA evidence in the postconviction context)); *see also* EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996) (discussing cases in which DNA testing exonerated wrongly convicted persons), *available at* http://www.ncjrs.org/pdffiles/dnaevid.pdf.

153. *See supra* note 72 and accompanying text.

154. *See, e.g.*, Robert R. Bryan, *The Execution of the Innocent: The Tragedy of the Hauptmann-Lindbergh and Bigelow Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 831, 832 n.3 (1990–1991) (listing numerous texts detailing wrongful convictions); CONNORS ET AL., *supra* note 152 (discussing cases in which DNA testing exonerated wrongly convicted persons); JIM DWYER ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000) (detailing ten cases of convicted defendants ultimately released due to discovery of evidence of their actual innocence); Michael L. Radelet, William S. Lofquist & Hugo Adam Bedau, *Prisoners Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T.M. COOLEY L. REV. 907 (1996) (examining cases of innocent prisoners released from death row); MICHAEL L. RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) (reviewing over 400 cases of innocent persons convicted of capital crimes, including twenty-three cases since 1900 where a person who was probably innocent was executed); *see also* Steve Mills et al., *Executions in America*, CHI. TRIB., Dec. 17, 2000, at 1 (reporting study of 682 executions in the U.S. since 1976 which found that at least 120 inmates were executed while proclaiming their innocence); Sara Rimer & Raymond Bonner, *Bush Candidacy Puts Focus on Executions*, N.Y. TIMES, May 14, 2000, at 1 (describing several cases in which executions were carried out despite possibility of innocence). Recently, a federal district court judge, in considering whether to declare the Federal Death Penalty Act unconstitutional because "it cuts off a defendant's ability to establish his actual innocence," stressed his concern for the fact that the criminal justice system fails to prevent wrongful convictions. United States v. Quinones, No. S3-00-CR-761, 2002 WL 724231, at *3 (S.D.N.Y. Apr. 25, 2002) (internal quotes omitted). The court noted: "We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of capital crimes with some frequency." *Id.*

155. *See supra* note 104.

156. *See* HERTZ & LIEBMAN, *supra* note 5, § 2.5, at 91 (noting that "by itself . . . innocence is not ordinarily a sufficient basis for habeas corpus relief"); *see also* Smith v. Armontrout, 888 F.2d 530, 539 (8th Cir. 1989) ("Questions of guilt or innocence . . . are . . . to be decided by the state trial court, subject to direct review on appeal. In a sense, then, innocence is irrelevant in a habeas case: the question is rather whether the conviction and sentence are consistent with the federal Constitution, and this question usually turns, in one form or another, on the fairness of the

enable federal courts to remedy "violations of constitutional rights, not to relitigate issues of guilt or innocence."[157] Indeed, the granting of a writ of federal habeas corpus had little, if anything, to do with a petitioner's guilt or innocence. The past thirty years, however, have seen an intimate coupling of the purpose and scope of habeas corpus relief with issues related to a petitioner's innocence. Innocence is now unquestionably relevant to federal habeas corpus review.

The Warren Court era represented the high-water mark of availability of federal habeas corpus relief to state prisoners who suffered violations of their constitutional rights. In a series of cases in the 1950s and 1960s,[158] the Court expanded the power of federal courts to enforce federal constitutional rules against states and to vindicate the federal constitutional rights of state prisoners as never before.[159] The years following the Warren Court's expansion of federal habeas corpus relief, however, stand in stark contrast. Over the course of the following three decades the Burger and Rehnquist Courts have whittled away at the writ's scope and availability.[160] In doing so, the Court has simultaneously

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procedure used in the state courts.").

157. Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH & LEE L. REV. 1, 4 (1997) [hereinafter Bright, *Is Fairness Irrelevant?*]. In fact, the Supreme Court has not squarely decided whether a claim of actual innocence is itself a substantive constitutional claim (i.e., whether the execution of an innocent person violates the Eighth Amendment). *See* Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming for the sake of argument that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim").

158. *See, e.g.*, Sanders v. United States, 373 U.S. 1, 15 (1963) (holding that successive habeas corpus petition should be precluded "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application; (2) the prior determination was on the merits; and (3) the ends of justice would not be served by reaching the merits of the subsequent application"); Fay v. Noia, 372 U.S. 391 (1963) (finding no jurisdictional bar to federal habeas court hearing procedurally defaulted claim brought by state prisoner and holding that habeas corpus courts have power to hear such claims, though courts may exercise discretion to refuse to hear defaulted claims if petitioner "deliberately bypassed" state procedures and remedies); Townsend v. Sain, 372 U.S. 293 (1963) (holding that federal habeas corpus courts are empowered to hold new evidentiary hearings when facts are in dispute and petitioner did not receive a full and fair hearing in state court); Brown v. Allen, 344 U.S. 443 (1953) (holding that all federal constitutional claims raised by state petitioners are cognizable in federal habeas corpus).

159. *See, e.g.*, *Fay*, 372 U.S. at 401–02 (stressing that the "function [of federal habeas corpus] has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints" and that the federal writ provides "a mode for the redress of denials of due process of law").

160. *See, e.g.*, HERTZ & LIEBMAN, *supra* note 5, § 2.4d, at 72–78 (describing expansion of federal habeas corpus review in the 1960s and its subsequent contraction by Supreme Court); Chen, *supra* note 13 (surveying limits imposed on habeas corpus availability); Panel Discussion, *Capital Punishment: Is There Any Habeas Left in This Corpus*, 27 LOY. U. CHI. L.J. 560 (1996) (discussing the legal and political factors that restrict post-conviction review of death sentences at both state and federal levels); Painter, *supra* note 13, at 1604 ("[T]he Burger and Rehnquist Courts have limited the writ [of habeas corpus] severely, ostensibly in the interest of federalism and the finality of state criminal proceedings."); Steiker, *Innocence*, *supra* note 13, at 337–44 (discussing

created more hurdles for state prisoners who seek federal habeas corpus relief[161] and closed or sharply narrowed substantive grounds for such relief.[162] The justifications for opposing a broad approach to federal habeas corpus were many, including concerns for the evisceration of comity and the lack of finality in state criminal convictions.[163]

Whereas traditionally the writ of habeas corpus provided a mechanism by which to protect the constitutional rights of the guilty as well as the innocent,[164] the Burger and Rehnquist Courts began developing a jurisprudence primarily concerned with constitutional violations related to actual innocence.[165] Fore-

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innocence as a source of the "miscarriage of justice" concept).

161. For example, the Warren Court previously held that an individual convicted in state court may raise claims in her federal habeas corpus petition that were not presented at trial if she could show that she deliberately chose to bypass the state procedures. *See Fay*, 372 U.S. at 72. The Burger Court heightened *Fay*'s "deliberate bypass" standard when it held that claims not raised in state court will be procedurally defaulted unless the petitioner can show good cause for not raising the matter in state court and prejudice from not having federal court review. *See* Wainwright v. Sykes, 433 U.S. 72 (1977). Similarly, whereas the Warren Court previously held that federal courts have the power hold new factual hearings when state court fact-findings are in dispute and the petitioner did not receive a full and fair hearing in state court, *see Townsend*, 372 U.S. at 160, the Burger Court held that a federal evidentiary hearing is available for matters not raised at the trial level only if the petitioner could show "cause and prejudice." *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 8 (1992).

162. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (lowering the harmless error standard for constitutional violations recognized in federal habeas corpus review); Teague v. Lane, 489 U.S. 288, 305–10 (1989) (plurality opinion) (limiting retroactive application of new constitutional decisions for purposes of federal habeas corpus); Patton v. Yount, 467 U.S. 1025, 1038–40 (1984) (requiring deference to fact finding by state court judges); Stone v. Powell, 428 U.S. 465 (1976) (withdrawing habeas corpus review of Fourth Amendment exclusionary rule claims that have been, or could have been, fully litigated in state court).

163. *See supra* note 13; *see also* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1010–11 (1985) (reviewing longstanding criticisms of federal habeas corpus).

