STRUCTURALLY HARMLESS: WHY *BRECHT* SHOULD APPLY ON COLLATERAL REVIEW OF STRUCTURAL ERRORS

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Even when a prisoner has overcome all of AEDPA's requirements and the Supreme Court's equitable bars to relief, the writ of habeas corpus may issue only as "law and justice" require. The Court has recognized in recent Terms that the habeas statute thus confers on courts discretion to deny relief notwithstanding the satisfactions of the statutory and equitable preconditions. This discretion, the Court has said, is not boundless. A judge may grant the writ only after considering the principles of finality and federalism. Whatever else that includes, the Supreme Court has made clear that a judge must apply Brecht*'s harmlessness standard before granting relief.*

The Supreme Court, however, has not yet clarified whether courts must apply Brecht *to cases involving structural error—i.e., error that is not susceptible to harmlessness review on direct appeal. The lower federal courts continue to forego a* Brecht *analysis on collateral review when an error is structural.*

Those courts are wrong. This Essay explains why cases involving structural error must nevertheless be subject to Brecht*'s harmlessness standard on collateral review. In so doing, this Essay explains how* Brecht *fits into both the historical and modern trajectory of habeas jurisprudence. It further illuminates why applying the structural-error doctrine on collateral review vitiates the principles of finality and state sovereignty that habeas is meant to protect. And it concludes by showing why applying* Brecht *on collateral review does not undermine the institutional justifications for the structural-error doctrine.*

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INTRODUCTION

The answer is no; the question is why. It's a blunt and draconian heuristic for dealing with federal habeas claims, but its descriptive utility is beyond reproach. The overwhelming majority of cases involving federal review of state-court convictions end in a denial of the petition for habeas corpus.[1] This is by design; granting the writ "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority."[2] For that reason, one of the many "whys"—i.e., one of the possible justifications for denying habeas relief—is a habeas-specific harmlessness standard. The Supreme Court declared in *Brecht v. Abrahamson* that a habeas petitioner must demonstrate that the underlying legal violation "had [a] substantial and injurious effect or influence in determining the jury's verdict."[3]

The Court in recent Terms has cabined habeas relief even further, especially as the Court grapples with the relationship between the Antiterrorism and Effective Death Penalty Act of 1996[4] (AEDPA) and equitable bars to relief. Perhaps most importantly, the Court has declared that a prisoner is never entitled to the writ, even if he or she can overcome the panoply of necessary conditions for relief.[5] In particular, AEDPA has "left intact the equitable discretion traditionally invested in federal courts"[6] to deny relief when "law and justice require."[7]

The precise contours of a court's equitable discretion to deny relief remain somewhat unclear; the Court's recognition of this discretion is of recent vintage. But recent Supreme Court decisions make pellucid that courts must wield this equitable discretion to protect the states' core federalism and finality interests in the administration of their criminal justice systems.[8] And it generally requires courts to apply the *Brecht* harmlessness standard.[9]

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1 *See, e.g.*, Nancy J. King, *Non-Capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT'G REP. 308, 309 (2012) (finding that a sample of petitions in non-capital cases surveyed had a success rate of 0.82%).

2 Harrington v. Richter, 562 U.S. 86, 103 (2011) (quoting Harris v. Reed, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)).

3 Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

4 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

5 Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022) ("And even if a prisoner overcomes all of these limits, he is never entitled to habeas relief.").

6 Brown v. Davenport, 142 S. Ct. 1510, 1524 (2022).

7 28 U.S.C. § 2243 (2018).

8 *See Davenport*, 142 S. Ct. at 1524.

9 *Id.*

But not all cases involving constitutional violations are susceptible to harmless-error analysis.[10] These are cases of structural error. "The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."[11] For example, a court's failure to honor a defendant's *Faretta* right to self-representation is structural and thus not subject to harmless-error review.[12] Lower courts have followed this logic in habeas cases, declining to apply *Brecht*'s harmless-error standard when faced with structural error.[13]

No court applying the structural-error framework in habeas, however, has considered the Supreme Court's recent dictates about the proper contours of discretion to deny relief. This is understandable; the Supreme Court has not squarely addressed the relationship between *Brecht* and structural error at any point, much less in the context of its recent habeas jurisprudence.

This Essay explains why harmless-error analysis should apply in all federal habeas cases, even when the structural-error doctrine would apply on direct review. Part I explicates the history and trajectory of federal judicial review of state convictions, including the Court's recent reification of judicial discretion to deny relief notwithstanding the satisfaction of the prerequisites to an issuance of the writ. Part II makes the case for why the structural-error doctrine is at odds with first principles of modern habeas and the express dictates of the Supreme Court's recent opinions. Part III explains why the traditional justifications for the structural-error doctrine do not justify its importation into federal habeas.

