THE ROBERTS COURT'S FAILED INNOCENCE PROJECT

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> "The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice."[1]
>
> "The sky is falling." – *Chicken Little*

INTRODUCTION

In 2009, the Roberts Court lost its grip on wrongful convictions. An opportunity to do the right thing presented itself in *District Attorney's Office for the Third Judicial District v. Osborne*[2] and the majority of the Court balked. In *Osborne*, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas and Alito, held there is no federal constitutional right to access evidence in the State's possession in order to conduct a DNA test that would conclusively prove innocence.[3]

Judicial restraint, federalism, and comity were all brought to bear on this recurring, nagging problem of the man who cries foul, or "Innocent!" Yet those rationales sounded in desperation rather than reason. Fear of slippery slopes, the floodgates, and the crashing of the entire criminal justice system drove the Court's decision.[4] *Osborne* was another nail in the coffin the Court had been constructing for the theoretically "innocent" since *Herrera v. Collins*[5] in 1993.

In *Herrera*, then-Chief Justice Rehnquist, writing for the majority, all but severed any relationship between a claim of actual innocence and the Constitution. He assumed, without deciding, that the imprisonment of an actually innocent person did not violate the Constitution.[6] For the sake of

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1. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009).
2. 129 S. Ct. 2308.
3. *Id.* at 2321–23.
4. *See infra* notes 85–102 and accompanying text.
5. 506 U.S. 390 (1993).
6. *Id.* at 398. In delivering the opinion for the Court, then-Chief Justice Rehnquist cited precedent for the concept that a claim of actual innocence based on newly discovered evidence is not a ground for habeas relief, but is only a gateway to a cognizable constitutional claim. *Id.* at 400, 404; *see infra* notes 22–23 and accompanying text.

argument, however, he left a loophole, saying it might be possible "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional. . . ."[7]

At that time, DNA testing was just gaining traction in the courtrooms as a tool to secure convictions.[8] A "truly persuasive" showing of innocence was not imaginable to the Justices then. Therefore Justice Scalia could concur with the majority in *Herrera* though he would have closed the loophole forever, and he could surmise that this "embarrassing question,"[9] as he called it, would not recur.

That embarrassing question recurred with a vengeance. In the following decade and a half, DNA testing emerged as a powerful tool for exoneration of the wrongfully convicted.[10] Since Chief Justice Roberts took the bench in 2005, the specter of wrongful convictions has been firmly in the public conscience. Innocence Projects are embedded in law schools,[11] state legislatures have debated partial solutions to the problem,[12] and practically every criminal procedure professor in the country has participated in a symposium on "what to do" about wrongful convictions.[13]

Only the Court has fallen far behind. The "truly persuasive" showing of innocence has arrived, and the Roberts Court cannot embrace it or even look it in the eye. DNA's silver bullet to innocence has caused dissenting members of the Court to pull at the seams of *Herrera* but even they cannot figure out what to do. In two cases that came before the Roberts Court, it had a chance to retool *Herrera* and confirm the existence of a constitutional

7. *Id.* at 417.

8. *See* Janet C. Hoeffel, Note, *The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant*, 42 STAN. L. REV. 465, 476–77 (1990) (discussing the introduction of DNA evidence into courtrooms beginning in 1987).

9. 506 U.S. at 428 (Scalia, J., concurring) ("With any luck, we shall avoid ever having to face this embarrassing question again, since it is improbable that evidence of innocence as convincing as today's opinion requires would fail to produce an executive pardon.").

10. *See, e.g.*, Innocence Project Case Files, http://www.innocenceproject.org/know/ (last visited Sept. 25, 2009) (citing 242 cases of DNA exoneration, and showing the number of exonerations per year, increasing into the early twenty-first century).

11. There are over sixty Innocence Projects across the United States, some housed in law schools and Universities and some free-standing. *See* Innocence Network Member Organizations, http://www.innocencenetwork.org/members.html (last visited Sept. 25, 2009) (listing Innocence Projects).

12. *See* Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308, 2316 (2009) (citing forty-six states as having enacted statutes dealing with access to DNA evidence); Stephanie Roberts & Lynne Weathered, *Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission*, 29 OXFORD J. LEG. STUD. 43, 47 (2009) (discussing legislative reforms including requirements for police to tape interrogations of suspects and opportunities for post-conviction DNA testing and access to courts).

13. Indeed, this article was generated as a result of such a symposium. A quick search on Westlaw reveals at least eleven published law review symposia on innocence/wrongful convictions in the last seven years.

right to prove actual innocence in light of DNA technology. One was *House v. Bell*[14] and the other was *Osborne*. Instead, in *House v. Bell*, the Court ratcheted up the standard of proof for freestanding innocence claims so high that it conceivably could never be met.[15] Then, in *Osborne*, the cognitive dissonance is laid bare: the *Herrera* standard of proof can in fact be met through a DNA test, but the Court found there is no right to make that proof.[16]

What these two cases, and the dissenting opinions in two other Roberts Court cases,[17] show is a deep-seated fear of the power of DNA. This article argues that this fear is hyperbolic and unwarranted. Conclusive proof of innocence through DNA is available in only a small number of cases.[18] The far greater fear is what it means to reject the claim – what does it say to individuals and society that we prefer the imprisonment or the execution of innocents over an avenue to prove their claim beyond any reasonable doubt?

The Court will need to revisit its decision in *Osborne* and directly confront the open question in *Herrera* with a definitive and reasonable standard for the cases that are in fact "truly persuasive" cases of innocence because of DNA test results. While not previously taken seriously, the Court must now embrace the fundamental and deeply-held principle that continued imprisonment of the innocent person violates the Eighth and Fourteenth Amendments of the Constitution. To do otherwise is nothing short of an embarrassment to our system of justice.

