The Unrealized Promise of Section 1983 Method-of-Execution Challenges

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Introduction

Angel Diaz was sentenced to death by the state of Florida and his time had seemingly run out. He had exhausted his full run of direct review and federal habeas corpus post-conviction review. When potentially significant new flaws in Florida’s lethal injection protocol came to light,1 though, Diaz had one additional avenue for relief that the Supreme Court had recently made available in Hill v. McDonough:2 a suit challenging Florida’s lethal injection protocol under 42 U.S.C. § 1983,3 the central cause of action in federal civil rights litigation. Nonetheless, applying an unjustifiably strict timeliness rule, the Florida Supreme Court refused to hear Diaz’s new challenge.4 The federal courts similarly declined to intervene, likewise finding Diaz’s challenge untimely in spite of the substantial new evidence he advanced.5 Angel Diaz was executed by lethal injection soon thereafter in a horrifically botched execution that clearly caused him suffering.6 In fact, his execution was so mishandled that it prompted Governor Jeb Bush to halt all executions and to order a comprehensive review of Florida’s lethal injection protocol.7

Prior to Hill, habeas corpus, one of the two significant avenues for a federal constitutional challenge related to imprisonment (along with § 1983), was nearly the sole

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1 Diaz presented the Florida courts with a prominent new medical journal article, the findings of a federal district court in California (invalidating that state’s lethal injection protocol), a letter from an expert, and an ABA report criticizing the Florida death penalty system, all of which came to light after his previous challenges.
3 42 U.S.C. § 1983 (2000) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .”).
4 Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006).
5 Diaz v. McDonough, 472 F.3d 849, 850 (11th Cir. 2006).
6 See Lightbourn v. McCollum, No. SC06-2391, 2007 WL 3196533, at *1 (Fla. Nov. 1, 2007) (noting that the Diaz execution took thirty-four minutes, which was “substantially longer than any previous lethal injection in Florida”).
means by which federal courts regulated state capital punishment schemes in the post-conviction setting. More specifically, it was also largely the only means by which to challenge a state’s method of execution in federal court. This was due to Supreme Court decisions that delineated the boundary between habeas corpus and § 1983. These rulings mandate that “[c]hallenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus, [whereas] requests for relief turning on circumstances of confinement may be presented in a § 1983 action.”

Because courts largely viewed method-of-execution challenges as falling under the former category, § 1983 had little role in capital post-conviction litigation.

At the same time, the Supreme Court and Congress developed labyrinthine rules and limitations to channel capital habeas corpus litigation, rules that have made such litigation difficult, and in some cases – such as with the rules against successive petitions – nearly impossible. When combined with the lack of a § 1983 option, these restrictions have placed death-sentenced inmates in a progressively tighter vise, unable to make legitimate method-of-execution challenges after their first habeas corpus petition concluded, even where such challenges were based on later-revealed factual predicates.

Hill and one other recent Supreme Court decision – Nelson v. Campbell – ought to have upset this framework: Method-of-execution claims are no longer the exclusive province of habeas corpus and may now be brought as § 1983 actions, within limits. The most recent and most significant a method-of-execution claim is Baze v. Rees, granted cert on September 27, 2007. Baze v. Rees, 128 S. Ct. 34 (2007) (grant of writ of certiorari); see also Robert Barnes, Lethal Injection Ruling May Have to Wait, WASH. POST, Jan. 8, 2008, at A2. This case has resulted

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8 Muhammad, 540 U.S. at 750 (internal citations omitted).
9 See, e.g., Fugate v. Dep’t of Corr., 301 F.3d 1287, 1288 (11th Cir. 2002); Williams v. Hopkins, 130 F.3d 333, 336–37 (8th Cir. 1997); In re Sapp, 118 F.3d 460, 462–63 (6th Cir. 1997); Reid v. Johnson, 333 F. Supp. 2d 543, 550 n.12 (E.D. Va. 2004).
10 See generally infra at Part II.
12 The most recent and most significant a method-of-execution claim is Baze v. Rees, granted cert on September 27, 2007. Baze v. Rees, 128 S. Ct. 34 (2007) (grant of writ of certiorari); see also Robert Barnes, Lethal Injection Ruling May Have to Wait, WASH. POST, Jan. 8, 2008, at A2. This case has resulted
While Section 1983 shares some analogous rules with habeas, there are important distinctions between them, too. These distinctions should, in turn, actually make a difference for a death-sentenced inmate by allowing him to avoid many of the habeas corpus limitations that he once faced. Thus, this seemingly routine clarification of the boundary between habeas and § 1983 is potentially a major doctrinal shift, one with significance for both habeas corpus and civil rights jurisprudence, as well as for death penalty litigation as a whole.

As is often the case, though, theory and practice can diverge. This Article will show that lower courts seeking to procedurally limit the litigation resulting from Hill often fall back on previously-applicable habeas corpus doctrine, reflexively importing aspects of it into these § 1983 suits. But given the very different policies and rules that underlie each of these doctrines, this importation frustrates the promise of Hill’s § 1983 vehicle for method-of-execution challenges. And even where courts do not engage in such importation, they frustrate Hill’s promise in other ways not required by applicable §

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13 Section 1983 in the prisoner-litigation context is significantly different than all other § 1983 litigation because it includes an exhaustion requirement not otherwise required. Where the plaintiff is incarcerated, the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, tit. I, § 101, 110 Stat. 1321-66–1321-77 (codified principally at 42 U.S.C. § 1997e(a) (2000)), adds what is in effect an administrative exhaustion requirement. For more on this important aspect of prisoner litigation and its effect on Hill challenges, see infra at Part II.E.

14 See Douglas A. Berman, Finding Bickel Gold In a Hill of Beans, 2006 CATO SUP. CT. REV. 311, 322–23 ("[T]he Supreme Court’s approach to Hill and other lethal injection litigation has displayed a kind of recklessness concerning how lower courts would have to decipher and respond to the Court’s opaque work."); John Gibeaut, More Inmates Likely To Contest Lethal Injection, 5 No. 24 A.B.A. J. E-Report 3 (June 16, 2006) ("[T]he justices [in Hill] . . . left the lower courts with precious little guidance. . . .").
1983 doctrine, such as by formulating unduly harsh timing rules (like the one applied in Diaz’s case) or by overlooking the applicable standard of review.\(^{15}\) In short, Hill’s § 1983 vehicle has done little to loosen the method-of-execution challenge vise.

Examples of how theory and practice have diverged abound. For instance, exemplifying the propensity to fall back on habeas doctrine, \textit{Cooey v. Strickland} explicitly imported into the § 1983 claim at issue both specific habeas corpus rules (something like the habeas statute of limitations), as well as the underlying policies of habeas corpus. According to the dissent, this “misapprehend[ed] the distinction between the two causes of action” by ignoring the fact that habeas doctrine is aimed at “promot[ing] finality in state court judgments,” a concern not implicated by § 1983.\(^ {16}\) And in \textit{Workman v. Bredesen}, the court took the extraordinary step of “[f]or the first time in a death-penalty case, . . . vacate[ing] a temporary restraining order.”\(^ {17}\) Given that a temporary restraining order is the least intrusive of all injunctive relief, intended merely


\(^{17}\) \textit{Workman v. Bredesen}, 486 F.3d 896, 921 (6th Cir. 2007) (Cole, J., dissenting).
to give the district court a short, ten-day period in which to consider further possible action, *Workman* is a paradigm example of the second tendency noted above: an unduly strict ruling unrelated to habeas rules and not supported by either normal § 1983 rules or civil procedure rules generally.

Contrast these cases with the district court decision in *Harbison v. Little*, a decision that came soon after *Workman*. In *Harbison*, the district judge conducted a three-day bench trial concerning the exact same lethal injection protocol at issue in *Workman*, finding serious infirmities that amounted to “not a mere ‘risk of negligence’ but a guarantee of accident, written directly into the protocol itself.”

The court’s full consideration of the important issues at stake through wide-ranging discovery and examination of witnesses illustrates one of § 1983’s key advantages over habeas corpus: the ability to conduct a full evidentiary hearing after the inmate had exhausted his first federal habeas challenge.

Cases like *Workman* and *Cooey* ignore the implications of the new procedural vehicle that *Hill* and its § 1983 vehicle made available, resulting in a “dysfunctional patchwork of stays and executions.” This piecemeal litigation, litigation that is pending nationwide, in turn creates tremendous uncertainty. The success or failure of a particular inmate’s challenge will turn more on which circuit or even district court hears the challenge rather than the actual merits of the challenge itself: the State of Tennessee executed Philip Workman under the very same protocol found unconstitutional in

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18 Harbison v. Little, 511 F. Supp. 2d 872 (M.D. Tenn. 2007).
19 *Id.* at 891.
20 Alley v. Little, 447 F.3d 976, 977 (6th Cir. 2006) (Boyce, J., dissenting from denial of rehearing en banc).
21 See *Cooey v. Strickland*, No. 2:04-cv-1156, 2008 WL 471536 (S.D. Ohio Feb 15, 2008) (“It remains the hope of this Court that the United States Supreme Court will grant the *certiorari* petition arising from this litigation in order to introduce much-needed nationwide uniformity and as much certainty as possible into an area of litigation that has often been plagued by needlessly convoluted and inconsistent reasoning.”).
Lower court application of *Hill* thus reintroduces to death penalty litigation the freakish and wanton randomness that the Court found so objectionable in *Furman v. Georgia*.

Part I of this Article will examine the boundary between habeas and § 1983, and will show how *Hill* and *Nelson* altered that boundary. Part II will explore Section 1983’s advantages over habeas corpus in the method-of-execution context, and show specific examples where courts have unjustifiably frustrated the realization of these advantages by importing habeas doctrines. Finally, Part III will conclude by analyzing court-imposed limitations unrelated to habeas corpus, such as unduly harsh timing rules and the detailed examination of a lethal injection protocol on review of a district court’s preliminary injunctive relief decision. This final Part will propose solutions that both seek to preserve the key advantages inherent in § 1983 while also remaining faithful to *Hill*’s admonition that federal courts “can and should protect States from dilatory or speculative suits.” In particular, this Article will propose that aggregation of *Hill* suits within states can effectively balance the interests of both inmates and states, while also allowing courts to properly adhere to applicable § 1983 doctrine.

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23 See Kreitzberg & Richter, *supra* note 15, at 467 (“Although many states’ procedures are almost identical and the challenges cited comparable evidence, declarations, and exhibits, courts reached different conclusions in disposing of these cases.”).
24 408 U.S. 238, 310 (1972) (Stewart, J., concurring) (“[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”)
25 *Hill*, 126 S. Ct. at 2104.
I. *Hill and Nelson* and Their Effect on the Habeas Corpus – Section 1983 “Boundary”

A. The Habeas Corpus – Section 1983 “Boundary”

Before *Nelson v. Campbell* was decided in 2004, it was generally accepted that federal method-of-execution claims were cognizable only through a habeas corpus petition. Courts hewed to this belief based not only on Supreme Court precedent that had hinted at this conclusion, but also based on cases that marked the dividing line between habeas and § 1983. This Section will provide a broad overview of the boundary the Supreme Court has developed between these two types of federal constitutional litigation, and will briefly discuss the one previous Supreme Court case that dealt with a § 1983 method-of-execution challenge.

