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Dylan Ruga
UCLA School of Law

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Federal Court Adjudication of State Prisoner Claims for Post-Conviction DNA Testing: A Bifurcated Approach

DYLAN RUGA*

I. INTRODUCTION

Undoubtedly, there are innocent people in prison. Moreover, it is probable that the wrongly convicted, if given a chance to conduct DNA testing on evidence used against them at trial, could establish their innocence.

Many federal courts recently have denied prisoners' requests for post-conviction DNA testing because the courts have reasoned that the prisoners are seeking release from confinement. This ignores the fact that prisoners who seek to prove their innocence through DNA testing necessarily must embark upon a two-step process, which courts should bifurcate and consider separately. The first step, which I call the "procurement phase," occurs when the initial request is made by a prisoner to secure any biological evidence within the state's control. If the prisoner's request is denied, a claim is filed against the state prosecutor or sheriff for violating the prisoner's due process right to the evidence, and thus it is properly brought under § 1983.¹ During this phase, the prisoner is not seeking release from confinement; rather, he merely is seeking injunctive relief to obtain and conduct DNA testing on evidence that is within the state's control.

The second step, or the "exoneration phase," occurs after the results of the DNA testing exclude the prisoner's DNA from the crime scene. During this phase, the prisoner seeks to use the test results to demonstrate his actual innocence and be released from confinement. While there is some

* J.D. candidate, UCLA School of Law, 2004; B.A., Oberlin College, 2000. Special thanks to Professor Gary Rowe for his guidance in the development of this article. I also am indebted to Jeremy Fogel and Thomas Rowe for their invaluable feedback and assistance in editing. Thanks also to Eugene Volokh for taking the time to provide insight into the publication process. Finally, I would like to thank the staff of the *Pierce Law Review* for their hard work and time spent on this article.

1. Typically, prisoners will initially seek access to the evidence by asking the prosecutor who tried the case. If the prosecutor refuses to supply the evidence, the prisoner will file a § 1983 action and allege that the prosecutor, acting under color of state law, deprived him of his Fourteenth Amendment right to Due Process. See *Harvey v. Horan*, 278 F.3d 370, 373 (4th Cir. 2002), *pet. for rehearing and rehearing en banc denied*, 285 F.3d 298 (4th Cir. 2002); *Boyle v. Mayer*, 2002 WL 31085186 (6th Cir. Sept. 17, 2002) at *1. For a discussion as to why a prisoner properly claims a due process violation, see *infra* Part III-C.

debate as to the proper federal remedy for claims of actual innocence,² requests made during the exoneration phase are properly brought as habeas petitions.³

The Fourth,⁴ Fifth,⁵ Sixth,⁶ and Eleventh Circuit Court of Appeals⁷ have all recently reviewed district court adjudications of prisoners' § 1983 actions to obtain DNA testing. In each case, the prisoner was in the procurement phase and was not seeking release from prison. The Eleventh Circuit stood alone in granting the prisoner's request; the others, citing the Supreme Court decisions *Heck v. Humphrey*⁸ and *Preiser v. Rodriguez*,⁹ denied relief because they reasoned that the prisoners, in reality, were attempting to assert claims of actual innocence, which are properly brought as habeas petitions.¹⁰

Legislation currently is pending in both the Senate¹¹ and the House of Representatives¹² that creates a uniform procedure for adjudicating claims for post-conviction DNA testing. The legislation is unclear, however, about whether state prisoners may continue to file § 1983 actions directly in federal court to obtain such testing. This ambiguity, unless revised before enacted, will lead to inconsistent judicial interpretation and further confuse the already unpredictable handling of requests for genetic testing.

Part II of this Comment will examine the reasoning behind recent circuit court decisions concerning prisoners' rights to post-conviction genetic testing. I will explain that a bifurcated approach is the appropriate paradigm for reviewing these claims and demonstrate why three of the four circuit courts erred in their analyses. This part also will review the Supreme Court decisions cited by the circuit courts and explain why the Fourth, Fifth, and Sixth Circuits' reliance on those decisions was misplaced.

2. See *infra* Part III(2)(A).

3. A writ of habeas is the traditional manner by which a prisoner is able to have his conviction dismissed. See *Ex Parte Watkins*, 28 U.S. 193, 202 (1830) (explaining that the purpose of a writ of habeas corpus is the "liberation of those who may be imprisoned without sufficient cause" and to "examine the legality of the commitment"). For a history of habeas corpus in the United States, see Erwin Chemerinsky, *Federal Jurisdiction* 785-89 (2d ed., Little, Brown & Co. 1994).

4. *Harvey*, 278 F.3d 370.

5. *Kutzner v. Montgomery County*, 303 F.3d 339 (5th Cir. 2002).

6. *Boyle*, 2002 WL 31085186.

7. *Bradley v. Pyror*, 305 F.3d 1287 (11th Cir. 2002).

8. 512 U.S. 477 (1994).

9. 411 U.S. 475 (1973).

10. See *Harvey*, 278 F.3d at 375-78 (relying on *Heck* and *Preiser* to reject plaintiff's claim); *Kutzner*, 303 F.3d at 340-41 (same); *Boyle*, 2002 WL 31085186 at *1 (same).

11. Advancing Justice through DNA Technology Act of 2003, 2003 S. 1700, 108th Cong. (Oct. 1, 2003) (as introduced).

12. Advancing Justice through DNA Technology Act of 2003, 2003 H.R. 3214, 108th Cong. (Nov. 6, 2003) (received by Senate).

Part III will address how the Supreme Court should reconcile the current circuit split concerning the rights of prisoners to post-conviction DNA testing. This part confronts skeptics' concerns of protecting finality, respecting federalism, and flooding the courts with prisoner suits. It concludes that neither the abstention doctrines nor the Prison Litigation Reform Act preclude federal court review of these claims and that a due process right to genetic testing should be recognized. Lastly, I will explain that the sole remedy currently available for prisoners with favorable DNA test results is executive clemency and I will argue why clemency is an insufficient solution.

Finally, Part IV will analyze briefly the pending congressional legislation and explain that its language, as written, leaves doubt as to whether Congress intends to preclude § 1983 actions to prisoners seeking DNA testing. This ambiguity, unless corrected, will further exacerbate federal courts' confusion regarding the proper analysis of such claims.

II. RECENT CIRCUIT COURT DECISIONS

A. *Squeezing a Square Peg into a Round Hole: The Problem with Relying on Precedent to Analyze Requests for Genetic Testing*

The Fourth, Fifth, and Sixth Circuit Courts of Appeals all recently have erred in their analysis of § 1983 claims brought by prisoners seeking to obtain DNA testing. In each case, the prisoner's action was in the procurement phase. The courts, however, concerned with disrupting the finality of convictions and opening the floodgates to state prisoners, erroneously relied on *Heck v. Humphrey* and *Preiser v. Rodriguez*, and ultimately denied the prisoners' claims as if they were in the exoneration phase. This mistaken reliance was a result of the courts' utilization of a singular, rather than a bifurcated, analysis.

