NOTE

COLLATERAL EFFECTS OF HABEAS RETROGRESSION

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Prisoners in state custody currently have two avenues to challenge violations of their constitutional rights: petitions for habeas corpus and suits under 42 U.S.C. § 1983. Although the two sometimes overlap, courts have held that § 1983 suits are not available to challenge most constitutional violations that could also be addressed through petitions for habeas corpus. This has excised a substantial category of constitutional violations from § 1983's scope. Most prominently, any constitutional violation that results in incarceration can only be challenged through habeas corpus, and not through § 1983. In his recent concurrence in Edwards v. Vannoy*, Justice Gorsuch suggested a new approach for federal courts evaluating habeas petitions by state prisoners. In his reading, the writ of habeas corpus only allows courts to grant prisoners relief if the court that convicted them lacked jurisdiction. To Justice Gorsuch, constitutional violations that result in incarceration are not grounds for habeas relief, or even habeas inquiry. In this Note, I take Justice Gorsuch's statement to that effect at face value and explore the necessary implications of his newly proposed regime for habeas corpus. I conclude that if habeas corpus were held to not provide an avenue to challenge violations of constitutional rights, the Supreme Court's cases limiting § 1983 suits by state prisoners because of the availability of habeas relief would implicitly be overruled. I then demonstrate that state prisoners would often benefit from raising their challenges as § 1983 suits rather than in habeas petitions.*

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INTRODUCTION

In 1871, Congress enacted the third Force Act,[1] also called the third Ku Klux Klan Act, and now widely known as the Civil Rights Act.[2] The Act, for the first time, allowed federal lawsuits against state actors who were alleged to have violated the federal constitutional[3] rights of individuals.[4] Prior to its enactment, the only recourse available to someone suffering constitutional injury at the hands of a state was a suit against the state actor under state law. But in cases where a federal constitutional right was violated by a state actor who did not happen to concurrently violate an analogous state law, no remedy was previously available at all.[5] The centerpiece of the Act is now codified at 42 U.S.C. § 1983.[6] That statute allows suits by individuals for injunction or damages against those acting

[1] Enforcement Act of 1871, ch. 22, § 1, 17 Stat. 13; see also Monroe v. Pape, 365 U.S. 167, 174 (1961) (describing enactment of the Act and its purpose).

[2] Zanita E. Fenton, Disarming State Action; Discharging State Responsibility, 52 Harv. C.R.-C.L. L. Rev. 47, 53–54 (2017).

[3] The Act is also now understood to allow suits based on violations of other federal, non-constitutional rights. See Maine v. Thiboutot, 448 U.S. 1, 7–8 (1980). For the purposes of this Note, however, the ability to bring suit challenging constitutional violations is more relevant.

[4] See Tiffany R. Wright, Ciarra N. Carr & Jade W.P. Gasek, Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983, 126 Dick. L. Rev. 685, 686 (2022).

[5] See *Monroe*, 365 U.S. at 196 & n.5.

[6] 42 U.S.C. § 1983.

"under color of" state law who are alleged to have committed a civil rights violation.[7]

The Ku Klux Klan Act was enacted against a backdrop of rampant violence and lawlessness in the southern states following the Civil War.[8] Recently freed slaves and white Republicans were often the targets,[9] and state officials—magistrates, constables, sheriffs, and others—were often complicit.[10] A key problem that the Act addressed was the inability of the criminal justice system in the South to protect the interests of Black citizens. This manifested both in crimes against Black citizens going unpunished and in Black citizens' being faced with an unfair and unjust legal system when they themselves were the defendants.[11]

Only a few years before, Congress had enacted the Habeas Corpus Act of 1867,[12] which addressed similar concerns. Also for the first time, it extended the availability of federal court review to those incarcerated in state prisons or otherwise in state custody.[13] Although the protections of the Great Writ had been constitutionally enshrined since the Founding,[14] federal habeas corpus could previously only be invoked by those in federal custody.[15]

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[7] Id.

[8] Some of the atrocities were described in a letter from President Grant to Congress, within which he reproduced a message from a general stationed in Georgia. See S. Exec. Doc. No. 41-3, at 2 (1869) [hereinafter Presidential Letter] ("[W]ere the most worthless vagabond . . . to be charged with a crime against . . . a negro, neither he nor any other . . . would dare . . . to testify against [the offender], whatever might be their knowledge of his guilt.").

[9] Id. ("[M]ost of the numerous outrages upon freedmen result from hostility to the race, induced by their enfranchisement."); S. Rep. No. 42-1, at 116 (1871) ("[T]here has been considerable apprehension on the part of the freedmen in regard to their personal safety.").

[10] See Presidential Letter, supra note 8, at 2 ("Murders have been . . . frequent. . . . There is great reason to believe that in some cases local magistrates are in sympathy with the members of these organizations."); S. Rep. No. 42-1, at 83 (1871) ("The sheriff belongs to the organization, and so do his deputies."); id. ("Question: Are the constables all members of it? Answer: Not quite all.").

[11] See Presidential Letter, supra note 8, at 2; see also Blyew v. United States, 80 U.S. (13 Wall.) 581, 583 (1871) (finding that no witnesses were allowed to testify at trial of Black woman's murderer because all witnesses were Black); Strauder v. West Virginia, 100 U.S. 303, 304 (1879) (describing West Virginia law prohibiting Black citizens from serving on juries); Virginia v. Rives, 100 U.S. 313, 315 (1879) ("The petitioners further represented that their race had never been allowed the right to serve as jurors . . . in the county of Patrick, in any case, civil or criminal.").

[12] Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385.

[13] Paul M. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 465 (1963).

[14] U.S. Const. art. I, § 9, cl. 2.

[15] Bator, supra note 13, at 465.

The enactment of these two statutes was a moment of promise for the post-Civil War Congress. The Acts represented a commitment by the federal government to offer protection to some of the country's most marginalized citizens. Individuals who had previously found courts fundamentally inimical to their interests now had an avenue to seek redress for the wrongs they suffered at the hands of powerful actors.

A hundred and fifty years later, both congressional acts have fallen into judicial disfavor. The right of action under § 1983 has been heavily qualified by the application of numerous immunity doctrines that either shield state actors absolutely or protect all but the most egregious offenders.[16] And the once-great writ of habeas corpus has been so riddled with technical, procedural requirements and exemptions that, for most, it might as well not exist at all.[17] Although the federal judiciary has acted mostly[18] alone in dissecting § 1983, Congress has stepped in to place its own restraints on habeas corpus.[19]

All of this would be, apparently, the routine development of federal law, if it were not for one thing: habeas corpus and § 1983 have an unusual, judicially created, inverse relationship of applicability. In a series of cases beginning with *Preiser v. Rodriguez*, the Supreme Court has held that § 1983's limitations are dependent on the Great Writ's outer boundaries.[20] In essence, the Court held that there are some claims that § 1983 does not recognize because habeas corpus covers them instead. The clearest example is that a prisoner cannot bring a suit under § 1983 to challenge the validity of their confinement, even if they allege that that

[16] See, e.g., John C. Jeffries, Jr. & George A. Rutherglen, Structural Reform Revisited, 95 Calif. L. Rev. 1387, 1402 (2007) ("As administered by the courts, qualified immunity shields a vast range of garden-variety unconstitutionality from vindication through money damages."); id. at 1390 n.12 ("The absolute immunity afforded those exercising legislative, judicial, and prosecutorial functions also has been criticized.").

[17] See Bryan A. Stevenson, The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases, 77 N.Y.U. L. Rev. 699, 727 (2002) (quoting McFarland v. Scott, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting from denial of certiorari)) (describing the law of habeas corpus as "a doctrinal jumble that had grown too 'byzantine' for ready comprehension or utilization"); Z. Payvand Ahdout, Direct Collateral Review, 121 Colum. L. Rev. 159, 174 (2021) (noting that "federal habeas relief is afforded in only 0.29% of noncapital cases," despite "substantial evidence that states systematically violate criminal defendants' constitutional rights").

[18] But see 42 U.S.C. § 1997e (placing limitations on some § 1983 suits by prisoners, including exhaustion requirement and limits on attorneys' fees and recovery).

[19] See Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 103-132, 110 Stat. 1214 (codified at 28 U.S.C. § 2254).

[20] 411 U.S. 475, 500 (1973).

confinement is the result of a constitutional violation by someone acting under color of state law.[21] Some suits several steps removed from this paradigmatic case are also within the "core" of habeas and therefore not cognizable under § 1983.[22]

In this Note, I examine the implications of the relationship between these two statutes in the face of some recent suggestions by Supreme Court Justices that the writ of habeas corpus should cease to function as it has been understood to for at least the last half century. In effect, I ask how the boundaries of § 1983 that are dependent on the availability of habeas corpus should be affected if the writ's availability is severely curtailed. *Preiser*'s holding has long been the source of unanticipated complexities.[23] But while some of the resulting puzzles have been resolved by subsequent cases,[24] it may be that the bond it strung between habeas corpus and § 1983 has not exhausted its capacity to surprise.

This issue arrives with particular urgency because of a concurrence penned by Justice Gorsuch in the recent case, *Edwards v. Vannoy*.[25] In that opinion, which is echoed in Justice Gorsuch's subsequent opinion for the Court in *Brown v. Davenport*,[26] he recounts the modern development of habeas corpus and what he views as its disconnection from its historical operation.[27] His conclusion: "[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."[28]

Reopening judgments issued by courts of competent jurisdiction that have become final is nearly[29] the only thing the writ has done for at least a century. Adoption of Justice Gorsuch's view would thus have

[21] Id. at 489.

[22] Id. at 487–88.

[23] See Martin A. Schwartz, The *Preiser* Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85, 87 (1988) ("*Preiser* . . . leaves open more questions than it answers.").

[24] Compare id. at 117–18 (asking whether, after *Preiser*, prisoners may bring claims for damages based on constitutional violations that resulted in their incarceration), with Heck v. Humphrey, 512 U.S. 477, 486–87 (1994) (answering that question in the negative).

[25] 141 S. Ct. 1547 (2021).

[26] 142 S. Ct. 1510 (2022); see also id. at 1531 (Kagan, J., dissenting) ("That account repeats the views expressed in a recent concurrence, authored by the same Justice as today delivers the majority opinion.").

