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Response

Habeas Myths, Past and Present

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Introduction

History is high-stakes narrative, so myths can be stubborn things. And because myths validate social practices, how they're embraced or disputed can depend on who's talking. Habeas corpus is a site of particularly energetic mythmaking, for its history is long and it is an instrument of great political power. In *The Myth of the Great Writ* ("*Myth*"), University of Michigan Law Professor Leah Litman trains her sights on one of two dominant habeas narratives.[1] This Response focuses on the other one, and I hope to expose some common features of the two revisionist projects.

Professor Litman focuses on what others sometimes call the "whig" version of habeas history.[2] On that account, the privilege matured alongside modern tastes for freedom and democracy.[3] Under the fierce protection of legislative bodies, the habeas writ liberated virtuous prisoners, severed the despotic yoke of tyrants, and generally promoted human progress. Litman scrutinizes three clusters of habeas practice—the law of slavery and freedom, Native American affairs, and immigration—which explode this rosy account. In so doing, Litman casts her lot with an increasingly vocal academic cohort

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1. Leah M. Litman, *The Myth of the Great Writ*, 100 TEXAS L. REV. 219 (2021).

2. *Myth* includes only passing reference to whig habeas histories, although Professor Litman's article is squarely within the category of whig-story skeptics.

3. *See* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 944–45 (2011) (explaining the relationship between Professor Paul Halliday's field-defining work, *Habeas Corpus: From England to Empire*, on the common law habeas privilege and the Whig histories that Herbert Butterfield attacked in the 1930s); *see also* PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010).

of whig-story skeptics. As part of that cohort, I respond from a place of deep sympathy and agreement.[4]

In responding, I want to situate Professor Litman's work in the broader academic discourse over the role of habeas history. The Supreme Court, moreover, remains in the habeas mythmaking business, even if the myth in current production differs from whig variants. Ironically, this other myth inverts a crucial feature of the whig histories: the idea that habeas corpus is a powerful remedy. Specifically, this other narrative conjures a simplified legal history in which federal judges lacked, until 1953, habeas power to review nonjurisdictional defects in criminal convictions. On this telling, *Brown v. Allen* (1953)[5] ruptured the steady state. Justice Neil Gorsuch is leading a charge to return postconviction practice to that mythical past with the full support of Justice Thomas and, to varying degrees, other Justices appointed by Republican presidents. The Gorsuch account, however, is more narrative than history; it is a myth recited to secure a specific set of normative objectives.[6]

I proceed in three parts. In Part I, I discuss Professor Litman's work on the whig myth. In Part II, I introduce the coexistent habeas myth that is gaining support on the Supreme Court: the idea that, before 1953, habeas power to review convictions was limited to instances of jurisdictional error. In Part III, I explore the historical errors in that postconviction narrative. My overarching objective in the latter parts of this Response is to expose Justice Gorsuch's project as mythmaking—complete with some legitimating and dialogic functions that Litman articulates—rather than as a careful attempt to capture the evolution of habeas law.

I. The Litman Account and Habeas Power

Myth is an essential work in a literature skeptical of whiggish habeas histories.[7] What Professor Litman adds to the skeptical content is indispensable evidence, as well as a rich descriptive account of the mechanisms by which habeas power promoted colonialism and subordination—rather than freedom and liberty. She thereby invigorates a

4. *See, e.g.*, Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753 (2013) (exploring the consequences of the whig narrative's tendency to analyze habeas through a rights framework).

5. 344 U.S. 443 (1953).

6. I use the word "myth" to refer to the function that the history plays in securing the aligned normative objectives. One might reasonably object that the whig history is closer to what one typically means when using the word "myth" because the whig account glorifies the privilege. The normative objectives associated with the Gorsuch history are less universally beloved, although certain legal communities certainly regard finality and federalism as virtues. Still, my analytic point remains true whether the word "myth" is the perfect term or not; histories validate aligned normative ideas, so histories can be works of considerable and ambitious invention.

7. *See generally* Vladeck, *supra* note 3; Kovarsky, *supra* note 4.

major tenet of skepticism: it's easier to understand the role of habeas corpus in the Anglo–American legal order if we think about the writ as a judicial power and not as a right. Like any other power, Litman observes, its virtues depend on who's using it and how: "The functions habeas performs depend in part on who is invoking the writ, for what end, and what the law external to habeas is."[8]

Part I is about the gulf between the whig histories and historical reality that Professor Litman captures. I map that divide not only so that I may do service to Litman's contributions but also so that I may stage the remaining portions of this Response. Both the whig histories and Litman's account share a common view of the habeas writ as a robust remedy capable of reaching virtually any detention—even as those accounts reflect very different ideas about the relationship between that power and human progress.

A. Whig Skeptics

The habeas writ was a storied fixture of English law even before it was swept into the mythmaking crucible of the American Revolution.[9] But King George III's six Revolutionary suspensions were reviled by the American colonists, so the Suspension Clause represented a stark and particularly symbolic rebuke of English tyranny.[10] Law-office history, unfortunate scholarship, and a preoccupation with Blackstone's Commentaries carried the whig myth forward. Americans arrived at a morally perfected historical moment, the story goes, because of an unwavering commitment to freedom and human flourishing—that's a better story than a here-and-now that bears the taints of oppression and subordination. The high point of whig influence on Supreme Court decision-making is likely the problematic history in Justice Brennan's opinion for the Court in *Fay v. Noia*.[11]

In what one might call the defining work of whig skepticism, Professor Paul Halliday put it memorably:

> [I]ts past has been written less as a history than as an exercise in legal narcissism. Through our celebrations of habeas corpus, the Anglo-American liberal mind has praised its uniqueness. It proclaims itself the result of an inescapable process, begun in a misty past, carried through Magna Carta, past a tyrannical king or two, and finally to its

8. Litman, *supra* note 1, at 284.

9. *See* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575, 593–613 (2008) (summarizing English practice).

10. *See* U.S. CONST. art. I, § 9, cl. 2.

11. 372 U.S. 391 (1963), *overruled by* Wainwright v. Sykes, 433 U.S. 72 (1977), *and abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991). The most fulsome academic defense of the story in *Noia* is in Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

> triumph: the realization of all that the writ portended with the help of democratic impulses working through statute-making bodies, whether British Parliaments, colonial assemblies, or American Congresses. This makes an appealing story, in part because we believe—or hope—that it arrives in us.[12]

Halliday laid waste to the whig take on English habeas practice, relying on his multicentury survey of understudied King's Bench records to show that common law judges creatively used habeas process to aggrandize judicial power.[13]

Professor Halliday was compiling his research just as the Supreme Court was deciding *Boumediene v. Bush* (2008),[14] the landmark case holding that the Constitution guaranteed habeas process to prisoners held at Guantánamo Bay, Cuba. *Boumediene* relied heavily on Halliday's work, then available only as part of a co-authored article draft.[15] (The other author was Professor G.E. White.) *Boumediene* was a high point for whig skeptics, as the Court took a particularly rigorous approach to its historical inquiry. It eschewed the idiom of individual rights, focused on the common law habeas power, and was unusually willing to acknowledge indeterminacy in the historical record.

