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HABEAS DISHARMONY: THE DISSENTS IN TREVINO V. THALER AND MCQUIGGIN V. PERKINS

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In the wake of the big 2011-term cases, such as *Martinez v. Ryan*,[1] *Maples v. Thomas*,[2] and the double punch of *Lafler v. Cooper*[3] and *Missouri v. Frye*,[4] the Supreme Court's 2012-term habeas cases cannot help but seem a little anemic, especially given the sheer number of blockbuster cases in areas of somewhat broader appeal.[5] Two of the term's more-notable habeas cases were, at first blush, quite modest in scope. *Trevino v. Thaler*[6] was a slight gloss on *Martinez v. Ryan*, and *McQuiggin v. Perkins*[7] added AEDPA's one-year statutory limitations period to the list of considerations that may be relaxed in the face of an actual-innocence claim.[8]

Much has been written about *Trevino* and *McQuiggin* in the mainstream media,[9] and the scope of both will undoubtedly soon be a topic of discussion in legal periodicals. In this short article, I will add to the discussion by analyzing an odd feature of both cases: the vehement dissents. Despite

1 132 S. Ct. 1309 (2012).
2 132 S. Ct. 912 (2012).
3 132 S. Ct. 1376 (2012).
4 132 S. Ct. 1399 (2012).
5 *E.g.*, United States v. Windsor, 133 S.Ct. 2675 (2013).
6 133 S. Ct. 1911 (2013).
7 133 S. Ct. 1924 (2013).
8 *Id.* at 1935.
9 *See, e.g.*, Robyn Blummer, *A Chance at Innocence*, TAMPA BAY TIMES, June 2, 2013, at 5P; Ed Whelan, *More Habeas Mischief*, NATIONAL REVIEW ONLINE, May 28, 2013, http://www.nationalreview.com/bench-memos/349461/more-habeas-mischief.

being cases of arguably minor impact, neither was unanimous — far from it —and both drew strong-worded responses. *Trevino* contained two, and *McQuiggin* brought a barnstormer by Scalia that was joined—mostly, as we will see below—by the conservative wing of the Court.

In this piece I argue that the dissents in both cases signal more than a disagreement over statutory interpretation and proper outcomes. Rather, as Andrew Cohen of the Atlantic suggested in his discussion of *Alleyne v. United States*,[10] the Court appears to be engaging in a coded discussion with itself,[11] contemplating the future role to be played by the federal courts in addressing habeas corpus petitions—a role complicated by evolving ideas of innocence, exoneration, and redemption colliding with principles of federalism and finality. *Trevino* and *McQuiggin*, while minor, might provide a fascinating glimpse into where the Supreme Court finds itself as of 2013 and 2014.

A) Trevino

1) The Holding

Of the two cases, *Trevino* is probably the simpler. Last term, the Court opened a door; *Trevino* marked its first, tentative step inside. But as the opinions reveal, the Court is not of one mind about whether to proceed further—or even to proceed at all.

Trevino is based on *Martinez v. Ryan*,[12] a genuinely paradigm-shifting case from last term. *Martinez* addressed the problematic timing of claims alleging ineffective assistance of counsel. While most constitutional rights can be asserted at trial and on direct appeal, the right to the effective assistance of counsel—"a bedrock principle in our justice system"[13]—is invoked, either by preference or by mandate,[14] at the collateral-attack stage.[15] By this point, it may be many years later, and the prisoner may not be entitled to counsel at all. And if he fails to properly invoke his

10 133 S. Ct. 2151 (2013).

11 http://www.theatlantic.com/national/archive/2013/06/at-the-supreme-court-divisions-and-signs-of-trouble-to-come/276931/.

12 132 S. Ct. 1309 (2012).

13 *Id.* at 1317.

14 1-7 Federal Habeas Corpus Practice and Procedure § 7.1 n.77 (collecting cases). Counsel's performance, which is a matter generally outside of the record, is difficult to address on direct appeal. *See, e.g.*, Massaro v. United States, 538 U.S. 500, 504–05 (2003); United States v. Thompson, 690 F.3d 977, 992 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 1611 (2013).

