

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*, *Maples v. Thomas*, and the double punch of *Lafler v. Cooper* and *Missouri v. Frye*, 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. Two of the term's more-notable habeas cases were, at first blush, quite modest in scope. *Trevino v. Thaler* was a slight gloss on *Martinez v. Ryan*, and *McQuiggin v. Perkins* 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.

Much has been written about *Trevino* and *McQuiggin* in the mainstream media, 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 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*, the Court appears to be engaging in a coded discussion with itself, 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.

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