An Analysis of the Antiterrorism and Effective Death Penalty Act in Relation to State Administrative Orders: The State Court Judgment as the Genesis of Custody

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I. INTRODUCTION

Over the past two years, federal courts of appeals have begun grappling with the questions whether and how the provisions of the Antiterrorism and EffectiveDeath Penalty Act\(^1\) apply to state prisoners who challenge state administrative decisions that extend their time in prison. When Congress wrote the AEDPA, it appears to have been thinking not of these prisoners, but of prisoners who challenge their convictions or sentences. This preoccupation is evident, for example, in the AEDPA’s one-year statute of limitation on habeas actions by state prisoners, which generally begins running when the state “judgment” becomes final.\(^2\) This wording makes application of the statute of limitations awkward in those cases where the state prisoner challenges not the “judgment” but the revocation of his parole, say, or the revocation of his “good-time” credits. And this awkwardness, in turn, raises the question: whether the statute of limitations, and other AEDPA provisions whose scope is defined by the same statutory formula, were intended to apply at all in this setting.

The federal circuits have had varying degrees of success in addressing these issues. Several circuits have concluded that one or another AEDPA provision applies to state prisoners who challenge administrative decisions extending their confinement. The Second,\(^3\) Eighth\(^4\) and Ninth\(^5\) Circuits, for example, have concluded that the AEDPA’s general prohibition on “second or successive” petitions applies to these prisoners. The Fifth Circuit has

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3. See James v. Walsh, 308 F.3d 162, 167 (2d Cir. 2002).
5. See Hill v. Alaska, 297 F.3d 895, 898 (9th Cir. 2002).
concluded that the AEDPA's one-year statute of limitations applies to these prisoners.6 And the Third7 and Sixth8 Circuits have concluded that the AEDPA's requirement of a certificate of appealability applies to these prisoners. Other circuits, though, have misstepped. For example, though the AEDPA's prohibition on "second or successive" petitions and its one-year statute of limitations appear to be co-extensive, the Seventh Circuit has held that the first but not the second applies to state prisoners who challenge administrative decisions that extend their confinement.9 The Tenth Circuit has gone even further astray, holding essentially that these prisoners are permitted to resort to a wholly separate statutory vehicle for obtaining habeas relief.10

These inconsistencies within and among the circuits are attributable to the failure of these courts – even those that have reached the correct results – to conduct a thorough analysis of the statutes' history, the relationships among the various statutes, and relevant Supreme Court precedent. In what follows, it will be argued that all of these sources point clearly in the same direction. They point to the conclusion that the four principal limitations imposed on state prisoners by the AEDPA – the statute of limitations, the prohibition on second or successive petitions, the requirement of deference to state courts, and the requirement of a certificate of appealability – apply to state prisoners who challenge administrative decisions that extend their time in state custody. This article also will argue that the awkwardness that attends the application of these sections can be, and has been, easily overcome.

II. PRISONERS AFFECTED BY THESE ISSUES

The class of cases under consideration includes, among others: cases where a state prisoner challenges the denial of parole release;11 cases where

6. See Kimbrel v. Cockrell, 311 F.3d 361, 363 (5th Cir. 2002).
9. Compare Cox v. McBride, 279 F.3d 492, 493-94 (7th Cir. 2002) (statute of limitations in section 2244(d)(1) does not apply to state prisoner who challenges prison disciplinary decision that results in the revocation of good-time credits), with Harris v. Cotton, 296 F.3d 578, 579 (7th Cir. 2002) (prohibition on second or successive habeas petitions applies to prisoner who challenges prison disciplinary decision that results in the revocation of good-time credits).
the prisoner challenges the revocation of his parole release;\textsuperscript{12} cases where the prisoner challenges a prison disciplinary determination that results in the loss of good-time credits;\textsuperscript{13} and cases where the prisoner challenges the warden’s calculation of his release date.\textsuperscript{14} These cases are habeas corpus cases by virtue of the fact that the administrative decision being challenged will have the effect of extending the prisoner’s time in confinement. The boundary that separates these habeas corpus cases from other, non-habeas challenges to administrative decisions was mapped out by the Supreme Court in three decisions: Preiser v. Rodriguez,\textsuperscript{15} Heck v. Humphrey,\textsuperscript{16} and Edwards v. Balisok.\textsuperscript{17}

In Preiser v. Rodriguez, the Supreme Court held that habeas corpus was the exclusive federal remedy for three state prisoners who sought restoration of good-time credits that had been revoked as a result of prison disciplinary proceedings.\textsuperscript{18} Each of the three prisoners had initially sought relief under the Civil Rights Act, 42 U.S.C. § 1983.\textsuperscript{19} And in each of the three cases, the district court ultimately had ordered the release of the prisoner.\textsuperscript{20} The state appealed these decisions, arguing that habeas corpus was the prisoners’ exclusive remedy and that the prisoners, accordingly, should have been required to exhaust their state remedies before seeking relief in federal court.\textsuperscript{21} The Second Circuit, sitting en banc, rejected the state’s argument and concluded the prisoners’ complaints “were cognizable either in federal habeas corpus or under the Civil Rights Act, and that as civil rights actions they were not subject to any requirement of exhaustion of state remedies.”\textsuperscript{22} The Supreme Court reversed. The Court said that a prisoner’s challenge to an administrative decision that extends his time in prison “is just as close to the core of habeas corpus as an attack on the prisoner’s conviction, for it goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from that confinement or the shortening of

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  \item \textsuperscript{12} See, e.g., Morrissey v. Brewer, 408 U.S. 471 (1972); Hunterson v. Disabato, 308 F.3d 236, 238 (3d Cir. 2002); Hunter v. Boone, 13 Fed. Appx. 828 (10th Cir. 2001).
  \item \textsuperscript{13} See, e.g., Cox v. McBride, 279 F.3d 492, 493 (7th Cir. 2002); Pannell v. McBride, 306 F.3d 499, 501 (7th Cir. 2002); Harris v. Cotton, 296 F.3d 578, 579 (7th Cir. 2002); In re Cain, 137 F.3d 234, 235 (5th Cir. 1998).
  \item \textsuperscript{14} See, e.g., Hill v. Alaska, 297 F.3d 895, 897 (9th Cir. 2002); James v. Walsh, 308 F.3d 162,165 (2d Cir. 2002); Walker v. Tennessee Dep’t of Corr., 265 F.3d 369, 370 (6th Cir. 2001).
  \item \textsuperscript{15} 411 U.S. 475 (1973).
  \item \textsuperscript{16} 512 U.S. 477 (1994).
  \item \textsuperscript{17} 520 U.S. 641 (1997).
  \item \textsuperscript{18} Preiser, 411 U.S. at 500.
  \item \textsuperscript{19} See id. at 476-77.
  \item \textsuperscript{20} See id. at 478-81.
  \item \textsuperscript{21} See id.
  \item \textsuperscript{22} Id. at 482.
\end{itemize}
its duration." The Court also emphasized that permitting these prisoners to proceed under the Civil Rights Act would frustrate the intent of 28 U.S.C. § 2254, which requires state prisoners to exhaust their state remedies before seeking federal habeas relief. "The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons."

In Preiser, the Court did not face the question whether relief under the Civil Rights Act would be available to a prisoner who, instead of seeking "immediate or speedier release from imprisonment" as the petitioners in Preiser had done, sought monetary damages for the wrongful revocation of good-time credits. But the Court suggested, in its dicta, that a prisoner who sought damages for the revocation of good-time credits would be permitted to seek relief under 42 U.S.C. § 1983. The Court said: "In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of exhaustion of state remedies."

Twenty years later, though, the Court in Heck v. Humphrey would characterize these dicta as "an unreliable, if not unintelligible, guide." And it would reach the opposite conclusion.

Heck was an Indiana prisoner who had been convicted of voluntary manslaughter for killing his wife. While his direct appeal was still pending, Heck filed a federal civil action under 42 U.S.C. § 1983, naming as defendants the prosecutors and investigators who had secured his conviction. Heck's complaint sought monetary damages, but did not seek release from custody or any other injunctive relief. The district court and the Seventh Circuit both concluded that Heck's action, because it implicated the legality of his conviction, was properly "classified as an application for habeas corpus" and that Heck's failure to exhaust his state remedies therefore was fatal to his claims.

The Supreme Court reached the same result, though by different reasoning. The Court analogized Heck's damages action to the common-law

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24. See id. at 492.
25. Id.
26. Id. at 494.
27. Heck, 512 U.S. at 482.
28. See id. at 478.
29. See id. at 479.
30. See id.
cause of action for malicious prosecution, whose elements include a showing that the criminal proceeding was terminated in favor of the accused.\textsuperscript{32} Relying on this analogy, the Court concluded that Heck could pursue an action for damages only after having his conviction set aside:

\begin{quote}
We hold that in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court’s issuance of a writ of habeas corpus, 28 U.S.C. § 2254.\textsuperscript{33}
\end{quote}

\textit{Heck} itself did not address the question whether the same rule would apply to a prisoner who challenged the validity of an administrative decision that extended his time in custody. But the Court would resolve this question just three years later in \textit{Edwards v. Balisok}.\textsuperscript{34} In \textit{Balisok} the question was whether the rule of \textit{Heck v. Humphrey} should apply to prisoners who filed actions for damages challenging the administrative procedures used to deprive them of good-time credits.\textsuperscript{35} Balisok had filed an action under the Civil Rights Act, challenging a prison disciplinary decision that resulted both in the loss of good-time credits and other sanctions.\textsuperscript{36} Balisok sought only damages, not the restoration of the good-time credits, so his case fell outside the scope of \textit{Preiser}.\textsuperscript{37} But the Court held, in keeping with \textit{Heck v. Humphrey}, that because Balisok’s claim, if credited, would necessarily imply the invalidity of the prison disciplinary decision, he was required to pursue the claim in a habeas corpus action: “We conclude, therefore, that respondent’s claim for declaratory relief and money damages, based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed, is not cognizable under § 1983.”\textsuperscript{38}

\begin{footnotes}
32. \textit{See} \textit{Heck}, 512 U.S. at 484-86.
33. \textit{Id.} at 486-87.
34. 520 U.S. 641 (1997).
35. \textit{See id.} at 643.
36. \textit{See id.}
37. \textit{See id.} at 643-44.
\end{footnotes}
Preiser, Heck, and Balisok together stand for the proposition that federal habeas review is the only federal avenue available to a state prisoner who wishes to challenge an administrative decision that has the effect of extending his time in confinement.39 The question is whether prisoners whose cases fall within the class defined by Preiser, Heck, and Balisok are subject to the various limitations imposed by the AEDPA.40

III. WHY THE APPLICABILITY OF THE AEDPA PROVISIONS DEPENDS PRIMARILY ON THE MEANING OF THE PHRASE "IN CUSTODY PURSUANT TO THE JUDGMENT OF A STATE COURT"

Four provisions of the AEDPA have proven particularly important in habeas cases initiated by state prisoners. The first is 28 U.S.C. § 2254(d), which requires the federal courts to accord broad deference to decisions of the state courts on the merits of the prisoner's claims. The second is 28 U.S.C. § 2244(d)(1), which imposes a one-year statute of limitations on most habeas claims. The third is 28 U.S.C. § 2244(b)(2), which prohibits "second or successive" habeas petitions except in a narrow range of circumstances. The fourth and last of these provisions is 28 U.S.C. § 2253(c)(1)(A), which requires the prisoner to obtain a "certificate of ap-

39. Indeed, for some prisoners federal habeas review provides the only means – state or federal – for obtaining judicial review of such administrative decisions. In Indiana, for example, the state courts have held that state law provides no avenue for obtaining state-court judicial review of the administrative determination. See Hasty v. Broglin, 531 N.E.2d 200 (Ind. 1988). But cf. Superintendent, Massachusetts Correctional Institution at Walpole v. Hill, 472 U.S. 445, 450 (1984). (“The extent to which legislatures may commit to an administrative body the unreviewable authority to make determinations implicating fundamental rights is a difficult question of constitutional law.”).