15 For more discussion of this "problematic timing" and its other consequences, see Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 688–98 (2007).

ineffectiveness claims at this late stage, he runs the risk of having them be "procedurally defaulted" and thus unavailable on federal review.[16]

The *Martinez* Court solved this problem by carving out an exception to *Coleman v. Thompson*,[17] which had earlier established the general rule that attorney negligence or inadvertence could not be "cause" to excuse procedural default.[18] Recognizing that "the initial-review collateral proceeding is . . . in many ways the equivalent of a prisoner's direct appeal as to the ineffective-assistance claim"[19]—and that there are "sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage"[20]—the Court held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective" *if* "claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding" under state law.[21] The *Martinez* Court nevertheless explicitly declined to address whether the right to counsel should be extended to collateral proceedings.[22]

In its opinion in what would become *Trevino*, the Fifth Circuit had taken *Martinez* at its word, limiting its application to situations where ineffectiveness claims were explicitly delayed until the collateral stage—in contrast to Texas, where certain procedures exist for bringing ineffectiveness allegations on direct appeal.[23] But Texas law, while permitting ineffectiveness claims to be raised on direct appeal, "make[s] it 'virtually impossible' for an ineffective assistance claim to be presented on direct review."[24]

The question is: is there a significant difference between "impossible" and "virtually impossible?" The Court answered in the negative. Its opinion hinged in part on its conclusion that, "as a systematic matter, Texas [does not] afford[] meaningful review of a claim of ineffective

16 *See generally* John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679 (1990).
17 501 U.S. 722 (1991).
18 *Id.* at 753–54.
19 *Martinez*, 132 S. Ct. at 1317.
20 *Id.* at 1318.
21 *Id.* at 1320; *see also id.* at 1315.
22 *Id.* at 1315; *see also* Mary Dewey, Comment, Martinez v. Ryan*: A Shift Toward Broadening Access to Federal Habeas Corpus*, 90 DENV. U.L. REV. 269, 270 (2012).
23 Ibarra v. Thaler, 687 F.3d 222, 227 (5th Cir. 2012).
24 Trevino v. Thaler, 133 S. Ct. 1911, 1915 (2013) (quoting Robinson v. State, 16 S. W. 3d 808, 810-811 (Tex. Crim. App. 2000)).

assistance of trial counsel" on direct review.[25] Further, while noting that ineffectiveness claims could be raised on direct review, the Texas courts nevertheless acknowledged the shortcomings of this process by, inter alia, allowing defendants to raise claims in both direct and collateral proceedings.[26] Because "the Texas procedural system . . . does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal," it "precludes as a matter of course" what "Arizona law [in *Martinez*] prohibited by explicit terms."[27] Thus was the *Martinez* holding expanded: "where, as here, state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective assistance of trial counsel on direct appeal," ineffectiveness or absence of counsel at the post-conviction stage can be "cause" for excusing a procedural default.[28]

2) The Dissents

In the first of two dissents, Chief Justice Roberts—who had voted with the majority in *Martinez*—strongly disagreed, in an opinion joined by Justice Alito. *Martinez,* Chief Justice Roberts wrote, was "unusually explicit" about its "narrowness," because limiting its ambit was necessary for "the *Coleman* rule [to] remain administrable."[29] Further, under the clear-cut rule in *Martinez,* "States could readily anticipate how such a sharply defined exception would apply to various procedural frameworks," a state of affairs that "could be reconciled with our concerns for comity and equitable balancing that led to *Coleman*'s baseline rule in the first place."[30] States would, post-*Martinez,* be presented with a clear choice: allow ineffectiveness claims to be raised on direct appeal, thus avoiding the application of *Martinez;* or follow Arizona and open up state proceedings to *Martinez*-excused claims.

Chief Justice Roberts pointed out that, by "tak[ing] all the starch out of its rule with an assortment of adjectives, adverbs, and modifying clauses," the formerly "crisp" *Martinez* rule would now be mired in ambiguity.[31] What, for example, is a "meaningful" opportunity to pursue ineffectiveness on direct appellate review? Texas did not provide one, but was there an example to

25 *Id.* at 1919.
26 *Id.* at 1919–20.
27 *Id.* at 1921.
28 *Id.* at 1921.
29 *Id.* at 1923 (Roberts, C.J., dissenting).
30 *Id.*
31 *Id.*

be put forward of a state that did? Chief Justice Roberts also emphasized that the actual claim at issue in *Trevino* was anything but typical, and was rather "a particular species of ineffectiveness claim that depends on time-consuming investigation of personal background and other mitigating circumstances."[32] Worrying that the new line of demarcation would not hold, Roberts concluded:

