
ARTICLE

WHAT IS HABEAS?

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The debate about post-conviction habeas for state prisoners is long-running, heated, and conceptually hazy. A majority of the Court is dissatisfied with the broad swath of constitutional errors that can currently give rise to habeas relief. The way the Court sees it, a broad writ is inefficient, untraditional, and bad for federalism. The consensus among scholars is that habeas should be at least as broad as it currently is: a broad writ is just, historically pedigreed, and good for constitutionalism.

But is this debate about unwritten law or about statutory law? It is impossible to have a coherent argument without answering that question. Yet the question has gone unasked for decades. Some scholars and jurists (of both narrow- and broad-writ persuasions) frame things in common law terms. Others emphasize statutes but go on to treat those statutes more like vehicles for judge-made law than as binding commands.

This article argues that the issue is one of statutory law, and it offers the first thoroughgoing analysis of the relevant texts. When Congress extended federal habeas to state prisoners in 1867, it gave courts no power to discharge validly convicted prisoners. But by reenacting the same text in 1948, Congress may have ratified the Court's then-existing interpretations of the 1867 Act. The result, if so, might be a middle-ground position—narrower habeas than petitioners would hope for, but broader habeas than the Court seems to want. In any event, and specific outcomes aside, a focus on statutory law offers new clarity to the habeas discourse.

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[F]or the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.¹

INTRODUCTION

If a conviction survives direct review, it becomes final. From then on, the convicted prisoner has precious few ways to seek freedom. One of those is to “collaterally attack” the conviction—to come at it from the side by petitioning a court for a writ of habeas corpus.² This article addresses the federal habeas writ’s proper scope. More specifically, it considers which kinds of state trial-court errors federal courts should consider on habeas review.³

This interjurisdictional issue first arose in 1867 when Congress opened federal habeas proceedings to state prisoners.⁴ The Supreme Court initially gave (or claimed to give) a very narrow answer: a convicted petitioner was eligible for federal habeas relief only if the state court lacked jurisdiction either to convict or to enter his sentence.⁵ I call this the “jurisdictional defect rule.” The Court purported to apply this rule in state prisoner cases (and federal prisoner cases) until 1915. The Court then gradually softened the rule, allowing relief for some grievous nonjurisdictional defects.⁶ It expressly discarded the rule in the 1953 case *Brown v. Allen*, after which it was enough to show any constitutional defect in the state-court trial, jurisdictional or otherwise.⁷

Scholars and jurists have been arguing about the proper scope of federal habeas ever since. One group, including a Supreme Court majority in two

1 Ex parte Bollman, 8 U.S. (4 Cranch) 75, 93-94 (1807).
2 See Heck v. Humphrey, 512 U.S. 477, 480-81 (1994) (stating that in federal court, a habeas petition is almost always the sole way to collaterally attack a criminal judgment).
3 State habeas review of federal detentions, which the Supreme Court barred in 1871, is beyond this article’s scope. See Tarble’s Case, 80 U.S. (13 Wall.) 397, 411 (1871) (limiting states’ authority to review federal detentions). So is state review of a state’s own detentions.
4 Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385-86 (1867)[hereinafter 1867 Act].
5 See, e.g., Ex parte Parks, 93 U.S. 18, 23 (1876) (“[I]f the [state] court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error”).
6 See discussion *infra* subsection III.B.2.
7 344 U.S. 443, 460 (1953). This does not include other obstacles to habeas relief, like exhaustion, procedural default, or the requirement that the petitioner be in custody.

recent terms, favors a narrow writ.⁸ This group frames the jurisdictional defect rule as an essential part of the Anglo-American habeas tradition. The rule promoted efficiency by preventing the endless relitigation of criminal convictions, and in the context of state convictions, it promoted federalism by giving state courts primacy. So *Brown* was a monumental shift in the law of habeas, and it was a monumental mistake. It “trivialized . . . the writ,” it “was inconsistent with the presumption of finality that traditionally attached to criminal convictions,” and it created “‘haystacks’ of new habeas petitions,” most of which were meritless.⁹ And, although *Brown* is still on the books for now, the Court is not shy about creating judge-made, “equitable” bars to habeas relief as a way of limiting the writ.¹⁰

⁸ See *Jones v. Hendrix*, 143 S. Ct. 1857, 1871 (2023) (rejecting an argument based on the Suspension Clause on the ground that “[a]t the founding, a sentence after conviction by a court of competent jurisdiction was in itself sufficient cause” for detention (emphasis omitted) (quotation omitted)); *Brown v. Davenport*, 142 S. Ct. 1510, 1522 (2022) (criticizing *Brown v. Allen* for discarding “[t]he traditional distinction between jurisdictional defects and mere errors in adjudication”); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1563-64 (2021) (Thomas, J., concurring) (depicting *Brown* as an abrupt change that allowed courts to “grant a writ of habeas . . . simply because they disagreed with a state court’s judgment”); *id.* at 1568-69 (Gorsuch, J., concurring) (reprimanding the *Brown* Court for turning habeas into “little more than an ordinary appeal”); *Wright v. West*, 505 U.S. 277, 285-87 (1992) (plurality opinion) (arguing the traditional scope of habeas was much narrower than *Brown* made it); David Kinnaird, *Habeas Corpus and Void Judgments*, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 4-5, 55, 63-64), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4624001 (taking a moderate narrow-writ view) [<https://perma.cc/8H3V-7W2H>]; Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1100-01 (1995) (“Habeas was available only before conviction and for the purpose of establishing that sufficient legal cause existed for the prisoner’s detention”); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (using a narrow-writ historical narrative and advancing a new focus on innocence); Lewis Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. CHI. L. REV. 31, 43-58 (1965) (provocatively arguing that the 1867 Act was intended to apply only to wrongfully detained freedmen, not to state prisoners at all); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 454-62 (1963) (offering the classic narrow-writ account); *Brown*, 344 U.S. at 547 (Jackson, J., concurring) (“[H]abeas corpus [should] be deemed to lie only for defects . . . going to the power, legal competence or jurisdiction of the committing state court.”); see also Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 793-96 (2009) (arguing federal habeas review of state convictions should be legislatively abolished and the resources reinvested elsewhere); cf. William Kamin, *The Great Writ of Popular Sovereignty*, 77 STAN. L. REV. (forthcoming 2025) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714694 [<https://perma.cc/99VB-62GG>] (reconceptualizing the habeas writ as an instrument of popular sovereignty).

⁹ *Davenport*, 142 S. Ct. at 1522 (quoting *Brown*, 344 U.S. at 543, 536-37 (Jackson, J., concurring)).

¹⁰ For a discussion on compensating adjustments see *infra* Section IV.A. For an argument that the Court’s current jurisprudence on equitable bars is based on a faulty foundation, see generally Lee Kovarsky, *The New Negative Habeas Equity*, 137 HARV. L. REV. 2222 (2024).

The other group, which is the minority view on the Court and the majority view among scholars, favors a broader writ.¹¹ The core policy intuition is easy enough to grasp: it is unjust to imprison people on the basis of state proceedings infected with constitutional violations. Direct review and state collateral review will inevitably miss many such violations—many state courts have poor track records of protecting federal rights, to say the least. And when it comes to history, the broad-writ camp argues the jurisdictional defect rule was never as airtight as some would like to pretend. As the Court dealt with Southern resistance to Reconstruction, it turned that “rule” into more of a legal fiction than a barrier to relief.¹² Federal habeas was thus quite broad before 1953, and *Brown* was less an innovation and more an admission of what everyone had already known for decades.

This well-worn debate conceals a deeper schism about which kind of law even determines the scope of habeas in the first place.¹³ Theorists of both the

¹¹ See *Jones*, 143 S. Ct. at 1895–97 (Jackson, J., dissenting) (arguing that there is a long historical pedigree of broad habeas relief, specifically for claims of legal innocence); *Davenport*, 142 S. Ct. at 1534 (Kagan, J., dissenting) (“*Brown* built on decades and decades of history.”); Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 509 (2022) (arguing that the jurisdictional defect rule “was not, in fact, the traditional rule, and . . . even if it were, Congress has displaced the rule by statute”); 1 RANDY A. HERTZ & JAMES S. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* § 2.4[d][viii]–[e] (7th ed. 2020) (arguing for a “parity” between direct review and habeas review); Lee Kovarsky, *Preclusion and Criminal Judgment*, 92 NOTRE DAME L. REV. 637, 638 (2017) (taking a moderately broad-writ approach and arguing that, counterintuitively, current law actually gives more res judicata effect to state criminal judgments than to civil ones); Eric M. Freedman, *Brown v. Allen: The Habeas Corpus Revolution That Wasn’t*, 51 ALA. L. REV. 1541, 1546 (2000) (arguing that *Brown* merely “reaffirm[ed] . . . the role of the federal courts on habeas corpus,” which was “to determine the correctness of the conclusions on the federal constitutional issues previously reached by the state court”); Alan Clarke, *Habeas Corpus: The Historical Debate*, 14 N.Y.L. SCH. J. HUM. RIGHTS 375, 390 (1998) (“The American developments are rich[] and . . . support a far richer pedigree for habeas corpus than that which is enunciated by Justice Thomas in *Wright v. West* which appears to collapse modern habeas history into the last few years.” (footnote omitted)); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 580 (1993) (arguing that the history of habeas shows a gradually increased willingness to review ad hoc instances of illegality, rather than a constant jurisdictional defect rule); James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2055 (1992) (arguing that habeas review of “all constitutional claims” has been available “since 1867”); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.–C.L. L. REV. 579, 630–34 (1982) (arguing that habeas review of federal questions was plenary in the late 1800s and that what might seem like a jurisdictional defect rule merely reflected the then-narrow scope of substantive criminal-procedure rights); *Fay v. Noia*, 372 U.S. 391, 402–411 (1963) (giving a broad-writ version of habeas history); Donald Chisum, *In Defense of Modern Federal Habeas Corpus for State Prisoners*, 21 DEPAUL L. REV. 682, 685, 691–92 (1972) (conceding much ground on the history but presenting functionalist arguments for a broad writ); see also Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 561–63 (2006) (arguing that federal habeas review of state convictions should be legislatively reformed and in some respects broadened).

¹² See *infra* Section II.C.

¹³ For discussion of the debate on the source of law that defines the scope of habeas corpus see *infra* Section I.A.

narrow- and broad-writ persuasions often assume that the scope of federal habeas is a matter of federal common law. This leads to a focus on whether *Brown* was a fast change in the common law (and therefore bad) or the culmination of a gradual evolution (and therefore good). Others assume that the scope of federal habeas is at least partially a matter of statute. But these scholars and jurists tend to interpret the Act only halfheartedly—either viewing the statute as a vague permission slip for judge-made law or giving the text a literalist gloss with little supporting analysis. The difference of opinion is surpassingly important because, of course, unwritten law and statutory law are fundamentally different. They come into existence in different ways, they change over time through different mechanisms, and judges ascertain their content with different tools. Yet we go on disagreeing about the scope of habeas without even acknowledging that we implicitly disagree about what *determines* that scope.¹⁴

This article argues that *habeas is statutory*—that is, statutory law determines the writ's scope. This article also offers the first rigorous interpretation of the relevant statutes. From the founding, federal courts lacked statutory authorization to issue habeas writs to state prisoners.¹⁵ In 1867, Congress extended federal habeas to prisoners "restrained of [their] liberty in violation of the constitution, or of any treaty or law of the United States."¹⁶ Read in light of the day's established legal principles, this language newly extended the writ to state prisoners without extending it to validly convicted prisoners. Such prisoners were not restrained "in violation of" the law. By leaving federal courts without statutory power to issue writs to validly convicted prisoners, the 1867 Act encoded the jurisdictional defect rule into statutory law.

So, yes, the habeas debate is a conceptual mess. But it does not have to be. A disciplined analytical approach reveals that statutory law is the boss here, as in so many other areas. And a statutory focus provides a roadmap for finding *today's* law: begin with the 1867 Act's original meaning, i.e., with the jurisdictional defect rule, and then ask whether Congress has since altered that rule. Surprisingly, it may well have done so in an oft-overlooked 1948 statute.

¹⁴ Put differently, we go on making truth claims about the scope of habeas without deciding whether unwritten or written law is the truthmaker for those claims. See Christopher R. Green, *Constitutional Truthmakers*, 32 NOTRE DAME J.L., ETHICS & PUB. POL'Y 497, 506 (2018) ("A truthmaker for a particular truth is just some existent, some portion of reality, in virtue of which that truth is true." (quoting DAVID ARMSTRONG, *TRUTH AND TRUTHMAKERS* 1 (2005) (alterations omitted))).

¹⁵ But see *infra* note 185 (acknowledging narrow exceptions to this general rule).

¹⁶ 1867 Act *supra* note 4 § 1.

* * *

Part I takes up the current debate. Some assume that the scope of habeas is determined by unwritten law; others, written law. The solution, I propose, is that unwritten law governed the issue in the early Republic—but Congress encoded the rule into text when it extended habeas to state prisoners in 1867.¹⁷

Part II interprets the 1867 Act's original meaning. Along the way, it makes several novel points that may be interesting even to those who ultimately reject my reading. For one, the nineteenth-century jurisdictional defect rule was a central aspect of habeas law. It was very much *not*, as is often supposed, merely an inference from the Court's limited appellate jurisdiction.¹⁸ For another, the Act's long-overlooked statutory structure strongly suggests that the Act encoded the jurisdictional defect rule.¹⁹ For a third—and contrary to the prevailing scholarly view—the jurisdictional defect rule had teeth and often determined case outcomes. It was not a legal fiction.²⁰

The remainder of the article moves from 1867 through to the present. Part III aims to identify the currently operative statutory text. Here, the usual argument is that a 1966 statute²¹ or 1996's AEDPA²² ratified *Brown's* plenary-review scheme.²³ This is puzzling because neither statute touched the key "in violation of" text. The more plausible argument (although I remain agnostic about its success) is that Congress ratified a middle-ground position in 1948 by reenacting that key text. Part IV turns to doctrinal implications, which fall into two main categories. First, the reenactment argument would have major consequences for the Court's practice of erecting equitable barriers to habeas relief.²⁴ Second, it is worth considering what a revived jurisdictional inquiry would look like today.²⁵ Here, too, the statutory framing offers insights about the way forward.

¹⁷ See *infra* subsection I.B.1 (discussing the 1789 Act's text); *infra* subsection I.B.2 (discussing the more definitive 1867 text).

¹⁸ See *infra* subsection II.A.2.

¹⁹ See *infra* subsection II.B.2.

²⁰ See *infra* Section II.C.

²¹ Act of November 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105 [hereinafter 1966 Act].

²² Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at various sections of 21, 28 U.S.C.).

²³ See *infra* Section III.C.

²⁴ See *infra* Section IV.A.

²⁵ See *infra* Section IV.B.

I. LATENT DISCORD

A. *Two Axes of Disagreement*

The obvious disagreement concerns how *broad* the habeas writ should be—how many kinds of defects should give rise to habeas relief for convicted state prisoners. The narrow-writ camp would prefer to focus on jurisdictional defects, with perhaps an allowance for some other especially egregious errors. Bator’s 1963 article is the classic scholarly example.²⁶ On the Court, Justices Gorsuch and Thomas are this approach’s most vocal proponents.²⁷ The broad-writ camp favors something like *Brown*’s approach, which allowed the writ to issue for practically any error of federal law.²⁸ Peller was an early scholarly adopter of this view; Hertz and Liebman’s leading treatise is a contemporary example.²⁹ We have already seen that these two camps raise a variety of policy and historical arguments to support their views.

There is, however, a second axis of disagreement that has thus far gone unrecognized. This disagreement concerns the source of law that *determines* how broad the writ is. One way to get at this disagreement is to pose a question: if the jurisdictional defect rule were a part of this nation’s law, would it be a rule of unwritten law—presumably, federal common law—or statutory law?

One group, which includes me in a previous work, gives the former answer.³⁰ The narrow-writ version of the story says “the writ of habeas corpus” itself, independently from any statute, “does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final.”³¹ Habeas “evolved at common law,” and the jurisdictional

²⁶ See Bator, *supra* note 8, at 456-57 (suggesting that jurisdictional defects or failures of state corrective process should be reviewable on habeas); see also *supra* note 8 (collecting sources arguing for a narrow writ).

²⁷ See *Brown v. Davenport*, 142 S. Ct. 1510, 1520-22 (2022) (Gorsuch, J.) (asserting that *Brown* displaced a longstanding jurisdictional defect rule; *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2020) (Gorsuch, J., concurring) (“The writ of habeas corpus does not authorize federal courts to reopen a judgment issued by a court of competent jurisdiction once it has become final.”); *id.* at 1563-64 (Thomas, J., concurring) (characterizing *Brown* as an “abrupt change[]” from the traditional jurisdictional defect rule).

²⁸ There are of course middle-ground positions. See, e.g., Woolhandler, *supra* note 11 (critiquing both narrow- and broad-writ approaches); Kovarsky, *supra* note 11 at 676-89 (making normative arguments against the narrow-writ approach).

²⁹ See generally Peller, *supra* note 11 (arguing for plenary review); HERTZ & LIEBMAN, *supra* note 11 (arguing for parity between direct review and habeas review, which is similar); see also *supra* note 11 (collecting sources).

³⁰ See Micah S. Quigley, *Article III Lawmaking*, 30 GEO. MASON L. REV. 279, 336-37 n.318 (2023). Mea culpa.

³¹ *Edwards*, 141 S. Ct. at 1573 (Gorsuch, J., concurring).

defect rule was one of the common law's "limits" on the writ.³² *Brown's* problem is that it departed from this practice, "upend[ing] centuries of settled precedent[,]. . . invit[ing] practical problems[, and] produc[ing] anomalies."³³ In short, post-conviction habeas should be narrow because it was traditionally narrow.

Some broad-writ theorists operate on the same framing. These theorists tacitly concede that *Brown* would be suspect *if it had* radically shifted the common law; they simply maintain that it did not. This view purports to show a "gradual evolution of the law that resulted in the modern writ" and that "support[s] a . . . richer pedigree for [broad] habeas corpus" than narrow-writ theorists acknowledge.³⁴ So "the rule that Justices Thomas and Gorsuch say was the traditional rule was not, in fact, the traditional rule."³⁵ *Brown* instead "built on decades and decades of history," and it is a major case only "because it made explicit, and delineated in precise style, the broad scope of federal habeas."³⁶ In short, post-conviction habeas should be broad because it has been broad for a long time.

The other group assumes the debate is about statutory law. The question, on this framing, is whether a given error means the convicted prisoner is being "restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."³⁷ Both narrow-writ and broad-writ theorists have posed this question. The unfortunate tendency is to give only a halfhearted attempt at answering it.

Bator, for instance, started out with statutory talk. "When is a state prisoner held in 'violation' of federal law?"³⁸ Bator interpreted the Act enough to conclude that it did *not* "compel[] the rule of *Brown*,"³⁹ and he noted that some early cases "*seem[ed]* to hold explicitly that the act of 1867 did not

³² *Davenport*, 142 S. Ct. at 1520.

³³ *Edwards*, 141 S. Ct. at 1569 (Gorsuch, J., concurring).

³⁴ Clarke, *supra* note 11, at 390.

³⁵ Siegel, *supra* note 11, at 509; *see also* Steve Vladeck, *Hiding Behind Habeas's Hardness*, JOTWELL (Oct. 6, 2021), <https://courtslaw.jotwell.com/hiding-behind-habeas-hardness> [<https://perma.cc/6L3N-5U23>] (reviewing Siegel, *supra* note 11); Jonathan Siegel, Comment to Vladeck, *supra* (Oct. 8, 2021, 7:29 PM) (clarifying that he views habeas interpretations as concerning unwritten law).

³⁶ *Davenport*, 142 S. Ct. at 1534 (Kagan, J., dissenting) (citing 1 R. HERTZ & J. LIEBMAN, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* §2.4[d][viii], 73-75 (7th ed. 2020)) (quotation omitted); *see also* Vladeck, *supra* note 35 ("[O]ne could fill a library with two decades of convincing, un rebutted academic work demonstrating beyond peradventure that habeas was far more robust before the Supreme Court's canonical 1953 decision in *Brown v. Allen* than is widely understood . . . Yet, . . . none of that scholarship seems to have broken through").

³⁷ 1867 Act, *supra* note 4, § 1.

³⁸ Bator, *supra* note 8, at 445 (quoting 1867 Act *supra* note 4, § 1).

³⁹ *Id.* at 474-75.

empower the federal courts” to decide nonjurisdictional issues.⁴⁰ Yet he stopped short of affirmatively offering his own interpretation: “[r]ead in the context of its time, the statute may at most be regarded as ambiguous.”⁴¹ Bator concluded that “the choice between [narrow and broad habeas review] *must* be made on the basis of functional, institutional[,] and political considerations.”⁴² And so he wound up advancing a modified version of the jurisdictional defect rule without attempting to harmonize it with the 1867 Act’s meaning.⁴³ Bator thus teed up an interpretive question and gave it a noninterpretive answer.

Another narrow-writ example is Justice Thomas’s plurality opinion in *Wright v. West*.⁴⁴ Justice Thomas began the analysis like this: “The habeas corpus statute permits a federal court to entertain a petition from a state prisoner ‘only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.’”⁴⁵ So far, so good. But he then immediately discounted that statutory requirement as a “bare guideline[.]”⁴⁶ The text, he assumed, serves only to “reflect the common law” jurisdictional defect rule, not to impose that rule.⁴⁷ The rest of the analysis was a Bator-like combination of precedent summary and prudential reasoning: “significant costs” and “countervailing benefits” “must be taken into consideration in defining the scope of the writ.”⁴⁸ This mode of analysis treats the statute less like a command from Article I and more like an empty vessel to be filled with judge-made law.⁴⁹

The broad-writ statutory approach likewise features skepticism that the text means much. Woolhandler notes that scholars have focused on “the intent of Congress when passing the 1867 Act.”⁵⁰ But she resorts to a form of

⁴⁰ *Id.* at 481 (emphasis added).

⁴¹ *Id.* at 477.

⁴² *Id.* at 449 (emphasis added).

⁴³ See *id.* at 456–57 (discussing his conclusion that a failure to provide “full and fair” opportunity to litigate should also suffice, even without a jurisdictional defect).

⁴⁴ See *Wright v. West*, 505 U.S. 277, 285–86 (1992) (characterizing the 1867 text as providing only “bare guidelines”); see also *Edwards v. Vannoy*, 141 S. Ct. 1547, 1562–64 (Thomas, J., concurring) (arguing the same as he did in *Wright*); Mayers, *supra* note 8, at 43–48 (arguing, with a bit more textual analysis, that the 1867 Act did not authorize federal habeas for state prisoners *at all*); *infra* note 253 (discussing Mayers).

⁴⁵ *Wright*, 505 U.S. at 285 (plurality opinion).

⁴⁶ *Id.*

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.* at 285–93.

⁴⁹ For discussion of judge-made law in interpretive contexts, see generally Tyler B. Lindley, *Interpretive Lawmaking* 111 VA. L. REV. (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4714692 [<https://perma.cc/HNF9-KYXV>].

⁵⁰ Woolhandler, *supra* note 11, at 582; see also William M. Wiecek, *The Great Writ and Reconstruction: The Habeas Corpus Act of 1867*, 36 J.S. HIST. 530, 539 (1970) (“Congressional intent

statutory dynamism after concluding that “[t]he legislative history of the . . . Act is limited, and its terms could be considered ambiguous.”⁵¹ This is akin to Bator’s recourse to functionalism—if the statute is unilluminating, stop trying to interpret it and do something else instead. Peller, in contrast, thinks that there really are answers to be found in the text: “[W]hen viewed in its historical context, the broad language of the 1867 Act must be read literally to require relitigation of every federal question.”⁵² Peller’s “literalist” reading, though free from terminal linguistic skepticism, suffers from an equally terminal failure to appreciate the text’s grammatical structure and legal context. I discuss this below.⁵³

So what seemed like a typical disagreement with two sides and some middle ground turns out to be more complicated—we are dealing with quadrants, not a simple spectrum.⁵⁴ Further, because this issue has gone largely unnoticed, the unwritten and statutory approaches proceed apace without even acknowledging that there is a disagreement.⁵⁵ This is a serious problem because unwritten and statutory law are fundamentally different types of law that change over time in very different ways. Post-conviction habeas will remain bewildering until this problem is in the rear-view.

in passing the Habeas Corpus Act of 1867 is unusually murky, even for a piece of Reconstruction legislation”).

⁵¹ Woolhandler, *supra* note 11, at 582, 643 (“It is the direction of [jurisprudential] changes rather than the scope of habeas at any particular moment that provides the significance of habeas history”).

⁵² Peller, *supra* note 11, at 618; *see also* HERTZ & LIEBMAN, *supra* note 11, § 2.4[d][iii] (offering a similar textual argument on the breadth of habeas in the Reconstruction Era).

⁵³ *See* discussion *infra* Section II.B.

⁵⁴ And even this leaves out the analyses that *hedge* about the type-of-law issue. *Compare* Clarke, *supra* note 11, at 390 (framing habeas as common law), *with id.* at 401 (framing habeas as statutory); *compare* HERTZ & LIEBMAN, *supra* note 9, at § 2.4[d] [iii] (framing habeas as statutory), *with id.* at § 2.4[d][x] (using what is evidently a common law framing). Likewise with analyses that take no stance on the issue. *See, e.g.,* *Fay v. Noia*, 372 U.S. 391, 402-14 (1963) (engaging in historical discussion but leaving unclear which type of law was at play).

⁵⁵ For one exception, see generally Note, *A Textual Argument for Challenging Conditions of Confinement under Habeas*, 135 HARV. L. REV. 1397 (2022), which advances a statutory argument for allowing prisoners to challenge their conditions of confinement by way of habeas. The clarity is commendable, but the argument is neither here nor there for present purposes. Also, the difference between a common law and statutory approach seems to be clearly recognized in the context of executive-detention habeas. *Compare* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2040-45 (2007) (identifying the two approaches described in this article and tentatively defending a common law approach), *with* Amanda L. Tyler, *A “Second Magna Carta”: The English Habeas Corpus Act and the Statutory Origins of the Habeas Privilege*, 91 NOTRE DAME L. REV. 1949, 1950-53 (2016) (emphasizing the importance of statutory habeas law).

B. *A Proposed Solution*

A careful comparison of two provisions—one from the 1789 Judiciary Act and the other from the 1867 Act—suggests a solution. Limitations on the scope of federal habeas corpus were initially a matter of unwritten law. But Congress codified those limitations into statute in 1867, at least with respect to state prisoners.

1. The 1789 Act's Sparse Text

The starting point is the 1789 Act. In relevant part:

[E]ither of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.⁵⁶

That text conferred on federal courts the “power” to issue habeas writs.⁵⁷ It also imposed two limitations: federal courts could issue writs only “for the purpose of an inquiry into the cause of commitment” and only to federal prisoners.⁵⁸ Yet the statute was silent about when it would be *proper* or *mandatory* for a court to issue a writ. There was no requirement, for instance, that a court issue the writ if conditions X, Y, or Z obtain. As long as the petition was “for the purpose of an inquiry into” a federal prisoner’s “cause of commitment,” the statute had nothing more to say.⁵⁹

Chief Justice Marshall recognized this paucity of statutory law in the canonical *Ex parte Watkins*.⁶⁰ To Chief Justice Marshall’s mind, the question of power was easy. “No doubt exists respecting [the Court’s] power [to issue a writ]; the question is whether this be a case in which it ought to be

⁵⁶ Judiciary Act of September 24, 1789, ch. 20 § 14, 1 Stat. 73, 82 [hereinafter 1789 Act].

⁵⁷ *Id.* Note that issuing a *writ* was not coterminous with issuing ultimate *relief*. For a bit more on this, see *infra* note 79.

⁵⁸ With the exception of non-federal prisoners who must be “brought into court to testify.” 1798 Act *supra* note 56; see also 28 U.S.C. § 2241(c)(5) (mirroring the exception for non-federal prisoners who are brought to court to testify). Also, I have omitted the All Writs part of the statute because that allows habeas writs only as an aid to preexisting jurisdiction, not as a means for testing the legality of a detention. See 1789 Act, § 14; cf. WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 12-23 (1980) (explaining the habeas writ was originally a way to ensure appearance in court, not a means of evaluating the lawfulness of a custody).

⁵⁹ 1789 Act § 14; see also Kinnaird, *supra* note 8, at 65 (noting that, because “commitment” is a technical term, “an inquiry into the cause of commitment” is possible only where a state actor is doing the restraining).

⁶⁰ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830).

exercised.”⁶¹ He then cast about for statutory limitations and came up empty: “[n]o law of the United States prescribes the cases in which this great writ shall be issued, nor the power of the court over the party brought up by it.”⁶²

Faced with that silence, Marshall applied principles of unwritten law by default. The statute’s “general reference to a power which [the Court is] required to exercise, without any precise definition of that power, imposes on us the necessity of making some inquiries into its use, according to that law which is in a considerable degree incorporated into our own,” i.e., traditional principles of general law (of which more later).⁶³ By its nature, the habeas writ looks to whether a petitioner is “imprisoned without sufficient cause”⁶⁴—or, as a treatise would put it a few decades later, whether “the custody [is] unlawful.”⁶⁵ And “the judgment of a court of competent jurisdiction . . . is . . . in itself sufficient cause” for imprisonment.⁶⁶ So if there is no jurisdictional defect, no writ can issue. The merits of this jurisdictional defect rule—and the extent to which the rule really applied at all—are not now the point. The point is that Marshall’s opinion located substantive limitations on habeas in unwritten law.

Other cases confirm this approach. Justice Story’s earlier opinion in the less famous *Ex parte Kearney* centered on the same two questions:

[F]irst, whether this Court has *authority* to issue a *habeas corpus*, where a person is in jail, under the warrant or order of any other Court of the United States; secondly, if it have, whether, upon the facts stated, a fit case is made out to *justify the exercise* of such an authority.⁶⁷

The answer to the first question was yes, because of the 1789 Act.⁶⁸ The answer to the second question was no, because the law’s general “principle [and] usage” imposed the jurisdictional defect rule, and the petitioner had

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 201-02.

⁶⁴ *Id.* at 202.

⁶⁵ SAMUEL T. SPEAR, *THE LAW OF THE FEDERAL JUDICIARY: A TREATISE ON THE PROVISIONS OF THE CONSTITUTION, THE LAWS OF CONGRESS, AND THE JUDICIAL DECISIONS RELATING TO THE JURISDICTION OF, AND PRACTICE AND PLEADING IN THE FEDERAL COURTS* 615 (New York, Baker, Voorhis & Co. 1883).

⁶⁶ *Watkins*, 28 U.S. at 202; *see also id.* (explaining that the 1679 Habeas Corpus Act, which “enforce[d] the common law,” did not extend the writ to “persons convicted”).

⁶⁷ *Ex parte Kearney*, 20 U.S. (7 Wheat) 39, 41 (1822) (emphasis added).

⁶⁸ *Id.* at 42 (citing *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)). *Bollman* similarly framed the 1789 Act as a power—granting statute that left it to the common law to limit the writ: “[F]or the meaning of the term habeas corpus resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States must be given by written law.” *Bollman*, 8 U.S. at 93-94.

identified no jurisdictional defect.⁶⁹ As the Court would put it in a much later federal prisoner case, “[t]here are other limitations of the jurisdiction . . . arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived.”⁷⁰

Thus, even in a time when the dichotomy between written and unwritten law was perhaps less stringent than it is today, the Court clearly recognized that these *were* two different bodies of law that did two very different things. Statutory law directed the habeas endeavor at a high level of generality (by telling courts to “inquir[e] into [the sufficiency of] the cause of commitment”),⁷¹ but it was general law that substantively restricted the writ’s scope.

Some federal prisoner cases do have language that seems to ground the rule in statute rather than unwritten law—idea being that the 1789 Act simply never empowered federal courts to question jurisdictionally sound convictions. In *Ex parte Parks*, the Court noted that the English common law’s “general principles . . . must have been in the mind of Congress when” it enacted the 1789 Act.⁷² In *Ex parte Curtis*, the Court suggested that substantive habeas limitations went to the Court’s “jurisdiction.”⁷³ And *Ex parte Yerger* features some dicta where the Court described habeas limitations as inherent to the 1789 Act.⁷⁴

The overall better reading, however, is that unwritten law and not the 1789 Act imposed limitations on habeas. That reading fits much better with the 1789 Act’s open-ended text, and it finds strong support in the Court’s seminal (and more thorough) cases on the topic: *Watkins* and *Kearney*. The Court’s formulations in much later cases like *Parks*, *Curtis*, and *Yerger* were perhaps inexact restatements of a principle so well established as not to need precise explication.⁷⁵

⁶⁹ *Kearney*, 20 U.S. at 44-45.

