HABEAS, HISTORY, AND HERMENEUTICS

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Supreme Court Justices Clarence Thomas and Neil Gorsuch recently proposed a radical shrinking of federal habeas corpus relief for state prisoners who are in custody pursuant to a final judgment of criminal conviction. They called for a return to the supposedly traditional principle that federal courts cannot grant habeas relief to such prisoners unless the state court that sentenced them lacked jurisdiction. This Article explains that (1) this supposedly traditional principle was not, in fact, a traditional principle of habeas, and (2) even if it were, Congress has displaced it by statute. Exploring the errors in the Justices' arguments provides valuable lessons in the proper uses of historical materials and in the hermeneutics of statutory interpretation.

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INTRODUCTION

Supreme Court Justices Clarence Thomas and Neil Gorsuch recently issued opinions that should have alarm bells clanging loudly throughout the criminal defense bar.[1] They argued for a dramatic reduction in the availability of federal habeas corpus for state prisoners. Their views could make federal habeas corpus relief less available for state prisoners than it has ever been since Congress first authorized it in 1867.[2]

Habeas corpus, the "Great Writ,"[3] is the ancient legal device used to challenge the lawfulness of detention.[4] Today, it is most commonly sought by state prisoners who are serving their sentence after being convicted of a crime in state court.[5] Under current law, a federal court (subject to various constraints) may grant habeas relief for such a prisoner if the state court proceedings leading to the prisoner's conviction or sentence clearly violated the prisoner's federal

1. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1562 (2021) (Thomas, J., concurring); *id.* at 1566 (Gorsuch, J., concurring).

2. *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

3. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970). Chief Justice Marshall referred to habeas corpus as the "great writ" in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807), and that soubriquet, usually capitalized, has become common. *See* Friendly, *supra*, at 142. Blackstone called habeas "the most celebrated writ in the English law." 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

4. *E.g.*, LARRY W. YACKLE, HABEAS CORPUS 1 (2d ed. 2010). The history of habeas corpus goes back as far as the thirteenth century, although its use as a device to test the lawfulness of detention emerged only gradually during the fifteenth to seventeenth centuries. R.J. SHARPE, THE LAW OF HABEAS CORPUS 1–19 (1976).

5. JONATHAN R. SIEGEL, FEDERAL COURTS: CASES AND MATERIALS 976 (2d ed. 2019); YACKLE, *supra* note 4, at 84. For example, in the 12-month period ending March 31, 2021, 15,354 "general" habeas petitions were filed in federal court, but only 2,558 involved the U.S. as a defendant; the remaining petitions were presumably filed by state prisoners. ADMIN. OFF. OF U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS, TABLE C-2 (2021), https://www.uscourts.gov/report-names/federal-judicial-caseload-statistics [https://perma.cc/45ER-PAZY].

constitutional rights.[6] When a federal court issues habeas relief in such a case, the state must release or, if appropriate, retry or resentence the prisoner.[7]

Although the Supreme Court has in the past approved habeas relief for such prisoners on the basis of any prejudicial, constitutional error in their state criminal proceedings,[8] the Court has been tightening the availability of habeas for such prisoners for several decades now. Some of this tightening has resulted from the Court's interpretation of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), by which Congress amended the habeas statute,[9] and some from the Court's own doctrinal development. Either way, federal habeas relief is much harder for state prisoners to obtain in 2021 than it was in 1971.

The Court's recent decision in *Edwards v. Vannoy*,[10] which continued this process of tightening, was therefore no surprise. Indeed, the decision, while theoretically significant, will likely make little practical difference. The decision formally closed off a potential basis for habeas relief, but no one had ever actually succeeded in convincing the Supreme Court to approve habeas on that basis anyway.[11]

Potentially much more significant than the majority opinion in *Vannoy* were the concurring opinions by Justice Thomas and Justice Gorsuch. These opinions agreed with the limitation on habeas imposed by the Court but suggested that the concurring Justices were prepared to go much further. The concurring opinions asserted that habeas corpus traditionally provided *no* relief to a prisoner held pursuant to a judgment of criminal conviction issued by a court of competent jurisdiction.[12] The concurring Justices indicated that they would be guided in future cases by this purportedly traditional rule.[13]

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6. *See* Brown v. Allen, 344 U.S. 443 (1953) (holding that habeas relief may issue if the state court that sentenced the prisoner violated the prisoner's constitutional rights); Trevino v. Thaler, 569 U.S. 413, 421 (2013) ("In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release."); Williams v. Taylor, 529 U.S. 362, 409–13 (2000) (holding that habeas relief may be granted only for *clear* violations of constitutional rights).

7. Release would be mandatory if the prisoner was convicted for conduct that cannot constitutionally be criminalized at all. If the constitutional error in the state proceedings was only procedural, retrial would be appropriate. In practice, retrial is far more common than release. Resentencing would be appropriate if constitutional error affected the prisoner's sentence but not the underlying conviction.

8. *E.g.*, Preiser v. Rodriguez, 411 U.S. 475, 485–86 (1973).

9. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, Pub. L. No. 104-132, 110 Stat. 1214.

10. 141 S. Ct. 1547 (2021).

11. *See infra* Subsection I.C.1.

12. 141 S. Ct. at 1563 (Thomas, J., concurring); *id.* at 1573 (Gorsuch, J., concurring).

13. *Id.* at 1573 (Gorsuch, J., concurring). Both Justices joined the other's concurring opinion.

Thus, according to these Justices, when a state prisoner who is serving a criminal sentence seeks habeas relief from a federal court, that court should inquire only whether the state court that sentenced the prisoner had *jurisdiction* to do so. If the answer is yes, the federal court should deny habeas relief, regardless of whether the state court's proceedings violated any of the prisoner's federal constitutional rights. Under this rule, it wouldn't matter if the state court that tried the prisoner's original criminal case violated the prisoner's right to a jury trial,[14] to the assistance of counsel,[15] to call witnesses,[16] to avoid self-incrimination,[17] or any of the numerous other federal constitutional rights that apply in state criminal proceedings. No matter how clear or how prejudicial these violations might have been, the federal court would be powerless to grant habeas relief, provided the state court that committed these constitutional errors had jurisdiction.

These concurring opinions require urgent attention. If the Supreme Court were to adopt what these concurrences assert to be the traditional rule, habeas would be drastically changed. Seeking freedom for state prisoners held pursuant to judgments of criminal conviction is the *main* use of habeas in federal court today.[18] Under the rule proposed by Justices Thomas and Gorsuch, this use of habeas would be all but abolished. Many of the detailed, long-standing debates about the availability of habeas and the application of AEDPA in various situations would be irrelevant under the concurring Justices' proposed rule.[19] Instead, in nearly all situations, habeas would simply be unavailable to state prisoners held pursuant to judgments of criminal conviction.

Even though the views expressed in the concurrences are so different from current law that adopting them would amount to a revolution, it would be foolish to discount the possibility that the law might take such a revolutionary turn. Personnel changes at the Supreme Court have transformed Justice Thomas from a lonely voice suggesting results far from the legal mainstream into a vital trendsetter. His once-idiosyncratic views on matters such as the nondelegation doctrine[20] and judicial deference to legal interpretations by administrative

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14. U.S. CONST. amend. VI.

15. *Id.*

16. *Id.*

17. U.S. CONST. amend. V. The cited provisions of the Fifth and Sixth Amendments as well as numerous other constitutional protections for criminal defendants apply in state criminal proceedings by virtue of the Fourteenth Amendment's Due Process Clause. Duncan v. Louisiana, 391 U.S. 145, 148 (1968).

18. *See supra* note 5.

19. *See, e.g., infra* text accompanying notes 58–62 (noting debates about whether habeas relief is available for Fourth Amendment claims, for claims based on "new" rules, and for cases in which a state court made a constitutional error but one that was not "unreasonable" in light of existing Supreme Court precedent).

20. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) ("On a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers.").

agencies[21] are on the verge of becoming law.[22] Justice Thomas's and Justice Gorsuch's concurrences in *Edwards* have already been relied upon to limit the reach of habeas.[23] Close, critical attention to the arguments of Justice Thomas and Justice Gorsuch is essential.[24]

This Article provides such attention. It highlights two fundamental flaws in the Justices' arguments. As noted, Justices Thomas and Gorsuch suggest that, traditionally, a habeas court would not issue relief for a prisoner held pursuant to a judgment of criminal conviction unless the sentencing court lacked jurisdiction. They also assert that modern federal courts should follow this purportedly traditional rule.[25] The two fatal flaws in these arguments are: (1) the rule that Justices Thomas and Gorsuch say was the traditional rule was not, in fact, the traditional rule, and (2) even if it were, Congress has displaced the rule by statute.

On the first point, the error in Justice Thomas and Justice Gorsuch's position lies in their insufficiently sensitive approach to using historical materials. Exploration of their error provides a valuable lesson in using such materials properly. Justice Gorsuch, particularly, relies on quotations from early cases without fully acknowledging the meaning that they had in their original context. He incorrectly ascribes to these quotations the meaning they might have if a court wrote them today. One must, however, always remember that "the past is a foreign country; they do things differently there."[26] Historical statements must be understood in their historical context.

Justice Gorsuch is correct that numerous early federal cases state that a federal court may grant habeas relief to a prisoner detained pursuant to a judgment

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21. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (Thomas, J., concurring) ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws.").

22. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting); Kisor v. Wilkie, 139 S. Ct. 2400, 2437–38 (2019) (Gorsuch, J., dissenting). In *Gundy*, Justice Gorsuch, in an opinion joined by the Chief Justice and Justice Thomas, said that he "would not wait" to revisit nondelegation doctrine and noted that Justice Alito's opinion indicated a willingness to revisit the doctrine in a future case. In *Kisor*, Justice Gorsuch, in an opinion joined by Justice Thomas, Justice Alito, and Justice Kavanaugh, said that a doctrine of judicial deference "sits uneasily with the Constitution" and that the judicial power to interpret the law cannot be shared with the other branches.

23. *See* Jones v. Hendrix, 8 F.4th 683, 689 (8th Cir. 2021) (citing the concurrences in rejecting an argument for habeas based on the Suspension Clause).

24. This attention is all the more necessary because the Justices' proposal for a radical change in habeas corpus came without briefing, as no party asked that habeas be restricted in the way proposed in the concurring opinions. *See* Richard M. Re, *Reason and Rhetoric in* Edwards v. Vannoy, 17 DUKE CONS. L. & POL'Y (forthcoming 2022) (manuscript at 9–10), https://ssrn.com/abstract=3865178 [https://perma.cc/J53U-8D79].

25. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1573 (Gorsuch, J., concurring) ("The writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final. . . . My vote in similar cases to come will, I hope, 'be guided as nearly as [possible] by the principles set forth herein.'" (quoting Brown v. Allen, 344 U.S. 443, 548 (1953) (Jackson, J., concurring in the result))).

26. L. P. HARTLEY, THE GO BETWEEN 9 (1953).

of conviction only if the court issuing that judgment lacked jurisdiction.[27] However, these statements cannot be wrenched from their context and taken to mean what they would mean if written today. These statements use the term "jurisdiction" in a special sense quite different from the usual meaning of the term.