> In what I suspect (though cannot know) will be a broad swath of cases, the Court's approach will excuse procedural defaults that, under *Coleman*, should preclude federal review. But even in cases where federal courts ultimately decide that the habeas petitioner cannot establish cause under the new standard, the years of procedural wrangling it takes to reach that decision will themselves undermine the finality of sentences necessary to effective criminal justice.[33]

Such an outcome would "offer [states] a gamble," frustrating "the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights."[34]

Chief Justice Roberts's dissent was accompanied by a dissent from Justice Scalia, joined by Justice Thomas. Scalia and Thomas, who dissented in *Martinez*, wrote in that decision that the *Martinez* limitation would not last.[35] Scalia's dissent in *Trevino* is a simple "I told you so,"[36] and does not invite additional discussion.

Turning, then, to the substantive thrust of Justice Roberts's critique, it is difficult to disagree with his conclusion that *Martinez* presented a clear choice that *Trevino* abrogated. Under a *Martinez* framework, the options are "permit or prohibit"; under *Trevino*, what was formerly a line becomes a spectrum. Furthermore, the Chief is correct that *Trevino*, far more so than *Martinez*, operates as a partial sub silentio overruling of *Coleman*, without any of the attendant stare decisis considerations or analysis that discarding well-established precedent should involve.[37]

That being said, it is unclear whether the *Martinez* dichotomy would in fact be practically workable. Under a pure *Martinez* framework, would the mere possibility of invoking ineffectiveness claims on direct appeal, no matter how slight, defeat the ability to seek relief from a default? *Martinez* arguably left that unclear. For example, if a state procedural rule allowed those proceeding with public-defenders at trial to raise ineffectiveness claims if, but only if, they retained paid counsel on direct appeal, *Martinez* would arguably not apply, no matter the remoteness of that scenario. Far

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32 *Id.*
33 *Id.* at1924.
34 *Id.* (quoting 501 U.S. 722, 748 (1991)).
35 *Martinez v. Ryan*, 132 S. Ct. 1309, 1321 n.1 (2012) (Scalia, J., dissenting).
36 *Trevino*, 133 S. Ct. at 1924 (Scalia, J., dissenting).
37 *See id.* at 1923 (Roberts, C.J., dissenting).

from presenting a "clear choice," *Martinez* unmodified established a "rule" that was more exception than relief. If the *Martinez* rule was intended to apply on a class-of-litigant basis, then *Trevino* itself does little, because *Martinez* would apply in the vast number of instances where review on direct appeal was technically possible, if not individually feasible. Of course, *Martinez* did not survive unmodified long enough for its exigencies to be truly untangled.

Further, while the Chief Justice's comity concerns are understandable, neither *Martinez* nor *Trevino* will likely result in a full-scale undermining of state criminal adjudications. He refers to "years of procedural wrangling," but the fact remains that, for less-substantial claims, federal courts may see fit to jump over the *Martinez*/*Trevino* question entirely, as they are perfectly entitled to do.[38] That "wrangling" will occur only if the ineffectiveness claim is facially substantial, and if the petitioner—likely proceeding pro se—presents it so as to indicate to the federal district court its possible merit. States could, meanwhile, encourage attorneys appointed as post-conviction counsel to submit to the court statements indicating why they raised the claims they did, which would lend their decisions the patina, if not the indisputable imprimatur, of strategy—to which courts generally defer.[39] Nor do *Martinez* and *Trevino* affect the remaining requirements of AEDPA that govern deference to state-court decisions.[40] And, as the Chief himself admits in his dissent, the "fundamental miscarriage of justice" exception always allowed for defaulted claims to be considered by the federal courts in the first instance.[41]

Rather, *Trevino* is probably about a right to counsel on collateral review, which (as discussed *supra*) *Martinez* claimed to *not* be about. This makes intuitive sense. Remember, the Chief Justice joined *Martinez*, which featured an impressive list of jurisdictions that "have in place procedures to ensure counsel is appointed for substantial ineffective-assistance claims."[42] Under *Martinez* proper, a state might have been able to get away with appointing counsel for only "substantial" claims, if it also left the door open (however slightly) for pursuing ineffectiveness claims on direct appeal. Under *Trevino*, this is arguably not so. If a state declines to appoint counsel for a claim it believes is not

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38 *See, e.g.*, Binder v. Stegall, 198 F.3d 177, 178 (6th Cir. 1999). Of course, because the "cause and prejudice" standard has a pseudo-merits inquiry built into it—as does *Martinez* itself, *see* 132 S. Ct. at 1318–19—courts may simply decide that the allegedly defaulted claim is meritless.

