PRECLUSION AND CRIMINAL JUDGMENT

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INTRODUCTION

The defining question in modern habeas corpus law involves the finality of a state conviction: What preclusive effect does (and should) a criminal judgment have? Res judicata[1] and collateral estoppel[2]—the famous preclusion rules for civil judgments—accommodate basic legal interests in fairness, certitude, and sovereignty. Legal institutions carefully calibrate the preclusive effect of civil judgments because judicial resources are scarce, because the reliability and legitimacy of prior process can vary, and because courts wield the authority of a repeat-playing sovereign that will find its own civil judgments attacked in foreign litigation. In stark contrast to the legal sophistication lavished on the finality of civil judgments, however, is the rudimentary treatment of preclusion rules in criminal cases. Nowhere is such treatment more mischievous than in modern habeas corpus law.

The preclusion rules inherited from English common law coexist rather uncomfortably with the habeas guarantee of lawful custody. Habeas challenges may attack any type of detention,[3] but the largest modern category consists of collateral challenges to state criminal judgments (convictions). An inmate who collaterally challenges a conviction in an Article III court seeks an inquiry that seems inconsistent with familiar preclusion rules. When that inmate is in custody pursuant to a *state* conviction, federal habeas process also presents knotty questions of *inter-jurisdictional* preclusion.

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1 *See* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (AM. LAW INST. 1982); Note, *Developments in the Law: Res Judicata*, 65 HARV. L. REV. 818, 820 n.1 (1952).

2 *See* 46 AM. JUR. 2d *Judgments* § 464 (2012).

3 *See generally* BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION (2013) (dividing custody categories into national security, post-conviction, immigration, and other civil detention).

The role of finality in habeas law is rooted in the Law of Judgments, which is the subject of two Restatements and involves the preclusive effects of judgments rendered in *civil* actions.[4] This Article follows from the premise that, if the Law of Judgments reduces finality interests to doctrinal form,[5] then habeas inquiry ought to take it seriously.

Contrary to a near-universal assumption, habeas preclusion no longer resembles a Law-of-Judgments rule. Having disregarded the Law-of-Judgments emphasis on the identity of "claims" and process in the rendering court, habeas preclusion rules instead rely on restrictive constructs developed for direct appellate review of criminal convictions. As a result, a state criminal judgment is now *more* preclusive than is its civil counterpart. That finding is inconsistent with the central premise of modern habeas restrictions: that they conform post-conviction process to standard, "trans-substantive" preclusion law.[6]

Methodologically, I compare standard inter-jurisdictional preclusion law to each of two major habeas paradigms, and then evaluate the differences. In Part I, I explain that, historically, generalizations about lax habeas preclusion rules involve the wrong comparison. For testing the preclusive effect of a state conviction in a subsequent federal habeas proceeding, the appropriate comparator is the law of inter-jurisdictional preclusion. For traditional inter-jurisdictional preclusion inquiries, a court bars relitigation on issues and judgments only if it independently determines that the rendering forum used reliable legal process.

In Parts II and III, I compare two different habeas paradigms to the standard inter-jurisdictional preclusion model. The Relitigation paradigm, defined in Part II, is the set of Warren-era habeas principles that derived in part from the Law of Judgments and that developed specifically for collateral challenges to state convictions in federal court.[7] The defining feature of the Relitigation paradigm is the rule that a federal court conducts merits review of a constitutional claim if the state process was unreliable.[8] Because the

4 *See* 1 RESTATEMENT (SECOND) OF JUDGMENTS ch. 1 Scope (AM. LAW INST. 1982).

5 I frequently refer to the "Law of Judgments," but in every instance I mean to refer also to the Law-of-Judgments concepts appearing in the *Restatement (First) of Conflict of Laws* and *Restatement (Second) of Conflict of Laws*.

6 Professor Robert Cover coined the term "trans-substantivity" in 1975. Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975). A procedural rule is trans-substantive if its operation does not vary across substantive categories of law. *Id.* Trans-substantive procedure is generally considered normatively desirable. *See* Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 111 (2009).

7 *Cf.* Stephen B. Burbank, Semtek, *Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1050 (2002) (emphasizing the distinction between recognition in state-state scenarios and in state-federal scenarios).

8 Even the academic work most associated with habeas restrictions fits a Relitigation model. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 456–57 (1963) (arguing that inmates should not be permitted to relitigate claims that received "full and fair" process in state court).

Relitigation paradigm also permitted independent merits inquiry when state process was sound, however, it indeed operated through an especially forgiving preclusion doctrine.

Part III traces the shift to an "Appellate paradigm," under which habeas inquiry mirrors the most restrictive elements of direct review in criminal cases. Under the Appellate paradigm, state convictions are actually *more* inter-jurisdictionally preclusive than judgments rendered in civil actions. The crucial features of the Appellate paradigm are: (1) "deference," meaning that reviewing courts will require heightened showings to declare error;[9] (2) "outcome orientation," meaning that a court reverses only when an error affected a proceeding's bottom line;[10] and (3) "intrinsicality," meaning that review is limited to the record in the prior proceeding.[11] Decisions of the Burger,[12] Rehnquist,[13] and Roberts Courts[14] nurtured the Appellate paradigm, which now dominates construction of habeas law at the lower levels of the federal judiciary.[15] It also explains novel restrictions in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[16]

In Part IV, I make the normative case against the Appellate paradigm. It does not inherit the comity and finality justifications for prior restrictive models, and it systematically undermines the ideal that every criminal defendant should have a day in court.[17] Moreover, under sway of the Appellate paradigm, legal institutions have constructed 28 U.S.C. § 2254(d)—the chief statutory limit on federal habeas review for state inmates and one of the most important provisions in the entire field of federal jurisdiction—in ways that violate constitutional "anti-puppeteering" norms against using procedural law to mimic otherwise forbidden rules of decision.[18]

I. Refining the Comparison

Scholarship and decisional law consistently confuse the operation of preclusion doctrines, on the one hand, with the presence of jurisdiction and a federal cause of action, on the other. Such confusion produces erroneous assumptions about how habeas process deviates from a "normal" preclusion

9 *See infra* note 289.

10 *See infra* note 290.

11 *See infra* note 290.

12 *See infra* subsection III.B.2.

13 *See, e.g.*, Williams v. Taylor, 529 U.S. 362, 409 (2000) (defining deference in "unreasonable application" in 28 U.S.C. § 2254(d)(1) (2012)).

14 *See, e.g.*, Cullen v. Pinholster, 563 U.S. 170, 181–82 (2011) (constructing § 2254(d) as an intrinsic inquiry limited to state record); Harrington v. Richter, 562 U.S. 86, 101 (2011) (reading outcome orientation and deference into § 2254(d)(1)).

15 *See infra* note 221.

16 Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26 (1996) (codified at various sections of 21, 28 U.S.C.).

17 *See infra* Sections IV.A (comity and finality justifications), IV.B (day-in-court ideal).

18 *See infra* Section IV.C.

inquiry.[19] The faulty assumptions, in turn, prime institutional actors to require especially heightened justification for habeas relief. Part I specifies the appropriate basis of comparison between habeas and traditional preclusion models. Parts II and III perform that comparison.

In order to discuss precisely a judgment's inter-jurisdictionally preclusive effects, I rely on a concept that I call "Regard." The Regard for a prior judgment refers to how prior judicial process restricts subsequent inquiry in another court. A "Regard Scenario" specifies the relationship between the prior and subsequent courts. An appellate Regard Scenario involves the appeal of a judgment to a *higher court*, and a collateral Regard Scenario involves the relitigation of a judgment in a *separate case*.

In each Regard Scenario, through operation of constructs like deference or preclusion, the prior judgment constrains subsequent inquiry. The following Figure shows the four major Regard Scenarios for federal review of criminal convictions:

FIGURE: SELECT REGARD SCENARIOS

	Subsequent Forum— U.S. Supreme Court	*Subsequent Forum— Lower Federal Court*
Prior State Criminal Proceeding	*Inter-Jurisdictional* Appellate Review of State Convictions (now 28 U.S.C. § 1257)	*Inter-Jurisdictional* Relitigation of State Convictions (now 28 U.S.C. §§ 2254, 1738)
Prior Federal Criminal Proceeding	*Intra-Jurisdictional* Appellate Review of Federal Convictions (now 28 U.S.C. § 1254)	*Intra-Jurisdictional* Relitigation of Federal Convictions (now 28 U.S.C. § 2255)

The concept of Regard makes the thrust of Part I easier to understand: the idea that state criminal convictions foreclose so much habeas inquiry persists because legal institutions have internalized norms about the wrong Regard Scenario. The canonical habeas precedent involves the degree to which criminal convictions foreclose habeas as a form of appellate process (southwest quadrant), but modern post-conviction litigation is instead about inter-jurisdictional preclusion (northeast quadrant).

The dominant limits on habeas relief in early American law were limits on appellate jurisdiction. There was no norm of habeas preclusion to speak of because, until 1867, state prisoners did not have a habeas cause of action

19 *See, e.g.*, Jennings v. Stephens, 135 S. Ct. 793, 800–01 (2015) ("There are undoubtedly some differences between writs of habeas corpus and other judgments—most notably, that habeas proceedings traditionally ignored the claim-preclusive effect of earlier adjudications."); Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502, 512 (1982) ("The writ of habeas corpus is a major exception to the doctrine of *res judicata*, as it allows relitigation of a final state-court judgment disposing of precisely the same claims." (emphasis added)); Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980) (describing habeas as the "traditional exception to res judicata" (citing Presier v. Rodriguez, 411 U.S. 475, 497 (1973))); Brian M. Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1173 (2005) ("[H]abeas proceedings have been exempted from . . . the more general doctrines of res judicata and collateral estoppel" (citing *Rodriguez*, 411 U.S. at 497)).

in federal court, and federal courts did not have subject-matter jurisdiction to grant relief to state prisoners.[20] State convictions were not res judicata in subsequent federal proceedings—at least not in the ordinary sense of that term. Federal courts simply lacked a vehicle to hear the case at all.

A. Inter-Jurisdictional Review of State Convictions

With roots in English common law, a habeas privilege guarantees a judicial forum to a prisoner contesting detention. The habeas Privilege specified in the U.S. Constitution corresponds to the habeas power of a federal judge to consider the contested custody and to the federal cause of action to contest it.[21] Although the underlying custody may be criminal, the habeas writ is a civil remedy.[22]

Lengthy discussion of the constitutional provisions whence the Privilege springs is beyond the scope of this Article,[23] but a skeletal one will help readers understand the importance of more refined Law-of-Judgments analysis. Article I, Section 9, of the Constitution (the "Suspension Clause") provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[24] Several academics and at least one Supreme Court Justice have suggested that, because the Suspension Clause does not contain language expressly creating the habeas Privilege, the Constitution requires no habeas process at all.[25] That position has failed to register any durable support on the Roberts Court,[26] but judges and the academic community still struggle to localize the source of the Privilege in specific constitutional text. In *Boumediene v. Bush*,[27] the Supreme Court held that the Constitution guarantees habeas process,[28] although the source and content of the guarantee remains disputed. One major area of such dispute involves the habeas remedies available to state inmates convicted of a crime.

Section 14 of the 1789 Judiciary Act established federal habeas power to adjudicate federal custody.[29] Scholarship has picked section 14 to death,[30]

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20 *See infra* notes 33–34 and accompanying text.

21 *See* Boumediene v. Bush, 553 U.S. 723, 797 (2008).

22 *See* Fay v. Noia, 372 U.S. 391, 423–24 (1963).

23 I have sourced and defined that power at length elsewhere. *See* Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753 (2013).

24 U.S. CONST. art. I, § 9.

25 Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting).

26 *See Boumediene*, 553 U.S. at 826–50 (Scalia, J., dissenting) (omitting the *St. Cyr* theory that the Constitution guarantees no habeas process at all).

27 553 U.S. 723.

28 *See id.* at 771.

29 *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81.

30 *See, e.g.*, 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, 536 (2000) (arguing that the 1789 Judiciary Act should have been interpreted to extend the writ to state prisoners); Dallin H. Oaks,

so I make only the most pertinent observations here. First, section 14 did not provide state prisoners with a cause of action or federal courts with power to grant habeas relief to state prisoners.[31] Second, in *Ex parte Watkins*[32]—an opinion explored in Section I.C—the Supreme Court held that section 14 did not vest it with habeas power to conduct conventional appellate review of federal criminal convictions.[33] Congress eventually empowered federal judges to consider state custody in the Habeas Corpus Act of 1867,[34] and 28 U.S.C. § 2241(c)(3) now permits habeas relief if a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States."[35]

The nineteenth-century Supreme Court refined its habeas power as an *appellate* remedy,[36] but the modern habeas power primarily facilitates *collateral* challenges to state convictions in lower federal courts. When a modern federal court conducts habeas review of a criminal judgment, it is engaged in post-conviction review. Habeas authority to consider state convictions and sentences therefore implicates touchy inter-jurisdictional questions about how state and federal sovereigns share power over criminal punishment. Now, before a state inmate seeks *federal* post-conviction relief, (s)he must exhaust state remedies, including any *state* post-conviction review.[37] State post-conviction review is, in fact, the phase where state judiciaries routinely consider many major constitutional challenges to a criminal judgment.[38] State-inmate process has dominated the habeas docket and the corresponding academic literature since the middle of the twentieth century.[39]

The habeas Privilege certainly makes unique inter-jurisdictional guarantees in the forms of federal judicial power and a cause of action to review state criminal judgments, but the presence of those phenomena does not establish an exception to ordinary preclusion doctrines. Conversely, if precedent shows that federal courts rejected habeas relief because there was no

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The "Original" Writ of Habeas Corpus in the Supreme Court, 1962 SUP. CT. REV. 153, 174–75 (reading the first sentence of section 14 as vesting federal courts with authority to grant "auxiliary" habeas writs, rather than with authority to grant habeas corpus *ad subjiciendum*). I do not believe that section 14 vested federal courts with habeas power to discharge state prisoners. *See* Lee Kovarsky, *Prisoners and Habeas Privileges Under the Fourteenth Amendment*, 67 VAND. L. REV. 609, 623 (2014).

31 § 14, 1 Stat. at 82.

32 28 U.S. (3 Pet.) 193 (1830).

33 *See id.* at 207.

34 *See* Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

35 28 U.S.C. § 2241 (2012).

36 *See* Lee Kovarsky, *Original Habeas Redux*, 97 VA. L. REV. 61, 68–69 (2011); Oaks, *supra* note 30, at 177–79.

37 *See* 28 U.S.C. § 2254(b).

38 *See* Larry W. Yackle, *The Misadventures of State Postconviction Remedies*, 16 N.Y.U. REV. L. & SOC. CHANGE 359, 377 (1988).

39 *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (compiling the most robust available set of post-conviction data).

jurisdiction or because there was no cause of action, the preclusion rule is *necessarily* unknown—by definition, the question was not reached.

B. Inter-Jurisdictional Preclusion Generally

Taking the relationship between habeas process and the Law of Judgments seriously requires isolating the actual habeas preclusion rule, and then comparing it to *other* federal preclusion rules that express Regard for state judgments. Domestic relitigation rules, which formally operate only in the rendering jurisdiction,[40] usually take two forms: issue preclusion (collateral estoppel) and claim preclusion (res judicata). Generally speaking, res judicata precludes parties to the prior proceeding from relitigating a "claim," which in the Law-of-Judgments context means all theories of recovery actually are capable of having been litigated en route to the prior judgment.[41] And, also speaking generally, collateral estoppel precludes a party to a prior proceeding from contesting an issue that was actually litigated and decided adversely.[42] These rules, and the exceptions thereto, represent an attempt to reconcile finality with competitor interests of the rendering forum.[43]

When a state inmate invokes federal habeas process to challenge a state conviction, that proceeding is a collateral attack on a foreign (state) judgment.[44] To precisely discuss the phenomenon of inter-jurisdictional preclusion, some concepts now require more formal specification. In the Law-of-Judgments literature, the rendering court or jurisdiction is the "F1" forum, and a foreign jurisdiction is an "F2" forum.[45] There is always an inter-jurisdictional preclusion question when an F2 court is asked, on collateral review, to Regard the F1 judgment.[46]

There are special preclusion rules for determining the effect of an F1 judgment in F2.[47] In the United States, the inter-jurisdictionally preclusive effect of an F1 judgment in F2 is a question of F2 law, subject to certain constitutional constraints. When F1 and F2 are sister states, Article IV, Sec-

40 *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 983 n.203 (1998).

41 *See supra* note 1.

42 *See supra* note 2.

43 *See* Toby J. Heytens, *Managing Transitional Moments in Criminal Cases*, 115 YALE L.J. 922, 929 (2006).

44 I will not address the so-called "penal exception." The penal-law exception is the conflicts-of-law rule that one sovereign will not enforce another's criminal law. *See* The Antelope, 23 U.S. (10 Wheat.) 66, 122–23 (1825). A federal habeas court is not being asked to enforce a judgment in the sense contemplated by the exception.

45 *See* KERMIT ROOSEVELT, CONFLICT OF LAWS 188 (1st ed. 2010).

46 *Id.*

47 *See generally* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986) (arguing that, unless there exists a statutory preclusion directive, inter-systemic preclusion is a question of federal common law); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 750–55 (1976) (arguing that inter-jurisdictional preclusion questions were not properly analyzed under the framework associated with *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

tion 1, of the Constitution broadly requires that the F2 state treat the F1 judgment the way F1 would—that "Full Faith and Credit . . . be given in each State to the . . . judicial Proceedings of every other State."[48] Article IV thereby constitutionalizes the common-law rule that the scope of F2 preclusion is, in most cases, whatever the scope of preclusion in F1 would have been.[49] So, a typical inter-jurisdictional preclusion analysis involves two steps: (1) determining the domestically preclusive scope of the F1 judgment in F1, and (2) determining whether F2 imposes any additional constraints on the inter-jurisdictional influence of that F1 judgment.[50]

When the F1-F2 configuration is state-federal rather than state-state, the inter-jurisdictional preclusion rule is statutory. In 28 U.S.C. § 1738, the Code provides that an F1 state "judicial proceeding[ ]" receive the "same full faith and credit" in every F2 federal court as it would have received in F1.[51] Unlike the strictures of Article IV, the § 1738 full-faith-and-credit rule is just a statutory default requiring a federal court to apply F1 state preclusion law.[52] Because it is merely a default, it can be trumped by a constitutional rule or modified by another statute.