40. No estimate of the number of such cases filed annually by state prisoners is readily available. In the statistics maintained by the federal courts, these cases are lumped together with cases where state prisoners challenge their convictions and sentences. See Administrative Office of the U.S. Court, Federal Judicial Caseload Statistics (Mar. 31, 2002) (table for “U.S. Courts of Appeals—Nature of Suit or Offense in Cases Arising From the U.S. District Courts, by Circuit, During the Twelve-Month Period Ending March 31, 2002”, available at http://www.uscourts.gov/caseload2002/contents.html). The statistics for federal prisoners, however, break out (1) the number of appeals involving federal prisoners who challenged their convictions or sentences under 28 U.S.C. § 2255 and (2) the number of appeals involving federal prisoners who sought relief under 28 U.S.C. § 2241, i.e., who challenged something other than their convictions or sentences (see text accompanying footnote 70, below). The ratio of federal prisoners in the first category to federal prisoners in the second category is about five to two. If the same ratio holds true for state prisoners, then the number of state prisoners who seek federal habeas relief from state administrative decisions that extend their confinement (and whose cases end up in the federal appellate courts) is roughly 2,000. See also Walker v. O'Brien, 216 F.3d 626, 640 (7th Cir. 2000) (Easterbrook, J., dissenting from denial of rehearing en banc) (estimating that number of cases filed each year in the Seventh Circuit by state and federal prisoners challenging administrative decisions extending their time in confinement is “easily more than a hundred”).
pealability" as a prerequisite to pursuing an appeal from the district court’s denial of habeas relief.

The first two of these provisions—the deferential framework and the one-year statute of limitations—use nearly the same words to define their scope. Under section 2254(d), the AEDPA’s deferential framework applies to any “application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court.”41 Under section 2244(d)(1), the AEDPA’s one-year statute of limitations applies to any “application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.”42 The fact that Congress used the word “by” in section 2244(d)(1) and “on behalf of” in section 2254(d) appears to be of no significance, at least for our purposes. What matters, rather, is the fact that the language otherwise is identical; both sections use the pivotal phrase “in custody pursuant to the judgment of a State court.”43

The phrase “in custody pursuant to the judgment of a State court” does not appear in section 2244(b)(2)’s prohibition on successive petitions, but it might as well. Section 2244(b)(2) defines its scope by referring back to section 2254. It provides that, except in a few limited circumstances,44 “[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed.”45 The scope of section 2254 as a whole is defined in the same words as the scope of the deferential framework in subsection 2254(d): Section 2254 applies to any “application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court.”46 Thus,

41. 28 U.S.C. § 2254(d) (emphasis added).
42. 28 U.S.C. § 2244(d)(1) (emphasis added).
43. 28 U.S.C. §§ 2244(d)(1), 2254(d).
44. The circumstances are:
   (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
   (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
   (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

45. 28 U.S.C. § 2244(b)(2); see also Jacobs v. McCaughtry, 251 F.3d 596, 598 (7th Cir. 2001) (prohibition on “second or successive” petitions applies only to petitions filed under section 2254, not petitions filed under section 2241).
46. Why section 2254(a) uses the phrase “in behalf of” and section 2254(d) uses the phrase “on behalf of” is anybody’s guess. As originally enacted in 1948, section 2254 applied to any “application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court.” Pub. L. No. 80-773, ch. 646. This somewhat quaint phrase was retained in subsection (a), but was jettisoned in favor of the modern phrase “on behalf of” in both subsections (b) and (d).
because the prohibition on second or successive petitions in section 2244(b)(2) applies to any application filed "under section 2254," it is coextensive with the deferential framework in section 2254(d) and with the statute of limitations in section 2244(d)(1). All three provisions apply to any petition by a person who is "in custody pursuant to the judgment of a State court."

It is highly significant that this phrase — "in custody pursuant to the judgment of a State court" — defines the scope not only of these three AEDPA provisions but also of section 2254 as a whole. It is significant in part because (as will become evident in the following sections of this article) the origins of this phrase in section 2254, which first was enacted in 1948, help determine Congress's intent in 1996. It also is significant because it means that the answer to the current inquiry — whether state prisoners who challenge administrative decisions that affect their custody fall within the scope of the AEDPA's limitations — will determine as well whether such prisoners are subject to section 2254 as a whole.

Section 2254, which is entitled "State custody; remedies in federal court," is ordinarily considered the state prisoner's principal vehicle for obtaining federal habeas relief. True, the federal courts' general authority over habeas corpus actions is derived from section 2241 of Title 28, which is entitled simply "[P]ower to grant writ;" section 2241(c)(3) makes habeas relief available to any prisoner, state or federal, who is "in custody in violation of the Constitution or laws or treaties of the United States." For most state prisoners, though, section 2254 is the "statute that implements the general grant of habeas corpus authority found in section 2241." This does not mean, however, that a state prisoner who falls outside the scope of section 2254 will be denied access to habeas relief entirely. Rather, such a prisoner, assuming he is "in custody" and is challenging the lawfulness of his custody, will be permitted to proceed under the more general provisions of section 2241 itself.

47. See Commissioner of Internal Revenue v. Lundy, 516 U.S. 235, 250 (1996) ("identical words used in different parts of the same act are intended to have the same meaning," particularly where the provisions are interrelated and proximate to one another").
48. See Ratzlaf v. United States, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."); Cohen v. De La Cruz, 523 U.S. 213, 220 (1998) (relying on "the presumption that equivalent words have equivalent meaning when repeated in the same statutes"); see also Fusco v. Perini North River Associates, 601 F.2d 659, 664 (2d Cir. 1979) ("when a legislature borrows an already interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase"), vacated, 444 U.S. 1028, on remand, 622 F.2d 1113, cert. denied, 449 U.S. 1131 (1981).
50. See, e.g., Dickerson v. State of Louisiana, 816 F.2d 220, 224 (5th Cir. 1987) ("[p]retrial petitions are properly brought under § 2241, which applies to persons in custody
State prisoners would have much to gain by proceeding under section 2241 alone. If state prisoners who challenge administrative decisions extending their imprisonment are permitted to “proceed under section 2241,”\(^5\) rather than under section 2254, then they will not be subject to the AEDPA’s deferential framework. Nor will they be subject to AEDPA’s prohibition on successive petitions, which, again, applies only to applications “under section 2254.”\(^5\) Nor, finally, will they be subject to the statute of limitations, whose scope is defined by the same formula that defines the scope of 2254.\(^5\) Accordingly, the question whether these prisoners are subject to the various limitations imposed by the AEDPA often has been framed, both by the courts\(^5\) and by the prisoners themselves, as whether these prisoners must be permitted to “proceed under section 2241.”\(^5\)

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\(^5\) As will become evident below, the phrase “proceed under section 2241” is somewhat misleading, since even state prisoners whose petitions fall within the scope of 28 U.S.C. § 2254 are necessarily proceeding under 28 U.S.C. § 2241 as well.

\(^5\) A determination that prisoners were permitted to proceed under section 2241 also would, by the same reasoning, make them exempt from the exhaustion requirement, which also is limited to prisoners who are “in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2254(b). As explained below, however, this is one of the strongest reasons for concluding that these prisoners are governed by section 2254 generally and by the various AEDPA provisions.

\(^5\)See, e.g., James v. Walsh, 308 F.3d 162, 167 (2d Cir. 2002) (framing question as “whether James’s claim that DOCS incorrectly credited his time served was properly brought under Section 2254, and, therefore, is subject to the gatekeeping requirements of AEDPA, or whether it was functionally a Section 2241 petition, which would not trigger the AEDPA”); Coady, 251 F.3d at 483 (framing question, in part, as whether the petition “is properly brought under 28 U.S.C. § 2241”).

\(^5\)Ironically, the one circuit that has accepted the prisoners’ argument has not followed the argument to its logical conclusion. The Tenth Circuit has held that petitions concerning the “execution of sentence” must be brought pursuant to 28 U.S.C. § 2241, rather than pursuant to § 2254, Montez, 208 F.3d at 865. But it appears to have concluded nevertheless that such petitions are subject to the deferential framework in section 2254(d). See Henderson v. Scott, 260 F.3d 1213, 1215 (10th Cir. 2001) (“Although we analyze Mr. Henderson’s claims under § 2241, we still accord deference to the [state court’s] determination of the federal constitutional issue.”); Powell v. Ray, 301 F.3d 1200 (10th Cir. 2002) (though petition challenging “implementation of the Oklahoma Truth in Sentencing Act” fell under section 2241, rather than 2254, decision of the Oklahoma Court of Criminal Appeals still was entitled to deference). It also appears to have concluded that such petitions are subject to the statute of limitations in section 2244(d)(1). See Brooks v. Utah Board of Pardons, 37 Fed. Appx. 386, 387 (10th Cir. 2002) (“claims brought pursuant to 28 U.S.C. § 2241,” i.e., claims falling outside the scope of section 2254, “are subject to the same one-year statute of limitations as are claims brought pursuant to § 2254”); see also Morrello v. Utah, 10 Fed. Appx. 788 (10th Cir. 2001) (affirming dismissal of petition under statute of limitations and explaining: “the dates the one-year limitations period began to run were December 10, 1996 for the challenge to his conviction and April 24, 1996, for the challenge to the parole decision”); Hunter v. Boone, 13 Fed. Appx. 828 (10th Cir. 2001) (affirming dismissal of petition as time-barred under statute of limitations where petition challenged the revocation of petitioner’s parole).
The courts’ formulation of the question is basically correct. Granted, sections 2241 and 2254 are not separate vehicles for habeas relief; and it therefore is somewhat misleading to talk, as the courts often do, about petitioners “proceeding” under one section or the other. But the courts are correct in assuming that at least three of the AEDPA’s provisions — the deferential framework, the statute of limitations, and the ban on successive petitions — are co-extensive with section 2254. And the courts also are correct in assuming that the question whether prisoners of a particular kind are subject to these three AEDPA provisions is the same as the question whether prisoners of that particular kind are subject to section 2254; the answers to both questions depend on whether these prisoners are “in custody pursuant to the judgment of a State court.”