When a nineteenth-century habeas court said that it could examine only whether a sentencing court had jurisdiction, it did not really mean that. Habeas courts did not traditionally limit themselves to issuing relief in cases where the sentencing court lacked what one would today call "jurisdiction"—cases in which, say, a probate court erroneously entertained a murder prosecution.[28] In fact, habeas courts might determine that the sentencing court lacked "jurisdiction" if the law under which the defendant was sentenced was unconstitutional, if the sentence violated the rule against double jeopardy, or if the sentencing court committed certain procedural errors in a proceeding under a valid law.[29]

Thus, the statement that a federal habeas court would not traditionally provide relief to someone held pursuant to a judgment of criminal conviction unless the sentencing court lacked jurisdiction, while not exactly false, is highly misleading. This statement is true only if the term "jurisdiction" is understood in its original, historical context, where it was used as a technical term of art with a special meaning quite different from its usual meaning. It would be much more informative to say that traditionally a habeas court would provide relief to someone held pursuant to a judgment of criminal conviction if the sentencing court committed an important error of a kind that habeas courts were willing to correct.[30]

In addition, even if it were true that habeas relief was traditionally not available to prisoners held pursuant to a judgment of criminal conviction issued by a court of competent jurisdiction, Congress has statutorily changed that rule. As to this point, exploration of Justice Thomas and Justice Gorsuch's position provides a useful lesson in the hermeneutics of statutory interpretation. The lesson is that when interpreting a statutory text, one must consider not only what is expressly stated in the text but what is necessarily implied. As amended by AEDPA, the federal habeas statute plainly assumes and confirms the availability of habeas relief in cases beyond the limits of the supposed traditional rule.[31]

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27. *See, e.g.*, *Ex parte* Watkins, 28 U.S. 193, 202–03 (1830); *Ex parte* Siebold, 100 U.S. 371, 375 (1879); *Ex parte* Bain, 121 U.S. 1, 3 (1887); Felts v. Murphy, 201 U.S. 123, 129 (1906).

28. *Cf., e.g.*, Wedmore v. State, 122 N.E.2d 1 (Ind. 1954) (vacating a judgment of conviction for assault and battery entered by a state probate court because that court did not have jurisdiction over that kind of criminal case).

29. *See infra* Section II.B.

30. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4[d] at 45–46 (2011) (stating that "nationally important claims" were traditionally cognizable in habeas and that "[a]t no time was the line between jurisdictional and nonjurisdictional claims a good proxy for the line between important and unimportant claims").

31. *See infra* Section III.B.

Thus, Justices Thomas and Gorsuch are doubly mistaken to suggest that federal habeas courts should return to applying a traditional rule that requires them to deny relief to any prisoner held pursuant to a judgment of criminal conviction issued by a sentencing court that had proper jurisdiction. That rule was not the traditional rule, and even if it were, Congress has changed the rule by statute.

Part I of this Article provides some background on the use of federal habeas corpus by state prisoners held pursuant to judgments of criminal conviction. Part II explores the "traditional rule" for such habeas cases and shows that federal courts traditionally issued habeas relief in cases not involving lack of jurisdiction. Part III explores the statutes Congress has passed regarding habeas and their implications for the availability of federal habeas relief for state prisoners.

I. MODELING HABEAS CORPUS

To appreciate the radical nature of the change that Justices Thomas and Gorsuch propose, one must first understand the model of habeas corpus as it exists today. As this Part explains, the Supreme Court currently understands habeas using what might be termed a "constrained certiorari substitute" model.[32] Under this model, a federal court considering a habeas petition from a state prisoner who is in custody pursuant to a state court judgment of criminal conviction may, subject to various constraints, issue habeas relief if the Supreme Court could have vacated the prisoner's conviction or sentence had it granted a petition for a writ of certiorari from the prisoner while the prisoner's case was on direct review.[33] The crucial characteristic of this model is that it treats habeas as "[e]xempt from [p]reclusion."[34] The federal court considering the habeas petition may reconsider and come to a different ruling on a question already decided by the state courts in the prisoner's underlying criminal case.

Justices Thomas and Gorsuch propose a very different model. Under their model, habeas would typically be subject to application of preclusion principles. A prisoner in custody pursuant to the judgment of a state court in a criminal case could not use habeas to challenge the correctness of the state court's decision. The prisoner could challenge only whether the state court had jurisdiction.

A. Terminology and Assumptions

Before discussing these competing models of habeas corpus, it will be convenient to establish some terminology and assumptions:

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32. *See* 1 HERTZ & LIEBMAN, *supra* note 30, § 2.4 (2011) (characterizing habeas as "[a] surrogate for Supreme Court review as of right").

33. *See id.* (noting "the parity that has long existed in this country between direct Supreme Court and habeas corpus review of state prisoners' constitutional attacks on their convictions and sentences").

34. Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 401 (1996); *see also* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 444, 463 (1963).

The term "habeas" will often be used as an abbreviation for "habeas corpus."[35] A person in custody seeking habeas relief will usually be referred to as "the petitioner" or "the prisoner." The court in which a petitioner is seeking habeas will often be referred to as "the habeas court," and the court that issued the criminal sentence pursuant to which the petitioner is confined will often be referred to as "the sentencing court." An attempt to win release via habeas will sometimes be referred to as a "collateral" attack on the judgment of the sentencing court, as opposed to a "direct" attack, which is made by taking an appeal of the judgment.

It will be assumed in most places throughout the Article that the petitioner seeking habeas relief is a state prisoner who is in custody pursuant to a judgment of criminal conviction issued by a state court.[36] This assumption will occasionally be spelled out or alluded to, and the application of habeas to other kinds of prisoners will also be discussed, but to avoid tedious repetition, whenever the term "petitioner" or "prisoner" is used without qualification, it should be understood, unless the context indicates otherwise, to mean someone who is in state custody pursuant to a judgment of criminal conviction issued by a state court.

It will also be assumed that the petitioner is seeking habeas relief from a federal district court and that the petitioner has satisfied the technical prerequisites for federal habeas relief. Thus, it will be assumed that the petitioner is in custody,[37] that the petitioner has exhausted available state remedies,[38] that the petitioner has applied for federal habeas relief within the applicable statute of limitations,[39] and that the petitioner has not previously sought federal habeas relief.[40]

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35. Strictly speaking, "habeas corpus" is itself an abbreviation for *habeas corpus ad satisfaceindum*, the full name of the writ that challenges detention, which distinguishes it from other forms of the writ of habeas corpus that serve other functions.

36. The writ of habeas corpus may be sought in numerous other situations: for example, by a prisoner held by the executive authority of a state government or the federal government without judicial involvement, by someone involuntarily confined for medical reasons (such as a quarantine or a mental health problem), or by someone involuntarily conscripted into the armed forces.

37. A state prisoner may obtain federal habeas relief only if the prisoner is in custody. 28 U.S.C. §§ 2241(c), 2254(a). This restriction primarily affects prisoners convicted of minor crimes who serve their entire sentence before they have an opportunity to seek habeas relief.

38. The habeas statute requires a state prisoner to exhaust state remedies before seeking federal habeas relief. *Id.* § 2254(b), (c).

39. The habeas statute limits the time within which a state prisoner may seek federal habeas relief to one year, usually measured from the date on which the U.S. Supreme Court denies the prisoner's petition for certiorari (or the time for the prisoner to seek certiorari expires), with an exclusion for time during which the prisoner is seeking review in state post-conviction or collateral proceedings. *Id.* § 2244(d). Certain capital cases are subject to a shorter limitation period. *Id.* §§ 2261, 2263.

40. The habeas statute, with very limited exceptions, limits a prisoner to filing only one federal habeas petition. *Id.* § 2244(b).

B. The Current Model: Habeas as Constrained Certiorari Substitute

Under the current model of habeas corpus, the writ serves petitioners as a constrained substitute for review by the Supreme Court via a writ of certiorari. The model's starting point is that the habeas court may grant relief whenever the Supreme Court might have vacated the sentencing court's decision in the petitioner's case on direct review via certiorari. This basic concept is, however, qualified by several constraints.

The habeas statute provides that writs of habeas corpus "may be granted" by federal courts and judges "within their respective jurisdictions."[41] It also provides, however, that federal courts and judges shall entertain an application for the writ on behalf of a petitioner in custody pursuant to the judgment of a state court "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."[42] The habeas statute therefore poses the question of what it means for a petitioner to be in custody "in violation of the Constitution."

Under current law (with qualifications described below), this requirement is satisfied if the state proceedings that led to the petitioner's conviction or sentence involved a prejudicial violation of the petitioner's federal constitutional rights.[43] The constitutional rights may be substantive or procedural.[44] Either way, the basic principle, subject to qualifications described below, is that the petitioner may obtain habeas relief whenever the U.S. Supreme Court might have vacated the petitioner's conviction on direct review.

Critically important to this model is that habeas is "[e]xempt from preclusion."[45] The availability of habeas relief is obviously in tension with ordinary principles of preclusion doctrine. Normally, if a party to a case in state court does not like the result, the party's remedy is to appeal within the state court system. If the party exhausts all available state appeals and still does not like the result, the party may request that the U.S. Supreme Court review any federal issues in the case via a writ of certiorari.[46] But if the Supreme Court denies certiorari, the party normally has no further avenue for relief.

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41. *Id.* § 2241(a).
42. *Id.* § 2254(a); *see also id.* § 2241(c)(3).
43. Trevino v. Thaler, 569 U.S. 413, 421 (2013) ("In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release."). The habeas statute also permits the writ to be granted in cases in which the prisoner is in custody in violation of "laws or treaties" of the United States, but there are very few federal statutes or treaties that regulate state criminal proceedings. Therefore, in practice, an application for habeas from a state prisoner held pursuant to a judgment of conviction almost invariably involves a federal constitutional claim.
44. *See* Preiser v. Rodriguez, 411 U.S. 475, 485–86 (1973).
45. Yackle, *supra* note 34, at 401.
46. 28 U.S.C. § 1257.

Certainly, in a civil case, such a party could not get a federal district court to issue a writ that would somehow negate the state court's judgment, even if the party claimed—indeed, even if the district court agreed—that the state court proceedings violated the party's federal constitutional rights.[47] The *Rooker–Feldman* doctrine prohibits federal district courts from reviewing judgments of state courts.[48] Even if there were no special doctrine to cover the situation, ordinary principles of preclusion would require the district court to give preclusive effect to the state court's judgment against the party.[49]

State court judgments in *criminal* cases, however, are treated differently. A petitioner in custody after being convicted in a criminal case in state court *is* allowed to ask a federal district court to issue a writ that effectively nullifies the state court's judgment.[50] The federal district court may reconsider and come to a different result on federal constitutional issues already considered by the state courts.[51] This result follows from the habeas statute's provision that a federal court may grant habeas relief to a petitioner who is "in custody in violation of the Constitution or laws or treaties of the United States,"[52] which the Supreme Court has long understood to empower federal courts to grant habeas without regard to preclusion. As early as 1886, the Court said that "while it might appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there [is] no escape from the [1867 habeas statute]."[53]

Habeas's avoidance of preclusion is also supported by two key policy considerations. First, habeas concerns human liberty. The uniquely powerful interest in liberty justifies the application of different preclusion rules than those that apply when only monetary interests are at stake. The Supreme Court has stated that "[c]onventional notions of finality of litigation have no place where life or

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47. State proceedings in civil cases might violate a party's constitutional rights. For example, the state court might have proceeded even though it lacked personal jurisdiction over the defendant, Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945); the selection of the jury (in a case tried by jury) might have violated the Equal Protection Clause, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994); or a judge might have participated in the case despite a constitutional duty to recuse himself, Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

48. Rooker v. Fidelity Tr. Co., 263 U.S. 413, 415–16 (1923); D.C. Ct. of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

49. *See* 28 U.S.C. § 1738; Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 81 (1984) ("[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.").

50. The Supreme Court has observed that issuing habeas relief does not, technically, alter the judgment of the state court pursuant to which the prisoner is in custody; it simply orders the prisoner released. Fay v. Noia, 372 U.S. 391, 430–32 (1963). But this is sophistry. Habeas relief may not, as a technical matter, alter the state court's judgment of conviction, but it has the effect of nullifying that judgment.

51. Yackle, *supra* note 34, at 401.

52. 28 U.S.C. § 2254(a); *see also id.* § 2241(a), (c)(3).