I. INNOCENCE CLAIMS BEFORE DNA

Before the rise of DNA exonerations and the so-called Innocence Movement, the Court had little reason to take much stock in claims of innocence. As a former public defender who handled cases at trial and on appeal, I can say that many claims of innocence are made, but few are sustained. Once convicted, a claim of innocence is highly suspect. As Morgan

14. 547 U.S. 518 (2006).

15. *See infra* notes 41–43 and accompanying text.

16. *See infra* Part IV.

17. *See infra* notes 44-78 and accompanying text (discussing *Kansas v. Marsh*, 548 U.S. 163 (2006) and *Baze v. Rees*, 128 S. Ct. 1520 (2008)).

18. The case has to have involved the deposit of human cellular material in an amount and manner that can be tested and would provide conclusive evidence of innocence. A prototypical case is a one-perpetrator rape case where the defense is misidentification, not consent. While 240 cases of DNA-proven innocence nationwide since the late 1990s is a significant number, it is certainly not a number that brings the criminal justice system to a halt.

Freeman quips in *The Shawshank Redemption*, "Everyone in [prison] is innocent. Didn't you know that?"[19]

This is likely the perspective with which the Court approached Leonel Torres Herrera's claim of innocence in 1992. Ten years earlier, he was convicted of capital murder and sentenced to death for the killing of a police officer. The evidence against him included two police officers' identifications of him, identification of the car used in the killings as belonging to Herrera's girlfriend, blood on his blue jeans matching the blood type of another police officer who was shot during the same time and not matching his, his social security card found at the scene of that other officer's shooting, and a handwritten letter on his person when arrested that implied he committed the killings.[20]

Eight years after his conviction, Herrera's new evidence of innocence was that his brother committed the crime. His brother was now dead, but his brother's lawyer, his brother's former cellmate and others said that the brother confessed to committing the crime.[21] There may well have been a colorable story here of an innocent, mentally impaired man getting framed by his crime-savvy brother for the murder, such that upon a retrial a good defense attorney could have been able to make a case for reasonable doubt. However, *Herrera* was not a case of obvious, or even suspected, innocence.

Indeed, no member of the Court postulated Leonel Herrera's innocence. Rather, the question was, if a reasonable juror could now, with the new evidence, have a reasonable doubt about the criminal defendant's guilt, does the Constitution give him a new trial? This question was not new. Hence, then-Chief Justice Rehnquist cited *Townsend v. Sain*[22] for the principle that newly discovered evidence can only lead to a federal habeas claim when it "'bear[s] upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.'"[23] The incantation of this familiar historical limitation on federal habeas was not surprising as Herrera had not given the Court a persuasive claim of innocence.

19. Wikipedia, The Shawshank Redemption, http://en.wikiquote.org/wiki/The_Shawshank_Redemption (last visited Oct. 20, 2009).

20. Herrera v. Collins, 506 U.S. 390, 393-95 (1993).

21. *Id.* at 396.

22. 372 U.S. 293 (1963).

23. 506 U.S. at 400 (emphasis omitted) (quoting *Townsend*, 372 U.S. 293, 317 (1963)). Further, federal habeas courts "sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact." *Id.*

While the shadow *Herrera* has subsequently cast is wide,[24] the holding is actually quite narrow. Then-Chief Justice Rehnquist limited the holding to the facts of Herrera's case.[25] Concurring Justices O'Connor and Kennedy made clear that "Dispositive to this case . . . is an equally fundamental fact: Petitioner is not innocent, in any sense of the word."[26] What to do about a convicted *innocent* man was not before the Court and the Court did not decide that question.

Most significantly, then-Chief Justice Rehnquist left a loophole that, to this date, has remained open. He conceded, "We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[27] Three of the concurring justices found this loophole more than an assumption. Justices O'Connor, for herself and Justice Kennedy, wrote, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution[,]" and "the execution of a legally and factually innocent person would be a constitutionally intolerable event."[28] Justice White wrote separately in agreement and to suggest a standard of proof for such a claim.[29]

Justice Scalia, joined by Justice Thomas in concurrence, would have preferred to close the loophole and decide once and for all that there is no freestanding claim of innocence under any circumstances. However, he accepted the loophole, "because I can understand, or at least am accustomed to, the reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our

24. *Herrera* can appear to the reader as the case that decided actual innocence is not a cognizable claim on habeas corpus, even though it did not decide that question. *See, e.g.*, Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1362 n.135 (2008) (citing *Herrera* as disallowing habeas relief for actual innocence claims unless there is an independent constitutional violation).

25. After summarizing Herrera's new evidence claim, then-Chief Justice Rehnquist stated: "Petitioner urges us to hold that this showing of innocence entitles him to relief in this federal habeas proceeding. We hold that it does not." 506 U.S. at 393.

26. *Id.* at 419 (O'Connor, J., concurring).

27. *Id.* at 417 (majority opinion).

28. *Id.* at 419 (O'Connor, J., concurring).

29. Justice White suggested that to be entitled to relief, a petitioner would have to show that, based on the new evidence and the entire trial record, "'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt.'" *Id.* at 429 (White, J., concurring) (quoting Jackson v. Virginia, 443 U.S. 307, 324 (1979)).

society has traditionally deemed adequate."[30] One can assume Justice Scalia was not terribly worried, however, because it was unlikely that the Court would have to face "this embarrassing question again,"[31] since no petitioner was likely to meet the "truly persuasive demonstration" of innocence that *Herrera* would require. The end result of *Herrera* is that a majority of the Court left open a door to a freestanding constitutional claim of actual innocence.