IV. Two Competing Interpretations

Federal courts have adopted two different views about the meaning of the phrase “in custody pursuant to the judgment of a State court,” neither of which is wholly implausible. The first, and predominant, view is that Congress, in adopting this formula, was concerned primarily with the source of the prisoner’s custody, rather than with the target of the prisoner’s complaint. What matters, on this view, is whether the prisoner’s “custody” is attributable, at least in part, to “a judgment of a State court.” This was the view espoused by the Seventh Circuit in Walker v. O’Brien, where the court held that section 2254 applied to a state prisoner who had challenged a disciplinary decision revoking good-time credits. In reaching this conclusion, the court relied primarily on the statutory language, whose focus, it said, “is on the fact of custody, not necessarily on flaws in the underlying

The Tenth Circuit is not alone in overlooking the relationship between section 2254 and the AEDPA provisions. In an odd inversion of the Tenth Circuit’s mistake, the Seventh Circuit has held both (1) that prisoners who challenge administrative decisions extending their custody are subject to section 2254 (Walker v. O’Brien, 216 F.3d at 633); and (2) that the same prisoners are not subject to AEDPA’s statute of limitations (Cox, 279 F.3d at 493-94), whose scope is defined in the same words. Cf. McLean v. Smith, 2002 U.S. Dist. LEXIS 5522 (M.D.N.C. 2002) (statute of limitations applies to prisoner who challenges calculation of sentence regardless of whether his challenge falls within section 2241 or section 2254); Owens v. Boyd, 235 F.3d 356, 360 (7th Cir. 2001) (“Section 2244(d)(1) applies to every ‘application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.’ It does not distinguish between applications under § 2241 and those under § 2254.”).

56. See infra text accompanying notes 70-87.
57. See, e.g., James, 308 F.3d at 167; Coady, 251 F.3d at 483; Cook v. New York State Div. of Parole, 321 F.3d 274 (2d Cir. 2003).
58. The scope of section 2253, which imposes the requirement of a certificate of appealability, is defined in somewhat different language. The question whether this section is co-extensive with section 2254 and with other AEDPA provisions is addressed separately in section I of this article, below.
59. See Walker, 216 F.3d at 633.
judgment or sentence that brought the person there." In his dissent from the court's denial of en banc rehearing, Judge Easterbrook espoused the same view: that "challenges to [the revocation of] good-time credits proceed under § 2254 because the words 'in custody pursuant to the judgment of a State court' refer to the genesis of custody rather than the claim made in the collateral attack."

The alternative view is that, despite the formula's obvious focus on the source of custody, Congress really was concerned with the target of the prisoner's complaint, rather than with the source of his custody. What matters, on this view, is whether the prisoner is challenging "the judgment of a State court." This alternative view was espoused by the Seventh Circuit in Cox v. McBride, where the Seventh Circuit held that AEDPA's statute of limitations did not apply to William Cox, a state prisoner who was challenging the decision of a prison disciplinary board to revoke good-time credits. Writing for the panel, Judge Posner stated:

[Section 2244(d)(1)] is limited to petitions filed by persons 'in custody pursuant to the judgment of a State court,' and a prison disciplinary board is not a court. It is true that Cox is in prison pursuant to the judgment of a state court; otherwise he would not be eligible for federal habeas corpus. ... But the custody he is challenging, as distinct from the custody that confers federal jurisdiction, is the additional two years of prison that he must serve as the result of the 'judgment' not of a state court but of the prison disciplinary board.

In most habeas cases filed by state prisoners, the Walker interpretation and the Cox interpretation will produce the same result. That is, in most cases the decision that is the source of the state prisoner's custody also will be the target of his habeas petition. After all, a state prisoner who seeks federal habeas relief is, by definition, arguing that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." And a prisoner ordinarily will be unable to demonstrate that "he is in custody in..."
violation of the Constitution or laws or treaties of the United States" without challenging the very decision that is the source of his custody.

The only exception is the class of cases under consideration, where the prisoner's "custody" is a joint product of a state court judgment and an administrative decision implementing the judgment. In this setting, the state court judgment can be a source of the prisoner's custody without also being the target of his habeas petition, for a petition targeted solely at the administrative decision could suffice to show that the prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." Thus, in this setting, the first and second interpretations of the phrase "in custody pursuant to the judgment of a State court" would lead to different results.

The Walker interpretation - which assigns import just to the source of the prisoner's custody, and not to the target of his petition - leads inevitably to the conclusion that a prisoner who challenges, say, the revocation of his parole is "in custody pursuant to the judgment of a State court." "Inevitably" because one cannot plausibly argue that, in this setting, the state court's judgment is any less a source of the prisoner's custody than the administrative decision. The prisoner is subject to detention on the basis of an administrative determination only because his sentence has not expired. The D.C. Circuit made this point in Madley v. United States Parole Commission, where it held that a District of Columbia prisoner who was challenging a denial of parole was required to obtain a certificate of appealability before appealing the district court's denial of his habeas petition: "the parole board would have no occasion to consider parole at all, and the prisoner to complain thereof, had the prisoner not been convicted in the first instance and had the prisoner fully served his sentence in the second."[66][67]

Further, treating the administrative decision as the exclusive source of these prisoners' custody would lead quickly to absurdity. Consider, for example, a prisoner who is in custody on the revocation of his parole. If the judgment is not a source of this prisoner's custody, and the source of the custody is what defines the scope of section 2254, then a challenge by the prisoner to the revocation of his parole would not be subject to section 2254. This conclusion seems palatable enough. The problem is that the same reasoning would apply to any habeas petition by the same prisoner, even a habeas petition challenging the prisoner's underlying conviction or sentence. Thus, section 2254 would apply to a prisoner's attack on his conviction if he had never been released on parole, or if he had been released on parole and was still on release, but not if he had been released and his

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66. 278 F.3d 1306 (D.C. Cir. 2002).
67. Id. at 1310.
parole had then been revoked. Needless to say, Congress cannot have intended this result. Thus, adoption of the *Walker* view – which assigns significance only to the source of custody – leads inevitably to the conclusion that a state prisoner who challenges, say, the revocation of his parole, is “in custody pursuant to the judgment of a State court,” even if his custody also is a product, in part, of the revocation order.\(^{68}\)

The *Cox* interpretation – which assigns significance to the target of the prisoner’s attack, rather than to the source of his custody – leads just as inevitably to the conclusion that a prisoner who challenges an administrative decision extending his time in custody is *not* “in custody pursuant to the judgment of a State court.” A prison disciplinary board is not a court,\(^{69}\) nor is a parole board. And, in those states where the prisoner can obtain state judicial review of an administrative decision that extends his confinement, the resultant state-court decision would not supply the requisite “judgment of a State court.” In this situation, the prisoner would be confined on the administrative order even if he had not appealed the administrative order at all; thus, it would be difficult to argue that his confinement is “pursuant to” the court decision affirming the administrative decision.

Thus the issue is joined. There are two alternative interpretations of the statutory formula, each of which leads to a different answer to the main question posed by this article: whether prisoners who challenge administrative decisions that extend their confinement are subject to the limitations imposed by the AEDPA.

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\(^{68}\)Indeed, it could be argued that the state court judgment is the only source of “custody” where a state prisoner challenges the denial or revocation of his parole. It is settled that a person who is on parole is nevertheless “in custody” for purposes of 28 U.S.C. § 2241. See *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). On the basis of this settled principle, it could be argued that the revocation or denial of parole has no effect on whether the prisoner is “in custody”; he is “in custody” as a result of the state-court sentence, regardless of whether he spends that sentence in prison or on parole. The decision denying or revoking parole cannot, then, be considered a source of the prisoner’s “custody.” This argument ultimately is unhelpful, however. Habeas relief is available only to a state prisoner who claims that he “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(c)(3); 28 U.S.C. § 2254(a). But habeas relief obviously is available to a prisoner who asserts that he should be on parole release, rather than in prison. See *Morissette v. Brewer*, 408 U.S. 471 (1972) (considering habeas petition that challenged revocation of parole). Thus, in this setting, “custody” essentially means custody or confinement; *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991) (“[i]f the prisoner is seeking what can fairly be described as a quantum change in the level of custody – whether outright freedom, or freedom subject to the limited reporting and financial constraints of bond or parole or probation . . . then habeas corpus is his remedy”). The administrative decision plainly is a source of the prisoner’s confinement (though, again, so is the judgment).

\(^{69}\)See *Cox*, 279 F.3d at 493.
V. WHY THE ANALOGY BETWEEN STATE AND FEDERAL PRISONERS IS MISGUIDED

Much of the persuasive force behind the Cox view is derived from an analogy between state prisoners and federal prisoners. A federal prisoner who mounts a collateral attack on his conviction or sentence ordinarily is required to proceed under 28 U.S.C. § 2255, while a federal prisoner who challenges an administrative decision as to "the execution of his sentence" is, by contrast, required to proceed under the more general provisions of 28 U.S.C. § 2241. From the fact that section 2255 is limited in scope to federal prisoners who challenge their convictions or sentences, one federal appellate court has inferred that its ostensible "counterpart" for state prisoners, section 2254 must likewise be limited in scope to those state prisoners who challenge their convictions or sentences. And if state prisoners who challenge prison administrative decisions fall outside the scope of section 2254 entirely, then they also must fall outside section 2254(d) and section 2244(d), whose scope is defined by the very same formula.

This analogy between state and federal prisoners has proved tempting, in part because of superficial similarities between sections 2254 and 2255. The immediate juxtaposition of the two sections in Title 28 and their roughly parallel titles - "State custody; remedies in Federal courts" for section 2254 and "Federal custody; remedies on motion attacking sentence" for section 2255 - have led the courts to think of the two sections as one another's counterparts, one for state and the other for federal prisoners. Further, the courts often have, for convenience's sake, used the same shorthand in referring to the two sections, either referring to both as "habeas" statutes or referring to both as "the post-conviction remedy statutes."

But the superficial resemblance between sections 2254 and 2255 conceals important differences between the two. The two sections bear fundamentally different relationships to the main habeas corpus statute, 28 U.S.C. § 2241. The two also serve fundamentally different purposes. And, in keeping with these differences in purpose, Congress used different language in defining the statutes' scope. To understand these differences, it is neces-

70. See, e.g., Carmona v. United States Bureau of Prisons, 243 F.3d 629, 632 (2d Cir. 2001).
71. See Montez, 208 F.3d at 865.
72. Granted, the Tenth Circuit has not followed the Montez rule to its logical conclusion. See supra text accompanying note 42.
73. See, e.g., James, 308 F.3d at 166; Trinkler v. United States, 268 F.3d 16, 22 (1st Cir. 2001); Paige v. United States, 171 F.3d 559, 560 (8th Cir. 1999).
74. See, e.g., Santana v. United States, 98 F.3d 752, 753 (3d Cir. 1996) ("[P]etitions filed pursuant to 28 U.S.C. § 2254 or § 2255 are commonly referred to as habeas petitions. Therefore, we will use this terminology.").
75. James, 308 F.3d at 166.
sary first to review the history of section 2255, which was enacted along with section 2254 in 1948 as part of a major overhaul of the judiciary law.

In the years immediately preceding the enactment of section 2255, the number of habeas corpus applications filed by federal prisoners had increased dramatically. These applications were filed, as required, in the district where the prisoner was detained, rather than the district where the prisoner had been convicted. This distribution of the applications proved problematic for several reasons, the most important of which was that the district court where the prisoner was detained was not necessarily well equipped to resolve questions related to the validity of the conviction itself: the records of the sentencing court were “not readily available to the habeas corpus court,” and witnesses who could provide relevant testimony often resided far away from the habeas corpus court. These problems were aggravated by the fact that large numbers of petitions tended to be filed in those districts where major federal penal institutions were located.

In response to these problems, Congress undertook to ensure that applications by federal prisoners would be heard in the district courts that were best equipped to resolve the prisoners’ complaints. If a prisoner’s application concerned the validity of the conviction or sentence itself — if, in the words of section 2255, the prisoner “claim[ed] the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States” — then the prisoner would be required to seek relief in the district where he had been convicted and sentenced and where the information relevant to his claims usually would be located. If, instead, the prisoner’s application concerned a matter other than the validity of his conviction or sentence, then he would be required to seek relief in the district where he was confined.