Other scholarship followed, stitching Professor Halliday's historical work into broader theories about how habeas operated in the American constitutional environment. Professor Steven Vladeck and I, for example, separately argued that the whig narrative glossed the privilege as a "right" or "liberty" rather than as an expression of judicial power.[16] The rights orientation led courts and commentators to slice detention into custody categories for which the detained person is "entitled" to habeas process. That inquiry, in turn, fueled an originalist focus on whether a prisoner belonging to a particular custody category actually got relief in the prefounding period of interest. The rights orientation obscures a story about judicial power that was more faithful to the writ's institutional function: if a person was in sovereign custody, a judge has authority to review it.

Enter Professor Litman, whose three case studies—on the law of slavery and freedom, Native American affairs, and immigration—focus on habeas as a form of power. If habeas is conceptualized as a feature of judicial power, then it is much easier to discern that power's capacity to control and

12. HALLIDAY, *supra* note 3, at 2 (endnote omitted).

13. The influence of Professor Halliday's research notwithstanding, there are also important authorities, including Professor Amanda Tyler, arrayed against the proposition that common law habeas practice was more interpretively significant than practice under the 1679 Habeas Corpus Act. *See, e.g.*, AMANDA L. TYLER, HABEAS CORPUS IN WARTIME: FROM THE TOWER OF LONDON TO GUANTANAMO BAY (2017).

14. 553 U.S. 723 (2008).

15. *See* Boumediene v. Bush, 553 U.S. 723, 740, 747, 752 (2008); *see generally* Halliday & White, *supra* note 9.

16. See Vladeck, *supra* note 3, at 944–45; *see generally* Kovarsky, *supra* note 4.

subordinate. Using her case studies as primary-source support, Litman sketches three mechanisms by which habeas practice "became part of the legal regime for American colonialism."[17] Habeas practice (1) legitimated detention schemes,[18] (2) relied on race and citizenship to establish the terms of membership and exclusion,[19] and (3) facilitated a dialogue between the courts and political branches that produced lawful forms of colonialism and subordination.[20]

Professor Litman's case studies and her framework are remarkable contributions. Although there had been work in each of the three contexts that Litman features, she digs deeper than did those who came before her. She also sets forth the most sophisticated analytic framework ever offered for understanding the more unsavory qualities of the privilege. She has given the academic community a vocabulary, a data set, and an approach for thinking about the rhetorical excess of our habeas discourse.

B. Two Myths, Two Takes on Power

The gauzy whig myth that Professor Litman subjects to withering critique persists, but it no longer commands the narrative energy of the Supreme Court. Explaining the Court's current mythmaking project requires readers to understand the basic way a habeas case unfolds—what it means to "test" detention, so to speak. A habeas writ formally orders a jailer to bring a prisoner to a judge so the judge can evaluate whether the custody is lawful. Questions about whether the underlying custody is justified (lawful) are analytically distinct from questions about habeas power to order a jailor to justify it. So, with respect to the whig myth that concerns Professor Litman, there are two different historical propositions at work: (1) that the habeas privilege entailed a broad power, and (2) that the power was universally exercised in progress- and freedom-enhancing ways. Disentangling these two propositions across the case studies is important for reasons that will become clearer in Part II.

The whig myth and Litman's critical review converge on a common view of the first historical proposition: habeas power is broad. On the whig histories, a broad habeas power (proposition 1) was essentially progress-enhancing and antisubordinating (proposition 2). By contrast, Litman uses her case studies to show that broad habeas power (proposition 1) permitted courts to do some pretty ugly things (proposition 2). Habeas jurisdiction was broad enough to reach any type of custody, allowing the Court to formulate the plenary power doctrine in immigration cases and induce legislation that

17. Litman, *supra* note 1, at 232.
18. *Id.* at 232–46.
19. *Id.* at 246–51.
20. *Id.* at 251–55.

subordinated Native people.[21] The privilege entailed broad discharge powers that were used to protect slave catchers.[22] Courts conceptualized habeas power so broadly that they used it as a means of adjudicating *private* custody of slaves.[23] And so forth.

In other words, Professor Litman shows how the whig myth gets the second proposition wrong. The habeas power was indeed thick, but it was not always an engine of human progress. And nothing about the mixed results of habeas power should be surprising; it is, after all, *power*. Sometimes courts blessed subordinating detention schemes, and sometimes they rejected them with instructions for rehabilitation, but they could not do either of those things without the logically antecedent power *to decide.* The interdepartmental dialogue about the nature of lawful custody simply could not take place unless there was power to adjudicate the underlying legal questions. That discourse helped generate the law of slavery, the legally sanctioned oppression of Native people, and plenary immigration power.

Professor Litman's work is consistent with the theory of habeas power that I have advanced over the years, and the specific area of complementarity is important to the argument I make here.[24] I have offered an originalist, structuralist case for treating habeas as judicial power and for eschewing the idiom of rights.[25] Professor Halliday had already shown that the power paradigm best captured (by far) the practice of English judges, and I theorized—and continue to believe—that we should treat that paradigm as having passed into American practice as part of the inherent power of Article III judges. I do not want to rehash the prior versions of that argument here, except to say that it is well supported both by Professor Halliday's work and by the plain text of the 1789 Judiciary Act, which gave habeas power to judges and not to courts.[26] This view of a thick constitutional guarantee is also at odds with the Supreme Court's more modern mythmaking enterprise.

II. The Ascendent Myth

In *The Whig Interpretation of History*, Herbert Butterfield argued at multiple levels of abstraction.[27] His most concrete targets were elegant narratives depicting Protestants and Whigs as heroic parliamentary allies in a manichean struggle against defenders of English stasis: Catholics, Tories, and the Crown. But his work was also a more abstract methodological

21. *See id.* at 252–53 (discussing effects of *Ex Parte* Crow Dog, 109 U.S. 556 (1883)).

22. *See id.* at 268.

23. *See id.* at 243–44.

24. Litman herself observes that her insights are consistent with a paradigm I have advanced for understanding the privilege. *See id.* at 260–61.

25. *See generally* Kovarsky, *supra* note 4.

26. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789).

27. HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1931).

critique of presentism—what he called the "pathetic fallacy" of organizing a history "by a system of direct reference to the present."[28]

There is an ascendant habeas narrative that is quite whiggish in this second, more abstract sense. That version of history might not be a tidy account of human progress, but it is very much an "anachronistic backward projection of present categories,"[29] narrated to ratify a preferred legal order. Roughly speaking, it exists to legitimate normative preferences for federalism and finality that disable most habeas review of criminal confinement. The narrative has been knocking around academia since Professor Paul Bator published his famous 1963 article in the Harvard Law Review,[30] but it only recently claimed a majority vote on the Supreme Court.

A. A Changing Purpose

Myths tend to ratify normative preferences, so it makes sense to look at the social and political projects that habeas narratives orbit. The whig myth's basic contours were fixed when there wasn't much criminal law. Eventually, however, American jurisdictions wrote dense criminal codes, and the Supreme Court announced new constitutional rules of criminal procedure that it also applied to states under the Fourteenth Amendment. There were more criminal convictions, and there was more constitutional law constraining each trial.