39 *See* Strickland v. Washington, 466 U.S. 668, 689 (1984).

40 *See, e.g.,* 28 U.S.C. § 2254(e).

41 *See Trevino*, 133 S. Ct. at 1922 (Roberts, C.J., dissenting) (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)). Some states have decided that rules requiring direct-appeal invocation of ineffectiveness claims create too much of a headache to administer. *See, e.g.*, Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002).

42 Martinez v. Ryan, 132 S. Ct. 1309, 1319 (2012).

substantial, it runs the risk of a different and potentially substantial ineffectiveness claim eliding default on federal habeas review (either de jure or de facto, given the squishiness of the *Martinez* merits standard); if it appoints counsel in all collateral actions, meanwhile, the state enjoys an additional layer of protection.

Some jurisdictions do not presently take this approach. Conspicuously, the federal system is among them.[43] While neither *Martinez* nor *Trevino* has facial applicability to 28 U.S.C. § 2255 motions, it would be strange indeed to have a pseudo-"right" propagated to state collateral petitioners that federal movants would not enjoy. If Chief Justice Roberts does indeed see *Trevino* as treading too close to the line establishing a right to counsel on collateral review in all but name—not a constitutional guarantee, perhaps, but an issue of the utmost practicality—its possible impact on strapped-for-cash jurisdictions may also be at the forefront of his concerns.[44]

In sum, both *Martinez* and *Trevino*, while possibly of minor actual impact, reveal fascinating schisms among the Justices, especially those two who thought *Martinez* proper but recoiled at the incremental expansion of *Trevino*. In the context of the blockbuster 2011-term habeas cases, Chief Justice Roberts's dissent in *Trevino* reveals his unease with a Court that is effecting more of a slight modification of the *Coleman* rule. Should the boundaries of *Martinez* be tested further—and should Scalia's dissent in that case prove characteristically prescient—it will be fascinating to see whether the *Trevino* majority can retain its coalition.

B) **McQuiggin**

1) The Holding

McQuiggin v. Perkins,[45] the second case, is odd in many respects. For one, it came to the Court with its nomenclature in flux. Further, it was plucked for consideration despite the fact that the claim pursued by petitioner Floyd Perkins was a dud—suggesting that its majority saw an opportunity to work a bit of doctrinal magic. Finally, it is a case for which the chasm between the majority and the dissent reveals a starkly different perspective on the purpose of federal habeas relief in the early years of the twenty-first century.

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43 *See, e.g.*, Bucci v. United States, 662 F.3d 18, 34 (1st Cir. 2011).

44 The federal system is among these as well, and the Chief has paid close attention to the funding of the federal judiciary. *See, e.g.*, Adam Liptak, Chief Justice Prods Congress to Resolve Budget Talks and Control National Debt, N.Y. TIMES, Dec. 31, 2013, at A12.

45 133 S. Ct. 1924 (2013).

McQuiggin arose from a Sixth Circuit case, in which the petitioner asked the Circuit "to determine whether a credible claim of actual innocence, *without more*, warrants equitable tolling of AEDPA's statute of limitations."[46] Although petitioner Perkins claimed to be entitled to the "new evidence" calculation of timeliness under AEDPA,[47] his petition was still grievously untimely.[48] Hence, Perkins argued further that he should be excused from the AEDPA statute of limitations completely because he was actually innocent of the crime of conviction.[49]

Surveying the applicable and analogous precedent, and attempting to resolve a perceived tension in governing Supreme Court decisions, the Sixth Circuit decided, in effect, that a persuasive showing of actual innocence did not require that the petitioner exercise reasonable diligence in presenting his claim; in fact, "[r]equiring reasonable diligence effectively makes the concept of the actual innocence gateway redundant, since petitioners only seek equitable tolling when they were not reasonably diligent in complying with § 2244(d)(1)(D)."[50] The upshot: innocence was different.