[27] *Edwards*, 141 S. Ct. at 1568 (Gorsuch, J., concurring).

[28] Id. at 1573.

[29] Habeas corpus is still invoked, though more rarely, to contest executive detention without trial. See, e.g., Boumediene v. Bush, 553 U.S. 723, 734 (2008).

momentous impact—both human and doctrinal.[30] Even now, few litigants find courts as unfriendly to their claims as prisoners bringing suits against state governments.[31] But those governments possess immense power to harm. Prisoners, more than other citizens, are at the government's absolute mercy and under its complete control. Removing the main avenue through which nearly two million people[32] can challenge violations of their rights by an entity that now controls every aspect of their lives is a proposition that should give us pause.

But Justice Gorsuch's limitations on the habeas remedy would have a similarly consequential impact on the doctrine that resulted from *Preiser* and its progeny. That is because *Preiser* limited the cause of action under § 1983 with explicit reference to and dependence on the availability of habeas review.[33]

Below, I ask whether Justice Gorsuch's concurrence in *Edwards* and the Supreme Court's opinion in *Preiser* can be reconciled in their reasoning or results. I conclude that they cannot. Justice Gorsuch's assertion about the limited scope of habeas relief is fundamentally at odds with the reasoning in *Preiser* and the cases that followed it. Thus, if Justice Gorsuch (and Justice Thomas, who joined him) maintain their views of what claims habeas corpus does *not* apply to, logic requires that they also reevaluate their views of what § 1983 *does* apply to.

To explore that assertion, I proceed in four parts. Part I explains Justice Gorsuch's position on the history of habeas corpus and how it should influence contemporary courts' willingness to grant the writ. Part II shows the development in courts of an interrelationship between habeas corpus and § 1983 and explains why the cord binding the two doctrines together would be severed by Justice Gorsuch's reasoning in *Edwards*. Part III discusses the legal framework that would result if Justice Gorsuch's opinion were taken to its logical conclusion and prisoners were able to bring § 1983 suits instead of habeas petitions. Part IV offers additional thoughts about the statutory interpretation that would be necessary to

[30] See Jonathan R. Siegel, Habeas, History, and Hermeneutics, 64 Ariz. L. Rev. 505, 508 (2022).

[31] Ahdout, supra note 17, at 174.

[32] Wendy Sawyer & Peter Wagner, Mass Incarceration: The Whole Pie 2023, Prison Pol'y Initiative (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html [https://perma.cc/7ZES-P5L7].

[33] See Preiser v. Rodriguez, 411 U.S. 475, 486–87 (1973).

reach this result and asks whether that interpretation is unwarranted or implausible as a response to Justice Gorsuch's own interpretive exercise.

I. *EDWARDS V. VANNOY*

In his concurring opinion in *Edwards v. Vannoy*, Justice Gorsuch proposed a new guiding principle for the Supreme Court's jurisprudence concerning habeas corpus. That principle is that valid claims of constitutional violations that resulted in prisoners' incarceration are not grounds for habeas relief.[34] Rather, the only ground on which federal courts should issue writs of habeas corpus is if the state court that convicted the petitioner lacked jurisdiction to convict him.[35] Though this principle is "new" in that it is miles away from what is accepted by any federal court as black letter law today, Justice Gorsuch framed it as both a reversion to a long-accepted historical norm[36] and as consistent with themes underlying the Court's contemporary jurisprudence.[37]

Edwards provided an appropriate vehicle for Justice Gorsuch to raise his argument because, in his view, the majority's opinion advanced those themes.[38] The case addressed the retroactivity of a rule of constitutional law that the Supreme Court had recognized in an earlier case, *Ramos v. Louisiana*.[39] There, the Court had declared for the first time that the Sixth Amendment requirement of a unanimous jury for a criminal conviction applied to states as well.[40] Previously, in *Apodaca v. Oregon*, the Court had stated that while unanimous juries were required to convict defendants of federal crimes, states were not subject to the same limitations.[41] Consequently, Louisiana and Oregon had been incarcerating and otherwise punishing defendants convicted by non-unanimous juries for decades.[42]

If it were held to be retroactive, *Ramos*'s consequences would have been significantly amplified. All prisoners who had been convicted in

[34] See Edwards v. Vannoy, 141 S. Ct. 1547, 1573 (Gorsuch, J., concurring).
[35] Id. at 1567.
[36] Id.
[37] Id. at 1573.
[38] Id. ("Today's decision advances the progress by making express what has long been barely implicit . . . .").
[39] 140 S. Ct. 1390 (2020).
[40] Id. at 1397.
[41] 406 U.S. 404, 406 (1972) (plurality opinion).
[42] Louisiana had only recently abolished non-unanimous verdicts when *Ramos* was decided. *Ramos*, 140 S. Ct. at 1426 (Alito, J., dissenting).

Louisiana by non-unanimous juries would have been entitled to file suits challenging their convictions. But the impediment to this result was the Court's holding in *Teague v. Lane*.[43] In *Teague*, the Court stated that, in general, only substantive constitutional rules declared by the Supreme Court would apply retroactively.[44] For procedural rules, like the one declared in *Ramos*, retroactivity would come only if the rule had outsized significance; the Court termed such a rule a "watershed."[45]

But the watershed exception from *Teague* had never been applied before, and the Court declined to apply it in *Edwards*.[46] Furthermore, after holding that *Ramos* did not apply retroactively, the Court went a step further, declaring that the watershed exception would never be applied in any future case, either.[47] This effectively extinguished the possibility that any future constitutional rule of criminal procedure would ever apply retroactively.[48]

If the *Edwards* majority went a step further than was necessary to resolve the case, Justice Gorsuch dramatically raised the stakes with a surprising concurrence that made arguments unaddressed by either party to the case.[49] In practical effect, he argued that federal courts should no longer issue writs of habeas corpus to state prisoners—at all.

Justice Gorsuch explained his conclusion by delving into the history of the writ of habeas corpus. Although the history that he presented has been vigorously disputed,[50] the focus here is on what further conclusions arise

[43] 489 U.S. 288 (1989).

[44] Id. at 311.

[45] Id.

[46] Edwards v. Vannoy, 141 S. Ct. 1547, 1555, 1559 (2021).

[47] Id. at 1559–60.

[48] At least one scholar has argued that the Court's opinion does little to change the *Teague* landscape and, in fact, leaves open the possibility that it could, in the future, declare a procedural rule to be a watershed. See Richard M. Re, Reason and Rhetoric in *Edwards v. Vannoy*, 17 Duke J. Const. L. & Pub. Pol'y 63, 79–81 (2022).

[49] See id. at 76 ("Gorsuch's theory came utterly without warning, leaving the parties no particular reason to attend to it.").

[50] See Siegel, supra note 30, at 524–32. Professor Siegel's argument that the term "jurisdiction" as it was used in nineteenth-century habeas cases had a different, and much broader, meaning than the term has today was echoed by Justice Kagan in her dissent in *Brown v. Davenport*, 142 S. Ct. 1510, 1533–34 & nn.2–3 (2022). See also Lee Kovarsky, A Constitutional Theory of Habeas Power, 99 Va. L. Rev. 753, 768–69 (2013) ("The notion that, at English common law, there was some jurisdictional barrier to using habeas for post-conviction review is one of the most pervasive falsehoods in the habeas literature."); Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L. Rev. 575, 609 (2008) ("Habeas corpus also concerned the

of necessity if one accepts Justice Gorsuch's account and his resulting conclusion. Thus, the criticisms of his opinion, and even its accuracy, are less relevant than the details of his analysis.

Justice Gorsuch began by recounting the origin of the habeas writ as a response to summary and indefinite detentions of prisoners by English monarchs, who sometimes declined to provide either explanation or process before imprisoning a subject.[51] The writ forced detainers to justify the incarceration of a detainee, which allowed the prisoners to "ensure adequate process—like a criminal trial."[52] But the scope of inquiry allowed by the writ was limited. Most prominently, "[c]ustody pursuant to a final judgement [by a court] was *proof* that a defendant had received the process due to him."[53] In short, "[a] prisoner confined under a final judgment of conviction by a court of competent jurisdiction" would find no relief through habeas corpus.[54] In fact, the only question that a court would ask in a habeas suit was whether the court of conviction had jurisdiction.[55] If so, the writ was conclusively denied. According to Justice Gorsuch, early cases in the United States that assessed the scope of the writ as authorized by Congress drew similar boundaries.[56] And the same held true after Congress authorized federal courts to grant habeas relief to state prisoners in 1867.[57]

In Justice Gorsuch's telling, the scope of habeas relief did not significantly change until *Brown v. Allen*[58] in 1953.[59] There, the Court held for the first time that federal courts could use habeas suits to "redress

correction of errors of officers, judicial and extra-judicial, whenever they wrongly detained one of the king's subjects.").

Justice Gorsuch's more literal reading of the term is also supported in the academy. See Bator, supra note 13, at 466. Still, even Professor Bator acknowledges that cases nearly contemporaneous with the Habeas Corpus Act of 1867 had already begun to expand outside of strictly "jurisdictional" bounds. See id. at 467 (describing *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873), as holding that "habeas corpus may be used to reexamine, not substantive errors going to the conviction, but alleged illegality in the sentence"); id. at 468 (citing *Ex parte Siebold*, 100 U.S. 371 (1879), as holding that federal courts could overturn convictions under unconstitutional statutes on habeas review).

[51] *Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring).

[52] Id.

[53] Id.

[54] Id.

[55] Id.

[56] Id.

[57] Id. at 1567–68.

[58] 344 U.S. 443 (1953).