I. HABEAS, JURISDICTION, AND FEDERALISM

Modern habeas is (or should be) a delicate balance between federal review of state convictions and the states' interests in finality of their criminal convictions. To understand why the structural-error rule, as applied in federal habeas, disrupts this careful federalist balance, it is first necessary to trace the historical trajectory of habeas corpus. This Part begins by recounting the origins of federal habeas

10 *See* Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017) (describing structural error).

11 *Id.*

12 *See* McKaskle v. Wiggins, 465 U.S. 168, 177 & n.8 (1984).

13 *See, e.g.*, Burgess v. Dretke, 350 F.3d 461, 471 (5th Cir. 2003); Ruelas v. Wolfenbarger, 580 F.3d 403, 410–11 (6th Cir. 2009); Frantz v. Hazey, 533 F.3d 724, 734 n.13 (9th Cir. 2008); McWilliams v. Comm'r, Ala. Dep't of Corr., 940 F.3d 1218, 1223–24 (11th Cir. 2019); *see also, e.g.*, Tamplin v. Muniz, 894 F.3d 1076, 1083–89 (9th Cir. 2018); Malone v. Williams, No. 18-cv-01146, 2022 WL 4808193, at *10–11 (D. Nev. Sept. 30, 2022).

review in the American legal tradition. It then describes the eventual development of both equitable and statutory bars to relief. It finally sheds light on the Supreme Court's recent articulation of the residual discretion afforded to courts to deny habeas relief notwithstanding the satisfaction of the other equitable and statutory bars.

A. Historical Habeas: Competent Jurisdiction, Not Error Correction

One need grasp the historical antecedents of the modern habeas regime to understand the relationship between federal habeas review and the structural-error doctrine.[14] The modern writ of habeas corpus finds its historical antecedent in the writ of habeas corpus *ad subjiciendum*.[15] In pre-Founding England, monarchs at times jailed their subjects without express reason.[16] "When English monarchs jailed their subjects summarily and indefinitely, common-law courts employed the writ as a way to compel the crown to explain its actions—and, if necessary, ensure adequate process, such as a trial, before allowing any further detention."[17]

The writ, however, had little—if anything—to do with prisoners who had been convicted by a court of competent jurisdiction. "A court might issue the writ asking, 'What is the reason for confinement?' But if the return came back: 'Because he's serving a custodial sentence after being convicted of a crime,' the inquiry was usually at an end."[18] In other words, the mere fact of a conviction following trial was proof of due process.[19] The writ could not be used to challenge the adequacy of process afforded at the trial itself.

Congress codified this arrangement in the Judiciary Act of 1789.[20] In particular, it instructed the Supreme Court to look "to the common

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14 For a more fulsome exposition of the history of federal habeas, see *Davenport*, 142 S. Ct. at 1520–25; *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566–72 (2021) (Gorsuch, J., concurring); Jaden M. Lessnick, *Writ-ing Around* Brown v. Allen*: How* Brown v. Davenport *Returns the Great Writ to Its Historic Office*, U. CHI. L. REV. ONLINE, https://lawreview.uchicago.edu/online-archive/writ-ing-around-brown-v-allen-how-brown-v-davenport-returns-great-writ-its-historic [https://perma.cc/6H2M-XDQ7].

15 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

16 *See Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring).

17 *Davenport*, 142 S. Ct. at 1520.

18 *Edwards*, 141 S. Ct. at 1567 (Gorsuch, J., concurring) (citing, *inter alia*, Opinion on the Writ of Habeas Corpus (1758) 97 Eng. Rep. 29, 36 (KB)).

19 *Id.*; *Davenport*, 142 S. Ct. at 1521 ("If the point of the writ was to ensure due process attended an individual's confinement, a trial was generally considered proof he had received just that.").

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

law" when construing the scope of relief available in habeas.[21] In the early years of the Republic, the Court "restate[d] the longstanding rule associated with criminal judgments: *Ad subjiciendum* provided no recourse for a prisoner confined pursuant to a final judgment of conviction."[22] Chief Justice Marshall asked rhetorically: "[I]f it be the judgment of a court of competent jurisdiction . . . is not that judgment in itself sufficient cause?"[23] He continued, "The judgment of a court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this court would be. It is as conclusive on this court as it is on other courts."[24]

This common law rule admitted an important exception: "A habeas court could grant relief if the court of conviction lacked jurisdiction over the defendant or his offense."[25] So, for example, a federal court could grant relief to a prisoner sentenced to death by a state court vested with jurisdiction over only noncapital offenses. The competency of a court's jurisdiction turned on the classes of offenses or categories of persons over which it had adjudicatory authority. A court therefore was not deprived of its competent jurisdiction merely by committing constitutional error, even though today we often think colloquially that a court lacks jurisdiction when it acts contrary to the Constitution or the laws of the United States.