164. *See, e.g.*, Schneckcloth v. Bustamonte, 412 U.S. 218, 257 (1973) (Powell, J., concurring) (noting that "history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt"); Irvin v. Dowd, 366 U.S. 717, 722 (1961) (habeas corpus applies "regardless of the heinousness of the crime . . . [or] the apparent guilt of the offender"); Moore v. Dempsey, 261 U.S. 86, 87–88 (1923) (holding "what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their rights have been preserved"); Friendly, *supra* note 13, at 142 (acknowledging but criticizing doctrine allowing habeas corpus review irrespective of guilt or innocence).

165. *See* Bright, *Is Fairness Irrelevant?*, *supra* note 157 (outlining development of actual innocence claims); Ledewitz, *supra* note 107, at 423 (noting that more conservative Justices, while narrowing the scope and availability of the writ, "were willing to create special protection to the innocent defendant"). Some commentators credit Judge Henry Friendly's 1970 Ernst Freund lecture at the University of Chicago as the "intellectual foundation of the Court's change of direction in habeas corpus." Ledewitz, *supra* note 107, at 416; *see also, e.g.*, HART & WECHSLER, *supra* note 105, at 1386 (suggesting profound influence on Justice Powell and others of Judge Friendly's speech, published as *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970), in which Judge Friendly contended that a petitioner who received a fair hearing in state court should only be allowed to collaterally attack a criminal conviction if he makes "a colorable showing that an error, whether 'constitutional' or not, may be producing the continued punishment of an innocent" person, *id.* at 160); Frank J. Remington, *Change in the Availability of Federal Habeas Corpus: Its Significance for State Prisoners and*

shadowing changes to come, Justice Powell wrote in a concurring opinion in *Schneckloth v. Bustamonte*:[166]

> Recent decisions . . . have tended to depreciate the importance of the finality of prior judgments in criminal cases. . . . This trend may be a justifiable evolution of the use of habeas corpus where the one in state custody raises a constitutional claim bearing on his innocence. . . . I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt. . . . We are now faced, however, with the task of accommodating the historic respect for the finality of the judgment of a committing court with recent Court expansions of the role of the writ. This accommodation can best be achieved, with due regard to all of the values implicated, by recourse to the central reason for habeas corpus: the affording of means, through an extraordinary writ, of redressing an unjust incarceration.[167]

In *Stone v. Powell*, three years after *Schneckloth*, the Court again expressed keen "interest in the relationship between innocence claims and habeas relief."[168] Justice Powell's majority opinion in *Stone* held that a state prisoner could not receive habeas corpus relief on a Fourth Amendment claim so long as there had been "an opportunity for full and fair litigation of [the] Fourth Amendment claim" in state court.[169] In distinguishing the relevance in habeas corpus jurisprudence of a possible Fourth Amendment violation from an issue relating to innocence, the *Stone* majority held that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffer an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government."[170] The Court's emphasis on the "truthfinding process" in *Stone* represented a sea change in the Court's approach to habeas corpus jurisprudence.[171] Whereas the vindication of constitutional rights in general had

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State Correctional Programs, 85 MICH. L. REV. 570, 573 (1986) (noting that some members of the Burger Court, "led by Justice Powell, . . . focus[ed] on the guilt/innocence issue . . . to determine when [federal] habeas [relief] is appropriate (Does the alleged error affect the reliability of the fact-finding process?)").

166. 412 U.S. 218, 250 (1973) (Powell, J., concurring).

167. *Id.* at 256–58.

168. Ledewitz, *supra* note 107, at 418 (discussing *Stone*).

169. *Stone*, 428 U.S. at 482.

170. *Id.* at 491 n.31. Members of the Burger Court in the period surrounding *Stone* also lodged various other criticisms of expansive habeas corpus jurisdiction. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482, 508 n.1 (1977) (Powell, J., dissenting) (suggesting that "[a] strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus"); Braden v. 30th Judicial Circuit Court, 410 U.S. 484, 501 (1973) (Blackmun, J., dissenting) ("point[ing] out that we have come a long way from the traditional notions of the Great Writ. The common-law scholars of the past hardly would recognize what the Court has developed . . . and they would, I suspect, conclude that it is not for the better.").

171. *See* Ledewitz, *supra* note 107, at 418 (citations omitted). As Professor Ledewitz notes, however, "[s]ome commentators do not view *Stone* as the beginning of an innocence reorientation on the Court." *Id.* at 418 n.16 (citing Boyte, *Federal Habeas Corpus After* Stone v. Powell*: A*

previously propelled the Court's analyses of habeas corpus claims, the *Stone* decision represented a new approach.[172]

The Court's increasing focus on the relevance of innocence in habeas corpus jurisprudence continued after *Stone*, particularly with the Court's development of the miscarriage-of-justice or actual-innocence doctrine. In 1977, the Court decided *Wainwright v. Sykes*,[173] holding that the petitioner's failure to comply with certain state procedural requirements—in that case, Florida's requirement that a confession's admission be challenged at trial or not at all—rendered his subsequent federal habeas corpus claim procedurally defaulted and barred from review.[174] Overruling its previous standard for petitioners who failed to abide by state procedural rules,[175] the Court articulated a new standard, referred to as the "cause and prejudice" test. The Court held that in order to avoid being procedurally defaulted for failing to comply with some state procedural rule, a petitioner had to show "cause and prejudice." To show "cause," the Court held a petitioner must demonstrate that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule," such as interference by officials that made compliance impracticable.[176] The Court defined "prejudice" as "actual prejudice resulting from the alleged constitutional violation."[177]

Critically, the Court never viewed "cause" and "prejudice" as entirely rigid concepts, due to the fact that any such rigid conception might result in barring an innocent prisoner from collaterally attacking her conviction due to a procedural error. In announcing the "cause and prejudice" rule in *Sykes*, the Court recognized the need for some mechanism to ensure that the procedural default rule "w[ould] not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice."[178] Similar concerns for innocent petitioners facing a procedural bar were stressed a few years later. In *Engle v. Isaac*,[179] the Court noted that "cause" and "prejudice" were not

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Remedy Only for the Arguably Innocent?, 11 U. RICH. L. REV. 291, 297–306 (1977); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 450–59 (1980)).

172. *See* Ledewitz, *supra* note 107, at 416 (commenting that in recent years the Supreme Court has generally taken the "view of habeas corpus as a safety valve for the innocent defendant [which thereby] explains why restrictions imposed by the Court in the areas of successive petitions and procedural default contain exceptions for the innocent defendant").

173. 433 U.S. 72 (1977).

174. *Id.* at 86–87.

175. *See* Fay v. Noia, 372 U.S 391, 438 (1963) (finding no jurisdictional bar to habeas corpus court hearing procedurally defaulted claim and holding that habeas corpus courts have power to hear such claims, though courts may exercise discretion to refuse to hear defaulted claims if petitioner "deliberately bypassed" state procedures and remedies).

176. Murray v. Carrier, 477 U.S. 478, 488 (1986).

177. *Sykes*, 433 U.S. at 84.

178. *Id.* at 91.

179. 456 U.S. 107 (1982).

inflexible requirements meant to bar a defaulted petitioner but were based upon general principles of comity and finality. And "[i]n appropriate cases," Justice O'Connor wrote, "those principles must yield to the imperative of correcting a fundamentally unjust incarceration."[180] As one commentator noted about the Court's creation of both new barriers to the writ and exceptions for innocence claims, "although the right to the new writ might be barred by procedural formality, if there is a claim of actual innocence the federal habeas court will look beyond the formality and examine the legitimacy of detention."[181]

Although the Court deferred the task of giving "precise content . . . [to these] terms . . . [to] later cases,"[182] the Court later supplied substance to the miscarriage of justice doctrine in *Kuhlmann v. Wilson*.[183] In a plurality decision, the *Kuhlmann* Court held that a "miscarriage of justice" exception exists in cases in which a petitioner can make a "colorable showing of factual innocence."[184] To make such a showing, the *Kuhlmann* plurality held that

> the prisoner must "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt."[185]

Following *Kuhlmann*, the Court continued to refine and rely upon the "miscarriage of justice" doctrine as it proceeded to erect barriers to federal review of state habeas corpus petitions.[186]

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180. *Id.* at 135; *see also Carrier*, 477 U.S. at 515 (Stevens, J., concurring) (stressing that "appellate procedural default should not foreclose habeas corpus review of a meritorious constitutional claim that may establish the prisoner's innocence").

181. Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 248, 323–24 (1988).