The use of "equitable tolling" in the Circuit's opinion probably strikes some observers as unusual, because "tolling" is more commonly defined as a "suspension or interruption"[51] (not an elimination) of a statutory period. The Court acknowledged that its innovation could be a horse of another color, quoting with approval a Ninth Circuit disposition that recommended use of the phrase "equitable exception" instead.[52]

The Supreme Court vacated the Circuit's decision, holding that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations"; and while the prisoner's diligence should not serve as a procedural bar to this rule, it could nevertheless be a substantive factor in considering whether the "actual innocence" standard had been met.[53] The Court clarified that

46 Perkins v. McQuiggin, 670 F.3d 665, 667 (6th Cir. 2012)
47 *See* 28 U.S.C. § 2244(d)(1)(D).
48 *McQuiggin*, 670 F.3d at 668.
49 *Id.*
50 *Id.* at 673.
51 Ballantine's Law Dictionary.
52 *McQuiggin*, 670 F.3d at 675 n.3 (quoting Lee v. Lampert, 653 F.3d 929, 932 & n.5 (9th Cir. 2011) (en banc)). The petition for certiorari employed both terms. *See* McQuiggin v. Perkins, 2012 U.S. S. Ct. Briefs LEXIS 3114, at *26–27 (U.S. July 25, 2012).
53 McQuiggin v. Perkins, 133 S. Ct. 1924, 1929 (2013).

"equitable tolling" was nowhere in play; Perkins "does not qualify for equitable tolling," and sought instead "an equitable *exception* to §2244(d)(1), not an extension of the time statutorily prescribed."[54]

This outcome was based on several cooperating rationales. First, the Court emphasized that a satisfactory actual innocence claim allows a petitioner to vault a procedural default, such as one based on a missed state filing deadline. To hold that the federal one-year limitations period acts as a strict bar to relief, but a state bar does not, "would thus accord greater force to a federal deadline than to a similarly designed state deadline"—an odd outcome for a statutory regime "seeking to promote federalism and comity."[55] Second, the Court emphasized that AEDPA reflects Congress legislating against the background of the miscarriage-of-justice/actual innocence exception to preexisting procedural bars, implementing additional barriers to relief in the context of serial petitions (through § 2244(b)(2)(B)) and evidentiary hearings (through 28 U.S.C. § 2254(e)(2)). The inclusion of the one-year-from-discovery limitations period (28 U.S.C. § 2244(d)(1)(D)) does not affect actual innocence claims because it applies to *all* petitions, not just those asserting actual innocence.[56] Thus:

> The more rational inference to draw from Congress' incorporation of a modified version of the miscarriage of justice exception in §§2244(b)(2)(B) and 2254(e)(2) is simply this: In a case not governed by those provisions, *i.e.*, a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA's passage intact and unrestricted.[57]

As mentioned above, however, the Court did not hold that diligence, the hallmark of equitable tolling, had no place in a court's analysis. Rather than functioning as a procedural barrier to relief—e.g., "these affidavits are very convincing, but you filed 400 days after discovering them, so I need not consider whether you're shown actual innocence"—diligence should instead function as a substantive part of the actual-innocence analysis—e.g., "these affidavits are very convincing, and I shall consider your delay in presenting your claim when deciding whether your proffer is convincing enough." This is so because "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing."[58]

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54 *Id.* at 1931.
55 *Id.* at 1932.
56 *Id.* at 1933.
57 *Id.* at 1934.
58 *Id.* at 1935. The Court based this portion of its analysis on *Schulp* itself. *See* Schlup v. Delo, 513 U.S. 298, 332 (1995). And while the Court considered one exception to its rule—when delay is clearly part of an attempt to manipulate the case, withholding of equitable relief could be a procedural consideration again, *see McQuiggin*, 133 S. Ct. at 1936 n.4—it lacked an occasion to elaborate further.

But all ended with an anticlimax: the District Court had already decided that Perkins's new evidence was not enough to meet the actual innocence threshold.[59] "On remand, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual-innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation."[60] Perkins, it seems, was out of luck.