Broad habeas power suited a legal order that prioritized reform of criminal procedure, but reformers were not long for unchallenged institutional control. Tough-on-crime politics changed the public's punishment preferences, and the story of thin habeas jurisdiction developed a constituency. The insurgent (and more politically conservative) coalition was interested in limiting the impact of the Warren Court's criminal procedure revolution. On the underlying constitutional rights of criminal procedure, the more conservative coalition lost, and there was no recourse to Congress. But a habeas strategy proved a viable alternative. Critics could shrink the practical footprint of a constitutional right if they went after the remedy.

B. The Limited-Jurisdiction Narrative

Interests in finality and federalism animate a modern Supreme Court that is invested in a newer story about the limits of habeas power. The story goes something like this. Before *Brown v. Allen*,[31] the Court reserved

28. *Id.* at 30–31.

29. Michael E. Parrish, *Friedman's Law*, 112 YALE L.J. 925, 956 (2003).

30. Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

31. 344 U.S. 443 (1953).

postconviction review for allegations of jurisdictional error. That is, before 1953, federal courts lacked habeas power to review underlying allegations of trial error—even legal errors—that were nonjurisdictional. The central claims are that *Brown v. Allen* changed the steady state and that Justice Felix Frankfurter's opinion for the Court imaginatively reconstructed the 1867 Habeas Corpus Act to permit habeas relief for nonjurisdictional mistakes at trial.

The logical starting point for this account is the 1963 law review article by Professor Bator.[32] Bator recited a habeas history supporting the idea of a steady-state rule against postconviction relief for nonjurisdictional error.[33] Bator's full-and-fair model was a response to the whig myth, which had been given decisional life in *Fay v. Noia*.[34] Subsequent generations of legal conservatives (for lack of a better term) have canonized Professor Bator's interpretation of nineteenth-century habeas history.[35] Bator's account corrects the whig myth on matters both large and small, and that is to be commended. But Bator's account, and the work that builds on it, has its own problems.

The Bator-aligned narrative has three primary planks. First, at English common law, English judges lacked habeas power to review criminal convictions for anything other than jurisdiction.[36] Second, American judges long observed the rule that habeas power reached only convictions with jurisdictional defects.[37] Third, *Brown v. Allen* ruptured the steady state, transforming habeas corpus into what is effectively a new appellate proceeding.[38] I offer a critical perspective on this narrative in Part III, but my aim in Part II is more descriptive.

C. A New Champion, A New Cause

The historical claims have found a new champion in Justice Neil Gorsuch. In two recent opinions, he has endorsed an exaggerated version of Professor Bator's history. In *Edwards v. Vannoy*,[39] a 2021 decision about the rule of nonretroactivity, Justice Gorsuch wrote for himself and Justice Thomas.[40] And in *Brown v. Davenport*,[41] a 2022 decision about how to

32. *See* Bator, *supra* note 30.

33. *See id.* at 487–88.

34. 372 U.S. 391 (1963), 401 ("Although in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with the growth of fundamental rights of personal liberty.").

35. *See* Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 583 n.43 (1993).

36. *See* Bator, *supra* note 30, at 466 (stating at "common law that the writ [of habeas corpus] was simply not available at all to one convicted of crime by a court of competent jurisdiction").

37. *See id.* at 471.

38. *See id.* at 500.

39. 141 S. Ct. 1547 (2021).

40. *See id.* at 1566–69 (Gorsuch, J., concurring).

41. 142 S. Ct. 1510 (2022).

conduct harmless error inquiry in a federal habeas case, he wrote for the Court.[42] Neither decision involved issues that required lengthy historical asides, so the presence of habeas narratives in those opinions is conspicuous story building. (On at least three key propositions in *Davenport*, Gorsuch cites his concurring opinion in *Edwards*.[43])

Take *Edwards* first. In *Ramos v. Louisiana*,[44] the Supreme Court had held that the Constitution required unanimous verdicts to convict defendants of serious criminal offenses.[45] In *Edwards*, the Supreme Court had to decide whether *Ramos* was retroactive—whether prisoners could challenge, on non-unanimity grounds, convictions that were final before the Court announced *Ramos*. *Edwards* held that *Ramos* was nonretroactive.[46] Justice Gorsuch wrote a lengthy concurrence promoting the idea that, before *Brown v. Allen*, habeas had largely been limited to jurisdictional error.[47] The history that Gorsuch offered was quite peripheral to the retroactivity issue before the Court.

In his *Edwards* concurrence, Justice Gorsuch made his endgame clear, explaining that federal courts should not even have to ask retroactivity questions because "[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."[48] And the defense of that assertion is familiar: under English and early American law, a jurisdictionally competent court's judgment of conviction was not subject to habeas review, and *Brown v. Allen* disrupted that established rule by permitting habeas relief for "practically any error of federal law they might find in state court proceedings."[49]

Davenport really had nothing to do with the historical claims either. At issue in *Davenport* was the relationship between the harmless error rule from *Brecht v. Abrahamson* (1993)[50] and 28 U.S.C. § 2254(d).[51] Justice Gorsuch authored the majority opinion in *Davenport*, offering the same account he advanced in his *Edwards* concurrence, with some minor adjustments to hedge prior inaccuracies.[52] Still, his argument remained an exaggerated version of Professor Bator's, and it revolved around the three familiar propositions: (1)

42. *See id.* at 1520–22.
43. *See, e.g.*, *id.* at 1521, 1523–1524.
44. 140 S. Ct. 1390 (2020).
45. *Id.* at 1397.
46. *See Edwards*, 141 S. Ct. at 1562.
47. *See id.* at 1566–69 (Gorsuch, J., concurring).
48. *Id.* at 1573.
49. *Id.* at 1568.
50. 507 U.S. 619 (1993).
51. Brown v. Davenport, 142 S. Ct. 1510, 1517 (2022).
52. *See*, *e.g.*, Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 506–07 (2022) (criticizing Justice Gorsuch's *Edwards* concurrence before the Supreme Court decided *Brown*).

under English law, there was no habeas power to relieve judgments of conviction;[53] (2) under early American law, habeas writs could not be used to review nonjurisdictional error;[54] and (3) *Brown v. Allen* changed everything.[55]

On the question of English law, Justice Gorsuch softened the historical claim a touch: "*Usually*, a prisoner could not use it to challenge a final judgment of conviction issued by a court of competent jurisdiction."[56] A judgment of conviction after trial, Gorsuch observed, was *itself* proof that the detention was lawful.[57] In terms of American decisional history, the material was familiar too. Gorsuch pointed to Chief Justice Marshall's language from *Ex parte Watkins*[58] and then reviewed pre-1953 case law, extrapolating from it that habeas relief was unavailable to those convicted of crimes unless the convicting court lacked jurisdiction.[59] *Davenport*, however, also softened the claim about the American doctrinal history: "To be sure, the line between mere errors and jurisdictional defects was not always a 'luminous beacon' and it evolved over time."[60] And finally, *Davenport* positions *Brown v. Allen* as the Big Pivot. Per Gorsuch, *Brown v. Allen* ushered in a new habeas regime in which the "traditional distinction between jurisdictional defects and mere errors in adjudication no longer restrained federal habeas courts" and where "[f]ull-blown constitutional error correction became the order of the day."[61]

* * *

Mythmaking has common features across myths. Professor Litman identifies, among other things, the "mechanisms" through which the whig habeas myth changed the legal order. I want to avoid overzealous assertions that each of the two myths discussed herein work identically, but they do have mechanistic similarities. Both substantially distort history in service of aligned normative outlooks. And both operate through versions of interbranch dialogue and what Litman calls legitimation.