[59] *Edwards*, 141 S. Ct. at 1568 (Gorsuch, J., concurring).

practically any error of federal law they might find in state court proceedings."[60] This led to a growing number of federal habeas suits, especially when *Brown*'s effect was augmented by the Supreme Court's recognition of several new rules of criminal procedure in the middle of the twentieth century.[61]

Having charted the course of habeas corpus from its narrow origins to its mid-century expansion, Justice Gorsuch then plotted the way back. He described the Court's cases since *Brown* that narrowed the writ through doctrines like procedural default and abuse of the writ as "aimed at returning the Great Writ closer to its historic office."[62] To him, the elimination of *Teague*'s watershed exception in the majority opinion continued a process that those earlier decisions began.[63] To justify the judicial, rather than legislative, process through which the writ's scope was being narrowed, he noted that the statute authorizing federal courts to grant habeas relief to state prisoners "provides that 'writs of habeas corpus *may* be granted'—not that they *must* be granted."[64] In his reading, the permissive language "invests federal courts with equitable discretion to decide whether to issue the writ or to provide a remedy."[65] For the final step, he argued the Court should exercise that discretion to refuse to grant the writ in every case where there is a "judgment issued by a court of competent jurisdiction . . . [that] has become final."[66] He concluded by pledging that his "vote in similar cases to come w[ould] . . . 'be guided as nearly as [possible]'" by the principles he had just described.[67]

To understand how Justice Gorsuch's argument would affect § 1983 suits, it is first necessary to lay out exactly what he is saying. His position rests on two premises. First, that the writ of habeas corpus should properly be understood to only allow federal courts to evaluate the jurisdiction of the state court that convicted an incarcerated prisoner.[68] And second, that

[60] Id.
[61] Id. at 1569–70.
[62] Id. at 1570.
[63] Id. at 1572–73.
[64] Id. at 1570 (quoting 28 U.S.C. § 2241(a)).
[65] Id.
[66] Id. at 1573.
[67] Id. (alteration in original) (quoting Brown v. Allen, 344 U.S. 443, 548 (1953) (Jackson, J., concurring)).
[68] Id. at 1567. Some commentators have questioned whether Justice Gorsuch's view of what constitutes a jurisdictional defect might be more nuanced than the rigid contemporary understanding of the term. See Siegel, supra note 30, at 530 ("Perhaps Justice Gorsuch . . . would declare that he is . . . using the term 'a court of competent jurisdiction' in

in writing the statute authorizing federal courts to grant the writ with permissive language, Congress was implicitly authorizing those courts to exercise "equitable discretion" to vastly abrogate the broader, contemporary understanding of the writ and return it to its historically limited office.[69] In terms of *how* federal courts should do so, Justice Gorsuch is not entirely clear. He seems to imply that the various judge-made doctrines that have incrementally limited the availability of habeas relief were motivated by such an impulse.[70] Potentially, Justice Gorsuch intends to transpose his strongest statement of his conclusion, 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,"[71] into a majority opinion in the future. Or, alternatively, he might intend to continue with the indirect avenues he described with the aim of eventually nullifying the writ. Neither approach has explicitly commanded a majority of the Court in any case yet.[72] But, as one scholar has noted, "[e]ven though the views expressed in the [*Edwards*] 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."[73] In either case, the shift would have the same "revolutionary" result: a prisoner whose

its nineteenth century sense."); Re, supra note 48, at 72–73 (asking whether Justice Gorsuch's theory would still allow for the watershed exception from *Teague*). But the response that Professor Siegel offers, that if Justice Gorsuch had intended a much broader meaning of the term "jurisdiction," he would have said so, is difficult to rebut. See Siegel, supra note 30, at 530–31.

[69] *Edwards*, 141 S. Ct. at 1570 (Gorsuch, J., concurring).

[70] Id. ("Exercising this remedial discretion, the Court began to develop doctrines aimed at returning the Great Writ closer to its historic office.").

[71] Id. at 1573.

[72] In the subsequent case *Brown v. Davenport*, 142 S. Ct. 1510 (2022), Justice Gorsuch appeared to at least temporarily opt to continue incrementally narrowing, rather than rapidly curtailing, the scope of habeas corpus. There, while restating, sometimes verbatim, much of the history from his previous concurrence in *Edwards*, see id. at 1520–23, Justice Gorsuch held for the Court that before granting relief, a court that agrees with a prisoner regarding legal error in their trial or sentencing must apply two different, arguably duplicative standards to determine whether the error was "harmless." Id. at 1518; see also id. at 1531 (Kagan, J., dissenting) ("All today's holding does going forward is compel habeas courts, and the parties before them, to spin their wheels."). This might have had the effect of further limiting the availability of habeas relief, though without going so far as overruling *Brown v. Allen*, 344 U.S. 443 (1953). Still, a majority of the Court adopted Justice Gorsuch's historical account, which is a substantial step towards the Court's wholesale embrace of the legal conclusions that he derives from that history.

[73] Siegel, supra note 30, at 508–09.

constitutional rights were violated in a manner that resulted in their incarceration would not be able to challenge the violation of their rights through habeas corpus.

II. THE INTERACTION BETWEEN PETITIONS FOR HABEAS CORPUS AND § 1983 SUITS

Justice Gorsuch's excision of constitutional violations from habeas corpus does not directly contradict the text of the statutes authorizing habeas relief. As he points out, no statute requires federal courts to grant habeas relief to prisoners who can show that their incarceration was the result of a violation of their constitutional rights.[74] In fact, no statute directly purports to define the writ of habeas corpus at all, or to direct courts to issue it in particular circumstances, although some explicitly state when it does not apply.[75]

That same description could not be applied to § 1983. Section 1983's text is explicit: "every person" who "under color of" state law subjects any "person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, [is] liable to the party injured in an action at law, [or] suit in equity."[76] For a claimed violation of a constitutional right to not be covered by § 1983, more elaborate justification would be required.

The Supreme Court identified such a justification in a series of cases where it interpreted § 1983 as limited by the availability of relief through habeas corpus. The Court's basic reasoning was this: Section 1983 is a broadly drafted statute that allows plaintiffs to raise any claim that a state actor has violated their constitutional rights in federal court.[77] It purports to apply to all violations suffered by all plaintiffs in all situations, and it has few explicit procedural limitations. But a different statute identifies habeas corpus as an appropriate vehicle for a narrow subset of those same constitutional claims: those being brought by state prisoners who are challenging the legality of their conviction or confinement.[78] And unlike § 1983, habeas corpus is subject to stringent procedural limitations, most

[74] *Edwards*, 141 S. Ct. at 1570 (Gorsuch, J., concurring).

[75] See, e.g., 28 U.S.C. § 2254(a) (establishing that federal courts "shall entertain an application for a writ of habeas . . . only on the ground that [a prisoner] is in custody in violation of the Constitution or laws or treaties of the United States").

[76] 42 U.S.C. § 1983.

[77] See id.; Preiser v. Rodriguez, 411 U.S. 475, 489 (1973).

[78] See 28 U.S.C. § 2254(a); *Preiser*, 411 U.S. at 485–86.

prominently a state exhaustion requirement.[79] Because allowing those same claims for the same relief to proceed through § 1983 would undo the procedural limitations that Congress had explicitly attached to habeas corpus, and because § 1983 is a "general" statute and the statute authorizing habeas relief is more "specific," the Court reasoned that those sorts of claims must be limited to being brought through habeas corpus, and not through § 1983.[80] But as the next Section shows, that chain of inference runs headlong into Justice Gorsuch's argument for drastically narrowing habeas corpus in *Edwards v. Vannoy*.

A. Preiser v. Rodriguez

The first Supreme Court case to directly address the relationship between § 1983 suits and habeas corpus was *Preiser v. Rodriguez*, which was decided in 1973.[81] *Preiser* was a consolidation of three suits by state prisoners, all of which raised the same question.[82] The suit brought by Rodriguez is illustrative. Rodriguez had been convicted of perjury and attempted larceny and sentenced to a term of, at most, four years.[83] While incarcerated, he participated in a program through which he accrued "good-behavior-time credits" that entitled him to release earlier than the maximum length of his sentence.[84] When corrections officials found contraband in Rodriguez's cell, they punished him by stripping him of 120 days of those credits, effectively increasing his time in detention by that amount.[85] Rodriguez filed a § 1983 suit against the prison officials alleging that his due process rights had been violated, and sought the restoration of his credits as a court-ordered remedy.[86] Had he proceeded instead through a petition for habeas corpus, he would have been required to exhaust state remedies before seeking relief in a federal court.[87]

The Court rejected Rodriguez's and the other prisoners' claims without reaching their merits. Instead, it held that § 1983 simply did not cover such claims, despite the fact that they fell within the bounds of its literal

[79] *Preiser*, 411 U.S. at 489.
[80] Id. at 489–90.
[81] Id. at 482.
[82] Id. at 477–82.
[83] Id. at 477.
[84] Id.
[85] Id. at 478.
[86] Id.
[87] Id. at 479.

text.[88] The Court reasoned that § 1983 was a "general" statute, and Congress had passed a different, "more specific" statute to cover the precise sort of claim that the prisoners wished to bring.[89] Because the prisoners' claims all *could have* been raised through habeas petitions, they fell outside of the scope of § 1983. In sum, the Court held that prisoners could not bring their suits under § 1983 if the remedy they sought was release from state confinement.

In reaching this conclusion, the Court noted that the original scope of "a habeas corpus attack . . . was a limited one."[90] Echoing Justice Gorsuch's concurrence that would postdate it by nearly fifty years, the Court described the "relevant inquiry" in habeas as previously being "confined to determining . . . whether or not the committing court had been possessed of jurisdiction."[91] But the writ had "evolved as a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law."[92] Because the writ had been thus expanded to cover all manner of legal challenges to confinement, the prisoners' suits "fell squarely within this traditional scope of habeas corpus."[93] Thus, the Court held, when a prisoner's "grievance is that he is being unlawfully subjected to physical restraint . . . habeas corpus has been accepted as the specific instrument to obtain release from such confinement."[94] This precluded the application of a different, more general statute to achieve the same end, like § 1983.