The Court began to chip away at the jurisdiction bar to federal review of state-court convictions in *Frank v. Mangum*.[26] There, the Court intimated that "if a trial is in fact dominated by a mob, so that the jury is intimidated and the trial judge yields," the trial court might be deprived of jurisdiction for habeas purposes, at least if the state supplies "no corrective process," such as an appeal.[27] The Court thus began blurring the concept of competent jurisdiction with the faulty exercise of that competent jurisdiction.

If *Frank v. Mangum* was a foot in the door, *Brown v. Allen* opened the floodgates in 1953. There, the Supreme Court recast the limited habeas remedy into a supervisory power exercisable by federal courts.[28] The transformed habeas remedy allowed federal courts to consider

21 *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94, 93–94 (1807), *superseded by statute*, Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385.

22 *Edwards*, 141 S. Ct. at 1567 (citing *Ex parte* Watkins, 28 U.S. (3 Pet.) 193, 209 (1830)).

23 *Watkins*, 28 U.S. (3 Pet.) at 202.

24 *Id.* at 202–03.

25 Brown v. Davenport, 142 S. Ct. 1510, 1521 (2022).

26 Frank v. Mangum, 237 U.S. 309, 349–50 (1915).

27 *Id.* at 335.

28 Brown v. Allen, 344 U.S. 443, 463 (1953).

whether "the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion."[29]

Justice Robert Jackson concurred only in the judgment (the Court ultimately denied habeas relief) but castigated the majority's watershed transmutation of habeas. In his view, the Court "sanctioned progressive trivialization of the writ until floods of stale, frivolous and repetitious petitions inundate the docket of the lower courts and swell our own."[30] He opined that "reversal by a higher court" in federal habeas "is not proof that justice is thereby better done."[31] After all, "whenever decisions of one court are reviewed by another, a percentage of them are reversed. That reflects a difference in outlook normally found between personnel comprising different courts."[32] Justice Jackson recognized that allowing such sweeping federal review would inevitably result in the usurpation of federalism and finality simply because different courts might view the law and facts differently.[33] Such an arrangement could not be justified as a legal or practical matter. As Justice Jackson famously reminded, "We are not final because we are infallible, but we are infallible only because we are final."[34]

By the middle of the twentieth century, the Court had transformed federal habeas review from a mechanism to ensure conviction by a court of competent jurisdiction to a mechanism of "[f]ull-blown constitutional error correction."[35] Justice Jackson's warnings were "prescient: Federal courts struggled with an exploding caseload of habeas petitions from state prisoners."[36] The ensuing years were the high-water mark for federal review of state convictions,[37] but by the same token, were the low-water mark for the preservation of federalism and finality.

B. Modern Habeas: Equitable and Statutory Bars

The Supreme Court eventually crafted equitable bars to federal habeas relief to deal with the deluge of meritless petitions. The habeas statute carved out the possibility for such equitable bars by using permissive language; the law provided (and still provides) that courts

29 *Id.*
30 *Id.* at 536 (Jackson, J., concurring in result).
31 *Id.* at 540.
32 *Id.*
33 *See id.* at 541.
34 *Id.* at 540.
35 Brown v. Davenport, 142 S. Ct. 1510, 1522 (2022).
36 *Id.*
37 *See id.*

"may" grant the writ,[38] "and that they should do so only as 'law and justice require.'"[39] This language, the Court has recognized, is "an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations."[40] Those equitable bars included, among others, the doctrines of procedural default,[41] nonretroactivity,[42] and abuse of the writ.[43] These doctrines reflect the States' "powerful and legitimate interest in punishing the guilty."[44] "*Brecht* was part of this effort" to "return[] the Great Writ closer to its historic office."[45]

Those equitable doctrines did not adequately stem the flow of baseless federal habeas petitions, at least in Congress's view. So Congress enacted AEDPA in 1996.[46] AEDPA strengthened the already-stringent barriers to relief in many ways, and it erected new bars as well.[47] For example, Congress codified a retroactivity bar in § 2254(d) even stricter than that in *Teague*, providing that the writ "shall not be granted" unless the state court's adjudication of the claim on the merits contradicted "clearly established Federal law, as determined by the Supreme Court of the United States."[48]

Until recently, the Court had not clearly defined the relationship between AEDPA's bars and the Court's equitable precedents. In *Edwards v. Vannoy*, for instance, the Supreme Court eliminated one of the exceptions to *Teague*'s retroactivity bar,[49] despite the fact that AEDPA's retroactivity bar admits no comparable exception. In other words, the petitioner's claim could have been denied under AEDPA without the Court reaching the applicability of the exception to *Teague*.[50] But recently, the Supreme Court has considered the relationship between AEDPA and equitable bars to relief, a development to which this Essay now turns.

