
RESPONSE

ORDINARY PUBLIC MEANING & HABEAS POWER TO REVIEW STATE CONVICTIONS

LEE KOVARSKY[†]

INTRODUCTION

Brown v. Allen affirmed habeas power to review constitutional errors tainting state criminal convictions, and it is the most important Supreme Court case in the history of American post-conviction law.¹ Starting in 1963, with Professor Paul Bator’s *Finality in Criminal Law*,² a cohort of legal scholars has worked aggressively to discredit *Brown*—and, by extension, to throttle habeas enforcement of constitutional rights.³ In *What is Habeas*, Micah Quigley usefully describes this group as “narrow-writ theorists.”⁴ Quigley is himself a narrow-writ theorist, and among his contributions is his scholarly phrasing. His preferred interpretive method is “ordinary public

[†] Bryant Smith Chair in Law and Co-Director of the Capital Punishment Center at the University of Texas School of Law.

¹ 344 U.S. 443 (1953).

² See Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 462 (1963).

³ See, e.g., Clarke D. Forsythe, *The Historical Origins of Broad Federal Habeas Review Reconsidered*, 70 NOTRE DAME L. REV. 1079, 1084 (1995) (offering general position in support of narrow writ scope); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 142 (1970) (arguing that relief should be limited to claimants with a “colorable claim of innocence”); William M. Kamin, *The Great Writ of Popular Sovereignty*, 77 STAN. L. REV. 297, 335 (2025) (arguing that relief was available only for an expanded set of jurisdictional errors and constitutional errors “ris[ing] to the level of a genuine affront to the sovereignty of We the People”); see also *infra* note 6 (collecting decisional references).

⁴ See Micah S. Quigley, *What is Habeas?*, 173 U. PENN. L. REV. 453, 471 (2025).

meaning” (OPM),⁵ a synthesis of originalism and textualism that most appeals to the narrow-writ enthusiasts on the Supreme Court.⁶

Quigley has substantially more methodological discipline than his narrow-writ predecessors, but he riffs on the same story of steady state and rupture. English judges could not review jurisdictionally sound convictions, that story goes, and the 1789 Judiciary Act incorporated that “jurisdictional defect” rule.⁷ The 1867 Habeas Corpus Act reincorporated the rule when it extended the privilege to state prisoners,⁸ Quigley says,⁹ and the rule remained largely intact until the Supreme Court decided *Brown* in 1953. Per narrow-writ theorists, *Brown* extinguished this longstanding limit on habeas relief. They urge a restoration.

The narrow-writ account is oversimplified in many respects, but I focus primarily on its weakest piece: The period between the 1942 decision in *Waley v. Johnston*¹⁰—which formally rejected the jurisdictional defect rule¹¹—and the 1953 decision in *Brown*. In the middle of that period sit the 1948 Revisions to the U.S. Code, which include the habeas provision that *Brown* actually interpreted.¹² OPM approaches are credible only to the extent that they take seriously what legal terms meant at the time of enactment to a particular interpreting community.¹³ The fatal flaw in Quigley’s account, and in narrow-writ theory more generally, is that legal authority from this period cuts decisively against the jurisdictional defect rule.

This lopsidedness of the authority bracketing the 1948 Revisions is especially challenging for narrow-writ theorists, given their persuasive burdens. Overturning *Brown* would implicate statutory stare decisis, so narrow-writ theorists need to show more than just some pre-*Brown* indeterminacy; they must find decisive evidence that *Brown* got the statute

⁵ See *id.* at 472-73; see also WILLIAM N. ESKRIDGE JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 33 (Robert C. Clark et al. eds., 2016) (discussing the ordinary meaning approach to statutory interpretation); John O. McGinnis & Michael B. Rappaport, *What Is Original Public Meaning?*, 76 ALA. L. REV. 223, 233-41 (2024) (reciting academic history of the theory).

⁶ See, e.g., *Jones v. Hendrix*, 143 S. Ct. 1857, 1871-73 (2023) (offering standard narrow-writ history); *Brown v. Davenport*, 142 S. Ct. 1510, 1520-24 (2022) (same). But see Lee Kovarsky, *Habeas Myths, Past and Present*, 101 TEX. L. REV. ONLINE 57, 67 (2022) (disputing account offered in *Davenport*).

⁷ See Quigley, *supra* note 4, at 455, 465-66.

⁸ Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

⁹ See Quigley, *supra* note 4, at 472.

¹⁰ 316 U.S. 101 (1942).

¹¹ See *id.* at 104-05.

¹² See Act of June 25, 1948, ch. 646, 62 Stat. 869 (revising Title 28 of the U.S. Code with revisions) [hereinafter 1948 Revisions]; see also *Brown v. Allen*, 344 U.S. 443, 462 (1953) (interpreting 1948 Revisions).

¹³ See *New Prime Inc. v. Oliveira*, 586 U.S. 105, 113 (2019) (emphasizing canon pegging interpretation to moment of enactment).

all wrong.¹⁴ I respect Quigley's commitment to a single interpretive method, but he fails to meet that burden. That failure, moreover, is common to all narrow-writ theories.

I proceed in three parts. Part I situates Quigley's effort within the narrow-writ movement. Part II identifies the gap in Quigley's work, which is an Achilles heel for narrow-writ theory more generally. I zero in on the eleven-year period between *Waley* and *Brown*, which includes the 1948 Revisions—a period from which Quigley does not cite a *single case* espousing a jurisdictional defect rule. The decisions from this period establish beyond doubt that the 1948 Revisions enacted a habeas provision that no neutral interpreter would read restrictively. Part III sets forth the simpler understanding of the operative habeas provision: that it secures a remedy for all detention that violates federal law.

I. SETTING THE STAGE

Quigley attacks broad-scope habeas relief for convicted prisoners, arguing that the operative statutory text permits relief only for jurisdictional defects. His thorough treatment re-shapes narrow-writ theory to fit modern textualist methodology, thereby imbuing an older argument with novel substructure. Like most of the genre, however, the article is ultimately an offshoot of Professor Bator's famous work. In Part I, I isolate the novel elements of Quigley's argument, which I critique in Part II.

A. Textualist Method

Quigley's method is textualist and originalist. More precisely, it is the orthodox academic strain of OPM textualism, under which an interpreter fixes the meaning of a legal text by reference to how its words would have been understood by the interpreting community at the time of enactment.¹⁵ And if the words are legally specialized, then meaning is fixed by how legal specialists would have understood them.¹⁶ Quigley's arguments won't convince people who are not OPM adherents, and I remain an OPM skeptic. But I still take the arguments on their own terms.

Quigley's digression about common versus statutory writ law distracts unnecessarily from his textualist inquiry. Per Quigley, what writ theorists of

¹⁴ See *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 455-56 (2015) (explaining the enhanced burden); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (same).

¹⁵ See *supra* note 5.