Prisoners have two primary options for challenging the actions of state officials in a federal forum: a federal habeas corpus challenge or a § 1983 suit in federal court. Habeas corpus provides the broader of the two remedies, allowing a federal court to order a sentence reduction or even the outright release of a prisoner in state custody. That being the case, in order to protect against undue interference with state criminal justice systems, the Supreme Court and Congress developed complicated rules to channel

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29 *Id.* at 484 (“[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.”).
federal habeas corpus litigation, culminating with the passage of the federal Anti-
Terrorism and Effective Death Penalty Act of 1996 (AEDPA).\(^{31}\)

In contrast, § 1983 is narrower, limited to situations where the prisoner seeks
 damages or injunctive relief that do not implicate the validity or duration of the inmate’s
sentence.\(^{32}\) Thus, a key difference between the two doctrines is that a habeas corpus
petition inherently requires a federal court to review and perhaps even overturn the final
judgment of a state criminal court, raising particularly acute issues of federalism and
comity.\(^{33}\) In contrast, Section 1983 does not as sharply implicate these issues because the
finality of a state-court judgment is rarely at issue. Where it is, comity and federalism are
preserved by applying state preclusion law to the later federal § 1983 civil suit.\(^{34}\)

Recognizing that litigants could use § 1983 to make an end-run around the more-
restrictive habeas doctrines, the Supreme Court established a boundary between the two,
starting with \textit{Preiser v. Rodriguez} in 1972. There the Court explicitly rejected the
plaintiff’s argument that § 1983 should permit him immediate access to federal court and
allow him to avoid habeas corpus’s exhaustion requirement.\(^{35}\) Instead, the Court held,
habeas and its exhaustion requirement applied even where only a reduction in sentence
was sought, in order “to avoid the unnecessary friction between the federal and state
court systems that would result if a lower federal court upset a state court conviction

\(^{32}\) \textit{Heck}, 512 U.S. at 486–87. Where such a damages action does implicate the validity of the prisoner’s
sentence, though, the so-called \textit{Heck} rule requires that the inmate must show a favorable termination of his
conviction or sentence in order to proceed in a § 1983 action. \textit{Id.}
\(^{33}\) Other habeas rules have developed in a similar fashion, such as limits on federal habeas evidentiary
hearings and a strict statute of limitations. \textit{See infra} at Part II.
also applies to federal § 1983 actions based on previously litigated state court claims, provided that a state
court would be claim precluded as a matter of state preclusion law); Allen v. McCurry, 449 U.S. 90, 105
(1980) (holding that state court decisions have issue preclusive effect on later § 1983 actions in federal
court, again provided that a state court would be precluded by that decision as a matter of state preclusion
law).
\(^{35}\) \textit{See infra} at Part II.E.
without first giving the state court system an opportunity to correct its own constitutional errors.\textsuperscript{36} Over a series of cases following \emph{Preiser}, the Court evolved, at least in theory, a relatively clear dividing line: a suit that implicates the fact or duration of a prisoner’s sentence must be brought as a habeas action, whereas a suit that challenges conditions of confinement can be brought as a § 1983 action.\textsuperscript{37}

Prior to \emph{Hill} and \emph{Nelson}, lower federal courts viewed method-of-execution challenges as falling on the habeas side of this boundary, characterizing them as affecting the “duration” of the sentence.\textsuperscript{38} They based this conclusion not only on cases like \emph{Preiser} and \emph{Heck v. Humphrey}, but also on an early Supreme Court case addressing a § 1983 method-of-execution challenge. In 1992, the Ninth Circuit permitted an inmate to use § 1983 to challenge California’s use of the gas chamber. The Supreme Court dismissed the suit as untimely, avoiding the question of whether § 1983 was an appropriate vehicle for the suit. But the Court strongly indicated that the suit was the functional equivalent of a successive habeas petition, finding that the prisoner had shown no “cause” for failing to raise the issue in one of his four previous federal habeas petitions.\textsuperscript{39}

\textbf{B. The \emph{Hill} and \emph{Nelson} Decisions}

It was against this backdrop that the Court decided \emph{Hill} and \emph{Nelson}. By allowing § 1983 method-of-execution challenges, these two cases permitted the precise end-run around habeas that once was understood to be barred. Inmates could now make an

\textsuperscript{36} \emph{Preiser}, 411 U.S. at 490 (citing Fay v. Noia, 372 U.S. 391, 419–20 (1963)).


\textsuperscript{38} \textit{See, e.g.,} Fugate v. Dep’t of Corr., 301 F.3d 1287, 1288 (11th Cir. 2002); Williams v. Hopkins, 130 F.3d 333, 336–37 (8th Cir. 1997); \textit{In re Sapp}, 118 F.3d 460, 462–63 (6th Cir. 1997); Reid v. Johnson, 333 F. Supp. 2d 543, 550 n.12 (E.D. Va. 2004).

\textsuperscript{39} \emph{Gomez}, 503 U.S. at 653–54.
immediate § 1983 challenge to a state’s lethal injection protocol, even where they had already litigated their first federal habeas petition.

In *Nelson v. Campbell* an inmate alleged that Georgia’s planned use of a “cut down” procedure to access his veins (compromised by a lifetime of intravenous drug use) violated the Eighth Amendment ban on cruel and unusual punishment. Filed just three days before his scheduled execution, the district court and the Eleventh Circuit both dismissed the claim as constituting an impermissible second or successive habeas petition, barred by the AEDPA.\(^\text{40}\)

The Supreme Court disagreed, holding that § 1983 was an appropriate vehicle for this challenge, but with key limitations. Noting that this cut-down challenge was similar to an ordinary § 1983 claim of deliberate indifference to medical needs, the Court held that “[m]erely labeling something as part of an execution procedure is insufficient to insulate it from a § 1983 attack.”\(^\text{41}\)

But, refusing to allow a broader § 1983 challenge to lethal injection, the Court set a number of limits on such challenges. If the particular procedure in question were statutorily required or if as a factual matter the inmate was unwilling or unable to concede acceptable alternatives, then there would be a “stronger argument” that habeas must be used, in that such a challenge would implicate the viability of the death sentence itself, rather than a step in effectuating it.\(^\text{42}\) Thus, lower courts were to focus on whether the plaintiff’s challenge to the cut-down “necessarily prevent[s the State] from carrying out its execution.”\(^\text{43}\) In addition, lower courts were not to allow such suits if they

\(^{41}\) *Id.* at 644–45.
\(^{42}\) *Id.* at 645.
\(^{43}\) *Id.* at 647.
constituted delaying tactics, and were to consider among the equitable balancing factors the state’s “strong interest in proceeding with its judgment.” 44 Finally, the Court also noted that because these suits are to be considered conditions of confinement cases under § 1983, the Prison Litigation Reform Act of 1995 (PLRA) 45 remains an independent limitation on them. 46

Where Nelson cracked opened the door to § 1983 method-of-execution claims, Hill v. McDonough pushed it wide open. Again filed virtually on the eve of the sentence being carried out, Hill involved a far broader § 1983 challenge to lethal injection, this time as to the three-drug cocktail used by Florida. 47 The lower courts in the Eleventh Circuit found Nelson inapplicable and dismissed the case as being the “functional equivalent” of a successive habeas claim. 48

Finding Nelson controlling, the Supreme Court again disagreed, allowing the § 1983 challenge to the three-drug cocktail, largely because the state could proceed with the execution through other methods or alternative chemical combinations. Thus “[u]nder these circumstances, a grant of injunctive relief could not be seen as barring the execution of Hill’s sentence.” 49 The Court concluded by emphasizing again that lower courts must guard against dilatory filings meant only to delay executions, primarily by strictly applying the normal equitable relief factors. 50

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44 Id. at 649–50.
45 See infra at Part II.E.
46 Id. at 650.
47 Hill v. McDonough, 126 S. Ct. 2096, 2100 (2006) (noting that Hill brought his § 1983 claim four days before his date of execution). In fact, Hill’s challenge was so last minute that he was actually strapped to a gurney awaiting execution when the Supreme Court granted cert and issued a stay. Gibeaut, supra note 14.
48 Id. at 2101. For a full explanation of the habeas successive petition limitations, see infra at Part II.B.
49 Id. at 2102. Importantly, the Court also soundly rejected the state’s contention that an inmate must propose a satisfactory alternative, characterizing this as an unacceptable heightened pleading requirement. Id. at 2103.
50 Id. at 2104.
Allowing § 1983 method-of-execution challenges has profound doctrinal implications for death penalty litigation, presenting litigants with both advantages and limitations. On the one hand, where a state court adjudicates a method-of-execution claim on direct review, a later federal § 1983 suit will potentially be precluded, an effect largely absent under habeas corpus (provided, of course, statutory and judge-made habeas restrictions are surmounted). And of course, in that it is limited only to method-of-execution challenges in the capital post-conviction setting, § 1983 holds out no hope for overturning the inmate’s conviction, unlike habeas corpus.

At the same time, though, § 1983 avoids many of the restrictions imposed under habeas corpus. For example, in virtually every case since Hill, the inmate has already exhausted all his direct and collateral appeals, including one or more federal habeas corpus petitions. The Supreme Court and Congress (through the AEDPA) have made bringing subsequent habeas petitions extremely problematic, even if there is a new factual or legal predicate for the challenge. By making § 1983 available, Hill reopens the door to federal court for inmates to assert new factual or legal claims, a door largely closed by habeas corpus rules.

II. The Unrealized Advantages of § 1983

Part II of this Article will examine the clear advantages § 1983 affords litigants over five important habeas doctrines, advantages Hill ought to have made available: those intended to preserve the finality of state court judgments, such as habeas procedural default doctrine; the rule against successive petitions; the barriers to obtaining a full evidentiary hearing; the strict habeas timing restrictions; and the habeas corpus “total

51 Migra, 465 U.S. at 86–87; Allen, 449 U.S. at 105.
52 Berman, supra note 14.
exhaustion” rule. With the exception of a few key rulings such as *Harbison,*53 *Morales v. Tilton,*54 and *Taylor v. Crawford,*55 this Part will also show that to date *Hill* has had little real impact. This is in part because decisions like *Cooey*56 – whose approach has been followed by courts in virtually every circuit that includes multiple pro-death-penalty states, including especially the Fifth, Sixth, Eighth, Tenth, and Eleventh Circuits – depart from applicable § 1983 principles, continuing instead to treat the challenges as if bound by previously-applicable habeas doctrine.