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38 28 U.S.C. § 2241(a) (2018).

39 *Davenport*, 142 S. Ct. at 1523 (quoting 28 U.S.C. § 2243 (2018)).

40 Danforth v. Minnesota, 552 U.S. 264, 278 (2008).

41 *See* Wainwright v. Sykes, 433 U.S. 72, 91 (1977).

42 *See generally* Teague v. Lane, 489 U.S. 288 (1989).

43 McCleskey v. Zant, 499 U.S. 467, 497 (1991).

44 Calderon v. Thompson, 523 U.S. 538, 556 (1998) (quoting Herrera v. Collins, 506 U.S. 390, 421 (1993) (O'Connor, J., concurring)).

45 Brown v. Davenport, 142 S. Ct. 1510, 1523 (2022) (quoting Edwards v. Vannoy, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring)).

46 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

47 *See, e.g.*, 28 U.S.C. § 2254(e)(2) (2018) (limiting federal courts' power to hold evidentiary hearings).

48 *Id.* § 2254(d).

49 *Edwards*, 141 S. Ct. at 1556–62.

50 *See id.* at 1562–66 (Thomas, J., concurring).

C. Equitable Discretion to Deny Relief

In many ways, *Brown v. Davenport*[51] represents a "departure from the Court's habeas jurisprudence" by clarifying "the relationship between AEDPA and the Court's equitable habeas precedents."[52] Although the point seems obvious in hindsight, *Davenport* held that to grant habeas relief, a petitioner must clear "both this Court's equitable precedents and Congress's statute."[53]

Two important points follow from *Davenport*. First, satisfying AEDPA's requirements is *necessary* but not *sufficient* to obtain relief. This flows from the statutory text itself; courts "may" grant habeas relief,[54] and relief "shall not be granted" unless AEDPA's requirements are satisfied.[55] The statute says nothing about when relief *must* issue. That is why "even if a prisoner overcomes all of these [equitable and statutory] limits, he is never entitled to habeas relief."[56] Second, and relatedly, the Supreme Court's equitable precedents do not constitute the entire universe of reasons why a habeas court may nevertheless decline to issue the writ. The Court has emphasized the residual equitable discretion courts possess to deny relief.[57] The nature of that discretion remains in flux, but for reasons I set forth below, a court likely abuses its discretion in denying relief in structural-error cases without applying *Brecht*.

The upshot of the foregoing history and the current trajectory of federal habeas is that the writ should issue in only the most extreme circumstances. Contemporary doctrine endeavors to ensure that relief is granted only when the intrusion on state sovereignty can be justified; usually, constitutional error alone will not do the trick. This background lays the foundation for considering the relationship between structural error and modern habeas.

II. *BRECHT* SHOULD APPLY EVEN IN CASES OF STRUCTURAL ERROR

Structural error has (almost) no role to play in federal habeas.[58] Section II.A explains why a contrary view cannot be squared with the

51 Brown v. Davenport, 142 S. Ct. 1510 (2022).

52 Lessnick, *supra* note 14.

53 *Davenport*, 142 S. Ct. at 1531.

54 28 U.S.C. § 2241(a) (2018).

55 28 U.S.C. § 2254(d) (2018).

56 Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022).

57 *See Davenport*, 142 S. Ct. at 1524 ("Congress left intact the equitable discretion traditionally invested in federal courts by preexisting habeas statutes.").

58 The Supreme Court has never squarely addressed this question. After *Brecht*, the Supreme Court has never granted or affirmed habeas relief in a case involving structural

Court's recent habeas jurisprudence, including *Davenport*. Section II.B clarifies why the circumvention of *Brecht* in structural-error cases vitiates the federalism principles that should undergird the issuance of the writ.

A. Recent Habeas Jurisprudence

Forgoing a harmlessness analysis under *Brecht* in cases involving structural error runs headlong into the Supreme Court's recent decision in *Davenport*, even though *Davenport* was not itself a structural-error case. Ervine Davenport was tried for first-degree murder.[59] At trial, one of Davenport's hands, his waist, and his ankles were shackled,[60] purportedly in violation of *Deck v. Missouri*.[61] The Michigan Supreme Court agreed that Davenport's shackling violated *Deck*, but it applied the harmless-error standard articulated in *Chapman v. California*,[62] which "held that a preserved claim of constitutional error identified on direct appeal does not require reversal of a conviction if the prosecution can establish that the error was harmless beyond a reasonable doubt."[63] The state trial court on remand held an evidentiary hearing and concluded that "the State had carried its burden to show harmlessness beyond a reasonable doubt."[64] The Michigan Court of Appeals affirmed, and the Michigan Supreme Court denied discretionary review.[65]