Heck v. Humphrey was a § 1983 action seeking damages from two prosecutors and an investigator for alleged misconduct during the investigation and trial that led to the plaintiff's confinement.¹³ The Supreme Court dismissed the claim, holding that:

when a state prisoner seeks *damages* in a §1983 suit, the district court must consider whether a judgment in favor of the plaintiff

13. Heck's complaint alleged that "respondents, acting under color of state law, had engaged in an 'unlawful, unreasonable, and arbitrary investigation' leading to [his] arrest; 'knowingly destroyed' evidence 'which was exculpatory in nature and could have proved [his] innocence'; and caused 'an illegal and unlawful voice identification procedure' to be used at [his] trial." *Heck*, 512 U.S. at 479.

would *necessarily imply* the invalidity of his conviction or sentence; if it would, the complaint must be dismissed But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.¹⁴

The "whole point" of *Heck* was to protect the finality of state convictions.¹⁵

In *Harvey v. Horan*, the Fourth Circuit, concerned that providing post-conviction genetic testing would offend *Heck* by disrupting the finality of convictions, relied on *Heck* to deny the plaintiff's request for DNA testing.¹⁶ The Fourth Circuit reasoned that, although the petitioner in *Heck* sought *damages*, "the [Supreme] Court did not limit its holding to such claims[] [a]nd we see no reason why its rationale would not apply in a situation where a criminal defendant seeks injunctive relief that necessarily implies the invalidity of his conviction."¹⁷ Simply stated, the Fourth Circuit's holding reflects its belief that "finality cannot be sacrificed to every change in technology."¹⁸ The Fifth and Sixth Circuit courts, in terse decisions devoid of explicit reasoning, followed the lead of the Fourth Circuit and similarly cited *Heck* to dismiss claims for post-conviction DNA testing.¹⁹

In addition to concerns about disrupting finality, these courts were concerned that recognizing the prisoners' claims under § 1983 would offend federalism and federal-state comity. To avoid this problem, the courts relied on *Preiser* and held that the prisoners' proper remedy is a habeas petition. In *Preiser*, the Supreme Court denied the respondents' § 1983 claim for injunctive relief to re-obtain good-time credits that were forfeited because of disciplinary action.²⁰ The Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal rem-

14. *Id.* at 487 (first and second emphasis added, final emphasis in original).

15. *Harvey*, 278 F.3d at 375 n.1.

16. *Id.* at 375. Although *Harvey* was denied relief in the federal courts, the state courts and legislatures eventually granted his request. *Harvey v. Horan*, 285 F.3d 298, 304 (2002) (*denying rehearing en banc*).

17. *Harvey*, 278 F.3d at 375.

18. *Id.* at 376.

19. *Kutzner*, 303 F.3d at 340-41 ("We agree with the analysis of the Fourth Circuit, which recently held, under *Heck*, that no § 1983 claim exists for injunctive relief to compel DNA testing under materially indistinguishable circumstances."); *Boyle*, 2002 WL 31085186 at *1.

20. *Preiser*, 411 U.S. at 500.

edy is a writ of habeas corpus.”²¹ The Court reasoned that due to states’ strong interest in the administration of their prisons, in order to protect federal-state comity, a prisoner challenging his confinement first should be required to exhaust available state remedies.²²

The circuit courts, equally concerned with protecting federal-state comity, all reasoned that *Preiser* controlled in the prisoners’ § 1983 actions for genetic testing and held that the proper remedy is a habeas petition. The Fourth Circuit justified its conclusion by explaining that the plaintiff essentially was attempting to gain access to the evidence in order to “set the stage for a future attack on his confinement.”²³ The Fifth Circuit, reaching the same conclusion, reasoned that a prisoner’s request for DNA testing is “so intertwined” with the merits of his conviction that any such claim must be treated as a habeas petition.²⁴ The Sixth Circuit followed the lead of its sister courts and found that the plaintiff was challenging “the validity of his criminal convictions and the fact or duration of his continued confinement”²⁵ and thus his exclusive federal remedy was a writ of habeas corpus.²⁶

In addition to offending federalism, the circuit courts expressed another, equally troubling, concern with allowing the plaintiffs’ claims to proceed under § 1983 - doing so would open the floodgates to state prisoners seeking federal court review of their convictions.²⁷ Without the restraints of a habeas petition, the argument goes, state prisoners will proceed directly into federal court to seek release from prison before even attempting to exhaust state remedies. This is a slippery slope that eventually will overburden federal courts with frivolous claims filed by prisoners who will use requests for genetic testing as yet another weapon in their arsenal of challenges to their convictions.

While the concerns expressed by these courts must be taken seriously, the error in the courts’ decisions is clear. *Heck* is not applicable in the procurement phase because granting a prisoner the right to conduct DNA testing on evidence does not “necessarily imply the invalidity” of his sentence.²⁸ On the contrary, if the prisoner’s suit is successful, the *only* possible outcome is that he would obtain access to evidence in order to conduct genetic testing. Although the test results may be favorable to the prisoner

21. *Id.* (emphasis added).

22. *Id.* at 491-92.

23. *Harvey*, 278 F.3d at 378.

24. *See Kutzner*, 303 F.3d at 341 (citing *Martinez v. Tex. Ct. Crim. App.*, 292 F.3d 417, 423 (5th Cir. 2002)).

25. *Boyle*, 2002 WL 31085186 at *1.

26. *Id.*

27. *See Harvey*, 278 F.3d at 378.

28. *Harvey*, 278 F.3d at 308 (Luttig, J., respecting the denial of rehearing en banc).

and enable him to challenge his conviction in the exoneration phase, merely obtaining access to the evidence does not in any way imply the invalidity of his sentence.

Similarly, *Preiser* is inapposite because the relief sought by a prisoner in the procurement phase is an injunction to compel a state official to turn over evidence, not a determination that he is entitled to an immediate or speedier release from confinement. Since a ruling in the prisoner's favor would not affect the length of his sentence, *Preiser* is not controlling in the procurement phase and should not be relied upon to deny prisoners' claims for access to the evidence.

Moreover, the policies advanced by *Heck* and *Preiser* - protecting finality and respecting federalism - are more appropriately addressed in the exoneration phase, where prisoners actually are seeking release from prison based on DNA test results. In the procurement phase, however, the sole concern should be limiting those who qualify to bring claims for genetic testing in order to avoid a flood of claims brought by every prisoner who will use such testing as a last-ditch effort to prove his innocence. Therefore, while the concerns expressed by these circuit courts are certainly relevant to the question of whether prisoners ultimately should be released based on genetic testing, the error in the courts' reasoning is a consequence of a singular - as opposed to bifurcated - approach to the analysis.