When Professor Litman says that the whig myth legitimated detention schemes, she means that powerful people traded on the myth—and its exaggerated association with liberty and human progress—to validate law and policy that was coercive and subordinating.[62] The Gorsuch-promoted myth does not conjure a warm association with human progress, but it

53. *See* Brown v. Davenport, 142 S. Ct. 1510,1521 (2022).
54. *See id.*
55. *See id.* at 1521–22.
56. *Id.* at 1520 (emphasis added).
57. *See id.* at 1521.
58. 28 U.S. 193 (1830).
59. *Id.* at 202–03 (stating that a criminal conviction is "conclusive on all the world").
60. *Davenport*, 142. S. Ct. at 1521 (quoting Bator, *supra* note 30, at 470, for "luminous beacon" language).
61. *Id.* at 1522.
62. *See* Litman, *supra* note 1, at 275–79.

legitimates detention schemes nonetheless. Specifically, it validates an especially thin account of habeas power that preserves appearances: that American carceral practices remain subject to meaningful federal review.

Professor Litman also points out that habeas decisions were a dialogic means by which the Supreme Court called the political departments to illiberal action.[63] And Justice Gorsuch's mythmaking is *nothing* if not a cross-branch exhortation. With the Warren Court as the Big Bad, *Davenport* and the *Edwards* concurrence invite Congress to return habeas practice to a mythical steady state during which federal judges did no more than audit the jurisdiction of the convicting court.

III. Defects in the Gorsuch Account

Edwards and *Davenport* are good movement narrative and poor history. Justice Gorsuch whiggishly spins a messy doctrinal past into a tidy history of limited habeas power, leaning anachronistically on the modern concept of "jurisdiction." He invokes Professor Bator's history as academic support, but Gorsuch tells a story that is far more simplistic than Bator's. I structure Part III around the three basic historical claims that Bator-adjacent accounts make: (1) about English practice; (2) about American decisional law before 1953; and (3) about *Brown v. Allen*. I want to be careful in distinguishing the work of Bator, which is a serious (albeit flawed) historical inquiry, with the work of Gorsuch, which is something closer to mythmaking.

A. English Practice

In *Edwards* and of pre-Revolutionary English practice, Justice Gorsuch writes that a "prisoner confined under a final judgment of conviction by a court of competent jurisdiction stood on different footing than one confined by the King without trial."[64] But why did the footing differ—because judges *lacked habeas power* to vacate criminal convictions, or because a conviction showed that the underlying detention was *lawful on the merits*? One view implies a limit on habeas power and one doesn't. In *Edwards*, Gorsuch answers that "[c]ustody pursuant to a final judgment was *proof* that a defendant had received the process due to him."[65] *Davenport* includes a similar observation: "If the point of the writ was to ensure due process attended an individual's confinement, a trial was generally considered proof he had received just that."[66] Gorsuch's formulated answers to his own

63. Professor Litman explains how *habeas process generally* is a way for the Supreme Court to have a dialogue with other branches. *See id.* at 252–55. By contrast, the current Court is using the Gorsuch-promoted myth to exhort Congress to restrict habeas power.

64. Edwards v. Vannoy, 141 S. Ct. 1547, 1567 (2021).

65. *Id.*

66. *Davenport*, 142 S. Ct. at 1521.

questions are puzzling because they indicate not a limit on habeas power *per se* but instead that a conviction proved the lawfulness of the custody on the merits. The rejoinder to Gorsuch is what it is to all Batorian positions: what happens when the dictates of due process change?

There are also questions as to whether postconviction review was really outside the ambit of English habeas power. As evidence of a limited English habeas power, Justice Gorsuch cites *Bushell's Case* (1670).[67] Gorsuch's decision to cite *Bushell* in support of a limited habeas power is also confusing because *Bushell* is traditionally invoked as a case inconsistent with such a limit.[68] *Bushell* arose out of the trial, for unlawful assembly, of William Penn and other Quakers. The jury acquitted Penn. Furious, the judge jailed the jurors as contemnors, including foreperson Bushell. Bushell sought habeas relief and was eventually discharged by the Court of Common Pleas. *Bushell* had some language suggesting that habeas power was limited, but it also declared that it was available to relieve any unlawful detention.[69]

As mentioned above, *Bushell* is typically invoked as a case *consistent* with broad habeas power. In *Fay v. Noia*, the Supreme Court quoted *Bushell* to assert that habeas was available to remediate any due process problem and *to dispute* the proposition that "common law habeas corpus was available only to inquire into the jurisdiction, in a narrow sense, of the committing court."[70] Harvard law professor Paul Freund famously read *Bushell* to support broad postconviction power.[71] That interpretation of *Bushell* is reflected in *Bacon's Abridgment*—that a prisoner is entitled to habeas discharge "if the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished."[72]

To be clear: I think those supporting broad habeas power have misread *Bushell*, and I regard it as weak precedent.[73] Among other things, *Bushell* involved a judicial commitment for contempt, the custody was ordered by an inferior court, and the significance of *Bacon's Abridgment* might be

67. *Id.* (citing *Bushell's Case*, 124 Eng. Rep. 1006, 1009–10 (C.P. 1670)); *see Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring) (same).

68. *See infra* notes 70–72 and accompanying text.

69. *See Bushell's Case*, 124 Eng. Rep. at 1016 ("[W]hen a man is brought by habeas corpus to the Court, and . . . was against law imprison'd and detain'd, though there be no cause of priviledge for him in this Court, he shall never be by the act of the Court remanded to his unlawful imprisonment . . . .").

70. *Noia*, 372 U.S. at 404.

71. *See* Brief for the Respondent at 34, United States v. Hayman, 342 U.S. 205 (1952) (No. 23), 1951 WL 81953, at *34.

72. 3 MATTHEW BACON, NEW ABRIDGEMENT OF THE LAW 434 (Bird Wilson ed., Philadelphia, Philip H. Nicklin 1813).

73. *See* David L. Shapiro, *Habeas Corpus, Suspension, and Detention: Another View*, 82 NOTRE DAME L. REV. 59, 67 n.33 (2006).

overstated.[74] Justice Gorsuch's ultimate position on the English habeas history is certainly reasonable, but his decision to load his narrative on *Bushell*'s back is strange. Gorsuch does not acknowledge the decisional law and academic authority that read *Bushell* for a conclusion opposite his own,[75] or the fact that such a reading is traditionally supported with contemporaneous sources like *Bacon's Abridgment*.[76]

B. Pre-Brown *Decisional Law*

Justice Gorsuch's account, like Professor Bator's, relies on a specific rendering of nineteenth- and early twentieth-century federal habeas cases. The narration of those cases is meant to establish a decisional steady state under which habeas power reached only convictions with jurisdictional defects. As compared to Bator's account, Gorsuch's is much briefer and less complex. I want to be abundantly clear about the position I take below. There is decisional authority consistent with the limited habeas power that Gorsuch prefers.[77] But that authority coexists with abundant authority inconsistent with the limit, and the full sweep of the precedent discloses a historical trajectory that undermines the Gorsuch narrative.