53. *Ex parte* Royall, 117 U.S. 241, 253 (1886).

liberty is at stake and infringement of constitutional rights is alleged."[54] Even its more recent opinions, which give more weight to the importance of finality in criminal cases, recognize that finality should still get less weight in criminal than in civil cases.[55]

Second, only a habeas petition provides a state prisoner with an opportunity, as of right, to have a federal court consider the petitioner's federal constitutional claims. State prisoners can, and indeed normally must, put forward any constitutional claims they may have in the state proceedings leading to their conviction, but in those proceedings state judges will rule on the claims, and state judges, who lack the life tenure and salary protection guaranteed to federal judges under Article III of the Constitution, may fear to provide robust enforcement of politically unpopular protections for criminal defendants.[56] State prisoners may also seek U.S. Supreme Court review of their claims by petitioning for certiorari when their cases are on direct review, but review by certiorari is discretionary, and the probability of getting certiorari granted is very low.[57] Accordingly, only habeas corpus review provides state prisoners with a guaranteed opportunity to have a life-tenured federal judge consider their federal constitutional claims, and habeas review therefore plays an important role in the enforcement of federal constitutional protections for criminal defendants.

Habeas relief is not, however, currently available in *every* case in which the petitioner might have obtained relief from the Supreme Court on direct review. Ever since the end of the Warren Court in 1969, the Supreme Court has gradually tightened the availability of habeas, subjecting it to numerous constraints. Three constraints are of particular importance. First, while habeas relief, as a general rule, may be based on any federal constitutional defect in the state criminal proceedings that resulted in the petitioner's confinement (provided the defect was prejudicial),[58] a claim that evidence was introduced in violation of the Fourth Amendment's exclusionary rule is not cognizable on habeas and may not be the basis for habeas relief.[59] Second, in determining whether a state prisoner is in custody "in violation of the Constitution," a federal habeas court must apply the constitutional law of criminal procedure as it existed on the date that the petitioner's state conviction became final on direct review; the petitioner is not

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54. Sanders v. United States, 373 U.S. 1, 8 (1963).

55. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 309 (1989) (plurality opinion) (quoting Friendly, *supra* note 3, at 150) ("The fact that life and liberty are at stake in criminal prosecutions 'shows only that "conventional notions of finality" should not have *as much* place in criminal as in civil litigation, not that they should have *none*.'").

56. *See* YACKLE, *supra* note 4, at 88–93.

57. *See* Sup. Ct. R. 10. Indeed, the Supreme Court's rules expressly state that the Court rarely grants certiorari to correct an "erroneous application of a properly stated rule of law," *id.*, so state courts that correctly articulate the rules of law they are required to apply will rarely have their decisions reconsidered by the U.S. Supreme Court.

58. Preiser v. Rodriguez, 411 U.S. 475, 485–86 (1973). Harmless errors, in habeas cases as on direct appeal, cannot be the basis for relief. SIEGEL, *supra* note 5, at 1059–61.

59. Stone v. Powell, 428 U.S. 465, 494 (1976).

entitled to the benefit of new constitutional rules of criminal procedure announced only after that date.[60] Finally, and most important, the Supreme Court has interpreted § 2254(d) of the habeas statute to prohibit a federal court from granting habeas relief unless the sentencing court's decision on a point of federal law was not only wrong, but unreasonably wrong.[61] That is, the habeas court must apply a principle of deference that is similar to the *Chevron* deference that a federal court must give to a federal administrative agency's interpretation of a statute that Congress has entrusted it to administer.[62]

However, notwithstanding the numerous constraints with which the Supreme Court has encumbered habeas, the current model still maintains the crucial characteristic that habeas is exempt from preclusion. Habeas relief is certainly much less available in 2021 than it was in 1971, but the writ still serves as a mechanism by which federal district courts can effectively overrule state courts in criminal cases. They can still provide relief that the Supreme Court might have provided on direct review via a writ of certiorari. To be sure, district courts can now do this only in clear-cut cases. But while habeas today is importantly constrained, it is still appropriate to refer to the current model of habeas as a "constrained certiorari substitute" model.

C. The Thomas–Gorsuch Model of Habeas

The habeas model championed by Justices Thomas and Gorsuch stands in sharp contrast to the current model outlined above. As they see it, habeas should not provide state prisoners with an opportunity to relitigate points of constitutional law already considered in their criminal cases. It should not allow a district court to act as a mini-Supreme Court and to provide relief that the Supreme Court could have provided via a writ of certiorari. Habeas should, instead, give preclusive effect to the decisions of the sentencing court. It should guard only against the rare case in which the sentencing court lacked jurisdiction.

Justices Thomas and Gorsuch set forth their proposed model of habeas in concurring opinions in the recent case of *Edwards v. Vannoy*.[63] While the precise point at issue in *Edwards* is not of critical importance to the main issue discussed

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60. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion); *see also* Penry v. Lynaugh, 492 U.S. 302, 313 (1989) (confirming the rule of *Teague*). A prisoner may seek habeas on the basis of developments in *substantive* constitutional law that occur after the prisoner's conviction becomes final. *Teague*, 489 U.S. at 307, 310–11; *see also* Montgomery v. Louisiana, 577 U.S. 190, 197–98 (2016) (restating this point). But the prisoner may not take similar advantage of subsequent developments in the constitutional law of criminal procedure.

61. Williams v. Taylor, 529 U.S. 362 (2000).

62. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984). Indeed, if anything, deference under § 2254(d) is stronger than *Chevron* deference. The Supreme Court has said that habeas relief is appropriate only if the state court's decision is so wrong that "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents." Harrington v. Richter, 562 U.S. 86, 102 (2011).

63. 141 S. Ct. 1547 (2021).

in this Article, it is worth considering briefly because, as will be seen below,[64] Justice Gorsuch's treatment of the point at issue in *Edwards* helps reveal one of the flaws in his position.

1. Edwards

Edwards modified the rule, noted earlier, that a habeas petitioner may not take advantage of new constitutional rules of criminal procedure that were established only after the petitioner's original conviction became final on direct review. *Edwards* rescinded an exception to the rule, thereby making the rule more stringent.

The rule was first announced in a plurality opinion by Justice O'Connor in the 1989 case of *Teague v. Lane*.[65] The opinion justified the rule as an appropriate balance between the petitioner's interest in life or liberty and the state's interest in the finality of its judgments in criminal cases.[66] States, the opinion noted, were "understandably frustrated" by cases in which they conducted a criminal trial in compliance with the constitutional requirements laid down by the Supreme Court, only to have the judgment vitiated in a subsequent habeas proceeding because the state had failed to comply with a rule of criminal procedure announced only *after* the trial had been completed.[67] Although Justice O'Connor concluded that a new rule of criminal procedure announced after a defendant's trial is completed but while the defendant's case is still pending on *direct* review must be applied to the case,[68] she said that once the defendant's opportunity for direct review is exhausted, the state's interest in finality outweighs the defendant's interest in having new rules applied to the case in collateral habeas proceedings.[69]

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64. *See infra* Section III.A.

65. 489 U.S. 288, 310 (1989) (plurality opinion). The full Court subsequently confirmed the rule. Penry v. Lynaugh, 492 U.S. 302, 313 (1989). The Court also applied the rule to capital cases, a point *Teague* had reserved. *See Teague*, 489 U.S. at 314 n.2 (reserving the question of the application of the anti-retroactivity principle to capital cases); *Penry*, 492 U.S. at 314 (applying the principle in a capital case).

66. *Teague*, 489 U.S. at 309.

67. *Id.* at 310. The opinion did not, apparently, give weight to the consideration that failure to apply a new rule retroactively on habeas might leave a *prisoner* feeling "understandably frustrated" at having to remain in prison or even, perhaps, be executed despite having had a trial process that violated the prisoner's constitutional rights. Such a prisoner might feel particularly frustrated if the timing were such that had the prisoner's direct appeal progressed a bit more slowly it would still have been pending when the Supreme Court announced the new rule, and the new rule would therefore have applied to the case. *See* SIEGEL, *supra* note 5, at 1021.

68. *Teague*, 489 U.S. at 304–05. The opinion justified this conclusion based on two considerations: first, a new rule must be applied in the case in which it is announced, for otherwise the announcement of the new rule would not be a judicial action but would instead effectively be legislation, and second, the new rule must then be similarly applied to all cases pending on direct review because like cases must be treated alike. *Id.*

69. *Id.* at 305–10. The opinion did not seem to consider that a defendant might feel "understandably frustrated" at having to remain imprisoned (or even, perhaps, be

Nonetheless, as originally conceived, the rule of *Teague* contemplated an exception for certain rare, "watershed" rules of criminal procedure, which, even though new, would apply retroactively in habeas proceedings.[70] However, after *Teague* announced this purported exception in 1989, the Supreme Court never found any new rule of criminal procedure to fall within it.[71] Over a period of more than 30 years, the Supreme Court announced several important new rules of criminal procedure, but never found any of them to be "watershed" rules that would apply retroactively in habeas proceedings.[72] *Teague*'s exception for "watershed" rules, though available in theory, seemed a nullity in practice.

In *Edwards*, after denying retroactive application to an important new rule yet again,[73] the Court finally put this supposed exception to *Teague*'s anti-retroactivity principle out of its misery. It held that new constitutional rules of criminal procedure simply do not apply retroactively to habeas cases, however significant they might be.[74]

Although three dissenting Justices took sharp issue with *Edwards*'s elimination of what they regarded as a "critical aspect" of *Teague*,[75] and although *Edwards*'s elimination of *Teague*'s "watershed" exception will no doubt engender much commentary,[76] a sober assessment of this development would have to conclude that whatever its theoretical significance, it is of little practical

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executed) even though a new rule announced after the defendant's conviction became final showed that the proceedings had violated the defendant's federal constitutional rights. Such a defendant might be especially frustrated if the timing were such that, had the defendant's direct appeals proceeded just a little more slowly, the defendant's case would still have been pending on direct review when the new rule was announced, thereby entitling the defendant to the benefit of the new rule.

70. *Id.* at 311–12.

71. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1557 (2021) (noting that "the Court since *Teague* has rejected *every* claim that a new procedural rule qualifies as a watershed rule").

72. *Teague* opined that it was "unlikely that many ['watershed'] components of basic due process have yet to emerge." *Teague*, 489 U.S. at 313. But it was only after *Teague* that the Court decided several criminal procedure cases that were, at a minimum, quite important. These cases included Ramos v. Louisiana, 140 S. Ct. 1390 (2020) (holding that the jury verdict in a state court trial in a serious criminal case must be unanimous); Crawford v. Washington, 541 U.S. 36 (2004) (holding that the Sixth Amendment's Confrontation Clause limits the use of hearsay evidence in state criminal cases); and Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that the Constitution does not permit a state court, based on facts found only by a judge, to "enhance" a defendant's sentence beyond the statutory maximum sentence for the offense of which a jury found the defendant guilty). The Court denied retroactive collateral application to all of these rules. *Edwards*, 141 S. Ct. at 1557.

73. 141 S. Ct. at 1559 (denying retroactive application to the rule of *Ramos*).

74. *Id.* at 1559–60.

75. *Id.* at 1574 (Kagan, J., dissenting).

76. *See, e.g.*, Re, *supra* note 24. Professor Re's article focuses on *Edwards*'s elimination of the "watershed" exception to *Teague*, and, while it notes the proposal by Justices Thomas and Gorsuch for a radical change in habeas corpus, it does not provide a detailed rebuttal.

importance. The distinction between having an exception that is theoretically available but never applied in practice, and having no exception at all, can hardly matter to anyone.

2. The Concurring Opinions

What is truly significant about the *Edwards* case is that Justices Thomas and Gorsuch used it as the occasion to make some additional points. Each joined the other's opinion. Each agreed with the majority's disposition of the precise question posed by *Edwards* but thought that the same result could also have been reached on different grounds.