¹⁶ See Quigley, *supra* note 4, at 472 (adopting that approach); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 968 (2009) (describing reversion to specialist meaning).

all persuasions miss is that the 1867 Act subjected writ scope to statutory constraints,¹⁷ rather than to common-law ones. But I don't think either side really conceptualizes the 1867 Statute that way,¹⁸ at least in the main. Academics disagree over the interpretation of the 1867 statute, but both sides tend to treat restrictions on habeas relief as *statutory*.¹⁹

The issue for most writ theorists, whether narrow or broad, is about whether to reverse seventy years of precedent about the meaning of statutory text: "custody in violation of the Constitution or laws or treaties of the United States."²⁰ Sure, judges fill gaps in meaning when they interpret statutes. But such gap filling is not common lawmaking, as the term is typically used, and it certainly does not mark *general* common law.²¹ I therefore join Quigley in assuming that the 1867 Act encodes statutory limits on habeas relief. I do so not arguendo, but because I believe it.

B. *The Familiar Story of Steady State and Rupture*

In broad strokes, narrow-writ theorists tell a common story of steady state and rupture that proceeds roughly as follows. Before the Civil War, the Supreme Court recognized a firm rule that habeas relief was unavailable unless a final conviction was tainted by jurisdictional error.²² When the 1867 Act brought state custody within the habeas power of federal courts, these theorists insist, the Act also incorporated the jurisdictional defect rule.²³ They treat that rule as having been so clearly carried forth in subsequent statutory enactments that *Brown* should be understood as a flagrant deviation from a steady state and therefore minimized or overturned.²⁴ The net result of the theory is that federal habeas review should cease to be a meaningful site of constitutional rights enforcement.

¹⁷ See Quigley, *supra* note 4, at 460-63.

¹⁸ Quigley quotes Justice Gorsuch as though Gorsuch has this view. See Quigley, *supra* note 4, at 460-61 (quoting *Brown v. Davenport*, 142 S. Ct. 1510, 1520 (2022) and *Edwards v. Vannoy*, 141 S. Ct. 1547, 1573 (2021) (Gorsuch, J., concurring)). But the quoted text is not an argument that limitations in the 1867 Act are extra-statutory. Quigley's examples from the broad-writ camp have the same problem. See *id.* at 461.

¹⁹ See, e.g., Bator, *supra* note 2, at 465-99 (offering narrow-writ account rooted in view that habeas restrictions operated by force of statute); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 602-63 (1982) (broad-writ account rooting arguments about limits on habeas relief in statute).

²⁰ The 1948 Revisions enacted this language where it remains, in 28 U.S.C. § 2241(c)(3).

²¹ Section 2241(c)(3) expressly refers to *federal* law, and I doubt that many academics miss that limitation.

²² See *Davenport*, 142 S. Ct. at 1521; Quigley, *supra* note 4, at 473.

²³ See *Edwards*, 141 S. Ct. at 1563 (Thomas, J., concurring); Quigley, *supra* note 4, at 473.

²⁴ See, e.g., *Davenport*, 142 S. Ct. at 1523 (linking narrow-writ account to justifications for modern habeas restrictions); Quigley, *supra* note 4, at 534-37 (urging "compensating adjustments").

Quigley's account of the pre-1867 case law is, in most material respects, the same as the narrow-writ accounts dating back to Professor Bator's. English habeas relief was for unlawful custody, and a jurisdictionally sound conviction was usually proof that custody was lawful.²⁵ Narrow-writ theorists interpret this practice as a rule that a valid criminal conviction precluded review of lawfulness, as opposed to a rule that all conviction-backed custody was lawful.²⁶ Colonial and antebellum practice remained committed to the jurisdictional defect rule, they say, even as the habeas power reached errors that would be classified as non-jurisdictional today.²⁷

I focus on other parts of the narrow-writ account, but I pause briefly to flag some errors in the above-recited pieces. First, the characterization of English common law ignores *Bushell's Case*, where the Court of Common Pleas ordered a habeas discharge for a criminal contemnor.²⁸ Second, habeas power under the 1789 Act reached convictions that were "nullities," and some decisions treat jurisdictional defects as but one nullifying phenomenon.²⁹ Third, limits under the 1789 Act reflected statutory restrictions on the Supreme Court's appellate jurisdiction over federal convictions,³⁰ not merely limits native to the habeas writ itself. Finally, although many 1789-Act cases intoned a jurisdictional defect rule,³¹ the prevailing concept of jurisdictional error became, over the latter half of the nineteenth century, much broader

²⁵ See Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 48 (1961) (quoting *United States v. Hayman*, 342 U.S. 205, 210-11 (1952)).

²⁶ See, e.g., *Davenport*, 142 S. Ct. at 1521-22 (interpreting the jurisdictional defect rule this way).

²⁷ See Quigley, *supra* note 4, at 498-518 (observing that the nineteenth-century jurisdictional defect rule was based on nineteenth-century understandings of "the conception of jurisdiction").

²⁸ *Bushell's Case* [1670] 124 Eng. Rep. 1006 (C.P.). Quigley himself notes that a "contempt commitment was considered a judgment of conviction." Quigley, *supra* note 4, at 480 n.161. Furthermore, the world's leading habeas historian concluded that post-conviction review was "on the rise in the early seventeenth century" and that many of the reviewed convictions had been formed by courts of more general jurisdiction. PAUL D. HALLIDAY, *HABEAS CORPUS: FROM ENGLAND TO EMPIRE* 117-20 (2010).

²⁹ See David Kinnaird, *Habeas Corpus and Void Judgments*, 100 NOTRE DAME L. REV. (forthcoming 2025) (manuscript at 7-9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4624001 [<https://perma.cc/G33Q-FYRP>]. The cases under the 1789 Act became especially mixed on this question after the passage of the 1867 Act. See, e.g., *Ex parte Parks*, 93 U.S. 18, 21 (1876) (describing jurisdictional defectiveness as a subset of voidness). But see Quigley, *supra* note 4, at 481-83 (answering Kinnaird).

³⁰ See, e.g., *Ex parte Watkins*, 28 U.S. 193 (3 Pet.), 203 (1830) ("We have no power to examine the proceedings on a writ of error, and it would be strange, if, under colour of a writ to liberate an individual from unlawful imprisonment, we could substantially reverse a judgment which the law has placed beyond our control."). But see Quigley, *supra* note 4, at 480-81 (rejecting "anticircumvention" a source of writ-scope limitation under the 1789 Act).

³¹ See, e.g., *Watkins*, 28 U.S. at 202-03 (canonically stating rule).

than it is now.³² Each of these issues warrants full-article scrutiny, but I abbreviate my treatment in the interest of space.³³

Quigley says that the 1867 Act incorporated whatever writ-scope rule prevailed at that time.³⁴ He then argues that the interpreting community would have understood jurisdictionally sound convictions to be beyond that scope.³⁵ Having made the case that the 1867 Act incorporated a jurisdictional defect rule, he turns to cases between 1867 and *Brown*. Because my focus begins with *Waley*, which the Supreme Court decided in 1942, I visit only briefly the earlier precedent interpreting the 1867 Act.