1. *Watkins*

Chief Justice Marshall wrote *Watkins*, which was an 1830 case decided when there was no writ-of-error review for federal criminal convictions.[78] The *Edwards* concurrence recites a line from *Watkins*: "is not that judgment in *itself* sufficient cause [for lawful detention]?"[79] Per Justice Gorsuch, that understanding of habeas power persisted through the end of the nineteenth century, for "[i]f a prisoner was in custody pursuant to a final state court judgment, [then] a federal court was powerless to revisit those proceedings

74. The most significant and forceful critic of *Noia's* interpretation of *Bushell* was Dallin Oaks. *See* Dallin H. Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 461–67 (1966).

75. *See, e.g.*, Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 884 n.380 (1965); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2042 n. 241 (1992); Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 462 n.62 (1990–1991); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After* INS v. St. Cyr, 33 COLUM. HUM. RTS. L. REV. 555, 612 (2002).

76. *See supra* note 67.

77. *See, e.g.*, Harlan v. McGourin, 218 U.S. 442, 448 (1910) ("Upon habeas corpus the court examines only the power and authority of the court to act, not the correctness of its conclusions.").

78. *See* Liebman, *supra* note 75, at 2061 & n.365.

79. Edwards v. Vannoy, 141 S. Ct. 1546, 1567 (Gorsuch, J., concurring) (quoting *Ex parte* Watkins, 28 U.S. 193, 202 (1830)).

unless the state court had acted without jurisdiction."[80] Or, as Gorsuch put it in *Davenport*: "Chief Justice Marshall invoked the common-law rule that a judgment of conviction after trial was conclusive on all the world."[81] There are problems with Gorsuch's reading of *Watkins* and problems with the history recited in *Watkins* itself.

In terms of how of Justice Gorsuch reads *Watkins*, he confuses the proposition that all detention following conviction was legal—that it was the only "process due"—with the proposition that there was limited habeas power.[82] (This is the same mistake he makes with respect to the English case law.) In fact, *Watkins* rather explicitly says there was no habeas relief for convicted prisoners because lawful detention required no more than proof of conviction.[83] To be fair to Gorsuch, his interpretation of *Watkins* has been ratified by dint of academic and decisional repetition.[84] Also, *Watkins* was decided in an era where virtually all jurisdictionally sound convictions were lawful, so courts did not carefully parse distinctions between convictions left intact because they were lawful and convictions left intact because there was no habeas power to review them.

Yet there is another problem with drawing inferences from *Watkins*, having to do with the procedural posture of the case. Specifically, *Watkins* involved a request that the Supreme Court use its habeas jurisdiction to conduct what amounted to *appellate* review of a lower-court conviction.[85] At the time *Watkins* was decided, Congress statutorily barred prisoners from obtaining appellate review in the Supreme Court.[86] Because Watkins could not invoke the traditional form of appellate jurisdiction, he tried to use habeas as a workaround. The Bator–Gorsuch position disregards the text in *Watkins* centering this problem: "We have no power to examine the proceedings on a writ of error, and it would be strange, if, under colour of a writ to liberate an individual from an unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control."[87] Nonetheless, and to be fair to Justice Gorsuch again, subsequent nineteenth-century decisions in similarly postured cases did not scrupulously distinguish between

80. *Id.* at 1568.

81. Brown v. Davenport, 142 S. Ct. 1510, 1521 (internal quotations omitted).

82. *See* RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 50 (2015).

83. *See Watkins*, 28 U.S. at 203 ("An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.").

84. *See* A. Christopher Bryant and Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 345–46 (2003) (documenting follow-on citation).

85. *See Watkins*, 28 U.S. at 201.

86. As a general matter, there was no writ-of-error review for federal criminal convictions until 1891. Judiciary Act of 1891, ch. 517, § 5, 26 Stat. 826, 827.

87. *Watkins*, 28 U.S. at 203.

limitations on the appellate jurisdiction of the Supreme Court and limitations native to any habeas power.[88]

Finally, *Watkins* itself relies on contested habeas history, tilted towards habeas practice under the Habeas Corpus Act of 1679 rather than under the common law.[89] Chief Justice Marshall connected the idea that a conviction is sufficient to show lawfulness with the absence of postconviction relief in the 1679 Statute, reasoning that "[t]his statute excepts from those who are entitled to its benefit, . . . persons convicted or in execution."[90] Professor Halliday has shown that *Watkins*'s emphasis on the 1679 statute is misplaced—and that norms of inherited habeas practice came from the common law privilege.[91] The 1679 Act may have contained no affirmative authorization for postconviction relief, but it contained no limits on the common law power. That *Watkins* treats the 1679 Act as the exclusive source of English habeas power is an objection well documented in the legal literature,[92] and the Supreme Court now recognizes the significance of the common law writ.[93] There is respected authority indicating that the 1679 Act should remain the interpretive lodestar for late eighteenth-century habeas provisions,[94] but Justice Gorsuch does not cite any of it.

2. Subsequent Decisional Law

The most important historical claim in Justice Gorsuch's narrative is also the weakest: that, until 1953, American decisional law reserved habeas relief (in postconviction cases) for jurisdictional error.[95] Professor Bator, by contrast, frankly acknowledges that—even before 1953—federal law permitted habeas remedies for some nonjurisdictional errors.[96] Bator deals

88. *See* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 67 n.38 (2011).

89. *See Watkins*, 28 U.S. at 202 (discussing the 1679 Act).

90. *Id.*

91. *See* HALLIDAY, *supra* note 3, at 55–56; Halliday & White, *supra* note 9, at 611. *See also* Paul Diller, *Habeas and (Non-)delegation*, 77 U. CHI. L. REV. 585, 595 (2010) (affirming the significance of the common law writ); Eric M. Freedman, *Just Because John Marshall Said It, Doesn't Make It So:* Ex Parte Bollman *and the Illusory Prohibition on the Federal Writ of Habeas Corpus for State Prisoners in the Judiciary Act of 1789*, 51 ALA. L. REV. 531, 579 n.160 (2000) (collecting sources in support of same); Neuman, *supra* note 75, at 563; Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 63 (2012) (same); Erica Hashimoto, *Reclaiming the Equitable Heritage of Habeas*, 108 NW. U. L. REV. 139, 144 (2014) (same); Shapiro, *supra* note 73, at 66 n.29 (same); Vladeck, *supra* note 3, at 955 (same). As I have mentioned, however, the idea that the 1679 Act should be the interpreted touchstone for federal judges has defenders in the academy, including Professor Tyler. *See supra* note 13 and accompanying text.