⁷⁰ *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

⁷¹ 1789 Act, *supra* note 56, § 14.

⁷² *Ex parte Parks*, 93 U.S. 18, 21 (1876).

⁷³ *Ex parte Curtis*, 106 U.S. 371, 375 (1882).

⁷⁴ *Ex parte Yerger*, 75 U.S. 85, 101 (1868). In the Court’s words:

“As limited by the act of 1789, [federal habeas jurisdiction] did not extend to cases of imprisonment after conviction, under sentences of competent tribunals; nor to prisoners in jail, unless in custody under or by color of the authority of the United States, or committed for trial before some court of the United States, or required to be brought into court to testify.”

Id.

⁷⁵ If this is incorrect, the interpretation of the 1867 Act still looks much the same. Rather than being drafted against the backdrop of a previously unwritten jurisdictional defect rule, the 1867 Act would have been drafted against the backdrop of an already written rule.

2. The 1867 Act's More Definitive Text

The 1867 Act gave federal courts the “power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.”⁷⁶ This is what extended federal habeas to state prisoners.⁷⁷ After the custodian gave his return, the habeas court would conduct a summary proceeding to determine whether the restraint did in fact violate federal law.⁷⁸ If it did, the statute required the court to “discharge[]” the prisoner “forthwith.”⁷⁹ If the restraint did not violate federal law, the petitioner was ineligible for relief.⁸⁰

This gave habeas courts much more direction than did the 1789 Act. The 1789 Act empowered courts to grant habeas writs without telling them when they should or should not do so. Any unwritten, substantive restrictions on habeas's scope (like the jurisdictional defect rule) then applied by default. But the 1867 Act told federal courts to grant habeas relief *if and only if* the petitioner was being held in violation of federal law.⁸¹ Now, to the extent any substantive limitations applied to state prisoner petitions, it was because the statute imposed them—an ineligible prisoner was not restrained “in violation of” the law. “The power of [the federal] courts on this subject” had become “purely statutory, and . . . , therefore, confined to the limits fixed by statute.”⁸² In this way, the 1867 Act was much more specific than the 1789 Act. One might say it was more “restrictive” on the courts, not in the sense that it necessitated fewer grants of relief, but in the sense that it took the merits out of the general law's domain and supplied a statutory rule of decision.

⁷⁶ 1867 Act, *supra* note 4, § 1.

⁷⁷ *But see infra* note 185 and accompanying text.

⁷⁸ 1867 Act § 1.

⁷⁹ *Id.* Granting a writ did not guarantee granting *relief*—i.e., discharge. Still, the two often went together. *See, e.g., In re Medley*, 134 U.S. 160, 174-75 (1890) (granting the writ and ordering discharge at the same time).

⁸⁰ *See* 1867 Act § 1 (telling courts not to issue writs at all, much less order discharge, if “it shall appear from the petition itself that the party is not deprived of his or her liberty in contravention of the constitution or laws of the United States”).

⁸¹ *Id.* The “if and only if” is a simplification. Under *Ex parte Royall*, a federal habeas court had discretion whether to hear the petition or to wait until after the state proceedings had concluded. 117 U.S. 241, 250-52 (1886). But “[i]t soon became apparent that the discretionary nature of the power [to review a lower state court judgment] was rather illusory,” and *Royall* became a more rigid exhaustion requirement. DUKER, *supra* note 58, at 199-204. Habeas was, nevertheless, sometimes appropriate to discharge state prisoners from pre-trial detention in extraordinary circumstances. *See, e.g., id.* at 201-202 (giving as an example *Cunningham v. Neagle*, 135 U.S. 1 (1889), in which a state detained a federal officer who killed a former Chief Justice of the California Supreme Court after the latter had assaulted United States Supreme Court Justice Stephen Field).

⁸² SPEAR, *supra* note 65, at 624.

Early interpretations back up this reading, too. I discuss the cases in more detail in Section II.B,⁸³ but the key for present purposes is that the two-step analysis of the federal prisoner cases did not apply for state prisoners. Now, one treatise said, statutory law “specifie[d]” the “classes of cases” in which habeas was allowed and “declare[d] that the writ shall not extend . . . unless [the] case comes within one of these classes.”⁸⁴ Or take *Ex parte Bridges*, where Justice Bradley (riding circuit) explained that a state prisoner was entitled to habeas relief because a federal statute had deprived the state court of jurisdiction.⁸⁵ Unlike the general law reasoning in *Watkins* and *Kearney*, Justice Bradley’s analysis keyed straight to the statutory text: the prisoner was entitled to relief because it was “in violation of *the laws of the United States* for the state court to try and imprison [him] for the crime in question.”⁸⁶ The Supreme Court took the same tack 15 years later in *In re Medley*, a case involving a sentence that was void because imposed pursuant to an unconstitutional statute.⁸⁷ The Court held that the prisoner was “entitled to his discharge . . . because, *within the language of* [the 1867 Act], he is in custody in violation of the Constitution of the United States.”⁸⁸ “The single question” in these state prisoner cases, quite simply, was “whether [the petitioner] is held in custody in violation of” federal law.⁸⁹

These early readings show that the 1867 Act’s more substantial text was not lost on interpreters. There had been a shift in focus: from whether unwritten law allowed relief to whether the petitioner fit within the statutory text. The endeavor was now an interpretive one.

3. Objections

One might object that the 1867 Act was incorporating the general law of habeas *by reference* without fixing any substantive limitations into the statute. By way of comparison, consider Baude, Campbell, and Sachs’s view of the Privileges or Immunities Clause, which says the Clause “secured” certain general law rights without “conferring” or “federalizing” those rights.⁹⁰ Maybe the 1867 Act did something similar. Maybe a state prisoner was restrained “in violation of” federal law if and only if the restraint would be

⁸³ See *infra* Section II.B.

⁸⁴ SPEAR, *supra* note 65, at 617.

⁸⁵ *Ex parte Bridges*, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1,862).

⁸⁶ *Id.* at 105 (emphasis added).

⁸⁷ *In re Medley*, 134 U.S. 160, 172–74 (1890); see also *infra* note 138 and accompany text.

⁸⁸ *Medley*, 134 U.S. at 174 (emphasis added).

⁸⁹ *In re Converse*, 137 U.S. 624, 631 (1891).

⁹⁰ See William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1227–28 (2024).

unlawful under general law habeas principles, whatever those principles may be when the case arises.

It is hard to rule out this interpretation definitively, but the purely statutory reading explains things in a more parsimonious way. Most importantly, the 1867 Act's text does not read like a directive to apply a non-statutory body of law. Consider that the Fourteenth Amendment referenced "the privileges or immunities of citizens of the United States"⁹¹ without purporting to "confer[] them anew in the federal Constitution."⁹² That reference suggests that the Amendment was incorporating a preexisting body of law. The 1867 Act, in contrast, has no such reference. It just says habeas is allowed if and only if the restraint on liberty is "in violation of" federal law. As I will argue below, the general law's jurisdictional defect rule was a key *background* principle that would have informed readers' understanding of what that phrase meant. But that is a matter of textual meaning, not incorporation by reference. This is why the Court subsequently located habeas limitations in the 1867 Act rather than in general law.

Congress also had little incentive to take the incorporation-by-reference approach. In the context of the Privileges or Immunities Clause, the Amendment's framers wanted to secure a variegated tapestry of principles that would have been impossible to codify exhaustively. The incorporation-by-reference approach allowed for federal enforceability without requiring the framers "to define, alter, or even fully agree about the rights at issue."⁹³ But in the habeas context, the jurisdictional defect rule was anything but a variegated tapestry. It was one rule, and nobody had any doubts about what it said. (That there were difficult edge cases in *application* does not change that.) In that context, it is hard to see the need to incorporate changeable general law principles by reference. Rather, as I will argue below, Congress extended federal habeas to state prisoners—but it did not extend federal habeas so far as to cover validly convicted state prisoners.

A closely related objection would be that the 1867 Act was a "common law statute[] . . . written in such sweeping and general terms" as to "resist[] . . . standard methods of statutory interpretation"—a statute with a "purpose[] . . . too abstract for deriving rules of decision."⁹⁴ If so, then it may be a mistake to come at the Act with ordinary interpretive tools. Courts would instead have to treat the text as an occasion for "creating federal common law."⁹⁵

⁹¹ U.S. CONST. amend. XIV, § 1, cl. 2.

⁹² Baude, Campbell & Sachs, *supra* note 87, at 1227.

⁹³ *Id.* at 1207.

⁹⁴ Charles W. Tyler, *Common Law Statutes*, 99 NOTRE DAME L. REV. 669, 671, 675 (2023).

⁹⁵ *Id.* at 675 (internal quotations omitted); see also *id.* at 675-700 (overviewing competing approaches to the interpretation of common law statutes and offering an approach of his own).

There are several reasons not to treat the 1867 Act as a common law statute. First, “the common-law-statute model is inconsistent with most text-based approaches to statutory interpretation,”⁹⁶ and text-based approaches are (in my view, rightly) dominant today.⁹⁷ Second and related, treating a text as a common law statute requires judicial lawmaking that arguably violates Article III.⁹⁸ Third, even if there is such a thing as a common law statute to which ordinary interpretive rules do not apply, the 1867 Act does not fit the bill.⁹⁹ Maybe the 1789 Act’s habeas provisions do. Story, Marshall, and other interpreters despaired of finding substantial answers in that text and applied general law instead. But it is telling that the 1867 Act did not get the same treatment—early readers seemed to think it was amenable to “standard methods of statutory interpretation” in a way that common law statutes are not.¹⁰⁰

4. Ramifications and Error Theory

If this framework is correct, several things follow. Most important: the first order of business should be interpreting the 1867 Act. What counts, then, is whether the phrase “restrained of . . . liberty in violation of the constitution, or of any treaty or law of the United States” extended federal habeas relief to state prisoners held subject to jurisdictionally sound convictions.¹⁰¹ If the answer is “yes,” then the Act required federal courts to issue habeas relief to convicted state prisoners upon finding (at least some kinds of) nonjurisdictional defects. If the answer is “no,” then the Act—by leaving federal courts unempowered to issue writs to validly convicted state prisoners—required courts to follow the jurisdictional defect rule.

Second, if we want to know what today’s operative law of post-conviction habeas is, we should begin with whatever rule the 1867 Act imposed and see whether intervening events have changed things. A statute’s meaning remains fixed in time. But statutory law can change if Congress changes it. As I point out in Part III, that obvious fact means the governing statutory text is *not* the

⁹⁶ Kovarsky, *supra* note 10, at 2233–34 n.86.

⁹⁷ William N. Eskridge, Jr., Brian G. Slocum, & Kevin Tobia, *Textualism’s Defining Moment*, 123 COLUM. L. REV. 1611, 1616 (2023) (“Textualism is now clearly ascendant and will remain so for the foreseeable future.”)

⁹⁸ See Lindley, *supra* note 49, at 62 (arguing that that Article III does not grant federal courts the power to make law in interpretive cases).

⁹⁹ Cf. Tyler B. Lindley, *Anachronistic Readings of Section 1983*, 75 ALA. L. REV. 898, 907–08 (2024) (noting the problems with reading Section 1983, which was enacted four years later, as a common law statute).

¹⁰⁰ Tyler, *supra* note 94, at 671.

¹⁰¹ Another way to pose the question is to ask whether the statute’s semantic meaning was broad enough to cover such custodies.

1867 Act's text; it is the 1867 Act's text *as reenacted* in 1948. And the reenacted text might not mean the same thing it did the first time around.

Third, it is time to retire the theories that treat post-conviction habeas as an area of unwritten law. When narrow-writ theorists suggest habeas should be narrow because unwritten law traditionally said so, they are making a category error. The same goes for broad-writ theorists who maintain *Brown* was correct because it faithfully applied principles of unwritten law, or for those who suggest today's unwritten law of interjurisdictional preclusion should apply.¹⁰² When Congress speaks to an issue, unwritten law no longer governs that issue.¹⁰³

Fourth, historical materials are still relevant, but they are relevant in a very specific way. The usual approach is to begin with pre-founding English law, discuss cases like *Watkins* and *Kearney*, then move on to the exciting cases from the late 19th century before finishing off with those leading up to *Brown*.¹⁰⁴ This approach portrays the broad sweep of habeas law: where it began, where it went, and where it seems to be going. Yet if statutory meaning is the goal, this is a mistake. For the 1867 Act, the most relevant sources are those closest to 1867.¹⁰⁵ For the 1948 reenactment, the most relevant sources are those closest to 1948. And those sources are relevant not for their own sake but as clues to statutory meaning.

Fifth, this way of seeing things also provides an error theory—an explanation for the longstanding confusion among able scholars and jurists. The confusion stems from the fact that the jurisdictional defect rule really *was* an unwritten rule (in the federal prisoner cases) but then *became* a written one (in the state prisoner cases). So the unwritten framing is correct, for example, to say that “Chief Justice Marshall invoked the common law rule” in *Watkins*, which arose under the 1789 Act.¹⁰⁶ But it is incorrect to characterize the later state prisoner cases in the same way.¹⁰⁷ Similarly, the

¹⁰² For more on this last point, see *infra* subsection IV.B.4.

¹⁰³ Cf. John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 147–52 (1998) (making a broadly similar point in the context of administrative law).

¹⁰⁴ See, e.g., *Brown v. Davenport*, 142 S. Ct. 1510, 1520–22 (2022) (following that approach); *id.* at 1531–35 (Kagan, J., dissenting)(same); see also Kinnaird, *supra* note 8, at 28–30 (discussing Bracton, Coke, and Blackstone); PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* (2010) (providing a revisionist history of the writ's English development that, I suspect, is more relevant for executive-detention habeas than for post-conviction habeas). For the reasons I give above the line, I do not think it matters whether cases like *Watkins* were wrong about the English jurisdictional defect rule. See, e.g., Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753, 768–69 (2013) (arguing *Watkins* was wrong).

¹⁰⁵ In Part II, because of the limited number of cases, I do discuss later cases. These are still less relevant than they would have been if decided closer to 1867, but they are what we have.

¹⁰⁶ *Davenport*, 142 S. Ct. at 1521.

¹⁰⁷ See, e.g., *id.* at 1521 n.1 (listing cases and implicitly characterizing that list, including state prisoner cases, as involving unwritten law).

statutory framing would be wrong to say that the 1789 Act was a source of habeas limitations in the early federal prisoner cases. But the statutory framing is quite right to say the state prisoner cases turn on “contemporary understandings of . . . the 1867 Act.”¹⁰⁸ In this way, each of the competing framings has been getting things half right. We can get things all the way right by recognizing that what had been an unwritten rule became statutory law in 1867.

The rest of the article applies this new framework, concluding that the jurisdictional defect rule was a nonfictional part of the 1867 Act and that a modified version of the rule probably perdures today under the 1948 Act. But readers need not agree with these conclusions to accept the starting point. The habeas debate would be a lot clearer if we could all agree that the writ’s scope is a matter of statutory law in state prisoner cases. Failing that, it would still go a long way if we could even openly disagree about which kind of law governs rather than talking past one another.

II. THE 1867 ACT’S MEANING

This Part of the article interprets the 1867 Act. I argue that the Act, as originally understood, imposed the jurisdictional defect rule in cases involving convicted state prisoners. More precisely, the Act did not empower federal courts to grant habeas writs to validly convicted state prisoners.

Interpretive theory is not this article’s focus, but a word on methodology may be helpful. My goal is to find the text’s “original meaning”—the understanding “an informed, reasonable member of the community would have [had] at the time of the [text’s] adoption.”¹⁰⁹ In non-technical statutes, original meaning is usually determined by *ordinary meaning*—the “everyday meaning[.]” of the words in the statute.¹¹⁰ But when “context indicates that a technical meaning applies[,] . . . *ordinary legal meaning* is to be expected, which often differs from common meaning.”¹¹¹ For example, a statute that refers to “persons” should generally be understood to include artificial persons like corporations, even if a “nonlawyer unschooled in the ways of legal

¹⁰⁸ Woolhandler, *supra* note 11, at 583.

¹⁰⁹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* app. B at 322 (2012). The interpretive discussion that follows is worth considering even for non-textualists because practically every interpretive method has some role for original meaning, even if not an exhaustive one.

¹¹⁰ *Id.* § 6.

¹¹¹ *Id.* (italics added). Another way to say it is that, in a technical context, ordinary meaning incorporates legal meaning by reference: an informed non-lawyer “would . . . believe that legal documents receive—at least for legal purposes—a legal interpretation that employs legal methods.” John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 N.W. L. REV. 751, 765 (2009).

terminology” would find that odd.¹¹² As we will see, the 1867 Act employed terms that seem nebulous when read in a vacuum, but that in fact drew a well-defined, technical meaning from established background principles.¹¹³

This Part has three sections. The first explains that the jurisdictional defect rule was an established principle of general law in the 19th century, applicable in both state and federal courts. This rule was part of the law of *habeas*, not merely an incidental consequence of the Supreme Court’s limited appellate jurisdiction. The second argues that the 1867 Act encoded that previously unwritten rule by extending federal habeas to state prisoners only if they were “restrained of [their] liberty in violation of the constitution, or of any treaty or law of the United States.”¹¹⁴ The third argues that the jurisdictional defect rule was a nonfictional rule that had great force. The 1867 Act encoded that real rule, not a legal fiction, into this nation’s statutory law.

A. Federal Prisoner Cases and the Unwritten Jurisdictional Defect Rule

1. The General Law’s Jurisdictional Defect Rule

In the nineteenth century, there was something called “general law.” This was the unwritten body of “general principles and . . . general usages which are to be found not in the legislative acts of any particular state, but in that generally recognised and long-established law, which forms the substratum of the laws of every state.”¹¹⁵ The general law was neither federal nor state law. Instead, both state and federal courts applied it when no other source of law, e.g., constitutional, treaty, or statutory law, governed the issue at hand. (Contrast *general law* with *local law*—the latter being under the sole control of any given jurisdiction.)¹¹⁶ “[W]hat matter[ed] [wa]s how *most* states d[id] things, not whatever the policymakers in one particular state . . . said.”¹¹⁷ And

¹¹² SCALIA & GARNER, *supra* note 109, § 6; James C. Phillips, *Ordinary Meaning as Last Resort: The Overlooked Meaning of “Undue Hardship” in Title VII*, 49 BYU L. REV. 1319, 1332–38 (2024) (overviewing the doctrine and authorities regarding technical meaning, including the presumption of legal meaning for statutory terms).

¹¹³ For the background principles that formed a backdrop for the 1867 Act, including the jurisdictional defect rule, see *infra* subsection II.A.1.

¹¹⁴ 1867 Act, *supra* note 4, § 1.

¹¹⁵ *United States v. Burr*, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (opinion of Marshall, J. riding circuit); see also Baude, Campbell, & Sachs, *supra* note 90, at 1194 (quoting this passage and elaborating on general law’s cross-jurisdictional character).

¹¹⁶ Baude, Campbell & Sachs, *supra* note 90, at 1183.

¹¹⁷ Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503–04, 524 & n.114; see also Stephen E. Sachs, *Pennoyer Was Right*, 95 TEX. L. REV. 1249, 1269 (2017) (quoting Nelson and elaborating on the widespread nature of general law); Baude, Sachs & Campbell, *supra* note 90 (“[N]o single jurisdiction’s courts had authority to settle [the] content [of general law]”).

obviously, federal courts' repeated pronouncements of general law had persuasive force of their own.

There was a significant body of general law habeas principles in the 1800s. The jurisdictional defect rule was one of those principles. Habeas's function was to assess the legality of a restraint on liberty, and a jurisdictionally sound judgment of conviction was "in itself sufficient cause" for a restraint.¹¹⁸ A habeas court therefore could not question a jurisdictionally sound judgment of conviction (as determined by the general law of jurisdiction).¹¹⁹ But a jurisdictionally defective judgment was utterly void and was thus no barrier to habeas relief. One treatise surveyed a great number of state-court habeas cases from the 1800s and summarized as follows:

It has been said by a thousand courts and a thousand judges that alleged errors and irregularities behind the judgment can not be inquired into on habeas corpus; and that the writ of habeas corpus was never designed to be a writ of error, by which the errors or irregularities of final judgments could be revised. It deals with more radical defects, which go to the jurisdiction of the court or officer, and which render the proceeding or judgment void. No matter how flagrant the error, the party must prosecute his appeal, writ of error, or certiorari; his remedy is not by habeas corpus. *On this writ nothing will be investigated except jurisdictional defects.*¹²⁰

The rule was sometimes a matter of statutory law: many state statutes expressly forbade habeas relief to convicted prisoners.¹²¹ But other times it remained unwritten, and it had no less force for that. As Oaks notes, there is an "absence of evidence that the scope of review of final criminal judgments was any more comprehensive" in cases governed by unwritten law.¹²² And, although there were a few instances of state courts deviating from the rule,

¹¹⁸ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202.

¹¹⁹ See Sachs, *supra* note 117, at 1252 (explaining that federal courts could take their own view of general law); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *347 (Boston, Little, Brown, & Co. 1883) (cross-referencing his own discussion of ordinary jurisdiction law as the source of "rules regarding the validity of judicial proceedings" for habeas purposes).

¹²⁰ WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS: INCLUDING JURISDICTION, FALSE IMPRISONMENT, WRIT OF ERROR, EXTRADITION, MANDAMUS, CERTIORARI, JUDGMENTS, ETC. WITH PRACTICE AND FORMS § 363, at 473 (San Francisco, Bancroft-Whitney Co. 1886) [hereinafter Church (1st ed. 1886)] (emphasis added); see also ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND WRIT OF HABEAS CORPUS 336 (1st ed., Albany, W. C. Little & Co. 1858) [hereinafter Hurd (1st ed. 1858)] ("But when the cause of commitment is shown and the prisoner is found in custody of a court of competent jurisdiction, not illegally asserted, the writ has fulfilled its office and the prisoner should be remanded."); *id.* at 329-51 (collecting many English and state cases to this effect).

¹²¹ Dallin H. Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 261-62 (1965).

¹²² *Id.* at 262.

“their authority is of little weight when compared with the numerous decisions on other points involving the same principles.”¹²³ So the jurisdictional defect rule, which was itself part of the general law (of habeas), conditioned habeas relief on whether the convicting court had jurisdiction under general law principles (of jurisdiction).

The rule was in this way a cognate of the *res judicata* rule, under which a jurisdictionally sound judgment was untouchable except on direct review.¹²⁴ A judgment, including a conviction, was always binding; a void judgment was no judgment at all. A prisoner held pursuant to such a faux judgment was no different than a prisoner locked up in the Tower of London on the King’s arbitrary command. Yet despite that similarity, the jurisdictional defect rule was more than a rote importation of *res judicata* into habeas cases. The rule was a “principle . . . which [ran] through the whole *law of habeas corpus*”—a limitation inherent in the very nature of the writ.¹²⁵ Hence the frequent judicial refrain that “[t]he writ of habeas corpus cannot be used to perform the office of a writ of error or appeal.”¹²⁶

What exactly could qualify as a jurisdictional defect sufficient to warrant habeas relief? At a high level of generality, the answer was simple: Jurisdiction was “[t]he power to hear and determine a cause[.]”¹²⁷ and it consisted then (as it does now) of subject matter and personal jurisdiction.¹²⁸ So a petitioner

¹²³ CHURCH (1st ed. 1886), *supra* note 120, § 352, at 462. Church was here discussing the rule’s application to the context of city ordinance violations, but the principle is the same. Oaks agrees the rule was in the majority and tentatively suggests that Georgia, Pennsylvania, South Carolina, and (prior to 1818) New York did not always follow the rule. Oaks, *supra* note 121, at 255; *cf. id.* at 255-57 (cautioning about evidentiary limitations arising from both selection effects and inconsistent state reporting practices).

¹²⁴ See William Baude, *The Judgment Power*, 96 GEO. L. J. 1807, 1828 (2008) (“Just as old as the rule that judgments closed a case was the rule that they only did so when the judgments had been rendered with jurisdiction.”); see also *id.* at 1826-31 (collecting historical sources in support and explaining the Article III implications); HURD, (1st ed. 1858), *supra* note 120, at 334 (“Wise rules of procedure established for the regulation of other judicial proceedings are not to be disregarded in that of habeas corpus, when they are applicable. One of these rules is that when a record or process is only *collaterally* brought into question, it cannot be invalidated for error or irregularity”).

¹²⁵ *Remarks on the Writ of Habeas Corpus ad Subjiciendum, and the Practice Connected Therewith*, 4 AM. L. REG. 17, 271 (1856) (emphasis added); accord CHURCH (1st ed. 1886), *supra* note 120, at § 363 (“[T]he writ of habeas corpus was never designed to be a writ of error . . .”).

¹²⁶ *In re Swan*, 150 U.S. 637, 648 (1893) (emphasis added) (citing *In re Frederick*, 149 U.S. 70, 76-78 (1893); *In re Tyler*, 149 U.S. 164, 180 (1893)). This contrast between the writs goes back at least to *Ex parte Kearney*. See 20 U.S. (7 Wheat) 38, 42 (1822).

¹²⁷ *Grignon’s Lessee v. Astor*, 43 U.S. (2 Howard) 319, 338 (1844).

¹²⁸ See, e.g., COOLEY, *supra* note 119, at 493 (“The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, *first*, of the subject matter; and, *second*, of the persons whose rights are to be passed upon”). Jurisdiction over the place was another requirement, but this did not come up often in the post-conviction context. See *Kinnaird*, *supra* note 8, at 14.

had to show that the convicting court lacked either of these. If “the court had jurisdiction over the person and the case,” that was the end of the matter.¹²⁹

It was not always easy to tell when a failing went to subject matter jurisdiction. The baseline rule was that, if a court had “general jurisdiction of the subject,” (i.e., of the offense at issue) that was enough.¹³⁰ But by at least the mid-to-late 1800s, most jurists recognized that a court could *exceed* its subject matter jurisdiction by doing something it had no power whatsoever to do. And so it was eventually settled that “the jurisdiction of the court to render the particular judgment in question [was] a proper subject of inquiry.”¹³¹ This is important because it provides a more granular way to look at subject matter jurisdiction than we may be used to today.

The classic situation was when a court imposed a sentence without lawful authority. In one such case, the Missouri Supreme Court held that the sentence (for ten years’ imprisonment when the statute allowed only for seven) was “not simply erroneous or irregular, but absolutely void, as exceeding the jurisdiction of the court and not being the exercise of an authority prescribed by law.”¹³² (If a sentence was partially valid and partially exceeded the trial court’s jurisdiction, the usual approach was to hold the

¹²⁹ *E.g.*, *Ex parte Reed*, 100 U.S. 13, 23 (1879).

¹³⁰ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 207 (1830). This relates to the difference between courts of *general* jurisdiction and courts of *limited* or *special* jurisdiction. The jurisdictional defect rule applied to both kinds of convicting courts, but the former got a practically irrebuttable presumption of jurisdiction, and the jurisdiction of the latter had to be affirmatively shown. Woolhandler correctly notes that *Watkins* treated lower federal courts as superior courts for purposes of judgment regard, and that the Court stopped doing this in the late 1800s. Woolhandler, *supra* note 11, at 587-89. I disagree with Woolhandler, however, to the extent she suggests this change allowed a “merits based version of jurisdictional review.” *Id.* at 630. “[T]he only difference ordinarily recognized between the judgments of superior and inferior courts is that there is a presumption in favor of the validity of the former—none in favor of the latter.” WILLIAM S. CHURCH, A TREATISE OF THE WRIT OF HABEAS CORPUS: INCLUDING JURISDICTION, FALSE IMPRISONMENT, WRIT OF ERROR, EXTRADITION, MANDAMUS, CERTIORARI, JUDGMENTS, ETC. WITH PRACTICE AND FORMS § 347, at 475 (2d ed. 1893) [hereinafter CHURCH (2d ed. 1893)]. Thus, when the Court abrogated *Watkins*’s “doctrine . . . that where no revision by a higher court of the judgment of a court in a criminal case is authorized, another court will not *inquire into its jurisdiction*,” *id.* § 380, at 547 (emphasis added), “the real issue was not jurisdiction, but evidence of jurisdiction.” Baude, *supra* note 124, at 1829-30 (cautioning against overreading cases like *Watkins*). That evidentiary issue is distinct from the issues that matter most: whether the jurisdictional defect rule was part of the 1867 Act’s meaning and whether the rule was a fiction. See *Remarks*, *supra* note 125, at 268-69 n.1 (explaining that “[t]he conclusiveness of the judgment . . . of a court or officer of competent jurisdiction is . . . in no way affected by opening . . . questions of fact to investigation” on habeas corpus, so long as questions of fact are used only to question “the *existence* of [the] judgment”).

¹³¹ CHURCH (1st ed. 1886), *supra* note 120 § 362; ROLLIN C. HURD, A TREATISE ON THE RIGHT OF PERSONAL LIBERTY AND WRIT OF HABEAS CORPUS 359-60(2d ed. 1876) [hereinafter HURD (2d ed. 1876)]; CHURCH (2d ed. 1893), *supra* note 130, § 368 (agreeing that courts may inquire into jurisdiction to render the particular judgment).

¹³² *Ex parte Page*, 49 Mo. 291, 294 (1872). *Page* was a statutory case, but it illustrates the general trend, which was not confined to statutory cases. See *supra* notes 119-125 and accompanying text.

sentence void only to the extent of the excess.)¹³³ Similarly, a court with jurisdiction over the case could not validly “extend” “its power . . . to commit for a contempt committed out of court,” at least without a special statute permitting this.¹³⁴ Courts also sometimes held the conviction void if the charging instrument charged something that was not a crime at all.¹³⁵

Some sources seem to describe this as a third prong to jurisdiction: (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) jurisdiction to enter the particular judgment.¹³⁶ The better understanding, however, is that these judgment-specific jurisdictional defects went to subject matter jurisdiction. That understanding fits much better with the rule (adhered to throughout this period, so far as I can tell) that subject matter and personal jurisdiction were the only two prongs of jurisdiction.¹³⁷ This formulation also finds support in *Ex parte Siebold*, where the Court said, “if the laws are unconstitutional and void, the Circuit Court *acquired no jurisdiction of the causes*.”¹³⁸

A judgment-specific look at jurisdiction decidedly did not mean the habeas writ could reach all errors—not even all serious errors, whether factual or legal. The writ could not issue after “proceeding[s] defective for irregularity” but only those “void for illegality.”¹³⁹ For instance, one

¹³³ See *In re Swan*, 150 U.S. 637, 653 (1893) (explaining the petitioner could not “be discharged on habeas corpus until he has performed so much of the judgment or served out *so much of the sentence as it was within the power of the court to impose*.” (emphasis added)); see also *In re Medley*, 134 U.S. 160, 171-73 (1890) (applying the logic of *Siebold* to conclude that a death sentence imposed under an unconstitutional statute was void and granting relief on this ground, despite no identification of errors in the proceedings themselves). But see *id.* at 174-75 (making sure that the warden could pick up the prisoner, whose conviction was still valid, immediately after his release).

¹³⁴ CHURCH (2d ed. 1893), *supra* note 130, at § 318.

¹³⁵ See, e.g., *Ex parte Kearny*, 55 Cal. 212, 228 (1880) (granting habeas corpus where, according to the court’s interpretation of the statute, the petitioner’s actions were not criminal). But cf. *Jones v. Hendrix*, 143 S. Ct. 1857, 1871-73 (collecting sources to the effect that courts could not “look beyond the judgment” to ensure that the convicting court had proved every element of the crime for which a prisoner was committed”).

¹³⁶ See *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 176-77 (“It is no answer . . . that the court had jurisdiction of the person of the prisoner, and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case.”); see also CHURCH (1st ed. 1886), *supra* note 120, at § 362 (framing the authority to render a particular judgment as a jurisdictional issue).

¹³⁷ See, e.g., COOLEY, *supra* note 119, at 397-98 (describing the two-prong approach to jurisdiction).

¹³⁸ *Ex parte Siebold*, 100 U.S. 371, 377 (1880) (emphasis added). It also explains the reference in *Siebold* to “the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.” *Id.* at 375. The “other matter” was lack of subject matter jurisdiction to enter the judgment the court purported to enter.