As a matter of statutory interpretation, *Preiser*'s reasoning is unusual. The Court did not directly state that it believed § 1983, when drafted, was intended to be limited by the applicability of habeas corpus. Nor does the opinion explicitly state that this conclusion is dictated by the text or structure of the statute. Rather, because habeas was an available avenue for the prisoner to bring his claim and Congress had limited habeas suits in certain pertinent ways, the Court drew the implication that Congress could not have intended for the broader remedy of a § 1983 action to be available.[95] This is odd partially because, by the Court's own explanation of the statutes' history, any overlap between them would have postdated

[88] Id. at 489.
[89] Id.
[90] Id. at 485.
[91] Id.
[92] Id.
[93] Id. at 486–87.
[94] Id. at 486.
[95] Id. at 489–90.

their enactment by several decades. None of the cases that the Court cited as expanding habeas corpus to recognize confinement in violation of the Constitution were decided prior to the enactment of § 1983.[96] And the narrowing of habeas corpus through a state-exhaustion requirement that the Court relied on as mandating the abrogation of § 1983 occurred in 1948.[97] In essence, the Court implied that the 1948 Congress repealed by implication a significant swath of § 1983's potential application by introducing limitations to a different cause of action.

Regardless of the oddities of the Court's holding in *Preiser*, which had already been well-explored by academics by the turn of the twenty-first century,[98] the result and its foundation are clear. Prisoners may not challenge violations of their constitutional rights through § 1983 suits if the remedy they seek is release from state confinement. And that is because the writ of habeas corpus separately allows them to do so, though with some accompanying procedural requirements and limitations.

B. Can Preiser *Survive* Edwards*?*

The account of *Preiser*'s holding offered above is uncontroversial, as is the description of Justice Gorsuch's analysis in his *Edwards* concurrence. It is also immediately clear that the two are in tension.

Preiser held that § 1983 could not be invoked to challenge violations of constitutional rights if the remedy sought was release from confinement. And it based that conclusion explicitly on the availability of habeas corpus to bring the *very same* claims challenging the *very same* violations of rights. As the Court put it, a state prisoner "challenging his underlying conviction and sentence on federal constitutional grounds in a federal court is limited to habeas corpus" because "Congress has passed

[96] See id. at 485–86. As noted above, § 1983 was enacted in 1871. See Enforcement Act of 1871, ch. 22, § 1, 17 Stat. 13.

[97] *Preiser*, 411 U.S. at 489. The Court had itself recognized an option to require state exhaustion earlier in *Ex parte Royall*, 117 U.S. 241, 251 (1886) (stating that while a federal court "has the power" to "wrest the petitioner from the custody of the State officers in advance of his trial in the State court," Congress did not "imperatively require" it to do so). But prior to 1948, federal courts did sometimes grant habeas relief to state prisoners without requiring exhaustion of state remedies. See, e.g., In re Neagle, 135 U.S. 1, 75 (1890) ("[I]t is established that he is innocent of any crime against the laws of the State . . . . The circuit court of the United States was . . . competent to ascertain these facts . . . and it was not at all necessary that a jury should be impanelled to render a verdict on them.").

[98] See Schwartz, supra note 23, at 116–19 ("The decision, Brennan stated, was unmanageable because the 'new-found' concept of [the] 'core of habeas corpus' is essentially 'ethereal.'" (quoting *Preiser*, 411 U.S. at 506 (Brennan, J., dissenting))).

a more specific act to cover that situation": the statute authorizing federal courts to grant writs of habeas corpus.[99]

Justice Gorsuch's argument in *Edwards*, meanwhile, is that those "federal constitutional grounds" are *not* covered by habeas corpus. He argues that the only claim that can be raised through a habeas petition is that the court of conviction and sentencing lacked jurisdiction.[100] Both *Preiser* and Justice Gorsuch recount a largely identical history of the writ's development, beginning with its narrow, jurisdictionally centered origins and concluding with its transformation into "a remedy available to effect discharge from any confinement contrary to the Constitution or fundamental law," or, as Justice Gorsuch disparagingly puts it, "an ordinary appeal with an extraordinary Latin name."[101] But *Preiser* uses the writ's twentieth-century expansion as the key load-bearing column for its analysis. By turning back the clock to habeas's nineteenth-century origins, Justice Gorsuch sweeps that support away.

The factual background of *Preiser* itself shows why its holding cannot survive Justice Gorsuch's analysis. The constitutional violations alleged by the prisoners in that case all occurred during their confinement in prison. All three alleged that they had been deprived of good-time credits without due process of law by prison officials as the result of their conduct post-incarceration.[102] Of course, none of their claims could have been raised during their trial or appeal, as the allegedly unconstitutional acts that they challenged had not occurred prior to those proceedings. If one accepts both that their claims are not within the scope of a habeas petition and that they cannot be raised through a § 1983 suit, those prisoners would never have any opportunity to challenge those constitutional violations in any manner at all. This is a difficult result to justify, given § 1983's authorization of a cause of action against "[e]very person who, under color of [state law] . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution."[103] The same would be true in any other situation where a constitutional violation occurs that could not

[99] *Preiser*, 411 U.S. at 489.
[100] Edwards v. Vannoy, 141 S. Ct. 1547, 1573 (2021) (Gorsuch, J., concurring).
[101] *Preiser*, 411 U.S. at 485; *Edwards*, 141 S. Ct. at 1569 (Gorsuch, J., concurring).
[102] *Preiser*, 411 U.S. at 478–82.
[103] 42 U.S.C. § 1983.

have been raised during trial or direct appeal. Most prominently, violations of *Brady v. Maryland* would often lack any remedy.[104]

But even outside of those most egregious examples where constitutional rights would be violated without any opportunity for the violations to be challenged, *Preiser*'s broader application still cannot withstand scrutiny if Justice Gorsuch's conclusions are accepted at face value. *Preiser* also purports to justify the general assertion that "a state prisoner challenging his underlying conviction and sentence on federal constitutional grounds in a federal court" cannot do so through a § 1983 suit because he is "limited to habeas corpus."[105] Before *Preiser*, several lower federal courts had held the same.[106] But if the prisoner is not "limited to habeas corpus" because habeas provides no opportunity to have those claims heard, the assertion that he cannot raise them in a § 1983 action has no substantial support.

The conclusion here is foregone. If Justice Gorsuch were to follow through with his promise in *Edwards* and dramatically curtail the availability of habeas relief, effectively overturning *Brown v. Allen*, the first subsequent domino to fall would have to be *Preiser*. The result would be that the current limits on § 1983 suits would be erased, and state prisoners would be able to raise all manner of constitutional challenges to their confinement in federal court through § 1983.

C. Does Heck *Save* Preiser*?*

One objection that could be raised to the above analysis is that § 1983 suits could still be independently barred in the same set of situations through the Supreme Court's reasoning in *Heck v. Humphrey*.[107] *Heck* took up a question that the Supreme Court had seemed to answer in *Preiser*: whether a prisoner could bring a § 1983 suit seeking only damages, not equitable relief or release from prison, if the gravamen of their complaint was still that their incarceration was contrary to the Constitution. In *Preiser*, the Court had stated directly that such § 1983

[104] 373 U.S. 83 (1963). *Brady* violations are discussed below. See infra notes 173–78 and accompanying text.

[105] 411 U.S. at 489.

[106] See, e.g., Gaito v. Ellenbogen, 425 F.2d 845, 848 (3d Cir. 1970); Johnson v. Walker, 317 F.2d 418, 419–20 (5th Cir. 1963); Denney v. Kansas, 436 F.2d 587, 588 (10th Cir. 1971).

[107] 512 U.S. 477 (1994).

suits would still be available,[108] and the Court had seemed to confirm that holding a year later in *Wolff v. McDonnell*.[109] But the resulting framework proved problematic in application in lower federal courts, which split on the question despite the seemingly explicit Supreme Court guidance.[110] When the Court finally reevaluated the question in *Heck*, it reached the opposite conclusion.

Heck concerned a prisoner who was serving a fifteen-year sentence in state prison for voluntary manslaughter.[111] While his appeal for his conviction was pending, he filed a § 1983 suit in federal district court naming state prosecutors and police officers as defendants.[112] His suit alleged that the investigation leading to his arrest had been "unlawful, unreasonable, and arbitrary," that the defendants had knowingly destroyed exculpatory evidence, and that they had used an illegal voice-identification procedure at his trial.[113] For relief, he sought only damages, not release from prison.[114] Citing *Preiser*, the Court still held that his suit was barred.[115]

Despite its use of *Preiser* as a starting point, *Heck*'s reasoning diverges from *Preiser*'s in key respects. The *Heck* Court first disposed of the language from *Preiser* that appeared to answer the same question by characterizing it as "unreliable . . . [and] unintelligible" dicta that "did not carefully consider" the question before the Court.[116] It then set forth on its own, separate exercise of statutory interpretation. While *Preiser* had rendered some § 1983 suits for equitable relief unavailable based on their encroachment into the "core of habeas corpus,"[117] *Heck* did the same for some § 1983 suits for damages by analogizing them to the common law tort of malicious prosecution.[118]

[108] 411 U.S. at 494 ("[A] damages action by a state prisoner could be brought under [§ 1983] in federal court without any requirement of prior exhaustion of state remedies.").

[109] 418 U.S. 539, 555 (1974) ("Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser* . . . .").

[110] See Schwartz, supra note 23, at 123–26 ("[C]ourts commonly hold that a claim for damages based upon an allegedly unconstitutional conviction may not be asserted under section 1983 without satisfying the state exhaustion requirement.").

[111] 512 U.S. at 478.

[112] Id. at 478–79.

[113] Id. at 479.

[114] Id.

[115] Id. at 481, 489.

[116] Id. at 482.

[117] Preiser v. Rodriguez, 411 U.S. 475, 487 (1973).

[118] 512 U.S. at 484.

The Court based its analytical methodology on several previous cases where the common law of torts had been the starting point for inquiry into the operation of § 1983.[119] According to Justice Scalia, who authored the Court's opinion, the tort of malicious prosecution was the right comparator for the case at hand because it permitted damages claims for confinement even when that confinement was, at the time that it occurred, justified by legal process.[120] But, as the Court noted, to establish a claim for malicious prosecution, a plaintiff at common law had to show that the relevant criminal proceeding had been resolved in their favor.[121] Thus, the Court held that the same principle applied to any § 1983 suit for damages where a prevailing plaintiff necessarily would demonstrate "the unlawfulness of his conviction or confinement."[122] In that context, to bring the suit at all, the plaintiff first must show that their "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal . . . or called into question by a federal court's issuance of a writ of habeas corpus."[123]

There are two relevant questions that arise from the Court's analysis in *Heck*. The first is whether the Court's holding in *Heck* would survive Justice Gorsuch's reinterpretation of habeas corpus. The second is whether *Heck*'s reasoning could be used as an alternative justification for the result in *Preiser*, and thereby avoid the problem presented by Justice Gorsuch's concurrence in *Edwards*.