A. *Hill* and the Need For Deference To State Court Judgments

Section 1983 and habeas corpus claims typically arise from quite different procedural postures. The typical § 1983 action is filed with no prior state court action related to the claim or issue at stake and thus has no impact on the finality of a state court judgment. This simple fact is perhaps the most important difference between the two.

In cases where there is a final state court judgment at issue (in the *Hill* context, a conviction and sentence), Section 1983 doctrine protects the finality of that judgment in two ways. First, if the state court adjudicated the method-of-execution issue and applicable state preclusion law would bar a later state court suit, a federal court is similarly precluded by virtue of the Full Faith and Credit Act, 28 U.S.C. § 1738.57 Second, even where the state criminal system has not yet addressed the method-of-

53 511 F. Supp. 2d 872 (M.D. Tenn. 2007); see also *McNair v. Allen,* Nos. 2:06-cv-00695-WKW, 2:06-cv-00919-WKW, 2007 WL 4106483, at *2 (M.D. Ala. Nov. 16, 2007) (noting that trial date was set and that discovery was complete, but putting case on hold pending both the resolution of *Baze* and a 45-day reprieve ordered by the Alabama governor to evaluate that state’s protocol).
54 465 F. Supp. 2d 972 (N.D. Cal. 2006) (effectively halting the use of lethal injection in California, and prompting Governor Schwarzenegger to convene a review of the state’s procedures and policies); see also Greer, *supra* note 15, at 776 (asserting that *Hill* prompted an “unprecedented four-day hearing on the constitutionality of the California lethal injection protocol”); Kreitzberg & Richter, *supra* note 15, at 478–91 (analyzing the *Morales* decision in detail); Mottor, *supra* note 15 (analyzing the *Morales* decision).
55 No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *1 (W.D. Mo. June 26, 2006), vacated, 487 F.3d 1072 (8th Cir. 2007); see also Mottor, *supra* note 15 (describing the *Taylor* district court decision).
56 See *supra* at notes 16–17 and accompanying text.
57 See *Migra,* 465 U.S. at 86–87; *Allen,* 449 U.S. at 105.
execution issue, the finality of the judgment is still protected by the Preiser and Heck rules.\textsuperscript{58} In fact, Hill conditioned its allowance of the § 1983 action against Florida’s three-drug cocktail on the fact that it “could not be seen as barring the execution of Hill’s sentence” given that Florida could execute him by another method or by adjusting its lethal injection protocol, a protocol that was not statutorily mandated.\textsuperscript{59}

Habeas corpus is different. Because habeas petitioners are required to exhaust the full state direct review process, habeas corpus inherently involves a federal court reviewing and potentially even overturning a state-court judgment, which in turn sharply implicates federalism and comity concerns. These concerns have prompted the development of a variety of rules aimed at preserving the finality of state court judgments and preventing federal courts from unduly interfering with state criminal justice systems.\textsuperscript{60}

This Section will examine two of these habeas corpus rules and will show how courts unjustifiably continue to apply them to Hill challenges. The application of these habeas corpus rules to § 1983 actions under Hill fails to recognize that these civil rights actions inherently do not implicate the finality of state court judgments: “[The inmate’s] challenge, even if successful, does not foreclose his execution. He will be put to death.

\textsuperscript{58} See supra at Part I.A.
\textsuperscript{59} Hill, 126 S. Ct. at 2102; see also Note, supra note 15, at 1311 (cataloguing ten states which allow a “fallback” method of execution that can be employed if the primary method is struck down); Justin B. Shane, Note, Nelson v. Campbell 124 S. Ct. 2117 (2004), 17 CAP. DEF. J. 107, 112–13 (2004) (comparing Virginia, where there is no codified procedure for whether a doctor must be present, with Alabama, which statutorily mandates who must be present at an execution).
\textsuperscript{60} McClesky v. Zant, 499 U.S. 467, 491 (1991) (“Finality has special importance in the context of a federal attack on a state conviction. . . . Reexamination of state convictions on federal habeas ‘frustrate[s] . . . ‘both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.’”) (quoting Murray v. Carrier, 477 U.S. 478, 487 (1986)) (internal citations omitted).
for his crime."\textsuperscript{61} Instead, at most a § 1983 method-of-execution challenge can delay the execution while the state revises its lethal injection protocol.

1. The Habeas Rule Against Retroactivity

Under the landmark habeas corpus case, \textit{Teague v. Lane}, habeas petitioners may not avail themselves of a “new” rule of law, defined as a rule that was not dictated by precedent at the time their conviction was final, unless they meet one of two exceptions.\textsuperscript{62} This rule preserves finality by preventing a federal court from overturning the decision of a state judge who reasonably relied on then-existing law.

The two exceptions to this rule are extremely narrow. An inmate must either show that the rule placed certain types of conduct beyond the power of state courts to regulate,\textsuperscript{63} or he must show that the new rule altered a watershed rule of criminal procedure that fundamentally affects the accuracy of decision making.\textsuperscript{64} Consistent with its effect on many habeas doctrines, the AEDPA further narrowed the scope of habeas review,\textsuperscript{65} although this provision applies only where a state court actually decided the constitutional issue.\textsuperscript{66}

Section 1983 incorporates no analogous rule. Quite the contrary: Section 1983 qualified immunity doctrine is expressly premised on allowing later litigants to benefit

\begin{itemize}
  \item \textsuperscript{61} Rutherford v. McDonough, 466 F.3d 970 (11th Cir. 2006) (Wilson, J., dissenting).
  \item \textsuperscript{63} Teague, 489 U.S. at 311. This exception has been found applicable in subsequent cases. See, e.g., Penry v. Lynaugh, 492 U.S. 302 (1989), \textit{abrogated on other grounds by Atkins v. Virginia}, 536 U.S. 304 (2002).
  \item \textsuperscript{64} Teague, 489 U.S. at 312. This exception has never been found to apply. See, e.g., Whorton v. Bockting, 126 S. Ct. 1173 (2007) (holding that Crawford v. Washington, 541 U.S. 36 (2004), and its progeny (which dramatically altered the court’s Confrontation Clause jurisprudence) did not fall under this exception).
  \item \textsuperscript{65} 28 U.S.C. § 2254(d)(1) (2000).
  \item \textsuperscript{66} RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER’S \textsc{The Federal Courts and the Federal System} 1335 (5th ed. 2003).
\end{itemize}
from new constitutional rules forged by those who have gone before them.  Perhaps on this basis, many inmates have argued that a late-filed *Hill* cause of action should not be considered untimely if it was filed soon after the Court decided *Hill* because prior to that case, circuit precedent expressly barred this type of suit.

But a number of courts, particularly those in the Fifth, Sixth, and Eleventh Circuits, have repeatedly rejected this argument, effectively importing the *Teague* nonretroactivity rule into *Hill* civil rights actions. In numerous cases, these circuits have held that “[s]o long as there remains the possibility of en banc reconsideration and Supreme Court review, circuit law does not completely foreclose all avenues for relief.”

Thus, the argument goes, despite circuit precedent clearly barring such a “legally futile” action, the inmate should have filed a § 1983 method-of-execution challenge even before *Hill*. Because they did not, the court will not excuse their current untimely action.

Note how closely this mirrors the *Teague* rule: Supreme Court precedent did not “dictate” that a *Hill* challenge could not be brought. Applicants facing imminent execution therefore cannot later bring a *Hill* challenge, even where they file soon after this new avenue of relief was established. This stricture imports the habeas corpus “new rule” restrictions into § 1983.

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67 See, e.g., Saucier v. Katz, 533 U.S. 194, 201 (2001) (requiring that a court deciding the issue of qualified immunity first decide whether the officer’s actions constituted a constitutional violation, a process that allows the law to become “clearly established,” thus barring a later claim of qualified immunity on the same basis).
68 Harris v. Johnson, 376 F.3d 414, 418–19 (5th Cir. 2004).
69 Workman v. Bredesen, 486 F.3d 896, 929 (6th Cir. 2007) (Cole, J., dissenting).
70 See, e.g., Rutherford v. Crosby, 438 F.3d 1087, 1092–93 (11th Cir. 2006) (applying this rule even while *Hill* was still pending); Williams v. Allen, 496 F.3d 1210, 1212 (11th Cir. 2007); Grayson v Allen, 491 F.3d 1318, 1322 (11th Cir. 2007); Cooey, 479 F.3d at 422–23; Harris v. Johnson, 376 F.3d 414, 418–19 (5th Cir. 2004) (the earliest example of this argument being made, after *Nelson*); Hallford v. Allen, Civil Action No. 07-0401-WS-C, 2007 WL 2683672, at *5 (S.D. Ala. Sept. 6, 2007); Arthur v. Allen, Civil Action No. 07-0342-WS-C, 2007 WL 2320069, at *2–3 (S.D. Ala. Aug. 10, 2007).
Unfortunately, however, this approach fails to recognize that “[l]itigants benefit from the efforts of prior litigants who shape the law every day. . . . Hill forged new precedent” and “breathed life into these claims.” While an inmate theoretically could have filed a § 1983 method-of-execution challenge before Hill, there is “no justification for holding that he was required to do so.” As one dissenting opinion noted, Hill itself was highly speculative, clearly dilatory (filed four days before his date of execution) and undeniably intended to delay his execution, and yet the Supreme Court granted certiorari and ordered the Eleventh Circuit to at least consider the possibility of hearing the challenge if the balance of equities favored it.