Davenport then sought federal habeas relief in the Western District of Michigan.[66] The court concluded that Davenport had failed to show, under AEDPA, that the Michigan court's application of *Chapman*

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error. In the few cases where the Court discusses structural error on a habeas posture, the Court has generally declined to conclude that an alleged error was structural. *See, e.g.*, California v. Roy, 519 U.S. 2, 5 (1996) (per curiam) (applying *Brecht* to a case involving an improper jury instruction); Neder v. United States, 527 U.S. 1, 8 (1999) (declining to find that a jury instruction that omits an element of the offense is structural); Hedgpeth v. Pulido, 555 U.S. 57, 58 (2008) (per curiam) (noting that the parties agreed that flawed jury instructions were not structural error and were instead subject to *Brecht*); Glebe v. Frost, 574 U.S. 21, 23 (2014) (per curiam) (reversing Ninth Circuit's holding that an improper restriction on the defendant's closing argument was structural).

59 *Davenport*, 142 S. Ct. at 1518.

60 *Id.*

61 *See* Deck v. Missouri, 544 U.S. 622, 635 (2005), *abrogated on other grounds by* Fry v. Pliler, 551 U.S. 112 (2007).

62 Chapman v. California, 386 U.S. 18 (1967).

63 *Davenport*, 142 S. Ct. at 1518 (citing *Chapman*, 386 U.S. at 24).

64 *Id.*

65 *See id.* (citing People v. Davenport, No. 306868, 2012 WL 6217134, at *3 (Mich. Ct. App. Dec. 13, 2012) (per curiam), *appeal denied*, 832 N.W.2d 389 (2013)).

66 *Id.*

was unreasonable.[67] The Sixth Circuit reversed.[68] It failed to analyze the case under AEDPA and instead applied only *Brecht*'s harmless-error rule.[69] Mike Brown, the Acting Warden of the facility housing Davenport, petitioned for Supreme Court review of the Sixth Circuit's issuance of the writ.[70]

The Supreme Court ultimately held that Davenport needed to satisfy both *Brecht* and AEDPA,[71] the latter of which required him to show that the Michigan court's application of *Chapman* was unreasonable.[72] In disposing of Davenport's claim, the Supreme Court emphasized "that Congress invested federal courts with discretion" in habeas cases.[73] I have explained the source of that holding above, so I do not repeat it here, but the Court did articulate some guiding principles for courts exercising that discretion.

Those guiding principles make clear that structural error cannot supply an excuse for avoiding the *Brecht* inquiry. "[E]ven a petitioner who prevails under AEDPA"—for example, by demonstrating that the state court committed a structural error—"must still today persuade a federal habeas court that 'law and justice require' relief."[74] "Law and justice" may be a flexible phrase. But "whatever else those inquiries involve, they continue to require federal habeas courts to apply this Court's precedents governing the appropriate exercise of equitable discretion—including *Brecht*."[75] Put a different way, "satisfying *Brecht*" is "a necessary . . . condition to relief."[76] Because the "Court's equitable precedents like *Brecht* coexist side-by-side with AEDPA," these "two tests impose analytically distinct preconditions to relief."[77]

Brecht is therefore part and parcel of the discretion reserved by Congress for the judiciary. The express dictates of *Davenport* thus require an application of *Brecht* whenever courts consider issuing the writ.

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67 *Id.* at 1518–19.
68 *Id.* at 1519.
69 *Id.*
70 Petition for a Writ of Certiorari at ii, *Davenport*, 142 S. Ct. 1510 (No. 20-826).
71 *Davenport*, 142 S. Ct. at 1520.
72 *See* 28 U.S.C. § 2254(d)(1) (2018).
73 *Davenport*, 142 S. Ct. at 1523; *see also id.* at 1524.
74 *Id.* at 1524 (quoting 28 U.S.C. § 2243 (2018)).
75 *Id.*
76 *Id.* at 1520.
77 *Id.* at 1526.

B. Federalism, Finality, and Brecht

Davenport was not a structural-error case, so one could not be faulted for assuming that the Court's sweeping statements about *Brecht* have little to say when applied to structural error. But to cabin the case to its facts would eschew the federalism and finality principles that underlie *Davenport*—as well as *Brecht* itself.