92. *See* Vladeck, *supra* note 3, at 980–81.

93. *See* Boumediene v. Bush, 553 U.S. 723, 746 (2008).

94. *See supra* note 13.

95. *See* Brown v. Davenport, 142 S. Ct. 1510, 1521 (2022); Edwards v. Vannoy, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring).

96. *See* Bator, *supra* note 30, at 483–99.

squarely (although inadequately) with cases inconsistent with his historical account, whereas Gorsuch pretends that those cases don't exist.

I approach these cases by dividing them into two decisional tracks. The first is decisional law in the *Watkins* posture—by which I mean Supreme Court cases where the Court, operating under authority of the 1789 Judiciary Act, conducted *appellate* review of *federal* criminal convictions ("federal conviction cases"). The second track is decisional law associated with the 1867 Habeas Corpus Act, which established federal habeas power to review state convictions ("state conviction cases"). Neither track generates particularly strong support for Justice Gorsuch's account, but his treatment of the state conviction cases stands out as the most problematic part of his narrative project.[97]

a. *The federal conviction cases.* Although they are the subject of lesser distortion, the federal conviction cases cause plenty of problems for the Bator–Gorsuch account. I have already discussed the problems with their reading of *Watkins*, but those are merely the iceberg's tip.[98] In *Ex parte Lange* (1873),[99] the Supreme Court used its habeas jurisdiction to vacate a federal conviction for violating the double jeopardy clause.[100] Three years later, in *Ex parte Siebold* (1879),[101] the Court announced that it could use its habeas power to review federal convictions tainted by unconstitutional statutes.[102] And ten years after that, the Court wiped out the distinction between unconstitutional statutes and unconstitutional applications of valid ones. Specifically, in *Ex parte Nielson* (1889),[103] the Court rejected a habeas distinction between "conviction and punishment under an unconstitutional law" and "unconstitutional conviction and punishment under a valid law."[104]

None of these cases involved what we would now call jurisdictional error.[105] Professor Bator candidly admitted, of the early federal conviction

97. Justice Kagan penned a lengthy dissent in *Davenport*, and that dissent takes the general position that I do here. *See Davenport*, 142 S. Ct. at 1531 (Kagan, J., dissenting). I do not want to rely on the Kagan dissent, however, because it is most methodologically appropriate to focus only on the primary source material: the pre-1953 cases.

98. There are other decisions rejecting the limitation that Justice Gorsuch asserts. *See, e.g.*, *In re* Bonner, 151 U.S. 242, 257 (1894) (explaining that there would not be "jurisdiction" where trial "modes of procedure" were not "within the limitations prescribed by the law, customary or statutory"); *Ex parte* Wells, 59 U.S. 307, 331 (1855) (Curtis, J., dissenting) (making argument, rejected by Court, that habeas relief was limited to jurisdictional defects in conviction).

99. 85 U.S. 163 (1873).

100. *Id.* at 168.

101. 100 U.S. 371 (1879).

102. *Id.* at 373. *See also Ex parte* Coy, 127 U.S. 731, 758 (1888) (recognizing power); *Ex parte* Curtis, 106 U.S. 371, 375 (1882) (same).

103. 131 U.S. 176 (1889).

104. *Id.* at 183 (1889).

105. *Cf. In re* Terry, 128 U.S. 289, 301 (1888) ("[This Court's] power to issue a writ of *habeas corpus* . . . extends to the cases . . . of persons who are in custody in violation of the constitution or laws of the United States.").

cases, that "[i]t would be useless to try to show that these decisions establish clear and sensible guidelines for the scope of the habeas corpus jurisdiction."[106] Using language that Justice Gorsuch would later quote, and in reference to their messy decisional treatment of jurisdictional limitation, Bator wrote that the *federal conviction cases* emitted less than a "luminous beacon."[107] Nevertheless, Bator tried to explain the cases inconsistent with his asserted throughline as narrow exceptions.

The exceptions covered scenarios "where the allegation was that the conviction was had under an unconstitutional statute, and where the Court viewed the problem in terms of the illegality of the sentence rather than that of the judgment."[108] To Professor Bator's credit, he did "not claim that these categories are easily justified today"; he merely considered them "not completely unintelligible."[109] Speaking only to Bator's account, the narrowness of the exceptions was a critical piece of a story about how there existed some broader rule from whence they were excepted. I don't dwell on Bator's argument here, but the rule-plus-exceptions model of the federal conviction cases is shaky. These exceptions were nowhere near what we would now call jurisdictional error, they were not small, and they were consistent with a broader shift that treated ad hoc state action as void when it was illegal.[110]

Unlike Professor Bator, Justice Gorsuch puts little effort into addressing the problems that these federal conviction cases pose for a strict, jurisdictional-error-only rule. He asserts breezily that all these federal conviction cases, as well as all state postconviction cases that I discuss momentarily, involved something "akin" to a jurisdictional defect.[111] An important question remains on the table: if these opinions are inconsistent with the modern concept of a jurisdictional defect, then is it still appropriate to insist that the era's courts viewed habeas power as limited to jurisdictional issues? The question answers itself.

b. *The state conviction cases.* Justice Gorsuch takes even greater liberties with the state conviction cases. He mentions almost none of the Supreme Court decisions in this category that are flatly inconsistent with the

106. *See* Bator, *supra* note 30, at 470.

107. *Id.* at 470.

108. *Id.* at 471.

109. *Id.*

110. *See* Woolhandler, *supra* note 35, at 602. In 1993, Professor Woolhandler penned a widely cited Stanford Law Review article taking issue with Professor Bator's suggestion that the two pseudojurisdictional categories were minor exceptions to a stricter rule against habeas power to review nonjurisdictional error. *See id.* These cases might intone rules about reviewing convictions only for voidness, but a conviction that was invalid for voidness was somewhere between a conviction that was invalid for "mere error" and a conviction that was invalid for "strict 'jurisdictional' error." *Id.* at 603.

111. Edwards v. Vannoy, 141 S. Ct. 1547, 1568 (2020) (Gorsuch, J., concurring).

idea that habeas power to review convictions was limited to jurisdictional error.[112] The very first cases in which the Court considered "the scope and purposes of"[113] the 1867 Act were decided in 1886, and they pose major problems for the Bator–Gorsuch thesis. In *Yick Wo v. Hopkins* (1886),[114] the Supreme Court used its habeas power to invalidate a conviction resulting from an Equal Protection violation.[115] In *Ex parte Royall* (1886),[116] the Supreme Court described the function of the postconviction power as authority "to determine whether the petitioner is restrained of his liberty in violation of the constitution of the United States."[117] In 1890 and 1891, the Court decided two cases granting habeas relief to state prisoners convicted for unlawfully selling meat on the ground that the meat-selling laws unconstitutionally burdened interstate commerce.[118] (Neither meat-selling case contains a word about the jurisdiction of the convicting court.) And *In re Converse* (1891)[119] invoked the principle—announced for federal conviction cases by *Nielson*—that there was no material distinction between convictions under unconstitutional statutes and convictions under unconstitutional applications of valid ones.[120] In *Davenport*, Justice Gorsuch does not acknowledge that *Yick Wo*, *Converse*, or the meat-selling cases exist, and his only reference to *Royall* is for an unrelated proposition in a *Davenport* footnote.[121]