2. Habeas Corpus Procedural Default Rules

Another important way that federal habeas preserves the finality of state court judgments is through habeas procedural default doctrine, which holds that habeas petitioners may not raise claims on which they procedurally defaulted in either state or federal court. After Fay v. Noia in 1963, habeas doctrine was broadly forgiving of procedural default, but starting with Wainwright v. Sykes in 1977, the Court

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71 Rutherford, 466 F.3d at 980 (Wilson, J., dissenting).
72 Workman, 486 F.3d at 927 (Cole, J., dissenting); see also Harris v. Dretke, No. 04-70020, 2004 WL 1427042, at *1 (5th Cir. June 23, 2004) (stating that most courts read Gomez as “standing for the proposition that a death row inmate may not use § 1983 to challenge the manner in which the state intends to carry out a sentence of death”); see also Moore v. Rees, Civil Action No. 06-CV-22-KKC, 2007 WL 1035013, at *8 (E.D. Ky. Mar. 30, 2007) (“Prior to the Supreme Court's decision in Nelson, the Sixth Circuit and most circuit courts of appeal treated all method-of-execution challenges filed under § 1983 as de facto second or successive habeas petitions.”); Robin Miller, Annotation, Timeliness of Challenge, Under 42 U.S.C.A § 1983, to Constitutionality of State Executions by Lethal Injection, 22 A.L.R.6TH 19, at § 2, n.2 (cataloguing the circuit split that Hill resolved).
73 Cooey v. Strickland, 479 F.3d 412, 426 (6th Cir. 2007) (Gilman, J., dissenting); see also Oken v. Sizer, 321 F. Supp. 2d 658, 664 n.4 (D. Md. 2004) (making the case that pre-Nelson it would be unrealistic to suppose that § 1983 was a proper vehicle and in fact excusing the inmate’s delay on this issue); Rutherford, 466 F.3d at 1098 (Wilson, J., dissenting) (noting that it is unrealistic to expect an inmate to bring a claim where the factual and legal predicate only became clear six days prior to the filing date).
74 Rutherford, 466 F.3d at 1098 (Wilson, J., dissenting).
significantly restricted the ability to raise a procedurally defaulted claim during habeas.\textsuperscript{76} \textit{Wainwright} bars habeas review of a procedurally defaulted claim unless the defendant can show “cause” for the default\textsuperscript{77} and “prejudice” resulting from refusal to hear the claim.\textsuperscript{78}

Again, because § 1983 does not involve review of a state court judgment, it contains no analogue to the habeas procedural default doctrine. In fact, \textit{Hill}’s allowance for § 1983 challenges is premised precisely on the fact that these suits do not implicate finality.\textsuperscript{79} And yet, in \textit{Jones v. Allen}, the Eleventh Circuit effectively imported habeas corpus procedural default doctrine into § 1983. In determining whether the inmate’s action was timely, the court noted that the inmate had raised a method-of-execution claim challenging Alabama’s electrocution protocol in his habeas corpus petition. It then asserted that “[w]hen the Alabama Legislature changed the method of execution to lethal injection, Jones could have then amended his habeas petition to challenge lethal injection as well,” but did not.\textsuperscript{80} While this was just one factor the court considered in finding the

\textsuperscript{77} A few examples of “cause” would be attorney error serious enough to constitute Sixth Amendment ineffective assistance of counsel, see, e.g., Murray v. Carrier, 477 U.S. 478 (1986); new law and facts (subject to the \textit{Teague} and AEDPA limitations); or interference by government officials, see, e.g., Strickler v. Green, 527 U.S. 263 (1999).
\textsuperscript{78} The precise meaning of this prong has not been fleshed out by the Supreme Court, with the issue being addressed in only one case. \textit{See} Alan W. Clarke, \textit{Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus}, 30 U. RICH. L. REV. 303, 333–34 (1996). \textit{In United States v. Frady}, the Court held that the inmate must show that the procedural errors at his trial “worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” United States v. Frady, 456 U.S. 152, 170 (1982). \textit{See also} \textit{FALLON, JR., ET AL., supra} note 66, at 1379 (discussing the fact that only three cases after \textit{Wainwright} address this issue and that \textit{Frady} is the “fullest” discussion of it). The AEDPA adds further restrictions that apply if states satisfy certain statutory standards for providing state post-conviction counsel to inmates. 28 U.S.C. § 2261 (2000). But where states have not met this standard, procedural defaults continue to be governed by \textit{Wainwright}. \textit{FALLON, JR., ET AL., supra}, at 1380.
\textsuperscript{79} \textit{Cooey}, 479 F.3d at 425 (Gilman, J., dissenting); \textit{see also} \textit{Cooey}, 489 F.3d at 776–77 (Gilman, J., dissenting from denial of rehearing en banc).
\textsuperscript{80} \textit{Jones}, 485 F.3d at 639–40. This ruling is particularly interesting considering that other courts have held that \textit{Hill} foreclosed bringing method-of-execution challenges through habeas corpus. \textit{See}, e.g., \textit{Rachal v. Quarterman}, No. 07-70016, 2008 WL 410696, at *4 (5th Cir. Feb. 14, 2008) (“Claims challenging the
action untimely, it nonetheless illustrates the tendency of courts to continue to apply habeas corpus doctrines that have no place in a § 1983 challenge.

B. Hill and Habeas “Successive Petition” Limitations

By allowing a new method-of-execution challenge after other post-conviction relief has been exhausted, Hill’s § 1983 vehicle ought to be a key new opportunity for death penalty litigants. Once an inmate concludes her first federal habeas petition, the habeas rules against second or successive habeas petitions make it nearly impossible to raise method-of-execution claims based on later-revealed factual predicates, such as articles in medical journals,\textsuperscript{81} academic commentary,\textsuperscript{82} and the successes of inmates in other courts, such as Morales, Taylor, and Harbison. Section 1983 is not subject to this rule and therefore should allow these inmates to take advantage of legitimate, newly-revealed factual predicates. This Section will examine the habeas corpus rule against successive petitions and will show that by barring civil rights actions that are based on method of execution cannot be raised in a habeas proceeding because they do not concern the fact or duration of a sentence.”); Amman v. Thompson, No. C07-1393RAJ, 2008 WL 110506, at *2 (W.D. Wash. Jan. 7, 2008); Henness v. Bagley, No. 2:01-cv-043, 2007 WL 3284930, at *64 (S.D. Ohio Oct. 31, 2007) (finding a method of execution challenge against a non-statutory three-drug protocol not cognizable under habeas corpus because it did “not present a general challenge to execution by lethal injection”); Duty v. Sirmons, No. CIV-05-23-FHS-SPS, 2007 WL 2358648, at *16 (E.D. Okla. Aug. 17, 2007); Parr v. Quarterman, Civil Action No. G-07-421, 2007 WL 2362970, at *4 (S.D. Tex. Aug. 14, 2007) (asserting that Hill “requires” that method-of-execution claims be brought via § 1983 and not via habeas corpus); Beets v. McDaniel, No. 2:04-CV-00085-KJD-GWF, 2007 WL 602229, at *12 (D. Nev. Feb. 20, 2007) (“While neither Nelson nor Hill hold that habeas corpus relief is unavailable to a prisoner seeking to invalidate a particular lethal injection procedure, both cases suggest that a § 1983 claim may be the more appropriate avenue where as in this case, the particular procedure under scrutiny is . . . not the only means by which the state is permitted to carry out the sentence.”); Bustamante v. Quarterman, Civil Action No. H-05-1805, 2007 WL 3541565 (S.D. Tex. Dec. 6, 2006); Hill v. Mitchell, No. 1:98-cv-452, 2007 WL 2874597, at *1 (S.D. Ohio, Sept. 27 2007). One court even expressed doubts about whether a § 1983 claim and a habeas action could be filed in one complaint. Moeller v. Weber, No. Civ. 04-4200, 2007 WL 4232720, at *1–2 (D.S.D. Nov. 28, 2007). Thus, were a jurisdiction to follow Jones’ lead while also foreclosing habeas, method-of-execution challenges could be effectively foreclosed altogether.

\textsuperscript{81} The most prominent of these was an article published in the British medical journal, The LANCET. Leonidas G. Koniaris et al., Inadequate Anaesthesia in Lethal Injection for Execution, 365 \textit{The LANCET} 1412 (Apr. 16, 2005). This article is in large part responsible for breathing new life into lethal injection challenges.

\textsuperscript{82} See, e.g., Denno, Lethal Injection Quandary, supra note 15; Ewart, supra note 15; Haines, supra note 15; Wong, supra note 15.
newly revealed facts regarding lethal injection protocols, courts are again wrongly falling back on habeas doctrines.

The Supreme Court initially was very lenient regarding second or successive habeas corpus petitions. But in the 1990s, both the Court and Congress drastically cut back on this flexibility, virtually foreclosing an inmate’s ability to bring a second or successive habeas petition. Also known as “abuse of the writ,” this limit is “similar in purpose and design” to habeas procedural default doctrine and the combination of the two results in the “qualified application of the doctrine of res judicata” to habeas corpus claims.

The AEDPA imposes two such restrictions. First, where an inmate already litigated a claim in a previous federal habeas petition, a federal court must dismiss that claim, without exception. Under this rule, if a prisoner litigated a method-of-execution claim during his first habeas petition, he may not raise that claim in any subsequent habeas petition, no matter what new legal or factual predicate subsequently arose.

Likewise, even where the inmate did not litigate a claim during his first federal habeas petition, the AEDPA strictly limits the ability to raise it in a second or successive habeas petition. Section 2244 of the AEDPA requires that the new claim be based either

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84 See McClesky v. Zant, 499 U.S. 467, 494 (1991) (overturning Sanders and holding that a successive petition would only be permitted upon a showing of either cause and prejudice, or “that a fundamental miscarriage of justice” would result from a failure to entertain the claim).
85 See 28 U.S.C. § 2244(b)(1) (2000) (requiring dismissal of a claim presented in a prior application); § 2244(b)(2) (only allowing a federal court to hear a second or successive claim that was not previously presented to a federal court where “the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,” or where specific strictures are met regarding later revealed factual predicates for the successive claim are met); § 2244(b)(3) (erecting a significant procedural barrier to bringing a successive habeas petition by requiring that a federal appeals court first authorize the bringing of such a challenge before a district court may hear it).
86 McClesky, 499 U.S. at 490.
on a “new rule of constitutional law, made retroactive . . . by the Supreme Court” or on new facts that could not have been discovered with due diligence. In addition, the petitioner must “establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”

Section 1983 doctrine developed quite differently. While such civil rights claims are generally subject to preclusion on the basis of both prior state and federal judgments, preclusion typically is not an issue in method-of-execution challenges, either because the issue was not raised during a prior habeas petition or, importantly, because newly revealed facts are at issue due to changes in the execution protocol since that earlier petition.

For a number of reasons, such newly-revealed factual predicates are especially prevalent in lethal injection challenges. First, some states have proven to be notoriously secretive and obstinate about revealing the details of their lethal injection protocols. For instance, in Oken v. Sizer, the state repeatedly frustrated the court’s efforts to obtain

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89 § 2244(b)(2)(A).
90 § 2244(b)(2)(B)(i).
91 § 2244(b)(2)(B)(ii). The “underlying offense” wording of this provision has created a circuit split on whether it applies to challenges related to sentencing. See Ross v. Berghuis, 417 F.3d 552, 557 n.4 (6th Cir. 2005); LeFevres v. Gibson, 238 F.3d 1263, 1267 (10th Cir. 2001). Thus, it is likewise uncertain that it would apply to a method-of-execution challenge.
details of the protocol at issue and only provided them after redacting sixteen pages. In addition, states often vest their departments of corrections with virtually unlimited discretion regarding execution protocols. Because these agencies enjoy so much discretion, they may change the protocol without notice and without informing inmates or the public of the change. The end result is that lethal injection protocols are highly variable both within states and as compared with each other, using different medical personnel, different levels of training, and different levels of guidance and specificity.