Start with a simple and uncontroversial premise: Standards that are appropriate on direct review are often inappropriate on collateral review. Such examples of divergent standards "abound throughout [the Court's] habeas cases."[78] For example, new rules of criminal procedure "always have retroactive application to criminal cases on direct review," but "they seldom have retroactive application to criminal cases on federal habeas."[79] To name another example, the "plain error" rule governs the ability of a defendant to raise a new claim on appeal, but the procedural-default rule and its cause-and-prejudice standard impose more stringent requirements on raising a new claim on habeas.[80]

The different standards applicable on direct or collateral review are nothing more than a reflection of the federalism and finality interests that cabin federal habeas.[81] "Because federal habeas review overrides the States' core power to enforce criminal law, it 'intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority.'"[82] Given the nearly insuperable interests of the States in the administration of their criminal systems, "federal habeas review cannot serve as 'a substitute for ordinary error correction through appeal.'"[83] A court that applies the direct-review standard in federal habeas, however, would do precisely that—it would transform federal habeas review into essentially plenary appellate review of state court decisions.

The law thus incorporates different, stricter standards in habeas than it does on direct review; *Brecht* is an instantiation of that principle in the context of harmlessness. Given the weighty federalism and finality interests at stake in federal habeas, the Court in *Brecht* declined

78 Brecht v. Abrahamson, 507 U.S. 619, 634 (1993).

79 *Id.* (first citing Griffith v. Kentucky, 479 U.S. 314, 320–28 (1987); and then citing Teague v. Lane, 489 U.S. 288, 305–10 (1989) (plurality opinion)).

80 United States v. Frady, 456 U.S. 152, 166–68 (1982).

81 *See Brecht*, 507 U.S. at 635 ("The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system.").

82 Shinn v. Ramirez, 142 S. Ct. 1718, 1731 (2022) (quoting Harrington v. Richter, 562 U.S. 86, 103 (2011)).

83 *Id.* (quoting *Harrington*, 562 U.S. at 102–03).

to extend the *Chapman* harmless-error rule to collateral review. The Court explained, "The imbalance of the costs and benefits of applying the *Chapman* harmless-error standard on collateral review counsels in favor of applying a less onerous standard on habeas review of constitutional error."[84] *Brecht*'s more permissive standard protects "final and presumptively correct convictions on collateral review," and it therefore vindicates "the States' interest in finality" and "sovereignty over criminal matters."[85]

The structural-error doctrine is appropriate on direct review, much as *Chapman* is appropriate on direct review for non-structural errors. But *Brecht* illustrates the necessity for less onerous harmlessness standards in federal habeas, and structural errors should not allow petitioners to bypass an important federalism safeguard. Indeed, the logic for applying structural error is *less* forceful in habeas than it is on direct appeal. Structural-error analysis kicks in even if an error is entirely harmless. A case involving structural error requires remand even when there is zero doubt as to the defendant's guilt. The Court has expressed grave concern with granting the writ "based on nothing more than 'speculation that the defendant was prejudiced by trial error.'"[86] If mere speculation of prejudice would "give short shrift to the State's 'sovereign interes[t]' in its final judgment,"[87] then the categorical absence of prejudice would obliterate the State's sovereign interests altogether.

Let's consider a recent example of how structural-error analysis in habeas exacts significant costs on the State. Domonic Malone was convicted by a Nevada jury in 2012 of kidnapping and murder.[88] Before trial, Malone had successfully invoked his *Faretta* right to self-representation.[89] The trial court eventually appointed counsel when Malone ostensibly reneged on his *Faretta* invocation.[90] Malone sought and obtained federal habeas relief in 2022—a full decade after his conviction—because the district judge believed that Malone's *Faretta* rights were violated when the state trial court reappointed counsel.[91] Malone did not claim that the *Faretta* error affected the jury's guilty verdict; he

84 *Brecht*, 507 U.S. at 637.

85 *Id.*

86 Brown v. Davenport, 142 S. Ct. 1510, 1524 (2022) (quoting Calderon v. Coleman, 525 U.S. 141, 146 (1998) (per curiam)).

87 *Id.* (alteration in original) (quoting *Calderon*, 525 U.S. at 146).

88 *See* Malone v. Williams, No. 18-cv-01146, 2022 WL 4808193, at *1–2 (D. Nev. Sept. 30, 2022).

89 *See id.* at *6–9.

90 *See id.* at *8–9.

91 *See id.* at *9–11.

did not attempt to claim innocence at all during his federal habeas proceedings. But the district court asserted that the "violation of Malone's constitutional rights is not subject to harmless error analysis" because *Faretta* violations are structural errors.[92] Now, more than a decade later, Nevada will be forced to retry Malone but without the benefit of ripe evidence. And because "the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant,"[93] there is no serious claim that Malone should prevail at retrial.[94]

The costs of federal intrusion into state sovereignty are at their highest when there is no realistic possibility that the petitioner is innocent. Such an outcome is hard to square with *Brecht*, which applied a lower standard on habeas even when the underlying error potentially affected the guilty verdict. And as I explain in Part III below, the rationales for applying the structural-error doctrine on direct appeal do not justify its application in federal habeas.