182. *Sykes*, 433 U.S. at 91.

183. 477 U.S. 436 (1986).

184. *Id.* at 454.

185. *Id.* at 454–55 n.17 (quoting Friendly, *supra* note 13, at 160 (footnote omitted)).

186. *See, e.g.*, Keeney v. Tamayo-Reyes, 504 U.S. 1, 12 (1992) ("[F]ailure to develop a claim in state-court proceedings will be excused and a hearing mandated if [the petitioner] can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing."); McCleskey v. Zant, 499 U.S. 467, 495 (1991) (discussing the miscarriage of justice exception to the abuse-of-the-writ doctrine, and stating that the exception "serves as 'an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty'" (quoting Stone v. Powell, 428 U.S. 465, 492-93 n.31 (1976))); Murray v. Carrier, 477 U.S. 478, 496 (1986) (even where the showing to excuse a procedural default cannot be made, the writ may be granted "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Kuhlmann*, 477 U.S. at 454 (holding that the "ends of justice" exception to the general bar against successive petitions "require[s] federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence"); *see also* Calderon v. Thompson, 523 U.S. 538 (1998) (holding that when a court of appeals recalls its mandate to revisit the merits of its earlier decision denying habeas corpus relief in a case not involving clerical error in judgment, fraud on the court, or a stay pending disposition of suggestion for rehearing en banc, absent a strong showing of actual innocence, the state's

As the foregoing shows, concomitant with its gradual narrowing of federal review, the Court repeatedly insisted that petitioners with evidence of actual innocence be allowed to litigate their claims. As Professor Steiker notes, "in tightening the procedural rules governing defaulted, abusive, or successive claims, the Court has consistently affirmed a 'safety valve' for a petitioner who 'supplements a constitutional claim with a 'colorable showing of actual innocence.'"[187]

While the Court's increased focus on the "centrality of innocence to the availability of a federal forum"[188] is illuminating, it is worth emphasizing that the Court's emphasis on innocence has been greeted with dismay by various proponents of habeas corpus relief who argue against the creation of a hierarchy of constitutional rights based upon their relation to innocence.[189] Despite such criticisms, however, it is evident that prior to AEDPA's passage in 1996, habeas corpus jurisprudence had developed to the point where a prisoner's innocence was perhaps the most "necessary condition of habeas corpus relief" in that it "provid[es] a sufficient basis for avoiding otherwise preclusive defenses to habeas corpus relief."[190]

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interests in finality are all but paramount and outweigh the prisoner's interest in obtaining another opportunity for review).

187. Steiker, *Innocence*, *supra* note 13, at 304–05 (quoting Ledewitz, *supra* note 107); *see also* McCleskey v. Zant, 499 U.S. 467, 495 (1991)); Alexander v. Keane, 991 F. Supp. 329, 338 (S.D.N.Y. 1998) ("In fact, the Supreme Court has often justified pruning back the scope of federal habeas review by cutting away those aspects which do not bear on actual innocence." (citations omitted)); Friedman, *supra* note 111, at 530 (noting that in the Court's "zeal to reform habeas" it still "cannot help itself from creating exceptions. . . . The Court should, and does, worry that in curtailing habeas it is closing a door to what might be a valid claim. . . . So, for every door it shuts, the Court creates several escapes.").

188. Steiker, *Innocence*, *supra* note 13, at 304.

189. *See, e.g.*, Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 971–72 (1991) (arguing that the focus on factual innocence is inconsistent with the habeas corpus statute, 28 U.S.C. § 2254(a) (1988), and unprotective of other significant values); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988) (arguing against a hierarchy of constitutional rights based on their relation to innocence); *see also* Bright, *Is Fairness Irrelevant?*, *supra* note 157, at 24–25 ("Fairness . . . matters because courts make many other decisions in criminal cases besides guilt or innocence. . . . [It also] matters because of the professed commitment of courts to keep improper influences, such as racial prejudice, from influencing the outcome of cases." (citations omitted)). *But see, e.g.*, Ledewitz, *supra* note 107, at 431 (arguing that "protecting the innocent defendant is fundamentally fair because innocent and guilty defendants are not 'similarly situated.' In fact, justice requires that the guilty and the innocent not be treated in the same way."); Joseph L. Hoffmann & William J. Stuntz, *Habeas after the Revolution*, 1993 SUP. CT. REV. 65, 113–14 (urging the Court to expand habeas corpus review of criminal cases in which there is a showing of actual innocence and to contract review in cases in which there is no issue of actual innocence).

190. HERTZ & LIEBMAN, *supra* note 5, § 2.5, at 100; Friedman, *supra* note 111, at 508 ("A showing of actual innocence became the panacea for every ill that might be spoken of the many procedural hurdles erected by the Court's habeas reform efforts."); *see also* Steiker, *Innocence*, *supra* note 13, at 375 (noting a few years prior to AEDPA's passage that despite the gradual winnowing of federal habeas corpus relief for state prisoners there has always been an allowance for "habeas courts to overlook procedural obstacles to prevent the continued incarceration (or execution) of innocent persons").

Perhaps nothing speaks louder of the critical role of innocence within the context of habeas corpus than the fact that in many instances the Court often explicitly *justified* pruning back the scope of federal habeas corpus review by noting that it was excising those aspects that did *not* bear on actual innocence.[191] In addition, the Court stressed that this powerful interest in correcting an unjust incarceration or sentence existed without regard to when the correction was made. As the Court stated in *Kuhlmann*,

> Even where . . . the many judges who have reviewed the prisoner's claims in several proceedings provided by the State and on his first petition for federal habeas corpus have determined that his trial was free from constitutional error, a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.[192]

2. Establishing a "Colorable Claim" of Actual Innocence

The Court has been quite clear in stating that the actual-innocence or miscarriage-of-justice exception to bars on habeas corpus relief is narrow, implicated only in "an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent."[193] In order to prevail, a petitioner cannot merely cast doubt upon the validity of her conviction, but must identify evidence that affirmatively demonstrates her innocence.[194]

The Court-created exceptions for innocent prisoners are not based on the principle that the incarceration or execution of an innocent person is per se unconstitutional; rather, "innocence may be used as a 'gateway' through which a habeas petitioner must pass to have her or his otherwise barred habeas corpus petition considered on the merits."[195] In other words, a petitioner's claim of innocence under habeas corpus jurisprudence operates as a procedural mecha-

191. *See, e.g.*, Dugger v. Adams, 489 U.S. 401, 410–11 (1989) (holding that while trial judge's instruction amounted to constitutional error, it was not grounds for relief, noting that "[d]emonstrating than an error is by its nature the kind of error that might have affected the accuracy of the death sentence is far from demonstrating that an individual defendant probably is 'actually innocent' of the sentence he or she received."); Wainwright v. Sykes, 433 U.S. 72, 91 (1977) (recognizing need for some mechanism to ensure that the "cause and prejudice" rule "will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice"); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976) (holding that Fourth Amendment claims are not cognizable in federal habeas corpus because petitioner "is usually asking society to redetermine an issue that has no bearing on the basic justice of his incarceration" and does not remove a "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty").

192. *Kuhlmann*, 477 U.S. at 452.

193. Murray v. Carrier, 477 U.S. 478, 496 (1986).

194. *See* Schlup v. Delo, 513 U.S. 298, 327 (1995).

195. Herrera v. Collins, 506 U.S. 390, 404 (1993).

nism rather than a substantive claim.[196] To have practical and legal effect, a colorable showing of actual innocence must be linked to some recognized habeas corpus claim (e.g., ineffective assistance of counsel or prosecutorial misconduct). In capital cases, two sorts of actual-innocence claims can be raised. The petitioner can be "actually innocent" of the crime for which he was convicted, as when the wrong person was convicted of the crime,[197] or the petitioner can be "actually innocent" of a death sentence, i.e., the petitioner was guilty of the underlying crime but the death penalty should not have been imposed.[198] In noncapital cases, actual-innocence claims as to the underlying crime, as in *Wyzykowski*, apply with equal force. It is less clear, however, whether an actual-innocence exception extends to noncapital sentencing cases.[199]

The case of Paris Carriger is illustrative as one example of the actual-innocence or miscarriage-of-justice doctrine enabling a petitioner to overcome a preclusive defense.[200] In 1978, Carriger was convicted and sentenced to death in Arizona. The state court denied his petition for collateral relief, and the federal district court in Arizona next denied his petition for a writ of habeas corpus. Years later, Carriger filed a second habeas corpus petition in which he alleged, inter alia, that he was innocent and that the state prosecutors had withheld exculpatory evidence in violation of the Constitution. The constitutional claim Carriger raised could have been raised in his first federal habeas corpus petition, and ordinarily he would have been barred under the abuse-of-the-writ doctrine.