Justice Thomas argued that the Court might have reached the result by applying the text of the 1996 AEDPA.[77] That argument, whether right or wrong, is fairly narrow. Even if the full Court adopted this argument, it would not work any great change in habeas corpus.[78]

Justice Gorsuch's opinion, by contrast, argued for a wholly different model of habeas corpus that would have far-reaching consequences if adopted by the full Court. After agreeing with the Court's disposition of the precise question posed by the *Edwards* case,[79] Justice Gorsuch suggested that that disposition was justified by a much broader reason. His fundamental argument was that "[t]he writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final."[80] In other words, according to Justice Gorsuch, a habeas court is not authorized to reconsider

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77. 141 S. Ct. at 1562 (Thomas, J., concurring). Justice Thomas observed that, as modified by AEDPA, § 2254(d) of the habeas statute prohibits habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . ." *Id.* at 1564. This provision, he asserted, clearly prohibits habeas relief based on a rule of law announced only after the prisoner's state court conviction became final on direct review. *Id.* at 1565. Apparently, Justice Thomas believed this textual argument was so compelling that it required no elaboration, as after quoting the statute he provided no additional explanation but simply said that "Congress, through AEDPA, has made clear that federal courts cannot provide relief in this case." *Id.*

78. Actually, Justice Thomas's argument would make an important change in habeas if it were applied to the *other* exception to the principle of *Teague*. Justice O'Connor's opinion in *Teague* indicated that the principle that habeas petitioners could not benefit from new rules would not apply in cases in which the new rule was substantive and determined that certain conduct cannot constitutionally be criminalized at all. Teague v. Lane, 489 U.S. 288, 311 (1989) (plurality opinion). Justice Thomas's concurrence states that AEDPA "does not contemplate retroactive rules upsetting a state court's adjudication of an issue that reasonably applied the law at the time," *Edwards*, 141 S. Ct. at 1555, without considering how this point would apply to a substantive rule. The Supreme Court has in several cases indicated in dicta that *Teague*'s exception for new substantive rules survived AEDPA, but it has never expressly reconciled this result with the language of § 2254(d). *See* SIEGEL, *supra* note 5, at 1023.

79. 141 S. Ct. at 1566 (Gorsuch, J., concurring).

80. *Id.* at 1573.

whether a sentencing court decided a criminal case correctly but only whether the sentencing court had jurisdiction.

The traditional office of the writ of habeas corpus, Justice Gorsuch argued, was to force the executive (in England, the Crown) to provide reasons for a person's detention. The writ performed a vital function in cases in which a prisoner had been detained extrajudicially—that is, in cases in which the executive simply arrested and held someone, without even charging the person with a crime. In cases in which a jailer responded to the writ by saying only that the prisoner was detained *per speciale mandatum domini regis* ("by special order of the King") or something similar,[81] habeas was the mechanism by which the prisoner could demand due process. But in cases in which the response to the writ was that the person was in custody because the person was serving a sentence imposed by a court following the person's conviction for a crime, "inquiry was usually at an end."[82] No further judicial process was needed in such a case because "[c]ustody pursuant to a final judgment was *proof* that a defendant had received the process due to him."[83]

Justice Gorsuch maintained that the U.S. federal courts, after being statutorily authorized to issue habeas writs in 1789, followed the traditional, common-law practice of denying relief for a prisoner confined pursuant to a final judgment of conviction. The only exception was for cases in which the sentencing court lacked jurisdiction over the defendant or the offense. Even after Congress empowered federal courts to grant habeas relief to prisoners in state custody in 1867, the federal courts were, Justice Gorsuch asserted, "powerless" to grant relief to a prisoner "in custody pursuant to a final state court judgment, unless the state court had acted without jurisdiction."[84]

This principle did not "really begin to change," according to Justice Gorsuch, until "the middle of the twentieth century."[85] Following a "modest" change in *Frank v. Mangum*,[86] the real change occurred in *Brown v. Allen*, which "effectively recast habeas as another way for federal courts to redress practically any error of federal law they might find in state court proceedings."[87] As a result, habeas became "little more than an ordinary appeal with an extraordinary Latin

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81. *Per speciale mandatum domini regis* was the response given in *Darnel's Case*, 3 How. St. Tr. 1 (K.B. 1627). Habeas relief was denied in that case. Habeas did not take its modern form until after passage of the Habeas Corpus Act 1679. SHARPE, *supra* note 4, at 9–19; AMANDA TYLER, HABEAS CORPUS, A VERY SHORT INTRODUCTION 7–17 (2021); *see* 141 S. Ct. at 1567 (Gorsuch, J., concurring) (citing *Darnel's Case*).

82. 141 S. Ct. at 1567 (Gorsuch, J., concurring).

83. *Id.*

84. *Id.* at 1568.

85. *Id.*

86. 237 U.S. 309 (1915). In that case, the Supreme Court admitted the possibility that the atmosphere at a criminal trial could be so dominated by a mob that implementing a guilty verdict would deprive the defendant of life or liberty without due process of law. *Id.* at 335. But the Court affirmed denial of relief in the case before it. *Id.* at 345.

87. 141 S. Ct. at 1568 (Gorsuch, J., concurring).

name"[88]—i.e., it became, as the previous section explained, a substitute for U.S. Supreme Court review via certiorari, in which a petitioner can get habeas relief based on "practically any error of federal law."[89]

Justice Gorsuch suggested that *Teague*'s rule against retroactive application of new procedural rules in habeas proceedings, as well as other restrictions on habeas, should be understood as attempts to "return[] the Great Writ closer to its historic office."[90] Denying petitioners the benefit of new rules developed after their convictions became final promoted the finality of criminal judgments, which the twentieth-century shift in habeas had disrupted. This principle makes sense, Justice Gorsuch argued, "when viewed against the backdrop of the traditional rule that old judgments are impervious to new challenges."[91] Justice Gorsuch concluded that he would in the future be guided by the principles set forth in his opinion.[92]

In sum, Justice Gorsuch (joined by Justice Thomas) proposed a starkly different model of habeas than the model currently in use. Under Justice Gorsuch's model, habeas would simply not be available to state prisoners in custody pursuant to a final court judgment, except in the exceedingly rare circumstance that the sentencing court lacked jurisdiction. Barring such a lack of jurisdiction, habeas courts would give preclusive effect to the judgments of sentencing courts. No matter how clear an error the sentencing court might have committed, and no matter how significant a violation of the petitioner's constitutional rights might have resulted, the habeas court would be compelled to deny relief.

II. HABEAS AND HISTORY

Justice Gorsuch's opinion is based on two key assertions: that federal courts traditionally refused habeas relief to petitioners in custody pursuant to the final judgment of a court of competent jurisdiction and that this purported tradition should be followed today. Each of these assertions is open to challenge. This Part considers the assertion that federal courts traditionally refused habeas relief to petitioners in custody pursuant to the final judgment of a court of competent jurisdiction. While this assertion is not exactly false, it is highly misleading. It fails to capture the nuanced reality of traditional habeas practice.

As will be shown below, it is true that in early cases federal courts often *said* that they could not award habeas to a petitioner confined pursuant to a court's judgment unless the court lacked jurisdiction. But these statements cannot be taken at face value. These cases used the term "jurisdiction" as a term of art with a specialized meaning quite different from the meaning it would have today. Federal courts issued habeas relief to petitioners in custody by virtue of courts' judgments even though the courts had what would today be regarded as jurisdiction.

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88. *Id.* at 1569.
89. *Id.* at 1568.
90. *Id.* at 1570.
91. *Id.* at 1572.
92. *Id.* at 1573.

Justice Gorsuch's error lies in imagining that statements made more than a century ago can be plucked from their historical context and understood as they would be understood if made today. Indeed, assessing Justice Gorsuch's position provides a useful lesson in the delicacy and difficulty that can attend the use of historical materials. One must always remember that "the past is a foreign country; they do things differently there."[93] Historical statements must be understood in their historical context. Understood in that context, the "traditional" statement that a habeas court will not reconsider issues decided by a sentencing court that had jurisdiction turns out to have a very different meaning than the same words would have if written today.

The remainder of this Part first shows the kernel of truth in Justice Gorsuch's position and then shows why that position is ultimately incorrect or, at least, highly misleading.

A. The Case for Justice Gorsuch's Position

Justice Gorsuch is by no means the first to assert that habeas relief was not traditionally available to petitioners in custody pursuant to the final judgment of a court of competent jurisdiction. Justice Jackson made the same claim in his concurring opinion in *Brown v. Allen*[94]—the case that, according to Justice Gorsuch, wrongly made habeas relief available for all manner of constitutional errors. Professor Paul Bator, in an influential article cited by both Justice Thomas and Justice Gorsuch in their opinions in *Edwards*,[95] asserted that it was a "black-letter principle of the common law that the writ was simply not available at all to one convicted of crime by a court of competent jurisdiction."[96] Indeed, Professor Bator claimed that as late as 1949 the federal courts' understanding of their habeas power remained "much nearer" to this traditional view than to the rule of *Brown v. Allen*.[97]

Moreover, it is true that in early habeas cases, federal courts often *said* that a habeas court could not reconsider questions already decided by the sentencing court but could inquire only whether the sentencing court had jurisdiction. Prior to 1867, when Congress had not yet empowered the federal courts to grant habeas relief to state prisoners, federal habeas courts made this statement in cases involving federal prisoners.[98] After Congress extended the writ to state prisoners in 1867, federal habeas courts made the same statement in cases involving state prisoners.[99]

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93. HARTLEY, *supra* note 26, at 9.

94. 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result).

95. *See* 141 S. Ct. at 1563 (Thomas, J., concurring); *id.* at 1571 (Gorsuch, J., concurring).

96. Bator, *supra* note 34, at 466.

97. *Id.* at 465.

98. *See, e.g.*, *Ex parte* Watkins, 28 U.S. 193, 202–03 (1830); *infra* text accompanying notes 100–104.

99. *See, e.g.*, Felts v. Murphy, 201 U.S. 123, 129 (1906); *infra* text accompanying notes 105–106.

Justice Gorsuch relied, for example, on the early case of *Ex parte Watkins*,[100] in which the Supreme Court refused habeas relief sought by a petitioner in federal custody following conviction for federal crimes. In an opinion by Chief Justice Marshall, the Court said that "[t]he judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be."[101] The Court refused to review the petitioner's claim that his indictment did not charge a crime under federal law, because even if the sentencing court's decision on that question had been erroneous, it was not a nullity.[102] The Court distinguished *Wise v. Withers*,[103] a case in which it permitted a collateral attack on the judgment of a court martial, on the ground that the court martial lacked jurisdiction over a person not belonging to the militia.[104]

Similar statements can be found in cases involving state prisoners after 1867. For example, in *Felts v. Murphy*,[105] the petitioner had been convicted of murder in state court. He contended that he had been unable to hear the proceedings because of deafness and that the state court's failure to take appropriate measures to accommodate his hearing problems deprived him of liberty without due process of law. In affirming denial of habeas relief, the Supreme Court said, "upon this writ the question for our determination is simply one of jurisdiction. If that were not lacking at the time of the trial, and if it continued all through, then the application for the writ was properly denied by the circuit court, and its order must be affirmed. The writ cannot perform the function of a writ of error."[106]

Thus, Justice Gorsuch's suggestion that federal courts traditionally issued habeas relief to a petitioner in custody following a criminal conviction only if the sentencing court lacked jurisdiction is certainly not without any basis. Federal courts recited that principle in numerous early cases and repeated it into the twentieth century.[107] Professor Bator also used it as the centerpiece of his academic examination of habeas.[108]

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100. 28 U.S. 193, 209 (1830).

101. *Id.* at 202–03.

102. *Id.* at 202.

103. 7 U.S. 331 (1806).