Problems with Quigley's presentation of 1867-Act cases start from the jump. Arguing that the Supreme Court "initially" embraced a jurisdictional defect reading of the 1867 Act,³⁶ Quigley quotes *Ex parte Parks*: "[I]f the [state] court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error."³⁷ But the word "state" isn't in the *Parks* opinion, which involved a prisoner convicted of a federal crime (forgery) in a federal court.³⁸ He would have been seeking *appellate* relief from his *federal* conviction in the Supreme Court, under the 1789 Act. Quigley's alteration therefore distorts (substantially) the posture and interpretive significance of *Parks*.³⁹

The first post-conviction case the Supreme Court actually decided under the 1867 Act was *In re Wo Lee*, the companion case to *Yick Wo v. Hopkins*.⁴⁰ *Wo Lee* ordered habeas relief for a selective prosecution that violated the Equal Protection Clause, and nobody thought a selective prosecution taint to be a

³² See Jonathan R. Siegel, *Habeas, History, and Hermeneutics*, 64 ARIZ. L. REV. 505, 524-34 (2022) (placing "jurisdiction" for nineteenth-century habeas cases in its "historical context"); Ann Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 596-97 (1993) (noting that "[j]ust as before the [Civil War], the Court frequently recited the verbal formula that habeas was not a writ of error and that it was limited to issues of jurisdiction," but that the Court also "occasionally reviewed the merits of constitutional issues on habeas"). This usage of the term "jurisdiction" is what probably prompted Justice Gorsuch to write, in *Brown v. Davenport*: "To be sure, the line between mere errors and jurisdictional defects was not always a 'luminous beacon' and it evolved over time." 142 S. Ct. 1510, 1521 (2022) (citing Bator, *supra* note 2, at 470).

³³ Cf. Anthony G. Amsterdam & James S. Liebman, *Loper Bright and the Great Writ*, 56 COLUM. HUM. RTS. L. REV. 54, 93 n.171 (2025) (flagging Quigley's slanted presentation of precedent preexisting the 1867 Act).

³⁴ See Quigley, *supra* note 4, at 483.

³⁵ See *id.* at 483.

³⁶ *Id.* at 455.

³⁷ *Id.* at 455 n.5 (alterations in original).

³⁸ *Ex parte Parks*, 93 U.S. 18, 18 (1876).

³⁹ Notwithstanding its distorting effect, I read this alteration as inadvertent. Later in the paper, Quigley acknowledges that *Parks* is a federal-prisoner case. Quigley, *supra* note 4, at 479 n.155, 508-09.

⁴⁰ 118 U.S. 356 (1886).

“jurisdictional defect” in the California conviction.⁴¹ *Ex parte Converse* later reaffirmed that “an unconstitutional conviction and punishment under a valid law would be as violative of a person’s constitutional rights as a conviction and punishment under an unconstitutional law.”⁴² Although the Court ultimately refused relief, it did so because the convicting court “did not exceed its jurisdiction, or deliver a judgment abridging appellant’s privileges or immunities, or depriv[e] him of the law of the land of his domicil.”⁴³ Granted, this period does feature many decisions stating that habeas was available only for convictions with jurisdictional defects, but the case law is far more mixed than Quigley conveys.

Frank v. Mangum (1915)⁴⁴ and *Moore v. Dempsey* (1923)⁴⁵ were particularly visible decisions,⁴⁶ and the Supreme Court pierced the jurisdictional defect rule in both. Quigley discusses *Frank* and *Moore*, but he marginalizes them as aberrant cases full of language that is “halfhearted at best and *ipse dixit* at worst.”⁴⁷ Quigley is vastly understating the interpretive significance of *Frank* and *Moore*. *Moore*, for example, was a straightforward rejection of the jurisdictional defect rule; the dissenter, Justice McReynolds, argued that the rule should have been honored.⁴⁸

Between *Moore* and *Waley*, the jurisdictional defect rule hung around, but only barely. The two biggest post-conviction cases of that era were *Mooney v.*

⁴¹ See James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 COLUM. L. REV. 1997, 2045 (1992) (observing that *Wo Lee* did not involve relief based on jurisdictional defect). Quigley tries to depict *Wo Lee*’s relief for an equal protection taint as a “jurisdictional” defect. See Quigley, *supra* note 4, at 492. His text and accompanying footnotes argue that convictions under unconstitutional statutes were jurisdictionally defective, and that the Supreme Court declared the statute facially unconstitutional. See *id.* at 492–93 nn.236–40. *Wo Lee*’s decisional text, however, disclaims a finding that the law is unfair “on its face.” *Yick Wo*, 118 U.S. at 373. It emphasizes that the decision was against “the public administration which enforces” the law, *id.* at 374, and it doesn’t once suggest that the taint might be jurisdictional.

⁴² *Ex parte Converse*, 137 U.S. 624, 631–32 (1891).

⁴³ *Id.* (emphasis added).

⁴⁴ 237 U.S. 309 (1915).

⁴⁵ 261 U.S. 86 (1923).

⁴⁶ *Frank* and *Moore* are central cases in most academic and pedagogical presentations of habeas history. See, e.g., Bator, *supra* note 2, at 484–93 (discussing changes in habeas law during the early twentieth century by reference to *Frank* and *Moore*); BRANDON L. GARRETT & LEE KOVARSKY, *FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION* 113–34 (2d ed. 2024) (case book presenting *Frank* and *Moore* as leading members of “Classic Due Process Cases”).

⁴⁷ Quigley, *supra* note 4, at 523; see also *Ipse Dixit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/ipse%20dixit> [<https://perma.cc/5BMB-VDFC>] (“[A]n assertion made but not proved”).

⁴⁸ Compare *Moore v. Dempsey*, 261 U.S. 86, 91 (1923) (broad-writ holding that writ scope reaches due process violations), with *id.* at 94–96 (McReynolds, J., dissenting) (endorsing jurisdictional defect precedent).

Holohan (1935)⁴⁹ and *Johnson v. Zerbst* (1938).⁵⁰ Although *Mooney* refused relief for non-exhaustion of available state remedies, it held that knowing use of perjured testimony would permit habeas relief—and it said nothing of any jurisdictional defect rule.⁵¹ *Johnson* held that the Sixth Amendment right to assistance of counsel formed a basis for habeas relief, although it tokenized the Sixth Amendment violation as a jurisdictional defect.⁵²

* * *

Textualists must read the precedent that predicates the 1948 Revisions in the way that the era's typical attorneys would. Quigley, however, is sometimes prone to stilted, idiosyncratic presentations of the pre-*Waley* opinions—thereby creating the false impression that those opinions consistently embraced a clean jurisdictional defect rule. I certainly don't want to suggest clarity in the other direction, however. Sometimes, the best a fair reader can say is that the case law is messy. But there is no uncertainty about the precedent that comes after the Supreme Court decided *Waley* in 1942.