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196. *See Schlup*, 513 U.S. at 314 (holding that petitioner's "constitutional claims are based not on his innocence, but rather on his contention that [some other constitutional violation] denied him the full panoply of protections afforded to criminal defendants by the Constitution" (citations omitted)).

197. *See id.*

198. *See* Sawyer v. Whitely, 505 U.S. 333 (1992); *see also generally* Ledewitz, *supra* note 107, at 432–49 (examining the "meaning and method of innocence" of the underlying offense and of the sentence in habeas corpus).

199. *Compare* Sones v. Hargett, 61 F.3d 410, 419 n.16 (5th Cir. 1995) (noting that the Fifth Circuit "has never explicitly held that the actual innocence standard can extend to non-capital sentencing procedures, an issue the Supreme Court has not yet addressed," although past circuit precedent "assumed without deciding that the standard would so extend" (referring to Smith v. Collins, 977 F.2d 951, 959 (5th Cir. 1992), *cert. denied,* 510 U.S. 829 (1993))), *and* Jones v. Arkansas, 929 F.2d 375, 381 & n.16 (8th Cir. 1991) (suggesting that petitioner might be actually innocent of noncapital sentence in certain circumstances)), *with* United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) (holding that a "person cannot be actually innocent of a noncapital sentence" (citations omitted)). *See also* James J. Sticha, *To Be or Not to Be? The Actual Innocence Exception in Noncapital Sentencing Cases*, 80 MINN. L. REV. 1615 (1996) (arguing that actual-innocence exception should extend to certain noncapital sentencing cases). Where the defendant pleaded guilty at trial, as in *Wyzykowski*, and therefore did not have his evidence evaluated by a jury, the standard for establishing a claim based on actual innocence remains the same (i.e., the petitioner still must show that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him"). Bousley v. United States, 523 U.S. 614, 623 (1998) (internal quotation marks omitted).

200. Stewart v. Carriger, 132 F.3d 463 (9th Cir. 1997) (en banc), *cert. denied*, 523 U.S. 1133 (1998). The following recitation of facts is drawn from the court's discussion of the procedural history. *See id.* at 466–68.

Despite the fact that Carriger was filing a successive petition, a federal court considered his claims on the merits because he "accompanie[d] his claim of actual innocence with substantial claims of constitutional violations at trial,"[201] bringing him within the "'narrow class of cases . . . implicating a fundamental miscarriage of justice.'"[202]

By linking his claim of innocence to a constitutional violation, prosecutorial misconduct, Carriger was able to overcome the bar on successive petitions. Had he merely alleged that he was innocent, yet not included the claim of prosecutorial misconduct, his petition almost certainly would have been rejected, because a "freestanding" claim of innocence is insufficient to obtain habeas corpus relief in federal court.[203]

As the Court stressed in *Herrera v. Collins*, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[204] Though the Court suggested a very narrow exception to this rule, noting that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim,"[205] the Court emphasized that such relief would be quite rare, as "the threshold showing for such an assumed right would necessarily be extraordinarily high."[206] Moreover, the Court merely assumed such a premise for the sake of argument.[207]

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201. *Id.* at 477.

202. *Schlup*, 513 U.S. at 315 (quoting McCleskey v. Zant, 499 U.S. 467, 494 (1991)).

203. *See* Herrera v. Collins, 506 U.S. 390, 416 (1993). *But see generally* Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 327 (1998) (noting "absurdity" of fact that making a colorable showing of innocence "is only an occasion for reaching the merits of [the] constitutional claims," so that if those "claims turn out to be unpersuasive, the court must deny relief" to a likely innocent prisoner).

204. *Herrera*, 506 U.S. at 400; *see also* HART & WECHSLER, *supra* note 105, at 1390 (noting that Court's decision in *Herrera* stressed that "[t]he function of habeas review . . . was to redress federal constitutional violations, not to correct factual errors, and review of innocence claims standing alone would severely disrupt the strong state interest in finality"). *But see* Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 503 (1996) (arguing that "the execution of an innocent person violates the Eighth and Fourteenth Amendments. There can be no sufficient constitutional justification for taking innocent life."); Hoffmann & Stuntz, *supra* note 189, at 97 (arguing that a "naked" claim of innocence, such as the one presented in *Herrera*, should constitute a valid habeas corpus claim).

205. *Herrera*, 506 U.S. at 417.

206. *Id.*; *see also Schlup*, 513 U.S. at 317 ("If there were no question about the fairness of the criminal trial, a *Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts *unquestionably* establish [petitioner's] innocence." (emphasis added)). In *Herrera*, the petitioner failed to meet the "truly persuasive" standard because his affidavits were based mostly upon hearsay, were obtained without benefit of cross-examination, contained inconsistencies, and did not overcome the strong proof of guilt presented at trial. *See Herrera*, 506 U.S. at 869–70. For other examples of cases in which the petitioners failed to satisfy the "truly persuasive" threshold in free-standing innocence claims see, for example, *Bowman v.*

The Supreme Court offered two explanations for why the threshold for the miscarriage-of-justice exception (in which the petitioner's innocence is linked to a recognized habeas corpus claim) is lower than the "extraordinarily high" threshold for freestanding claims of innocence. First, the miscarriage-of-justice exception does not itself provide an independent basis for relief. Instead, the basis for relief is the underlying constitutional violation being alleged. Moreover, because a petitioner claiming to fall within the miscarriage-of-justice exception asserts at least one constitutional error at trial, the petitioner's conviction is not entitled to the same degree of respect as a conviction concededly free of constitutional taint.[208] As a result, a petitioner asserting *both* innocence *and* constitutional error "need carry less of a burden" with respect to innocence than a petitioner like Herrera who claimed only innocence.[209] Yet as the foregoing discussion illustrates, despite the narrowness of the actual-innocence exception, the view of habeas corpus as an ever-available remedy for innocent prisoners remained constant during the course of the changes wrought on habeas corpus by the Burger and Rehnquist Courts.

3. The Actual-Innocence Exception: Must One Exist?

Though recognizing the need to provide some level of recourse for otherwise-barred innocent prisoners, the Court has never held that an actual-innocence exception is constitutionally required. This is largely because the miscarriage-of-justice exception has always been applied either to overcome procedural hurdles of the Court's own making[210] or as a means of giving substance to a discretionary power vested in the federal courts by statute.[211] That said, the power of habeas corpus courts to vindicate an innocent prisoner's right to freedom and liberty has long been justified by the Court, and is now sewn firmly into the fabric of habeas corpus jurisprudence. As Professors Hertz and Liebman note, Justice Scalia, to name one, has interpreted pre-AEDPA case law as indi-

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Gammon, 85 F.3d 1339, 1343 (8th Cir. 1996) (newly discovered evidence of deal between state prosecutor and testifying codefendant did not warrant relief under *Herrera*); Stockton v. Angelone, 70 F.3d 12, 14 (4th Cir. 1995) (affidavits of non-eyewitnesses suggesting that third party murdered victim did not meet significant burden of *Herrera* because state evidence showed that third party was in jail on date of murder); Swan v. Peterson, 6 F.3d 1373, 1384 (9th Cir. 1993) (evidence that victim of statutory rape charge had an intact hymen held insignificant since defendants were convicted based on evidence of oral sex).

207. *See Herrera*, 113 S. Ct. at 874 ("Accordingly, the Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence. That difficult question remains open.").

208. *See Schlup*, 513 U.S. at 316.

209. *See id.*

210. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722, 729–32 (1991) (creating procedural default rules in interests of comity and federalism).

211. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 449 (1986) (plurality opinion) (under version of 28 U.S.C. § 2244(b) then in effect, courts "need not entertain" successive or abusive petitions); *id.* at 451 (plurality opinion) ("permissive language" gives court discretion to consider claims of innocence).

cating that the Court has assumed that habeas corpus courts were *required* to entertain otherwise adequate successive petitions when a petitioner satisfied the "probable innocence" standard.[212] Against this backdrop, it seems clear that there must be an actual-innocence exception to AEDPA's statute of limitations. The pre-AEDPA jurisprudence illustrates that an actual-innocence exception should exist under any circumstances, notwithstanding time limitations.[213]

As the statute and its legislative history are silent with regard to the statute of limitations and actual innocence, AEDPA's statute of limitations provision should be construed narrowly.[214] To derogate from the principle that an actual-innocence exception exists under habeas corpus jurisprudence, the statute must "speak directly" to the question addressed by the common law.[215] As I illustrated in Part I, AEDPA's statute of limitations fails to address the situation of a time-barred innocent petitioner. Under these circumstances, it is appropriate to consider the preexisting fabric of habeas corpus up until and including AEDPA's passage, which, as I have shown, expressed a clear and explicit concern for defaulted or otherwise barred claims linked to innocence.

The traditional treatment of habeas corpus petitions filed after lengthy time periods before AEDPA provides further support for this argument. The common law doctrine of laches, though ultimately codified under Habeas Corpus Rule 9(a),[216] was until AEDPA the only mechanism for determining whether a petition was somehow untimely. The laches doctrine allowed prisoners access to federal habeas corpus courts without regard to time unless the delay attributable to the petitioner was unreasonable and prejudiced the government in its ability to

212. HERTZ & LIEBMAN, *supra* note 5, § 28.4f, at 1336 n.63 (citing *Schlup*, 513 U.S. at 344 (Scalia, J., dissenting) (noting Court's "unmistakabl[e] pronounce[ment] 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")).

213. *Cf.* Murray v. Carrier, 477 U.S. 478, 495–96 (1986) ("We remain confident that, for the most part, 'victims of a fundamental miscarriage of justice will meet the cause-and-prejudice standard.' . . . [But in extraordinary cases where they do not,] a federal habeas court may grant the writ *even in the absence of a showing of cause* for the procedural default." (emphasis added)).

214. *See, e.g.*, Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) ("Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

215. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978); *see also* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, . . . the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." (internal quotation marks and citations omitted)); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 105 (1868) ("Repeals by implication are not favored. They are seldom admitted except on the ground of repugnancy; and never, we think, when the former act can stand together with the new act."); William N. Eskridge & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992) ("[T]he Court . . . has tended to create the strongest clear statement rules to confine Congress's power in areas in which Congress has the constitutional power to do virtually anything.").

216. *See supra* note 12.

respond.[217] The adoption of the laches doctrine by federal habeas courts was grounded in the "sound premise . . . that [people] incarcerated in flagrant violation of their constitutional rights have a remedy."[218] When Congress codified the laches doctrine under Rule 9(a), it indicated that interpretations of the rule "should be guided by the liberal standards that long had governed the area."[219] Thus, the "ultimate concern" of Rule 9(a) was "that adjudications under a habeas petition be fair and accurate."[220] Fairness and accuracy, for both the government and the petitioner, ruled the day.

Even when critics of Rule 9(a) attacked its supposedly lenient standards, concern for a petitioner's possible innocence always remained at the fore. For example, in the denial of certiorari in *Spalding v. Aiken*,[221] a case in which a prisoner filed his first federal habeas corpus petition fourteen years after his original conviction, Chief Justice Burger endorsed the proposition that "the time has come to consider limitations on the availability of the writ of habeas corpus in federal courts, especially for prisoners pressing stale claims that were fully ventilated in state courts."[222] The Chief Justice expressed his frustration with what he saw as the inherent weakness of Rule 9(a) as a check against abuse of the writ by state prisoners, arguing that "relief on claims presented many years after conviction should be limited to cases in which the petitioner can demonstrate a *miscarriage of justice* or a *colorable claim of innocence*."[223] Justice Blackmun, who, unlike the Chief Justice, would have granted certiorari in the Spalding case, nevertheless agreed that Rule 9(a) should be reconsidered. Justice Blackmun suggested that "summary dismissal of habeas petitions [should be allowed] when the state can prove that the lapse of time has made reprosecution impossible."[224] He held out a few exceptions, however, under which he would allow a habeas corpus petitioner to proceed, including "where the petitioner can

217. *See, e.g.*, Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) ("[T]here is no statute of limitations governing federal habeas, and the only laches recognized are those which affect the State's ability to defend against the claims raised on habeas.").

218. Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116, 123 (1956); *see also* HERTZ & LIEBMAN, *supra* note 5, §§ 24.1–.4.

219. HERTZ & LIEBMAN, *supra* note 5, § 24.1, at 1011 n.7 (citing H.R. REP. NO. 94-1471, at. 4–5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2478, 2481–82).

220. Rodriguez v. Artuz, 990 F. Supp. 275, 279–80 (S.D.N.Y. 1998) (citations omitted). As originally proposed, Rule 9(a) contained what would have been the closest thing to a time limitation theretofore seen in habeas corpus: a rebuttable presumption that a petition filed more than five years after conviction prejudiced the state's ability to respond. Congress, however, expressly rejected this provision in adopting the rules. *See* Ira D. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 163–69 (1990) (reviewing arguments surrounding adoption of Rule 9(a)).

221. 460 U.S. 1093 (1983).

222. *Id.* at 1093–94.

223. *Id.* at 1094 (emphasis added).

224. *Id.* at 1097. The Court later rejected this suggestion in *Vasquez v. Hillery*, 474 U.S. at 264–65, by holding that prejudice to the State's ability to retry or reconvict the habeas corpus petitioner is irrelevant.

make a *colorable claim of innocence*, demonstrate that a significant *miscarriage of justice* has occurred, or show that his claim is based on ground that, with the exercise of reasonable diligence, could not have been discovered earlier."[225] Thus, even when critics of the laches doctrine sought to ratchet up the stringency of Rule 9(a) by reducing the prejudice requirement, exceptions for innocence-related claims remained.

AEDPA's deviation from bedrock habeas corpus jurisprudence also necessarily raises due process concerns. Although the above discussion of Professor Steiker's "incorporation" argument noted that courts have been reluctant to adopt his position, there may yet be a viable substantive due process argument regarding the intersection of innocence and the statute of limitations.[226] While nearly all lower federal courts have granted the statute of limitations a constitutional stamp of approval,[227] there is nevertheless a unique concern when the statute of limitations intrudes on claims linked to innocence. In *Edwards v. Kearzey*,[228] the Court held that an unreasonably short statute of limitations, "designed to defeat the remedy" for the wrong asserted, may violate the due process clause.[229] Ordinarily, courts will defer to a legislative determination that a given limitation period is reasonable, "unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice."[230] In light of the fact that those exonerated from death row since the mid-1970s spent an average of eight years incarcerated,[231] a one-year limitation period seems on its face grossly inadequate, particularly given the amount of time and resources needed to investigate and file a federal habeas corpus petition.[232] As the Court

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225. *Spalding*, 460 U.S. at 1098 (emphasis added).

226. One commentator suggests that

> [s]uccessful challenges to the constitutionality of the habeas provisions [amended by AEDPA] . . . may be limited to cases in which a petitioner is able to make a colorable showing of actual innocence. In such circumstances, one could make a substantive due process claim that the continued incarceration of an innocent individual, despite any procedural default on the part of that individual, necessarily offends fundamental notions of justice.

Note, *supra* note 147, at 1588 (citation omitted); *cf.* Davis v. United States, 417 U.S. 333, 346–47 (1974) (noting that if a prisoner is jailed for an act that the law does not render criminal, "such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances'" justifying collateral relief (quoting 28 U.S.C. § 2255) (alteration in original)).

227. *See supra* note 72 and accompanying text.

228. 96 U.S. 595 (1878).

229. *Id.* at 603.

230. Wilson v. Iseminger, 185 U.S. 55, 63 (1902).

231. *See* Death Penalty Information Center, *Innocence: Freed From Death Row*, *at* http://www.deathpenaltyinfo.org/Innocentlist.html (last visited June 29, 2002).