Though Congress might have accomplished this end merely by changing the rules that determined venue in habeas actions, it opted for a different approach. It created, in section 2255, an alternative to habeas corpus for just those cases where the applicant challenged the validity of his conviction or sentence. Though the relief available under section 2255 was equivalent in substance to the relief available in habeas actions, section 2255 was intended to create a remedy that was separate from, and mutually exclusive of, the traditional habeas remedy codified in section 2241. This point was explained in the revisor’s notes concerning section 2255:

77. See Ahrens v. Clark, 335 U.S. 188 (1948).
78. See Hayman, 342 U.S. at 213.
79. See id. at 214.
80. Id. at 213 (“a habeas corpus action must be brought in the district of confinement”).
81. See id. at 219.
This section restates, clarifies and simplifies the procedure in the nature of the ancient writ of error coram nobis. It provides an expeditious remedy for correcting erroneous sentences without resort to habeas corpus. 82

That section 2255 creates an alternative to habeas relief—an alternative to the relief available in section 2241—also is apparent from the text of section 2255 itself. The only time section 2255 uses the word "habeas" is to refer to habeas as an alternative to the relief available under section 2255 itself:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion . . . unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. 83

In contrast to section 2255, section 2254 does not create an alternative to the habeas corpus remedy provided in section 2241; rather, it imposes limitations on this remedy. When first enacted, section 2254 merely codified the requirement of exhaustion of state remedies. 84 This limitation on the relief available under section 2241 was eventually supplemented by additional limitations, such as the requirement that the habeas court accord a presumption of correctness to the findings of the state courts. But the fundamental character of the section never changed. It remains a set of limitations on relief available under section 2241. It has not metamorphosed into an alternative to habeas relief. 85

The existence of a substantial overlap between sections 2241 and 2254 also may be inferred from the fact that some issues arising in cases governed by section 2254 plainly are determined by section 2241. For exam-

82. Reviser's Notes, title 28—U.S. Code, Judiciary and Judicial Procedure, 80th Cong., 2d Sess., reprinted in 1948 U.S. Code Cong. Serv. 1908. The reviser's reference to this alternative remedy as "in the nature of the ancient writ of error coram nobis" is consistent with Congress's intent to limit this remedy to petitioners who challenged their conviction or sentence only. The Latin words "coram nobis" mean "before us." BLACK'S LAW DICTIONARY 338 (7th ed. 1999). The writ traditionally has been "directed to a court for a review of its own judgment." Id.


84. See Pub. L. No. 80-773, ch. 646.

85. In 1966, Congress added several new subsections to section 2254. It moved the exhaustion requirement to subsection (b) and broke out a new subsection (a) that was designed essentially to be redundant of section 2241(c)(3). November 2, 1966, P.L. 89-711 § 2, 80 Stat. 1105. But these changes were not intended to alter fundamentally the character of the section. A Senate report on the bill that eventually became Public Law 89-711 said that the bill "revises the procedure applicable to review by lower federal courts of petitions for habeas corpus by prisoners who have been convicted and who are in custody pursuant to the judgment of a state court." Senate Report No. 1797, 1966 89th Cong. at 1966 U.S. Code Cong. & Adm. News 3663.
ple, the venue of an action filed under section 2254 is determined under section 2241(d), which provides that where

an application for writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each such district court shall have concurrent jurisdiction to entertain the application.

The realization that section 2254 does not create an alternative to section 2241, but instead imposes limitations on the relief available under section 2241, clarifies our current inquiry considerably. It becomes apparent, first, that our inquiry is not about which of the two sections governing state prisoners' habeas petitions – section 2241 or 2254 – is the more suitable vehicle for state prisoners who challenge administrative decisions affecting their sentences. That is, the inquiry is not whether such a case is "best viewed as a challenge to the execution of the sentence under § 2241." Rather, the inquiry is simply whether such a case falls within the scope of both sections 2241 and 2254, as most habeas petitions by state prisoners do, or instead falls within the scope of section 2241 alone.

The same point also answers the prisoner's claim that he can, by electing to proceed under section 2241, avoid the various limitations on habeas relief imposed by section 2254 (and by sections 2244(b), 2244(d), and 2253). In responding to this argument, the Third Circuit invoked the principle that "when two statutes cover the same situation, the more specific statute takes precedence over the more general one." But this response misses the real defect in the prisoner's argument. The rule of construction favoring specific provisions over general provisions "need not be invoked unless it is impossible to give effect to both provisions." It is not impossible to give effect to both section 2241 and section 2254; indeed, it is not even difficult. If section 2254 merely imposes limitations on the court's general authority under section 2241, then a prisoner who invokes section 2241 is not presumptively exempt from the requirements of 2254; thus the two sections are not inconsistent.

87. 28 U.S.C. § 2241(d).
89. Coady, 251 F.3d at 484.

Owens believes he can avoid § 2244(d)(1) by recharacterizing his petition as a request for habeas corpus under section 28 U.S.C. § 2241 or coram nobis under the All-Writs Act, 28
That section 2255 provides an alternative to habeas relief, while section 2254 merely imposes limitations on habeas relief, is not the only fact that undermines the analogy between sections 2255 and 2254. Section 2255 was intended to channel collateral attacks by federal prisoners to the districts that were best equipped to resolve them; it made perfect sense, then, for Congress to define the scope of the section by reference to the target of the application, rather than by reference to the source of the prisoner's custody. The same cannot be said of section 2254 or of any of the subsequently imposed limitations that share its scope.

The analogy between sections 2255 and section 2254 also is undermined by textual differences in the two sections. While section 2254 applies to any state habeas applicant who is "in custody pursuant to the judgment of a State court," section 2255 applies only to federal prisoners who claim[ ] 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.

These textual differences are the reason the Second, Third, and Seventh Circuits rejected the proposed analogy between state and federal prisoners. In Walker, for example, the Seventh Circuit said that the narrow language of section 2255 was what had "led courts to find that challenges brought by federal prisoners that implicate the fact or duration of confinement but do not stem from the original conviction can be brought only under 28 U.S.C. § 2241."

VI. WHY IT MAKES SENSE TO ASSIGN SIGNIFICANCE TO THE SOURCE OF CUSTODY

The textual differences between sections 2254 and 2255 not only undermine the analogy between state and federal prisoners, they also provide a solid basis for understanding just what Congress did and did not mean when

U.S.C. § 1651(a). Not so. Section 2244(d)(1) applies to every "application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."
93. See infra text accompanying notes 97-114.
95. See Walker, 216 F.3d at 633; see also Coady, 251 F.3d at 486 ("Section 2254, in contrast to Section 2255, confers broad jurisdiction to hear the petition of any state prisoner 'in custody in violation of federal law'); James, 308 F.3d at 166-67.
Unlike Section 2255, which allows a federal prisoner to challenge only the legality of a judgment imposing a sentence, Section 2254 permits a state prisoner to file a habeas petition 'on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
96. Walker, 216 F.3d at 633.
it used the phrase "in custody pursuant to the judgment of a State court" to define the scope of section 2254, and later to define the scope of sections 2244(b), 2244(d)(1), and 2254(d). The differences do this by elucidating the "plain meaning" of this phrase.  

Section 2254 says, in plain language, that it applies to any habeas petition by a person whose custody is "pursuant to the judgment of a State court." If Congress had meant this section to apply only to petitions whose target was the state court judgment, it could easily have said so. It could have said, for example, that the sections were to apply to any prisoner in custody under a state court sentence who claimed the right to be released on the ground that the conviction or sentence was imposed in violation of federal law. Indeed, that is almost exactly what Congress said in defining the scope of section 2255, which applies to any "prisoner in custody under a 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 or the United States."

This inference – from the language of section 2254 and from differences in the language of section 2255 – is strengthened considerably by the fact that these two sections were adopted simultaneously, as part of the same act. Congress adopted both sections in 1948, as part of a major revision of the laws relating to the judiciary and judicial procedure. These revisions were drafted with considerable care over the course of several years, with the help of expert revisers. Particularly under these circumstances, it surely is reasonable to assume that "where the Legislature uses certain statutory language in one instance, and different statutory language in another, there is a difference in legislative intent."

Why, then, would Congress have wanted to define the scope of section 2254, and later the scope of sections 2254(d) and 2244(d)(1), by reference to the source of the prisoner's custody, rather than by reference to the target of his complaint? The reason why Congress assigned different import to the state court judgment than to other state action was, presumably, that the

97. Forest Guardians v. Dombeck, 131 F.3d 1309, 1312 (9th Cir. 1997) ("When construing statutory language, 'we assume that the legislative purpose is expressed by the ordinary meaning of the words used.'") (quoting Conlan v. U.S. Dep't of Labor, 76 F.3d 271, 274 (9th Cir. 1996)).
98. See Pub. L. No. 80-773, ch. 646.
99. See id.
101. United Parcel Service v. State, Dep't of Revenue, 687 P.2d 186, 191 (Wash. 1984); see also Legacy Emanuel Hospital and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996) ("the use of different language by Congress creates a presumption that it intended the terms to have different meanings").
judgment itself carries a heightened presumption of legitimacy. And though this presumption of legitimacy might have reassured Congress as to the fairness of placing obstacles in the path of a prisoner who challenges the judgment itself, this same presumption could hardly (one might argue) have reassured Congress as to the fairness of placing obstacles in the path of a prisoner who challenges a purely administrative order of a state official. It is difficult to see how the administrative order could partake of the judgment's presumption of regularity.

The answer is that Congress was concerned not with the presumptive legitimacy of the order being challenged but with the presumptive legitimacy of the petitioner's custody. Where the sentence imposed by a state court judgment has not yet expired, the petitioner's detention continues to carry a presumptive legitimacy, even if his detention also is in part the product of an administrative order. It is the judgment, after all, that deprives the petitioner of the greater part of his liberty; the administrative order deprives him only of the conditional liberty interest in, say, parole release or good-time credits. Thus, because the state court judgment itself is presumptively legitimate, Congress could well have concluded that it was acceptable to place obstacles in the paths of prisoners whose sentences had not expired.

It is acceptable, that is, for the very reason that it is acceptable to afford only minimal due process protection to a person who faces the revocation of his parole. Though a person who faces parole revocation, like a defendant in a criminal proceeding, is at risk of losing his liberty, he is not entitled to "the full panoply of rights due a defendant in [a criminal] proceeding." Instead he is entitled only to "an effective but informal hearing." The reason why is that his custody is in keeping with the terms of the original judgment; so long as the original sentence has not expired, the person has only a conditional liberty interest. "Revocation deprives the individual, not of the absolute liberty to which every citizen is entitled, but

102. Indeed, until the latter half of the twentieth century, state prisoners could not challenge state court judgments at all in habeas proceedings, except on the ground that the state court lacked jurisdiction. See Walker, 216 F.3d at 644 (Easterbrook, J., dissenting from denial of rehearing en banc).

The distinction [between prisoners in custody 'pursuant to the judgment of a State court' and other state prisoners] is both historical and sensible. Until the latter half of the twentieth century no state prisoner could obtain collateral review following conviction by a court of competent jurisdiction, and federal law still makes it difficult to wage a collateral attack on the final judgment of a state court.