III. APPLYING *BRECHT* IN STRUCTURAL-ERROR CASES DOES NOT VITIATE THE PURPOSE OF THE STRUCTURAL-ERROR DOCTRINE

Someone unfamiliar with federal habeas might suppose that structural rights should be subject to a standard more forgiving than *Brecht* on collateral review because of their unique importance. After all, "the purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial."[95] This argument fails for three reasons. First, it is at odds with the fundamental precept of federal habeas that state courts are equally competent in protecting federal rights. Second, applying *Brecht* on collateral review does not unduly undermine the three main justifications for applying the structural-error doctrine on direct review. And finally, remedies other than habeas are better suited to enforcing rights subject to structural error.

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92 *See id.* at *11.

93 McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984).

94 The Ninth Circuit recently denied rehearing en banc. *See* Malone v. Williams, 112 F.4th 867, 868 (9th Cir. 2024) (order). In a separate statement, Judge Jay Bybee, joined by thirteen other Ninth Circuit judges, wrote to "suggest[] to the U.S. Supreme Court that the case should be summarily reversed," although for reasons unrelated to *Brecht*. *Id.* (Bybee, J., respecting the denial of rehearing en banc). The State of Nevada did not file a petition for a writ of certiorari.

95 Weaver v. Massachusetts, 137 S. Ct. 1899, 1907 (2017).

A. State Court Fora

By now, it should be obvious that federal habeas protects the centrality of state-court remedies, even for violations of the U.S. Constitution. Federal habeas was "designed to confirm that state courts are the principal forum for asserting constitutional challenges to state convictions."[96] For that reason, a petitioner cannot obtain relief simply by demonstrating a constitutional violation—even if that violation seriously undermines confidence in the verdict. Instead, "a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[97] This high standard is by design; it prevents habeas from becoming "a substitute for ordinary error correction through appeal."[98] Federal habeas thus reflects a strong presumption that state courts are an adequate forum in which to vindicate federal rights. That is true for constitutional rights subject to harmless-error review and those subject to structural-error review.

One might suppose that structural rights should be subject to a more forgiving standard in federal habeas because of their unique importance (a dubious supposition, but I take it as true for this analysis). That argument proves too much; it would indict the entire habeas regime, AEDPA and all. Consider a case involving the *Faretta* right to self-representation. If the state court adjudicated the *Faretta* claim on the merits, the petitioner could obtain relief only by demonstrating that no fair-minded jurist could agree with the state court's resolution of the claim.[99] That is the same standard we apply to errors that are subject to *Brecht*; harmlessness review applies only once the petitioner has overcome the initial AEDPA hurdles.[100] But the Court has never suggested that structural errors are entitled to a less deferential substantive standard, and AEDPA makes no such distinction. Much as we presume that states can adequately protect one's right to effective assistance of counsel, one's right to confrontation, or one's right against self-incrimination, we presume that states can adequately protect against structural errors. There is no reason to think that states are

96 Harrington v. Richter, 562 U.S. 86, 103 (2011).

97 *Id.*

98 *Id.* at 102–03 (citing Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment), *superseded in part by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214).

99 *See Harrington*, 562 U.S. at 103.

100 *See* Brown v. Davenport, 142 S. Ct. 1510, 1517 (2022).

worse at protecting structural rights than they are at protecting those subject to harmlessness.

B. Justifications for the Structural-Error Doctrine

To put a finer point on the foregoing, let's examine the three general justifications the Supreme Court has offered for applying structural-error review in a narrow set of cases.

First, the Court will deem an error structural if "harm is irrelevant to the basis underlying the right,"[101] such as the right to self-representation.[102] In these cases, a defendant can establish structural error on direct review or in state post-conviction proceedings. If a state court incorrectly labels a certain error "harmless" that was in fact a structural error, a federal habeas court could conclude that the state court's reasoning contradicted clearly established federal law.[103] Of course, such an error would likely be harmless under *Brecht*, so the petitioner would not be entitled to relief; but these are rights that are "not designed to protect the defendant from erroneous conviction but instead protects some other interest,"[104] so it is adequate that the state courts will have guidance in future cases even if relief is unavailing to the petitioner in the instant case. What's more, any under-enforcement of the structural right is outweighed by the federalism and finality interests that undergird the entire federal habeas regime. To reiterate, habeas is not a mechanism for ordinary constitutional error correction.