The most pressing (state-federal) inter-jurisdictional preclusion issues appear in cases about whether civil rights statutes modify the § 1738 default, and those cases cement the rule that the preclusive scope of an F1 judgment in F2 is a question of F2 law. In *Allen v. McCurry*,[53] the Supreme Court considered whether § 1738 was modified by 42 U.S.C. § 1983, which authorizes suits against state officials for violating the federal Constitution. The Court found that the civil rights plaintiff could not relitigate, in an F2 federal forum, a Fourth Amendment issue given "full and fair" consideration in an F1 state criminal proceeding.[54] The Court reasoned that nothing about § 1983 changed the default operation of inter-jurisdictional preclusion under § 1738.[55] *McCurry*, however, hedged as to whether the full-and-fair condition was a feature of (F1) state law or of (F2) federal inter-jurisdictional preclusion law.[56]

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48 U.S. CONST. art. IV, § 1.

49 *See* Stewart E. Sterk, *The Muddy Boundaries Between Res Judicata and Full Faith and Credit*, 58 WASH. & LEE L. REV. 47, 71–73 (2001).

50 A foreign judgment is "recognized" if it is given full preclusive effect in F2. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (AM. LAW INST. 1971). I avoid the term "recognition" so as not to multiply hyper-technical terminology that alienates readers. "Inter-jurisdictional preclusion" captures the necessary meaning. Defenses to recognition and enforcement are housed in the *Restatement (Second) of Conflicts*. *Id.* §§ 103–21.

51 28 U.S.C. § 1738 (2012).

52 *See infra* notes 53–63 and accompanying text; *see also* Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 381 (1985) (explaining that the basic rule applies unless there is an implied repeal).

53 449 U.S. 90 (1980).

54 *Id.* at 104.

55 *See id.* at 97–105.

56 *See id.* at 101.

Subsequent cases make clear that the scope of inter-jurisdictional preclusion is a federal question. In *Kremer v. Chemical Construction Corp.*,[57] the Court held that Title VII of the Civil Rights Act of 1964[58] did not modify the § 1738 default.[59] In the process, it took great pains to specify *McCurry*'s residual ambiguity. It explained that the full-and-fair requirement was imposed by *federal* inter-jurisdictional preclusion law,[60] and not by F1 state preclusion doctrine: "[O]ther state and federal courts are not required to accord full faith and credit" to a judgment that does not "satisfy the applicable requirements of the Due Process Clause."[61] In cases where states fail to afford sufficient process, the Court reasoned, "[T]here could be no constitutionally recognizable preclusion at all."[62] *Kremer*'s implication for habeas cases is unmistakable. To the extent federal habeas law permits relief when state process is reliable, it indeed uses an idiosyncratic inter-jurisdictional preclusion rule. To the extent that it disregards judgments that are not the result of "full and fair" process, however, habeas law is quite unexceptional.[63]

C. Origins of the Habeas Preclusion Rule

In the modern dispute over habeas process, those favoring taut restrictions theorize a steady state of habeas preclusion from which the Warren Court facilitated massive deviation.[64] Parsing the Regard Scenario in early American habeas cases is the first step in understanding how that steady state is not particularly relevant to the modern inter-jurisdictional preclusion question involving state convictions. Specifically, the steady state reflects limits on appellate jurisdiction and the absence of a cause of action, not a preclusion rule.

Nineteenth-century legal institutions elevated habeas Regard when the process was used for *direct appellate* review of *federal* convictions.[65] Because there was no statutory grant of conventional appellate jurisdiction over federal criminal cases, the early American precedent contemplates whether the Supreme Court should have used its so-called "original" habeas jurisdiction as a substitute vehicle for direct appellate review of federal convictions. That precedent was about an F1 appeals court reviewing a domestic (F1) judgment from an inferior tribunal. Modern post-conviction review, by contrast, operates in a different Regard Scenario. State-inmate claims present inter-juris-

57 456 U.S. 461 (1982).

58 Pub. L. No. 88-352, §§ 701–16, 78 Stat. 253–66 (1964) (codified as amended at 42 U.S.C. §§ 2000e–2000e-17 (2012)).

59 *See Kremer*, 456 U.S. at 466–78.

60 *See id.* at 481.

61 *Id.* at 482.

62 *Id.* at 482–83.

63 The Supremacy Clause bars habeas relief when a state court considers federal custody. *See* Tarble's Case, 80 U.S. (13 Wall.) 397, 411–12 (1871); Ableman v. Booth, 62 U.S. (21 How.) 506, 523–24 (1858).

64 *See infra* note 106.

65 *See infra* sebsection I.C.1.

dictional preclusion questions that arise when an F2 forum entertains a collateral attack on an F1 judgment.

Judicial systems that distribute assets and specify rights have finality doctrines to ensure a return on the process: rules providing that litigants, third parties, and legal institutions can rely on the outcome.[66] When disputes involve private or commercial law, the familiar preclusion rules make the most sense; rights and assets lose value when they remain open to redundant legal challenge. Even in the civil-judgment context, however, there is a special allowance for attacking judgments that implicate restraints on custody.[67] Just last term, the Supreme Court indicated that res judicata rules operated differently in challenges to anti-abortion laws because of their impact on "important human values."[68]

In the context of a criminal judgment, some traditional finality interests are diminished. A conviction is closer to an ongoing decree than to a final civil judgment.[69] Moreover, the underlying asset is not property or an entitlement, but liberty. Losing defendants in civil cases have a finality interest in merger,[70] but criminal defendants experience no such return on a conviction. Finally, some might argue that the dominant function of private law is utility maximization,[71] but most would agree that such maximization is a lesser goal of criminal process.[72] Criminal judgments, however, trigger other types of finality interests: government litigants and winning defendants need repose,[73] victims want closure,[74] and courts must reallocate scarce judicial resources.[75] The most familiar criminal preclusion rule is the Constitution's

66 *See* Brown v. Felsen, 442 U.S. 127, 131 (1979).

67 The Restatement authors seem to recognize the unique interests at stake when the collateral attack implicates freedom from restraint. *See, e.g.*, 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (AM. LAW INST. 1982) ("Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.").

68 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2306 (2016) (quoting 1 RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. f (AM. LAW INST. 1982)).

69 The legal literature tends not to conceptualize criminal convictions as "ongoing decrees" because there are mature, subjudicial institutions that seamlessly enforce a judgment's supervisory features. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 512 (1980).

70 *See* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 18 (AM. LAW INST. 1982).

71 *See, e.g.*, Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1801 (1997) (restating the traditional law-and-economics position for contract judgments).

72 *See, e.g.,* Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 857 (2002) (referring to rehabilitation, incapacitation, and deterrence as the "principal consequentialist theories of punishment").

73 *See* Bator, *supra* note 8, at 452.

74 *See* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. Rev. 547, 606 (2002).

75 *See* Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 140 (2012).

Double Jeopardy Clause, which bars a jurisdiction from trying a defendant for the same offense twice.[76] Issue preclusion usually operates *against* a party to a criminal case[77]—i.e., a state or a defendant—only if that party had a "'full and fair' opportunity to litigate" that issue in the prior trial.[78] The development of habeas preclusion rules, however, does not reflect a nuanced approach to the difference in finality interests attached to civil and criminal judgments.

1. Appellate Regard: Deference

An appeals court usually has some Regard for lower court determinations. Appellate Regard is expressed through constructs such as harmless error doctrines, the restricted reviewability of fact-finding, and deference to discretionary rulings. Theoretically, the Regard range runs from zero (no deference) to infinity (unreviewable). The canonical habeas statements about Regard for criminal convictions were expressions of appellate deference, not collateral preclusion. Early precedent developed Regard rules in situations where Congress had withheld conventional forms of appellate jurisdiction. The Supreme Court was using its (poorly denominated) "original" habeas power in a rather exotic Regard Scenario: to conduct the functional equivalent of direct appellate review of federal convictions.[79]

The appellate Regard Scenario of early American habeas power dramatically affected its content. In *Ex parte Watkins*,[80] an extraordinarily important case that I revisit throughout this Article, Chief Justice John Marshall interpreted the Supreme Court's original (but really appellate) habeas power narrowly. He disclaimed the Supreme Court's original habeas power to subject *federal* criminal convictions to the functional equivalent of direct review.[81] *Watkins* effectively eliminated the Court's ability to use original habeas writs to correct nonjurisdictional defects in federal convictions. In one part of the opinion, the Court stated that the federal judgment was to be treated as conclusive in a habeas proceeding, without expressly limiting that rule to the appellate-type process it confronted in the case before it: "The decision of [punishment] is the exercise of jurisdiction . . . . The judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it."[82] That proposition—isolated from surrounding text situating it as a rule about using the writ as a substitute for appellate jurisdiction—heavily influenced habeas

76 *See* U.S. CONST. amend. V.

77 *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970).

78 Standefer v. United States, 447 U.S. 10, 21–22, 25 (1980) (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 325 (1979)).

79 *See* Oaks, *supra* note 30, at 177–79.

80 28 U.S. (3 Pet.) 193 (1830).

81 *See id.* at 203.

82 *Id.*

law until 1915, when the Court got deeper into the business of establishing rules for collateral review of state convictions.[83]

2. Collateral Regard: Inter-Jurisdictional Preclusion

Watkins is the rolling fog of modern post-conviction law, clouding habeas process for state inmates. (That status is ironic, because *Watkins* involved neither collateral review nor a state conviction.) Throughout the nineteenth century, courts parroted the *Watkins* proposition that a conviction by a jurisdictionally competent federal court precluded federal habeas inquiry.[84] The idea that *Watkins* and its progeny formed a steady-state preclusion rule for inter-jurisdictional process, however, is a bridge too far. For much of that era, federal courts did not address *any* inter-jurisdictional preclusion issue because the federal habeas statute both withheld jurisdiction over state custody from federal courts and withheld a cause of action from state prisoners. That distinction bears repeating because so many have confused the concepts so badly: from the Stone Age until 1867, Article III courts refused habeas consideration of state convictions because Congress had provided neither for a federal cause of action nor for federal jurisdiction[85]—not because any preclusion-like rule barred relief.

Law-of-Judgments nomenclature allows me to present the difference in Regard Scenarios precisely. *Watkins* was a direct review case about the appellate Regard an F1 court has for an F1 judgment otherwise immune from appellate review. Inter-jurisdictional preclusion questions about the F2 power to review F1 judgments did not materialize until 1867, when Congress created a federal habeas cause for state inmates and empowered lower federal courts to entertain it.[86]

Those favoring aggressive habeas restrictions point to a series of post-1867 cases as evidence that the 1867 Act simply incorporated the norms of appellate restraint as norms of inter-jurisdictional preclusion.[87] That precedent is discussed momentarily, and it established a more elastic understanding of the "jurisdictional error" necessary to void a conviction. For many, however, the precedent does double duty as evidence of an expanding

83 *See* Frank v. Mangum, 237 U.S. 309 (1915).

84 *See, e.g.*, *Ex parte* Wilson, 114 U.S. 417, 420–21 (1885) ("[H]aving no jurisdiction of criminal cases by writ of error or appeal, [the Court] cannot discharge on habeas corpus a person imprisoned . . . in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence." (citations omitted)); *Ex parte* Kearney, 20 U.S. (7 Wheat.) 38, 42 (1822) ("[T]his Court has no appellate jurisdiction confided to it in criminal cases . . . . If, then, this Court cannot *directly* revise a judgment of the Circuit Court in a criminal case, what reason is there to suppose, that it was intended to vest it with the authority to do it indirectly?").

85 *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82; *Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845).

86 Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

87 See *infra* notes 90–93 and accompanying text. These cases, while decided after 1867, were not state-inmate cases decided "under" the 1867 Act. *See infra* note 95.

habeas power and as evidence of its limits.[88] It supposedly shows that, although *Watkins* was no longer the North Star for habeas process involving criminal convictions, it had fallen only a little farther south.[89]

Specifically, the argument against broad habeas power extracts a steady state of habeas preclusion from the Regard expressed in *Ex parte Lange*,[90] *Ex parte Parks*,[91] and *Ex parte Siebold*.[92] The steady state, some argue, always required the state inmate to gesture at a jurisdictional error to argue that the convicting court entered judgment unlawfully—until due process language crept into the other cases after the turn of the twentieth century.[93] Because of differences in the Regard Scenarios producing them, *Lange*, *Parks*, and *Siebold* themselves disclose fewer limits on state-inmate relitigation than meet the eye. First, in those cases, the Supreme Court was *still* using habeas as a direct review vehicle.[94] Second, those cases involved review of federal convictions, and involved no inter-jurisdictional Regard questions.[95]

If all that *Watkins*, *Lange*, *Parks*, and *Siebold* can tell us is the type of defect that allowed a higher federal court to grant appellate relief by way of habeas process to a lower federal court, then they are not exactly a font of inter-jurisdictional preclusion norms. These cases nonetheless became the

88 *See, e.g.*, Bator, *supra* note 8, at 465–74, 468 n.61 (inferring limits from cases deviating from *Watkins*); Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1131–32, 1162 (1995) (criticizing scholars for failing "to take *Watkins* at face value"); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 605 (1993) (positioning *Siebold*, among other cases, as a cautious expansion of the *Watkins* rule to include constitutional challenges to statutes).

89 Bator specifically argues that the state-inmate cases decided under the 1867 Act honored the limits of habeas jurisdiction as specified in cases like *Ex parte Siebold*, 100 U.S. 371 (1879), *Ex parte Parks*, 93 U.S. 18 (1876), and *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). *See* Bator, *supra* note 8, at 480. Those three cases are discussed *infra* in notes 90–96 and accompanying text.

90 85 U.S. (18 Wall.) 163. *Lange* involved the availability of habeas relief for a double jeopardy violation, and rejected the idea that a judgment imposed by a jurisdictionally competent court is necessarily lawful and preclusive of habeas scrutiny. *See id.* at 177–79.

91 93 U.S. 18. Parks was convicted of forging documents purporting to authenticate a bankruptcy proceeding. *See id.* at 19. The Supreme Court repeatedly emphasized that it had no habeas power to correct "mere" error. *Id.* at 21.

92 100 U.S. 371. Siebold was one of several election judges convicted of election fraud under federal law. He argued that the laws under which the district court convicted him were beyond the Article I power of Congress to enact. *Id.* at 373. The question was whether, using the habeas writ as a direct-review vehicle, the Court could review custody on the grounds that the statute in question was unconstitutional. *See id.* at 374. It explained that "the general rule is[ ] that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*." *Id.* at 375. The general rule controlled, *Siebold* holds, unless there is "some other matter rendering its proceedings void." *Id.*

93 *See* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 263 (1988).

94 *See Siebold*, 100 U.S. at 373–74; *Parks*, 93 U.S. at 18; *Lange*, 85 U.S. (18. Wall.) at 165–66.

95 *See Siebold*, 100 U.S. at 373 (convicted in the District of Maryland); *Parks*, 93 U.S. at 18 (Western District of Virginia); *Lange*, 85 U.S. at 163 (Southern District of New York).

standard source of authority cited in many late nineteenth-century Supreme Court cases recognizing what the Court viewed as a longstanding rule: that jurisdictionally competent state convictions precluded collateral relief in federal district court.[96] That line of precedent was ultimately rejected by the cases discussed in Sections II.A and II.B, but it contributes meaningfully to the broader narrative about the natural state of preclusion rules in federal habeas cases.

* * *

Standard inter-jurisdictional preclusion law dictates that an F1 judgment is void in F2 if it was not the result of full-and-fair process.[97] As Parts II and III demonstrate, the procedural integrity of the state (F1) criminal proceeding is a less and less salient condition of habeas preclusion in federal (F2) court. In many other respects, too, the habeas finality doctrines have now become far more preclusive than those of the standard model.

II. The Relitigation Paradigm

In Part II, I dissect the era during which legal institutions treated state convictions as less preclusive than civil judgments. The era's dominant habeas model, what I call the "Relitigation paradigm," nonetheless retained certain basic features of an inter-jurisdictional preclusion inquiry. The Relitigation paradigm flourished under the Warren Court, but its influence has diminished since. Under the Relitigation paradigm, habeas proceedings expressed Regard in the familiar two-step form applied to collateral litigation, with the first step focused on the reliability of F1 process. The basic normative justification for the Relitigation model centered on things like the importance of the underlying constitutional challenges, the superior institutional competence of federal court as a forum for resolving those issues, and the primacy of a liberty interest in any adjudication touching on custody.[98]

96 *See, e.g.*, Andrews v. Swartz, 156 U.S. 272, 276 (1895) (citing *Siebold*, 100 U.S. at 375); *In re* Frederich, 149 U.S. 70, 75 (1893) (first citing *Lange*, 85 U.S. (18 Wall.) 163; then citing *Siebold*, 100 U.S. 371); *Ex parte* Bridges, 4 F. Cas. 98, 105 (C.C.N.D. Ga. 1875) (No. 1862) (authored by Justice Bradley riding circuit and citing *Lange*, 85 U.S. (18 Wall.) 163); *cf.* Bergemann v. Backer, 157 U.S. 655, 659 (1895) ("The court below having had jurisdiction of the offence and of the accused, and having proceeded under a statute not repugnant to the Constitution of the United States, the Circuit Court of the United States had no authority to interfere, by means of a writ of *habeas corpus*, with the execution of the sentence." (first citing *Andrews*, 156 U.S. 272; and then citing New York v. Eno, 155 U.S. 89, 98 (1894)); *In re* Jugiro, 140 U.S. 291, 297 (1891) ("The errors, if any, committed by that court in respect to any of those matters, did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus*.").