104. Id.
105. Id. at 485.
only the conditional liberty properly dependent on the observance of special parole restrictions.”

The same is true of a person who faces the revocation of good-time credits as punishment for disciplinary violations. Though “due process requires procedural protections before a prison inmate can be deprived of a protected liberty interest in good time credits,” the process due is far less than the process afforded the accused in a criminal proceeding: “Revocation of good time credits is not comparable to a criminal conviction,” and thus “the full panoply of rights due a defendant in such proceedings does not apply.” Again, because the defendant’s sentence has not yet expired, the defendant therefore has no legitimate claim to “absolute liberty[;]” the revocation of good-time credits deprives him only of a relatively slight “conditional” liberty interest, the deprivation of which triggers only minimal scrutiny.

A still more instructive analogy is found in the extradition context. A demand for the extradition of a person charged with a crime in another state ordinarily will not be recognized in the absence of a judicial finding of probable cause, either in the form of an indictment or in the form of an arrest warrant; a mere allegation by an executive authority will not suffice. In contrast, where the demand for extradition is based on a parole or probation violation, the asylum state ordinarily will require only “a copy of a judgment of conviction or of a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state that the person claimed has ... broken the terms of his ... probation or parole.” No judicial finding with respect to the parole or probation viola-

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106. Id. at 480; see also Gagnon v. Scarpelli, 411 U.S. 778, 783 (1973) (addressing the question whether a probationer has a right to counsel at a probation revocation hearing, the Court said: “we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime”).


109. Id. at 456.

110. Wolff, 418 U.S. at 556.

111. Hill, 472 U.S. at 456.

112. See Uniform Criminal Extradition Act § 3; State v. Wallace, 484 N.W.2d 477, 480 (Neb. 1992). Cf. Michigan v. Doran, 439 U.S. 282, 290 (1978) (“when a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination”).

113. Uniform Criminal Extradition Act § 3 (1936); see also In re Moskaluk, 591 A.2d 95, 98 (Vt. 1991) (original judgment of conviction provides the basis for extradition where the demanding state alleges that person violated the terms of his parole or probation; papers need not demonstrate probable cause to believe person violated parole or probation); Morris v. State, 199 So. 2d 675, 677 (Ala. App. 1967) (paperwork sufficient in parole revocation case without judicial finding that parole or probation has been violated); In re Kirk, 431 P.2d
tion is required. Thus, the presumptive legitimacy of the judgment of conviction justifies the courts of the asylum state in handing the defendant over to the asylum state, even though the immediate cause of the extradition (and the necessary target of any challenge) is the wholly untested "statement" of the executive authority that the defendant has violated the terms of his probation or parole.

What lies beneath all of these rules is the principle that the state's detention of the prisoner retains a presumptive legitimacy throughout the term of his sentence, regardless of whether the immediate cause of his detention at a particular moment also is in part the product of an administrative order. Put another way: the sentence itself remains a basic datum, despite the fact that the implementation of criminal sentences is a complex process that varies widely among the states. Thus, for example, a state could not defend a sentence against a claim of disproportionality or excessiveness on the ground that the defendant was almost certain to be paroled; the sentence itself must be defensible. Nor, obviously, could a state decide to create a system wherein everyone convicted of a felony was sentenced to life imprisonment and thenceforth was subject to reimprisonment administratively.

VII. THE LEGISLATIVE HISTORY OF SECTION 2254

The legislative history of section 2254 bears out the hypothesis that Congress was concerned not with the presumptive legitimacy of the order being challenged but with the presumptive legitimacy of the petitioner's custody.

The formula used to define the scope of section 2254 — "in custody pursuant to the judgment of a State court" — was the product of a Senate amendment to the original House version of section 2254. As originally passed by the House, section 2254 would have required exhaustion of state remedies by any person held "in custody pursuant to the judgment of a State court or the authority of a state officer." The Senate deleted the emphasized phrase for fear that if "the section were applied to applications by persons detained solely under the authority of a State officer, it would unduly hamper the Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty." The Senate said:

The first purpose [of the amendment to section 2254] is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under the authority of a state officer but whose custody has not been directed at the judgment of a State court. If the section were applied to

678, 679 (Ariz. App. 1967) (allegation of parole violation sufficient; whether "person has in fact violated his parole is of no concern in the courts of the asylum state").
applications by persons detained solely under the authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.117

As a preliminary matter, Congress’s reference here to “the protection of Federal officers prosecuted for acts committed in the course of official duty” must be read in relation to 28 U.S.C. § 2241(c)(2), a special habeas provision for prisoners who are “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.” Section 2241(c)(2) has been interpreted broadly to grant a habeas remedy to any federal official who is made subject to state prosecution for an act performed “in pursuance of his official duty.”118 This section often has been invoked by federal officers whose performance of their duties put them at odds with state officials over such controversial matters as civil rights.119

Of course, it is not dispositive in itself that Congress, when it narrowed the scope of the proposed section 2254, appears to have been concerned exclusively with the fate of federal officials who were facing prosecution for acts performed in pursuance of their official duties. Whatever Congress’s narrow concern, the resultant limitation on the exhaustion requirement was written broadly. The Senate amendment effectively relieved of the duty to exhaust state remedies anyone—not just a federal officer awaiting trial—who was held “solely under the authority of a state officer” rather than “pursuant to the judgment of a State Court.”120

117. Id.
118. See Isaac v. Googe, 284 F.2d 269, 270 (5th Cir. 1922).
119. A good discussion of these cases, and a good illustration of the basis for the Senate’s concern, can be found in In re McShane, 235 F. Supp. 262 (N.D. Miss. 1964). James McShane was the Chief of the Executive Office of the United States Marshal and in that capacity was responsible for enforcing federal court orders that required the University of Mississippi to admit African-American James Meredith as a student. When U.S. marshals escorted Meredith onto the campus to register for classes, a riot broke out that led to two deaths and numerous injuries. A Lafayette County grand jury subsequently indicted McShane for inciting a riot. After he was arrested on this charge, he filed a petition for a writ of habeas corpus in federal district court. The Mississippi Attorney General argued, in opposition to the petition, that McShane should be required to exhaust his state remedies. The district court rejected this argument, in accordance with the Senate amendment to section 2254.
120. In practice, persons other than federal officers rarely will derive any benefit from the Senate amendment. Under Younger v. Harris, 401 U.S. 37 (1971), the federal courts may not enjoin a pending state prosecution except in extremely narrow and exceptional circumstances. This means, in effect, that most state prisoners will be unable to obtain habeas relief prior to judgment. Thus, although Congress acted in broad terms when it amended section 2254—making the exhaustion requirement inapplicable generally to any state prisoner who is not in custody pursuant to a state court judgment—Congress really accomplished just about what it meant to: it exempted from the exhaustion requirement just those federal officials who are being held on state charges for acts performed in pursuance of official duties.
But the Senate's explanation for the amendment is useful nevertheless. The Senate's explanation shows that, from the Senate's perspective, the existence of a judgment made a difference in the interests of the prisoner, not in the interests of the state government. In other words, the Senate didn't conclude that the state interests driving the exhaustion requirement were weaker in the absence of a state court judgment; rather, it concluded that the prisoner's countervailing interests in forgoing exhaustion were stronger in the absence of a state court judgment. This focus on the prisoner's countervailing interests is consistent with the view that the Senate, and Congress as a whole, was concerned with the source of the prisoner's custody, rather than with the target of the prisoner's complaint; with the presumptive legitimacy of the prisoner's custody, rather than with the presumptive legitimacy of the judgment. After all, as we have seen from cases like Morrissey, the prisoner's liberty interest is diminished during the entire term of the prisoner's sentence.

Further, the particular words used by the Senate to explain the amendment are powerfully corroborative of the same view. As legislative bodies often do in explaining a bill or an amendment, the Senate paraphrased the words of the proposed statute. The Senate's two paraphrases, like the language of the statute itself, both plainly reflect exclusive concern for the source of the prisoner's custody, rather than the target of the prisoner's attack. The Senate said it did not want section 2254 to be "applied to applications by persons detained solely under the authority of a State officer[;]" it did not say, as it easily might have, that it did not want the section to be applied to applications solely challenging decisions of a State officer. The Senate also said, in another paraphrase of the statute, that it did not want the statute to be applied to "applications in behalf of prisoners in custody under the authority of a state officer but whose custody has not been directed at the judgment of a State court." Again, the Senate's exclusive focus on the source of the custody, rather than the target of the application, is plain.

The Senate Report's use of the word "solely" also is strong evidence of Congress's intent to exempt from exhaustion just those not yet convicted. Persons whose detention is the combined product of a state court judgment and an administrative order implementing the judgment are not "detained

122. See Morrissey, 408 U.S. at 480. "Revocation deprives the individual, not of the absolute liberty to which every citizen is entitled, but only the conditional liberty properly dependent on the observance of special parole restrictions." Id.
124. See id.
125. Id.
solely under the authority of a State officer."\textsuperscript{126} Again, the prisoner is subject to detention on the basis of an administrative determination only because his sentence has not expired: "the parole board would have no occasion to consider parole at all, and the prisoner to complain thereof, had the prisoner not been convicted in the first instance and had the prisoner fully served his sentence in the second."\textsuperscript{127}

In summary, the legislative history of section 2254 leads to the same conclusion as the plain language of the section. When Congress adopted section 2254, it intended to include within its scope every state prisoner who was not "detained solely under the authority of a State officer," i.e., whose custody was attributable, at least in part, to the judgment of a state court. When Congress readopted the same formula to define the scope of AEDPA's various limitations on habeas relief, it intended to make the limitations apply to the same group of prisoners as section 2254.

\section*{VIII. \textit{Preiser v. Rodriguez} Revisited}

The same conclusion can be reached by yet another, wholly independent means: by extrapolating from the \textit{Preiser} decision.\textsuperscript{128}

When Congress codified the exhaustion requirement in section 2254, it plainly meant to be exhaustive. In other words, it meant to capture all of the cases that were subject to the requirement, not just some of them. For example, when the Senate narrowed the scope of the proposed section 2254 to exclude those prisoners who were held solely on the authority of a state executive-branch official, it meant to relieve those prisoners from the requirement of exhaustion, not just to throw them back on the pre-1948 case law. Thus, when we ask whether exhaustion is required in a particular case, we really are just asking whether that case fits within the scope of the codified exhaustion requirement — whether, in other words, the petition was filed "on behalf of a person in custody pursuant to the judgment of a State court."\textsuperscript{129}

It is significant, then, if not wholly dispositive, that the Supreme Court held in \textit{Preiser} that prisoners who challenge administrative decisions that extend their time in confinement are required to exhaust their state remedies.\textsuperscript{130} By so holding, the Court necessarily held too that these prisoners are "in custody pursuant to the judgment of a State court" and so fall within the scope of section 2254. Though the Court did not parse the language of this formula, it certainly signaled that its decision concerned the scope of

\begin{itemize}
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Madley}, 278 F.3d at 1310.
\item \textsuperscript{128} See \textit{Preiser}, 411 U.S. 475.
\item \textsuperscript{129} 28 U.S.C. § 2254(b).
\item \textsuperscript{130} See \textit{Preiser}, 411 U.S. at 500.
\end{itemize}
section 2254. It quoted section 2254, and mentioned that the exhaustion requirement had been "codified in § 2254."\textsuperscript{131} It implied that its task was to implement Congress's intent "[i]n amending the habeas corpus laws in 1948."\textsuperscript{132} And it assumed at every juncture that its task was to determine the scope of section 2254(b). It said, for example, that the prisoner-respondents "view the reasons for the exhaustion requirement of § 2254(b) too narrowly."\textsuperscript{133}