B. *Creating a Circuit Split: The Eleventh Circuit's Analysis*

Contrary to the Fourth, Fifth, and Sixth Circuit Court decisions, which erroneously applied *Heck* and *Preiser* to preclude § 1983 claims made during the procurement phase, the Eleventh Circuit correctly permitted the petitioner's § 1983 action to stand in *Bradley v. Pryor*. In that case, Joe Bradley filed a § 1983 action and sought the production of evidence used against him at trial²⁹ in order to conduct DNA testing.³⁰

The Eleventh Circuit, which correctly adopted a bifurcated analysis, granted Bradley's claim. Specifically, the court distinguished *Heck* and *Preiser* and reasoned that Bradley will have prevailed in his §1983 action once he obtains access to the evidence or an accounting for its absence.³¹ The court further reasoned that granting Bradley's claim does not "necessarily demonstrate[] or even impl[y] that his conviction is invalid."³² The

29. Specifically, Bradley sought to conduct DNA testing on the rape kit and on the clothing worn by the victim when her body was discovered. *Bradley*, 305 F.3d at 1288-89.

30. *Id.*

31. *Id.* at 1290.

32. *Id.*

court correctly realized that even if Bradley is able to demonstrate on the basis of genetic testing that there is no match between his DNA and the evidence used against him, he still would have to bring an entirely different lawsuit to challenge his conviction and sentence based on those test results.³³

Although the court distinguished prisoners' claims for genetic testing from the textual holdings of *Heck* and *Preiser*, it neither specifically addressed the policies advanced by those cases nor explained what should happen if the DNA results are favorable to the plaintiff. Moreover, the court neglected to address whether Bradley's claim for DNA testing differs from other prisoner's claims, or what, if any, consequences will arise from granting Bradley's request. The following section of this comment confronts these issues and suggests an appropriate paradigm for subsequent adjudication of suits for post-conviction genetic testing.

III. TIME TO ADAPT: HOW COURTS SHOULD HANDLE CLAIMS IN THE FUTURE, ABSENT CONGRESSIONAL LEGISLATION

Legislation currently is pending in both the Senate³⁴ and the House of Representatives³⁵ to establish uniform guidelines for post-conviction DNA testing in state and federal courts. In the absence of such legislation, however, the Supreme Court should resolve the current circuit split by adopting an analysis that recognizes prisoners' due process right to DNA testing.³⁶ This bifurcated approach would acknowledge that a prisoner in the procurement phase is constitutionally entitled to conduct genetic testing on the evidence, but would nevertheless place the burden on the prisoner to make a persuasive showing of actual innocence in the exoneration phase.

The interests of protecting finality, respecting federalism, and avoiding a flood of prisoner litigation are interests that underlie the decisions grappling with post-conviction genetic testing and these concerns must be considered before any viable solution can be presented. Numerous law review articles,³⁷ state statutes,³⁸ and even proposed federal legislative bills³⁹

33. *See id.*

34. 2003 S. 1700, 108th Cong. (Oct. 1, 2003).

35. 2003 H.R. 3214, 108th Cong. (Nov. 6, 2003).

36. *But see Harvey*, 285 F.3d at 303 (suggesting that courts should not "constitutionalize this area;" rather, they should wait for Congress to enact appropriate legislation).

37. *See e.g.* Jennifer Boemer, Student Author, *Other Rising Legal Issues: In the Interest of Justice: Granting Post-Conviction Deoxyribonucleic Acid (DNA) Testing to Inmates*, 27 Wm. Mitchell L. Rev. 1971 (2001); Karen Christian, Student Author, "And the DNA Shall Set You Free": *Issues Surrounding Postconviction DNA Evidence and the Pursuit of Innocence*, 62 Ohio St. L.J. 1195 (2001); David

have attempted to address the question of whether prisoners should be entitled to post-conviction testing and, if so, whether they should be released if the results are favorable to the prisoner. Each of these efforts, however, envisions a singular approach to the analysis, and the vast majority of them attempt to solve the problem by imposing various requirements intended to limit actions at the procurement phase. In contrast, a bifurcated approach allows the concerns of protecting finality, respecting federalism, and avoiding a flood of litigation to be addressed in turn - the latter is the only concern relevant in the procurement phase; protecting finality and respecting federalism, on the other hand, are apposite in the exoneration phase.

A. *The Procurement Phase*

As explained in Part II, the Supreme Court's holdings in *Preiser* and *Heck* are inapposite to a request to obtain and conduct genetic testing on evidence because both of those cases involved prisoners who were trying to challenge or shorten the length of their confinement - goals that are not applicable in the procurement phase. The relevant concern in this phase is that prisoners seeking post-conviction DNA testing will flood the courts. Traditional doctrines created to avoid federal-court adjudication of claims, such as the Prison Litigation Reform Act and federal court abstention, were not intended to apply to prisoners seeking DNA testing and thus should not be applied in these cases. Instead, courts should recognize prisoners' due process right to such testing and should make DNA evidence available to every prisoner whose conviction would be undermined by exculpatory results.

DeFoore, Student Author, *Postconviction DNA Testing: A Cry for Justice From the Wrongly Convicted*, 33 Tex. Tech L. Rev. 491 (2002); Holly Schaffter, Student Author, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 Drake L. Rev. 695 (2002); Kathy Swedlow, *Don't Believe Everything you Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355 (2002).

38. See e.g. Ariz. Rev. Stat. Ann. § 13-4240 (West 2002); Cal. Penal Code § 1405 (West 2002); Del. Code Ann. tit. 11, § 4504 (2002); D.C. Code § 22-4133 (2003) and § 22-4135 (2003); Fla. Stat. § 925.11 (2002); Idaho Code § 19-4902 (2002); 725 Ill. Comp. Stat. 5/116-3 (2002); La. Crim. Proc. Code Ann. art. 926.1 (2002); 15 Me. Rev. Stat. Ann. § 2138 (2002); Md. Crim. Proc. Code Ann., § 8-201 (2002); Mo. Rev. Stat. Ann. § 547.035 (West 2002); Neb. Rev. Stat. § 29-4120 (2002); N.J. Stat. Ann. § 2A:84A-32a (2002); N.Y. Crim. Proc. Law § 440.30 (McKinney 2002); N.C. Gen. Stat. § 15A-269 (2002); Or. Rev. Stat. § 138 (2002); 42 Pa. Consol. Stat. Ann. § 9543.1 (2002); Tenn. Code Ann. § 40-30-303 (2003); Tex. Crim. Proc. Code Ann. § 64.03 (2002); Utah Code Ann. § 78-35a-301 (2002); Wash. Rev. Code Ann. § 10.73.170 (West 2003); Wis. Stat. Ann. § 974.07 (West 2002). For a criticism of these legislative attempts, see Swedlow, *supra* n. 37.