97 *See supra* notes 53–63 and accompanying text.

98 *See* Woolhandler, *supra* note 88, at 578–79 (collecting authority). Many also believe that the paradigm insufficiently reflected the comity and federalism interests implicated by an F2 proceeding in which a foreign law (the state conviction) might be declared invalid. *See also* Danforth v. Minnesota, 552 U.S. 264, 279 (2008); Richard H. Fallon, Jr., *The "Con-*

The Relitigation paradigm has four elemental features. First, it operates through two discrete steps: a process-oriented decision about whether or to what degree a state conviction precluded federal habeas consideration, followed by a decision "on the merits" of the claim. Second, the universe of evidence capable of being considered during *both* the Step 1 preclusion and Step 2 merits inquiries was fairly robust, and not limited to the state record. Third, for legal and factual issues that the state court actually decided on the merits, the relitigation conditions could always be satisfied *at least* by showing defects in the state process. Fourth, the operative legal constructs were closer to issue-preclusion than to claim-preclusion rules.

The observation that the Warren Court expanded the opportunity for inmates to relitigate criminal judgments is nothing new. The neglected idea involves the form that the increased litigation opportunity took. By distinguishing the actual preclusion law from a jurisdictional provision authorizing federal courts to award relief and a cause of action necessary to seek it, I am in a superior position to do an apples-to-apples comparison of the Relitigation paradigm and a more conventional inter-jurisdictional preclusion model. Moreover, isolating the preclusion law reveals just how substantially the Appellate paradigm, discussed in Part III, deviates from more general preclusive norms.

*A. Pre-*Brown v. Allen

The 1867 Habeas Corpus Act extended federal habeas power to reach "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."[99] "Modern" post-conviction law begins with *Brown v. Allen*,[100] decided in 1953. *Brown* affirmed—or established, depending on one's point of view—that the 1867 Act permitted state inmates to relitigate challenges to their convictions in federal court.[101] The conditions for such relitigation are the phenomena at issue when federal habeas law is criticized as giving insufficiently preclusive effect to state convictions. *Brown* and the 1867 Act anchor most historical debates about the preclusive effect of state convictions.[102]

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servative" Paths of the Rehnquist Court's Federalism Decisions, 69 U. CHI. L. REV. 429, 465 (2002).

99 Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

100 344 U.S. 443 (1953).

101 The denomination of the opinions is confusing, but the decision on the pertinent issue in *Brown* was announced in an opinion by Justice Felix Frankfurter in a companion case. *See* Daniels v. Allen, *reported sub nom.* Brown v. Allen, 344 U.S. 443, 488–513 (1953) (opinion of Frankfurter, J.).

102 *Compare* Bator, *supra* note 8, at 463–64 (depicting mid-twentieth-century Supreme Court law permitting extensive habeas relitigation by state inmates as an expansion from previous understandings of the writ), *with* Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 579, 660–63 (1982) (arguing that Professor Bator's theory of the federal privilege for state inmates is too restrictive). Professors Bator and Peller are the two figures most readily associated with the two major sides in the debate. *See* James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas*

The legitimacy of the Relitigation paradigm centers substantially on interpretation of precedent announced between the 1867 Act and *Brown*,[103] and on when federal judges obtained legitimate authority to look behind the face of a state conviction and conduct more searching federal habeas process. The pertinent decisions exclude a proposition favored by those critical of the Relitigation paradigm: that a state conviction, issued by a jurisdictionally competent court, barred collateral habeas scrutiny.[104] I am not the first person to make *that* point,[105] and my emphasis is elsewhere—on the comparison between the pre-*Brown* state-inmate cases and the features of standard inter-jurisdictional preclusion inquiry. In criticizing Relitigation paradigm features, opinions and scholarship abound with references to a collection of older decisions in which federal habeas relief was unavailable for F1 state criminal process marred by error other than a defect in subject-matter or personal jurisdiction.[106] That account, among other things,[107] ultimately

Corpus/Direct Review Parity, 92 COLUM. L. REV. 1997, 2041–48 (1992) (contrasting "The Bator Thesis" with the "The Brennan-Peller Thesis" (emphasis omitted)).

103 *See, e.g.*, Moore v. Dempsey, 261 U.S. 86 (1923) (granting habeas relief for conviction obtained after the Elaine Race Riot, noting unavailability of sufficient state corrective process); Frank v. Mangum, 237 U.S. 309 (1915) (denying habeas relief in the murder trial of Leo Frank, citing availability of state corrective process); *see also supra* notes 87–89 (collecting other authority).

104 I strongly disagree with Professor Bator's categorical description of the state of habeas law during even the earliest parts of this period. Professor Bator wrote: "[In 1915,] if a court of competent jurisdiction adjudicated a federal question in a criminal case, its decision of that question was final . . . and not subject to redetermination on habeas corpus." Bator, *supra* note 8, at 483. He dismissed cases inconsistent with that general principle as part of "a few classes of issues . . . which were labeled jurisdictional though they did not really bear on the competence of the committing court; these were, however, strictly limited and their creation was probably grounded on the lack of appeal in federal criminal cases." *Id.* at 483–84. Professor Bator is, of course, referring to the cases decided in the appellate Regard Scenario, which do not translate well for inter-jurisdictional-preclusion inquiries. Some cases certainly support the general principle Professor Bator identifies, but the picture is far more muddled than he suggests. The case most explicitly stating the general principle is an equal protection case about a juror-selection claim that the inmate forfeited at trial, and does not exclude the possibility that any conviction obtained in violation of due process was void. *See In re* Wood, 140 U.S. 278, 285 (1891) (cited as leading by Bator, *supra* note 8, at 481). Nor do the other cases upon which Professor Bator relies deal with due process violations. *See, e.g.*, Andrews v. Swartz, 156 U.S. 272, 276 (1895) (cited by Bator, *supra* note 8, at 482); *In re* Jugiro, 140 U.S. 291, 296–97 (1891) (same). In cases where the Supreme Court did encounter a state inmate alleging a violation of the Fourteenth Amendment Due Process Clause, it generally treated the due process allegation as a claim of jurisdictional error and reached the merits. *See infra* note 107.

105 *See, e.g.*, Peller, *supra* note 102, at 603–63 (revisiting decisional history preceding *Brown*).

106 *See, e.g.*, Fay v. Noia, 372 U.S. 391, 454 (1963) (Harlan, J., dissenting) ("There can be no doubt of the limited scope of habeas corpus during this formative period, and of the consistent efforts to confine the writ to questions of jurisdiction."); Forsythe, *supra* note 88, at 1162 (criticizing scholars for failing "to take *Watkins* at face value"); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 932 (1998) (criticizing abandonment of *Watkins* in collateral Regard Scenarios).

traces to precedent that never actually spoke to an inter-jurisdictional preclusion issue. The pertinent decisions—*Ex parte Watkins*,[108] *Ex parte Lange*,[109] *Ex parte Parks*,[110] and *Ex parte Siebold*[111]—are not inter-jurisdictional preclusion cases, and are subject to different preclusion norms because they involved federal judgments.[112]

There was simply no pertinent inter-jurisdictional habeas precedent before 1867.[113] Until 1867—subject to exceptions not relevant here[114]—federal habeas relief for state inmates was categorically unavailable, whether there was a state conviction or not.[115] There was neither federal jurisdiction for courts to entertain, nor a federal cause of action for state inmates to assert, constitutional claims. Once the 1867 Habeas Corpus Act[116] made inter-jurisdictional preclusion a live issue by establishing both jurisdiction and a cause of action,[117] the availability of federal relitigation became quite

107 Another issue with the account is that there is a competing explanation for why habeas relief was infrequently granted to state prisoners: because it was limited to due process violations, and there were few due process restrictions on the states. *See* Peller, supra note 102, at 621–22. The due process constraints on states that did exist—requirements that courts have subject-matter and personal jurisdiction—were precisely the types of error that voided convictions. *See, e.g.*, Bowen v. Johnston, 306 U.S. 19, 24 (1939) ("But if it be found that the court had no jurisdiction to try the petitioner . . . the remedy of *habeas corpus* is available." (citations omitted)). The cases cited by Professor Bator do not exclude this possibility, because none foreclosed relief for a Fourteenth Amendment due process violation. *See supra* sources collected in note 104. The Supreme Court quite explicitly reached the merits of Fourteenth Amendment due process claims *other than* allegations of defects in subject-matter and personal jurisdiction. *See, e.g.*, Felts v. Murphy, 201 U.S. 123, 129 (1906) ("The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution."); *In re* Converse, 137 U.S. 624, 631 (1891) ("The single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States . . . .").

108 28 U.S. (3 Pet.) 193 (1830).

109 85 U.S. (18 Wall.) 163 (1873).

110 93 U.S. 18 (1876).

111 100 U.S. 371 (1879).

112 *See id.* at 372; *Parks*, 93 U.S. at 18; *Lange*, 85 U.S. (18 Wall.) at 165–66; *Watkins*, 28 U.S. (3 Pet.) at 194.

113 In *Ableman v. Booth*, 62 U.S. (21 How.) 506, 526 (1858), the Supreme Court barred state habeas consideration of a federal conviction. That decision was based on the Supremacy Clause, not preclusion. *Id.* at 517–18.

114 South Carolina moved to nullify federal tax law, and Congress passed the Force Act of 1833 to ensure habeas relief for federal officials arrested for enforcing it. *See* Habeas Corpus Act of 1833, ch. 57, § 7, 4 Stat. 632, 634. In response to a diplomatic crisis, Congress passed the Force Act of 1842, which provided habeas relief for foreign representatives detained for conduct undertaken in their official capacities. *See* Habeas Corpus Act of 1842, ch. 257, 5 Stat. 539.

115 *See Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845).

116 Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

117 There was no cause of action available to state detainees under the Judiciary Act of 1789, which permitted habeas consideration only of custody "under or by colour of the

sensitive to the reliability of the F1 state procedure.[118] Under Law-of-Judgments principles, there is no reason why the holding from *Watkins*—that the Supreme Court could not use its original habeas power to correct nonjurisdictional error in federal convictions[119]—would require the same level of Regard to be expressed in a rule that operated collaterally and inter-jurisdictionally.

In the two canonical pre-*Brown* state-inmate cases, *Frank v. Mangum*[120] and *Moore v. Dempsey*,[121] the Supreme Court began to "soften" the appellate and intra-jurisdictional habeas Regard that emerged from *Lange*, *Parks*, and *Siebold*. An entirely different set of institutional imperatives—including the push to collateralize litigation involving the judgment of another sovereign—gave rise to *Frank* and *Moore*, which seeded the Relitigation paradigm for collateral state-inmate cases. Professor Bator positioned *Frank* and *Moore* as the seminal precedent for his "full and fair" model of habeas law,[122] but what he identified was simply an emphasis on full-and-fair F1 process typical of inter-jurisdictional preclusion inquiry.

In *Frank*, a Georgia inmate claimed that a southern mob dominated his murder trial—a national media sensation—and that he was convicted without due process.[123] The Supreme Court went as far as to "put out of view . . . the suggestion that even the questions of fact bearing upon the jurisdiction of the trial court could be conclusively determined against the prisoner by the decision of the state court of last resort."[124] The Court, however, determined that Frank's conviction was lawful on the merits, and that the availability of state corrective process was sufficient to avoid any due process problem.[125] To put the result a little differently, the Supreme Court denied relief because it determined, as a substantive matter, that the conviction was lawful; and it only determined the conviction was substantively lawful because it was pursuant to due process. *Frank* did not bar relitigation *in spite of* a due process violation.

Justice Holmes dissented in *Frank*, but secured his majority in *Moore*, a case stemming from the Elaine Race Riots in Arkansas.[126] Moore was capitally sentenced for his alleged role in the riots.[127] The defense lawyer did not meet with Moore until trial, he called no witnesses and presented no evidence, the trial took less than an hour, and the jury deliberated for less than

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authority of the United States." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82; *Dorr*, 44 U.S. (3 How.) at 105.

118 *But see supra* note 96 (collecting late nineteenth-century cases parroting the *Watkins* rule for inter-jurisdictional preclusion scenarios).

119 *See* 28 U.S. (3 Pet.) 193, 202 (1830).

120 237 U.S. 309 (1915).

121 261 U.S. 86 (1923).

122 *See* Bator, *supra* note 8, at 486–89.

123 *See* 237 U.S. at 324–25.

124 *Id.* at 334.

125 *See id.* at 334–36.

126 261 U.S. 86.

127 *See id.* at 89.

five minutes.[128] The Supreme Court made federal habeas relief available, but an important distinction as to the reason is not immediately clear from the face of the opinion. One might fairly read *Moore* as of a piece with *Frank*: a substantive determination that the custody was lawful because corrective appellate process was sufficient. One might also read *Moore* a bit differently, to say that state corrective process disables the habeas remedy notwithstanding unlawful custody. The difference between the two readings lies in the conceptual significance of appellate process. On the first reading, such process ensures the lawfulness of custody; on the second, it has no effect on lawfulness but still bars relief.

In the period between *Moore* and *Brown*, the Court issued several state-inmate opinions that generally (if a bit clumsily) described the absence of state corrective process as a condition for federal habeas relief rather than necessary for a due process violation.[129] Conceptualizing defective state corrective process as a remedial condition was crucial to Professor Bator's full-and-fair proposal,[130] but the distinction between right and remedy does not bear meaningfully on my position. Under either conceptualization, defective state process permitted federal habeas relitigation. Moreover, the emphasis on prior process as expressed through *Frank* and *Moore* arose at precisely the time that habeas relief became an inter-jurisdictional preclusion question. That question had remained unsettled until the turn of the twentieth century because there was no antebellum federal remedy for state inmates and

128 *See id.*

129 *See, e.g.*, White v. Ragen, 324 U.S. 760, 764 (1945) (per curiam) ("[T]he allegations . . . make out prima facie cases of violation of these constitutional rights of petitioners, sufficient to invoke corrective process in some court, and in the federal district court if none is afforded by the state."); House v. Mayo, 324 U.S. 42, 48 (1945) ("[W]here a state court has considered and adjudicated the merits of a petitioner's contentions . . . a federal court will not ordinarily reexamine upon writ of habeas corpus the questions thus adjudicated. But that rule is inapplicable where . . . the basis of the state court decision is that the particular remedy sought is not one allowed by state law . . . ." (citations omitted)); *Ex parte* Hawk, 321 U.S. 114, 118 (1944) (per curiam) ("But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised . . . a federal court should entertain his petition for habeas corpus, else he would be remediless." (citations omitted)); Waley v. Johnston, 316 U.S. 101, 104–05 (1942) (per curiam) ("[T]he use of the writ . . . extends . . . to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." (citations omitted)); Johnson v. Zerbst, 304 U.S. 458, 467 (1938) ("If [the contention that he had no effective appellate remedy is] true in fact, it necessarily follows that no legal procedural remedy is available to grant relief for a violation of constitutional rights, unless the courts protect petitioner's rights by *habeas corpus*. Of the contention that the law provides no effective remedy for such a deprivation of rights affecting life and liberty, it may well be said that it 'falls with the premise.' To deprive a citizen of his only effective remedy would not only be contrary to the 'rudimentary demands of justice' but destructive of a constitutional guaranty specifically designed to prevent injustice." (footnote omitted) (citation omitted) (quoting Mooney v. Holohan, 294 U.S. 103, 112–13 (1935))).

130 Professor Bator was developing a narrative in which only certain types of due process violations triggered federal habeas relief. *See* Bator, *supra* note 8, at 481.

because many of the due process guarantees that define a "full and fair" proceeding had not been applied to the states through the Fourteenth Amendment.[131]

Frank and *Moore* are not points further to one end of an appellate-Regard continuum that also includes *Parks*, *Lange*, and *Siebold*; they sit on an entirely separate axis. *Frank* and *Moore* speak to the early preclusion norms from inter-jurisdictional habeas cases; cases decided under the other Regard Scenario do not. I do not mean to imply that *Frank* and *Moore* were consistent with all of the inter-jurisdictional habeas precedent decided in the 1890s.[132] They are, however, recognized as landmark cases precisely because, rather than parrot language from the appellate Regard cases, they began to wrestle with the collateral features of the habeas posture.

B. Relitigation Paradigm Features

Brown v. Allen resides on the *Moore-Frank* axis, and was the decisive moment in the fight over the meaning of the 1867 Habeas Corpus Act. In *Brown*, the Supreme Court held that state inmates could collaterally relitigate their convictions in federal court, *without respect to whether prior state consideration of the claim was procedurally defective.*[133] That federal relitigation could proceed notwithstanding a procedurally sound state disposition on the claim was what distinguished habeas as an "exception to *res judicata*."[134] If habeas relief were contingent on a failure of full-and-fair state process, then there would be nothing distinguishing the inter-jurisdictionally preclusive effect of a state conviction from that of an ordinary civil judgment.

As opposed to *Frank* and *Moore*, *Brown* devotes considerable space to explaining the unique dimensions of inter-jurisdictional preclusion in federal habeas cases. The opinions in *Brown*, for example, explore how the inter-jurisdictional relitigation constraints should reflect interests in comity and federalism, in addition to finality.[135] As the font of the Relitigation paradigm, *Brown* announced the rule for federal consideration of claims actually litigated in state proceedings; but it also prefigures rules for forfeited claims and for predicate fact determinations. Through *Brown* (claims decided on the merits), *Fay v. Noia* (forfeited claims),[136] *Townsend v. Sain* (factual predicates),[137] and the 1966 Habeas Amendments,[138] American legal institutions ratified the Relitigation paradigm, customized to the unique inter-jurisdic-

131 *See supra* note 107.

132 *See supra* note 96.

133 *See* 344 U.S. 443, 500–01 (1953) (opinion of Frankfurter, J.).