II. *WALEY*, THE 1948 REVISIONS, AND *BROWN*

In 1948, Congress reenacted provisions from the 1867 Habeas Act as part of a comprehensive Code revision. Those revisions included 28 U.S.C. § 2241(c), the writ-scope provision. Quigley deserves praise for taking the 1948 Revisions seriously, because that is the statutory enactment that *Brown* actually interpreted. By contrast, Justice Gorsuch threw down his narrow-writ gauntlet in *Brown v. Davenport* and *Edwards v. Vannoy*, but he ignored the revisions.⁵³ In their own seminal narrow-writ works, Professor Bator and Judge Henry J. Friendly did not mention them once.⁵⁴ My quarrel with Quigley lies elsewhere—he (commendably) focuses on the correct enactment, but he draws the wrong conclusions from the interpretive inputs.

Specifically, Quigley and other narrow-writ theorists tend to ignore cases between 1942 and 1953 that bracket the 1948 Revisions and prefigure *Brown*. To repeat: *Brown* was not an interpretation of the 1867 Habeas Corpus Act.

⁴⁹ 294 U.S. 103, 112-13 (1935).

⁵⁰ 304 U.S. 458, 467-68 (1938).

⁵¹ 294 U.S. at 112-13.

⁵² 304 U.S. at 467-68.

⁵³ See *Brown v. Davenport*, 142 S. Ct. 1510, 1520-22 (2022) (neglecting to mention any substantial habeas statute or decision between 1914 and 1953); *Edwards v. Vannoy*, 141 S. Ct. 1547, 1566-70 (2021) (Gorsuch, J., concurring) (jumping in its analysis directly from *Frank v. Mangum*, 237 U.S. 309 (1915), to *Brown v. Allen*, 344 U.S. 443 (1953)).

⁵⁴ See generally Bator, *supra* note 2 (not discussing revisions as source of operative law); Friendly, *supra* note 3 (same).

It was an interpretation of the 1948 Revisions,⁵⁵ which included a small cosmetic change to the 1867 Act but were mainly intended to codify existing judicial construction of the statute.⁵⁶ Serious OPM theorists (like Quigley) should be laser-focused on the way a lawyer in 1948 would have understood the revisions. Unlike the cases between 1867 and 1942, those between 1942 and 1953 are not ambiguous, messy, or mixed. By that point, the jurisdictional defect rule was dead and buried.

A. From Waley to the 1948 Revisions

Waley v. Johnston was a 1942 decision in which a convicted prisoner sought habeas relief because FBI agents coerced his plea.⁵⁷ Without any noted dissent, the Court held that “the use of the writ . . . is not restricted to those cases where the judgment of conviction is void for want of jurisdiction,” and that it “extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights.”⁵⁸ Quigley mentions *Waley* once in passing,⁵⁹ but without acknowledging the aforementioned text or otherwise making clear that *Waley* flatly rejected the jurisdictional defect rule. The marginalization of *Waley* is typical of narrow-writ work.

Between 1942 and the 1948 revisions, the Supreme Court repeatedly cited *Waley* for the proposition that habeas power reached convictions tainted by non-jurisdictional errors.⁶⁰ This *Waley*-reinforced proposition appeared in *Von Moltke v. Gillies* (1948),⁶¹ *United States v. Smith* (1947),⁶² *Hawk v. Olsen*

⁵⁵ See *Brown v. Allen*, 344 U.S. 443, 447-50, 462 (1953) (recognizing the 1948 code revisions as controlling).

⁵⁶ See *infra* notes 74-77 and accompanying text.

⁵⁷ *Waley v. Johnston*, 316 U.S. 101, 102 (1942).

⁵⁸ *Id.* at 104-05.

⁵⁹ Quigley, *supra* note 4, at 525 & n.459.

⁶⁰ Professor Herbert Wechsler took some credit for *Waley*'s assimilation into the DNA of post-conviction law during the 1940s. See Herbert Wechsler, *Habeas Corpus and the Supreme Court: Reconsidering the Reach of the Great Writ*, 59 U. COLO. L. REV. 167, 174 (1988) (“[T]he abandonment in the *Waley* case of the fiction that *habeas* reached only jurisdictional defects . . . was a small victory for me since I had urged exactly that reformulation of the basic standard in my argument for the government in *Walker v. Johnson*[, 312 U.S. 275 (1941)].”).

⁶¹ 332 U.S. 708, 709-10 (1948) (coerced confession, unconstitutional waiver, and denial of counsel).

⁶² 331 U.S. 469, 475 (1947) (habeas available for “jurisdictional *and* constitutional errors at the trial”) (emphasis added).

(1945),⁶³ *House v. Mayo* (1945),⁶⁴ *Ex parte Hawk* (1944),⁶⁵ *People v. Wilson* (1943),⁶⁶ *Wells v. United States* (1943),⁶⁷ and *Pyle v. Kansas* (1942).⁶⁸ These cases were not laden with caveats either. *Smith*, for example, straightforwardly stated that habeas corpus “provides a remedy for jurisdictional *and constitutional errors at the trial* without limit of time.”⁶⁹ Not one of the listed cases mentioned a jurisdictional defect rule,⁷⁰ and Quigley does not cite any from this period. Of the 583 Supreme Court orders and opinions issued between *Waley* and the 1948 Revisions that contained the word “habeas,” there was only *one* case with a vague, equivocal allusion to a jurisdictional defect rule.⁷¹

Far more common during this period were cases expressly rejecting Quigley’s assertion that the 1867 Act incorporated the prevailing scope of the writ.⁷² *Hawk v. Olson*, for example, held that the 1867 Act “enlarged . . . the ‘bare legal review’ of the authority under which a petitioner was held which had been previously afforded by habeas corpus” and that habeas “is a proper procedure to ‘safeguard the liberty of all persons within the jurisdiction of the United States against infringement through *any violation of the Constitution.*’”⁷³ The point is not whether cases like *Hawk* were right or wrong about the original meaning of the 1867 Act; it is that *Hawk* was the controlling gloss on that Act when Congress enacted the 1948 Revisions.

The one-sidedness of the precedent between *Waley* and the 1948 Revisions is a major problem for all narrow-writ theorists. Quigley analyzes the 1948

⁶³ 326 U.S. 271, 274 (1945) (denial of “opportunity to examine the charge, subpoena witnesses, consult counsel and prepare a defense”).

⁶⁴ 324 U.S. 42, 46 (1945), *overruled on other grounds by* *Hohn v. United States*, 524 U.S. 236 (1998) (denial of access to counsel).

