NOTES

A TEXTUAL ARGUMENT FOR CHALLENGING CONDITIONS OF CONFINEMENT UNDER HABEAS

As the COVID-19 pandemic has spread through prisons, jails, and other detention facilities in the United States, it has brought new attention to a decades-old issue of whether challenges to conditions of confinement can be brought under habeas statutes.[1] The COVID-19 virus spread rapidly through detention facilities in the United States given the inability to social distance within the facilities, the flow of guards between the community and the detention centers, a lack of sanitary conditions, and other factors.[2] By June 25, 2021, there were at least 398,627 COVID-19 cases and 2,715 COVID-19-related deaths among those incarcerated in state and federal prisons.[3] In the federal prison system, the case rate was 2,866 per 10,000 incarcerated individuals, nearly triple the U.S. population case rate of roughly 1,020 per 10,000 in that same period.[4] Meanwhile, the courts provided very few options for those facing a possible death sentence from COVID-19 to seek relief.[5]

One possible option for incarcerated individuals was filing a writ of habeas corpus in federal court. Habeas is a centuries-old avenue for challenging unlawful confinement, used to seek outright release or a conditional release order mandating that the government either remedy unlawful aspects of custody or release the individual.[6] However, for many, the long-standing federal court disagreement over whether conditions-of-confinement claims can be brought under habeas proved "a salient obstacle to relief."[7] The Supreme Court has explicitly "left

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[1] *See, e.g.*, Wilson v. Williams, 961 F.3d 829, 837–38 (6th Cir. 2020); Martinez-Brooks v. Easter, 459 F. Supp. 3d 411, 416 (D. Conn. 2020); Lee Kovarsky, Essay, *Pandemics, Risks, and Remedies*, 106 VA. L. REV. ONLINE 71, 80 (2020); Allison Wexler Weiss, *Habeas Corpus, Conditions of Confinement, and COVID-19*, 27 WASH. & LEE J.C.R. & SOC. JUST. 131, 135 (2020).

[2] *See* Kelly Davis, *Coronavirus in Jails and Prisons*, THE APPEAL (Aug. 3, 2020), https://theappeal.org/coronavirus-in-jails-and-prisons-37 [https://perma.cc/FB82-SE64].

[3] *A State-by-State Look at 15 Months of Coronavirus in Prisons*, THE MARSHALL PROJECT (July 1, 2021, 1:00 PM), https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons [https://perma.cc/QTP5-4RMN].

[4] *Id.*; *Trends in Number of COVID-19 Cases and Deaths in the US Reported to CDC, by State/Territory*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://covid.cdc.gov/covid-data-tracker/#trends_dailycases_totalcasesper100k [https://perma.cc/X6CF-8DPR]. As of June 25, 2021, when *The Marshall Project* numbers were last updated, there were 10,202 total cases per 100,000 people in the U.S. *Id.* That number was divided by ten to be comparable to *The Marshall Project*'s scale of total cases per 10,000 people.

[5] *See* Kovarsky, *supra* note 1, at 72; Weiss, *supra* note 1, at 134–35.

[6] *See* Wilkinson v. Dotson, 544 U.S. 74, 81 (2005); *id.* at 87 (Scalia, J., concurring).

[7] Kovarsky, *supra* note 1, at 80; *cf.* Wilson v. Williams, 961 F.3d 829, 837 (6th Cir. 2020) (holding the district court had jurisdiction to consider a habeas petition alleging unconstitutional confinement).

open the question whether [incarcerated individuals] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus,"[8] although some earlier Supreme Court cases allowed them to do just that.[9] Circuit courts have meanwhile divided sharply on the issue.[10]

This question is a vital one because habeas is one of few avenues of relief for prisoners — especially federal ones — seeking to challenge unlawful conditions of confinement. State prisoners seeking federal relief from unlawful conditions of confinement can do so through § 1983 of the Civil Rights Act,[11] which allows individuals to sue state officials who violate their federal rights,[12] or via the less common approach of §§ 2254 or 2241 of the habeas statutes, which allow federal courts to hear petitions for writs of habeas corpus by individuals in state custody under certain circumstances.[13] States also have their own methods through which state prisoners may seek relief from unlawful prison conditions, including state habeas statutes.[14]

Individuals incarcerated in federal prisons, meanwhile, cannot bring suits against federal prison officials under the Civil Rights Act, because § 1983 applies only to state and local, not federal, officials.[15] Instead, federal prisoners have four possible options: the Federal Tort Claims Act[16] (FTCA), suits under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[17] mandamus,[18] and § 2241 of the habeas statutes.[19] The FTCA, *Bivens*, and mandamus all have severe limitations. The FTCA provides only for monetary damages and does not authorize a court to issue injunctive relief, so it may not successfully

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[8] Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017); *see also* Bell v. Wolfish, 441 U.S. 520, 526 n.6 (1979).

[9] *See* Wilwording v. Swenson, 404 U.S. 249, 249–51 (1971) (per curiam); Johnson v. Avery, 393 U.S. 483, 484–86 (1969).

[10] *See* Wilborn v. Mansukhani, 795 F. App'x 157, 163 (4th Cir. 2019) (per curiam) (collecting cases); Aamer v. Obama, 742 F.3d 1023, 1036–38 (D.C. Cir. 2014) (same).

[11] 42 U.S.C. § 1983.

[12] *Id.*

[13] 28 U.S.C. §§ 2241, 2254.

[14] *See* Kelsey v. State, 283 N.W.2d 892, 895 (Minn. 1979); Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483, 489–91 (2020); George L. McGaughey, Recent Case, In re Lamb*, 34 Ohio App. 2d 85, 296 N.E.2d 280 (1973)*, 25 CASE W. RSRV. L. REV. 684, 685 (1975) (discussing an Ohio case holding that habeas corpus relief was available to state prisoners protesting detention in solitary confinement).

[15] *See* 42 U.S.C. § 1983 (allowing suit exclusively against persons under the power of "any State or Territory or the District of Columbia").

[16] 28 U.S.C. §§ 1291, 1346, 1402, 2401–2402, 2411–2412, 2671–2680.

[17] 403 U.S. 388 (1971).

[18] 28 U.S.C. § 1361.

[19] Timothy J. Kilgallon, Note, *The* Bivens *Remedy in Prisoners' Rights Litigation*, 40 WASH. & LEE L. REV. 215, 218 (1983).

alleviate unlawful conditions.[20] It also is limited to tort-based recovery,[21] which may not encompass all claims related to unlawful conditions of confinement. *Bivens* has meanwhile been severely limited in the years since its inception. *Bivens* was a landmark Supreme Court case in 1971 that created a cause of action against federal officials similar to the one available against state officials under § 1983.[22] But the Court in recent years has narrowed the remedy nearly to the facts of *Bivens* itself, all but cutting off this route for prisoners challenging unlawful conditions.[23] Lastly, mandamus allows federal courts "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff,"[24] but it is a "'drastic and extraordinary' remedy"[25] with high hurdles for obtaining relief.[26] Given the limitations of these other avenues, habeas may sometimes be the only way for a federal prisoner to challenge and remedy unlawful conditions of confinement. And although state prisoners have the alternative of § 1983, habeas still can offer an important avenue for relief, given evolving differences in procedural requirements between habeas and § 1983.