134 *See supra* note 19.

135 *See* 344 U.S. at 497–501; *id.* at 533–40, 543–45 (Jackson, J., concurring in result); *id.* at 553–54 (Black, J., dissenting).

136 372 U.S. 391, 398–99 (1963), *abrogated by* Coleman v. Thompson, 501 U.S. 722 (1991).

137 372 U.S. 293, 319–22 (1963), *overruled by* Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

138 Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1104, 1105–06.

tional preclusion issues presented by collateral challenges to state convictions.

Four attributes emerged across different types of Relitigation paradigm inquiries. First (and most importantly), the decision to grant habeas relief always consisted of two steps. A court had to make an initial determination as to the preclusive scope of the state judgment, and then had to decide "the merits" in light of any applicable relitigation restriction. In cases where state inmates were able to avoid any restriction—where there was no preclusion whatsoever—a federal court decided the claim *simpliciter*. Even in cases where inmates could not avoid relitigation restrictions, however, those restrictions did not take the form of categorical preclusion bars. If the conviction had preclusive effect, it usually took the form of an evidentiary presumption at the second-step merits determination.[139]

Second, the Relitigation paradigm had a distinct process orientation. For legal and factual issues that the state court actually decided on the merits, the relitigation conditions could make a Step 1 showing that there was no preclusion *at least* by showing defects in the state process for deciding the constitutional challenge.[140] In fact, federal courts could generally exercise independent judgment about even claims that states decided pursuant to perfectly reliable process, and that authority was a source of major disagreement within legal institutions and the academy.[141] That defective or otherwise unreliable process was sufficient to avoid the (Step 1) relitigation restriction, however, was never in doubt. Even the leading critic of independent judicial evaluation, Professor Bator, never questioned the appropriateness of such inquiry when the state procedure or legal reasoning could not produce confidence in a conclusion.[142]

Third, the universe of evidence capable of being considered during *both* the (Step 1) preclusion and (Step 2) merits inquiries was fairly robust, and not limited to the state record.[143] (The admissibility of evidence outside the F1 record is a typical feature of an inter-jurisdictional preclusion inquiry.)[144] Federal courts were not only *permitted* to conduct evidentiary hearings for the preclusion and merits inquiries, they were frequently *required* to hold them.[145] Any presumption of correctness attached *after* the Step 1 inquiry resulted in a conclusion that the state process was reliable, not *during* Step 1, the process by which reliability was shown.[146]

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139 *See infra* subsection II.B.3.

140 *See, e.g.*, *infra* subsections II.B.1 (claims decided on the merits), II.B.3 (fact-findings).

141 *See, e.g.*, *supra* note 102 (describing axis of academic disagreement).

142 *See* Bator, supra note 8, at 489.

143 *See* Johnson v. Zerbst, 304 U.S. 458, 466 (1938).

144 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 77 (AM. LAW INST. 1982).

145 *See* Miller v. Fenton, 474 U.S. 104, 111 (1985).

146 *See* Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1104, 1105 (repealed).

Fourth, the restrictions on federal consideration were more in the nature of issue preclusion than claim preclusion.[147] State courts might have decided some challenges to a conviction on the merits, and inmates may have procedurally forfeited others. These four features of the Relitigation paradigm were expressed across different types of federal habeas inquiry, with the most important expressions appearing in law controlling federal litigation of claims decided on the merits, forfeited claims, and fact questions. Part III uses these same categories of habeas inquiry to demonstrate the influence of the modern Appellate paradigm.

1. Claims Decided on the Merits

Brown held that the 1867 Act authorized federal courts to make independent determinations on the merits of claims, without much respect for the adequacy and outcome of—i.e., without much Regard for—prior state process.[148] Writing for the Court, Justice Frankfurter explained that "[i]t is inadmissible to deny the use of the writ merely because a State court has passed on a federal constitutional issue."[149] That the state record adequately supported a state disposition was *never* sufficient to preclude federal consideration. Winding down the lengthy opinion, Justice Frankfurter emphasized that the Regard Scenario was inter-jurisdictional relitigation, and not appellate review: "[I]t is not a case of a lower [federal] court sitting in judgment on a higher [state supreme] court."[150]

To understand how the Relitigation model dealt with claims that state courts decided on the merits, recall that relitigation occurs in two steps. First, a court decides, as a procedural matter, whether any litigation is precluded. Second, it decides a question on the merits, subject to whatever relitigation constraints the state conviction entails. There can be Regard expressed at either step. Having settled on minimal Regard at Step 1,[151] *Brown* set out to define the conditions for relitigation—including some Regard—at Step 2.[152] In other words, *Brown* made clear that Regard for a state conviction would be expressed in the Step 2 merits inquiry and not in the Step 1 determination of whether there was a procedural defect in the

147 *See* Anthony G. Amsterdam, Address, *Remarks at the Investiture of Eric M. Freedman as the Maurice A. Deane Distinguished Professor of Constitutional Law, November 22, 2004*, 33 HOFSTRA L. REV. 403, 409 (2004); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2423 (1993).

148 *See* Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.) ("State adjudication of questions of law cannot, under the habeas corpus statute, be accepted as binding."); *see also* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (presenting *Brown* as a pivotal moment for the preclusion question); John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 440 (2011) (same).

149 *Brown*, 344 U.S. at 513 (opinion of Frankfurter, J.).

150 *Id.* at 510.

151 *Id.* at 500.

152 The thrust of the Step 2-centric opinion appears in six numbered subsections. *Id.* at 502–08. The Step 2 Regard generally took the form of deference to procedurally sound state fact determinations. *See id.* at 506–08.

state claim adjudication. In permitting Step 2 merits review notwithstanding sound state procedure, however, the Relitigation paradigm involved a substantially reduced level of inter-jurisdictional preclusion, at least as compared with the inter-jurisdictionally preclusive scope of a civil judgment.

2. Forfeited Claims

Legal institutions honoring the Relitigation paradigm also refused to incorporate forfeiture rules developed in the appellate Regard Scenario. *Brown* dealt with claims that state courts actually denied on the merits, and was decided near the beginning of Chief Justice Warren's tenure. By the end of it, the Supreme Court had marbled criminal procedure with constitutional law,[153] and so the number of claims capable of being lodged on direct or collateral review rose dramatically. Because of the growth and change in constitutional content, the Warren Court ultimately had to fashion relitigation principles for forfeited claims—i.e., issues that state courts *had not* decided on the merits in either direct review or state post-conviction proceedings. For the decade after *Brown*, many courts believed that, under *Daniels v. Allen* (a *Brown* companion case),[154] state forfeiture precluded federal habeas consideration.[155]

In *Fay v. Noia*,[156] the Supreme Court rejected the forfeiture rule for appeals. It announced that an inmate could obtain (Step 2) merits review if the inmate had not "deliberately by-passed" a state remedy.[157] *Noia* is generally considered the high-water mark of federal habeas relitigation; the Court has overturned *Noia*'s formal holding and disavowed its ethos in the decades since.[158] Authored by Justice Brennan, the opinion recites a stilted history,[159] but it nevertheless captures the day's dominant habeas paradigm. *Noia* held that nothing about a procedurally defaulted claim deprived a federal court of *jurisdiction* to entertain it.[160]

Noia explicitly rejected certain Regard principles developed for appellate review of state convictions.[161] Under some views of the pre-*Noia* forfeiture rule, a claim was procedurally defaulted if there were adequate-and-

153 *See infra* notes 179–80.

154 Daniels v. Allen, *reported sub nom.* Brown v. Allen, 344 U.S. 443, 510 (1953) (opinion of Frankfurter, J.).

155 *See, e.g.*, Fay v. Noia, 372 U.S. 391, 448 (1963) (Clark, J., dissenting) (describing majority opinion as "negating" *Daniels*).

156 372 U.S. 391.

157 *See id.* at 438.

158 *See* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (formally overruling *Noia* and explaining its diminished influence).

159 *See Noia*, 372 U.S. at 399–414; *see also* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 985 n.227 (2011) (reviewing PAUL D. HALLIDAY, HABEAS CORPUS: FROM ENGLAND TO EMPIRE (2010)) ("Forests have been felled over Justice Brennan's reading of the history of the Habeas Corpus Act of 1867 . . . .").

160 *See Noia*, 372 U.S. at 426.

161 *See id.* at 429 ("The fatal weakness of this contention is its failure to recognize that the adequate state-ground rule is a function of the limitations of *appellate* review.").

independent state grounds (AAISG) to sustain the state order denying relief.[162] Very roughly speaking, a state procedural rule is "adequate" if it is firmly established and regularly followed,[163] and it is "independent" (of federal law) if it is not intertwined with the underlying federal claim.[164] Adequacy and independence are established constraints on the *appellate jurisdiction of the Supreme Court* to conduct direct review of state judgments.[165] The basic logic of the AAISG rule is that it forecloses the Supreme Court's appellate review of federal issues that do not dictate the outcome of a dispute;[166] if there is an AAISG, then there is no Article III case or controversy.[167] In *Noia*, however, the Court refused to incorporate the AAISG rule as a constraint on habeas relitigation, believing that the habeas rule should reflect the Regard Scenario at issue in an inter-jurisdictional preclusion inquiry.[168] The touchstone of Article III habeas power is simply custody;[169] state forfeiture does not moot the case or controversy.

3. Factual Predicates

The Relitigation paradigm also suppressed the inter-jurisdictionally preclusive effect of predicate fact determinations. In *Brown*, Justice Frankfurter explained that if the state record was "inadequate to show how the State court decided the relevant historical facts, the District Court shall use appropriate procedures, including a hearing if necessary, to decide the issues."[170] Note the basic sequence of federal process: a (Step 1) preclusion rule based on the reliability of the state proceeding, followed by a (Step 2) determination of fact *simpliciter*. At several other points throughout the opinion, Justice Frankfurter outlined a basic two-step fact-determination process, with the first step being a preclusion rule focused on procedural sufficiency. Justice Frankfurter explained that, "[u]nless a vital flaw be found in the process of ascertaining such facts in the State court, the District Judge may accept their determination in the State proceeding and deny the application."[171]

Noia had been decided in 1963, and was the zenith of the Relitigation paradigm—at least for the federal judiciary. That year, the Supreme Court also decided *Townsend v. Sain*,[172] which filled out the two-step process for relitigating facts. *Townsend* particularized *Brown*'s "vital flaw" language by specifying six scenarios under which federal fact-finding was *mandatory*: (1)

162 *See id.* at 398 (describing lower court opinion).
163 *See* Walker v. Martin, 562 U.S. 307, 316–17 (2011).
164 *See* Coleman v. Thompson, 501 U.S. 722, 729 (1991).
165 *See* Michigan v. Long, 463 U.S. 1032, 1041–42 (1983).
166 *See* Herb v. Pitcairn, 324 U.S. 117, 125 (1945).
167 *See Long*, 463 U.S. at 1041–42.
168 *See* Fay v. Noia, 372 U.S. 391, 429 (1963).
169 *See Coleman*, 501 U.S. at 730.
170 Brown v. Allen, 344 U.S. 443, 503 (1953) (opinion of Frankfurter, J.).
171 *Id.* at 506.
172 372 U.S. 293 (1963).

where the state failed to resolve the facts in dispute; (2) when the record "as a whole" did not support the state factual determination; (3) where the state fact-finding procedures were inadequate to afford a full-and-fair hearing; (4) in the face of substantial allegations involving newly discovered evidence; (5) if there was a failure to develop material facts at a state hearing; or (6) if "for any reason" the state trial court did not afford a full-and-fair fact hearing.[173] The particularized rules set forth a two-step process for factual development typical of the Relitigation paradigm. Scenarios (1), (3), (5), and (6) go directly to the quintessential relitigation question of whether the state procedures produce reliable outcomes. Scenario (4) requires a federal hearing when the state inmate might show the state determination to be incorrect through evidence extrinsic to the state record. Only Scenario (2) looks anything like appellate review for correctness, as it requires a federal court to evaluate whether the state record supports the state finding. Several attributes of *Townsend* express a forgiving Relitigation model. First, a (Step 1) conclusion that the state court "correctly" evaluated the state record was never sufficient to preclude (Step 2) consideration on the merits. Second, of the six particularized scenarios sufficient to *require* (Step 2) merits consideration, five have nothing to do with "review" of the state outcome in light of the state record.

Congress modified a few parts of *Townsend* in 1966 legislation,[174] and committed federal habeas process to an even less restrictive Relitigation paradigm. As with claims forfeited on the merits, the availability of federal habeas process for fact relitigation was presumed. The question was simply whether, at Step 2, Regard took the form of a presumption of correctness attached to express state findings or not. The statute specified eight scenarios when a presumption, itself capable of being overcome by clear and convincing evidence, vanished.[175] Seven of those scenarios did not involve "review" of the state conviction, and instead focused on whether the state process tended to produce reliable outcomes.[176] Only the eighth involved any substantive review of whether the state finding was correct in light of the record.[177] The same two observations I made about *Townsend* apply to the successor provision. First, that a state court correctly or fairly resolved a factual issue in light of the state record was never *sufficient* to bar merits review of the claim. Second, of the eight statutorily specified scenarios for relaxing a presumption in favor of the state finding at Step 2, seven were process-oriented and had nothing whatsoever to do with the correctness of the state determination.

* * *

The four markers of the Relitigation paradigm—strictly divided preclusion and merits inquiries, preclusion bars disabled by showings of unreliable

173 *Id.* at 313 (quoting *Brown*, 344 U.S. at 503 (opinion of Frankfurter, J.)).

174 Act of Nov. 2, 1966, Pub. L. No. 89-711, § 2, 80 Stat. 1104, 1105–06.

175 *See id.* §§ (2)(d)(1)–(d)(8).

176 *See id.* §§ (2)(d)(1)–(d)(7)

177 *See id.* § (2)(d)(7).

state process, consideration of evidence outside the state record, and a granular definition of "claim"—dominated many different types of Warren-era habeas inquires. Collectively, they constitute a process-oriented habeas jurisprudence in which unreliable state procedure was a *sufficient-but-not-necessary* condition for merits review of a habeas claim.

Moreover, the markers are consistent with the familiar proposition that state convictions are less preclusive than ordinary civil judgments. The *manner* of proving that proposition, however—isolating the preclusion constructs from laws withholding jurisdiction or a cause of action—is crucial. Such methodology enables the appropriate apples-to-apples comparison between preclusion rules for state convictions and those for other types of judgments. In Part III, I perform the same comparison with Roberts-era habeas process, and that result upends the conventional wisdom animating modern restrictions on relief.

III. The Appellate Paradigm

The first major crack in the Relitigation paradigm appeared in 1963, when the *Harvard Law Review* published Professor Bator's *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*.[178] Professor Bator's article crystallized an insurgent critique of the era's criminal process "revolution[ ]," establishing finality as a formidable presence in modern habeas discourse. The Warren Court had been announcing new rights of criminal procedure,[179] incorporating them against the states,[180] and enlisting lower federal

178 Bator, *supra* note 8, at 475.

179 *See, e.g.*, Stovall v. Denno, 388 U.S. 293, 302 (1967) (barring the use of out-of-court identification based on unnecessarily suggestive identification procedure); United States v. Wade, 388 U.S. 218, 228–39 (1967) (requiring that defendant have counsel at post-indictment line-up); Miranda v. Arizona, 384 U.S. 436, 467 (1966) (holding that the Fifth Amendment requires that suspects be warned prior to custodial interrogation); Griffin v. California, 380 U.S. 609, 615 (1965) (announcing that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt"); Pointer v. Texas, 380 U.S. 400, 407–08 (1965) (recognizing a defendant's Sixth Amendment right to confront and cross examine trial witnesses); Massiah v. United States, 377 U.S. 201, 207 (1964) (imposing a Sixth Amendment bar against using incriminating statements that law enforcement deliberately elicited after indictment and in counsel's absence); Brady v. Maryland, 373 U.S. 83, 87, 90–91 (1963) (announcing prosecutors' duty to disclose exculpatory evidence); Douglas v. California, 372 U.S. 353, 357–58 (1963) (entitling an indigent defendant to appointed counsel during any mandatory state appeal); Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) (Black, J., plurality opinion) (giving indigent defendants rights to free trial transcripts to ensure adequate appellate consideration).

180 *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 795–96 (1969) (Fifth Amendment double jeopardy rule); Duncan v. Louisiana, 391 U.S. 145, 159–62 (1968) (Sixth Amendment jury trial right in non-petty criminal cases); Washington v. Texas, 388 U.S. 14, 18 (1967) (Sixth Amendment right to compulsory process); Klopfer v. North Carolina, 386 U.S. 213, 225–26 (1967) (Sixth Amendment speedy trial guarantee); *Pointer*, 380 U.S. at 403 (Sixth Amendment Confrontation Clause right); Aguilar v. Texas, 378 U.S. 108, 111 (1964) (Fourth Amendment warrant requirement); Malloy v. Hogan, 378 U.S. 1, 6 (1964)

courts to enforce them in habeas proceedings.[181] Professor Bator argued forcefully that giving inmates an unrestricted federal habeas forum improperly neglected interests in finality and comity that should be honored after a criminal conviction becomes final.[182] The specter of serial relitigation provoked Bator-inflected responses on the Burger and Rehnquist Courts.[183] And, if modern habeas law is contoured by reference to a Batorian finality interest,[184] then its jagged edge is AEDPA[185]—the most restrictive post-conviction legislation Congress has ever passed. The Roberts Court continues to embrace finality so energetically as to invite speculation about whether legal institutions perceive a logical stopping point.

Contrary to the innumerable references to habeas process as a "*res judicata* exception," a criminal conviction is now *more* inter-jurisdictionally preclusive than is an ordinary civil judgment. That surprising state of affairs exists because, I argue, the logic and idiom of appellate review have displaced the Relitigation paradigm as the dominant theoretical framework that legal institutions use to construct and administer habeas process. The Appellate paradigm actually eschews process-oriented preclusion concepts in favor of those developed for appellate review of criminal cases. The mix of new Appellate-paradigm and surviving Relitigation-paradigm rules constitutes, broadly speaking, a habeas regime that is designed to promote comity and finality by incorporating each model's most restrictive features.