Second, "an error has been deemed structural if the effects of the error are simply too hard to measure," such as "when a defendant is denied the right to select his or her own attorney."[105] States can protect these rights for many of the reasons described in the preceding paragraph. Further, the Court has explained that in these cases, "the government will . . . find it almost impossible to show that the error was 'harmless beyond a reasonable doubt,' [so] the efficiency costs of letting the government try to make the showing are unjustified."[106] But in habeas, *Brecht* flips the harmlessness burden, and it is the petitioner who has to demonstrate that the error was harmful.[107] Although the

101 Weaver v. Massachusetts, 137 S. Ct. 1899, 1908 (2017) (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006)).

102 *See id.*

103 *Cf., e.g.*, O'Neal v. Balcarcel, 933 F.3d 618, 628 (6th Cir. 2019) (noting that refusal to admit statements could have been subject to harmless-error review as a structural error if they did not result in actual prejudice).

104 *Weaver*, 137 S. Ct. at 1908.

105 *Id.*

106 *Id.* (citation omitted) (quoting Chapman v. California, 386 U.S. 18, 24 (1967)).

107 *See* Brecht v. Abrahamson, 507 U.S. 619, 637–38 (1993).

petitioner may similarly struggle to show that the error prejudiced the guilty verdict, the federalism and finality interests outweigh the efficiency costs of letting the petitioner try to make the showing.

The third instance in which the Court has applied the structural error doctrine is "if the error always results in fundamental unfairness," such as "if the judge fails to give a reasonable-doubt instruction."[108] But in these cases, it should be easy for the petitioner to demonstrate that the error was not harmless under *Brecht*; the very premise of this class of structural error is that the error is necessarily harmful.

C. Alternative Remedies

I admit that eschewing the structural-error doctrine in favor of *Brecht* in habeas will remove one of the tools federal courts might employ in the enforcement of rights subject to structural-error analysis. As I have explained, though, habeas was never meant to be a mere rights-enforcement mechanism. To the extent that state courts are in fact worse at protecting structural rights, mechanisms other than habeas exist to marshal federal enforcement.

First, § 1983 provides a declaratory and injunctive remedy for violations of federal law.[109] Although immunity doctrines might shield state officials from suits for monetary damages, "judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity."[110] Systemic violations of structural rights may therefore be redressable under § 1983.[111] To be sure, *Younger* abstention might prohibit a state-court defendant from asserting § 1983 in his or her particular criminal case.[112] But as explained in the preceding Section, the central justification for the structural-error doctrine is institutional—not individual—in nature.

Second, direct appeal to the United States Supreme Court ensures recourse for the most egregious structural-rights violations. In *Waller v. Georgia*, for example, the Supreme Court held, on direct review from a Georgia conviction, that "the defendant should not be required to prove specific prejudice in order to obtain relief for a violation of the

108 *Weaver*, 137 S. Ct. at 1908.

109 42 U.S.C. § 1983 (2018).

110 Pulliam v. Allen, 466 U.S. 522, 541–42 (1984), *superseded by statute,* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847.

111 *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 106–07, 107 n.5 (1975) (noting that the respondents—themselves Florida criminal defendants—filed a class action lawsuit seeking declaratory and injunctive relief under § 1983).

112 *See generally* Younger v. Harris, 401 U.S. 37 (1971).

public-trial guarantee."[113] Indeed, a number of structural-error cases have come before the Court on direct appeal.[114]

These remedies are not panaceas. The point is simply that habeas is not a mere gap-filling tool when other remedies like § 1983 and direct review cannot achieve absolute compliance. To suppose otherwise would commit the *Brown v. Allen* error of using federal habeas as a mechanism of "[f]ull-blown constitutional error correction."[115]

CONCLUSION

Although we are usually accustomed to thinking of "justice" as coextensive with the protection of rights afforded to criminal defendants, the term means something quite different in the context of federal habeas.[116] The Court has now tied *Brecht* to the habeas statute's "law and justice" requirement.[117] *Brecht*—like modern habeas jurisprudence itself—is a rule of federalism, and it should apply even in cases involving structural error. Granting the writ when there is no doubt about the petitioner's guilt hollows out "the States' 'powerful and legitimate interest in punishing the guilty'"[118] and derogates state sovereignty. Neither law nor justice tolerates the structural-error doctrine on collateral review.

113 Waller v. Georgia, 467 U.S. 39, 49 (1984).

114 *See, e.g.*, Tumey v. Ohio, 273 U.S. 510, 535 (1927) (lack of an impartial trial judge); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) (erroneous reasonable-doubt instruction to jury).

115 Brown v. Davenport, 142 S. Ct. 1510, 1522 (2022).

116 *Cf.* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring in result) ("However, reversal by a higher court is not proof that justice is thereby better done.").

117 *See Davenport*, 142 S. Ct. at 1524 ("[W]hatever else those [law and justice] inquiries involve, they continue to require federal habeas courts to apply . . . *Brecht*.").

118 *Id.* at 1523 (quoting Calderon v. Thompson, 523 U.S. 538, 556 (1998)).