For the first question, the answer is "probably not." Although *Heck* relies less centrally on the availability of habeas corpus than *Preiser*, it still frames the conflict between habeas corpus and § 1983 as arising from their similarity: "[b]oth . . . provide access to a federal forum for claims of unconstitutional treatment at the hands of state officials."[124] As the Court acknowledges when it begins its analysis, the case still addressed "the intersection of . . . § 1983, and the federal habeas corpus statute."[125] If habeas corpus ceased to "provide access to a federal forum for claims of unconstitutional treatment,"[126] it is not clear that recourse to common law analogs to abrogate § 1983 would still be appropriate, even on the

[119] Id. at 483.
[120] Id. at 484.
[121] Id.
[122] Id. at 486.
[123] Id. at 486–87.
[124] Id. at 480.
[125] Id.
[126] Id.

decision's own terms. In alignment with this view, several Justices have since agreed, for example, that a prisoner who is released from prison before they had the opportunity to seek habeas relief is not barred from filing suit under § 1983.[127]

In addition, the Supreme Court's own, more recent, opinions applying *Heck* have framed its holding as premised on § 1983's intersection with habeas corpus, not on the similarity of some § 1983 claims to the tort of malicious prosecution.[128] This aligns the contemporary understanding of *Heck* with the reading of the opinion proposed by Justice Souter, who concurred in the judgment, joined by Justices Blackmun, Stevens, and O'Connor.[129] Justice Thomas, who fully concurred in the Court's opinion, also explicitly relied on the conflict between habeas corpus and § 1983 in agreeing with the Court's conclusion.[130] And, in fact, the Court's subsequent opinions that have cited *Heck* have only even mentioned the tort of malicious prosecution when the plaintiff at issue was specifically bringing a malicious prosecution claim on constitutional grounds.[131] Where cases have concerned other types of § 1983 suits for damages that

[127] The question has not squarely been before the Court, but it was addressed by several Justices in separate opinions in *Spencer v. Kemna*. See 523 U.S. 1, 20–21 (1998) (Souter, J., concurring); id. at 21–22 (Ginsburg, J., concurring); id. at 25 n.8 (Stevens, J., dissenting); see also Note, Defining the Reach of *Heck v. Humphrey*: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?, 121 Harv. L. Rev. 868, 880 (2008) ("*Heck* itself reveals that Justice Scalia's admonition against permitting § 1983 claims by inmates challenging the constitutionality of conviction or confinement does not . . . extend to claims brought by individuals . . . ineligible for habeas."). Circuit courts have split on this issue. Compare Huang v. Johnson, 251 F.3d 65, 75 (2d Cir. 2001) (concluding *Heck* does not bar a § 1983 action where no habeas remedy exists), with Huey v. Stine, 230 F.3d 226, 230 (6th Cir. 2000) (holding that, under *Heck*, the unavailability of habeas relief does not necessarily allow a § 1983 action).

[128] See, e.g., Nance v. Ward, 142 S. Ct. 2214, 2222 (2022) (citing *Heck*, 512 U.S. at 487, for the proposition that "an inmate must proceed in habeas when the relief he seeks would 'necessarily imply the invalidity of his conviction or sentence' "); Muhammad v. Close, 540 U.S. 749, 751 (2004) (per curiam) ("[C]onditioning the right to bring a § 1983 action on a favorable result . . . served the practical objective of preserving limitations on the availability of habeas remedies.").

[129] See 512 U.S. at 500 (Souter, J., concurring in the judgment) ("The Court's opinion can be read as saying . . . [that] after enactment of the habeas statute *and because of it*, prison inmates seeking § 1983 damages in federal court for unconstitutional conviction or confinement must satisfy a . . . favorable-termination requirement." (emphasis added)).

[130] See id. at 491 (Thomas, J., concurring) ("Given that the Court created the tension between the two statutes, it is proper for the Court to devise limitations aimed at ameliorating the conflict . . . in a principled fashion.").

[131] See, e.g., Thompson v. Clark, 142 S. Ct. 1332, 1337 (2022) (citing *Heck* in discussion of elements of "Fourth Amendment claim under § 1983 for malicious prosecution").

might be understood to impugn a conviction, the Court has cited *Heck* as simply reaffirming *Preiser*'s principle: that some § 1983 suits are made implicitly unavailable by the litigant's ability to challenge the deprivation of the underlying right through habeas corpus.[132]

Furthermore, some on the Court have questioned the availability at all of malicious prosecution-type claims under § 1983, and thereby implicitly questioned *Heck*'s common law analogy. The most explicit example is Justice Alito's dissent in *Thompson v. Clark*, which was joined by Justice Gorsuch.[133] As Justice Alito noted regarding the majority opinion in *Thompson*, "[t]he Court assert[ed] that malicious prosecution [was] the common-law tort . . . most analogous to [a] Fourth Amendment claim, but in fact the Fourth Amendment and malicious prosecution have almost nothing in common."[134] Although Justice Alito makes the point to deny the substance of a prisoner's claim, essentially arguing that malicious prosecution claims have no legitimate constitutional basis,[135] his reasoning is difficult to reconcile with the generalized sort of common law tort analogy that is the basis of *Heck*.[136] In short, if *Heck* were to survive the overruling of *Brown v. Allen*, both its foundations and subsequent interpretation would have to be fundamentally rewritten.

For the second question, whether *Heck*'s reasoning could be rallied to provide support to *Preiser*'s holding if the Court otherwise sweeps it away, the answer is certainly "no." Suits for equitable relief such as the one at issue in *Preiser* lack any substantial similarity to the tort of malicious prosecution. As the Court noted in *Heck*, malicious prosecution plaintiffs had to show that they had already been acquitted or otherwise found to not be culpable in the underlying criminal proceeding.[137] It follows necessarily that they could not have used the tort as the basis to seek release from detention. In other areas of § 1983 jurisprudence, the analogy to tort law has survived only so long as the relevant suits sought the remedy that would have been available for a claim under the relevant

[132] See *Nance*, 142 S. Ct. at 2217.

[133] See *Thompson*, 142 S. Ct. at 1341 (Alito, J., dissenting).

[134] Id. (citations omitted).

[135] Id. at 1342.

[136] Compare id. at 1341–42 (comparing elements of Fourth Amendment seizure with elements of malicious prosecution and concluding that "there is no overlap"), with Heck v. Humphrey, 512 U.S. 477, 484 (1994) (concluding that malicious prosecution should supply elements for claim under § 1983 because "it permits damages for confinement imposed pursuant to legal process").

[137] 512 U.S. at 484.

tort. Qualified immunity is a prime example.[138] As Justice Alito's dissent in *Thompson* makes clear, the analogy of § 1983 suits for damages to the tort of malicious prosecution is already tenuous. Extending that comparison to suits for equitable relief would stretch the analogy to its breaking point.

In summary, if one accepts Justice Gorsuch's view of the scope of habeas corpus, *Preiser* must go. And *Heck* can't save it.

D. Could Preiser *Be Limited But Not Overruled?*

An additional attempt to rebut this argument might limit it without entirely refuting it. To do so, one would accept that *Preiser*'s specific holding cannot survive the severe curtailment of habeas corpus but disagree that that requires allowing the majority of § 1983 suits that are within *Preiser*'s broader principle. In essence, the claim would be that § 1983 may cognize suits challenging constitutional violations by prison officials that occur after conviction, but run-of-the-mill suits challenging constitutional violations by prosecutors or state courts or alleging that a conviction was pursuant to an unconstitutional statute would still be outside of its scope. This argument, too, would be misguided.

As a preliminary matter, any limitation on § 1983 that excludes challenges based on some violations of constitutional rights would still have to be justified as a matter of statutory interpretation. By its text, § 1983 allows suit to be brought against "[e]very person" who under color of state law "subjects . . . [any] person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution."[139]

As noted above, *Preiser*'s attempt to reach a similar result even with the existing habeas regime was already somewhat convoluted.[140] But limiting § 1983's scope while making no reference to the availability of habeas corpus for constitutional claims would be even more so. The most likely framework for this argument would still rely on habeas corpus, but would reference it based on the remedy that it allows rather than the legal questions that it addresses. Simply put, the argument would be that writs of habeas corpus are the sole means for a person to seek release from incarceration. Habeas corpus would be judged to be the exclusive means

[138] See Joanna C. Schwartz, How Qualified Immunity Fails, 127 Yale L.J. 2, 13 & n.35 (2017) (noting that "qualified immunity does not attach in . . . claims for injunctive or declaratory relief").

[139] 42 U.S.C. § 1983.

[140] See supra notes 95–97 and accompanying text.

not to raise certain legal issues, but instead to seek a particular remedy.[141] The Court could not reasonably conclude that Congress *could not have* written a statute that allowed prisoners to challenge their unconstitutional confinement by states. Congress clearly has the power to do so under § 5 of the Fourteenth Amendment, which grants it the power to "enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]."[142] Instead, the Court would have to decide that, although Congress could have written such a statute when it drafted the Civil Rights Act of 1871, it did not do so.

This conclusion would certainly rest on more uncertain ground than *Preiser*. *Preiser* based its holding on a negative inference drawn from an affirmative congressional act: Congress had enacted a law that covered a category of constitutional claims and then explicitly limited it through a state-exhaustion requirement.[143] If plaintiffs could bring the same claims through § 1983 without facing the same exhaustion requirement, it would render Congress's actions in creating that requirement mostly toothless and devoid of meaning. But there would be no similar basis for a holding limiting § 1983 based only on its application to habeas's remedy. Rather, the Court would essentially be creating a new rule of construction: for a statute to allow plaintiffs to seek release from unconstitutional confinement by states, it must state that it is doing so explicitly. There is some irony here: the Court has previously required such clear statements when Congress seeks to *abrogate* federal court jurisdiction to entertain petitions for habeas corpus.[144] Under this new interpretive rule, the Court would confusingly be protecting habeas corpus with one hand while preventing its remedy with the other.