The story Justice Gorsuch tells about the decisional history becomes more problematic still in view of the early twentieth-century cases—and it is with respect to those cases that he breaks radically from Professor Bator. Those cases both functionally and formally exercised habeas power over state convictions with nonjurisdictional defects,[122] and so Bator felt compelled to come up with a different explanatory model. Specifically, Bator argued that

112. I lack space to summarize all of the relevant cases. Additional state-conviction cases include: Wade v. Mayo, 334 U.S. 672, 683 (1948) (holding that a due process violation "renders void the judgment and commitment under which petitioner is held"); Felts v. Murphy, 201 U.S. 123, 129 (1906) (deciding whether court lost "jurisdiction" by reference to whether trial procedures violated due process); Davis v. Burke, 179 U.S. 399, 403–04 (1900) (deciding conviction's voidness by reference to whether trial procedure violated due process); Bergemann v. Backer, 157 U.S. 655, 658 (1895) (deciding voidness by reference to whether trial process violated equal protection and due process); *Ex parte* Bain, 121 U.S. 1, 5–6 (1887) (deciding voidness by whether change to indictment required resubmission to grand jury).

113. Bator, *supra* note 30, at 478.

114. 118 U.S. 356 (1886).

115. *Id.* at 374.

116. 117 U.S. 241 (1886).

117. *Id.* at 253.

118. *See* Brimmer v. Rebman, 138 U.S. 78, 83–84 (1891); Minnesota v. Barber, 136 U.S. 313, 329–30 (1890).

119. 137 U.S. 624 (1891).

120. *Id.* at 631.

121. Brown v. Davenport, 142 S. Ct. 1510, 1522 n.2 (2022).

122. *See infra* notes 112–21 and accompanying text.

these cases supported a "full and fair" approach to habeas relief: there was habeas power to review nonjurisdictional error in state convictions, sure, but only in cases where there was inadequate state corrective process.[123] Gorsuch, by contrast, is apparently unwilling to acknowledge the many cases that reject the limited view of habeas power he wants to narrate.

I have been as generous as possible with other parts of *Davenport* and the *Edwards* concurrence, but there is no room for reasonable debate on the state conviction cases between 1915 and 1953. *Frank v. Mangum* (1915)[124] held that federal habeas power extended to certain legal error tainting criminal convictions, "whether or not 'jurisdictional.'"[125] In one of the most famous postconviction cases in American history, *Moore v. Dempsey* (1923),[126] the Court granted relief for a due process violation.[127] And the *Moore* dissent protested that relief by advancing a framework that *Moore* itself rejected: that habeas should be reserved only for jurisdictional error.[128] In *Johnson v. Zerbst* (1938),[129] the Court used habeas power to vindicate a violation of the Sixth Amendment right to counsel.[130] And relying on *Moore*, *Waley v. Johnson* (1942)[131] stated what the Court believed to be established habeas law: "[T]he use of the writ in the federal courts to test the constitutional validity of a conviction for crime *is not restricted to those cases where the judgment of conviction is void for want of jurisdiction* of the trial court to render it."[132]

Between 1915 and *Waley*, the Supreme Court would sometimes intone the jurisdictional-defects-only rule. But it is *extremely* well accepted that the term "jurisdiction" meant something much broader then than it means now.[133] When older decisions speak of a court acting without "jurisdiction," that term encompassed more than scenarios in which, say, a tax court capitally

123. Bator, *supra* note 30, at 486.

124. 237 U.S. 309 (1915).

125. Bator, *supra* note 30, at 486–87 (emphasis omitted) (citing and quoting *Frank*, 237 U.S. at 329–31).

126. 261 U.S. 86 (1923).

127. *Id.* at 92.

128. *Id.* at 93–96 (McReynolds, J., dissenting).

129. 304 U.S. 458 (1938).

130. *Id.* at 468.

131. 316 U.S. 101 (1942).

132. *Id.* at 104–05 (1942) (emphasis added).

133. *See, e.g.*, Siegel, *supra* note 52, at 524–32; *see also* Shapiro, *supra* note 73, at 68 (observing phenomenon); Woolhandler, *supra* note 35, at 602–30 (documenting phenomenon); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y. L. SCH. J. HUM. RIGHTS 375, 409 (1998) ("The Supreme Court paid due obeisance to the jurisdictional fiction that usually constrained habeas corpus by reasoning that a sentence that violated the Constitution was void . . . ."); HERTZ & LIEBMAN, *supra* note 82, at 57 ("During this period, moreover, the line between lack of jurisdiction and lack of constitutionality sometimes blurred entirely . . . ."); Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660 (1948) ("By increasingly strained fictions, they expanded the word jurisdiction far beyond its formal requirements.").

sentenced a defendant for armed robbery. Professor Woolhandler has produced the most careful work documenting this phenomenon,[134] and it draws wide academic support and decisional recognition.[135] No less a figure than Professor Henry Hart observed that any hard-and-fast rule against habeas scrutiny of nonjurisdictional error "had been softened by a long process of expansion of the concept of a lack of 'jurisdiction.'"[136] Even Professor Bator candidly admitted that the federal-conviction cases were not really legible as cases about jurisdiction in a modern sense.[137] (Professor Litman explains that it was the elasticity of "jurisdiction" that allowed courts "to encode race and citizenship" criteria into rules for lawful detention.[138])

Even though Professor Bator recognized that the post-*Frank* cases were inconsistent with a jurisdictional-defect-only rule, he insisted that those same cases *were* consistent with a different limit. He therefore made the lesser claim: Although habeas power reached nonjurisdictional error in criminal convictions, it did not reach *all error* in that category. He argued that *Frank*, *Moore*, *Zerbst*, *Waley*, and other cases not discussed here still hewed to a rule that "the legality of detention may not be tested simply in terms of whether error occurred in previous proceedings."[139] Review for nonjurisdictional error was, he argued, limited to cases when state corrective process was inadequate.[140] I disagree with that reading of the pertinent cases, but my only point here is that not even Bator reads them to support the rule that Justice Gorsuch suggests.

c. *Evaluating the decisional history.* Justice Gorsuch's opinions in *Davenport* and *Edwards* touch on almost none of the authority announced during the seventy years in which the Court grappled meaningfully with the question of postconviction power. In *Davenport*, Gorsuch includes a string citation to cases intoning a rule against habeas power to review convictions for nonjurisdictional error, with most of the cited cases coming from the late nineteenth century and none from after 1925.[141] *Davenport* does not even acknowledge the existence of *Yick Wo*, *Nielson*, *Converse*, *Frank*, *Moore*, *Zerbst*, or *Waley*. His *Edwards* concurrence likewise omits reference to any of those decisions, save a reference to *Frank* as a "modest" innovation

134. *See* Woolhandler, *supra* note 35, at 602–30 (documenting phenomenon).

135. *See* Bator, *supra* note 30.

136. Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 104 (1959).

137. *See* Bator, *supra* note 30, at 483–99.