⁶⁵ 321 U.S. 114, 115-16 (1944) (perjured testimony and an accelerated trial schedule effectively denied right to counsel).

⁶⁶ 318 U.S. 688, 690 (1943) (plea tainted by fraud and misrepresentation).

⁶⁷ 318 U.S. 257, 258-59 (1943) (plea tainted by law enforcement threats and denial of counsel).

⁶⁸ 317 U.S. 213, 215-16 (1942) (prosecution’s knowing use of perjured testimony and suppression of defense-favorable evidence).

⁶⁹ *United States v. Smith*, 331 U.S. 469, 475 (1947) (emphasis added).

⁷⁰ The Supreme Court knew what a jurisdictional defect rule looked like, since it regularly reviewed state habeas laws that used such a rule. *See, e.g., Woods v. Nierstheimer*, 328 U.S. 211, 215 (1946) (reading Illinois law to reject habeas relief if “the court which rendered the original judgment had jurisdiction over the person and over the subject matter, and nothing has happened since the conviction to entitle the applicant to his release”).

⁷¹ *See Sunal v. Large*, 332 U.S. 174, 179 (1947) (stating as “not absolute” a general rule that “the writ is not designed for collateral review of errors of law committed by the trial court . . . which do not cross the jurisdictional line”).

⁷² *See, e.g., supra* notes 61-69 & accompanying text (collecting sources).

⁷³ 326 U.S. 271, 274-75 (1945) (emphasis added).

Revisions under the reenactment canon,⁷⁴ as any textualist must.⁷⁵ The canon captures the intuitive proposition that, when Congress reenacts statutory language, it both intends and is understood to adopt the existing judicial construction of the reenacted language. As the Supreme Court put it, “Congress is presumed to be aware of [a] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”⁷⁶ As recently as 2023, the Court observed that the 1948 Revisions “largely recodified,” with respect to state prisoners, the “federal courts’ pre-existing habeas authority in [28 U.S.C. § 2241].”⁷⁷

There is no “clear expression” of change “elsewhere” in the 1948 Revisions, which is what deviation from the reenactment rule requires.⁷⁸ To the contrary, the revisions’ text plainly embraces *Waley*. For custody to be “in violation of” federal law meant the same thing for both state and federal prisoners,⁷⁹ and the federal-prisoner provision in the 1948 Revisions *expressly* distinguished custody “in violation of” federal law from custody where the trial court “was without jurisdiction to impose [the] sentence.”⁸⁰ To state the obvious, there would be no need to distinguish those two things if “custody in violation” of federal law included a jurisdictional defect rule.

Extrinsic evidence corroborates this reading of the text. Quigley himself quotes Albert B. Maris, whom Chief Justice Stone appointed to work on the 1948 Revisions. Maris stated that “[i]t was the aim of the revision staff to restate the law upon the subject of habeas corpus as clearly as possible *in accord with the body of decisional law upon the subject*.”⁸¹ A revisor’s note to the 1948 Revisions indicates that complementary text appearing in the new 28 U.S.C. § 2254 was likewise “declaratory of existing law as affirmed by the Supreme Court.”⁸²

⁷⁴ See Quigley, *supra* note 4, at 520–21.

⁷⁵ That Quigley is the first to phrase the narrow-writ account with reference to the operative text of the 1948 Revisions is an ironic but substantial indictment of prior narrow-writ work.

⁷⁶ See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

⁷⁷ *Jones v. Hendrix*, 143 S. Ct. 1857, 1865 (2023).

⁷⁸ See *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 240 (2009) (explaining that the Court will assume congressional intent for reenactment “absent a clear expression . . . of Congress’ intent . . . to abrogate our decisions”).

⁷⁹ The same provisions governed post-conviction relief for state and federal prisoners in the federal district courts until 1948, when Congress created a separate post-conviction remedy for people serving federal sentences. See 1948 Revisions, *supra* note 12, at 967 (codified as amended at 28 U.S.C. § 2255); see also *United States v. Hayman*, 342 U.S. 205, 219 (1952) (noting that the purpose of § 2255 was to provide a more convenient forum for federal habeas petitioners—not a substantively different remedy).

⁸⁰ 1948 Revisions, *supra* note 12, at 967 (codified as amended at 28 U.S.C. § 2255).

⁸¹ See Quigley, *supra* note 4, at 527 (quoting *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)).

⁸² See *id.* at 528 (quoting 28 U.S.C. § 2254 Historical and Revision Notes).

The rub: In 1948, nobody would have thought the words of § 2241(c) enacted a jurisdictional defect rule. No court citing *Waley* mentioned the jurisdictional defect rule, and most cases simply stated that habeas relief was for constitutional violations.⁸³ The Court applied *Waley* to recognize the availability of relief in cases asserting: rights against coerced confessions,⁸⁴ involuntary waivers,⁸⁵ knowing use of perjured testimony,⁸⁶ state suppression of favorable evidence,⁸⁷ and pleas tainted by fraud,⁸⁸ misrepresentation,⁸⁹ or threats;⁹⁰ and rights to consult with counsel,⁹¹ to effective assistance of counsel,⁹² to subpoena witnesses,⁹³ and to prepare a defense.⁹⁴ These allegations of error were not jurisdictional—the decisions did not gloss them that way, and ordinary lawyers reading the 1948 Revisions would never have assigned that meaning to them.⁹⁵

B. *From the 1948 Revisions to Brown*

We also know that the pertinent interpretive community did not think the jurisdictional defect rule was part of the 1948 Revisions because, between the date of their enactment and *Brown*, the Supreme Court did not mention that rule *once*. Of all 405 opinions and orders between the 1948 enactment and *Brown* that contain the word “habeas,” there is not a single reference to the rule that, according to Quigley, *Brown* abrogated. From this period, Quigley cites only a 1953 treatise “published just before *Brown* came down”⁹⁶ that contradicts the jurisdictional defect rule and that states: “The writ of habeas corpus provides a remedy for jurisdictional *and constitutional* errors.”⁹⁷

⁸³ See *supra* notes 61–71 and accompanying text.

⁸⁴ See *Von Moltke v. Gillies*, 332 U.S. 708, 709–10 (1948).

⁸⁵ See *id.*

⁸⁶ See *Ex parte Hawk*, 321 U.S. 114, 115–16 (1944).

⁸⁷ See *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942). *Pyle* was a case reviewing a Kansas Supreme Court order denying habeas relief, but the Court nonetheless analyzed whether the allegation charged “a deprivation of rights guaranteed by the Federal Constitution.” *Id.* at 216.

⁸⁸ See *People v. Wilson*, 318 U.S. 688, 690 (1943). *Wilson* was a case reviewing a New York order denying habeas relief, but the Supreme Court stated that the *Waley*-based rule was that the allegations, if true, required relief. See *id.*

⁸⁹ See *id.*

⁹⁰ See *Wells v. United States*, 318 U.S. 257, 258–59 (1943).