232. *See id.* (noting that out of 101 persons freed from death rows since the mid-1970s due to their innocence, only three were exonerated within one year of their convictions); *see also* Rosa v. Senkowski, No. 97 CIV. 2468, 1997 WL 436484, at *10 & n.4 (S.D.N.Y. Aug. 1, 1997) (noting letter from four former United States Attorneys General, as well as numerous statements by members of Congress, contending that any imposition of time limitations "without a guarantee of counsel to ensure that inmates are aware of the 'fatal consequences' of a late petition[] could result in an absolute deprivation of federal habeas review of a prisoner's bona fide constitutional

itself warned in *Kuhlmann,* a miscarriage-of-justice exception must be available no matter when the exculpatory evidence comes to light.[233]

The question also remains whether the continued incarceration or the execution of an innocent, albeit procedurally defaulted, person contravenes the Fifth, Eighth, or Fourteenth Amendments.[234] In light of *Herrera*, however, and as shown recently in the *Graham* decision, such Constitutional arguments can offer no great comfort to innocent prisoners.[235]

Although it is well-established that Congress has the general authority to alter the scope and availability of habeas corpus, the foregoing suggests that cutting off all exceptions for innocent prisoners raises troubling questions about the constitutional validity of AEDPA's statute of limitations.

4. Avoiding Constitutional Questions

When confronting a challenge to the constitutionality of a statute, courts follow a well-established doctrine whereby they "first ascertain whether a construction [of the statute] . . . is fairly possible" that renders the statute constitutional.[236] In other words, facing the specter of finding a statute unconstitutional, courts will attempt to resolve the matter, when possible, on non-constitutional grounds.[237] As the foregoing examination strongly suggests, challenges to

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claims"). For a brief description of the steps involved in preparing and filing a federal habeas corpus petition, *see* HERTZ & LIEBMAN, *supra* note 5, §§ 11.1–11.9.

233. *See* Kuhlmann v. Wilson, 477 U.S. 436, 452 (1986); *see also* Mello & Duffy, *supra* note 69, at 476 ("[I]t is never too late to discover the truth which would release a person confined either for a cause for which no person should be restrained or by a process by which no person should be convicted.").

234. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 325 (1995) ("[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system."); Herrera v. Collins, 506 U.S. 390, 432 n.2 (1993) (Blackmun, J., dissenting) (proposing that the imprisonment of an innocent person offends the Eighth Amendment); *cf. Ex parte* Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996) (holding that the due process clause of federal Constitution forbids not just execution, but also incarceration of an innocent person).

235. *See Herrera*, 506 U.S. at 416–17 (noting that "[o]ur federal habeas cases have treated claims of 'actual innocence,' not as an independent constitutional claim, but as a basis upon which a habeas petitioner may have an independent constitutional claim considered on the merits . . . . History 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."); Graham v. Johnson, 168 F.3d 762, 787–88 (5th Cir. 1999) (rejecting the argument that strict enforcement of AEDPA to bar federal habeas corpus review notwithstanding evidence of actual innocence would violate due process, Eighth Amendment, or Suspension Clause).

236. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

237. *See id.* at 347 (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."); Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Chief Justice Marshall admonishing that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available); *see also* Clinton v. Jones, 520 U.S. 681, 684 n.11 (1997) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of

AEDPA's statute of limitations on the grounds that it precludes a time-barred innocent petitioner from filing a federal habeas corpus petition raise a host of troubling constitutional concerns. Because such challenges directly confront the constitutionality of AEDPA's statute of limitations, courts may appropriately avoid these constitutional adjudications by recognizing an actual-innocence exception for time-barred petitioners who establish a colorable claim of innocence.

As Judge Easterbrook of the Seventh Circuit warns, "[t]he canon about avoiding constitutional decisions . . . must be used with care, for it is a closer cousin to invalidation than to interpretation."[238] Yet as some commentators have suggested, the application of the "avoidance canon" is, in fact, quite appropriate when interpreting AEDPA, both because of AEDPA's severe curtailment of federal court jurisdiction[239] and because of the general sloppiness of the statute's drafting.[240] Indeed, some federal courts have upheld certain provisions of AEDPA against constitutional challenges by interpreting the statute as not foreclosing alternative sources of relief.[241] Moreover, acknowledging an actual-

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constitutionality . . . unless such adjudication is unavoidable." (quoting Spector Motor Service v. McLaughlin, 323 U.S. 101, 105 (1944))).

238. United States v. Marshall, 908 F.2d 1312, 1318 (7th Cir. 1990) (en banc), *aff'd sub nom.* Chapman v. United States, 500 U.S. 453 (1991).

239. *See, e.g.*, Ernest Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549 (2000) (defending use of "avoidance canon" when interpreting AEDPA); Note, *supra* note 147 (supporting notion that AEDPA should be interpreted to permit judicial review of some claims in order to avoid ruling on difficult question of whether complete withdrawal of jurisdiction is constitutional).

240. *See* Lindh v. Murphy, 521 U.S. 320, 336 (1997) (Souter, J.) (noting "that in a world of silk purses and pigs' ears, the Act is not a silk purse of the art of statutory drafting"); West v. Vaughn, 204 F.3d 53, 59 (3d Cir. 2000) ("AEDPA is less than a masterpiece of clarity."), *abrogated on other grounds by* Tyler v. Cain, 533 U.S. 656 (2001); *see also* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 3 (1997) (discussing enactment of AEDPA and Prison Litigation Reform Act, suggesting that judicial developments may "induce legislators to be inattentive to details of statutory design," leading to "difficulties in integrating the new statutes with the law the courts have developed. These difficulties may in turn induce the courts to interpret the statutes to make only marginal changes in the law they themselves have fashioned."); Senator Orrin Hatch, Senate Judiciary Committee, News Conference (Apr. 15, 1996), *available at* 1996 WL 199479 (referring to AEDPA's passage through Congress: "[T]he Senate passed its original bill in a *matter of weeks* and reached an agreement with the House on this conference report in a *matter of days*" (emphasis added)).

241. *See, e.g.*, Slack v. McDaniel, 529 U.S. 473 (2000) (rejecting a narrow interpretation of 28 U.S.C. § 2253, AEDPA's provision concerning the issuance of certificates of appealability); Martinez-Villareal v. Stewart, 118 F.3d 628, 630–31 & nn.3–4 (9th Cir. 1997), *aff'd on other grounds*, 523 U.S. 637 (1998) (noting that "'serious constitutional problems'" would arise under the Suspension Clause if § 2244(b)(1) were interpreted to bar a second habeas corpus petition that raised an incompetence-to-be-executed claim that was denied at the time of the first petition on prematurity grounds, especially given the unavailability of the claim on original writ to Supreme Court; avoiding "patent" "constitutional problem" by concluding that petition does not qualify as "'second or successive,'" though literal interpretation would require opposite conclusion (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996))); *see also* Triestman v. United States, 124 F.3d 361, 380 n.24 (2d Cir. 1997) ("It is possible that [the requested relief] might be deemed available if

innocence exception under the statute reaches a compromise that few proponents of AEDPA could fault. As one commentator suggests, the use of the avoidance canon should be seen as "a rule designed to push interpretations in directions that reflect enduring public values."[242] Applying the avoidance canon to the intersection of innocence with the statute of limitations effectuates Congress's clear intent—a short statute of limitations on habeas corpus petitions—while also recognizing the bedrock principle of vindicating the liberty interests of the wrongfully convicted. By following the alternative path suggested here—the judicial recognition of an actual-innocence exception—courts can avoid the constitutional questions that these cases raise.[243]

III.
INNOCENCE IS ALWAYS RELEVANT

At least since the beginning of the Burger Court's treatment of the writ, innocence has been regarded as a highly relevant factor in habeas corpus jurisprudence. The doctrine has developed to the point where it is positioned near, if not at, the top of the list of justifications for granting federal habeas corpus review. I have argued in this article that such heightened sensitivity toward innocence must be extended to those cases in which AEDPA's statute of limitations precludes petitioners from having innocence-related claims heard.