¹³⁹ HURD (1st ed. 1858), *supra* note 120, at 333; see also *id.* (“It would be *irregular* to sentence a man to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence. It would be *illegal* to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only.”)

defendant was convicted under a charging instrument that “failed to charge” the crime in proper terms.¹⁴⁰ The charge was “perhaps so defective that a motion in arrest of judgment ought to have been sustained” at trial, but the Kansas Supreme Court held the defect did not go to jurisdiction and denied habeas relief.¹⁴¹ Another defendant was convicted of vagrancy and argued that she had been “prohibited from producing witnesses on her own behalf, and from cross-examining witnesses produced against her, and that she [wa]s innocent of the charge made against her.”¹⁴² The court held that these alleged errors, which were as serious as can be, did not go to jurisdiction; it then denied relief.¹⁴³ An Indiana justice of the peace imprisoned another man pursuant to a jury verdict.¹⁴⁴ On habeas corpus, the man protested that the verdict did not comport with the governing statute.¹⁴⁵ The Indiana Supreme Court held that this, too, was no ground for habeas.¹⁴⁶ Thus, although the general law allowed an inquiry into the convicting court’s power to issue the judgment it did, this looked nothing like full merits review. The general law’s jurisdictional defect rule had teeth.

As explained in Part I, the Supreme Court repeatedly said these principles of general law operated by default in federal prisoner cases. Having adopted the rule, the Court applied it along much the same lines state courts did. Errors and irregularities were off the table; jurisdiction over the subject matter and the person were fair game.¹⁴⁷ And the Court, like the states, also recognized that a convicting court could lose subject matter jurisdiction by entering a judgment beyond its authority. That was true even if the court did have broad subject matter jurisdiction over criminal cases and personal jurisdiction over the defendant.¹⁴⁸

¹⁴⁰ See CHURCH (1st ed. 1886), *supra* note 120, at § 349 (discussing Constitutional Prohibitory Amendment Cases, 24 Kan. 700 (1881)).

¹⁴¹ See *id.*

¹⁴² See *id.* § 240 (quoting and discussing Stewart’s Case, 1 Abb. Pr. 210).

¹⁴³ See *id.* (quoting and discussing Stewart’s Case, 1 Abb. Pr. 210).

¹⁴⁴ Willis v. Bayles, 105 Ind. 363, 367 (1885).

¹⁴⁵ *Id.* at 370.

¹⁴⁶ *Id.* at 371. This case involved a civil judgment against a debtor. The debtor lost and failed to repay the creditor. Indiana law allowed imprisonment in such circumstances. See *id.* at 369-70. In any event, the issue was whether the underlying judgment was void. See *id.* at 368; see also CHURCH (2d ed. 1893), *supra* note 130, § 351 at 478 (citing Willis).

¹⁴⁷ See *infra* subsection 2.C.1 (collecting cases).

¹⁴⁸ Examples include *Ex parte Lange*, 85 U.S. 163, 176 (1873) (holding that under the Double Jeopardy Clause, “the power of the court to punish further was gone” after the defendant “had fully suffered” one sentence), and *Ex parte Siebold*, 100 U.S. 371, 377 (1879) (holding that a conviction under an unconstitutional law was jurisdictionally defective because the court had jurisdiction over only criminal offenses, and an unconstitutional law could not make something a criminal offense). I discuss these cases and others below. See discussions *infra* subsections II.C.3-6. See also *In re Mills*, 135 U.S. 263, 270 (1890) (holding a judgment jurisdictionally defective when the court had specific statutory empowerment to impose a certain sentence but imposed another sentence instead).

One objection might be that the jurisdictional defect rule was part of local law, not general law. Perhaps the rule was a limitation inherent in a petitioner's habeas *cause of action*. And “[g]eneral law did not create causes of action” in the early Republic.¹⁴⁹ “[R]ather, causes of action were matters of local law.”¹⁵⁰ If that is correct, then maybe the Court was not resorting to general law in the *Watkins* line of cases but was instead applying states’ local law under the Process Act, which “required federal courts to adjudicate causes of action recognized under the law of the state in which the federal court sat.”¹⁵¹ And maybe the Court felt no need to say that explicitly because “[i]t was more natural for litigants and judges simply to apply [established state] forms and modes rather than to recite repeatedly Congress’s command that they borrow them.”¹⁵²

This might be correct or it might not, but the bottom line is the same either way. What counts for present purposes is that the jurisdictional defect rule was a settled part of the legal backdrop when Congress enacted the 1867 Act. Whether it was a rule of general law or of widespread local law, federal courts consistently applied it. This practice informed the 1867 Act’s original meaning, as I argue below.¹⁵³

2. General Law, Not Pure Statutory Inference

Watkins, *Kearney*, and similar federal prisoner cases had another strand of reasoning. The Court noted that, despite its habeas jurisdiction, it did not have writ-of-error jurisdiction in federal criminal cases. A writ of error was a means for directly reviewing a lower court’s legal conclusions, with accompanying power to vacate the judgment—roughly like a non-discretionary version of today’s writ of certiorari.¹⁵⁴ So if the Court ignored the jurisdictional defect rule, it would effectively convert the habeas writ into a writ of error, thereby circumventing Congress’s limited jurisdictional grant. This it would not do: “if . . . this Court cannot directly revise a judgment of the circuit court in a criminal case, what reason is there to suppose that [Congress] intended to vest it with the authority to do it indirectly[?]”¹⁵⁵ That

¹⁴⁹ Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 639 (2015). Thanks to Bradford Clark for raising this point.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 641.

¹⁵² *Id.* at 660; *see also id.* at 660 n.228 (touching on habeas).

¹⁵³ *See infra* subsection II.B.1.

¹⁵⁴ *See* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 818–23 (2022) (explaining the writ of error at length).

¹⁵⁵ *Ex parte Watkins*, 28 U.S.(3 Pet.) 193, 208 (1830) (quoting *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 42 (1822)); *see also Ex parte Parks*, 93 U.S. 18, 20–21 (1876) (“[T]hose errors . . . which

reasoning has led some scholars to treat the jurisdictional defect rule (in the federal prisoner cases) *purely* as an anticircumvention rule—with the important corollary that it would have no function if the Court could directly review the convicting court's judgment.¹⁵⁶

That is incorrect. The anticircumvention idea was certainly one buttressing rationale for the jurisdictional defect rule, but the rule was also a fundamental, inherent part of habeas law. A habeas writ could test only the lawfulness of a custody, and a valid judgment was "in itself sufficient cause" for custody.¹⁵⁷ The proof is in the pudding: Congress gave the Court writ-of-error jurisdiction in federal criminal cases in 1889 (in capital cases),¹⁵⁸ and it gave the Court certiorari jurisdiction in all federal criminal cases in 1891.¹⁵⁹ That included power to vacate federal criminal convictions.¹⁶⁰ If the rule was purely a matter of anticircumvention, it should have disappeared after that.

But the Court kept on applying the rule. In *In re Tyler*, a federal court had imprisoned a county sheriff for contempt of court.¹⁶¹ The sheriff petitioned the Supreme Court for a writ of habeas corpus, and the Court denied the writ.¹⁶² "Unless the order of commitment was utterly void for want of power, this application must be denied. The writ of habeas corpus is not to be used to perform the office of a writ of error or appeal."¹⁶³ And the Court expressly stated that "even if . . . under the fifth section of the Judiciary Act of March 3, 1891, a writ of error might be brought to review such a judgment as that before us," the analysis would be unchanged.¹⁶⁴ In other words, the

can only be reviewed by appeal or writ of error[] cannot be reviewed in this court in . . . other cases than those in which those processes are given."); *Ex parte Lange*, 85 U.S. 163, 184-85 (1873) "Except in [a] limited class of cases this court cannot re-examine any ruling . . . in any criminal case, nor will a writ of error lie from this court to the Circuit Court"; *Ex parte Wilson*, 114 U.S. 417, 420-21 (1885) ("It is well settled . . . that this court, having no jurisdiction of criminal cases by writ of error appeal, cannot discharge on habeas corpus [barring jurisdictional error]").

¹⁵⁶ See *Peller*, *supra* note 11, at 611; Kovarsky, *supra* note 11, at 645 (suggesting a similar view).

¹⁵⁷ See *Watkins*, 28 U.S. at 202.

¹⁵⁸ Act of February 6, 1889, ch. 113, § 6, 25 Stat. 655, 656.

¹⁵⁹ Act of March 3, 1891, ch. 517, § 6, 26 Stat. 826, 828.

¹⁶⁰ This grant of certiorari jurisdiction allowed for direct review of judgments, just like writ-of-error jurisdiction, but it was discretionary rather than mandatory. See *Johnson*, *supra* note 154, at 828 ("In essence, Supreme Court review of these cases was not mandatory—certiorari is always discretionary—but once the Court granted the writ, subsequent review was comprehensive. The Court decided the case as if on a writ of error."); *Lau Ow Bew v. United States*, 144 U.S. 47, 58 (1892) ("[I]t is competent for this court by certiorari to direct any case to be certified, whether its advice is requested or not, except those which may be brought here by appeal or writ of error").

¹⁶¹ 149 U.S. 164, 191 (1893). A contempt commitment was considered a judgment of conviction. See *Kearney*, 20 U.S. at 43 ("There is, in principle, no distinction between [a post-conviction] case and the present").

¹⁶² *Tyler*, 149 U.S. at 191 (Fuller, C.J.).

¹⁶³ *Id.* at 180.

¹⁶⁴ *Id.* at 180-81. It was Section 6 that gave the Supreme Court writ-of-certiorari jurisdiction over federal criminal judgments. But this was a *civil* case that involved imprisonment by way of a

jurisdictional defect rule would remain binding in a habeas case even if it could have been avoided by bringing a writ of error. The Court followed a similar course a few years later in *In re Lennon*, another contempt case.¹⁶⁵ In *Glasgow v. Moyer*, the Court went so far as to fault the petitioner for failing to seek direct review, which would have lain.¹⁶⁶ There are other examples, too.¹⁶⁷ Woolhandler sums it up nicely: “[T]he scope of review did not change dramatically when the Court’s direct review of federal criminal cases expanded”¹⁶⁸

These cases establish that the jurisdictional defect rule in federal prisoner cases was not merely a matter of statutory anticircumvention. Habeas was only for inquiring into the legality of detention, and a jurisdictionally sound conviction rendered a petitioner’s custody lawful.¹⁶⁹

3. Jurisdiction Over the Process? Nonjurisdictional Voidness?

In an interesting new piece, David Kinnaird advances two ideas worth addressing here. First, Kinnaird says it is “indispensable” to focus on “jurisdiction over the process,” which is the power to issue “the writs or precepts that go forth from a court.”¹⁷⁰ Kinnaird is certainly correct to some extent. An order of commitment is a form of process. And if that process is void, then there is presumably nothing left to justify the detention. The prisoner stands “in the same position as one subject to arbitrary detention by

contempt commitment. The Court assumed for the sake of argument—though without conceding it—that Section 5 would allow writ-of-error jurisdiction in these circumstances. *See id.* at 180.

¹⁶⁵ *In re Lennon*, 166 U.S. 548, 552–53 (1897) (“The only question which can properly be raised upon this writ is whether the Circuit Court exceeded its jurisdiction in holding the petitioner for a contempt and in imposing upon him a fine therefor”).

¹⁶⁶ *Glasgow v. Moyer*, 225 U.S. 420, 429–30 (1912).

¹⁶⁷ *See, e.g., id.* at 428–29 (citing *In re Lincoln*, 202 U.S. 178 (1906); *Harlan v. McGourin*, 218 U.S. 442 (1910); and *In re Gregory*, 219 U.S. 210 (1911)); *see also* *Andrews v. Swartz*, 156 U.S. 272, 276 (1895) (affirming the denial of a habeas writ and explaining the petitioner’s “proper remedy was, after final judgment of conviction, to carry the case to the highest court of the State having jurisdiction to review that judgment, *thence upon writ of error to this court . . .*”) (emphasis added). In another case, *Bergemann v. Backer*, the Court denied the writ and noted:

[T]he judgment of the court of original jurisdiction was, within the meaning of the acts of Congress, the judgment of the highest court of the state in which a determination of the case could be had, *and such judgment could have been, upon writ of error, reexamined here* if it had denied any right, privilege, or immunity specially set up and claimed under the Constitution of the United States.

¹⁶⁸ 157 U.S. 655, 659 (1895) (emphasis added).

¹⁶⁹ Woolhandler, *supra* note 11, 598 n.140. It would perhaps be more accurate to say, “the scope of review did not change at all.”

¹⁷⁰ *See* Peller, *supra* note 11, at 612–14, 616 for extensive discussion of *In re McDonald*, 16 F. Cas. 17 (C.C.E.D. Mo. 1861) (No. 8,751) in support of his anticircumvention reading. I have not addressed *McDonald* here because Liebman and Forsythe have already explained why the case does little to support Peller’s view. *See* Liebman, *supra* note 11, at 2046 n.277; Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1150–55 (1995).

¹⁷⁰ Kinnaird, *supra* note 8, at 14, 17 (quotation omitted).

an executive officer.”¹⁷¹ A habeas writ and an order to discharge are the appropriate solution for this.

This insight, however, has limited import in the context of post-conviction habeas. When a defendant was convicted, the court would issue a “mittimus”—the form of “final process” that directed the jailer to imprison the defendant.¹⁷² This commitment to imprisonment, though, was merely the “execution” of the adjudication.¹⁷³ Courts therefore recognized that “[t]he imprisonment rests upon the judgment, and the mittimus is important only as a direction to the officer, and as evidence of the authority which the judgment gives.”¹⁷⁴ So aside from the exceptional circumstance of a mismatch between the judgment and the execution thereof,¹⁷⁵ the propriety of post-conviction habeas relief turned on the validity of the conviction. Because “[t]he [final process] [wa]s merely a recital of the record” and was “secondary” to the conviction, I will focus on jurisdiction to convict.¹⁷⁶

Kinnaird also purports to identify certain defects—judicial conflict of interest, invalid waiver of a condition precedent to jurisdiction, and fraud in the proceedings—that could render a conviction void even without going to jurisdiction.¹⁷⁷ Kinnaird is on strong footing when he claims that these defects voided a conviction. He has less support, however, for his claim that they were nonjurisdictional. For example, Kinnaird admits that a judge with a conflict of interest “is prohibited from using” any “sovereign authority” in the case at hand.¹⁷⁸ This sounds much the same as lacking jurisdiction to enter the particular judgment. Kinnaird also admits that a party’s invalid waiver was ineffective to “cure[]” what would otherwise be a jurisdictional defect.¹⁷⁹ Query how such a failing could leave jurisdiction intact. In the spirit of admissions, however, I must acknowledge that judicial conflicts of interest are

¹⁷¹ *Id.* at 1.

¹⁷² *Scott v. Spiegel*, 25 A. 262, 263 (Conn. 1896).

¹⁷³ *Ex parte Kearney*, 20 U.S. (7 Wheat) 38, 43 (1822).

¹⁷⁴ *Howard v. United States*, 75 F. 986, 990 (6th Cir. Ct. App. 1896) (quoting *Sennott v. Swan*, 16 N.E. 448, 452 (Mass. 1888) (collecting cases)). Compare *HURD* (1st ed. 1858), *supra* note 120, at 331 (stating the general rule that valid process is necessary), *with id.* at 336 (affirming that, in the more specific post-conviction context, a jurisdictionally sound judgment was sufficient justification for imprisonment).

¹⁷⁵ See *Caldwell’s Case*, 13 Abb. Pr. 405, 411 (N.Y. Sup. Ct. 4th Dist. 1862) (“[F]inal process may . . . be impeached by showing . . . that the judgment does not show a case authorizing the execution on which a party is arrested . . .”).

¹⁷⁶ *Cushing v. Friendship*, 36 A. 1001, 1003 (Me. 1897). Indeed, much of Kinnaird’s analysis would work equally well with a focus on jurisdiction to convict rather than jurisdiction over the process. See Kinnaird, *supra* note 8, at 67–68 (discussing *Edwards v. Vannoy*, 141 S. Ct. 1547 (2021)).

¹⁷⁷ *Id.* at 28–36.

¹⁷⁸ *Id.* at 29.

¹⁷⁹ *Id.* at 35.

harder to characterize as jurisdictional. This category, as Baude has recognized, is “a closer call.”¹⁸⁰

In any event, *by the late 1800s*, the established refrain was that “when the cause of commitment is shown and the prisoner is found in custody of a court of competent jurisdiction, not illegally asserted, the writ has fulfilled its office and the prisoner should be remanded.”¹⁸¹ The idea of a voiding-but-not-jurisdictional defect is very hard—if not impossible—to square with that principle. Judicial conflicts of interest present a more difficult case, but that discordant note is drowned out by the otherwise harmonious chorus. I venture that Kinnaird’s examples are on the whole best categorized as instances of courts without “jurisdiction . . . to render the particular judgment.”¹⁸²

B. State Prisoner Cases—*The Statutory Jurisdictional Defect Rule*

Now we come to the interpretive meat and potatoes. To preview my reading: The 1867 Act gave state prisoners access to federal habeas proceedings. But a petitioner qualified only if she was “restrained of . . . her liberty in violation of the constitution, or of any treaty or law of the United States.”¹⁸³ That grammatical structure focused on whether the “restrain[t]” on “liberty” was lawful. And in 1867, a restraint on liberty was lawful if backed by a jurisdictionally sound judgment of conviction.¹⁸⁴ Thus, the best reading is that the Act extended the federal habeas writ to state prisoners restrained without a jurisdictionally sound judgment—but no further than that.

This section proceeds as follows. First, statutory text, background principles, and early interpretations show that the Act encoded the jurisdictional defect rule. Second, provisions in the same statutory paragraph would make little sense on the contrary reading. Third, by specifying that a custody could violate the Constitution, a treaty, or a federal statute, the statute recognized that different sources of *federal* law, but not state law, could render a conviction jurisdictionally defective. Fourth, the 1867 Act allowed relief not for just any due process violation, but only for those going to

¹⁸⁰ Baude, *supra* note 124, at 1844.

¹⁸¹ HURD (1st ed. 1858), *supra* note 120, at 336; *see also infra* subsection II.C.1 (collecting sources stating that a jurisdictionally sound conviction was a sufficient condition for denial of the writ). Compare these with the two sources Kinnaird primarily relies on to show that the relevant defects were nonjurisdictional: a Joseph Story treatise from 1834 and Bracton, writing in the 1200s. *See* Kinnaird, *supra* note 8, at 29–30.

¹⁸² CHURCH (1st ed. 1886), *supra* note 120 § 362, at 471.

¹⁸³ 1867 Act, *supra* note 4, § 1.

¹⁸⁴ *See supra* notes 118–123 and accompanying text; *see also* Baude, *supra* note 124, at 1827 (“[A] judgment’s legality was independent from its correctness on the merits . . . Legal or constitutional error did not . . . Render the judgment invalid.”)

jurisdiction. That is true regardless of one's reading of the Due Process Clause.

1. Statutory Text and Early Readings

Start with the pre-1867 baseline. The federal courts had no statutory authority to grant habeas writs to state prisoners except in very narrow circumstances, such as when a state imprisoned a federal officer or an alien for performing duties on behalf of his own government.¹⁸⁵ The 1867 Act altered that baseline by extending federal habeas to petitioners (including those in state custody) who were restrained of liberty in violation of federal law. Thus, the key interpretive question is the extent to which the statute empowered federal courts to issue habeas writs they could not have issued before.

The Act's grammatical structure, in turn, is the place to start answering that question. Both a petitioner's initial entitlement to a writ and his ultimate entitlement to discharge hinged on whether the "*restrain[t]*" on the petitioner's "liberty"¹⁸⁶ was "in violation of"¹⁸⁷ federal law. Because the phrase "in violation of . . ." modified the phrase "restrained of his or her liberty," the prisoner's entitlement to relief depended on whether the restraint on liberty—i.e., the custody—was lawful. This accords with the writ's traditional focus on whether "the imprisonment . . . be illegal."¹⁸⁸ Thus, the Act newly allowed habeas writs to state prisoners, but only to the extent the *custody* was *unlawful*.

Incidentally, this grammatical structure shows the problem with some purportedly plain-text readings of the Act. Take Peller, who asserts that the text's "literal" meaning "require[s] relitigation of every federal question."¹⁸⁹ This mistakenly treats the phrase "restrained of his or her liberty in violation of [federal law]" as if it said, "restrained of his or her liberty pursuant to a legal process that involved violations of federal law." The Act does not say that; it conditions habeas eligibility on the unlawfulness of the custody. It is possible, in principle, that every custody was unlawful if the custody resulted

¹⁸⁵ See Act of March 2, 1833, 4 Stat. 632, 634 (creating federal officers exception); Act of Aug. 29, 1842, 5 Stat. 539 (creating alien exception); see also Mayers, *supra* note 8, at 33 (describing the exception-creating statutes).

¹⁸⁶ Or the "depriv[ation] of his or her liberty[.]" an interchangeable phrase. 1867 Act, *supra* note 4, § 1.

¹⁸⁷ Or "in contravention of[.]" which is likewise interchangeable. *Id.*

¹⁸⁸ HURD (1st ed. 1858), *supra* note 120, at 210-11.

¹⁸⁹ Peller, *supra* note 11, at 618; see also Liebman, *supra* note 11, at 2091 (suggesting that the broad-writ reading is simply an acknowledgment that the 1867 Act "meant what [it] said"); Brown v. Davenport, 142 S. Ct. 1510, 1532-34 (Kagan, J., dissenting) (similar). For another interpretation of the same text, though in a context not relevant here, see Note, *supra* note 55, at 1410.

from a process involving violations of federal law. But that is hardly the only concept of unlawfulness the Act could have been baking in. So the bare text might or might not mean what Peller says it does.¹⁹⁰ Nor do the literal meanings of the statutory terms, or even of related terms, appear to shed much light on things.¹⁹¹

The better approach is to apply “[t]he age-old principle . . . that words undefined in a statute are to be interpreted and applied according to their common law meanings”—or here, their general law meanings.¹⁹² In 1867, a core concept of habeas law (or even *the* core concept) was that of unlawful imprisonment.¹⁹³ By hinging habeas eligibility on whether the prisoner’s “restraint” was “in violation of the law,” the 1867 Act encoded that concept into the statutory text. And as detailed above,¹⁹⁴ it was beyond peradventure that a jurisdictionally sound conviction yielded a *lawful* imprisonment. The conviction was “in itself” a “sufficient,”¹⁹⁵ “lawful cause of imprisonment.”¹⁹⁶ An informed reader, taking this context into account, would have understood that the phrase “restrained . . . in violation of” was a technical one that did not encompass state prisoners held pursuant to valid convictions.

More precisely, it is not that the statute placed an *affirmative bar* on habeas for validly convicted state prisoners—there was no need to do that because federal courts had zero preexisting power to entertain state prisoners’

¹⁹⁰ See Bator, *supra* note 8, at 474-75 (noting that an error does not automatically make the “judgment of a competent tribunal . . . illegal” or in “[v]iolat[ion]’ [of] the ‘law’”). Hertz and Liebman fall into a similar trap, quoting *Ex parte McCardle* for the proposition that it would be “impossible to widen” the 1867 Act’s jurisdictional grant. HERTZ & LIEBMAN, *supra* note 11, at §2.4 [d][iii] (quoting 73 U.S. (6 Wall.) 318, 325-26 (1867)) (emphasis omitted). The full quote from *McCardle* shows the mistake: “This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of *privation of liberty contrary to the National Constitution, treaties, or laws*. It is impossible to widen this jurisdiction.” *McCardle*, 73 U.S. at 325-26 (emphasis added). The Court was simply saying that *if* a given custody is unlawful under federal law, then the Act covers it. That says nothing about which custodies were unlawful.

¹⁹¹ See *Violation*, BLACK’S LAW DICTIONARY (1st ed. 1891) (“Injury; infringement; breach of right, duty, or law. Ravishment; seduction.”); *Unlawful*, *id.*; (“That which is contrary to law.”); *Lawful*, *id.* (“Legal; warranted or authorized by the law; having the qualifications prescribed by law; not contrary to nor forbidden by the law”). The definition of “lawful” goes on to draw a distinction between “lawful” and “legal,” but then clarifies that the distinction collapses in the case of a “writ, warrant, or process”—which happens to be the exact situation habeas deals with. See Kinnaird, *supra* note 8, at 57 (explaining that, properly speaking, the lawfulness of a custody depended on whether the custody was justified by valid “process”); see also notes 170-176 and accompanying text.

¹⁹² SCALIA & GARNER, *supra* note 109, at § 53.

¹⁹³ For discussion of cases making clear that habeas corpus existed to test the legality of detention rather than inquire into errors in a criminal proceeding, see *supra* notes 161-167 and accompanying text.

¹⁹⁴ See *supra* notes 118-123 and accompanying text.

¹⁹⁵ *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830).

¹⁹⁶ *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

petitions.¹⁹⁷ The 1867 Act just *did not empower* federal courts to liberate validly convicted state prisoners. The legal permutations went like this: (1) The pre-1867 status quo was that federal courts could not issue habeas writs to state prisoners at all.¹⁹⁸ (2) The 1867 Act changed that status quo by allowing writs for prisoners “restrained . . . in violation of” federal law. (3) But a validly convicted prisoner was not “restrained . . . in violation of” federal law within the Act’s meaning, which meant that a court had no statutory authorization to issue a habeas writ to such a prisoner.¹⁹⁹ The statute encoded the jurisdictional defect rule into statutory law simply by leaving federal courts without power to violate the rule.²⁰⁰

Why accept this reading? For one thing, it finds support in early judicial interpretations. In *Bridges*, Justice Bradley explained that in “a case [where] the state court had jurisdiction . . . the imprisonment would not be in violation of the constitution or laws of the United States. The judgment might be wrong, but the imprisonment under it would be right until the judgment was reversed.”²⁰¹ The Court adopted this reading the first time it got a chance in *Ex parte Crouch*.²⁰² The petitioner was not “detained in violation of the Constitution” precisely because he was “in the custody of a State court of competent jurisdiction.”²⁰³ Or take *In re Converse*, where the Court explained that “the single question” was “whether appellant [was] held in custody in violation of the Fourteenth Amendment” and held that he was not because the state court had jurisdiction.²⁰⁴ These are not the only examples.²⁰⁵ To be sure, the Court did not *always* frame the jurisdictional

197 Thanks to Aziz Huq for raising this point.

198 But see *supra* note 185 (noting narrow exceptions).

199 See *Bollman*, 8 U.S. (4 Cranch) at 94 (“[T]he power to award the writ by any of the courts of the United States, must be given by written law”).

200 See *supra* notes 90–94 and accompanying text (explaining why the 1867 Act should not be treated as a common law statute). Nine justices took background law into account in analogous fashion in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). Compare *id.* at 2261 (“The APA thus codifies for agency cases the unremarkable, yet elemental proposition reflected by judicial practice dating back to *Marbury*: that courts decide legal questions by applying their own judgment . . .”), with *id.* at 2304, 2306 (Kagan, J., dissenting) (agreeing that the APA codified the then-existing law and disagreeing about what that law was).

201 *Ex parte Bridges*, 4 F. Cas. 98, 106 (C.C.N.D. Ga. 1875) (No. 1,862) (opinion of Bradley, J.).

202 *Ex parte Crouch*, 112 U.S. 178, 180 (1884).

203 *Id.* Duker notes that this came before Congress restored the Court’s appellate jurisdiction and that the Court strangely seems to have ignored the jurisdiction strip here. DUKER, *supra* note 58, at 243–44. This does not affect *Crouch*’s probative value into the statute’s meaning.

204 *In re Converse*, 137 U.S. 624, 631 (1891).

205 See, e.g., *Wood*, 140 U.S. 278, 286 (1891) (“No such authority is given to the Circuit Courts of the United States by the statutes defining and regulating their jurisdiction.”); *Andrews v. Swartz*, 156 U.S. 272, 275–76 (1895) (“The further contention of the accused is that he is restrained of his liberty in violation of the Constitution and laws of the United States. . . . It is a sufficient answer to this contention that the state court had jurisdiction both of the offense charged and of the accused.” (emphasis added)); *In re Cuddy*, 131 U.S. 280, 286 (1888) (equating the petitioner’s

defect rule in terms of statutory text; it often applied the rule as settled doctrine without elaboration.²⁰⁶ But when the Court did explain, the explanation was always the same: a convicted prisoner did not fit into the statute's terms unless he showed a jurisdictional defect.²⁰⁷

For another thing, it seems that Congress read its own statute in the same way. The 1867 Act's initial interpretation was left to the lower courts because, in 1868, Congress stripped the Supreme Court's habeas jurisdiction.²⁰⁸ As Clark Forsythe has documented, some of these lower courts—now freed from Supreme Court review—interpreted the “in violation of” text too broadly for Congress's liking.²⁰⁹ Perhaps the most natural congressional response would have been an amendment: “We did not quite realize how broad the Act was until these judicial decisions started coming down—better narrow the text.” Congress instead responded in 1885 by simply reinstating the Court's jurisdiction, giving it a chance to interpret the Act's original text in the way that Congress intended. And as just explained, that is what the Court did, embracing the jurisdictional defect rule in the first 1867 Act case it got its hands on.²¹⁰ Congress corrected the lower courts, not by changing the statute, but by letting the Supreme Court set the record straight. That is further evidence of the Act's original meaning.²¹¹

“averment . . . that he was detained in violation of the Constitution and laws of the United States” with his averment “that the District Court had no jurisdiction or authority to try and sentence him, in the manner and form above stated”); CHURCH (2d ed. 1893), *supra* note 130 § 362 at 501 (stating the jurisdictional defect rule and reciting the “in violation of” text immediately thereafter, thereby treating the two as equivalents).

²⁰⁶ See, e.g., *Felts v. Murphy*, 201 U.S. 123, 129–30 (1906) (applying the jurisdictional defect rule without expressly rooting the rule in the text).

²⁰⁷ See also CHURCH (1st ed. 1886) *supra* note 120, for a description of the scope of inquiry: “Where the prisoner is held in violation of the constitution, laws, or treaties of the United States, . . . the courts of the United States . . . will . . . issue the writ of habeas corpus to inquire into the cause of his imprisonment; and though he be so held by virtue of the judgment of a court of another jurisdiction, they will examine the case on this writ *so far as to ascertain that fact*.” § 67 61 n.1 (emphasis added).

²⁰⁸ Act of March 27, 1868, ch. 34 § 2, 15 Stat. 44.

²⁰⁹ See Forsythe, *supra* note 8, at 1117–19 (canvassing); SPEAR, *supra* note 65, at 622–24 (discussing a few lower-court cases that may fall in this category). It would be an error to read these decisions, to the extent they did bend the rule (which is itself unclear at best), as strong evidence of the Act's meaning. That is because of (1) the jurisdictional defect rule's strong status in the general law before the 1867 Act; (2) Congress's displeasure with expansive lower-court interpretations; and (3) the Supreme Court's unwavering commitment to the rule.

²¹⁰ See *supra* notes 202–204 and accompanying text (discussing *Crouch* and *Converse*); see also Forsythe, *supra* note 8, at 1124 (“In *Ex parte Royall*, the first case applying the 1867 Act after its jurisdiction was restored, the Court adopted the exhaustion doctrine and the jurisdictional principles of *Watkins* that would be applied for the next forty years”).

²¹¹ See Forsythe, *supra* note 8, at 1119–24. It is true that these episodes could be equally well explained by (a) a congressional understanding that the common law's jurisdictional defect rule was supposed to *survive* the 1867 Act or (b) a congressional understanding that the 1867 Act was supposed

2. Statutory Context

In the same paragraph as the “in violation of” language, the Act anticipated that state criminal proceedings might be underway even while federal habeas proceedings were pending. And it crafted a solution that would have made little sense without a jurisdictional defect rule. This contextual cue has gone unnoticed, but it provides additional evidence for the jurisdictional defect reading.²¹²

The relevant text states:

[P]ending [federal habeas corpus] proceedings or appeal, and until final judgment be rendered [in those proceedings or appeal], and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.²¹³

In simpler terms, this provision applied to state prisoners in the midst of federal habeas proceedings (whether on appeal or not), while the state had its own proceedings ongoing against the same individual for the same subject matter at issue on habeas.²¹⁴

to *codify* the common law’s rule. The text, statutory structure, and early judicial interpretations point to (b).