Even were the Court to adopt such a rule, § 1983 still might satisfy it. As noted above, the language of the statute is unequivocally broad: it applies to "every" person who subjects "any" other person to the

[141] It should be noted that if the Court were to adopt this approach, that would still leave *Heck*'s holding, which barred suits for damages where they merely "imply" the invalidity of conviction, without substantial support. See supra Section II.C.

[142] U.S. Const. amend. XIV, § 5; United States v. Georgia, 546 U.S. 151, 158 (2006) ("[N]o one doubts that § 5 grants Congress the power to enforce . . . the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions." (omission in original) (internal quotation marks omitted)).

[143] Preiser v. Rodriguez, 411 U.S. 475, 489–90 (1973).

[144] See Ex parte Yerger, 75 U.S. 85, 102 (1868) ("We are not at liberty to except from [habeas corpus jurisdiction] any cases not plainly excepted by law . . . ."); see also Felker v. Turpin, 518 U.S. 651, 660–61 (1996).

deprivation of "any" constitutional rights. Although various common law doctrines and immunities have been read into the statute,[145] in none of those cases have any claims actually been fully excised from it in contradiction of its text. Stripping a plaintiff of their ability to bring suit to challenge violations of their constitutional rights is different in kind from rendering some suits unsuccessful because of official immunity. In the latter case, the court at least has the opportunity to declare that a violation has occurred.[146] Leaving prisoners whose rights have been violated without any cause of action at all thus inflicts dignitary harms not contemplated by the Court's current immunity doctrines.[147]

The historical relevance of habeas corpus is also of no help. In fact, the writ has long been understood to offer remedies that were equally available through other common law avenues. For example, the writ could be used to challenge unlawful detention by private parties,[148] although the same result could be sought through other causes of action.[149] And it was used to challenge military conscription,[150] despite the fact that conscription can be contested in other ways as well.[151] In other areas too, such as suits involving the custody of children, cases have long acknowledged the overlap in scope between petitions for the writ of habeas corpus and claims for general equitable relief.[152]

[145] See Imbler v. Pachtman, 424 U.S. 409, 419 (1976) ("[T]he considerations underlying the nature of the immunity . . . in suits at common law [lead] to essentially the same immunity under § 1983.").

[146] See Pearson v. Callahan, 555 U.S. 223, 236 (2009) (stating that courts may address the merits of a plaintiff's claim even where the official is shielded by immunity); Rachel Bayefsky, Remedies and Respect: Rethinking the Role of Federal Judicial Relief, 109 Geo. L.J. 1263, 1314 (2021) ("Even if . . . damages are blocked by immunity . . . , the declaration serves the remedial purpose of signaling that the plaintiff was entitled to respectful treatment that the plaintiff did not receive.").

[147] Cf. Bayefsky, supra note 146, at 1303 (stating that "processes . . . [that] enabl[e] litigants to make their cases" also "safeguard dignity").

[148] See Somerset v. Stewart (1772) 98 Eng. Rep. 499 (K.B.).

[149] See Dred Scott v. Sandford, 60 U.S. 393, 470 (1857) ("This was an action of trespass *vi et armis* . . . for the recovery of freedom for himself, his wife, and two children.").

[150] See Kevin Costello, Habeas Corpus and Military and Naval Impressment, 1756–1816, 29 J. Leg. Hist. 215, 215 n.3 (2008) (collecting cases); see also Tarble's Case, 80 U.S. 397, 397–98 (1871) (describing father's attempt to use the writ of habeas corpus to discharge his son from the Army).

[151] See, e.g., Rostker v. Goldberg, 453 U.S. 57, 61–63 (1981) (describing suit challenging military draft as unconstitutional).

[152] See Blackburn v. Moore, 89 So. 745, 745 (Ala. 1921) ("Any matter affecting a child may become a subject of chancery jurisdiction; and it is immaterial whether it is brought . . . [by] writ of habeas corpus." (quoting Woodruff v. Conley, 50 Ala. 304, 304 (1874))).

More recent cases confirm the same principle. Most prominently, in *Brown v. Plata*, the Supreme Court affirmed that the Prison Litigation Reform Act ("PLRA") gives federal courts the power to enter "prisoner release order[s]" to "remedy constitutional violations" relating to prison conditions.[153] Thus, under the PLRA, courts can order prisons to drastically cut their populations, even when that would require releasing large numbers of persons who had been convicted of state crimes.[154] But the text of the PLRA only states when such relief may *not* be granted; it never explicitly grants courts the authority to order prisoner releases.[155] Still, in *Plata*, the Court affirmed a lower court's order that was "the functional equivalent of 46,000 writs of habeas corpus."[156]

The Court's new rule also could not affect the availability of identical relief pursuant to petitions for habeas corpus in state courts, or pursuant to any other cause of action available at state law. Although there are cases where it has been held that state courts cannot order release from some forms of federal detention,[157] those concerns are not implicated by cases within *Preiser*'s scope, which apply only to state incarceration. In fact, prisoners can even, in some narrow circumstances, seek habeas relief in the courts of one state to challenge unconstitutional actions by a prison in another state.[158] So, if the Court were to hold that federal habeas corpus is exclusive in the remedies that it offers to state prisoners, barring explicit statements to the contrary, that limitation would only apply to acts of Congress, and not to any remedies created under state law.

Creating such a rule of construction out of whole cloth with no basis in any congressional action or historical practice would be a pure act of judicial imagination. The only thing that would have been special about federal habeas corpus to Congress in the mid-nineteenth century was that it had certain benefits that other actions in law or equity did not. For example, writs of habeas corpus could be filed repeatedly in different

[153] 563 U.S. 493, 526 (2011); 18 U.S.C. § 3626(a)(3).

[154] See *Plata*, 563 U.S. at 501–02 (stating that the California prison system had been operating at nearly 200% of design capacity and was being ordered to reduce to 137.5% of design capacity).

[155] See § 3626(a)(3).

[156] *Plata*, 563 U.S. at 560 (Scalia, J., dissenting).

[157] See Tarble's Case, 80 U.S. 397, 407–08 (1871).

[158] See Barrett v. Peters, 383 P.3d 813, 814–15 (Or. 2016) (describing prisoner who was convicted in Oregon, transferred to Florida, and then filed petition for habeas corpus in Oregon challenging the actions of his Florida jailer as violating the Oregon Constitution).

courts without any worry about doctrines of preclusion.[159] And, of course, habeas corpus had constitutional protections[160] that did not apply elsewhere. But nothing about those additional features has previously been interpreted as limiting other causes of action that would also apply in parallel. Nor is there any principled basis for such a limitation. Of course, habeas corpus allowed prisoners to challenge some violations of rights for which no relief was available otherwise. But § 1983 itself also broke new ground and allowed a great many legal challenges that would not previously have been possible.[161]

In short, if *Preiser* goes, no part of its current scheme of limitations can be left behind. The Court's broader limits on § 1983, including suits that challenge constitutional violations prior to confinement, would be wiped out as well.

III. THE IMPLICATIONS OF THE NEW REGIME

If the Supreme Court were to adopt Justice Gorsuch's reasoning and overrule *Brown v. Allen*, which Justice Gorsuch argued was the key case that expanded the scope of habeas review beyond merely jurisdictional questions,[162] the many statutory limitations imposed by Congress on federal habeas petitions would be almost entirely irrelevant.

But § 1983 would come with its own baggage, and it is difficult to state conclusively that state prisoners would be better or worse off. The following Section delves into a few of the most pertinent differences that would distinguish the new regime of prisoner suits, both in terms of legal doctrine and in practical results.[163] It concludes that while *res judicata* principles would bar a significant portion of § 1983 suits that might be allowed by habeas corpus, many would still survive. Meanwhile, many suits that would be barred by limitations on successive habeas petitions would be allowed to proceed if brought under § 1983. Finally, prisoners

[159] See McCleskey v. Zant, 499 U.S. 467, 479 (1991).

[160] U.S. Const. art. I, § 9.

[161] See supra notes 1–7 and accompanying text.

[162] See Edwards v. Vannoy, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring).

[163] For a thorough discussion of the differences between suits under § 1983 and applications for habeas corpus as of 1990, see Schwartz, supra note 23, at 98–111. Professor Schwartz concludes that "state prisoners and their attorneys view section 1983 as the preferred remedy." Id. at 111. Much has since changed in the law of habeas corpus, but because the effect of those changes has generally been to narrow, rather than to expand, the availability of relief, Professor Schwartz's conclusion is likely still valid. See Felker v. Turpin, 518 U.S. 651, 664 (1996) (stating that AEDPA "further restricts the availability of relief to habeas petitioners").

proceeding through § 1983 would not be required to exhaust state remedies and would have some attorney's fees available if they prevailed. On balance, prisoners would likely be better off with § 1983 than they would have been with habeas corpus.

A. Res Judicata

If habeas corpus were to be broadly replaced with suits under § 1983, the single most significant difference would be the applicability of *res judicata* principles. *Res judicata* encompasses two different, but related, doctrines: in contemporary parlance they are called issue preclusion and claim preclusion.[164] Issue preclusion applies to prohibit a party to a suit from attempting to relitigate a question that has already been answered in a different suit.[165] Claim preclusion prohibits a party from raising claims in a suit that arise from the same factual circumstances as a previous suit, such that the newly raised claims could have been raised in the previous suit and doing so would have conserved judicial resources.[166]

The Supreme Court has held that, formally, neither issue preclusion nor claim preclusion apply to habeas corpus.[167] But the reality is slightly more complicated. Claims that could have been raised in state court but were not will often fail exhaustion requirements and be procedurally defaulted.[168] The doctrine of procedural default generally prevents prisoners from raising claims in a habeas petition that could have been raised on direct appeal and were not.[169] And although issue preclusion does not apply to bar relitigation of questions that were answered by state courts, prisoners are still barred from reraising claims that have been rejected in previous collateral attacks.[170]

Still, as far as preclusion is concerned, the regime under habeas corpus is more generous than what would exist under § 1983. The Supreme Court has held that both issue preclusion and claim preclusion directly apply to

[164] See Brownback v. King, 141 S. Ct. 740, 747 n.3 (2021); Lee Kovarsky, Preclusion and Criminal Judgment, 92 Notre Dame L. Rev. 637, 643 (2016).