A mere two years after *Herrera*, the Court made the "truly persuasive demonstration" practically out of reach in *Schlup v. Delo*.[32] *Schlup* addressed a narrow "miscarriage of justice" exception for habeas claimants who were procedurally barred from presenting their constitutional claims. In essence, a prisoner could assert his innocence as a gateway to consideration of his defaulted constitutional claims but not as a constitutional claim in and of itself.[33]

Justice Stevens, writing for the Court, defined the standard a petitioner had to meet for the exception. A petitioner would have to establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt."[34] This standard would ensure "that petitioner's case is truly 'extraordinary.'"[35] On the other hand, Justice Stevens stated that a freestanding innocence "*Herrera*-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [petitioner's] innocence."[36]

Reading *Schlup* and *Herrera* together, one is at a loss to differentiate a "truly 'extraordinary'" claim of innocence from a "truly persuasive" or "unquestionable" claim of innocence. With cases of DNA exoneration still gathering on the horizon and not yet in the forefront, this distinction may not have made much practical difference. However, when the Roberts Court took its first "innocence" case, it had an opportunity to close this unrealistic gap.

30. *Id.* at 428, 428 n.* (Scalia, J., concurring) (referencing Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) ("[N]ot every problem was meant to be solved by the United States Constitution, nor can be.").

31. *Herrera*, 506 U.S. at 428.

32. *See* 513 U.S. 298, 314 n.28 (1995).

33. *Id.* at 314–15.

34. *Id.* at 327.

35. *Id.* (citation omitted).

36. *Id.* at 317.

II. *HOUSE V. BELL*: A POST-DNA INNOCENCE CLAIM

In 2006, Paul Gregory House came as close as one could—without a silver bullet—to showing the Court he was actually innocent. Justice Kennedy, for a bare majority in *House v. Bell*,[37] bent over backward to demonstrate House's innocence. He painstakingly covered the evidence presented at trial and the new evidence, both forensic and testimonial. Central forensic proof was "called into question" and "substantial evidence" pointed to a different suspect.[38] Justice Kennedy engaged in an intensive fact-finding mission, unrestrained by prior findings of the district court. [39] A central, although not conclusive, piece of this new evidence was a DNA test on evidence at the scene of the crime that showed Mr. House was not the source.[40]

Mr. House's powerful case of innocence was a chance for the Court to clarify the *Herrera* claimant's burden. Instead, Justice Kennedy continued the muddling of the boundaries. He concluded that House met the *Schlup* standard of presenting a "truly 'extraordinary'" case of innocence such that it was more likely than not that no reasonable juror would find him guilty beyond a reasonable doubt after hearing the new evidence.[41] However, after describing the new evidence in this "extraordinary" case of demonstrated innocence, Kennedy stated blankly, "This is not a case of conclusive exoneration."[42] Of course: any convicted person has some evidence against him or he never would have been convicted. Every case of DNA exoneration has had some proof of guilt: an eyewitness, a confession, forensic evidence, a jailhouse snitch.

Further, Kennedy declined to clarify the terms of a "truly persuasive" showing of innocence under *Herrera*: "[W]hatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it," because in *Herrera*, "the Court described the threshold for any hypo-

37. 547 U.S. 518 (2006).

38. *Id.* at 554.

39. Indeed, Kennedy's partially dissenting colleagues took him to task for "casting aside the District Court's factual determinations made after a comprehensive evidentiary hearing." *Id.* at 561 (Roberts, C.J., concurring in part and dissenting in part).

40. New DNA testing on the semen on the victim's nightgown showed that it belonged to her husband not to Paul House, as the State had argued at trial. *Id.* at 540. House also introduced other new evidence pointing to the victim's husband as her killer. As House was charged with her murder and not her rape, this DNA test undermined the State's case, but did not conclusively obviate it. Justice Kennedy stated that the DNA evidence was of "central importance." *Id.* The evidence at trial was largely circumstantial and the semen stain "was the only forensic evidence at the scene that would link House to the murder." *Id.* at 541.

41. *Id.* at 554.

42. *Id.* at 553.

thetical freestanding innocence claim as 'extraordinarily high.'"[43] This word play between "extraordinary" and "extraordinarily high" is deeply confounding. It effectively leaves only one kind of case for a freestanding innocence claim: one of "conclusive exoneration," a practically impossible burden.

The portent of *House v. Bell* is that if a prisoner has an "extraordinary" case of innocence, although short of a "conclusive" case, it is not a claim of "constitutional" significance. Rather, this extraordinary claim of innocence allows the petitioner to now go back and litigate his "constitutional" claims, such as ineffective assistance of counsel or prosecutorial misconduct. This is a deeply fractured concept of a "miscarriage of justice." While it is more likely than not that no reasonable juror would find the petitioner guilty beyond a reasonable doubt, he must still show a particular "constitutional" cause for the erroneous conviction in order to win his freedom.

The Roberts Court accepted Paul House's case to clarify the *Schlup* standard but not to clarify the *Herrera* standard. The Roberts Court's avoidance of the *Herrera* claim, continuing to make it theoretically out of reach, was in the face of DNA exonerations occurring across the country. A look at two other cases the Roberts Court decided between 2006 and 2008 offer a small window into the reasons for the Court's reluctance to constitutionalize an innocence claim.

III. THE ROBERTS COURT'S INTERNAL STRUGGLE WITH WRONGFUL CONVICTIONS

It was inevitable that the Roberts Court Justices were thinking about DNA exonerations. For the liberal wing of the Court, the wrongful convictions were not sitting well. Several Justices' fractured thoughts on the issue finally burst forth in two death penalty cases where it was arguably irrelevant.

The 2006 case of *Kansas v. Marsh*[44] was an unlikely case for a discussion of innocence. At issue was whether the Kansas death penalty statute, which required the imposition of the death penalty when the sentencing jury determined that aggravating evidence and mitigating evidence were in equipoise, violated the Eighth Amendment prohibition against cruel and unusual punishment. Justice Thomas, for the majority, held that it did not.[45]

43. *Id.* at 555.
44. 126 S. Ct. 2516 (2006).
45. *Id.* at 2520.