Assuming a litigant challenged her method-of-execution in her first habeas petition, without § 1983 she would never again be able to challenge a lethal injection protocol, no matter how different it had become (because of agency discretion) or how many new facts about it had been revealed (because of agency secrecy). The successive

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94 Oken v. Sizer, 321 F. Supp. 2d 658, 667 (D. Md. 2004). The court was offended enough by this behavior to hold it against the state in later weighing the equitable factors for whether to issue a stay. See also Cooey, 489 F.3d at 777 (Gilman, J. dissenting from denial of rehearing en banc) (noting that Ohio considers some information about the lethal injection protocol non-public); Evans v. Saar, 412 F. Supp. 2d 519, 522–23 (D. Md. 2006); Denno, Delegate Death, supra note 15, at 66 (noting that courts routinely dismiss media accounts of executions, which are in fact one of the only reliable windows into these procedures and their effects); Denno, Lethal Injection Quandary, supra note 15, at 121–23 (recommending increased transparency in lethal injection procedures); Haines, supra note 15, at 478–82 (positing that shielding the public from details of executions prevents that prevailing view of what constitutes “standards of decency” from ever evolving).

95 This was true of the very first lethal injection protocol, in Oklahoma, which pioneered this method not out of concern for humaneness but rather did so because the electric chair needed an expensive repair and because the gas chamber was deemed too expensive. Kreitzberg & Richter, supra note 15, at 452–53. Thus, the first lethal injection statute – passed with “no committee hearings, research, or expert testimony” – provided no guidance on the cocktail to be used, leaving this task to a doctor who today admits that he did no research in concocting it. Id. at 453–54. See also Robin Miller, Annotation, Substantive Challenges to Propriety of Execution by Lethal Injection in State Capital Proceedings, 21 A.L.R.6TH 1, § 2 (2007).

96 See Cooey, 479 F.3d at 427 (Gilman, J., dissenting) (noting that the fluid nature of the Ohio protocol is important because Ohio does not require the Ohio Department of Rehabilitation and Correction (ODRC) to publish changes and the ODRC has a policy of keeping some of the information non-public); Cooey, 489 F.3d at 776 (Gilman, J., dissenting from denial of rehearing en banc). See generally Denno, Delegate Death, supra note 15, at 116–25; Kreitzberg & Richter, supra note 15, at 461–62. But see Cooey, 479 F.3d at 423 (holding that the “[f]luid nature of [the] protocol” is not enough to make a late challenge timely).

97 See Note, supra note 15, at 1309–10. See also Harbison, 511 F. Supp. 2d at 903 (“[Morales and Taylor] demonstrate that although lethal injection is the most prevalent form of execution, it is not sacrosanct, and the constitutionality of a three-drug protocol is dependent on the merits of that protocol.”).
petition rule would bar it outright. By avoiding this stricture, Hill allows a significant opportunity that was not available under the previous habeas-only regime.

Ironically, while complaining about Hill and Nelson, one state official precisely captured their value: they allow inmates to “refocus their complaints every time a state changes its execution protocol.”98 Yet, courts frustrate this core advantage of Hill’s method-of-execution vehicle when they reflexively reject the argument that an earlier challenge was infeasible because the factual predicate for that argument was not in place.99

C. Hill and Habeas Evidentiary Hearing Limitations

Another important difference between habeas corpus and § 1983 is that the latter allows for full evidentiary hearings on the merits of a petitioner’s claim. A further promise of the Hill vehicle, then, is that it should allow prisoners to more fully adjudicate the merits of a method-of-execution claim. In the few cases where such challenges have been heard, the Hill vehicle is allowing prisoners to realize this advantage.

Habeas corpus places strict limits on evidentiary hearings. As one recent study revealed, after the passage of the AEDPA courts are conducting only about half as many evidentiary hearings as before.100 This is partly because under habeas, federal courts are

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98 John Gibeaut, It’s All In the Execution, 92-AUG A.B.A.J. 17, 17 (Aug. 2007) (quoting the prosecutor in Nelson, who later filed an amicus brief in Hill).
99 See, e.g., Rutherford v. McDonough, 466 F.3d 970, 975–76 (11th Cir. 2006) (rejecting the Lancet article as an insufficient new factual predicate); Arthur v. Allen, Civil Action No. 07-0341-WS-C, 2007 WL 2320069, at *2–3 (S.D. Ala. Aug. 10, 2007) (rejecting the assertion that the confidentiality of a protocol is sufficient reason to allow a late-filed challenge); Diaz v. State, 945 So. 2d 1136, 1144 (Fla. 2006). But see Williams v. Allen, 496 F.3d 1210, 1215 (11th Cir. 2007) (Barkett, J., dissenting) (disagreeing with the dismissal in part because “[r]ecent developments in medical research have raised questions about the degree of pain and suffering caused by the method of lethal injection that some states, including Alabama, use” (citing the LANCET article (see supra at note 81))).
bound by specific rules of deference regarding state court fact-finding and application of law to fact: the AEDPA requires that federal courts presume state court fact-finding to be correct, a presumption that the inmate must overcome by a showing of clear and convincing evidence.101

In addition, the Supreme Court and Congress both have imposed increasingly strict barriers to federal habeas evidentiary hearings that allow additional evidence to be introduced. Whereas in the past the Court focused on when an evidentiary “hearing must be held,”102 later cases applied the “cause and prejudice” or “fundamental miscarriage of justice” standards for evidence not previously developed by the inmate in state court.103 The AEDPA further tightened this requirement, precluding an evidentiary hearing in federal habeas review unless the inmate can satisfy two strict requirements.104

Section 1983 has the clear advantage here because it allows both for full discovery under Federal Rule of Civil Procedure 26 and for the evidentiary hearings that can subsequently result from such discovery. For instance, in Harbison, the court held a full bench trial after the publication of Tennessee’s revised lethal injection protocol, including testimony from court- and litigant-appointed experts, review of academic

103 Id. at 1356 (discussing Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992)).
104 28 U.S.C. § 2254(e)(2) (2000). This provision holds that “the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
(A) the claim relies on—
   (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
   (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.”
articles, and consideration of the laws and execution protocols of other states. In *Morales v. Tilton*, the court conducted five days of formal hearings and a site visit to California’s execution chamber, reviewing virtually every aspect of that state’s lethal injection protocol through “a mountain of documents, including hundreds of pages of legal briefs, expert declarations, and deposition testimony.” Finally, after the appeals court ruled that its initial hearing was inadequate, the district court in *Taylor v. Crawford* engaged in thirty days of discovery and conducted a full two-day hearing on Missouri’s lethal injection protocol. Likewise, a number of courts have been engaged in detailed discovery disputes related to *Hill* challenges. Thus, in some limited but important instances to date, *Hill* is proving its advantages over habeas corpus.

**D. *Hill* and Habeas Timing Requirements**

The most important bar to *Hill* suits to this point has been the tendency of courts to find such suits untimely under a variety of doctrines (not all of which mirror habeas rules), including the application of a strict habeas-like statute of limitations. This Section will briefly discuss the habeas corpus timeliness rules and note examples where courts are inappropriately applying parallel rules in *Hill* § 1983 injunctive relief cases, a context not amenable to the habeas corpus statute of limitations approach.

Like almost every other area of habeas corpus law, the AEDPA significantly altered the timing requirements applicable to habeas petitions. In fact, prior to its passage...

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105 *Harbison*, 511 F. Supp. 2d at 873–76.
109 See infra at Part III.A.
110 Other timeliness rulings will be discussed in Part III.A of this Note.
in 1996, there was no statute of limitations on habeas corpus. Instead, “[c]ourts invoked the doctrine of ‘prejudicial delay’ to screen out unreasonably late filings.”

The AEDPA took an entirely different tack, creating a one-year period of limitations, which runs from the latest of four different dates and which is subject to various tolling rules and limitations. While some courts apply equitable tolling and this provision does have a new facts exception, both exceptions are difficult to meet and this time limitation is therefore quite strict.

While § 1983 damages actions are subject to a statute of limitations, generally speaking, § 1983 injunctive relief actions should not be. Statutes of limitations are more appropriate for a damages action to remedy a past injury and “cannot attach from an act that has yet to occur and a tort that is not yet complete.” Yet in a number of cases, this is precisely the rule courts are importing from habeas corpus, applying a strict statute of limitations to Hill method-of-execution claims.

112 Id.
113 28 U.S.C. § 2244(d)(1) (2000). Generally, “the operative date is that ‘on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.’” FALLOn, JR., ET AL., supra note 66, at 1298 (quoting § 2244(d)(1)(A)).
115 The Supreme Court has “never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations.” Pace v. DiGuglielmo, 544 U.S. 408, 418 n.8 (2005).
116 § 2244(d)(1)(D).
117 Regarding equitable tolling, see, e.g., Burger v. Scott, 317 F.3d 1133, 1141 (10th Cir. 2003) (“[W]e have limited equitable tolling of the one-year limitations period to 'rare and exceptional' circumstances.”) (quoting Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir.2000)); Davis v. Johnson, 158 F.3d 806, 811 (5th Cir. 1998). Regarding the “new facts” exception, see, e.g., Owens v. Boyd, 235 F.3d 356, 359 (7th Cir. 2000) (“Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance.”).
In *Cooey v. Strickland*, the court mandated that inmates have two years (based on the state’s general personal injury statute of limitations) to file an action once the claim is “ripe.” This “ripeness” triggering event is one “that should have alerted the typical lay person to protect his rights,”\(^{120}\) which in a method-of-execution challenge is defined as “conclusion of direct review in the state court or the expiration of time for seeking such review.”\(^{121}\) By comparison, the Eleventh Circuit recently held that the statute of limitations starts to run the date the inmate selects his method of execution.\(^{122}\)

Note again how directly the *Cooey* approach parallels the AEDPA’s timing provisions: 28 U.S.C. § 2244(d)(1)(A) mandates that the statute of limitations is triggered when “the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” In fact, *Cooey* explicitly adverted to and cited the AEDPA, holding that because *Hill* challenges fall at “the margins of habeas,” Supreme Court habeas doctrine and the AEDPA “apply with equal force in this case.”\(^{123}\) Courts taking this approach are not simply echoing habeas doctrine; they are applying it directly.

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\(^{120}\) *Cooey* v. *Strickland*, 479 F.3d 412, 416 (6th Cir. 2007) (citing 28 U.S.C. § 2244(d)(1)(A)).

\(^{121}\) *Id.* at 421–22.