Though \textit{Preiser} was decided in 1973, there is no reason to suppose that the Court would be inclined to abandon its interpretation of section 2254(b) today. Indeed, its recent decision in \textit{Edwards v. Balisok} – to extend the rule of \textit{Preiser} to cases where the prisoner seeks only damages – suggests that \textit{Preiser} retains all of its vitality.\textsuperscript{134} Moreover, even if the Court were inclined to abandon \textit{Preiser}’s interpretation of the formula that defines the scope of section 2254(b), it probably would be foreclosed from doing so, at least where Congress has readopted the same formula post-\textit{Preiser}. When, in 1996, Congress adopted the various provisions of the AEDPA and used, to define their scope, the very formula interpreted in \textit{Preiser}, it essentially adopted the Court’s interpretation of this formula.\textsuperscript{135}

Nor is this argument from \textit{Preiser} mere sleight-of-hand; it is fully consonant with \textit{Preiser}’s foundation in policy. The Supreme Court’s decision in \textit{Preiser} was based largely on the Court’s perception that the balance of the state’s and the prisoner’s interests with respect to exhaustion did not differ according to whether the prisoner was challenging an administrative decision or a court decision. The Court said, for example, that the state’s prison-administrative decisions were no less deserving of comity than its judicial decisions: "The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors . . . also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons."\textsuperscript{136} The Court likewise perceived no difference in the prisoners’ interests: in addressing the respondents’ argument that the delay attendant upon exhaustion might render their claims moot, the Court pointed out that the same argument would logically extend to a state prisoner who had received relatively short sentences;\textsuperscript{137} thus, the court assumed that the two prisoners’

\textsuperscript{131} \textit{Id.} at 483, 490.
\textsuperscript{132} \textit{Id.} at 489.
\textsuperscript{133} \textit{Id.} at 491.
\textsuperscript{134} \textit{See Edwards}, 520 U.S. at 648.
\textsuperscript{135} \textit{See Central Bank of Denver NA v. First Interstate Bank of Denver NA}, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language.").
\textsuperscript{136} \textit{Preiser}, 411 U.S. at 492.
\textsuperscript{137} \textit{See id.} at 496-97.
underlying interests in obtaining habeas relief were at least roughly equivalent. The apparent equivalence of the state's and the prisoners' interests in the two different situations supports the view that Congress intended the various limitations imposed by the AEDPA to apply equally to both groups of prisoners.

A. Differences in Section 2253

There remains the question whether the AEDPA's requirement of a "certificate of appealability" applies to state prisoners who challenge administrative decisions that extend their confinement. Congress used somewhat different language in defining the scope of this requirement than it did in defining the scope of the other limitations imposed by the AEDPA. Section 2253(c)(1)(A) applies to any state prisoner who means to appeal a "final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court." There are three potentially significant differences between the language of section 2253(c)(1)(A) and the language of sections 2254(d) and 2244(d)(1). First, instead of referring to the "judgment of a State court," section 2253(c)(1)(A) refers to "process issued by a state court." Second, instead of referring to "custody," section 2253(c)(1)(A) refers to "detention." Third, section 2253(c)(1)(A) adds the words "complained of" to modify the word "detention;" section 2254(d) and 2244(d)(1) contain no similar modifier. It cannot really be doubted that Congress must have intended something different by this very different formula. The question is what, exactly, Congress intended.

138. See id.
139. If anything, the prisoner's interest in obtaining habeas relief is less where he challenges an administrative decision, as opposed to a conviction or sentence. This point was made by the D.C. Circuit in Madley, 278 F.3d at 1310, where the court drew attention both to "the relative informality of the liberty-affecting administrative processes of parole or good-time-credit disciplinary proceedings, compared to judicial convictions and sentencing" and to the general principal that "less process is due in those post-conviction determinations." The court pointed out that both of these facts were inconsistent with the assumption that Congress intended to extend greater rights to prisoners who challenged administrative orders than to prisoners who challenged their convictions.
141. 28 U.S.C. §§ 2254(d), 2244(d)(1).
143. 28 U.S.C. §§ 2254(d), 2244(d)(1).
144. 28 U.S.C. § 2253(c)(1)(A).
145. Id.
146. See 28 U.S.C. §§ 2254(d), 2244(d)(1).
147. See United Parcel Service v. State, Dep't of Revenue, 687 P.2d 186, 191 (Wash. 1984) ("where the Legislature uses certain statutory language in one instance, and different statutory language in another, there is a difference in legislative intent"). Cf. Montez, 208 F.3d at 868 ("If Congress had intended to restrict the COA requirement to state prisoner
By the phrase "process issued by a State court," Congress evidently intended to reach more broadly than it had with the phrase "judgment of a State court."\textsuperscript{148} Granted, the word "process" sometimes is used narrowly to refer to a "summons or writ ordering a defendant to appear in court."\textsuperscript{149} And the courts rightly have concluded that the phrase "process issued by a state court" does, indeed, encompass cases where the petitioner is awaiting trial on state charges.\textsuperscript{150} But the word "process" also is used more broadly to refer to \textit{any} writ,\textsuperscript{151} that is, anything that "proceeds or issues forth" from a court.\textsuperscript{152} And federal courts appear uniformly to have interpreted the word in this very broad sense; thus, they have assumed, for example, that "the detention complained of arises out of process issued by a State court" where the state prisoner files a habeas petition challenging his state court conviction or sentence.\textsuperscript{153}

Analysis of the word "detention" leads in the same direction. The word "detention" sometimes is used narrowly to refer to pretrial custody.\textsuperscript{154} But the word also is used broadly as a synonym for "custody."\textsuperscript{155} Black's Law Dictionary, for example, defines the word "custody" in part as "\textit{[t]he detention of a person by virtue of lawful process or authority.}\textsuperscript{156} And the federal courts consistently have assumed that where a state prisoner challenges petitions brought pursuant to § 2254, it would have employed exactly the same language that it chose with regard to federal prisoners in § 2253(c)(1)(B)" [confining requirement to appeals from "a final order in a proceeding under section 2255")].

\textsuperscript{148} \textit{Montez}, 208 F.3d at 862 ("Section 2253(c)(1)(A) is written broadly").

\textsuperscript{149} \textit{American Heritage Dictionary} 1444 (3d ed. 1992) ("5. Law. A. A summons or writ ordering a defendant to appear in court."); \textit{see also Black's Law Dictionary} 1222 (7th ed. 1999) ("2. A summons or writ, esp. to appear or respond in court").

\textsuperscript{150} Stringer v. Williams, 161 F.3d 259 (5th Cir. 1998).

\textsuperscript{151} \textit{Black's Law Dictionary} 1222 (7th ed. 1999).

\textsuperscript{152} \textit{See} 1 Joseph Chitty, A Practical Treatise on the Criminal Law 338 (2d ed. 1826) ("\textit{Process} is so denominated because it \textit{proceeds} or issues forth in order to bring the defendant into court, to answer the charge preferred against him, and signifies the writ or judicial means by which he is brought to answer."); \textit{quoted in Black's Law Dictionary} 1222 (7th ed. 1999).

\textsuperscript{153} \textit{See}, e.g., Grotto v. Herbert, 316 F.3d 198 (2d Cir. 2003); Beaty v. Stewart, 303 F.3d 975, 988 (9th Cir. 2002).

\textsuperscript{154} \textit{See}, e.g., \textit{Merriam-Webster's Collegiate Dictionary} 315 (10th ed. 1999) ("2: the state of being detained; esp: a period of temporary custody prior to disposition by a court"); \textit{American Heritage Dictionary of the English Language} 509 (3d ed. 1992) ("[I] b. The state of being detained, especially a period of temporary custody while awaiting trial.").

\textsuperscript{155} \textit{See Black's Law Dictionary} 459 (defining "detention" in part as "1. The act or fact of holding a person in custody; confinement or compulsory delay") and 390 (defining "custody" in part as "3. The detention of a person by virtue of lawful process or authority.").

\textsuperscript{156} \textit{Id.} at 390. Judge Easterbrook, in his dissent from the denial of rehearing in \textit{Walker v. O'Brien}, assumed that detention was the equivalent of custody. \textit{Walker}, 216 F.3d at 644 (Easterbrook, J., dissenting from denial of rehearing \textit{en banc}) ("Section 2253(c)(1)(A) deals with detention (= custody) that depends on a state court order; it is not limited to attacks on that order.").
his underlying state conviction or sentence, "the detention complained of
arises out of process issued by a state court."\(^{157}\)

By using the words "detention" and "process" – each of which is at least
as broad as its counterpart in section 2254, but each of which also carries a
special connotation connected to the pretrial setting – Congress can only
have intended to reach more broadly than it did in section 2254, and in
particular to reach those persons who are in custody pending trial or extra-
dition. This appears to have been the view adopted in *Stringer v. Wil-
liams*,\(^{158}\) where the Fifth Circuit held that a defendant's "pretrial habeas
petition" fell within the scope of section 2253.\(^{159}\) This also was the view
espoused by Judge Easterbrook in his dissent from the denial of rehearing
en banc in *Walker*. He said: "[Section] 2253(c)(1)(A) is more general [than
section 2254], applying to all whose custody can be traced to state judicial
process, such as an arrest warrant or indictment . . . Section 2253(c)(1)(A)
applies before trial, in extradition cases, and after judgment too. . . ."\(^{160}\)

The third difference in the wording of the two formulae – section 2253's
use of the phrase "complained of," which is absent from the section 2254
formula – is somewhat more problematic. One could argue that the phrase
"complained of" was intended to shift the formula's focus from the *source*
of the prisoner's custody to the *target* of the prisoner's complaint. That is,
one could argue that the phrase was intended shift the formula's focus to
"the custody he is challenging."\(^{161}\)

Though this "target" argument is more plausible with respect to section
2253 than with respect to section 2254, it ultimately is not persuasive. It
just doesn't make sense to say, in the case of a state prisoner who is chal-
lenging an administrative order, that "the custody complained of" is the
administrative order being challenged. The "custody complained of" is the
prisoner's physical confinement, which is attributable *both* to the adminis-
trative order and to the judgment. If Congress had meant to define the
scope of section 2253(c)(1)(A) by reference to the *order* complained of,
rather than the "custody complained of," it would just have said so, as it did
in section 2255.

A better explanation for Congress's use of the phrase "the custody com-
plained of" is that Congress simply intended to make explicit what is im-
PLICIT (and indeed, obvious) in provisions like section 2244(d)(1): that the
"custody" referred to is the custody being challenged as unlawful. It is

\(^{157}\) *See supra* note 106.
\(^{158}\) 161 F.3d 259 (5th Cir. 1998).
\(^{159}\) *Id.* at 262.
\(^{160}\) *Walker*, 216 F.2d at 644 (Easterbrook, J., dissenting from denial of *en banc*
rehearing).
\(^{161}\) *Cox*, 279 F.3d at 493 (applicability of section 2244(d) depends on "the custody [the
prisoner] is challenging, as distinct from the custody that confers federal jurisdiction").
trivially true that any habeas petition must challenge the "custody complained of[;]" a state prisoner who seeks federal habeas relief is, by definition, arguing that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." Congress's decision to make this explicit in section 2253 adds nothing to the meaning of the formula.