There is much to debate about the constitutionality of a scheme that allows a person to be sentenced to death when the jury does not find that the aggravating factors outweigh the mitigating factors, but the conviction of factually innocent persons would not appear to be part of this debate.

Nonetheless, Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, seemed to have been lying in wait for an opportunity to raise the issue of wrongful convictions of death row inmates. In his dissenting opinion, Justice Souter cited various reports that discussed the numbers and cases of innocent men who were under a sentence of death before being exonerated.[46] He found that "[w]e are thus in a period of new empirical argument about how 'death is different': not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases."[47]

Calling the Kansas statute's solution to equipoise a "moral irrationality,"[48] Justice Souter marshaled the wrongful conviction data as a "new body of fact [that] must be accounted for in deciding what" the Eighth Amendment should tolerate.[49] His tenuous link between the issue in the case and the issue of wrongful convictions was that, in the face of proof of wrongful convictions of those on death row, it was amoral to expand the reach of the death penalty in this manner.[50]

Justice Souter stopped short of using the "new body of fact" to call for an end to the death penalty. He stated that "it is far too soon for any generalization about the soundness of capital sentencing across the country[.]"[51] However, there is no valid rationale upon which to distinguish between a discontinuation of *expansion* of the death penalty and a discontinuation of the death penalty at all. Either the fact of wrongful convictions makes the imposition of the death penalty unconstitutional or it does not.[52]

46. *Id.* at 2544–45 (Souter, J., dissenting) (citing former Illinois Governor Ryan's REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENTS (2002); Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2006); Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions*, 10 PSYCHOL. PUB. POL'Y & L. 577 (2004)).

47. *Marsh*, 126 S. Ct. at 2544.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 2545.

52. The legal argument for abolition was there for the taking if Justice Souter had wanted to make it. In *Furman v. Georgia*, the Court found that the country's then-existing system of capital punishment led to arbitrary imposition of the punishment, which violated the Eighth Amendment. 408 U.S. 238, 239-240 (1972) (per curiam). At the time, fact finders had unbounded discretion to choose when to impose the ultimate penalty and chose it infrequently and randomly. *See id.* at 309-10 (Stewart, J., concurring), 311-12 (White, J., concurring). The capital punishment systems that states put in place

Justice Souter's digression on wrongful convictions was weak and unconvincing. No response would appear to have been needed from other members of the Court. The fact that Justices Thomas and Scalia delivered swift and strong responses anyway revealed more about their fear of the effect of an innocence claim on the criminal justice system.

Justice Thomas raised the specter of abolition in response: "Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority."[53]

Justice Scalia wrote his own separate concurrence to dismiss the dissent's digression as irrelevant and to argue the wrongful convictions issue head on. Echoing his concurring opinion in *Herrera*, he declared, "[o]ne cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation."[54] As for what should be done about that possibility, he proclaimed: "The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of all in the meting out of condign justice for horrible crime—outweighs the risk of error."[55] It is very unclear, however, that the American people have decided this question with the full facts in front of them.[56]

Most revealing about Justice Scalia's opinion was his vehemence in denying that the problem of wrongful convictions actually exists in significant numbers to be of any concern. As to the execution of an innocent man, he baldly asserted there is no such case.[57] He took issue with the reports relied upon by Justice Souter in both their accuracy and in their classifica-

after *Furman* were constitutional to the extent that they ensured that the death penalty was not imposed under "sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Applied to today's circumstances, Justice Souter could have argued that the number of DNA exonerations indicate a "substantial risk" of "arbitrary and capricious" imposition of the punishment. The debate would likely turn on the meaning of "substantial" in this context.

53. *Marsh*, 126 S. Ct. at 2529.

54. *Id.* at 2539 (Scalia, J., concurring).

55. *Id.*

56. The number of death sentences imposed by juries, and the number of executions carried out, has declined significantly in recent years. *See* Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 427–428 (citing statistics). While polls still show the vast majority of Americans are in favor of capital punishment, the number of Americans in favor of the death penalty drops when life without the possibility of parole is given as an available option. *Id.* at 428 (citing polling data). As Justice Marshall warned in *Furman*, the more the population is educated, the less they will be in favor of capital punishment. 408 U.S. at 361-63 (Marshall, J., concurring). The number in favor would drop even more if the public were asked if it was still in favor if a number of death row inmates awaiting execution were innocent with no avenue of relief.

57. 126 S. Ct. at 2533 (Scalia, J., concurring) ("[T]he dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit.").

tion of certain cases as exonerations of the "innocent."[58] His fierceness in arguing against the data belied his initial blasé attitude toward the problem of error.[59]

In 2008, Justice Stevens took the bat from Justice Souter in a concurring opinion in *Baze v. Rees*.[60] Once again, actual innocence was not directly relevant to the issue presented. Justice Stevens wedged it in. In a case about the constitutionality of Kansas' lethal injection protocol, he wrote, "[t]he time for a dispassionate, impartial comparison of the enormous costs that death penalty litigation imposes on society with the benefits that it produces has surely arrived."[61] However, as it turned out, not so fast.