Before moving on to the dissent, it is helpful to discuss what *McQuiggin* did and what it did not do. It did not, as the Court repeatedly stressed, modify the *Schlup* actual innocence standard at all; rather, the Court repeatedly emphasized how "demanding" the *Schlup* was and remained.[61] It did not affect "true" equitable tolling, where innocence was not in play. Nor did it relax the included diligence requirements that were specifically included via the AEDPA amendments, such as in 28 U.S.C. § 2244(b)(2)(B)(i).[62] It did not suggest that the AEDPA principles of deference to state-court determinations of fact and law should not apply when actual-innocence claims were before a court. And, of course, *McQuiggin* did not take the fateful step of recognizing a freestanding actual-innocence claim; prisoners would still have to articulate an independent constitutional violation upon which to anchor their grounds for relief. Unlike the *Martinez/Trevino* twosome, *McQuiggin* seemed unlikely to lead inexorable to further modification of the Court's habeas jurisprudence.[63]

2) The Dissent

Justice Scalia's dissent, which was joined by Chief Justice Roberts, Justice Thomas, and—in part—Justice Alito, was a barnburner of the typical Scalia sort. It was composed in two parts, only the first of which answered the analysis of the majority, by excoriating them for their statutory high crimes. The second part of Scalia's dissent, however, was atypical, something else entirely: a breathtaking (and somewhat non sequitur) challenge to the scope of the great writ itself. It revealed a

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59 *McQuiggin*, 133 S. Ct. at 1936.

60 *Id.*

61 *See id.* at 1928, 1936.

62 The diligence for successive petitions is diligence of discovery, not of presentment. 28 U.S.C. § 2244(b)(2)(B)(i).

63 Indeed, the narrowness of the result raises the question of the real reach of the rule, and—as a necessary outgrowth—the Court's intent in deciding as it did. It is possible that the Court wished to avoid scenarios where, through procedural blunders, a petitioner fails to timely present his claim—for example, by trying, but failing, to exhaust state remedies (e.g., having a state petition be deemed untimely). *See* 28 U.S.C. § 2244(d)(2); Artuz v. Bennett, 531 U.S. 4, 8 (2000). The petitioner could, of course, file a "protective" petition in federal court, but this option might not be obvious to a pro se litigant. *See* Pace v. DiGuglielmo, 544 U.S. 408, 413 (2005). In light of situations like these, the Court's desire to harmonize the rules governing procedural default and timeliness seems quite reasonable.

Court deeply divided over the continuing role of the federal judiciary in policing the constitutional validity of state trials, convictions, and sentences.

Scalia's objection to the outcome in *McQuiggin* is encapsulated by the final sentence of his first paragraph: "What is the source of the Court's power to fashion what it concedes is an 'exception' to this clear statutory command?"[64] The "statutory command," of course, is the standard AEDPA one-year deadline.[65] Indeed, to Justice Scalia, the majority's analysis amounted to a near-usurpation of the separation of powers; whereas prior "actual innocence" exceptions applied only to "judge-made, prudential barriers to habeas relief," here the Court dared to excuse itself from a statutory mandate duly imposed by Congress.[66] For example, the ability of a reviewing court to excuse a petitioner's procedural default derived from the default rule's origin as a "prudential rule grounded in considerations of comity and concerns for the orderly administration of criminal justice."[67] What "courts have created, courts can modify."[68]

Scalia also took aim at the Court's pretenses of modesty. Whether the newly announced rule would apply only to a small number of cases was of no moment: "[t]hat the Court's exception would not entirely frustrate Congress's design does not weaken the force of the State's argument that Congress addressed the issue comprehensively and chose to exclude dilatory prisoners like respondent."[69] Nor did Scalia find the "anomaly" of giving state deadlines less force than a federal deadline to be convincing, because the only thing giving those state deadlines force was a judicially created doctrine, whereas federal courts were explicitly bound by federal statutes.[70]

Finally, Scalia found the distinction between "equitable tolling" and "equitable exceptions" to be a potent one. The former, such as the rule in *Holland v. Florida*,[71] "vindicate[s] what might be considered the genuine intent of the statute," by "extending the deadline for a filing because of an event or circumstance that deprives the filer, through no fault of his own, of the full period accorded by the statute."[72] The latter, by contrast, was a "blatant overruling."[73]

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64 *McQuiggin*, 133 S. Ct. at 1937 (Scalia, J., dissenting).
65 *Id.* (citing 28 U. S. C. §2244(d)(1)).
66 *Id.*
67 *Id.* (quoting Dretke v. Haley, 541 U.S. 386, 392–93 (2004)).
68 *Id.*
69 *Id.* at 1939.
70 *Id.*
71 Holland v. Florida, 560 U.S. 631 (2010).
72 *McQuiggin*, 133 S. Ct. at 1941 (Scalia J., dissenting).
73 *Id.*