A. Essentializing Appellate Review in Criminal Cases

Authors can credibly put the "Law of Judgments" in title case. The Law of Judgments is the subject of two Restatements,[186] as is its conceptual

(Fifth Amendment *Miranda* rules); Ker v. California, 374 U.S. 23, 33–34 (1963) (Clark, J., plurality opinion) (Fourth Amendment reasonableness requirement for searches and seizures); Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (Sixth Amendment right to counsel in all felony cases); Robinson v. California, 370 U.S. 660, 667–68 (1962) (Eighth Amendment Cruel and Unusual Punishments Clause); Mapp v. Ohio, 367 U.S. 643, 653 (1961) (Fourth Amendment exclusionary rule).

181 *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1041 (1977). This proposition went hand in glove with the recognition that the Supreme Court could not enforce these incorporated rights using traditional review. *See* Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991, 1008 (1985).

182 *See infra* Section IV.A.

183 *See, e.g.*, Calderon v. Thompson, 523 U.S. 538, 555 (1998) (citing Professor Bator); McCleskey v. Zant, 499 U.S. 467, 492 (1991) (same); Teague v. Lane, 489 U.S. 288, 309 (1989) (same); Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (same); Engle v. Isaac, 456 U.S. 107, 127 n.32 (1982) (same); Jackson v. Virginia, 443 U.S. 307, 337 n.12 (1979) (same).

184 Many of the legislative proposals developed during the second half of the twentieth century were also riffs on Bator's model. *See* Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 460–62, 502–07 (2007).

185 Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26.

186 *See* RESTATEMENT (SECOND) OF JUDGMENTS (AM. LAW INST. 1982); RESTATEMENT (FIRST) OF JUDGMENTS (AM. LAW INST. 1942).

cousin, Conflict of Laws.[187] By contrast, there are laws of appellate review but no "Law of Appellate Review." Appellate process lacks qualities conducive to its treatment as an atomic unit of legal analysis. It is not a body of substantive rules like Contract or Trust Law, and its procedural features lack the trans-substantivity of Arbitration or Judgments Law.[188]

The major trans-substantive feature of appellate review is that it is *not* something else: an exercise of original or collateral jurisdiction. It is direct review of an inferior court or administrative body.[189] Beyond that shared attribute, the objectives and manner of appellate process vary enormously. For example, when a federal court reviews a federal agency, the objectives of and process for that review share little in common with those for a state court reviewing a tort judgment in favor of an assault victim.[190] That one cannot essentialize all appellate review does not exclude the possibility that some categories of appellate process nonetheless hang together in ways that warrant title-case treatment.

When I use the term "Appellate paradigm," I refer to the transdoctrinal practice of *appellate review in criminal cases*.[191] That Appellate paradigm has three features: (1) "outcome orientation," which means error is not reversible if it is "harmless" and therefore a nondispositive feature of the prior judgment;[192] (2) "intrinsicality," by which I mean that the appellate decision is made in light of the record before the trial court;[193] and (3) "deference," which means that a higher court puts a thumb on the scale in favor of trial determinations.[194] Using outcome orientation, intrinsicality, and deference as markers, Part III makes the case that facets of the Appellate model are now staples of federal habeas process.

Some luminaries have observed more generally that the Supreme Court has swapped its own appellate review for a lower court habeas remedy.[195] My

187 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS (AM. LAW INST. 1935).

188 Arbitration Law is the subject of its own Restatement. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (AM. LAW INST. 2015).

189 *See* Ira Mickenberg, *Abusing the Exceptions and Regulations Clause: Legislative Attempts to Divest the Supreme Court of Appellate Jurisdiction*, 32 AM. U. L. REV. 497, 517 (1983).

190 *Cf.* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 1000–02 (2011) (explaining how an Appellate model for judicial review of agency action might not fit institutional reality).

191 Trans-substantivity means that a procedure operates similarly across different bodies of substantive law. *See supra* note 6. I use the term "transdoctrinality" to refer to procedure that operates similarly across doctrines within a substantive body of law.

192 The most familiar such doctrine is "harmless error," although there are many others. *See* Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 83–111 (1988).

193 *See* Merrill, *supra* note 190, at 998.

194 *See* Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 512 (2008).

195 *See, e.g.*, Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 87 ("Less obviously, federal courts perform an essentially appellate function in reviewing petitions for writs of habeas corpus from state prisoners." (citing

descriptive argument (Part III) differs significantly and my normative argument (Part IV) differs entirely from prior accounts. First, I remain agnostic as to how well the Appellate model works as a descriptive or normative theory of *writ scope*.[196] Second, prior Appellate model entries are not oriented heavily towards the paradigm's limits, as I am here.[197] Finally, I am not invested in showing that the federal courts are switching entirely to a habeas process defined by direct-review features. I am most interested in the drift and its selectivity.

B. Historical Pedigree and Practical Appeal

Two features of the American criminal-process experience made the Appellate model desirable. First, there was a superficially accessible body of precedent decided in an appellate Regard Scenario: for almost a century, the Supreme Court had actually used its habeas power as a vehicle to conduct direct review of federal criminal convictions.[198] Second, because the Warren Court substantially expanded the definition of unlawful custody by announcing new criminal procedure rights,[199] there was hydraulic pressure to have lower federal courts use habeas process to enforce them in a direct-review-like way.

1. Supreme Court Appeals

The Appellate model became increasingly attractive in part because of changes to the basic structure of Supreme Court review. As highlighted in Part I, an appellate-like habeas writ had in fact been a durable direct-review vehicle before state-inmate relief created modern preclusion questions.[200] The Judiciary Act of 1789 did not give federal defendants an as-of-right

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Friedman, *supra* note 93)); Friedman, *supra* note 93, at 254 ("Accordingly, the federal habeas courts were to act as surrogates for the United States Supreme Court through habeas review, in effect exercising appellate jurisdiction over state criminal proceedings."); Liebman, *supra* note 102, at 2096 ("Simply recognizing that the scope and nature of habeas corpus review almost exactly parallel, and substitute for, the Court's own review on direct appeal may satisfy some that federal-question review in criminal cases should remain as it is.").

196 In other words, I take no position as to whether the Appellate model influences the *types* of claims that are cognizable on habeas process. *Cf., e.g.*, Friedman, *supra* note 93, at 277–88, 331–40 (emphasizing writ scope alongside other phenomena).

197 Indeed, predecessors who observed Appellate-paradigm features seem to focus on how they facilitate an *expanded* remedy. *See, e.g.*, *id.* at 331 ("The [Appellate] model recognizes this review for what it is: a surrogate for the direct review that the Supreme Court could no longer meaningfully provide for every criminal case.").

198 *See, e.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 163–64 (1873) (relying on a combination of original habeas writ and common-law certiorari petition); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 75 (1807) (same); *Ex parte* Burford, 7 U.S. (3 Cranch) 448, 448 (1806) (same).

199 *See supra* note 179.

200 *See supra* subsection I.C.1.

appeal to the Supreme Court in criminal cases,[201] but it did authorize habeas consideration of federal custody.[202] As a result, the Court began to use its original habeas power as a vehicle for entertaining what amounted to appeals from federal convictions.[203] The Supreme Court could not exercise such power by reference to its Article III *original* jurisdiction—limited to cases or controversies between states and those involving foreign envoys[204]—so it exercised that power pursuant to the Article III grant of *appellate* jurisdiction. Insofar as the Supreme Court was using the original habeas writ as a form of appellate power, it was constrained by constitutional limits on its appellate authority. The Marshall Court articulated all sorts of limits on its original habeas power (including *Watkins*), and was not especially careful to specify which restrictions were appellate-jurisdiction limits and which restrictions inhered in habeas process.[205] The Supreme Court continued to use its original habeas power as a direct-review vehicle until 1925,[206] but only for federal criminal convictions. That channel persisted not because habeas was a good fit for the desired function, but because there were no other options. That some appellate-jurisdiction rules have been re-expressed as habeas rules is not, therefore, surprising.

Shortly after federal habeas process became generally available to *state* prisoners in 1867,[207] Congress stripped the Supreme Court of traditional appellate authority to review the state-inmate cases.[208] At that time, lower courts were in the awkward role of making final, unreviewable pronouncements on important questions of federal law. The Supreme Court gestured at the idea of using its original habeas power to review state-inmate cases, but it never actually ordered a discharge. In 1885, Congress reinstated the Court's more conventional authority over the state-inmate cases,[209] providing it with its first opportunity to opine on that type of habeas power.[210] When the Court started regularly deciding the scope of state-inmate relief at that time, it did so in an environment where its direct-review authority over the conviction itself remained a viable mechanism for enforcing federal law in all

201 *See* Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 84; *see also* Oaks, *supra* note 30, at 177–79. A right of appeal was added in 1803. *See* Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244.

202 *See* § 14, 1 Stat. 81–82.

203 *See* Kovarsky, *supra* note 36, at 68–69.

204 *See* U.S. CONST. art. I, § 2.

205 *See supra* subsection I.C.2.

206 *See Ex parte* Grossman, 267 U.S. 87 (1925).

207 *See* Habeas Corpus Act of 1867, ch. 28, 14 Stat. 385.

208 *See* Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

209 *See* Act of Mar. 3, 1885, ch. 353, 23 Stat. 437.

210 The first case decided in the new posture was *Ex parte Royall*, 117 U.S. 241 (1886); *see also* Bator, *supra* note 8, at 478–83 (discussing what Professor Bator describes as the "Early 'State' Cases").

cases.[211] Habeas review for state inmates was therefore a secondary mechanism for ensuring lawful custody. That situation changed in 1925, when Congress replaced as-of-right appeals in state criminal cases with the modern writ of certiorari.[212] Only then did lower federal courts become the exclusive forum for enforcing federal rights in many state criminal cases.

2. Expanding Bases for Unlawful Custody

The Appellate model also got substantial traction when the substantive scope of due process expanded. Before the Supreme Court began using the Fourteenth Amendment's Due Process Clause to incorporate rights against the states, there were few grounds upon which to assert that custody was unlawful. The major grounds upon which an inmate could obtain relief were the absence of jurisdiction to convict,[213] conviction under an unconstitutional statute,[214] or a double jeopardy violation.[215] Over the course of several cases that still drive much debate over the modern writ's scope—discussed in Part II—the Supreme Court decided that other due process violations could also render convictions unlawful and therefore subject to habeas challenge.[216]

The Supreme Court eventually began using the Due Process Clause to incorporate rights against the states just as Congress developed the modern system of (discretionary) certiorari review.[217] The result was pressure on the Court to find a substitute for its review of state criminal convictions,[218] and lower court habeas process fit the bill.

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211 *See* Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 339.

212 *See* Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat 936, 937.

213 *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 202 (1830).

214 *See Ex parte* Siebold, 100 U.S. 371, 376 (1879).

215 *See Ex parte* Lange, 85 U.S. (18 Wall.) 163, 176 (1873).

216 *See supra* Section II.A (discussing *Moore v. Dempsey*, 261 U.S. 86 (1923), and *Frank v. Mangum*, 237 U.S. 309 (1915)); *see also, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 463 (1938) (referring to deprivation of due process rights as "power and authority" (i.e., jurisdiction) withheld from the court). *Compare, e.g.*, Bator, *supra* note 8, at 483–93 (extracting from *Frank* and *Moore* a rule that habeas jurisdiction only extended to certain types of unremedied due process violations), *with* Peller, *supra* note 102, at 644–48 (arguing that, through *Frank* and *Moore*, the Court established that habeas could be a remedy for due process violations).

217 For a catalogue of the due process rights, see *supra* note 179. The most recognizable form of the statutory certiorari writ appeared for the first time in 1925. *See* Judiciary Act of 1925, ch. 229, §§ 237–40, 43 Stat. 936, 937–39.

218 *See* Aziz Z. Huq, *Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 589 (2014). In the early twentieth century, Congress had replaced as-of-right Supreme Court review with a discretionary vehicle: the modern writ of certiorari. The most recognizable form of the statutory certiorari writ appeared for the first time in 1925. *See* Judiciary Act of 1925 §§ 237–40.

C. Appellate Paradigm Features

Habeas law now conforms largely to an Appellate model, and evidence of the drift is detectable in each of the three inquires that had formerly reflected Relitigation-model thinking: (1) rules for claims that state courts decide on the merits; (2) process on forfeited claims; and (3) fact-finding. Moreover, the shift appears to reflect some selectivity: lawmakers are borrowing only the most restrictive features of the Appellate paradigm and have styled them as limits on the habeas remedy. The most salient change is the switch from a process-oriented preclusion inquiry to an outcome-oriented inquiry about whether custody is reasonable. There is nothing inherently wrong with selecting the most restrictive features available, but one must recognize that the organizing objective is restriction itself, and not some other legal construct.

1. Claims Decided on the Merits

AEDPA, passed in 1996, remains the practical starting point for any federal post-conviction litigation. The way courts and scholars refer to AEDPA's centerpiece, 28 U.S.C. § 2254(d), reflects the change associated with the Appellate paradigm—they call it a "standard of review."[219] Section 2254(d) provides:

> [A state-inmate petition] shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[220]

The text of the statute formally imposes a relitigation rule; federal habeas relief "shall not be granted with respect to any claim that was adjudi-

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219 *See, e.g.*, White v. Woodall, 134 S. Ct. 1697, 1704 (2014) (describing § 2254(d) as a "standard of review"); Johnson v. Williams, 133 S. Ct. 1088, 1097 (2013) (same); Hardy v. Cross, 132 S. Ct. 490, 495 (2011) (per curiam) (same); Berghuis v. Thompkins, 560 U.S. 370, 389 (2010) (same); Smith v. Spisak, 558 U.S. 139, 155 (2010) (same); Knowles v. Mirzayance, 556 U.S. 111, 114 (2009) (same); Horn v. Banks, 536 U.S. 266, 269, 272 (2002) (per curiam) (same); *see also, e.g.*, Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 812 n.74 (2009) (same); Hoffstadt, *supra* note 19, at 1218 (same); Huq, *supra* note 218, at 537 (same); Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 692 (2003) (same). The Supreme Court has intermittently described § 2254(d) as a bar on relitigation. *See, e.g.*, Greene v. Fisher, 132 S. Ct. 38, 44 (2011); Premo v. Moore, 562 U.S. 115 (2011); Harrington v. Richter, 562 U.S. 86 (2011).

220 28 U.S.C. § 2254(d) (2012).

cated on the merits in State court" (Step 2) unless an inmate can satisfy one of the two subsections (Step 1).[221] In practice, however, courts have constructed § 2254(d) to impose the most restrictive features of the Appellate paradigm: outcome orientation, intrinsicality, and deference.

First, federal courts have largely adopted an outcome-oriented reading of § 2254(d), in which even severely defective state process does not permit relitigation of a constitutional claim; instead, the *outcome* of the state adjudication must be unacceptable to every fair-minded jurist.[222] Every federal appellate jurisdiction has either endorsed or seriously flirted with an "ultimate conclusion" rule—the idea that the actual reasoning of a state court does not affect the § 2254(d) inquiry.[223] The ultimate-conclusion rule means that a federal court effectively determines whether a reasonable jurist could deny the underlying claim, as opposed to whether the state court's actual decisional processes were reasonable. The Supreme Court has formally imposed an ultimate-conclusion rule for summary state orders denying state post-conviction relief.[224] Reliable state process, which is a touchstone of ordinary inter-jurisdictional preclusion inquiry and is a necessary condition to foreclose merits review under the Relitigation model, is increasingly irrelevant to federal habeas relief.[225] The Appellate paradigm is, in this respect, a fundamental rejection of Professor Bator's premise that "if the state's findings are to 'count,' they must be reasoned findings rationally reached through fair procedures."[226]

Second, the Supreme Court has required Appellate-model intrinsicality for *any* § 2254(d) inquiry, although no statutory text seems to impose that restriction on § 2254(d)(1). The plain text of § 2254(d)(2) imposes an intrinsicality principle for factual unreasonability: a state inmate avoids § 2254(d) if the state adjudication "resulted in a decision that was based on an unreasonable determination of the facts *in light of the evidence presented in the State court proceeding*."[227] Section 2254(d)(1)—the "legal unreasonable-

221 *Id.*

222 *See infra* notes 223–38 and accompanying text.

223 *See, e.g.*, Williams v. Roper, 695 F.3d 825, 837 (8th Cir. 2012); Gill v. Mecusker, 633 F.3d 1272, 1290 (11th Cir. 2011); Clements v. Clarke, 592 F.3d 45, 55–56 (1st Cir. 2010); Holder v. Palmer, 588 F.3d 328, 341 (6th Cir. 2009); Wilson v. Ozmint, 352 F.3d 847, 855 (4th Cir. 2003), *opinion amended on denial of reh'g*, 357 F.3d 461 (4th Cir. 2004); Jackson v. Ray, 390 F.3d 1254, 1259 (10th Cir. 2004); Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam); Hernandez v. Small, 282 F.3d 1132, 1140 (9th Cir. 2002); Cruz v. Miller, 255 F.3d 77, 81 (2d Cir. 2001); Hollman v. Wilson, 158 F.3d 177, 180 n.3 (3d Cir. 1998); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997). *But see* Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (rejecting ultimate-conclusion rule for formal § 2254(d)(1) analysis under "contrary to" clause (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000) (O'Connor, J., delivering the opinion of the Court in part))).

224 *See* Harrington v. Richter, 562 U.S. 86, 101–02 (2011).

225 *But see* Brumfield v. Cain, 135 S. Ct. 2269, 2282–83 (2015) (refusing to "defer" to state court on element of claim upon which state court did not expressly rule).