104. 28 U.S. at 209. Numerous other cases in which a prisoner in federal custody sought habeas relief stated that relief could be granted only if the sentencing court lacked jurisdiction. *E.g.*, *Ex parte* Bain, 121 U.S. 1, 3 (1887) ("[T]his court . . . can have no right to issue this writ as a means of reviewing the judgment of the circuit court simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge.").

105. 201 U.S. 123, 123 (1906).

106. *Id.* at 129.

107. *E.g.*, *id.* at 125.

108. *See generally* Bator, *supra* note 34. Another leading academic examination of the early habeas cases is Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.–C.L. L. REV. 579 (1982). Professor Peller maintained that early cases such as *Watkins* did not reflect a limit on habeas generally but rather a limit that applied only to

B. The Error in Justice Gorsuch's Position

Justice Gorsuch's assertion is, however, extremely misleading. As suggested earlier, statements by nineteenth-century habeas courts that they would inquire only into the "jurisdiction" of a sentencing court must be understood in their historical context. That context imbues these statements with a very different meaning. For at the same time as nineteenth-century federal courts were ostensibly disclaiming the authority to issue habeas relief to a petitioner in custody pursuant to the final judgment of a court of competent jurisdiction, these same federal courts were, in fact, issuing habeas relief to petitioners convicted of crimes in courts that had what today would certainly be called jurisdiction.

This paradox is resolved by recognizing that, in these early cases, the habeas courts used the term "jurisdiction" as a specialized term of art. Today, the statement that a habeas court could inquire only whether the sentencing court had jurisdiction calls to mind cases such as *Wise v. Withers*, noted above, in which a court martial was held to lack jurisdiction to entertain a prosecution of a civilian.[109] In fact, however, in cases decided during the "traditional" period upon which Justice Gorsuch relies, the inquiry into the "jurisdiction" of the sentencing court had a completely different meaning. A habeas court would claim to be examining only whether a sentencing court had jurisdiction, but it would find such jurisdiction to be lacking if the sentencing court's proceedings suffered from defects that one would today characterize as nonjurisdictional. The sentencing court would be found to lack jurisdiction if it had committed certain important errors unrelated to what would today be regarded as the court's jurisdiction. The term "jurisdiction" must be understood in this historical context.

For example, numerous cases demonstrate that if a petitioner were convicted pursuant to a substantively unconstitutional law, the sentencing court would be said to lack jurisdiction, with the result that a federal court could grant habeas relief. In one such case, *Ex parte Siebold*, the petitioners were in federal custody, having been convicted in federal court of federal crimes under federal election law.[110] They sought habeas on the ground that the law under which they were convicted was unconstitutional.[111] Although the Supreme Court ultimately denied relief,[112] it held that the question raised was "proper for consideration on

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the Supreme Court specifically. Congress had not granted the Supreme Court appellate jurisdiction in criminal cases, and the Court believed it was inappropriate to use the habeas writ to vitiate criminal judgments over which it had no appellate power. *Id.* at 611–15. In their exhaustive treatise, Professors Randy Hertz and James S. Liebman maintain that neither Bator nor Peller accurately describe early habeas practice. They maintain that habeas served as a limited substitute for appeal as of right and that the availability of habeas depended inversely on the availability of direct review in the Supreme Court. 1 HERTZ & LIEBMAN, *supra* note 30, at 45 & n.71.

109. *See supra* notes 103–104 and accompanying text; *see also supra* note 26 and accompanying text.

110. 100 U.S. 371, 373–74 (1879).

111. *Id.*

112. *Id.* at 399.

habeas corpus."[113] The Court explained that "[a]n unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."[114] Accordingly, the Court said, a court trying a case under an unconstitutional law "acquire[s] no jurisdiction."[115]

Siebold illuminates what a nineteenth-century habeas court meant when it said that it could inquire only whether a sentencing court had jurisdiction. *Siebold* reconciled that statement with the assertion of authority to grant habeas relief to a petitioner convicted under an unconstitutional statute by holding that a court conducting a criminal case under an unconstitutional statute necessarily lacks jurisdiction.[116] Technically, these statements are consistent. But it is obvious that this consistency has been achieved only by use of a legal fiction.[117]

The suggestion that a sentencing court loses jurisdiction because of a constitutional defect in the statute creating the crime being tried is not true. It is a fiction. Like all legal fictions, it is a statement known to be false but made and treated as though it were true in order "to reconcile a specific legal result with some premise or postulate."[118] Here, the "premise or postulate" is that a habeas court can issue relief to a petitioner in custody by virtue of a final judgment of conviction only if the sentencing court lacked jurisdiction. Rather than soften that postulate, the courts introduced the fiction that if a petitioner was convicted under an unconstitutional statute, then the sentencing court lacked jurisdiction.

Of course, this is not really true. A federal court trying a criminal case does not acquire jurisdiction over the case by virtue of the statute creating the crime being tried. That jurisdiction comes not from a substantive criminal statute but from a statute that gives federal courts jurisdiction over federal criminal cases generally, currently 18 U.S.C. § 3231.[119] This was as true at the time of *Siebold* as it is today. At the time of *Siebold*, § 563 of the Revised Statutes of the United States provided, "[t]he district courts shall have jurisdiction . . . [o]f all crimes and offenses cognizable under the authority of the United States."[120] Section 629 provided that "[t]he circuit courts shall have . . . [e]xclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except

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113. *Id.* at 376.

114. *Id.* at 376–77.

115. *Id.* at 377. *Siebold* involved a prisoner convicted of a crime in federal court, but other cases approved similar relief for prisoners in state custody who had been convicted of crimes in state court.

116. *See supra* notes 110–115 and accompanying text.

117. *See* Lon Fuller, *Legal Fictions* (pts. 1–3), 25 ILL. L. REV. 363, 513, 877 (1930–1931).

118. *Id.* at 363–72, 514.

119. That statute provides, "The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

120. U.S. Rev. Stat. § 563 (1878).

where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."[121]

These undoubtedly constitutional provisions gave the circuit court that tried and sentenced the petitioners in *Siebold* jurisdiction over the criminal case against them. The alleged constitutional infirmity in the statutes creating the substantive crimes for which they were tried (§§ 5515, 5522 of the Revised Statutes) could not take away that jurisdiction. Certainly no one today would suggest that if a defendant is criminally prosecuted under an unconstitutional statute, the unconstitutionality of the substantive criminal statute deprives the court of jurisdiction.[122]

Siebold, as noted above, concerned petitioners in federal custody, but numerous cases make clear that the same principle applied to cases involving petitioners in state custody following conviction of crimes. A federal court could issue habeas relief to such a petitioner if it determined that the statute under which the petitioner was convicted was substantively unconstitutional. Thus, for example, in *Brimmer v. Rebman*,[123] the petitioner was confined after being convicted in Virginia state court of selling meat without first complying with Virginia's inspection laws.[124] The Supreme Court affirmed habeas relief on the ground that the Virginia inspection statute was "a regulation of commerce beyond the power of the state to establish."[125] The Court did not even bother to say that the unconstitutionality of the statute under which the petitioner was convicted deprived the sentencing court of jurisdiction. Indeed, the word "jurisdiction" does not appear in the Court's opinion. The Court stated that "[t]he sole question to be determined is whether the statute under which Rebman was arrested and tried is repugnant to the constitution of the United States."[126] Upon determining that it was, the Court simply affirmed habeas relief.[127]

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121. *Id.* § 629.

122. This point is almost too obvious to prove by citation, as cases today do not even bother to explain it. But support for this point can be seen in the many cases that dismiss criminal prosecutions under unconstitutional statutes without suggesting that there is any jurisdictional problem. For example, when the Supreme Court held in *United States v. Eichman*, 496 U.S. 310 (1990), that the federal Flag Protection Act was unconstitutional, it therefore affirmed the dismissal of the prosecution against the defendant in that case, but there was no suggestion, either in the Court's opinion or that of the district court's opinion that the Court affirmed, that the dismissal was for lack of *jurisdiction*. There was similarly no suggestion in the parallel state case of *Texas v. Johnson*, 491 U.S. 397 (1989), that a state court trying a criminal case under a state flag-burning statute lacks jurisdiction because the statute is substantively unconstitutional.

123. 138 U.S. 78 (1891).

124. *Id.* at 79.

125. *Id.* at 84.

126. *Id.* at 80.

127. *Id.* at 84; *see also* Minnesota v. Barber, 136 U.S. 313, 330 (1890) (also affirming habeas relief to a prisoner convicted in state court of selling meat without complying with inspection laws); *In re* Beine, 42 F. 545, 546 (Cir. Ct. D. Kan. 1890)

Thus, the frequently repeated statement that a habeas court considering the case of a petitioner held pursuant to a judgment of conviction could inquire only whether the sentencing court had jurisdiction must be understood in a special sense. When understood in its original context, with due consideration given to the legal fiction that determined whether the sentencing court had "jurisdiction," one can see that the habeas court was not really limited to inquiring into what today we would call the sentencing court's jurisdiction. The habeas court could also inquire whether the sentencing court's proceedings suffered from a defect that, for habeas purposes, was fictionally deemed to be jurisdictional, even though it really had nothing to do with jurisdiction.

It is therefore a serious error to wrench from its original context the statement that the habeas court could inquire only into the sentencing court's jurisdiction. The statement does not mean what the same words would mean if a court wrote them today. The statement must be understood in its historical context.

Moreover, further examination of that historical context shows the set of defects that were fictionally deemed jurisdictional for habeas purposes was not limited to substantive constitutional defects in the statute under which a defendant was prosecuted. Habeas courts also determined that sentencing courts lost jurisdiction on the basis of defects in a petitioner's sentence, particularly where the defect was a violation of the Double Jeopardy Clause. Habeas relief was approved in cases in which the petitioner had been subjected to two sentences for a single offense.[128]

Thus, for example, in *Ex parte Lange*, the petitioner was incorrectly sentenced to two punishments (a fine and a term of imprisonment) for a single offense, fulfilled one of them (the fine), and sought habeas relief from the other (the term of imprisonment).[129] The sentencing court then purported to resentence the petitioner to a single punishment of imprisonment.[130] The Supreme Court, however, held that once the petitioner "had fully suffered one of the alternative punishments to which alone the law subjected him, the power of the court to punish further was gone."[131] Accordingly, the Court held, the sentence "was pronounced without authority," and habeas relief could be granted.[132] Similarly, in *Ex parte Nielsen*,[133] in which the petitioner also sought habeas relief on double jeopardy grounds, the Court acknowledged the rule that a "regular" judgment of conviction cannot be questioned collaterally, but it said that "[i]n the present case the sentence given was beyond the jurisdiction of the court, because it was against

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(granting habeas relief to prisoners convicted in state court of selling alcohol in violation of state law, but in a manner protected by the federal "original package doctrine").

128. *E.g.*, *Ex parte* Nielsen, 131 U.S. 176, 182–91 (1889); *Ex parte* Lange, 85 U.S. 163, 176–78 (1873).

129. 85 U.S. at 204.

130. *Id.* at 164.

131. *Id.* at 176.

132. *Id.* at 178.

133. 131 U.S. 176 (1889).

an express provision of the constitution which bounds and limits all jurisdiction."[134] The Court ordered habeas relief.[135]

Again, in both of these cases it seems clear that the sentencing court had what today we would regard as jurisdiction and that the Supreme Court's suggestion that the sentencing court lacked jurisdiction was a legal fiction. Indeed, in *Nielsen*, the Court, commenting on its prior decision in *Lange*, said in that case, "the court had authority to hear and determine the case, but we held that it had no authority to give the judgment it did,"[136] which seems very close to saying "the sentencing court had jurisdiction over the case, but we are going to treat it as though it lacked jurisdiction."

