Court grew increasingly impatient with the delays that were made possible through procedural protections, especially those associated with federal *habeas corpus* review.[62] Having consistently held that capital punishment is not inherently unconstitutional, the Court seemed bent on clarifying and even streamlining constitutionally required procedures so that those states that choose to impose capital punishment may do so without inordinate delays. In the *habeas* context, the interest in finality at first trumped a death-is-different approach.[63] Then, in *In re Troy Anthony Davis*,[64] the Court found a death-row convict with a claim of actual innocence to be entitled to a District Court determination of his *habeas* petition. Justice Stevens, in a concurring opinion joined by Justices Ginsburg and Breyer, "refuse[d] to endorse" Justice Scalia's reasoning (in a dissent joined by Justice Thomas) that would read the Constitution to permit the execution of a convict "who possesses new evidence conclusively and definitively proving, beyond any scintilla of doubt, that he is an innocent man."

The writ has also been restricted statutorily.[65]

Changed membership on the Court has had an effect. Gone from the Court are Justices Brennan and Marshall, whose belief that all capital punishment constitutes cruel and unusual punishment resulted in two automatic votes against any challenged death sen-

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citizens also differs dramatically from any other legitimate state action. It is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."

[62] *See*, *e.g.*, Barefoot v. Estelle, 463 U.S. 880, 888 (1983): "unlike a term of years, a death sentence cannot begin to be carried out by the State while substantial legal issues remain outstanding. Accordingly, federal courts must isolate the exceptional cases where constitutional error requires retrial or resentencing as certainly and swiftly as orderly procedures will permit." *See also* Gomez v. United States District Court, 503 U.S. 653 (1992) (vacating orders staying an execution, and refusing to consider, because of "abusive delay," a claim that "could have been brought more than a decade ago"—that California's method of execution (cyanide gas) constitutes cruel and unusual punishment).

[63] In Herrera v. Collins, 506 U.S. 390, 405 (1993), the Court rejected the position that "the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus," and also declared that, because of "the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high." Id. at 417. In a subsequent part of the opinion, however, the Court assumed for the sake of argument that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional," and it imposed a high standard for making this showing. 506 U.S. at 417–419.

[64] 557 U.S. ___, No. 08–1443 (2009).

[65] *See*, *e.g.*, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 110 Stat. 1214.