39. Advancing Justice through DNA Technology Act of 2003, 2003 S. 1700, 108th Cong. (Oct. 1, 2003); Advancing Justice through DNA Technology Act of 2003, 2003 H.R. 3214, 108th Cong. (Nov. 6, 2003).

1. *The PLRA Does Not Apply to Claims in the Procurement Phase*

42 U.S.C. § 1983 allows a claim to be brought against any person who, under color of state law, has violated a federally protected right.⁴⁰ Unlike habeas corpus proceedings, there is no general requirement that a § 1983 claimant first exhaust available state remedies before filing suit in federal court.⁴¹ In reaction to the large number of frivolous claims brought by prisoners,⁴² however, Congress enacted the Prison Litigation Reform Act (PLRA),⁴³ which establishes an exhaustion requirement specifically for prisoners seeking relief in federal court.⁴⁴ Applying the PLRA to prisoners in the procurement phase is one way to limit the influx of claims for post-conviction genetic testing; however, the PLRA, as written and interpreted by the Supreme Court, is not applicable to these suits.

The PLRA precludes claims by prisoners “with respect to prison conditions” brought under § 1983 or any other federal law “until such administrative remedies as are available are exhausted.”⁴⁵ Although the PLRA does not define what is meant by “prison conditions,” the Supreme Court recently had occasion to interpret the term in *Porter v. Nussle*.⁴⁶ In that case, Ronald Nussle alleged that a prison officer severely assaulted him in violation of his Eighth Amendment right to be free of cruel and unusual punishments.⁴⁷ Nussle brought his § 1983 claim directly to federal court, bypassing the PLRA’s exhaustion requirement.⁴⁸ The Second Circuit Court of Appeals held that Nussle’s claim was not controlled by the PLRA because the exhaustion requirement “governs only conditions affecting prisoners generally, not single incidents, such as corrections officers’ use of excessive force, actions that immediately affect only particular prison-

40. 28 U.S.C. § 1331 provides federal court jurisdiction to hear claims brought under 42 U.S.C. § 1983. Chemerinsky, *supra* n. 3, at 422.

41. Chemerinsky, *supra* n. 3, at 437; *Porter v. Nussle*, 534 U.S. 516, 523 (2002); *Patsy v. Bd. of Regents of Fla.*, 457 U.S. 496, 516 (1982).

42. Senator Dole, in a statement to Congress, proclaimed that the PLRA was necessary because, “[f]rivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding citizens.” 141 Cong. Rec. S14413 (daily ed. Sept. 25, 1995). The notion that frivolous lawsuits filed by prisoners poses a problem to federal courts has been challenged. See Anne H. Matthews, Student Author, *The Inapplicability of the Prison Litigation Reform Act to Prisoner Claims of Excessive Force*, 77 N.Y.U. L. Rev. 536, 549-51 (2002).

43. 42 U.S.C. § 1997e (2000).

44. See 42 U.S.C. § 1997e(a) (2000).

45. *Id.*

46. 534 U.S. 516 (2002).

47. *Id.* at 519.

48. *Id.* at 519-20.

ers.”⁴⁹ The Supreme Court rejected the Second Circuit’s reasoning and held that the PLRA’s exhaustion requirement applied in Nussle’s case.⁵⁰

After considering congressional intent and prior judicial precedent, the Court ultimately held that “the PLRA’s exhaustion requirement applies to all inmate suits *about prison life*, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”⁵¹ Given the broad, sweeping language of the Court’s holding, commentators and courts have understandably erred in their belief that the PLRA now applies to all prisoner suits, regardless of their claims.⁵² The error stems from focusing on the latter portion of the holding (“whether they allege excessive force or some other wrong”) and concluding that the Court intended to encompass every conceivable claim made by a prisoner. Such a reading, however, overstates the Court’s holding and leads to anomalous results.⁵³

The proper interpretation of the *Porter* holding realizes that the latter clause is limited by the former. In other words, the holding covers all possible claims made by a prisoner, but only to the extent that the claim is *about prison life*. Thus, one can imagine numerous claims brought by prisoners that are not about prison life and therefore are not subject to the PLRA’s exhaustion requirement.⁵⁴ A prisoner’s claim for access to evidence in the procurement phase is one such claim.

Moreover, a claim by a prisoner to obtain access to evidence in order to conduct DNA testing is not one about “prison life” in the ordinary sense of that term. Prisoners in the procurement phase are neither complaining about the conditions of their confinement nor seeking redress for alleged wrongdoing by corrections officers; rather, they are merely attempting to

49. *Id.* at 520.

50. *Id.* at 532.

51. *Id.* (emphasis added).

52. John Collins, Student Author, *The Prison Litigation Reform Act: Excessive Force as a Prison Condition*, 21 St. Louis U. Pub. L. Rev. 395, 396 (“The Supreme Court, reversing the Second Circuit, held that the PLRA’s exhaustion requirement applies to all inmate suits regardless of their claim.”). See also *Fatir v. Dowdy*, 2002 WL 2018824 at *12 (D. Del., Sept. 4, 2002) (memorandum and order).

53. See *Fatir*, 2002 WL 2018824 at **11-12 (finding that, since the Supreme Court did not specifically exclude constitutional claims from those subject to the PLRA’s exhaustion requirement, plaintiff’s First Amendment constitutional claims must be exhausted even though they “do not appear to assert claims for prison conditions”).

54. For example, a person may have a § 1983 cause of action against a police officer for an illegal search and seizure that occurred before his incarceration. Because of the statute of limitations, the claim would not have to be brought for a number of years. In the meantime, before the claim is filed, the person is arrested and imprisoned for an unrelated crime. Once in prison, the person may bring the § 1983 action against the officer. See Wright, Miller, & Kane, *Federal Practice and Procedure Civil* § 1560, p. 446-47. This claim would not be about prison life and thus not subjected to the PLRA’s exhaustion requirement. Under an interpretation that the *Porter* holding applies to *all prisoner suits*, however, the person would be precluded from filing his claim directly in federal court without first exhausting administrative remedies.

compel state prosecutors and sheriffs to respect their due process right to obtain exculpatory evidence.⁵⁵ It follows that such claims are not addressed by the Supreme Court's holding in *Porter* and thus are not subject to the PLRA's exhaustion requirement.

2. *The Abstention Doctrines are Generally Inapplicable*

The Supreme Court has determined that, in some instances, federal district courts must abstain from hearing cases that are otherwise justiciable,⁵⁶ especially where abstention leads to "proper constitutional adjudication, regard for federal-state relations, or wise judicial administration."⁵⁷ An argument thus could be made that federal courts should abstain from hearing prisoners' claims in the procurement phase where the convicting state has enacted post-conviction DNA testing legislation because "wise judicial administration" favors state-court adjudication of state prisoners' post-conviction claims. This argument is further supported by the well-settled doctrine that a federal court has authority to decline to exercise jurisdiction when "employ[ing] its historic powers as a court of equity."⁵⁸ Because prisoners in the procurement phase are seeking an equitable remedy in the form of injunctive relief, the argument continues, federal courts should use their authority to abstain from hearing their claims.

Despite the intrinsic appeal of this argument, a general rule of federal court abstention from hearing claims in the procurement phase would be inappropriate for several reasons. First, it is clear that federal courts have the authority to interpret state law.⁵⁹ Second, federal courts regularly interpret state law when exercising supplemental jurisdiction and thus are competent tribunals to adjudicate state prisoners' § 1983 claims. Finally, the Court has been reluctant to extend the abstention doctrines beyond several well-established circumstances,⁶⁰ none of which generally are applicable in the procurement phase.⁶¹

55. 22A C.J.S. *Criminal Law* § 487 (1989) ("Defendant has a constitutional right to obtain . . . exculpatory evidence."); see also *Brady v. Maryland*, 373 U.S. 83, 87 (1963). While the right to exculpatory evidence generally is relevant before trial, it is equally applicable after conviction where testing may prove the defendant's innocence. See *Dabbs v. Vergari*, 570 N.Y.S.2d 765, 768 (1990) ("[W]here evidence has been preserved which has a high exculpatory potential, that evidence should be discoverable after conviction.").

56. Chemerinsky, *supra* n. 3, at 685.

57. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) (quoting *Colo. River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 817 (1976)) (internal quotations omitted).

58. *Id.* at 717 (quoting *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 120 (1981) (Brennan, J., concurring)).

59. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

60. See *Younger v. Harris*, 401 U.S. 37 (1971); *R.R. Commn. of Tex. v. Pullman*, 312 U.S. 496 (1941); *La. Power and Light Co. v. Thibodaux*, 360 U.S. 25 (1959); *Colo. River Water Conservation*

3. *Due Process & the Procurement Phase*

In the seminal case of *Brady v. Maryland*,⁶² the Supreme Court held that suppression of evidence favorable to an accused violates due process where the evidence is material to either guilt or punishment.⁶³ Evidence is material under the *Brady* rule if “its suppression undermines confidence in the outcome of the trial.”⁶⁴ Although *Brady* was concerned with pre-trial rights of an accused, the Court has long since recognized that prisoners also are entitled to due process protections.⁶⁵

Brady logically extends from the accused to the imprisoned because suppressed DNA evidence necessarily undermines confidence in the outcome of a trial.⁶⁶ The potentially exculpatory effect of DNA testing⁶⁷ casts doubt on the jury’s finding in any trial where such evidence was available but not admitted.⁶⁸ Indeed, where witnesses’ memories fail, testimony is weighed subjectively by judges and juries, and sympathies are extended to victims, DNA may be the *only* objective and inherently neutral evidence that can affirmatively demonstrate a defendant’s innocence. Where such evidence exists, it shocks the conscience to deny inmates access to it.⁶⁹

Critics argue that defendants should not be constitutionally entitled to conduct post-conviction DNA testing on evidence because the unavailability of DNA testing at the time of trial does not mean that their trial was

Dist. v. U.S., 424 U.S. 800 (1976); *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491 (1942); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

61. *Younger* abstention applies where the federal court may interfere with ongoing state proceedings. *Chemerinsky*, *supra* n. 3, at 716. *Pullman* abstention is permitted when state law is unclear and a state court’s clarification may make a federal court’s constitutional ruling unnecessary. *Id.* at 687. *Thibodaux* abstention is relevant in a diversity case if “there is uncertain state law and an important state interest that is ‘intimately involved’ with the government’s ‘sovereign prerogative.’” *Id.* at 701. *Colorado River* abstention is relevant in limited circumstances where there is there is duplicative litigation in state and federal courts. *Id.* at 757-78. *Brillhart* abstention applies where a district court declines to hear a claim seeking declaratory judgment. Charles Alan Wright, *Law of Federal Courts* 715 (5th ed., West 1994). *Burford* abstention applies where the federal court defers to complex state administrative procedures. *Chemerinsky*, *supra* n. 3, at 702.

62. 373 U.S. 83 (1963).

63. *Id.* at 87.

64. *U.S. v. Bagley*, 473 U.S. 667, 678 (1985).

65. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); see also *Godschalk v. Montgomery County Dist. Attorney’s Off.*, 177 F.Supp.2d 366, 369 (2001); *Dabbs* 570 N.Y.S.2d at 767-68.

66. *Godschalk*, 177 F.Supp.2d at 370; *Dabbs*, 570 N.Y.S.2d at 768 (“[W]here evidence has been preserved which has high exculpatory potential, that evidence should be discoverable after conviction.”).

67. See Sen. 486, 107th Cong. at § 103(a)(1)(B); Cf. Natl. Commn. on the Future of DNA Evidence, Natl. Inst. of Just., U.S. Dept. of Just., *Postconviction DNA Testing: Recommendations for Handling Requests* (1999) [hereinafter NIJ Report]; Schaffter, *supra* n. 37, at 699-702.

68. *Godschalk*, 177 F.Supp.2d at 370 (granting plaintiff’s request for DNA testing, even though he had confessed to the crime, because, given the “well-known powerful exculpatory effect of DNA testing,” confidence in the jury’s finding of guilt would be undermined).

69. Sen. 486, 107th Cong. at § 103(a)(1)(K).

unfair.⁷⁰ While it may be technically true that the wrongly convicted received a constitutionally “fair” trial, this argument callously disregards the truth that conceptions of fairness and justice evolve with societal advancements. Relying on historical notions of fairness to preclude post-conviction DNA testing damages the credibility of our justice system and validates the constitutionally unacceptable act of punishing innocent persons.

Skeptics also contend that recognition of a post-conviction constitutional right to obtain DNA evidence in order to conduct testing will flood the courts with claims and overburden the judiciary. Of course, this is mere speculation, because it is uncertain how much genetic evidence has been preserved from cases decided decades ago; it is even less certain how many prisoners will seek such evidence even if they can. Moreover, Congress has proposed that prisoners who file frivolous claims should be subject to further prosecution.⁷¹ Thus, a sudden influx of claims brought into district courts, even if it occurred, merely will incentivize Congress to enact its currently pending legislation in order to place procedural restrictions on procurement phase claims.⁷²

B. *The Exoneration Phase*

Once a prisoner is successful in the procurement phase and obtains exculpatory DNA testing results, he enters the exoneration phase, in which he seeks release from prison based on the newly-obtained DNA evidence. In this phase, the prisoner, in a petition for a writ of habeas corpus,⁷³ claims that he is “actually innocent” of the charges and should be released from prison. The concerns of protecting finality and preserving federalism that lead the Supreme Court to reject the petitioner’s claim for exoneration in *Herrera* are no longer applicable and should not prevent courts from freeing prisoners with exculpatory DNA evidence.

70. See *Harvey*, 278 F.3d at 379.

71. See Advancing Justice through DNA Technology Act of 2003 § 3600(f), 2003 S. 1700, 108th Cong. (Oct. 1, 2003).

72. See Part IV *infra* for a discussion of the restrictions imposed by pending Congressional legislation. For a detailed argument of why Supreme Court jurisprudence compels the recognition of a due process right to post-conviction genetic testing, see *Harvey*, 285 F.3d at 312-20 (Luttig, J., respecting the denial of rehearing en banc).

73. A habeas petition is the proper remedy for state prisoners seeking a federal-court determination that their confinement is unconstitutional. Wright, *supra* n. 61, at 352. The writ “is a bulwark against convictions that violate ‘fundamental fairness.’” *Engle v. Isaac*, 456 U.S. 107, 126 (1982), and permits a federal court to order the release of a state prisoner held in violation of the constitution. Wright, *supra* n. 61, at 352.

1. *Herrera v. Collins*

While nearly everyone agrees that an actually innocent prisoner should be released from confinement, some remain unconvinced that DNA testing can prove such innocence conclusively. Skeptics argue that DNA, like fingerprints, is “negative evidence” - while its presence can establish that someone was at a crime scene, its absence does not necessarily mean that someone was not there.⁷⁴ Thus, a prisoner in the exoneration phase should retain the burden of demonstrating how the results of the DNA testing conclusively establish his innocence. It is clear from the Supreme Court’s decisions in *Heck* and *Preiser* that such a result cannot be accomplished through a § 1983 action, but there is some doubt as to what does constitute the proper federal remedy.

In *Herrera v. Collins*,⁷⁵ the Supreme Court expressed its reluctance to exonerate prisoners, based on claims of actual innocence, solely because of newly discovered evidence. The petitioner in that case, Leonel Herrera, was convicted of capital murder.⁷⁶ In an attempt to avoid his death sentence, he produced various affidavits that claimed he had not committed the crime.⁷⁷ The Court suggested that the continued incarceration of someone who could make a “truly persuasive” showing of actual innocence is unconstitutional,⁷⁸ but without explaining what evidence would suffice to meet this standard, the Court found that Herrera’s claim fell “far short” of it⁷⁹ and suggested that he seek executive clemency instead.⁸⁰ Four Justices criticized Chief Justice Rehnquist’s reliance on clemency to vindicate the rights of actually innocent prisoners and proposed various standards that, if met, would allow a prisoner claiming actual innocence access to a judicial proceeding.⁸¹ Chief Justice Rehnquist rejected these standards and argued that there is no guarantee, if a prisoner’s claim of actual innocence was

74. Interview by Ofra Bikel with Judge Sharon Keller, Texas Court of Criminal Appeals (transcript at *Frontline, The Case for Innocence*, <http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html> (last visited Mar. 1, 2004)); *but see* Christian, *supra* n. 37, at 1227 (“[T]he accuracy of DNA testing demands that DNA evidence be given greater weight than fingerprint evidence.”).

75. 506 U.S. 390 (1993).

76. *Id.* at 393.

77. *Id.* at 396-97.

78. *Id.* at 417.

79. *Id.* at 418-19.

80. *See id.* at 411.

81. Justice White would permit federal courts to hear claims of actual innocence, even after traditional remedies were exhausted, if the prisoner could show that “based on proffered newly discovered evidence and the entire record before the jury that convicted him, ‘no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.’” *Id.* at 429 (White, J., concurring in the judgment) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). Justices Blackmun, Stevens, and Souter would also permit federal courts to consider claims of actual innocence where the petitioner demonstrates that he “probably is innocent.” *Id.* at 442 (Blackmun, J. dissenting).

considered in a judicial hearing, that the determination of guilt or innocence would be any more accurate than at trial because the “passage of time only diminishes the reliability of criminal adjudications.”⁸² Moreover, the Court questioned the credibility of Herrera’s affidavits because he did not explain why he waited until the “11th hour” to produce them, they contained inconsistencies, and, save for one, they all consisted of hearsay.⁸³

Currently, a court’s analysis in the exoneration phase is limited by the Supreme Court’s holding in *Herrera*. Arguably, the sole remedy available is executive clemency,⁸⁴ however, *Herrera* was decided in 1993, before DNA testing became prevalent in courts.⁸⁵ Additionally, the Court’s reasons for rejecting Herrera’s claim of actual innocence - the passage of time and the questionable nature of affidavits - are not of concern in the exoneration phase, where the prisoner appears before the court with DNA testing results that might demonstrate conclusively that he was not the perpetrator.⁸⁶ DNA results, unlike affidavits and witness testimony fashioned years after the trial, are not subject to bias⁸⁷ and thus should alleviate the Court’s concerns regarding the integrity of the petitioner’s claim.⁸⁸

The *Herrera* court’s reliance on executive clemency to handle claims of actual innocence is misplaced for prisoners in the exoneration phase. The Court explained that clemency is the “historic remedy for preventing miscarriages of justice where judicial process has been exhausted[,]”⁸⁹ and provides the “‘fail safe’ in our criminal justice system.”⁹⁰ While clemency may be well-suited to handle individual claims of innocence based on questionable nonscientific evidence proffered subsequent to the exhaustion

82. *Id.* at 403-04 (citing *McClesky v. Zant*, 499 U.S. 467, 491 (1991) to argue that “erosion of memory and dispersion of witnesses” would lessen the chances of a reliable trial for prisoners claiming actual innocence).

83. *Id.* at 417-18.

84. *But see* NIJ Report, *supra* n. 67, at 13 (suggesting that DNA evidence may suffice to make a “truly persuasive” showing of actual innocence and thus make habeas petitions viable for prisoners).

85. Sen. 486, 107th Cong. at § 101(a)(3); H.R. 912, 107th Cong. at § 101(a)(3); *see also* Boemer, *supra* n. 37, at 1976 (noting that post-conviction DNA testing did not “move[] to the forefront” until 1996); Schaffter, *supra* n. 37, at 699-702 (explaining the history of DNA evidence and noting that it “was not admitted in all United States jurisdictions until 1998.”).

86. *See* Sen. 486, 107th Cong. at § 103(a)(1)(B); Christian, *supra* n. 37, at 1195; NIJ Report, *supra* n. 67, at 19.

87. This statement assumes that DNA analysts’ personal biases are avoided by, for example, conducting a double-blind analysis of the evidence.

88. *See* Sen. 486, 107th Cong. at § 103(a)(1)(D) (“Uniquely, DNA evidence showing innocence, produced decades after a conviction, provides a more reliable basis for establishing a correct verdict than any evidence proffered at the original trial.”).