[165] See Kovarsky, supra note 164, at 643.

[166] Id.

[167] See Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980); Preiser v. Rodriguez, 411 U.S. 475, 497 (1973) ("Principles of res judicata are, of course, not wholly applicable to habeas corpus proceedings.").

[168] See Woodford v. Ngo, 548 U.S. 81, 92–93 (2006).

[169] See Shinn v. Ramirez, 142 S. Ct. 1718, 1727–28 (2022).

[170] See 28 U.S.C. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.").

§ 1983.[171] That means that, although prisoners may be able to bring suits challenging rights violations that occurred during an investigation or trial, those suits would often be easily disposed of if the prisoner raised the same argument previously in state court or could have.

But that is not to say that preclusion would render § 1983's availability to be without value to prisoners currently relegated to habeas corpus. Claims like the ones in *Preiser v. Rodriguez*, that arose based on the conduct of prison officials,[172] would not have been previously raised in state court and could not have been, as the violations at issue would have occurred after those proceedings were finalized.

More importantly, at least two paradigmatic constitutional violations raised by prisoners would still, in many cases, be available grounds for relief: *Brady* violations and claims of ineffective assistance of counsel. A *Brady* violation occurs when the state violates a defendant's due process rights by withholding evidence that could be exculpatory.[173] And a prisoner can bring a claim for ineffective assistance of counsel if their counsel's representation "fell below an objective standard of reasonableness" and there is a reasonable probability that, had it not been for their counsel's deficient performance, the proceeding would have had a different outcome.[174] Both types of claims are based on factual premises that are often unknown to prisoners during their initial trial and appeal.[175] Assuming that the *Brady* violation or claim of ineffective assistance was not raised in the trial proceedings or on direct appeal, issue preclusion would not apply. Claim preclusion is a more complicated question, but it would be difficult to argue that a prosecutor's failure to divulge exculpatory evidence is an issue that "could have been raised"[176] in the

[171] See *Allen*, 449 U.S. at 98 ("[T]he legislative history of § 1983 does not . . . suggest that Congress intended to repeal . . . the traditional doctrines of preclusion."); 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.").

[172] See 411 U.S. 475, 477–82 (1973).

[173] See Smith v. Cain, 565 U.S. 73, 75 (2012) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

[174] See Hinton v. Alabama, 571 U.S. 263, 272 (2014) (quoting Padilla v. Kentucky, 559 U.S. 356, 366 (2010)).

[175] See Ahdout, supra note 17, at 161–62; cf. Thea Johnson, What You Should Have Known Can Hurt You: Knowledge, Access, and *Brady* in the Balance, 28 Geo J. Legal Ethics 1, 3 (2015) (discussing trend in federal courts of holding that *Brady* does not apply when defendant knew or should have known the exculpatory information that the prosecution did not disclose).

[176] See Lucky Brand Dungarees v. Marcel Fashions Grp., 140 S. Ct. 1589, 1594 (2020).

initial proceeding. At the very least, several federal circuits have held that claim preclusion does not bar suits based on newly discovered evidence if the evidence was fraudulently concealed or could not have been discovered with due diligence.[177]

And neither category of claims is a rarity, to put it mildly. *Brady v. Maryland* and *Strickland v. Washington*, which set the standard for ineffective assistance claims, are among the most-cited Supreme Court opinions by federal courts.[178] So, while some significant portion of prisoners' suits under § 1983 might be resolved by *res judicata*, a great many of the most commonly raised claims would still survive.

B. Successive Suits

Although the introduction of preclusion into prisoner suits under § 1983 would bar some previously available claims, § 1983 would come with its own advantages for litigants. Most importantly, the currently rigid limitations on successive habeas petitions would evaporate. Successive habeas petitions are regulated both by a complex body of judge-made doctrine and by explicit statutory text.[179] For state prisoners, the relevant statutory provisions are in 28 U.S.C. § 2244(b). That subsection states that claims in "second or successive" habeas applications are to be dismissed unless they fit into two narrow exceptions: either that the claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or that the claim's "factual predicate . . . could not have been discovered previously through the exercise of due diligence" and those facts are such that "no reasonable factfinder would have found the applicant guilty of the underlying offense."[180] In addition, any such successive application must be pre-authorized by a court of appeals before it can be filed in a district court.[181]

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[177] See, e.g., Lenox MacLaren Surgical Corp. v. Medtronic, Inc., 847 F.3d 1221, 1244 (10th Cir. 2017).

[178] Adam N. Steinman, The Rise and Fall of Plausibility Pleading?, 69 Vand. L. Rev. 333, 390–91 (2016) (listing *Strickland v. Washington*, 466 U.S. 668 (1984), as the sixth most cited case by federal courts and *Brady v. Maryland*, 373 U.S. 83 (1963), as the thirty-fifth).

[179] See Banister v. Davis, 140 S. Ct. 1698, 1705–06 (2020) (stating that determining what qualifies as "second or successive" under 28 U.S.C. § 2244 requires evaluating whether the filing "would have 'constituted an abuse of the writ, as that concept is explained in . . . pre-AEDPA cases' " (quoting Panetti v. Quarterman, 551 U.S. 930, 947 (2007))).

[180] 28 U.S.C. § 2244(b)(2)(B)(ii).

[181] Id. § 2244(b)(3)(A).

No similar limitations apply to § 1983 suits. To be sure, many successive suits would be disposed of as resolved by principles of preclusion. But in situations where preclusion does not apply, the bar would be substantially lower for a successive § 1983 suit than it is currently for successive habeas petitions. Once again, the example of a *Brady* violation is illustrative. Although *Brady* violations might currently be covered by § 2244(b)(2)(B), which allows successive habeas petitions based on newly discovered facts, the requirements of that subsection pose significant obstacles: the petitioner has the burden to show, "by clear and convincing evidence," that given those facts, "no reasonable factfinder would have found [them] guilty of the underlying offense."[182] That is significantly more than is required to establish "materiality" under *Brady*. Although the *Brady* standard varies based on the prosecutor's specific conduct, it generally only requires a showing that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[183] So, there would be many situations where a successive suit claiming a *Brady* violation would have been barred under the current habeas regime, but would be allowed if proceeding through § 1983. The same would be true of other commonly raised claims, such as, again, ineffective assistance of counsel: even when a claim might have been successful, it can still be barred if it is successive.[184]

C. Exhaustion

Both *Preiser* and *Heck v. Humphrey* arose in situations where prisoners' claims would have failed exhaustion requirements if they had been brought as habeas petitions. The same was true of many of the cases prior to *Preiser* in lower federal courts where prisoners had sought release from prison by filing § 1983 actions.[185] Exhaustion of state remedies was

[182] Id. § 2244(b)(2)(B)(ii); see also Justin F. Marceau, Is Guilt Dispositive? Federal Habeas After *Martinez*, 55 Wm. & Mary L. Rev. 2071, 2110 (2014) (describing *Brady* claim in second habeas petition as failing to surmount the obstacles posed by § 2244(b)(2)(B)(ii)).

[183] See United States v. Bagley, 473 U.S. 667, 682 (1985).

[184] See, e.g., Felder v. McVicar, 113 F.3d 696, 698 (7th Cir. 1997) (petitioner barred from raising ineffective assistance of counsel claim that had been previously raised); In re Everett, 797 F.3d 1282, 1291 (11th Cir. 2015) (petitioner barred from raising ineffective assistance of counsel claim that had not been previously raised).

[185] See United States ex rel. Hunter v. Bibb, 249 F.2d 839, 839 (7th Cir. 1957); In re Ryan, 47 F. Supp. 1023, 1023 (E.D. Pa. 1942); Johnson v. Walker, 317 F.2d 418, 419 (5th Cir. 1963);

a judicially imposed requirement on habeas petitions[186] before it was eventually codified by § 2254(b)(1)(A). As it is defined in an adjacent subsection, state remedies are not exhausted if the prisoner "has the right under the law of the State to raise, by any available procedure, the question presented."[187] Because state remedies can often take substantial time to exhaust and state court findings of fact will be held against the prisoner in many cases,[188] the exhaustion requirement is a significant hurdle to state prisoners who wish to have their claim adjudicated by a federal court.[189] Because § 1983 does not require plaintiffs to have exhausted state remedies,[190] it would often be the preferable avenue to seeking relief, if it were available.

D. Attorney's Fees

Finally, although there are some limitations specific to prisoners,[191] federal courts are authorized by statute to award attorney's fees to plaintiffs who prevail in § 1983 suits.[192] Generally, courts may not decline to grant attorney's fees to prevailing plaintiffs when Congress has authorized those fees to be granted.[193] But without such authorization, a court has no discretion to award attorney's fees.[194] There is no statutory authorization to grant attorney's fees for federal prisoners who prevail on writs of habeas corpus.[195]

The opportunity to recover attorney's fees creates powerful incentives that allow prisoners to obtain counsel for civil rights suits.[196] Indeed,

DeWitt v. Pail, 366 F.2d 682, 685 (9th Cir. 1966); Peinado v. Adult Auth. of Dep't of Corr., 405 F.2d 1185, 1186 (9th Cir. 1969).

[186] See Fay v. Noia, 372 U.S. 391, 453 (1963) (Harlan, J., dissenting); Bator, supra note 13, at 483–84.

[187] See 28 U.S.C. § 2254(c).

[188] See id. § 2254(e)(1) ("In a proceeding . . . for a writ of habeas corpus . . . a determination of a factual issue made by a State court shall be presumed to be correct.").

[189] See Schwartz, supra note 23, at 103.

[190] Monroe v. Pape, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

[191] See 42 U.S.C. § 1997e(d).

[192] Id. § 1988(b).

[193] See Schwartz, supra note 23, at 105–06; Newman v. Piggie Park Enters., 390 U.S. 400, 402–03 (1968).

[194] See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269 (1975).

[195] Schwartz, supra note 23, at 106.