Justice Stevens invoked Justice White's "decisive vote" in *Furman v. Georgia*[62] in 1972 to shore up his own view that the time had come. In *Furman*, Justice White had based his conclusion that the death penalty was being imposed in an arbitrary manner on "a factual premise that he admittedly could not 'prove' on the basis of objective criteria,"[63] but which stemmed from his observations from the bench for ten years.[64] Likewise, Justice Stevens relied on his own exposure to capital cases to conclude "that the imposition of the death penalty represents 'the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose. A penalty with such negligible returns to the State [is] patently excessive and cruel and unusual punishment violative of the Eighth Amendment.'"[65]

58. *Id.* at 2533–35. Almost every single one of Justice Scalia's scathing retorts is unmet by the dissent. Professor Samuel Gross, one of the report writers castigated by Justice Scalia, had to explain where Justice Scalia went wrong and defend his findings in a law review article. *See* Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the* Marsh, 105 MICH. L. REV. FIRST IMPRESSIONS 67, 69 (2006) ("[T]he true number of wrongful convictions is unknown and frustratingly unknowable. But the rate that Justice Scalia advocates is flat wrong and badly misleading."). Others have done the same. *See, e.g.*, Lawrence C. Marshall, *Litigating in the Shadow of Innocence*, 68 U. PITT. L. REV. 191 (2006); D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction* Rate, 97 J. CRIM. L. & CRIMINOLOGY 761 (2007).

59. Recognizing the potential power of innocence rhetoric, he also expressed concern it might attract the attention of the "finger-waggers" in other parts of the civilized world. *Marsh*, 126 S. Ct. at 2532–33.

60. 128 S. Ct. 1520, 1542 (2008) (Stevens, J., concurring).

61. *Id.* at 1548–49.

62. 408 U.S. 238 (1972).

63. *Baze*, 128 S. Ct. at 1550 (Stevens, J., concurring) (citing *Furman*, 408 U.S. at 312, 313 (White, J., concurring)).

64. 408 U.S. at 313 (White, J., concurring) (stating he could not "prove" his conclusion but had to base it on his years of experience with hundreds of capital cases).

65. *Baze*, 128 S. Ct. at 1551 (Stevens, J., concurring) (quoting *Furman*, 408 U.S. at 312 (White, J., concurring)).

Among the reasons Justice Stevens cited for concern[66] was the risk of error in capital cases, which "may be greater than in other cases,"[67] and therefore "the irrevocable nature of the consequences is of decisive importance to me."[68] Justice Stevens cited the "abundant evidence accumulated in recent years" that demonstrated "the exoneration of an unacceptable number of defendants found guilty of capital offenses."[69] He concluded that the risk of executing innocent men would be eliminated altogether by treating any penalty more severe than life imprisonment without parole as constitutionally excessive.[70]

This might have been a watershed moment for Justice Stevens personally but, unlike Justice White, he did not make a watershed decision. The surprise conclusion was that Justice Stevens concurred in the judgment upholding the injection procedure. He claimed he must "respect precedents that remain a part of our law"[71] and under those precedents, which include a finding that the death penalty is constitutional, Kansas' lethal injection protocol was constitutional.[72] Let the tinkering continue then.[73]

Justice Scalia again wrote a separate concurrence to respond. He reprimanded Justice Stevens for believing that his own subjective opinion was important: "[p]urer expression cannot be found of the principle of rule by judicial fiat."[74] Again, as in *Marsh*, Justice Scalia criticized overriding the opinions of his fellow citizens,[75] and repeated that there was no case of an innocent man being executed.

Significantly, however, Justice Scalia took his concerns a step further: "[Justice Stevens'] analysis of this risk is thus a series of sweeping condemnations that, if taken seriously, would prevent any punishment under

66. Other reasons for concern were selection of a conviction-prone death-qualified jury, and the risk of discriminatory application. *Id.* at 1550–51.

67. *Id.* at 1550 ("[T]he risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt concerning the identity of the offender.").

68. *Id.* at 1551.

69. *Id.*

70. *Id.*

71. *Id.* at 1552.

72. *Id.*

73. This is a reference to Justice Blackmun's famous renunciation of the death penalty in *Callins v. Collins*, 510 U.S. 1141, 1145–46 (1994) (Blackmun, J., dissenting from denial of cert.) ("From this day forward, I no longer shall tinker with the machinery of death. . . The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants. . . .").

74. *Baze*, 128 S. Ct. at 1555 (Scalia, J., concurring).

75. *Id.*

any criminal justice system."[76] There is the rub then: if we acknowledge the problem, the only fix is the end of the criminal justice system.

In these two cases, the various members of the Court reproduce the fears that drove the decision in *McCleskey v. Kemp* in 1987.[77] The legacy of *McCleskey v. Kemp* is that if we acknowledge the dirty secrets of our criminal justice system—in *McCleskey*'s case, racial injustice—it will fall apart.[78] Just as we cannot ensure a system without racism and racial prejudice, we cannot ensure a system without wrongful convictions. However, the similarity of the two issues is not complete. Whereas it is virtually impossible to demonstrate the effect of racism in any one individual case, it is possible to demonstrate innocence in an individual case.

Perhaps the simplest starting solution was presented to the Court in *District Attorney's Office for the Third Judicial District v. Osborne*[79] in 2009. By June 2009, when the Court decided *Osborne*, some 240 people had been exonerated with the help of conclusive DNA evidence proving their innocence.[80] The Court could easily have embraced a *Herrera* claim in the few cases where convicted prisoners can conclusively prove their innocence through a DNA test.

IV. *OSBORNE*: A MISSED OPPORTUNITY TO PUSH *HERRERA* FORWARD

The combined effect of *Herrera*, *Schlup* and *House* left only one possible avenue for a freestanding claim of actual innocence. As Justice Kennedy stated it in *House*, theoretically only a conclusive case of innocence could meet the *Herrera* burden. He must have known by then that such a showing could in fact be made through a conclusive DNA test. However, the Court was not confronted with that issue until *Osborne*.

76. *Id.* at 1554.

77. 481 U.S. 279 (1987).