226 Bator, *supra* note 8, at 489.

227 28 U.S.C. § 2254(d)(2) (2012) (emphasis added).

ness" rule—lacks the express intrinsicality constraint appearing in its statutory neighbor. In *Cullen v. Pinholster*,[228] the Supreme Court nonetheless held that an inmate cannot use evidence outside the state record to satisfy it.[229] *Pinholster* presented the question as a pure Appellate-paradigm issue: "whether *review* under § 2254(d)(1) permits consideration of evidence introduced in an evidentiary hearing before the federal habeas court."[230] Appellate-model intrinsicality is considerably more restrictive than the interjurisdictional preclusion rule for ordinary civil judgments, the validity of which may be attacked using evidence outside the F1 record.[231]

Third, § 2254(d) incorporates Appellate-paradigm deference by requiring, as a Step 1 condition for even getting to the Step 2 merits inquiry, an inmate to show that a state's disposition of a claim is unreasonable. In other words, under AEDPA, deference attaches *during* the (Step 1) preclusion inquiry itself.[232] Before AEDPA, deference was simply the *result* of a Step 1 inquiry resolved in a state's favor.[233] Moreover, the Supreme Court has recently issued a slew of decisions interpreting § 2254(d) to require substantially elevated deference levels—holding that a state decision is reasonable as long as any fair-minded jurist might agree with it.[234] Finally, Appellate-paradigm deference surfaces in how federal courts proceed at Step 2, *after* a determination that an inmate avoids § 2254(d). Under the statute's text, § 2254(a) should kick in and a federal court appears to be required to consider the claim *simpliciter*.[235] Even when a state inmate avoids § 2254(d), however, some federal courts still consider themselves to be "reviewing" state decisions rather than deciding claims.[236] For ordinary civil judgments, by

228 563 U.S. 170 (2011).

229 *Id.* at 181. In *Pinholster*, the Court did attempt to anchor the rule in the text of the statute. Because the statute used the "backward-looking" past-tense verbs "resulted in" and "involved," the Court explained, the federal inquiry must be limited to the record in existence at the time the state decision was made. *Id.* at 182.

230 *Id.* at 180. (emphasis added).

231 *See* Thompson v. Whitman, 85 U.S. (18 Wall.) 457, 468 (1873); RESTATEMENT (SECOND) OF JUDGMENTS § 77 (AM. LAW INST. 1982).

232 Even if one conceptualized state post-conviction review as a determination of validity to which some sort of preclusion attached, *that* rule would *still* be more restrictive than what controls in civil judgment cases. *See Whitman*, 85 U.S. at 467–68.

233 *See supra* subsection II.B.1.

234 *Compare* Harrington v. Richter, 562 U.S. 86, 101 (2011) (equating unreasonableness with no "fair-minded jurist[ ]" standard (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004))), *with* Williams v. Taylor, 529 U.S. 362, 377–78 (2000) (rejecting "all reasonable jurists" standard); *see also* White v. Woodall, 134 S. Ct. 1697, 1703 (2014) (citing *Harrington*, 131 S. Ct. at 787); Burt v. Titlow, 134 S. Ct. 10, 16 (2013) (same).

235 28 U.S.C. § 2254(a) (2012) is the general grant of post-conviction authority over state-inmate cases.

236 One example involves the Supreme Court's decision, under *Atkins v. Virginia*, that intellectually disabled offenders are ineligible for execution. 536 U.S. 304, 321 (2002). Some states continue to define intellectual disability using their own rules of decision. *See, e.g.*, *Ex parte* Briseno, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (identifying seven evidentiary factors to be used to decide intellectual disability claims in Texas post-conviction pro-

contrast, if the F1 process is insufficient to satisfy Step 1, there is no deference at Step 2. The F2 court simply treats the F1 judgment as invalid, and must therefore make a determination on the merits of the underlying issue.

For claims that state courts decide on the merits, the Appellate paradigm confuses courts into thinking that an unreasonableness finding entails relief.[237] The federal reporters wheeze with alarm at the idea that state convictions are void if an inmate satisfies a § 2254(d) exception.[238] Of course, an inmate avoiding § 2254(d) is supposed to get only an unencumbered merits adjudication in federal court, not a new criminal trial or a discharge. The cumulative effect of the Appellate-paradigm influence is unmistakable. *Pinholster* (intrinsicality) combines with the ultimate-conclusion rule (outcome orientation) and the Supreme Court's no fair-minded jurist standard (deference) to form an almost insurmountable § 2254(d) hurdle: a state inmate must show that no reasonable jurist could accept the state court's ultimate conclusion, based only on the state record.

2. Forfeited Claims

In subsection II.B.2, I presented forfeiture law (procedural default) as a major feature of the Relitigation paradigm. It has subsequently developed quintessential Appellate-paradigm features. I devote more attention to forfeiture law than to two other procedural restrictions on modern federal postconviction relief: the writ-abuse rules and the limitations period.[239] Abusive-writ rules implicate a different Regard Scenario—the preclusive effect of a prior federal habeas proceeding rather than a prior state conviction.[240] The statute of limitations might be fertile ground for insight as to paradigm drift, but it did not exist until 1996.[241] Forfeiture law and the evidentiary rules explored in subsections II.B.2 and II.B.3 are the best test cases because they operate in the appropriate Regard Scenario and they have been around long enough to evaluate change longitudinally.

Appellate-paradigm features of § 2254(d) are a combination of judicial and legislative innovation, but modern procedural default law is all judges.

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ceedings). When *Atkins* claimants from some of those states avoid § 2254(d), there are federal courts that continue to "review" the state *Atkins* decision rather than decide the federal claim. *See, e.g.*, Mays v. Stephens, 757 F.3d 211, 219 (5th Cir. 2014) (applying Texas rule of decision to *Atkins* claim).

237 *See, e.g.*, *Woodall*, 134 S. Ct. at 1706 ("Section 2254(d)(1) provides a remedy for instances in which a state court unreasonably *applies* this Court's precedent . . . .").

238 *See, e.g.*, Sims v. Rowland, 414 F.3d 1148, 1152 n.2 (9th Cir. 2005) ("To our knowledge, the Supreme Court has never granted habeas relief solely on the basis of the 'reasoning' used by the state court."); Neal v. Puckett, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam) ("Similarly, we do not interpret AEDPA in such a way that would require a federal habeas court to order a new sentencing hearing solely because it finds the state court's written opinion unsatisfactory." (footnote omitted)).

239 I disfavor the use of the term "procedural" to describe this group of restrictions because it, by negative implication, treats § 2254(d) as a "substantive" limit on relief.

240 *See* 28 U.S.C. § 2244(b)(2).

241 *See id.* § 2244(d) (1996).

Courts developed it to screen certain claims forfeited in state litigation from federal habeas consideration.[242] State inmates must exhaust state remedies,[243] but they procedurally default the claim if, in the course of such exhaustion, they would (or do) lose on a state procedural ground.[244] Procedural default doctrine has been a fixture in habeas jurisprudence for over half a century, but Congress has never tinkered with it.[245]

In 1977, the Supreme Court reconstructed the forfeiture rules using an Appellate model. *Wainwright v. Sykes* established that the AAISG rule for direct appeals—a restriction on the Supreme Court's appellate jurisdiction that I skeletally outlined in subsection II.B.2—also restricted habeas consideration of forfeited claims.[246] In the terminology I have developed here, it transformed AAISG from a rule of Regard for direct-review cases into a rule of Regard for inter-jurisdictional preclusion cases. The Court stated very matter-of-factly: "[I]t is a well-established principle of *federalism* that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts."[247] The Court cited *Murdock v. City of Memphis*[248] and *Fox Film Corp. v. Muller*[249]—two cases about limits on Supreme Court review.[250] The negative implication of that citation selection is obvious; there was no precedent indicating that an AAISG rule restricted Article III jurisdiction common to all federal courts. That concept was new, and a little under-developed. The collateral AAISG constraint is nonjurisdictional,[251] and *Noia* contains a detailed discussion of the policy differences between a rule constraining the Supreme Court's Article III *appellate* power over state judgments and a rule constraining habeas power common to all federal courts.[252] In *Sykes*, there is no such discussion.

Sykes reflects an Appellate-paradigm shift not only in how it defines default, but also in how it defines whether default is excused. Under post-*Sykes* law, a state inmate excuses default by showing cause for and prejudice from the forfeiture.[253] Under *Noia*, there was no prejudice element. The Supreme Court has not defined "prejudice" precisely, but it requires generally that there may be no merits consideration unless the constitutional error

242 *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87–88 (1977) (overruling Fay v. Noia, 372 U.S. 391, 439 (1963)).

243 *See* 28 U.S.C. § 2254(b) (2012).

244 *See* Woodford v. Ngo, 548 U.S. 81, 93 (2006).

245 *See* Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 336 (2010).

246 433 U.S. 72.

247 *Id.* at 81 (emphasis added).

248 87 U.S. (20 Wall.) 590 (1875).

249 296 U.S. 207 (1935).

250 *Sykes*, 433 U.S. at 81.

251 The federal court is reviewing custody, not a judgment. *See* Lambrix v. Singletary, 520 U.S. 518, 523 (1997).

252 Fay v. Noia, 372 U.S. 391, 426–35 (1963).

253 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).

was sufficiently likely to have influenced a prior outcome.[254] It performs roughly the same function as does a harmless-error rule on direct review.[255] Prejudice is therefore a straightforward source of outcome orientation, one of the Appellate-paradigm staples.[256]

3. Factual Predicates

The Appellate-paradigm drift also surfaces in the factual predicate cases. Under pre-AEDPA law, detailed in subsection II.B.3, the federal fact-finding restrictions worked like an issue-preclusion rule conditioned on the reliability of F1 process. Under both *Townsend* (1963) and the corresponding statutory revision (1966), issue preclusion attached only if none of the specified exceptions in the laundry list were satisfied.[257] For both *Townsend* and the statute, all but one of the special exceptions were process-oriented.[258] Moreover, the outcome-oriented exception was not something that a state inmate had to satisfy in addition to a process-oriented one, but was a separate and sufficient gateway. Consistent with the Relitigation paradigm, deference was a result of a successful (Step 1) showing that the F1 proceeding was procedurally reliable, not something that attached as part of that inquiry.

Post-AEDPA federal fact-finding rules reflect confusion about how Relitigation-paradigm principles survive in an Appellate-paradigm world. AEDPA excised the statutory laundry list and swapped in two other provisions relating to state fact determinations. Section 2254(d)(2) is a (Step 1) preclusion rule that permits an inmate to obtain (Step 2) merits consideration if the state adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[259] Section 2254(e) contains rules for finding facts, which (before *Pinholster*) a federal court might have done at Step 1 or Step 2.[260]

As was the case with the § 2254(d)(1) legal-unreasonability rule, federal courts have constructed the § 2254(d)(2) factual-unreasonability rule using basic Appellate-paradigm principles. The first Appellate-paradigm feature evident from post-AEDPA law is deference. Before AEDPA, a state fact-finding error would disable the (Step 1) preclusion rule.[261] Section 2254(d)(2), however, now incorporates deference by requiring that the fact-finding error

254 *See* 2 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 26.3[c], at 1507–16 (6th ed. 2011).

255 *See id.* at 1509–12; John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 684 (1990).

256 *See supra* note 192. There is no harmless error inquiry in traditional preclusion law. *See* Richard B. Kennelly, Jr., *Precluding the Accused: Offensive Collateral Estoppel in Criminal Cases*, 80 VA. L. REV. 1379, 1408 (1994).

257 *See supra* subsection II.B.3.

258 *See supra* subsection II.B.3.

259 28 U.S.C. § 2254(d)(2) (2012).

260 *See supra* notes 229–30 and accompanying text.

261 *See supra* subsection II.B.3.

be *unreasonable*.[262] After AEDPA, an inmate seeking federal merits consideration must show more than F1 fact-finding error; deference means that the error must be severe.

The textual source of any outcome orientation is murkier, and so the judiciary's role in promoting it is greater. Nothing in § 2254(d)(2) appears to exclude inquiry into the procedural integrity of the F1 fact-finding process; in fact, the provision permits relitigation if a state decision was "based on" an unreasonable fact determination.[263] With some exceptions, however, the federal courts have disfavored a process-oriented reading of § 2254(d)(2), opting instead for an outcome-oriented standard involving the correctness of the result.[264] Although the Supreme Court has held that a state procedural failure rising to the level of a procedural due process violation can disable § 2254(d),[265] it does not do so under § 2254(d)(2). Instead, the due process violation is an "antecedent unreasonable application" of law under § 2254(d)(1),[266] leaving lower court interpretation of § 2254(d)(2) as a results-oriented rule intact.

The Appellate paradigm also manifests in the (Step 2) fact development surrounding a claim. Before AEDPA, federal hearings were a matter of largely unrestricted discretion.[267] After AEDPA, even if an inmate clears Step 1 by avoiding § 2254(d), (s)he is not entitled to a Step 2 evidentiary hearing absent an outcome-oriented prejudice showing. The outcome orientation is expressed through § 2254(e)(2), which conditions an evidentiary hearing on a showing that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[268] Whether evaluating it by reference to the conditions for preclusion at Step 1 or merits determination at Step 2, fact-finding is increasingly treated as part of a habeas process in which federal courts review a state decision rather than entertain relitigation of a constitutional claim.[269]

* * *

Most courts and observers incorrectly treat modern habeas restrictions as a return to a more ordinary preclusion rule.[270] The Appellate-paradigm

262 28 U.S.C. § 2254(d)(2).

263 *Id.*

264 *See supra* notes 223–38 and accompanying text.

265 *See* Panetti v. Quarterman, 551 U.S. 930, 949 (2007).

266 *Id.* at 953.

267 *See* Larry W. Yackle, *Federal Evidentiary Hearings Under the New Habeas Corpus Statute*, 6 B.U. PUB. INT. L.J. 135, 138 (1996).

268 28 U.S.C. § 2254(e)(2)(B).

269 *See* Abigail L. Kite, Note, *The Fact-Finding Process Review Model: Remedying Fact-Based Constitutional Challenges on Federal Habeas Corpus Review*, 31 T. JEFFERSON L. REV. 351, 354–57 (2009).

270 *See, e.g.*, Philip C. Chronakis, *Cold Comfort for Change: Trends of Preclusion in Habeas Corpus Litigation*, 76 U. DET. MERCY L. REV. 17, 22 (1998) ("What we have now is a habeas corpus framework in which state criminal convictions contain nearly the same preclusive

ideas that now suffuse the habeas process are actually considerably more restrictive than are the standard inter-jurisdictional preclusion rules that apply to civil judgments. To be sure, modern habeas law retains certain features of the Relitigation paradigm. The selectivity of that retention, however, suggests that the animating principle is not actually an attempt to promote doctrinal consistency, but to seek restriction for its own sake. Normative evaluation of the modern trend should therefore center on questions about whether habeas restrictions are desirable, not about whether they conform to the standard model.

The strongest arguments in favor of the Appellate paradigm would position its restrictions as a check on habeas law's two most idiosyncratic inter-jurisdictional features. First, federal law guarantees a cause of action to attack a state conviction,[271] but there are no comparable guarantees for collateral challenges to civil judgments. Second, the remedy for a successful habeas attack is a discharge in F1, whereas the remedy for a successful collateral attack on a civil judgment is simply non-enforcement in F2.

To illustrate these idiosyncrasies, consider a creditor with a Montana (F1) money judgment that it seeks to enforce against a debtor in a California (F2) court; or same-sex partners to a marriage validly celebrated in New York (F1) who want that marriage recognized for the purposes of securing federal (F2) benefits. Generally speaking, those paradigmatic inter-jurisdictional preclusion issues—referred to as "recognition" and "enforcement"[272]—involve the preclusive effect that an F1 judgment has in F2, and not the enforceability of the F1 judgment in F1. The issue is simply whether California will issue a coercive order requiring the debtor to pay on the Montana judgment or whether the federal government will award the benefits incidental to a marital relationship formed in New York.

In habeas cases, however, two things are different. First, F2 grants the F1 loser a cause of action to challenge the F1 judgment in F2; second, the F2 remedy reaches back into F1. Habeas relief entails a discharge, which voids the F1 conviction entirely—even in the F1 jurisdiction. The extreme remedial consequence of a successful habeas action is one of the most urgent reasons why federal law might overlook defective state process in post-conviction cases. The best argument for Appellate-paradigm restrictions is not that they are consistent with standard preclusion models, but that they offset the guaranteed access to a singularly harsh discharge remedy.

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effects as do civil proceedings, where the preclusion doctrine is virtually insurmountable in finality.").

271 The federal habeas statute empowers federal courts to hear habeas causes in which state inmates allege that they are "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

272 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 93–98 (AM. LAW INST. 1971) (recognition); *id.* §§ 99–102 (enforcement).

IV. Normative Criticism of the Appellate Model

Even with the justificatory revision I suggest, however, there are at least three reasons to be skeptical of the Appellate model. First, because of its outcome orientation, the Appellate paradigm does not comfortably inherit the normative justifications for prior, Bator-influenced habeas restrictions. Second, the Appellate paradigm compromises the dignitary and instrumental values expressed through the legal ideal that every criminal defendant gets a day in court. Finally, the Appellate paradigm may violate constitutional "anti-puppeteering" norms against using procedural rules to mimic prohibited rules of decision.

A. The Comity and Finality Interests

As an initial matter, the outcome-oriented Appellate paradigm does not actually share the established theoretical justifications of the restrictive but process-oriented theories preceding it. Professor Bator's full-and-fair model is the template for virtually every legislative attempt to restrict the habeas remedy since 1963,[273] and it exerts similar influence on modern decisional law.[274] The model is built on a basic epistemic premise: the unknowability of absolute truth.[275] If ultimate legal or factual truth is unknowable,[276] then the validity of a decision denying a claim reduces to a question about whether the underlying process was reliable.[277] The law should not require incremental federal habeas inquiry, the theory says, when the state criminal process was sufficiently reliable to achieve truth-approximating results.[278]

Other than finality, the major interest invoked to justify restrictive state-inmate process is comity,[279] which refers generally to an interest in having one sovereign recognize and enforce laws of another.[280] Professor Bator's model relies on a combination of comity and finality interests to urge a categorical preclusion rule for claims that were fully and fairly adjudicated in state court.[281] The comity and finality interests are deeply intertwined, inso-

273 *See supra* note 8.