²¹² See WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 86 (2016) (“[O]ne sentence in a statute, read in isolation, might be ambiguous as a matter of ordinary meaning—but, read in the context of the remainder of the statute, the sentence might have a plain meaning”).

²¹³ 1867 Act, *supra* note 4, § 1; see also *Ex parte Royall*, 117 U.S. 241, 248–49 (1886) (discussing this provision briefly).

²¹⁴ It is not immediately obvious which specific state proceedings this provision covered. There are, however, a couple of textual clues. First, the provision applied only to state “proceeding[s] against” the habeas petitioner “in any State court, or by or under the authority of [the] State.” 1867 Act, *supra* note 4, § 1. So the provision could nullify only proceedings the *state* brought against the *individual*. Second, the provision applied to state proceedings “for any matter or thing . . . heard and determined” in the habeas proceedings. *Id.* The Act used the verbs “hear[]” and “determine” earlier in the same paragraph, directing habeas courts to “proceed in a summary way to *determine* the facts of the case, by *hearing* testimony and the arguments of the parties interested.” *Id.* (emphases added). So a habeas court determines facts and hears testimony and arguments related to the detention’s legality. The Act’s subsequent reference to state proceedings “for any matter or thing . . . heard and determined” by the federal habeas court was thus a sort of subject matter test: state proceedings were eligible for nullification if they concerned the same facts or pieces of testimony that formed the subject matter of the habeas proceedings.

Combining those two pieces of evidence yields: a state proceeding was subject to nullification (either temporarily or permanently) if (1) the state was bringing the proceeding against the federal habeas petitioner, and (2) the proceeding concerned the same underlying facts or testimony at play on habeas.

The provision nullified state proceedings in two ways. It temporarily nullified state proceedings “pending [federal habeas] proceedings or appeal, and until final judgment.”²¹⁵ This temporary nullification presumably aimed to avoid parallel proceedings in state and federal courts. It also reflected an awareness that bad actors could use state proceedings to undermine the federal writ.²¹⁶ Hypotheticals are easy to think up. Imagine, for instance, that a southern state during Reconstruction indicts a freedman on trumped-up charges. The freedman petitions for a federal habeas writ, and the prosecutor retaliates by trumping up another indictment for a slightly different offense based on the same circumstances underlying the first one.²¹⁷ Or perhaps it is the state judge who retaliates by holding the defendant in contempt of court. (A contempt commitment was itself treated like a judgment of conviction, so this would ordinarily take a jurisdictional defect to undo on habeas.)²¹⁸ The Act would nullify these proceedings during the pendency of the habeas petition. I am not aware of instances where states took these precise measures, but obviously one can excuse the 1867 Congress for worrying that they might.

The provision also *permanently* nullified state proceedings “upon final judgment of discharge” in the federal habeas proceedings.²¹⁹ Here, too, it is easy to imagine what Congress may have been concerned about. Suppose a convicted state prisoner seeks federal habeas relief, shows a jurisdictional defect, and wins discharge. The prosecutor then decides to harass the now-freed prisoner by bringing a second indictment for a different offense based on more or less the same underlying conduct.²²⁰ The Act would nullify this new proceeding *ab initio*, thereby taking this tool out of the harassing prosecutor’s toolbox.

The curious thing, however, is the choice to nullify state *proceedings* and not state *judgments of conviction*. When a convicted habeas petitioner won, the

²¹⁵ *Id.* (emphasis added).

²¹⁶ This concern was plainly in the Act’s purview. A provision in the same paragraph made it a misdemeanor to ignore, refuse, or dishonestly respond to a federal habeas writ. *Id.*

²¹⁷ Under the day’s precedents, the Double Jeopardy Clause would not necessarily foreclose this. So long as each of the two offenses required proof of at least one unique fact, there was no double jeopardy violation. *See Carter v. McClaughry*, 183 U.S. 365, 394–95 (1902); *Gavieres v. United States*, 220 U.S. 338, 342–45 (1911) (elaborating and collecting cases). *But cf. Ex parte Nielsen*, 131 U.S. 176, 188 (1889) (clarifying that there is a double jeopardy problem if one offense is a lesser-included offense of the other).

²¹⁸ *See, e.g., Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 43 (1822). This could be hard to avoid even if the petitioner won on his first habeas petition. *See Ex parte Milburn*, 34 U.S. 704, 710 (1835) (“A discharge of a party under a writ of habeas corpus from the process under which he is imprisoned, discharges him from any further confinement under the process, *but not under any other process which may be issued against him under the same indictment.*” (emphasis added)).

²¹⁹ 1867 Act, *supra* note 4, § 1.

²²⁰ *See supra* note 217 (explaining that this would likely not amount to double jeopardy, which means the nullification provisions had work to do).

court could discharge him but could not vacate the underlying judgment: a habeas writ did not (and does not) bring the judgment of conviction before the habeas court.²²¹ It seems to follow that—even if an unlawfully convicted state prisoner won discharge under the 1867 Act—the state could visit devastating collateral consequences upon him. That would include disenfranchisement, a favorite instrument of recalcitrant southern states.²²² The habeas court could not vacate the conviction (because that is not what habeas does), and the statute did not either (because it nullified state proceedings but not judgments). So, yes, the state would have to grant the petitioner his freedom upon the habeas court's discharge order.²²³ But it could poison that freedom by treating him as a convicted felon for the rest of his life. Was the Act really this shoddy?

The answer is no. The ostensible mistake disappears if the Act imposed the jurisdictional defect rule. The Act had no need to include a provision nullifying state convictions upon a grant of federal habeas relief because *federal habeas relief would issue only if the state conviction was already jurisdictionally defective, i.e., null and void*. The set of cases where habeas was warranted was identical to the set of cases where the judgment was already a nullity under the general law of jurisdiction—and a nullity cannot justify collateral consequences any more than it can justify a detention. Thus, the federal court had only to declare the state conviction jurisdictionally defective and grant discharge; that very act necessarily entailed the state conviction was void.²²⁴ Any collateral consequences would thus be deprivations of liberty without due process of law, in violation of the Fourteenth Amendment.²²⁵ That is why the Act's nullification language touched only on proceedings but not judgments.

²²¹ See *Watkins*, 28 U.S. (3 Pet.) 193, 202-03 (1830) (discussing the “final” and “conclusive” nature of judgments).

²²² For a historical overview (in a context where the history's relevance was admittedly unclear), see *Harness v. Watson*, 47 F.4th 296, 300-02 (5th Cir. 2022) (en banc) (reviewing a state's use of voter disenfranchisement to discriminate against black people). For more discussion of collateral consequences, see Andrew L. Shapiro, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 537-43 (1993) (discussing the history of disenfranchisement in the Reconstruction South); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUSTICE 253, 253-56 (2002) (discussing the same history and touching on other kinds of collateral consequences).

²²³ See *Milburn*, 34 U.S. at 710 (explaining that a habeas court “discharge[s] [the petitioner] from any further confinement under the process”).

²²⁴ Church stated the point in these terms: “[A] discharge by a judge . . . for want of jurisdiction in the court rendering the judgment seems to be *final and conclusive*, and the party can not be again imprisoned for the same cause, unless by order of the court in which he is recognized to appear, or other court having jurisdiction of the matter.” CHURCH (1st ed. 1886), *supra* note 120, § 318 at 412 (emphasis added).

²²⁵ That is, after the Amendment's ratification. As discussed later, see *infra* subsection II.B.4, scholars disagree about whether the Fourteenth Amendment's Due Process Clause guaranteed more

Perhaps one response would be that the provision's reference to state "proceedings" included both literal proceedings and the judgments that result from those proceedings. If that were true, the Act would nullify state convictions, thus avoiding the loophole even without the jurisdictional defect rule. Yet earlier in the same sentence, the Act distinguished between federal habeas "proceedings" and federal-court "judgment[s]" resulting therefrom. It is implausible that the Act first recognized the fine distinction between proceedings and judgments and then overlooked the same distinction in the same sentence.²²⁶

3. The "Constitution," "any Treaty," and the "Laws"

So a convicted state prisoner was not held in violation of federal law if held pursuant to a jurisdictionally sound conviction. It is worth asking more specifically what it meant to be held in violation of "the constitution, or of any treaty or law of the United States."²²⁷ The proper reading is straightforward and elegant: this text simply recognized that different sources of federal law may render a given restraint unlawful. In the post-conviction context, this is another way to say that different types of federal law may render a judgment jurisdictionally defective. A judgment might be jurisdictionally defective *because of* a constitutional provision, *because of* a treaty clause, or *because of* a federal statute. But the defect still had to be jurisdictional because otherwise the restraint did not violate federal law.

The simplest example is where a federal statute renders a state court's judgment jurisdictionally defective. In *Bridges*, a Georgia state court had convicted the petitioner of perjury.²²⁸ The problem was that the petitioner's alleged perjury had happened in a federal proceeding, and Congress had given federal courts exclusive jurisdiction over perjury charges arising in that

than a jurisdictionally sound judgment. It seems to be uncontroversial, however, that a state would violate the Clause by depriving someone of life, liberty, or property with only a jurisdictionally void judgment to justify the deprivation.

²²⁶ Compare *Proceeding*, BLACK'S LAW DICTIONARY (1st ed. 1891) ("In a general sense, the form and manner of conducting juridical business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action from its commencement to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object."), with *Judgment*, *id.* ("The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. . . . The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury." (emphasis added)). See also *Judgment*, *id.* (containing much further elaboration upon "judgment").

²²⁷ See 1867 Act, *supra* note 4, § 1.

²²⁸ *Ex parte Bridges*, 4 F. Cas 98, 104-05 (C.C.N.D. Ga. 1875) (No. 1,862).

way.²²⁹ Thus, “it was clearly in violation of *the laws of the United States* for the state court to try and imprison the defendant for the crime in question.”²³⁰ The statute rendered the conviction jurisdictionally defective, so the resulting custody was in violation of the statute. Similarly, if a treaty rendered a conviction jurisdictionally defective, the conviction would be in violation of the treaty.²³¹

What did it mean for a custody to be in violation of the Constitution? The most obvious answer, as Clark Forsythe has explained, is that the Act aimed to enforce the just-ratified Thirteenth Amendment.²³² Southern resistance kept many freedmen in their bonds. This was custody “in violation of” the Thirteenth Amendment, and the 1867 Act provided a remedy.

A custody might also violate the Equal Protection Clause of the Fourteenth Amendment, which Congress had sent to the states in 1866.²³³ One example is *Yick Wo v. Hopkins*,²³⁴ a landmark Equal Protection case.²³⁵ A Chinese immigrant had been convicted and imprisoned for violating a California municipal ordinance.²³⁶ He invoked the rule that a conviction under an unconstitutional law was jurisdictionally defective. I discuss that doctrine in detail below; it was nothing new to *Yick Wo*.²³⁷ The Court agreed, holding that a law conferring “naked and arbitrary power” on officials (either on its face or as evidenced by its unfair application)²³⁸, violates the Equal Protection Clause. Thanks to the 1867 Act, a habeas court could now hold that the federal Constitution rendered a law and any conviction upon which it was

²²⁹ *Id.* at 105.

²³⁰ *Id.* (emphasis added).

²³¹ See SPEAR, *supra* note 65, at 619-20 (giving a hypothetical example of how this could be); see also CHURCH (1st ed. 1886), *supra* note 120, 61 (discussing *In re Wong Yong Quy*, 6 Saw. 237 (C.C. Cal. 1880)).

²³² Forsythe, *supra* note 8, at 1116 (“[T]here is a strong and consistent record that can be read to understand the 1867 Act as referring to the Thirteenth Amendment and the Reconstruction laws designed to enforce it”).

²³³ See Joint Resolution proposing an Amendment to the Constitution of the United States, H.R.J. Res. 39th Cong. (1866).

²³⁴ 118 U.S. 356 (1886).

²³⁵ See *infra* Section IV.B (discussing when constitutional violations did or did not rise to the level of jurisdictional defects).

²³⁶ The habeas petitioner’s name was actually Wo Lee; his case was consolidated with Yick Wo’s direct-review case. See *Yick Wo*, 118 U.S. at 356-58.

²³⁷ See *infra* subsection II.C.3.

²³⁸ See *Yick Wo*, 118 U.S. at 366, 373-74 (discussing the as-applied nature of that case); see also Woolhandler, *supra* note 11, at 622 (“Still, the Court discussed at length the fact that the ordinance itself was invalid, because it allowed [arbitrary enforcement].” (citing *Yick Wo*, 118 U.S. at 374)).

based “inoperative and void.”²³⁹ A custody pursuant to such a conviction violated the Constitution, so habeas was warranted.²⁴⁰

All this might lead one to think that the Act covered every jurisdictional defect. If so, it seems like the Act’s enumeration of “the constitution,” “any treaty,” and “law” was superfluous. To the contrary, the Act’s list of three categories protected federalism by barring relief when a conviction was rendered jurisdictionally defective on purely state-law grounds.²⁴¹ In *Whitten v. Tomlinson*, for instance, a state court had ordered the petitioner detained pending further proceedings.²⁴² The petitioner raised a federal-law argument and some arguments based on a state statute.²⁴³ The Court held that the petitioner would have to exhaust the former in state court before coming back and filing for federal habeas.²⁴⁴ But in contrast, it entirely rejected his state-law argument without even deciding whether it went to jurisdiction: the “question . . . should be left to the decision of the courts of the State.”²⁴⁵ As Liebman correctly puts it, this amounted to a holding that state-law violations were “beyond the Court’s power to review.”²⁴⁶ Federal courts usually do not second-guess state courts on issues of state law,²⁴⁷ and Congress did not want to override that principle. I believe that is why the Act extended federal habeas only to state prisoners restrained in violation of *federal* law.

Partially for this same reason, I disagree with Kinnaid’s slightly different interpretation of the same text. On Kinnaid’s view, it makes no grammatical sense to say that a “restraint” on liberty violates a federal “law” in a case like *Bridges* (for instance). Even if a statute is what rendered the conviction void

²³⁹ *Yick Wo*, 118 U.S. at 373 (quotation omitted); see also *Crowley v. Christensen*, 137 U.S. 86, 92, 94 (1890) (distinguishing *Yick Wo* and holding that the law at issue did not violate the Equal Protection Clause).

²⁴⁰ See *Yick Wo*, 118 U.S. at 374 (ordering discharge). Alan Clarke argues that *Yick Wo* “is . . . properly viewed as the case that broadened the reach of habeas corpus to redress fundamental injustices.” Clarke, *supra* note 11, at 413; see also Liebman, *supra* note 11, at 2045 (making a similar claim). The Court did discuss the uneven enforcement of the ordinance. But this was evidence *that the ordinance was void* for violating the Equal Protection Clause—which triggered the ordinary rule that a conviction under a void law is void. See *Yick Wo*, 118 U.S. at 369–70, 373; see also Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 725 (1971) (discussing *Yick Wo* and its holding on discriminatory enforcement); Woolhandler, *supra* note 11, at 621–22.

²⁴¹ It is true that if a conviction was void on grounds of *general* law, the resulting custody would violate the Fourteenth Amendment. But a purely state-law defect was an issue of *local* law, and so it seems that a jurisdictional defect caused by a purely local-law problem would not trigger the Fourteenth Amendment—or at least, it would not trigger review by a federal court. Cf. Sachs, *supra* note 117, at 1301 (discussing an analogous issue in the context of personal jurisdiction).

²⁴² *Whitten v. Tomlinson*, 160 U.S. 231, 243 (1895).

²⁴³ *Id.* at 244, 246.

²⁴⁴ *Id.* at 247.

²⁴⁵ *Id.*

²⁴⁶ Liebman, *supra* note 11, at 2051.

²⁴⁷ See, e.g., *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 638 (1874) (“Whether decided well or otherwise by the State court, we have no authority to inquire”).

there, the statute did not illegalize the jailer's restraint on the petitioner's liberty.²⁴⁸ Kinnaird concludes that the resulting "restraint" does not violate federal "law." Instead, it violates the Due Process Clause (of which more below), thereby fitting only into the "in violation of the constitution" part of the statute.²⁴⁹

This grammatical oddity may not be all that odd. Although the statute in a *Bridges*-type case does not outlaw the custody directly, it is still the thing that vitiates what would otherwise be a valid cause of commitment (i.e., the conviction). It is natural enough, even if not the height of grammatical fastidiousness, to say that the resulting custody violates the jurisdiction-eliminating statute. Additionally, Kinnaird's interpretation runs the risk of rendering the "any treaty" and "laws" language superfluous. On my reading, some unlawful custodies violate the "constitution," others a "treaty," and still others a "law." On Kinnaird's reading, *all* unlawful custodies violate the Due Process Clause and thus the "constitution." Indeed, his reading would also seem to eliminate the federalism-protecting function I have identified: on his view, a custody resulting from a jurisdictionally defective conviction would be a due process violation *even if* the jurisdictional defect was purely a matter of state law.²⁵⁰ So it is unclear what work the words "treaty" and "laws" have left to do.²⁵¹

4. Restraints in Violation of the Due Process Clause

A custody could also violate the Fourteenth Amendment's Due Process Clause. Everyone agrees, so far as I can tell, that a state would violate due process by imprisoning someone in the absence of any judgment or other legal process.²⁵² Unfortunately, when it comes to the post-conviction context, the Supreme Court's early state prisoner cases contain some seemingly equivocal language. That language has caused much confusion and disagreement.²⁵³

²⁴⁸ Kinnaird, *supra* note 8, at 66.

²⁴⁹ *Id.* at 64, 66.

²⁵⁰ *Cf.* Whitten v. Tomlinson, 160 U.S. 231, 247 (1895) (stating that, in an 1867 Act case, a purely state-law question "should be left to the decision of the courts of the State").

²⁵¹ *But see id.* (positing that the 1978 Indian Child Welfare Act might trigger this language).

²⁵² *See* Kinnaird, *supra* note 8, at 17-19 (discussing the original meaning of due process, including its prohibition against "arbitrary deprivations"). Detention pursuant to warrantless arrest may be an exception.

²⁵³ I do not address in detail Mayers's view that the Act does not apply to Fourteenth Amendment claims at all. *See* Mayers, *supra* note 8, at 52-53 (stating that contemporary sources "furnish no evidence" that the habeas statute was intended to implement the Fourteenth Amendment). This view has few or no adherents today, and Mayers reached it only by prioritizing legislative history over statutory text. *See id.* at 53-54.

a. *The Cases and the Disagreement*

In the wake of the 1867 Act and the Fourteenth Amendment, the Court had to decide how to approach cases of convicted state prisoners who raised due process arguments on habeas. The confusing thing is that the Court's opinions often seemed to conflate *jurisdiction* and *due process*. In *Converse*, for example, the Court recited the jurisdictional defect rule, but it then said, "[t]he single question is whether appellant is held in custody in violation of the Fourteenth Amendment to the Constitution of the United States, in that the state thereby deprives him of liberty without due process of law."²⁵⁴ That almost sounds like all due process violations were cognizable. In *In re Wood*, decided the same term, the Court rejected a due process argument solely on jurisdictional grounds—without mentioning due process at all.²⁵⁵ That sounds like only jurisdictional due process defects could qualify.²⁵⁶ In *Felts v. Murphy*, the Court held *both* that a procedural error (raised by a defendant too deaf to hear most of the proceedings) was not a jurisdictional defect *and* that the error was not a due process violation.²⁵⁷ That sounds like due process and jurisdiction are the same thing.

The seemingly equivocal language has given rise to two polar opposite scholarly interpretations. The broad-writ camp tends to say that the Due Process Clause originally guaranteed only a jurisdictionally sound judgment before a deprivation of life, liberty, or property. Peller, for example, adopts this reading and argues that cases like *Converse*, and *Felts* had nothing to do with limitations on habeas—it just so happened that plenary review at the time looked only for jurisdictional defects.²⁵⁸ Thus, "[o]nce the cases are considered in light of [the originally narrow Due Process Clause], it becomes clear that . . . the Supreme Court . . . reached on habeas the merits of due process claims."²⁵⁹

Bator, representing the narrow-writ view, argued that the Clause originally guaranteed more than just a jurisdictionally sound judgment; it also meant the trial proceedings had to comport with the common law's traditional

²⁵⁴ *In re Converse*, 137 U.S. 624, 631 (1891); see also *Davis v. Burke*, 179 U.S. 399, 403-04 (1900) ("For us to say that the accused had been denied due process of law would involve the absurdity of holding that what the people had declared to be the law was not the law").

²⁵⁵ *In re Wood*, 140 U.S. 278, 287 (1891).

²⁵⁶ *Id.* ("The petition for the writ sets forth no ground affecting its jurisdiction either of the offense charged or of the person alleged to have committed it."); see also *id.* (noting that even if the merits issue had been raised at trial and decided incorrectly, "such error in decision would not have made the judgment of conviction void, or [the petitioner's] detention under it illegal").

²⁵⁷ *Felts v. Murphy*, 201 U.S. 123, 128-30 (1906).

²⁵⁸ Peller, *supra* note 11, at 630-34.

²⁵⁹ *Id.* at 630; see also *id.* at 621-22. Kinnaid takes a similarly narrow reading of the Clause but draws different conclusions. Kinnaid, *supra* note 8, at 17-19.

rules.²⁶⁰ If the Clause extended beyond jurisdictional defects, then the Court's summary rejection of nonjurisdictional due process arguments indicates that the Court, *contra* Peller, was not engaging in plenary review. Instead, the Court was constrained by *habeas law* from reaching what may well have been meritorious due process arguments.

b. *A Proposed Solution*

This disagreement rests on a faulty foundation. Both sides take for granted that we need to discern the Due Process Clause's original meaning to determine whether the jurisdictional defect rule applied in this context.²⁶¹ While that would be nice, it is not necessary. Regardless of whether due process guaranteed more than just jurisdiction, the jurisdictional defect rule applied to due process claims.

Assume, for the sake of argument, that the Clause originally guaranteed only a jurisdictionally sound judgment. On that assumption, which I tend to think the likelier one, the Court's analysis would look exactly the same if it denied habeas relief on the merits (no due process violation because no jurisdictional infirmity) as if it denied habeas relief under the jurisdictional defect rule (no habeas because no jurisdictional infirmity). Consider *Converse*, where the Court resolved both the due process merits and the jurisdictional defect analysis in one stroke: "the State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."²⁶² This is analytically identical to today's rare cases where jurisdiction and the merits are so "intertwined" that a court must decide the latter to decide the former.²⁶³ For that reason, Peller is wrong to treat these cases as evidence for his plenary-review thesis. Whether these were merits dispositions or applications of the jurisdictional defect rule cannot be divined from the cases themselves—we must turn to other sources of evidence.²⁶⁴ The

²⁶⁰ See Bator, *supra* note 8, at 456-57.

²⁶¹ Peller and Bator made this assumption, and so does Woolhandler, who sides with Bator on this point only because she agrees on his view about due process. See Woolhandler, *supra* note 11, at 597-601.

²⁶² *In re Converse*, 137 U.S. 624, 631 (1891). The *Converse* opinion closed with the following: "The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging appellant's privileges or immunities or depriving him of the law of the land of his domicil." *Id.* at 632. The Court's analysis, which denied relief *in toto* after concluding that the judgment was not "utterly void," makes clear that a jurisdictional defect was mandatory—these were not three independent routes toward habeas relief.

²⁶³ See *Brownback v. King*, 141 S. Ct. 740, 749 (2021).

²⁶⁴ One exception is *Wood*. The Court's rejection of a due-process argument on jurisdictional defect grounds is suggestive because the Court did not even say there had been no due process violation. See *infra* notes 328-330 and accompanying text.

evidence I have already canvassed shows that the rule really did apply to all claims, including constitutional ones. There is no reason to think due process claims were a *sui generis* exception.

Now assume due process originally encompassed more than jurisdiction. On this assumption, too, the jurisdictional defect rule applied to due process claims. *Wood* comes to the fore here. The petitioner there raised a due process argument.²⁶⁵ The Court rejected the argument on jurisdictional-defect-rule grounds without saying anything about due process.²⁶⁶ As I explain in greater detail below, there is only one explanation for that omission: the Court held²⁶⁷ that a nonjurisdictional due process error is no warrant for habeas relief.²⁶⁸

Liebman says this cannot be right: the Court “undeniably decided—although it denied—constitutional claims that were not premised on the detaining court’s lack of jurisdiction or application of an unconstitutional statute or sentence.”²⁶⁹ This argument does not work at all. To prevail in these cases, petitioners needed to argue (1) that there was some constitutional error and (2) that the error was not a mere error but a jurisdictional defect. Sometimes prong (2) was the easy one. In these cases, the Court could tell the petitioner: “we do not need to decide whether you have shown an error because, even if you did, it is not a jurisdictional defect.” But sometimes prong (1) was easier. In these cases, the Court could say: “we need not decide whether the error you claim to have identified would have been a jurisdictional defect because, even if it would have been, there was really no error at all.” Courts do this kind of thing all the time today.²⁷⁰ In none of these cases did the Court say or suggest that a nonjurisdictional due process violation would suffice for habeas relief.

²⁶⁵ This shows up in Justice Harlan’s own statement of the case, so the Court was clearly aware of the argument despite the lack of its appearance in the opinion. See *In re Wood*, 140 U.S. 278, 280, 283 (1891) (statement of the case).

²⁶⁶ *Id.* at 287–88.

²⁶⁷ Not implied, but held, for it was essential to the judgment.

²⁶⁸ See *infra* notes 324–330 and accompanying text.

²⁶⁹ Liebman, *supra* note 6, at 2045 (citing *Felts v. Murphy*, 201 U.S. 123, 129 (1906); *Davis v. Burke*, 179 U.S. 399, 403–04 (1900); *Bergemann v. Backer*, 157 U.S. 655, 656–68 (1895); *In re Converse*, 137 U.S. 624, 631 (1891); *In re Duncan*, 139 U.S. 449, 454–61 (1891); *Crowley v. Christensen*, 137 U.S. 86, 92–94 (1890)); see also HERTZ & LIEBMAN, *supra* note 11 § 2.4[c] (“The Bator thesis . . . cannot explain a number of . . . cases, including *Yick Wo v. Hopkins*, that undeniably decided the merits . . . that were not premised on . . . lack of jurisdiction . . .” (footnotes omitted)). See also Kovarsky, *supra* note 11, at 653 n.107 (making a similar argument citing *Felts* and *Converse*).

²⁷⁰ See, e.g., *Nerio v. Evans*, 974 F.3d 571, 574 (5th Cir. 2020) (explaining that there is no “order of operations” in qualified-immunity cases, so a court may resolve the case on whichever prong is easiest (quotation omitted)); *Acheson Hotels, LLC v. Laufer*, 144 S. Ct. 18, 21 (2023) (“[W]e can address jurisdictional issues in any order we choose”).

5. Nonfiction

Per the above analysis, the 1867 Act imposed the jurisdictional defect rule by leaving federal courts powerless to grant habeas writs to validly convicted state prisoners. That might not matter much if the rule was by this time a legal fiction—if courts merely paid lip service to the rule while really granting relief for nonjurisdictional errors. On this view, yes, the Court did repeatedly assert that habeas eligibility turned on jurisdictional defects. But in cases like *Ex parte Lange* (Double Jeopardy violation), *Ex parte Bain* (indictment defect), and *Ex parte Siebold* (unconstitutional statute), the Court held that habeas relief was available. These cases and others like them, the argument goes, show that the jurisdictional defect rule was a fig leaf covering up the *real* governing rule.

Scholars do not broadly agree on what that real rule was—some say habeas review was plenary,²⁷¹ others that the Court initially focused on systemic illegality but gradually became more “willing[] to address ad hoc . . . acts of official illegality[,]”²⁷² and still others that habeas relief was available for important errors but not unimportant ones.²⁷³ And this point does not always get the “fiction” label. But the gist is that the Court was claiming to look at jurisdiction even while really applying a different rule instead.

In this Section, I argue that the rule was not a fiction either before or after the 1867 Act’s passage. A legal fiction is “a statement known to be false but made and treated as though it were true in order ‘to reconcile a specific legal result with some premise or postulate.’”²⁷⁴ The nineteenth-century jurisdictional defect rule does not fit that definition. The best explanation for the available data is that the Court was faithfully applying the prevailing conception of jurisdiction to resolve the cases before it. That conception allowed review for (1) subject matter jurisdiction over the class of cases generally, (2) jurisdiction over the person, and (3) jurisdiction to enter the particular judgment.²⁷⁵ This readily explains the Court’s behavior in the cases surrounding 1867.²⁷⁶ The point is not that the Court reached the correct

²⁷¹ See, e.g., Peller, *supra* note 11, at 581.

²⁷² Woolhandler, *supra* note 11, at 580.

²⁷³ HERTZ & LIEBMAN, *supra* note 11, § 2.4[d][i].

²⁷⁴ Siegel, *supra* note 11, at 525 (quoting Lon Fuller, *Legal Fictions*, 25 ILL. L. REV. 363, 363–72, 514 (1931)). For an overview of some definitions of the phrase “legal fiction,” see *Introducing Fictions: Examples, Functions, Definitions and Evaluations*, in LEGAL FICTIONS IN THEORY AND PRACTICE xx–xxiii (Maksymilian Del Mar & William Twining, eds., 2015).

²⁷⁵ Jurisdiction to enter the particular judgment, as noted, is best conceived as a subset of subject matter jurisdiction. See *supra* notes 136–138 and accompanying text. I am treating it as its own category for ease of analysis.

²⁷⁶ Bator, too, denied that the Court saw itself as engaged in a fiction. Bator, *supra* note 8, at 472. But he too readily conceded that the cases did not cohere with one another—that they did not more or less make sense—on their own terms. See *id.* at 470–72 (“It would be useless to try to show

conclusions in these cases—indeed, I take no stance on that.²⁷⁷ Instead, the point is that the Court was doing its best to apply the jurisdictional defect rule rather than using that rule to cover up what it was really doing.

I pause to make one clarification and one point of emphasis. The clarification: There is a difference between arguing that jurisdiction was a fiction in the nineteenth century and arguing that the word “jurisdiction” meant something different then than it does now. Sometimes these two arguments get bundled together. Siegel, for instance, notes that the Court used to “issu[e] habeas relief to petitioners convicted of crimes in courts that had what *today* would certainly be called jurisdiction.”²⁷⁸ That is well and good, but it would be a mistake to view it as suggesting a legal fiction. A mismatch between old and new conceptions of “jurisdiction” says nothing about whether the Court was telling tall tales back then. Thus, I will here argue only that the above-described conception of jurisdiction was the real rule; the Court was not secretly doing plenary review, sorting for only the important issues, or distinguishing systemic from ad hoc illegality.²⁷⁹

The point of emphasis: 1867 is the relevant year. As Part I explained, one of the problems with existing accounts is the free-ranging treatment of old cases with little or no explanation of the legal salience those cases may have. So I want to reiterate that, although the following analysis discusses many of the same cases that have featured in the literature over the years, the issue here is whether the 1867 Act encoded a real jurisdictional defect rule or a mere fiction.

a. *Judicial and Scholarly Rule Statements*

Before we even look at the results the Court reached in the years surrounding 1867, we can start with rule statements. Rule statements are themselves data in need of explanation, so it would be a mistake simply to brush them aside.²⁸⁰

Kearney and *Watkins* are two obvious pre-1867 examples, which I have already described at length.²⁸¹ The Court continued to state the rule well past

that these [nineteenth century] decisions establish clear and sensible guidelines for the scope of the habeas corpus jurisdiction”).

²⁷⁷ For discussion that gets more into those particular weeds, see Kinnaird, *supra* note 8, at 55–62.

²⁷⁸ Siegel, *supra* note 11, at 524 (discussing “traditional” habeas practice) (emphasis added).

²⁷⁹ For comparisons between the old conception of jurisdiction and the conception applied today, see *infra* Part IV.

²⁸⁰ See generally William Baude & Stephen E. Sachs, *The Official Story of the Law*, 43 OXFORD J. LEGAL STUDIES 178 (2023) (emphasizing the importance of officials’ assertions about what the law is).