The fact that section 2253(c)(1)(A) is somewhat broader in scope than section 2254 has no significance for the class of cases under consideration here: these cases either fall within both sections or within neither. Where a state prisoner challenges an administrative decision that extends his time in detention, his custody can be said to "arise from" or be "pursuant to" either of two determinations: the decision of the state administrative body or the underlying judgment of the state court. But the decision of the state administrative body qualifies neither as a "judgment of a State court" nor as "process issued by a State court." And the underlying judgment of the state court qualifies both as a "judgment of a State court" and as "process issued by a State court." Thus, a prisoner who challenges an administrative decision that extends his time in detention is governed either by both 2253 and 2254 or by neither.

There can be no justification, then, for the Tenth Circuit's conclusion in Montez that section 2253(c)(1)(A) but not section 2254 applies to state prisoners who challenge administrative decisions that extend their custody. Nor, by the same token, can there be any justification for the Seventh Circuit's opposite conclusion in Walker: that section 2254 but not section 2253(c)(1)(A) applies to state prisoners who challenge administrative decisions that extend their custody. As Judge Easterbrook explained in his dissent from rehearing en banc in Walker, either the prisoners are both "in custody pursuant to the judgment of a State court" and in custody "arising out of process issued by a State court" or they are neither:

If challenges to good-time credits proceed under § 2254 because the words 'in custody pursuant to the judgment of a State court' refer to the genesis of the custody rather than the claim made in the collateral attack, then the words 'detention complained of arises out of process issued by a State court' also must refer to the genesis of the custody rather than the claim made in the collateral attack.

162. 28 U.S.C. § 2241(c)(3); see also 28 U.S.C. § 2254(a).
163. See Montez, 208 F.3d at 865, 869.
164. See Walker, 216 F.3d at 633, 637.
165. Id. at 643 (Easterbrook, J., dissenting from the denial of en banc rehearing).
IX. The Problem of Awkwardness

The only question remaining is whether the awkwardness that accompanies application of these AEDPA provisions to the class of cases under consideration is sufficiently profound to compel the conclusion that Congress could not have intended them to apply at all. The answer to this question is no. Courts have had little difficulty in implementing these provisions. What little awkwardness attends the application of these provisions is at most another demonstration that "in a world of silk purses and pigs' ears, [the AEDPA] is not a silk purse in the art of statutory drafting."

A. The Statute of Limitations

The problem of awkwardness is worst with respect to the one-year statute of limitations, which generally begins running when the "judgment" becomes final. Where a state prisoner challenges an administrative determination that was made long after the underlying judgment became final, the timeliness of the petition obviously ought not to depend on whether it was filed within a year of the judgment. No obvious solution to this dilemma appears in the text of section 2244(d)(1) itself. Subsection (d)(1)(D) permits the petitioner to file his claim within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." But the administrative order being challenged in these cases is not really a "factual predicate" for the claim; nor, in most cases, will it make sense to talk about when the administrative decision "could have been discovered."

These conceptual concerns have proven to be no impediment to the application of the statute of limitations. Some courts simply have treated the

166. See United States v. Ron Pair Enterprises, 489 U.S. 235, 242 (1989) (if ‘the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters,’ . . . the intention of the drafters, rather than the strict language, controls”).
169. Under section 2244(d)(1), the period of limitation begins running on the latest of:
   (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking review;
   (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
   (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
   (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
administrative decision as the equivalent of a “judgment”; thus, the one-year limitation period begins running when the administrative decision becomes final.\textsuperscript{171} This approach is illustrated by the Sixth Circuit’s decision in \textit{Klopp v. Wolfe}.\textsuperscript{172} Klopp had been convicted of robbery and other offenses in 1985 and had received a sentence of six to 35 years’ imprisonment. He was released in 1995, but the Ohio Adult Parole Authority revoked his parole in June 1998. About 18 months later, Klopp filed a federal habeas petition challenging the revocation of his parole. The district court dismissed Klopp’s petition as time-barred under 28 U.S.C. § 2244(d)(1) and the Sixth Circuit affirmed. After reciting the principle that “a state prisoner has one year from the date on which the judgment becomes final to file for federal habeas relief,”\textsuperscript{173} the court pointed out that, under Ohio law, “a parole revocation becomes final when a hearing officer for the Ohio Adult Parole Authority determines that the defendant violated the conditions of his release and, therefore, the revocation sanction should be imposed.”\textsuperscript{174} The court held that the one-year limitation period had begun running when the hearing officer had revoked Klopp’s parole.\textsuperscript{175}

The Tenth Circuit appeared to apply the same approach in \textit{Morello v. Utah}.\textsuperscript{176} Morello had been convicted of aggravated robbery in Utah state court in 1983 and had received a sentence with an upper limit of life in prison.\textsuperscript{177} The parole board eventually set a release date of 2008 for Morello.\textsuperscript{178} Morello subsequently sought federal habeas relief, challenging both the validity of his conviction and the decision of the parole board to set his release for 2008. The district court held that Morello’s petition was untimely and accordingly dismissed it.\textsuperscript{179} The Tenth Circuit affirmed. The Tenth Circuit explained that “the dates the one-year limitations period began to run were December 10, 1996, for the challenge to his conviction and April 24, 1996, for the challenge to the parole decision.”\textsuperscript{180} Thus, the court appears to have concluded that Morello’s time for challenging the parole

\begin{itemize}
\item \textsuperscript{171} See, e.g., Klopp v. Wolfe, 8 Fed. Appx. 444 (6th Cir. 2001); Morello v. Utah, 10 Fed. Appx. 788 (10th Cir. 2001).
\item \textsuperscript{172} See Klopp, 8 Fed. Appx. 444.
\item \textsuperscript{173} Id. at 446.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} Id.
\item \textsuperscript{176} Morello, 10 Fed. Appx. 788.
\item \textsuperscript{177} See id. at 789.
\item \textsuperscript{178} See id.
\item \textsuperscript{179} See id.
\item \textsuperscript{180} Id. April 24, 1996 was the effective date of the AEDPA; it represents the date on which the one-year period began running on claims that ripened before the AEDPA’s effective date. See Duncan v. Walker, 533 U.S. 167, 183 (2001) (Stevens, J., concurring) (“the Courts of Appeals have uniformly created a 1-year grace period, running from the date of AEDPA’s enactment, for prisoners whose state convictions became final prior to the AEDPA”).
\end{itemize}
decision ran separately from his time for challenging the underlying judgment. In effect, the two decisions operated as separate "judgments." 181

In contrast, the Fifth Circuit has held that the administrative decision is, in effect, a "factual predicate" of the petitioner's claim. In *Kimbrell v. Cockrell*, the court held that the AEDPA's one-year period of limitation had begun running on the date of the prisoner's administrative hearing, when he had learned that he would be deprived of several thousand days of good-time credit for possessing escape paraphernalia. 182 The Fifth Circuit considered and rejected the possibility that the administrative decision counted as a "judgment" for purposes of section 2254(d)(1)(A). 183 The court's rejection of this approach was significant for Kimbrell's petition, since it meant that Kimbrell's pursuit of an administrative appeal did not delay the commencement of the limitation period but instead merely tolled it. Because Kimbrell had waited more than a year before seeking administrative review, the Fifth Circuit's approach to this issue was dispositive of Kimbrell's claim; his claim was time-barred. 184

Cases like Kimbrell's - where the two rules produce different results - will probably be rare. And the differences between the Sixth Circuit's approach and the Fifth Circuit's approach are, in any event, less important than what they have in common: their recognition that Congress could not have intended to require these prisoners to pursue their claims within one year of the judgment of conviction and their recognition that Congress could not have intended to exempt these prisoners entirely from the operation of the AEDPA's statute of limitations. Both rules represent fair accommodations of the prisoner's interests and the government's interests. And both, more importantly, demonstrate that the courts in practice have had relatively little difficulty overcoming the awkwardness that attends the application of the statute of limitations to these prisoners.

181. The Tenth Circuit appeared to apply the same principle in *Hunter v. Boone*, 13 Fed. Appx. 828 (10th Cir. 2001). Billy Hunter was an Oklahoma prisoner who, in July 2001, had filed a federal habeas petition challenging the state's revocation of his parole. The district court dismissed the petition as time-barred, and the Tenth Circuit denied Hunter a certificate of appealability. *Id.* at 829. Though the Tenth Circuit's decision contains little explanation for this result, it does mention that Hunter's parole was revoked on February 7, 1996 and that "[o]n June 29, 1999, more than two years after the parole revocation, Hunter filed an application for post-conviction relief in state court." *Id.* at 829 (emphasis added). Thus, the court appears to have assumed that the time had begun to run with the parole revocation and that Hunter's delay of more than two years between the revocation and his application for post-"conviction" relief (which presumably would have tolled the statute of limitations) was dispositive under section 2244(d)(1).

182. *See* Kimbrell v. Cockrell, 311 F.3d 361, 364 (5th Cir. 2002).

183. *See id.*

184. *See id.*
B. Ban on Successive Petitions

The courts have had even less difficulty applying to these cases the AEDPA's general prohibition on "second or successive" petitions. The absence of any statutory definition of "second or successive" has left the courts with wide latitude to fashion an appropriate accommodation of the interests at stake.

As the courts have recognized, the interests at stake here are much the same as they are with respect to the application of the statute of limitations. That is, just as it wouldn't be fair to foreclose the prisoner's claim on the ground that his conviction had been final for more than a year, nor would it ordinarily be fair to foreclose the prisoner's claim on the ground that he previously had filed a habeas petition challenging his underlying conviction or sentence. At the same time, however, it wouldn't make sense to relieve him entirely of the obligation to pursue his claims in a single petition; the basis in policy for the prohibition on successive petitions is surely no less compelling in cases where prisoners repeatedly challenge the same administrative decision than it is in cases where prisoners repeatedly challenge the same conviction and sentence.

In keeping with these interests, the courts have held that a prisoner's challenge to an administrative order that extends his confinement is not "second or successive" merely by virtue of the fact that the prisoner previously has filed a habeas petition challenging his conviction. The courts also have held that such a challenge is not "second or successive" merely by virtue of the fact that the prisoner previously has filed a habeas petition challenging a different administrative order. At the same time, the courts have held that a prisoner's challenge to an administrative order that extends his confinement is a "second or successive" petition if the prisoner previously has filed another petition challenging the same administrative order.

These results could be justified under either of two rules. First, the court could treat the administrative decision as wholly separate from the criminal judgment and from other administrative decisions implementing the same judgment. On this rule, no petition challenging an administrative decision ever would be "successive" to a petition challenging the conviction, nor would it ever be "successive" to a petition challenging a different adminis-

185. See In re Cain, 137 F.3d 234, 236 (5th Cir. 1998) (arguing that Congress could not have intended to foreclose such claims, particularly in light of "the fact that a prisoner may seek redress for the loss of good-time credits only through a habeas petition").
186. See, e.g., Crouch v. Norris, 251 F.3d at 274.
187. See, e.g., In re Cain, 137 F.3d at 236-37 (5th Cir. 1998).
188. Harris v. Cotton, 296 F.3d 578 (7th Cir. 2002).
trative decision implementing the same judgment. Alternatively, the
courts could treat the administrative decision as part of the same underlying
case as the judgment, but could hold nevertheless that the petition is non-
successive to the extent that it raises issues that could not have been raised
in prior petitions. On this rule, a petition challenging an administrative de-
cision would be "successive" to a petition challenging the underlying judg-
ment if the challenge to the administrative decision could have been raised
in the earlier petition.

Some decisions have been ambiguous about which of the two rules is
being applied. In In re Cain, the Fifth Circuit held that Cain's two new
petitions, which challenged disciplinary determinations that had resulted in
the loss of good-time credits, were not "successive" to his prior petitions. But the court's explanation was ambiguous. On the one hand, the court
emphasized that Cain was not challenging the underlying judgment:
"Rather than attacking the validity of his conviction or sentence, Cain's
petitions focus on the administration of his sentence." This remark ar-
guably is suggestive of the view that an attack on the administration of the
sentence is not, by its nature, "successive" to an attack on the conviction or
sentence itself. On the other hand, the court pointed out that "Cain's cur-
rent petitions do not present claims that were or could have been raised in
his earlier petitions." This remark, of course, is suggestive of the view
that a petition challenging the administration of a sentence would qualify as
"successive" if it could have been raised in an earlier petition challenging
either the judgment itself or another administrative decision implementing
the same judgment.

Other decisions, though not wholly unambiguous, have shown a prefer-
ence for the second rule. For example, in Crouch the Eight Circuit held that
Crouch's new petition, which challenged the state's denial of parole release,
was not "successive" to his earlier petition challenging his convictions. In
reaching this conclusion, the court appeared to rely principally on the
fact that Crouch "could not have raised his parole-related claims in his first
habeas petition." But the court, in stating its conclusion, appeared to rely
on an amalgam of the two alternative rules of decision, saying, "we con-
clude that Crouch's petition, which neither raises a claim challenging his
conviction or sentence that was or could have been raised in his earlier
petition, nor otherwise constitutes an abuse of the writ, is not 'second or

189. See Beyer v. Litscher, 306 F.3d 504 (7th Cir. 2002) (section 2244(b) does not
require the petitioner to consolidate challenges to two separate judgments).
190. See In re Cain, 137 F.3d at 236.
191. Id. at 236.
192. Id.
193. See Crouch, 251 F.3d at 724.
194. Id.
successive’ for purposes of § 2244(b).” 195 From this remark, it is unclear whether the court would have deemed Crouch’s petition successive if it “was or could have been raised in his earlier petition” but did not “chall[e]nge[e] his conviction or sentence.”

Even less ambiguous is the Ninth Circuit’s decision in *Hill v. Alaska.* 196 Hill was an Alaska prisoner who sought permission from the Ninth Circuit to file a habeas petition challenging the calculation of his release date by prison officials. Hill had “filed numerous habeas petitions since he was convicted of robbery in 1993.” 197 But this petition was the first one challenging the calculation of his release date. The court cited *Crouch* for the proposition that “a petitioner’s first petition challenging the calculation of release date should not be deemed successive if the prisoner did not have an opportunity to challenge the state’s conduct in a prior petition.” 198 And the Ninth Circuit appeared to apply the same rule to Hill’s case. The court concluded: “Because the district court has never addressed Hill’s claims relating to mandatory parole on the merits, and those claims could not have been included in earlier petitions challenging his conviction and sentence, Hill is not obliged to secure this court’s permission prior to filing his habeas petition in the district court.” 199

Regardless of which of the two alternative rules the courts have applied in these cases, the fact remains that courts have faced neither conceptual nor practical obstacles to the application of section 2244(b) in cases where a state prisoner challenges an administrative order that extends his confinement.

C. Deference to State Courts

Section 2254(d)(1) requires the federal courts in habeas matters to defer to any “adjudication on the merits in State court proceedings.” 200 This reference to “court” proceedings, like section 2244(d)’s reference to the “judgment,” might be attributable to Congress’s apparent preoccupation with cases where a state prisoner challenges the underlying judgment or conviction. But section 2254(d)’s reference to “court” proceedings is different in one pivotal respect from section 2244(d)’s reference to the “judgment”: it is possible to read this reference literally without excluding state administra-

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195. *Id.* at 725.
196. See *Hill,* 297 F.3d at 895.
197. *Id.* at 897.
198. *Id.* at 898.
199. *Id.* at 899; see also *James,* 308 F.3d at 168 (“Because the claim asserted in the 1999 petition did not exist when James filed his 1997 petition, the 1999 petition is not ‘second or successive’ for the purposes of the AEDPA’s gatekeeping provisions”).
200. 2254(d)(1) (emphasis added).
tive orders from the statute entirely, and without doing violence to Con-
gress's intent. It is possible to take Congress at its word.

This is just what the courts have done, as is illustrated by the Seventh
Circuit's decision in Pannell v. McBride.\textsuperscript{201} Pannell's federal habeas peti-
tion challenged an administrative decision by a prison disciplinary board.\textsuperscript{202} The board had sanctioned him with two years' disciplinary segregation and a demotion in credit-earning class.\textsuperscript{203} The district court denied Pannell's petition, but the Seventh Circuit remanded the case for further consideration.\textsuperscript{204} On appeal, both parties assumed that the court would "examine the propriety of the prison disciplinary proceeding under the deferential lens prescribed by 28 U.S.C. § 2254(d)(1)."\textsuperscript{205} But the court disabused the parties of this notion, pointing out that section 2254(d)(1) required deference only to "a state court's adjudication on the merits."\textsuperscript{206} The court said: "as this court has stated several times, a prison disciplinary board is not a 'court,' and Indiana does not provide for judicial review of conduct board determinations."\textsuperscript{207}

The Seventh Circuit's statement implies, of course, that deference might be required if the state did provide for judicial review of conduct board determinations. And at least one court has held just that. In Hunterson v. Disabato,\textsuperscript{208} state prisoner Hunterson filed a habeas petition challenging the revocation of his parole. The district court granted Hunterson's petition after concluding that the revocation was in violation of Hunterson's due process rights.\textsuperscript{209} The Third Circuit reversed. It held that the district court had failed to accord sufficient deference to a decision of the state appellate court rejecting Hunterson's constitutional claims.\textsuperscript{210} The court held, in ef-
fact, that where a state prisoner files a federal habeas petition challenging a state administrative decision that has the effect of extending his time in state custody, and a state court previously has adjudicated the prisoner's

\begin{itemize}
\item \textsuperscript{201} 306 F.3d 499 (7th Cir. 2002).
\item \textsuperscript{202} See id. at 501.
\item \textsuperscript{203} See id.
\item \textsuperscript{204} See id.
\item \textsuperscript{205} Id. at 502.
\item \textsuperscript{206} Panell, 306 F.3d at 502.
\item \textsuperscript{207} Id.; see also Chavez v. Ylst, 1999 U.S. Dist. LEXIS 9614 (N.D. Cal. 1999) ("The administrative denials of Chavez's claims [relating to the forfeiture of good-time credits] are not entitled to any deference under the AEDPA, which requires deference only to state court decisions."); Piggie v. McBride, 277 F.3d 922, 925-26 (7th Cir. 2002); White v. Indiana Parole Board, 266 F.3d 759, 765-66 (7th Cir. 2001).
\item \textsuperscript{208} 308 F.3d 236, 238 (3d Cir. 2002).
\item \textsuperscript{209} See id.
\item \textsuperscript{210} See id. at 246.
\end{itemize}
claims on their merits, the decision of the state court is entitled to deference in federal court under 28 U.S.C. § 2254(d)(1).\textsuperscript{211}

It is possible, then, to read section 2254(d) as requiring deference to state court decisions reviewing administrative orders, but not to the administrative orders themselves. And this reading is not obviously out of step with Congress's aims. Though federal courts typically have accorded broad deference to administrative decisions of state prison officials,\textsuperscript{212} Congress might well have concluded that, given the differences between court and administrative decisions, section 2254(d) ought not to serve as a vehicle for defining the deference to be accorded administrative decisions.

X. Conclusion

The worst that can be said of these arguments is that they are too obvious. It seems obvious that the AEDPA's statute of limitations, the AEDPA's prohibition on second or successive petitions, and the AEDPA's deferential framework are co-extensive with one another and with section 2254 as a whole. And it seems obvious that the formula used to define the scope of each of these provisions — "in custody pursuant to the judgment of a State court" — was designed to make each provision's applicability in a particular case depend on the source of the prisoner's custody, rather than on the target of the prisoner's complaint. The reasons why Congress would choose to focus on the source of the prisoner's custody, rather than the target of the complaint, also seem obvious, as do the reasons why the analogy between state prisoners and federal prisoners is misguided. Perhaps most obvious of all is that the lower federal courts, in interpreting the phrase "in custody pursuant to the judgment of a State court," are bound by the Supreme Court's interpretation of this very formula in \textit{Preiser}.

But the fact remains that, for all the apparent obviousness of these arguments, two federal courts of appeals already have got these issues badly wrong. Led astray by the flawed analogy between state prisoners and federal prisoners, the Tenth Circuit has concluded that state prisoners who challenge administrative orders that extend their confinement are not subject to 28 U.S.C. § 2254 as a whole.\textsuperscript{213} Worse, the Seventh Circuit has

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\item \textsuperscript{211} See \textit{id.} at 245-46; \textit{see also} Henderson v. Scott, 260 F.3d 1213, 1216 (10th Cir. 2001) (where habeas petition challenged parole board's refusal to grant prisoner annual reconsideration for parole, Tenth Circuit accorded deference to decision of Oklahoma Court of Criminal Appeals rejecting same claim); Powell v. Ray, 301 F.3d 1200 (10th Cir. 2002) (though petition challenging "implementation of the Oklahoma Truth in Sentencing Act" fell under section 2241, rather than 2254, decision of the Oklahoma Court of Criminal Appeals still was entitled to deference).
\item \textsuperscript{212} See, e.g., Turner v. Safley, 482 U.S. 78, 84 (1987); Vann v. Angelone, 73 F.3d 519, 521 (4th Cir. 1996) ("[petitioner] appears before us with a heavy burden . . . for it is difficult to imagine a context more deserving of federal deference than state parole decisions").
\item \textsuperscript{213} See Montez, 208 F.3d at 865.
\end{enumerate}
concluded that state prisoners who challenge administrative orders are subject neither to the AEDPA’s statute of limitations nor to the AEDPA’s requirement of a certificate of appealability. And it is not impossible that other circuits eventually will follow these courts into error, though none has done so yet.

The AEDPA’s four most significant provisions for state prisoners – its deferential framework, its statute of limitations, its prohibition on successive petitions, and its requirement of a certificate of appealability – all apply to state prisoners who challenge administrative decisions that extend their time in confinement, regardless of whether individual members of Congress were thinking about these prisoners when they cast their votes in favor of the AEDPA. In defining the scope of three of these provisions, Congress used the same language it had used years before in defining the scope of the exhaustion requirement and the scope of 28 U.S.C. § 2254 as a whole. And so, in the absence of some very good reason to the contrary, it makes sense to conclude that Congress intended these three new provisions apply to just those prisoners to whom the exhaustion requirement and section 2254 apply. Since the exhaustion requirement and section 2254 apply to state prisoners who challenge administrative decisions that extend their time in confinement, so do these three AEDPA provisions. And so does the fourth AEDPA provision – the requirement of a certificate of appealability – which plainly was intended to reach somewhat more broadly than the other three provisions.

214. See Cox, 279 F.3d at 493-94.
215. See Walker, 216 F.3d at 638.