Despite the importance of this question, the Supreme Court has yet to squarely address the issue.[27] A scholar writing in 1987 on this topic wrote then that "[t]he time has come for the Supreme Court to announce a rule regarding the use of habeas corpus to challenge improper prison conditions."[28] Yet in the three decades since, the issue has not been

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[20] *See* PRIYA PATEL, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWS. GUILD, FEDERAL TORT CLAIMS ACT: FREQUENTLY ASKED QUESTIONS FOR IMMIGRATION ATTORNEYS 5–6 (2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/fed/2013_24Jan_ftca-faq.pdf [https://perma.cc/D8E6-5M6J].

[21] *See* WILLIAM B. WRIGHT, THE FEDERAL TORT CLAIMS ACT: ANALYZED AND ANNOTATED 11–22 (1957).

[22] *Bivens*, 403 U.S. at 395–97. The Court initially expanded this remedy further. *See* Carlson v. Green, 446 U.S. 14, 24 (1980); Davis v. Passman, 442 U.S. 228, 229–30 (1979); Kilgallon, *supra* note 19, at 220–24.

[23] *See, e.g.*, Hernández v. Mesa, 140 S. Ct. 735, 743 (2020); Ziglar v. Abbasi, 137 S. Ct. 1843, 1859 (2017); *see also* Laurence H. Tribe, *Death by a Thousand Cuts: Constitutional Wrongs Without Remedies After* Wilkie v. Robbins, 2006–2007 CATO SUP. CT. REV. 23, 26 ("[T]he best that can be said of the *Bivens* doctrine is that it is on life support with little prospect of recovery."); *The Supreme Court, 2019 Term — Leading Cases*, 134 HARV. L. REV. 410, 550 (2020) (discussing *Hernández*, 140 S. Ct. 735, and the Court's trend toward limiting *Bivens*).

[24] 28 U.S.C. § 1361.

[25] Cheney v. U.S. Dist. Ct. for D.C., 542 U.S. 367, 380 (2004) (quoting *Ex parte* Fahey, 332 U.S. 258, 259 (1947)).

[26] A petitioner generally must establish the lack of any other adequate remedy, a "clear and indisputable" right to the relief, and that the writ is appropriate under the circumstances. *Id.* at 380–81 (quoting Kerr v. U.S. Dist. Ct. for the N. Dist. of Cal., 426 U.S. 394, 403 (1976)).

[27] *See, e.g.*, Martin A. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 150 & n.394 (1988).

[28] Scott Singer, "*To Be or Not to Be: What is the Answer?" The Use of Habeas Corpus to Attack Improper Prison Conditions*, 13 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 149, 170 (1987).

resolved. If anything, it has grown more complicated in tandem with Congress's efforts to erect greater hurdles to prison litigation via the Prison Litigation Reform Act[29] (PLRA) in 1996.[30]

Amid this uncertainty, there has been very little discussion over whether the text of the habeas statutes actually covers conditions of confinement — arguments on the issue have instead focused primarily on originalist understandings of habeas or on how other statutes, like § 1983 or the PLRA, impact the scope of habeas. This Note aims to fill this gap by examining the text of the habeas statutes, arguing that conditions-of-confinement claims can be covered and that courts should allow such challenges to proceed. Part I provides an overview of the current state of the law, updating and building on prior surveys. Part II advances a textual analysis, arguing the habeas statutes can cover conditions-of-confinement claims. Part III then turns to addressing two key counterarguments: (1) that an originalist understanding of habeas would not cover conditions of confinement and (2) that the PLRA evinces Congress's intent that conditions-of-confinement claims should not be brought under habeas.

I. CONDITIONS-OF-CONFINEMENT CASES IN THE COURTS

The federal courts are sharply divided as to whether conditions-of-confinement claims can be brought under the habeas statutes. The Supreme Court has equivocated on the issue but recently indicated in dicta that conditions-of-confinement claims may indeed be cognizable under habeas.[31] Circuit courts have meanwhile diverged both within and between circuits.[32] This Part provides an overview of evolving Supreme Court precedent in the first section, then turns to the circuit court divide in the second.

A. Supreme Court Precedent

The Supreme Court's stance on this issue has evolved over the past half century, shifting from allowing conditions-of-confinement claims to proceed under habeas to now referring to the issue as an open question. In 1969, in *Johnson v. Avery*,[33] the Court allowed a state prisoner to use habeas to challenge a prison regulation barring him from providing legal

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[29] Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 3626 and 28 U.S.C. § 1932).

[30] *See* Elizabeth Alexander, *Prison Litigation Reform Act Raises the Bar*, 16 CRIM. JUST. 10, 11 (2002).

[31] *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1862–63 (2017); Johnson v. Avery, 393 U.S. 483, 484 (1969).

[32] *See* Wilborn v. Mansukhani, 795 F. App'x 157, 163 (4th Cir. 2019) (per curiam) (collecting cases); Aamer v. Obama, 742 F.3d 1023, 1036–38 (D.C. Cir. 2014) (same).

[33] 393 U.S. 483 (1969).

assistance[34] — a condition of confinement. The Court, following a line of cases in which it had struck down regulations hampering access to the writ,[35] held that the prison regulations unlawfully interfered with the right of prisoners to petition for habeas corpus at a federal court.[36] It did not directly discuss the issue of whether conditions of confinement could be challenged under habeas, but that may be because the issue was not in contention — both the district court and the Sixth Circuit had upheld the petitioner's ability to bring the "motion for law books and a typewriter" under habeas.[37]

Two years later, in *Wilwording v. Swenson*,[38] the Court affirmed this understanding of *Johnson*, citing it for the conclusion that the state prisoners' claims challenging living conditions and disciplinary measures were "cognizable in federal habeas corpus."[39] Although the habeas issue was not central to the case, the Supreme Court nevertheless wrote in dicta that the claims were cognizable under habeas, responding directly to the Eighth Circuit's contention that they might not be.[40]

The next case to address this issue was *Preiser v. Rodriguez*[41] in 1973.[42] The respondents had brought claims under § 1983 alleging that state prison administrators had unconstitutionally deprived them of good-time credits.[43] Because the remedy of restoring those credits would have led to the respondents' immediate release, the Court determined that the claims were ultimately seeking release from confinement and therefore fell at the "core"[44] or "heart" of habeas corpus.[45] The Court then held that claims "challenging the very fact or duration of . . . physical imprisonment" where the relief sought is immediate or speedier release must be brought under habeas rather than § 1983.[46] The Court

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[34] *Id.* at 484 (noting that the District Court treated the petitioner's motion for law books and a typewriter as a petition for a writ of habeas corpus).

[35] *Id.* at 485–86 (citing Smith v. Bennett, 365 U.S. 708, 708–09 (1961); Long v. Dist. Ct. of Iowa, 385 U.S. 192, 193–94 (1966) (per curiam); Lee v. Washington, 390 U.S. 333, 333–34 (1968) (per curiam); *Ex parte* Hull, 312 U.S. 546, 549 (1941)).

[36] *Id.* at 485, 490.

[37] *Id.* at 484 (quoting Johnson v. Avery, 382 F.2d 353, 354 (6th Cir. 1967), *rev'd*, 393 U.S. 483 (1969)); *see Johnson*, 382 F.2d at 355 ("[I]t seems clear that [petitioner] has been subjected to a restraint upon his liberties unauthorized by the life sentence he is serving. In such a case, habeas corpus will lie to inquire into the lawfulness of this added punishment, even though it will not result in his unconditional release from prison.").