[196] See Randal S. Jeffrey, Facilitating Welfare Rights Class Action Litigation: Putting Damages and Attorney's Fees to Work, 69 Brook. L. Rev. 281, 316–17 (2003) ("Not only can

without the benefit of statutes awarding fees to prevailing plaintiffs, many or most parties bringing § 1983 suits would be otherwise unable to secure representation at all.[197] Meanwhile, through various statutes, Congress has attempted to disincentivize litigation by prisoners, as their suits have increasingly flooded federal court dockets.[198] But a shift from habeas corpus to § 1983 would result in headwinds to those efforts: Congress would be discouraging prisoner suits with one hand and incentivizing them with the other.

IV. IS THIS REASONABLE STATUTORY INTERPRETATION?

It might seem counter to common sense to allow federal prisoners to avoid explicit statutory bars on successive habeas petitions, exhaustion requirements, and the possibility of procedural default simply by proceeding through a § 1983 action when it appears clear that Congress drafted those limitations to apply to these very claims.[199] But there are reasons why this objection has less force than it may immediately seem.

Most prominently, the exact same point could be, and has been, made regarding Justice Gorsuch's argument generally.[200] As commentators have pointed out, whether or not habeas corpus was historically intended to only allow inquiry into a state court's jurisdiction, Congress has made it abundantly clear through its many revisions to the statutes authorizing

§ 1988 potentially provide the funding necessary for attorneys to pursue welfare rights litigation, but the way courts calculate attorney's fees provides added incentives for nonprofits to pursue such litigation."); Clive B. Jacques & Jack M. Beermann, Section 1983's "And Laws" Clause Run Amok: Civil Rights Attorney's Fees in Cellular Facilities Siting Disputes, 81 B.U. L. Rev. 735, 767 (2001) (stating justification for § 1988 fees as "giving civil rights victims effective access to the courts and giving members of the bar an economic incentive to act as 'private attorneys general' by aiding civil rights enforcement").

[197] See Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. Ill. L. Rev. 183, 205–06 ("[M]ost civil rights plaintiffs are unable to afford counsel and without a fees statute, the available counsel would be limited to attorneys willing to represent them pro bono.").

[198] See Brandon L. Garrett, Aggregation in Criminal Law, 95 Calif. L. Rev. 383, 445–46 (2007) (describing one purpose of habeas as to provide "procedures designed to discourage baseless claims and to keep the system open for valid ones"); Marin K. Levy, Judging the Flood of Litigation, 80 U. Chi. L. Rev. 1007, 1043–44 (2013). In addition, very few habeas petitions are actually granted. See Margaret A. Upshaw, The Unappealing State of Certificates of Appealability, 82 U. Chi. L. Rev. 1609, 1615 (2015) ("In other words, over 99 percent of noncapital habeas petitions are denied.").

[199] See Preiser v. Rodriguez, 411 U.S. 475, 489–90 (1973).

[200] See Siegel, supra note 30, at 537 ("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.").

habeas corpus that habeas applications are now the intended vehicles for prisoners' claims of constitutional violations at trial.[201] And, as the Supreme Court has acknowledged many times before, "judgments about the proper scope of the writ are normally for Congress to make."[202] Although no statute *requires* federal courts to issue writs of habeas corpus to prisoners who establish that their incarceration is the result of a constitutional violation, a multitude of statutory sections clearly imply or suggest that that will occur.[203] In other contexts where the Court has interpreted a statute and Congress has subsequently enacted more law that depends on the Court's interpretation of that statute, the Court has treated that ratification as "validation" that puts the statute's meaning "beyond dispute."[204] Ignoring the many provisions of federal habeas statutes that unambiguously assume that they will be used by prisoners who have been sentenced by courts of competent jurisdiction to challenge alleged constitutional violations at trial is directly contrary to that principle.

For example, courts are limited to "entertain[ing]" applications for habeas relief "only on the ground that [a prisoner] is in custody in violation of the Constitution or laws or treaties of the United States."[205] How a challenge to a state court's jurisdiction would interact with this description is an interesting question. The jurisdiction of state courts is a matter of state law, not "the Constitution or laws or treaties of the United States."[206] And while it would doubtless violate a prisoner's due process to be incarcerated pursuant to the judgment of a state court that lacked jurisdiction,[207] the only substantial questions raised would be questions of state law.[208] Other references to constitutional claims also populate federal habeas statutes. Claims in successive habeas petitions must be

[201] Id. at 532–33.

[202] See Felker v. Turpin, 518 U.S. 651, 664 (1996) (internal quotation marks omitted) (quoting Lonchar v. Thomas, 517 U.S. 314, 323 (1996)).

[203] See Siegel, supra note 30, at 537.

[204] See Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001) (recognizing that 42 U.S.C. § 2000d-7 had "ratified" the Court's decision in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), which held that a private right of action existed under Title IX).

[205] 28 U.S.C. § 2254(a).

[206] See Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981) (stating that the subject matter jurisdiction of state courts is "governed in the first instance by state laws").

[207] See, e.g., Wright v. West, 505 U.S. 277, 298 (1992) (O'Connor, J., concurring) ("Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction . . . ." (quoting Twining v. New Jersey, 211 U.S. 78, 110 (1908))).

[208] Cf. Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960) (stating that due process "deals neither with power nor with jurisdiction, but with their exercise").

dismissed unless "the applicant shows that the claim relies on a new rule of constitutional law."[209] And the statute of limitations of habeas corpus in some cases runs from "the date on which the constitutional right asserted was initially recognized by the Supreme Court."[210] All of these statutory requirements and subsections would be rendered entirely superfluous if the only question that could be evaluated in a habeas petition was whether the court of conviction had jurisdiction. It is difficult to imagine a more substantial violation of canons of statutory interpretation.[211]

And it is clear that statutory interpretation is the project at hand. Justice Gorsuch does not argue that it is outside of Congress's constitutional powers to give state prisoners an avenue to seek release from incarceration when that incarceration resulted from a constitutional violation. Nor could he. Section 5 of the Fourteenth Amendment explicitly grants Congress the "power to enforce, by appropriate legislation, the provisions of [the Amendment]."[212] And "no one doubts that § 5 grants Congress the power to enforce . . . the provisions of the Amendment by creating private remedies against the States for *actual* violations of those provisions."[213] Furthermore, Justice Gorsuch reaches his conclusion by interpreting the statutes authorizing federal courts to grant habeas relief, relying on the use of the word "may" in § 2241(a) to justify the "equitable discretion" that, in his view, allows federal courts to restrict habeas relief to state prisoners.[214]

Reading neither § 1983 nor federal habeas statutes to reach unconstitutional actions by state officials that result in confinement would also require willful blindness to the historical context in which the statutes were enacted. Such an interpretation would imply that both the Civil Rights Act of 1871, which created a broad cause of action for civil rights violations against state officers, and the Habeas Corpus Act of 1867, which extended habeas relief for the first time to every state prisoner, were drafted to entirely exempt whole categories of constitutional claims

[209] 28 U.S.C. § 2244(b)(2)(A).

[210] Id. § 2244(d)(1)(C).

[211] Cf. Duncan v. Walker, 533 U.S. 167, 174 (2001) ("It [has been] said that a statute ought . . . to be so construed that . . . no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)).

[212] U.S. Const. amend. XIV, § 5.

[213] United States v. Georgia, 546 U.S. 151, 158 (2006) (omission in original) (internal quotation marks omitted).

[214] See Edwards v. Vannoy, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring).

from any remedy, with the only dispositive factor being whether the state had managed to put the claimant in prison. This is an odd conclusion, not only because neither statute says anything of the sort, but also because that result would imply that Congress at the time had complete faith in state criminal justice systems. In fact, a great deal of evidence indicates the opposite.[215] For example, one of the primary evils at which the Civil Rights Act was directed was the exclusion by law of Black citizens as witnesses and from juries, which resulted both in crimes against Black victims going unpunished[216] and Black defendants facing biased panels predisposed to find them culpable.[217]

In summary, this reading of the relevant statutes is no more implausible than reading them to bar habeas relief for violations of constitutional rights outright. This is especially so because the same procedural limitations that would be nullified by allowing prisoners to proceed through § 1983 would already be effectively nullified by Justice Gorsuch's narrowing of habeas corpus, as the writ would largely lose its application altogether. So, if the Supreme Court is willing to accept Justice Gorsuch's proposition, it should not blink at accepting this collateral effect as well.

CONCLUSION

In his concurrence in *Edwards*, Justice Gorsuch set out to replace the often-incomprehensible tangle of habeas corpus law with a simple and straightforward rule. Although the inclination is understandable, his effort was ultimately misguided. Barring federal prisoners from raising civil rights claims through habeas applications would merely displace those claims to § 1983. And there, if Congress wanted to preserve the resources

[215] See, e.g., Cong. Globe, 42d Cong., 1st Sess. 333 (1871) ("Suppose . . . that the constitution of the State all the time declaring that there shall be punishment of crime, to a particular class of citizens there is no criminal remedy enforced for any crime committed upon them."); S. Rep. No. 42-1, at 11–12 (1871) (describing prisoners being tortured and being hung by their necks or their thumbs to extort confessions). By most accounts, state criminal justice systems are not entirely reformed. See Ahdout, supra note 17, at 160 ("The largescale and often systemic violations of federal constitutional rights that occur in the state system are well documented.").

[216] See generally Blyew v. United States, 80 U.S. 581 (1871) (a Black woman was murdered by two white men and no witnesses to the murder were allowed to testify at trial because they were Black).

[217] See Strauder v. West Virginia, 100 U.S. 303, 304 (1879); see also Virginia v. Rives, 100 U.S. 313, 315 (1879) (describing two Black men charged with murder in Virginia facing a jury on which only white people were allowed serve).

of federal courts as it hoped to through AEDPA, it would have to replicate a similar regime of procedural obstacles and restrictions to govern the resulting civil rights suits. In the end, such a doctrinal move would cause much confusion and have limited, likely undesirable results. It might be, to some, normatively desirable for the vast majority of habeas applications to be quickly disposed of without requiring substantive inquiry by courts. But such a fundamental rewriting of federal habeas relief can only be accomplished through the constitutionally prescribed pathway for such material alterations in federal law: legislation.[218]

[218] Cf. Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975, 1990 (2017) (Gorsuch, J., dissenting); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring).