JUST DNA: EXPANSION OF FEDERAL § 1983 JURISDICTION UNDER *SKINNER V. SWITZER* SHOULD BE LIMITED TO ACTIONS SEEKING DNA EVIDENCE

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INTRODUCTION

During Reggie Caswell's trial for burglary, the prosecutor admitted surveillance footage from a convenience store but declined, over Caswell's objection, to show the footage to the jury during closing statements.[1] After the jury convicted Caswell, the State introduced a Persistent Violent Felony Offender Statement, asserting that he had two prior convictions.[2] The trial judge sentenced him to twenty-five years to life imprisonment.[3] When the appeal process commenced, neither the footage nor the Persistent Violent Offender Statement were available to Caswell.[4] After extensively and unsuccessfully petitioning both the prosecution and trial judge for access to this evidence to support his post-conviction appeals,[5] Caswell filed a 42 U.S.C. § 1983 civil rights claim in federal court against his prosecutors.[6] He alleged, *inter alia*, that access to such evidence would not *necessarily* invalidate his state conviction or sentence, but rather, the trial and sentencing exhibits would be used to support his subsequent postconviction filings.[7] The federal court, thus, was faced with a choice:

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1 Brief of Plaintiff-Appellant at 7 Caswell v. Green, 424 F. App'x 44 (2d Cir. 2011) (No. 10-1251-pr), 2010 WL 5064758 at *7.

2 *Id*. at 11.

3 *Id.*

4 *Id*. at 12.

5 *Id*. at 12-13.

6 *Id*. at 11.

7 Brief for Plaintiff-Appellant, *supra* note 1, at 16.

abridge judicial economy and state conviction finality in favor of fairness, or preserve efficiency in lieu of due process.

The district court dismissed Caswell's § 1983 claim as barred under the rule established by the Supreme Court in *Heck v. Humphrey*[8]—that the only federal remedy available to prisoners directly challenging their state conviction is a habeas petition.[9] However, the United States Court of Appeals for the Second Circuit reversed, finding that, although access to the surveillance footage and sentencing exhibit may eventually exculpate, inculpate, or render inconclusive results, the immediate § 1983 action did not directly challenge Caswell's state conviction.[10] Accordingly, the Second Circuit held that Caswell's post-conviction request for access to this evidence was properly brought under § 1983.[11]

The decision in *Caswell v. Green* demonstrates the far-reaching applicability of the Supreme Court's recent ruling in *Skinner v. Switzer*.[12] In *Skinner*, the Supreme Court held that a prisoner's § 1983 federal civil rights lawsuit, seeking access to postconviction DNA testing, was actionable because it would not *necessarily* invalidate his state conviction.[13] Rather, DNA evidence is just as likely to inculpate or render inconclusive results as it is to exculpate.[14] *Skinner* was an extension of the Supreme Court's holding in *Wilkinson v. Dotson*—that § 1983 remains available for procedural challenges where success in the action would not necessarily spell immediate or speedier release for the prisoner.[15] The *Wilkinson* decision created an exception to the standard set forth by the Supreme Court in *Heck v. Humphrey* that a state prisoner's § 1983 action is barred if success in that action would necessarily demonstrate the invalidity of the conviction.[16] While policy and jurisprudence support extending postconviction access to

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[8] *See* Caswell v. Green, 424 F. App'x 44, 44 (2d Cir. 2011) (describing the basis of the district court decision).

[9] Heck v. Humphrey, 512 U.S. 477, 487 (1994).

[10] *Caswell*, 424 F. App'x at 45-46.

[11] *Id.* at 46.

[12] *See generally* Skinner v. Switzer, 131 S. Ct. 1289, 1298 (2011) (extending federal jurisdiction under § 1983 to allow a convicted state prisoner to seek DNA evidence).

[13] *Id.*

[14] *Id.*

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

[16] *See id.*; Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).

DNA,[17] a revolutionary scientific advancement that has exonerated 297 individuals since its first courtroom use in 1989 and is available by statute in 48 states,[18] it is not difficult to imagine the extension of *Skinner* to less meritorious evidence-seeking motions, such as the one filed by Caswell.[19]

This Comment argues that the Supreme Court's clouding of the *Heck* bar against § 1983 claims in *Skinner* could impede comity, federalism, and principles of finality by prompting a flood of postconviction, evidence-seeking tort suits in federal court. Therefore, lower courts, unlike the Second Circuit in *Caswell*, should interpret the *Skinner* holding narrowly—as applying only to requests for DNA evidence. Part I provides an introduction to the *Wilkinson* decision and its lineage, which culminate in the doctrinal rule that § 1983 claims for postconviction relief are actionable only when they do not directly invalidate the state's conviction. Part II expounds upon the application of this rule to claims for postconviction DNA access, including the Supreme Court's decision in *Skinner*, that prevailing on a § 1983 claim for DNA evidence would not *necessarily* invalidate the state conviction because DNA testing may inculpate, exculpate, or render inconclusive results. This Part takes inventory of the safeguards against frivolous lawsuits recounted by the majority in *Skinner*. Part II also presents applications of the *Skinner* rule by several district courts. Finally, Part III concludes that an extension of the *Skinner* doctrine to evidence-seeking § 1983 claims, other than those requesting access to DNA under state-enacted statutes, diminishes state conviction finality, threatens federal judicial economy, and depreciates federalism.

I. BACKGROUND

A prisoner seeking access to postconviction evidence has two possible avenues for legal redress: (1) civil rights claims under 42

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[17] Memorandum from Eric H. Holder, Jr., Attorney General, to Assistant Attorney General, Criminal Division, et. al., *DNA Sample Collection from Federal Arrestees and Defendants* (2009), http://www.justice.gov/ag/ag-memo-dna-collection111810.pdf.

[18] *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Sept. 25, 2012).

[19] *See* Caswell v. Green, 424 F. App'x, 44, 45 (2011).

U.S.C. § 1983,[20] and (2) petitions for a writ of habeas corpus.[21] Both provide access to a federal forum to litigate constitutional violations, but "they differ in scope and operation."[22] Section 1983 provides litigants a civil cause of action for violations of constitutional or other federal rights[23] where compensatory damages or injunctive relief is sought.[24] Conversely, habeas corpus provides a remedy where prisoners challenge the fact or duration of their confinement and seek immediate or speedier release.[25]

Habeas petitioners must navigate numerous procedural hurdles to secure release.[26] First, a state prisoner must exhaust all state remedies as a prerequisite to bringing a habeas challenge.[27] On the other hand, prisoners are not required to exhaust state remedies before filing a § 1983 claim.[28] Second, following the Antiterrorism and Effective Death Penalty Act of 1996,[29] federal habeas petitions are subject to stricter time limitations and rules against successive filings than are

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20 42 U.S.C. § 1983 (2006).

21 Heck v. Humphrey, 512 U.S. 477, 480 (1994).

22 *Id.*

23 Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2006).

24 *See, e.g.*, Osborne v. Dist. Attorney's Office (*Osborne I*), 423 F.3d 1050, 1053 (9th Cir. 2005) (explaining that *Heck* "applies both to actions for money damages and to those . . . for injunctive relief.").

25 *See* Heck v. Humphrey, 512 U.S. 477, 481 (1994) (citing Preiser v. Rodriquez, 411 U.S. 475 (1973)).

26 *Osborne I*, 423 F.3d at 1053.

27 28 U.S.C. § 2254 (b)(1)(A) (1996); O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.").

28 *See, e.g.*, Patsy v. Bd. of Regents, 457 U.S. 496, 500-01 (1982) ("[T]his Court has stated categorically that exhaustion is not a prerequisite to an action under § 1983.").