Supporters of AEDPA might object that the purpose of the statute of limitations would be undermined if an actual-innocence exception were permitted.[244] But recognizing the relevance of a prisoner's innocence would not dilute

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their existence were necessary to avoid serious questions as to the constitutional validity of both § 2255 and § 2244—if, for example, an actually innocent prisoner were barred from making a previously unavailable claim under § 2241 as well as § 2255."). *But see Tyler*, 533 U.S. at 662–64 (narrowly interpreting 28 U.S.C. § 2244(b)(2)(A)); *Felker*, 518 U.S. 651 (interpreting § 2244(b) as prohibiting review of circuit court's denial of petitioner's request for permission to file successive petition); *In re* Vial, 115 F.3d 1192, 1197–98 (4th Cir. 1997) (rejecting a constitutional challenge to 28 U.S.C. § 2255's ban on successive habeas petitions).

242. Young, *supra* note 239, at 1551; *see also* Tushnet & Yackle, *supra* note 240, at 3 (suggesting that "statutes [such as AEDPA] enacted after substantial judicial reconstruction of the law are likely to be largely symbolic").

243. Then-District Court Judge Sotomayor noted that claims running up against AEDPA's restrictions on federal court review involve such weighty issues as "relations among the three branches of the federal government, relations between the federal and state governments, and the balancing of individual liberty interest against society's need for a criminal justice system that at some point rests in its adjudication of guilt," and that "[w]hen such momentous issues are involved . . . this Court is mindful of the longstanding maxim of judicial restraint that it is 'our duty to avoid deciding constitutional questions presented unless essential to proper disposition of the case.'" Alexander v. Keane, 991 F. Supp. 329, 338 (S.D.N.Y. 1998) (citation omitted). *Cf.* INS v. St. Cyr, 533 U.S. 289, 301 n.13 (2001) ("The fact that this Court would be required to answer the difficult question of what the Suspension Clause protects is in and of itself a reason to avoid answering the constitutional questions that would be raised by concluding that review was barred entirely.").

244. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 179 (2001) ("The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments." (citing Calderon v. Thompson, 523 U.S. 538, 555–56 (1998))); Williams v. Taylor,

the efficacy of the statute-of-limitations provision.[245] First, cases in which a prisoner can, in fact, make a colorable showing of innocence are rare enough that an actual-innocence exception would not likely disrupt the habeas corpus procedure established by AEDPA;[246] nor would it entice petitioners or their attorneys to withhold innocence-related claims for strategic purposes.[247] Second, it is simply contrary to policy and precedent to read the statute in a manner that would preclude a prisoner who can make a sufficient showing of innocence from having her claim heard.[248] Traditional arguments in favor of a reduced scope of habeas corpus—finality, comity, judicial resources—have never been used to deny the rights of an innocent prisoner. The Court and, to a large extent, Congress have stated that a critical function of the modern writ is to protect the innocent. As a federal district court judge recently declared:

> Just as there is typically no statute of limitations for first-degree murder—for the obvious reason that it would be intolerable to let a cold-blooded murderer escape justice through the mere passage of time—so too one may ask whether it is tolerable to put a time limit on

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529 U.S. 420, 436 (2000) (noting "AEDPA's purpose to further the principles of comity, finality, and federalism"); President Bill Clinton, Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996 (Apr. 24, 1996), *in* 32 WKLY. COMP. PRES. DOCS. 719 (Apr. 29, 1996) ("For too long, and in too many cases, endless-death row appeals have stood in the way of justice being served."); H.R. CONF. REP. NO. 104-518, at 111 (1996) (noting that AEDPA "incorporates reforms . . . to address the acute problems of unnecessary delay and abuse in capital cases").

245. At least one commentator has noted that AEDPA's statute of limitations (and other preclusive defenses intended to shorten federal post-conviction proceedings) notwithstanding, federal habeas corpus review will continue to tax both the state and the federal judicial systems:

> Although AEDPA makes some effort to shorten this period by establishing a new statute of limitations for filing federal habeas claims, the limitations period does not begin to run until after the direct appeal and is necessarily tolled during state postconviction proceedings. Thus, notwithstanding AEDPA, federal habeas review will continue to impose significant costs on states by undermining the finality of state criminal convictions.

Steiker, *Habeas Exceptionalism*, *supra* note 127, at 1727 (footnotes omitted).

246. *See* Williams, *supra* note 106, at 940 (noting that "our courts are confronted daily with frivolous claims, and are able to resolve those claims expeditiously" (internal footnote omitted)).

247. *See, e.g.*, Stevenson, *supra* note 44 ("Successive petitions and last-minute stay applications were the product of a variety of systemic forces, not intentional delay and gamesmanship on the part of capital prisoners and their lawyers." (citations omitted)); Williams, *supra* note 106, at 939 ("I find it doubtful that a competent, well-meaning attorney would risk his client's life, and place his law license in jeopardy, simply to preserve a claim for the last possible moment. . . . [A]ttorneys with evidence of their client's innocence are likely to come forward . . . at the earliest possible moment.").

248. *See* Murray v. Carrier, 477 U.S. 478, 515 (1986) (Stevens, J., concurring) (stressing that "the history of the Court's jurisprudence interpreting the Acts of Congress authorizing the issuance of the writ of habeas corpus unambiguously requires that we carefully preserve the exception which enables the federal writ to grant relief in cases of manifest injustice"); Williams, *supra* note 106, at 936 ("The federal courts should always be able to consider claims of innocence in capital cases. We should value accuracy over finality. It is more important that we get it right than to simply get it over with, because if we fail to get it right, the consequences are too high.").

> when someone wrongly convicted of murder must prove his innocence or face extinction.[249]

It follows that a colorable showing of actual innocence should outweigh a state's interest in finality when the prisoner has not yet obtained an opportunity for federal habeas corpus review.

There are, however, certain undesirable conclusions one could draw from an argument in support of acknowledging the heightened relevance of innocence to habeas corpus. Perhaps most troubling is the prospect of innocence-related habeas corpus claims coming to be seen as more worthy than claims not related to innocence, leading to underenforcement of federal constitutional claims that are unrelated to innocence. This, of course, would fly in the face of the historical role of the writ to vindicate the rights of the guilty as well as the innocent.[250] Nevertheless, the current state of habeas corpus law demands a pragmatic assessment and recognition of how the writ is prescribed and understood, and what it will allow. As the law stands today, untold numbers of constitutional claims will continue to go unheard and unvindicated because of AEDPA's statute of limitations, with or without any actual-innocence exception. Recognizing an exception for those claims linked to innocence will merely protect one class of barred petitioners out of many who deserve habeas corpus relief.

CONCLUSION

The history of habeas corpus reveals a compromise of conflicting pressures. While both opponents and proponents of federal habeas corpus appear to agree that "the writ of habeas corpus known to the Framers was quite different from that which exists today,"[251] deep fissures still remain—and perhaps will always remain—over who gets to decide what the writ means.[252] The growth of complex rules of practice and procedure in habeas corpus is in many ways indicative of the competing views held by members of the Court, and more recently Congress, about what the writ means and how it should apply. As the late Justice Harry Blackmun once commented, "Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of con-

249. *United States v. Quinones*, No. S3-00-CR-761, 2002 WL 724231, at *2 (S.D.N.Y. Apr. 25, 2002).

250. *See supra* note 164, and accompanying text.

251. Felker v. Turpin, 518 U.S. 651, 663 (1996); *see also* Steiker, *Incorporating the Suspension Clause*, *supra* note 72, at 863 (remarking that the contemporary writ "serves a far broader purpose today than its counterpart at the time of the Founding."); Sessions, *supra* note 72, at 1522 (noting that "most scholars seem to agree that habeas practice during the framers' day indicates that the scope of the writ was quite narrow" as compared with the current writ). Indeed, it was not until the Judiciary Act of 1867 that Congress made federal habeas corpus review available to *both* state and federal prisoners (it had originally been granted only for the benefit of federal prisoners). *See* Judiciary Act of 1867, ch. 28, 14 Stat. 385.

252. *See* David L. Shapiro, *Federal Habeas Corpus: A Study in Massachusetts*, 87 HARV. L. REV. 321, 324 (1973) (noting that the habeas corpus debate "goes on, and is likely to continue, no matter what course legislation may take, so long as there are state prisoners and federal courts.").

founding and labyrinthine procedural obstacles."[253] In many ways, the creation of a statute of limitations for federal petitions represents a straightforward attempt to curtail the tortuous system already in place by cutting petitioners off at the pass.