138. *See* Litman, *supra* note 1, at 257.

139. *See* Bator, *supra* note 30, at 471.

140. *See id.* at 486–87.

141. *See* Brown v. Davenport, 142 S. Ct. 1510, 1521 n.1 (2022) (collecting cases). Other than the 1925 case, all of the other authorities cited predate *Frank*, which was decided in 1915.

equating severe due process violations with jurisdictional defects.[142] In *Davenport* and *Edwards*, Gorsuch talks about *Lange* and *Siebold* as though they stand for jurisdictional-error-only rule,[143] even though Bator invoked them as singular examples of how the pre-1915 Court was *stretching* the meaning of jurisdiction to reach something more akin to "void" judgments.[144]

In *Davenport*, Justice Gorsuch winks at the mountain of precedent inconsistent with his tidy account through a single-sentence citation to his own opinion in *Edwards* and by quoting Professor Bator: "To be sure, the line between mere errors and jurisdictional defects was not always a 'luminous beacon' and it evolved over time."[145] The "luminous beacon" line is confounding for several reasons. First, Gorsuch wrenched it from its original context. Bator had used that phrasing to describe only the nineteenth-century *federal* conviction cases.[146] He was not suggesting a mixed inference from the *state* conviction cases. As even Bator would not deny, the period between the 1867 statute and the mid-twentieth century was a period marked by a consistent drift towards more robust habeas review.[147]

There are other problems with the "luminous beacon" line, depending on how one reads it. If Justice Gorsuch means to suggest that the cases were "not always a luminous beacon" but that decisions recognizing robust habeas review were small blips, then that characterization is not accurate—for all the reasons discussed above. What if, instead, Gorsuch recognizes that the history is genuinely muddled and is asserting that the cases expressing a more limited view of habeas power are the important ones? But how persuasive is that? If a model doesn't fit a huge chunk of data, then isn't the model flawed?

C. Brown v. Allen

Both *Edwards* and *Davenport* indicate that Justice Gorsuch thinks that *Brown v. Allen* abrogated a preexisting *res judicata* rule for state convictions. In *Edwards*, Gorsuch describes Justice Jackson's *Brown v. Allen* concurrence as consistent with the "traditional rule" that a criminal conviction "was *res judicata*, and the sole exception was a lack of jurisdiction."[148] *Davenport* contains a passage stating that "federal habeas practice began to take on a

142. Edwards v. Vannoy, 141 S. Ct. 1547, 1568 (2021) (Gorsuch, J., concurring) (quoting Frank v. Magnum, 237 U.S. 309, 316, 335–36 (1915)).

143. *See Davenport*, 142 S. Ct. at 1521 n.1*; Edwards*, 141 S. Ct. at 1567, 1571 n.6.

144. Bator, *supra* note 30, at 467–68 (quoting *Ex parte* Siebold, 100 U.S. 371, 376–77 (1889)). *See also, e.g.*, Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 605 (1982) (summarizing Bator's arguments).

145. *Davenport*, 142 S. Ct. at 1521 (citing Bator, *supra* note 30, at 470) (also citing *Edwards*, 141 S. Ct. at 1568) (Gorsuch, J., concurring)).

146. *See* Bator, *supra* note 30, at 465–70.

147. *See supra* notes 122–32 and accompanying text.

148. *Edwards*, 141 S. Ct. at 1569 (Gorsuch, J., concurring) (citing Brown v. Allen, 344 U.S. 443, 543–44 (1953) (Jackson, J., concurring in the result)).

very different shape" when *Brown v. Allen* held that "a state-court judgment 'is not *res judicata*' in federal habeas proceedings."[149]

The *res judicata* timeline is wrong. At the time *Brown v. Allen* was decided, it was very well established that federal habeas relief could not be precluded on *res judicata* rounds.[150] A determined skeptic might argue that *Brown v. Allen* abrogated a *res judicata* rule that had attached to state convictions even if it hadn't attached to other types of judgments. But that isn't true either. Recall that *Waley* had reasoned that "the principal of *res judicata* does not apply" to state conviction cases.[151]

In suggesting that *Brown v. Allen* abrogated some steady state in which *res judicata* attached to state convictions, Justice Gorsuch casts his lot with Justice Jackson's *Brown v. Allen* concurrence. A major problem is that not even Justice Jackson took that position:

> It is sometime said that *res judicata* has no application whatever in habeas corpus cases *and surely it does not apply with all of its conventional severity*. . . . But call it *res judicata* or what one will, courts ought not to be obligated to allow a convict to litigate again and again exactly the same question on the same evidence.[152]

Nor was Justice Jackson suggesting that something like a strict *res judicata* rule should apply in spirit—his objection was to scenarios when a person convicted in state court tried to relitigate an issue previously litigated on identical facts. Professor Bator, too, rejected the suggestion that there was some *res judicata* rule before *Brown v. Allen*. He wrote, "Several times [before *Brown v. Allen*] the Court stressed that technically res judicata does not apply in habeas proceedings . . . ."[153] Bator's preclusion argument was a narrower claim against revisiting allegations that states had already resolved using sufficient corrective process.

* * *

One can be clear-eyed about the mixed history of habeas power in state-prisoner cases. It is true that whig histories, under which habeas power was available to challenge any feature of detention, are problematic. And it is true that *Bushell* is questionably invoked as an English decision proving that English courts used habeas power for postconviction review. And one can credibly argue that *Watkins* correctly focused on the limitations in the 1679 Act rather than common law habeas practice. But what one cannot credibly do is insist on a decisional story in which, before *Brown v. Allen*,

149. *Davenport*, 142 S. Ct. at 1521–22 (quoting *Brown*, 344 U.S. at 458).

150. *See*, *e.g.*, Salinger v. Loisel, 265 U.S. 224, 230 (1924) (first citing Carter v. McClaughry, 183 U.S. 365, 378 (1902); then citing *Ex parte* Spencer, 228 U.S. 652, 658 (1913)).

151. Waley v. Johnston, 316 U.S. 101, 105 (1942) (per curiam) (citing *Salinger*, 265 U.S. 224).

152. *Brown*, 344 U.S. at 543–44 (Jackson, J., concurring in the result) (second emphasis added).

153. Bator, *supra* note 30, at 497.

criminal convictions consistently precluded federal habeas review of nonjurisdictional issues. The history simply doesn't bear it.

Conclusion

What appears in *Davenport* and the *Edwards* concurrence is narrative and myth but not history. Justice Gorsuch cites himself for key historical propositions, ignores inconsistent precedent in favor of cherry-picked opinions, and calls a standard story of habeas power "revisionist."[154] Despite superficial similarities, it is a gloss on habeas history that is far more extreme than the account that Professor Bator offered. And there is no confusion about *why* Gorsuch is so invested in the history: as a source of authority to scale habeas power down. It is a message to lower courts and to Congress. It is also a cover for Justices who decide future cases about the breadth of the statute. And I can't help but wonder whether Gorsuch is seeding a structuralist argument that broad habeas power over state convictions is unconstitutional.

154. *Davenport*, 142 S. Ct. at 1522 n.2.