78. In *McCleskey v. Kemp*, the Supreme Court, per Justice Powell, held that an intensive study of the Georgia death penalty—indicating that black defendants who kill white victims are sentenced to death at nearly twenty-two times the rate of blacks who kill blacks and more than seven times the rate of whites who kill blacks—did not amount to a constitutionally significant risk of racial bias and did not establish a violation of the Eighth Amendment. 481 U.S. at 313. When asked what decision he most regretted as a Member of the Supreme Court, Justice Powell answered *McCleskey v. Kemp*. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–52 (Charles Scribner's Sons, ed., 1994). Of course, he reached the decision as a part of his metamorphosis into an opponent of the death penalty. To follow the study in *McCleskey* to its logical conclusion would be to find that the death penalty can never be reliably imposed. As Justice Powell said, "Given [the] safeguards already inherent in the imposition and review of capital sentences, the dissent's call for greater rationality is no less than a claim that a capital punishment system cannot be administered in accord with the Constitution." *McCleskey*, 481 U.S. at 313 n.37.

79. 129 S. Ct. 2308 (2009).

80. *See* Innocence Project Case Files, *supra* note 10.

On post-conviction, William Osborne proclaimed his innocence from charges of kidnapping and sexual assault and requested that the State supply him with the evidence gathered from the scene of the crime so he could perform DNA testing, not previously performed,[81] at his own expense. With no explanation, the State denied him access to the evidence.[82] All parties conceded that the DNA test, if performed, would conclusively demonstrate Mr. Osborne's guilt or innocence.[83] Nonetheless, Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas and Alito, held there was no federal due process right to access DNA evidence in order to prove innocence.

A reasonable response to Mr. Osborne's petition might sound something like Justice Stevens' dissent: "It seems to me obvious that if a wrongly convicted person were to produce proof of his actual innocence, no state interest would be sufficient to justify his continued punitive detention. If such proof can be readily obtained without imposing a significant burden on the State, a refusal to provide access to such evidence is wholly unjustified."[84]

Fear, on the other hand, sounds something like Chief Justice Roberts for the majority: "The dilemma is how to harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice."[85] Chief Justice Roberts did not elaborate on how such a disaster would come to pass. Recognition of the due process claim requested by *Osborne* would affect a small number of cases.[86] Such an opening could only enhance the public's sense that justice was done.

Chief Justice Roberts sounded the trumpet of judicial restraint over and over again, emphasizing that this was a matter for the states, not the federal judiciary. Because the states were coming up with their own solutions to the issue of post-conviction DNA testing, he said:

81. There was some dispute among the Justices as to whether he specifically asked for a type of DNA testing that had not yet been performed and was not available at the time of trial. The State had performed a DQ alpha test, which is a relatively inexact test. While the majority suggested that Osborne only made a request for RFLP testing, which was available at the time of trial, the dissent cites to his briefs and arguments before the state trial court and the state appellate court that show that he asked for STR DNA testing, which was not available at the time of trial. *See Osborne*, 129 S. Ct. at 2333 (Stevens, J., dissenting).

82. The majority did not discuss the fact that "for reasons the State has been unable or unwilling to articulate, it refuses to allow Osborne to test the evidence at his own expense and to thereby ascertain the truth once and for all." *Id.* at 2331.

83. The State conceded that a DNA test in Osborne's case would be dispositive of his guilt or innocence. *Id.* at 2336.

84. *Id.* at 2338.

85. *Id.* at 2316 (majority opinion).

86. *See supra* note 18.

> [T]he recognition of a freestanding and far-reaching constitutional right of access . . . would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way.[87]

That the states also recognized a right has never been a satisfactory reason for rejecting the recognition of a constitutional right. In fact, quite the opposite has been true. That states have recognized the need for legislation can in fact indicate that society believes that a right is fundamental.[88] As the dissent pointed out, such a pattern was the history of the recognition of the right to counsel as applied to the states through the due process clause.[89]

When Chief Justice Roberts did engage in the appropriate legal analysis—whether the right to access evidence for DNA testing was so fundamental to ordered liberty as to be constitutionally-protected—he obfuscated the real issues at stake. First, he jettisoned any procedural due process claim by claiming that, even if a constitutional right to be released upon proof of actual innocence existed under *Herrera*, "there is no due process problem"[90] because Osborne would be entitled to some discovery under federal habeas law.[91] Not only did he thereby avoid addressing the existence of a *Herrera* claim, there *is* a due process problem since the only way Osborne could get through the court doors on a freestanding claim of actual innocence would be with the results of the DNA test *already* in hand.

Likewise through a scant analysis, Chief Justice Roberts found no substantive due process claim. He described Osborne's liberty interest as seeking "access to state evidence so he can apply new DNA-testing technology that might prove him innocent."[92] With this as the stated liberty interest, he easily rejected it because "[t]here is no long history of such a right, and '[t]he mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it.'"[93]

87. *Osborne*, 129 S. Ct. at 2312.

88. *See id.* at 2335 (Stevens, J., dissenting) ("The fact that nearly all the States have now recognized some post-conviction right to DNA evidence makes it more, not less, appropriate to recognize a limited federal right to such evidence. . . .").

89. *Id.* at 2338–39. In addition, as Professor Brandon Garrett has observed, "The adoption of a federal constitutional innocence claim would provide uniformity and ensure an avenue of relief in the states that do not yet provide for meaningful adjudication of innocence claims." Brandon Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1692 (2008).

90. *Osborne*, 129 S. Ct. at 2321–22.

91. *Id.*

92. *Id.* at 2322.