29 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

§ 1983 actions.[30] In sum, § 1983 plaintiffs "'generally face a substantially lower gate' than those prisoners petitioning for habeas."[31] Therefore, prisoners seeking access to DNA evidence have an incentive to do so by a § 1983 suit rather than a habeas petition.[32]

The two remedies, however, are not necessarily mutually exclusive, and the distinguishing features are not inherently clear.[33] Consequently, the Supreme Court has attempted to "[harmonize] '[t]he broad language of § 1983' . . . with 'the specific federal habeas corpus statute.'"[34] Under a line of cases beginning with *Preiser v. Rodriguez*,[35] the Supreme Court has narrowed the expansive language of § 1983 by holding that certain claims must be brought as habeas petitions, although they would otherwise fall within the scope of § 1983.[36]

Section A outlines the precedent governing the actionability of § 1983 suits brought by prisoners. Section B concludes this Part by discussing the Supreme Court's application of the *Presier-Heck* doctrine to postconviction § 1983 actions specifically seeking DNA evidence.

A. *Developing the* Preiser-Heck *Doctrine*

The Supreme Court first considered the propriety of postconviction claims under § 1983 in *Preiser*.[37] Later, in *Heck*, which held that a § 1983 claim is proper where its success would not *necessarily* imply the invalidity of the state conviction or sentence, the Supreme Court elaborated on the distinction between habeas petitions and § 1983 suits.[38] Following the Wilkinson decision, which clouded Heck's bright-line rule, a lower-court split subsequently developed over

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30 *See* 28 U.S.C. § 2244 (d)(1) (2006). AEDPA requires that a habeas petition in federal court is filed within one year of exhausting all state remedies. *Id.* AEDPA also generally prohibits successive habeas claims in federal courts. *See* § 2244(b)(1)-(2).

31 McKithen v. Brown, 481 F.3d 89, 100 (2d Cir. 2007) (quoting Muhammad v. Close, 540 U.S. 749, 751 (2004) (per curiam)).

32 Eric Despotes, *The Evidentiary Watershed: Recognizing a Post-Conviction Constitutional Right to Access DNA Evidence Under 42 U.S.C. § 1983*, 49 SANTA CLARA L. REV. 821, 826-27 (2009).

33 *See* Docken v. Chase, 393 F.3d 1024, 1030-31 (9th Cir. 2004).

34 Heck v. Humphrey, 512 U.S. 477, 491 (1994) (Thomas, J., concurring) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)).

35 Preiser v. Rodriguez, 411 U.S. 475, 476 (1973).

36 *Id.* at 481 (citing Preiser v. Rodriguez, 411 U.S. 475, 488-89 (1973)).

37 Preiser v. Rodriguez, 411 U.S. 475 (1973).

38 *Heck*, 512 U.S. at 486-87.

whether postconviction access to DNA evidence directly challenges a state conviction.[39]

1. *Preiser v. Rodriguez*

In *Preiser*, three state prisoners brought civil rights actions under § 1983, challenging the constitutionality of disciplinary proceedings that deprived them of their accrued good-behavior-time credits.[40] The prisoners sought injunctive relief that would restore their time credits, which would result in their immediate release from prison.[41] The prisoners pursued their claim under § 1983, as opposed to filing a habeas petition, arguing that "their complaints plainly came within the literal terms of that statute," and thus, that they should not be excluded from "the broad remedial protection provided by [§ 1983]."[42]

The Court framed the issue not as whether the prisoners' claims fell within the plain text of § 1983, but whether § 1983 was an appropriate alternative to habeas corpus where a favorable outcome would result in the prisoners' release from confinement.[43] The Court surveyed the traditional purpose of the habeas petition—"to effect release from illegal custody"[44]—and found that the prisoners' challenge to the duration of their imprisonment fell squarely within this traditional understanding of the writ.[45] Accordingly, the Court held that the prisoners could not seek restoration of their good-time credits, which would result in their immediate release, through a § 1983 claim.[46] The Court noted, however, that action for monetary damages sought neither immediate nor speedier release and, therefore, fell comfortably within the boundaries of § 1983.[47]

2. *Heck v. Humphrey* and the "Favorable Termination" Rule

Roy Heck was convicted of voluntary manslaughter in the murder of his wife, and sentenced to fifteen years imprisonment.[48] Before

39 Wilkinson v. Dotson, 544 U.S. 74 (2005).
40 *Preiser*, 411 U.S. at 476-77.
41 *Id.* at 476-77.
42 *Id.* at 488.
43 *Id.* at 489, 500.
44 *Id.* at 486 n.7.
45 *Id.* at 487.
46 Preiser v. Rodriguez, 411 U.S. 475, 489, 500 (1973).
47 *Id.* at 494.
48 Heck v. Humphrey, 512 U.S. 477, 478 (1994).

exhausting all available state remedies, Heck filed a § 1983 action against county prosecutors and the state police investigator alleging that his conviction violated his constitutional rights.[49] Although these accusations may have been sufficient to support a habeas petition for release, Heck sought only compensatory and punitive damages.[50] The district court dismissed the § 1983 action because it "directly implicate[d] the legality of [petitioner's] confinement,"[51] and thus, should have been brought in a habeas challenge. Both the Seventh Circuit Court of Appeals and the Supreme Court affirmed this ruling.[52]

The Supreme Court explained that, where a successful § 1983 claim would necessarily imply the invalidity of the state conviction or sentence, the plaintiff must prove that his underlying conviction or sentence has been invalidated through available state statutory or federal habeas means.[53] This prerequisite, which has since been termed the "favorable termination" requirement,[54] enables courts to "avoid[ ] parallel litigation" and "preclude[ ] the possibility of the claimant succeeding in the tort action . . . in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction."[55] Essentially, this requirement prevents convicts from using civil § 1983 actions as "vehicles for challenging the validity of outstanding criminal judgments" by preserving the traditional function of habeas petitions—effecting release from unlawful custody.[56]

If, however, a successful § 1983 claim will not *necessarily* imply the invalidity of the underlying conviction or sentence, *Heck*'s exhaus-

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[49] *Id.* at 479. Heck argued that the government had engaged in an "unlawful, unreasonable, and arbitrary investigation," destroyed exculpatory evidence, and used "an illegal and unlawful voice identification procedure" at his trial. *Id.*

[50] Heck v. Humphrey, 997 F.2d 355, 357 (7th Cir. 1993).

[51] *Heck*, 512 U.S. at 479 (internal citations omitted).

[52] *Heck*, 512 U.S. at 490; *Heck*, 997 F.2d at 359.

[53] *Heck*, 512 U.S. at 486-87 ("[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.").

[54] *Osborne I*, 423 F.3d 1050, 1053 (9th Cir. 2005).

[55] *Heck*, 512 U.S. at 487. In other words, the favorable termination requirement is a "simple way to avoid collisions at the intersection of habeas and §1983." Spencer v. Kemna, 523 U.S. 1, 20 (1998).

[56] *Heck*, 512 U.S. at 486-87.

tion requirement does not apply.[57] For example, where an inmate challenges the lawfulness of his prehearing detainment and not the charge that caused his detainment, the favorable termination requirement does not apply because his successful § 1983 claim does not threaten the validity of the charge against him.[58] Therefore, the justifications for the *Heck* rule—preventing redundant litigation and precluding conflicting resolutions—are inapplicable.[59]

3. Expanding the § 1983 Exception to Habeas Relief

In 2005, the Supreme Court revisited the intersection between habeas corpus and § 1983 claims in *Wilkinson*.[60] In *Wilkinson*, two state prisoners brought § 1983 suits claiming that state parole procedures were unconstitutional and sought declaratory and injunctive relief that would render invalid the procedures used by the state to deny parole eligibility and suitability.[61] The state unsuccessfully argued that the prisoners' claims were not actionable under § 1983 because the prisoners' success would result in speedier release.[62] Thus, the state claimed that the prisoners were collaterally challenging the duration of their imprisonment and success would necessarily imply the invalidity of their confinement.[63] The Court found that this argument was logically flawed: "it[ ] jump[s] from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)."[64] Namely, the connection between the constitutionality of state parole procedures and release from imprisonment was too tenuous to apply the *Heck* bar.[65] Therefore, the prisoners' successful § 1983 claim would not "necessarily spell immediate or speedier release."[66]

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57 Muhammad v. Close, 540 U.S. 749, 751-52 (2004).

58 *Id.* at 754-55.

59 *See id.* at 755.

60 Wilkinson v. Dotson, 544 U.S. 74, 76 (2005).

61 *Id.* at 76-77 (2005). Both petitioners argued that retroactive application of harsher parole guidelines violate the *Ex Post Facto* and Due Process Clauses of the Constitution. *Id.*

62 *Id.* at 78.

63 *Id.*

64 *Id.*

65 *See id.*

66 Wilkinson v. Dotson, 544 U.S. 74, 81 (2005).

The Court then surveyed the development of the law as it applies to prisoners seeking postconviction relief under § 1983.[67] The Court consolidated the relevant doctrine to show that:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.[68]

Whether a successful § 1983 plaintiff would subsequently find himself in a better position to launch future attacks on his underlying conviction or sentence was irrelevant.[69] *Heck* applies only when a § 1983 claim goes to the "core" of habeas relief.[70] Therefore, *Heck* is not implicated in cases like this one, where a prisoner uses the fruits of his § 1983 success—a ruling on the constitutionality of state parole procedures—in subsequent litigation to challenge his underlying sentence or conviction.[71]

Wilkinson's implications for postconviction requests for DNA testing procedures were evident: "[e]very Court of Appeals to consider the question since [*Wilkinson*] has decided that because access to DNA evidence . . . does not 'necessarily spell speedier release,' it can be sought under § 1983."[72] Prior to *Wilkinson*, the Fourth, Fifth, and Sixth Circuit Courts of Appeals rejected § 1983 as a vehicle for gaining postconviction access to DNA evidence.[73] Those circuits relied on the Supreme Court's opinion in *Heck*, which supplied the

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[67] *Id.* "*Preiser* found an implied exception to § 1983's coverage where the claim seeks—not where it simply 'relates to'—'core' habeas corpus relief . . . . *Wolff* [clarified] that § 1983 remains available for procedural challenges where success in the action would not necessarily spell immediate or speedier release for the prisoner." *Id. Heck* then specified that a § 1983 claim is not cognizable if "success would necessarily imply the unlawfulness of a (not previously invalidated) conviction or sentence." *Id.* Finally, "*Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of a (not previously invalidated) state confinement." *Id.*

[68] *Id.* at 81-82.

[69] *See id.* at 82.

[70] *See id.*

[71] *See id.*

[72] Dist. Attorney's Office v. Osborne (*Osborne II*), 557 U.S. 52, 66 (2009) (internal citations omitted).

[73] *See* Harvey v. Horan, 278 F.3d 370, 372-73 (4th Cir. 2002); Kutzner v. Montgomery County, 303 F.3d 339, 340-41 (5th Cir. 2002); Boyle v. Mayer, 46 F. App'x 340, 340-41 (6th Cir. 2002).

favorable termination requirement,[74] and *Preiser*, "which established habeas corpus as prisoners' only means for challenging the validity or duration of their confinement."[75] Following *Wilkinson*, however, a prisoner's ultimate goal of exoneration did not bar his § 1983 claim because the immediate outcome—whether a new parole board hearing or access to DNA evidence—would not "necessarily spell speedier release."[76]

B. *Applying the* Preiser-Heck *Doctrine to § 1983 Claims Seeking Postconviction DNA Access*

Four years after its decision in *Wilkinson*, the Supreme Court considered whether a state prisoner's claim for access to the state's evidence for DNA testing is cognizable under § 1983.[77] The Court also addressed the issue of whether the prisoner has a due process right to obtain access to DNA evidence for testing.[78]

William Osborne, an African-American, was charged with kidnapping, assault, and two counts of sexual assault.[79] During his trial, the state tested sperm found at the crime scene, which matched Osborne's DQ Alpha type–an indicator used in early DNA testing, which "reveals the alleles present at a single genetic locus."[80] This genetic marker, however, is shared by 14.7 to 16 percent of African-Americans.[81] The state also tested two hairs found at the crime scene, but these results were inconclusive.[82] This DNA evidence was submitted to the jury, who convicted Osborne.[83] He was sentenced to twenty-six years imprisonment.[84]

Osborne sought postconviction relief and alleged his trial counsel was ineffective for failing to seek more sophisticated methods of DNA testing.[85] With this application pending in the state courts, Osborne

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74 *Osborne I*, 423 F.3d 1050, 1053 (9th Cir. 2005).

75 *Leading Cases*, 125 HARV. L. REV. 321, 326-27 (2011).

76 *Id.*

77 *See Osborne II*, 557 U.S. 52 (2009).

78 *Id.* at 59-62.

79 *Osborne I*, 423 F.3d 1050, 1051-52 (9th Cir. 2005).

80 *Id.* at 1052.

81 *Id.*

82 *Id.*

83 *Id.*

84 Jackson v. State, Nos. A-5276, A-5329, 1996 WL 33686444, at *3 (Alaska Ct. App. Feb.7, 1996).

85 Osborne v. State, 110 P.3d 986, 989-92 (Alaska Ct. App. 2005).

filed a § 1983 suit in district court.[86] He claimed that the state violated his due process rights by denying him access to crime scene evidence.[87] As relief, he sought only "the release of the biological evidence" and "the transfer of such evidence for DNA testing."[88] If granted, Osborne intended to subject the evidence to two advanced DNA testing methods that were unavailable at the time of trial.[89]

The district court dismissed Osborne's § 1983 claim, finding that he sought to "set the stage" for an attack on his underlying state conviction and, under *Heck*, his sole remedy was a petition for habeas corpus.[90] The Ninth Circuit, however, reversed this ruling, finding illogical the state's reasoning that, "if a claim *can* be brought in habeas, it *must* be brought in habeas."[91] In support, the Ninth Circuit cited the logical fallacy highlighted by the Supreme Court in *Wilkinson*—that such an argument "jump[s] from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief)."[92]

Further, the Ninth Circuit reasoned that DNA testing may inculpate, exculpate, or render inconclusive results.[93] As in *Wilkinson*—where a successful § 1983 claim would have meant only another parole hearing—if the evidence proves exculpating, release would come through an entirely different proceeding.[94] For these reasons, the Ninth Circuit found that Osborne's § 1983 action seeking postconviction access to DNA evidence was not precluded by *Heck*.[95]

On remand, the district court granted Osborne's motion for summary judgment "under the unique and special facts presented," including the unavailability of these DNA testing mechanisms at the time of trial and the absence of financial burden on the state because

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86 *Osborne I*, 423 F.3d 1050, 1052 (9th Cir. 2005).

87 *Id* at 1051-52.

88 *Id* at 1052.

89 *Id.*

90 *Id.*

91 *Id.* at 1054.

92 *Osborne I*, 423 F.3d 1050, 1055 (9th Cir. 2005) (quoting Wilkinson v. Dotson, 544 U.S. 74, 78 (2005)).

93 *Id.* at 1054.

94 *Id.* at 1054-55.

95 *Id.* at 1054.

Osborne would fund the testing.[96] The Ninth Circuit affirmed this ruling,[97] and the Supreme Court granted certiorari.[98]

The Supreme Court denied Osborne relief for several reasons.[99] First, the state had an adequate statute for obtaining postconviction access to DNA evidence, which Osborne neglected to leverage.[100] Therefore, Osborne could not challenge the process as applied to him.[101] Second, the Court refused to "constitutionalize this area" by granting a freestanding, substantive due process right to postconviction DNA evidence access.[102] Such a grant would lead to policy implications, such as the state's obligation to preserve DNA evidence, which are better handled by state legislatures.[103]

Osborne left unresolved the question whether a convicted state prisoner seeking DNA testing of crime-scene evidence may assert that claim in a civil rights action under § 1983 or may assert the claim in federal court only in a petition for habeas corpus relief.[104] Namely, the Supreme Court proceeded in *Osborne* without deciding whether the prisoner's § 1983 claim was *Heck*-barred.[105]

The Supreme Court likely decided against resolving *Osborne* on its merits for several reasons, including its unique procedural posture and several other problematic factors.[106] Although the Court acknowledged "'some uncertainty in the details' of how claims for access to DNA might fare under [the state]'s postconviction relief procedures. . . . it reasoned that the [s]tate could not be blamed for this uncertainty."[107] Osborne "ha[d] not tried to use the process provided to him by the State or attempted to vindicate the liberty interest that

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96 Osborne v. Dist. Attorney's Office, 445 F. Supp. 2d 1079, 1081-82 (D. Alaska, 2006).

97 Osborne v. Dist. Attorney's Office, 521 F.3d 1118, 1142 (9th Cir. 2008).

98 Dist. Attorney's Office v. Osborne, 129 S. Ct. 488 (2008).

99 *Id.* at 69-74.

100 *Id.* at 70-71.

101 *Id.* at 71.

102 *Id.* at 73-74.

103 *Id.*

104 Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011). Notably, in *Osborne II*, four of the Justices endorsed the Ninth Circuit's determination that a prisoner could use a § 1983 claim to access postconviction DNA evidence. *Osborne II*, 557 U.S. 52, 87 n.1 (2008) (Stevens, J., dissenting).

105 *Osborne II*, 557 U.S. 52, 67 (2009).

106 *See id.* at 60-67.

107 Cunningham v. Dist. Attorney's Office, 592 F.3d 1237, 1262 (11th Cir. 2010) (quoting *Osborne II*, 557 U.S. 52, 70 (2009)).

is now the centerpiece of his claim."[108] Further, Osborne sought a different type of DNA testing in his federal lawsuit than in his previous state petitions.[109] The Court noted that Osborne's failure to exhaust state remedies made him an unsatisfactory challenger of the state processes.[110]

Further, the Court pointed out Osborne's outcome in state court to emphasize their inability to make a due process judgment.[111] According to the Court, if Osborne were to request the same access to DNA testing in state court today, "he might well get it" or if not, "it may be for a perfectly adequate reason, just as the federal statute and all state statutes impose conditions and limits on access to DNA evidence."[112] *The Court concluded that the state process was adequate on its face and, further, Osborne could not challenge its application because he had sidestepped the state procedures.*[113] In 2011, the Supreme Court confronted this same issue in *Skinner v. Switzer*.[114]

II. EXPANDING FEDERAL JURISDICTION UNDER § 1983

In *Skinner*, the Supreme Court held that postconviction access to DNA evidence will not necessarily imply the invalidity of a state conviction and thus is not precluded by *Heck*.[115] Subsequently, lower courts have diverged on the issue of whether *Skinner*'s holding applies to evidence other than DNA.[116]

A. *The Factual and Procedural History of* Skinner

On New Year's Eve 1993, Henry "Hank" Watkins Skinner and his live-in girlfriend, Twila Busby, planned to celebrate the holiday at a friend's party.[117] However, when their friend, Howard Mitchell, arrived to pick them up, Skinner was already "passed out on the

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108 *Id.* (alteration in original) (quoting *Osborne II*, 557 U.S. 52, 70-71 (2009)).

109 *Id.*

110 *Id.* (quoting *Osborne II*, 557 U.S. at 70).

111 *Id.* (citing *Osborne II*, 557 U.S. at 70).

112 *Id.*

113 Cunningham v. Dist. Attorney's Office, 592 F.3d 1237, 1262 (11th Cir. 2010) (citing *Osborne II*, 557 U.S. at 70).

114 Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011).

115 *Skinner*, 131 S. Ct. at 1299.

116 *See infra* Part II.C.

117 Skinner v. State, 956 S.W.2d 532, 535 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).

couch."[118] Mitchell and Busby left Skinner behind and went to the party.[119] About an hour prior to midnight, Busby asked Mitchell to drive her home because she was upset about her uncle's drunken sexual advances toward her at the party.[120]

At midnight, police were dispatched to investigate reports of a stabbing near Skinner's residence.[121] Police found one of Busby's sons, 22-year-old Elwin Caler, sitting on a neighbor's porch with a mortal stab wound under his left arm.[122]

As the police officers approached Skinner's residence, they saw a blood smear on the door and a blood trail running from the porch to the fence.[123] In the living room, officers found Busby's dead body, an ax handle stained with blood and hair, and a trash bag containing a knife and a towel with wet brownish stains.[124] Busby had been strangled and then beaten over the head with a club multiple times.[125] Busby's second son, 20-year-old Randy Busby, was found dead, stabbed three times, in his bunk bed.[126] Lastly, police noticed bloody handprints on the doorknobs leading from the kitchen to the utility room and from the utility room into the backyard.[127]

Meanwhile, Skinner sought sanctuary with a former girlfriend, Andrea Reed.[128] He told Reed he had been stabbed and shot, but Reed could find no injuries except a cut in the palm of his right hand.[129] However, Skinner's pants and shirt had a "great deal of blood on them."[130] While at Reed's house, Skinner made several inconsistent statements about the events surrounding his injury and threatened to kill Reed when she attempted to call the police.[131] Only

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118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 Skinner v. State, 956 S.W.2d 532, 536 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).

124 *Id.* at 535-36.

125 *Id.* at 536.

126 *Id.*

127 *Id.*

128 *Id.* at 535.

129 Skinner v. State, 956 S.W.2d 532, 535 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).

130 *Id.*

131 *Id.* at 535-36.

after procuring Reed's promise not to divulge what he revealed, Skinner told her that he thought he kicked his girlfriend to death.[132]

At approximately 3:00 a.m., officers found Skinner in a closet in Reed's house wearing bloodstained socks and blue jeans and appearing intoxicated.[133] Officers arrested Skinner who voluntarily provided a blood sample, which revealed a blood alcohol level of 0.11 percent and 0.11 milligrams of codeine per liter of blood.[134] He claimed not to remember what happened after passing out on the couch.[135]

Skinner was convicted of capital murder in March 1995 for the triple homicide of Twila Busby and her two sons.[136] Prosecutors, in preparation for trial, had tested blood from Skinner's clothes, blood and hair found on and around the victims, and fingerprint evidence.[137] Although some of the evidence—including bloody handprints—matched Skinner, some of it—such as fingerprints found on a bag containing one of the murder weapons—did not.[138] The remaining evidence, including "the axe handle, vaginal swabs, fingernail clipping, and additional hair samples," went untested.[139]

Skinner's counsel admitted that he did not request testing because he feared the results would incriminate his client.[140] The Texas Court of Criminal Appeals found this to be a "reasonable trial strategy," and subsequently upheld his conviction and death sentence.[141]

B. *The Decision in* Skinner

The Supreme Court ruled that Skinner's § 1983 claim seeking access to postconviction DNA evidence was cognizable.[142] The Court explained that the DNA evidence will not "necessarily imply" the invalidity of his conviction because, while it may prove exculpatory, it

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132 *Id.* at 536.

133 *Id.*

134 *Id.*

135 Skinner v. State, 956 S.W.2d 532, 536 (Tex. Crim. App. 1997), *cert. denied*, 523 U.S. 1079 (1998).

136 *Id.* at 535.

137 Skinner v. Switzer, 131 S. Ct. 1289, 1294 (2011) (quoting Skinner v. State, 122 S.W.2d 808, 810 (Tex. Crim. App. 2003)).

138 *Id.*

139 *Id.*

140 *Id.* at 1295.

141 *Id.*

142 *Id.* at 1297-98.

may just as likely prove inconclusive or inculpatory.[143] The Court also noted that, unlike plaintiff Osborne, who attempted to sidestep state procedures through a federal § 1983 action, "Skinner first resorted to state court. In this respect, Skinner is better positioned to urge in federal court 'the inadequacy of the state-law [postconviction] procedures.'"[144] Irrespective of the purpose of § 1983 as vindicating constitutional harms and *Osborne*'s ruling that access to testing is not a constitutional right, the *Skinner* Court held that there is a continuing role for § 1983 in postconviction requests for evidence access.[145]

The Court delineated several safeguards against the argument that its holding would submerge federal courts in a wave of § 1983 claims seeking access to evidence.[146] First, *Osborne*'s ruling rejected substantive due process as a basis for § 1983 claims, limiting prisoners' potential arguments.[147] Second, "no evidence tendered by Switzer shows any litigation flood or even rainfall" in the federal circuit courts of appeal that have allowed § 1983 claims for postconviction access to DNA.[148] Finally, in the Prison Litigation Reform Act of 1995 (PLRA),[149] Congress enacted several constraints on frivolous federal claims by prisoners.[150] The PLRA requires prisoners to exhaust all administrative remedies prior to filing a federal claim,[151] to pay the full filing fee out of a percentage of his or her prison trust account,[152] and revokes, "with limited exception, *in forma pauperis* privileges for

143 *Skinner*, 131 S. Ct. at 1298.

144 *Id.* at 1296 n.8 (citation omitted) (quoting *Osborne II*, 557 U.S. 52, 71 (2009)).

145 *Id.* at 1298; *see also* Myrna S. Raeder, *Postconviction Claims of Innocence*, 24-FALL CRIM. JUST., 14, 16-17 (citing *Osborne II*, 557 U.S. 52, 69 (2009)). *Osborne II* indicated that a due process claim might arise if the state's postconviction procedures "'offend[ ] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgress[ ] any recognized principle of fundamental fairness in operation.'" *Osborne II*, 557 U.S. 52, 69 (2009) (quoting Medina v. California, 505 U.S. 437, 446, 448 (1992)).

146 *Skinner*, 131 S. Ct. at 1299 ("Respondent Switzer and her amici forecast that a 'vast expansion of federal jurisdiction . . . would ensue' were we to hold that Skinner's complaint can be initiated under § 1983.").

147 *Id.*

148 *Id.*; *see* Brandi Grissom, *DNA Exonerations Continue, but Not for One Man*, THE TEXAS TRIBUNE (Nov. 5, 2011), *available at* http://www.nytimes.com/2011/11/06/us/dna-exonerations-continue-but-not-for-one-texas-inmate.html ("'I have never had a case where we had to fight 10 years to get DNA tests,' said Nina Morrison, senior staff attorney at the Innocence Project, who has worked on hundreds of cases. 'This kind of protracted litigation is extremely rare these days.'").

149 28 U.S.C. § 1915.

150 *Skinner*, 131 S. Ct. at 1299-1300.

151 PLRA § 803(d) (42 U.S.C. § 1997e).

152 PLRA § 804(a)(3) (28 U.S.C. § 1915(b)(1)).

prisoners who have filed three or more lawsuits that fail to state a claim, or are malicious or frivolous."[153]

The dissenters found that if Skinner's § 1983 claim were cognizable at all, it would sound in a habeas petition.[154] Because there is no federal remedy for reviewing state trial procedures, which are part of the "process of law under which [a prisoner] is held in custody by the State," § 1983 should not be extended to review post-trial proceedings.[155] "Similarly, although a state is not required to provide procedures for postconviction review, it seems clear that when state collateral review procedures are provided for, they too are part of the 'process of law under which [a prisoner] is held in custody by the State.'"[156] For the foregoing reasons, the dissenters reasoned that all constitutional challenges to the procedures involving the validity of a criminal conviction should be treated similarly.[157]

C. *Divergent Applications of* Skinner *in Lower Courts*

This Section explores the lower courts' differing applications of the *Skinner* rule—that a postconviction § 1983 action seeking evidence is cognizable only when the evidence sought would not *necessarily* invalidate a state conviction, but rather, when the evidence challenges application of state procedures as violative of due process under *Osborne*.[158] The Third Circuit Court of Appeals constructively applied the *Skinner* rule, although it resolved a similar § 1983 claim one year before the Supreme Court handed down its ruling.[159] On remand, the district court narrowly applied the ruling, finding that the state court's application of current state law violated the prisoner's

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153 Skinner v. Switzer, 131 S. Ct. 1289, 1299-1300 (2011); PLRA § 804(d) (28 U.S.C. § 1915(g)); *see also Crawford–El v. Britton*, 523 U.S. 574, 596–597 (1998) (PLRA aims to "discourage prisoners from filing claims that are unlikely to succeed," and statistics suggest that the Act is "having its intended effect.").

154 *Skinner*, 131 S. Ct. at 1302.

155 *Id.* (quoting Frank v. Mangum, 237 U.S. 309, 327 (1915)); *see id.* at 1301 (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973) ("In Preiser, the Court began with the undisputed proposition that a state prisoner may not use § 1983 to 'challeng[e] his underlying conviction and sentence on federal constitutional grounds.'")).

156 *Id.* at 1302 (citing Frank v. Mangum, 237 U.S. 309, 327 (1915).

157 *Id.* at 1303; *see* Heck v. Humphrey, 512 U.S. 477, 491 (1994) (Thomas, J., concurring) ("[I]t is proper for the Court to devise limitations aimed at ameliorating the conflict [between habeas and § 1983], provided that it does so in a principled fashion.").

158 *Skinner*, 131 S. Ct. at 1298-99.

159 Grier v. Klem, 591 F.3d 672, 674 (3d Cir. 2010).

procedural due process right to seek postconviction access to DNA.[160] The court held that such a claim that could lawfully be brought under § 1983 because success—defined here as access to the biological evidence—would not necessarily invalidate his state conviction.[161] Conversely, the Second Circuit interpreted *Skinner* broadly in *Caswell v. Green*,[162] revealing the potential problems with such an interpretation.[163]

1. The Third Circuit: Correct Interpretation and Application of *Skinner*

In 2010, the Third Circuit addressed the issue of whether a prisoner may bring a § 1983 claim seeking postconviction access to DNA evidence.[164] In *Grier v. Klem*, a prisoner, who had confessed to rape, attempted rape, burglary, and unlawful restraint, was sentenced to twenty-eight and one-half to seventy-five years imprisonment.[165] Because of his confession, the state police laboratory never analyzed the rape kits that had gathered biological evidence immediately after the crime occurred.[166] At trial, Grier's attorneys never requested DNA testing of the rape kits.[167]

Grier challenged his conviction in state habeas proceedings.[168] Under state precedent, the courts held that Grier had no right to DNA testing because he had voluntarily confessed to the crimes.[169]

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160 Grier v. Klem, No. 05-05, 2011 WL 4971925 at *1, 5, 8 (W.D. Pa. Sept. 19, 2011).

161 *Id.* at *4-5.

162 Caswell v. Green, 424 F. App'x 44, 45-46 (2d Cir. 2011).

163 *See infra* Part III.

164 Grier v. Klem, 591 F.3d 672, 675-76 (3d Cir. 2010).

165 *Id.* at 674.

166 *Id.* ("Police testified that a state laboratory policy prevents the laboratory from analyzing DNA evidence in cases where the identity of the defendant is not in question due to a taped confession.").

167 *Id.* at 675 ("[N]either Grier nor the Commonwealth had the DNA [evidence] tested."). However, it was also noted that while Grier maintained that he insisted on testing the rape kits, his attorney claimed he and Grier decided against DNA testing. *Id.*

168 *Id.* at 675-76.

169 *Id.* at 675 n.2.

Even though Pennsylvania's Postconviction DNA Access Law went into effect between the time Grier filed his PCRA petition and when the court issued its judgment, the court made its determination without citing it. Therefore, Grier's request for postconviction access to evidence has never been considered under this new statute. Notably, the bar to postconviction DNA testing based on a pre-charge confession has been applied to petitions filed under Pennsylvania's Postconviction DNA Access Law. But, the Pennsylvania Supreme Court has granted an appeal on the issue of whether a confession should bar a petitioner's access to postconviction DNA testing.

Subsequently, Grier filed this § 1983 suit in federal court, claiming that the Government's refusal to grant DNA testing violated his due process right.[170] The district court dismissed Grier's § 1983 claim as "an improper attempt to collaterally attack [his] state court criminal conviction" under *Heck*.[171] The Third Circuit reversed, ruling that Grier's § 1983 claim is cognizable because, even if he prevails, he "merely gains access to evidence, and having access to evidence does not necessarily invalidate the prisoner's conviction."[172] Before remanding the suit to determine whether Grier's due process rights were in fact violated, the Court reaffirmed their holding as narrow and only reversing a motion to dismiss, similar to the procedural holding in *Skinner*.[173]

On remand, the district court agreed with Grier that "the state court's use of Grier's confession—a confession he immediately and consistently repudiated—as an automatic bar to deny access to DNA testing was fundamentally unfair."[174] The court noted, "[i]t is not unheard of for a suspect to confess to crimes he has not committed . . . . studies have shown that false confessions accrued in approximately 25 [percent] of DNA exonerations in the United States."[175] Thus, "[p]rohibiting defendants who have confessed to a crime from accessing DNA evidence after conviction violates the concept of fundamental fairness."[176] Further, the district court ruled that Grier had "demonstrated that the procedures afforded him by the state court . . . violate his right to procedural due process."[177] The court recommended granting Grier's motion and order testing of the DNA evidence collected prior to his conviction.[178] This ruling represents the first time that a federal court found the denial of access to postconviction DNA to violate procedural due process.[179]

Id. (internal citations omitted).

170 Grier v. Klem, 591 F.3d 672, 675 (3d Cir. 2010).

171 *Id.* at 676 (citation omitted).

172 *Id.* at 678-79.

173 *Id.* at 676, 679.

174 Grier v. Klem, No. 05-05, 2011 WL 4971925, at *9 (W.D. Pa. Sept. 19, 2011).

175 *Id.* at *8.

176 *Id.* at *8.

177 *Id.* at *9; *but see* Skinner v. Switzer, 131 S. Ct. 1289, 1300 (2011) (noting that the Supreme Court's decision in *Osborne* obviates any attempt to find that these procedures violate a substantive due process claim).

178 Grier v. Klem, No. 05-05, 2011 WL 4971925, at *11 (W.D. Pa. Sept. 19, 2011).

179 Charles T. Kotuby Jr. & Anderson T. Bailey, *Federal Judge Rules that State Law Prohibiting Post-Conviction Access to DNA Testing Violates Due Process*, JONES DAY (Sept.

2. The Second Circuit: Broad Interpretation of *Skinner*

In a federal § 1983 action, Caswell, a state prisoner, sought access to video surveillance footage and the state's supporting documents at sentencing.[180] Caswell argued that, under *Skinner* and Second Circuit precedent, his § 1983 claim was cognizable because even a favorable ruling would merely grant him access to evidence that might exculpate, inculpate, or be irrelevant.[181] However, neither *Skinner* nor Second Circuit precedents extended to claims outside the scope of DNA evidence.[182] By finding Caswell's § 1983 claim for access to non-biological evidence to be cognizable, the Second Circuit extended the Supreme Court's holding in *Skinner* beyond its intended application.[183]

In *Skinner*, the majority was careful to stress the unique nature of its holding—that § 1983 was a proper avenue for seeking access to DNA evidence—by outlining the vast safeguards against abuse of its decision.[184] The Court distinguished access to DNA evidence from *Brady*[185] claims, which redress the withholding of evidence "favorable to an accused" and "material to [his] guilt or to punishment."[186] Moreover, the Court addressed concerns that § 1983 suits seeking DNA evidence would flood federal dockets by examining those circuits that already extend federal jurisdiction to such claims.[187] It concluded that not even a "rainfall" of litigation had resulted and that such projected toll was limited by the Supreme Court's rejection of substantive due process as a basis for such claims in *Osborne*.[188] Accordingly, the Court intended to provide § 1983 claimants with an avenue for access to biological evidence, which, by its nature, might yield "exculpatory, inculpatory, or inconclusive" results.[189] It did not intend to extend § 1983 to all postconviction claims seeking access to

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2011), http://www.jonesday.com/experiencepractices/ExperienceDetail.aspx?experienceid=25079.

180 Brief for Plaintiff-Appellant, *supra* note 1, at 15.

181 Brief for Plaintiff-Appellant, *supra* note 1, at 40-48.

182 *Skinner*, 131 S. Ct. at 1293, 1300; *see, e.g.*, McKithen v. Brown, 481 F.3d 89 (2d Cir. 2007).

183 *See* Caswell v. Green, 424 F. App'x 44, 45-46 (2d Cir. 2011).

184 *Skinner*, 131 S. Ct. at 1299-1300.

185 Brady v. Maryland, 373 U.S. 83 (1963).

186 *Skinner*, 131 S. Ct. at 1300 (quoting Cone v. Bell, 556 U.S. 449, 451 (2009)).

187 *Id.* at 1299.

188 *Id.* (discussing *Osborne II*, 557 U.S. 52, 72 (2009)).

189 *Id.* at 1293.

evidence, which might share this feature, because such evidence would not be required to comply with the rigid safeguards, such as the threshold of *Osborne*, and such evidence had not been evaluated at the circuit court level.[190]

III. POSTCONVICTION § 1983 JURISDICTION IS PROPER ONLY WHERE CLAIMS SEEK BIOLOGICAL EVIDENCE FOR DNA TESTING

Expansion of federal jurisdiction under § 1983 is proper only in claims requesting evidence for DNA testing. This Part argues that enlarging § 1983 jurisdiction to encompass claims seeking evidence other than for the purpose of DNA testing undermines finality, diminishes judicial economy, and threatens state sovereignty. Accordingly, lower courts should narrowly interpret the *Skinner* test—whether evidence will render exculpatory, inculpatory, or inconclusive results[191]—to apply only in cases requesting access to biological evidence for DNA testing.

Section A argues that the district court in *Caswell* misapplied the Court's ruling in *Skinner*. Section B outlines the distinctive features of § 1983 claims for access to biological evidence for DNA testing, including the torrent of DNA exonerations, the lofty burden defined in *Osborne*, and the requirement that the petitioner challenge an existing state statute to recover. Section C highlights the absence of safeguards in cases seeking access to evidence other than DNA and the potential to flood federal courts with postconviction suits brought by prisoners aiming to rebut their state convictions with evidence that may yield exculpatory, inculpatory, or inconclusive results. Granting such postconviction access will alter the evidentiary decisions of state prosecutors prior to and during trial and will render state convictions subject to the ultimate evaluation of federal courts, which will have the power to grant a prisoner means to challenge his or her conviction outside of those provided by state statutes. In sum, extending § 1983 beyond DNA evidence will subjugate federalism by diminishing the finality of state criminal convictions.

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190 *Id.* at 1298; *Osborne II*, 557 U.S. 52, 72 (2009).

191 Skinner v. Switzer, 131 S. Ct. 1289, 1293, 1298 (2011).

A. *Why the* Caswell *Court Got it Wrong*

The Second Circuit's reliance on its own precedent, specifically *McKithen v. Brown*,[192] is suspect. *McKithen* ruled that § 1983 was an appropriate vehicle for a prisoner seeking an injunction requiring a knife be made available for DNA testing.[193] Such testing, the court found, "*necessarily* implies nothing at all about the plaintiff's conviction."[194] The Second Circuit deduced, as the Supreme Court did in *Skinner*,[195] that such testing could yield exculpatory, inculpatory, or inconclusive results.[196] The court announced it was joining the "Seventh, Ninth, and Eleventh Circuits, and district courts in the First and Third Circuits, agreeing with them that a claim seeking post-conviction access to evidence for *DNA testing* may properly be brought as a § 1983 suit."[197] Again, this result seemed to turn on the evidence sought—biological evidence for DNA testing.

Furthermore, the Second Circuit in *Caswell* offers no adequate explanation for its expansive reading of both *Skinner* and *McKithen*.[198] Rather, the court relies on the principle that, if Caswell's § 1983 claim were successful, it "would not *necessarily* invalidate his conviction or sentence, [and thus was] not barred by *Heck*."[199] However, this reading conflicts with *Skinner*, which took great care to ensure there were proper safeguards to prevent against the flooding of federal dockets and federal oversight of state criminal justice systems.[200] Additionally, this holding expands *McKithen*, which cited supporting authority from other circuits that were extending § 1983 only to evidence for DNA testing.[201] Such an expansion of *Skinner* and *McKithen* is neither warranted nor proper, under the controlling doctrines of finality and state sovereignty.[202]

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192 McKithen v. Brown, 481 F.3d 89 (2d Cir. 2007); *see also* Caswell v. Green, 424 F. App'x 44, 46 (2d Cir. 2011) ("We believe *Skinner* and *McKithen* are equally applicable to this case.").

193 *McKithen*, 481 F.3d at 102-03.

194 *Id.* (quoting Harvey v. Horan, 285 F.3d 298, 308 (4th Cir. 2002)).

195 Skinner v. Switzer, 131 S. Ct. 1289, 1298 (2011).

196 *McKithen*, 481 F.3d at 102-03.

197 *Id.* at 99 (emphasis added).

198 *See Caswell*, 424 F. App'x at 46.

199 Caswell v. Green, 424 F. App'x 44, 46 (2d Cir. 2011).

200 *See* Skinner v. Switzer, 131 S. Ct. 1289, 1299-1300 (2011).

201 *McKithen*, 481 F.3d at 99 ("We today join the Seventh, Ninth, and Eleventh Circuits, and district courts in the First and Third Circuits, agreeing with them that a claim seeking post-conviction access to evidence for DNA testing may properly be brought as a § 1983 suit.").

202 *See infra* Part III.B-C.

B. *The Unique Features of DNA Warrant Expansion of Postconviction § 1983 Jurisdiction*

One scholar recently quipped that "it is almost trite to observe that DNA has provided uncontestable proof that individuals can be convicted for crimes they did not commit."[203] The Supreme Court has acknowledged that DNA is unlike other evidence, because it can both "exonerate the wrongly convicted and identify the guilty."[204] This abundant recognition in the simultaneous absolving and condemning power of DNA has led to both the boon of databases for DNA-based-investigations, authorized by every state in the country,[205] and the formation of dozens of Innocence Projects scouring decades-old convictions for untested DNA evidence.[206] The Supreme Court recognized this unique feature of DNA in *Skinner*, when it found that such evidence could render "exculpatory, inculpatory, or inconclusive" results.[207] It is precisely this unique feature of DNA—its ability to exculpate or inculpate—that justifies the extension of federal jurisdiction under § 1983 to hear claims of procedural due process violations by prisoners who allege that the states misapplied relevant postconviction law in preventing access to biological evidence.

1. High-Profile DNA Exonerations Threaten the Criminal Justice System[208]

Traditional postconviction law stressed finality; over time, it becomes more difficult for courts to revisit facts, as memories of witnesses fade and physical evidence degrades. DNA testing, however, can provide reliable evidence for decades-old cases.[209] To date, 297

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203 Raeder, *supra* note 145, at 14.

204 *Osborne II*, 557 U.S. 55, 55 (2009).

205 Paul M. Monteleoni, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 247 (2007).

206 *See, e.g.*, *About the Organization*, INNOCENCE PROJECT, http://www.innocenceproject.org/about/ (last visited Sept. 24, 2012).

207 Skinner v. Switzer, 131 S. Ct. 1289, 1293 (2011).

208 *See generally DNA Exoneration Raises Tough Questions in Texas*, CBS NEWS (Oct. 13, 2011, 11:35 AM), http://www.cbsnews.com/stories/2011/10/13/national/main20119874.shtml.

209 Brandon L. Garrett, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2921 (2010).

convicts in thirty-six states have been exonerated by DNA testing and the true perpetrators have been identified in 146 of those cases.[210]

These exonerations have garnered much media attention.[211] *Dallas DNA*, a television show airing on the Investigation Discovery network, chronicles wrongfully convicted prisoners' quest for postconviction DNA testing.[212] In 2011, the *New York Times* published eleven articles about DNA exonerations, including an article calling for evidentiary reforms[213] and another questioning prosecutorial integrity in denying requests for DNA testing.[214] This negative press creates doubt in the ability of the criminal justice system to convict those who are actually responsible for the crimes at issue.[215]

In addition to casting doubt on the reliability and fairness of the criminal justice system, wrongful convictions also expose public safety failures, as rapists and murderers remain free to pursue new victims.[216] "Thus, all of us, not just wrongfully convicted defendants, are harmed by these systemic breakdowns."[217]

2. The Profuse Safeguards Against Frivolous Suits for DNA Evidence

As hundreds of wrongful exonerations based on DNA testing have emerged, legislators have recognized the importance of postconviction access to DNA evidence, and a majority of states have enacted statutes provided such access.[218] Texas, the state Skinner has repeatedly petitioned for access to DNA evidence, recently expanded post-

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210 *Facts on Post-Conviction DNA Exonerations*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Facts_on_PostConviction_DNA_Exonerations.php (last visited Sept. 25, 2012).

211 *See, e.g.*, *DNA Exoneration Raises Tough Questions in Texas*, CBS NEWS (Oct. 13, 2011, 11:35 AM), http://www.cbsnews.com/stories/2011/10/13/national/main20119874.shtml.

212 *See About Dallas DNA*, INVESTIGATION DISCOVERY, http://investigation.discovery.com/tv/dallas-dna/about.html (last visited Sept. 25, 2012).

213 Brandi Grissom, *Inmate's Release Brings Call for New Evidence Law*, N.Y. TIMES, Oct. 9, 2011, at 31A.

214 Erica Goode, *When DNA Evidence Suggests 'Innocent,' Some Prosecutors Cling to 'Maybe'*, N.Y. TIMES, Nov. 16, 2011, at 19A.

215 Raeder, *supra* note 145, at 14.

216 *Id.*

217 *Id.*

218 Garrett, *supra* note 209, at 2921-22 (citing Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1673-75 (2008)).

conviction access to biological material by statute.[219] Rather than denying access where DNA evidence had been previously analyzed, the statute now grants access where technological advances provide a reasonable likelihood of more accurate and probative results than the previous test.[220] Texas State Senator Rodney Ellis, who proposed the law, described it as an effort "to make advanced DNA testing available in all cases where it can aid the truth-seeking process, and Skinner's case falls squarely within that category,[221] These amendments reflect equity and fundamental notions of fairness within the criminal justice system.[222]

As DNA has rightfully been recognized as a game-changer in criminal justice,[223] prisoners should not be made to clear the greater procedural hurdles of habeas petitions to gain access to untested DNA evidence.[224] Rather, ensuring access to such evidence via the relatively simple procedures of § 1983 will increase the likelihood that those wrongfully convicted will successfully challenge a violation of their procedural due process right and gain access to DNA testing.[225]

Moreover, it is not likely that granting access to DNA evidence through § 1983 will subjugate state intent, because, under *Skinner* and *Osborne*, those prisoners are challenging the unfair application of state laws that grant postconviction access to such evidence.[226] Therefore, evaluation of the application of such statutes may better help preserve state legislatures' intent.[227] Further, in cases where the prisoner is seeking redress by § 1983 in the face of imminent execution,

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219 TEX. CODE CRIM. PROC. ANN. art. § 64.01(a-1) (West 2011); *see also* Brandi Grissom, *DNA Exonerations Continue, but Not for One Man*, N.Y. TIMES, Nov. 5, 2011, *available at* http://www.nytimes.com/2011/11/06/us/dna-exonerations-continue-but-not-for-one-texas-inmate.html?_r=0.

220 TEX. CODE CRIM. PROC. ANN. art. § 64.01(b)(2) (West 2011).

221 Brandi Grissom, *Hank Skinner Seeks DNA Testing Under New Law*, THE TEXAS TRIBUNE, Sept. 6, 2011, http://www.texastribune.org/texas-dept-criminal-justice/hank-skinner/hank-skinner-seeks-dna-testing-under-new-law/.

222 *See* DEP'T OF JUSTICE, POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS (1999) ("The vigilant search for truth is the hallmark of our criminal justice system. Our methods of investigation, rules of criminal procedure, and appellate process are designed to ensure that the guilty are apprehended and convicted while the innocent are protected.").

223 Garrett, *supra* note 209, at 2925 (recognizing DNA exonerations as a "revolution.").

224 *Leading Cases*, 125 HARV. L. REV. 321, 327 (2011).

225 *Id.* at 328.

226 *Id.*

227 *Id.*

such as *Skinner*,[228] the state legislature may not be able to act quickly enough to resolve the procedural obstacle.[229] *Skinner*, therefore, provides federal district courts with a narrow but crucial role in protecting state prisoners' right to access postconviction statutes under § 1983, while simultaneously preserving state legislatures' intent.[230]

C. *States, Not Federal Courts, Should Grant Postconviction Access to Non-DNA Evidence*

In the absence of DNA evidence, the need for finality is more pronounced.[231] Because circumstantial evidence of guilt or the presence of second-guessing juries may result in retrials with antiquated evidence, neutral sources typically are unable to definitively establish innocence.[232] Considering such variables, state legislatures, in their role as laboratories for policy experimentation, and not federal courts, should be the catalyst to postconviction remedies.[233]

Further, federal courts should refrain from standing in as arbiters of evidentiary proceedings, as the Second Circuit did in *Caswell*.[234] First, this will likely manifest the *Skinner* dissenters' prediction of a litigation flood,[235] as state convicts will be tempted to pursue access to evidence in federal courts. Second, as in *Caswell*, federal courts would be forced to evaluate the merits of a state conviction, threatening notions of comity and federalism. Moreover, these decisions must be made in the absence of state statutory guidance. The *Skinner* Court emphasized that plaintiff Skinner first sought relief in state court under state procedure, but, once denied, he turned to federal

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228 Skinner v. Switzer, 131 S. Ct. 1289 n.6 (2011) ("The State of Texas scheduled Skinner's execution for March 24, 2010. We granted Skinner's application to stay his execution until further action of this Court.").

229 *Leading Cases*, 125 HARV. L. REV. 321, 331 (2011).

230 *Id.*

231 Raeder, *supra* note 145, at 24.

232 *Id.*

233 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

234 *See supra* Parts II.C.2–III.A.

235 *See generally* Skinner v. Switzer, 131 S. Ct. 1289, 1303 (2011) (Thomas, J., dissenting) ("In truth, the majority provides a roadmap for any unsuccessful state habeas petitioner to relitigate his claim under § 1983.").

court.[236] Further, his claims fell clearly within the protections of the state statute designed to provide postconviction access to biological materials for testing.[237]

Skinner should not be construed to allow access to evidence merely because it will not necessarily invalidate a state conviction. This would allow prisoners to petition for almost any piece of evidence in federal court, and, in fact, seems to provide an incentive to bring claims for less germane evidence, which is, in turn, less likely to invalidate a conviction. This would be an absurd use of federal resources. *Caswell* extended *Skinner* to its logical extreme in relying on its reasoning when granting access to non-DNA evidence. This approach is faulty not only because it is clear that Skinner applies only in suits seeking evidence pursuant to state statutes, but also because it would tend to give rise to frivolous litigation. Therefore, Skinner should be interpreted narrowly, as the Third Circuit did in *Grier*.[238]

CONCLUSION

For the criminal justice system, the trade-off between preserving finality and ensuring justice is daunting. However, it is best left to the state legislatures, in their role as laboratories for policy, to actively confront the challenges that postconviction requests for evidence pose to our criminal justice system and the traditional notions of finality.[239] By extending § 1983 to claims seeking access to non-DNA evidence, the Second Circuit usurped this key role of the state.

In *Caswell*, the Second Circuit was misguided in concluding that § 1983 is an appropriate vehicle for postconviction prisoners seeking access to the state's evidence.[240] The Supreme Court's holdings in *Osborne* and *Skinner* make clear that where the prisoner has no free-standing right to access the evidence under state law, the federal courts should not constitutionalize the issue and place the matter outside the "arena of public debate and legislative action."[241] Further,

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[236] Skinner v. Switzer, 131 S. Ct. 1289, 1296-97 n.8 (2011).

[237] *See id.* at 1299.

[238] *See supra* Part II.C.1.

[239] *See supra* Part III.C.

[240] *See supra* Part III.A.

[241] *See Osborne II*, 557 U.S. 52, 72 (2009) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We

such extension of § 1983 falls outside the compass of the safeguards carefully tallied by the *Skinner* court to ensure against flooding of the federal dockets.[242] Finally, narrowing the scope of *Skinner*'s holding to apply only in cases seeking access to biological evidence for DNA testing preserves federalism.

must therefore exercise the utmost care whenever we are asked to break new ground in this field.")).

[242] *See* Skinner v. Switzer, 131 S. Ct. 1289, 1299-1301 (2011).