[38] 404 U.S. 249 (1971) (per curiam).

[39] *Id.* at 251; *see* Wilwording v. Swenson, 439 F.2d 1331, 1332 n.2 (8th Cir. 1971), *rev'd*, 404 U.S. 249 (1971) (per curiam).

[40] *See Wilwording*, 439 F.2d at 1337.

[41] 411 U.S. 475 (1973).

[42] *See* Singer, *supra* note 28, at 153.

[43] *Preiser*, 411 U.S. at 476.

[44] *Id.* at 487, 489.

[45] *Id.* at 498.

[46] *Id.* at 500.

reasoned that because § 1983 allowed state prisoners to bring claims without an exhaustion of state remedies, while habeas required exhaustion, it "would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings."[47] Yet, at the close of its opinion, the Court carefully left open the reverse possibility: challenging conditions of confinement under habeas.[48] Although the issue was not directly before it, the Court noted that "[w]hen a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal."[49]

Standing alone, *Preiser* seemed to leave unchanged the Court's prior precedents allowing for conditions-of-confinement claims under habeas.[50] But six years later, the Court in *Bell v. Wolfish*[51] suggested more explicitly that the issue was not yet settled, dropping a footnote that read: "[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of confinement itself."[52]

This question has remained unresolved at the Supreme Court level for decades now. In 2017, the Court in *Ziglar v. Abbasi*[53] again called the question an open one but suggested that habeas may actually offer a more expedient avenue for relief than filing a *Bivens* suit for monetary damages.[54] Individuals held in federal detention after the September 11, 2001, attacks had brought a *Bivens* action alleging federal officials had violated their constitutional rights by subjecting them to punitive strip searches; guard abuse; and harsh pretrial conditions on account of race, religion, or national origin.[55] They could not bring a § 1983 claim because they were detained in federal custody,[56] and the *Ziglar* Court ruled they couldn't bring a *Bivens* claim for most of their case either.[57] In pertinent part, the Court reasoned that a *Bivens* remedy is typically not available when other relief, such as an injunction or habeas, is.[58] The

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47 *Id.* at 489–90.

48 *See id.* at 499–500; *see also* John Flannery, *Habeas Corpus Bores a Hole in Prisoners' Civil Rights Actions — An Analysis of* Preiser v. Rodriguez, 48 ST. JOHN'S L. REV. 104, 109–10 (1973) (suggesting that habeas could be used to challenge conditions of confinement after *Preiser*).

49 *Preiser*, 411 U.S. at 499.

50 *See* Singer, *supra* note 28, at 155 ("The Court's previous decisions in *Avery* and *Wilwording* regarding the use of habeas corpus to challenge conditions of confinement . . . went unchanged.").

51 441 U.S. 520 (1979).

52 *Id.* at 526 n.6 (citing *Preiser*, 411 U.S. at 499–500).

53 137 S. Ct. 1843 (2017).

54 *Id.* at 1863; *see id.* at 1862–63 (citing *Bell*, 441 U.S. at 526 n.6; *Preiser*, 411 U.S. at 499).

55 *Id.* at 1853.

56 *Id.* at 1854.

57 *Id.* at 1869.

58 *Id.* at 1862–63.

Court touted the likelihood that habeas "would have provided a faster and more direct route to relief than a suit for money damages," requiring "officials to place respondents in less-restrictive conditions immediately; [whereas] this damages suit remains unresolved some 15 years later."[59] The Court ultimately declined to "determine the scope or availability of the habeas corpus remedy," since that issue was not before it, but did rely on habeas to deny *Bivens* relief.[60] Thus, though the Supreme Court has yet to rule definitively on the issue, dicta in its most recent case suggest that habeas is potentially available for conditions-of-confinement claims.

B. Circuit Court Split

While the Supreme Court has called the conditions-of-confinement issue an open question, the circuit courts have stepped in to fill the void, diverging significantly both between and within circuits. The D.C. and Second Circuits clearly allow conditions-of-confinement claims to proceed under habeas. In 2014, the D.C. Circuit in *Aamer v. Obama*[61] reasoned that custody may be illegal due to "the fact of detention, the duration of detention, the place of detention, or the conditions of detention."[62] In all such cases, "the habeas petitioner's essential claim is that his custody in some way violates the law, and he may employ the writ to remedy such illegality."[63] The Second Circuit has also "long interpreted § 2241 [of the habeas statutes] as applying to challenges to the execution of a federal sentence, 'including such matters as . . . prison conditions.'"[64]

Other circuits, including the First and Third, have referred to the proposition that conditions-of-confinement claims may be brought under habeas in a more offhand way, seemingly taking the proposition to be a given.[65] And others once embraced a similar conclusion prior to

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[59] *Id.* at 1863.

[60] *Id.*

[61] 742 F.3d 1023 (D.C. Cir. 2014).

[62] *Id.* at 1036 (citations omitted).

[63] *Id.*

[64] Thompson v. Choinski, 525 F.3d 205, 209 (2d Cir. 2008) (quoting Jiminian v. Nash, 245 F.3d 144, 146 (2d Cir. 2001)); *see also* Kahane v. Carlson, 527 F.2d 492, 498 (2d Cir. 1975) (Friendly, J., concurring) (arguing that § 2241 "furnishes a wholly adequate remedy" to challenge conditions of confinement).

[65] *See, e.g.*, United States v. DeLeon, 444 F.3d 41, 59 (1st Cir. 2006) ("If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available."); Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 238–39, 242 & n.5 (3d Cir. 2005) (finding that "even if what is at issue here is 'conditions of confinement,'" *id.* at 242 n.5, the suit would be cognizable under habeas); Miller v. United States, 564 F.2d 103, 105 (1st Cir. 1977) ("Section 2241 provides a remedy for a federal prisoner who contests the conditions of his confinement."). *But cf.* Cardona v. Bledsoe, 681 F.3d 533, 537 (3d Cir. 2012) (holding that in order to properly challenge the "execution" of a sentence

Preiser and *Bell*.[66] In *Coffin v. Reichard*,[67] for example, the Sixth Circuit reasoned that, even if a person is validly convicted of a crime, "[h]is conviction and incarceration deprive him only of such liberties as the law has ordained he shall suffer for his transgressions."[68]

By contrast, circuit courts ruling that conditions-of-confinement claims cannot be brought under habeas have done so primarily on two key grounds: (1) that conditions-of-confinement claims are outside the scope of the essential definition of the writ of habeas corpus[69] and (2) that § 1983 and the PLRA evince Congress's intent that conditions-of-confinement claims should fall outside habeas.[70] Under the first approach, courts have cited to *Preiser*'s emphasis on release constituting the core of habeas to support the very proposition *Preiser* disclaimed.[71] The Ninth Circuit in *Crawford v. Bell*,[72] for example, cited to *Preiser* to conclude that: "According to traditional interpretation, the writ of habeas corpus is limited to attacks upon the legality or duration of confinement."[73] The Ninth Circuit failed to acknowledge that this reversed its earlier holdings that habeas was available to challenge conditions of confinement.[74] The Fifth Circuit has also adopted this "traditional interpretation" analysis, holding that conditions-of-confinement claims do not fall within the "purpose" of habeas corpus.[75]

Under the second approach, courts have inverted *Preiser*'s reasoning. In *Preiser*, the Court argued that because the habeas statutes are more specific than the broad relief afforded by § 1983, Congress intended for habeas to be the exclusive remedy for claims falling within

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under § 2241, the petitioner would have to "allege that [the Bureau of Prisons's] conduct was somehow inconsistent with a command or recommendation in the sentencing judgment").