93. *Id.* (quoting Reno v. Flores, 507 U.S. 292, 303 (1993))

While DNA testing may be novel, Justice Roberts's description is the narrowest possible way to describe the liberty interest at stake. Rather, protection of the innocent from wrongful incarceration is a firmly rooted liberty interest.[94] It is true that a convicted man is no longer presumed innocent, but that does not mean the justice system turns a blind eye to proof of actual innocence. Hence, in *Herrera*, concurring Justices O'Connor and Kennedy found it a "fundamental legal principle that executing the innocent is inconsistent with the Constitution."[95] That is precisely why *Herrera* left open the potential of a constitutional claim of freestanding innocence. To disallow a prisoner access to evidence for testing, at his own expense, that could conclusively show he is innocent is nothing short of arbitrary and shocking.[96]

Chief Justice Roberts further argued against finding a due process right because it "would force us to act as policymakers. . . ."[97] He complained that the Court, rather than the states, would have to decide myriad questions such as whether, as part of the right, evidence had to be preserved and for how long, and whether it had to be gathered in the first instance.[98] There are two easy responses. First, these questions always follow the finding of a constitutional right, and would be no different than the issues that flow from the defendant's due process right to exculpatory evidence in the hands of the government.[99] Second, those are not hard questions. If a habeas petitioner has a right of access to the state's evidence for DNA testing, the state must preserve it, or the right would be meaningless, but there is no corollary right to have the evidence gathered in the first instance.

Far more politically controversial than a right to prove actual innocence, the findings of due process rights to abortion, contraceptives, or interracial marriage all led to questions for the states of what limits they could place on the right. States are free to choose limitations, as they have

94. Or, as Justice Stevens framed the liberty interest in dissent, there is a deep-rooted "'interest in being free from physical detention by one's own government.'" *Id.* at 2334 (Stevens, J., dissenting).

95. 506 U.S. 390, 419 (1993) (O'Connor, J., concurring); *see also id.* at 430 (Blackmun, J., dissenting) ("Nothing could be more contrary to contemporary standards of decency . . . than to execute a person who is actually innocent.").

96. *See Osborne*, 129 S. Ct. at 2336 (Stevens, J., dissenting) ("'The touchstone of due process is protection of the individual against arbitrary action of government.'" (quoting Meachum v. Fano, 427 U.S. 215, 226 (1976))); *Herrera*, 506 U.S. at 435–36 (Blackmun, J., dissenting) ("So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience.'" (quoting Rochin v. California, 342 U.S. 165, 172 (1952))) .

97. *Osborne*, 129 S. Ct. at 2323.

98. *Id.*

99. For more on a defendant's due process right to exculpatory evidence, see United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

done in statutes allowing for post-conviction DNA testing. The Court would have to do its usual gate keeping task of deciding whether those limitations abridge the fundamental right.[100]

The Court's reluctance to find a due process right of access to DNA testing was mostly fueled by the slippery slope concerns. Somehow, innumerable prisoners would take advantage of this right and the courts would be clogged with claims of guilty men. Justice Alito's bizarre concurrence, joined by Justices Kennedy and Thomas, which raised a host of concerns about the potential unreliability of DNA testing,[101] echoed this fear. The very power of DNA to prove conclusive innocence had the majority of Justices cowering from it, rather than embracing it.

A rationale for this cautionary approach is found in the dissenting opinion of Justice Souter. While he dissented because he found the state's post-conviction procedures violated due process, he reserved judgment on the recognition of a federal due process right.[102] He seemed to apologize for the Court's and his slowness to recognize this right:

> We can change our own inherited views just so fast, and a person is not labeled a stick-in-the-mud for refusing to endorse a new moral claim without having some time to work through it intellectually and emotionally . . . the broader society needs the chance to take part in the dialectic of public and political back and forth about a new liberty claim before it makes sense to declare unsympathetic state or national laws arbitrary to the point of being unconstitutional.[103]

This is a truly curious statement. It would make sense if he were speaking on a more controversial subject, such as the definition of marriage or the right to abortion. But, in this case, what "new moral claim" is he talking about? It is hard to believe that the majority of American people would find it morally objectionable to allow a man to conclusively prove his innocence if he could do so at no expense to the people.

The majority in *Osborne* rejected an opportunity to abandon its illegitimate fears of the power of DNA to exonerate and to embrace a liberty interest for those who can prove their innocence through DNA testing. The Court once again declined to address whether a *Herrera* claim truly ex-

100. Conditions states have placed on the right include demonstrating materiality, a sworn statement the applicant is innocent, and that testing have been technologically impossible at trial. *See Osborne*, 129 S. Ct. at 2317. More controversial, and arguably unconstitutional, is the limitation of the right to those who did not decline testing at trial for tactical reasons. *See id.* at 2317, 2336 n.8 (Stevens, J., dissenting); *see also* Garrett, *supra* note 89, at 1675-84 (describing the "onerous" standards and limitations for post-conviction DNA testing in the states).

101. *Osborne*, 129 S. Ct. at 2327–29 (Alito, J., concurring).

102. *Id.* at 2340 (Souter, J., dissenting).

103. *Id.* at 2341.

isted, even now when there is little doubt that, no matter how high the standard is set, the standard can be met through a DNA test.

CONCLUSION

The Roberts Court has demonstrated a palpable fear of the effect of wrongful convictions on the criminal justice system. However, the fear that the entire system of criminal justice will come crumbling down is unjustified. Justice Scalia is right that we have to live with an imperfect system—we will occasionally convict the wrong person even if we do everything we can to ensure the most reliable proceedings.[104] We know that eyewitnesses have sworn on the bible that this is the man who they saw kill another man when they were quite simply mistaken.[105]

The man falsely imprisoned and the real perpetrator are likely the only ones who know he is innocent. However, if the innocent man was given the fairest possible trial (were there such a thing) and yet he cannot prove his innocence with some degree of certainty, the painful reality is that there is little we can do with his claim of innocence. In a rare few cases, the innocent man has the kind of proof that convinces hardened courts—a DNA test showing he could not have been the perpetrator. As *Herrera* could only hypothesize at the time, "a truly persuasive demonstration of 'actual innocence'" can now be shown.