⁹¹ See *Hawk v. Olson*, 326 U.S. 271, 274 (1945).

⁹² See *Ex parte Hawk*, 321 U.S. 114, 115–16 (1944).

⁹³ See *Hawk*, 326 U.S. at 274.

⁹⁴ See *id.*

⁹⁵ Decided just days before Congress passed the 1948 Revisions, *Wade v. Mayo* held that habeas relief was for “unjust and illegal deprivation of human liberty.” 334 U.S. 672, 681 (1948).

⁹⁶ Quigley, *supra* note 4, at 524 n.453.

⁹⁷ LEGIS. 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) (cited in Quigley, *supra* note 4, 524 n.453).

Indeed, by this time, the Court regularly spoke of more sweeping habeas power. The year before *Brown*, *United States v. Hayman* famously upheld 28 U.S.C. § 2255 as a post-conviction remedy for convicted *federal* prisoners.⁹⁸ In so doing, it described the scope of the 1867 Act as one in which a court determines whether “a prisoner has been deprived of liberty in violation of constitutional rights.”⁹⁹ It then offered as examples deprivations that the Supreme Court plainly regarded as non-jurisdictional: “mob domination,” “knowing use of perjured testimony,” “no intelligent waiver of counsel in federal court,” “no intelligent waiver of jury trial in federal court,” and “the denial of the right to consult with counsel.”¹⁰⁰ And section 2255 itself, which the Court interpreted to be coextensive with the scope of relief for convicted state prisoners,¹⁰¹ declared the remedy to include *both* sentences imposed “without jurisdiction” and sentences “imposed in violation of the Constitution or laws of the United States.”¹⁰²

Other pre-*Brown* opinions reflect the view that prevailed after the 1948 Revisions: that habeas was a remedy for non-jurisdictional errors. In *Frisbie v. Collins* (1952), the Supreme Court explained that habeas was unavailable because there was “a fair trial in accordance with constitutional procedural safeguards.”¹⁰³ In a 1950 case, Justice Frankfurter observed that the increase in habeas activity was due less to a change in the scope of the remedy than to “the expanded concept of due process.”¹⁰⁴ Justice Rutledge wrote that the 1867 Act was “liberalizing” in that it expanded the writ’s scope to reach “any detention in violation of the Constitution or laws of the United States.”¹⁰⁵

* * *

The cases do the talking. Narrow-writ theorists must accommodate what the interpreting community believed about the 1948 Revisions, which requires scrutiny of the contemporary case law. But *Waley* killed off the jurisdictional defect rule in 1942, and its fate was well recognized when Congress adopted the 1948 Revisions. Between the 1948 Revisions and *Brown*, I have located no order or decision—*not a single one*—even hinting at the ongoing operation of a jurisdictional defect rule. Whether *Brown*

⁹⁸ See 342 U.S. 205, 220–24 (1952).

⁹⁹ *Id.* at 212.

¹⁰⁰ *Id.* at 212 n.12 (citations omitted).

¹⁰¹ See *id.* at 219.

¹⁰² *Id.* at 207 n.1 (quoting extant provision).

¹⁰³ 342 U.S. 519, 522 (1952).

¹⁰⁴ *Darr v. Burford*, 339 U.S. 200, 221 (1950) (Frankfurter, J., dissenting).

¹⁰⁵ *Ahrens v. Clark*, 335 U.S. 188, 206 n.23 (1948) (Rutledge, J., dissenting).

ruptured a steady state defined by the jurisdictional defect rule is not a close question.

C. *The Fallback*

Quigley often seems quite aware that the 1948 Revisions cannot really be squared with a pure jurisdictional defect rule.¹⁰⁶ As Professors Anthony Amsterdam and Jim Liebman put it, Quigley's "concession undoes his entire argument."¹⁰⁷ Quigley ultimately resorts to a modified, fallback position: Even if there is no jurisdictional defect rule, he suggests that the habeas remedy is still available only when there was "a complete failure of state corrective process."¹⁰⁸

Quigley's modified position, however, misapprehends questions of writ scope. Just because there was a rule that habeas relief was unavailable when there was enough state corrective process does not mean that the corrective-process rule was a limit on *writ scope*. By 1948, writ scope was a statutory question about what it meant to be in custody "in violation of" federal law,¹⁰⁹ not a question about the adequacy of state remedies for that violation. State corrective process did not go to whether custody was "in violation of" federal law, even when it restricted relief. Custody "in violation of" federal law meant the same thing for both state and federal prisoners,¹¹⁰ and a state-corrective-process rule for federal prisoners would be legally unintelligible. The Supreme Court, moreover, regularly used direct review over state post-conviction proceedings to hold that state criminal sentences were in violation of federal law, without respect to corrective process.¹¹¹ The state-corrective-process doctrine that Quigley describes operated as a procedural constraint—like modern-day procedural default and statute of limitations rules—and not as a restriction on *writ scope* as specified in section 2241(c).¹¹²

Quigley's modified theory has a graver problem: It cannot survive the plain text of the 1948 Revisions. Section 2241(c)(3) extended the habeas power to all "custody in violation of the Constitution or laws or treaties of the United States."¹¹³ Then, the new section 2254 took some of that power away. Specifically, habeas relief was to be denied unless "it appears that [1] the

¹⁰⁶ Quigley, *supra* note 4, at 522 (stating that 1948 abrogation of strict jurisdictional defect rule was "quite plausible").

¹⁰⁷ Amsterdam & Liebman, *supra* note 33, at 93 n.171.

¹⁰⁸ Quigley, *supra* note 4, at 524.

¹⁰⁹ 1948 Revisions, *supra* note 12, at § 2241.

¹¹⁰ See *supra* note 79.

¹¹¹ See *supra* notes 87–88 & accompanying text.

¹¹² See 28 U.S.C. § 2244(d) (statute of limitations); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (modern procedural default rule).