89. *Herrera*, 506 U.S. at 411-12.

90. *Id.* at 415.

of judicial remedies,⁹¹ it never was intended to provide widespread relief to an entire class of persons who can demonstrate their innocence conclusively. Prisoners in the exoneration phase should not be forced to seek executive clemency, an arduous process that generally contains its own procedural requirements,⁹² because the judiciary, after considering the petitioner's record as a whole, is better equipped to evaluate the exculpatory nature of the evidence.⁹³

2. *Should Finality and Federalism Prevent Exoneration?*

Even if *Herrera* is not controlling, skeptics may argue, the possibility of exonerating prisoners will disrupt the interests of finality and federal-state comity that traditionally have limited the scope of habeas review.⁹⁴

Finality is a problem that "raises acute tensions in our society."⁹⁵ It is important because it gives legitimacy to convictions⁹⁶ and allows prisoners to begin rehabilitating once it becomes apparent that their convictions will not be overturned.⁹⁷ Without it, "criminal law is deprived of much of its deterrent effect."⁹⁸ Skeptics of post-conviction DNA testing argue the dangers of a slippery-slope effect - if prisoners can obtain testing whenever there is a technological advancement, there will never be any finality to convictions.⁹⁹ Whatever the relative importance of protecting finality, it cannot be more necessary to the criminal justice system than the exoneration of innocent prisoners.¹⁰⁰ Indeed, the highly exculpatory nature of

91. *But see* Alyson Dinsmore, Student Author, *Clemency in Capital Cases: The Need to Ensure Meaningful Review*, 49 UCLA L. Rev. 1825 (opining that clemency is not an effective substitute for judicial consideration of claims of actual innocence).

92. *See Herrera*, 506 U.S. at 415-18 (describing Texas clemency procedures).

93. *See* NIJ Report, *supra* n. 67, at xvi (recommending that the judiciary, not the governor, consider the relevance of favorable post-conviction DNA testing).

94. *Teague v. Lane*, 489 U.S. 288, 308 (1989); *Engle*, 456 U.S. at 126; *see also Herrera*, 506 U.S. at 426 ("At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation.") (O'Connor, J., concurring); *Harvey*, 285 F.3d at 299 ("It is important however that claims of innocence should be entertained, where possible, in the first instance by the court, or at least by the court system, that initially heard the case.").

95. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 441 (1963).

96. Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W. L. Rev. 389, 409 (2002).

97. Bator, *supra* n. 95, at 452.

98. *Teague*, 489 U.S. at 309.

99. *See Harvey*, 278 F.3d at 376 ("[W]e believe that finality cannot be sacrificed to every change in technology."); *but see Harvey*, 285 F.3d at 321 (Luttig, J., respecting the denial of rehearing en banc).

100. *See Herrera*, 506 U.S. at 398 ("[T]he central purpose of any system of criminal justice is to convict the guilty and free the innocent."); *Dabbs*, 570 N.Y.S.2d at 769 ("[T]o deny petitioner the opportunity to prove his innocence with such evidence simply to ensure the finality of convictions is untenable.").

DNA testing satisfies even the most conservative approaches to limit the number of collateral attacks on criminal convictions.¹⁰¹

Skeptics may also argue that prisoners who hold favorable DNA testing results should nevertheless be subjected to the exhaustion requirements of the Anti-Terrorism and Effective Death Penalty Act (AEDPA)¹⁰² before having their claims heard in federal court.¹⁰³ Among the various restrictions AEDPA places on habeas petitions,¹⁰⁴ § 2244(b)(2) requires dismissal of a second or successive habeas petition if the claim had not been presented previously unless the prisoner can demonstrate that: (1) the factual predicate of the claim could not have been discovered previously through reasonable diligence, and (2) the claim, if proven, would be sufficient to establish by “clear and convincing evidence that, *but for constitutional error*,” no reasonable factfinder would have found him guilty.¹⁰⁵ Moreover, AEDPA requires that a prisoner obtain an order from the appropriate court of appeals to direct a district court to entertain the claim.¹⁰⁶

AEDPA should not stand in the way of the exoneration of innocent prisoners. AEDPA was enacted to further the interests of finality, comity, and federalism;¹⁰⁷ however, these concerns are not offended where a prisoner possesses exculpatory DNA testing results and seeks immediate release from prison. Moreover, legislation currently pending in Congress expresses an apparent interest in excluding claims based on post-conviction DNA testing from AEDPA’s requirements.¹⁰⁸ While provisions

101. See generally Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). Judge Friendly sought to limit the number of habeas petitions filed by prisoners by requiring such claims to be supplemented with “a colorable claim of innocence.” *Id.* at 142. One acceptable manner for the prisoner to achieve this is by showing “a fair probability that, in light of all the evidence, including . . . 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.” *Id.* at 160.

102. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

103. The Ninth Circuit recently confronted this very issue in *Redd v. McGrath*, 343 F.3d 1077 (2003), and concluded that AEDPA’s exhaustion requirement applies to claims of actual innocence based on newly discovered evidence. The court explained that the limitations period on these claims “begins to run when the prisoner could have discovered the new evidence through the exercise of due diligence.” *Id.* at 1083. Under AEDPA’s exhaustion requirement, however, the prisoner’s federal habeas claim cannot be filed until state court remedies have been exhausted. *Id.* Accordingly, the federal limitations period is tolled while the state claim is pending. *Id.*

104. See Howard P. Fink, et al., *Federal Courts In The 21st Century*, 1022 (2d ed., LexisNexis 2002).

105. 28 U.S.C. § 2244(b)(2)(B)(i) (2000) (emphasis added). A prisoner may also escape dismissal if he can demonstrate that his claim “relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable[.]” 28 U.S.C. § 2244(b)(2)(A) (2000).

106. 28 U.S.C. § 2244(b)(3)(A) (2000).

107. *Williams v. Taylor*, 529 U.S. 420, 436 (2000).

108. See Sen. 1700, 108th Cong. at § 3600(h)(3) (explaining that a motion for post-conviction DNA testing shall not be considered a habeas petition for purposes of considering whether the motion should be barred by AEDPA).

of pending legislation are by no means binding on federal courts, they do provide guidance in handling novel issues that Congress has considered. Current legislative efforts, coupled with the realization that no interest is served by precluding the exoneration of an innocent prisoner, should provide federal courts with a reasonable basis for departure from AEDPA's restraints.