66 *See, e.g.*, Willis v. Ciccone, 506 F.2d 1011, 1014 (8th Cir. 1974) ("[I]t is generally acknowledged that habeas corpus is a proper vehicle for any prisoner, state or federal, to challenge unconstitutional actions of prison officials."); Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam).

67 143 F.2d 443 (6th Cir. 1944) (per curiam). The Sixth Circuit has more recently shifted away from allowing conditions-of-confinement claims under habeas. *See* Wilson v. Williams, 961 F.3d 829, 838 (6th Cir. 2020).

68 *Coffin*, 143 F.2d at 445.

69 *See, e.g.*, Crawford v. Bell, 599 F.2d 890, 891–92 (9th Cir. 1979); Cook v. Hanberry, 592 F.2d 248, 249 (5th Cir.) (per curiam), *modified*, 596 F.2d 658 (5th Cir. 1979) (per curiam).

70 *See, e.g.*, Wilborn v. Mansukhani, 795 F. App'x 157, 163–64 (4th Cir. 2019) (per curiam); Nettles v. Grounds, 830 F.3d 922, 932–33 (9th Cir. 2016); Palma-Salazar v. Davis, 677 F.3d 1031, 1035 (10th Cir. 2012); Graham v. Broglin, 922 F.2d 379, 381 (7th Cir. 1991).

71 *See, e.g.*, *Crawford*, 599 F.2d at 891 (citing Preiser v. Rodriguez, 411 U.S. 475, 484–86 (1973)).

72 599 F.2d 890 (9th Cir. 1979).

73 *Id.* at 891 (citing *Preiser*, 411 U.S. at 484–86).

74 Workman v. Mitchell, 502 F.2d 1201, 1208 n.9 (9th Cir. 1974); *see also* Mead v. Parker, 464 F.2d 1108, 1111 (9th Cir. 1972) ("Nor can it be said that habeas corpus is not available because the petitioners do not ask to be released from custody, but only certain aspects of that custody be found illegal. . . . The Supreme Court has permitted the use of the writ for just such purposes.").

75 Cook v. Hanberry, 592 F.2d 248, 249 (5th Cir.) (per curiam), *modified*, 596 F.2d 658 (5th Cir. 1979) (per curiam).

its core.[76] But some courts have taken this to mean that habeas and § 1983 provide *mutually exclusive* forms of relief,[77] even though they cite cases dealing only with whether relief *must* be brought under habeas, not whether it cannot be.[78] And other courts have gone further by extending this holding to individuals in federal custody,[79] even though there is no correlative § 1983 available to underpin the reasoning.

Another aspect of this congressional intent argument is that the PLRA indicated Congress's intent that all conditions-related claims should be channeled through § 1983 rather than habeas.[80] The PLRA was intended to curb prisoner litigation and erected a series of hurdles to prisoners' efforts to address illegal prison conditions.[81] A number of courts have held that certain barriers in the PLRA do not apply to habeas actions.[82] The Ninth Circuit has thus reasoned that Congress intended the PLRA's exhaustion requirements to apply to "all inmate suits about prison life" and that it would "'wholly frustrate explicit congressional intent' to hold that prisoners could evade the requirements of the PLRA 'by the simple expedient of putting a different label on their pleadings.'"[83] The Ninth Circuit did not squarely address whether this same holding would apply to individuals in federal detention, given their lack of a correlative § 1983 remedy.

II. A TEXTUAL ANALYSIS OF THE HABEAS STATUTES

Despite the widespread doctrinal disagreement on this issue, few courts have spent much time, if any, examining the text of the habeas statutes themselves. This silence may be because habeas corpus is a strange hybrid of English common law, constitutional law, and statutory law. The writ of habeas corpus traces its history back as early as 1220 C.E. in England;[84] the U.S. Constitution explicitly incorporates the concept of the writ via the Suspension Clause;[85] and Congress has enacted

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[76] *Preiser*, 411 U.S. at 489–90.

[77] Nettles v. Grounds, 830 F.3d 922, 929 (9th Cir. 2016); Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996).

[78] *See, e.g.*, *Nettles*, 830 F.3d at 930 (citing Skinner v. Switzer, 562 U.S. 521, 533–35 (2011)); *id.* at 929 (citing Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)); *id.* at 928 (citing Wolff v. McDonnell, 418 U.S. 539, 554 (1974)).

[79] *See, e.g.*, Spencer v. Haynes, 774 F.3d 467, 469–70 (8th Cir. 2014).

[80] *Nettles*, 830 F.3d at 932–33. Such relief is available only to state prisoners, but the court noted that federal prisoners can bring claims under *Bivens* or the FTCA. *Id.* at 931 n.6.

[81] *See* Alexander, *supra* note 30, at 11.

[82] *See, e.g.*, Walker v. O'Brien, 216 F.3d 626, 628–29 (7th Cir. 2000); Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997).

[83] *Nettles*, 830 F.3d at 932 (quoting Porter v. Nussle, 534 U.S. 516, 532 (2002); Preiser v. Rodriguez, 411 U.S. 475, 489–90 (1973)).

[84] *Developments in the Law — Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1042 (1970).

[85] U.S. CONST. art. I, § 9, cl. 2 ("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.").

a series of statutes, spanning from the Judiciary Act of 1789[86] to the Antiterrorism and Effective Death Penalty Act of 1996[87] (AEDPA), setting out details of how habeas functions in the United States.

At its core, though, the power of the federal courts to issue writs of habeas corpus is primarily a statutory issue rather than an originalist one. The courts' power to issue the writ is not an inherent authority but rather is determined by congressional enactments.[88] The constitutional element of the Suspension Clause does protect some minimum bound of the writ "as it existed in 1789,"[89] but it is widely acknowledged that the habeas statute "has expanded habeas corpus 'beyond the limits that obtained during the 17th and 18th centuries.'"[90] Given that this Note is dealing with the statutory *grant* of the ability of federal courts to hear habeas claims rather than an effort to strip the courts of such jurisdiction, the precise contours of the writ as it existed in 1789 need not be delineated.[91] This Part therefore turns to the current habeas statutes themselves, arguing that they can cover conditions-of-confinement claims. Part III will return to the possible originalist and statutory counterarguments to this interpretation.

The habeas statutes are outlined in Chapter 153 of Title 28 of the U.S. Code, encompassing §§ 2241–2255. These sections provide federal courts the power to grant the writ of habeas corpus, outline limitations on when the courts can grant the writ, and detail procedures for handling habeas cases.[92] The key provisions that could provide for conditions-of-confinement claims are § 2241, which provides broad power for federal courts to grant the writ to individuals in state and federal custody, and § 2254, which provides more limited power for federal courts to grant the writ to individuals in state custody. Individuals in federal custody can also attack unlawful sentences via § 2255, but that section likely does not provide a basis for conditions-of-confinement claims. Section 2241 provides that:

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[86] Ch. 20, 1 Stat. 73; *see id.* § 14, 1 Stat. at 81–82.