²⁸¹ See *supra* notes 60–71 and accompanying text.

the 1867 Act's passage. For instance, the Court said in *Siebold*: "the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*."²⁸² In *Ex parte Yarbrough*, the Court said mere "error[s] of law . . . cannot be looked into on a writ of *habeas corpus* limited to an inquiry into the existence of jurisdiction on the part of [the convicting] court."²⁸³ The opinion in *In re Lennon* began with the words: "The only question which can properly be raised upon this writ is whether the Circuit Court exceeded its jurisdiction in holding the petitioner for a contempt and in imposing upon him a fine therefor."²⁸⁴ Other examples are easy to come by.²⁸⁵

Even when the Court spoke of a "general rule . . . that when the court has jurisdiction by law of the offence charged, and of the party who is so charged, its judgments are not nullities," it was quite clear that the "exceptions to this rule" occurred only when the particular judgment exceeded the convicting court's jurisdiction.²⁸⁶ There were no exceptions to the jurisdictional defect rule, just exceptions to the rule of thumb that judgment-specific issues did not usually go to jurisdiction.²⁸⁷ Similarly, *Siebold* contemplated that if a habeas court also "has cognizance by writ of error or appeal to review the judgment," the court might "save the party the delay and expense of a writ of error" by issuing habeas relief immediately.²⁸⁸ But the habeas court had to possess direct-review jurisdiction ("cognizance") to review the conviction at issue *in that very case*.²⁸⁹ This shortcut was a way of exercising direct-review jurisdiction, not a way of expanding habeas power.

Then there are commentators' descriptions, which provide powerful evidence of the law's steady state both before and after 1867. In 1858, Hurd said, "when the cause of commitment is shown and the prisoner is found in

²⁸² *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

²⁸³ *Ex parte Yarbrough*, 110 U.S. 651, 654 (1879).

²⁸⁴ *In re Lennon*, 166 U.S. 548, 552 (1897).

²⁸⁵ See, e.g., *In re Wood*, 140 U.S. 278, 287 ("The petition for the writ sets forth no ground affecting its jurisdiction either of the offence charged or of the person alleged to have committed it."); *In re Duncan*, 139 U.S. 449, 455 (1891) ("We repeat, that as the District Court had jurisdiction over the person of the petitioner and the offence with which he stood charged, it had jurisdiction to determine the applicatory law[.]"); *Ex parte Crouch*, 112 U.S. 178, 180 (1884) (calling the rule "elementary learning"); *Ex parte Terry*, 128 U.S. 289, 305 (1888) ("As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, these facts cannot be re-examined or reviewed in this collateral proceeding. They present a case . . . so far as the subject matter is concerned . . . within the jurisdiction of the Circuit Court").

²⁸⁶ *Ex parte Bigelow*, 113 U.S. 328, 330-31 (1885) (emphasis added).

²⁸⁷ See *id.* at 331 (holding that habeas could not lie because "what was done by [the convicting] court was within its jurisdiction"); see also *In re Eckart*, 166 U.S. 481, 484-85 (1897) (giving a similar formulation of the "general rule").

²⁸⁸ *Ex parte Siebold*, 100 U.S. 371, 375 (1879).

²⁸⁹ *Id.* (noting that this route was available if the habeas court could take "cognizance by writ of error or appeal to review the judgment" in the case at hand).

custody of a court of competent jurisdiction, not illegally asserted, the writ has fulfilled its office and the prisoner should be remanded.”²⁹⁰ In 1871, Cooley acknowledged that courts at times violated the jurisdictional defect rule by “correct[ing] the errors and irregularities of other judges and courts”—and he called “any such employment of the writ . . . an abuse.”²⁹¹ In 1876, Hurd again said that “[n]either the Supreme or Circuit Court will grant the writ where the petitioner is in conviction or execution of a sentence of a court having jurisdiction.”²⁹² Later commentary from Spear and Church, the latter being the “nineteenth century’s leading habeas treatise” writer,²⁹³ confirms the story. Spear said in 1883 that habeas “relates to the existence and legal validity of the process by which the party is detained; and beyond this the inquiry cannot extend without exceeding its just limits.”²⁹⁴ Church in 1886 analyzed cases like *Lange* and *Siebold*, and he recognized that the Court (along with many state courts) was willing to inquire into the convicting court’s “jurisdiction . . . to render the particular judgment in question.”²⁹⁵ Figuring out whether a convicting court had jurisdiction may be “a question difficult of solution,” but Church did not despair and call the whole endeavor bogus.²⁹⁶ To the contrary, he evidently saw no problem with both acknowledging difficulties and reiterating the rule, “said by a thousand courts and a thousand judges[,] that alleged errors and irregularities behind the judgment can not be inquired into on habeas corpus.”²⁹⁷ And in the 1893 edition of the same treatise (after discussing many of the cases that are now supposed to have fictionalized “jurisdiction”), Church saw things in just the same way: “[j]urisdictional defects are the only ones cognizable on this writ in assailing judgments.”²⁹⁸

²⁹⁰ HURD (1st ed. 1858), *supra* note 120, at 336; *see also id.* at 332 (“[The writ] does not, like [writs of error or certiorari], deal with errors or irregularities which render a proceeding voidable only; but with those radical defects which render it absolutely void”).

²⁹¹ COOLEY, *supra* note 119, at 347.

²⁹² HURD (2d ed. 1876), *supra* note 131, at 154–55.

²⁹³ Kovarsky, *The New Negative Habeas Equity*, *supra* note 10, at 2238. *But see* HALLIDAY, *supra* note 104, at 16 n.15 (criticizing Hurd and Church as offering “whig” accounts of seventeenth-century English habeas history).

²⁹⁴ SPEAR, *supra* note 65, at 616.

²⁹⁵ CHURCH (1st ed. 1886), *supra* note 120, at §§ 332, 362 (citing *Lange* and *Siebold* for this “settled rule of decision in this court”); *see also id.* at § 371 (discussing “Power to Render the Particular Judgment” in more detail).

²⁹⁶ *Id.* at § 362.

²⁹⁷ *Id.* at § 363.

²⁹⁸ CHURCH (2d ed. 1893), *supra* note 130 at § 362; *see also id.* at §§ 363–81 (giving an extended discussion with many examples, all treating the jurisdictional defect rule as a real thing); *id.* at §§ 347–56 (“The want of power to hear and determine, and not error or irregularity in the exercise of that power, renders a judgment void”).

The views of a critic suggest the same thing. Seymour D. Thompson vehemently argued that the judgment of a court with general jurisdiction over the subject matter should be absolutely unquestionable on habeas.²⁹⁹ He criticized lower federal courts³⁰⁰ for adopting a “modern idea of jurisdiction” that allowed inquiry into “the power [of the convicting court] to render the particular judgment.”³⁰¹ By adopting this idea, courts were effectively “revising and reversing the judgments of the courts of the States”; “lift[ing] themselves out of the category of courts co-ordinate with those of the States”; and arrogating “a supervisory authority over the State courts.”³⁰² In slightly different terms, Thompson’s hardline view was that habeas courts should ask only whether a criminal case fell within the “*sovereign power*” of the state writ large—even if the judgment lay beyond the “*judicial power* merely” of the convicting court.³⁰³

At a glance, this might seem like evidence for the fictionalism thesis. But Thompson’s complaint was not that federal courts had gotten rid of the jurisdictional defect rule; his complaint was that they were taking the rule too literally. Early in the nineteenth century, courts sometimes implied not only that a jurisdictional defect was required for habeas relief, but also that a habeas court would not even look into jurisdiction on a case-by-case basis.³⁰⁴ On this approach, it would suffice that the convicting court had jurisdiction over the defendant and that it *generally* had jurisdiction over the *class* of cases. Thompson correctly recognized that courts had given up on this ultra-deferential rule—even while they continued to look only for jurisdictional defects in the judgment.³⁰⁵ Thus, Thompson’s problem was not that the courts

299 See generally Seymour D. Thompson, *Abuses of the Writ of Habeas Corpus*, 18 AM. L. REV. 1 (1884); Seymour D. Thompson, *The Modern Idea of Jurisdiction*, 19 CENT. L. J. 102 (1884). Thompson sought to explain away many of the cases on the ground that, when a habeas court inquired more robustly into jurisdiction than he thought proper, it tended to be a habeas court that *also* had direct-review jurisdiction over the judgments of the convicting court. Thompson *Abuses*, *supra*, at 19; Thompson, *The Modern Idea*, *supra*, at 104. This argument is implausible because, as shown by the other contemporary sources, a court plainly did not need direct-review jurisdiction to examine the jurisdiction of another court. E.g., CHURCH (2d ed. 1893), *supra* note 130, § 222 (“The question of jurisdiction . . . is always open and may be inquired into upon proceedings by habeas corpus, either prior to indictment, subsequent to it, or even after a regular prosecution, trial, and conviction”).

300 Some of his criticism was aimed at the Supreme Court, too, but Thompson’s key articles came between 1867 and 1885—while the Court still lacked appellate jurisdiction. Thompson, *Abuses*, *supra* note 299, at 23.

301 Thompson, *The Modern Idea*, *supra* note 299, at 102.

302 Thompson *Abuses*, *supra* note 299, at 16, 20.

303 *Id.* at 20.

304 See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830) (“An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous”).

305 See *supra* note 66 and accompanying text (discussing the court’s departure from the deferential rule).

were claiming to inquire into the power to enter the particular judgment but were in fact doing something else. His problem was that they were claiming to do that inquiry and were in fact doing it.³⁰⁶ Thompson's criticisms are evidence that the jurisdictional defect rule (construed as including a judgment-specific inquiry) was real. He just did not like it.

These statements are not ironclad proof, but they are evidence that the rule was real. And the scholars, especially, had no obvious incentive to give cover to judicial make-believe.³⁰⁷ The presumption should be that the Court and the commentators were telling the truth; that presumption can give way only upon evidence.

b. *Holdings*

Rule statements aside, the fictionalism account struggles to explain all the cases where the Court denied habeas relief solely because of the jurisdictional defect rule.³⁰⁸ In *Crouch*, a state court was trying³⁰⁹ the petitioner for violating a licensing law.³¹⁰ The petitioner conceded the law was constitutional, but he argued an affirmative defense based on the Contract Clause.³¹¹ If this argument succeeded, it would have been a "valid defence to the charge, which [defence] grows out of a provision in the Constitution of the United States."³¹² The Court nonetheless refused to consider the argument because of the "elementary learning that if a prisoner is in the custody of a State court

³⁰⁶ Thompson did add the rhetorical flourish that the Court was asking "whether it would be *better* to render the particular judgment which was rendered" than to render another judgment. Thompson, *The Modern Idea*, *supra* note 299, at 104 (emphasis added). Yet the rest of the article makes clear Thompson's view that courts were inquiring into "the *power* of the court to render th[e] particular judgment." *Id.* (emphasis added).

³⁰⁷ *But cf.* Lon L. Fuller, *Legal Fictions*, 25 ILL. L. REV. 1, 1 (1967) ("Fictions are to be found not only in the opinions of judges, but in critical treatises written by men free from any of the influences which supposedly restrain the judge and warp his expression").

³⁰⁸ I am not highlighting *Kearney* and *Watkins*, *see supra* notes 60–71 and accompanying text, in this discussion because fictionalists sometimes seem to concede that the rule was real in these cases but became a fiction later. *See, Peller*, *supra* note 11, at 604–05 (appearing to make this concession). *But see id.* at 610 (characterizing *Watkins* as a pure statutory inference case that did not reflect a narrow writ).

³⁰⁹ Because the state proceedings were still ongoing, it seems that this case should have fallen under the *Royall* exhaustion rule, under which federal courts would generally allow state criminal proceedings to proceed to judgment before interfering by way of habeas (even if there were a potential jurisdictional defect). *Ex parte Royall*, 117 U.S. 241, 250–52 (1886). But *Crouch* was two years before *Royall*. Also, as Duker notes, *Crouch* came down before Congress restored the Court's appellate jurisdiction in habeas cases. *See* DUKER, *supra* note 58, at 243 (concluding the Court "clearly lacked jurisdiction in this case" for that reason). These apparent faux pas do not make *Crouch* any less probative as to whether the jurisdictional defect rule was a fiction.

³¹⁰ *Ex parte Crouch*, 112 U.S. 178, 179 (1884).

³¹¹ *Id.*

³¹² *Id.* at 180.

of competent jurisdiction, not illegally asserted, he cannot be . . . discharged on habeas corpus issued by a court of the United States, simply because he is not guilty of the offence for which he is held.”³¹³

Crouch made clear that constitutional errors were irremediable on habeas unless they went to jurisdiction—even if the constitutional error went to a full-on affirmative defense that should have rendered the petitioner “not guilty.”

Or take *Ex parte Harding*, where the petitioner raised constitutional challenges to the composition of both the grand jury and the petit jury.³¹⁴ He also argued that the convicting court denied him his Sixth Amendment right “to have compulsory process for obtaining witnesses in his favor.”³¹⁵ The Court disclaimed its own “jurisdiction for the discharge on habeas corpus of a person imprisoned under the sentence of a territorial court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.”³¹⁶ It then rejected the petitioner’s arguments for failure to raise a jurisdictional defect—in terms that made absolutely clear it was not passing on the arguments’ merits. “The objection, *if it be one*, goes only to the regularity of the proceedings, not to the jurisdiction of the court. . . . For such errors or irregularities, *if they exist*, a judgment is not void, and a writ of habeas corpus gives this court no authority for their correction.”³¹⁷ Perhaps the response would be that the Court secretly knew these arguments were weak on the merits and secretly rejected them for that reason, or maybe for some other reason. Query whether there is any affirmative evidence to support that.

Another Sixth Amendment case is *In re Belt*, where a D.C. court imposed a heightened sentence for Belt’s second conviction for the same crime.³¹⁸ Belt

³¹³ *Id.*

³¹⁴ *Ex parte Harding*, 120 U.S. 782 (1887).

³¹⁵ U.S. CONST. amend. VI; *Harding*, 120 U.S. at 783; *see also* HURD (1st ed. 1858), *supra* note 120 at 334 (approvingly citing a case that held “a defendant on trial for vagrancy, [who] was not allowed to cross-examine the prosecuting witnesses, nor to produce witnesses in her own behalf” was ineligible for habeas relief).

³¹⁶ *Harding*, 120 U.S. at 783-84. Here, “no authority to hold him under the sentence” refers to a situation where a prisoner has been validly sentenced, but the sentence does not align with the actual time spent in custody. This would be the case, for example, if a court sentenced someone to five years and the custodian tried to hold him for six. *Cf.* Kinnaird, *supra* note 8, at 37-38 nn.209-10 and accompanying text.

³¹⁷ *Harding*, 120 U.S. at 784 (emphasis added). Woolhandler cites *Harding* and characterizes it the same way I have, above. Woolhandler, *supra* note 11, at 598 n.145, 629 n.323. Hertz and Liebman cite *Harding* for the proposition that all “fundamental” claims, “including all constitutional . . . claims” were cognizable in habeas review. HERTZ & LIEBMAN, *supra* note 11, § 2.4[d][v] n.181 (reading *Harding* as merely deciding that the Fifth and Sixth Amendments were inapplicable to the states). The case does not support that proposition.

³¹⁸ *In re Belt* 159 U.S. 95, 96 (1895).

argued that the first court had violated his Sixth Amendment rights by convicting him without a jury, and that the second court's heightened sentence (heightened because of the first conviction) was therefore invalid.³¹⁹ The Court explained that "the Supreme Court of the District had jurisdiction and authority to determine" these constitutional issues. Left with "no doubt that the courts below had jurisdiction," the Court concluded the writ must not issue.³²⁰

Similarly, in *Ex parte Bigelow*, a D.C. double jeopardy case, the Court acknowledged that "it is not always very easy to determine what matters go to the jurisdiction of a court so as to make its action when erroneous a nullity."³²¹ But the Court concluded that here (unlike in some double jeopardy cases, discussed below), any error was on the nonjurisdictional side of the line.³²² "Without giving an opinion as to whether" the trial court's resolution of the double jeopardy issue "was sound or not," the Court denied relief.³²³

Finally, there are the cases where the Court concluded there was no jurisdictional defect with very little explication of the petitioner's claims. In *Wood*, the Court's sole ground for rejecting a constitutional argument was the absence of a jurisdictional defect.³²⁴ In another case, the entire opinion read as follows: "Leave to file petition for writs of *habeas corpus* and *certiorari* is denied. The ground of the application does not go to the jurisdiction or authority of the Supreme Court of the District [of Columbia], and mere error cannot be reviewed in this proceeding."³²⁵ These snippy analyses are informative precisely because there is so little meat on the bone. It is hard to see what else the Court was doing if not strictly applying the jurisdictional defect rule.

It is possible, if one strains hard enough, to come up with fictional explanations for these cases. For instance, Peller says *Belt* and *Bigelow* concerned only the Court's lack of jurisdiction to directly review the D.C. courts' judgments at this time.³²⁶ This does not persuade because, as I have explained, the jurisdictional defect rule applied even when the Court had direct-review jurisdiction.³²⁷ Peller also brushes off *Wood* as an exhaustion

³¹⁹ *Id.* at 96-97.

³²⁰ *Id.* at 99-100.

³²¹ *Ex parte Bigelow*, 113 U.S. 328, 330 (1885).

³²² *See id.* at 331.

³²³ *Id.* at 331; *see also id.* at 330 (making clear that the "defence" whose validity the Court refused to opine on was the double jeopardy claim).

³²⁴ *See In re Wood*, 140 U.S. 278, 287 (1891) ("[T]he writ sets forth no ground affecting its jurisdiction either of the offence charged or of the person alleged to have committed it").

³²⁵ *In re Schneider*, 148 U.S. 162, 166 (1893).

³²⁶ Peller, *supra* note 11, at 615-16 n.194.

³²⁷ *See supra* notes 154-169 and accompanying text.

case.³²⁸ This does not persuade because, even though exhaustion was one ground for the judgment, so was the jurisdictional defect rule—alternative holdings are a routine part of opinion-writing. Hertz and Liebman, for their part, say *Wood* was just about the Court's refusal to second-guess state courts' factual findings.³²⁹ This does not persuade because, as Hertz and Liebman elsewhere acknowledge, the Court allowed exactly the same kind of claim it rejected in *Wood* in a direct-review posture.³³⁰

In any event, the question is not whether a clever lawyer could concoct a metaphysically possible explanation for the data points. The question is which hypothesis explains all the data points with the best combination of completeness and parsimony. The best hypothesis is that the Court was applying a real, muscular jurisdictional defect rule consistently in both federal and state prisoner cases. The fact patterns were sometimes easy and sometimes (as in the cases discussed below) hard. But that is an unremarkable feature of all adjudication. It is not evidence of a legal fiction.

c. *Unconstitutional Statutes*

Now I turn to the cases that often get cited as evidence of the fictionalism view. Start with *Siebold*, where Justice Bradley's opinion for the Court held that a conviction under an unconstitutional statute is void for lack of jurisdiction.³³¹ Federal criminal jurisdiction was limited to "crimes and offences cognizable under the authority of the United States."³³² Thus, the Court explained, the existence of a crime under some statute is "the

³²⁸ *Id.* at 639-40. This is in addition to the scope-of-due process explanation, which I have already examined.

³²⁹ HERTZ & LIEBMAN, *supra* note 11, at § 2.4[d][vi], 63 n.186.

³³⁰ *See Id.* at § 2.4[d], 45 n.69; Woolhandler, *supra* note 11, at 601 & n.159-60 (noting that the *Wood* Court emphasized the difference between cases that came "by way of writ of error rather than on habeas").

³³¹ *Ex parte Siebold*, 100 U.S. 371, 377 (1879). This was not a holding because the Court went on to conclude the statute at issue was constitutional, so the judgment was jurisdictionally sound. *Id.* at 398-99. A similar case is *Ex parte Virginia*, 100 U.S. 339 (1879), a pre-conviction case from earlier the same term. *See id.* at 348-49 (denying a constitutional challenge to the congressional act underlying the habeas petition). Also consider *Brimmer v. Rebman*, 138 U.S. 78 (1891), where the court applied the *Siebold* rationale without expressly stating that the unconstitutionality of a statute voids the conviction. *See id.* at 80 ("The sole question to be determined is whether the [state] statute . . . is repugnant to the Constitution of the United States."); *id.* at 84 (finding the statute violated the commerce clause). Siegel argues this is evidence of the fictionalism thesis. Siegel, *supra* note 11, at 526-27. But by 1891, *Siebold*'s principle had become solid precedent. *Brimmer* was just an ordinary application of the principle, so it is hardly surprising that the Court felt no need to rehash things explicitly.

³³² 1789 Act, *supra* note 56, § 11, 1 Stat. 73, 78-79; *see also* 18 U.S.C. § 3231 (current codification of the same concept). *See generally* Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985) (discussing the early Republic's eventual decision that there was no such thing as a federal common law crime).

foundation of [federal criminal] proceedings.”³³³ But an unconstitutional statute “is void, and is as no law,” and “[a]n offence created by it is not a crime.”³³⁴

This notion, right or wrong, was a very real part of the Court’s non-habeas jurisprudence at the time. As the Court said in *Norton v. Shelby County*: “An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”³³⁵ And if an offense created by an unconstitutional statute is no crime, a trial under that statute does not fit within the jurisdiction-granting statute. There is no “crime [or] offence[]” to be found.³³⁶ Thus, a so-called conviction under such a statute is jurisdictionally defective—a court cannot try (much less convict) someone for a non-crime.³³⁷ The *Siebold* opinion happened to conclude the statute at issue was constitutional, but the Court has applied the same rationale in a variety of contexts.³³⁸

The usual scholarly conclusion is that *Siebold*’s reasoning is incredible on its face and should not be taken seriously. Siegel says the jurisdiction-granting statute was “undoubtedly constitutional” and “gave the circuit court . . . jurisdiction over the criminal case.”³³⁹ He says it is “[o]f course . . . not really true” that the constitutional defect deprived that court of jurisdiction.³⁴⁰ Liebman calls *Siebold* a “halting step” with “unclear”

³³³ *Siebold*, 100 U.S. at 376.

³³⁴ *Id.* This is not the same as saying that judicial review empowers courts to “strike down” statutes. Nor is it the same as saying a statute that is unconstitutional in one application is unconstitutional in all applications. See generally Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 933 (2018) (arguing against treating the judicially imposed nonenforcement of a statute as a veto-like power to “strike down” legislation).

³³⁵ 118 U.S. 425, 442 (1886).

³³⁶ 1789 Act, *supra* note 56, § 11, 1 Stat. 73, 79.

³³⁷ See *Siebold*, 100 U.S. at 376–77 (invoking the traditional English rule that a conviction is jurisdictionally defective where the court convicts someone for a crime that just does not exist).

³³⁸ See, e.g., *In re Coy*, 127 U.S. 731, 758 (1888) (“[T]he validity of the statute under which a prisoner is held in custody may be inquired into under a writ of habeas corpus as affecting the jurisdiction of the court which ordered his imprisonment”). What about the cases applying *Siebold*’s rationale to state-court convictions? See, e.g., *supra* note 331 (discussing *Brimmer v. Rebman*). Much of the same reasoning would apply. State courts, like federal courts, presumably have criminal jurisdiction only over crimes. If the Constitution renders a “crime” a non-crime, then *Siebold* would dictate the state court lacks jurisdiction to proceed. Any conviction under such a statute would fit within the 1867 Act’s ambit because the jurisdictional defect comes not from state law but from the superposition of the federal constitution onto state law. In one case along similar lines, the Court granted a habeas writ to a prisoner who was being “held . . . under sentence of death” where that sentence had been imposed pursuant to an unconstitutional, and therefore void, state statute. See *In re Medley*, 134 U.S. 160, 161, 174–75 (1890).

³³⁹ Siegel, *supra* note 11, at 526.

³⁴⁰ *Id.* at 525.

logic.³⁴¹ Woolhandler cites *Siebold* for the proposition that “the Court [was] refus[ing] to limit itself to strictly jurisdictional questions.”³⁴² Even Bator viewed *Siebold* as “anomalous” and questioned its “wisdom.”³⁴³

These critiques confidently assert that *Siebold* makes no sense *without explaining which of Siebold’s premises was false*.³⁴⁴ Federal courts really did have jurisdiction to try only offenses against the United States. And under *Norton*—which cannot possibly have been a habeas fiction because it was not a habeas case—a statute was void to the extent it contradicted the Constitution. So an ostensible offense against the United States would be no offense at all if the statute is unconstitutional.³⁴⁵ It appears to follow that a conviction under an unconstitutional statute is jurisdictionally defective. Not only that, but jurisdiction could not even attach in the first place. It is one thing, then, to argue that *Siebold* was wrong. After all, it was based on *Norton*’s understanding of unconstitutionality, which is a contestable one.³⁴⁶ But it is quite another, and in my view totally implausible, to say that *Siebold* was obvious nonsense³⁴⁷ or that it was somehow drastically out of keeping with nineteenth-century law.

The *Siebold*-as-fiction view also does a poor job of explaining related precedents from both before and after. Take *Parks*, a pre-*Siebold* case. The petitioner argued that, as the actions he had committed did not amount to a federal statutory violation, he was entitled to habeas relief.³⁴⁸ Today, one might call this a “legal innocence claim.”³⁴⁹ Despite this argument’s similarity to the one that would soon prevail in *Siebold*, the Court held that the

³⁴¹ Liebman, *supra* note 11, at 2042.

³⁴² Woolhandler, *supra* note 11, at 602.

³⁴³ Bator, *supra* note 8, at 468 n.61. *But see* Kinnaird, *supra* note 8, at 36-37 n.209 (stating that *Siebold* was not an innovation).

³⁴⁴ *Cf.* CHURCH (2d. ed. 1893), *supra* note 130, at § 374 (noting that not all state courts agreed with *Siebold* but calling the Court’s approach “the soundest in reason and best supported by authority”).

³⁴⁵ *Cf.* William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 41 (2023) (“[S]uppose that we already have adopted a constitutional provision that repeals . . . unconstitutional tenure protection[s]—which we have, Article II. That should produce the same outcome [as a legislative repeal], because the Constitution displaces inconsistent statutes”) (emphasis omitted).

³⁴⁶ *See* Michael C. Dorf & Matthew D. Adler, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1112-13 (2003) (defending *Norton* as both a traditional and coherent view of unconstitutionality, but canvassing competing views).

³⁴⁷ Consider the rather similar stance that a conviction based on an unconstitutional rule should not be amenable to harmless-error analysis. Henry P. Monaghan, *Harmless Error and the Valid Rule Requirement*, 1989 SUP. CT. REV. 195 (1990). *That* stance hardly seems like nonsense.

³⁴⁸ *Ex parte Parks*, 93 U.S. 18, 20 (1876).

³⁴⁹ *See* *Jones v. Hendrix*, 143 S. Ct. 1857, 1878 (2023) (Jackson, J., dissenting).

argument did not go to jurisdiction.³⁵⁰ And in the post-*Siebold* case of *Yarbrough*, the Court applied both *Parks* and *Siebold* at once. The *Yarbrough* petitioner's legal innocence claim was off the table (under *Parks*), but the constitutionality of the statute was fair game (under *Siebold*).³⁵¹

The Court's efforts at harmonization do not scream "fiction." Why, for example, would the Court keep a supposedly outmoded *Parks* around instead of overruling it *sub silencio* in *Yarbrough*? Instead, it looks like the Court was taking its precedent seriously and attempting to apply it as well as possible. *Parks* made a lot of sense (can a court really lose jurisdiction just because it wrongly says someone's conduct constitutes an offense?), but so did *Siebold* (can a court really obtain jurisdiction to try a non-crime?). So the Court kept them both around. Further—though this has often gone unremarked—the Court actually abandoned *Siebold* in the 1912 case *Glasgow v. Moyer*.³⁵² If *Siebold* was a first step in an ever-expanding, fiction-based habeas jurisdiction, this just does not add up.

d. *Indictment Defects*

Next consider *Ex parte Bain*, where the Court held certain indictment defects could render a conviction jurisdictionally defective. There, a federal grand jury charged Bain with the crime of "having made a false report or statement as cashier of the Exchange National Bank of Norfolk, Virginia," in violation of a federal statute.³⁵³ The crime was an infamous one, which meant a grand jury was required. Intent to deceive was an element; the indictment specified that Bain had acted "with intent to deceive the Comptroller of the Currency and" another government official.³⁵⁴ After indictment and just before Bain pleaded guilty, the trial judge ordered the words "Comptroller of the Currency and" struck from the indictment because he saw them as "surplusage."³⁵⁵

³⁵⁰ *Parks*, 93 U.S. at 20, 23 ("[T]he question whether [the charged conduct] was or was not a crime within the statute was one which the District Court was competent to decide.") (citing *Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830)).

³⁵¹ *Ex parte Yarbrough*, 110 U.S. 651, 653–54 (1883) (differentiating an "error of law" under *Parks* from whether a "law of Congress . . . is warranted by the Constitution, or . . . null and void"); see also *In re Coy*, 127 U.S. 731, 758 (1888) ("If the statute has invested the court which tried the prisoner with jurisdiction to punish a well defined class of offences . . . its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of *habeas corpus*."); see also *supra* notes 308–313 and accompanying text (discussing *Ex parte Crouch*).

³⁵² *Glasgow v. Moyer*, 225 U.S. 420, 429 (1912) ("The [jurisdictional defect] principle is not the less applicable because the law which was the foundation of the indictment and trial is asserted to be unconstitutional or uncertain in the description of the offense").

³⁵³ *Ex parte Bain*, 121 U.S. 1, 2 (1887); see also *id.* at 3–4 (quoting the statute).

³⁵⁴ *Id.* at 4 (quoting the indictment against Bain) (emphasis omitted).

³⁵⁵ *Id.* at 9.

The Court noted that Bain denied “[t]he jurisdiction of [the trial] court . . . upon two principal grounds,” one of them being the change in the indictment.³⁵⁶ The Court held that the change rendered the conviction jurisdictionally defective, a conclusion based partly on common law tradition and partly on constitutional text.³⁵⁷ The Court marched through a long list of authorities to establish that “the common law” views “an indictment by a grand jury as a *prerequisite* to a prisoner’s trial for a crime.”³⁵⁸ And at common law, the Court explained, a judicially altered indictment—no matter how small the change—is “no indictment of a grand jury” at all.³⁵⁹ The Court buttressed this conclusion by reference to the “positive and restrictive language of the” Fifth Amendment, which does not even allow a defendant to be “held to answer for”—much less convicted of—infamous crimes without indictment.³⁶⁰ The Court put these pieces together and had “no difficulty” concluding that the conviction was jurisdictionally defective: the judge’s tweak meant there was no grand jury indictment, and a grand jury indictment “was indispensable to the power of the court to try the petitioner for the crime.”³⁶¹

The consensus, again, is that the Court had either descended into folly or was playing a fast one; again, we are given no explanation of how or why this case was wrong under the jurisdictional defect rule.³⁶² *Bain*’s analysis calls to mind the many recent cases where the Court determined whether a statutory requirement (e.g., a time bar) is jurisdictional or merely a claims-processing rule. As one lower court has noted, “[w]hether a disputed matter concerns jurisdiction or the merits . . . is sometimes a close question.”³⁶³ Just as today’s Court must consider text and background principles to determine whether a given *statutory* violation goes to jurisdiction,³⁶⁴ the *Bain* Court considered text and background principles to determine whether a *constitutional* violation

³⁵⁶ *Id.* at 3.

³⁵⁷ *Id.* at 9–12.

³⁵⁸ *Id.* at 10 (emphasis added); *see also id.* at 3–13.

³⁵⁹ *Id.* at 13; *see also* Kinnaird, *supra* note 8, at 36 (discussing the deep “doctrinal roots” going “to the necessity of an indictment”).

³⁶⁰ *Bain*, 121 U.S. at 5–6 (quoting U.S. CONST. amend. V).

³⁶¹ *Id.* at 12–13.

³⁶² *See, e.g.*, Bator, *supra* note 8, at 471; Woolhandler, *supra* note 11, at 625–26; Peller, *supra* note 11, at 615, 615 n.192. The Court explicitly overruled *Bain* in *United States v. Cotton*, 535 U.S. 625, 631 (2002). The Court’s opinion rested partly on the (undefended) assertion that *Bain*’s conception of jurisdiction was a fiction and partly on subsequent precedent. *Id.* at 630 (discussing “[t]he [*Bain*] Court’s . . . ‘somewhat expansive jurisdiction’ . . . which was ‘more a fiction than anything else’”) (internal citations omitted).

³⁶³ *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 361 (2d Cir. 2000); *see also* Arbaugh v. Y&H Corp., 546 U.S. 500, 516 (2006) (quoting this snippet approvingly).