274 *See supra* note 183 (collecting Supreme Court references to Professor Bator).

275 *See* Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 198 n.322 (2012).

276 *See* Bator, *supra* note 8, at 446–47.

277 *See, e.g.*, *id.* at 448 ("The task of assuring legality is to define and create a set of arrangements and procedures which provide a reasoned and acceptable probability that justice will be done, that the facts found will be 'true' and the law applied 'correct.'").

278 *See id.* at 448–52.

279 *See, e.g.*, Skinner v. Switzer, 562 U.S. 521, 541 (2011) (Thomas, J., dissenting) ("Because of these concerns for federal-state comity, Congress has strictly limited the procedures for federal habeas challenges to state convictions and state habeas decisions.").

280 Perhaps the leading Supreme Court statement of comity's meaning is in *Hilton v. Guyot*, which defines comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." 159 U.S. 113, 164 (1895).

281 *See* Yackle, *supra* note 147, at 2345.

far as the reasons for treating judgments as final do double duty as conditions for recognizing and enforcing foreign convictions.

Even though its proponents invoke Professor Bator religiously, the Appellate paradigm cannot be draped neatly atop the normative foundations of the full-and-fair model. When the comity interest surfaces, it frequently reflects an erroneous assumption that an F2 forum must give an F1 conviction as much preclusive effect as it would give a conviction from F2.[282] Comity, however, is a principle that jurisdictions give some preclusive effect to foreign judgments, not that foreign judgments are treated the same as domestic ones.[283] The comity interest embedded in full-and-fair models is one that conditions preclusion on the reliability of process in the rendering jurisdiction.[284] Under the Appellate paradigm, however, preclusion is not predicated on the F2 court's confidence in the reliability of F1 process.

Professor Bator recognized the centrality of F1 procedure to comity and finality interests, and so his argument about the equal treatment of state criminal judgments is premised on the reliability of state process.[285] Two decades after AEDPA, it is difficult to fathom that Bator's full-and-fair model was considered *too preclusive* for the 103rd Congress[286]—an enacting legislature whose intent is now invoked in support of the most aggressive Appellate-paradigm restrictions.[287] AEDPA's text categorically precludes relitigation if a state merits disposition is not "based on" unreasonable factual determinations and does not "involve[ ] an unreasonable application of, clearly established Federal law."[288] The federal judiciary has constructed the statute to impose not only the Relitigation model preclusion rule, but also the Appel-

282 For example, in *Stone v. Powell*, 428 U.S. 465 (1976), the Supreme Court famously held that Fourth Amendment challenges to state convictions were not cognizable in federal habeas proceedings. *See id.* at 481–82. *Stone* distinguished *Kaufman v. United States*, 394 U.S. 217 (1969), a case holding that Fourth Amendment challenges to federal convictions were permitted. *See id.* at 486–87; *see also, e.g.*, Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 436 (2004) (explaining that habeas jurisprudence is increasingly driven by comity and federalism interests); *cf.* Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 461 (1980) (criticizing the Supreme Court for reflexively equating the habeas consequences of a federal forfeiture with that in a state criminal proceeding).

283 *See* Joel R. Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1, 9 (1991).

284 *See Hilton*, 159 U.S. at 202–03 (providing the canonical statement that comity is conditioned upon sufficiency of process producing the judgment in the F1 jurisdiction).

285 *See* Bator, supra note 8, at 451.

286 That § 2254(d) does not use the words "full and fair" actually reflects the failure of restrictionist legislators to garner enough votes to obtain preferred Regard levels for state convictions. *See* Kovarsky, *supra* note 184, at 464–65.

287 *See, e.g.*, Harrington v. Richter, 562 U.S. 86, 102 (2011) ("If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." (citing Felker v. Turpin, 518 U.S. 651, 664 (1996))); *see also, e.g.*, Burt v. Titlow, 134 S. Ct. 10, 16 (2013) (quoting *Richter*, 131 S. Ct. at 786).

288 28 U.S.C. §§ 2254(d)(1), (2) (2012).

late-model features of deference,[289] outcome orientation,[290] and intrinsicality.[291] Outcome orientation and deference to flawed procedure would be particularly problematic for Professor Bator and for the process-oriented habeas models his work inspired.[292] Under the Appellate paradigm, that a state disposition be a product of reliable process is no longer a precondition of F2 habeas preclusion.[293] For that reason, comity and finality do not do the same normative work for the Appellate paradigm that they did for the full-and-fair model.

B. The Day-in-Court Ideal

The Appellate paradigm also undermines the Anglo-American ideal that all criminal defendants should have a "day in court."[294] There are various phrasings of the ideal, and the defining judicial statement appears in a 1948 Supreme Court case, *In re Oliver*:[295]

> We further hold that [the error] . . . was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.[296]

There is obviously substantial slippage between the ideal and day-to-day reality.[297] Moreover, people disagree over the mix of values that the ideal expresses,[298] and they therefore prefer different compromises. The slippage and the differentiated normative accounting are secondary to my larger observation: by severing the relationship between the sufficiency of state process and the availability of a federal remedy, the Appellate paradigm chips away at the ideal's most basic features.

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289 *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 1001, 1026 (1986).

290 *See id.* at 1046; *see also* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 1 (1994) (discussing the canonical Supreme Court harmless error opinion in *Chapman v. California*, 386 U.S. 18, 23–24 (1967)).

291 *See* Merrill, *supra* note 190, at 940.

292 *See* Kovarsky, *supra* note 184, at 460–68 (collecting history of legislative proposals modeled on the full-and-fair concept).

293 *See supra* notes 223–24 and accompanying text.

294 *Cf.* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 37–38 n.209 (1979) (emphasizing the role of ideal in criminal cases); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2256 (2013) (same).

295 333 U.S. 257 (1948).

296 *Id.* at 273 (footnote omitted).

297 For example, the pervasiveness of plea bargains underscores the idealized status of day-in-court principles. *See* Kim Lane Scheppele, *The New Judicial Deference*, 92 B.U. L. REV. 89, 156 (2012).

298 *See infra* notes 317–19 and accompanying text.

Like other abstracted phenomena, the day-in-court ideal has a core.[299] It might simply embody an aspiration to a judicial proceeding—*any* judicial proceeding—as a condition of criminal punishment, but one can safely exclude the possibility that those invoking the ideal have such kangaroo-court process in mind.[300] The criminal-process ideal does capture a preference for individuated consideration and punishment.[301] Collective-action mechanisms are largely disabled in criminal cases,[302] and each criminal defendant is constitutionally entitled to *at least* an individualized determination of facts triggering a criminal punishment and (usually) a sentence.[303] The elemental day-in-court feature, as *Oliver* describes, seems to be "notice . . . and an opportunity to be heard" in a *judicial* proceeding.[304]

The day-in-court ideal has a slightly broader interpretation in the habeas literature, where it sets norms for both trials and post-conviction proceedings.[305] There are first-order due process rights that criminal defendants enjoy during trial,[306] but inmates may need to wait until post-conviction litigation to assert that any due process violation occurred.[307] There frequently exists a second-order question about how much post-conviction process a state should provide to consider an allegation that there was trial-phase violation of a due process right. The most extreme versions of the day-in-court ideal require the most post-conviction process. A defendant has no day in court on the question of guilt, the argument goes, unless that defendant has a day in court on the due process predicates for that guilt determination.[308] Stated more colloquially, how effectively can institutions honor a day-in-court ideal if inmates do not have procedural guarantees in the post-conviction process for enforcing it?

That the ideal animates both trial and post-conviction process is particularly important when—as in the case with most habeas claims—the conduct giving rise to the underlying violation also interferes with having the violation considered at trial or on appeal. For example, when defense representation

299 *See* Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 209 (1996).

300 As the balance of this Section shows, any disagreement is over the *content* of a judicial proceeding and the normative justifications it is to reflect.

301 *See* Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. 383, 385 (2007).

302 *See id.* at 385–86.

303 *See* United States v. Booker, 543 U.S. 220, 244 (2005); *In re* Winship, 397 U.S. 358, 364 (1970).

304 *In re* Oliver, 333 U.S. 257, 273 (1948).

305 *See* Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1888–1912 (2009).

306 *See, e.g.*, *supra* notes 179–80.

307 *See* Flanagan v. United States, 465 U.S. 259, 263 (1984) (holding that, in criminal cases, the final judgment rule "prohibits appellate review until conviction and imposition of sentence" (citing Berman v. United States, 302 U.S 211, 212 (1937))).

308 *See* Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 12 (2006); Redish & Katt, *supra* note 305, at 1888.

is prejudicially ineffective, it both violates *Strickland v. Washington*[309] and interferes with presentation of the claim on direct review.[310] When the prosecution violates *Brady v. Maryland*[311] by suppressing evidence, the violation frequently remains undiscovered until long after direct-review proceedings conclude; post-conviction process is the only forum to seek a remedy.[312] That state inmates get a fair crack at litigating a claim before preclusion attaches has animated habeas-reform proposals ranging from Batorian full-and-fair models,[313] to that of a committee chaired by former Associate Justice Lewis F. Powell.[314] *Brown v. Allen* itself expresses the principle that every inmate should have a *federal* forum to litigate a federal clam.[315]

The messy normative questions arise because the day-in-court ideal and reality necessarily diverge. The scope of acceptable compromise depends on one's view of the ideal's animating values. It has both dignitary and instrumental accounts. Dignitary justifications center on the intrinsic value of party participation as a condition of coercive state action.[316] Instrumental justifications emphasize how the ideal secures other objectives. One instrumental account positions it as central to "truth discovery"—findings of historical fact, culpability determinations, and legal conclusions.[317] Another emphasizes its legitimacy-enforcing role.[318] The day-in-court ideal, however, is actually a bundle of rights reflecting all of these dignitary and instrumental

309 466 U.S. 668 (1984).

310 *See* Martinez v. Ryan, 132 S. Ct. 1309, 1316 (2012).

311 373 U.S. 83 (1963).

312 *See Martinez*, 132 S. Ct. at 1321–22 (Scalia, J., dissenting); *cf.* Trevino v. Thaler, 133 S. Ct. 1911, 1921 (2013) (holding that *Martinez* applies where defendants lacked a "meaningful opportunity" to raise their claim on direct review, and should be permitted to raise the claim via collateral review).

313 Batorian Relitigation models assume that a state inmate will have at least one procedurally sufficient shot, in state *or* federal court, at litigating a challenge. *See* Lee Kovarsky, *The Habeas Optimist*, 81 U. CHI. L. REV. DIALOGUE 108, 114 (2014). The full-and-fair terminology echoes other preclusion rules based on the ideal. *See, e.g.*, Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996) (invoking the ideal as a limit to state estoppel rules); Hansberry v. Lee, 311 U.S. 32, 45 (1940) (holding that binding parties not adequately represented in a prior piece of litigation ran afoul of the Fourteenth Amendment's Due Process Clause).

314 *See* JUDICIAL CONF. OF THE U.S., AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, COMMITTEE REPORT AND PROPOSAL (1989), *reprinted in Report on Habeas Corpus in Criminal Cases*, 45 CRIM. L. REP. (BNA) 3239, 3241–42 (1989).

315 *See supra* subsection II.B.1.

316 *See, e.g.*, Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978) ("[T]he distinguishing characteristic of adjudication . . . [is] that it confers on the affected party a peculiar form of participation in the decision . . . . Whatever heightens the significance of this participation lifts adjudication toward its optimum expression. Whatever destroys the meaning of that participation destroys the integrity of adjudication itself.").

317 *Cf.* Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1396 n.138 (1991) (discussing the truth-seeking value of the ideal).

318 *See* Ted Sampsell-Jones, *Making Defendants Speak*, 93 MINN. L. REV. 1327, 1335 (2009).

values, but a particular legal right might implicate each stick in the bundle differently.[319] For example, rules against admitting self-incriminating statements or unlawfully obtained evidence might promote dignitary and legitimacy interests, but they might also undermine truth discovery. The most corrosive deviations from the day-in-court ideal are those compromising the most interests to the greatest degree.

Through intrinsicality, deference, and outcome orientation, the Appellate paradigm effectively permits flimsy state post-conviction process to launder trial-phase error. The day-in-court ideal dies by a million cuts: under § 2254(d), many claims subject to summary state post-conviction determination are now "reviewed" as though they received trial-like process;[320] reliable state process is no longer a condition for preclusion;[321] lower federal courts now determine whether a *hypothetical* rationale could reasonably support a state outcome;[322] the Court has defined an "unreasonable" state post-conviction result to mean an outcome with which no "fair-minded jurist" could agree;[323] and the § 2254(d) inquiry now ignores all evidence outside the state post-conviction record.[324] These *federal* restrictions encourage the most troubling pathologies of *state* post-conviction adjudication: entry of state post-conviction judgments with unreasoned opinions;[325] *in toto* adoption of unmodified state post-conviction findings submitted by the prosecution;[326] and under-resourced state post-conviction representation.[327] The Appellate paradigm disguises the system's most uncomfortable truth: there is frequently no procedurally reliable state disposition for federal courts to review.

C. The Anti-Puppeteering Objection

I refer to the proposition that the federal Constitution guarantees federal habeas process to state inmates as the "constitutionality assumption." If the assumption holds, then Appellate-paradigm constructions of § 2254(d)

319 *See* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 200–02 (1983); Michel Rosenfeld, *Can Rights, Democracy, and Justice Be Reconciled Through Discourse Theory? Reflections on Habermas's Proceduralist Paradigm of Law*, 17 CARDOZO L. REV. 791, 794 (1996); David L. Shapiro, *Should a Guilty Plea Have Preclusive Effect?*, 70 IOWA L. REV. 27, 45 (1984).

320 *See supra* note 224 and accompanying text (explaining the Supreme Court's holding in *Harrington v. Richter*).

321 *See supra* subsection III.C.1.

322 *See supra* notes 222–26 (documenting lower court rules).

323 *See supra* note 234 (detailing recent affirmation of rule).

324 *See supra* notes 229–30 and accompanying text (describing post-AEDPA intrinsicality).

325 *See* Harrington v. Richter, 562 U.S. 86, 98 (2011).

326 *See, e.g.*, Jefferson v. Upton, 560 U.S. 284, 288 (2010) (per curiam) (noting the "verbatim" adoption of state-drafted findings (quoting Jefferson v. Zant, 431 S.E.2d 110, 111 (Ga. 1993))); *Ex parte* Reed, 271 S.W.3d 698, 729 (Tex. Crim. App. 2008) (same).

327 *Martinez v. Ryan* only furnishes an ineffective state post-conviction attorney excuse for default. *See* 132 S. Ct. 1309, 1320 (2012). It does not provide a gateway around § 2254(d).

violate constitutional "anti-puppeteering" principles associated with *United States v. Klein*.[328] *Klein*, which has come to stand for a body of good-government norms, is canonical (if difficult to penetrate) precedent about congressional power to use rules of jurisdiction and evidence to bypass constitutional restrictions on its power to pass substantive law.[329]

I do not defend the constitutionality assumption here. Many contest it capably,[330] and there is no specific constitutional theory that commands consensus on the particulars.[331] Professors James Liebman and William Ryan have influentially theorized that a federal habeas guarantee for state inmates is part of an Article III court's mandate to ensure the supremacy of federal law.[332] Professor Jordan Steiker has argued that that the Fourteenth Amendment Due Process Clause entitles state inmates to a federal habeas forum.[333] I have made an article-length case for it under the Fourteenth Amendment Privileges or Immunities Clause.[334] The Supreme Court itself has suggested that a restriction might amount to an unconstitutional "suspension" if it lies beyond the "compass" of the writ's normal evolution.[335] Under *which* theory one makes the constitutionality assumption is secondary; puppeteering

328 80 U.S. (13 Wall.) 128 (1871). Professor Gordon Young is the scholar to whom most trace the reading of *Klein* as an anti-puppeteering case. *See* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132 (1995) [hereinafter Young, *Critical Reassessment*]; Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes:* United States v. Klein *Revisited*, 1981 WIS. L. REV. 1189, 1215–24 [hereinafter Young, Klein *Revisited*]; Gordon G. Young, United States v. Klein, *Then and Now*, 44 LOY. U. CHI. L.J. 265 (2012).

329 The *Klein* issues are presented as puppeteering concepts in RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 303–05 (6th ed. 2009) [hereinafter HART AND WECHSLER'S 6th]; *see also, e.g.*, Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437, 439–40 (2006) (arguing that *Klein* bars use of procedure to "decepti[vely]" change statutory rules of decision); Lawrence G. Sager, Klein *'s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2529 (1998) ("[*Klein's* first principle is that the] judiciary will not allow itself to be made to speak and act against its own best judgment on matters within its competence which have great consequence for our political community.").

330 *See, e.g.*, WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126–80 (1980) (assembling historical support for interpreting the Suspension Clause as a guarantee of *state* habeas process); Rex A. Collings, Jr., *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CAL. L. REV. 335 (1952) (arguing that the Constitution guarantees no habeas process at all).

331 *Cf.* Hoffmann & King, *supra* note 219, at 839 (concluding that the Court will cobble together a theory from Suspension Clause precedent to support the position).

332 *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 850–84 (1998).

333 *See* Jordan Steiker, *Incorporating the Suspension Clause: Is There a Constitutional Right to Federal Habeas Corpus for State Prisoners?*, 92 MICH. L. REV. 862, 868 (1994).

334 *See* Kovarsky, *supra* note 30, at 612.

335 Felker v. Turpin, 518 U.S. 651, 664 (1996).

problems arise in all scenarios where a state-inmate privilege is more than a matter of legislative grace.