[87] Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); *see id.* tit. I, 110 Stat. at 1217–26.

[88] *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 94 (1807).

[89] INS v. St. Cyr, 533 U.S. 289, 301 (2001) (quoting Felker v. Turpin, 518 U.S. 651, 664 (1996)), *superseded by statute*, Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, *as recognized in* Nasrallah v. Barr, 140 S. Ct. 1683 (2020).

[90] Rasul v. Bush, 542 U.S. 466, 474 (2004) (quoting Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977)), *superseded by statute*, Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739.

[91] *Cf.* Boumediene v. Bush, 553 U.S. 723, 815 (2008) (Roberts, C.J., dissenting) (discussing the minimum protections due at the time of the Founding where the concern of suspension of the writ was at play); James E. Pfander, *Constructive Constitutional History and Habeas Corpus Today*, 107 CALIF. L. REV. 1005, 1008–12 (2019) (describing a "constructive constitutional history," *id.* at 1006–07, of habeas corpus).

[92] *See, e.g.*, 28 U.S.C. §§ 2241, 2243–2244, 2245–2253.

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.[93]

And:

> (c) The writ of habeas corpus shall not extend to a prisoner unless — (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or . . . (5) It is necessary to bring him into court to testify or for trial.[94]

Section 2254 meanwhile provides that:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.[95]

There are three key aspects of this statute that require analysis: (1) what "writ of habeas corpus" means, (2) in what circumstances the court can extend the writ of habeas corpus to state and federal prisoners, and (3) whether the remedies available would allow courts to redress conditions-of-confinement claims. This Part takes these issues in turn.

A. "Writ of Habeas Corpus"

The habeas statute notably does not define what a "writ of habeas corpus" actually is. It merely provides federal courts with the power to issue one.[96] So what is a writ of habeas corpus?

The origins of habeas corpus stretch back centuries.[97] Its use evolved widely through both common law and statutory law, expanding from initially concerning only private custody to including custody by the Crown.[98] The form of habeas corpus that is most well-known today — the form that involved illegal confinement — was *habeas corpus ad subjiciendum*.[99] Blackstone defines it as a writ "directed to the person detaining another, and commanding him to produce the body of the prisoner with the day and cause of his caption and detention, . . . to

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[93] *Id.* § 2241(a).
[94] *Id.* § 2241(c).
[95] *Id.* § 2254(a).
[96] *Id.* § 2241(a).
[97] *Developments in the Law — Federal Habeas Corpus*, *supra* note 84, at 1042.
[98] *Id.* at 1042–45.
[99] *Id.* at 1043 & n.8.

do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf."[100]

But *habeas corpus ad subjiciendum* was only one of multiple types of habeas corpus in England,[101] and some of these other forms are also incorporated into U.S. law.[102] Other types of habeas in England included the mandate to bring a prisoner before court (1) to testify or be prosecuted or tried in the proper jurisdiction (*ad testificandum*, *prosequendum*, and *deliberandum*), (2) to be charged with a new action when someone had a new cause of action against them (*ad respondendum*), (3) for the process of execution of a judgment if the prisoner had a judgment against him by a plaintiff (*ad satisfaciendum*), or (4) to remove the case from an inferior court to a superior one (*ad faciendum et recipiendum*).[103] Though they dealt with different purposes, the common element of these writs is that they involved directing the person who had custody of the prisoner to bring them into court. This understanding accords with the literal meaning of "habeas corpus": "You shall have the body."[104] The essential definition of "writ of habeas corpus" has therefore historically been an order to produce the body of the person.

Turning to the text of today's habeas statutes, the definition of "writ of habeas corpus" is not limited merely to *habeas corpus ad subjiciendum*. First, both 28 U.S.C. §§ 2241 and 2254 suggest that the definition of "writ of habeas corpus" encompasses something broader than what the statute allows the courts to grant. Section 2241(a) first gives federal courts the power to grant the writ. Section 2241(c) then limits the breadth of that power, providing that the writ "shall not extend to a prisoner" unless one of the listed conditions is met. Similarly, § 2254(a) grants the power to the federal courts to "entertain an application for a writ of habeas corpus" then limits that power to "only" if the individual is "in custody in violation of the Constitution or laws or treaties of the United States." The structure of each of these provisions suggests that Congress understood the possible scope of a "writ of habeas corpus" to be something courts could potentially issue in a wide range of circumstances and then limited the circumstances under which the writ can issue to prisoners.

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100 3 WILLIAM BLACKSTONE, COMMENTARIES *131.

101 *See id.* at *129–30; Charles Porterfield, *Habeas Corpus*, *in* 15 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 125, 131–32 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1900).

102 *See, e.g.*, 28 U.S.C. § 2241(c)(5) (authorizing federal courts to issue writs of habeas corpus to bring prisoners to testify in court).

103 3 BLACKSTONE, *supra* note 100, at *129–30.

104 *Habeas Corpus*, MERRIAM-WEBSTER, https://merriam-webster.com/dictionary/habeas%20corpus [https://perma.cc/F693-HKWX].

Second, and more tellingly, § 2241 incorporates elements that go beyond the writ of *habeas corpus ad subjiciendum*. Section 2241(c)(5) provides that a writ of habeas corpus may extend to a prisoner if "[i]t is necessary to bring him into court to testify or for trial." The use of the term "writ of habeas corpus" in this context clearly does not require an inquiry into the unlawfulness of confinement. Here, the term is presumably used in the sense of the old writs of habeas *ad testificandum*, *prosequendum*, and *deliberandum*. Thus, the words "writ of habeas corpus" here refer to the essential element of habeas corpus: the power to direct a person holding another in custody to bring that person into court.

There is a well-established textualist canon that presumes that the same words used throughout the same statute have the same meaning.[105] Here, the same instance of the words "writ of habeas corpus" in § 2241(c) is used to refer to both the situation of bringing a prisoner to court to testify and to the situation of a prisoner who is in custody in violation of the laws of the United States. Therefore, "writ of habeas corpus" would merely mean an order to produce the body, whether for testifying or for inquiring into unlawful custody or for some other purpose.

Based on this interpretation, the statutory definition cannot mean something so narrow as what the Fifth Circuit suggested in *Cook v. Hanberry*.[106] In *Cook*, the Fifth Circuit held that habeas corpus is not available to remedy unlawful conditions because the relief would merely be "equitably-imposed restraint, not freedom from otherwise lawful incarceration," and the court saw habeas's only purpose as providing freedom rather than a change in conditions.[107] Admittedly, *habeas corpus ad subjiciendum* was typically used for total freedom from confinement rather than a change in conditions.[108] But, as shown above, the statutory term "writ of habeas corpus" encompasses something broader than merely a situation in which the prisoner seeks release.

B. When the Writ May Extend to a Prisoner

As discussed above, the habeas statutes begin by providing the federal courts with authority to grant a writ of habeas corpus, then limit that power only to certain situations. The second question that requires statutory analysis is when a prisoner falls under those situations. For individuals in federal custody, this question is easily resolved — § 2241(c)(1) provides that the writ may extend to a prisoner who "is in custody under or by color of the authority of the United States

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[105] *See* Stephen M. Durden, *Textualist Canons: Cabining Rules or Predilective Tools*, 33 CAMPBELL L. REV. 115, 138–40 (2010).