Professor Bator, to his credit, recognized that courts traditionally made exceptions to what he called the "strict jurisdictional test" for cases where the underlying criminal statute was unconstitutional and for cases involving double jeopardy. He even acknowledged that these exceptions are "not . . . easily justified today."[137] He maintained, however, that they were not legal fictions and that when "viewed in a historical context they are not completely unintelligible."[138] According to Bator, in the era in which these cases were decided, courts regarded unconstitutional statutes as "void" and believed "they created no law at all," and that therefore "a judgment under such a statute, too, has a nonexistent quality."[139] As to the exception for defects in the sentence, Bator explained it on the ground that a sentence was not regarded as a "judgment" in the same sense as a judgment of conviction.[140] Bator cautioned against viewing these exceptions as legal fictions that could be expanded and used to justify habeas relief whenever a modern court felt relief would be appropriate. Other scholars have, however, long regarded the Supreme Court's assertions from this era as fictions.[141]

In addition, although Bator recognized the two exceptions stated above, those exceptions did not by any means exhaust the situations in which a nineteenth-century habeas court might grant relief even though the sentencing court had what we would today regard as jurisdiction. There were other such situations, which Bator does not attempt to explain. A nineteenth-century habeas court might also hold that a sentencing court lacked "jurisdiction" and that habeas relief could be awarded because there was a constitutional defect in the *procedure* by which the sentencing court tried the petitioner.

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134. *Id.* at 185.
135. *Id.* at 190–91.
136. *Id.* at 184.
137. Bator, *supra* note 34, at 471.
138. *Id.* at 471–72.
139. *Id.* at 471.
140. *Id.*
141. *E.g.*, Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y. L. SCH. J. HUM. RIGHTS 375, 409 (1998) ("The Supreme Court paid due obeisance to the jurisdictional fiction that usually constrained habeas corpus by reasoning that a sentence that violated the Constitution was void."); Note, *The Freedom Writ — The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660 (1948) ("By increasingly strained fictions, they expanded the word jurisdiction far beyond its formal requirements.").

For example, in *Callan v. Wilson*,[142] the petitioner was convicted of a crime in a court of the District of Columbia, but the trial had been by the court, not by a jury. The Supreme Court granted habeas relief because the trial violated the petitioner's right to trial by jury.[143] As a formal matter, it appears that the Court determined that the denial of the petitioner's right to trial by jury left the sentencing court "without jurisdiction" to try him,[144] but the Court's opinion was focused on the jury trial issue, not on "jurisdiction." Certainly, today, a denial of the right to trial by jury, even if it led to reversal of a conviction, would not be thought to deprive a court of jurisdiction over a criminal case.[145]

Similarly, nineteenth-century cases allowed habeas relief where the trial proceedings violated the petitioner's right to a grand jury indictment. In *Ex parte Bain*,[146] for example, the sentencing court permitted an amendment of the indictment after the grand jury had issued it and did not require resubmission of the indictment to the grand jury. The Supreme Court granted habeas relief.[147] Again, as a formal matter, the Court said that because of the flaw in the indictment, "jurisdiction of the offense is gone."[148] But again, if the case were a modern one, a defect in the indictment would not be regarded as depriving the sentencing court of jurisdiction.[149]

The above examples show that, notwithstanding the frequent statement that habeas relief could be granted only for want of "jurisdiction" in the sentencing court, the set of errors for which habeas relief might in fact be granted is not easily rationalized or even characterized. Professor Bator's suggestion that there were only two exceptions to the "strict jurisdictional rule" and that these exceptions could be regarded as sincere, not fictional, is off the mark. Indeed, dicta in some cases suggested that the scope of errors that could cause the sentencing court to be deemed to have lost its jurisdiction was broad indeed. For example, in *In re Bonner*, the Court said:

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142. 127 U.S. 540 (1888).

143. *Id.* at 557.

144. The prisoner argued that the denial of the right of trial by jury left the sentencing court "without jurisdiction" to try him, and the Court said it would determine that "precise question." *Id.* at 547.

145. *See, e.g.*, United States v. Gaudin, 515 U.S. 506, 522–23 (1995). In that case, the Supreme Court held that the defendant's conviction for making false statements in a matter within the jurisdiction of a federal agency was invalid because the trial court did not submit the question of the alleged false statements' materiality to the jury, but the Court made no suggestion that this error deprived the trial court of jurisdiction.

146. 121 U.S. 1, 2 (1887).

147. *Id.* at 14.

148. *Id.* at 13.

149. For example, in *Stirone v. United States*, 361 U.S. 212 (1960), the Supreme Court vacated a defendant's conviction because the facts showed that the defendant had been convicted of a crime not charged in the indictment. *Id.* at 218–19. But the Court never suggested that this defect deprived the trial court of jurisdiction. Indeed, the defendant never even *argued* that the defect was jurisdictional. *See* Brief for Petitioner, *Stirone* (No. 35).

> [A] court has jurisdiction to render a particular judgment only when the offense charged is within the class of offenses placed by the law under its jurisdiction, and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.[150]

This statement suggests something akin to the modern rule permitting habeas relief whenever the sentencing court violated the petitioner's constitutional rights.[151]

In light of the cases described above, it is clear that Justice Gorsuch's flat statement that "[t]he writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final"[152] is at best misleading and at worst simply untrue. If traditional, nineteenth-century habeas practice is the touchstone, then one can say that a habeas court is limited to inquiring whether a sentencing court had jurisdiction only if the term "jurisdiction" is understood as a complex term of art that encompasses numerous considerations that are in reality nonjurisdictional. The statements upon which Justice Gorsuch relies cannot be ripped from their historical context. They had a very different meaning when made than they would if made today.

To be sure, it is conceivable that, in suggesting Justice Gorsuch has taken the statements upon which he relies out of historical context, this Article is doing him an injustice. Perhaps Justice Gorsuch, if confronted with this Article, would declare that he is, of course, using the term "a court of competent jurisdiction" in its nineteenth-century sense. Perhaps he means that term to encompass all the nonjurisdictional considerations (as we would call them today) with which courts imbued it in the nineteenth-century cases discussed above. Such usage would reconcile Justice Gorsuch's position with actual historical practices.

But two difficulties lie in the way of such reconciliation. First, if Justice Gorsuch meant that a habeas court's inquiry into a sentencing court's jurisdiction should follow all the nuances and fictions with which this inquiry was actually conducted in the nineteenth century, he should have said so clearly and expressly. But he didn't. The portion of his opinion in which he set forth his basic claim about the "traditional" rule makes no mention of these fictions at all. It simply

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150. 151 U.S. 242, 257 (1894) (emphasis added).

151. *See also Ex parte* Nielsen, 131 U.S. 176, 183 (1889) ("It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law.").

152. Edwards v. Vannoy, 141 S. Ct. 1547, 1573 (2021) (Gorsuch, J., concurring).

asserts flatly that "a federal court was powerless to revisit [a state sentencing court's] proceedings unless the state court had acted without jurisdiction."[153]

Surely, Justice Gorsuch must understand what this statement sounds like to modern lawyers. He must know that most of his readers will be unfamiliar with the way federal courts handled habeas cases in the nineteenth century—even those who are familiar with habeas at all will presumably be focused on how it works today, not on how it worked more than a century ago. Justice Gorsuch must know that the concept of "jurisdiction" in his statement is likely to be understood as it is used today, not as it was used in the nineteenth century.

In addition, Justice Gorsuch's opinion does contain a brief reference, hidden in a footnote, to the nuances of the nineteenth-century inquiry into a sentencing court's jurisdiction, and, in that reference, he declines to embrace those nuances fully.[154] In the footnote, Justice Gorsuch observes that the plurality opinion in *Teague* provided that federal habeas courts could give retroactive application to new rules of *substantive* constitutional law announced after a petitioner's criminal conviction becomes final on direct review. Citing *Ex parte Siebold*, Justice Gorsuch allowed that this principle from *Teague* could be justified based on its "resemblance to this Court's early cases finding a lack of jurisdiction over a defendant or an offense."[155]

Even in this footnote, however, Justice Gorsuch does not commit to applying the tradition of regarding a criminal proceeding under an unconstitutional statute as one in which the sentencing court lacks "jurisdiction" and as to which habeas relief may issue. He says that "perhaps" such a case would come within the "jurisdictional exception to the finality rule" but "perhaps not."[156] If Justice Gorsuch is not necessarily willing to accept that a sentencing court lacked "jurisdiction" in a case in which the defendant was prosecuted under a substantively unconstitutional statute, then it would likely follow *a fortiori* that he would not regard "jurisdiction" as being lacking if the sentencing court's error were procedural, even if the error was considered "jurisdictional" in the coded sense of the term used in nineteenth-century cases.

Accordingly, it seems unlikely that when Justice Gorsuch says that habeas relief cannot be granted in cases where a petitioner is in custody pursuant to the final judgment of a court of "competent jurisdiction," he is at the same time winking to indicate that the term "jurisdiction" should be understood in its nuanced, fictional, nineteenth-century sense. And if he is, his opinion is simply all the more misleading. If he meant that, he should have said so clearly.[157]

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153. *Id.* at 1567–68.

154. *Id.* at 1571 n.6.

155. *Id.*

156. *Id.*

157. One other potential riposte to the arguments in this Section would be to note that they rely on cases decided after the Civil War, when Congress first allowed federal courts to grant habeas relief to prisoners in state custody. Perhaps, some might argue, these cases were already a deviation from the proper operation of habeas, which should be

In sum, Justice Gorsuch, like Justice Jackson before him, relies too casually on a supposed tradition that a habeas court cannot question a final judgment of criminal conviction unless the sentencing court that issued that judgment lacked jurisdiction. Yes, that statement can be found in many nineteenth-century opinions. But the statement must be understood in the historical context in which it was made. That context shows that the statement was subject to many exceptions based on the fiction that the sentencing court lacked jurisdiction in situations in which it had violated the petitioner's constitutional rights—so many, in fact, that the distance between nineteenth-century habeas practices and those approved in *Brown v. Allen* is much smaller than Justice Gorsuch is prepared to acknowledge.[158]

III. HABEAS AND HERMENEUTICS

The previous Part suggested that Justice Gorsuch's account of when habeas relief was traditionally available fails to consider the numerous circumstances in which a nineteenth-century habeas court could determine that a sentencing court lacked "jurisdiction." But even if this part of Justice Gorsuch's argument were accepted, his assertion that federal courts today should follow what he regards as the "traditional" rule would fail for a different reason. The reason is that Congress has displaced the allegedly traditional rule by statute. Exploring this point provides a lesson in the hermeneutics of statutory interpretation, namely, that a court interpreting a statute must consider not only what the statute expressly states but also what its provisions necessarily imply. This kind of hermeneutical analysis is distinct from intentionalist analysis or reliance on legislative history.

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discerned from earlier cases. But Justice Gorsuch himself said in *Edwards* that even after the Civil War, "this Court continued to interpret the habeas statute consistent with historical practice," and that "[o]nly in the middle of the twentieth century did things really begin to change." 141 U.S. at 1567–68. If post-Civil War cases are "consistent with historical practice," then it is proper to rely on those cases to determine what the historical practice was. In addition, pre-Civil War cases also show that habeas relief could be granted to those in custody as the result of judicial action by a court that had jurisdiction. *E.g.*, *Ex parte* Bollman, 8 U.S. 75 (1807) (granting habeas relief to a prisoner confined pursuant to a court's arrest warrant, although not yet convicted); United States v. Hamilton, 3 U.S. 17 (1795) (similar); *Ex parte* Burford, 7 U.S. 448 (1806) (granting habeas relief to a prisoner confined by order of several justices of the peace for the District of Columbia for being "not of good name and fame"); *see also* Bushell's Case, 124 Eng. Rep. 1006 (Common Pleas 1670) (granting habeas relief to prisoners confined for contempt of court). These cases may not quite fit the fact pattern with which Justice Gorsuch's opinion is most concerned, but they do show habeas relief being granted for prisoners confined by judicial action.