\(^{123}\) *Id.* at 420–21 (citing numerous Supreme Court cases applying the AEDPA statute of limitations); *see also* *Callahan* v. *Allen*, No. 06-cv-695-WKW, 2008 WL 227945, at *1 (11th Cir. Jan. 29, 2008) (barring the action under a statute of limitations and noting that “[i]n considering when a method-of-execution claim accrues under § 1983, we are especially mindful of [the AEDPA]”). *Cf.* *Anderson* v. *Evans*, No. CIV-05-0825-F, 2006 WL 83093, at *2 (W.D. Okla. Jan. 11, 2006) (finding that the statute of limitations did not bar the challenge because the current lethal injection protocol had been revealed within two years of the filing date); *Nooner* v. *Norris*, 491 F.3d 804, 808 (8th Cir. 2007) (stating that a claim becomes ripe when 1) direct review, including denial of cert, is final; 2) lethal injection is established as the method of execution; 3) the state’s lethal injection protocol is known; and 4) no state administrative remedies are available). Lee Kovarsky recently argued that advertizing to the “legislative purpose” of AEDPA has caused courts to “erect unintended obstacles to habeas relief with alarming regularity.” Kovarsky, *supra* note 16, at 446. Applying AEDPA’s “purpose” to a Section 1983 action, as *Cooey* did in this instance, makes even less sense. *See id.* at 487 n.281. Interestingly, a district court in the Sixth Circuit recently expressed doubt about whether *Cooey* constitutes a final judgment that binds that court regarding *Cooey* and eight inmates seeking to intervene in that suit. *Cooey* v. *Strickland*, No. 2:04-cv-1156, 2008 WL 471536, at *8–15 (S.D. Ohio Feb. 25, 2008).
E. *Hill* and the Habeas “Total Exhaustion” Requirement

Both habeas corpus and prisoner-initiated § 1983 actions entail exhaustion requirements, but these requirements are quite different in both their nature and scope. The final Section of Part II will briefly compare habeas and § 1983 / PLRA exhaustion requirements in order to show that this is yet another important advantage *Hill* affords capital post-conviction litigants. Because the Supreme Court recently clarified that habeas total exhaustion does not apply to § 1983 and the PLRA, this is one area where courts categorically cannot prevent litigants from realizing that advantage. More important, this also indicates a broader unwillingness on the part of the Court to allow habeas corpus doctrines to be imported into § 1983 civil rights actions.

Exhaustion has been required in some form under habeas corpus since the late 1800s, and like habeas doctrine generally, this requirement has become increasingly strict in the modern age. Today, habeas corpus incorporates what has come to be known as a “total exhaustion” requirement, which requires that all habeas applicants have “exhausted the remedies available in the courts of the State.” In addition, *Rose v. Lundy* requires district courts to dismiss habeas corpus petitions containing a mix of both exhausted and unexhausted claims unless the inmate amends the complaint to delete the unexhausted claims (which later could be barred as being “successive”). This rule is particularly stringent because it can mean the termination of any federal review where a court applies *Lundy* after the AEDPA statute of limitations has run. As the Court recently explained, habeas total exhaustion is premised on the fact that “[s]eparate claims

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124 *See Ex parte Royall*, 117 U.S. 241 (1886).
in a single habeas petition generally seek the same relief from custody, and success on one is often as good as success on another.”

In contrast, there is no exhaustion requirement inherent in § 1983. In fact, this is the promise of § 1983 and *Ex parte Young*: immediate access to federal court in order to challenge allegedly unconstitutional acts of state officers. Congress has, however, imposed an exhaustion requirement on § 1983 suits brought by prison inmates, through the Prison Litigation Reform Act of 1995 (PLRA). While these requirements are strict, they essentially amount to *administrative* exhaustion. Given that habeas requires exhaustion of state *judicial* remedies, the two types of exhaustion are wholly distinct from one another.

In addition, because the nature of § 1983 is quite different from habeas corpus, the exhaustion requirement necessarily is so as well. Unlike habeas, § 1983 actions often involve multiple claims each seeking different types of relief. Thus, the Court has held that “[t]here is no reason failure to exhaust on one necessarily affects any other.” In *Jones v. Bock*, the Court emphasized this when it struck down the Sixth Circuit’s effort to convert the PLRA exhaustion requirement into a heightened pleading standard and a “total exhaustion requirement.” Specifically, that circuit had begun to expand PLRA exhaustion into something akin to habeas exhaustion by “requir[ing] courts to dismiss the

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129 *209 U.S. 123 (1908).*
131 *See Woodford*, 126 S. Ct. at 2382–83 (holding that prisoners must exhaust all available remedies, “even where the relief sought . . . cannot be granted by the administrative process”); *see also* *Booth v. Churner*, 532 U.S. 731, 739 (2001).
133 *Id.* at 924–26.
entire action if the prisoner fails to satisfy the exhaustion requirement as to any single claim in his complaint.”134

While Nelson makes clear that the PLRA exhaustion requirement applies to § 1983 method-of-execution claims,135 one court has expressed discomfort at even this more limited type of exhaustion preventing it from addressing a challenge where an inmate’s life was at stake. In Evans v. Saar, the court admitted that the PLRA might have barred the action, but then refused to find that the state carried its burden on this issue, noting that it was “unprepared to decide whether Evans’ failure to exhaust is attributable to his delay in filing his administrative claim or the State’s delay in deciding it.”136

In light of Jones v. Bock, although PLRA exhaustion has affected a number of Hill claims,137 habeas exhaustion doctrine has not intruded on these challenges. Indeed, Jones’s distinction between habeas and § 1983 exhaustion is important not just for its effect on specific Hill challenges, but also because it indicates a broader unwillingness on the part of the Court to allow habeas doctrines to be imported into § 1983 challenges.

III. Non-Habeas Related Limitations on Hill Challenges

The limitations that mimic previously-applicable habeas doctrines are not the only ones courts are imposing. Just as courts limit these challenges by applying something akin to habeas corpus statute of limitations rules, they likewise have limited them with unduly harsh timing rules that do not stem from habeas corpus. In addition, appeals courts have exhibited a striking tendency to exceed the applicable standard of review,

134 Id. at 914.
135 Nelson, 541 U.S. at 650. Interestingly, though, the PLRA is never mentioned in Hill.
137 See, e.g., Walton v. Johnson, No. 2:06cv258, 2006 WL 2076717, at *5 (E.D. Va. July 21, 2006) (agreeing with the state that the inmate failed to follow up on his informal grievance process, thereby failing to complete “all the steps” in the grievance process in accordance with the rules, and therefore holding that the prisoner did not exhaust in compliance with the PLRA); Reid v. Johnson, 333 F. Supp. 2d 543 (E.D. Va. 2004).
making detailed findings about particular execution protocols on the simple review of preliminary injunctive relief, a review that should be governed by an abuse of discretion standard. The final Part of this Article will examine each of these phenomena and will propose some limited solutions to each. The Article will then conclude by explaining the promise of aggregation for solving many of the problems illustrated throughout.

A. *Hill*-Challenge Timeliness Rulings

1. The Effect of Harsh Timeliness Rulings

Both *Hill* and *Nelson* admonished litigants that federal courts “should protect States from dilatory or speculative suits.”\(^{138}\) But neither *Hill* nor *Nelson* categorically bans *any* delay caused by a particular § 1983 method-of-execution challenge. To the contrary, in *Hill*, the Supreme Court stated that “[a]ny incidental delay caused by allowing Hill to file suit does not cast on his sentence the kind of negative legal implications that would require him to proceed in a habeas action.”\(^{139}\) In fact, the court explicitly mandated that “inmates seeking time to challenge” their method of execution are to be treated “like any other stay applicants.”\(^{140}\)

Stays of execution can be vital to allowing time for both district courts to adjudicate the merits of these claims and for appeals courts to review them.\(^{141}\) The Supreme Court itself entered a stay while Hill was strapped to a gurney awaiting the needle, despite the fact that Hill himself filed his challenge only *four days* before his execution date.\(^{142}\) In reaching this ruling, the Court noted that a stay is an equitable

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\(^{138}\) *Hill*, 126 S. Ct. at 2104; *see also Nelson*, 541 U.S. at 649–50.

\(^{139}\) *Hill*, 126 S. Ct. at 2104.

\(^{140}\) *Id.* *See also Nelson*, 541 U.S. at 649–50.


\(^{142}\) *Gibeaut,* *supra* note 14 (“Hill was strapped to a prison gurney awaiting execution when the justices accepted his case.”). Likewise, Nelson filed his § 1983 challenge just three days prior to his date of execution. *Nelson*, 541 U.S. at 639.
remedy that courts may not grant as a matter of right. Instead, there is thus a “strong presumption against a stay” where the challenge could have been brought earlier.\textsuperscript{143}

A “presumption” against a stay, however strong, is \textit{not} an outright ban. But in the Fifth, Tenth, and Eleventh Circuits, there is a strong tendency “toward mechanically denying stays according only to the length of delay between execution setting and the date of the petition”\textsuperscript{144} such that there is a de facto ban on stays in these circuits.

For instance, in \textit{Reese v. Livingston}, the court held that “a plaintiff cannot wait until a stay must be granted to enable him to develop facts and take the case to trial[,] not when there is no satisfactory explanation for the delay.”\textsuperscript{145} To date, not a single plaintiff in the Fifth Circuit has advanced a “satisfactory explanation” that persuaded the court to hear the challenge, regardless of the factual predicate on which the challenge was based.\textsuperscript{146}

In \textit{White v. Johnson},\textsuperscript{147} the Fifth Circuit addressed a challenge in which the inmate did not even ask for a stay. The court dismissed it as untimely, holding that the rule above applies for “any equitable relief, including permanent injunction, sought by inmates facing imminent execution.”\textsuperscript{148} And in \textit{Kincy v. Livingston}, the court noted that

\begin{footnotesize}
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\item\textsuperscript{143} \textit{Hill}, 126 S. Ct. at 2104. \textit{See also} Gomez v. U.S. Dist. Court for the N.D. Cal, 503 U.S. 653, 654 (1992) (per curiam) ("A court \textit{may consider} the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.") (emphasis added)).
\item\textsuperscript{145} Reese v. Livingston, 453 F.3d 289, 290 (5th Cir. 2006).
\item\textsuperscript{147} 429 F.3d 572 (5th Cir. 2005).
\item\textsuperscript{148} \textit{Id.} at 573.
\end{itemize}
\end{footnotesize}
dilatoriness is a bar to “any method of execution challenge that could have been brought after [the inmate’s] conviction and sentence had become final.”

The Eleventh Circuit takes a similarly hostile approach. In *Jones v. Allen*, the Eleventh Circuit dismissed a case filed before the Supreme Court declined to review the inmate’s federal habeas petition, before the inmate’s date of execution had been set, and soon after *Hill* had been decided. Noting that the inmate should have foreseen that Alabama would set his execution date soon after his federal habeas appeal was denied (as is their custom), the Court initially made a nod to the “strong equitable presumption against a stay” mandated by *Hill*. But later in the opinion, it went beyond a “presumption,” holding that “the proper query in this case is whether Jones could have brought his claim ‘at such a time as to allow consideration of the merits without requiring entry of a stay.’” The pattern of these cases is that the “strong equitable presumption” has become a rule, not a presumption.

These jurisdictions are in fact applying even harsher standards than those applicable under habeas. The Supreme Court has “come close to laying down a rule that a petitioner under sentence of death is entitled to a stay of execution in connection with a first habeas petition.” But courts in these circuits are willing to dismiss a § 1983

150 Jones v. Allen, 485 F.3d 635, 639 (11th Cir. 2007).
151 Id.
152 Id. at 641 (quoting *Nelson*, 541 U.S at 650); see also *Hamilton v. Jones*, 472 F.3d 814, 815–16 (10th Cir. 2007) (rejecting as sufficient reason for a five-month delay the inmate’s efforts to obtain counsel in order to file the action); *Rutherford v. McDonough*, 466 F.3d 970, 974–76 (11th Cir. 2006); *Siebert v. Allen*, No. 2:07-cv-295-MEF, 2007 WL 2903009 (M.D. Ala. Oct. 3, 2007). Note also that another panel in the Eleventh Circuit recently ruled that a statute of limitations applies to § 1983 method-of-execution challenges, *Callahan v. Allen*, No. 06-cv-695-WKW, 2008 WL 227945, at *1 (11th Cir. Jan. 29, 2008), raising for inmates in this circuit a great deal of uncertainty about precisely what timing rule applies.
153 See *King*, supra note 100, at 60 (study of post-AEDPA federal habeas litigation noting that only 4.1% of capital cases in the study’s sample were dismissed on the basis of being untimely).
154 FALLON, JR., ET AL., supra note 66, at 1301 (citing *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (allowing a stay of execution for a death-sentenced inmate who filed his first habeas petition on the day of
Hill challenge that is the inmate’s first post-conviction challenge of any kind where hearing the merits of that challenge would necessitate the entry of a stay.

Furthermore, rigid timing rules encourage future litigants to do the very thing that these courts ostensibly seek to prevent: file frivolous, obviously-barred suits. In a jurisdiction that applies a strict statute of limitations rule, an inmate must bring his § 1983 suit within two years of his conviction and direct appeal becoming final, regardless of any factual or legal developments that occur subsequent to this time. And under the approach outlined in this Section, an inmate is forced to constantly bring § 1983 suits to discover whether changes are being made to the protocol by secretive and obstinate state officials. Furthermore, requiring an inmate to file both habeas and parallel civil rights actions challenging their method of execution (often three to five years before their likely execution date) is “counterintuitive, unduly harsh, and just plain wrong.” This is especially true given that the two actions have wholly conflicting bases, which can create “cognitive dissonance and inefficiency” for the attorneys and the court.

The botched execution of Angel Diaz starkly illustrates the effect of this type of harsh timing rulings. Had the federal court in Diaz chosen to intervene under Hill, it is by no means a foregone conclusion that Angel Diaz’s execution would have been any different. But perhaps it would have.

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155 See supra at Part II.D.
156 Cooey, 479 F.3d at 429 (Gilman, J., dissenting).
157 Id.; see also Cooey v. Strickland, 489 F.3d at 776 (Gilman, J., dissenting from denial of rehearing en banc).
158 See supra at notes 1–7 and accompanying text.
2. The Promise of Conforming to Hill’s Mandated Approach to Timing

Because dismissals on timeliness grounds are so prevalent, treating the timing issue as what Hill and Nelson say it is – an exertion of a court’s equitable powers – promises to have immediate effect. There is no reason “to read [Hill] as encouraging [courts] to overlook all other considerations that are called for in equity, which, after all, should be a recourse to the principles of justice and fairness to correct or supplement the law as applied to particular circumstances.” Instead, the “presumption” adverted to by Hill should be read merely as guidance to lower courts on how to balance particular equitable relief factors.

Not every court approaches timeliness in a rigid fashion: some courts do conscientiously weigh the equitable factors. For instance, the Ninth Circuit balances the equity/timeliness issue by examining whether the claim could have been brought earlier and whether the defendant had good cause for the delay. This approach is also exemplified by the “give and take” approach to timing in Evans v. Saar. In Evans, the district court addressed the dilemma faced by many judges addressing a relatively late-filed challenge: whether simply to dismiss the suit as untimely, or whether to at least

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159 Brown v. Livingston, 457 F.3d 390, 391–92 (5th Cir. 2006) (Dennis, J., dissenting).
160 Hill, 126 S. Ct. at 2104 (stating that a stay is not a matter of right and that there is a strong presumption against a stay where the claim could have been brought earlier); Nelson, 541 U.S. at 649 (“A stay is an equitable remedy, and equity must take into consideration the State’s strong interest in proceeding with its judgment and . . . attempt[s] at manipulation.”).
161 See, e.g., Alley v. Little, 186 Fed. Appx. 604, 607 (6th Cir. 2006) (“[T]he timeliness of a petitioner's filing is an important—but is not the only important—consideration when a federal court determines the appropriate method of disposing of a death row inmate’s § 1983 challenge to lethal injection.”).
162 Beardslee, 395 F.3d at 1070 n.6; see also Cooey, 479 F.3d at 429–30 (Gilman, J., dissenting) (providing four guideposts for district courts making such equitable judgments: whether the protocol recently changed; the petitioner’s diligence; the petitioner’s reasonable attempts to ascertain the protocol; and the traditional equitable factors).
164 Evans’s petition was filed approximately eighteen days prior to his scheduled execution date. Id. at 520–21.
make a principled attempt to evaluate the merits of the inmate’s claim. The court eventually denied equitable relief, but stated that for a number of reasons, it was prepared to make a reasoned decision on the merits. 165

Ideally, Hill should allow for full hearings on the merits of a non-frivolous claim against a particular execution protocol, one like that accomplished in Harbison. But where this is not possible due to strict timing guidelines or due to a district court’s desire to balance the state’s interest in finality, it is certainly preferable to provide an inmate with some review on the merits, which is at least what Evans accomplished.

B. The Standard of Review of Preliminary Injunctive Relief Decisions

1. The Effect of Broad Pronouncements on Review of Preliminary Injunctive Relief

Some appeals courts have treated the review of a district court’s preliminary injunctive relief decision as an opportunity to issue opinions that appear to address the merits of a particular protocol. 166 This Section will examine the pitfalls of this phenomenon, pitfalls that are clearly illustrated by the juxtaposition of the Sixth Circuit’s opinion in Workman v. Bredesen 167 with the district court opinion in Harbison v. Little, 168 both of which examined Tennessee’s newly-revised lethal injection protocol and reached very different conclusions.

In Workman, the Sixth Circuit found the inmate’s petition untimely and ruled that the district court’s issuance of a temporary restraining order (TRO) was an abuse of

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\text{165 Id. at 522–23.}
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\text{166 See, e.g., Hamilton v. Jones, 472 F.3d 814, 816–17 (10th Cir. 2007) (referencing other state protocols and addressing merits-type issues in a very cursory fashion).}
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\text{167 Workman v. Bredesen, 486 F.3d 896 (6th Cir. 2007).}
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\text{168 Harbison v. Little, 511 F. Supp. 2d 872 (M.D. Tenn. 2007).}
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discretion,\textsuperscript{169} despite the fact that the inmate filed the action ninety-six hours after Tennessee released the revised protocol.\textsuperscript{170} The court described the revised protocol in quite laudatory terms, implying that the protocol revision committee went to extensive lengths to improve it:

Call the requirements of the Eighth Amendment what you will . . . [but] they certainly do not prohibit the adoption, implementation and refinement of a lethal-injection procedure in as comprehensive manner as this. The efforts of the Governor and the Corrections Department suggest a State intent not just on satisfying the requirements of the Eighth Amendment, but on far exceeding them.\textsuperscript{171}

\emph{Workman} considered the merits of the new protocol based on no record or adversarial proceeding below, but rather on voluminous pleadings filed in a very short period of time.\textsuperscript{172} The complaint, on which the district court understandably based its TRO, was eighty-two pages long, including extensive allegations and a fifty-five page memorandum in support, along with forty-five exhibits.\textsuperscript{173} The state responded two days before the scheduled execution with a nineteen-page motion to the court of appeals to vacate the TRO by the district court, to which the inmate responded with a forty-five page reply brief.\textsuperscript{174} The court’s thirty-five page opinion was then issued \emph{the same day} as these two briefs. Even if one supposes that these documents (which, again, were completely untested by any adversarial process) were an adequate basis, it seems highly

\textsuperscript{169} \textit{Workman}, 486 F.3d at 911–12 (finding that Workman gets “no better purchase” to challenge a protocol that is “better,” when he could have challenged it earlier).
\textsuperscript{170} Id. at 900–01, 906–07.
\textsuperscript{171} Id. at 906–07.
\textsuperscript{172} The inmate filed his complaint five days before his scheduled execution (which, again, was only four days after the new protocol was released). \textit{Id.} at 900–01.
\textsuperscript{173} Id. at 924 (Cole, J., dissenting).
\textsuperscript{174} Id. at 900–01.
unlikely that the court could give them proper consideration in just one day, including drafting and issuing its lengthy opinion.\footnote{Philip Workman was subsequently executed by lethal injection. Tracie Simer, \textit{Death Penalty: Just or Unjust?}, \textsc{Jackson Sun}, Jan. 26, 2008.}

The dissent in Workman excoriated the majority on a number of grounds. Judge Cole began by noting that this was the first time to his knowledge that a court in a death penalty case had \textit{ever} overturned a simple TRO, which has the modest purpose of preserving the status quo to allow further initial proceedings.\footnote{\textit{Id.} at 921–22 (Cole, J., dissenting).} Characterizing this as a “profound jurisdictional defect,” he noted that this did not fall under either of the usual exceptions allowing the review of a TRO.\footnote{\textit{Id.} at 921–23 (Cole, J., dissenting) (noting that TRO’s are generally only reviewable when issued for greater than ten days (which this one was not) or when they are “in substance a preliminary injunction”).} As such, there was no appealable order, “even though the State and a majority of this court may wish it.”\footnote{\textit{Id.} at 922.} He then pointed out that even if it did fall under these exceptions, the court may not overturn the district court if it acted within its discretion, regardless of whether the appeals court disagrees with the merits of that decision.\footnote{\textit{Id.} at 927.}

Compare the majority opinion in \textit{Workman} with the more recent decision by Judge Aleta Trauger of the Middle District of Tennessee in \textit{Harbison v. Little}.\footnote{511 F. Supp. 2d 872 (M.D. Tenn. 2007).} Decided four months after \textit{Workman}, \textit{Harbison} concerned the very same revised protocol at issue in that case. But in \textit{Harbison}, the court based its opinion on a full, three-day evidentiary hearing, a hearing that revealed incredible shortcomings on the part of the executive branch regarding the lack of execution team training and the lack of any