Scalia's basic point here is certainly well taken. While the Court's outcome did effect but a minor increment in habeas jurisprudence, it can plausibly be argued that the Court circumvented the established statutory framework to reach its preferred goal. Of course, both Scalia and the majority speak as if AEDPA was the product of considered intent—many observers beg to differ[74]—and the Court's outcome hardly does fatal damage to the strictures of AEDPA. Also, strictly speaking, Justice Scalia is not entirely correct in his central statutory point, as courts can and do circumvent timeliness rules in ways that would appear to dodge congressional intent, if not necessarily with the high court's imprimatur.[75] But the final part of Scalia's dissent casts his statutory argument in a different light entirely. It goes far beyond the objections expressed in his *Martinez* and *Trevino* dissents; and, indeed, appears unconnected to the case at bar.

Scalia begins by disparaging what he refers to as the Court's "vision of perfect justice": a need to assure redress of unjust outcomes no matter how tardy (or separated in time from the original trial) the claim.[76] He acknowledges the Court's protestations that tenable, gateway-passing actual-innocence claims are rare, but points out that "[f]rom now on, each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner's innocence claim."[77]

But then, he pivots hard. Justice Scalia observes that sixty years have passed since *Brown v. Allen*[78] struck the "Faustian bargain that traded the simple elegance of the common-law writ of habeas corpus for federal-court power to probe the substantive merits of state-court convictions."[79] AEDPA, an attempt at making sense of federal habeas jurisprudence, had nonetheless done little as

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74 *See, e.g.*, Michael M. O'Hear, *Bypassing Habeas: The Right to Effective Assistance Requires Earlier Supreme Court Intervention in Cases of Attorney Incompetence*, 25 FED. SENT'G. REP. 110 (2012).

75 Would it have mattered if the *McQuiggin* majority had simply said that, in cases of actual innocence, the one-year deadline never begins to run? For example, time limits for petitioning for review of an immigration decision are classically jurisdictional and cannot be tolled. *See, e.g.*, Ruiz-Martinez v. Mukasey, 516 F.3d 102, 118 (2d Cir. 2008). But courts have threaded this needle by stating that the time period does not begin to run "until the agency *properly* serves the alien with the [final] order." Villegas de la Paz v. Holder, 614 F.3d 605, 608 (6th Cir. 2010) (collecting cases) (emphasis added). Similar logic could be applied to the present situation; a persuasive claim of actual innocence simply halts the one-year (and non-jurisdictional) AEDPA period before it begins to run.

76 *McQuiggin*, 133 S. Ct. at 1432 (Scalia, J., dissenting).

77 *Id.* To be sure, digging into the weeds of state postconviction procedure may not be inherently more difficult than addressing the viability of an actual-innocence claim under *Schlup*. 513 U.S. 298, 332 (1995).

78 Brown v. Allen, 344 U.S. 443 (1953).

79 *McQuiggin*, 133 S. Ct. at 1942 (Scalia, J., dissenting).

a device for "separating the truly deserving from the multitude of prisoners pressing false claims."[80] Quoting Justice Jackson's reference to a "flood" of "worthless" petitions, Scalia emphasizes that the "flood" of Jackson's time—541 petitions—had grown to an almost Biblical magnitude by 2012.[81] "Today's decision," Scalia conclude, "piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints."[82]

This closing commentary is curious for a number of reasons. Scalia is certainly correct that the number of federal petitions has swelled since the time of *Brown*, but he leaves that statistic twisting in the wind, unconnected to salient factors like incarceration rates and the continuation of constitutional incorporation under the Warren court. Second, Scalia's source for his "541 petitions" citations is Judge Friendly's seminal article, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*.[83] That article's thesis: "with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence."[84] Judge Friendly also believed that imposing the requirement of a colorable showing of actual innocence would allow the courts of first instance to "screen out rather rapidly a great multitude of applications not deserving their attention and devote their time to those few where injustice may have been done."[85] It is "passing strange," in the language of the *McQuiggin* majority, that Justice Scalia cites in his fusillade against federal habeas relief an article that, in part, supports the basic thrust of the Court's holding.