While *Herrera* contemplated a constitutional claim of freestanding innocence only in capital cases, it is not significantly less shocking to the conscience of a civilized nation to send an innocent man to prison than it is to execute him. It is equally violative of the due process and the cruel and unusual punishment clauses of the Constitution to send an innocent man to his death or to send him to prison.[106] An obvious corollary to the due process right to relief from imprisonment is the right to make one's proof of innocence through DNA testing.

104. At this point in time, the sources of wrongful convictions are well known and include faulty eyewitness testimony, unreliable snitches, bad forensic evidence, false confessions, prosecutorial misconduct and ineffective defense lawyers. Measures can be taken by law enforcement and the courts to minimize some of the dangers, such as videotaping confessions, following best practices for identification procedures, and overseeing the delivery of services by overworked and underpaid defense attorneys. *See* Stopping Wrongful Convictions Before They Happen, http://www.innocenceproject.org/fix/ (last visited Sept. 1, 2009) (describing procedures that have been and can be taken to fix the problems).

105. *See* Eyewitness Misidentification, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Sept. 1, 2009) (over 75% of DNA exonerations involved faulty eyewitness testimony).

106. Note that this is a different argument from the death-penalty-specific doctrine where the existence of a "substantial risk" of arbitrary imposition of the death penalty suggests a violation of the Eighth Amendment. *See supra* note 52. There is no corresponding jurisprudence in non-capital cases. This section discusses the actuality of wrongful convictions, not just the risks.

A standard of "conclusive exoneration,"[107] as articulated in *House v. Bell*, would work for bullet-proof *Herrera*/DNA claims. However, that standard may well prove problematic in practice. In more than one case of DNA exoneration, a prosecutor has balked at the suggestion that his or her office prosecuted the wrong man.[108] For example, in light of DNA evidence proving the defendant could not have been the depositor of semen at a rape scene, a prosecutor's office then maintained that a second person must have accompanied the defendant.[109] It has been an instinctive reaction of prosecutors to find doubt even in the face of DNA evidence of innocence.

In the eyes of some, no proof will ever be conclusive. After all, some evidence must have initially led to the arrest of the defendant, as in the case of Paul House: there may always be some nagging doubt, even if not entirely reasonable. A standard just below "conclusiveness"—such as one that would require that no reasonable juror would find the defendant guilty beyond a reasonable doubt, given the totality of the evidence, old and new[110]—is about as close as human beings can come to certainty. A prisoner who can make that "extraordinary" showing has surely met the hypothetical "truly persuasive" case of innocence that *Herrera* requires for a constitutionally-recognized freestanding claim of innocence. In the case of a prisoner who can produce evidence of a DNA test conclusively showing his innocence, there is little question that this standard is met.

107. 547 U.S. 518, 553–54 (2006).

108. *See* Brief for Individuals Exonerated by Post-Conviction DNA Testing as Amici Curiae Supporting Respondent at 16–17, Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S. Ct. 2308 (2009) (No. 08-6) (describing the case of Kirk Bloodsworth, where DNA tests proved he was not the perpetrator and he was given a gubernatorial pardon, but where prosecutors maintained his guilt for ten years thereafter); Kennedy Brewer, http://www.innocenceproject.org/Content/1176.php (last visited Sept. 25, 2009) (describing case of Kennedy Brewer, where his conviction was overturned when a DNA test proved he did not commit the crime, but the prosecution held him in jail five additional years in order to retry the case, until he was freed); Murder Case Against Ralph Armstrong Dismissed After Prosecution Hid Evidence of His Innocence, www.innocenceproject.org/Content/2096.php (last visited Sept. 25, 2009) (describing case of Ralph Armstrong, where even after the state supreme court overturned his conviction because of DNA testing showing he could not be the perpetrator, prosecutors sought to retry the case and withheld further evidence of innocence); Prosecutor Dismisses Case Against Chris Heins Based on DNA Evidence, www.innocenceproject.org/Content/1051.php (last visited Sept. 25, 2009) (describing the case of Chad Heins, where DNA tests on hair, victim's fingernails and semen on bed all excluded perpetrator and prosecutor dismissed case but refused to concede innocence).

109. *See, e.g.*, Robert Miller, www.InnocenceProject.org/Content/219.php (last visited Sept. 25, 2009) (describing case of Robert Miller).

110. This is basically the standard proposed for a freestanding innocence claim by Justice White in *Herrera*. *See supra* note 29. Professor Garrett has proposed the lower *Schlup* "more likely than not" standard for all innocence claims, which would lead to a new trial or sentence. Garrett, *supra* note 89, at 1710–11. I differentiate between the two standards, creating a slightly higher one for freestanding innocence claims, because it is my belief that if this standard is met, there is no cause for a retrial, as the standard suggests.

Justice Stevens' rhetorical waxing on innocence in *Schlup* would now have real meaning if the claim actually led to the release of the wrongly convicted:

> [T]he individual interest in avoiding injustice is most compelling in the context of actual innocence. The quintessential miscarriage of justice is the execution of a person who is entirely innocent. Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system.[111]

While petitioners who met the slightly lower "more likely than not" standard in *Schlup* could make their gateway claim, petitioners who met the higher standard proposed here would be released from custody, as no reasonable juror would find them guilty on retrial.

Innocence Projects around the country cannot help every actually innocent person in prison. Nor can the Supreme Court. However, where Innocence Projects are transparent about what they are doing, the Supreme Court is opaque. Members of the Court are concerned about wrongful convictions, but not concerned enough to pull the plug on the death penalty. Members of the Court are aware that DNA tests have exonerated people who have spent substantial periods of time in prison, but still cannot say that a DNA test can be enough to meet the *Herrera* standard for actual innocence. "Truly persuasive" claims of innocence are knocking at the Court's door, and the Court should answer.

111. 513 U.S. 298, 324–25.