Section 2254(d) *indirectly* restricts what we casually call "substantive rights," but it *directly* restricts the constitutionally specified habeas remedy.[336] That distinction is crucial. Some scholars have argued that § 2254(d) unacceptably interferes with Article III judicial power because it cabins the sourcing and method by which federal courts resolve underlying substantive rights—i.e., federal "rules of decision."[337] Because § 2254(d) interferes with how federal courts construct constitutionally specified substantive law, the idea is that it violates *Marbury*'s bedrock principle that the Supreme Court is, so to speak, the boss of what federal law means.[338] Theories involving the indirect effects on constitutionally specified *substantive law* assume an unnecessary argumentative burden. If the constitutionality assumption holds, then § 2254(d) is a direct restriction on a constitutionally specified *procedural remedy*.

The extent to which Congress may use jurisdiction and procedure to restrict a constitutionally specified remedy is a difficult question implicating the jurisprudence and legal theory associated with *Klein*.[339] As most "cult of *Klein*" scholarship readily admits, any argument that there are constitutional problems "under *Klein*" means problems under a set of anti-puppeteering norms generally, but imperfectly, associated with the text of that decision.[340] Chief Justice Chase's opinion in *Klein* is among constitutional history's most enigmatic.[341] If the constitutionality assumption holds, then—even under narrow readings of *Klein* and the norms for which it now stands—Appellate modeling of § 2254(d) is prohibited puppeteering.

1. *Klein* and the Anti-Puppeteering Norm

In 1863 Civil War legislation,[342] Congress authorized seizure and sale of property taken in disloyal states, but permitted loyalist owners to recover sale

336 The Constitution specifies another remedy in the Fifth Amendment's Just Compensation Clause. *See* U.S. CONST. amend. V.

337 Rules of decision, generally speaking, regulate primary obligations and are considered "substantive law." Alan M. Trammell, *Jurisdictional Sequencing*, 47 GA. L. REV. 1099, 1103–04 (2013).

338 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* Vicki C. Jackson, *Introduction: Congressional Control of Jurisdiction and the Future of the Federal Courts—Opposition, Agreement, and Hierarchy*, 86 GEO. L.J. 2445, 2467 (1998) (discussing supportive scholarship).

339 *See supra* note 328.

340 The "cult" meme expresses the idea that academic fascination with *Klein* reflects the decision's ambiguity. *See* Howard M. Wasserman, *The Irrepressible Myth of* Klein, 79 U. CIN. L. REV. 53, 55, 69 (2010) (citing Young, Klein *Revisited*, *supra* note 328, at 1195).

341 *See, e.g.*, Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218 (1995) (questioning the "precise scope of *Klein*"); HART AND WECHSLER's 6th, *supra* note 329, at 303 ("Unfortunately, the Court's opinion raises more questions than it answers."); Sager, *supra* note 329, at 2525 (calling *Klein* "deeply puzzling").

342 *See* The Abandoned Property Collection Act, ch. 120, § 3, 12 Stat. 820, 820 (1863).

proceeds in suits against the Treasury. V.F. Wilson had been the surety on bonds of Confederate officers, but President Lincoln pardoned him; his estate (with Mr. Kline as the representative) sought proceeds for seized cotton.[343] The Court of Claims held that Wilson was loyal.[344] In *United States v. Padelford*,[345] decided while *Klein* was pending, the Supreme Court held that a presidential pardon constructively established loyalty. *Padelford* was steeped in constitutional avoidance, as the Court appeared to interpret the statute to avoid impairing the President's constitutionally specified pardon power.[346]

While *Klein* was still pending on appeal, Congress countermanded *Padelford* in a piece of 1870 legislation.[347] The 1870 Act disqualified pardons as evidence of loyalty under the 1863 Act.[348] In fact, courts were generally to treat pardons as *conclusive proof of disloyalty*, and were to dismiss, for want of jurisdiction, claims for proceeds by all pardoned disloyals.[349] The 1870 legislation also contained several "procedural" provisions, sourced largely to congressional authority over Article III jurisdiction. The procedural provisions were an odd raft of ducks. The 1870 Act stripped Supreme Court jurisdiction to affirm Court of Claims awards in pending cases,[350] required the Supreme Court to dismiss appeals with instructions to the Court of Claims to dismiss the cause from its docket,[351] stripped federal jurisdiction to grant monetary awards to disloyal claimants,[352] and established an evidentiary presumption that a presidential pardon was almost always conclusive proof of disloyalty.[353] The legislation is not so confusing once one understands that it was not "procedural" at all; these were provisions designed to thwart judicial enforcement of the pardon power.

Klein struck down the restrictions in the 1870 Act.[354] *Klein*'s constitutional holding is maximally disorienting if presented as a doctrinal rule about which specific statutory provisions violated what specific strings of constitutional text. The constitutional problem was that, *collectively*, the provisions abusively invoked congressional power to regulate the judiciary; they were pretext to effectuate otherwise *verboten* limits on the pardon power.[355] Abstractly, the Court found constitutionally problematic the related ideas that the 1870 Act "shows plainly that it does not intend to withhold appellate

343 Kline v. United States, 4 Ct. Cl. 559, 566–67 (1868), *modified sub nom.* Klein v. United States, 7 Ct. Cl. vii (1871), *aff'd*, United States v. Klein, 80 U.S. (13 Wall) 128 (1871).

344 *Id.* at 567.

345 76 U.S. (9 Wall.) 531 (1869).

346 *See id.* at 542–43.

347 *See* Act of July 12, 1870, ch. 251, 16 Stat. 230.

348 *See id.* at 235.

349 *See id.*

350 *See id.*

351 *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 145–46 (1871).

352 16 Stat. at 235.

353 *See id.*

354 *See Klein*, 80 U.S. (13 Wall.) at 146–48.

355 *See generally Klein*, 80 U.S. (13 Wall.) 128. *Klein* itself does not articulate this logical proposition effectively.

jurisdiction except as a means to an end" and that "denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress."[356] The Court also condemned the constructive-disloyalty provision as a violation of the pardon power masquerading as an evidence rule.[357] Some analyze *Klein* as a more limited Exceptions Clause holding,[358] but those accounts unreasonably discount opinion language expressing the broader anti-puppeteering principles.[359] In *Klein*, three things combined to work as a synthetic rule of decision about pardons: the restrictions on the Supreme Court's appellate jurisdiction, the restrictions on the lower federal courts' original jurisdiction, and the evidentiary presumption. That synthesis was constitutionally impermissible because it was mimicking an actual rule of decision about pardons that Congress could not pass.[360]

As the cult of *Klein* phrasing suggests, a small but intensely focused group of academics have argued vigorously over the meaning of Chief Justice Chase's opinion, and over how to synthesize it with sparse precedent that followed.[361] *Klein* scholars generally associate *Klein* with several other anti-puppeteering cases that involve similar questions: those in which *trial courts* could not enforce the 1870 Act's rule that they must dismiss actions for proceeds by pardoned claimants,[362] and those in which the Court considered whether Congress can create federal jurisdiction to prosecute a crime but withhold jurisdiction to consider a constitutional defense.[363] Others have flagged *Klein*'s extraordinary real-world importance for proposals dealing with school busing, reproductive rights, school prayer, and national-security detention.[364] If the constitutionality assumption obtains, then the Appellate-paradigm construction of § 2254(d) violates anti-puppeteering norms even more flagrantly than did the legislative proposals touching on those other issues.

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356 *See id.* at 145–46.

357 *See id.* at 147–48.

358 *See, e.g.*, Joseph Blocher, *Amending the Exceptions Clause*, 92 MINN. L. REV. 971, 1014 (2008) ("At least implicitly, then, *Klein*'s holding endorsed a separation of powers limitation on the Exceptions Clause."); Louis J. Virelli III, *Congress, the Constitution, and Supreme Court Recusal*, 69 WASH. & LEE L. REV. 1535, 1583 (2012) (describing *Klein* as "the lone case in which the Court did strike a statute under the Exceptions Clause").

359 *Klein* itself notes this distinction. *See* 80 U.S. (13 Wall.) at 145–46.

360 *See id.* at 146–47 (distinguishing permissible puppeteering provision in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855)).

361 *See supra* notes 340–41, 358.

362 *See* Armstrong v. United States, 80 U.S. (13 Wall.) 154 (1871); Witkowski v. United States, 7 Ct. Cl. 393 (1871).

363 *See* Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting).

364 *See* Howard M. Wasserman, *Constitutional Pathology, the War on Terror, and* United States v. Klein, 5 J. NAT'L SEC. L. & POL'Y 211 (2011) (national security); Young, Klein *Revisited*, *supra* note 328, at 1190–91 (busing, reproductive rights, and school prayer).

2. Section 2254(d) as Impermissible Puppeteering

I operate with the following anti-puppeteering norm: Congress cannot invoke its Article I power to constitute Article III courts in an effort to mimic a substantive rule of decision that it could not otherwise enact.[365] So, for example, Congress could not pass a statute stating that proof of English citizenship conclusively established, as a matter of evidence, that someone was not a "person" within the meaning of the Due Process Clause. In that scenario, Congress could not work around rules forbidding certain forms of alienage discrimination under the auspices of establishing evidence rules pursuant to the Rules Enabling Act.[366] Certain Appellate-model constructions of § 2254(d) belong in the same category of forbidden statutory law. In light of the anti-puppeteering rule and the constitutionality assumption, when do procedural restrictions on a state-inmate privilege cross a line?

Among the courts and academics that have considered the issue, the relationship between *Klein* and the privilege is treated as a question about the degree to which Congress could use habeas as a *means* of puppeteering judicial dispositions on some *other* substantive rule of decision.[367] Congressional interference with habeas process is, in this sense, like any other congressional restriction on judicial enforcement of the Bill of Rights. Under the constitutionality assumption, that analogy sells the habeas power short. Rather than evaluating the degree to which habeas restrictions may interfere with some other substantive rule of decision, legal institutions should be evaluating the degree to which such restrictions may directly interfere with a remedy that is itself constitutionally specified.

The essential quality of the habeas privilege is its guarantee of a federal forum to determine the lawfulness of custody.[368] If anti-puppeteering principles preclude Congress from using second-order procedural rules to interfere with constitutionally specified first-order powers,[369] then Congress is presumably forbidden from using second-order rules to interfere with constitutionally specified first-order remedies. The distinction between Relitigation and Appellate paradigms is central to my normative position because it

365 I separate my *Klein* principle from the more aggressive readings of *Klein* detailed at the end of this subsection. Additionally, I would not designate the 1870 Act's Supreme Court provisions as "puppeteering" and the Act's lower court provisions as jurisdiction stripping. *Cf.* Young, *Critical Reassessment*, *supra* note 328, at 158–59 (drawing such a distinction). The 1870 Act's lower court provisions were one part of a puppeteering statute, and the anti-puppeteering principle limits congressional regulation of lower court jurisdiction. *See* HART AND WECHSLER'S 6th, *supra* note 329, at 304–05 n.27 (suggesting that Professor Young's earlier work might have overstated the difference between the two types of limits).

366 *See* Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064.

367 *See* Jackson, *supra* note 338, at 2467 (collecting authority).

368 *See* Boumediene v. Bush, 553 U.S. 723, 745 (2008).

369 In the military-detention context, the Supreme Court squarely held that habeas process has essentialized features walled off from congressional incursion. *See id.* at 771.

capably tracks the distinction between permissible procedural restrictions on and impermissible puppeteering of the privilege.

Traditional procedural restrictions involving things like timeliness and frivolity are inevitable features of any congressional regulation.[370] The Law-of-Judgments literature does not categorically treat all facets of preclusion rules as procedural;[371] inter-jurisdictional preclusion promotes some F1 interests that might be considered substantive. The modern habeas Regard Scenario, however, does not implicate any major source of F1 state substantive interest: interests in avoiding double monetary recovery, in defining the scope of the claim, and in specifying who is bound.[372] A process-oriented F2 preclusion rule simply acts like any other procedural limit that does not reduce to a merits assessment of the claim. When § 2254(d) operates like a preclusion rule in which the sufficiency of F1 process is determined by F2, it does not interfere with the basic features of habeas power. As explained in Part III, however, legal institutions do not apply § 2254(d) that way. Instead, they have constructed § 2254(d) nontraditionally, incorporating Appellate-paradigm features—intrinsicality, deference, and outcome orientation—that transform it into an impermissible puppeteering provision.

Outcome orientation presents a particularly vexing anti-puppeteering problem for restrictions on habeas power. To the extent that preclusion rules are procedural, it is precisely because they lack outcome orientation and are focused on the sufficiency of prior process.[373] An F1 judgment might be preclusive because the F2 jurisdiction decides that the F1 process was sufficiently adapted to determining the Truth,[374] not because the outcome was close enough to the Truth to trigger preclusion notwithstanding procedural infirmity.[375] The Relitigation paradigm always honored that distinction. Because the Appellate paradigm smuggles an outcome orientation into the Step 1 preclusion inquiry, it transforms § 2254(d) from a procedural limitation on the privilege into a disfavored form of substantive puppeteering. The Appellate paradigm does not limit habeas relief by defining a procedural relitigation restriction, but by redefining what types of unlawful custody get a habeas remedy.

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370 *See* 28 U.S.C. § 2244(d) (2012) (limitations statute); Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. § 2254, Rule 4 (2004) (frivolity rule).

371 *See* Erichson, *supra* note 40, at 1017, 961–63.

372 *See* Burbank, *supra* note 7, at 1054–55; D. Michael Risinger, *"Substance" and "Procedure" Revisited with Some Afterthoughts on the Constitutional Problems of "Irrebuttable Presumptions"*, 30 UCLA L. REV. 189, 210 (1982); Gene R. Shreve, *Preclusion and Federal Choice of Law*, 64 TEX. L. REV. 1209, 1260 (1986).

373 *See* 1 RESTATEMENT (SECOND) OF JUDGMENTS § 28 (AM. LAW INST. 1982).

374 See Geoffrey C. Hazard, Jr., *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 88 (1984).

375 *But cf.* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970) (proposing that habeas law be reorganized to preclude based on evidence of innocence).

In combination, Appellate-paradigm deference and intrinsicality also present serious puppeteering problems.[376] Their combined operation makes § 2254(d) difficult to distinguish meaningfully from the evidentiary "presumption" and limits on lower court jurisdiction at issue in *Klein* itself. In *Klein*, Congress had tried an end-around the pardon power by legislating a virtually conclusive presumption about the relationship between pardons and loyalty,[377] which a pardonee could overcome only by reference to recitations in the underlying pardon document.[378] Section 2254(d), as constructed under the Appellate paradigm, amounts to the same trick. It relies on deference and intrinsicality to impose a similar presumption around a state merits determination, thereby skirting the constitutionally specified habeas power to determine lawfulness and order discharge by reference to the sufficiency of F1 process.

Intrinsicality and deference would pose a lesser puppeteering problem if they operated at different parts of the habeas process, as they do under the Relitigation paradigm and under inter-jurisdictional preclusion inquiry involving civil judgments. Before AEDPA's § 2254(d) alterations, there was no deference on legal questions, and deference on fact questions materialized only *after* a (Step 1) determination that state process was reliable.[379] After AEDPA, however, deference attaches *in the process* of applying Step 1. A state decision is not unreasonable—and a state inmate cannot obtain a (Step 2) merits determination—unless "no fair-minded jurist" (deference) would think that the state record (intrinsicality) supported the state result (outcome orientation).[380]

Worth mentioning is that problems I identify with Appellate-paradigm construction of the § 2254(d) position are not contingent upon an aggressive anti-puppeteering norm. For example, I do not read *Klein* as a restriction on congressional authority to strip the Supreme Court's appellate jurisdiction in pending cases.[381] Nor do I subscribe to an interpretation of *Klein* as a restriction on the congressional power to adjust the Supreme Court's jurisdiction in all cases.[382] Finally, I need not commit to any proposition about how anti-puppeteering principles would affect *statutorily* specified rules of decision.[383] I find anti-puppeteering constraints on statutory rights desirable as a good-governance principle, but the *legal authority* for my position is far stronger. By relying on outcome orientation and by combining intrinsicality and defer-

376 On its own, intrinsicality does not present constitutional problems that are unique to the appellate paradigm.

377 *See* Act of July 12, 1870, ch. 251, 16 Stat. 230, 235.

378 *See id.*

379 *See supra* subsections II.B.1 (merits decisions), II.B.3 (factual predicates).

380 *See supra* subsections III.C.1 (merits decisions), III.C.3 (factual predicates).

381 *See supra* notes 357–58 and accompanying text.

382 *See supra* note 365 and accompanying text.

383 For one such discussion of the limits of Congress's power to manipulate the judicial process, see generally Redish & Pudelski, *supra* note 329, at 437.

ence into a single step, legal institutions are constructing § 2254(d) as a puppeteering rule that impermissibly interferes with the privilege.

Conclusion

The proposition that state criminal convictions are less preclusive than are judgments rendered in civil actions is an article of faith among those who favor new limits on habeas relief, and it is a deeply embedded assumption even among those who do not. It is also incorrect. Controlling for the presence of jurisdiction and a cause of action—thereby isolating the real habeas prelusion rules—reveals that state convictions are, in fact, idiosyncratically preclusive. This Article therefore amounts to an attack on the central narrative accompanying modern habeas restrictions, which positions them as necessary to conform habeas law to standard relitigation norms.

With respect to the Appellate paradigm—the vehicle for transforming the norms of habeas relitigation—I hope I leave readers with a vantage of both trees and forest. As for the trees, the Appellate paradigm poses immediate challenges for courts and scholars seeking to justify modern decisions by reference to foundational text and habeas theory. As for the forest, Article III judges have been neither neutral interpreters of legal authority nor the faithful stewards of some inherited habeas paradigm. Instead, they have been creative lawmaking agents, developing habeas process that selectively borrows limiting principles from appellate models of direct review in criminal cases.