So what does this portion of Scalia's dissent portend? Is it simply a manifestation of the Justice's displeasure, isolated to the facts at hand? I think not; rather, it is more plausibly taken at face value. Justice Scalia sees the federal habeas system as broad, unworkable, and an affront to both sense and sensible administration of justice. But while Justice Scalia laments the poor state of the system, that his concerns arise in the context of the *McQuiggin* dissent leaves the true focus of his ire unclear. Would he prefer a system akin to the one Judge Friendly discussed in his piece? Or would he prefer that the federal system, through the Supreme Court, reverse course from the *Brown*

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80 *Id.* at 1943. Actually, Justice Scalia refers AEDPA's "pass through the Augean stables" and the "[B]yzantine" federal-habeas process. *Id.* at 1942–43. Justice Scalia's two-to-one Greek-to-German imagery ratio may have deeper meaning, but this paper will not explore it.

81 *Id.* at 1943 (quoting *Brown*, 344 U.S. at 536–37 (Jackson, J., concurring in the judgment)).

82 *Id.*

83 38 U. CHI. L. REV. 142 (1970).

84 *Id.* at 142.

85 *Id.* at 150.

"Faustian bargain" and return to a system of jurisdictional analysis? The latter course would truly be radical; and yet, the weight of Justice Scalia's grievances (a system overburdened; resources depleted; triage ineffective) signals that direction.

That Justice Scalia would propose such a radical solution is unsurprising. But what *is* surprising is that he does not stand alone; the dissent was joined *in its entirety* by the Chief Justice and Justice Thomas, who signed on to the final post-script that potentially advocated the return to a pre-*Brown* era. And while it would be easy to dismiss this as portending little, it remains the case that Justice Alito conspicuously declined to join the final portion of the dissent.[86] In other words, Justice Alito saw in that final section something more than mere bluster or rhetoric. He saw something with which he disagreed.

As of the time of writing, the *McQuiggin* dissent has not been cited by the Court, nor has Justice Scalia renewed the critiques he raised therein. It is unclear whether it indicates a passing storm or signals a renewed fight over the scope of federal habeas relief—one that finds Justice Alito standing somewhat apart from two of his conservative colleagues. But it certainly suggests, in any event, that the 2013 term will be one to watch.

C) Conclusion

Trevino and *McQuiggin* represent modest developments in the Supreme Court's post-AEDPA habeas corpus jurisprudence, but each—and especially *McQuiggin*—carries dissents that suggest deep schisms in even these incremental decisions. A Court that is united on the basic framework of adjudicating the merits of habeas petitions finds itself potentially wondering whether it should bother at all, just as it contemplates anew uncomfortable questions of comity and the wisdom of its various procedural bars.

The Court's concerns are quite timely. The media is comparatively awash with stories about long-delayed exonerations.[87] Competing with these headlines are stories that are less encouraging—if

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86 Technically, Justice Alito joined "Parts I, II, and III" of the dissent. *McQuiggin*, 133 S. Ct. at 1937. As released by the Court, and as presently available in electronic databases, *McQuiggin* does not have a fourth "part"; the final section of Scalia's dissent is offset by asterisks and not by a separate Roman numeral. The only logical way to read the vote distribution is to assume that the final section is the part that Alito did not join.

87 *See, e.g.*, Kristina Davis, *FREED MAN DISCUSSES WRONGFUL CONVICTION; Law school project helped get DNA test redone in rape case after serving 8 years*, SAN DIEGO UNION-TRIBUNE, June 26, 2013, at B-1; Tony Rizzo, *DNA test frees man from a long prison sentence*, KANSAS CITY STAR, June 14, 2013.

not about the meting out of justice *per se*, then about the systems for doing so.[88] At the same time, federalism and so-called "judicial activism" collide when long-settled state convictions are vacated by the federal courts—when federal courts play the "safety valve" role that *Brown* ushered into being.[89] Despite Justice Scalia's dissent in *McQuiggin*, the courts are not, at least in the near future, likely to withdraw from their roles as overseers; for one, Justice Scalia clearly does not have the votes for a total withdrawal; for another, abdicating such a role would arguably contravene AEDPA more than the holes poked in its framework by the Court's contemporary procedural decisions. But they should not be surprised to find their part to be in flux moving forward.

88 *See, e.g.*, Joel Anderson, *Like Watching a Train Wreck in Slow Motion*, ATLANTA JOURNAL-CONSTITUTION, Oct. 2, 2011, at 5B (discussing the Innocence Project and the Troy Davis case).

89 *See, e.g.*, Elmore v. Ozmint, 661 F.3d 783 (4th Cir. 2011).