³⁶⁴ *See* *United States v. Kwai Fun Wong*, 575 U.S. 402, 410–11 (2015) (laying out the test for determining whether a statutory requirement is jurisdictional).

went to jurisdiction. Given the Fifth Amendment's robust text and the long common law tradition at play, it was entirely reasonable for the Court to hold that a void indictment deprived the convicting court of jurisdiction.³⁶⁵

Here, too, related cases belie the fiction story. In the years surrounding *Bain*, the Court held that some other kinds of indictment defects did not go to jurisdiction.³⁶⁶ For example, in *Harding*, the petitioner argued that he had been indicted by a grand jury whose composition violated the Fifth and Sixth Amendments.³⁶⁷ That constitutional claim is self-evidently a serious one, seemingly much more serious than the tiny wording change the trial judge made in *Bain*. Yet the Court did not reach the argument's merits—it simply held that even if there had been a constitutional violation, it did not go to jurisdiction.³⁶⁸ So we have the Court allowing habeas for a very small change to the indictment (where there was a strong jurisdictional argument) and denying it for an issue of grand jury composition (where the issue was very serious but there was no winning jurisdictional argument).³⁶⁹ If the Court was employing a fiction in order to fix the big errors, that is the opposite of what we should expect. The Court's approach in these cases reeks of formalism.

e. *Double Jeopardy*

Next there are the double jeopardy cases, most notably *Ex parte Lange*.³⁷⁰ Lange violated a federal statute that prescribed a punishment of either a fine or imprisonment, but not both.³⁷¹ The court convicted Lange and mistakenly sentenced him to just that: both.³⁷² After Lange had paid the fine and served five days in jail, the court realized its error.³⁷³ Attempting to rectify the mistake, the court purported to vacate its own judgment and entered a new sentence of imprisonment, albeit without ordering the fine returned.³⁷⁴

On habeas, the Supreme Court held this second judgment violated the Double Jeopardy Clause. Lange had “not only [been] put in jeopardy twice,

³⁶⁵ For discussion of the role of constitutional text in differentiating jurisdictional from nonjurisdictional defects, see *infra* notes 540–550 and accompanying text.

³⁶⁶ See, e.g., *Ex parte Harding*, 120 U.S. 782, 784 (1887); *Ex parte Parks*, 93 U.S. 18, 20 (1876); *Ex parte Yarbrough*, 110 U.S. 651, 654 (1883); *In re Coy*, 127 U.S. 731, 741–42 (1888).

³⁶⁷ *Harding*, 120 U.S. at 783 (syllabus).

³⁶⁸ *Id.* at 783–84.

³⁶⁹ See DUKER, *supra* note 58, at 238 (discussing and critiquing the Court's line-drawing between *Bain* and *Harding*).

³⁷⁰ *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873).

³⁷¹ *Id.* at 175.

³⁷² *Id.* at 174–75.

³⁷³ *Id.* at 164 (syllabus). The court realized the error after Lange petitioned it for a habeas writ. *Id.*

³⁷⁴ *Id.*

but put to actual punishment twice for the same thing.”³⁷⁵ And this was a jurisdictional defect. Under both the common law (which made clear that a court’s power over a defendant *completely ended* after jeopardy had attached once) and the Fifth Amendment’s text (under which this was an *a fortiori* case because the bar goes to double “jeopardy” at the threshold and this case involved double punishment), the court’s power over *Lange* had ended upon entry of the first judgment.³⁷⁶ By the time the court purported to enter the second judgment, “the power of the court to punish for that offence was at an end”; “[t]he power to render any further judgment did not exist.”³⁷⁷ In this way, the Court based its jurisdictional analysis on a combination of common law principles and Constitutional threshold text, just as in *Bain*.

The Court found *Lange*’s limits twelve years later in *Bigelow*.³⁷⁸ There, the government charged the petitioner with fourteen federal counts of embezzlement, and the trial judge consolidated all the charges. The judge swore in a jury but then decided the charges should not be tried together after all.³⁷⁹ So he undid the consolidation order and tried the petitioner before the same jury for just one of the counts. The jury found him guilty.³⁸⁰ The petitioner invoked *Lange*, arguing that this was a double jeopardy violation. The Court acknowledged that “it is not always very easy to determine what matters go to . . . jurisdiction,” but held that this alleged constitutional violation did not.³⁸¹ The reason: In *Lange*, there was a clean cut-off point—a point after which “the authority of the Circuit Court over the case was at an end, and the subsequent proceedings were void.”³⁸² In *Bigelow*, no such cut-off point existed, so the Fifth Amendment operated as a “defence” without voiding subsequent proceedings or the resulting conviction.³⁸³

The fictionalism story tries to downplay *Bigelow* by claiming that *Lange* was the true statement of law; Bator did something of the opposite.³⁸⁴ There is no need to do either. As the Court acknowledged in *Bigelow*, it can be hard to draw lines between jurisdictional and nonjurisdictional defects. The Court

³⁷⁵ *Id.* at 175.

³⁷⁶ *See id.* at 176.

³⁷⁷ *Id.* Note also that the government argued the *first* judgment was jurisdictionally defective, such that jeopardy had not attached even once. *Id.* at 174. The Court rejected this argument, holding that the first judgment was not void. *See id.* (“The argument is plausible but unsound”).

³⁷⁸ *Ex parte Bigelow*, 113 U.S. 328 (1885).

³⁷⁹ *Id.* at 329.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 330.

³⁸² *Id.* at 331.

³⁸³ *Id.*

³⁸⁴ Compare Bator, *supra* note 8, at 468-69 & 469 n.62 (“[The *Bigelow* Court] explicitly rejected the contention that the fact that the issue was one of constitutional law made it automatically a jurisdictional one.”), with Peller, *supra* note 11, at 616 n.194 (arguing that *Bigelow* can be entirely explained by the anti-circumvention rationale discussed *supra*, notes 154-169).

was simply drawing one such line in *Bigelow*, even if imperfectly.³⁸⁵ That it felt this endeavor necessary is further evidence that the jurisdictional defect rule was real. If it had been a fiction, whence the need to strive for doctrinal coherence in *Bigelow*? Much easier to devise a semi-plausible rationale by which to force the case into the *Lange* mold.

f. *Nielsen, Bonner, and Miscellaneous Arguments*

Then there is *Ex parte Nielsen*, another double jeopardy case.³⁸⁶ The government charged Nielsen with bigamy on the ground that he was married to two women at the same time. He pleaded guilty in district court, paid a fine, and spent three months imprisoned.³⁸⁷ The prosecutor then charged Nielsen with adultery on the ground that he was being unfaithful to his first wife with his second wife.³⁸⁸ After Nielsen was convicted, he pressed a double jeopardy argument on habeas.³⁸⁹

The Court stated the jurisdictional defect rule and explained that this case fit within *Lange*'s reasoning.³⁹⁰ Nielsen had already been convicted and punished for bigamy, so if adultery was the same offense as bigamy, the district court lacked jurisdiction to enter the second conviction.³⁹¹ Most of the Court's analysis, therefore, focused on whether there had been a double jeopardy violation. It concluded there had been and remanded with instructions to discharge.³⁹² This was simply an application of the principle described in *Lange*.

The *Nielsen* decision gets attention not because of its analysis, which was straightforward enough, but because of some of the language Justice Bradley

³⁸⁵ See Kinnaird, *supra* note 8, at 39 (“[C]loser inspection of the Court’s reasoning [in *Bigelow* and *Lange*] helps reconcile the seemingly divergent results”).

³⁸⁶ *Ex parte Nielsen*, 131 U.S. 176, 183 (1889).

³⁸⁷ *Id.* at 179.

³⁸⁸ *Id.* at 177–78.

³⁸⁹ *Id.* at 179.

³⁹⁰ *Id.* at 184–85 (citation omitted) (“It is well settled by a series of decisions that this Court, having no jurisdiction of criminal cases by writ of error or appeal, cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District court in a criminal case unless the sentence exceeds the jurisdiction of that court or there is no authority to hold him under the sentence.”); *id.* at 184 (discussing *Lange*).

³⁹¹ *Id.* at 183; see also *id.* (citing *In re Snow*, 120 U.S. 274 (1887), in a discussion of double conviction for the same offense).

³⁹² *Id.* at 190–91. One slight difference was that in a case like *Lange* or *Snow*, “the double conviction for the same offense appeared on the face of the judgment.” *Id.* at 183. Here, the government did not contest the fact that there was a double conviction—it contested only whether the two convictions were for one offense. *Id.* The Court held that this form of double conviction was sufficient to find in the defendant’s favor. *Id.* This issue goes not to the scope of the jurisdictional defect rule, but simply to the sources a habeas court can look at to determine whether there was jurisdiction.

employed along the way. The Court stated that “an unconstitutional conviction and punishment under a valid law” is just as “violative of . . . constitutional rights” as “a conviction and punishment under an unconstitutional law.”³⁹³

The Court went on:

A party is entitled to a *habeas corpus*, not merely where the court is without jurisdiction of the cause, but where it has no constitutional authority or power to condemn the prisoner. . . . In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution which bounds and limits all jurisdiction. . . . And why should not such a rule prevail *in favorem libertatis*? If we have seemed to hold the contrary in any case, it has been from inadvertence. . . . In the present case, the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction.³⁹⁴

Peller reads *Nielsen* as a declaration that the Court “was prepared to hold that any constitutional error made a judgment void.”³⁹⁵ Hertz and Liebman, along with Siegel, follow suit.³⁹⁶

There is a simple but insuperable objection: if *Nielsen* really means that all constitutional defects are jurisdictional defects, then *Nielsen* is incompatible with several of the Court’s holdings from both before and after it. This is not a matter of tension or of stretching the cases. It is a matter of logical incompatibility. On the plenary-review reading, *Nielsen* contradicts the holdings (not dicta) of *Crouch*, *Harding*, *Bigelow*, *Belt*, and *Wood*. If this contradiction were unavoidable, we would have no choice but to accept it.³⁹⁷ But if there is a plausible way to read *Nielsen* that avoids the contradiction, that would be best.

And there is such a reading. The Court did not say that “any constitutional error made a judgment void.”³⁹⁸ The Court said the judgment is void if the convicting court had “no constitutional *authority* or *power to condemn* the

393 *Id.* at 183; *see also id.* at 184 (contrasting “a . . . mere error in law” with “a case of denying to a person a constitutional right,” in which case “the party is entitled to be discharged”).

394 *Id.* at 184-85.

395 Peller, *supra* note 11, at 615.

396 *See* HERTZ & LIEBMAN, *supra* note 11, at § 2.4[d][iv] (citing *Nielsen* for the proposition that “[d]uring [the 1789-1874] period . . . the line between lack of jurisdiction and lack of constitutionality sometimes blurred entirely”); Siegel, *supra* note 11, at 528 (citing *Nielsen* to argue that the jurisdictional rule was a fiction).

397 Even this would ultimately leave the fictionalism thesis outgunned by the sheer number of cases on the other side of the ledger.

398 Peller, *supra* note 11, at 615.

prisoner.”³⁹⁹ This language recognized that some constitutional errors can rise to the level of jurisdictional defects, and that when they do, the resulting so-called “judgments” are entitled to no respect. In these situations, the judgment itself *just is* a constitutional violation because the Constitution removes the convicting court’s power to enter it. This is what it means for a court to lack “constitutional authority or power to condemn,” or for a “conviction and punishment” to be “unconstitutional,” or for a “sentence” to be “against an express provision of the Constitution, which bounds and limits all jurisdiction.”⁴⁰⁰ Thus, while the fictionalism approach would allow habeas relief on the basis of any constitutional error *along the way to the judgment*, Nielsen’s actual approach would allow relief only if the error rendered the resulting *judgment of conviction* unconstitutional, void, jurisdictionless. Justice Bradley’s Nielsen opinion, like his opinion in the sovereign immunity case *Hans v. Louisiana*, “wouldn’t win any prizes for draftsmanship.”⁴⁰¹ But that is no reason to read the case as a flat contradiction of the Court’s other cases from the same time frame.

We should take the same approach to the Court’s broad dicta in *In re Bonner*.⁴⁰² The Court held that the sentencing court had exceeded its jurisdiction by imprisoning the defendant in a state penitentiary in circumstances where the statute did not allow penitentiary imprisonment.⁴⁰³ In rejecting the government’s argument to the contrary, Justice Field went on at some length about the kinds of procedural errors that, in his view, could amount to jurisdictional defects. Quite a few errors seemed to make the cut:

There has been a great deal said and written, in many cases with embarrassing looseness of expression, as to the jurisdiction of the courts in criminal cases. From a somewhat extended examination of the authorities we will venture to state some rule applicable to all of them, by which the jurisdiction as to any particular judgment of the court in such cases may be determined. It is plain that such court has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction; and when, in taking custody of the accused, and in its modes of procedure to the determination of the question of his guilt or innocence, and in rendering judgment, the court keeps within the limitations prescribed by

³⁹⁹ Nielsen, 131 U.S. at 184 (emphasis added).

⁴⁰⁰ *Id.* at 183-85; see also CHURCH (2d. ed. 1893), *supra* note 130, § 362, at 501 (equating “[a] judgment of conviction . . . pronounced in violation of the constitution, laws, or treaties of the United States” with a jurisdictionally defective judgment).

⁴⁰¹ William Baude & Stephen E. Sachs, *The Misunderstood Eleventh Amendment*, 169 U. PA. L. REV. 609, 619 (2021) (explaining that *Hans* was probably a lot less ad hoc and atextual than is often assumed); *Hans v. Louisiana*, 134 U.S. 1 (1890).

⁴⁰² *In re Bonner*, 151 U.S. 242, 256-57 (1894).

⁴⁰³ *Id.* at 254-55.

the law, customary or statutory. When the court goes out of these limitations, its action, to the extent of such excess, is void. Proceeding within these limitations, its action may be erroneous, but not void.⁴⁰⁴

Here too, reading the case as an endorsement of plenary review—which, by its terms, it was not—will yield nothing but contradictions.⁴⁰⁵ The better reading is that Justice Field was explicating, in dicta that was admittedly much broader than it had to be, the kinds of errors he thought could rise to the level of jurisdictional defect.

One last pro-fiction argument comes from Hertz and Liebman, who maintain that the jurisdictional defect hypothesis “cannot explain . . . cases *denying* habeas corpus review on claims that manifestly *did* challenge the jurisdiction of the convicting court.”⁴⁰⁶ Their leading case is *Whitten*.⁴⁰⁷ There, the petitioner’s federal-law argument was that he had been indicted as “a fugitive from justice,” that he was not a fugitive from justice, and that his detention was thus jurisdictionally defective.⁴⁰⁸ The Court held that this argument did not make out a “case of [such] peculiar urgency” that the petitioner should “be discharged by a court or judge of the United States upon a writ of *habeas corpus*, in advance of any proceedings in the courts of the State to test the validity of his arrest and detention.”⁴⁰⁹ In other words, this was an exhaustion holding: the Court refused to consider the argument until the state’s own courts had taken a pass at it. Hertz and Liebman are conflating that exhaustion holding with a full rejection of the claim.

The second case is *Tyler*, where the petitioner had been committed for contempt in a civil case.⁴¹⁰ He argued the court lacked jurisdiction because the amount in controversy requirement had not been met. The Court rejected this argument on the ground that an amount-in-controversy defect—at least after a final judgment, which had already issued—can be raised on direct review but not on collateral attack.⁴¹¹ Hertz and Liebman infer that the Court did not care about jurisdiction. The better view is that (a) jurisdiction was ultimately what counted, but (b) in this rare circumstance, review was still unavailable because this kind of “apparent defect . . . depend[s] upon an

⁴⁰⁴ *Id.* at 256-57.

⁴⁰⁵ *Cf.*, e.g., Siegel, *supra* note 11, at 530-31 (reading much of this same language to “suggest[] something akin to the modern rule permitting habeas relief whenever the sentencing court violated the petitioner’s constitutional rights”).

⁴⁰⁶ HERTZ & LIEBMAN, *supra* note 11, § 2.4[c].

⁴⁰⁷ *Id.* at 43 n.64.

⁴⁰⁸ *Whitten v. Tomlinson*, 160 U.S. 231, 245-247 (1895).

⁴⁰⁹ *Id.* at 247 (second emphasis added).

⁴¹⁰ *In re Tyler*, 149 U.S. 164, 166-67 (1893); HERTZ & LIEBMAN, *supra* note 11, at 43 n.64.

⁴¹¹ *Id.* at 171, 180-81.

inquiry into facts which might or might not support . . . jurisdiction.”⁴¹² This special class of cases seems to have been akin to today’s *res judicata* “bootstrapping” rule, which generally treats a court’s determination of its own jurisdiction as itself *res judicata*.⁴¹³ Even if not, the most *Tyler* would show is one extremely narrow exception that forbade relief for certain ostensibly jurisdictional defects without allowing relief for any nonjurisdictional ones.

* * *

The fictionalism thesis is wrong for all the many reasons just given. In conversations on this topic, however, I have noticed two recurring reactions even among individuals open to that conclusion.⁴¹⁴ Put crudely, these reactions may be characterized as follows.

The no-meaning response: “Maybe the fictionalism thesis fails. But these cases are so indeterminate and full of inconsistency that we cannot draw any definitive legal rule (or, in turn, definitive statutory meaning) from them at all. No fiction, no nonfiction, just pulp. If the 1867 Act encoded the rule of these cases, the statute is meaningless.”

The no-difference response: “The fictionalism thesis may fail, but maybe that makes no difference. Even you admit that the Court may have been misapplying the rule in many cases. There is hardly any daylight between a fictional rule and a real rule as frequently misapplied as this one.”

These views are, in my view, an improvement over fictionalism. But I do not accept them. To the skeptic of meaning: The usual approach when interpreting a text or glossing a series of cases is to find the best reading rather than demanding a problem-free or indubitable one. The idea is to take the best available path rather than “stand at the crossroads” and “hate[] all the roads.”⁴¹⁵ Further, the assertion of meaningless statutory text is itself an interpretive claim and is therefore also susceptible to problems and doubts. (For instance, are we *sure* that the cases are *so* indeterminate as to render the 1867 Act meaningless?) If a reading should be rejected because it has such susceptibilities, then we should reject the no-meaning reading just as much as any other. For my money, it is most plausible that the 1867 Act’s key language did mean something definite (i.e., what judges and commentators kept saying it meant) than that it meant nothing at all.

⁴¹² *In re Sawyer*, 124 U.S. 200, 220-21 (1888) (casting the issue in *res judicata* terms).

⁴¹³ See Baude, *supra* note 124, at 1846-50 (documenting the modern rule of *res judicata*, which allows jurisdictional bootstrapping).

⁴¹⁴ The following reactions are based on conversations I have had with scholars in this field. I have done my best to summarize the general thrust of their remarks in a concise manner. I certainly welcome more detailed replies from all and sundry.

⁴¹⁵ G.K. Chesterton, *ORTHODOXY* 76 (1908).

To the indifferent observer: There is a great deal of difference between an intentionally fictional rule and even a very pockmarked real one. Remember that we are dealing with a statute. If the jurisdictional defect rule was a fiction, then (at least arguably) the 1867 Act did nothing but encode that fiction into statutory law. If the rule was a real part of the unwritten law, then the 1867 Act encoded that—the real rule—into statutory law. That is true even if the courts were regularly botching the rule's application.

III. THE CURRENTLY OPERATIVE STATUTORY TEXT

The 1867 Act's original meaning imposed the jurisdictional defect rule, and that rule was not a fiction. That is important. But it does not determine whether the rule is part of our law today. This Part has three sections. Section A canvasses subsequent federal enactments to determine which statutory provision governs today. Section B points out, for the first time, that Congress may have ratified then-current judicial practice when it reenacted the operative text in 1948. Section C considers arguments that Congress ratified *Brown* in 1966 or 1996. These arguments face a serious uphill battle because Congress has neither reenacted nor significantly changed the key text since 1948.

A. Three Relevant Enactments

Congress first reenacted the 1867 Act in modified form as part of the 1874 Revised Statutes. The 1874 version simplified the original text and broke it up into sections. In relevant part:

Sec. 752. The several justices and judges of the [federal] courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.

Sec. 753. The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is [*inter alia*] . . . in custody in violation of the Constitution or of a law or treaty of the United States.⁴¹⁶

This was the first time Congress adopted the split structure (empower, then limit) that still exists in today's 28 U.S.C. § 2241.⁴¹⁷

⁴¹⁶ 13 Rev. Stat §§ 752–53 (1874). The 1874 version also includes the nullification provisions discussed *supra* subsection II.B.2. See 13 Rev. Stat. § 766 (1874).

⁴¹⁷ Compare 28 U.S.C. § 2241(a) (empowering), with *id.* at § 2241(c) (limiting). Additionally, the extent to which the Revised Statutes control over Congress's original enactments is today a source of controversy. Will Baude, *Codifiers' Errors and 42 U.S.C. 1983, THE VOLOKH CONSPIRACY* (June 12, 2023), <https://reason.com/volokh/2023/06/12/codifiers-errors-and-42-u-s-c-1983/> [perma.cc/E7EM-2FRN]. That controversy is irrelevant here because, even if the 1874 text displaced

Congress codified these provisions when it created the U.S. Code in 1926,⁴¹⁸ but it enacted them into positive law only in 1948.⁴¹⁹ The 1948 version of 28 U.S.C. § 2241 reads in relevant part as follows:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

...

(c) The writ of habeas corpus shall not extend to a prisoner unless—

...

(3) He is in custody in violation of the Constitution or laws or treaties of the United States.⁴²⁰

So the new § 2241(c) reenacted the same text that mandated the jurisdictional defect rule. Congress has neither reenacted nor meaningfully altered § 2241(c) since 1948.⁴²¹ The 1948 Act also created, *inter alia*, 28 U.S.C § 2254.⁴²² This required courts to deny habeas relief to convicted state prisoners who had not yet exhausted their state remedies.⁴²³

Congress altered § 2254 in 1966 without altering § 2241.⁴²⁴ The new § 2254 began by reiterating what the 1867 Act and now the 1948 reenactment had already said: that federal courts should issue habeas relief to convicted state prisoners “only on the ground that [they are] in custody in violation of

the 1867 text, there is no reason to believe the original meaning was any different. The evidence I discuss *supra* Part II is probative of the 1874 text’s meaning, not just the 1867 Act’s meaning.

⁴¹⁸ See generally Act of June 30, 1926, ch. 12, 44 Stat. 777 (1926).

⁴¹⁹ See Act of June 25, 1948 [hereinafter “1948 Act”], ch. 464, 62 Stat. 869 (revising, codifying, and enacting Title 28 into positive law).

⁴²⁰ 1948 Act, *supra* note 419, § 2241.

⁴²¹ Congress made grammatical changes to the text without reenacting it in 1949. See Act of May 24, 1949, ch. 139, 63 Stat. 89, 105 (“Subsection (b) of section 2241 of title 28, United States Code, is amended by inserting a comma after ‘Supreme Court’, and by inserting a comma after ‘any justice thereof’, near the beginning of such subsection”). Congress added a venue section to § 2241 in 1966, but without altering or reenacting the existing text. See Act of September 19, 1966, Pub. L. No. 89-590, 80 Stat. 811. Congress also changed § 2241 several times in 2005 and 2006, once again without changing or reenacting § 2241(c). See Act of Dec. 30, 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2742; Act of Oct. 17, 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2635-36; Act of Jan. 6, 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3477-78.

⁴²² The provision also included a couple of exceptions. See 1948 Act, *supra* note 419, § 2241(c).

⁴²³ This provision included exceptions. See 1948 Act, *supra* note 419, § 2254.

⁴²⁴ Act of November 2, 1966, Pub. L. No. 89-711, 80 Stat. 1105 [hereinafter “1966 Act”]. But see Act of September 19, 1966, Pub. L. No. 89-590, 80 Stat. 811 (adding a venue section, not relevant here, to § 2241 in a different 1966 enactment). The 1966 Act seems to have been a response to some of the Court’s more aggressive post-*Brown* holdings, which had effectively allowed for even broader inquiry on habeas than on direct review. HERTZ & LIEBMAN, *supra* note 11, § 2.4[x]; see also 1966 Act, *supra*, at 1104-05 (altering § 2244 to impose a fairly detailed scheme for handling second-or-successive petitions from convicted state prisoners).

the Constitution or laws or treaties of the United States.”⁴²⁵ It also dealt with state courts’ factual findings. Subject to various exceptions—including an absence of subject matter or personal jurisdiction—state courts’ factual findings got a strong presumption of correctness.⁴²⁶

In the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),⁴²⁷ Congress again altered § 2254 and again left § 2241 intact. The current § 2254(d) says:

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.⁴²⁸

Both the 1966 and the current versions of § 2254 assume that federal courts will be entertaining habeas petitions from convicted state prisoners. And they each impose bars to relief—one via factual deference and the other via a wholesale deference regime—that do not hinge on jurisdictional defects.⁴²⁹ As we will see, these provisions have given rise to arguments that Congress ratified *Brown* by enacting legislation that presumed the jurisdictional defect rule was dead.

B. *The 1948 Act and the Reenactment Canon*

The 1948 Act has received little attention in comparison to the 1966 and 1996 statutes.⁴³⁰ But the 1948 Act may well have ratified existing judicial interpretations of the 1867 Act by reenacting the key statutory phrase. Per the reenactment canon’s black-letter formulation, there are two “requirements for

⁴²⁵ *Id.* at 1105.

⁴²⁶ See 1966 Act, *supra* note 424, at 1106 (requiring petitioners to “establish by convincing evidence” that a state court’s factual finding was wrong).

⁴²⁷ Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified at various sections of 21, 28 U.S.C.).

⁴²⁸ 28 U.S.C. § 2254(d).

⁴²⁹ See also 28 U.S.C. § 2264 (provision dealing with capital cases, generally directing federal courts “only” to “consider a claim or claims that have been raised and decided on the merits in the State courts”).

⁴³⁰ Mayers touches on the point, elliptically suggesting that the 1948 Act ratified judicial practice as it stood. Mayers, *supra* note 8, at 32 n.7. But his focus is on § 2254, not on the reenactment of the “in violation of” phrase.

congressional ratification”: (1) Congress must “reenact [the relevant provision] without change,” and (2) the existing interpretation must be “broad and unquestioned,”⁴³¹ or in other words “authoritative,” by the time of the reenactment.⁴³²

There are two different rationales for the canon. One is based in legislative intent.⁴³³ “Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”⁴³⁴ Interestingly, the Court once applied this rationale to a (non-habeas) part of the very same 1948 Act at issue here.⁴³⁵ The other rationale is based on “the reasonable expectations of the bar,” or (put slightly differently) on the reasonable expectations of informed members of the public.⁴³⁶ On this rationale, the existing interpretation must be well-established because only then would an informed reader understand the reenacted text as a ratification of that interpretation.⁴³⁷ This reasoning fits better with today’s public-meaning textualism than the legislative-intent rationale does, for obvious reasons.

It is also worth noting that, although the canon is a presumption rather than an ironclad precept, its effect is total where it applies. *Stare decisis* merely shelters a wrong decision from overruling; reenactment has the power to make wrong decisions right under the statute’s new meaning.

1. An Unusual Fact Pattern

The 1948 Act satisfies the reenactment canon’s first requirement—reenactment without material change. The 1874 Revised Statutes (which non-

431 *Jama v. Immigr. & Customs Enf’t*, 543 U.S. 335, 349 (2005); *see also, e.g.*, WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 290-91 & n.84 (2d ed. 2006) (discussing this presumption’s pedigree); CALEB NELSON, *STATUTORY INTERPRETATION* 478-86 (2011) (same); *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 299 (1995) (refusing to apply the rule to cases that, among other defects, “involved dicta, not holdings, and . . . were not uniform in their approach”).

432 *See* GARNER & SCALIA, *supra* note 109, at § 54.

433 Although this article generally takes a public-meaning approach to interpretation, the legislative-intent rationale is worth considering because the Court’s formulations tend to use that rationale.

434 *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see also Jama*, 543 U.S. at 349 (noting that an interpretation must be well established because only then can courts “presume Congress knew of and endorsed it” by reenacting).

435 *See Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992) (“With respect to such a longstanding and well-known construction of [the 1948 enactment] . . . we presume . . . that Congress adopt[ed] that interpretation when it reenacted [the statute].”) (quotation omitted).

436 GARNER & SCALIA, *supra* note 109, at § 54. Note that Scalia and Garner give only the “expectations of the bar” phrasing.

437 *See Phillips*, *supra* note 112, at 1336 (“[A] legal meaning can change over time, and it is the meaning at the time of a statute’s enactment that controls”).

substantively shuffled the 1867 Act's text without reenacting) empowered federal courts to issue habeas writs and then provided, "[t]he writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is [*inter alia*] . . . in custody in violation of the Constitution or of a law or treaty of the United States."⁴³⁸ The 1948 version of § 2241 empowered federal courts to issue habeas writs and then provided, "[t]he writ of habeas corpus shall not extend to a prisoner unless He is in custody in violation of the Constitution or laws or treaties of the United States."⁴³⁹ There are tiny wording changes, but the texts are otherwise identical.

The second requirement plays out in an unusual way in this instance. In the archetypal reenactment situation, Congress enacts a text; that text receives a settled interpretation; and Congress reenacts the same text. The habeas fact pattern is more complicated. Congress enacted the text in 1867. The Court authoritatively interpreted the text in the late 1800s and early 1900s, as imposing the jurisdictional defect rule. After that, however, the Court interpreted *the same text in a different way* prior to Congress's 1948 reenactment.⁴⁴⁰

In this circumstance, the starting point is the text's original, 1867 meaning. The question is: by 1948, had the Court's different interpretation become so well-settled or authoritative that Congress (or an informed reader—pick your rationale) would have understood the reenactment to ratify that interpretation?

2. The 1948 Act May Have Allowed Some Nonjurisdictional Defects

To answer that question, we must turn to a line of cases stretching from 1915 to 1948. By the end of that time frame, the Court had made clear that habeas was allowed *either* if there was a jurisdictional defect *or* if there were both a due process violation at trial and a total failure, by the state, to provide corrective process for that error. I believe it quite plausible that the 1948 Act codified this new two-pronged test by reenacting the "in violation of" text.

Start with *Frank v. Mangum*.⁴⁴¹ The petitioner argued that a mob had so overshadowed his trial and intimidated the judge and jury as to render the proceedings a sham.⁴⁴² With no real explanation, the Court suggested there could be "such disorder [in the trial court] as to cause a loss of jurisdiction."⁴⁴³

⁴³⁸ Title XII Rev. Stat. § 753 (1874).

⁴³⁹ 1948 Act, *supra* note 419, § 2241(1).

⁴⁴⁰ See *infra* notes 441–51 and accompanying text.

⁴⁴¹ 237 U.S. 309 (1915).

⁴⁴² *Id.* at 324–25.

⁴⁴³ *Id.* at 336. This was not a holding because of the Court's corrective-process analysis. In any event, this became a holding in *Moore*, as described below.

This is halfhearted at best and ipse dixit at worst—a sharp contrast to the Court’s earlier cases, which had taken great pains to explain why any given defect was jurisdictional.⁴⁴⁴ Because of that contrast, I view *Frank* as the Court’s first suggestion that a nonjurisdictional defect could render a custody (in the Court’s words) a “violation of the Constitution of the United States.”

⁴⁴⁵

The *Frank* Court’s other big move was to widen the analytical lens. Rather than looking only at the trial court, the Court also asked whether the state’s *appellate* courts had provided sufficient “corrective process.”⁴⁴⁶ It concluded that they had. By giving Frank’s mob-domination arguments a fair hearing on appeal, the state had effectively cured any due process violation that might otherwise have resulted.⁴⁴⁷ Thus, even as *Frank* implicitly countenanced a nonjurisdictional mob-domination theory, it gave the state a shield against that theory in the form of “corrective process.”

That shield was unavailing in *Moore v. Dempsey*, another mob-domination case.⁴⁴⁸ The Court held that the trial court had violated due process and that the state had *not* provided adequate corrective process on appeal. So the Court vacated the lower court’s denial of habeas relief and remanded for further proceedings without purporting to identify a jurisdictional defect.⁴⁴⁹ *Frank*’s dictum was now a holding.

The Court subsequently applied this rationale with some regularity, drifting further and further from any reliance on jurisdiction as it did so.⁴⁵⁰ In the 1945 case *House v. Mayo*, for instance, the Court explained that the writ may issue “where the conviction has been in disregard of the constitutional rights of the accused, *and* where the writ is the only effective means of preserving his rights, at least where the facts relied on are *dehors* the record *and their effect on the judgment was not open to consideration and review on appeal.*”⁴⁵¹

⁴⁴⁴ See *supra* notes 331–413 and accompanying text.