[106] 592 F.2d 248, 249 (5th Cir. 1979) (per curiam), *modified*, 596 F.2d 658 (5th Cir. 1979) (per curiam).

[107] *Id.*

[108] 3 BLACKSTONE, *supra* note 100, at *131.

or is committed for trial before some court thereof." This language tracks with the Judiciary Act of 1789, which empowered federal courts to grant habeas relief to individuals in custody under federal, rather than state, law.[109] Under the statute, the federal courts may extend a writ of habeas corpus, that is, an order to produce the body, to anyone detained pursuant to federal law. The question of remedy then resumes in section II.C of this Note.

For state prisoners, the issue is more complicated. There is no catch-all provision for individuals in state custody similar to § 2241(c)(1). Instead, federal courts can generally only issue writs of habeas to individuals in state custody if they are "in custody in violation of the Constitution or laws or treaties of the United States."[110] Taking a plain-meaning approach, this language seems to encompass claims that the manner or conditions of a prisoner's custody violate federal law, even if the prisoner could be legally held in some form of custody. Someone who is in custody where the conditions constitute cruel and unusual punishment is "in custody in violation of the Constitution." As the Sixth Circuit wrote in *Coffin v. Reichard*, "[a] prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."[111] Thus, someone who has further rights taken from them while in custody is "in custody in violation of" the law.

That the language of §§ 2241 and 2254 carries this meaning is reinforced by the "whole act" canon of construction, which requires "looking to the other parts of the statute to ensure the will of the legislature is executed."[112] Section 2255, the final section of the habeas corpus chapter, provides a remedy for federal custody in narrower circumstances, providing that:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.[113]

This language deals specifically with sentencing and is narrower than the broad language of §§ 2241 and 2254, which merely requires the prisoner to be "in custody in violation of the Constitution or laws or treaties of the United States." Where Congress uses different language within the same statute, that difference is deemed to be significant.[114]

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

110 28 U.S.C. §§ 2241(c)(3), 2254(a).

111 Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) (per curiam).

112 Nancy Staudt et al., *Judging Statutes: Interpretive Regimes*, 38 LOY. L.A. L. REV. 1909, 1934 (2005) (footnote omitted).

113 28 U.S.C. § 2255(a).

114 Staudt et al., *supra* note 112, at 1933.

Here, given that they are part of the same chapter on habeas corpus and were amended at the same time in 1996, §§ 2241 and 2254 must, at least, mean something broader than § 2255's mere violation in sentencing.

The alternative possible meaning of the phrase "in custody in violation of the Constitution or laws or treaties of the United States" would be that the fact of someone's being in custody at all is in violation of federal law. In other words, the person's being in custody, versus out of custody, is in violation of the Constitution or laws or treaties of the United States. But this reading is largely foreclosed by more than a century of precedent. In 1894, when the habeas statute employed nearly identical language,[115] the Supreme Court in *In re Bonner*[116] held that the writ could issue where the prisoner had been validly convicted by a federal court but where the sentence imposed was unlawful because it was ordered to be carried out in a state prison instead of a federal one, in contravention of a federal law.[117] The Court emphasized that the power to impose imprisonment does not allow for infliction of that imprisonment in any manner desired.[118] Absent this rule, the Court noted, "[i]mprisonment might be accompanied with inconceivable misery and mental suffering, by its solitary character, or other attending circumstances," and "[d]eath might be inflicted by torture or by starvation, or by drawing and quartering."[119] Other courts have similarly allowed conditions-of-confinement claims to proceed insofar as they challenge the "place" of confinement — for example, solitary confinement or maximum-security detention within a hospital — even if other custody, perhaps within the same prison even, is valid.[120]

As a practical matter, there is arguably a line that can be drawn between cases involving the "place" of confinement and other conditions of confinement, and many courts have attempted to draw it. But such a distinction is not evident from the statute itself. Place-based habeas cases have to do with custody that in some way violates federal law, not with whether the individual can be validly held in some form of custody. As the D.C. Circuit acknowledged in *Aamer*, the substantive inquiry courts apply in place of confinement and conditions-of-confinement

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115 Pub. L. No. 39-28, § 1, 14 Stat. 385, 385 (1867) (providing federal courts "power to grant writs of habeas corpus in 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").

116 151 U.S. 242 (1894).

117 *Id.* at 254–55, 262.

118 *Id.* at 258.

119 *Id.*

120 *See, e.g.*, Krist v. Ricketts, 504 F.2d 887, 887 (5th Cir. 1974) (per curiam) ("Generally, habeas corpus has been available to persons who seek release from solitary confinement within the context of general incarceration."); Bryant v. Harris, 465 F.2d 365, 366–67 (7th Cir. 1972); Walters v. Henderson, 352 F. Supp. 556, 557 (N.D. Ga. 1972); Covington v. Harris, 419 F.2d 617, 623–24 (D.C. Cir. 1969); Miller v. Overholser, 206 F.2d 415, 419–20 (D.C. Cir. 1953).

challenges "will often be identical," asking at their core: "[D]o the conditions in which the petitioner is currently being held violate the law?"[121] Similarly, courts have consistently allowed Eighth Amendment challenges to the method of execution in capital punishment cases to proceed via habeas, even if the ultimate sentence to death is not being challenged.[122]

Thus, the better, more accurate meaning of "in custody in violation of the Constitution or laws or treaties of the United States" is the one that encompasses any unlawful custody, no matter the reason for its being unlawful. Even if such a reading were not adopted for state prisoners, federal prisoners would nevertheless continue to have access to the courts under § 2241(c)(1), discussed at the beginning of this section.

C. What Remedy Is Available?

Having already established that "writ of habeas corpus" statutorily means an order to produce the body and that a writ of habeas corpus can extend to both federal and state prisoners, the final question is whether the available remedies fit with the complaint. The unequivocal answer here is that they do.

Historically, the writ of *habeas corpus ad subjiciendum* was used primarily to order release from unlawful custody.[123] But statutory changes have broadened the type of remedy available. Section 2243 of the habeas chapter outlines the procedures for issuing the writ, holding a hearing, and reaching a decision.[124] It provides that "[t]he court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."[125] This statutory directive is exceptionally broad and does not limit the remedies available to mere release from custody. As Justice Scalia noted in *Wilkinson v. Dotson*,[126] the Court has "interpreted this broader remedial language to permit relief short of release."[127]

The most common approach courts have taken is a conditional release order, triggering release only if the unlawful aspects of custody are not corrected within a certain timeframe.[128] The "sole distinction between a conditional and an absolute grant of the writ of habeas corpus

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121 Aamer v. Obama, 742 F.3d 1023, 1035 (D.C. Cir. 2014).

122 *See, e.g.*, Hill v. McDonough, 547 U.S. 573, 579–80 (2006); Nance v. Comm'r, Ga. Dep't of Corr., 981 F.3d 1201, 1207 (11th Cir. 2020).

123 Fay v. Noia, 372 U.S. 391, 427 n.38 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977); *In re* Medley, 134 U.S. 160, 173 (1890).

124 28 U.S.C. § 2243.

125 *Id.*

126 544 U.S. 74 (2005).

127 *Id.* at 85 (Scalia, J., concurring).