¹¹³ 1948 Revisions, *supra* note 12, at § 2241.

applicant has exhausted the remedies available in the courts of the State, or [2] *that there is either an absence of available State corrective process* or [3] the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.”¹¹⁴ Congress thereby made the state-corrective-process inquiry into a textual element of section 2254, not a subtextual limitation on scope in section 2241. If section 2241 really withheld habeas power over cases in which there was adequate state corrective process, then what point would the other two parts of section 2254 serve? Section 2254 elements (1) and (3) expressly permit habeas relief when there *is* corrective state process.¹¹⁵

The case law between the 1948 Revisions and *Brown* confirms the straightforward reading of the statute. Section 2241 set the scope of habeas power to reach all custody in violation of federal law,¹¹⁶ and section 2254 made clear that relief is permitted even in cases where there is not “a complete failure of state corrective process.”¹¹⁷ *Jennings v. Illinois*, from 1951, explained that a federal court could hear a “denial of substantial federal rights” if state corrective process is “invoked and relief denied.”¹¹⁸ *Frisbie* (mentioned above) held that federal courts should ordinarily deny writs if state corrective process remained “available,” but even that rule was “general” and amenable to “deviat[ion] . . . in special circumstances.”¹¹⁹ These are two examples, but there are others.¹²⁰

And to return to a theme, Quigley does not cite to a single decision between the 1948 Revisions and *Brown* suggesting that corrective state process was a limitation on writ scope specified in section 2241. The relevant cases explain that the *absence* of corrective process permits federal review *under section 2254*, but they do not suggest that the *presence* of corrective process precludes review *under section 2241*. Whatever one might say about Quigley’s modified theory, it is not one of ordinary meaning, and it is not a baseline from which *Brown* deviated radically.

III. REFERENCE LAW MODELS

In Part III, I endorse what I will call “reference law models” of writ scope, which take seriously section 2241’s status as a remedial statute. Like any statute creating judicial remedies for extrinsically defined substantive rules,

¹¹⁴ *Id.* § 2254 (emphasis added).

¹¹⁵ But see Quigley, *supra* note 4, at 527 n.466 (suggesting that § 2254(d) would not be redundant of his reading of § 2241 because allegations of jurisdictional error would still need to be exhausted).

¹¹⁶ 28 U.S.C. § 2241(c)(3).

¹¹⁷ Quigley, *supra* note 4, at 524.

¹¹⁸ *Jennings v. Illinois*, 342 U.S. 104, 109 (1951).

¹¹⁹ *Frisbie v. Collins*, 342 U.S. 519, 520-21 (1952).

¹²⁰ See, e.g., *Gusik v. Schilder*, 340 U.S. 128, 131 (1950) (under a “long line of cases,” federal courts have habeas power where state corrective process has been exhausted).

the “scope” of relief changes with the extrinsic law. The models are simple and elegant: There are habeas remedies for custody that violate federal law, but what violates federal law is not frozen the moment Congress enacts the remedial statute. Reference law models are preferable because they comfortably fit the doctrinal history, are more faithful to the 1948 Revisions, honor the usual treatment of broad remedial statutes, do not force rules inconsistent with subsequent legislation, and will not require the Supreme Court to abandon statutory precedent that has controlled for over seventy years.

A. *The Models*

Constitutions and statutes often create remedies for rules of substantive law specified elsewhere, and nobody thinks twice about it. The Takings Clause requires just compensation for public-use taking of “property,”¹²¹ but the Clause does not define that term. The Supreme Court regularly finds violations respecting private interests that were not classified as “property” in 1789—commercial data,¹²² earned interest on client trust accounts,¹²³ and airspace,¹²⁴ to name a few. It is a “basic axiom” that, for the purposes of Takings Clause analysis, “property interests are not created by the Constitution. Rather, they are created and . . . defined by existing rules or understandings that stem from an independent source such as state law.”¹²⁵

The venerable civil rights remedy, 42 U.S.C. § 1983, works the same way. It creates a cause of action against state officers for the deprivation of “rights, privileges, or immunities secured by the Constitution and laws.”¹²⁶ But the scope of federal law for which section 1983 is a remedy—the reference law—was not fixed in 1871. Indeed, section 1983 famously secures constitutional rights announced long after its enactment.¹²⁷ The corpus of reference law also expanded to include statutory rights that sprung into being during the twentieth and twenty-first centuries.¹²⁸ That the remedial statute looks to reference law makes “obvious sense,” as “[section] 1983 merely provides a

¹²¹ U.S. CONST. amend. V.

¹²² See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984).

¹²³ See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998).

¹²⁴ See *United States v. Causby*, 328 U.S. 256, 261-62 (1946).

¹²⁵ *Ruckelshaus*, 467 U.S. at 1001 (alteration in original) (emphasis added) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

¹²⁶ 42 U.S.C. § 1983.

¹²⁷ See, e.g., *Estelle v. Gamble*, 429 U.S. 97, 101 (1976) (finding a constitutional violation when officials display deliberate indifference to a prisoner's serious medical needs).

¹²⁸ See *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 143 S. Ct. 1444, 1450 (2023) (“[Section] 1983 can presumptively be used to enforce unambiguously conferred federal individual rights . . .”).

mechanism for enforcing individual rights . . . *independently* ‘secured by the Constitution and laws’ of the United States.”¹²⁹

The same principle applies to criminal remedies too. Section 241 of Title 18 enacts criminal penalties for conspiracies to interfere with “any right or privilege secured . . . by the Constitution or laws of the United States.”¹³⁰ It nonetheless reaches reference law that sprung to life after 1870,¹³¹ when Congress enacted section 241’s statutory precursor.¹³² That is why the Supreme Court insists that “when [section] 241 speaks of ‘any right or privilege secured by the Constitution or laws of the United States,’ it means precisely that.”¹³³

There is no reason to treat the habeas corpus statute any differently. The writ creates no substantive rights, but it entitles anyone in custody to judicial review.¹³⁴ That is the way it worked in England¹³⁵ and the way it operated in the early American legal environment.¹³⁶ In *Ex parte Watkins*, Chief Justice Marshall famously wrote that habeas corpus “enforces the common law.”¹³⁷ The 1948 Revisions may have authorized habeas relief for custody in contravention of “the Constitution or laws or treaties of the United States,”¹³⁸ but the reference law was not fixed in 1867. Are narrow-writ theorists really prepared to argue, for example, that habeas power doesn’t reach custody that violates the Fourteenth Amendment’s Due Process Clause, given that the Amendment was not ratified until a year *after* the 1867 Act?¹³⁹

B. Subsequent Statutes and Cases

Reference-law models are stronger than narrow-writ theories for at least four interrelated reasons. First, reference-law models are more consistent

¹²⁹ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002) (emphasis added) (quoting 42 U.S.C. § 1983).

¹³⁰ 18 U.S.C. § 241.

¹³¹ See Adam G. Safwat, *Section 241 and the First Amendment: Avoiding A False Conflict Through Proper Mens Rea Analysis*, 43 DUKE L.J. 625, 630-31 & nn.29-36 (1993) (collecting cases).

¹³² See Act of May 31, 1870, ch. 114, § 6, 16 Stat. 140, 141 (criminalizing conspiracy to violate any “right or privilege granted or secured . . . by the Constitution or laws of the United States”).

¹³³ *United States v. Guest*, 383 U.S. 745, 753 (1966) (internal alterations omitted).

¹³⁴ See generally Lee Kovarsky, *Citizenship, National Security Detention, and the Habeas Remedy*, 107 CAL. L. REV. 867 (2019) (explaining that the habeas writ lacks substantive content, even as it is closely associated with certain types of unlawful detention).