⁴⁴⁵ *Frank*, 237 U.S. at 326 (quoting 13 Rev. Stat § 752–53 (1874)).

⁴⁴⁶ *Id.* at 335.

⁴⁴⁷ *Id.* at 327–37 (reviewing and rejecting Frank’s argument, largely on the basis of the appellate proceedings).

⁴⁴⁸ 261 U.S. 86 (1923).

⁴⁴⁹ *Id.* at 92.

⁴⁵⁰ See, e.g., *Hawk v. Olson*, 326 U.S. 271, 276 (1945) (“When the state does not provide corrective judicial process, the federal courts will entertain habeas corpus to redress the violation of the federal constitutional right.”); *id.* (collecting cases and noting that the Court should scrutinize state supreme courts’ judgments for error *on direct review* when the state *does* provide corrective process).

⁴⁵¹ *House v. Mayo*, 324 U.S. 42, 46 (1945) (emphasis added) (quotation omitted); see also *Woolsey v. Best*, 299 U.S. 1, 2 (1936) (per curiam) (refusing habeas relief where there was neither an assertion of inadequate corrective process nor a jurisdictional defect); *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (per curiam) (seeming to suggest that a state must “afford . . . corrective judicial

The Court's new view, then, was essentially the following: a convicted state prisoner was held "in violation of" federal law if either (1) there had been a jurisdictional defect, or if (2) there had been a nonjurisdictional due process violation coupled with a complete failure of state corrective process.⁴⁵²

Indeed, a 1948 law review note summarized the doctrine in almost exactly that way: habeas corpus "will upset a conviction where the petitioner's commitment to or presence in custody violates due process—and then only in certain circumstances," one of which was total failure of state corrective process.⁴⁵³ At the same time, as Woolhandler has noted, this was not the same thing as plenary review. "After the turn of the century, constitutional criminal procedure cases, both on direct review and on habeas, focused increasingly on ad hoc denials of justice. Nevertheless, it was not clear until the Court's 1953 decision in *Brown v. Allen* that virtually all such constitutional error was reviewable on habeas."⁴⁵⁴

To be sure, that is not the only possible reading of the cases. If you squint, it is possible to read them in at least two other ways. A narrow-writ theorist, pining for the glory days of the jurisdictional defect rule, might cast the cases as mere applications of that rule. (*Frank* did invoke the concept of "loss of jurisdiction," after all.)⁴⁵⁵ The broad-writ approach would be to cast the cases as plenary review in disguise. On this reading, the Court's discussion of "corrective process" was merely part of the due process merits rather than an aspect of habeas law, such that *Brown* did not even break new ground.⁴⁵⁶ (The

process to remedy the alleged wrong" when there is a *separate*, underlying "denial of due process" in the trial itself); *Knewel v. Egan*, 268 U.S. 442, 446 (1925) (making clear that, absent a failure of corrective process, nonjurisdictional defects were "not so fatal . . . as to be open to collateral attack after trial and conviction").

⁴⁵² See Bator, *supra* note 8, at 483-85 (giving this formulation); see also *Wright*, 505 U.S. at 285-86 (plurality opinion) (arguing that nonjurisdictional federal claims were available only "if no state court had provided a full and fair opportunity to litigate those claims").

⁴⁵³ Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 667 (1948) (emphasis added). One treatise, published just before *Brown* came down, offered equivocal statements about the scope of habeas. Compare LEG. REFERENCE SERV., LIBR. OF CONG., CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 82-170, at 314 (Edward S. Corwin, ed., 1953) ("The proceeding [of habeas corpus] may not . . . be used as a substitute for an appeal or writ of error."), with *id.* at 313 ("The writ of habeas corpus provides a remedy for jurisdictional and constitutional errors . . ." (emphasis added)).

⁴⁵⁴ Woolhandler, *supra* note 11, at 631 (footnotes omitted).

⁴⁵⁵ *Frank*, 237 U.S. at 336; see also *Johnson v. Zerbst*, 304 U.S. 458, 467-68 (1938) (holding a deprivation of the Sixth Amendment right to counsel was a jurisdictional defect).

⁴⁵⁶ *Moore v. Dempsey*, 261 U.S. 86, 91 (1923). But see Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 106 (1959) ("*Brown* manifestly broke new ground").

majority in *Frank* did, after all, suggest that supplying corrective process satisfies the requirements of due process.)⁴⁵⁷

Yet we need not analyze these alternative readings in much depth for reenactment purposes. The reenactment canon focuses only on the interpretive moves that make it clear “the Court now says the statute means X.” That means what the Court *said* the statute meant matters much more than what the Court may have been up to beneath the surface. And the Court said jurisdictional defects and fundamental failures of corrective process—but nothing else—were now cognizable. Even if the Court was doing something else, it is implausible to suggest that this “something else” was clear enough to overcome its pre-1948 express rule statements.

3. The 1948 Act Did Not Modify the Concept of Jurisdiction

It is also worth noting that the Court’s corrective-process innovation had a sort of hydraulic effect that reduced the pressure to alter the concept of jurisdiction. In *Frank*, the Court was still operating within the jurisdictional defect space—even as it opened the door and took one step out of that space. This is why the Court felt the need to characterize mob domination as a “loss of jurisdiction.”⁴⁵⁸ That was a clear invocation of the classic jurisdictional defect rule, albeit one that would have been too flimsy to stand on its own without the additional corrective-process rationale to support it. But in the subsequent cases, the Court tacitly admitted that habeas could issue for nonjurisdictional defects. So there was no longer a need to dub a defect “jurisdictional” to allow habeas relief.

This hydraulic effect is significant. Precisely because the Court was now openly interpreting the “in violation of” text to allow relief for (mere) corrective-process failures, it was not breaking much ground in the domain of jurisdiction. Thus, for instance, the Court in *Waley v. Johnson* could characterize the jurisdictional defect inquiry as seeking “those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render” the particular judgment.⁴⁵⁹ That is the same idea of jurisdiction that existed in 1867. The Court certainly stretched the notion of jurisdiction in

⁴⁵⁷ *Frank*, 237 U.S. at 335; see also Peller, *supra* note 11, at 645 (highlighting *Frank* as the first time the Court held that “due process must be evaluated in light of the state’s procedures as a whole”).

⁴⁵⁸ *Frank*, 237 U.S. at 336.

⁴⁵⁹ *Waley v. Johnson*, 316 U.S. 101, 104-05 (1942) (per curiam); see also *Bowen v. Johnston*, 306 U.S. 19, 24 (1939) (stating, in a federal prisoner case, that “the court ‘has jurisdiction to render a particular judgment only when the offence charged is within the class of offences placed by the law under its jurisdiction’”) (quoting *Bonner*, 151 U.S. at 257)); *Goto v. Lane*, 265 U.S. 393, 402 (1924) (holding, in a territorial case, that habeas could not issue because “[t]he circuit court in which the petitioners were tried and convicted undoubtedly had jurisdiction of the subject matter and of their persons, and the sentence imposed was not in excess of its power”).

some cases, as in *Johnson v. Zerbst*'s holding that a total deprivation of the Sixth Amendment right to counsel was a jurisdictional defect.⁴⁶⁰ One might argue that this stretching was *itself* codified into the statutory meaning by way of reenactment, but that would be taking things a bit too far. The reenactment canon gives credence to a high court's "authoritative construction[s]" of the reenacted text because it is those constructions that put Congress (or informed readers) on notice about textual meaning.⁴⁶¹ *Frank* quoted the statutory text and interpreted that text as allowing a second avenue for relief; *Zerbst* then reached its result precisely by (mis-)applying the existing framework *without* glossing the statute anew. The most plausible conclusion is that the 1948 reenactment tacked on a new and nonjurisdictional element to the habeas doctrine but did not alter the concept of jurisdiction.

4. Problems

There are, however, objections to be considered. One is that the reenactment canon might not apply in cases of absolutely crystal-clear statutory meaning.⁴⁶² As I have argued, the jurisdictional defect reading is the only correct way to understand the 1867 Act's text. So, one might conclude, the clear text leaves no room for reenactment. But I do not think that is right: it is telling that this issue has been the subject of so much controversy for so long. That suggests the 1867 Act's text, though not *underdeterminative*, is not so *obvious* or *plain* as to rule out reenactment.

Another objection is that the reenactment argument is in some way hyperformalistic or unrealistic. This objection may be phrased either in terms of legislative intent or public meaning, depending on one's preferred basis for the reenactment canon. In terms of legislative intent, one might think it "silly to presume that the reenacting Congress had the intention of ratifying" the *Frank* line of cases.⁴⁶³ Congress's main goal in 1948 was to clean up Title 28 and enact it into positive law. This happened to require reenacting 28 U.S.C.

⁴⁶⁰ Compare *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938) ("[C]ompliance with [the Sixth Amendment's] constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty.") with *Ashe v. United States*, 270 U.S. 424, 425 (1926) ("[T]he much abused suggestion is made that [the State Court] lost jurisdiction by trying the two indictments together. Manifestly this would not be true even if the trial was not warranted by law").

⁴⁶¹ See GARNER & SCALIA, *supra* note 109, at § 54 ("When [the word or phrase at issue] has been authoritatively interpreted by a high court . . . the members of the bar practicing in that field reasonably enough assume that, in statutes pertaining to that field, the term bears this same meaning").

⁴⁶² See, e.g., *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction."); see also NELSON, *supra* note 431, at 479-80 (collecting cases).

⁴⁶³ NELSON, *supra* note 431, at 481 n.14.

§ 2241, but maybe Congress was not thinking about the intricacies of habeas practice when it did so.⁴⁶⁴

But it turns out that Congress *was* thinking about habeas in 1948.⁴⁶⁵ The 1948 Act also created Sections 2254 and 2255.⁴⁶⁶ And it even added new material—which allowed judges not to entertain certain applications—to § 2241 itself.⁴⁶⁷ But the Act left the “in violation of” text intact, reenacting it as it stood. This suggests an intent to leave § 2241 as it was, not a mere inattention to habeas minutiae.⁴⁶⁸

Further, it seems that Congress understood the state of the Court’s habeas jurisprudence as of 1948. Consider the views of Judge Albert B. Maris, whom Chief Justice Stone appointed to assist with the 1948 revisions.⁴⁶⁹ He told a congressional committee the following:

[I]n this field [of federal habeas] the existing statutory provisions have been almost completely encrusted with a gloss of judicial decisions which has left the subject in a great deal of confusion. It was the aim of the revision staff to

⁴⁶⁴ See H.R. REP. NO. 80-304, at A177-78 (1947) (stating that revisions to § 2241 were for consolidation purposes, without mentioning judicial glosses); Kovarsky, *supra* note 10, at 2240 (discussing legislative-history evidence that the 1948 changes were not meant to change the meaning of the “law and justice” clause in §2243); see also *Brown v. Gardner*, 513 U.S. 115, 121 (1994) (“The record of congressional discussion preceding reenactment makes no reference to the . . . regulation, and there is no other evidence to suggest that Congress was even aware of the [agency’s] interpretive position. In such circumstances we consider the . . . re-enactment to be without significance.”) (quotation omitted).

⁴⁶⁵ Thanks to Matthew Donaghy for bringing many of the below-discussed sources to my attention.

⁴⁶⁶ See *Jones v. Hendrix*, 143 S. Ct. 1857, 1865 (2023) (discussing § 2255 and other provisions, and concluding that in 1948 Congress “largely recodified the federal courts’ pre-existing habeas authority” with respect to state prisoners). This raises a question: does the 1948 version of § 2254 fit with the reading I have suggested? The answer is yes. Section 2254 imposed an exhaustion requirement, but exhaustion was not required if either (1) “there [wa]s . . . an absence of available State corrective process” or (2) there were “circumstances rendering such process ineffective to protect the rights of the prisoner.” See 1948 Act, *supra* note 419, §2254 (1948). On the reenactment reading, if the petitioner could show a failure of state corrective process, he would thereby satisfy both § 2241 (rendering him eligible for habeas relief) and § 2254 (excusing him from exhaustion). If the petitioner could show a jurisdictional defect, he would satisfy § 2241 but would still need to exhaust under § 2254. That makes sense because full exhaustion of state-court remedies would presumably be futile in the case of a failed corrective process—but not necessarily in the case of a jurisdictional defect.

⁴⁶⁷ 28 U.S.C. § 2241 Historical and Revision Notes.

⁴⁶⁸ See *Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1991) (“With respect to such a longstanding and well-known construction of the [relevant] statute, and where Congress made substantive changes to the statute in other respects, . . . we presume, absent any indication that Congress intended to alter [the operative rule], that Congress adopted that interpretation when it reenacted the . . . statute.”) (quotations omitted) (citations omitted) (alterations omitted).

⁴⁶⁹ JAMES WM. MOORE, MOORE’S COMMENTARY ON THE JUDICIAL CODE 65 n.7 (1949).

restate the law upon the subject of habeas corpus as clearly as possible *in accord with the body of decisional law upon the subject*.⁴⁷⁰

Indeed, the Reviser's Note for the new § 2254, just a few doors down, expressly describe that section as "declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321, U. S. 114, 88 L. Ed. 572.)"⁴⁷¹ Congress purposefully focused on habeas, and it was clearly aware of the Court's recent habeas cases. So it seems difficult to maintain that Congress lacked the requisite intent.

Phrased in terms of public meaning, the objection would be that a reasonable person—no matter how well informed—would have inadequate reason to read the *Frank* line into the 1948 text. Everyone agrees that those cases did *something* to habeas law, but as noted, what exactly that "something" was remains a subject of debate. Maybe that fuzziness defeats any attempt to read the *Frank* cases into the reenacted text. On the other hand, it seems rather odd to read the 1948 Act as if nothing significant had happened since 1867. An informed reader in 1948 may well have understood the text differently than an equally informed reader in 1867 would have.

The reenactment argument is not airtight. But it is plausible. And its result would be, incidentally, a sort of compromise position—at least in the sense that a real compromise fully satisfies no one. The Court's typical approach uses the full jurisdictional defect rule as the baseline, with anything beyond that framed as either slippage (*Frank*) or perilous innovation (*Brown*). But if the reenactment argument succeeds, the baseline should be the *Frank* rule—which would now be part of the statute even if it was judge-made at first. This approach, however, would disappoint many habeas petitioners and broad-writ theorists. Jurisdiction plus corrective process is still a relatively narrow inquiry.

C. *The More Tenuous Case for the 1966 Act and AEDPA*

I now ask whether the 1966 Act or AEDPA altered or abolished the (possibly softened) jurisdictional defect rule. The key difference between the 1948 Act and these later enactments is this: the 1948 Act went to the *operative text*; the others did not. That puts the later enactments on a much weaker footing. As I will explain, it is very difficult to see how these enactments are supposed to have changed a statutory rule without changing the text in which that rule has its home.

⁴⁷⁰ *Judicial Code and Judiciary: Hearings on H.R. 3214 Before the S. Comm. on the Judiciary*, 80TH CONG. 28 (1948) (statement of Circuit Judge Albert B. Maris) (emphasis added).

⁴⁷¹ 28 U.S.C. § 2254 Historical and Revision Notes.

The 1966 Act or AEDPA might have altered or abolished the jurisdictional defect rule in any of three ways. Maybe one of these enactments itself satisfies the reenactment canon, such that Congress ratified judicial interpretations as they stood in 1966 or 1996. Or maybe the enactments' text, on a fair reading, got rid of the rule. Or, finally, even if nothing in the text *said* the rule was being abrogated, maybe the statutes taken together did so implicitly. I conclude that none of these things happened. The jurisdictional defect rule (and perhaps, the rule as modified by the 1948 Act), is operative statutory law today.

Reenactment first. The canon is an awkward fit for the 1966 Act and for AEDPA, neither of which reenacted the text of § 2241(c). In some cases, the Court has seemingly applied the rule when Congress tweaked surrounding language without reenacting the operative text.⁴⁷² But more recently, the Court has, quite rightly, implied or stated that the canon applies only when Congress has in fact reenacted the operative text.⁴⁷³ And there was no reenactment of the operative text in 1966 or 1996. Thus, the first “requirement[] for congressional ratification is [not] met here: Congress did not . . . reenact [the relevant provision] without change.”⁴⁷⁴

Alternatively, some have suggested that the 1966 and 1996 statutes abrogated any jurisdictional defect rule that may have then existed.⁴⁷⁵ This argument relies in part on congressional assumptions and in part on the canon against superfluity. The reasoning goes something like this: True, neither the 1966 nor 1996 enactments contain any text broadening habeas eligibility—the

⁴⁷² See *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336 (1934) (“From 1898 to 1932 the Bankruptcy Act was amended seven times without alteration of the section [at issue]. This is persuasive that the construction adopted by the courts has been acceptable to the legislative arm of the government.”) (footnote omitted); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (interpreting a statutory provision to be consistent with precedent where intervening amendments did not alter the text of the provision in question).

⁴⁷³ See *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018) (relying on the fact that “Congress . . . rewrote and recodified the provision”); see also *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (taking reenactment for granted).

⁴⁷⁴ *Jama v. Immigr. & Customs Enf’t*, 543 U.S. 335, 349 (2005); see also Forsythe, *supra* note 8, at 1169–71 (deriding the idea that *Brown v. Allen* was codified in the 1966 Act as “an argument from silence”). Congress did reenact text *similar* to the text of § 2241(c) in the 1966 version of § 2254(a). But by its terms, the unaltered § 2241(c) continues to apply across the board—including to state prisoners. See 28 U.S.C. § 2241(c) limiting relief for “a prisoner,” not “a federal prisoner”. Congress’s choice to reenact the entirely separate § 2254(a) cannot have changed the meaning of § 2241(c).

⁴⁷⁵ See HERTZ & LIEBMAN, *supra* note 11, § 2.4[d][ix], at 36 (arguing that Congress’s amendments to the habeas statutes “confirmed and strengthened the parity between and substitutability of direct and habeas corpus review”); Siegel, *supra* note 11, at 537 (“The clear implication of § 2254(d) is that federal habeas courts may grant habeas relief in cases other than those in which the sentencing court lacked jurisdiction”).

texts only *limit* the writ's scope.⁴⁷⁶ But the changes demonstrate that Congress assumed habeas relief would sometimes be available in cases with no jurisdictional defect. Congress acted on this assumption without altering § 2241(c). This shows that Congress did not think § 2241(c), as it then stood, imposed even a softened jurisdictional defect rule. Further, if the rule had been in force, the 1966 amendment to § 2244 would not have allowed habeas courts to disregard state courts' factual findings under a variety of circumstances, many of which do not go to jurisdiction. Nor would Congress have enacted the § 2254(d) deference regime (or special § 2264 procedures for capital cases). These provisions would not do anything in a world where the jurisdictional defect rule governed.

To the extent this argument relies on Congress's unenacted assumptions, it fails for two independent reasons. First, from a formal and textualist perspective, the statutory text went through bicameralism and presentment and became law; Congress's assumptions did not. Congress could have enacted text to give its assumptions legal force—perhaps by repealing § 2241(c) or by again reenacting it. It was instead silent on the issue, and congressional silence is not legislation.⁴⁷⁷

Second, from a legislative-intent or functionalist perspective, these enactments signify nothing about whether the 1966 or 1996 Congresses thought the jurisdictional defect rule was law. Rather, all they tell us is that Congress knew the *courts* were not applying the rule. The 1966 and 1996 Congresses might have been thinking, "Well, we think the courts are right to hold that § 2241(c) does not impose a jurisdictional defect rule. We just need to make some tweaks to the system to make things run smoothly." Or they might have instead been thinking, "Well, we believe the courts were wrong to hold that § 2241(c) does not impose a jurisdictional defect rule. But we do not want to have a big fight about it right now; that would cost too much political capital. So we will make some tweaks to the system to make things run more smoothly and reduce the damage the courts have done."

To the extent the argument goes to superfluity, there is a similar problem. Everyone accepts that federal courts were not following the jurisdictional

⁴⁷⁶ See Siegel, *supra* note 11, at 539 (acknowledging this); *cf. id.* (arguing that the enactments nonetheless expand habeas eligibility by implication).

⁴⁷⁷ See Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 330 (2005) ("Even with respect to Supreme Court decisions, the notion that congressional silence following a judicial interpretation constitutes congressional acquiescence in it has been subject to a great deal of scholarly and judicial criticism. This criticism has been persuasive . . ."); see also NELSON, *supra* note 431, at 478-79 (noting the modern Court's hostility to legislative-acquiescence arguments); ESKRIDGE, FRICKEY, & GARRETT, *supra* note 431, at 290 n.84 (describing the old acquiescence rule as "universally criticized"); RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 26 (2017) (asking why interpreters should care about the views of any Congress other than the one that enacted the text).

defect rule in 1966 or 1996. The 1966 and 1996 habeas provisions, for that reason, had a significant impact in a great number of cases. (Section 2254(d) is of course the centerpiece of much habeas litigation today.)⁴⁷⁸ So the enactments were not superfluous.

The obvious reply is that the provisions *would be* superfluous if § 2241(c) had been imposing a form of the jurisdictional defect rule over all these years. But this reply is a sleight of hand. The provisions would be superfluous if (1) § 2241(c) imposed the rule *and* (2) courts had always been observing that rule in real cases. But (2) is false, and that means the provisions had plenty of work to do. Perhaps another reply would be that these provisions *will become* obsolete if courts start to apply the jurisdictional defect rule now. That may be partially true,⁴⁷⁹ but that would just mean the provisions had served their purpose in the meantime. When Congress enacts a statute with a sunset provision, courts do not say, “[t]hat sunset provision will render the statute superfluous once the statute is no longer in effect.” The 1966 and 1996 provisions have served significant functions for years and years, and it is therefore impossible for them to be superfluous. For everything there is a season.⁴⁸⁰

Finally, there is the argument that even if the 1966 or 1996 enactments do not *say* or *mean* the jurisdictional defect rule is inoperative, they “fairly imply” as much. Siegel says:

[E]ven if one were to agree that the sections described above do not affirmatively authorize habeas relief, in determining what these sections mean when fairly construed, a court must give effect not only to what these sections affirmatively state but also what they fairly imply . . . [T]hese sections fairly, indeed very strongly, imply that federal courts can grant habeas relief to petitioners confined pursuant to a judgment of conviction issued by a court with jurisdiction.⁴⁸¹

Siegel then analogizes to *Alabama Association of Realtors v. Department of Health and Human Services*.⁴⁸² In that case, the CDC pointed to an apparently broad statutory grant of authority to justify a nationwide eviction

⁴⁷⁸ See, e.g., Brandon L. Garrett & Kaitlin Phillips, *AEDPA Repeal*, 107 CORNELL L. REV. 1739, 1760-63, 1765-67 (2022) (emphasizing the impact of § 2254(d) on merits adjudication in modern habeas cases and arguing its repeal would have major consequences for the law).

⁴⁷⁹ But not completely true. Section 2254(d) could easily apply on top of a jurisdictional defect rule. A habeas petitioner would have to show a jurisdictional or jurisdiction-like defect to surmount § 2241(c). He would also have to show the state court’s adjudication of the claim was bad enough to flunk § 2254(d). There is nothing incoherent about that.

⁴⁸⁰ Ecclesiastes 3:1 (English Standard Version).

⁴⁸¹ Siegel, *supra* note 11, at 540 (footnote omitted).

⁴⁸² *Id.* at 540-41 (citing *Ala. Ass’n of Realtors v. Dep’t of Health and Hum. Servs.*, 141 S. Ct. 2485 (2021) (per curiam)).

moratorium.⁴⁸³ The Court rejected this argument. In part, that was because the rest of the statute—which Congress had enacted at the same time as the broad language—suggested the power grant was narrower than one might initially think.⁴⁸⁴ In Siegel’s view, the habeas situation is similar. Just as the surrounding text fairly implied a narrow power grant in *Alabama Realtors*, the 1966 and 1996 texts fairly imply a broad writ in the habeas context.⁴⁸⁵

Regardless of one’s interpretive methodology, this argument runs straight into the presumption against partial implied repeals. That is as well-established a canon as there is.⁴⁸⁶ Congress enacted the jurisdictional defect rule in 1867, and Congress (maybe) enacted a modified jurisdictional defect rule in 1948. That was the state of statutory law as of 1966. Thus, this argument by implication is not merely saying that Congress implicitly changed the law in some abstract sense in 1966 or 1996. Rather, the argument is saying that Congress implicitly repealed part of § 2241(c). This kind of reading is strongly disfavored.⁴⁸⁷

Alabama Realtors turns out to underscore the point. The Court there used context from *the same enactment* to determine the original meaning of the contested text.⁴⁸⁸ The text Congress enacted in 1944 is obviously probative of the original meaning of neighboring text in the same 1944 enactment.⁴⁸⁹ So there is simply no partial-implied-repeal problem to deal with there. The opposite is true in the habeas context.

One counterargument might go like this: In Justice Scalia’s words, “[w]hile the implication of a later enactment will rarely be strong enough to repeal a prior provision, it will often change the meaning that would otherwise be given to an earlier provision that is ambiguous . . . because laws *in pari materia* (including later-enacted laws) are to be interpreted together.”⁴⁹⁰ If that is right, then maybe the 1948 text should be interpreted in light of the 1966 and 1996 enactments. And maybe plenary review would be the result.

This counterargument fails because the 1948 reenactment is not ambiguous in the relevant way. It is one thing to suggest, as I have done, that

483 See 42 U.S.C. § 264(a) (providing the Surgeon General authority to make and enforce regulations “necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession”).

484 *Alabama Realtors*, 141 S. Ct. at 2488–89 (noting the difference in kind between the eviction moratorium and the examples specified in the statute; “inspection, fumigation, disinfection, sanitation, pest extermination, and destruction of contaminated animals and articles”).

485 Siegel, *supra* note 11, at 541.

486 See, e.g., *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (recognizing the “Court’s aversion to implied repeals”).

487 *Id.*

488 *Alabama Realtors*, 141 S. Ct. at 2488.

489 58 Stat. 703 (1944) (codified as amended at 42 U.S.C. § 264(a)).

490 GARNER & SCALIA, *supra* note 109, § 55 (second emphasis added).

the reenactment softened the 1867 Act's jurisdictional defect rule. It may have, or it may not have—put differently, the reenactment is perhaps ambiguous *with respect to whether it softened the jurisdictional defect rule*. It would be quite another thing to say that the reenactment is ambiguous *with respect to whether plenary habeas review is allowed*. It is not.

* * *

Congress's 1966 and 1996 enactments may still be relevant, not as a matter of operative statutory law, but as a matter of *stare decisis*.⁴⁹¹ When the Court interprets a statute at T₁ and Congress enacts another provision at T₂ that assumes the first interpretation is correct, the Court will be reluctant to visit the interpretation at T₃. The classic example is *Franklin v. Gwinnett County Public Schools*.⁴⁹² There, the Court stood by its earlier holding (in *Cannon v. University of Chicago*)⁴⁹³ that Title IX included an implied cause of action for damages.⁴⁹⁴ Justice Scalia's concurrence explained that *Cannon* was wrong. But it was too late to revisit it now that Congress had withdrawn States' sovereign immunity against *Cannon* lawsuits and expressly provided for remedies in them.⁴⁹⁵ That legislation was "not only . . . 'a validation of *Cannon's* holding,' but also . . . an implicit acknowledgment that damages are available" in such cases.⁴⁹⁶

A similar argument might apply here. Maybe the 1966 and 1996 enactments should give the Court pause about revisiting *Brown*, even if the Court would otherwise do so. Then again, the analogy to *Franklin* is far from perfect. The enactments in that case expressed approval for *Cannon* by giving its implied cause of action more breadth and force.⁴⁹⁷ The 1966 and 1996 habeas statutes, in contrast, do not connote approval. They instead suggest serious congressional discomfort with the judicially created state of affairs.

⁴⁹¹ This relates to the "developments since the decision was handed down" *stare decisis* factor. *Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., Council 31*, 585 U.S. 878, 916-18 (2018); see also NELSON, *supra* note 431, at 486 (concluding it "seems more sensible" to characterize a subsequent, non-reenacting statute as "simply affect[ing] the proper application of the Court's own doctrine of *stare decisis*" than to characterize the statute as "forbid[ding] the Court to overrule" its earlier decision).

⁴⁹² *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

⁴⁹³ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 702-03 (1979).

⁴⁹⁴ *Franklin*, 503 U.S. at 75-76.

⁴⁹⁵ *Id.* at 77-78 (Scalia, J., concurring in the judgment).

⁴⁹⁶ *Id.* at 78 (citation omitted) (quoting *id.* at 72); see also NELSON, *supra* note 431, at 486 (calling this conclusion "not controversial").

⁴⁹⁷ See *Franklin*, 503 U.S. at 73 ("Congress made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act.")

IV. IMPLICATIONS FOR TODAY'S LAW

Statutory law matters. Section A explains this article's implications for judge-made "equitable" bars to habeas relief. The Court sees these bars as a way to compensate for *Brown's* unwise broadening of the habeas writ. Even on the assumption that this is a permissible maneuver as a general matter, a statutory understanding of habeas has significant consequences for how the Court should perform it. Section B explores what it would look like for today's federal courts to inquire into a state court's jurisdiction. The usual assumption is that courts would face a stark choice: either apply our narrow, contemporary conception of jurisdiction (and practically bar habeas entirely) or apply our forebears' conception (and practically conduct review on the merits). This is a false dichotomy. The correct approach would likely be to apply the old conception of jurisdiction. But that conception is neither as broad nor as foreign as is commonly assumed, and there is ample room to disagree with yesteryear's courts on the details.

A. *Compensating Adjustments*

When faced with a precedent it sees as flawed, the Court sometimes creates "compensating adjustments" for the precedent rather than overruling it outright. "[T]he idea [is] that multiple departures from the optimal or first-best . . . arrangement[] might offset each other, producing compensating adjustments that ensure . . . equilibrium."⁴⁹⁸

In *Brown v. Davenport*, the Court made clear that it sees its body of unwritten, "equitable" bars to habeas relief as a genus of compensating adjustment.⁴⁹⁹ The narrative goes like this. First, *Brown* was a major and unjustified deviation from the traditional jurisdictional defect rule.⁵⁰⁰ This deviation caused "an exploding caseload of habeas petitions from state prisoners."⁵⁰¹ That explosion needed to be contained because it cluttered federal courts' dockets and trampled on federalism.⁵⁰² Second, the "Court responded to the post-*Brown* habeas boom" by creating compensating adjustments—"devising new rules aimed at separating the meritorious needles from the growing haystack" of petitions and at "returning the Great

⁴⁹⁸ Adrian Vermeule, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 421 (2003). Vermeule is here discussing the constitutional context, but the concept is similar in the statutory domain.

⁴⁹⁹ *Brown v. Davenport*, 142 S. Ct. 1510, 1523-24 (2022).

⁵⁰⁰ See *id.* at 1522-23 (arguing that "[t]he traditional distinction between jurisdictional defects and mere errors in adjudication no longer restrained federal habeas courts" after *Brown*.)

⁵⁰¹ *Id.*

⁵⁰² *Id.*

Writ closer to its historic office.”⁵⁰³ These new rules included things like *Teague v. Lane*’s retroactivity bar, *Stone v. Powell*’s rule against raising Fourth Amendment claims on habeas, and the *Brecht v. Abrahamson* harmless-error rule.⁵⁰⁴ Third, Congress authorized this judicial creativity by “providing that [federal courts] ‘may’ (not must) grant writs of habeas corpus, and [providing] that they should do so only as ‘law and justice require.’”⁵⁰⁵ By using this narrative, *Davenport* gave a unifying justification to what might have otherwise seemed a hodgepodge of ad hoc rules.⁵⁰⁶

It is fair to ask whether this kind of equitable lawmaking is permissible, particularly in the habeas context. The Court may not be interpreting the statutes correctly, and this level of judicial creativity may not fit well with the limited Article III judicial power.⁵⁰⁷ But here, I will set these objections aside for the sake of argument. On the assumption that the Court’s judge-made bars are generally lawful, a statutory understanding of habeas corpus has implications for what those bars should look like.

The process of compensating adjustments starts with identifying the first-best answer—the goal is to approximate the first-best world as closely as possible, even though it may not be possible to recover Eden. So, what is the first-best answer in habeas? The Court’s answer, implicit throughout *Davenport*, is: *the full jurisdictional defect rule*. On this view, equitable bars are justified precisely because the pre-*Brown* Court “generally sought to police the [jurisdictional defect rule’s] boundaries in cases involving federal and state prisoners alike.”⁵⁰⁸ Because *Brown*’s plenary-review scheme was so far from that first-best answer, the *Davenport* majority felt quite comfortable with ratifying and expanding the phenomenon of judge-made equitable bars. The equitable bars may be strong medicine, but they are necessary.