128 *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 395–96 (1964); Harvest v. Castro, 531 F.3d 737, 741–42 (9th Cir. 2008); Gentry v. Deuth, 456 F.3d 687, 692 (6th Cir. 2006).

is that the former lies latent unless and until the state fails to perform the established condition, at which time the writ springs to life."[129] And conditional release orders may not be the only option available — as the Supreme Court wrote in *Boumediene v. Bush*,[130] "the habeas court must have the power to order the conditional release of an individual unlawfully detained — though release need not be the exclusive remedy and is not the appropriate one in every case in which the writ is granted."[131]

Conditions-of-confinement cases can be handled in the exact same manner as other habeas cases involving conditional release orders. The Court may order release if the unlawful conditions are not remedied within a certain time period. Thus, there is nothing in the remedies available under habeas that forecloses the ability to bring claims challenging unlawful conditions.

Under this interpretation of the habeas statutes, courts have significant leeway to address conditions-of-confinement claims for those in federal custody and likely for those in state custody as well. But that power is still discretionary, given that the statute grants courts the *power* to issue writs of habeas corpus rather than a mandate to do so in certain circumstances.[132] The next Part turns to addressing originalist and statutory arguments that courts should not exercise this power.

III. ADDRESSING COUNTERARGUMENTS

The two most prominent counterarguments for why conditions-of-confinement claims cannot be brought under habeas are: (1) that conditions-of-confinement claims are so far outside the common law understanding of the writ of habeas corpus that courts should not address them under habeas and (2) that the PLRA demonstrates Congress's intent that conditions-of-confinement claims cannot be brought under habeas.

A. Does the Common Law Understanding of Habeas Exclude Conditions-of-Confinement Claims?

The first of these arguments centers on habeas corpus as a common law creation. Under this view, "writ of habeas corpus" may indeed mean an order to produce the body, but only in a limited set of circumstances as they were defined under common law. In other words, courts have the power to issue writs of *habeas corpus ad testificandum* or *habeas corpus ad subjiciendum*, but they cannot or should not issue the writ in situations that would not have accorded with these prior definitions.

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[129] *Gentry*, 456 F.3d at 692.
[130] 553 U.S. 723 (2008).
[131] *Id.* at 779.
[132] 28 U.S.C. § 2241.

Justice Scalia provided a version of this reasoning in his concurrence in *Wilkinson*.[133] He acknowledged that the writ of habeas corpus has changed over time due to changes in the habeas statutes and judicial interpretations that allow for relief short of total release, such as the conditional release orders discussed above or orders to change the type of restraint from incarceration to parole.[134] But he emphasized that this expansion of habeas is different from "authoriz[ing] federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody."[135] Justice Scalia wrote that such an expansion "would utterly sever the writ from its common-law roots."[136]

Looking at those common law roots, *habeas corpus ad subjiciendum* likely would not have encompassed conditions-of-confinement claims. It is not clear whether there are any decisions from England or the early years after the Founding that used habeas to challenge conditions of confinement.[137] And, as discussed in Part II, Blackstone defined the writ as a method of inquiring into the "cause" of imprisonment — "if the cause of imprisonment were palpably illegal," the court may discharge the person in custody.[138]

However, the history of the writ also makes clear that it was a flexible remedy that evolved significantly over time. For example, English courts departed from a strict definition of custody involving physical restraint to grant the writ in cases where the party was only under a legal restraint, such as being indentured or being in the legal custody of a different parent.[139] Both the majority and the dissent in *Boumediene* acknowledged this flexibility, writing that "common-law habeas corpus was, above all, an adaptable remedy" and that "[i]ts precise application and scope changed depending upon the circumstances."[140]

Although this flexibility may not have extended to unlawful conditions at the time of the Founding or in England, that is not a reason to

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[133] 544 U.S. 74, 85–87 (2005) (Scalia, J., concurring).

[134] *Id.* at 86.

[135] *Id.*

[136] *Id.*

[137] English decisions or early American cases directly on point do not appear to exist. *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2063 (2007) ("We have been unable to find decisions from the early Republic on the availability of habeas to challenge conditions of confinement . . . .").

[138] 3 BLACKSTONE, *supra* note 100, at *131.

[139] *See* Jones v. Cunningham, 371 U.S. 236, 238–39, 243 (1963) (discussing English cases and writing that habeas "is not now and never has been a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose — the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty," *id.* at 243).

[140] Boumediene v. Bush, 553 U.S. 723, 779 (2008); *see id.* at 813 (Roberts, C.J., dissenting) ("[H]abeas is, as the majority acknowledges, a flexible remedy rather than a substantive right. . . . The shape of habeas review ultimately depends on the nature of the rights a petitioner may assert.").

foreclose that pathway now. The relevant substantive constitutional principles regarding conditions-of-confinement claims were not yet developed in the early Republic.[141] The Eighth Amendment barring cruel and unusual punishment was not ratified until 1791.[142] Even then (and for at least another century), punishments such as whipping, forced sterilization, and banishment were not seen as cruel or unusual.[143] Additionally, as Justice Scalia himself acknowledged in *Wilkinson*, the statutory grant of habeas authority to courts has changed over time, now allowing courts to "dispose of the matter as law and justice require" rather than merely ordering release.[144]

Based on this shift in both the habeas statutes and the substantive protections for incarcerated individuals, allowing habeas claims challenging unlawful conditions of confinement to proceed does not seem to conflict with core concepts of habeas. There may indeed be valid reasons for the federal courts to defer to prison administrators on certain conditions of confinement. But that decision is ultimately a discretionary one, not one that is mandated by the nature of habeas. And for conditions-of-confinement claims rising to the level of Eighth Amendment violations, there are strong reasons for courts to hear such claims. In particular, for federal prisoners with limited or perhaps no other form of relief, allowing such claims to proceed under habeas may be the only way to ensure a remedy for constitutional wrongs. As Professors Richard Fallon and Daniel Meltzer argue, completely stripping individuals of a path to remedy unconstitutional conditions may itself be unconstitutional "because it contravenes a broader postulate of the constitutional structure . . . : that some court must always be open to hear an individual's claim to possess a constitutional right to judicial redress of a constitutional violation."[145] Allowing individuals in federal custody to bring such claims under habeas would resolve this constitutional concern.

B. The Impact of the PLRA

Second, some courts, like the Ninth Circuit, have argued that the PLRA demonstrates Congress's intent that all conditions-of-confinement claims should be channeled through vehicles other than habeas, such as § 1983 for individuals in state custody.[146] Such a view

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[141] *See* Fallon & Meltzer, *supra* note 137, at 2063.

[142] Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103 [https://perma.cc/693G-AH74].

[143] Stanley Mosk, *The Eighth Amendment Rediscovered*, 1 LOY. U. L.A. L. REV. 4, 9 (1968).

[144] Wilkinson v. Dotson, 544 U.S. 74, 85 (2005) (Scalia, J., concurring) (quoting 28 U.S.C. § 2243).

[145] Fallon & Meltzer, *supra* note 137, at 2063.

[146] Nettles v. Grounds, 830 F.3d 922, 932–33 (9th Cir. 2016).

is inherently circular and fails to adequately anchor itself in the text of the PLRA.