Yet despite this primary design of AEDPA, in this article I have argued that it is appropriate and, indeed, necessary to recognize an actual-innocence exception to the statute of limitations. As one federal court noted simply, "If there is any core function of habeas corpus—and constitutionally required minimum below which the scope of federal habeas corpus may not be reduced—it would be to free the innocent person unconstitutionally incarcerated."[254] And it is not difficult to imagine that cases of wrongfully convicted persons who have failed to file within the statute of limitations will become increasingly frequent as this country's vast prison population continues to grow.[255]

If and when federal courts do deem an actual-innocence exception to AEDPA's statute of limitations to exist, critical questions will remain. For example, what standard for establishing a viable claim of innocence should be applied? As noted briefly in Part I, when Congress drafted the provisions of AEDPA dealing with claims of actual innocence in second or successive petitions, it rejected the Court's "probably" standard, articulated in *Schlup v. Delo*,[256] instead adopting the more stringent "clear and convincing evidence" standard.[257] It has been suggested that AEDPA's "clear and convincing" standard overrules the *Schlup* standard for all innocence-related successive

253. Coleman v. Thompson, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting). In the same vein, Chief Judge Mark W. Bennett of the Northern District of Iowa wrote:

> Not only has this procedural web taken on a life of its own, it has developed its own unique nomenclature, a procedural cant further obscuring the merits of most *habeas corpus* actions: Rather than addressing the underlying merits of the constitutional claims asserted by a petitioner for habeas corpus relief, opinions in habeas actions are now riddled (in both the primary and secondary sense of the word) with terms like "procedural default," "cause and prejudice," "abuse of the writ," "successive petitions," "mixed petitions," "adequate and independent state law grounds," "the 'look through' presumption," "the total exhaustion rule," "state waiver of the exhaustion defense," "non-retroactivity," "non-cognizable constitutional claims," "fairly presented claims," "unintended claims," "objective factors external to the defense," and "the presumption of correctness." The vast majority of federal habeas petitioners find themselves entangled in this omnipresent and perplexing procedural web, which effectively precludes federal courts from ever reaching the merits of their constitutional claims.

Lee v. Kemna, 213 F.3d 1037, 1048 (8th Cir. 2001) (Bennett, C.D.J., sitting by designation, dissenting), *vacated and remanded*, 122 S. Ct. 877 (2002).

254. Alexander v. Keane, 991 F. Supp. 329, 338 (S.D.N.Y. 1998).

255. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON STATISTICS (reporting that there were 1,965,495 prisoners in federal and state prisons and local jails as of June 30, 2001, constituting an increase of 1.6% from mid-year 2000), *available at* http://www.ojp.usdoj.gov/bjs/prisons.htm

256. *See supra* notes 48–51 and accompanying text.

257. *See* 28 U.S.C. 2254(e)(2) (Supp. V 1999) (applying "clear and convincing" standard for determining whether petitioner meets "miscarriage of justice" exception under AEDPA's prohibition on federal evidentiary hearings).

claims (i.e., actual innocence and actual innocence of the death penalty).[258] The implication from examining the standards for establishing actual innocence under other AEDPA provisions is that the "clear and convincing" standard should apply to any similar exception that is read into the statute of limitations.[259] Various courts have avoided the difficult constitutional questions in these cases by finding that the petitioners were unable to make a showing of actual innocence in the first instance.[260]

While the standards articulated under AEDPA's existing miscarriage-of-justice exceptions might offer guidance, they should not be viewed as definitively prescribing the standard for an actual-innocence exception to the statute of limitations. In fact, those courts that have entertained the notion of a miscarriage-of-justice exception to the statute of limitations have tended to agree that the *Schlup* standard should apply.[261]

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258. *See* Mark M. Oh, *The Gateway for Successive Habeas Petitions: An Argument for* Schlup v. Delo*'s Probability Standard for Actual Innocence Claims*, 19 CARDOZO L. REV. 2341, 2354 n.74 (1998) (citing "viable argument[s]" that contended that *Schlup* standard is overruled); *see also In re* Boshears, 110 F.3d 1538, 1542 (11th Cir. 1997) (denying leave to file successive petition asserting *Brady* claim based on state's failure to disclose a police report containing an ambiguous hearsay statement of the doctor who examined the victim, noting, "This is simply not enough to overcome the strict evidentiary standard outlined in § 2244(b)(2)(B)(ii).").

259. The significance of the difference between the two standards cannot be overstated. The *Schlup* case itself illustrates the difference. On remand, the district court in *Schlup* found that under the "probably" standard, Schlup succeeded in showing enough evidence to warrant consideration of the constitutional claim. *See* Schlup v. Delo, 912 F. Supp. 448, 455 (E.D. Mo. 1996). The district court had previously denied Schlup's claims when applying the "clear and convincing" standard. *See* Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993).

260. *See, e.g.*, Lucidore v. New York State Div. of Parole, 209 F.3d 107, 113 (2d Cir. 2000) (holding that because petitioner failed to demonstrate actual innocence, the question whether the Constitution requires an actual-innocence exception to AEDPA's statute of limitations need not be reached); Molo v. Johnson, 207 F.3d 773, 775 (5th Cir. 2000) ("Without deciding whether proof of factual innocence would toll the limitations period, we find that Molo does not show that he is factually innocent."); Dew v. Clarke, No. 99-56843, 2000 WL 1545500, at *2 (9th Cir. Oct. 17, 2000) (unpublished opinion) (holding that petitioner "has not made a credible claim of actual innocence. Therefore, we decline to decide in this case the issue of whether there is an 'actual innocence' exception to AEDPA's statute of limitations."), *cert. denied*, 531 U.S. 1198 (2001); Thomas v. Straub, 10 F. Supp. 2d 834, 834 (E.D. Mich. 1998) (rejecting Suspension Clause challenge to limitation period where petitioner does not fit within the actual innocence exception, if such an exception exists).

261. *See, e.g.*, Ruvalcaba v. Ratelle, No. 00-55557, 2001 WL 1069326, at *1 (9th Cir. Sept. 13, 2001) (unpublished opinion) (declining to address whether "actual-innocence" exception exists because petitioner failed to meet "actual-innocence" showing delineated under *Schlup*); Craddock v. Mohr, No. 99-3756, 2000 WL 658023, at *2 (6th Cir. May 8, 2000) (unpublished opinion) ("Even if the § 2244 statute of limitations can be excused because of a petitioner's actual innocence, Craddock has not submitted any new evidence demonstrating his innocence of his convictions."); Barber v. Hargett, No. 99-6065, 2000 WL 339230, at *2 (10th Cir. Mar. 31, 2000) (unpublished opinion) (finding that since petitioner "failed to set forth evidence creating even a reasonable probability that the jury convicted the wrong man," there was no need to pursue inquiry into possible existence of actual innocence exception); Davila v. Johnson, No. 3-01-CV-1065-R, 2001 WL 1295491, at *3 (N.D. Tex. Oct. 5, 2001) (citing *Schlup* in reference to petitioner's failure to establish colorable claim of innocence); Johnson v. Wolfe, No. C2-00-248, 2001 WL 1681128, at *3 (S.D. Ohio, Aug. 30, 2001) (noting that "[w]hether or not there is an actual innocence

Remaining questions aside, as an initial step, courts can and should read an actual-innocence exception into AEDPA's statute of limitations. As one commentator noted a few years ago, "Although the concept of 'actual innocence' has not explicitly played a part in federal post-conviction jurisprudence until recently, it is obvious that an enlightened system of justice should not tolerate continued incarceration of one who is demonstrably innocent."[262] Recognizing an actual-innocence exception to the statute of limitations would be a simple yet great step forward toward recognizing the fundamental importance and timeless relevance of innocence.

exception to the AEDPA's statute of limitations, petitioner did not submit any new and reliable evidence that could have convinced a reasonable juror not to convict him of involuntary manslaughter") (citing *Schlup*, 513 U.S. at 327-29); Nickerson v. Carey, No. C-98-04909, slip op. at 12 (N.D. Cal. Sept. 14, 2000) (on file with *NYU Review of Law & Social Change*) (applying *Schlup*); Rockwell v. Jones, No. 99-72315, 2000 WL 973675, at *4 (E.D. Mich. June 30, 2000) (same); *Keane*, 991 F. Supp. at 339 (same).

262. Friedman, *supra* note 181, at 323.