158. Justice Thomas, in his concurring opinion in *Edwards*, also contended that in early habeas cases the Supreme Court applied the supposed common law principle that a habeas court could examine only whether the sentencing court had jurisdiction, but he acknowledged somewhat more forthrightly that the Supreme Court "later expand[ed] the category of claims deemed to be jurisdictional for habeas purposes." 141 S. Ct. at 1563 (Thomas, J., concurring) (quoting Wright v. West, 505 U.S. 277, 285 (1992)). He also, however, maintained that *Brown v. Allen* "abruptly changed course and decided that federal courts could grant a writ of habeas corpus simply because they disagreed with a state court's judgment," and, of course, he joined Justice Gorsuch's opinion. *Id.*

Justice Gorsuch regards himself very much as a textualist, and he would scoff at efforts to show that Congress "intended" habeas relief to be available in certain situations, especially if based on extrinsic materials such as legislative history.[159] But even a textualist (indeed, perhaps, especially a textualist) must give due weight to matters that are implied, even if not expressly stated, by statutory text.

The 1867 habeas statute empowered federal courts to grant habeas relief "in all cases where any person may be restrained of his life or liberty in violation of the constitution, or any treaty or law of the United States."[160] Nearly identical words remain in the statute today.[161] This language might, by itself, be interpreted to authorize habeas relief in cases in which a sentencing court's judgment is infected by constitutional error.[162] But even if it were not, such a rule is implicit in Congress's subsequent amendments to the habeas statute.

Congress significantly amended the habeas statute in 1966 and 1996.[163] But as early as 1953, all agree, *Brown v. Allen* had made clear that habeas relief may be granted on the basis of any constitutional error by the sentencing court.[164] The 1966 and 1996 amendments do nothing to rescind the rule of *Brown v. Allen*, which would normally lead to the conclusion that Congress had adopted it.[165] Moreover, the 1996 amendments added language that *assumes* the ability of federal habeas courts to grant relief in cases other than those where the sentencing court lacked jurisdiction.

Justice Gorsuch's failure to acknowledge the significance of this language is akin to an argument he made in *Edwards*. The following Section first examines Justice Gorsuch's curious argument and then considers how it is related to the correct understanding of the 1996 habeas amendments.

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159. *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (holding, based on the text of Title VII of the Civil Rights Act of 1964, that the statute covers employment discrimination based on sexual orientation or gender identity, even though such application was not likely anticipated by legislators who voted for the statute); *id.* ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

160. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

161. 28 U.S.C. § 2254(a).

162. *Ex parte* Royall, 117 U.S. 241, 253 (1886) ("[W]hile it might appear unseemly that a prisoner, after conviction in a state court, should be set at liberty by a single judge on habeas corpus, there [is] no escape from the act of 1867.").

163. Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105; ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, *supra* note 9.

164. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring) (explaining that *Brown v. Allen* allowed a habeas court to "redress practically any error of federal law they might find in state court proceedings").

165. Congress is presumed to be aware of a judicial interpretation of a statute, and when it re-enacts a statute without change it is presumed to adopt that interpretation; the same is true when Congress uses language that has a settled judicial interpretation. *E.g.*, Lamar, Archer & Cofrin, LLP v. Appling, 138 S. Ct. 1752, 1762 (2018).

A. Justice Gorsuch's Curious Argument

Whatever one thinks of Justice Gorsuch's main argument in *Edwards*, one part of his opinion seems rather curious. He suggests that the Supreme Court's refusal to find any rules to fall within the supposed "watershed" exception to the anti-retroactivity principle of *Teague v. Lane* "only begins to make sense" against the backdrop of the supposedly traditional rule that habeas courts cannot reopen final judgments of courts of competent jurisdiction.[166] But this rule, if it were accepted, would make the anti-retroactivity principle of *Teague* bewildering, not sensible.

As noted earlier, *Teague* held that petitioners seeking habeas relief are normally not entitled to the benefit of "new rules" of criminal procedure, but it left open a possible exception for "watershed" rules.[167] *Teague* justified its anti-retroactivity principle as a balancing between the petitioner's interest in life or liberty and the state's interest in the finality of its judgments.[168]

Justice Gorsuch suggests that the Supreme Court's refusal ever to find that a new rule of criminal procedure fell within *Teague*'s "watershed" exception makes sense for a quite different reason, namely, the supposedly traditional rule that habeas courts cannot reopen a final judgment of a court of competent jurisdiction. But if the Supreme Court were to adopt this purportedly traditional rule, that would not justify refusing to make exceptions to the anti-retroactivity principle of *Teague*. Rather, it would render the entire regime of *Teague* superfluous. If a habeas court were limited to inquiring whether a sentencing court had jurisdiction, it is certainly true that the habeas court could not grant habeas relief based on retroactive application of a new rule of criminal procedure. But it also could not grant habeas relief based on *prospective* application of a new rule of criminal procedure. Rules of criminal procedure would not matter at all in habeas proceedings if the habeas court could only inquire whether the sentencing court had jurisdiction.

Thus, the rule of *Teague* makes sense only as part of a larger regime within which habeas courts can grant relief based on the failure of sentencing courts to follow constitutional rules of criminal procedure. If the supposedly traditional principle for which Justice Gorsuch argues in *Edwards* were ever adopted, it would not justify stringent application of *Teague*'s anti-retroactivity principle and the concomitant elimination of exceptions to that principle. It would overwhelm the entire regime within which decisions about whether to apply that principle are even necessary.[169]

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166. *Edwards*, 141 S. Ct. at 1570, 1572.

167. Teague v. Lane, 489 U.S. 288, 305–10 (1989).

168. *Id.*

169. Perhaps Justice Gorsuch is suggesting that refusal to permit exceptions to *Teague*'s anti-retroactivity principle makes sense in light of his putatively traditional habeas rule because both lead to the result of denying relief. But just because two rules lead to the same result does not mean that one makes sense in light of the other. The rule of *Teague* does not look sensible in light of Justice Gorsuch's purportedly traditional rule; it looks

B. The Habeas Statute and Its 1966 and 1996 Amendments

A similar point applies to the proper interpretation of the habeas statute in light of Congress's amendments to the statute. Not only do the 1966 and 1996 amendments fail to rebuff what were by then the Supreme Court's clear holdings that federal habeas courts could grant relief for constitutional errors by sentencing courts that had jurisdiction, but they also added language that makes sense only on the assumption that such relief is possible.

1. The 1966 Amendment

The 1966 amendment concerned how federal habeas courts should treat factual determinations by state courts. It created what was then 28 U.S.C § 2254(d),[170] although the 1996 AEDPA amendments subsequently amended the subsection substantially and redesignated it as § 2254(e).[171]

The new subsection 2254(d) gave state court factual findings a presumption of correctness. It provided that: "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . shall be presumed to be correct, unless . . . ."[172] There then followed eight circumstances in which the presumption of correctness would *not* apply, one of which was "that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding."[173] Other circumstances in which the presumption of correctness would not apply included when "the merits of the factual dispute were not resolved in the State court hearing," or "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing."[174] If none of the eight exceptional circumstances applied, then the burden would rest on the habeas applicant to show that the state court's factual determinations were erroneous.[175]

Plainly, § 2254(d), as created by the 1966 amendment, contemplated that a federal habeas proceeding initiated by a state prisoner confined pursuant to a judgment of criminal conviction could go forward even in a case in which the state sentencing court had jurisdiction. The section shows that Congress expressly considered the question of whether the state sentencing court had jurisdiction. But instead of saying that habeas relief could issue only when such jurisdiction was

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strangely underinclusive. The rule "deny relief if the prisoner's name starts with a vowel" would also lead to the same result as the supposedly traditional rule, but it would not "begin to make sense" in light of that rule. It would be as puzzling as it obviously is.

170. Act of Nov. 2, 1966, *supra* note 163, § 2(d).

171. ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, *supra* note 9, § 104(2).

172. Act of Nov. 2, 1966, *supra* note 163, § 2.

173. *Id.*

174. *Id.*

175. *Id.* This provision was further amended by AEDPA and now provides an even stronger presumption of correctness to state-court factual findings. *See* 28 U.S.C. § 2254(e).

lacking, Congress chose merely to list lack of jurisdiction as one of eight possible circumstances in which the factual findings of the state sentencing court would not be entitled to a presumption of correctness.

If Justice Gorsuch's view of habeas were correct, then the 1966 amendments would make no sense. If, as Justice Gorsuch maintains, the "writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final,"[176] then in cases in which the state court had jurisdiction, the federal court simply could not issue habeas relief. Accordingly, there could be no possible point to listing other circumstances, besides lack of jurisdiction, that might deprive the state court's factual findings of the presumption of correctness. A federal court would have no need to know whether the state court's factual findings were entitled to a presumption of correctness in a case in which relief was impossible whether the state court's factual findings were correct or not.

Similarly, there could be no point to stating that if none of the eight circumstances applied, the habeas applicant would have the burden of proving that the state court's factual findings were erroneous. Again, if Justice Gorsuch's view were correct, then in cases in which none of the eight circumstances applied (which would necessarily be cases in which the state sentencing court had jurisdiction, because lack of jurisdiction is one of the eight circumstances), the federal habeas court would simply be unable to award habeas relief. The statute's provision that made lack of jurisdiction merely one possible basis for depriving the state court's factual findings of the presumption of correctness therefore implies that habeas relief is possible even in cases in which the state sentencing court had jurisdiction.

If Congress agreed with Justice Gorsuch's view that a federal court cannot issue habeas relief for the benefit of a petitioner confined pursuant to a judgment of criminal conviction issued by a state court of competent jurisdiction, then in passing a statute that expressly considered the issue of whether the state sentencing court had jurisdiction, Congress would have instructed the federal habeas court simply to deny relief in such cases. Instead, Congress gave detailed instructions for determining, in such cases, whether or not the state court's factual findings should be presumed correct and what burden the petitioner would bear with regard to the factual findings if they were presumed correct. Plainly, these instructions presume that even where the state sentencing court had jurisdiction, the habeas petitioner could still proceed in federal court.

2. The 1996 AEDPA Amendments to § 2254(d)

A similar implication follows from the 1996 AEDPA amendments. The main thrust of AEDPA was to *limit* the availability of habeas relief. AEDPA imposed several restrictions on habeas relief for state prisoners. But even as it did so, it unmistakably assumed the availability of habeas relief based on constitutional errors in a state sentencing court's proceedings.

176. Edwards v. Vannoy, 141 S. Ct. 1547, 1573 (2021) (Gorsuch, J., concurring).

Section 104 of AEDPA, after redesignating what was then 28 U.S.C § 2254(d) as § 2254(e), created a new § 2254(d) that provided:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

This provision importantly narrowed the availability of habeas relief for state prisoners. As interpreted by the Supreme Court, this is the provision that requires federal habeas courts to give deference to legal rulings by state sentencing courts.[177] The amended § 2254(d), thus construed, departs from the principle that federal habeas courts may grant relief whenever the Supreme Court might have vacated a petitioner's conviction on direct review.

However, the significance of § 2254(d) for present purposes is that it necessarily assumes that a federal habeas court may review the legal rulings of the state sentencing court. As interpreted by the Supreme Court, § 2254(d) provides that a federal habeas court may not grant habeas relief unless a ruling by the state sentencing court on a federal constitutional issue was clearly wrong under Supreme Court precedent. But the very articulation of this standard presupposes that the federal habeas court may at least consider the state sentencing court's rulings under that standard. If, as Justice Gorsuch suggests, the federal habeas court's consideration is limited to determining whether the sentencing court had jurisdiction, then § 2254(d) would be pointless. The habeas court could not grant relief *even if* the sentencing court's decision were contrary to clearly established federal law.