¹³⁵ See *id.* at 880-84.

¹³⁶ See *id.* at 884-88.

¹³⁷ See *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202 (1830) (emphasis added).

¹³⁸ 28 U.S.C. § 2241(c)(3).

¹³⁹ U.S. CONST. amend. XIV, § 1, cl. 3. Congress approved the Fourteenth Amendment on June 13, 1866, but the Amendment was not ratified until July 1868. CONG. GLOBE, 39th Cong., 2d Sess. 3149 (June 13, 1866); Proclamation No. 11, 15 Stat. 706 (July 20, 1868) (certifying that three-fourths of the States had adopted the amendment).

with the operative text of the habeas statute. Part II already established that the 1948 Revisions shunned the tenets of narrow-writ theory, and subsequent legislation further degrades it. That is because narrow-writ theory asks interpreters to blind themselves to 1966 and 1996 amendments confirming broad-writ practices.

The 1966 legislation birthed section 2254(a), which is a rule that federal courts could entertain state-prisoner petitions only if they alleged that the petitioner was custody “in violation of the Constitution or laws or treaties of the United States.”¹⁴⁰ The wording of that provision should sound familiar, since it is identical to the wording of section 2241(c). When Congress reenacted those words in 1966, it surely assumed that they meant what *Brown* said they meant. The 1966 legislation also created section 2254(d), which specified conditions for federal fact-finding in cases where state judgments had no jurisdictional defects and were subject to full corrective process¹⁴¹—a hefty provision that would be superfluous under a jurisdictional defect rule or Quigley’s modification.

The same implications follow from the most recent, 1996 amendments. The new version of section 2253, which controls appellate jurisdiction in habeas cases, conditions that jurisdiction on “a substantial showing of the denial of a constitutional right.”¹⁴² The new section 2254(d)(1) expressly keys the scope of relief to developing constitutional law precedent.¹⁴³ The new section 2254(i) carves out the “ineffectiveness . . . of counsel during . . . State collateral post-conviction proceedings” from the category of otherwise available relief.¹⁴⁴ For a subclass of capital habeas litigation, section 2264 defines the “Scope of Federal review” to include “a new Federal right that is made retroactively applicable.”¹⁴⁵ None of these statutory provisions is compatible with narrow-writ readings of section 2241(c).

Second, reference law models still fit the jurisdictional defect rule observed during English and early American practice. It was not that a jurisdictional defect rule *limited relief for illegal convictions*, it was just that jurisdictionally sound convictions *were legal*. No less a figure than Justice Gorsuch confused these two ideas when he wrote a narrow-writ argument into *Brown v. Davenport*: “If the point of the writ was to ensure due process

¹⁴⁰ 28 U.S.C. § 2254(a).

¹⁴¹ See Act of Nov. 2, 1966, Pub. L. No. 89-711, 80 Stat. 1104 (codified as amended at 28 U.S.C. § 2254(d)).

¹⁴² 28 U.S.C. § 2253(c)(2).

¹⁴³ See 28 U.S.C. § 2254(d)(1) (permitting federal relitigation of a claim decided on the merits by a state court if the state-court adjudication “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”).

¹⁴⁴ See 28 U.S.C. § 2254(i).

¹⁴⁵ See 28 U.S.C. § 2264(a)(2).

attended an individual's confinement, a trial was generally considered proof he had received just that."¹⁴⁶ On the reference law model, writ scope did not change—what counted as lawful custody did.

Third, reference law models take seriously the status of section 2241 as a remedial statute. As explained in Part III.A, courts *do* and *should* use reference law models to interpret statutes providing remedies for constitutional violations. That practice is, moreover, consistent with a longstanding interpretive tradition that constructs remedial statutes broadly¹⁴⁷—especially Reconstruction-era remedies that enforced new substantive rights.¹⁴⁸ The 1948 Revisions reflected this broader remedial function, which was itself consistent with a longstanding view that the habeas remedy was to be only minimally constrained by legalistic formalities.¹⁴⁹

Fourth, the reference law model honors statutory stare decisis.¹⁵⁰ The reliance interests attached to *Brown* are substantial. Every state in the Union has passed post-conviction legislation in *Brown*'s shadow¹⁵¹ and on the assumption that certain types of judgment defects require certain types of state remedies. Clemency practices assume that the federal habeas process will meaningfully detect wrongful sentences. Congress has enacted two major habeas overhauls, each assuming the statutory interpretation in *Brown*.¹⁵² And indigent-defense provisions that open post-conviction defender offices and pay for post-conviction legal representation¹⁵³ are keyed to modern writ scope.

* * *

“Reference law model” is a new term for an old idea, and there is nothing fancy about it. The habeas remedy is for custody that violates federal law,

¹⁴⁶ *Brown v. Davenport*, 142 S. Ct. 1510, 1521 (2022).

¹⁴⁷ See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1011 (1989) (“[F]or Blackstone and for nineteenth century American jurists, the central precepts for statutory interpretation were the narrow construction of statutes in derogation of common law and the broad construction of remedial statutes.”).

¹⁴⁸ See *supra* notes 126–133 & accompanying text (discussing 42 U.S.C. § 1983 and 18 U.S.C. § 241).

¹⁴⁹ See, e.g., *Wade v. Mayo*, 334 U.S. 672, 681 (1948) (“[T]he flexible nature of the writ of habeas corpus counsels against erecting a rigid procedural rule that has the effect of imposing a new jurisdictional limitation . . .”).

¹⁵⁰ See *supra* note 14 (discussing enhanced burden).

¹⁵¹ See Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953, 1000 (2012).

¹⁵² See *supra* notes 140–144 & accompanying text (discussing the 1948 and 1966 revisions).

¹⁵³ See, e.g., 18 U.S.C. § 3006A (permitting the appointment of counsel for indigent defendants in habeas proceedings in the interest of justice and setting payment rates for appointed counsel in non-capital habeas proceedings); 18 U.S.C. § 3599 (providing for counsel in habeas proceedings for indigent defendants sentenced to the death penalty).

although the content of federal law changes. The idea is still worth articulating in full because it honors the jurisdictional defect rule as an artifact of its time, is consistent with ordinary interpretation of broad remedial statutes, was the prevailing model for the 1948 Revisions, and doesn't needlessly avulse seventy-plus years of post-conviction law.

CONCLUSION

Quigley's efforts highlight something ironic about narrow-writ theory. The more methodologically rigorous the approach, the weaker the case. As narrow-writ theorists reject the eclecticism of earlier work and focus on the 1948 Revisions that *Brown* actually construed, they confront a very one-sided body of interpretive inputs. The one-sidedness of the *Waley-to-Brown* period is particularly salient because the narrow-writ theorists fighting statutory stare decisis need the one-sidedness to run *in the other direction*. But the habeas statute does what it says: It provides a remedy for custody that violates federal law.