But if the 1948 Act ratified judicial interpretations (not an insignificant “if”), the Court has the wrong first-best answer in mind. The first-best answer—as a matter of statutory law—is not the full jurisdictional defect rule Congress enacted in 1867. The first-best answer is the *softened* jurisdictional

⁵⁰³ *Id.* at 1523 (quoting *Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring)).

⁵⁰⁴ See *Davenport*, 142 S. Ct. at 1523; *Brecht v. Abrahamson*, 507 U.S. 619, 620 (1993); see also *Edwards*, 141 S. Ct. at 1570–71 (Gorsuch, J., concurring) (discussing *Teague v. Lane*). *Teague v. Lane* provides that, “[u]nless they fall within an exception . . . , new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.” 489 U.S. 288, 310 (1989) (plurality opinion).

⁵⁰⁵ *Davenport*, 142 S. Ct. at 1523 (quoting 28 U.S.C. §§ 2241, 2243).

⁵⁰⁶ *Davenport* was also drawing on other cases, to be sure. See, e.g., *id.* at 1523 (citing *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), and others).

⁵⁰⁷ See Kovarsky, *The New Negative Habeas Equity*, *supra* note 10, at 2224–26 (arguing that at least an aggressive form of “negative habeas equity” is illegitimate); Quigley, *supra* note 30, at 339–44 (suggesting that unwritten habeas bars may be an unconstitutional form of judicial lawmaking).

⁵⁰⁸ *Davenport*, 142 S. Ct. at 1521 (citation omitted); see also *id.* at 1520–22.

defect rule it ratified in 1948. To the extent the Court wishes for a return to the full rule, that wish is nothing more than a classic judicial policy preference, and it is therefore legally irrelevant. So, if the reenactment argument succeeds, the Court should stop leaning on the full jurisdictional defect rule as a justification for compensating adjustments. Some adjustments would probably still be appropriate, but the goal would be to approximate the 1948 rule—not the 1867 one.

Second, it is also worth asking what would happen to these equitable bars if the Court did decide to overrule *Brown*.⁵⁰⁹ If there is no *Brown* anymore, do law and justice *still* require judge-made equitable bars? One answer might be that there are other justifications for the bars. The harmless-error rule, for instance, seems easy enough to defend. Law and justice presumably do not require the discharge of a petitioner whose trial involved a harmless constitutional error.

But other bars seem to rest more squarely on the compensating-adjustment rationale. Take *Teague*, the quintessential example of a rule that “could [not] even begin to make sense” without *Brown* in the background.⁵¹⁰ The post-*Brown* danger was that if *any* newly announced rule could be used to reopen a conviction that had already become final, there would be precious little real finality left in the world. So *Teague* shut that process down by holding that new rules generally would not apply “retroactively,” i.e., to petitioners whose convictions had become final before the new rule’s announcement.⁵¹¹ That seems sensible as a way to compensate for *Brown*, especially given the Court’s rapid rate of criminal-procedure innovation in the late twentieth century.

If the Court reinstated a version of the jurisdictional defect rule, keeping the *Teague* regime would be hard to justify. The whole point of the jurisdictional defect rule is that a defective judgment is *void* and a *nullity*.⁵¹² And void nullities are incapable of rendering anything final. So it is not clear

⁵⁰⁹ A related question is how the softened jurisdictional defect rule would fit with AEDPA’s limitations, which Congress enacted to narrow *Brown* and similar cases. See *supra* notes 424–427 and accompanying text (discussing how AEDPA amended the previously enacted 28 U.S.C. § 2254). AEDPA is a strictly negative statute. It provides that habeas relief may issue *only if* certain conditions are met; it does not say that, *if* those conditions are met, relief must issue. See 28 U.S.C. § 2254 (noting that a writ of habeas corpus “shall not be granted unless” certain conditions are met). Thus, the jurisdictional defect rule would simply apply on top of AEDPA’s existing requirements. For instance, a convicted state prisoner would have to show *both* that the state court erred badly enough to trigger § 2254(d) *and* that the error deprived the trial court of jurisdiction (or that there was no corrective process).

⁵¹⁰ *Edwards v. Vannoy*, 141 S. Ct. 1547, 1570 (2021) (Gorsuch, J., concurring); see also *id.* (“Chief among these new-but-old developments was *Teague* I.”).

⁵¹¹ *Teague v. Lane*, 489 U.S. 288, 326 (1989) (plurality opinion).

⁵¹² See Baude, *supra* note 124, at 1826–31 (explaining that judgments rendered without jurisdiction have traditionally been deemed invalid).

that *Teague* would have any work to do—the judgment against any qualifying petitioner would necessarily be non-final (because void). Further, many of the important habeas cases from the late 1800s would have been impossible under *Teague*. Cases like *Siebold*, *Bain*, and *Yick Wo* all involved non-trivial pronouncements of constitutional law that surely would have counted as “new rules.” And new rules are exactly what *Teague* says courts are not supposed to announce on habeas review.⁵¹³ It seems almost absurd to reinstate the jurisdictional defect rule and yet keep *Teague*, with the result that the Court’s crucial old cases would be impossible to repeat today.⁵¹⁴

B. *Jurisdiction*[1867] and *Jurisdiction*[2025]

The operative statutory text, I have argued, allows for relief if there is a jurisdictional defect. It might also allow relief if there was a constitutional error coupled with total failure of the state corrective process. That second route to relief is somewhat less complicated than the first—the *Frank* line of cases could serve as at least a starting point.⁵¹⁵ This section therefore focuses on the harder question: what would a search for jurisdictional defects look like today? For clarity’s sake, I will use “jurisdiction[1867]” to refer to the old conception of jurisdiction. Under jurisdiction[1867], the reviewing court was required to have (a) subject matter jurisdiction over the class of cases generally, (b) personal jurisdiction over the defendant, and (c) power to enter the particular judgment.⁵¹⁶ I will use “jurisdiction[2025]” to refer to today’s dominant conception of jurisdiction. The usual blackletter taxonomy is something like: (a) subject matter jurisdiction over the class of cases generally

⁵¹³ The holdings of *Siebold*, *Bain*, and *Yick Wo* would have counted as “new rules” because they involved close or novel issues. Under *Teague*, a holding not “dictated by then-existing precedent” is a new rule and thus almost always out of bounds. *Lambrix v. Singletary*, 520 U.S. 518, 527–28 (1997) (emphasis omitted); cf. *Woolhandler*, *supra* note 11, at 641 (“With its decision in *Teague*, the Court has committed largely final determination of . . . [certain constitutional] violations to the state courts . . .”).

⁵¹⁴ Justice Thomas has argued that *Teague*’s exceptions are often irrelevant because a proper interpretation of § 2254(d) usually bars relief anyway. *See Edwards*, 141 S. Ct. at 1565–66 (Thomas, J., concurring) (“Section 2254(d)—the absolute bar on claims that state courts reasonably denied—has no exception for retroactive rights”). I am setting that aside.

⁵¹⁵ *Primus* purports to give examples of “states systematically violat[ing] criminal defendants’ rights”; this includes Idaho’s practice of “statutorily barr[ing] [capital defendants] from challenging the state’s [evidentiary] misconduct in state court” and New York’s practice of “routinely violat[ing] defendants’ due process rights by misconstruing state procedural rules to prevent defendants from raising substantive federal violations.” Eve Brensike *Primus*, *A Structural Vision of Habeas Corpus*, 98 CALIF. L. REV. 1, 2 (2010); *see also Aziz Z. Huq, Habeas and the Roberts Court*, 81 U. CHI. L. REV. 519, 562–64 (2014) (describing the concept of “concatenated error”).

⁵¹⁶ As I pointed out earlier, it is my view that there was no meaningful difference between the prevailing conception of jurisdiction in 1948 and the prevailing conception in 1867. *See supra* notes 458–461 and accompanying text. Thus, even if the reenactment argument succeeds, there is no need to break out a fourth conception called “jurisdiction[1948].”

and (b) personal jurisdiction over the defendant.⁵¹⁷ (As I will discuss below, however, I believe that jurisdiction[2025] also encompasses (c) power to enter the particular judgment—at least in some circumstances.)⁵¹⁸

1. Jurisdiction[1867] Matters

When narrow-writ theorists advocate for returning to a jurisdictional inquiry, they sometimes treat *jurisdiction* as a self-explanatory idea.⁵¹⁹ The assumption, from what I can tell, is that habeas courts could just apply the jurisdictional analysis they would use in any other context today—that is, jurisdiction[2025].⁵²⁰ Jurisdiction is jurisdiction, even though the Court’s jurisprudence once called more errors “jurisdictional” than we would today. And yes, we should correct any of today’s precedents that are wrong about what goes to jurisdiction and what does not. But we should correct them, the argument goes, only because they are wrong, not merely because they happen to conflict with yesteryear’s precedents on the same topic.

This approach rests on the questionable assumption that “jurisdiction” necessarily has only one meaning. When the 1867 Act imposed the jurisdictional defect rule, it was essentially telling courts (not in so many words) that “habeas eligibility turns on whether the convicting court had jurisdiction.”⁵²¹ But by necessity, any reference to “jurisdiction” in 1867 pointed not to jurisdiction[2025], which did not yet exist, but instead to jurisdiction[1867]. Siegel is quite right on this point.⁵²² So it is difficult to see how courts can follow the 1948 Act (which carried over the jurisdiction[1867] conception) by applying an understanding of jurisdiction to which the statute did not refer.⁵²³

The narrow-writ theorist might respond along the following lines: Whether a custody violates federal law turns on whether there is a jurisdictionally sound judgment backing up the custody. The point is that, to trigger the statute, the judgment of conviction must *really* be void. So what matters is not jurisdiction[1867] or jurisdiction[2025]. What matters is what we might call jurisdiction[true]—the real, platonic, ultimately correct

⁵¹⁷ See *Wilkins v. United States*, 143 S. Ct. 870, 875-76 (2023).

⁵¹⁸ See *infra* notes 531–532 and accompanying text.

⁵¹⁹ See *Brown v. Davenport*, 142 S. Ct. 1510, 1520-22 (2022).

⁵²⁰ I do not mean to impute this view to anyone. I am merely making an inference from the narrow-writ camp’s comparative silence on the nuances of jurisdiction.

⁵²¹ Cf. *Ex parte Crouch*, 112 U.S. 178, 180 (1884) (holding that the petitioner was not “detained in violation of the Constitution” because he was “in the custody of a State court of competent jurisdiction”).

⁵²² See Siegel, *supra* note 11, at 509-10 (critiquing Justice Gorsuch for using the modern definition of “jurisdiction” while discussing nineteenth-century habeas cases without noting that the traditional notion of “jurisdiction” was different than today’s notion).

⁵²³ Cf. *supra* Section III.B.

conception of jurisdiction that determines a court's authority to act in a given case.⁵²⁴

This response has some intuitive force, but it does not give enough weight to the original statutory meaning. The 1867 Act necessarily could encode only the jurisdiction[1867] conception, not jurisdiction[2025] or even jurisdiction[true]. And the 1948 Act left that conception unchanged. I struggle to see how we can shift to a different conception and stay faithful to the text.⁵²⁵ Admittedly, however, things are complicated by the fact that the text does not use the word “jurisdiction.” This leaves a bit of room for the notion that courts can respect the text's fixed meaning even while applying evolved notions of jurisdiction. It is a close call, but I tend to err on the side of fixity out of respect for the statute.

2. Comparing Outcomes and Conceptions

When broad-writ theorists contemplate returning to a jurisdictional inquiry, in contrast, two themes tend to emerge. First is the suggestion that the Court's old *applications* of the jurisdiction[1867] conception are binding. The idea is that, as cases like *Lange*, *Siebold*, and *Bain* demonstrate, far more defects counted as jurisdictional in the past than would qualify now.⁵²⁶ If we are going to follow those cases in one way (by following the jurisdictional defect rule), then we have to follow them in other ways (by applying the rule the same way they did). Thus, the Court “should not be so sure that it really wishes . . . to ‘return the Great Writ closer to its historic office’” because it “might then find itself bound to grant habeas relief, with more regularity and less compunction than it would prefer.”⁵²⁷

This approach is mistaken. The statutory text does direct courts to look to the *conception* of jurisdiction[1867]. And the Supreme Court's applications of jurisdiction[1867] are evidence of what that conception entails. But they are not conclusive evidence.⁵²⁸ The Court might have been wrong, for example, to hold in *Siebold* that a conviction under an unconstitutional statute

⁵²⁴ Thanks to Max Bloom and Tyler Lindley for each raising this argument.

⁵²⁵ Cf. Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 560 (2006) (arguing, in an influential piece, that “the *sense* of a constitutional expression is fixed at the time of the framing, but the *reference* is not, because it depends on the facts about the world, which can change”).

⁵²⁶ See, e.g., *United States v. Cotton*, 535 U.S. 625, 630 (2002) (“*Bain*’s elastic concept of jurisdiction is not what the term jurisdiction means today, i.e., ‘the courts’ statutory or constitutional power to adjudicate the case.’”) (citations omitted).

⁵²⁷ *Brown v. Davenport*, 142 S. Ct. 1510, 1534–35 (2022) (Kagan, J., dissenting) (quoting *id.* at 1523 (majority opinion) (citation omitted)); see also *Siegel*, *supra* note 11, at 531 (faulting Justice Gorsuch for “not commit[ing] to” *Siebold*).

⁵²⁸ Cf. Green, *supra* note 525, at 579–82 (explaining why it is theoretically unworkable to approach interpretive questions simply by asking, “what would the [drafters] do?”).

deprives the convicting court of jurisdiction[1867]. Or maybe the Court was wrong to suggest in the *Bonner* dicta that all manner of serious procedural errors could deprive a court of jurisdiction[1867]. So even though it is fair game to ask whether the convicting court had jurisdiction to enter the particular judgment, we should be looking for the *correct* answer to that question in any given instance. That may or may not be the same as the answer the Court's holdings (much less dicta) gave in the past.

The second broad-writ theme is the difference between jurisdiction[1867] and jurisdiction[2025]. In recent decades, the Court has battened down the hatches about what counts as jurisdictional. It is now easy to find cases saying that subject matter jurisdiction goes to "the classes of cases a court may entertain," with no mention of jurisdiction to enter the particular judgment.⁵²⁹ With statements like these, it is understandable to conclude that jurisdiction[1867]—with its regard for power to enter the particular judgment—has little or nothing to do with jurisdiction[2025]. Indeed, maybe the phrase "power to enter the particular judgment" is just slang for "merits review" after all. Justice Kagan, citing Siegel and Woolhandler, reached this conclusion in her *Davenport* dissent.⁵³⁰

But it is a mistake to overstate the difference between jurisdiction[1867] and jurisdiction[2025]. In fact, courts commonly inquire into each other's jurisdiction to enter a particular judgment even today. The doctrines of Article III standing and mootness are prime examples.⁵³¹ Suppose that A asks a federal court for damages from, and an injunction against, B. The court might hold there is no ongoing harm or threat of future harm, which means the court lacks jurisdiction *to enter the injunction*—even though it has subject matter jurisdiction over the "class" of case before it, and even though there might be past harm sufficient to justify damages.⁵³² Or the reverse might be true. Suppose there is only a threat of future harm. In this case, the court might lack jurisdiction to award damages, notwithstanding its power over the

⁵²⁹ *Wilkins v. United States*, 143 S. Ct. 870, 875-76 (2023) (citation omitted).

⁵³⁰ See *Davenport*, 142 S. Ct. at 1533-34 (Kagan, J., dissenting) (citing Woolhandler, *supra* note 11, at 630; Siegel, *supra* note 11, at 26) (pressing a broad-writ historical narrative).

⁵³¹ See *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020) ("To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." (emphasis added)); *Collins v. Yellen*, 141 S. Ct. 1761, 1779-80 (2021) ("[I]t is necessary to consider whether [an intervening development] moots the shareholders' constitutional claim. It does so only with respect to some of the relief requested").

⁵³² See *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-10 (1983) (holding that a plaintiff who had suffered past harm, but who could make no showing of likely future harm, lacked standing to seek an injunction).

class of cases and its power to issue an injunction.⁵³³ And in the mootness context, intervening events often moot one of a plaintiff's requested forms of relief but not others.

Another example is the argument that district courts can neither vacate agency actions nor enter nationwide injunctions. The idea is that “the ‘judicial Power’ is the power to ‘decide cases for parties, not questions for everyone,’” and that courts exceed their power when they vacate agency actions or enter nationwide injunctions.⁵³⁴ Here, too, the argument seems to presume that district courts have subject matter jurisdiction to enter *some* judgment in these cases; it is just that the entry of certain judgments exceeds that jurisdiction. For one last example, there is *Biden v. Texas*, where the Court expressly recognized that some statutes “withdraw[] a district court’s ‘jurisdiction or authority’ to grant a particular form of relief,” without “depriv[ing] [the] court[] of all subject matter jurisdiction over” the claim.⁵³⁵

It is true that courts do not usually do this kind of judgment-specific inquiry in the criminal context. But that might have more to do with a lack of practice than anything else: *Brown* has left federal courts with very few occasions to inquire into jurisdiction on habeas. Thus, though it is easy to declare that the old cases were employing a vastly different conception of jurisdiction than we would today, that may not be true. Nor is it true that a judgment-specific look into jurisdiction must collapse into a review of the merits, as the nineteenth-century habeas cases (and Article III standing, for that matter) demonstrate.

3. Putting the Pieces Together

If we combine these ideas, something like the following picture emerges. Inquiring into jurisdiction today would require recovering the conception of jurisdiction that prevailed in 1867 (and that survived in 1948). These statutes cannot have required courts to employ a conception that did not yet exist. That means habeas courts would have to ask whether the convicting court had subject matter jurisdiction over the class of cases and personal jurisdiction over the defendant. And they would have to ask whether the court exceeded its subject matter jurisdiction by entering a judgment beyond its power. But to answer that last question—which, it bears emphasizing, is not as foreign to

⁵³³ See *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) (“[A] plaintiff’s standing to seek injunctive relief does not necessarily mean that the plaintiff has standing to seek retrospective damages”).

⁵³⁴ *United States v. Texas*, 143 S. Ct. 1964, 1980 (2023) (Gorsuch, J., concurring) (quoting Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 421 (2017)).

⁵³⁵ *Biden v. Texas* 142 S. Ct. 2528, 2539 (2022).

today's law as it may seem—courts would not need to unthinkingly reach the same conclusions that prevailed in the 1800s. Any one of those conclusions may have been right or wrong, and they deserve case-by-case analysis.

Even so, I will very tentatively gesture at which defects might count as jurisdictional and which might not.⁵³⁶ For one thing, if a court proceeds all the way to *conviction* in the face of a threshold prohibition that should have stopped it from even entertaining the *prosecution*, that may be a good candidate. Constitutional text could play a role here. The Fifth Amendment, for instance, does not merely guarantee a grand jury;⁵³⁷ it protects the defendant from even being “held to answer” for certain crimes without one.⁵³⁸ The same Amendment does not merely bar double convictions; it stops the government from even “put[ting]” someone “twice . . . in jeopardy” for the same crime.⁵³⁹ Based in part on this threshold language, today's Court recognizes that these provisions at least sometimes create a “right not to be tried” sufficient for immediate appeal under the collateral order doctrine.⁵⁴⁰ Similarly, yesterday's Court may have been on to something in cases like *Bain* (grand jury issue) and *Lange* (clear-cut double jeopardy violation).⁵⁴¹

Some sentencing issues might also qualify as jurisdictional. The classic case occurs where a state court sentences someone in excess of a statutory maximum. In my view, this case cannot arise in interjurisdictional habeas because the resulting custody would not be in violation of *federal* law.⁵⁴² But if a state court imposed a “cruel and unusual” sentence, that sentence might be “beyond the jurisdiction of the court, because it was against an express provision of the Constitution, which bounds and limits all jurisdiction.”⁵⁴³ This circumstance is a less obvious one, but the argument is at least colorable.

⁵³⁶ For an astute and more in-depth attempt at this line-drawing exercise, see Kinnaird, *supra* note 8, at 16–22, 28–44. I do differ from Kinnaird on at least one point. Kinnaird at points suggests the analysis should hinge on whether “a given provision of the Constitution limits the judicial power.” *Id.* at 3. Although the text is certainly relevant, I am skeptical that a purely provision-by-provision analysis is specific enough.

Also noteworthy is Kamin's suggestion that reconceptualizing the habeas writ as an instrument of popular sovereignty might help draw the line. *See generally* Kamin, *supra* note 8.

⁵³⁷ This guarantee has not been incorporated against the states, but it is still a conceptually useful example. *See generally* Roger A. Fairfax, Jr., *Interrogating the Nonincorporation of the Grand Jury Clause*, 43 CARDOZO L. REV. 855 (2022).

⁵³⁸ U.S. CONST. amend. V.

⁵³⁹ *Id.*; *see also* *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (holding that the Double Jeopardy Clause is incorporated against the states).

⁵⁴⁰ *See* *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (“Only a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment, gives rise to the constitutional right not to be tried.”); *Abney v. United States*, 431 U.S. 651, 662 (1977) (holding that a double jeopardy claim is immediately appealable).

⁵⁴¹ *But see* *United States v. Cotton*, 535 U.S. 625, 631 (2002) (overruling *Bain*).

⁵⁴² *See supra* notes 241–247 and accompanying text; 28 U.S.C. § 2241(c).

⁵⁴³ *Ex parte Nielsen*, 131 U.S. 176, 185 (1889).

In contrast, it is hard to see how most procedural errors, in the absence of a threshold prohibition, would qualify. Again, constitutional text can provide cues—some provisions protect defendants without appearing to cut off judicial power wholesale. The Fifth Amendment provides that no “person . . . shall be compelled in any criminal case to be a witness against himself”—a simple proscription unadorned with threshold language.⁵⁴⁴ The Sixth Amendment’s guarantee that “the accused shall enjoy” certain rights and the Fourteenth Amendment’s bar on “depriv[ing] any person of life, liberty, or property, without due process of law” likewise lack the threshold language of the Grand Jury or Double Jeopardy Clauses.⁵⁴⁵ It does not follow that these kinds of claims can *never* qualify; the constitutional text is only one part of drawing the line between jurisdictional and nonjurisdictional defects. But it would probably take a particularly egregious, threshold-type error to get there—something that undermines the legitimacy of the entire criminal proceeding from the start. Thus, for instance, the Court may have been right not to consider the purely procedural violation in the *Felts* case, where the defendant had been convicted without being able to hear the proceedings.⁵⁴⁶

What to do with *Siebold* is a harder question.⁵⁴⁷ On the one hand, the case rested on *Norton*’s premise that an unconstitutional law, in addition to being unenforceable, might as well not even exist at all. That premise might strike us as a little extreme today. And *Siebold* itself has not been good precedent since 1912.⁵⁴⁸ On the other hand, *Siebold*’s logic has a certain enthralling elegance—courts have jurisdiction over statutory violations, unconstitutional statutes are void, so an unconstitutional statute cannot be the basis of any prosecution. That might be tempting for today’s formalist Court if the issue ever came up.

4. Objection—Judgment Defects?

Even if what I am calling the “jurisdictional defect rule” was not a fiction and continues in force in modified form, maybe I have mischaracterized the rule’s contents. Instead of looking for jurisdictional defects, perhaps courts should be applying today’s usual rules of *res judicata*, which tell courts whether to respect foreign judgments.⁵⁴⁹ In this vein, *Re* suggests “judgment

⁵⁴⁴ U.S. CONST. amend. V.

⁵⁴⁵ U.S. CONST. amends. VI, XIV.

⁵⁴⁶ See *supra* notes 257–259 and accompanying text.

⁵⁴⁷ See *supra* subsection II.C.3 (discussing the *Siebold* line of cases and *Norton*).

⁵⁴⁸ See *Glasgow v. Moyer*, 225 U.S. 420, 429 (1912) (overruling *Siebold* and holding that a conviction resulting from an unconstitutional law may be reviewed only upon a writ of error).

⁵⁴⁹ See *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–81 (1982) (“[*Res judicata*] does not apply when the party against whom the [state court] decision is asserted did not have a ‘full and fair opportunity’ to litigate the claim or issue.” (citations omitted)).

defects” of any kind should suffice for habeas purposes, whether or not jurisdictional.⁵⁵⁰ One might also argue that modern “inter-jurisdictional preclusion norms” should govern.⁵⁵¹ Or consider a narrow-writ spin on the same idea: state courts’ rulings on their own jurisdiction usually get res judicata effect so long as the jurisdictional issue got “full and fair” consideration, so why not allow the same kind of “bootstrapping” in the habeas context?⁵⁵²

These suggestions read the 1867 Act for less than it is worth. Before the Act, the cardinal, unwritten rule of post-conviction habeas law was that *the writ could issue only for jurisdictional defects*. The Act encoded that rule for state prisoner cases, thereby tying habeas eligibility to the absence of jurisdiction. That was not because the res judicata principles of the day just happened to center on jurisdiction, though they did.⁵⁵³ It was because the very nature of habeas corpus forbade inquiry into jurisdictionally sound judgments.⁵⁵⁴ So it would be a mistake to seek out any and all “judgment defects”⁵⁵⁵ or to apply today’s “inter-jurisdictional preclusion norms” in the habeas context.⁵⁵⁶ And even if the key idea were voidness rather than jurisdiction, we would still be looking for the *old* conception of voidness—not today’s.

It would also be a mistake to allow bootstrapping. I admit that this is a close issue—even if habeas relief hinges on jurisdiction, it does not obviously

550 Richard M. Re, *Reason and Rhetoric in Edwards v. Vannoy*, 17 DUKE J. CONST. L. & PUB. POL’Y 63, 74 (2022). I do not take Re to be expressly framing this as an argument about modern res judicata doctrine, but I think that is one fair implication of his view. *See id.* at 73 (explaining that “jurisdictional defects are just one way in which judgments can be inadequate” under today’s law); *see also* Kinnaird, *supra* note 121, at 27–36 (purporting to identify nonjurisdictional defects that render a judgment void). *But see supra* notes 177–182 (disagreeing with Kinnaird on this).

551 *See* Kovarsky, *supra* note 11, at 648–49 (discussing application of these norms in habeas cases). Kovarsky is not quite advocating for the application of these norms—I do not mean to impute that to him. I take Kovarsky’s project to be more in the spirit of comparing those norms with habeas law. Kovarsky does, however, appear to criticize the Court’s early 1867 Act cases for reading the Act as imposing the jurisdictional defect rule. *Id.* at 652–53. The rule had its genesis in federal prisoner cases—“intra-jurisdictional” scenarios where federal courts considered whether to credit federal judgments. *Id.* at 653. Kovarsky points out that the state prisoner cases were “interjurisdictional” because they involved federal courts considering whether to credit *state* judgments. *Id.* Kovarsky says it is a mistake to import preclusion rules from the one context into the other. *Id.* at 653–54. One response is that this is right: in light of the federalism and comity concerns at play, we should expect federal courts to give *more* respect to state courts’ judgments than they do to their own judgments. But the more fundamental response is that—whether wisely or not—the 1867 Act *did* import the jurisdictional defect rule from the one context to the other.

552 *See* Bator, *supra* note 8, at 461 (setting forth this idea); Baude, *supra* note 124, at 1846–50 (discussing “jurisdictional bootstrapping” and casting it as a recent and questionable innovation); *Durfee v. Duke*, 375 U.S. 106, 111 (1963) (allowing jurisdictional bootstrapping).

553 *See* Baude, *supra* note 124, at 1828–29 (discussing this rule’s very long historical pedigree).

554 *See, e.g., supra* note 120.

555 Re, *supra* note 550, at 74.

556 Kovarsky, *supra* note 11, at 649.

follow that federal courts have to determine the issue of jurisdiction *de novo*.⁵⁵⁷ But the text tells federal courts to issue relief only if the petitioner is “in custody in violation of” federal law.⁵⁵⁸ To determine whether a particular case fits that description, federal courts must inquire into state courts’ jurisdiction, just as they clearly did in the old cases.⁵⁵⁹ It would be more than a little odd to superimpose the unwritten (and historically dubious) bootstrapping rule onto the statute.

5. Objection—No General Law?

Another objection might be that this whole project makes no sense after *Erie Railroad Co. v. Tompkins*, in which the Court said that “[t]here is no federal general common law.”⁵⁶⁰ As Sachs has shown, nineteenth-century courts assessed each other’s judgments by applying the general law’s rules of jurisdiction.⁵⁶¹ But if the 1867 Act contained a jurisdictional defect rule, then complying with the statute now would appear to require applying general law—which is what *Erie* says not to do. A broad-writ version of this objection might conclude that the only recourse is to ignore the statute (because compliance is not possible). A narrow-writ version might conclude that the only recourse is to apply the statute and simply never find a jurisdictional defect (because to do so would require recourse to general law, which is illegitimate).

The easiest response is to deny the premise: general law lives.⁵⁶² Alternatively, even if general law is *mostly* dead, it seems to perdure in the context of interjurisdictional preclusion. Consider 28 U.S.C. § 1738, under which federal courts must give state-court judgments the same full faith and credit that other state courts are obliged to give them. The statute, much like the 1867 Act, does not spell out which judgments qualify for respect. So federal courts have always applied general law principles to sort things out. (We can also call this an “enclave of federal common law,” if that helps smooth things over.) The inquiry under the 1867 Act, as carried over in the 1948 Act,

⁵⁵⁷ Cf. Baude, *supra* note 124, at 1849 (“The constitutional case that judgments are constitutionally final where courts have jurisdiction is somewhat independent of the regime for establishing the jurisdiction of those courts.” (emphasis added)).

⁵⁵⁸ 28 U.S.C. § 2241(c).

⁵⁵⁹ See CHURCH (2d. ed. 1893), *supra* note 130, § 222, at 311 (“The question of jurisdiction, in the commitment of persons for either civil or criminal matters is always open and may be inquired into upon proceedings by habeas corpus, either prior to indictment, subsequent to it, or even after a regular prosecution, trial, and conviction.”); *see also id.* at 311 n.2 (collecting sources).

⁵⁶⁰ *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁵⁶¹ Sachs, *supra* note 119, at 1301.

⁵⁶² See, e.g., Nelson, *supra* note 117, at 505–525 (canvassing relatively recent judicial reliance on general law); Sachs, *supra* note 119, at 1255 (“[E]ven in the post-*Erie* landscape, there’s still a vital role for general law”).

is slightly different because it directs courts to inquire specifically into *jurisdiction* rather than preclusion norms writ large. But if federal courts can apply general law principles of interjurisdictional regard when 28 U.S.C. § 1738 says so, there is no reason they cannot apply general law principles of jurisdiction when 28 U.S.C. § 2241 says so.

CONCLUSION: WHY BOTHER?

It is fair to ask whether a return to statutory law is worthwhile. From the perspective of a Court primarily concerned with “separating the meritorious needles from the . . . haystack” of habeas petitions, narrowing habeas relief might seem like the end goal.⁵⁶³ Precise fidelity to statutory meaning would be nice, but there is no reason to get bogged down in details. From the perspective of the habeas academy, along with Justices Kagan, Sotomayor, and Jackson, the liberty-protecting function of habeas corpus might seem like the end goal. We might be “all textualists now,” but statutory minutiae may still seem more distraction than help.⁵⁶⁴

Yet there are good reasons for both the Court and its critics to care about habeas’s statutory law. To the extent the Court prioritizes a *narrow* habeas writ over a *legally accurate* one, it risks needlessly compromising its formalist and textualist bona fides. When Congress has spoken on an issue, that is the end of the matter; “no amount of policy-talk can overcome a plain statutory command.”⁵⁶⁵ For the Court’s critics and its habeas dissenters, legal accuracy is equally important. Precision about the nature of habeas may very well open up new arguments—including but not limited to the 1948 reenactment argument—that would preserve more habeas review than the Court’s majority seems inclined to allow.

⁵⁶³ *Brown v. Davenport*, 142 S. Ct. 1510, 1523 (2022).

⁵⁶⁴ Harvard Law School, *The 2015 Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), <https://www.youtube.com/watch?v=dpEtszFToTg> [<https://perma.cc/XY6S-VRGY>].

⁵⁶⁵ *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021).