Congress would not need to set forth a standard of review for a form of review that does not exist. The clear implication of § 2254(d) is that federal habeas courts may grant habeas relief in cases other than those in which the sentencing court lacked jurisdiction.[178] If habeas courts were limited to inquiring whether

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177. Williams v. Taylor, 529 U.S. 362 (2000).

178. *See* Yackle, *supra* note 34, at 384 ("Fairly read according to its literal terms and the negotiations that produced those terms, § 2254(d) respects a federal court's authority to award habeas relief on the basis of a meritorious claim, notwithstanding a previous state court decision against the prisoner."). Yackle argued the implication of § 2254(d) is that a federal habeas court need not give deference to the state sentencing court's rulings. *Id.* The Supreme Court ultimately rejected that argument, but § 2254(d)'s implication that a federal habeas court can conduct some form of review of the state sentencing court's determinations seems inescapable.

sentencing courts had jurisdiction, the provisions of § 2254(d) would be superfluous.

3. The 1996 AEDPA Amendments to § 2264

AEDPA's assumption that a federal habeas court may reconsider issues decided by a state sentencing court, even if the sentencing court had jurisdiction, is also clear in AEDPA's provisions establishing "special habeas corpus procedures in capital cases."[179] These provisions are probably unfamiliar to most readers (even readers who are knowledgeable about the main habeas provisions such as 28 U.S.C. § 2254) because they have not seen much use. They apply only in a state that has "opted-in" to them and as to which the Attorney General has certified that the state has established a mechanism for providing counsel in postconviction proceedings,[180] and, for more than 20 years after AEDPA was passed, no state had been so certified.[181] Nonetheless, the provisions' implications for the powers of a federal habeas court are highly instructive.

After providing that a habeas petition from a prisoner in state custody who is subject to a capital sentence must be filed within a shortened time limit,[182] the statute provides:

> (a) Whenever a State prisoner under capital sentence files a petition for habeas corpus relief to which this chapter applies, the district court shall only consider a claim or claims that have been raised and decided on the merits in the State courts, unless the failure to raise the claim properly is—
>
> (1) the result of State action in violation of the Constitution or laws of the United States;
>
> (2) the result of the Supreme Court's recognition of a new Federal right that is made retroactively applicable; or
>
> (3) based on a factual predicate that could not have been discovered through the exercise of due diligence in time to present the claim for State or Federal post-conviction review.
>
> (b) Following review subject to subsections (a), (d), and (e) of section 2254, the court shall rule on the claims properly before it.[183]

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179. 28 U.S.C. §§ 2261–64.

180. *Id.* § 2261(a), (b).

181. Alexander Brock, Note & Comment, *When Death Becomes an Option: How AEDPA's Opt-In Provisions Will Violate the Constitutional Rights of Habeas Corpus Petitioners*, 27 J.L. & POL'Y 377, 382 (2019). Arizona was certified in 2020. *Certification of Arizona Capital Counsel Mechanism*, 85 Fed. Reg. 20,705 (U.S. Dep't of Just. Apr. 14, 2020).

182. State prisoners subject to capital sentence have only 180 days to seek habeas relief, 28 U.S.C. § 2263, as opposed to the one year allowed to most state prisoners, *id.* § 2244(d).

183. *Id.* § 2264.

Thus, the statute provides that (subject to stated exceptions) the federal habeas court "shall only consider a claim or claims that have been raised and decided on the merits in the State courts." The statute requires the habeas court to consider such claims and to subject them to the standard of review provided in 28 U.S.C. § 2254(d), which, as noted earlier, allows habeas relief only if the state sentencing court's ruling on a constitutional issue was clearly and unreasonably incorrect.[184] Such consideration could not occur if a federal habeas court could not reconsider *any* issue decided by a sentencing court of competent jurisdiction. The command of § 2264(a) would be meaningless if habeas courts were so limited.

Section 2264 necessarily assumes that federal habeas courts have the power to reconsider issues decided by state sentencing courts. To be sure, it provides that such reconsideration will take place under a very lenient standard of review that will typically result in denial of relief, but that is very different from having no review at all. A legislature that contemplated application of what Justice Gorsuch asserts to be the traditional rule (that a habeas court cannot provide any relief to a petitioner in custody pursuant to the final judgment of a court of competent jurisdiction) would never have enacted § 2264. That section necessarily implies that federal habeas courts have more power than they would have under the putatively "traditional" rule advocated by Justice Gorsuch.

C. A Possible Reply, Refuted

One can anticipate what Justice Gorsuch might say in response to the above arguments. He would likely say that the amendments discussed above only *limit* habeas. The 1966 amendment discussed above only deals with the presumption of correctness of state court factual findings. Section 2254(d), as amended by AEDPA, provides only that habeas relief shall *not* be granted unless certain conditions are met. Neither statute directs that habeas relief *shall* be granted under any circumstances.[185] Even § 2264, which instructs the federal habeas court to "rule on the claims properly before it," does not say what those claims are. A member of Congress who voted for these revisions might have agreed with the principle that habeas relief should not be granted to one confined pursuant to a judgment of conviction issued by a court with jurisdiction but recognized that the principle was not currently applied by the courts. Such a legislator might have intended the statutes discussed above to ensure that habeas relief *not* be granted unless the conditions specified in them were met, while leaving the door open for judicial revival of the traditional principle of not granting relief for those confined by a criminal sentence unless the sentencing court lacked jurisdiction.

However, a textualist such as Justice Gorsuch should not care what a legislator *intended* when the legislator voted for the statutory text. The textualist

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184. Williams v. Taylor, 529 U.S. 362 (2000); *see supra* note 61 and accompanying text.

185. *Cf.* Edwards v. Vannoy, 141 S. Ct. 1547, 1571 n.5 (2021) (Gorsuch, J., concurring) ("AEDPA creates only additional conditions to relief; it did not do away with the discretion afforded courts in the habeas statute, or the various rules this Court has formulated in the exercise of that discretion.").

should inquire only what the fair construction of the text is. And even if one were to agree that the sections described above do not affirmatively authorize habeas relief,[186] in determining what these sections mean when fairly construed, a court must give effect not only to what these sections affirmatively state but also what they fairly imply. As shown above, these sections fairly, indeed very strongly, imply that federal courts can grant habeas relief to petitioners confined pursuant to a judgment of conviction issued by a court with jurisdiction.

The Supreme Court illustrated the importance of giving effect to the implications of statutory text in the recent case of *Alabama Association of Realtors v. Department of Health and Human Services*.[187] That case provides an instructive example of the kind of reasoning that a court would need to apply in interpreting the habeas statute.

Alabama Realtors concerned a challenge to a nationwide "eviction moratorium" imposed by the Centers for Disease Control and Prevention ("CDC") in response to the COVID-19 pandemic.[188] In imposing this moratorium the CDC relied on authority given by 42 U.S.C. § 264(a) to the Surgeon General, which had by regulation been delegated to the CDC.[189] Section 264(a) provides:

> The Surgeon General . . . is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession. For purposes of carrying out and enforcing such regulations, the Surgeon General may provide for such inspection, fumigation, disinfection, sanitation, pest extermination, destruction of animals or articles found to be so infected or contaminated as to be sources of dangerous infection to human beings, and other measures, as in his judgment may be necessary.[190]

The first sentence of § 264(a) is extremely broad. It authorizes the Surgeon General to "make and enforce *such regulations as in his judgment are necessary*" to prevent the interstate spread of communicable disease. The second sentence, without imposing any restrictions or specifying anything that the Surgeon General may *not* do in furtherance of the power granted by the first sentence, lists several things that the Surgeon General *may* do, and even that list concludes by generally authorizing the Surgeon General to provide for "other measures, as in his judgment may be necessary." Nothing in either sentence

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186. This assertion is itself far from self-evident. To say that a court may not grant habeas relief "unless" specified conditions are met, *see* § 2254(d), could certainly be understood as authorizing relief if the conditions are met. Section 2264(d)'s instruction that the habeas court "shall rule on the claims properly before it" could also certainly be understood as affirmatively authorizing relief.

187. 141 S. Ct. 2485 (2021) [hereinafter *Alabama Realtors*] (per curiam).

188. *Id.* at 2486.

189. *See* 42 C.F.R. § 70.2 (2020).

190. 42 U.S.C. § 264(a).

expressly provides any restriction or limitation on the Surgeon General's power to take measures to prevent the interstate spread of communicable disease.

Nonetheless, the Supreme Court held that it was so clear that the statute did not authorize the eviction moratorium that not only did the plaintiff have a substantial likelihood of success on the merits of their challenge to the moratorium, but it also was "difficult to imagine them losing." The Court said that the second sentence "informs the grant of authority" given in the first sentence "by illustrating the kinds of measures that could be necessary." The eviction moratorium, the Court held, was too different from the kinds of measures listed in the illustrative second sentence (inspection, fumigation, etc.). Emphasizing that it was necessary to "read[] both sentences together, rather than the first in isolation," the Court held that it was "a stretch" to understand the statute to authorize the moratorium. Indeed, the Court suggested that the statute was not even ambiguous on this point.

Thus, *Alabama Realtors* confirms that a court should not take an unreasonably crabbed, limited approach to statutory text. Nothing in the text of the statute involved in that case expressly limited the Surgeon General's power to take measures to prevent the interstate spread of communicable disease, but the Court held that such a limit was fairly implied by the illustrative examples of such measures that the statute contained. Similarly, even if one regards the provisions of the habeas statute discussed above as not expressly authorizing habeas relief, the fair implication of those sections is that it must be possible for federal courts to award such relief, even in some cases not falling with the narrow confines of Justice Gorsuch's purported traditional rule.

The text of the habeas statute necessarily implies, even if it does not expressly state, that federal habeas courts may award habeas relief to a petitioner in custody by virtue of the final judgment of a court of competent jurisdiction. As shown above,[191] several different provisions of the habeas statute enacted in 1966 and 1996 would make no sense if federal habeas courts lacked such power. Of course, as noted earlier, there are also important policy reasons why federal courts should be able to issue habeas relief even in such cases.[192] But even those who, in the name of textualism, might be inclined to disregard such policy considerations must give effect to the statutory text, including both what the text states and what it fairly implies. A court holding that federal courts lack power to issue habeas relief to a petitioner in custody by virtue of the final judgment of a court of competent jurisdiction would not be interpreting the habeas statute but would be usurping the powers of Congress and arrogating to itself the authority to make a vitally important social policy decision on the appropriate scope of habeas relief.

CONCLUSION

Exploration of the concurring opinions by Justices Thomas and Gorsuch in *Edwards* is valuable both because of the great importance of the scope of the federal habeas power and because of the larger historical and hermeneutical

191. *See supra* Section III.B.

192. *See supra* notes 52–55 and accompanying text.

lessons involved. The historical lesson is that historical materials must be understood in historical context. The hermeneutical lesson is that statutory text must be read in light of both what it says and what it fairly implies.

Justices Thomas and Gorsuch are doubly mistaken to suggest that federal courts should follow a supposedly traditional rule under which a federal habeas court cannot award relief to a state prisoner in custody pursuant to a final court judgment unless the sentencing court lacked jurisdiction. The language in early habeas cases that they claim supports this supposed rule must be understood in its historical context. Properly understood, the early cases establish no such rule but instead show that habeas courts were traditionally able to award relief for a broad range of constitutional errors by sentencing courts.

Moreover, even if there were a traditional rule along the lines that Justice Thomas and Justice Gorsuch suggest, Congress has displaced that rule by statute. The 1996 AEDPA amendments necessarily presuppose a broader scope of habeas relief than contemplated by Justices Thomas and Gorsuch. The text of the habeas statute as it exists today, when read in light of both what it says and what it necessarily implies, shows that the allegedly traditional rule, if it ever existed, has been statutorily displaced.