The PLRA was enacted to reduce prisoner litigation and restrict the actions federal courts could take on such cases.[147] It includes provisions increasing filing fees, requiring exhaustion of administrative remedies before filing litigation regarding prison conditions, and limiting the types of prospective relief courts can provide.[148] The exhaustion requirements apply to actions "brought with respect to prison conditions under section 1983 . . . or any other Federal law,"[149] the filing fee requirements apply to any "civil action" brought by a prisoner,[150] and the prospective relief portions apply to "any civil action with respect to prison conditions."[151]

Some courts have held that the filing fee requirements in the PLRA do not apply to habeas petitions because habeas does not count as a "civil action."[152] This distinction has provided fodder for courts attempting to exclude conditions-of-confinement claims from habeas and restrict them to § 1983 — a civil action. For example, the Ninth Circuit has reasoned that allowing petitioners to bring such claims through habeas instead of § 1983 would allow them to evade the PLRA's requirements by simply changing the label on their lawsuit, an outcome that would "wholly frustrate explicit congressional intent."[153]

However, this reasoning is circular in a way that fails to show Congress intended the PLRA to foreclose the use of habeas for unlawful conditions of confinement. A key feature of the cases distinguishing habeas from other civil actions is their focus on the inability to bring conditions-of-confinement claims under habeas. For example, in *McIntosh v. U.S. Parole Commission*,[154] the Tenth Circuit wrote that habeas "attacks the fact or duration of a prisoner's confinement and seeks the remedy of immediate release or a shortened period of confinement," whereas a civil rights action "attacks the conditions of the prisoner's confinement and requests monetary compensation for such conditions."[155] Because the distinction courts have drawn between "civil

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147 *See* Alexander, *supra* note 30, at 11.

148 *See id.* at 11–14; 42 U.S.C. § 1997e(a); 28 U.S.C. § 1915(b), (f)(2); 18 U.S.C. § 3626.

149 42 U.S.C. § 1997e(a).

150 28 U.S.C. § 1915(b)(1).

151 18 U.S.C. § 3626(a)(1).

152 *See, e.g.*, Walker v. O'Brien, 216 F.3d 626, 628–29 (7th Cir. 2000) (collecting cases); Carson v. Johnson, 112 F.3d 818, 820 (5th Cir. 1997); McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811–12 (10th Cir. 1997); *see also* Katherine Bennett & Rolando V. del Carmen, Note, *A Review and Analysis of Prison Litigation Reform Act Court Decisions: Solution or Aggravation?*, 77 PRISON J. 405, 431–32 (1997) (discussing circuit split over § 2241 habeas actions).

153 Nettles v. Grounds, 830 F.3d 922, 932 (9th Cir. 2016) (quoting Preiser v. Rodriguez, 411 U.S. 475, 489 (1973)); *see also id.* at 931–33.

154 115 F.3d 809 (10th Cir. 1997).

155 *Id.* at 812 (quoting Rhodes v. Hannigan, 12 F.3d 989, 991 (10th Cir. 1993)).

actions" and habeas turns on conditions-of-confinement claims being excluded from habeas, it is circular for courts to use that distinction to support the assertion that such claims *must* be excluded from habeas. It is tantamount to asserting that "conditions-of-confinement claims are not cognizable in habeas because they are not cognizable in habeas."

An alternative to the Ninth Circuit's approach that would avoid both the concerns that court expressed and this circular reasoning would be to simply apply the PLRA's hurdles to any conditions-of-confinement claims, even if brought under habeas. The D.C. Circuit, for example, noted the possibility of this approach in *Blair-Bey v. Quick*,[156] writing that if conditions-of-confinement claims can be brought under habeas, they "would have to be subject to the PLRA's filing fee rules, as they are precisely the sort of actions that the PLRA sought to address."[157]

Turning to the text of the PLRA, there is strong support for the argument that Congress understood habeas to potentially cover conditions-of-confinement claims. The prospective relief sections of the PLRA apply to "any civil action with respect to prison conditions," defined as: "[A]ny civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison."[158] Applying the textualist canon that calls for avoiding rendering language superfluous,[159] a clear interpretation of this definition is that Congress thought habeas could encompass something broader than challenges to the fact or duration of confinement. The last nine words of this definition — "challenging the fact or duration of confinement in prison" — would be wholly unnecessary if Congress believed that habeas corpus proceedings could *only* apply to challenges to the fact or duration of confinement, as some courts, like the Ninth Circuit, have now ruled.[160]

Some might argue this text merely shows the fact that Congress was aware that some courts had interpreted habeas as applying to conditions-of-confinement claims and wanted to ensure habeas could not be used as a judicial runaround for the PLRA. Even if true, this view does not show that Congress intended to foreclose habeas as an option for conditions-of-confinement claims. At most, it shows that Congress intended the PLRA to apply to *all* conditions-of-confinement claims, whatever the vehicle. Indeed, Congress enacted changes to the habeas statutes in the same year as the PLRA, erecting greater hurdles to habeas relief via AEDPA.[161] Had that Congress wanted to foreclose

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156 151 F.3d 1036 (D.C. Cir.), *reh'g granted*, 159 F.3d 591 (D.C. Cir. 1998).
157 *Id.* at 1042.
158 18 U.S.C. § 3626(g)(2).
159 *See* Staudt et al., *supra* note 112, at 1933.
160 Nettles v. Grounds, 830 F.3d 922, 933 (9th Cir. 2016).
161 *See* Pub. L. No. 104-132, tit. I, 110 Stat. 1214, 1217–26.

conditions-of-confinement relief under habeas, it could have done so at the same time.

If the PLRA does indeed apply to all conditions-of-confinement claims, including those brought under habeas, this Note's argument may not have much immediate impact on claims of those in state custody, given that § 1983 may provide an easier path to relief. However, individuals in federal custody still stand to benefit if its argument is adopted, even if such claims are subject to the PLRA, because there is no § 1983 alternative available for individuals in federal custody.[162]

CONCLUSION

In sum, turning to the habeas statutes themselves, there is nothing in the text that excludes unlawful conditions-of-confinement claims. The statutory term "writ of habeas corpus" merely means an order to produce the body, and the federal courts are afforded wide latitude to deal with the matter "as law and justice require."[163] Given this latitude, the federal courts perhaps may decline to provide relief on conditions-of-confinement claims,[164] but that abstention would be discretionary and cannot be based on the assertion that such claims are not cognizable under habeas corpus.

There are far better solutions for remedying unlawful and unconstitutional conditions than by simply allowing challenges to them to proceed under habeas. First and foremost of these would be ceasing to subject individuals to inhumane and unlawful conditions.[165] Another would be providing a better avenue for incarcerated individuals to challenge such conditions. But while people continue to be incarcerated in such conditions, the courts should not take it upon themselves to cut off one of the only forms of relief available.

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[162] 42 U.S.C. § 1983.

[163] 28 U.S.C. § 2243.

[164] *Cf.* Fallon & Meltzer, *supra* note 137, at 2063 (arguing that "total preclusion of judicial review of challenges to conditions of confinement is unconstitutional").

[165] *See, e.g.*, Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1124–38 (2015) (arguing for an abolition framework that would gradually decrease the carceral state and improve human welfare); Dorothy E. Roberts, *The Supreme Court, 2018 Term — Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 43–48 (2019) (noting that "the success of nonpunitive approaches developed by abolitionists for addressing human needs and social problems can be a compelling reason to abandon current dehumanizing and ineffective practices," *id.* at 43–44).