\footnotesize{\textsuperscript{175} Philip Workman was subsequently executed by lethal injection. Tracie Simer, \textit{Death Penalty: Just or Unjust?}, \textsc{Jackson Sun}, Jan. 26, 2008.}

\footnotesize{\textsuperscript{176} Id. at 921–22 (Cole, J., dissenting).}

\footnotesize{\textsuperscript{177} Id. at 921–23 (Cole, J., dissenting) (noting that TRO’s are generally only reviewable when issued for greater than ten days (which this one was not) or when they are “in substance a preliminary injunction”).}

\footnotesize{\textsuperscript{178} Id. at 922.}

\footnotesize{\textsuperscript{179} Id. at 927.}

\footnotesize{\textsuperscript{180} 511 F. Supp. 2d 872 (M.D. Tenn. 2007).}
effective verification of unconsciousness prior to administering the second and third
drugs in the lethal injection “cocktail,” both of which can be excruciatingly painful.\textsuperscript{181}

In fact, the state ultimately even rejected simple measures like pinching the
inmate or moving something along his foot to verify unconsciousness because such
actions were, in their view, not “appropriate.”\textsuperscript{182} Instead, the state left in place its meager
requirement that one non-medically-trained person observe the inmate \textit{through a window},
which doctors testified to be totally insufficient.\textsuperscript{183} The court continued on to aver that
the lack of training fell equally short. In fact, the executioners were woefully under-
tained laymen, one of whom had a history of drug and alcohol abuse and psychological
disorders, factors for which the state does at all not screen.\textsuperscript{184} Perhaps most egregiously,
none of the execution team members were even required to read the new protocol and
were largely ignorant of a whole range of problems, including setting the IV in the wrong
direction, catheter slippage, and line failure.\textsuperscript{185} Thus, these were not mere oversights on
the part of the committee that revised the new protocol: the state knew about both
shortcomings and yet failed to include reliable safeguards in the revision.\textsuperscript{186}

The court summarized its findings by characterizing the revised protocol as “not a
mere ‘risk of negligence’ but a guarantee of accident written directly into the protocol
itself.”\textsuperscript{187} And \textit{Harbison} did not simply disagree with the court in \textit{Workman}, it
affirmatively criticized that court for praising the revised protocol and ignoring its real
findings. In fact, Judge Trauger pointed out that state officials in large part rejected the committee’s recommendations out of hand. For instance, after consulting with experts, the committee recommended unanimously to the state that it adopt a one-drug protocol, a recommendation that the state unilaterally overrode. But *Workman* incorrectly implied that the committee itself had considered and rejected this option on the basis of its research. Likewise, *Workman* implied that the new protocol required the participation of a certified IV team and the presence of a doctor. Judge Trauger pointed out that both of these conclusions were patently wrong.

2. The Promise of Narrow Pronouncements on Review of Preliminary Injunctive Relief

The solution to this phenomenon is as simple as the solution to the timeliness issue: federal courts should narrowly tailor their pronouncements on the merits of an execution protocol when ruling only on the question of preliminary injunctive relief. That a court must opine on the likelihood of success on the merits is inherent in this equitable balancing process. But courts should minimize the creation of precedent that seems to have been based on a well-developed record, when in fact it was not. More important, later courts should recognize the inherently limited nature of such decisions and not rely on them in their own opinions regarding a particular execution protocol.

Courts recognize that this will cut both ways. For instance, in *Beardslee v. Woodford*, the Ninth Circuit briefly expressed serious doubts about California’s lethal injection procedure, but then noted it was bound by the abuse of discretion standard.

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188 *Id.* at 899–900.
189 *Id.*
190 *Id.*
191 *Id.* at 899–900 (rejecting the applicability of *Workman* and one other Sixth Circuit decision, stating that they were each merely opinions in dicta, issued in the course of various stays and injunctions).
With no further opinion on the merits, it affirmed the district court’s denial of injunctive relief.\textsuperscript{192} And in \textit{Cooper v. Rimmer}, the court noted that its review of the district court’s denial of injunctive relief was for abuse of discretion, based on a lower court opinion that itself did not fully review the merits of the protocol. Thus, the court noted, “[n]either the district court nor the parties should read today’s decision as more than a preliminary assessment of the merits.”\textsuperscript{193} Finally, in \textit{Hicks v. Taft}, the Sixth Circuit (in sharp contrast to its sister panel in \textit{Workman}), refused to weigh in on the likelihood of success on the merits issue at all, instead simply declaring that the district court did not abuse its discretion in denying a stay.\textsuperscript{194}

C. The Promise of Aggregation

A promising solution to many of the flaws discussed so far is the possibility of aggregating numerous challenges within a state into one or only a few cases.\textsuperscript{195} Inmates in a particular state are all challenging the same protocol and every challenge therefore has the same factual basis. To be sure, there are individual nuances, such as the need to access compromised veins, but even these are sufficiently common such that courts should be able to address them. In fact, the ability to aggregate these actions is yet another key advantage of the \textit{Hill} vehicle over habeas corpus, an area of the law where class actions have disappeared.\textsuperscript{196}

\textsuperscript{192} \textit{Beardslee}, 395 F.3d at 1076.
\textsuperscript{193} \textit{Cooper v. Rimmer}, 379 F.3d 1029, 1033–34 (9th Cir. 2004).
\textsuperscript{194} \textit{Hicks v. Taft}, 431 F.3d 916, 917 (6th Cir. 2005).
\textsuperscript{195} For an in-depth discussion of aggregation in criminal cases, see Brandon L. Garrett, \textit{Aggregation in Criminal Law}, 95 CAL. L. REV. 383 (2007).
\textsuperscript{196} \textit{Id.} at 408–10.
This is by no means a novel concept. Courts are already accomplishing it on a smaller scale through both consolidation and intervention. But neither of these mechanisms fully cures many of the issues discussed in this Article, instead largely only promoting judicial economy. An even better solution, one that does promise a comprehensive remedy, is to certify a class action of all similarly situated inmates in a state.

In fact, one court has already certified a Hill class action. In Jackson v. Danberg, the Federal District Court for the District of Delaware certified “a state-wide class consisting of all current or future prisoners in the custody of the Delaware Department of Corrections who are or will be sentenced to death.” The court found that the class of sixteen inmates satisfied the numerosity requirement and that it satisfied Federal Rule of Civil Procedure 23(b)(1) because allowing individual actions would create a risk of inconsistent decisions based on the same facts and law.

Aggregation promises both to cure many of the states’ objections to Hill while at the same time curing many of the flaws noted above. For one thing, it would remove some of the randomness from the process: at least at the intra-state level, one court would resolve common issues in the same way. It would also resolve many of the timeliness concerns expressed by courts: once a court finally resolves all of the factual and legal

199 See, e.g., Timberlake, 2007 WL 2316451, at *1 (noting that one of the intervening inmates was executed during the pendency of the case).
200 For an example of a § 1983 capital punishment class action, see Murray v. Giaratano, 492 U.S. 1, 3–4 (1989) (addressing a class action by Virginia death row inmates challenging the lack of state-paid post-conviction counsel).
202 Id. at 147–48.
issues in the aggregated case, provided the state did not change its protocol (if the protocol is found constitutional), or provided it complied with the changes ordered by the court, later challenges would have a more principled basis for decision than simple timing.

Presumably, the class of inmates represented in the aggregated action would be represented by one of the many expert capital post-conviction attorneys that litigate such claims. This approach therefore also promises to provide the sharpest possible litigation on these very important issues. And the aggregated action would allow full discovery combined with a comprehensive remedy that prevents state regulatory agencies from changing the protocol without full disclosure, potentially curing many of the issues surrounding the secretive nature of these protocols and the obstinacy of state agencies in revealing them.

Finally, aggregation would alleviate state fears that Hill will open a “floodgate” of challenges by engendering all of the advantages in cost and efficiency that class actions suits allow. Indeed, “[a]ggregation may be no boon for” death-sentenced

203 See Gibeaut, supra note 98, at 17 (noting that the prosecutor in Nelson filed an amicus brief in Hill and later complained that “in neither Nelson nor Hill do the justices offer significant guidance on how trial courts can stop litigation that could continue forever by allowing inmates to refocus their complaints every time a state changes its execution protocol”). Indeed, Nelson himself did this, challenging central line procedures that he previously conceded as being acceptable in front of the Supreme Court. Id. at 17–18. See also Greer, supra note 15, at 768 (“Hill has unnecessarily complicated Eighth Amendment lethal injection challenges by inviting a flood of litigation on a single narrow issue.”).

In some sense, this debate rehashes the debate that followed the Court’s ruling in Monroe v. Pape, 365 U.S. 167 (1961), which revitalized § 1983 as a vehicle for challenging the actions of state officials. In the years following Monroe, states and some federal judges decried the case for opening the floodgates to civil lawsuits against state officials. In a seminal study in 1987, however, Professors Eisenberg and Schwab showed that in fact Monroe did not have this effect. Theodore Eisenberg & Stewart Schwab, The Reality of Constitutional Tort Litigation, 72 CORNELL L. REV. 641, 643 (1987) (“[T]he image of a civil rights litigation explosion is overstated and borders on myth.”). Instead, the increase in § 1983 filings in federal court was largely in proportion to federal civil litigation generally. Id. at 644 (asserting that civil rights litigation is certainly an “essential part of the federal docket but it is not engulfing that system or local governments”).
inmates: when class actions were feasible under habeas corpus, they were often an efficient way for a class of prisoners to be denied relief.204

Were an inmate to opt out of the class due to individual nuances in his own case, he is free to do so. While the result of the class action would not be preclusive on him, it certainly would have stare decisis weight as to the major aspects of the protocol. This then would allow the individual case to be disposed of more efficiently by focusing only on the individual nuances presented to the court. And where the inmate opts out of an aggregated case merely to gain time, he does so at his own peril: a court would almost certainly give very nearly preclusive effect to a fully adjudicated class action based on the very same facts.

**Conclusion**

Section 1983 holds a special place in American jurisprudence. During the last half century, that short provision has played a vital role in vindicating federal constitutional rights. While habeas corpus fills an equally important role in our federal system, it has developed quite differently, evolving a raft of restrictions that do not apply to § 1983 actions.

By making § 1983 available for method-of-execution challenges, the Supreme Court implicitly made all of its advantages over habeas corpus available as well. Indeed, if not to free litigants from the difficult restrictions that apply to habeas, it is hard to imagine why the Court ruled as it did in *Hill*. Nonetheless, lower courts persist both in importing habeas doctrines into a context where they do not belong and in adding limitations not called for by either *Hill* or *Nelson* themselves or by § 1983 doctrine

204 Garrett, *supra* note 195, at 408.
generally. And in so doing, they frustrate the promise of the § 1983 method-of-execution vehicle.