Even if AEDPA's strict requirements are not imposed on prisoners in the exoneration phase, exhaustion of state remedies should not be disregarded completely. The Supreme Court has touted on numerous occasions the importance of exhaustion in respecting federalism.¹⁰⁹ Indeed, long before the passage of AEDPA, the Court declared that, in the interest of comity, federal courts should not entertain habeas petitions until the state courts have had an opportunity to resolve the matter.¹¹⁰ This idea, that federal courts should avoid interfering with the legitimate activities of the states, has existed since the early days of America.¹¹¹ It "occupies a highly important place in our Nation's history and its future."¹¹²

Typically, exhaustion is required only where the state remedy is adequate and available.¹¹³ For prisoners in the exoneration phase, state relief may or may not be available, depending on the particular state's post-conviction legislation.¹¹⁴ Thus, if the state does not have a post-conviction DNA testing statute, or if the prisoner would be procedurally barred from asserting a right under an applicable state statute, the prisoner should be able to file his habeas petition in federal court without first seeking state redress, since any such attempt would be futile. On the other hand, if the state has an adequate¹¹⁵ post-conviction DNA statute or procedure pursuant to which the prisoner is able to bring a claim, then it is reasonable to require that such remedies be exhausted before suit is filed in federal court.¹¹⁶

109. See e.g. *Younger*, 401 U.S. at 37 (1971). In *Younger*, the Court explained that the notion of "Our Federalism" represents the idea that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* at 44.

110. *Ex Parte Royall*, 117 U.S. 241 (1886); see also *Preiser*, 411 U.S. at 491 ("The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity."); *Darr v. Burford*, 339 U.S. 200, 204 (1950) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."); Chemerinsky, *supra* n. 3, at 800-01.

111. *Younger*, 401 U.S. at 45.

112. *Id.*

113. 28 U.S.C. § 2254 (2000).

114. See *supra* Part III & n. 36.

115. There is some debate as to what remedy is "adequate" where a prisoner holds favorable DNA test results; however, anything less than a right to a new trial should not be considered adequate.

116. Indeed, pending federal legislation requires state prisoners to exhaust available state remedies before seeking redress in federal court. Sen. 1700, 108th Cong. at § 3600(a)(1)(B)(ii)(II).

IV. THE ADVANCING JUSTICE THROUGH DNA TECHNOLOGY ACT: A STEP IN THE RIGHT DIRECTION

The Advancing Justice through DNA Technology Act of 2003 (the “Act”),¹¹⁷ which currently is pending in both branches of Congress, provides certain post-conviction DNA testing rights to prisoners,¹¹⁸ but falls short of recognizing prisoners’ due process rights to the evidence.

A. *Claims Made in the Procurement Phase*

Pursuant to the Act, prisoners who are incarcerated for a state offense may make a motion for post-conviction DNA in federal court only if: (1) there is no adequate state remedy; or (2) the prisoner can demonstrate that he has exhausted available state remedies.¹¹⁹ Recall that § 1983, the traditional vehicle for redress in federal court by state prisoners, does not have an exhaustion requirement.¹²⁰ It thus appears that the Act intends to modify § 1983 by requiring exhaustion in the post-conviction DNA testing context; however, the Act never specifically states this intent. Indeed, in an apparent attempt to avoid the very confusion that it creates, the Act makes clear that it shall not “affect the circumstances under which a person may obtain DNA testing or post-conviction relief under any other law.”¹²¹

This legislation would allow a prisoner to bring a civil action to assert his right to post-conviction DNA testing, but it is unclear whether such a suit could be brought under § 1983. The Supreme Court has explained that Congress may preclude the availability of § 1983 suits to vindicate federal rights by including a “sufficiently comprehensive” remedial scheme in an Act;¹²² the scheme’s existence evidences Congress’ intent to prohibit otherwise cognizable §1983 claims.¹²³

As written currently, it is unclear whether Congress intends for the Act’s remedial scheme to foreclose § 1983 actions to prisoners who are denied post-conviction DNA testing. The Act simultaneously adds an exhaustion requirement to claims made in the procurement phase and states

117. For a discussion of Congress’ ability to enact the Advancing Justice through DNA Technology Act, see Larry Yackle, *Congressional Power to Require DNA Testing*, 29 Hofstra L. Rev. 1173 (2001).

118. The Act also provides relief for federal prisoners, but analysis of those provisions is outside the scope of this Comment.

119. Sen. 1700, 108th Cong. at § 3600(a)(1)(B)(ii).

120. See Part IIIA.

121. Sen. 1700, 108th Cong. at § 3600(h)(1).

122. *Middlesex County Sewerage Auth. v. Natl. Sea Clammers Assn.*, 453 U.S. 1, 20 (1981).

123. *Id.* at 21. Justice Stevens, writing separately, suggests that Congressional intent should not be assumed by the mere existence of a comprehensive remedial scheme; rather, the burden should be on the defendant to identify express language demonstrating Congress’ intent to foreclose § 1983 actions. *Id.* at 28 & n. 11 (Stevens, J., concurring in part and dissenting in part).

that other laws shall remain unaffected. Unless revised, this ambiguity will lead to confusion and further delays in the exoneration of innocent prisoners.

B. *Claims Made in the Exoneration Phase*

Under the Act, a prisoner who receives exculpatory DNA testing results may file a motion for a new trial or resentencing. This motion shall be granted if the court finds that “the DNA test results, when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by a preponderance of the evidence that a new trial would result in an acquittal”¹²⁴ The Act precludes an end-run around its requirements by stating that “[n]othing in [the Act] shall provide a basis for relief in any [f]ederal habeas corpus proceeding.”¹²⁵

The consequence of the Act is that prisoners in the exoneration phase who possess exculpatory DNA test results *may* receive a new trial *if* the judge concludes after considering all of the evidence - even evidence that was not introduced at trial - that an acquittal is likely. This remedy is a far cry from the exoneration and release from confinement currently available to prisoners through a successful writ of habeas corpus or executive clemency. Thus, while the Act is a step in the right direction, in many ways it lessens innocent prisoners’ available remedies.¹²⁶

V. CONCLUSION

The current split among the circuits as to what rights prisoners have to post-conviction DNA testing must be resolved. Congress ultimately will determine the proper approach to handling such claims; however, given the current political climate, legislation may take years to enact. In the meantime, the Supreme Court should recognize that DNA testing can rectify the inherent errors of our fallible justice system.¹²⁷ In so doing, it is imperative that a bifurcated approach be employed whereby a due process right to DNA testing is recognized in the procurement phase and judicial review of favorable testing results is mandated in the exoneration phase.

124. S. 1700, 108th Cong. at § 3600(g)(2).

125. *Id.* at § 3600(h)(2).

126. There is no need to elaborate further on the proper judicial interpretation of this statute because it is still pending and subject to revision.

127. *Herrera*, 506 U.S. at 415 (“It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”).

Moreover, pre-existing procedural restrictions, such as the Prison Litigation Reform Act and the Anti-Terrorism and Effective Death Penalty Act, which are meant to keep frivolous claims out of court, should not be permitted to preclude meritorious claims of innocence based on DNA testing. Only when these rights are bestowed upon prisoners and the innocently incarcerated are allowed to regain their freedom can the criminal justice system be considered just.